# THE QUASI-REGULATORY REGIME OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA) AND ITS IMPACT UPON THE AIRLINE INDUSTRY AND THE CONSUMER

Lasantha Hettiarachchi

Institute of Air and Space Law,
McGill University, Montreal

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**ABSTRACT**

The growth of global trade and commerce has contributed to an increase of private non-state entities making transnational rules and standards which regulate industries around the word. IATA is such a non-governmental international organization. Established in 1945 as a trade association of scheduled international airlines, its professed objective was to promote safe, regular and economic air transport for the benefit of the public through mutual cooperation amongst members.

At its advent, IATA provided a conference mechanism facilitating airline members to meet, confer, compare costs and agree on air fares and rates applicable for scheduled air transport around the world. This function of tariff coordination, performed with the acquiescence of national governments, was also used by IATA to prescribe rules for service standards, travel agent administration and a multitude of other matters covering international air transport. These rules, formulated as contractual obligations imposed on its members and accredited agents, created direct and indirect implications for airline consumers. Numerous influences such as regulatory pressures, the discontinuation of antitrust immunity, economic challenges from non-scheduled operators and airline alliances that IATA encountered in its seven decades of existence resulted in a significant transformation of the organization. Contemporary IATA is a dynamic and robust commercial enterprise whose sustenance is solely predicated on the revenue generated by supplying products and services to the airline industry. IATA's commercial pursuits are seamlessly integrated into its regime of rules and standards that are made for members and agents. However, IATA rules invariably also affect the rights and interests of many stakeholders in the airline industry and notably the consumer.

Although a considerable amount of academic literature has been produced on IATA and its quasi rules, most of these predate IATA's transformation into a predominantly commercial enterprise. This thesis therefore proposes to examine contemporary IATA and its transnational quasi-regulations which affect the airline industry in general and the consumer in particular. An analysis of specific IATA resolutions relating to passenger services and travel agents is presented to show the mandatory compliance features contained in these resolutions which affect consumers and third parties. By tracing the historical evolution of IATA and its current commercial pursuits, this thesis seeks to justify increased national regulatory oversight of IATA and its quasi-rules as essential for the protection of consumers. In concluding that states should not abdicate their responsibilities for protecting citizens, this thesis proposes recommendations for national regulatory and oversight measures that will ensure IATA and its quasi-rules are consistent with their declared objective to promote safe, regular and economic air transport for the benefit of the peoples of the world.

**RÉSUMÉ**

*La croissance du commerce et des échanges mondiaux a contribué à l'augmentation du nombre d'entités privées non étatiques qui décident des règles et normes transnationales régissant les industries autour du monde. L'AITA est une telle organisation internationale non gouvernementale. L'AITA fut établie en 1945 en tant qu'association professionnelle de compagnies aériennes internationales régulières avec pour objectif de promouvoir un transport aérien sûr, régulier et économique dans l'intérêt du public grâce à une coopération mutuelle de ses membres.*

*À son avènement, l'AITA prévoyait un mécanisme permettant aux membres des compagnies aériennes de se rencontrer, de se concerter, ainsi que de comparer les coûts et de se mettre d'accord sur les tarifs applicables au transport aérien régulier dans le monde. Cette fonction de coordination tarifaire, assurée par les gouvernements nationaux, a également été utilisée par l'AITA pour imposer des règles prévoyant des standards de service, d'administration des agents de voyages et une multitude d'autres questions concernant le transport aérien international. Ces règles, formulées comme des obligations contractuelles imposées à ses membres et agents accrédités, ont créé des implications directes et indirectes pour les consommateurs aériens. De nombreuses influences telles que les contraintes réglementaires, l'abandon de l'immunité antitrust, les défis économiques des opérateurs non réguliers et les alliances aériennes que l'AITA a rencontrées au cours de ses sept décennies d'existence ont entraîné une transformation significative. Ainsi, l'AITA contemporaine est une entreprise commerciale dynamique et robuste dont la subsistance est basée sur les seuls revenus générés par la vente de produits et de services à l'industrie du transport aérien. Les activités commerciales de l'AITA sont parfaitement intégrées dans son régime de règles et de normes créées pour ses membres et agents. Cependant, les règles de l'AITA affectent également inévitablement les droits et les intérêts de nombreuses parties prenantes de l'industrie du transport aérien tel que le consommateur.*

*Bien que l'AITA, ainsi que ses quasi-règles, aient fait l'objet de nombreuses études, la majeure partie de cette littérature et de ces analyses sont antérieures à la transformation de l'AITA en tant qu'entreprise commerciale. Cette thèse propose donc d'examiner l'AITA contemporaine et ses quasi-réglementations transnationales qui affectent tant l'industrie du transport aérien en général que le consommateur en particulier. Une analyse des résolutions de l'AITA relatives aux services de passagers et aux agents de voyages est présentée afin d'illustrer les caractéristiques de conformité obligatoires contenues dans ces résolutions qui affectent les consommateurs et les tiers. En retraçant l'évolution historique de l'AITA et ses activités commerciales actuelles, cette thèse cherche à justifier le renforcement de la surveillance réglementaire nationale de l'AITA et de ses quasi-règles en tant qu'éléments essentiels pour la protection des consommateurs. En concluant que les États ne devraient pas renoncer à leurs responsabilités de protection des citoyens, cette thèse émet des recommandations telles que des mesures nationales de régulation et de contrôle qui assureront que l'AITA et ses quasi-règles sont conformes à leur objectif déclaré de promouvoir un transport aérien sûr, régulier et économique au profit des peuples du monde.*

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I dedicate this thesis to my mother Cynthia and to the memory my late mother-in-law, Nanda.

**TABLE OF CONTENTS**

**Introduction**

The International Air Transport Association (IATA) was founded in 1945 as a trade association of international airlines. With a current membership of 280 airlines from over 120 countries, IATA has emerged as a powerful, non-governmental organization within the civil aviation industry. IATA has formulated its own scheme of rules and regulations for internal governance under the authority of its Articles of Association. This scheme of rules and regulations is structured to confer benefits and privileges to members, whilst also regulating their rights and obligations *inter se*. IATA gained initial acceptance from and support of national governments, since its creation was designed to fill a void that existed in economic regulation at the time. States at the Chicago Conference were able to agree on a body of rules and regulations relating to safety and operational matters for international civil aviation. However, states did not achieve multilateral consensus on economic regulation at the Chicago conference.

At its advent in 1945, the core activity of IATA was to coordinate and agree on international airfares and tariffs amongst its members. However, such coordination was *per se* violative of US antitrust law. IATA received universal support to engage in tariff coordination as most of its member airlines were then owned and controlled by national governments. This led to IATA tariff coordination being granted immunity in the USA. A strange quirk of fate then saw IATA being formally recognized in the bilateral air transport agreement between the USA and the UK. Many countries followed the example of the USA and UK and granted recognition to IATA in bilateral agreements,

leading to the misconception that IATA had been 'delegated' the task of rate fixing by national governments. IATA never endeavoured to correct this misconception, but actively perpetuated the idea that its authority had in fact been delegated.

Through its first 30 years, IATA operated a tight regime of price fixing for international air fares and tariffs that were policed by strict sanctions and fines imposed on defaulting airline members. Immunity from antitrust suit in the USA strengthened IATA's hand. After 1975, deregulation, the discontinuation of antitrust immunity, and mounting regulatory pressure against rate fixing activities resulted in IATA transforming itself. In countries where antitrust laws existed, tariffs were coordinated and agreements made by member airlines only to the extent permitted under these laws. However, in countries where restrictions did not apply, IATA tariff coordination was extensive. From 1945 up to airline deregulation in 1978, IATA resolutions enjoyed *laissez faire* treatment. In the two decades after 1978, IATA tariff coordination came under increased regulatory scrutiny. Regulatory pressure in the USA was the catalyst to IATA's transformation. After 1995, IATA began metamorphosing into an aggressive provider of goods and services to the airline industry. Thus, IATA transformed itself from a mere trade association to a profit based commercial enterprise. This transformation has since given rise to serious questions relating to IATA's *quasi* regulatory regime, and its integrity.

Initial IATA activities of coordinating and reaching agreements on airfares gradually progressed into making rules and setting standards for service conditions and agent

administration in air transport. With its membership and accredited agent numbers growing, IATA standards and rules began to acquire recognition within the airline industry as efficient and functional solutions for procedural and logistical problems relating to international air transport. IATA's initiatives relating to airline interlining and clearing services for revenue settlement became extremely popular and indispensable tools for the airline industry. IATA did not lose time in exploiting commercial opportunities that arose from its recognition in the industry. By introducing a multitude of products and services designed to facilitate the implementation of resolutions formulated at its traffic conferences, IATA successfully exploited a captive market consisting of members and agents who subscribed to its rules. Through its work/study groups, advisory bodies, standard setting committees and market research, IATA devised a product portfolio consisting of guidance material, standard forms, contract templates, service and procedure manuals, consultancy services, information technology, computer software, market research, databases, administrative and management tools, training programmes, processes and facilitation schemes, revenue management and clearing services. IATA operations are presently funded by revenue generated from its portfolio of products and services and not from membership subscriptions.

IATA operates a tenuous governance structure within the international air transport industry through its member airlines and accredited travel agents. IATA's traffic conference resolutions impose binding contractual obligations on member airlines and

accredited agents who voluntarily accede to IATA's governance by acquiring membership and accreditation. IATA resolutions also indirectly affect the rights of the airline consumer who is involuntarily compelled to adhere to them. Therefore, IATA's rules have far reaching implications for the airline industry. IATA's regulatory ambit—consisting of numerous resolutions—is an ever-expanding canvas that directly and indirectly impacts on all aspects of international air transport. The IATA quasi-regulatory structure that was built on the backbone of airline interlining is weighted towards the enhancement of its own economic opportunities. While the benefits and privileges of IATA as a trade association are significant and cannot be underrated, IATA's foray into the domain of economic regulation has given rise to serious questions. The professed objective of IATA as an airline trade association is to pursue the interests of its members and enhance their profitability. Nonetheless, when IATA assumes the mantle of a *de facto* regulator, significant legal implications arise. Since IATA is also a supplier of products and services to the airline industry, these implications relate not only to the propriety or legitimacy of IATA rules, but also to their foundation and validity. The airline consumer, although not an adherent to IATA rules, involuntarily submits to IATA rules upon contracting transportation for international air travel. Hence, IATA's *quasi*-regulatory scheme has, in reality, a compelling nature.

IATA programmes and initiatives are not confined to regulating trade association activities. More recently, IATA resolutions have moved into the domain of regulating

airline safety, historically a prerogative vested upon states and governed by public international law instruments such as the Chicago Convention. As such, serious questions arise as to the legitimacy and validity of collateral regulatory initiatives that are propagated and operated by IATA.

Disputes relating to IATA, its rules and their legitimacy, have been addressed by national courts and regulatory authorities in several countries. However, no common or uniform guiding principles have emerged whereby IATA rules and their legitimacy could be evaluated on a universal scale. Fragmented judicial decisions and piecemeal regulatory responses gleaned from various jurisdictions also do not provide a predictable set of general rules that can be relied upon for this purpose.

The objective of this thesis, therefore, is to present an overview of the IATA regulatory regime—with emphasis on its economic regulations—and to examine how IATA rules impact the airline consumer. The methodology employed for research and organizing content is devised to present a general overview of rulemaking and the scope of IATA rules, followed by a comprehensive analysis of IATA passenger services and passenger agency resolutions. This analysis leads to the identification of specific resolutions (and their attributes) which result in inequitable consequences for airline consumers.

In this thesis, the evaluation of legitimacy and legal validity of IATA resolutions is largely influenced by Hans Kelson's pure theory, based on an understanding that positive law and rules can derive legitimacy only from within a legislative structure emanating from a legitimate source. Hans Kelson conceives the notion of a "Grund-

norm" within a legal system as the primary source and ultimate authority under which other laws and regulations are hierarchically structured and thus derive their legitimacy within that system. The normative structure Kelson envisages is a pyramid wherein the "Grund-norm" sits at the apex whilst the other norms representing primary legislation and subsidiary rules of the system are arranged in a descending manner within this pyramidical structure according to their hierarchy. The rules or norms at lower levels within the structure derive their authority and validity from the norms placed immediately above them. Rules at the higher levels of the pyramid manifest a general application whilst towards the base of the pyramid their application become specific. The validity of a rule or norm at any level within this structure is ascertained by examining the higher norm from which it derives legitimacy and so on in the ascending order until the apex, Grund-norm is reached. The validity of the Grund-norm according to Kelson itself does not depend on any norm within this pyramidical structure but on extraneous forces and circumstances which lend credence to its existence and thereby to the legal system as a whole. The *de facto* legal system of IATA consisting of its rules and resolutions is analysed on the basis of Kelson's theory, in the thesis to ascertain whether the corpus of IATA *quasi* regulations can be considered a legal system. IATA rules do not emanate from a state or municipal legislature or derive authority from any multilateral international treaty. However, rules of IATA, in fact operate within nation states and sometimes in indeterminable geographical space creating and imposing obligations on airline consumers. IATA's putative legal system is predicated on contractual arrangements made amongst airlines and travel agents. When these rules

impose obligations on airline consumers, the legitimacy and validity of such rules need to be determined by questioning whether they fall within a normative construct flowing from a valid source. As shown in the thesis the source of IATA rules is its Traffic Conferences. Recognition and acceptance accorded to IATA Traffic Conferences by nation states leading to their existence and validity, can therefore be considered, the Grund-norm of the IATA legal system. The acceptance by nation states of IATA Traffic Conferences in bilateral air service agreements at the beginning of IATA lent credence to its rule making. The underlying circumstances for such recognition being granted to IATA, have changed drastically and the historical reasons for IATAs recognition do not hold true for the contemporary air transport industry. Open skies and liberal air transport agreements between states and the transformation of IATA from a simple trade association into one that is also a commercial enterprise no longer justify recognition of IATA rules on historical considerations. In this environment it becomes difficult to identify whether there is in fact an identifiable Grund-norm or a single source within the quasi-regulatory regime of IATA which lends credence to all its rules applicable to the air transport industry today. Kelson's theory forms the basis of deliberations in the thesis in its attempt to demonstrate that validating and legitimizing many of IATAs current rules become difficult as the source of its rule-making authority in a contemporary environment is not always clear and the justification for same is no longer valid.

Thus, the legitimacy and implications of implementing IATA resolutions within national territories are examined in terms of the ability of such rules to derive legitimacy from, or claim validity within, existing national and international legislative initiatives. This thesis will thereby identify inherent deficiencies in IATA resolutions and potential conflicts in implementing them within national territories. Whilst acknowledging the existence of many IATA rules that do not fall within the purview of national and international legislative structures, this thesis also examines whether such rules can derive legitimacy from emerging notions of global governance and transnational legal structures that operate outside conventional legal systems.

Finally, this thesis recommends remedies to resolve areas of conflict and deficiencies outlined in the preceding analysis by applying principles enunciated in existing laws, regulations, accepted legal doctrines and jurisprudence. These recommendations examine justiciable remedies, national legislative initiatives and regulatory responses that could be applied to contain adverse consequences of IATA resolutions which lead to undesirable regulatory duplicity, impact competition, hinder market forces and affect consumers. The thesis recommends that national courts and regulators search for a higher morality within IATA rules in the course of implementing or recognizing them in their jurisdictions.

The thesis is structured with the 1st chapter discussing the background and creation of IATA: its legal status, its standing in international as well as domestic law, and how it derives authority to engage in its present range of activities in the airline industry. That

chapter will also outline the structure of IATA, its corporate and organizational hierarchy, its governing bodies and organs, the mechanisms employed by each of the IATA organs to promulgate rules and resolutions, and include a brief narrative setting out the early functions of IATA. The 2nd chapter will analyse the rulemaking authority of IATA and challenges encountered in its early years in different jurisdictions, both at administrative and judicial level, with particular focus on regulatory and judicial treatment of IATA in the USA. This chapter will then identify how these challenges influenced the transformation of IATA as an organization and the current regulatory environment in which IATA operates currently. The 3rd chapter contains a detailed description of the numerous programmes and initiatives that IATA has introduced to the industry, to demonstrate the scope and extent to which IATA initiatives impact the contemporary international air transport industry. The 4th chapter traces the transformation of IATA as an organization and examines its contemporary relevance to the air transport industry, with particular emphasis on current developments in the industry where IATA core activities of tariff setting have ceased to be mandatory, and where its coordinating activities are replicated by parallel models such as airline alliances. This chapter also raises questions regarding IATA's existential justification, particularly in light of its professed not-for-profit status, while highlighting the regulatory and oversight vacuum in which IATA operates. The 5th chapter is dedicated to an examination of the objectionable attributes of IATA and particularly its current rules and initiatives that adversely affect the consumer which address, *inter alia*, matters such as anti-competitive effects and secrecy. The 6th and 7th chapters respectively

address specific IATA resolutions of passenger services conferences and passenger agency conferences. These two chapters examine applicable rules for passenger services and agency and discuss how these affect the industry in general and the airline consumer in day-to-day operations. The 8th and final chapter is dedicated to an analysis of the current regulatory shortfall in dealing with IATA operations. This chapter sets out recommendations that could be relied upon as a cogent body of principles to guide future judicial treatment and administrative responses with regard to IATA and its operations.

The research on which this thesis is based entailed a comprehensive examination of IATA passenger services and passenger agency resolutions, which are not freely accessible or available for public scrutiny. The exposition and analysis of such material in this thesis will thus provide a significant contribution to knowledge, particularly due to the paucity of this material in existing academic literature.

## Chapter 1 – Introduction and Overview

### 1.1 Overview of international air transport regulation

The air transport industry is unique in nature and distinct from all other modes of transportation. The flight of an aircraft is not physically constrained or restricted by national terrestrial borders or geographical territorial limits. Civil air transportation is

the most popular mode used in transporting people between countries today.[1] Transportation by air facilitates the movement of persons and goods in a fast and efficient manner between countries, continents and to all parts of the globe, contributing immensely to global commerce and economic development.

From the advent of the use of aircraft for transportation, states involved in air transport activities have endeavoured to regulate this mode of transport. The objective of these endeavours were to formulate uniform rules, regulations, procedures and practices applicable to the transportation of persons and goods by air, that applied at an international level. With air transport gaining unprecedented popularity as an expeditious, convenient and efficient mode of transport with the ability to traverse large distances within short periods of time, states engaged in aviation were confronted with a plethora of legal problems. They needed urgent solutions if civil aviation was to continue to grow and be readily accepted as a reliable mode of transport by people around the world. The early efforts of the international aviation community at unifying rules resulted in multilateral consensus being achieved and codified in the 1919 Paris Convention.[2] The landmark multilateral consensus achieved by States in relation to civil

[1] Convention on International Civil Aviation, 7 December 1944, 15 UNTS 295 art 3 (a) (entered into force 4 April 1947) [*Chicago Convention*],

"This Convention shall be applicable only to civil aircraft and shall not be applicable to state aircraft" thereby making the distinction between "civil" and "state" aircraft.

art 3(b), "aircraft used in military customs and police services shall be deemed to be state aircraft".

[2] Convention relating to the Regulation of Aerial Navigation, 13 October 1919, 297 LNTS 173 ; For a description of the regulatory development and history leading to the Paris Convention, see, Paul Stephen Dempsey,, *Public International Air Law*, (Montreal: McGill Institute and Center for Research in Air & Space Law, 2008) at 14 – 30;, See generally, Nicholas Mateesco Matte, *Treatise on Air Aeronautical Law*, (Montreal: McGill Institute and Center for Research in Air & Space Law, 1981) at 44-52. The Paris Convention came into force and became operative multilaterally amongst thirty-three (33), mostly European nations. However, the United States, which helped draft the Paris Convention, did not ratify

aviation was reached at the Chicago Conference in 1945, which culminated with the opening of the Chicago Convention for signature on 7th December 1944.[3] Upon ratification by the required number of states as stipulated therein,[4] the Chicago Convention came into force in 1947,[5] and has since continued to be the cornerstone of international regulatory consensus and the universal source of governance for international civil aviation.

The preamble of the Chicago Convention postulates its primary objective to be the development of "international civil aviation in a safe and orderly manner" that would enable the establishment of international air transport services "on the basis of equality of opportunity and operated soundly and economically".[6] According to its preamble, states which were parties to the Chicago Convention, had as their common objective not only to ensure that civil aviation was developed in a "safe and orderly" manner, but also that such development should be on the "basis of equality of opportunity", and based upon sound "economic" operating principles. The Convention's objective was to ensure that equal opportunities were created for states to facilitate and ensure that each signatory state engaged in civil aviation had access to equal opportunities based on sound economic operations. The Chicago Convention did not confer, by implication or

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it. Thus, the Paris Convention did not achieve universal multilateral consensus in the absence ratification by the United States, which at the time was a leading aviation power. Dempsey, *supra*, at page 15.

[3] *Chicago Convention, supra* note 1.

[4] *Ibid*, art 91(b).

[5] The *Chicago Convention* came into force on 4th April 1947.

[6] *Chicago Convention*, preamble, para 3 sets out;

"THEREFORE, the undersigned Governments have agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established, on the basis of equality of opportunity and operated soundly and economically".

otherwise, "equal opportunities" to individuals or corporate bodies within states, but rather recognized such opportunities of sovereign states as contracting parties to the Chicago Convention.

Apart from the Chicago Convention, several multilateral agreements and international treaties have been formulated by states to regulate numerous matters in the realms of private and public law. These provide rules, *inter alia,* on matters related to aviation security, protection of civil aviation from external threats, international liability of airlines with regard to passengers and shippers of cargo, liability for surface damage by aircraft and the recognition and protection of property rights in aircraft.[7] These multilateral agreements that govern the rights of states (public international law instruments) and the rights of individuals (private international law instruments) have resulted in the codification of rules which govern matters of international air transportation today. These multilateral Conventions have acquired the force of law and created binding obligations on states upon ratification and formal recognition thereof according to the constitutional procedures of municipal or national laws of each signatory state.

[7] See the *Chicago Convention*, *supra* note 1; Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 704 UNTS 10106 (entered into force 4 December 1969) [*Tokyo Convention*]; Convention for the Suppression of Unlawful Seizure of Aircraft, 16th December 1970, 860 UNTS 12325 (entered into force 14 October 1971)[*Hague Convention*]; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23rd September 1971, 974 UNTS 14118 (entered into force 26 January 1973) [*Montreal Convention 1971*]; Convention for the Unification of Certain Rules relating to International Carriage by Air, 12th October 1929, 137 LNTS 11; [1963] ATS 18 (entered into force 13 February 1933) [Warsaw Convention]; Convention on the International Recognition of Rights in Aircrafts, 19th June 1948, 310 UNTS 151 (entered into force 17th September 1953) [*Geneva Convention of 1948*]; Convention on International Interests on Mobile Equipment,, 16th November 2001, online: UNIDROIT < www.unidroit.org/instruments/security-interests/cape-town-convention> [*Cape town Convention*]; Protocol to the International Convention on Mobile Equipment on Matters Specific to Aircraft Equipment, online: UNIDROIT < www.unidroit.org/instruments/security-interests/aircraft-protocol>; See generally, *Annals of Air & Space Law* (2005) XXX – Part 1.

The Chicago Convention unified and brought into existence a body of law applicable to international air transport, which mainly focused on aspects of safety and the implementation of a mutually recognized structure for the conduct of international air transport.[8] According to Professor Paul Dempsey, the Chicago Convention "accomplished two principal achievements. First, it recognized and certified certain principles of substantive public international law. Second, it established an international organization and vested it with jurisdiction to accomplish certain objectives and prescribed the procedures to govern the exercise of its jurisdiction."[9] The Chicago Convention created the International Civil Aviation Organization (ICAO). It promulgated regulations to achieve uniform standards of safety and rules applicable to international civil aviation,[10] and required states to give effect to the Standards and Recommended Practices (SARPS) that were formulated through its Annexes.[11] In turn, states, through their national laws and regulations, gave effect to SARPS prescribed in the Annexes of the Chicago Convention.

## 1.2 The basis for a logical & transparent regulatory structure

Upon examining the rules and regulations that are generally applicable to matters of safety, air operations and registration of aircraft, etc., one could clearly trace a

[8] See Michael Milde, "The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later?", (1994) 19:1, Ann Air & Sp L, 401 at 402 - 403. (According to Professor Michael Milde, "…The 96 Articles of the Convention are by themselves a monumental drafting achievement ……. [I]t is in the first-place comprehensive codification/unification of public international air law and, in the second a constitutional instrument of an international intergovernmental organization of universal character……. the Chicago Convention contains, in great detail, a self-contained corpus of public international air law").

[9] Dempsey, *supra* note 2 at 43.

[10] See, *Chicago Convention*, *supra* note 1, (particularly Part I – relating to Air Navigation and Part III - relating to International Air Transport.)

[11] *Ibid,* ch, VI, arts 37 -42.

hierarchical normative structure which demonstrates the existence of an orderly regulatory regime. This regulatory regime is transparent, has a clearly identifiable source, and depicts a structure and an intelligible nexus between multilateral treaties and national laws. When the legitimacy of rules governing air transport within most countries are examined, they can generally be identified as rules promulgated using legislative power that derives from a legitimate source within a normative structure. Laws and regulations governing matters related to aviation within a state can usually be identified within a transparent regulatory structure where the source of these laws and regulations can be traced either to the Chicago Convention, or to some multilateral air law treaty. In the realm of economic regulation of international air transport there are a host of rules and regulations in force that impact the entire spectrum of civil aviation. However, many rules which govern the rights and obligations of airlines, travel agents and consumers cannot be placed within a legitimate hierarchical structure that is connected to an international normative source.

The collateral scheme of rules propagated through the IATA traffic conference machinery does not derive validity from a normative structure or have a direct nexus to a multilateral legislative initiative of sovereign states such as the Chicago Convention. IATA, which does not have parallel rulemaking powers to the ICAO, promulgates an independent and *sui generis* scheme of rules that governs many aspects of international civil aviation. These rules of IATA are not confined to IATA members, but also govern travel agents and airline consumers. Even in the absence of "*locus standi*" to legislate in

the international or the national realms, IATA nonetheless operates its collateral and *sui generis* regulatory regime and procures compliance of its rules by its members, accredited agents and the airline consumer. Thus, the latter is an unwitting adherent to IATA rules.

Today, international air transport is an essential public service. It not only facilitates the movement of passengers and cargo between countries, but also contributes significantly towards the movement of persons and goods within national boundaries. Air transport has thus come to be recognized as a **"**public utility."[12] Professor Peter Haanappel states that the reason governments regulate international air transport in general, and IATA in particular, is that "international air transport being regarded as a world public utility calling for a high degree of government regulation in order to assure adequate and stable service to the consumer and to prevent wasteful competition between airlines."[13]

The main focus of international and the national legislators has been the propagation of rules in the area of safety of air transport within the scope of the Chicago Convention and its annexes. However, the absence of adequate involvement and initiatives of

[12] Peter P. C. Haanappel, *The Scheduled International Airlines and the Aviation Consumer* (LLM Thesis, McGill University Institute of Air & Space Law, 1974) [unpublished]at 50.; See also Ram Sarup Jakhu, *The Legal effects of Airline Tariffs* (LLM Thesis, McGill University, Institute of Air and Space Law, 1978) [unpublished] at 1. (where he asserts that, "air transport, though of recent origin, yet certainly has become the backbone of almost every economic and social activity, therefore definitely is a public utility. It is in the public interests that regular and cheap air transportation should be available to the public and the public should be assured of uniformity and equality of treatment.")

[13] Haanappel, however states that, whilst governments consider predominantly the areas of foreign policy, national defence, national prestige and national economy to play a substantial role in regulating international air transport, they have not paid sufficient attention to the consideration of the "**public utility**" character of international air transport. Haanappel, further opines that, as a result of too much focus on matters of foreign policy, national defence, etc., the governments may have lost sight of the interests of the aviation consumer and it is therefore important to make governments conscious of the weak position of the consumer particularly as airlines have effectively organized themselves into a trade association which will impose a responsibility upon the governments to protect the consumer. See *ibid* at 50.

governments to make rules and regulations covering a large swathe of economic activities concerning international air transport, has resulted in states having abdicated such responsibilities to IATA, a non-governmental industry trade association. This abdication has inevitable consequences for the consumer. The emergence and the spread of trade associations and alliances of airlines have enabled them to coordinate and cooperate in their spheres of activity, with the goal of pursuing the collective interests of their members. These trade associations and alliances have become strengthened, not only by their collective bargaining power, but also by their coordinated action plans which are implemented through various schemes of rules which target not only members, but also persons outside the circle of membership and the confines of voluntary accession to such rules.

IATA is a prime example. IATA's scheme is extensive, far reaching and regulates a wide spectrum of activities in international civil aviation, including airlines, airline consumers and travel agents. IATA's scheme of regulations stands alone, is independent, and *sui generis*. It cannot be placed within a hierarchical legal structure of norms applicable to international air transportation: the source of which is the Chicago Convention or any other multilateral treaty.

IATA's regulatory scheme is based on a parallel quasi-regulatory initiative, where multilateral consensus is reposed on member airlines who have formed themselves into a trade association. These member airlines do not have parity of status with sovereign states in the realm of international law. Airline members of IATA are entities that may

be privately or government owned and controlled. Therefore, airlines of IATA are essentially legal entities recognized by their respective licensing or incorporating governments, whose legal or corporate existence depends entirely on its sponsor government. Notwithstanding the absence of direct law-making power, IATA has promulgated an entire body of rules that are in force and are regularly followed by members and travel agents.

By permitting the rules and resolutions of IATA to be implemented and given effect to within their respective territories, governments and national regulatory bodies appear to have acquiesced to the implementation of the regulatory schemes of IATA. In most situations, one cannot find a legislative or regulatory connection or nexus between IATA resolutions and national laws and international conventions. IATA resolutions are given effect within countries, mostly as extended contractual obligations that are assumed by member airlines and accredited travel agents. Therefore, serious questions of legislative due process, as well as regulatory legitimacy, arise with regard to the quasi-regulatory regime of IATA which is implemented in and applicable to air transport matters in practically every corner of the world.

### 1.3 Regulatory interface and the consumer.

Although rules play an important role in regulating civil air transport, what is mostly of concern to the airline consumer is how such rules impact him/her. The airline consumer would ordinarily not get involved in examining underlying rules that are applicable to aviation but would more likely be interested in the price of an air ticket,

including knowing the terms, conditions and levels of service provided by an airline for the price charged. For example, an airline consumer would be keen to know the services that would be offered on board an aircraft as well as the facilities that are provided in the course of his journey and that are included in the price paid for air transportation. The type of seat provided to the passenger, attendant comforts, airport lounge facilities, the number and weight of bags that can be transported without further payment, are some of the important considerations from an airline consumer's perspective. The terms and conditions of service contracted within the scope of the air transportation agreement and included in the ticket price are generally referred to as "tariffs,"[14] which can vary from one air transportation enterprise to another. An airline consumer's interest would be well served if the consumer was presented with a choice of air transportation services available based on a competitive offering of products in the marketplace. For such competitive offerings of air transportation products to be available, it is imperative that a robust regulatory structure—both at national and international level—exists to promulgate, implement and oversee economic regulation of international air transport.

[14] Jakhu *supra* note 12 at 7-8. (The use of the word "tariff" in relation to United States aviation law "connotes not only fares, rates or charges, but also 'governing provisions' applicable to the transportation of persons or property by air. 'Governing provisions' are nothing but rules regulations, terms and conditions of carriage by air". He also cites the definition contained in Section 2 of the Air Carrier Regulations issued by the Canadian Transport Commission pursuant to Section 14 of the Aeronautics Act to describe a "tariff" to mean "a publication containing terms and conditions of carriage, tolls, rules, regulations and practices applicable to the carriage of traffic by an air carrier and includes an amendment or supplement to a tariff or a page of loose-leaf tariff").

## 1.4 Economic regulations and the emergence of IATA

Although the Chicago Convention achieved consensus among states with regard to uniformity of safety regulations, it could not achieve multilateral consensus on economic regulation of air transport. The Chicago Conference also signed and opened for ratification the International Air Services Transit Agreement[15] and the International Air Services Transport Agreement[16] in addition to the Chicago Convention. The International Air Services Transit Agreement recognized the right of peaceful overflight, and the right of airlines registered in one state to land in a foreign state for transit and non-traffic purposes.[17] The International Air Transport Agreement [*Five Freedoms Agreement*] was formulated to exchange third, fourth and fifth freedom[18] air traffic rights multilaterally in addition to the first and second freedoms granted in the *Transit Agreement*. Although the *Five Freedoms Agreement* entered into force on the 8th of February 1945, it remained a dormant and largely unapplied multilateral instrument as states mostly preferred to exchange the "five freedoms" through bilateral air services agreements. Thus, the international aviation community failed to reach consensus on a multilateral scheme to regulate economic matters in civil aviation. This role was

[15] *International Air Services Transit Agreement*, 7th December 1944, 84 UNTS 389; 59 Stat. 1963 (entered into force 30 January 1945). [*Transit Agreement*]

[16] *International Air Transport Agreement*, 7th of December 1944, 17 UNTS 502. [*Five Freedoms Agreement*].

[17] Under this Agreement State parties have recognized the mutual rights of their designated airlines to overfly as well as stop for non-traffic purposes – the 1st and 2nd freedoms of the air (for the purpose of refuelling and technical stopover other than embarking or disembarking passengers, cargo or mail) in the other contracting states.

[18] These freedoms viz, the 3rd, 4th and 5th of air traffic rights respectively relate to the rights of the airlines of signatory states to, carry passengers, cargo and mail between the point of origin and point of destination in the territories of two states directly as well as via an intermediary or beyond point on the same route situated within the territory of a third signatory state. For a detailed exposition of the traffic rights commonly recognized in Civil Aviation see Dempsey *supra* note 2 at 23- 27. Also see, Bin Cheng, *The Law of International Air Transport*, (London & New York: Steven & Sons Limited & Oceana Publications, 1962), at 8-16.

thereupon assumed by the International Air Transport Association (IATA) with the knowledge, concurrence and (at times) the express sanction of sovereign states.

## 1.5 The founding and history of IATA

The International Air Transport Association (IATA) was originally founded as a trade association of airlines engaged in providing scheduled international air transportation. An association of international airlines was first established under the name "International Air Traffic Association" which is considered to be the predecessor to the modern-day IATA.[19] The International Air Traffic Association was established in the Hague in 1919, the same year that the world's first international scheduled airline service was provided,[20] and was initially limited to membership of European airlines until Pan American joined the Association in 1939.[21] The contemporary IATA, which emerged as a dynamic and robust organization, was established soon after the Second World War, and on the side-lines of the Chicago Conference in December 1944. Its beginning is regarded as a reactionary response to the failure of the Chicago Conference to achieve multilateral consensus on a set of rules to govern economic aspects of international air transport.

States that attended the Chicago Conference were unable to agree on a scheme, either within the Chicago Convention or its associated multilateral Instruments,[22] to promulgate rules on tariffs for international air transport. This failure is considered to be the catalyst that led to parallel discussions at the Chicago Conference and the

[19] See Haanappel, *Scheduled International Airlines, supra*, note 13 (Haanappel refers to the Air Transport Association that was created in 1945 as the post war IATA while he refers to the International Air Traffic Association established in 1919 as the pre-war IATA, the latter which he states was, "mostly an European affair").
[20] IATA, "The Founding of IATA: The Early Days" online: <www.iata.org/about/Pages/history.aspx>.
[21] IATA online: <www.iata.org>.
[22] See *Transit Agreement supra* note 15; *Transport Agreement supra* note 16.

formation of a trade association of airlines engaged in scheduled international air transport under the name IATA.[23] After the second World War, civil aviation experienced extensive growth. A trade association of international airlines with a systematic organization and commensurate infrastructure was required to address the needs of a growing number of international airlines from diverse regions of the world.[24] The blueprint for IATA was laid by airline representatives attending the Chicago Conference, who circulated a draft Articles of Association that was later adopted by members at the inaugural conference of the IATA in Havana in 1945.[25] IATA convened its inaugural Annual General Meeting in Montreal in October 1945,[26] subsequent to which a Canadian Act of Parliament conferred corporate personality upon IATA.[27] After its founding and incorporation as a trade association, IATA assumed extensive functions and powers, as set out in its Articles of Association.[28]

The primary objective of airline representatives in establishing IATA was to create a multilateral scheme that would facilitate member airlines to collectively agree on pricing mechanisms and tariffs for international air transport. According to its express mission, purposes, objects and aims, IATA was established as a trade association to facilitate air transportation related matters on behalf of its members and to perform

[23] For a detailed historical account leading to the establishment of the contemporary IATA following the Chicago Conference, see Haanappel, *Scheduled International Airlines, supra,* note 12, at 10-14.
[24] *Ibid.*
[25] Haanappel, *Scheduled International Airlines, supra* note 12; *ibid.*
[26] *Ibid.*
[27] *An Act to Incorporate International Air Transport Association*, SC 1945, c 51, as amended by SC 1974-75-76, c 111. [*Act of Incorporation*] The International Civil Aviation Organization's (ICAO) which was established under the Chicago Convention in December 1944, had set up its headquarters in Montreal. This had also been the motivating factor for IATA to also establish its headquarters in Montreal and the incorporation of IATA as a Canadian Corporation under the law of Canada.
[28] Haanappel, *Scheduled International Airlines, supra*, note 12 at 13.

tariff coordination through its Traffic Conferences.[29] However, in the 70 years following its establishment, IATA has altered significantly from its original character. The contemporary IATA is not only a trade association, but is also a dynamic commercial enterprise that earns profits from supplying products and services to the airline industry.[30] From its original role of a facilitator, IATA has transformed into a powerful non-governmental body which—both directly and indirectly—impacts and exercises significant control over a wide swathe of matters in civil aviation worldwide.

### 1.6 Independence of IATA and its rule making

IATA makes rules by adopting resolutions to give effect to its policy objectives and the collective interests of its member airlines. These rules are meant to procure facilitation of international air transport and to create benefits and conveniences for the airline industry. The professed objective for IATA to promulgate these rules is the pursuit of its collective interests and that of its members. In democratic governance structures, regulators of any trade or service activity would ordinarily be expected to remain independent; that is, without any self interest in the subject being regulated. IATA is an organization pursuing the interests of its member airlines. However, these airlines—acting collectively—formulate rules to regulate their relationships and mutual obligations *inter se.* These rules impose obligations upon travel agents and the airline

[29] *Act of Incorporation supra* note 27; IATA, *Articles of Association,* online:<www.iata.org/about/Pages/corporate-structure.aspx>.

[30] IATA, "From a New Trade Association to New Strategic Thrust" online:< www.iata.org/about/Pages/history_5.aspx.> (IATA claims that, "IATA has changed the basis of its funding. Much of the association's funding is now done through the marketing of its products and services to member airlines, other airlines and others in the travel and transport and tourism industry").

consumer. Could one reasonably anticipate that IATA rules are made with the objective of balancing the interests of all affected stakeholders in a non-discriminatory manner? Would it not be natural for IATA to give precedence to its own interests and to that of its members, thus compromising the rights and privileges of the airline consumer to their disadvantage? Would not IATA be inclined to pursue interests that are linked to the profitability of its own members? Could IATA be expected to adopt a benevolent attitude to protect the interests of consumers and intermediaries, if the interests of its member are prejudiced? These questions come to the fore when examining the legitimacy of the quasi regulatory scheme that is implemented through IATA resolutions.

IATA programmes cover multiple activities across the air transport industry. These are implemented at international, national and regional levels through its members and accredited travel agents. To render a logical analysis of the IATA quasi regulatory scheme, it becomes necessary to examine the various initiatives and programmes that have been formulated by IATA and to examine the way it formulates rules.

## 1.7 Rulemaking structure

According its Act of Incorporation, the purposes, objects and aims of the IATA are:[31]

a. To promote safe, regular and economical air transport for the benefit of the peoples of the world, to foster air commerce and to study the problems connected therewith;
b. To provide means for collaboration among the air transport enterprises engaged directly or indirectly in international air transport service;
c. To co-operate with the International Civil Aviation Organization (ICAO) and other international organizations.[32]

IATA shares the view, also expressed by several experts, that it was 'delegated' the authority to hold Traffic Conferences for the purpose of developing fares and rates subject to final government approval, as international airlines could not independently develop tariffs.[33] According to IATA, the predictability of tariffs achieved through coordination also enabled airlines to accept each other's tickets on multi sector journeys leading to the advent of interlining.[34] The most significant instrument of coordination is

[31] *Act of Incorporation*, *supra,* note 27, s.3(a) – (c)

[32] According to IATA "*most important tasks of IATA during its earliest days were technical because safety and reliability are fundamental to airline operations. These require the highest standards in air navigation, airport infrastructure and flight operations. The IATA airlines provided vital input to the work of ICAO as that organization drafted its standards and recommended practices……The standardization of documentation and procedures for the smooth functioning of the world's air transport network also required a sound legal basis. IATA helped to mesh international conventions developed through ICAO with US transport law which had developed in isolation prior to World War II. The association made a vital input with development of conditions of carriage, the contract between the customer and the transporting airline."* IATA online: <www.iata.org>.

[33] IATA online: <www.iata.org>. The aim of delegating price determination to IATA Traffic Conferences was to, ensure that fares and rates would not involve cut throat competition encouraging prices to be set as low as possible in the interests of consumers. IATA rationalizes that "a coherent pattern of fares and rates being established would avoid inconsistencies between tariffs affecting neighbouring countries and also avoid traffic diversion." *Ibid.*

[34] Interlining contemplates an arrangement or agreement by one airline to accept for transportation passengers, baggage and cargo on routes and journeys involving multi sectors, which had been contracted or ticketed by a partner airline with

the Traffic Conference system of IATA, the first of which was held in Rio de Janeiro in 1947.[35] "The first worldwide Traffic Conference achieved unanimous consensus in relation to almost 400 resolutions covering all aspects of air travel including, fare construction rules for multi sector trips, revenue allocation and pro rating rules, baggage allowances, ticket and airway bill design and agency appointment procedures."[36] IATA's professed objective, as stated in its website, "has been to save money for its airlines while enhancing airline services".[37] In pursuit of this objective, IATA regulates travel agents though a mandatory accreditation process, whereby travel agents are permitted to act as agents for a member airlines only upon accreditation.[38]

In October 1979, in response to looming antitrust scrutiny by the United States, and consequent to recommendations of a task force appointed at its 33rd Annual General

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whom an interline agreement exists. IATA states that "today over 50 million international air passengers per year pay for their tickets in one place and one currency while completing their journeys using at least two and sometimes five or more airlines from different countries using different currencies."

[35] IATA online: <www.iata.org>.

[36] IATA resolutions have extensive application in today's context. They encompass a multitude of issues relating to air transport and include: a, Multilateral Interline Traffic Agreements (MITAs) which form the basis of airline interline networks. Almost 400 airlines are known to have signed MITAs accepting each other's tickets, airway bills and the passengers and cargo traffic on a reciprocal basis.; b. Passenger and cargo services conference resolutions, prescribe a variety of standard formats and technical specifications in relation to air tickets and airway bills; c. Passengers and cargo agency agreements and sales agency rules govern relationship between member airlines and their accredited agents; d. Debt and account settlement amongst airlines arising from interlined carriage, performed through the IATA Clearing House (ICH). *Ibid.*

[37] IATA, "Growth and Development" online: <www.iata.org/about/Pages/history_3.aspx>.

[38] IATA, *Passenger Sales Agency Rules*, Res.800, art.2 stipulates under the title "ONLY ACCREDITED AGENTS TO BE APPOINTED" that, "a travel agent appointed by a Member (IATA airline) to sell international air transportation must be an Accredited Agent (by IATA), IATA Passenger Agency Conference Resolutions Manual, 38th Edition, June 2017. Although the accreditation by IATA is a mandatory pre-requisite for access to business by travel agents worldwide, IATA sees this as an opportunity given to travel agents to prove their professional status. IATA states that, the airline-agent relations were established with the introduction of the Standard Agency Agreement in 1952 and that there are over 81,000 IATA accredited agents worldwide whilst it has provided training to over 135,000 students through IATA sponsored agency training courses. IATA proclaims that "accreditation process and training is done in conjunction with the Universal Federation of Travel Agents Associations and the Federation of Freight Forwarders Associations. IATA online, *Supra.*

Meeting, IATA activities were regrouped[39] into "trade association"[40] and "tariff coordination"[41] categories. The former was designed to deal with technical, legal, financial, traffic services and most agency matters and the latter was intended to agree on passenger fares, cargo rates and related conditions and charges.[42] The technical and tariff coordination activities of IATA have resulted in propagation of numerous rules governing members, accredited agents and the airline consumer, the latter an unwitting subject of the IATA regulatory regime.

## 1.8 Hierarchy of bodies within IATA

### 1.8.1 The Act of Incorporation of IATA

IATA was established, and was granted corporate status formally by its Act of Incorporation promulgated by the Canadian Parliament, on 18th December 1945.[43] The purposes, aims and objects set out in the *Act of Incorporation* ("the Act") contemplate that IATA promotes safe, regular and economical air transport, for the "benefit of the peoples of the world."[44] Whilst the "benefit" (of air transport) is anticipated for "the peoples of the world",[45] the purposes and objects expressed in relation to the "air transport enterprise" are for achieving "a means of collaboration".[46] The primacy of

[39] IATA, "A Two Tier IATA" online: IATA, <www.iata.org>.
[40] Trade association activities - functions relating to technical, medical, legal, facilitation, industry, clearing house, finance, standardization of passenger, baggage & cargo handling, multilateral interline traffic agreements, procedures (other than remuneration) relating to intermediaries engaged in the sale of member's products.
[41] Tariff coordination in respect of passenger and cargo including the regulation of fares, rate levels and conditions and matters relating to remuneration to intermediaries engaged in the sale of members' products.
[42] Hugette Larose Aubrey, "Reorganization and Restructuring of IATA", (1978) 3 Ann. Air & Sp L 582.
[43] *Act of Incorporation*, *supra* note 27.
[44] *Ibid,* s. 3(a).
[45] *Ibid.*
[46] *Ibid,* s. 3(b)

interest in the Act has therefore clearly been accorded to the "peoples of the world." The Act defines an "air transport enterprise" inclusively to mean persons or bodies "operating an air service for public hire under proper authority"[47] and "air service" to mean "any air service" performed by aircraft for the "public transport of passengers, mail and cargo."[48] The language of the Act, when considered in conjunction with its definitions, demonstrates that international air transport has been ascribed a status of a "public utility."

The definition in section 1 of the Act manifests that, an "air transport enterprise" (airline)" collaborating in the IATA scheme should be duly licensed by a state (which is a member of ICAO) to provide public air transportation services for passengers and cargo.[49] The authority empowering IATA to make by-laws, rules and regulations is granted in Section 5 of the Act.[50] IATA is empowered to make by-laws, and rules, *inter alia*, to:

- Define and regulate the qualifications, admission, termination, suspension and expulsion of members, determine the different classes of members and their rights, duties and privileges, and fix the fees, subscription and dues to be paid by them;[51]
- To establish an Executive Committee of the Association with executive powers, determine the method of election or appointment thereto, or selection thereof,

[47] *Ibid,* s. 1.
[48] *Ibid.*
[49] *Ibid.*
[50] *Ibid*, s. 5.
[51] *Ibid*, s. 5(a).

define the constitution, powers, duties, quorum and terms of office of such executive committee and fix the number, powers, duties, quorum, terms and conditions of office of the officers and committees of the Association;[52]

- Provide for the administration and management of the business and affairs of the Association and the furthering of its objects, purposes and aims and such delegation as it may deem proper of any of its powers to the Executive Committee of the Association and to any other committee as it may from time to time appoint.[53]

The authority conferred by section 5 is the main statutorily-derived power of IATA to make rules where power is confined to the specific matters stipulated in the statute. The principal source of IATA's rulemaking power emanates from the Act. IATA rulemaking authority is therefore a rulemaking power that is confined in territorial application and to subsidiary law making for the internal governance IATA.[54] The source of IATA rulemaking power is set out in section 5(d) of the Act, which provides that rulemaking powers are confined to the pursuit of its objects, purposes and aims and may be delegated by IATA to its Executive Committee or any other committee. Section 6(1) of the Act stipulates that, "in addition to the **general powers accorded to it by law** (*emphasis added*) and to those set forth elsewhere in this Act, the Association shall have

[52] *Ibid* s. 5(b).
[53] *Ibid* s. 5(d).
[54] Section 5(d) empowers the Association to make by-laws, rules and regulations to **"**provide for the administration and management of the business and affairs of the association and the furthering of its objects, purposes and aims" and also empowers IATA to delegate any of its powers to its Executive Committee or any other committee through by-laws, rules and regulations as it may from time to time deem proper. *Ibid*.

power…". The reference to "general powers accorded to it by law" in the Act should necessarily refer to general powers of corporations of the incorporating state, Canada.

Section 6 of the Act grants IATA ancillary powers:

- to acquire any part of the rights and properties owned or held by or on behalf of the unincorporated association (IATA's predecessor association prior to being so incorporated);[55]
- to purchase take on lease, to hire, acquire by gift, grant, device, legacy, to own and hold any estate property or rights, real or personal, movable or immovable… to alienate sell, exchange, manage, develop, lease in such manner as the Association may determine;[56]
- to borrow money for the purposes of the Association;[57]
- to carry out all or any of the objects of the Association and do any of the above things as principal agent, contractor or otherwise and either alone or in conjunction with others'[58]
- to do all such other things as are incidental or conducive to the attainments of the objects and the exercise of the powers of the Association.[59]

Only Section 5 of the Act empowers IATA to make by-laws and rules. The language in section 6(1)(g) that IATA shall have power "to do all such other things" cannot be

[55] *Ibid*, s. 6(1)(a).
[56] *Ibid,* s. 6(1)(b).
[57] *Ibid,* s. 6(1)(c).
[58] *Ibid*, s. 6(1)(f),
[59] *Ibid,* s. 6(1)(g).

interpreted to include the power to make rules, since the specific authority for rulemaking is contained in section 5(d) of the Act. The language "to do all things" contained in section 6 is an omnibus power that is incidental to the attainment of the objects of IATA. Interpreted *ejus dem generis*, it is merely an incidental power "to do things" and does not correspond to the rulemaking authority of IATA.

Section 8 of the Act stipulates that the "existing constitution, by-laws and rules of the unincorporated Association insofar as they "**are not contrary to law or to the provisions of this Act** (*emphasis added*)" shall be the constitution, by-laws and the rules of the Association until altered or repealed at an Annual or Special General Meeting of the Association." Although this provision is of transitional application, it nevertheless restates the principle that the validity of the constitution, by-laws and the rules of IATA, is predicated upon them being consistent with "the law" and the provisions of the Act. "The law" referred to in section 8 should mean the law of Canada, since the Act has been promulgated under Canadian law, granting corporate personality to IATA.

According to section 9 of the Act, "the association may exercise its **functions** throughout Canada or elsewhere and meetings of the association and the Executive Committee and any other committees of the Association may be held at any place other than the head office of the Association and either within or without Canada" (emphasis added). This provision makes clear that extraterritorial capacity had been conferred only in relation to the 'functions' of IATA. This provision also buttresses the argument that the Act did not confer extraterritorial authority for IATA rulemaking to be

exercised outside its domicile, as the statute expressly stipulated that IATA may perform its 'functions' in Canada or elsewhere.

This distinction and the confines of IATA's rulemaking authority as being of 'territorial application' is of significance, because most by-laws, rules and regulations made by IATA are not limited in application within Canada, but rather operate extraterritorially. It is a well-settled principle of municipal—as well as international law—that the legislative authority of a sovereign state and any agency empowered to make law is confined in application to the territorial limits that are within the control of such a state. When a sovereign state confers corporate personality and subsidiary law-making authority by legislative instrument on a corporate entity, the legislative authority conferred upon that body corporate is confined to the territorial realm of the sovereign state which created the corporate body.

To ascertain the consanguinity (or the bloodline) of numerous IATA resolutions operating in many countries, it is necessary to link these resolutions to the rulemaking authority of IATA. The statutory provisions of the IATA *Act of Incorporation* analysed above serve as a reference point from which to assess the legitimacy and validity of IATA resolutions implemented not only within Canada, but in all corners of the world.

### 1.8.2 IATA Articles of Association.

Article II of IATA *Articles of Association* ("the Articles")[60] contains definitions for the various terms used therein. The *Act of Incorporation* is defined as "the Statute of Canada by which IATA was incorporated".[61] "Air service" means "the public transport of passengers, mail or cargo by aircraft" while "Airline" means "an entity operating an air service".[62] The Articles refer to an "airline,"[63] whilst the Act refers to an "air transport enterprise."[64] "Articles" are given an extended meaning to include "by-laws, articles of association, rules and regulations adopted pursuant to section 5 of the *Act of Incorporation*."[65] The missions and aims of IATA—as declared in its Articles—are to represent, lead and serve the airline industry by promoting safe, secure and reliable air services for the benefit of the peoples of the world;[66] providing means of collaboration among airlines in compliance with applicable law;[67] and cooperating with the ICAO and other relevant international organizations.[68] Both, the Articles and the Act highlight that the objectives of IATA should inure to the benefit of "the peoples of the world."[69]

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[60] *Articles of Association supra* note 29.
[61] *Ibid,* art. II (1).
[62] *Ibid,* art. II (2).
[63] *Ibid,* art. II (3).
[64] See *Act of Incorporation,* s. 1(b) which defines "an air transport enterprise" to be any person or entity (includes corporate and unincorporated bodies, societies, associations, firms and partnerships) operating a properly authorized "Air Service" under the flag of a State eligible for membership in the ICAO.
[65] *Articles of Association supra* note 29, art. II (5).
[66] *Ibid,* art. IV (1).
[67] *Ibid,* art. IV (2).
[68] *Ibid,* art. IV (3).
[69] *Act of Incorporation supra* note 27, s. 3(a); *Articles of Association supra* note 29, art. IV (1).

The Articles further underscores that collaboration among airlines should be in "compliance with the applicable law."[70]

Criteria[71] for membership[72] in IATA requires that an applicant:

*a*. must operate an air service;[73]

*b*. must maintain a valid IATA Operational Safety Audit (IOSA)[74] registration;[75] and

*c*. has operated an air service for a period of not less than 2 years and performed for each of those years at least five million (5,000,000) revenue/tonne kilometres (RTK).[76]

Operational safety is a responsibility that is conferred on states and their aeronautical authorities under the Chicago Convention and its annexes. Safety oversight is therefore

[70] *Articles of Association, supra* note 29, art. IV (2).
[71] *Ibid,* art. V (1).
[72] Article VI recognizes the authority of the Board of Governors to establish a different class of membership known as "IATA Affiliates" and to determine the criteria for membership and the rights and duties of such affiliate members.
[73] *Ibid,* art. V (1) (i). An air service is defined as "the public transport of passengers, mail and cargo by aircraft." *Ibid,* art. II (2). Article IV (2) states IATA's mission is to provide a means of collaboration among "Airlines" in compliance with applicable law. The *Act of incorporation* in Section 3(b) stipulates that, the purposes, objects and aims of IATA shall be to provide means for collaboration amongst air transport enterprises engaged directly or indirectly in international air transport services. This means an "airline" referred to in Article IV of should be an "air transport enterprise" which according to the Act of Incorporation has been duly licensed by an ICAO member state to engage in international air transport services.
[74] The IATA Operational Safety Audit Program (IOSA) is a recent initiative introduced in or around the year 2009 during the tenure of its then Director General and CEO Giovanni Bisignani, who is credited as having conceived this concept. The IOSA has been introduced as a global standard for airline safety management which requires all member airlines of IATA to achieve the IATA operational safety audit approval and registration, as a pre-condition to IATA membership. IOSA covers areas of audits in relation to passenger and cargo, flight operations, infrastructure, training and data collection. IATA, "IATA's Leaders Over the Years", online:<www.iata.org/about/Pages/leaders.aspx>.
[75] *Ibid,* art. V(1)(ii).
[76] *Articles of Association, supra* note 29, art. V(1)(iii). However, an applicant airline that does not meet the criterion set out in this Article, V(1)(iii) may be nevertheless admitted to membership if the IATA Board of Governors consider that, admitting such an airline to membership in IATA would be in the interests of IATA.

a function that is performed by states and their respective aeronautical authorities. Prior to the introduction of the mandatory IOSA registration by IATA, airlines resorted to multiple safety audits that were conducted by entities applying varying audit standards in different regions. The IOSA registration, whilst creating a uniform audit platform and certification of auditors, undoubtedly also created collateral commercial opportunities for IATA.[77] Therefore, IOSA registration inevitably added to the operational costs of airlines, which in turn passed on those costs to the consumer. A relevant question might be whether, in making IOSA audits compulsory for airlines, is not IATA encroaching into the regulatory functions of state aeronautical authorities, and thus indirectly imposing a financial burden on the consumer to exploit commercial opportunities for itself?

### 1.8.3 The General Meeting & Board of Governors

Article VIII of the Articles divides general and specific powers of IATA between its Executive Committee, the Board of Governors and its members in General Meeting. Accordingly, the General Meeting is vested with ultimate authority to exercise all powers of IATA.[78] Those powers of IATA which are not required by law[79]to be

[77] Lindsey Sabec, "FAA Approves IATA's Operational Safety Audit (IOSA) Programme: A Historical Review and Future Implications for the airline industry", (2004/2005) 32 Transport Law Journal 1 at 2, 12 & 16.. Lindsey Sabec states that, "*The demand for airline safety around the world resulted in mushrooming of audits costing the airline industry millions and it was estimated more than 10,000 airline audits were conducted each year. …IATA structured the IOSA programme consisting of multiple entities including IATA, audit organizations, endorsed training organizations and the IOSA oversight committee. The IOSA programme provides uniform international audit standards to ensure airline safety compliance throughout the world. After 2004 July the Federal Aviation Administration (FAA) accepts audits performed by IOSA accredited organizations as another method of US airlines to fulfil their responsibility of ensuring their code share partners satisfy international safety standards. US airlines will benefit by decreasing costs, saving time and reducing the manpower necessary to perform multiple audits on every prospective foreign code-share partner as previously mandated." Ibid at pages 2, 12 & 16.*

[78] *Ibid,* art. VIII (1).

[79] Constituent documents of IATA stipulate that, powers of the Board, and the General Meeting should be exercised in a manner consistent with the *Act of Incorporation*, the *Articles*, the decisions of the General Meeting and the law. The

exercised by the General Meeting—namely the Act and the Articles—are to be exercised by IATA's executive committee, known as the "Board of Governors,"[80] which is accountable to the General Meeting for the overall performance of IATA.[81] Article XII specifies the mandatory[82] powers that are to be exercised by the Annual General Meeting.[83] The powers of the Board of Governors[84] excludes those powers expressly conferred upon the Annual General Meeting (AGM).[85]

The Board of Governors is the Executive Committee of IATA.[86] The Board is responsible to determine, review and approve IATA policy within the framework of the Act, the

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reference in the Article to the words "by law" would necessarily mean the Corporation's law of Canada. The confines and scope of authority of the Board of Governors will therefore have to be determined according to Canadian law applicable to the division of powers and functions between a General Meeting and the Board of Governors in a corporation.

[80] *Articles of Association*, *supra*, note 29*,* art. VIII (2)a.

[81] *Ibid,* art. VIII (2)b.

[82] "Mandatory" as the word used in the relevant Article is "shall".

[83] *Articles of Association, supra* note 29, art. XII. The powers;

a. Elect its president;
b. Receive nominations from the Nominating Committee and elect members of the Board;
c. Elect the Nominating Committee to make recommendations to the next Annual General Meeting to the Board;
d. Establish the rules of the Nominating Committee;
e. Establish IATA Conferences, and such groups and subordinate bodies as it considers appropriate;
f. Confirm the appointment, term of office and the duties of the Director General;
g. Receive and consider reports of the Board, Industry Committees, IATA conferences and the Director General;
h. Approve the audited annual consolidated financial statements for the previous year;
i. On the recommendation of board approve the applicable fees and dues;
j. On the recommendation of the board approve the currency or currencies, and the time by which such fees and dues shall be payable;
k. Appoint the external auditor for the current year;
l. Transact any other business as may properly come before the AGM.

[84] The Articles of Association empowers the Board of Governors to formulate its own rules and regulations, to adopt and to amend same. The general function of the Board is to give policy directives and guidance to the IATA Industry Committees and subsidiary bodies of IATA. The Board provides policy guidelines to IATA Traffic Conferences and to Industry Settlement Plans as required. *Ibid,* art. XIV(8)(q) and IATA, *Rules and Regulations of the Board of Governors,* rule II (4), online: IATA <www.iata.org/about/Pages/corporate-structure.aspx>.

[85] *Ibid,* art. XII (3).

[86] Is a body with not more than 31 persons elected by the AGM. Article XIV(8)(c), states that, the Board shall be vested with "Executive powers and duties including the general management and control of business, affairs, funds and property of IATA." *Ibid,* art. XIV (1).

Articles and decisions of the General Meeting.[87] The Board appoints the Director General subject to the approval of the AGM. It also determines the term of office, duties and remuneration[88] of the Corporate Secretary, the Chief Financial Officer and such other officers of IATA who are subject to the supervision and authority of the Director General.[89] The Board is also mandated with a duty[90] to establish subsidiary corporations, branches, and regional and other offices of IATA anywhere in the world as it considers appropriate.[91] The Board, acting in terms of Rule VII(4),[92] has also established several Industry Committees[93] which are the Cargo,[94] Environment,[95] Financial,[96] Industry Affairs,[97] Legal[98] and Operations Committees.[99]

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[87] *Ibid,* art. XIV (8) (c) & (d).
[88] *Ibid,* art. XIV (8) (f).
[89] *Ibid,* art. XIV (8) (g).
[90] The relevant provisions viz., Article XIV(8)(a) – (o), start with the words "the Board Shall" which denotes not only the conferring of requisite authority on the Board, but also concomitant obligations in respect of such functions given therein. Only in respect of the powers set out in Articles, XIV(8)(p) & XIV(8)(q) is the Board vested with the discretionary power as the latter provisions uses the words "The Board may."
[91] *Articles of Association supra* note 29, art. XIV (8)(h). The authority of the Board to make rules for internal governance is contained in Article XIV(8)(l), of the Articles of Association, which provides that, the Board "may adopt and amend its rules and regulations as deemed appropriate by the exercise of its executive powers and the performance of its duties". The Board is vested with the power to approve rules and regulations of Industry Committees and for conducting IATA Traffic Conferences. It is also empowered to establish and determine the, membership, duties, functions, rules and regulations of any Committee of the Board and to authorize any such Committee to adopt its own rules and regulations. The Board of Governors may delegate as appropriate its authority to a Committee of the Board or to the Director General. *Ibid,* art. XIV (8) (j), (k), (l) & (p).
[92] *Ibid*, *rule*, VII (4).
[93] IATA, *Rules and Regulations of the Board of Governors, supra* note 84, rule VII (2). Three permanent committees have been established under Rule VII of the Rules and Regulations of the Board of Governors. They are the Chair Committee, the Audit Committee and the Strategy and Policy Committee. The appointment of members to Industry Committees, is done by the Director General subject to the approval of the Board. The Director General or an Industry Committee with the approval of the Director General, could establish working groups and *ad hoc* task forces in terms of Rule VII (8) of the Rules and Regulations of the Board of Governors. The Board of Governors under Rule XIII, is vested with discretion to amend the provisions for the conduct of the IATA Traffic Conferences. *ibid*, rules VII(7)(i)- (x) (Set out the criteria to be considered for appointment to the industry committees). However, the Board is required to obtain prior approval of the AGM before making any amendments to the Sections VIII and XIV of the provisions relating to the conduct of Traffic Conferences, the effect of which would be to alter the requirement for a unanimous vote of all the voting members of the Traffic Conference.
[94] IATA, *Cargo Committee Mandate*, online: IATA< www.iata.org/about/Pages/corporate-structure.aspx>. - The mandate of the Cargo Committee is to act as an advisor to the Board of Governors, the Director General and other relevant IATA bodies on all air cargo industry policy issues and to develop policies, positions, action plans and resolve issues.

### 1.8.4 The Director General of IATA

The Director General is the Chief Executive of IATA who is empowered to supervise, direct and control the business and affairs of IATA under the authority of the Board of Governors and to perform other functions and duties as may be delegated or assigned by the General Meeting or the Board of Governors.[100] The powers of the Director General are set out in Article XV of the Articles. In addition to his mandatory powers and functions, the Director General is also vested with the discretion to establish one or more industry committees to advise on subjects of significant interest to the air transport industry, to appoint members of such committee, and to dissolve any such industry committee at any time.[101]

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Areas of activity of the cargo committee relate to forwarder-air carrier relations, cargo safety and security, cargo automation, cargo handling, cargo facilitation, cargo related regulatory development, cargo quality standards.

[95] *See,* IATA, "*Environment Committee*", online: IATA<www.iata.org/about/Pages/corporate-structure.aspx>.- The Environment Committee acts as the advisor to the Board, the Director General and other IATA bodies on environmental issues and is mandated to, monitor, asses and respond to environmental developments, policies and regulations of concern to IATA member airlines; develop and recommend common industry positions on environmental issues; advise and implement strategies to promote IATA positions with regulatory bodies and stake holders.

[96] *See,* IATA, online:www.iata.org/about/Pages/corporate-structure.aspx>. This committee acts as advisor to the Board, the Director General and other IATA bodies on financial services and activities connected with international air transport. The scope of this committee's functions include advising IATA management on the development of industry financial positions, policy implementation for industry financial matters and financial strategy; industry financial services and settlement systems (IATA Settlement Systems (ISS), IATA clearing House, IATA currency clearing services, credit card sales processing and new financial services; industry financial standards and services that support airline financial positions, industry revenue and financial accounting procedures, interlining and electronic billing services.

[97] *See, ibid.* - Advises the Board, the Director General and IATA bodies on all industry and aeronautical affairs, developing and supervising industry positions, policy implementation, customer services relating to passenger and airport services, facilitation, governmental, distribution, slots and related infrastructure issues, multilateral interlining, promotion and enhancement of competition within the aviation industry and of its overall competitiveness.

[98] *See, ibid.* The Legal Committee advises the Board, the Director General and IATA bodies on legal and compliance matters affecting member airlines; coordinate with the IATA legal department on various legal issues relevant to the air transport industry; liaise with member airlines on legal matters; recommend to the Director General issues on which IATA should litigate or intervene in litigation on an industry wide basis.

[99] *See, ibid.* Advises the Board and the Director General on all matters relating to the improvement of safety, security and efficiency of civil air transport and covers within its scope matters such as airline safety, flight operations and global air traffic management, engineering and maintenance, security and aviation infrastructure.

[100] *Articles of Association, supra* note 29*,* art. XV (1).

[101] *Ibid,* art. XV (4).

### 1.8.5 Amendment of Articles and dissolution

An amendment to the IATA Articles[102] requires a two thirds majority vote of members registered and voting at the General Meeting, provided that the amendment has come before the General Meeting in a proper manner in accordance with the Articles.[103] Article XXIV stipulates the provisions for the dissolution of IATA, which can be done when two thirds of all the members approve such a resolution in writing at a General Meeting. In the event of such dissolution, all net assets remaining are to be disbursed to the United Nations.[104]

[102] *See, ibid,* art. XXIII.
[103] *See, ibid,* art. XXIII (Any such amendment is due to take effect only after the close of the Annual General Meeting at which the amendment is passed or such date specified by the General Meeting.)
[104] *Ibid,* art. XXIV.

### 1.8.6 Meetings of members and the Board

Meetings of the Board of Governors are required to be held immediately before each AGM in the same locality as the AGM. At least one additional regular Board meeting must be held each year on a date and a place to be fixed by the Board.[105] The Board is authorized to also hold special meetings without prior notice immediately following the AGM if the Director General, in consultation with the Board Chair, considers this necessary.[106]

### 1.8.7 IATA Traffic Conferences

Separate Traffic Conference are established by IATA to deal with matters of passenger and cargo air transport.[107] Passenger and cargo matters are coordinated at separate conferences that are convened to deal with issues of 'Tariffs,' 'Services' and 'Agency'.

Passenger Service Conferences are mandated with formulating worldwide rules and regulations pertaining to services for passenger air transport. Passenger Agency Conferences make and deal with worldwide rules and regulations that are applicable to travel agents. Unlike the Passenger Procedure Conferences, which have worldwide authority, the Passenger Tariff Conferences coordinate and make rules applicable to a specific geographical region.[108] There is also a similar division in Traffic Conferences for air cargo. Cargo 'Services' and 'Agency' conferences formulate resolutions having

[105] *Supra,* note 84, rule IV (1).
[106] A Board meeting could also be convened at the request of four (4) Board members or at the request of the Director General in consultation with the Board Chair upon giving 30 days prior notice. *Ibid,* rule IV (2).
[107]IATA, Rules and Regulations, *The Provisions for the Conduct of the IATA Traffic Conferences*, online: IATA<www.iata.org/about/Pages/corporate-structure.aspx>.
[108] Therefore, "Passenger Tariff Conference 1" is conferred with authority to coordinate and agree on passenger tariffs for the air transport within that geographical area demarcated as "Passenger Tariff Conference 1".

worldwide application, while cargo 'Tariff' conferences formulate tariffs that are applicable to geographical regions as specified by numerals in their respective names.

The *IATA Rules and Regulations for the Conduct of Traffic Conferences* ("the Rules") recognize two classes of members: voting and non-voting. An "Associate member of IATA" may elect to become a non-voting member of any Traffic Conference.[109] The term 'Associate member' is only used in these Rules, while the term used in the Articles is 'Affiliate member,' which refers to airlines engaged in domestic operations, as opposed to 'Members' who are engaged in international operations. Rule IV (1) of the Rules stipulates that "the aims, objects and purposes of the Traffic Conferences shall be those of IATA and nothing contained herein (Rules) nor action taken pursuant hereto shall be inconsistent with the Articles of Association of IATA."

### 1.8.8 Services Conferences (Passenger & Cargo)

Passenger Services Conferences take action on matters relating to passenger and baggage handling, documentation procedures, rules and regulations; reservations, ticketing, schedules and automations standards.[110] Cargo Services Conferences are responsible for developing standards and recommended practices for cargo industry procedures, developing common industry positions on broad cargo services issues, and

[109] *Supra,* note 107 rule II, (1) & II (2) (j).
[110] *Ibid,* rule IV(3)(i).

promoting effective implementation of cargo industry standards and exchange of industry information.[111]

### 1.8.9 Agency Conferences (Passengers & Cargo)

The scope of action mandated to Passenger Agency Conferences pertain to "relationships between airlines, recognized sales agents and other intermediaries,"[112] while Cargo Agency Conferences are required to take action on matters relating to relationships between airlines and intermediaries engaged in the sale and/or processing of international air cargo, but excluding remuneration levels.[113]

### 1.8.10 Tariff Coordinating Conferences

Tariff Coordinating Conferences consider the operating costs of air travel, and take action to develop passenger fares, cargo rates and related conditions in respect of the area of authority of such a conference.[114] Combined Tariff Conferences[115] are established to coordinate tariffs for air transport between two or more geographic regions.[116] A composite meeting of tariff conferences (which will involve more than one geographical

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[111] *Ibid,* rule IV. 4 (i). (the USDOT approved and immunized this paragraph, upon the condition that the Cargo Services Conference shall not take action to develop rates, charges and/or related conditions.).
[112] *Ibid,* rule IV. 3 (ii).
[113] *Ibid,* rule IV. 4 (ii).
[114] *Ibid.*, rule IV. 5, 6, 7 & 8 make express provision for the conducting of tariff coordinating conferences in respect of both passengers and cargo.
[115] *Ibid.* The combined passenger tariff conferences presently in operation, which coordinate and agree on tariffs for air transport within the geographic regions identified by number(s) denoted at the end of the conference name are, *The Passenger Tariff Conference 1/2*; *The Passenger Tariff Conference 2/3*; *The Passenger Tariff Conference 3/1* and *The Passenger Tariff Conference 1/2/3*. *Ibid.* The combined cargo tariff conferences presently in operation are: *The Cargo Tariff Conference I/2*; *The Cargo Tariff Conference 2/3*; *The Cargo Tariff Conference 3/1* and *The Cargo Tariff Conference 1/2/3*.
[116] *Supra* note 107. The geographical areas referred to above are identified on a master map on file with the Director General of IATA which incorporates the following: Area1 – *North and South American continents, and the islands adjacent thereto, Greenland, Bermuda the West Indies and islands of the Caribbean Sea, Hawaiian Islands (including Midway and Palmyrah);* Area2 - *All of Europe including that part of the Union of Soviet Socialist Republics in Europe) and the islands adjacent thereto, Iceland, the Azores, all of Africa and the islands adjacent thereto, Ascension Island, that part of Asia lying west of and including Iran;* Area3 – *all of Asia and the islands adjacent thereto except the portion included in Area2. All of East Indies, Australia New Zealand and the islands adjacent thereto, the islands of the Pacific Ocean except those included in Area2*.

conference area) is required to take action on fare construction and currency rules, conditions of service, baggage allowance and charges, remuneration levels of recognized passenger sales intermediaries, and other such other matters as may be referred to a Tariff Conference.

Rules relating to the conduct of Traffic Conferences permit joint committees and working groups to adopt their own procedural rules which have to be consistent with Traffic Conference rules.[117] Only action in the form of a 'resolution' is binding upon the members of a Traffic Conference.[118] No IATA member is bound by any action required by a Traffic Conference Resolution, if the action results in the contravention of an applicable law, regulation, or official policy of the state of which such member is a national.[119] In such circumstances, the relevant member must give written notice to the Secretary of such events.[120]

## 1.9 Early functions of IATA

At its first General Meeting, held in Montreal in December 1945, IATA adopted the conference provisions containing the authority for the establishment, conduct and administration of the IATA Traffic Conferences.[121] Participation in a Traffic Conference

[117] *Ibid*, rule VIII.1.
[118] *Ibid,* rule VIII.2
[119] *Ibid.*
[120] *Ibid.*
[121]W. M. Sheehan, "The IATA Traffic Conferences" (1953) 7 Sw LJ 135 at 139.Each Traffic Conference has a Standing Committee for analysis of costs;(Costs Committee) for fares, rates, charges and schedules;(FRCS Committee), and for administration of agents (Agency Committee). These committees, members of which are appointed by the Conferences from personnel of airlines, meet as often as required and function in accordance with specific terms of reference. Like the conferences they are convened usually in joint and composite sessions (involving two or more geographic conference areas). See Sheehan, "The IATA Traffic Conferences" at 141. ("the 'Traffic Committee' although not strictly part of the Conference machinery has played an important role in its development. More than 40% of the existing Traffic Conference resolutions originated as recommendations of the Traffic Committee…To an extent activities of the

was mandatory for airline members who operated services within the geographic area of such a Traffic Conference. Decisions were taken by unanimous vote only,[122] and a failure to vote or an abstention was deemed to be an affirmative vote. The unanimity rule for adopting of resolutions was changed after the US Civil Aeronautics Board's show cause order of 1978.[123]

### 1.9.1 Agreeing on fares and rates:

The main function of Traffic Conferences was the establishment of fares and rates.[124] Traffic Conferences agreed on fares/rates only between key points (main cities), and created a supplementary system of rules for construction and computing other rates. Where a rate was not specified, fare construction rules provided for a through fare or for a rate to be constructed by adding up the component sectional fares.[125]

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Traffic Committee tend to overlap those of the FRCS committee. The Traffic Committee however is concerned with broad policy matters, the FRCS committee more with details.")

[122] The mandatory participation rule at Traffic Conferences for members was made optional with the restructuring of the IATA Traffic Conference machinery as a result of regulatory developments in the United States and the "Show Cause" order issued by the CAB, to be discussed later.

[123] US CAB, Show Cause Order, E-9305 (9th June 1978).

[124] Sheehan, "IATA Traffic Conferences" *supra* note 121 at 167. ("it is impossible at a Conference meeting to agree rate figures between all points of the world, for the number required would be virtually limitless. In any case there is need for flexibility in the rate structure; new routes may be inaugurated between the Conference meetings; certain fares and rates e.g., domestic, are not subject to IATA's jurisdiction even though they may have an important bearing on international fares and rates".)

[125] *Ibid*, at 168. (Initially, passenger fares were categorized as "normal fares" (full fares) or "special fares" (discounted). Fares were also classified as "first class" (for a superior service) or "tourist class" (for a cheaper less comfortable service). Cargo rates were agreed initially as "normal rates" (full); "quantity rates" (discounted rates for heavier or bulkier cargo consignments; "class rates" (a lower or higher than normal rate for items of a particular kind such as gold, newspapers or livestock); or "special commodity rates" (a lower or higher than normal rate for items of a particular kind carried in fairly large quantities between specified points.)

### 1.9.2 Traffic Documents

A significant early accomplishment of Traffic Conferences was adopting the uniform passenger ticket and baggage check, airway bill, exchange order, excess baggage ticket and procedures for their use by air carriers throughout the world.[126]

### 1.9.3 Interline Agreements

The formulation of multilateral interline agreements[127]can be identified as one of the significant achievements of the IATA Traffic Conferences.

### 1.9.4 Administration of Sales Agents

Early Traffic Conference resolutions also introduced extensive provisions with regard to the administration and control of travel agents.[128]

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[126] *Ibid,* at 172. (By 1948 the Traffic Conferences had adopted the "Conditions of Carriage" applicable for the carriage of passengers and baggage as "Recommended Practices" which had been adopted and widely used from the inception by a large number of airlines.)

[127] Interlining is where two or more airlines combine their services to transport passengers/cargo from origin to destination, (distinct to online carriage where the entire journey is performed by a single airline). Interlining is done through mutual agreements between participating airlines where tickets issued by one airline is accepted by others participating in interline arrangements. Interlining allows baggage delivered at origin to be seamlessly transferred by interlining member airlines and delivered to the passenger at the destination without the passenger having to collect and redeliver baggage at each point of transit in the journey. Further, irrespective of the number of airlines involved in performing a journey the passenger only pays in one single currency for the entire journey.

*Ibid*, at 170 & 173; IATA Res. 850 (a) & 853. These interline agreements created contractual relationships between participating carriers, wherein mutual acceptance of passenger tickets, notification of tariff and schedule information, trade indemnities, payment of airway bills, exchange orders, commissions, transfer of accompanied or unaccompanied baggage and cargo, interline settlement of accounts, etc., were provided for. Disputes under the Interline Traffic Agreements were to be resolved by reference to arbitration. Interline Baggage Agreements and Cargo Agreements, were introduced as supplementary to the Interline Traffic Agreement, and were open to airlines which had become parties to the Interline Traffic Agreements. The Interline Baggage Agreement contained provisions with regard to interline checking of baggage, issuance of interline baggage tags and excess baggage tickets, charging for excess value and handling of mishandled baggage whilst the Interline Cargo Handling agreement dealt with various types of documents such as a tracer, airway bill, irregularity report, cargo accounting advice, transfer manifest, identification tags, restricted articles label and aircraft differentiating labels. It also made procedure and rules related to packing, marking and loading of packages, the manner in which charges were to be billed and collected, insurance, COD, charges collect, charges, embargoes, rerouting, stoppage of goods on route, delivery, billing and settlement.

[128] The resolution pertaining to agency matters formulated a mandatory rule that no airline member could employ or retain any person as an agent unless such agent was IATA approved. IATA Traffic Conferences also postulated the percentage of commission that could be paid to travel agents by member airlines for sale of air transportation and a

The above description briefly outlines the early functions of IATA and highlights the areas of coordination through its Traffic Conference scheme. These coordination activities ultimately resulted in the creation of a large and extensive body of rules that governed the rights and obligations of the IATA members and accredited agents *inter se.* These rules also directly and indirectly affected the airline consumer. In the first three decades since 1945, IATA operated an enforcement machinery for policing and/or the monitoring of compliance by members of Traffic Conference resolutions. Rates and fares set through Traffic Conferences were strictly enforced, with large fines and penalties being imposed on members violating resolutions and agreed tariffs until the enforcement mechanism was discontinued.

The historical reasons for and the background of IATA's creation discussed in this chapter are used as a reference point throughout this thesis to analyse the legitimacy of IATA resolutions and to test their standing in international and municipal law. The structure of IATA and its rulemaking methods set out in this chapter contextualise the nature of conflicts and legal questions relating to the validity of IATA rules that are discussed in the next chapter. The 2nd chapter will also demonstrate how regulatory challenges, particularly in the USA, influenced IATA's transformation and impacted upon regulators' attitudes across the world regarding IATA.

corresponding prohibition that no commission in excess of that specified by IATA should paid to any travel agent. See IATA Res. 810, 810 (A), 810(b), 810(d), 810 (e) & 812.

## Chapter 2 – Rulemaking Authority & Regulatory History

### 2.1 Rulemaking authority of IATA

IATA's regulatory realm is built on its rulemaking authority that is posited in its *Act of Incorporation,*[129]*the Articles of Association*[130] and in the large number of resolutions made by its traffic conferences. IATA—which was formed as a trade association—underwent a significant transformation and metamorphosis, not purely of its own volition but as a result of several external forces. IATA's current role and reasons for its transformation can thus be appreciated only by tracing the course of its journey from inception in 1945 to date.

IATA was established as a result of developments at the Chicago Conference of 1944 and the Conference's failure to achieve multilateral consensus to address economic matters in civil aviation.[131] What the national governments failed to achieve multilaterally was pursued through IATA as an association of airlines. IATA's headquarters was established in Montreal, alongside the International Civil Aviation Organization (ICAO), to facilitate cooperation with ICAO. This was an expressed aim and objective of IATA.[132]

From its inception, IATA sought to forge an identity which did not confine it to mere trade association activities. This is demonstrated by the efforts taken by IATA to ensure its functions complemented those of the ICAO, itself an international inter-

[129] *Act of Incorporation*, *supra* note 27.
[130] *Articles of Association, supra* note 29.
[131] See, chapter 1.4 *above* on Economic Regulations and the Emergence of IATA.
[132] *Act of Incorporation*, *supra*, note 27 s. 3(c); *Articles of Association, supra* note 29, art. IV (3).

governmental organization composed of sovereign states as its members. Experts on the work of IATA readily acknowledge the complementary nature of IATA's work with that of ICAO, particularly its coordination[133] and collaboration[134] with ICAO in numerous technical matters in the agenda of ICAO.

The first formal recognition and/or acknowledgement of IATA's activities by a sovereign state was contained in the bi-lateral air services agreement between the governments of the United States of America and the United Kingdom (commonly known and referred to as the "Bermuda 1" Agreement).[135] The United States and the UK Governments met in Bermuda in 1946 in an effort to forge a bilateral air services agreement between the two countries. However, the two governments could not agree on rates and tariffs for operations of air services between them. Therefore, the US and the UK governments agreed to refer to the passenger fares and cargo rates that would

[133] Lorne S. Clark, "IATA and ICAO: The First Fifty Years", (1994) 19:2, Ann. Air & Sp L 125 at 128. According to Lorne S. Clark, "*there are few if any parallels in the modern world of the degree of symbiosis which exists between the two organizations situated at Montreal – IATA representing a global industry and ICAO an inter-governmental organization representing governments*." , at 126 Clark proceeds to state that both organizations have a history of collaboration with respect to safety and security of passengers and aircraft both on the legal and practical levels. "*It is not coincidental that both headquarters of IATA and ICAO are located in the same city, Montreal, at present barely a stone's throw apart distance. Indeed, IATA's Act of Incorporation adopted by the Canadian Parliament and assented to on 18 December 1945 clearly articulates that one of IATA's principal aims is to cooperate with the international civil aviation organization.*"

[134] *Ibid* at 129. Clark further states, that, "*physical security for passengers and baggage has also been an area of ongoing cooperation in an effort to keep the sky safe for civil air transport. IATA and ICAO provide input to each other's security training programmes and respective security manuals and members of the two Secretariats serve on the other panels of experts and working groups. Another area of cooperation surrounds the economics of route navigation facilities. For several decades ICAO has regularly produced a set of Council statements on the economics of airport and route navigation facilities. These guidelines form the basis of the economic relationship between the air transport industry and the providers of such facilities and are supported by guidance material on accounting procedures used by airport and air traffic control (ATC) providers. IATA has been the principal collaborator of ICAO in developing these instruments and in helping ensure the observance of the norms therein by airports and ATC providers".*

[135] *The Air Services Agreement between the United States of America and the United Kingdom of Great Britain and Northern Ireland,* 11 February 1946 in "Air Law Documents" (2005) 30:1 Ann of Air & Sp L [*Bermuda I*].

be agreed upon through the traffic conference machinery of IATA.[136] The ensuing intergovernmental bilateral air services agreement signed between the US and the UK governments made express reference to IATA in paragraphs II (b) and II (d) of its Annex II.[137]

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[136] Warren A. Koffler, "IATA: its Legal Structure – A Critical Review" (1966) 30: 4 & 5 J Air L & Com 222 - "*IATA was conceived at Chicago nurtured at Havana, born at Montreal and emancipated at Bermuda. It was at Bermuda that IATA received the rate making authority which it continues to exercise today*"

[137] *Bermuda I, supra* note 135, Annex. II formulates as follows:

(a) Rates to be charged by air carriers by either contracting party between points in the territory of the United States and points in the territory of the United Kingdom referred to in this Annex shall be subject to the approval of the Contracting Parties within their respective constitutional powers and obligations. **In the event of disagreement, the matters in dispute shall be handled as provided below (***emphasis added***)**:

(b) The Civil Aeronautics Board of the United States having announced its intention to approve the rate conference machinery of the International Air Transport Association (hereinafter called IATA) as submitted for a period of one year beginning in February 1946 any rate agreement concluded through this machinery during this period and involving United States air carriers will be subject to approval by the board.

(c) Any new rate proposed by the air carrier or carriers of either contracting party shall be filed with the aeronautical authorities of both contracting parties at least 30 days before the proposed date of introduction; provided that this period of 30 days may be reduced in particular cases if so agreed by the aeronautical authorities of both contracting parties.

(d) The contracting parties hereby agree that:

  (i) during the period of the Board's approval of IATA rate conference machinery, either any specific rate agreement is not approved within a reasonable time by either contracting party, or the conference of IATA is unable to agree on a rate or;

  (ii) at any time no IATA machinery is applicable, or;

  (iii) either contracting party at any time withdraws or fails to renew its approval of that part of IATA's rate conference machinery relevant to this provision, the procedures described in paragraphs (e), (f) and (g) hereof shall apply.

(e) In the event that power is conferred by law upon the aeronautical authorities of the United States to fix fair and economic rates for the transport of persons and property by air on international services and to suspend proposed rates in a manner comparable to that in which the Civil Aeronautics Board is at present empowered to act with respect to such rates for the transport of persons and property by air in the United States, each of the contracting parties shall thereafter exercise its authority in such manner as to prevent any rate or rates proposed by one of its carriers for services from the territory of one contracting party to a point or points in the territory of the other contracting party from becoming effective, if in the judgment of the aeronautical authorities of the contracting parties whose carrier or carriers are proposing such rate that rate is unfair or uneconomic. If one of the contracting parties on receipt of the notification of paragraph (c) above is dissatisfied with the new rate proposed by the air carrier or carriers of the other contracting party it shall so notify the other contracting party prior to the first 15 of the 30 days referred to and the contracting parties shall endeavour to reach agreement on the appropriate rate. In the event that such agreement is reached, each contracting party will exercise its statutory powers to give effect to such agreement. If agreement has not been

Most authors writing on the subject of IATA seem to take the view that IATA had therefore been 'delegated' the authority of fixing rates, subject to approval by respective governments. However, a plain reading of Annex II of the *Bermuda I*, which is considered to be the source of the 'delegated' authority of IATA,[138] conveys a different position.

According to paragraph (a) of Annex II of *Bermuda* I, rates charged by air carriers of either contracting party (in this case UK and USA) are subject to compulsory approval

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reached at the end of the 30 day period referred to in paragraph (c) above, the proposed rate may unless the aeronautical authorities of the country of the air carrier concerned see fit to suspend its operation, go into effect provisionally pending the settlement of any dispute in accordance with the procedure outlined in paragraph (g) below.

(f) Prior to the time when such power may be conferred by law upon the aeronautical authorities of the United States if one of the contracting parties is dissatisfied with any new rate proposed by air carrier or carriers of either contracting party for services from the territory of one contracting party to a point or points in the territory of the other contracting party it shall so notify the other party prior to the expiry of the first 15 of the 30 day period referred to in paragraph (c) above and the contracting parties shall endeavour to reach agreement on the rate. In the event that such agreement is reached each contracting party will use its best efforts to cause such agreed rate to be put into effect by its air carrier or carriers. It is recognized that if no such agreement can be reached prior to the expiry of such 30 days the contracting party raising objection to the rate may take such steps as it may consider necessary to prevent the inauguration or continuation of the service in question at the rate complained of.

(g) When in any case under paragraphs (e) and (f) above the aeronautical authorities of the two contracting parties cannot agree within a reasonable time upon the appropriate rate after consultation initiated by the complaint of one contracting party concerning the proposed rate or an existing rate of the air carrier or carriers of the other contracting party upon the request of either, both contracting parties shall submit the question to the Provisional International Civil aviation Organization or to its successor for an advisory report, and each party will use its best efforts under the powers available to it and to put into effect the opinion expressed in such report.

(h) The rates to be agreed in accordance with the above paragraph shall be fixed at reasonable levels, due regard being paid to all relevant factors such as cost of operation, reasonable profits and the rates charged by any other air carriers

(j) The executive branch of the government of the United States agrees to use its best efforts to secure legislation empowering the aeronautical authorities of the United States to fix fair and economic rates for the transport of persons and property by air on international services and to suspend proposed rates in a manner comparable to that in which the Civil Aeronautical Board is empowered to act with respect to such rates for the transport of persons and property by air in the United States.

[138] IATA has been called an exercise in professional para legislation. See Koffler, *supra* note 136 at 231."*What governments have been unable or unwilling to agree upon directly, they have quite frequently been able to agree upon through the machinery of IATA. This is clearly an exercise in delegated national authority. It would be quite simple for most nations to freely accept this rationale. It is impossible for the United States to do so for the CAB does not have any international rate making power to delegate*".

of the contracting parties within their respective constitutional powers and obligations.[139] The use words "*in the event of disagreement the matter in dispute shall be handled as provided below*" in the last sentence of paragraph (a) conveys the idea that the primacy of authority for approving rates to be charged by the air carriers of either country had been vested upon the contracting parties with the qualification "*within their respective constitutional powers and obligations*." Therefore, the other provisions contained in Annex II—particularly paragraphs (b) and (d) where reference is made to the IATA conference machinery—constitute an alternative scheme provided only in the event of a disagreement between the UK and US governments to agree upon rates in the manner provided in paragraph (a) of Annex II.

The words "**shall be subject to the approval of the contracting parties within their respective constitutional powers and obligations**" (emphasis added) in paragraph (a) of Annex II only acquire meaning when the following provisions of the Annex (in particular paragraphs (e), (f) and (j)) are examined. Paragraphs (e), (f) and (g) of Annex II clearly manifest that, at the time of entering into the *Bermuda I*, the Civil Aeronautical Board (CAB) of the United States government did not possess the statutory and/or constitutional power to "*fix fair and economic rates for transport of persons and property by air on international services*" or the power "to suspend proposed rates in a manner comparable to that in which the Civil Aeronautics Board is at present empowered to act with respect to such rates for transport of persons and property by air within the United

[139] *Bermuda 1*, *supra* note 135, Annex II(a).

States." It is therefore clear that the air transport regulator for the United States at the time—the Civil Aeronautics Board [CAB]—was empowered to approve air fares and cargo rates within the United States in respect of air carriers of the United States, but did not exercise parallel power in respect of international air transport as did its counterpart in the UK.[140] The CAB did not have statutory power to determine fair or reasonable rates for international air transportation, as it did for air transport within the United States. However, the statute made it mandatory for all intercarrier agreements on air fares and rates to be submitted for approval to the CAB. Such intercarrier agreements on international rates and fares could be implemented only upon CAB approval and the ensuing antitrust immunity that resulted from such approval. The rates, fares and tariffs agreed at IATA Traffic Conferences fell within the purview of intercarrier agreements requiring approval of the CAB. This authority of the CAB used to approve IATA agreements formed the basis of its statutory power over international air fares and rates.

The *Civil Aeronautics Act of 1938* (The Act),[141] which was the principal statute governing civil aviation in the United States when IATA was established, was the source from

[140] Koffler, *supra,* note 136 at 228 – 229. Koffler states that, "*notwithstanding the express manifestations of congressional intent to the contrary, it is clear that one of the prime objectives of the CAB at the Bermuda Conference was to obtain a greater measure of control over rate making in international aviation……. although the Bermuda Agreement like all of the subsequent bilateral executive agreements concerning the exchange of civil aviation operating privileges, was negotiated by the State Department, the CAB provided technical assistance and counsel to the United States diplomatic team of negotiators; they were present and vocal throughout the meeting. In fact, the record clearly reflects that the Chairman of the CAB was personally present at the negotiating table almost constantly throughout the meeting. This influence was remarkably documented in the text of the agreement wherein it provides for alternative rate making procedures should Congress see fit to grant CAB the authority it sought over international rate making*"

[141] *The Civil Aeronautics Act of 1938*, 52 Stat 973. [*Civil Aeronautics Act*]. The statutory authority which the CAB invoked to evaluate domestic and international air fares and rates have been discussed at pp.67-69 *infra* and in detail under, 2.4 at pp.73-78 *infra.* The conditions and criteria contained in the relevant statutory provision for granting permits to foreign carriers - section 402(a), the requirement for foreign carriers to file rates and tariffs, viz., sections 403(a)&(b), attendant

which the CAB derived statutory powers. The Act did not contain any specific procedure for reaching rate agreements.[142] Section 412 of the Act required that agreements between air carriers be filed with the CAB and be subject to the approval of the CAB.[143] Section 412(b) of the Act stipulated that "the Authority shall by order disapprove any such contract or agreement whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest or in violation of this Act (…)".[144] If the CAB did not find (under the provisions of the Act) that an agreement entered into by an airline and submitted to it was against public interest, the Civil Aeronautics Board would approve the agreement, and this approval would then result in the agreement obtaining immunity from antitrust laws.[145]

Gazdik[146] states that, although the CAB was empowered under the Civil Aeronautics Act of 1938 to determine fair and reasonable rates to be charged in domestic air

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provisions, sections 404, 411 and the specific conditions for granting approval of intercarrier agreements - section 412 of the Act, are set out in ff.184 – 200, *infra.*

[142] J G Gazdik, "Rate Making and IATA Traffic Conferences", (1949) 16 J Air L& Com 298 at 300.

[143] *Civil Aeronautics Act*, s.412(a) - "Every air carrier shall file with the Authority a true copy or if oral, a true and complete memorandum of every contract or agreement (whether enforceable by provisions of liquidated damages, penalties, bonds or otherwise affecting air transportation and in force on the effective date of this section or hereafter entered into or any modification or cancellation thereof between such air carrier and any other carrier, foreign air carrier or other carrier, for pooling or apportioning earnings, losses, traffic services or equipment or relating to the establishment of transportation, rates, fares, charges or classifications, or for preserving and improving safety, economy, and efficiency of operations, or for controlling, regulating, preventing or otherwise eliminating destructive, oppressive or wasteful competition or for regulating stops, schedules and character of service or for other cooperative working arrangements."

[144] *Civil Aeronautics Act,* s.412(b).

[145] *Civil Aeronautics Act,* s 414. "any person affected by order under sections 408 and 409 and 412 of this Act shall be and is hereby relieved from the operations of the antitrust laws as designated in Section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for such other purposes", approved October 15, 1914 and of all other restraints and prohibitions made by or imposed under authority of law insofar as may be necessary to enable such persons to do anything authorized approved or required by such order."

[146] Gazdik, *supra,* note 142 at 301.

transportation, (i.e. to fix rates and remove discriminatory and prejudicial rates),[147] the CAB did not have direct control over the rates charged by United States airlines for international air transport services.[148] A few years after the initial approval by the CAB of the IATA Traffic Conference machinery, it was observed that, "thus because rates became the subject of agreements, the Board (CAB) indirectly acquired more power over the United States international carriers than had been conferred by the Act."[149]

Annex II of the *Bermuda I* also had the effect of reserving final control to the US government in terms of the participation of its airlines in IATA. As such, the relevant provisions in the Annex of *Bermuda I* aimed to confer on the CAB a control similar to that possessed by other foreign governments and their aeronautical authorities.[150] A large number of governments adopted the model of the *Bermuda I* for their bilateral air services agreements. IATA's traffic conference machinery for agreeing on passenger fares and cargo rates had been expressly recognized in *Bermuda I*.[151] Hence, the starting point of IATA's rulemaking authority can be considered to be *Bermuda I*, which was adopted and followed as a model by several countries in negotiating air services

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[147] *Civil Aeronautics Act,* ss. 406 & 1002 (f).

[148] See the analysis of the *Bermuda I* agreement and particularly the language contained in Annex II paragraphs (e), (f), and (j). See, also Gazdik, *supra* note 142 at 301, fn 10 who supports this contention by reference to §404 (c) of the *Civil Aeronautics Act of 1938* whereby the CAB was merely empowered and directed to investigate and report to Congress within a year as to what extent rates, fares and charges and the classification rules and regulations affecting such rates should be regulated by the Federal Government.

[149] Gazdik, *supra* note 142*,* at 302.

[150] *Ibid,* at 303 & 304. Gazdik, further observed that (at the time), "*there was no approval of IATA conference machinery expressed by British authorities because there was no need for such approval as the United Kingdom did not have legislation similar to Sec. 412(b) of the Civil Aeronautics Act; nor did the United Kingdom have antitrust laws which necessitated previous approval of the IATA rate fixing machinery as was required under the antitrust law of the United States. …Without this power granted indirectly upon the CAB through the Bermuda I, Annex and absent the Traffic Conference machinery of IATA, the CAB would have had less authority over the rate policies of a US airline than any one of the large number of foreign governments."*

[151] Mark A. Welge, "Impact of Technology on IATA Ratemaking", (1970-1971) 39 Geo Wash L Rev, 1167 at 1173. As of 1971 out of 1248 bi-lateral air services agreements throughout the world 872 had incorporated the IATA Traffic Conference machinery.

agreements with others. Therefore, in most of these bilateral air services agreements, the fixing of tariffs for operations between states was based on the IATA mechanism which was adopted in *Bermuda I*.[152]

IATA did not have government members, nor did it have direct participation by governments. However, when member airlines—through IATA— agreed on rates and tariffs to be charged on air routes and then submitted these tariffs for approval, the act of approving these rates conferred tacit recognition by governments that IATA had the ability and/or the competence to formulate tariffs. The main reason for this tacit recognition of IATA is that, except in the United States, most airlines across the world were either owned and/or controlled by their respective governments. Thus, in view of these close relationships, there was hardly any distinction between governments and their airlines when it came to participating in the IATA conferences to fix tariffs.[153] It has been observed that "comprised of airlines most of which are owned or controlled in whole or part by governments, and charged under numerous bilateral government agreements with the task of establishing and maintaining fares and rates, it (IATA) is more in the nature of a quasi-public rate recommending organization than a trade association."[154]

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[152] Gazdik, *supra* note 142 at 322. Gazdik states that, "*It is interesting to note that while the present structure was created almost incidentally by the Bermuda Agreement in 1946 it had been so reinforced by subsequent bilateral agreements that it represents today a worldwide network in which great confidence has been placed by all parties concerned*."

[153] Koeffler, *supra*, note 136 at 228.

[154] Sheehan, "IATA Traffic Conferences", *supra* note 121 at 136. Sheehan, who at the time in 1953, was the Legal Drafting Officer of IATA stated that "*The reason attributed for permitting IATA to take over the role of fixing rates and tariffs for international air transport was, because, "the establishment of worldwide rates, being too complex and technical to be dealt with initially at least at other than the operators' level*.", ibid, at 137.

## 2.2 Is the legislative authority of IATA 'delegated'?

Most experts are of the view that IATA's authority for tariff coordination was "delegated" by governments. One of the most prolific writers on the subject of IATA, Professor Peter Haanappel, opines that "(IATA) performs some very important 'quasi-public' functions "**delegated to it by the great majority of the governments of the world through their bi-lateral transport agreements."** *(*emphasis added*)*. Haanappel states that one of the most important and controversial of these 'quasi-public' functions is the setting of rates and fares for international air transport."[155] Saleh Ali Saleh, referring to *Bermuda I*,[156] states that paragraph(b) of the Annex to *Bermuda I*, "**delegated**" the determination of international air fares and rates to IATA (…)."[157] Saleh contends that:

> [U]pon the Civil Aeronautics Board (CAB) approving the IATA rate making machinery a few days after the closing of the Bermuda Conference in 1946, IATA was "**delegated**" (emphasis added) the authority to determine international air fares and rates.[158]… [S]uch delegation is implicit from the U.K. side. On the other hand, it is explicit from the US side, because of approval required from the US Civil Aeronautics Board (CAB) to the

[155] Haanappel, *Scheduled International Airlines, supra* note 12 at 2. Also see, Peter P. C. Haanappel *Ratemaking in International Air Transport: A Legal Analysis of International Air Fares and Rates,* (Netherlands: Kluwer, 1978); Peter P.C. Haanappel, *Pricing and Capacity Determination in International Air Transport: A Legal Analysis*, (Deventer, Netherlands: Kluwer Law & Taxation Publishers, 1984).

[156] *Bermuda I*, *supra*, note, 135.

[157] Saleh Ali Saleh, *The Legal Status of IATA Under National and International Law*, (LLM Thesis, McGill University Institute of Air and Space Law, 1986) [unpublished] at 27. The Annex of *Bermuda I*, in its paragraph II(b) contains the following provision: *"the Civil Aeronautics Board of the United States having announced its intention to approve the rate conference machinery of the International Air Transport Association (hereinafter called "IATA"), as submitted for a period of one year beginning in February, 1946, any rate agreements concluded through this machinery during this period and involving United States air carriers will be subject to approval by the Board."*

[158] *Ibid,* at 27, fn. 43 – *"the CAB approved the IATA rate making machinery on February 19, 1946 a few days after the closing of the Bermuda Conference. This approval was valid for only one year but it was renewed in 1947, 1948, 1950, 1951, 1952 and 1954. In 1955 the CAB approved it permanently; see CAB orders E-269 (1947); E-706 (1947); E-1227, 9 CAB reports 222 (1948); E-3888 (1950), E-5079 (1951); E-6390 (1952); E-8023 (1954); and E-9305 (1955)".*

> IATA rate making machinery in order to exempt IATA rate fixing activity from the application of the U.S. antitrust Laws.[159]

The nomenclature used by experts and authors to explain the source of IATA's rulemaking authority as one that had been 'delegated', appears to be somewhat anomalous, considering the factual standing of IATA *vis a vis,* governments and their legislative authority.

Is the authority of IATA to determine air fares and tariffs on international air routes and its *fiat* to make resolutions that impact practically every aspect of the civil aviation industry, one that is 'delegated'? Could IATA's authority to make rules have been 'delegated' by any one or more sovereign states? Can the mere recognition of IATA in a bilateral air services agreement—which recognized certain functions of IATA—lead to IATA assuming a rulemaking power with universal application to matters not specified or contemplated in that bilateral agreement? Conversely, are IATA resolutions and rules binding within the territories of other states that had not granted similar recognition to IATA's agreed air fares and tariffs for international air transport? As such, can it be said that the legislative authority which IATA relies upon for the propagation of rules, regulations to be an authority derived from such 'delegation'?

For 'delegation' to take effect, it would first be imperative for the delegating party—in this case the state transferring the relevant function—to be vested with the legislative authority to perform or engage in that particular function. The principle of state sovereignty enshrined in the Chicago Convention recognizes that states retain exclusive

[159] *Ibid*, at 27 & 28.

legislative power and the sole prerogative to make rules in respect of all matters in civil aviation, except such matters where law making authority had been collectively conferred upon the ICAO.[160]

Professor Haanappel is of the view that the failure of the international community and the states at the Chicago Conference to reach consensus in regulating economic matters greatly influenced the establishment of IATA, as well as the formulation of rules for rate making machinery through the auspices of IATA. He states that:

> At the end of the Chicago Conference and in the light of the failure of the conference to reach agreement on important economic issues, airline representatives who had attended the conference as members of or as advisors to their national delegations, held a separate meeting and decided to set up the International Air Transport Association. On December 7, 1944, 34 of these representatives of operators from all over the world met together in the same Stevens Hotel in Chicago, where the Chicago Conference was held, agreed to appoint a committee under the chairmanship of John C. Cooper of Pan American World Airways to draft articles of association for this new association. Within a week that committee was able to send out draft articles of association and to call the airlines into conference to consider them. The conference was held at Havana(Cuba) from April 16-19, 1945 and was attended by airlines representatives from 31 nations. At the end of the conference IATA's articles of association were enacted. The first Annual General meeting of IATA was held at Montreal in October 1945 ……[B]y unanimous vote of all the members present the meeting adopted the "provisions for regulation and conduct of the IATA Traffic Conferences". These provisions created IATA's so-called traffic conference machinery charged with, i.e. the task to reach inter-carrier agreements on fares and rates for international air services.[161]

Professor Haanappel thus concludes that "the carriers (airlines) had, acting on their own initiative through their new trade association, IATA, devised a system, the traffic conference machinery to set rates and fares for international air transport," which was as a result of the "Chicago Conference failing to reach agreement on the important

[160] *Chicago Convention, supra,* note 1, art.1. "[e]very state has complete and exclusive sovereignty over the air space above its territory."
[161] Haanappel, *Scheduled International Airlines*, *supra* note 12 at 14.

economic issues of exchange of 3rd, 4th and 5th freedom rights and the related problems of frequency, capacity and rates."[162] This clearly demonstrates the historical developments and the motivation that led to the formation of IATA and the underlying objectives of IATA at its inception. However, one cannot ignore the fact that IATA consists not of state parties, but rather is an association constituted of member airlines. In terms of economic regulation, does the absence of consensus at inter-governmental level indicate that the authority had been 'delegated' to IATA, a mere trade association which does not have the parity of status of a sovereign state within the realm of international law?

There is no ambiguity in terms of the recognition of state sovereignty in the realm of international law. Neither is there ambiguity in the re-statement of the principle in the Chicago Convention that individual member states retained their legislative powers in relation to economic matters in civil aviation which had not been the subject of multilateral consensus in the Chicago Convention. When states make rules and regulations on economic matters, these regulations will ordinarily be of territorial application, other than in very rare circumstances in which national laws assume a character of extra territorial applicability. Even if such regulations and rules made at a state level manifest extra territorial applicability, they may not yet be recognized or given effect in any other country, unless the latter expressly or implicitly agrees to or recognizes and gives effect to such extraterritorial rules within its own territory. Each state has its own national law making and/or legislative machinery and its own

[162] *Ibid.*

indigenous modality to recognize international law and to give effect to same.[163] When recognizing and giving effect to rules and regulations made outside of its own legislative machinery, countries normally follow an identifiable, transparent process to recognize and accept the legitimacy and the validity of such rules and regulations. Therefore, the validity of a rule to be implemented within a country should be examined by considering whether the constitutionally dictated mechanism within the state for recognizing a rule has been duly followed.

The IATA rules, frequently implemented within national territories, do not derive their legitimacy from any legislative construct formulated in international treaties or national laws. However, this excludes Canada, which has conferred upon IATA the status of corporate legal personality through an Act of Parliament.[164] IATA resolutions bear no legislative consanguinity to any international or multilateral treaties or any nationally promulgated statutes other than to an Act of the Canadian Parliament, which confers corporate personality to IATA within Canada. The *Act of Incorporation* empowers IATA to make by-laws rules and regulations, *inter alia*, to "provide for the administration and

[163] Upon execution and ratification of multi-lateral treaties they would *ipso facto* be deemed as having become law and applicable in countries such as the United States. This principle is analogous to a legal precedent propounded by the Appellate Courts in the United States, in relation to another multilateral treaty on air transport signed and ratified by the United States, viz., *Warsaw Convention, supra*, note 7, where the US Courts have held that the Warsaw Convention was "self-executory" *vide*, -*T.W.A. Vs. Franklin Mint Corporation* 18 Avi.Ca. 17778, "and is the Supreme Law of the Land" – *vide,* Article VI, Clause 2 of the U.S Constitution; *Abramson Vs. Japan Airlines* [1984] 587 F. Sup.1099 (D.C. New York), "and it pre-empts and overrides all domestic, state and federal laws"- *vide, Siayed Vs. Trans Mediterranean Airways* [1981] 509 F. Sup. 1169, (D.C. Michigan). "Certain provisions of the *Chicago Convention,* impose direct obligations upon member States and require no implementing legislation" - *See* Dempsey, *Public International Air Law, supra* note 2 at 86 fn. 100; For a detailed explanation of which provisions of the *Chicago Convention* are self-executory, and which provisions need to be implemented though legislation in the U.S, also see Dempsey, *supra* note 2 at 86 & 87. Other countries following a dualist system will normally recognize and give effect to international obligations assumed under a multilateral treaty upon the relevant treaty or the provisions thereof being enacted either by an Act of Parliament or through a formal national constitutional process mandated for adopting such treaty within their territories.

[164] *Act of Incorporation, supra*, note 27.

management and furthering of its objects, purposes and aims."[165] This, is not a 'delegation' of authority, but rather a direct statutory empowerment, the scope of which is limited to the powers and functions specified in the *Act of Incorporation*.

The concept of 'delegation' or 'delegated legislative authority' conveys significant implications to public and administrative law. Any statutory body or legislature can delegate only such legislative or administrative power that has been vested upon it by law. Inversely stated, if an administrative body or agency created under the law or any subsidiary organ of a state had not been vested with legislative authority in respect of any matter, then that agency of body cannot delegate a power which it did not have in the first instance.

At the advent of IATA, the CAB[166] was empowered to perform such acts, conduct investigations, to issue and amend orders and to make and amend general or special rules, regulations and procedures pursuant to and consistent with the provisions of the Act,[167] as deemed necessary to carry out the provisions and to exercise and perform the powers and duties of the CAB under the Act.[168] In exercising its powers and duties the

[165] *Act of Incorporation*, *supra* note 27, s. 5(d).

[166] The Civil Aeronautics Board (CAB) was established by the *Civil Aeronautics Act*, *supra* note 141 which Act was later amended by the *Federal Aviation Act of 1958*, Pub L No 85-726, 72 Stat 737. (codified as 49 USC §1301). The CAB was the Regulatory Authority vested with administrative and supervisory jurisdiction over matters related to civil aviation in the United States in 1944 at the time IATA was established. The functions of the Civil Aeronautics Board were terminated and transferred to the Secretary of Transportation of the United States Department of Transportation (US DOT), by the *Civil Aeronautics Board Sunset Act of 1984*, Pub L No 98 – 443 , 98 Stat 1703, (codified as 49 USC §1301) which after the 1st of January 1985 exercised the powers and function hitherto vested in the CAB.

[167] The reference herein made to the "Act", includes references to relevant provisions of the statutes, viz., the *Civil Aeronautics Act of 1938,* as amended by the *Federal Aviation Act of 1958* including subsequent amendments as were relevant and in force in the United States during the period of 1945 -1985 the period under which the operations of IATA have been subjected to historical discussion in this chapter. As described above the powers and the authority of the CAB was terminated by the CAB Sunset Act of 1984 consequent to which the said powers and authority was transferred to the US Department of Transportation (US DOT).

[168] *The Act, s.* 204 (a). *Civil Aeronautics Act of 1938,*

CAB was required to give consideration, *inter alia,* to specific matters "in the public interest" and in accordance with "public convenience and necessity.[169]"

These provisions clearly demonstrate that the statute conferred precedence to the aspect of "public interest," having postulated that the CAB ought to consider the "public interest" and prevent anti-competitive practices which could result in unreasonable industry concentration, excessive market domination and monopoly power.[170] Considering these express provisions, it would be tenuous to assume that there was a 'delegation' of rate making authority to IATA by the United States government merely due to CAB having granted immunity to IATA rate fixing in several orders.[171]

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[169] *The Act,* s.102 (a). Accordingly, the following matters were to be considered by the CAB*:*

a- The availability of a variety of adequate economic, efficient and low-priced services by air carriers and foreign air carriers without unjust discrimination, undue preference, advantages or unfair or deceptive practices ……". §102 (a)(3), the *Act*, *ibid.*

b- The placement of maximum reliance on competitive market forces and of 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 attract capital, taking account nevertheless of material differences, if any which may exist between inter-state and overseas air transportation on the one hand and foreign air transportation on the other, §102(a)(4), *ibid.*

c- The prevention of unfair deceptive predatory or anticompetitive practices in air transportation and the avoidance of – (A) unreasonable industry concentration, excessive market domination and monopoly power and (B) other conditions that would tend to allow one or more air carriers or foreign carriers unreasonably to increase prices, reduce services or exclude competition in air transportation. §102 (a)(7)(A) & (B)*, ibid.*

[170] *Ibid.*

[171] *See*, Saleh, *supra* note 157, and the CAB orders specified therein. After the sunset of the Civil Aeronautics Board and the transfer of its functions to the United States Department of Transportation (US DOT) the latter has continued to grant approval for IATA coordinated tariffs and fares on the basis of the provisions contained in the *Airline Deregulation Act of 1978,* Pub L No 95-504, 92 Stat.1705 (codified at 49 USC §1301),, which Act itself amended the relevant provisions of the *Federal Aviation Act*, pertaining to the grant of approval of airline fares and tariffs in the public interest. *The Act,* s. 105(a)(i) provided that "*Except as provided in paragraph 2 of this sub section, no state or political sub division thereof and no inter state agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier (emphasis added) having authority under Title IV of this Act to provide air transportation." The Act,* s. 105(a)(1) itself is an amending provision enacted through the *Airline Deregulation Act of 1978*. The reference to second paragraph of the sub section of §105(a) is to exempt the application of that section (1) in respect of air transportation within the state of Alaska.

Thus, at the time IATA came into existence, the authority of making rules on "rates, routes and services" in the United States had been conferred exclusively upon the CAB,[172] the federal Agency established specifically for such a purpose.[173]

According to the express provisions of the Act, delegation of the authority by the CAB could be done only in respect of limited functions.[174] Therefore, it is clear that the CAB itself could not have delegated its authority for making rules on "rates, routes or services on any air carrier" granted to it under the Act. The CAB was empowered only to grant antitrust immunity for any arrangements or agreements which it approved, by determining it to be in the "public interest."[175] This the CAB had proceeded to do, in respect of "traffic conferences" of IATA. It is at these "traffic conferences" that IATA made a multitude of other rules and regulations, apart from fares for international air transport. As such, approval by CAB of IATA selected tariff resolutions cannot or ought

[172] Title IV of the Act, pertained to "Air Carrier Economic Regulation" and also contained provisions with regard to foreign air carriers. Title IV, also contained specific provisions whereby filing of tariffs by air carriers with the CAB was required. Powers under Title IV of the Act, also included a power for the CAB (then in authority), to suspend tariffs filed by a foreign airline under s.1002 (g) and s.1002 (j) of the Act. Provisions relating to competition also had been enacted under Title IV of the Act which included *inter alia*, methods of competition, investigations and granting of approval for agreements. These provisions read together with s. 105(a)(1), conferred exclusive authority to the CAB to make rules, regulations, to enforce the law relating to rates, routes and air carrier economic regulations. See, *The Act,* ss. 402 (a), 403(a), & §411(a). s.105(a)(1) of *the Act* expressly precluded any state (meaning any state government having legislative power within the United States) and/or any political sub division thereof or any inter-state agency or other political agency from exercising any of the powers set out or described in s.105(a)(1) of *the Act*, which were legislative powers exclusively conferred to the regulatory mandate of the CAB. *See* definition of "State" contained in s105(d) *of the Act*.

[173] Since the above section s.105(a)(1) of the Act, was at that time applicable to air transportation under Title IV of the Act,(which also included air transport by foreign air carriers), the pre-emption created by the said provision of law precluded not only state governments within the United States or an agency of a state, but by necessary implication also IATA, (which was a trade association), from making any rules, laws or regulations in relation to rates, routes or services in respect of international air transport.

[174] *The Act,* s. 314 (a), of *the Act*, *ibid*. These included the statutory authority of the CAB in respect of (a) the examination, inspection and testing necessary to the issuance of certificates under Title VI of the Act; and (b) the issuance of such certificates in accordance with the standards established by any specialist to whom powers have been so delegated.

[175] *The Act, s.*414, read together with s.412(a)(1). The authority of the Board under s.414 relating to orders made under s.412 (a) & 412(b) with respect to interstate and overseas air transportation and relating to s.408 and s.409 terminated January 1, 1989; *The Act,* s.1601 (a) (6) & (7).

not be deemed a 'delegation' of its authority for general rulemaking on matters that are unrelated to air fares and tariffs.

IATA's authority to make rules is not granted by any national legislature other than Canada. At times, sovereign states may knowingly acquiesce to the rulemaking by IATA, by permitting such rules and regulations to be implemented either directly or indirectly within their territories. Instances of states' acquiescence to IATA members and agents implementing its resolutions within their states should not be interpreted or construed as the authority for IATA to engage in making rules and laws which have universal application. At times, states without due cognizance of all implications or consequences may grant covering recognition for IATA activities to be carried out or indirectly incorporated into national regulations.[176] However, these instances when state governments or regulators within states recognize and grant tacit and express approval, acquiescence, or sanction for selected IATA activities should not be deemed as having invested unbridled authority for IATA to make rules covering a wide swathe of matters governing air transport within the national territories.

[176] The author was personally involved in the drafting of regulations for the Licensing of Air Transport Service Providers in Sri Lanka which were promulgated under the Air Navigation (Special Provisions) Act No.55 of 1992 and came into force in the year 1993 in Sri Lanka. The Director General of Civil Aviation of Sri Lanka convened a meeting of all the stakeholders and particularly the travel agents who themselves canvassed for regulations to be introduced for admitting persons into the travel agency business and also to determine and set out the minimum requirements for such persons or companies to be so admitted as licensed travel agents. The convening of the meeting leading to the promulgation of these regulation was mainly done on the initiative of an association of local travel agents a majority of whom had been previously accredited by IATA. The motivation for these agents to call for regulating entry of travel agents in the country was also fuelled by the fact that these agents wanted to ensure that no other persons were admitted to the travel agency business other than travel agents accredited by IATA. Subsequently the Director General of Civil Aviation under the statutory authority granted to him under the relevant Statute promulgated the Air Transportation Service Providers (licensing) Regulations of 1993, wherein specific provision was made that any person to be admitted to the business of a travel agent in Sri Lanka or be so licensed by the Director General of Civil Aviation had to comply with certain mandatory requirements. One of these requirements was for a travel agent to be accredited by IATA. Therefore, IATA was given official recognition by the Director General of Civil Aviation in Sri Lanka, in the relevant regulations for licensing travel agents by recognizing IATA accreditation. These licensing conditions are yet applicable in Sri Lanka.

The maxim *delegatus non potest delegare* militates against the assumption that the authority of IATA has been delegated to it by sovereign states.[177] When Parliament has specifically appointed an authority to discharge a legislative function, a function that is normally exercised by Parliament itself, it cannot readily be presumed to have intended that its delegate should be free to empower another person or body to act in its place.[178] H.W.R Wade is of the view that it is "safe to presume that unless Parliament expresses or implies a dispensation, legislative power must be exercised by those to whom it is given and not by further delegates."[179] Thus, it becomes difficult to subscribe to the view that IATA's power to make rules is attributable to 'delegation' by a sovereign state.

In the light of the foregoing analysis, the contention that the power to fix rates had been delegated to IATA by the governments cannot be deemed an accurate proposition; particularly as the CAB itself did not have such constitutional and/or statutory power. The CAB, being bereft of such power, could not have therefore delegated the same to any third party, including IATA. Therefore, when analysing the validity and legitimacy of IATA resolutions as a whole or any specific resolution, it is imperative to shed the

[177]The rule against Delegation – see J A L Sterling et al., *De Smith's Judicial Review* 6th ed, (London: Sweet & Maxwell, 2007) at 298 paras 5-139. This maxim postulates that "a power or discretion conferred by statute is *prima facie* intended to be exercised only by an Authority upon which the statute has conferred it and by no other Authority." Also see references cited in De Smith, P. Duff & H. Whiteside, "The Maxim in American Constitutional Law: A Study in Delegation of Legislative Power" (1929) 14 Cornell L Q 168 at 173; H. Ehmke "Delagatus Postas non Protest delegare: A Maxim of American Constitutional Law" (1961) 47 Cornell. L Q 54-65; J. Willis, *Delegatus Non Potest Delegare* (1943) 21 Can B R 257.

[178] Sterling, *De Smith's Judicial Review*, at 301. De Smith describes that, "there is a strong presumption against construing a grant of delegated legislative power as empowering the delegate to sub-delegate the whole or any substantial part of the law-making power entrusted to it." citing *King Emperor vs. Benoari Lal Sarma* (1945) AC 14 and page 24.

[179] H.W.R. Wade & C. F. Forsyth, *Administrative Law*, 8th ed., (Oxford University Press, 2000) at 865 - 866.

notion of IATA's authority as being 'delegated' and to evaluate such IATA rules based on the laws of each country where IATA resolutions are sought to be implemented.

### 2.3 Tariff coordination and regulatory oversight

The authority of IATA to establish rates and fares for international air transport, as described above, emanated from *Bermuda I*, which was adopted as a model bilateral air services agreement by numerous governments. Most bilateral air services agreements, which recognized the function of IATA in fixing rates, contained a compulsory safeguard that rates fixed by IATA would be operative only upon approval of governments.[180] Thus, it had been contended that IATA did not fix rates or fares for international air transport, but rather was only adopting a rate fixing mechanism for the recommendation of rates and tariffs to governments which retained the prerogative of approving or disapproving same. However, when the circumstances of international airlines are considered from a historical perspective, this argument cannot be readily accepted. Apart from the airlines of the United States, most other airlines of that day were either wholly or majority owned by the respective states. As a result, when participating in IATA tariff coordinating activities, airline members represented not purely the interest of that airline, but also the interests of the states that owned or controlled these airlines. This indirect governmental participation resulted in providing a measure of assurance that the rates and/or tariffs agreed through the IATA traffic

[180] Peter P.C Haanappel, "IATA Tariff Co-ordination and Competition Law", (1995) 20:2 Air & Sp L, 82 "*fixing of rates for international air transport involved two tiers, viz., the First tier, for the fares and rates to be negotiated at technical consultations or conferences and agreed upon amongst the IATA members and a Second tier being, the rates so agreed upon, to be submitted for approval to the respective governments of each airline before same became operative. The international air transport system was essentially one of 'regulated competition' through IATA Conferences.*"

conference machinery would eventually be granted approval by the relevant governments.[181]

## 2.4 Approval of IATA tariffs in the US

During the first four decades of IATA, there was very little administrative interference or regulatory oversight, other than the perfunctory approval of IATA resolutions by governments[182] and their aeronautical authorities: except in the United States. When considering the regulatory oversight of IATA, the regulatory environment in the United States—from 1946 up to deregulation in 1978—becomes significant. Most regulatory conflicts encountered in the first four decades of IATA operations had a nexus to US regulators. IATA tariff fixing mechanisms also came under scrutiny in several other jurisdictions including Europe and Australia. However, increased regulatory attention in these jurisdictions followed deregulation of air transport in the United States.

When IATA was established in 1945, the statutory provisions pertaining to both domestic and foreign air transportation applicable in the United States were contained in the *Civil Aeronautics Act of 1938*.[183] This statute was replaced by the *Federal Aviation Act of 1958*.[184] The source of the statutory power of the CAB over foreign air carriers

[181] Haanappel, *Pricing and Capacity Determination, supra* note 155 at 80., "*it is true that in accordance with the provisions of most bilateral air transport agreements, IATA agreed fares and rates must be submitted to individual governments for approval, but this approval is very often merely perfunctory and in that fashion IATA agreed fares and rates do more often than not become the actual fares and rates*."
[182] Koeffler, *supra*, note 136 at 228 "*Since the vast majority of international airlines are owned by their respective national governments in one form or another and are almost without exception chosen instruments of each government."*
[183] *Civil Aeronautics Act , supra* note 141.
[184] *Federal Aviation Act, supra* note 166. The preamble of the Federal Aviation Act, expressly states its objective "to continue the Civil Aeronautics Board as an agency of the United States to create a federal aviation agency to provide for the regulation and promotion of civil aviation……"

emanated from section 402(a) of the Act,[185] which stipulated that no foreign airline shall engage in foreign air transportation, unless it had a permit which was issued by the Board (CAB) authorizing such airline to engage in foreign air transportation.[186] Upon a permit being granted under the aforesaid provision, a foreign air carrier (like its counterpart airline of the United States) became obliged to file with the CAB rates and tariffs applicable to air transportation to be provided by such carrier.[187] This statutory provision contained authority whereby the CAB was conferred the discretion to require an airline to provide all details pertaining to the decisions of joint rates in which such airline participated.[188] The rates and fares agreed upon through the IATA Traffic

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[185] The reference herein made to the *Act*, includes references to relevant provisions of the statutes, viz., the *Civil Aeronautics Act of 1938,* as amended by the *Federal Aviation Act of 1958*, including subsequent amendments as were relevant and in force in the United States during the period of 1945 -1985 the period under which the operations of IATA have been subjected to historical discussion in this chapter.

[186] *The Act,* s 402(a). The Board's authority to issue a permit to a foreign carrier depended on the Board making a finding that the air carrier was "fit, willing, and able" to properly perform such air transportation and "conform to the provisions of this Act, the rules regulations and requirements of the Board (*emphasis added*)".

[187] *The Act,* ss. 403(a) & (b). As s 403 (a) empowered the Board to reject a tariff which upon rejection became void, by necessary implication it followed that, any tariff filed with the Board in terms of s403(a) by a foreign air carrier and not rejected would become valid and effective.

*The Act,* s.403(b), stipulated that when a foreign air carrier has any tariff, which became currently effective (as contemplated in s.403(a):

a. Such foreign air carrier cannot charge, demand, collect or receive a greater or less or different compensation for air transportation or for any service in connection therewith than the rates, fares or charges currently in force. The air carrier or foreign air carrier cannot also employ any device whether directly or indirectly through any agent, broker or otherwise, to refund or remit any portion of the rate or fare or charges which it had specified and had therefore become currently effective.
b. The foreign airline was also precluded from granting any privileges or facilities in connection with air transportation which may indirectly impact upon the tariffs prescribed by it, other than any privileges or conditions that have been specifically set out in the tariffs filed by it.
c. This statutory provision also specified what concessions may be granted in the tariffs and/or when a foreign airline may issue or interchange its tickets or passes for free or reduced rate transportation under the conditions prescribed by the Board (CAB).
d. The statute also stipulated that, the fare or rate that is in force cannot be changed or any classification or regulation or practice that affects such fare or tariff or the value of the service as specified in the tariff in force cannot be changed without 30 days prior notice and without having complied with the requirement of Section 306(a) for filing of such changed tariffs with the Board.
e. The notice filed must also state plainly the changes proposed to be made to a tariff.
f. If the Board (CAB) so required, a foreign air carrier was compelled(shall), to keep on file with the Board established decisions of all joint fares, rates and charges for air transportation in which it participates. *See*, §403(b) & §403(c) of the *Act*.

[188] *The Act,* s403(d).

Conferences thus came within the purview of this provision.[189] The CAB's power with regard to regulating competition also contained important provisions.[190] Where the Board came to a finding of the existence of unfair or deceptive practices or unfair methods of competition, the Board was duty bound[191] to order the air carrier or foreign air carrier or ticket agent involved in unfair competition to cease and desist from such practice or methods of competition.[192]

The authority which was exercised by the CAB to indirectly exert and or exercise control over foreign air carriers as well as domestic air carriers was stipulated in §412(a).[193] Upon the filing of rate agreements, the CAB was empowered to disapprove[194] any such contract or agreement—even if it had previously approved such

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[189] *The Act* s *404(b)*. Granting of any unreasonable preference or advantage to any particular person, port, locality or description of traffic by air carriers was prohibited to prevent unjust discrimination, undue or unreasonable prejudice or disadvantage being caused.

[190] *The Act,* s411 of the *Act* conferred on the Board discretionary authority to be exercised:

a. Upon its own initiative or upon a complaint by any foreign air carrier or ticket agent;
b. If the Board considered that such action would be in the interest of the public;

to investigate and determine whether any air carrier or foreign air carrier or ticket agent has been or is engaged in:

i. Unfair or deceptive practices
ii. Unfair methods of competition in air transportation or the sale thereof.

[191] Use of the word "shall" in the statute denotes a mandatory requirement for the Board to take action.

[192] See *The Act,* s. 411, Before the Board made an order to cease and desist on any airline as contemplated in Section 411, it was mandatory for the Board to give notice to the party it believes to be engaged in such unfair deceptive practices or unfair methods of competition and to follow up same with a hearing. If the Board made a finding of the existence of unfair, deceptive practices or unfair competition, it was mandatory for the Board to issue a cease and desist order against such unfair or deceptive practice or methods of competition.

[193] The rate and fare resolutions formulated at the IATA Traffic Conferences were required to be filed with the Civil Aeronautics Board under the authority contained in this provision of the *Act*, *ibid*.

[194] *The Act,* s 403, empowered the CAB to reject any "tariff" which was not filed in compliance with §403 or any conditions prescribed by regulations of the Board, which rendered the tariff so filed to be void. §412(b) on the other hand granted CAB power to approve or disapprove any "agreement" (including agreements relating to rates and tariffs) by applying the public interest consideration as stipulated in that section. An agreement approved under §412 (b) of the *Act*, by the CAB would necessarily include tariffs viz., rates, fares and conditions that would be included as components or portions of such agreement. It had been the practice of IATA to submit composite resolutions which contained several attributes, parts, of service conditions, regulations, passenger fares, cargo rates, etc., for approval to the CAB. Upon approval of a composite resolution the entirety of the agreement and its component elements referring to multifarious matters, would also automatically be relieved from the operation of antitrust laws as postulated in §414 of the *Act*.

agreement—if the Board found the same to be adverse to the public interest, or otherwise in violation of the *Act*.[195] Conversely, the Board was required to (**shall**) approve any contract or any agreement or modification or cancellation where it was not so adverse or in violation of the Act.[196] Any agreement approved by the CAB in terms of section 412(b) was exempt and/or relieved from the operation of the antitrust laws,[197] without which exemption persons involved in such agreements and tariff coordination could be prosecuted for violating US antitrust law.[198] The CAB had statutory authority to investigate and make orders prescribing the 'lawful' rates and practices of US air carriers, which were required to be just and reasonable.[199] However, in the case of

[195] *The Act,* ss.1002(a), 1002 (b) & 1002 (c) when a complaint was made to the Board, the person against whom the complaint is made was required to satisfy the Board that there were no reasonable grounds for investigating the complaint. Therefore, the onus of satisfying to the Board the absence of grounds for complaint was cast upon the person against whom a complaint was made. If the person against whom the complaint was made failed to satisfy the Board that there were no reasonable grounds for the complaint, it was compulsory for the Board (CAB) to investigate the matter complained of. On the other hand, if in the opinion of the Board, the complaint did not state or elicit facts warranting an investigation the Board had the discretion to ("the Board may") dismiss the complaint without hearing. The same procedural rules applied where the Board initiated an investigation of its own motion. According to §1002(c) of the Act, upon investigation if the CAB found that any person had failed to comply with the provisions thereof or any requirements established pursuant thereto, the authority of the Board extended merely to the issuing of an appropriate order, to compel compliance with the provisions of the *Act* or the requirements established thereafter.

[196] *The Act,* s 412(b).

[197] *The Act,* s 414. The approval or disapproval of tariffs filed had to be done by an order made by the CAB. §414 of the *Act* expressly provided that "any person affected by any order made under Sections 408, 409 or 412 of this Act shall be and is hereby relieved from the operation of the antitrust laws as designated in §1 of the Act entitled *'An act to supplement existing laws against unlawful restraints and monopolies and for other purposes' approved October 15, 1914* and of all other restraints or prohibitions made by or imposed under authority of law insofar as may be necessary to enable such persons to do anything authorized, approved or required by such order *(emphasis added)*."

[198] *The Act,* ss. 1002(i) & 1002(a)., Apart from the powers discretion and the authority of the Board discussed above, the Board also had been empowered to exercise certain *quasi-judicial* functions with regard to investigating, correcting and/or making orders to prevent discrimination. The authority of the CAB to conduct investigations arose, either upon a complaint made to the Board or on its own initiative. The complaint to be received for the Board to initiate an investigation had to be made in writing and should indicate that the person against whom the complaint is made had either done or omitted to do or had acted in contravention of the provision of the *Act.* The CAB's authority to investigate therefore could be invoked on a general breach or violation of the provisions of the *Act.*

[199] *The Act,* s. 1002(d). The CAB had been granted specific authority and power to prescribe rates and practices of air carriers in respect of domestic and overseas air transportation under s. 1002(d) of the Federal Aviation Act. In the case of foreign air transportation, however, the authority of the Board was distinctly different to that contemplated in s. 1002(d) of the Federal Aviation Act. Overseas air transportation in this provision referred to transportation between two states of the United States, or between any State of the United States and any one of its protectorates however, was distinct from foreign air transportation. According to s. 1002(d), the CAB acquired authority to prescribe rates and

foreign air transportation, all the CAB was authorized to do was to investigate whether any fare, rate or any regulation, service, condition or classification or practice—including any services provided—would be unjustly discriminatory or unduly preferential or unduly prejudicial.[200] If the CAB came to such a finding, its discretion was nevertheless limited to making an order correcting such discrimination, preference or prejudice and ordering that the foreign air carrier concerned to discontinue such rates, practices, charges which were found to be discriminatory, preferential or prejudicial.

How this statutory authority of CAB was employed in regulating the conduct of airlines which adopted IATA tariffs bears historical importance. The illustrations cited below

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practices for air carriers, if upon a complaint or upon its own initiative an investigation had been conducted and the Board formed an opinion that:

a. any individual or joint rate, fare or charge imposed, collected by an air carrier or;
b. any classification, rule or regulation or practice affecting such rate, fare or charge or the value of the service thereunder was:

(i) unjust (ii) unreasonable (iii) unjustly discriminatory (iv) unduly preferential or (v) unduly prejudicial.

The CAB would then become empowered to determine the "**lawful**" (*emphasis added*) rate, fare or charge or the "**lawful**" (*emphasis added*) classification, rule or regulation or practice that can be made effective thereafter. In doing so (prescribing the rates and practices of air carriers) the Board was required to (shall) prescribe only a just and reasonable maximum or minimum of the rate, fare or charge. The use of the word "**lawful**" in s.1002(d) is a clear reference to the legislative provisions which prescribed the manner in which rates and fares and/or practices were to be formulated by air carriers according to law in the United States particularly in compliance with ss. 403 and 404 of the *Act*.

[200] *The Act,* s.1002(f). The Board after due notice and hearing either upon a complaint received or upon its own initiative formed an opinion that;

(a) any individual or joint rate fare or charge
(b) demanded, a charged collected or received by
(c) any air carrier or foreign air carrier
(d) for foreign air transportation
(e) or any classification rule or regulation or practice affecting such rate, fare or charge or the value of service thereunder is:

(i) unjustly discriminatory or;
(ii) unduly preferential or;
(iii) unduly prejudicial,

The Board had the discretion (the "Board may") to alter to the extent necessary to correct any discrimination, preference or prejudice and make an order for an air carrier or the foreign air carrier to discontinue demanding, collecting or receiving a discriminatory, preferential or prejudicial rate, fare or charge or discontinue such discriminatory, preferential or prejudicial classification rule regulation or practice.

show that statutory mandate of the CAB encountered numerous challenges from IATA and from governments which had lent credence to its pseudo authority for tariff fixing.

## 2.5 Civil Aeronautics Board (CAB) and IATA

In the United States, the IATA rates and tariffs were subjected to much scrutiny, discussion and debate: sometimes leading to approval, the conditional approval, or disapproval thereof. The CAB's regulatory oversight of IATA contributed in no small measure to its transformation.[201] It also operated as a deterrent to IATA excesses that may have resulted in harmful consequences to the airline industry and the consumer. When most governments had adopted an accommodating attitude towards IATA rate fixing, the CAB acted as the sole bulwark against the excesses and/or possible abuse by IATA of its tariff coordination. In 1946, the CAB granted temporary approval for IATA tariff coordination for an initial period of 1 year, which was extended annually thereafter until 1955 when the approval was made permanent.[202]

## 2.6 CAB debate and historical rationale adopted to grant approval to IATA

An early reason for the CAB to approve IATA rate agreements was the fear of the economic chaos that could result if they were disapproved. Each government adopted

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[201] Leonard Bebchick "The International Air Transport Association and the Civil Aeronautics Board," (1958) 25:1 J Air L & Com8. Referring to hearings before the Committee on Interstate and Foreign Commerce (on H.R.4648 and H.R 4677, 84th Congress, 18th March 1955) at p. 10, fn. 8(a), Leonard Bebchick states, that, that "*the United States by far has been most active in passing upon IATA agreements. ……. the CAB has disapproved more IATA rate resolutions than all of the other governments combined. Indeed, the Board has disapproved almost seven times as many IATA resolutions as the government with the next highest total of disapprovals.*" .

[202] CAB order, 6 CAB 639, *IATA Traffic Conference Resolution*, Approved on 19th February 1946 in CAB Reports, Economic Cases, 6 (July 1944 – May 1946) 639.

its own rates and/or rate fixing practices.[203] However, such approval did not come easily, but rather was subject to intense debate and criticism from opponents of the scheme. [204] Commissioner Lee of the CAB in his dissenting opinion argued that CAB:

> [W]as mistakenly granting much and gaining little…. Its purported gain in control over international rates was illusory. It would lack the needed information which a record develops. International pressure to approve would be intense and the lack of an item veto would prevent the board from eliminating rises which would be undesirable. At best carriers might make token obeisance to board requirements. ……. the Board was surrendering to a system of worldwide restriction in order to satisfy two countries (England and France) and in order to gain a far less valuable right…. the Board's temporary approval is an empty gesture…… Little more will be known in a year and time cannot cure what is inherently unfit.[205]

Bebchick noted that Commissioner Lee was correct in his observations, since a year later the CAB had no new facts to consider. Temporary approval was thereafter periodically extended, before being made final in 1955."[206]

It was IATA's practice to present its rate resolutions in large packages: attaching various subsidiary resolutions which were not wholly relevant to the major agreement. This practice sometimes resulted in the entire resolution being disapproved, due to a repugnant provision or the effects of a subsidiary resolution which was tacked on to the

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[203] *See,* Bebchick *supra*, note 201 at 13. "*the Board (CAB) recognized the desirability of competition but certainly not the unlimited and uncontrolled competition which permits destructive rates having no relation to the cost of operation but having the power to provoke subsidy wars among nations. What is needed is 'regulated competition' which seeks to avoid the stultifying influence of monopoly on the one hand and the economic anachronism of unrestrained competition on the other.*"; Bebchick, *supra* note 201 at 15. Bebchick proceeds to state that, *"drawing support from rate conference practices permitted by the ICC and maritime commissions, the Board mounted the pragmatist pedestal and declared that it would* ***'refrain from prejudging a proposal that is assailed and supported by only theoretical considerations'****…..hence the IATA structure was granted temporary approval for 1 year for the purpose of gaining information and experience which would enable the CAB to re-evaluate its position and come to a more informed final judgment."*

[204] *Ibid* at 16, "*competition by consent is not competition – effective competition by its very nature depends upon the reservation to individual carriers of substantial freedom of action in the institution of fare reductions. Rate setting by unanimous consent inevitably leads to a rate set at the level of the most inefficient operator……with controlled rates the carriers would be forced to resort to non-price competition – itself productive of higher costs. Further, the IATA rate agreement was opposed to the economic philosophy of aviation policy of the US.",* citing Commissioner, Lee, in CAB order, 6 CAB 639.

[205] 6 CAB 639 at 646 (dissenting opinion of Commissioner Lee).

[206] Bebchick, *supra* note 201 at 16.

main resolution.[207] The CAB imposed a condition that approval of any IATA resolution was to be strictly limited to the agreement itself, and was to admit of no implicit approval of wider scope.[208] As the authority granted to the CAB under section 412 of the Act did not confer authority to modify any rate agreements submitted for approval, the CAB was compelled either to approve or disapprove resolutions in total. However, the CAB disapproved fare increases and agreements proposed or initiated by the IATA Secretariat as an undesirable practice, as opposed to the practice of rate agreements being initiated by one or more individual airlines.[209]

From the outset, the CAB recognized the importance of having access to information, including access to background discussions that led to agreements being reached at IATA traffic conferences. Therefore, the CAB insisted on the submission of such information by IATA through its US airlines. However, information from IATA was not forthcoming. Hence, in its early years, the CAB frequently noted inadequacies

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[207] Sheehan, *supra* note 121 at 22. In 1953 the entire Pacific fare structure had been disapproved by the CAB leading to an open rate for one year as it had been the only means of defeating reduced immigrant fare provisions which had been tacked on or smuggled as a part of a major fare agreement. When disapproving the relevant IATA resolutions, the CAB had stated that:

> "The Board has noted with concern the increasing tendency of carrier members of IATA to use the interlocking device to restrict the power of review of responsible regulatory agencies, of all governments concerned which have to act on the resolution submitted to them. The Board is cognizant that various rates may be commercially interdependent under certain circumstances. The Board believes however, that except where the inter-relationship is clear and really significant the interlocking of resolutions or parts thereof is improper and in considering future agreements it will consider the presence of unjustified interlocks as an important adverse factor in determining whether agreement should be approved", *ibid.*, at pages 22& 23.

[208] Bebchick, *supra,* note 201 at 17 & 18. In the United States approvals of each resolution of IATA was mandatory by application of s. 412 of the Civil Aeronautics Act (then in force) read together with the conditions attached by the CAB in its initial approval of the traffic conference machinery.

[209] Bebchick, *supra* note 201 at 23 & 24. Initially agreements of IATA took effect unless specifically disapproved. The CAB subsequently required that such agreements be submitted to CAB for prior approval. The requirement of prior approval was applicable in respect of all agreements dealing with air transportation to or from the United States. The CAB observed that, *"……the initiative in the formulation of fare and rate adjustments should remain with the carrier members of IATA which have intimate knowledge of all operating factors involved. Initiation of agreements by the Secretariat of IATA appears unsound as a matter of policy and represents the type of price fixing procedure which the Board considers objectionable*." *See*, (E 11215, 10th April 1957).

regarding information submission by IATA.[210] Not only during the initial decade of IATA operations—but even today—the absence of information and availability of facts, figures and discussions leading to the formulation of IATA resolutions and rate agreements, is considered one of the most negative aspects of IATA. This absence of transparency has coloured the legitimacy of decisions and/or resolutions which have been promulgated through IATA Traffic Conferences. This is an area where IATA has been significantly remiss, as will be discussed in a subsequent chapter.

Bereft of any statutory power to fix international tariffs, unlike aeronautical authorities of other governments, the CAB nevertheless exerted immense influence over the IATA from its inception. The continuous scrutiny of IATA resolutions by the CAB can be identified as the single most important influence impacting the evolution and/or transformation of IATA and its activities. Hence, the power of the CAB over IATA in its formative years cannot be underestimated. However, the interaction and relationship between IATA and the CAB was a curious one. On the one hand, the puissance of the CAB resulted in IATA retreating on several occasions, or scaling its activities so as not to be found in violation of the US antitrust laws. On the other hand, the CAB was also careful not to alter the *status quo* of this relationship by taking any drastic actions.[211] On the few occasions where drastic action was taken by the CAB against the IATA resolutions, the reaction of IATA and governments supporting its rate fixing scheme

[210] Sheehan, "IATA Traffic Conferences", *supra* note 121.
[211] Koeffler, *supra*, note 136 at 232. Koeffler states that, "*In its effort to retain some margin of control over international air fares, the CAB has increasingly tended to cooperate with IATA. There is a growing body of informed opinion that feels that the CAB has grown so accommodating that it is becoming increasingly difficult to tell the regulator from the regulatee; that it no longer carries forth its legislative mandate to protect the public interest with sufficient vigour.*"

was swift and extraordinarily firm, forcing the CAB to step back. The examples discussed in this chapter will demonstrate that the relationship between IATA and the CAB was controversial, while remaining productive. Perhaps it is the nature of this relationship that led to the comment that the interaction between IATA and the CAB was "a process of mutual accommodation and continuous adjustment."[212]

The CAB had full authority to set air fares and rates for domestic rates within the United States. For international air transportation the statute merely authorized the CAB to eliminate unjust discrimination, undue preference or undue prejudice in air transportation.[213] The CAB had no direct statutory authority to regulate the independent conduct of carriers on international routes.[214] Even the decision to bring an antitrust action did not rest with the CAB, but with the Justice Department. If an antitrust prosecution was successful, yet this would not entitle the CAB to impose its affirmative regulatory policy on airlines. Notwithstanding these limitations, the CAB

[212] Bebchick, *supra*, note 201 at 14. See also, S Ralph Cohen, "Confessions of a Former IATA Man," (1968) 34 J Air L & Com 610 at 618. Ralph Cohen states that, *"Nowhere, I suspect, is the airline-government, or the IATA-government, relationship more difficult and delicate than in the United States, where the attitudes and actions of the CAB have had a primary and far reaching influence on what goes on in the conferences. The Board and its staff are able, intelligent and conscientious, but they are also prisoners of circumstances…. The system was conceived and the board staffed primarily for the regulation of the greater American domestic network and its attitudes and procedures have been extended virtually without adaptation to the quite different conditions of the international industry. In a field where many other governments, as well as airlines, are involved and diplomacy must be paramount, the board is forced to act unilaterally and to cover all its actions with the assumption of absolute infallibility and righteousness. In this situation the opportunity for friction and misunderstanding has been great".*

[213] *The Act, s.* 1002(f). Although §1002(b) of the *Act*, which conferred CAB the power to fix rates for "overseas transportation", the definition contained in the Statute of "overseas transportation" meant travel between a State and a territory of the United States or transportation between two US territories. However, it did not include transportation between the United States and a foreign country.

[214] "CAB Regulation of International Aviation", (1961 – 62) 75 Harv L Rev 575 at 580.

appears to have effectively exercised supervision and control over the activities of IATA and its resolutions on rates and fares through orders of approval and disapproval.[215]

## 2.7 Illustrations of CAB intervention and orders relating to IATA resolutions.

The CAB prevented IATA's attempts to compel non-IATA airlines to charge the IATA direct fare from Lima, Peru to New York.[216] The IATA fare was higher than the non-IATA fare from Lima to Miami when combined with a domestic flight from Miami to New York. Thus, interline agreements between the IATA and non-IATA airlines made the journey from Lima, to New York with a transit in Miami cheaper than the direct flight.[217] To eliminate this type of competition, IATA adopted a resolution forbidding its members to participate in interline agreements with non-IATA members if the net fare for such trips would be lower than the IATA fare. Relying on this resolution National Airlines (an IATA member) sought to cancel its interline agreement with the Honduran airline, *Transportes Aereos Nacionales, SA*, (a non-IATA member). The CAB concluded that IATA was attempting to regulate the rates of non-IATA members, and therefore disapproved the resolution forbidding National Airlines to cancel the relevant interline or other similar agreements.[218]

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[215] The CAB control of IATA as described above was procured through the same mechanism of bilateral air services Agreement between the UK and the USA (Bermuda I) whereby the approval of CAB would lead to the grant of antitrust immunity under US law to IATA Agreements.

[216] *Investigation Relating to the Regulation of Conduct of the Regional Traffic Conferences of IATA*, 24 CAB 463 (1957), cited in the article, "CAB Regulation of International Aviation*" supra* note 214 at 580.

[217] "CAB Regulation of International Aviation.", *supra* note 214, at 580 *"In 1956 IATA rate from Lima, Peru to New York, was $306. A traveller could fly Transportes Aereos Nacionales, SA from Lima to Miami and then take National Airlines to New York for a total of $241.55."*

[218] *Ibid.,* The CAB disapproval however was confined to agreements covering wholly domestic connecting segments, so that the Board could take direct action against the carriers refusing to comply with its disapproval. This case demonstrates that CAB Board had viewed operations by non-IATA members as a counter balance to IATA's monopolistic tendencies.

The *North Atlantic Tourist Commission's Case*[219] was an attempt by IATA to control or regulate commissions paid to travel agents; not only by its members airlines, but also by non-member airlines. IATA forbade its members to pay agent commissions higher than the percentage it approved. In this instance, the CAB agreed that it was necessary to eliminate this form of competition and approved the relevant resolution of IATA. However, the CAB denied approval to a separate resolution that prohibited payment of commission to agents selling tickets on any carrier below the IATA rate. [220]

Whilst attention of regulators was focused towards air fares and rates, deliberations of IATA on the costs of its member airlines appear to have been given very little regulatory attention. McGoldrick comments that "what is striking about the regulatory process as it has evolved during this period is that it has been oriented primarily towards regulation of the end product, the rate."[221] Airline costs are co-related to the rates agreed upon by members of IATA at traffic conferences. The rule of unanimity, then prevalent, ensured a reasonable return to the least efficient operator, without whose affirmative vote the unanimity required for passing of a resolution could not be achieved. More efficient airlines would not be averse to such resolutions which would

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[219] "CAB Regulation of International Aviation.", *supra* note 214 at 581, and *North Atlantic Tourist Commission's Case,* 16 CAB 225 (1952); *IATA Agency Resolution Proceedings*, 12 CAB 493 of (1951) & *IATA Traffic Conference Meetings,* 1A Aviation Law Reports 21061 (CAB 1960).

[220] "CAB Regulation of International Aviation", *supra* note 214at 582, "*despite the lack of effective sanctions to reinforce its policies the CAB does have certain informal pressures that can be brought to bear. The Board consults with American members of IATA before each IATA meeting; these carriers are expected to make the Board's views known. The influence of such discussions has been questioned, but it is unlikely that IATA members would totally ignore the CAB's desires. The carriers realize that the United States is the most important single market in the network of international airways and disregard for the Board's determination of American interest might lead Congress to increase the Board's power.*"

[221] John Lewis McGoldrick "Regulation of Services Competition in International Air Travel", (1967) 8 Harv Int'l L J 78 at 79.

guarantee higher returns for them.[222] Also, when the setting of fares came under scrutiny, coordination amongst members shifted to the less regulated areas of service competition.[223] Service conditions of air transport is an area in which IATA's detailed rules have been regularly followed by both member and non-member airlines.

Although, the CAB appears to have used its statutory power to enforce IATA agreements, it is more likely that such powers of enforcement were confined to those IATA agreements which it had approved.[224] Thus, when the CAB, deciding that it was an unfair competitive practice for a member airline to pay a travel agent, commissions above the rate prescribed in the CAB approved IATA resolution, the CAB was nevertheless careful to render a narrow interpretation, qualifying that its decision was limited to the facts and did not create a precedent.[225] It had been observed that, "…the CAB has declined to become merely another forum for the international carriers to pursue remedies against their competitors who violate IATA regulations. If no harm to the public or to American carriers result from the violation of a non-rate provision of a

[222] *Ibid.* "*The Business of Airlines is Airlines, but what is or is not the business of airlines is not always so clear and that is the issue, …. In the regulation of air transport, because of the nature of the overall regulatory environment and because of the particular character of the industry's economics, cost factors are of special importance……. the debates over costs in international air travel has been primarily about what costs are, not what they should be …"*

[223] *Ibid* at 80. Service competition occurs in product differentiation, such as the type of aircraft or equipment used, its speed, its size, the internal configuration, seating density, intangible passenger appeal, in-flight service such as food and drink, entertainment, service personnel and various forms of giveaways, ground services such as baggage handling and charges, baggage allowances, ticketing matters, airport facilities, ground transportation, miscellaneous matters such as airline credit extension, creative fares including tour packages, relationships with travel agencies and advertising. *ibid*, at page 80.

[224] *Ibid,* at 93.

[225] *Ibid*, at 93 fn. 46. Referring to, *In the matter of Pan American World Airways Incorporated,* CAB Order No. E - 12791 (July 15, 1958). The Board's position before the Congress in 1965 was that *"… order E-12791 (does not stand) for the proposition that foreign air carrier fares in violation of an IATA agreement would "appear to be an unfair method of competition… the Board had never held that the mere breach of an IATA agreement would constitute a violation of Section 411*".

resolution, the Board will not compete with (or even supplement) the IATA Breaches Commission." [226]

When TWA first introduced inflight movies by equipping its fleet, it faced tremendous opposition from other international airlines, which sought a ban on the inflight movies.[227] IATA passed a resolution prohibiting inflight movies on the North Atlantic but allowing TWA a reasonable time to phase out its inflight movies. In, *Trans World Airlines (TWA)*, the CAB, by its decision dated 1st June 1965, disapproved the IATA resolution which banned showing of movies on board.[228] IATA thereafter adopted another resolution imposing a surcharge of $2.15 for inflight movies, which was temporarily approved by the CAB.[229] This is an example of an IATA resolution approved by the CAB which permitted transferring of costs to the consumer in respect of a service enhancement (inflight movies), which *TWA* had introduced at no direct cost

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[226] Ronald S Tauber, "Enforcement of IATA agreements", (1969) 10 Harv Int'l L J 1 at 32. A dissenting member of CAB in the *Pan American* travel agent commission case had expressed the view that, "*IATA resolutions are no more than a private agreement between carriers and the Board should not consider violations of such an agreement to be unfair or deceptive practices…. Further, antitrust exemptions of itself did not compel the Board to enforce all IATA resolutions ….. The Board should use its enforcement machinery only when the resolutions have serious effects on transportation or when a substantial and systematic deception is proved*.", *ibid*, at pages 26 & 27, footnotes140-142.

[227] McGoldrick, *supra* note 221 at 96, fn 57. "*TWA movies were first used on international flights and then spread to its domestic network. TWA first used movies on international first class in July 1961 and in May 1963 the service was added to international economy class. This innovative feature of TWA had received great passenger appeal and in the first month of all class operation of the system TWA's international passenger miles had increased by 50%. ……. Almost all of the international carriers sought a ban on movies because of the very high cost of the feature and because it was felt that entertainment was not "creative" in the sense of attracting new buyers to the travel market. If this was so, the only effect would be, on the share of the market held by each carrier. Without regulation, all lines would be forced to install movie equipment and this would mean no significant long run change in total travel or shares of the market but would add greatly to the airline's cost factors*."

[228] McGoldrick, *supra* note 221 at 97 & 98, and fn. 64 citing, *Resolution adopted by the Members of the International Air Transport Association relating to Visual Inflight Entertainment*, CAB Order No. E-22240 (June 1, 1965).

[229] CAB Order, E-23708, dated 20th May 1966, *IATA Agreement Re-Inflight Entertainment*, CAB Report Vol 44, (Feb-Jun 1966) 823. The CAB in its decision noted that *"the record does not demonstrate that the $ 2.50 charge will result in the termination of in-flight entertainment. . In view of the relationship of the carriers' cost to the proposed charge we do not find the agreement to be adverse to the public interest"*, One member of the CAB concurring in the decision stated "*I am willing to accept the $2.50 but do not regard it to be scientifically sacrosanct"* whilst another observed *"I reluctantly vote to approve, with the misgiving however that a charge as high as $2.50 may succeed in pricing in-flight entertainment out of the plane",* ibid at page 825.

to the consumer. In the *Credit Agreement's* case,[230] a resolution of IATA prohibited member airlines from paying commissions to any credit agency providing loans for air travel except for the Universal Air Travel Plan (UAT), which was a credit provider owned by airlines. In disapproving this resolution, the CAB concluded that it was an arrangement to boycott credit companies such as American Express and Diners Club.[231]

Resolutions submitted for approval to the CAB and subjected inquiry proceedings were available in the public domain. Unbeknownst to the regulators and the public, numerous disputes arising from resolutions were dealt with confidentially through IATA's enforcement mechanism:[232] the Breaches Commission.[233] Disputes adjudicated in the Breaches Commission never reached the public domain[234] other than in rare instances. One such instance is the *Sandwich Case* of 1958.[235] In this case, Pan American Airways and TWA filed a complaint against Air France, Scandinavian Airways System, KLM Royal Dutch Airlines and Swissair before the Breaches Commission of IATA,

[230] McGoldrick, *supra*, note 221 at 111. - *IATA Credit Agreement,* 30 CAB 1553 (1960): Aviation Law Reports 21061.
[231] *IATA Credit Agreement case*, *ibid*, the resolution was found to be doubly pernicious as it restrained individual members from obtaining traffic they might otherwise get. The Board, in arriving at this conclusion rejected the airlines' argument that, without the restraint contained in such resolution the airlines in turn would face increased credit costs. The Board found that the restrictive resolution did not address a "serious transportation need." In its decision, the CAB ruled that, any measures or resolutions regulating service competition by IATA in violation of antitrust laws will only be approved if there was either a "serious transportation need" or if such resolutions effected "important public benefits."
[232] Tauber, *supra* note 226 at 5. "with the adoption of the 1950 amendments IATA equipped itself with an effective police and a judicial enforcement system, one not subject to national governmental review and not open to public inspection"; See also Tauber, *supra* note 226 at 5 fn. 28.
[233] Established in 1950 by its the Executive Committee of IATA, the Breaches Commission of IATA was responsible for handling numerous matters based on complaints of member airlines which were referred to it for adjudication. The Breaches Commission was also empowered to impose punitive sanctions which included, (a) notification to Conference members of findings; (b) reprimand; (c) fine for each breach up to a maximum of USD 25,000; and (d) expulsion from IATA. During the 1950s, the Breaches Commission performed a robust function of policing the IATA traffic conference system and enforcing resolutions to ensure compliance by members through fines and other penalties.
[234] Proceedings of the IATA Breaches Commissions, relating to investigations and punishments were confidential and protected by the privilege of secrecy. A privilege voluntarily ceded by airline members to the IATA.
[235] McGoldrick, *supra*, note 221 at 101, fns. 77 & 78., states that, *"information on such matters is exceedingly difficult to come by. As for the sandwich case the facts presented here have been culled from an article in New York Times,"*

alleging that the European airline alliance had violated an IATA resolution which stipulated service conditions that could be offered on board for economy class passengers. Pursuant to the relevant resolution, passengers in economy class were to be served "simple, inexpensive cold sandwiches". However, PanAm and TWA alleged that the sandwiches served by the respondent airlines although "cold, were neither simple nor inexpensive." IATA's Breaches Commission's ruling thus defined what constitutes a "sandwich" that could be served in economy class.[236]

Approval of resolutions by CAB created concurrent statutory obligations upon member airlines licensed by the CAB to comply with them in addition to contractual obligations assumed *inter se* as members of IATA. Thus, a violation of an approved resolution could be tantamount to a breach of the US law. When its enforcement machinery was operative, IATA members faced double jeopardy[237] of penalties within IATA and prosecution by CAB for breach of resolutions.[238] The position of the CAB had been

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[236] "Economy class meals must be:

a. meals to consist of sandwiches which may be of open or closed variety;
b. each sandwich to be a separate unit; the whole meal not to give the appearance of a cold plate
c. a substantial and visible part of each unit to consist of bread, roll or similar bread like material
d. each unit to be cold
e. each unit to be simple, that is not complicated, unadorned. This calls for a minimum of garnishing. Hence each unit to be inexpensive. This calls for the avoidance of materials normally regarded as expensive or luxurious such as (for example, but without limiting) smoked salmon, oysters, caviar, lobsters, game, asparagus, pate de foie gras and also for the avoidance of overgenerous and lavish helpings of permissible commodities such as meats which affect the money value of the unit and destroy the necessary conditions of low cost and simplicity."

*See*, also Cohen, "Confessions of a Former IATA Man", *supra*, note 212, "*the controversy which exploded over the economy class sandwich, was simply because the conference session was too tired to set down a simple definition as an earlier conference had done in a more relaxed moment on a related issue*".

[237] The same occasion or incident where a member was found in breach of an IATA resolution could also give rise to a violation of the Federal law, particularly §§ 403 and or 411 of the Act, where the CAB was authorized not only to enjoin or issue cease and desist orders upon airlines under §411 but also impose penalties and punishments by invoking the provisions contained in §902.

[238] IATA Breaches Commission was empowered to investigate and punish miscreant airlines for violating conditions in IATA resolutions. The offenders would be subject to penalties and fines the information of which, never reached the public domain.

clarified before a House Sub Committee,[239] where the CAB confirmed that it did not subscribe to the view that a "mere breach of an IATA agreement would constitute a breach of Section 411."[240] However, there are numerous examples of the statute being invoked by the CAB to indirectly implement the IATA resolutions.

In 1959, CAB issued a cease and desist order requiring KLM to discontinue exchanging air transportation for advertising and other services.[241] Following this case, the CAB noted in its annual report "that it was disturbed by the apparent recent increase in violation of Section 403(b) of the Act through the exchange of transportation for various types of goods and services"[242] and sent letters warning airlines that exchanging or bartering air transportation for services received by an airline would be considered wilful violations of the *Federal Aviation Act*.[243] The CAB had also instituted proceedings against Sabena and Lufthansa for violating provisions of the *Federal Aviation Act* by exchanging air transportation for advertising, publicity and promotional services. [244] In 1963, Pakistan International Airlines (PIA) had been issued a cease and desist order by the CAB for selling transportation at lower than agreed tariffs and imposed a civil

[239] As reflected in its decision *In the matter of Pan American World Airways Incorporated,* CAB Order No. E - 12791 (July 15, 1958, *supra,* note 225.
[240] Tauber, *supra* note 226 at 27.
[241] Tauber, *supra* note 226 at 28, fn. 145 citing *In Re KLM*, CAB order No. E-14761 (December 22, 1959).
[242] *Ibid.*, at 28, fn. 146. citing the, *CAB Annual Report,* 1960 at 40.
[243] *Ibid.,* at 28.
[244] *Ibid.* at 28 & 29. Although the Sabena & Lufthansa did not admit to having violated the provisions of the Federal Aviation Act they nevertheless agreed to comply with the cease and desist order of the Board and the did not contest the findings upon which such order had been issued. In both cases, the airlines agreed that they had, in fact, entered into contracts to obtain advertising, publicity and promotional services in exchange for the same value of air transportation over each airline's route network.

penalty in a sum of $12,500.[245] In 1967, Lufthansa was charged by the CAB for making refunds to passengers/ shippers of cargo, thereby charging lower tariffs and for paying higher rates of commission to travel agents. Lufthansa consented to a cease and desist order made by the CAB and agreed to pay $75,000 as a compromise instead of being imposed a civil penalty.[246]

Condor,[247] a subsidiary of Lufthansa, sought a foreign carrier permit from the US to operate charters between Germany and the US. Following public hearings, the Examiner ordered Lufthansa to divest itself of its subsidiary—Condor—in order to prevent Lufthansa from evading IATA resolutions. The CAB overruled the Examiner's decision, and granted a 5 year charter permit to Condor, noting that it had no duty to prevent violation or evasion of IATA resolutions, as the IATA enforcement machinery was sufficient to deal with same.[248]

The CAB's authority was put to test in the *Chandler* case, which marked the turning point in relations between IATA and CAB. In the *Chandler* controversy, the CAB was shown to be powerless to effect its regulatory mandate against IATA, which was driven by European airline members and their sponsor governments. In 1962, transatlantic

[245] *Ibid*, at 29, fn. 152. PIA had consented to the cease and desist order. It is the first time a civil penalty had been assessed and imposed by the CAB under §901 of the Act for having violated the tariff rates agreed and filed in terms of s.403.

[246] *Ibid*, at 29 & 30 fn. 154, citing CAB order No. E-26068, December 4, 1967. The first charge was having violated s.403(b) of the *Act* and engaging in continuous breach of §403(b) for granting refunds, whilst for paying higher commissions the charge was engaging in an unfair and deceptive practice and an unfair method of competition in violation of s.411.

[247] *Condor Flugdienst*, G.M.B.H Foreign Permit, CAB Order No. E-26747,47 CAB Reports 845.

[248] *Ibid*, at 849-850 *"We cannot accept the premise that this Board has a duty to impose conditions in foreign air permits, otherwise found to be in the public interest so as to prevent violation evasion or subversion of IATA resolutions unless such a condition is necessary to prevent detriment to US carriers...The Board approval of an IATA resolution as not being adverse to public interest imposes no obligation or responsibility on the Board per se to protect such resolution from violation. A fortiori the Board does not deem it incumbent upon it to take unilateral action to prevent evasion of IATA resolutions".*

fares were increased by 5.5% by a tariff conference of IATA held in Chandler, Arizona. In March 1963, the CAB disapproved this increase on the grounds that IATA (airlines) failed to provide economic documentation to support the fare increase. As a result of the open rate situation that ensued, the British authorities threatened to confiscate aircraft of American carriers landing in London for violating IATA approved fares. The Department of State, which had supported the CAB's rejection of the rate increase, then advised CAB to allow American carriers to agree to the rate increase.[249]

Referring to the *Chandler* dispute, Mark Welge, observed "[t]he CAB therefore had been reluctant to veto IATA rates because of fear of retaliatory action from other countries which it is powerless to prevent. Its impotence has been inculcated by an unwillingness or inability to retaliate."[250] *Bermuda I* contained a stipulation that empowered governmental aviation authorities (in this case CAB) "to take such steps as it may consider necessary to prevent the inauguration or continuation of the services in question at the rate complained of".[251] The statute itself had not conferred such a power on the CAB as was stipulated in *Bermuda I*. As such, had CAB enforced such action on

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[249] Welge, *supra* note 151.

[250] *Ibid.* "*Annex II (f) (of the Bermuda Agreement) provides that, when IATA rates are unacceptable to either government, the contracting parties shall endeavour to reach agreement on the appropriate rate. In the event that no agreement can be reached as was the case with regard to the Chandler impasse, the parties to the agreement are authorized to 'take such steps [as they] … may consider necessary to prevent the inauguration or continuation of the service in question at the rate complained of'. The necessary steps clause was apparently intended to be used by either party to prevent unilateral rate reductions. The CAB however has not interpreted its powers under the Federal Aviation Act to include the type of economic reprisals envisioned in paragraph (f) of the Annex of the Bermuda Agreement ……Although the act empowers the CAB to grant foreign carrier permits when it has determined that issuance would be in the public interest, the Board did not interpret that permission as extending authority to take retaliatory action. Similarly, the State Department denied that it had such authority. Thus, although it was clear that this country possessed the power to take retaliatory action, no department or agency of government felt it had the authority to do so.*" *ibid*, at pages 1177-1179 at pages 1177-1179.

[251] Haanappel, *Pricing and Capacity Determination, supra* note 155, "*the CAB never received more from Congress than the power to suspend and reject international air tariffs. It did not receive the power to fix them, notwithstanding the declaration of intent by the United States as set out in paragraph (j) of Annex II to Bermuda 1 Agreement. Even the power to suspend and reject rates was granted to the CAB only in 1972 by the addition of Section 1002 (j) to the Federal Aviation Act by an amendment., ibid.,* at page 31 footnotes 103 and 104.

foreign airlines or IATA, (except UK airlines covered by *Bermuda I*) it could well have been contested on the grounds of being *ultra vires* CAB's statutory powers.

It had been contended that IATA rate increases were not always related to rising costs, but were rather influenced by European pressures to maximize profit,[252] resulting in distortion of actual costs to protect the interests of the most inefficient of the airlines.[253] IATA's reaction to technological improvements is a prime example of its disconnect with the actual costs of operation in setting fares and rates. When 747s, the DC10s and the L1011s were introduced into service on transatlantic services (with a predictable drop in load factors) rather than lowering fares, in order to increase demand IATA raised its fares for transatlantic travel by 5% in 1963.[254] Thus, even on occasions where price reductions were possible, IATA acted arbitrarily to increase fares and rates.[255] Therefore, what is clear is that the fixing of rates in the traffic conferences are more

[252] Welge, *supra,* note 151 at 1167, fn. 12. Referring to a cost comparison of European carriers with those of 5 medium sized US domestic airlines which bore similarity to major European airlines, Welge asserted, that, "*American air carriers are more efficient than their European competitors and have experienced profitable operations under IATA rates.*", *ibid.,* at page 1180 and footnote 111.

[253] *Ibid,* at 1183, 1184 & fn. 138. "*The inefficient carrier has been responsible for vetoing rate reductions, thereby preventing the benefit of advanced technology being passed on to the consumer. In essence, a small carrier with its high costs and fewer aircraft vetoes lower rates thus tying the rate system to the cost of the less efficient carrier. The result is that the mass market is precluded by costs from enjoying air transport, the inefficient carrier is permitted to make a profit and the efficient carrier makes an excessive profit. Such a system has not been tolerated in other transport industries.*" ; Edles, "IATA Bilateral and International Aviation Policy" (1967) 27 Federal Bar Association J 291.

[254] Cohen, "Confessions of a Former IATA Man", *supra*, note 212, , Commenting on the first two decades of tariffs coordination, Ralph Cohen noted in 1968 that, IATA tariffs "*so far failed entirely to reflect the changing capability and operating costs of the airplane itself. The north Atlantic rate structure, for example, is still conditioned by the limitations of the piston engine aircraft of 1948. Because they are still founded on the assumption that the airplane is incapable of a long over water flight than Gander-Prestwick, they are calculated on a base of London-New York with all continental and interior points as add-ons*". *ibid,* at page 616.

[255] K.G.J. Pillai, "Consumer Protection in Aviation Rate Regulation," [(1972) 38 J Air L & Com 215 at 223 &224, "*The CAB has never made any investigation into the reasonableness of the IATA fares. Even the board members admit that IATA fares on all major international routes are prohibitively high. According to the recent statistics of the International Civil Aviation Organization the spectacular improvement in the performance of jet aircraft during the past decade has reduced the cost of operation of world airlines by one half. The cost per ton kilometer flown adjusted to the US consumer price index has dropped from 28.3 cents in 1960 to 15.8 cents in1970. The actual operating costs of the US carriers are considerably less than IATA counterparts. If the international fares are brought into reasonable relationship with costs of US carriers, the public will be able to travel at one half the price than they are now paying. e.g. TWA's total operating costs on the transatlantic division were less than 4.2 cents per revenue passenger mile for wide bodied jets in 1971. The new IATA prices for New York-London are set at 12.1 cents per mile for first class, 8.5 cents per mile for peak season economy class and 5.9 cents for peak season 14/21-day exclusion fares.*"

aligned to protecting the interests of members and the maximization of profits.[256] Even the few instances when fare reductions have taken place, they were involuntary reactions to competition from non IATA carriers (including charter carriers) rather than voluntary cost reductions made by IATA.

## 2.8 The CAB Show Cause order and its repercussions

The legislative provisions of the *Federal Aviation Act of 1958*, were amended by *The Airline Deregulation Act of 1978*[257] and *The International Air Transportation Competition Act of 1979*.[258] These amendments strengthened the power of the CAB and expanded its authority in respect of foreign air carriers similar to which it enjoyed over domestic airlines in the US.[259] The turning point in the IATA and CAB relationship came about after IATA had enjoyed over 30 years of antitrust immunity granted by the CAB. On 9th June 1978, the CAB issued a show cause order directing IATA and other interested parties to show cause as to why the antitrust immunity granted to IATA should not be withdrawn.[260] Whilst IATA's response and reaction to the show cause order of the CAB

[256] Welge, *supra*, note 151 at 1182, 1186 & 1187.
[257] *Airline Deregulation Act of 1978,* Pub L 95 – 504, 92 Stat 1705 (95th Congress).
[258] *International Air Transportation Competition Act of 1979,* Pub L 96-192, , 94 Stat 35 (96th Congress).
[259] For detailed narratives relating to the inner workings and regulatory development leading to these regulatory changes in the United Sates, See, Interview of Jeffery N. Shane by Brian F. Havel, (12 April 2012) in Brian F. Havel," A Conversation with Jeffery N. Shane April 12 2012"(2013) 12:2 Issues in Aviation Law & Policy 209; Haanappel, *Pricing and Capacity Determination, supra* note 155.
[260] Show Cause Order of 9th June 1978, CAB, E- 9305; Havel, "A Conversation with Jeffery N. Shane" *supra* note 259 at 211. Jeffrey Shane noted that:
*"IATA saw itself as almost a quasi-governmental agency. And the CAB would to the extent it had power over rates – it had that power only through its ability to approve or disapprove those agreements. Those agreements needed antitrust immunity under aviation law. And that was the control which the CAB exercised over rate making. Once we began doing more liberal bilateral agreements – and one of the big objectives was to get Governments to stop insisting on these rate agreements, allow airlines to price their services in keeping with what the market actually would want – the CAB became very skeptical of these IATA agreements. And it simply thought as a matter of logic, a logical next step in our effort to liberalize pricing regulation would be to put this long-standing system of inter carrier agreements over price, put that system to sleep entirely".*

was immediate and pronounced, the opposition to the show cause order by the international aviation community was overwhelming.[261]

Opposing the show cause order, Scandinavian Airlines Systems contended that there is no alternative other than tariff coordination.[262] El Al airlines contended that it constituted a violation of the provisions contained in the Chicago Convention.[263] The author is of the view that the submission of El Al airlines by reference to the Chicago Convention is flawed. The United States law relating to antitrust predated the Chicago Convention. The principle of State sovereignty was recognized and restated in Article 1 of the Chicago Convention. The Chicago Convention has clearly recognized the right of each State to make laws in relation to economic regulation of civil aviation. The only obligation under the Chicago Convention (article 15) was that laws or regulations applied within its territory ought to be applied in a non-discriminatory manner to airlines of other contracting states as much as its own. IATA could not have claimed parity of status with sovereign states under the Chicago Convention, nor invoked its

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[261] Jean-Louis Magdelenat, "The Story of the Life and Death of the CAB Show Cause Order" (1980) 5:2 Air Law 83. at 97."*a simple quantitative comparison of the responses to the invitation of the Civil Aeronautics Board order resides in the inescapable conclusion that the international aviation community was overwhelmingly opposed to the Board's tentative findings. The Board apparently seriously considered all arguments presented to it; in September 1979 the scope of the investigation was narrowed to US related flights through the issuance of Order 79-8194, 6th September 1979.*" ; Havel, "A Conversation with Jeffrey N Shane, ," *supra*, note 259 at 212, Jeffry Shane notes that the *"The order to show cause was addressed at IATA rate making or rate fixing I should say globally and not surprisingly it created a firestorm among our trading partners.*".

[262] Magdelenat, *supra* note 261 at 93 fn. 67, *"the question which should then be posed is not whether there should be rate coordination because there will be and must be rate coordination and it is not whether IATA should be disapproved. It is whether there is a better practical way to achieve rate coordination in an international system which has among its goals, safe efficient dependable low cost international transportation geared to consumer needs. In commencing this proceeding by tentative disapproving, the vehicle which has existed for 30 odd years… the Board appears to have started at the wrong end of the issue."* at page 93 footnote 67.

[263] *Ibid* at 94, fn. 76. "*The above provisions of the Chicago Convention (Articles 79, 77 and 44) impose upon all contracting states the duty to enable each party to the convention, in matters of civil aviation, freely to negotiate, to combine, to contract, to make agreements relating to same; this right may be exercised through joint air transport operating organizations, international operating agencies, pooling arrangements. It is provided expressly that at the sole discretion of the contracting states concerned, such joint operating organizations, etc., may be state-owned, partly state owned or privately owned. No state may enact laws or regulations which would deprive the other contracting states from their a priori right to negotiate, to contract, to combine, to make agreements irrespective of their character and to constitute joint operating organizations for such claims".*

articles. Only a State could invoke provisions of the Chicago Convention. Here again, it would purely be a matter to be resolved bilaterally and not a matter for multilateral action.

The Show Cause order was supported by the Aviation Consumer Action Project (ACAP) on the basis that IATA tariff agreements were against the public interest and anti-competitive in nature. It was argued by ACAP that the Traffic Conferences protected economically weak carriers from competition; the end result being cartel pricing, where consumer interests were given little protection.[264] The US State Department reviewing the opposition of other governments observed that: "[t]he show cause order offends the sovereignty of other nations and disregards the principle of comity by submitting an international problem to the internal administrative procedures of a single country. Another breach of sovereignty arises from the Board's failure *ab initio* to exclude from its consideration air services where foreign rather than US interests predominate."[265]

IATA's response to the CAB[266] underscores the fact that its Traffic Conference machinery was "an essential underlying fact to bilateral agreements" both of the US and others to which US was not a party. IATA argued that states would justify the

[264] Magdelenat, *ibid,* at 97 fn. 91.
[265] Magdelenat, *ibid*, at 90 fn. 47.
[266] *Ibid* at 91, fn. 57. IATA responded to the show cause order stating that, "The standard US bilateral agreement and many other air transport agreements to which the United States is not a party, contemplate as an essential underlying fact the existence of the IATA traffic conference machinery or its equivalent. The destruction of this underlying fact such as might result from finalization of the Board's proposal would appear to constitute circumstances justifying nations in invoking the doctrine of *rebus sic stantibus*, thereby potentially nullifying countless air transport agreements which are essential to the maintenance of an orderly international air transport system. The Board's proposal is therefore inconsistent with the letter and spirit of Section 1102."

invocation of the "*rebus sic stantibus*" (the change of circumstances) doctrine to nullify existing bilateral agreements if its resolutions were not granted immunity from antitrust suit in the US. This position of IATA is manifestly far-fetched. There are many bilateral air service agreements in existence, the underlying conditions and circumstances of which frequently vary during the course of their life. Such changes are not relied upon by states to nullify or render invalid the entire agreement bringing the substratum of airline services between countries to a standstill. On the contrary, countries would, in such circumstances, explore rational and practical solutions under which air services can be continued without interruption. The significant point in IATA's contention is the acknowledgement that the source of its authority or the "*Grund Norm*" upon which its entire legislative structure is predicated, is a multitude of bilateral air service agreements that recognize IATA tariff coordination. The pertinent question then is, would the renunciation or termination of bilateral agreements by states bring an end to the authority of IATA and its current operations? The answer is clearly no. IATA had developed into a *sui generis* system that would continue to operate even in the absence of bilateral air services agreements between countries. IATA, on the other hand, relies only upon the cooperation of airlines to formulate the resolutions it propagates to further its existence. After the show cause order, IATA restructured its traffic conferences[267] and procedures, making member participation optional and changing the

[267] A fundamental feature in the early years of IATA operations was its policing mechanism for enforcement of IATA agreed tariffs. In 1978 the IATA enforcement office was discontinued and no longer were fines imposed on airline members who did not comply with IATA agreed tariffs. A significant portion of IATA's income in its early years of operation was composed of fines and penalties collected through its enforcement mechanism.

previous requirement for mandatory participation.[268] IATA thereafter contended that, due to the changes to its structure, the show cause order of the CAB should be discontinued. CAB granted interim approval to amendments of Traffic Conferences in May 1979,[269] with accompanying antitrust immunity.[270]

Intense diplomatic pressure was brought about by other governments and international airlines against the show cause order,[271] leading to show cause proceedings being terminated in May 1985 by the US Department of Transportation (DOT), which had assumed the powers hitherto vested in the CAB,[272] after the latter was sunset by the

[268] IATA traffic conference procedures were reformed, which allowed the members the discretion to decide whether they would participate or not in tariff conferences. If members chose to participate they had the option to participate either in coordination of passenger fares or cargo rates or both. The tariff enforcement machinery and the Breaches Commissions of IATA were discontinued.

[269] Haanappel, *Pricing and Capacity Determination, supra* note 155 at 62-63. The restructuring was carried out at an IATA Special General Meeting where far reaching amendments to the provisions "for the regulation and conduct of IATA Traffic Conferences" were approved by the IATA Executive Committee and by its General Meeting which was submitted to the CAB in November 1978.

[270] Hannappel, *"IATA Tariff Coordination and Competition Law*," *supra*, note 180 at 82. Ten years after the termination of CAB show cause proceedings, and the transformation of the IATA tariff coordination procedures Haanappel noted, that, "*most bilateral air transport/services agreements in the world still contain the following system: designated air carriers must consult casu quo, agree on air tariffs, if possible through the rate making machinery of IATA and tariffs so agreed shall be subject to government approval. This traditional system is incompatible with the unrestrained application of competition law which would forbid inter carrier consultation and a fortiori agreements. Only where liberal or open skies agreements are in force not mandating inter carrier tariff agreements or consultations and not referring to IATA – is it possible fully to apply competition law to international air tariffs.*", at page 85.

[271] Alistair Tucker, "International Regulation and Air Transport",(1982) 3:4 Tourism Management, 294 at 295. "*In a direct snub to the USA the ICAO 2nd air transport conference held in February 1980 supported by a very large majority resolution recommended that the worldwide multilateral machinery of the IATA traffic conferences shall, whenever applicable, be adopted as a first choice when establishing international fares and rates to be submitted for the approval of the states concerned, and that carriers should not be discouraged from participation in the machinery*" at 295.

[272] Paul Stephen Dempsey, *Law and Foreign Policy in International Aviation*, (New York: Transnational Publishers Inc., 1987) at 44. Dempsey notes, that "*opposition to the Board's (CAB's) temerity was growing …. domestically as well. Congressman Elliot Levitas (D. Georgia) an influential member of the House committee on public works and transportation succeeded in attaching an amendment to the Transportation Appropriation Bill for fiscal year 1982 prohibiting the CAB's implementation of its IATA show cause order. And President Reagan in mid 1981 informed the CAB that 'it would be appropriate and in the best interest of the foreign policy that the Board extend the effective date of its decision ….so that our continuing efforts to maintain foreign government cooperation as we rebuild our air traffic system will not be adversely affected.*",. See Paul Stephen Dempsey, *Deregulation and Discrimination and Dispute Resolution in International Aviation: Turbulence in Open Skies*, (DCL McGill University Institute of Air & Space Law, 1986) [unpublished] at 28. , "*as a result of the pressure brought about the Board postponed thrice the effective date of its final order with regard to its previous show cause order made on IATA. With mounting pressure not only from international quarters but also from a domestic front by May 1985 the US Department of Transportation which had assumed the powers, functions and duties of the Civil Aeronautics Board consequent to the Civil Aeronautics Board's Sunset Act of 1984 terminated the 7-year old proceedings bringing an end to the show cause order previously issued against IATA.*"

CAB Sunset Act of 1984.[273] The CAB functions were transferred to the United States Department of Transportation (DOT) from 1st January 1985, which thereupon assumed jurisdiction over international aviation, and also adopted the CAB regulations hitherto in force.

## 2.9 Regulatory challenges, catalyst to internal reforms

After 1978, IATA tariffs were non-binding on routes to and from the United States and on routes within the European Economic Area (EEA), which allowed airlines to file tariffs that were different than those agreed at traffic conference meetings in relation to the US & European routes. Gradually, IATA tariffs became non-mandatory in other parts of the world and were formulated merely as reference fares to be resorted to by airlines for interlining.[274] IATA transformed itself so that its tariff coordination did not attract the adverse reactions of regulatory authorities which monitored anticompetitive practices in their respective aviation markets, particularly in terms of the increased scrutiny it faced in several jurisdictions.[275] Scrutiny of cooperative arrangements and

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[273] *Civil Aeronautics Board Sunset Act of 1984*. Dempsey, sums up the CAB show cause proceedings very colourfully, stating, "*the United States was spared further embarrassment when the CAB submitted to euthanasia by self-destructing at midnight on 31st December 1984, chronically constipated by the IATA show cause order. By the spring of 1985 the United States and the ECAC signed an agreement extending the MOU for another two years thereby postponing once again the final day of reckoning. And in May 1985 the US Department of Transportation brought this long saga to a graceful conclusion (not with a bang but with a whimper) by simply terminating the 7-year old proceedings*."[273] *ibid,* at pages 27 & 28.

[274] Although, IATA tariffs were not mandatory, by IATA's own admission, in practice most airlines follow the IATA agreed tariffs in formulating the applicable air fares and cargo rates from point to point on international routes. The US DOT following the Australian Competition & Consumer Commission's (ACCC) Determination, A90435, noted, "*that many airlines have acknowledged in submissions that IATA agreed fares are used for bench marking market fares and as a basis for calculating discount fares… and that individual airlines appeared to use the conditions agreed upon for IATA fares (conditions such as definition of a "child" and a definition of "seasons") for their own fares*." See, US DOT Order 2007-3-23, Dockets, OST-2006-25307 & OST-2006-26404, (30th March 2007) and The Determination, of the Australian Competition & Consumer Commission (ACCC), A90435, (9th November 2006).

[275] Martin Dresner & Michael W Tretheway, "The Changing role of IATA: Prospects for the Future," (1988), 13 Ann of Air & Sp L 3. The antitrust legislation applicable within the EEC is legislated in Articles 85-94 of the Treaty of Rome. (*Treaty establishing the European Economic Community of 1957*). Although the EEC council had issued Regulation No. 17 implementing articles 85 and 86, pertaining to antitrust legislation applicable within the EEC, air transport had been

agreements in jurisdictions with advanced antitrust or competition legislation ordinarily entail the examination of anticompetitive effects, as well as public benefit of such arrangements/agreements. If an agreement is deemed to be in the public interest and produces public benefits which cannot otherwise be procured, such agreements would normally be approved even if they result in reducing or eliminating competition.[276] Regulators also consider whether agreements amongst enterprises result in horizontal or vertical cooperation.[277] As will be seen in the following chapters of this thesis, in reality IATA displays features of both a horizontal and a vertical alliance. IATA's common defense to competition regulators is that its Traffic Conferences and agreements do not result in parallel pricing, but merely facilitates interlined pricing. Conscious fixing of parallel prices amongst members of an alliance would be deemed *per se* anticompetitive. However, according to IATA, its agreed fares are used solely as a reference by airlines selling interline tickets to determine the share of revenue to be paid to the other airlines who perform a part of the journey sold on an interline ticket. Since competition regulators attribute significant value to public benefits achieved through airline interlining, IATA agreements and tariff coordination, which make possible such interlining, generally pass muster.

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exempted from the effects of Regulation 17; Haanappel, *Pricing and Capacity Determination in International Air Transport*, *supra* note 155 at 85 – 88. Haanappel observed that that, "*IATA's price fixing covers currency exchange and agency resolutions including its clearing house activities would be directly affected by article 85 and 86. However, since there was no implementing regulation for air transport issued under Article 87, there was no enforcement mechanism available for the enforcement of Article 85 and 86 with the EEC. Therefore, the enforcement of these articles 85 and 86 was left to individual member states of the EEC.*"

[276] Marion Hiriart, *Introduction of Metal Neutrality on the Transatlantic Air Market: Antitrust and Regulatory Concerns,* (LLM Thesis, McGill University, Institute of Air and Space Law, 2015) [unpublished] 65- 69.

[277] Steven Truxal, *Competition and Regulation in the Airline Industry, Puppets in Chaos*, (London/New York: Rutledge, 2012) at 120. "*A horizontal alliance is one between firms selling on the same product or service market, whereas a vertical alliance is one between a firm and its suppliers, distributors or buyers."*

## 2.10 Present regulatory approaches

As of October 1984, the Australian Trade Practices Commission had withdrawn antitrust immunity that had been previously granted to IATA agreements and coordination activities in several areas.[278] In March 2007, the US DOT made final the order[279] to terminate the previous antitrust approval[280] granted for tariff conference agreements relating to fares and rates for US-transatlantic and US-Australia markets.[281] In making the said order, the DOT aligned its findings with those of the European Commission's Directorate General for Competition (DG-Competition),[282] as well as the Australian Competition and Consumer Commission (ACCC).[283] These authorities had similarly discontinued exemption from competition law for IATA tariff conferences and

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[278] See "Australian Trade Practices Commission Application A3485 for Authorization Under Section 88(1) of the Trade Practices Act of 1974 of IATA Arrangements other than Accreditation of Travel Agents Related Matters, Final Determination, 31st October 1984" (1985) 10 Ann Air & Sp L 536; See also "Australia Trade Practices Commission Applications A3499, A90412, A3101 and A90394 for Authorization under Section 88 (1) of the Trade Practices Act of 1974 of Commercial Agreements with Certain Airlines, Competition and Antitrust Law Final Determination" , 12th February 1985, (1985) 10 Ann Air & Sp L , 540. In withdrawing antitrust immunity to the activities of IATA, the Australian Trade Commission commented that, "*collaboration can continue between carriers through IATA as to trade association activities such as technical, legal, ticketing, clearing house and safety matters. Collaboration can also continue as to tariff coordination activities in the formulation of IATA tariffs which are not enforced by IATA or any of its members acting together but are to be subject to free price competition in Australia and competitive advertising of fares.*"

[279] US DOT final Order, 2007-3-23, , Dockets, OST-2006-25307 & OST-2006-26404, which was made consequent to show cause Order 2006-7-3 dated 5th July 2006.

[280] 89 CAB (1981); Order 85-5-32 (6th May 1985) - are the previous orders by which antitrust immunity had been granted, under 49 U.S.C.41308 and 41309 for IATA Traffic Conferences.

[281] In making the said final order the DOT concluded that the IATA tariff conferences are anti-competitive and do not provide important public benefits or meet a serious transportation need, pricing discussions among competitors of the kind that take place at IATA tariff conferences are inherently anticompetitive and likely to increase the fares paid by the consumers, and further that foreign policy consideration no longer warrant continuing antitrust immunity for the specified markets. The markets identified in the order, were US-European Union, included member states of the EU, Iceland, Norway, Switzerland, Liechtenstein and markets between the United States and Australia. *See*, US DOT Order 2007-3-23, dated 30th March 2007, *Supra*, at pages 2 & 12.

[282] EC, *Commission Regulation (EC) No 1459/2006 of 28 September 2006 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports* [2006] OJ, L 272/3. The European Union adopted a regulation which ended the exemption from European Competition laws for passenger tariff conferences for markets within Europe on December 31, 2006 and the exemption for transatlantic markets from 30th June 2007, whilst denying any exemption for cargo tariff conferences in all third country markets including the transatlantic markets. The EU thereby terminated the previous exemption granted to IATA for cargo tariff conferences.

[283] ACCC, Determination A90435 *supra* note 274. IATA's exemption from Australian competition laws which had been granted previously were ordered to expire, on 30th June 2008.

agreements. ln 2008, by a further Order,[284] the US DOT approved IATA "flex fares"[285] resolutions without granting antitrust immunity to same.[286] In April 2012,[287] the US DOT granted broad prospective exemption from the application of a condition,[288] which hitherto required approval of all agreements and resolutions of IATA traffic conferences. In this order the DOT granted a 3-tier[289] system of approvals for different types of IATA resolutions, categorized as: (a) resolutions eligible for perfunctory/automatic approval; (b) resolutions and agreements requiring review prior

[284] US DOT *Final Order, 2008-7-4,* Dockets, OST-2006, 25307, OST-2007, 28556, 28558, 28569 & 28570. The DOT observed that it is not prepared to immunize the flex fare agreements stating that it was not convinced by the contradictory assertion of IATA that approval and immunity were warranted in order to remove the spectre of private antitrust suits that would allegedly frighten away carriers from participating in flex fares. However, the DOT noted that, "the proposed flex fare system was competitively benign and consistent with public interest as the flex fare system by contrast was a mechanistic, computer driven process that involves no direct contact between carriers and that it would produce interline IATA fares based on adjusted averages of market fares rather than through negotiations among competitors, *ibid*, at pages 6 &7.

[285] Flex fares were established based on an algorithm where a flex fare is determined by identifying an average round trip fare in each class of service for a given market that meets specified standards and are offered in the market on a calculation date (these fares are IATA member airlines' unrestricted fares available for sale to the public excluding coupon fares and promotional fares of various types.) The identified fares are then averaged and those that deviate excessively from the average are excluded using a formula based on the standard deviation of the market fares. The remaining fares are re-averaged and the resulting figures are then increased by the interline premium percentage. In the usual case the resulting figure becomes the round-trip Flex Fare. Under the "safeguard check" if the highest market fare used in computing the average is higher than the computed flex fare price, then the higher market fare becomes the flex fare.

[286] *See*, US DOT Order 2008-7-4, *supra* note 284, at 7. When approving the flex fares, the DOT noted that, although traditional tariff coordination is prohibited on the US-EU and US-Australian routes, its previous Order (US DOT Final Order, 2007-3-23), had not barred traditional tariff coordination on other routes, and that it was theoretically possible for IATA to conduct both traditional and flex fare coordination on other routes.

[287] US DOT Order, 2012-4-18, 13th April 2012, Dockets 32851, Agreement CAB 1175, OST-2006-25307, OST-2006-26404, OST-2010-0114 and OST 2012-0058.

[288] The aforementioned "Condition # 2", contained in the CAB Order 85-32 dated May 6, 1985, required the filing for review and approval of all IATA resolutions and Agreements with the then CAB and subsequently the US DOT.

[289] DOT Order 2012-4-18, *supra* note 287 at 4. The 1st tier includes all traffic conference agreements (except those included in tiers 2 and 3) IATA files all 1st tier agreements and related IATA documentation such as conference minutes for information in a master public docket maintained by the DOT 30 days prior to their intended effective date. Where the Department considers review of these necessary, IATA would be informed whilst interested parties would also have a 30-day period to review the agreement which unless such a review is notified, would come into effect on the 30th day. Where a review was necessary the Department would advise IATA to re-file the agreement in a separate docket for review and action. These tier 1, agreements would become effective without antitrust immunity. 2nd tier agreements were those covering specific subject areas listed by IATA which the DOT had already indicated ought to be reviewed on a case by case basis before implementation. These agreements generally pertain to conditions of carriage for passengers and cargo, ticket notices, airway bills, carriage of cargo using electronic data interchange, cargo security, carriage of passengers requiring special assistance and flex fares in the US markets. The 3rd tier agreements are those which IATA wished to file with the DOT for specific approval and antitrust immunity which would become valid only upon review and approval subject to conditions as recommended by the DOT.

to approval; and (c) resolutions for which antitrust immunity was sought under US law. In the current regulatory environment in the US,[290] Europe,[291] Australia[292] and several other countries (with stringent consumer protection and extensive competition law regimes), IATA agreements and resolutions would receive immunity from competition/antitrust law only where IATA demonstrates that the benefit to the public exceeds the propensity for harm therefrom. However, in jurisdictions where regulatory regimes are less stringent, IATA resolutions and agreements yet operate unfettered. The resolutions made operative in several regions are selectively exempted from application in the US and in countries in which restrictions are imposed to their application.[293] Even today, IATA seeks antitrust immunity for its agreements and initiatives in jurisdictions where its resolutions and initiatives would expose them to violation of laws.[294] Whilst the rigour of coordination in relation to air fares and cargo rates by IATA eased with

[290] *See*, Antitrust immunity and approval granted by the CAB formerly (and thereafter DOT) to IATA agreements and resolutions upon the criteria of public benefit, discussed in detail above in this Chapter.

[291] EU Competition Policy is designed to identify and deal with any anticompetitive behaviour that would negatively impact upon competition in the European single market. The primary objective of Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU) is, the protection of market competition in order to preserve consumer welfare and to ensure efficient allocation of resources. Article 102 TFEU prohibits any abuses of dominant position or predation by one or more undertakings that would restrict or prevent competition. The applications of articles 101 and 102 TFEU is made effective by the procedure rule set out in regulation EC Council Regulation No.1/2003 of 16th December 2002 on the implementation of rules on competition laid down in articles 81 and 82 of the treaty. This regulation implements a system of antitrust procedure that imposes ex post control of restrictive practices bearing on undertakings. Essentially this means that companies whose practices or agreements fall under the scope of article 101 do not need to notify the agreement to the Commission before implementing it in the market. They must self-assess the legality and effect on competition of their agreements and assume the risk of being prosecuted later by the EC or eligible third party. See Hiriart, *Introduction of Metal Neutrality on the Transatlantic Air Market, supra* note 276.

[292] Under the *Trade Practices Act (1974)* the Australian Competition and Consumer Commission (ACCC – formerly known as the Trade Practices Commission, is empowered to grant immunity from legal action for anti-competitive conduct in certain circumstances, where the ACCC is satisfied that the public benefits arising from such conduct outweighs any public detriment associated with same. Upon application the ACCC grants "authorization" to the specific conduct for which immunity is sought.

[293] *See*, specifically, the *Passenger Services* and *Agency* resolutions which are discussed under Chapters 6 & 7, *below*., many of which are not applicable in the United Sates and specifically so identified in the resolution heading. Also see the reservations to resolutions discussed in Chapter 6, *Infra*.

[294] *See*, US DOT Final Order 2014-8-1, 6th August 2014, approving the *New Distribution Capability (NDC)* initiative under the Enhanced Airline Distribution initiative of IATA, making final the show cause order, US DOT Order 2014-5-7, dated 21st May 2014, Docket OST-2013-0048.

time, coordinating on matters which did not strictly fall within the scope of "tariffs"[295] continued unabated, resulting in coordination in these areas seeing a manifold increase. However, a large content of IATA resolutions which did not fall strictly within the purview of "tariffs" continued to be imposed as rules upon members, accredited agents and the airline consumer, the latter an involuntary participant in this regulatory scheme. Tariff coordination which encountered regulatory challenges and external influences could be seen as the catalyst to the internal metamorphosis of IATA, which transformed itself by foraying into areas which attracted little or no regulatory supervision. From an organization established principally for tariff coordination, IATA transformed itself into an entity providing an extensive and diverse array of initiatives and programmes to the airline industry. This transformation has helped IATA to remain at the forefront of the airline industry. IATA's initiatives remain extremely relevant and useful to the airline industry today, and a significant portion of the world's airlines (84% of international airlines) are its members[296] who participate in one or more of its initiatives.

[295] The US DOT observed that, "*unlike the tariff conferences the services and agency traffic conferences generally have not been controversial. They adopt cooperative procedures that enable airlines to operate more efficiently and offer better service. The services conferences discuss matters such as interline practices and electronic ticketing while the agency conferences discuss relationships with travel agencies. The inter carrier agreements created through these conferences also facilitate interline transportation. The kind of arrangements created through the services and agency conferences can be procompetitive, and when so, do not violate anti-trust laws*" See, US DOT, Order 2006-7-3, *supra*, note 279 at 3-4 & 15-16.

[296] IATA Programmes, online : IATA<www.iata.org/about/Pages/corporate-structure.aspx>.

## Chapter 3 - IATA Programmes and Initiatives

### 3.1 IATA programmes and initiatives

This chapter presents a general description of current IATA initiatives, to provide an understanding of the nature and scope of the functions, and of the services and products provided to the airline industry. This chapter also discusses how current offerings of IATA are relevant to the airline industry and examines the manner in which IATA services its interests through implementation of its initiatives, with the overall goal of ensuring IATA's continued industry dominance. The main source of information for this chapter is the IATA website. The description of IATA's initiatives set out in this chapter parallels the structure and categorization of the IATA website. Initiatives of IATA across the following areas are described in detail in this chapter: passenger, environment, operations, safety, security, simplifying the business, air cargo, and airline distribution.

### 3.2 Passenger

IATA passenger initiatives cover areas of airline distribution, passenger experience, baggage services and passenger data.[297] Several programmes and initiatives are carried

[297] IATA Website, <http://www.iata.org/whatwedo/passenger/pages/index.aspx.>

out to formulate rules, resolutions and recommended practices[298] that relate to ticketing, reservations, passenger tariffs, Billing and Settlement Plans ("BSPs"), reporting and New Distribution Capability ("NDC"). A committee named the Joint Passenger Ticketing Committee (JPTC)[299] formulates "Conditions of Contract" that are applicable to passenger tickets. The JPTC also develops electronic tickets, miscellaneous documents, standard form notices, and compulsory legal notices for use by member airlines.[300] IATA collaborates with the Airlines for America ("A4A") to formulate Reservation Interline Message Procedures for Passengers ("AIRIMP").[301] Through this collaboration, A4A and IATA have developed a universally accepted set of communication standards for handling passenger reservations and interline messages.[302]

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[298] *Ibid*, A body titled "Reservations Committee" (RESCOM) function as a passenger related initiative for the development of recommendations on all procedures and policy issues relating to reservation rules and regulations including the transmission of reservation services for use by customers and agents.

[299] JPTC established by IATA works jointly with the Air Transport Association (ATA) to develop and maintain standards and procedures relating to interline ticket forms. It is responsible for the development of standards for both manual as well as automated tickets and for publishing these standards as resolutions and recommended practices. This Committee's current work is mainly focused on standards for implementing a 100% electronic ticketing-based platform and for developing new standards for electronic miscellaneous documents. The legal notices relating to limitation of liability the Conditions of Contract and ancillary documents developed by IATA also contain information to passengers and shippers of their rights in relation to denied boarding, obligations as to checking in times and other matters relating to accompanied/unaccompanied baggage and transportation of dangerous goods.

[300] *Warsaw Convention*, arts. 3, 4, & 5. Also see *Montreal Convention* arts. 3, 4, & 5. Mandatory requirements are imposed for the delivery of passenger ticket/luggage check and particulars to be included in passenger tickets/luggage check & air consignment note (airway bill) for cargo under the Warsaw Convention amended by Hague Protocol of 1955. In the event of the failure by an airline to deliver a passenger ticket/baggage check or airway bill compliant with the aforementioned provisions the airline is denied the entitlement to invoke liability limitations otherwise available in respect of passenger claims arising from death, injury or delay of passengers and the loss destruction, damage or delay of baggage and cargo. Uniform documents, standard form passenger tickets, airway bills and mandatory notices such as those relating to liability limitation applicable under the Warsaw and Montreal Convention are developed by IATA, in compliance with the requirements postulated in the abovementioned Conventions.

[301] "Airlines for America (A4A)" is an airline trade association consisting of a large number of member airlines within the United States which closely coordinates its activities with IATA and also conducts several joint initiatives with it. A4A mainly participates in the IATA interline system and the IATA Billing and Settlement Plan (BSP) as well as the IATA Clearing House (ICH).

[302] IATA states that AIRIMP standards constitute the sole source of reference and are used in millions of transactions between travel agencies and airline systems for communications between airlines. These AIRMP standards which have

### 3.3 Passenger tariffs

The formulation of passenger tariffs is a core function of IATA. The multilaterally agreed upon and coordinated interline system provides interline fares to the entire world, connecting off-line points with the convenience of one booking, one ticket, in one currency, in a single transaction.[303] These tariffs are agreed at IATA Tariff Conferences and are published by IATA for use by member airlines and travel agents in calculating airfares for interline travel.

been developed by IATA are not freely accessible but are sold as a publication through the IATA website, as is the case with most other guidance material, processes and products developed by IATA.

[303] "Passenger Tariffs", IATA Website, *supra,* note 297.

### 3.4 Billing & Settlement Plans (BSPs)

All airline members that participate in BSPs have access to a centrally-managed system of billing and settlement among each other in respect of interline fares charged, collected and prorated according to IATA rules. BSPs are operated on a global data interchange platform,[304] which exchanges data between each BSP and the Global Distribution Systems ("GDS's") on which airline products are displayed and marketed by each member airline.[305]

### 3.5 IATA Clearing House and clearing services for the airline industry

With an annual turnover of 55 Billion USD, and a settlement success rate of 100%, the IATA Clearing House ("ICH") is one of most sought-after services by the industry. ICH currently enjoys a membership of over 430 participants. The ICH infrastructure allows airline members and associates to settle accounts with each other around the world for passenger and cargo, as well as non-transportation billings through a single "net receipt" or "net payment" to the ICH.[306] IATA states that ICH services significantly

[304] The data interchange specifications for the BSP have been published as a handbook (known as the "DISH"). The DISH handbook contains the definitions for reporting standards which in turn enable Global Distribution Systems (GDS) to report ticket and miscellaneous document sales made by travel agents participating in the Billing and Settlement plans to the IATA data processing centres whereby the sales data will be provided in turn to the airlines and to credit card companies facilitating efficient settlement and remittances of payments. See, IATA, *Passenger Service Conference Resolutions Manual* Res. 750, att A (IATA, June 2017). IATA identifies the key benefits of the DISH handbook as that of travel agents being able to report via the Global Distribution Systems to the Billing and Settlement Plans, regarding airline accounting, sales, transmission of accounting data from the BSPs, invoicing of data from BSP's to the credit card companies, banks and airlines, assimilation of market share analysis data, providing reports on request from the airlines.

[305] "Billing and Settlement Plan" IATA Website, *supra* note 297.

[306] The ICH settlement is achieved through multilateral and multi-currency set-off and netting of receivables eliminating the need for cross-remittances amongst airlines and delays in credit collection. Multi-currency transactions are translated into the clearance currencies at ICH rates of exchange. After netting, settlement of the net balance is made by/to the members & associates through a single payment. Members & associates are able to avoid commissions, bank transfer charges on multiple foreign exchange transactions. IATA contends that 80% netting ratio achieved for receivables

accelerate the collection of outstanding credit[307] and reduce exchange risk.[308] The ICH also offers a dispute resolution mechanism for billings and protection for default, bankruptcy and cessation of operations.[309]

### 3.6 Passenger Experience Management Group (PEMG)

The PEMG[310] carries out the programmes relating to "fast travel,"[311] "passenger facilitation"[312] and "Common Use Working Groups ("CWUG")[313]."

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through the ICH translates to 80% reduction in credit risk exposure and in turn provides a fast, secure and cost-effective billing and settlement service to the airline industry. See, "IATA Clearing House", online: IATA < www.iata.org/services/finance/clearinghouse/Pages/index.aspx>.

[307]Although membership of the Clearing House implies no credit status whatsoever, Clearing House monitors the payment history of each participant. Where necessary, security deposits are taken to cover future transactions. In the event of a default in settlement by a member or associate of the Clearing House, all other members & associates are notified concurrently and at an early date. To ensure continued wide interlining capabilities and efficient customer service, members & associates tend to pay their Clearing House balance on priority over other bilateral arrangements. IATA Website, See *ibid.*

[308] In countries where stringent Exchange Control laws exist or where Central Bank approvals are required for resident airlines to make outward remittance of hard currencies, the ICH ensures that only a single exchange control application need to be made to settle the net balance to the ICH instead of making numerous applications for individual sums payable to several airlines and service providers. See *Ibid.* .

[309] Legal issues and concerns regarding the ICH are discussed in detail *below* in Chapter 5 - Control of sales revenue though settlement systems and Clearing House, Objectionable Attributes.

[310] The PEMG which was established by IATA Resolution 705, reviews and approves of proposed additions or changes to standards within the PEMG, future products and activities, report to the Joint Passenger Services Contracts (JPSC), liaises with the Airlines for America (A4A) and other IATA committees (PEMG) standards. IATAs passenger experience programme addresses end to end passenger journey from ticket purchase through to arrival at destination. It comprises a range of projects to improve the travel experience and help reduce operational costs to the industry. One delivery channel devised by the PEMG, is the self-service options for passengers. PEMG aims to improve the facilitation in processes controlled by government authorities such as security, immigration and customs, by harmonizing passenger data requirements and enhancing passenger preparedness to reduce queues and process times.

[311] IATA "Fast Travel" IATA Website, *supra* note 297. The fast travel programme is devised for providing self-service options in passenger's airport journey. IATA states that the fast travel programme saves up to 2.1 billion USD for the airline industry by creating uniform standards.

[312] The passenger facilitation programme attempts to provide end to end secure seamless and efficient passenger experience by coordinating standards for security, border protection, immigration and customs.

[313] *See*, *supra* note 297. The CUWG develops common standards for use by airlines and other handling agents to process passengers using shared technology at airports.

## 3.7 Baggage services

IATA claims that its baggage services bring value to the airport industry through several mechanisms[314] that facilitate collaboration amongst airlines transporting passenger baggage.[315]

Matters relating to passenger services are agreed and formulated as standards and recommended practices by Passenger Services Conference ("PSC's").[316] IATA products and services include consultancy and knowledge validation services.[317] IATA consultancy services to the air transport industry cover areas of pricing, revenue management, distribution strategy, interlining and prorating.[318] IATA also offers a service known as the online library and e-Composite. The cost of accessing IATA's

[314] IATA, *Passenger Services Conference Resolutions Manual*, 37th ed (June 2017). Baggage services resolutions address matters such as baggage security control, form of interline baggage tags, passenger name and address labels, excess baggage tickets, and technical specifications, found and unclaimed checked baggage, local baggage committees, dangerous goods in passenger's baggage, pooling of baggage, BSP data interchange specifications, resolutions governing use of reservations, interline message procedures for passengers, flight numbers, airline designators, location identifiers, arrival and departure times, interline connecting time intervals - passenger and checked baggage, interline passenger reservations procedure, baggage tags issue codes and interline traffic agreement for passengers. IATA's Airport Services Committee (ASC) develops standards and procedures for handling of passengers and baggage at airports.

[315] The "Innovation in Baggage" (InBag) scheme produces standards for handling of baggage and baggage messages. These standards are formulated both as resolutions and recommended practices. IATA convenes baggage working groups, baggage steering groups, airport service committees and publishes for sale a "Baggage Book", "Baggage Service Manual", "Passenger Services Conference Resolutions Manual" and the "Baggage Identification Chart." See "Baggage Services," IATA Website, *supra* note 297.

[316] The PSC makes standards and procedures for passengers and baggage handling, passenger reservations and passenger ticketing matters. These resolutions and recommended practices agreed at the Passenger Services Conferences are published in the *Passenger Services Conference Resolution Manual* and are implemented on an industry wide basis. This *Manual* which contains rules pertaining to passenger services is sold by IATA at a significantly high price.

The Passenger and Airport Data Interchange Standards (PADIS) Board established by the IATA Passenger Services Conference, develops electronic data interchange and XML message standards for passenger travel and airport related passenger service activities. These message standards support the publication of schedules and slot management, airline shopping, reservation and electronic ticketing including electronic miscellaneous documents, airport resource management and airport handling, including baggage handling, data exchange between airlines and governments concerning passenger data (PNRGOV), data interchange between airlines and airports for operational flight related data (AIDX), XML schemas for exchange of data on the Bar Coded Boarding Pass (BCBP).

[317] Consultancy tools of IATA consist of a "City Code Directory", a "Global Passenger Survey", "IATA rates of exchange", "Mileage Manual", "Online Library", "Passenger Fare Construction Tool Kit", "Passenger Interline Tariff Webinars (recorded podcast)", "Passenger Tariff Coordinating Conference Resolutions Manuals", "Ticket Point Mileage Manual", "Ticket Tax Box Services" and "Revenue Accounting Tax Database."

[318] *See,* IATA website, *supra* note 297.

online library portal—the e-Composite platform—is prohibitively high, which deters public access to IATA source material.[319]

### 3.8 Environmental initiatives of IATA

IATA has dedicated a specific work programme to improve environmental performance and mitigate harmful consequences of the aviation industry upon the environment. Amongst these initiatives of IATA are the search for alternative fuels,[320] carbon offset programmes,[321] environmental impact assessments,[322] aircraft noise reduction, [323] local air quality[324] and advocacy action on environmental matters.[325] Other

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[319] *See,* "IATA online library E – Composite" in *supra* note 297. The online library for the "passenger" is sold as web download by IATA for US $ 8635/- and online library for "cargo" at the price of US$ 2919/- whilst the "passenger and cargo" online price for web download is US$ 11,339/-. The above prices are published as at September 20th, 2017 at which time the price of the e-Composite Passenger Tariff Coordination Conference Resolutions Manual sold on the IATA website was US$ 3108/-

[320] Several IATA members have carried out test flights using bio fuels, to demonstrate that bio fuels can be used for commercial aviation and on passenger flights to enhance the use of bio fuels in the airline industry.

[321] IATA has developed a common programme for use by its member for offsetting of carbon with the objective of implementing an immediate direct method for both - airline members as well as the travelling public to participate in a common action designed to limit climate change impacts in the short term. IATA carbon offset programmes are offered as a standardized process which enable airlines of any size to introduce independently validated carbon offset programmes through which airline passengers and corporate customers could purchase emission offsets on any particular journey by making payment towards a carbon reduction project. IATA states that over 30 of its airline members have already introduced carbon offset programmes integrated into their web sales or through a third-party offset provider. IATA pursues a set of ambitious targets to mitigate carbon dioxide (CO2), on its 4-pillar strategy: (a) improved technology and the deployment of sustainable low carbon fuels (b) more efficient aircraft operations (c) infrastructure improvements including modernized air traffic management systems and (d) a single global market-based measure to fill the remaining emissions reductions gap. IATA members have identified sustainable alternative aviation jet fuels towards emission reduction which include bio fuels derived from sustainable oil crops such as Jatropha, Camelina and algae or from wood and waste bio mass which have been found to reduce the overall carbon footprint by about 80% over their full life cycle.

[322] IATAs environmental assessment programme (IEnvA) is designed to independently assess and improve the environmental management of an airline. This programme, is based on voluntary compliance, where assessments are carried out by environmental assessment organizations utilizing tools and data devised by IATA and based on the IATA Operational Safety Audit (IOSA) and the IATA Safety Audit for Ground Operations (ISAGO) processes compatible with the Environmental Management System Requirement of ISO-14001.

[323] With the adoption of a new standard by the ICAO to introduce Chapter 5 Noise Standards with effect from the year 2018, IATA anticipates that the effective perceived noise decibels will have a resultant reduction of 7 levels from the current noise levels accepted under Chapter 4 Aircraft. ICAO *Resolution A33-7* adopted at the 33rd ICAO General Assembly in 2001 on *Approach to Noise Management*, identifies the elements of noise reduction at source, land use management and planning, noise abatement operational procedures and operating restrictions.

[324] The emissions from aircraft engines that affect air quality are Nitrogen Oxide (NOx), Carbon Monoxide (CO), Sulphur Oxide (SOx), unburned Hydro Carbons (HC), Smoke and particulate matter (PM). The advancement of

technology and improved engine designs have greatly reduced these emissions, particularly Nitrogen Oxide and Carbon Monoxide which have been efficiently reduced whilst eliminating completely the unburned Hydro Carbons and smoke.

[325] IATA, "Environmental Advocacy Action", IATA Website, *supra* note 297. IATA's advocacy actions are focused upon challenging and lobbying national governments and regional authorities against local taxes and other restrictive measures imposing multiplicity of regulatory compliance burdens upon the airline industry. IATA intervenes at a global, regional and national level to challenge various taxes and other restrictive regulatory stipulations imposed by national governments as well as supra-national legislative authorities which result in regulatory duplicity and/or cost burdens to the airline industry. IATA directly gets involved in judicial review and other legal challenges in different parts of the world against local regulations that have an undesirable impact on global aviation. For example:

**(A) Bogota Night Restrictions-**The Bogota International Airport in Colombia consists of 2 runways but has only 1 runway (the north runway) open for traffic during night time whilst the south runway is closed for all operations between 10pm and 6am. As a result of the north runway being subject to operational constraints, over-flights over Bogota are restricted. IATA in its advocacy actions has contended that the existing restrictions on the use of the south runway exacerbates congestion, flight disruptions and delays at the El Dorado airport in Bogota which negatively affects airlines, passengers as well as the local economy. IATA's advocacy against the Bogota Night Restriction are based on the contention that this restriction which was adopted at El Dorado Airport in Bogota, Columbia two decades ago are no longer applicable since these restrictions were predicated on noise levels of aircraft which have now improved significantly and no longer produce adverse consequences which were experienced at the time of their introduction. Therefore, IATA has recommended that these restrictions based on the noise levels must be immediately reassessed in view of the lower noise emissions of today's aircraft and also explore the possibility of re-evaluating the land use planning and management of operational procedures before deciding to prolong the currently existing noise restrictions at the El Dorado airport in Bogota.

**(B) Italy's Noise Tax** - In 2012 and 2013 several Italian regions introduced an aircraft tax on the aircraft noise IRESA. Although several regions did not implement the tax considering its negative impact on the economy and competitiveness, Rome and Naples continue to collect this tax from airlines. IATA contends that upon information available, IRESA or the relevant tax is not designed at addressing any genuine environmental objective but is rather a tax for raising revenues for the treasury in these regions. IATA therefore opposed the application of IRESA (Tax) on the basis that it defeats the global objectives of uniformity in aviation and creates undesirable duplicity and regulatory impact. IATA has further contended that such a tax is contrary to the international as well as European policies and legislation and in particular is inconsistent with the ICAO policy that environment related levies are designed to recover no more than the costs applied to the alleviation or prevention of environmental problems. The ICAO policies as well as the EU law and international agreements between Italy and third countries mandate that noise related measures be adopted in accordance with the ICAO balanced approach which impose an overriding obligation on the national authorities to assess all available measures to mitigate noise.

**(C) Spain - the Catalan Nitrous Oxide Tax.** At the end of 2013 the government of Catalonia proposed to impose a tax on Nitrous Oxide emissions from aviation. The said tax was admittedly to increase public revenue and to reduce public deficit and to thereby limit budget cuts that affect public services. In 2015 the Spanish Competition Authority released a report in which it concluded that the Catalan Nitrous Oxide tax distorts competition and is not justified by any positive impact on the local environment. IATA through its advocacy actions opposed the Catalan Nitrous Oxide tax on aviation citing it as a blunt fiscal measure which will not deliver any environmental benefits. IATA has therefore urged the Catalonian authorities to address noise issues in accordance with the policies formulated by ICAO.

**(D) EU directive Energy Efficient Directive 2-12/27/EU**. This directive applies to airlines having more than 250 employees or an annual turnover of over 50 million Euros within EU states. It requires implementation of an audit covering fuel use, including on all flights to or from destinations outside of the EU. IATA has expressed concerns that this EU directive which has transnational impact, will create duplicity and unnecessary compliance burdens on airlines which are already subjected to environmental audits under national regulatory schemes. IATA has contended that airlines whether European or not will have to report to several authorities sometimes in respect of the same activities whilst use of fuel on flights between European countries may be subjected to multiple audits and be included in efficiency improvements thus being subject to duplicity of regulatory oversight. IATA has recommended to have a single point of accountability and for requirements to be streamlined so that the administrative burden upon airlines is reduced.

resources developed by IATA in this sphere include the IATA Fuel Guidelines,[326] IATA Sustainable Alternative Aviation Fuel Strategy,[327] the IATA Report on Alternative Fuels,[328] a directory of bio fuel producers compiled by IATA, and an IATA Bio Jet Fuel Workshop and Guidance Material for Bio Jet Fuel Management (Bio Guide).[329] These resources, developed under the aegis of IATA environmental programmes, are part of the IATA product portfolio and guidance materials sold to the airline industry.

### 3.9 Operations and infrastructure

Several initiatives[330] have been devised and implemented by IATA relating to aircraft on the ground[331] and in flight. The IATA Ground Handling Council ("IGHC"),[332]

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[326] The IATA fuel guidelines have been developed by the IATA Technical Fuel Group in consultation with the specialists of the industry with experience in typical fuelling tasks. These guidelines are marketed by IATA as an information tool to the industry which *inter alia* contains important information such as fuel and environmental management, standard into plane fuelling procedures, aviation turbine fuel specifications, investigating and categorizing of engine filter blockages, micro biological blockages in aircraft fuel tanks and bio jet management. *See*, Fuel Guidelines.

[327] IATA, "Sustainable Alternative Aviation Fuel Strategy", in *supra* note 297.

[328] The IATA Alternative Fuel Report is a reference report which contains information on innovations in alternative aviation fuels, fuel properties, certification and flight trials, greenhouse gas emissions and sustainability, production capabilities, capacity and efficiency, bio fuel economics and the impact on emission trading schemes. This is an important resource for airlines contemplating the use of alternate fuels in their commercial flights.

[329] The IATA Bio Guide incorporates several practical attributes including the technical certification and handling of bio jet fuel, bio jet sustainable certification, compliance with emissions regulations and standard formats for purchase contracts and insurance relating to bio jet fuels. See IATA "Guidance Material for Bio Jet Fuel Management (Bio Guide)", in *supra* note 297.

[330] IATA "Operations" in *supra* note 297. IATA initiatives have been designed for, (a) optimizing engineering and maintenance measures through safety, reliability and productivity;(b) promoting global harmonization of air traffic equipment;(c) identifying reduction opportunities in fuel consumption and carbon emissions;(d) improving safety and efficiency in ground operations; (e)improving knowledge skills and efficiency of aviation personnel in safety and operational matters;(f) identifying and mitigating operational cost issues and achieving paperless aircraft operations.

[331] IATA, "Ground Operations", in *supra* note 297. A considerable amount of efforts and time is devoted to develop operational standards for ground handling and procedures with the aim of promoting consistency and harmonization. These initiatives are supervised and monitored by an internal body named IATA Ground Handling Council (IGHC).

[332] The IGHC is set up under the IATA Operations Committee (IOC) which provides expertise for ground operations and oversees, Engineering and Maintenance Group, Flight Operations Group, IOSA Oversight Committee, ISAGO Oversight Committee, the Technical Fuel Group, the Safety Group and the Security Group. The Air Side Safety Group (ASG) also reports to the GHC, task force which comprises of safety experts drawn from airlines, ground handling companies and aircraft manufacturers to review and develop policies and guidelines in the areas of occupational safety and health, aircraft damage mitigation, standard processes and risk management, performance management and human factors. A multidisciplinary task force known as the Load Control and Aircraft Messaging (LCAM) Task Force, also reports to the Ground Handling Council. The Ground Support Equipment and Environmental Management (GSEE) Task Force is assigned the tasks of technical, functional and safety aspects of ground support equipment.

publishes the Airport Handling Manual ("AHM")[333] which is a reference guide for safe and efficient airport operations worldwide, and the IATA Ground Handling Operations Manual ("IGOM").[334] An important tool relating to ground operations is the IATA Safety Audits for Ground Operations ("ISAGO").[335] These audits are frequently referred to by airlines when flying into overseas destinations and in selecting a suitable ground handling agent or operator to provide ground handling services at the destination or point of service in another country.[336] These audit service manuals and guidance material are published in print and electronic format and are sold by IATA to the airline industry.

### 3.9.1 Fuel management

Several important resources have been developed through IATA initiatives in the area of fuel management. These include the IATA Environment Managing Systems ("IEMS"), Fuel Action Campaign, Green Teams, Fuel Conservation, Fuel Management Guidelines and Fuel Related Training. IATA also publishes a Jet Fuel Price Monitor, Fuel Fact Sheets, Alternative Fuels Facts Sheet, Technical Fuel Group, Commercial Fuel

[333] The AHM contains the industry recognized contract template known as the Standard Ground Handling Agreement (SGHA). This standard form contract is widely used not only by members but also non-member airlines to appoint airport ground handling service providers.
[334] IGOM is a reference manual for ground operations which provides standards and procedures to be followed by ground handling personnel. The Aviation Ground Services Agreement (AGSA) Task Force reviews and updates the IATA Standard Ground Handling Agreement (SGHA) and the IATA Airport Handling Manual (AHM) every 5 years.
[335] ISAGO is an operational audit to determine the levels of a ground handling service in comparison with a set of guidelines and reference standards formulated by IATA.
[336] IATA, "Integrated Solutions for Ground Operations", in *supra* note 297. ISAGO provides audit standards applicable to all ground handling companies worldwide uniformly covering specific activities of any ground handler, both multinational and companies providing ground handling services at smaller airports.

Pricing and the Global Fuel Portal which are extremely popular resources among airlines.[337]

### 3.9.2 Air traffic management services

IATA collaborates with ICAO to develop global Standards and Recommended Practices ("SARPS") as well as guidance material for airlines, air navigation service providers and regulatory agencies to achieve cost effective, globally harmonized, inter-operable air traffic management.[338]

### 3.9.3 Engineering and maintenance

IATA devotes significant efforts to develop and establish guidelines on engineering and maintenance best practices and the standardization of technology.[339]

### 3.9.4 Radio spectrum

IATA assumes a leading role in both developing and representing airline requirements at the International Telecommunications Union ("ITU") and at the World Radio Communications Conferences ("WRCC") with regard to the allocation of aviation radio spectrum at a worldwide level.

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[337] IATA, "Sustainability and Fuel Efficiency" in *supra* note 297. In fuel management and fuel sustainability IATA initiatives include the, IATA Environment Managing Systems (IEMS), Fuel Action Campaign, Green Teams, Fuel Conservation, Fuel Management Guidelines and Fuel Related Training. IATA publishes a Jet Fuel Price Monitor, Fuel Fact Sheets, Alternative Fuels Facts Sheet, Technical Fuel Group, Commercial Fuel Pricing and the Global Fuel Portal, which are popular management and operational tools for fuel management.

[338] IATA also collaborates with other organizations such as the Civil Air Navigation Services Organization (CANSO), Air Transport Action Group (ATAG) and the Airlines Electronic Engineering Committee (AEE).

[339] The Engineering and Maintenance Group (EMG) supports the IATA Operations Committee, in all matters relating to engineering and maintenance. An information exchange known as the EMG Information Exchange (EMGIE) has been established to exchange information confidentially and speedily on any matter with technical implication based on past experiences, and lessons learnt. The EMG develops policy standards and recommendations relating to aircraft engineering and maintenance activities, air worthiness and reliability issues, aircraft recovery, aircraft performance and avionics.

### 3.9.5 Flexible air routes.

IATA believes that its iFlex initiative will significantly change the way in which long haul flights operate, by moving to a dynamic and flexible routing structure that allows airlines to achieve noteworthy commercial benefits by reduction of fuel burn, flight times and carbon dioxide emissions. [340]

### 3.9.6 Paperless aircraft operations

"Paperless aircraft operations"[341] are part of IATA's "Simplifying the Business Initiative," which includes e-ticketing, Radio Frequency Identification ("RFID") for baggage handling,[342] e-Airway bill[343] and cargo RFID.

## 3.10 Safety

The safety initiatives of IATA concentrate on: runway safety,[344] loss of control in flight, controlled flight into terrain, collisions and fatigue,[345] operational safety audits and

[340] IATA Flexible Routings (iFlex). IATA contends that fixed routes are insensitive to, jet stream patterns will not facilitate full efficiencies being achieved or carbon dioxide being reduced at an optimum level.

[341]Paperless Aircraft Operations (PAO) are designed for use in technical operations, aircraft maintenance activity, part supply chain and logistics, transfer of aircraft assets, to facilitate commercial flight to be moved into an e-enabled paperless environment. IATA carries out projects in auto ID (identification) /RFID, (radio frequency identification) aircraft parts tracking, RFID as alternative means of compliance, digital signature and technical operations, electronic air worthiness compliance, electronic maintenance record keeping, electronic aircraft lease transfers, IATA standardized maintenance agreement, aircraft leasing best practices for delivery/redelivery and maintenance receipts, and electronic regulatory documents.

[342] The global deployment of - Radio Frequency Identification (RFID) enables to accurately track passengers' baggage in real time across key points in the journey helping airports, airlines and ground handlers to keep track of bags at every step of the journey and ensure the right bag is loaded onto the correct flight. The technology introduced in terms of Resolution 753 effective from 2018, requires airlines to track every item of baggage from point acceptance to delivery to passenger. IATA estimates that RFID will provide savings of over US$3 billion to industry over the next seven years.

[343] IATA, *Passenger Service Conference Resolutions Manual (PSCRM)*, Res. 672, 37th ed. (IATA, June 2017).

[344] Runway Excursion Risk Reduction (RERR) Toolkit is a joint project of IATA and ICAO. The highest number of aircraft accidents occur in the runway during take-off or on landing, which represent more than 25% of all commercial aircraft accidents annually. Therefore, IATA has developed the Runway Safety Implementation (RSI) Kit and the Runway Excursion Risk Reduction Toolkit (RERR) in collaboration with ICAO, ACI, CANSO, IFALPA, FAA, EASA and EUROCONTROL.

[345] Fatigue Risk Management Systems (FRMS) is a system developed by IATA based for monitoring and management of fatigue related safety risks. Based on scientific principles, knowledge and operational experience this system aims to ensure that relevant personnel, (pilots, cabin crew, aircraft dispatchers, air traffic controllers) perform at adequate levels

oversight of third party Safety Management Systems ("SMS")[346] providers, harmonization and standardization of air navigation, effective recruitment and training,[347] and emerging safety issues.[348] IATA has devised several audit and evaluation tools for use in the airline industry. These include the IATA Operational Safety Audit ("IOSA"),[349] the ISAGO, IATA Standard Safety Assessment ("ISSA"),[350] the

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of alertness The Annexes to the Chicago Convention make mandatory standards with regard to Flight Time Limitations (FTL). These are the specified time limits and restrictions to duties that are assigned to cockpit as well as cabin crew in aircraft operations and include mandatory rest to be taken by such personnel in between the performance of flights and in the course of flights which are operated into different time zones. *See*, Chicago Convention, Annex 19. The IATA FRMS although not a mandatory standard is an enhancement to the mandatory flight and/or duty time limitations imposed under the Annexes in the Chicago Convention which allows airlines to implement FRMS to identify potential risks and to efficiently implement and manage fatigue mitigation strategies within their respective operational environments. IATA, FRMS have been designed on the basis of sharing responsibility between management and individual crew members to manage fatigue risks. IATA in collaboration with International Civil Organization, ICAO, and the International Federation of Airline pilot (IFALPA) has formulated an FRMS implementation guide as a model for the airline industry. Although FRMS of IATA in principle is not mandatory it may nevertheless represent some compulsory attribute due to national civil aviation regulators who not being able to adequately monitor flight duty time (FTL) limitations could require an airline operator licensed by such civil aviation regulator to implement a FRMS acceptable to the regulator as a method of ensuring that flight duty time limitations being duly complied with and properly supervised. Therefore, FRMS of IATA could indirectly acquire a mandatory character when an FRMS, is relied upon by national regulator to monitor and supervise flight duty time limitations.

[346] Annex 19 of the Chicago Convention has mandated the implementation of Safety Management Systems (SMSs) as a responsibility of service providers. All types of service providers, such as aircraft operators, approved maintenance organizations, organizations responsible for type design and manufacture of aircraft, air traffic service providers, certified aerodromes and approved training organizations which are exposed to safety risks during provision of services, are required to mandatorily establish and implement a Safety Management System (SMS) acceptable to their State. Safety Management System requirements have been incorporated into IATA safety audits (IOSA) which evaluate the compliance of the SMS requirements by member airlines. The Safety Management Standard strategy introd1uced by IATA in April 2015, into its safety audits (IOSA) set out a timeline for progressive elevation of all standards and recommended practices to the SMS compulsory standards by the year 2016. SMS's are required to be supervised by States. These SMS should have as minimum, criteria to identify all safety hazards and to ensure all remedial action necessary to maintain acceptable levels of safety being implemented. SMS's also need to incorporate processes for continuous monitoring and regular assessment to improve overall levels of safety.

[347] IATA programs in this area include IATA Training and Qualification Initiative (ITQI), the IATA Air Traffic Control (ATC), Next Generation of Aviation Professionals, (NGAP), and Ground Handling Agents (GHA) training.

[348] Current work in this area consist of studies, recommendations on Lithium batteries, safe integration of remote piloted aircraft systems (RPAC), Global Navigation Satellite System Signal (GNSS) Interference, GNSS Jamming, space weather and laser attacks.

[349] Operational Safety Audits (IOSA)in *supra* note 297. IATA operational Safety Audit (IOSA) is a global standard recognized and adopted by numerous airlines including 154 airlines, which are not IATA members. Currently 402 airlines are registered under IOSA Audit platform.

[350] The IATA Standard Safety Assessment (ISSA) is a voluntary evaluation programme which extends the benefits and safety audits conducted under the IOSA programme to smaller aircrafts that are otherwise not eligible to participate in the IOSA programme. When smaller or regional airlines particularly those operating small aircrafts (with a Maximum Take of Wight (MTOW) of less than 5700Kg) seek to collaborate with larger alliances or larger airlines, on code share and similar arrangements, the larger partner may insist on the smaller airline being audited or evaluated based on acceptable standards. In such instances, an audit may be performed to ascertain compliance with the ISSA standard as a precondition for the smaller airline being allowed entry into the alliance or collaboration with the larger airline. Upon the

IATA Fuel Quality Pool ("IFQP"),[351] the IATA Drinking Water Quality Pool ("IDQP"),[352] and the IATA De-Icing/Anti-icing Quality Pool ("DAQCP").[353]In addition to the above, IATA also administers information collection and dissemination tools such as the IMX Integrated Management Solutions (Quality & Safety)[354] and the Global Aviation Data Management ("GADM").[355] The IATA safety report is a document

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successful satisfaction of an audit, the airline concerned is inducted into the ISSA registry thereby expanding its commercial opportunities to link up or code share with larger carriers and also have access to lower insurance rates.

[351] The IFQP is a group of airlines which actively share fuel inspection reports and workload at locations worldwide. The benefits of IFQP is that it drastically reduces the repetitive inspections at many airports and helps to improve overall quality of inspections due to the stringent evaluation criteria established and implemented by the Pool. The main feature of a fuel quality pools is, that it facilitates the inspections which are confined to quality and safety issues. The inspection reports are shared only among the participating airlines through a secured website. Shortcomings found in the evaluations are communicated to the respective supplier for appropriate corrective action whilst the pool also conducts training for inspectors and development of standard inspection procedures that are applied according to industry standards. IATA estimates that due to the pooling of resources in fuel inspections, participating airlines are able to reduce their workload and attendant costs up to 85% in relation to fuel supplies.

[352] The IATA Drinking Water Quality Pool (IDQP) conducts audits on drinking water quality around the world. IDQP has developed its own procedures for conducting air field inspections using highest quality standards approved by the World Health Organization. The IDQP also trains and certifies auditors, collects consolidates and communicates audit results through a website to the pool member airlines. Drinking Water Quality Pool is designed to promote and safeguard health of the passenger and crew by using the highest standards of water quality and to avoid multiple audits and incidental costs of obtaining water from the same provider at any location.

[353] The main role of DAQCP is to ensure that a common set of standards and safety guidelines and recommendations for de-icing and anti-icing procedures are followed at airports around the world. The Pool members share audit results and thereby avoid multiple audits in respect of the same provider at the same location while improving the quality of inspections of the audits carried out by DAQCP inspectors.

[354] The IMX solution is a comprehensive database which gathers all quality management systems (QMS) and safety management systems and presented in user friendly format. The IMX which is developed in collaboration with airlines collate all basic elements of quality and safety management systems onto a single electronic platform and disseminates the information through an IATA global aviation database. The data managed through such a database includes, audits and findings, management, IOSA and ISAGO check lists, risk assessment and root cause analysis, production of e-IOSA conformance reports, safety report management, communication of data from quality and safety oversight activities, data collection and analysis, multilingual interfaces and data exchange capability with Safety Trend Evaluation Analysis and Data Exchange Systems(STEADES) and Ground Damage Database (GDDB).

[355] *See*, IATA "Global Aviation Data Management (GADM) Programme", in *supra* note 297. Safety Data Management is a service offered through the GADM. The Global Aviation Data Management Programme (GADM), is a tool that provides IATA members and other industry participants with information from multiple sources on aircraft operations. It integrates all sources of operational data received from various channels and IATA unique programmes such as flight operations, infrastructure and IATA audits, into a common interlinked database structure. The GADM programme collects and incorporates data such as industry accident incident data and analysis, operational reports (pilot and flight attendant reports), the IATA safety report, aircraft ground damage reports and analysis of the Ground Damage Database (GDDB), collated Flight Data Analysis (FDA), Global Flight Data e-Exchange (FDX), reviews of IATA operational safety audit (IOSA) and IATA safety audit for ground operations (ISOGA) findings. IATA states that over 90% of its members contribute to at least one (1) of the GADM databases.

published annually since 1964. It is one of the few information-based resources that are available free of charge for distribution.

### 3.11 Cabin operations best practice

The Cabin Operations Safety Best Practices Guide published by IATA covers topics such as turbulence management, inadvertent slide deployment prevention, unruly passenger prevention and management, safe service of alcohol on board, electronic cigarettes, managing medical events and the safety of infants and children on board. This guide is developed by the Cabin Operations Safety Task Force of IATA.

### 3.12 Medical Advisory Group.

IATA's Medical Advisory Group consists of airline medical experts from around the globe, whose role is to provide advice to the industry on a wide range of medical issues which are covered in the IATA medical manual.[356]

### 3.13 Aviation security

Smart Security is an initiative implemented jointly by IATA and the Airports Council International ("ACI") which brings all stakeholders together and addresses subjects

[356] *See* "Guidelines on Health & Safety Issues," in *supra* note 297. The guidelines on health and safety issues included in the medical manual cover, food poisoning on board, passengers emitting radiation, passive passenger screening, request form for passenger contact tracing, medical incident report form, death on board, international transport of human remains, thermometers onboard, oxygen delivery system for passengers, cabin crew with insulin treated diabetes, cabin crew with seizure disorders, etc. IATA conducts numerous studies and work programmes in the areas of communicable disease and the management or curtailment of global pandemics by sharing important information, working in collaboration with national public health authorities and International agencies). IATA, has formulated an emergency response plan and action checklist for communicable diseases aligned with the WHO which contains documents and templates for ready use by airlines, such as cabin announcement scripts, universal precaution kit, cabin air quality brief, bird strike maintenance crew, cargo baggage handlers, cabin cleaning crew, passenger agents, passenger locater form, and the flu hygiene flyer.

such as strengthened security, greater operational efficiency and improved passenger experience. IATA's Cyber Security Strategy coordinates global efforts to address cyber threats to civil aviation. "One Stop Security"[357] is a process of avoiding duplicate security screening for passengers who are required to take connecting flights on their journeys. The core elements of IATA Security Management System ("SeMS") are mandatory for IOSA registration. IATA's "Secure Freight" project is designed as an end-to-end global security solution for the air cargo supply chain.

### 3.14 Facilitation and passenger data

Facilitation efforts are intended to reduce unnecessary regulations and improve inspection procedures to expedite the movement of people and goods over international boundaries. Streamlining passenger data is an integral part of the facilitation process, as governments around the world require airlines to obtain, produce, store and transmit passenger data—both Advance Passenger Information ("API")[358] and Passenger Name Records ("PNR")[359]—in multiple reporting formats and

[357] IATA, "Smart Security", in *supra* note 297. Security initiatives of IATA are gradually incorporated, tested and evaluated in partnership with governments, airports, airlines and solution providers. IATA states that most of the 325 million people that connect annually through hub airports are screened twice, at departure and again when they change flights. IATA believes that such duplicity in screening could be avoided by improving coordination on the part of governments and therefore recommends the concept of "one stop security" which envisages screening people for prohibited items only once, at the beginning of their journey. IATA states that in a major breakthrough the United States, the European Union and Switzerland have agreed to a mutual recognition of each other's cargo security programme whilst United States and Canada have signed a similar agreement. The European Union and Canada have also carried out an initial comparison of their respective security systems.

[358] Advance Passenger Information(API) - refers to the information regarding passengers obtained processed and transmitted in advance and before the contracted journey by the passenger is commenced. The API usually consists of the full name, date of birth, gender, passport number, country of citizenship, country of passport issuance of the passenger. IATA reports that 39 countries now (as of 2017 December) require airlines to send Advance Passenger Information (API) before the arrival of a flight into their countries and that 32 more are planning to introduce similar requirements in the near future.

[359] The PNR usually contain information provided by the passenger at the time of making an airline booking and sometimes several months before the date of travel. This information is therefore held in an airline reservation system until the booked flight is performed. IATA states that 6 countries require such PNR and 30 more are in the process of

in inefficient ways. API usually consists of data found in the Machine Readable Zone ("MRZ") of passports and other travel documents. However, some countries require additional information of passengers to be transmitted in advance, that is, not generally contained or used as machine read data in the MRZ zone of a passport.[360]

### 3.15 Interlining tools and templates

The foundation and backbone of IATA's existence is its multilateral interline system. No single airline has the capability of providing services to every part of the world. When passengers need to be transported from one city to another in a different region, if the airline at point of origin does not operate direct services, that airline will need to collaborate with one or more other airlines and connect their respective flights by "interlining" services to enable passengers to reach their desired destination. IATA interlining is not done on a mere bilateral basis between airlines, but rather on a multilateral platform amongst all participating airlines. The main attribute of this interlining system is the coordination of air fares and cargo rates. Air fares applicable for travel between city pairs and airports in any part of the world to which its member airlines operate are agreed at Tariff Conferences. To ensure that it does not fall foul of antitrust and competitions regulators, IATA's current tariffs are market driven interline-able fares that are agreed upon through online coordination supported by web-based

implementing such requirements. IATA is keen to ensure that uniform rules are formulated in this area to be followed by governments to avoid a multiplicity of PNR formats being imposed by different countries in different regions.

[360] IATA works to ensure that all countries requiring API type data have uniform requirements consistent with global standards. IATA intervenes where countries formulate non-standard requirements or regulations placing additional burdens on airlines. The ICAO and the World Customs Organization (WCO) have jointly formulated Advanced Passenger Information (API) guidelines which are set out in Annex 9 to the Chicago Convention. IATA has also developed an API & PNR toolkits in partnership with ICAO and WCO which contain presentations, reviews, checklists and other guidance material on the extraction, storage and transmitting of passenger data.

technology.[361] An essential product for interlining is the Multilateral Interline Traffic Agreement ("MITA") The MITA Manual[362] contains passenger and cargo interline agreements, templates and the basic rules airlines must follow when collecting money, issuing documents for carriage on interlined services and apportioning liability on passenger claims. The Cargo Claims and Loss Prevention Handbook[363] contains instructions and guidance on the legal aspects of carriage of cargo, principles of loss prevention and practical information and rules for apportionment of cargo claims amongst interlining airlines.

### 3.16 Air cargo

The Advisory body of IATA dealing with air cargo[364] is its Global Air Cargo Advisory Group ("GACAG").[365]Apart from the Air Cargo Tariff Conferences, cargo standards are

[361] IATA, "Multilateral Interline System" online: <http://www.iata.org/whatwedo/passenger/tariffs/Pages/multilateral-interline-system.aspx.,>. IATA's current online fare coordination is an internet-based voting mechanism that allows airlines to propose and agree on changes to "Flex fares" without having to meet face to face (e-Tariffs). The online fare coordination is supported by the "IATA Electronic Prorate Manual – Passenger" (EPMP) which is used to calculate interline passenger revenue prorates. The (EPMP) manual is also sold online as a product by IATA. A similar prorate manual has also been developed for air cargo transport – Prorate Manual for Cargo (PMC) which contains the Multilateral Prorate Agreement.

[362] IATA, "Multilateral Interline Traffic Agreements" online: IATA www.iata.org/publications/store/Pages/multilateral-interline-traffic-agreements.aspx. , The MITA Manual is sold online at a price of US$ 279.40 by IATA whilst the connected Bilateral Interline E-Ticketing Agreements Table (BIETA Excel Spreadsheet) is offered at the price of US$24077.55

[363] IATA, "Publications" online: IATA<www.iata.org/publications/store/Pages/cargo-claims-and-loss-prevention-handbook.aspx>. The Cargo Claims Handbook regular bound manual is sold by IATA at US$ 320.00 whilst the electronic version is priced at US $ 295.00.

[364] IATA, "Air Cargo" online: IATA <www.iata.org/whatwedo/cargo/Pages/index.aspx>. Air cargo transports goods worth in excess of $6.4 trillion annually and represents approximately 35% of the world trade in terms of value. The revenue generated by air cargo is approximately $70 billion a year which according to IATA estimates provide direct and indirect employment to 57 million persons worldwide.

[365] IATA, "Global Air Cargo Advisory Group" online: IATA<www.iata.org/whatwedo/workgroups/Pages/gacag.aspx>. The (GACAG) Consists of the International Federation of Freight Forwarders' Association (FIATA), The International Air Cargo Association (TIACA), the Global Shippers' Forum (GSF) and IATA. IATA hosts the World Cargo Symposium (WCS) which is a major industry decision making event for air cargo. Cargo 2000 (C2K) is also an IATA quality management system available for, for shipment planning and tracking of a Master Airway Bill (MAwB) at "Airport to Airport" (AtoA) and House Airway Bill (HawB) from "Door to Door" (DtoD) from shipper to consignee. A third level is presently being planned to manage shipment

developed and formulated in the Cargo Service Conferences ("CSC") and Cargo Agency Conferences ("CAC"). Cargo Services Conferences make standards and rules on dangerous goods,[366] live animals,[367] perishables and pharmaceuticals,[368] Unit Load Devices ("ULD"),[369] airmail,[370] Airway Bills ("AWB"),[371] cargo security,[372] customs and

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planning and tracking at individual piece level to provide full visibility to shippers at the transit of the individual shipments.

[366] Several items and commodities are identified as "dangerous goods" by the airline industry as items that could endanger the safety of the aircraft or the persons on board an aircraft. The transportation of these "dangerous goods" are either forbidden or restricted. Extensive rules and regulations under the Chicago Convention stipulate standards applicable for documenting, handling, transporting and storing of dangerous goods transported by air.

[367] IATA makes standards and recommended practices for the transportation of pets and live animals as well as perishables on board aircraft. The IATA "Live Animals Regulations" contain the rules and standards applicable to the transportation of live animals by commercial airlines. These regulations and information manuals published by IATA also contain country specific regulations applicable to the transportation of live animals.

[368] Pharmaceuticals according to IATA are the critical industry that moves $1 trillion cargo per annum. Maintenance of temperature during transportation is a crucial challenge which is essential to ensure the preservation of these temperature sensitive products. IATA therefore states that the transportation of health care products by air requires a complex logistical network and methods to ensure the due preservation and integrity of the shipment requiring specific equipment, storing facilities, harmonized handling procedures and above all, cooperation amongst the cold chain partners. Centre of Excellence for Independent Validators (CIEV) in pharmaceutical logistics for the airline industry was created by IATA to improve the handling and transport of pharmaceuticals to meet requirements of shippers and manufacturers. IATA publishes the IATA Temperature Control Manual (TCR) which addresses temperature management issues identified by the industry. This manual contains the standards for transportation of pharmaceutical products and the mandatory use of time and temperature sensitive labels. The work in this area is developed by the Time and Temperature Task Force (TTTF) which formulates the standards and procedures for the documentation, handling, packaging and acceptance of air cargo from the health care sector. IATA Time and Temperature Sensitive Label is a shipment label which is mandatory with effect from 1st July 2012 applicable specifically for the transportation of goods in the health care industry. This label has to be affixed to all shipments classified as time and temperature sensitive cargo to indicate the external transportation temperature range during the course of the entire shipment.

[369] A Unit Load Device is a pallet or container used to load freight for its air transportation. IATA estimates that every year a sum of over $ 300 billion is incurred to meet both repair costs as well as costs arising from the loss of ULDs. The losses given have not considered the flight delays and cancellations due to unavailability of ULDs. The IATA ULD Panel (ULDP) develops standards and procedures and makes ULD Regulations (ULDR)concerning the technical and operational specifications, handling, restraint and maintenance requirements applicable to ULD operations. IATA states that ULD management is a key element of the high efficiency in air transport by ensuring that the correct ULD is available at the correct place at the correct time in proper condition to ensure efficient operations and revenue management.

[370] IATA, "Sustaining Growing and Simplifying air mail" online: IATA<www.iata.org/whatwedo/cargo/Pages/air-mail.aspx>. Transportation of air mail represent around 10% of the air cargo business for the airline industry. The IATA Air Mail Panel (AMP) is responsible for developing standards and procedures for handling of air mail and works closely in collaboration with the Universal Postal Union (UPU) and the International Post Corporation (IPC). IATA states that almost 380 billion letters and 6.1 billion postal parcels are carried annually and as such air mail plays an essential role in the industry. Although the emergence of electronic communication caused a dramatic decrease in the number of letters sent, an exponential growth in the transportation of small and medium size airmail parcels is seen as a result of online shopping. IATA in collaboration with the UPU and IPC bodies has developed guidelines for the use of the Postal Airway Bill (PAWB) number and a joint brochure to promote the use of electronic data interchange for the airmail business.

[371] The regulatory provisions mandating the issue of an Airway Bill do not specify the form or a template other than the mandatory information that ought to be contained in an Airway Bill. IATA has been instrumental in developing a

trade and facilitation.[373] In terms of Cargo Agency initiatives, the e-Cargo[374] project has resulted in the development of e-Freight and the electronic Airway Bill ("e- AWB"). The IATA Dangerous Goods Regulations Manual[375] is frequently resorted to by the industry to obtain all necessary day-to-day practical information in relation to transporting dangerous goods. The Dangerous Goods Training Task Force ("DGTTF")[376] provides

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uniform template for Airway Bills which are used not only by IATA airlines but non-members as well. The forms developed by IATA could either be an airline Airway Bill with a pre-printed carrier airline identification or a neutral airway bill without such pre-printed identification to identify the issuing airline. *Cargo Services Conference Resolution* 600a formulates the rules on the use of airway bill, technical specifications, completion instructions and the issuance/making of copies as well as the applicable conditions for transmitting the airway bill or its information in an electronic platform. The CSC resolution 600p contains the text of the conditions of contract to be used and printed with an airway bill as well as the notices for liability limitation, etc., appearing on airway bills.

[372] The Consignment Security Declaration (CSD) incorporates the ICAO requirements. This declaration ensures that every consignment of cargo received by a carrier or any regulated agent is accompanied by adequate documentation either as an inclusion in the Airway Bill or as a separate declaration. The Consignment Security Declaration (CSD) provides an audit trail of how, when and by whom the cargo has been secured along the supply chain. IATA Centre of Excellence for Independent Validators (CEIV) trains and provide guidelines for validators who are assigned the task of validating security standards and security programmes employed by shippers, cargo suppliers, airlines and other industry stakeholders in the cargo supply chain. Secure Freight is an IATA programme for the supply chain in the global air cargo industry to procure security to the entire supply chain through uniform standards to secure freight from the point of shipment and through the entire supply chain preventing any unlawful interference till it reaches its final destination.

[373] The Advance Cargo Information requirements (ACI) adopted in 2005 and implemented by the World Customs Organization (WCO) is already being used in many countries for transportation of air cargo. The Air Cargo Tariff & Rules (TACT) published by IATA is the ultimate reference for air cargo transportation and contains comprehensive information with regard to cargo rates as well as the rules applicable in over 220 countries worldwide. The extensive rules published in the TACT *inter alia* include rules on acceptance of goods and Airway Bill completion, country rules, regulations and charges on import, transit and export, airport and storage facilities, handling equipment, airline, city and airline codes and Airway Bill prefixes and rates and surcharges with over 4.5 million airline specific rates for 350,000 city pairs as well as industry, country and airline specific charges. TACT also provides e-customs & security documents and templates that contain information on the Advanced Cargo Information to be provided in each of the countries covered by the Manual.

[374] As the industry moves from the paper-based Airway Bill to an electronic Airway Bill (e-AWB), IATA Cargo Services Conferences have been instrumental in developing the necessary services for same. IATA publishes cargo/XML standards for e-freight which contains the XML format for the way bill, house way bill, house manifest, flight manifest, freight book list, status messages, response messages, booking messages, customs status notification, shippers declaration of dangerous goods, invoice packing list, certificate of origin and the shippers letter of instructions.

[375] Under the dangerous goods regulations, specific matters related to the storage, transportation by air of infectious substances, environmentally hazardous material, lithium batteries, etc., have been dealt with in detail. Dangerous goods, which constitute a significant portion of goods transported need to be treated and handled in accordance with the applicable rules and regulations. Dangerous goods are also carried as accompanied or unaccompanied baggage by airline passengers. These goods consist of lithium batteries, electronic cigarettes, fuel cells and related electronic equipment. The Dangerous Goods Regulations Manual which is published by IATA therefore has become a useful tool for airlines, passengers, shippers and freight forwarders of cargo to correctly identify and efficiently deal with the transportation of dangerous goods by air. IATA also prepares standard formats to be used for the purpose of declarations such as the Dangerous Goods Declaration (DGD) and also provides training for personnel handling dangerous goods.

[376] The work of the DTTTF is conducted under the guidance of the Live Animals and Perishables Board (LAPB) of IATA. The LAPB is responsible for the development of standards and regulations applicable to accepting, handling,

training and validation for airlines handling dangerous goods. Through this scheme, airlines are evaluated and validated as having adequate levels of skilled personnel and processes to transport dangerous goods. The Live Animals Regulations ("LAR") Manual and the IATA Perishable Cargo Regulations Manual[377] are also popular reference guides and management tools for airline industry personnel. These guidance materials, manuals and training programmes constitute important products that are developed and marketed by IATA which generate significant income for IATA.

loading and transport of live animals as well as the shipping of time and temperature sensitive goods. The LAPB is appointed by the Cargo Services Conference.

[377] Perishable Cargo Regulations (PCR) manual is a further publication that is endorsed by the IATA Live Animals and Perishables Board and is considered an essential reference guide for those involved in the packaging and handling of temperature sensitive products and perishable goods, such as fruits, flowers, vegetables. IATA states that its Perishable Cargo Regulations manual is an essential reference in temperature control and cold chain management for goods from the health care & food sectors including pharmaceutical products and non-hazardous biological materials. The PCR manual contains all information required to prepare package and handle temperature sensitive goods quickly and efficiently. IATA also conducts training programmes in this area particularly on perishable cargo regulations and the shipping of perishable cargo.

### 3.17 Airline distribution

Airline distribution is one of the main activities of IATA hosted on its interline transaction platform. Distribution entails scheduling,[378] filing, ticketing, booking and reservation,[379]payments, revenue accounting, prorating, interline billing and settlement, shopping/search/comparisons, price quotations, servicing and delivery.[380]

### 3.18 Airline slots

Since time 'slots'[381] for aircrafts to arrive and depart airports are limited, the coordination of available slots and the sharing of slots amongst airlines to maximize each other's scheduling capabilities become an extremely important feature of slot coordination and management. Therefore, IATA's initiative, the Worldwide Slot

[378] The Schedules Information Standards Committee (SISC), of the IATA Slot Conference, is responsible for the development of standard schedules, data procedures and formats for the exchange of schedule information. These formats and data procedures are contained within the Standard Schedules Information Manual (SSIM).

[379] The IATA Reservations Interline Message Procedures – Passenger (AIRIMP) is a reference source, which formulates universally agreed communication standards for handling of passenger reservations and interline messages. AIRIMP standards are used in millions of transactions between travel agency and airline systems as well as between airline to airline transmission systems for passenger reservations and interline messages.

[380] IATA, "A look Ahead to 2021, Highlights, Airline Distribution" online: IATA<www.iata.org/whatwedo/airline-distribution/Pages/index.aspx>. IATA claims that, a typical travel shopper visits 22 websites in multiple shopping sessions before booking a trip and that passengers are more likely to own smart phones and tablet devices on which online shopping sessions would be conducted. According to IATA's projections, travel represents the largest category of electronic commerce (e-commerce) of which airline ticket sales are at the forefront. IATA projects that by 2021 a large content of all online direct bookings will be made based on mobile devices and there will also be connected ancillary purchases made through these devices.

[381] An airline "Slot" is the approval and the facility required to access an airport including the full range of services and infrastructure supplied at such an airport, for the arrival and departure of an aircraft on a specific date at a specific time. The lack of capacity in airports had exacerbated the problem of congestion due to limited runway facilities or zoning requirements and a multitude of other environmental issues. Hence, the time periods available for aircraft to arrive and depart from airports get reduced. Particularly in busy airports where large numbers of aircraft arrive and depart, there are a limited number of time slots for aircraft to arrive and depart from such an airport. These time slots available at different airport have to be coordinated in such a manner so that arrival and departure times at one airport will be properly synchronized to ensure that an aircraft departing from one airport into a different time zone does not arrive at a time when such airport is subject to night curfews or flying restrictions, etc. The airport slots therefore have to be coordinated in a manner that operations in one airport are enmeshed in an efficient and coordinated structure which enables these slots to be utilized so that efficient and convenient connections can be made for onward flights at an airport into which an earlier flight arrives.

Guidelines (WSG),[382] is a recognized global standard for policies, principles and procedures of airport slot management.[383]

### 3.19 The New Distribution Capability (NDC)

New Distribution Capability ("NDC") is a recent IATA initiative which enables airline consumers to access and purchase tailor-made airline travel solutions through an interactive web-based platform that is supported and hosted on global distribution systems. The NDC is structured as an industry-wide messaging standard, upon which retailing opportunities can be offered by an airline indirectly through Global Distribution Systems ("GDS") and travel agent channels.[384]

After introducing the NDC initiative to the airline industry and obtaining conditional approval for its operation, IATA recently sought to challenge existing GDSs through its

[382] IATA conducts the Worldwide Slot Conference twice a year which creates an opportunity for airlines worldwide to meet with each other and to review their slot portfolios through which meetings, future schedules of these airlines are agreed and formalized. In this area IATA pursues many initiatives to manage scarce airport capacity consisting of slots to facilitate better coordination and management of the limited slots available around the world at busy airports. The Slot Conference itself which is identified as a working conference sees the participation of almost 1,000 delegates from over 200 airlines representing more than 60 fully coordinated airports. There are 159 fully slot coordinated airports around the world. IATA states that the worldwide slot guidelines provide the global airline industry with a single set of rules and recommended practices for airport slot management and allocation. 50 years after their introduction, these guidelines continue to represent globally accepted best practices due to continuous advancement, update and revision of these guidelines.

[383] IATA says that its main objective is to ensure the slot process creates an opportunity for airlines to acquire, retain and exchange slots necessary to operate at a given airport. Through the allocation of slots, limited airport resources are efficiently used to benefit the greatest number of airport users and travellers.

[384] IATA, Press Release, 49 "IATA Welcome US Dept. of Transportation Final approval of Resolution 787" (7 August 2014) online: IATA<www.iata.org/pressroom/pr/Pages/2014-08-07-01.aspx>.The NDC project of IATA itself has attracted antitrust immunity review of the United States Government where IATA had made certain filings with regard to its New Distribution Capability programme. The NDC is based on Passenger Services Conference Resolution 787, of IATA. The US Department of Transportation (DOT) issued Show Cause Order –Docket –OST-2013-0048 on 21st May 2014, declaring its intention to conditionally approve the said resolution 787 as being in the public interest and subject to any objections to be received. Subsequently US DOT granted final approval to the said resolution subject to the same conditions attached in its Show Cause Order referred to above. The said resolution 787 was made effective by IATA from 7th August 2014. See, US DOT Order, 2014-8-1, dated 6th August 2014. The NDC initiative and the enacting IATA resolution was approved with antitrust immunity by the US DOT with the condition that proper safeguards relating to the privacy of individuals should be built into the standards to be developed under the NDC initiative which standards will require further review and approval by the DOT prior to their implementation.

industry advocacy action, claiming that these contain anti-competitive features limiting customer choice. However, IATA had never complained regarding the large GDS systems that hitherto serviced the air transport industry until its own distribution initiative the-NDC was introduced. This gives rise to the question whether IATA sees existing GDSs as a threat to the market entry of its own NDC programme. Another example is the Pro-Competitive Agreement IATA entered into with engine manufacturer CFM International as reported in an IATA press release of 31st July 2018.[385] IATA had earlier challenged CFM warranty restrictions applicable to third party engine parts and Maintenance Repair and Overhaul (MRO) of CFM manufactured engines as being anti-competitive. The agreement with CFM, made way for third party engine parts manufacturers and MRO organizations to supply parts and MRO services for CFM manufactured engines. It is difficult to ignore the possibility that IATA's zealous advocacy in this instance being inspired by the potential for vast commercial opportunities in licensing and auditing engine parts manufacturers and MRO organizations.

The scope and diversity of IATA products and services described in this chapter will help understand how these are leveraged seamlessly by IATA into its rulemaking structure, in order to secure a predominant position within the contemporary airline industry. How present-day IATA has achieved its contemporary status within the industry through its programmes and initiatives is discussed in the next chapter.

[385] IATA Website, < https://www.iata.org/pressroom/pr/Pages/2018-07-31-01.aspx>.

## Chapter 4 - Metamorphosis and Contemporary Relevance

### 4.1 IATA's relevance to the airline industry

ICAO and government regulators mandate standards and processes to be employed to achieve safety and security and to facilitate many areas of operations relating to air transport. IATA develops specific processes, guidance materials, document templates and other tools for day-to-day use by the airline industry to facilitate compliance with the standards and regulations governing air transport. IATA guidance material and products are incorporated into manuals and guides that are published for sale to the airline industry. These manuals contain best practices, processes and guidelines that are fashioned upon regulatory platforms to be consistent with the requirements imposed by the Annexes of the Chicago Convention and the Standards and Recommended Practices that flow therefrom. Due to their convenience, IATA products have acquired a high level of contemporary recognition in the airline industry and are commonly accepted as industry standards to achieve uniformity in procedures, processes and practices applicable to civil aviation.

Through its numerous programmes and initiatives, IATA has cleverly-devised tools, guides, reference manuals and a host of services for management and training which are deemed essential by the airline industry. IATA products and services obviate the need for airlines to independently develop their own resources or solutions—at great

cost—for operational matters. Were airlines to independently develop their own resources, the inevitable result would be the creation of multiple, diverse schemes that would each require separate regulatory oversight. The absence of consistency in this independent approach would lead to the propagation of piecemeal standards and practices, and would ultimately defeat the imperative objective of uniformity, which is essential in international air transport. Therefore, IATA products and services have become extremely popular amongst airlines, which frequently rely on them to enhance their knowledge of and operational efficiencies in relevant areas.[386]

Product and service offerings of IATA came about due to a paradigm shift in its core business activities. Curiously, IATA's existence now appears to be dependent on its ability to generate funds and to remain relevant to the industry. It achieves these goals through the development of industry solutions, products and service offerings. However, this focus on the commercial pursuits of IATA may not always result in the interests of the airline consumer being given precedence over those of IATA. Whether IATA activities are consistent with its professed mission: to represent, lead and serve the global airline industry towards safe, efficient and sustainable global connectivity for public benefit, is therefore an important question.

[386] ACCC, Determination A90435 *supra* note 274 at 5 "*IATA covers much of its operating costs from selling products and services to member airlines and others in the industry*"

## 4.2 Airline interlining

IATA's contemporary relevance to the airline industry is predicated on interlining.[387] The surviving vestiges of its tariff coordination are justified by airline interlining. The IATA interlining system constitutes an integral part of its Traffic Conferences.[388] The interline system allows passengers the flexibility of changing flights, airlines or the route when travelling on an interline ticket. This means that passengers are not confined to travelling on one airline from their point of origin to their destination, but rather have the flexibility of changing airlines *en route* and of combining journeys on different airlines from their point of origin to their point of destination. A further, significant benefit of interlining is that it allows passengers to purchase tickets by paying in a single currency for multi-sector journeys that involve transportation on several airlines with stopovers in different countries. Passengers deliver their bags to the airline for carriage at the point of origin. When baggage is interlined, passengers do not need to unload or clear their bags at each transit point on the journey, but merely to collect their bags at the final destination. Thus, interlining is essential to facilitate connectivity between different airlines in transporting passengers and cargo from point

[387] *See*, Interlining Tools & Templates Chapter 3, *above*

[388] IATA Passenger Tariff Coordinating Conferences produce and formulate interline-able fares which are categorized as "fully flexible" fares or "promotional fares". The flexible fares are formulated for the business traveller whilst the promotional fares are designed for leisure travellers. The fully flexible fares which are also referred to as 'flex fares' do not generally contain restrictions and a traveller purchasing a flex fare ticket is entitled to change the route, the flight or even the airline before or during the course of the journey on such a ticket. The promotional fares on the other hand contain numerous restrictions to changing dates, airlines or the routing and are priced at lower levels than the flex fares. There are other fares which are identified as apex fares which usually may have some restrictions applicable such as a traveller being compelled to travel during a weekend or a child having to pay 75% of the adult apex fare. Fares could be interlined on a half round trip basis which entails a round trip passenger flying out of the point of origin in one airline and returning to the point of origin on a different airline. Interlining could also occur en route where two or more different airlines are used to get from point of origin to the final destination.

of origin to destination. When a passenger obtains an interline ticket on a selected IATA airline from the point of origin to the destination via an intermediate point, even if the passenger misses the onward connection at the intermediate point, the passenger is nevertheless entitled to be offered onward passage on any IATA member airline either on the same route or on a different route, at no additional cost.

IATA Tariff Conferences agree on air fares for international routes that connect practically every point around the world to which airlines fly. Tariff Conferences agree on full economy fares and business fares which are declared to be in force for a year at a time. These fares are then either continued or are revised annually at future Tariff Conferences. Apart from the fully flexible (flex) business and economy fares, conferences also agree upon 'apex' or 'discounted fares' which have specific conditions attached to them[389] in respect of city pairs on routes which have significant air traffic. IATA multilateral interlining is supported by an accounting system that applies the interline fares based on a weightage that is determined in the *Multilateral Prorate Agreement* ("the MP Agreement"). The MP Agreement contains provisions to determine the portion or percentage of revenue that each airline performing a part of the journey will receive from the fare paid by the passenger.

In the IATA interline system, there is no obligation on any airline to charge passengers the fares agreed in IATA Tariff Conferences. Rather, the interline system requires a

[389] For example, a condition of an Apex fare stipulates that a return ticket must be booked and paid for two weeks in advance and should include at least one Saturday night's stay or a condition that the child fare must be 75% of the Apex fare.

contracting airline (which sells the ticket to the passenger) to pay/settle IATA airlines performing parts of the interlined journey a prorated amount of the IATA tariff applicable for the entire journey, calculated according to the MP Agreement. The multilateral interlining system of IATA is not confined to IATA member airlines. It provides a common multilateral platform which can be accessed by non-IATA member airlines. The MP Agreement[390] is implemented in conjunction with the *Multilateral Interline Traffic Agreement* ("MITA")[391] which is subscribed to by IATA airlines. The MITA is the overarching agreement by which member airlines accept tickets issued by any of the IATA member airlines according to the fares and applicable conditions set by the airline performing the carriage.[392] The interline system also works in conjunction with the resolutions that formulate the terms and conditions of service such as baggage handling, ticketing and common rules for fare construction such as agreed mileages and rules on currency conversion.[393] The multilateral interline system works in collaboration with the IATA Agency programme, whereby IATA accredited travel agents are appointed by member airlines for the sale and issue of air tickets.

The significant advantage of the IATA interline system is the ability for all IATA members participating in the system to interline with any airline at IATA fare levels agreed at Tariff Conferences. The airline issuing an interline ticket is required to pay a

[390] A prorate agreement referred to above is where several airlines performing combined carriage of passengers or cargo agree to divide or share the revenue earned from such carriage according to the proportion or formula based on mileage/distance carried or transported by each participating airline.
[391] "Attachment 'A' to Multilateral Interline Traffic Agreements (MITA)- Resolution PSC (36) 780" in *IATA Passenger Services Conference Resolutions Manual,* 37th ed., (IATA, 2017).
[392] *IATA Interline Traffic Agreement,* art. 2.2, *ibid.*
[393] *IATA Interline Traffic Agreement - Passenger*, *ibid.*

prorated share of the IATA fare (calculated by applying a weightage formula set out in the Agreement) to the airline performing the carriage. However, this does not compel the contracting airline to apply the IATA tariff, but merely to determine its financial obligation towards other airline(s) performing any part of the journey by prorating the published IATA tariff that is applicable for the journey or the relevant portion of the journey.

### 4.3 'Online carriage' as opposed to 'interline carriage'

Distinct from interline air fares, airlines also offer what is referred to as 'online' fares, which are for carriage by a single airline from point of origin to destination. Tickets based on online fares are usually not interchangeable with other airlines, except where special arrangements are made to meet contingencies, such as the sudden cancellation of flights.

### 4.4 Airline alliances

Joint air fares are those agreed to between two or more airlines. Partnerships are also built upon interline and code-share agreements as well as integrated cooperation arrangements allowing regular airlines to expand the scope of their respective networks and the services offered. Tactical and strategic cooperation amongst several partner airlines achieved through complex long-term arrangements are used to coordinate and jointly exploit commercial, operating and marketing opportunities for all partners. These agreements are referred to by the generic term 'airline alliances', and are based on mutual contractual obligations assumed between participating airlines when operating

air services over agreed routes. Such strategic relationships involving foreign airlines are referred to as "global alliances" and cover integrated global networks and international air transportation markets. In such arrangements, the participating alliance members agree on the interchangeability of tickets: that is, to accept passengers on tickets that are issued by other members of the alliance and also mutually cooperate in commercial activities such as coordinating schedules, yield management, joint pricing, purchasing, collective decision making and revenue sharing.[394]

### 4.5 The emergence of airline alliances and the effect on IATA

Interlining does not occur only amongst the IATA members. Interlining occurs amongst non-IATA airlines when they agree—through interlining arrangements—to accept each other's documents for the carriage of passengers, baggage and cargo. Non-IATA interlining is generally referred to as 'Club' or 'bilateral interlining,' since it is based on commercial agreements between two or more airlines. In 'club' or 'bi-lateral' interlining, the revenue is shared amongst the participating airlines based on a wholesale or fixed price for each sector of the journey irrespective of the fare charged to the passenger by the airline issuing the ticket.[395] Airlines alliances interline traffic amongst their members and share facilities that could be collectively offered to passengers. Shared facilities

[394] For a detailed discussion on 'airline alliances' *see*, Paul S. Dempsey & Laurence E Gesell, *Airline Management Strategies for the 21st Century,* 2nd Ed. (Coast Aire Publications, Chandler, Ariz, 2006) Chapter 13, pp. 619-680. Dempsey, identifies the motivating factors for creation of airline alliances to be, (1) the desire to achieve greater economies of scale, scope and density; (2) the desire to reduce costs by consolidating redundant operations; (3) the need to improve revenue by reducing the level of competition wherever possible as markets are liberalized; and (4) the desire to skirt around nationality rules which prohibit multinational ownership and cabotage., *ibid* at p. 20.

[395]It has been observed that club or bilateral interlining, increasingly resorted to in the United States as well as the EU has seen significant growth since the advent of larger airline alliances which offer cheaper or less expensive alternatives than IATA interlining. *See*, Observations noted in the, EU, *Director General's Competition Consultation Paper, preceding the EU Commission Regulation (EEC)* No.1617/93(1) (February 2001).

include common check in services, check in desks, passenger handling and airport lounge facilities. Extensive and far reaching integration of services within airline alliances has led to "Metal Neutral" joint ventures where partners of the alliance are indifferent as to which of them operates the metal(aircraft) when the alliance jointly markets its members' services. In a metal neutral environment individual partners do not derive an economic advantage by booking passengers on their own aircraft or pursue a larger share of the revenue for themselves but behave as a single entity to jointly market and sell each-others' products on the alliance network without regard to which airline is operating the aircraft and collecting revenue. Metal neutral joint ventures allow partner airlines to cooperate in their commercial activities *inter alia*, by coordinating schedules, yield management, joint pricing, purchasing, collective decision making and revenue sharing.[396] These global alliances and metal neutral joint ventures also result in agreements that replicate many attributes of coordination achieved by IATA. Global alliances and metal neutral joint ventures are approved in the United States, on the condition that alliance members withdraw from IATA tariff coordination.[397]

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[396] Marion Hiriart, *Introduction of Metal Neutrality on the Transatlantic Air Market: Antitrust and Regulatory Concerns*, (LLM Thesis, McGill University Institute of Air and Space Law, 2015) [unpublished] at at pages 49, 50 & 62. "Since 1977 three major global alliances or controversially four, if Wings is added, have come into existence. In addition to having geographic market share areas of particular strength and competitive tension due to the composition of their membership, each of the alliances offers extensive services across the transatlantic network. As of 2015 Star Alliance was the oldest global airline alliance counting 15 members including United, Lufthansa and Air Canada. In 2000 SkyTeam was created by a few members and had grown up to 20 members including Air France, KLM, Delta and Alitalia in 2015. Oneworld founded in 1998 included British Airways, American Airlines and Iberia. Global alliances over the transatlantic route covered more than 82% of the transatlantic market". *ibid.* at p. 4 & 45.

[397] Anne Frederique Pothier, *Leading International aviation towards Globalization: the new relationship among carrier alliances, open skies treaties and antitrust immunity* (LLM Thesis, McGill University Institute of Air and Space Law, 1987) [unpublished] at 80. "When alliances were granted antitrust immunity in the US, they were required to withdraw from IATA tariff coordination. Despite the attempt by IATA to convince the US DOT not to impose such a condition on the carriers, the

Membership in global alliances are based on the ability of each member to integrate services and operations with other members of the alliance. Hence, interlining is done only amongst alliance members. Alliance membership itself depends on the size and level of service of each airline. The business models of alliance members have to be comparable allowing efficient enmeshing of services whereby operations of member airlines can be integrated conveniently. This does not usually allow low cost carriers and smaller airlines access to global airline alliances.

Emergence of global airline alliances which procure coordination amongst alliance members have posed several competitive challenges to IATA. However, IATA interlining achieved through its 280-airline member network and non-members who regularly use one or more of IATA's services, provide a comprehensive resource sharing model that cannot be replicated or matched by global airline alliances. Any airline notwithstanding its size or category (whether conventional full-service airline or a low-cost no-frills carrier) is able to interline its services on the IATA interline network. Even members of global airline alliances on occasion interline with the IATA network to offer services to destinations which are not covered by the route network of the alliance. Although airlines which are members of global alliances do not participate in IATA tariff coordination, they nevertheless continue to retain membership in IATA. They also

US DOT underlined that this condition was limited to the prices between the US and the countries that have recognized the concept of competitive pricing and for whom the grant of alliance immunity is a reasonable substitute for IATA tariff conference participation. The immunity requested in the alliance proceedings included broad coverage of price coordination activities between the applicants with respect to internal alliance needs. As such tariff coordination through the IATA conference mechanism was deemed duplicative and unnecessary."

routinely obtain and use numerous products and services offered by IATA in addition to interlining with IATA members as and when necessary.

Although journeys purchased using an airline 'alliance' provide more flexibility to a passenger than an 'online' (single airline) ticket, the features attached to alliance fares are limited to the services offered by the alliance members. Further, the levels of service available from point of origin to destination could vary significantly depending on the frequency and levels of service of the alliance member that is performing the relevant sector of carriage. Thus, IATA interline fares provide better interchangeability and flexibility for passengers compared to online fares (single airline) or fares of airline alliances to many cities around the world, except perhaps the heavily saturated US—EU transatlantic and US—Australia aviation markets.[398]

Although there is no compulsion for member airlines to price tickets at IATA fares levels, in reality, air fares displayed in the systems of member airlines appear to be same as the IATA fares.[399] The IATA interline system does not discriminate as to whether a large or small carrier is involved in the interline arrangement. Opportunities exist for small airlines, as much as for large airlines, to participate in IATA's interline system and to offer passengers carriage from any point of origin to a final destination

[398] US DOT, final Order, 2007-3-23, (30th March 2007) , Dockets, OST-2006-25307 & OST-2006-26404, *supra*, note 279. In its final Order of 30th March 2007, the US DOT following similar conclusions of the EU-DG Competition and the ACCC, concluded that IATA Interline Product does not offer better prices, benefits or conditions (particularly on the US- EU transatlantic and the US-Australia markets) than those provided by airline alliances and as such the further tariff coordination agreements of IATA in such markets did not warrant approval or immunity. This final order was made consequent to Show Cause Order 2006-7-3 dated 5th July 2006. See also EC, *Directorate General for Competition, Discussion Papers leading to Commission Regulation 1459/2006,* (28th September 2000); ACCA, Determination No. A90435, *supra,* note 274.

[399] Observations noted in the, EU, *Director General's Competition Consultation Paper, preceding the EU Commission Regulation (EEC)* No.1617/93(1) (February 2001), *supra,* note 395.

when an airline selling the ticket does not operate services from point of origin to the final destination of a traveller.

IATA interline fares are at times more expensive and less competitive than interline fares of alliances. However, no matter how remote the destination is, or how thin the route (meaning the absence or infrequency of services available on a route), an airline service would nevertheless be available for passengers to fly from the point of origin to destination by interlining on IATA. The network of combined air routes served by IATA's 280 airline members is significantly larger than the collective route network of any one of the existing airline alliances. Interline fares of alliance platforms may present less expensive alternatives in terms of certain types of fares.[400] However, services offered by alliances proliferate in routes with larger volumes of traffic, which leaves routes which do not offer comparable commercial opportunities without adequate services.[401] On these routes, IATA interline fares are the only option available to passengers.

IATA flex-fares (fully flexible tickets) permit passengers to fly on any IATA member airline at any time, or to fly on any reasonable route between two points. Only one IATA flex-fare each for business class and for economy class will exist for a given route, irrespective of the airline a passenger chooses to travel. Hence, there is hardly any competition to IATA flex fares from alliance fares on less popular (thin) routes with

[400] *EU Director General's Competition Consultation Paper, supra,* note 395. Although IATA fully flexible fares enjoy a competitive advantage, the "tourist fares" or "leisure fares" offered by airline alliances are deemed more competitive and significantly lower than IATA "restricted or leisure fares."
[401] *Ibid.*

limited services.[402] Even when global alliances offer flexibility to passengers on certain types of fares, such service is confined to routes which are serviced by alliance members. Notwithstanding the emergence of airline alliances, IATA has as yet maintained operational competitiveness, as it is able to offer airfares that present significant advantages over those of airline alliances. It had been observed that IATA tariffs have a significant influence over fares of individual airlines and that "the fares of airlines tended to increase in price with the increase of IATA prices thereby suggesting that IATA tariffs were being used as a reference price on certain routes."[403] It has also been noted in the EU DG's competition paper that, although actual prices experienced a decrease, the IATA prices on routes had in fact increased during the same period.[404]

## 4.6 The transformation of IATA

Antitrust immunity has been granted in most jurisdictions for Traffic Conferences and tariff setting by IATA on the basis that the public benefits of interlining cannot be secured in the absence of such tariff coordination. That is, regulators tolerate IATA in deference to the benefits of its interline system which is procured only through tariff coordination.[405] IATA contends that its tariffs are used merely to calculate the prorated

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[402] *Ibid.*
[403] *Ibid.*
[404] *Ibid.*
[405] IATA, online; <www.iata.org> IATA concedes that the immunity from competition laws under which its interline system is operating has been scaled back in many parts of the world and therefore suggests the establishment of a convenient multilateral new interline system that meets competition concerns, thereby being able to offer passengers flexibility and convenience of interlining which IATA states is essential to the viability of air the transport industry. IATA states that, in order to respond to future requirements of fare coordination, it has developed a mechanism based on the latest web-based technology, which greatly increases the speed, efficiency and accessibility of tariff coordination. This mechanism is based on an internet-based voting mechanism allowing airlines to propose and agree on changes to flex fares formulae and fare rules without having to meet face to face (E-tariffs) and a market driven interline-able fare

share of revenue payable to airlines performing interlined carriage and are not the actual fares paid by passengers. Notwithstanding IATA's position that airlines can sell tickets at fares lower than its fares, in practice, IATA fares are frequently used as reference fares by many airlines.[406] When airlines have the opportunity to compare costs and levels of service, it is difficult to exclude the possibility of airlines using tariff coordination to agree on anything other than the lowest common denominator to achieve commercial viability. Despite these realities, the IATA interlining system remains as relevant to international air transport today as it was at the formation of IATA in 1945.

Prior to 1978, IATA compelled member airlines to sell tickets only at prices that were determined by its Tariff Conferences. Today, IATA tariffs are applied for the purpose of calculating revenue shares for interlining. Regulatory restrictions have largely targeted IATA tariff coordination, with comparatively less attention focused on rules formulated by IATA's Agency and Services Conferences. The latter conferences formulate a multitude of rules relating to air transport 'services' and governance of 'travel agents'. These rules also contain features which create adverse and inequitable circumstances for airline consumers. The regulatory challenges encountered during the first four decades of IATA impacted its core activity of tariff coordination. However, IATA managed to survive by reinventing itself and changing its goals to offering numerous products and services to the airline industry. Thus, the metamorphosis of IATA is its

which is produced automatically based on carrier agreed flex fares. IATA believes that the new system will guarantee more transparent prices linked to the market whilst offering a cost and time efficient process for worldwide application.

[406] *EU Director General's Competition Consultation Paper*, *supra* note 395.

movement from pure tariff setting to rulemaking, in furtherance of industry initiatives and programmes which support its existence and viability. IATA transformed from a trade association founded to achieve multilateral consensus on airline tariffs to an organization that is no longer reliant on tariff coordination for its existence. Today, IATA is an aggressive supplier of goods and services to the airline industry, which it also regulates through a scheme of quasi rules that are made in Traffic Conferences. IATA procures compliance of its quasi rules by linking them to its vast array of programmes and initiatives offered to the airline industry. Thus, IATA has succeeded in remaining relevant to the contemporary airline industry by offering popular initiatives which are accepted as convenient and useful by the industry. Such IATA initiatives and programmes include: work and study groups, guidance materials, advisory bodies, standard setting committees, market research and analysis, standard forms, contracts templates and training.[407] These programmes have gained increased popularity and acceptance not only among IATA members, but also among non-member airlines.

The emergence of airline alliances and other partnerships has resulted in the competitive offering of airfares and services, the enmeshing of airline schedules, interlining traffic, and the sharing of common facilities. However, the competitive offerings of alliances have not significantly challenged IATA's business model. IATA continues to remain the preferred platform, even for alliance airlines and non-IATA

[407] IATA's numerous products and services, include publications, consultancy services, information technology, computer software, guidance materials for the airline industry, training programs, market research, data dissemination, administrative and management tools, processes and facilitation schemes, revenue management through the Billing and Settlement Plans (BSPs), IATA Clearing House (ICH), training programmes and many more complementary initiatives for the airline industry.

airlines, who regularly resort to using the IATA interlining system and its many products and services offered to its member airlines. The interline network built upon IATA Traffic Conferences is a strong superstructure that cannot be matched or replicated by any single airline or airline alliance.

Conceptually, IATA's tariffs are deemed non-compulsory. Tariff coordination at IATA conferences is not confined to agreement on airfares. Conditions attached to airfares—which include levels of service—also constitute essential elements of tariffs which are agreed at Traffic Conferences. Tariff coordination does not merely influence airfares for international travel, but also impacts common service conditions that are offered on international flights.[408] IATA Tariff Conferences also recommend processes and best practices as 'recommended practices' to be followed by airlines and travel agents. Today, IATA operations are predicated upon initiatives and programmes that cover a wide array of matters pertaining to the airline industry. These initiatives are then inextricably interwoven into the fabric of quasi rules that mandate compliance with standards and recommended practices formulated at Traffic Conferences. IATA's current initiatives and programmes are sustained by these quasi rules, many of which contain mandatory postulates, requiring compliance of members as well as non-members. Therefore, it is undeniable that the existence of quasi rules and recommended practices propagated by IATA have an impact on the consumer.

[408] J McGoldrick, *supra* note 221.

## 4.7 Mismatch between rulemaking and implementation

A mismatch exists between air transport rules made in international Conventions and the implementation of these rules at the grassroots level. Rules governing international air transport in the areas of safety and security are made by ICAO and its technical bodies in the form of *Standards and Recommendation Practices* ("SARPS"). The implementation of SARPS is the responsibility of states. States assume the obligation of implementing SARPS that govern international air transport within their geographical territories. Generally, the involvement of the state and its aeronautical authorities in implementation and compliance takes the form of licensing air transport providers such as airlines and airport operators. However, apart from the functions of licensing, oversight and audit, aeronautical authorities do not ordinarily assist or guide airlines and the industry to implement or follow applicable rules. Thus, a lack of guidance and clear practical processes which connect the rules to their on-ground implementation has created a vacuum between the industry, regulating states and airlines.

## 4.8 IATA as the continuum between regulation and their implementation

IATA has effectively filled this vacuum. Its programmes, training courses, toolkits, guidance material, standard form contracts, templates and other initiatives covering an extensive gamut of airline industry operations are designed to address the gap that exists between rules and their implementation at the grassroots level. The products and services portfolio of IATA are cleverly designed as utility tools to guide and encourage airlines, travel agents and other industry stakeholders to implement rules correctly and

practically in a live environment. Therefore, through its programme design, IATA's initiatives have become extremely popular in the industry. IATA programmes, guidance materials, publications, toolkits, templates and similar resources have acquired an essential character to them, thus cementing IATA's existence and its relevance to the contemporary airline industry.

Guidance materials are published by IATA in user-friendly and easily understood formats, that make their use convenient and efficient for the airline industry personnel who are involved at different levels of the delivery and supply chain. International regulations, formulated by the ICAO for implementation at national level, contain legal stipulations that are not always easily decipherable by industry personnel. IATA, on the other hand, has collated, arranged and presented these regulations in the form of manuals in hard copy, electronic formats and web-based applications that are very convenient user tools for airline industry personnel. IATA industry programmes and initiatives are robust and cleverly tailored to meet the needs of the current airline industry. They enjoy wide acceptance and use.

## 4.9 IATA - a dynamic regulator in the airline industry

ICAO is the legitimate body authorized by states under the Chicago Convention to make rules applicable to international air transport. Rules made by ICAO, once they are subject to due process in their respective territories, are given effect and enforced within states. The constraints and fetters of bureaucracy burdening the ICAO rule making process do not hinder IATA Traffic Conferences. In comparison to ICAO, IATA is a

dynamic organization which reacts expeditiously to changes in the airline industry; prescribing appropriate guidelines and making soft law to meet the evolving needs of the industry. Even in the absence of national rules, airlines and travel agents give effect to IATA resolutions through their membership and/or contractual obligations *vis a vis* IATA. IATA resolutions and rules are implemented as contractual obligations assumed by member airlines and accredited travel agents. Airlines and agents in turn perpetuate and apply IATA rules in their dealings with the airline consumer. Other than features that give rise to contractual disadvantages and negative implications to consumers, airlines and agents, IATA resolutions do not contain the same enforcement attributes that are present in municipal and national regulations or "hard law". However, due to their relevance and general acceptance within the airline industry the IATA soft laws often serve as pilot schemes for the formulation of national and international rules governing air transport.

IATA acts prospectively by anticipating changes in the airline industry and by adopting appropriate responses through its internal regulatory mechanism. By comparison, law making in the ICAO is mostly reactionary. Rules made by ICAO go through a cumbersome negotiating and legislative process prior to being promulgated.[409] The delays and bureaucracy that burden the ICAO inevitably delays promulgation of

[409] Adoption of international standards and recommended practices as rules applicable to international civil air transport in the Annexes to the Chicago Convention require a two-thirds majority vote of all members of the ICAO Council at a meeting called for that purpose and they come into force unless disapproved by a majority of ICAO contracting states. *See*, Michael Milde, *International Air Law and ICAO: Essential Air & Space Law* (Eleven International Publishing, 2008) at 158. Dr. Micheal Milde notes that, "in the history of ICAO such a collective veto such a collective has never taken place; this is a reflection of the fact the adoption and amendment of the standards is always the result of extensive consultation and dialogue with States through the regional and divisional meetings and consultation through the exchange of letters and questionnaires conducted by the Air Navigation Commission and the Council itself".

essential rules which are required as fast responses to an industry which evolves swiftly. Thus, IATA plays a dynamic role in the air transport industry through its creation of soft laws/resolutions passed in its Traffic Conferences. IATA resolutions address a comprehensive span of issues covering practically every aspect of the airline industry. Hence, IATA is often seen as the leader of regulatory initiatives for the airline industry, while ICAO often appears to be the follower. IATA also plays a complementary role in law making as its soft law and resolutions greatly influence the regulations that are eventually promulgated through the ICAO and given effect by nation states.[410] In many instances, rules made by ICAO reflect or contain features of an IATA initiative or pilot programme that is already implemented among its member airlines.[411] Thus, it is apparent that IATA is the *de facto* forerunner of many regulatory initiatives in civil aviation, whereas ICAO has often lagged behind in making rules.[412]

As such, there is no doubt that the contemporary IATA and its quasi regulations perform the essential and complementary roles of fostering civil aviation and regulating

[410] The IATA Programmes and Initiatives described in detail in Chapter 3 will aptly demonstrate the extremely wide scope of coverage achieved by IATA regulations in numerous facets and spheres of the airline industry. *Above,* Chapter 3.

[411] For example, ICAO and the international aviation community have been grappling for many years to reach consensus for the implementation of common rules relating to carbon mitigation programmes and market-based measures for carbon offsetting for civil air transport, without an effective and universally accepted set of rules yet being finalized other than agreeing to a broad set of principles at the 39th Assembly in 2016. IATA on the other hand for several years has been implementing its industry initiatives through members based on voluntary commitments and mutual cooperation towards carbon offsetting under its Environmental Initiatives. *See,* generally *Environmental Initiatives of IATA* and in particular the Carbon Offset Programmes discussed in Chapter 3, *IATA Programmes and Initiatives*, *supra.*

[412] S. Ralph Cohen, "Confessions of a former IATA man" *supra* note 212 at 611. "Yet I am inclined to think today that some of IATA's finest moments have occurred in its technical work. It was not always easy to give this work its due. For one thing much of it could be successful only if it went unpublicized, i.e. only if some other agency with real executive power (the government and airport administration or ICAO itself) could be persuaded to adopt an IATA proposal as its own bright idea. One of the troubles with universality is the tendency of man to think in terms of himself, his family or his country. It is a good story in Britain or America or Italy if IATA endorses a British, American or Italian device or idea."

the airline industry. While IATA resolutions are greatly beneficial to the airline industry, an important question remains: whether they always ensure the greater good of the public and the aviation consumer?

## 4.10 Historical justifications and contemporary relevance

The historical justification of IATA was predicated on the need to have a tariff coordinating mechanism. Tariff coordination is viewed with disfavour today, particularly in developed economies that have advanced consumer protection and competition laws. In countries where state funded or subsidized airlines operate, IATA coordinated tariffs remain prevalent and regularly followed. However, in many countries, the historical justification of IATA tariff coordination is no longer deemed relevant or acceptable.

Having originally established itself for the purpose of coordinating and fixing airline tariffs, IATA gradually moved into setting standards for air transport services and travel agent administration. The coordinating platform employed to formulate airline tariffs was also used to formulate service standards and to make rules for agent administration. Today, IATA airfares are mostly applied for interlining on routes which do not have competing non-IATA airline operators or alliances offering competitive fares. However, IATA resolutions on service standards and agency administration remain the prevalent standards and rules that are regularly implemented by the airline industry.

The genus of tariff rules and service standards of IATA are entirely based on its Traffic Conferences. IATA's regulatory structure cannot exist in a vacuum and is wholly dependent on the existence and continuation of its Traffic Conferences. Irrespective of the form of conference or coordination that the IATA relies upon,[413] it is an inescapable truth that no resolutions can be made in the absence of continued coordination of 'tariffs', 'services' and 'agency' in its conferences. Therefore, products and services that are offered by IATA derive their authority and legitimacy only from its regulatory structure, the genus of which is the IATA Traffic Conferences. Most experts and officials of IATA contend that, at present, IATA tariffs are non-mandatory. If this is so, the relevant question is: why does IATA still devote a significant amount of time, effort and resources to continue holding Tariff Conferences and to propagate rules when it knows that such rules are not mandatory for the industry? Clearly, IATA would not expend large sums of money on maintaining its Traffic Conference structure and tariff coordinating schemes unless it had a tangible reason and expected a benefit for doing so.

### 4.11 Traffic conferences – IATA's grundnorm

In the absence of tariff coordination, IATA would not have the superstructure and network which allows it to promulgate rules and standards. Therefore, the continuation of Traffic Conferences is imperative for IATA to maintain the legitimacy needed to

[413] These traffic conferences have now evolved from the traditional face to face conference meetings to online voting and adoption of rules and standards then adopted by airline members as the governing rules.

justify its current business model and the multitude of product and service offerings it relies upon.

If IATA tariffs are not regularly followed by member airlines, and if alliances rely on their own pricing structures, what benefit or rationale would remain to support continued tariff coordination through IATA? This leads to the conclusion that, absent its tariff coordination system which provides the essential platform to agree and formulate airline tariffs and connected rules, IATA could lose its substratum. Undoubtedly, the grundnorm of IATA is its Traffic Conference mechanism, without which IATA and its rules would cease to derive legitimacy. In the absence of legitimacy, IATA's present-day activities—which it continues to engage in under the guise of being a non-governmental organization acting upon authority that is purported to have been delegated by states—would disappear. When IATA's principal function of tariff coordination (for which it was created) ceases to be relevant, what further legitimacy could be accorded to IATA to further perpetuate its pseudo tariff coordination and the underlying quasi regulations that arise from it? One conclusion is clear. IATA is now riding upon tariff coordination, that was established with the acquiescence and support of governments that lent it historical legitimacy, to justify its current activities in the avatar of a transnational business corporation. Relying on its traditional role of promulgating tariffs and operational standards for the airline industry, IATA pursues a collateral (albeit, supervening) commercial objective of supplying products and services to the airline industry. Thus, IATA is a supplier of products and services to an industry

which it also purports to regulate through rules, standards and processes that are devised to promote and preserve its predominance and monopolistic commercial interests.

### 4.12 Is IATA a business or a non-profit organization?

Is IATA a commercial organization acting in pursuit of profits, or a benevolent organization merely pursuing the interests of it member airlines? At its advent, IATA was mainly funded through membership subscriptions and contributions. In addition, IATA generated significant revenue from its enforcement mechanism: levying fines on members who violated agreed tariffs and resolutions. There is a paucity of information about IATA's funding and financial accounting, and this is troubling. There is no official information available either through any national legislature, regulatory body or the IATA website that demonstrates how IATA funds itself. That is, other than general and ambiguous statements, there is no information available in the public domain that explains how much money IATA earns and how much of these earnings are expended upon programmes, initiatives and work that is performed for the air transport industry.

### 4.13 Does IATA make a profit?

There is no record indicating whether there is a surplus or deficit in the IATA income after it meets expenses required for its work programmes. However, the limited information available points to the fact that IATA generates significant income from its

numerous initiatives, products and services that it provides to the airline industry. IATA acknowledges that its programmes and initiatives are funded primarily from monies generated through its commercial activities.[414] If membership dues have not been raised since 2009; as stated by Tony Tyler (IATA's former Director General) at the IATA AGM in Doha, Qatar in June 2014, then it seems clear that, in the preceding 5 years, IATA had no need to rely on membership subscriptions to fund its expanding array of initiatives and activities. This leads to the conclusion that IATA programmes and initiatives provided to the airline industry had been funded exclusively through its commercial activities since the year 2009. Hence, it would be prudent to assume that the commercial activities of IATA are pursued for reasons beyond the mere objective of generating funds required to meet expenditure for these programmes and initiatives. Further, it would not be unreasonable to assume that IATA generates surplus funds from its commercial activities of supplying products and services to the airline industry.

### 4.14 How are IATA profits applied?

One question that arises from this analysis is: how does IATA expend its surplus revenue and in what manner are surplus funds applied after it meets expenses? Several questions also arise in relation to profits which appear to be generated by IATA. Does IATA distribute profit in the manner of a normal corporation? And, if it does so, who are the persons/entities that are entitled to benefit from such profits or dividends?

[414] IATA, "Tony Tyler's State of IATA" *Speech delivered at IATA Annual General Meeting* (2 June 2014), online: IATA <www.iata.org>. IATA Website, *supra.* IATA's Director General, Tony Tyler states that "membership dues collected are no longer sufficient to fund the programmes and initiatives of IATA. The gap is filled with surplus generated from IATA commercial activities. Membership dues have not been raised since 2009."

Further, does IATA distribute surplus income over expenses (profits) to its members? There is no evidence indicating that IATA follows this practice. Thus, if IATA generates surplus income, does it properly account to any revenue authority in any state, or pay taxes in respect of surplus income or profits generated? Again, no evidence currently exists of published accounts of an IATA member reported to a state authority that shows dividends or distributions received from an IATA surplus. What then does IATA do with its profits? To which state authority or fiscal regulator would IATA be bound to report its income and profits? And, lastly, in the absence of formal financial reporting and public disclosure of financial information, can IATA (as a profit generator and rule making body) be accorded continued legitimacy?

### 4.15 Absence of financial reporting and fiscal accountability

In which jurisdiction does fiscal accountability arise for IATA's revenue and profits generated from supplying products and services to the airline industry? As described above, the commercial activities of IATA are carried out with the concurrence or acquiescence of nation states. As a public utility organization that is engaged in providing products and services directly linked to air transportation, surely IATA should be required to disclose and disseminate its revenue, expenditure, profits, and to report the application of profits, if any? Further, would it not be incumbent upon IATA to make this information publicly available? What justification can be relied upon by IATA to preserve confidentiality of this essential information and its continued non-disclosure of its internal financial structure? In the absence of adequate fiscal and

regulatory oversight, is there not a danger that IATA's professed objective—being a trade association—be compromised by its collateral conduct of pursuing profit? Would not the interests of the consumer be adversely affected by this conduct? Would not the likelihood be that IATA resolutions are structured in line with the predominant objective of generating profits, at the expense of the welfare of airline consumers? As an organization relying on commercial activity for its continued operation, would not IATA naturally be inclined to serve its own interests over those of the airline consumer?

### 4.16 Can IATA's professed regulatory intent be reconciled with its commercial objectives?

The concerns identified in the section above assume extreme significance in the modern-day context, where IATA's primary role has been transformed to that of a robust supplier of goods and services to the airline industry. IATA's products and services are designed as facilitation tools that procure compliance of IATA's own regulations. IATA products and services are thus intended to serve as the means by which compliance of its own regulations are achieved. As a regulator, IATA prescribes rules for its 'Regulatees' (members, travel agents and consumers); professedly to ensure compliance with standards that are required for safe, economic and efficient operations of civil air transport. However, in its *alter ego*, IATA is a dynamic enterprise supplying products and services to the same captive Regulatees, as part of a commercial scheme which collaterally sustains IATA. It is the author's view that enhanced oversight of IATA is imperative to ensure that a proper balance is maintained between the diverse interests of industry stakeholders, including the consumer. At the very least, disclosure

of information with regard to IATA revenues should be made available in the public domain, and this information should include its income, expenditure and profits. This financial disclosure is essential to ensure the continued legitimacy of IATA as a rule maker for the industry.

### 4.17 The need for national regulatory supervision and oversight

The difficulty in determining fiscal and financial regulatory oversight of IATA arises from the status of IATA as an organization composed of airline members. IATA has been conferred with corporate personality under the laws of Canada, where its headquarters is situated. IATA also has a permanent office in Geneva[415] and several regional offices in other countries.[416] Under Canadian law, IATA is "a Special Act Corporation" without share capital,[417] which comes within the administrative authority of the Minister of Industries.[418] Thus, the governing statute[419] recognizes that a not-for

[415] *Articles of Association, supra,* note 29, art. 8(h) of mandates that the Board, (Executive Committee of IATA) "Shall establish subsidiary corporations, branches regional and other offices of IATA anywhere in the world as it considers appropriate."

[416] Online: IATA,<http://www.iata.org/about/worldwide/pages/index.aspx>, IATA has 54 offices in 53 countries. IATA's headquarters are in Montreal, Canada and its Executive Headquarters is in Geneva, Switzerland. IATA has major regional offices in Beijing (China and North Asia), Singapore (Asia Pacific), Amman (Africa & Middle East), Madrid (Europe) and Miami (Americas).

[417] *Canada Not -for Profit Corporations Act,* SC 2009, c 23., s. 4. (Section 4, of the *Canada Not for Profit Corporations Act,* stipulates its purpose "to allow the incorporation or continuance of bodies corporate as corporations without share capital, including certain bodies corporate incorporated or continued under various other Acts of Parliament, for the purpose of carrying on legal activities and to impose obligations on certain bodies corporate without share capital incorporated by a Special Act of Parliament").

[418] *Ibid,* Canada Federal Regulations SI/2011-60, – Designating the Minister of Industries for the purpose of *Canada Not-for Profit Corporations Act*, *ibid.*

[419] *Canada Not for Profit Corporations Act,* s. 3(1). This section is made applicable to, "every corporation and to the extent provided in its Part 19, to bodies corporate without share capital incorporated by Special Act of Parliament". *ibid.* Formerly, the statute which applied to bodies incorporated by Special Acts of the Canadian Parliament were governed under the provisions contained in Part III, of the *Canada Corporations Act*, RSC, , C -32, which was repealed and replaced with provisions of *Canada Not -for Profit Corporations Act* SC 2009, C 23. (effective 1st October 2011).

profit corporation (such as IATA) may exercise extra-territorial capacity,[420] while also prohibiting activities or exercise of any power contrary to its articles.[421] As a registered corporation,[422] several provisions[423] of the *Canada Not for Profit Corporations Act* apply to IATA, including the obligation to send annual returns within specified periods to the director.[424] Information in the official government website shows that IATA made annual filings for the years of 2016 and 2017. However, the annual returns filed by IATA are not available to be viewed on the government website.[425] The provisions in the *Canada Not for Profit Corporation Act* pertaining to the maintenance, dissemination

[420] *Canada Not for Profit Corporations Act*, s. 16(3) "Extraterritorial Capacity" means the "the capacity to carry on its activities, conduct its affairs and exercise its powers in a jurisdiction outside Canada to the extent that the laws of that jurisdictions permit."

[421] *Canada Not for Profit Corporations Act*, s.17 (2).

[422] IATA's registration in the Canada Corporations Website, is depicted a "active" under Corporation Number 046311-6 and Business Number 107510570RC0001.

[423] *Canada Not for Profit Corporations Act S*s. 294 make several provisions contained in *Not-for Profit Corporations Act*, viz., s. 160(1) -regarding convening of a special meeting at any time, s. 168(1) - calling of meeting by court, s. 212 -amendment of charter and rules relating to internal affairs, ss. 221-223 - liquidations and dissolutions and Section 278-annual returns, applicable to bodies incorporated by Special Acts of Parliament.

[424] Director is an individual appointed by the Minister under Section 281., to supervise and perform specified duties under the *Canada Not-for Profit Corporations Act.*

[425] In the course of conducting research the author directed several queries by telephone and email to IATA as well the Corporations Canada to ascertain the legal and corporate status of IATA under Canadian law. The queries made to IATA went unanswered whilst the responses sent by Corporations Canada appear to be vague and unclear. More importantly the answers provided by the government officials are indicative of a total misconception about IATA's status and its administrative responsibilities and accountability under Canadian law. For example, relying upon the statutory provisions in the relevant statue which makes it abundantly clear that IATA is a in fact a Special Act Corporation to which several provisions of the *Canada Not-for Profit Corporations Act* applies, specific queries were addressed through the Corporations Canada's web inquiry portal. These queries were specifically, *Is IATA deemed a soliciting corporation*? *Has IATA applied or been granted exemption from financial disclosure - under Part II Section 173 of the Canada Not for Profit Corporations Act?*
The responses received in respect of these queries were – "our records indicate that International Air Transport Association is governed by a Special Act of Parliament. Please note that you can only request copies of corporate documents online for corporations governed by the Canada Not-for-Profit Corporations Act, or the Canada Business Corporations Act."
Further clarification was then sought by querying, *"Whether the International Air Transport Association (IATA) had been listed by the Minister, in the report required under Section 295(1) of the Canada Not-for Profit Corporations Act., to be laid before Parliament? (list of bodies incorporated by Special Acts of Parliament and later continued under Section 212 thereof). If so does Part 19 of the Canada Not-for Profit Corporations Act applies to IATA?*
The answers received stated that - "Part 19 of the Canada Not-for-profit Act does not apply to this corporation since this corporation is currently under the Special Act of Parliament Act. Unfortunately, the only information we have on file for a Special Act of Parliament is the basic information, such as the office address, the board of directors, their annual return filings, etc. Therefore, we don't have information on whether this organization has been listed by the Minister or any information on their operations." vide, email exchange between author and the Corporations Canada dated 23rd & 26th April 2018.

and disclosure of records and financial information require that members and directors of not for profit corporations be provided with that information. However, these statutory provisions do not appear to support the objective of placing such information in the public domain.

There is no evidence that any of the profits made by IATA have been distributed to its members.[426] There is also no record on the IATA website—or anywhere in the public domain—to indicate that the income of IATA, or the income of any of its branch or regional offices, is reported to any national fiscal authority. Similarly, no information is available in terms of whether IATA subsidiaries or regional offices have paid income or other taxes to any national revenue authority. In Canada, IATA will not qualify to be treated as a 'non-profit organization' under the *Excise Tax Act*[427] or the *Income Tax Act of Canada*.[428] In most countries, there are consumer taxes applicable to the supply of goods

[426] *Canada Not-for Profit Corporations Act*, s. 34 prohibits any profits or accretions on property being distributed to the members or directors or officers except in furtherance of its activities or as otherwise permitted under the Act. There is also no evidence of IATA having applied and obtained dispensation from complying with this postulate or any other provisions of this *Act*, *ibid.*

[427] *Excise Tax Act (ETA)* RSC 1985-c. E-15. "An entity may carry on an income-generating activity and still qualify as a non-profit corporation. To so qualify, the income-generating activity must be carried on, and the resulting income must be used by the entity, to achieve its declared non-profit objectives. However, an entity is considered as not operated solely for non-profit purposes when its principal activity is the carrying on of a commercial activity indicating that it is not operated in a non-profit manner, as a) it is a trade or business that is operated in a normal commercial manner; b) its goods or services are not restricted to members and their guests; c) it is operated on a profit basis rather than a cost-recovery basis; or d) it is operated in competition with taxable entities carrying on the same trade or business. In certain cases, an entity may earn income in excess of its expenditures and still qualify as a non-profit organization. The excess may result from the activity for which it was organized or from some other activity. However, if a material part of the excess is accumulated each year and the balance of accumulated excess at any time is greater than the entity's reasonable needs to carry on its non-profit activities, profit will be deemed to be one of the purposes for which the entity is operated. If the balance accumulated is excessive or an annual excess is regularly accumulated, it may indicate that the entity's aims are two-fold: to earn profits and to carry out its non-profit purposes. In such a case, the "operated solely" requirement in subsection 123(1) would not be met". See, Determination of whether an entity is a "non-profit organization" for purposes of the *Excise Tax Act (ETA)*, GST/HST Policy Statement P-215, Decision issued, September 16th 1998 Effective January 1st 1991, Legislative reference, *ETA,* ss. 123(1) & 259(1), National Coding System File No. 11925-1.

[428] *Income Tax Act (ITA)* RSC 1985 c-1. "Members' groups are usually formed exclusively to further their own interests, and therefore lack the necessary element of altruism required to be charitable at law. Their direct benefits are tied

and services such as value-added taxes, goods and services taxes, etc. IATA products are sold online and through the internet. However, there is no evidence of goods and services taxes or consumption taxes being charged for products and services sold by IATA for settlement of tax to any national fiscal authority.[429]

How does Canada, as the state that granted corporate status to IATA, feature in this equation? What is the scope of authority exercised by Canadian regulators consequent to having granted corporate status to IATA through an Act of Parliament?[430] Does Canada have any international obligations to exercise extended supervisory or administrative oversight and control over IATA and its activities?

Both the IATA *Act of Incorporation* and the *Canada Not-for Profit Corporations Act* recognize IATA's "qualified extraterritorial capacity."[431] The qualification is that IATA's functions, activities and powers (when exercised outside Canada) are subject to the *lex loci*, that is, the law of the land in which such activities are carried out. However, if the *locus* of a transaction is indeterminable nor fixed, as is the case for most IATA online

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primarily to membership and are available only to members." - Policy statement, CPS-016, issued under the Income Tax Act (ITA), Effective September 7, 2000.

[429] The author made several purchases of IATA Manuals containing its passenger and cargo resolutions in the course of research being conducted for this thesis. These purchases were made online from Montreal, Canada as well as Colombo Sri Lanka. In both these jurisdictions from where payments were made for the IATA products purchased by the author, which are deemed as the *locus* where IATA' income arose from the sale, the nature of the products sold by IATA would be subject to consumption taxes (Goods & Service Taxes/Provincial Services Taxes and Value Added Taxes) which IATA would normally be obliged to collect from the purchaser and remit to the relevant revenue authority. However, in all of the purchases made by the author no such taxes (GST/PST or VAT) was charged by IATA the only additional charge being shipping costs recovered in addition to the purchase price of the products sold by IATA.

[430] *Act of Incorporation,* ss. 2 & 9 *supra* note 27. s. 9 of the Act of Incorporation stipulates that "the Association may exercise its functions throughout Canada or elsewhere and meetings of the Association and of the Executive Committee and any other committees of the Association may be held at any place other than the head office of the Association and either within or without Canada."

[431] *Canada Not for Profit Corporations Act. supra*, note 27, s. 16(3) , i.e., the "*the capacity to carry on activities, conduct affairs and exercise powers in a jurisdiction outside Canada to the extent that the laws of that jurisdictions permit.*"

sales, should a residual national legal regime apply? And, if so, which state should assume this oversight responsibility? In reality, Canada, as the incorporating state which maintains a continuing statutory and regulatory nexus with IATA would be the most logical choice to fill this vacuum. However, can the function of 'residuary regulator'—to make IATA accountable for its worldwide activities—be imposed on Canada? And, if so, under which principle of law can this responsibility be invoked?

IATA is an organization which makes rules related to the airline industry that affect individuals and entities in far reaching corners of the world. IATA's rules and resolutions derive legitimacy from its *Act of Incorporation*, which is a statute promulgated by the Canadian legislature. It is the author's view that the fact of creating IATA as a corporate entity, by an act of constitutional legislative authority, in turn imposes certain concomitant obligations on Canada to exercise a minimum level of regulatory oversight in relation IATA's activities.[432]

IATA's transactions and commercial activities involve private individuals and corporations. Hence, they would not ordinarily give rise to a determination of rights within the realm of public law. Therefore, Canada's regulatory edict over IATA would be confined in scope to those matters specified in the governing national statues. Any attempt at regulatory/oversight that ventures beyond that specific regulatory mandate could be challenged as *ultra vires*. For effective oversight of IATA to be achieved, it is

[432] The authors' recommendation with regard to operational and fiscal oversight regulatory responsibilities of Canada and other national regulators *vis a vis* IATA, are discussed in a following chapter of this theses titled, *Filling the Regulatory Void and Recommendations*, *See*, Chapter 8, *Infra.*

imperative that regulatory oversight of IATA be mainly exercised by national regulatory authorities in each country. Regulatory oversight at the national level could be supplemented by the supervening regulatory oversight of IATA by Canadian national regulators and fiscal authorities. This could, in turn, ensure that any oversight lacunae of IATA activities are captured and duly addressed, which in turn should obviate any inequity resulting to the airline consumer.

## Chapter 5 - Objectionable Attributes

### 5.1 Objectionable attributes of current IATA activities

The attributes and activities of IATA which are commonly criticized as inconsistent with universally accepted norms of good governance can be organized into several categories. This chapter will address those attributes of IATA which conflict with the interests of the airline consumer. Specific characteristics that are contained in resolutions formulated at 'passenger services' and 'passenger agency' Conferences which are incompatible with consumer interests, are discussed in detail in chapters 6 and 7 respectively.

### 5.2 Inherent defects in resolution procedure

Rules prescribing standards and recommended practices for the airline industry are formulated as resolutions of IATA Traffic Conferences.[433] Traffic Conferences follow a specific procedure to formulate rules by way of resolutions. The general body of rules made by IATA for the industry consists of several thousand resolutions that relate to air fares, airline service conditions and travel agency matters. These rules do not only apply to IATA members, but also affect third parties and the airline consumer.

The procedures of IATA Traffic Conferences are often criticized as undemocratic and inconsistent with best practices of procedural due process. Historically, decisions of Traffic Conferences were known to have been motivated by expediency to achieve

[433] *See,* Chapter 1, "Legislative Structure of IATA" *above.* The rules pertaining to IATA' internal management and governance are contained in its *Act of Incorporation*, *Articles of Association, and Rules & Regulations of the Board of Governance*. Traffic conferences of IATA on the other hand are the rule making organs which prescribe rules for external governance on airline industry matters which rules are applicable to members, non- members and consumers.

hurried consensus within a limited time.[434] In his comment on the first 20 years of Traffic Conferences, Ralph Cohen observed that:

> [T]raffic conferences are an area where airlines operate with the least scientific certainty beset by most intangibles and judgements are made on the basis of forecast opinion rather than demonstrable fact where the only way to proceed is by compromise.[435][….] Airlines have different points of view and face diverse operational circumstances before conferences. However, at conferences they are required to function by reconciliation and compromise… They will reach compromise based on different aspirations and relying upon varying sets of data where the content of data relied upon may be of different degrees of sophistication. Hence, reaching consensus is an essentially laborious task where all these divergent circumstances are reduced to an acceptable and general set of facts and assumptions.[436]

Traffic Conference procedure has undergone drastic changes in recent years.[437] However, in spite of these changes, airline executives who meet or participate through online procedures to formulate resolutions, still find it challenging to achieve consensus, that govern practically all affairs of the airline industry. Even though significant changes have been made to rulemaking procedures, one cannot disagree with Cohen's observation that expediency of achieving compromise[438] often overrides

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[434] Cohen, "Confessions of a former IATA Man" *supra* note 212 at 610 -612. "Too often the compromise agreement is not a point in the logical development of an argument, but rather the point at which the hotel can no longer provide space for the conference. And, too often, the really important issues are decided by exhaustion, by the pressure, actual or artificially induced, of a deadline which may have nothing to do with the case in point; too many conferences are ended without adequate consideration having been given to the consequences or implications of a decision."

[435] *Ibid* at 610.

[436] *Ibid* at 614 "It is both possible and proper for airlines to have quite different points of view on matters before a conference. Each of them however will reach these positions on the basis of different aspirations, different degrees of optimism and different sets of data, some more complete than others. Much, perhaps too much, of a conferences time can be spent in trying to reduce all of these to a single, generally accepted set of facts, or at least assumptions. Sometimes this never happens at all…. The information needs of modern airline management are so great that no one airline can really hope to keep up with them all. Furthermore, information once established must be programmed in order to make consideration and decisions as efficient as possible".

[437] *See*, *above* Chapter 2 *Regulatory Challenges, catalyst to internal reforms*.

[438] Cohen, "Confessions of a former IATA Man" *supra* note 212 . "Albert Plesman once defined compromise by saying "there are times when we cannot agree so we say: alright we will do it wrong for six months. He was right, and IATA is often criticized for doing it wrong. But critics often forget that it may be better to do something which is wrong by many measures than not to be able to do it at all…." When one is part of an IATA conference one can be so caught up in the drama of achieving agreement between 100 harassed airlines that any agreed result, however tentative or incomplete, becomes spectacular and even miraculous. Yet accumulation over the years of many miracles of this sort can produce

the demands of scientific and detailed analysis in IATA resolutions. In the current context, it seems inevitable that the interests of member airlines and the commercial objectives of IATA would be preferred over those of travel agents and consumers. Further, the absence of consumer representatives at IATA Traffic Conferences has resulted in a discernible lack of consumer perspectives in resolutions and rules adopted. Airline representatives at Traffic Conferences will likely be preoccupied with potential implications of proposed regulations for their airlines. Given the commercial motivations of airline representatives, one can see that the lack of advocacy for consumer interests in IATA's rulemaking process is not merely a reasonable assumption, but a defensible conclusion. In such circumstances, resolutions of Traffic Conferences would naturally be weighted towards protecting member interests, thereby subordinating and diminishing the other, legitimate interests of the airline consumer. Industry trade associations such as IATA do not always pursue or act to advance the interests of consumers. They instead focus on the political, operational and economic interests of their members. Consumer perspectives therefore become collateral objectives and ancillary outcomes of predominant member interests of such industry trade associations.

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very lopsided results, and it is only by standing off at a distance that one can get an accurate idea of how far, and in what direction, the tower of Pisa is actually leaning", at 611and 612.

## 5.3 Nature of resolutions

Shortcomings and procedural issues in rulemaking at early Traffic Conferences included: their tendency to legislate down to every detail,[439] an overemphasis on uniformity,[440] and extreme legalism.[441] Notwithstanding the numerous changes that have been made to Traffic Conference procedures in the past five decades, the same shortcomings appear to burden IATA's rule making process today.[442] Another notable process concern is the absence of any internal mechanism within IATA for *ex post facto* review of Traffic Conference resolutions.

## 5.4 Absence of mechanisms for ex-post facto review

IATA resolutions are scrutinized by regulatory authorities that have a mandate to review and approve tariffs. In its first four decades of tariff setting, IATA encountered little or no regulatory intervention, except in the USA.[443] Presently, IATA activities are subject to scrutiny and review mainly by competition regulators in countries with sophisticated antitrust or competition law regimes. Except when aggrieved consumers

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[439] Cohen, "Confessions of a former IATA Man" *supra* note 212. "Conference resolutions are not merely summaries of agreements reached between carriers; they are drafted, enacted and regarded as explicit laws in which the undotted "i" and the crossed "t" may have as much significance as the basic intent of the resolution...There have been many times when a resolution has not been completely explicit, when the conferences have not anticipated all its implications, or when points have been deliberately left obscure in order to get some kind of agreement on paper. As the conferences presently operate, these gaps cannot be filled, or conflicts clarified until the growth of a further conference, except through the process of an enforcement tribunal in which some carrier must be put in the dock to defend itself against charges, and at some considerable hazard and costs". at pages 614 and 615.

[440] *Ibid.* "Thus, if one airline wishes to try a new type of fare or a variation in service, it must have the *a priori* agreement of all other airlines concerned before, rather than after its case is proven. Of course, if the new idea is adopted and proves a failure, not just one airline but all the carriers concerned, will have suffered. If Airline A desires, for example, to use its aircraft interchangeably on a wide variety of routes, other airlines with more local interests are under pressure to mould their services in the same pattern, regardless of whether this really suits local needs and market conditions, and regardless of whether the diversity will do any real harm to airline A". at page 614.

[441] *Ibid* at 614 & 615.

[442] *See,* generally, the passenger services and agency resolutions discussed *below* in Chapters 6 and 7.

[443] *See above, Legislative Authority and Regulatory History,* Chapter 2.

or travel agents challenge IATA resolutions before courts and excepting review under the limited regulatory contexts referred to above, there is no internal mechanism within the IATA rules for *ex post facto* review of its resolutions. Thus, consumers and third parties that are affected by IATA resolutions have no voice to object to, or maintain involvement in, the process of its rulemaking. Equally, there is also no internal mechanism within IATA by which consumers or third parties affected by its resolutions may escalate a grievance or seek redress from the IATA.[444] Thus, one can see that the IATA rules that affect consumers are unjust on two fronts. Consumers affected by IATA resolutions are left with the sole option of seeking redress from courts: an option that requires a party to invoke a lengthy judicial process and incur prohibitive costs.

### 5.5 Absence of consumer participation in rulemaking or review.

From 1945 onwards, IATA agreements and resolutions were required to be filed with the Civil Aeronautics Board (CAB). After 1985, they had to be filed with the United States Department of Transportation. Mainly, US regulators examined whether the IATA resolutions in general—and tariffs in particular—were anti-competitive and/or created market distortions. Resolutions or tariffs that were found to be anticompetitive were nevertheless approved, on the basis that the public benefits they achieved were greater than possible detriments. Approvals granted by US regulators were also influenced by the need for international comity. The significant omission in the consideration of IATA resolutions by US regulatory authorities was the absence of a

[444] *See*, *below Travel Agency Commissioner* and *Redress for agent grievances and dispute resolution* Chapter 7., IATA internal dispute resolution mechanism is only accessible to its members, accredited agents, and others who voluntarily adhere to its resolutions or are parties to numerous IATA agreements.

voice for the airline consumer. The evaluation process that preceded approval of IATA tariffs did not contain any opportunities for consumer participation. Although approvals that were granted to IATA tariffs were predicated on the grounds of 'public benefit', the airline consumer who represented the public in this context was not heard. Even today, there is no mechanism which allows for the consideration of the implication and effects of IATA resolutions from the perspectives of global airline consumers. Regulatory and judicial reviews of IATA resolutions are confined to evaluating the effects on the public within relevant territories, and do not usually extend to assessing their extraterritorial implications. This defect in the procedure and due process of IATA rulemaking inevitably results in detrimental consequences for the airline consumer. Consumer rights activist Dr. K.G. J Pillai has elevated consumer rights in aviation to the level of a universal human right, on the assumption that air transport is an utility service.[445] His complaint was that governments were indifferent to consumer interests, because of their confidence in airlines and in IATA, which represented the airlines.[446] Dr. Pillai castigated the CAB for abdicating its regulatory responsibility by not exercising what he called "essential" control over IATA, and for

[445] Dr. S Bhatt, "Review of the Air Net: The Case against the World Aviation Cartel by K G J Pillai," (1970) 36 J Air L& Com 812.

[446] *Ibid*. The above book review echoes the sentiments of the author Dr. Pillai that, "IATA has no sound economic principles to recommend. Instead it acts as a gang leader making subtle use of the inter-governmental discord and sometimes with threats of its own dissolution with subsequent adverse consequences. Inter-governmental discord is the sine qua non, of the IATA success. Unfortunately, no government can reprimand IATA because of its collective responsibility" at page 812.

CAB's failure to accord due recognition to consumer interests in when approving resolutions.[447]

## 5.6 Competition & antitrust concerns

A vocal critic of IATA during the 1970s, Dr. Pillai once observed that:

> IATA's pervasive influence on the economic life of air carriers has not only spelled disaster for the relatively efficient US air carriers but also imposed a continuing economic burden on overseas travellers. Apart from price fixing for international travel, IATA controls travel agents, sets private currency exchange rates, opposes non-IATA competitors and determines the pitch and width of seats in airplanes.[448]

In spite of the metamorphosis IATA underwent in the 50 years following that observation, a review of IATA activities today reveals that it still continues to engage in numerous activities which hardly pass muster on competition and antitrust considerations.

Antitrust immunity previously granted to IATA was terminated in several jurisdictions including the United States, the European Union ("EU") and Australia.[449] These decisions to terminate antitrust immunity were based on findings of the relevant regulatory authorities, made consequent to detailed assessments of IATA resolutions and activities. However, even though antitrust immunity is no longer granted to IATA *ipso facto* when its resolutions are approved, tariff coordination of IATA is not *per se* prohibited in the United States, the EU and Australia. Today, IATA resolutions are

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[447] K G J Pillai, *the Air Net: The Case against the World Aviation Cartel*, (New York: Grossman Publishers, 1969), at xii. "Both private and government-owned airlines are members of IATA, and the vast majority of them are inefficient to the core. Most of them just yearn for high fare, some fight for it, and some have it thrust upon them. The outstanding skill of IATA lies in manipulating rate agreements – commonly called "delicate compromises" -among its members to the extent that is required to avoid unpleasant governmental interference." Introduction, at page xii.

[448] Pillai, "Consumer Protection in Aviation Rate Regulation" (1972)*supra* note 255 at 255.

[449] *See,* "*Regulatory challenges catalyst to internal reforms,*" *above* Chapter 2.

subjected to restrictions and conditions only if they are found to violate antitrust or competition laws in relevant jurisdictions. IATA could still apply for antitrust immunity prior to implementing resolutions, by demonstrating that a proposed resolution would procure a public benefit which would override its anti-competitive effects. Thus, even today, IATA applies for antitrust immunity for numerous resolutions and initiatives.[450]

Conclusive pronouncements noting the negative attributes of IATA traffic conferences and tariff coordination have been made in various orders and decisions[451] of the US Department of Transportation (DOT),[452] the Australian Competition and Consumer Commission (ACCC)[453] and the European Commission's Directorate General for Competition (EU-DG Comp).[454] In certain orders—and in several discussion papers generated in the course of inquiries leading to these orders—regulators[455] in the US, EU and Australia have identified the following common features of IATA tariff coordination that are inconsistent with competition laws and the interests of consumers.

a. IATA tariff conferences "facilitate collusive behaviour, both tacit and explicit, regarding prices or other matters." Therefore, the Tariff Conferences did not

[450] US DOT Final Order 2014-8-1 (6th August 2014), *supra,* note 292, approving Resolution 787, New Distribution Capability (NDC) initiative under the Enhanced Airline Distribution initiative of IATA, making final the show cause order, US DOT Order 2014-5-7, dated 21st May 2014, Docket OST-2013-0048, discussed *above* in "*IATA Programmes and Initiatives*" Chapter 3.

[451] Regulatory bodies, *viz.*, the US DOT, Australian Competition and Consumer Commission (ACCC) and the EU DG-Competition had independently reviewed the effects of IATA tariff coordination on competition within their jurisdictions. Inquiries leading to the termination of antitrust immunity conducted in each jurisdiction had been contemporaneous in time. As such each regulatory authority acknowledged parallel/common findings made by the regulators in the other jurisdictions regarding IATA, in their respective orders.

[452] US DOT final Order, 2007-3-23, (30th March 2007) *supra,* note 279.

[453] ACCC Determination A90435 *supra* note 274.

[454] EC, Regulation 1459/2006, *supra*, note 282.

[455] US-DOT, EU-DG Comp. & ACCC.

appear to create consumer benefits capable of outweighing the anti-competitive effects.[456]

b. Many airlines acknowledge that IATA-agreed fares are used to benchmark market fares and as a basis for calculating discount fares.[457]

c. Concession rates agreed at IATA tariff coordinating conferences are applied as standard fares for children, infants and unaccompanied children. The adopting of IATA concession rates as a standard could remove the opportunity for market forces to contribute to lower fares for children and others.[458]

d. Conditions stipulated as applicable to IATA fares, such as excess baggage charges, are transferred to non-IATA fares, to the detriment of consumers.[459]

e. Individual airlines use conditions agreed in relation to IATA fares (for example, conditions such as the definition of a "child" and the definition of "seasons") for their own fares.[460]

f. IATA Tariff Conferences constitute a forum that enables actual and potential competitors to routinely exchange sensitive information.[461]

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[456] US DOT Order 2007-3-23, *supra* note 279, at 9. When making its show-cause order final by the instant order the DOT made extensive reference to parallel investigations carried out by the EU-DG Comp and the ACCC and aligned its order to the finding of parallel investigations and the discussion papers issued by the both the ACCC and the EU-DG Comp. *ibid, at* pages 7, 8 & 9.

[457] DOT Order, 2007-3-23, *ibid.*, at 7, making specific reference to, the Determination-A90435 of ACCC.

[458] ACCC Determination A-90855, *supra* note 275 at 32.

[459] *Ibid.*

[460] DOT Order, 2007-3-23, *supra,* note 279*,* at 7. Citing the finding of the ACCC, the DOT also noted that, "tariff conferences adopted a resolution defining which children would be eligible for discounted fares. By defining a child is someone between 2 and 11 years old the airlines effectively agreed that anyone who was 12 years old or older would not get that discount." *ibid*, at page 42.

[461] *Ibid* at 8, aligning its reasoning with that of the EU-DG Comp - discussion papers; ACCC Determination A90435 *Supra* note 274. The Australian Competition and Consumer Commission (ACCC) had also categorically noted that, "IATA passenger tariff coordinating conferences provide an opportunity for sharing of knowledge which given the roles of the airline representatives attending, clearly stated objectives of the conferences and the matters being discussed

g. In conferences, carriers discuss and agree on the level of fares for IATA tickets, i.e. for products very similar to their own, which belong to the same product markets in which they compete, and which they then integrate into their own product offerings.[462]

h. Tariff Conferences give rise to bilateral discussions between direct competitors on a route by route basis which are not entirely transparent.[463] The ACCC drew specific attention to the IATA Tariff Services Handbook (issue 1st July 1999) which identified the benefit for airlines attending IATA coordinating conferences, was to gain "access to market knowledge"—explaining that—"participation in tariff coordination opens the door to sharing and the exchange of market and other types of information required to intelligently price passenger and cargo tariffs."[464]

i. The fact that airlines participate in open discussions regarding fares for markets they do not serve, and which are served only by other airlines, strongly suggests that Tariff Conferences provide opportunities and incentives for competitors to reach consensus on all fares.[465]

j. Many of the composite conference resolutions are agreements among competitors that affect the price and quality of their services. Composite

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would not be in the interest of the competitive air passenger markets.", ACCC Determination A-90435 *supra* note 274 at 30.

[462] DOT Order, 2007-3-23.

[463] *Ibid.*

[464] ACCC Determination A-90855, *supra,* note 274 at 30.

[465] DOT Order 2007-3-23, at 10. The DOT noted in its order that, IATA Airlines could punish competitors who compete too vigorously in their home markets due to their ability to make trade-offs and influence fare agreements in markets they do not serve. For example, airlines can threaten to block fare changes desired by competing airlines in their important markets if those airlines do not accept fare changes by those airlines in its own markets.

conference resolutions set rules which determine price levels for the quality of a service offered at a particular fare.[466]

k. Tariff Conferences do more than just establish prices for IATA interline products. They also establish special fares which are subject to restrictions typically applicable to discount fares. If the only purpose of Tariff Conferences were to establish fully flexible normal fares, the Tariff Conferences would not establish special fares.[467]

l. Composite tariff conference resolutions limiting the passenger's ability to check luggage without charge is anti-competitive.[468]

m. Airlines do not need antitrust immunity for standard setting activities at composite tariff conferences, as antitrust laws already allow competitors to engage in legitimate standard setting activities.[469]

n. Detriment to the public could arise from the IATA model conditions of carriage (stipulated in Recommended Practice 1724) due to:[470]

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[466] DOT Order, 2007-3-23, *ibid,* at 41 & 42, The DOT observed that, "several composite conference resolutions have been controversial just because they operated as an agreement among competitors to increase prices or to lower the quality of services provided at some fare levels". Referring to a previous example, the DOT noted that: "International passengers travelling to and from the United States are allowed two (2) free pieces of checked baggage. For many years neither bag could weigh more than 70 pounds. Airlines had agreed amongst themselves that they should no longer allow economy class passengers to check baggage weighing more than 50 pounds, without charge. We disapproved that agreement by Order 2004-10-11 (October 19, 2004), because IATA had failed to provide any economic justification for the change. This resolution was an agreement amongst competitors to reduce the level of service provided to economy passengers."

[467] *Ibid* at 18.

[468] *Ibid*. The DOT aligned its decision as being consistent with the tentative finding of the ACCC as set out in paragraphs 9.89 – 9.94 of the ACCC, Consultation paper that, "Composite tariff resolutions on baggage allowances and excess baggage charge reduced competition as airlines in domestic Australian markets competed in these areas."

[469] *Ibid* at 46.

[470] ACCC Determination, A -90435. , *supra*, note 274 at 28.

- the inability of passengers to transfer a ticket from one passenger to another;
- the requirement for ticket coupons to be used in sequence;
- consumer liability for changes in fare and taxes and for fees and charges levied at various stages through the ticket booking process;
- the extent to which taxes, fees and charges are refunded to consumers for unused tickets;
- the lack of guidelines for prompt provision of refunds to consumers;
- inadequate compensation for passengers denied boarding when overbooking occurs;
- inadequate compensation for the cancellation or rescheduling of flights;
- the failure to appropriately advise consumers of airlines' conditions of carriage; and
- inadequacies in the conditions of travel for incapacitated passengers.

o. Ticketing time limits for online and interline international travel, and the imposition of interline service charges between airlines applicable under the IATA International Payment Settlement Systems ("IPSS"), were anti-competitive and detrimental.[471]

[471] *Ibid* at 28.

p. The method of prorating revenue between carriers on the interline system, which is based on agreed fares and rates, links it directly to tariff coordination.[472]

q. The level of annual fees charged for non-IATA airlines to participate in the IATA Clearing House (ICH)[473] services, relative to fees charged for IATA members, are anti-competitive.[474]

The historical justification for immunity granted to IATA tariff coordination was predicated on the inability of states to reach multilateral agreement on economic matters.[475] The antitrust immunity granted to IATA for tariff coordination in several jurisdictions continued for over six decades, until it was withdrawn completely in 2007.[476] However, notwithstanding the fact that antitrust immunity was withdrawn in the US and in several other countries,[477] IATA is not prohibited from continuing with tariff coordination. The implication of this continuation is that, absent antitrust immunity, IATA tariffs are exposed to antitrust litigation and attendant penalties if they are found to be in breach of applicable antitrust and competition laws. Thus, even

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[472] *Ibid* at 18.

[473] *IATA Clearing House (ICH) & clearing services for the airline industry*, *IATA Programmes & Initiatives*, Chapter 3, *above*.

[474] ACCC, Determination A 90435, *supra*, note 274, at 21. In its Determination, ACCC noted IATA's claim that its members do not pay annual fees to IATA Clearing House (ICH), as the operating costs of the ICH are covered by interests accrued through funds passing through the ICH account and interest charged on overdue accounts. However, non–IATA airlines using the services of the ICH are required to pay an annual membership fee on a sliding scale according to the gross claims settled through the ICH. According to information submitted by IATA, the average fee payable in 2002 was US$ 23,809/- with the top 25% of non-IATA airlines paying an average fee of US$ 53,390/- and the bottom 25% an average fee of US$ 9,000/-.

[475] See *Legislative Authority and Regulatory History*, Chapter 1, *above*.

[476] DOT Order 2007-3-23, *supra,* note 279.

[477] Joseph Monteiro, "The Recent Competition Authorities' Drive to End or Reduce IATA's Immunity from Competition Law", at 14. Unlike the other jurisdictions Canada has never granted IATA agreements an explicit exemption from its competition law though IATA requested one.

today, IATA seeks permission from the US DOT and relevant regulatory bodies in other jurisdictions when making certain rules that are applicable to the industry.[478]

Today, one cannot ignore the possibility that critical evaluations of IATA and its resolutions are influenced by historical justifications and considerations. In the contemporary international air transportation industry, in which IATA's role has been significantly transformed, it is worth asking whether these historic justifications bear any relevance to the legitimacy of IATA tariff coordination. This question is particularly relevant in those countries and regions where IATA's authority prevails without any fetters or control.

The threshold that a court of law would ordinarily apply to determine whether conduct is anti-competitive (when evaluating tariff coordination and horizontal agreements among competitor airlines) does not encourage consumers to rely on the antitrust suit as an effective remedy for anti-competitive behaviour. The general approach of US courts can be gleaned from the judgement of the US Court of Appeals for the 4th Circuit in *Continental Airlines vs. United Airlines*[479] where it held that "a plaintiff cannot prove the unreasonableness of the restraint merely by showing that it caused economic injury. Rather, because the antitrust laws were enacted for the protection of competition, not competitors, the plaintiff must show that; the net effect of the challenged restraint is harmful to competition." In the case of *in re Travel Agent Commission Antitrust Litigation,*

[478] US DOT Final Order 2014-8-1 ( 6th August 2014) Docket OST-2013-0048, Approving the *New Distribution Capability (NDC) above*, note 292; Also see, *IATA* NDC Resolutions 787, discussed in *The New Distribution Capability (NDC),* Chapter 3, *above*.
[479] *Continental Airlines* vs. *United Airlines,* 277 F (3d) 499 (9th Cir 2002).

*Tam Travels Inc., and others Vs. Delta Airlines Inc. and others* ("Tam Travels"),[480] a number of travel agencies alleged antitrust conspiracy by Delta and other airlines, alleging that they had collectively reduced travel agents' commissions leading to the elimination of base commission being paid to travel agents in the United Sates. The facts of the case are that, in or around 1995, several airlines—Delta, American, Northwest, United and Continental—each announced a $25 cap on base commissions for one-way domestic tickets and a $50 cap for round-trip domestic tickets to be paid to travel agents. Then in 1997, United decided to reduce its base commission paid to travel agents from 10% to 8%. Shortly after, American, Delta, Northwest, US, Continental and America West also applied the same cap, and Frontier and Alaska Airlines implemented the policy a year later. Base commission caps were also introduced for international fares by United at $50 dollars one-way, and $100 round-trip. American, Delta, Continental, Northwest and US Airways followed suit soon after. In 1999, United then reduced the base commission for international fares from 8% to 5%, and was followed a week later by American, Delta, Northwest, Continental and US Airways, and by America West, Alaska and Frontier Airlines within two months. In 2001, American implemented a base commission cap of $10 for one-way and $20 for round-trip tickets, and this policy was then introduced by United, Delta, Northwest, Continental, US Airways and America West 10 days later, and by Frontier and Alaska shortly thereafter. By March 2002, Delta announced that it would eliminate the practice of paying base commissions to travel agents for both domestic and international airfares. This policy was

[480] *In re Travel Agent Commission Antitrust Litigation, Tam Travels Inc., and others vs. Delta Airlines Inc. and others*, (9th Cir 2009), LEXIS 28367.

subsequently implemented within 10 days by American, United, Northwest, Continental, US Airways, America West, Frontier and Alaska Airlines.[481]

The District Court summarily dismissed the plaintiffs action ruling that, "the plaintiffs failed to allege any conduct other than sporadic parallel conduct and also failed to aver sufficient facts to plausibly suggest an illegal agreement amongst the airlines." Forty-Nine of the travel agent plaintiffs appealed. The US Court of Appeals for the 6th Circuit upheld the District Court's decision by a majority, with judgement pronounced by Griffin. J. The majority held that:

> Allegations of concerted action by competitors are frequently based on a pattern of uniform business conduct, which courts often refer to as 'conscious parallelism'. Conscious parallelism however is not in itself prohibited under § 1 of the *Sherman Act*. Even conscious parallelism - the common reaction of firms in a concentrated market will recognize their shared economic interests and their inter-dependence with respect to price and output decisions is not itself unlawful.[482]

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[481] The plaintiff travel agents alleged that, each defendants' decision to reduce and eventually eliminate paying base commission would not have occurred without collusion because, such action if taken independently was contrary to individual defendants' economic self-interest.

[482] *In re Travel Agent Commission Antitrust Litigation, Tam Travels Inc., and others vs. Delta Airlines Inc. and others, supra* note 480. "§1 of the Sherman Act does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination or conspiracy. The crucial question is whether the challenged anticompetitive conduct stems from an independent decision or from an agreement, tacit or express. To survive a motion to dismiss, the complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory. A court need not accept as true legal conclusions or unwarranted factual inferences and conclusory allegations. Legal conclusions masquerading as factual allegations will not suffice. Whilst a showing or parallel business behaviour is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establishing agreement by itself constituting a Sherman Act offence. The inadequacy of showing parallel conduct or inter dependence, without more, mirrors the ambiguity of behaviour; consistent with conspiracy, but just as much in line with a wide swathe of rational and competitive business strategy unilaterally prompted by common perceptions of the market. An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict. Proof of a conspiracy must include evidence tending to exclude the possibility of independent action. The plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently. In evaluating circumstantial evidence of concerted action, the following factors are important; whether the defendants' action if taken independently would be contrary to their economic self-interest; whether the defendants have been uniform in their action; whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; whether the defendants have a common motive to conspire. An affirmative answer to the first of these factors would consistently tend to exclude the likelihood of

Despite acknowledging that parallel conduct was consistent with an unlawful agreement, the Court concluded that this conduct did not plausibly suggest an illicit accord, because such conduct was not only compatible with, but indeed was more likely explained by, lawful unchoreographed free market behaviour. The Court accepted the defendants' arguments that technological advances and new alternate methods to purchase airfare on the internet provided greater economic incentives to cut commission rates on a trial and error basis. The defendants described parallel pricing behaviour as an inexpensive method of price setting whereby the leader airline innovated expecting its competitors to follow. If the industry did not follow, the leader would simply retract the commission cuts. It seems clear that, given the view of the Majority in *Tam Travels*, mounting an antitrust complaint against IATA tariff coordination in a US court would be an onerous and daunting prospect for a consumer.

That agreements on tariffs are concluded among airlines is a fact. Thus, regulators in the US, Australia and the EU have concluded that IATA fares are used as reference fares by airlines, and its tariff conditions are also regularly followed.[483] In these circumstances, could the incidence of similar or identical tariffs being applied by IATA members, consequent to their coordination and agreement, plausibly be explained as "conscious parallelism." If not, how do we explain the high standard at which US courts recognize unlawful choreographed market behaviour? If the rationale of conscious parallelism is not persuasive, then does the fact that IATA rules are collectively applied to regulate

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independent conduct." Per Griffin J. *- pinpoint page reference cannot be cited as case report obtained from LEXIS website does not contain page/paragraph numbers.*

[483] See, Competition and Antitrust Concerns, *above*.

service standards and agent relations across the airline industry, not militate against a passive perception that, this is the standard outcome of unchoreographed free market behaviour? If not, what would be the lofty standard at which US courts recognize choreographed behaviour? Consumers can take some comfort from the dissenting opinion of Merrit J. in *Tam Travels*, where he stated that:

> Here my colleagues have seriously applied a new standard by requiring not simple "plausibility" but by requiring the plaintiff to present at the pleading stage a strong possibility of winning the case and excluding any possibility that the defendants acted independently and not in unison[484]……Five times the airlines acted affirmatively, aggressively and publicly in unison to cut, fix and hold the price the airlines should pay the travel agents. Although at present there is no written contract to that effect the facts alleged present so plain a case that they might as well have put the plan in writing[485]……. As in this case the proponents of this strategy propose to require either an express written agreement among competitors or a transcribed oral agreement to fix prices. Nothing less will do. Insider testimony, a strong motivation to collude, an aggressive lock step unanimity by competitors in pricing become insufficient to state a case. Over time the antitrust laws fall further into desuetude as the legal system and the market place are manipulated to benefit economic power, cartels, and oligopolies capable of setting prices.

The dissenting opinion of Merrit J. highlights the issues that beset aviation regulators worldwide when dealing with a non-governmental organization such as IATA. The question then becomes: have economic regulators, for the sake of expediency, abdicated their responsibility to deal properly with IATA? And, in the process, have they

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[484] *In re Travel Agent Commission Antitrust Litigation, Tam Travels Inc., and others Vs. Delta Airlines Inc. and others, supra,* note 480, "The allegation concerning the unison, affirmative behaviour of the airlines in this case are obviously sufficient. The factual allegations in this case create an overwhelming case for the plaintiffs to get by a motion to dismiss on the pleading." supra, Per Merrit J. (dissenting).

[485] *Ibid.* "United and American tried in 1981 and 1983, respectively to fix the prices lower…. but the other airlines would not go along …. The allegations recite the statements of an American Airlines executive that the airlines learned not to try again until everyone was on board. The complaint alleges inside information tantamount to a partial confession. When they tried again in 1995, the plan went like clockwork. Every one followed the leader five straight times until the price reached zero. The allegations of fact based on the testimony of insiders, was that the plan could not work without agreement but could work if the airlines acted in unison. Since the plan worked like a charm the allegations raise a strong inference of agreement. Not as strong as allegations raising an inference that the "sun will rise in the morning" based on history but strong enough to be more than plausible.", Per Merrit J.(dissenting). *pinpoint page reference cannot be cited as case report obtained from LEXIS website does not contain page/paragraph numbers.*

sacrificed consumer and public interests, fair competition and equity considerations in favour of the overawing presence and economic power of IATA? Professor Paul Dempsey makes the apt observation that:

> "..[t]he U.S. Department of Justice (DOJ) abdicated while the industry consolidated. Further, the USDOT injected airlines with antitrust immunity so that they could establish global alliances, allowing competitors to collude on pricing, capacity, frequency, and service. The U.S. government jettisoned both economic regulation and antitrust oversight, which had historically protected the public interest, in favour of airline self-regulation without meaningful government oversight, leaving an industry characterized by collusion, monopolization, consumer exploitation, and predation, with skeletal consumer protection."[486]

In *Republic Airlines Inc., IATA vs. the Civil Aeronautics Board*, ("Republic Airlines")[487] IATA and member airlines challenged a decision of CAB in which it found several provisions of IATA agreements to be anti-competitive, and refused to grant the indefinite antitrust-immunity that was sought by IATA.[488] The US Court of Appeal upheld CAB's decision, observing that:

> [T]he board may not approve an anti-competitive agreement unless it finds the agreement is necessary to meet a serious transportation need or to secure important public benefits including international comity or foreign policy considerations, and it does not find that such need can be met or such benefits can be secured by reasonably available alternative means."[489]

CAB had refused to approve provisions in IATA agreements which: prohibited Business Travel Departments ("BTDs") of large organizations to be accredited to sell airline tickets; imposed exclusivity provisions with regard to access to interlining; and

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[486] Paul Stephen Dempsey, "Regulatory Schizophrenia: Mergers, Alliances, Metal-Neutral Joint Ventures and the Emergence of a Global Aviation Cartel", 83 J. Air L & Com 3 (2018) at page 5.
[487] *Republic Airlines Inc., IATA Vs. the Civil Aeronautics Board*, 756 F ( 2d) 1304, (8th Cir) 1985.
[488] Orders E-21285, 99 CAB 1 (1982) and 83-3-127, 100 CAB 409 (1983). These are the main orders upon which restraints and conditions of approval had been placed by the CAB on IATA resolutions which resulted in IATA re-designing or reformulating its resolutions to attain compliance with the conditions imposed by the CAB in subsequent amendments or reformulation of these resolutions relating to travel agency matters as well as passenger services.
[489] *Republic Airlines Inc., IATA Vs. the Civil Aeronautics Board*, *supra,* note 486. Per Bowman, J.

prohibited the participation of non-accredited entities in IATA settlement plans. In affirming the decision of the CAB, the US Court of Appeal made several key observations regarding these IATA resolutions. These observations, drawn from the *dicta*, of Bowman J., provide useful considerations against which to measure the contemporary legitimacy of IATA resolutions in most countries.

a. There was no valid reason for an agreement among competing carriers to deny compensation to BTDs for the services they performed. Such provisions in IATA agreements are tantamount to a group boycott of a class of persons providing services similar to those provided by accredited agents.
b. Common accreditation schemes must allow any accredited agent to interline with any member airline unless the airline specifically refuses to permit a particular agent to write tickets for its fares.
c. Settlement plans should be opened to unaccredited agents. If a bar was imposed on access to this low cost, efficient system of settling agent/airline debts, this would clearly be anti-competitive, as Area Settlement Plans were an essential facility of commerce.
d. Agreements that are subject to a serious antitrust attack, yet also provide public benefits not reasonably obtainable by other means, are entitled to antitrust immunity only to the extent necessary to enable the parties to proceed.
e. It is only appropriate to grant antitrust immunity when antitrust litigation poses a serious threat to the continued operation of an agreement that produces

important public benefits. The statute requires antitrust immunity to be granted only to the extent necessary to enable the parties to proceed with the transaction specifically approved.

Professor Dempsey, states that:

> "[It] is collusion of airlines on pricing, entry, capacity, frequency, and marketing in competitive markets where antitrust immunity has the most value to the carriers but also poses the most significant burden on both consumers and competitors".[490]

## 5.7 Secrecy

The work programmes and dynamic initiatives of IATA designed for the airline industry are salutary. They encompass an extensive array of subjects that cover every aspect of the industry. Nevertheless, the manner in which these initiatives are implemented through end products and services sold by IATA raises questions of legitimacy and propriety.

Rulemaking in IATA is based on a hierarchical system that consists of the members in General Meeting, the Board of Governors, and other subordinate bodies which

[490] Paul Stephen Dempsey, "Regulatory Schizophrenia: Mergers, Alliances, Metal-Neutral Joint Ventures and the Emergence of a Global Aviation Cartel," *supra* note 486, at page 42. Professor Dempsey, discusses the example relating to collusion of airlines imposing surcharges on cargo rates in the above article and the consequences that arose therefrom which exposed the airlines concerned to heavy penalties. He states that, "As an example of unlawful collusion in the aviation sector the enormously expensive air cargo fuel surcharge litigation proved for airlines. The conspiracy to fix fuel surcharges began in 1996 when IATA passed Resolution 116ss on fuel surcharges. However, the USDOT denied antitrust immunity. Nevertheless, number of air carriers continued to coordinate fuel surcharges. But since the charges were not tied to distance flown, they were not correlated with fuel consumption. Fuel prices fell in 2001, but the surcharges continued. In the early years of the new millennium, Lufthansa and its subsidiary Swiss International turned "state's evidence" so as to enter the corporate leniency program. They revealed that a number of airlines (including Lufthansa, Lan Chile, Air France, British Airways, Japan Airlines, Korean Airlines, American Airlines, SAS, Asiana Airlines, Polar Air, Cathay Pacific, Atlas Air, and Cargolux) had conspired to impose uniform fuel and security surcharges. In 2006, law enforcement officers raided the offices of several airlines." Twenty airlines and four executives pled guilty and paid fines. British Airways and Korean Airlines paid fines totalling $300 million in settlement of a DOJ investigation. As of 2011, twenty-two airlines and twenty-one airline executives had been charged with unlawful price fixing." More than $1.8 billion in criminal fines were imposed, and four executives were sent to prison. More than one hundred civil class action lawsuits were filed by private plaintiffs in the United States in settlements of nearly half a billion dollars. By 2012 fines totalled almost $2 billion. ……. the EU Commission imposed fines of £776 million on eleven air cargo carriers that participated in the scheme from December 1999 to February 2006., *ibid*, at pages 17 & 18.

formulate rules for the internal governance and administration of IATA and its organs.[491] Traffic Conferences periodically meet and formulate rules[492] pertaining to the fares and tariffs applicable for international air transport.[493] Traffic Conferences also formulate rules pertaining to services[494] and the control of agents.[495] Member airlines representing every region of the world participate in these Conferences to agree upon and formulate applicable rules for tariffs, services and agency matters for both passenger and cargo air transport.[496] The agreed airline tariffs contain the terms and conditions applicable to carriage.[497] It is important to reiterate that resolutions of IATA are applicable not only to members of IATA and accredited agents. They also govern non-IATA airlines and those seeking to participate in the business and commercial initiatives of IATA. For example, numerous airlines which are not members of IATA use the settlement services of the ICH and participate in IATA BSPs to apportion interline revenue with member airlines.

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[491] Chapter 1, *above*.
[492] From recent times, a significant number of Traffic Conferences resolutions have been agreed and formulated online.
[493] *IATA Traffic Coordinating Conferences*, Chapter 1, *above*.
[494] *Services Conferences*, Chapter 1, *above*.
[495] *Agency Conferences*, Chapter 1, *above*.
[496] Passenger Agency Conference Procedures -Tie - in PAC resolution 001aa, *Passenger Agency Conference Resolutions Manual*, 38th Edition, IATA June 2017.Although a general description of the scope of activities which fall within the purview of the "services" and "agency" conferences and those that are within the "tariff" conferences have been provided by IATA, the exact scope of activities of these separate conferences can be discerned only upon examining the relevant source documents or resolutions by which the matters dealt with by the separate conferences have been expressly set out and published. For example, whilst separate conferences have been established to deal with passenger and cargo agency matters, rules relating to the commission to be paid to travel agents are dealt with by the "tariff" conferences. Similarly, passenger agency related matters covered in Passenger Agency Conference (PAC) Resolutions, 001, 004a, 004p, 006, 007, 008, 008a and 200g, have been assigned to the Passenger Services Conference and can be amended only by the latter.
[497] For example, the rules relating to the baggage allowances (the number, weight and/or the size of the checked bags or baggage items that are allowed to be taken on and carried as unaccompanied baggage of a passenger without additional payment) as well as the rates and charges for excess baggage carried by a passenger beyond the free baggage allowance.

Against this backdrop, a serious concern to note is the absence of transparency and the preference for secrecy in IATA's operations. IATA processes and dealings are shielded behind a veil of secrecy, except on rare occasions when it is directed by regulatory authorities to divulge information. IATA has no obligation to disseminate information to the public or to regulators set out in any of its constituent documents or resolutions. That the dealings of IATA are mostly confidential and obscured from public view has caused several controversies. Thus, the legitimacy of IATA's continued reliance on secrecy and the absence of transparency in its activities, merit discussion.

The fact that air transportation is considered to be a public utility needs no further elaboration. Further, the fact that IATA's regulatory authority has extended to every activity connected to international air transportation has been clearly illustrated throughout this thesis. Primarily, IATA Traffic Conference resolutions are designed to coordinate tariffs for international air transport, while collaterally they facilitate IATA's commercial objectives. IATA resolutions are not confined to mere trade association activities. In the guise of regulating standards for the industry, they extend into areas which distort competition and affect consumer interest. Travel agents do not participate in IATA tariff coordination other than in very limited circumstances. On those limited occasions when accredited agent bodies are allowed into Agency Conferences of IATA, they do not have a voice to propose or vote on rules made at these conferences. Hence,

this too appears to be an attempt by IATA to confer a veneer of superficial legitimacy to its agency resolutions.[498]

On the other hand, the consumer is totally excluded from IATA rulemaking.[499] Nonetheless, a large number of IATA resolutions have, as their manifest objective, to regulate matters relating to airline passengers and travel agents.[500] Pillai observes that,

> The public's *knowledge* about IATA's conferences is limited to certain selected documents filed by the carriers with the CAB. These documents are carefully contrived to transmit distorted and pre-censored accounts of arguments and discussions of anonymous carriers, but do not include important studies, analyses and reports that are allegedly used as the basis of IATA's rate agreements. Moreover, the CAB classified these truncated IATA documents as confidential.[501]

Commenting on the secrecy of IATA in 1974, Professor Haanappel stated:

> An important characteristic of IATA which has not been mentioned yet is its policy of secrecy. This policy has always been heavily criticized by consumer protection advocates. It is important for the consumer to know what is going on in IATA, so that he can decide whether IATA is working to his benefit or to his detriment. Most of IATA's activities are enacted behind closed doors and so far IATA has always been extremely cautious and superficial in giving information to the general public about what happens in the association. Resolution 035 (Unethical disclosure of information) prohibits IATA members from disclosing to the outside world knowledge or information obtained as a result of their membership of the Traffic Conferences; an exception is made for information that a member has to give to its government, to courts of law or to governmental hearings. Due to all this secrecy surrounding IATA the consumer only has a very vague notion of what IATA is and what it does. This vagueness is still further obscured by the practice of IATA of hiding behind its member airlines and the practice of IATA airlines hiding behind the association. On the one hand IATA over emphasizes the fact that it is nothing but the airlines that form part of it. On the other hand, the airlines often explain unpopular IATA rules to the public by saying that they have to adhere to these rules 'because IATA forces them to do so'. A typical

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[498] *Participation of agents in the IATA rulemaking process*, *Passenger Agency*, Chapter 7, *below*.

[499] Pillai, "Consumer Protection and Aviation Rate Regulation" *supra* note 255. "In 1971 IATA's secret rate making conference in Montreal was picketed when the airlines denied the request of consumer representatives to be present at the conference as observers. In May 1971 ACAP as well as certain other consumer groups from Europe made the request. Upon denial one dozen ACAP volunteers picketed the Montreal conference.", *ibid,* at page 216.

[500] *Passenger Services & Passenger Agency,* Chapter 6 & Chapter 7, *below*.

[501] Pillai, "Consumer Protection and Aviation Rate Regulation" *supra*, note 255 at 222 and 223.

> example of this last practice is the notice that one finds at all check in desks at the airports saying that 'IATA gives the passenger only a limited free baggage allowance.' Another example is the announcement made during flights of IATA airlines that due to international regulations the airline has to charge the passenger USD 2.50 for inflight entertainment equipment (earphones).[502]

Several questions of legitimacy arise in relation to IATA's secrecy. Should not IATA commit itself to the obligation of disclosing its rules to the consumer who is affected by its conduct? Should the consumer be provided a reasonable opportunity, at least after rules are promulgated by IATA, to examine these rules and make informed decisions about their application? Is it fair for the consumer to be made aware of IATA rules only when they take a flight or arrive at the airport to embark on a journey? Should there be a concurrent or supervening obligation upon IATA to disseminate information of the underlying objectives of its rules to the consumer? Since air transportation is considered a public utility, and since IATA its quasi regulator, why should IATA not have an obligation to disclose information to the public regarding its rulemaking? Further, should information released to the public domain about IATA not be confined to documents connected to its internal governance, but mandatorily include all source documents, background papers, supporting data, discussions, meeting minutes and statistics that are relied upon to formulate resolutions at Traffic Conferences?

[502] Hannappel, *The Scheduled International Airlines and the Consumer*, *supra,* note 12 at 41.

## 5.8 CAB intervention directing disclosure.

Historically, airlines of the United States which were members of IATA were required to submit resolutions and information relating IATA Traffic Conferences to the CAB.[503] The authority of CAB to direct the submission of information by airlines was contained in §407(a) of the Act.[504] There were also corresponding obligations cast upon US and foreign airlines to submit their tariffs to the CAB under §403(a) of the Act. Agreements between air carriers (such as pooling, sharing and coordinating arrangements) were also required to be filed with the CAB under §412(a) of the Act.[505]

Several conditions were imposed in CAB orders that granted initial approval and extensions to the IATA Traffic Conferences and tariff coordination. The CAB insisted that it must have full information leading to agreement on tariffs,[506] and imposed the

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[503] Order 6 CAB 845, (8th May 1946), *Resolutions of North Atlantic Traffic Conference Relating to Rates and General Conditions of Carriage*, reported in CAB Reports, vol 6, economic cases, at 845.

[504] *Civil Aeronautics Act* as amended by the *Federal Aviation Act of 1958* Pub L *supra* note 166, in force in the United States during the period of 1945 -1985 the period during which the CAB exercised regulatory control and supervision over IATA. §407(a) of the Act stipulated that "the Board is empowered to require annual, monthly, periodical and special reports from any air carrier; to prescribe the manner and form in which such report shall be made; and to require from any air carrier specific answers to all questions upon which the Board may deem information to be necessary. Such reports shall be under oath whenever the Board so requires. The Board may also require the carrier to file with it a true copy of each of any contract, agreement, understanding or arrangement between such air carrier and any other carrier or person in relation to any traffic effected by the provisions of this Act."

[505] *Civil Aeronautics Act,* §412 (a) , required every air carrier to file with the Board, "a true copy where it is written or where it is oral, a complete memorandum of (a) every contract or agreement (b) affecting air transportation and in force on the effective date of this section or entered into thereafter (c) any modification or cancellation of such agreement between any air carrier or foreign air carrier or other air carrier (d) for pooling or apportioning of earnings, losses, traffic services or equipment or (e) relating to the establishment of transportation rates, fares, charges or classifications or (f) for preserving and improving safety economy and efficiency of operations or (g) for controlling, regulating, preventing or otherwise eliminating destructive, oppressive or wasteful competition or (h) for regulating stops schedules and character of services or for other cooperative working arrangements."(*emphasis added.)* § 412(a) of the Act of 1958.

[506] Order 6 CAB 845,( 8th May 1946), CAB Reports, vol. 6 economic cases at 845, *supra.* note 503 at 850 & 851. In its order the CAB specifically suggested that "therefore it will be of great value if the Conference, in reaching rate agreements hereafter, will make a record of the data considered by it and of the considerations which resulted in its conclusion that the rates fixed by it meet the required standards of economic soundness and make the record available to

responsibility to supply such information upon US carriers. The CAB cautioned that failure to provide the minimum required information would be taken as reasonable cause for prompt disapproval of IATA resolutions.[507] These early conditions imposed by the CAB were predicated upon obtaining information essential for the CAB to perform its statutory functions in evaluating IATA resolutions.[508] Subsequent conditions imposed by the CAB required that information provided by IATA to the CAB should also be made available to interested persons upon request and on payment.[509] Notwithstanding the commitments to provide information to the CAB, and in spite of several of its resolutions being disapproved for failure to submit essential

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the Board and to appropriate aeronautical agencies of the other nations which may undertake to review the Conference action on rates."

[507] Order 9 CAB 221 (20th February 1948), *IATA Traffic Conference Resolution*, Reported in CAB Reports, vol. 9 economic cases at 221. In making this Order, the CAB stated that, "The Board will regard as reasonable cause for prompt disapproval of rate resolutions the failure to support such resolutions with this minimum of information covering the operation of the principal-carrier participants in the rates included in the resolutions for not less than the most current half year preceding the adoption of the resolutions." at page 223.

[508] Order on *IATA North Atlantic Fares,* E-11662 (7th August 1957), CAB Reports, vol. 25 at 792. In disapproving a 5% rate increase agreed by an IATA traffic conference and submitted to the CAB for approval, the CAB noted in the instant order that "The Board does not consider the information of the type here submitted by the carriers to represent adequate justification of the proposed increase. In the Board's opinion the sound development of air transportation requires that the level of fares be closely related to the actual cost of operation and that any proposal contemplating the adjustment in the basic fare level be so documented to demonstrate clearly the actual operating experience upon which the adjustment is predicated. We take this position not only as a matter of sound economic practise, but as requirement to which the Board must adhere in the proper discharge of its responsibilities under the Civil Aeronautics Act which contemplates the establishment of fares at the lowest level consistent with sound and economic provision of the service." *ibid,* at page 794. The CAB proceeded to note that, "The Board has therefore made it clear that the provision of economic data adequate to ensure that, the rate making process of IATA are conducted in accordance with its original understanding is basic to the Board's approval of the traffic conference machinery. The Board stands ready at any time to study information submitted which details the actual operating experience of the carriers as previously outlined and has encouraged the carriers to make such data available to it. This information is within the knowledge of the respective carriers and is certainly necessary in their collective evaluation of the level of fares. We believe it to be equally necessary to an adequate appraisal of IATA rate proposals by the appropriate reviewing agency of the governments concerned.", *ibid,* at page 795.

[509] Order 68-7-55 on *IATA Articles of Association* ( 12th July 1968), *n*, CAB Reports vol. 48 at 977. The CAB noted that, "IATA Traffic Committee's establishment of a subscription service through which subscribers may purchase on an annual basis, certain documents, papers and materials (at the same time they are distributed to member of IATA) upon payment of an annual fee of US$ 500., meets the conditions proposed by the CAB in its order E-23120.", *ibid*, at page 978. According to the conditions of approval set out in this Order; US Air carrier members of IATA shall submit to the Board for appropriate action all recommended practises, agreements and resolutions adopted by IATA and each of its conferences and permanent conference committees - Condition 2; US air carrier members of IATA shall file with the Board such documents and other data as the Board may direct - Condition 5.

data, historical records show that IATA's compliance with information disclosure obligations has been deficient.[510] In 1958, ten years after the CAB ordered IATA to provide essential information, Bebchick observed that the CAB had not yet received what it deemed to be a minimal amount of relevant information, although no IATA resolution had been disapproved solely on the ground of failure to submit such information.[511] The CAB also imposed conditions requiring IATA to report disciplinary proceedings initiated against members and the fines imposed on them by the IATA Breaches Commissions.[512] In spite of these orders, the continued secrecy accorded to proceedings of IATA Breaches Commissions was criticized by the US Congress Sub-Committee during its Hearings on Monopoly Problems in Regulated Industries before the Antitrust Sub Committee.[513]

Ronald Tauber notes that:[514]

> Chairman Celler (Chairman of the Congressional Sub Committee) appeared to be a bit taken aback by the fact that American corporations were being brought before the Breaches Commissions which were empowered to inflict penalties of $ 25,000. He requested Sir William Hildred (the then Director-General of IATA) to supply the Committee with a list of the airlines that had been fined $25,000 and a list of all American carriers that had been involved in Breaches Commissions proceedings. The Director-General was very reluctant however, to give the committee such lists for public

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[510] Order 9 CAB 221( 20th February 1948), *supra,* note 505. It was observed by the CAB that, "*Two years have elapsed since the initial Board approval of participation by the United States in rate making by the conference agreement method. On a number of occasions in these 2 years conference rate resolutions have been submitted to the Board for its approval. The Board however is without advice that IATA has yet established measures for obtaining and transmitting to the Board, either directly or through the United States members of IATA data in support of the rate resolutions which can be regarded as satisfactory evidence of their economic soundness, or that such date have been given adequate consideration by IATA in its rate determinations."- ibid,* at page 222.

[511] Leonard Bebchick, "The International Air Transport Association and Civil Aeronautics Board," *supra*, note 201, at 19.

[512] Order 68-7-55 *supra*, note 507. "*With respect to "Breaches of Conference Action" The US carrier members of IATA shall notify the Board of any fine or penalty assessed against them with a brief statement of the reasons therefor; shall file with the Board a record of the fines or penalties assessed against it under IATA enforcement procedures; shall file with the Board a report of the cases decided by the Breaches Commission and the action taken.*" *Vide* - Conditions, 8a.,8b., &8c (Agreement CAB 1175) set out in the Appendix of the Order, 979.

[513] Tauber, *supra* note 226 at 5 fn. 28.

[514] *Ibid* citing the, *Hearings on Monopoly Problems in Regulated Industries before the Antitrust Sub Committee of the House of Commons of the Judiciary*, (84th Congress Second Session) Series 14.1 at 1066 (1956) at 5 fn. 28.

record, although he indicated that he would do so for the Committee's own study. His offer of disclosure to the Committee on the condition that it not be made public was rejected by Celler, despite Sir William Hildred's view that demanding public disclosure was the equivalent 'for all the times I have been fined for being drunk'. Chairman Celler was not impressed with this analogy and strongly advised the Director-General to secure authorization from the Executive Committee of IATA to submit such a list. Five days later IATA submitted the list. It showed that Pan American had been fined $10,500 for violations ranging from granting improper student discounts ($3,500) to unfair advertising ($5,000). Panagra had been fined a total of $5000 for selling tickets at wrong currency exchange rates and for not charging for excess baggage. Transworld Airlines had been fined only $600 for infractions in their relations with travel agents.[515]

## 5.9 Obstacles to enforcing national regulations

Most national regulators (except in the United States, EU, Australia and other countries with developed antitrust laws) approve IATA resolutions on tariffs when they are filed by airlines without detailed scrutiny. No recent evidence is available of any national regulator having compelled IATA to divulge information as a pre-condition for approval of tariffs filed. Even the conditions imposed by US regulators regarding disclosure of information do not appear to be followed within the spirit of the orders: either by IATA, or by member airlines on whom the obligations are imposed. Past interactions between IATA and the CAB demonstrate that the CAB had exercised a certain measure of trepidation when dealing with IATA, as it was mindful that most IATA airlines were foreign-government owned or controlled. It is likely that the CAB

[515] Tauber, *supra* note 226 notes that, "Two years later in September 1958 American Aviation published a list of IATA fines. The article which was highly complementary of the IATA enforcement system was preceded by the following caveat: 'The Editors of American Aviation want to emphasize that the information used did not come from IATA sources….The list of fines showed that $ 663,000 had been collected in penalties by all the IATA Breaches Commissions between 1950-1958 …common violations described by the article included failure to collect for excess baggage (fines of up to $15,000); failure to report an agent who was delinquent in remitting funds usually $500; granting student discounts after improper identification (rarely above $1,000); failure to apply the proper rate of exchange ($5,000-20,000); and most frequently doing business with a non IATA agent ($2,000) and giving away free rides ($200-5,000)", at 15 & 16.

was concerned with the limitations and absence of direct statutory power to enforce its edict on IATA airlines or to compel the dissemination of information, given the experience of the *Chandler* controversy.[516]

Foreign airlines of IATA that apply for permits to operate into the United States can be compelled to divulge information to US regulatory authorities. Several statutory provisions in the *Federal Aviation Act* ("the Act") can be invoked by US regulators to obtain information from foreign airlines. §§403, 404, 407 and 412 of the Act impose different obligations in relation to the dissemination of information on airlines, while §902(e) of the Act imputes criminal liability for failure to provide information required under the Act, or for providing false information. Referring to the CAB's past experiences with IATA, McGoldrick has observed that:

> It is to be noted that even if the CAB could clear legal obstacles to the obtaining of an order to produce documents, it could face even greater problems with enforcing the order. If the documents are located abroad, actual fiscal enforcement of the order would require the unlikely cooperation of foreign judiciary and would be subject to the defence of extraterritoriality.[517]

As such, it is difficult to enforce these obligations today; particularly if the airline concerned is either owned or controlled by a foreign state. In these cases, the US DOT would possibly exercise caution before deciding to invoke enforcement mechanisms that are available to it under US law, given the delicate foreign policy issues and diplomatic relations at stake.

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[516] *See*, *Illustrations of CAB intervention and orders relating to IATA resolutions*. Chapter 2, *above*.
[517] McGoldrick, *supra* note 221 at 107.

## 5.10 Judicial treatment of secrecy

The privilege of secrecy claimed by IATA came under scrutiny in the case of *Lorraine Stanford Executrix of the estate of William Stanford vs. Kuwait Airways, other airlines and IATA.*[518] This was a procedural application incidental to a wrongful death claim brought against several airlines and IATA,[519] in which the plaintiffs alleged a breach of duty for lapses in airport/airline security that resulted in the hijacking of an aircraft and the subsequent murder of two passengers.[520] IATA sought a protective order from the Court to prevent the engagement of an expert witness on behalf of the plaintiffs, aiming to prevent disclosure of confidential documents which IATA argued had come into the possession or knowledge of the expert witness during his prior employment with IATA. The court denied IATA's motion for the protective order and held that IATA had failed to show a disqualifying connection between the expert witness' past employment and the facts of the case.[521] In rejecting IATA's argument that the engagement of the witness to provide testimony would violate a duty of trust and loyalty owed to IATA

[518] *Lorraine Stanford Executrix of the estate of William Stanford Vs. Kuwait Airways, other airlines and IATA* , 705 F Supp. 142 (SDNY 1989).

[519] *Lorraine Stanford Executrix of the estate of William Stanford Vs. Kuwait Airways, other airlines and IATA* 1990, U.S Dist., LEXIS 16761. Also see connected case 648 F. Supp. 1164 (SDNY 1986).

[520] IATA sought summary judgment moving on the grounds that it owed no duty of care. IATA's motion for summary judgement was denied as the court found there was a material issue to consider whether IATA owed a duty of care which had to be tried before a jury upon submission of evidence.

[521] The court noted that although the expert had been a member of the security survey team assigned by IATA to inspect the airport from which the hijacked plane departed there was no claim of other involvement. Therefore, the court held that disqualification of such a witness was not necessary to preserve the court's integrity in the case and as such the said witness should be permitted to provide testimony before the trial court proceedings.

by virtue of his former employment as a private consultant on airline security in IATA and his receipt of confidential information, the Court observed:

> No cases or authorities were submitted by IATA in support of this broad proposition seeking to disqualify the witness. The cases cited by IATA related to trade secrets which prohibited the use of confidential information on the basis of a fiduciary duty in competition with the former employer……in the absence of a contractual restriction and demonstrable harm, there does not appear to be a general legal doctrine preventing the expert witnesses' engagement to provide testimony and/or having access to his protected documents.

## 5.11 Difficulties in obtaining source documents

One of the most problematic attributes of IATA is its failure to enable pubic access to its resolutions. Enabling this access to information would create a convenient, easy and inexpensive reference for use by the airline industry and the consumer. IATA implements most of its industry programmes through Traffic Conference resolutions. These resolutions are frequently changed, revised and amended and new resolutions are frequently added to the ever-expanding corpus of IATA rules. However, there is no convenient method for the airline consumer or the public to access or obtain information with regard to these resolutions, their current amendments or consolidated texts. IATA publishes a large content of information about the organization, its various programmes and initiatives on its website. However, no source documents, (i.e., the traffic conference resolutions which make up the corpus of quasi-rules made for the industry) are made available on its website. Information currently available in the public domain consists mostly of descriptions about numerous IATA programmes and

initiatives and some, limited information regarding its resolutions. This information consists mainly of subjective narratives and descriptions of what the resolutions are designed to achieve.

The only means of gaining access to IATA resolutions is by purchasing different types of publications and manuals sold by IATA. These publications are collated and arranged in formats that suit IATA's marketing purposes. This practice of compiling and collating source documents to suit its commercial objectives, and the practice of marketing and selling information at high prices to generate revenue, raise serious questions of propriety and reflect adversely on the integrity of IATA's regulatory structure. The biggest problem encountered in conducting this research was the difficulty of obtaining IATA resolutions—the essential source documents—needed to analyse matters relevant to this thesis. No individual or consolidated texts of IATA resolutions are published on its website. They are not provided free of charge, nor at nominal prices charged directly by IATA or any of its offices. The content of resolutions, their legislative history, repeals, amendments, validity periods, date of government filing, and approvals cannot be easily ascertained. The IATA website directs interested persons to its publications, which are advertised for sale online, which are said to contain its resolutions. However, IATA's current practice is to consolidate its resolutions into publications (both in print and electronic formats) which are arranged to optimize its commercial objectives. These publications are made available for purchase at high prices through the IATA website. This is most often the only manner

in which source documents or resolutions may obtained by the public. However, this process would not encourage public access to IATA source documents, nor facilitate academic inquiry. Even when resolutions are made available at a price, they are not sold as individual or composite resolutions but are required to be purchased in the form of published manuals, which contain not only the specific resolutions required, but also other resolutions, templates, formats and guidance material combined in the publication.[522] When purchasing an IATA publication to gain access to any specific resolution, the interested person is invariably compelled to pay for other, unwanted material consolidated in the publication; including IATA's own interpretations of its role and duties.

Professor Lon Fuller, in his seminal work *The Morality of Law,* states that there are eight ways in which any attempt to create and maintain a system of rules can miscarry.[523] Within these, he specifically identifies three: "(a) the failure to publicize, or at least make available to the affected party the rules which he is expected to observe; (b) introducing such frequent changes in the rules that the subject cannot orient his action by them and (c) the failure of congruence between the rules as announced and their

[522] For example, if a person needs to find out the rules applicable to a service standard in international passenger air transport as well as international air cargo transport, he would be required to purchase the *IATA Passenger Services Conference Resolutions Manual*, (at the current price of US$ 667/- [print] & US$ 900/-[web download]) to scrutinize the required passenger services resolution whilst he will also need to purchase the *IATA Cargo Services Conference Resolutions Manual* (at the current price of US$310/-) to gain access to the relevant resolution of the IATA Cargo Services Conference. These manuals contain *inter alia,* resolutions of the relevant conferences in addition to templates, formats and sample documents prescribed in relation to the implementation of resolutions. As most resolutions have a validity period of one year (some resolutions are valid for indefinite periods until amended or repealed) subsequent extensions of validity, amendments, repeals, revisions and continuing status of any resolutions can be ascertained only by purchasing the next editions of the very same IATA manual (which is published for sale as a new edition every year) at the same or a higher price.

[523] Lon Fuller, *The Morality of Law*, (New Haven: Yale University Press, 1964).

actual administration. "[524] These three rules are of particular relevance to an analysis of the legitimacy of the IATA system of *quasi* rules. Professor Fuller goes on to state that "[a] total failure of any one of these eight directions does not simply result in a bad system of law; it results in something not properly called a legal system at all." Clearly the IATA system of rules does not satisfy the prescribed minima of a Fullerian evaluation. Such an evaluation would inevitably condemn the IATA rules as falling below the minimum threshold envisaged by Fuller. This, further highlights IATA's failure to achieve its duty in rulemaking, and its inability to attain the aspiration of perfection in legality.[525]

The above discussion highlights some serious concerns of accepting IATA as a legitimate rulemaking body. The legitimacy of IATA's conduct, particularly its failure to make available information and its rules to the public, comes into sharp focus. IATA is an organization that has acquired tacit acquiescence of member governments by design and by accident to formulate rules that affect the public. When the public is affected by IATA rules that impinge upon their freedom of choice, there necessarily ought to be a corollary obligation upon states to ensure that IATA rules are applied in a fair and reasonable manner, without causing an undue or unfair burden upon their citizens. It is the author's view that, given the nature of IATA resolutions and their direct impact on international air transport – itself a public utility, IATA has an obligation to disseminate and make available its source documents for public scrutiny.

[524] "The Morality that makes law possible" ch 2 in *ibid,* at 39.
[525] *See*, Fuller, *supra,* note 521 at 41 – 42.

IATA should be subject to minimum of regulatory oversight by states in areas which affect their nationals. A supervening obligation is also imposed on states to provide protection to its nationals. Hence, states are duty bound to ensure that the tacit recognition of IATA rules within their territories do not adversely affect their nationals.

When resolutions which ought to be in the public domain are sold to the public at high prices, what recourse is available to compel the dissemination of these resolutions to the public at no cost or at reasonable prices? As the country which granted corporate status to IATA, Canada should bear a certain measure of administrative responsibility towards and regulatory oversight of IATA. This responsibility should also extend to compelling IATA to disseminate information that ought to be in the public domain. IATA resolutions should be made available and published either on a website accessible to the general public, or to the regulatory authorities in Canada and other countries where IATA resolutions are implemented, so that the public can access these documents at reasonable costs. States ought not abdicate their responsibility of protecting consumers within their territories. While recognizing the need for the existence of IATA and the important functions it performs, the state cannot be remiss in permitting IATA unfettered freedom to operate without adequate supervision. States therefore have an essential obligation to rein in, where necessary, the regulatory authority of IATA so as to ensure that adequate protection is provided to the public. This obligation more readily applies in the area of disclosure of information, whereby

states should assume the responsibility to ensure that IATA makes available its resolutions and any prescribed information which affect the nationals of states. This information should be made available to a nominated regulator or public agency in a convenient form that enables the dissemination of such information to the public upon request.

## 5.12 Control of funds through the Clearing House (ICH)

Another area of concern is how IATA controls its sales revenue. Revenue generated from the sale of air transportation comes into IATA's control soon after the incidence of the sale and is retained until final payment is made to the airlines entitled to payment. While the settlement systems and the ICH provide a service intended to facilitate the convenient and efficient settlement of revenue among airlines, the underlying procedure of this scheme warrants scrutiny. Several BSPs operate around the world to procure settlement of funds among airlines.[526] When air transportation is sold, the travel agent effecting the sale is required to remit the revenue collected to the local area BSP account of IATA. As is discussed in a later chapter,[527] these funds are then deposited into a 'Hinge' account of IATA. The rules of remittance require the travel agent making the sale to remit the sale proceeds into the IATA Hinge account within a specified period (currently within 7 days) irrespective of whether the funds have been

[526] Tyler, *supra* note 414.
[527] See *below* Chapter 7 on Ticketing, reservations and remittance procedures, Passenger Agency.

paid by the consumer within that specified period. Under IATA agency rules, the travel agent must then provide security directly to IATA—by way of bank guarantees—for the settlement of sales revenue within the specified period. There are several issues with this process. First, this process creates cash flow problems for travel agents, precluding the possibility of a travel agent offering credit beyond the 7 days prescribed by IATA for settlement. Second, even if an airline was willing to grant longer periods of credit for settlement to selected travel agents, they cannot do this, as the settlement plans come under the direct administration and control of the IATA. The travel agent's responsibility to make the remittances is tied to the date of issuance of the ticket (or the date of sale), which would generally occur several days in advance of the date of commencement of travel indicated in the ticket. The funds remitted to the Hinge account are kept under the control of IATA, until final settlement is made to the airlines through the IATA Clearing House, which occurs several weeks after the date of travel. Therefore, during the period between the date of sale and the date of settlement (which could be between 30-45 days from the actual date of travel) sales revenue is held by IATA. These funds do not belong to IATA, but to the airlines which perform the carriage. However, during the time that sales proceeds are within its control, IATA makes short term investments using these funds.[528] Thus, a question arises regarding the ownership of accretions generated by IATA from sales revenue which belongs to the airlines performing the carriage. Rules governing travel agents stipulate that,

[528] *See,* ACCC, Determination A 90435, *supra,* note 274, at 21. In its Determination, ACCC noted IATA's claim that the operating costs of the Clearing House (ICH), are covered by interest accrued through funds passing through the ICH account and interest charged on overdue accounts.

immediately upon a ticket being issued, sales proceeds received for the sale become the property of the airline, which is deemed to be held by the agent in trust for the airline concerned.[529] These sales proceeds are collected from a consumer and are at times advanced by the travel agent on account of its obligation under the BSPs and the IATA remittance rules for settlement. However, these proceeds are also used as investment funds by IATA to generate revenue for itself. It is possible that IATA's Clearing House Agreement with airlines would confer the right of appropriation for accretions in temporarily held funds to IATA as a contractual privilege in consideration of IATA providing settlement services. However, IATA also charges airlines fees for participating in the ICH. The ACCC has found that charging higher fees for non-IATA airlines for settlement services relative to the lower fees charged to member airlines for the very same service to be discriminatory and anti-competitive.[530] No single airline or governmental authority has knowledge as to the total content of funds that are managed by IATA through the ICH or the revenue/profit that is generated as interest from short term investment of the monies passing though the ICH.

The UK House of Lords considered the legality of the ICH rules in *British Eagle International Airlines Ltd. vs. Compagnie Nationale Air France* ("British Eagle"),[531] and held that ordinary rules of liquidation will prevail upon the liquidation of a member airline over any ICH rules of IATA that are applicable to the settlement of debts between

[529] Res. 824 "Monies due by Agents to Carriers", s. 7.2 in - IATA, *Remittance*, *Passenger Agency Conference Resolutions Manual,* 38th ed., (June, 2017).
[530] ACCC, Determination A 90435, *supra*, note 274 at 21.
[531] *British Eagle International Airlines Ltd. Vs. Compagnie Nationale Air France* 1975 (1) WLR 758.

members of the ICH. Clearing House arrangements of IATA were held to be invalid, insofar as such arrangements attempted to contract out of company law provisions in the UK, whereby preferential status was accorded to a member of the ICH over unsecured creditors in liquidation. British Eagle, which had recently been placed in liquidation, owed money to the ICH. At the same time, Air France owed money to British Eagle. The liquidator of British Eagle attempted to recover the money from Air France, which opposed the liquidators' claim on the basis that it was bound by ICH rules, and was therefore obliged to set off or collect money only after netting off the claims of all creditors of British Eagle through the ICH. The liquidator of British Eagle challenged the legality of the ICH scheme on the grounds that it purported to subvert and/or circumvent the mandatory rules of distribution in insolvency applicable under the statute. The House of Lords, by a majority decision, held that the ICH scheme should not be permitted to elevate the status of Air France into a preferential creditor, and that the ICH should not be able to avoid the priority rules for distribution applicable in insolvency, as this would be against public policy.[532] The court further observed that it was unlawful to contract out of the provisions of insolvency law and

[532] *British Eagle International Airlines Ltd. Vs. Compagnie Nationale Air France,* Lord Cross, who formulated the leading opinion for the majority went on to state in his judgment that: "the parties to the "Clearing House" arrangements did not intend to give one another charges on some of each other's future book debts. The documents were not drawn so as to create charges but simply so as to set up by simple contract a method of settling each other's mutual indebtedness at monthly intervals. Moreover, if the documents had purported to create such charges, the charges would have been unenforceable against the liquidator for want of registration under §95 of the Companies Act … The Clearing House creditors are clearly not secured creditors…… the clearing house creditors are claiming nevertheless that they ought not to be treated in the liquidation as ordinary unsecured creditors but that they have achieved by the medium of the Clearing House agreement a position analogous to that of secured creditors without the need for creation of registration of charges on the book debts in question. The respondents argue that the position which according to them, the Clearing House creditors have achieved while it may be anomalous and unfair to the general body of unsecured creditors, is not forbidden by any provision of the Companies Act and that the power of the court to go behind agreements, the results of which are repugnant to our insolvency legislation is confined to cases in which parties' dominant purpose was to evade its operation. I cannot accept this argument."

therefore ruled in favour of the liquidator of British Eagle, permitting the recovery of funds from Air France and disregarding the scheme of settlement that had operated according to rules of the ICH.

After the *British Eagle*[533] decision, IATA amended the Clearing House agreement and relevant regulations to overcome the implications of that decision. The amendments reclassified the character of the relationship between member airlines, with the objective being that the ICH would receive payments from airlines on the basis of a contract and not as creditor.

However, in the case of *Ansett Australia Holdings Ltd and others vs. International Air Transport Association,*[534] the Supreme Court of Victoria observed that, when a contract provides for the relationship of one kind, a provision which purports to state that the contract is of another kind will be either read down, or read as ineffective.[535] In its decision, the Court refused to classify the ICH as a creditor of Ansett Airlines—which was in administration—on the basis that the ICH agreement was an attempt to contract out of relevant insolvency laws.[536] Thus, *British Eagle* enunciated the important principle

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[533] *British Eagle International Airlines Ltd. Vs. Compagnie Nationale Air France.*

[534] *Ansett Australia Holdings Ltd and others Vs. International Air Transport Association,* t VSCA 242, 10th November 2006.

[535] *Ansett Australia Holdings Ltd and others Vs. International Air Transport Association.* Relying upon the *dicta* of Lord Denning M.R., in the case of *Massey Vs. Crown Life Insurance Co* (1978 1 WLR 676 at 679) and the principle that "the parties cannot alter the truth of the relationship by putting a different label to it", the court held that although IATA regulations were different to those considered in the case of *British Eagle,* the meaning of the regulations determined objectively by construing each clause according to its natural and ordinary meaning in the light of a contract as a whole, the relationship between the airlines remained one of debt. As such the Court held that the principle set out in British Eagle was still applicable.

[536] *IATA Vs. Ansett Australia Holdings Ltd (Subject to Deed of Company Arrangement)* (2008) HCA 3., It must be noted that in appeal, the High Court of Australia, overturned the above decision of Victoria's Supreme Court, stating that the ICH contract was not repugnant to the provisions of the *Ansett* deed of company arrangement in administration, concluding that it did not create any preference for ICH over other creditors of *Ansett.* Although, the High Court distinguished the application of the principle *British Eagle* to the instant case, it did not deny its applicability in appropriate circumstances.

that, if IATA resolutions produce effects inconsistent with or which tend to circumvent national law, such resolutions would be deemed contrary to public policy.

### 5.13 Selective application of resolutions

IATA resolutions are formulated so that selected provisions of resolutions—and sometimes entire resolutions—are excluded from application in selected countries. This is evident from the resolutions that are discussed in detail in chapters 6 and 7 of this thesis under the headings 'Passenger Services' and 'Passenger Agency'. Mindful of the regulatory impediments that it could face in certain jurisdictions, IATA has scaled back its edict. Resolutions are made applicable only in some countries where IATA anticipates little or no opposition to their implementation. If the professed objective of IATA is to achieve uniformity in its rules applicable to worldwide air transport, what rationale would support its selective application of resolutions in different parts of the world? If IATA is cautious that some of its rules are repugnant to the laws of certain countries, what justification can be advanced for those same resolutions being implemented in full force by IATA in countries with weaker or less developed consumer protection and competition law regimes? Would the citizens and airline consumers of other countries not be affected the same way that airline consumers in the US, Australia or Europe are affected, given that courts in these countries have criticized and overruled IATA resolutions on policy grounds? Does this selective implementation of IATA resolutions not constitute an opportunistic exploitation by IATA of consumers and the public in those jurisdictions which do not have the same level of regulatory

protection as countries with more sophisticated consumer protection frameworks? Thus, we can see that while the professed objective of IATA is to achieve uniformity in rules worldwide, it is evident that the selective rulemaking and application of rules by IATA defeats that objective.

### 5.14 Pricing of IATA products and services

IATA is a leading provider of goods and services to the airline industry at every level of the supply chain. The range of products and services that IATA develops and supplies to the airline industry is multifaceted and encompasses every aspect of the airline industry. IATA no doubt incurs significant costs to provide these goods and services. However, the important question to consider is: on what basis does IATA price its goods and services, and at what levels of return or profit? As described above, resolutions of IATA are sold in the form of manuals and other publications at relatively high prices. The numerous services provided to the industry are also priced at significantly high levels. What is the basis followed by IATA for determining the prices of these products and services? IATA rules and regulations are structured in such a manner that airlines, travel agents and others are compelled to purchase products and services of IATA at different levels of the supply chain.[537] The consumer is also an involuntary subscriber to IATA's revenue when s/he contributes indirectly to costs that are factored into these products and services sold to airlines and agents by IATA. From this perspective, it becomes difficult to ascribe legitimacy to IATA rules. On the one

[537] *See,* for example, *the fees and costs of being an IATA Agent*, Passenger Agency *below* in Chapter 7.

hand, IATA is a pseudo legislator that makes rules governing its members and consumer alike. On the other hand, it also assumes the role of a facilitator: developing and supplying products and services in order to procure compliance with its own rules.

One problem to address is determining who should supervise and adjudicate reasonableness in setting the price of IATA products and services. Reasonableness in the pricing of goods and services can be determined only if there is access to complete information regarding the costs of supplying such goods or services. An independent authority or regulator would be able to assess whether there is a nexus between prices charged for goods and services and the cost incurred to produce these. In the absence of such independent supervision, the pricing methods of IATA escape scrutiny, leaving open the possibility of arbitrary and unreasonable pricing by IATA. There are past instances when regulators investigated whether costs passed onto passengers on the basis of IATA resolutions were reasonable.[538] However, this is not a common practise. Hence, the cost implications of IATA initiatives and rules often escape scrutiny by national regulators, leaving the consumer to unconsciously meet the indirect costs hidden within prices of air tickets and tariff rules which impose additional financial burdens. An important principle can be drawn from the CAB order relating to the *IATA*

[538] CAB Order E- 23324 (20th May 1966), *IATA Agreement Re In-flight Entertainment*, CAB Reports vol. 44, 823. Granting approval to IATA resolutions to charge passengers $2.50 for providing headsets for audio visual in-flight entertainment. In making this order CAB considered in detail the costs of providing audio visual headset on board to passengers, comparing the cost information submitted by several US based airlines before it came to a finding to approve the resolution for a limited period of time. Having considered the cost details, the CAB concluded that the agreement to charge $ 2.50 per passenger was not adverse to the public interest "in view of the relationship of the carrier costs to the proposed charge" *(emphasis added)*.

*Agreement Re In-flight Entertainment*: that, for a "charge to be deemed reasonable it must be related to the cost." [539]

Where regulatory scrutiny of IATA exists, it is designed to ensure that resolutions and agreement of IATA do not hinder competition. Regulatory authorities do not ordinarily concern themselves with matters such as the reasonable pricing of IATA goods and services, their suitability, or their merchantability. IATA does not report or disclose its revenue or profits. It is also not known to pay income tax in any jurisdiction. It is also not known whether IATA products and services are registered or licensed by any particular authority. IATA has, through its own regulations, cornered the airline industry market and created a virtual monopoly for its products and services. These products and services are then interwoven into the fabric of its regulatory regime. Thus, in the absence of adequate regulatory supervision of IATA's commercial activities, there will always be questions regarding the legitimacy of IATA and its activities.

If the pricing of IATA products and services is unreasonable, this would certainly defeat IATA's professed mission as a trade organization for the airline industry and would erode its integrity and its claim to set fair standards for the airline industry. The legitimacy of its rules depends on several questions to which only IATA could provide answers. Such questions are: what line separates IATA the trade organization from IATA the business? Which regulator assumes responsibility to ensure that this line of

[539] *Ibid.*

separation does not get blurred? Would the pursuit of higher profits overtake the objective of IATA continuing as a trade association?

This chapter has discussed various characteristics of IATA's tariff coordination and agreements reached amongst member airlines which give rise to adverse implications for the consumer. The next two chapters (6 and 7) contain detailed analyses of implications to the consumer which arise due to resolutions made by IATA Passenger Services and Passenger Agency Conferences.

# Chapter 6 - Passenger Services

## 6.1 Passenger Services and Agency

As described in earlier chapters of this thesis, IATA tariff coordination has transformed from a compulsory to voluntary system that is relied on by airlines, mostly to facilitate airline interlining. Although tariff coordination is no longer mandatory, subscription to IATA programmes has become a *cine qua non* for airlines, to procure the benefits of interlining and the multifaceted initiatives of IATA which have become industry norms. Agency and Services Conferences have not attracted the same level of scrutiny as Tariff Conferences, as they do not mandate *ex facie* price fixing arrangements. However, resolutions of Agency and Services Conferences contain features that stimulate price coordination. These resolutions, which deal with matters such as the accreditation of travel agents, service levels and conditions, agent and airline relationships and rules for interlining, all incorporate compelling rules. Although these resolutions may not openly display anticompetitive characteristics, they contain latent features which, upon scrutiny, appear to impede competition and to be disadvantageous to consumer interests. Rules relating to 'services' and 'agency' also significantly influence tariffs, as they have a direct bearing upon costs.

This chapter and the following (chapter 7) will examine Passenger Services and Passenger Agency Conference resolutions which impose mandatory compliance obligations upon the consumer that, in turn, suggest features of questionable legitimacy and anti-competitive consequences.

## 6.2 General rules of interpretation

Several resolutions formulate general rules with regard to the applicability and effectiveness of resolutions.[540] Procedural and drafting rules uniformly apply to the interpretation of all conferences (Tariff, Agency and Services) resolutions.[541] The entire content of some rules and regulations are not set out in the body of the resolution, and some detailed provisions are formulated as attachments to resolutions.[542] This practice has been frowned upon by regulatory authorities in the United States.[543] Members are required to notify the Secretary of each conference whether filing and approval of any resolution is required by their government authorities, and to file the resolution within the filing period where necessary.[544] Members are also required to promptly notify the conference Secretary of approval or disapproval of a resolution filed and extension of filing periods.[545] Resolutions are categorized into Type A, Type AA and Type B, based

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[540] IATA, *Passenger Services Conference Resolutions Manual (PSCRM)* 37th ed., (Montreal: IATA, 2017), res.001, 004A, 008A and 200G [*PSCRM*]; IATA*, Passenger Agency Conference Resolution Manual*, (*PACRM*), 38th ed. (Montreal: June, 2017) [*PACRM*]. These resolutions describe the procedures and rules with regard to effectiveness, filing and approval, government reservations and restrictions of applicability etc., relating to such resolutions.

[541] Subject headings and sub-headings are assigned to identify the category and nature of each IATA resolution, which ascribe the geographical applicability of such resolution. When a resolution heading indicates an area for example as "Area 2" or "Area 1" that resolution will apply to the particular area/region as demarcated in the IATA Area map. See, "IATA master map," in Chapter 1*, above.*

[542] IATA claims that it uses attachments to formulate rules mainly to avoid overloading the resolution with close details. See*,* explanation regarding Attachments to Resolutions., *PACRM supra* note 540 at vii.

[543] Illustrations of CAB intervention and orders relating to IATA resolutions in Chapter 2. *above.*

[544] *PACRM supra* note 540, -"Permanent Effectiveness Resolution*"* - 001, -PAC (48)001, para. 2. on - Filing and Approval.

[545] *Ibid,* res. 001, para. 3. . Any resolution not disapproved by the Government authorities remain in effect until -

a. Any member rescinds the approval after making a proposal for the rescission of the approval which becomes effective 180 days after it is so rescinded, or;
b. The resolution is effectively modified or rescinded by the relevant Conference;
c. A Government disapproves or withdraws approval previously granted in respect of such resolution;
d. Where any member gives notice of its intention or the resolution ceases to be effective in which event it so ceases to be effective 30 days after giving of such notice or until the date of expiry.

- *Ibid,* para. 5 - PAC 48(001).

on effectiveness and government approval/disapproval.[546] If a member is prevented from implementing any terms of the resolution due to action of any other government (than their own) such member may notify the conference Secretary that it will not be bound by any government action that applies to such resolution.[547]

### 6.3 Passenger Services Conferences

The rules relating to passenger services are made in the Passenger Services Conference. The rules set at these Conferences have worldwide application and seek to establish technical standards, passenger/baggage handling procedures, and communication

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[546] *Ibid,* paras. 8.1- 10.1, of PAC (48)001. Each type of resolution, *viz*, "A" "B" and "AA" have different conditions of validity applicable to them. For example, disapproval of a type A resolution or any part thereof is considered as disapproval of the entire resolution whilst in the case of Type B resolution, the disapproval of any portion of such resolution does not invalidate the entire resolution but only the portion of the resolution that has been disapproved. For Type AA resolutions the disapproval of any part of same will render the entire resolution invalid but automatically restore the previous Type AA, resolution which it replaced.

[547] *Ibid,* paras. 9 – 9.2, 10.1 of PAC (48)001. Upon receipt of such notice under the said provision, the resolution referred to in the notice shall not apply to the member giving notice and will not be bound thereby. If, however, such member has not given notice within the 30-day period, the member is bound according to the terms of the resolution. Several government reservations have been made to the effect that, if any IATA resolution is to be made more liberal by means of any reservation, condition or order imposed or issued by any government in favour of an airline then such reservations and conditions also will apply in favour of the national airline of the country making such reservation. Several such country reservations are set out at the end of the relevant resolution. *See,* Government Reservations PAC (48)001., *PACRM.,* ibid, at pages 2-3.

Resolution 008a - *Extension of Expiry date*, PSC-CSC (01)008a., *IATA PACRM, ibid.* If a resolution of a joint or composite meeting having an indefinite application (where there's no expiry date given) is to be replaced by a similar resolution, however, the amending resolution is delayed due to government approvals being delayed or for some similar reason, the previous resolution which was to be replaced by the proposed new resolution may be extended by the Secretary of the conference provided that no extension beyond 60 days of the date of the intended expiry of the resolution. Governments of United States and Australia have entered reservations to this resolution.

PAC (42) 200g., *Filing of Government Requirements and Authorities, PACRM, ibid.* If any government imposes requirements or conditions for authorization, the IATA members in that country is responsible to file an exact copy of the conditions/requirements within 30 days of such imposition and thereafter be circulated to all members by the Secretary of the conference.

PAC-1/2/3/ (01)001a, *Passenger and Agency Conference Procedures –Tie-in*, *PACRM, ibid.* "Tie in" are those resolutions which become effective or invalid upon another resolution to which it is "tied in" being made effective or invalidated. There are instances where Passenger Agency Conference resolutions are tied into resolutions adopted by Passenger Services Conferences. In such situations the resolutions formulated at the Passenger Agency Conferences are assigned the scope or functions of a Passenger Services Conference and such resolutions are only amended or varied by a Passenger Service Conference which will then be accepted as applicable to the Passenger Agency Conference as well.

protocols to facilitate multilateral interlining.[548] Therefore, the underlying objective of the Services Conference is to facilitate multilateral interlining, which is the backbone of IATA. The resolutions which are the source of these rules are not publicly available in their original form.[549] Rather, they are compiled into manuals sold by IATA. The main document which contains the compilation of passenger services resolutions is the *Passenger Services Conference Resolutions Manual.*[550]

### 6.4 Passenger services rules

The resolutions relating to passenger services are arranged under several categories according to their sequential numbers, which are: passenger processing,[551] ticketing,[552] baggage,[553] reservations,[554] and miscellaneous.[555] A close examination of the content of services resolutions demonstrates that they frequently exceed their mandate of facilitating interlining. The line separating procedural rules from those that create substantive obligations is often blurred: the resolutions inevitability also create substantive rules that affect members and non-members, including the consumer.

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[548] *PSCRM, supra* note 540, res. 004, "Applicability of Resolutions and Recommended Practices", PSC (MV) (78) 004 Type B.
[549] *Difficulties in obtaining source documents*, Chapter 5, *above*.
[550] *PSCRM supra* note 540; *PACRM supra* note 540. *Passenger Services Conference Resolution Manual, Parts I and II*, (*PSCRM*) International Air Transport Association Montreal and Geneva, 37th Edition, effective 1st June 2017 to 31st May 2018. This manual *PSCRM* is usually published in two parts, (Part I and Part II) the most recent publication of which is the 37th Edition effective from 1st June 2017 and is usually updated every year.
[551] *Ibid*, res., 700 -719.
[552] *Ibid*, res., 720 -739.
[553] *Ibid*, res., 740 -759.
[554] *Ibid*, res., 760 -779.
[555] *Ibid*, res., 780 -799.

## 6.5 Government reservations[556]

Approximately 32 government reservations have been filed in relation to resolutions formulated by Passenger Services Conferences. These reservations indicate a wide variety of conditions and stipulations imposed by several countries when approving IATA resolutions. These reservations also highlight divergences in attitude and the absence of a uniform set of principles that could be invoked by national regulators to deal with IATA. These reservations also denote the varying degrees of national recognition of passenger services resolutions.[557] The French Government states that it will not be bound by or follow the IATA resolutions, or any reservations filed by other states, which have the effect of substantially changing the intent (diluting the force) of such resolutions.[558] By comparison, Germany reserves the right for its airline,

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[556] *PSCRM supra* note 540, "Permanent Effectiveness Resolution," PSC-CSC (16) 001A. . This resolution contains the reservations filed by the various governments.

[557] The Australian governments' reservation states that, "*Approval by the Australian Government of IATA resolutions, does not relieve the airlines from their obligations under relevant bilateral air transport agreements and the national Australian regulations from submitting their tariff or charges for the carriage of persons and cargo on their services to the Secretary to the Department of Transport, for approval.*", *PSCRM, ibid.*

The Canadian Government's reservation *inter alia* stipulates,

"*1. The Canadian Transportation Agency will accept tariff filings reflecting the provisions of IATA resolutions insofar as they apply to traffic to and from Canada without prejudice to change that might be deemed necessary or desirable by the said committee upon investigations of complaints at any time.*

*2. Fares, rates charges and conditions or practices relating thereto established pursuant to orders, conditions or reservations of a foreign Government shall not be applicable in respect of traffic to or from Canada until prior authority has been granted in writing by, and appropriate tariffs have been filed with the Canadian Transport Agency. Ibid.*

Netherlands states that IATA resolutions shall be applicable, on the condition that concessions applied for air transportation in the Netherlands or to or from the Netherlands consequent to any reservation imposed by any other government can be practiced or implemented in the Netherlands only subject to specific approval for such revised conditions on fares to those imposed by IATA being expressly approved by the Netherlands Civil Aviation Authority, *ibid.*

The United Kingdom notes in its reservations that "the resolutions herein considered are those adopted by IATA which has not taken account of any conditions or reservations made by the other governments in approving the resolutions. Accordingly, Her Majesty's government reserves the right to withhold its approval to or impose conditions or changes thereto or to disapprove a portion of any resolution herein if it appears that decisions of other governments have substantially changed the meaning of any resolution herein. *ibid.*

[558] In its reservations France states that, "*having noticed that many governments in approving resolutions are placing conditions or reservations which substantially change the intent of the resolutions, it is to be understood that the French government shall not automatically*

Lufthansa, to alter its conduct and not be bound by resolutions and to vary the conditions applicable to Lufthansa to match any new conditions brought about by government reservations to the resolutions.[559] The Japanese government reserves its entitlement to match competitive fares if different rates and fares to those agreed by IATA are established as a result of foreign government action.[560] Most government reservations demonstrate tacit acknowledgement that conditions could be more competitive, although governments generally agree to follow IATA resolutions.[561]

### 6.6 Interline billing

Interline revenue is billed in accordance with the *IATA Revenue Accounting Manual* ("Revenue Accounting Manual") as amended from time to time.[562] Airlines participating in interline carriage are required to abide by resolutions governing interline carriage both in respect of 'passenger tariffs' as well as 'passenger services.'[563] The adoption of uniform standards introduced in IATA resolutions for interlining also entails additional costs for airlines and travel agents, who must formulate their financial reporting in a manner consistent with the Revenue Accounting Manual. The Revenue

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*be bound by such conditions or reservations, especially those which are issued by the governments not directly concerned with the type of traffic involved.*" *ibid.*

[559] In its six (6) point reservation, Germany stipulates *inter alia* that "*Where fares, rates or governing conditions are established pursuant to the order, directive, authorization or reservation of a foreign government for application by one or more air carriers, Lufthansa is authorized to apply the same fares, rates or conditions.*" *ibid.*

[560] The reservations filed by Japan stipulates that "*Japan Airlines Company Ltd., is entitled to establish competitive fares and/or rates, where special fares and/or rates are established pursuant to the order of a foreign government*.", *ibid.*

[561] India states in its reservation that "*should an International Air Transport Association resolution be made more liberal by means of any reservations, conditions or orders imposed or issued by any government in favour of an airline then such reservations, conditions or orders shall apply in favour of Air India unless otherwise directed by the Government of India.*" *ibid.* Similar reservations have been filed by Indonesia and several other countries, *ibid.*

[562] *PSCRM*, res. 663, "Interline Billing" – PSC–CSC (14) 663 Type A.

[563] *Ibid,* res. 663. Airlines are also required to comply with standards and accounting procedures formulated in the IATA Revenue Accounting Manual, which sets uniform accounting standards to be adopted by all member airlines, agents and others participating in interline carriage.

Accounting Manual and training programs for accounting methods are sold by IATA to the airline industry as a part of its product portfolio.[564] This is one of the many instances where the implementation of IATA resolutions also creates revenue generation opportunities for IATA.

### 6.7 Passengers requiring special assistance

'Passengers requiring special assistance'[565] have been classified into the following passenger categories: blind, deaf, disabled (intellectual or development disability needing assistance) and/or 'meet and assist'. Passengers needing medical assistance are further categorized into wheelchair and medical categories (for example, those passengers requiring oxygen, stretchers and special handling instructions, such as a passenger with a leg in a cast). The rules for forwarding and accepting passengers with special assistance needs are set out in Resolution 700.[566] Member airlines are required to follow this resolution when transporting passengers who require special assistance. This resolution specifies the situations in which medical clearance is required for passengers.[567] Member airlines can refuse transportation to passengers unless medical

[564] IATA,online:,<www.iata.org/publications/store/Pages/revenue-accounting-manual.aspx,>The Revenue Accounting Manual online version effective as of 1st January 2017 is offered for sale at the price of US$ 220/- which is a single user online platform. Multiple user licences are also offered for sale where the price for a 25- 40 user license of the Revenue Accounting Manual is US$ 4550/-.

[565] *PSCRM supra* note 540, res. 700, "Acceptance and Carriage of Passengers Requiring Special Assistance"

[566] *See, ibid* res. 700, s. 2.

[567] *Ibid*, res. 700, ss. 2.2 & 2.1. *PSCRM, Ibid.* Medical clearance is required, where a member of IATA receives information that the passenger suffers from a disease believed to be communicable in the course of air travel or when a passenger due to disability or disease could develop unusual behaviour or physical conditions which endanger the safety or health or affect the comfort of other passengers or crew, or can be considered to be a particular hazard to the safety or the punctuality of the flight or would require medical attention or special equipment to maintain their wellbeing on the flight and where the medical condition of such a passenger could be aggravated due to such flight.

clearance is provided, when such passengers are deemed to require medical clearance according to the relevant resolution that relates to transportation.[568]

### 6.8 Inadmissible Passengers and Deportees

An "inadmissible passenger" ("INAD")[569] is defined to mean "a passenger who is refused admission to a country by authorities of such country, or is refused onward carriage by a government authority at the point of transfer, e.g. due to lack of visa, expired passport, etc."[570] A deportee is defined to mean "a person who has legally been admitted to a country by its authorities, or who had entered the country illegally, and who at some later time is formally ordered by the authorities to be removed from that country."[571] Airlines are required to waive restrictions applicable to return tickets—such as minimum stay requirements—and to use the return ticket to transport or provide outbound carriage to an inadmissible passenger who holds a return ticket for the outbound carriage.[572] Where an inadmissible passenger does not have a return ticket for the outbound carriage, the inbound carrier (the airline which transported the passenger to the point where admission to the country has been refused) is required to re-ticket the passenger to either his point of origin, or the last point of stopover, provided that the passenger is admissible to the country of the last point of stopover.[573] The inadmissible passenger is required to pay for the additional ticket issued, or the fare difference which has to be collected by the inbound carrier that transported the

[568] *Ibid*, res. 700, s. 2.2.3.
[569] *Ibid*, res, 701, "Inadmissible Passengers and Deportees", PSC (32)701, Type B – *PSCRM, ibid.*
[570] *Ibid,* res. 701, s.1.1. .
[571] *Ibid,* res. 701, s.1.2.
[572] *Ibid,* res. 701, s.2.1.
[573] *Ibid,* res. 701, s.2.2.

passenger to the point where he was refused admission.[574] The inadmissible passenger is responsible for covering expenses of food, hotel accommodation and ground transportation incurred at the place where admission or onward carriage is refused, until the commencement of outbound carriage.[575]

Even if an airline has negligently or without proper examination of visa documents transported an inadmissible passenger to a country or point of destination at which the passenger is refused entry, IATA rules require that all costs and expenses for food and hotel accommodation be borne by the passenger. Only if these expenses cannot be collected from an inadmissible passenger will they be absorbed by the inbound airline. If passenger costs exceed USD$25, or the inbound airline is unable to collect the outbound fare from an inadmissible passenger due to the inability of the passenger to pay, or due to government regulations or applicable law, such costs are to be prorated among the airlines which performed the inbound carriage and apportioned according to the distance carried by each inbound airline.

### 6.9 Issuing and honouring tickets

The compulsory procedures to be followed by airlines when issuing and honouring tickets for interline carriage are stipulated in Resolution 720.[576] According to these rules, the transportation of passengers and baggage can be performed only according to the sequence of flight coupons.[577] Once issued, passenger tickets cannot be altered at any

[574] *Ibid,* res. 701, s.2.4
[575] *Ibid,* res. 701, s.2.6.1, Resolution 701.
[576] *Ibid,* res. 720a, "Passenger Ticket and Baggage Check – Issuance and Honouring Procedures", PSC (36)720a, Type B.
[577] *Ibid*, res. 720a, s.1.6 *PSCRM, Ibid.*

time except according to the authority set out in Resolution 727.[578] A 'not valid before' date is required to be specified in respect of each flight coupon when issuing tickets.[579] A ticket cannot be completed (or issued) until a confirmed reservation is entered in the ticket. Where a voluntary date change is prohibited, or subject to additional payment, the reservation date should be entered into the 'not valid before' date of each travel coupon. Except where a ticket has a normal one-year validity period, it is mandatory for the expiry date of the ticket to be entered on its face.[580] Prior to the introduction of this rule, air tickets were issued with the return date on a round trip indicated as 'open.' However, a return air ticket is no longer able to be classified as 'open', or issued without the return date being specified. This rule places passengers in a difficult situation, where they are compelled to either purchase a one-way ticket or a return ticket with a tentative date of return. However, if the tentative return date set out in the ticket must be changed, the passenger incurs additional costs for this date change which, according to the relevant IATA resolution, is then categorized as a 'voluntary date change.' On the other hand, if the category of ticket prohibits voluntary date changes,[581] the return journey on such a ticket is rendered useless, even though the passenger has still paid for a return ticket. Even if an airline had different and less rigid rules applicable to the issuance of tickets—other than those stipulated in IATA resolutions—in order for this

[578] *Ibid*, res. 720a, s.1.13.
[579] *Ibid*, res. 720a, s.8. . The said Resolution 720a, deals with paper tickets. The parallel provisions in respect of electronic tickets are set out in §3.12 of Resolution 722, Transitional Automated Ticket (TAT), PSC (36)722, Type A, *PSCRM, Supra* and §3.2.3 of Resolution 722c, Automated Ticket/Boarding Pass-Version2(ATBT) PSC (34)722c, Type B.
[580] *Ibid*, res. 720a, s. 9. This provision requires a date and month to be entered in the "not valid after" box of the ticket, except when the ticket is issued in conjunction or in exchange for another ticket. The parallel provisions in respect of electronic tickets is set out in §3.13 of Resolution 722, Transitional Automated Ticket (TAT), PSC (36)722, Type A, *PSCRM, Supra* and §3.2.4 of Resolution 722c, Automated Ticket/Boarding Pass-Version2 (ATBT) PSC (34)722c, Type B, *PSCRM, ibid.*
[581] *Ibid*, res. 720a, s.9, exception 1.

airline to interline its services on the IATA interlining platform, it must comply with IATA mandatory rules for the 'issuance and honouring procedures' that are mandated in respect of passenger tickets and baggage check.[582]

## 6.10 Extra Seating for Cabin Baggage or Passenger Comfort

Several formalities are imposed upon airlines issuing tickets when an extra seat(s) is required for passenger comfort, cabin baggage, or to accommodate a stretcher. The airline issuing the ticket has to charge such passenger for an extra seat(s).[583] The text of the relevant resolution stipulating that, "when a passenger requires the use of a seat to accommodate excess cabin baggage or where a passenger requires the use of an additional seat for comfort,"[584] conveys the idea that assigning an extra seat only occurs following a passenger's request. However, what would be the position if the airline deems that an extra seat is necessary to 'comfortably accommodate a passenger', that is, where the choice of the extra seat is not made by the passenger, but rather by the airline? Such a situation could arise where an airline compels an obese passenger,[585] or a

[582] The rules of this resolution also create implications for passenger in respect of baggage allowances and conditions applicable to same. See, generally, res. 720a, s. 22. The procedural rules for completion and issuing of the baggage check require *inter alia*, the number of checked bags (If the free baggage allowance is based on the number of pieces) or the weight of the bags (where the free baggage allowance is based on weight) to be specified. See also *ibid* res. 720a, s. 22.2

[583] *PSCRM,* res. 720a, att. C.

[584] A *PSCRM,* res. 720a, att. C.

[585] Dealing with overweight passengers has become a real and contemporary issue for many airlines where much discussion has been generated as to the passenger rights and the concomitant obligations of airlines in accepting for carriage such passengers.
*In Re Mackay-Panos*, 2006 CarswellNat 1160, 2006 CarswellNat 99, 2006 CAF 8, 2006, FCA 8, [2006] F.C.J No. 28, 145 A.C.W.S. (3d) 754, 264 D.L.R 4th 120, 346 NR 354, the Canadian Federal Court of Appeal reviewing a decision of the Canadian Transportation Agency, held that a morbidly obese person was to be considered a "disabled" person under the Canadian Transportation Act, on account of her having encountered an activity limitation in view of her impairment or condition in being accommodated or fitting into a "seat" in the aircraft.

passenger with a medical condition or disability,[586] to purchase an extra seat because it deems that such a passenger is unable to assume a seating position in a single seat. What are the implications for a passenger who purchases a ticket online,[587] and then shows up at the check-in counter for travel, but the airline staff decide that an extra seat is required to accommodate the passenger. What happens if this passenger refuses or is unable to pay the additional fare? Can the airline refuse carriage to a passenger in this situation who refuses to pay for an extra seat, where this is deemed necessary by the airline? Further, could an airline rely on the IATA interlining rules to avoid liability under international and national laws for denying boarding to this passenger?

'Air transportation' as contemplated in IATA resolutions—notably Resolution 720a—envisages the selling of a seat on a flight, as opposed to the notion of selling 'transportation by air'. International Conventions dealing with airline liability to

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Brian O'Connel, "US airlines charging overweight passengers for extra seats", *The Irish Times* (5 July 2008). - In 2008 Southwest began charging overweight passengers who could not be accommodated in a seat with its armrests down, requiring such passengers to pay the additional price of an extra seat.

Jane E. Fraser, "Airline Squeeze remains the elephant in the room; insider", *Sun Herald,* (1 August 2010). Jane. E. Fraser, citing a survey conducted by travel.com.au contends that, 70% passengers surveyed expressed the view that overweight passengers should pay for an extra seat. The same survey had shown 53% passengers had held such a view in 2008, relying upon which statistics the author concludes that the sentiments of travellers has changed significantly where the onus had been shifted to the overweight passenger to bear the additional costs.

Julian Lee, "Airlines' answer to obesity – pay for an additional seat" , *Sydney Morning Herald*, (21st January 2010). - In January 2010 Air France and KLM had announced that they would charge 75% for an extra seat for "larger" passengers who could not be accommodated in a 43 centimetres wide seat, with its the armrest down or where the seat belt could not be fastened around the passenger in the normal seating position.

[586] Bart Jansen, "300 Wheelchair complaints costs US Airways $1.2M fine", *USA Today* (5 November 2013). The Department of Transportation had fined US Airways a sum of US $ 1.2 Million, (one of the largest penalties for a disability case) for its poor wheelchair assistance to passengers in Philadelphia and Charlotte. The Department of Transportation had also made new rules requiring the easier stowage of wheelchairs in new planes and the accessibility of airport kiosks and airline websites.

[587] *See*, the example cited above *In Re Mackay-Panos, supra* note 585. In this case the passenger was morbidly obese. Having contracted with Air Canada over the telephone and having informed the airline staff of her condition the passenger offered to purchase a business class ticket or two seats on economy. However, she was only assigned/sold a single seat which led to the passenger suffering sever difficulty, inconvenience on the onward journey and extra cost to purchase a business class ticket on the return flight. The Federal Appeals Court overruling a decision of the Canadian Transport Agency held that, such a passenger was to be treated as a "disabled" person. The Court's decision thus extended the meaning of "disabled" under Canadian Transportation Act, to include the condition of obesity.

passengers for loss, damage and delay (including denied boarding) incorporate the notion of selling 'transportation by air' in a contract of transportation, as distinct from selling an airline seat.[588] The specific language of the *Warsaw* and *Montreal Conventions* ("the Conventions"), which govern international air transportation and the rights of passengers *vis a vis* the airline, make specific reference to 'carriage of persons', rather than the sale of a ticket. Further, the relevant provisions in the Conventions stipulating the content of passenger tickets to be issued for the carriage of persons do not make reference to service conditions (for example the size of seat or the space between seats) even by implication.[589] These Convention provisions do not contain any indication of a term or condition which denotes that the 'carriage of persons' is synonymous with the sale of a seat or a specific type of seat. Both of the Conventions also contain parallel provisions which allow airlines to refuse to 'enter into a contract of carriage' and to 'make regulations/lay down conditions' that do not conflict with the provisions of the Conventions.[590] Both the Conventions confer authority for airlines to impose restrictions applicable to the contract of carriage. However, any restriction cannot be given effect if it defeats the underlying objective of protecting passenger interests—as set out in the Conventions—relating to international air transport and airline liability. Hence,

[588] *Warsaw Convention,* art. 1 "This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward." See also *Montreal Convention,* art.1, "This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward."

[589] *Warsaw Convention,* art. 3 - "For the carriage of passengers, the carrier must deliver a passenger ticket which shall contain the following particulars…" also see *Montreal Convention,* art. 3. – "In respect of carriage and individual or collective document shall be delivered containing the following……"

[590] *Warsaw Convention,* art. 33 "Nothing in this convention shall prevent the carrier either from refusing to enter into a contract of carriage or from making regulations which do not conflict with provisions of this Convention." and Montreal Convention, *and* Article 27 of Montreal Convention, ibid., "Nothing contained in this Convention shall prevent the carrier form refusing to enter into a contract of carriage, … or from laying down conditions which do not conflict with the provisions of this Convention."

arguments in favour of airlines imposing restrictions that enable them to refuse or charge extra for carriage to passengers with physical disabilities or obesity may be invalidated under the laws of jurisdictions which have developed social justice legislation according primacy to the recognition of equality and individual interests.[591] What is contemplated within the Conventions relating to air transport is a contract to transport persons by air from one place to another. However, in its purported exercise of formulating standards and rules for international air travel, IATA has narrowed the concept of air transportation to a sale of a seat in an aircraft. Therefore, it seems that IATA's rules for member airlines overreach their boundaries in terms of stipulating terms and conditions that have substantive, negative implications for third parties and consumers.

IATA's own definition of a 'disability' is a condition or state that "could develop unusual behaviour or physical conditions which endanger the safety or health or affect the comfort of other passengers or crew, or can be considered to be a particular hazard to the safety or the punctuality of the flight or would require medical attention or

[591] Norman(Estate) Vs. Air Canada, Canadian Transport Agency, (Docket 6- AT –A- 2008), 2008 CarswellNat 1633, 2008 CarwellNat1634. Canada can be considered as being at the forefront of legislative initiatives in this sphere as was seen by the order made by the Canadian Transportation Agency pursuant to an application made to it under the provisions §172(1) of Canada Transportation Act S.C. 1996, c.10 as amended, whereby the Canadian Transportation Agency made orders directing *inter alia*, that the airline respondents cited in the order shall not charge a fare for additional seating provided to persons with disabilities, who are required to be accompanied by an attendant, persons disabled due to obesity and others requiring an additional seating to accommodate their disability.
EC, *Commission Regulation (EC) No 1107/2006, Concerning the Rights of Disabled Persons and Persons with Reduced Mobility Traveling by Air*, prohibits airlines from refusing carriage to disabled persons.[2006] OJ. L 204/1 , art. 3.
*United Kingdom, The Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations of 2014*, United Kingdom, 2014 No; 2833.
*India, Carriage by air of persons with disability or persons with reduced mobility, India,* Regulations, issued 6th March 2013. This regulation made in India prohibit airlines from refusing carriage to persons with mental and physical disabilities and compelling provision of minimum service requirements for such passengers.
Hong Kong, *LCQ 14; Provision of Civil Aviation Services for Persons with Disabilities*, Hong Kong Government, News, Wednesday, June 17, 2015. These regulations of Hong Kong stipulate that persons with disability shall not be refused air transport on the ground of disability or reduced mobility.

special equipment to maintain their wellbeing on the flight." [592] As such, unless the nature of the disability of a passenger could reasonably be assessed to endanger the safety of the flight, or that of its crew and fellow passengers, no justiciable grounds could be found to support airlines in imposing restrictive conditions of carriage which permit disabled passengers to be denied boarding or be charged extra for transportation by air.

Categories of seating in aircraft are classified as economy, premium economy, business and first class. These categories are based on the size of the seat, the leg room or space between rows of seats, whether there is a sleeper or bed available, and service attributes and luxuries including food service and choice of meal. Thus, airlines have many options for seating and could adopt innovative solutions when having to accommodate special needs passengers. However, when IATA prescribes standards and rules for airlines to follow, this diminishes the possibility of airlines adopting their own standards to provide better facilities and comparatively higher standards for special needs passengers. In these circumstances, one cannot escape the reality that IATA resolutions do not always serve the interest of the travelling public. Rather, while they ostensibly impose uniform standards and rules, they in fact confer an advantage upon airlines in terms of commercial operations, to the detriment of passengers.

The above discussion also highlights the occasions when national regulations can come into conflict with IATA rules. As shown in footnote 591 *supra*, the Canadian

[592] *PSCRM, supra*, note 540 , ,res. 700 "Passenger Services Resolution" s. 2.2 and 2.1.

Transportation Agency has made regulations stipulating minimum facilities and seating that should provided to "disabled" passengers and also extended the definition of "disabled" to include obese passengers. EU and several other countries such as India and Hong Kong have also adopted regulations to protect airline passengers with disabilities and to prohibit airlines refusing carriage to such passengers. These regulations prescribe minimum facilities to be provided by airlines for passengers with disabilities. Similarly, national and supra-national regulations have been made in the areas of passenger rights regulations, denied boarding and delays. For example, Canada's *Bill C-49 passed on 23rd May 2018 (Statutes of Canada 2018 c.10),* and *Regulation (EC) No. 261/2004 of the European Parliament and of the Council, of 11 February 2004, Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights* provide minimum compensation for passengers encountering delays and denied boarding overriding any IATA or airline tariff conditions made in that regard. In addition to these several regulatory initiatives are being pursued by national regulators designed to protect passenger interests. These include, regulations prescribing baggage allowances, (Brazil), regulations prescribing the types of ticket airlines must issue (Italy, the Philippines and Latin America), regulations as to what airlines can charge for re-booking, cancellation, checked baggage, and seat selection (US) and; regulations regarding seat allocation (UK). However, IATA opposes these national regulatory initiatives and is actively engaged in challenging these regulatory initiatives and is urging governments against their introduction. This is clear from the IATA Director General's report on the Air

Transport Industry, presented to IATA's 74thAGM held in Sydney, Australia, in June 2018 by, Alexandre Junaic, (https://www.iata.org/pressroom/speeches/Pages/2018-06-04-01.aspx) wherein he says that "*creeping re-regulation is worrying and addressing regulatory over-reach has become a major focus for IATA*". In strongly urging states to refrain from re-regulation, he also says that, "*competition and social media provide adequate safeguards for consumer interests*". These pronouncements manifest that the current interests of IATA or the objectives it pursues are not exactly consistent with consumer interests. It must be further noted that such national regulations for passenger protection are adopted by individual states and do not have universal application. However, it is hoped that they would provide examples and lead to increased scrutiny and attention in other states of existing IATA rules that limit or inhibit passenger rights and lead to the adoption of appropriate regulatory responses in such states.

### 6.11 Transitional Automated Ticket

Airline members are required to issue electronic tickets (e-tickets)[593] when the itinerary of a proposed journey is eligible for e-ticketing and it is technically and procedurally feasible for an e-ticket to be issued.[594] The resolution relating to e-tickets also contains some curious stipulations,[595] which indicate that passenger services resolutions have encroached into the areas of tariffs and ticket pricing. The rule compels an issuing

[593] *PSCRM, supra,* note 540, res. 722, s,1.4.
[594] *Canadian Standard Travel Agent Registry (CSTAR) Vs. IATA, 2008 Competition Tribunal 14, CT-2008-06, Registry Doc. 0047*, CSTAR, filed a complaint before Canadian Competition Tribunal, alleging that, the IATA initiative to move towards exclusive electronic tickets eliminating neutral paper tickets was a "refusal to deal" which was reviewable conduct by the Tribunal. The Tribunal however refused to grant leave by concluding that CSTAR "*was not directly and substantially affected in its business*" by the alleged practice of IATA (initiative to move to exclusive e-tickets).
[595] *PSCRM, supra*, note 540, res. 722, "Open Jaw Minimum and Round Trip Minimum Fare Provisions".

airline or agent to raise the applicable fare in relation to an 'open jaw'[596] and 'round trip' [597] to the level of the highest 'open jaw' and 'round trip' IATA fare applicable for the relevant city pairs. This seemingly innocuous provision creates a situation where a minimum price stipulation is introduced for service conditions in the form of a procedural requirement for the issuance of airline tickets. This resolution does not indicate, *ex facie*, whether it has been disapproved of or granted immunity in the United States, which is normally stated at the top of each resolution.[598] Therefore, one could conclude that the relevant provision has so far escaped regulatory scrutiny, given that it is found within a services resolution, and because it has not been adopted by the Tariff Conferences.

When a ticket is issued, endorsements are required to be made to ensure that there is a common understanding on the part of the passenger as well as airline employees that the fare paid on such ticket may contain restrictions as to time of travel, period of validity, voluntary re-routing and/or other restrictions.[599] The issuing airline or accredited agent is required to imprint the applicable fare restrictions on a ticket.[600]

[596] *Ibid,* res.722, ss. 3.16 – 10.6 A one-way journey involving a point of origin and a point of destination with at least one or more stopovers in between).
[597] *Ibid,* res.722, ss. 3.16 – 10.6 . A journey where the point of origin and destination is the same, with one or more agreed stopping places in between the point of origin and destination.
[598] *Ibid,* res.722, "Open Jaw Minimum and Round Trip Minimum Fare Provisions,".
[599] *Ibid*, res. 722, s. 27 Such restrictions and conditions are required to be printed in appropriate spaces or written out in plain language on the tickets with the intent of duly notifying a passenger of the restrictions applicable on the ticket.
[600] *Ibid*, res. 722, "Fare Calculation Mode Indicator", s. 29. , Numeral code values identify and distinguish the fare calculation basis used for the issuance of tickets. Code value "0" indicates that the relevant fare is based on computer pricing system (applying the standard fare conditions in accordance with Tariff Resolutions 100 and 101), with no change to such system generated fare or the data filed with the fare (tariff conditions) which includes taxes and charges. Value "1" indicates a manually created fare or a system generated fare with agent overriding entries. Code value "2" shows computer system generated fare with changes/manipulations for baggage allowances, taxes fees and charges.

However, in most instances the complex codes used to denote fare restrictions on airline tickets cannot be easily understood by passengers.

## 6.12 Electronic Tickets

An electronic ticket is a document used to sell passenger transportation and to track the passenger through a journey until it is completed.[601] E-tickets[602] can be issued either by an airline,[603] as a neutral document, or as an e-ticket for ground handling.[604] The validating carrier of an e-ticket is the controlling and authorizing entity for e-ticketing transactions.[605] Data elements of an e-ticket can only be changed by a validating carrier subject to specified reservation change procedures,[606] and flight coupons are honoured only in sequence.[607]

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[601] *Ibid*, res. 722f, s.3.6 The "electronic ticket" (ET) is defined as "the itinerary or receipt issued by or on behalf of the carrier, the electronic coupons and if applicable the boarding document." An e-ticket not only procures sale of transportation but also provides continued monitoring of the status of the passenger, from the point of sale up to the completion of the transportation. Passenger information is frequently updated under e-tickets, with change of status messages such as, airport control, checked in, boarded, or where journey has not taken place, suspended, unavailable, refund applied, refund granted or voided, etc., being shown on an electronic database.

[602] *Ibid,* res.. .722f, 722g and 722h, *PSCRM, ibid.* The Passenger Services Conference had formulated three (3) separate resolutions formulating rules applicable to the three types of electronic tickets.

[603] *Ibid,* res. 722f, s.1.2.

[604] *Ibid,* res. 722h, s.1, "Introduction & Scope", PSC (36)722h, Type B. E-ticket provisions for ground handling purposes are due to become effective on 1st of June 2020, and will apply where member airlines elect to use a third party for ground handling services. The standards stipulated in the Resolution722h, relating to e-tickets for ground handling are established for the purpose of exchange of data between operating carriers and ground handlers for electronic checking. *See*, *Ibid,* res. 722h, " Electronic ticket – ground handling".

[605] *Ibid,* res. 722f, "Electronic Ticket – Airline"*,* PSC (36)722f, Type B. The validating carrier assumes responsibility to ensure that prior to the issue of an e-ticket, a proper agreement exists with the marketing carrier (where the airline performing transportation is different to the airline issuing the e-ticket). The validating carrier is also responsible to ensure that proper agreements exists between the validating carrier and all operating carriers in code share operations. §2 – Acceptance, Resolution 722f, *PSCRM, ibid.*- Under Resolution 722f, member airlines are required to accept and honour e-tickets where interline traffic arrangements and bilateral agreements exist between a validating carrier and a marketing/operating carrier.

[606] *Ibid*, res. 722f, s 6.1.5.

[607] *Ibid*, res. 722f, ss. 6.1.6, 6.1.7, 6.4.1, 6.4.1.1, 6.4.1.2, 6.4.1.5, & 6.5, It is the responsibility of the marketing carrier to inform the validating carrier each time when the former issues an e-ticket. The control of the entire e-ticketing data parameters is retained by the validating carrier and may be relinquished upon request to any other carrier including any carrier not participating in the itinerary when such control is required in accordance with e-ticketing bilateral agreements. The validating carrier maintains control of the entire e-ticket and can also request control back from a marketing or operating carrier using a change of status message. Member airlines are bound to accept and honour e-ticket in accordance with interline redeemer and/or baggage redeemers. Authorization to use e-ticket flight coupons are to be obtained from the validating carrier and can be honoured only according to their proper sequence. When reservation changes are necessary, the carrier initiating the change is required to verify whether the e-ticket is eligible for the change and the new itinerary, prior to sending a reservation change message to the validating carrier.

The conditions of contract and other important notices that are to be provided with the passenger ticket and baggage check for international carriage are set out in Resolution 724.[608] Of these conditions, the most important are the mandatory notices to be given to passengers regarding liability limitations.[609] This resolution also contains templates and texts of notices to be given in relation to dangerous goods, check in times, baggage requirements, baggage liability limitations, passports and required travel documents such as visas, and passenger data that may be required by governments.

### 6.13 Alteration of flight coupons and extension of ticket validity

No alteration can be made to flight coupons in a ticket after the ticket has been issued[610] other than in exceptional circumstances.[611] Even in such circumstances, only limited alterations are allowed, on the proviso that no change of fare is involved.[612] Although Resolution 727 appears to provide some flexibility for changes to be made by passengers, Resolutions 735d and 736 clearly limit the exceptional circumstances in which changes to tickets may be made.

The validity of a ticket can be extended by an airline without collecting an additional fare when the passenger is prevented from travelling within the period of validity of the

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*Ibid*, res. 722f, s 6.12, "Reservation change" . The validating carrier can acknowledge a request for reservation change only where a bilateral electronic ticketing agreement exists with a new marketing carrier/s and the coupon is not at final status.

[608] *Ibid*, res. 724, "Ticket Notices" PSC (29) 724, Type A, *PSCRM, ibid.*

[609] The mandatory requirement pertaining to the liability limitation notices are stipulated in the *Warsaw Convention (1929)* and the *Montreal Convention.*

[610] *PSCRM supra* note 540, res. 727, "Tickets – Alterations to Flight Coupons" –PSC (34) 727, Type B, .

[611] Exceptional circumstances where changes to tickets after issue can be made, are those necessitated by involuntary occurrences such as illness, death of passenger, or cancellation, suspension and/or non-operation of a flight concerned. This resolution (727), however does not apply to IATA Billing and Settlement Plans (BSPs).

[612] *Ibid,* res. 727"Reservations, Alterations, Stickers", s. 2. Alterations can be made only to, the carrier(airline); the flight or booking class (RBD); date; time and status in a flight coupon, and if such change is required in terms of Resolutions 735d and 736 with prior approval for the change being obtained.

ticket if the airline: (a) cancels the flight; (b) omits a scheduled stop, provided that such a stop is the passenger's destination or stopover point; (c) fails to operate the flight reasonably according to schedule; (d) causes a passenger to miss a connection; (e) substitutes a different class of service; or (f) is unable to provide a previously confirmed space.[613] Even when a passenger is prevented from travelling due to unavailability of space (a circumstance over which the airline has full control and the passenger has no control) the validity of the ticket will be extended only up to a maximum of 7 days from the date of the first flight on which space becomes available in the same category and fare class.[614]

This rule could substantially disadvantage a passenger who is prevented from travelling due to the unavailability of space on a flight which is a matter wholly within the control of the airline. In such a situation, the passenger's choice of travel would be curtailed as a result of the rule that travel must be completed within 7 days of space being available, because the rescheduled flight may not suit the passenger's travel requirements.

When a passenger is prevented from travelling due to illness, the validity of a ticket is extended to enable travel after the passenger is declared medically fit, on the condition that travel is completed within 3 months.[615] Corresponding validity extensions are also

[613] *Ibid,* res. 735a, "Extension of Ticket Validity", PSC (30) 735a, Type B, s. 1.
[614] *Ibid,* res. 735a, s.2. This condition applies for the tickets issued at normal fares or on special fare with the same validity as normal fare tickets.
[615] *Ibid,* res. 735a, s 3, Resolution 735a.

allowed for family members who accompany incapacitated passengers.[616] Minimum stay requirements applicable to special fares can be waived by an airline for accompanying passengers and family if a passenger death occurs en route.[617] A refund is permitted when a passenger or an immediate family member of a passenger dies before travel commences.[618] Passengers are allowed to return to the place of origin (as shown on the ticket) without stopovers on the next available flight, from the point at which travel is interrupted, in the event of the death of a family member. Even when re-routing and reservation changes are restricted on the ticket, no fare changes apply to such passengers in relation to group and individual fares if return travel is completed within 45 days from the date of interruption.[619]

### 6.14 Involuntary change of carrier, routing, class or type of fare

When an involuntary change of a carrier, routing or class of service or fare occurs, [620] the airline selling the ticket or the airline performing the operations is required to take into consideration the passenger's reasonable interest and to arrange a refund in accordance with Resolution 735,[621] or provide onward carriage to a destination or to a stop-over point named on the ticket,[622] even at a higher cost, without additional charges being incurred by the passenger. If the airline is unable to arrange for an alternative route within a reasonable time, it is required to meet expenses incurred by the passenger

[616] *Ibid,* res. 735a, s 3.1, Resolution 735a.
[617] *Ibid,* res. 735b "Waiver of Minimum Stay Requirement" PSC (30) 735b, Type B.
[618] *Ibid,* res. 735c, "Rerouting and Refunding in Case of Death"–PSC (30) 735 c, Type B.
[619] *Ibid,* res. 735c, "Death in the Immediate Family", s. 3.2.
[620] *Ibid,* res. 735d, "Involuntary Change of Carrier, Routing, Class or Type of Fare" , PSC (35) 735d, Type B, s. 2.
[621] *Ibid,* res. 735d, s 2.2.1.
[622] *Ibid,* res. 735d, s 2.2.2. Onward carriage should be arranged on the same or another of its own aircraft if the flight interruption was *en route*, or on the service of the original receiving carrier or any other transportation services if the flight interruption was not *en route*.

during the delay,[623] at the point of the involuntary change and at subsequent points en route. When flight coupons are not available to effect an involuntary re-routing of passengers resulting from an en route flight interruption, the forwarding airline (that is the member airline who transported the passengers up to that point) is required to provide for alternate air carriage for the interrupted portion of the journey.[624] When involuntary changes occur on charter flights operated by IATA members, Resolution 735f requires that passengers be rerouted to scheduled flights.[625] In such an event, the charter airline (the IATA member) is required to pay the applicable fare and charges of the carrying airline on the available class.[626] A one-way ticket cannot be converted to the discount rate that is applicable for a round trip or a circle trip after carriage has commenced on the one-way ticket.[627]

### 6.15 Refunds

According to IATA rules, refunds[628] on air tickets are either 'involuntary refunds'[629] or 'voluntary refunds.'[630] In the case of voluntary refunds where no portion of the ticket

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[623] *Ibid,* res. 735d, s 5. The expenses paid under this rule are limited to essential expenses incurred for hotel accommodation, suitable meals and beverages without regard to class of service, ground transportation, transit taxes and reasonable communication costs incurred by the passenger because of the involuntary change involving an interline journey.

[624] *Ibid,* res. 735e, s 1.

[625] *Ibid,* res. 735f, s.1"Involuntary Change of Routing of Charter Passengers to Scheduled Service"– PSC (3)735f, Type B,. An IATA member performing a charter is permitted to reroute a passenger on the lowest class of the first available service if, that airline is unable to land at the destination provided in the charter agreement for reasons beyond its control; the member airline is unable to provide previously confirmed space due to operational limitations beyond its control including, weather conditions necessitating the off-loading of the passengers; and mechanical failure *en route* which would result in a delay of at least 24 hours.

[626] *Ibid,* res. 735f, s.2. . Here again the charter member(IATA) is responsible to meet the passengers' expenses related to hotel accommodation, meals, beverages, ground transportation, transit taxes and reasonable communication costs of the passenger occasioned because of re-routing.

[627] *Ibid,* res. 737, s.5.1.2. The US government has entered a reservation to this resolution where Civil Aeronautics Board (in 1974) had stipulated that a carrier cannot conduct such operations stipulated in Resolution 735f, unless it has filed an effective tariff with the CAB, embodying the specific conditions under which such rerouting of charter passengers will be made or has received specific CAB authority to conduct such operations. CAB Order 74-1-109, dated 22nd January 1974, See, *ibid,* res. 735f, "Government Reservations - United States".

has been used, the full fare is refunded after applicable service charges and communication expenses have been deducted.[631] If a portion of the ticket has been used for travel, the difference between the fare paid and the IATA fare for the portions travelled is refunded after service charges and communication expenses have been deducted.[632] However, airlines cannot deduct service fees, reservations or communications expenses from the passenger unless the cancellation is made for safety or legal reasons, or is caused by the condition or conduct of the passenger.[633]

### 6.16 Baggage reconciliation and security control

IATA member airlines are required to develop baggage security control measures to ensure that passenger baggage is not accepted on international flights if the passenger is not on that flight, unless the baggage separated from passengers is subjected to further security control measures. These measures—referred to as 'Baggage Reconciliation'—are crucial features that ensure the security of both passengers and aircraft.[634] Airline

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[628] *Ibid,* res. 737, "Refunds", – PSC (MV30) 737, Type B.

[629] *Ibid,* res. 737, s.1.1, An Involuntary Refund, means "a refund of an unused ticket or portion thereof or an unused Miscellaneous Charges Order(MCO) required for any reason specified in Resolution 735d or where because of safety or legal requirements or the condition or conduct of the passenger carriage is refused.", *viz.*, when the airline cancels a flight; the airline fails to operate a flight reasonably in accordance with its schedule; the airline fails to stop at a point to which the passenger is destined or is scheduled to stop over; the airline is unable to provide previously confirmed space; the airline causes the passenger to miss a connecting flight on which the passenger holds a reservation.

[630] *Ibid,* res.737, s.1.2, A voluntary refund means "a refund of an unused ticket or portion thereof or an unused Miscellaneous, Charges Order other than an involuntary refund"

[631] *Ibid,* res. 737, s.3.1.1.

[632] *Ibid,* res. 737, s.3.1.2.

[633] *Ibid,* res.737, s.2.3, The United States Government has entered a reservation to this resolution, prohibiting airlines being indemnified by a passenger for loss or damage incurred through the loss of a ticket by a passenger, if such loss is due to the negligence of the airline. The relevant order requires the airline to absorb reasonable communication expenses and prohibits imposition of any service charges upon the passenger when an involuntary refund is necessitated for legal or safety reasons not caused by the action of the passenger. *See, Ibid,* res.737, Order E-8927, "Government Reservations".

[634] *Ibid,* res. 739, s.1, "Baggage Security Control" –PSC (13)739, Type B. §2 of this Resolution imposes a concurrent obligation on handling agents to follow the baggage reconciliation methods developed by member airlines.

members are also under a duty to forward unclaimed checked baggage[635] to the 'Local Lost and Found' ("LL") office for identification.[636]A late or misconnected bag[637] must be forwarded without delay and without waiting for tracing inquiries to the LL office of the carrier at the destination[638] that is shown on the baggage tag, using the expedite baggage tag and according to the procedures set out in Resolution 740.[639]

Mishandled baggage when identified is to be forwarded without any charge by the fastest possible means using the services of any member to the airport that is nearest to the passenger's address.[640]At the airport of destination, the expedited baggage must be returned to the passenger by the member on whose flight the passenger travelled to the final destination or point of stop-over. In a case where the member airline is not

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[635] *Ibid,* res. 743, "Found and Unclaimed Checked Baggage" – PSC (31) 743, Type B. , formulates the procedures to be followed by member airlines when dealing with locally found unclaimed or unidentifiable baggage. These rules also apply to airlines when they act as handling agents for other IATA airlines including when providing instructions to handling agents to apply such procedures.

[636] *Ibid,* res. 743, s 1.1*,* Immediately upon identification, member airlines are required to enter a standard message in the applicable baggage tracing system using the prescribed format in Attachment A of Resolution 743.

[637] *Ibid,* res. 743, s.1.6.3, A "Late Bag" is defined as a bag which was received from the delivering carrier outside the "Minimum Connecting Time" (MCT) and was too late to be loaded on the connecting flight. A late bag is also referred to as a Misconnected bag. A "forward" (FWD) file is required to be created by the responsible airline in the baggage tracing system in respect of a Late Bag.

[638] *Ibid,* res. 743, s.2.1.

[639] *Ibid,* res. 740 – "Form of Interline Baggage Tag" – PSC (35)740, Type B, *PSCRM, ibid.* This resolution describes the form and procedures for interline baggage tags and the content and form to be used in interline baggage tags.
Under §1 & 2 of Resolution 743a, any member forwarding the baggage is required to execute and securely affix a tag as specified in Resolution 740 to each piece of mishandled baggage and forward it in accordance with the instructions received. The forwarding carrier is also required to advise the airline and station to which the baggage has been addressed on the Expedite Baggage Tax, by teletype message using the standard office designator LL or directly through automated baggage tracing system. *See*, §1 & 2 of Resolution 743a, *PSCRM, ibid.*
Resolution 743a, *Forwarding Mishandled Baggage* –PSC (36)743a, Type B, *PSCRM, ibid.* When a request is made for a baggage by some other station or carrier due to a match in the baggage tracing system, the baggage is to be forwarded and a FWD message sent to the requesting station or carrier using the standard office function designator LL in accordance with Resolution 743a. The rules and procedures to be followed pertaining to the forwarding of mishandled baggage as contained in this Resolution 743a, are to be implemented in conjunction with the Recommended Practice 1743a. If no claim is made for the baggage by a passenger or by some other station or carrier within 120 hours after the baggage being found, the baggage itself or an "On Hand Baggage" (OHD) message in the format of Attachment A, resolution 743a, shall be sent to the carrier's own central baggage tracing office. See, §2.2.9 Resolution 743, *PSCRM, ibid.*

[640] *Ibid,* res. 743a, s.3., Forwarding such expedite baggage should not be restricted or delayed at an interline connecting point for security reasons provided it is identified by the forwarding airline, that the bag was mishandled, or it is established that a claim for the bag has been made and that it is electronically and/or physically strayed.

represented in the relevant airport, the baggage is to be returned by the member on whose flight the expedited baggage arrived at this airport. All delivery costs from the airport to the passenger are to be recovered by the delivering airline from the airline responsible for the mishandling of the baggage.[641]

## 6.17 Dangerous goods in passenger baggage

Member airlines are required to apply specific rules with regard to dangerous goods[642] in passenger checked or carryon baggage.[643] Separate rules apply to the acceptance of firearms, other weapons and small calibre ammunition on board an aircraft,[644] and the

[641] *Ibid,* res 743a, s.4*.,* According to §5.1, Resolution 743a, the airline responsible for mishandling, (improper checking, tagging, marking or routing) is required to indemnify all the other parties from all claims, costs and expenses arising from such mishandling. When it is not known which carrier is responsible for mishandling, each party that participated in the carriage of baggage prior to the discovery of mishandling, shall share in the claims, costs and expenses except delivery costs, in the same proportion as its revenue share from the transportation of the passenger. Any airline participating in interline carriage could exonerate itself from the liability for sharing the claim, by proving that it was not responsible for such mishandling in which even it shall not be required to share in such claim.

[642] *Ibid,* res.745, "Dangerous Goods in Passenger Baggage" - PSC (35) 745, Type B.*;* Res.745, s. 2*,* Member airlines are required to display prominent notices to passengers at or prior to the time of purchasing a ticket, as to items or articles categorized as dangerous goods which are prohibited from being carried on an aircraft. Dangerous goods and the applicable rules for handling are set out in the, IATA Dangerous Goods Regulations (DGR).

[643] *See, ibid,* res. 745, s. 1.1.1., According to these rules other than in circumstances specified in Subsection 2.3 of IATA Dangerous Goods Regulations, airlines are prohibited from carrying or permitting dangerous goods on board on aircraft either to be included in the passenger checked in or carryon baggage. These rules are formulated to ensure safety. The IATA rules on dangerous goods are based on the rules and Standards made in the Annexes of Chicago Convention. The UK Government has expressed a reservation with regard to Resolution 618, 619, 745, 745a and 745b and 801 to the effect that where dangerous goods or weapons, firearms and ammunition are transported, as air cargo or as accompanied baggage of passengers the regulations and legislation in the United Kingdom would take precedence over the IATA resolutions. The UK legislation on the subject is contained in the *Air Navigation Order and the Air Navigation (Dangerous Goods) Regulations of April 1985*. See, res. 745, "Reservation of UK,".

[644] *Ibid,* res. 745a, s.1 and 2 . Member airlines are required knowingly not to permit passengers to retain custody of any ammunition, firearms and/or other weapons in the passenger cabin. Firearms ammunition and weapons can be accepted for carriage only as checked baggage provided that the weapons are unloaded, and the ammunition is suitably packed for such carriage. The resolution further stipulates that, ammunition can be carried only in the aircraft hold as checked baggage and the ammunition should consist of small arms ammunition for sporting purposes only. However, these exclude explosive or incendiary projectiles which are totally prohibited for carriage by air. This resolution is also subject to a reservation entered by the United Kingdom referred to above.

acceptance of power-driven wheelchairs or other battery powered mobility aids as checked baggage.[645]

## 6.18 Baggage pooling

Important rules with regard to the pooling of passenger baggage,[646] interline baggage claims and proof of fault for baggage prorates are set out in Resolution 754.[647] This resolution indicates the baggage claim profiles of interlined carriage[648] and rules governing the airline that is responsible for settling the claim in each case. Although these rules are not readily available to public or passengers, they nevertheless represent the IATA rules according to which passenger bags are to be accepted and handled for interlined carriage by airlines. These rules also set clear provisions for the division of responsibility between airlines participating in interline carriage for handling,

[645] *Ibid,* res. 745b, "Acceptance of power-driven wheelchairs or other battery powered mobility aids as checked baggage". Power driven wheelchairs or other battery powered mobility aids are accepted for interline carriage as checked baggage on passenger aircraft only if the battery is disconnected and the battery terminals are insulated to prevent accidental short circuit whilst the battery is securely attached to the wheelchair or mobility aids. This resolution also makes further provision for marking and labelling of batteries, wheelchairs and other battery powered mobility aids including the precautions to be followed to ensure no leakage of batteries occur whilst such a device is being transported on board.

[646] *Ibid,* res. 746, "Pooling of Baggage" PSC (34)746 Type B. According to this resolution where two or more passengers travelling as one party to a common destination or point of stopover by the same flight present themselves and their baggage for travelling at the same time and place, they are entitled to a total baggage allowance equal to the combination of their individual baggage allowances. For the purpose of reconciling baggage each passenger in a pool of a non-family group is required to be issued their own individual baggage checks.

[647] *Ibid,* res. 754, "Profiles of interline baggage claims and proof of fault for baggage prorates", PSC (36) 754, Type B. According to these rules when it cannot be established which airline in interline carriage is responsible for mishandling (meaning damage, delay, loss or pilferage), each carrying airline that participated in the carriage of the passenger is required to share the claim settlement on the basis of the flown mileage between all ticketed points of each carrying airline. Resolution 754 is intended to assist baggage claims personnel in determining cases when an interline baggage claim can result in 100% prorate, to avoid disputes and unnecessary correspondence between carriers.
Res. 780, "Form of Interline Traffic Agreement – Passenger", PSC (36) 780, Type B,. The claim and the proration of the liability is to be handled by the airline receiving the claim in the manner specified in §5.4.3 of Resolution 780, which is the standard form *Passenger Interline Traffic Agreement.*

[648] *Ibid,* res. 754. The claim profiles are; Tag-Less Baggage; Delayed Delivery; Baggage Misrouted by Originating Carrier; Transfer Within Minimum Connecting Time (MCT); Transfer Not Within MCT; Early Departure (Not Respecting MCT); Delayed Delivery by a Third Party at the Transfer Airport; Short Tagging; Through Check-in on Separate Tickets; Through Check-in No Interline Agreement between Carriers; Passenger does not Collect the Baggage for Customs Clearance; Passenger Rerouted or Involuntary Rerouted; Damage or Pilfered baggage.

transferring within Minimum Connecting Times ("MCT")[649] and delivering baggage to passengers at their destination.

The rules contained in relevant IATA resolutions apportion liability between airlines participating in interlined carriage. However, there are no provisions in these resolutions that provide for the settlement of claims made by a passenger. The rules provide for an airline settling a passenger claim to invoke the relevant resolutions for apportioning the claim that is settled among other airlines involved in interline carriage. These rules—which are based on contract (of membership in IATA)—cannot be invoked by a passenger who has no privity to such contracts. However, a court could be urged to take cognizance of these rules as the standards against which the conduct of IATA airlines can be measured, in order to ascertain the extent of fault or negligence of airlines when a passenger claim for lost or misplaced baggage is brought.

Rules relating to interline passenger reservations[650] deal with matters such as: duplicate reservations,[651] misconnections,[652] passengers with "no record",[653] "no show"

[649] *Ibid,* res.765, "Interline Connecting Time – Passengers and Checked Baggage" PSC (36) 765, Type B, . Minimum Connecting Time (MCT) Interval means the shortest time interval required in order to transfer a passenger and his baggage from one flight to a connecting flight in a specific location or metropolitan area. MCTs differ from one airport to another according to the local conditions and logistic of such airport. Under this resolution all member airlines together with other transport services such as railways providing services to an airport or city are required establish Local MCT Groups for recommending any new MCTs or changes to the exiting MCTs at such airport which are then incorporated into the airline schedules by the IATA Schedule Services Department. *See*, § 5 – 11 of Resolution 765, *PSCRM, ibid.*

[650] *Ibid,* res. 766, "Interline Passenger Reservations Procedure" PSC (31) 766, Type B.

[651] This is when two or more reservations are the made for the same passenger and when it is evident that the passenger is able to use only one of them. *See*, §1- Definitions, Resolution 766, *PSCRM ibid.*

[652] When a passenger due to late arrival or non-operation of his original (delivering) flight arrives at the interline point too late to board the original (receiving) flight. See, *ibid*, res. 766, s.1- "Definitions".

[653] Is a condition when a passenger presents a ticket for reserved space, but the boarding airline has no record of ever confirming or receiving a booking for that reserved space. See*, ibid*, res. 766, s.1- "Definitions".

passengers,[654] overbooking,[655] "over-sale",[656] "pre-flight check",[657] reconfirmation,[658] "standby/go show" passengers[659] and ticketing time limits.[660] Several rules in this resolution complement passenger interests. For example, when a member airline is confronted with a "no record" passenger who has a booking for interline carriage, the airline has a duty in its first dealing with the passenger to advise the next receiving airline(s) of the balance itinerary of that passenger, so as to facilitate the uninterrupted carriage of the passenger for the rest of their journey.[661] When a passenger misses a connection by arriving too late at an interline point, the airline transporting the passenger up to that point is required to cancel onward transportation which the passenger will not be able to use and must rebook the passenger on alternative flights for the onward journey.[662]

### 6.19 Interline Traffic Agreement

Both IATA and non-IATA airlines[663] subscribe to a multilateral contract of adhesion[664] when they engage in interline carriage and coordinate tariffs.[665] Several provisions of

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[654] Means the failure to use reserved accommodation (show up for the flight) for reasons other than misconnections. See *ibid*, res. 766, s.1- "Definitions"

[655] When more seats have been booked on a flight than the seats allowable for sale. See *ibid*, res. 766, s.1- "Definitions"

[656] When a passenger who has a valid ticket or for whom the airline has positive reservation record is not accommodated at flight departure or is carried but not in the accommodation as reserved. See *ibid*, res. 766, s.1- "Definitions".

[657] An internal procedure of airlines to verify reservation records for the purpose of eliminating duplicate reservations, incorrect recording and other errors. See *ibid*, res. 766, s.1- "Definitions".

[658] Is a procedure where certain airlines require their passengers to advise the airline of the intention to use space reserved. See *ibid*, res. 766, s.1- "Definitions".

[659] A potential revenue passenger who presents himself at a check in counter and is prepared to accept space subject to availability. See *ibid*, res. 766, s.1- "Definitions".

[660] Means a time by which a passenger secures his reservation. This could be done by either purchasing the ticket according to the booking/reservation made or having a previously issued ticket revalidated or reissued according to the booking or reservation. See *ibid*, res. 766, s.1- "Definitions".

[661] *Ibid,* res. 766, s.17.

[662] *Ibid.*

[663] *PSCRM, supra* note 540, res. 780, art.e 10.5, att. A. Non-IATA airlines could participate in interline transportation with IATA airlines by becoming a party to the agreement and paying an annual subscription fee. Several associate

the Interline Traffic Agreement, have implications for the airline consumer. Accordingly, airlines are prohibited from issuing tickets for interline transport other than at fares formulated by IATA.[666] Rules set out in Resolution 735 have to be followed in the event of involuntary rerouting.[667] Passenger baggage cannot be accepted on a flight where the passenger has not boarded that flight, unless the baggage is subjected to extra security control.[668] Priority is given to transfer baggage over terminating baggage and the delivering airline is responsible for delivering baggage to the next receiving airline. The airline on which the passenger travelled to the transit point or the final destination bears primary responsibility for tracing and delivering missing

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resolutions formulate rules separately in respect of interline arrangements for passenger, baggage and cargo. See, *PSCRM supra* note 540*, Interline Baggage Handling Agreement –To/From Member's Charter/Scheduled Flights*, PSC (01)780a, Type B, Attachment A; *Passenger Interline Service Charge*, PSC(13)780b, Type A, *PSCRM, ibid; Passenger Interline Service Charge for Non-IATA Carriers*, PSC (13) 780c, Type A,; *IATA Interline Traffic Participation Agreement –Passenger*, PSC (36) 780e, Type B.

[664] *PSCRM supra* note 540, res. 780, "Form of Interline Traffic Agreement- Passenger," PSC (36) 780, Type B. requires airlines desiring to exchange passenger traffic through interlining to adopt the, *IATA Interline Traffic Agreement – Passenger*, as set out in Attachment A of the Resolution 780. Canada, India and the United States have entered reservations to this resolution. Accordingly, the provisions regarding the minimum fares and charges and those imposing mandatory compliance of the resolution by IATA Associate airlines shall not apply to traffic to and from Canada. The Arbitration provisions of Article 9 in the resolution shall not affect the power of the relevant Tribunal in India to question the correctness and applicability of tariffs of it national carriers on domestic routes. In the US this resolution is approved without the grant of antitrust immunity on the condition that, non-IATA airlines are not bound by the resolution rules and it enforcement provisions are not applicable in the United States air transportation. See, res. 780, "Government Reservations".

[665] *PSCRM, supra* note 540, res. 780, art. 2.3, "Furnishing of Tariffs Etc." atta. A. Each airline is required to furnish to the others the tariffs necessary for the sale of transportation services and also distribute scheduled data and Minimum Connecting Time (MCT) data at least 360 days in advance to schedule aggregators, reservation and ticketing systems in which that airline participates.

Res. 780, arts., 3.5.1 & 3.5.2, att. A., "Interline" (transported on more than one airline) and online (transported on the same airline) connecting baggage is required to be segregated from other baggage prior to commencement of delivery and when any baggage is to be left behind due to weight or space restrictions loading priority is given to transfer baggage.

Res. 780, art. 3.3.1, att. A. Live animals cannot be accepted for interline carriage unless all receiving airlines have confirmed acceptance and provided the animal is in a crate or container.

[666] *Ibid,* res. 780, art. 2.4 "Minimum Fares & Charges,", att. A. Issuing airlines are required to pay the each carrying airline for transportation provided by such airline in accordance with the applicable IATA regulations and ICH procedures whilst the billing an settlement is to be done according to the rules of the IATA Revenue Accounting Manual. See, res. 780, art. 8.1 & 8.2, att. A. Disputes arising between airlines for interline transport are to be resolved by arbitration as set out in, res. 780, art. 9att. A.

[667] *Ibid,* res. 780, art. 2.6, "Involuntary Rerouting" att. A. The rules described in res. 735 are discussed in detail above under the heading of, "Involuntary Change of Carrier, Routing, Class or Type of Fare".

[668] *PSCRM supra* note 540, res. 780, art. 3.3.2, "Involuntary Rerouting", att. A.

baggage to the passenger.[669] The airline under whose control passengers and baggage are being transported has to provide a general indemnity to all other airlines involved in interline transportation that covers all claims, demands, costs, expenses and liability arising due to the death or injury of a passenger or the loss, damage or delay of baggage.[670] The airline issuing the ticket is required to indemnify the carrying airline against all claims and liability that arise from the improper use, completion or delivery of tickets and baggage checks,[671] while the carrying airline is required to indemnify the ticketing airline for liability arising from the failure to provide carriage pursuant to a properly issued ticket.[672] The airline receiving baggage is responsible for processing the claim to a conclusion with the passenger in accordance with the law of the country of settlement.[673] These claims settlement rules generally encourage airlines to invoke tariff policies and IATA resolutions to limit their liability or to mitigate a claim made by a passenger.[674] The applicable law to determine an airline's liability for death and injury to a passenger and the loss, damage or delay of baggage and cargo in international

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[669] *Ibid,* res. 780, art. 4, "Mishandled Baggage".
[670] *Ibid,* res. 780, art, 5.1, "General Indemnity", att. A.
[671] *Ibid,* res. 780, art 5.2.1, att.t A.
[672] *Ibid,* res. 780, art, 5.2.2, att. A.
[673] *Ibid,* res. 780, art, 5.4.1, att. A., The tariff policies of the claim settling airline is to be applied for all baggage claims in doing so. These policies may include interim expense policy, exclusions and liability. When it is established in which airlines' custody baggage mishandling occurred that airline is required to accept the settlement incurred by the settling carrier. However, when it cannot be so established the settled claim is to be prorated amongst all airlines that participated in the interline carriage according to the flown mileage of each airline. See res. 780,arts, 5.4.2 & 5.4.3, att.A. Where the claim settling airline uses transportation in lieu of cash to settle the total claim it is not entitled seek proration from other airlines involved in the interline carriage. Where only a prat of the claim is settled by transportation and the balance in cash the proration will apply to the cash settlement portion only. *See*, Article, 5.4.8, Resolution 780 – Attachment A, *PSCRM, ibid.*
[674] Article, 5.4.8, Resolution 780 –Attachment A, *PSCRM, ibid.* When a suit is commenced in pursuance of a claim, all indemnified airlines are required to cooperate and assist the airline dealing with such claim or suit by providing all documents, legal processes, information and material needed to "**resist and defend**" (*emphasis added*) such claim or suit. This provision clearly shows that the main objective of the relevant IATA agreement and the resolutions are not to facilitate the settlement of the claim or suit instituted by a passenger but rather to resist and defend or defeat such claim or suit.

transportation, prevails over airline tariff policies and IATA resolutions. In almost every part of the globe, either the Warsaw Convention or the Montreal Convention[675] governs the substantive law in relation to airline liability. Both of the Conventions contain provisions that render invalid any condition of carriage which relieves an airline from liability, fixes lower limits of liability, or infringes on the rules laid down in the Conventions.[676] The provision in the Conventions are therefore an effective remedy against any airline's attempt to invoke IATA rules to defeat or mitigate a passenger claim.

IATA passenger services rules discussed above regarding: passenger ticket validity extensions, involuntary changes in itinerary, ticket refunds, baggage security and settlement of passenger and baggage claims, also formulate the conditions which are complementary to the interests of airline passengers. However, what is significant about these rules is their unavailability in the public domain for free use or inexpensive passenger access. These rules are also not usually published by member airlines in their conditions of carriage, or applicable tariffs. Ordinarily, airlines do not volunteer to settle claims of passengers that are made consequent to involuntary itinerary changes or baggage mishandling. As discussed above, passengers do not have ready access to IATA rules, and therefore lack the opportunity to invoke them to support their claims. The IATA rules mainly serve to determine the rights of airlines to apportion liability *inter se,* when one airline settles a passenger claim. By design, these IATA resolutions do

[675] See, *Warsaw Convention ; Montreal Convention.*
[676] *Warsaw Convention,* art. 32; and *Montreal Convention*, art. 26.

not protect passenger interests, even though *prima facie* they contain features that appear to be complementary to passenger interests.

While this chapter was devoted to an analysis of resolutions relating to passenger services, the next chapter discusses passenger agency resolutions which formulate rules governing travel agents and their administration.

## Chapter 7 -Passenger Agency

### 7.1 Passenger Agency Rules

The Passenger Agency Conference is vested with the exclusive authority to enact, amend and repeal resolutions and rules relating to passenger sales agency matters.[677] The decisions of the Agency Conference are binding on IATA, the Agency

[677] *PACRM supra* note 540. Passenger Agency Conference, resolution 010 formulates the rules applicable to the interpretation and the hierarchy of rules in the Sales Agency Programme.
Res. 01, "Interpretation and Hierarchy of Rules Pertaining to the Sales Agency Programme", PAC-1/2/3 (50) 010- (except USA) - *(PACRM), ibid.,* See, also *General Rules of Interpretation*, Passengers Services Rules, as detailed in the previous Chapter 6, *above*.
*PACRM,* res. 010, ss. 3 -4.1 – 4.4, para 4. ; *PACRM,* res. 010, "Hierarchy of Sources"., These rules of interpretation stipulate the hierarchy accorded to the sources of such rules in connection with the passenger agency programme. The primacy of rules is accorded firstly to applicable law, which prevails over the Passenger Sales Agency Agreement. Third in hierarchy are contractual documents specifically executed between an Agent and IATA acting on behalf of a member airline, followed by all other resolutions of the conference as set out in the Travel Agents Handbook. Local financial criteria approved by the Conference come fifth in order and; finally, all applicable rules and provisions included in the BSP (Billing and Settlement Plan) Manual for Agents. IATA recognizes that applicable law prevails over any rights and obligations derived from the Sales Agency Agreement or any contractual document between IATA and a Travel Agent. The local financial criteria are given recognition only at a lower level in this hierarchy, that too only if such criteria have been approved by the relevant Conference. The rules of interpretation provide that sources of inferior ranking (such as local financial criteria) may in exceptional circumstances prevail over any obligation occupying a higher level in the hierarchy, if explicitly provided by the relevant IATA Conference.*; Ibid*; See, also the *PACRM,* "Permanent Effectiveness Resolution", PAC (48) 001, Type A.

Administrator, member airlines, other airlines that are party to the PSAA,[678] travel agents and the Travel Agency Commissioner. Subject to government approval (where required) resolutions of the passenger agency conference are globally applicable wherever a passenger agency programme is in effect, unless any resolution confines the area or countries of its applicability.[679] The passenger sales agency rules are formulated in Resolution 800[680] and Resolution 818g.[681] An Agency Investigation Panel[682] is normally established in countries referred to in Resolution 800, but only until the full implementation of a BSP[683] in such countries.[684]

[678] *PACRM,* res. 824, ver. 2 "Passenger Sales Agency Agreement".
[679] *Ibid,* res. 010 s.6.
[680] *Ibid,* res. 800, PAC-2/3/ (51)800 . Resolution 800 is applicable in a limited number of countries, whilst a larger group of countries (except the USA) is covered in Resolution 818g. The names of countries are set out at the beginning of both Resolution PAC 2/3/ (51)800 & PAC 1(except USA)/2/3/ (51)818g. An examination of these countries named in Resolution 800 manifests that the said resolution 800 had been made applicable to a majority of countries where local air transport markets may not be of a sophisticated or developed level (with the exception of countries such as Israel and Iran which are also included in this resolution). Resolution 800 provides for the establishment of an Agency Investigation Panel (AIP) by the Agency Administrator in each country where it is applicable.
[681] *PACRM supra* note 540, PAC-1(except the USA)/2/3(51) 818g. As clearly set out at the very top of the resolution it is not applicable in the United States. Resolution 818g makes the relevant passenger sales agency rules therein applicable to a vast number of countries, in all three geographical areas identified in the IATA map except the United States of America and the countries to which Resolution 800 applies.
[682] *Ibid,* res. 800, "Constitution of Agency Investigation Panel".
[683] *Ibid*, res. 866, "Definitions of Terms Used in Passenger Agency Programme Resolutions", PAC 1(except USA)/2/3 (51) 866. Billing and Settlement Plans(BSPs) – "means the method of providing and issuing Standard Traffic Documents and other accountable forms and the accounting for the issuance of these documents between BSP airlines on the one hand and Accredited Agents on the other as described in the Passenger Sales Agency Rules" Billing & Settlement Plans are provided for in Resolution 850 – "Billing & Settlement Plans" - Resolution 850 " Billing and Settlement Plans, and it Attachments"- PAC 1(except USA)/2/3 (51) 850, *PACRM, ibid.*
[684] The other apparent distinction between Resolutions 800 and 818g is that the former applies in respect of countries that do not have Billing and Settlement Plans (BSPs) through which sales revenue is collected and settled to airlines. Resolution 818g on the other hand contains provisions that contemplate the existence of BSPs within the countries or regions covered under that resolution. Provision is made in Resolution 800 for disbanding of an Agency Investigation Panel upon full implementation of a BSP in any country where the members in that country upon consultation with IATA move to the more progressive set of rules stipulated in Resolution 818g. See *Ibid,* res. 800, s. 3.1.1.3.

## 7.2 Accreditation of Agents.

Passenger sales agency resolutions[685] provide rules, *inter alia*, for the accreditation of travel agents[686] and for retaining such accreditation. These conditions of accreditation include specific criteria such as security standards to be maintained at the business premises, fees to be paid, systems to be followed, and the reporting of sales and remittance of monies to airlines directly or through a BSP. To be accredited by IATA, a travel agent must be solvent, of good financial standing, have sufficient capital and liquid funds.[687] IATA airlines can appoint only an agent accredited by IATA, who operates from an IATA approved location, to sell international air transportation.[688]

Under Resolution 800, when an application for accreditation is made, the Agency Investigation Panel ("AIP") for the country (or, where there is no such panel in that country, the Agency Administrator) will evaluate the application and the proposed location. Accredited agents can only engage in the travel agency business from an 'approved location' and must obtain prior approval to move the business to a new location.[689] The same restriction does not apply in relation to approved locations under Resolution 818g which states that,[690] "Any person in possession of the appropriate

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[685] *Ibid*, res. 800 & 818g.

[686] Accreditation is a process through which IATA admits travel agents into the IATA Travel Agents Scheme. Once IATA has "Accredited" a travel agent, any airline member of IATA can appoint such Accredited Agent for the sale of its passenger tickets and cargo transport services.

[687] *Ibid*, res. 800, s. 2, Re "Criteria for Accreditation & Retention"; Res. 818g, s. 2, "Qualifications for Accreditation".

[688] *Ibid,* res. 800, para 2. "Introduction"; Res. 818g, s. 3.4.1.1 . Resolution 818g provides that "a Member or BSP airline may appoint an Accredited Agent, which is on the Agency List and such appointment shall unless otherwise specified cover all approved locations of the Agent" *ibid.*

[689] *Ibid*, res. 800, ss 2.1, & 11.12.1(a)," Move of Approved Location to a New Location" .

[690] *Ibid*, res. 818g., s.10.8.1(a), "Change of Location or Name". An applicant in a resolution 818g country, could have more than one business premises as "approved locations" at the time of being accredited. Further, under the resolution 818g, prior notice is not mandatory to change the business premises from the "approved location" to an unapproved location but could be notified within 30 days after the location is changed.

official license where required, may become an Accredited Agent by making an application to IATA **wherever** (emphasis added) such person carries on business and by meeting the qualifications described below."[691]

A pre-qualification stipulation relating to the accreditation of agents (set out in §2.1 of Resolution 818g) contains the words: "[a]ny person in possession of the appropriate official license where required….". These words indicate that, for the purposes of accreditation, IATA confers implicit recognition of licenses or trading approvals granted by the state or municipal authorities of countries that are covered under Resolution 818g. However, the absence of parallel provisions in Resolution 800 allowing for the recognition of official licenses, indicates that accreditation criteria are *per se* discriminatory, depending on the country in which the travel agent seeking accreditation from IATA is licensed.

### 7.3 Appointment and execution of Sales Agency Agreement

When an agent has been 'accredited', the Director General of IATA, acting on behalf of all the members of IATA, executes a PSAA with the accredited agent. [692] Thereafter, member airlines can appoint[693] an accredited agent in respect of any one or all of the

[691] *Ibid*, res.818g, s. 2.1 "Qualification for Accreditation".
[692] *Ibid,* res. 824, "Passenger Sales Agency Agreement (Version II)" PAC 1/2/3 (22), 824(Except USA), PSAA is a model agreement contained in Resolution 824 recommended by IATA to be signed between each Accredited Agent and IATA Director General. *See*, Res. 824, §2.1(a), provides that the terms and conditions governing the relationship between the Carrier and the Agent are set forth in the relevant resolutions (and other provisions derived therefrom) and includes provisions in the Travel Agents Handbook, which are incorporated as a part of the Passenger Sales Agency Agreement between the Agent and the Carrier.
[693] The PSSA becomes effective between the agent and the member airline, upon the airline making an appointment of an accredited agent in accordance with the Sales Agency Rules applicable in the relevant countries.

'approved locations' of the agent.[694] The appointment of an accredited agent is done: (a) by a member airline depositing with the Agency Administrator a statement of 'General Concurrence;'[695] and (b) by a member airline appointing a specific agent (or agents) and by delivering to such an agent a 'Certificate of Appointment' in the form prescribed.[696]

### 7.4 Passenger Sales Agency Agreement ("PSAA")

The PSAA signed between accredited agents and IATA incorporates (by reference) the *Travel Agents Handbook* that contains sales agency rules, Billing and Settlement Plan Rules contained in the BSP Manual for agents, local standards provided under the sales agency rules and other IATA resolutions.[697] The authority to sell air transportation on any member airline is confined to "tariffs and conditions of carriage" and written instructions provided to the agent by the member airline.[698] The agent is only entitled to make representations as authorized by the carrier.[699] The obligation to comply with

[694] *Ibid*, res. 800 s. 5.1 "Execution of Sales Agency Agreement," ; Res. 818g, s3.4 "Appointment of Agent by individual member of BSP Airlines", Res. 800, s.5.2 "Appointment of Agents by members"; Res.818g, s. 3.4.1"Manner of Appointment".

[695] *PACRM, supra* note 540, res. 878, att. A, "General Concurrence", PAC 1(except USA)/2/3, (26)878. A statement of General Concurrence constitutes a confirmation by an IATA airline that all accredited agents of IATA will be recognized as being authorized to act and represent that member airline with effective authority in all countries in which IATA accredited agents have "approved locations". Res. 800, §5.2.1.1 (a), and, res 818g, §3.4.1.1.General Concurrence could be made subject to geographical exclusions. Such exclusions are to be notified by the Agency Administrator to all accredited agents.

[696] *Ibid,* res.800, s.5.2.1.1(b); res.818s. 3.4.1.1(b). When the appointment is made a copy of the Certificate of Appointment simultaneously should be transmitted to the Agency Administrator. The form of the Certificate of Appointment is prescribed in Resolution 820, PAC 1(except USA) 2/3(40), *PARCM*, *ibid.*

[697] *Ibid,* res. 822, s. 2.1(a).

[698] *Ibid,* res. 824 ss. 3.1 & 3.2 The sale of air passenger transportation means all activities necessary to provide the passenger with a valid contract of carriage including but not limited to the issuance of a valid Traffic Document and the collection of monies therefor. The Agent is also authorized to sell such ancillary and other services as the carrier may authorize.

[699] *Ibid,* res. 824, ss. 3.2 & 3.3.

government laws and regulations applicable to the sale of air transportation is imposed upon the agent and not the appointing airline.[700]

## 7.5 Traffic Documents

The appointment of an agent *per se* does not entitle the agent to engage in the sale of passenger or cargo transportation for IATA airlines. An agent can sell air transportation services for IATA airlines only after Traffic Documents[701] are delivered to an agent.[702] "Standard Traffic Documents ("STDs")"[703] for the sale of air transportation can be held only by accredited agents at approved locations.[704] STDs issued in countries where Resolution 818g applies, consist of an authorization to issue electronic tickets[705] and have specific numeric codes and values that are supplied to agents by IATA Settlement Systems Management ("ISS Management"). STDs remain at all times the property of IATA until issued to a passenger.[706] If an IATA member ceases scheduled international operations for reasons of financial failure, the Agency Administrator, acting on the

[700] *Ibid,* res. 824, s. 4.
[701] *Ibid,* res. 866. . "Traffic Documents" – are defined, to include, an airlines' own Traffic Documents, such as the Passenger Tickets, Baggage Check forms, Automated Boarding Passes, Miscellaneous Charge Orders, Multipurpose Documents, Agent Refund Vouchers, Online Tickets supplied by member airlines to Accredited Agents for issue to their customers as well as Standard Traffic Documents, issued manually or mechanically or electronically for air passenger./baggage/ cargo transportation over the lines of such member Airline.
[702] *Ibid,* res. 800, s. 5.3, Resolution 800, "Delivery of Traffic Documents"
[703] *Ibid,* res. 866, defines "Standard Traffic Documents", as: "documents issued under a Billing and Settlement Plan, that do not have the airline identification until same is issued to a customer, and include, Electronic Miscellaneous Documents (EMD), Electronic Tickets, Automated coupon-by-coupon- Virtual Multipurpose Charge Orders (VMCO) and Virtual Multipurpose Miscellaneous Documents (VMPD) which are supplied by the ISS Management to an Agent."
[704] *Ibid,* res. 818, s. 4 "Issue of Standard Traffic Documents".
[705] *Ibid,* res. 800, s. 5.3.1, "Granting of Electronic Ticketing Authority". , makes provision for the issue of electronic tickets, in areas where electronic ticketing has been implemented and if the country or area concerned has a Billing and Settlement Plan (BSP) in operation. The authority for issuing electronic tickets is granted to the Agent, by the member airline participating in the Billing and Settlement Plan, for the e-tickets to be sold either at the Agent's head office or the Branch Office Location.
[706] *Ibid,* res. 818g, s. 4.

instructions of the airline or Director General of IATA, removes all Traffic Documents of that airline from approved locations holding Traffic Documents.[707]

ISS Management[708]is responsible for providing all agents in BSP countries with the ranges of electronic ticket numbers for issue of STDs under the IATA Numeric Code.[709] Traffic Documents can be validated only for locations to which an IATA Numeric Code has been allocated.[710] IATA numeric codes are also issued to designated non-IATA entities that subscribe to any recognized IATA industry scheme.[711] Only IATA accredited agents are permitted to participate in BSPs. Non-IATA agents may be accepted into BSPs for domestic only services where a business case can be made and provided that 90% of its ticket transactions are for air transport.[712]

[707] *Ibid,* res. 800 s. 5.3.1.3 Res. 818g, s. 4.1.3 "Removal by an Agency Administrator in special circumstances".
[708] *Ibid,* res. 850, "Billing and Settlement Plans", PAC 1(except USA)/2/3 (51)850. specifies the responsibilities of IATA Settlement Systems Management (ISS Management) and mandates the operation of ISS, service provisions when operating BSPs. "IATA Settlement System Management is a functional area of IATA Financial and Distribution Services (FDS) responsible to the IATA Board of Governors for the management and efficient operation of IATA Settlement Systems (hereafter referred to as "ISS") ISS Management, is advised by Local Customer Advisory Groups – Passenger (LCAG-P) which are established under the authority of the Conference in countries wherever a BSP is in operation., See *Ibid,* res. 850, s. 4, Resolution 850e recognizes ISS as having specific responsibilities for budgets, staffing, contracts, office management and administration of ISS. Resolution 850e, "Industry Settlement Systems*",* PAC1(except to USA)/2/3 (49)850e.
[709] *Ibid,* res. 822, s.1. The IATA Numeric Code consist of; a two-digit geographic designator; a one-digit area designator, a four-digit location designator followed by, a check digit which is calculated according to a modulus specified in the relevant resolution. The Numeric Codes assigned in accordance with Resolution 822 remains the property of IATA and are allocated by the Agency Administrator to each Agreed Location of IATA Agents, non-IATA sales intermediaries who have been authorized to hold and issue STDs pursuant to Resolution 850 and domestic only Agents reporting their sales through a BSPs.
[710] *Ibid*, res. 822, s.4., IATA Numeric codes are issued by the Electronic Ticketing Service Provider appointed in accordance with Resolution 854.
[711] *Ibid,* res. 822, ss. 3.1.1 & 3.1.2., Others who subscribe to a recognized IATA industry scheme, are also allocated Numeric Codes by the IATA Agency Administrator.
[712] *Ibid,* res. 850, ss. 7.2 & 8.5.

## 7.6 Responsibilities of an Agent in relation to STDs

Agents are responsible for the safe custody of the STDs which are entrusted to them.[713] Agents' authority is limited to the issuance of STDs at approved locations in accordance with the specific conditions granted to them.[714] Agents cannot issue, sell or validate STDs of one IATA airline for transport solely on another airline unless they have been authorized to do so by the airline that issues the STDs.[715] Thus issuing STDs on code share flights can be done by an agent only if the airline whose STDs are used has specifically authorized this action. The obligations of an agent in relation to STDs are cast in the form of a 'duty of care' under Resolution 818g, which also extends to ensuring that no post issuance tampering of STDs occurs in the custody of the agent. Strict liability is imposed upon an agent for damage, expenses or losses occasioned to a BSP airline due to misapplication, theft or forgery of STDs.[716] Imposition of a duty of care ordinarily presupposes the existence of the defence that a person did in fact act with the requisite degree of care or diligence. However, strict liability is automatic, and here agents are not given an opportunity to submit a defence as to why such liability ought not attach. Under the terms of this Resolution, agents would be strictly liable for loss or damage that arises from theft, misapplication and forgery of STDs, even if they have acted within expectations of the duty of care.

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[713] *Ibid,* res. 800, ss. 5.4.1, 6.1; *Ibid,* res. 818g, ss. 5, 5.1, "Integrity of Standard Traffic Documents, Custody, Protection and Proper Issuance". Agents who have been entrusted with STDs are obliged to take all reasonable precautions to secure their business premises and prevent unlawful or improper use or access to STDs, by unauthorized parties.

[714] *Ibid,* res. 800, s,5.4.2. ; *Ibid,* res. 800, s.5.4.6 stipulates that if an agent does not use STDs for more than 6 months the BSP ticketing facility will be removed from such agent by the Agency Administrator whilst the reinstatement of such facility will be subject to a review of the financial standing of the agent. *See,* the parallel provisions contained in res. 818g s.4.1.4.4.

[715] *Ibid,* res. 800, s.5.4.4.

[716] *Ibid,* res. 818, s.5.2, 'Liability".

## 7.7 Ticketing, reservation and remittance procedures

Several resolutions make substantive and procedural rules relating to reservations procedure,[717] consequences for violating ticketing/reservation procedures,[718] change of Traffic Documents,[719] payment, reporting,[720] remittances[721] and for dealing with default of agents. [722] The rules include penalties and sanctions to be imposed against defaulting travel agents. Two separate remittance procedures are mandated for agent issued STDs and for tickets issued by BSP airlines on behalf of agents.[723]Agency Conferences establish the frequency of remittance of sales revenue by all agents participating in BSPs.[724] The rules relating to remittance frequency for sales proceeds cause burdens for travel agents. When remittance frequency is determined by IATA conferences, inevitably the interests of the airlines will predominate those of travel agents. Historically, sales agents were allowed 45 days to remit sales proceeds to BSPs. This period was gradually reduced to 30 days, then 20 days, thereafter 15 days and finally 7 days. The remittance frequency of 7 days imposes heavy cash flow burdens on travel

[717] *Ibid,* res. 830d, "Reservation Procedure for Accredited Agents" PAC 1(except USA) /2/3 (50)830d.
[718] *Ibid,* res.830a, "Consequences of Violation of Ticketing and Reservation Procedure". PAC 1(except USA)/2/3 (45)830a.
[719] *Ibid,* res. 838, s. 3, "Change of Traffic Documents by Agents". PAC 1(except USA)/2/3(46)838, This Resolution formulates the rules to be followed by agents in case of voluntary re-routing which is a change made at the passenger's request. When a passenger requests a change in the Traffic Document, the agent is empowered to effect a change of a reservation or effect a re-routing without changing the point of origin. If involuntary re-routing or change of Traffic Document is occasioned due to special operational circumstances of the airline, a re-issue of the ticket by the agent is to be done according to the terms in set out in the Resolution. See, *ibid,* res. 838, ss. 1.1 & 4.
[720] *Ibid,* res. 832, s. 1 "Reporting and Remitting Procedure", PAC 1(except USA) /2/3 (except 818g countries) (50)832, contains the rules regarding reporting and remitting through Billing and Settlement Plans (BSPs). These rules *inter alia* provide the procedure for remitting where priority is accorded to remittance by electronic fund transfers or business to business direct remittances.
[721] *Ibid,* res. 800, s. 9., implementing §3 of res. 832. – PAC 1 (except USA)/PAC 2/3(50)832 (excepting 818g countries).
[722] *Ibid,* res. 818g, s. 8. which adopts §2 of Attachment A, thereof where the applicable default provisions are stipulated in detail.
[723] *Ibid,* res.832, ss.1.1.1(a) & 1.1.1(a)(i), res. 832. These provisions stipulate the dates of remittances, frequency of remittances and the manner in dealing with irregularities and defaults of remittance by agents. §2 of Resolution 832 formulates the rules pertaining to reporting and remitting directly by agents to members airlines in non-BSP countries.
[724] *Ibid,* res. 832, s. 1.6.2, "Frequency of Remittance".

agents. In competitive markets it is customary for travel agents to offer credit on air ticket sales. The ability to offer such credit was predicated on the longer periods being allowed for the remittance of sales proceeds through BSPs. However, the shorter remittance periods currently applicable compel travel agents to support credit offered to clients though their own financing and capital. Travel agents are now required to remit sale proceeds within 7 days of issuing a ticket. Thus, on many occasions, agents remit sales proceeds to BSPs even before the air transportation service is performed. The rules for BSPs[725] also compel agents to provide financial securities—including bank guarantees—to secure due settlement of sales proceeds. Hence, these IATA rules secure sales proceeds for airlines at the cost of agents, and in many cases compel the remittance of sales proceeds before the air transport service is actually performed. These IATA rules render the travel agency business capital intensive and create financial barriers for entry into the business by restricting access to those who are capable of infusing high capital and providing financial security for IATA airlines.

Separate rules govern direct remittances to airlines by agents where sales revenue is not settled through BSPs. The agent must remit to the carrier the amount payable for Traffic Documents immediately upon money being received for tickets sold by the agent. All monies received, including remuneration payable to the agent, is the property of the airline and is held in trust until settlement by the agent.[726] If an agent faces bankruptcy proceedings, or is placed in receivership, all monies held on behalf of an airline by the

[725] *Ibid,* res. 850, "Billing and Settlement Plans" PAC 1 (Except USA)/2/3 (51) 850, Type B.
[726] *Ibid,* res. 824, "Monies due by Agents to Carriers – Remittance".

agent are immediately payable, notwithstanding any remittance rules.[727]Although protection against insolvency of agents is provided for members airlines, no corresponding protection is given under these rules for agents for financial failure of IATA airlines.[728]

Sales revenue paid by agents are received into the IATA Hinge Account,[729] where it is held under the control and custody of IATA until it is settled through the ICH. A claim for settlement is made by an airline only after the air transportation covered by that claim is performed. Hence, during the period in which funds are remitted to the IATA Hinge Account and until remittance is settled through the ICH, the funds remain under IATA's control until the completion of the ICH billing cycle.[730] Thus, IATA rules ensure that an extremely large pool of funds are available for the use of IATA.[731] Although the sales revenue that is remitted to the ICH does not belong to IATA, funds passing through the ICH are used by IATA to generate revenue for itself.[732] The question is: how does IATA account for sales revenue for the period during which it controls these

[727] *Ibid,* res. 824, ss.7.2, & 7.4. . Whilst resolution 824, notes that its provisions are applicable in all regions except USA, §7 thereof stipulates that it shall also not apply in Australia and Germany.
[728] IATA regulations are primarily focused in conferring preferential circumstances for its members. For, example IATA Clearing House (ICH) regulations rules purport to confer preferential creditor status for the Clearing House settlement schemes in the event of bankruptcy of an airline. However, as illustrated in Chapter 5, *supra*, the House of Lords in the UK and the Victoria Supreme Court in Australia have pronounced judicial decisions by giving prevalence to national rules of bankruptcy over the scheme of preferential settlement contained in ICH rules.
[729] Under the "Hinge account" rules of the Counter Indemnity Agreement all remittances are collected into an IATA Hinge Account, See*, ibid,* res. 850, s. 1att. C "Hinge Account" is the "**Bank Account into which Agents' remittances are paid and from which monies are distributed to participating airlines**." See, *PACRM supra* note 540, res. 866.
[730] Under the IATA Clearing House rules and procedures specific dates, times and cycles have been stipulated for claims, such as "Closure Days" "Call days" "Advice Days" and "Settlement days" etc. When a claim is made such claim or billing is netted or subject to set off in the ICH by the "Closure day". The airline members are thereafter informed of the net amount payable to or by them to the ICH by the "Advice day". All amounts due to the ICH are to be paid by the "Call day" and the net amount due to airlines from the ICH are paid by the "Settlement day.", See "IATA Clearing House" *supra* note 306.
[731] See "Billing and Settlement Plans (BSPs), Remittance Procedures and Frequencies, Counter Indemnities, and IATA Clearing House", Chapter 5 *above*.
[732] See "Control of Revenue through Settlement Systems and Clearing House" Chapter 5, *above*.

funds? Further, who is entitled to receive interest or accruals on the funds during the period that the monies are in the ICH and Hinge Accounts? The irony of this position is that the Hinge Account rules require airlines to indemnify IATA for any shortfall that might occur due to non-remittance of sales revenue. However, the rules also ensure that IATA has no financial exposure, even though it derives significant benefits from the control of large sums of funds retained in the ICH.

### 7.8 Financial securities

Financial securities[733] accepted from agents are bank guarantees, standby letters of credit, letters of credit, insurance bonds, surety bonds and default insurance programmes.[734]

### 7.9 Counter indemnities and honouring STDs

Airlines participating in BSPs are required to enter into a Counter Indemnity Agreement[735] to facilitate the collection of sales revenue in the BSP into one single account known as the IATA Hinge Account.[736] If a BSP airline suspends operations, then IATA will immediately suspend financial activities relating to this airline.[737] If

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[733] *PACRM, supra* note 40, res. 850p "Financial Securities" PAC1 (except USA) /2/3 (51)850p.
[734] *Ibid,* res. 850p, s. 2 "Acceptable financial security types".
[735] *Ibid,* res. 850, att. C "Form of Counter Indemnity" . §6.5 and §8.5 of, Resolution 850, stipulate the requirement for both member airlines as well as non-IATA members to enter into a Counter Indemnity Agreements in relation to BSPs.
[736] *Ibid,* res. 850, s., att. C, 1. "Hinge Account" is defined in Resolution 866 which contains definitions of terms used in the Passenger Agency Program Resolutions to mean the *"Bank Account into which Agents' remittances are paid and from which monies are distributed to participating airlines."* The Counter Indemnity Agreement is a joint indemnification by all airlines participating in a BSP scheme to reimburse and indemnify IATA for any shortfalls as a consequence of any transaction not supported by a full agent remittance being made. Shortfalls in the Hinge Account not supported by agent remittances, are to be treated as operating costs and expenses of the BSP according the joint indemnification referred to above. *Ibid,* res. 850, s.3, att. C.
[737] *Ibid,* res. 850, s. 2, att. F, In such situations IATA informs the relevant BSP airline, and all BSP airlines participating in that BSP as well as all agents to immediately suspend ticketing activities on behalf of such BSP airline which suspends operations and to immediately stop the use of such airline's name and Numeric Code as the ticketing airline in STDs.

revenue collected on tickets sold is not paid to a BSP airline because of the irredeemable fault of an agent, the loss is borne by the BSP airline.[738] If a defaulting agent has issued blacklisted STDs that are unreported, they are nevertheless to be honoured by BSP airlines when they are presented for travel by passengers.[739] If losses are incurred due to the fraudulent use of STDs, the BSP airline honouring the STD is entitled to reimbursement from BSP airlines under a cost sharing formula.[740] These rules appear to be consumer-directed, in that they require airlines to perform the contracted carriage even when agents default to remit sales revenue. However, as principals contracting with passengers, the airlines remain contractually liable in any event. As such, these resolutions of IATA do not create any obligation on airlines beyond that which ordinary laws provide in most legal systems.

### 7.10 Redress for Agent grievances and dispute resolution

Opportunities for travel agents to seek redress for their grievances are very limited under the rules of IATA's quasi regulations. These opportunities are restricted to provisions within the Agency programme and a contract of adhesion which an agent is compelled to become party to upon accreditation. These rules do not generally permit IATA agents to refer disputes to national courts other than in exceptional circumstances.

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[738] *Ibid,* res. 850, s.2, att. G, "Financial Losses Incurred in Honouring Standard Traffic Documents (STDs". . The airline whose ticketing authority was used by the Agent to issue the Traffic Document is required to bear the loss in this situation.

[739] *Ibid,* res. 850, s.2, att. G.

[740] *Ibid,* res. 850, s.4, att. G. . If, however the fraudulent STD had been listed in the Industry Tickets Service at the time such ticket was honoured by the BSP airline, the loss from such STD is to be borne wholly by the airline which honoured the STD, which cannot seek loss sharing under the BSP., See *ibid,* res.850, s.3 "Indemnification of Honouring Airline", att. G.

## 7.11 Travel Agency Commissioner

The IATA Travel Agency Commissioner[741] has jurisdiction to review[742] decisions affecting agents (accredited) or applicants (agents pending accreditation) made under the IATA Agency Programme.[743] Agents or applicants might seek review by the Travel Agency Commissioner where an application for accreditation,[744] application for an additional location,[745] application for acquisition of ownership of an agency or location,[746] or application for the change of location and /or name[747] has been rejected by the Agency Administrator. Review may also be sought where a director of the agent or applicant has been subjected to a disqualification,[748] or where notice of removal of the agent or approved location from the agency list is received, which has unreasonably diminished the ability of the agent to conduct business.[749] Agents or applicants may also apply for review where ISS Management has withdrawn STDs from the agent,[750] where an agent's commercial survival is threatened by a member airline that is preventing it from acting as agent or from issuing Traffic Documents,[751] where the

[741] *Ibid,* res. 820d, att. A, "Travel Agency Commissioner Profile". Travel Agency Commissioner is an independent arbiter appointed jointly by the IATA, the Universal Federation of Travel Agency Associations (UFTAA), and the World Travel Agency Associations Alliance (WTAAA) to conduct reviews and act with respect to decisions and/or actions affecting Agents and applicants under the IATA Agency Programme.
[742] *Ibid,* res.820e., "Reviews by the Travel Agency Commissioner".
[743] *Ibid,* preamble of res. 820e; res. 800, s.12; res.818g, s. 11., The main resolutions formulating rules for passenger agents refer to 820e as the applicable resolution prescribing jurisdiction of the Travel Agency Commissioner and the procedure for conducting reviews by the Travel Agency Commissioner.
[744] *Ibid,* res. 820e, s.1.1, "Review initiated by Agent or Applicant".
[745] *Ibid,* res. 820e, s.1.1.2. .
[746] *Ibid,* res. 820e, s.1.1.3.
[747] *Ibid,* res. 820e, s.1.1.6.
[748] *Ibid,* res. 820e, s.1.1.4.
[749] *Ibid,* res. 820e, s.1.1.5.
[750] *Ibid,* res. 820e, s.1.1.7.
[751] *Ibid,* res. 820e, s.1.1.8.

agent is aggrieved by an impending amendment to its PSAA,[752] or where the Agency Administrator has not followed the correct procedures to the detriment of the agent.[753]

A review to the Travel Agency Commissioner can be invoked by the IATA Agency Administrator under Resolution 820e, to "determine whether the agent or location has breached its PSAA, and IATA Resolutions incorporated into it".[754]

The Travel Agency Commissioner must decline to act on[755]claims arising under restraint of trade law/regulations of the state or international authority that has jurisdiction;[756]and in relation to any matter where the Commissioner does not have jurisdiction.[757] These express provisions make it clear that the jurisdiction of the Travel Agency Commissioner under passenger sales agency rules are specifically confined to those circumstances set out in Resolution 820e.[758] Therefore, any complaint crafted by an agent that invokes local law on the grounds of restraint of trade will effectively preclude such a matter being inquired into by the Travel Agency Commissioner. An agent could thus opt out of the internal dispute resolution under IATA and seek redress under domestic/national law. Conversely, IATA rules preclude an agent from invoking any domestic law remedy unless the complaint relates to restraint of trade. Similarly,

[752] *Ibid,* res. 820e, s 1.1.9.
[753] *Ibid,* res. 820e, s 1.1.10.
[754] *Ibid,* res. 820e, ss 1.3.1- 1.3.12.
[755] *Ibid,* res. 820e, s 1.4, "Matters Outside the Purview of the Travel Agency Commissioner".
[756] *Ibid,* res. 820e, s 1.4.1.
[757] *Ibid,* res. 820e, s 1.4.2.
[758] *Ibid,* res. 820e, ss §§ 1.1, 1.3 & 1.4.

IATA makes it mandatory for any other dispute to be resolved by initiating a complaint with the Travel Agency Commissioner.[759]

Decisions of the Travel Agency Commissioner are subject to review by arbitration.[760] The right to arbitration can be invoked to submit a decision of the Travel Agency Commissioner to *de novo* review.[761] It is mandatory for "all disputes arising out of or in connection with a decision of a Travel Agency Commissioner ("A Decision") to be finally settled under the Rules of Arbitration of the International Chamber of Commerce".[762] The provisions of PSAA also make it mandatory for agents to submit disputes to arbitration.[763] It is clear from the above provisions that an extensive grievance process and dispute resolution mechanism is provided within IATA passenger agency Resolutions, where recourse can be made in the first instance to the Travel Agency Commissioner, and thereafter any decision of the Travel Agency Commissioner may be referred to arbitration for *de novo* review.

The question to be considered at this point is: does the existence of this dispute resolution mechanism prevent an IATA agent from seeking recourse in a court of law for a grievance or dispute with a member airline or IATA, or from escalating a

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[759] *Ibid,* res. 820e, s 3.4. stipulates that, the parties may at any time during the Commissioner's Review, with the Commissioners recommendation seek to settle their dispute amicably by resorting to mediation under the rules of Amicable Dispute Resolution of the International Chamber of Commerce (ICC ADR rules). The reference to "parties" in this Section is a reference to parties to the dispute referred to the Travel Agency Commissioner. This is clear from the words, "…. any dispute arising out of in connection with this Resolution …"

[760] *Ibid,* res. 800, s 13, res. 818g, s. 12.

[761] *Ibid,* res. 800, s.13.1, res. 818g, s. 12.1.

[762] *Ibid,* res. 820e. Arbitration is before an arbitrator or arbitrators appointed in accordance with the said rules in the resolution and for judgment upon an arbitral award to be entered in any Court having jurisdiction thereof. Also see *ibid,* res. 800, s. 13.2, res. 818g, s.12.2.

[763] *Passenger Sales Agency Agreement (PSAA)* (Version II) s*upra* note 540, res. 824, s. 14.

complaint to a local authority that ordinarily has administrative or judicial powers of review in relation to such dispute. For matters covered under §1.4 of Resolution 820e,[764] the Travel Agency Commissioner is under an express obligation to decline to act even if the complaint is referred the Commissioner for resolution. Hence, it is implicit in the relevant IATA rule that local courts and regulatory authorities can exercise judicial and administrative review in respect of matters not falling specifically within the Travel Agency Commissioner' authority. The question is then raised: whether the existence of a dispute resolution mechanism in the IATA resolutions in respect of specific matters[765] effectively ousts jurisdiction of local courts, or local administrative and regulatory authorities in such matters.

The words "all disputes arising out of or in connection with a decision of a Travel Agency Commissioner ("A Decision") shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce" set out in Resolutions 800 & 818g[766] are significant in this context. The implication is that an agent would be restricted from invoking jurisdiction of a local court of law in any country to seek redress for a grievance or dispute which falls within the purview of the Travel Agency Commissioner's powers, if that country has given effect to the *New York Convention on Arbitration* ("New York Convention") and where its principles apply in that country.[767]

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[764] *PACRM supra* note 540, res. 820e, s. 1.4, "Matters Outside the Purview of the Travel Agency Commissioner".
[765] *Ibid,* res. 820e, ss.1.1 & 1.3.
[766] *Ibid,* res. 800, s. 13.2, res. 818g, s. 12.2.
[767] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, (entered into force on 9th June 1959) , [hereinafter referred to as the *New York Convention*], Revised Reprint, United Nations, New York, 2015. The New York Convention, which entered into force on the 9th of June 1959, gave effect to the Final Act of the New York Conference on International Commercial Arbitration held from 20th May to 10th June 1958. The main objective of this Convention is to

The jurisdiction of local courts would ordinarily be ousted in countries which have either adopted legislation modelled on the UNCITRAL *Model Law on International Commercial Arbitration*[768] or the principles formulated in the New York Convention have been given effect to in domestic legislation. Therefore, in such countries, IATA or a member airline (as a party to the PSAA) could object to a local court exercising jurisdiction over matters which are specified for review by the Travel Agency Commissioner. In these circumstances, an IATA agent will be confined solely to remedies under IATA Resolutions.[769] As remedies available to an agent are clearly limited under IATA Resolutions, [770] such agents will not be able to recover damages or costs incurred, from IATA or a member airline.

Due to the existence of alternative remedies within the IATA internal governance structure, and because any dispute arising from decisions of the Travel Agency

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ensure that countries ratifying and adopting its principles enact domestic legislation to facilitate the recognition and enforcement of foreign and non-domestic arbitral awards within their jurisdictions. This *Convention* also contemplates that signatory countries ratifying this *Convention* give effect to domestic legislation requiring domestic courts to deny parties access to courts if such parties have already agreed to refer disputes to arbitration. Article II (3) of the *New York Convention on Arbitration* states that "a court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.".

[768] *UNCITRAL, Model Law on International Commercial Arbitration, 1985* (with Amendments up to 2006) (Vienna: UN Committee on International Trade Law, 2008) [UNCITRAL Model Law] Numerous countries have adopted provision contained in the UNCITRAL model law Article 5 of which under the heading "Extent of court intervention" stipulates that, "*In matters governed by this Law, no court shall intervene except where so provided in this Law".* For example, the Arbitration Act of Sri Lanka No. 11 of 1995 which follow the UNCITRAL model law, consequent to the ratification of the New York Convention by that country, contains a provision in Section 5 of the Act, compelling courts of law not to exercise jurisdiction over any matter where the parties have an agreement to refer disputes to arbitration and if one of the parties to such agreement objects to the court exercising jurisdiction over such dispute.

[769] *PACRM, supra* note 540, res. 820e, ss. 3.1 & 3.3. The remedies that could be granted by the Travel Agency Commissioner are specified in §§ 3.1 & 3.3.

[770] Upon review, the Travel Agency Commissioner can either affirm the decisions and implement the actions recommended by the Travel Agency Administrator or the member airline or where it finds in favour of the Agent could merely approve an application that has been rejected, reinstate withdrawn Traffic Documents, grant relief to alleviate any threat effecting the commercial survival of the Agent, or any detriment that could result by amending the Sales Agency Agreement. However, no provision in these rules permit the Travel Agency Commissioner to grant any monetary or compensatory relief or costs related to the invocation of review procedure, that would ordinarily be available to a litigant in a court of law in most countries.

Commissioner are deemed to be exclusively arbitrable, a travel agent or an applicant for IATA accreditation would be precluded from instituting proceedings in a local court against IATA or a member airline where the agent or applicant has submitted to the jurisdiction, or participated in a hearing before the Travel Agency Commissioner. The indemnity and waiver provisions contained in Resolutions 800 and 818g—whereby agents expressly waive all claims and causes of action[771] for any loss, injury or damage for any act done or omitted in good faith in connection with Agency Conference Resolutions—seem to support the proposition that agents are precluded from invoking the jurisdiction of local courts, or of seeking administrative redress for matters that fall within the dispute resolution mechanism established under passenger agency resolutions.

This leads to the conclusion that decisions of the IATA Agency Administrator and/or the IATA Travel Agency Commissioner in relation to matters contained in Resolutions 800 and 818g will not be subject to review by national courts. As an applicant for accreditation would not yet have signed the PSAA and voluntarily acceded to the Resolutions of IATA, it could argue that it is not bound by the IATA rules. However, since the application for accreditation is predicated on the rules contained in relevant IATA Resolutions for making an application, it is not easy for an applicant to seek redress in a court of law, particularly when a decision on the matter has already been made by the Travel Agency Administrator or the Travel Agency Commissioner.

[771] *Ibid,* res. 800, 818g, s. 15. The indemnity covers member airlines, IATA, Director General, Agency Administrator and ISS Management and any of their officers and employees

If an accredited agent or an applicant for agency intends to sue IATA or a member airline under local law to recover damages, the plaintiff should not submit to the jurisdiction of the Travel Agency Commissioner, but rather should initiate action before any decision is made by that office, and should craft the action to include an element of restraint of trade which compels the Travel Agency Commissioner to decline to hear the dispute.

Several decisions of US courts provide illustrations of disputes between travel agents and IATA. A review of these decisions will assist in identifying principles that can be applied to the agent-principal relationship that exists between IATA and agents and the characteristics of this relationship that are specific to the air transport industry.

In *John Caceres/Caceres Agency et al vs. IATA*[772], The plaintiff travel agents brought a class action alleging that IATA had conspired to refuse and reject their applications to become accredited by IATA. They therefore sought to recover treble damages, on the grounds that IATA had violated antitrust law. Although the Court ruled that a class action could not be maintained,[773]and that IATA Resolutions (when approved) were

[772] *John Caceres/Caceres Agency et al Vs. IATA,* 46 F.2d. 89 (1969) U.S. Dist. Lexis 13021; 12 Fed Rep Service 2d (Callaghan) 561; 1969 Trade Cases (CCH) P72, 693.
[773] *Ibid.* The Court ruled that a class action could not be maintained against IATA, as different reasons had been given to each travel agent when IATA rejected or disapproved their respective applications for accreditation. The court held that, it could not find common issues of fact and law which, predominate over questions affecting the individual members of the purported class.

immunized from antitrust suit,[774] it nevertheless set out the following principles to evaluate IATA Resolutions:

a. A court of law has the authority to hear evidence and review the circumstances under which IATA had implemented its Resolutions (such as, in this case, when rejecting the applications of travel agents for accreditation) in order to determine whether IATA had acted within the scope of immunity that has been granted.
b. A court could review whether a notice of disapproval or rejection by IATA of a travel agents' application for accreditation had been done legitimately and in a proper manner by examining the adequacy of the notice.
c. Even if an agent could invoke arbitration to challenge IATA's refusal to grant accreditation, the court can nevertheless exercise its jurisdiction to examine whether the IATA notice of disapproval was adequate, since without a proper notice, the travel agent cannot decide what action should be taken, including the reference to arbitration.
d. Although IATA resolutions had previously been granted immunity against suit by administrative orders (by the CAB), this immunity was subject to express terms and conditions.
e. IATA could rely on immunity granted only so far as its resolutions and conduct was within the scope of immunity granted.

[774] *Ibid.* The Court noted that, "in view of the CAB's approval of the resolutions no basis exists for attacking them as violating antitrust laws (even though plaintiff characterizes the defendant's conduct in implementing them as an illegal boycott) since they have been immunized by reasons of the CAB approval."

In *Sheldon Lowe (Trustee in Bankruptcy) of the Estate of Robert M. Hefler (Party Time Tours) vs. IATA et al,*[775] the plaintiff alleged that IATA had violated antitrust law by boycotting and refusing to deal with the plaintiff, after it removed the plaintiff from the list of IATA accredited agents without giving proper notice of the reasons for removal. IATA contended that the removal or the plaintiff was authorized or approved, insofar as the Resolutions under which it exercised the power of removal had been approved by the CAB and thus constituted conduct immune from antitrust suit. The Court disagreed with IATA and found that the procedure adopted to remove the plaintiff from the list of accredited agents was defective,[776] particularly since the issues raised by the plaintiffs in his objection were not explored by IATA. The court observed that: "[t]he action of IATA in delisting the plaintiff was not an act "authorized" or "approved" by the CAB's order because the notice given by IATA to the plaintiff did not comply with the (CAB)order in that it was not sufficiently detailed. Therefore, the umbrella of the CAB approval no longer protects defendants, in that their refusal to deal with plaintiffs constitutes per se antitrust violation."

*Turicentro, S.A Central America Travel Agency Ltd, Negocios Glabo, S.A and Fronteras Del Aire, S.A, vs. American Airlines Inc., Continental Airlines Inc., Delta Airlines Inc., IATA and*

[775] *Sheldon Lowe (Trustee in Bankruptcy) of the Estate of Robert M. Hefler (Party Time Tours) Vs. IATA et al* 1976 US Dist. Ct, Lexis 17250; 1975 - 2 Trade Cases (CCH) P60,668; 13 Aviation Cases (CCH) P18,214.

[776] *Ibid.* The court noted that IATA failed to notify the plaintiff of the reasons for removal with the requisite specificity and this violation of the CAB requirement was not cured because plaintiff had actual knowledge for the reasons of his removal. Nor was the requirement waived by plaintiffs' decision not to avail himself of the optional arbitration procedure.

*United Airlines Inc.*,[777] involved a case where several travel agents in Central America filed an action in the US courts alleging that the defendant airlines, together with IATA, had acted in concert to lower the commission rates in violation of US antitrust laws, with devastating effects upon the plaintiffs' businesses in their home countries.[778] The court summarily dismissed the plaintiff's complaints on the grounds that the plaintiffs lacked antitrust standing, as US antitrust laws do not regulate competitive conditions in foreign countries. The court further held that the *Sherman Act* would reach conduct outside border of United States only when such conduct had an effect on American commerce.[779] The Court observed that "while it may be true that the antitrust conspiracy alleged here has significantly injured the plaintiffs' businesses in the Caribbean and Latin America, American antitrust laws do not regulate the competitive conditions of other nations' economies. Accordingly, the plaintiffs must look to the laws of the Caribbean and Latin America for redress in this case and we find that this court lacks the requisite subject matter jurisdiction to hear this matter."

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[777] *Turicentro, S.A Central America Travel Agency Ltd, Negocios Glabo, S.A and Fronteras Del Aire, S.A, Vs. American Airlines Inc., Continental Airlines Inc., Delta Airlines Inc., IATA and United Airlines Inc*.,152 F Supp. 2d. ,829, 201, U.S Dist. Lexis 10649; 2001-2; Trade Cases (CCH) P 73383.

[778] *Ibid.* This case was instituted after the IATA passenger Tariff Conference decided to lower the commission paid to IATA accredited travel agents in Central America and Panama to a flat rate of 7%. Prior to this revision the commission paid to travel agents in Latin America and the Caribbean varied depending on the country and were as high as 10-11%.

[779] *Ibid.* The Court noted that "The Sherman Act does not apply to domestic or foreign conduct affecting foreign markets consumers or producers unless there is a direct, substantial and reasonable foreseeable effect on the domestic market or on opportunities to the exports from the United States." citing authorities, *Black Vs. SmithKline Beecham Corp.* (1998) US District. Ct. Lexis 12397; (ed.ba 1998) and., *T Areeda and H Hovenkamp* 1987-6 *Supp Antitrust Law*, 192-193 (1987) and *Matsushita*, 475 U. S at 582 & *Continental Ore Company vs Union Carbide and Carbon Corporation* 370.US.690, 704 82S CT.1404 8L Ed. 2D 777 (1962).

In *Beltz Travel Service Inc. vs. International Air Transport Association and United Airlines,*[780] the plaintiff alleged that its ticket writing authority as an accredited agent had been revoked by IATA and the five defendant airlines in furtherance of a conspiracy. The plaintiff complained that, after the defendant airlines entered the tour packaging business, they used predatory tactics to take over and monopolize the tour packaging market in California in violation of antitrust law. The District Court granted summary judgment in favour of the defendants, relying on antitrust immunity granted to IATA by the CAB. However, the US Court of Appeal for the 9th Circuit reversed the order of the District Court on the ground that: "immunity for specific actions did not provide immunity from a conspiracy which was alleged in the complaint. Furthermore, the statutory immunity for these defendants' specific actions did not immunize them from the actions of the co-conspirators."[781]

## 7.12 Participation of Agents in the IATA rule making process.

Agency Resolutions provide for the establishment of Agency Programme Joint Councils ("APJC") in selected countries.[782] The relevant Resolution[783] mandates that one half of the members should be "accredited agents selected from the agent community as

[780] *Beltz Travel Service Inc. Vs. International Air Transport Association and United Airlines,* 620 F. 2d. 1360; 1980 US App. Court Lexis 19477; 1980-1 *Trade Case*s (CCH) P 63243; 15 *Aviation Cases*. (CCH) P18063.

[781] *Ibid.* The Appeals Court held that, "a claim of a conspiracy to eliminate independent tour operators while attempting to monopolize the tour packaging industry is one upon which relief could be granted under the Sherman Act. The District Court was in error when it considered that the only alleged involvement of IATA & the defendant airlines was their act in terminating the ticket writing authority of the plaintiff, which were immune, because they were required by CAB approved agreements. This overlooks the allegation that the defendants were part of the overall conspiracy agreement. The defendants would not be immune from liability as co-conspirators even though the defendants' specific acts in furtherance of the conspiracy could be found to be immune. A conspiracy is not to be judged by dismembering it and viewing its separate parts…. All conspirators are jointly liable for the act of their co-conspirators.", *ibid.*

[782] *PACRM*, *supra,* note 540, res.818g, s.1, Agency Programme Joint Council (APJC), It is to be noted the establishments of APJC's are provided only for countries in Resolution 818g and not those covered under Resolution 800.

[783] *Ibid,* res, 818g, s." Composition of Agency Programme Joint Council".

coordinated by the agency associations."[784] Although APJC's provide an opportunity for accredited agents to participate in agency conferences, the role of APJC's are limited to making recommendations on local financial criteria in each country and on the frequency of remittances to be made of travel agents' sales proceeds.[785] In reality, travel agents have no power of action or voice, as the interests of airline members predominate. The best example of this hierarchy is that, in spite of the participation of agents in the AJPCs, and despite their objections to this decision, Agency Conferences succeeded in reducing the remitting period for sales proceeds from an original 45 days to the current limit of 7 days.

### 7.13 Fees and costs of being an IATA Agent

Accreditation of IATA agents entail extensive financial obligations. These multiple, diverse financial obligations are charged in the form of fees. They include:[786] non-refundable application fees to become accredited agents[787] (the fee is location specific; a separate fee is payable for each location if the applicant/agent wishes to have more than one approved location);[788]entry fees to list the agents' head office/each branch in the Agents' List (paid with the application);[789] annual agency fees[790] (payable for the

[784] §1.1.2, Resolution 818g, *APJC, Authority and Terms of Reference, PACRM, ibid*. The authority and terms of reference of such Joint Councils enable them to make recommendations to be included in the agenda as proposals for the Passenger Agency Conference for future action.
[785] §1.1.2, Resolution 818g, *APJC Authority and Terms of Reference*, *ibid.*
[786] § 4. 4, *Agency Fees*, Resolution 800 & §14.1 -*Types of Fees*, Resolution 818 g. *PACRM. ibid.*
[787] *PACRM supra* note 540, s 4.4.1.1 "Agency Fees", res.800, s14.1.1. "Types of Fees", res.818g. Under both Resolutions fees are determined by the Conference in consultation with the Director General of IATA; See res. 800, s. 4.4.1.6, res. 818g, s.14.1.1.
[788] *Ibid,* res. 800, s.4.4.1.
[789] *Ibid,* res. 800 s.4.4.1.2 , res. 818g, s. 14.1.1.2.
[790] *Ibid,* res. 800, s.4.4.2, res. 818g, s. 14.2. The annual fee is to be paid by the agent in advance for the following year on or before 1st December in the previous year.

head office and for each branch/location);[791] fees to effect changes in the name, ownership, location,[792] or type of location (head office to branch and *vice versa)*.[793] Annual fees for any year (if not paid by the 1st of December in the previous year) attract late payment charges. For those agents in countries where Resolution 800 applies, an agency is liable to be terminated for failure to pay annual fees by 31st December.[794] The consequence for agents (in countries where Resolution 818g applies) for non-payment of application fees, annual fees or administrative fees by the due date is that two instances of irregularity will be entered, and a 'Notice of Irregularity' will be issued, accompanied by a 'Notice of Suspension.' This process provides a 30-day moratorium for the defaulting agent to comply with the relevant rules and make payment of the outstanding fees.[795] Suspension and removal from the 'Agency List' will occur only if the fees remain not settled 30 days after the 'Notice of Suspension' is issued.[796]

### 7.14 Agent's commissions & remuneration.

Airlines are required to notify agents of the rate of commission that will be paid to them.[797] The relevant Resolutions do not specify the rate of commission, but stipulate that the commission and/or remuneration paid to agents shall be as established by

[791] *Ibid,* res. 800, s.4.4.1.3, res. 818g, s. 14.1.1.3.
[792] *Ibid,* res. 800, s.4.4.1.4, res. 818g, s.14.1.1.4. It should be noted that the Passenger Agency Resolutions make it mandatory for Agents to notify changes of ownership, name or location. The failure to notify will be considered as double irregularities or events of default exposing an Agent to be removed from the Agency List and the termination of Travel Agency – *Vide* §11.15 of Resolution 800 & §10.12 of Resolution 818g, *PACRM*, *ibid.*
[793] *Ibid,* res. 800, s,4.4.1.5, res. 818g, s.14.1.1.5.
[794] *Ibid,* res. 800, s.4.4.2.
[795] In countries where Resolution 818g applies.
[796] *PACRM supra* note 540, res. 818g, s.14.3, "Non-Payment of Annual, Application and Administrative Fees".
[797] *Ibid,* res. 800, s. 10 "Commissions & Beneficial Services", res. 818g, s.9, "Conditions for Payment of Commission and Other Remuneration".

member airline from time to time.[798] Agents are prohibited from rebating or passing any portion of their commissions on to passengers or any other person.[799]

### 7.15 Agency Debit Memos ("ADM")

An ADM is a document that notifies an agent that it owes to the issuing BSP airline the amount specified in such an ADM.[800] ADMs are used as legitimate accounting tools by all BSP airlines to collect amounts and to make adjustments in relation to agent transactions for STDs that are issued by the agent.[801]

### 7.16 Selection of ticketing airline

Agents are required to observe a strict order of priority when selecting a ticketing airline.[802] This rule is subject to the proviso that the selection conforms to the requirements of 'fare rules' and the existence of an interline agreement between the ticketing airline and each transporting airline.[803] Although not obvious at first glance, the implications of the above rule are significant. IATA contends that its tariffs are not mandatory. However, it is mandatory for an agent to follow IATA 'fare rules' when selecting the airline to issue tickets in interline transactions. Thus, IATA procures the application of its fares indirectly through agents, who are then required to select a

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[798] *Ibid,* res. 800, s.10.1, res. 818g, s. 9.1, "Rate of Commission or Amount of Remuneration".

[799] *Ibid,* res. 800, s.10.2.1.2. See also, res. 800, s.10.3, "Interline Sales". , res. 818g, s. 9.2. . The commission or remuneration payable to an agent is computed including interline passenger transportation over the services of Members or BSP airlines with which the agent's principal has an interline traffic agreement. Member airlines are also permitted to pay commission to agents where interline transportation is sold by its agent on services of non-member airlines who interline with member airlines if the member has been authorized by such other airline.

[800] *Ibid,* res. 850m, s.1.1, "Issue and Processing of Agency Debit Memoirs (ADMs)'.

[801] *Ibid,* res. 850m, s. 1.2.

[802] *Ibid,* res. 850m, s.19, "Designation and Selection of Ticketing Airlines" PAC1(except USA)/2/3(47)852. , makes it mandatory for all member airlines in a BSP scheme to follow ticketing airline selection rules specified in Resolution 852. The selected airline should be a BSP airline performing carriage under the ticket or a BSP airline acting as a General Sales Agent (GSA) for any airline performing a sector of the transportation in the country of the ticket issuance.

[803] *Ibid,* res. 852, s.2.1.

ticketing airline based on the existence of interline agreement(s) among airlines performing the transportation and where such airlines observe the 'fare rules' of IATA.

This is an instance where rules relating to fares have been structured as concomitant obligations of agents in agency resolutions. Had these rules been included in tariff resolutions, they may well have come under a higher level of scrutiny by regulators. A curious feature that becomes apparent when reviewing the numerous, interconnected agency resolutions that are contained in the Manual ("PACRM"),[804] is the manner in which the resolutions are arranged. The arrangement by which most of these resolutions are connected to one another is extremely complicated. When navigating through the complex points of connections between resolutions, one might ask whether the arrangement is deliberately designed to serve a collateral purpose. That is, a question arises as to whether the arrangement of piecemeal provisions connecting resolutions to each other in such a convoluted manner is a deliberate attempt to escape scrutiny of national regulators.

### 7.17 Electronic Ticketing Systems

Detailed provisions impose extensive technical and procedural obligations upon agents in the sale of air transportation using electronic tickets in countries where electronic ticketing exists[805] and the rules for issuing electronic STDs.[806] These rules create

[804] *PACRM, supra,* note 540.
[805] *Ibid,* res. 854, "Electronic Ticketing Systems in BSP countries/areas", §2 PAC1(except USA)/2/3(51)854, res. 854, s. 4. makes the Sales Agency Rules, the Resolutions, the Passenger Sales Agency Agreement, Billing & Settlement Plan and the IATA Numeric Code applicable to all Electronic Ticketing contemplated in Resolution 854.
[806] *Ibid,* res. 854, s.6.1, Resolution 854, *PACRM*, *ibid.* Electronic tickets can be issued only where an Agent has been issued a certificate of technical compatibility upon evaluation. With regard to electronic ticketing and payment by cards

financial security for consumers who use electronic payment systems, debit, credit or charge cards to pay for air transportation.[807]

## 7.18 Agent benefits and identification

Agency rules also provide benefits of reduced fares for agents, their spouses and related parties for international air travel.[808] The IATA Travel Agent Identity Card is issued to agents and is used to claim fare rebates and complimentary travel.[809] Reduced fares are also granted for travel agency officials and delegates attending IATA conferences, travelling on official business, vocational training trips for agents, agents attending or travelling for professional examinations, and for agents travelling for Travel Agency Commissioner hearings.[810]

The discussions in chapters 6 and 7 of this thesis relating to passenger services and passenger agency resolutions demonstrate how compelling obligations are imposed on airline consumers by IATA. The detailed analyses in these chapters also help us to

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§7, of Resolution 854 has mandated that all equipment, software, hardware and transmission channels installed and used in an approved location by an Agent shall be compliant with Payment Card Industry (PCI) Data Security Standards, § 7.2, Resolution 854, *PACRM*, *ibid.* §7.2.4, Resolution 854, and §§ 6.1.1 & 6.1.2, & Attachment A of Resolution 854, *PACRM*, *ibid.* The agent should have also executed an Electronic Ticketing System Provider Agreement in the prescribed form with a System Provider which operates an electronic ticketing system within the country or where the approved locations are situated for the issuance of electronic STDs. All Electronic Ticketing System Providers are required to submit annually to IATA a certificate of compliance as described by the PCI Security Standards Council.

[807] *Ibid,* res.890, "Card Sales Rules", PAC1(except USA)/2/3(50)890. These rules applicable to credit and charge card sales provide for acceptance of cards, the authority of Agents to accept card payments in respect of sales, the rules to be applied for face to face transactions as well as non-face to face transactions, reports, recording and with regard to the responsibility for settlement of card transactions.

[808] *Ibid,* res. 880, s,10*,* "Reduced Fares for Accredited Passenger Sales Agents" PAC1(except USA)/2/3(47)880. This resolution formulates the rules of eligibility of persons to be granted reduced fares on air travel as well as eligibility of their subordinates, officers and spouses. The number of reduced fare tickets that may be provided annually, the procedures for application acceptance and allotment of reduced fare tickets, recording, reporting and maintaining deductions of allotment in respect of reduced fare tickets issued to Agents, etc., are also set out in detail in this Resolution. The said resolution also formulates the rules with regard to billing where issuance of such reduced fare ticket receives concurrence of participating carriers.

[809] *Ibid,* res. 880a, "Travel Agent Identity Card" PAC1(except USA)/2/3(42)880a.

[810] *See, ibid,* res. 884a, 884a, 886, 886a, 886b, and 888.

understand how these compelling rules are enmeshed into the wide array of IATA programmes and initiatives. Against the backdrop of this analysis, the final chapter of this thesis is devoted to identifying the regulatory shortfall and oversight lacunae in which IATA operates and the potential adverse implications for the consumer that could result. This final chapter recommends measures that might fill this regulatory vacuum and proposes regulatory initiatives that would enable consumer interests to be protected while still preserving the beneficial attributes of IATA.

## Chapter 8 -Filling the Regulatory Void and Recommendations

IATA is an international non-governmental trade organization representing airlines. It was incorporated by an Act of Parliament in Canada. As described in earlier chapters of this thesis, IATA makes rules for the airline industry. Member airlines subscribe, accept and agree to follow IATA rules.

### 8.1 International rules and national implications

Although IATA rules are made in relation to international air transportation, the implementation of these rules has a local impact. That is, the rules of IATA have to be implemented within a territory or jurisdiction of some country. The incidences and occurrences that are envisioned by IATA resolutions arise within a national territory. For example, when an air ticket is sold to a passenger the sale, collection of sales

proceeds and remittances[811] occur within a national territory. Such transactions inevitably involve a person within that country buying and paying for a ticket, and a travel agent collecting and remitting the money to an IATA account. Thus, IATA resolutions have a territorial connection to the place where they are given effect and necessarily involve persons residing within a national territory. This means that IATA resolutions—in whichever form they take—will eventually bear some nexus to the territory of a state in which they are implemented and affect persons residing therein.[812]

Whether due to conscious parallelism,[813] or independent unilateral unchoreographed market responses, it is an inescapable fact that airlines apply similar pricing structures, agent commissions and tariff conditions on most international routes. Although IATA rules are applied within states, these rules do not always derive legitimacy from a normative construct within the constitutional structures of states. Rather, IATA's edict is implemented through contractual obligations assumed by member airlines and agents within each country. In turn, IATA members and accredited agents capture the compliance of consumers who are not a part of IATA contractual arrangements. The consumer is drawn into this vortex when obtaining services from airlines and travel agents.

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811 *See*, *Ticketing, reservation and remittance procedures, Passenger Agency*, Chapter 7, *above*.

812 Tomaso Ferrando, *Global Land Grabbing, A Tale of Three Legal Homogenizations, Private International Law and Global Governance*, (UK: Oxford University Press, 2014). At page 71, Tomaso Ferrando says that, *"there is no global issue that is not locally rooted"*.

813 *In re Travel Agent Commission Antitrust Litigation, Tam Travels Inc., and others Vs. Delta Airlines Inc. and others*, 2009 U. S. Appeals Court, LEXIS 28367, *supra*, note, 476.

## 8.2 IATA – not merely a standard-making INGO

IATA is often compared to other international non-governmental organizations ("INGOs") which make standards and rules for industries.[814] IATA has thus been likened to the International Organization for Standards ("ISO"),[815] the Codex Alimentarius (which is the organization that formulates standards for the food trade)[816] and the Basel Committee on Banking Supervision ("BCBS") that was established by the Bank for International Settlements ("BIS").[817] Comparisons have also been made between IATA and organizations such as Responsible Care,[818] Equator Principles[819] and

[814] Rodney Bruce Hall, & Thomas J. Biersteker, eds, *The Emergence of Private Authority in Global Governance,* (Cambridge University Press, 2002). - "Forms of governance without the presence of formal state or interstate institutions have been identified in the international arena. Actors other than the state – appear to have taken on authoritative roles and functions in the international system. Many of these new actors have often been closely associated with the practices associated with the phenomenon of globalization. They include, but are not restricted to, the apparent authority exercised by global market forces, by private market institutions engaged in the setting of international standards*."* at page 4.

[815] ISO online:,<<www.iso.org/about-us.html>. ISO is an independent, non-governmental international organization with a membership of 161 national standards bodies, which creates standards, specifications, guidelines or characteristics applied for uniform global certification in materials, products, processes and services. ISO claims that it has published, 22147 International Standards and related documents, covering almost every industry, from technology, food safety, agriculture and healthcare.

[816] CodexAlimentariusonline:<http://www.fao.org/fao-who-codexalimentarius/about-codex/en/>
The Codex Alimentarius, is a collection of internationally adopted uniform food standards and related texts, designed by the Codex Alimentarius Commission. The latter is an inter-governmental body established by FAO and WHO to devise food standards, guidelines and codes of practice to procure safety, quality and fairness in the international food trade.

[817] BIS online:<https://www.bis.org/fsi/index.htm?m=1%7C17%7C629.>Headquartered in Basel, Switzerland, the Bank for International Settlement (BIS) is an international non-government organization owned by 60 central banks of the countries collectively representing 95% of world GDP. The Basel Committee on Banking Supervision (BCBS) is a regulatory initiative hosted by the BIS with an independent governance structure. The BCBS itself is composed of 45 members representing central banks and bank regulators of 28 countries. BCBS is the primary global standard setter for the prudential regulation of banks. The BCBS formulates rules/standards *inter alia*, covering international financial regulatory matters, sound supervisory practices, latest prudential standards to be followed in the banking industry, guidance on banking and insurance supervision, accounting and deposit insurance. The standards formulated by BCBS are adopted and given effect to by central banks and national financial regulators in their respective countries. BCBS also acts as the forum for regular cooperation on banking supervisory matters.

[818] Responsible Care is a global, voluntary initiative of the chemical industry. Operating in 67 countries Responsible Care standards have been adopted by 96 of the 100 largest chemical producers in the world who collectively produce 90% of global chemicals and have committed to improve health, safety, and environmental performance. Online: <https://www.icca-chem.org/responsible-care/>.

[819] The Equator Principles is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in project finance, to provide minimum standards for due diligence to support responsible risk decision-making. Equator Principles, cover a majority of international project finance debt in emerging and developed markets. http://equator-principles.com/

the Forest Stewardship Council.[820] These INGOs have gained tacit recognition by national governments and regulators because their standards and rules are followed and applied by local industries within states.

In the author's view, although these comparisons highlight some common features of these organizations and IATA, they also call attention to the distinguishing characteristics of IATA. International standards made by INGOs such as the ISO, Codex Alimentarius, Responsible Care and BCBS that relate to food, banking, pharmaceuticals, chemicals and other industries are commonly applied in both developed and developing countries.[821] However, national regulatory agencies within these countries often perform robust regulation, supervision and oversight in relation to industries such as food, pharmaceuticals, chemicals and banking, which have a direct impact on consumers and the public. Internationally prescribed standards are recognized and relied upon by national regulators mostly to ascertain or certify the quality of goods produced or supplied in international trade from sources outside a national territory. For example, in the banking and financial services industry, national regulators seek guidance from and apply standards formulated by the BCBS. However, these international standards have no *sui generis* force or application within a national

[820] The Forest Stewardship Council (FSC) is an international non-profit, multi -stakeholder organization established to promote responsible management of the world's forests, by setting standards on forest products, along with certifying and labeling them as eco-friendly. https://us.fsc.org/en-us.

[821] Hall, & Biersteker, *supra*, note 814, "INGO's do many things traditionally, and exclusively, associated with the state, acting in the domestic and in the international arenas, with apparent legitimate authority. They claim and are at times actually recognized as legitimate by states. They author policies, practices, rules, and norms. Set agendas, establish boundaries or limits for action, certify, offer salvation, guarantee contracts, and provide order and security." *ibid.*

territory unless municipal statutes or national regulators expressly recognize and give effect to them.

Herein lies the distinction of the IATA quasi-regulations. As described in an earlier chapter of this thesis,[822] most IATA rules that apply within national territories and impact consumers do not derive their regulatory consanguinity from national law-making bodies or international Conventions. Their authority is posited in contracts that are sourced from IATA membership/accreditation agreements, its constitution, its rule making bodies, Tariff Conferences and resolutions that are formulated through these Conferences. As highlighted above, these contractual arrangements do not explicitly involve the airline consumer. However, the rules and resolutions derived from IATA contracts are given effect within national territories by the contracting party (member airlines and agents) in their dealings with consumers. Hence, the objective of IATA quasi-rules is not merely to regulate the conduct of the contracting parties but also to control and regulate end users through the contracting parties. IATA's model can be further differentiated from those INGOs discussed above. IATA, which make rules ostensibly as a trade organization for the airline industry, also supplies for-profit products and services to the same industry. Hence, the models of international standard setting organizations such as ISO, Codex Alimentarius, Responsible Care or BCBS are not readily comparable to IATA.

[822] *Rulemaking authority of IATA*, Chapter 2, *above*.

### 8.3 Supervision and national treatment of IATA

If a consumer or public grievance is occasioned due to the implementation of an IATA rule, the consumer can only seek redress by referring to those contractual arrangements against the contracting airline or agent. IATA sits comfortably beyond the pale of this contractual accountability, thereby escaping any direct or vicarious responsibility to the consumer. Seldom can any public law remedy be invoked by consumers directly against IATA other than an arduous antitrust suit, that too available only to consumers in some countries having advanced antitrust law regimes.

IATA's rules and resolutions operate mostly under the radar and in the rather obscure milieu of private contractual arrangements. These rules escape national scrutiny while their implementation within states is not subject to adequate supervision and oversight. This situation occurs due to several reasons. National regulators for air transport accord a higher level of importance to safety regulation compared to economic regulation. The economic regulation of air transport varies from extensive, to moderate or to low levels, depending on the country and on the level of development of domestic law for consumer protection within each jurisdiction. On the other hand, the national economic regulation of air transport gives precedence to fostering competition over protecting the interests of individual consumers. While laws in some countries contain safeguards for the aviation consumer, in most cases the regulator charged with consumer protection is not the same as the regulator responsible for air transport in that country. Lack of efficient coordination between state air transport regulators and consumer protection

agencies also negatively affect the supervision of private rules and arrangements in air transport that affect consumers.

Modern global governance principles recognize soft law made by self-regulating industries.[823] However, it is the author's view that states ought not allow unfettered and unsupervised IATA rulemaking in the guise of self-regulation for the air transport industry.[824] Although international organizations perform salutary functions through their development of standards for relevant industries, they do not provide a panacea for all ills of respective industries. As the standards of international organizations become operational within a national territory, they should be subject to oversight by national regulatory authorities, particularly when these standards and rules impinge upon the rights of the public.

### 8.4 The relevance of notions of global governance

Contemporary realities manifest the existence of collateral regimes of governance outside the traditional state and its legislative structure. Non-state actors—including non-governmental organizations—are increasingly acquiring power in the international political economy. They gain implicit legitimacy and authority to the extent that their

[823] Kuzi Charamba, *Hired Guns and Human Rights: Arbitrary Justice for victims of private military and security companies*,[DCL Thesis, McGill University Institute of Comparative Law,2016]. Kuzi Charamba states that "The goal of transnational regulation is to better facilitate the actions and interactions of global actors within a specific industry, where national and international regulations may have failed. Transnational regulation attempts to respond to problems of fragmented market rules that result both in and from of divergent national regimes, through the introduction of uniform private rules. The active participation of private industry actors outside of national and international regulatory processes aims to provide the technological and technical expertise that state-based regulators may be lacking". *Ibid,* at page 82.

[824] *Ibid.* Charamba at 83 notes further that, "Associations provide standards and regulations for their members through codes of conduct and conditions for membership. Like many other private trade associations, producing codes of conduct these associations have often not been able to achieve the legitimacy required to be seen as effective regulators because of their limited representation of other relevant stake holders.".

powers remain unchallenged. When a state accepts some international rule or body as legitimate, that rule or body becomes authoritative.[825] It has thus been observed that:

> Where evidence exists that functions that were once the exclusive, sovereign prerogatives of the state have devolved to the responsibility of private actors, the question of state complicity arises. In such cases, is the state complicit in the devolution of its authority to private actors? Has the state delegated authority, enabled authority, or simply allowed authority to slip away, and for what purposes? Or is the state merely impotent to do much about this devolution of authority? Has the state no mechanism with which to combat the collusion and coordination of firms with interests in minimizing state authority through the development of "private regimes"? If the state is complicit in the transfer of authority to private actors, is it because state managers wish to escape domestic accountability for painful adjustments, which the requirements of macroeconomic policy coordination suggest are indicated and necessary? Or, to take the question a step further, has the state been captured, perhaps through the "indifference" of domestic polities by powerful actors within domestic society, whose interests the captured state promulgates as economic, monetary, and trade policy?[826]

IATA's quasi rules have ostensibly been elevated to authoritative status due to their express or implicit national recognition when states concur or acquiesce to the implementation of IATA rules within their territories. In this context, the following observations drawn from contemporary debates on global governance[827] become relevant to consideration of IATA and its quasi-rules.

a. Globaization has replaced vertically integrated hierarchical firms functioning within national economies with a global, postmodern, networked mode of

[825] Hall, & Biersteker, *supra,* note 814, at 6 & 7.
[826] *Ibid* at 8.
[827] Benedict Kingsbury & Megan Donaldson, "Global Administrative Law", in *Max Planck Encyclopedia of Public International Law [MPEPIL]*, online: Oxford Public International Law<http://opil.ouplaw.com>. (Oxford University Press, 2015). New York University; date: 06 September 2016, "Law and law-like structures play an increasingly significant role in global administration. Law has a dual effect, both channelling and magnifying administrative power, and constraining this power. Thus, adherence to legal standards and patterns can normalize and legitimatize the use of power, but law can also provide a basis for contestation, critique, and change in power and its exercise. However, global administrative law principles and mechanisms primarily address process values, rather than substantive values (such as distributive justice, political democracy, sustainability, non-domination, or individual autonomy and capabilities), which are extremely difficult to ground as generally-accepted bases for most global administrative structures."

organization where the concept of geographically based economies may not even be relevant.[828]

b. Decision-making by private actors leads to changes in the national institutions and the laws of states that seek access to their products. This is the basis of their private authority.[829]

c. The proliferation of transnational, regional and nascent legal orderings reflect "new kinds of legal order" that are linked together by one theme: "the disengagement of law and state."[830]

d. Administrative law is produced through autonomous approaches which do not depend on courts or other institutions. Administrative structures correspond with one another when common conditions prevail within specialist contexts, where possible approaches are rapidly transmitted and where these approaches are reinforced through networks.[831]

e. The preference among commercial actors for "soft law" rather than "hard law" reflects the transformation in the "rule of law" and the creation of a more permissive rule structure that permits cheating when necessary.[832]

f. The global economy simultaneously transcends the authority of the national state, yet it is also implanted in national territories and institutions.[833]

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[828] A. Claire Cutler, "Private international regimes and interfirm cooperation - The Emergence of Private Authority in Global Governance" in Hall & Biersteker *supra* note 814 at 3,"Merchant autonomy over law creation is creating a highly privatized legal order that delocalizes and deterritorializes commercial transactions and law. However, states remain intimately involved in the enforcement of international commercial agreements, serving to relocalize and reterritorialize the transactions at the point of dispute settlement".

[829] *Ibid,* at 12.

[830] *Ibid,* at 33.

[831] Kingsbury & Donaldson, *supra* note, 827 at para 25.

[832] *Ibid,* at 35.

g. Markets are a tool of state policy, not a substitute for it. The system requires a manager to guarantee the stability of markets. Some local or international institution will always step in to fill this role. However, in a crisis, if the state or legitimate public authority does not take back regulatory power, markets will collapse.[834]

h. Efforts to hold private institutions accountable could fail; for that which goes unrecognized is difficult to regulate. The movement of private authority towards obscurity and away from transparency serves to isolate and insulate increasing aspects of existence from public scrutiny and review.[835]

i. General types of authoritative arrangements that can be identified include cartels,[836] business associations[837] and private international regimes.[838] Of these three, private international regimes embody the most extensive

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[833] Hall, & Biersteker, *supra,* note 814, at 11.

[834] Louis W. Pauly, "Global finance, political authority, and the problem of legitimation, The Emergence of Private Authority in Global Governance" in Hall and Biersteker, *supra* note 814.Pauly states that, "Self-regulatory organizations, as oxymoronic as the term sounds, are nothing new in the broader international economy. The International Chamber of Commerce, for example, has for a century now promoted voluntary codes of conduct in this or that area of business activity. When such efforts accomplish their goals, catastrophes are avoided, few notice, and public officials willingly recede into the shadows. But when such efforts fail, or threaten to fail, the overarching issue of social justice returns to counterbalance ideological demands for ruthless efficiency. One of two things then happen. Agents of legitimate public authority reassert their ultimate regulatory power, or, if they truly cannot, markets collapse. the public authorities lying beneath their surface seem now to require a high degree of cooperation among themselves if their ultimate regulatory power is not to prove illusory". at pages 87 & 88.

[835] Cutler, *supra*, note 828, at 24.

[836] Cartels are formal and informal arrangements between producers to coordinate their output and prices.

[837] Business associations: Corporations often cooperate through the formation of business and industry associations, which often operate transnationally. Such organizations may operate as self-regulatory associations, developing norms and procedures that bind their members. They also may operate as representative associations, acting on behalf of members in their dealings with governments and others. Business associations, like the International Chamber of Commerce, are an important source of norms and practices, many of which may evolve into rules of customary international law.

[838] A private international regime is defined as "an integrated complex of formal and informal institutions that is a source of governance for an economic issue area as a whole."

institutionalization of rules and procedures governing regime members as well as non-members.[839]

j. Firms functioning like governments pose major problems of ensuring accountability for their corporate actions. It is increasingly difficult to determine corporate nationality and to identify the appropriate legal jurisdiction in which to attribute responsibility in cases of transnational corporations. These factors render transnational corporations and their actions "invisible" under international law.[840]

k. An electronically networked world economy renders economic borders less meaningful when jurisdiction loses significance. As markets are increasingly constructed in cyberspace, governance over territory becomes problematic.[841]

l. Networks replacing hierarchies and markets as the form of economic organization and the migration of markets to cyberspace have rendered national control of global commerce both difficult and demanding.[842]

m. Multinational Enterprises ("MNEs") are national firms with a home country (domicile), that engage in international operations and require access to territory

[839] Cutler, *supra*, note 828, at 28 & 29.
[840] Cutler, *supra*, note 828, at 32.
[841] Stephen J. Kobrin, "Economic governance in an electronically networked global economy - The Emergence of Private Authority in Global Governance", in Hall and Biersteker, *supra n*ote 814 at 43. Kobrin observes, "that raises a question of interest: where did the transaction take place? It is far from clear which "jurisdiction" gets to tax it, or whether it is an export or an import. There is a very real possibility that national markets and territorial jurisdiction are not directly relevant when markets are constructed in cyberspace. Geography and territorial jurisdiction do not map on cyberspace." *ibid,* at page 52.
[842] Kobrin, at 43 & 44.

to function. MNEs are international entities which are firmly rooted within a national jurisdiction.[843]

n. Globalization will affect the structure and functioning of both states and the interstate system. At a minimum, states will be responsible for a number of critical functions such as the welfare of their citizens and insuring economic viability.[844]

o. Both law and politics have failed to control the private processes of economic globalization. Thus, the perverse effects of financial speculation arise out of disparities between public national market regulations and the spread of scientific knowledge that is dominated by conflicts of interest.[845]

p. Although nation-states can no longer be held accountable on all issues which directly affect the daily lives of citizens they represent and protect, governments that fail to respond with appropriate means to situations that imperil citizens will not remain long in power.[846]

q. Nationally and territorially implemented remedies that are objectively designed to protect society and the public good are needed to correct this situation, even if these remedies do not fit into existing theoretical models.[847]

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[843] *Ibid*, at 46.
[844] *Ibid,* at 66.
[845] Horatia Muir Watt & Fernandez Arroyo eds. *Private International Law and Global Governance*, (Oxford University Press, 2014) at 344.
[846] Hall, & Biersteker, *supra*, note 814 at 10. "If history is any guide, national citizens lay responsibility for financial crises and for their resolution squarely at the door of national governments." .
[847] Muir Watt & Arroyo *supra,* note 845 at 345, states that, "Collective energy should be invested in more strategic work on the ground, using available legal tools such as the language of rights, economic or constitutionalism to make headway in practise - whatever conceptual or methodological reservation one might have about the theoretical stance they imply- ....towards legal protection against vultures, modern day pirates or slave drivers, golden parachutes, tax havens, conflicts of interest, homophobes, domestic violence and so much more."

The above arguments highlight the difficulties encountered in regulating and supervising transnational entities such IATA within the structures and existing principles of national and international law. These notions—presented within the global governance debate—will be invoked as the rationale for the recommendations that follow in this chapter. The author is of the view that these recommendations provide a pragmatic and objective approach to dealing with IATA and its quasi-regulatory regime.

## 8.5 Rationale for national regulatory oversight

National regulatory authorities may not have the competence or capability to independently postulate international standards required for industries such as the aviation industry. Therefore, states have either delegated or acquiesced in certain functions being outsourced to third parties such as INGOs. Irrespective of whether states have expressly delegated or tacitly outsourced to INGOs the function of making standards and rules, states nevertheless bear a fundamental responsibility to ensure that these standards and rules do not adversely affect the rights of citizens and consumers within their jurisdiction. This is the main argument advanced in this thesis. States cannot and ought not abdicate their responsibility to protect consumers and citizens within their territories.

Historically, the express recognition of the authority of IATA and its tariff coordination was founded on bilateral air services agreements between most countries.[848] Bilateral agreements allowed airlines to adopt IATA tariffs either with approval or alternatively

[848] *See*, *Rulemaking authority of IATA*, Chapter 2, *above*.

without the disapproval of regulators in their respective territories. As such, there was an inbuilt safeguard within these bilateral agreements: the national regulatory prerogative to approve and disapprove tariffs submitted by airlines for approval. Taking into account the numerous implications of IATA quasi-rules that have been discussed in the foregoing chapters, it is the considered view of the author that aviation regulators worldwide ought not grant perfunctory approval of tariffs for international air transport when they are submitted for evaluation. As has been shown above, IATA tariffs submitted for approval do not contain only air fares or cargo rates. Appended to such tariffs are extensive conditions and terms which are formulated within composite resolutions. At the least, these conditions and tariffs indicate the influence of coordinated agreements. Therefore, it is imperative that national air transport regulators exercise a minimum level of supervision and oversight of IATA, its tariffs, rules, standards and conditions that regulate activities which do not fall within the purview of tariffs. The objective of such regulatory oversight should be to ensure that IATA activities and tariffs do not encroach upon the inherent rights of consumers and the public within national territories.

It is clear from the discussion in earlier chapters that IATA provides an essential and incomparable service to the airline industry through its numerous programmes and initiatives.[849] The foundations upon which IATA initiatives, products and services are made available to the airline industry are its Traffic Conferences and interline system. The IATA quasi-regulatory model has evolved into a superstructure that supports the

[849] *See*, particularly, *IATA Programmes and Initiatives*, Chapter 3, *above*. See also *Passenger Services* and *Passenger Agency* in Chapters 6 & 7, *above*.

aviation industry, and which cannot be easily replicated either by regional or global airline alliances. IATA's interline network, tariff coordination, ICH and product and services portfolio are readily accepted at every level of the airline industry as dependable and efficacious resources. Standards and initiatives introduced by IATA are salutary and have enhanced the quality, safety and operational efficiencies of the airline industry worldwide. IATA continuously innovates: staying abreast of technical, logistical and regulatory developments in the industry. It also plays the role of facilitator by developing rules for international civil air transport in coordination with the ICAO. Thus, there is no doubt that IATA plays a pivotal role within the airline industry.

Nonetheless, it is essential that IATA's involvement in the industry is tempered by satisfactory supervision and regulatory oversight at the national level. The lines of distinction between IATA's dual roles (i.e. as a rulemaking trade association and as a supplier of goods and services to the airline industry) should remain, clear, clean and unblurred. For IATA to continue serving the airline industry in an efficient manner while maintaining its legitimacy, it is imperative that certain steps be taken. These steps cannot be taken by IATA in the form of self-regulation. Rather, this responsibility must be assumed by regulators of each state where IATA resolutions and tariffs are given effect and where its products and services are sold, either directly or indirectly. It is imperative that nation states exercise oversight responsibility over IATA resolutions

and activities taking place within their territories to protect airline consumers and the public.

## 8.6 Recommendations

Several arguments gleaned from the theme of global governance (set out above) clearly show that traditional solutions within existing legal theories may not be apt or efficient for dealing with an organization such as IATA. Hence, new, practical approaches will have to be ascribed meaning and applicability within existing regimes of national and international legal principles in order to devise an acceptable medium for this purpose. Finding solutions within the confines of conventional or conservative legal theories may seem tenuous. However, objectivity and purpose-driven solutions that provide equitable treatment to consumers and IATA need to be recognized and implemented, and this can be done by expanding the canvas of existing legal theory to accommodate new solutions.

The author believes that, if adopted in a pragmatic manner by national regulators and judicial fora, the following recommendations would provide an effective apparatus to review and address the deficiencies and imbalances of contemporary IATA and its activities. It is anticipated that greater oversight, proactive regulation and review of IATA would benefit the airline consumer, by removing and curtailing the detrimental attributes of IATA, while preserving its features which are beneficial to the airline industry.

### 8.6.1 Regulating IATA under national law

The IATA resolutions described in previous chapters are given effect to or implemented within a nation state, and involve either a consumer, a commercial entity or an airline within that state. National regulators will usually not have occasion or a regulatory lever with which to subject IATA to its regulatory realm, as IATA dealings within states are carried out indirectly through airlines and agents. Therefore, to make IATA subject to national regulations, it may be essential to impute vicarious liability to its agencies/counterparts (IATA airlines and accredited agents) who are regulated by national authorities. This may appear to be a controversial proposition. However, it finds support in the anticipated outcome that filling gaps in the regulatory mandate will prevent regulations (and gaps between those regulations) being exploited by IATA to the detriment of consumers.[850] National air transport regulators would be the best strategically placed agencies to exert administrative pressure and enforce regulatory oversight of IATA activities occurring within their territories. At a minimum, it is recommended that tariff clauses in bilateral air services agreements which recognize IATA should impose mandatory conditions compelling airlines to submit prescribed information regarding all IATA resolutions. This would facilitate disclosing information to national regulators and ensuring consistent review of these resolutions. National regulators should also assume a proactive role in terms of regulating areas of consumer

[850] Kingsbury & Donaldson, *supra*, note 827 at para 58 "Global administrative law has focused largely on procedural requirements, rather than on the substantive content of norms generated by administrative bodies, or requirements for the constitution and empowerment of actors in global administration. It is thus possible that global administrative law rules may regulate the procedures of an entity, while the authority of that entity and the limits to its powers are not readily traced to any regulative legal foundation.".

protection to prescribe rules for airline passengers within their territory and requiring airlines and agents to give precedence to such regulations over any contractual arrangements.[851] Such regulatory initiatives will pre-empt and discourage attempts to transcend national regulations by international rulemaking entities in name of putative uniformity. Where proactive national regulation is made in the interest of consumers, there is little room for internationally agreed standards which provide less protection than those imposed by national regulations within national territories.

### 8.6.2 Essential evaluation of IATA resolutions and activities

The economic activities of MNEs are generally subject to national regulations in the areas of competition law, consumer protections, environmental, labour and tax laws.[852] IATA activities should also be subjected to national regulatory oversight in these areas, as they all have a bearing on nationals within each state. Air transport regulators need to expand the scope of evaluating IATA resolutions, tariffs and activities, taking into account all direct and indirect implications for citizens within their territories. How IATA activities affect competition, consumer interests, employment rights, cause barriers to entry, restrain trade and prevent access to remedies are all relevant considerations for national regulators. Particularly, the review process should ascertain whether IATA resolutions seek to procure any undue advantage or unfair benefit for IATA or its member airlines by creating circumstances for exclusive dealing or abuse of

[851] *Norman(Estate) Vs. Air Canada, Canadian Transport Agency,* (Docket 6- AT –A- 2008), 2008 Carswell Nat 1633, 2008 CarwellNat1634, *supra,* note 585. For example, the order made by the Canadian Transportation Agency that, airlines shall not charge a fare for additional seating provided to persons with disabilities, who are required to be accompanied by an attendant, persons disabled due to obesity and others requiring an additional seating to accommodate their disability.

[852] Brian L. Nelson, *Law and Ethics in Global Business, How to Integrate Law and Ethics into Corporate Governance around the World*, Routledge, Taylor & Francis Group, New York. 2006.

dominant positions in the market where other goods and service providers to the industry are affected by these resolutions and where their right to engage in legitimate business activities are curtailed. [853]

### 8.6.3 Fiscal accountability for local revenue

Attention should be focused on the incidence of revenue and income that are derived by IATA from its activities within a state (as distinct from the income of member airlines) to ensure IATA receives proper treatment under domestic income tax and fiscal statutes. Imposing taxes on IATA is not the overriding intention of this recommendation. Rather, imputing fiscal accountability would help to ensure that IATA does not derive any discriminatory fiscal advantage which is not accorded to local commercial enterprises. Regulatory capture of IATA by fiscal statutes could also compel effective reporting and disclosure of financial information which would otherwise escape regulatory scrutiny.

It is also important to ensure there is adequate coordination and sharing of information between air transport regulators and national fiscal authorities, in order to verify that financial information relating to IATA activities is duly conveyed to the tax and fiscal authorities. This may prove to be logistically difficult to implement. However, imposing obligations on local and foreign airlines—as well as on travel agents who are licensed by air transport regulators—to report all direct and indirect payments made to IATA for

[853] Kingsbury & Donaldson, s*upra*, note 827, at para 24. "Rulings of national courts of other national agencies may both shape national governmental responses to global administration, and shape the conduct of private actors in the global administrative space."

products/services would enable national regulators to ascertain the quantum of revenue/profits derived by IATA from or within their territories.

### 8.6.4 Rules for disclosure of information

Source documents and complete background information relating to IATA resolutions should be available to national regulators so that a proper evaluation may be made of IATA activities and rules that apply within their territories. The applicability of IATA rules is subject to national laws.[854] However, IATA resolutions do not provide any procedures or method to encourage IATA to voluntarily submit to the regulatory/judicial mandates that apply within states. Therefore, the existing local regulatory landscape should be utilized by national authorities to compel IATA to produce all source documents and prescribed information that is required by national regulators.

The importance of disseminating relevant information to the public is a principle recognised by several international multilateral conventions, by state laws, as well as by non-state entities that set industry standards and rules.[855] Notions of public participation in decision-making and access to information are increasingly considered to be essential elements of access to justice by non-state rule making bodies, which then

[854] *Act of Incorporation, supra,* note 27;*Articles of Association, supra,* note 29. See also discussion in Chapter 1, *above*.

[855] Kingsbury & Donaldson, *supra* note 827. "In the area of environmental law, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('Aarhus Convention'), developed under the auspices of the United Nations Economic Commission for Europe and now ratified by some 40 States, contains requirements for public authorities to provide environmental information to the public on request, and certain types of information on a routine and proactive basis; as well as for public participation in various stages of environmental decision-making. The ILC's Articles on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law (Prevention of Transboundary Harm from Hazardous Activities) provide that States concerned must provide the public likely to be affected by activities covered by the Articles with relevant information relating to that activity, the risk involved and the harm which might result, and ascertain their views.".

adopt internal rules and procedures to address concerns in this area.[856] Therefore, state regulators and courts should draw from these examples and follow developments in rules and procedures adopted by non-state organizations that relate to access to information, and which protect those whose interests are affected by private rules and orders.[857]

Conditions could be imposed by national air transport regulators when approving tariffs, or when granting operating licences to local and foreign airlines, that require these airlines: [858]

- To submit all IATA resolutions, tariff agreements and background information prior to implementation of such resolutions within their territories.
- To provide details of joint venture, cooperation, pooling agreements and information relating to any product or service offered or sold directly or indirectly by an airline within the territory.

[856] *Ibid.*, "Human rights law also requires some measure of transparency including, potentially, transparency about rule-making and decisions pursuant to global administration. Article 19 (2). International Covenant on Civil and Political Rights (1966) provides that everyone shall have the right to freedom of expression, and that this right shall include freedom to seek, receive, and impart information of all kinds. The Inter-American Court of Human Rights (IACtHR) has stated that a similar provision in the American Convention on Human Rights (1969) 'protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention … and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention. the State is allowed to restrict access to the information in a specific case. An analogous provision in the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) has not been interpreted as bestowing a general right of access by individuals but the European Court of Human Rights (ECtHR) has recognized the right of the public to receive information of general interest, and has scrutinized in particular measures that hamper the press, and now other 'social watchdogs' in their functions.", *ibid*, at para 32.

[857] *Ibid.*, "Insofar as global administrative law helps to legitimate and stabilize the current order, and to empower experts and shift the possibilities of contestation into highly technical arenas not accessible to many whose interests are affected, it might forestall more radical change." *ibid*, at para 58.

[858] The *Chicago Convention*, recognizes and restates the principle of exclusive state sovereignty over territorial airspace in Article 1 thereof, whilst Article 6 of the Convention requires scheduled air services to be operated subject to permission and authorization obtained from the relevant state subject to terms imposed by such state. This leads once again to bilateral agreements between states under which air services are operated between the states by their airlines. These bilateral agreements could specify and contain covering authority empowering air transport regulators to impose operating and tariff approval conditions, which are required to compel disclosure of information referred to above, towards economic evaluation and consideration of implications to the public and consumers within their territories.

- To report on and provide information and financial details relating to products and services of IATA that are subscribed to or paid for within or outside the territory, when such product/services are attributable to any operations which take place within that territory.
- To provide information regarding any rule, resolution, agreement, service condition or arrangement, whether independently or collectively implemented by any airline, that imposes any financial obligation or has any direct or indirect economic impact or application to a resident or national (individual or corporate) within the national territory.

In addition to the above, airline travel agents licensed by national regulators should be required:

- To provide periodic information about existing/new rules and resolutions imposed by IATA or member airlines which create any direct or indirect economic or financial implications for travel agents and/or airline consumers within local territories.
- To periodically report all fees, charges, levies, subscriptions, contributions and any other payment made by them for membership, accreditation or any product or service of IATA.

National airline regulators should:

- Publish, or make available in the public domain for scrutiny, selected contents of IATA information obtained in the above manner (except sensitive financial information).

- Where IATA resolutions and rules are determined to have implications for the public within a national territory, the relevant regulatory authority should direct IATA and/or the airline members within that territory, to cause the publication of the resolution and appropriate information regarding same, on a website (either run by IATA or the airlines) with free public access.
- Direct the publication of IATA resolutions to be done in a manner that encourages public comment and challenges to such resolutions.
- Suspend forthwith the operation of any resolution or agreement which appears to be repugnant to domestic laws and/or that unfairly impinges upon the rights and privileges of the public/consumers within such country, until a proper inquiry may be conducted in relation to such resolution or agreement.
- Give due recognition to public complaints and consumer perspectives prior to approving any tariffs or resolutions when any IATA resolution /rule is challenged by the public.

As seen in a previous chapter of this thesis,[859] regulatory pressure IATA encountered in the United States influenced its transformation and enhanced protection for airline consumers. Today, competition regulations and fair-trading laws are in force in several countries. Yet, a large number of other countries, particularly developing nations, lag behind in fair-trade and consumer protection laws. Aviation is an international industry, where changing circumstances in some member countries can have an immediate and significant effect on other countries. As such, it is both opportune and

[859] *See*, *Regulatory challenges, catalyst to internal reform*, Chapter 2, *above*.

prudent for regulatory leaders in the airline industry to initiate and implement common schemes for the review and approval of IATA resolutions and activities. The schemes and national regulatory initiatives of leading aviation nations are bound to be followed by others, resulting in popular regulatory responses emerging to supply voids in the existing regulatory landscape.

### 8.6.5 Control of locally supplied products and services

Since the market for most IATA products and services has migrated from geographical to cyberspace, even if local laws provide safeguards and remedies for consumer protection, these can quickly become redundant due to their inability to compel IATA to take part in domestic redress mechanisms. Thus, where complaints of merchantability or defects in products arise, or when deficiencies in services provided are discovered, consumers would have no forum to seek redress against IATA. In this respect, it is pertinent to note that IATA BSPs operate in most countries. A local bank account—operated by IATA—is required to facilitate the function of its BSPs and clearing systems within any country. Thus, local financial regulators could impose conditions which require that the opening and operating of local bank accounts by INGO's such as IATA (which do not have corporate presence or an asset base within a local territory) be subject to specific conditions and approval by financial regulators.[860]

[860] Such regulatory propositions can be supported on the anti-money laundering laws which are now commonly given effect to in most countries, following the initiatives UN Instruments and other relevant international standards on money-laundering and terrorist financing including the *UN Convention against Corruption* online: <https://www.unodc.org/unodc/en/treaties/CAC/index.html>;, *The 1988 United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, online:<http://www.unodc.org/pdf/convention_1988_en.pdf,> and the *UN Convention against Transnational Organized Crime* online: <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.htm>.

The financial regulator vested with authority to grant local banking approvals to IATA could then use this opportunity to impose related conditions/terms to capture IATA's compliance with regulations that meet national objectives, fiscal accountability and consumer protection goals. These conditions could, *inter alia,* require the registration/notification of the product and service portfolio of IATA offered for sale within a local territory, the licensing of products and services where necessary and provide adequate insurance and financial indemnities in relation to products and services. These measures would ensure IATA's accountability to the end user of their products and services that are supplied within a territory, and the collection of locally applicable fiscal levies and charges from IATA.

### 8.6.6 Canada's responsibility as residual regulator

A question posed in an earlier chapter was whether an obligation should be imposed on Canada in relation to extended supervisory and administrative oversight of IATA, since Canada granted legal personality to IATA with extraterritorial capacity.[861] It was also suggested that Canada should act as a residual regulator of IATA to address oversight deficiencies occasioned due to the inability of national regulators to adequately regulate IATA within their own territories. Although such an initiative by Canadian regulators would be both welcome and useful, determining legitimacy for such regulatory oversight within the existing law poses a challenge. As discussed in detail in that

[861] *See*, *Metamorphosis of IATA and Contemporary Relevance*, Chapter 4, *above*.

chapter,[862] the legislative instruments in force in Canada do not include clear provisions enabling extended regulatory control over IATA. Thus, any attempt by Canada to act as a residual regulator of IATA could be challenged as *ultra vires* and arbitrary. The IATA *Act of Incorporation*, a special Act of the Canadian parliament sets out expressly the foremost object of IATA is to "*promote safe, regular and economical air transport for the benefit of the peoples of the world*". The "public" nature of this object set out in the IATA *Act of Incorporation* assumes great significance from the perspective of Canada, the incorporating state of IATA. Canada has given life to IATA, and invested it with specific powers and authority. Canada therefore bears a concomitant duty to ensure that IATA exercises its powers and authority in a manner consistent with the express objectives set out in its *Act of Incorporation* and in the larger interests of the consumer. Procedural and substantive limitations may hinder regulators in Canada extending their supervisory ambit over IATA and limit occasion for judicial review over IATA activities. However, it is imperative that Canadian regulators play a proactive role and craft innovative methods to increase regulatory scrutiny and occasions for judicial review of IATA and its operations that do not come within the purview of regulators and courts in other countries.

On the other hand, could regulatory oversight of IATA by the Canadian government be invoked under principles of international law?

[862] *See, Metamorphosis of IATA and Contemporary Relevance*, Chapter 4, *above*.

### 8.6.7 State responsibility for extraterritorial harm

International law recognizes the general principle to impute responsibility upon a state for extraterritorial harm that is caused by or attributed to a source which is harboured by that state.[863] Although the harm contemplated by this principle is different to the economic harm anticipated from IATA activities,[864] the general statement of this principle could nevertheless be invoked to impute state responsibility to Canada for harm caused in third countries due to the latter's failure and insufficient regulatory control over IATA.

Brownlie states:

> There are certain types of legal persons, which are neither private legal persons nor simple organs of the state but which are public in terms of their provenance and function. They may be described as public corporations, 'parastatal entities', or quasi-public legal persons. In appropriate conditions the state may become responsible for failure to control the acts and policies of such persons. The state is under a duty to control the activities of private persons within its state territory and the duty is no less applicable where the harm is caused to persons within the territory of other states."[865]

Phoebe Okowa observes that,

> "The obligation of the source state to prevent harm to others is grounded on the actual or presumed control that international law vests in it. The principle involves a duty to exercise control over sources of transboundary harm and to pay reparation for any resultant damage.[866]

It is however important to note that the responsibility envisaged under the above principle is within the realm of public international law and can be imposed only upon a state. It cannot ordinarily be invoked by a private individual or person against a

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[863] Phoebe, N. Okowa, *State Responsibility for Transboundary Air Pollution in International Law*, (Oxford University Press, 2000). Okawa states that, "territorial sovereignty provides a basis for the imposition of state responsibility on a sovereign state for causing, maintaining or failing to control a source of nuisance to other states." at page 66.

[864] The principle is attributed to the, decisions in the *Corfu Channel Case*, ICJ Rep (1949) and in relation transboundary air pollution in the, *Trail Smelter Case*, III RIAA at 1905.

[865] Ian Brownlie, *System of the Law of Nations, State Responsibility*, Part I, (Oxford: Clarendon Press, 1983) at 163.

[866] Phoebe, N. Okowa, *supra*, note, 863, at 65 & 66.

foreign state for harm occasioned to that individual by an entity that operates within such foreign state. However, if an individual or resident is compensated by his home country for harm occasioned due to conduct of an entity in another state, the compensating country may be able to invoke this principle to seek reparation or restitution from the source state which harbours the entity responsible for the harm. Support for this notion can also be drawn from the *Ruggie Principles*, which recommend that states should take steps to prevent abuse abroad by business enterprises domiciled within their jurisdiction.[867]

Considered in light of the above context, one cannot escape the inference that Canada should either exercise increased regulatory responsibility for IATA, or else devise a more proactive oversight mechanism to monitor IATA, particularly given that Canada is the state which conferred corporate personality upon it. Being mindful of the limitations applicable within existing statutory powers which allow regulatory and supervisory bodies to intervene, Canada must innovate and search for appropriate opportunities to impose accountability on IATA and its activities. At present, the effective oversight of IATA by Canadian domestic regulators that are responsible for supervising air transport, consumer rights, fiscal and revenue accountability as well as

[867] *Guiding Principles on Business and Human Rights, United Nations Human Rights*- Office of the High Commissioner, HR/PUB/11/04, 2011 United Nations, New York, Geneva. "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. – *Commentary* - At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction. There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages and preserving the State's own reputation." – Principle, I.A.2.

monitoring corporations (both profit and not-for-profit), is constrained by traditional approaches to administrative law. This means that, at present, these regulators cannot achieve the requisite level of accountability of IATA to ensure the adequate protection of consumer and public interest.

For the reasons set out above, Canada should be held to account for its failure to exercise adequate regulatory oversight and control of IATA; notably when its activities negatively affect the rights of consumers, irrespective of the state or territory in which the affected consumer resides or where they suffer harm. Canada's current oversight of IATA is manifestly inadequate and uncoordinated. As set out in this thesis, even Corporations Canada – the regulatory body which is responsible for the supervision and oversight of corporations established in Canada—appears to be uncertain of the regulatory space occupied by IATA.[868] The current laissez-faire approach taken by Canada and its regulatory agencies towards IATA is troubling. One wonders whether the accommodating attitude of Canadian regulators towards IATA is due to Canada's desire to remain the 'home state' of IATA, as several other countries have made overtures to international aviation organizations such as ICAO and IATA in relation to residency. One is left wonder whether Canada's regulatory complacency is due to its fear that IATA might move out of Canada.

As shown above, past internal changes that occurred within IATA and its rules were largely brought about due to external regulatory pressures and events. It is the author's

[868] *See*, "The need for national regulatory supervision and oversight", Chapter 4.17, *above*.

view that similar external influences are necessary to bring about positive changes to IATA's structure, as it is unlikely that IATA would voluntarily adopt internal changes at the pace required to meet consumer and public interests. Other non-state rule making bodies that have adopted voluntary, internal rules governing access to information and public participation in rule making would no doubt influence IATA to follow suit. However, whether these examples will be followed in the absence of external and compelling reasons to do so remains to be seen.

IATA is both a business and a regulator. Only the potential for direct state regulatory oversight could prompt IATA to actively seek internal change. The country best positioned to invoke that potential and to adopt the necessary measures for direct state oversight is Canada. Canada should not forego this opportunity. In this discussion it is relevant to note that, although IATA is a corporation established in Canada, IATA pays no taxes in Canada. There is no public scrutiny of IATA's revenue in Canada. Thus, as Canada has failed to exercise essential regulatory oversight over IATA, a serious question arises as to whether Canada has become a tax haven to a global monopoly?

## 8.7 Judicial responses

### 8.7.1 Invoking jurisdiction of national courts

For most activities of IATA, there is often no contractual nexus which can be used to compel IATA to submit to the jurisdiction of a local court. IATA's commercial and financial interests within national territories are procured through its member airlines and agents who contract with consumers. It would be rare for a plaintiff to directly

initiate legal action against IATA in a local court. Parties contracting with IATA i.e., airlines and agents, ordinarily have arbitration as an exclusive dispute resolution mechanism enshrined in their contracts with IATA.[869] This prevents local courts from exercising jurisdiction in respect of disputes that airlines and travel agents may have with IATA. Generally, IATA will not yield to national jurisdiction, but will make every attempt to avoid litigation relating to private suits in local courts. IATA will ordinarily submit to the jurisdiction of local courts if it becomes necessary for a ruling or directive made against it by a local regulator to be challenged. Thus, IATA is likely to submit to the jurisdiction of a local court if a local regulator (such as a competition or tax regulator) initiates action to enforce statutory obligations or punish violations of national law.

Examples discussed in a previous chapter of this thesis[870] show that, on occasion, IATA has initiated legal action in national courts as an industry advocate to challenge national regulations which affected the airline industry.[871] In such instances, IATA's *locus standi* as an industry advocate or a representative of airlines was recognized by national courts. Although national courts easily recognize IATA as a plaintiff—and sometimes as *amicus curiae*—the converse situation of initiating private or public suit against IATA cannot be done with similar ease. Often, plaintiffs need to surmount procedural challenges such as: the absence of *locus standi*, the absence of contractual privity,

[869] *See*, *Redress for Agent Grievances and Dispute Resolution, Passenger Agency*, Chapter 7, *above*.
[870] *See*, IATA industry advocacy, *IATA Programmes and Initiatives*, Chapter 3, *above*.
[871] *See*, IATA advocacy actions discussed under *Environmental Initiatives of IATA*, in Chapter 3, *above*.

exclusivity of arbitration etc., before a local court takes cognizance of a dispute and exercises jurisdiction against IATA as a defendant. Horatia Muir Watt aptly observed:

> [T]he realm of state courts' competence has been whittled away de facto, so that arbitration has become the common method to settle disputes in a wide range of fields related to global trade. Matters affecting general or public interests and directly or indirectly human rights (such as the provision of water or public health) cannot be left to a random process - or least to a process which generates decisions which are too often inscrutable and thereby unaccountable.[872]

Global governance advocates contend that local courts need to take cognizance of transnational entities and their conduct on the basis of access to justice guarantees for claimants who are citizens or resident of the forum state. Similarly, if the applicable law in a dispute is local law, there is an obligation for local courts to allow access to a plaintiff.[873] Relying on principles set out in the Universal Declaration of Human Rights and other human rights treaties,[874] Moshe Hirsh submits that "everyone holding a claim concerning a civil right must have access to a court."[875]

The above discussion highlights the importance of local courts adopting a liberal interpretation of procedural rules to ensure that nationals within their territories are not denied access to justice when a dispute, claim or complaint is escalated against a transnational entity like IATA. Apart from these procedural aspects, local courts also become obliged to apply substantive provisions of law by being mindful of the inherent inequality between the rights, privileges and economic strengths of IATA and its

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[872] Muir Watt, *supra,* note 845, at 11.
[873] *Ibid* at 13.
[874] *Universal Declaration of Human Rights,* art.10; *United Nations Covenant on Civil and Political Rights* – Article 14; and *European Convention on Human Rights,* art. 6.
[875] Moshe Hirsh, *The Responsibility of International Organization Towards Third Parties: Some Basic Principles*, (Netherlands: Kluwer Academic Publishers, 1995).

proxies on the one hand, and IATA's transactional counterparts—such as local consumer or travel agents—on the other. Where travel agents are concerned, local courts must recognize that a travel agent is not in an equal economic bargaining position to IATA or its members acting at its behest. If the objective is to ensure justice by correcting transactional and economic imbalances, it is imperative that courts look beyond the four corners of the IATA 'contract'. Predictably, IATA contracts of adhesion are devises to shield IATA from financial exposure[876] at the expense of consumers and agents who are left with insufficient redress or the ability to recoup economic losses occasioned from breach of contract. National courts should accord priority to nationals and their fundamental rights to engage in legitimate businesses and trades within their respective territories without any impediment or restraint placed upon by IATA.

### 8.7.2 Justiciable Juridical responses

Numerous disputes involving IATA and travel agent/passengers have led to litigation. These have resulted in judicial pronouncements by national courts of several countries. Such judgments of national courts do not have universal binding force, nor are they recognized by foreign courts. Yet, these judgments have produced important principles of persuasive value that could be used to fashion a predictable set of norms by which to evaluate the legitimacy of IATA rules. That is, the following principles—drawn from judgements and the notions of global governance discussed above—could be consolidated into a coherent *corpus* to guide future adjudication of IATA related disputes worldwide.

[876] *See*, *Redress for Agent Grievances and Dispute Resolution*, *Passenger Agency*, Chapter 7, *above*.

The procedural safeguards recommended below would ensure the protection of the local litigant's interest when a dispute involving a transnational organization such as IATA is brought before a national judicial forum:

a. National courts should interpret procedural rules in a liberal manner to ensure that nationals and residents of a country are guaranteed access to justice and a forum to present their claim against transnational corporations.
b. National courts should assume jurisdiction, if a connection exists between the act or omission complained of or any effect thereof, within the national territory.
c. Local courts should assume jurisdiction where the law applicable to the dispute is the local law of the forum.
d. Objections to jurisdictions such as *forum non conveniens* should be decided by giving precedence to the economic and logistical convenience/hardships a plaintiff would encounter in pursuing a claim in an alternative or foreign forum.
e. National courts should assume jurisdiction over any dispute/complaint which relates to a statutory obligation arising under national law—such as the payment of taxes or compulsory contributions under labour statutes—by a transnational entity.
f. Where jurisdiction has been assumed by a local court over a transnational defendant or plaintiff, at the outset, the court must make appropriate orders

directing the transnational litigant, (which has no national presence or assets within the local territory) to provide adequate security for the claim or the costs of the opposite party.

Apart from these procedural recommendations, it is also believed that the application of the following principles could procure fair adjudication and substantive justice for litigants seeking redress or presenting complaints against a transnational/multinational enterprise to a national court:

g. National courts should examine the legitimacy/authority of a transnational enterprise to engage in any activity or business within a local territory and/or supply goods and services within that territory.

h. Where a multinational enterprise conducts or carries on any operations within the national territory under the authority or approval of state agency, the local court must evaluate whether the conduct of the enterprise is strictly in compliance with the permits, approvals and the specific conditions applicable to the approval.

i. If concessions or immunities have been granted to a transnational corporation, the court must examine whether such an entity has acted strictly within the scope of these concessions or immunities.[877]

j. No act, agreement, rule or conduct of a transnational enterprise should be permitted to prevail within the local territory or against the nationals thereof,

[877] *John Caceres/Caceres Agency et al Vs. IATA, supra*, note 766.

if such act, agreement, rule or conduct contravenes or is inconsistent with domestic law.[878]

k. All activities and operations whether commercial, non-commercial or benevolent, must be conducted within the national territory in a transparent manner, where all relevant information is disclosed to the public domain.

**l.** No privilege of secrecy should be accorded to the operations of transnational enterprises, except in relation to proprietary information that is protected by national intellectual property laws and should not extend beyond the scope of such privileges ordinarily accorded to nationals and local entities.[879]

### 8.7.3 Liability for goods and services supplied

As described in Chapter 3 of this thesis, the product and services portfolio of IATA is extensive. The vast array of products and services marketed by IATA is undoubtedly its principal source of income. IATA assumes a certain measure of responsibility when professing technical expertise to formulate, design and supply its products and services to the airline industry. It is thus imperative that a corresponding degree of responsibility be imputed to IATA for the due performance of those products and services it supplies to the industry. In the event of failure of a product or service, IATA can be held responsible on the basis of product liability principles that are applicable under domestic law. National courts ought to apply principles of tort and product liability applicable within their local jurisdictions to hold IATA accountable for

[878] *British Eagle International Airlines Ltd. Vs. Compagnie Nationale Air France, supra*, note 525.
[879] *Lorraine Stanford Executrix of the estate of William Stanford Vs. Kuwait Airways, other airlines and IATA*, *supra*, note 512.

products and services supplied within their territory. Local courts should also be reluctant to recognize or give effect to liability exclusion and limitation clauses if these are found in IATA contracts. These judicial approaches will enable end users and consumers to sue and recover damages and compensation when products and services supplied by IATA are either defective, or do not attain the professed results as represented.

A useful precedent that lends credence to such judicial treatment can be drawn from the *ratio decidendi* formulated in the case of *Lorraine Stanford, (Executrix of the estate of William Stanford) vs. Kuwait Airways Corporation, PanAm., Northwest., MEA Air Liban SA, and IATA*.[880] This case involved a claim for damages against IATA and several airlines involving an interlined journey. The damages were alleged to have arisen due to the death of a US diplomat who was tortured and killed after the passenger aircraft he was travelling on was hijacked in the middle-east. The cause of action against IATA was predicated upon an alleged breach of its duty of care, in relation to a security lapse at the airport where the hijackers boarded the aircraft. This lapse was alleged to be the proximate cause of the death and injuries of the decedent. It was alleged that, since IATA had promulgated security guidelines and recommendations for member airlines around the world, IATA was responsible to ensure proper security at the airport concerned. IATA argued that it owed no duty of care to the plaintiff and moved for summary dismissal. The court denied the motion for summary dismissal and observed that:

[880] *Lorraine Stanford, (Executrix of the estate of William Stanford) Vs. Kuwait Airways Corporation, PanAm., Northwest., MEA Air Liban SA, and IATA, supra*, note 513.

> [B]ecause IATA exists for the benefit of its member airlines, which specifically rely on it for guidance in the area of security and safety recommendations, it therefore has a special relationship with the airline and their passengers. Given the unique role played by IATA in airline and airport security, this court concludes that a reasonable jury could find that IATA had assumed in part a duty of care owed by common carriers and airports to their passengers and as such had a special relationship with the plaintiffs.[881]

Although the above decision arose from a procedural objection, it has important implications for IOSAs and, more generally, for the product and services portfolio IATA supplies to the air transport industry.[882] The decision recognized that IATA can be held liable in tort for breaching a duty of care, and that it does have a duty of care in relation to its products and services. As such, national courts must be mindful that liability of IATA will depend on the factual circumstances of a case and that IATA cannot avoid responsibility by dealing at arms-length. For IOSA mandatory audits, without which an airline cannot become a member of IATA,[883] this decision has far-reaching implications. By enforcing its IOSA programme, does IATA undertake that all member airlines comply with its safety standards and security requirements? Does IATA guarantee that its standards are fool proof and ensure safety and security for airlines and passengers? Does IATA collaterally and/or vicariously owe a duty of care towards airline passengers regarding the safety and security of air transport? When IATA professes

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[881] *Lorraine Stanford, ibid.,* the court also observed that, "IATA had undertaken the duty of promulgating minimum standards of safety for the various airports around the world. IATA apparently has expended considerable efforts in enhancing the security of airports around the world such as the one in Athens, Greece, Narita in Japan as well as those in Dubai and Kuwait. Indeed, whether IATA's failure to inspect Beirut airport is a failure to take reasonable care in its undertaking of airport safety inspections and other security measures is a question best suited for the trier of fact."

[882] *See*, the IOSA, *IATA Programmes and Initiatives*, Chapter 3, *above*.

[883] If airlines can be denied membership if they are not compliant under the IOSA (IATA Operational Safety Audits) does not an overarching obligation devolve upon IATA to ensure the absence of danger in air travel when members conform to IOSA requirements.

expertise and makes and audits safety/security standards, should not a concomitant duty be imposed upon IATA to ensure the safety and security of passengers using air transport? If this is so, cannot liability be imputed on IATA for breaches of security and lapses of safety standards which lead to injury and damage being suffered by passengers?

Resolutions discussed in Passenger Services[884] and Agency[885] Conferences also set out extensive procedural rules governing internal obligations of IATA members (e.g., rules dealing with mishandled baggage and rules indemnifying members airlines against each other for losses occasioned in relation to STD). Although these rules are not designed to create a consumer protection framework, they nevertheless specify the standards that IATA airlines should follow in relevant circumstances. Courts can apply these standards to ascertain whether the conduct of IATA members in each situation complied with the minimum requirements stipulated in IATA rules. The shortfall in actual conduct of a member airline measured against IATA's own standards should be sufficient to impute liability in the event of injury or loss to a consumer. Air transport is, by its very nature, a global industry. As it develops, the importance, power and involvement of many unconventional non-national rule-making bodies such as IATA will have a growing influence on this industry. In this environment it is imperative that the rights of consumers, which cannot be guaranteed other than through national initiatives, are duly preserved and protected. Therefore, if the interest of the consumer

[884] *See*, *Baggage Reconciliation and Security Control,* Chapter 6, *above*.
[885] *See*, *Counter Indemnities and Honouring STDs,* Chapter 7, *above*.

is to be given its rightful place, the importance of proactive national regulation and oversight, coupled with effective judicial intervention over IATA activities, cannot be overstated.

## Conclusion

A tracing of IATA's history and its activities demonstrates that IATA was established in an entirely different environment to that which exists in the aviation industry today. At its advent, IATA was established to achieve tariff coordination which nation states could not readily achieve then. During its early years, many states expressly permitted, while others merely acquiesced, in IATA engaging in tariff coordination for international air transport. However, the airline industry has gone through a significant transformation in the past 73 years since the creation of IATA in 1945. IATA, which has a significant influence on the global airline industry, has morphed into an entirely different organization from its beginnings as a mere trade association. Today, IATA is a robust commercial entity supplying goods and services to the airline industry for profit. Parallelly, it engages in the activities of a trade association to facilitate member interests and develop worldwide standards for the airline industry. IATA's history relating to national regulatory supervision and oversight is controversial. States engaged in operating airlines thought it important to grant a certain measure of indulgence to IATA. However, this indulgence was gradually reduced when public interests and competition was compromised within national territories. As states began to enhance competition, liberalize air transportation, reduce government ownership of airlines and

withdraw the safety net over IATA, its activities became subjected to increased scrutiny and challenge. Yet, even today a large number of states still grant significant indulgence to IATA rules and regulations. Even in states with advanced consumer protection and antitrust law regimes, IATA enjoys some measure of latitude in terms of the operation of its numerous initiatives which do not come under the administrative or judicial microscope, or attract essential regulatory attention.

IATA has emerged as an essential organization for the international air transport industry. It provides salutary initiatives and programmes which have considerably enhanced the airline industry. The initiatives of IATA have resulted in many benefits and privileges for the airline consumer, in terms of improving the efficiency and convenience of air travel. However, by and large, one cannot escape the fact that IATA is a multinational enterprise engaged in commercial pursuits that generate large revenues (and presumably surplus). Against this backdrop, the main proposition of this thesis is to suggest that there is an imperative obligation upon nation states not to abdicate their responsibilities of supervision and oversight of IATA activities, particularly in light of the need to protect the interest of their nationals.

In this context, the need for supervision and oversight has been identified in several areas. Enhanced regulatory oversight and judicial intervention at a national level could ensure that the beneficial role IATA performs for the airline industry is refined to achieve equitable circumstances for all stakeholders. A further recommendation would be to increase accountability of IATA to the state agencies of Canada where it was incorporated. Canada is in the best position to exercise direct regulatory supervision

over IATA. Within existing regulatory mandates of Canadian regulators for air transport, competition and corporations, Canada could enhance its oversight authority by requiring dissemination of source material and essential financial information of IATA: particularly of its income and profits. Perhaps an inquiry or judicial review initiated by public interest litigation could nudge regulators into a long-overdue response to IATA's activities. This could have the outcome (at least) of indicating to the public whether IATA is exempt from paying taxes in Canada and, if so, why this is the case.

The first years and historical developments of IATA demonstrate that its transformation was influenced largely by national regulatory intervention. Fiscal and regulatory accountability would therefore be an essential next step in the process of IATA's evolution, with an end goal of benefitting the consumer. IATA is here to stay. So is the airline consumer. The *Act of Incorporation*, the statue of Canada which gave life to IATA as well as IATA *Articles of Association* expressly stipulate that the primary objective of IATA is to, **"promote safe regular and economical air transport for the benefit of the peoples of the world".** That the creators of IATA intended primacy of its objectives to be oriented towards public interests is therefore an inescapable fact. The "peoples of the world" or the public contemplated in these provisions, were the airline consumer. The impact caused to the airline consumer when implementing IATA resolutions thus assumes extreme importance. If the interests of the "peoples of world" as proclaimed by IATA as its objective, are to be given due recognition, it is imperative that national and supra national regulators evaluate the effects and implications to the airline consumer

caused by IATA rules. The environment in which IATA operates today is vastly different to that which existed at its advent. Significant technological and operational advancements in the international air transport industry and its regulatory landscape have taken place over the past seven decades. IATA has grown and transformed its character into a totally different organization from what it was in 1945. These circumstances necessitate that regulators worldwide adopt new perspectives and proactive attitudes in dealing with IATA's rules and its operations. As a trade association which is also a commercial enterprise it cannot be reasonably expected that IATA would always be committed to its professed objective of pursuing the interest of the "peoples of the world" or that of the airline consumer. As shown in this thesis the processes as well as outcomes of IATA rules do not always procure the interest of the consumer. Like any other trade association IATA would be inclined to pursue its own political, operational and economic interests before considering consumer perspectives. Therefore, there is no alternative other than for national regulators to step into this regulatory void and ensure that consumer interests are not subsumed to those of IATA and the airlines. To achieve a sustained balance of their interests, the privileges of IATA must not be allowed to predominate those of consumers, whereby the latter is detrimentally affected by IATA's interests. Past developments within IATA were catalysts of regulatory influences and were mostly self-initiated to meet changing industry needs. Continuing regulatory influences and national oversight would no doubt propagate further change within IATA. Such transformations would also no doubt be complementary in terms of the rights and privileges of all interest groups. A

satisfactory equilibrium between different interests will enhance protection for consumers while simultaneously guaranteeing reasonable profits and privileges for both airlines and IATA to collectively drive the future of air transport.

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