

## AVIATION LAW—AIR SERVICES AGREEMENT BETWEEN THE UNITED STATES AND THE UNITED KINGDOM\*

The bilateral agreement is the primary instrument for formulating aviation law between the United States and other countries.<sup>1</sup> Because the original Bermuda Agreement was considered the model for most United States aviation pacts,<sup>2</sup> the renunciation of that agreement by Britain on June 22, 1976<sup>3</sup> was a particularly important development in international aviation. The British entered negotiations for a new agreement with the primary purpose of securing a better share of the aviation market.<sup>4</sup> The United States, on the other hand, was seeking to uphold the principles of the original Bermuda Agreement by stressing competition.<sup>5</sup> The outcome of the negotiations was the signing of a new agreement, now known as Bermuda II. *Air Services Agreement*, July 23, 1977, *United States—United Kingdom*, — U.S.T. —, T.I.A.S. No. 8641.

The British renunciation of the original Bermuda Agreement was apparently prompted by a Civil Aeronautics Board (CAB) decision in March 1976 to disapprove any additional capacity rationalization pacts<sup>6</sup> between

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<sup>1</sup> These agreements are Executive Agreements and are not, therefore, subject to the approval of Congress as treaties are. *United States International Aviation Negotiations, Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess. 153-54 (1978) (testimony of Joel W. Biller) [hereinafter cited as *Int'l Aviation Hearings*]. This status is being challenged by the Aviation Consumer Action Project, a Ralph Nader organization, on constitutional grounds calling for the Senate to ratify all such agreements as treaties. *Id.* at 347 (testimony of Reuben B. Robertson III). See also Ellingsworth, *Bermuda Pact Sparks Opposition*, *AV. WEEK & SPACE TECH.*, Aug. 1, 1977, at 26. This could have a very serious impact on international air service because all such agreements would have to be ratified, and the Senate tends to move slowly on ratification of treaties. Another problem is lobbying by special interests once the agreement is sent to the Senate. *Id.* at 27. The Aviation Consumer Action Project has raised other legal issues as well. *Int'l Aviation Hearings supra* at 346-48 (testimony of Reuben B. Robertson). For a discussion of antitrust implications see *Id.* at 319-22 (testimony of John W. Barnum).

<sup>2</sup> See, e.g., Diamond, *The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements*, 41 *J. AIR L.* 419, 442 (1975).

<sup>3</sup> *Int'l Aviation Hearings supra* note 1, at 6 (statement of Alan S. Boyd).

<sup>4</sup> The British insisted on this position even though in recent years the balance of earnings has been more equal. Ellingsworth, *Special Panel to Study Bermuda*, *AV. WEEK & SPACE TECH.*, July 5, 1976, at 29, 31.

<sup>5</sup> Doty, *White Paper Confirms Gap on Bilateral*, *AV. WEEK & SPACE TECH.*, Jan. 3, 1977, at 26. See also *Int'l Aviation Hearings* note 1 *supra*, at 8, 20 (statement of Alan S. Boyd).

<sup>6</sup> A capacity rationalization pact is an informal agreement between airlines to avoid over-competition on specific routes. *The Perils of No Policy on International Aviation*, *BUS. WEEK*, Aug. 16, 1976, at 104 [hereinafter cited as *Perils*]. Other factors may have been the CAB's last minute rejection of fare increases, chastising language in an earlier capacity agreement concerning the Miami-London route, and failure to reach capacity agreements with Pan Am and TWA. Ellingsworth, *supra* note 4, at 29. It is the negotiator's opinion that the last minute fare rejections were the primary reason for the British action. *Int'l Aviation Hearings supra* note 1, at 86 (testimony of Alan S. Boyd).

airlines, which the British had requested. Specifically, the British wanted cutbacks of fifth freedom rights,<sup>7</sup> rigid capacity controls,<sup>8</sup> single carrier designation for each route,<sup>9</sup> and an exchange of traffic statistics.<sup>10</sup> Furthermore, Britain made it clear that fifty percent of the traffic moving between the United States and Great Britain should belong to British Airways<sup>11</sup> and that steps should be taken to ensure them that much of the market.<sup>12</sup> Finally, the British believed that air fares should conform more closely to the higher European tariffs rather than the lower CAB standards.<sup>13</sup>

The United States position on international aviation policy was embodied in a statement issued by President Ford on September 8, 1976.<sup>14</sup> This statement was adopted by the Carter administration for the purpose of negotiating Bermuda II.<sup>15</sup> Points of the statement directly corresponding to British demands indicate that the United States will no longer consider multi-carrier designation as vital to a successful competitive system, but that it will continue to support the original Bermuda Agreement principles on capacity which allow control by carriers with only *ex post facto* review

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<sup>7</sup> Doty, *supra* note 5. *Int'l Aviation Hearings supra* note 1, at 18 (statement of Alan S. Boyd). A fifth freedom right is the right to pick up traffic in a foreign country and carry it to a point in another foreign country. Crucial disagreement in the original Bermuda negotiations occurred over regulation of fifth freedom rights and not the actual granting of these rights because some are essential, Diamond, *supra* note 2, at 441-42. British and European carriers fly minimal traffic beyond the United States and are therefore particularly concerned with limiting these rights. Doty, *British Action Forces Bermuda Review*, *AV. WEEK & SPACE TECH.*, Oct. 18, 1976, at 51. Britain contends that Bermuda allows the United States to carry most of North Atlantic traffic through a superior route system with higher flight frequency; therefore, it should receive 50% of the traffic instead of the current 42%. *Closing the Gaps in Air-Service Talks*, *BUS. WEEK*, May 9, 1977, at 32. In 1976 the United States carriers had \$375 million in revenue, British Airways \$274 million; on the fifth freedom routes (out of London) United States carriers made \$170 million and British Airways only \$8.5 million.

<sup>8</sup> Capacity controls are controls over the number of seats or amount of cargo space available on a specific route within a given period of time. One means of controlling capacity is through restrictions on flight frequency. One reason for controlling capacity is that overcapacity leads to low fares and rates. Another is that unfilled seats and cargo space means waste, inefficiency and operating losses. *The Bermuda Parallelogram*, *ECONOMIST*, June 4, 1977, at 98. Britain was particularly concerned with the waste of fuel during the fuel shortage. Reed, *Transatlantic Flight Paths Cleared in Dawn Deal*, *THE TIMES* (London) June 23, 1977, at 23, col. 4.

<sup>9</sup> Single carrier designation allows only one airline from each country to operate a specific route as opposed to multicarrier designation which allows competition between the airlines of each country on that route. *Int'l Aviation Hearings supra* note 1, at 18 (statement of Alan S. Boyd).

<sup>10</sup> Doty, *supra* note 5, at 26.

<sup>11</sup> *Int'l Aviation Hearings supra* note 1, at 17 (statement of Alan S. Boyd).

<sup>12</sup> *Id.* See also *Bluff and Counter-Bluff Across North Atlantic*, *ECONOMIST*, June 18, 1977, at 94.

<sup>13</sup> *The Bermuda Parallelogram, supra* note 8.

<sup>14</sup> *New International Aviation Policy Will Be Released Today*, *AV. DAILY*, Sept. 8, 1976, at 33 [hereinafter cited as *Release*].

<sup>15</sup> *U.S. Eases Its Position on Multiple Designation*, *AV. WEEK & SPACE TECH.*, March 7, 1977, 28 [hereinafter cited as *U.S. Eases Position*].

by government, and that bilateral review will be sought where sixth freedom<sup>16</sup> capacity is heavily relied upon.<sup>17</sup> Although the statement did not directly address the question of fifth freedom rights, the United States position was to maintain the status quo, with minor concessions.<sup>18</sup> The statement left room for the negotiation of capacity agreements where excess capacity was affecting the viability of markets, if the public interest was served, other alternatives proved infeasible, and the restrictions were temporary and approved and monitored by the CAB.<sup>19</sup> As to fares and rates, the statement provided that the United States would continue to accept the International Air Transport Association (IATA) system for negotiation of scheduled tariffs and called for cost-related fares at the lowest possible levels permitting a reasonable return. It also urged prompt action by the CAB on IATA proposals.<sup>20</sup>

The United States policy statement also contained other provisions more domestic in scope, including urging the consideration of different carriers to serve a single foreign destination from different American points, placing less emphasis on traditional gateways and more emphasis on opening new coterminal points, recognizing area competition in choosing carriers, and extending the domestic route system.<sup>21</sup> A basic general consideration was the commercial viability of a route and its impact on the current international route system.<sup>22</sup>

Another component in the United States position was the role of the

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<sup>16</sup> Sixth freedom rights are a variation of fifth freedom rights and involve picking up traffic in one foreign country, carrying it through the flag country and to another foreign country.

<sup>17</sup> *New International Aviation Policy Statements: A Preview*, *AV. DAILY*, Sept. 3, 1976, at 22-24, citing a draft statement [hereinafter cited as Draft Statement]. The content of this statement was not substantially different from the later statement, *Release*, *supra* note 5.

<sup>18</sup> *U.S. Eases Position*, *supra* note 16. See also *Int'l Aviation Hearings* note 1 *supra*, at 8 (statement of Alan S. Boyd).

<sup>19</sup> Draft Statement, *supra* note 17, at 23. The CAB is an independent regulatory commission responsible for the promotion and regulation of the civil air transport industry through approval or disapproval of proposed routes involving international routes. Their decisions are subject to the approval of the President, 49 U.S.C. § 1461 (1970).

<sup>20</sup> Draft Statement, *supra* note 17, at 24. The International Air Transport Association (IATA) is a voluntary, non-exclusive organization composed of most of the world's major international carriers. Its purposes are to promote safe, regular, and economical air transport; to foster air commerce and study problems connected with it; and to provide a means of collaboration among air transport enterprises either directly or indirectly involved in international air transport service. The IATA establishes fares in the first instance but every nation must approve the fares as reasonable. All decisions of the IATA must be unanimous. Edles, *IATA, The Bilaterals and International Aviation Policy*, 27 *FED. B. J.* 291, 292-93 (1967). The CAB's failure to act as promptly as provided in Bermuda I has caused a measure of complaint in the past from other countries. The British in particular have complained because the CAB waits until the last minute to express approval or disapproval of fare proposals. *Perils*, *supra* note 6. See also *Int'l Aviation Hearings* note 1 *supra*, at 7 n. 4, 5 (statement of Alan S. Boyd).

<sup>21</sup> Draft Statement, *supra* note 17, at 22. Recommending extension to Canada, Mexico, and the Caribbean.

<sup>22</sup> *Id.*

CAB, which assists the State Department in the negotiation of international agreements.<sup>23</sup> The CAB's role was highlighted by the Transatlantic Route Proceeding, which involved a comprehensive review of United States air service over transatlantic routes.<sup>24</sup> This review encompassed consideration of United States—United Kingdom air routes and focused on such factors as the survival and strengthening of Pan Am and TWA, the potential contribution to the United States balance of payments, effective service, the strengthening of the United States position in light of increased foreign competition, and the relationship between city—pair designations and the overall United States—European market.<sup>25</sup> A specific issue considered by the CAB was the designation of new coterminal points. The CAB recognized the possibility of foreign governments demanding concessions in return for new gateways and, therefore, selected only those cities which it felt could support nonstop service immediately, within the foreseeable future, or which provided benefits not otherwise attainable.<sup>26</sup>

The Bermuda II pact was marked by considerable compromise. Notwithstanding the British position on capacity controls, the agreement basically reiterates the original Bermuda Agreement's principle of competi-

<sup>23</sup> 14 C.F.R. § 384 (1977).

<sup>24</sup> CAB Decision, Transatlantic Route Proceeding, Docket No. 25908 (July 21, 1976) 1 [hereinafter cited as CAB Decision]. The proceeding involved renewal of scheduled passenger service, new coterminal points, renewal of supplementary authority, and the possibility of scheduled supplementary service, renewal of existing cargo service, possible expansion of the route map, and the possibility of cargo transport on supplementary carriers. The proceeding was initiated by CAB Order 73-9-83 (Sept. 21, 1973), which was amended (Nov. 21, 1973); Judge Newmann issued a recommended decision (Jan. 17, 1975). President Ford disapproved that decision on December 24, 1976. Ellingsworth, *Ford Overturns Atlantic Decision*, *Av. WEEK & SPACE TECH.* Jan. 3, 1977, at 25. The Board held further hearings in the summer of 1977 and met in September to make a decision. The CAB submitted its decision to the President on Oct. 21, 1977. The President approved the CAB decision with two revisions on December 21, 1977, and the CAB approved those changes on January 11, 1978. *CAB OKs Atlanta-London Route*, *Atlanta Constitution*, Jan. 12, 1978, § C, at 13, col. 4. The President signed the order implementing the decision on Jan. 27, 1978. *President Signs Revised Air Package For Expanded U.S.—Europe Service*, *Wash. Post*, § F, at 11, col. 4. All citations to the decision are to the July 21 opinion. The new decision incorporates changes necessary to the implementation of Bermuda II and President Carter's two revisions but is otherwise materially the same. CAB Decision, Transatlantic Route Proceeding, Docket No. 25908 (Jan. 11, 1978) 1.

<sup>25</sup> CAB Decision, *supra* note 24, at 8, 11-12. See generally, Note, *A New Era in International Aviation: CAB Regulation, Rationalization and Restrictionism on North Atlantic*, 7 N.Y.U. J. INT'L L. & POL. 317 (1974). This Note also poses some arguments regarding capacity controls and fare regulation. See notes 54-59 *infra* and accompanying text. See also Recommended Decision, Newmann, J., Transatlantic Route Proceeding, Docket No. 25908. (Jan. 17, 1975) 12-13 [hereinafter cited as Newmann Decision].

<sup>26</sup> CAB Decision, *supra* note 24, at 31. CAB recommended Houston, Dallas/Ft. Worth, Cleveland, Pittsburgh, Atlanta, St. Louis, Denver, Kansas City, Tampa, New Orleans, and Minneapolis/St. Paul. *Id.* at 3. Insofar as these choices are inconsistent with Bermuda II they will have to be changed. 49 U.S.C. § 1502 (1970).

tion, as supported by the United States.<sup>27</sup> In particular Bermuda II provides for adequate capacity to meet traffic demands, consideration of efficiency of operations, and consultations when either party believes the principles have been violated. The agreement also delineates three factors which should be considered in relation to capacity: traffic requirements of the countries at either end of a route, "through" airline operation requirements, and the traffic requirements of intermediate areas after taking into account local and regional services.<sup>28</sup> There are, however, some restrictions on flight frequency on routes involving Japan-Hong Kong, Thailand, and Singapore.<sup>29</sup> Also, route schedules must be submitted for inspection by the other country, and agreement must be reached.<sup>30</sup> Furthermore, the compromise established that only one carrier would be permitted per gateway, unless traffic exceeds certain limits, or the other party fails to designate a carrier within three years. Each country may, however, designate two gateways to be serviced by two carriers.<sup>31</sup> There were no such limitations on carrier designation in the original Bermuda Agreement.<sup>32</sup>

Bermuda II includes very significant changes in fifth freedom rights. The United States gave up fifth freedom rights to 22 cities not currently being served.<sup>33</sup> In addition, the United States may serve Austria and Belgium for only three more years and Holland, Norway, and Sweden for five more years. After those periods end, the United States will have fifth freedom rights only to Frankfurt, Hamburg, Munich, and Berlin from London and Prestwick/Glasgow. Other points are included on around the world combination routes, in all-cargo service, and from Bermuda.<sup>34</sup> Britain has fifth freedom rights to points in Central and South America, Japan, and Mexico City, in both passenger and cargo flights.<sup>35</sup> Vancouver is a fifth freedom right point on the Hong Kong-United States route.<sup>36</sup> These limitations on fifth freedom rights are offset in part by provisions allowing both countries

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<sup>27</sup> Lowenfeld, *High Stakes in a New Air Pact*, N.Y. Times, July 3, 1977, § F, at 1, col. 1. See also *Int'l Aviation Hearings* note 1 *supra*, at 51-2 (statement of Alan S. Boyd).

<sup>28</sup> Air Services Agreement, July 23, 1977, United States—United Kingdom, arts. 11, 12-14, — U.S.T. —, T.I.A.S. No. 8641 [hereinafter cited as Bermuda II].

<sup>29</sup> *Id.* at Annex 1, 24, 38. The figures for flights allowed per week are: 14 round trip combination Japan—Hong Kong; 7 Thailand & Singapore; 7 Japan by United Kingdom.

<sup>30</sup> *Id.* at Annex 2. In the absence of agreement a formula is used. Each airline may operate on a proposed schedule not to exceed the total round trip frequencies allowed during the previous corresponding seasons plus the average forecast percentage applied to those frequencies, i.e., the previous frequency plus an additional number based on a mean projected percentage of increased traffic.

<sup>31</sup> *Id.*, art. 3(2)(a)(b).

<sup>32</sup> Air Services Agreement, Feb. 11, 1946, United States—United Kingdom, 60 Stat. 1499, T.I.A.S. No. 1507 [hereinafter cited as Bermuda I].

<sup>33</sup> Brown, *Compromise Marks Bilateral Pact*, AV. WEEK & SPACE TECH., June 27, 1977, at 26.

<sup>34</sup> Bermuda II, *supra* note 28, Annex 1, § 1 (United States routes).

<sup>35</sup> *Id.* Annex 1, § 3, (United Kingdom routes) 3-5, 10-12.

<sup>36</sup> *Id.* Annex 1, § 3, (United Kingdom route 6).

to carry unlimited transit and on-line traffic.<sup>37</sup>

Bermuda II also provides for certificates of airworthiness, consultations on safety and security, conformance to the standards of the other party, and maximum cooperation in matters of security. Portions of the agreement relating to certificates are identical to the provisions of the original agreement, but those promoting safety and security are new.<sup>38</sup> Provision is also made for the exemption of equipment, fuel, spare parts, and aircraft stores from custom duties, excise taxes, and other charges when they are on board the aircraft. This exemption also applies to an extent when they are taken on board in the country of the other party. The exemption previously applied only to supplies retained on board; supplies taken on board were subject to charges not less favorable than those granted to the most favored nation.<sup>39</sup>

The new agreement also provides that tariffs be established at the lowest level consistent with safety and an adequate profit. Where the tariffs result from intercarrier discussion, they are subject to the approval of the aeronautical authorities. Such approval is necessary even where they arise under the procedures of IATA. Procedural requirements as to timing of proposals have changed, but the basic structure is the same as in the original agreement.<sup>40</sup> Bermuda II provides for dispute settlement to be handled first by a round of formal consultation and then submitted to some person or body chosen by agreement. If no agreement can be reached, the dispute will be referred to a three member arbitration tribunal. The original Bermuda Agreement had provided for consultation and then submission to the Interim Council of the Provisional International Civil Aviation Organization.<sup>41</sup>

The CAB decision of July 21, 1976 provided for new coterminals at eleven cities.<sup>42</sup> The Bermuda II agreement, however, provides for new coterminals only at Atlanta, Houston, Dallas/Ft. Worth, and an additional point to be agreed upon by the parties.<sup>43</sup> All of these points will receive

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<sup>37</sup> *Id.* Annex 1, § 5. Flag carriers of either country carrying passengers originating in their own territory may carry these passengers through designated coterminals to other points, whether they remain on the same flight or transfer to another flight of the same airline. Limits on fifth freedom rights apply only to picking up traffic in the coterminal to carry to other points. See also *Int'l Aviation Hearings* note 1 *supra*, at 29-32 (statement of Alan S. Boyd).

<sup>38</sup> *Id.* art. 6, 7; Bermuda I, *supra* note 32, art. 4.

<sup>39</sup> Bermuda II, *supra* note 28, art. 9; Bermuda I, *supra* note 32, art. 3.

<sup>40</sup> Bermuda II, *supra* note 28, art. 12; Bermuda I, *supra* note 32, Annex II.

<sup>41</sup> Bermuda II, *supra* note 28, art. 17; Bermuda I, *supra* note 9, art. 9.

<sup>42</sup> See note 26 *supra*.

<sup>43</sup> Bermuda II, *supra* note 28, at Annex 1, § 1 (United States route 1). These routes, however, were stressed by the CAB and another point can be added, and presumably it will be chosen from the other cities suggested. The CAB's consideration of possible requests for reciprocity or other concessions may have foreseen the possibility of routes being limited; thus, they may have asked more than expected. Because the three points are all in the Southern region the CAB concern for serving these markets can be satisfied. CAB Decision, *supra* note 24, at 31, 35.

reciprocal authority eventually, but from the additional point and Houston to London, and from London to Atlanta and Dallas/Ft. Worth, nonstop service is delayed three years.<sup>44</sup> Britain also gets new entries into the United States at San Francisco and Seattle.<sup>45</sup>

One initial criticism of the agreement from the American point of view addressed the number of gateways the British gained into the United States versus only one major gateway in the United Kingdom for the United States. Other criticisms centered on the limits on flights in the Pacific arena and lost fifth freedom rights. The first area of criticism may be valid, but it should be noted that each route does have reciprocity which allows American carriers to fly to Britain,<sup>46</sup> and there are other points in the British Commonwealth open to the United States. The second area, limited flights in the Pacific, is of concern primarily because of the need for these routes in around the world service.<sup>47</sup> The third area, lost fifth freedom rights, is probably the most serious in its effect on the amount of traffic United States carriers will handle in Europe, even though the United States did retain fifth freedom rights for around the world service and for the major German cities. Also, although fifth freedom rights to Austria, Belgium, Norway, Sweden and The Netherlands will be phased out, carrier officials are not too concerned, because nonstop service to these points is likely in the near future. American carrier officials are concerned, however, because of the comparatively larger number of fifth freedom rights granted to Britain—South America, Mexico City—and because all points in Canada are intermediate points to the United States.<sup>48</sup>

This concern over fifth freedom losses was echoed by CAB Chairman Kahn in his statement before the House Subcommittee on Aviation. He stated that one goal of international aviation negotiations should be maximum flexibility in fifth and sixth freedom rights; however, the only specific area he mentioned was the possible impact of fifth freedom restrictions on all-cargo flights involving Hong Kong.<sup>49</sup>

Chairman Kahn also expressed concern over the limitations on carrier designation and capacity restrictions, since restrictions in these two areas may interfere with competitive development of the market.<sup>50</sup> In his opin-

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<sup>44</sup> Bermuda II, *supra* note 28, Annex 1, § 1, (United States route 1), § 3 (United Kingdom route 1). Other points involved are Prestwick/Glasgow, Manchester (Britain to United States only), Bermuda and the Caribbean.

<sup>45</sup> *Britain Wins, Travellers Lose*, *ECONOMIST*, June 25, 1977, at 90 [hereinafter cited as *Britain Wins*]. See also *Int'l Aviation Hearings* note 1 *supra*, at 34 (statement of Alan S. Boyd).

<sup>46</sup> Lowenfeld, *supra* note 27, col. 5-6. For a general analysis of Bermuda II see *Int'l Aviation Hearings* *supra* note 1, at 304-15 (statement of John W. Barnum).

<sup>47</sup> *Pact Seen Dangerous Precedent*, *AV. WEEK & SPACE TECH.*, July 18, 1977, at 25.

<sup>48</sup> *Id.* See also *Int'l Aviation Hearings* *supra* note 1, at 191 (testimony of J. J. O'Connell).

<sup>49</sup> *Int'l Aviation Hearings* *supra* note 1, at 102 (testimony of Alfred E. Kahn).

<sup>50</sup> *Id.* The British were back to negotiate restrictions on flights within a few weeks of

ion, encouraging competitive development is necessary in order to serve the public interest in more efficient, responsive, and inexpensive air service;<sup>51</sup> any restrictions would sacrifice these long-term goals for the protection of short-term carrier profits.<sup>52</sup> As mentioned earlier, the United States policy in the negotiations was that multi-carrier designation would not be considered essential for a competitive system,<sup>53</sup> a position in direct conflict with Kahn's statement. The United States policy statement allowed for some limited capacity controls, and the Bermuda II Agreement may very well have imposed more restrictions than contemplated, but capacity is still a subject of negotiation and agreement.

The issue of capacity has been the subject of much discussion in recent years. The United States stance against controls has been heavily criticized. In fact, as early as 1974 officials within the State Department, the Department of Transportation, and the airline industry were admitting that the original Bermuda Agreement position on capacity was becoming weaker and less defensible because of intense competition, high costs, and economic problems.<sup>54</sup> Various writers have suggested a change in the policy approach of the United States in light of the diminished share of the market American planes carry, the overall decline in air traffic,<sup>55</sup> and the lack of any real control of fares by the current system.<sup>56</sup>

One specialist in international aviation law, Andreas Lowenfeld, suggests a reversal of our stands on capacity and fare regulation and argues for the reasonable allocation of resources through negotiation of restraints on capacity. He suggests three steps: (1) setting target load factors, (2) estimating consumption (number of passengers per day) and setting the number of spaces to offer accordingly, and (3) negotiating the share of capacity, as well as provisions for regular adjustment in capacity as situations change or more accurate information is acquired.<sup>57</sup> Complementing this structure a relaxation of fare control is recommended along with the adoption of a target price range which would allow freedom to vary extras.<sup>58</sup>

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signing Bermuda II. *Id.* But see *Int'l Aviation Hearings*, note 1 *supra*, at 74, 83-84 (testimony of Alan S. Boyd).

<sup>51</sup> *Id.* at 100.

<sup>52</sup> *Id.* at 100-01.

<sup>53</sup> Draft Statement, *supra* note 17.

<sup>54</sup> *Heightened Competition Sparks Turn from Bermuda Principles*, AV. WEEK & SPACE TECH., Aug. 5, 1974, at 29.

<sup>55</sup> Diamond, *supra* note 2, at 477. In 1946 the United States generated 70% of traffic and carried 80%. Now, fifth freedom principles expose the United States market to competition from dozens of foreign carriers, many of which generate little traffic, so that now the United States airlines carry about 40% of the traffic while generating 71% of it.

<sup>56</sup> Lowenfeld, *A New Takeoff for International Air Transport*, 54 FOR. AFF. 36, at 45. See also, Edles, *supra* note 20, at 303-06.

<sup>57</sup> Lowenfeld, *supra* note 56, at 46-47.

<sup>58</sup> *Id.* at 49. See also, Jordan, *Airline Capacity Agreements Correcting a Regulatory Imperfection*, 39 J. AIR L. & COM. 179 (1973), for a discussion of reasons to encourage the relaxation of the controls.



Another commentator suggests that an equitable exchange of economic benefits can be obtained in negotiating new agreements by determining: (1) the type of traffic to include in evaluating the market potential of a route, (2) the proportion of the market to attribute to each country, (3) the number of passengers or tons of cargo attributable to each, and (4) potential revenues.<sup>59</sup>

A final criticism of Chairman Kahn was the failure to reach an agreement on charter competition, which was left to further negotiation. In his opinion any restriction on charters would endanger their survival and, therefore, endanger the future of the low-cost service they provide. His concern was prompted because the memorandum on this subject, which is in effect until a new agreement is reached, puts more restrictive conditions on charters than the CAB does.<sup>60</sup>

There has been much less criticism of the new agreement from British sources. The Secretary of State for Trade termed the agreement reasonable and satisfactory for both sides and predicted that the agreement would result in more opportunity for British airlines, less waste of resources, and real advantages to air travellers. Furthermore, he said that the capacity control mechanisms would lead to lower fares in real terms.<sup>61</sup> Other commentators, however, have suggested that although the British taxpayer would win—the state-owned British Airways would probably obtain a larger portion of the market—the passengers would lose because of less competitive service.<sup>62</sup> Another criticism, from British Caledonian, Britain's major private carrier, focused on provisions which undermined that airline's competitive position, and which placed Britain in a generally inferior position in terms of market share opportunity.<sup>63</sup> The overall British viewpoint, however, seems to be that the United Kingdom received most of what it had sought, particularly because of the capacity controls won.

Although the outcome of negotiations in Bermuda II seems to be a fairly rational compromise in light of the long negotiations and differences in position, the real test will be whether it achieves either a solution to United States difficulties or the goals of the British. Hopefully, it will at least partially fulfill the needs of both countries.

Because of the recent economic difficulties of American international carriers and generally poor market conditions it seems that a new approach

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<sup>59</sup> Diamond, *supra* note 2, at 433 quoting from *THE FREEDOM OF THE AIR 180-89* (E. McWhinney & M. Bradley, eds. (1968)).

<sup>60</sup> *Int'l Aviation Hearings*, *supra* note 1, at 102 (testimony of Alfred E. Kahn). For an explanation of the charter issue see *id.* at 16, 17 n. 11 (statement of Alan S. Boyd) and *id.* at 70, 76 (testimony of Alan S. Boyd). But see *id.* at 231-52 (testimony of Edward J. Driscoll).

<sup>61</sup> Reed, *U.S. Views Air Pact with Britain as Victory For All*, *THE TIMES* (London), June 23, 1977, at 1, col. 6.

<sup>62</sup> *Britain Wins*, *supra* note 45.

<sup>63</sup> Reed, *Airline Sees Pact On Atlantic as Unfair*, *THE TIMES* (London), June 24, 1977, at 7, col. 8. No reasons for that feeling were given.

may be appropriate. Lowenfeld's suggestions for changes in the United States position seem to be realistic, flexible, and direct. To the extent that the capacity clauses are indeed sufficient and can become operational, Lowenfeld's approach has been partially implemented. But in the area of fares, which are still to be set with approval of IATA, Lowenfeld's complementary structure cannot be realized, and the control of both capacity and fares may not be desirable. However, it is too late for the United States to take a freer approach on fare regulation.<sup>64</sup>

For the United States, it is also important to consider the relationship between its aviation policy and the various executive agencies and the CAB. President Ford, the Justice Department, and former CAB Chairman Robson, were all concerned about the changing desires of other governments.<sup>65</sup> In its response to President Ford's disapproval of the recommended decision, the CAB emphasized that the Departments of State, Justice, and Transportation had previously chosen not to participate in the hearings and requested that those departments be involved in future considerations of the case.<sup>66</sup> This response indicates the need for more cooperation among the United States government agencies involved in order to alleviate the difficulty in haphazardly considering foreign policy arguments. Such cooperation is particularly important for the development of a uniform position in future negotiations.<sup>67</sup> In order to fulfill its responsibilities in the development of policy, the CAB has redefined the mission of

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<sup>64</sup> There are indications that the Carter administration is considering the adoption of a new very pro-competitive aviation policy and taking a somewhat harsher position in the negotiation process. *U.S. Readies Stiffer International Policy*, *AV. WEEK & SPACE TECH.*, Sept. 12, 1977, at 29. Any new policy is significant, but when there are substantial changes the significance is greater. The policy may also increase the role of the President in negotiations. *Id.* Another difference in the policy of the Carter administration is the increased emphasis on low-fare innovation and charter air services. *Int'l Aviation Hearings supra* note 1, at 177 (testimony of Joel W. Biller).

<sup>65</sup> Lowenfeld, *Commentary: The Air Rules Need a Change*, *N.Y. Times*, Aug. 8, 1976, § F, at 2, col. 5. The negotiation of Bermuda II has policy implications reaching beyond American-British relations. Both Japan and Italy have elected to open negotiations of their agreements with the United States. Doty, *Japan Joins Bermuda Principles Attack*, *AV. WEEK & SPACE TECH.*, Aug. 23, 1976, at 24. The pact will undoubtedly serve as a model for other bilateral agreements. Keplar, *U.S., Great Britain Fights New Air War Over the Atlantic*, 9 *NAT'L J.*, 23 (1977). *But see Int'l Aviation Hearings*, note 1 *supra*, at 137, 149-50 (testimony of Chester C. Davenport and Joel W. Biller). Canada, Mexico and others have also started negotiations. Kahn statement, *supra* note 49, at 8. *Id.* at 99 (testimony of Alfred E. Kahn).

<sup>66</sup> CAB Order 77-4-118, Transatlantic Route Proceeding, Docket No. 25908 at 4 (Apr. 25, 1977).

<sup>67</sup> Chairman Kahn was also concerned about the lack of uniformity in position among agencies and the role of the CAB in providing guidance to the Department of State. *Int'l Aviation Hearings supra* note 1, at 107 (testimony of Alfred E. Kahn). *But see id.* at 11, 22, 84-85 for indications of agency participation and opportunity for participation in the negotiations and formulation of policy. He indicates agreement has been reached among these agencies for negotiations with the Japanese. *Id.* at 105.

the Bureau of International Aviation to develop policy options that have a solid factual, analytical, and legal basis, and has appointed a new director who believes in the development of a more competitive system.<sup>68</sup> One means of achieving uniformity would be through a permanent Cabinet level Council, which would coordinate international air policy, establish specific objectives, and perhaps actively search for those countries offering the most promising opportunities.<sup>69</sup> Whatever the future course of international aviation agreements, the provisions of Bermuda II should be regarded as a partial step in the direction of the revitalization of international air transport for both the airlines and passengers.

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<sup>68</sup> *Id.* at 107.

<sup>69</sup> *Id.* at 108.

