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NATIONALITY OF AIRLINES: A HIDDEN FORCE IN THE INTERNATIONAL AIR REGULATION EQUATION

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INTRODUCTION

IN HIS 1975 ARTICLE, *A New Takeoff For International Air Transport*,¹ Professor A.F. Lowenfeld enumerated several basic assumptions concerning civil aviation "as developed under American leadership just after the war."² As one of these assumptions, he listed the national character of the airline industry stating that: "Airlines would not be multinational corporations . . . in terms of ownership or organization, but would be owned by the state or citizens of the state whose flag they flew."³ Lowenfeld was referring to certain concepts,

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¹ Lowenfeld, *A New Take-Off For International Air Transport*, 54 FOREIGN AFF. 36 (1975).

² *Id.* at 38.

³ *Id.* at 39. Lowenfeld's "assumptions" were an interesting attempt to identify certain basic thoughts, whether recorded or not in formal documents, which in his opinion formed the background of the postwar system of international civil aviation. Such thoughts were understood and accepted by all members of the international aviation community although it is, in Lowenfeld's opinion, hard to tell how much real consensus there was on these matters, and how much the postwar aviation settlement simply reflected the economic and political realities of the time: a war ravaged world in which only the United States had money, airplanes and large numbers of potential

principles or philosophies reflected in positions taken at the 1944 Chicago Conference⁴ and documents adopted at the Conference⁵ and in subsequent bilateral air transport agreements.

Lowenfeld wrote in 1975 and therefore was able to simultaneously assess how the international air transport experience since 1944 dealt with this assumption attributed to the immediate postwar period. Among the facts he undoubtedly considered was not only the Chicago Convention itself, which con-

travellers. *Id.* at 38. Lowenfeld summarized these assumptions in the context of the need for a fundamental reappraisal. One assumption, relating to national airlines, is the subject of the present article. The other "assumptions" included:

- 1) International transportation by air would be offered predominantly by major international airlines, performing scheduled services on the basis of individual ticketing;
- 2) The right to conduct airline services would be negotiated in bilateral agreements . . . so that at least two airlines (one from each country) would connect each pair of points;
- 3) Fares are more interdependent than routes, and the basic control mechanism, the International Air Transport Association, would function on a global basis;
- 4) While airlines were expected to compete with one another for traffic over the same route, the prices on that route would be completely uniform and service very nearly so.

Id. at 38-39.

⁴ In 1944, the International Civil Aviation Conference (The Chicago Conference) was held in Chicago upon invitation of the United States Government with the participation of representatives of 54 States in order to make arrangements for the immediate establishment of provisional world air routes and services and to set up an interim council to collect, record and study data concerning international aviation and to make recommendations for its improvement. The participants were to discuss the principles and methods to be followed in the adoption of a new aviation convention.

⁵ The Chicago Conference adopted the following documents: The Interim Agreement on International Civil Aviation, *opened for signature* Dec. 7, 1944, *replaced*, Apr. 4, 1947, 59 Stat. 1516, E.A.S. No. 469, 171 U.N.T.S. 345; The Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (*entered into force* Apr. 4, 1947) [hereinafter cited as Chicago Convention]; The International Air Services Transit Agreement, *opened for signature* Dec. 7, 1944, 59 Stat. 1693, E.A.S. No. 487, 184 U.N.T.S. 389 (*entered into force* Jan. 30, 1945) [hereinafter cited as International Air Services Transit Agreement]; International Air Transport Agreement, *opened for signature*, Dec. 7, 1944, 59 Stat. 1701, E.A.S. No. 488, 171 U.N.T.S. 387 (*entered into force* Feb. 8, 1945). The Chicago Conference also adopted several resolutions and recommendations, including a standard form bilateral agreement for air routes. As of December 31, 1981, 150 states were parties to the Chicago Convention, 95 states were parties to the International Air Services Transit Agreement and 12 states were parties to the International Air Transport Agreement.

tains provisions relating to joint air transport operating organizations, international operating agencies and pooled services,⁶ but also more recent attempts of the International Civil Aviation Organization (ICAO) to facilitate cooperative ventures by the development in 1967 of the concept of a joint or international registration of aircraft,⁷ and the existence over the past years of cooperative airlines of the type of the Scandinavian Airline System and Air Afrique.⁸ Under these circumstances, Lowenfeld's assumption could be understood to imply that states may want, for various national reasons, to ensure an adequate participation of their "national" airline representatives⁹ in the international air transportation system and they may be also willing to cooperate with some other states in establishment of jointly owned airlines. An entirely different proposition, however, would be to abdicate a considerable amount of control in this area to genuine private multinational corporations of the traditional type as known in other fields of international trade.

Interestingly enough, the many changes in the regulatory environment of international air transport in recent years have not affected the traditional views and national policies of states in regard to the nationality of airlines. Additionally, little appreciation seems to be given to the effects that this often neglected but omnipresent factor may have on actual developments. The modern forms and requirements of the relationship between governments and national airlines entail elements which may be labeled as protectionist, if this term is not used in a derogatory sense. This article will attempt to shed some light on the evolution of this concept of the nationality of airlines and the place it occupies at present in the international order of the air.

⁶ Chicago Convention, *supra* note 5, art. 77.

⁷ ICAO Doc. 8743-C/978, Action of Council, 62nd Session, at 25-27, 48-54 (1967).

⁸ For more detailed information about cooperative arrangements, see Scandinavian Airlines System; Consortium Agreement and Related Agreements, ICAO Circular 99-AT/20 (1970); Report on the East Africa Airways Corporation, ICAO Circular 100-AT/21 (1970).

⁹ Lowenfeld's terminology; See Lowenfeld, *supra* note 1, at 49.

I. FROM PARIS 1919 TO CHICAGO 1944: A CONFUSING LEGACY

Since the early years of international air transport, states have perceived the nationality of airlines as integral to the operation of international air services. The basic principle of exclusive sovereignty of states over the use of their air space was embodied in the 1919 Paris Convention on the Regulation of Air Navigation¹⁰ and other various air treaties of the prewar period.¹¹ This principle was confirmed by the 1944 Chicago Convention and reflected in other Chicago instruments¹² and in bilateral air transport agreements of the period after 1945. Countries originally asserted complete sovereignty over their national air space essentially for reasons of security and protection from surface damage. This sovereignty developed the attributes of economic control over air transport activities in and over the national territory in the pursuance of national interests which were deemed to include the interests of a country's own national airline industry.

Rights of a commercial nature normally have been granted between states. Much less frequently, these rights were granted directly by a state to the foreign airline, if sufficient means of control were available to the grantor state over operations of a foreign airline. The exercise by states of commercial control over the operation of air services over or into the respective territories has been firmly established by Article 6 of the Chicago Convention.¹³ Bilateral air transport agree-

¹⁰ The Convention for the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173 [hereinafter cited as Paris Convention] was prepared by the Aeronautical Commission of the 1919 Paris Conference and approved by the Supreme Council of the Conference. The draft was presented for signature to thirty-two allied and associated states on October 19, 1919. At the outbreak of the Second World War, thirty-four states had agreed to the Convention. The United States has not ratified the Convention, but it did participate by special invitation in some activities of the Commission for Air Navigation established under the Convention.

¹¹ See, e.g., The Pan-American Convention on Commercial Aviation (The Havana Convention), Feb. 20, 1928, 47 Stat. 1901, T.S. No. 840, 129 L.N.T.S. 223. The participants of the Havana Convention attempted to combine exclusive sovereignty of states over their airspace with qualified freedom of international air commerce granted on a multilateral basis. However, the liberal principles of the Havana Convention have had little real effect on the actual practices of states.

¹² See *supra* note 5.

¹³ Chicago Convention, *supra* note 5, art. 6, provides: "No scheduled international

ments have served as international legal instruments for an exchange of authorizations contemplated by Article 6 of the Chicago Convention to operate international air services, as a bilaterally agreed regulatory framework for the operation of such services resulting primarily from the harmonization of national rules and policies, and as a commercial transaction concerning the exchange of routes and traffic rights.¹⁴ The philosophy underlying Article 6 involves viewing international air routes and traffic as a "potential commodity" subject to

air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization." *Id.* Bilateral air transport agreements are presently the typical form of exchanging such authorization between states. However, nothing in the text of Article 6 provides that bilateral agreements are the exclusive means of implementation of the Article. Indeed, the first Interim Assembly of the Provisional International Civil Aviation Organization (Montreal, May 1946), ICAO Doc. 2089-EC/57, at ix (1946), concluded that a multilateral agreement on commercial rights constituted "the only solution compatible with the character of the International Civil Aviation Organization (ICAO) created at Chicago," *Id.* The Seventh Session of the ICAO Assembly declared in 1953 that "multilateralism in commercial rights to the greatest possible extent continues to be an objective of the Organization." *Id.* at III-7.

In recent years, the ICAO has been involved more actively in air transport matters, as evidenced in the 1977 and 1980 Air Transport Conference, but no new attempt has been made to reopen consideration of multilateral approaches to the granting of traffic rights. In this context, the Netherlands Civil Aviation Authority has prepared a "Draft Plurilateral Air Transport Agreement" which is reprinted in H. WASSENBERGH & H. FENEMA, *INTERNATIONAL AIR TRANSPORTATION IN THE EIGHTIES* 223-247 (1981). The International Chamber of Commerce took another initiative towards multilateralism similarly based on the idea of liberalizing the present regulatory structures. For Bing Cheng's elaboration on the initiative, see ICC Air Transport Committee, Sess. of Feb. 17, 1981, ICAO Doc. No. 310/INT 139 (1981).

Of course, Article 6 of the Chicago Convention also can be implemented by a government granting traffic rights directly to an airline of another state without the intermediary of the respective foreign government. See Chicago Convention, *supra* note 5, art. 6.

¹⁴ For more on the nature of bilateral air transport agreements, see, e.g., B. CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 231-46 (1962) W. GILLILAND, *Bilateral Agreements*, in *THE FREEDOM OF THE AIR* 140-158 (1968); O. LISSITZYN, *INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY* 378-82 (1942); Diamond, *The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements*, 41 *J. AIR L. & COM.* 419 (1975); Gertler, *Bilateral Air Transport Agreements: Non-Bermuda Reflections*, 42 *J. AIR L. & COM.* 779 (1976); Lissitzyn, *Bilateral Agreements on Air Transport*, 30 *J. AIR L. & COM.* 248 (1964); Lowenfeld, *CAB v. KLM; Bermuda at Bay*, 1 *Air Law* 2 (1975); Salacuse, *The Little Prince and the Businessman: Conflicts and Tensions in Public International Air Law*, 45 *J. AIR L. & COM.* 807 (1980).

granting, acquisition or exchange.¹⁵

Over the past decades several techniques have been developed in international air law to ensure that certain rights to operate services in international air transport exchange between states or granted by states will be exercised only by carriers designated or accepted by governments for such operations. The original 1919 Paris Convention¹⁶ combined control of the nationality of airlines with controls over the nationality of aircraft. Thus, aircraft had the nationality of the state where they were registered and aircraft could be registered in a contracting state only if fully owned by nationals of that state. The Paris Convention required that the president of the airline and at least two-thirds of its directors be of the same nationality and that the airline comply with all other conditions of the state where registration took place.¹⁷ In other words, the enjoyment of rights under the Convention was granted to aircraft registered in one of the contracting states and the airline operating such aircraft had to have the same nationality as the state of registry of aircraft. Subsequently, the basic rules regarding the nationality of airlines developed by the Paris Convention were quickly perceived as inadequate.¹⁸

The 1929 Amendments to the Paris Convention¹⁹ deleted the conditions governing the nationality of airlines and the linkage between the nationality of airlines and the nationality of aircraft.²⁰ The principle that aircraft have the nationality of

¹⁵ See Gazdik, *Nationality of Aircraft and Nationality of Airlines as Means of Control in International Air Transportation*, 25 J. AIR L. & COM. 1 (1958).

¹⁶ See *supra* note 10.

¹⁷ Paris Convention, *supra* note 10, arts. 6 & 7.

¹⁸ See A. HENRY-COUANNIER, *ÉLÉMENTS CRÉATEURS DU DROIT AÉRIEN* (1929), in which the author focused upon the fact that the mere ownership of aircraft and of a certain composition of the governing body of an airline does not satisfactorily guarantee full control by the state of registry, particularly from the view of national security. Henry-Couannier therefore advocated imposition of a new condition that the pilot and flight crew be nationals of the state of registry and that the pilots be permitted to fly only aircraft of their own nationality. *Id.* at 168-77.

¹⁹ Protocol Concerning Amendments to Articles 3,5,7,15,34,37,41,42, and 70, the Final Provisions of the Convention Relating to the Regulation of Aerial Navigation, signed June 15, 1929, 138 L.N.T.S. 418 (entered into force May 17, 1933).

²⁰ *Id.* art. 19.

the state of registry was retained, but the contracting states were allowed to enact national laws and regulations determining conditions under which the registration of aircraft could be affected.²¹ The system of the Paris Convention became more flexible but the right of contracting states to impose national ownership or control conditions upon registration of aircraft was not disturbed.

The philosophy of the Chicago Convention on this subject followed the principles of the Paris Convention as amended. Aircraft have the nationality of the state of registry and aircraft may be registered in one state.²² The applicable national laws of the state where registration or transfer of registration²³ takes place governs registration and the transfer of registration. Every aircraft in international navigation also must bear appropriate nationality and registration markings.²⁴

In addition, the Chicago Conference developed another separate regime for the control of ownership of airlines. Under Article 5(a) of the United States proposed "Convention on Air Navigation,"²⁵ any state would have the right to withhold permission to fly across its territory (overflights and technical stops on scheduled services) to a foreign airline in which substantial ownership or control is not vested in nationals of a state party to the Convention. The United States delegation presented two reasons justifying this proposal:

The problem of ex-enemy or present enemy states or nationals, and the problem of knowing with whom you are dealing at all times. Rights and permits are conceded by a country or countries to another country or countries as part of friendly relations and not for the purpose of being peddled.²⁶

In a consenting opinion, the United Kingdom delegation stated that a national company should be a national com-

²¹ *Id.* art. 20.

²² Chicago Convention, *supra* note 5, arts. 17 & 18.

²³ *Id.* art. 19.

²⁴ *Id.* art. 20.

²⁵ I U.S. DEPT. OF STATE, PROCEEDINGS OF THE INTERNATIONAL CIVIL AVIATION CONFERENCE 556 (1948) [hereinafter cited as CHICAGO PROCEEDINGS].

²⁶ II CHICAGO PROCEEDINGS, *supra* note 25, at 1283.

pany.²⁷ No government should allow any foreign interest to have a majority holding.

The Chicago Conference was apparently quite receptive to this reasoning and the delegation from El Salvador was the only discordant voice. Speaking for the interest of small countries which depend on foreign capital and foreign technicians for the provision of national air services, the El Salvador delegation proposed that the proportion of ownership and effective control to be vested in the nationals of a state should be judged in accordance with the internal legislation of that particular state.²⁸ In practice, this formula would have meant that if "national" criteria of a state concerning the ownership and effective control of a company are satisfied, no other state could deny the exercise of rights under the Convention to an airline of that state because of the nationality criterion.

The draft Convention on International Civil Aviation presented to the Conference by the United States, United Kingdom and Canada²⁹ contained a special provision concerning the nationality of airlines under which no state would be bound to grant privileges of the Convention to an airline of any state unless it would be satisfied that "substantial ownership and effective control are vested in the nationals of that state."³⁰ Under the revised draft of the Convention, each member state would reserve the right to "withhold or revoke" a certificate or permit to an air transport enterprise of another state in any case where the state would be satisfied that substantial ownership and effective control are vested in nationals of a state "not a party to this agreement."³¹ This language was only slightly modified in the second revised draft.³² In the

²⁷ *Id.*

²⁸ *Id.* at 595.

²⁹ *Id.* at 427.

³⁰ *Id.* at 401. Article 14 of this draft reads as follows: "No state shall be bound to grant any of the privileges of the Convention to an airline of any state unless it shall be satisfied that substantial ownership and effective control are vested in the nationals of that state." *Id.*

³¹ *Id.* at 415.

³² *Id.* at 401. The second revised draft read: "Where it is not satisfied that substantial ownership and effective control is vested in nationals of a member state" instead of the earlier version: "where it is satisfied that substantial ownership and effective

third revised draft the text reverted to some extent to the initial proposal.³³ In the definitions article of the original tripartite draft "nationality of airline" was defined as the nationality of the state in which the aircraft or the aircraft of the airline are registered.³⁴ This definition was omitted, however, in the first revised draft and following drafts because that matter was covered by other sections of the Convention.³⁵

Ultimately the Chicago Conference decided not to incorporate any provision on the nationality or ownership of airlines into the Chicago Convention³⁶ itself, but instead to include such provisions in two other agreements developed by the Conference, namely the International Air Transport Agreement³⁷ and the International Air Services Transit Agreement.³⁸ The definition of an "airline" in the Chicago Convention linked the concept of an "airline" with the operation of "international air services"³⁹ and "air service" was defined as "any scheduled air service performed by aircraft for the public transport of passengers, mail and cargo."⁴⁰ Traffic or transit rights on scheduled services were not dealt with in the Chicago Convention, but in the two other agreements. Hence, the appropriate place for provisions concerning the qualification of airlines would be again the context of these other agreements.

In this regard, the International Air Services Transit Agreement⁴¹ and the International Air Transport Agreement⁴² contain identical language. Each contracting state has a discretionary power to withhold or revoke authorizations granted to

control is vested in nationals of a state not a party of this agreement." *Id.*

³³ *Id.* at 387. Instead of reserving for member states the right to withhold or revoke a certificate or permit, the third revised draft referred, as in the initial text, to states "not being bound to grant any of the privileges of this Convention." *Id.*

³⁴ *Id.*

³⁵ *Id.* at 473.

³⁶ See *supra* note 5.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Chicago Convention, *supra* note 5, art. 96.

⁴⁰ *Id.* art. 96(a). See I CHICAGO PROCEEDINGS, *supra* note 25, at 173.

⁴¹ See *supra* note 5.

⁴² See *supra* note 5.

airlines of another state if it is not satisfied that "substantial ownership and effective control are vested in nationals of a contracting State"43 The form of standard bilateral agreement for provisional air routes adopted by the Chicago Conference contained a corresponding provision in Article 7 with one important modification: substantial ownership and effective control were to be vested in "nationals of a party to this Agreement."⁴⁴

Following the example of the Chicago Conference, bilateral agreements on air transport of the post-Chicago period included a provision on the "substantive ownership or effective control" of airlines designated for the operation of services agreed under such agreements although varying, to some extent, the language used.⁴⁵ One commentator, Bin Cheng, noted particular improvements achieved in such post-Chicago bilateral agreements over the original Chicago Standard text.⁴⁶ States would have not only the right to withhold or revoke authorizations to designated airlines, but would also have the right, as a somewhat softer measure, to impose such conditions as deemed necessary. Further, ownership and effective control of a national airline was to be vested not necessarily only in nationals of a party to the agreement, but possibly in the state itself. According to Bin Cheng, the bilateral provisions on substantial national ownership have the effect of enabling the contracting states "to bar flags of convenience from international air transport."⁴⁷

⁴³ International Air Services Transit Agreement, *supra* note 5, art. I, § 5; International Air Transport Agreement, *supra* note 5, Art. I, § 6. See I CHICAGO PROCEEDINGS, *supra* note 25, at 176, 180.

⁴⁴ I CHICAGO PROCEEDINGS, *supra* note 25, at 129.

⁴⁵ For examples of the language used in such agreements, see ICAO Circular 63-AT/6, at 27-28, 35-36 (1962). The participants to the Chicago Conference contemplated the use of bilateral treaties and therefore drafted a Standard Form which dealt in the same provision with both "withholding" and "revoking" a certificate or permit of an airline because of dissatisfaction with the ownership and control situation. I CHICAGO PROCEEDINGS, *supra* note 25, at 129. Many bilateral air agreements of the post-Chicago period included two separate provisions, one relating to withholding the operating permission or the exercise of the rights granted, the other to the revocation of a certificate or permit of the exercise of the rights granted.

⁴⁶ B. CHENG, *supra* note 14, at 377.

⁴⁷ *Id.* at 375. The "flag-of-convenience" or "open-registry" concept, traditional in

Another significant change occurred in the typical language of the post-Chicago bilateral agreements as compared with the Chicago text. The new bilateral language referred to the ownership or control situation of the airline(s) designated by the other contracting party. Such language was also used in the Standard Clauses for Bilateral Agreements developed in 1959 by the European Civil Aviation Conference.⁴⁸ The ICAO analysis of administrative clauses of bilateral air transport agreements found that some agreements required that substantial ownership and effective control of an airline be vested in nationals of either contracting party.⁴⁹ The prevailing practice of states in this regard, however, seems to be to establish a right of each bilateral partner to take certain measures if it finds that the substantial ownership and effective control of an airline designated by the other state are not vested in this state or its nationals, and this other state is unable to prove otherwise.⁵⁰

II. THE POST-CHICAGO TREND TOWARDS RIGIDITY

This brief historical recapitulation raises some doubts, if not about the philosophy reflected in the Chicago provisions relating to nationality or ownership of airlines, then at least about the clarity of the objectives these provisions were intended to achieve. The United States delegation to the Chicago Conference referred to the problem of ex-enemy or present enemy states or nationals, implying that it would be undesirable should rights granted under the Chicago Convention to friendly states be passed into other hands without any control or possibility of intervention by the grantor state.⁵¹

maritime transport, has been actively re-examined in recent years within the United Nations Conference on Trade and Development. For details, see U.N.C.T.A.D. Doc. TD/B/C.4/220 (1981).

⁴⁸ See ICAO Circular 63-AT/6, at 117 (1962).

⁴⁹ *Id.* at 28.

⁵⁰ See, e.g., Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Air Services, art. 3(6)(a) July 13, 1977, 28 U.S.T. 5367, T.I.A.S. No. 8641, as amended, T.I.A.S. 8965 (replacing Bermuda I, *infra* note 137) [hereinafter cited as Bermuda II].

⁵¹ II CHICAGO PROCEEDINGS, *supra* note 25, at 1283. The following statement was

The background to this concern is clear. In view of a strong prewar German participation in the ownership of airlines operating in Latin America, the United States, supported by a resolution of the Foreign Ministers of the American Republics adopted in Rio de Janeiro in January 1942,⁵² desired to develop an aviation variant of the Monroe Doctrine. The United Kingdom similarly emphasized the need for a national airline in which foreign interests should not have a majority holding.⁵³

With respect to the first concern of the United States to prevent possible peddling of rights into undesirable hands, the approach of the International Air Services Transit Agreement and the International Air Transport Agreement might have been sufficient.⁵⁴ These agreements required that airlines remain under an effective control of, and be substantially owned by nationals of a contracting state,⁵⁵ although not necessarily of the state designating an airline for the operation of bilaterally agreed air services. The formula used in the Chicago standard form of bilateral agreement⁵⁶ could satisfy, to some extent, the United Kingdom's concern⁵⁷ that the majority control over, or ownership of an airline be vested in either of

recorded:

We have two problems—the problem of ex-enemy or present enemy states or nationals, and the problem of knowing with whom you are dealing at all times. Rights and permits are conceded by a country or countries to another country or countries as part of friendly relations and not for the purpose of being peddled. For example, we would not care to have a group of Germans go abroad and use their ill-gotten gains to purchase aircraft and utilize rights we might have accorded a friendly state to fly into the United States.”

Id.

⁵² *Id.* at 1283-89. The resolution is reprinted in Scutt & Lear, *Regulation by the Civil Aeronautics Board of the Ownership and Control of Foreign Air Carriers*, 27 J. AIR L. & COM. 247 (1960).

⁵³ II CHICAGO PROCEEDINGS, *supra* note 25, at 1283-84. The United Kingdom noted: “A national company should be a national company; we do not want any undesirable people doing the kind of thing the United States said; no government should allow any foreign interest to have a majority holding.” *Id.* at 1283-84.

⁵⁴ *Supra* note 5.

⁵⁵ International Air Services Transit Agreement, *supra* note 5, art. I, § 5; International Air Transport Agreement, *supra* note 5, art. I, § 6.

⁵⁶ *See supra* note 45.

⁵⁷ II CHICAGO PROCEEDINGS, *supra* note 25, at 1283-84.

the two parties concluding an air transport agreement. Post-Chicago bilateral air agreements further developed the Chicago approach, requiring airlines to be controlled or owned by the party, or the nationals of the party designating the airline. In the United States practice, the United States-Brazil Bilateral Agreement in 1946⁵⁸ marked this development, but the exact motives for this change are unclear.⁵⁹

This historical perspective is interesting, but it does not completely elucidate the background and motives of post-Chicago developments. As discussed above, the genesis of the nationality/ownership formula of the various Chicago documents and the post-Chicago air agreements does not necessarily relate to the evolution of air services. One commentator, J.G. Gazdik, noted another problem concerning the difference between the nationality concept embodied in Article 5 of the Chicago Convention, applicable to non-scheduled flights, and the Chicago formula described above relating to scheduled services.⁶⁰ The rights under Article 5 are available to aircraft of the other contracting states, irrespective of the nationality or ownership situation of the carrier.⁶¹ In view of more recent developments in international air transport and the existence of a relatively sizable charter sector, it is even more puzzling now than ever, why the nationality/ownership carrier situation may be important for scheduled services, while remaining relatively uncontrolled for charter services which are operated under the general umbrella of Article 5 of the Chicago Convention and often hardly distinguishable from scheduled services.

The Chicago order in the air taken as a whole cannot be interpreted as an unequivocal endorsement of the idea of

⁵⁸ Air Transport Agreement between the United States of America and the United States of Brazil, Sept. 6, 1946, 61 Stat. 4121, T.I.A.S. No. 1900.

⁵⁹ See Scoutt & Lear, *supra* note 52, at 253-55. In the opinion of the authors, the British ownership and control of the Brazilian designated carrier (Aerovia Brazil) may have been a factor leading to a reappraisal and tightening of the ownership and control provision although such ownership and control would be excluded also under the "nationals of either Party" formula. *Id.*

⁶⁰ Gazdik, *supra* note 15, at 3.

⁶¹ Chicago Convention, *supra* note 5, art. 5.

strictly national airlines. Interestingly, the Chicago Conference did not seem to have any great difficulties with the adoption of the provisions of the Canadian preliminary draft concerning joint operating organizations and pooling.⁶² Two main ideas of the Canadian proposal have been fully reflected in the final text of the Chicago Convention: nothing in the Convention shall prevent contracting states from constituting joint air transport operating organizations or international operating agencies or from pooling their services,⁶³ and the ICAO Council may suggest, on its own initiative, that certain contracting states form joint organizations to operate air services on any routes or in any regions.⁶⁴ Moreover, the ICAO Council determines in what manner the provisions of the Chicago Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies.⁶⁵

Over the years following the Chicago Conference, ICAO Assemblies and ICAO Councils have considered on a number of occasions questions relating to joint air transport operating organizations and pooled services with respect to the nationality of aircraft. An ICAO Assembly resolution⁶⁶ placed the desirability of cooperative arrangements in the context of Article 44(e) of the Chicago Convention under which the ICAO aims to "prevent economic waste caused by unreasonable competition."⁶⁷ The Council was directed to give assistance to states that take the initiative in developing such cooperative arrangements directly among themselves or whose national airlines develop such arrangements. The consolidated version of

⁶² I CHICAGO PROCEEDINGS, *supra* note 25, at 581-582.

⁶³ Chicago Convention, *supra* note 5, art. 77.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ ICAO Doc. 7670, at 140-141 (1956). The Resolution contained the following clauses:

WHEREAS Article 44, paragraph (a) of the Convention provides that one of the aims of the International Civil Aviation Organization is to prevent economic waste caused by unreasonable competition; and
WHEREAS cooperative arrangements in a number of different forms as provided in Chapter XVI of the Convention have already been developed by certain airlines and governments with satisfactory results and promise of still further satisfactory results in the future.

⁶⁷ Chicago Convention, *supra* note 5, art. 44(e).

the ICAO Assembly resolutions relating to this subject includes, apart from this directive for the Council to provide assistance to states, an invitation to states to inform the ICAO about experiences acquired in various forms of joint operation of international air services.⁶⁸ In December 1967, the ICAO Council adopted a resolution concerning nationality and registration of aircraft operated by international operating agencies establishing the concept of "joint" and "international" registration.⁶⁹

The fact that more than twenty years passed before the Council was in a position to adopt such a resolution indicates a relatively small interest of states in joint operating organizations and pooled services. Indeed, in March 1950 the Council suspended its study of the problem because of a "lack of interest in an international operating agency on the part of nearly all States."⁷⁰ In September 1957, the ICAO Legal Committee decided to include the subject in the inactive part of its work program because there appeared to be no prospect of an international operating agency composed of states coming into existence.⁷¹

In the thirty-five years of the ICAO's existence, neither the Assembly nor the Council has taken part in any action relating to Article 78 of the Chicago Convention. In other words, it has never considered any initiative towards an active promotion of joint operating organizations to be appropriate. In its 1967 Summary of Material Collected on Cooperative Agreements and Arrangements, the ICAO Secretariat stated that to date, there had been only two clear cases of advanced cooperation in ownership and operation of a single airline by several states: the SAS Consortium and Air Afrique.⁷² One other simi-

⁶⁸ ICAO Doc. 9275, Resolution A16-33, at III-9 (1978).

⁶⁹ ICAO Doc. 8900/2, art. 77, at 1-6 (1977).

⁷⁰ ICAO Doc. 7313-C/848, at 15 (1952).

⁷¹ ICAO Doc. 7921-LC/143-1, at IX, para. 9 (1958).

⁷² Summary of Material Collected on Cooperative Agreements and Arrangements ICAO Circular 84-AT/14, at 8 (1967). See also *supra* note 8 and accompanying text. The Scandinavian Airlines System is consortium of three Swedish, Danish and Norwegian airlines (Aktiebolaget Aerotransport, Det Danske Luftfartselskab A/S, and Det Norske Luftfartselskab A/S) based on an agreement of October 1, 1950 (which replaced previous agreements of 1946, 1947 and 1949). The shares in the consortium

lar venture, East Africa Airways, ceased operations after several fairly successful years. Many other proposed joint ventures in other regions of the world so far have failed to materialize, but recently there have been some new initiatives in this area.⁷³

III. NATIONALITY OF AIRCRAFT: UNCEASING INFLUENCE

As observed earlier, the rules of the Chicago Convention on registration of aircraft do not link the national registration of aircraft to ownership by nationals of the state of registration.⁷⁴ Hence these provisions, by themselves, may be considered as having no impact on the question of nationality of the operator of the aircraft and, in commercial international aviation, on the nationality of carriers. The Chicago Convention refers, of course, to the regime established by national laws

are 3/7 for the Swedish company, and 2/7 each for the Danish and Norwegian companies. Aircraft are contributed by the party to the Consortium as capital, and aircraft acquired by the consortium are registered in individual countries in the proportion of their shares. The governing body of the Consortium is an Assembly of Representatives, Board of Directors and a General Manager (President). All participating airlines have equal representation in the Assembly and on the Board of Directors. Air Afrique was established as a joint corporation, with the participation initially of eleven African countries: Cameroun, Central Africa Republic, Republic of Congo, Ivory Coast, Gabon, Dahomey, Upper Volta, Mauritania, Niger, Senegal and Chad. Since that time there have been some changes in the membership in the joint corporation. Air Afrique has been conceived as a common international airline, although contracting states may entrust to it the operation of their domestic air services as well. Aircraft owned by the corporation may be registered in one of the States or jointly. The corporation is administered by a Board of Directors and the number of seats on the Board is for each participant proportional to the part of the authorized capital it holds in the corporation. Summary of Material Collected on Cooperative Agreements and Arrangements, ICAO Circular 84-AT/14, at 88 (1967).

⁷³ Among unsuccessful past initiatives worth mentioning is the failure of attempts to establish a joint international airlines within the European Common Market. The negotiations on the proposed Europair or later Air Union in 1959-1964 failed for a number of reasons, particularly because of disagreement on the determination of quotas for the participation of individual airlines. The existing consortium KSSU (KLM, SAS, Swissair, UTA) provides for close cooperation mainly in the technical areas. As reported in 1980 five Arab airlines: The Royal Jordanian Airline, Gulf Air, Kuwait Airways, Middle East Airlines and Saudi Arabian Airlines, were considering the formation of a consortium to operate long haul international air services. Gulf Air will apparently service several states in the Gulf area. See ICAO Doc. 9327, at 39 (1980).

⁷⁴ See *supra* notes 36-40 and accompanying text.

and regulations⁷⁶ and thus some attention must be given to these national regimes and to their possible effects on the national approach to the operation of international air services. Thus, if only aircraft registered in a state are normally eligible to operate commercial air services in the territory of that state, and if there are certain ownership/control conditions imposed on the national registration of aircraft, the net result may be the same as if such ownership/control conditions were imposed on the operation of commercial air services. This is true whether the services are domestic or authorized for that state by international air agreements.

Admittedly, the control over the registration of aircraft, and over the nationality of carriers operating international air services, have a different purpose.⁷⁶ With respect to registration of aircraft, the Chicago Convention imposes various responsibilities in international air operations on the state of registry of aircraft, so understandably a state wishes to maintain sufficient means of control over aircraft on its registry, and can establish whatever conditions it deems necessary for registration. On these grounds, of course, one would expect conditions related to the ability of owners to ensure the required level of operational performance of aircraft, rather than conditions referring to owner's nationality. Yet in practice the nationality factor may be more important than technical or operational considerations and it is somehow difficult to draw a clear line between policies with respect to nationality in the case of aircraft and in the case of entities operating international air services.

In 1955, the ICAO undertook a survey of national legislations concerning registration of aircraft in preparation for the meeting of its Legal Subcommittee on Hire, Charter and Interchange of aircraft.⁷⁷ The extracts from national laws which the ICAO collected indicated a great deal of similarity in national policies in this matter. To obtain registration, and the resulting nationality for an aircraft, certain conditions must

⁷⁶ See the Chicago Convention, *supra* note 5, art. 19.

⁷⁶ See Gazdik, *supra* note 15, at 7.

⁷⁷ See ICAO Doc. LC/SC/CHA No. 20 (1955).

be met. Typically, that aircraft must be owned by citizens or residents of the state of registry (or of specified other states belonging to certain group of states) or by corporations established in that state and operating under control of its nationals. Regulation in Canada illustrates this policy.

The Canadian Air Regulations,⁷⁸ promulgated pursuant to the powers given to the Minister of Transport by the Aeronautics Act, provide that a:

[P]erson is qualified to be the registered owner of a Canadian aircraft who is

- (a) a Canadian citizen;
- (b) a person, lawfully admitted to Canada for permanent residence, who, since being so admitted, has been ordinarily resident in Canada for a period of not more than six years;
- (c) a corporation that is incorporated under the laws of Canada or any province, at least two-thirds of the directors of which are Canadian citizens; or
- (d) in the case of a private aircraft,
 - (i) a citizen or subject of a contracting state who normally resides in Canada, or
 - (ii) a corporation incorporated under the laws of Canada or a province.⁷⁹

A companion provision prohibits operation in Canada of a foreign registered aircraft which has been in the country for an "aggregate period of ninety days or more during the preceding twelve months or any part thereof" and an exception is made only for cases where the foreign contracting state of registry grants reciprocal privileges under like terms and conditions in respect to aircraft registered in Canada and the operator is a citizen or subject of that state or is a corporation under the laws of that state.⁸⁰ Therefore, normally national carriers would not be able to operate foreign registered aircraft in the country for more than ninety days. Hypothetically, a foreign owned entity could operate nationally owned, and conse-

⁷⁸ CONSOL. REG. CAN., ch. 2 (1978).

⁷⁹ *Id.* pt. 2, § 205(2).

⁸⁰ *Id.* §§ 200-01.

quently registered aircraft, but the viability of such operations would be highly questionable.

The concept of registration under the Chicago Convention implies responsibility and control of the state of registry over the ability of the aircraft and its operator to operate flights safely and in compliance with applicable national or foreign technical, operational and other regulations. The state owning the territory and air space where international flights by foreign registered aircraft take place has a considerable interest in the registration and nationality of such aircraft. This interest is the source of a natural aversion on the part of the regulatory authorities to situations of confused responsibilities and unclear supervision over the performance of aircraft. Such uncertainty may arise in cases of leases, interchange of aircraft and similar transactions.

The amendments to the Chicago Convention adopted in 1980 by the 23rd Session of the ICAO Assembly in the form of proposed Article 83 (bis) of the Chicago Convention,⁸¹ may solve some, but not all possible problems in this area. This provision would apply when an aircraft registered in a contracting state is operated pursuant to a lease, charter or interchange by a foreign operator. Proposed Article 83 (bis) would allow the state of registry to transfer all or part of its functions or duties to the operator's state of business or residence.⁸² This provision may be helpful in facilitating the utilization of foreign registered aircraft by national carriers without possible detriment to the safety of operations and to compliance with applicable standards. The controlling responsibilities of the state of registry would be clearly transferred to the state of the operator of aircraft. However, the new formula would have a less certain effect on wet leases, arrangements whereby it is not always clear who actually has the custody and control of a leased aircraft. In practice the custody and

⁸¹ See ICAO Doc. 9316, at 35-36 (1980).

⁸² *Id.* The transfer has effect with respect to the other contracting states only upon registration with the ICAO Council and publication of the respective transfer agreement or direct communication on the existence and scope of the agreement to third states. *Id.*

control question poses numerous problems but it is the type of arrangement, not necessarily the foreign registration of aircraft, which is the source of difficulties.

Realistically, proposed Article 83 (bis) will not be effective in the near future. The amendment procedures of the Chicago Convention⁸³ require in this case ratification by ninety-eight ICAO Contracting States. Experience with amendments of the Chicago Convention does not encourage unrealistic expectation concerning the length of the ratification process. In any case, Article 83 (bis) is not a panacea to all problems relating to the use of foreign registered aircraft by national operators. These considerations suggest that national carriers will continue normally to operate nationally registered aircraft. Governments will prefer a fusion of the nationality of carriers and the nationality of aircraft. Therefore, the broader effects of ownership conditions controlling the registration of aircraft will not disappear.

IV. NATIONALITY OF AIRLINES

Many countries have developed techniques and procedures which result in a more open and direct control over the ownership of carriers operating in the national territory. The traditional idea of national, flag or chosen instrument carriers has been bolstered by policies, laws and regulations of states both with respect to foreign carriers authorized to operate bilaterally agreed air services, and to carriers based in the national territory and deemed to be national carriers.

In the first respect, the essentially discretionary power established in most bilateral air agreements to not authorize a foreign carrier's services if certain ownership/control conditions are not complied with has been apparently transformed in practice into an almost binding rule. Rarely will one party not object to the services of an air carrier of the other party which does not comply with the ownership/control condi-

⁸³ Amendments to the Chicago Convention enter into force upon ratification by the number of contracting states specified by the ICAO Assembly. The number so specified shall not be less than two-thirds of the total number of contracting states. Chicago Convention, *supra* note 5, art. 9.

tions.⁸⁴ Similarly, states have abandoned in practice the original Chicago formula requiring that the substantial ownership/effective control be vested in nationals of either party to the agreement. This change of the ownership/control formula may have little importance as it would be "rare for a State to refuse permission to an airline designated by the other contracting party which is substantially owned by its own nationals merely on account of that factor."⁸⁵ A State should be in a position to control through licensing or other domestic regulatory procedures the involvement of its national carriers in international air transportation and thus avoid the possible need to resort to a bilateral substantial ownership/effective control clause to prevent air operations which it deems to be undesirable. The difference in the bilateral ownership/control clause, however, may still retain considerable relevance in the case of foreign subsidiaries or affiliates of domestic companies outside the reach of domestic air regulations. Apart from these considerations, the change of the language of the bilateral ownership/control clause demonstrates a more restrictive, rather than liberal, approach to the problem of the nationality of air carriers.

States have apparently been reluctant to accept arrangements whereby a foreign designated carrier would transfer the operation of a bilaterally agreed service to another carrier by a contract or service agreement. Such transactions are more easily approved if motivated by a temporary inability of the designated carrier to operate the service in question such as lack of aircraft or adequate aircraft, unusual traffic demand elsewhere, and grounding of a particular type of equipment. They are usually met with greater resistance should they amount to a revision in practice of some components of the bilaterally agreed upon pattern of operation of air services. The words pronounced at the Chicago Conference concerning undesirable "peddling" of authorizations to operate air services, and about a "national company being a national company" still echoes

⁸⁴ For analysis of some United States CAB decisions in these matters, see *Scoutt & Lear*, *supra* note 52.

⁸⁵ See B. CHENG, *supra* note 14, at 377.

strong in international aviation.⁸⁶

In spite of possible variations in general policies of states in air transport, the approach to matters pertaining to the ownership or control of national airlines is still very similar. The main reasons for this, clearly enunciated or not, are not difficult to understand. In possible contrast to some other industries or economic activities, air transport is identified as an area where states perceive their public interest to demand disallowance of any significant foreign involvement or control. On more specific regulatory grounds, governments believe that an aeronautical regulatory authority may deal more easily with an entity fully subject to national jurisdiction, as opposed to entities of an uncertain legal status.

Governments use various legal instruments to achieve these objectives. In the United States, the applicable legal regime revolves around the definition of air carrier in the Federal Aviation Act.⁸⁷ "Air Carrier" is defined as: "any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation"⁸⁸ A "Citizen of the United States" is defined as:

- (a) an individual who is a citizen of the United States or one of its possessions, or
- (b) a partnership of which each member is such an individual, or
- (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.⁸⁹

⁸⁶ See *supra* notes 26-27, 51-56 and accompanying text.

⁸⁷ 49 U.S.C. §§ 1301-1601 (1976)(as amended).

⁸⁸ *Id.* § 1301(3).

⁸⁹ *Id.* § 1301(13).

These provisions establish a definite limitation on foreign involvement in United States air carriers and, as interpreted by the Civil Aeronautics Board (CAB) in the 1971 case *Daetwyler, Foreign Permit*,⁹⁰ the limitation is considered in substantive, not formalistic terms. In this case, the CAB concluded that a corporation nominally meeting the bare minimum percent of ownership or directorship held by citizens of the United States, in which control in fact lies in foreign citizens cannot qualify as a United States citizen and consequently as an air carrier within the meaning of the Act because that would be contrary to the intent of Congress and the public interest. The CAB stated that the intent of Congress was to "insure that air carriers issued licences by the United States as U.S. air carriers would be owned and controlled by citizens of the United States."⁹¹

In addition to controls applying to those not falling within the definitions of "air carrier" and "citizen of the United States," some further controls would apply if the foreign subject intending to acquire ownership or control in a United States carrier was a "foreign air carrier" or "person controlling a foreign air carrier."⁹² Such an acquisition would necessitate a prior approval by the CAB subject to criteria and con-

⁹⁰ 58 C.A.B. 118 (1971).

⁹¹ *Id.* at 120-21. Interamerican Air Freight Corporation applied for an operating authorization as a United States citizen international airfreight forwarder. Although seventy-five percent of the stock of Interamerican was nominally owned by U.S. citizens and two-thirds of the board of directors and other managing officers of Interamerican were U.S. citizens, *id.* at 119, the CAB concluded that the company was effectively controlled by Willye Peter Daetwyler, a Swiss national. *Id.* at 121. The CAB held that it "must look at the substance of a transaction, rather than its form." *Id.* Consequently, the CAB denied the application of Interamerican for a United States citizen international airfreight forwarder operating authorization and issued instead a foreign indirect air carrier permit to Willye Peter Daetwyler doing business as Interamerican Air Freight Co. (U.S.A.). *Id.* at 122.

⁹² 49 U.S.C. § 1378 (1976)(as amended). CAB concern over the nationality of airlines operating in United States became evident again recently during CAB consideration of data reporting obligations of air carriers after the CAB "sunset" as a result of deregulation. Although the staff recommended to terminate reports on stockholder ownership on January 1, 1983, CAB Chairman McKinnon and Member E. Schaffer took the position that there should remain some mechanism for disclosing foreign ownership of U.S. airlines. The CAB consequently instructed its staff to study how the citizenship of airlines could be monitored. *See Av. Daily*, June 24, 1982, at 300.

siderations outlined above.

In Canada, no statute specifically addresses the matter of foreign ownership or control of Canadian airlines. The Aeronautics Act defines an "air carrier" as "any person who operates a commercial air service," or "any use of aircraft in or over Canada for hire or reward."⁹³ The Air Carrier Regulations promulgated by the Canadian Transport Commission further define a "Canadian air carrier" as "any air carrier that carries on business principally in Canada and (a) is incorporated or registered in Canada, or (b) has its head office in Canada."⁹⁴ Under section 17(1) of the Aeronautics Act,⁹⁵ no person shall operate a commercial air service without a valid and subsisting licence. Under section 16(3),⁹⁶ the Commission shall not issue such a licence if not satisfied that the proposed commercial air service is and will be required by the present and future public convenience and necessity. The Commission may also promulgate regulations which would, inter alia, prescribe "the terms and conditions to which licences issued . . . shall be subject."⁹⁷ These provisions, combined with the general supervision exercised by the Canadian Foreign Investment Review Agency and government policy statements regarding foreign ownership in Canada and with the application, if approved, of ownership/control clauses of bilateral air agreements, provide some if not perhaps quite satisfactory safeguards in the matter of ownership of Canadian airlines.

In the United Kingdom, the term "British airline" is defined in of the Civil Aviation Act as

an undertaking having power to provide air transport services and appearing to the [Civil Aviation] Authority to have its principal place of business in the United Kingdom, the Channel Island or the Isle of Man and to be controlled by persons who are either United Kingdom nationals or are for the time being approved by the Secretary of State for the purposes of

⁹³ Aeronautics Act CAN. REV. STAT., ch. A-3, § 9(1) (1970).

⁹⁴ AIR CARRIER REGULATIONS, CONSOL. REGS. CAN., ch. 3, No. 1 (1978).

⁹⁵ CAN. REV. STAT., ch. A-3, § 16(3) (1970).

⁹⁶ *Id.*

⁹⁷ *Id.* § 14(1).

this subsection.⁹⁸

Under French law, the criteria for the determination of the French nationality of airlines seems to be established more specifically, without the flexibility reflected in the British formula. In substance, the head office of the company must be in the French territory, at least one-half of the ownership must be in the French hands and the leading representatives as well as the majority of members of governing bodies must be French nationals.⁹⁹

The Aeronautics Act of the Federal Republic of Germany (Luftverkehrsgesetz) links the concept of the German nationality of airlines with the German nationality of aircraft. A commercial license could be refused if the applicant intends to operate aircraft other than those registered in Germany.¹⁰⁰ To register an aircraft in Germany, the aircraft must be owned exclusively by German nationals. As far as legal persons are concerned, the prevailing part of the ownership and the effective control over such entities must be in German hands and the majority of members of the representative or governing bodies must be German nationals.¹⁰¹ Provisions are made in the Act for possible exceptions from these rules for special circumstances.

The airline licensing requirements in the Netherlands include a condition that licences will be granted only to Dutch companies that have demonstrated that the majority of their ownership and their effective control are in Dutch hands.¹⁰² The Italian Code of Navigation¹⁰³ requires that air transport enterprises applying for a licence to operate scheduled air services must qualify under the nationality of owners require-

⁹⁸ The Civil Aviation Act of 1971, pt. I, § 3(6) (as amended by the Civil Aviation Act of 1980, part III, § 12).

⁹⁹ Décrets portant règlement d'administration publique et décrets en Conseil d'Etat, art. R.330-2.

¹⁰⁰ BGBl art. 20(2), § 3 (1961).

¹⁰¹ *Id.* art. 3(1).

¹⁰² Aviation Act, Article 16; Royal Decree of January 29, 1970.

¹⁰³ Italian Code of Navigation, approved by Royal Decree No. 327 of March 30, 1942 (as amended). Requirements concerning the Italian nationality of airlines are expressed for scheduled services in art. 777 of the Code.

ments of the Code.¹⁰⁴ Administrative and technical management of such enterprises must be in the hands of Italian nationals.¹⁰⁵ The Code specifies persons, organizations or companies which would be considered Italian for these purposes, namely the State, Provinces, municipalities and any other Italian public organizations; Italian nationals; companies constituted and established in Italy with at least two-thirds of capital owned by Italians and whose president and two-thirds of the board administrators (including the managing director and the director general) are Italian nationals.¹⁰⁶

In Australia, a commercial air transport license or certificate normally is not issued to a person who is not a British subject ordinarily resident in Australia or a corporation substantially owned and effectively controlled by British subjects ordinarily resident in Australia.¹⁰⁷ A Foreign Investment Review Board controls foreign investment in Australian enterprises, including airlines.¹⁰⁸ Apparently, the policy of the Board is to restrict foreign equity in domestic Australian airlines.¹⁰⁹

The Aeronautical Code of Argentina permits licensing of commercial air transport services in the case of individuals who are Argentinians and have their effective residence in Argentina, and in the case of companies subject to the following conditions:

- 1) The head office must be located in Argentina,
- 2) The control and management must be in the hands of persons effectively residing in Argentina;
- 3) The majority of capital must be owned by Argentinians with the effective residence in Argentina and, if applicable, more than half of co-owners must be Argentinians, and

¹⁰⁴ *Id.* art. 751.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Australian Air Navigation Regulation no. 322 (promulgated 1952).

¹⁰⁸ The Board was established in 1976 to provide, "advice to the Government on foreign investment proposals and to foster an awareness and understanding of the Government's policy." YOUR INVESTMENT IN AUSTRALIA, A GUIDE FOR INVESTORS (1981).

¹⁰⁹ *Id.* at 11.

4) The president and members of the governing body and at least two-thirds of the directors and administrators must be Argentinians.¹¹⁰

Without attempting to provide a more complete review of existing legislation, the above examples will serve as an illustration of various techniques which may be used to secure national control over the ownership of airlines. In other countries other techniques might be used depending on the general constitutional, legal or economic context. A more comprehensive review undoubtedly would lead to similar conclusions.

V. NEW DIMENSIONS AND PROBLEMS

In setting policy, governments distinguish between air carriers on the basis of their nationality, rather than upon performance related factors such as economic efficiency, quality and price of services provided and similar considerations. Such policies, or parallel laws and regulations, may establish a special relationship between a state and its national air carriers, not identical with the relations between such state and foreign carriers operating into its territory. Special policies or laws and regulations compound the effects of general economic and legal conditions such as taxation, labor laws, availability of credits or, in some countries, special exchange rates for hard currencies earned. These considerations would seem to render somewhat artificial the concept of an advantage in the international air services exchange which would entail a special role of some states or carriers in such an exchange.¹¹¹ At the same time, policies, laws and regulations of states based on the nationality of airlines could in any case balance and correct whatever unfavorable effects such artificially created advantage might have upon their national air carriers.

¹¹⁰ Código Aeronáutico de la República Argentina, Ley 17.285, [1967] C Anales, arts. 97-99, 128.

¹¹¹ This has to be compared with cases where such a concept is seen as having some justification. For example, H.A. Wassenbergh has stated that the shares of airlines in international air transport should be determined on the basis of airlines' "fitness, willingness and ability." H. WASSENBERGH, PUBLIC INTERNATIONAL AIR TRANSPORTATION LAW IN A NEW ERA 153 (1976).

To enumerate all the general economic and legal conditions in individual states which affect the competitive position of respective national air carriers is not possible. Because of these specific conditions, air carriers that enter into the international competitive area are not necessarily in an equal position. The rules of the commercial game in international air transport are expressed in the first place in economic provisions of bilateral air transport agreements. While these agreements provide in most instances for equality of opportunity, an air carrier can do very little to correct the effects of general economic and legal conditions or other factors of the artificial comparative advantage. This is another explanation of the need perceived in many states to build and if necessary put in operation mechanisms based on the nationality of airlines aimed at the protection of interests of their national carriers.

The policies of governments with respect to the nationality of airlines may be the result of a combination of several different concerns. The fact of their existence cannot but add some weight to the sometimes disputed views about the specificity of international air transport¹¹² and the need to approach it in a manner not necessarily identical with general external economic policies or ideologies. Such policies on the nationality of airlines constitute an element of regulatory control affecting in one way or other the provision of air transport services. Possibly, these policies could be squared with liberal general

¹¹² International air transport is an export and import of air transport services, comparable to other fields of international trade of services. It has, of course, specific role and characteristic features. The argument revolves about the importance of the specific against the general, in other words about the applicability to international air transport of concepts or policies applied to other areas of international trade. Various commentators have recognized these problems. See, e.g., E. Warner, *Forward*, D. LISITZYN, *INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY* vi (1942) ("We shall have a false idea of air transport history . . . if we think of it as purely a commercial enterprise, or neglect the extent to which political considerations have been controlling in shaping its course."); Lowenfeld, *supra* note 1, at 36 ("The difference between aviation and, say, textiles, shipping or non-ferrous metals is that aviation directly engages the prestige, the fascination, and the national interest of almost all countries in the world . . . international aviation is a serious problem in international relations . . ."); *Av. Daily*, Dec. 11, 1981, at 214 ("it does not make sense to set up a government structure that encourages considering international commerce in aviation and international commerce in all other goods and services in isolation from one another") (statement by A.E. Kahn).

economic policies or liberal air transport policies,¹¹³ but such harmonious interaction cannot be taken for granted.

The apparent expansion of the concept of nationality of airlines may accentuate some of the previously discussed problems. The concept which at the time of the Chicago Conference had a limited protective connotation (authorized services may not be "peddled") and was supported by considerations relating to the responsibility of states for aircraft on their registry, has over the years acquired some additional attributes. The foremost of these is a presumed responsibility of a state for the well-being and prosperity of its national airline industry. This responsibility might have been in earlier stages of development of international air transport, and, in many cases may still be associated with a state's interest in having certain air services operated. The justifiable concern of states bilaterally exchanging air traffic rights not to let such values end up in the hands of third parties not participating in the bilateral exchange, could perhaps be satisfied without requiring a national airline industry. The same could be said about the interest of governments to have activities for which they

¹¹³ See United States Policy for the Conduct of International Air Transportation Negotiations (1978), which expresses the assumption that "competition and low prices are also fully compatible with a prosperous U.S. air transport industry." *Id.* at 1. It also states that the United States and other countries' interest in the economic prosperity of the airline industry is "best served by a policy of expansion of competitive opportunity rather than restriction." *Id.* By offering more services to the public, in a healthy and fair competitive environment, the international air transport industry can stimulate the growth in traffic which contributes both to profitable industry operations and to maximum public benefits. *Id.*

This is, in substance, the same philosophy which led the former CAB Chairman, A.E. Kahn, to the rejection of the concept of bilateral air negotiations as a means to exchange privileges on behalf of air carriers. The CAB constituents are, in his view, "travellers and shippers, rather than airlines" and the function of economic policy is "to serve consumers rather than protect producers." Kahn contrasted the idea of international air negotiations as a zero game ("what foreigners obtain from us, we lose") to the philosophy of such economists as Adam Smith and David Ricardo concerning the elimination of barriers to international trade increasing the total wealth of nations. See A. Kahn, *The Evolving United States International Aviation Policy*, Paper Presented to the Royal Institute of International Affairs, London April 18, 1978. In his testimony before the U.S. House Public Works Investigations and Oversight Subcommittee in December 1981, A.E. Kahn again warned against undue responsiveness to the private interests of the airline industry in protection from competition. See *Av. Daily*, Dec. 11, 1981, at 214.

are responsible, like the international operation of aircraft on their registry, firmly under control through certain specific nationality requirements. Again, such interests need not affect policies relating to the existence or well-being of a national airline industry.

As stated earlier, the concept of the nationality of airlines traditionally has been perceived as inseparable from the principles on which the operation of international air services is based.¹¹⁴ Depending upon circumstances, a bilateral air transport agreement may be concluded with one of the parties not intending to use its rights, or not to use them immediately, or with one of the parties not having at that stage any national carrier capable or wanting to exercise the rights granted under the agreement. The history of international air transport provides numerous examples of situations of this kind.¹¹⁵ Such cases do not alter the conclusion of the place of the concept of the nationality of airlines in the present structures of international air transport. However, the apparent availability of other than strictly national forms of operation of international air services casts doubts upon the perceived essential nature of the link between the nationality of airlines, and the prevailing principles and methods of organization of international air transport services.¹¹⁶

The affirmative aspect of the concept of the nationality of airlines and the presumed responsibility of governments for the well-being of their national airlines has so many manifestations that their enumeration would exceed greatly the scope of this article. Admittedly, the bilateral exchange of traffic rights and related provisions are negotiated with an eye on the interests of carriers which are predestined designated carriers under such a bilateral agreement. This government concern does not, however, end at the moment the negotiations are concluded. During the time of actual application of the agreement, governments monitor and intervene in various forms as necessary to ensure for national carriers the best possible con-

¹¹⁴ See *supra* note 9 and accompanying text.

¹¹⁵ See B. CHENG, *supra* note 14, at 375-76.

¹¹⁶ See *supra* notes 8 and 73 with respect to cooperative operations.

ditions for the operation of their services. This includes the protection of national carriers from measures of foreign governments or other bodies which could be viewed as unfair, unjust or discriminatory. The key which triggers such protective mechanisms is again the nationality of airlines and protection is extended to airlines which are under some kind of national control and contribute through their activities to the attainment of national economic or other objectives.

In economic terms, the operation of international air services is influenced not only by the regime governing traffic rights, access to markets, capacity, tariffs and other basic commercial parameters, but also by laws, policies and practices of governments in such matters as airport and navigation charges, access to facilities, availability and pricing of fuel, taxation, remittance of funds, and currency exchange rates. Particularly in matters of the latter category, which is regulated to a lesser degree by international agreements, a government's perception of unfair treatment of its airlines by other governments may give rise to reciprocal restrictions or other measures aimed at restoring the balance of commercial opportunities.

As to the identification of typical areas of such possible confrontation outside the framework of traffic rights and other basic parameters established usually by bilateral air agreements, of some interest may be the distribution of cases dealt with by the CAB in its annual report for 1978¹¹⁷ under the International Air Transportation Fair Competitive Practices Act.¹¹⁸ Cases of discrimination investigated by the CAB related to airport user charges (five cases), ground handling (five cases), fuel (four cases), currency conversion/remittance (three cases), airways user charges (two cases), security charges (one case), availability of an airport to charters (one case), prohibition of certain discounts (one case), cargo competitive disadvantage (one case) and cargo/capacity restrictions (one

¹¹⁷ CAB Report to Congress (1978).

¹¹⁸ Pub. L. No. 93-623, 88 Stat. 2102 (codified as amended in scattered sections of 49 U.S.C.).

case).¹¹⁹

Similarly, the 1980 McGill Institute study¹²⁰ lists in part the following practices against carriers operating abroad: unequal airport and user charges, preferential customs and immigration services, preferential ground services, discounting or special tickets on the national carrier to the detriment of foreign carriers, restrictions on advertising by foreign carriers, and monopolies held by the national carrier upon check-in, reservation, ticketing, and boarding facilities.¹²¹

The presumed responsibility of governments for the well-being of their national airlines and the measures which may be taken by governments on that basis create the possibility of irritations and conflicts in international air relations. The existing problems may be viewed from differing perspectives; what is perceived as a legitimate, economically desirable measure in one country may be considered unfair or discriminatory by another country. The maintenance of rigid national positions easily may lead in practice to an escalation of a conflict which can affect provision of adequate transportation services to the public.¹²²

The escalation and confrontation of unilateral protective or retaliatory measures is an undesirable prospect. In spite of this, many believe that such measures are the most efficient method to obtain relief in an unsatisfactory situation, particularly in comparison with other procedures which may be available to the injured state. The Chicago Convention¹²³ embodies some basic rules concerning discriminatory practices. One of the objectives of ICAO is to "avoid discrimination between

¹¹⁹ CAB Report to Congress 92-97 (1978).

¹²⁰ CENTER FOR RESEARCH OF AIR AND SPACE LAW, LEGAL, ECONOMIC AND SOCIO-POLITICAL IMPLICATIONS OF CANADIAN AIR TRANSPORT (McGill, Montreal 1980).

¹²¹ *Id.* at 596.

¹²² There is no scarcity of such situations. For example, in 1977 some thought that a dispute between the United Kingdom and Malaysia concerning transit flights by Concorde aircraft over Malaysia could escalate to the point of the suspension of all flights connecting the two countries. See *Av. Daily*, Dec. 29, 1977, at 327. This scenario failed to materialize only because Malaysia allowed the operation of the Concorde through Malaysian air space for a limited, experimental period. See ICAO Doc. 9266, at 28 (1978).

¹²³ *Supra* note 5.

contracting States.”¹²⁴ The Convention ensures the “national” treatment of aircraft of other contracting States with respect to charges for the use of airports and navigation facilities. Charges cannot be higher than those paid national aircraft of the same class engaged in similar operations.¹²⁵ Other provisions ensure non-discrimination in the availability of cabotage rights if any are granted, access to prohibited areas, applicability of air regulations and application of cargo restrictions.¹²⁶

The ICAO Council 1981 Statements on Charges for Airports and Route Air Navigation Facilities¹²⁷ require that such charges be “non-discriminatory both between foreign users and those having the nationality of the state of the airport and engaged in similar international operations, and between two or more foreign users.”¹²⁸ Also, the “proportion of costs allocable to various categories of users . . . should be determined on an equitable basis, so that no users shall be burdened with costs not properly allocable to them” Fuel “throughput” charges, if any, should be assessed in such a manner “as to avoid discriminatory effects, either direct or indirect.”¹²⁹

Procedures to correct an unfair situation through the ICAO are often unsatisfactory and on some issues the ICAO has adopted only recommendations, which are not binding on States. For example, the inclusion of phrases like “insofar as possible” or “as it may find practicable,” impose only weak obligations on member States.¹³⁰ States have too much leeway in the interpretation of the recommendations and in the extent to which they are required to adhere to or even accept the proposals. Even admitting this, it is not quite understandable why States have not approached the ICAO concerning some discriminatory practices, such as complaints over land-

¹²⁴ Chicago Convention, *supra* note 5, art. 44(g).

¹²⁵ *Id.* art. 15.

¹²⁶ *Id.* note 5, arts. 7, 9b, 11, & 35b.

¹²⁷ ICAO Doc. 9082 (1973).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

ing fees, given the clear mandate of Article 15 of the Convention.¹³¹ By precedent setting decision making, the ICAO Council could achieve more significant progress towards an orderly flow of international air transport commerce than is possible in isolated bilateral contexts through unilateral national protective measures.

Typical bilateral air transport agreements also contain several provisions designed to protect airlines designated by one contracting party from unfair or discriminatory practices of the other party.¹³² Bilateral air agreements based upon the Standard Agreement for provisional air routes adopted at the Chicago Conference¹³³ usually include provisions designed to prevent discriminatory practices and to assure equality of treatment in the areas of charges for the use of airports and other facilities and customs. The provisions on charges mostly reaffirm with small variations, rights and obligations under Article 15 of the Chicago Convention.¹³⁴ The requirement of Article 15 of the Chicago Convention concerning "uniform conditions" for availability of airports, open to public use by national aircraft, to aircraft of all other ICAO contracting states, has been developed in some bilateral air agreements into an obligation not to give any preference to national or third party airlines over an airline designated by the other bilateral contracting party in the application of regulations dealing with customs, immigration, quarantine and other similar services or in the use of airways, air traffic services and associated facilities.¹³⁵ Provisions on customs exist in many

¹³¹ The Chicago Convention, *supra* note 5, art. 15.

¹³² See, e.g., Air Transport Agreement Between the Government of the United States of America and the Government of the Italian Republic, June 22, 1970, 21 U.S.T. 2096, T.I.A.S. 6957. Article 9 requires "fair and equal opportunity for the airlines at each Contracting Party." Article 10 prohibits unreasonable and discriminatory rates. *Id.*

¹³³ For the text of the Chicago Standard Form Agreement, see I CHICAGO PROCEEDINGS, *supra* note 25, at 128-29.

¹³⁴ *Supra* note 5, art. 15. For typical language see ICAO Handbook on Administrative Clauses in Bilateral Air Transport Agreements, ICAO Circular 63-AT/6, at 45-48 (1962) [hereinafter cited as ICAO Handbook].

¹³⁵ See, e.g., Air Agreement between Canada and France, June 15, 1976, art. 7, ___ U.N.T.S. ___, reprinted in, [1977] CAN. T.S. No. 15 [hereinafter cited as Canadian-French Agreement].

variations in present bilateral air agreements,¹³⁶ but the main idea remains the ensurance of equality of treatment of foreign and national airlines by exempting foreign airlines from customs duties on certain items introduced into the territory of the other party or taken on board aircraft in that territory.

Apart from rules based upon the Chicago Convention or the Chicago Standard Form of Agreement, several other provisions in typical bilateral air transport agreements have an anti-discriminatory effect. One of the main principles of the 1946 Bermuda bilateral air agreement between the United States and the United Kingdom¹³⁷ was assurance of "fair and equal opportunity" for the carriers of the two nations "to operate on any route between their respective territories . . . covered by the Agreement and its Annex."¹³⁸

This principle, which is related to the ICAO objective under the Chicago Convention to "[i]nsure that . . . every contracting State has a fair opportunity to operate international airlines,"¹³⁹ was adopted in a great number of postwar bilateral air transport agreements and represents a general standard of treatment to be accorded airlines where no specific bilateral rules or provisions apply.

Some bilateral provisions preclude discrimination by expressly enunciating the rights of foreign airlines in activities where discrimination or unfair treatment could occur. Provisions of this nature include an airline's right to engage in the sale of transportation, directly or through agents,¹⁴⁰ to transfer the excess of receipts over expenditures,¹⁴¹ to maintain

¹³⁶ See ICAO Handbook, *supra* note 134, at 49-61.

¹³⁷ Agreement Between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between Their Respective Territories, *signed*, Feb. 11, 1946, 60 Stat. 1499, T.I.A.S. No. 1507 (replaced by Bermuda II, *supra* note 50) [hereinafter cited as Bermuda I].

¹³⁸ *Id.* para. 4. Bermuda II retains and expands upon this concept. See *id.*

¹³⁹ Chicago Convention, *supra* note 5, art. 44(f).

¹⁴⁰ See, e.g., Canadian-French Agreement, *supra* note 135, art. 13.1, which states that "[t]he designated airlines of each Contracting Party shall have the right to engage in the sale of air transportation in the territory of the other Contracting Party directly or through their agents." *Id.*

¹⁴¹ See, e.g., the 1959 Standard Clauses for Bilateral Agreements Developed by the European Civil Aviation Conference, ICAO Circular 63-AT/6, art. 8, at 119 (1962), which provides that:

representatives in the other territory and to choose personnel for commercial, operational and technical ground services,¹⁴² and the right to exemption from taxation on airlines' accrued revenues.¹⁴³

Bilateral air transport agreements concluded by the United States in recent years introduce some new provisions aimed at prevention of unfair and discriminatory practices. Apart from the general principle of "fair opportunity" for the designated airlines "to compete in the international air transportation services covered by the Agreement,"¹⁴⁴ these agreements include another general provision relating specifically to discrimination.¹⁴⁵ Other provisions are aimed at preventing pred-

Either Contracting Party undertakes to grant the other Party free transfer, at the official rate of exchange, of the excess of receipts over expenditure achieved on its territory in connection with the carriage of passengers, baggage, mail shipments and freight by the designated airline of the other Party. Wherever the payments system between Contracting Parties is governed by a special agreement, this agreement shall apply.

¹⁴² For an example of language used, consider the text of article 14 of the Canadian-French Agreement, *supra* note 135, which provides:

The designated airline or airlines of one of the Contracting Parties shall have the right to maintain one or more representatives in the territory of the other Contracting Party, as well as commercial, operational and technical staff as required to operate the agreed services. Said staff may, at the discretion of the designated airline or airlines, be supplied by the airlines themselves, or by any qualified body, company or airline operating on the territory of the other Contracting Part.

¹⁴³ See, e.g., Air Agreement between Canada and the Kingdom of the Netherlands, June 17, 1974, art. 14, — U.N.T.S. —, reprinted in, [1975] CAN. T.S. No. 19. This agreement provides:

Income or profits derived by an airline, which is resident for purposes of income taxation in the territory of one Contracting Party, from the operation by it of an aircraft in international traffic shall be exempt from any income tax and all other taxes on profits imposed by the government of the other Contracting Party.

Id.

¹⁴⁴ See, e.g., Protocol amending Air Transport Services Agreement, Nov. 1, 1978, United States-Federal Republic of Germany, art. 5(a), 30 U.S.T. 7323, T.I.A.S. No. 9591 [hereinafter cited as United States-Germany Protocol].

¹⁴⁵ There are some variations in the formula used. In article 5(f) of the United States-Germany Protocol, *supra* note 144, both parties "reaffirm the importance of the principle of non-discrimination" and undertake to take "all necessary steps to ensure that there is no discrimination" between a party's own designated airlines and airlines designated by the other party. *Id.* The Protocol Amending Air Transport Services Agreement, April 4, 1979, United States-Jamaica, art. 5(5), 31 U.S.T. 318,

atory or discriminatory tariff practices¹⁴⁶ and some unilateral restrictions on capacity.¹⁴⁷ Provisions on commercial operations provide for an airlines' sales activities in the territory of the other party, along with the maintenance of staff, officers, and ground handling.¹⁴⁸

Certain considerations tend to diminish the usefulness of fair treatment and anti-discrimination provisions in bilateral air transport agreements as an instrument for obtaining relief in situations of perceived unfairness or discrimination. Bilateral air agreements may not deal specifically with situations or activities which are the reason for complaints and a general fair treatment provision may not suffice or may not be contained in the agreement. Also, the relief mechanism of bilateral air agreements may be inflexible and too cumbersome to invoke in situations requiring an urgent corrective measure. A contrary argument, however, would be that bilateral air agreements have demonstrated over the years of their existence considerable capacity to adapt to changing circumstances and requirements and there is no obstacle to the inclusion of new provisions covering specifically situations or problems which may require attention. The same applies to the availability and effectiveness of a bilateral relief mechanism.

T.I.A.S. No. 9613, obligates the two parties "to take all appropriate action within their jurisdiction to eliminate all forms of discrimination or unfair competitive practices affecting the airlines of the other Party."

¹⁴⁶ See, e.g., Memorandum of Understanding between the United States and Singapore, June 2, 1979, art. 10(1)(a), T.I.A.S. No. 9654, — U.N.T.S. —, which limits the possible intervention of governments in tariff matters to the "prevention of predatory or discriminatory prices or practices."

¹⁴⁷ See, e.g., United States-German Protocol, *supra* note 144, art. 5(c), which prohibits limitation of the "volume, frequency, or aircraft type operated by the designated airlines of the other party, except as may be required for technical, operational or environmental reasons under uniform conditions consistent with Article 15 of the Convention."

¹⁴⁸ See, e.g., United States-Germany Protocol, *supra* note 144, art. 9; Protocol Amending Air Services Transport Agreements, Aug. 16, 1978, United States-Israel, art. 10, 29 U.S.T. 3144, T.I.A.S. No. 9002; Protocol Amending Air Services Transport Agreement, Apr. 4, 1979, United States-Jamaica, art. 10, 31 U.S.T. 308, T.I.A.S. No. 9613; Protocol Amending Air Transport Services Agreement, Mar. 31, 1978, United States-The Netherlands, art. 10, 29 U.S.T. 3088, T.I.A.S. No. 8998.

VI. CONCLUSION

The concept of national airlines, rather than being an essential part or product of the institutional structures of international air transport, is a socioeconomic or political principle which originates elsewhere but affects these air transport structures. It is not always easy to distinguish between the right protectionism, aimed at ensuring or restoring necessary conditions for orderly airline operations, and the wrong protectionism,¹⁴⁹ which jeopardizes the smooth flow of international air commerce and air transportation services. The assertion of national criteria in this uncertain area can lead only to friction in international air relations and may have a disrupting effect on air services. Therefore, such unilateral corrective measures should give way to international cooperation of different types and forms as appropriate, through consultations or agreements, bilateral or multilateral, however arduous this cooperative approach may appear or prove to be.

¹⁴⁹ CAB Chairman McKinnon provided an interesting confirmation of such confusion. In the speech to the International Aviation Club in Washington he cautioned that the U.S. must "at all costs . . . avoid the siren of protectionism." Then, having pointed out that some industries "do not fit exactly into the general policy," he outlined his "pragmatic approach" to international aviation including protective measures to ensure for the U.S. airlines adequate commercial opportunities in foreign countries. Address by D. McKinnon, Chairman of CAB, International Aviation Club, Washington, D.C. (Feb. 16, 1982) ("A Pragmatic Approach to International Aviation"). Similarly, Transportation Secretary Drew Lewis stated in a November 1981 interview, that he was "very much concerned about our international carriers" but he "did not want it to look like we are going to protect our airlines." *Av. Daily*, Nov. 10, 1981, at 49.