**The Chicago Convention**

- **Article 1** recognizes that each State enjoys complete and exclusive sovereignty over the airspace above its territory.
- **Article 5** gives non-scheduled flights 1st and 2nd Freedom rights, but restricts carriage for compensation on 3rd and 4th Freedoms to “such regulations, conditions or limitations” as the underlying State deems desirable.
- **Article 6** provides that no scheduled flight may operate over or into the territory of a State without its permission, and pursuant to any terms or conditions thereon.
- The Chicago Conference produced two multilateral documents to exchange such rights – the **Transit Agreement** (exchanging First and Second Freedom rights), and the **Transport Agreement** (exchanging the first Five Freedoms).
- The former has been widely adopted, while the latter has received few ratifications.
First Freedom

The civil aircraft of one country has the right to fly over the territory of another country without landing, provided the overflown country is notified in advance and approval is given.
Second Freedom

A civil aircraft of one country has the right to land in another country for technical reasons, such as refueling or maintenance, without offering any commercial service to or from that point.
The First and Second Freedoms were multilaterally exchanged in the **Transit Agreement** concluded at the Chicago Conference in 1944.

126 States have ratified the Transit Agreement. However, several large States have not ratified the Transit Agreement, including the Russian Federation, Canada, China, Brazil, and Indonesia. Hence, for these major States, transit rights must be negotiated bilaterally.
Third Freedom
An airline has the right to carry traffic from its country of registry to another country.
Fourth Freedom
An airline has the right to carry traffic from another country to its own country of registry.
**Fifth Freedom**

An airline has the right to carry traffic between two countries outside its own country of registry so long as the flight originates or terminates in its own country of registry.
The first five rights were included in the **Transport Agreement** concluded at the Chicago Conference in 1944.

However, only 11 States are Parties to the Transport Agreement. Bolivia, Burundi, Costa Rica, El Salvador, Ethiopia, Greece*, Honduras, Liberia, Netherlands, Paraguay, Turkey*

Thus, most traffic rights have been exchanged bilaterally.
Sixth Freedom

An airline has the right to carry traffic between two foreign countries via its own flag State of registry. (Sixth freedom can also be viewed as a combination of third and fourth freedoms secured by the State of registry from two different countries).
Seventh Freedom

An airline operating entirely outside the territory of its State of registry has the right to fly into another State and there discharge, or take on, traffic coming from, or destined to, a third State.
Eighth Freedom

An airline has the right to carry traffic from one point in the territory of a country to another point in the same country on a flight which originates in the airline’s home country. (This right is more commonly known as consecutive cabotage, in which domestic traffic is reserved to domestic carriers).
**Ninth Freedom**

An airline has the right to carry traffic from one point in the territory of a country to another point in the same country. (This right is pure cabotage).
The Chicago Conference of 1944

- At Chicago, the British and Canadians urged creation of an international regulatory authority to distribute routes;
- The Australians and New Zealanders urged creation of a single international airline;
- The U.S. urged open skies.
- A political impasse resulted, so that the Chicago Convention conferred only advisory powers to ICAO over economic issues (Art. 44).
- However, two “side agreements” addressing traffic rights - the Transit Agreement and the Transport Agreement, as well as a model bilateral air services agreements - were drafted in Chicago.
Bilaterals

- The failure to agree on commercial issues led to the bilateral negotiation of traffic rights.
- Thus, bilateral air transport agreements have become the principal vehicle for implementing the rights conferred to States under Articles 1 and 6 of the Chicago Convention to authorize international scheduled air services to, from and through their territory.
- Today, there are more than 2,500 bilateral air transport agreements between nearly 200 States.
“Any nation, except during that the time that it is committed otherwise by the Transit or Transport or other special Agreements, is still fully authorized to take advantage of its own political position and bargaining power, as well as the fortunate geographical position of its homeland and outlying possessions, and unilaterally determine (for economic or security reasons) what foreign aircraft will be permitted to enter or be excluded from its airspace, as well as the extent to which such airspace may be used as part of world air trade routes.”
Bermuda I and the Early Bilaterals

Early bilateral air transport agreements typically addressed five principal issues:

1. entry (designation of carriers and routes);
2. capacity;
3. rates;
4. discrimination and fair competition; and
5. dispute resolution.
Bermuda I: ENTRY

Typically, States exchanged traffic rights on a *quid-pro-quo* basis. Bermuda I-type bilaterals usually identified the routes to be served in an Annex appended thereto, which would be revised periodically with an exchange of notes.

Typically, each State designated one of its flag carriers per city-pair route.
Bermuda I: CAPACITY

Bermuda I-type agreements left to the discretion of carriers the levels of capacity offered, although there were vague provisions requiring that:

(a) air services should be closely related to traffic demand (in the 3rd and 4th Freedom markets);

(b) there should be a fair and equal opportunity for the air carriers of the two nations to operate over the designated routes; and

(c) the "interest of the air carriers of the other government shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same route."

Moreover, each nation enjoyed the right of ex post facto review of capacity.

However, many non-US bilaterals provided for predetermination of capacity, measured by flight frequency or aircraft size.
Bermuda I specified that airport charges could be no higher than those imposed upon domestic airlines.

Taxes, customs duties, and inspection fees, imported fuel and spare parts would be accorded treatment not less favorable than that accorded like items brought in by domestic airlines.
Bermuda I: DISPUTE RESOLUTION

Bermuda I called for consultations between the aggrieved governments, and reference to the ICAO for an advisory report.

Termination of the bilateral air transport agreement could be only upon one year's prior notice.
Bermuda I: RATES

Rates were to be set initially by the airlines themselves, subject to approval upon 30-days notice and prior approval by each of the governments involved.

Rates would have to be "fair and economic", and under domestic regulatory law, just and reasonable and nondiscriminatory.

Prior to 1960, most Bermuda I-type agreements contained an explicit endorsement of the IATA rate-making machinery.
Modern Bilateral Air Transport Agreements

- Entry (Carrier and Route Designation)
- Carrier Nationality
- Pricing
- Capacity/Frequency
- Discrimination/Fair Competition
- Dispute Resolution
- Security
- Cargo
Open Skies Bilaterals

Beginning in 1978, the US began negotiating more liberal bilaterals, conferring “hard rights” to nations willing to liberalize.

In 1992, the US began negotiating even more liberal “open skies” bilaterals, and conferring upon the air carriers of States signing them antitrust immunity for their alliances.
OPEN SKIES BILATERALS:

(1) Open entry on all routes;
(2) Unrestricted capacity and frequency on all routes;
(3) Unrestricted route and traffic rights, that is, the right to operate service between any point . . . including no restrictions as to intermediate and beyond points, change of gauge, routing flexibility, coterminalization, or the right to carry Fifth Freedom traffic;
(4) Double-disapproval pricing in Third and Fourth Freedom markets;
(5) Liberal charter arrangement (the least restrictive charter regulations of the two governments would apply, regardless of the origin of the flight);
(6) Liberal cargo regime (criteria as comprehensive as those defined for the combination carriers);
(7) Conversion and remittance arrangement (carriers would be able to convert earnings and remit in hard currency promptly and without restriction);
(8) Open code-sharing opportunities;
(9) Self-handling provisions (right of a carrier to perform/control its airport functions going to support its operations);
(10) Procompetitive provisions on commercial opportunities, user charges, fair competition and intermodal rights; and
(11) Explicit commitment for nondiscriminatory operation of and access for computer reservation systems.
By 2008, the US had signed bilateral air transport agreements with 114 States, of which, 73 were “Open Skies” bilaterals.
The MALIAT Accord

- In 2001, the US and four Pacific-rim countries (Brunei, Chile, New Zealand and Singapore) concluded the APEC Agreement (also known as “The Multilateral Agreement on the Liberalization of International Air Transport,” [MALIAT], or the “Kona Accord”).

- MALIAT permits unrestricted services by the airlines of the countries involved to, from and beyond the others' territories, without prescribing where carriers fly, the number of flights they operate and the prices they charge.

- Despite the fact that the MALIAT agreement is open for ratification by other States, they have not been beating down the doors to sign. In addition to the original signatories, Samoa, Tonga and Peru joined in 2004, and then Peru withdrew the following year.
In 1988, African Ministers met in Yamoussoukro, Ivory Coast, to consider liberalization of air transport policy on a multilateral basis.

After a series of meetings, they announced the “Yamoussoukro Decision” in 1999, and it was formally adopted by the African Union in 2000; it formally came into force in December 2003.

The West African Economic and Monetary Union adopted a multilateral agreement for its eight member states (i.e., Benin, Burkina Faso, Ivory Coast, Guinea-Bissau, Mali, Niger, Senegal and Toga) implementing the Yamoussoukro Decision.
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The Agreement authorizes every U.S. and every EU airline (irrespective of flag) to:

- fly between every city in the European Union and every city in the United States;
- operate without restriction on the number of flights, aircraft, and routes;
- set fares according to market demand; and
- enter into cooperative arrangements, including codesharing, franchising, and leasing.
The “Plus”, Subject to Side Agreements

The Open Skies Plus framework of the Agreement would:

- Allow U.S. investors to invest in a European Community airline, as long as the airline is majority owned and effectively controlled by a member state and/or nationals of member states;
- Make clear that, under U.S. law, EU investors may hold up to 49.99 percent of the total equity in U.S. airlines, and on a case-by-case basis even more;
- Open the possibility for EU investors to own or control airlines from Switzerland, Lichtenstein, members of the European Common Aviation Area (ECAA), Kenya, and America’s Open Skies partners in Africa without putting at risk such airlines’ rights to operate to the United States; and lastly,
- Grant new traffic rights to EU carriers that would open the door to cross-border airline mergers and acquisitions within the EU, which is possible today only if airlines are prepared to place their international operating rights in legal jeopardy.
TRAFFIC RIGHTS

by

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