

Anomalies in the Regulatory Structure

The Chicago Convention

There is no recognized definition of “air transport”. In the absence of such, let us say that air transport is a product that offers carriage by air from one point to another or several other points and that a study of air transport would essentially involve economic theory and practice pertaining to the air transport industry i.e. the airline industry. Therefore, what we are addressing are primarily the economic aspects of air transport, whether they apply to market access¹ or market based measures in aircraft engine emissions. As the ensuing discussion will reflect, investment in air transport plays a key role in such a discussion.

But first we have to discuss the regulatory structure that provides a foundation for the economics of air transport. In the Preface, I touched on the difficulties posed by the treatment of the Chicago Convention² by the international community as a “moribund” instrument that will continue to serve the ever changing vicissitudes of air transport without much revision. A commentator offers this view:

During its period in force the Chicago Convention underwent a series of minor amendments. However, it must be recognized that, with two exceptions, the amendments were related to cosmetic matters and did not touch the unification of international air law. Nothing of fundamental importance has been amended in the Convention over 60 years. Most of the amendments occurred in a haphazard manner without any thorough preparation

¹ Air transport market access, by any particular air carrier or carriers, is the nature and extent of the basic rights (with any accompanying conditions and limitations) that are granted/authorized by the relevant governmental authorities (and identified and discussed in this chapter) as well as ancillary rights such as those covering product distribution. Air transport market penetration by any particular air carrier or carriers is the extent to which access is actually used to obtain and carry traffic. Rights can be subject to numerous constraints (outside the scope of this chapter) such as aircraft range and payload limitations, airport congestion and distribution system problems. See *Manual on the Regulation of International Air Transport*, ICAO: Montreal, First Edition-1996, Chapter 4.1.

² Convention on International Civil Aviation, 7 December 1944, 15 U.N.T.S. 295, ICAO Doc 7300/9. The Chicago Convention also established the International Civil Aviation Organization.

and reasoning, without any systemic logic but only in response to sometimes “selfish interests of influential States wishing to maintain their acquired quasi permanent position on the Council.”³

While this may well be the case, a greater problem is that the understanding by regulatory authorities of the regulatory principles as enshrined in the Chicago Convention has not progressed with the changing times and remains as it was in 1944. To begin with, one might well ask whether the Chicago Convention applies only to international civil aviation (as its title denotes) or whether the Convention should apply to all civil aviation as was presumed when the international aviation community called for the involvement of the International Civil Aviation Organization (ICAO)⁴ in considering possible action relating to the attacks on the United States on 11 September 2001 which involved only domestic aviation. Confusion is worse confounded by the fact that the concept of State sovereignty as embodied in Article 1 of the Chicago Convention, which states that the Contracting States to the Convention recognize that every State (not merely Contracting States but any State) has complete and exclusive sovereignty over the airspace above its territory, is still viewed by many as a cloistered virtue and a rigid principle whereby States can shut down commercial air traffic within their territories arbitrarily and at will. While technically this may appear to be true, in reality it is both counter intuitive and unjustifiably restrictive. This subject is discussed in more detail in the next chapter.

Although “State Sovereignty” is the term applicable at public international law, it is an incontrovertible fact that sovereignty is vested in the people and in governments. As such sovereignty belongs to the nation and not the State. The fundamental distinction between these two terms is that a nation denotes the people of a country whereas a State as a person at law, as defined in the Montevideo Convention of 1933⁵ comprises four factors: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States. In this context the United Nations, which is a collection of States that acts to the benefit of the people of those States, is appropriately named. This practical anomaly, where States ascribe to themselves sovereignty which should belong to their people, is exposed in the Preamble to the Chicago Convention (which sets the tone and overall objectives of the Treaty) which speaks of preserving friendship and understanding among the “nations and peoples”(my emphasis) of the world for whom air transport services may be established on the basis of equality of opportunity and operated soundly and economically.

³ Milde (2004) at 443.

⁴ ICAO is the specialized agency of the United Nations handling issues of international civil aviation. ICAO was established by the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (Chicago Convention). One of the overarching objectives of ICAO, as contained in Article 43 of the Convention is to foster the planning and development of international air transport so as to meet the needs of the peoples for safe, regular, efficient and economical air transport. ICAO has 191 member States, who become members of ICAO by ratifying or otherwise issuing notice of adherence to the Chicago Convention. See ICAO Doc 7300/9 Ninth Edition 2008.

⁵ Montevideo Convention on the Rights and Duties of States (1933), Article 1. See <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897>.

When we move to Article 2 of the Convention, we find that it is antiquated and outmoded in terms of modern government and governance. The territory of a state, as defined in this provision panders to the vestiges of colonialism which no longer can be found in as much abundance as was seen in 1944 when the Convention was signed. The terms “suzerainty, protection and mandate” are the offenders (suzerainty occurs where a region or people is a tributary to a more powerful entity which controls its foreign affairs while allowing the tributary vassal State some limited domestic autonomy). Furthermore, the reference to “territorial waters” as a benchmark of sovereignty without tagging the term to applicable regimes of international law leaves the reference bereft of clarity and direction.

Article 3 of the Convention stipulates that it would apply only to civil aircraft and will not be applicable to State aircraft. The provision further explains that aircraft used in military, customs and police services will be deemed to be State aircraft. At best this provision is ambivalent and leaves the reader puzzled as to whether it is an inclusive or a comprehensive provision that excludes all other forms of aircraft engaged in the services of the State. According to one commentator this provision is in itself not a definition but remains a rebuttable presumption which is not exhaustive.⁶

A civil aircraft has been defined as any aircraft, excluding government and military aircraft, used for the carriage of passengers, baggage, cargo and mail.⁷ Civil aviation comprises in general all aviation activities other than government and military air services which can be divided into three main categories: commercial air transport provided to the public by scheduled or non scheduled carriers; private flying for business or pleasure; and a wide range of specialized services commonly called aerial work, such as agriculture, construction, photography, surveying, observation and patrol, search and rescue, aerial advertisement *et.al.*⁸ By the same token, military aviation must be aviation activities carried out by military aircraft. Military aircraft have been defined as aircraft that are designed or modified for highly specialized use by the armed services of a nation.⁹

The Convention does not address the subject of the use of civil aircraft for military purposes. This subject brings to bear issues of identification of aircraft and the status of aircraft under article 3 of the Chicago Convention. The question as to whether civil aviation and military aviation have demarcated operational regimes or whether they can still function in symbiosis has become an argumentative one in view of developments in the air transport industry which have occurred over the years. There are some determinants in this regard. Firstly, the nature of the cargo carried. Are they supplies or equipment for the military, customs or police services of a State? Article 35 of the Chicago Convention recognizes that the mere carriage

⁶ Milde, *supra*, note 3 of this chapter at 418.

⁷ Groenewege (1999) at 437. It must also be noted that an aircraft has been defined in Annexes 6, 7 and 8 to the Chicago Convention as any machine which can derive support in the atmosphere from the reactions of air other than the reactions of air on the Earth's surface.

⁸ *Ibid.*

⁹ <http://www.answers.com/topic/military-aircraft>.

“of munitions or implements of war” does not by itself make an aircraft a state aircraft. Then there is the question of ownership of the aircraft. Is it owned privately or by the State? The degree of control and supervision of the operation of the aircraft by the specified services are also factors to be considered in this equation. The nature of the passengers or personnel carried is also a consideration. Are they military, customs or police officials, or members of the public at large? Is the particular flight open for use by members of the public? Do aircraft registration and nationality markings become relevant? Will a usual civil (ICAO) flight plan be submitted and the usual air traffic clearances obtained? What is the nature of crew? Are the crew civilian, or are they military, customs or police personnel, or employed by these services? Who is the operator? Is the operator a military, customs or police agent? What sort of documentation is carried in the aircraft? Are the documents required by the Chicago Convention and its Annexes to be carried on civil aircraft in fact being carried (e.g. certificate of registration, certificate of airworthiness, licences for the crew, journey log book, etc.)? What would the area of operations be? Will the aircraft fly to, or over, areas in a situation of on-going or imminent armed conflict? What about customs clearances? Will the normal clearances be obtained?

The broad answer to all these questions would lie in the fact that, in the ultimate analysis, the responsibility of using civil aircraft and crew for military purposes rests with the State concerned. The fundamental legal premise which applies in such situations is that, in international relations, the erosion of one’s legal interests by another brings to bear the latter’s responsibility. State responsibility is a recognized principle of international law in the current context. The law of international responsibility involves the incidence and consequence of acts which are irregular at international law, leading to the payment of compensation for the loss caused. It might therefore just be worthwhile to inquire as to whether Article 89¹⁰ of the Chicago Convention should be reviewed so that the international community and

¹⁰ Article 89 stipulates that in case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle would apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council. In October 1949, on the occasion of the adherence of Israel to the Chicago Convention, the Government of Egypt advised ICAO that, in view of considerations of fact and law which at that time affected Egypt’s special position with regard to Israel and in pursuance of Article 89, Israeli aircraft may not claim the privilege of flying over Egyptian territory. See letter dated 16 October 1949 reproduced in Annex A to Doc 6922-C/803 at p. 125. It was Egypt’s claim, as was later clarified by Egypt upon a query of the Secretary General of ICAO, that a state of war existed between the two countries. The Government of Iraq also advised ICAO along similar lines, that a state of emergency had been declared on 14 May 1948 and therefore Article 89 was applicable and all Israeli aircraft were denied the privilege of flying over the territory of Iraq. On 28 November 1962 the Government of India informed ICAO that as a result of external aggression into Indian Territory by the People’s Republic of China a state of grave emergency existed and the Government of India may not find it possible to comply with any or all of the provisions of the Chicago Convention. On 6 September 1965 the Government of Pakistan notified ICAO of the state of emergency under Article 89. In all instances, ICAO relayed the communications received to all its member States.

ICAO could be given more flexibility in the determination of propriety in the use of civil aircraft for military purposes.

The most baffling provision in this category is Article 3c) of the Convention which requires that no State aircraft of a Contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise and in accordance with the terms therein. The obvious question which follows this provision is “why does the Chicago Convention say on the one hand that it does not apply to State aircraft and on the other contain a provision applicable to State aircraft? This absurdity is carried to its next level where the Convention stipulates in Article 3d) that the Contracting States undertake, when issuing regulations for their State aircraft, that they will have due regard to the safety of navigation of civil aircraft.

As the next Chapter on investment will elaborate, Article 6 of the Chicago Convention is a monument to the disastrous state of affairs regarding market access and air traffic rights that has prevailed ever since the Convention was signed in 1944. The restriction placed on air carriers by Article 6 which provides that no scheduled international air service may be operated over or into the territory of a Contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization, initially prohibits airlines from operating scheduled international air services. This prohibition can be lifted only if airlines obtain permission from the grantor State to operate air services in and out of the territory of that State.

Article 6 should be revisited in the context of the discussions during the Chicago Conference of 1944. The United Kingdom, in its statement of position, strongly advocated a plan that would provide the services needed between States, serve the interests of the travelling public and would be fair between States. It was further recognized that each State had a fair share in the operation of air services and carriage by air of traffic, giving as an example the pre war proposals by the United Kingdom and the United States of opening a trans-Atlantic service on a fifty-fifty basis. The United Kingdom further contended:

While recognizing national interests we want to encourage enterprise and efficiency which are indeed themselves a national as well as an international interest. And we want therefore to encourage the efficient and to stimulate the less efficient. . .only by common action on some such lines as indicated can we reduce and gradually eliminate subsidies, thereby putting civil aviation on an economic footing and incidentally very considerably relieving the tax payer. Unrestricted competition is their most fruitful soil.¹¹

The United Kingdom seems to have adopted a balanced approach that supported the establishment of air services to serve the needs of the travelling public, while not unduly affecting the rights of States to have a fair share of traffic for themselves.

¹¹ See Proceedings of the International Civil Aviation Conference (1948) at 65.

India, while believing that it was essential for air services to develop rationally with a certain degree of freedom of the air being the inherent right of every State, went on to say:

We believe that the grant of commercial rights - that is to say, the right to carry traffic to and from another country, - is best negotiated and agreed to on a universal reciprocal basis, rather than by bilateral agreements. We think that only such an arrangement will secure to all countries the reciprocal rights which their interests require. But the grant of any such freedoms and rights must, in our opinion, necessarily be associated with the constitution of an authority which will regulate the use of such freedoms. It will be the function of such authority. . .to ensure that the interests of the people, both of the most powerful and of the smaller countries, are secured.¹²

India's position therefore has been to recommend a liberal approach of universal reciprocity within the parameters of control by an authority which could ensure that the smaller nations were protected from being swamped by larger States.

It is important to note that the economic significance of the Chicago Convention lies entirely in its main theme—of meeting the needs of the peoples of the world for economical air transport, whilst preventing waste through unfair competition and providing for a fair opportunity for all States concerned to operate air services. In order to accomplish this goal, the Convention, through ICAO, has to consider all aspects of economic implications that the operation of international air services by commercial air transport enterprises of the world, particularly those of the member States of ICAO, pose.

In August 1945, at the first meeting of the Opening Session of the Interim Council of the Provisional International Civil Aviation Organization (PICAO), the Hon. C.D. Howe, Minister of Reconstruction, Canada said :

We (Canada) believe that there must be greater freedom for development of international air transport and that this freedom may best be obtained within a framework which provides equality of opportunity and rewards for efficiency.¹³

Dr. Edward Warner, Representative of the United States of America (later the first President of the ICAO Council) said at the same meeting:

Our first purpose will be to smooth the paths for civil flying wherever we are able. We shall seek to make it physically easier, safer, more reliable, more pleasant; but I believe it will be agreed also that we should maintain the constant goal that civil aviation should contribute to international harmony. The civil use of aircraft must so develop as to bring the peoples closer together, letting nation speak more understandingly unto nation.¹⁴

Dr. Warner had notably stressed the purpose of civil aviation to be the promotion of international harmony and dialogue between nations. He had also made it clear that the seminal task of civil aviation is to bring the people of the world together through understanding and interaction. It is clear that at this stage at least,

¹² *Id.* 76.

¹³ *PICAO Documents*, Montreal, 1945, Volume 1, Doc 1, at 3.

¹⁴ *Id.* Doc 2, at 2.

civil aviation was recognised more as a social necessity rather than a mere economic factor. In addition, through the statements of Minister Howe and Dr. Warner, one can glean the attitude of the international community towards aviation at that time:

- (a) That civil aviation was based on equality of opportunity: and,
- (b) That it was a social need rather than a fiscal tool.

The First Interim Assembly of the Provisional International Civil Aviation Organization (PICAO) was held in May 1946. This Session set the scene for identifying issues that had culminated in the provisions of the Chicago Convention. In the period that followed the First Interim Assembly Session, PICAO commissioned a group of experts called Commission 3 to draft a multilateral agreement on commercial rights for aircraft, which culminated in a Draft Multilateral Agreement on Commercial Rights. The Draft Agreement contained three basic elements:

1. A grant of the right to operate commercially to a reasonable number of traffic centres serving as conveniently as is practicable each State's international traffic;
2. A basic regulatory provision dealing with the amount of capacity to be provided, with subsidiary provisions designed to prevent abuses; and,
3. A provision for the settlement of differences between contracting States through arbitral tribunals with power to render binding decisions.¹⁵

The only provisions of the draft on which unanimous agreement was not reached were those concerning routes and airports and capacity. Commission 3 also inquired into the distinction between scheduled and non-scheduled services as they appeared in Articles 5 and 6 of the Chicago Convention.

As a result of the study of Commission 3 on scheduled and non-scheduled air transport, the Air Transport Committee, at the 17th Session of the ICAO Council, examined in 1952, a Secretariat study on regulations in international non-scheduled aviation. The study found that at the time, national policies with respect to the taking on or discharging of traffic in their territories by foreign non-scheduled aircraft had taken a variety of forms. There were 13 States which required prior permission for each individual flight or series of flights where the granting of permission was based on the circumstances of each case. 10 States required that permission for non-scheduled flights should be granted for each flight or series of flights subject to prescribed regulations. Some States required specific bilateral agreements, while others demanded reciprocal treatment for their carriers.¹⁶ Five European States were known to have made arrangements by means of formal bilateral arrangements for the regulation of non-scheduled commercial flights between their territories.¹⁷

The Committee also noted that the Council had expressed the view that a "stop for non-traffic purposes" as referred to in Article 5 of the Convention should be

¹⁵ *Views of Commission No 3, Doc 4023, A-1—P/3, 1/4/47*. See also *C-WP/369, 22/6/49* for a detailed discussion on the Commission's work on the Agreement.

¹⁶ *AT-WP/295, 15 Dec 52* at 5.

¹⁷ *Ibid.*

taken to include the freedom to load and unload passengers or goods not carried for remuneration or hire. The Council had also considered “remuneration or hire” to mean something received for the act of transportation from someone other than the operator. This interpretation would mean that flights carried out on the business of the operator would receive the freedom granted by the first paragraph of Article 5.¹⁸ The Council’s analysis of Article 5 also indicated that the State flown over must not consider its right to require landing as a matter of course and that this right, as granted in the provision, must not be exercised too restrictively. Consideration was also given to the fact that although the Chicago Convention, by Article 3, precludes its application to State aircraft, most States may be prepared to agree that civilian State aircraft should be given the type off free passage described in the first paragraph of Article 5.¹⁹ The same right may be given to emergency operations, taxi type flights and all inclusive charter tours.²⁰

An analysis containing the above views of the ICAO Council, together with a definitive report by Council to contracting States of scheduled international air services²¹ as referred to in Article 6 of the Chicago Convention was adopted by Council at its Fifteenth Session on 28 March 1952. This Report contained the fact that a scheduled international air service must in the first instance consist of a series of flights. A single flight by itself could thus not constitute a scheduled international air service. Article 6 therefore requires that a series of flights must be performed through the air space over the territory of more than one State and performed by aircraft for the transport of passengers, cargo or mail for remuneration in order to constitute a scheduled national air service. The service must be performed so as to serve traffic between the same two or more points, either according to a published time table, or with flights so regular or frequent that they constitute a recognizably systematic series.²² The word “remuneration” in the provision has the same application and meaning as in Article 5.

In the meanwhile, in 1946, the United States and the United Kingdom, as a means of compromise between the “free market” approach of the former and the somewhat more cautious and conservative approach by the latter entered into a bilateral agreement for air services between their two territories. Called “Bermuda 1” this agreement represented a compromise between the philosophies of the two States that had been so divergent during the Chicago Conference. The Bermuda 1 agreement

¹⁸ See AT-WP/296, 15/12/52, at 9.

¹⁹ *Ibid.*

²⁰ AT-WP/296 *supra*, note 18 at 10.

²¹ The ICAO Assembly, at its Second Session held in Geneva in June 1948, adopted Resolution A2-18 which called for the adoption by Council of a definition of the term “scheduled international air service”. See Doc 7670, *supra*, note 52 in the chapter “Anomalies in Airline Economics”, at 79–80.

²² See, *Report By the Council to Contracting States on the Definition of a Scheduled International Air Service and the Analysis of the Rights Conferred by Article 5 of the Convention*. Doc 7278, C/841, 10/5/52.

was typified by its restrictive pricing regime and liberal capacity arrangements and route descriptions. In the Agreement, while the United States compromised by withdrawing its opposition to the international regulation of fares and agreed that primary fare-setting functions should devolve upon the International Air Transport Association (IATA), the United Kingdom agreed to retract its earlier position that capacity should be regulated and recognized that airlines should be allowed to regulate capacity by determining their frequency on a given route provided that Governments were the ultimate arbiters of the control of capacity on the routes that were relevant to their territories. Accordingly, the Bermuda 1 Agreement determined that capacity should bear a strong and close relationship to the requirements of the public for air transport.

Many other States followed the Bermuda model in their air services agreements for nearly 30 years following its conclusion. One of the advantages of the Bermuda model was recognized as the IATA tariff setting clause which achieved a certain multilateralism through bilateralism, while one of its main disadvantages has been known to be that it gave governments a basis to formulate their civil aviation policies and sometimes adopt an unduly restrictive stance on their sovereignty in airspace, leading to air traffic rights that were being enjoyed by airlines being frequently withdrawn by States. Due to these shortcomings, Bermuda 1 collapsed predictably after 30 years.²³

The first ICAO Assembly in 1947 followed up on the development of a Multilateral Agreement on Commercial Rights in International Civil Air Transport that was commenced by PICAO. At this Assembly, The United Kingdom felt that certain general principles should govern route agreements.²⁴ The concern of the US Government was that in matters of frequencies, capacity route exchanges and fifth freedom traffic rights, there would be disorder in operating on a general multilateral basis.²⁵ At this meeting, the Delegate of Canada analyzed the reason for seeking multilateralism in air services by stating :

So we looked at the matter basically and said, "Why do we want Multilateralism?" and the feeling that I had, speaking for Canada, was not that we wanted uniformity, although that is desirable, in as much as I see no end result in uniformity for its own sake. We had a much loftier purpose in mind, and that was the idea of creating a set of conditions that all nations who wanted to fly could use so that they would know in advance what their opportunities were, what the conditions were that they would be up against, so that it would not be possible for nation to discriminate against another, and grant to another nation privileges that they would not be willing to grant to others equally entitled to them, so that these things would not lead to friction between nations and quarrels and eventually be the seed from which might spring a war. For this reason, it was said we wanted multilateralism, not merely uniform clauses.²⁶

²³ The "Bermuda II" Agreement, which was signed in 1977, contained a system of multiple designation of airlines by one State and other liberal provisions that toned down the harshness of capacity and route designation of its predecessor.

²⁴ ICAO *Doc 4510, AI-EC/72*, May 1947, 12–13.

²⁵ *Id.* 23.

²⁶ *Id.* 35.

The views of the developing world were placed before the Assembly by the delegate of Peru :

The multilateral agreement is a high ideal for which we have already fought and must continue to fight, but a firm fighting spirit should not allow eagerness to obscure reality. The latter, as we Peruvians see it, places grave difficulties in the way of an absolute and universal multilateral agreement. Those difficulties emanate from the different stages of development in commercial aviation among various nations, from the different aeronautical potential of each country, from the variations found when considering each country in international air transport, according to its climatic or geographical conditions and lastly, what is more important, the substantial differences between the countries already in commercial aeronautics, and these countries, such as ours, which can only look to the future.²⁷

The ICAO Assembly, at its Second Session held in Geneva in June 1948 adopted Resolution A2-16 which called for further action on a Multilateral Agreement on Commercial Rights and resolved that contracting States study and consider the above elements.²⁸

Pursuant to the inability of contracting States to reach multilateral agreement on uniformity in the award of air traffic rights, two agreements emerged that attempted to group States into accepting a limited common base on commercial aviation. The first—the Transit or Two Freedoms Agreement—was signed by 32 States and admitted of aircraft of those States being able to fly across each other's territories or land them for non-traffic purposes, without having to obtain permission from the grantor State concerned. The second—the Five Freedoms or Transport Agreement, was signed by 20 States who granted each other the Five Freedoms of the air as they are known today, which their carriers could use freely in each others territories.²⁹ Those States which did not sign any of these agreements were required to sign bilateral air services agreements with each other, if their aircraft were to operate commercial air services into each other's territories involving the taking on or discharging passengers, mail and cargo in each other's territories. In addition, cabotage was introduced in Article 7 of the Convention, giving states the option of disallowing aircraft from a State from picking up or discharging passengers, mail and cargo destined from one point of a State to another.

Article 10 of the Chicago Convention grants authority to a State to make an aircraft which flies over its territory land for customs purposes, Article 15 *inter alia* provides

²⁷ *Id.* 45–46.

²⁸ *Resolutions and Recommendations of the Assembly 1-9th Sessions (1947–1955)* Part II, Doc 7670 at 78.

²⁹ See Shawcross and Beaumont (1977). There are three other freedoms of the air that have been added since the Chicago Convention was signed: The Sixth Freedom provides that an airline has the right to carry traffic between two foreign States *via* its own State or registry. This freedom can also be considered a combination of third and fourth freedoms secured by the State of registry from two different States producing the same effect as the fifth freedom *vis a vis* both foreign States; The Seventh Freedom allows an airline operating air services entirely outside the territory of its State of registry, to fly into the territory of another State and there discharge, or take on, traffic coming from, or destined for, a third State or States; and, the Eighth Freedom is Cabotage, as referred to in Article 7 of the Chicago Convention. See Dempsey (1987) at 50. There is also a Ninth Freedom, which is referred to in note 30.

that airports will be open for use by aircraft of contracting States and that no State shall impose charges on aircraft for use of such airports on a discriminatory basis.

Article 24 admits of the admission of aircraft free of duty, subject to the customs regulations of a grantor State. The same provision allows—for the exemption from customs duty, inspection fees or similar national or local duties or charges—fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft which arrive in the territory of State and retains the above mentioned items at the time of leaving the territory of that State. Also, spare parts and equipment imported into the territory of a contracting State for incorporation in or use on an aircraft of another State are made exempt of customs duties by the same provision.

Two things have to be done if the air transport industry were to be recognized as a major contributor to the world economy and trading process and assisted accordingly. The first is to treat air transport as a trading tool and not as a luxury. A liberalized trading process must be applied in the context of air transport. It is incontrovertible that liberalization of air transport is a global trend that is irreversible and has been ongoing since the eighties. In the liberalization process, fluctuations of global economic factors and their effect on the role and national approaches to market access continues to be the most critical element in air services agreements between States. These factors remain integral to substantive regulatory liberalization should a State decide to radically alter its stance toward opening the skies. In considering liberalization of market access, States invariably face two basic issues: the extent of liberalization, *i.e.* how open the market access should be in terms of the grant of traffic rights; and the approach to liberalization, *i.e.* whether liberalization should be national, bilateral, regional, plurilateral, or multilateral and the pace with which liberalization should be pursued.

Article 7 which deals with cabotage³⁰ is also often misunderstood by those who interpret it erroneously as prohibiting cabotage. The text of the Article only provides that State shall have the right to refuse permission to the aircraft of Contracting States to carry cabotage traffic. The operative words are “shall have the right” which, in the context of other various different words used in the Convention which identify States’ duties would understandably create in the minds of the reader a presumption of prohibition.

³⁰ A cabotage right or cabotage privilege is a right or privilege granted to a foreign State or foreign carrier to carry revenue traffic from one airport of a State to another in the same contiguous territory of that State. see Manual on the Regulation of International Air Transport, ICAO Doc 9626, at 4.1-10. Cabotage is covered in what is called the Eighth Freedom of The Air—which is the right or privilege, in respect of scheduled international air services, of transporting cabotage traffic between two points in the territory of the granting State on a service which originates or terminates in the home country of the foreign carrier or (in connection with the so-called Seventh Freedom of the Air) outside the territory of the granting State (also known as Eighth Freedom Right or “consecutive cabotage”).

The Ninth Freedom of The Air is the right or privilege of transporting cabotage traffic of the granting State on a service performed entirely within the territory of the granting State (also known as a Ninth Freedom Right or “stand alone” cabotage).

Terminology of the Chicago Convention

In the context of terminology of the Convention, various words have been used in various contexts that may cause confusion. For example, various provisions, depending on their compelling nature, use words that attempt to describe the meaning and intent of the treaty. For example, Article 1, on the question of sovereignty, states that the contracting States “recognize” that each State has complete and exclusive sovereignty over the air space above its territory. Here, the word “recognize” conveys the meaning that the legal recognition of sovereignty of nations has already existed, which is a fact, as sovereignty over national airspace was first introduced in the Paris Convention of 1919. In Articles 2 and 3 that follow, the Convention uses the word “shall” to denote a peremptory rule of law (for example, in Article 3 a) the Convention stipulates that it “shall” be applicable only to civil aircraft, and shall not be applicable to State aircraft).

In Article 3 *bis* a) and b) one again sees the word “recognize” where the Convention provides that Contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that States also recognize that each State has the right to require aircraft to land at designated airports. However, in Article 3 *bis* c) the provision starts with “Every civil aircraft shall comply with an order given in pursuance of paragraph b) of the Article”, thus bringing in the mandatory element of compliance.

A slight deviation is seen in Article 4, where the Convention provides that each Contracting State “agrees” not to use civil aviation for any purposes inconsistent with the aims of the Convention. Here, the word “agrees” implies general agreement of States. It is arguable that the particular use of the word leaves a window of opportunity for a State to deviate from its agreement if it is impossible for that State to keep to its agreement. In the following Article, the word “agrees” occurs once again where States are recognized as having agreed to allow non scheduled flights the right to make technical and non commercial flights into their territory.

Article 6 deviates from the positive approach of the preceding provisions by saying that each Contracting States shall have the right to refuse cabotage rights or commercial air traffic rights to foreign aircraft between points within their own territory. The use of the words “shall have the right to refuse” are skillfully used to convey the meaning that a State’s right to grant cabotage rights already exists.

The discretionary right of a State is explicitly recognized in Article 9, which provides that each Contracting State may, for reasons of military necessity or public safety, restrict or prohibit aircraft in certain circumstances of flying over their territory. The use of the word “may” is clear in its meaning and purpose.

Article 12 carries yet another nuance of language where each contracting State is required to undertake to adopt certain measures. The word “undertake” implies accountability and responsibility. The difference between the use of the words “agree” and “undertake” bring to bear the clear intent of a treaty carved out many years ago with vision and foresight by its founding fathers.

The above terminology can be compared with the use of the words in Article 17 which state that “aircraft have the nationality of the State in which they are registered”. It is to be noted that this provision does not have the peremptory admonition issued by the word “shall” and one could only conclude that the provision conveys that it is a fact taken for granted, that once an aircraft is registered in a particular State it shall *ipso facto* be deemed registered in that State. The following statement in Article 18, that aircraft cannot be validly registered in more than one State, conveys the impossibility of such an exigency. Here, the use of the word “cannot” instead of “shall not” leaves no room for doubt that in this instance the right for dual registration of aircraft did not exist to begin with. This usage is contrasted with the use of the words “shall not” which implies that a right which seemingly exists is taken away.

Another provision in the Chicago Convention which needs some refurbishment is the portion of Article 15 which provides that any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher, (a) as to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and (b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services. In theory, this principle is fine. However, without additional words in the provision that would ensure that the protection of users against potential abuse of dominant position by airports and air navigation services providers (ANSPs) is a State’s responsibility and that this responsibility could be discharged through economic oversight, i.e. monitoring by a State of the commercial and operational practices of service providers, it will be rendered destitute of effect. Similarly, since many airports and air navigation service providers do not consult users in setting charges, innovative solutions must be ensured to establish the foundation for a sound cooperation between providers and users. On the issue of governance the Convention should be clear that States establish autonomous entities to operate airports, taking into account the economic viability of the airport as well as the interests of service providers and users. Where the operation of one or more airports represents only one of several functions performed by a government entity, States should give consideration to a clear separation of the regulatory and operational functions, with roles and powers clearly defined for each one.

Arguably the most troubling issue for air transport is that the Chicago Convention in Article 44 identifies the aims and objectives of ICAO as “to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport” making it clear that ICAO has no authority to develop principles of air transport as it can in the area of air navigation. An example of this dilemma is the ongoing spat over the European Emissions Trading Scheme (which is discussed at length in Chapter Four), where all ICAO member States (including those of Europe) agree that a solution to the problem should be found through ICAO. By this, do the States mean exactly what ICAO’s Mission and Vision Statements say *i.e.* that ICAO is just a global forum where

States come to agree with each other? Or, do these States mean that ICAO should initiate and offer a globally applicable instrument regarding financial instruments pertaining to aircraft engine emissions?

Moving on, the Convention does not clarify in Article 48 what the ICAO Assembly is except to say that it will meet at least every 3 years upon being convened by the ICAO Council. The most substantial function of the Assembly, which is to adopt Resolutions is not even mentioned in the Convention, bringing to bear a serious ambivalence of the functions of the Assembly. Article 49(k) on powers and duties of the Assembly is somewhat insouciant when it says that the Assembly will “deal with any matter within the sphere of action of the Organization not specifically assigned to the Council”.

It is clear that the Chicago Convention should be looked at seriously by the aviation community with a view to adapting it to modern exigencies of air transport from the perspective of the consumer. As this discussion demonstrated, a good start would be Articles 1 to 15 which primarily deal with air transport.

References

- Dempsey PS (1987) Law and foreign policy in international aviation. Transnational Publishers, Dobbs Ferry, p 50
- Groenewege AD (1999) Compendium of international civil aviation, 2nd edn. International Aviation Development Corporation, Canada, p 437
- Milde M (2004) Chicago convention at sixty – stagnation or renaissance? *Annals of Air and Space Law* XXIX:443–472
- Proceedings of the International Civil Aviation Conference (1948) Chicago, Illinois, November 1–December 7 1944. United States Government Printing Office, Washington, p 65
- Shawcross CN, Beaumont KM (1977) Air law, vol 1, 4th edn. Butterworths, London



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