The Patchwork in the Sky

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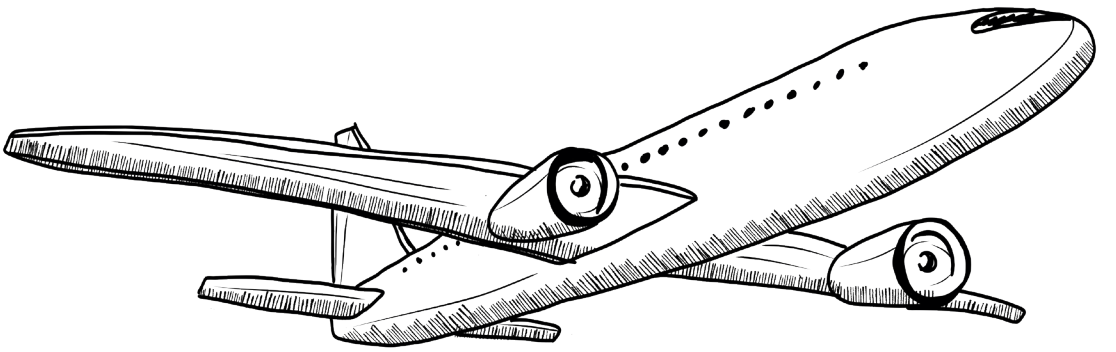
An examination of how the eight largest global aviation markets regulate trade, investment and alliances between airlines



Emma Moulds

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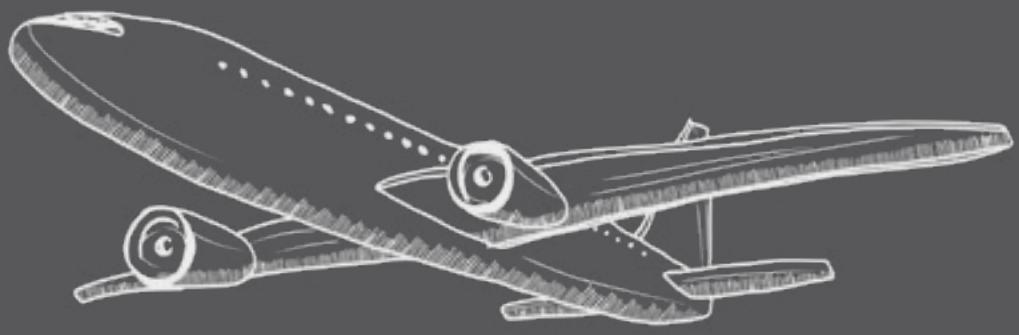


CHAPTER 1:

INTRODUCTION

OVERVIEW

Prior to the COVID-19 pandemic, the airline industry had been on an upward trajectory. In 2019, registered airlines carried nearly 4.6 billion passengers on domestic and international air transport services.[1] The International Civil Aviation Organization (ICAO) had forecast that world scheduled passenger traffic would increase at an average annual rate of 4.6 per cent between 2011 and 2030.[2] The International Air Transport Association (IATA) projected that airlines would carry 8.2 billion passengers by 2037.[3]

In 2020, COVID-19 decimated the airline industry. The total number of passengers on domestic and international services decreased by approximately 60 per cent on the year prior and ICAO estimates that airlines lost approximately $US372 billion in revenue.[4] Although markets began to recover in 2021, ICAO estimates that the total number of passengers was 49 per cent lower than 2019.[5] The airline industry has suffered many shocks, tragedies and black swan events before, such as the Severe Accurate Respiratory Syndrome (SARS), Middle East respiratory syndrome (MERS), September 11 and various volcanic eruptions and financial crises, however, these shocks have tended to be regional in nature and short in duration. The sheer scale and duration of the COVID-19 pandemic is unparalleled.

To mitigate the financial impacts of COVID-19, airlines initially implemented a wide range of measures to reduce their operating and capital expenditure. These measures typically included heavily reducing seat capacity, furloughing or retrenching staff, retiring older and inefficient aircraft, deferring orders for new aircraft and severing lease arrangements. Some airlines refitted aircraft to capitalise on cargo opportunities. Governments implemented a wide-range measures to support their aviation sectors, such as employee support packages, low interest loans, waivers of government fees and charges and substantial recapitalisations of key airlines. In addition to this support, airlines also sought to raise additional capital and took on substantial debt.

1 The World Bank, Air transport, passengers carried (2022) <http://data.worldbank.org/indicator/IS.AIR.PSGR>.

2 International Civil Aviation Organization, 'Global Air Transport Outlook to 2023 and trends to 2040' (Circular 333 AT/190, ICAO, 2013), 12.

3 International Air Transport Association, 'IATA Forecast Predicts 8.2 billion Air Travelers in 2037' (Press Release No. 62, 24 October 2018) <https://www.iata.org/pressroom/pr/Pages/2018-10-24-02.aspx>.

4 International Civil Aviation Organization, 'Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis' (Powerpoint Presentation, 10 June 2022) 3-4.

5 Ibid.

Past shocks and global events have typically spurred change within the industry and brought into sharp focus how governments regulate airlines with respect to trade and market access, investment and competition. In the long-term, it is foreseeable that national governments will be unable to continue to provide ongoing financial support at the levels that they have done so to date. Beyond the immediate impact of the pandemic, the reduction in demand for air transport services may continue to necessitate structural changes within the industry, and in the longer term, may require States to rethink how they regulate foreign investment, market access and competition between airlines.

The economic regulatory framework underpinning scheduled international air passenger transport has been long-standing and is unique when contrasted with other internationally traded goods and services. Trade in air services explicitly sits outside the remit of the World Trade Organization (WTO) and major trade agreements. A passenger's transit options are instead a by-product of a complex, patchwork international regulatory framework. The Convention on International Civil Aviation (the Chicago Convention) provides States with exclusive sovereignty to regulate their own airspace.[6] However, it does not prescribe how this is to occur. In practice, States regulate airlines through a combination of domestic legislation, and for scheduled, international air transport services, bilateral treaties, commonly known in the industry as air service agreements (ASAs) or air transport agreements (ATAs).

The patchwork regulatory framework imposes a number of economic regulatory barriers for airlines. For an airline to offer international services, it must firstly be licensed by a State under that State's domestic legislation. One of the common criteria an airline will be required to satisfy in order to obtain its operating licence is that it is substantially or majority owned and effectively controlled by nationals of the licensing state. These criteria effectively limit an airline's ability to access to foreign investment and management personnel, notwithstanding that the airline may provide international services spanning the globe.

A licence, by itself, does not however, provide an airline with the requisite authority to then offer scheduled, international air transport services to passengers. An airline is not permitted to fly into the territory of, or transport passengers or cargo to or from another State without permission. To service international routes, an airline's licensing State must be a party to an ASA or multilateral agreement with the State to which the airline wishes to fly. The airline is also required to be designated or authorised to service the route under that ASA or multilateral agreement.

6 See *Convention on International Civil Aviation*, opened for signature on 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) ('*Chicago Convention*'), arts. 1, 6 and 7.

ASAs and multilateral ATAs typically impose a number of restrictions on airlines with respect to the routes that they may service. They may restrict the number of passengers designated airlines transport and the frequency of those services. ASAs also typically contain an article requiring airlines to be substantially owned and effectively controlled by the designating State, its nationals or a combination of both. The terms of these agreements therefore significantly impede an airline's ability to access international markets.

To circumvent the patchwork regulation framework and improve their global reach, a large number of airlines have entered into alliance, joint-venture or equity arrangements with other international partners. While alliance arrangements are unregulated at an international level, States can regulate the partners an airline works with in its own jurisdiction through domestic competition or antitrust legislation. These arrangements are often closely scrutinised by national competition regulators. In the face of constrained demand for international air transport services, alliance arrangements are likely to once again become an important part of an airline's strategy.

Over the past thirty years, there has been international momentum to reform the economic regulatory framework for airlines, under the banner of liberalisation. However, most jurisdictions showed very little appetite to truly move away from the comfort of the patchwork bilateral trading system prior to the pandemic. Since the early 1990's, a number of multilateral agreements have been concluded at a regional level, specifically for the purpose of liberalisation. Several are yet to be fully implemented in their respective jurisdictions. States with significant air transport markets, such as Japan and India, are not a party to agreements of this nature. Additionally, the conclusion of these agreements has not deterred many States from continuing to impose stringent ownership, control and market access criteria for airlines through domestic legislation and in their bilateral ASAs.

A number of scholars have considered different aspects of trade and market access, foreign investment and the regulation of airline alliances. To date, the literature on investment has tended to focus on desktop reviews of the statutory provisions in different jurisdictions and an exploration of alternatives to the nationality clause. In 2001, Chang and Williams examined the merits and shortcomings of foreign investment and control restrictions, with a specific focus on the US, EU and Asia-Pacific.[7] In 2004, Chang, Williams and Hsu undertook a study of foreign investment and control restrictions using data from the Asia Pacific Economic Cooperation and IATA. The authors identified that most of the jurisdictions in their review imposed a limit on foreign ownership.[8] In 2016, Walulik

7 Yu-Chun Chang and George Williams, 'Changing the rules – amending the nationality clauses in air service agreements' (2001) 7 *Journal of Air Transport Management* 207, 207-216.

8 Yu-Chan Chang, George Williams and Chia-Jui Hsu, 'The evolution of airline ownership and control provisions' (2004) 10 *Journal of Air Transport Management* 161, 162. The authors examined 21 jurisdictions.

undertook a broader desktop legislative review of 121 different states and territories. This study also found that the majority of reviewed jurisdictions imposed some limit on foreign ownership for their domestic and international airlines and there was no uniformity in the way different states and territories elected to regulate it.[9] Mendes de Leon has previously explored the alternative principal place of business criterion.[10] Havel and Sanchez have also explored the use of a unilateral declaration and a multilateral treaty to waive nationality provisions in ASAs.[11]

On regional liberalisation, Tan has critically examined trade in air transport services in south-east Asia, with a particular focus on the Association of Southeast Asian Nations (ASEAN), its Single Aviation Market and negotiating agreements with China and the European Union.[12] Lee has closely examined market access, foreign ownership and control and airline alliances in Northeast Asia. His research focused on the jurisdictions of China, Japan and Korea and proposed a Trilateral Agreement on Air Services between the three jurisdictions.[13] Lee has also extensively considered India's foreign investment regime.[14] Williams has previously examined China's approach to aviation policy.[15] Havel has extensively considered deregulation and liberalisation in the United States of America and the European Union, the application of GATS to the air transport sector and more recently, the impact of Brexit.[16] Havel and Sanchez have also considered the infeasibly of negotiating a new Chicago Convention.[17] Burghouwt, Mendes de Leon and de Wit have

9 Jan Walulik, 'At the core of airline foreign investment restrictions' (2016) 49 *Transport Policy* 234, 242.

10 Pablo Mendes de Leon, 'Establishment of air transport undertakings – Towards a more holistic approach' (2009) 15 *Journal of Air Transport Management* 96, 96-101.

11 Brian F. Havel and Gabriel Sanchez, 'The Emerging Lex Aviatica' (2011) 42 *Georgetown Journal of International Law* 639, 639-672.

12 See for example,

Alan Khee-Jin Tan, 'The Proposed E.U.-ASEAN Comprehensive Air Transport Agreement: What Might it Contain and can it Work?' (2015) 43 Transport Policy 76, 76-84.

Alan Khee-Jin Tan, 'Assessing the Prospects for an E.U.-ASEAN Air Transport Agreement' (Discussion Paper No. 2015-02, International Transport Forum, 2015).

Alan Khee-Jin Tan, 'India's Evolving Policy on International Civil Aviation' (2013) 38(6) *Air and Space Law* 439, 439-462.

Alan Khee-Jin Tan, 'The 2010 ASEAN-China Air Transport Agreement: Much Ado Over Fifth Freedom Rights?' (2014) 14(1) *Issues in Aviation Law and Policy*, 19, 19-32.

Alan Khee-Jin Tan, 'The 2010 ASEAN-China Air Transport Agreement: Placing the Cart before the Horse?' 37(1) *Air and Space Law* 35, 35-50.

Alan Khee-Jin Tan, 'Liberalizing Aviation in the Asia-Pacific Region: The Impact of the EU Horizontal Mandate' (2006) 31 *Air and Space Law*, 432-454.

13 Jae Woon Lee, *Regional Liberalization in International Air Transport*: Towards Northeast Asian Open Skies (Eleven International Publishing, 1st ed, 2016).

14 Jae Woon Lee, 'India's New Foreign Direct Investment (FDI) Regime in the Airline Industry: Changes and Challenges' (Working Paper 16/04, National University of Singapore Centre for Asian Legal Studies, September 2016).

15 Alan Williams, *Contemporary Issues Shaping China's Civil Aviation Policy* (Ashgate Publishing, 1st ed, 2009).

16 Brian F. Havel, *Beyond Open Skies* (Kluwer Law International, 1st ed, 2009).

Brian F. Havel, 'Rethinking the General Agreement on Trade in Services as a Pathway to Global Aviation Liberalisation' 44 Irish Jurist 44, 47-94.

Brian F. Havel, 'How Brexit can transform the Governance of Global Civil Aviation' (2017) 42 Annals of Air and Space Law, 1, 1-48.

17 Brian F. Havel and Gabriel S. Sanchez, 'Do we need a new Chicago Convention?' (2011) 11 *Issues in Aviation Law and Policy* 7, 14-21.

also examined liberalisation in the European Union.[18] Walulik has considered the impact of Brexit on aviation regulation in the United Kingdom.[19]

Many scholars have also considered the immediate and potential longer-term impact of COVID-19 on airlines. Of relevance to this research, as part of a special edition of the Journal of Air and Space Law in 2020, twenty-two scholars contributed to an article examining the initial national aviation law responses to COVID-19 in sixteen different States.[20] Abate, Christidis and Purwanto examined the measures implemented in 57 States and considered the impact of those measures on competition and liberalisation, investment and environmental sustainability.[21] Truxal examined measures undertaken to support European airlines in the context of the European Union's Temporary Framework for State Aid.[22] Warnock-Smith, Graham, O'Connell and Efthymiou investigated the impact of COVID-19 on Chinese air transport markets and identified factors contributing to why some airlines had been less affected by the pandemic than others.[23]

RESEARCH PURPOSE AND RELEVANCE

The purpose of this research is to critically examine how the eight largest global markets regulate airlines from the three different perspectives of trade and market access, investment and airline alliances. The eight jurisdictions considered in this dissertation are Brazil, China, the European Union, India, Indonesia, Japan, the United States of America and the United Kingdom. These jurisdictions have been selected as they were the eight largest markets, based on the number of passengers carried between 2010 and 2019. In 2019, their registered airlines collectively carried approximately 3.0 billion passengers on domestic and international air transport services.[24] This represented approximately 66 per cent of global air traffic for that year. Although there has been extensive English language research into the regulatory frameworks for these major markets, particularly the European Union and the United States of America, the literature to date has not considered these eight jurisdictions as a cohort.

18 Guillaume Burghouwt, Pablo Mendes de Leon, Jaap de Wit, 'EU Air Transport Liberalisation Process, Impacts and Future Considerations' (Discussion Paper, International Transport Forum, 2015).

19 Jan Walulik, *Brexit and Aviation Law* (Routledge, 1st ed. 2019).

20 Benjamin I. Scott, Ricardo Fenelon Junior, Lívia Herdy, Brian F. Havel, Pai Zheng, José Ignacio García Arboleda, Stefania Mortelliti, Vincent Correia, Katja H. Brecke, Nitin Sarin, Carlos Sierra, Juan Manuel Estrada, Alexander A. Batalov, Oleg I. Aksamentov, Ricardo de Oliveira, Niall Buissing, Charles Cockrell, Francesco Fiorilli, Laura Chele, Thomas van der Wijngaart, Jess Harman, Inês Afonso Mousinho and Philip Weissman, "National Air Law Responses" (2020) 45 *Air & Space Law*, 195-272.

21 Megersa Abate, Panayotis Christidis and Alloysius Joko Purwanto, 'Government support to airlines in the aftermath of the COVID-19 pandemic' (2020) 89 *Journal of Air Transport Management*, published online 14 September 2020.

22 Steven Truxal, 'State Aid and Air Transport in the Shadow of COVID-19' (2020) 45 *Air & Space Law* 61-82.

23 David Warnock-Smith, Anne Graham, John F. O'Connell and Marina Efthymiou, 'Impact of COVID-19 on air transport passenger markets: Examining evidence from the Chinese market' (2020) 94 *Journal of Air Transport Management* 102085, 20.

24 The World Bank, *Air transport, passengers carried* (2022) <http://data.worldbank.org/indicator/IS.AIR.PSGR>.

In the wake of COVID-19, regulatory reform is not an immediate concern for the airline industry. Over the past two years, the impact of COVID-19 travel restrictions has completely overshadowed the underlying regulatory framework. However, these measures are not indefinite. As the industry continues to recover, trade and market access, foreign investment and airline alliances will once again become a focal point for airlines, legislators and regulators, as they have been in response to past shocks and global events.

This dissertation will contribute to the existing literature by demonstrating that in spite of multiple attempts to reform the regulatory framework for airlines over the last thirty years, with respect to these eight markets, progress has been slow and has prolonged a dysfunctional and opaque regulatory framework that is arguably no longer fit for purpose. This dissertation will consider three prospective pathways for future reform of the airline industry in the wake of COVID-19 and suggest that in spite of the tremendous upheaval of the airline industry through the pandemic, trade, investment and alliance issues will continue to polarise the industry, legislators and regulators for a long time to come.

RESEARCH QUESTIONS

This dissertation seeks to address the following research questions:

- How does each jurisdiction regulate market access for foreign licensed airlines through the use of air service or air transport agreements?
- How does each jurisdiction regulate the level of foreign investment and control for the airlines it licenses through domestic legislation and regulation and in air service or air transport agreements?
- How does each jurisdiction regulate airline alliances through domestic competition or antitrust regulation?
- What are the key similarities and differences between the regulatory frameworks of the jurisdictions?
- In the wake of COVID-19, what options are available to reform the regulatory framework in the future?

METHODOLOGY

This dissertation is structured around three key themes of trade and market access, investment and airline alliances and draws upon a range of domestic and international air law resources.

For trade and market access issues, this dissertation contains a qualitative examination of the key provisions of a sample of nearly 100 ASAs and ATAs concluded between the

jurisdictions. The sample has been developed by reviewing ASAs and ATAs published on ICAO's World Air Service Agreements (WASA) database, supplemented by agreements published by the jurisdictions on their own government websites. The Department for Transport (United Kingdom) and the Department of Transportation (United States of America) have also provided additional information and updated agreements to assist with this research.

The investment and alliance chapter reviews have been conducted by undertaking a legislative review of key legal instruments for the jurisdictions. For investment, this research has been supplemented by examining legislative debates, government publications and case law to better understand the impetus behind particular provisions and how they have been applied. For the alliance chapter, this research will examine the practical application of the key instruments with two case studies.

For the purposes of this research, the European Union will be considered as one jurisdiction. Although it is not a party to the Chicago Convention and its Member States[25] are able to negotiate their own ASAs and ATAs, the European Union is an international organisation in its own right and it has a distinct legal personality. Through its Single Aviation Market, discussed in more detail in Chapter 2, it has taken a coordinated approach to foreign investment and the negotiation of market access with key trading partners, key issues discussed in this research.

This research contains a number of references to the temporary regulatory measures and the impacts of COVID-19 on the airline industry for each jurisdiction. These measures and impacts are constantly changing and evolving. This dissertation endeavours to provide a point-in-time assessment as at 30 June 2022.

RESEARCH STRUCTURE

This dissertation is structured into seven chapters. Chapter 2 will provide a brief legal history of the bilateral trading system. This chapter will discuss how ASAs and ATAs have shaped the economic regulation of airlines, and how these agreements have led to a patchwork regulatory framework. The chapter will examine the divergent approaches to liberalisation and regional agreements concluded to date for this purpose and will explore how trade in air services has been carved out of the remit of the WTO and other regional trade agreements.

25 They are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.

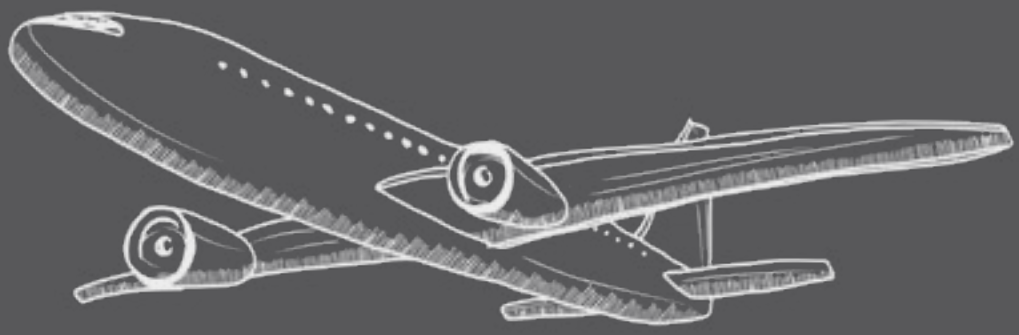
Chapter 3 will consider market access and issues pertaining to trade in air services. This chapter will illustrate how the economic regulatory framework by which airlines are required to comply is opaque and archaic. Drawing on agreements published in WASA and by state governments, this chapter will analyse the ASAs and ATAs to which the jurisdictions are a party, and specifically consider issues pertaining to transparency, designation and authorisation, traffic rights, capacity, frequency, tariffs and dispute resolution. This chapter will also briefly discuss the temporary market access restrictions introduced during the pandemic.

Chapter 4 will explore the use of foreign ownership and control restrictions in airline licensing for each jurisdiction through an examination of key provisions in domestic legislation and regulations. Due to limitations in obtaining English language materials, this chapter will only consider the legislative history and case law for some jurisdictions. The chapter will argue that the nationality rule is no longer fit for purpose, however, is still deeply ingrained in the licensing frameworks for most jurisdictions and is unlikely to change in the foreseeable future.

Chapter 5 will examine how airlines circumvent the patchwork regulatory framework by participating in alliances. This chapter will explore the different structures and features of airline alliances, how each jurisdiction regulates them through either domestic competition or antitrust law and includes two case studies to illustrate the complexity of the patchwork regulatory framework for airlines participating in an alliance.

Chapter 6 will discuss the impact of COVID-19 on major airlines licensed by the jurisdictions and measures undertaken by governments during the pandemic to support their licensed airlines. This chapter will explore the longer-term impact of COVID-19 on the airline industry and consider three different options to reform the economic regulation of air transport services. These options include the development of a single multilateral agreement on air transport, the establishment of a regional trading block model, incorporating traffic rights within the scope of the WTO.

Chapter 7 will lastly summarise the key findings arising from this dissertation and suggest that although the overarching regulatory framework is archaic, opaque and arguably no longer fit for purpose, and the industry has experienced tremendous upheaval from the COVID-19 pandemic, the underlying regulatory framework is unlikely to substantially change. This chapter will also identify barriers and challenges to further liberalisation measures in the future and suggest areas for further research.



CHAPTER 2:

THE HISTORY OF THE PATCHWORK

INTRODUCTION

The patchwork regulatory framework underpinning trade in air transport has evolved over a long period of time with attempts to liberalise the framework occurring in a protracted and piecemeal fashion. This chapter will provide an overview of the history of the patchwork regulatory system, including the key multilateral and regional agreements, the freedoms of the air and the role of the International Civil Aviation Organization in facilitating liberalisation of air transport services. This chapter will also discuss how discuss how air transport services have been carved from the remit of the World Trade Organization, and from other major regional trade agreements.

THE CHICAGO CONVENTION

The Chicago Convention is the centerpiece of the international regulatory framework for air transport. It was the product of the International Civil Aviation Conference, an event convened in Chicago, at the invitation of the United States Government in 1944 to establish a general agreement for world route arrangements, an Interim Council and a more permanent international aeronautical body.[26]

The Chicago Convention recognises airspace sovereignty as a fundamental right in international aviation law, however, it is silent on matters pertaining to traffic rights, market access and airline ownership.[27] In developing the Convention, the Committee on Multilateral Aviation Convention and International Aeronautical Body fielded four markedly different proposals on the future regulation of airlines in a post-war era. Although the proposals entertained the idea of traffic rights and airline ownership, these issues were ultimately excluded from the scope of the Convention.

With the benefit of hindsight, the proposals provide a unique insight into some of the challenges that still plague the economic regulation of trade in air transport. The joint Australian-New Zealand proposal was the most ambitious, suggesting that an international authority should be established to operate international air services.[28] Under this proposal, national governments would remain responsible for operating air services in their own jurisdictions, however, the authority would own aircraft and ancillary equipment to operate the services on international trunk routes.[29] The proposal was rejected and proceedings to the Conference noted, ‘the rejection of that proposal indicated the tendency of the Conference away from extensive international control of air

26 The Department of the State, *Proceedings of the International Civil Aviation Conference* (United States Government Printing Office, Publication 2820 , Vol I, 1948) 1.

27 *Chicago Convention*, art 1.

28 The Department of the State, *Proceedings of the International Civil Aviation Conference* (United States Government Printing Office, Publication 2820 , Vol I, 1948), 539-540.

29 Ibid.

services'.[30] In proceedings, Brazil expressed that it could not accept 'internationalization of aviation or international ownership of aircraft'.[31] Similarly, the United States was of the view that a proposal of this nature was not possible at this time and it would require 'years of work'.[32]

The United Kingdom suggested a new Convention should be drawn up for the purpose of reaffirming the principle of national sovereignty in international air transport (previously recognised in the 1919 Paris Convention), to outline the degree of freedoms of the air and traffic rights, to define the routes which would be subject to international regulation and to provide for the licensing of international air operators.[33] In contrast, the United States proposed a Convention on Air Navigation with specific air traffic rights. Under this proposal, scheduled international air passenger transport between contracting States would be governed by 'the terms of a special agreement' between the States concerned.[34] The Canadian proposal involved a regional approach, with airlines to be licensed by a Regional Council, and thereafter, able to exercise traffic rights to all Member States in their region. On the issue of ownership, the Canadian proposal noted:

> The convention is an agreement between states and is not concerned with such domestic questions as whether the international air services of the various member states should be government-owned or privately-owned or whether a state should have more than one government-owned or privately-owned airline company engaged in international air transport. These are matters of domestic policy which each individual member state decides for itself. They are therefore, outside the scope of the international convention.[35]

Issues pertaining to traffic rights and market access instead became the subject of two separate multilateral agreements: the International Air Services Transit Agreement[36] (the IASTA, sometimes also referred to as the "two freedoms agreement") and the International Air Transport Agreement[37] (the "five freedoms agreement"). Although the Chicago Convention has garnered widespread international support with 193 State signatories, these other two agreements have not enjoyed the same level of support, with 134 and 11 signatories respectively.[38] The World Trade Organization (WTO) has previously noted that

30 Ibid,1.

31 Ibid, 544.

32 Ibid, 545.

33 Ibid, 569.

34 Ibid, 554-566.

35 Ibid, 570-572.

36 *International Air Services Transit Agreement*, opened for signature on 7 December 1944, 84 UNTS 389 (entered into force on 30 January 1945) ('*IASTA*').

37 *International Air Transport Agreement*, opened for signature on 7 December 1944, 171 UNTS 387 (entered into force on 8 February 1945) ('*International Air Transport Agreement*').

38 International Civil Aviation Organization, *Convention on International Civil Aviation signed at Chicago on 7 December 1944* (undated) <https://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf>.

Canada, Brazil, the Russian Federation and China are not a party to the IASTA, in spite of their large airspaces.[39] Of relevance to this research, Brazil and Indonesia are not a party to the IASTA either.[40]

FREEDOMS OF THE AIR

At an international level, there are nine well-recognised traffic rights, or "freedoms of the air". ICAO's Manual on the Regulation of International Air Transport neatly summarises those freedoms as follows:

> ***First Freedom of the Air*** *— the right or privilege, in respect of scheduled international air services, granted by one State to another State or States to fly across its territory without landing (also known as a* ***First Freedom Right****).*[41]
>
> ***Second Freedom of the Air*** *— the right or privilege, in respect of scheduled international air services, granted by one State to another State or States to land in its territory for non-traffic purposes (also known as a* ***Second Freedom Right****).*[42]
>
> The ***Third Freedom of the Air*** *is the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down, in the territory of the first State, traffic coming from the home State of the carrier (also known as a* ***Third Freedom Right****).*[43]
>
> The ***Fourth Freedom of the Air*** *is the right or privilege, in respect of scheduled international air services, granted by one State to another State to take on, in the territory of the first State, traffic destined for the home State of the carrier (also known as a* ***Fourth Freedom Right****).*[44]

See also, International Civil Aviation Organization, *International Air Services Transit Agreement signed at Chicago on 7 December 1944* (undated) <https://www.icao.int/secretariat/legal/List%20of%20Parties/Transit_EN.pdf>.

See also, International Civil Aviation Organization, *International Air Services Agreement signed at Chicago on 7 December 1944* (undated) <https://www.icao.int/secretariat/legal/List%20of%20Parties/Transport_EN.pdf>.

39 See World Trade Organization, Air Transport and the GATS: 1995-2000 in Review (Documentation for the First Air Transport Review under the General Agreement on Trade in Services (GATS), 2006), 191.

Canada withdrew from the IASTA in 1988.

With respect to China, the IASTA continues to apply to Hong Kong and Macao.

40 International Civil Aviation Organization, *International Air Services Transit Agreement signed at Chicago on 7 December 1944* (undated) <https://www.icao.int/secretariat/legal/List%20of%20Parties/Transit_EN.pdf>.

41 International Civil Aviation Organization, *Manual on the Regulation of International Air Transport* (2nd ed, 2004) 4.1-5.

See also, *IASTA*, art 1.

42 Ibid.

43 Ibid, 4.1-8.

See also, *International Air Transport Agreement*, art 1.

44 Ibid.

> The ***Fifth Freedom of the Air*** *is the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down and to take on, in the territory of the first State, traffic coming from or destined to a third State (also known as a* ***Fifth Freedom Right****).*[45]

In addition to the five established Freedoms of the Air recognized in the IASTA and the International Air Transport Agreement, the international air transport sector has recognised four unofficial Freedoms of the Air, further summarised by ICAO as follows:

> The so-called ***Sixth Freedom of the Air*** *is the right or privilege, in respect of scheduled international air services, of transporting, via the home State of the carrier, traffic moving between two other States (also known as a* ***Sixth Freedom Right****).*[46]

> The so-called ***Seventh Freedom of the Air*** *is the right or privilege, in respect of scheduled international air services, granted by one State to another State, of transporting traffic between the territory of the granting State and any third State with no requirement to include on such operation any point in the territory of the recipient State, i.e. the service need not connect to or be an extension of any service to/from the home State of the carrier.*[47]

> The so-called ***Eighth Freedom of the Air*** *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 territory 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 an* ***Eighth Freedom Right*** *or "****consecutive cabotage****").*[48]

> The so-called ***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****).*[49]

45 Ibid.

46 Ibid, 4.1-10.

47 Ibid.

48 Ibid.

49 Ibid, 4.1-10 - 4.1.11.

THE ROLE OF AIR SERVICE AGREEMENTS

In the absence of the International Air Transport Agreement or another multilateral traffic right agreement gaining significant traction, bilateral air service agreements (ASAs) (also referred to as air transport agreements or ATAs) have been the primary mechanism for facilitating trade in air transport. ASAs typically prescribe which airlines can fly between the contracting Parties through designation and authorisation provisions. They also typically prescribe how many passengers the airline may carry (capacity), how often they may fly (frequency) and how much they may charge for their services (tariffs).[50] Moreover, ASAs may also dictate an airline's ownership, impose limitations on foreign influence and control in its management and prescribe where its principal place of business may be located.

Many of these provisions stem from the 1946 and 1977 ASAs concluded between the Governments of the United States of America and the United Kingdom. The 1946 agreement, colloquially referred to as *Bermuda I,* required the parties to designate which airlines may provide services on the routes named in the agreement.[51] The agreement permitted each party to deny traffic privileges to designated airlines that were not substantially owned and effectively controlled by nationals of the airlines' designating State.[52] The agreement prescribed the routes that may be serviced by each parties' airlines.[53] The agreement also provided a process for the mutual recognition of certificates of airworthiness, competency and licensing, and for dispute resolution and agreement amendments.[54]

In 1977, a revised Agreement, commonly referred to as the *Bermuda II*, superseded its predecessor.[55] Bermuda II continued to specify routes that may be served by the designated carriers of each State.[56] It also imposed restrictions on the number of airlines that could be designated on particular routes, and contained a requirement for designated airlines to be substantially owned and effectively controlled by the designating Contracting Party or its nationals in order to be authorised under the agreement.[57] Bermuda II dictated trade in air transport between the United States and United Kingdom until 2008 when it was superseded by the U.S.-EU Air Transport Agreement.

50 Yu-Chun Chang and George Williams, 'Changing the rules – amending the nationality clauses in air service agreements' (2001) 7 *Journal of Air Transport Management* 207, 207-208.

51 *Agreement between the Government of the United Kingdom and the Government of the United States of America relating to Air Services between their Respective Territories*, signed on 11 February 1946 (entered into force on 11 February 1946), art 2(1).

52 Ibid, art 6.

53 Ibid, Annex, III.

54 Ibid, arts 4, 8-9.

55 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning Air Services* 076/1977; Cmd7016 (signed and entered into force 23 July 1977) ('*Bermuda II*').

56 Ibid, art 2, Annex I.

57 Ibid, art 3.

Although Bermuda I and II are no longer in force, many ASAs still contain identical or similar provisions to those two iconic agreements. Newer ASAs may also contain provisions regarding safety and security, environmental protection, labour standards and fair competition.

LIBERALISING SCHEDULED INTERNATIONAL AIR TRANSPORT

Over the past three decades, States have sought to move beyond the current bilateral regulatory framework using a two-pronged approach: deregulation of their domestic markets and liberalisation of air transport regulation on a bilateral and multilateral basis. Liberalisation effectively entails the removal of trade barriers between States, neatly summarised by Decurtins, as follows:

> The term liberalisation refers to international trade rules that govern how tariff and non-tariff barriers will be reduced or removed between or among a group of states. International agreements determine *inter alia*, market access, national treatment, and levels of foreign ownership. In short, it is the trade barriers that are affected when liberalisation occurs, not the national regulatory structures that govern the operational aspects of a given industry. This is particularly true in the case of international trade in services, which includes the air transport sector.[58]

Hooper has previously noted that liberalising international air transport invariably creates 'winners' and 'losers' and all stakeholders have a vested interest in ensuring they are no worse off. This presents a challenge for policy makers in balancing the competing interests of stakeholders.[59]

For States, airspace sovereignty is considered a valuable property right.[60] The Chicago Convention was negotiated against the backdrop of war when national security and sovereignty was at the forefront of negotiators' minds. As Lykotrafiti notes, this is illustrated in the Preamble of the Chicago Convention and its predecessor, the Convention relating to the Regulation of Aerial Navigation[61] (commonly referred to as the "Paris Convention of 1919") which explicitly states that the abuse of international civil aviation 'can become a threat to the general security'.[62] Chang and Williams have also observed that maintaining a right to designate airlines enables a State government to "safeguard

58 Cecilia Decurtins, (PhD Thesis, University of Geneva, 2007) 2.

59 See Paul Hooper, 'Has liberalisation stalled? (2014) 41 *Journal of Air Transport Management* 17, 20.

60 Ibid, 17.

61 *Convention relating to the Regulation of Aerial Navigation* 11 LNTS 173 (signed and entered into force 13 October 1919) ('*Paris Convention*').

62 Antigoni Lykotrafiti, 'Liberalisation of international civil aviation – charting the legal flightpath' (2015) 43 *Transport Policy* 85, 86.

its sovereignty".[63] Havel and Sanchez have argued that it would not be feasible to replace the Chicago Convention with a new convention containing economic rights.[64] However, they suggested that removing nationality restrictions through unilateral reciprocity, a multilateral agreement or through internal domestic reform would provide airlines with a host of new opportunities.[65]

In 2012, the ICAO Secretariat identified, as part of a working paper for the Sixth Meeting of the Worldwide Air Transport Conference, five reasons why States would be concerned about liberalising air transport. These included the desire of States to have their own airline, assurance of air services to and from their territory, provision of essential air services, achieving a fair, competitive market and concerns about unilateral regulation by another State.[66]

Notwithstanding these concerns, liberalisation has previously been shown to increase passenger traffic and in turn, increase employment within the aviation sector and contribute to broader economic growth for States that embrace it. For example, the European Union's Single Aviation Market, discussed in further detail later in this chapter, contributed to approximately 25,000 new jobs within airlines in the EU Member States and Switzerland between 1998 and 2007.[67] Chang and Williams have noted that for airlines, foreign investment provides tangible commercial benefits to improve their financial position, gain access to new markets and improve their business practices through the transfer of knowledge and technology.[68]

Liberalisation also contributes to an increase in passenger traffic for airlines. In 2006, Inter*VISTAS*-ga^2 examined the impact of liberalisation in five case studies (U.S.-U.K., Intra EU, UAE-U.K./Germany, Trans-Tasman and Malaysia-Thailand) and developed an economic model to assess the impact of liberalising 320 country pair markets.[69] Inter*VISTAS* found liberalisation had contributed in an increase in traffic growth and liberalising ASAs between those 320 country pairs would deliver significant employment opportunities and increase economic growth.[70] Inter*VISTAS* also noted that a number of countries were

63 Yu-Chun Chang and George Williams, 'Changing the rules – amending the nationality clauses in air service agreements' (2009) 7 *Journal of Air Transport Management*, 207, 208.

64 Brian F. Havel and Gabriel S. Sanchez, 'Do we need a new Chicago Convention?' (2011) 11 *Issues in Aviation Law and Policy* 7, 14-21.

65 Brian F. Havel and Gabriel Sanchez, 'The Emerging Lex Aviatica' (2011) 42 *Georgetown Journal of International Law* 639, 662-671.

66 International Civil Aviation Organization, 'Safeguard measures for Air Transport Liberalization' (Working Paper ATConf/6-WP/3, Sixth Meeting of the Worldwide Air Transport Conference, 2012) 1.

67 Booz & Company, 'Effects of EU Liberalisation on Air Transport Employment and Working Conditions' (Report commissioned by the European Commission Directorate-General for Energy and Transport, 2009) 139.

68 Yu-Chun Chang and George Williams, 'Changing the rules – amending the nationality clauses in air service agreements' (2001) 7 *Journal of Air Transport Management*, 207, 209.

69 Inter*VISTAS*-ga^2, 'The Economic Impact of Air Service Liberalization – Final Report' (21 June 2006).

70 Ibid, ES-2.

still protecting their national carriers.[71] In 2015, Inter*VISTAS* updated its 2006 study by examining the top 1,000 country pairs based on passenger traffic. It concluded that in 2012, only 33% of the bilateral ASAs examined were fully liberalised with no restrictions on routes, pricing, single airline designation, fifth freedom rights or capacity.[72]

In 2006, the World Trade Organization Secretariat published the Quantitative Air Services Agreements Review (QUASAR) to also assess the degree of liberalisation in the air transport sector.[73] QUASAR applied an Air Liberalization Index (ALI) weighting to the registered ASAs of ICAO Member States. The ALI weighting considered a range of factors including traffic rights, capacity, tariffs, ownership and control criteria, designation, statistical information and co-operative arrangements.[74] As a result of its analysis, the Secretariat found that traffic was highly concentrated and 100 ASAs involving 50 different States were responsible for two-thirds of WASA traffic.[75] The Secretariat also noted there was a high degree of similarity between agreements and restrictive market access provisions were still prevalent in the examined ASAs.[76]

In 2008, Piermartini and Rousová estimated the impact of liberalising air transport between 184 different countries (approximately 2,300 country–pairs) using a gravity economic model. In their study, they identified that liberalising air transport from the 25th to the 75th percentile would increase passenger traffic between countries linked through a direct air service by approximately 30 per cent.[77]

However, liberalisation can be challenging for inefficient airlines and increased competition from new entrants in their markets may require these airlines to restructure or perish. Consequently, some airlines have previously been very resistant to any liberalisation measures which may be detrimental to their business. Trethway and Andriulaitis have previously noted that geographic location, the size of the carrier, differences in cost of factors of production, technological advantage and access to airport slots do not constitute legitimate reasons to not progress liberalisation.[78] However, these

71 Ibid.

72 InterVISTAS Consulting Inc, 'The Economic Impacts of Air Service Liberalization' (Study sponsored by Boeing, Airports Council International-North America, Air Transport Action Group, European-American Business Council, General Electric, International Air Transport Association, the Pacific Asia Travel Association, Pratt and Whitney, US-ASEAN Business Council, the U.S. Chamber of Commerce and the World Travel & Tourism Council, 2015) 61.

73 World Trade Organization, *Air transport services* (2021) <https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_air_e.htm>.

74 World Trade Organization, 'Part A: Introduction to QUASAR' (S/C/W/270/Add.1) Page I. 14 <https://www.wto.org/english/tratop_e/serv_e/transport_e/quasar_parta_e.pdf>.

75 World Trade Organization, 'Part B: Preliminary Results' (S/C/W/270/Add.1) Page I. 23 <https://www.wto.org/english/tratop_e/serv_e/transport_e/quasar_partb_e.pdf>.

76 Ibid.

77 Roberta Piermartini and Linda Rousová, 'Liberalization of Air Transport Services and Passenger Traffic' (Staff Working Paper, World Trade Organization Economic Research and Statistics Division, 2008) 20.

78 See Mike Tretheway and Robert Andriulaitis, 'What do we mean by a level playing field in international aviation?' (2015) 43 *Transport Policy*, 96, 102.

issues still polarise airlines. Prior to the pandemic, American and European carriers had leveled significant criticism at Gulf carriers arguing that they had been beneficiaries of State subsidies and assistance which had unfairly distorted the market.[79]

ICAO AS A FORUM FOR LIBERALISATION

Historically, ICAO has served as a forum in which to progress liberalisation. The notion of liberalisation arose during the 1994 Worldwide Air Transport Conference, and it has repeatedly featured in successive conferences and assemblies.

At its most recent Conference in 2013, the jurisdictions included in this research expressed a range of views in respect of how liberalisation should be progressed. The United States submitted that the current system had been very effective in progressing liberalisation and open-skies agreements and should continue to be used at bilateral, regional, plurilateral and multilateral levels.[80] It further submitted that the Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT) provided an opportunity to further progress liberalisation at a multilateral level.[81] The EU encouraged ICAO to adopt a long-term vision for global liberalisation and suggested a "low-key, bottom up, incremental approach" would be most palatable.[82] It submitted that restrictive nationality clauses should be waived in bilateral ASAs with the view to developing a global agreement on air carrier ownership and control.[83] The EU also recommended establishing universal principles for open and fair competition which could ultimately lead to a multilateral agreement on traffic rights being developed through ICAO.[84] Brazil submitted that as a stepping stone, States should remove restrictions on ownership and control in the designation clause of ASAs so as to remove conflict between a States' own statutory restrictions on airline investment and the ASAs it negotiates.[85] Indonesia submitted that sovereignty should remain as the main criterion for airline designation, however, further work needed to be undertaken to define "control".[86]

79 See for example, Partnership for Open & Far Skies, 'Restoring Open Skies: The need to address subsidized competition from State-owned Airlines in Qatar and the UAE' (White Paper, 2015).

Emirates subsequently provided a written response to this White Paper. For further information, see Emirates, 'Emirates' response to claims raised about State-owned airlines in Qatar and the United Arab Emirates' (Report, 2015).

80 International Civil Aviation Organization, 'Liberalization of Market Access' (Working Paper ATConf/6-WP/60 presented by the United States of America, Sixth Meeting of the Worldwide Air Transport Conference, 2013) 4.

81 Ibid.

82 International Civil Aviation Organization, 'Liberalization of Market Access' (Working Paper ATConf/6-WP/54 presented by Ireland on behalf of the European Union and its Member States and other Member States of the European Civil Aviation Conference, Sixth Meeting of the Worldwide Air Transport Conference, 2013) 3.

83 Ibid.

84 Ibid.

85 International Civil Aviation Organization, 'Differences between Carrier Ownership and Control Principles in Designation Clauses in Air Services Agreements and National Laws regulating the subject' (Working Paper ATConf/6-WP/94 presented by Brazil, Sixth Meeting of the Worldwide Air Transport Conference, 2013) 2.

86 International Civil Aviation Organization, 'Air Carrier Ownership and Control Principle' (Working Paper ATConf/6-WP/84 presented by Indonesia, Sixth Meeting of the Worldwide Air Transport Conference, 2013) 2.

On market liberalisation, the Conference concluded that there was a need to modernise the regulatory regime to meet the needs of States, industry and consumers.[87] The Conference concluded that there was a strong endorsement for further liberalisation of air transport and that ICAO should take a lead role to explore how to expand market access.[88] In its recommendations, the Conference supported States to continue to liberalise at a pace and manner appropriate to their own circumstances, however, the Conference recommended that the ICAO should develop and adopt a 'long-term' vision for air transport, including an international agreement by which States could further liberalise market access.[89]

In 2015, the ICAO Council adopted the Long-Term Vision for International Air Transport Liberalization which requires Member States to "actively pursue the continuous liberalization of international air transport to the benefit of all stakeholders and the economy at large".[90]

At its most recent session in October 2019, the ICAO Assembly made a number of resolutions with respect to economic regulation of international air transport. The Assembly again urged Member States to continue to pursue liberalisation at their own pace, but to not implement policies which may be detrimental to the ongoing, sustainable development of air transport.[91] Member States were also urged to become a party to the IASTA if they were not already and to have regard to ICAO's Long-Term Vision for International Air Transport Liberalization.[92]

87 International Civil Aviation Organization, 'Report on Agenda Item 2.1' (ATConf/6-WP/104, Sixth Meeting of the Worldwide Air Transport Conference, 2013) 2.1-2.

88 Ibid.

89 Ibid, 2.1-3.

90 See International Civil Aviation Organization, *Air Transport Policy and Regulation* (undated) <https://www.icao.int/sustainability/Pages/economic-policy.aspx>.

91 International Civil Aviation Organization, 'Assembly Resolutions in Force (as of 4 October 2019)' (Doc 10140) Appendix A, Section I.

92 Ibid.

MULTILATERAL APPROACHES TO LIBERALISATION

Since the 1990's, there has been a proliferation of agreements and arrangements which have sought to liberalise international air transport. The majority of these agreements have been negotiated at a regional level, or have been regional in origin. Figure 2.1 shows a global map illustrating some of the regional liberalisation initiatives and the States that are a party to those agreements. While these initiatives have sought to sew together the patchwork regulatory framework at a regional level, some agreements and arrangements have arguably been more successful than others.

Some, but not all of the jurisdictions considered in this research participate in a regional liberalisation agreement or arrangement. The European Union has been highly successful in adopting an integrated Single Aviation Market (SAM) between its Members States. This model has served as a template for other SAMs, including the Association of Southeast Asian Nations SAM (of which Indonesia is a party), the Australian-New Zealand SAM and more recently, the African SAM. Brazil is a party to the Fortaleza Agreement and the Multilateral Open Skies Agreement for Member States of the Latin American Civil Aviation Commission, both South American sub-regional air transport agreements. The United States of America is a party to the Multilateral Agreement on the Liberalization of International Air Transport. While this is not a regional agreement per se, it is regional in origin. The United States of America has also relied on Open Skies Agreements, discussed in more detail in Chapter 3. By contrast, China, India, Japan and the United Kingdom are not strictly a party to regional trading blocs for air transport. This section will outline the different agreements and arrangements in place at regional level, as shown in Figure 2.1.

The European Single Aviation Market

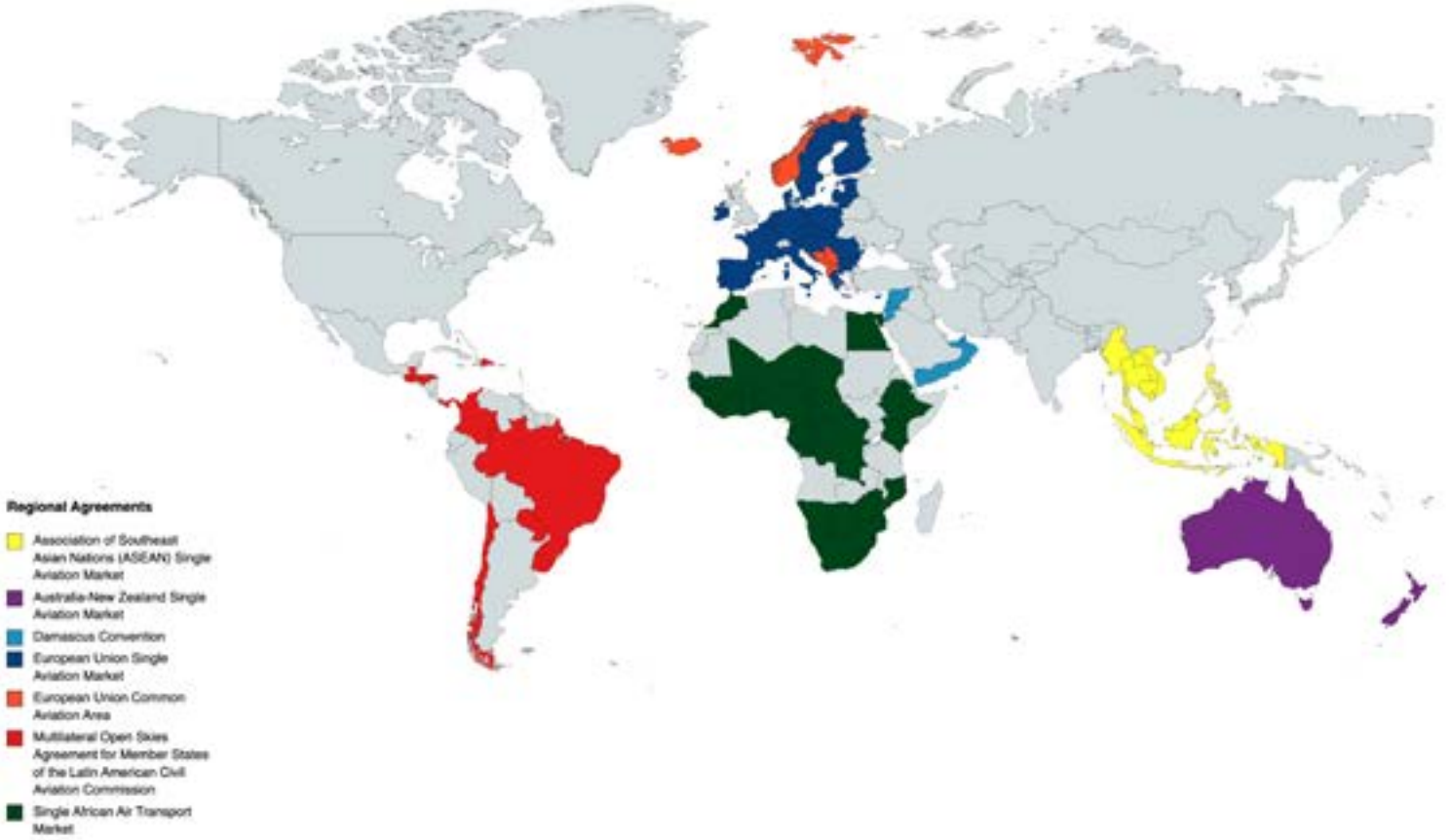
The European Union (EU) SAM is arguably the most successful example of a single aviation market. Its success is grounded in the shared ambition and mandate to create a common market that removes barriers to trade between individual Member States across a wide variety of industries. The SAM was implemented over a 10-year period through three packages of reform.[93] The first package of measures, adopted by the Council of European Communities in 1987, began to relax restrictions on traffic rights between the jurisdictions, permitted States to accept multiple designations on a country-pair basis from another state and established rules around fare setting.[94] In addition, two Council Regulations

93 For a comprehensive history of the European Single Aviation Market, see Louise Butcher, 'Aviation: European Liberalisation, 1986-2002' (SN/BT/182, House of Commons Library, 13 May 2010).

94 See Council Decision No. 87/602 of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States [1987] OJ L 374/19.

See also, Council Directive No. 87/601 of 14 December 1987 on fares for scheduled air services between Member States [1987] OJ L 374/12.

Figure 2.1: Map of Regional Liberalisation Initiatives and Participating States



specified how competition provisions in the Treaty establishing the European Economic Community would apply to air transport.[95]

In 1990, the Council approved the second package of measures.[96] These measures reformed the process for fare approvals and further relaxed restrictions on traffic rights between select Member State airports and permitted State to accept multiple designations on a city-pair basis.

In 1993, the third package of measures commenced.[97] These measures established a common process for issuing and maintaining operating licences for air carriers within Europe. Notably, a Member State could not be granted an operating licence unless the proposed operation had its principal place of business and registered office in that Member State's territory and it was an air transport operation owned and effectively controlled by a Member State or its nationals.[98] European air carriers were permitted to exercise traffic rights within the European Economic Community, although Member States were generally not required to authorise cabotage until 1 April 1997 for carriers licensed by another Member State.[99] The third package of measures also enabled community air carriers to determine their own fares.[100]

95 See Council Regulation (EEC) No. 3975/87 of 14 December 1987 on laying down the procedure for the application of the rules on competition to undertakings in the air transport sector [1987] OJ L 374/1.

See also, Council Regulation (EEC) No. 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [1987] OJ L 374/9.

96 These were:

Council Regulation (EEC) No. 2342/90 of 24 July 1990 on fares for scheduled air services [1990] OJ L 217/1;

Council Regulation (EEC) No. 2343/90 of 24 July 1990 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States [1990] OJ L 217/8; and

Council Regulation (EEC) No. 2344/90 of 24 July 1990 on amending Regulation (EEC) No 3976/87 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [1990] OJ L 217/15.

97 These were:

Council Regulation (EEC) No. 2407/92 of 23 July 1992 on licensing of air carriers [1992] OJ L 240/1;

Council Regulation (EEC) No. 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes [1992] OJ L 240/8;

Council Regulation (EEC) No. 2409/92 of 23 July 1992 on fares and rates for air services [1992] OJ L 240/15;

Council Regulation (EEC) No. 2410/92 of 23 July 1992 amending Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector [1992] OJ L 240/18.

Council Regulation (EEC) No. 2411/92 of 23 July 1992 amending Regulation (EEC) No 3976/87 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [1992] OJ L 240/19.

98 Council Regulation (EEC) No. 2407/92 of 23 July 1992 on licensing of air carriers [1992] OJ L 240/1, art 4.

99 Council Regulation (EEC) No. 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes [1992] OJ L 240/8, art 3.

100 Council Regulation (EEC) No. 2409/92 of 23 July 1992 on fares and rates for air services [1992] OJ L 240/15, art 5.

In 2008, the SAM regulations were consolidated into a single regulation on the operation of air transport in the EU.[101] This regulation continues to govern the EU's SAM and provides some broader criteria for the licensing of EU air carriers. In particular, it requires that Member States or Member State nationals must own more than 50 per cent of a proposed operation and effectively control it, unless the EU is a party to an agreement that specifies otherwise.[102] EU airlines are required to notify their licensing authority of significant changes to their operations and ownership structure to enable the licensing authority to consider financial viability of the airline.[103] The licensing authority is also required to consider the financial viability of new undertakings.[104]

The Regulation enables European airlines to operate internal European services.[105] The Regulation also enables intra-European airlines to codeshare on routes to, from or via any airport in their territory to or from points in third countries, however, this does not prohibit a Member State from imposing restrictions on codeshare agreements between a European airline and a third State's airline in the context of a bilateral ASA if the same opportunities are not afforded to the European airline.[106] European airlines and third State airlines are able to determine their own fares on intra-European routes.[107]

Brexit

Although overshadowed by COVID-19, one of the most significant developments to the European Union Single Aviation Market has been the United Kingdom's departure. Brexit presented two challenges for European and United Kingdom airlines. Firstly, it was initially unclear how airlines with blended ownership would be authorised or designated and secondly, it was unclear what traffic rights would be available to them.

Prior to Brexit, British airports, such as Heathrow and Gatwick, had long-served as hubs for European long-haul international flights. As will be evident in Chapter 5, slot access at these airports had also previously been a critical consideration in the European Commission and Department of Transportations' considerations in competition and antitrust proceedings. In 2019, approximately 66% of passenger movements at British airports were transiting to or from a destination in an EU Member State.[108] By contrast,

101 Council Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) [2008] OJ L 293/3.

102 Ibid, art 4(f).

103 Ibid, art 8.

This includes when a Community air carrier plans to service a new route, in advance of any mergers or acquisitions and within 14 days of any change in the ownership of the carrier which represents more than 10% of its total shareholding or that of its parent company.

104 Ibid, art 5.

105 Ibid, art 15.

106 Ibid.

107 Ibid, art 22.

108 Sourced from Department for Transport, 'Aviation Statistics: data tables (AVI) (16 December 2021) <https://www.gov.uk/government/statistical-data-sets/aviation-statistics-data-tables-avi>.

The data table relied on is: 'AVI0105: International passenger movements at UK airports by country of embarkation or landing: time series'.

approximately 10% of passengers were transiting to or from North America and 17% from other international destinations that same year.[109] In light of this, Brexit presented unique challenges for both jurisdictions with respect to air transport.

In November 2018, the European Commission proposed that the European Union and the United Kingdom reciprocate first to fourth freedoms to enable each other's airlines to continue services between each other.[110] In December, the Commission subsequently proposed a new regulation for common rules on air transportation to effect this proposal.[111] In doing so, it noted that the majority of air transportation between European Union Member States and the United Kingdom occurred on their own airlines and therefore, failing to conclude a temporary agreement in respect of air transport would have serious ramifications on travel between them.[112] The Commission proposed that the regulation should commence on the United Kingdom's withdrawal from the EU, on a temporary basis, and without prejudice to the two jurisdictions concluding a more comprehensive ASA in the future.[113]

The regulation entered into force in March 2019, although many provisions did not apply until after European law ceased to apply in the United Kingdom.[114] The regulation provided United Kingdom designated airlines with first to fourth freedom traffic rights for scheduled and non-scheduled passenger and cargo services.[115] The agreement prohibited EU Member States from negotiating air service agreements regarding matters contained in the regulation, and in particular, prohibited Member States from providing UK designated airlines with any additional rights.[116] With respect to ownership and control restrictions, the Regulation provided a six-month grace and transition period for airlines to satisfy European ownership and control requirements following the withdrawal of the United Kingdom from the European Union.[117] The regulation adopted a specific definition of UK air carrier to recognise the commercial realities of ownership and control of UK airlines and relied on the principal place of business criterion.[118] The Preamble to the Regulation

109 Ibid.

110 European Commission, 'Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: a Contingency Action Plan' (Communication, 13 November 2018) 9 <https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/communication-preparing-withdrawal-brexit-preparedness-13-11-2018.pdf>.

111 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on common rules ensuring basic air connectivity with regard to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Union' (Explanatory Memorandum, COM(2018) 893 19 December 2018).

112 Ibid, 1.

113 Ibid, 6-7.

114 Regulation (EU) 2019/502 of the European Parliament and the Council of 25 March 2019 on common rules ensuring basic air connectivity with regard to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Union [2019] OJ L 85 I/49, art. 16(1)-(2).

115 Ibid, art. 4(1)(a)-(c).

116 Ibid, art. 4(3).

117 Ibid, art. 7.

118 Ibid, art. 3(4).

recommended that the European Union and United Kingdom promptly negotiate a comprehensive air transport agreement.[119]

In January 2020, the United Kingdom and the European Union concluded a Withdrawal Agreement to facilitate the United Kingdom's departure from the European Union. The agreement entered into force the following month and delivered on the 2016 referendum decision.[120] The agreement provided for a transition period until 31 December 2020.[121] The parties were entitled to extend the transition period by one or two years, however, such a decision needed to be made before 1 July 2020.[122] That option was not ultimately exercised. During the transition period, the agreement prescribed that European Union law would continue to be applicable to and in the United Kingdom.[123] Notwithstanding this, the United Kingdom was entitled to conclude its own international agreements during the transition period without the European Union's authorisation, although they could not enter into force or apply during the transition period.[124]

In the lead-up to Brexit, the United Kingdom began to conclude new ASAs with key trading partners. In November 2018, the United Kingdom concluded a new OSA with the United States of America.[125] This agreement is broadly consistent with the United States model Open Skies Agreement, and the existing US-EU ATA. It provides their respective airlines with first to fifth freedoms for market access.[126] Both States have agreed to allow airlines to price their services on commercial terms and there are no restrictions on the number of services that may be offered.[127] In respect of authorisation, the agreement recognises the unusual circumstances surrounding ownership and control of European and British airlines:

> An airline of the United Kingdom that was authorized by the Department of Transportation as of November 28, 2018, shall be deemed to satisfy the ownership and control standards of Articles 3(a) and 4(1)(b) of the Agreement, provided that:
>
> a. substantial ownership of the airline remains vested in the United Kingdom, one or more States that were party to the European Economic Area Agreement as of

119 Ibid, Preamble (5).

120 *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, signed on 24 January 2020 (entered into force on 1 February 2020) art 185(a).

121 Ibid, art 126.

122 Ibid, art 132.

123 Ibid, art 127.

124 Ibid, art 129(4).

125 *Air Transport Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland*, signed on 28 November 2018 (provisionally applied from 1 January 2021, entered into force on 25 March 2021).

126 Ibid, art. 2.

127 Ibid, arts. 11(2) and 12(1).

November 28, 2018, and continue to be such a party, nationals of one or more of these States, or a combination thereof, provided that any such State is party to a modern liberal air transport agreement with the United States that is being applied;

b. changes in the degree of ownership of the airline by third countries or their nationals do not result in significant third country ownership; and
c. the degree of control of the airline exerted by third countries or their nationals does not increase substantially.[128]

During this time, the United Kingdom also concluded ASAs with a number of other countries.[129]

In addition to further fragmenting the regulatory framework, Brexit presented some practical challenges for airlines. In the lead up to Brexit, a number of airlines undertook corporate restructures to ensure they would be compliant with EU and UK licensing requirements. easyJet, for example, established a new subsidiary airline, easyJet Europe in Austria.[130] Its new subsidiary enabled it to continue its operations in Europe, independent of any agreement concluded between the United Kingdom and the European Union. It also obtained a new Air Operator's Certificate to enable it to continue its operations in the United Kingdom.[131] Irish airline Ryanair removed voting rights from ordinary shares held by United Kingdom nationals after Brexit and United Kingdom nationals were prohibited from purchasing ordinary shares in its airline.[132] In February 2019, British regional carrier, flybmi, filed for administration, citing the uncertainty surrounding Brexit and its impact on EU routes as a key factor in its demise.[133]

In late 2020, the United Kingdom and the European Union concluded comprehensive a Trade and Cooperation Agreement (TCA) to govern trade between the two jurisdictions across a wide variety of industries.[134] For scheduled air passenger transport, the TCA recognises traditional ownership and control criteria. To be authorised under the TCA, a United Kingdom airline must be owned, directly or through majority ownership, and be effectively controlled by the United Kingdom, its nationals or both. It must also have its principal place of business in the United Kingdom, be licensed under United Kingdom law, and hold an air operator certificate issued by the competent United Kingdom

128 Ibid, Annex 1.

129 Department for Transport, 'UK and US agree new open skies arrangements' (News Story, 28 November 2018) <https://www.gov.uk/government/news/uk-and-us-agree-new-open-skies-arrangements>.

130 easyJet plc, *Q3 Interim Management Statement* (2017) <http://otp.investis.com/clients/uk/easyjet1/rns/regulatory-story.aspx?cid=2&newsid=893241>.

131 easyJet plc, 'Annual Report and Accounts 2018' (2018) 133 <http://corporate.easyjet.com/~/media/Files/E/Easyjet/pdf/investors/results-centre/2018/2018-annual-report-and-accounts.pdf>.

132 Ryanair Investor Relations, *Q&A Hard Brexit & Non-EU Shareholders* (2018) <https://investor.ryanair.com/brexit/>.

133 flybmi, Untitled (Press Release, 16 February 2019) <www.flybmi.com>.

134 *Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one party, and the United Kingdom of Great Britain and Northern Irelands, of the other part*, signed on 24 December 2020 (provisionally applied from 1 January 2021 and entered into force on 1 May 2021).

authority.[135] For a European airline, the TCA requires it to be owned, directly or through majority ownership, and effectively controlled by either: one or more Member States, other Member States of the European Economic Area, Switzerland, the nationals of these States or a combination of both. In addition, the airline must have its principal place of business in the European Union, hold a valid European Union operating licence and an air operator certificate issued by a Member State competent authority.[136] The TCA provides first to fourth freedom rights for authorised airlines and prohibits unilateral restrictions on the volume of traffic, capacity or frequency.[137]

The TCA also provides for a Specialised Committee on Air Transport. The Committee serves as a forum between the parties to oversee the TCA and has specific statutory functions. These functions include reviewing ownership and control criteria, monitoring progress with respect to obstacles for airlines doing business and facilitating statistical reporting.[138]

The ASEAN Single Aviation Market

The Association of Southeast Asian Nations (ASEAN) has also sought to establish its own Single Aviation Market (ASAM). ASEAN is comprised of 10 States in Southeast Asia, each with very diverse air transport markets.[139] ASEAN has adopted a staged approach to the introduction of its ASAM.

In 2008, Member States concluded the Multilateral Agreement on Air Services (MAAS) and six appended Protocols.[140] The MAAS and all protocols have subsequently been ratified by all ASEAN Member States.[141] The agreement provides unlimited first and second rights and the Protocols provide for a staged progression of third, fourth and fifth freedom rights, initially between ASEAN Sub-Regions and then ASEAN capital cities.[142] The MAAS enables Member States to designate an unlimited number of airlines under the agreement provided that the airline satisfies one of three types of ownership and control criteria. The airline may either be substantially owned or effectively controlled by the designating Member State, its nationals or both.[143] Alternatively, the airline may, subject to acceptance by a Contracting Party receiving the application, have its principal place of business in

135 Ibid, art. 422(1)(a).

136 Ibid, art. 422(1)(b).

137 Ibid, art. 419(1)-(3), (6).

138 Ibid, arts. 425, 428, 433.

139 The Member States are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

For further information on market diversity, see Peter Forsyth, John King, Cherry Lyn Rodolfo, 'Open Skies in ASEAN' (2006) 12(3) *Journal of Air Transport Management*, 143, 144-145.

140 *Association of Southeast Asian Nations Multilateral Agreement on Air Services*, signed on 20 May 2009 (entered into force on 23 November 2009) ('*ASEAN MAAS*').

141 Association of Southeast Asian Nations, *ASEAN Air Transport Instruments and Status of Ratification* (23 March 2022) <https://asean.org/wp-content/uploads/Ratification-Status-of-Air-Transport-Agreements-as-of-26July2021.pdf >.

142 *ASEAN MAAS*, Protocol 1-6.

143 Ibid, art 3(2)(a)(i).

the territory of the designating Member State and be substantially owned and effectively controlled by either one or more ASEAN Member States, their nationals or a combination of both.[144] In this situation, the designating State is required to maintain effective regulatory control over the airline. An airline may also be designated for the purposes of the agreement if it is established and operates its principal place of business in the designating Member State, and that Member State also exercises effective regulatory control over the airline.[145] In addition to satisfying these requirements, designated airlines may also be required to demonstrate that they are able to satisfy the domestic laws applied by the other Contracting Party to international air transport and the airline's own designating Member State is required to comply with the safety and security provisions of the agreement.[146]

In 2010, ASEAN Member States concluded a supplementary agreement, the Multilateral Agreement on the Full Liberalisation of Passenger Air Services (MAFLPAS) as part of its commitment to complete the ASAM by 2015.[147] The MAFLPAS is currently comprised of the agreement and four appended protocols. The agreement mirrors the designation and authorisation criteria contained within the MAAS. Protocols 1 and 2 of the Agreement extend the progression of third, fourth and fifth freedom rights between any ASEAN cities.

In 2017 and 2018, ASEAN Member States subsequently concluded two further Protocols to the MAFLPAS. Protocol 3 enables designated airlines to participate in code-sharing arrangements and Protocol 4 enables designated airlines to service two or more points in another Member State's territory provided those services form part of an international route (referred to as "co-terminal rights" in the Protocol).[148] The Protocols are only effective between the States that have ratified it.[149] Of relevance to this research, these Protocols have not been ratified by Indonesia.[150]

Although Member States have remained steadfast in their aspiration for a truly integrated ASAM, its progress has been much slower and more protracted than the EU's SAM, in part

144 Ibid, art 3(2)(a)(ii).

145 Ibid, art 3(2)(a)(iii).

146 Ibid, art 3(2)(b)-(c).

147 *Association of Southeast Asian Nations Multilateral Agreement on the Full Liberalisation of Passenger Air Services*, signed on 12 November 2010 (entered into force on 30 June 2011) ('*ASEAN MAFLPAS*').

148 *Association of Southeast Asian Nations Multilateral Agreement on the Full Liberalisation of Passenger Air Services Protocol 3 Domestic Code-Share Rights between Points within the Territory of any other ASEAN Member States*, signed on 13 October 2017 (entered into force on 6 March 2019) ('*ASEAN MAFLPAS Protocol 3*').

See also, *Association of Southeast Asian Nations Multilateral Agreement on the Full Liberalisation of Passenger Air Services Protocol 4 Co-Terminal Rights between Points within the Territory of Any Other ASEAN Member State*, signed on 9 November 2019 (entered into force on 16 August 2019) ('*ASEAN MAFLPAS Protocol 4*').

149 *ASEAN MAFLPAS Protocol 3*, art 5(3).

See also, *ASEAN MAFLPAS Protocol 4*, art 5(3).

150 Association of Southeast Asian Nations, *ASEAN Air Transport Instruments and Status of Ratification* (23 March 2022) <https://asean.org/wp-content/uploads/Ratification-Status-of-Air-Transport-Agreements-as-of-26July2021.pdf >.

evidenced by failing to meet the original 2015 timeframe. Zuan, Ellis and Pagliara attribute ASAM's progress to a range of geopolitical factors such internal domestic politics to protect domestic markets and intra-regional differences such as Members' differing arrangements with third States.[151] They also note that ASEAN does not have a supranational regional institution to facilitate the progression of the ASAM.[152] Tan has previously noted that the disparity between Member States' airlines and their regional competitiveness also pose a challenge to progressing a meaningful ASAM.[153]

Single African Air Transport Market

The African Union has also sought to liberalise its intra-African air transport market in a very similar way to the EU, although its progress has also been much slower. In 1988, the African Ministers responsible for civil aviation signed the Declaration of Yamoussoukro on a New Air Transport Policy (the Yamoussoukro Declaration).[154] It committed African States to individually and collectively undertake all necessary efforts to achieve airline integration within eight years through three phases of reform. Phase I entailed the exchange of information about Contracting Parties' respective airlines, maximizing capacity and promoting co-operation between national airlines. Phase II involved airlines co-operating on airline operations including insurance, capital, market access, revenue and cost sharing and maintenance. Phase III focused on enabling airlines to develop consortiums, joint ownership arrangements and mergers. Schlumberger previously noted that one of the challenges in implementing the Yamoussoukro Declaration was that most African carriers were State owned and a liberalised regulatory environment was detrimental to their profitability.[155]

Over the following eleven years, there were a number of statements made on the importance of progressing liberalisation in air transport. These included in the 1991 Treaty Establishing the African Economic Community (the Abuja Treaty), 1994 decisions of the African Ministers responsible for civil aviation adopted in Mauritius on accelerating the implementation of the Yamoussoukro Declaration and a 1997 recommendation of the 11th Conference of African Ministers responsible for Transport and Communications calling for further investigation into how the Declaration could be implemented.[156] This culminated in a further meeting of African Ministers responsible for Civil Aviation in Yamoussoukro in 1999. From this meeting, the Decision relating to the Implementation of the Yamoussoukro

151 Haris Zuan, Darren Ellis and Romano Pagliari, 'Geopolitics and the ASEAN Single Aviation Market: Aspirations versus realities' (2021) 59 *Transportation Research Procedia* 95, 100-102.

152 Ibid, 96-97.

153 Alan Khee-Jin Tan, 'Toward a Single Aviation Market in ASEAN: Regulatory Reform and Industry Challenges' (ERIA-DP-2013-22, ERIA Discussion Paper Series, October 2013) 31.

154 Declaration of Yamoussoukro on a New African Air Transport Policy, understood to have opened for signature October 1988, E/ECA/TRANS/77A (date of entry into force unknown).

155 Charles E. Schlumberger, Open Skies for Africa (The World Bank, 1st ed, 2010) 5-6.

156 Decision relating to the implementation of the Yamoussoukro Declaration concerning the liberalisation of access to air transport markets in Africa, opened for signature in July 2000, ECA/RCID/CM.CIVAC/99/RPT (entered into force on 12 August 2000) ('*Yamoussoukro Decision*') Preamble.

Declaration concerning the Liberalisation of Access to Air Transport Markets in Africa (the Yamoussoukro Decision) was developed.[157]

The purpose of the Yamoussoukro Decision is to establish arrangements between State Parties for the liberalisation of scheduled and non-scheduled intra-African air transport services.[158] It grants State Parties first to fifth freedoms and removes limitations on the frequency and capacity of services linking city pairs between State Parties subject to competition laws provided within the Decision. It also includes environmental, safety, technical and other considerations and provides a common process for the designation and authorisation of airlines operating intra-African services.[159] Importantly, the Decision requires airlines designated to operate intra-African air services to satisfy seven criteria.[160] Notably, the Decision requires airlines to have their headquarters, central administration and principal place of business physically located in the State concerned and be effectively controlled by the State Party.

To facilitate its implementation, the Yamoussoukro Decision charges three bodies with responsibility for supervising this task. Firstly, the Decision established a Sub-Committee on Air Transport of the Committee on Transport, Communications and Tourism to provide for the overall supervision, follow-up and implementation of the Yamoussoukro Decision.[161] Secondly, the Decision established a Monitoring Body comprised of representatives of the United Nations Economic Commission for African (ECA), the Organization of African Unity, the African Civil Aviation Commission (AFCAC) and the African Airlines Association (AFRAA) to assist the Sub-Committee on Air Transport in the follow-up of the implementation of the decision.[162] The Yamoussoukro Decision also required an African Air Transport Executing Agency to be established for the purpose of supervising and managing Africa's liberalised air transport industry.[163]

Unlike the EU which has achieved a deeply integrated SAM, implementation of the Yamoussoukro Decision has also progressed at a much slower pace. There are a number of African States that are not a party to the Yamoussoukro Decision. Schlumberger has previously estimated that approximately one third of Party States would not be willing to implement it in any event.[164] He has also noted that there are a number of pre-existing

157 Charles E. Schlumberger, Open Skies for Africa (The World Bank, 1st ed, 2010), 11.

158 *Yamoussoukro Decision*, art 2.

159 Ibid, arts 3 and 6.

See also, art 10 which provided for a two-year transition period which provided States with the option not to grant and receive rights specified in Articles 3 and 4.

160 Ibid, art 6.9.

161 Ibid, art 9.1.

162 Ibid, art 9.2.

163 Ibid, art 9.4.

164 Charles E. Schlumberger, Open Skies for Africa (The World Bank, 1st ed, 2010), 172.

challenges which impede liberalisation of the African market including the prevalence of unviable national carriers, current policy formulation capabilities and an inadequate safety and security oversight regime which deters investment in African aviation.[165] Intervistas Consulting has previously noted that some African States prefer to grant market access to non-African countries, rather than entering into open sky arrangements with other African countries.[166] Given the significant disparities between the air transport markets of the 54 African States, Njoya argued that it is unlikely that all States would be prepared or able to open their market at the same time in any event.[167]

Notwithstanding these challenges, in 2015, the Assembly of Head of States and Government adopted the Declaration on the Establishment of a Single African Air Transport Market (SAATM) and committed to implementing the Yamoussoukro Decision to facilitate the creation of the SAATM as part of the African Union Agenda 2063.[168] The African SAATM was officially launched in January 2018 with 23 Member States declaring a Solemn Commitment to implementing the Yamoussoukro Decision.[169] To date, 34 African States have become a party to the SAATM.[170]

Australia - New Zealand Single Aviation Market

On a much smaller scale, Australia and New Zealand operate a Trans-Tasman bilateral SAM. The agreement establishing the SAM provides for unlimited designations and authorisations.[171] To be authorised to conduct air transport as a SAM airline, an airline is required to be majority owned and effectively controlled by nationals of either or both parties, at least two-thirds of its Board must be nationals of either or both parties, the Chairperson must be a national of either party and the airline's headquarters and operational base must be in the territory of either party.[172] An airline is also required to meet the legislative requirements to operate air transport by the party considering the application, hold the necessary operating permits and comply with safety and security standards.[173] Most significantly, the SAM permits cabotage to enable Australian and New Zealand airlines to operate domestic services under a common market.[174]

165 Ibid, 174.

166 Intervistas Consulting Limited, 'Transforming Intra-African Air Connectivity: The Economic Benefits of Implementing the Yamoussoukro Decision' (Consulting Report prepared for the International Air Transport Association in partnership with the African Civil Aviation Association and the African Airlines Association, 2014) 34.

167 Eric Tchouamou Njoya, 'Africa's Single Aviation Market: the progress so far' (2016) 50 *Journal of Transport Geography* 4, 8-9.

168 African Union, 'Africa Opens Its Skies as AU gathers leaders for Summit' (Press Release No. 13, 30th AU Summit, 29 January 2018) 1.

169 Ibid, 3.

170 International Air Transport Association, The Single African Air Transport Market (SAATM) (2022) <https://www.iata.org/en/about/worldwide/ame/saatm/>.

171 *Agreement between the Government of Australia and the Government of New Zealand relating to Air Services* [2003] ATS 18 (signed and entered into force on 8 August 2002), arts 1, 3.

172 Ibid, art 2(4)(a)-(e).

173 Ibid, art 2(4)(f)-(g).

174 Ibid, Annex, s 1(C).

Arab States: Damascus Convention

In 2004, the Council of Arab Air Transport Ministers adopted the Agreement for the Liberalization of Air Transport between the Arab States (commonly known as the Damascus Convention, although some literature also refers to it as the Damascus Agreement). The Damascus Convention is of a similar form to other regional multilateral agreements. The Convention supersedes bilateral and multilateral agreements concluded between State parties to regulate air transport if the provisions of those agreements are in conflict with the Convention.[175]

The Damascus Convention grants carriers of State parties with the right to embark and disembark passengers, separately or in combination, from the territories of any of the state parties, although the right to cabotage is expressly denied.[176] The Convention removes restrictions on capacity and frequency and allows airlines to select the aircraft they wish to use for their services.[177] It also promotes the principles of equal and fair competition, which are contained within Annex 2 to the Convention.[178]

The Damascus Convention adopts a more liberal approach to ownership and control of State party carriers in that substantial ownership and effective control is required to be vested in a State or several State parties or their nationals and the airline's headquarters must be in the territory of one of these State parties.[179] The Convention also allows airlines to enter into cooperative market arrangements such as joint enterprises.[180] To date, the Convention has been signed by thirteen Arab States and ratified by eight: Jordan, Lebanon, Morocco, Oman, Palestine, Syria, Yemen, and the United Arab Emirates.[181]

Multilateral Agreement on Liberalization of International Air Transport

The Multilateral Agreement on Liberalization of International Air Transport (MALIAT) originated from the Asia-Pacific Economic Cooperation (APEC), although it is not specifically an APEC Agreement and non-Member economies may become a party to it.[182] The Agreement was signed on 1 May 2001 by the Brunei Darussalam, Chile, New Zealand, Singapore and the United States of America.[183] Subsequently, the Cook Islands, Peru, Samoa and Tonga acceded the MALIAT, with Peru withdrawing in 2005 and Samoa

175 *Agreement for the Liberalization of Air Transport between Arab States*, signed in 2004 (entered into force in 2007) ('*Damascus Convention*') art 2(3).

176 Ibid, art 4.

Note, art 4(3) expressly provides that the Agreement does not impose on State parties the rights of internal transport.

177 Ibid, art 7.

178 Ibid, art 9.

179 Ibid, art 5(2)(a).

180 Ibid, art 13(2).

181 Arab Air Carriers' Organization, *Liberalization* (November 2019) <https://aaco.org/policy/liberalization>.

182 For a history of the MALIAT, see John H. Kiser, 'The Multilateral Agreement on the Liberalization of Air Transport' (Speech delivered at the Preparatory Conference for the Worldwide Air Transport Conference, Montreal, 22 March 2003).

183 Sometimes also referred to as the Kona Agreement.

in 2019.[184] Although MALIAT has been promoted by its signatories as a template for multilateral liberalisation of air transport, it has not attracted new signatories over the past decade.[185] Khee-Jin Tan has previously noted that most signatories have such small domestic markets that there is 'no meaningful right of domestic cabotage to speak of within their aviation markets'.[186]

MALIAT provides carriers with the right to service points from behind the territory of the Party designating the airline, via its territory and intermediate points to any point or points in the territory of any other Party and beyond.[187] The Brunei Darussalam, New Zealand, Singapore and the Cook Islands have also signed a Protocol to the MALIAT for seventh freedom rights and cabotage.[188] MALIAT departs from the traditional foreign investment restrictions imposed on airlines in bilateral agreements. Party States may designate as many carriers as they wish.[189] On receiving a designation, a Party State is required to grant the appropriate authorisations and permissions provided the carrier meets the following criteria:

a. effective control of that airline is vested in the designating party, its nationals, or both;
b. the airline is incorporated in and has its principal place of business in the territory of the Party designating the airline;
c. the airline is qualified to meet the conditions prescribed under the law, regulations, and rules normally applied to the operation of international air transportation by the Party considering the application or applications; and
d. the Party designating the airline is in compliance with the provisions set forth in Article 6 (Safety) and Article 7 (Aviation Security).[190]

Notwithstanding these provisions, MALIAT explicitly states that it will not affect a Party State's own domestic legislation regarding designation.[191] This clause enables states to retain stringent restrictions on foreign investment in their own jurisdictions if they so choose.

184 Multilateral Agreement on the Liberalization of International Air Transportation, *Country* (last update unknown) <https://www.maliat.govt.nz/home/country/>.

185 The Cook Islands was the last signatory to the Agreement in 2006.

186 Alan Khee-Jin Tan, 'Liberalizing Aviation in the Asia-Pacific Region: The Impact of the EU Horizontal Mandate' (2006) 31 *Air and Space Law*, 432, 438.

187 *Multilateral Agreement on the Liberalization of International Air Transportation*, signed on 1 May 2001 [2001] PITSE 7 (entered into force 21 December 2001) art 2 ('*MALIAT*').

188 *Protocol to the Multilateral Agreement on the Liberalization of International Air Transport*, signed on 1 May 2001 (entered into force 21 December 2001).

189 *MALIAT*, art 3(1).

190 Ibid, art 3(2).

191 Ibid, art 3(5).

South America

Although South America has not adopted a SAM, several regional agreements have sought to facilitate liberalisation of air transport services in the region. In the early 1990's, the Andean Community adopted an Air Transport Policy for its region. The agreement grants Contracting Parties with third, fourth and fifth freedom rights for scheduled and unscheduled passenger, cargo and mail air transport in the region.[192] In the mid 1990's, Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay concluded the Fortaleza Agreement to promote sub-regional air transport services.[193]

In 2010, Member States of the Latin American Civil Aviation Commission (LACAC) also concluded an agreement for the purpose of liberalising air transport within the region.[194] The LACAC is comprised of 22 South American Member States.[195] The Contracting Parties of the Andean Air Transport Policy and the Fortaleza Agreement are also Members of the LACAC. To date, Panama, Uruguay and Brazil have ratified the agreement.[196] Chile, Guatemala, Honduras, Paraguay and the Dominican Republic provisionally apply it.[197]

The agreement permits each Contracting Party to designate as many airlines as it wishes, with other parties required to provide operational approval provided that those airlines are incorporated and headquartered in the designating Contracting party, they are under effective regulatory control of the designating Contracting Party and that Party complies with its safety and security obligations under the agreement.[198] The agreement provides designated airlines with first to ninth freedom rights.[199] Of relevance to this research, Brazil has made reservations to the seventh to ninth traffic rights provided for in the agreement.[200] The agreement also contains provisions regarding fair competition,

192 Decision 297: Integration of Air Transport in the Andean Subregion, signed on 16 May 1991 (entered into force on the day of its publication in the Official Gazette of the Cartagena Agreement) art 5.

See also, Mauricio Siciliano 'The Andean Subregional Air Transport Integration System' (LLM Thesis, McGill University, 1995) 55.

In his thesis, Mr Siciliano notes that the agreement entered into force on 12 June 1991.

193 *Agreement on Subregional Air Services between the Government of the Argentine Republic, the Republic of Bolivia, the Federative Republic of Brazil, the Republic of Chile, the Republic of Paraguay and the Eastern Republic of Uruguay*, signed on 17 December 1996 (understood to have entered into force on 9 April 1999).

194 Adopción del Acuerdo Multilateral de Cielos Abiertos para los Estados Miembros de la Comisión Latinoamericana de Aviación Civil (CLAC), signed on 4 November 2010 (entered into force on 7 April 2019) ('*Multilateral Open Skies Agreement for Member States of the Latin American Civil Aviation Commission*').

195 Latin American Civil Aviation Commission, *Member states* (undated) <https://clac-lacac.org/member-states/?lang=en>.

196 Agência Nacional de Aviação Civil, *Open Skies Multilateral Agreement for Member States of Latin American Civil Aviation Commission (LACAC)* (9 October 2019) < https://www.anac.gov.br/en/air-services/open-skies-multilateral-agreement-for-member-states-of-latin-american-civil-aviation-commission-lacac#:~:text=The%20Agreement%20entered%20into%20-force,by%20other%20CLAC%20Member%20States>.

197 Ibid.

198 *Multilateral Open Skies Agreement for Member States of the Latin American Civil Aviation Commission*, art 3.

199 Ibid, art 2.

200 Ibid.

See also, *Multilateral Open Skies Agreement for Member States of the Latin American Civil Aviation Commission*, Notas de Reserva.

and permits Contracting Parties to determine their own capacities and tariffs based on commercial considerations.[201]

IATA's Statement of Policy Principles

In addition to the agreements that States have initiated of their own accord, the International Air Transport Association, (IATA) also sought to progress liberalisation through its Agenda for Freedom Summit. IATA was established in in 1945 as the successor to the International Air Traffic Association.[202] It now represents 290 airlines and purports to represent 83 per cent of total air traffic.[203]

In 2003, the IATA's Director General, Mr Giovanni Bisignani identified three obstacles, or "pillars of stagnation" in the commercial regulation of airlines.[204] These were the bilateral system, national ownership rules and the attitude of competition authorities. He explained that the aviation industry required regional liberalisation, airlines needed to be able to merge and approach the international financial market for capital and required a better competition policy framework.[205]

In 2008, IATA convened the Agenda for Freedom Summit with the purpose of finding solutions to improve airlines' access to international markets and capital.[206] In October 2009, seven parties concluded a Statement of Policy Principles regarding the Implementation of Bilateral Air Service Agreements. These parties included the Republic of Chile, Malaysia, Republic of Panama, Republic of Singapore, Swiss Confederation, United Arab Emirates, the United States of America and the European Union. The Statement affirms commitments to reduce restrictions on foreign investment, market access and pricing in air services.[207]

201 Ibid, art 15-17.

202 International Air Transport Association , *The Founding of IATA* (2022) <http://www.iata.org/about/Pages/history.aspx>.

203 International Air Transport Association, *About us* (2022) <https://www.iata.org/en/about/>.

204 Giovanni Bisignani, 'Seeking a New Way' (Speech delivered at Seminar prior to the ICAO Worldwide Air Transport Conference, Montreal, 22 March 2003).

205 Ibid.

206 International Air Transport Association, 'Successful Agenda for Freedom Summit Concludes' (Press Release, 26 October 2008).

207 International Air Transport Association, *Statement of Policy Principles regarding the Implementation of Bilateral Air Services Agreements* (2009) <https://www.iata.org/contentassets/05ba82ed6fca4a17aaa568c66c9691b4/agenda-for-freedom-multilateral-statement-policy.pdf>.

A ROLE FOR THE WORLD TRADE ORGANIZATION?

In spite of the international nature of air transport, there has been a reluctance for the World Trade Organization (WTO) to assume a role in the regulation of economic rights in the air transport sector. The WTO trading system is built upon two key principles: the most-favoured nation (MFN) principle which prohibits a State from discriminating between trading partners and the national treatment principle which entails a State treating domestic and imported goods and services equally. The bilateral trading system for air transport, in its current form, does not apply these principles. Rather, it specifically enables States to apply discriminatory treatment to trade.[208]

The 1947 General Agreement on Tariffs and Trade[209] explicitly excluded air transport on the grounds that air traffic would be dealt with by the Provisional International Civil Aviation Organization, a precursor to the ICAO as it is today.[210] When this issue was reconsidered as part of the Uruguay Round of negotiations for the General Agreement on Trade in Services (GATS), Members again agreed to exclude traffic rights and all services related to them from the purview of the WTO, rather preferring to maintain existing bilateral agreements.[211] In his negotiating history of the Uruguay Round, Stewart notes that some Members, such as the United States of America, were subject to tremendous domestic lobbying, and, coupled with concerns about national security, changed their perspective on whether GATS should exclude particular services.[212] Members instead determined that the application of GATS to the air transport sector should be reviewed after five years.[213]

In 1994, an Annex on Air Transport Services was concluded as part of the GATS. The Annex applies to measures affecting trade in air transport services, scheduled and non-scheduled and ancillary services. It explicitly provides that GATS shall not apply to measures affecting traffic rights or services directly related to traffic rights.[214] However, it does apply to measures affecting aircraft repair and maintenance services, the selling and marketing of air transport services and computer reservation system services.[215] The agreement defines traffic rights as follows:

208 For further discussion of this issue, see for example, Christopher Findlay and David K. Round, 'The three pillars of stagnation: challenges for air transport reform' (2006) 5(2) *World Trade Review* 251, 255.

209 *General Agreement on Tariffs and Trade*, opened for signature on 30 October 1947 64 UNTS 187 (provisionally entered into force 1 January 1948).

210 *Preparatory Committee of the International Conference on Trade and Employment,* E/PC/T/C.II/54/Rev.1 (28 November 1946) (Report of the Technical Sub-committee) [7].

211 *Report of the Second Session of the Review mandated under paragraph 5 of the Air Transport Annex* WTO Doc S/C/M/50 (5 March 2001) (Note by the Secretariat for session held on 4 December 2000) 1.

212 Terence P. Stewart (ed), *The GATT Uruguay Round* (Kluwer Law and Taxation Publishers, 3rd Ed., 1993) Volume 2, 2364.

213 Ibid.

214 *General Agreement on Trade in Services*, opened for signature 15 April 1994, 1869 UNTS 183 (entered into force 1 January 1995) ('*GATS*') Annex on Air Transport Services ('*GATS Annex on Air Transport Services*'), cl 2.

215 Ibid, cl 3.

> "Traffic rights" mean the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control.[216]

This can be distinguished from the sale and marketing of air transport services, defined in the Annex, as follows:

> "Selling and marketing of air transport services" mean opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions.[217]

The WTO Secretariat has previously noted that the Annex does not define "trade in air transport", "ancillary services" or "services directly related to the exercise of traffic rights" and member commitments indicate there is no uniform interpretation of this paragraph.[218]

The Annex provides that at least once every five years, the Council for Trade in Services (CTS) should review developments in the sector and the operation of the Annex with a view to considering how it could be further applied to air transport.[219] In September 2000, the Council commenced its first review, focusing on two specific purposes: firstly, to consider the present scope of the GATS Annex, and secondly, whether traffic rights and services should continue to be excluded from the GATS.[220] At the conclusion of the first review, Members were unable to reach consensus on either of these two issues.[221] A number of States with significant air transport markets, such as Japan and India were of the view that the existing air bilateral system was sufficient and there was no need to expand GATS to include traffic rights.[222]

216 Ibid, cl. 6(d).

217 Ibid, cl. 6(b).

218 World Trade Organization, 'World Trade Report 2005: Exploring the links between trade, standards and the WTO' (Report, 2005, World Trade Organization) 250.

See also, *Report of the Second Session of the Review mandated under paragraph 5 of the Air Transport Annex*, WTO Doc S/C/M/50 (5 March 2001) (Note by the Secretariat for session held on 4 December 2000) 1.

219 *GATS* Annex on Air Transport Services, cl 5.

220 *Report of the Second Session of the Review mandated under paragraph 5 of the Air Transport Annex*, WTO Doc S/C/M/50 (5 March 2001) (Note by the Secretariat for session held on 4 December 2000) 2.

221 World Trade Organization, 'World Trade Report 2005: Exploring the links between trade, standards and the WTO' (Report, 2005, World Trade Organization) 250-251.

222 *Report of the Fourth Session of the Review mandated under paragraph 5 of the Air Transport Annex*, WTO Doc S/C/M/62 (17 October 2002) (Note by the Secretariat for session held on 18 March 2002) 4-6.

In preparation for the Second Review, the Secretariat undertook an extensive Quantitative Air Services Agreements Review (commonly referred to as QUASAR). QUASAR provided a comprehensive analysis of ASAs concluded by 184 contracting States.[223] The Second Review commenced in September 2006 and is considered to be in progress.[224] During the last session of the second Review (conducted in 2007), Members continued to hold conflicting views on the application of GATS to ground-handling and airport operation services, and were unable to reach consensus on further steps for the review.[225] The Second Review did not reconvene and no further reviews have subsequently been conducted.

In 2013, a subset of WTO Members, colloquially known as the 'Really Good Friends of Services', commenced negotiations on a separate Trade in Services Agreement (TiSA). In 2015, the European Union reported that issues pertaining to market access for scheduled passenger air transport services and foreign investment in airlines would nevertheless remain outside of TISA's scope.[226] An agreement has not eventuated.

REGIONAL TRADE AGREEMENTS

Notwithstanding the various regional agreements that States have concluded for the purpose of liberalising scheduled, international air transport, States have also been reluctant to incorporate traffic rights into their regional trade agreements. The Agreement between the United States of America, the United Mexican States and Canada (USMCA) contains MFN and national treatment provisions for investment and cross-border trade in services.[227] Of relevance to this study, the USMCA also prohibits parties from imposing nationality restrictions for senior management positions for foreign businesses.[228] Notwithstanding these provisions, in their respective Annexes, the three parties have advised that these obligations do not apply to scheduled air transportation services.[229] Domestic and international air transportation services are outside the scope of the Cross-Border Trade in Services Chapter.[230] The Comprehensive and Progressive Agreement for

223 For further information, see World Trade Organization, *Second Review* (2022) <https://www.wto.org/english/tratop_e/serv_e/transport_e/review2_e.htm#quasar>.

224 The Second Session of the Second Review was held on 2 October 2007. No further sessions have since been held.

World Trade Organization, *Air Transport Services* (2022) <https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_air_e.htm>.

225 *Report of the Second Session of the Review mandated under paragraph 5 of the Air Transport Annex*, WTO Doc S/C/M/89 (19 November 2007) (Note by the Secretariat for the session held on 2 October 2007) 20-25.

226 Elina Viilip, 'The Trade in Services Agreement (TISA): An end to negotiations in sight?' (European Parliament, Directorate-General for External Policies, October 2015) 18.

227 *Agreement between the United States of America, the United Mexican States and Canada*, signed on 30 November 2018 (entered into force 1 July 2020) arts. 14.4-14.5 and 15.3-15.4.

228 Ibid, art 14.11.

See also, art 14.1 regarding the definition of a covered investment.

229 Ibid, Annex I – Mexico, 32.

See also, Annex I – United States, 7.

See also, Annex I – Canada, 26-28.

230 Ibid art 15.2(4).

Trans-Pacific Partnership (CPTPP) contains a similar framework to USMCA for investment and cross-border trade in services.[231] In their respective Annexes, most Contracting Parties have advised of various non-conforming domestic provisions for investment in their licensed airlines.[232] Additionally, the cross-border trade in services provisions do not apply to domestic or international air transportation services.[233] The Comprehensive and Economic Trade Agreement concluded between Canada and the European Union excludes most air services from both the investment and cross-border trade in services provisions of the agreement.[234] Air services have been similarly carved out of the Agreement between the European Union and Japan.[235]

CONCLUDING REMARKS

The regulatory framework for international air transport is unique when contrasted with the international trade of other services. There is no uniform regulation of economic rights through ICAO or the WTO. Rather, ICAO has been used as a forum to progress liberalisation, rather than taking a regulatory role itself. Economic rights for airlines largely fall outside of the WTO's purview and to date, there has been little appetite to change this. Traffic rights have similarly been explicitly excluded from major regional trade agreements.

States regulate their air transport markets through a complex patchwork of ASAs, regional and multilateral agreements and domestic legislation. Although many regional, multilateral agreements have been concluded for the purpose of liberalising international, scheduled air transport, most of these agreements have not delivered significant change to the economic regulation of airlines. Of all of the regional initiatives, the European Union's SAM is by far the most successful. Its success is grounded in a broader shared

231 See *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed on 8 March 2018 (entered into force on 30 December 2018), arts. 9.4-9.5 and 10.3-10.4.

232 Ibid, Annex I, Schedule of Australia, 17-18.

See also, Annex I, Schedule of Canada, 22-23.

See also, Annex I, Schedule of Chile, 28-29.

See also, Annex I, Schedule of Japan, 46-48.

See also, Annex I, Schedule of Mexico, 46.

See also, Annex I, Schedule of New Zealand, 10.

See also, Annex I, Schedule of Peru, 23-24.

See also, Annex I, Schedule of Singapore, 24.

See also, Annex I, United States, 7.

See also, Annex I, Schedule of Vietnam, 41.

233 Ibid, art 10.2(5)

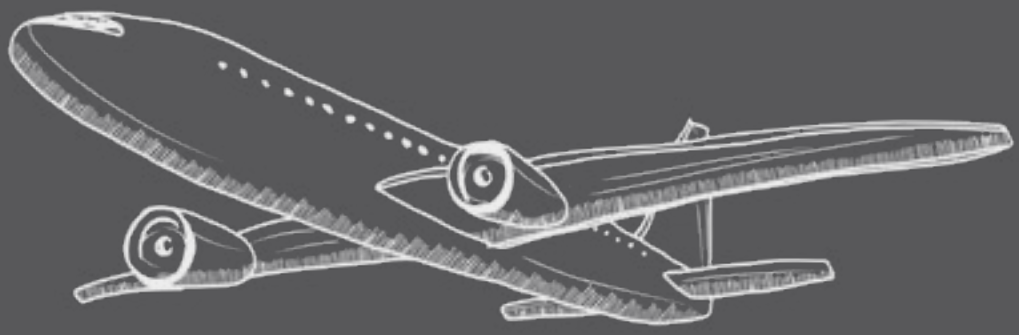
234 *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*, signed on 30 October 2016 (entered into force on 21 September 2017) arts 8.2(2)(a), 9.2(2)(e).

These provisions limit the scope of application to aircraft repair and maintenance services, marketing, computer reservation systems, ground handling and airport operation services.

235 *Agreement between the European Union and Japan for an Economic Partnership*, signed on 17 July 2018 (entered into force on 1 February 2019) arts 8.6(2)(b) and 8.14(2)(b).

ambition and mandate to create a common market that removes barriers to trade between individual Member States across a wide variety of industries and is supported by strong governance structure to facilitate this objective.

Many States continue to impose stringent restrictions on airlines by regulating operational aspects of their business, such as prescribing where they may fly, how many passengers they may transport, pricing, foreign investment and control in their business and the other airlines they may partner with through domestic legislation and the ASAs that they are a party to. The following chapters will further explore how the jurisdictions regulate trade in air transport services between themselves, foreign investment in the airlines that they regulate and competition issues between airline alliances.



CHAPTER 3:

TRADE AND MARKET ACCESS

INTRODUCTION

Air transport is intrinsic to international trade; as an internationally traded service in itself, and as an enabler for the trade of other services and goods.[236] However, unlike other internationally traded goods and services, airlines are subject to a very unique regulatory framework. The Chicago Convention expressly prohibits airlines from operating international air services in or over the territory of another contracting party of the Convention without the State's permission or authorisation.[237] As a matter of practice, there is a two-step process for obtaining authorisation or permission to operate international air services. Firstly, the airline's licensing State must be a party to an air service agreement (ASA), air transport agreement (ATA) or other multilateral ASA. Secondly, the airline must be designated by its licensing State and/or authorised by the other Contracting Party to provide international services on the routes specified in the agreement. The extent to which an airline has access to another jurisdiction's market depends on the terms agreed by the contracting parties. During the pandemic, market access issues have been further compounded by COVID-19 travel restrictions.

This chapter will explore issues pertaining to trade in air transport services and specifically, market access. The chapter will provide some context to the features of the jurisdictions' markets for international air transport and key trading partners prior to the pandemic and will then explore the key provisions of air service and air transport agreements concluded between the jurisdictions. This analysis has been prepared by reviewing a sample of nearly 100 agreements against six key elements. Those elements include designation and authorisation, traffic rights, frequency, capacity, tariffs and dispute resolution. A list of the agreements considered in this examination is contained in Appendix A. This chapter will also explore how some of the jurisdictions have approached market access issues more broadly and will lastly discuss the temporary measures the jurisdictions have imposed during the pandemic and the impact of those measures on market access for international airlines.

236 World Trade Organization, 'World Trade Report 2005: Exploring the links between trade, standards and the WTO' (report, 2005, World Trade Organization) 213.

237 *Chicago Convention*, art 6.

THE JURISDICTIONS: AT A GLANCE

Although the jurisdictions are geographically dispersed, their aviation markets share many similarities with respect to their domestic markets and the nature of their key trading partners for air transport services.

Prior to the pandemic, each jurisdiction had a considerable market for domestic, or intrastate services. With the exception of the United Kingdom, a greater proportion of passengers travelled on scheduled, intrastate services than scheduled, international services. In the United States of America, for example, there were approximately 811 million passenger enplanements on domestic services in 2019.[238] By contrast, for the same time period, there were approximately 115 million passenger enplanements on international services.[239] In China, approximately 585 million passengers travelled on domestic Chinese routes in 2019, whereas 74 million passengers travelled on international routes involving a Chinese destination for the same year.[240] In India, approximately 140.3 million passengers travelled on domestic services in 2018-19, compared to 63.9 million on international services.[241] In Brazil, approximately 95 million passengers travelled on domestic services in 2019, compared to 24 million passengers on international services.[242] Exclusive access to a large domestic market affords some airlines with unique privileges as these airlines are able to offer a complementary suite of domestic and international services. Airlines licensed by States with no domestic market, for example, in Singapore and the United Arab Emirates, are entirely dependent on access to international markets.

With respect to international air transport services, the jurisdictions' main trading partners prior to the pandemic tended to be their regional neighbours, rather than with each other. In 2018, Brazil's major trading partners were the United States of America, Argentina, Portugal and Chile.[243] For the same year, China's major partners were the Republic of Korea, Thailand and Japan.[244] Japan's largest trading partners for air transport were China and the Republic of Korea. Significant trade also occurred with the United

238 Bureau of Transportation Statistics, *U.S. Air Carrier Traffic Statistics* (2022) <https://www.transtats.bts.gov/traffic/>. Calculated by customizing the data for domestic and international scheduled passenger enplanements from January to December 2019.

239 Ibid.

240 Civil Aviation Administration of China, 'Statistical Bulletin of Civil Aviation Industry Development in 2019' (China Civil Aviation Report 2019) 36 <http://www.caac.gov.cn/en/HYYJ/NDBG/202011/W020201123499246549689.pdf>.

241 Directorate-General of Civil Aviation (India), 'Handbook on Civil Aviation Statistics' (2018-19) 6 <https://www.dgca.gov.in/digigov-portal/?page=jsp/dgca/InventoryList/dataReports/aviationDataStatistics/handbookCivilAviation/HANDBOOK2018-19.pdf&main4252/4205/sericename>.

Note, domestic metric is based on departing passengers whereas the international metric is based on departing and arriving passengers.

242 Agência Nacional de Aviação Civil, 'Anuáio do Transporte Aéro: Sumário Executivo - 2019' (2020) 5.

243 *WASA*.

244 Ibid.

States of America.[245] Indonesia's two largest partners were Singapore and Malaysia. In the years prior to the pandemic, the top five gateways for U.S. international services were Canada, Mexico, the United Kingdom, Japan and Germany.[246] Although a large volume of passengers travelled between India and its regional neigbours, such as Malaysia, Thailand, Sri Lanka and Singapore, in 2018, its largest trading partner was the United Arab Emirates.[247]

Similarly, regional partnerships were equally important to the European Union and the United Kingdom in a pre-pandemic environment. In 2019, approximately 34 per cent of passengers on EU flights transited between EU Member States.[248] By comparison, approximately 50 per cent of passengers transited to destinations outside of the EU and 16 per cent of passengers transited to destinations within the same EU Member State.[249] The European Union was also particularly important for the United Kingdom. Department for Transport statistics indicate that in 2019, approximately 66 per cent of passenger movements at British airports were transiting to or from a destination in an EU Member State.[250] By contrast, approximately 10 per cent of passengers were transiting to or from North America and approximately 17 per cent from other international destinations that same year.[251]

Although the jurisdictions, for the most part, were not each other's most significant trading partners prior to the pandemic, for the purposes of this research, this chapter will consider the ASAs and ATAs concluded between them. In many other industries, it would be natural for these States to freely trade between themselves. However, the regulatory framework underpinning the economic regulation of airlines prevents this from occurring and these ASAs and ATAs illustrate the peculiar nature of trade in air transport services.

245 Ibid.

246 Sourced from U.S. Department of Transportation, 'U.S. International Air Passenger and Freight Statistics Report' (22 April 2022)

<https://www.transportation.gov/policy/aviation-policy/us-international-air-passenger-and-freight-statistics-report>.

The U.S. Department of Transportation publishes quarterly International Passenger and Freight Reports on its website.

247 *WASA.*

248 eurostat, *Air transport statistics* (Data extracted in November 2020) <https://ec.europa.eu/eurostat/statistics-explained/index.php/Air_transport_statistics#Main_statistical_findings>.

249 Ibid.

250 Sourced from Department for Transport, 'Aviation Statistics: data tables (AVI) (16 December 2021) <https://www.gov.uk/government/statistical-data-sets/aviation-statistics-data-tables-avi>.

The data table relied on is: 'AVI0105: International passenger movements at UK airports by country of embarkation or landing: time series'.

251 Ibid.

TRANSPARENCY

At present, it is difficult to ascertain the true status of ASAs and ATAs to which the jurisdictions are a party. The Chicago Convention requires all contracting States to register a copy of any executed agreements with ICAO Council.[252] ICAO has developed an online database of the World's Air Service Agreements (WASA) based on registered agreements and other publicly available information.

Notwithstanding the requirement to register ASAs under the Chicago Convention, the World Trade Organization has previously noted that Contracting States do not always comply with this obligation.[253] In 2019, the ICAO Assembly urged all Member States to register their agreements and arrangements with ICAO to enhance transparency.[254] With respect to the jurisdictions considered in this research, a small number of agreements have either not been registered with ICAO, they are administratively applied but not yet in force or have been amended by Memoranda of Understanding not publicly available. At the time of conducting this research, a number of the jurisdictions' departmental websites also suggested that the State is a party to a different number of agreements than indicated in WASA.

There are also several agreements which are applied on an administrative basis as they have not yet entered into force. China and the United Kingdom, for example, concluded a new ASA in 2011, which has been applied on a provisional basis thereafter.[255] Similarly, Brazil and the United Kingdom, concluded a draft ASA in October 2018, although it is yet to be formally signed and enter into force.[256] In the interim, the parties have agreed to apply the majority of the agreement on an administrative basis.[257] Indonesia and the United States of America concluded an OSA in 2004, however, this agreement is not in force.[258] The status of that agreement is difficult to ascertain on published information.

There is consequently no single true repository of ASAs and ATAs and market access arrangements, at least between the jurisdictions in this research. This chapter will

252 *Chicago Convention*, art 81.

253 World Trade Organization, 'Part A: Introduction to QUASAR' (S/C/W/270/Add.1) Page I.11 <https://www.wto.org/english/tratop_e/serv_e/transport_e/quasar_parta_e.pdf>.

254 International Civil Aviation Organization, 'Assembly Resolutions in Force (as of 4 October 2019)' (Doc 10140) III-3.

255 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China concerning air services*, initialled on 14 April 2011 (provisionally applied from 14 April 2011).

256 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federative Republic of Brazil*, initialled on 31 October 2018 (not yet in force, certain articles applied administratively from 31 October 2018) ('*Agreement between the UK and Brazil*').

257 *Memorandum of Understanding between the Aeronautical Authorities of the Federative Republic of Brazil and the United Kingdom of Great Britain and Northern Ireland*, signed on 31 October 2018 (entered into force on 31 October 2018) ('*MOU between the UK and Brazil*').

258 *Air Transport Agreement between the Government of the United States of America and the Government of the Republic of Indonesia*, signed on 24 August 2004 (not yet in force).

examine the agreements in place between the jurisdictions relying on publicly available agreements. However, due to limitations in access to information, it is not possible to gauge the true status of market access arrangements based on publicly available information. This is a key limitation in this research and highlights a broader concern about the opaque nature of the economic regulatory framework for scheduled, international air transport.

DESIGNATION AND AUTHORISATION

Designation or authorisation is one of the key provisions in an ASA. The purpose of this provision is to prescribe the number of airlines that may be "designated" or "authorised" to benefit from the market access privileges provided for in the agreement. ASAs then typically require the other contracting party to provide the relevant authorisations and technical permissions to enable the designated airline to provide services in the other contracting party's territory.

Authorisation is often conditional on airlines satisfying three criteria. Firstly, it is commonplace for agreements to require airlines to be "majority owned and substantially controlled" by the designating State, its nationals or a national corporation in order to be designated or authorised under the agreement. Secondly, it is commonplace for ASAs to require designated airlines to satisfy international air transport laws and regulations of the other contracting party in order to obtain authorisation. Thirdly, ASAs also typically require designated airlines to maintain safety and security standards prescribed in the agreement.

The substantial ownership and effective control provision is a legacy of the Bermuda I agreement which allowed the United States or the United Kingdom to withhold or revoke rights provided under the agreement if either party was not satisfied that a designated airline was substantially owned and effectively controlled by either party's nationals.[259] Although some jurisdictions have extensively considered what constitutes majority ownership and substantial control in context of airline licensing, these terms are generally not defined in ASAs. The Trade and Cooperation Agreement (TCA) between the European Union and the United Kingdom does however define effective control, as follows:

> "effective control" means a relationship constituted by rights, contracts or any other means which, either separately or jointly, and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by:
>
> (i) the right to use all or part of the assets of an undertaking;

259 *Bermuda I*, art 6.

(ii) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking;[260]

Very few agreements concluded between the jurisdictions do not require airlines to satisfy the traditional nationality rule in order to be designated or authorised under an ASA. In accordance with their Single Aviation Markets, the European Union and ASEAN have adopted slightly different approaches to the typical substantial ownership and effective control provisions in some agreements they are a party to recognise their SAMs. Case Study 3.1 details the approach taken by the European Union with respect to designation of Member State licensed airlines. Case Study 3.2 details the approach taken by ASEAN in the Air Transport Agreement between its member states and China.

For the most part, ASAs and ATAs between the jurisdictions provide for multiple airlines to be designated or authorised under the agreement. However, a number of older agreements still prescribe that only one airline should be designated by each State. The 1968 Indian-Indonesian ASA for example, as published by the Ministry of Foreign Affairs of the Republic of Indonesia and the Government of India's Ministry of External Affairs, permits both States to designate one airline each for the specified route.[261]

Case Study 3.1 – The European Union's Approach to Designation

The EU SAM has markedly changed the way in which Member States negotiate market access with non-Member States. In respect of international services, an airline may only provide services to another State if the ASA is consistent with EU law, or alternatively, if the European Commission has negotiated a horizontal or comprehensive agreement, on behalf of all EU Member States, with that third country. These requirements arose from the 2002 judgments of the Court of Justice of the European Union (CJEU).

As the EU progressed its packages of reforms for its SAM in the early 1990's, the European Commission sought a mandate from the European Council to negotiate an ASA between the United States of America and the European Communities. In 1996, the European Council ultimately granted the Commission with a limited mandate to negotiate with the United States on a select range of issues including the ownership and control of their respective airlines. However, by this time, a number of European Member States had revised their bilateral ASAs with the United States to reflect Open

260 *Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one party, and the United Kingdom of Great Britain and Northern Irelands, of the other part*, signed on 24 December 2020 (provisionally applied from 1 January 2021 and entered into force on 1 May 2021) art 417(l).

261 *Agreement between the Government of India and the Government of the Republic of Indonesia for Air Services between and beyond their respective territories*, signed on 18 September 1968 (understood to have entered into force), art 3(1).

Skies principles. The European Commission brought actions against eight Member States: United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany on the basis that they had failed to fulfil their obligations under the Articles 5[262] and 52 of the European Communities Treaty and Council Regulations pertaining to the third package. In 2002, the CJEU handed down eight separate judgments on these proceedings.[263]

In its judgments, the CJEU noted that each Open Skies Agreement contained an article which required the United States to refuse to issue operating authorisations or technical permissions to airlines designated by an EU Member State if a substantial part of ownership or effective control of the airline was not vested in that Member State or nationals of the Member State or the United States. Commonly, in each of the judgments, the Court held that this clause was contrary to Article 52 of the EC Treaty.

In response to the judgements, the Commission of European Communities requested Member States to take 'all appropriate measures' to ensure that they were in compliance with EU law. The Commission also identified the need for an external air transport policy.[264] The judgements provided the impetus for the EU to subsequently commence negotiations with the United States on a new Air Transport Agreement.[265] Recognising that this issue was likely to extend to a large number of other Air Service Agreements (ASAs) concluded by EU Member States with third parties, the Commission also proposed to open negotiations with third parties on ownership and control provisions.[266]

262 Not applicable to the United Kingdom.

263 See:

Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (C-466/98) [2002] ECR I – 9496, I – 9515.

Commission of the European Communities v Kingdom of Denmark (C-467/98) [2002] ECR I – 9528, I – 9569.

Commission of the European Communities v Kingdom of Sweden (C-468/98) [2002] ECR I – 9583, I – 9623.

Commission of the European Communities v Republic of Finland (C-469/98) [2002] ECR I – 9635, I – 9676.

Commission of the European Communities v Kingdom of Belgium (C-471/98) [2002] ECR I – 9690, I – 9735.

Commission of the European Communities v Grand Duchy of Luxembourg (C-472/98) [2002] ECR I – 9750, I – 9793.

Commission of the European Communities v Republic of Austria (C-475/98) [2002] ECR I – 9807, I – 9851.

Commission of the European Communities v Federal Republic of Germany (C-476/98) [2002] ECR I – 9865, I – 9913.

264 Commission of European Communities, 'Communication from the Commission on the consequences of the Court judgments of 5 November 2002 for European air transport policy' (COM(2002)649, Commission of European Communities, 19 November 2002) 15.

265 See European Commission, 'Communication from the Commission on relations between the Community and third countries in the field of air transport' (COM/2003/0094, European Commission, 26 February 2003) [29].

266 Ibid, [33].

In 2004, a new regulation on Air Service Agreements between EU and non-EU countries came into effect to clarify Member States' obligations when negotiating ASAs with non-EU States.[267] The regulation requires Member States to amend or replace all existing bilateral agreements if they are not 'wholly compatible' with EU law.[268] The regulation also enables Member States to negotiate new ASAs or modify existing ASAs with third parties provided the Member State includes EU standard clauses in the negotiations and the Member State complies with the notification period detailed in the regulation.[269] Prior to commencing such negotiations, Member States are required to notify the Commission, in writing, at least one calendar month before formal negotiations commence.[270]

The regulation provides the Commission with 15 working days from receipt of this negotiation to notify the Member State if the Commission is of the view that the negotiations would undermine 'the objectives of Community negotiations' or are incompatible with EU law.[271] Member States are obliged to notify the Commission of the outcomes of any negotiations.[272] The regulation provides Member States with express authority to conclude agreements if the agreement incorporated the Commission's standard clauses.[273]

In 2005, the European Commission approved four standard clauses for Member States to include in bilateral ASAs.[274] The standard clauses also cover a range of other issues including pricing, ground handling and aviation fuel taxation.[275]

267 Council Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries [2004] OJ L 157/7.

268 Ibid, Preamble (6).

269 Ibid, art 1(1).

270 Ibid, art 1(2).

271 Ibid, art 1(4).

272 Ibid, art 4(1).

273 Ibid, art 4(2).

274 See European Commission, 'Commission Decision on approving the standard clauses for inclusion in bilateral air service agreements between Member States and third countries jointly laid down by the Commission and the Member States' (C(2005)943, European Commission, 29 March 2005).

275 Ibid 3-5.

In addition to unilateral measures undertaken by Member States, the European Commission has also negotiated a number of horizontal agreements. Horizontal agreements seek to align the designation provisions in all EU Member States' ASAs with EU law through a single agreement with a third State. Horizontal agreements may also contain additional provisions pertaining to fair competition, safety and taxation. The EU has previously noted that these types of agreements have led to a significant increase in traffic between EU Member States and agreement partners.[276] To date, the European Commission has concluded horizontal agreements with China, India and Indonesia, although the agreements with China and Indonesia are yet to commence.[277] Consequently, European airlines are only permitted to provide services to China and Indonesia if they comply with the individual designation provisions contained within each individual agreement.

Case Study 3.2 – The ASEAN – China ATA

The ASEAN-China ATA also adopts a variation on the substantial ownership and effective control criteria to recognise ASEAN's SAM.[278] The agreement enables China and ASEAN Member States to designate one or more airlines for the purpose of the agreement.[279] To be authorised, an airline must be substantially owned and effectively controlled by the contracting parties, its nationals or both and is required to comply with the safety and security provisions of the agreement.[280] For ASEAN airlines, the airline must be incorporated and have its principal place of business in an ASEAN Member State and remain substantially owned and effectively controlled by one or more ASEAN Member States, their nationals or both.[281] The designating ASEAN Member State is also required to maintain effective regulatory control over the airline.[282]

276 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economics and Social Committee and the Committee of the Regions: An Aviation Strategy for Europe' (COM(2015) 598 Final, 7 December 2015) 4.

277 See *Agreement between the European Community and the Government of the Republic of India on certain aspects of air services*, signed on 28 September 2008 (entered into force on 21 February 2018).

See also, European Commission, 'Aviation Strategy for Europe: Commission signs landmark aviation agreements with China' (Press Release, 30 May 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2650>.

See also, European Commission, 'EU and Indonesia sign deal that will boost air transport' (Press Release, IP / 11/ 818, 30 June 2011) <http://europa.eu/rapid/press-release_IP-11-818_en.htm>.

278 *Air Transport Agreement between the Governments of the Member States of the Association of Southeast Asian Nations and the Government of the People's Republic of China*, signed on 13 January 2011 (entered into force on 9 August 2011), art 2(2).

See also, Annex I.

279 Ibid, art 3(1).

280 Ibid, art 3(2)(a)(i) and 3(2)(b).

281 Ibid, art 3(2)(a)(ii).

282 Ibid.

TRAFFIC RIGHTS

The key purpose of an ASA or ATA is to prescribe the traffic rights that a designated or authorised airline may be permitted to access under the agreement. The International Air Services Transit Agreement ('IASTA') and the International Air Transport Agreement were intended to be the principal instruments to facilitate the exchange of traffic rights. Brazil and Indonesia are not a party to the IASTA and, as discussed in Chapter 2, very few States are a party to the International Air Transport Agreement. Traffic rights are typically granted through bilateral ASAs. With respect to the jurisdictions, there is no uniform approach to traffic rights, in part due to the age of some agreements. The lack of uniformity and the absence of a single, widely endorsed agreement on third to sixth traffic rights means that airlines are to comply with a multitude of bilateral ASAs for each State that they operate services to.

All of the bilateral ASAs concluded between the jurisdictions provide at least third and fourth freedom rights to the contracting parties. Some agreements name the points where the contracting party may exercise the third and fourth freedom rights. For example, a handful of agreements concluded between China, India, Indonesia and Japan with smaller EU Member States only provide first to fourth freedom rights and name the points where the third and fourth freedom rights may be exercised to.[283]

Many of the agreements between the jurisdictions provide fifth freedom rights. This is commonly expressed as "points beyond" in an agreement, although in some agreements, these fifth freedom points are also named. Of the agreements examined, very few provide sixth freedom rights, and seventh and eighth freedom rights are not included in any of the ASAs examined in the sample for scheduled international air passenger transport.

The most liberalised form of traffic right, the ninth freedom, is cabotage. Cabotage allows foreign licensed airlines to provide domestic or intrastate flights in a State's territory. The prohibition effectively acts a regulatory barrier to trade and protects a State's own licensed carriers from competition for intrastate services. With the exception of the European Union's Single Aviation Market, the jurisdictions prohibit cabotage at two levels. Firstly, the ASAs to which they are a party do not include ninth freedom rights for scheduled, international passenger transport. Secondly, most jurisdictions also have provisions within their domestic aviation legislation prohibiting cabotage. In Indonesia, the Aviation

283 See for example, *Air Transport Agreement between the Government of the People's Republic of China and the Government of the Republic of Bulgaria*, signed on 21 June 1993 (entered into force on 1 October 1996) Annex.

See also, *Agreement between the Government of the People's Republic of China and the Government of the Polish People's Republic relating to Civil Air Transport*, signed on 20 March 1986 (entered into force 1 August 1986), Schedule.

Act only allows domestic, scheduled services to be provided by appropriately licensed national air transport businesses.[284]

Japan's Civil Aeronautics Act similarly prohibits foreign aircraft from providing services between points in Japan, unless permission has been obtained from the Minister of Land, Infrastructure, Transport and Tourism.[285] Brazil's Aeronautical Code only permits Brazilian legal entities to offer domestic air transport services.[286] The U.S. Transportation Code prohibits foreign airlines from providing domestic services in the United States except in certain emergency situations.[287] In spite of concluding OSAs specifically for the purpose of liberalising international air transport, the United States of America has been reluctant to allow open skies partners to access its domestic market. Some scholars have argued that this has created uneven benefits for the airlines of open skies partners as they have not been granted the same privileges as those given to U.S. airlines in respect of market access.[288]

CAPACITY, FREQUENCY AND TARIFFS

In addition to designation and authorisation, and traffic rights, ASAs can also prescribe capacity, frequency and how airfares (tariffs) are to be determined. On capacity, there are three provisions which appear in many of the ASAs concluded between the jurisdictions. Firstly, it is common for ASAs between the jurisdictions to require designated airlines to have a "fair and equal opportunity" to operate services on the routes agreed under the ASA. Secondly, designated airlines are typically required to "take into account" the interests of their competitors so as not to unduly affect other designated airlines' abilities to offer services. Thirdly, agreements typically prescribe that capacity should be commensurate to traffic needs. These provisions are a legacy of Bermuda I. A small number of agreements allow capacity to be determined on commercial terms.

Many the agreements concluded between the jurisdictions continue to impose frequency restrictions. Frequency restrictions limit the number of flights that an airline may offer between the two States and can prohibit an airline from offering services competitively and in accordance with natural market demand. In ASAs, frequency restrictions are usually expressed as a specific number of flights per week, or the ASA will contain a clause indicating that frequency is to be agreed between airlines and then approved by the

284 UU Nomor 1 Tahun 2009, Pasal 85.

285 *Civil Aeronautics Act,* Act No. 231 of 5 July 1952, art 130.

286 *Lei Nº 7.565, de 19 de Dezembro de 1986,* art 216 (*unofficial translation*).

287 49 U.S.C. § 41703(c).

288 See for example, Cornelia Woll, 'Open skies, closed markets: Future games in the negotiation of international air transport' (2012) 19(5) *Review of International Political Economy,* 918, 919.

See also, Panayotis Christidis, 'Four shades of Open Skies: European Union and four main external partners' (2016) 50 *Journal of Transport Geography*, 105, 113.

contracting parties' aeronautical authorities or approved by the aeronautical authorities in the first instance. Very few ASAs expressly allow airlines to determine the number of services on a commercial basis.

The ASAs concluded between the jurisdictions broadly contain one of three different approaches to tariffs. At one end of the spectrum, under the ASA provisions, many agreements require tariffs to be agreed between the designated airlines and approved by the contracting parties' aeronautical authorities. Some agreements require designated airlines to agree on tariffs through IATA's tariff procedures. Some agreements allow airlines to determine their own tariffs in line with commercial considerations.

DISPUTE RESOLUTION

The dispute resolution process applicable to traffic rights is complicated, and in literature about liberalisation, rarely attracts attention. The Chicago Convention provides the ICAO Council with the jurisdiction to resolve disputes that Contracting Parties are unable to between themselves, as the dispute relates to the "interpretation or application" of the Convention and its Annexes.[289] The Chicago Convention provides aggrieved parties with an opportunity to appeal a decision of the Council to an arbitral tribunal or the Permanent Court of International Justice.[290] The Chicago Convention further provides that decisions of the Council, or if successfully appealed, the arbitral tribunal or Permanent Court of International Justice are binding on airlines.[291] Any matter for the Permanent Court of International Justice would now be referred to the International Court of Justice.[292] In any event, traffic rights fall outside the scope of the Chicago Convention and therefore, this dispute resolution process is not definitively available to aggrieved States under the Convention.

The International Air Services Transit Agreement and International Air Transport Agreement both contain similar provisions regarding dispute resolution. Firstly, the agreements enable aggrieved contracting parties to request that the ICAO Council investigate action which the aggrieved party considers is causing "injustice or hardship" to it.[293] The Council is compelled to consider the matter and consult with the contracting parties involved. In the event that the contracting parties are unable to resolve their dispute, the Council may make findings and recommendations to the parties. If the conduct continues, the Council may recommend to the Assembly that the privileges provided under the agreement be

289 *Chicago Convention*, art 84.

290 Ibid.

291 Ibid, art 86.

292 *Statute of the International Court of Justice*, art 37.

293 *IASTA*, art II, s. 1.
See also, *International Air Transport Agreement*, art IV, s. 2

suspended until the conduct ceases. Secondly, if contracting parties have a difference of opinion regarding the interpretation of provisions within the agreement and are unable to resolve it between themselves, the dispute resolution process under the Chicago Convention is available.[294]

All of the agreements considered in the sample contain a dispute resolution process. For the most part, the agreements require the contracting parties to either consult or negotiate a solution with each other, with the matter to then be resolved through diplomatic channels or by arbitration if consultation or negotiation is unsuccessful. Very few agreements include a reference the Chicago Convention's dispute resolution process.

ALTERNATIVE APPROACHES TO MARKET ACCESS

Over the last thirty years, some jurisdictions have proactively sought to adopt different approaches to market access. The United States of America has been a strong advocate of Open Skies Agreements (OSAs). OSAs are a form of ASA that effectively seek to remove restrictions on routes, capacity, frequencies and pricing.[295] In respect of market access, the model OSA provides contracting parties with the first to fifth freedoms.[296] However, it also contains a range of clauses in respect of authorisations, safety, security, commercial opportunities, customs and duties and charges. The United States concluded its first OSA with the Netherlands in 1992 and has since signed over 125 different OSAs with other partners.[297]

The European Union, by contrast, does not have a uniform approach to traffic rights for agreements concluded between a Member State and another party. It has however, sought to enter into comprehensive ASAs with select trading partners. Comprehensive agreements go beyond rectifying the designation compliance issues discussed in Case Study 3.1 and seek to provide the parties' airlines with greater opportunities with respect to market access. In 2007, the EU concluded one of its most significant comprehensive agreements with the United States of America. The US-EU Air Transport Agreement replaced a number of bilateral ASAs between EU Member States and the U.S. and

294 *IASTA*, art II, s. 2.

International Air Transport Agreement, art IV, s. 3.

295 Bureau of Public Affairs, 'Open Skies Partnerships: Expanding the Benefits of Freer Commercial Aviation' (Fact Sheet, 20 January 2021, U.S. Department of State) <https://www.state.gov/open-skies-partnerships-expanding-the-benefits-of-freer-commercial-aviation/>.

296 See U.S. Department of State, *Current Model Open Skies Text* (12 January 2012) <https://2009-2017.state.gov/e/eb/rls/othr/ata/114866.htm> art 2.

297 Bureau of Public Affairs, 'Open Skies Partnerships: Expanding the Benefits of Freer Commercial Aviation' (Fact Sheet, 20 January 2021, U.S. Department of State) <https://www.state.gov/open-skies-partnerships-expanding-the-benefits-of-freer-commercial-aviation/>.

commenced in March the following year.[298] It provides the parties' licensed airlines with the right to serve behind, intermediate, and beyond points.[299] These rights are particularly advantageous for EU licensed airlines as it enables them to offer flights to the U.S. from a wide variety of destinations.[300] Importantly, the agreement also removed restrictions on airline designation, frequency and capacity. The US-EU ATA requires the parties to provide operating authorisations and technical permissions to any licensed airline of the other party on the proviso that the airline satisfies ownership, control and principal place of business criteria.[301] This represented a significant departure from previous bilateral agreements as many previously limited the number of airlines that could be designated to operate services between EU Member States and the United States. The Bermuda II agreement, for example, only enabled the United States and the United Kingdom to designate two airlines each on particular route segments.[302]

The US-EU ATA also enables the authorised airlines to determine their own capacity and frequency of services on a commercial basis.[303] In 2010, the EU and U.S. signed a protocol to amend some of the provisions of their ATA to include mutual regulatory recognitions, the environment, labour standards and future opportunities.[304] In 2011, Norway and Iceland also became parties to the ATA, thus extending its scope.[305]

COVID-19 TRAVEL RESTRICTIONS

Since the beginning of the pandemic, airlines have also been subject to additional access restrictions to manage COVID-19. Under the Chicago Convention, contracting States are required to take effective measures to prevent the spread of communicable diseases.[306] The Chicago Convention permits contracting States to restrict or prohibit another State's aircraft from flying over its territory for public safety.[307] When a contracting State declares a national State of emergency and notifies the ICAO Council accordingly, the Chicago Convention will not affect a contracting State's freedom of action.[308] During the pandemic,

298 *United States of America – European Union Air Transport Agreement*, United States of America – European Union, signed 27 and 30 April 2007 (entered into force 30 March 2008) ('*US-EU ATA*') art 22.

299 Ibid, art 3(1).

300 Ibid, art 3(1)(c)(ii).

301 Ibid, art 4.

302 See *Bermuda II*, art 3.

303 *US-EU ATA*, art 3(4).

304 *Protocol to amend the Air Transport Agreement between the United States of America and the European Community and its Member States signed on 25 and 30 April 2007*, United States of America – European Union, signed on 24 June 2010 (not yet in force, provisionally applied from 24 June 2010).

305 *Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part*, signed 21 June 2011 (not yet in force, provisionally applied from 21 June 2011).

306 *Chicago Convention,* art. 14.

307 Ibid, art. 9.

308 Ibid, art. 89.

temporary measures have changed rapidly, varied considerably between jurisdictions and have directly impacted an airline's ability to provide services in both domestic and international markets. This section endeavours to provide an overview of the measures each jurisdiction has taken in response to the pandemic with respect to international, scheduled air transport services. For the European Union, this section will focus on the overarching guidance provided to Member States, rather than specific restrictions within each Member State.

At the start of the pandemic, Brazil initially closed its borders completely for passengers arriving by land, air or water.[309] In July 2020, Brazil relaxed its restrictions and foreigners were permitted to enter by air provided they complied with the relevant immigration requirements.[310] In December 2020, Brazil introduced a requirement for travellers to obtain a negative or non-reactive RT-PCR test no later than 72 hours prior to boarding the first leg of their trip and to complete a declaration that the traveller would comply with health measures during their stay.[311] Over the following year, testing requirements remained in place and travellers were required to obtain a negative or non-detectable result up to 72 hours prior to departure for a PCR test or 24 hours prior to departure for an antigen test.[312] In April 2022, Brazil removed testing requirements for vaccinated passengers.[313]

309 *Lei Nº 13.979, de 6 de Fevereiro de 2020*, art 3.
See also, *Portaria Nº 255, de 22 de Maio de 2020*, art 2.
See also, *Portaria No 340, de 30 Junho de 2020*, art 2.

310 *Portaria CC MJSP MINFRA MS Nº 1, de 29 de Julho de 2020,* art 6.
See also, *Portaria CC-PR MJSP MINFRA MS Nº 419, de 26 de Agosto de 2020*, art 6.
Portaria Nº 456, de 24 Setembro de 2020, art 6.
Portaria Nº 470, de 2 de Outubro de 2020, art 6.
Portaria Nº 478, de 14 de Outubro de 2020, art 7.
Portaria Nº 518, de 12 de Novembro de 2020, art 7.
Portaria Nº 630, de 11 de Dezembro de 2020, art 7.

311 *Portaria Nº 630, de 17 de Dezembro de 2020*, art 7.
See also, *Portaria Nº 648, de 23 de Dezembro de 2020*, art 7.

312 *Portaria Nº 651, de 8 de Janeiro de 2021*, art 7.
See also, *Portaria Nº 652, de 25 de Janeiro de 2021*, art 7.
See also, *Portaria Nº 653, de 14 de Maio de 2021*, art 7.
See also, *Portaria Nº 654, de 28 de Maio de 2021*, art 7.
See also, *Portaria Nº 655, de 23 de Junho de 2021*, art 7.
See also, *Portaria Nº 657, de 2 de Outubro de 2021*, art 3.
See also, *Portaria Nº 658, de 5 de Outubro de 2021*, art 3.
See also, *Portaria Nº 660, de 27 de Novembro de 2021*, art 3.
See also, *Portaria Nº 661, de 8 de Dezembro de 2021*, art 3.
See also, *Portaria Nº 663, de 20 de Dezembro de 2021*, art 3.
See also, *Portaria Nº 666, de 20 de Janeiro de 2022*, art 3.

313 *Portaria Nº 670, de 1 de Abril de 2022*, art 3.

In late March 2020, China suspended foreign nationals from entering its territory.[314] In the early part of the pandemic, China temporarily limited the routes and frequency of international services offered by both Chinese and foreign airlines and prescribed the Chinese airports that could be used for international services.[315] It also introduced a circuit breaker system to incentivise airlines to not transport passengers who had tested positive to COVID-19. In July 2020, China introduced new requirements for inbound passengers to complete a COVID-19 nucleic acid test within 5 days of boarding at a facility designated or recognised by a Chinese Embassy or Consulate.[316] In September 2020, direct international flights to Beijing resumed with eight different States and later in the month, China eased entry restrictions for foreign nationals holding a valid permit for work, personal matters or reunion.[317]

Throughout the pandemic, the European Commission and European Council have provided overarching guidance to Member States on restrictions. At the beginning of the pandemic, a temporary travel restriction applied to non-essential travel and European Union Member States were allowed to introduce temporary internal border control measures.[318] From mid-2020, the European Union progressively sought to lift restrictions,

314 Ministry of Foreign Affairs of the People's Republic of China, 'Ministry of Foreign Affairs of the People's Republic of China National Immigration Administration Announcement on the Temporary Suspension of Entry by Foreign Nationals Holding Valid Chinese Visas or Residence Permits' (MFA News, 26 March 2020).

315 Civil Aviation Administration of China, Notice on Diverting International Flights Bound for Beijing to Designated First Points of Entry (No. 2), dated 22 March 2020.

Civil Aviation Administration of China, 'CAAC Publishes Designated First Points of Entry into China for International Flights Bound for Beijing' (Media Release, 22 March 2020).

Civil Aviation Administration of China, 'CAAC: Beijing Capital International Airport has Operated Smoothly since Adjustment of the First Entry Point for its International Passenger Flights' (Media Release, 29 March 2020).

Civil Aviation Administration of China, Notice on Further Reducing International Passenger Flights during the Epidemic Prevention and Control Period', dated 26 March 2020.

Civil Aviation Administration of China, Notice on Adjustments to International Passenger Flights, dated 4 June 2020.

Civil Aviation Administration of China, List of Cities with Airports that Can Accommodate International Passenger Flights, dated 4 June 2020.

Civil Aviation Administration of China, Notice on Diverting International Flights Bound for Beijing to Designated First Points of Entry into China, dated 11 June 2020.

316 Civil Aviation Administration of China, 'CAAC, GACC and MFA Public Announcement on Presenting Negative Results of COVID-19 Nucleic Acid Tests before Boarding by Passengers Taking Flights Bound for China' (Media Release, 20 July 2020).

317 Civil Aviation Administration of China, 'Beijing international passenger flights diverted through the first entry point will gradually resume direct flights' (Media Release, 2 September 2020).

See also, Ministry of Foreign Affairs of the People's Republic of China, 'Announcement on Entry by Foreign Nationals Holding Valid Chinese Residence Permits of Three Categories' (MFA News, 23 September 2020).

318 European Commission, 'COVID-19: Temporary Restriction on Non-Essential Travel to the EU' (Communication from the Commission to the European Parliament, the European Council and the Council, COM2020 115 final, 16 March 2020) 1-3.

See also, European Commission, *COVID-19 Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy* [2020] OJ C 102 I/3, 4-5.

See also, European Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council on the assessment of the application of the temporary restriction on non-essential travel to the EU' (COM(2020) 148 final, 4 April 2020) 3.

See also, European Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council on the second assessment of the application of the temporary restriction on non-essential travel to the EU' (COM(2020) 222 final, 8 May 2020) 3.

See also, European Commission, *Guidelines for border management measures to protect health and ensure the availability of goods and essential services* [2020] OJ C 86 I/1, 3-4.

firstly focusing on internal border controls and secondly, permitting travel between select third States.[319] In October 2020, the EU also agreed to seven key principles and a traffic light mapping system to govern internal border closures.[320] In early 2021, the EU introduced new requirements for non-essential travel into the EU. Of note, passengers intending to enter the EU were required to obtain a negative polymerase chain reaction (PCR) test no earlier than 72 hours before departure.[321] In May 2021, the European Council recommended that Member States begin to ease restrictions on non-essential travel

319 See European Commission, *Joint European Roadmap towards lifting COVID-19 containment measures* [2020] OJ C 126/1, 9.

See also, European Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council on the third assessment of the application of the temporary restriction on non-essential travel to the EU' (COM(2020) 399 final, 11 June 2020) 8.

See also, *Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2020] OJ L 208/1, 3-6.

See also, *Council Recommendation (EU) 2020/1052 of 16 July 2020 amending Council Regulation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2020] OJ L 230/26, 26-28.

See also, *Council Recommendation (EU) 2020/1144 of 30 July 2020 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2020] OJ L 248/26, 26-28.

See also, *Council Recommendation (EU) 2020/1186 of 7 August 2020 amending Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2020] OJ L 261/83, 83-85.

See also, *Council Recommendation (EU) 2020/1551 of 22 October 2020 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2020] OJ L 354/19, 19-21.

See also, *Council Recommendation (EU) 2020/2169 of 17 December 2020 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2020] OJ L 431/75, 76-77.

See also, *Council Recommendation (EU) 2021/89 of 28 January 2021 amending Recommendation 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 33/1-3.

See also, *Council Recommendation (EU) 2021/132 of 2 February 2021 amending Recommendation 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 41/1-5.

See also, *Council Recommendation (EU) 2021/767 of 6 May 2021 amending Recommendation 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 165 I/66-68.

See also, *Council Recommendation (EU) 2021/982 of 3 June 2021 amending Recommendation 2021/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 198/1-4.

See also, *Council Recommendation (EU) 2021/992 of 18 June 2021 amending Recommendation 2021/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 221/12-14.

See also, *Council Recommendation (EU) 2021/1085 of 1 July 2021 amending Recommendation 2021/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 235/27-30.

See also, *Council Recommendation (EU) 2021/1170 of 15 July 2021 amending Recommendation 2021/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 255/3-6.

See also, *Council Recommendation (EU) 2021/1346 of 30 August 2021 amending Recommendation 2021/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 306/4-7.

See also, *Council Recommendation (EU) 2021/1459 of 9 September 2021 amending Recommendation 2021/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 320/1-4.

See also, *Council Recommendation (EU) 2021/1782 of 8 October 2021 amending Recommendation 2021/1782 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 360/128-131.

See also, *Council Recommendation (EU) 2021/1945 of 9 November 2021 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 397/28-31.

See also, *Council Recommendation (EU) 2021/2022 of 18 November 2021 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 413/37-40.

See also, *Council Recommendation (EU) 2021/2150 of 2 December 2021 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 434/8-11.

See also, *Council Recommendation (EU) 2022/66 of 17 January 2022 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2022] OJ L 11/52-55.

320 *Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic* [2020] OJ L 337/3-9.

321 *Council Recommendation (EU) 2021/132 of 2 February 2021 amending Recommendation 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 41/4.

to the EU and permit vaccinated non-essential travellers to enter into the EU.[322] In the first part of 2021, the EU also moved towards developing a Digital Green Certificate to evidence vaccination, a negative test result or recovery from COVID-19.[323] The regulatory framework for EU Digital COVID Certificates commenced in mid-2021.[324] In January 2022, the EU provided further guidance to Member States on vaccination certificates, vaccine recognition, third State testing rates and alternatives to vaccination.[325]

In India, all air passenger transport was temporarily suspended in late March 2020.[326] Although domestic services were allowed to recommence in May 2020, scheduled international air transport services were still prohibited, with flights only allowed on a case-by-case basis.[327] In November 2021, the Government of India indicated that scheduled international air transport would recommence the following month, however the temporary suspension continued.[328] Notwithstanding the overarching suspension,

322 *Council Recommendation (EU) 2021/816 of 20 May 2021 amending Recommendation 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2021] OJ L 182/1-5.

323 See Communication from the Commission to the European Parliament, the European Council and the Council, 'A united front to beat COVID-19' (COM(2021) 35, 19 January 2021).

See also, Communication from the Commission to the European Parliament, the European Council and the Council, 'A common path to safe and sustained re-opening' (COM(2021) 129 final, 17 March 2021).

324 See, *Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic* [2021] OJ L 211/1, 1-22.

325 *Council Recommendation (EU) 2022/290 of 22 February 2022 amending Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction* [2022] OJ L 43/79-83.

326 See also, Government of India, Travel and Visa restrictions related to COVID-19, No. 4/1/2020-IR, dated 19 March 2020.

See also, Government of India, Government Order on Operation of domestic operators engaged in Scheduled, non-scheduled and private aircraft operations in India, No. 4/1/2020-IR, dated 23 March 2020.

See also, Government of India, Government Order on Operation of domestic Operators engaged in scheduled, non-scheduled and private aircraft operations in India extended till 3 March 2020, No. 4/1/2020-IR, dated 14 April 2020.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 2 May 2020.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 17 May 2020.

327 See also, Government of India, Recommencement of Domestic Schedule Operations, No. 4/1/2020-IR, dated 22 May 2020.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 30 May 2020.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 26 June 2020.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 27 October 2020.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 21 December 2020.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 30 December 2020.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 21 January 2021.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 26 February 2021.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 23 March 2021.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 30 April 2021.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 28 May 2021.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 30 June 2021.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 30 July 2021.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 29 August 2021.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 28 September 2021.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 29 October 2021.

328 Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 26 November 2021.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 1 December 2021.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 9 December 2021.

See also, Government of India, Travel and Visa Restrictions related to COVID-19, No. 4/1/2020-IR, dated 19 January 2022.

India entered into bilateral Air Travel Arrangements, referred to as air transport bubbles, with a number of States to facilitate air transport between their jurisdictions.[329] In March 2022, India relaxed restrictions on scheduled international air transport.[330]

In April 2020, Indonesia temporarily prohibited foreign nationals from entering into their territory.[331] The regulation was repealed on 1 October 2020 and foreign nationals were permitted to re-enter Indonesia on a visa or permit subject to complying with a health protocol.[332] However, the regulation provided that it was not possible to arrive without a visa, or to obtain a visa on arrival until the end of the pandemic.[333] In July 2021, the Indonesian Government reimposed restrictions preventing foreign nationals from entering Indonesia unless they satisfied exemption criteria.[334] In October 2021, Indonesia relaxed restrictions to foreign citizens from a select number of countries to enter Bali and the Riau Islands for tourism.[335] In December 2021, in response to the Omicron variant, Indonesia temporarily restricted entry to persons who resided in or had visited particular States in the previous 14 days.[336] In January 2022, Indonesia relaxed restrictions allowing foreign nationals to visit again.[337]

At the beginning of the pandemic, Japan prohibited foreign nationals who had visited named States or regions in the 14 days prior to their entry from entering Japan.[338] From January 2021, incoming passengers were required to submit a certificate to certify a negative COVID test result 72 hours prior to departure, undertake a COVID test on arrival and quarantine at a location designated by the Quarantine Station Chief for 14 days.[339] In March 2022, Japan relaxed restrictions to enable foreign nationals to enter Japan for business, employment or a long term stay, and relaxed restrictions to enable certain travellers to undertake their quarantine at home.[340] In June 2022, Japan further relaxed

329 Ministry of Civil Aviation, *About Air Transport Bubbles* (22 February 2022) <https://www.civilaviation.gov.in/en/about-air-transport-bubbles>.

330 Government of India, Resumption of scheduled commercial international passenger services to/from India- reg., No 4/1/2020-IR, dated 8 March 2022.

331 Regulation No. 11 of 2020 concerning the Temporary Prohibition for Foreigners to Enter the Territory of the Republic of Indonesia, art 2.

332 Regulation No. 26 of 2020 regarding Visa and Stay Permit in the New Normal, art 2(1).

333 Ibid, art 3(1).

334 Regulation No. 27 of 2021 concerning Restrictions of Foreigners Entry into Indonesian Territory during the Implementation of Restrictions to Emergency Community Activities, art 2.

335 See Consulate-General of the Republic of Indonesia in Los Angeles, United States of America, *Update: Indonesia Travel Restrictions* (updated 2 November 2021) <https://kemlu.go.id/losangeles/en/news/11727/update-indonesia-travel-restrictions>.

336 Ibid (updated 28 December 2021).

337 Ibid (updated 16 February 2022).

338 For the most recent information on border restrictions in Japan, see Ministry of Foreign Affairs of Japan, *Border enforcement measures to prevent the spread of novel coronavirus (COVID-19)* (as at 29 April 2022) <https://www.mofa.go.jp/ca/fna/page4e_001053.html>.

339 Ibid (as at 5 March 2022).

340 Ibid (as at 24 February 2022).

restrictions to permit a wider range of travellers to enter and abolished quarantine requirements for vaccinated travellers entering from particular countries and regions.[341]

In the United Kingdom, England, Scotland, Wales and Northern Ireland each adopted separate regulations governing the travel restrictions and quarantine measures for their respective countries. Although the specific provisions in each countries' regulations differed, the overarching principles in the regulations were broadly consistent. In June 2020, the United Kingdom introduced a 14-day self-isolation period for international passengers unless they were eligible for an exemption.[342] In January 2021, the United Kingdom introduced a requirement for passengers to possess a negative test result from a qualifying COVID-19 test on arrival into the United Kingdom when entering from outside of the common travel area.[343] The United Kingdom subsequently also introduced 10 day managed isolation for travellers arriving from an acute risk State.[344] From July 2021, the United Kingdom allowed prescribed vaccinated passengers who had been in named States within the preceding 10 days to be exempt from completing an isolation period.[345] In January 2022, the United Kingdom modified its testing regime to allow vaccinated passengers from non-red list States to only require a negative PCR or lateral flow device test within two days on arrival in the United Kingdom.[346] The following month, the United Kingdom removed testing requirements for vaccinated travellers.[347]

341 Ibid (as at 26 June 2022).

342 See, The Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020, reg. 4.
See also, The Health Protection (Coronavirus, International Travel) (England) Regulations 2020, reg. 4.
See also, The Health Protection (Coronavirus, International Travel) (Wales) Regulations 2020, regs. 7, 12.
See also, The Health Protection (Coronavirus, International Travel) (Scotland) Regulations 2020, reg. 6.

343 See, The Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020, reg. 3A.
See also, The Health Protection (Coronavirus, International Travel) (England) Regulations 2020, reg. 3A.
See also, The Health Protection (Coronavirus, International Travel) (Wales) Regulations 2020, reg. 6A.
See also, The Health Protection (Coronavirus, International Travel) (Scotland) Regulations 2020, reg. 5A.

344 See, The Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020, reg. 14.
See also, The Health Protection (Coronavirus, International Travel) (England) Regulations 2020, Schedule B1A.
See also, The Health Protection (Coronavirus, International Travel) (Scotland) Regulations 2020, reg. 6B.

345 See, The Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2021, regs. 3A, 10.
See also, The Health Protection (Coronavirus, International Travel) (England) Regulations 2021, regs. 2A, 9.
See also, The Health Protection (Coronavirus, International Travel) (Wales) Regulations 2020, regs. 2A, 9.
See also, The Health Protection (Coronavirus, International Travel) (Scotland) Regulations 2020, regs. 2A, 7.

346 See, The Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2021, regs. 6, 8.
See also, The Health Protection (Coronavirus, International Travel) (England) Regulations 2021, regs. 3ZA, 3J.
See also, The Health Protection (Coronavirus, International Travel) (Wales) Regulations 2020, regs 6A, 6AB.
See also, The Health Protection (Coronavirus, International Travel and Operator Liability) (Scotland) Regulations 2021, regs. 8, 14.

347 See, The Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2021, regs. 6, 8.
See also, The Health Protection (Coronavirus, International Travel) (England) Regulations 2021, regs. 3ZA.
See also, The Health Protection (Coronavirus, International Travel) (Wales) Regulations 2022, regs. 7, 8.
See also, The Health Protection (Coronavirus, International Travel and Operator Liability) (Scotland) Regulations 2021, regs. 8, 11.

At the beginning of the pandemic, the United States of America restricted entry to non-citizens who had not passed through a prescribed list of States in the 14 days prior to seeking entry.[348] In December 2020, the Centers for Disease Control and Prevention (CDC) issued an order which required passengers from the United Kingdom to obtain a negative PCR or antigen test 72 hours prior to departure.[349] In January 2021, that requirement was expanded to include all passengers. To enter the United States, passengers were required to either obtain a negative COVID-19 test 72 hours prior to departure, or otherwise, a positive COVID-19 test and provide documentation to support that the passenger had recovered from COVID-19 and was fit to travel.[350] In November 2021, the United States lifted country-based suspensions on air travel and instead suspended non-citizen, non-immigrant passengers from entering the United States by air if a traveller was not fully vaccinated or eligible for an exemption.[351] To coincide with the new entry requirements, CDC also amended its testing requirements. Initially, vaccinated travellers were required to obtain a viral test no more than three calendar days before departure and non-vaccinated travellers were required to obtain a test no more than one calendar day before departure.[352] From December 2021, travellers were required to obtain a negative viral test no more than one calendar day before departure from a foreign country, regardless of vaccination status or provide documentation to demonstrate recovery from COVID-19 in the past 90 days.[353] In June 2022, the CDC rescinded testing requirements for both vaccinated and unvaccinated passengers.[354]

348 See Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons who pose a risk of transmitting coronavirus, issued 31 January 2020, s. 1.

See also, Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus, issued 29 February 2020, s. 1.

See also, Proclamation—Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus, issued 11 March 2020, s. 1.

See also, Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus, issued 14 March 2020, s. 1.

See also, Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus, issued 24 May 2020, s. 1.

See also, Proclamation on the Suspension of Entry as Immigrants and Non-Immigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease, issued 23 January 2021, ss 1-2.

See also, Proclamation on the Suspension of Entry as Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019, issued 30 April 2021, ss 1-2.

349 Centers for Disease Control and Prevention, Order: Requirement for Negative Pre-Departure COVID-19 Test Result for All Airline Passengers Arriving Into the United States From the United Kingdom, 27 December 2020.

350 Centers for Disease Control and Prevention, Order: Requirement for Proof of Negative COVID-19 Test Result of Recovery from COVID-19 for All Airline Passengers arriving in the United States, 28 January 2021.

351 Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic, issued 25 October 2021.

352 Centers for Disease Control and Prevention, Notice and Amended Order, Requirement for Negative Pre-Departure COVID-19 Test Result of Documentation of Recovery from all airline or other aircraft passengers arriving into the United States from any Foreign Country, 25 October 2021.

353 Centers for Disease Control and Prevention, Notice and Amended Order under Section 361 of the Public Health Service Act (42 U.S.C 264) and 42 Code of Federal Regulations 71.20 & 71.31(b), Requirements for Negative Pre-Departure Test Result or Documentation of Recovery from COVID-19 for all Airline or other Aircraft Passengers arriving into the United States from any Foreign Country, 2 December 2021.

354 Centers for Disease Control and Prevention, Order under Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 Code of Federal Regulations 71.20 and 71.31(b) rescinding requirement for negative pre-departure COVID-19 test result or documentation of recovery from COVID-19 for airline or other aircraft passengers arriving into the United States from any foreign country, 10 June 2022.

Although these travel measures, restrictions and quarantine measures have only been temporary, they have nevertheless created significant uncertainty for passengers and airlines alike. Consequently, these temporary measures have been more immediate barriers to market access than the archaic patchwork regulatory framework that underpins the industry.

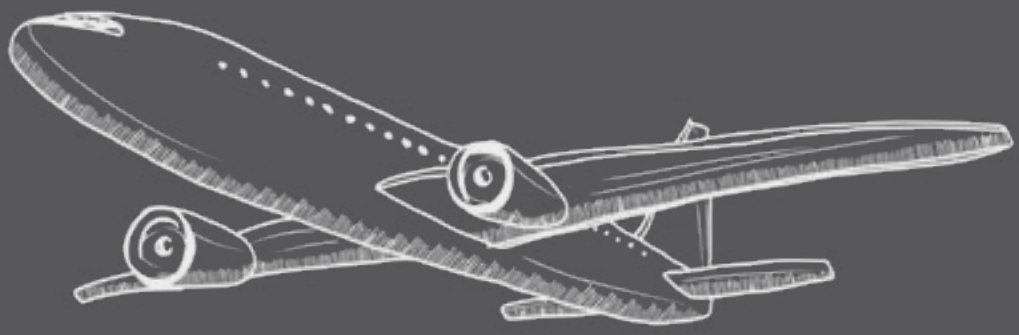
CONCLUDING REMARKS

Market access is critical for international airlines. As a service, international airlines are dependent on access to different markets to develop and sustain their businesses. Traffic rights and market access have been carved out of GATS and significant trade agreements, and airlines are therefore not able to benefit from the MFN or national treatment provisions.

This chapter has examined the provisions of the ASAs and ATAs concluded between the jurisdictions as an example of the opaque and archaic regulatory framework underpinning the economic regulation of airlines more generally. Although parties to the Chicago Convention are required to register their ASAs with ICAO, it would appear that some States have not discharged their obligations under the Convention. This was previously noted by WTO and this issue appears to be still be prevalent today. One of the challenges throughout this study has been obtaining reliable and accurate information on the status of ASAs between the jurisdictions. Although WASA suggests that most aviation relations between the jurisdictions are governed by historic ASAs or ATAs, State based sources suggest that some of those agreements have been updated by more recent Memorandums of Understanding, Records of Discussion or Meeting Minutes, the full contents of which are not always publicly available. It is not possible for a market to work effectively and efficiently when the international laws that underpin it are not readily publicly available.

There is some uniformity in the agreements concluded between the jurisdictions. Most agreements require airlines to satisfy a traditional substantial ownership and effective control provision in order to be designated. All of the agreements provide at least first to fourth freedom traffic rights and some form of dispute resolution process. Many agreements contain highly restrictive provisions regarding capacity, frequency and tariffs and do not specifically permit airlines to operate in line with commercial considerations.

Notwithstanding these longstanding market access issues, temporary measures to mitigate the spread of COVID-19 have been the most significant barrier over the past two years. The environment in which international airlines are expected to operate in has never been more complex, or more restrictive.



CHAPTER 4:

INVESTMENT

INTRODUCTION

One of the most controversial aspects of liberalising scheduled international air passenger transport has been the regulation of foreign ownership and control. Many States have been steadfast in maintaining some form of restriction on the level of investment and influence foreign citizens may have on airlines operating in a State's airspace. This chapter will explore the history of the nationality rule, its prevalence in airline licensing for the jurisdictions, and alternative approaches to the traditional substantial ownership and effective control criteria.

THE ROLE OF NATIONALITY IN AIRLINE LICENSING

Since 1919, there has been international recognition for the principles of State sovereignty and aircraft nationality. The world's first international treaty on air transport, the 1919 Paris Convention, acknowledged that 'every Power has complete and exclusive sovereignty over the airspace above its territory'.[355] The Convention that introduced the concept of aircraft nationality originally stipulated that an aircraft could not be included on a contracting State's register if it was not owned by nationals of that State.[356] The Convention also provided that an incorporated company could not be recognised as an aircraft owner unless it was of the same nationality as the State in which the aircraft was registered, the company's President and at least two thirds of the Board were also of this nationality and the company met any additional conditions imposed by the registering State in its own legislation.[357]

The Chicago Convention, the successor to the 1919 Paris Convention, has continued to recognise that States have exclusive sovereignty over their airspace.[358] The Chicago Convention prohibits an airline from operating scheduled international air transport services over another State's territory without its permission or authorisation.[359] However, it does not expressly address airline ownership and control. The International Air Services Transit Agreement and the International Air Transport Agreement, both enable States to withhold or revoke an operating certificate or permission of another State's airline where it is not satisfied that the substantial ownership and effective control is vested in the other State's nationals.[360] Neither agreement has defined what constitutes substantial ownership and effective control.

355 *Paris Convention*, art 1.

356 Ibid, art 7.

357 Ibid.

358 *Chicago Convention*, art 1.

359 Ibid, art 6.

360 *IASTA*, art 1, s 5.
International Air Transport Agreement, art 1, s 6.

Foreign ownership and control restrictions are imposed on airlines at two levels. Firstly, to operate a commercial, scheduled air service, an airline must obtain an operating licence or certificate. A licence or certificate will enable the airline to operate in their licensing State's airspace. Domestic legislation, rules and regulations detail the process for obtaining a licence. As part of the licensing process, most States require airlines to comply with stringent thresholds for foreign investment and control. These restrictions are colloquially referred to as the 'nationality rule' or the 'nationality clause'. Secondly, to provide international air transport services, an airline's licencing State must be a party to an ASA or other multilateral agreement with the other State that the airline wishes to provide air transport services to or from. In addition, the airline must be designated or authorised for the purposes of the ASA. To be designated or authorised, an airline is typically required to comply with stringent thresholds for foreign investment and control. In some instances, airlines may also be required to demonstrate where their principal place of business is located, or this may be used as an alternative threshold to the traditional criteria. These restrictions have previously been characterised as being akin to a "double-bolted' locking mechanism in that domestic restrictions act as an internal lock and the treaty restrictions act as an external lock for airlines.[361]

Chang and Williams have previously noted that foreign investment and ownership restrictions enable a government to protect national interests, control and protect national airlines and dissuade flags of convenience.[362] However, relaxing restrictions on foreign investment can enable an airline to access new capital to finance expansion and benefit from the transfer of technology, expertise, new practices and innovation from its foreign owners.[363] This may in turn stimulate competition between existing carriers which can be of benefit to consumers and improve efficiency within the industry.

REFORMING THE NATIONALITY RULE

In the last two decades, there has been substantial international interest in relaxing foreign investment and control restrictions for airlines. The ICAO Secretariat has previously noted that the nationality clause made 'obvious sense' when most airlines were creatures of their respective State, however, many States have now privatised their national carrier.[364]

361 World Economic Forum, 'A New Regulatory Model for Foreign Investment in Airlines' (Industry Agenda, January 2016) 6.

See also, Brian F. Havel and Gabriel Sanchez, 'The Emerging Lex Aviatica' (2011) 42 *Georgetown Journal of International Law* 639, 653.

362 See Yu-Chan Chang and George Williams, 'Changing the rules – amending the nationality clauses in air service agreements' (2001) 7 *Journal of Air Transport Management* 207, 208.

363 Ibid, 209-210.

364 International Civil Aviation Organization, 'Liberalization of Air Carrier Ownership and Control' (Working Paper ATConf/6-WP/12 presented by the Secretariat, Sixth Meeting of the Worldwide Air Transport Conference, 2013) 1.

In 2003, the Fifth Worldwide Air Transport Conference recommended that air carrier designation and authorisation should be liberalised in a progressive and flexible way with regard to safety and security.[365] As an alternative to traditional ownership and control criteria or the principal place of business criterion, the Conference recommended that States may also include guidance on their requirements for designation through policy statements, common policies or legally binding instruments.[366] In addition, the Conference recommended that States provide ICAO with information about their policies, positions and practices for designation and that ICAO maintain public information about the policies, positions and practices regarding ownership and control.[367] In 2003, ICAO invited Member States to participate in a survey to ascertain this information. It received 82 responses with varying degrees of completeness.[368]

At the 37th ICAO Assembly in 2010, the United States of America proposed a Multilateral Convention on Foreign Investment in Airlines (MCFIA).[369] Under the proposal, each contracting party would, at the time of ratification, acceptance, approval of or accession to the Convention, deposit a "Partner List A" and at its discretion, a "Partner List B".[370] A Partner List A would contain a list of partners that each party had agreed to not exercise any available rights under its ASAs to refuse, revoke, suspend or limit operating authorisations or technical permissions to an airline of a partner if that airline was substantially owned or effectively controlled by other partner(s) on the list, its nationals or both.[371] A Partner List B would contain a list of partners to which the party would not limit on the basis of nationality, ownership or control of its airlines by one of the partners named on the list.[372] The proposed Convention explicitly provided that it did not require a party to permit foreign ownership or control of its airlines.[373] As such, parties to the Convention would not have been required to modify their own domestic legislation.[374]

365 International Civil Aviation Organization, 'Consolidated Conclusions, Model Clauses, Recommendations and Declaration' (ATConf/5, Fifth Meeting of the Worldwide Air Transport Conference, 2003) 5.

366 Ibid, 5.

367 Ibid, 6.

368 For further information, see International Civil Aviation Organization, *Air Transport Policy and Regulation – Database and Studies* (undated) <https://www.icao.int/sustainability/pages/Eap_ER_Databases_StatePolicies_Replies.aspx>.

369 International Civil Aviation Organization, 'Facilitating Airline Access to International Capital Markets' (Working Paper, A37-WP/190 presented by the United States of America to the Assembly – 37th Session, 2010) 2.

370 Ibid, Appendix, *Multilateral Convention on Foreign Investment in Airlines*, art 4(1).

371 Ibid, art 4(1)(a).

372 Ibid, art 4(1)(b).

373 Ibid, art 5.

374 See Krishna R. Urs, 'What Comes Next for U.S. International Aviation Policy After 100 Liberalized Air Service Agreements?' (Speech delivered at the Conference on Key Issues in International Aviation Law, Beijing, 25 May 2011).

In 2013, the Sixth Worldwide Air Transport Conference made several recommendations in respect of airline ownership and control. The Conference firstly recommended that States should continue to liberalise air carrier ownership and control through existing measures.[375] It also recommended that ICAO should continue to provide policy guidance on this issue and develop an agreement to address air carrier ownership and control.[376] At the 40th ICAO Assembly in 2019, Member States considered the draft Convention on Foreign Investment in Airlines. The draft Convention would enable airlines to be majority owned and effectively controlled by nationals of any other signatory by way of a waiver.[377] While some Member States were concerned about a range of issues, such as the notion of "free-riders" unilaterally exploiting traffic rights and broader concerns about regulatory oversight, the Assembly resolved to request that the Council address these concerns to enable the Convention to progress.[378] In addition to the work regarding the Convention, the Assembly also urged Member States to continue to liberalise their ownership and control criteria for airlines and give consideration to other approaches for designation and authorisation.[379]

In spite of this momentum, restrictions on foreign investment and control are still prevalent. Ownership and control criteria play an important role in facilitating regulatory oversight by establishing a clear line of responsibility between an airline and its licensing or authorising State for issues such as safety and security. Additionally, over the past year, a number of large international airlines have recapitalised and some States now hold equity, or more equity in their licensed airlines, further complicating this key regulatory issue. COVID-19 measures will be discussed in more detail in Chapter 6.

THE NATIONALITY RULE: BY JURISDICTION

The nationality rule is a key condition of airline licensing in China, the European Union, Indonesia, Japan, the United Kingdom and the United States of America. While each jurisdiction adopts different thresholds and requirements, they each prescribe a statutory limit on the level of capital that may be held by foreign shareholders.

In China, the Special Administrative Measures for Foreign Investment Access (Negative List) (2021 Edition) prescribes statutory limits for foreign investment in Chinese airlines. In 2020, the new Foreign Investment Law commenced to promote and standardise foreign

375 International Civil Aviation Organization, 'Report on Agenda Item 2.2' (ATConf/6-WP/104, Sixth Meeting of the Worldwide Air Transport Conference, 2013) 2.2-3.

376 Ibid.

377 International Civil Aviation Organization, 'Progress Report on the Development of International Agreements on the Liberalization of Market Access, Air Cargo and Air Ownership and Control' (Working Paper, A40-WP/16 presented by the Council of ICAO, 40th Session, Economic Commission 2019) 2.

378 International Civil Aviation Organization, 'Assembly Resolutions in Force (as of 4 October 2019)' (Doc 10140) III-5.

379 Ibid.

investment in China. The Foreign Investment Law provides for a Negative List to detail the industries in which foreign investment is restricted or not permitted.[380] The Negative List (2021 Edition) requires that the company be controlled by a Chinese party, each foreign investor's individual shareholding shall not exceed 25% and the company must have a legal representative of Chinese nationality.[381]

The Provision on Foreign Investment in Civil Aviation previously prescribed statutory limits for foreign investment in Chinese airlines. The Provision commenced in 2002 and adopted the same approach as the Negative List.[382] This Provision superseded two prior 1994 circulars regarding foreign investment for the Chinese aviation sector. The May 1994 Circular permitted foreign investors, in cooperation with Chinese air transport businesses, to invest in establishing Chinese airlines, through either an equity or contractual joint venture.[383] The Circular specified that the General Administration of Civil Aviation of China (the predecessor to the CAAC) should choose one or two airlines to serve as test cases for foreign investment in the Chinese aviation sector.[384] The Circular prescribed that foreign investors may invest up to 35 per cent of the Chinese airline's registered or paid capital, with foreign control limited to 25 per cent of voting rights.[385] The Circular additionally required the Chairman of the venture's board and the General Manager to be Chinese nationals.[386]

In October 1994, a supplementary Circular was issued to clarify these provisions. The Circular stipulated that China Eastern Airlines and China Southern Airlines would serve as the two test cases for foreign investment and, following a decision by the State Council to temporarily cease licensing new Chinese airlines, foreigners would not be permitted to invest in any new Chinese airlines.[387] The supplementary Circular also clarified that investment would refer to capital actually paid and foreign investors could not exercise more than 25 per cent of voting rights through an airline's Board of Directors, or at shareholder meetings.[388]

In the European Union, to be granted an operating licence as a "Community Air Carrier", at least 50 per cent of the applicant business, must be owned and effectively controlled by Member States and/or their nationals, unless there is an agreement in place between the

380 Foreign Investment Law of the People's Republic of China, art. 28.

381 Special Administrative Measures for Foreign Investment Access (Negative List) (2021 Edition), No. 11.

382 Provisions on Foreign Investment in China, CLI.4.40377, art 6.

383 Circular on the General Administration of Civil Aviation of China and the Ministry of Foreign Trade and Economic Cooperation concerning relevant policies on Foreign Investment in Civil Aviation, s. 2(1).

384 Ibid, s. 2(3).

385 Ibid, s. 2(4).

386 Ibid, s. 2(5).

387 Ibid, s. 4, 6.

388 Ibid, s. 7.

European Union and another state which displaces this requirement.[389] The ownership and control requirements can be satisfied directly, or indirectly, if there are intermediary businesses involved in the airline corporate structure. The Regulation defines effective control as a relationship which confers the possibility of 'directly or directly exercising a decisive influence on an undertaking'.[390] The Regulation establishes factors that will be considered in this judgement, including the right to use the applicant's assets and rights or contacts which confer influence on the decision-making processes within the applicant business or its operations.[391]

The EU first imposed common foreign investment and control restrictions as part of the Single Aviation Market in 1993. In order to be granted an operating licence, Council Regulation (EEC) 2407/92 on the licensing of air carriers introduced a requirement for airlines (referred to as 'undertakings' in the Regulation) to be majority owned and effectively controlled by Member States and/or their nationals.[392] These statutory limitations were considered necessary at the time due to the 'basic characteristics of the international aviation system'.[393]

In 1995, the Commission of European Communities clarified the statutory test in response to a request from the Belgium Government to consider if Swissair's acquisition of a 49.5 per cent share in Belgium air carrier, Sabena complied with the regulation.[394] In its decision, the Commission noted that the statutory requirements of Council Regulation (EEC) 2407/92 were designed to prevent third-party carriers from unilaterally exploiting the Community's SAM.[395] It considered that the majority ownership threshold would be satisfied if Member States and/or their nationals owned at least 50 per cent and one share of the air carrier's equity capital.[396] In determining whether a carrier is effectively controlled by Member States and/or their nationals, the Commission will consider each case on its individual merits and determine whether these parties have 'ultimate decision-making power' in the carrier's management.[397]

389 Council Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) [2008] OJ L 293/3, art 4(f).

390 Ibid, art 2(9).

391 Ibid.

392 Council Regulation (EEC) No. 2407/92 of 23 July 1992 on licensing of air carriers [1992] OJ L 240/1, art 4(2).

393 Commission of the European Communities, 'Completion of the Civil Aviation Policy in the European Communities' (Proposal for a Council Regulation, COM(91) 275 final, 18 September 1991) 9.

394 *Commission Decision of 19 July 1995 on a procedure relating to the application of Council Regulation (EEC) No 2407/92 (Swissair / Sabena)* [1995] OJ L 239/19.

395 Ibid, 24.

396 Ibid.

397 Ibid, 25.

In 2008, a consolidated regulation on the operation of air services in the EU came into effect, repealing Regulations (EEC) No 2407/92, (EEC) No 2408/92 and (EEC) No 2409/92.[398] The recast regulation sought to address fragmentation and inconsistent application of the third package of measures across the EU.[399] This regulation remains in force and is the basis of the EU's current regulatory framework.

The European Commission has developed guidelines to clarify how it will apply these requirements.[400] It considers the ownership and control requirements to be "distinct and cumulative" and both criteria regarding ownership and effective control must be satisfied.[401] The applicant undertaking bears the burden of proof for demonstrating its compliance with these two requirements at its time of application for a license.[402] The European Commission is of the view that the ownership element will be satisfied if 50 per cent plus one share of the equity capital is owned by Member States, and, or, their nationals.[403] Capital will be considered equity capital if holders are firstly, granted the right to participate in operational decisions, and secondly, granted the right to obtain a share of the profits, or residual assets in the event of liquidation.[404] To satisfy the effective control element, the European Commission considers that Member States or their nationals, should have a 'decisive influence' over the management of the undertaking beyond that of any third country shareholders.[405] Assessments may consider the corporate governance of the undertaking, strategic business matters such as the rights of shareholders and financial relationships between the undertaking and non-EU shareholders and any commercial co-operation.[406] The European Commission is of the view that an assessment of the effective control element should be undertaken on a case-by-case basis.[407]

The European Commission had previously publicly expressed its willingness to continue to relax restrictions on its ownership and control rules on a reciprocal basis with other States as part of its 2015 Aviation Strategy for Europe.[408] At the Sixth Worldwide Air Transport Conference, the EU noted that relaxing restrictions could enable airlines to access new

398 Council Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) [2008] OJ L 293/3.

399 Commission of European Communities, 'Proposal for a Regulation of the European Parliament and of the Council on common rules for the operation of air transport services in the Community (recast)' (COM/2006/396/Final, 18 July 2006) 2.

400 European Commission, 'Interpretative guidelines on Regulation (EC) 1008/2008 – Rules on Ownership and Control of EU air carriers' (C(2017) 3711, 8 June 2017).

401 Ibid, 3.

402 Ibid, 6.

403 Ibid, 7.

404 Ibid.

405 Ibid, 9.

406 Ibid, 9-10.

407 Ibid, 10.

408 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economics and Social Committee and the Committee of the Regions: An Aviation Strategy for Europe' (COM(2015) 598 Final, 7 December 2015) 5.

capital, lead to the development of transnational carriers, enable States to privatise their national airlines if they so desired and reduce reliance on State aid and subsidies.[409]

In Indonesia, an airline (a national commercial air transportation business) is required to obtain a commercial air transportation permit.[410] An authorised airline may also then operate international, scheduled services.[411] To obtain a permit, the business must be entirely or majority owned by an Indonesian legal entity or an Indonesian citizen, such that there is a single majority of national shareholders.[412]

To operate an air transport service in Japan, an airline is required to obtain a licence from the Minister of Land, Infrastructure, Transport and Tourism.[413] The Japanese Civil Aeronautics Act 1952 prescribes a number of different situations in which an applicant is not eligible for a licence. These include:

- any person who does not have Japanese nationality
- any foreign state or public entity or its equivalent in any foreign state
- any juridical person or body established in accordance with the laws and ordinances of any foreign state
- any juridical person of which the representative is any one of those listed in the preceding three items or of which more than one-third of the officers are such persons or more than one-third of voting rights are held by such persons.[414]

As such, if more than one third of an airline's officers do not hold Japanese nationality or more than one third of the airline's voting rights are held by foreign investors, an airline is not entitled to a Japanese licence. If an airline subsequently meets one of these criteria, the Act provides that its licence is invalidated.[415]

To operate scheduled, air transport services in the United Kingdom, airlines are required to obtain an air transport license. Under the *Civil Aviation Act 1982* (UK), the CAA is required to refuse an application for an air transport licence if it is not satisfied that the applicant is a United Kingdom national, or that the body is not incorporated under United Kingdom law and controlled by United Kingdom nationals, unless the Secretary of State

409 International Civil Aviation Organization, 'National Restrictions on Air Ownership and Control' (Working Paper ATConf/6-WP/50 presented by Ireland on behalf of the European Union and its Member States and other Member States of the European Civil Aviation Conference, Sixth Meeting of the Worldwide Air Transport Conference, 2013) 3.

410 UU Nomor 1 Tahun 2009, Pasal 84.

411 Ibid, Pasal 86(1).

412 Ibid, Pasal 108(2)-(3).

413 *Civil Aeronautics Act 1982*, art 100 (1).

414 Ibid, art 101(v)(a).
Unofficial translation.

415 Ibid, art 120(1).

otherwise consents.[416] If the CAA intends to refuse to issue a licence, it is required to notify the Secretary of State and postpone its own decision until the Secretary of State has considered the application and determined if consent should be granted.[417] A United Kingdom national is defined as a British citizen, British Dependent Territories citizen, British National (Overseas) citizen or a British overseas citizen, a person who is a British subject or a British protected person under the *British Nationality Act 1981*.[418] During the Brexit transition period, the Department of Transportation and the CAA publicly expressed a view that current ownership and control restrictions were no longer fit for purpose and safety, security and proper regulation were more important matters than an airline shareholder's nationality.[419]

The United States of America is the most conservative of the jurisdictions. The Secretary of Transportation is responsible for issuing prospective air carriers with an Air Operators Certificate, referred to as a 'Certificate of Public Convenience and Necessity'.[420] To be issued a certificate, the Secretary must be satisfied that the carrier is 'fit, willing, and able to provide the transportation to be authorized by the certificate'.[421] In determining the fitness of a prospective air carrier, the Department of Transportation (DOT) will consider the competence of the key management personnel, the applicant's financial fitness and compliance record.[422] Critically, the applicant is required to be a citizen of the United States.[423] A citizen of the United States is defined as:

> (A) an individual who is a citizen of the United States;
> (B) a partnership each of whose partners is an individual who is a citizen of the United States; or
> (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.[424]

416 *Civil Aviation Act, 1982*, s. 65(3).

417 Ibid.

418 Ibid, s 105(1).

419 Department for Transport and Civil Aviation Authority, *Air services from the EU to the UK if there is a no-deal Brexit* (5 September 2019)
<https://www.gov.uk/guidance/air-services-from-the-eu-to-the-uk-in-the-event-of-no-deal#traffic-rights>.

420 49 U.S.C. §41102(a)(1).

421 Ibid, §41102(b)(1).

422 See 14 CFR §204.3.

423 Ibid, §204.3(e).

424 Ibid, §204.2 (c).
See also, 49 U.S.C. 40102(a)(15) .

The nationality rule has been widely considered by Congress, the DOT and the United States General Accounting Office (U.S. GAO). Case Study 4.1 provides an overview of the history of this provision and past attempts to reform it.

Case Study 4.1 - Foreign Investment in U.S. Airlines

The United States first began to regulate foreign investment in its airlines in 1926 with the enactment of the Air Commerce Act.[425] That Act provided that the Secretary of Commerce was only able to grant registration to aircraft owned by a citizen of the United States.[426] Under the Air Commerce Act, a citizen of the United States could either be: an individual United States citizen; a partnership in which each member of the partnership was a United States citizen, or; a corporation established under a law of the United States in which the President and two thirds of the Board or other managing officers were individual United States citizens and at least 51 per cent of the voting stock was controlled by United States citizens.[427]

The citizenship requirements were purportedly modeled off the *Merchant Marine Act of 1936*.[428] In 1938, the control thresholds for foreign investment were revised with the introduction of the *Civil Aeronautics Act*. This Act imposed more stringent ownership restrictions on airlines by now requiring that a corporation could not be considered a "citizen of the United States" unless 75 per cent of the voting interest was owned or controlled by persons who were citizens of the United States.[429] This definition of a United States citizen was retained in the Federal Aviation Act of 1958.[430] In 1994, Federal Transportation legislation was codified. As part of this process, the definition of citizen of the United States was extended to include a corporation or association organised under the laws of the United States, or a State, the District of Columbia or a territory in the possession of the United States.[431]

As the Act does not define control, the DOT has developed its own test for determining if an airline is controlled by citizens of the United States. The test was first expressed in the matter of 1983 matter of *Page Avjet Corporation*:

425 *Air Commerce Act of 1926,* Pub L No 69-251, 44 Stat 568.

426 Ibid, §3(a)(1).

427 Ibid, §9(a).

428 Civil Aeronautics, Legislative History of the Air Commerce Act of 1926 approved 20 May 1926, together with Miscellaneous Legal Materials relating to Civil Air Navigation, Revision of the 1923 Edition of Law Memoranda upon Civil Aeronautics, corrected to 1 August 1928, 82.

429 *Civil Aeronautics Act of 1938*, Pub L No. 75-706, 52 Stat 973, §1(13).

430 See *Federal Aviation Act of 1958*, Pub L No. 85-726, 72 Stat 731, §101(13).

431 An Act to revise, codify, and enact without substantive change certain general and permanent laws, related to transportation, as subtitles II, III, and V-X of title 49, United States Code, "Transportation", and to make other technical improvements in the Code, Pub L No 103-272, 108 Stat. 1097, §40102(a)(15).

> In examining the control aspect for purposes of determining citizenship, we look beyond the bare technical requirements to see if the foreign interest has the power – either directly or indirectly – to influence the directors, officers or stockholders. We have found control to embrace every form of control and to include negative as well as positive influence; we have recognized that a dominating influence may be exercised in ways than through a vote.[432]

In 2003, Congress codified this test to ensure the United States had a comparable measure to that used by EU Member States.[433] Although the sponsor, Senator Ted Stevens had originally intended to use the phrasing "effective control", at the request of the DOT, the amendment was changed to reflect the DOT's "actual control" test.[434] As such, the Transportation Code has since required corporations to demonstrate that they are under the actual control of citizens of the United States.[435]

Over the years, there have been numerous Congressional attempts to increase thresholds for foreign investment in U.S. carriers, however, these have been unsuccessful.[436] The DOT has also been a fierce advocate of reform. In 2004, *In the*

432 *In the matter of Page Avjet Corporation*, Order No. 83-7-5, Docket No. 40905 (1 July 1983), 2-3.

This test was subsequently applied in:

Acquisition of Northwest Airlines by Wings Holdings, Inc., Order 89-9-51, issued 29 September 1989.

Application of Discovery Airways, Inc., Order 89-12-41, issued 21 December 1989.

Application of North American Airlines, Inc., Order 89-11-8, issued 6 November 1989.

433 149 *Congressional Record* S 7813 (Ted Stevens) (12 June 2003, Senate).

434 149 *Congressional Record* S 7813 (John McCain) (12 June 2003, Senate).

435 See *Vision 100 – Century of Aviation Reauthorization Act*, Pub L No 108-176, 117 Stat 2490, §807.

436 See, for example:

A Bill to amend the Federal Aviation Act of 1958 to limit acquisitions of control of air carriers to ensure fitness, HR 2321, 101st Congress (1989-1990).

A Bill to amend the Federal Aviation Act of 1958 to prohibit the acquisition of a controlling interest in an air carrier unless the Secretary of Transportation has made certain determinations concerning the effect of such acquisition on aviation safety, S 1277, 101st Congress (1989-1990).

A Bill to amend the Federal Aviation Act of 1958 to prohibit the acquisition of a controlling interest in an air carrier unless the Secretary of Transportation has made certain determinations concerning the effect of such acquisition on aviation safety, HR 2891, 101st Congress (1989-1990).

A Bill to amend the Federal Aviation Act of 1958 to provide for review of certain acquisitions of voting securities of air carriers, and for other purposes, HR 3443, 101st Congress (1989-1990).

Airline Competition Enhancement Act of 1991, HR 2074, 102nd Congress (1991-1992).

A Bill to amend the Federal Aviation Act of 1958 to permit the Secretary of Transportation to authorize certain foreign investment in United States air carriers in excess of 25 percent, S 1980, 102nd Congress (1991-1992).

A Bill to amend the Federal Aviation Act of 1958 to permit the Secretary of Transportation to authorize certain foreign investment in United States air carriers in excess of 25 percent, S 1977, 102nd Congress (1991-1992).

A Bill to amend the Federal Aviation Act of 1958 to provide for review of certain acquisitions of voting securities of air carriers, and for other purposes, HR 470, 103rd Congress (1993-1994).

A Bill to amend the Federal Aviation Act of 1958 to authorize the Secretary of Transportation to reduce under certain circumstances the percentage of voting interests of air carriers which are required to be owned or controlled by persons who are citizens of the United States, HR 926, 103rd Congress (1993-1994).

A Bill to amend title 49, United States Code, to authorize the Secretary of Transportation to reduce under certain circumstances the percentage of voting interests of air carriers which are required to be owned or controlled by persons who are citizens of the United States, HR 951, 104th Congress (1995-1996).

Vision 100 – Century of Aviation Reauthorization Act, HR 2115, 108th Congress (2003-2004).

matter of the citizenship of DHL Airways Inc., the DOT summarised its approach to the actual control test:

> Under Department precedent, "The control standard is a *de facto* one – we seek to discover whether a foreign interest may be in a position to exercise actual control over the airline, *i.e,* whether it will have a substantial ability to influence the carrier's activities."[23] In addition, the inquiry required by the actual control standard examines whether the totality of the circumstances means that the carrier is subject to foreign control.[24] Each citizenship case presents its own set of facts, and we must apply the law to the specific factual situation in the case.[25]
>
> We have never held that a carrier was controlled by a foreign entity merely because it had cooperative arrangements with a foreign business, or because it obtained the majority of its revenues from one or more foreign firms. Without the presence of other controlling factors – such as substantial ownership ties, financial arrangements or managerial affiliations – we have not found that a close business relationship between a U.S. airline and a foreign airline meant that the foreign carrier was deemed to control the U.S. carrier.[437]

In 2005, the DOT issued a Notice of Proposed Rulemaking proposing to change its interpretation of "actual" control.[438] The following year, the DOT withdrew its proposal, however it noted that the current requirements had become so complex and burdensome to the detriment of US airlines. It further expressed a view that the United States should not perpetuate 'archaic and time-consuming administrative practices that serve neither a statutory purpose nor an identifiable policy interest'.[439]

The United States General Accounting Office has undertaken three reviews of foreign ownership and control restrictions on US airlines (1992, 2003 and 2019). In its first review, the GAO found that reducing the statutory limitations on foreign investment and carrier control may enable US carriers to have greater access to capital and improve their domestic competitiveness.[440] However, the report identified five primary concerns with relaxing restrictions, including the impact on domestic and international competition, national security, employment and safety oversight.[441] In

A Bill to direct the Secretary of Transportation to report to Congress concerning proposed changes to long-standing policies that prohibit foreign interests from exercising actual control over the economic, competitive, safety, and security decisions of United States airlines, and for other purposes, S 2135, 109th Congress (2005-2006).

A Bill to amend title 49, United States Code, to allow certain persons to own and control an air carrier providing air transportation or intrastate air transportation, and for other purposes ('Free to Fly Act'), HR 5000, 115th Congress (2017-18).

437 *In the matter of citizenship of DHL Airways, Inc. n/k/a Astar Air Cargo, Inc.*, Order 2004-05-10, issued 13 May 2004, 8.

438 Actual Control of U.S. Air Carriers, 70 FR 67389-67396 (7 November 2005).

439 Actual Control of U.S. Air Carriers, 70 FR 71106 (8 December 2006).

440 United States General Accounting Office, 'Airline Competition: Impact of Changing Foreign Investment and Control Limits on U.S. Airlines' (Report to Congressional Requesters, December 1992) 2.

441 Ibid, 4-5.

2003, the GAO advised that issues raised in its 1992 report relating to domestic and international competition, national security and employment were still relevant.[442] In its 2019 review, the GAO found foreign ownership in US airlines generally did not exceed 15 percent of voting stock and could be attributed to existing alliance arrangements, a lack of international interest in investing in new US carriers and the inability for a foreign entity to take actual control of an airline.[443] As part of its engagement with stakeholders, the GAO tested views on employment and national security and considered that if the foreign investment threshold increased to 49 percent of an airline's capital, it was unlikely to affect airline employment and national security issues could be managed.[444]

ALTERNATIVE APPROACHES TO THE NATIONALITY RULE

Although the nationality rule is ingrained in domestic legislation for most of the jurisdictions considered in this research, Brazil and India have sought to move away from requiring airlines to be substantially owned and effectively controlled by their nationals.

In 2013, India began to allow foreign airlines to invest up to 49 per cent in the capital of any Indian airline operating scheduled air passenger transport services, except for the national carrier, Air India, subject to certain conditions.[445] In 2016, as part of a broader policy to increase foreign investment in India to stimulate economic development, the Union Cabinet raised the limit of foreign direct investment in Indian airlines to 100 per cent, with any investment over 49 per cent subject to Government approval.[446] Under the policy, foreign airlines may continue to invest in up to 49 per cent of an Indian airline's paid up capital.[447] In 2017, the Indian Cabinet Committee on Economic Affairs also provided in-principle approval for the divestment of Air India and five of its subsidiaries.[448] The tender

442 Letter from the Director, Physical Infrastructure Issues, United States Government Accounting Office to the Chairman and Ranking Minority Member, Subcommittee on Aviation, Committee on Commerce, Science and Transportation, 30 October 2003, 6.

443 Letter from Mr. Andrew Von Ah (Director, Physical Infrastructure, United States Government Accountability Office) to the Hon. Mike Lee (Chairman, Joint Economic Committee, United States Congress) 25 June 2019, 7-9.

444 Ibid.

445 Guidelines for Foreign Direct Investment in the Civil Aviation Sector, AIC 6/2013, 3.2.1(b).

Superseded by Guidelines for Foreign Direct Investment in the Civil Aviation Sector, AIC 12/2013, 3.2.1(b).

446 Press Information Bureau, Government of India, 'Cabinet Approves simplification and liberalisation of the FDI policy, 2016 in various sectors' (Media Release, 31 August 2016) cl. 5.

447 Ibid.

448 Press Information Bureau, Government of India, 'Cabinet gives 'in principle' approval for disinvestment of Air India and five of its subsidiaries' (Media Release, 28 June 2017) 1.

process reportedly did not attract any expressions of interest for the airline.[449] In January 2020, the Government of India launched a new expression of interest for a 100 per cent stake in Air India.[450] In October 2021, the Tata Group was announced as the successful bidder.[451]

In recent years, Brazil has also sought to move away from the nationality rule in airline licensing. Historically, to operate scheduled, public air transport services in Brazil, an airline needed to have its headquarters located in Brazil, be exclusively managed by Brazilians and at least 80 per cent of its voting stock needed to belong to Brazilians.[452] In March 2016, President Dilma Rouseff sought to relax restrictions through a Presidential decree. The decree provided that authorisation could be granted to airlines that were headquartered in Brazil and where at least 51 per cent of voting stock was held by Brazilians.[453]

During Congressional review of the provisional law, the threshold was subsequently revised to enable foreigners to invest 100 per cent in Brazilian airlines. However, in July 2016, new President, Michel Temer, vetoed these measures.[454] In December 2018, President Temer issued a new Presidential decree to permit 100 per cent foreign investment in Brazilian airlines, conditional on the airline being constituted under Brazilian law and headquartered and administered in Brazil.[455] The measure was issued shortly after Brazilian airline, Avianca Brasil filed for bankruptcy.[456] The decree sought to attract foreign investment for new and existing Brazilian airlines and encourage growth and competitiveness within Brazil's aviation sector.[457] In June 2019, following passage of the legislation through the Brazilian Parliament, President Jair Bolsonaro approved these changes to the Code.[458] In 2020, the Brazilian Government announced a new reform agenda for the aviation industry, Programa Voo Simples (the Simple Flight Program) to modernise the regulatory framework. As part of reform agenda, in late 2021, the Code was amended to permit international air transport services to be performed by either national or foreign

449 The Economic Times, *Government open to the idea of listing Air India* (13 June 2019) <https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/government-open-to-the-idea-of-listing-air-india/articleshow/64572140.cms?from=mdr>.

450 Ernst & Young LLP India, 'Preliminary Information Memorandum for Inviting Expression of Interest for Strategic Divestment of Air India Limited, including AI's shareholding interest in the AIXL and AISATS by Government of India Ministry of Civil Aviation' (27 January 2020) 12.

451 Tata Group, 'Tata Group to Acquire 100% Stake in Air India' (Press Release, 8 October 2021).

452 Lei Nº 7.565, de 19 de Dezembro de 1986, art 181 (revoked).

453 Medida Provisória Nº 714, de 1 de Março de 2016, art 4.

454 Lei Nº 13.319, de 25 de Julho de 2016, art 4.

455 Medida Provisória Nº 863, de 13 de Dezembro de 2018, art 1.

456 Lisandra Paraguassú and Anthony Boadle, 'Brazil allows 100 pct foreign investment in domestic airlines – decree' *Reuters*, 14 December 2018 <https://www.reuters.com/article/brazil-airlines/brazil-allows-100-pct-foreign-investment-in-domestic-airlines-decree-idUSS0N1XG00Y>.

457 Presidency of the Republic of Brazil, 'Provisional Measure authorizes 100% foreign capital in domestic airlines' (Media release, 14 December 2018).

458 Lei Nº 13.842, de 17 de Junho de 2019, art 1.

companies and domestic air transport services reserved for legal entities incorporated under Brazilian law with headquarters and administration in Brazil. [458-2]

Brazil and India are part of a small cohort of jurisdictions globally that have sought to move away from the conventional nationality rule. A small number of other jurisdictions have also developed alternative tests to assess whether foreign owned or controlled entities may operate air services in their jurisdiction.

In Chile, the nationality of an airline is established by demonstrating that the airline has its principal place of business in Chile. The criterion requires that the majority of aircraft are based in Chile, they are registered in Chile, the crew are Chilean and maintenance is undertaken in Chile.[459] The Chilean Government has previously noted that since the inception of these requirements in 1979, no State has raised any concerns that their airlines are not required to be majority owned by Chilean nationals.[460] The World Economic Forum has previously noted that Costa Rica and El Salvador follow the same approach.[461]

In Australia, foreign persons are prohibited from holding more than 49 per cent of the total value of the issued share capital of one Australian carrier, Qantas.[462] However, Australian legislation does not currently impose any restrictions on foreign investment in other domestic carriers.[463]

The World Economic Forum has previously suggested adopting a model of "regulatory nationality". This would involve the State in which the majority of an airline's aircraft are registered becoming the State responsible for oversight of an airline's compliance with international safety standards.[464]

CONCLUDING REMARKS

The nationality rule is a challenge for airlines, legislators and regulators. Over time, different States have adopted their own approaches to regulating foreign investment and control for airlines operating in their airspace with no uniformity between them. The

458-2 Medida Provisória No 1.089, de 29 de Dezembro de 2021, art 2.
See also, Lei No 14,368, de 14 de Junho de 2022, art 3.

459 International Civil Aviation Organization, 'Proposal for the Liberalization of Air Carrier Ownership and Control' (Working Paper ATConf/6-WP/29 presented by Chile, Sixth Meeting of the Worldwide Air Transport Conference, 2013) 2.

460 Ibid, 2.

461 World Economic Forum, 'A New Regulatory Model for Foreign Investment in Airlines' (Industry Agenda, January 2016) 12.

462 See *Air Navigation Act 1920* (Cth), s 11A(2)(a).
See also, *Qantas Sale Act 1992* (Cth), s 7(1)(a).

463 The *Air Navigation Act 1920* (Cth) is silent.

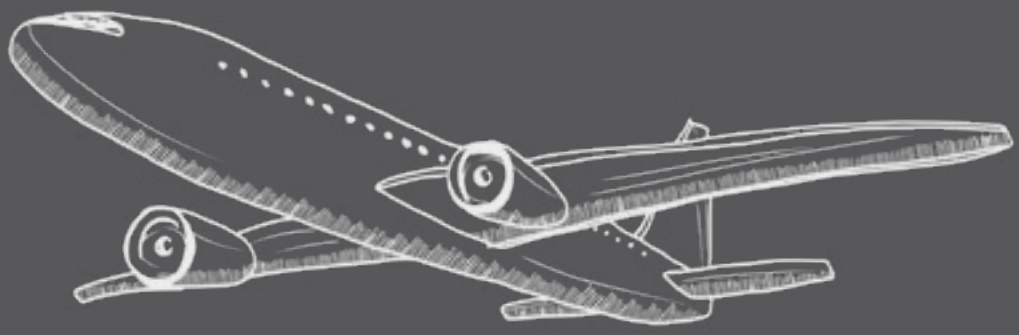
464 World Economic Forum, 'A New Regulatory Model for Foreign Investment in Airlines' (Industry Agenda, January 2016) 15.

regulatory divide is particularly evident between the major aviation markets with each adopting different approaches to this issue.

At one end of the spectrum, the United States of America has adopted a conservative approach to foreign investment. Over the past 90 years, United States Congress has only amended its legislation on three occasions; firstly, to amend the statutory threshold for foreign investment to 25 per cent in 1938; secondly, to define the territory to which the legislation applies in 1994; and most recently, to formally recognise the Department of Transportation's "actual control" test in 2003. In spite of multiple attempts to relax restrictions on how foreign interests may invest in and control U.S. airlines and the Department of Transportation's advocacy for further reform at various points in time, Congress has been unwilling to further relax the statutory restrictions. In 1992, the United States General Accounting Office identified five concerns against further reform pertaining to the impact on domestic and international airline competition, national security, employment and safety oversight. Its most recent analysis in 2019 suggests that with respect to security and employment, the impact was manageable if the foreign investment threshold was to be increased to 49 per cent. Without strong domestic champions in the legislature or an economic imperative to reform the industry, the regulatory framework is unlikely to change in the near future. Indonesia has also expressed its disinterest in further reform to its current regulatory framework.

At the other end of the spectrum, the European Union Member States, India and Brazil have reformed their approaches to the nationality rule. The European Union has successfully standardised restrictions between its Member States as part of its Single Aviation Market. Currently, a carrier must demonstrate that it is majority owned and effectively controlled by Member States or their nationals to receive an operating licence. Beyond this, the EU has previously also indicated that it would be willing to further relax restrictions on foreign investment and control with other States on a bilateral basis. Similarly, India has progressively reformed its approach to ownership and control restrictions as part of its broader economic agenda to attract more investment into its country and stimulate economic development. Indian airlines may now be completely owned by foreigners, subject to Government approval. In response to economic challenges, Brazil has also relaxed its regime.

It is therefore apparent that reform does not occur unless there is an economic or political imperative to do so. Whilst there are alternatives to the traditional ownership and control criteria, such as the "principal place of business" criterion, this has not gained significant traction in domestic legislation or ASAs. These jurisdictions have so little in common in respect of their regulation of this issue that it is also unlikely that they would be able to successfully negotiate a multilateral agreement pertaining to ownership and control issues in the near future either.



CHAPTER 5:

AIRLINE ALLIANCES

INTRODUCTION

To circumvent the complex patchwork of domestic and international regulation on market access and foreign investment, many airlines have formed alliances with other airlines to extend their global reach in jurisdictions they would not otherwise be legally permitted to operate in. This chapter will explore the different structures and features of global airline alliances, discuss how they are regulated by each jurisdiction through domestic competition or antitrust law and consider two case studies to illustrate the complexity of the patchwork regulatory framework for airlines participating in an alliance.

STRUCTURE AND FEATURES OF AN AIRLINE ALLIANCE

There is no formal definition of what constitutes an alliance. Alliances can take many different forms and involve varying degrees of integration and coordination between the partner airlines.[465] At one end of the spectrum, an alliance may involve airlines entering into interlining agreements, coordinating their frequent flyer programs or providing passengers of a partner airline with reciprocal access to their airport lounge.[466] Alliance partners may enter into a code-share agreement where one airline will advertise and market the flights of its alliance partners on select routes under its own designator code thereby being able to offer services without providing them itself.[467] Airlines may also co-operate with each other by sharing facilities and staff in operational areas such as ground-handling, aircraft maintenance, catering and sales to reduce costs.[468] At the highest end of the alliance spectrum, alliances may resemble a highly integrated joint venture and it may be a precursor to a consolidation or merger.[469] Gudmundsson and Lechner have observed that some airlines have also extended the scope of their service by partnering with other travel related businesses to provide services such as accommodation, transfers and activities at the passenger's destination.[470]

Alliances enable airlines to improve their profitability without the expense of establishing additional services in markets that they may be otherwise unable to or prohibited from entering due to regulatory restrictions, high barriers to entry or infrastructure constraints. Alliances also provide airlines with access new markets through a virtual network of

465 International Civil Aviation Organization, 'Antitrust Immunity for Airline Alliances' (Working Paper, ATConf/6-WP/85 presented by the Republic of Korea, Sixth Meeting of the Worldwide Air Transport Conference, 2013) 2.

466 See European Commission and United States Department of Transportation, 'Transatlantic Airline Alliances: Competitive Issues and Regulatory Alliances' (Report, 16 November 2010) 5.

467 Ibid, 4-5.

468 Ibid, 5.

469 Ibid.

470 Sveinn Vidar Gudmundsson and Christian Lechner, 'Multilateral Airline Alliances: The Fallacy of the Alliances to Mergers Proposition' in John F. O'Connell and George Williams, *Air Transport in the 21st Century* (Ashgate Publishing, 1st ed, 2011) 171, 173.

routes, to attract new customers and to retain customer loyalty on current routes, improve efficiency through resource and knowledge sharing, benefit from marketing and good-will associated with an alliance or alliance partner and to co-operate with partners in respect of pricing. However, alliances can be difficult to manage and govern and they are subject to the goodwill of the alliances' partners. Lordan and Klophaus have noted that alliances may become vulnerable if an alliance member withdraws, thereby leaving part of an alliance's virtual network unserviced.[471]

For passengers, alliances provide a more seamless travel experience through better connectivity and a broader virtual network of routes, sometimes referred to as 'metal neutrality'.[472] However, this may mean that passengers are sometimes not aware of the operator of their flight or who is responsible for resolving any difficulties that may arise.[473] Passengers can benefit from frequent flyer programs, rewarding a passenger's loyalty with benefits such as lounge access, priority check-in, boarding and baggage handling and additional baggage allowances. Notwithstanding these benefits, the overwhelming concern with alliances is the prospective lessening of competition if airlines collaborate rather than compete with each other on routes and use their market power to the detriment of passengers.[474] This may in turn lead to higher fares, a poorer quality of service and innovation within the industry and less choice for passengers.

Since the late 1990's, many full-service airlines have participated in one of the three multilateral, global alliance programs: Star Alliance, oneworld or SkyTeam. These large global alliances have now firmly established themselves as global airline networks. Star Alliance is the largest of the three global alliances. It was established in 1997 and it is now comprised of 26 member airlines.[475] The oneworld alliance was established in 1999 and it is now comprised of 13 member airlines and a number of affiliate members, servicing over 170 territories.[476] SkyTeam was established in 2000 and it is now comprised of 18 member airlines servicing over 1,000 destinations.[477] Table 5.1 demonstrates the prevalence of the global alliances for the jurisdictions in this study.

471 Oriol Lordan and Richard Klophaus, 'Measuring the vulnerability of global airline alliances to member exits' (2017) 25 *Transportation Research Procedia*, 7, 14.

472 European Commission and United States Department of Transportation, 'Transatlantic Airline Alliances: Competitive Issues and Regulatory Alliances' (Report, 16 November 2010) 8.

473 See, for example, Daniel Friedenzohn, 'Code-Sharing in the U.S. Airline Industry: Effective Disclosure Requirements for an Aspect of Air Transport That is Complex, Important and Often Misunderstood' (2010) 10 *Issues in Aviation Law and Policy*, 39, 55.

474 See for example, Organisation for Economic Co-operation and Development 'Air Service Agreement Liberalisation and Alliance Airlines' (Country-Specific Policy Analysis, Organization for Economic Co-ordination and Development, International Transport Forum, 1 December 2014) 47.

475 Star Alliance, *About Star Alliance* (2022) <https://www.staralliance.com/en/about>.

476 oneworld, *Benefits* (undated) <https://www.oneworld.com/travel-benefits>.

477 SkyTeam, *SkyTeam Airline Alliance* (undated) <https://www.skyteam.com/en/about>.

Table 5.1: Jurisdiction Member Airlines of the Three Global Alliances

oneworld	Star Alliance	SkyTeam
American Airlines (US)	Aegean Airlines (EU)	Air Europa (EU)
British Airways (UK)	Air China (China)	Air France (EU)
Cathay Pacific (HK SAR)	Air India (India)	China Airlines (China)
Finnair (EU)	ANA (Japan)	China Eastern Airlines (China)
Iberia (UK/EU)	Austrian Airlines (EU)	Czech Airlines (EU)
Japan Airlines (Japan)	Brussels Airlines (EU)	Delta Air Lines (US)
	Croatia Airlines (EU)	Garuda Indonesia
	LOT Polish Airlines (EU)	(Indonesia)
	Lufthansa (EU)	ITA Airways (EU)
	SAS (EU)	KLM (EU)
	Shenzhen Airlines (China)	TAROM (EU)
	TAP Air Portugal (EU)	Xiamen Air (China)
	United Airlines (US)	

In spite of their international character, there is no overarching international framework for determining how alliances should be regulated. As with foreign investment, alliances are subject to an airline's domestic competition or antitrust legislation. At an international level, the ICAO Assembly has previously urged Member States to encourage co-operation between their regional and national competition authorities for international air transport matters including for the consideration of airline alliances.[478]

DOMESTIC REGULATION OF AIRLINE ALLIANCES

The jurisdictions adopt different approaches to the regulation of airline alliances domestically. For most jurisdictions, alliances are subject to domestic competition law, and for some jurisdictions an alliance may only come to the attention of a regulator if it has engaged in anticompetitive conduct. Japan and the United States of America are unique from the other jurisdictions as they have specific legislation for airline alliances and allow airlines to prospectively receive antitrust immunity for an alliance.

In Brazil, the Conselho Administrativo de Defesa Econômica (also referred to as the Administrative Council of Economic Defense or CADE) is responsible for overseeing competition law in Brazil. CADE is comprised of three different sections: the Administrative Tribunal, the General Superintendence and the Department of Economic Studies. On aviation matters, the National Civil Aviation Agency (ANAC) also provides CADE with support. The principal legislative instrument, Lei No 12.529, de 30 de Novembro de 2011 (Law N° 12.529 of November 30, 2011) prohibits certain anticompetitive conduct and

478 International Civil Aviation Organization, 'Assembly Resolutions in Force (as of 4 October 2019)' (Doc 10140), Appendix A, Section III.

actions which have an objective or may have an effect on free competition, market control, lead to an arbitrary increase in profits or an enterprise abusing its dominant position in the market.[479]

The law requires select businesses to seek the Administrative Tribunal of Economic Defense's approval for an "act of economic concentration".[480] Broadly, the Act defines these as mergers between two or more previously independent companies, acquisitions, incorporations or when two or more companies enter into an associative contract, consortium or joint venture.[481] Approval is required if one of the businesses involved in the transaction has annual sales or total turnover for the preceding year greater than R$400,000,000 and one of the other parties has registered annual sales or total turnover for the preceding year greater than R$30,000,000.[482] The Act prohibits arrangements that eliminate competition in a substantial part of the relevant market.[483] Anticompetitive arrangements may be permitted if they increase productivity or competitiveness, improve the quality of product or service provision or promote efficiency, the benefits of which are provided to consumers.[484] This statutory framework has been used to assess codeshare agreements, equity acquisitions and joint business agreements.

In China, the State Administration for Market Regulation (SAMR) is responsible for regulating competition related matters. The Anti-Monopoly Law prohibits competitive business operators from concluding monopoly agreements that, amongst other conduct, fix prices or restrict supply.[485] Similarly, undertakings are prohibited from fixing prices, maintaining a price floor and other monopoly agreements with their trading counterparties.[486] These types of conduct are not considered to be anti-competitive if the undertaking can prove that they were established for one of seven prescribed purposes, such as improving technology, mitigating a sharp decrease in sales volumes or obvious overproduction caused by an economic event or safeguarding foreign trade interests.[487]

479 Lei Nº 12.529, de 30 de Novembro de 2011, art 36.

480 Ibid, art 88.

481 Ibid, art 90.

Note, an associative contract has subsequently been defined as a contract that establishes a joint venture for the exploration of economic activity between competitors in the relevant market, has the object of sharing the risks and results of the economic activity and has a contract term of at least two years: see Resolução Nº 17, de 18 de Outubro de 2016, art 2.

482 Ibid, art 88, items I-II.

483 Ibid, art 88, § 5.

484 Ibid, art 88, § 6, items I-II.

485 Anti-Monopoly Law of the People's Republic of China, art 13(1)-(2).

486 Ibid, art. 14.

487 Ibid, art. 15.

In the European Union, the European Commission is responsible for enforcement of competition law. As with other many of the other jurisdictions, there are no specific regulations pertaining to competition in the air transport industry. Rather, the Treaty on the Functioning of the European Union[488] (TFEU) competition rules apply. For airline alliances, the Commission applies a three-part test in accordance with Article 101 of the TFEU[489] to determine if an infringement has occurred. In making its assessment, the Commission will firstly consider whether there is an agreement between the undertakings, secondly, whether the agreement effects trade between Member States, and thirdly, if the agreement restricts or distorts competition within the market.[490] If an agreement, decision or concerted practice is deemed to restrict competition, the Commission will secondly determine if the benefits arising out of the arrangement outweigh the externalities.[491] If the benefits do not outweigh the externalities, the agreement will be automatically void.[492] Also of relevance to the aviation industry, the TFEU prohibits an undertaking abusing its dominant position within the common market or a substantial part of the market if the conduct affects trade between Member States.[493]

In India, the Competition Act, 2002 prohibits anticompetitive agreements which impact upon competition:

> (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.[494]

Anticompetitive agreements are deemed to be void under the Act.[495] The Act also prohibits enterprises or groups from abusing their dominant position within the Indian market and the Act outlines specific examples of such conduct.[496]

The Competition Commission of India (CCI) is responsible for administering competition law in India. The CCI may conduct an inquiry into an anticompetitive agreement or alleged breach of dominant position on its own motion, on receipt of information or on a reference from the Central Government, a State Government or another statutory authority.[497] The

488 *Treaty on the Functioning of the European Union*, opened for signature on 7 February 1992, [2012] OJ C 326/341 (entered into force on 1 November 1993) ('*TFEU*').

489 On 1 December 2009, Articles 81 and 82 of the EC Treaty respectively became Articles 101 and 102 of the TFEU.

490 *TFEU*, art 101.

491 Ibid, art 101(3).

492 Ibid, art 101(2).

493 Ibid, art 102.

494 Competition Act, 2002, s 3(1).

495 Ibid, s 3(2)-(3).

496 Ibid, s 4(2).

497 Ibid, s 19(1).

Commission may investigate agreements executed outside of India or involving a party that resides outside of India if the conduct has or is likely to have, an appreciable adverse effect on competition within India.[498] In determining whether an agreement is anticompetitive, or an enterprise or group has abused its dominant position, the Commission is required to consider a number of different factors such as the market, competitors, barriers to entry and consumer benefits.[499] Notwithstanding this, joint ventures are permitted if such the joint-venture agreement 'increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services'.[500]

In Indonesia, UU No. 5 Tahun 1999 (Law No. 5 on the Prohibition of Monopolistic Practices and Unfair Business Practices) applies to airlines in the same way that it would apply to businesses operating in other industries. The Law details a number of different types of prohibited anticompetitive conduct, such as price fixing, price discrimination, dumping, boycotts, cartels and abuse of dominant position.[501] Komisi Pengawas Persaingan Usaha (KPPU) is responsible for regulating competition in Indonesia.

In the United Kingdom, the *Competition Act 1998* prohibits agreements, decisions and concerted practices which may affect trade in the United Kingdom and either intend to, or actually does impact on competition within the United Kingdom.[502] The Act adopts the same language as Article 101 of the TFEU by outlining the types of agreements, decisions or concerted practices that are considered anti-competitive:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[503]

498 Ibid, s 32.
499 Ibid, ss 19(3)-(4).
500 Ibid, s 3(3).
501 UU Nomor 5 Tahun 1999, Pasal 4-25.
502 *Competition Act, 1998,* s 2(1).
503 Ibid, s 2(2).

Any agreements or decisions that fall within this conduct are void, pursuant to the Act.[504] However, a company may apply for an individual or block exemption for agreements, if it is able to demonstrate that the agreement satisfies the following test:

(a) contributes to—
  (i) improving production or distribution, or
  (ii) promoting technical or economic progress,
  while allowing consumers a fair share of the resulting benefit; but
(b) does not—
  (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
  (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.[505]

In the United States of America, the Department of Transportation (DOT) may grant approval and antitrust immunity to airlines to enable them to participate in an alliance. The DOT assesses applications for antitrust immunity using a two-part test. At the outset, the US or foreign carrier may file copies of agreements between them, request to discuss prospective co-operative arrangements or file modifications or cancellations of agreements with the Secretary of Transportation (in practice, the DOT) for consideration.[506]

As part of the two-part test, the Secretary is firstly required, by the statute, to approve an agreement if it is not 'adverse to the public interest' (coined by the DOT as the 'Competitive Effects Analysis') and does not violate certain statutory provisions.[507] The Secretary is required to disapprove an agreement that will substantially reduce or eliminate competition unless the Secretary is able to establish that the action is required to address a serious transportation need or it will achieve important public benefits that could not otherwise be obtained.[508] In determining public benefits, the DOT may consider international relations and foreign policy considerations.[509] While an OSA is a factor for this consideration, the DOT has previously indicated that an OSA will not guarantee a grant of immunity.[510] If the Secretary approves the request, the DOT may then consider whether to grant antitrust immunity to the alliance. The DOT may only exempt an airline, as part of an order under 49 U.S. Code §§ 41309 or 42111 (relating to mutual aid agreements for labour

504 Ibid, s 2(4).

505 Ibid, s 9.

506 49 U.S.C. § 41309(a).

507 49 U.S.C. § 41309(b).

508 Ibid, § 41309(b)(1).

509 Ibid, § 41309(b)(1)(A).

510 See for example, *Joint Application of Alitalia-Linee Aeree Italiane-S.p.A., Czech Airlines, Delta Air Lines, Inc., KLM Royal Dutch Airlines, Northwest Airlines, Inc, and Société Air France for Approval of and Antitrust Immunity for Alliance Agreements under 49 U.S.C. §§ 41308 and 41309*, Order 2008-4-17, issued 9 April 2008, 4.

strikes), if the Secretary decides that the exemption 'is required by the public interest' (coined by the DOT as the 'Public Benefits Analysis').[511] The DOT considers this to be a higher threshold than 'adverse to the public interest' test contained within §41309(b).[512] As a matter of practice, the DOT applies the Clayton Act test to determine if the alliance will substantially reduce competition and exercise market power as it has historically considered airline alliances to be akin to a merger.[513]

Japan's *Civil Aeronautics Act 1952* adopts a similar approach to the United States of America by allowing certain airline alliance arrangements to receive an exemption from domestic competition laws. The Minister for Land, Infrastructure, Transport and Tourism may grant approval to a domestic airline to enter into or alter the contents of an agreement in two circumstances, detailed by the Act as follows:

(i) In the case where any domestic air carrier concludes an agreement on joint management with another air carrier, when two or more domestic air carriers operate air transport services in order to ensure passenger transport necessary for local residents' life in a route between points within the country where it is expected to be difficult to continue the services due to decreased demand for air transport services.
(ii) In the case where any domestic air carrier concludes an agreement on joint carriage, fare agreement and other agreements relating to transportation with another air carrier in order to promote public convenience in a route between a point in the country and another point in a foreign country, or between one point and another in foreign countries.[514]

However, the Act provides that Minister should not grant approval for an agreement if the contents of the agreement fall into one of four categories:

(i) The contents of the agreement shall not unfairly impair the benefits of users.
(ii) The contents of the agreement shall not unfairly discriminatory.
(iii) The contents of the agreement shall not unfairly restrict participation and withdrawal.
(iv) The contents of the agreement shall be kept to the minimum necessary for the purpose of the agreement.[515]

511 49 U.S.C. § 41308(b).

512 See, for example, *Joint Application of Northwest Airlines, Inc. and KLM Royal Dutch Airlines for Approval and Antitrust Immunity of an Agreement Pursuant to Sections 412 and 414 of the Federal Aviation Act, as amended,* Order 93-1-11, issued 11 January 1993, 11.

See also, *Joint Application of Alitalia-Linee Aeree Italiane-S.p.A., Czech Airlines, Delta Air Lines, Inc., KLM Royal Dutch Airlines, Northwest, Inc., Société Air France for Approval of and Antitrust Immunity for Alliance Agreements under 49 U.S.C. §§ 41308 and 41309,* Order 2005-12-12, issued 22 December 2005, 32.

513 See *Joint Application of Northwest Airlines Inc. and KLM Royal Dutch Airlines for Approval and Antitrust Immunity of an Agreement Pursuant to Sections 412 and 414 of the Federal Aviation Act, as amended* and *In the Matter of the Acquisition of Northwest Airlines by Wings Holdings, Inc.,* Order 92-11-27, issued 16 November 1992, 13.

514 *Civil Aeronautics Act 1982*, art 110 (*unofficial translation*).

515 Ibid, art 111(2) (*unofficial translation*).

If the Minister intends to grant an alliance agreement with approval, the Minister is required to consult with the Japanese Fair Trade Commission.[516]

ONE ROUTE: DUAL REGULATORY OBLIGATIONS

One of the consequences of the current multijurisdictional framework is that airlines participating in an alliance are required to comply with the competition or antitrust legislation of at least two separate jurisdictions for one route. This imposes a dual regulatory burden on airlines. Depending on the application of each jurisdiction's own legislation, it is possible for different competition regulators to reach different conclusions about whether an alliance should be permitted to operate.

The European Commission and the United States Department of Transportation have considered multiple agreements between member airlines of the three global alliances on the transatlantic routes and published extensive reasons for their decisions. To ally Commission concerns, airlines have typically been required to make commitments, for a fixed period of time, to assist a new entrant to offer services on routes of concern. These commitments have included relinquishing slots and allowing the new entrant to participate in the airlines' frequent flyer programs, and interlining, special prorate, fare or blocked space agreements. In some instances, airlines have also proposed frequency freezes and to be subject to additional monitoring by a trustee. In order to gain approval and antitrust immunity, the DOT has tended to impose a number of obligations on applicant airlines. These obligations have included a requirement to enact a joint venture agreement within a certain period of time, to withdraw from IATA tariff conferencing and co-ordination, for foreign carriers to provide data on their passengers and to seek additional approval from the DOT if the airlines intend to operate under a common brand. In some instances, their consideration of an alliance has overlapped and they have historically adopted slightly different approaches to resolving their identified competition concerns. Case Studies 5.1 and 5.2 investigate how the regulators have historically approached competition issues for alliance arrangements between Star Alliance and oneworld members.

516 Ibid, art 111-3.

Case Study 5.1 – Star Alliance

In 1996, foundation Star Alliance Members, United Air Lines and Lufthansa sought approval and antitrust immunity from the DOT for an alliance expansion agreement to facilitate an operational merger between their airlines for a five-year term. In the same year, the European Commission commenced a proceeding pursuant to Article 85 of the EC Treaty to examine agreements concluded between United Airlines, Lufthansa and Scandinavian Airlines Systems regarding coordination of commercial, marketing and operational activities.

For the antitrust proceedings, United Air Lines and Lufthansa argued that the respective foreign ownership and control rules of the US and the EU prohibited the airlines from merging at the time and their operational merger would be consistent with US international air law policy.[517] They also argued that their proposal would enable them to operate more efficiently and competitively against the other global alliances.[518] Additionally, the applicants were already code-sharing on select US-German routes.[519]

In its Final Order, the DOT agreed to approve and grant antitrust immunity to United Air Lines and Lufthansa to enable them to enter into their alliance agreement.[520] The DOT determined that the agreement would not reduce competition in the US-EU, US-Germany and behind and beyond markets.[521] The airlines agreed to not coordinate on certain decisions relating to two city pairs (Chicago-Frankfurt and Washington-Frankfurt) in response to concerns raised by the Department of Justice.[522] The DOT agreed to grant antitrust immunity as it noted that the alliance would not proceed in the absence of the grant of immunity.[523] In granting approval and immunity, the DOT required the agreement to be resubmitted within five years from the date of issuance, the airlines were required to withdraw from IATA tariff coordination, Lufthansa was required to participate in the survey of airline passenger traffic and the airlines were required to seek DOT's approval for subsequent subsidiary agreements or to operate under a common name .[524]

517 *Joint Application of United Air Lines and Deutsche Lufthansa A.G. d/b/a, Lufthansa German Airlines for approval of and Antitrust Immunity for an Alliance Expansion Agreement pursuant to 49 U.S.C. §§41308 and 41309*, Show Cause Order 96-5-12, issued 9 May 1996, 5-6.

518 Ibid.

519 Ibid, 3-4.

520 See *Joint Application of United Air Lines, Inc. and Deutsche Lufthansa, A.G. for approval of and Antitrust Immunity for an Alliance Expansion Agreement pursuant to §§ 41308 and 41309*, Order 96-5-27, issued 20 May 1996, 1.

521 Ibid, 8.

522 Ibid.

523 Ibid, 9.

524 Ibid, 17-18.

Across the Atlantic, the European Commission was concerned about the impact the agreements would have on passenger transport on five transatlantic routes: Frankfurt-Chicago, Frankfurt-Washington, Frankfurt-Los Angeles, Frankfurt-San Francisco and Copenhagen-Chicago.[525] The Commission noted that the airlines had been competitors on these routes prior to entering into their agreements and it considered that the agreements infringed Article 81(1) of the EC Treaty (now Article 101(1) of the TFEU).

In response to the Commission's concerns, the airlines argued that United Airlines would not have serviced three of the routes (Frankfurt-Los Angeles, Frankfurt-San Francisco and Copenhagen-Chicago) in any event and the alliance had therefore not delivered an actual or potential reduction in competition.[526] The airlines also argued that their alliance would provide passengers with a number of benefits. These included the provision of a greater route network with increased service frequency and greater cost savings through resource sharing.[527]

The airlines nevertheless submitted undertakings to surrender slots at Frankfurt airport, subject to conditions, to address the Commission's concerns.[528] In addition, the airlines also agreed to allow a competitor to access their frequent flyer program, to allow the competitor to enter into interlining agreements with them and to withdraw from IATA tariff conferencing for those particular routes.[529] The Government of the Federal Republic of Germany also agreed to refrain from any fare invention on the four German transatlantic routes.[530] On the basis of the airlines' commitments and the German Government's declaration, the Commission closed the proceedings.[531]

525 *Commission notice concerning the alliance between Lufthansa, SAS and United Airlines* [2002] OJ C 181/E/2, 3.

526 Ibid, 3.

527 Ibid, 4.

528 *Commission notice concerning the alliance between Lufthansa, SAS and United Airlines (cases COMP/D-2/36.201, 36.076, 36.078 — procedure under Article 85 of the Treaty (ex Article 89))* [2002] OJ C 264 E/5, 6-8.

529 Ibid, 8-9.

530 Ibid, 9.

531 Ibid, 5.

Case Study 5.2 – oneworld

In 2009, the European Commission investigated a proposed revenue sharing joint venture between oneworld Members British Airways, American Airlines and Iberia. This investigation was conducted concurrently to a review by the DOT for approval and antitrust immunity of the same joint venture. The Commission initiated the proceedings into the oneworld joint venture following a complaint by Virgin Atlantic. In its complaint, Virgin asserted that British Airways and American Airlines would be collaborating on six transatlantic routes that they had been competing on, and the arrangement would thereby increase the alliance's dominance on these routes and the wider Heathrow market.[532]

The Commission adopted a Statement of Objections in which it raised concerns about the joint venture potentially restricting competition on seven transatlantic routes.[533] The Commission noted that there were significant barriers to entry including the availability of slots at London and New York JFK airport, the alliance's market position, network effects and regulatory constraints.[534] These factors would limit the ability of existing competitors or new entrants from effectively competing in the proposed Joint Venture.

The airlines did not agree that their Joint Venture would infringe the TFEU. Nevertheless, they proposed to make slots available at London Heathrow or Gatwick to allow their competitors to operate additional services between select city pairs for ten years.[535] The airlines also filed commitments for fare combinability and prorate agreements and to make their frequent flyer program available to competitors for those routes, if the competitor did not have a comparable program of its own.[536] The Commission market tested these commitments and following revisions by the parties in response to the market test and further concerns submitted by Virgin, the Commission determined that the amendments to the commitments would sufficiently address its concerns.[537]

532 See Case COMP/39.596 – British Airways/American Airlines/Iberia Decision rejecting Virgin Atlantic's complaint of 30 January 2009 C (2011) 4505, 3-4.

533 See *Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/39.596 – British Airways/American Airlines/Iberia* OJ C 58 E / 20, 20.

534 Ibid.

535 Ibid, 21.

536 Ibid.

537 Case COMP/39.596 – British Airways/American Airlines/Iberia Decision rejecting Virgin Atlantic's complaint of 30 January 2009 C (2011) 4505, 67.

Across the Atlantic, the United States Department of Transportation concurrently considered two applications from five members of the oneworld alliance (American Airlines, British Airways, Iberia, Finnair and Royal Jordanian) seeking approval and antitrust immunity for alliance arrangements.[538] Their agreements sought to effect a blanket code-share arrangement between the applicants.[539] In addition, American Airlines, British Airways and Iberia were also seeking to establish a Joint Business Agreement to coordinate their transatlantic services.[540] This was the third time that American Airlines and British Airways had sought antitrust immunity for their transatlantic operations.[541]

In 2010, the DOT issued a preliminary Show-Cause order, tentatively approving the applications. In reaching this decision, the DOT considered that the American Airlines-British Airways code-share was consistent with the US-EU OSA and that it would provide US passengers with new network opportunities.[542] For the alliance agreements, the DOT considered that the alliance would stimulate competition across a number of markets.[543] However, it was concerned that the alliance's prospective market position may potentially restrict competition on some US-London routes.[544] As such, the DOT tentatively concluded that the alliance would not be adverse to the public interest, insofar as the alliance provided four slots pairs at Heathrow airport for its competitors.[545] The DOT required that two of the slot pairs be allocated for Boston-London routes. It also noted that the slot remedy needed to be consistent with the European Commission's own determination.

In determining whether to grant antitrust immunity, the DOT was of the view that the alliance would provide a number of public benefits.[546] These included better network coordination, lower fares, increased discounting and improvements to the scope of the alliance members' frequent flyer programs.[547] However, following concerns about a potential reduction in competition on the overlap routes, it tentatively decided to grant the antitrust immunity, subject to the slot transfer, the airlines implementing their joint venture within 18 months of the issuance of the final order, providing annual reports on the alliance, the foreign carriers' participation in the survey of airline passenger traffic and the carriers agreeing to withdraw from IATA's tariff

538 See *Joint Application of American Airlines, Inc., British Airways PLC, Finnair OYJ, Iberia Líneas Aéreas de España, S.A., Royal Jordanian Airlines* and *Joint Application of American Airlines, Inc. and British Airways PLC*, Order 2010-2-8, issued 13 February 2010, 4-5.

539 Ibid, 10.

540 Ibid, 5.

541 Ibid, 4.

542 Ibid, 12.

543 Ibid, 28.

544 Ibid.

545 Ibid, 28-29.

546 Ibid, 30.

547 Ibid.

coordination.[548] In its Final Order, the DOT reaffirmed its decision to approve the alliance agreements and grant antitrust immunity subject to the airlines satisfying its conditions.[549] The applicants also enacted some confidential changes to their Joint Venture Agreement.[550]

In 2018, the oneworld alliance was once again placed under the spotlight, this time by the United Kingdom's Competition and Markets Authority (CMA). The CMA advised that it had commenced an investigation into the transatlantic alliance. Specifically, it would be investigating American Airlines, Aer Lingus, British Airways, Iberia and Finnair pursuant to Chapter 1 of the Competition Act and where applicable, Article 101 of the TFEU. The investigation had been motivated by the impending expiry of slot commitments to the European Commission in 2020.[551] The European Commission was not required to reconsider those commitments, and of note, the majority related to points in the United Kingdom anyway, of which the European Commission no longer had jurisdiction over after Brexit.

The CMA was concerned about the impact of the alliance on routes between London and five separate points in the United States.[552] The city pairs were London-Boston, London-Chicago (premium services), London-Dallas, London-Miami and London-Philadelphia. In conducting its competition assessment, the CMA based its assessment on pre-COVID-19 conditions and considered the relevant markets, barriers to entry, competition on the identified routes and efficiencies achieved through the alliance.[553] In response to these concerns, American Airlines and British Airways proposed commitments to make slots available at London airports for competitors to operate additional services to four of the identified U.S. points (Boston, Dallas, Miami and Philadelphia), maintain minimum capacity in certain circumstances and provide addition support by way of special prorate and fare combinability agreements and frequent flyer program participation.[554]

548 Ibid, 36-39.

549 See *Joint Application of American Airlines, Inc., British Airways PLC, Finnair OYJ, Iberia Líneas Aéreas de España, S.A., Royal Jordanian Airlines* and *Joint Application of American Airlines, Inc. and British Airways PLC*, Order 2010-7-8, issued 20 July 2010, 22.

550 Ibid, 20.

551 Competition and Markets Authority, 'Investigation of the Atlantic Joint Business Agreement' (Media release, 11 October 2018) <https://www.gov.uk/cma-cases/investigation-of-the-atlantic-joint-business-agreement>.

552 Competition and Markets Authority, 'Notice of intention to accept binding commitments offered by International Consolidated Airlines Group S.A. and American Airlines Inc, in relation to the Atlantic Joint Business Agreement' (Case number 50616, 7 May 2020) 15.

553 Ibid, 15-27.

554 Ibid, 28-30.

Although the CMA originally indicated that these commitments would address its concerns, in light of the prolonged impact of COVID-19 on the airline industry, it subsequently notified the parties of its decision to not accept the proposed commitments and instead issue interim measures.[555] The interim measures direction extends the 2010 European Commission commitments to cover an identified enforcement gap until the CMA is able to complete its investigation.[556] Although oneworld is the only global alliance with a United Kingdom carrier, Heathrow and Gatwick have historically been two of the busiest airports in Europe and served as hubs to various European destinations. They have also been critical airports for transatlantic routes. The CMA's future consideration of the oneworld alliance will serve as an important precedent in a post-Brexit era.

CONCLUDING REMARKS

Airline alliances have been one of the industry's creative solutions for circumventing the restrictive patchwork regulatory framework for scheduled, international air transport. They take many forms, from simple interlining agreements and mutual frequent flyer programs to highly integrated joint venture agreements. They enable airlines to still offer services in jurisdictions where they are not legally permitted to physically operate. However, alliances have the potential to curtail competition when airlines strategically collaborate rather than compete against one another to the detriment of passengers. Consequently, they are closely scrutinised, particularly on transatlantic routes.

The jurisdictions all have domestic competition and antitrust legislation and there is a high degree of consistency between the types of conduct considered to be anticompetitive. Broadly, this includes agreements or conduct that restrict competition, fix prices or restrict production or supply. Notwithstanding these similarities, airlines are still required to comply with the specific legislation for each State they operate in. Consequently, one alliance arrangement may be subject to review by multiple competition regulators even though the agreement will relate to the same routes. Regulators are not bound to reach the

555 Ibid, 42.

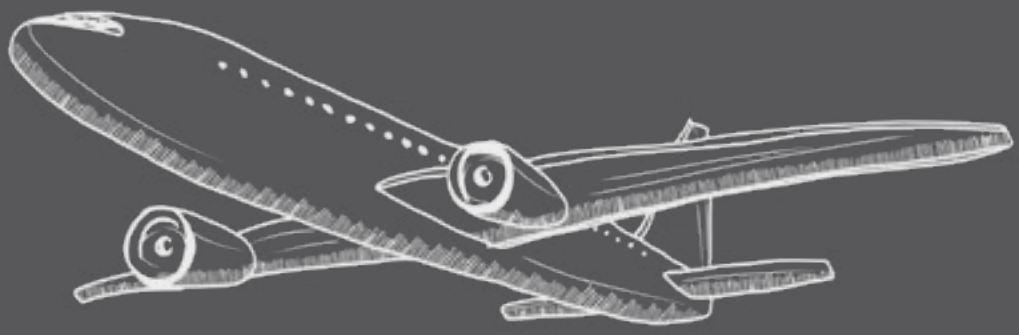
See also, Competition and Markets Authority, 'Notice of decision not to accept commitments offered by International Consolidated Airlines Group S.A. and American Airlines Inc, in relation to the Atlantic Joint Business Agreement' (Case number 50616, 17 September 2020) 3.

See also, Competition and Markets Authority, 'Decision to not issue interim measures directions' (Investigation into the Atlantic Joint Business Agreement Case number 50616, 17 September 2020).

556 Competition and Markets Authority, 'Decision to issue interim measures directions' (Investigation into the Atlantic Joint Business Agreement Case number 50616, 17 September 2020) 32-33.

See also, Competition and Markets Authority, 'Decision to issue interim measures directions' (Investigation into the Atlantic Joint Business Agreement Case number 50616), 4 April 2022. This decision extends the interim measures until the Winter 25/26 IATA season.

same decision in respect of the alliance in their own jurisdiction, further highlighting the complex patchwork regulatory framework international airlines are required to navigate.



CHAPTER 6:

NAVIGATING THE FUTURE POST PANDEMIC

INTRODUCTION

COVID-19 has been devastating for the airline industry. The International Civil Aviation Organisation (ICAO) reports airlines collectively lost approximately $372 billion in revenue in 2020.[557] Seat capacity declined by 50 per cent and airlines transported approximately 2.7 billion less passengers than they expected to.[558] In 2021, the industry continued to experience a challenging operating environment. Although the impact was not as severe as 2020, ICAO reports that airlines lost $324 billion in revenue, seat capacity was approximately 40 per cent less than 2019 and airlines carried approximately 2.2 billion less passengers.[559] The impact of COVID-19 has been more pronounced on international air transport services.[560]

In their examination of government support for the airline industry, Abate, Christidis and Purwanto noted that wealthier States and those with domestic markets were more likely to provide financial aid to their airline industries.[561] They also observed that the most likely recipients of this support tended to be domestic airlines who were deemed to be "too big to fail". This support in turn provided some airlines with an unfair advantage when competing in international markets.[562] Macilree and Duval also expressed a similar sentiment about certain airlines being "too big to fail" in their analysis of the aeropolitical issues that may impact the sector after the pandemic.[563]

This chapter will examine the impact of COVID-19 on major international airlines licensed by the jurisdictions and will then examine three different long-term regulatory reform options as the airline industry repositions itself in a post-pandemic environment. These options include an ambitious single international agreement on the economic regulation of air transport, a regional trading block model and a review of the incorporation of air transport into the scope of GATS. This chapter will suggest that in spite of the merits of these options, the challenges associated with their implementation would overshadow genuine reform of the sector, such that, notwithstanding the tremendous upheaval associated with the pandemic, the regulation of scheduled international air transport is likely to continue on its current trajectory.

557 International Civil Aviation Organization, 'Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis' (Powerpoint Presentation, 10 June 2022) 5.

558 Ibid.

559 Ibid.

560 Ibid, 35.

561 Megersa Abate, Panayotis Christidis and Alloysius Joko Purwanto, 'Government support to airlines in the aftermath of the COVID-19 pandemic' (2020) 89 Journal of Air Transport Management, published online 14 September 2020, 3.

562 Ibid, 12.

563 John Macilree and David Timothy Duval, 'Aeropolitics in a post-COVID-19 world' 88 *Journal of Air Transport Management* 101864, 3.

IMPACT OF COVID-19 ON MAJOR INTERNATIONAL AIRLINES

The impact of COVID-19 on major international airlines has been profound. Table 6.1 provides a summary of the key impacts of COVID-19 on major international airlines licensed by the jurisdictions in this study at the height of the pandemic, as reported to investors in their 2020 annual reporting year.

Table 6.1: Impact of COVID-19 on Select Major International Airlines

For their 2020 annual reporting year:

- China Southern Airlines' passenger revenue was approximately 49.1 per cent lower than 2019.[564] There was a marked difference between its domestic and international passenger services. Whilst revenue from international services decreased by 63.38 per cent, its domestic passenger revenue decreased by 43.32 per cent.[565]
- Lufthansa experienced a 68 per cent decline in traffic revenue from 2019.[566] At the time of reporting, it was in the process of reducing its workforce by approximately 28,000 staff and its fleet by 150 aircraft.[567]
- Finnair experienced a 78.7 per cent decrease in revenue compared to the year prior, and the total number of passengers decreased by approximately 76.2 per cent. At the time of report, approximately 1,100 staff had left the airline.[568]
- AirFranceKLM experienced a 69 per cent decline in scheduled passenger revenue and a 67 per cent decline in total number of passengers compared to 2019.[569] At the end of 2020, more than 7,000 staff had left the Group.[570]
- The International Airlines Group (IAG, comprised of British Airways, Aer Lingus, Iberia and Level) experienced a 75.5 per cent decrease in passenger revenue and 66.5 per cent decline in passenger capacity.[571] During 2020, the group retired or stood down aircraft earlier than anticipated, ended leases and at year-end, nearly half of its "in-service" fleet had been grounded.[572] Its workforce decreased by approximately 20 per cent.[573]

564 China Southern Airlines Company Limited, 'Annual Report 2020' 39.
565 Ibid, 39-40.
566 Lufthansa Group, 'Annual Report 2020' 2.
567 Ibid, 6.
568 Finnair Group, 'Annual Report 2020' 4, 10.
569 AirFranceKLM Group, 'Universal Registration Document 2020' 34.
570 Ibid, 6.
571 International Airlines Group, 'Annual Report and Accounts 2020' 3, 26.
572 Ibid, 27.
573 Ibid, 6.

- Garuda Indonesia experienced a 73.0 per cent decline in revenue from passenger services, and a reduction in passenger numbers of 66.1 per cent compared to the 2019 financial year.[574]
- Delta Air Lines' total passenger revenue decreased by 70 per cent in 2020. Approximately 18,000 staff took a voluntary separation package or early retirement and 227 aircraft were retired. Delta expected to retire a further 128 aircraft by 2025.[575]
- United Airlines' passenger operating revenue decreased by 70.2 per cent, only carrying 57 per cent of its scheduled capacity for the year.[576]
- American Airlines' passenger revenue decreased by 65.4 per cent compared to the prior year. Approximately 20,000 staff had either left the company or were on long-term leave and the airline retired various groups of aircraft earlier than planned.[577]
- Scandinavian Airlines (SAS) experienced a 59.8 per cent decrease in currency adjusted passenger revenue compared to the year prior. SAS reduced its workforce by approximately 5,000 staff through redundancies.[578]
- Japan Airlines experienced a 96 per cent decline in passengers and a 94.3 per cent decline in passenger revenue for international services. For domestic services, the airline experienced a 66.5 per cent decline in revenue passengers and a 67.2 per cent decline in revenue.[579]

JURISDICTION RESPONSES TO COVID-19

To support airlines through the immediate liquidity crisis, most of the major jurisdictions provided some form of financial support or assistance to their large airlines. These measures ranged from grants, credit facilities or a State backed guarantee for a loan facility, payroll support and various types of fees waivers.

In Brazil, airlines were able to defer their air navigation and airport fees.[580] Finance was also available from the National Bank for Economic and Social Development.[581]

574 Garuda Indonesia, 'Corporate Presentation Performance Full Year 2020' (Powerpoint presentation, 23 August 2021) 16, 23.

575 Delta Air Lines, Inc., 'Annual Report' (SEC Filings, Form 10-K, 12 February 2021) 3, 7, 34.

576 United Airlines Holdings, Inc., '2020 Annual Report' (SEC Filings, Form 10-K, 1 March 2021) 3, 39.

577 American Airlines Group Inc., 'Annual Report' (SEC Filings, Form 10-K, 17 February 2021) 12, 68, 75.

578 Scandinavian Airline Systems, 'SAS Annual and Sustainability Report Fiscal Year 2020' 9, 32.

579 Japan Airlines, 'Consolidated Financial Results for the year Ended March 31, 2021' 5.

580 Agência Nacional de Aviação Civil, 'Federal Government announces measures to minimize impacts on civil aviation' (Press Release, 18 March 2020).

581 Ibid.

Many European Union Member States have provided state aid to their licensed airlines. The Treaty on the Functioning of the European Union (TFEU) prohibits Member States from providing state aid which distorts or threatens to distort competition, so far as the measures impact on trade between Member States.[582] State aid may however be provided in a number of set circumstances, including for natural disasters and exceptional circumstances.[583] The European Commission has adopted a temporary framework for State aid measures that allows Member States to offer state aid to assist businesses with liquidity issues arising from COVID-19.[584]

As the pandemic has progressed, the Commission has considered a number of provisions of state aid to European licensed airlines. Table 6.2 provides a summary of the measures the European Commission has considered to date. In these cases, Member States have commonly highlighted the financial impact of COVID-19 on the airline industry, the importance of the industry to local employment and each Member State's economy and for regional connectivity. Some Member States have made various commitments with respect to their grants of state aid. In the support measures provided to KLM, for example, the Dutch Government imposed a number of sustainability and performance targets on the airline, and required a substantial reduction in the number of flights to Schiphol Airport in Amsterdam.[585] In accordance with points 55-59 of the Temporary Framework, airlines have also been required to have an exit plan to enable States to withdraw as a shareholder.

582 *TFEU,* art 107(1).

583 Ibid, art 107(2)(b).

584 *Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak* [2020] OJ C 91 I/1, 1-9.

See also, *Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak* [2020] OJ C 112 I/1, 1-9.

See also, *Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak* [2020] OJ C 164/3, 3-15.

See also, *Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak* [2020] OJ C 218/3, 3-8.

See also, *4th Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance* [2020] OJ C 240 I/1, 1-10.

See also, *Fifth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance* [2021] OJ C 34/6, 6-15.

See also, *Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance* [2021] OJ C 473/1-12.

585 European Commission, *State Aid SA.57116 (2020/N) – The Netherlands – COVID-19: State loan guarantee and State loan for KLM*, C(2021) 5437 final, 16 July 2021, 18-19.

Table 6.2: Financial assistance provided by European Member States

Member State	Airline	State Aid
Austria	Austrian Airlines	Convertible subordinated loan of EUR 150 million and a 90% State guarantee on a loan of EUR 300 million.[586] Ryanair unsuccessfully challenged the validity of the decision, and has appealed the General Court's judgement.[587]
Belgium	Brussels Airlines	Loan of EUR 287.1 million to SN Airholding with a lower interest rate and EUR 2.9 million recapitalisation of Brussels Airlines using a hybrid capital instrument of profit-sharing certificates.[588]
Croatia	Croatia Airlines	Grant of approximately EUR 11.7 million to compensate Croatia Airlines for losses incurred between 19 March and 30 June 2020.[589]
Estonia	Nordica	Recapitalisation totalling EUR 22 million (to be treated as COVID shares as Nordica is a State-owned airline) and a loan of EUR 8 million at a subsidised interest rate.[590]

586 European Commission, *State Aid S.A. 57539 (2020/N) – Austria – COVID-19 – Aid to Austrian Airlines*, C(2020) 4684 final, 6 July 2020, 9.

Note, Austrian Airlines has also received €150 million equity contribution from Lufthansa, bringing total aid to €600 million. For further information, see European Commission, 'State aid: Commission approves €150 million Austrian subordinated loan to compensate Austrian Airlines for damages suffered due to coronavirus outbreak' (Press release, 6 July 2020).

587 *Ryanair DAC and Laudamotion v Commission* (T-677/20) [2021] <https://curia.europa.eu/juris/document/document.jsf?text=&docid=244115&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=14926122>.

588 European Commission, *State Aid S.A. 57544 (2020/N) – Belgium – COVID-19: Aid to Brussels Airlines*, C(2020) 5840 final, 21 August 2020, 6. These measures in part replace some of the support originally provided by Germany to the Lufthansa Group.

589 European Commission, *State Aid S.A.55373 (2020/N) – Croatia. COVID-19: Damage compensation to Croatia Airlines*, C(2020) 8608 final, 30 November 2020, 2, 8.

590 European Commission, *State Aid S.A.57586 (2020/N) – Estonia – COVID 19: Recapitalisation and subsidised interest loan for Nordica*, C(2020) 5616 final, 11 August 2020, 3, 7.

Member State	Airline	State Aid
Finland	Finnair	In 2020, the European Commission approved a State guarantee for 90 percent of a loan from the Ilmarinen Pension Fund totalling EUR600 million to cover Finnair's working capital needs and a recapitalisation in the order of EUR 499-512 million.[591] Ryanair unsuccessfully challenged the validity of the loan component in the General Court, and has subsequently lodged an appeal.[592] In March 2021, the Commission approved loan support in the order of EUR 351 million.[593]
France	AirFrance	In 2020, the European Commission approved for France to provide support of approximately EUR 7.0 billion to AirFrance comprised of two parts: a State guarantee on loans and a subordinated shareholder loan.[594] In April 2021, the European Commission approved a recapitalisation plan of EUR 4.0 billion, comprised of a conversion of the previously approved EUR 3.0 billion loan into a hybrid capital instrument and a capital injection up to EUR 1.0 billion.[595]
Germany	Lufthansa	Recapitalisation using equity and hybrid equity measures totalling EUR 6 billion and a State guarantee for 80 per cent of a EUR 3 billion, three-year loan.[596]

591 European Commission, *State Aid S.A.56809 (2020/N) – Finland. COVID-19: State loan guarantee for Finnair*, C(2020) 3387, 18 May 2020, 2-3.

European Commission, *State Aid S.A.57410 (2020/N) – Finland COVID-19: Recapitalisation of Finnair*, C(2020) 3970 final, 9 June 2020, 2.

592 *Ryanair DAC v European Commission* (T-388/20) [2021] <https://curia.europa.eu/juris/document/document.jsf?text=&docid=239866&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4013322>.

593 European Commission, *State Aid SA.60113 (2021/N) – Finland – COVID-19 aid to Finnair*, C(2021) 1788 final, 12 March 2021, 1.

594 European Commission, *Aide d'Etat SA.57082 (2020/N) – France COVID-19 – Encadrement temporaire 107(3)(b) – Garantie et prêt d'actionnaire au bénéfice d'Air France*, C(2020) 2983, 4 May 2020.

See also, European Commission, 'State aid: Commission approves French plans to provide €7 billion in urgent liquidity support to Air France' (Press release, 4 May 2020).

595 European Commission, *State Aid SA.59913 – France COVID-19 – Recapitalisation of Air France and the Air France – KLM Holding*, C(2021) 2488 final, 5 April 2021, 10.

596 European Commission, *State Aid S.A.57153 (2020/N) – Germany – COVID-19 – Aid to Lufthansa*, C(2020) 4372 final, 25 May 2020, 2-3, 7.

See also, European Commission, 'State aid: Commission approves €6 billion German measure to recapitalize Lufthansa' (Press release, 25 June 2020).

Member State	Airline	State Aid
Italy	Alitalia[597]	Five grants totalling approximately EUR 350 million.[598] Ryanair challenged the validity of the first grant.[599]
The Netherlands	KLM	In July 2020, the Commission did not raise objections to a State guarantee to cover up to 90 per cent of a commercial loan to the value of EUR 2.4 billion and a State subordinated loan to the value of EUR 1.0 billion.[600] In May 2021, the General Court annulled this decision.[601] The aid was subsequently reapproved by the Commission in July 2021.[602]
Portugal	TAP	In June 2020, the European Commission approved a rescue loan in the order of EUR 1.2 billion.[603] The General Court annulled this decision in May 2021 on the basis the Commission had failed to provide a statement of reasons to support the decision.[604] In July 2021, the Commission adopted a new decision to address the General Court's concerns and also opened an investigation into a proposal to provide EUR 3.2 billion in restructuring aid to TAP.[605] In December, the Commission approved EUR 2.55 billion in equity or quasi equity state aid for the TAP Group and compensation in the order of approximately EUR 178.5 million for losses incurred between 1 July 2020 and 30 June 2021 for TAP Air Portugal.[606]

597 In late 2020, Alitalia ceased operations.

598 European Commission, *State Aid SA.58114 (2020/N) – Italy – COVID-19 aid to Alitalia*, C(2020) 6194 final, 4 September 2020, 1-2.

See also, European Commission, *State Aid SA. 59188 (2020/NN) – Italy - COVID-19 aid to Alitalia,* C(2020) 9659 final, 29 December 2020, 20.

See also, European Commission, *State Aid SA.61676 (2021/NN) – Italy – COVID-19 aid to Alitalia,* C(2021) 2346 final, 26 March 2021, 15.

See also, European Commission, 'State aid: Commission approves €12.835 million Italian aid measure to compensate Alitalia for further damages suffered due to coronavirus outbreak' (Press release, 12 May 2021).

See also, European Commission, 'State aid: Commission approves €39.7 million of Italian aid measure to compensate Alitalia for further damages suffered due to coronavirus outbreak' (Press release, 2 July 2021).

599 *Ryanair v European Commission* (T-225/21) [2021] <https://curia.europa.eu/juris/document/document.jsf?text=&docid=242850&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=14653310#1>.

600 European Commission, *State Aid S.A.57116 (2020/N) – The Netherlands – COVID-19: State loan guarantee and State loan for KLM*, C(2020) 4871 final, 13 July 2020, 4-5.

601 *Ryanair DAC v European Commission* (T-643/20) [2021] <https://curia.europa.eu/juris/document/document.jsf?text=&docid=241444&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3880131>.

602 European Commission, *State Aid SA.57116 (2020/N) – The Netherlands – COVID-19: State loan guarantee and State loan for KLM*, C(2021) 5437 final, 16 July 2021, 34.

603 European Commission, *State Aid SA. 57369 (2020/N) – COVID 19 Portugal Aid to TAP*, C(2020) 3989 final, 10 June 2020, 5.

604 *Ryanair DAC v European Commission* (T-465/20) [2021] <https://curia.europa.eu/juris/document/document.jsf?text=&docid=241442&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3880024>.

605 European Commission, *State Aid SA. 57369 (2020/N) – Portugal – Rescue aid to TAP SGPS* C(2021) 5302 final, 16 July 2021, 2, 12, 29.

See also, European Commission, *State Aid SA 60165 (2021/C) – Portugal – Restructuring aid to TAP SGPS*, C(2021) 5278 final, 16 July 2021, 1, 25.

606 European Commission, 'State aid: Commission approves €2.55 billion Portuguese restructuring aid in favour of TAP Group and €107 million compensation for damages suffered due to coronavirus pandemic' (Press release, 21 December 2021).

See also, European Commission, 'State aid: Commission approves €71.4 million Portuguese measure to further compensation TAP Air Portugal for damages suffered due to coronavirus pandemic' (Press release, 22 December 2022).

Member State	Airline	State Aid
Romania	TAROM	In February 2020, the European Commission did not raise objections to a loan of approximately EUR 36.7 million to the airline to assist with the airline's financial difficulties.[607] In July 2021, the Commission announced that it would commence an investigation into a restructuring proposal for TAROM to the value of EUR 190 million as the Commission doubted that the proposal satisfied its guidelines on State aid for rescuing and restricting non-financial undertakings in difficulty.[608]
Sweden and Denmark	Scandinavian Airline Systems (SAS)	In April 2020, the Commission did not raise objections to Sweden and Denmark providing State guarantees for revolving credit facilities in the order of EUR 274 million.[609] Ryanair unsuccessfully challenged the validity of these measures and has appealed the General Court's decision.[610] In August 2020, Sweden and Denmark sought approval for a larger recapitalisation in the order of EUR 1 billion in favour of SAS to replace the previous credit facilities.[611]

In Indonesia, flag carrier Garuda Indonesia undertook a recapitalisation using a Mandatory Convertible Bond in the order of IDR 8.5 trillion provided by the Ministry of Finance.[612]

The UK Government established a Covid Corporate Finance Facility to provide loans to companies with a large corporate footprint in the United Kingdom. The facility was designed to provide liquidity during the crisis through the purchase of a commercial paper.[613] Businesses needed to be rated as investment grade such that their financial difficulties could only be attributed to COVID-19 to be eligible.[614] Four airlines, British

607 European Commission, *State Aid S.A.56244 (2020/N) – Romania – Rescue air to* TAROM, C(2020) 1160 final, 24 February 2020, 12.

608 European Commission, *State Aid A. 59344 (ex 2020/N) (ex2020/PN) – Romanian – Restructuring Aid to TAROM* C(2021) 4882 final, 5 July 2021, 1-3.

609 European Commission, *State Aid S.A. 57601 (2020/N) – Sweden – Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines*, C(2020) 2784 final, 24 April 2020, 3-4.

European Commission, *State Aid S.A.56795 (2020/N) – Denmark – Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines*, C(2020) 2416, final, 15 April 2020, 2-3.

610 *Ryanair DAC v European Commission* (T-378/20) [2021] (decision not yet published) <https://curia.europa.eu/juris/document/document.jsf?text=&docid=239864&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4019460>.

See also, *Ryanair DAC v European Commission* (T-379/20) [2021] (decision not yet published) <https://curia.europa.eu/juris/document/document.jsf?text=&docid=239863&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4020168>.

611 European Commission, *State Aid SA.57543 (2020/N) – Denmark and State Aid SA. 58342 (2020/N) – Sweden – COVID-19: Recapitalisation of SAS AB*, C(2020) 5750 final, 17 August 2020, 4-5.

In addition, SAS has also received nearly EUR 1 million from Norway and entered into public service contracts with the State to the value of approximately EUR 50 million – see pp. 5-6.

612 Garuda Indonesia, 'Corporate Presentation 3Q-2020' 8.

613 Bank of England, Covid Corporate Financing Facility (CCFF): information for those seeking to participate in the scheme (20 March 2020) <https://www.bankofengland.co.uk/news/2020/march/the-covid-corporate-financing-facility>.

614 Ibid.

Airways, Easyjet, Ryanair and Wizz Air collectively received £1.8 billion in loan support through the facility.[615]

In the United States, the Coronavirus Aid, Relief, and Economic Security (CARES) Act provided airlines with up to $25 billion in financial assistance for employee benefits and additional loan assistance of $25 billion.[616] Additionally, the CARES Act provided for a temporary suspension of some aviation excise taxes.[617] In December 2020, the Payroll Support Program Extension provided an additional $15 billion to passenger carriers, with further support of $14 billion made available to passenger carriers with an extension of the program in March 2021.[618]

REGULATORY CHALLENGES POST COVID-19

COVID-19 presents many short-term and longer-term regulatory challenges. In the immediate term, COVID-19 travel restrictions and the general uncertainty around the pandemic have presented the largest challenge for international airlines to date. While state-based financial assistance has shielded some airlines from the unprecedented financial impact associated with these measures, if these measures persist for a prolonged period of time or demand for scheduled international air transport services continues to be depressed, some airlines may require further financial support from their State Governments in the future.

As the pandemic recedes and airlines resume international services, the competitive dynamics of the market will be very different. Some airlines have not survived the pandemic and a number of others have undergone bankruptcy or insolvency to restructure their affairs. These airlines will emerge from the pandemic leaner and with a more targeted suite of services. Some airlines have received generous financial assistance from their respective State Governments. These airlines will be better positioned to compete for international air services than international airlines that have received more limited state aid. Additionally, international airlines are more likely to rely more heavily on alliance partners and the hub and spoke model to be able to continue to provide a wide network of services in the face of lower demand. Well positioned airlines will be able to undertake strategic mergers and acquisitions within the sector and may further cement their position in the international market.

615 Bank of England, 'CP held by the CCFF by business – more detailed' (Excel Spreadsheet, September 2021) <https://www.bankofengland.co.uk/markets/bank-of-england-market-operations-guide/results-and-usage-data>.

Note, this has been calculated from Tab 03.06.20.

616 *Coronavirus Aid, Relief, and Economic Security Act, Pub L No 116-136*, 134 Stat. 281, §4003(b)(1), §4112(a)(1).

617 Ibid, §4007(a), §4117.

618 *Consolidated Appropriations Act, Pub L No 116-260*, §402(a)(1).

See also, *American Rescue Plan Act of 2021*, *Pub L No 117-2*, 135 Stat. 4, §7301(b)(1)(A).

Although it is not a key consideration at the moment, the role of foreign investment in airlines is likely to emerge as a key issue in the years to come. For most States, it will be unsustainable to continue to provide such high levels of financial support to the airline industry into the future. If airlines require further sources of capital, or State Governments seek to divest an equity they have acquired in the course of providing financial support to their licenced airlines, States may seek to look beyond their own borders for investment.

While the patchwork regulatory framework underlying scheduled international air transport is not front of mind at the moment, these issues are likely to challenge its relevance into the future. Given that no State has been immune and the impact has been so profound on international airlines globally, COVID-19 presents an opportunity to reassess the patchwork regulatory framework and reassess the best way to regulate market access, foreign investment and competition between international airlines, both at a State and international level. These next sections will step through three potential post-pandemic pathways for regulatory reform.

REVISITING A SINGLE AGREEMENT FOR THE ECONOMIC REGULATION OF AIR TRANSPORT

Notwithstanding the complexities associated with COVID-19, one of the most effective, albeit ambitious ways to improve the economic regulation of scheduled, international air transport would be the conclusion of a single, global air transport agreement. A single agreement would not displace the Chicago Convention, but rather sit tangential to it. It would alleviate the fragmented and patchwork nature of the economic regulation of air transport by incorporating all of the key elements into a single text and would also markedly improve transparency. It would also arguably provide more certainty to airlines through a structured framework, independent of domestic legal processes.

For completeness, such an agreement would need to canvas a broad range of issues related to the economic regulation of airlines. These issues would include traffic rights, designation and authorisation, capacity, frequency and tariffs and competition. It may be beneficial for an agreement of this nature to also have dispute resolution provisions. This study has highlighted that there is striking similarity between the jurisdictions on baseline elements, with a large number of agreements incorporating legacy provisions from the Bermuda agreements. The agreements concluded between the jurisdictions all provide at least some form of first to fourth freedom rights and there is consensus on substantial ownership and control as criteria for designation or authorisation. With respect to competition, many agreements contain a fair and equal opportunity to compete provision. The agreements reviewed in this research highlighted a wider variety of approaches to frequency, capacity and tariffs.

A single agreement could take one of two approaches. It could either recognise the baseline commonality between jurisdictions, such as providing for first to fourth freedom rights and the substantial ownership and control criteria or an equivalent to recognise the different licensing arrangements in the European Union and other jurisdictions such as Chile. An agreement could also contain a fair and equal opportunity to compete provision and either adopt a negotiation/consultation dispute resolution framework or pick up on the framework already provided in the International Air Services Transit Agreement or International Air Transport Agreement. The agreement could append protocols for more ambitious measures such as fifth freedom rights, environmental protection or more complex competition provisions, similar to MALIAT or ASEAN's Multilateral Agreement on Air Services and the Multilateral Agreement on the Full Liberalisation of Passenger Air Services. Alternatively, a single agreement could be drafted to reflect a more aspirational position and provide States with an opportunity to make waivers as they see fit. With either approach, capacity, frequency and tariff provisions may be a point of difference in light of the wide variety of provisions in current agreements.

However, there would be many challenges to such a proposal. Firstly, the IASTA and International Air Transport Agreement were originally intended to be the primary mechanism to facilitate the exchange of traffic rights between contracting parties. The latter agreement has never gained global support. Traffic rights continue to polarise States just as they did during the 1944 Chicago Convention. Attempts to formulate a new agreement to liberalise market access have also been unsuccessful. In 2019, the Air Transport Regulation Panel determined that there was unlikely that such an agreement could be concluded in the short-term, with efforts to instead be focused on building a better understanding of the benefits of liberalisation and impediments to liberalising market access.[619]

Secondly, the piecemeal and bilateral nature of air service agreements has meant that some jurisdictions, such as the United States of America, have concluded agreements with a range of terms that step beyond Bermuda I/II framework that has underpinned economic regulation of the sector for so long. It would be difficult to create a single agreement which recognises the individual nuances in the ASAs concluded between different jurisdictions where they are above and beyond the Bermuda I/II baseline. It is unlikely that States would be prepared to become a signatory to an agreement that did not recognise the bilateral progress they have made with key trading partners. Similarly, States may not wish to become a signatory to a more liberal agreement, or more liberal provisions within an agreement or protocol if they are not assured of reciprocity from other contracting parties.

619 International Civil Aviation Organization, 'Progress Report on the Development of International Agreements on the Liberalization of Market Access, Air Cargo and Air Carrier Ownership and Control' (A40-WP/16, Assembly – 40th Session, 2019) 2.

Thirdly, many States have preferred to negotiate and conclude regional air service agreements between themselves for the purposes of liberalisation. This study has highlighted that prior to the pandemic, regional neighbours were critical trading partners for the purposes of air transport and with respect to the major markets, a greater proportion of passengers travelled on flights between the major markets and their regional neighbours than between themselves. An encompassing single agreement would also be inconsistent with the recommendation arising from the 40th ICAO Assembly to continue to progress a separate Convention on Foreign Investment in Airlines.[620]

Although a single agreement would theoretically be a preferable option to the patchwork of air service and air transport agreements and domestic regulation that proliferate the economic regulation of air transport, it is highly unlikely, even in the current environment, for such an agreement to be negotiated.

REGIONAL TRADING BLOCK MODEL

Another ambitious proposal would be to move towards a regional trading block model, similar to the block-to-block agreement ASEAN and the EU have negotiated.[621] A regional trading block model would involve two steps. Firstly, States would need to be a signatory to a regional air transport agreement to form a regional trading block. Secondly, those blocks would then assume the role of liberalising air trade on behalf of their Member States internationally. This second step could either be achieved by regional trading blocks concluding further agreements between themselves or a single, uniform agreement to govern the economic regulation of air transport between all trading blocks. Figure 6.1 illustrates how this model may work.

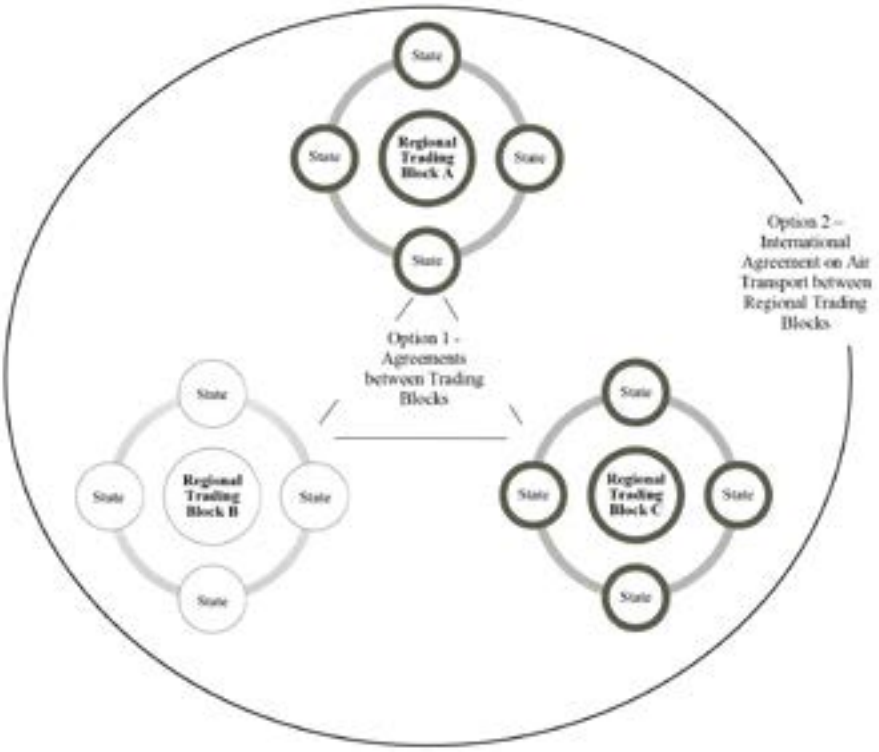
A regional trading block model would simplify the economic regulation of air transport and improve transparency. Each State would only need to be a party to one Regional Trading Block Agreement, rather than a plethora of bilateral ASAs. Using Regional Trading Block A in Figure 6.1 as an example, one regional air transport agreement could replace up to six bilateral agreements concluded between individual States if the regional trading block agreement comprehensively addressed all issues pertaining to the economic regulation of airlines. Regional trading block secretariats could be responsible for lodging a copy of the regional trading block agreement with ICAO, alleviating the need for individual States to register all of their bilateral ASAs.

Regional trading block agreements could take many forms and build upon progress made to date at a regional level. Many States are already a party to a regional ASA or

620 International Civil Aviation Organization, 'Assembly Resolutions in Force (as of 4 October 2019)' (Doc 10140) III-5.

621 European Commission, 'ASEAN and the EU conclude the world's first block-to-bloc Air Transport Agreement' (Press release, 4 June 2021)

Figure 6.1: Regional Trading Block Model



trading group such as the European Union's Single Aviation Market and Common Aviation Area, ASEAN's Single Aviation Market and the Single African Air Transport Market. These existing arrangements could provide a platform for further liberalisation within and between trading blocks. For States that are not a party to an existing regional air transport agreement, air transport could be incorporated into regional trade agreements or be negotiated between neighbouring States specifically for the purpose of the regional trading block.

Regional trading block agreements may contain more liberal provisions between contracting parties, particularly for foreign investment and market access provisions. The majority of air trade, at least with respect to the jurisdictions considered in this research, is with regional neighbours. Liberalisation of air trade at a regional level is therefore likely to be more palatable in the first instance.

For the regional trading block model to be successful, trading blocks would need to negotiate agreements between themselves to govern air transport between their blocks. These secondary agreements may be more limited and only contain key provisions such

as the exchange of traffic rights and authorisation or designation to facilitate trade in air transport services.

For the regional trading block model to be successful, air transport liberalisation within regions would need to be improved. Although there is a plethora of regional agreements already in place, many agreements have not been completely implemented or Member States have made reservations to key provisions of these agreements, particularly with respect to the nationality clause and traffic rights. In addition, many existing agreements do not comprehensively address all issues pertaining to the economic regulation of airlines. While the European Union, for example, has established a Single Aviation Market, and the European Union has negotiated air transport agreements with key partners as a block, Member States are still a party to a large number of bilateral ASAs. To truly improve the patchwork regulatory framework for air transport, regional trading blocks would need to have a framework to comprehensively address all issues pertaining to the economic regulation of air transport.

This model would also require careful consideration as to how airlines are licensed and regulated operationally. Safety and security are common concerns raised in response to liberalisation. A regional trading block model, particularly one that relaxes the nationality criteria and permits more liberal exchanges of rights, will require a robust licensing and regulatory framework to ensure that airlines are subject to the same standards in their region.

Another challenge with adopting the regional trading block model globally is that many States are not a party to an existing regional trading block at all. Considering the jurisdictions in this research alone, India and Japan do not participate in a regional air transport agreement. Although MALIAT was regional in origin, the United States of America is not a party to a true regional trade agreement either. While China and the United Kingdom are a party to agreements with a regional trading block, they are not a party to a regional trading block themselves. In addition, regional air transport agreements tend to be more successful when accompanied by an underlying regional commitment and mandate to implement trading reforms more generally and a governance structure and supporting organisations to facilitate and monitor implementation.

INCORPORATING TRAFFIC RIGHTS IN GATS

Another ambitious reform option would be to incorporate traffic rights into the scope of the GATS. This option has been previously considered by several scholars. In 2001, Hubner and Sauvé proposed that air transport could initially be liberalised between a group of

like-minded members and later brought under the auspices of the GATS in entirety.[622] They proposed two stages to a transition. The first stage would encompass market access and the freedoms of the air, while the second stage would encompass all other areas of air transport.[623] In 2006, Findlay and Round suggested the development of a Reference Paper on Air Transport Services.[624] They proposed that the Reference paper could draw on principles from the Reference Paper on Basic Telecommunications and ICAO materials.[625] They proposed that the Reference Paper would supersede any bilateral agreement if both States were signatories to the Reference Paper.[626]

Lykotrafiti and Abeyratne have noted that expanding the Annex on Air Transport's scope may give rise to a conflict between a State's obligations between the Chicago Convention and the GATS.[627] Additionally, Abeyratne has also noted that including additional hard rights such as traffic rights in the scope of GATS may not necessarily result in further liberalisation of air transport if States do not amend their existing domestic legislation to facilitate it.[628]

This option would be the most politically challenging to pursue. Prior to the pandemic, there had been no momentum for traffic rights to be included in the scope of Annex. The Council for Trade in Services is required to review developments in the sector and the operation of the Annex at least every five years, however, it has not reviewed the operation of the Annex in over a decade. In addition, prior to the pandemic, the United States of America had led calls for significant reform of the WTO and there had been a broader global shift towards pursuing trade relations through regional trade agreements. Most importantly, ICAO is recommended as the preferred body for leading the economic liberalisation of air transport services.[629]

In spite of Members' reluctance to apply GATS and GATS principles to traffic rights, the agreement itself would not necessarily displace the current regulatory framework. A number of essential services with similar features to air transport, such land transport

622 Wolfgang Hubner and Pierre Sauvé, 'Liberalization Scenarios for International Air Transport' (2001) 35 *Journal of World Trade*, 973, 979.

623 Ibid.

624 Christopher Findlay and David Round, 'The 'three pillars of stagnation: challenges for air transport reform' (2006) 5 *World Trade Review* 251, 265.

625 Ibid.

626 Ibid.

627 See Antigoni Lykotrafiti, 'Liberalisation of international civil aviation – charting the legal flightpath' (2015) 43 *Transport Policy* 85, 89.

See also, Ruwantissa Abeyratne, 'Trade in Air Transport Services: Emerging Trends' (2001) 35(6) *Journal of World Trade* 1149.

628 Ruwantissa Abeyratne, 'Trade in Air Transport Services: Emerging Trends' (2001) 35(6) *Journal of World Trade* 1142.

629 International Civil Aviation Organization, 'Assembly Resolutions in Force (as at 4 October 2019)' (Doc 10140) Appendix A, Section I, resolutions 3, 5 and 6.

services, postal and courier services and telecommunications currently fall under the remit of GATS.[630]

There would be several benefits to bringing traffic rights within the scope of GATS. Under GATS, a Member State would be required to comply with the MFN principle and ensure it does not provide less favourable treatment to other WTO Members than it provides to any other country.[631] GATS permits a Member State to maintain measures that are inconsistent with the MFN principle, however, to do so, an exemption must be granted under the waiver provisions of the WTO Agreement: by consensus of the Ministerial Council within a fixed period of time, or if consensus is unable to be reached, on the decision of three quarters of the membership.[632] Waivers are required to be reviewed by the Ministerial Conference annually until the waiver terminates.[633]

Exemptions are designed to a temporary measure and GATS prescribes that they should not exceed a period of 10 years in principle.[634] In spite of this, many exemptions have been long-standing, an issue that has attracted criticism in successive reviews of MFN exemptions.[635] At present, the United States of America has an existing exemption for the selling and marketing of air transport services and the operation and regulation of computer reservation system services, and a number of individual EU Member States also have exemptions to provisions in the Annex on Air Transport Services.[636]

630 For further information on the status of these services, see:

World Trade Organization, *Land transport* (2022) <https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_land_e.htm>.

World Trade Organization, *Postal and courier services* (2022) <https://www.wto.org/english/tratop_e/serv_e/postal_courier_e/postal_courier_e.htm>.

World Trade Organization, *Telecommunication services* (2022) <https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm>.

631 *GATS*, art II, para 1.

632 Ibid, art II, para 2 and Annex on Article II Exemptions, cl. 2.

See also, *Agreement establishing the World Trade Organization,* signed on 15 April 1994 (entered into force on 1 January 1995) ('*Marrakesh Agreement*'), art IX, para. 3.

633 Ibid, art IX, para. 4.

634 *GATS*, Annex on Article II Exemptions, para. 6.

635 World Trade Organization, 'Report of the Meeting Held on 16 June 2017' (Note by the Secretariat, S/C/M/132) para. 8.4-8.7.

See also, World Trade Organization, 'Report of the Meeting Held on 2 May 2011' (Note by the Secretariat, S/C/M/105) para. 31.

636 World Trade Organization, 'United States of America: Final List of Article II (MFN) Exemptions' (GATS/EL/90, 15 April 1994) pp. 13-14.

See also, World Trade Organization, 'Austria: Final List of Article II (MFN) Exemptions' (GATS/EL/7, 15 April 1994) p. 4.

See also, World Trade Organization, 'Finland: Final List of Article II (MFN) Exemptions' (GATS/EL/33, 15 April 1994), p. 4

See also, World Trade Organization, 'Lithuania: Final List of Article II (MFN) Exemptions' (GATS/EL/133, 21 December 2001) p. 3.

See also, World Trade Organization, 'Poland: Final List of Article II (MFN) Exemptions' (GATS/EL/71, 15 April 1994), p. 2.

See also, World Trade Organization, 'Romanian: Final List of Article II (MFN) Exemptions' (GATS/EL/72, 15 April 1994) p. 1.

See also, World Trade Organization, 'Solvenia: Final List of Article II (MFN) Exemptions' (GATS/EL/99, 30 August 1995) p. 2.

See also, World Trade Orgnaization, 'Sweden: Final List of Article II (MFN) Exemptions' (GATS/EL/82, 15 April 1994) p. 4.

In addition to broad-spectrum MFN exemptions, GATS also permits Member States to prescribe specific commitments for market access and national treatment in their Schedules.[637] Although Member States have been reluctant to incorporate traffic rights into the GATS, these provisions would also enable Member States to legally maintain restrictions on traffic rights if they were to come into the agreement's scope.

It is important to note that the Annex currently defines traffic rights to include scheduled and non-scheduled passenger, cargo and mail services. The definition also encompasses capacity, tariffs and designation, as it relates to the nationality rule. This definition of traffic rights is far broader than other agreements which typically only consider traffic rights to encompass the geographic dimension rather than capacity, tariffs and designation. Additionally, it is not uncommon for some ASAs and ATAs to differentiate between the types of rights available to airlines for scheduled international air transport and cargo. This issue would also need to be considered.

Member States are required to have a legal framework for administrative review of decisions affecting trade in services, ideally independent of the government agency responsible for making such decisions.[638] GATS also enables the Council for Trade in Services to establish disciplines to review qualification, technical and licensing standards and ensure that such standards do not in themselves constitute barriers to trade.[639]

GATS requires Member States to comply with certain transparency obligations. The agreement requires Member States to publish international agreements to which the Member is a signatory and pertain to or affect trade in services.[640] Member States are also required to notify the Council for Trade in Services of any legislative changes which may significantly impact on the Member States' commitments under the GATS, if such commitments have been made.[641] Additionally, GATS includes an information disclosure framework to enable Members to obtain further information about another Member's measures or international agreements.[642] In the context of air transport, the application of GATS to traffic rights would require many States to improve their information disclosure on air service agreements and publish information on measures which pertain to or affect GATS if traffic rights were brought into scope. These transparency obligations would be in addition to each Member State's obligation to register their ASAs with ICAO, in accordance with the Chicago Convention.

637 *GATS*, arts. XVI and XVII.

638 Ibid, art VI(2)(a).

639 Ibid, art VI(4).

640 Ibid, art III(1).

641 Ibid, art III(3).

642 Ibid, art III(4).

Non-compliance with GATS obligations ordinarily allow an aggrieved Member State to undertake dispute resolution proceedings against the non-compliant State. In the context of aviation, this would prohibit individual airlines from bringing action against a third State and would require the involvement of their licensing State to pursue dispute resolution proceedings. The Annex prevents Members from commencing dispute settlement proceedings with the WTO until all dispute resolution procedures available under bilateral and multilateral agreements have been exhausted.[643] Further consideration would need to be given to this issue if GATS applied to measures affecting traffic rights.

CONTINUING ON THE PRE-COVID-19 PATH

Although COVID-19 presents a unique opportunity for states to reconsider the regulatory framework underpinning the economic regulation of air transport services, history suggests that crises do not always serve as a catalyst for significant regulatory reform. IATA has previously identified that there have been four particularly large international shocks for the airline industry. They included 1979 oil shock, the Gulf War, September 11 and the Global Financial Crisis.[644] For the latter two shocks, IATA has noted that the industry was able to return to its pre-shock level of growth within four years. Following the outbreak of the Severe Acute Respiratory Syndrome in 2003, the industry recovered to pre-epidemic traffic levels within six to seven months.[645] Notably, these four shocks did not lead to significant wholesale reform in the economic regulation of airlines, at least with respect to market access, the nationality rule and competition.

While the sheer magnitude of COVID-19 and the public health responses are unparalleled to any previous crisis, there was limited interest in truly moving beyond the patchwork regulatory system prior to the pandemic. Some jurisdictions had undertaken measures at a domestic level, such as India and Brazil with their relaxation of the nationality rule and others had pursued external policy reforms such as the United States of America with its Open Skies Agreements and the European Union with its Single Aviation Market. However, such reforms tended to be on a unilateral or bilateral basis in line with a State's individual policies and objectives. The major markets generally held quite different views on key regulatory issues, such as the nationality rule and market access.

In the face of COVID-19 and the liquidity challenges airlines have faced, legislative or multilateral reform is not an immediate priority. However, due to the prolonged length and complexity of COVID-19, some State Governments or their statutory investment arms

643 *GATS Annex on Air Transport Services*, cl. 4.

644 World Economic Forum, 'The Travel and Tourism Competitiveness Report 2015' (Insight Report, 2015), 59-60.

645 International Air Transport Association, 'COVID-19: Initial data point to a larger impact than SARS' (IATA Economics Chart of the Week, 21 February 2020) <https://www.iata.org/en/iata-repository/publications/economic-reports/covid-19-initial-data-point-to-a-larger-impact-than-sars/>.

have become shareholders of their licensed airlines, or increased their exposure through a larger equity stake. These measures are likely to make it even more challenging for States to reach a consensus on key regulatory issues as States have a heightened interest and exposure to the industry.

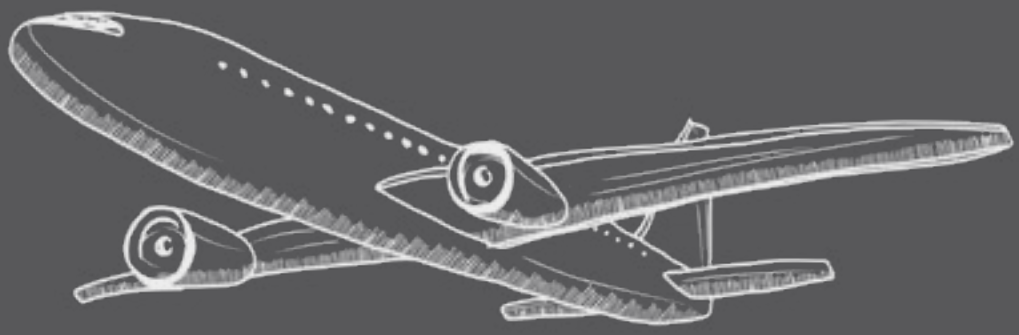
Consequently, the most likely pathway is that liberalisation will continue in a piecemeal fashion with preference given to agreements with like-minded regional neighbours and any change to the nationality rule occurring by necessity at a domestic level. One would expect to see an increased focus on airline alliances as airlines seek to tap into their international networks to provide their customers with a wide variety of travel options without needing to incur significant expenditure themselves to offer point to point services. It is unlikely that any significant reform would occur in this space at an international level.

CONCLUDING REMARKS

COVID-19 has profoundly impacted the airline industry. In 2020, most of the large international airlines licensed in one of the major markets experienced at least a 50 per cent decline in revenue and seat capacity was decimated. To mitigate the impact of COVID-19, airlines undertook drastic measures to reduce their operating and capital expenditure. In addition, State Governments provided substantial financial assistance through recapitalisation, subsidised loans, payroll assistance and fee waivers.

As the industry recovers, there is an opportunity to reconsider the archaic and opaque regulatory framework that underpins it. However, history suggests that major shocks have not displaced the fragmented regulatory framework in the past. Although the sheer magnitude of COVID-19 is unparalleled, to date, State responses to date have focused on measures that provide immediate liquidity, rather than longer term reform.

This dissertation has considered three possible longer-term reform options including an ambitious single agreement on trade in air transport services, a regional trading block model and has re-explored incorporating traffic rights within the scope of GATS. Given the disparate views on key regulatory issues including foreign ownership and control and traffic rights between the major markets, it is more likely that the industry will continue on its pre-pandemic path, favouring regional air transport initiatives and only reforming foreign ownership criteria by necessity.



CHAPTER 7:

CONCLUSIONS

INTRODUCTION

The airline industry has suffered tremendous adversity. The measures undertaken to mitigate COVID-19 have changed the way that we live, work, interact and travel. The impact on the airline industry has been devastating. Prior to the pandemic, the International Civil Aviation Organization had forecast that world scheduled passenger traffic would increase at an average annual rate of 4.6 per cent up to 2030 and the International Air Transport Association had forecast that airlines would carry 8.2 billion passengers by 2037.[646] In 2020, COVID-19 travel restrictions decimated demand for scheduled international air passenger transport services and the recovery is still ongoing. While COVID-19 has affected so many industries, the impact on the airline industry has been profound. Many international airlines have received significant financial assistance from their licensing States temporarily masking the impact of COVID-19 on their businesses. However, it is foreseeable that the sheer scale and duration of the pandemic and its impact on demand for scheduled international air transport services will necessitate structural changes within the industry in the future.

This dissertation has examined how the eight largest global aviation markets of Brazil, China, the European Union, India, Indonesia, Japan, the United Kingdom and the United States of America regulate international airlines with respect to trade and market access, investment and airline alliances. While the regulation of this issues is not an immediate concern to the airline industry, in the aftermath of the pandemic, it is likely to re-emerge as a focal point for airlines, legislators and regulators.

646 International Civil Aviation Organization, 'Global Air Transport Outlook to 2023 and trends to 2040' (Circular 333 AT/190, ICAO, 2013), 12.

See also, International Air Transport Association, 'IATA Forecast Predicts 8.2 billion Air Travelers in 2037' (Press Release No. 62, 24 October 2018) <https://www.iata.org/pressroom/pr/Pages/2018-10-24-02.aspx>.

KEY FINDINGS

The major global air transport markets share several features. With the exception of the United Kingdom, prior to the pandemic, the jurisdictions had significant domestic air transport markets in that more passengers travelled on domestic services than on international flights to and from the jurisdictions' territories. For international scheduled, air transport services, for the most part, the jurisdictions were not each other's most significant air trading partner. Rather, the most significant air trade partners tended to be their regional neighbours.

All of the jurisdictions are a party to the Chicago Convention. The Chicago Convention enshrines the principle of State airspace sovereignty, however, it does not prescribe how airlines should facilitate international air transport services between States. The International Air Services Transit Agreement (IASTA) and International Air Transport Agreement were concluded for this purpose. The European Union Member States (except Lithuania and Romania), India, Japan, the United Kingdom and the United States are a party to the IASTA for first and second freedom traffic rights. Of the jurisdictions examined in this dissertation, European Union Member States, Greece (with reservations) and the Netherlands are the only two States that are a party to the International Air Transport Agreement for first to fifth freedom traffic rights.

Over time, there has been a proliferation of bilateral air service agreements to underpin trade in air transport services. In spite of international momentum to move beyond this bilateral framework, and the conclusion of multiple regional and multilateral air service agreements specifically for that purpose, the bilateral, patchwork regulatory framework has persisted. Tangential to this, traffic rights have also remained outside the scope of the General Agreement on Trade in Services and other major regional trade agreements.

One of the key challenges in examining the bilateral regulatory framework for market access has been transparency. The Chicago Convention requires Member States to register a copy of any executed agreements with ICAO. In 2005, the WTO previously noted that States have not always complied with their obligations to register their ASAs. This issue is still prevalent today. In recent years, the jurisdictions have formally amended a number of agreements concluded between themselves through Memorandums of Understanding, Records of Discussion or Meeting Minutes. Some agreements have been replaced in entirety by new agreements applied on an administrative basis until they enter into force. ICAO's Database of the World's Air Services Agreements does not contain a number of the agreements and arrangements concluded between the jurisdictions. It is difficult to ascertain the status of world air trade if jurisdictions do not comply with their obligations

under the Chicago Convention or ensure that publicly available information accurately reflects the current status of those arrangements.

Although the airline industry had been dynamic and progressive prior to the pandemic, the economic regulatory framework that underpins market access is archaic. An examination of the key terms and conditions of a sample of ASAs and ATAs concluded between the jurisdictions has shown that these major jurisdictions typically require airlines to satisfy traditional substantial ownership and control criteria, modelled on provisions in the Bermuda I/II agreements. While all the examined agreements provide designated airlines with some form of first to fourth freedom traffic rights, fifth freedom traffic rights are less prevalent. It is common for agreements to specify that airlines are not allowed to operate services in line with commercial considerations for frequency, capacity and tariffs.

With respect to foreign investment, India and Brazil have been the only major markets that permit airlines to be wholly owned by foreign investors. India relaxed its threshold in 2016 as part of a broader economic reform agenda, however, Government approval is required before an airline may be wholly owned by foreigners. A foreign air transport business may only invest up to 49 per cent of an Indian airline's capital. Successive Brazilian Presidents sought to relax restrictions on foreign investment in the airline industry from 2016, with the Brazilian Parliament passing legislation to formalise the change in 2019 and further amending the framework in late 2021. In light of these changes, their domestic ASAs may need to be updated to reflect that in the future, some airlines may not be substantially owned and effectively controlled by their Governments or their citizens. All other jurisdictions impose a limit on the level of foreign investment for domestic licensed airlines. The United States of America is the most restrictive (20 per cent), followed by Japan (33 per cent) and China, the European Union, Indonesia and the United Kingdom (49 per cent). Prior to the pandemic, there did not appear to be any momentum for further domestic reform within these jurisdictions, although the sheer impact of COVID-19 may necessitate reconsideration of this in the future.

Airline alliances are the industry's creative solution to circumventing the patchwork regulatory framework on market access and investment. One alliance arrangement may be subject to review by multiple competition regulators even though the agreement will relate to the same routes. Regulators are not bound to reach the same decision in respect of the alliance in their own jurisdiction, and there have been historic instances where competition decisions have required airlines to enact different measures to respond to regulators' concerns.

Over the past two years, all of the challenges that have traditionally plagued airlines have been completely overshadowed by the pandemic. Temporary COVID-19 travel restrictions

have profoundly impacted international airlines. States have provided extraordinary financial assistance to their airline industries in the form of loans, grants, waivers of government fees and charges and recapitalisations. While these measures provided immediate relief at the height of the pandemic, ongoing financial assistance of this magnitude is not sustainable.

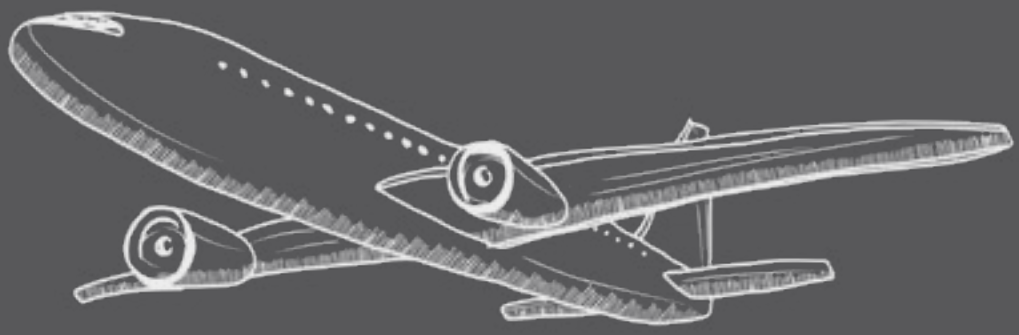
This dissertation has considered three possible longer-term pathways for reform for the airline industry post-pandemic. They included a single air transport agreement on the economic regulation of airlines, a regional trading block model and a reconsideration of the incorporation of traffic rights into the General Agreement on Trade in Services. To be successful, each of these options would require States to agree on a framework for key regulatory issues such as foreign investment and traffic rights. These issues polarised States prior to the pandemic, and given that some State Governments or their statutory investment arms have become shareholders of their licensed airlines, or increased their financial exposure to the airline industry as a condition of financial support, it is likely to be even more challenging to reach consensus on key regulatory issues in the immediate future.

AREAS FOR FURTHER RESEARCH

This research has focused on the eight largest global markets for air transport, however, airlines licensed by one of the major air transport States are likely to be better placed after the pandemic than many other airlines. This is in part due to the financial support from licensing States and unfettered access to large domestic markets. There are a number of States which do not have a domestic air transport market, rely heavily on scheduled international air transport services for connectivity and the provision of essential services or do not have the means to provide significant financial assistance to their airlines. Airlines licensed by these States will be more vulnerable in the aftermath of the pandemic.

CONCLUDING REMARKS

Although COVID-19 presents a unique opportunity for jurisdictions to reconsider the opaque and archaic economic regulatory frameworks underpinning trade in air transport, history would suggest that this is unlikely. Crises have not led to significant regulatory reform in the past. Additionally, the two obvious regulatory solutions, a single multilateral agreement on trade in air transport and the incorporation of traffic rights into GATS, have previously not been well received. Although the framework that underpins the economic regulation of scheduled, international air transport is opaque, archaic and arguably no longer fit for purpose, the patchwork in the sky is likely to prevail for the foreseeable future.



APPENDIX A

AIR SERVICE AND AIR TRANSPORT AGREEMENTS CONSIDERED IN CHAPTER 3

Accord entre le Gouvernement de Belgique et le Gouvernement de L'Inde relatif aux services aerienes entre leurs territoires respectifs et au dela, signed on 6 April 1967 (entered into force on 25 November 1968), as amended by the Exchanges of Notes dated 3 March 1993, 25 April 1996 and 18 May 2005.

Accord relatif aux Communications aeriennes entre le Gouvernement de la Republique Populaire de Chine et Le Gouvernement de la Republic Francaise, signed 1 June 1966 (entered into force on 1 June 1966).

Accord relatif aux Services Aeriens entre le Japon et la Belique, signed on 20 June 1959 (entered into force on 3 July 1961), as amended by the Exchange of Notes dated 30 April 1963 and 4 September 1990.

Accord relatif aux transports aeriens entre la France et le Japan, signed on 17 January 1956 (entered into force on 24 May 1956), as amended by the Exchanges of Notes dated 21 December 1959, 16 May 1961, 29 March 1968, 10 February 1970, 18 July 1972, 9 March 1973, 17 January 1975, 4 July 1983 and 23 April 1996.

Agreement between Denmark and Japan for Air Services, signed on 26 February 1953 (entered into force on 14 July 1953), as amended by the Exchanges of Notes dated 19 July 1953, 5 February 1971 and 23 February 1999.

Agreement between Federal Republic of Germany and Japan for Air Services, signed on 18 January 1961 (entered into force on 12 July 1962), as amended by the Exchanges of Notes dated 10 September 1965, 26 June 1968, 21 March 1972, 18 July 1972, 18 March 1988 and 5 August 1994.

Agreement between Italy and Japan for Air Services, signed on 31 January 1962 (entered into force on 26 July 1963), as amended by the Exchanges of Notes dated 10 February 1970, 24 March 1970, 24 August 1973, 7 July 1978, 25 July 1986 and 30 June 1994.

Agreement between Japan and the Republic Finland for Air Services, signed on 23 December 1980 (entered into force on 5 June 1981), as amended by the Exchanges of Notes dated 28 May 1991 and 22 September 1993.

Agreement between Japan and the Republic of Austria for Air Services, signed on 7 March 1989 (entered into force on 3 July 1989), as amended by the Exchange of Notes dated 16 June 1993.

Agreement between Japan and the United Kingdom of Great Britain and Northern Ireland for Air Services, signed on 29 December 1952 (entered into force on 31 July 1953), as amended by the Exchanges of Notes dated 22 August 1967, 17 June 1969, 26 May 1970, 15 April 1977, 16 September 1988, 10 September 1990, 29 May 1992 and 26 June 1993.

Agreement between Spain and Japan for Air Services, signed on 18 March 1980 (entered into force on 18 June 1980), as amended by the Exchange of Notes dated 21 June 1990.

Agreement between Sweden and Japan for Air Services, signed on 20 February 1953 (entered into force on 24 July 1953), as amended by the Exchanges of Notes dated 19 July 1954, 5 February 1971 and 23 February 1999.

Agreement between the Austrian Federal Government and the Government of the People's Republic of China relating to Civil Air Transport, signed on 12 September 1985 (entered into force on 27 January 1986), as amended on 1 April 1996 and 26 November 1998.

Agreement between the Austrian Federal Government and the Government of India relating to Air Services, signed on 26 October 1989 (entered into force on 1 December 1989), as amended by the Exchange of Notes dated 12 March 1999.

Agreement between the Federal Republic of Germany and the Republic of Indonesia for Air Services between and beyond their respective territories, signed on 4 December 1969 (entered into force on 1 March 1973), as amended by the Exchange of Notes dated 14 November 1980.

Agreement between the Government of Denmark and the Government of the Republic of Indonesia for Air Services between their respective Territories, signed on 23 June 1971 (entered into force on 23 June 1971).

Agreement between the Government of India and the Federal Republic of Germany relating to Air Services, signed on 31 May 1963 (entered into force on 18 February 1965).

Agreement between the Government of India and the Government of Italy relating to Air Services, signed on 16 July 1959 (entered into force on 12 March 1962), as amended by the Memorandum of Understanding dated 15 February 2006.

Agreement between the Government of India and the Government of the Kingdom of Denmark relating to air services, signed on 19 December 1995 (entered into force on 19 December 1995), as amended by the *Memorandum of Understanding between the Government of India and the Governments of Denmark, Norway and Sweden* dated 30 November 2008.

Agreement between the Government of India and the Government of the French Republic relating to Air Services, signed on 16 July 1947 (entered into force on 16 July 1947), as amended by the Exchange of Notes dated 30 October 1961 and the Memorandum of Understanding dated 23 February 2005.

Agreement between the Government of India and the Government of the Hungarian People's Republic relating to air services, signed on 23 February 1966 (entered into force on 16 December 1966).

Agreement between the Government of India and the Government of the Republic of Latvia, signed on 20 October 1997 (not yet in force).

Agreement between the Government of India and the Government of the Grand Duchy of Luxembourg, signed on 9 January 2001 (not yet in force).

Agreement between the Government of India and the Government of the Republic of Malta, signed on 8 October 1998 (entered into force on 8 October 1998).

Agreement between the Government of India and the Government of the Kingdom of Sweden relating to Air Services, signed on 19 December 1995 (entered into force on 19 December 1995), as amended by the Memorandum of Understanding dated 30 November 2006.

Agreement between the Government of India and the Government of the Japan relating to Air Services, signed on 26 November 1955 (entered into force on 11 May 1956), as amended by the Exchange of Notes dated 28 September 1973.

Agreement between the Government of India and the Government of the Republic of Indonesia for Air Services between and beyond their respective territories, signed on 18 September 1968 (understood to have entered into force).

Agreement between the Government of Japan and the Government of the Republic of Poland for Air Services, signed on 7 December 1994 (entered into force on 4 March 1996).

Agreement between the Government of Sweden and the Government of the Republic of Indonesia for Air Services between their Respective Territories, signed 23 June 1971 (entered into force on 23 June 1971).

Agreement between the Government of the Kingdom of Belgium and the Government of the People's Republic of China relating to Civil Air Transport, signed on 20 April 1975 (entered into force on 20 April 1975).

Agreement between the Government of the Kingdom of Belgium and the Government of the Republic of Indonesia for Air Services between and beyond their respective territories, signed on 12 March 1971 (entered into force on 12 March 1971).

Agreement between the Government of the Kingdom of Spain and the Government of the People's Republic of China relating to Civil Air Transport, signed on 19 June 1978 (entered into force on 24 November 1983), as amended by the Exchanges of Notes dated 28 December 1993 and 29 March 2000.

Agreement between the Government of the Kingdom of the Netherlands and the Government of the People's Republic of China relating to civil air transport, signed on 20 January 1979 (entered into force on 20 January 1979), as amended by the Exchange of Notes dated 28 March 1980.

Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia for air services between and beyond their respective territories, signed on 12 July 1966 (entered into force on 12 July 1966).

Agreement between the Government of the People's Republic of China and the Government of the Republic of Bulgaria, signed on 21 June 1993 (entered into force on 1 October 1996).

Agreement between the Government of the People's Republic of China and the Government of the Republic of Finland relating to Civil Air Transport, signed on 2 October 1975 (entered into force on 22 March 1976), as amended by the Exchange of Notes dated 28 March 2003.

Agreement between the Government of the People's Republic of China and the Government of the Kingdom of Greece relating to Civil Air Transport, signed on 23 May 1973 (entered into force on 14 January 1975).

Agreement between the Government of the People's Republic of China and the Government of the Republic of Hungary, signed on 15 September 1993 (entered into force on 20 June 1997).

Agreement between the Government of the People's Republic of China and the Government of the Italian Republic relating to Civil Air Transport, signed on 8 January 1973 (entered into force on 29 January 1975).

Agreement between the Government of the People's Republic of China and the Government of the Grand Duchy of Luxembourg relating to Civil Air Transport, signed on 18 November 2002 (not yet entered into force).

Agreement between the Government of the People's Republic of China and the Government of the People's Republic of Malta relating to Civil Air Transport, signed on 1 September 1997 (entered into force on 1 September 1997).

Agreement between the Government of the People's Republic of China and the Government of the Polish People's Republic relating to Civil Air Transport, signed on 20 March 1986 (entered into force on 1 August 1986).

Agreement between the Government of the People's Republic of China and the Government of the Republic of India relating to Civil Air Transport, signed on 22 December 1988 (entered into force on 26 July 1990), as amended by the Exchange of Notes dated 11 April 2005.

Agreement between the Government of the Polish People's Republic and the Government of India relating to Air Services, signed on 25 January 1977 (not yet in force).

Agreement between the Government of the Republic of France and the Government of the Republic of Indonesia for Air Services between and beyond their respective territories, signed on 24 November 1967 (entered into force on 24 November 1967).

Agreement between the Government of the Republic of Hungary and the Government of Japan for Air Services, signed on 23 February 1994 (entered into force on 17 March 1995).

Agreement between the Government of the Republic of India and the Government of the Republic of Lithuania, signed on 20 February 2001 (not yet in force).

Agreement between the Government of the Republic of Latvia and the Government of the People's Republic of China relating to Civil Air Transport, signed on 4 April 1994 (entered into force on 1 February 2000).

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federative Republic of Brazil, initialled on 31 October 2018 (not yet in force, certain articles applied administratively from 31 October 2018).

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China concerning air services, initialled on 14 April 2011 (provisionally applied from 14 April 2011).

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India concerning Air Services, signed on 8 September 2005 (in administrative effect from 8 September 2005).

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia concerning Air Services, signed on 27 November 2013 (entered into force via diplomatic notes in 2017).

Agreement between the Government of the United States of America and the Government of the People's Republic of China relating to Civil Air Transport, United States of America –China, signed on 17 September 1980 (entered into force on 17 September 1980), as amended by the Exchange of Notes dated 19 August 1982, 10 February 1992, 24 July 2004 and 9 July 2007.

Agreement between the Kingdom of Greece and Japan for Air Services, signed on 12 January 1973 (entered into force on 30 January 1976), as amended by the Exchange of Notes dated 28 February 1984.

Agreement between the Kingdom of the Netherlands and Japan for air services, signed on 17 February 1953 (entered into force on 24 July 1953) as amended by the Exchanges of Notes dated 15 May 1958, 25 May 1964, 19 December 1972, 19 October 1973 and 6 June 1995.

Agreement between the People's Republic of China and the Government of the Republic of Estonia relating to Civil Air Transport, signed on 1 March 1999 (not yet entered into force).

Agreement between the Republic of Indonesia and Japan for Air Services, signed on 21 January 1962 (entered into force on 3 September 1963), as amended by the Exchanges of Notes dated 24 February 1965, 31 March 1970, 29 June 1987 and 22 February 1994.

Air Services Agreement between the Government of India and the Government of Romania, signed on 4 December 1993 (entered into force on 4 December 1993).

Air Services Agreement between the Government of the People's Republic of China and the Government of the Federative Republic of Brazil, signed on 11 July 1994 (entered into force on 27 November 1997).

Air Services Agreement between the Government of the People's Republic of China and the Government of the Republic of Croatia, signed on 20 June 2009 (entered into force on 20 June 2009).

Air Services Agreement between the Government of the Republic of Poland and the Government of the Federative Republic of Brazil, signed on 13 March 2000 (not yet in force).

Air Transport Agreement between the Austrian Federal Republic Government and the Government of the Republic of Indonesia on Scheduled Air Transport, signed on 19 March 1987 (entered into force on 1 October 1987), amended by the Exchange of Notes dated 26 June 1989.

Air Transport Agreement between the Government of India and the Government of Ireland, signed on 20 February 1991 (entered into force on 20 February 1991).

Air Transport Agreement between the Government of India and the Government of the United States of America, signed on 14 April 2005 (entered into force on 21 June 2005).

Air Transport Agreement between the Government of the Czechoslovak Socialist Republic and the Government of the People's Republic of China, signed on 25 May 1988 (entered into force on 27 September 1988).

Air Transport Agreement between the Government of the Czechslovak Socialist Republic and the Government of the Republic of Indonesia, signed on 10 May 1972 (entered into force on 7 August 1976), as amended by the Exchange of Notes dated 18 January 1986.

Air Transport Agreement between the Government of the Republic of India and the Government of Spain, signed on 10 April 1987 (entered into force on 11 April 1988), as amended by the Memorandum of Understanding arising from the discussions held on 7-8 November 2006.

Air Transport Agreement between the Government of the Republic of Poland and the Republic of Indonesia relating to Schedules Air Transport, signed 13 December 1991 (not yet in force).

Air Transport Agreement between the Government of the Republic of India and the Government of the Czech Republic, signed on 16 October 1997 (entered into force on 16 October 1997).

Air Transport Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil, signed on 19 March 2011 (entered into force on 21 May 2018).

Air Transport Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, signed on 28 November 2018 (provisionally applied from 1 January 2021, entered into force on 25 March 2021).

Air Transport Agreement between the Government of the United States of America and the Government of the Republic of Indonesia, signed on 15 January 1968 (entered into force on 15 January 1968).

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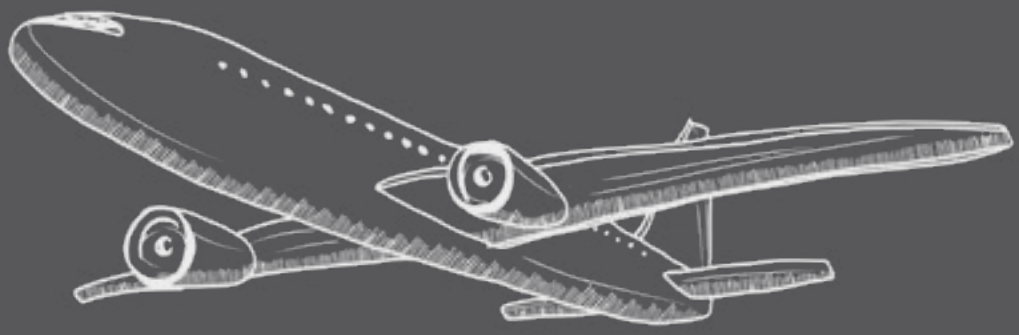

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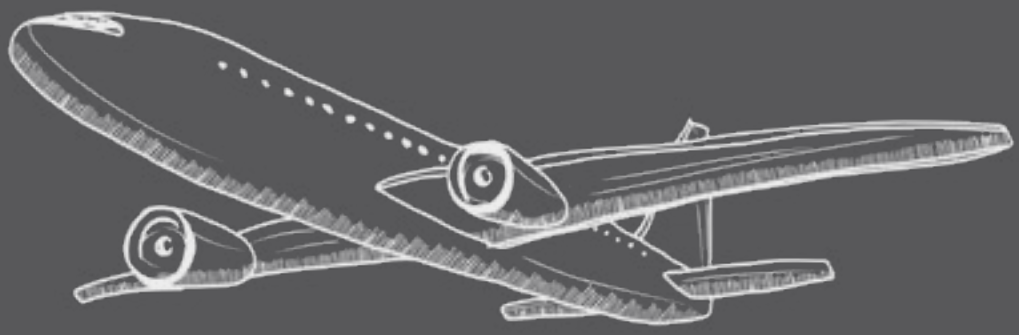


SUMMARY

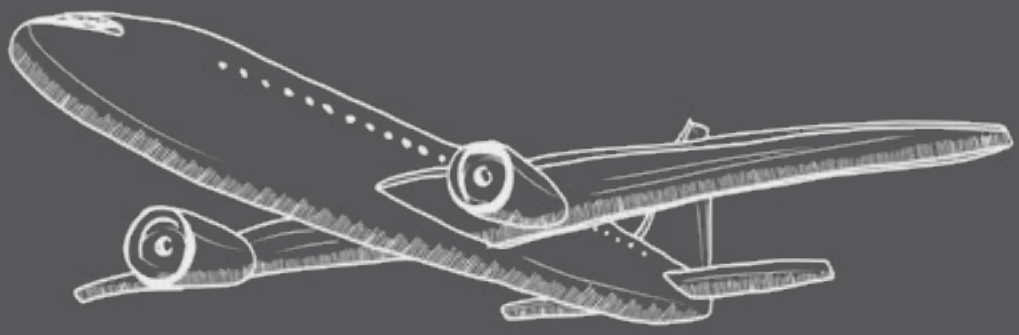
In 2020, the COVID-19 pandemic devastated the airline industry. Although no industry has been immune from the impact of the virus and the measures undertaken by governments around the world to manage it, the impact on the airline industry has been profound. Stringent travel bans, quarantine measures and the uncertainty associated with them had an immediate impact on demand for scheduled international air transport services. At the height of the pandemic, scheduled international air transport nearly ground to a halt.

Past shocks and global events have typically spurred change within the industry and brought into sharp focus how governments regulate trade and market access, foreign investment and alliances between airlines. The COVID-19 pandemic is unlikely to be any different.

The economic regulatory framework underpinning scheduled international air passenger transport has been long-standing and is unique when contrasted with other internationally traded goods and services. Trade in air services explicitly sits outside the remit of the World Trade Organization and major trade agreements. A passenger's transit options are instead a byproduct of a complex, patchwork international regulatory framework comprised of domestic regulations and bilateral and multilateral air service agreements.

This research critically examines how the eight largest global markets regulate airlines from the three different perspectives of trade and market access, investment and airline alliances. The eight jurisdictions considered in this dissertation are Brazil, China, the European Union, India, Indonesia, Japan, the United States of America and the United Kingdom. These jurisdictions have been selected as they were the eight largest markets, based on the number of passengers carried between 2010 and 2019.

This dissertation seeks to contribute to the existing literature by demonstrating that in spite of multiple attempts to reform the regulatory framework for airlines over the last thirty years, with respect to these eight markets, progress has been slow and has prolonged an archaic and opaque regulatory framework that is arguably no longer fit for purpose. This dissertation will consider three prospective pathways for future reform of the airline industry in the wake of COVID-19 and suggest that in spite of the tremendous upheaval of the airline industry through the pandemic, issues pertaining to the regulation of trade, investment and alliances will continue to polarise the industry, legislators and regulators for a long time to come.



IMPACT STATEMENT

OBJECTIVE

The objective of this research to critically examine how the eight largest global aviation markets regulate scheduled international air transport through the lens of trade, investment and airline alliances, and to consider three prospective pathways for future reform of the airline industry in the wake of COVID-19. The jurisdictions examined in this research include Brazil, China, the European Union, India, Indonesia, Japan, the United Kingdom and the United States of America. In 2019, their registered airlines collectively carried 3.0 billion passengers on domestic and international air transport services and accounted for approximately 66 per cent of the world's scheduled air passenger transport.[647]

RELEVANCE

Over the past decade, there has been extensive academic consideration of trade, investment and alliance issues for the jurisdictions, particularly the European Union and the United States of America, however, extensive research has not been undertaken on these eight major markets as a cohort. This research is a contemporary piece of analysis on these issues in the face of the COVID-19 pandemic.

TARGET GROUP AND ACTIVITY

This research is intended to be a point-in-time resource for legal practitioners and other industry professionals seeking to understand how the major global markets have regulated trade, investment and airline alliances in the lead-up to the pandemic, and jurisdictional responses to support the airline industry thereafter.

RESULTS AND CONCLUSIONS

The underlying economic regulation of scheduled, international air passenger transport is akin to a patchwork in the sky. Airlines are subject to a complex economic regulatory framework involving domestic legislation and multiple bilateral and multilateral air service or air transport agreements. In spite of multiple attempts to reform the regulatory framework for airlines over the last thirty years, progress has been slow and has prolonged an archaic and opaque regulatory framework that is no longer fit for purpose.

Prior to the COVID-19 pandemic, the global airline industry had been on an upward trajectory. Forecasts by the International Civil Aviation Organization (ICAO) and the International Air Transport Association (IATA) suggested that it could expect to experience

647 The World Bank, *Air transport, passengers carried* (2022) <http://data.worldbank.org/indicator/IS.AIR.PSGR>.

exponential growth in the coming years. While so many industries have been impacted by COVID-19 and the measures undertaken to manage it, the impact on the international airlines has been profound. COVID-19 travel restrictions had an immediate and devastating impact on demand for scheduled international air transport services. In June 2020, international air passenger traffic was a mere 3.2 per of 2019 traffic for the same month.[648]

Past shocks and global events have typically spurred change within the industry and brought into sharp focus how State Governments regulate airlines with respect to trade, investment and competition. This research has examined these three issues with a particular focus on market access afforded through air service and air transport agreements, restrictions on the level of foreign investment and foreign control in airlines and the regulation of airline alliances.

This dissertation contains a qualitative examination of the key provisions of nearly 100 ASAs and ATAs concluded between the jurisdictions. This research identifies that it is difficult to ascertain the exact status of air service agreements between the jurisdictions as at present, there is no single, accurate repository of information on air service agreements and arrangements between them. Some of the jurisdictions do not appear to have complied with their obligation under the Chicago Convention to register their ASAs or ATAs and some older agreements have been updated in recent years, although the updated Memorandums of Understanding or Records of Discussion are not always publicly available.

Air service or air transport agreements concluded between the jurisdictions typically require airlines to comply with traditional airline ownership and control criteria, provide some form of first to fourth freedom traffic rights, with fifth freedom rights being less prevalent, and often contain provisions that do not allow airlines to operate services in line with commercial considerations for frequency, capacity and tariffs. This research has observed that prior to the pandemic, each jurisdiction had a sizeable domestic or intrastate air transport market, and their key trading partners for air transport services tended to be their regional neighbours, rather than each other.

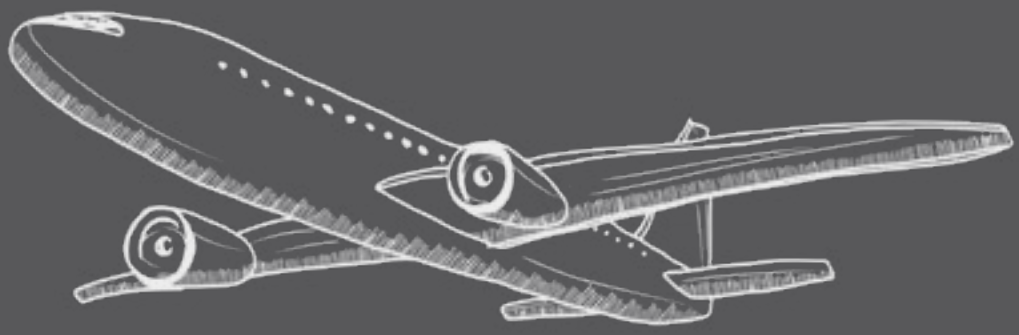
On foreign investment, this research found that Brazil and India have been the only jurisdictions in the cohort to relax foreign investment and control restrictions. In the lead-up to the pandemic, there did not appear to be any momentum by the other jurisdictions to reform their domestic legislation.

648 International Air Transport Association, 'Recovery Delayed as International Air Travel Remains Locked Down' (Press Release No. 63, 28 July 2020) <https://www.iata.org/en/pressroom/pr/2020-07-28-02/>.

With regards to airline alliances, there is no overarching international framework to address competition issues within the sector and most jurisdictions do not have airline specific competition provisions in their domestic legislation. Airline alliances may be subject to review by multiple competition regulators even though the alliance agreement will relate to the same routes. Regulators are not bound to reach the same decision.

Drawing on these findings, this dissertation explores three options for reforming the regulatory framework in a post-pandemic environment. These options include the development of a single multilateral agreement on air trade, the establishment of a regional trading block model and incorporating traffic rights within the scope of the WTO.

This dissertation concludes that in spite of the tremendous upheaval of the airline industry through the pandemic, the industry is likely to continue on its pre-pandemic regulatory path, with the regulatory patchwork in the sky to prevail for the foreseeable future.



BIOGRAPHY

Emma Jane Moulds was born in Australia in 1990. She attained her South Australian Certificate of Education at Trinity College. She holds a Bachelor of Economics and Bachelor of Laws from the University of Adelaide and a Graduate Diploma of Legal Practice and Master of Laws (Legal Practice) with Merit from the Australia National University.

Emma commenced her PhD candidature at Maastricht University's Institute for Globalization and International Regulation in 2015. As part of her research, she visited McGill University's Institute of Air and Space Law for one month as a Graduate Research Trainee in early 2018 and spent three weeks at University of Bern's World Trade Institute as a Visiting Fellow in mid 2019.