

The Patchwork in the Sky

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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 cent 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.