Air Transportation Management,
M.Sc. Programme

Air Law, Regulation and
Compliance Management

Course material:

Conventional and Customary International Aviation Law
Module 2

Excerpt from:

Paul Stephen Dempsey, Public International Air Law, (Montreal: McGill University Institute and Centre for Research in Air and Space Law 2008)

CHAPTER I

INTRODUCTION

Law establishes the perimeters of acceptable conduct. Law is a product of public policy, and a means of substituting order for chaos in social relations. The predictability and stability of law facilitates economic growth. The uniformity of law across jurisdictions promotes predictability and stability.

The first Air Law was enacted only a year after the first balloon went aloft over Paris. An international conference was convened in Paris only seven years after the Wright Brothers flew a heavier-than-air craft at Kitty Hawk, and four years after Santos-Dumont flew over France. From its inception, air transport has been recognized as a technology inherently international, and thus in need of harmonious treatment by nation States.

Like few other commercial activities, an airline embodies the national symbol of the State whose flag it flies.[1] Its existence, and its routes and other commercial activities, are a product of national oversight and regulation.[2] For some nations, aviation is a symbol of national aspirations of pride, prestige and global penetration.

Among the most important infrastructure industries is aviation—important for purposes of facilitating commerce, communications and national defense.[3] The shrinking of distance and time made possible by the spectacular technological breakthroughs of international aviation has

[1] Under " substantial ownership and effective control" requirements included in many bilateral air transport agreements, an airline flies the flag of the State in which it is licensed. This contrasts sharply with the "flags of convenience" principle dominant in international maritime law. Paul Stephen Dempsey & Lisa Helling, *Oil Pollution by Ocean Vessels - An Environmental Tragedy: The Legal Regime of Flags of Convenience, Multilateral Conventions and Coastal States,* 10 DEN. J. INT'L L. & POL'Y 37 (1980); Paul Stephen Dempsey, *Compliance and Enforcement in International Law - Oil Pollution of the Marine Environment by Ocean Vessels* 6 NW. J. INT'L L. & BUS. 459 (1984).

[2] PAUL STEPHEN DEMPSEY, ROBERT HARDAWAY & WILLIAM THOMS, AVIATION LAW & REGULATION (Butterworth1993).

[3] OLIVER LISSITZYN, INTERNATIONAL AIR TRANSPORT AND POLICY 18-19, 38 (1942); PAUL STEPHEN DEMPSEY & WILLIAM THOMS, LAW AND ECONOMIC REGULATION IN TRANSPORTATION ix (Quorum 1986).

made the planet noticeably smaller, and brought homo sapiens and their vastly different cultures closer. The speed and range of large commercial aircraft also make aviation a predominantly international adventure. Aviation contributes far more to the success of national economies and global trade than it produces for investors.

From the outset, States have played an active role in the growth and development of their airlines. Most governments recognize the important role that their air carriers play in facilitating communications, trade, tourism, and national pride, as they "show the flag" around the world.[4] Air transportation is an essential component of the infrastructure of global trade. Airlines create wealth far beyond their facial value in the wide array of industries and communities reliant upon it. As a consequence, most airlines traditionally were viewed as "public utility" types of enterprises, leading governments to impose public service obligations beyond those which would be provided by companies in a "free" market. Airlines cannot operate without airports and air navigation services. Hence, airlines, airports, and air navigation services have long been governmentally regulated, owned and/or subsidized, though increasingly, they are becoming corporatized and privatized.

Because so much of aviation is inherently international in scope, early in its development the world community assembled and drafted major multilateral conventions attempting to unify international rules

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[4] Many factors have shaped the history of mankind. Among these factors have been transportation and communications -- not causes, but certainly essential conditions of human progress.

> The existence of facilities for human migrations has made possible the expansion of the more highly developed races, tribes and nationalities, and the submergence of the less advanced ones. . . .
>
> Improved means of world intercourse have also facilitated the dissemination and migration of cultural, as distinguished from biological forms . . . . Adequate means of communication and transportation are an essential condition of the progressive economic and political integration of mankind.

OLIVER LISSITZYN, INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY 18-19 (1942).

> Rapid communications and transportation facilitate commercial intercourse between the various parts of a single nation and between the various parts of a single nation and between nations. Hence, the possession of a rapid means of communications such as air transport may prove an important competitive asset in international trade.

Id. at 38.

> Transportation is the most important industry in the United States so far as employment, investment and impact on other industries is concerned. It is the fundamental infrastructure which facilitates the free flow of commerce.

PAUL STEPHEN DEMPSEY & WILLIAM THOMS, LAW AND ECONOMIC REGULATION IN TRANSPORTATION ix (Quorum 1986).

governing safety and navigation and other aspects of civil aviation to ensure protection of the public. From the inception of commercial aviation, airlines have depended upon the economic, technological, and infrastructure support of their governments. After World War I, government subsidies and mail contracts sustained the economic viability of commercial aviation, built the runways and air navigation facilities, and provided the capital for technological research and development.[5] With Charles Lindberg's flight across the Atlantic in 1927, interest in international aviation accelerated. The United States preferred private ownership of airlines to State ownership, although for four decades protected airlines from the ravages of destructive competition through the mechanism of government regulation. With the promulgation of the Civil Aeronautics Act of 1938, the U.S. government would supervise rates, routes and mergers, acquisitions and other business practices. Though economic regulation was the response of the U.S. to the economic collapse of the airline industry precipitated by the Great Depression, in Europe, governments would nationalize failing airlines. In Europe, government ownership prevailed as the model for managed competition.

As World War II was drawing to a close, the United States invited the world community to a conference in Chicago to discuss to rules to govern international civil aviation. In the Chicago Convention of 1944, the world community reaffirmed a basic principle that had been the foundation of its predecessor, the Paris Convention of 1919: "The Contracting States recognize that every State has complete and exclusive

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[5] Anthony Sampson observed:

> [T]he pilots and entrepreneurs soon discovered that they could not fly without their government's support, and that even within their own country they could not make their airline pay without subsidies or the air mail contracts which governments awarded. In every country the soaring ambitions of the aviators and their financiers came up against the controls and military designs of their governments. . . . [T]he European governments were determined from the beginning to harness aviation to their own needs, and particularly to bind their colonies and overseas settlements more closely to the home country. The new "airlines" could not avoid being dependent on the governments which subsidized them, merged them or controlled their routes.

ANTHONY SAMPSON, EMPIRES OF THE SKY: THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 24 (1984). International civil aviation enjoyed robust growth after the end of World War I. The cessation of hostilities provided the impetus for the development of aviation for transport purposes; large numbers of military aircraft and pilots were available for conversion to civilian use, governments and businesses realized the potential of aviation for expeditious transport and communications, and postwar conferences generated a need for official travel. BETSY GIDWITZ, THE POLITICS OF INTERNATIONAL AIR TRANSPORT 37 (1980). SEE GENERALLY, PAUL STEPHEN DEMPSEY & WILLIAM THOMS, LAW AND ECONOMIC REGULATION IN TRANSPORTATION 26-27 (Quorum 1986).

sovereignty over the airspace above its territory."[6] The Chicago Convention established the International Civil Aviation Organization [ICAO] to facilitate safety and navigation, and to provide uniformity of standards across borders.[7] As aviation evolved, additional issues came within ICAO's ambit – security and environmental protection, for example. But the identification of the routes on which carriers would be permitted to operate, how many carriers could be designated to serve particular markets, and what level of capacity would be offered was left outside the Chicago Convention, to the bilateral negotiations between the involved States, many of which initially were modeled after the U.S. – U.K. *Bermuda* air transport agreement of 1946. The issue of the appropriate level of rates initially was left to the International Air Transport Association [IATA], the trade association of the world's airlines.

As in all things economic, legal and political, differing cultural perceptions and policy orientations have led to conflict and confrontation between governments. Friction over aviation matters was largely avoided during the first three decades following World War II, when the United States regulated the domestic operations of its privately owned carriers, and participated in an international regulatory regime characterized by consensus and cooperation. But the stability that had characterized the *Bermuda*-ICAO-IATA regime after World War II came to an abrupt end in the late 1970s. In the U.S., the Carter administration, encouraged by some initial successes with domestic airline deregulation, embraced an "open skies" policy of trading foreign access to interior U.S. markets for guarantees of greater pricing flexibility. With promulgation of deregulation legislation (the Air Cargo Deregulation Act of 1977, the Airline Deregulation Act of 1978, and the International Air Transportation Competition Act of 1979), the role of the U.S. government over commercial aviation was much reduced, and market forces came to dominate the destiny of the industry. Beginning in the late 1970s, the United States began to export its deregulation ideology abroad. By the early 1990s, the European Union had created a free internal European market in air services.[8]

A second wave of liberalization began in the early 1990s as the United States began to exchange antitrust immunity and unlimited access to interior U.S. cities for even more liberal "open skies" bilaterals.

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[6] Convention on International Civil Aviation, 61 Stat. 1180 (1944) [hereinafter cited as Chicago Convention], Art. 1.
[7] BRIAN F. HAVEL, IN SEARCH OF OPEN SKIES 123-24 (Kluwer 1997).
[8] See PAUL STEPHEN DEMPSEY, EUROPEAN AVIATION LAW (Kluwer 2004).

The antitrust immunity so conferred allowed the creation of global airline alliances, free to engage in such traditionally prohibited anticompetitive areas as pooling of revenue, and price-fixing. Competition was now to be fostered via anticompetitive means.

Meanwhile, across the Atlantic, the European Union was liberalizing with all deliberate speed.[9] Privatization began to replace government ownership, and competition began to supplant economic regulation.

International aviation, where many of the carriers traditionally have been owned or heavily subsidized by their governments, or at least regulated in a regime of managed competition, and where strict territorial sovereignty over a State's airspace is universally recognized, has always been subjected to a strong governmental presence. Many international air carriers have been operated for purposes of prestige or national security, rather than for economic reasons which inspire capitalist efficiency and consumer welfare.

Governments remain heavily involved in aviation. Yet an international organization – ICAO – also has been established to harmonize domestic laws into a unified international approach to issues important to safety, security and the environment. Airlines must traverse quite a complex political and legal labyrinth before passengers can step aboard the aircraft for an international flight.

Though commercial issues have been relatively tempestuous, issues surrounding safety and security have been less controversial. This has enabled ICAO to achieve impressive levels of global uniformity. Moreover, this is an area where sovereignty has been relaxed in favor of cooperation and harmonization of law across borders.

This book addresses Public International Air Law in its many forms – from customary and conventional International Law to domestic law. In fact, much of Air Law is domestic law that is required under the Chicago Convention to be promulgated consistently with ICAO's Standards and Recommended Practices [SARPs]. Thus, the sources of Public International Air Law are:

- Multilateral Conventions

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[9] *See* Paul Stephen Dempsey, *Competition in the Air: European Union Regulation of Commercial Aviation*, 66 J. AIR L. & COM. 979 (2001).

- ICAO Standards and Recommended Practices
- Bilateral Agreements (e.g., Traffic Rights, Safety, Security)
- Customary International Law
- Intergovernmental decisions and regulations (e.g., those of the European Union)
- National Legislation and Regulation
- Administrative Practice and Procedure
- Contracts (e.g., air carrier alliance agreements, airport agreements)
- Judicial Opinions; jurisprudence of courts interpreting all the above in cases and controversies brought before them

There is some dispute in the academic literature as to whether the proper term is "Air Law", or "Aviation Law". "Aeronautical Law". This author has used the terms Air Law and Aviation Law interchangeably. The term Air Law apparently was coined by Professor Ernest Nys of the University of Brussels a year before the Wright Brothers flew at Kitty Hawk, North Carolina.[10] Indeed, the concept of air has spawned a wide range of terminology to describe various components of air transport – airlines, airports, air freight, air traffic control, air navigation, and so forth. Yet some commentators, such as Professor Ronald Bartsch, assert that Air Law is too broad a term; that it might embrace the use of the airwaves for broadcast communications, for example, and that therefore the term Aviation Law would be preferable.[11] But Professor Milde disagrees: "From the beginning of the legal thinking relating to 'air law' it was obvious that the term was to be used exclusively for the regulation of such social relations in the air space that are related to or generated by the aeronautical uses of that space. None of the early authors thought to include under the term 'air law' also the regulation of wireless transmissions or any other aspects of the propogation of electromagnetic waves through the space; neither did they consider the issues of the use of wind power to generate electricity."[12] The Chicago Convention, which created the International Civil *Aviation* Organization is, after all, the Convention on International Civil *Aviation.* Noneheless, we find the debate highly academic and, ultimately, of little consequence, and use both phrases interchangeably.

One final issue is whether Air Law (or Aviation Law, if you prefer) is a sufficiently different subject from other areas of the law to warrant

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[10] MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 1 (Eleven 2008).
[11] *See e.g.,* RONALD I.C. BARTSCH, AVIATION LAW IN AUSTRALIA 22-25 (Thompson Reuters 4th ed. 2013).
[12] MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 1 (Eleven 2008).

categorization as a separate discipline. True, much of Air Law is a part of other areas of law, and exists in a broader legal normative framework. Air Law can be found in various areas of public law (e.g., Constitutional Law, Administrative Law, Criminal Law, Antitrust, and Labor Law) and private law (e.g., Torts, Contracts, and Property).[13] It is true, to be an aviation (or air) lawyer, one needs to have a command of many of the established disciplines of law.

Legal historian Professor Stuart Banner declares Air Law dead, observing the declining number of U.S. programs in Aviation Law, or Law Professors teaching it: "Air law ceased to be a useful category when the airplane was no longer a novelty."[14] Nonetheless, there are volumes of treaties, statutes, regulations, and jurisprudence which is unique to aviation in all its forms. This is particularly true in Public International Air Law. On this issue, your author sides with Professors Havel and Sanchez, who write: "[T]o legal conservatives who may be suspicious of *sui generis* bodies of law that depart from the ideal of a set of foundational principles covering all of *international* commercial aviation offers a compelling resonse as to why it can and should support a separate body of law: it is a massive industry, heavily regulated, structurally borderless, and treated by governments (e.g., through creaetion of a separate United Nations (U.N.) organ to frame common global aviation rules) not as an ordinary part of international trade but as singular and exceptional."[15]

As the ensuing Chapters reveal, there is much about Public International Air Law that is unique to aviation. The early portions of this book are devoted to a review of the historical evolution of Public International Air Law. Chapter II provides a historical overview of the development of customary International Air Law. Chapter III examines the Chicago Convention's major codifications of substantive law, and the administrative powers and jurisdiction of ICAO. Chapters IV through VII review issues of safety, navigation, security, and airports, respectively. The latter Chapters of this book address issues over which there is relatively less consensus – environmental regulation (in Chapter VIII) and commercial airline traffic rights (in Chapters IX and X). We then (in Chapter XI) examine mechanisms for the resolution of international aviation disputes. We conclude (in Chapter XII) with a

[13] RONALD I.C. BARTSCH, AVIATION LAW IN AUSTRALIA 25-30 (Thompson Reuters 4th ed. 2013).
[14] STUART BANNER, WHO OWNS THE SKY? 224 (Harvard 2008).
[15] BRIAN F. HAVEL & GABRIEL S. SANCHEZ, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL AVIATION LAW 5(Cambridge 2014).

look at the intersection of Air Law and Space Law. We begin our examination of this complex process with a chronology and explanation of the international regulation of air transport, its origin, history and development.

CHAPTER II

MULTILATERAL CONVENTIONS

SYNOPSIS

I. INTRODUCTION
II. AVIATION TECHNOLOGY: WAR & PEACE
III. EARLY ATTEMPTS AT AIR TRANSPORT REGULATION
IV. THE EVOLUTION OF INTERNATIONAL AIR LAW
  A. CUSTOMARY INTERNATIONAL LAW
  B. THE TREATY OF VERSAILLES
  C. THE CONVENTION RELATING TO THE REGULATION OF AERIAL NAVIATION (PARIS CONVENTION OF 1919)
  D. THE MADRID AND HAVANA CONVENTIONS
  E. THE CONVENTION ON INTERNATIONAL CIVIL AVIATION (THE CHICAGO CONVENTION OF 1944)
  F. THE ANTARTIC TREATY OF 1959
  G. THE OUTER SPACE TREATY OF 1967
  H. THE LAW OF THE SEA CONVENTION OF 1982
V. AIR LAW IN THE 21st CENTURY
VI. SUMMARY & CONCLUSIONS

I. INTRODUCTION[♣]

♣ The author would like to thank Andrea J. DiPaolo, Doctoral candidate, McGill University Institute of Air & Space Law, for her assistance in the preparation of this chapter.

The landscape of aviation is inherently international. Thus, it is not at all surprising that nations would attempt to establish universal and uniform laws governing air transport. Aviation therefore has been the subject of a number of international legal conferences, which has resulted in multilateral agreements in both Public and Private International Law governing such issues as air safety and navigation, security, sovereignty, transit and commercial traffic rights, and liability. The following is a list of the major international aviation conventions (with the Public International Air Law agreements in bold):

- ***Paris Convention of 1919*** **(addressing safety and navigation)**
- *Warsaw Convention of 1929* (addressing carrier liability to passengers and shippers)
- *Rome Convention of 1933* (addressing aircraft operator liability for surface damage)
- ***Chicago Convention of 1944*** **(addressing safety and navigation)**
- *Geneva Convention of 1948* (addressing aircraft registration)
- *Rome Convention of 1952* (addressing aircraft operator liability for surface damage)
- ***Tokyo Convention of 1963*** **(addressing offenses on board aircraft)**
- ***Hague Convention of 1970*** **(addressing aircraft hijacking)**
- ***Montreal Convention of 1971*** **(addressing aircraft and air navigation security)**
- *Montreal Protocols of 1975* (amending the *Warsaw Convention*)
- *Montreal Convention of 1999* (addressing carrier liability to passengers and cargo)
- *Cape Town Convention of 2001* (addressing financial interests in aircraft)
- *Montreal Conventions of 2009* (addressing aircraft operator liability for surface damage)
- ***Beijing Convention and Protocol of 2010*** **(addressing aviation security)**
- ***Montreal Protocols of 2014*** **(amending the Tokyo Convention)**[1]

[1] These and other Public and Private International Air Law agreements are compiled in XXX(1) Annals of Air & Space L. (2005).

The World Wars have been catalysts for multilateral aviation agreements. At the end of the First World War, the major aviation powers drafted the first multilateral air transport agreement – the Convention for the Regulation of Aerial Navigation of 1919 [the Paris Convention], which, *inter alia,* confirmed State sovereignty over their airspace.

As World War II was drawing to a close, the United States invited the world community (absent the Axis powers) to attend a conference in Chicago. Fifty-two of the world's nations met in Chicago from November 1 to December 7, 1944, and drafted the Convention on International Civil Aviation of 1944 [the Chicago Convention]. The Chicago Convention established the International Civil Aviation Organization [ICAO], a specialized agency which became part of the United Nations family, headquartered in Montreal. Virtually the entire global aviation community of States has become ICAO members.

ICAO has been highly successful in promulgating "International Standards and Recommended Practices", harmonizing safety and navigation in air transportation. Areas addressed by ICAO include personnel licensing, rules of the air, aeronautical meteorology, charts, units of measurement, operation of aircraft, airworthiness, aeronautical telecommunications, air traffic services, search and rescue, accident investigation, aircraft noise and emissions, security, and satellite navigation.[2] ICAO also has been the forum for negotiation of most of the world's major multilateral aviation conventions, in areas such as carrier liability for death, injury, loss and damage, and aviation security, hijacking and terrorism.[3]

II. AVIATION TECHNOLOGY: WAR & PEACE

George Orwell wrote, "We were once told that the aeroplane had 'abolished frontiers.' Actually it is only since the aeroplane became a serious weapon that frontiers have become definitely impassable."[4] War was very much in the minds of the delegates at the Paris Convention of 1919 and the Chicago Convention of 1944, which produced the two organic conventional international law documents of civil aviation in the

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[2] *See* PAUL STEPHEN DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 273-95 (Transnational 1987).

[3] *See* Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT'L L. 649 (2003).

[4] George Orwell, *You and the Atomic Bomb*, Tribune, Oct. 15, 1945; reproduced at

20th century.

The military applications of aviation technology were identified in the earliest days of flight. The use of aircraft as instruments of war has been a catalyst for international legal prescriptions on their deployment. In 1784, a year after the first recorded manned free flight in a hot-air balloon over Paris, the French army made the first military application of aviation, observing their Austrian adversaries from a balloon.[5] In the 1860s, balloons also became a medium of military reconnaissance during the American War Between the States. In 1870-71, as Prussians besieged Paris, the French used balloons to ferry passengers and mail out of the city.[6] The British army developed its own balloon in 1878. The French army attached an electric motor to an airship in 1884.[7]

The first multilateral effort to regulate military uses of airspace was an agreement concluded in 1898 between Germany, Italy and Austria-Hungary which specified the conditions under which military balloons and dirigibles could cross their national boundaries. The following year, the Hague Convention of Land Warfare prohibited the launching of explosives from the air for five years.[8] This prohibition was reaffirmed in the Hague Convention on Land and Naval Warfare of 1910, though widely ignored during the ensuing Great War.[9]

The first heavier-than-air craft was a glider, flown in England in 1853.[10] Nonetheless, the inauguration of modern aviation is usually attributed to a 20-second 120 foot flight by the Wright Brothers at Kitty Hawk, North Carolina, at 10:35 on the morning of December 17, 1903.[11] The Wright Brothers proceeded to carry the first air freight (a bolt of

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[5] The first manned free flight was by Pilatre de Rozier and the Marquis d'Arlandes from a seven-story blue-and-gold hot-air balloon which rose 3,000 feet above Paris and flew some five miles, on November 21, 1783. The balloon was designed by Joseph and Etienne Montgolfier. The first hydrogen balloon was also flown in 1783. PAUL STEPHEN DEMPSEY & LAURENCE GESELL, AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY 43 (Coast Aire 3rd ed. 2010).

[6] PAUL LARSEN, JOSEPH SWEENEY & JOHN GILLICK, AVIATION LAW 2 (Transnational 2006).

[7] PAUL STEPHEN DEMPSEY & LAURENCE GESELL, AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY 23-31 (Quorum 3rd ed. 2010).

[8] MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 7 (Eleven 2008).

[9] PAUL LARSEN, JOSEPH SWEENEY & JOHN GILLICK, AVIATION LAW 35 (Transnational 2006).

[10] Gliders crashed and killed their pilots in Germany in 1896, and in England in 1899. PAUL STEPHEN DEMPSEY & LAURENCE GESELL, AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY 31-33 (Quorum 3rd ed. 2010).

[11] In 1905, Wilbur Wright flew his aircraft for 38 minutes and more than 24 miles. PAUL STEPHEN DEMPSEY & LAURENCE GESELL, AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY 33-35 (Quorum 3rd ed. 2010).

silk), from Dayton to Columbus, Ohio, in 1908.[12] The first flight across the English Channel followed the next year.[13]

The U.S. army invited bids for a military bi-plane in 1908.[14] The British army formed its first battalion for conducting air war in 1911.[15] By 1914, Germany had the largest number of military aircraft of any nation.[16] In 1918, the U.K. became the first nation to create an air force, the Royal Air Force.[17] William Boeing formed an aircraft company in 1916, which in 1921 won a $1.5 million contract for military aircraft, the largest awarded up to that time.[18] U.S. involvement in World War II began and ended in aviation, from the Japanese attack on Pearl Harbor in December 7, 1941, until a U.S. B-29 aircraft dropped an atomic bomb on Nagasaki, Japan, on August 9, 1945. Investment by the military in research and development has been a catalyst for many of the technological breakthroughs in aircraft design and engineering.

III. EARLY ATTEMPTS AT AIR TRANSPORT REGULATION

The French have always claimed aviation as theirs. Observing that paper would rise in a chimney, two papermakers from Lyon - the Montgolfier Brothers - constructed the first hot air balloons. The first recorded manned free flight was by Jean de Rozier from a balloon which rose 1,000 feet above Paris and flew some five miles in 25 minutes, on November 21, 1783.[19] The law was soon to follow.[20] On April 23, 1784,

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[12] Tony Janus was the first to fly passengers in the United States, a twenty minute trip across the 19 miles of Tampa Bay in 1914. NAT'L COMM'N TO ENSURE A STRONG COMPETITIVE AIRLINE INDUSTRY, CHANGE, CHALLENGE AND COMPETITION 4 (1993). The fare was $5 one-way for a gross weight, including baggage, up to 200 pounds, with a charge of six cents for each additional pound. CHRONICLE OF AVIATION 114 (Bill Gunston ed. 1992). Regular commercial service did not begin in the United States until 1918, when the mail began to fly from Washington, D.C., to Philadelphia to New York. America's first international service began in 1919, with a flight from Key West, Florida, to Havana, Cuba. Chronicle of Aviation 173 (Bill Gunston ed. 1992). The first nonstop transatlantic flight was flown by Charles Lindbergh in 1927. Id. at 241. After that, international aviation grew robustly. U.S. traffic grew from 6,000 passengers in 1926, to 1.5 million in 1938, to 49 million in 1958, to 275 million in 1978, to 466 million in 1990. NAT'L COMM'N TO ENSURE A STRONG COMPETITIVE AIRLINE INDUSTRY, CHANGE, CHALLENGE AND COMPETITION 4 (1993).

[13] Louis Bleriot was the pilot. CHRONICLE OF AVIATION 71 (Bill Gunston ed. 1992).

[14] CHRONICLE OF AVIATION 60 (Bill Gunston ed. 1992).

[15] *Id.* at 89.

[16] *Id.* at 116.

[17] *Id.* at 156.

[18] *Id.* at 136, 187.

[19] ROBERT KANE, AIR TRANSPORTATION 2-9 (12th ed. 1996).

[20] Elmar M. Giemulla, *Chicago System: Genesis and Main Characteristics*, in INTERNATIONAL

the first Air Law was promulgated when the Paris police issued a directive prohibiting balloon flights without prior authorization.[21] In 1852, Henri Giffard installed a steam engine on a balloon to move a propeller with a directed arm, creating the first dirigible airship, and began moving passengers over France.[22]

The French were dubious of the Wright Brothers' claim that they had flown a heavier-than-air aircraft in 1903, for they were unwilling to demonstrate their invention publicly, ostensibly in order to first perfect their patents. Even before Alberto Santos-Dumont's flight of a dirigible airship at Paris in 1903, or a heavier-than-air aircraft in 1906, the French jurist Paul Fauchille in 1901 urged adoption of a code of air navigation by the *Institut de Droit International.* But he argued against airspace sovereignty, contending that the "air is free."[23] Because the air cannot be appropriated, he argued, real property of the air is impossible, and the same principle prescribes State assertions of dominance over it; airspace therefore is *res communes,* and *l'air est libre.* He argued that the right of States to control flights over their sovereign territory was proper only if necessary to advance their inherent "right of self preservation."[24]

Earlier scholars also had argued for open skies. In 1532, Spain's Francisco de Vitoria advocated a general right of trade and commerce between nations; territorial sovereignty, he argued, was limited by the general right of transit and commerce for the benefit of all nations. In 1609, Holland's Hugo Grotius advocated a general right to commerce, claiming that "every nation is free to travel to every other nation and to trade with it."[25] In the late 17th century, Germany's Samuel von Pufendorf argued that "man's sovereignty in the air was limited by the ability for effective control."[26]

The contrary view was articulated by the Swiss jurist Emeric de Vattel in 1757, that nations are free and independent, and enjoy the exclusive right to sovereignty over their territory, and may "prohibit

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AND EU AVIATION LAW 6 (Wolters Kluwer 2011).

[21] I. H. PH. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 2 (6th ed. 1997).

[22] PAUL LARSEN, JOSEPH SWEENEY & JOHN GILLICK, AVIATION LAW 2 (Transnational 2006).

[23] Elmar M. Giemulla, Chicago System: Genesis and Main Characteristics, in INTERNATIONAL AND EU AVIATION LAW 4 (Wolters Kluwer 2011).

[24] John Cobb Cooper, *Backgrounds of International Public Air Law*, 1 YEARBOOK OF AIR AND SPACE LAW 3, 11 (1967).

[25] John Cobb Cooper, *Backgrounds of International Public Air Law*, 1 YEARBOOK OF AIR AND SPACE LAW 3, 4-6 (1967).

[26] Quoted in Stephen Schrewsbury, *September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty*, 68 J. AIR L. & COM. 115, 126 (2003).

entrance into his territory either of all foreigners in general or to certain persons . . . according as the welfare of the State may require."[27] Vattel's view would prevail at Paris, and later, at Chicago, ultimately crystallizing as a norm of customary international air law.

The first international aviation agreements were concluded in late in the 19th century. As noted above, in 1898, Germany, Italy and Austria-Hungary concluded an agreement addressing the crossing of borders with military balloons. The following year, the multilateral Hague Declaration prohibited the "launching of projectiles and explosives from balloons, and other methods of similar nature."[28]

In 1908, the French government protested to the German government about the number of German balloons drifting over the French border. At least ten German balloons landed in France carrying more than 25 Germans, at least half of whom were military officers.[29] In December of that year, the French invited the European powers to Paris to address the regulation of air navigation. Despite the French protests, German balloons continued to drift over French soil in 1909. The French government responded by directing local authorities to hold balloons for the collection of import duties and to obtain information concerning the purpose of the flight.[30] The violation of French air space led France to call for an international conference to address the problem.

The first major multilateral effort at lawmaking in international aviation was the Paris Conference of 1910. The conferees met from May 10 until June 29, 1910. Though it concluded without adopting a Convention, the conference laid the foundation for the Paris Convention of 1919. In particular, the 1910 Conference produced a draft convention addressing aircraft nationality and registration, navigation, crew licenses, logbooks, radio equipment, prohibited zones and cabotage. Though the conference derailed over a dispute between the Germans and French over whether the same standards should be applied both to domestic and international aircraft, the 1910 Paris conference produced the international agreement that usable air space above the land and

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[27] John Cobb Cooper, *Backgrounds of International Public Air Law*, 1 YEARBOOK OF AIR AND SPACE LAW 3, 6-7 (1967).
[28] Elmar M. Giemulla, *Chicago System: Genesis and Main Characteristics,* in INTERNATIONAL AND EU AVIATION LAW 6 (Wolters Kluwer 2011).
[29] MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 8 (Eleven 2008).
[30] John Cobb Cooper, *Backgrounds of International Public Air Law*, 1 YEARBOOK OF AIR AND SPACE LAW 3, 12 (1967).

water of a State is part of its territory.[31] There was clear consensus that territorial airspace extended upward as high as then practical for flight, and there was no general right of innocent passage through such airspace by foreign aircraft. Hence, national sovereignty over the airspace above a State's territory was a recognized legal principle well before the outbreak of World War I.[32]

The legal and diplomatic framework within which international air transport has since developed is based upon three simple, yet fundamental, principles:

1. each State has sovereignty and jurisdiction over the air space directly above its territory (including territorial waters);
2. each State has complete discretion as to the admission or non-admission of any aircraft to the air space under its sovereignty; and
3. air space over the high seas, and over other parts of the earth's surface not subject to any State's jurisdiction, is free to the aircraft of all States.

Although of relatively recent origin, these principles are now among the least disputed in international law.[33] These principles of air sovereignty insured that national governments would play a dominant role in the development of international civil aviation.[34]

After the Paris conference of 1910, the United Kingdom enacted the Aerial Navigation Acts, which declared prohibited zones along British coasts. Regulations addressing aircraft were imposed by Berlin and the province of Brandenburg, Germany. In 1912, Russia decreed an absolute prohibition against flying over its western borders. In 1913, France and Germany concluded the first bilateral air transport

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[31] John Cobb Cooper, *Backgrounds of International Public Air Law*, 1 YEARBOOK OF AIR AND SPACE LAW 3, 13 (1967).

[32] I.H.PH. DIEDERIKS-VERSCHOOR, HISTORY AND DEVELOPMENT OF AIR LAW 9-10 (1997).

[33] OLIVER LISSITZYN, INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY 365 (1942).

[34] Salacuse, *The Little Prince and the Businessman: Conflicts and Tensions in Public International Law*, 45 J. AIR L. & COM. 807, 814 (1980). Professor Lowenfeld points out that, unlike most other industries, "aviation directly engages the prestige, the fascination, and the national interest of almost all countries … [and] is a serious problem in international relations." Andreas Lowenfeld, *A New Take-Off for International Air Transport,* 54 FOREIGN AFF. 36 (1975). Another commentator concurred: "We shall have a false idea of air transport history. . . if we think of it as purely a commercial enterprise, or neglect the extent to which political considerations have been controlling in shaping its course." OLIVER LISSITZYN, INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY vi (1942).

agreement.[35] As World War I began, in 1914, the United States forbade flights over the Panama Canal, and Switzerland became the first state to prohibit all foreign aircraft from its skies, with Sweden following suit in 1916.[36]

III. THE EVOLUTION OF INTERNATIONAL AIR LAW

A. CUSTOMARY INTERNATIONAL LAW

Customary international law is a component of international law recognized under Article 38(c) of the Statute of the International Court of Justice. In order to constitute binding customary international law, both elements of State practice and *opinio juris* must be satisfied.[37] To satisfy the element of State practice, a generality of States must comply with the practice (compliance by all States is not necessary).[38] As stated by Professor Bin Cheng, "[O]pinio juris is the view that is held by, or that may be said, with effect opposable to that state, to be held by, a state as to what the law is at any given moment."[39] This holds true of customary public international air law as a subset of customary international law generally.

The International Court of Justice has recognized that a treaty provision can accurately reflect customary international law under two circumstances: when it codifies existing customary international law, or when such provision crystalizes emerging customary law.[40] For example, the principle of sovereignty over airspace is an accepted principle of customary international law that is also embodied in the Chicago Convention. By the time the Chicago Convention was drafted, this concept was already recognized by customary international law.[41] Subsequent adherence to the rule has only served to strengthen its

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[35] Elmar M. Giemulla, *Chicago System: Genesis and Main Characteristics*, in INTERNATIONAL AND EU AVIATION LAW 8 (Wolters Kluwer 2011).

[36] WYBO P. HEERE, PROBLEMS OF JURISDICTION IN AIR AND OUTER SPACE (1999).

[37] Statute of the International Court of Justice, 18 April 1946, 59 Stat. 1031, art 38(c).

[38] Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in R. ST.J. MACDONALD & DOUGLAS M. JOHNSTON, EDS, THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 485, at 549 (Dordrecht: Martinus Nijhoff Publishers, 1986).

[39] *Id.* at 548.

[40] *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands),* [1969] ICJ Rep. 3 at 25; VAUGHN LOWE, INTERNATIONAL LAW 83 (Oxford: Oxford University Press, 2007).

[41] BIN CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT 120 (Stevens, 1962). The broad acceptance of this rule is recognizable in its inclusion in a series of prior international instruments (Paris Convention, Havana Convention, Madrid Convention), as well as domestic legislation.

status.[42]

Unlike Maritime Law, which had a long evolutionary history of customary international law dating from the Phoenicians, the Greeks and the Romans, and subsequently codified into conventional international law, Air Law was formulated into conventional international law at its infancy, without the gradual step-by-step evolutionary growth of customary international law. Professor Diederiks-Verschoor observed, "Due to the rapid developments in aviation and with the law-makers attempting to keep pace, custom has largely been bypassed as a source of law, the result being that air law today consists mainly of written [conventional international] law."[43]

Other scholars, however, have pointed to areas where customary international law appears present in full glory in aviation. Professors Brian Havel and Gabriel Sanchez argue that airspace sovereignty is such a principle, with sovereignty as a dominant principle among States dating back at least as far as the Treaty of Westphalia (1648). Further, they point to the nationality rule, whereby airlines are expected to be owned and controlled by citizens of their home State, as yet another such customary principle. Prohibitions against piracy also be customary international law rule, though in aviation an elaborate conventional regime has been developed since the Tokyo Convention of 1961.[44]

Although, as we shall see, both the Paris Convention of 1919 and the Chicago Convention of 1944 recognize that States enjoy complete and exclusive sovereignty in the airspace above their territory, the remainder of those multilateral agreements dilute that sovereignty as they oblige States to comply with the treatys' provisions, to comply "to the extent practicable" (as the Chicago Convention provides) with the SARPs as promulgated by the ICAO Council. Moreover, at least since the Nuremburg Trials, limitations have been placed on what a sovereign may do, even to its own citizens. Today, for example, sovereigns may be prosecuted for war crimes and crimes against humanity, suggesting in fact, that law has evolved in a direction in which international limitations are increasingly, and with broader scope, imposed upon State sovereignty.

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[42] R.R. Baxter, *Multilateral Treaties as Customary International Law*, 41 BRIT YB INT'L L 275, 278-79 (1965-1966).
[43] I.H.PH. DIEDERIKS-VERSCHOOR, HISTORY AND DEVELOPMENT OF AIR LAW 9-10 (1997).
[44] BRIAN F. HAVEL & GABRIEL S. SANCHEZ, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL AVIATION LAW 18 (Cambridge 2014).

B. THE TREATY OF VERSAILLES

From its inception, commercial air transport has relied on the support of national governments; in the years following World War I, only government subsidies and mail contracts sustained the economic viability of commercial aviation. International civil aviation enjoyed robust growth after the end of World War I. The cessation of hostilities provided the impetus for the development of aviation for transport purposes. Large numbers of military aircraft and pilots were available for conversion to civilian use, governments and business realized the potential of aviation for expeditious transport and communications, and postwar conferences generated a need for official travel.[45]

The victors in the Great War – touted as the "war to end all wars" – imposed conditions in the Versailles Treaty upon Germany addressing aerial navigation. The victors gave their aircraft "full liberty of passage and landing over and in the territory and territorial waters of Germany . . .",[46] and access to all German airports,[47] while requiring Germany to recognize their certificates of nationality and airworthiness and licenses,[48] and to give them most favored nation treatment.[49] The Versailles Treaty also established the League of Nations, which the United States, consumed by post-war isolationism, never joined.

B. THE CONVENTION RELATING TO THE REGULATION OF AERIAL NAVIATION (PARIS CONVENTION OF 1919)

Both commercial and military issues were the driving forces behind the development of conventional international air law at the end of the Great War. Aviation had demonstrated its military capability during the war, and at war's end, there were fleets of available aircraft and scores of trained pilots eager to take up commercial aviation. On February 8, 1919, the first scheduled air service was inaugurated between Paris and London.[50] Professor Manley Hudson observed:

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[45] BETSY GIDWITZ, THE POLITICS OF INTERNATIONAL AIR TRANSPORT 37 (1980). *See generally*, PAUL STEPHEN DEMPSEY & WILLIAM THOMS, LAW AND ECONOMIC REGULATION IN TRANSPORTATION 26-27 (1986).

[46] The Convention of the League of Nations, Art. 313, 1 League of Nations O.J. 3 (1920).

[47] Id. Art. 315.

[48] Id. Art. 317

[49] Id. Art. 318.

[50] I. H. PH. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 2 (6th ed. 1997).

> It was the very rapid development of aviation during the course of the War which made international legislation inevitable. At the conclusion of the hostilities, various belligerents found themselves with a large number of aircraft and trained pilots, and in 1919 they were faced with the necessity of regularizing the conditions under which these aircraft might be employed in international commerce.[51]

In order to establish and define a basic legal framework for international aviation, the Paris Conference of 1919 produced the Convention Relating to the Regulation of Aerial Navigation, more commonly known as the Paris Convention.[52] The first article of the Paris Convention recognized that each State enjoyed "complete and exclusive sovereignty over the airspace above its territory."[53] The use of the verb "recognize" suggests that prevailing customary international law at the time embraced the fundamental principle of State sovereignty over air space.[54] With the taste of war fresh in the mouths of the delegates at Paris, they rejected the tradition of Hugo Grotius and his notion of "freedom of the seas." Homo sapiens is a territorial beast, and this notion of supremacy and exclusivity seemed to satisfy a powerful primordial imperative. In recognizing the exclusivity of national territorial rights, the world community rejected the older concept of international Maritime Law which allowed unencumbered commercial use of the oceans during peacetime by vessels flying the flag of any nation and owned by citizens of any country to visit the ports of any nonbelligerent

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[51] Manley Hudson, Aviation and International Law, 1 Air L. Rev. 183, 186 (Apr. 1930).

[52] Convention Relating to the Regulation of Aerial Navigation, signed, Oct. 13, 1919, 11 L.N.T.S. 173 (hereinafter cited as Paris Convention). *See generally,* NICHOLAS MATEESCO. MATTE, TREATISE ON AIR-AERONAUTICAL LAW 125-127 (1981); OLIVER LISSITZYN, INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY 366-73 (1942); WENCESLAS J. WAGNER, INTERNATIONAL AIR TRANSPORTATION AS AFFECTED BY STATE SOVEREIGNTY 39-61 (1970).

[53] *Id.*, art. 1. *See generally*, LORD MCNAIR, THE LAW OF THE AIR 407 (3rd ed. 1964).

> [The Paris Convention] repudiated the notion of freedom of the air and jealously guarded the new notion of air sovereignty which limited planes more than ships; for nations were naturally far more worried by aircraft flying over their territory—whence they could spy, bomb, or secretly land—than by ships which under the law of the sea were allowed in theory to call at any port they wished.

ANTHONY SAMPSON, EMPIRES OF THE SKY: THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 24, 91 (1984).

[54] Stephen Shrewsbury, *September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty,* 68 J. AIR L. & COM. 115, 130 (2003); MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 11 (Eleven 2008).

State and there participate in international trade and commerce.[55]

The Paris Convention confirmed that transit and landing rights for airlines would be largely defined by the explicit or tacit approval of the national governments in or above whose territory they would operate, though the right of innocent passage during peacetime was embraced.[56] But this right, too, was circumscribed by the right to impose nondiscriminatory "prohibited areas", restricting flying for military or safety reasons.[57] Aircraft straying over these areas were required to give a signal of distress and land expeditiously at an airport outside the prohibited area.[58] The Convention also established the *Commission Internationale de la Navigation Aerienne* [CINA][59] (or in English, the International Commission on Air Navigation) under the direction of the League of Nations, and granted it regulatory power over technical issues.[60] CINA could amend the Annexes to the Paris Convention via a qualified majority, making them binding on all contracting States, even those opposing the change.[61]

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[55] ANDREAS LOWENFELD, AVIATION LAW § II-3 (1972). Professor Lowenfeld predicted in 1975 that "Airlines would not be multilateral corporations . . . in terms of ownership and organization, but would be owned by the States or citizens of the State whose flag they flew." Andreas Lowenfeld, *A New Take-Off for International Air Transport,* 54 FOREIGN AFF. 36 (1975). The notion that an ocean vessel may be owned by citizens other than those of the flag it flies has not been without controversy. *See* Paul Stephen Dempsey & Lisa Helling, *Oil Pollution by Ocean Vessels – An Environmental Tragedy: The Legal Regime of Flags of Convenience, Multilateral Conventions and Coastal States*, 10 DEN. J. INT'L L.& POL'Y 37, 50-65 (1980); Herman, *Flags of Convenience – New Dimension of an Old Problem*, 24 MCGILL L.J. 1 (1978); McDougal, Burke & Vlassic, *The Maintenance of Public Order at Sea and the Nationality of Ships*, 54 AM. J .INT'L L. 25 (1960); PAUL STEPHEN DEMPSEY & WILLIAM THOMS, LAW AND ECONOMIC REGULATION IN TRANSPORTATION 29, 33 (1986); WENCESLAS J. WAGNER, INTERNATIONAL AIR TRANSPORTATION AS AFFECTED BY STATE SOVEREIGNTY 1-8 (1970); Andreas Lowenfeld, *A New Take-Off for International Air Transport*, 54 FOREIGN AFF. 36 (1975).

Professor Bin Cheng has pointed out that the requirement of "substantial ownership of effective control" of an airline by nationals of the State whose flag it flies, widely incorporated into bilateral air transport agreements, has essentially banned the notion of flags of convenience from international air transport. However, Dr. Gertler has pointed out three examples of multilateral airline ownership: SAS, Air Afrique, and the failed East Africa Airways. Joseph Gertler, *Nationality of Airlines: A Hidden Force in the International Air Regulation Equation,* 48 J. AIR L. & COM. 51, 65-66 (1982). He also emphasizes that the Chicago Convention does not impose such a "genuine link" requirement. *Id.* at 59, 66.

[56] Paris Convention, Art. 2.

[57] Paris Convention, Art. 3.

[58] Paris Convention, Art. 4.

[59] CINA was established under Chapter VIII of the Paris Convention. It is, in effect, the predecessor agency of ICAO.

[60] I. H. PH. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 4-5 (6th ed. 1997).

[61] Elmar M. Giemulla, *Chicago System: Genesis and Main Characteristics*, in INTERNATIONAL

Thirty-three (mostly European) nations became subject to the Paris Convention. Though the U.S. helped draft it, the United States never ratified the Paris Convention, on grounds that CINA was under the direction of the League of Nations (which the U.S. also never joined), and CINA held authority to adopt Annexes as amendments the Convention,[62] without U.S. Senate review or approval.[63] The United States was unwilling to confer lawmaking power to an international organization. Many of the substantive law provisions set forth in the Paris Convention subsequently would be embraced by the Chicago Convention of 1944, which replaced the Paris Convention.[64]

C. THE MADRID AND HAVANA CONVENTIONS

During the interwar period, several attempts were made to achieve a multilateral agreement on international aviation services. In addition to the Paris Conference of 1919, similar conventions were signed in Madrid[65] in 1926, and Havana[66] in 1928. At the time these agreements were concluded, there still remained the possibility that States would collectively adopt an "open port" policy analogous to that which existed for maritime shipping.[67] Despite optimism for a comprehensive multilateral resolution of these issues, however, bilateral air transport agreements gradually proliferated between the signatory States of the Paris, Madrid and Havana Conventions, and States increasingly exchanged aviation traffic rights on the basis of bilateral reciprocity.[68] Cabotage restrictions also were defined differently from those of the subsequent Chicago Convention, allowing a contracting State to discriminate in favor of its national aircraft for the provision of domestic air transport services,[69] but allowing other States to impose the same restrictions upon such aircraft in their territory.[70] However, unlike

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AND EU AVIATION LAW 10 (Wolters Kluwer 2011).

[62] Paris Convention, Art. 39.

[63] John Cobb Cooper, *Backgrounds of International Public Air Law*, 1 YEARBOOK OF AIR AND SPACE LAW 3, 19 (1967).

[64] Among those that were not included a provision that aircraft be registered by a State only if owned by its nationals, or a local company. Paris Convention, Art. 7.

[65] Ibero-American Convention Relating to Aerial Navigation (Madrid, 1926).

[66] Convention on Commercial Aviation (Havana, 1928).

[67] Peter Haanappel, *Bilateral Air Transport Agreements – 1913-1980,* 5 INT'L TRADE L.J. 241 (1980).

[68] *Id.*

[69] Paris Convention, Art. 16.

[70] Paris Convention, Art. 17. Another provision not found in the subsequent Chicago Convention was Art. 23, which provided that maritime law would apply to salvaged aircraft.

the Paris and Madrid Conventions, the Havana Convention addressed traffic rights in a more liberal manner, permitting the discharge of passengers and air freight at any airport in the 16 ratifying Latin American States.[71]

Articles 1 and 2 of the Madrid Convention repeated verbatim the first two articles of the Paris Convention, while the Havana Convention repeated them in substance.[72] According to Professor John Cobb Cooper, these developments between the two world wars reveal "a universally accepted rule of international law that the airspace above national lands, waters, and territorial waters is part of the territory of the subjacent State, and that each sovereign State has the same right to control all movement in its national airspace as it had on national lands and waters, and that the traditional rights of innocent passage enjoyed by surface vessels through territorial waters did not exist for the benefit of foreign aircraft above such territorial waters."[73]

D. THE CONVENTION ON INTERNATIONAL CIVIL AVIATION (THE CHICAGO CONVENTION OF 1944)

In the 1920s and early 1930s, the European governments realized the potential of international air transport in linking their overseas colonies to the home country. A number of colonial powers, including France, the United Kingdom, Germany, Belgium, and the Netherlands, opted to concentrate their respective resources in the development of a single national carrier. These national carriers, owned and/or heavily subsidized by their respective governments, provided a sense of security in a rapidly changing international environment, and helped link their colonial territories to the homeland.

Across the Atlantic, a number of private airlines were growing. Like their European counterparts, many were initially dependent upon government subsidies and mail contracts for their survival. The government of the United States, however, was not interested in the development of a single national carrier; by 1930, the "Big Four" private carriers—United Air Lines, Eastern Airlines, American Airlines, and Trans World Airlines—were flying transcontinental routes. Another U.S. carrier, Pan American World Airways, had no domestic routes, but as

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[71] MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 13 (Eleven 2008).
[72] John Cobb Cooper, *Backgrounds of International Public Air Law*, 1 YEARBOOK OF AIR AND SPACE LAW 3, 21-22 (1967).
[73] John Cobb Cooper, *Backgrounds of International Public Air Law*, 1 YEARBOOK OF AIR AND SPACE LAW 3, 23 (1967).

the "chosen instrument" of U.S. international aviation, developed international routes.

By the mid-1930s, passenger traffic on the world's commercial airlines had grown substantially, replacing mail contracts as the primary source of carrier revenue. In Europe, however, the major civil aviation powers had repeatedly failed in their attempts to formulate a uniform aviation economic policy, which might have increased the efficiency of air travel on the continent. The emergence of the Nazis in Germany in 1933 and Germany's invasion of Austria, Czechoslovakia and Poland sent shock waves through the civil aviation industries of Europe as governments once again began to give priority to the production of military aircraft.

In 1938, the Roosevelt administration created a Civil Aeronautics Authority—later re-formed as the Civil Aeronautics Board [CAB]—to allocate and supervise air routes and rates. The U.S. approach was one of "managed competition," in which the airlines, while remaining privately owned, were nonetheless dependent on the government for approval of new routes (which would be authorized under the Civil Aeronautics Act of 1938 if the proposed service was consistent with "the public convenience and necessity"), and rates. The Big Four domestic airlines were awarded certificates or "grandfather rights," to their pre-existing domestic routes, while Pan American's U.S.-flag monopoly of international routes was allowed to continue until the 1950s. Domestic and international rates were required to be filed in tariffs with the CAB, which reviewed them to determine whether they were "just and reasonable" and "nondiscriminatory." In another important decision that would have far-reaching implications, U.S. aircraft manufacturers were prohibited from owning or exercising control over any U.S. carriers.

In Europe, the governmental response to the financial collapse of airlines resulting from the Great Depression was different. Most European airlines were nationalized. The nightmare of World War II and the ensuing German occupation of most of Europe wreaked havoc upon the international civil aviation system. While denied most of its overseas routes, the German national carrier, Lufthansa, emerged as Europe's dominant commercial carrier, taking over the fleets of several other prominent European carriers. Britain's commercial carriers virtually ceased to exist, as its aviation industry was converted to the production of military aircraft, particularly fighter aircraft.

The outbreak of hostilities also had a profound effect on the U.S.

aviation industry, particularly after the entry of the United States into the war in 1941. The Big Four domestic carriers and Pan American were pressed into military service, some of them ferrying supplies to Allied forces in Europe and around the globe.

As World War II entered its final stages, several prominent members of the international community expressed concern over the postwar development of international civil aviation, realizing that this brave new world would require multilaterally negotiated solutions to a growing number of political, economic and technical problems. In response to these concerns, the United States agreed to sponsor an international conference in the hope that it would lay the foundation for the future growth and development of the industry. President Roosevelt extended an invitation to 55 States to attend a diplomatic conference in Chicago. Roosevelt's invitation included the following words of aspiration:

> As we begin to write a new chapter in the fundamental law of the air, let us all remember that we are engaged in an attempt to build institutions of peace. These peace settlements cannot be endangered by petty considerations, or weakened by groundless fears. Rather, with full recognition of the sovereignty and judicial equality of all nations, let us work together so that the air may be used by humanity, to serve humanity.[74]

Fifty-two nations did attend the International Civil Aviation Conference in Chicago from November 1 to December 7 of 1944. Virtually all of the civil aviation powers of the prewar era were represented. The Soviet Union was invited but declined to attend the Chicago Convention, presumably because the fascist governments of Spain and Portugal were present. With the War not yet over, the Axis nations (*i.e.*, Germany, Italy, and Japan) were not invited.[75] Initial optimism for a comprehensive multilateral agreement soon faded, however, as economic and political rivalries emerged between a number of the conference's more prominent members, particularly the United States and the United Kingdom.[76]

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[74] ASSAD KOTAITE, MY MEMOIRS 42 (ICAO 2013).

[75] ANTHONY SAMPSON, EMPIRES OF THE SKY: THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 65-66 (1984). The Soviet Union would not become a member until 1970. The People's Republic of China did not join until 1974. ASSAD KOTAITE, MY MEMOIRS 50 (ICAO 2013).

[76] MCGILL CENTER FOR RESEARCH OF AIR & SPACE LAW, LEGAL, ECONOMIC AND SOCIO-

The United States entered the Chicago negotiations as the world's dominant aviation power, both in terms of aircraft production and technological expertise. During WWII, the British had devoted their aviation industrial capacity building fighter planes, while the U.S. built most of the freighters. The war left the U.S. with a tremendous fleet of long-range transport planes readily convertible to civilian use (including large fleets of DC-2s and DC-3s), as well as a massive industrial infrastructure which, when fully converted to civilian production, would be capable of producing large numbers of commercial aircraft. Other nations feared the prospect of unrestrained competition with the giant U.S. civil aviation industry.[77] In addition to this obvious advantage in production capability, the U.S. aircraft industry had achieved a number of important technological breakthroughs during the war years which would insure its supremacy for decades to come.

Other States represented at Chicago, particularly the United Kingdom, feared the prospect of unrestrained competition with the U.S. civil aviation industry. In the last stages of the war, U.S. carriers had captured almost 72 percent of world air commerce, compared to about 12 percent by British carriers. The European nations had devoted their full resources to the war effort; their civil aviation industries, either nonexistent or ill-equipped for the production of commercial aircraft,

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POLITICAL IMPLICATIONS OF CANADIAN AIR TRANSPORT 521-22 (1980) [citations omitted]. ANTHONY SAMPSON, EMPIRES OF THE SKY: THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 62-69 (1984).

> The second World War not only transformed the scope of the airlines but produced two contradictory political attitudes to the air. The horrors of air warfare, culminating in the atomic bomb on Hiroshima, generated a new insistence that both military and civil aircraft should be separated from national ambitions and put under international control. Yet every government was more convinced that it must protect and advance its own airlines, as the lifeline to its trade and security.

Id. at 57.

> The system, whereby all over the world international air services are performed on the basis of bilateral air transport agreements is a result of the failure of the 1944 Chicago Conference and the subsequent failure of P.I.C.A.O. and I.C.A.O. to reach a Multilateral exchange of traffic rights for scheduled international air services. A multilateral agreement in the exchange of traffic rights was impossible in 1944 because of the widely divergent views of the two key aviation powers at the time, the U.S.A. and the U.K., on the economics of international air transport. The U.K. was then champion of strict intergovernmental regulation of international air transport, whereas the U.S. advocated a system of free competition between international air carriers.

MCGILL CENTER FOR RESEARCH OF AIR & SPACE LAW, LEGAL, ECONOMIC AND SOCIO-POLITICAL IMPLICATIONS OF CANADIAN AIR TRANSPORT 521-22 (1980) [citations omitted and emphasis in original].

[77] NEWAL TANEJA, U.S. INTERNATIONAL AVIATION POLICY (1980).

would require large expenditures of time and capital before they could realistically compete with their U.S. counterparts. Moreover, much of the European manufacturing infrastructure had been destroyed by the war. Professor Wenceslas Wagner observed:

> Before the war, there were in the whole world, 2,388 airplanes flying on regular air lines, 1,200 of which served on international routes; in 1944, the United States alone had 20,000 transport planes and five million skilled workmen in aeronautical industry. . . . As no country in the whole world was able to compete, in the last period of the war, with American aeronautical equipment and personnel, it seemed certain that the proclamation of air freedom, parallel to the freedom of the high seas, would be advantageous to interests of the United States.[78]

Following World War II, the United States embarked on a crusade to encourage freer trade and economic cooperation between nations in the belief that the American people and, indeed, the Western World, would prosper if obstacles to the free flow of commerce were eliminated. By eliminating tariff and non-tariff barriers, it was believed, free trade would be encouraged, and the law of comparative advantage would dictate which nations were best suited for producing various commodities and services.[79] Essentially, it was argued that each nation would produce the manufactured products, agricultural commodities, or raw materials for which it was best suited (*i.e.*, each would export that which it could produce most economically and most efficiently).[80] Further, encouraging commercial relations between nations as their

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[78] WENCESLAS J. WAGNER, INTERNATIONAL AIR TRANSPORTATION AS AFFECTED BY STATE SOVEREIGNTY 80-82 (1970). NEWAL TANEJA, U.S. INTERNATIONAL AVIATION POLICY (1980). ANTHONY SAMPSON, EMPIRES OF THE SKY: THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 64 (1984).

[79] The law of comparative advantage posits that national wealth will be enhanced if each nation specializes in the production of goods and services which it can produce most economically and efficiently, and imports those products in which it has a comparative disadvantage. Export specialization is based on the utilization of the factors of production with which each nation is particularly blessed, such as raw materials, technological ability, or skilled labor. The concept was introduced as a basis for increasing the wealth of a population through international trade by DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1817). Luigi L. Pasinnetti, *A Mathematical Formulation of the Ricardian System*, 27 REV. ECON. STUD. 78 (1960). Ronald Findlay, *International Distributive Justice*, 13 J. INT'L ECON. 1 (1982).

[80] *See e.g.,* Luigi L. Pasinnetti, *A Mathematical Formulation of the Ricardian System,* 27 REV. ECON. STUD. 78 (1960). Ronald Findlay, *International Distributive Justice,* 13 J. INT'L ECON.1 (1982).

economies became inextricably intertwined might deter future military conflict.

In Chicago, the United States promoted the position that airlines of all nations should have relatively unrestricted operating rights on international routes.[81] In the U.S. view, reliance on commercial air carriers to provide the quantity and quality of transport services demanded by consumers was preferable to economic regulation by government fiat.[82] In pursuit of this policy, U.S. negotiators called for a multilateral granting of all of the so-called "five freedoms"[83] of the air, and insisted that the determination of capacities,[84] frequencies,[85] and fares should be left to market forces rather than delegated to an international regulatory body.[86]

The "five freedoms" of the air for which the U.S. delegation sought multilateral recognition are as follows:

> *First freedom* -- The civil aircraft of an airline holding an operating certificate issued by one State (known as the "flag State") has the right to fly over the territory of another State without landing, provided the overflown country is notified in advance and approval is given.

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[81] *See* United Nations Information Organization (UNIO), *Report of the Chicago Convention on International Civil Aviation* 1, 4, 31 (1944). *But see* ANTHONY SAMPSON, EMPIRES OF THE SKY: THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 66-67 (1984).

[82] *See generally*, ANTHONY SAMPSON, EMPIRES OF THE SKY: THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 63-67 (1984); NICHOLAS MATEESCO MATTE, TREATISE ON AIR-AERONAUTICAL LAW 128 (1981).

[83] BETSY GIDWITZ, THE POLITICS OF INTERNATIONAL AIR TRANSPORT 49-50 (1980); Ralph Azzie, *Specific Problems Solved by the Negotiation of Bilateral Air Agreements,* 13 MCGILL L.J. 303 (1967).

[84] Capacity refers to the available number of commercial seats on a specific aircraft-type multiplied by the flight frequency of that aircraft-type during a specific time period (usually one week) over a specific route.

[85] Frequency refers to the number of flights during a specific time period (usually one week) over a specific route.

[86] *See* ANDREAS LOWENFELD, AVIATION LAW II-5 (1972).

Second freedom -- A civil aircraft of one country has the right to land in another country for technical reasons, such as refueling or maintenance, without offering any commercial service to or from that point.

Third freedom -- An airline has the right to carry traffic from its flag State to another country.

Fourth freedom -- An airline has the right to carry traffic from another country to its own country.

Fifth freedom -- An airline has the right to carry traffic between two countries outside its own flag State so long as the flight originates or terminates in its own State.[87]

[87] Subsequent practice has allowed "change of gauge" operations, whereby airlines transfer

Some have argued that these were not really "freedoms" of the air at all, but restrictions – the antithesis of freedom.[88] Professor Bin Cheng has noted that "the more refined these distinctions become the more restrictive is the policy pursued; for every newborn 'freedom of the air' is in reality an additional shackle on the right to fly of foreign carriers, to be removed only at a price."[89] Professor Brian Havel notes that, "These freedoms are, in reality, a protectionist artifice to imprint government control on every conceivable means of access to national airspace . . . . [T]rading of the 'freedoms' is conducted in a routinely bilateral fashion, with each side committd to a kind of 'aeropolitics' of restriction and artful compromise, classiz zero-sum diplomacy, in defense of the home carrier's market share."[90] Actually, they were certainly freedoms if won in bilateral or multilateral negotiations, though usually exchanged on a *quid-pro-quo* basis. Otherwise, each State enjoyed complete and exclusive sovereignty above its territory to prohibit the exercise of such "freedoms", in the same way it could deny an alien person the ability to roam freely within its borders.

In addition to the Chicago Convention, the Chicago conference also produced two important "side" agreements – the Transit Agreement, which provided for the multilateral exchange of first and second freedoms,[91] and the Transport Agreement, calling for the multilateral exchange of all five freedoms.[92] In the years since Chicago, several other freedoms of the air have been identified:

Sixth freedom -- An airline has the right to carry traffic

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passengers between aircraft at a foreign point.

88 BIN CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT 13, 17 (1962).

89 BIN CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT 13, 17 (1962).

90 BRIAN F. HAVEL, IN SEARCH OF OPEN SKIES 19 (Kluwer 1997).

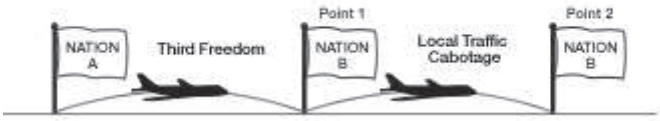
91 International Air Services Transit Agreement, 59 Stat. 1693, T.I.A.S. No. 487, U.N.T.S. 389 (1951).

92 International Air Transport Agreement, 59 Stat. 1701, T.I.A.S. No. 488, U.N.T.S. 387 (1953).

between two foreign countries via its own flag State of registry. (Sixth freedom can also be viewed as a combination of third and fourth freedoms secured by the State of registry from two different countries).

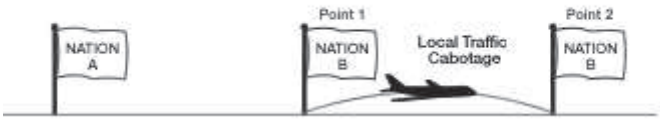
Seventh freedom -- An airline operating entirely outside the territory of its State of registry has the right to fly into another State and there discharge, or take on, traffic coming from, or destined to, a third State.

Eighth freedom -- An airline has the right to carry traffic from one point in the territory of a country to another point in the same country on a flight which originates in the airline's home country. (This right is more commonly known as consecutive cabotage).



Ninth freedom -- An airline has the right to carry traffic from one point in the territory of a country to another point in the same country. (This right is pure cabotage).[93]

[93] Article 7 of the Chicago Convention allows a nation to reserve cabotage to its own flag carriers; if it surrenders it to another State, it must do so on a nondiscriminatory basis.



Actually, early U.S. drafts of the Chicago Convention included elaborate provisions for the limitation of carrier capacity. The United States also called for the strict recognition of cabotage in international aviation, thereby restricting foreign access to domestic traffic. Moreover, the U.S. continued to regulate entry and pricing of its airlines for several decades following the Chicago conference. Hence, the U.S. negotiating posture at Chicago was not as *laissez faire* as some historians have suggested.[94]

The United Kingdom was understandably fearful of the prospect of unrestrained competition with U.S. carriers on international routes. In response to these concerns, British negotiators proposed that an international regulatory body be established to distribute routes and determine capacities, frequencies and fares.

Britain's proposed "International Air Authority" would "(i) control routes and frequencies in accordance with agreed criteria designed to 'avoid wasteful competition on the one hand [but to] give ample facilities on the other'; (ii) allocate quotas to countries' carriers for services over the assigned routes; and (iii) set rates to 'avoid waste' and get rid of subsidies."[95] Such a system, the British believed, would provide their aviation industry with a much needed period of recovery, one which would allow it to survive direct competition with its American counterpart.[96] Canada proposed creation of an international air authority with jurisdiction over economic regulation, whereby regional councils would issue operating certificates and regulate international air transport.[97] Australia and New Zealand proposed a more novel proposal

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BETSY GIDWITZ, THE POLITICS OF INTERNATIONAL AIR TRANSPORT 49-50 (1980).

[94] M. WILLRICH, *ENERGY AND WORLD POLITICS* 11-13 (1975).

[95] ANDREAS LOWENFELD, AVIATION LAW §§ II-6 AND II-7 (1972).

[96] ANTHONY SAMPSON, EMPIRES OF THE SKY: THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 67-68 (1984), NICHOLAS MATEESCO MATTE, TREATISE ON AIR-AERONAUTICAL LAW 129 (1981).

[97] Assad Kotaite, My Memoirs 42 (ICAO 2013).

-- create a single international airline providing worldwide service.[98]

Though the U.S. Civil Aeronautics Board regulated routes and rates domestically, the U.S. was unwilling to embrace such a regulatory approach internationally, choosing instead to press its capacity advantage by insisting on "open skies." Despite lengthy negotiations, U.S. and U.K. negotiators were unable to reach a compromise on several important economic aspects of international aviation. In the area of tariffs, the United States remained firm in its refusal to delegate ratemaking jurisdiction to an international authority. The two sides also differed on the critical issue of fifth-freedom traffic; negotiators could not agree on whether the regulation of such traffic should be included in a multilateral agreement or how fifth-freedom capacity should be determined.

But the delegates at Chicago were not drafting from scratch. They examined the provisions of the Paris, Madrid and Havana models, and the Annexes that had been drafted by CINA. The Chicago Convention[99] reaffirmed the principle of exclusive sovereignty over a nation's airspace[100] enunciated in the Paris Convention twenty-five years earlier and, therefore, allowed each nation to prohibit foreign aircraft from being operated over its territory without its consent.[101] With this principle, the Chicago Convention effectively denied any multilateral grant of rights for scheduled international air services.[102]

Neither American nor British proposals gained significant support, however. Of the five proposed freedoms, only the first two "technical" freedoms were adopted by the majority of the nations attending the Chicago Conference. The United States, which viewed a multilateral granting of all five freedoms with no capacity or frequency restrictions as consistent with its stated goal of open competition in the marketplace, was once again opposed by the British and others who maintained that such a system would confer upon the United States a near-monopoly on a number of major international routes. The multilateral grant of fifth-freedom rights in itself was not totally unacceptable to the Europeans;

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[98] Welch Pogue, *Airline Deregulation, Before and After: What Next?* 16 (Lindbergh Memorial Lecture, Washington, D.C., May 23, 1991.

[99] Convention on International Civil Aviation, 61 Stat. 1180 (1944) [hereinafter cited as Chicago Convention].

[100] Chicago Convention, *id.* art. 1.

[101] Chicago Convention, *id.* art. 6.

[102] PETER HAANAPPEL, PRICING AND CAPACITY DETERMINATION IN INTERNATIONAL AIR TRANSPORT 16 (1984).

nearly all nations at the Conference agreed that a certain amount of fifth-freedom traffic was essential to the profitability of many international air routes. Rather, the crucial disagreement concerned the degree to which capacity in relation to fifth-freedom rights should be regulated. Having little domestic traffic, the Europeans feared that a multilateral grant of fifth freedom rights with no limitations on capacity would provide U.S. carriers with unlimited access to the European carriers' most valuable traffic. Thus, the nations represented at Chicago were unable to reach agreement on the economic structure of postwar civil aviation.

As noted above, side agreements were drafted at the Chicago Conference addressed traffic rights, including notably the Transit Agreement[103] and the Transport Agreement. The Transit Agreement provides for a multilateral exchange for scheduled international air services of the first two freedoms of the air; today, it has been ratified by more than 100 nations, though notably some very large States – such as the Russian Federation, Canada, Brazil, China and Indonesia – are not members.[104] The Transport Agreement[105] provides for a multilateral exchange for international air services of all five freedoms of the air; however, in the ensuing half century, fewer than a dozen nations ratified this agreement, and even the United States – its principal proponent – withdrew after ratification.[106]

Thus, the dominant aviation powers were unable to reach a meaningful compromise on economic regulatory issues at Chicago; the attending nations, particularly the United States, were unwilling to surrender their sovereignty to an international regulatory body having the power to formulate and enforce a comprehensive and uniform aviation policy. The British and many other nations had no enthusiasm for opening the skies to destructive competition. With the failure of the Chicago Conference and subsequent multilateral conferences of the immediate postwar era to produce a convention addressing the economic regulatory aspects of international civil aviation – particularly entry, ratemaking and capacity – it became increasingly clear that bilateral negotiations between individual pairs of nations remained the

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[103] International Air Services Transit Agreement, 59 Stat. 1693, T.I.A.S. No. 487, 84 U.N.T.S. 389 (1951) [hereinafter cited as Transit Agreement]. *See* App. B.

[104] PETER HAANAPPEL, PRICING AND CAPACITY DETERMINATION IN INTERNATIONAL AIR TRANSPORT 17 n. 33 (1984).

[105] International Air Transport Agreement, 59 Stat. 1701, T.I.A.S. No. 488, U.N.T.S. 387 (1953) [hereinafter cites as Transport Agreement]. *See* App. C.

[106] PETER HAANAPPEL, PRICING AND CAPACITY DETERMINATION IN INTERNATIONAL AIR TRANSPORT 17 n. 33 (1984).

only viable option for determining route assignments, frequencies, capacities and fares.[107] We will examine the exchange of commercial traffic rights in Chapters IX and X of this book.

Although the Conference failed to formulate a comprehensive economic charter for international civil aviation or to effectuate a universal exchange of traffic rights (though a side agreement – the Transport Agreement – offered States the opportunity to exchange traffic rights multilaterally), it did establish major substantive principles governing international air law, particularly on technical issues calling for uniformity such as safety and navigation, and laid the foundation for the postwar establishment of the International Civil Aviation Organization [ICAO], headquartered in Montreal.[108] ICAO President Assad Kotaite observed, "As a piece of international air law, the Chicago Convention is remarkable, like a true Magna Carta."[109] He noted that, "The fact that the Chicago Convention remains essentially the same instrument today that it was in 1944 (despite a few important amendments and the addition of 19 Annexes with over 10,000 Standards and Recommended Practices, many of them highly technical) is an indication that the Chicago delegates created a modern, far-sighted, yet flexible instrument which could be adjusted over the course of time with the advent of new technological advances."[110] Professor Michael Milde summarized the major accomplishments of the Conference, and the contribution of the Convention it produced:

> The Chicago Convention is a remarkable legal instrument. By today's standards and experience in the codification of international law it is hard to believe that it was drafted within 37 calendar days without any significant previous multilateral consultation and without a draft text consulted by the participants prior to the opening of the Conference… .
>
> The 96 Articles of the Convention are by themselves a

[107] Many bilaterals contain clauses which provide that, in the event a multilateral air transport agreement is accepted by both parties, the provisions of the multilateral agreement will prevail over those of the bilateral.

[108] The participants in the Chicago Conference hoped to reach agreement with respect to both (a) safety, communications and technology, and (b) economic regulatory issues of entry, rates, frequency and capacity. The Convention created ICAO and gave it important responsibilities over the former questions, which it has performed quite well. But ICAO was given only limited general policy directions over the more controversial economic issues. *See* ANDREAS LOWENFELD, AVIATION LAW § II-5 (1972).

[109] ASSAD KOTAITE, MY MEMOIRS 42 (ICAO 2013).

[110] Id. at 43.

> monumental drafting achievement, but represent only a fraction of the entire work of the Conference [which included an Interim Agreement on International Civil Aviation, the Transit Agreement, the Transport Agreement, and a Standard Form of Agreement for Provisional Air Routes].
>
> The Convention has a dual personality, like many of today's constitutional instruments of the specialized agencies of the United Nations system. It is in the first place a comprehensive codification/unification of public international air law and, in the second, a constitutional instrument of an international intergovernmental organization of universal character… . [T]he Chicago Convention contains, in great detail, a self contained corpus of public international air law.[111]

We shall explore these two functions of the Chicago Convention in the next Chapter.

In must be noted that the Chicago Conference, held from November 1 to December 7, 1944, creating ICAO, preceded the San Francisco Conference, held in the Spring of 1945, which drafted the United National Charter and created the United Nations. [112] ICAO was established on April 4, 1947 as the Chicago Convention entered into force (30 days after the 26th ratification).[113] On May 13, 1947, ICAO became a specialized agency of the United Nations pursuant to Article 7 of the UN Charter, and the Agreement between the United Nations and ICAO of 1947.[114] Montreal, Canada, was chosen as its headquarters.[115] As Dr. Assad Kotaite, former President of the ICAO Council observed, "Montreal has since come to be recognized as 'the world capital of civil aviation.'"[116]

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[111] Michael Milde, *The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later?,* XIX ANNALS OF AIR & SPACE L. 401, 402-03 (1994).

[112] Elmar M. Giemulla, *Chicago System: Genesis and Main Characteristics,* in INTERNATIONAL AND EU AVIATION LAW 14 (Wolters Kluwer 2011).

[113] ASSAD KOTAITE, MY MEMOIRS 43 (ICAO 2013). ICAO was preceded by the Provisional International Civil Organization [PICAO] from June 6, 1945, until April 4, 1947). PAUL STEPHEN DEMPSEY & LAURENCE GESELL, AVIATION AND THE LAW 883 (5th ed. 2011).

[114] Ludwig Weber, *International Organizations*, in INTERNATIONAL AND EU AVIATION LAW 75, 80 (Wolters Kluwer 2011).

[115] The Canadian government pays 75% of the rent of ICAO's Headquarters Building at 999 University Street in Montreal. ASSAD KOTAITE, MY MEMOIRS 104 (ICAO 2013).

[116] ASSAD KOTAITE, MY MEMOIRS 43 (ICAO 2013). Dr. Kotaite noted that when he arrived in Montreal in the early 1950s, "McGill University had recently created the world's leading Institute of Air and Space Law at its downtown campus, just a few blocks from ICAO

E. THE ANTARTIC TREATY OF 1959

The Arctic Ocean, though covered by ice during much of the year, is to be governed by the rules of the high seas. The Antarctic Treaty of 1959 suspends any new territorial claims in Antarctica, though it makes no effort to either endorse or reject pre-existing territorial claims.[117] The treaty left unresolved the pre-existing territorial claims asserted by several States. Professor Milde argues that, "it appears justified, on balance, to consider the Antarctica as a territory of undetermined sovereignty comparable to the status of the high seas", though some States claiming territorial sovereignty over various parts of that continent might object to this characterization.[118] While assertions of airspace sovereignty in those areas claimed prior to adoption of the Antarctic Treaty could be considered valid under the terms of the treaty, these territorial claims have not garnered wide recognition in the international community.[119]

F. THE OUTER SPACE TREATY OF 1967

The Outer Space Treaty of 1967 establishes the basic framework of international law applicable to space. Its essential principles are these:

- the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries and shall be the province of all mankind;
- outer space shall be free for exploration and use by all States;
- outer space is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means;
- States shall not place nuclear weapons or other weapons of mass destruction in orbit or on celestial bodies or station them in outer space in any other manner;
- the Moon and other celestial bodies shall be used exclusively for peaceful purposes;

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headquarters . . . ." Id. at 62. The McGill Institute of Air & Space Law was subsequently awarded the Edward Warner Award, "the greatest single honor in the world of civil aviation." Id. at 63.

[117] "No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force." Antarctic Treaty § 4(2), 12 U.S.T. 794, 402 U.N.T.S. 71 (1959).

[118] MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 42 (Eleven 2008).

[119] Stephen J. Lonergan, *The Legal Status of the Antarctic Airspace* (McGill University Institute of Air and Space Law, 1972) at 92.

- astronauts shall be regarded as the envoys of mankind;
- States shall be responsible for national space activities whether carried out by governmental or non-governmental activities;
- States shall be liable for damage caused by their space objects;
- States shall conduct their space activities with due regard to the corresponding interests of all other States Parties; and
- States shall avoid harmful contamination of space and celestial bodies.[120]

We will examine the intersection of Air Law and Space Law in the concluding Chapter of this book.

G. THE LAW OF THE SEA CONVENTION OF 1982

Pursuant to Article 12 of the Chicago Convention, over the high seas, the rules in force are those established by ICAO, or in other words, the SARPs set forth in the Annexes to that Convention.

The United Nations Convention on the Law of the Sea of 1982 establishes several different areas, over which the legal regime differs:

- In *Internal Waters,* the coastal State holds exclusive sovereignty.
- The *Territorial Waters* of a State extend to 12 nautical miles from the coastal baseline.[121] The coastal state may set laws, regulate any use and use any resource there. Maritime vessels are given the right of "innocent passage" through territorial waters,[122] though aircraft are not. Coastal state "sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil."[123] However, "sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international

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[120] http://www.oosa.unvienna.org/SpaceLaw/outerspt.html. The Outer Space Treaty since has been supplemented by four other multinational conventions:

- *The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space* (the "Rescue Agreement);
- *The Convention on International Liability for Damage Caused by Space Objects* (the "Liability Convention");
- *The Convention on Registration of Objects Launched into Outer Space* (the "Registration Convention"); and
- The *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* (the "Moon Agreement").

[121] United Nations Convention on the Law of the Sea, Art. 3, Dec. 10, 1982, 1933 U.N.T.S. 397 [hereinafter UNCLOS].

[122] UNCLOS Art. 17.

[123] UNCLOS Art. 2 ¶ 2.

law",[124] which would include the Chicago Convention.

- *Straits* "used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone"[125] are treated differently, even if within the 12-mile territorial seas. In straits, both ocean vessels and aircraft enjoy the right of "transit passage", defined for aircraft as, "overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. . . ", though certain limitations are imposed.[126] Further, aircraft in transit passage must "observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation . . . ."[127]
- The *Archipelagic Waters* can be within a coastal State's territory depending on the distance between islands. Unlike the States with straits running through them, the archipelagic State may designate air lanes for use by aircraft, which shall enjoy free passage therein.[128]

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[124] UNCLOS Art. 2 ¶ 3.

[125] UNCLOS Art. 37.

[126] UNCLOS Art. 38 ¶ 2. Art. 39 provides:

> 1. Ships and aircraft, while exercising the right of transit passage, shall:
> (a) proceed without delay through or over the strait;
> (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
> (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;
> (d) comply with other relevant provisions of this Part. . . .
> 3. Aircraft in transit passage shall:
> (a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;
> (b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.

[127] UNCLOS Art. 39 ¶ 3.

[128] As relevant to aviation, UNCLOS Art. 53 provides:

> 1. An archipelagic State may designate . . . air routes thereabove, suitable for the continuous and expeditious passage of . . . aircraft through or over its archipelagic waters and the adjacent territorial sea.

- The *Contiguous Zone,* beyond the 12 mile territorial water limit, extends a further 12 nautical mile from the territorial sea baseline within which the coastal State may enforce its customs, fiscal, immigration or sanitary laws.[129]
- The *Exclusive Economic Zone* [EEZ] extends 200 nautical miles from the baseline. Here, the coastal State has exclusive rights over all economic resources. More specifically, it enjoys, "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds . . . ."[130] Nevertheless, in the EEZ, other States continue to have the rights of overflight and navigation as they would on the high seas.[131] And though it is not specified in UNCLOS, the Chicago

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2. All . . . aircraft enjoy the right of archipelagic sea lanes passage in such . . . air routes.
3. Archipelagic sea lanes passage means the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.
4. Such . . . air routes shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters . . . .
5. Such . . . air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. . . . [A]ircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during passage, provided that such . . . aircraft shall not navigate closer to the coasts than 10 per cent of the distance between the nearest points on islands bordering the sea lane. . . .
8. Such . . . traffic separation schemes shall conform to generally accepted international regulations.
9. In designating or . . . substituting traffic separation schemes, an archipelagic State shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such . . . traffic separation schemes as may be agreed with the archipelagic State, after which the archipelagic State may designate, prescribe or substitute them.
10. The archipelagic State shall clearly indicate the axis of . . . the traffic separation schemes designated or prescribed by it on charts to which due publicity shall be given. . . .
12. If an archipelagic State does not designate . . . air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.

[129] UNCLOS Art. 33.

[130] UNCLOS Art. 56 ¶ 1.

[131] UNCLOS Art. 58.

Convention clearly provides that the rules in force over the high seas are those established by ICAO.[132]

- The *Continental Shelf* is the natural prolongation of the land not more than 350 nautical miles under the seas. Although the coastal State enjoys exclusive economic rights over the natural resources in the shelf, though they do not possess sovereignty over the shelf itself,[133] "The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters."[134]
- The *High Seas* "are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States: (a) freedom of navigation; [and] (b) freedom of overflight; . . ."[135] This freedom of aerial circulation was first recognized in Article 2(4) of the Geneva Convention of the High Seas. Further, Article 89 of the Law of the Sea Convention provides that no State, "may validly purport to subject any part of the high seas to its sovereignty." Hence, the principle of freedom of the seas pertains to the high seas for both ocean vessels and aircraft.

Air Defense Identification Zones [ADIZs] are not mentioned in UNCLOS, though more than a dozen States claim authority to impose requirements upon aircraft about to enter their territory for security reasons, presumably relying upon the customary international law principle of self defense, and Article 51 of the U.N. Charter.[136] The United States' five ADIZs extend some 200 miles out from its coasts. Thus, the United States requires that aircraft having the intention of entering U.S. airspace must provide identification and location reports

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[132] Chicago Convention, Art. 12.

[133] Kay Hailbronner, *Freedom of the Air and the Convention on the Law of the Sea*, 77 AM. J. INT'L L. 490, 506 (1983).

[134] UNCLOS Art. 78.

[135] UNCLOS Art. 87.

[136] Article 51 recognizes the customary right of self defense. Specifically, it provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs . . . ." U.N. Charter. Art. 51.That right is limited by necessity and proportionality. See Paul Stephen Dempsey, *Economic Coercion and Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto*, 9 CASE WESTERN RES. J. INT'L L. (1977). Arguably, reliance also may be placed on Article 11 of the Chicago Convention, providing that the "laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation . . ." shall be applied in a nondiscriminatory fashion.

an hour before entering it.[137] Aircraft flying along the coast with no intention of entering US airspace need not so report, but foreign aircraft entering US airspace are exposed to US action for failing to comply. Moreover, post-9/11, the U.S. also began requiring that aircraft destined for the United States reveal their passenger manifests prior to departure.

In November of 2013, China implemented an ADIZ in a significant section of the East China Sea.[138] There are two remarkable features of this ADIZ: first, unlike the U.S. ADIZ, China requires that all aircraft entering the zone, not only those intending to enter Chinese airspace, provide information; and, second, that it includes maritme areas which are contested by other States.[139] Japan, South Korea, the U.S., and Australia all promptly protested the creation of this ADIZ.[140] There were no prior recorded instances of protest against an ADIZ.[141] China demands that aircraft abide by the following rules:

1. *Flight plan identification*. Aircraft flying in the East China Sea ADIZ should report the flight plans to the Ministry of Foreign Affairs of the People's Republic of China or the Civil Aviation Administration of China.
2. *Radio identification*. Aircraft flying in the East China Sea ADIZ must maintain the two-way radio communications, and respond in a timely and accurate manner to the identification inquiries from the administrative organ of the East China Sea ADIZ or the unit authorized by the organ.
3. *Transponder identification*. Aircraft flying in the East China Sea ADIZ, if equipped with the secondary radar transponder, should keep the transponder working throughout the entire course.

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[137] Kay Hailbronner, *Freedom of the Air and the Convention on the Law of the Sea*, 77 AM. J. INT'L L. 490 515-16 (1983).
[138] James Fallows, "How to Think About the Chinese Air-Defense News" (The Atlantic, 26 November 2013), online: http://www.theatlantic.com/china/archive/2013/11/how-to-think-about-the-chinese-air-defense-news/281871/.
[139] James Fallows, "More on This Strange Chinese ADIZ: 'Sovereign Is as Sovereign Does'" (The Atlantic, 27 November 2013), online: http://www.theatlantic.com/china/archive/2013/11/more-on-this-strange-chinese-adiz-sovereign-is-as-sovereign-does/281890/.
[140] Nicholas Szechenyi, et al, "China's Air Defense Identification Zone: Impact on Regional Security" (Center for Strategic and International Studies, 26 November 2013) online: http://csis.org/publication/chinas-air-defense-identification-zone-impact-regional-security; see also, Lowell Bautista & Julio Amador III, "Complicating the Complex: China's ADIZ" (University of Wollongong Faculty of Law, Humanities and the Arts – Papers, 2013).
[141] Ruwantissa Abeyratne, "In Search of Theoretical Justification of Air Defense Identification Zones" (International Foundation for Aviation and Development, 19 August 2011), online: http://aviationdevelopment.org/eng/sites/default/files/2011111501_Publication.pdf.

4. *Logo identification*. Aircraft flying in the East China Sea ADIZ must clearly mark their nationalities and the logo of their registration identification in accordance with related international treaties.

US Secretary of State John Kerry responded by stating, "Freedom of overflight and other internationally lawful uses of sea and airspace are essential to prosperity, stability, and security in the Pacific. We don't support efforts by any State to apply its ADIZ procedures to foreign aircraft not intending to enter its national airspace. The United States does not apply its ADIZ procedures to foreign aircraft not intending to enter U.S. national airspace. We urge China not to implement its threat to take action against aircraft that do not identify themselves or obey orders from Beijing."[142] The Japanese Foreign Ministry issued a statement that said, "The airspace the Chinese side established today is totally unacceptable and extremely regrettable as it includes the Japanese territorial airspace over the Senkaku Islands, an inherent territory of Japan.... Unilaterally establishing such airspace and restricting flights in the area is extremely dangerous as it may lead to miscalculation in the area..."[143] One commentator notes:

> International law does not recognize the right of coastal nations to restrict the exercise of non-resource-related high seas freedoms beyond the territorial sea. On the other hand, states may establish Air Defense Identification Zones (ADIZ) in the international airspace adjacent to their territorial airspace for purposes of regulating the admission of aircraft into its territory in the interest of national security. Aircraft intending to enter a state's territorial airspace may be required to file detailed flight plans and to identify themselves while in international airspace before penetrating the ADIZ. International law permits states to establish reasonable conditions of entry into their territorial airspace, providing that the conditions are applied to the aircraft of all contracting states "without distinction" as to their nationality.[144]

Also not mentioned in the Law of the Sea Convention are *Flight Information Regions* [FIRs], which consist of an area over which a State has responsibility for air traffic control. For coastal States, FIRs are the

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[142] http://www.globalsecurity.org/military/world/china/adiz.htm (visited Aug. 4, 2014).
[143] Id.
[144] Andrew Williams, *The Interception of Civil Aircraft Over the High Seas in the Global War on Terror*, 59 A.F. L. REV. 73, 95-96 (2007).

airspace over their territory and territorial waters, as well as that part of the high seas which air navigation has been delegated to it by ICAO. Under Article 12 of the Chicago Convention, the rules applicable to flights over the high seas are those established by ICAO.

IV. AIR LAW IN THE 21st CENTURY

With the emergence of the global economy, and the end of the Cold War, 19th century concepts of territorial sovereignty may be growing somewhat anachronistic in the aviation sector. Liberalization of traffic rights has made the skies more open. Airlines have formed alliances to skirt around foreign ownership and cabotage restrictions. The range of aircraft technology, the growth of international markets, and a more mobile human race have called for a reduction in restrictions and an increase in freedoms.

ICAO also has been emboldened to monitor and report compliance and noncompliance with SARPs. The US and EU have blacklisted noncompliant airlines and nations, thereby making enforcement a reality. Hence, in this sector as in others, the global imperatives of trade, tourism and commerce are melting away sovereign restrictions on airspace.

V. SUMMARY & CONCLUSIONS

The first article of the Paris Convention of 1919 provided that each State enjoys "complete and exclusive sovereignty over the airspace above its territory." Thus, the world community rejected the concept of international Maritime Law which allowed "freedom of the seas" -- unconstrained use of the oceans by vessels flying the flag of any nation and owned by citizens of any country. Transit and landing rights for airlines would be defined by the explicit or tacit approval of the national governments in or above whose territory they would operate. Thus, national governments would play a dominant role in the political development of international air transportation.

As World War II drew to a close, several prominent members of the international community advocated multilaterally negotiated solutions to a growing number of political, economic and technical problems. The United States agreed to sponsor an international conference to discuss emerging civil aviation issues.

Fifty-two nations -- virtually all of the civil aviation powers of the

prewar era (not including the Axis Powers and the Soviet Union) -- met in Chicago from November 1 to December 7, 1944, at the International Civil Aviation Conference.[145] Initial optimism for a comprehensive multilateral agreement soon faded, however, as economic and political rivalries emerged. In Chicago, the United States advocated a free-market philosophy in which airlines would have relatively unrestricted operating rights on international routes.[146] American negotiators called for a multilateral granting of all five freedoms.[147] In addition, the United States proposed that the determination of capacity,[148] frequency,[149] and fares[150] be left to market forces rather than delegated to an international

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[145] The Soviet Union and Saudi Arabia were invited, but declined to attend the Chicago Conference. Welch Pogue, Airline Deregulation, Before and After: What Next? 14-15 (Lindbergh Memorial Lecture, Washington, D.C., May 23, 1991). The U.S.S.R. delegation refused to attend once they learned that Fascist government of Spain was represented. Professor Milde suggests that the "negative attitude of the USSR was perhaps an early sign of the 'cold war' mistrust and isolation and the secretive USSR was not ready to open its air space to international cooperation." MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 14 (Eleven 2008). The Soviet Union did not join ICAO until 1970.

[146] Early U.S. drafts of the Chicago Convention included elaborate provisions for the limitation of carrier capacity. *See* Union, Report of the Chicago Convention on International Civil Aviation 31 (1944). The United States also called for the strict recognition of cabotage in international aviation, thereby restricting foreign access to domestic traffic. *See id.* at 1, 4. Hence, the U.S. negotiating posture at Chicago was not as *laissez faire* as some historians have suggested. *But see* ANTHONY SAMPSON, EMPIRES OF THE SKY: THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 66-67 (1984).

[147] The "five freedoms" are universally applicable working rules for bilateral air transportation relations.

[148] Capacity refers to the available number of commercial seats on a specific aircraft-type multiplied by the flight frequency of that aircraft-type during a specific time period (usually one week) over specific route. Professor Cheng has stated that,

> [a]s to capacity, the question was whether a foreign airline, once given permission to operate commercially into and out of the territory of the grantor-State, may offer as many passenger places and as much cargo space on as many services a week as they wish—or, in other words, unrestricted capacity. If so, a strong operator would be able to absorb all the available traffic and to gain eventually a monopoly over the route concerned. Capacity regulation thus becomes one of the most thorny problems in post-war scheduled international air transport.

BIN CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT 17 (1962).

[149] Frequency refers to the number of flights during a specific time period (usually one week) over a specific route. Thus, frequency can be viewed as merely one component of capacity.

[150] Although the terms "air rates," "air fares" and "air tariffs" are often used interchangeably (as they are in this discussion), strictly speaking, the term "fares" relates to prices to be paid for the air transportation of passengers and their baggage, whereas the term "rates" relates to the prices to be paid for the air transportation of cargo. The wider term "tariffs" means the prices to be paid for the air transportation of passengers, baggage and cargo, and the conditions under which those prices apply. Peter Haanappel, *Bilateral Air Transport Agreements – 1913-1980,* 5 INT'L TRADE L.J. 241 (1980). BIN CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT 17 (1962).

regulatory body.

At Chicago, the British delegation proposed the establishment of an international regulatory body to distribute international routes and determine capacities, frequencies and fares -- an International Civil Aeronautics Board.[151] The British believed that such a system would provide their aviation industry with a much-needed period of recovery.[152] But neither the U.S. nor the British proposal was not endorsed by the world community.

The "five freedoms" have become extremely important in the legal conceptualization of international air transportation. They are as follows:

> 1) A civil aircraft holding an operating license issued by one State has the right to fly over the territory of another State without landing.
> 2) A civil aircraft of one State has the right to land in another State for technical reasons, such as refueling or maintenance, without offering any commercial service to or from that point.
> 3) An airline has the right to carry traffic from its flag State to another State.
> 4) An airline has the right to carry traffic from another country to its own flag State.
> 5) An airline has the right to carry traffic between two State outside its own country of registry so long as the flight originates or terminates in its own State.[153]

Since the Chicago Convention, several other freedoms have been added:

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[151] The United Kingdom urged establishment of an "International Air Authority" which would (i) control routes and frequencies in accordance with agreed criteria designed to 'avoid wasteful competition on the one hand [but to] give ample facilities on the other'; (ii) allocate quotas to countries' carriers for services over the assigned routes; and (iii) set rates to 'avoid waste' and get rid of subsidies." Andreas Lowenfeld, *Aviation Law* II-6 and II-7 (1972).

[152] ANTHONY SAMPSON, EMPIRES OF THE SKY: THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 67-68 (1984), NICHOLAS MATEESCO. MATTE, TREATISE ON AIR-AERONAUTICAL LAW 129 (1981).

[153] BETSY GIDWITZ, THE POLITICS OF INTERNATIONAL AIR TRANSPORT 49-50 (1980); Ralph Azzie, *Specific Problems Solved by the Negotiation of Bilateral Air Agreements*, 13 MCGILL L.J. 303 (1967).

6) An airline has the right to carry traffic between two foreign State via its own flag State.
7) An airline, operating entirely outside one territory of its flag State, has the right to fly into the territory of another State and there discharge, or take on, traffic coming from, or destined to a third country.
8) An airline has the right to carry traffic from one point in the territory of a State to another point in the same State.[154]

The nations present at the Chicago Convention drafted two agreements which attempted to achieve multilateral recognition of several of these rights -- the Transit Agreement, and the Transport Agreement.[155] The Transit Agreement involved the exchange of the first two freedoms, and has been ratified by more 100 nations. The Transport Agreement attempted to exchange the first five of the foregoing freedoms, providing a framework for international aviation routes among adhering nations; but only a dozen nations ratified it.[156]

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[154] The eighth freedom involves cabotage rights. Some sources refer to a ninth freedom as the right to interrupt a flight. E. GIEMULLA & R. SCHMID, EUROPEAN AIR LAW § 5 (1992).

[155] The Chicago Conference actually drafted two additional agreements, the International Air Services Transit Agreement, 59 Stat. 1693, T.I.A.S. No. 487, 84 U.N.T.S. 389 (1951), which entered into force on January 30, 1945 [hereinafter cited as Transit Agreement], and the International Air Transport Agreement, 59 Stat. 1701, T.I.A.S. No. 488, 171 U.N.T.S. 387 (1953) [hereinafter cited as Transport Agreement], which has not entered into force.

The Transit Agreement provides for the privileges of: (1) flying across each contracting States' territory and of landing for non-traffic purposes; (2) taking on passengers, mail, and cargo destined for the territory of the State whose nationality the aircraft possesses: and (3) taking on passengers, mail, and cargo destined for the territory of any other contracting State, and delivering passengers, mail, and cargo coming from any such territory.

Acceptance of the Transport Agreement has been rather limited and *slow*. *See generally,* WENCESLAS J. WAGNER, INTERNATIONAL AIR TRANSPORTATION AS AFFECTED BY STATE SOVEREIGNTY 140-43 (1970). By 1984, 95 nations had accepted the Transit Agreement, while only 12 were parties to the Transport Agreement. By 2002, 118 nations had ratified the Transit Agreement, while still only 12 were parties to the Transport Agreement. Status of Certain International Air Law Instruments, ICAO J. (Nov. 6, 2002), at 36-38. Though its initial champion, the United States withdrew from the Transport Agreement in 1946. Withdrawal of the United States of America, Dep't of State Press Release No. 510 (July 25, 1046). 3 CCH AV. L. REP. ¶ 26,016.

[156] PAUL STEPHEN DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 51, 411-18 (1987).