The Chicago Convention

- **Article 1** recognizes that each State enjoys complete and exclusive sovereignty over the airspace above its territory.

- **Article 5** gives non-scheduled flights 1st and 2nd Freedom rights, but restricts carriage for compensation on 3rd and 4th Freedoms to "such regulations, conditions or limitations" as the underlying State deems desirable.

- **Article 6** provides that no scheduled flight may operate over or into the territory of a State without its permission, and pursuant to any terms or conditions thereon.

- The Chicago Conference produced two multilateral documents to exchange such rights – the **Transit Agreement** (exchanging First and Second Freedom rights), and the **Transport Agreement** (exchanging the first Five Freedoms).

- The former has been widely adopted, while the latter has received few ratifications.
First Freedom

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

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.
The First and Second Freedoms were multilaterally exchanged in the Transit Agreement concluded at the Chicago Conference in 1944.

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

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

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

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

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

An airline operating entirely outside the territory of its State 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 State to another point in the same State on a flight which originates in the airline’s home State. (This right is more commonly known as consecutive cabotage, in which domestic traffic is reserved to domestic carriers).
Ninth Freedom

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

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

Thus, bilateral air transport agreements have become the principal vehicle for implementing the rights conferred to States under Articles 1 and 6 of the Chicago Convention to authorize international scheduled air services to, from and through their territory.

Today, there are more than 2,500 bilateral air transport agreements between nearly 200 States.
“Any nation, except during that the time that it is committed otherwise by the Transit or Transport or other special Agreements, is still fully authorized to take advantage of its own political position and bargaining power, as well as the fortunate geographical position of its homeland and outlying possessions, and unilaterally determine (for economic or security reasons) what foreign aircraft will be permitted to enter or be excluded from its airspace, as well as the extent to which such airspace may be used as part of world air trade routes.”
Early bilateral air transport agreements typically addressed several issues:

1. entry (designation of carriers and routes);
2. carrier nationality;
3. capacity;
4. rates;
5. discrimination and fair competition; and
6. dispute resolution.
Typically, States exchanged traffic rights on a *quid-pro-quo* basis. Bermuda I-type bilaterals usually identified the routes to be served in an Annex appended thereto, which would be revised periodically with an exchange of notes. Typically, each State designated one of its flag carriers per city-pair route.
Substantial Ownership and Effective Control

- Section 5 of the Transit Agreement, and Section 6 of the Transport Agreement, provide: “Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State . . . .”

- Like their predecessors, traditional and modern “Open Skies” bilaterals require that “substantial ownership and effective control” be vested in the nationals of the State designating the airline, and that failure to meet this requirement would entitle either nation to revoke, suspend or limit the operations of the offending airline.
Bermuda I: CAPACITY

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

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

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

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

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

However, many non-US bilaterals provided for predetermination of capacity, measured by flight frequency or aircraft size.
Bermuda I specified that airport charges could be no higher than those imposed upon domestic airlines. Taxes, customs duties, and inspection fees, imported fuel and spare parts would be accorded treatment not less favorable than that accorded like items brought in by domestic airlines.
Bermuda I: DISPUTE RESOLUTION

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

Termination of the bilateral air transport agreement could be only upon one year's prior notice.
Rates were to be set initially by the airlines themselves, subject to prior approval by each of the governments involved upon 30-days notice.

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

Prior to 1960, most *Bermuda I*-type agreements contained an explicit endorsement of the IATA rate-making machinery.
Canada’s Policies on Negotiation

- Canada’s principal goals when negotiating air agreements are to:

- Provide a framework that encourages competition and the development of new and expanded international air services to benefit travellers, shippers, and the tourism and business sectors.

- Provide opportunities for Canadian airlines to grow and compete successfully in a more liberalized global environment.

- Enable airports to market themselves in a manner that is unhindered by bilateral constraints to the greatest extent possible.

- Support and facilitate Canada’s international trade objectives.

- Support a safe, secure, efficient, economically healthy and viable Canadian air transportation industry.

Modern Bilateral Air Transport Agreements

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

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

In 1992, the US began negotiating even more liberal “open skies” bilaterals, and conferring upon the air carriers of States antitrust immunity for their alliances.
Open Skies

- 1992 - the United States concluded the first second generation “open skies” agreement with the Netherlands. It allowed KLM and any other Dutch carrier to fly to any point in the United States, and allowed U.S. carriers to fly to any point in the Netherlands, a country about the size of West Virginia. The U.S. was ideologically wedded to open markets, so the imbalance in traffic rights was of no concern. Moreover, opening up the Netherlands would allow KLM to drain traffic from surrounding airline networks, which would eventually encourage the surrounding airlines to ask their governments to sign “open skies” bilateral with the United States.

- 1993 - the U.S. conferred antitrust immunity on the Wings Alliance between Northwest Airlines and KLM. The encirclement policy began to corrode resistance to liberalization as the sixth freedom traffic drain began to grow; soon Lufthansa, then Air France, were asking their governments to sign liberal bilaterals.

- 1996 - Germany fell, followed by the Czech Republic, Italy, Portugal, the Slovak Republic, Malta, and Poland.

- 2001 - the United States had concluded bilateral open skies agreements with 52 States and concluded its first multilateral open skies agreement with Brunei, Chile, New Zealand and Singapore.

- 2002 – France fell.

- 2007 - The U.S. and E.U. concluded a multilateral “open skies” traffic agreement that liberalized everything but foreign ownership and cabotage.

- 2010 – Japan fell.

- 2011 – cumulatively, the U.S. had signed “open skies” bilaterals with more than 100 States.
US Initiatives

- 1977-78 U.S. Airline Deregulation
- 1978 First Generation “Open Skies” Bilaterals negotiated with Benelux Countries
- 1990 “Cities Program”
- 1992 Second Generation Open Skies Bilateral negotiated with the Netherlands
- 1993 Antitrust Immunity Granted to NW/KL
- 1995 Open Skies Bilaterals with Switzerland, Finland, Denmark, Norway, Sweden
- 1996 Germany falls
- 1997 Singapore, Taiwan, Malaysia
- 1998 Korea
- 1999 U.A.E.
- 2001 France falls
- 2005 India
- 2007 Canada, Argentina
- 2008 US/EU ratify “Open Skies Plus”
OPEN SKIES BILATERALS:

(1) Open entry on all routes;
(2) Unrestricted capacity and frequency on all routes;
(3) Unrestricted route and traffic rights, that is, the right to operate service between any point . . . including no restrictions as to intermediate and beyond points, change of gauge, routing flexibility, coterminalization, or the right to carry Fifth Freedom traffic;
(4) Double-disapproval pricing in Third and Fourth Freedom markets;
(5) Liberal charter arrangement (the least restrictive charter regulations of the two governments would apply, regardless of the origin of the flight);
(6) Liberal cargo regime (criteria as comprehensive as those defined for the combination carriers);
(7) Conversion and remittance arrangement (carriers would be able to convert earnings and remit in hard currency promptly and without restriction);
(8) Open code-sharing opportunities;
(9) Self-handling provisions (right of a carrier to perform/control its airport functions going to support its operations);
(10) Procompetitive provisions on commercial opportunities, user charges, fair competition and intermodal rights; and
(11) Explicit commitment for nondiscriminatory operation of and access for computer reservation systems.
Free Market Competition
No restrictions on international route rights; number of designated airlines; capacity; frequencies; or
types of aircraft.

Pricing Determined by Market Forces
A fare can be disallowed only if both governments concur -- "double-disapproval pricing" -- and only
for certain, specified reasons intended to ensure competition.

Doing Business Protections
For example:
  o All carriers of both countries may establish sales offices in the other State, and convert earnings
    and remit them in hard currency promptly and without restrictions.
  o Carriers are free to provide their own ground-handling services -- "self handling" -- or choose
    among competing providers. Airlines and cargo consolidators may arrange ground transport of air
cargo and are guaranteed access to customs services.
  o User charges are non-discriminatory and based on costs.

Cooperative Marketing Arrangements
Airlines may enter into code-sharing or leasing arrangements with airlines of either State, or with
those of third countries. An optional provision authorizes code-sharing between airlines and surface
transportation companies.

Provisions for Consultation and Arbitration
Model text includes procedures for resolving differences that arise under the agreement.

Liberal Charter Arrangements
Carriers may choose to operate under the charter regulations of either State.

Safety and Security
Each government agrees to observe high standards of aviation safety and security, and to render
assistance to the other in certain circumstances.

Optional 7th Freedom All-Cargo Rights
Provides authority for an airline of one State to operate all-cargo services between the other State and
a third State, via flights that are not linked to its homeland. (source: US Dep’t of State)
<table>
<thead>
<tr>
<th>Year</th>
<th>Entity</th>
<th>Total # Open Skies*</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>Bangladesh</td>
<td>111</td>
</tr>
<tr>
<td>2010</td>
<td>Japan</td>
<td>99</td>
</tr>
<tr>
<td>2008</td>
<td>Laos</td>
<td>94</td>
</tr>
<tr>
<td>2005</td>
<td>Maldives</td>
<td>67</td>
</tr>
<tr>
<td>2005</td>
<td>India</td>
<td>65</td>
</tr>
<tr>
<td>2004</td>
<td>Indonesia</td>
<td>63</td>
</tr>
<tr>
<td>2001</td>
<td>Sri Lanka</td>
<td>56</td>
</tr>
<tr>
<td>1999</td>
<td>Pakistan</td>
<td>33</td>
</tr>
<tr>
<td>1998</td>
<td>Korea</td>
<td>30</td>
</tr>
<tr>
<td>1998</td>
<td>Malaysia</td>
<td>24</td>
</tr>
<tr>
<td>1997</td>
<td>Taiwan</td>
<td>16</td>
</tr>
<tr>
<td>1997</td>
<td>Brunei</td>
<td>15</td>
</tr>
<tr>
<td>1997</td>
<td>Singapore</td>
<td>14</td>
</tr>
</tbody>
</table>
By 2008, the US had signed bilateral air transport agreements with 114 States, of which, 73 were “Open Skies” bilaterals.

By 2009, the US had concluded 94 “Open Skies” bilaterals.

By 2011, the US had concluded 102 such bilateral agreements.

By 2012, 107 agreements had been concluded.
US OPEN SKIES AGREEMENTS:

1. *Netherlands
2. *Belgium
3. *Finland
4. *Denmark
5. Norway
6. *Sweden
7. *Luxembourg
8. *Austria
9. Iceland
10. *Czech Republic
11. *Germany
12. Jordan
13. Singapore
14. Taiwan
15. Costa Rica
16. El Salvador
17. Guatemala
18. Honduras
19. Nicaragua
20. Panama
21. New Zealand
22. Brunei
23. Malaysia
24. Aruba
25. Chile
26. Uzbekistan
27. Korea
28. Peru
29. Netherland Antilles
30. *Romania
31. *Italy
32. U.A.E.
33. Pakistan
34. Bahrain
35. Tanzania
36. *Portugal
37. *Slovak Republic
38. Namibia
39. Burkina Faso
40. Turkey
41. Gambia
42. Nigeria
43. Morocco
44. Ghana
45. Rwanda
46. *Malta
47. Benin
48. Senegal
49. *Poland
50. Oman
51. Qatar
52. *France
53. Sri Lanka
54. Uganda
55. Cape Verde
56. Samoa
57. Jamaica
58. Tonga
59. Albania
60. Madagascar
61. Gabon
62. Indonesia
63. Uruguay
64. India
65. Paraguay
66. Maldives
67. Ethiopia
68. Thailand
69. Mali
70. Bosnia and Herzegovina
71. Cameroon
72. Cook Islands
73. Chad
74. Kuwait
75. Liberia
76. Canada
77. *Bulgaria
78. *Cyprus
79. *Estonia
80. *Greece
81. *Hungary
82. *Ireland
83. *Latvia
84. *Lithuania
85. *Slovenia
86. *Spain
87. *United Kingdom
88. Georgia
89. Australia
90. Kenya
91. Laos
92. Armenia
93. Zambia
94. Trinidad & Tobago
95. Switzerland
96. Japan
97. Croatia**
98. Israel**
99. Barbados**
100. Colombia**
101. Brazil
102. Saudi Arabia
103. Macedonia
104. St. Kitts
105. Montenegro
106. Suriname
107. Sierra Leone
108. Macedonia
109. Seychelles
110. Yemen
111. Guyana
112. Bangladesh
113. Botswana
114. Equatorial Guinea
Antitrust Immunity Conferred by USDOT to:

- American-CAI
- American-British Airways
- American-Finnair
- American-LAN Chile
- American-Sabena-Swissair
- American-TACA Group
- American-Swiss Int’l Air Lines
- Continental-COPA
- Delta-Austrian-Sabena-Swissair
- Delta-Air France-Alitalia-Czech Airlines
- Delta-Korean Air Lines-Air France-Alitalia-Czech Airlines
- Northwest-KLM
- Northwest-KLM-Alitalia
- Northwest-Malaysia
- United-Asiana Airlines
- United-Lufthansa
- United-Lufthansa-SAS
- United-Austrian-Lauda-Lufthansa-SAS
- United-British Midland-Austrian-Lauda-Lufthansa-SAS
- United-Air Canada
- United-Air New Zealand
- SAS-Icelandair
By 2010, the highest levels of integration under antitrust immunity in “metal neutral” joint ventures had been achieved by the following airlines:

- **Air Canada, Lufthansa, United-Continental**
- **Air France-KLM, Alitalia, Delta**
- **American, British Airways, Iberia**

Hierarchy of Intercarrier Agreements

- Code-Sharing
- Coordination of Prices and Schedules
- Revenue & Profit-Sharing Joint Venture
- Frequent Flyer Program Agreements
- Interlining: T&B and Joint Fare Agreements
The MALIAT Accord

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

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

Despite the fact that the MALIAT agreement is open for ratification by other States, they have not been beating down the doors to sign. In addition to the original signatories, Samoa, Tonga and Peru joined in 2004, and then Peru withdrew the following year. Mongolia subsequently joined.
THE YAMOUSSOUKRO DECISION

- In 1988, African Ministers met in Yamoussoukro, Ivory Coast, to consider liberalization of air transport policy on a multilateral basis.
- After a series of meetings, they announced the “Yamoussoukro Decision” in 1999, and it was formally adopted by the African Union in 2000; it formally came into force in December 2003.
- The West African Economic and Monetary Union adopted a multilateral agreement for its eight member states (i.e., Benin, Burkina Faso, Ivory Coast, Guinea-Bissau, Mali, Niger, Senegal and Togo) implementing the Yamoussoukro Decision.
<table>
<thead>
<tr>
<th>Provision</th>
<th>MALIAT ACCORD AND YAMOUSSOUKRO DECISION</th>
<th>Yamoussoukro</th>
</tr>
</thead>
<tbody>
<tr>
<td>Routes</td>
<td>Open Routes</td>
<td>Open Routes</td>
</tr>
<tr>
<td></td>
<td>Open Traffic Rights including</td>
<td>Open First, Second,</td>
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<tr>
<td></td>
<td>Seventh Freedom Cargo</td>
<td>Third, Fourth, and</td>
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<tr>
<td></td>
<td></td>
<td>Fifth Freedom Routes</td>
</tr>
<tr>
<td>Capacity</td>
<td>Open Capacity and Frequency</td>
<td>Open Capacity and</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Frequency</td>
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<tr>
<td>Operations</td>
<td>Operational Flexibility, including</td>
<td>No provision</td>
</tr>
<tr>
<td></td>
<td>Change of Gauge, Aircraft Type, Co-</td>
<td></td>
</tr>
<tr>
<td></td>
<td>terminalization, and International Rights</td>
<td></td>
</tr>
<tr>
<td>Airline Designation</td>
<td>Unlimited</td>
<td>At least one airline (but can be from another State party) or African multilateral airline</td>
</tr>
<tr>
<td>Code Sharing</td>
<td>Unlimited</td>
<td>No provision</td>
</tr>
<tr>
<td>Pricing</td>
<td>Open pricing and minimal tariff filing</td>
<td>No approval required, but 30 days prior filing (except for price decreases)</td>
</tr>
</tbody>
</table>
European Union Initiatives

- 1993: Third package of liberalization opens all routes (including cabotage) and all rates to community carriers;
- 2001: European Court of Justice rules all bilaterals with preferences for flag carriers are unlawful under EU law; and
The Agreement authorizes every U.S. and every EU airline (irrespective of flag) to:

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

The Open Skies Plus framework of the Agreement would:

- Allow U.S. investors to invest in a European Community airline, so long as the airline is majority owned and effectively controlled by a member State and/or nationals of member States;
- Make clear that, under U.S. law, EU investors may hold up to 49.9 percent of the total equity in U.S. airlines, and on a case-by-case basis even more;
- Open the possibility for EU investors to own or control airlines from Switzerland, Lichtenstein, members of the European Common Aviation Area (ECAA), Kenya, and America’s Open Skies partners in Africa without putting at risk such airlines’ rights to operate to the United States; and,
- Grant new traffic rights to EU carriers that would open the door to cross-border airline mergers and acquisitions within the EU, which is possible today only if airlines are prepared to place their international operating rights in legal jeopardy.
ARTICLE I

A The Parties agree:

1. To facilitate acceptance by each Party of the other Party’s (a) airworthiness approvals and environmental testing and approvals of civil aeronautical products, and (b) qualification evaluations of flight simulators;

2. To facilitate acceptance by the Parties of the approvals and monitoring of maintenance facilities and alteration or modification facilities, maintenance personnel, flight crew members, aviation training establishments, and flight operations of the other Party;

3. To provide for cooperation in sustaining an equivalent level of safety and environmental objectives with respect to aviation safety.
B. Each Party hereby designates its civil aviation authority as the executive agent to implement this Agreement. For the Government of the United States, the executive agent shall be the Federal Aviation Administration (FAA) of the Department of Transportation. For the Government of the Republic of Singapore, the executive agent shall be the Civil Aviation Authority of Singapore (CAAS).
ARTICLE III

A. The Parties’ civil aviation authorities shall conduct technical assessments and work cooperatively to develop an understanding of each other’s standards and systems in the following areas:

- 1. Airworthiness approvals of civil aeronautical products;
- 2. Environmental approval and environmental testing;
- 3. Approval and monitoring of maintenance facilities and maintenance personnel;
- 4. Approval and monitoring of flight operations and flight crew members;
- 5. Evaluation and qualification of flight simulators; and
- 6. Approval and monitoring of aviation training establishments.
B. When the civil aviation authorities of the Parties agree that the standards, rules, practices, procedures, and systems of both Parties in one of the technical specialties listed in paragraph (A) of this Article are sufficiently equivalent or compatible to permit acceptance of findings of compliance made by one Party for the other Party to the agreed-upon standards, the civil aviation authorities shall execute written Implementation Procedures describing the methods by which such reciprocal acceptance shall be made respect to that technical specialty.
AIR TRAFFIC RIGHTS

By
Paul Stephen Dempsey
McGill University Institute of Air & Space Law
welcome to the institute of
AIR & SPACE LAW
Postgraduate Law Degrees and Certificate Programs
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