

# CHICAGO CONVENTION REVISITED: REVIEW OF CHICAGO CONVENTION AND BILATERALISM IN AIR SERVICES

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Chicago Convention 1944<sup>1</sup> is the basis of the present regime of civil aviation system. It also created International Civil Aviation Organization and its detailed articles are mentioned in it.

## 1. ACHIEVEMENTS

Starting with 44 contracting countries in 1944, there are now 198, only two short of the UN membership who have ratified the Chicago Convention 1944. The Convention provides for the formation of International Civil Aviation Organization (ICAO) and gives it a legal form with detailed articles.

Along with the main Convention two more Agreements were negotiate also in Chicago in 1944: International Air Transit Agreement and International Air Transport Agreement.

The Chicago Convention has withstood the test of time and has seen only three major amendments in its 66 years of existence.

ICAO has faced many crisis, the last one being the use of civil aircraft as a weapon of mass destruction on 9th November 2001 at New York. This led to a major revamp of the Standards and Recommended Practices (SARPs) and introduction of Audits.

It has also seen mammoth growth of air traffic and managed to keep up the regulations. Air transport has now become the preferred means of travel and has 'shrunk' the world

## The Chicago Convention of 1944

*Article 1 affirms the "complete and exclusive sovereignty" of every State over "the airspace above its territory" while Article 6 prohibits scheduled international flights over the territory of a State, "except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization". Hence, scheduled international flights through or into foreign airspace is prohibited unless authorized by the State whose air territory is penetrated. This could be by a specific permission or an agreement. Normally States enter into bilateral agreements for scheduled flights between countries.*

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**Aircraft Nationality**

Article 17 of the Chicago Convention provides that, "Aircraft shall have the nationality of the State in which they are registered".

Article 18 provides that aircraft may not be registered in more than one State.

Article 31 and 32 require registering States to provide such aircraft with a certificate of airworthiness, and issue certificates of competency and licenses for pilots and flight crew.

However, **airline nationality** is nowhere addressed in the main Chicago Convention.<sup>2</sup> Multilateral and Bilateral Air Transport Agreements 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 not vested in nationals of a contracting State . . . ." This issue has become a major requirement for bilateral agreements and a major deterrent to cross border ownership of Airlines. This trend has continued in the modern open skies agreements. Like their predecessors, modern "Open Skies" bilaterals also require "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.

**Role of the Council**

The Council is a legislative body of 36 elected countries. It makes international Air Law after due diligence and a process based on consensus. The council has also grown in size from 21 to 36 over the years.<sup>3</sup>

Making of Standards and Recommended Practices (SARPs) which form as Annexures to the Chicago Convention is its core mandatory functioning.

It makes them from very technical issues of navigation to security and facilitation issues including passport types.

An elected Air Navigation Commission also ably assists it in its decision making process.<sup>4</sup>

**Settling Disputes**

ICAO Council's mandatory role in settling disputes between contracting states has been a mixed bag. Many disputes are settled informally in an amicable manner and don't get noticed.

Some of the more prominent disputes settled by the Council under Article 84 and 85 of the Chicago Convention are:

### **Dispute between India and Pakistan**

In 1952 India complained to ICAO regarding restricting passage of aircrafts over Pakistan to Afghanistan. Because of ICAOs intervention a friendly settlement was reached.

In 1971 India banned over flights of Pakistani aircrafts because an Indian aircraft was forced to land at Lahore airport and subsequently destroyed. Pakistan filed a complaint with the ICAO Council. India went on appeal to ICJ on the issue of Jurisdiction.

### **Dispute between US and Cuba**

Dispute between US and Cuba over flights by Cuban planes over US territory was amicably settled by the Council of ICAO.

### **Dispute between US and EU**

Dispute between US and the EU over Emissions was also resolved by the President of ICAO on behalf of the Council.

### **Safety and Security Audit**

To add greater teeth to its functioning it has introduced Safety and Security Audit for each contracting country which makes implementation more effective and allows a watchdog function to ICAO.<sup>5</sup>

Safety audit has been made public so all countries are aware of each others strong and weak points. This has had a major impact on defaulting states as there was no other provision for enforcement of its SARPs.

Security audits are still confidential.

### **Sovereignty and Chicago Convention**

Article1 of the Convention clearly recognizes exclusive sovereignty of a state over its airspace. This along with International Air Transport Agreement of 1944 has led to the concept of bilateralism in air services between countries. International Air Services Transit Agreement of 1944, however, provides in section 3 that non-stop flyover and stoppage for non-tariff purposes shall be on non-discriminatory basis.

Exclusive sovereignty has led to the right of each state to go in for bilateral agreement with another state on basis of mutual advantage. Mutual advantage is without any rules and is based on perceived advantage of each side. National airlines generally participate in the inter-governmental agreements and try and get as much commercial advantage as possible.

## **2. SHORTFALLS OF CHICAGO CONVENTION**

### **Result of Bilateralism**

Bilateralism has led to a cobweb of Agreements which are not always in public domain. This has led to an uneven growth of civil aviation. In fact, many states followed over-restricted policies mainly on the pressure of their national airline not understanding the harm it is causing to their own growth. Aviation is a major driver of growth in the last few decades. Even in cargo sector about 40% of cargo in value terms travels by air. Trade and Tourism are directly dependent upon efficient air services. With improved technology in aircrafts including longer endurance, point to point service is leading to a major growth both in international trade and tourism. Those countries that realize this and have liberalized their skies have benefitted from it.

Bilateralism also led to many deviations and unnecessary conflicts. The traditional philosophy of bilateralism was based on actual demand between two countries and did not cater for beyond or earlier points. This is being corrected by accepting and allowing airlines 5th and 6th freedoms.

### **Rise of Regionalism**

As a result of insufficiencies of bilateralism in the growing international travel and globalization whose major engine was the civil aviation, US insisted in many cases limited open skies which became better known as the Bermuda type agreements.

Bermuda type agreements allowed unlimited flights between two or more international destinations.

The next stage was to go for regional limited open sky between groups of countries.

### **Recent Multilateral Efforts Towards Liberalization**

2001 – APEC Agreement (“Kona Accord”) included optional provisions waiving ownership requirements and substituted effective control, incorporation and principal place of business requirements.

2002 – OECD model all cargo template.

## **OWNERSHIP BY FOREIGN AIRLINES IN AIRLINES OF ANOTHER COUNTRY**

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, modern “Open Skies” bilaterals continue to require “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.

Nationality rules are discretionary and may be waived. Foreign ownership restrictions are not unique to aviation, and exist in broadcasting, telecommunications, electric and nuclear power production, shipping and banking. The U.S. has waived the nationality requirements for airlines registered in states that met FAA Category I safety/security requirements, and that have concluded an "Open Skies" bilateral with the U.S. When Iberia Airlines gained control of Aerolíneas Argentinas, the U.S. did not object to the fact that Spanish citizens owned and control the Argentine carrier after Argentina opened the bilateral to expand traffic rights for U.S. carriers. Conversely, when British Airways sought to gain effective control of USAir, the U.S. stalled until the issue of Heathrow access under Bermuda II was resolved.<sup>6</sup> Hence, the presence of an ownership and control restriction can be an effective lever to pry loose concessions that would be unattainable absent formal renunciation of the bilateral in the most liberal country, the US to qualify as a U.S. flag carrier; U.S. citizens must hold at least 75% of the voting equity. (EU wants this relaxed).

#### **Recent Multilateral Efforts Toward Liberalization**

2001—*APEC Agreement Kona Accord* included optional provisions waiving ownership requirements, and substituted effective control and principal place of business requirements.

2002—*OECD model all cargo template*: Irrespective of the nationality of the airlines majority owner, the carrier would incorporate itself in a certain country, and operate under its regulatory control. EU is a newly emerging institution which is taking away the sovereignty of its member states in many respects. A common sky policy and the right to participate by EU in all bilateral negotiations of its member states are their main trend in aviation sector.

2002—*EU Court of Justice decision*: under the Right of Establishment provisions of Community Law, no member State may conclude a bilateral air transport agreement that excludes any Community carrier from operating on the traffic rights provided under the bilateral.

2003—*ICAO Fifth Worldwide Air Transport Conference* drafted a model clause for insertion into bilaterals that focused on an airlines principal place of business and effective regulatory control. Permanent residence was an optional requirement. Australia and New Zealand have created a common aviation area.

#### **Arguments in Favour of Preserving the Status Quo**

As in the maritime trade, elimination of the foreign ownership restrictions would enable the creation of "flags of convenience"<sup>7</sup> in international aviation, with owners of airlines shopping for countries with the least burdensome labour laws, safety and environmental requirements;

It could compromise national security, given reliance on the civilian commercial airline fleet for needed lift capacity in time of international conflict, such as the US Civil Reserve Air Fleet [CRAF] program; It would eliminate competition in the city pair markets dominated by the acquired and acquiring airline;

Because national airlines also sit along with country delegations in bilateral air service negotiations and if a foreign airline has effective control over a national airline it may sit as an advisor on both sides of the negotiating table. This would undermine the integrity of bilateral air transport negotiations in the following manner:

It would enable a carrier from a nation with less desirable bilateral relationships to take advantage of a third nation's more liberal bilateral relationships; and

It would reduce bargaining leverage against a carrier whose government had not conceded comparable bilateral opportunities to those being exercised under the bilateral whose rights the foreign carrier was operating.

**Has Chicago Convention** over lived its utility? Does it need an overhaul? The answer is Yes and No. There is no doubt that Chicago Convention has been very crucial to the growth of a nascent airline industry. Along with IATA, the International Airline Association it has seen to the tremendous growth in civil aviation leading to integration of world both for business and pleasure. It has overseen the tremendous task of regulating this growth in a harmonious way from all parts of the world, bringing in order in both safety and security of travel so much so that air travel is, perhaps the safest mode of travel. In doing so International Civil Aviation Organization has brought in detailed legislation both by way of Standards and Recommended Practices and 18 detailed Annexes to air law. Further, its guidelines in all area of aviation from technical radio waves to facilitation by improved passport.

Two major shortcomings in Chicago Convention was the concept of bilateral air service agreements based on sovereignty of air space of a nation and the need to have an airline substantially owned and effectively controlled by the nationals of a State. In this context it may be stated that most Airlines the world over, except for the US stated as public sector airlines funded by the state. In India it was like US but after independence all private airlines were nationalised.<sup>8</sup> While growth of this industry has been phenomenal, except for a few airlines like the Singapore or Emirates, many had difficult financial times and got sold off into private sector. The nature of Airline industry worldwide went through a change with the perennial overcapacity problems of airlines leading to frequent losses. Financial aspects of airline industry became fragile. On top of this was added the concept of "Substantial Ownership and effective Control" This has led to a strange and peculiar situation in the airline industry which is global in nature but is unable to merge and acquire each other which happens in other industries. The airlines started to adopt new measures and mechanisms to bye

pass this problem. This was done through new concept of code sharing, joint ventures, profit sharing and finally to global alliances.

The inadequacies of Chicago Convention provided innovative methods. It may however, be stated that the Chicago Convention does stated in its Preamble:—

“Therefore the undersigned governments had agreed on certain principles and arrangements in order that International Civil Aviation may be developed in a safe and orderly manner and that the International Air Transport Services may be established on basis of equality of opportunity and operated soundly and economically”. While the Preamble does provide for operating air transport services soundly and economically, there has been no major thinking on this issue. In fact, IATA had originally come up as a cartel to fix price of ticket, but with US objection in subsequent years this was dropped and airlines went in for cut-throat competition leading to many airlines going insolvent. This issue has not been tackled by ICAO but looking into the recent worldwide recession it could be taken up. While anti-competition laws have become very assertive, excessive growth of airline fleets leading to financial difficulties has not been considered by ICAO so far.

### **3. ISSUES FOR THE FUTURE**

#### **World Trade Organization and ICAO**

With the coming into being of WTO the Chicago Convention requires a fresh look. This is so because WTO covers Trade in Services also and aviation as a service falls well within its domain.

While Chicago Convention laid emphasis on Sovereignty and bilateralism, WTO believes in trade and services without discrimination.

#### **Main Features of WTO**

Most Favored Nation: WTO wants a country to treat all other countries equally in trade of goods and services. This is the concept of Most Favored Nation. It implies that a country should not normally discriminate between trading partners. In terms of civil aviation in bilateral agreements it should follow a more transparent and non-discriminatory policy between all countries.

This negates the concept of bilateral agreements on air services under the Chicago convention where no two bilateral agreement may have anything in common.

##### **(a) National Treatment**

Another principle of WTO is National Treatment: treating foreigners and locals equally. This concept is not present under Chicago Convention and therefore, national airlines tend to enjoy advantages.

Reverse is also possible i.e. Chicago Convention provides for Aviation fuel and some other imports free of taxes to foreign aircrafts. In India while foreign airlines enjoy such tax free advantages, our airlines going abroad don't and therefore suffer disadvantage.

(b) Level Playing Field

Bilateralism is also based on the principle of level playing field. Both sides must get equal mutual advantage. However relative weight of the economic size of the country and the size of its fleet are two important variables amongst others. However, in bilateral negotiations it's the bargaining capacity of each side is of great advantage as there is no appeal once agreement is signed.

### **WTO And Chicago Convention**

The philosophical difference between Chicago Convention and WTO are immense. However, developed aviation powers realize that a protected regime of air services does more harm than good to an economy. Further, protecting national airlines against foreign airlines can be detrimental to an economy.

In practice liberal bilateralism leading to open sky or even regional open sky is gaining greater recognition.

To this extent there is a natural movement from restricted bilateral agreement to regional open sky is becoming more acceptable.

The philosophical differences between Chicago Convention and WTO are, therefore, narrowing down on their own.

### **National Airlines, Ownership and Control of Airlines**

The clear demarcation drawn up in 1944 between nationality of an aircraft and of airline company is becoming blurred. Cross/Joint ownership is making the concept of 'substantial ownership and effective control' difficult to implement. New definitions are being propounded. The need of the hour is to recognize that Airline industry is a very capital intensive and competitive industry. The concept of Flag Carriers must be replaced by the concept of airline as any other industry. However, there are two issues in this. The first one is the issue of big fish eating the small one. This will mean that if airlines are allowed to cross purchase each other there would be mergers, acquisition and consolidation. This will lead to many countries not having their own airline. This in turn could lead to two problems. First, of poor service to a country dependent upon an airline based abroad. Second, it could lead to some issues of internal security as national airlines are considered as a strategic asset to be used in an emergency. India deployed its civil fleet for emergency troop movement in Kashmir in 1947 and again for rescue of Indians stranded in Kuwait during Gulf War I which also a landmark and appeared in the Guinness Book of Records. In case of emergency most countries keep a provision of compulsory requisition of civil fleet. If there is no civil airline and a fleet of civil



planes registered in some other country then this aspect becomes a great liability. The second issue is that the extent to which we can allow an airline registered in a country to have foreign ownership. Also domestic air travel normally does not allow foreign airline ownership. The present requirement is that an airline should be substantially owned and effectively controlled. However with more globalization and the need for airlines to enhance its capital base by way of equity infusion which may not be readily available within the country, need to get equity from abroad is keenly felt. The moment equity held by foreign parties goes over 50% it does not remain 'substantially owned and effectively control'. If a foreign airline owns a substantial portion of equity then other issues of competition and cartelization also comes up at times. The concept of 'substantially owned and effectively controlled' is being substituted in bilateral agreements by 'principle place of businesses to over come the above issue.

While the US does not allow more than 49% foreign voting equity in a US registered airline, the European Union has gone a step ahead and has allowed cross ownership within the European Union and has called all airlines registered in the EU as 'Community Carriers'. Under this definition all airlines registered in EU member countries are treated as if they were part of one country where cross ownership is allowed.

### **Aviation Security**

Each sovereign nation is responsible to provide security of all types within its boundaries. However with the changing nature of security which spreads across countries largely due to civil aviation, security cannot be treated as a sovereign function. The history on aircraft hijacking shows this and its culmination is the incident of the use of aircrafts as missiles in New York on 11th Sept 2001. Since 11th September 2001 incident there has been a major shift in the world wide inter dependent security scenario but security still remains a sovereign function with ICAO providing an overall umbrella of regulation. Post 9/11 ICAO has managed an Audit of National Aviation Security on a voluntary basis of all members, but it is inadequate and insufficient. A global approach to security is the need of the day and there is a need for interoperability of security personnel. The Universal Security Audit Programme (USAP) was launched by ICAO in 2002 in a six year cycle to provide high standards of security, quality control, training and certification of auditors.

Chicago convention provides standards and Recommendations for only international aviation and domestic aviation security is left to the country concerned. This contention cannot be accepted. The incident of 9/11 amply proves that a weak domestic security set up was used by international terrorists to achieve their aims.

ICAOs voluntary security audits are now practically compulsory. However a voluntary agreement is drawn up before audit and the audit report is not made public or shown in full to member countries.

Civil Aviation can no longer afford the luxury of allowing international security to remain a sovereign function with international audit and domestic security be kept outside the sphere.

With such intense globalization in air travel with domestic and international interconnectivity increasing, it is necessary to integrate the two securities under overall supervision of ICAO. It may be pointed out that the attack on Twin Towers of New York on 11 September 2001 by hijacking of civil aircrafts was all done in domestic flights of US and no international flight was involved.

### **Globalization with Aviation Security**

With massive increase in international air travel which could not have been dreamt of in 1944 along with seamless integration of domestic and international travel the issues of aviation security become global concern. No state can now claim that domestic aviation can remain a domestic concern.

While ICAO is seized of the issue, it is felt that a greater degree of integration of the two securities is needed to make international travel safe. Answer lies in amendment of the Chicago Convention to allow ICAO to inspect domestic security also.

### **Environment and Chicago Convention**

ICAO has been working hard to bring about a consensus on issues of emissions and noise. Aviation sector by its very nature crosses national boundaries. Aircraft emissions cannot be confined to sovereign air space. Aircraft flying over 30,000ft or above cross international boundaries seamlessly but could be subject to the laws of the country they are overflying as emissions coming out of the aircraft at that height impact the region and not just the sovereign air space.

Emission standards vary between countries but are difficult to implement in aircrafts unlike automobiles. Sovereignty comes in conflict with international norms. ICAO needs to provide standards which can be checked and implemented.

Noise is yet another issue which needs regulation. Airport noise and noise due to overflying at low heights, especially near airports has led to local protest leading to night curfews at many airports in developing country. Such unilateral decisions by a municipality or city are not conducive to orderly growth of aviation. If all airports around the world close down at night then international air transport will become very difficult to manage, especially getting landing slots at airports. ICAO needs to come out with Standards and Recommended Practices on this issue.

### **Unilateral Taxation on Emissions**

The tendency to over-reach and have more stringent standards than ICAO also has its pitfalls as EU is attempting. Airline industry is perhaps one of the highest taxed industry in the world. On top of it there are moves to have an emission tax on a global level put on it which will make it more difficult to survive.

### **Health**

International health issues of pandemics have proved that aviation can have major impact on health issues. SARs, H1N1 etc. have made the spread of virus truly global and cannot be considered localized.

### **Conclusion**

The role of Chicago Convention in orderly growth of civil aviation has indeed been tremendous since the last 66 years of aviation. ICAO was set by the Convention and it has been greatly successful in providing international air laws to the world. But with the growth came the issues of bilateralism in air traffic which has a highly protectionist tendency and also issues of ownership which dissuades cross country ownership and control. Airline industry is not treated on par with rest of the industry due to strategic and protectionist reasons which need to be overcome by suitable amendments.

### **Endnotes**

1. Convention on International Civil Aviation signed at Chicago on 7th December, 1944.
2. Chicago Convention mentions only aircraft nationality which will be based on its place of registration. However, Air Transport Agreement of 1944 mentions in Section 6 Air Transport Enterprise and brings in the concept of 'substantially owned and effectively controlled by the nationals of the State where it is registered'. However, this agreement has been ratified by eleven countries only.
3. The last increase in the Council Membership took place in 2003. Elections of the Council are held every three years.
4. The Membership in Air Navigation Commission was last increased to 19 members.
5. Universal Safety Oversight Audits Policy by ICAO on a voluntary basis was introduced in 1999 and Universal Security Audits Policy in 2002. It may be noted that security audits were introduced only after 9/11 incident.
6. Arranging airport landing slots are generally not part of bilateral negotiations. But in bilateral negotiations all extraneous issues can come up as discussions are based on mutual advantage.
7. "Flag of Convenience" concept prevalent in shipping can play havoc in Civil Aviation especially in context of safety and security. Small and poor states may encourage foreign airlines to setup Head Quarters of an airline entity which may be controlled by unscrupulous elements.
8. By Air Corporation Act of 1953 all airlines in India were nationalized and reorganized into two public sector airlines, Air India and Indian Airlines.

**Readings:**

1. Capital and Market Access in International Aviation: Nationality Requirements and Cabotage Restrictions by Prof. Dr. Paul Stephen Dempsey, McGill University Institute of Air & Space Law.
2. New Regulatory framework for Civil Aviation in India by Rohan Shah, Sudeep Mahapatra, Sumana Nagendaran, Mahfooz, Nazki, Manshur Nazki in *Emerging Trends in Air & Space Law*, Uppal Publishing House, New Delhi.