

Part IV

REGULATORY CONTENT

Chapter 1

INTRODUCTION TO REGULATORY CONTENT

1.1 Regulatory content is defined in the Foreword as “the particular subjects being regulated (such as market access, pricing and capacity)”. Part IV of the manual deals with subjects which make up the regulatory content in the economic field of international air transport. Air transport regulators face these regulatory content subjects in all three venues of regulation, i.e. national, bilateral and multilateral. Though distinct from one another, these subjects, in practice, are rarely treated in isolation because of their interrelationships.

1.2 Chapter 2 uses a building block approach to identify and explain the three basic market access rights, i.e. route, operational and traffic rights, which are the most important element of international air transport regulation. The chapter also discusses market access in terms of the so-called “Sixth Freedom”.

1.3 The subject of capacity, an important element of air transport regulation, is examined in Chapter 3. This chapter describes the involvement of governments in air carrier capacity regulation, and capacity regulation viewed from an air carrier perspective.

1.4 Air carrier tariffs, another principal element in economic regulation, are discussed in Chapter 4. Tariff-related terms, different types and characteristics of tariffs, and methods for regulating tariffs, as well as some key tariff issues are examined.

1.5 Chapter 5 discusses air carrier ownership and control, a subject that has evoked considerable interest in recent times because of the changes in the airline industry brought about by globalization, liberalization and privatization (which often involves transnational investment in air carriers). The chapter describes the traditional criteria used by States for airline designation and authorization, the rationale for their use, and some exceptions. It also briefly discusses the implications of foreign investment in air carriers and, lastly, examines some key issues in liberalizing airline ownership and control.

1.6 Chapter 6 deals with air cargo, an increasingly important component of international air transport, identifying the distinct features of air cargo and describing how air cargo service is regulated.

1.7 The subject of non-scheduled air services is covered in Chapter 7. It describes the characteristics which set it apart from scheduled air services, identifies the numerous kinds of international non-scheduled operations and discusses how governments regulate them.

1.8 Chapter 8 is devoted to airline commercial activities (sometimes referred to as “doing business” matters) which can be important in the provision of international air services in a foreign country. The activities described in this chapter are currency conversion and remittance of earnings, employment of non-national personnel, sale and marketing of international air transport, airline product distribution and electronic commerce, and aircraft leasing. They can, in certain circumstances, be regarded by air carriers and States with the same degree of importance as the three principal regulatory elements of market access, capacity and tariffs.

1.9 Chapter 9 provides information on three major airline cooperative activities, namely, airline alliances, codesharing and franchising, and discusses their regulatory implications.

1.10 Chapter 10 is devoted to air passengers. It discusses passenger rights, the relatively new topics of unruly or disruptive passengers, and improperly documented passengers.

1.11 Chapter 11 covers airport-related matters. It contains information on ground handling, slot allocation at international airports and privatization of airports.

Chapter 2

BASIC MARKET ACCESS

2.1 INTRODUCTION

2.1.1 An *air transport market* between any two places consists of the actual and potential traffic in persons and goods that does move or may move between such places on commercial air services. International air transport markets can fall into four categories in a hierarchical structure: a *city-pair market*, i.e. the air route linking two cities (e.g. New York-London); a *country-pair market*, consisting of all city-pair routes linking two countries (e.g. United States-United Kingdom); a *region-to-region market*, one that includes all routes linking two regions (e.g. North America-Europe, also known as the North Atlantic market); and the *global market* which includes all points served in the world by the airline industry. A scheduled air service is likely to carry traffic moving in numerous city-pair markets on each flight; a non-scheduled air service typically, but not always, serves a single city-pair market on each flight.

2.1.2 *Air transport market access*, by any particular air carrier or carriers, is the nature and extent of the basic rights (with any accompanying conditions and limitations) that are granted/authorized by the relevant governmental authorities (and identified and discussed in this chapter) as well as ancillary rights such as those covering product distribution. *Air transport market penetration* by any particular air carrier or carriers is the extent to which access is actually used to obtain and carry traffic. Rights can be subject to numerous constraints (outside the scope of this chapter) such as aircraft range and payload limitations, airport congestion and distribution system problems.

2.1.3 Access by an air carrier to a State's domestic air transport market is typically obtained (with relatively few exceptions) only if it is a carrier of that State and is usually acquired by a licensing process. Access to an international air transport market is also usually acquired by a licensing or approval process in each State involved. The reason for this dates back to the earliest period of flight when States recognized that every State has and may exercise complete and exclusive sovereignty over the airspace above its territory. This principle is reaffirmed in Article 1 of the Chicago Convention, and this exercise of sovereignty is usually expressed in a licensing or approval process. Thus, primarily because of the need to use the territorial airspace of another State in order to serve an international market, access to such air transport markets by foreign air carriers has come to be regulated in very different ways than access by foreign entities in other service industries (e.g. hotel chains and telecommunications companies).

2.1.4 Commercial air transport services, when performed as other than scheduled international air services involving ICAO Contracting States, are subject to Article 5 of the Chicago Convention. Under that Article, the foreign aircraft of such a State have the right to fly into or in transit non-stop across the territory of any other ICAO Contracting State and to make stops for non-traffic purposes (such as refuelling or repairs) without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. That Article also extends the privilege of taking on or discharging traffic (i.e. obtaining access to the non-scheduled market), subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable. In actual practice, such impositions may result in denial of or various constraints on market access by non-scheduled services, and in the absence of agreement between the States concerned, it is regulated unilaterally, usually on the basis of comity and reciprocity.

2.1.5 Scheduled international air services are regulated in a basic way by Article 6 of the Chicago Convention. That Article prohibits such services without the special permission or other authorization of the foreign State involved. In practice, a State extends such permission or authorization for scheduled international services by foreign air carriers in licences or permits of fixed or conditioned duration and does so (with rare exceptions) on the basis of the service being the utilization of market access rights which that State has granted to the home State(s) of the air carrier.

2.1.6 A *basic market access right* is a conditioned or limited right or privilege (usually set out in an international agreement) granted by one State to another State for use by an air carrier or carriers designated by that other State and may consist of agreed: geographic specifications of routes along which the air service may take place; physical specifications regarding designation of an air carrier or carriers and how a designated carrier may employ aircraft; and physical and/or geographic specifications of what kinds of traffic may be carried. Such rights in total determine the extent of market access granted.

2.1.7 Market access rights are usually granted in exchange for similar rights by means of some agreement(s) or arrangement(s) between States and are usually limited to scheduled international air services. Although a market access right fundamentally provides an opportunity to serve a market, it is also a limitation on market access because of its specifications. States limit market access for various reasons including to bring about some perceived balance in rights exchanged; to retain leverage for possible future exchanges; to avoid or minimize competitive impacts on their national carriers; to be precise in order to avoid misinterpretation; and to promote or favour some market segment (such as that of a particular city or national region). Ancillary rights, which relate to how an air carrier may conduct its business in a foreign State, are sometimes treated by States as elements of market access. These are identified and discussed separately in the manual.

2.1.8 *Foreign investment or inward investment* in the air carrier(s) of a State, including investment by foreign air carriers, i.e. the purchase of equity holdings with some possible degree of influence in management decisions if not control, is an additional means of obtaining market access. Yet another is that of obtaining a *right of establishment*, i.e. the freedom to establish an air carrier in the territory of a foreign State. Both additional means are in limited use in liberalized markets, either as exchanges between or among States or unilateral grants. (See also Chapter 5).

2.1.9 This chapter uses a building block approach to identify and explain three types of basic market access rights which, in practice, States tend to intermix rather than keep separate in the annexes, articles, paragraphs and sentences of their air transport agreements and sometimes even intermingle with capacity or other subjects. The treatment accorded the many types of market access conditions and limitations in current use is fairly comprehensive; however, this chapter does not explore the topics of liberalization of market access, simplification of its regulation, or bilateralism versus multilateralism. Neither does it examine new concepts of *progressive liberalization* in the grant of basic market access, i.e. the incremental removal of regulatory restraints, or of a *safety net*, i.e. some regulatory arrangement for use in the exceptional event of a clear threat to the ability of a State to sustain some level of market participation.

2.1.10 The first section of this chapter identifies various kinds of geographic specifications of the routes along which an air service may take place. The next section focuses on carrier designation and various specifications regarding the use of aircraft on such routes. The third section deals with specifications of categories of traffic that may be transported on the routes. The final section discusses market access as affected by the so-called "Sixth Freedom".

2.2 ROUTE RIGHTS

2.2.1 A *route right* is a market access right which is expressed as an agreed geographic specification, or combination of geographic specifications, of the route or routes over which an air service or services may be held out and performed and of the order in which authorized places may be served. Generally, route rights are found in the route annex of an air transport or air services agreement between States, the annex itself setting forth separately a route or routes for use by the airline or airlines of each party to the agreement. In all following examples, “A” represents the State receiving the route right and “C” the State granting the route right (typically in exchange for a similar right or rights).

2.2.2 The most basic way of describing the grant of a route right to a State is to name one city in the territory of that State and a second city in the territory of the State granting the right, for example:

From City A1 to City C1.

The basic approach need not be limited to a single city in each State, for example:

From City A1 to City C1/City C2.

From City A1/City A2 to City C1.

From City A1/City A2 to City C1/City C2.

A *point* is a city, named or unnamed, on the route granted. The basic approach can be expanded to describe a route as:

From any point or points in State A to City C1.

A more expansive variation of the basic grant is:

From any point or points in State A to any point or points in State C.

2.2.3 An *intermediate point* is a point outside but between the territories of the granting and recipient States. (In exceptional cases, points within the territory of the recipient State lying along the general path of the route may be considered as intermediate points.) When the territories of the States involved in the grant are not adjacent and the territories and cities of other States lie between them, the route description may include an intermediate point or points, for example:

From City A1, via City B1, to City C1.

2.2.4 There are many other ways to indicate the grant of an intermediate point or points on a route with varying degrees of specificity, for example:

... via City B1 and City X1 ...

... via City B1, City B2 and City X1 ...

... via State B ...

... via State B or State X ...

... via State B and State X ...

... via an intermediate point ...

... via two intermediate points ...

... via an intermediate point or points ...

2.2.5 In the latter three examples, greater specificity may be achieved when desired by adding a particular continent, region, or country, for example:

... via an intermediate point in Africa ...

... via two intermediate points in Europe ...

... via an intermediate point or points in the Indian Ocean ...

2.2.6 The provision of an intermediate point or points on a route also serves to indicate a general direction that the route must follow. There may be an implicit or explicit expectation that the route employed on an actual operation will be a reasonably direct one (between “A” and “C” in the examples). There may also be a desire to specify one general route in order to exclude another, for example:

... via the South Pacific ... to exclude ...
via the North Pacific ...

... via a Polar route ... to exclude ...
via a trans-Pacific route ...

... via the North Atlantic ... to exclude ...
via the mid-Atlantic ...

2.2.7 In lieu of various specifications, the parties may make a general grant of the right to serve intermediate points on any routes granted.

2.2.8 A *beyond point* is a point on a route which is generally more distant from the territory of the route recipient than the territory of the granting State (i.e. is situated beyond the latter) and which forms a part of a route description. For example, a basic route description for use by State A — from City A1, via City B1, to City C1 — may have added to it:

... and beyond to City D1.

... and beyond to one (two) (three) point(s).

... and beyond to a point or points in Asia.

2.2.9 Note that the latter example, apart from setting a general direction for continuation of the route, confines the beyond points to a single continent. Note also that the “beyond rights” on the route may be stated simply as:

... and beyond.

2.2.10 Additional flexibility may also be provided by allowing the air carrier operating the route to choose intermediate points, exchange them, omit them, or vary the order in which they are used. A *rover point* is an intermediate point, a second country destination point, or a beyond point to be chosen by the recipient State from among several named or unnamed points, the choice being notified to (and, if so stated, needing the concurrence of) the granting State, that choice then precluding service to other such points until some future change of points is made. For example:

... and beyond to any two points to be chosen from among City X1, City X2, City Y1, City Y2 and City Z1.

2.2.11 A route granted to a State in a traditional agreement is most likely to begin in the territory of the recipient State, follow a single general direction and be capable of being operated (and anticipated to be served) both outbound from the recipient State and inbound to it on a return service. A route granted to a State in an “open skies” agreement may well be described as beginning in or behind the territory of the home State. It is extremely rare for a route to be described for use in a single direction only, and when that occurs, it is likely to be for air freight service and to be either circular in structure or continuing around the world. In other unusual cases a State may be granted *cargo flexibility*, i.e. the right of a designated carrier or carriers to serve points outside the right-granting and right-receiving States with complete flexibility in the order of points served as intermediate and beyond points for the purpose of picking up and/or discharging international traffic in cargo and/or mail. It is much less unusual to allow a named point to be served either as an intermediate or as a beyond point (as in example route 7 on Table 2-1) on a given flight, particularly where relatively little deviation from the general path of the route is involved.

2.2.12 The majority of route descriptions in bilateral agreements are in sentence form. However, numerous route exchanges use an alternative tabular format as shown in Table 2-1.

Table 2-1. Routes for State A (tabular format)

<i>Route</i>	<i>Points in State A</i>	<i>Intermediate points</i>	<i>Points in State C</i>	<i>Beyond points</i>
1	City A1		City C1	
2	City A2	City B1	City C1	
3	City A3 City A4		City C2 City C3	Country D
4	City A1	City B2	City C1	City D1
5	Any point or points in A	North Africa	Cities C1, C2, C3	one point
6	Any point or points in A	Middle East and South Asia	any point or points in C	Australasia
7	City A3	City B2	City C1	City B2

2.2.13 A *behind point* is any point outside the route as described and usually geographically “behind” the beginning point or points of the route. “Behind points” can be points within the territory of the route recipient and/or points in third countries. They are usually not included in traditional route descriptions. However, there may be an explicit or implicit understanding that either or both kinds of behind points may be served (explicit regarding third country behind points in typical “open skies” agreements), and the through service held out and advertised as such. Alternatively, such services involving points in third countries may be subject to conditions or be proscribed.

2.2.14 Other terms used in route right grants include:

- a) *gateway or gateway point*, i.e. any point of last departure/first arrival of an air service in the territory of the recipient State or the granting State;
- b) *route terminal or terminal point*, which may be a gateway or gateway point or a behind point;
- c) *co-terminal or co-terminal point*, i.e. any one of two or more points on the same route and in the same territory (of the recipient State or of the granting State) which may be served separately or in combination on any service over the route;
- d) *double tracking*, a term borrowed from the railroad industry to describe establishing a *double track route*, i.e. a route for use by a carrier or carriers designated by one State party to a bilateral agreement which has a mirror-image counterpart route for use by a carrier or carriers designated by the other State party to such agreement; and
- e) *single tracking*, also a term borrowed from the railroad industry to describe establishing a *single track route*, i.e. a route for use by a carrier or carriers designated by one State party to a bilateral agreement which has no mirror-image counterpart route for use by a carrier or carriers designated by the other State party to such agreement. A route that has some sector that is not matched may still be considered as a double-tracked rather than single-tracked route if the principal sector between the two States is double-tracked.

2.3 OPERATIONAL RIGHTS

2.3.1 An *operational right* is a market access right which is expressed as an agreed physical specification of how many carriers may be designated; of how aircraft may be operated; or of what aircraft types, parts of aircraft, or substitute conveyances may be employed and assigned flight designators over an agreed route or routes. In practice, operational rights may be found in air transport agreements in the route annex, in various articles or in side understandings, or may or may not be implicitly included.

2.3.2 One of the most basic operational rights is that of carrier designation. *Designation* is the formal notification by one State to another State, usually by diplomatic note, of the name of an air carrier chosen by the designating State to use all or certain of the market access rights received by that State under its air transport agreement with the second State. Depending upon the terms of the relevant agreement, a designation may be made for use of any or all market access rights granted, for a particular route or routes or for a particular part of a route.

2.3.3 *Single designation* is the right to designate only one carrier (with an implicit right to substitute another carrier). *Dual designation* is the right to designate up to two carriers (with the right to substitute). *Multiple unlimited designation* is the right to designate any number of carriers. *Multiple controlled designation* is the right to designate a specified number of airlines in total or a certain number per route, per gateway, or per route sector (with the right to substitute).