# COMMENTARY:
# MODEL AIR COMMERCE ACT

**General.** This model statute for the economic regulation of civil aviation reflects an attempt to balance the experience that the United States has had in regulating civil aviation over many years, on the one hand, with the widely different needs, experience, and legal systems of other countries, on the other. Although based on the present U.S. system, the model changes or omits certain provisions that reflect the peculiar evolution of U.S. regulation rather than constituting necessary components of a general regulatory arrangement. The model is adaptable to whatever degree necessary to conform to existing legal systems. In countries following the "common law," like the United States, many statutory provisions are interpreted and refined through individual judicial decisions; in other systems, this function may be served by more precise and extensive codification. Both forms of clarification are used extensively in the U.S. system. In either case, this model is designed to be supplemented by additional regulations to implement specific provisions.

**Aviation in the general transportation scheme.** A major problem in devising a "neutral" regulatory framework is the relationship of aviation to other forms or "modes" of transportation. Regulation of the latter varies enormously from country to country, yet promoting efficient linkages between aviation and surface transportation is essential to a progressive transportation system. In the United States, the Department of Transportation administers most aspects of national transportation law, which makes it easier to coordinate the different policies and regulatory schemes. Most countries, however, already have established regulatory frameworks for at least some of the various kinds of surface transportation, and many of these may not have consolidated all such regulation under a single executive authority, as indeed the United States did not until relatively recently. In such cases, the advantages of consolidation may be outweighed by the disruption of fundamentally reorganizing existing regulatory systems for surface transport. Accordingly, the model tries to avoid assuming that the "Minister responsible" for aviation regulation is necessarily also in charge of other transport functions, although the U.S. has found this approach successful.

## Title I

**Section 102: Definitions—general.** The U.S. statute includes a number of provisions, including this one, that are common to both the economic and the technical regulation of civil aviation. Throughout the model, specific elements of such provisions have been deleted when they apply solely to technical and safety

issues, as the model is not designed to address these subjects. (The U.S. Federal Aviation Administration has already created a separate model statute addressing these areas, available at its website: www.faa.gov/avr/iasa/CAL.doc) Also, certain terms have been purposely not defined. For example, "common carrier" is undefined because the term has historically been the subject of common law and administrative decisions. The definition of common carrier is particularly significant in the U.S. scheme because it determines whether or not an entity is an airline, or holding itself out as an airline, and is thus subject to the licensing regime. In the case of the term "common carrier," a state may wish to define the term according to its own legal standards.

**Section 102: Definitions—air commerce and air transportation.** This distinction, which appears in U.S. law, may prove useful to address types of operations that, because they do not qualify as "air transportation", would not be subject to the comprehensive licensing scheme set forth in Title IV for carriers wishing to perform air transportation, but that still may be retained within the Minister's jurisdiction. Use of aircraft in activities such as crop-dusting, logging, mapping, etc. are regarded as *air commerce*—constituting "operation of aircraft in furthering a business or vocation"—without constituting *air transportation*. In U.S. law, domestic operators of this sort are not regulated under the economic regime, although all aircraft must still of course comply with safety and technical requirements; foreign operators, however, must obtain a license to engage in such activity.

**Section 102: Definitions—cargo and mail.** Many existing national regulatory systems may govern the transportation of mail by aircraft separately from passengers and cargo, reflecting such factors as the governmental or quasi-governmental status of the national postal authority, the provisions of the Universal Postal Union (UPU), international trade commitments, and national service and postal rate policies. Mail transportation, including service standards, mail tender practices, and even rates paid for the air transportation of mail, may therefore be subject to the primary jurisdiction of another ministry, such as communications or postal services. Mail transportation can be administered separately or in some combination with civil aviation, as well as treated as purely commercial traffic in the same manner as passengers and cargo. Where mail is treated as other than commercial traffic like cargo, the possible economic importance of mail revenues to many national air transportation systems normally makes it prudent to give the Minister responsible for transportation sufficient authority to ensure that the transportation of mail is consistent with the public interest under this title. To the extent that mail may be treated other than as normal commercial traffic, mail is excluded from the definition of cargo, and appropriate statutory provisions and regulations are adopted to harmonize overlapping governmental authority.

**Section 102: Definitions—citizen.** There are many different national standards regarding ownership of airlines, and the issue of air carrier citizenship remains highly controversial. The definition offered here reflects the present U.S. law, without specific numerical standards.

**Section 102: Definitions—civil aircraft.** The definition of civil aircraft is intended to be consistent with the term as it is used in the Chicago Convention.

**Section 102: Definitions—minister.** The responsibilities and powers of the Minister, which appear frequently throughout the model statute, may not always have to be exercised by the Minister personally. The model statute addresses the delegation of functions to subordinates only in general terms (in Section 302(b)), it being understood that specific delegations of authority could be prescribed by regulation.

## Title II

**Purpose and policy.** The model statute includes criteria emphasizing that marketplace competitive forces are in the public interest. This section gives an opportunity for any revisions or additions that an individual state may wish to make. Certain overarching procedural policies, such as transparency and due process, are also reflected in the model, in the belief that they are universally desirable features.

**Section 202(c), 203(h): Intermodalism.** The model promotes the benefits and efficiency of intermodal transportation (the use of more than one form of transport) in the transportation of both passengers and cargo. This policy statement has been added to the model act to represent the belief in its importance in air transportation policy.

## Title III

**Section 302: Administrative.** This provision authorizes the Minister to take enforcement actions against persons in violation of the model act and to impose penalties for violations. The Minister may wish to create regulations that specifically detail enforcement procedures and remedies. For example, these could be provisions setting forth investigation procedures, amounts for civil penalties, and criminal penalties.

**Section 304(a): Advice and consultation.** A state may wish to have the Minister advise and consult with other appropriate agencies in addition to the minister responsible for foreign affairs.

**Section 305(b): Records of carriers.** In addition to the general record-keeping requirements of subsection 305(b)(1), the model act contains a specific provision in subsection 305(b)(2) requiring carriers to retain records of prices and conditions of carriage. The subsection 305(b)(2) requirement is intended to ensure that when a consumer or the Minister makes a complaint, the airline's actual prices and conditions of carriage at the time of travel can be ascertained.

## Title IV

**Licensing.** This title adopts the conventional approach of regulation by licensing, whereby operators may not engage in regulated activity without a license, and must meet certain standards to receive and retain such a license. It may be desirable to explicitly state that a license issued under this title does not confer an exclusive (or proprietary) right to use airspace or an air navigation facility.

**Section 402(b): Finding required for issuance.** For national air carriers seeking to provide domestic air transportation, there is a general presumption that licensing them is in the public interest. By contrast, in either licensing them to provide foreign air transportation or in licensing foreign air carriers, the Minister must find that the license will be in the public interest. This is not intended to discourage entry, but rather acknowledges that additional factors may need to be considered when international air service is involved.

**Section 404: Notice, response, and action on applications (detailed procedures).** The model here articulates the key considerations in establishing procedures, such as transparency and opportunity to be heard, but does not specify steps or timeframes, because it is understood that individual countries' legal circumstances will vary considerably.

**Section 404: Notice, response, and action on applications (Presidential review).** The U.S. statute also provides for review of decisions by the Chief Executive, where certain foreign operating authority is involved. As this extra layer of review is discretionary and may be unnecessary because of a country's existing legal constraints, it is omitted here.

**Section 405: Terms of license (constraints on Minister).** As a matter of policy, a country may wish to specify certain limitations on Ministerial actions. For

example, the country could prohibit conditioning a license to limit an airline's ability to change its schedules.

**Section 406: Effective periods, modifications, suspensions, and revocations of licenses.** States may wish to specify different procedures for these processes. For example, the country could specify only minimal procedures to revoke license authority where it has gone unused by the licensee. The model contemplates that such procedures would generally track those established under section 404, and would accommodate the basic criteria enumerated there, but latitude remains for a state to change specific procedural details if necessary.

## Title V

**Foreign air carriers.** Much of this title is similar, if not identical, to what precedes it in Title IV for homeland carriers. Nevertheless, different considerations may apply to treatment of foreign air carriers, and the draft reflects the conclusion that some parallel specification of procedures is appropriate to preserve foreign air carrier licensing as a distinct and separate process.

**Section 502: Standards for foreign air carrier licenses.** This section sets two conjunctive standards: fitness coupled with either designation and qualification or an independent public interest finding. The Minister thus may license a foreign air carrier if it is in the public interest even where there is no bilateral agreement providing for designation, but must still address the carrier's fitness. (It remains for a country to determine the degree to which it will examine fitness in an exemption situation under section 801.) The United States often licenses airlines whose homelands have no bilateral agreement with the U.S., and therefore are not formally designated; even in these situations, of course, the licensing country may wish to require some indication of the homeland government's approval. If a country's law requires a bilateral agreement to be in place before an airline can serve, this distinction becomes less significant.

**Sections 503, 505: Procedures.** These sections refer back to sections 403(a) and 404 to guide the Minister in formulating procedural regulations. Such regulations may vary in specifics (hence they must be “similar” rather than “identical” to those under Title IV), but all should be consistent with basic considerations of fairness and transparency, in particular the criteria listed under section 404(d). The references are not intended to suggest, however, that other issues in section 403 and 404, such as burden of proof, should also be addressed identically in other procedural contexts.

**Section 505(c): Summary suspension and restriction.** The Minister may summarily modify or suspend, but not summarily revoke, the license of a foreign air carrier. Under principles of fairness and due process in U.S. law, revocation of a license under section 505(a) would require minimum procedural safeguards, which may be established by regulation.

## Title VI

**Sections 601, 603, *et al*.: "Unreasonably discriminatory," etc.** Such phrases have often occasioned considerable semantic debate, because "discriminatory" is often regarded, particularly in other languages, as being inherently unjust or unreasonable. Because U.S. practice recognizes legitimate bases for economic "discrimination" in certain circumstances, the adverb "unreasonably" is retained here.

**Section 601: Establishing prices, classifications, rules, and practices for air transportation.** This section of the model act differs from the comparable provision in U.S. law. U.S. law requires carriers to establish "reasonable" prices, classifications, rules and practices and lists a number of factors the Secretary shall consider in deciding whether to disapprove a tariff. The Secretary is also authorized to take action against unreasonably discriminatory prices. These provisions reflect U.S. policy and administrative practice in 1958, when the U.S. and most of the world were regulating airline prices much more strictly than is now the case. Since then, the U.S. has deregulated domestic air transport, including pricing, and regulates prices in foreign air transportation with a much lighter hand. Yet, the U.S. statutory language does not fully reflect this change in policy and practice. In addition, the detailed decisional factors in U.S. law may not be the ones that each country might choose as guidelines. Thus, the model act reflects current U.S. international policy and practice, which is also generally consistent with the grounds for government intervention set forth in the pricing articles of the liberal bilateral agreements we have concluded with over 50 countries, including several in Africa.

**Section 603: Notice to purchasers.** Under U.S. law, air transportation is a contractual service. Under this principle, purchasers, both passengers and shippers, need effective notice of the terms of carriage. In other words, they should have a meaningful opportunity to know the pertinent terms of their contract. There are two systems for consumer notice in the model act—tariffs and direct notice. For many years, the U.S. addressed this public notice issue using the first system through a comprehensive tariff system. This system required carriers to file complete tariffs for all types of air transportation for review by the civil aviation authority and, in addition, to make them available for public inspection at their sales offices. Since review by the civil aviation

authority was deemed to be implied consent/knowledge by the consumer, carriers were not required to provide passengers/shippers with the same type of notice of tariff/contract terms that they would provide under a direct-notice system. In recent years, the U.S. has used the direct-notice system by eliminating tariffs for all forms of domestic air transportation and for many aspects of foreign air transportation, whether provided by national or foreign carriers. Instead, the U.S. now largely directs carriers and their agents to provide notice of terms of carriage directly to the public, under regulations prescribed by the Department of Transportation. This approach has eliminated great quantities of bureaucratic paperwork and carrier cost, and, has led to a better informed public. To ensure that carriers will comply with the disclosure rules, U.S. regulations provide that a carrier may not enforce against passengers or shippers any contract provision not meeting the prescribed disclosure requirements.

While we have found in our own experience that a direct-disclosure approach offers certain advantages, we recognized, in formulating the model, that certain countries may be more comfortable at present with the more traditional tariff approach. Furthermore, even our own system remains something of a hybrid, with some international tariffs still being filed. Thus, the model act provides for both options—reliance either on a tariff-filing regime, as in 603(a)(1), or on a direct-notice regime, as in 603(a)(2). Should a country choose to employ both options, it would need to specify which prices and terms for which types of air transportation are to be governed by which regime.

**Section 603(a)(1): Tariff rejection.** Section 603(a)(1)(B) deals with rejections of tariff filings for technical inconsistency with the tariff-filing and notice regulations. Section 604, on the other hand, deals with disapprovals of prices, classifications, rules and practices on substantive grounds.

## Title VII

**Section 701: Foreign aircraft.** This provision completes the regulatory regime for foreign civil aircraft by setting out conditions under which a foreign aircraft may operate within a state's airspace otherwise than under Title V--that is, when it is not engaged in air transportation. Section (c) clarifies that cabotage is forbidden, except pursuant to a dry lease or as authorized by an exemption under Title VIII. Foreign aircraft engaged in *air transportation* are thus governed by Title V; those engaged in *air commerce* that does not constitute air transportation are governed by subsection 701(c); and all other foreign aircraft operations are governed by subsections 701(a) and (b).

## Title VIII

**Section 801: Exemptions; cabotage.** The exemption provision is designed to address a situation that requires immediate action without awaiting the completion of normal procedures. Exemptions are in principle grants for limited terms in special circumstances, rather than routine substitutes for normal licenses. As drafted, the model statute does not limit the Minister's ability to exempt particular operations, including cabotage. The U.S. law prescribes very narrow conditions for cabotage exemptions, to permit it only in exceptional circumstances. Although most countries strictly limit cabotage, this matter is very much a function of individual circumstances, and criteria for exempting cabotage may be drafted either as additional statutory provisions or as regulations.

**Section 802: Unfair practices, etc.** This provision reflects a fusion of several different sections of the U.S. law, with the goal of offering a single standard and procedure, regardless of the type of activity involved.

**Section 805: Review of Minister's decisions.** In the U.S. system, administrative decisions by the Department of Transportation may be appealed directly to a U.S. Court of Appeals; the latter's decision may then be appealed to the United States Supreme Court. The judicial systems of nations vary considerably, and the model is drafted to allow maximum flexibility with respect to the character of the reviewing entity, while retaining the crucial element of an aggrieved party's access to appellate authority independent of the Minister.

**Immunity from antitrust/domestic competition laws.** Depending on the scope of a state's antitrust or domestic competition laws, the state may want to amend this model act to create special provisions addressing competition law and air transportation. For example, in U.S. law, the Secretary of Transportation may exempt an air carrier or foreign air carrier from domestic antitrust laws in order for the carrier to enter into approved cooperative agreements.

**Smoking and controlled substances**. Although not included in the model act, the U.S. statute contains provisions explicitly prohibiting (1) smoking on scheduled flights and (2) illegal importation of controlled substances. A state may wish to also include such provisions.