

Legal and Regulatory Issues of Aviation

Traffic Rights

Dr. Till Vogel

Agenda for this Modul

Saturday, 2022/09/17

- Institutions and Authorities
- Traffic Rights
- Access to Airports
- Compliance

Sunday, 2022/09/25

- Safety & Security
- Liability & Consumer Protection
- Air Traffic Control - ATC
- Travel Agencies

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~~■ Institutions and Authorities~~

Done!

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Part II

Traffic Rights

Useful books

- *Diederiksen-Verschoor/Mendes de Leon*,
An introduction to Air Law, 10th edition, 2017
- *Havel/Sanchez*,
The Principles and Practice of International Aviation
Law, 2014
- Paul Stephen Dempsey, Ram Jakhu
Routledge Handbook of Public Aviation Law, 2017
- Milde, Michael,
International Air Law and ICAO - Third edition - 2016
- *Schaefer, Christoph*,
Recht des Luftverkehrs, 2017

What happened on September 1, 1983 to Flight KE 007?

Traffic Rights



What happened on September 1, 1983 to Flight KAL 007? And why did it happen?

Traffic Rights

Political Map of the World, October 2016



Source: Central Intelligence Agency

Traffic Rights

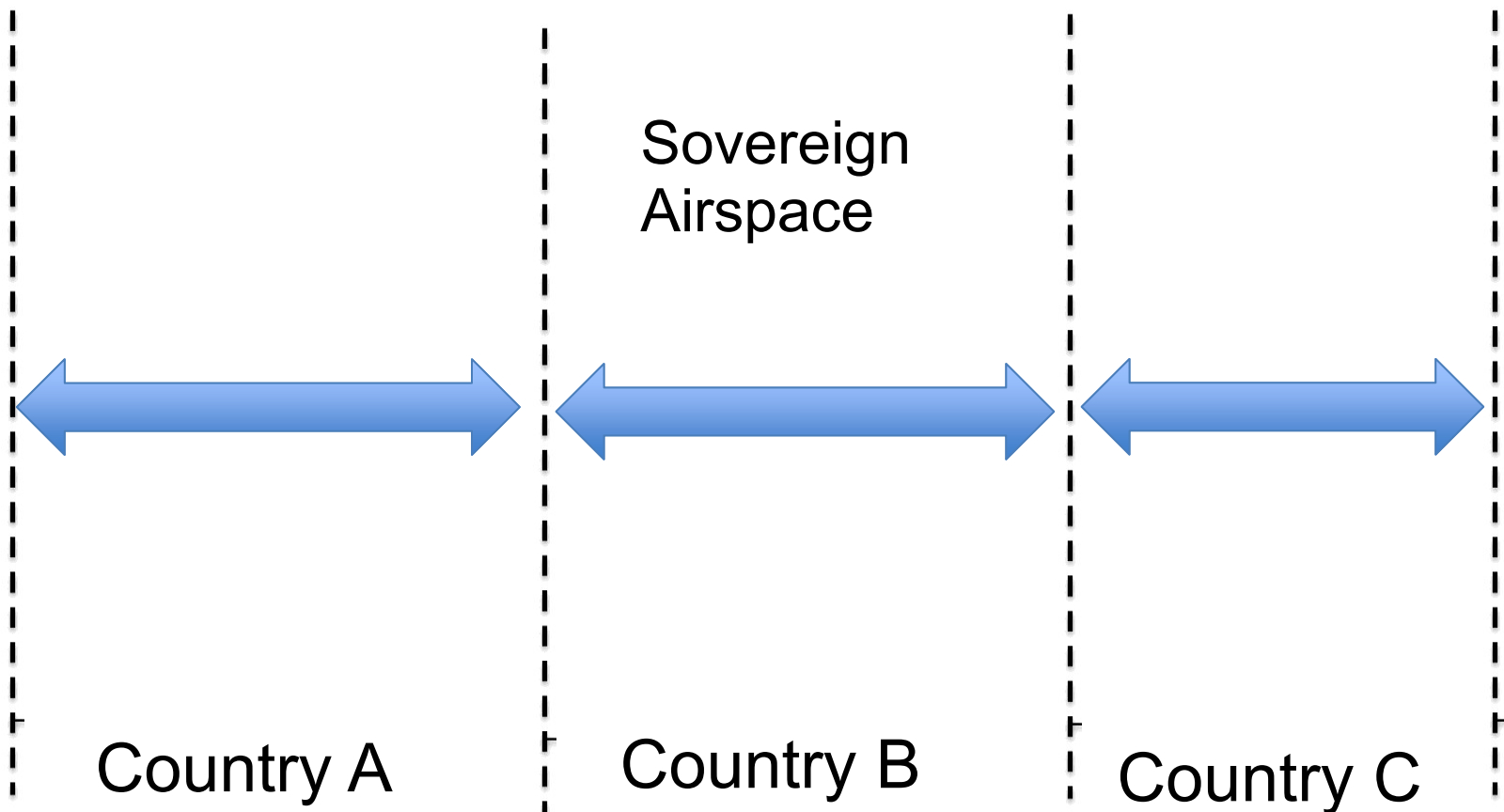
Article 1

(Chicago Convention)

Sovereignty

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Traffic Rights

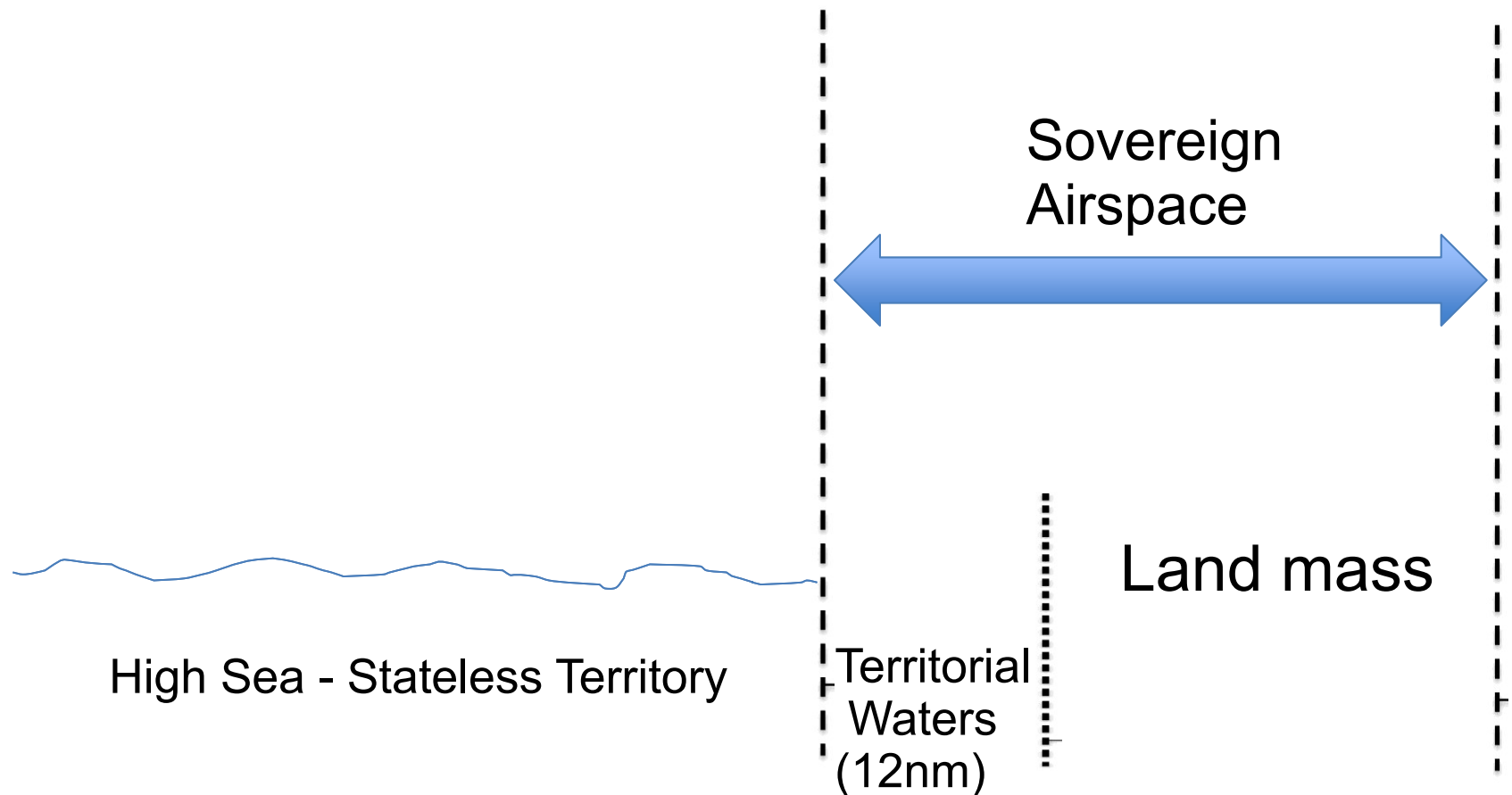


Traffic Rights

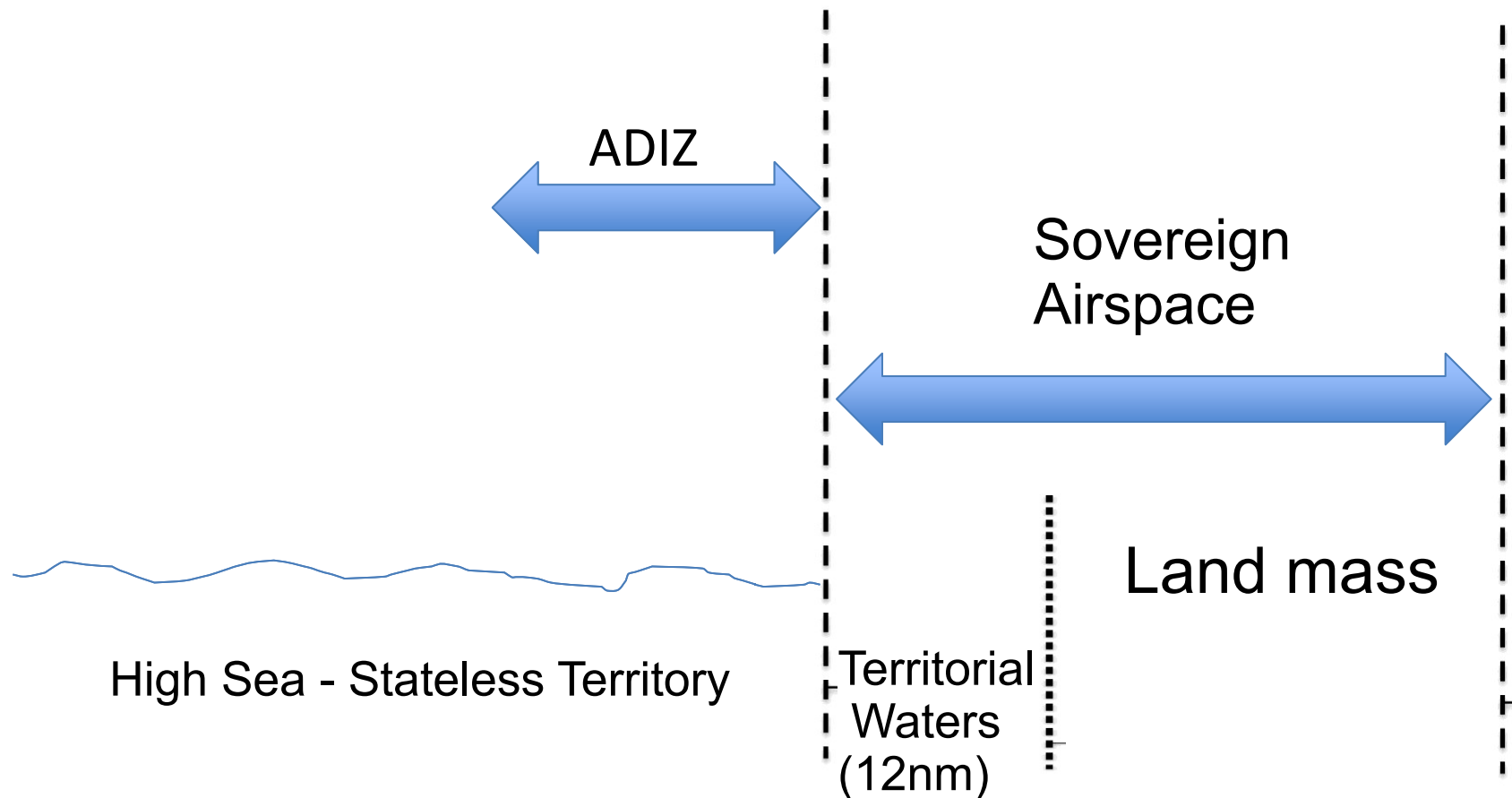
But where are the borders of sovereign airspace?

- Delimitation to Space?
- Territorial conflicts?
- Territorial waters ?
 - incorporating all legal debate issues of UNCLOS
- De-facto regimes (Northern Cyprus, Taiwan)?
- Air Defense Identification Zones (ADIZ)?

Traffic Rights



Traffic Rights



Traffic Rights - Definition

Rule: Aerial Sovereignty, Art. 1 CC

➡ Every state has to grant permission to every single foreign aircraft to use its airspace

Traffic rights grant such permission to another country's airlines for commercial use

Traditional Concept of Traffic Rights

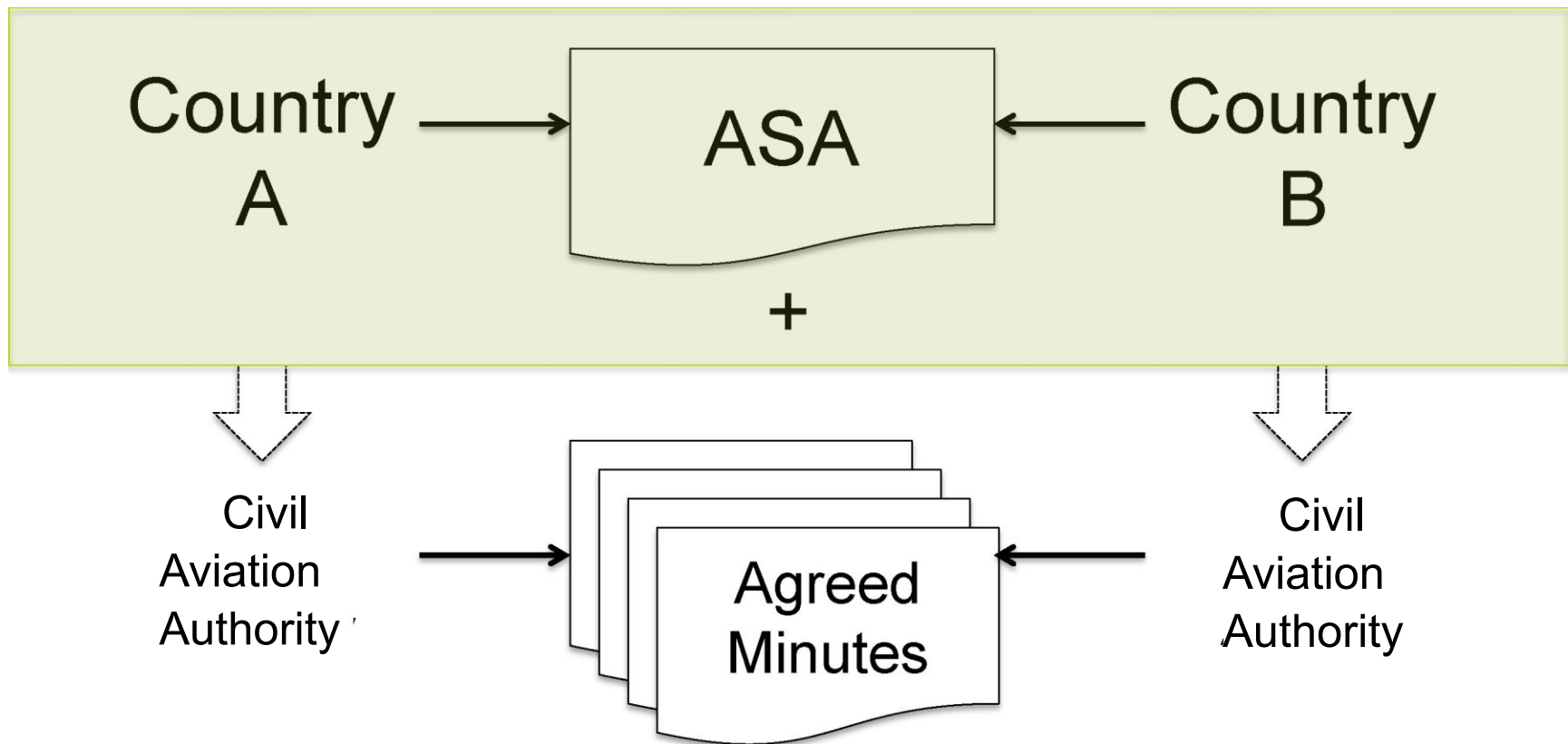
Source for traffic rights:

- No comprehensive international agreement
- Traditionally traffic rights are granted in bi-lateral formal agreements between two states
- Liberalisation by way of Open Skies Agreements

Traffic Rights not required for Charter traffic

	Scheduled Flight	Charter Flight
Traffic Right	Required, Art. 6 CC	Not required, Art. 5 CC
Characteristic	Systematic series of flights	Lack of regularity
Reliability	Full legal reliability	May be revoked at any time, State of destination has right to <i>„impose such regulations, conditions and limitations as it may consider desirable.“</i> Art. 5 S. 3 CC

Air Service Agreements



Typical Structure of Air Service Agreements

- **ASA:**
 - International treaty
 - Lengthy ratification required
 - Is the framework for traffic rights
- **Agreed Minutes**
 - Requires enabling provision in the ASA
 - Provisional execution is possible
 - Ratification by exchange of diplomatic notes
 - Contains details like, e.g.
 - Flight plans and
 - Other important operational points

Core Elements of Air Service Agreements

- The Air Service Agreement (“*Bermuda I*”)
 - Exchange of traffic rights between the parties
 - Designation of (one) airline
 - Ownership & Control of the designated airline
- Usually regulated in the Agreed Minutes
 - Route Schedule
 - Capacity Control

ASA: Ownership & Control Clauses

Ownership & Control over the designated airline traditionally means

- a substantial ownership (> 50% equity)
- AND effective control (domestic legislation) are vested in nationals of the designating party

In fully liberalized ASA it means

- Effective REGULATORY control by the designating state

ASA: Designation Clauses

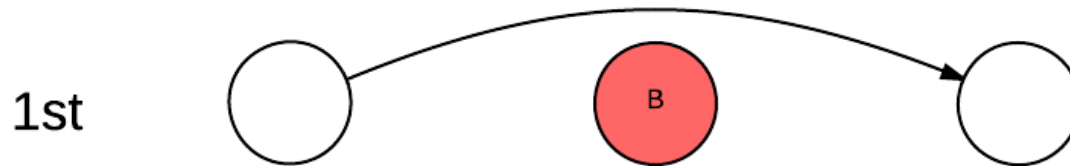
Traditional	Single-Designation	Allows only one airline to exercise the traffic rights
Transitional	Dual-designation	Allows two carriers to exercise traffic rights
	Multi-Designation	Allows several carriers to exercise traffic rights
Fully liberalized	Designation-free	Operating authority is granted by direct application

Traffic Rights in the EU

- According to ECJ Open Skies case law, the EU is (exclusively) competent to conclude some elements of an ASA
- Accordingly, Member States and EU conclude shared agreements with other countries
- EU grants Member States right to conclude ASA alone if they use certain standard clauses prescribed by Union ([EU-Regulation 847/2004](#))

Freedoms of the Air

1st Freedom of the Air



- The right granted by one state (B) to another state (A) to fly across its territory without landing

Freedoms of the Air

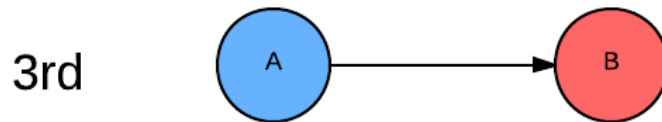
2nd Freedom of the Air



- The right granted by one state (B) to another state (A) to land there for non-traffic purposes, e.g. refueling or maintenance

Freedoms of the Air

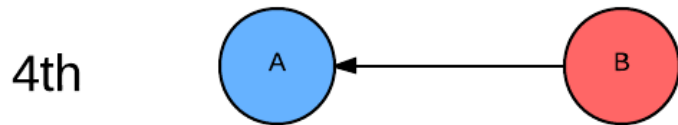
3rd Freedom of the Air



- The right granted by one state (B) to another state (A) to put down passengers, mail and cargo taken on in the territory of the state whose nationality the aircraft possesses (A)

Freedoms of the Air

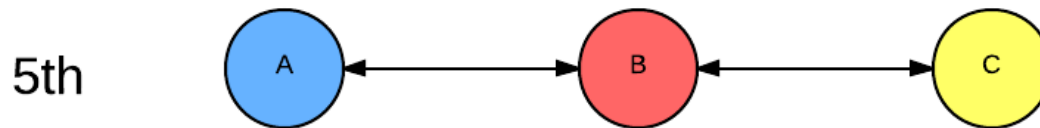
4th Freedom of the Air



- The right granted by a state (B) to another state (A) to take on passengers, mail and cargo destined for the territory of the state whose nationality the aircraft possesses (A)

Freedoms of the Air

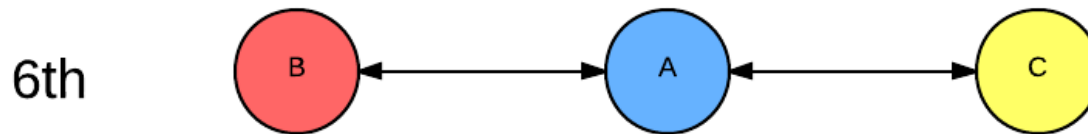
5th Freedom of the Air



- The right granted by one state (B) to another State (A) to put down and to take on, in the territory of the first State (B), traffic coming from or destined to a third State (C)

Freedoms of the Air

6th Freedom of the Air

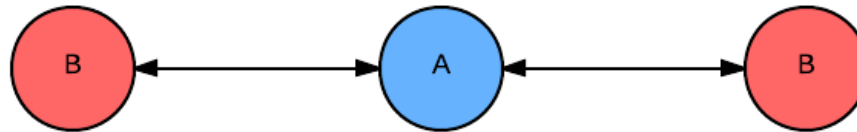


- The right granted by one state (B) to another state (A) of transporting, via the home State (A) of the carrier, traffic moving between two other States (B and C)

Freedoms of the Air

6th *modified* Freedom of the Air

modified 6th



- The right granted by one state (B) to another state (A) of transporting, via the home State (A) of the carrier, traffic moving between two airports in the same State (B)

Freedoms of the Air

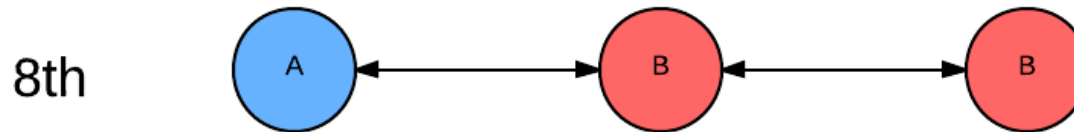
7th Freedom of the Air



- The right granted by one State (B) to another State (A) to fly between State (B) and State (C) with no operation to any point in the territory of (A)

Freedoms of the Air

8th Freedom of the Air



- The right granted by one state (B) to another state (A) of transporting cabotage traffic between two points in the territory of state (B) on a service which originates or terminates in the home country (A) of the foreign carrier

Freedoms of the Air

9th Freedom of the Air



- The right granted by one state (B) to another state (A) of transporting cabotage traffic between two points in the territory of state (B) without any connection to the home country (A) of the foreign carrier

EU: Common Market for Aviation

Regulation (EU) 1008/2008

Chapter III Access to Routes

Article 15

Provision of intra-Community air services

1. Community air carriers shall be entitled to operate intra-Community air services.
2. Member States shall not subject the operation of intra-Community air services by a Community air carrier to any permit or authorization. [...]

Open sky: EU between USA

- Came into force on March 30th, 2008
- Grants the 5th Freedom of the Air
 - airlines are allowed to fly on to a further destination in another country after their initial stop
 - EU is not treated as one country under this agreement
- For cargo flights the 7th Freedom of the Air applies
- Norway and Iceland joined the agreement in 2011
- Open up Heathrow for more than two airlines (British Airways, Virgin Atlantic Airways, United Airlines, and American Airlines) for Atlantic services

Open Sky Agreements: Different levels of liberalisation

	Traditional bilateral	Transitional multilateral	Fully liberalized
Nationality requirements Airline	Applicable	Applicable	None
Designation	Single	Multiple	None
Traffic rights	I-IV, V subject to conditions	I-VI, VII for cargo	I-IX
Capacity	Subject to conditions	Free	Free
Scheduled/ charter	Only scheduled	All services included	All services included