



States' obligations under the Cape Town Instruments of 2001 and their relationship with national civil aviation law and practice

Background to, and status and main legal terms of, the Cape Town Convention

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History of the Cape Town Convention

- 1992-1995: the International Institute for the Unification of Private Law (UNIDROIT) undertook background and preliminary work relating to the development of an international instrument modernizing the law applicable to financing and leasing of mobile equipment
- 1994: UNIDROIT requested the formation, by Airbus and Boeing, of the Aviation Working Group (AWG) to provide detailed, coordinated input to assist UNIDROIT in the development of the above international instrument as applied to aviation financing and leasing. AWG was formed given the need for the above-mentioned modernization, particularly given the large numbers of developing and transforming countries increasing their international aviation activities
- 1996-1997: the International Civil Aviation Organization (ICAO) became directly involved in the treaty negotiation, at first through a group (aircraft protocol group) with AWG and IATA. That contributed to a governmental decision to structure the international instrument as a treaty modified by equipment-specific protocols, which, in the case of a conflict, would override the general wording in the base treaty
- 1997-2001: international negotiation of the treaty (convention) as modified by an aircraft protocol (protocol) under the joint auspices of ICAO and UNIDROIT, including a formal meeting of the ICAO legal committee
- 2001: adoption of the convention and protocol (Cape Town Convention, CTC) at a diplomatic conference in Cape Town held under the joint auspices of ICAO and UNIDROIT. Resolution 2 adopted at that conference contemplated the appointment of ICAO as the supervisory authority for the CTC international registry (and a commission of experts to assist ICAO in that capacity)

What is the Cape Town Convention

- International treaty designed to facilitate asset-based financing and leasing of aviation equipment by increasing legal certainty and predictability

Problem

- Many laws do not reflect best international standards regarding aviation financing and leasing
- Uncertainty among financiers and lessors as to efficacy of their rights over aircraft and engines
- Differing and conflicting laws around the world



Solution

- Cape Town Convention, international treaty reflecting best international standards
- Cape Town Convention, international treaty providing legal and timing-related predictability
- Cape Town Convention, international treaty containing uniform rules, subject to elective then binding declarations made by state parties

Cape Town Convention status and importance

- 85 states parties to the convention and protocol
- CTC is globally accepted as the foundational and leading law relating to and facilitating international aviation financing and leasing. That applies to all legal systems, civil and common law, and countries at all stages of economic development
 - See list of ratifying states at www.unidroit.org
 - CTC overrides the Geneva Convention of 1948 to the extent of conflicts (most substantive items)
- CTC creates an international standard designed to suit the needs of aviation financing and leasing
- CTC is now considered the most successful transactional commercial law treaty in history
- Properly implemented, CTC supersedes all conflicting national law, and is not (with some explicit exceptions) designed to align with such national law
- CTC permits a range of declarations at the time of ratification (or subsequently through a specific treaty mechanism). The economic benefits of CTC require the making of the ‘[qualifying declarations](#)’ under the OECD aircraft sector understanding, most countries have done
- Making such qualifying declarations is necessary but not sufficient. Economic benefits require full compliance by contracting states with the terms of the treaty and the declarations it has made
- It is now uniformly accepted that there are no disadvantages to, or costs linked to, ratifying CTC
 - The above statement was seen and supported in the hard cases of global COVID and resulting insolvencies

Basic principles of CTC



1. CTC is a treaty designed to **facilitate asset-based financing and leasing of aviation equipment**, expand financing opportunities, and reduce costs – thereby providing **substantial economic benefits**



2. CTC does so by **reducing a transactional risk** and by **enhancing legal predictability** by establishing clear rules on the creation, priority (through the international registry), and enforcement of leasing and security rights in the case of default by the debtor, including in the insolvency context

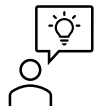


3. CTC is a **rule-based system** (rather than standards). That serves the overriding objective of **predictability** – based on the time of the transaction. The **system applies** if a debtor is located in a contracting state, or as regards interest in airframes, if the relevant aircraft is registered in a contracting state

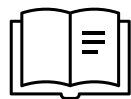
Basic principles of CTC



4. CTC provides a **simple standard to create an ‘international interest’** over **airframes** (see technical definition thereof) and separately **engines** (see technical definition thereof), other than those used in military, customs, or police services. CTC refers to such airframes and engines as **aircraft objects**

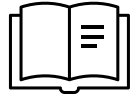


5. CTC is based on a **high degree of party autonomy**, giving the debtor and creditor the ability to agree on (a) what constitutes a default, (b) the applicable treaty remedies, (c) the law to govern their contractual relations, and (d) which courts have jurisdiction to resolve disputes (there are some additional basis of jurisdiction in select cases).



6. CTC provides **basic remedies including** repossession, immobilization, deregistration, export, and, in the case of secured transactions, sale of aircraft equipment

Basic principles of CTC



7. Where '**non-judicial' remedies apply**, the exercise of remedies, including repossession and grounding, do not need a court order.

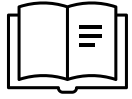


8. Where a 'speedy advanced relief order' is obtained, that order is to be **recognized in all contracting states**

- The standard for obtaining such judicial relief is 'adducing evidence of default', rather than establishing a default after a full judicial proceeding, which would occur subsequently



9. CTC provides important rules which apply in the case of the debtors' insolvency particularly where the debtor's contracting state has opted into protocol, art. 11 (alternative A) -- which is **fundamental to the economic benefits of CTC**



10. CTC creates ‘noticed based’ **international registry** – to determine priority of conflicting interests in ‘airframes’ and ‘engines’

- Compare the nature and purpose of the CTC international registry with registries relating to aircraft nationality

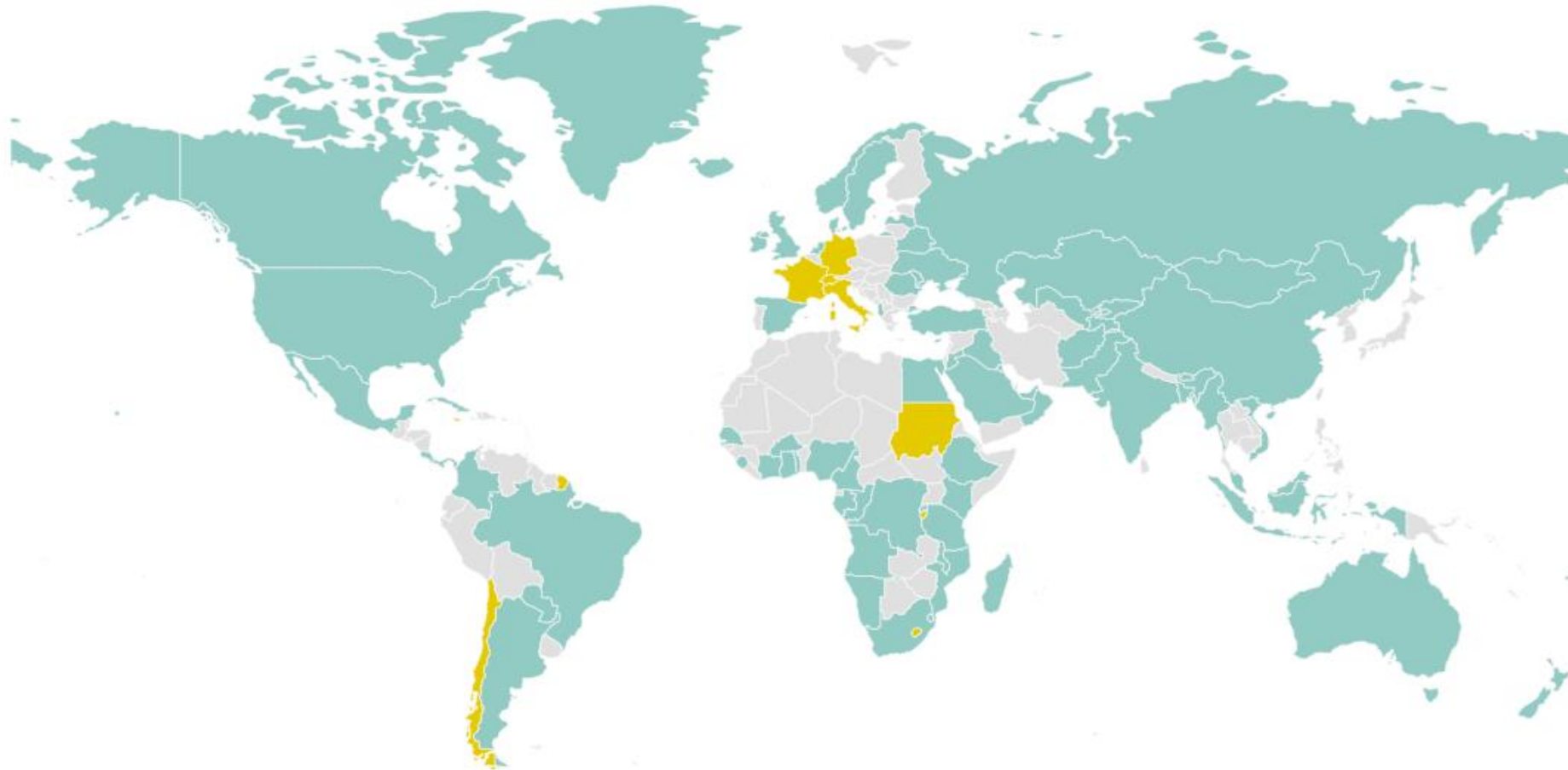


11. The treaty is to be **interpreted** in accordance with its basic purposes and general principles. Principles of national law are only used as a last resort to fill interpretive gaps. The authoritative source of interpretation is the official commentary, now in its revised and final 5th edition



12. **Comprehensive treaty**. Overrides national law on secured transactions, and supporting points, including, most importantly, jurisdiction, dispute resolution, and the use of trust

Status map of the Protocol to the Convention on international interests in mobile equipment on matters specific to aircraft equipment – signatures, entry into force



■ Ratified
■ Signatory party without ratification

Cape Town Convention – qualifying declarations

1. Insolvency (Alt. A with no more than 60 day waiting period) – protocol, Art. XI(3)
2. Method of exercising remedies: remedies without leave of court, see convention Art. 54(2), and/or judicial timetables, see convention Art. 13 and protocol Art. X
(10 – 30 calendar day rule)
3. De-registration and export request authorization – protocol, Art. XIII
5 calendar days
4. Choice of law – protocol, Art. VIII

Cape Town Convention declaration on non-consensual rights and interests

- Non-consensual rights and interests (NCRI) are those conferred under the laws of a contracting state
- Contracting states may retain, but not expand, their national law **preferences** given to NCRI over consensual interests. Such preferences are retained without registration. Art. 39(1)(a)
 - These could include amounts payable to airport or air navigation providers. They also could constitute registrable NCRI, see last bullet point below
- CTC also permits countries, through a savings clause, to retain their rights of detention for amounts owed to authorities or private providers of public services directly relating to services or an aircraft object. As with NCRI, CTC does not permit a contracting state to expand detention rights. Art. 39(1)(b)
- CTC also permits countries, through a declaration, to specify registrable and NCRI, which have priority based on their time of registration. Art. 40

CTC treaty compliance at a glance

Reasons for non-compliance

Implementational problems

Educational/
informational
problems

Institutional
problems
(judicial/
administrative
resource constraints)

Interpretive
problems
(lack of clear
guidance)

Implicit rule of law
problems
(protectionism and
corruption)

Explicit rule of law
problems
(political risks)

Means to address

Complete
implementation

Develop and
promote
educational
materials

National and
international
supportive
arrangements

Develop and
promote credible
interpretation of
recurring or
difficult issues

Transparency and
legal engagement
– incentivizing
compliance
(investment and
reputational interest)

To a degree, same
as box to the left

Risk transfer
(insurance or other
contractual
arrangement)

Cape Town Convention COMPLIANCE INDEX

BY



A • W • G
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$$\text{Score} = 5(\mathbf{A+B}) + 2.5(\mathbf{C + D + E + F})$$

WITH A **PRECEDENT-BASED ADJUSTMENT (PBA)**, AT LEVELS I, II OR III, BASED ON THE PREDICTIVE VALUE OF COURT CASES OR REPORTED ADMINISTRATIVE ACTION

Scoring: 100 (highest) to 20 (lowest)
Variable range: 5 (highest) to 1 (lowest)

100 - 88: **very high** probability level that the terms of CTC (with applicable declarations) will be substantially complied with

87 - 75: **high** probability level that the terms of CTC (with applicable declarations) will be substantially complied with

74 - 63: **medium** probability level that the terms of CTC (with applicable declarations) will be substantially complied with

62 and lower: **low** probability level that the terms of CTC (with applicable declarations) will be substantially complied with

Definitions-

A is legal implementation, meaning (i) steps to ensure that CTC, with declarations, prevails over conflicting national law (**primacy**), and (ii) that no regulatory gaps or inaccuracy exists which may adversely impact application (**completeness**)

B is (i) reported precedent, meaning (a) judicial decisions, and (b) RANJA, in each case with analysis by AWG's legal advisory panel, as or to be posted on the CTC academic project website, and (ii) experience, advised by experts, in applying and enforcing CTC

C is whether a country is and should remain eligible, for a 'CTC discount' under the OECD Aircraft Sector Understanding and whether it has been removed from such eligibility due to non-compliance with CTC

D is whether a country has designated a 'communication channel' with AWG to consult on compliance issues, as and when they arise, and the extent to which the results of such consultations are timely and effective

E is the result of a jurisdictional analysis of legal rules and practices, other than those covered by variables A, B, and F, which indicate anticipated compliance with CTC, including those relating to aircraft repossession, enforcement of contractually agreed remedies and dispute resolution provisions, and strict application of commercial laws newly introduced into that jurisdiction

F is a weighing of select rule of law and political risk indices measuring, or materially relevant to, regulatory enforcement of existing law

Precedent-Based Adjustment (PBA)

Level I increases the weight of B by 0.6 and decreases the weights of each of E and F by 0.3 (lower predictive value)

Level II increases the weight of B by 1 and decreases the weights of each of E and F by 0.5 (medium predictive value)

Level III increases the weight of B by 1.4 and decreases the weights of each of E and F by 0.7 (higher predictive value)

Methodological note and disclaimer: Please read the linked*/ [methodological note](#) and [disclaimer](#). This index is a high level assessment with speculative and predictive features (including what courts or other authorities may or may not do, acting on correct or incorrect legal analysis or impacted by other factors) which are inherently uncertain, and, thus, should not be relied upon by any party.

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*/ These documents are under development, and will be linked to, and released concurrently with, the Index.

Annex

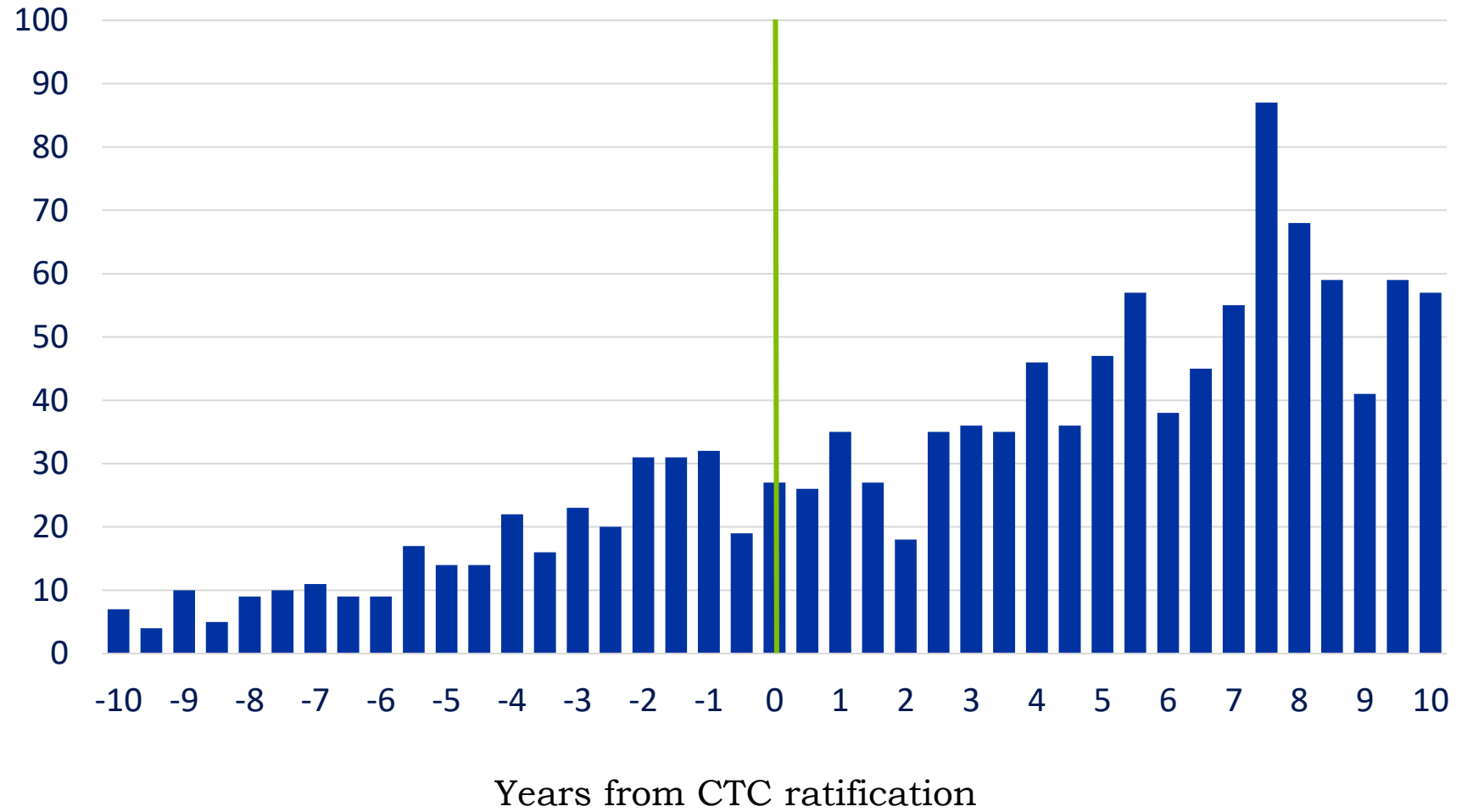
Economic benefits

These are the economic and financial benefits by ratifying CTC, with the qualifying declarations, and the evidence for them (subsequent slides).

- Greater range of financing options for fleet acquisitions
- Greater access to the international commercial markets (and at lower rates)
- Lower cost export credit (10% reduction in exposure fee), should it choose to explore that option
- Ability to confirm highest quality legal and regulatory basis in:
 - Lease negotiations
 - Bank negotiations
 - Exploring emerging financing structures

Economic benefits

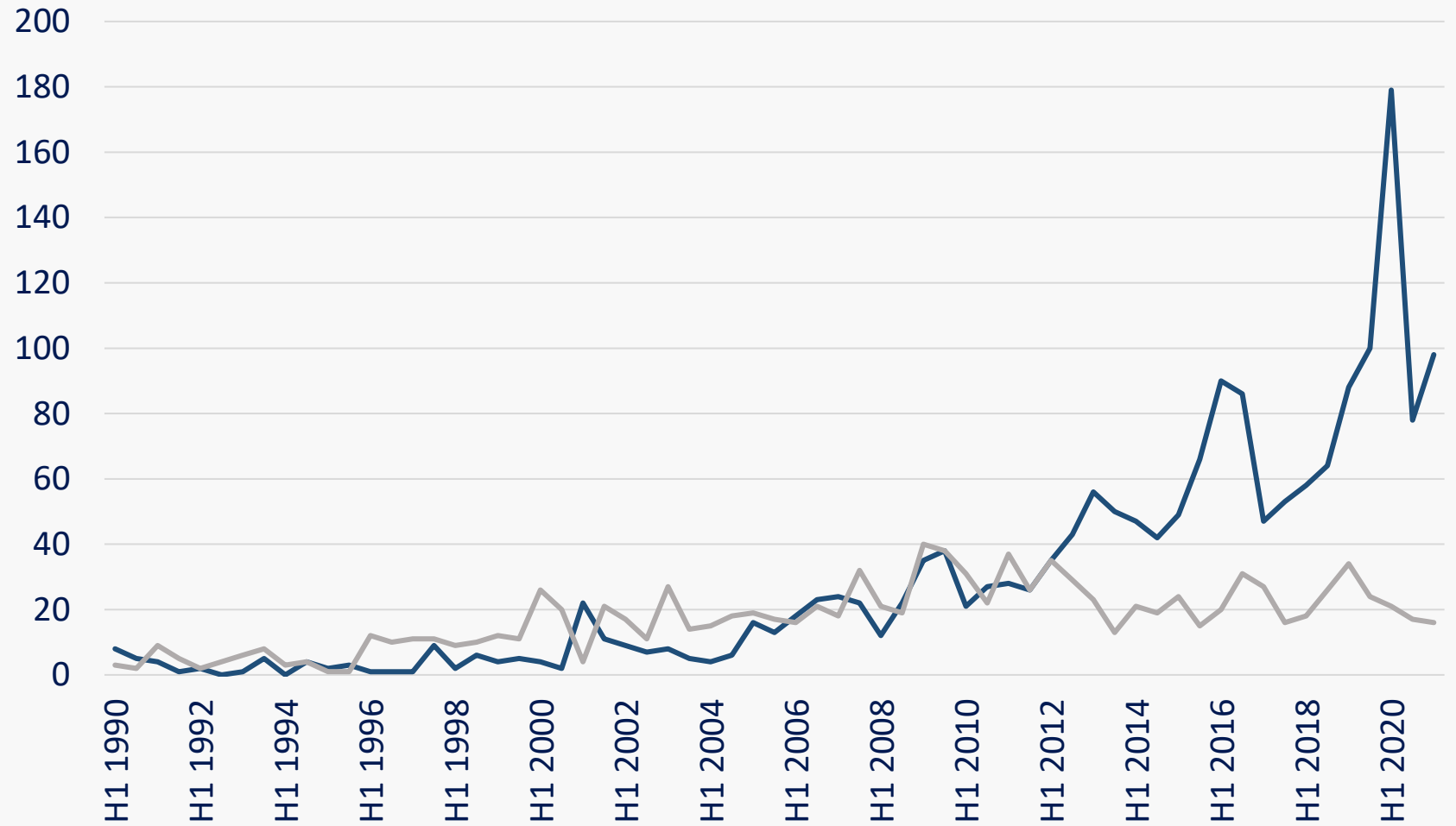
Airline debt issuances in CTC countries



Economic benefits

Airline debt
issuances
(ratified vs not
ratified)

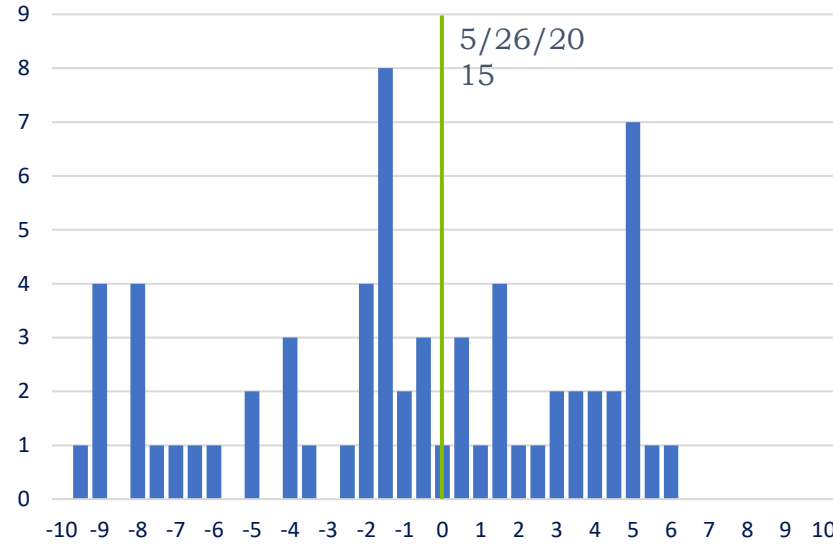
— Ratified
— Not ratified



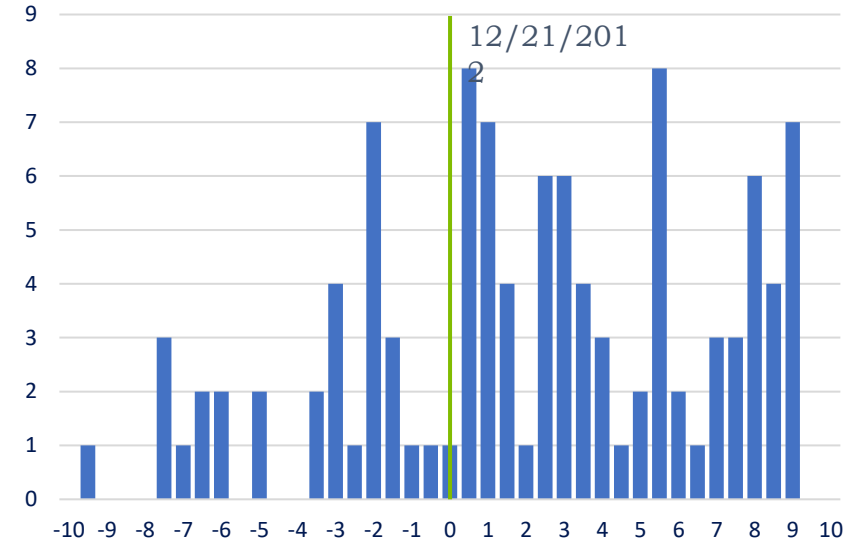
Economic benefits

Airline debt
issuances from select
countries, years from
ratification

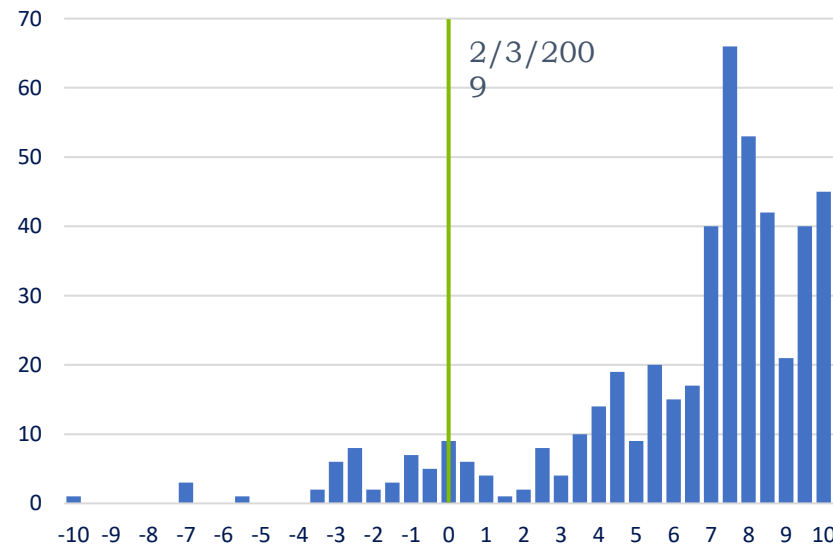
Australia



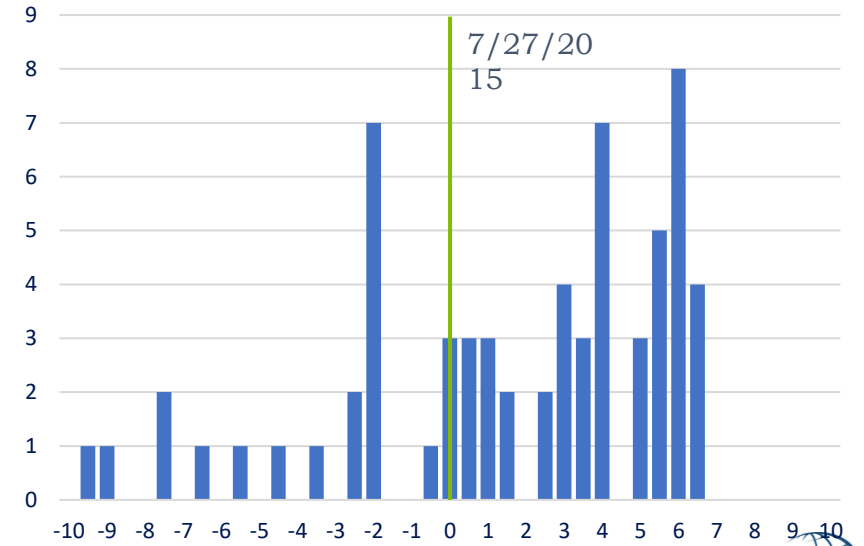
Canada



China



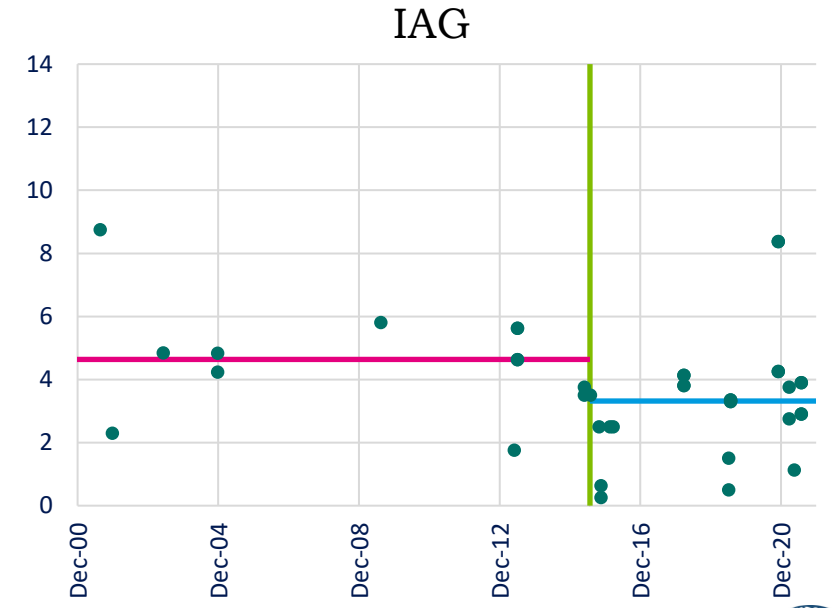
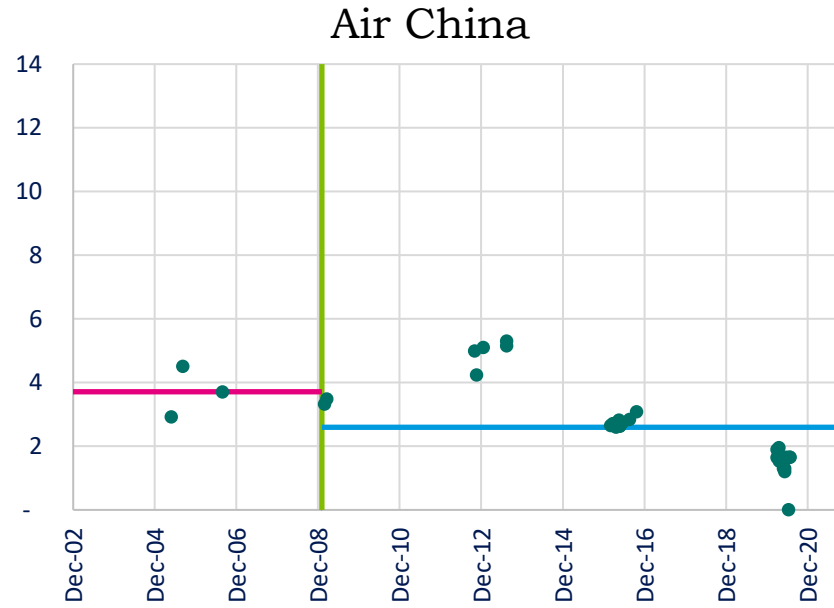
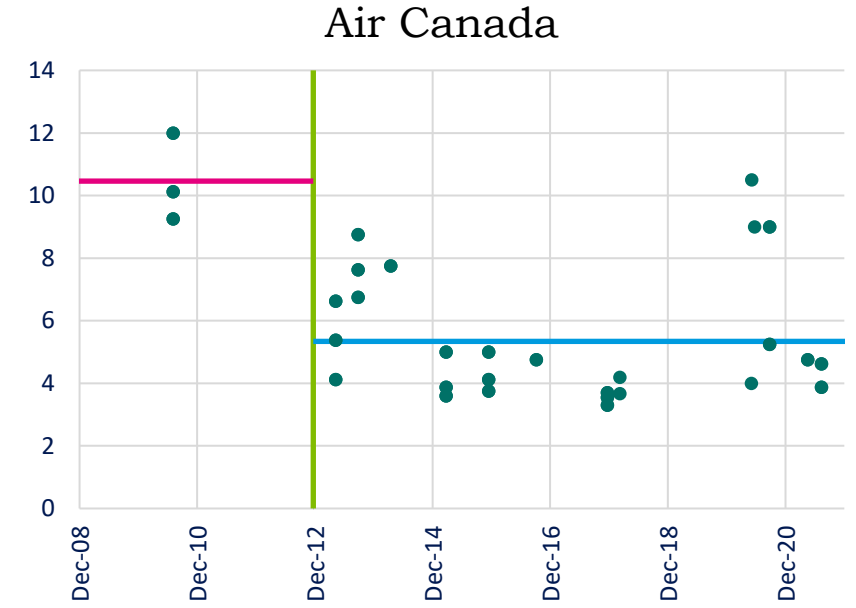
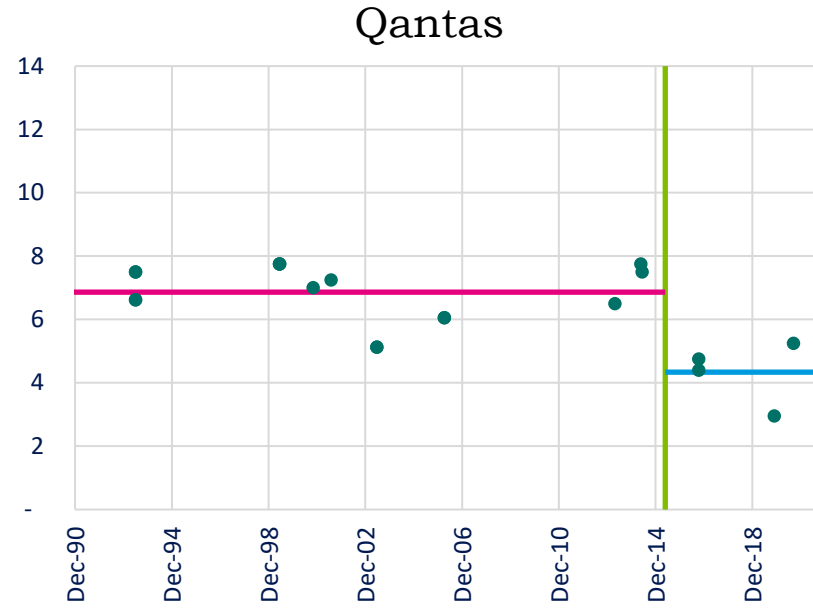
United Kingdom



— Ratification

Economic benefits

Airline initial bond pricing from select airlines



- Ratification
- Pre-ratification avg
- Post-ratification avg