



Committee on Economic Development of Air Transport – Topic 1

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¹ This paper reflects the author's personal views and cannot be considered as the views of ICAO.

THE QUESTION OF FOREIGN OWNERSHIP AND CONTROL

1. Global Context

The air transport industry has known major trends of liberalization starting from the deregulation of air transport in the United States in the 1980s to the liberalization policy in Europe in the 1990s. These trends are, however, centered mainly on the domestic liberalization air traffic rights to allow airlines to serve as many markets as possible, i.e. market access liberalization. International air transport is governed by bilateral Air Service Agreements, which contain restrictions on the number of airlines and frequency of services on many international routes, while many States have limits on airline ownership and control by foreign nationals.

This briefing paper examines the progress made regarding the development of an international agreement on air carrier ownership and control. This topic relates to Strategic Objective 4—Economic Development of Air Transport, among ICAO’s five Strategic Objectives.²

2. Air Carrier Ownership and Control in International Air Transport

The question of air carrier ownership and control remains critical among the several rounds of liberalization policies. These policies are generally viewed as still restrictive with regard to ownership and control. According to ICAO, 90% of Air Services Agreements contain a so-called “nationality clause,” whereby States will only accept service from a foreign carrier (the carrier of the other bilateral contracting State), if that carrier is “substantially owned and effectively controlled” by the other bilateral contracting State or by its citizens.³ The consequence of these strict rules is easy to see: airlines cannot merge across borders or (because most States back up the nationality clause with domestic legislation banning foreign ownership of their airlines) cannot establish subsidiary operations in other States. Almost no States have decided to relax ownership and control regulation despite the merits of the global benefits of air transport liberalization; the pace of such initiatives remains slow.

As a consequence, alternatives, such as global alliances, have been developed by the airline industry to mitigate and circumvent national airline ownership restrictions. This effort to work around the traditional rules has been especially pronounced when the airline industry is experiencing growth and expansion. Without these restrictions, consolidation through full-scale

² ICAO Business Plan 2017-2019, 2016:

<http://www.icao.int/Meetings/a39/Documents/Business%20Plan%202017-2019.pdf>

³ What do these terms mean? Typically, we look to domestic legislation to establish the benchmarks. “Substantial ownership” usually means 50% or more of the voting equity of an airline, but “effective control” is more of a fluid non-mathematical idea that looks at the actual legal and business structure of an airline to see how much of its operations are influenced or even mandated by shareholders who are not citizens of the designating country.

cross border mergers and acquisitions would be possible. If that could be achieved, it would have considerable financial and operational benefits in the airline industry, including cutting down costs by consolidating redundant operations and reducing inefficient overlapping competition among allied carriers. On the other hand, some commentators argue that there is a lack of concerted lobbying among by the global airline industry to radically change the current restricted nationality and ownership rules; perhaps this situation is in part a consequence of the benefits perceived by some airlines from preserving the protectionist status quo.⁴

Indeed, ownership and control rules have often been considered by many States as a matter of national sovereignty, whereas other commentators consider this the rules to be “barely disguised protectionism,” arguing that “protecting national sovereignty...does not necessarily require foreign ownership limits.”⁵ In that context, a concept of “regulatory” nationality has been proposed by the World Economic Forum to “replace a citizenship definition of nationality”. The proposed concept is described as “similar to the idea of principal place of business, but more narrowly defined and therefore less likely to restrain airlines planning subsidiaries in foreign locations.”⁶

During ICAO’s 39th General Assembly, Brazil, Chile, New Zealand and Singapore presented a paper entitled “Perspectives on ICAO’s Multilateral Agreement to Liberalize Market Access.” The co-sponsors of the paper note that “it is desirable that the liberalisation of airline ownership and control and the liberalization of market access, in particular fifth freedom traffic rights, progress together;” in so doing, it allows airlines incentives “to circumvent fifth freedom traffic rights restrictions by a State through investing in or setting up an airline in that State.”⁷

The development of an ICAO-brokered international agreement for States to relax ownership and control requirements for airline designation could find inspiration in past initiatives. For example, there was a semi-official “agreement” reached in 2009 by States under the IATA Agenda for Freedom Summit initiative to liberalize key aspects of international air transport regulatory practice, including airline ownership and control. The agreement would allow waiver of the so-called “nationality clause” in bilateral Air Services Agreements on the basis of reciprocity; following that IATA initiative, seven States signed a political commitment, a so-called Statement of Policy Principles, which was also endorsed by the European Commission and later signed by four additional States. Of course, as an IATA-led arrangement, it is not a treaty as such among sovereign States, but it does reflect the desire of some States to break away from the traditional confines of the nationality rule.

⁴ CAPA Airline Leader Summit in Dublin in May-2017: <https://centreforaviation.com/insights/analysis/airline-ownership-and-control-rules-at-once-both-irrelevant-and-enduring-345816>

⁵ *Idid.*

⁶ *Idid.* Regulatory nationality would refer to the state that oversees the airline's compliance with safety, labour and environmental regulations, where the majority of its aircraft are registered, and where it pays taxes. This would separate the nationality of an airline, as determined from a regulatory point of view, from the nationality of those owning its shares or making its operational decisions both of which are currently limited by the traditional nationality rule.

⁷ ICAO, *supra* note 1

3. General Development: Towards an Agreement on Air Carrier Ownership and Control

Once every decade, ICAO holds a worldwide air transport conference (ATConf) to examine the key issues and related regulatory framework governing the development of air transport. The most recent conference (ATConf/6) was held in Montreal from 18 to 22 March 2013 with the participation of a thousand delegates and observers from 131 Member States and 39 international organizations.⁸ The main outcomes of ATConf/6 can be summarized in four key points: (1) highlighting air transport policy as an integral element of a sustainable civil aviation system; (2) reaffirming the objective of enhanced liberalization and ICAO's leadership role in developing related policies and tools; (3) opening up new perspectives for the modernization of the global regulatory framework; and (4) providing a basis for concrete actions by ICAO.⁹

In May 2014, experts from 27 member States and 18 observer States and international organizations participated in the twelfth meeting of the Air Transport Regulation Panel (ATRP/12), in order to assist the ICAO Secretariat in the ATConf/6 follow-up work.¹⁰ The Panel noted that the work of the ATRP will take into consideration the interests of all stakeholders including an effective and sustained participation of States in international air transport, as well as the ICAO Strategic Objectives for 2014-2016. In that regard, the ATRP has committed to undertake several actions and measures, including further development of ICAO's policy and guidance material on international air transport regulation and liberalization. Accordingly, ATRP is charged with further consideration of strategic issues relating to air transport liberalization. These include: (1) a long-term vision for international air transport liberalization;¹¹ (2) an international agreement for member States to liberalize market access and air carrier ownership and control; (3) regulatory approaches for fair competition; and (4) a set of core principles on consumer protection. Moreover, a working group (WG) was established to analyze and prepare the draft text of either a comprehensive or a supplemental agreement on market access liberalization, and an agreement related to air carrier ownership and control.

In October 2013, the ICAO 38th General Assembly discussed the progress made, following ATConf/6, with regard to the development of an international agreement on air carrier ownership

⁸ ICAO Assembly — 38th Session. Economic Commission, A38-WP/56 presented by the Council, Outcome of the Sixth Worldwide Air Transport Conference (ATConf/6), 31 July 2013: www.icao.int/Meetings/a38/Documents/WP/wp056_en.pdf.

⁹ *Idid*

¹⁰ ICAO. Air Transport Regulation Panel, Twelfth Meeting ATRP/12 from 26 to 30 May 2014, 19 June 2014: http://www.icao.int/Sustainability/Compendium/Documents/ReferenceDocuments/ATRP12_Report_en.pdf

¹¹ In May 2014, the ICAO Council adopted, based on the recommendation ATRP/12-1 of the Panel, a long-term vision for international air transport liberalisation, to serve as a reference point and inspirational guide for member States in their pursuit of the ultimate goal of liberalisation:

“We, the member States of the International Civil Aviation Organization, resolve to actively pursue the continuous liberalization of international air transport to the benefit of all stakeholders and the economy at large. We will be guided by the need to ensure respect for the highest levels of safety and security and the principle of fair and equal opportunity for all States and their stakeholders”:

https://www.icao.int/Meetings/ICAN2017/Documents/YWang_presentation_for_ICAN2017.Dec2017.pdf;

https://www.icao.int/Sustainability/Compendium/Documents/ReferenceDocuments/ATRP12_Report_en.pdf.

and control. Assembly Resolution A38-14 requested the Council, *inter alia*, “to initiate work on the development of an international agreement to liberalize air carrier ownership and control.”¹²

In June 2015, the ATRP-WG reviewed the first draft of two agreements on the liberalization of market access, and the liberalization of foreign investment restrictions in international airlines. General agreement was reached on certain administrative and technical provisions including “definitions, recognition of certificates, safety, security, user charges consultation and withdrawal.”¹³

In September 2015, the thirteenth meeting of the panel (ATRP/13) examined the revised draft agreement. Draft texts on five key areas were addressed and prepared: traffic rights, safeguards, air carrier ownership and control, amendment, and reservations. The work of the panel on the draft agreement has benefited from the outcomes of the third ICAO Air Transport Symposium (IATS) in March 2016, which addressed, *inter alia*, issues relating to competition in international air transport.¹⁴

In his presentation on ICAO’s work on air transport policy and regulation, Yuanzheng Wang, chief of the Economic Regulatory Framework Section at ICAO, emphasizes the outstanding issues regarding the adoption of the final agreements; these issues consist of the form of agreement (whether comprehensive or supplemental), the scope and pace of liberalization (the grant of traffic rights), the safeguard provisions (what and how to cover), and the agreement on Ownership and Control (stand-alone or incorporated into the baseline agreement).¹⁵ These key areas were identified, yet consensus was not reached.¹⁶ It is envisaged that the final draft text of the agreements will be presented to the governing bodies, followed by consultations with ICAO member States, during the period from 2017 to 2019.¹⁷

¹² ICAO Assembly —39th Session, Economic Commission, A39-WP/5, presented by the Council, Progress Report on the Development of International Agreements on the Liberalization of Market Access, Air Cargo and Air Carrier Ownership and Control, 5 July 2016: https://www.icao.int/Meetings/a39/Documents/WP/wp_005_en.pdf

¹³ *Idid.*

¹⁴ *Idid.*

¹⁵ ICAO, ICAN 2017, December 2017:

https://www.icao.int/Meetings/ICAN2017/Documents/YWang_presentation_for_ICAN2017.Dec2017.pdf; See also *supra* note 6.

¹⁶ ICAO, *supra* note 6.

¹⁷ ICAO, *supra* note 9.

4. Non-exhaustive list of potential questions to be addressed by the delegates

1. ICAO has accepted the possible need for multilateral liberalization of both market access and the foreign ownership rule: do you agree that more multilateral air transport liberalization is the most effective way for ICAO to proceed?
2. Is ICAO the optimal forum for multilateral agreements on air transport or should these agreements be negotiated regionally or even bilaterally?
3. Are ICAO's current institutional arrangements (Air Transport Conferences and Working Groups, etc.) sufficient and efficient for purposes of pursuing multilateral air transport liberalization?
4. Does ICAO have a role to play in economic matters or should it focus only on safety and security matters?
5. Should ICAO circulate a draft multilateral treaty on foreign ownership or should it simply issue guidelines to its member States and ask them to include these guidelines in their bilateral treaties?
6. Should ICAO limit itself to framing a common definition of "substantial ownership" and "effective control" rather than trying to create a new multilateral agreement on foreign ownership?
7. Would introducing a new idea of "regulatory" nationality ensure that safety is not compromised by removing the "citizenship" requirement on airline ownership?
8. The foreign ownership rule helps to ensure that airlines from all countries have limited access to capital investment; isn't this consistent with ICAO's mission of assuring equality of opportunity rather than allowing a few countries to dominate the global air transport industry?
9. What is the relationship between liberalization of market access and liberalization of the foreign ownership and control rule?

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