



WORKING PAPER

WORLDWIDE AIR TRANSPORT CONFERENCE (ATCONF)

SIXTH MEETING

Montréal, 18 to 22 March 2013

Agenda Item 2: Examination of key issues and related regulatory framework

Agenda Item 2.2: Air carrier ownership and control

MARKET ACCESS RESTRICTIONS

(Presented by 22 Member States², Members of the Latin American Civil Aviation Commission (LACAC))

EXECUTIVE SUMMARY

This working paper examines how some States are still applying the traditional approach of the substantial ownership and effective control criterion to the designation of airlines during bilateral negotiations. This restricts market access, which in turn limits the liberalization of Air Transport.

Action: The Conference is invited to:

- a) consider this information and the assessments presented in this paper;
- b) endorse the conclusions presented in paragraph 3; and
- c) adopt the recommendations in paragraph 4.

References: ATConf/6 reference material is available at www.icao.int/meetings/atconf6.

1. INTRODUCTION

1.1 International air transport has made enormous efforts to become a competitive sector and to this end, certain governments of countries at different stages of development have implemented regulations and policies to work towards deregulation, increased foreign investment and liberalization of market access amongst other measures.

1.2 Commercial aviation has been evolving in this area, and thus the International Civil Aviation Organization, ICAO, has itself drafted model clauses for Air Services Agreements which expand the concept of airlines' nationality to the place of establishment and principal place of business of the

¹ Spanish version provided by the Latin American Civil Aviation Commission (LACAC).

² Argentina, Aruba, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela.

airlines, thereby reconciling national interests and policies on the promotion of foreign investment with the air traffic rights system concluded in bilateral agreements.

1.3 Notwithstanding the above, in certain States, air commercial policy still applies the traditional approach based on the criterion of substantial ownership and effective control of airlines that may develop international air transport services, even if these criteria are not necessarily in accordance with various States' legislation.

1.4 This subject is so relevant that the International Civil Aviation Organization has addressed it in Working paper ATConf/6-WP/12, where it examines some of the aspects and possible options for liberalizing the rules on air carrier ownership and control with regard to designation of airlines under the bilateral air services agreements. This paper also includes a proposal on a multilateral approach.

2. THE REGION'S EXPERIENCE

2.1 The aviation landscape in the region has been changing and alliances are playing a more important role in the development of Latin America. Over the last few years an extraordinary acceleration of this trend has been observed in this region.

2.2 Colombia has witnessed three main Latin American alliances. Its legislation established freedom of foreign capital investment in Colombian companies, including in air transport companies, as of the beginning of the nineties, without companies feeling as if they had lost their nationality or were longer governed by the country's laws. Thanks to this liberal foreign capital scheme, the State has received significant amounts of investment in various economic sectors, which have given impetus to and encouraged the nation's growth and economic development.

2.3 In keeping with the above, the Colombian Aviation Authority has been including the designation clause that applies the concept of "nationality by establishment" in its commercial air transport agreements.

2.4 Notwithstanding the above, in the case of air commercial relations with Canada, the United States and the European Union- countries that continue to apply the criterion of substantial ownership and effective control- Colombia has had to resort to waivers as regards the application of standards on the concept of nationality of the airlines designated in these States, in order to ensure that Colombian airlines may operate in these territories, pursuant to our law on foreign capital investment, which inter alia has contributed to the promotion of air mergers.

2.5 By way of illustration, the clauses concluded by Colombia with the United States, Canada, Spain, China and Luxembourg, amongst other States, have been **attached** hereto.

3. CONCLUSION

3.1 The substantial ownership and effective control criterion is becoming increasingly obsolete. International air transport requires air carriers to adjust to an ever more competitive and dynamic global environment, which is why there is a need to apply broader criteria that promote liberalization of air carrier ownership and control.

3.2 The Member States of LACAC welcome ICAO's initiative to explore the possibility of an international agreement between States to make the ownership and control requirements for the designation of airlines more flexible and facilitate access to international capital.

4. **RECOMMENDATIONS**

4.1 The following recommendations are proposed for consideration by the Conference:

- a) ICAO should take the relevant steps to prepare a possible international agreement in order for States to liberalize ownership and control of airlines;
- b) ICAO should continue to promote its guidance on air carrier ownership and control policies and encourage States to use these in their regulatory practices; and
- c) ICAO should update its guidance to ensure that it responds to changing situations and States' requirements.

APPENDIX

UNITED STATES OF AMERICA

Provisions included in the Memorandum of Consultations signed on 11 November 2010, with regard to Articles 3 and 4 related to the Authorization and Revocation of Authorization in the negotiated Air Transport Agreement:

“...The Colombian delegation proposed that the Agreement include a principal place of business standard in Articles 3 and 4, because pursuant to the Colombian Constitution and law, foreign capital investment in airlines must be facilitated and, for such reason, the nationality of a Colombian airline is not determined by its ownership and control, but rather by its place of establishment.

The U.S. delegation stated that it would be a significant departure from U.S. policy and practice not to include the ownership and control provisions currently in the 1956 U.S.-Colombia Air Transport Agreement, as amended. The U.S. delegation further stated that the U.S. Department of Transportation has authority to waive the ownership and control standards with respect to foreign airlines and has an established practice of waiving such standards for airlines when all countries involved are Open-Skies partners. The U.S. delegation confirmed that the agreement of Colombia to phase in an Open-Skies Agreement will constitute a positive consideration for the U.S. Department of Transportation in responding to requests by Colombian airlines for a waiver of the substantial ownership and effective control provisions of the U.S. – Colombia Air Transport Agreement, in particular with respect to investments from Open-Skies partners. Such requests will receive fair and expeditious treatment...”

Provisions of the Agreement:

“...Article 3 Authorization

Each Party, on receipt of applications from an airline of the other Party, in the form and manner prescribed for granting authorizations and technical licences, shall grant the appropriate authorizations and licences with minimum procedural delay, provided:

- a. substantial ownership and effective control of that airline are vested in the other Party, nationals of that Party, or both;*
- b. the airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transport by the Party considering the application or applications; and*
- c. the other Party is maintaining and administering the provisions set forth in Article 6 (Safety) and in Article 7 (Aviation Security).*

*Article 4
Revocation of Authorization*

1. Either Party may revoke, suspend, limit or impose conditions on the operating authorizations or technical licences of an airline where:

- a. that airline is not an airline of the other Party under Article 1(4);*
- b. substantial ownership and effective control of that airline are not vested in the other Party, the other Party's nationals or both; or*
- c. that airline has failed to comply with the laws and regulations referred to in Article 5 (Application of Laws) of this Agreement.*

2. Unless immediate action is essential to prevent further non-compliance with subparagraph 1(c) of this Article, the rights established by this Article shall be exercised only after consultation with the other Party.

3. This Article does not limit the rights of either Party to withhold, revoke, suspend, limit or impose conditions on the operating authorization or technical licence of an airline or airlines of the other Party, in accordance with the provisions of Article 6 (Safety) or Article 7 (Aviation Security).."

CANADA:

Provisions included in the Memorandum of Consultations signed on 16 March 2012 with regard to the negotiated Air Transport Agreement:

"...Authorization of Designated Airlines

With respect to Article 5 paragraph 1) c) (Withholding, Revocation, Suspension and Limitation of Authorization) of the Agreement, the delegations had a detailed exchange of views.

The Colombian delegation proposed that the Agreement include a "nationality by establishment" standard for Article 5 paragraph 1) c), because pursuant to the Colombian Constitution and law, foreign capital investment in airlines must be facilitated and, for such reason, the nationality of a Colombian airline is not determined by its ownership and control, but rather by its place of establishment.

The Canadian delegation stated that it would be a significant departure from Canadian policy and practice to not include provisions on substantial ownership and effective control in an air transport agreement. The Canadian delegation further stated that Canada may waive its discretion to take action with respect to authorizations of designated airlines of other Parties, where such airlines are not substantially owned and effectively controlled by the Party designating the airline, or its nationals, and has waived such discretion in the past.

In this regard, the Canadian delegation confirmed that the Government of Canada undertakes, that, on a permanent basis, it will not take action under Article 5 paragraph 1) c) with respect to authorizations to be issued by Canadian aeronautical authorities to airlines designated by Colombia on the date of receipt by Canada of the Colombian Diplomatic Note as per paragraph 8 above, based on their ownership and control structure on that date and so long as: the aeronautical authorities of Colombia exercise the necessary oversight to ensure compliance by its designated airlines with the provisions of the Agreement; and the designated airlines maintain their principal place of business in Colombia.

In keeping with the close and positive relations between Canada and Colombia, Canada will give positive consideration with regard to waiving Article 5 paragraph 1) c) for airlines designated by Colombia in the future..."

"...Authorization of designated airlines

1. *With respect to Article 5 paragraph 1) c) (Withholding, Revocation, Suspension and Limitation of Authorization) of the Agreement, the delegations had a detailed exchange of views.*
2. *The Colombian delegation proposed that the Agreement include a "nationality by establishment" standard for Article 5 paragraph 1) c), because pursuant to the Colombian Constitution and law, foreign capital investment in airlines must be facilitated and, for such reason, the nationality of a Colombian airline is not determined by its ownership and control, but rather by its place of establishment.*
3. *The Canadian delegation stated that it would be a significant departure from Canadian policy and practice to not include provisions on substantial ownership and effective control in an air transport agreement. The Canadian delegation further stated that Canada may waive its discretion to take action with respect to authorizations of designated airlines of other Parties, where such airlines are not substantially owned and effectively controlled by the Party designating the airline, or its nationals, and has waived such discretion in the past.*
4. *In this regard, the Canadian delegation confirmed that the Government of Canada undertakes that, on a permanent basis, it will not take action under Article 5 paragraph 1) c) with respect to authorizations to be issued by Canadian aeronautical authorities to airlines designated by Colombia on the date of receipt by Canada of the Colombian Diplomatic Note as per paragraph 8 above, based on their ownership and control structure on that date and so long as: the aeronautical authorities of Colombia exercise the necessary oversight to ensure compliance by its designated airlines with the provisions of the Agreement; and the designated airlines maintain their principal place of business in Colombia.*
5. *In keeping with the close and positive relations between Canada and Colombia, Canada will give positive consideration with regard to waiving Article 5 paragraph 1) c) for airlines designated by Colombia in the future...."*

Provisions of the Agreement:

“..ARTICLE 3

Designation

Each Party shall have the right to designate, by diplomatic note, an airline or airlines to operate the agreed services on the routes specified in this Agreement for that Party and to withdraw a designation or to substitute another airline for one previously designated.

ARTICLE 4

Authorization

1. Following receipt of a notice of designation or of substitution pursuant to Article 3 of this Agreement, the aeronautical authorities of the other Party shall, consistent with the laws and regulations of that Party, issue without delay to the airline so designated the required authorizations to operate the agreed services for which that airline has been designated.

2. The Parties confirm that, upon receipt of such authorization, the designated airline may begin at any time to operate the agreed services, in whole or in part, provided that the airline complies with the provisions of this Agreement.

ARTICLE 5

Withholding, Revocation, Suspension and Limitation of Authorization

1. Notwithstanding paragraph 1 of Article 4, the aeronautical authorities of each Party shall have the right to withhold the authorizations referred to in Article 4 of this Agreement with respect to an airline designated by the other Party, and to revoke, suspend or impose conditions on such authorizations, temporarily or permanently:

(a) in the event of failure by such airline to qualify under the laws and regulations normally applied by the aeronautical authorities of the Party granting the rights;

(b) in the event of failure by such airline to comply with the laws and regulations of the Party granting the rights;

(c) in the event that they are not satisfied that substantial ownership and effective control of the airline are vested in the Party designating the airline or its nationals; and

(d) in the event the airline otherwise fails to operate in a manner consistent with the conditions set out in this Agreement.

2. The rights enumerated in paragraph 1 of this Article shall be exercised only after consultations between the aeronautical authorities of the Parties in conformity with Article 21 of this Agreement, unless immediate action is essential to prevent infringement of the laws and regulations referred to above or unless safety or security requires action in accordance with the provisions of Articles 7 or 8 of this Agreement. ...”

SPAIN:

Provisions included in the Memorandum of Understanding signed on 24 January 2012, with regard to the negotiated Air Transport Agreement:

"...With regard to the Community Clauses included in Articles 3 and 4 of the ASA (Designation of Airlines and Revocations), the Colombian delegation requested clarification of the concept of "establishment" used by Spain. The Spanish Party accordingly provided information about the principles that European Union airlines have to comply with, in order to become established in Spain and thus be able to use the traffic rights agreed between Spain and third countries.³ Notwithstanding the above, both delegations agreed to exchange, by diplomatic note, relevant information on the application of the "establishment" criteria for airlines used in the respective countries..."

PROVISION OF THE AGREEMENT ON DESIGNATION OF AIRLINES

"...3. The Aeronautical Authorities of one of the Contracting Parties may require that the airlines designated by the other Contracting Party demonstrate that they are in a position to fulfil the obligations prescribed in the Laws and Regulations that are normally and reasonably applied by these Authorities for operating international air services, in compliance with the provisions of the Convention.

4. The granting of the operating authorizations mentioned in paragraph 2 of this Article shall require:

4.1 In the case of an airline designated by the Kingdom of Spain:

4.1.1 it is established on the territory of the Kingdom of Spain under the European Union Treaties and has a valid operating licence in accordance with European Union law; and

4.1.2 effective regulatory control of the airline is exercised and maintained by the EU Member State responsible for issuing its Air Operator's Certificate and the relevant Aeronautical Authority is clearly identified in the designation, and

4.1.3. the airline is owned, either directly or through majority ownership, and effectively controlled by Member States of the European Union and/or nationals of EU Member States, and/or other States listed in Annex II and/or nationals of these other States.

4.2. In the case of an airline designated by the Republic of Colombia:

4.2.1 it has its main office on the territory of the Republic of Colombia and is authorized in accordance with the applicable law of the Republic of Colombia; and

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¹ The establishment criteria of Spain include, amongst other requirements:

- Stable and permanent organizational structure;
- Respect of European and national legislation, with regard to air transport (in particular related to safety and security) and social and taxation matters;
- Material and human resources for developing the activity, especially with regard to safety.
- Submission of an Operational Plan.³

⁴

4.2.2 effective and continuous regulatory control of that airline is held and maintained by the Republic of Colombia; and

4.2.3. it has a valid operating licence in accordance with the national legislation of the Republic of Colombia.

5. *Once an airline has been designated and authorized in this manner, it may at any time begin to operate the agreed services in accordance with the provisions of this Agreement...*

LUXEMBOURG:

Provision included in the Agreed Minutes on 20 January 2012, with regard to the negotiated Air Transport Agreement:

“...(Establishment criteria

Luxembourg delegation explained the establishment criteria of Luxembourg

The establishment criteria of Luxembourg include inter alia:

stable and permanent organizational structures;

respect of the appropriate EU law and national legislation, such as safety and security regulations for air transport, fiscal and social law;

conformity with EU law, in particular on non-discrimination and proportionality;

establishment and permanent presence of management, staff responsible for safety, crew and other personnel)...”

PROVISION OF THE AGREEMENT ON DESIGNATION OF AIRLINES

“...Designation and Authorization

Either Contracting Party shall have the right, by written notification through diplomatic channels to the other Contracting Party, to designate one or more airlines to operate international air services on the routes specified in the annex and to substitute another airline for an airline previously designated.

On receipt of such a notification, each Contracting Party shall, without delay, grant to the airline(s) so designated by the other Contracting Party the appropriate operating authorizations subject to the provisions of this article, unless it is not satisfied that:

in the case of an Airline designated by Luxembourg:

it is established in Luxembourg under the European Union Treaties and has a valid operating licence in accordance with European Union law, and

effective regulatory control of the Airline is exercised and maintained by the EU Member State responsible for issuing its Air Operator’s Certificate and the relevant Aeronautical Authority is clearly identified in the designation, and

the Airline is owned, directly or through majority ownership, and is effectively controlled by Member States of the European Union or the European Free Trade Association and/or by nationals of such States;

in the case of an airline designated by the Republic of Colombia:

it is established in the territory of the Republic of Colombia and has a valid operating licence in accordance with applicable law of the Republic of Colombia, and effective regulatory control of the airline is exercised and maintained by the Republic of Colombia.

and that:

the Government designating the Airline is maintaining and administering the standards set forth in Article 6 (Safety) and Article 7 (Aviation Security);

the designated airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operations of international air transportation by the Contracting Party considering the application or applications.

Upon receipt of the operating authorization of paragraph 2 of this article, the designated airline(s) may at any time begin to operate the agreed services, in part or in whole, provided that it complies with the provisions of this agreement...”

CHINA

Memorandum of Understanding from 18 May 2012

2. Airlines Designation

1. The Colombian delegation proposed that the Agreement include a “nationality by establishment”, because pursuant to the Colombian Constitution and law, foreign capital investment in airlines must be facilitated and, for such reason, the nationality of a Colombian airline is not determined by its ownership and control, but rather by its place of establishment.

2. The Chinese delegation stated that it would be a significant departure from its policy and practice to not include provisions on substantial ownership and effective control in an air service agreement. Nonetheless, in keeping with give positive consideration on a case by case basis with regard to waiving Articles 3 and 4 for airlines designated by Colombia, or its nationals, provided that the aeronautical authorities of Colombia exercise the necessary oversight to ensure compliance by its designated airlines with the provisions of the ASA; and the designated airlines are established and maintain their principal place of business in Colombia.

AIR SERVICES AGREEMENT

ARTICLE 3 DESIGNATION AND AUTHORISATION

1. Both Parties shall have the right to designate, through a written notification to the other Party, one or more airlines for purposes of allowing those airlines to operate the agreed services on the routes specified under this Agreement.
2. Once a Party receives from the other Party the designation and application for the designated airline in the mode and manner prescribed for authorization and operation, the said Party shall grant the relevant authorization to operate in the shortest span of time and the minimum filing steps possible provided that:
 - a) the substantial ownership and effective control of the designated airline remains vested in the designating Contracting Party or its nationals;
 - b) the Party designating the airline has and maintains effective regulatory control of the airline;
 - c) the Party designating the airline is in compliance with the provisions set forth in Article 7 (Safety) and Article 8 (Aviation Security);
 - d) the designated airline is qualified to meet other conditions prescribed under the laws and regulations normally applied to the operation of international air transport services by the Party receiving the designation.
3. Among the regulatory control evidence, they should provide information such as if the airline holds a license or a valid operating permit issued by the designating aeronautical authority in the form of an Operator Certificate (AOC) that meets the criteria of the designating Party for the operation of international air services, such as proof of ability to meet public interest requirements and obligations of service guarantee, and that the designating Party has and maintains surveillance programs for safety and security aviation in compliance with ICAO standards.

THE NETHERLANDS

Memorandum of Understanding signed on 17 January 2012

AIR SERVICES AGREEMENT

Article 3 Designation and Authorization

1. Either Contracting Party shall have the right, by written notification through diplomatic channels to the other Contracting Party, to designate one or more Airlines to operate International Air Services on the routes specified in the Annex and to substitute another Airline for an Airline previously designated.
2. On receipt of such a notification, each Contracting Party shall, without delay, grant to the Airline(s) so designated by the other Contracting Party the appropriate operating authorizations subject to the provisions of this Article, unless it is not satisfied that:

- a. in the case of an Airline in the European part of the Netherlands is designated by the Kingdom of the Netherlands:
 - i. it is established in the Territory of the Kingdom of the Netherlands under the European Union Treaties and has a valid operating licence in accordance with European Union law, and
 - ii. effective regulatory control of the Airline is exercised and maintained by the EU Member State responsible for issuing its Air Operator's Certificate and the relevant Aeronautical Authority is clearly identified in the designation, and
 - iii. the Airline is owned, directly or through majority ownership, and is effectively controlled by Member States of the European Union or the European Free Trade Association and/or by nationals of such States;

- b. in the case of an Airline in the Caribbean part of the Netherlands is designated by the Kingdom of the Netherlands:
 - i. it is established in the Caribbean part of the Netherlands and has a valid operating license in accordance with the appropriate legislation for the Caribbean part of the Netherlands,
 - ii. effective regulatory control of the Airline is exercised and maintained by the Netherlands,
 - iii. the Airline is owned, directly or through majority ownership, and is effectively controlled by residents of the Caribbean part of the Netherlands with Dutch nationality;

- c. in the case of an Airline is designated by the Republic of Colombia:
 - i. it is established in the Territory of the Republic of Colombia and has a valid Operating Licence in accordance with applicable law of the Republic of Colombia, and
 - ii. effective regulatory control of the Airline is exercised and maintained by the Republic of Colombia.

- and that:

- d. the Government designating the Airline is maintaining and administering the standards set forth in Article 16 (Safety) and Article 17 (Aviation Security);

- e. the Designated Airline is qualified to meet the conditions

prescribed under the laws and regulations normally applied to the operations of international air transportation by the Contracting Party considering the application or applications.

3. Upon receipt of the operating authorization of paragraph 2 of this Article, the Designated Airline(s) may at any time begin to operate the Agreed Services, in part or in whole, provided that it complies with the provisions of this Agreement.

— END —