



## 世界范围航空运输会议（ATCONF）

### 第六次会议

2013 年 3 月 18 日至 22 日，蒙特利尔

议程项目 2： 审议关键问题和相关的监管框架

议程项目 2.2： 航空承运人的所有权和控制权

### 市场准入的限制

（由拉丁美洲民航委员会（LACAC）22 个成员国<sup>2</sup>、成员提交）

#### 执行摘要

本工作文件审议了为什么一些国家仍在双边谈判中对航空公司指定的主要所有权和有效控制权标准方面仍然采用传统做法。这会限制市场准入，反之亦会限制航空运输自由化。

行动：请会议：

- a) 审议本文件提供的信息和评估；
- b) 批准第3段提出的结论；和
- c) 通过第4段中的建议。

参考文件：

ATConf/6 次会议参考材料载于：[www.icao.int/meetings/atconf6](http://www.icao.int/meetings/atconf6)。

## 1. 引言

1.1 国际航空运输已经做出巨大努力，成为有竞争力的部门，为此目的，除其他措施外，处于不同发展阶段的某些国家的政府已经实施法律和政策，努力放松管制、增加外国投资和开放市场准入。

1.2 商业航空在这一领域发展，因此，国际民航组织编制了民用航空协定示范条款，它扩大了航空公司组建地点和航空公司主要国籍的概念，从而协调国家利益与政策以此推动外商对双边协定中签订的航权投资。

<sup>1</sup> 西班牙文本由拉丁美洲民航委员会（LACAC）提交。

<sup>2</sup> 阿根廷、阿鲁巴岛、伯利兹、玻利维亚、巴西、智利、哥伦比亚、哥斯达黎加、古巴、多米尼加共和国、厄瓜多尔、萨尔瓦多、危地马拉、洪都拉斯、牙买加、墨西哥、尼加拉瓜、巴拿马、巴拉圭、秘鲁、乌拉圭和委内瑞拉。

1.3 尽管有上述规定，某些国家的航空商业政策仍然适用主要所有权和有效控制权标准的传统做法，它可能发展国际航空运输业务，即使这些标准并不一定符合各国立法。

1.4 国际民航组织在 ATConf/6-WP/12 号工作文件中提到这一相关议题，它审议了双边航空运输协定关于航空公司指定的航空承运人所有权和控制权规则自由化的某些可能选择方案。本文件包括一项多边方法的建议。

## 2. 地区的经验

2.1 本地区的航空局面已经改观，联盟在拉丁美洲的发展中发挥出更重要的作用。过去几年中，观察到该地区这一趋势突飞猛进的提速。

2.2 哥伦比亚目前有三个主要的拉美联盟。其立法规定外国资本可在哥伦比亚公司自由投资，包括航空运输公司。从 20 世纪 90 年代开始，没有航空公司感觉好像它们已失去国籍或不再受国家法律管理。由于这种自由化的外国资本计划，各国不同的经济部门都收到显著的投资额，进而推动国家增长和经济发展。

2.3 按照上述，哥伦比亚航空当局已经将指定条款纳入其商业航空运输协定当中，它适用“确定国籍”的概念。

2.4 尽管有上述规定，在与加拿大、美国和欧盟这些依然适用主要所有权和有效控制权标准国家的商业航空关系当中，哥伦比亚不得不求助豁免适用上述国家关于航空公司指定国籍概念的标准，以便确保哥伦比亚的航空公司按照我们对于外资的法律在上述领土运营，它将有助于促进航空结盟。

2.5 通过举例说明，哥伦比亚与美国、加拿大、西班牙、中国和卢森堡以及其他国家签订的条款随函附奉。

## 3. 结论

3.1 主要所有权和有效控制权的标准正变得越来越过时。国际航空运输需要航空承运人做出调整以适应一个更具有竞争力和活力的全球环境，这就是为什么有必要适用一个更广泛的标准，进而促进航空承运人所有权和控制权实现自由化。

3.2 拉丁美洲民航委员会的成员国欢迎国际民航组织探索各国之间签订国际协定的可能性，使航空公司指定对于所有权和控制权的要求更加灵活并推动进入国际资本市场。

#### 4. 建议

##### 4.1 提出下述建议供会议审议：

- a) 国际民航组织应该采取相应步骤，编制可能的国际协定以便使各国将航空公司所有权和控制权实现自由化；
- b) 国际民航组织应该继续推动对航空承运人所有权和控制权政策的指导，并鼓励各国在其管理做法中使用这些指导；和
- c) 国际民航组织应更新其指导，确保它对不断变化的情况和各国的要求作出回应。

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## 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.<sup>3</sup> 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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<sup>1</sup>.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.<sup>3</sup>

*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..."*

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## **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.

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