

SAMPLE

BILATERAL TEMPLATE AIR SERVICES AGREEMENT

Throughout this document:

- 1) an asterisk is used to indicate that a specific provision within an article is common to each of the traditional, transitional and full liberalization approaches. No asterisk appears if the whole article applies to all three approaches. However in some articles, such as “Designation and authorization”, the provision is reproduced in full for each approach for purposes of readability and clarity of the Article;*
- 2) in an article which provides for more than one approach, i.e. traditional, transitional, full liberalization, the same sequential order of presentation is maintained down the page, for ease of readability;*
- 3) similarly, where there are options within an approach (for example, two options within the transitional approach) these are also provided separately, but not in any order of priority.*

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Article 3
Designation and authorization

Traditional

1. Each Party shall have the right to designate in writing to the other Party an airline to operate the agreed services [in accordance with this Agreement] and to withdraw or alter such designation.

2.* On receipt of such a designation, and of application from the designated airline, in the form and manner prescribed for operating authorization [and technical permission], each Party shall grant the appropriate operating authorization with minimum procedural delay, provided that:

a) substantial ownership and effective control are vested in the Party designating the airline, nationals of that Party, or both;

b)* the Party designating the airline is in compliance with the provisions set forth in Article _ (Safety) and Article _ (Aviation Security); and

c)* 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.

The formulation of the Designation and authorization provision may be simplified by addressing the reasons in paragraph 2 for a State to receive an authorization in the Revocation of authorization Article, since the conditions for not granting an authorization are the same.

The traditional approach refers to one airline or a single designation.

The traditional “substantial ownership and effective control” formula is still used in the majority of bilateral agreements. The phrase is not defined and the authorizing Party is the sole judge of whether the ownership and control criteria have been met. Nevertheless, “substantial ownership” is broadly considered to mean more than 50 per cent equity ownership. On the other hand, States take varying views in their domestic legislation or practice as to what might constitute “effective control”. With the traditional clause, there have been individual instances where the authorizing Party has waived its right to require that the ownership and control criteria be met.

For a Party which receives the designation, it would retain the discretionary right of refusal as a measure of control to address legitimate concerns if and when required. This provision addresses potential concerns such as safety, security or other economic aspects including potential emergence of “flags of convenience”.

Article 3
Designation and authorization (cont'd)

Traditional (cont'd)

3.* On receipt of the operating authorization of paragraph 2, a designated airline may at any time begin to operate the agreed services for which it is so designated, provided that the airline complies with the applicable provisions of this Agreement.

Transitional

1. Each Party shall have the right to designate in writing to the other Party one or more airlines to operate the agreed services [in accordance with this Agreement] and to withdraw or alter such designation.

2. On receipt of such a designation, and of application from the designated airline, in the form and manner prescribed for operating authorization [and technical permission], each Party shall grant the appropriate operating authorization with minimum procedural delay, provided that:

**[Sub-paragraphs 2a) through 2 c) ,
option 1 of 2]**

a) the airline is and remains substantially owned and effectively controlled by nationals of any one or more States in a group, or by any one or more of the Parties themselves;

The transitional approach refers to one or more airlines or multiple designation. The phrasing was sometimes interpreted as being met by the designation of two airlines. The transitional approach also includes formulae for increasing the number of designated airlines on specific routes based on, for example, negotiated multi-year increases or the achievement of a specified level of passenger traffic in city-pair markets.

This approach uses the recommendation of the 1994 World-wide Air Transport Conference (ATConf/4) which refers to an airline which is and remains substantially owned and effectively controlled by nationals of one or more States that are not necessarily party to the agreement concerned but are within a predefined group with a "community of interest". A second group formulation by ATConf/4 is an airline which is substantially owned and effectively controlled by nationals of any one or more States that are parties to an agreement, or any one or more of the parties themselves. The definition of a European Union (EU) air carrier is an example of this ownership and control within a group (the EU criteria also includes principal place of business and administrative headquarters in a Member State).

Article 3 Designation and authorization (cont'd)	
Transitional (cont'd)	
<p>b)* the Party designating the airline is in compliance with the provisions set forth in Article _ (Safety) and Article _ (Aviation Security); and</p> <p>c)* 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.</p> <p>[Sub-paragraphs a) through d) *, option 2 of 2]</p> <p>a) the designated airline has its principal place of business (see (i) below) [and permanent residence] in the territory of the designating Party;</p> <p>b) the Party designating the airline has and maintains effective regulatory control (see (ii) below) of the airline;</p> <p><i>Notes: —</i></p> <p>(i) evidence of principal place of business includes such factors as: the airline is established and incorporated in the territory of the designating Party in accordance with relevant national laws and regulations, has a substantial amount of its operations and capital investment in physical facilities in the territory of the designating Party, pays income tax, registers and bases its aircraft there, and employs a significant number of nationals in managerial, technical and operational positions.</p> <p>(ii) evidence of effective regulatory control includes but is not limited to: the airline holds a valid operating licence or permit issued by the licensing authority such as an Air Operator Certificate (AOC), meets the criteria of the designating Party for the operation of international air services, such as proof of financial health, ability to meet public interest requirement, obligations for assurance of service; and the designating Party has and maintains safety and security oversight programmes in compliance with ICAO standards.</p>	<p><i>In agreements where a reference is made to ownership by nationals within a group of States, for example, Member States within the European Union, the text would be modified to take into consideration any changes in the European Community legislation.</i></p> <p><i>This approach recommended by ICAO would enable a State to designate air carriers as it sees qualified (including those with majority national ownership) to use and benefit from its entitled market access rights under a bilateral agreement. At the same time, it would reinforce the obligation on the part of the designating party to maintain effective regulatory control (including safety and security oversight) over the airline it designates. Such control is envisioned primarily through licensing which can include both economic and operational elements. The arrangement would not require the State to change its existing laws, policies or regulations pertaining to national ownership and control of its own national air carrier(s), but would allow such change if and when the State wishes to do so.</i></p>

Article 3
Designation and authorization (cont'd)

Transitional (cont'd)

c)* the Party designating the airline is in compliance with the provisions set forth in Article _ (Safety) and Article _ (Aviation Security); and

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.* On receipt of the operating authorization of paragraph 2, a designated airline may at any time begin to operate the agreed services for which it is so designated, provided that the airline complies with the applicable provisions of this Agreement.

Full liberalization

1. Each Party shall have the right to designate in writing to the other Party as many airlines as it wishes to operate the agreed services [in accordance with this Agreement] and to withdraw or alter such designation.

2.* On receipt of such a designation, and of application from the designated airline, in the form and manner prescribed for operating authorization [and technical permission], each Party shall grant the appropriate operating authorization with minimum procedural delay, provided that:

a) the airline is under the effective regulatory control of the designating State;

b)* the Party designating the airline is in compliance with the provisions set forth in Article _ (Safety) and Article _ (Aviation Security); and

The full liberalization approach refers to as many airlines or no quantitative limit on the number of airlines which can be designated.

Full liberalization removes all criteria pertaining to the airline, but requires effective regulatory control by the designating State to ensure compliance with Safety and Security standards. It would also include a "right of establishment" that is a right for non-nationals to establish and operate an airline in the territory of a Party which could then engage in domestic and international air services.

Article 3
Designation and authorization (cont'd)

Full liberalization (cont'd)

c)* 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.* On receipt of the operating authorization of paragraph 2, a designated airline may at any time begin to operate the agreed services for which it is so designated, provided that the airline complies with the applicable provisions of this Agreement.