

WORLDWIDE AIR TRANSPORT CONFERENCE: CHALLENGES AND OPPORTUNITIES OF LIBERALIZATION

Montreal, 24 to 29 March 2003

Agenda Item 2: Examination of key regulatory issues in liberalization **2.1: Air carrier ownership and control**

SUBSTANTIAL OWNERSHIP AND EFFECTIVE CONTROL

(Presented by Bahrain, Egypt, Iraq, Jordan, Lebanon, Libyan Arab Jamahiriya, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen and the Observer from Palestine)²

SUMMARY

This working paper deals with the subject of substantial ownership and effective control of airlines in the context of air transport liberalization. It also addresses ideas and suggestions designed to expand the criteria of the traditional ownership and control regime to become more flexible and more responsive to the needs of liberalization process.

Action by the Conference is in paragraph 4.1.

1. INTRODUCTION

1.1 In their bilateral air services agreements concluded over the past decades, States required that substantial ownership and effective control of the designated airline of the other party must be in the hands of that party or its nationals. Most airlines were owned by States (public ownership) and States had to have a stake of more than 50% in the airline to exercise such control, with the exception of few cases where air carriers were owned by more than one State under the provisions of Article 77 of the Convention on International Civil Aviation, e.g. Gulf Airlines, Air Afrique and SAS. States that owned such air carriers had to include provisions in special memoranda of understanding with other parties to exempt such carriers from clauses pertaining to substantial ownership and effective control and to avoid the clause on the termination of operating authorizations contained in bilateral agreements.

¹ Arabic version provided by Members of the Arab Civil Aviation Commission (ACAC).

² Members of the Arab Civil Aviation Commission (ACAC).

1.2 States have always insisted on the inclusion of that clause in bilateral agreements for reasons that may partly be due to the fact that traffic rights between the two States are confined to the national airlines. Carriers of third parties were denied the opportunity to exercise such rights by acquiring stock in other carriers. Other factors also included security or political considerations related to access by carriers from countries that have political problems with that State, as well as considerations related to the implementation of a balance of benefit policy between carriers of the states concerned. Recently, there has been a strong global trend towards the liberalization of international air transport, freedom of market access and air carrier privatization. Many States, in effect, privatized their air carriers and several States went as far as allowing foreign investment in the privatized airlines.

1.3 Some regions of the world adopted more flexible policies towards the criterion of substantial ownership and effective control. The European Civil Aviation Conference, on January 1st, 1993 adopted a definition of an European Union (EU) air carrier as well as the conditions to be met by an EU carrier, namely:

- C that the majority share of the ownership of and the effective control of the air carrier be in the hands of Member States of the European Union or their nationals.
- C that the principal place of business of the air carrier and its place of registration, if any, be located in one of the EU Member States.

ICAO's Air Transport Regulation Panel (ATRP/9, 10-14 February 1997) recommend that a more liberal criterion, which is commensurate with the new trends in air transport, should be adopted to allow airlines to have access to markets if:

- a) the principal place of business or permanent headquarters of the airline is located in the territory of the designating State; and
- b) the airline maintains a close relationship with the designating state.

2. PRESENT STATUS

2.1 International air transport is now witnessing a process of restructuring and formation of airlines in the face of competition and market forces. Hence, marketing alliances, mega multinational airlines and low-cost airlines are beginning to dominate the market. We have to deal with these new entities whether we like it or not.

2.2 In keeping with ICAO's Policy, developing countries should pursue a phased programme for liberalizing the provisions of substantial ownership and effective control of air carriers, if new regulatory arrangements are adopted in this area. A mode adopted by the Kingdom of Bahrain may be appropriately embraced by the developing countries. It provides for exempting air cargo and non-scheduled carriers from the traditional requirement of substantial ownership and effective control and adopting the criterion of the principal place of business in the designating State in two phases:

- a) Phase 1: cargo carriers (now being applied); and
- b) Phase 2: non-scheduled carriers (now being applied).

As for passenger airlines, we believe that the current regulatory and operational developments dictate that we approach this issue with much caution and deliberation, in view of the sensitivities associated with this important and essential aspect of liberalization.

2.3 It should be recalled that International Air Transport Association (IATA) has invited States willing to do so to liberalize airlines by deregulating ownership, while retaining the control requirement in relation to standards of safety and operational procedures. The Arab Air Carrier Organization (AACO) considers that the question of ownership and control is one that pertains to individual governments within the framework of their national policies.

2.4 ICAO's Air Transport Regulation Panel, within the framework of preparation for the Fifth Worldwide Air Transport Conference, recognized that in order to overcome restrictions resulting from the traditional regime and to address concerns that accompany such matters, efforts should be concentrated on the development of alternative regulatory arrangements. On this basis, it was suggested that designation should be based on the following:

- a) that the principal place of business be located in the designating State;
- b) that effective regulatory control be exercised by the designating State; and
- c) that the designated airline meets the conditions contained in laws and regulations applicable to the operation of international airlines by the party receiving the designation.

Such a proposed approach would be accompanied by specific criteria for the two concepts.

3. THE ARAB POSITION

3.1 Recognizing that flexible application and expansion of air carrier ownership and control criteria play a role in allowing market access and effective participation by airlines, some Arab States have begun to apply the principle of multiple designation. Others have accepted the principle of amending ownership and control criteria in order to expand their scope. Within the framework of the Draft Inter-Arab Air Transport Liberalization Agreement, which is being developed by the Arab Civil Aviation Commission (ACAC), they have opted for requiring that the ownership of the majority stake and effective control of the air carrier should rest with a Member State or its nationals.

3.2 If we have moved, at the regional level, in the direction of embracing liberalized concepts in connection with that principle, and have favoured the expansion of ownership and control criteria at the Arab level in conformity with the notion of community of interests within economic and regional groupings (ICAO Assembly Resolution A33-19: Consolidated Statement of Continuing ICAO Policies in the Air Transport Field), we are of the view that the elements of ownership and effective control constitute an essential requirement that cannot be overlooked in the field of international air transport. Ownership responds to concerns of the State, particularly regarding some security and political interests, while effective control provides assurances that the standards of control, safety, operation and discipline are all observed by a known supervisory entity.

3.3 The concept of effective control by the designating State, which is the focus of ICAO's proposal in paragraph 2.4 above, includes many reassuring aspects that alleviate basic concerns regarding that subject. It, however, does not fully dissipate our concerns regarding the concept of national ownership. If the

determining criteria of the principal place of business do address such concerns or if the right to deny designation is included, that approach can be supported in principle.

3.4 This issue is actually closely related to the progress in the process of air transport liberalization. The success of this process places us before three options:

- a) to accept ICAO's proposal as indicated above;
- b) to uphold and retain the traditional regime of regulating the air carrier designation and authorization process, as long as matters have not yet become sufficiently clear for taking a final and satisfactory decision that addresses the concerns in question; or
- c) to accept air carrier ownership and control liberalization in implementation of the concept of community of interests within regional or sub-regional economic groupings, thus keeping the substantial ownership of and the effective control in the hands of a Member State or States in the region or in the hands of their nationals. This may be done while retaining the traditional concept as an operational regime at the international level, at least during the current phase until arrangements and conclusions are agreed upon and a favourable climate is created for the acceptance of liberalization in that domain.

3.5 In view of the sensitivity and diversity of the issues at stake and the linkages between the various interests, it is difficult, based on the current information and proposals, to reach a definitive solution that addresses all concerns. In the light of the above, option c) above may be adopted as an interim solution. In fact, it might be the least harmful solution that is more in keeping with the interests of developing countries. It is also the formula that currently satisfies the requirements of regional liberalization, which we all seek and which constitutes an essential step towards international liberalization. It further meets the requirements of States for the preservation of their political, economic and sovereign interests.

4. ACTION BY THE CONFERENCE

4.1 The Conference is invited to:

- a) accept gradual liberalization of the criterion of substantial ownership and effective control for non-scheduled transport of passengers and cargo;
- b) adopt the principle of liberalizing air carrier ownership and control at the level of regional groupings while retaining the traditional regime in respect of scheduled air transport with other parties; and
- c) request ICAO to continue monitoring developments in the field of air carrier ownership and control liberalization and to address issues relevant to that matter.

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