



**Professor Brian F. Havel**  
*Associate Dean, DePaul University College of Law and  
Director, International Aviation Law Institute*

**IATA Agenda for Freedom Summit – Summary of Presentation**

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INTRODUCTION

- The International Air Transport Association, following the precedent of its own member airlines, is working with States to forge a transnational body of liberalized trade principles for the international aviation industry.

NATIONALITY CLAUSES

- Nationality clauses, *i.e.*, provisions in air services agreements which mandate that any carrier designated by such an agreement must be owned and controlled by the designating Party or its nationals, appear in 90% of bilateral agreements covering 90% of international air transport.
- The standard language for these clauses requires that both “substantial ownership and effective control” be vested in the designating Party or its nationals before operational authorization will be given.
- This language is not universal; variability exists within the bilateral system.
- The European Community, for example, has negotiated non-reciprocal waivers of the nationality clause with respect to so-called “Community” carriers.
- Even though we have the resources to locate these nationality clauses, there is no comparable ease or certainty with respect to ascertaining under which terms and conditions these clauses will actually be enforced.

## DOCTRINE OF WAIVER IN INTERNATIONAL LAW

- There is nothing remarkable or “deviant” about a doctrine of waiver in international law.
- Contextually, waiver operates within the law of treaties, the law of sovereign immunity, and the World Trade Organization.
- Public international law has a general principle of abdicative waiver whereby any State may abandon a right or claim arising under any international agreement. This can be accomplished unilaterally or by treaty.

## CURRENT WAIVER PRACTICE FOR THE NATIONALITY CLAUSE

- The practice of States waiving the nationality clauses in some of their bilaterals is typically tacit, indefinite, and non-transparent.
- States which tacitly waive the nationality clauses in their bilaterals enter the murky area of acquiescence under international law.
- There is uncertainty as to whether tacit waivers can constitute a legally binding declaration under international law; but there is very clear law that explicit waivers can bind.
- Clear, unambiguous, and unconditional unilateral declarations of waiver could give rise to enforceable claims under international law.
- A conditional requirement of reciprocity in a unilateral declaration narrows the range of potential relying States but does not exclude the possibility of an enforceable claim.

## THE IATA STATEMENT OF POLICY PRINCIPLES

- The IATA *Statement* cannot be construed against any signatory State as giving rise to an enforceable claim; it is neither a treaty nor a binding unilateral declaration.
- The *Statement* provides a menu of options for States to reach beyond the legally uncertain realm of tacit waivers.
- The *Statement* proposes an indispensable condition for explicit waiver of the nationality clause: reciprocity.
- Reciprocity excludes operation of the Most Favored Nation (MFN) principle.
- Explicit unilateral declarations of waiver can promote legal certainty under international law. Bilateral instruments, both formal and less formal, could also induce legally binding commitments.

## BILATERALISM VERSUS MULTILATERALISM

- The bilateralism which may follow from the *Statement* may not achieve full legal and commercial coherence; the Draft Multilateral Convention on Foreign Investment in Airlines would go further in this respect.
- Under the bilateral approach, recalcitrant States with significant aviation markets could continue to “block” foreign investment.
- There is a history of hesitancy over consummating crossborder airline mergers due to the risk of losing lucrative international traffic rights.

## WAIVERS AND DOMESTIC AVIATION LAW

- We cannot ignore the political reality that there may be unease about the effect of a waiver of the nationality clause on States' domestic air transport law and policy.
- Nevertheless, the IATA *Statement* and the actions it envisages relate *only* to the nationality clauses in States' bilaterals; it does not implicate their right to maintain national ownership and control rules for their own airlines.
- For example, the United States can fully commit itself to reciprocally waiving the nationality clauses in its bilaterals while maintaining the current 25% mandatory cap on foreign ownership of the voting equity of its airlines.