

Discussion Draft as on 10 September 2009

Message from Mr John Byerly,

Deputy Assistant Secretary for Transportation Affairs, U.S. Department of State.

Washington, 14 Sept. 2009

Attached is a third “discussion draft” of the Multilateral Convention on Foreign Investment in Airlines. The draft is marked to show how it differs from the second discussion draft circulated in April 2009. We received constructive and thoughtful comments on the second draft and appreciated very much others’ consideration of this idea.

The third draft includes an idea suggested by the European Union, which would provide an optional opportunity for a Party to specify countries as to which it agrees to waive, on the basis of reciprocity, limitations on foreign investment in and control of its own airlines (see, in particular, paragraph 1(b) of Article 4). The United States has not reached a judgment as to the advisability of including this optional opportunity in the draft, pending evaluation of others’ views. In this connection, however, I note that, were the Convention to include this additional element, U.S. law would not permit the United States to participate in this aspect. -

The third “discussion draft” may be freely shared with interested colleagues and third parties. We seek to foster an open discussion and look forward to receiving comments on the proposed additional element as well as on any other aspects that others wish to address. As before, the objective is to complete a full exploration of the issues related to the Convention very carefully and only then to consider next steps. As stated when the first draft was circulated a year ago, a decision as to whether the United States would itself sign a multilateral agreement, and under what conditions, must be reserved until the concept is fully developed and others’ views have been considered.

**Revised Discussion Draft**  
**Multilateral Convention on**  
**Foreign Investment in Airlines**

The Parties to this Convention;

Recognizing that many air services agreements include “nationality clauses” that allow each party to those agreements to refuse, revoke, suspend, or limit operating authorizations or technical permissions for airlines of the other parties to such agreements unless substantial ownership and effective control of those airlines are vested in the other parties, their nationals, or both;

Seeking to enhance the access of airlines to global capital markets in order to strengthen competition and reflect the realities of a global aviation industry;

Acknowledging that such nationality clauses are not required under international law and may discourage foreign investment in airlines; and

Desiring to facilitate foreign investment in the airlines of those states that permit or encourage such investment;

Have agreed as follows:

**Article 1**  
**Definitions**

For the purposes of this Convention the term:

1. “Airline of a Party” means an airline that has received its air operator certificate (AOC) from, and has its principal place of business in the territory of, that Party; and
2. “Partner List A” means a list submitted by a Party, in accordance with paragraph 1 (a) of Article 4.
3. “Partner List B” means a list submitted by a Party, in accordance with paragraph 1 (b) of Article 4.

**Article 2**  
**Waiver of Nationality Clause**

1. A Party shall not exercise any available rights under an air services agreement with another Party to refuse, revoke, suspend, or limit operating authorizations or technical permissions for an airline of such other Party on the grounds that substantial ownership or effective control of that airline is vested in any third Party or Parties, their nationals, or both, provided that each said Party has included all other said Parties on its Partner List A.

2. A Party that includes itself on its Partner List A shall not exercise any available rights under an air services agreement with a second Party to refuse, revoke, suspend, or limit operating authorizations or technical permissions for an airline of that second Party on the grounds that substantial ownership or effective control of that airline is vested in the first Party, its nationals, or both, provided that each of the two Parties has included the other on its Partner List A.

### **Article 3 Removal of Limitation on Foreign Ownership and Control**

A Party shall not limit on the basis of nationality the ownership or control of the airlines of that Party by nationals of another Party or Parties, provided the first Party has included the other Party or Parties on its Partner List B and each of the other Parties has included the first Party on its Partner List B.

### **Article 4 Partner Lists**

1. Each Party, at the time of ratification, acceptance, or approval of or accession to this Convention, shall submit to the Depositary:

a. a Partner List A of partners as to which it shall not exercise any available rights under its air services agreements with those partners to refuse, revoke, suspend, or limit operating authorizations or technical permissions of an airline of those partners on the grounds that substantial ownership or effective control of the airline is vested in another partner or partners on the list, nationals of that other partner or partners, or both; and

b. at its discretion, a Partner List B of partners as to which it shall not limit on the basis of nationality the ownership or control of airlines of that Party by nationals of one or more of those partners.

2. A Party may add partners to or delete partners from a Partner List by submitting a new list to the Depositary superseding its prior list. The new list shall identify any additions to and deletions from the Party's prior Partner List. Additions shall become effective 30 days after the date of receipt of the new list by the Depositary and deletions shall become effective at the end of the International Air Transport Association (IATA) traffic season in effect one year after the date of receipt of the new list by the Depositary.

3. The requirement under paragraph 1(a) of this article that a Party submit a Partner List A may also be satisfied by a Party submitting to the Depositary written notice that it will not exercise any available rights under its air services agreements with any Party to this Convention to refuse, revoke, suspend, or limit operating authorizations or technical permissions of an airline of that Party on the grounds that substantial ownership or effective control of the airline is vested in another Party or Parties, nationals of a Party or Parties, or both.

4. The discretionary filing under paragraph 1(b) of this article of a Partner List B may also be satisfied by a Party submitting to the Depositary written notice that it will not limit

on the basis of nationality ownership or control of airlines of that Party by nationals of any Party or Parties to this Convention.

### **Article 5 Ownership and Control of a Party's Own Airlines**

Nothing in this Convention requires a Party to permit foreign ownership or control of airlines of that Party.

### **Article 6 Depositary**

1. The original of this Convention shall be deposited with [ ], which is hereby designated as the Depositary of this Convention.
2. The Depositary shall transmit certified true copies of this Convention and any amendments thereto to all Parties and signatories.
3. The Depositary shall notify all Parties and signatories of:
  - a. All signatures, ratifications, acceptances, and approvals of and accessions to this Convention in accordance with Article 7, and any amendments thereto;
  - b. The dates on which this Convention enters into force for each Party in accordance with Article 7; and
  - c. Any withdrawals from this Convention and the effective date thereof in accordance with Article 9.
4. The Depositary shall maintain a centralized register accessible to all Parties, including on the Internet, of each Partner List submitted to it in accordance with Article 4.
5. Following entry into force of this Convention, it shall be registered with the Council of the International Civil Aviation Organization in accordance with Article 83 of the Convention on International Civil Aviation and with the United Nations in accordance with Article 102 of the UN Charter.

### **Article 7 Signature, Consent to be Bound, and Entry into Force**

1. This Convention shall be open to all States for signature at [ ] until it enters into force in accordance with paragraph 3 of this Article.
2. This Convention is subject to ratification, acceptance, or approval by signatory States and shall be open to accession by non-signatory States.
3. This Convention shall enter into force 30 days after the third instrument of ratification, acceptance, approval, or accession has been deposited with the Depositary.

4. After the third instrument of ratification, acceptance, approval, or accession has been deposited in accordance with paragraph 3 of this Article, this Convention shall enter into force for any other signatory or acceding State 30 days after the date of deposit of its instrument of ratification, acceptance, approval, or accession with the Depositary.

**Article 8**  
**Regional Economic Integration Organizations**

[Text to be developed in consultation with key  
Regional Economic Integration Organizations]

**Article 9**  
**Withdrawal**

A Party may withdraw from this Convention by giving written notice of withdrawal to the Depositary. The withdrawal shall be effective at the end of the IATA traffic season in effect one year after the date of receipt of the notice by the Depositary, unless the Party withdraws its notice by written communication to the Depositary prior to the effective date of the withdrawal.

**Article 10**  
**No Reservation**

No reservation shall be made to this Convention.

IN WITNESS WHEREOF, the undersigned, being duly authorized, have signed this Convention.

DONE at [ ], this [ ] day of [ ], 20[ ].