



International Civil Aviation Organization

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WORKING PAPER

ASSEMBLY — 37TH SESSION

ECONOMIC COMMISSION

Agenda Item 49: Liberalization of International Air Transport Services

LEGAL COMMISSION

Agenda Item 62: Other Issues to Be Considered by the Legal Commission

The Topic “Facilitating Airline Access to International Capital Markets” Should Be Added to the Work Programs of the Legal Committee and the Air Transport Regulation Panel

(Presented by the United States of America)

EXECUTIVE SUMMARY

ICAO should continue to foster consideration of options for facilitating airlines’ access to international capital markets as a means of increasing the contributions of international air transport to trade, tourism, job creation, and economic growth. ICAO’s efforts should include consideration of a multilateral instrument by which ICAO members, if they so choose, may enter into reciprocal obligations to lift barriers to cross-border investment by pledging to forgo recourse to the nationality clause.

Action: The Assembly is invited to add the topic “Facilitating Airline Access to International Capital Markets” to the work programs of the Legal Committee and the Air Transport Regulation Panel

<i>Strategic Objectives:</i>	This working paper relates to Strategic Objectives F (Rule of Law) and D (Efficiency).
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<i>Financial implications:</i>	Minimal.
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<i>References:</i>	
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1. INTRODUCTION

1.1 Under agenda item 2.1, the Fifth Worldwide Air Transport Conference concluded that: “there could ... be benefits in liberalizing air carrier ownership and control provisions”; “it is up to each State to choose its liberalization approach and direction based on national interest”; “States may ... [facilitate] liberalization by accepting designated foreign air carriers that might not meet the traditional national ownership and control criteria”; “States may choose to liberalize air carrier ownership and control on a unilateral, bilateral, regional, plurilateral, or multilateral basis”; and, “ICAO has played, and should continue to play, a leading role in facilitating liberalization in this area.”

1.2 Working Paper 7, Liberalizing Air Carrier Ownership and Control, prepared by the ICAO Secretariat for the Fifth Worldwide Air Transport Conference, noted that “the majority of [bilateral air transport] agreements, including liberal or “open skies” agreements, have continued to apply the traditional [ownership and control] criterion”. The paper recognized that “there are clear benefits in liberalizing air carrier ownership and control” and that “it could provide air carriers with wider access to capital markets.” It also observed that “a major challenge is how to have States that do not wish to liberalize at present not inhibit others from doing so.”

1.3 The Statement of Policy Principles, developed by the International Air Transport Association and subscribed to by several important aviation States in November 2009, observed that “Restrictions in bilateral air services agreements on ... investment ... may reduce the contributions of international air transport to trade, tourism, job creation, and economic growth.” It calls for respect for the “policies ... of countries that seek to encourage foreign investment in their airlines ... in the absence of valid social or public policy concerns” and for “sympathetic consideration to the possibility of a multilateral agreement to accomplish this goal.”

2. **DISCUSSION**

2.1 The 2007 U.S.-EU Air Transport Agreement took an important step toward liberalizing airline investment opportunities. Each side agreed not to object, under bilateral agreements with third countries, to ownership of third-country airlines by the other’s nationals. The United States also agreed not to exercise its right to bar air services by any airline from ten countries in Europe that are not members of the EU as well as 18 African countries on grounds that EU nationals control the airline.

2.2 The United States has developed, for purposes of discussion, a Draft of a Multilateral Convention on Foreign Investment in Airlines. Such a Convention, if adopted by a diplomatic conference convened by ICAO, would be open to accession by countries that are prepared to enter into reciprocal obligations to lift the barriers to cross-border investment by pledging to forgo recourse to the nationality clause. The Draft has undergone extensive revision based on comments received from other countries, aviation stakeholders, and experts in the field. A copy of the most recent Draft is attached.

2.3 As used in this paper and the attached Draft, the term “control” refers to managerial and economic control of an airline and does not in any way affect the responsibility of States under the Chicago Convention for regulatory oversight of airlines.

3. **CONCLUSION**

3.1 The Legal Committee and the Air Transport Regulation Panel should include in their Work Programs the consideration and eventual development of a legally binding multilateral agreement or instrument that would be open to accession by States that are prepared to enter into reciprocal obligations to lift the barriers to cross-border investment by pledging to forgo recourse to the nationality clause.

4. **ACTION BY THE ASSEMBLY**

4.1 The Assembly is invited to request the Council to:

- a) add the topic “Facilitating Airline Access to International Capital Markets” to the work programs of the Legal Committee and the Air Transport Regulation Panel, and
- b) direct the Committee and the Panel to consider and develop a legally binding multilateral agreement or instrument that would be open to accession by States that are prepared to enter into reciprocal obligations to lift the barriers to cross-border investment by pledging to forgo recourse to the nationality clause.

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[].