

Insights into the Airline Globalization Process in Colombia

By Angela Maria Clavijo

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Institute of Air and Space Law, McGill University, Montreal, Quebec

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Abstract

There is not much literature on Latin American air transportation industry, thus it might not be well known that Latin America has been facing globalization in what has been called a *unique way*. Many countries have gotten together in different forums to discuss changes in substantial ownership and effective control restrictions, but only few have taken steps in that direction. Colombia, a country that considers air transport as a public service, has eliminated all restrictions for foreign investment in national airlines. This thesis will study the current airline globalization process in Colombia within the Latin American environment. How have Colombian airline's managed the air traffic relationship with other major global players, especially with those still containing the restrictions? The study will describe the existing uses, determine their disadvantages, if any, and analyze any aspects to be considered in order to protect the industry and encourage its further development.

Abstract

Il n'y a pas suffisamment de littérature concernant l'industrie de transport aérien en Amérique Latine, donc - peut être - c'est n'est pas très connu que la mondialisation a fait face dans cette région d'une manière exceptionnelle. Plusieurs pays se sont réunis à l'occasion de différents forums dans le but de discuter les changements sur les restrictions dans la propriété substantielle et sur les contrôles effectifs. Par contre, très peu d'entre eux ont pris des mesures dans cette voie. La Colombie, un pays dont le transport aérien est considéré un service public, a éliminé toutes les restrictions relatives aux investissements étrangers dans les compagnies aériennes. L'objectif de cette mémoire sera d'étudier l'impact du processus actuel de mondialisation aérienne en Colombie dans tout le contexte latino-américain. Comment les compagnies aériennes en Colombie ont géré les relations du trafic aérien avec d'autres acteurs importants dans l scène mondiale, spécialement avec ceux qui pratiquent encore des restrictions? Cette étude tente de décrire les usages existant, de déterminer les désavantages y liés au cas où elles existent, et d'analyser les aspects à considérer pour protéger l'industrie et son futur développement.

Insights into the Airline Globalization Process in Colombia

INTRODUCTION

Air transportation is a key element for the development of nations. It has been included as a strategic sector in the general policy of the States, thus it has been given a status that reflects its importance. All along the history of civilization, transportation means have become the basic support of progress, development and wellbeing of the nations, the articulation of the productive system, commerce and integration, amongst others. In today's society, traveling and tourism have given air transportation a unique characteristic: the ability to become an instrument of change for the way of living of millions of people on our planet earth.¹

But several matters, from costs to legal limitations, affect the optimum performance of airlines and their growth at the same pace as other industries. As Carlos Grau Tanner argues:

The modern air transport industry is riddled by a major contradiction. It is a global industry, and one that has made globalization possible. Yet it is governed by rules of another era that severely hamper its ability to seize the business opportunities that globalization itself generates. The thick web of bilateral, State-to-State agreements governing the international civil aviation *business* is all about barriers blocking access to markets and equity capital. The very term 'freedoms

¹ Julian Palacin Fernandez, La OACI y la CLAC en el desarrollo del Transporte Aéreo en la Región (no Publisher, Lima 94) at 3-4 [Translated by author].

of the air' is the quintessential misnomer. Rather, they are limitations.²

This thesis will be focused in Colombia within the context of Latin America and will use the Synergy Group as a primary model.³ It will analyze the Colombian air transport scenario and its relationship with other important players inside the industry. As some authors have pointed out, Latin America is going through a globalization process that might even be considered unique. The main purpose will be to identify the risks associated with the current *status quo* of the air transport situation in Colombia, to determine if and how the legal framework should be amended to maintain the same direction as the aviation industry's globalization process.

The research project will be divided in two main parts. The first part will identify the *status quo* of the Colombian air legal framework and the practical application that it had been given by air carriers. To complete the *status quo* it is necessary to include a description of the Latin American's current picture to identify the competition status among regional carriers, and in particular, the treatment that

² Carlos Grau Tanner, "The Latin American Way: Law Merchant of the Air", *proceedings of a panel held at the ALTA Legal Symposium, Miami, FL. 2007* [unpublished forthcoming in Boletín ALTA No. 14].

³ Although Latin America is defined as the American territory located south of the United States, this thesis will only focus in South America and Panamá, although making a brief reference to Central America regarding the description and significance of the Taca Group.

other Latin American carriers have had in order to accomplish their corporate and business objectives.

Once the description of the current *status quo* is completed, the research will focus on its risks and their significance, and future issues that will arise from such status. Those risks and future issues are related primarily to ownership and control limitations and to the will to open new point-to-point services to serve additional markets and city-pairs. The study will also include a brief consideration of the Colombian policy in respect to bilateral agreements, and negotiation of air traffic rights.

The second part of the thesis will analyze whether the *status quo* is adequate or which available alternatives are to be followed if the conclusion is that it is not adequate. Those alternatives should be analyzed in respect to three different main partners, as they are likely to be the ones posing greater barriers and risks for the Colombian airlines: The United States, the European Community and New Markets. What is the way forward with these main partners?

In analyzing the relationship between Colombia and other countries, the Colombian restrictive approach to an open skies policy will be described. Will the benefits of a more certain and stable basis for its operations outweigh the risks of an open skies policy? The research will study the viability and necessity of an open skies policy for Colombia and, if applicable, the best way for its implementation.

Additionally, in relation with the current equity investments made by foreigners in different regional airlines, it would be necessary to study the risks that they pose as in respect to powerful and influencing countries like the U.S. Will there be a need to liberalize the ownership and control restrictions as opposed to available tools such as the waivers that have been applied by the U.S. to certain Latin American countries? As with waivers, what would be a good way to approach their limitations and discretionary application, while at the same time keeping the risk at an acceptable level?

With respect to the European Community, the study will focus on the current negotiation process by which the E.U. is trying to amend the existing bilateral agreements to include the Community Clause, while Colombia is trying to include the Right of Establishment Rule. Could the situation with the E.U. be somewhat easier as both regions are headed in the same direction? To what degree will it be important to have an integration of the regional market? Will such integration involve the liberalization of the restrictions related to ownership and control?

CHAPTER 1 - DESCRIPTION OF THE AIRLINE INDUSTRY

WORLDWIDE ENVIRONMENT TODAY.

Historically, the airline industry has shown that it is hardly profitable, primarily due to its very high fixed costs, excess capacity and volatile demand. Still, it is a necessary means of transportation. All over the world, airlines struggle to find their way to successful and economically viable operations, and many times creativity for new alternatives is necessary. Unquestionably, aviation is a large international industry subject to rapid changes and growth. Due to continuous changes and operational requirement updates this industry faces new challenges every day.

Lately, the industry trend is towards globalization that is aimed to have some control over capacity and competition. Alliances are becoming very important as carriers “have sought the marketing and operational benefits of widespread market presence (...) The airline industry is inherently flexible and market forces can, in general, be relied upon to produce economically efficient outcomes. [Thus there is] justification for seeking the development of a workable competitive international aviation market that operates in the interests of all. In this context, one of the roles of government is to establish the broad regulatory framework which permits markets to function efficiently.” ⁴

⁴ OECD, *The future of international air transport – Responding to global change* (1997) at 7.

Airlines enter into cooperation agreements with other airlines to expand their markets and be able to offer routes they would like to have in their own route maps. With little capital and less risk, alliances build virtual networks that otherwise would be impossible to offer. Airlines entering into an alliance usually entail operational and marketing cooperation that result in multiple benefits for them.

Accordingly, in order to face globalization, regional blocks, such as Mercosur, CAN, and NAFTA, have emerged as a way to increase competitiveness and autonomy, and to accomplish greater economies of scale. The worldwide economic future will depend on the relationship among those regional blocks.⁵

Since the 1990's, alliances, multilateral agreements, megacarriers and foreign investments, have been a matter of discussion among the Latin American participants.⁶ Back in 1996, Latin America was perceived as an emerging market; what wasn't clear was when it was going to emerge. "Latin America's promise [was] based on the fledging nature of its passenger base and the inadequate

⁵ Augusto Fúster Colunga, "La política de cielos abiertos y su repercusión sobre la región" (2005-2006) 30-31 CIDA-E Dirección Nacional de Aviación Civil e Infraestructura Aeronáutica Uruguay. Revista del centro de investigación y difusión aeronáutico-espacial 25 at 25 [Translated by author].

⁶ James Ott, "Latin carriers display rare signs of unity" (1994) 140 Aviation Week & Space Technology 68 at 71.

development of its route structure.”⁷ As will be described, air transport industry in Latin America has emerged and it seems to have a promising future.

⁷ Melbourne, FLA, “Latin American airlines bolster regional alliances” (1996) 144 Aviation Week & Space Technology 46-7 at 46.

CHAPTER 2 – THE COLOMBIAN *STATUS QUO*

A. Colombian legislative framework

The Colombian legal framework has been developed in accordance with all international policies defined for international aviation and with ICAO general rules.⁸ Colombia is part of the main international civil aviation Conventions. For instance, Law 12/1947 ratified the adherence of Colombia to the Chicago Convention of 1944, although it was only enacted from 1991 by Decree 2007/1991. The Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal in 1999 was ratified by the Colombian government by the Law 701/2001.

The Republic of Colombia has a very active air transportation industry. Within a regulated environment Colombia has five major national passenger carriers (Avianca, Sam, Aerorepublica, Satena and Aires), one cargo carrier (Tampa) and receives many more foreign carriers. In accordance to Law 105/93 and Decree 260/2004, the aviation activity is under the supervision and control of the Bureau of Civil Aeronautical Administration [Translated by the author] (hereinafter Colombian Aeronautical Authority or UAEAC, acronym for its Spanish name Unidad Administrativa Aeronáutica Civil). Article 47 of Law 105/93 appoints the

⁸ Plinio Enrique Márquez, *Manual de Derecho Aeronáutico. Reseña Histórica – Normatividad Procedimientos* (Bogotá: Librería Ediciones del Profesional Ltda, 2003) at 30 [Translated by author].

UAEAC to perform all activities related to air transport. Moreover, Article 2 of Decree 260/2004 states that the UAEAC is the authority in all aviation matters and is responsible for the regulation, administration, supervision, and control of the civil aviation use of the Colombian air space. As established in Article 3 of the latter, the main objective to be achieved by the UAEAC will be to guarantee the safe and efficient development of civil aviation and the administration of the air space.

The Colombian legal framework contains several general regulations that apply to all civil and/or commercial matters, including civil aviation. Those can be found in the Constitution, Civil Code, Statutes, and Regulations. Law 336 of 1996 establishes the National Statute of Transport, containing several general principles to be considered in the regulation of all means of transportation. The Code of Commerce and the Colombian Aeronautical Regulations (commonly known as RAC, acronym for its Spanish denomination: Reglamento Aeronáutico Colombiano) are the two special statutes exclusively related to air transportation activities.

1. Constitution

The supreme Colombian norm is its Political Constitution that contains general constitutional principles, some of which can be related to air transportation. For instance, Article 24 grants to all Colombians, subject to statutory limitations, the

freedom of movement within the country's territory, as well as the right to leave and enter the country as desired.

Article 100 determines that foreigners in Colombia have the same rights as the Colombian citizens, excluding some civil and political rights that are restricted exclusively to Colombians. Article 101 recognizes the air space over Colombia as Colombian territory, implying of course, the sovereignty over it.

Article 189 Numeral 22 appoints directly to the President of the Republic the control and supervision of all public services. In Colombia, air transport has been expressly given the status of essential public service as it is pointed out in article 68 of Law 336/1996.

Articles 224 to 227 relate to international relationships, specially pointing out that political, economic, social, and ecological relationships should be internationalized under the principles of equity, reciprocity and national convenience. The Constitution also directs that political, social, and economic integration should be promoted with other nations, in particular with Latin American and Caribbean countries, under the principles of equity, equal protection, and reciprocity.

Article 333 recognizes freedom of economic activities and private initiatives, while appointing the State as responsible to prevent abuses of dominant positions and any restrictions to such economic freedom. Finally, Article 365 defines all

public services as inherent to the social objective of the State and holds the State responsible to guarantee that all public services are provided continuously, efficiently, and conveniently to all residents in the national territory.

2. The Foreign Investment Regime and Article 1426 of the Code of Commerce

In accordance with the constitutional principles set out in the Constitution of 1991, Article 15 of Law 9/1991 mandates that all foreign investment in Colombia should be given the same treatment as national investment, express emphasizing that no special conditions or discriminatory treatment should be allowed or imposed on foreign investors. Nowadays, the general foreign investment regime regulated by Decree 2080/2000 allows foreign investment in every sector of the Colombian economy without limitation except in relation with all activities of defense and national security, and treatment, disposal, and disregard of toxic, dangerous or radioactive waste not produced in Colombia. These two cases are expressly described in Article 8 of Conpes Resolution 51/1991 and Article 6 of Decree 2080/2000. Hence, all foreign investment is welcome in Colombian corporations except as indicated in the above-mentioned Articles 8 and 6.

Article 1426 of the Code of Commerce restricted foreign ownership of Colombian air and maritime carriers to a 40% limitation, but such article was tacitly abolished by article 15 of Law 9/1991, article 8 of Conpes Resolution 51/1991, and article 6 of Decree 2080/2000. The abolishing of article 1426 was subject to

multiple legal debates but ultimately it was concluded that article 15 of Law 9/1991 authorized all foreign investment, and that air transportation was not the exception. To avoid any doubt, the Honorable Privy Council in concept No. 1255 dated April 6, 2000, stated that the principles set in article 15 of Law 9/1991 to regulate the foreign investment regime, were in contradiction with article 1426 of the Code of Commerce, which imposed restrictions on foreign investment in air and maritime carriers. Moreover, article 35 of Law 9/1991 requested that all provisions contrary to the foreign investment regime should be understood as tacitly abolished. Thus, Article 1426 of the Code of Commerce was tacitly abolished for being contrary to the regime set in Law 9/1991.⁹ The Superintendence of Companies also expressly confirmed the abolition of Article 1426 in the concept No. 220-53816 of June 3, 1999.¹⁰

3. Code of Commerce

The Colombian Code of Commerce is divided into 6 books. The fifth book is divided into two parts; the first one regulates maritime transportation and the second part is dedicated exclusively to air transportation. The first article in Book Fifth was Article 1426 that, as explained before, has been abolished, thus

⁹ Colombian Honorable Privy Court – Consultation and Civil Services Bureau. Concept 1255 April 6, 2000 [Translated by author].

¹⁰ Superintendencia de Sociedades concepto No. 220-53816, junio 3 de 1999, online: Superintendencia de Sociedades <<http://www.supersociedades.gov.co/ss/drvisapi.dll?MIval=sec&dir=45&id=3353>> [Translated by author].

allowing foreign investment in national air carriers without restrictions. Articles 1783 through 1909 of the Code of Commerce establish the regulation for all aircraft using the Colombian air space, as well as for aircraft under Colombian registration flying over high seas or over some other territory not subject to any State's jurisdiction. Unless otherwise expressly stated, such legislation is applicable only to civil aviation. The above mentioned articles regulate general matters on registration, personnel, crew, licenses, procedures, aerodromes, liability for damages to third parties, contract of carriage, and insurance in a pretty much standard manner. This thesis will focus on describing only those articles that are relevant for the discussion contained herein.

Article 1776 gives civil aviation the status of public utility. Article 1785 specifies that cabotage is restricted to Colombian aircraft,¹¹ except as specified in international agreements. Under the definition of cabotage in Part 1 of the RAC, it is also declared that transportation within Colombia is reserved exclusively to Colombian aircraft. Article 1795 specifies that ownership and effective control of aircraft used in commercial services, should be held by a Colombian person or entity. Article 1803 states that at least 90% of the employees working for a Colombian air carrier or a foreign company's branch must be Colombian, unless otherwise authorized by the Aeronautic Authority. Such percentage will not be

¹¹ Chapter 20 of the RAC defines Colombian aircraft as an aircraft holding either a Colombian registration or a foreign registration, as long as a Colombian carrier operates it under an aircraft utilization agreement dully registered in the Registry of the Aeronautical Authority [Translated by author].

applicable to foreign employees from a country that offers reciprocity to Colombian workers.

The requirements to obtain the Air Operator's Certificate ¹² for an airline can be found in articles 1851 through 1870, which specify that the carrier should demonstrate its administrative, technical and financial capacity to operate the proposed air transport services. It has been concluded that the requirements for each mode of air transportation are different, making it possible to establish specific criteria for each kind and thus being able to confine a carrier's operation to a determined specific market. ¹³ The right to serve a certain route will be granted in a public audience in which the necessity and convenience of the proposed service is carefully analyzed. All international and cabotage routes can only be served by entities legally established in Colombia, as stated in Article 1864.

Article 1865 allows Colombian carriers to serve international routes using aircraft with a foreign registry whenever there is either a partnership or integration agreement with foreign carriers or a consolidation of a multinational carrier. Of

¹² Operating Permit would be the exact translation of the Colombian name of the document authorizing the operation of an airline.

¹³ Unidad Administrativa Especial de Aeronautica Civil, *Acceso a los mercados. Barreras de Entrada / Modalidades de Aviación No. SPA/I-CU/2.1* dated 20 August, 2003, *Proceedings of the Primer Simposio de Política Aerocomercial, Rionegro, 2003*, online: Aeronáutica Civil <http://portal.aerocivil.gov.co/portal/page/portal/Aerocivil_Portal_Internet/normatividad/politica_aerocomercial/Documentos> [Translated by author] [UAEAC, "CU/2.1"].

course, all partnership, integration, joint operation, consolidation or merger agreements between carriers are subject to authorization by the Aeronautical Authority since they affect competition within the market.

4. Colombian Aeronautical Regulation

The RAC contains more specific regulations on different matters of civil air transportation. The Regulation is divided into twenty parts as follows:

1. Definitions
2. Aeronautic personnel
3. Civil aviation activities
4. Rules on airworthiness and aircraft operation
5. Rules of the air
6. Air transit management
7. Sanction regime
8. Accidents investigation and aviation incidents
9. Type certificates and manufacture of aeronautical products
10. Air transportation of hazardous materials
11. Environmental rules for aviation
12. Aeronautic meteorology
13. Aeronautic charts for air navigation
14. Aerodromes, airports, and heliports
15. Aeronautical information services
16. Search and rescue
17. Civil aviation security rules
18. Measurement units for air and ground operation of aircraft
19. Reserved. Aeronautical telecommunications are to be included in this chapter.
20. Rules on aircraft registration, registration number and identification

Although the RAC contains the detailed regulation of air transportation in Colombia and further develops general contents of the Code of Commerce, not all chapters are relevant for the subject matter of this thesis. Only those sections considered to be significant as in respect to airline globalization, incorporation of a foreign air carrier in Colombia and the start up of new point to point services will be considered herein.¹⁴

Part 1 gives the most relevant definitions and scope of application of the Colombian Aeronautical Regulation. Consequently, as previously stated in the Code of Commerce, the RAC also expressly clarifies that the Colombian aeronautical regulation is commonly applicable to all civil aeronautic activity, performed by any national or foreign person or entity. It is particularly applicable to all civil aviation activities performed above Colombian territory or onboard an aircraft under Colombian or foreign registration but operated by a national carrier, in accordance with article 83 bis of the Chicago Convention, when flying over an airspace not subject to any state's jurisdiction. As mandated by the Constitution and the Contentious Administrative Code, Colombian civil aviation activities will be governed by principles of favorability, due process, defense, economy, celerity, efficiency, impartiality, and publicity and contradictions. All persons or

¹⁴ The complete version of the Colombian Aeronautical regulation can be found online: Aeronáutica Civil
<http://portal.aerocivil.gov.co/portal/page/portal/Aerocivil_Portal_Internet/normatividad/rac/indice_general>

entities performing civil aviation activities must have knowledge and comply with all applicable regulations.

Part 3, Section 3.6.3.2.2., defines the scope of the requirements on technical, administrative and financial capacity that an air carrier should have in order to obtain the operation permit. The list of information that should be attached to the request for an operating permit is detailed in section 3.6.3.2.5. Some of the requirements are: description of the convenience and necessity of the proposed service, routes, regions or places to be served, fleet quantity and characteristics, and market research analysis including a description of the expected market share and the strategies to accomplish it.

The granting of AOC and designation of routes will be done by means of public audiences, previously requested by the interested carrier. The procedure regulating the audiences is set in Section 3.6.3.2.6. The principal place of business is defined in Part 1 under definitions and in Section 3.6.3.2.7.1.1. as the place where the operator has the facilities to control its operations and perform the aircraft maintenance; the place where the carrier offices are located to perform all the administrative, commercial, financial, technical and accounting activities and where it keeps all aircraft maintenance files. At least one of the aircraft should be permanently based in such place. Availability of crew is also required. The carrier should be headquartered or branched in the principal place of business.

Section 3.6.3.2.9. sets additional requirements to be fulfilled in order to obtain a AOC. Some of such requirements are as follows:

- To have the minimum aircraft required for the air services to be provided;
- To have sufficient aircraft maintenance facilities in accordance with the number of aircraft to be operated;
- To keep in stock the necessary spare parts for each aircraft model. Such spare parts should be approved and ready for use;
- To have available and sufficient crew to comply with duty time limitations, as well as sufficient operational and maintenance technicians to take care of the carrier's operations; and
- To hold an administrative and technical organization that guarantees the proposed operations. Additionally, the carrier must have adequate facilities and equipment in every base to be operated.

Cargo air transportation is contained in Section 3.6.3.3.1.8. The Colombian Aviation Authority should expressly authorize this type of transportation. There are limitations related to passenger transportation in cargo aircraft depending on the type of aircraft used. Colombian aeronautic regulation is very strict with respect to passenger or cargo capacity in accordance with the registered scheduled itineraries published and authorized to each carrier. Section 3.6.3.3.1.11 deals with the reduction in the number of available aircraft. Whenever the number of aircraft affects the capacity, the carrier must file a new adjusted itinerary and that unused capacity is designated to other interested carriers.

The procedure to be followed and the paperwork to be filed to initiate, add or modify international air transportation services is explained in Section 3.6.3.3.2.

¹⁵ The first part at 3.6.3.3.2.1. deals with the procedure for Colombian carriers. Section 3.6.3.3.2.2. explains the procedure to be followed by foreign carriers having international operations to/from Colombia. If there is a bilateral agreement in force, the carrier should be previously designated by its country. When there is no bilateral, the authorization to operate in Colombia will be granted after analyzing national convenience, public security, economic interests of air transportation, the treaties or pacts entered into by Colombia in accordance with the principle of real and effective reciprocity. Among the paperwork to be filed, the interested carrier must describe the requested routes, stops and freedoms, the fleet to perform such services stating if they are owned, leased or chartered, and any relation with Colombian corporations. The carrier should attach an official certificate stating that substantial ownership and effective control is held by nationals of the flag country, as well as an analysis of all the economic aspects of the new route and a description of the carrier's current route network including alliances and pool agreements. All foreign requests will also be subject to the public audiences procedure. Once the authorization to operate to/from Colombia, the foreign carrier must constitute a branch in Colombian territory, comply with all regulations and information requests made by the UAEAC and appoint a legal representative.

¹⁵ A complete list of proceedings before the Colombian Aeronautical Authority can be found online: Aeronáutica Civil
<http://portal.aerocivil.gov.co/portal/page/portal/Aerocivil_Portal_Internet/home_tramites/empresas_aeronauticas>

Section 3.6.3.4 contains the general rules applicable to domestic and international scheduled air transportation. As a general principle it is stated that all domestic routes, and the right to operate the international routes, are considered to be Colombian property, and thus cannot be sold, assigned or transferred by any other means. Any carrier is entitled to file a request for investigation whenever it considers that it has been subject to anticompetitive practices. Section 3.6.3.7.3. specifies that all alliances and agreements between national or involving foreign carriers that in anyway affect air transport services, should be approved by the UAEAC.

From section 3.6.4 and onwards, the RAC contains the applicable regulation for civil aviation with noncommercial purposes, and other related activities such as instruction and maintenance facilities, specialized airport services, forms and statistics, and duties and passenger rights in scheduled air services.

Other Parts of the RAC not discussed herein are related to air navigation procedures, rules for aviation, air type certificates, security, environmental provisions, and other operational technical details.

5. Colombian bilateral agreements

Colombia has several bilateral agreements currently in force. Traditionally, Colombia negotiates its bilaterals on a case-by-case basis, but generally speaking, the Colombian approach to bilateral negotiations can be divided into two stages.

During the first stage, going from the ratification of the Chicago Convention until the early 1990s, the negotiation strategy was characterized for being very restrictive, regulating number of carriers, frequencies, city pairs, capacity, and detailed description of the traffic rights that could be exercised. As of 1991, there has been a liberalized policy for the negotiation of bilateral agreements, allowing multiple designations and more capacity.¹⁶

As of today, there is no general negotiation policy for air traffic rights; it all depends on the level of development of the other party, its geographical location, the particular tourism needs of each country (there are touristic cities to which an open skies policy applies), the market size and needs, and the level of competition that the other parties' carriers represent for Colombian carriers. From the Colombian airline's point of view, the main difficulty faced in the air traffic rights negotiations is the possibility to obtain effective reciprocity. Colombia has a good market and a privileged location that makes it hard to find equivalent traffic rights. Colombia needs an air traffic rights negotiation policy based on real and effective reciprocity. Consequently, Colombia doesn't have the same negotiation strategy with every country. It is one scenario to negotiate a freedom with countries located south to Colombia, and a very different situation to negotiate with countries like Panama and Costa Rica, which have an excellent geographical

¹⁶ Unidad Administrativa Especial de Aeronautica Civil, *Acceso a los mercados. Política regulatoria o no en los accesos a los mercados internacionales No. SPA/1-NE/2.3.1: Proceedings of the Primer Simposio de Política Aero comercial, Rionegro, 2003*, online: Aeronáutica Civil <http://portal.aerocivil.gov.co/portal/page/portal/Aerocivil_Portal_Internet/normatividad/politica_aero comercial/Documentos> at 2 [Translated by author] [UAEAC, "NE/2.3.1"]].

location, and want to gain access to the Colombian market to feed their hubs using sixth freedom rights.

Following, there will be a very brief description of different negotiations agreed to by Colombia with third countries. Colombia and Venezuela entered in 1991 into an open skies agreement that integrated the air transport systems of both countries with no geographical or traffic rights limitations. Thus, capacity, routes and schedules were completely liberalized. Unlike other traditional bilaterals, this agreement does not contain any annex specifying city pairs; the two governments agreed that only previous notice was required to serve a route.¹⁷

The bilateral agreement with Chile has no restrictions on capacity and allows for multiple designation. The agreement includes a fifth freedom right for traffic headed to five destinations north of Colombia as determined by Chile, excluding Costa Rica. The bilateral agreements with Brazil and Argentina also include fifth freedom rights with multiple designations but with limited frequencies.¹⁸ Mexico has a very restrictive and protectionist policy; still, capacity has been liberalized although the single designation clause is maintained.

Negotiation of traffic rights with Panama has been very complicated for Colombia, as the latter considers that air traffic conditions are not reciprocal for

¹⁷ Marina Donato, "Latin America's present aviation policy vis-à-vis the new global air transport environment" (1995) 20:1 Ann. Air & Sp. L. 221 at 225 [Donato, "L.A. aviation policy"].

¹⁸ UAEAC, "NE/2.3.1", supra note 16.

both parties. Panama's own air traffic is considerably smaller than Colombia's, but both countries have privileged geographical location and important hubs to feed. Colombian airlines have opposite interests in granting certain traffic rights to Panama. Consequently, both governments have undergone several consultation meetings over the last few years.¹⁹ Due to the foregoing, the bilateral agreement was denounced by Colombia, as of May 30, 2003. A Memorandum of Understanding dated July 26, 1997, provides no clause requiring the substantial ownership and effective control to be in the hands of nationals and allows for multiple designations.

Costa Rica granted fifth freedom rights to Colombia in exchange for access for a Costa Rican airline to the Colombian market. The bilateral does regulate capacity by indicating the permitted frequencies and authorized type of aircraft. Due to the socioeconomic differences, the situation with Caribbean countries is not reciprocal. Air traffic between Colombia and Dominican Republic, Aruba and Curacao is primarily originated in Colombia in a very cyclical basis, as those are touristic destination for Colombians. Except for Curacao, frequencies and aircraft restrictions have been liberalized.

For selected touristic cities that are going to be described ahead in this thesis, an open skies policy has been implemented in many of the bilaterals currently in force. As in respect to substantial ownership and effective control restrictions, the

¹⁹ *Ibid.* at 4

bilateral agreements with Germany, Belgium, Brazil, Curacao, Aruba, Spain, United States, France, Italy, Mexico, Portugal, United Kingdom, Switzerland, and Uruguay include such restrictions. The non-compliance do not jeopardize the traffic right under the bilateral, it forbids the use of those traffic rights by designated airlines if its ownership and effective control is not held by nationals of the contracting party. Under the bilateral agreements with Argentina, Panama, Chile, Peru, Bolivia, Ecuador, Costa Rica, Cuba, Netherlands, and Dominican Republic, each party can freely designate their own carriers without any restrictions on substantial ownership and effective control.

Cargo air traffic rights are negotiated on a more liberalized basis in order to promote competition with non-regulated access as in respect to capacity and number of carriers. Moreover, the route network has also been liberalized, creating a proper environment for new markets to arise from the commerce increase.²⁰

6. Regional Agreements

²⁰ *Ibid.* at 8

The Cartagena Agreement of 1969 gave birth to the Andean integration process by creating the Andean Community (formerly known as Andean Pact). The agreement was originally entered into by Colombia, Bolivia, Ecuador, Peru, and Venezuela. The objective of the agreement was to strengthen the union among those governments, promoting the balanced and harmonic development of such member states by means of social and economical integration aiming to the gradual integration of a common Latin-American market. [Translated by author]

The agreement was also intended to improve the regional position as a block, thus reducing the Andean vulnerability within the economic international context.²¹

Currently, Colombia, Peru, Bolivia and Ecuador are the four state members of the Andean Community of Nations. Argentina, Brazil, Chile, Paraguay, and Uruguay are associate members, and as of 2006 Venezuela is not longer a member of the community.

The Cartagena Agreement was the first regional agreement that took action to liberalize the economic policies for the member states, and that expressly included air transportation. According to Folchi's opinion, "[u]ndoubtedly, the Cartagena agreement constitutes a significant step towards regional harmonization and provides guidance in how to establish aeropolitical policies which promote integration."²² Such integration of air transport consists in a total liberty to

²¹ Andean Subregional Integration Agreement "Cartagena Agreement" online: Comunidad Andina <http://www.comunidadandina.org/ingles/normativa/ande_trie1.htm> at Article 1.

²² Mario O. Folchi, "Air transport policy in Latin America" (1994) 19:2 Ann. Air & Sp. L. 311 at 317.

exercise third, fourth, fifth, sixth, and seventh freedom rights by all air carriers pertaining to any of the member States, for scheduled and nonscheduled passengers, cargo, and mail air transportation within the Member States of the Andean Community. The market access within the region was completely liberalized eliminating all restrictions on aircraft, number of carriers, and frequencies.

Decision 297/1991 *Air transport integration within the Andean Subregion* as amended by Decision 360/1994, approved the integration of air transport inside the Andean Subregion. Article 5 granted the exercise of third, fourth and fifth freedom rights within the region. The Decision set the conditions under which such rights could be exercised. Article 9 allowed for multiple designations upon issuance of a uniform regulation, that would guarantee free market access. The foregoing Decisions were complemented by Decision 320/1992 *Multiple designation in Air Transport in the Andean Subregion*, as amended by Decision 361/2004, that published the regulation defining the conditions for multiple designation.

In 2004, it was considered that the Andean regulation on air transport should be consolidated and updated according to the new socioeconomic scenario,

technological developments and corporate organization.²³ Consequently, Decision 582/2004 now regulates the air transportation policy within the Andean Sub-Region. Article 6 grants free exercise of third, fourth and fifth freedom rights for scheduled passenger cargo and mail services, separately or combined, performed within the Subregion. Article 7 does so for non-scheduled services and prescribes additional conditions for such services.

It is important to note that article 1 defines fifth freedom as follows:

The right to board passengers, cargo and mail in a different country from that of the carrier's nationality, bound for another Subregion's country, or somewhere outside that country but different from that of the carrier's nationality.²⁴

Hence, although any of the Decisions expressly mention sixth and seventh freedom rights, under the definition, they are considered to fit in and be included as well.

According to Article 11 there should be free access and no discrimination to operate any of the routes, as long as the designated company is legally established

²³ Decisión 582 Transporte Aéreo en la Comunidad Andina, mayo 04 de 2004, online: Comunidad Andina <<http://www.comunidadandina.org/normativa/dec/D582.htm>> at whereas [Translated by author].

²⁴ *Ibid.* at Article 1.

in the designating country. Article 12 defines the requirements to be fulfilled by the designated air carriers: it should be legally incorporated under the laws of the designating state, where it should have its domicile and effective headquarters.²⁵ The operational requirements were simplified for member state carriers, the multiple designation clause was incorporated, and it was stated that the country of origin principle would be applicable to set the fares and rates for air transportation.

Under Article 27, member states should revise the bilateral agreements among them to make sure they coincide with the free exchange of regional air traffic rights in accordance with the community interest, competition and quality and efficiency of air transport services. Thus, in case of conflict between bilaterals and the Cartagena Agreement, the provisions of the latter would prevail. It is important to note that inside the Andean Community it is possible to constitute the so called Andean Multinational Enterprise; as yet, no one has done anything to give use to that figure.

Although the Cartagena Agreement is the only regional agreement signed by Colombia and expressly involving and regulating air transport services, there are

²⁵ In order to verify the effective headquarters, the designating state should confirm: 1. That the administrative headquarters and principal base of operation are in its territory; 2. The licenses of the aircraft crewmembers are given by the Designating State, and 3. The air carrier holds operational control and technical direction over the aircraft, not being just a charterer [Translated by author].

other trade and commerce regional agreements that have an indirect impact on air transportation. In 1994 the G3 Free Trade Agreement was entered into by Colombia, Mexico and Venezuela. Although Law 172/94 incorporated it to Colombian legislation, it only became effective with Decree 1266/97. The agreement was intended to gradually liberalize the tax restrictions in trade activities among those three countries.

Mersosur is an agreement entered into by Brazil, Argentina, Paraguay, and Uruguay in 1991 for the free trade and movement of goods, capital, and persons inside that southern American region. Albeit at the beginning the Asuncion Treaty²⁶ did not expressly mention air transport services, in 1996 an agreement for air transportation inside the region was reached. Colombia became an associate member as of 2004, and in 2005, it approved a free trade zone with the southern states pertaining to Mercosur.

During the last few years, Colombia also agreed on important trade agreements with Chile, Peru, Ecuador, Salvador, Guatemala and Honduras, Cuba, Costa Rica, Nicaragua, and Panama in order to increase the bilateral trade with those countries by loosening the existing barriers for commerce. Despite many contrary opinions, Colombia is currently negotiating a free trade agreement with the United States. The Colombian Constitutional Court approved it on July 24, 2008 and it is pending final approval by the US Congress in order to become effective.

²⁶ Asuncion Treaty dated 26 March, 1991 have birth to Mercosur.

Colombia has very high expectations on the trade increase with the United States. The Andean Community of Nations also intends to enter into trade negotiations with the European Community, and Colombia together with Peru, have ongoing negotiations with Canada.

The trade agreements entered into by Colombia bring along more trade of goods, services, business opportunities and greater tourism promotion, all of the foregoing implying additional use of passenger and cargo air services. Additionally, all those negotiations have helped to strengthen the political relationship with other countries, which gives Colombia a better chance to be considered as an interesting opportunity for foreign investment. Although Colombia still has significant social problems, the overall economy has considerably improved as compared to that of the early 1990s.

B. Market Shares and Competition in Latin America

During the past years, in response to the globalization trend, Latin America's air transportation industry has gone from highly regulated, restricted and protectionist to more liberalized and competitive, mainly characterized by private carriers. Market liberalization has increased air traffic in Latin America.²⁷ The steps taken in South America are changing the region's air transport industry, allowing carriers to participate in a more global manner. Latin American carriers are

²⁷ *Melbourne*, supra note 7 at 47.

relying their whole operational strategy on the fact that “a hub and spoke system is the surest way for an airline to gain a dominant position in its market”.²⁸ Additionally, they are consolidating alliances that give them the opportunity to increase their share in the market and optimize their operational resources while they improve revenue and reduce costs, while building a larger route network that otherwise would be impossible to offer, not only because of costs but also because the market access is still limited by bilaterals.²⁹

Back in the 1990s, Miami was the hub connecting South America with the rest of the world. Nowadays, air traffic to/from Colombia and South America has several hubs, including Bogota, Lima, Santiago de Chile, Panama and Costa Rica. Furthermore, back then the Americans were the preferred carriers, but all regional carriers managed to increase their reliability by showing excellent results on punctuality, safety and quality service. Their market shares increased and financially speaking, TACA, COPA, LAN and AVIANCA are now some of the most stable regional carriers.³⁰ Privatization of commercial air services and globalization has determined the current *status quo* of the regional economy.³¹

²⁸ Jacques Pavaux, ed, *Air Transport: Horizon 2020 Key factors and future prospects* (Dordrecht: Martinus Nijhoff Publishers, 1988) at 85.

²⁹ Paul Stephen Dempsey & Laurence E. Gesell, *Air Transportation Foundations for the 21st Century*, 2d ed. (Chandler: Coast Aire Publications L.L.C, 2005) at 193.

³⁰ Anthony Concil, “Wide Horizons” (2008) *Airlines International* at 45.

³¹ Marina Donato, “Air Transport in Latin America and the Caribbean: a Story of Success and Failure” (1996) 51:10 *ICAO Journal* 5 at 5 [Donato, “Air Transport in L.A.”].

Notwithstanding such liberalization, it is clear that bilateralism, protectionism in the negotiation of traffic rights and the restrictions on ownership, and control of air carriers by foreign investors are perceived as the main obstacles for further developments.³² Latin America is a developing region with a complex economic environment, a vast extent of land of approximately 21,069,501 km² and a population of 579 million.³³ The flying distances between main cities are often very long. Even though there is an important traffic inside Latin America, markets are relatively small if compared to those in the United States or Europe. As of 2000, 80% of the Latin American flights were domestic or regional; the rate of number of people per aircraft in Latin America is 500,000 to 1, while in the United States is 56,000 to 1; and last but not least, the operational costs in LATAM are 30% higher than in the US. Even if labor costs are cheaper in LATAM, the truth is that American carriers have more and newer aircraft that explain lower operational costs. A single airline in the US has more aircraft in their fleet than all the airlines members of AITAL³⁴ (International Association of Latin American Air Transport).³⁵ LAN Airlines CEO opportunely comments:

³² *Fúster Colunga*, supra note 5 at 25 [Translated by author].

³³ See online: ECLAC <http://www.eclac.cl/publicaciones/xml/6/32606/LCG2356B_1.pdf> [Translated by author].

³⁴ AITAL is a Latin American organization that provides the forum to find solutions to common problems and to enhance collaboration among the 36 Latin American carriers that are members as of July 2008. See online, ALTA <<http://www.alt.aero>>

³⁵ Bob Booth, “Transparencia, Cielos Abiertos, Alianzas, Competencia salvaje, CYBC y otras ideas sobre el futuro de la region” (2000) 56 Aital Boletín Informativo 17 at 18.

“with this reality, even if you are a great airline in a single country, you cannot survive as a global player”.³⁶

Despite the recent movement in capital and industry developments in the region, the financial situation for Latin American carriers is as complex as for any other airline. As Nawal K. Taneja asserted back in the late 1980s,

The financial performance of airlines based in ICAO’s Latin America/ Caribbean region depends heavily on the economic and financial condition of the countries within this region. Some nations are reporting an economic revival (...) But despite their current economic, financial and social problems, selected countries in Latin America have tremendous potential for substantial economic development.³⁷

Recently, economies have improved and revealing that tremendous potential. New businesses are arising, fresh capital is being invested, tourism has increased and air traffic has also grown. As globalization aims towards consolidation, smaller airlines are making alliances and/or integrating with some large strong carriers in order to survive. Latin American carriers have shown a will to integrate and act as a region, forming strong blocks that have a better negotiating leverage within the global air transportation market. Some authors foresaw such integration as the most effective way to increase the region’s share in the market and to strengthen its carriers and their participation.

³⁶ *Concil*, supra note 30 at 45.

³⁷ Nawal K. Taneja, *The international airline industry: trends, issues, and challenges*. (Lexington: D.C. Heath and Company, 1988) at 23-27.

Regional agreements, market liberalization and improvement on national economies, have contributed for a continuous increase on the demand for passenger and cargo air transportation services in Latin America. Back in the 90s, South America was the region that showed the greatest growing indexes throughout the world.³⁸ IATA and the FAA foresee that Latin America's air transportation industry will continue to grow faster than any other region in the world. The FAA believes that the total market between the US and Latin America and the Caribbean will be doubled by 2011, when more than 80 million passengers are expected to be flying between those two markets.³⁹

According to the statistics published by the Economic Commission for Latin America and the Caribbean (ECLAC), the following is the size of the Latin American market measured in air traffic passenger kilometers for scheduled international and domestic flights as of 2006⁴⁰

Country	PAX-KM (thousands)	KM FLOWN (thousands)
Brazil	49,218,200	477,800
Colombia ⁴¹	18,190,585	141,800
Argentina	14,555,900	101,500

³⁸ *Booth, supra* note 35 at 17 [Translated by author].

³⁹ *Ibid.* at 18 [Translated by author].

⁴⁰ See online: ECLAC <http://www.eclac.cl/publicaciones/xml/6/32606/LCG2356B_3.pdf> [Translated by author].

⁴¹ The statistics provided by ECLAC are somehow different from the statistics provided by the Colombian Aeronautical Authority. The data was changed to reflect the Colombian statistics on international air traffic. ECLAC's data is as follows: pax/km – 10,478,200.

Chile	13,858,300	120,400
Panama	6,078,400	61,600
Peru	5,752,200	65,800
Venezuela	2,635,000	61,200
Bolivia	1,412,900	16,900
Uruguay	940,400	7,600
Ecuador	918,800	12,000
Paraguay	480,700	7,200
Latin America	109,946,938	1,073,800

Recently, the Latin American Air Transport Association (ALTA for its name in Spanish Asociación Latinoamericana de Transporte Aéreo) published the Latin America & Caribbean Capacity Analysis report that measures one-way capacity offered as of April 2008, within and to/from Latin America, the Caribbean and the top destinations served to/from the region. The analysis contains very useful information that allows completion of a good picture and sizing of Latin America's air transport industry. The data is compared to the capacity as of April 2007 and includes an Average Annual Growing Rate from 2000 to 2008 (AAGR). Accordingly, the following chart summarizes the results for the Latin American airports that are the subject matter of this thesis, including all domestic and international flights: ⁴²

⁴² The data is based on the statistics presented in the Latin America & Caribbean Capacity Analysis 2008, but the chart shown above is construed by the author.

Airport - City		Total Flights	Flights added	Flights Change	AAGR 00-08
MEX - Mexico City ⁴³	Total	13.612	851	7%	5%
CGH - San Paulo	Total	6.826	-288	-4%	87%
	Domestic	6.826	-288	-4%	87%
	International	0	0	0	0
GRU - Sao Paulo	Total	6.503	1.460	29%	15%
	Domestic	4.169	1.146	38%	18%
	International	2.334	314	16%	10%
BOG - Bogota	Total	6.380	467	8%	12%
	Domestic	4.915	246	5%	14%
	International	1.465	221	18%	8%
GIG - Rio de Janeiro	Total	4.762	976	26%	21%
	Domestic	4.269	929	28%	25%
	International	493	47	11%	7%
SCL - Santiago	Total	3.096	247	9%	7%
	Domestic	1.593	357	29%	9%
	International	1.503	-110	-7%	6%
LIM - Lima	Total	2.962	427	17%	17%
	Domestic	1.431	195	14%	N/A
	International	1.531	232	18%	12%
SJO - San Jose	Total	2.872	345	14%	6%
	Domestic	1.272	16	1%	N/A
	International	1.600	329	26%	6%
EZE - Buenos Aires	Total	2.470	80	3%	6%
	Domestic	53	23	43%	N/A
	International	2.417	57	2%	6%
PTY - Panama	Total	2.299	394	21%	10%
	Domestic	0	0	0	0
	International	2.299	394	21%	10%
UIO - Quito	Total	2.230	-107	-5%	40%
	Domestic	1.769	-108	-6%	85%
	International	461	1	0%	16%
SAL - San Salvador	Total	N/A	N/A	N/A	N/A
	Domestic	N/A	N/A	N/A	N/A
	International	1.039	83	9%	2%

⁴³ The largest airport in Latin America and the Caribbean is Mexico City's. Although the thesis does not analyze the situation of any Mexican carrier, the data for such airport is left as reference. The second largest airport is Sao Paulo's with almost half the number of flights offered.

Air transportation policies in Latin American countries are very diverse. The approach is determined by several factors that depend on the advantages or disadvantages that each country poses within the air transportation industry. Geographical, social, political and economical aspects are highly relevant to determine the risks or advantages that a given policy will signify for the country's air transportation industry. Thus, the approach is different depending on the country: Mexico and Brazil own a huge market that encourages the creation of enterprises and they are very protective with respect to restrictions of substantial ownership and effective control. Some other countries are less restrictive in their air transportation policies because they don't have much to lose. Due to its geographical location, Chile and Argentina are countries with not much to offer. Panama and Central America have very small own markets. And other Andean countries have neither an interesting geographical position nor a large owned market.

But overall, it can be concluded that the regulatory framework in Latin America has been liberalized to be in accordance with the globalization trend. Although it is true that some countries like Colombia, Mexico, and Brazil still regulate capacity and fares, such regulation is looser as compared to previous years. Some countries like Chile, Peru and Panama have implemented open skies policies for their traffic rights.

Colombia, a country of approximately 43 million inhabitants and an extension of 1.141.748 km², has a privileged location in South America that connects traffic

between South America, the Caribbean, United States and Europe. As of July 2008, there are daily scheduled nonstop service from Colombia to the United States (Houston, New York, Miami, Fort Lauderdale and Atlanta), France (Paris), Spain (Madrid,) Mexico (Mexico City), Brazil (Sao Paulo), Argentina (Buenos Aires), Chile (Santiago), Venezuela (Caracas, Maracaibo and Valencia), Peru (Lima), Ecuador (Quito and Guayaquil), Panama (Ciudad de Panama), Costa Rica (San Jose), and Aruba.

With some frequencies per week, there are also scheduled nonstop service from Colombia to Canada (Toronto), United States (Washington and Los Angeles), Spain (Barcelona), Dominican Republic (Santo Domingo and Punta Cana), Cuba (Habana), Venezuela (Porlamar), and Curacao.

The following are the statistics presented by the UAEAC for Passenger - Kilometers and Tons – Kilometers in Colombian domestic and international passenger and cargo air traffic for the years 2005, 2006 and 2007: ⁴⁴

Year		PAX – KM (Thousands)	TONS –KM (Thousands)
2005	International	11,917,189	1,547,836
	Domestic	3,733,015	68,104
	Total	15,650,204	1,615,941

⁴⁴ The data is based on the statistics presented by the UAEAC, but the final results contained herein are construed by the author. For details on annual statistics, see online: Aeronautica Civil <http://portal.aerocivil.gov.co/portal/page/portal/Aerocivil_Portal_Internet/estadisticas/transporte_aereo/Estad%EDsticas%20Operacionales/Boletines%20publicados%20anteriormente/Boletines%20Mensuales%20Pasajeros-Kil%F3metros%20y%20Toneladas-Kil%F3m>

2006	International	14,096,138	1,687,676
	Domestic	4,094,447	68,590
	Total	18,190,585	1,756,266
2007	International	15,187,272	1,505,104
	Domestic	4,330,104	68,894
	Total	19,517,376	1,573,998

The numbers reflect a continuous increase in passenger air traffic and relatively stable cargo traffic. As of April 2008, Avianca's market share in international passenger air traffic to/from Colombia was 44.67%, followed by Iberia with 12.03%. In cargo international air traffic, Tampa was ranked first among 36 cargo carriers, with a 26.85% market share. Avianca was ranked fifth with a 7.01% market share.

The statistics on air traffic presented by the Colombian Aeronautical Authority are construed in accordance with the data given by scheduled and cargo carriers. The size of the different markets can be measured by calculating the passenger-kilometer and tons-kilometers indexes. The correspondent definitions are as follows:

Passenger-Kilometers: The value resulting from multiplying the number of passengers on board of an aircraft, times the distance of the leg in which they are flying. The resulting number equals the number of kilometers traveled by all the passengers on board of the aircraft.

Tons - Kilometers: The value resulting from multiplying the amount of tons on board of each leg, times the distance of the leg to be flown. The resulting number equals the number of kilometers traveled by all the tons on board of the aircraft.⁴⁵

As studied, it can be concluded that compared to other Latin American countries, Colombia has a significant natural market big enough to guarantee that the country will be able to sustain its own air services. Such market is so promising that many foreign investors have showed interest in placing their money on a Colombian carrier. In fact, *mutatis mutandis* the Colombian air transportation industry is very similar to that of the United States. Several national carriers hold a strong competition between them to gain domestic market share. Competition for international markets is also very strong but only between a national carrier (Avianca), Copa Holdings and several international carriers.

C. Existing Uses. How is the framework used in a practical context?

Within the current legal framework, airlines have found their way towards their internationalization. Large international airline holding groups, or controlling companies that work together as a network on a coordinated manner to strengthen their market shares in a particular region have been created in Latin America. But

⁴⁵ Aeronáutica Civil – Oficina de Transporte Aéreo, “Boletín estadístico de Pasajeros – Kilometros y Toneladas – Kilometros Operación regular (November 2006), online: Aeronáutica civil <http://portal.aerocivil.gov.co/portal/pls/portal/!PORTAL.wwwpob_page.show?_docname=752408.PDF> at 2 [Translated by author].

as the legal framework and the bilateral environment is restrictive and limits the possibility for international mergers or cross border ownerships, such holding groups have to find the legal way to operate within those restrictions. Some authors have started to mention the asset-less airlines ⁴⁶ due to the high tendency to outsource more and more services. It seems logical that in order to reduce costs by consolidating redundant operations, airlines can enter into agreements that allow them to have, where possible, one same operational and administrative infrastructure.

As Milan A. Racic says,

The fact that airlines must continue not to look like global airlines, while making every effort to act like one, is important because it detracts them from the task at hand, which is the creation of an efficient, secure, globe-spanning, and profitable transportation company. The necessity of keeping up the appearance of a 'national' global airline is time and resource consuming, both of which are better spent in actually creating and running such an airline. In the long term, the uncertainty which this sort of regulatory system engenders stunts and skews the development of airlines, as the carriers in the question lack the confidence to take the bold technological, organizational, and financial steps required to create the airline of the future. The success of the airlines of the future will be predicated on their efficiency, financial strength and access to global markets. Regulation will dictate if, when, and how this can occur. It can either continue to inhibit these developments, or it can play the leading role in directing and nurturing them. ⁴⁷

⁴⁶ James Ott & Raymond E. Neidl, *Airline Odyssey. The Airline Industry's Turbulent Flight into the Future* (Paris: n.p, 1995) at 207.

⁴⁷ Milan A Racic, *The Evolution of Global Airlines: The Role of Airline Mergers, Franchises and Alliances in the Re-Development of International Air Transport Regulation* (LL.M. Thesis, McGill University Institute of Air and Space Law, 1996) [Unpublished] at 119.

Many authors have been starting to talk about *megacarriers*. A megacARRIER is a big corporation with an important share in the air traffic market that enters into alliances or commercial agreements with other related carriers, so as to dominate an even bigger share of the market. These megacarriers leave no doubt that the air industry is globalizing and that sooner or later, the air traffic will be dominated by some few strong of them and that those not part of an alliance will either disappear or survive as feeders and/or in small markets.

Back in the early 90s, some thought that the future of Latin American carriers would be as feeders of a large global carrier or within small regional and cabotage markets.⁴⁸ They were totally mistaken. It is now widely recognized in the industry that during the last recent years, the air transport industry in Latin America has had a continuous growth and evolution at a higher rate than any other region in the world. And such growth has happened in a very particular way. As explained by Carlos Grau Tanner, in Latin America “a new breed of virtual multinational ‘branded’ carrier has emerged despite the very traditional regulatory framework governing the region’s markets.”⁴⁹ As will be described forward on, some Latin American carriers with different nationalities have started to operate under a same brand. As Carlos Grau Tanner comments, the globalization process in Latin America has been referred to as the *Latin American way*, a *new breed of*

⁴⁸ Ernesto Vásquez Rocha, “¿Tiene la Industria Latinoamericana de Transporte Aéreo algún futuro?” (1994) 4:19 AITAL Boletín Informativo 25 at 32 [Translated by author].

⁴⁹ *Grau Tanner*, supra note 2.

*virtual multinational branded carrier, a new model of network carrier, and as an innovative business model.*⁵⁰

All the foregoing is happening within a traditional legal framework in which only a few countries have liberalized their ownership and control restrictions. “Still, as a rule of thumb, the common brand spans over a complex underlying legal structure in which traditional carriers, licensed by the designating State, hold and operate the traffic rights.”⁵¹ Carriers have managed to comply with the minimum operational conditions and with substantial ownership and effective control requirements still in force. The compliance with ownership and control requirements is sometimes made through front man investments or through what has been called *flight capital*. Such term is used to refer to foreign capital investments that stay for a short time and migrate to be able to take advantage of investments in other countries.

Notwithstanding the foregoing, the model is not uniform. There is no magic formula and the legal structure that should be given to each particular case depends very much on the different provisions that regulate the operation, incorporation and designation of each participating carrier. So far, airlines have found the way to make it happen. Not only inside an outdated regulatory framework, but also without risking the traffic rights negotiations with powerful

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

and influencing countries like the U.S. Thus the question that arises is whether there is a real need to change the legal framework? It might be a good idea in order to achieve better flexibility but it doesn't really seem to be necessary. Instead it sounds advisable to create technical and commercial standards that allow, if necessary, the interchangeability of aircraft and crew between the member airlines of those *virtual multinational airlines*.

1. In Colombia - Grupo Synergy

The new foreign investment regimes without limitations has been advantageous for Colombian airlines, since some of them were able to survive and are still operating due to the injections of foreign capital. Aerorepublica, Tampa and Avianca are three significant examples. The case of Avianca and Tampa will be described ahead.

Colombia's largest national airline is Avianca S.A., whose main hub is located in Bogotá D.C., a major hub for connecting traffic between South America, Europe and the United States. Avianca is part of the Synergy Group, a perfect example of the consolidation process among Latin American carriers.

Avianca has always been considered as the Colombian flag national carrier and with no doubt it has played a key role in the country's economic development and cultural identity. Although hardly criticized for a long time, today it has very competitive passenger services and a very strict safety policy that has allowed

them to operate with no accidents or major incidents for almost two decades. The big change in the corporate culture that lead to the airline's new image and improved service, started in 2002 with Alianza Summa, alliance by which Avianca, Sam, and ACES joint their operations. Aces, a former Colombian carrier, was widely recognized for its outstanding passenger services. Despite the alliance and many efforts to keep it operating, Aces ceased operations in 2003. 5 years later, Avianca's improvements are publicly recognized and under it's corporate policy they are doing all the best to keep high standards to measure safety and passenger services. With the slogan: *things are happening here*, they are trying to show big changes to improve customer satisfaction.

After going through a Chapter 11 bankruptcy proceeding before the Southern District Courts of New York during almost 2 years, Avianca was acquired in 2004 by the Brazilian Mr. German Efromovich. Considering that he had performed various activities in accordance with the Colombian interests, the Colombian government granted Mr. Efromovich the Colombian citizenship in 2005. Such gesture was understood as a major support to the investment projects performed by Synergy Group in different sectors of the Colombian economy.⁵²

Although as of 1991, under Colombian law there are no limitations related to foreign ownership of national air carriers, most bilateral agreements signed by

⁵² "Empresario Efromovich es ahora colombiano" Colombia.com (11 April 2005), online: Colombia.com <<http://www.colombia.com/noticias/autonoticias/2004/detallenoticia25650.asp>> [Translated by author].

Colombia do have such restrictions, and the new Colombian nationality of Avianca's major substantial owner and effective controller, kept the airline safe from the consequences of non-compliance with the restrictions.

The fact is that the holding groups have found the legal way to have the restrictions fully respected while maintaining a unity that allows them to operate almost as a single air carrier with branches in different countries, thus, taking advantage of traffic rights offered by different countries. It is not a secret that Mr. Efromovich's ultimate objective is to consolidate the biggest airline in the Americas. The structure and business plans of the holding group can easily be found online:

Synergy Group is a South American conglomerate owned by Bolivian-born German Efromovich, an entrepreneur holding dual citizenship of Colombia and Brazil. The group operates several airlines in South America and one in Africa, and is active in the exploration of oil and natural gas throughout the region. Furthermore, it operates hydroelectric power plants and participates in the construction of telecommunications infrastructure. Synergy Aerospace is a sub-division of Synergy Group headquartered in Bogotá, Colombia.⁵³

CEO Juan Emilio Posada, manages this holding company for six airlines in four countries: Avianca, SAM and Tampa in Colombia, OceanAir in Brazil, VIP in Ecuador, and Capital Airlines in Nigeria. As it has been reported,

⁵³ Wikipedia the Free Encyclopedia, online: Wikipedia <http://en.wikipedia.org/wiki/Synergy_Group>

Avianca S.A. (Spanish acronym: Aerovías del Continente Americano S.A., formerly Aerovías Nacionales de Colombia S.A.) has been the national flag air carrier of Colombia since 1919, making it the second-oldest continuously running airline in the world behind Dutch Netherlands-based KLM. Avianca was founded in Barranquilla but its main operation base and headquarters are in Bogotá, D.C. adjacent to El Dorado International Airport. Avianca belongs to South American conglomerate Synergy Group. In 2007, Avianca was the 18th profitable airline in the world (with US\$237,1 millions net) and the fastest growth Latin American airline. Avianca operates six subsidiary airlines: Helicol, SAM and Tampa Cargo in Colombia; OceanAir in Brazil; VIP in Ecuador; and Capital Airlines in Nigeria. Avianca is also planning the establishment of a new airline in Paraguay, which presumably would be called OceanAir Paraguay. Avianca is attempting to take control of the Ecuadorian airline Aerogal. During 2008, SAM, OceanAir in Brazil, VIP, Tampa Cargo and eventually OceanAir Paraguay, will be rebranded as Avianca, consolidating one of the major airlines in the Americas.⁵⁴

Except as for Avianca and Sam, currently the holding group does not offer its route network as a whole through the web. They share procedures, major purchases and acquisitions, some management activities, and have an operational coordination that allows them to feed the main hub in Bogota. Nowadays, although they share the same distinctive signs, each airline retains its own corporate name and their rebranding as AVIANCA will probably be done through a franchising or a brand use agreement. Although fleet negotiations, orders, delivery procedures, etc, are developed as if they were a single entity, each airline has its fleet registered under its name. Unless otherwise agreed between them for a particular case, there is no regular aircraft leasing between them. All carriers

⁵⁴ Wikipedia the Free Encyclopedia, online: Wikipedia <<http://en.wikipedia.org/wiki/Avianca>>

belonging to the Synergy Group share Avianca's frequent flyer program called AviancaPlus.

As of July 2008, Synergy Group is undergoing through a fleet renovation program and the goal is to totally renew the fleet within the next few years. In 2007 the Group placed purchase orders for 57 Airbus, 5 of which are expected to be operating in December 2008 (2 A319, 2 A330, and 1 A320), and for 12 B787 Dreamliners, becoming the first Latin American carriers to operate the new Boeing aircraft. The orders for new fleet will not only make the airline's operations more efficient, safer and able to provide better passenger services, but also shows the air carrier's growth and strengthening. It seems unbelievable to think of an airline that only 6 years ago was about to cease operations and now it is strongly moving towards becoming the biggest airline in the Americas.

Avianca and its subsidiary SAM, both Colombian carriers, currently operate with 54 aircraft: 2 B767-300, 5 767-200, 7 B757, 16 MD83, 13 F100, 8 F50, 2 A319, and 1 A320, to 21 domestic destinations and 23 international destinations in 13 countries in North America, South America, The Caribbean and Europe.

Tampa is a Colombian cargo carrier recently acquired by Avianca. It has a commercial alliance with European cargo carrier Martinair. As explained before, Tampa is the largest cargo carrier in Colombia with direct international operations to Brazil, Chile, Ecuador, Venezuela, Peru, Mexico, Puerto Rico, and the United States. In fact, Tampa Cargo is the only Colombian cargo airline authorized to fly

to the United States.⁵⁵ Moreover, Tampa has an extended route network by means of several General Sales Agents all around the world. Colombia is currently negotiating different commercial agreements that will be very beneficial for the cargo transportation market as they will generate multiple business opportunities. Especially for Tampa, the proposed Free Trade Agreement (TLC in Spanish for its name Tratado de Libre Comercio) with the United States will bring out several new trade openings as they have one of their operation centers in Miami and Los Angeles.⁵⁶

Helicol S.A. is a Colombian carrier headquartered in Bogotá and exclusively operates helicopters for non-scheduled passenger and cargo transportation, and different support services. The services are provided with a fleet composed of 3 Bell 412 and 1 Bell 212 used as an aerial ambulance. Helicol is worth mentioning in this project only as part of the description of the Synergy Group; its operations do not have an impact on the scheduled passenger transportation market share of any of the other air carriers part of the Group.

Ocean Air is a Brazilian airline based in Rio de Janeiro serving 26 domestic destinations in Brazil with a fleet of 18 aircraft (16 F100 and 2 F50). VIP S.A.

⁵⁵ “Avianca anunció que adquiere el 100% de las acciones de Tampa” (02 April 2008), online: Magnum Logistics

<http://www.magnumlogistics.com.co/index.php?option=com_content&task=view&id=21&Itemid=1> [Translated by author].

⁵⁶ “Avianca se quedará con Tampa Cargo” El Espectador (01 April 2008), online:

[Elespectador.com <http://www.elespectador.com/noticias/negocios/articulo-avianca-se-quedara-tampa-cargo>](http://www.elespectador.com/noticias/negocios/articulo-avianca-se-quedara-tampa-cargo) [Translated by author] [El Espectador, “Tampa Cargo”].

also serves only short haul domestic destinations within Ecuador using 3 Dornier 328 aircraft. Though a code share agreement with Avianca, they serve many other international routes.

2. In Latin America

Different airlines within the region are also operating under the umbrella of a parent company, forming big regional airline groups by making foreign equity investments in different regional airlines or commercial alliances that allow them to operate as a single carrier where possible.

a. Grupo Lan

Lan Airlines S.A. is a Chilean airline originally founded in 1929 and headquartered in Santiago de Chile. It started as a state owned company offering passenger, cargo and mail transportation services. It was privatized in 1994 and since then it started an expansion and internationalization process, achieving sustained revenue increase and consistent profitability. LAN has created an extensive regional network by establishing passenger operations in Peru, Ecuador, and Argentina, as well as cargo operations in Brasil and Mexico.⁵⁷ LAN is the parent company of five passenger carrier subsidiaries (LanExpress, LanArgentina,

⁵⁷ See online: Lan.com <http://plane.lan.com/investor_relations/compania/historia-es-un.html> [Translated by author].

LanPeru, LanEcuador and LanDominicana) and 3 cargo carriers (LanCargo, ABSA Cargo, and MasAir).

As of June 2008, the market share of LAN Airlines is as follows:

	Chile	Argentina	Peru	Ecuador
National	77%	18%	68%	0%
International	50%	16%	27%	21%

LAN Airlines S.A. is a stakeholder in every single one of the 8 subsidiaries. The percentage of participation varies depending on the local restrictions on substantial ownership and effective control. For instance, it owns 39.5% of MasAir, 45% of LanEcuador, 49% of LanPeru and LanDominicana, 70% of LanArgentina, and 74% of ABSA Cargo.

Although all the passenger carriers are legally incorporated and based in their home countries, they share the LAN brand in order to publicly show the characteristics and service policies that are common between them, while making a statement regarding the group's internationalization strategy and objective. All the routes in the group's network can be found under the same web page as if they were a single airline.

LanAirlines, LanArgentina, and LanEcuador are members of One World alliance, the third biggest airline alliance after the Star Alliance and Sky Team. In One

World webpage, Santiago de Chile, served by LAN, is announced as the main alliance's hub in South America. With five hubs located in Santiago de Chile, Buenos Aires, Lima, Quito, and Guayaquil, LanAirlines consider themselves to be the best option to travel to and from South America. Their goal is to achieve a 1% share in the total traffic and to be "recognized as the best airline to fly in Latin America."⁵⁸ They are currently replacing their old fleet with more efficient aircraft such as A320 and B787. As of March 31, 2008 LAN operated with a fleet of 72 (38 leased and 34 owned) passenger aircraft including B737, B767, A318, A319, and A320, and 9 B767-300 cargo aircraft (1 leased and 8 owned).⁵⁹

It is interesting to point out that LanEcuador is a carrier that doesn't have any aircraft registered under its name. It operates with aircraft leased from LanAirlines S.A., as required according to their operation. LanEcuador doesn't have domestic operations within Ecuador. They serve nonstop international routes to Buenos Aires, Santiago de Chile, Miami, and New York. Presumably, the shareholders sole interest was to be able to have access to the Ecuadorian traffic to the United States and to feed the hubs in Santiago for international routes and Buenos Aires for domestic service within Argentina.

LanPeru does have some aircraft registered under their name, but operates LanAirlines Chilean registered aircraft as well. LanPeru offers domestic service in

⁵⁸ *Concil*, supra note 30 at 49.

⁵⁹ See online: Lan.com <http://plane.lan.com/investor_relations/compania/flota_consolidada-es-ar.html>

Peru and some international routes. This aircraft leasing scheme works as explained by Carlos Grau Tanner, IATA's Director of Government and Industry Affairs:

Perhaps the most innovative solutions are on the operational side, based on the flexibility provided by articles 33 and 83 bis of the Chicago Convention. Leased planes, registered in one country only, are transferred throughout the day from one operator to another (and indeed from the supervision of one Civil Aviation Authority to another). The same plane will thus cover a combination of short and long haul rotations, operated under different authorities. Group Airline A, licensed by country A, starts the day operating from A to B. The plane is then transferred to Group Airline B whose crew (same brand, same uniforms, same product) flies it from B to C, under a license and traffic rights from country B, and so on. This allows the airline to maximize the fleet's flight time well beyond what would be possible under the traditional model, in which each airline in the group would fly nationally registered aircraft on routes in and out of its country.⁶⁰

Through a press release dated May 8, 2008, LAN announced its plan to incorporate a cargo carrier in Colombia as they recognize the Colombian cargo market to the United States as biggest one in Latin America. LAN's proposal is currently under study for approval by the Colombian government. With the incorporation of a cargo carrier in Colombia, LAN would be able to integrate the Colombian market to its cargo network.⁶¹ According to information provided by the UAEAC, in 2007 the Colombian cargo market handled 137,186 domestic and

⁶⁰ Grau Tanner, *supra* note 2.

⁶¹ "Lan Cargo anuncia planes para una nueva operación carguera en Colombia" (12 May 2008), online: Lan.com <http://plane.lan.com/investor_relations/noticias/2008_05_12b-es-un.html>

[Translated by author].

511,274 international tons.⁶²

The integration of additional hubs to the traditional operations based in Santiago the Chile, has given LanAirlines the status of a *strong regional player*. According to Lan's CEO, their main challenge is to keep growing while maintaining their safety and quality standards. He believes that the region should have a big change that allows strong regional alliances or the possibility for mergers and acquisitions. He sees deregulation and open skies policy as "fundamental to the development and growth of the Latin American airline industry and its ability to offer users an efficient, world-class service."⁶³ Under his perspective, granting more traffic rights to open new, changes on ownership and control restrictions, and coordination between governments are necessary to the growth and development of the air transportation industry in Latin America.⁶⁴

Chile has already implemented an open skies policy with the United States and signed the horizontal agreements with the EC. As there was a big debate concerning whether the community clause would affect the balance between the designated carriers of both parties, Chile included a revocation clause including a free rider text⁶⁵ as a requirement inside the negotiation process to incorporate the

⁶² *El Espectador*, "Tampa Cargo", supra note 56.

⁶³ *Concil*, supra note 30 at 49.

⁶⁴ *Ibid.*

⁶⁵ Chilean *free rider* revocation clause: "*The Republic of Chile may refuse, revoke, suspend or limit the authorizations or permissions of an air carrier designated by a Member State where:*

community clause. Those negotiations are relevant as it could be concluded that the horizontal agreement “cannot and does not affect the ‘hard rights’ of the bilaterals concerned, such as the number of carriers that may be designated by the two governments concerned (single/dual/multiple designation) or the agreed capacity/frequency entitlements.”⁶⁶ The possibility to grant necessary authorizations and permissions and designate new or additional carriers “depends on the availability of unused traffic rights”.⁶⁷ It is worth mentioning that the free rider clause has been included in several of the horizontal agreements concluded by the commission.

b. TACA Group

Back in 1931, a carrier called Central American Air Transportation (TACA for its Spanish name Transportes Aereos Centro Americanos) was created in Honduras.

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1. *the air carrier is not established in the territory of the designating Member State or under the Treaty establishing the European Community or does not have a valid Operating License in accordance with European Community law; or*
 2. *effective regulatory control of the air carrier is not exercised or not maintained by the Member State responsible for issuing its Air Operator’s Certificate, or the relevant aeronautical authority is not clearly identified in the designation; or*
 3. *the air carrier is not owned and effectively controlled directly or through majority ownership by Member States and/or nationals of Member States, or by other States listed in Annex 3 and/or nationals of such other States; or*
 4. *the Republic of Chile demonstrates that, by exercising traffic rights under this Agreement on a route that includes a point in another Member State, the air carrier would be circumventing restrictions on traffic rights imposed by a bilateral agreement between the Republic of Chile and that other Member State; or*
 5. *the air carrier holds an Air Operator’s Certificate issued by a Member State and there is no bilateral air services agreement between the Republic of Chile and that Member State, and traffic rights to that Member State have been denied to the air carrier designated by the Republic of Chile.”* Peter Van Fenema, “EU Horizontal Agreements: Community Designation and the ‘Free Rider’ Clause” (2006) 31 Air & Space L. 172 at 181-812.

⁶⁶ *Ibid.* at 178.

⁶⁷ *Ibid.* at 177.

Between 1989 and 1995, the TACA Group resulted from the alliance entered into TACA, Aviateca in Guatemala, Lacsá in Costa Rica, and NICA from Honduras. The corporate name was changed to Air Transportation of the American Continent (In Spanish Transportes Aéreos del Continente Americano). Nowadays, TACA Group, headquartered in San Salvador, is the parent company of five Latin American airlines that are commercially linked to one another: Aviateca in Guatemala, Lacsá in Costa Rica (10%), Taca in El Salvador, Taca de Honduras in Honduras, and Taca Peru (49%) in Peru. Except for Honduras, the substantial ownership and effective control limitations requirements have been loosen in Central America and Peru.

The group offers 35 international destinations within 20 countries, served with 36 Airbus aircraft; aircraft that are worldwide recognized by their technological innovations, efficiency and comfort. They announce themselves as an airline flying the youngest and most sophisticated fleet of all the Americas.⁶⁸ All the airlines fly similar aircraft with similar colors and signs but they all keep their own name in the fuselage as operators. All airlines, except LACSA, operate with Taca's flight designator codes.

TACA group's route network prides its success to having three main hubs: One in Costa Rica, primarily connecting traffic headed north, south and to the Caribbean, another one in Salvador that operates to/from North America, and a third hub in

⁶⁸ See online: TACA <<http://www.taca.com/esp/oth/oabo/oabofle.asp>>

Lima that connects traffic to/from South America. All the routes in the group's network can be found under the same web page as if they were a single airline.

Inside their legal framework, the airlines from the Grupo TACA have not found many difficulties to perform their operations as described. They consider that they could use some better accessibility to certain markets, if countries like Colombia were to change their air transport policy to allow the market to open instead of being so protectionist with their national airlines. With the operational structure developed by TACA Group, they have managed to obtain important economies of scale as in respect to aircraft, spare parts, fuel and on board services purchases. Such purchases are negotiated as a whole, even if each airline remains responsible for having and being compliant with their AOC and with crew and personnel requirements.

Salvador is currently promoting its tourism industry hence it is not very likely to oppose to the community clause and has already implemented an open skies policy with the United States that, generally speaking, has been very positive for tourism and air industry. Notwithstanding, they have had to face some anticompetitive practices, like dumping. Moreover they are not big fans of the chapter 11 procedures, as they consider such procedures to allow operational inefficiencies as it permits the reorganization of the airline every time things go wrong.

As Ernesto Vasquez Rocha points out, TACA Group can be considered as an example of how to organize a system for the benefit of a group of airlines. They got together in order to find a way to achieve the same goals. With an adequate fleet planning and with a coordinated route network, they now have better access to available markets. Additionally, they have obtained important economies of scale by joint negotiations of fleet, fuel and insurances.⁶⁹

c. Copa Holdings S.A.

In 2005, Copa Airlines purchased 90% of Aerorepublica, the second largest airline for domestic traffic in Colombia. Currently, Copa Holdings S.A. headquartered in Panama, is the parent company of AeroRepublica (99.8%) and Copa Airlines. Copa and Aerorepublica are members of the OnePass frequent flyer program. Such membership has been very significant for Aerorepublica in order to obtain better international recognition. Inside the alliance, there have been important investments that have contributed to the achievement of a better service and the improvement of the overall passenger travel experience.

Copa Airlines has an alliance with Continental, member of the Star Alliance, thus being able to offer the Colombian market a huge route network via two hubs, first in Panama and then, if necessary, using any of the Continental hubs in Houston or Newark, both cities having nonstop service from Panama City. From its hub in

⁶⁹ *Vásquez Rocha*, supra note 48 at 30.

Panama City, Copa offers nonstop services to 41 destinations in 22 countries as follows: South America (Argentina, Venezuela, Ecuador, Brazil, Uruguay, Chile, Colombia and Peru), North America (USA and Mexico), and Central America and the Caribbean (Panama, Guatemala, Honduras, Nicaragua, El Salvador, Puerto Rico, Cuba, Costa Rica, Jamaica, Trinidad and Tobago, Haiti, and Dominican Republic).

Copa and Aerorepublica share similar distinctive signs but each carrier keeps their corporate name in their fleet fuselage. Aircraft are registered under each operator's AOC and their webpages are not integrated. Copair.com would not allow buying a ticket on a domestic route in Colombia and aerorepublica.com only offers the routes operated by Aerorepublic. Aerorepublica offers domestic destinations within Colombia and one international destination to Panama, all routes served with an only coach class fleet of 14 aircraft (3 MD82, 2 MD 83 and 9 Embraer190). Copa operates with a fleet of 39 aircraft (20 B737-700, 6 B737-800, and 13 Embraer 190). All the Embraer aircraft were brought new into the fleet, introducing the blended winglet technology that allowed them to obtain more efficient and environmental friendly aircraft. Copa and Aerorepublica announce themselves as operating one of the youngest fleet in the world.

C. Risks associated with the existing uses

1. Substantial ownership and effective control restrictions

As the aviation industry has evolved during the past 50 years, the approach and understanding of the substantial ownership and effective control requirement is changing to meet the industry's globalization and expansion needs. The industry itself is pushing so hard in that direction that alternatives such as alliances, mergers and acquisitions are happening every day. Ruwantissa I.R. Abeyratne argues:

The seminal response of most strategic airlines to the interference of governments was to 'share' each other's resources, including air traffic rights, thus gaining access to what was disallowed under bilateral governmental agreement. Recently airlines have become more aware than ever that they are becoming an increasingly capital intensive industry and have a compelling need to reduce costs in order to survive.⁷⁰

Many authors believe that the substantial ownership and effective control requirement, still included in many bilateral agreements, are hindering the growth of the air industry. Isabelle Lelieur states:

International air transport is already one of the world's largest industries; nevertheless, for the industry to flourish in the 21st century, it will require a more liberalized legal and economic framework tailored to the global marketplace. At present, the main impediment to establishing this framework is the traditional requirement that airlines must be substantially owned and effectively controlled by nationals of the State to which such airlines are linked through the flags of the State concerned.⁷¹

⁷⁰ Ruwantissa I.R. Abeyratne, *Aviation Trends in the New Millennium* (Burlington: Ashgate Publishing Company, 2001) at 4.

⁷¹ Isabelle Lelieur, *Law and Policy of Substantial Ownership and Effective Control of Airlines. Prospects for Change* (Aldershot: Ashgate Publishing Limited, 2003) at 1.

The main subject of the ICAO Fifth Worldwide Air Transport Conference (AT Conf/5) held in March 2003, was Challenges and Opportunities of Liberalization. The conference discussed several matters on liberalization and concluded by presenting a proposed wording for a Template Air Services Agreement for Bilateral, Regional or Plurilateral Liberalization (Hereinafter TASA). According to the summary presented by the ICAO Secretariat, “the application of the TASAs should enhance harmonization of the regulation of international air transport and global coordination of the ongoing process of liberalization”.⁷² The proposed wording was intended for the use by governments in their will to liberalize their air transport markets and relationships with other countries. The TASA contains suggested wordings prepared by ICAO on standard provisions such as capacity, tariffs, competition laws, and safety. It was agreed in the Conference that states should take into consideration a suggested clause for Designation and Authorization to be included at their discretion in their air transport agreements.⁷³ Despite the apparent interest perceived at the conference to facilitate liberalization and globalization, the suggested wording as an alternative approach still hasn’t been used.⁷⁴

⁷² ICAO, ATConf/5 Consolidated Conclusions, Model Clauses, Recommendations and Declaration, *Proceedings of the Fifth Worldwide Air Transport Conference (AT Conf/5)*, Montreal, 2003, online: ICAO <<http://www.icao.int/icao/en/atb/atconf5/index.html>> [ICAO, “ATConf/5”].

⁷³ *Ibid.* at 5.

⁷⁴ **Article X: Designation and Authorization:**

1. Each Party shall have the right to designate in writing to the other Party [an airline] [one or more airlines] [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

The Conference came up with interesting conclusions on liberalization, privatization and globalization. Among others, it was concluded that the dynamics of today's air transport industry call for a modernization of the regulatory framework. The conference acknowledged that there could be benefits from loosening the substantial ownership and effective control requirements. By analyzing previous events, it was concluded that "liberalization in ownership and control has demonstrated that it can take place without conflicting with the obligations of the parties under the Chicago Convention and without undermining the nature of international air transport".⁷⁵

The conference recognized certain flexibility on the current air transport regulations. Such flexibility could expedite the liberalization process as it will be easier for states to accept the designation of carriers that do not meet the traditional ownership and control clauses, thus creating a more suitable environment for cross border investments.

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 designated airline has its principal place of business [and permanent residence] in the territory of the designating Party;*
- b) the Party designating the airline has and maintains effective regulatory control of the airline;*
- 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.

⁷⁵ ICAO, "ATConf/5", supra note 72 at 3.

Notwithstanding the conclusions reached at the Conference and despite the various attempts to liberalize and globalize the international air transportation, the bilateral system is still the way to negotiate traffic rights, and many of those still include restrictions on ownership and control. Many countries refuse to liberalize such restrictions especially because they consider that it will be against their national interests to allow foreigners to own their national airlines, as the latter are considered to contribute to the correct performance of the State's activities. National airlines are perceived as a key element for national security and employment, and as an important support to development of economy and commerce.⁷⁶ Another reason is that they want to make sure that traffic rights to those countries are used by the country to which they were granted, and not by a third country. Such refusal makes it harder for countries that have loosened the restrictions, to offer many alternatives for their national airlines in hands of foreigners. In accordance with most Latin American legal hierarchy of statutes, international treaties prevail over any domestic legal framework, once the treaty has been ratified by the State, if such treaty does not oppose to the country's constitutional principles. Hence, even if the country has liberalized its ownership

⁷⁶ Unidad Administrativa Especial de Aeronáutica Civil, *Propiedad y control sobre operadores* No. SPA/1-CU/04 dated 20 August, 2003, *Proceedings of the Primer Simposio de Política Aerocomercial, Rionegro, 2003*, online: Aeronáutica Civil <http://portal.aerocivil.gov.co/portal/page/portal/Aerocivil_Portal_Internet/normatividad/politica_aerocomercial/Documentos>.[Translated by author].

and control restrictions, but the bilateral still contains such restrictions, the bilateral prevails.⁷⁷

As described herein, the current scenario has been very positive for regional air carriers. Even if liberalization of ownership and control restrictions might not be a must in the regionalization process, it has happened already in some countries, making it easier for regional airlines to consolidate the groups studied in this thesis, and helping the survival of the airlines pertaining to each group. Recently another issue has entered into the picture: the continuous rise in the price of fuel. The financial sustainability of small domestic airlines has already started to be questioned. Governments that have not liberalized the restrictions might eventually need to consider such liberalization if they want to have their own national airline.

The Colombian airline structure, as described above, found the way to develop their business plans and meet their foreign investment needs while remaining compliant with all the regulations under the bilateral agreements. In the case of Aerorepublica, there are no current risks as it only operates domestic routes and one international to the group's hub in Panama⁷⁸. Thus, Aerorepublica operates the cabotage rights that could not be operated by Copa for not being a Colombian

⁷⁷ *Folchi*, supra note 22 at 317.

⁷⁸ The Memorandum of Understanding dated July 26, 1997 between Panama and Colombia provides no clause requiring the substantial ownership and effective control to be in the hands of nationals, and whereby each Part designated its companies for the permitted services.

airline, and feeds with Colombian traffic its related company's hub from where they, as group, offer non stop services to the 41 destinations in 22 countries. The future issues that could rise from such structure would be in case that Aerorepublica would like to expand their route network to offer international nonstop service from Colombia to countries whose bilaterals contain ownership and control restrictions.

In Avianca's case, there are no current risks as well. Nowadays, the substantial ownership and effective control of the airline is in hands of a Colombian national. The future issues that could arise from such status are related to the nationality of the owner's inheritors that, as of today, remain solely Brazilian. Avianca's directives have decided to face the future issues as they come. The worst-case scenario would be to give timely notification to all countries whose bilaterals contain restrictions on ownership and control, and request for a waiver. According to Avianca's itinerary as of July 2008, the countries that would require a waiver would be Brazil, Curacao, Spain, United States, and Mexico.

Although countries are allowed to refuse a designation whenever the foreign air carrier does not comply with ownership and control restrictions, they are not obliged to do so. Usually there are political and economic interests involved. Thus, they are granted on a discretionary basis; there are several issues that can be considered in order to grant a waiver to refuse a designation. Originally in 1934 the restrictions were imposed in order to prevent enemy states to use traffic rights

granted by one country to another one.⁷⁹ Although the foundation for those restrictions has changed nowadays, the discretionary approval of such waivers is still a risk as there is no way to foresee if the affected country will, or will not, exercise its right to refuse the designated carrier. Under the current scenario the discretionary waiver application is a risk that can be measured and anticipated and thus, it has an acceptable level that can be tolerated. Moreover, as Marina Donato comments, the clauses containing restrictions on ownership and control have been liberalized as “a trend in favor of inter-airline equity transfers and mergers has emerged. (...) Even where [*the restrictions*] remain in original form, they have been used less frequently and more flexibly.”⁸⁰

Notwithstanding that there are no existing risks for the actual national carriers, the current Colombian legal framework has two main disadvantages. The first one is that not all States in which Colombia has market interests recognize as acceptable the freedom of foreign investment and consequently not all Colombian air carriers could be designated. The second disadvantage is that the door is open for foreign carriers incorporated in Colombia to use the traffic rights that have been granted to Colombia.

In conclusion, the only risks and future issues are related primarily to ownership and control limitations in some bilaterals, and to the will to open new point-to-

⁷⁹ Angela Cheng-Fui Lu, *International Airline Alliances. EC Competition Law – US Antitrust Law and International Air Transport* (The Hague: Kluwer Law International, 2003) at 17.

⁸⁰ Donato, “L.A. aviation policy”, *supra* note 17 at 227.

point services to serve additional markets and city-pairs by national carriers with majority of foreign capital. But so far, none of those issues have even been formally acknowledged, and airlines are prepared to face those issues as they arise.

2. New point to point services

As soon as airlines foresee a business opportunity in a new market, they try to go after it. There are several limitations and procedures to be accomplished during the process but those limitations could be even bigger in the case of the international airline holding groups or controlling companies in Latin America. Of late, they mainly operate in a hub-and-spoke system in which small regional carriers perform as feeders. But as cross ownership increases within the region, not only might there come a time when a partner refuses to allow traffic, but the possibility of opening of new point-to-point services will also get more complicated. This is a problem that involves matters related to ownership and control restrictions or the negotiation of seventh freedom rights. The tendency is that seventh freedoms are not easy to negotiate.

Currently, the principal international markets served by Colombian carriers are the United States, South America and Europe. Geographically speaking, Colombia has a privileged location that makes it a perfect hub to integrate those three markets. But there are some new markets that if taken into consideration, will probably be better served from another strategic geographical point. From the

holding groups' point of view, it will make sense to be able to take advantage, as a group, of the competitive benefits that each one of the members has such as various geographical locations with huge markets, and a wide range of different sized fleet. With the current restrictions, the business plan is limited to the existing hub-and-spoke networks.

CHAPTER 3 - THE SITUATION WITH THE MAIN PARTNERS – THE POSITION TOWARDS THE MAIN PROPOSALS

A. Open Skies policy and the United States

1. Open Skies policy

Some authors like Bob Booth were of the opinion that eventually open skies were going to be inevitable for Latin America, but that it would be recommended to agree first on open skies agreements within the region and to widen the existing regional agreements, to strengthen the position of the region as a block.⁸¹ The first open skies agreement entered into by Colombia was with the members of the Andean Community of Nations. As of 2002, Colombia started to work with other Caribbean nations trying to implement an open skies strategy to promote tourism in the Caribbean Sea. Accordingly, San Andres Island, Santa Marta and Cartagena were included as part of the strategy.⁸²

Colombia is a beautiful country with many touristic places to visit. Not only is the

⁸¹ *Booth, supra* note 35 at 20 [Translated by author].

⁸² “Colombia diseña estrategia de cielos abiertos en el mar Caribe” (04 October, 2002), online: Presidencia de la República de Colombia
<http://www.presidencia.gov.co/prensa_new/sne/2002/octubre/04/07102002.htm> [Translated by author].

exchange rate always favorable for foreign visitors coming from countries with stronger economies, but tourism is cheaper in Colombia. Food, hotels, ground transportation, shows, entertainment, night life, museums, etc, are considerably less expensive than the United States, Canada or Europe, for example. Additionally, being located in the tropics, it is a country with no seasons where all temperatures can be found year round due to the different altitudes given by the three sets of mountains that go along the country from south to north. Consequently, it has a wide range of possibilities for all touristic preferences and tastes. Considering the great tourism potential, Colombia has selected a few highly touristic cities and gave them the status of open skies.

During 2003, the Colombian government implemented a few actions to relieve some of the air transport operational costs and the effects of the devaluation of the Colombian currency. Some years later, in 2005, the Colombian air transport environment was completely different. The actions taken by the government had a positive response, the Colombian peso was revaluated, the load factors increased, and there was a bigger concentration in the market due to the cessation of operations of a few carriers. Considering the foregoing and that air carriers reported better financial results from year 2004, the UAEAC revised the aero political policies to access Colombian markets. Such revision came to the conclusion that it was time to modify the air transport policy in order to promote competition and allow access to new carriers. As of international air transport services, it was decided to continue with a progressive liberalization for new services and to keep the implementation of open skies policies for certain touristic

cities. Thus, for those cities, eliminating any limitations or entry barriers on number of operators, frequencies and traffic rights.⁸³

As of 2008, Colombia, though still under a regulated air transportation regime, has liberalized the capacity and fares⁸⁴ in Cartagena, Barranquilla, Santa Marta, San Andres, and Armenia. Fernando Sanclemente Alzate, director of the Colombian Aeronautic Authority, explained that the decision to liberalize the minimum fares is in accordance to the government's objective to promote tourism, making it easier and increasing the access to air transportation services by national and international users.⁸⁵

2. The United States:

The United States actually represents great competitive and market opportunities for Latin American countries. Colombian approach and negotiations with the United States can be identified in two stages. For many years and until 1996 the

⁸³ Unidad Administrativa Especial Aeronáutica Civil, Revisión de política aerocomercial, online: Aeronáutica Civil

<http://portal.aerocivil.gov.co/portal/page/portal/Aerocivil_Portal_Internet/normatividad/politica_aerocomercial> [Translated by author] at 6.

⁸⁴ The fare liberalization is only in respect to the minimum. Air carriers are free to set fares as long as they don't exceed the maximum fares authorized by the Colombian government for each particular route.

⁸⁵ "Liberan tarifas mínimas de transporte aéreo hacia destinos nacionales" (07 August, 2007) online: Presidencia de la República de Colombia <<http://web.presidencia.gov.co/sne/2007/julio/16/11162007.htm>> [Translated by author].

two governments had tacitly agreed to keep balanced the number of carriers and frequencies. The picture started changing in 1992 when Colombia tried to designate an additional carrier that resulted in an overall increase of requests for additional frequencies and commercial conditions that were not sustainable for Colombian carriers. Starting from 1996, there were several consultation meetings to regulate frequencies, beginning a gradual liberalization process that is currently governing the air transport relationship the two countries. It was agreed that liberalization would depend on the size of the markets and efficiencies generated by the carriers, while allowing the addition of new city pairs and the alliances between Colombian and US carriers.⁸⁶

Colombia considers that the conditions for competition are not equivalent between American and Colombian carriers, and that explains the protectionist and restrictive approach with the U.S. Thus even if many Latin American countries have entered into Open Skies agreements with the U.S., Colombia has refused to accept a full implementation of such policy. Instead, and as explained in relation to some touristic cities, the implementation has been made gradually in accordance with the needs presented by the market.

⁸⁶ *UAEAC*, “NE/2.3.1”, *supra* note 16 at 5-6.

B. Colombian's position Towards the Community Clause

The traditional bilateral agreements signed by individual European countries contained the substantial ownership and effective control clause. Such restrictions prevented cross-border investments and mergers between airlines of different nationalities, as those transactions could endanger the traffic rights under the bilateral.

In November 2002 the European Court of Justice determined that the nationality clauses in the open skies agreements between European countries and the U.S. were illegal as they discriminated between European airlines of different nationality. As a consequence, the Commission obtained a mandate from the member states to amend the existing bilaterals between third countries and the EU member states, in order to replace, through so called horizontal agreements, the forbidden nationality provisions in such bilaterals by a non-discriminatory European ("community carrier") clause. Thus, instead of only the national carrier, any EU member carrier could be designated by a member state under its bilaterals with third countries, subject to the Bilateral's (dual, single) designation and capacity provisions, of course.⁸⁷

⁸⁷ I.H.Ph. Diederiks & Verschoor, *An Introduction to Air Law* (The Netherlands: Kluwer Law International, 2006) at 76.

Up till now, Colombia has not accepted the EU proposal to amend the existing bilateral agreements through a horizontal agreement in order to incorporate the Community Clause. Colombia argues that there is still no formula for reciprocity and equality of opportunities, due to the fact that while the E.U. has a legal framework that allows designation of air carriers from all Member States, such legal status is not the same for Member States of the Andean Community of Nations.

Thus, any European carrier could be designated by any European country under its bilateral with Colombia, while Colombia can only designate Colombian carriers. Colombia's position is not equal because it is not part of a community of nations such as the European Community. Moreover, Colombia argues that it has independent bilateral negotiations with each of the individual European countries, and the EC has not been granted a legal personality to act as a whole.

Currently, Colombia only has ongoing negotiations to amend the bilaterals with Spain, Belgium and the United Kingdom. Colombia did not accept the proposed community clause wording. Instead Colombia is willing to include a right of establishment clause as follows:

It is understood that for an air carrier to be designated, it must be legally incorporated in the designating state, where it should have its principal domicile, and its effective and real headquarters.

In order to verify that an air carrier has its real and effective headquarters in the designating state, the designating state should confirm:

- 1. That the administrative headquarters and principal base of operation are in its territory;*
- 2. The licenses of the aircraft crewmembers are given by the Designating State, and*
- 3. The air carrier holds operational control and technical direction over the aircraft, not being just a charterer. [Translated by the author]*

With the proposed wording, Colombia is seeking to be able to designate national air carriers that are substantially owned and effectively controlled by foreigners, such as Aerorepublica. The proposed wording was not accepted by any of the European delegations under the argument that it does not comply with the requirement of freedom of establishment within the E.U.

Colombia is in no rush to sign the horizontal agreement. The bilateral currently in force allows required air traffic to flow adequately. Considering that there are very high costs involved in opening a new city pair or adding frequencies to destinations between Colombia and Europe, Colombia has been of the opinion that there is no need to liberalize the negotiation policy with Europe and predetermined capacity is the rule. The foregoing does not imply that there are not periodical revisions to meet the market needs as they evolve.⁸⁸

⁸⁸ UAEAC, “NE/2.3.1”, supra note 16 at 6.

2. European Community as a business model

Apparently, the situation with the E.U. can be somewhat different, as both regions seem to be headed in the same direction in terms of regional integration. There have been some agreements that show the will of Latin American countries to act as a region and to join their efforts towards the same trade and air transport related goals. But still, it will not be likely for the region to agree on anything similar to the European Union. Latin American governments will probably not reach an agreement to “comprise an area without internal frontiers in which free movement of goods, persons, services and capital is ensured”⁸⁹, allow for the creation of multinational airlines, and much less, the elimination on the restrictions on substantial ownership and effective control. The liberalizing trend in Latin America has been slowed by the new left socialist regimes such as Venezuela, Ecuador, Bolivia, and Argentina. These countries are trying to control key industries like air transportation and they are not willing to allow them to be owned and controlled by foreign hands. Not even Brazil is expected to loosen its ownership and control restrictions.

It is also important to take into consideration that the geographical size, and the socio economic and political scenario in Latin America are very different from the European scenario. As Marina Donato opportunely comments, Latin America is

⁸⁹ Council Regulation (EEC) No. 2408/92 of July 23 1992 on access for Community air carriers to intra-Community air routes, Official Journal L 240, 24/08/1992 P. 0008 – 0014.

“an area that is twice the size of Europe, [and] is characterized by a multiplicity of settings and players.”⁹⁰ In order to even consider a business model like the European one, Latin America still has a long path to follow. Developments in several fields must be achieved, especially as opposing political positions within the region relegate many integration initiatives to a second place. Ruwantissa I.R. Abeyratne’s opinion is that “from an essential point of view, the region, which has an enormous geographic expanse, will tend to remain regionalized for a while, notwithstanding the macro political changes envisioned. What this means for development of air transport is that competition will remain the main consideration.”⁹¹

Latin American countries have set some of their differences aside to try to reach a common understanding that allows them to obtain macroeconomic stability and international competitiveness,⁹² and in fact there have been several trade agreements as described before. But despite that regionalization tendency, with no doubt, the situation for a developing region cannot be compared to that of a developed community. Latin American countries have different political and economical interests and a different vision towards the rest of the world, especially towards the big player in the region: the United States. For instance, Chile focuses its policies on the integration with the Pacific, while Colombia

⁹⁰ Donato, “Air Transport in L.A.”, *supra* note 31 at 5.

⁹¹ Ruwantissa I.R. Abeyratne, “Strategies for air transport in Latin America” (2000) 22:4 *The Aviation Quarterly* 269 at 271.

⁹² Donato, “Air Transport in L.A.”, *supra* note 31 at 5.

focuses on the traditional allies, like the United States. I personally don't expect Latin America to adopt the European Community as a business model anytime soon. Latin American countries still have a need to protect national industries and it would seem better for each one to find solutions for their own socio economical problems. As Vijay Poonoosamy comments, "the inevitable preoccupations in developing countries are the bare necessities of life and national survival, in particular food, health and education." ⁹³

As to the questions that arise related to the importance of having an integration of the regional market and the need to liberalize the ownership and control restrictions, it can be said that as of today, the market has been integrating as far as the legal framework permits it and the governments have considered it to be necessary. Competition has been adequate to provide better services and reasonable pricing.

C. Issues with other interesting markets

After reviewing the Latin America & Caribbean Capacity Analysis published by ALTA, it is worthy to note that there is an important international market flying out of Sao Paulo and Rio de Janeiro that will eventually be interesting for the Synergy Group to pursue. None of the top international city pairs currently flying

⁹³ Vijay Poonoosamy, "Developing countries in the wake of aeropolitical changes" (1994) 19:2 Ann. Air & Sp. L. 589 at 590-591.

to/from Sao Paulo and Rio de Janeiro are served by any of the airlines pertaining to the Synergy Group. But it seems that shortly they will be totally capable of starting service among those city pairs. With their fleet renewal plans they will be able to operate the appropriate fleet for those routes. They could create a second hub in Sao Paulo and/or Rio de Janeiro and continue the expansion of their route network. Currently, and from a legal standpoint, there are not any risks that can be foreseen as the actual carrier would be Ocean Air that complies with all the ownership and control restrictions posed by the Brazilian regulatory framework and by any Brazilian bilaterals holding such restrictions.

The following chart will provide details on the capacity for those top international city pairs flying to/from Sao and Rio as compared to the same destinations but flying to/from Bogotá. Avianca already serves all of the destinations shown to/from Bogotá. The comparison will not only show that the Brazilian capacity is considerably larger than the Colombian capacity, but that there are some routes that are better served from Brazil and some others that are better served from Colombia. With only few exceptions, the average annual growing rate shows a tendency for the market to grow. The foregoing would create very interesting business opportunities for the Synergy Group to consider the opening of the above-mentioned second and/or third hub and increase their participation in such important markets.

City Pair	One Way Seats Offered	Seats Added	Variation 07-08	AAGR 00-08
BUE - SAO	72.779	13.820	23%	8%
BUE – BOG	4.935	665	16%	-2%
BUE - RIO	25.110	6.177	33%	-2%
SCL – SAO	38.640	-738	-2%	10%
SCL – BOG	6.617	545	9%	14%
NYC- SAO	36.828	-384	-1%	8%
NYC - BOG	9.775	-245	-2%	-3%
PAR - SAO	32.250	6.695	23%	6%
PAR - RIO	24.036	3.451	17%	23%
PAR - BOG	8.160	0	0%	12%
MAD - SAO	31.785	15.128	91%	16%
MAD - RIO	13.378	5.338	66%	22%
MAD - BOG	19.125	1.946	11%	10%
MIA - SAO	31.442	161	1%	0%
MIA - BOG	28.992	-300	-1%	1%
MEX - SAO	19.249	11.679	154%	38%
MEX - BOG	12.630	2.290	22%	11%
LIM – SAO	15.000	2.686	22%	N/A
LIM - BOG	23.800	5.542	30%	12%

Non Stop destinations only served from Brazil

FRANKFURT - SAO	19.050	8.010	73%	13%
LONDON – SAO	15.480	0	0%	N/A
MILAN -SAO	12.192	-5.238	-30%	15%
AMSTERDAM - SAO	10.494	1.914	22%	9%
DUBAI – SAO	7.826	7.826	N/A	N/A
ROME - SAO	7.566	7.566	N/A	18%

Non Stop destinations only served from Colombia

CARACAS – BOG	27.169	4.594	20%	9%
PANAMA – BOG	25.260	4.160	20%	27%
QUITO – BOG	21.186	-1.773	-8%	5%
SAN JOSE - BOG	7.080	1.612	29%	6%
GUAYAQUIL - BOG	5.100	-152	-3%	1%
LOS ANGELES - BOG	2.975	245	9%	N/A

In fact 13 from the 20 fastest growing international city pairs in Latin America are destinations to/from Brazil as follows: ⁹⁴

Rank	City Pair	Seats added	Seats Change	Total Seats Offered	AAGR 00-08
1	Madrid-Sao Paulo	15.128	91%	31.785	16%
2	Buenos Aires-Sao Paulo	13.820	23%	72.779	8%
3	Mexico City-Sao Paulo	11.679	154%	19.249	38%
6	Buenos Aires-Porto Alegre	8.100	94%	16.740	6%
7	Frankfurt-Sao Paulo	8.010	73%	19.050	13%
8	Dubai-Sao Paulo	7.826	n/a	7.826	n/a
10	Rome-Sao Paulo	7.566	n/a	7.566	18%
12	Brasilia-Lisbon	6.942	n/a	6.942	n/a
13	Paris-Sao Paulo	6.695	23%	35.250	6%
15	Buenos Aires-Rio de Janeiro	6.177	33%	25.110	-2%
16	Bogota-Sao Paulo	5.990	105%	11.690	10%
17	Belo Horizonte-Lisbon	5.607	n/a	5.607	46%
20	Lisbon-Rio de Janeiro	5.338	66%	13.378	22%

With respect to Colombia, it is important to note that Avianca already serves almost all the fastest growing and top domestic and international city pairs to/from Colombia. From the 20 top city pairs in Latin America, only one is served by Avianca (BOG-MIA), and 6 of them are operated to/from Brazil (non operated by Synergy Group).

Although it would be logical to think that those new international markets from Brazil will be one of the next steps for the Synergy Group due to its proven

⁹⁴ The complete list of the top 20 fastest growing international city pairs in Latam can be found in page 42 of the Latin America & Caribbean Capacity Analysis 2008.

growth and the will to extend their fleet and operations, the truth is that in the near future, any additions on international routes are only projected for Avianca. Hence, it is very likely that the Synergy Group will not pursue servicing new international markets from Brazil. Not only because opening and certification costs are significantly high, but also and so far, it is very hard to gain market share in the Brazilian markets due to the size, strength and positioning of those airlines serving destinations to/from Brazil. Consequently, even if the group decided to burden all related initial costs, another uncertain issue will be whether they will obtain the designation to operate those city pairs or not. Ocean Air is not as big as other airlines servicing the aforementioned city pairs and therefore it might not be willing to take the risks. The group does have a larger airline that could eventually operate them, but it would be necessary to negotiate fifth freedom rights with Brazil and third countries or to merge both airlines constituting the first multinational air carrier in Latin America. In the foreseeable future, that is not expected to happen.

CHAPTER 4 - CONCLUSIONS

In an article written by Ernesto Vasquez Rocha in 1994, he stated that the future of Latin American carriers was very much uncertain. It was not clear which was the path to follow. Foreign carriers were dominant inside the regional markets. It was the time to decide whether to remain passive towards the new environment given by the liberalization of the economies, or to take some actions so as to strengthen the regional air transport industry.⁹⁵ Mario O Folchi also commented on the Latin American aviation industry of the early 90s. In his opinion, “it is clear that Latin American countries have not been successful in coping with the liberalization and regionalization trend occurring in modern international civil aviation.”⁹⁶ And last, Marina Donato also stated back in 1995: “it is [...] imperative that creative solutions are found in order to develop Latin America’s air transport industry in harmony with that of the rest of the world, and on the basis of orderly, safe and efficient flight.”⁹⁷

As discussed, it can definitely be concluded that Latin American carriers did not remain passive. Instead they came up with an innovative idea that made them strongly competitive inside the worldwide air transport industry. The development of national economies was also a key factor to air traffic growth and to increase the regional market share within the industry. The will shown by air carriers to

⁹⁵ *Vásquez Rocha*, supra note 48 at 33.

⁹⁶ *Folchi*, supra note 22 at 314.

⁹⁷ *Donato*, “L.A. aviation policy”, supra note 17 at 223.

overcome a critical situation and the fact that “Latin America has the malleability necessary to adapt to profound changes without renouncing it’s identity”⁹⁸, were also crucial for Latin American air transport transformation.

Having identified the *status quo* of the Colombian air legal framework and the practical application that it had been given by air carriers, it can be concluded that although it is not the ideal scenario, because of the remaining restrictions on the bilaterals, it is pointing towards the correct direction and has worked so far. Although air transportation industry moves so fast that regulatory frameworks would most likely always be behind the new challenges, the Colombian framework seems to be appropriate. The foregoing specially due to the fact that Colombia has a regulatory framework that is not only protective of the industry but also promotes and supports its growth and strengthening. Air carriers have a very active role in the negotiation of traffic rights with other countries and the government manages to provide a fair environment in accordance with market needs and airline capabilities. As stated by the UAEAC,

Colombian aeronautic policy has been oriented to promote the Colombian carrier’s share in international markets, creating new services, increasing the levels of competition, but always keeping in mind the passenger services, international commerce and other economic sectors. Air traffic negotiations have been developed under more flexible schemes encouraging more open markets, especially between countries with similar levels of development, guaranteeing national airlines at least equivalent conditions to compete. All these processes are in accordance

⁹⁸ *Ibid.* at 228.

with the principle of equal opportunities contained in the Chicago Convention. Notwithstanding, in markets where Colombian carriers are in disadvantage to compete, less flexible policy has been adopted, maintaining capacity control (basically as in respect to number of frequencies) as the principal regulation key.⁹⁹

Air transport will always remain a complex activity. There are some complexities that will never be eliminated and others in which a difference can be made.¹⁰⁰

Sometimes it will be necessary to look back to other's experiences, but other times it is worthwhile to try new alternatives. Fortunately, in Latin America we find hard working people that are willing to find a way to make things happen. It is very important to keep in mind that, as Bob Booth opportunely comments, Latam "(...) airline's owner-business men, executives and employees are dedicated and intelligent people willing to work hard for their airlines. And that's the best combination possible (...) Demand brings opportunities, and if it continues growing exceeding all expectations, it is worth to keep giving the fight."¹⁰¹ As a former in-house attorney for a Colombian airline, I can testify to the hard work that all employees are committed to perform and the great amount of innovative formulas that have to be shaped from a legal, economic, commercial and political standpoint. The results can be perceived and I think that airlines, working together with their governments, have managed to maximize their good

⁹⁹ Speech given by the Director of the Colombian Aeronautic Authority "Política Aérea Comercial y Globalización", VII Congreso Nacional de Agencias de Viajes, Cartagena, 19-21 de Mayo de 2002 [Translated by author].

¹⁰⁰ Nawal K. Taneja, *Airline Survival Kit: Breaking Out of the Zero Profit Game*. (Aldershot: Ashgate Publishing Limited, 2003) at 28.

¹⁰¹ Booth, *supra* note 35 at 22 [Translated by author].

features and find ways to overcome the problems that they have to face. Working for the airline industry is an every day adventure. Something is always going on. Most surely the next challenge to face will be the rising price of fuel as it will start reducing air transportation services as soon as they stop being profitable.

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