# Comparative regulation of air transport in the Asia-Pacific region

by

Sean McGonigle

Institute of Air and Space Law
Faculty of Law
McGill University, Montreal
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Abstract

This thesis provides a comprehensive review of recent developments in the economic regulation of air transport in the Asia-Pacific region. The focus is on the progressive liberalisation of the designation criteria in selected agreements. A brief historical overview is followed by a summary of the decision of the European Court of Justice in the "open skies" cases. The thesis then examines three recent Asia-Pacific agreements: the Australia - New Zealand arrangements; the APEC Multilateral agreement; and the Pacific Islands agreement. This review is followed by a discussion of some potential developments in the region that could lead to the conclusion of a new multilateral agreement between the European Union and selected Asia-Pacific States.

Cette thèse fournit un examen complet des développements récents dans le règlement économique des transports aériens dans la région Asie-Pacifique. Le foyer est sur la libéralisation progressive des critères de désignation dans des accords choisis. Une brève vue d'ensemble historique est suivie d'un sommaire de la décision de la Cour de Justice Européenne dans les caisses "de cieux ouverts". La thèse examine alors trois accords Asie-Pacifiques récents: les arrangements de l'Australie - New Zealand; l'accord Multilatéral d'APEC; et l'accord Pacifique d'Iles. Cette revue est suivie d'une discussion de quelques développements potentiels dans la région qui pourrait mener à la conclusion d'un nouvel accord multilatéral entre l'Union Européenne et les états Asie-Pacifiques choisis.

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I dedicate this thesis to my mother on the occasion of her 70th birthday.

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# I. INTRODUCTION

Much attention in recent years has been focused on developments in air transport liberalisation in Europe and the US. This is natural, since the aviation market in and between these two regions constitutes a significant proportion of the global total.[1] Indeed, there have been important developments in the regulatory arena in those places, such as the creation of a single European market and the US deregulation and open skies initiatives.

The recent decision of the European Court of Justice (ECJ), which dealt with the complaint by the European Commission (Commission) concerning agreements between Member States of the European Union (EU) and the US, has also focused attention on what happens next in the transatlantic market. Of key importance is the issue of ownership and control, since this is the issue on which the Commission has most notably secured its mandate to negotiate on behalf of Member States.

The Europe - US axis is not alone, however, in generating important developments in air transport regulation. In the Asia-Pacific region there have been a number of significant steps taken by governments towards loosening the restrictions that apply to air transport, especially in the area of ownership and control. In the South West Pacific in particular, Australia and New Zealand have established a single aviation market, allowing trans-Tasman ownership of airlines. Additionally, both countries have permitted the establishment of entirely foreign-owned domestic airlines. The wider Asia-Pacific region has also recently seen the signing of two multilateral agreements on the regulation of air transport.

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[1] Intra-Europe scheduled traffic accounts for 21% of IATA total scheduled passengers carried in 2001; intra-US traffic for 35%; and Europe - US traffic for 4%. See IATA, *World Air Transport Statistics* (2001), online at <www.iata.org/air> (date accessed: 29 June 2003).

Examination of these developments forms the basis for this thesis, with an emphasis on the ownership and control clauses in various Asia-Pacific agreements. The thesis will first briefly review the background of air transport regulation, as found in the Convention on International Civil Aviation (Chicago Convention)[2] and the bilateral agreements that followed. The US open-skies initiative and the creation of the European Single Market will be outlined. The recent ECJ decision in the "open skies" cases taken by the Commission against Member States will also be mentioned.[3]

Next, three Asia-Pacific region treaties will be considered: the Australia-New Zealand arrangements leading to a single market;[4] the Multilateral Agreement on the Liberalization of International Air Transportation, signed by a group of Asia-Pacific Economic Cooperation (APEC) member economies (APEC Multilateral);[5] and the Pacific Islands Air Services Agreement (PIASA).[6] Finally, the thesis will consider possible future developments in the region.

The conclusion of this thesis is that Australia, New Zealand and Singapore in particular have demonstrated their readiness to move towards increased liberalisation in the regulation of air transport. At the present time, the Commission is looking for partners that will permit more flexible ownership of

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2 *Convention on International Civil Aviation, 7 December 1944,* 15 U.N.T.S. 295, ICAO Doc. 7300/6 *[Chicago Convention].*

3 *Commission v. United Kingdom,* C-466/98; *Denmark,* C-467/98; *Sweden,* C-468/98; *Finland,* C-469/98; *Belgium,* C-471/98; *Luxembourg,* C-472/98; *Austria,* C-475/98; *Germany,* C-476/98.

4 *Agreement Between the Government of New Zealand and the Government of Australia Relating to Air Services,* 8 August 2002. This Agreement incorporates the former Memorandum of Understanding (1 August 1992) and the *Australia-New Zealand Single Aviation Market Arrangements* (19 September 1996) (SAM) that together created the framework for the Australia - New Zealand Single Aviation Market. Online: <www.mft.govt.nz/foreign/regions/australia/tradeeconomic/austairservice.html> (date accessed: 29 June 2003).

5 *Multilateral Agreement on the Liberalization of International Air Transportation,* 1 May 2001 [APEC Multilateral], online: <www.maliat.govt.nz/Webhosting/MOT/airline.nsf/> (date accessed: 30 June 2003). New Zealand is the Depository for the Agreement (Art. 19).

6 *Pacific Islands Air Services Agreement,* 30 October 2002 [PIASA].

airlines. This thesis will suggest that Australia, New Zealand and Singapore (rather perhaps than the US) offer the best prospect for achieving a new multilateral air services agreement that includes a community ownership provision. Such an agreement, it is hoped, will remove the requirement for national ownership and control that has been the standard since the Chicago Convention.

## II. BACKGROUND TO INTERNATIONAL AIR TRANSPORT REGULATION

### A. Development of Bilateral Air Services Agreements

Bilateral air services agreements (ASAs) are the means by which, in general, the regulation of international air transportation is effected. The necessity for these agreements arises from certain provisions of the Chicago Convention.[7] The Convention was the result of the 1944 Chicago Conference, which was a multilateral effort to shape the post-war future of civil aviation. The Conference was only partially successful because, while safety principles and an international mechanism were established, economic regulation of air transport on a global basis was not effectively organised.

Article 1 of the Convention recognizes that each State has sovereignty over its airspace. Arising from that, Article 6 provides that scheduled international air services to or over another State must therefore have the permission of that State. Thus, any air services authorised by a State may only proceed on the basis of the terms of that authorisation. These provisions are in the Chicago Convention because of the fundamental underlying principle that all States should be able to participate in air transportation on an equal basis.[8] It was therefore necessary to allow each State to be able to control the grant of those rights, the assumption being that they would be given in exchange for rights from other States.

The authorisation required by Article 6 could have been granted by all States, once and for all, through another agreement, the International Air

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[7] *Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295, ICAO Doc. 7300/6 *[Chicago Convention]*.

[8] I. Diedriks-Verschoor, *An Introduction to Air Law* (The Hague: Kluwer, 1997) at 11.

Transport Agreement.[9] This is a multilateral agreement in which the States grant each other five categories of traffic rights. These five categories of rights are also known as the "freedoms of the air". They are the right to overfly the territory of other States (first freedom); to make technical stops in other States (second freedom); the rights to carry commercial traffic to (third freedom) and from (fourth freedom) one State to another; and the right for an airline of one State to carry traffic between two other States (fifth freedom). For various political and economic reasons, very few countries adopted the Air Transport Agreement, and it remains essentially a dead letter.

The other multilateral agreement drawn up at the time of the Chicago Conference was the International Air Services Transit Agreement.[10] This Agreement granted on a multilateral basis the first two freedoms, namely the right for airlines of Contracting States to overfly the territory of other Contracting States; and the right for airlines of Contracting States to make stops for technical purposes in other Contracting States. This Agreement met with much more acceptance, most States becoming signatories. The notable exceptions to this were those States with large territories, which saw some value in trading rights to access their airspace.[11]

A central feature of both the Air Transport Agreement and the Air Services Transit Agreement, and one that was carried over into the bilateral system, was the "designation" of airlines. Only an airline that was correctly designated by one of the Contracting States was permitted to utilise the rights granted in those

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[9] *International Air Transport Agreement*, 7 December 1944, 171 U.N.T.S. 387, US Department of State Publication 2282 *[Air Transport Agreement]*.

[10] *International Air Services Transit Agreement*, 7 December 1944, 84 U.N.T.S. 389, ICAO Doc. 7500 [*Air Services Transit Agreement*].

[11] P. Haanapel, "Multilateralism and Economic Bloc Forming in International Air Transport" (1994) 19-1 Ann. Air & Sp. L. 279 at 287. For a discussion on how valuable these rights may be, see M. Milde, "Some Question Marks about the Price of 'Russian Air'" (2000) 49 Z.L.W. 147.

Agreements. In the post-war environment, this designation was designed to ensure that only "friendly" States and their airlines would be permitted access to what were valuable commercial rights. There was a concern that rights granted by a State could be exploited by non-friendly nationals, who could take control of an airline in a friendly State.[12] The rights were valuable since, in the post-war era, aircraft had limited range. In order to operate most routes, one or more stops for refuelling of aircraft (and passengers) was required.

The model for designation that was used in both the Air Transport and the Air Services Transit Agreements therefore gave other States a discretionary power to withhold permission, if the airline that was being designated was not "substantially owned and effectively controlled" by the nationals of the contracting State.[13] After the Chicago Conference it was clear that many States would proceed to regulate the remaining commercial rights on a bilateral basis and so a draft bilateral ASA was prepared, which also included the requirement for substantial ownership and effective control.[14] Since that time the substantial ownership and effective control requirement has been the cornerstone of the bilateral system.

The designation provision in an ASA serves as the "key" to unlock the door to the ASA. With it, a designated airline then has access to the rights contained elsewhere in the Agreement. The most significant of these are the traffic rights. These are the same freedoms that were set out in the Air Transport Agreement. Each ASA grants certain traffic rights to the designated airlines from each side. The specific grant of rights will vary from agreement to agreement. Generally, almost all ASAs will provide for third and fourth freedom rights, which would

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[12] See J. Gertler, "Nationality of Airlines: Is it a Janus With Two (or More) Faces?" (1994) 19-1 Ann. Air & Sp. L. 211 at 237.

[13] Air Transport Agreement, Article 1, Section 6; Air Services Transit Agreement, Article 1, Section 5.

[14] Haanapel, *supra* at note 11 at 289.

then permit the designated airlines of the two States to operate between one another. In some but not all ASAs there may also be an exchange of fifth freedom rights. These rights can be extremely valuable and in the past have been granted sparingly, if at all.

## B. Major Developments since 1945

### *1. UK - US Agreements*

Shortly after the Chicago Convention, the US and the UK concluded the first major ASA of the post-war bilateral system. The Agreement was signed in Bermuda and is known as "Bermuda I".[15] In terms of designation, it granted to each Party the right:

> *[T]o withhold or revoke the exercise of the rights specified in the Annex to this Agreement by a carrier designated by the other Contracting Party in the event that it is not satisfied that substantial ownership and effective control of such carrier are vested in nationals of* ***either*** *contracting Party...* [emphasis added][16]

Interestingly enough, this formulation actually granted a great deal more to the airlines of either side in terms of ownership and control than subsequent arrangements. The way the Article is drafted, the UK (for example) could have designated an airline that was owned by any combination of UK *and* US nationals, something that is no longer permitted. In any event, of course, US domestic legislation does not permit foreign ownership or control of US airlines. Foreign nationals may own a maximum of 25% of the equity of such an airline, but without control there is little reason for anyone to do so.[17]

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15 *Agreement between the United Kingdom and the United States*, 11 February 1946, 3 U.N.T.S. 253, 60 Stat. 1499, T.I.A.S. No. 1507 [*Bermuda I*].

16 *Ibid.*, Article 6.

17 See D. Arlington, "Liberalization of Restrictions on Foreign Ownership in US Air Carriers" (1993) 59 J. Air L. & Com. 133.

In the eyes of the UK, Bermuda I, despite its other restrictions such as controls on pricing, soon gave US carriers a dominant position in the North Atlantic air transport market. Following a dispute between the two regarding capacity issues, Bermuda I was replaced in 1977 by Bermuda II,[18] which, *inter alia*, narrowed the ownership and control clause. Article 5 of the new Agreement states that:

> *(1) Each Contracting Party shall have the right to revoke, suspend, limit or impose conditions on the operating authorisations or technical permissions of an airline designated by the other Contracting Party where:*
> *(a) Substantial ownership and effective control of that airline are not vested in the Contracting Party designating the airline or in nationals of such Contracting Party;*

As may be seen, the removal of the word "either" limited the scope for ownership of airlines, compared to the previous Agreement, so that it would no longer be possible for a designated airline from one Party to be owned or controlled by nationals of the other. Henceforth, *e.g.*, a UK designated airline had to be controlled by UK nationals only. The formulation in this clause is indeed the most common method of defining designation in bilateral air service agreements.

Bermuda II closely regulates the airlines that are permitted to operate on transatlantic routes between the UK and the US, both by number (only two are permitted to be designated by each side to serve London Heathrow) and by points of departure and destination in the territories of the two Parties. It focuses on third and fourth freedom traffic as the "primary objective" of the

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18 *Agreement Between the Government of the Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning Air Services*, 23 July 1977, 28 U.S.T. 5367, T.I.A.S. No. 8641 [*Bermuda II*].

Agreement, limiting fifth freedom traffic.[19] This type of ASA is sometimes known as a "predetermination" type, because it does not permit the airlines the freedom to adjust their capacity or operations outside the limits predetermined by the Agreement. For most of the period since 1945, this type of agreement has been the predominant model for the economic regulation of international air transport.

## 2. *The US "Open Skies" Policy*

At the time Bermuda II was concluded, it did not really fit well with overall US air transport policy. In 1978 the internal US aviation market was deregulated. This removed all controls on capacity, pricing and scheduling.[20] Accordingly, the US Department of Transportation (DOT) began to reconsider the US position on *international* aviation regulation. The result was the announcement in 1992 by the DOT of its "open skies" initiative. Initially, this was primarily directed at European countries. It stated that the US would be prepared to negotiate with any willing European partner an ASA that would offer unlimited access on a reciprocal basis.[21] After calling for public comment on the proposal, an official definition of open skies was promulgated.[22] One of the criteria not altered from previous bilateral agreements was the designation clause. This remained based on substantial national ownership and effective control.

The first agreement to be signed by the US following the announcement of the new policy was with the Netherlands in 1992. It was not a new agreement,

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19 P. Mendes de Leon, "Before and After the Tenth Anniversary of the Open Skies Agreement Netherlands - US of 1992" (2002) XXVIII/4/5 Air & Space L. 280 at 281.

20 On the topic of the effects of the Airline Deregulation Act of 1978 see, *inter alia*, J. Heuer & M. Vogel "Airlines in the Wake of Deregulation" (1991) 19 Transp. L.J. 247; P. Dempsey, "Airlines in Turbulence" (1995) 23:15 Transp. L. J. 15.

21 Arlington, *supra* at note 17 at 179.

22 *In re* Defining Open Skies, DOT Order No. 92-8-13 Docket 48130 (August 5 1992).

but an amendment of the existing ASA to bring the arrangement into line with the new open skies policy. This matter was specifically addressed by the Parties, who stated that "the delegations agreed to amend the Air Transport Agreement of 1957 and the Protocol of 1978 relating to the Agreement, in order to conclude an Open Skies agreement."[23]

As noted above, the open skies policy had not included alterations to the ownership and control provisions. The Netherlands specifically raised the issue during consultations with the US. This was because at the time KLM Royal Dutch Airlines (KL) was involved in an equity stake in Northwest Airlines (NW). In 1989 KL had taken a non-voting share of 56.74% in NW. There had been some negotiations between KL, NW and the DOT, since the latter was concerned to ensure that control of NW remained with US citizens. Though these concerns had been worked out through the establishment of a holding company, the arrangement was less than ideal.[24]

The Netherlands therefore suggested that the designation clause be modified to that found in the Bermuda I agreement - namely that designation would be permitted, provided the airline being designated was substantially owned and effectively controlled by nationals of *either* Party. This would have facilitated the KL/NW transactions mentioned above. The US, however, declined to adopt the proposal, pointing out that in any event US domestic law would continue to apply, and this prohibited effective control of US carriers being held by nationals.[25] As noted earlier, US domestic legislation mandates a limit of 25% on foreign control of voting equity in a US carrier. Two-thirds of the board of directors and managing officers must be US citizens. Even if these

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[23] *Memorandum of Consultations Concerning the US - Netherlands Open Skies Agreement* (1992) cited in Mendes de Leon, *supra* at note 19 at 288.

[24] Mendes de Leon, *supra* at note 19 at 285.

[25] *Ibid.* at 291.

statutory limits are complied with to the letter, there is an additional, less clearly stated, requirement that a US carrier be *controlled* by US citizens.[26]

The US position on ownership and control remained unchanged in 1992 and for nearly ten years afterwards. The open skies agreements it signed with Member States and other European nations[27] in all cases maintained the requirement for substantial ownership and effective control. On the other side of the Atlantic, however, regulation of certain aspects of air transport, especially ownership and control, was moving ahead of the US position.

### 3. *The Liberalisation of the European Internal Market*

Working towards the creation of a common internal aviation market in the EU, the Commission had by 1993 enacted three sets of legislation known as "packages". The "Third Package" was introduced in 1992, and completed the establishment of the single EU marketplace for air transport. Two pieces of legislation in particular created the concept of a "Community carrier".

To be a Community carrier, an airline must be majority owned and effectively controlled by Community nationals.[28] These carriers may have their principal place of establishment or registered offices anywhere within the EU. There is no requirement that they be tied to a particular Member State. Any Member State may issue a licence to any air transport undertaking established in that State, provided that it meets the requirements of ownership and control

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26 Arlington, *supra* at note 17 at 138.

27 (Luxembourg (6 June 1995); Finland (9 June); Austria (14 June); Denmark, Sweden and Norway (16 June); Belgium (5 September); Germany (23 May 1996); Italy (6 December 1999); Portugal (30 May 2000); and France (11 January 2002). Denmark, Sweden and Norway generally conduct air service negotiations concurrently, signing identical agreements with the third State involved. This is due to their mutual designation of jointly-owned SAS as the air carrier authorised to operate to and from each of those States and the third State in the negotiations. Norway was not a Member State of the EU at the time of the negotiations with the US.

28 *Council Regulation 2407/92 on Licensing of Air Carriers* [1992] O.J. L240/1.

by nationals of EU Member States.[29] That air transport undertaking is then a Community carrier.

In addition to removing any restrictions on establishment within the EU, from 1 April 1997 Community carriers were permitted the right to carry traffic between any points within the EU, including between points within a single Member State.[30] Thus within the EU, there was a single market open to any Community nationals meeting the licensing requirements. This was complemented by the removal of restrictions on tariffs, which allowed for free pricing of intra-Community air services.[31]

As may be seen, the combination of the elements of the Third Package and the two earlier Packages means that within the EU there is a completely deregulated market, with no barriers to entry for nationals of Member States. Along with this is an absence of restrictions on traffic rights, fares and capacity. The only element missing from this picture is a unified position with regard to the external relations between the Member States and third parties. This is important for two reasons. First, philosophically, a common aviation area in which there is no unity of position in respect of external matters still retains some barriers to completely unfettered market access. This means that the system has not reached its optimum efficiency.

Second, from a practical point of view, no matter how liberal the internal EU market becomes, Community carriers cannot take advantage of that when it comes to air transport between EU Member States and third countries. This is because of the provisions relating to ownership and control in the ASAs

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29 As well as certain requirements regarding financial fitness.

30 *Council Regulation 2408/92 on Access for Community Carriers to Intra-Community Air Routes* [1992] O.J. L240/8.

31 *Council Regulation 2409/92 on Fares and Rates for Air Services* [1992] O.J. L240/15.

between each individual Member State and third countries. These of course restrict access to routes to the properly designated airlines of the two bilateral partners concerned. With almost no exceptions, no third country ASA with a Member State has permitted Community carriers (being an airline substantially owned and effectively controlled by EU nationals) to be designated.[32] It was to deal with these concerns that the Commission, starting in the 1990s, began a process aimed at gaining the mandate to undertake, on behalf of the EU, negotiations with third parties.

### 4. *The Decision of the European Court of Justice*

To complement the progress on the internal market, the Commission had, as early as 1990, sought a mandate from the Council of the European Union (Council)[33] for authorisation to conclude an *external* agreement between the EU and the US in the field of air transport. This was because the Commission considered that the single internal market was being compromised by the exercise of fifth freedom rights between European points by US carriers. These rights had been granted in earlier ASAs between the US and EU Member States. Nevertheless, in 1993 this request by the Commission to negotiate was declined by the Council.

A subsequent request was made by the Commission in 1995. In June 1996 the Council granted a limited mandate to negotiate with the US on the following matters: competition rules; ownership and control; computer reservation systems (CRS); codesharing; dispute resolution; environmental matters; and

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[32] One exception appears to be the 1994 ASA between Germany and Brunei Darussalam, which seems to permit Germany to designate an airline substantially owned and effectively controlled by EU nationals. See K. Bohmnann, "The Ownership and Control Requirement in US and European Air Law and US Maritime Law" (2001) 66 J. Air L. & Com. 689 at 728 and footnote thereto.

[33] By a decision in 1993 the Council decided it should be known as the 'Council of the European Union': [1993] OJ L281/18.

transitional measures. It explicitly stated that the mandate did not cover the negotiation of traffic rights.[34]

As far as relations with the Member States were concerned, the Commission in 1994 asked Member States not to enter into negotiations with the US without first arriving at an agreed position with the Commission. This request was repeated in early 1995, and was then followed in mid-1995 with formal notice to Member States, claiming that they were infringing on the Commission's competence. All the Member States concerned filed replies protesting the Commission action. Not satisfied with the situation, the Commission in 1998 delivered a reasoned opinion, and that having failed to elicit the desired response, the Commission in December 1998 bought actions in the ECJ against eight Member States, namely the UK, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany.

The complaint against the UK dealt solely with the issue of the nationality clause[35] because, as noted above, the agreement between it and the US is not an open skies agreement. The Commission made the argument that the Bermuda II agreement provides for designation on the basis of substantial ownership and effective control by the UK or its nationals. By making and applying this agreement in 1977, after the date that the UK joined the EC, the UK breached its obligations under Article 43 (ex 52) of the Treaty Establishing the European Community (TEC).[36]

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34 Opinion of Advocate General Tizzano (delivered 31 January 2002) in Cases *Commission v. United Kingdom*, C-466/98; *Denmark*, C-467/98; *Sweden*, C-468/98; *Finland*, C-469/98; *Belgium*, C-471/98; *Luxembourg*, C-472/98; *Austria*, C-475/98; *Germany*, C-476/98, [AG's Opinion] at para. 12.

35 The Commission and the ECJ have generally referred to the designation provisions in the respective agreements as the "nationality clause".

36 *Treaty Establishing the European Community*, 7 February 1992, [1992] 1 C.M.L.R. 573 [*TEC*], *incorporating changes made by Treaty on European Union*, 7 February 1992, [1992] 1 C.M.L.R. 719 [*TEU*]. The *TEU, supra*, amended the *Treaty Establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 11 [*EEC Treaty*], *as amended by Single European Act*, O.J.L. 169/1 (1987), [1987] 2 C.M.L.R. 741 [*SEA*], in *Treaties Establishing the European Communities* (EC Off'l Pub. Off. 1987).

Article 43 TEC prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Article 48 (ex 58) provides that a company or firm that is established in one Member State is to be treated in the same way as a natural person. The ECJ has made it clear that:[37]

> *The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his state of origin and to profit therefrom...*

Thus, an airline that is established in a Member State should be able to set up an operation in any other Member State on the same basis as an airline that is controlled by nationals of that Member State. This, of course, runs foul of the designation clause in an ASA, which prevents an airline, other than one controlled by nationals of the *Contracting Party*, from being designated to operate on the routes covered by that ASA. This argument was repeated against all the Member States involved in the case, because they all have a similar designation clause (*i.e.* substantial ownership and effective control).

In respect of the other Member States only,[38] the Commission made two additional complaints. The first was that merely by having concluded highly liberal agreements with the US, the Member States contravened the principles governing the division of external powers between the Community and the Member States. In effect the Commission argued that the Member States, by concluding the agreements, encroached upon an area in which the Commission had an exclusive mandate.

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37 Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 at para 25.

38 *I.e.*, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany.

The Commission based this part of its complaint on two separate arguments. The first was that it was *necessary* for such agreements to be concluded at Community level in order to implement Treaty objectives. The second argument was that the Community has exclusive competence because the agreements in question *affect,* in a specific sense, the common rules adopted by the Community in the field of air transport, such as the rules the Commission had promulgated in establishing the three packages referred to earlier.[39]

The ECJ held that whenever the Community acted to implement a common policy under the Treaty, and adopted provisions laying down common rules, Member States no longer have rights to enter into obligations with third countries that affect those rules. The ECJ held that this applied in any area where the Community has achieved harmonisation. In the field of air transport, the ECJ agreed that the Commission had effected rules in the areas of fares and rates to be charged by carriers of non-Member countries on intra-Community routes (Regulation 2409/92); in the area of CRS (Regulation 2299/89); and in the area of slot allocation at Community airports (Regulation 95/93). The ECJ, however, only found infringements in the area of fares and CRS regulation.

Most importantly, however, the ECJ held that the nationality clause in each of the ASAs permitted the US to refuse or withdraw licences in respect of an airline designated by the relevant Member State, where substantial ownership and effective control was not vested in nationals of that Member State. In contrast, the clause had the effect of (in principle at least) *requiring* the US to recognise designation by a Member State of an airline that was substantially owned and effectively controlled by nationals of that Member State. There could be no doubt, the ECJ concluded, that such a clause was capable of

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[39] See *supra* at note 28 and accompanying text.

affecting a Community airline established in such a Member State. Such an airline would not be able to be designated, which meant that it could not operate on routes between that Member State and the third country. This therefore meant that there was the potential for discrimination relative to the "home" carrier, which of course is what is specifically prohibited by the TEC.

Accordingly, the ECJ declared that by entering into and maintaining bilateral air service agreements with the US, which recognised that the US had the right to withhold or revoke traffic rights where air carriers designated by the Member State were not owned or controlled by nationals of that State, the Member States had failed to fulfil their obligations under Articles 10 (ex 5) and 43 (ex 52) of the TEC.

The decision received a mixed reception and some comments are in order. First, and as more than one Member State pointed out during the arguments before the ECJ,[40] the action is more political than practical in nature. While the ECJ quickly dismissed the suggestion during the hearing, nonetheless the fact remains that no Member State airline has ever actually applied for and been refused designation by another Member State to operate on a third country route from that State. There are very sound practical reasons why this is so, because there are very sound commercial reasons why a major Community airline would not want to set up operations in another Member State.

Community airlines based in a particular State are based at a hub airport: KL at Amsterdam Schiphol (AMS), Lufthansa (LH) at Frankfurt (FRA), Air France (AF) at Paris Charles de Gaulle (CDG), and so forth. The airport hub is vitally important to the operations of these airlines. It is their dominance at this hub that makes the respective airline competitive, as well attractive to a US (or

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[40] See AG's Opinion, *supra* at note 34 at para 30.

other foreign) alliance partner seeking access to domestic routes in Europe. The same argument applies in reverse to US airlines, which having at great expense and over time established hubs at major US cities, do not lightly decide to move to some other airport.

The costs involved in moving even a part of the operations of a European major airline to a new hub, there to compete with an already entrenched competitor airline holding prime slots and gates, would be prohibitively high. This is a good reason why no airline has undertaken such a task. New entrants on intra-European routes tend to avoid hub airports for many of the same reasons and therefore operate out of secondary points. While this use of smaller airports works for intra-Community traffic, it is not suitable for international traffic. Airlines rely to a significant extent on the ability to mesh schedules with both their own flights and those of alliance partners, as well as competitors. Accordingly, there has been no need for a European major airline to seek designation in another Member State.

The second point is that in any case, even if such an airline had sought designation, it is quite likely that the US would have agreed to allow it. Jeffrey Shane (Associate Deputy Secretary of the DOT) said as much in a speech widely seen as the official US reaction to the ECJ decision.[41] The most far-reaching element of the decision, agreed Shane, was that relating to the designation clauses. The clauses, however, were nothing special - they were found in all US open skies agreements, as well in many other bilaterals not so characterised. Further, they were permissive: the US has from time to time waived its rights to object.

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41 Jeffrey Shane, "Open Skies Agreements And The European Court Of Justice" (Speech to the American Bar Association Forum on Air and Space Law, 8 November 2002) online: <www.dot.gov/affairs/briefing.htm> (date accessed: 29 June 2003).

Additionally, Shane referred to the APEC Multilateral. Designation under that agreement, to which the US is a Party, is based on the "principal place of business and incorporation" model, rather than on substantial ownership. Effective control is still required, but Shane said that the APEC Multilateral is evidence that the US was "prepared to look creatively at nationality clauses".[42]

The US is especially likely to look favourably on Community ownership of those airlines from Member States that have open skies agreements with the US. As one author notes, while the US wants to keep its own carriers owned and controlled by US citizens, it does not insist on this for foreign designated air carriers, as long as they are from States that have concluded open skies agreements.[43] In fact, as Allan Mendelsohn (formerly Deputy Assistant Secretary of State for Transportation Affairs and chief US aviation negotiator during the APEC Multilateral negotiations) points out, the US in 1995 accepted the designation of an airline (Cargo Lion) by Luxembourg, which was majority owned by German and Swiss nationals. The basis for the approval was that the US had open skies agreements with both Germany and Switzerland.[44]

A third point is that the whole argument can be described as missing the forest for the trees. Why is the Commission still concerning itself with the notion of ownership and control in the first place? Some eight years ago now, Wassenbergh suggested removing the ownership and control requirement to allow an end to air carrier nationalism.[45] National sovereignty would only

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42 *Ibid.* at 6.

43 H. Wassenbergh, "Global Economic Regulation of Air Transport" (2001) 26 Ann. Air & Sp. L. 237 at 247.

44 A. Mendelsohn, "Ownership and Control" (2003) 17:3 Air & Space Law. 1 at 20.

45 H. Wassenbergh, "Future Regulation to allow Multi-national Arrangements between Air Carriers (Cross-border Alliances), putting an End to Air Carrier Nationalism" (1995) XX:3 Air & Space L. 164.

extend to safety, security and environmental protection. As Rene Fennes, formerly of the European Commission, pointed out in a recent interview:[46]

> The whole debate on degree of market access is outdated. One would expect the open-market philosophy to be accepted as standard in the so-called modern and global aviation world. The EU-US discussion must deal with more pressing issues. Market access should not even be part of the [EU-US] discussion because it should take from the outset the view that an open market forms the basis.

Of course, the US is not lightly going to alter its own requirements for airline ownership. As Mendelsohn notes "...no formula ought to require a State to alter its internal laws that govern ownership of its own airlines, no matter how willing that State is to accept multinational ownership of other airlines".[47] That does not, however, preclude discussion between the US and the EU, for example, from placing less emphasis on ownership and control issues. It seems unlikely, however, that regulators on either side of the Atlantic are quite ready to remove their attachment to designation clauses based on national (or even multinational) ownership.

## C. Summary

Thus far, this thesis has considered some of the major developments in air transport regulation since the Chicago Convention. Primarily these developments have concerned Europe and the US. It may be seen that there has been little emphasis on changing the ownership and control clause from requiring substantial ownership and effective control for designation of an airline. Only recently, in the European context, has a different model developed. If one considers the EU as a "nation", then even the EU system of

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[46] Quoted in J. Feldman, "One step forward, two steps back? The debate over right of establishment goes on - and on - but progress is measured in inches" *Air Transport World* (1 April 2003) 75 at 76.

[47] Mendelsohn, *supra* at note 44 at 22.

designation still requires national ownership; that is, ownership by EU nationals is required. Nonetheless, the creation of an internal aviation market inside the EU amongst what are, after all, sovereign States, is still a noteworthy accomplishment in the area of air transport regulation. The real problem facing the EU is how to deal with the external dimension.

We now turn to the Asia-Pacific region and examine three relatively new ASAs, which have taken a liberal approach to the issue of ownership and control. The attitudes of at least some of the States party to these ASAs offers the prospect of a further movement along the road to removal of ownership restrictions.

## III. THE AUSTRALIA-NEW ZEALAND SINGLE AVIATION MARKET

### A. The Development of Trans-Tasman Aviation Relations

Australia-New Zealand air transport arrangements were formalised in 1961, in an ASA that was fairly similar to the prevailing Bermuda I standard. The designation clause was the usual "substantial ownership and effective control" model. Market access for carriers of both sides was limited to certain points and routes. Fares required government approval and capacity was arranged to ensure a fairly even split between carriers from each side of the Tasman.[48]

In 1983 the two nations concluded an agreement creating a trans-Tasman free trade area, known as the "Australia New Zealand Closer Economic Relations Trade Agreement" (CER).[49] Progress of the CER was initially slow, not least because Australia had much less to gain from trade liberalisation than New Zealand. The faster pace of market reform in New Zealand also provided benefits. By 1986, New Zealand had liberalised the restrictions on ownership and control of its domestic airlines, permitting foreign ownership. This had permitted Ansett New Zealand, a subsidiary of Ansett Australia (AN), to enter the New Zealand domestic market to compete with Air New Zealand (NZ). Australia still maintained foreign ownership restrictions along with its "two airline" policy, which mandated that only two airlines were permitted to operate on certain inter-state trunk routes within Australia.

Nonetheless in 1992, when the CER was reviewed for the second time, the question of a single aviation market was included in the discussions. This led to

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48 J. Goh, *The Single Aviation Market of Australia and New Zealand* (London: Cavendish, 2001) 44.

49 *Australia New Zealand Closer Economic Relations Trade Agreement*, 28 March 1983, A.T.S. 1983 No.2 (CER), online: < http://www.dfat.gov.au/geo/new_zealand/anz_cer/anzcertal.pdf> (date accessed: 29 June 2003).

the November 1992 Memorandum of Understanding (MOU), which was aimed at more liberal access between and beyond the two countries.

The 1992 MOU phased out regulation in three stages, with the second stage in 1993 and the third commencing in 1994. Multiple designation was to be permitted, initially on only three routes. There was an increase in available routes at the second stage with full multiple designation permitted for all trans-Tasman routes in the final phase. Fifth freedom rights were still regulated, but again with a progressive increase in the available number of points. By November 1994 there would be an increase to eleven points for New Zealand and ten points for Australia. Capacity on beyond routes was also increased in a similar manner, rising to a maximum of twelve B747 units.

As may be seen, this agreement did not completely remove all restrictions. Even at the end of the three year phase-in period, there would still be some control on beyond points and capacity. On the other hand, although cabotage was not permitted immediately, the parties did agree that it would be permitted from November 1994, the date at which the third and most liberal stage took effect.[50]

In the period between the signing of the 1992 MOU and the commencement of the final stage in 1994, the Australians however became increasingly concerned about the benefits which they perceived were accruing to the New Zealand side. The Australian Federal Minister of Transport, Laurie Brereton, described the situation as "...an arrangement that, in the absence of any rationalisation of the airline structures competing with each other, was in

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[50] Goh, *supra* at note 48 at 51.

New Zealand's favour to the tune of many millions of dollars".[51] Shortly before 1 November 1994, Australia announced that it would not proceed to the final stage of the 1992 MOU. Despite the protestations of the New Zealand Government and NZ, the Australians stood by their decision.

The main motivation on the Australian side was that the Government was shortly due to sell its stake in Qantas (QF). It was looking for a foreign investor to take at least a 25% stake and, it was felt, the price for this would suffer if NZ was allowed unfettered access to the Australian domestic market. In addition to this, the Australian Government was also keen to see the domestic duopoly of QF and AN extended across the Tasman. News Corporation, the owner of a half-share of AN, was also at the time looking to sell its share. It was equally concerned at the effect on the price it might obtain if NZ made similar aggressive use of domestic Australian rights as it had done with fifth freedom rights.

By 1996, these concerns had been alleviated. QF had successfully sold a 25% stake to British Airways (BA), while NZ and the other half-share owner of AN (TNT, a large Australian transportation conglomerate), had almost agreed on the terms for NZ's purchase of the stake. Both Governments also agreed that the time was right for a renewal of the agreement as part of a reaffirmation of closer trans-Tasman economic relations. The result was the Australia-New Zealand Single Aviation Market Arrangements (SAM) of 1996.[52]

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51 S. Lewis, "NZ agrees not to take legal action on broken Airline access Agreement" *Australian Financial Review* (11 November 1994) 6.

52 *Australia-New Zealand Single Aviation Market Arrangements* (19 September 1996) [SAM].

## B. The Single Aviation Market Arrangements

The SAM, much like the Third Package in the EU, established a new category of airline, in this case the "single aviation market airline" or SAM airline.[53] This was in addition to a "domestic airline", which was one that met the conditions of either Party for operating in the respective domestic market.

A SAM airline, on the other hand, must be at least 50% owned by nationals of either or both Australia or New Zealand. In addition there must be effective board control by such nationals, with two-thirds of the Board members and the Chairperson of the Board also being citizens of either country. The head office along with the operational base of the airline may be in either country.[54] There is also a provision that allows an airline not otherwise meeting the criteria to be designated as a SAM airline by the Ministers responsible for aviation in both Australia and New Zealand. In addition to the ownership and control requirements, a SAM airline must also meet security, noise and insurance requirements of both countries and also have operating authorisations from both Australia and New Zealand.

Once so approved, a SAM airline may operate domestic services in Australia and New Zealand. It may also operate between Australia and New Zealand and carry cabotage traffic between domestic points on the international routing. There is no limit to the number of SAM airlines of either country that may operate services linking any city pair within and between the two countries. Nor are there any requirements for tariffs to be approved.[55] Code-

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53 *Ibid.*, Article 3.

54 *Ibid.*, Article 8.

55 *Ibid.*, Article 5.

sharing by SAM airlines is also permitted within the SAM area.[56] The only derogation from the capacity provision is in respect of intra-State services in Australia. A SAM airline would need to have approval for such services from the respective State Government, since this is a matter over which the Federal Government does not have complete jurisdiction. There is a declaration in the SAM Agreement to the effect that the Australian Government would seek to review those powers in order to make the situation more consistent.

Both parties agreed that services beyond Australia and New Zealand would remain governed by the 1961 ASA and the 1992 MOU. This position with regard to external relations is one of the weaknesses of the SAM. As mentioned earlier, the same issue confronts the EU. While a SAM airline may operate without restriction between, say, Auckland (AKL) and Sydney (SYD), it might not be permitted to operate beyond SYD to Bangkok (BKK). This is because, for the purposes of the Australia - Thailand ASA, a SAM airline is not recognised. To the Thais, the airline involved will be either a New Zealand or an Australian designated carrier.

If the carrier is assumed to be an Australian carrier (*i.e.*, substantially owned and effectively controlled by Australians, assuming that to be the designation criteria under the Australia - Thailand ASA), then it will be governed as to permitted operations on the SYD - BKK sector by that ASA. It might be that frequencies are limited and another Australian carrier is already using the maximum number permitted. In addition, it is conceivable that the ASA may not permit an airline to route services AKL - SYD - BKK without a change of flight number at SYD, making the flight potentially less attractive.

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[56] *Ibid.*, Article 6.

If, on the other hand, the SAM airline in the example is a New Zealand airline (*i.e.*, it is substantially owned and effectively controlled by New Zealanders) then any operations by it on the SYD - BKK sector will be under the provisions of the New Zealand - Thailand ASA *and* the 1992 MOU. This is because SYD – BKK is a fifth freedom sector for a New Zealand carrier under both those ASAs. If fifth freedom rights are even permitted under the New Zealand - Thailand ASA, there are likely to be restrictions on the number of such services allowed. In addition, for fifth freedom services beyond Australia by a New Zealand carrier, only twelve frequencies per week are permitted under the 1992 MOU. If, *e.g.*, NZ is using all the permitted frequencies, then there will be none available for the SAM airline.

On the other hand, the Australia – Thailand and the New Zealand – Thailand ASAs may well permit Thai Airways (TG) to operate unlimited fifth freedom services between points in Australia and New Zealand. Such rights may have been granted to Thailand by Australia or New Zealand, in unrelated and temporally disparate negotiations, in exchange for any number of concessions by the Thais. The concessions sought will most likely have been completely different for each side.

Australia, for example, may have sought the right for QF to operate BKK – London (LHR); the right to operate to secondary points in Thailand, such as Chiang Mai; or it may even simply had to grant the fifth freedom rights to Thailand as a premium, to recognise that the majority of the traffic between Australia and Thailand is one way, to the detriment of TG. New Zealand may have had to offer trans-Tasman fifth freedom rights for completely different reasons: the right for NZ to codeshare on TG services to points beyond BKK, or to permit NZ services to carry fifth freedom traffic between Singapore (SIN) and BKK on an AKL – SIN – BKK –AKL routing.

Thus, TG may well be able to offer a BKK - SYD - AKL - BKK service (or a similar trans-Tasman service) and indeed, given the restrictions noted earlier on SAM airlines, it may well be the *only* carrier able to so operate. This example highlights the problem faced by any common aviation market; that is, achieving a coherent approach to third country relations because of the bilateral nature of those relations for the parties in the common aviation market.

## C. The Australia-New Zealand Open Skies Agreement of 2000

By 2000, it appeared that the SAM was working quite well. NZ, having taken a 50% stake in AN, was therefore not operating in the Australian domestic market, which was the most desirable outcome as far as QF was concerned. In 1999, Singapore Airlines (SQ) had secured agreement to purchase the other half-share in AN from its owner, News Corporation. NZ had then given notice that it would exercise its pre-emptive option and make an offer for that half-share. Negotiations then proceeded on the basis that NZ would continue with the absorption of AN, while SQ would take a 25% stake in NZ.

On the aeropolitical front, both Australia and New Zealand had been active in discussions within the Asia-Pacific Economic Forum (APEC) with regard to air transport liberalisation. At the 1994 APEC Leaders' Meeting in Bogor, Indonesia, a commitment had been made for developed APEC member economies to achieve the goal of free trade in services, including air services, by 2010. At the Auckland APEC Leaders' Meeting in 1999, eight steps for further liberalisation had been adopted. Arising out of those developments, both countries participated in discussions during 2000 aimed at establishing an APEC-based multilateral air services agreement.[57]

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[57] This subject will be discussed more fully in Part IV, below.

It was in this context that the two Governments agreed, in November 2000, to proceed to the next stage in liberalisation, by signing a new ASA.[58] The MOU that accompanied the ASA referred specifically to the Bogor goal of liberalisation of air services, and there was also a reference to the increasing integration of the two trans-Tasman economies. Certainly, there was significant integration in respect of air services, with one of the two Australian major domestic airlines now in New Zealand hands.

The MOU and the draft ASA replaced the earlier 1961 ASA, as well as the 1992 MOU and the 1996 SAM Agreement. The new ASA was given immediate interim effect, pending ratification by the two Governments. It was in fact not until August 2002 that the ASA was formally signed. Of note were Articles 5 and 6 of the MOU, dealing with passenger seventh freedom rights.[59] The two sides agreed that they would further consider the granting of such rights, in the light of the ongoing development of a competitive aviation market. Notwithstanding that, if Australia granted such rights to a third Party, then both Parties would grant such rights to one another. The reason for putting the trigger in Australia's hands was that, once again, it was New Zealand that was the more liberal of the two. It had already agreed to grant seventh freedom passenger rights (as well as cabotage) under the Protocol[60] to the APEC Multilateral, which was signed in May 2001. Australia had been present at the negotiations, but decided not to accede.

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58 *Supra* at note 4.

59 The right for an airline of State A to operate services to and from State B without having to return to State A at any point in the routing. This traffic right is rarely granted.

60 *Protocol to the Multilateral Agreement on the Liberalization of International Air Transportation*, 1 May 2001, online: <www.maliat.govt.nz/Webhosting/MOT/airline.nsf/> (date accessed: 30 June 2003).

The ASA itself folded in the provisions in the former SAM Agreement. It established two types of airline, one being a SAM airline. There was no limit to the number of airlines that could be designated. Designation of an ordinary airline (*i.e.* one that was not a SAM airline) would be accepted provided that the airline was incorporated and had its principal place of business in the territory of the designating Party; and provided that nationals of that Party had effective control of the airline.[61]

This provision was, of course, more liberal than the clause in the 1961 ASA between Australia and New Zealand. It was also an advance on the type of clause seen in earlier ASAs between, *e.g.*, the US and the UK or the Member States of the EU. The clause in those agreements (even the "open skies" agreements) required substantial ownership and effective control of airlines by the nationals of the designating Party. The clause used by Australia and New Zealand was based on recommendations made by ICAO in 1997 to its members, aimed at gradually liberalising the language found in all bilaterals.[62] The provision had been included in the open skies agreement signed between New Zealand and Singapore in 1997,[63] which appears to have been the first such agreement to include it in respect of both parties.[64]

The designation for a SAM airline was the same as found in the earlier SAM Agreement.[65] In addition, the aeronautical authorities (rather than the relevant Ministers, as in the SAM Agreement) may jointly approve an airline as

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61 *Supra* at note 4, Article 2(2).

62 ICAO, *Recommendation ATRP/9-4*, approved by the Council on 30 May 1997.

63 *Air Services Agreement between the Government of the Republic of Singapore and the Government of New Zealand*, 18 September 1997.

64 Some earlier ASAs had included such language in respect of one of the Parties. For example, ASAs with Hong Kong traditionally permitted designation by Hong Kong on the basis of principal place of business and incorporation, recognising the fact that Cathay Pacific (CX), Hong Kong's *de facto* airline, was incorporated in the territory, but was owned by offshore (primarily UK-based) interests.

65 *Supra* at note 54 and accompanying text.

a SAM airline, providing for more flexibility. A SAM airline may or may not be an ordinary designated airline. Both ordinary and SAM airlines may be either an operating airline or a marketing airline or both.

This wording raises the interesting possibility of a "virtual" airline. If a marketing airline was a SAM airline, it could sell travel between any two points in the SAM area. It would be allowed to codeshare on any other operator by virtue of Article 12, which permits any airline covered by the ASA to enter into codeshare arrangements with any third party airlines. This is so even in the absence of an understanding between either Party and a third party regarding such cooperative arrangements. What this means is that, *e.g.*, a SAM airline could place its code on a trans-Tasman flight operated by Cathay Pacific (CX). This would be permitted even if, in this example, Australia and Hong Kong did not permit codesharing under their respective ASA. Normally, such a situation would have meant that no codesharing would be permitted on any flights operating to, from or via Australia by any Hong Kong-based airline.

Such a clause is quite liberal, because it avoids a situation where airlines of one party to a bilateral are precluded from exercising commercial rights with airlines of a third party, simply because the other party to a bilateral and that same third party are unable to agree on codesharing language for whatever reason. The clause is found in the ASA between Australia and Singapore, and permits QF to codeshare on CX flights between SIN and, *e.g.*, Hong Kong (HKG), even though Singapore and Hong Kong have not permitted codesharing in their bilateral and therefore neither CX nor SQ can place their codes on any other airlines' flights, whether between or beyond SIN or HKG. As can be seen, this clause gives QF a distinct advantage. Australia is often able to secure such advantages as this (capacity premiums or extensive fifth freedom rights being other examples) because of the fact that Australia is a destination market for

many airlines. It has not needed to enter into liberal arrangements because it usually needs less from its bilateral partners, in terms of market access, than they need from it. Australia has only two open skies agreements, one of them being with New Zealand and the other being the PIASA, which will be discussed later.

Article 13 is another innovative provision:

> *Each Party shall allow the airlines of the other Party to establish and operate an airline for the purpose of operating domestic air transport wholly within the territory of the other Party with aircraft registered in the territory of the other Party, subject to the application of national laws and regulations of the other Party.*

The establishment of entirely foreign owned domestic airlines had been allowed by New Zealand as early as 1986, in order to foster competition for NZ that would not have been possible by relying on the limited New Zealand equity markets. Following a review by its Productivity Commission, Australia in 2000 announced that it would amend its Foreign Investment Review Board guidelines to permit foreign persons, including foreign airlines, to own up to 100% of the equity in an Australian domestic airline.[66] The policy did not affect the situation with regard to QF, however, since it was governed by a specific piece of legislation that limited foreign ownership to 25% by a single foreign owner and 40% in aggregate.[67] In any case, the limit for international airlines (such as QF) remains at 49%, since this is the most that bilateral partners generally will accept.

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66 *International Air Services: A Policy Statement by the Hon John Anderson MP, Deputy Prime Minister and Minister of Transport and Regional Services* (June 2000) Department of Transport and Regional Services. Online: < www.dotars.gov.au/avnapt/ipb/intairservices.htm> (date accessed: 29 June 2003).

67 *Qantas Sale Act* 1992 (Cth.).

Finally, the Annex to the Agreement provided three different route schedules for airlines of both sides. Ordinary designated airlines may operate from any points behind their home territory, via that territory, any intermediate points, points in the territory of the other Party and any points beyond. This language permits the carriage of third, fourth, fifth and sixth freedom traffic, without having to explicitly state that fact. The second type of routing applies to all-cargo services, which may operate from the territory of the other Party to any point; *i.e.*, seventh freedom. Third, SAM airlines are permitted to operate between any two points in Australia and New Zealand. There are also liberal "operational flexibility" notes, which permit a variety of commercially useful activities. An example is codesharing beyond gateway points. This gives an operator the ability to place its code on a service operated by a regional carrier, on which traffic is carried to and from a major airport, where it connects with an international service. Having a single flight number for such carriage is seen as a marketing advantage, because it reflects the passenger's perception that the overall flight, regardless of the number of actual sectors and change of aircraft, is in fact one journey.

## D. Summary of Australia-New Zealand Air Transport Relations

Australia and New Zealand have over the last ten years developed one of the most liberal aviation environments outside the EU. In terms of their domestic markets, both States have committed themselves to permit unlimited access by foreign investors. Few other States have made such a commitment. Important aviation nations such as the US and Canada keep their doors firmly closed to anything more than the most limited foreign investment, with the result that their largest airlines are almost constantly in financial trouble.

Of course, the ride has not been as smooth for NZ as for QF in recent years. NZ suffered badly following its failed attempt to absorb all of AN, after the purchase in 2000 of the remaining 50% share. Is this a sign that the trans-Tasman policy is flawed? This author does not think so. The fault lies in the turbulent nature of trans-Tasman politics. NZ would have had a much better chance to make this acquisition work had SQ been permitted to increase its 25% stake in NZ to the desired 40%. The failure to achieve this was partly because of the then Labour-led coalition Government's [68] ideological difficulty with allowing foreign ownership of any important assets, a market reform that Government inherited along with many others.[69] Now that the current Labour Government has had to come to the rescue of NZ, it is adopting a more flexible approach to the current proposal for QF to take a 22.5% stake in NZ. The difficulty also had something to do with the traditionally close relationship between QF and the Australian Government. Deputy Prime Minister John Anderson has made it clear that Australia requires a strong international airline and he has not shied from exerting pressure on his trans-Tasman colleagues where necessary.[70]

As has been shown throughout this survey of Australia-New Zealand relations, it has generally been New Zealand that has taken the lead in reform. The Australians have followed at a more considered pace. Nonetheless, both sides have now concluded a most liberal ASA, which permits unlimited cross ownership of each others' domestic airlines, along with cabotage and seventh

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[68] At the time (late 2001 - 2002) the centre-left Labour Party was in a coalition with the left-wing Alliance Party. The latter in particular supported a command-and-control style economy, with key assets in national hands. Elements of the Labour Party also supported this view, to a greater or lesser extent.

[69] D. Stone, "Papers reveal govt ignored advisers, destroyed Air NZ" *Independent Business Weekly* (17 April 2002). Stone, a long-time commentator on New Zealand aviation policy, obliquely refers to the possibility that a certain degree of selective xenophobia played a part in the decision-making process at the time of the SIA proposal.

[70] D. Stone, "How the dingos got our airline" *Independent Business Weekly* (12 April 2002). Anderson has sometimes been referred to as the "Minister for Qantas".

freedom rights for all-cargo services. Should the proposed acquisition by QF of an equity stake in NZ succeed, it is quite likely that further reforms may occur.

The one main area remaining for both Australia and New Zealand to tackle is their common approach to third party negotiations. The 1992 MOU specifically referred to the possibility of both countries forming a bloc for the purposes of negotiating international traffic rights.[71] This provision was not carried over into the MOU of 2000 that accompanied the new open skies ASA. While this may not have been a priority or even a real possibility given the events in 2000, the decision of the ECJ has opened the way for Australia and New Zealand to negotiate on a joint basis with an interested partner. This point will be further considered later in the thesis, but in the meantime we turn to examine another significant development in Asia-Pacific air transport regulation.

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[71] Article 3(h)(ii).

# IV. THE APEC MULTILATERAL

## A. Background

### 1. *Asia-Pacific Economic Cooperation*

The Asia-Pacific Economic Cooperation (APEC) is a regional grouping of economies that aims to facilitate economic growth, cooperation, trade and investment in the Asia-Pacific region.[72] Formed in 1989, it currently has twenty-one member economies, covering a population of around 2.5 billion. Annual trade of the APEC economies accounts for 47% of the world total.

The term "member economy" is used to avoid the political connotations that arise from the sovereignty of States. By allowing economies, rather than States, to join, APEC is able to focus on its economic goals. In line with the APEC goal of consensual decision-making based on open dialogue, the admission of new members requires the consensus of all existing members. There are in addition three observers: the Association of Southeast Asian Nations (ASEAN) Secretariat; the Pacific Economic Cooperation Council (PECC); and the Pacific Islands Forum Secretariat (PIF).

Leaders of the economies meet annually. As noted earlier, at the 1994 Leaders' Meeting in Bogor, member economies committed themselves to achieving free and open trade and investment in the Asia-Pacific region, by 2010 for developed economies and by 2020 for developing economies (the "Bogor Goals"). APEC has identified three areas central to achievement of the Bogor Goals: trade and investment liberalisation; business facilitation; and economic and technical cooperation. As part of this process, several different working

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[72] See the APEC website, online: <www.apecsec.org.sg/> (date accessed: 29 June 2003).

groups were established and one of these, the Transportation Working Group (TWG), focused on transportation.

## 2. *The Eight Options*

In 1995 the APEC Transportation Minister's meeting directed the establishment of an Air Services Group (ASG), in order to give further impetus to the examination of competitive air services in the Asia-Pacific. The ASG identified "Eight Options" for further reform in the field of air transport regulation. These Eight Options dealt with the following areas: ownership and control; tariffs; doing business matters; airfreight; multiple designation; charter services; airlines' cooperative arrangements; and market access. For each of the Options a recommendation was made, and each Option was placed in one of three categories of priority: low, medium or high. At the Second APEC Transportation Minister's Meeting in June 1997, the Eight Options were endorsed and Member Economies asked to report on implementation through the Transportation Working Group (TWG).

For ownership and control, which was a medium priority, the ASG noted that most economies required substantial ownership and effective control of national airlines and also included such requirements in their ASAs. The ASG recommended that economies relax their requirements in this area, and suggested use of the model proposed by ICAO in 1997.[73] Multiple airline designation in bilaterals was seen as a high priority item, as was language facilitating airline cooperative arrangements, such as codesharing (both third-

[73] See *supra* at note 62.

party and domestic),[74] joint operations and other forms of joint marketing arrangements.

The ASG recommended that economies move to increase market access on a progressive basis, while ensuring fair and equitable opportunity for economies involved. This was a medium priority issue. The removal or progressive easing of tariff regulations was a medium priority, the ASG recommending either a double disapproval regime[75] or the removal of all formal requirements for filing of tariffs.

The heading "doing business matters" refers to issues such as the remittance of foreign currency by airlines, the establishment of sales offices and the placement of airline staff in foreign countries, ground handling arrangements and the payment of duties and taxes on fuel, spare parts and other aircraft supply. The ASG recommended removal of impediments on such activities as a high priority, with the ICAO model clauses as guidance. For air freight, in view of its importance in the development of trade in the broader APEC region, the ASG recommended progressive removal of restrictions. One

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[74] Third-party codeshare permits an airline of State A to enter into codeshare arrangements with an airline of a third State when offering services to State B. This is distinguishable from bilateral or second party codeshare, which would permit for an airline of State A codeshare arrangements only with airlines of State B. Third-party codeshare thus allows for more choice in a marketing partnership, since the airline of State B may not be in the same marketing alliance as that of State A, or it may have substantially inferior offerings in terms of product than the airline of State A or its preferred partner.

Domestic codeshare permits an airline of State A to offer connecting services to domestic points in State B, which is usually done by way of a domestic airline in State B. This is an advantage because often an ASA will permit an airline of State A to operate only to certain points in State B ('gateway' points), thus precluding it from offering online services to all residents of State B, namely those in points other than the 'gateway' points. If State B's airline operates to those points as well as operating to State A, this clearly puts the airline of State B at a marketing advantage.

[75] A double disapproval regime requires airlines to file their proposed tariffs to the relevant aeronautical authorities in the country of origin and country of destination. Only if both authorities disapprove of the proposed tariffs are they not permitted. Otherwise the tariffs may be used.

method of achieving this was through the use of additional flexibility and capacity in ASAs for all-cargo services.[76]

During the process of discussion on the Eight Options, there developed a distinct dichotomy between certain member economies. The difference related to the speed and manner of implementation of the proposals, with a small group of like-minded economies being prepared for faster reform. This group consisted of New Zealand, Singapore, Brunei Darussalam, Chile and the United States. They were spurred on by a Declaration from the Auckland Leaders' Meeting in 1999, in which the Leaders had stated that they:[77]

> [S]upport implementation of the eight steps for more competitive air services, and the identification of further steps to liberalise air services in accordance with the Bogor Goals. Tourism and air services have a large contribution to make to development and community in the region.

The "further steps" that the like-minded economies had in mind was unveiled at the 17th meeting of the TWG in Singapore in March 2000. Included in a "think piece" on the Eight Options and further steps to liberalise air services, was the suggestion that any two or more member economies could initiate cooperative arrangements between themselves, so as to accelerate the liberalisation of air services in the APEC region.[78] The think-piece argued that the inherent

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[76] Many ASAs do in fact include separate capacity and routing rights for all-cargo services, often (though not always) with fewer restrictions on traffic rights. This recognises the fact that in many cases the airlines of some States do not offer adequate, if any, cargo capacity. Cargo capacity is especially important to developing States. For example, India offers, on a unilateral basis, unrestricted access for all-cargo services over and above anything included in its (otherwise restrictive) ASAs. This policy reflects the aim of the Indian Government to encourage its export industry, which Indian carriers cannot themselves service. At the same time India maintains protection over the passenger market for its own carriers.

[77] *The Auckland Challenge: APEC Economic Leaders' Declaration* (Auckland, New Zealand, 13 September 1999), online: <www.apecsec.org.sg/> (date accessed: 29 June 2003).

[78] *APEC Air Services Think Piece: Implementation of the Eight Air Services Group Recommendations, and Further Steps to Liberalise Air Services* (17th Transportation Working Group, Singapore, March 2000), online: <www.apecsec.org.sg/> (date accessed: 29 June 2003).

limitations of the bilateral model would make it increasingly difficult to accommodate the needs of air transport in the 21st century. Airline alliances and networks were already multilateral or global in nature. Bilateral negotiations were time-consuming and inefficient, and did not offer the maximum return. Economies might be more willing to offer improved market access and other concessions in a multilateral setting, because this would maximise the reciprocal opportunities over a bilateral arrangement.

The think-piece included the New Zealand - Singapore ASA, which was similar to agreements New Zealand had concluded with four other APEC economies. There was also a draft plurilateral, based on the US open skies ASA signed with eight member economies. The draft plurilateral demonstrated how certain clauses from a bilateral needed to be adopted in order to make them work in a multilateral agreement. The New Zealand - Singapore ASA was included to demonstrate the then-limits of a liberal agreement since, as mentioned earlier, the US had not at that time moved from the substantial ownership and effective control method of designation. There were clauses dealing with cooperative airline arrangements and tariffs in the New Zealand - Singapore agreement that were also more liberal than in the comparable US model.

A series of negotiations were subsequently held in Kona, Hawaii, during 2000 in order to reach agreement on the form of the multilateral. Australia and Japan attended the negotiations but neither acceded to the final agreement. The resulting document, the "Multilateral Agreement on the Liberalization of International Air Transportation" was concluded in November 2000 and signed by the five like-minded economies of New Zealand, Singapore, Brunei Darussalam, Chile and the United States at Washington, D.C., on 1 May 2001.

## B. The APEC Multilateral Text

This agreement, billed as the first multilateral open skies agreement, is an amalgam based on previous bilateral open skies agreements, with changes necessary to accommodate the plurilateral nature of the document. There are nonetheless some innovations. The most significant parts of the Agreement deal with designation, tariffs and market access. There is also a Protocol to the Agreement, which allows Parties to further liberalise their relations. Finally, the sections of the Agreement dealing with accession deserve some attention.

### *1. Designation*

#### a. Ownership and Control

The ownership and control provision provides that on receipt of a designation of an airline from another Party, each Party shall grant authorization and permission, provided that:[79]

> *a. effective control of that airline is vested in the designating Party, its nationals, or both;*
> *b. the airline is incorporated in and has its principal place of business in the territory of the Party designating the airline;...*

The clause permits airlines to be designated so long as they have their principal place of business and incorporation in the territory of one of the Parties to the Agreement. The ownership of the airline no longer needs to be vested in nationals of the designating Party. This language was taken from the New Zealand-Singapore ASA. It represents a significant advance, especially since the US is a Party to the APEC Multilateral. This is the first agreement in which the US has accepted such a designation criteria. There is however a requirement that effective control be vested in nationals of the designating Party. The

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[79] *Supra* at note 5, Article 3(2).

inclusion of this clause has given rise to some criticism of the APEC Multilateral. This will be dealt with in the subsequent discussion.

b. The "Flags of Convenience" Provision

There is an additional element to designation criteria. Article 3(3) states that:

> 3. *Notwithstanding paragraph 2, a Party need not grant authorizations and permissions to an airline designated by another Party if the Party receiving the designation determines that substantial ownership is vested in its nationals.*

What is the purpose of this particular clause, not found in other agreements? It is designed to prevent the problem of "flags of convenience". This is a term that refers to the ability, in maritime law, for a ship-owner to register a vessel in any State, regardless of the ship-owners' own nationality. Owners with an eye on the bottom line might therefore register a ship in a State that has less onerous restrictions on such matters as certification and labour. Aviation law has always sought to avoid this possibility, though not only for safety reasons.

This clause was placed in the text to safeguard the interests of one Party to the agreement, so that equity from that Party's nationals would not be used to control an airline from a second Party; which second-Party airline then is used to operate on routes from that second-Party's territory to the first Party in question, in competition with the airlines domiciled in that first Party. To be more specific, the concern in this scenario is that US equity, faced with certain labour-based restrictions at home, might instead fund an airline in one of the other APEC Multilateral States (*e.g.* New Zealand). That New Zealand-domiciled but US-funded airline might then compete with US-domiciled airlines on routes between that New Zealand and the US, enjoying an advantage

because of lower labour costs in New Zealand.[80] This has long been a concern of organised US aviation (and other sector) labour groups, which have a significant influence amongst policy-makers in Washington. The clause was included in the APEC Multilateral, according to John Byerly, (Department of State Senior Advisor for Transportation Affairs) to "get a 100 per cent buy-in" from US labour groups such as the Air Line Pilots Association (ALPA).[81]

### 2. *Tariffs*

The APEC Multilateral removes the requirement for the filing and approval of tariffs. In the past, clauses dealing with what fares might be charged by the airlines could run into several pages. For example, the US - Canada agreement has seven clauses on the subject. The clause in the APEC Multilateral is worth reproducing in full to illustrate the difference:

*Article 12*

*Pricing*

*Prices for international air transportation operated pursuant to this Agreement shall not be subject to the approval of any Party, nor may they be required to be filed with any Party, provided that a Party may require that they be filed for informational purposes for so long as the laws of that Party continue to so require.*

There is little more that can be done to liberalise this aspect of ASAs.

### 3. *Market Access*

The APEC Multilateral is an open skies agreement and thus removes many restrictions on the operation of airlines. Two points are worth noting in

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80 *Supra* at note 43 at 246.

81 Quoted in A. Schofield, "U.S. Hopes Transition Option Will Boost Appeal Of New Multilateral" *World Airline News* 11:21 (25 May 2001).

particular: the provisions on commercial opportunities; and the traffic and route rights.

a. Commercial Opportunities

As the Agreement was modelled on both the US open skies agreements and the New Zealand-Singapore ASA, there was a basis for codeshare language to be included. Both those agreements are liberal, in that they permit "cooperative marketing arrangements". This term includes but is not restricted to codeshare; it can also include blocked-space[82] or leasing[83] arrangements. Such arrangements are generally permitted with both airlines of the other Party to the agreement, as well as third parties. Previous US-based open skies agreements had, however, included a requirement that arrangements with third parties would only be permitted:[84]

> *[P]rovided that such third country authorizes or allows comparable arrangements between the airlines of the other Party and other airlines on services to, from and via such third country;*

The effect of this clause is as follows. If *e.g.* NZ wanted to enter into a codeshare arrangement with Thai Airways (TG) on routes operated by TG between Thailand and the US, it would not be permitted to do so by the US authorities, unless and until Thailand and the US concluded an agreement that permitted US airlines to enter into similar codeshare arrangements with third party airlines between Thailand and the US. As may be seen, this is a form of trade

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82 An arrangement whereby an airline (the "operating airlines") blocks a certain number of seats on its aircraft for sale by another airline (the "marketing carrier"). The seats are often at a set price allowing the marketing carrier to make a profit on the transaction; alternatively the two carriers may pool the revenue, the advantage arising from the increased sales channels of the two carriers.

83 Leasing of aircraft between airlines (as opposed to between an aircraft lessor and an airline) is often done on a short-term basis, to cover peaks and troughs in demand. A European carrier, for example, may lease surplus aircraft during northern winter to a South Pacific-based airline, where it is of course summer and demand is higher.

84 See *e.g.* Article 8(7)(b) of the *Air Transport Agreement Between the Government of the United States of America and the Government of New Zealand*, 18 June 1999.

restriction, since whether or not Thailand and the US enter into such an agreement cannot be influenced in any way by New Zealand.

This provision has been removed from the APEC Multilateral, so that airlines from the Parties may enter into cooperative arrangements with any airlines, whether or not the State involved has reciprocal arrangements with the other APEC Multilateral Parties. In addition, airlines of the Parties may enter into such arrangements with surface transportation providers. This would allow an airline *e.g.* to sell to a passenger a ticket that included a segment on a railway service in a destination State. The ticket would include the rail segment, with an airline-like code for the rail trip, and would include through baggage-check. For the passenger, such an arrangement would be no different than connecting with a regional or commuter jet flight after an international flight. Such practices are already in place in Germany and France, but as yet only the respective airlines, Lufthansa (LH) and Air France (AF), are able to offer these services, since those airlines do not need bilateral permission to sell such services.

The clause on commercial opportunities is therefore a small but commercially significant improvement over the situation that existed prior to the signing of the APEC Multilateral. It allows airlines from the Parties to operate in a more flexible manner, and provides them with an advantage over airlines from States that are not Parties, especially with respect to services to the US.

b. Traffic Rights and Routes

In the APEC Multilateral, the provisions dealing with traffic and route rights are dealt with in the body of the agreement, rather than in an annex. The

reason for this is likely to be transparency. There is a requirement in Article 83 of the Chicago Convention for arrangements made between States to be forthwith registered with the Council. In conventional ASAs it has become the custom for route rights to be included in an annex, while traffic rights on those routes are often dealt with in an entirely separate document, such as an MOU. The use of an annex permits easier amendment. The MOU is usually agreed between the "aeronautical authorities" of the respective States, rather than the States themselves. This sophistry permits the two States to avoid "agreeing" and thus allows the MOU to remain confidential. Since the MOU contains commercially sensitive material, the airlines are generally happy with the arrangement. The APEC Multilateral, however, has no MOU. Since the Parties are keen to encourage other States (whether or not they are member economies of APEC) to join, there is no benefit in keeping parts of the agreement confidential.

In addition to the first and second freedoms, airlines of the Parties are granted:[85]

> *[T]he right, in accordance with the terms of their designations, to perform schedule and charter international air transportation between points on the following route:*
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> *i. from points behind the territory of the Party designating the airline via the territory of that Party and intermediate points to any point or points in the territory of the Party granting the right and beyond;*
>
> *ii. for all-cargo service or services, between the territory of the Party granting the right and any point to points;...*

The grant of rights is notable for several reasons. First, it explicitly recognises the use of "sixth freedom" traffic, which is traffic collected from points behind an airline's home territory and carried via that territory to a third country. Since

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85 *Supra* at note 5, Article 2(1)(c).

the membership of APEC includes several small economies, it is important that this right is recognised. All carriers, but particularly those from Singapore, Hong Kong, Taiwan, Brunei and even New Zealand engage in sixth freedom traffic to a greater or lesser extent.

Full fifth freedom rights are also granted to all airlines. There is no distinction made between intermediate and beyond fifth freedom rights. In the context of the Asia-Pacific, intermediate fifth freedom rights are as important, if not more so, than the beyond fifth freedom rights, even though it is often the exercise of the latter that has caused friction between airlines and their respective States. This is because of the vast distances involved in operating across the Pacific. SQ, for example, relies on intermediate fifth freedom rights in order to be able to serve points in the US and Canada.[86]

Also noteworthy is the grant of seventh freedom rights to all-cargo services. The US in particular has granted such rights to only a few partners, one of them being Germany. Again, such rights are commercially important in the Asia-Pacific context, since cargo does not always travel on routes to and from one pair of States. Large US freight airlines such as FedEx and UPS operate important hub centres in the Asia-Pacific region, and the ability to base aircraft in such points and operate without the need to return to the US is extremely valuable. Similarly, for an airline such as Singapore Airlines Cargo (a wholly-owned subsidiary of SQ operating a fleet of cargo-only freighters) a network of fifth and seventh freedom rights allows an efficient routing across the Pacific to the US and back, uplifting and discharging cargo at several points without the need to return at each stage to Singapore.

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[86] It is Canada's reluctance to grant intermediate fifth freedom rights to Singapore that prevents the two sides from concluding an ASA. The intermediate fifth freedom rights sought for SQ are at points where Air Canada (AC) exercises third and fourth freedom rights. AC is not willing to permit competition from SQ at these points.

## 4. *The Protocol to the APEC Multilateral*

During discussion of the main agreement, some of the Parties to the APEC Multilateral indicated that they would be prepared to grant additional traffic rights. The particular rights under discussion were seventh freedom and cabotage for passenger services. These rights are not usually granted, however some Parties wished to create additional opportunities for the airlines covered by the Agreement. It may also have been felt that such an exchange of rights would set a precedent for future negotiations and also encourage other States to accede to the APEC Multilateral.

In order to accommodate the wishes of those Parties, a Protocol was concluded along with the main Agreement.[87] One part of the Protocol deals with seventh freedom for passenger services and a second deals with cabotage. The Protocol is entirely optional and Parties to the main Agreement need not sign it at all. If it chooses to do so, a Party may grant both seventh freedom for passenger services and cabotage, or it may grant seventh freedom for passenger services without agreeing to cabotage. At present only New Zealand, Singapore and Brunei Darussalam have signed the Protocol. All three Parties have exchanged both sets of rights.

As may be seen, the Protocol is of little practical use, since there is no cabotage traffic within Singapore or Brunei Darussalam. The US is not presently prepared to grant either seventh freedom for passenger services or cabotage. It would face strong opposition from US labour groups if it were to do so. At present, then, the Protocol is mainly of value for its illustration of how far Parties can progress in liberalisation.

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87 *Supra* at note 60.

## 5. *Accession and the problem of Taiwan*

The provisions of the Agreement dealing with accession are somewhat more involved than would be the case for a simple bilateral agreement. While this is not unexpected, there is an additional element of complication relating to the fact that the Agreement, at least initially, is aimed at APEC partners. As noted earlier, APEC is not comprised of member States, but member economies. This nomenclature is designed to avoid certain political sensitivities, the most obvious being the fact that both China and "Chinese Taipei" (as Taiwan is referred to) are members.

Normally, international organisations must choose between China and Taiwan. Although Taiwan has two strong airlines, its aeropolitical relations are difficult. It is usual for ASAs to be between States, reflecting the principle (noted earlier) that, under the Chicago Convention, States have sovereignty over their airspace. In the case of Taiwan, however, the issue of whether or not it is a "State" in international law is not fully resolved. This would appear to preclude an ASA in the conventional sense. The solution has been for agreements to be concluded between the aeronautical authorities of Taiwan and similar organisations in other countries.[88] In virtually all respects these agreements mirror a usual ASA, but they avoid direct State-to-State relations that would be diplomatically awkward.

The APEC Multilateral has however made provision for the accession of economies as well as States to the same agreement. The main provision dealing with accession is in Article 20. That initially establishes that the APEC

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[88] For example, the arrangement between Singapore and Taiwan is the *Agreement on Exchange of Traffic Rights between the Department of Civil Aviation of the Republic of Singapore and the Civil Aeronautics Administration of the Republic of China*, 17 June 1988. The US arrangement eschews even that level of direct relationship between government departments, relying on cultural organisations instead. See the *Air Transport Arrangement Between the Taipei Cultural and Economic Representative Office and the American Institute in Taiwan*, 18 March 1988.

Multilateral is an agreement between the five founding members, namely the US, Chile, New Zealand, Brunei Darussalam and Singapore. The Agreement is open for signature by these States, and comes into effect once four have so signed. In fact, all five States signed in one ceremony in May 2001.

Article 20(4) then provides:

> *After this Agreement has entered into force in accordance with paragraph 2 of this Article, any State which is a party to the aviation security conventions listed in Article 7, paragraph 1 may accede to this Agreement by deposit of an instrument of accession with the Depositary.*

It should be noted that the term "State" is used in this article, which would appear to preclude the accession of Taiwan. There is also the issue of whether Taiwan is a Party to the named conventions, though it has clearly indicated its intention to be bound.[89]

To overcome this difficulty, the Annex provides a mechanism by which APEC member economies may accede to the Agreement. The Appendix to the Agreement lists all APEC member economies. Provided an economy is on this list (as Taiwan is) it may accede, subject to two criteria: 1) it is unable to accede under the terms of Article 20; and 2) it agrees to be bound by the security conventions in Article 7, or such conventions otherwise apply to it. An APEC

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89 The conventions referred to in Article 7 are the *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, 14 September 1963, ICAO Doc. 8364 [*Tokyo Convention*]; the *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, ICAO Doc. 8920 [*Hague Convention 1970*], the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, ICAO Doc. 8966 [*Montreal Convention 1971*], and the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Done at Montreal on 23 September 1971*, 24 February 1988, ICAO Doc. 9518 [*Montreal Protocol 1988*]. China is a signatory to all three conventions. It has made statements at the time of signing purporting to nullify any signature by Taiwan, such as the declaration to the Tokyo Convention: "The Chinese Government declares illegal and null and void the signature and ratification by the Chiang clique usurping the name of China in regard to the above-mentioned Convention." The language has been toned down for subsequent conventions, but the effect remains the same.

member economy that accedes to the Agreement in this manner has all the rights and obligations provided for Parties under the APEC Multilateral. Therefore Taiwan would be able to accede to the APEC Multilateral.

This illustration of the political sensitivities underlying ASAs also indicates a potential avenue for future progress. There is a growing movement towards the establishment of regional trading groups. Amongst the members of these blocs, air services along with other industries are candidates for liberalisation. There is no reason why liberalisation needs to be delayed simply by the fact that there are political differences. Allowance can be made for the accession of recognised economies, as was done in the APEC Multilateral. It would be an interesting next step for the Parties to the APEC Multilateral to consider amending the Appendix, to permit the accession of other regional economic groups, such as the EU or NAFTA. In the next section, we will turn to consider some other avenues for improving upon the Agreement.

## C. Criticisms of the APEC Multilateral

Despite having made what may appear to be a significant step towards liberalisation of aviation in the Asia-Pacific region, the APEC Multilateral partners were in fact subject to criticism and obstruction from various quarters, even before the document was signed. The criticisms may be considered in two categories. One of the main arguments was that the document did not go far enough in liberalising foreign ownership and control provisions. Because of this, some States did not see any value in signing. Another criticism was that there was little of value in the Agreement because there was no community of interest amongst the Parties.

## 1. *Ownership and Control*

It is true that the requirement for effective control means that the APEC Multilateral does not go as far as to permit complete multinational ownership of airlines, although it does certainly permit some multinational investment. This is to some extent unfortunate. John Byerly (Department of State) admitted that the Agreement should have moved further in liberalising ownership and control. Another of the key architects of the APEC Multilateral, Allan Mendelsohn, has expressed disappointment at the manner in which the designation clause is worded.

In a recent article on the topic, Mendelsohn refers first to the discussion on ownership and control that took place during the negotiations. He says that the aim at the time was to open up the potential for multinational ownership of airlines, to allow ownership of any signatory State's airline by citizens of any signatory State. It was, he says:[90]

> [T]he firm intent of the contracting parties to allow contracting states, should they wish to do so, to abandon the historic national ownership requirement and to allow, even encourage, multinational investment in airlines combined with formalized multinational ownership.

The "principal place of business" provision does achieve this, because *prima facie* it permits capital to be sourced globally and not just from nationals, as the "substantial ownership" model requires. In the context of the APEC Multilateral, it permits an airline of any Party to be owned by nationals from any of the Parties. Unfortunately, however, the "effective control" requirement somewhat dampens the liberalising effect of the clause.

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[90] A. Mendelsohn, "The United States, the European Union and the Ownership and Control of Airlines" in *Issues in Aviation Law and Policy* (2003: CCH Incorporated) ¶25,151.

Mendelsohn admits as much, saying that effective control by nationals "is a limitation on multinational ownership".[91] In fact, he concedes that it is likely that the clause was in fact *intended* as something of a limitation on multilateral ownership, but argues that it was not the US that sought to have effective control included; quite the contrary:[92]

> As Chairman of the U.S. Delegation to the APEC negotiations, I can frankly say that the insertion of the clause was a disappointment to many on the U.S. side, as there was always some hope that the APEC agreement could have avoided the issue of national ownership entirely.

How much weight can be given this statement is open to question. After all, Mendelsohn goes on to say that the US for various reasons did not deem it necessary to change *its own* rules on ownership and control of US carriers, despite the provisions in the APEC Multilateral that encouraged relaxation of ownership rules. Further, he notes that the clause as it stands would be very useful to the US in two situations. The first is where "a major owner of an airline designated by an APEC partner is from a state that the U.S. deems to be a rogue or otherwise unacceptable state", while the second is the case of an "airline designated by an APEC partner but owned directly or indirectly by an airline from a state with which the U.S. does not have an open skies agreement."[93]

Others have pointed to a difference in views within the US delegation, with DOT taking a far less liberal view from the start of the negotiations.[94] Indeed

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91 Mendelsohn, *supra* at note 44 at 21.

92 *Supra* at note 90.

93 *Ibid.* The trouble is that no-one knows what State falls into either category at any particular time.

94 J. Feldman, "Drip, drip, drip" *Air Transport World* (1 March 2001) 42 at 43.

the DOT was almost successful in torpedoing the APEC Multilateral before its signature. Basing its position on Article 3(3) (the "flags of convenience" provision) DOT issued an Order[95] proposing to modify the foreign air carrier permits of the airlines from the other Parties to the APEC Multilateral (specifically, LAN Chile; NZ; Ansett New Zealand; SQ; and Royal Brunei). The change would have required these airlines to notify DOT, at least thirty days *in advance*, of any proposed change in excess of 5% of their voting stock. The rationale was that the DOT had no means by which to ascertain the degree of US ownership of these airlines.

The vigorous opposition of not only the airlines concerned and their respective governments, but also US carriers such as UPS,[96] convinced the DOT to amend the Order. The reporting requirement is now only triggered when US investment reaches either 20% or 40% of voting equity. In addition, the report may be made up to thirty days *after* the changes become known to the airline.

Stanley Kuppusamy, Vice President International Relations for SQ, was involved in the negotiations from the start. He observed that there was a distinct split in the US delegation, with DOT being reluctant to remove the substantial control provision, primarily due to pressure from ALPA. He concedes, however, that the US was non-committal about effective control and that it was New Zealand that insisted it be included.[97] In the end, the State Department was able to overrule DOT on substantial ownership, but with the "flags of convenience" language as the *quid pro quo*. As several authors have

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95 In re *Foreign air carrier permits*, DOT Docket No. OST-2000-8393-1 (24 November 2000).

96 UPS filed a Motion in support of the objections of the carriers, stating that the DOT action could jeopardise the Agreement. It supported the Agreement since it offered the prospect of seventh freedom rights in the Pacific, which as mentioned earlier is of significant commercial importance for all-cargo operators.

97 Private communication with the author.

noted,[98] the clause preventing "flags of convenience" was certainly included to deal with US labour concerns. While Mendelsohn personally was probably disappointed, one is left with the impression that the US DOT, at least, was not unhappy to see the "effective control" requirement included.

Be all that as it may, Mendelsohn does advocate a change in the APEC Multilateral to more explicitly permit multinational ownership of airlines. He argues that the US is likely to view "effective control" as meaning "effective regulatory control", provided that the Party designating the airline, or the nationals constituting the ownership, are from States with which the US has an open skies agreement. There is a precedent for this in the "Cargo Lion" case, discussed earlier.[99]

Disagreeing with that interpretation, however, is another recent article, prepared for the ICAO Air Transport Seminar prior to the 2003 ICAO World Air Transport Conference 5 (WATC). In it the authors argue that the effective control requirement in the APEC Multilateral is more likely to give rise to a corporate governance test, like the one applied by the US DOT in respect of US airlines.[100] They refer to an earlier article, which examined the US response to attempts by foreign airlines to take controlling stakes in NW and USAir (US) during the early 1990s.[101] As briefly discussed earlier, the attempt by KL to take a stake in NW was initially unsuccessful, since the DOT considered that a 56.74% ownership by KL of the equity of NW posed citizenship problems, especially when KL was also permitted to organise a three-member financial

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98 *E.g.*, Feldman, *supra* at note 94; Wassenbergh, *supra* at note 43.

99 See *supra* at note 44 and accompanying text.

100 R. Janda and J. Wilson, "Has Europe Kickstarted the Global Liberalization of Airline Ownership and Control?" in *Aviation Strategies: Challenges & Opportunities of Liberalization* 46 at 47, CD-ROM: World Market Series Business Briefing *Aviation Strategies: Challenges & Opportunities of Liberalization.* (World Markets Research Centre Ltd, March 2003). The full version of the article, including footnotes, is available on the CD-ROM.

101 See Arlington, *supra* at note 17 and accompanying text.

committee to advise NW on financial matters. The KL interest was subsequently reorganised to eliminate such obvious control of NW.

Of particular importance to the final approval of the deal was the fact that the US and the Netherlands had a liberal aviation relationship.[102] On the other hand, BA's attempt to take a stake in US failed, at least in part because of the absence of an open skies agreement between the UK and US. These two examples show that when dealing with control of US airlines, the DOT will look more favourably at the effective control criteria where there is a liberal aviation relationship with the State concerned.

In terms of the likely interpretation by the US of the effective control provision in the APEC Multilateral, Mendelsohn's view is probably therefore correct. There is little benefit to the US to be dogmatic about which of its aviation partners control which airline, provided that US airlines are not adversely affected. Where there is an open skies agreement in place, it seems likely that the US will adopt a liberal approach to the ownership of foreign airlines. This is the point Shane made in his response to the ECJ decision; that "the U.S. from time to time has waived its objections under such clauses in the interests of ensuring fuller participation in the aviation market by certain trading partners and to encourage competition."[103]

Nonetheless, the fact that there is some debate over this issue means that there is uncertainty. For an airline from one of the Parties to the APEC Multilateral, this uncertainty could adversely affect whether or not it seeks to invest in another airline. A solution to this problem is to more clearly define the effective control provisions in the APEC Multilateral. The best outcome, in

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102 Arlington, *ibid.*, at 158.

103 Shane, *supra* at note 41 at 6.

terms of overall global liberalisation, would be one which permits airlines to be owned by nationals of any Party to the APEC Multilateral, provided that there is a guarantee to the other Parties that safety and security issues were controlled by one of their co-signatories. This is the "effective regulatory control" requirement, which has been proposed by several writers and organisations.

The Organisation for Economic Co-operation and Development (OECD) has developed a form of "effective regulatory control" in its proposed "Multilateral Agreement for the Liberalisation of Air Cargo Services".[104] All-cargo airlines would be designated on the basis that they are incorporated and have their principal place of business in the designating country, as well as having an Air Operator Certificate (AOC) issued by the designating Contracting Party. This formulation would "be preferable from the viewpoint of cross-border investment and operational flexibility for the industry".[105] The OECD proposal also includes a clause that was designed to meet both the "flags of convenience" problem and the associated "free rider" problem.

The "free rider" problem is a constant concern in discussions about liberalisation. It is often put forward by certain States as a reason why they will not adopt a liberal agreement, though in reality protectionism is more likely to be the true explanation. Be that as it may, the issue does vex those seeking progress in the regulation of air transport. The "free rider" problem is as follows. Consider a "Hypothetical Liberal Agreement" (HLA), one that does not require either substantial ownership or effective control for the designation of airlines. States A and B are Parties to the HLA and *e.g.*, State A, designates an airline. That airline, however, is actually entirely owned by an airline of State C. State C is not a Party to the HLA, nor does it have an equally liberal agreement

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104 "Liberalisation of Air Cargo Transport", Directorate for Science, Technology and Industry, Division of Transport, OECD (2 May 2002), online: <www.oecd.org> (date accessed: 29 June 2003).

105 *Ibid.* at 66.

with either State A or B. Its airline, however, can benefit from the HLA, without giving anything in return. This is because its nationals can own an airline designated under the HLA, since neither substantial ownership nor effective control by nationals of States A or B are required. Thus the airline of State C is a "free rider" on the HLA.

In order to combat this problem, the OECD proposed to include a clause permitting a Contracting Party that receives a designation to refuse or limit it, where the designated carrier:[106]

> 4) Is effectively controlled by either:
>
> a) An airline of such Contracting Party or by nationals of such Contracting Party who directly or indirectly control one of its airlines, or
>
> b) A third country, or by nationals of a third country, which is not a Contracting Party to this Agreement and whose air services arrangements with the receiving Contracting Party are more restrictive in terms of international air cargo transportation rights and privileges than those provided under this Agreement.

The OECD model multilateral thus allows for multinational ownership, by removing restrictions on nationality found in substantial ownership and effective control clauses. At the same time it offers safeguards to its Contracting Parties by guarding against "flags of convenience" and "free riders".

Another, simpler, proposal surfaced most recently at the WATC. This was a proposal by the Air Transport Regulation Panel for a new draft model clause on designation and authorisation, to be included in the ICAO Template Air Services Agreement. The main concerns of the Panel were to deter the potential emergence of "flags of convenience" and to deal with the potential deterioration of safety and security standards.[107]

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106 *Ibid.* at 67.

107 ICAO, AT Conf/5-WP/7.

The WATC endorsed the following model clause, which provides that a Party receiving a designation:

> [S]hall 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;

The proposed clause includes criteria for defining the terms "principal place of business" and "effective regulatory control". Principal place of business is predicated on an airline being established and incorporated in a territory. It should have a substantial amount of attachment to that territory by way of operations, infrastructure and capital; it should pay tax, register its aircraft and employ a significant number of personnel there. This is another way of dealing with the "free rider" problem. Effective regulatory control would require that the airline hold a valid AOC and meet other licensing criteria of that territory for international air services. The designating Party should meet ICAO safety and security standards.

## D. Assessment of the APEC Multilateral

Had a clause such as either the OECD or the ICAO proposals been included in the APEC Multilateral, then that Agreement may well have received more support than has been the case to date. Only two additional States have acceded to the Agreement, Peru in May 2002 and Samoa in November 2002. Does this mean the APEC Multilateral is a failure? This writer thinks not, for several reasons.

First, the APEC Multilateral shows what is possible in terms of liberalisation, without pretending to be the final word. As Stanley Kuppusamy of SQ noted at the time:[108]

> The agreement by no means met expectations, especially in ownership and control, but if it went too far there would have been problems in getting other countries to join in ... as we achieve more comprehensive membership, the end result will be much better.

John Byerly (Department of State) observed that it was important "achieve what was achievable right now."[109]

A second reason is that the APEC Multilateral is a *multilateral* agreement. It is therefore a useful model in itself for other regional groupings, whether or not such groupings decide to go further in substance. Charles Hunnicut, former DOT Assistant Secretary for Aviation and International Affairs alluded to this when he said that the APEC Multilateral is the appropriate model for future plurilateral discussions.[110] There is now no need to reinvent the process.

A third and related reason is that the APEC Multilateral will avoid duplication of effort. In the past, the US has had to simultaneously negotiate a number of similar agreements with several countries in a regional group. Examples are the open skies agreements concluded with six Central American States during 1997. The APEC Multilateral now offers a framework to avoid such a waste of resources. As the US approaches other regional groupings, it can offer accession the APEC Multilateral as a quick means of reaching open skies. Samoa, for instance, was the first country to achieve open skies with the US without the need for bilateral negotiations; it simply acceded to the APEC

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108 Quoted in Schofield, *supra* at note 81.

109 *Ibid.*

110 Quoted in "APEC Multilateral Moves U.S. Toward Globalizing Pacts" *Aviation Daily* (1 May 2001) 3.

Multilateral.[111] It is also noteworthy that Samoa is not an APEC Member, thus indicating the broad appeal of this process.

As the APEC Multilateral reaches its second anniversary, it may be time for the Parties to consider an amendment to the designation clause to reflect the changes that have occurred over that time. Adopting the model clause that was agreed at the ICAO WATC would be a useful step. This is because (unlike the OECD model) that clause meets two important criteria. First, it would have the necessary practical effect of allowing greater equity flows amongst the APEC Multilateral airlines. Second and equally importantly, in the developing world ICAO has a great deal of influence as far as government regulation of aviation is concerned. The fact that ICAO debated and finally supported this proposal is of enormous significance to such States. Were the APEC Multilateral partners to incorporate this clause, there would potentially be more support from developing economies in the Asia-Pacific region, both within and outside APEC.

Yet even without such a change, the APEC Multilateral is an important development in the liberalisation of air transport and shows the leadership of the Asia-Pacific in the movement towards a more open regulatory environment. Illustrating this point, we turn now to consider what may be considered a "micro" common aviation area amongst certain Pacific Island States.

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111 "Samoa Joins APEC Multilateral, To Gain Open Skies With U.S." *Aviation Daily* (10 July 2002) 2.

# V. THE PACIFIC ISLANDS AIR SERVICES AGREEMENT

## A. The Pacific Islands Forum

The PIASA is the most recent addition to the development of air transport in the Asia-Pacific region. It was developed by the Pacific Islands Forum (Forum). The Forum is a regional intergovernmental body formed in 1971. It represents the Heads of Government of all the independent and self-governing Pacific Island countries ("Forum Island Countries", or FICs) plus Australia and New Zealand, a total membership of 16. Since its establishment, it has provided member nations with the opportunity to express their joint political views and to cooperate in areas of political and economic concern. It provides policy analysis and technical assistance on economic, trade, political and international legal affairs.

The Forum has in particular looked at the need for trade liberalisation in the region. In 1999 Forum leaders endorsed the idea of a free trade agreement and in 2001 a regional "Pacific Area Closer Economic Relations" (PACER) initiative was created. Within that framework a free trade arrangement, the "Pacific Island Countries Trade Agreement" (PICTA) was created. This came into force in April 2003, after the required sixth ratification. Members of PICTA are Cook Islands, Fiji, Nauru, Niue, Samoa and Tonga. The Agreement has a phase-in period of ten years.

Concurrent with the efforts to achieve greater trade liberalisation, in September 2001 the Ministers agreed to examine the concept of a single aviation market and consider the necessary means to implement it. The creation of a single aviation market in the Pacific was expected to help island country airlines to develop and strengthen. It would also assist in the increasing integration of economic activities in the Pacific following the implementation of the PICTA. In

October 2002 delegates meeting in Tonga agreed on a new air transport agreement, the PIASA.

According to the Secretariat, the PIASA is intended to provide a gradual and staged process for the development of FIC airlines. It aims to place the "control of change in the hands of FICs", rather than having change forced upon the airlines by external factors. Larger international airlines will be prohibited from operating within the region in order that FIC airlines may develop and establish stronger relationships with major airlines and alliances.[112]

## B. The PIASA Text

The objectives of the Agreement are set out in Article 2, rather than in a preamble. They include improving the flexibility, competitiveness and efficiency of air services in the region. A framework is to be established to gradually integrate regional air services at the same time as ensuring sustainable development by FICs. The final objective in Article 2(6) is to:

> *Establish arrangements that are intended to provide "stepping stones" to allow the Forum Island Countries gradually to become part of a single regional aviation market among all members of the Pacific Islands Forum.*

By placing these objectives in the operative part of the text, rather than in a preamble, the Parties clearly intend to place a significant emphasis on the progressive and developmental nature of the pact, towards its final goal of the creation of a single aviation market. Article 4(1) explicitly sets out that the Parties "shall gradually establish a single aviation market in accordance with this Agreement". This may be the first time that any group of nations has

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[112] ICAO, "The Pacific Islands Air Services Agreement (PIASA): Phased Development of a Single Aviation Market in the Pacific" AT Conf/5-WP/72 (Presented by the Pacific Islands Forum Secretariat) 3.

specifically pledged themselves to such an aim in an air services agreement.

The PIASA includes an Annex 1 that sets out a timetable for the progression to the single aviation market. Stage 1 takes effect six months after the coming into force of the Agreement; Stage 2, after twelve months; and Stage 3 after thirty months. This timetabling applies to designation and to the grant of rights.

### *1. Ownership and Control*

The provisions on ownership and control are important to FIC airlines. This is because of the limited access to capital funding, given the small size of the FIC economies. The requirement for substantial ownership and effective control of airlines can mean that operations become difficult and the government is the only source for support.[113]

The PIASA has two phases of transition to a common ownership and control regime. The first phase, taking effect after six months, requires an airline designated by one of the Parties to be substantially owned and effectively controlled by nationals of one or more Parties to the Agreement.[114] Where an airline ceases to be so owned or controlled, it may still be designated, provided that it is effectively controlled by nationals of one or more of the Parties to the Agreement, and has its place of residence and principal place of business in the territory of the designating Party. Finally, a Party to the Agreement that does not have an international airline operating may designate an airline that has its place of residence and principal place of business in the territory of the designating Party.[115]

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113 P. Harbison, "Island countries turn to multilateralism" (2002) 57:9 *ICAO Journal* 16 at 18.

114 Article 6(2)(a).

115 Article 6(2)(a)(iii).

These provisions make sense in an environment characterised by small island states. The first part of the Article allows ownership of an airline by nationals from more than one State, thus increasing the available pool of equity. The second part would appear to permit a situation where FIC nationals no longer hold a majority of the equity in an airline. Provided that such nationals still control the airline (*e.g.*, through the board) and it is based in a FIC, it may be designated. This clause offers great opportunity to FIC airlines to attract investment from outside the region, perhaps by way of an alliance partner.

The final part of this Article allows FICs with no international airline to designate an airline based in that territory, regardless of its ownership. Such an airline could probably not be a major airline from another FIC, because that airline would have been established (and thus have a principal place of business) in that other State. The clause would more likely apply to a situation where FIC nationals from States other than the designating Party set up an airline. That airline can be designated by the State in which it is established, even though there is no ownership or control by the nationals of that designating State.

The second phase takes effect after thirty months. At this time the PIASA permits designation by any Party (not just one without an airline) on the basis of either community ownership and control, or place of residence and principal place of business. This effectively creates a single aviation market, by permitting nationals of any FIC to own or control any of the airlines under the Agreement. As the Secretariat notes:[116]

> Making cross-ownership permissible by removing the requirement for substantial

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116 *Supra* at note 112 at 4.

> ownership and effective control in any single Forum Island country also opens up the potential for rationalisation of airline ownership...

The ownership and control provisions work along with the other main feature of the PIASA, the phasing-in of increased market access.

## 2. *Market access*

As noted above, the PIASA adopts a three-stage process for the implementation of a single aviation market, which is set out in Annex 1 to the Agreement. Six months after the Agreement enters force, Stage 1 permits full third, fourth and sixth freedom rights between the Parties. Full fifth freedom rights between the Parties are granted to airlines designated by Parties without their own airline,[117] and to all-cargo airlines of the Parties.

Where a Party already has the right for its airline to carry traffic to another Party from an intermediate point which is also a Party (*i.e.* intermediate fifth freedom rights); or where its airline has the right to carry traffic from another Party to a third Party or another State (*i.e.* beyond fifth freedom rights), it may continue to do so. The Agreement refers to such traffic as "local" fifth freedom traffic. It distinguishes such traffic from traffic that originates in States not party to the Agreement. Clause 4 states:

> 4. *The designated airlines of any Party may exercise such 5th freedom rights, where they do not already exist, for the carriage of passengers whose journey originates in the territory of a State that is not a Party to this Agreement.*

It is not altogether clear what the phrase "such 5th freedom rights" refers to, but what seems to be granted in this clause is the right to carry fifth freedom traffic,

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117 See *supra* at note 115 and accompanying text.

as long as it originates from a State that is not a FIC. The reason for the distinction may be to provide some protection to existing intra-FIC fifth freedom traffic during the phase-in period.

For example, an airline from Tonga would not, under this Clause, be permitted to carry traffic from Nadi (Fiji) to Avarua (Cook Islands); nor could it carry Nadi - AKL traffic, unless in both cases such rights were pre-existing. It would, however, be permitted to carry traffic from Auckland to Nadi and *vice versa* (on a routing Tonga (TBU) - Fiji (NAN) - AKL *vv*) because such traffic originates outside the FIC. Presumably, traffic from outside the FIC is seen as benefiting the region as a whole. Both an airline from Tonga and one from Fiji can compete to carry Auckland-originating traffic, although under a traditional ASA, one might expect that the Tongan airline would be restricted in respect of such rights.

Stage 2 takes effect after twelve months. At this time, the internal single aviation market comes into force. Airlines may exercise third, fourth, fifth and sixth freedom rights between the territories of all Parties. Stage 2 goes on to state:

> 2. *Where a Party already has rights for its designated airlines to operate scheduled 5th freedom services between the territory of another Party to this Agreement and the territory of a State that is not a Party to this Agreement, those rights may continue to be exercised.*
>
> 3. *The designated airlines of all Parties to this Agreement may operate scheduled 5th freedom services between the territory of another Party to this Agreement and, to the extent that bilateral arrangements allow, the territory of a State that is not a Party to this Agreement for the carriage of passengers whose journey originates in any State that is not a Party to this Agreement.*

Clause 2 covers the situation where an airline of one Party has existing fifth freedom rights for the carriage of traffic between another Party and third

countries. As in Stage 1, those rights may continue to be exercised. Clause 3 then provides that all designated airlines may exercise fifth freedom rights between another Party and a third country, subject to two conditions. First, such carriage may only be of passengers whose journey originates in such a third country. Second, the relevant bilateral agreement with the third country will also be applicable.

The subtle distinction between Clauses 2 and 3 is that pre-existing fifth freedom rights would presumably cover both inward *and* outward traffic. That is, where (using the earlier example) an airline from Tonga had been granted pre-existing fifth freedom rights, it could carry traffic originating in *either* Auckland or Nadi between those two points. Where, however, the airline had not been granted such rights it may, under Clause 3, carry traffic between Auckland and Nadi *only* if the traffic originated in Auckland.

Stage 3 of the PIASA takes effect after thirty months. At this time a full single aviation market will be in place. Airlines may exercise third, fourth, fifth and sixth freedom rights between all Parties to the Agreement. In addition, and subject only to the relevant bilateral, they may exercise full fifth freedom rights between any Party and any State not a party to the PIASA.

## C. Implementing the PIASA

The PIASA is not yet signed. It will be discussed by Forum aviation ministers sometime in mid-2003. According to the Secretariat, they are expected to recommend the PIASA to their respective governments, for signing at the annual Forum Leaders' Meeting due to take place in August 2003.

Notwithstanding the enthusiasm of the Secretariat, there has been some

opposition to the PIASA from within the Pacific region. The Chairman and acting CEO of Solomon Airlines has been critical of the open skies policy being adopted by his country.[118] A paper presented to the WATC by Fiji was strongly against the proposed multilateral agreement.[119] The paper included the views of the Association of the South Pacific Airlines (ASPA) and of Air Pacific (FJ), both of whom also expressed reservations.

The ASPA has concerns about liberalising on a multilateral basis. It argues for protection against unnecessary competition on profitable routes that have been developed by Pacific Island airlines. It is especially concerned about the exploitation of fifth freedom rights. Pointing to the collapse of Australian domestic carriers such as Impulse, Flight West and Ansett in the context of the Australia - New Zealand SAM, the ASPA argues that such a fate could befall small Pacific Island carriers in the open environment proposed by the PIASA. Such carriers are "entitled to an appropriate level of protection on their main catchment routes within the region to enable them to sustain air services."[120] The ASPA criticizes the Forum Secretariat for failing to provide a convincing economic rationale for the proposed exchange of fifth freedom rights. FJ's views are in line with those of the ASPA.

The Fiji Government stated that it will accord high priority to the interest and future viability of FJ. It considers that bilateral arrangements have been and always will be the preferred option for the promotion of Fiji's interests. The Government has also followed events that have occurred in the trans-Tasman aviation market and drawn the conclusion that the bilateral system is

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118 "Solomon Airlines chief dismisses 'open skies' policy" *Radio New Zealand International* (19 March 2003).

119 ICAO, "Fiji's Position On Multilateral Air Service Agreements: Pacific Islands Air Services Agreement (PIASA)" AT Conf/5-WP/45 (Presented by Fiji).

120 *Ibid.* at 4.

appropriate for the growth and development of FJ. Accordingly, the Government "has made an explicit undertaking not to accede nor sign the new multilateral air service agreement until further review..." which it will undertake "when appropriate".[121] As recently as late May 2003, the Fiji Cabinet has approved a recommendation from its Minister for Transport and Civil Aviation not to endorse the PIASA.[122] It based its position in part on the "Declaration of Global Principles for the Liberalisation of International Air Transport" that was the result of the WATC in March 2003.[123]

Does the position adopted by Fiji reflect the views of all the FICs? If so, this would appear to pose a serious obstacle to the implementation of the PIASA. Certainly the views of the ASPA cannot be easily ignored by the Forum governments, since in most cases the airlines of the FICs have a substantial degree of government ownership. Fiji has, however, indicated that it will actively take part in discussions on the PIASA, to help States that want it to move on. Samoa, for example, has a more liberal attitude, having acceded to the APEC Multilateral. It has also recently concluded an open skies agreement with Nauru. It remains to be seen, therefore, whether the PIASA will receive sufficient acceptance by FICs to come into force. Should it do so, it will be a signal to other regional blocs that a liberal aviation agreement can be compatible with the needs of developing countries.

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121 *Ibid.* at 5.

122 "Fiji reiterates opposition to regional air services agreement" *BBC Monitoring Asia Pacific* (23 May 2003).

123 ICAO, "Consolidated Conclusions, Model Clauses, Recommendations And Declaration" AT Conf/5 (31 March 2003) at para 4.4.

## VI. FUTURE DEVELOPMENTS

In this section, we turn to consider what is in store for the Asia-Pacific region. One of the most important recent events in the development of air transport regulation is the ECJ decision in the "open skies" cases. As noted earlier, that decision casts doubt on the sustainability of the conventional national-ownership model for the designation of airlines under bilateral agreements. The Commission sees the decision as an opportunity to achieve a single ASA between the EU and the US.

While it is possible that such an agreement will eventuate, it is by no means clear. Even if it does occur, it will take a great deal of time and may not significantly alter the present ownership and control rules on a wide scale. This is because, as seen earlier, the US is not keen to alter its own rules, even while it is prepared to accept a different set of rules for its bilateral (or multilateral) partners. Thus, a single agreement, though it will be important in moving away from the bilateral model of regulation, may get the aviation world no closer to the goal of removing restrictions on foreign equity holdings. Many observers now consider this to be absolutely vital to the industry, since without it the necessary consolidation cannot occur. As *The Economist* recently observed, the most important issue for the airline industry is a lack of concentration.[124] Even (or especially) US carriers could benefit from a change to these rules, as Michael Whitaker (Vice-President International and Regulatory Affairs at United Airlines) argued in a paper presented to the recent Seminar prior to the WATC.[125]

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124 "A way out of the wilderness - The problems of the airline industry" *The Economist* (3 May 2003).

125 M. Whitaker, "Liberalized Airline Ownership and Control: Good for Consumers, Airlines and the United States" (Paper presented to the Seminar prior to the ICAO Worldwide Air Transport Conference, March 2003).

## A. Australia and New Zealand

So what does the Asia-Pacific region, and in particular the developments that have been examined in this thesis, have to offer the world? As will be clear from the material so far, two States in particular have made significant progress towards a liberal aviation regime: Australia and New Zealand. Both States have committed themselves to an ASA that permits ownership of airlines of either State by nationals of either State. They have also been prepared, without significant political interference, to accept the outcome in commercial terms of those commitments. Australia has seen the demise of several smaller airlines, as well as the acquisition by NZ of all of Ansett Australia, formerly the second airline in Australia's "two airline policy".

The subsequent collapse of Ansett, followed by the near bankruptcy and return to majority government ownership of NZ, has not seriously altered the commitment of both governments towards an open environment. Neither has the current QF proposal to take a 22.5% stake in NZ caused a rethink. While many in New Zealand are unhappy at the prospect of a QF stake in the national airlines, the New Zealand Government has remained fairly neutral as to the outcome. In particular it has not indicated any intention to modify its policy on foreign ownership of airlines.

Some commentators in fact see the continuing existence of two separate airlines as unnecessary and a hindrance to the achievement of even closer harmonisation between the two trans-Tasman economies. United's Michael Whitaker made the point in a recent address that the combined Australia - New Zealand market was only 24 million people. While the region had moved from three to two network carriers, even two network carriers for a market that size

was one too many: it was the equivalent of 24 network carriers for the US.[126]

Closer to home Peter Harbison (of the Sydney-based Centre for Asia Pacific Aviation) argues that the failure of the QF/NZ equity proposal to gain approval from the competition regulators on either side of the Tasman was really a failure of policy. Harbison suggests that the rejection by the competition watchdogs was because they are not equipped to make the decisions that are required. This means that the Australian Government in particular now needs to take an active role in creating the conditions for the entry of a major foreign airline, SQ. This airline would provide the necessary competition that would allow QF/NZ to combine much more effectively. In the past, as Harbison notes, Australia's professed liberal policy on the establishment of foreign-owned domestic airlines has been tempered by a lack of behind-the-scenes effort. Harbison argues that an explicit encouragement is necessary.[127]

These sentiments have been echoed in New Zealand. As one commentator noted, a deal on trans-Tasman aviation has been on the drawing boards for more than a decade. Political intervention is now required, rather than leaving the problem to competition regulators that have inadequate tools to craft a new aviation structure. A better step would be:[128]

> [T]o establish a regulatory model for a single Australasian aviation market - merge the two airlines into a supra-carrier with cross-shareholding - and then open the doors for other major competitors to fly against the new regional behemoth across all regional and domestic markets.

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126 M. Whitaker, "Aviation in Hard Times: Restructuring and Recovery" (Speech to the American Bar Association Forum on Air and Space Law 2003, 3 April 2003).

127 P. Harbison, "Qantas-Air New Zealand Proposal for Joint Operating Agreement Effectively Knocked on the Head" (10 April 2003), online: Centre for Asia Pacific Aviation < www.centreforaviation.com/> (date accessed: 29 June 2003).

128 F. O'Sullivan, "Just a phone call away" *New Zealand Herald* (14 April 2003), online: <www.nzherald.co.nz/> (date accessed: 29 June 2003).

Such a move would require little regulatory reform on either side of the Tasman, since, as has been discussed, both Australia and New Zealand have no limits on foreign ownership of domestic airlines. What would be required, however, would be bilateral or multilateral negotiations in order to gain acceptance by other countries of a single airline for Australia and New Zealand. As noted earlier, this was one element of the SAM that had not yet been tackled, though it was alluded to as long ago as 1992. NZ's then General Manager for Government and International Affairs, Graham McDowall, argued in 1996 that without a coherent approach to external aviation relations, there would be a loss of traffic rights from SAM airlines to the benefit of airlines of third countries:[129]

> [H]aving gone to the trouble of creating a single market, this fact should not be ignored when arrangements with third countries are being negotiated. After all, the existence of the single market owes much to the historical closeness and special relationship between Australia and New Zealand ... It therefore seems logical that when governments of [Australia or New Zealand] are negotiating with third countries they recognise the existence of the single market.

There are no doubt problems to be overcome in getting other States to acknowledge the legal status of the SAM, but these are not likely to be insurmountable. The Scandinavian States (Norway, Denmark and Sweden), for example, have been able to conclude bilateral agreements for some years on the basis that the provisions in each bilateral between one of the three States and the third party are in all respects similar. Each State designates the jointly-owned Scandinavian Airlines Systems (SK) as the airline to exercise the rights under the relevant agreement. While this is not quite the same as negotiating with Australia and New Zealand as one bloc, with a single airline, it is not so

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129 G. McDowall, "Deregulation of Australasian aviation - the single aviation market" (Paper presented to the 15th Annual Conference of the Aviation Law Association of Australia and New Zealand, 1996) cited in J. Goh, *supra* at note 48 at 60.

different as to be impossible. There is in fact one entity that is likely to be extremely interested in such a development, but before discussing that, we turn to consider one other Asia-Pacific State: Singapore.

## B. Singapore

The reason for considering Singapore alongside Australia and New Zealand is that it shares many of the same philosophies in respect of aviation regulation. Singapore has signed liberal agreements with New Zealand and the US, and is now an APEC Multilateral partner. Singapore has long been recognised as a liberal economy, with few barriers to market entry in any sector. In terms of aviation regulation, there are no restrictions on foreign ownership and control. Of course, since all aviation in Singapore is international in nature, there is no need because the relevant bilateral requirements will determine the level of foreign ownership permitted. Because of this, Singapore has a keen interest in seeing the international rules on foreign ownership relaxed to permit more flexibility.

This is important to SQ in particular, as it cannot expand indefinitely based on the limited Singaporean market. SQ would like to take equity stakes in other carriers. This is a natural method for growing a business and in any other industry would present little difficulty. In the aviation industry, under present international rules, it is extremely difficult to achieve meaningful equity investment and control. As its Chairman, Koh Boon Hwee, stated recently:[130]

> Internationally, there is no denying that our mission to expand abroad has faced difficulties, but we have always known the path would not be easy. Restrictions on air traffic rights continue to be a given. Governments continue to support and subsidize their flag carriers. Equity ownership restrictions mean that a stake in another airline often

130 Singapore Airlines Limited, *Annual Report 2001*-2002 at 7.

> comes without meaningful management control. We continue to argue for the liberalization of these regulatory hurdles and for more open and free competition among carriers, but until that happens, we will take these realities in our stride.
>
> In the long run, we cannot rely solely on operations based in Singapore. In order to have continuing growth and profit, it is important for us to expand beyond our home base. Therefore, we will continue to look at international expansion opportunities as they arise, since these tend to happen only with liberalization and regulatory changes.

The airline is therefore acutely aware of the need for liberalisation, as it is important for its continued growth.

The Singapore Government likewise has participated in regional and international moves towards changing ownership and control. Singapore in 1997 signed a liberal ASA with New Zealand that was one of the first bilaterals to incorporate the "principal place of business and incorporation" model of designation.[131] Since 1997, Singapore has adopted a policy of proposing this language in all ASA negotiations, successfully including it in around twenty percent of Singapore's bilaterals.[132] It was, as we have seen, one of the original parties to the APEC Multilateral in 2001. Singapore continues to be at the forefront of moves towards the removal of constraints under ASAs. At the recent WATC, Singapore presented a paper which stated:[133]

> Singapore would be prepared to incorporate an "European Union (EU) community clause" in our bilateral ASAs with European countries for all EU carriers to utilize the rights under the said ASAs, so long as third-party free riding can be prevented.

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131 *Air Services Agreement between the Government of the Republic of Singapore and the Government of New Zealand*, 18 September 1997.

132 ICAO, "An Open and Consultative Approach to Liberalizing Air Carrier Ownership and Control" AT Conf/5-WP/39 (Presented by Singapore) at para. 2.2.

133 *Ibid.* at para 2.5.

Such a position is entirely consistent with the aims of the Singapore Government to foster competition and therefore economic growth:[134]

> Singapore's aviation policy is based on the fundamental belief in free and open competition to provide an extensive and liberal framework for more air services and city links to Singapore. A liberal air policy helps to facilitate the growth in trade, investment and tourism flow between Singapore and other countries by encouraging airlines to provide the necessary air linkages.

This policy has resulted in both a strong international airline and an important international airport, both of which are universally acknowledged as being among the world's best.[135]

## C. A New Single Aviation Market?

Each having made significant progress towards a more liberal aviation environment over the last decade, the next step for Australia, New Zealand and Singapore might be to move to a new single market. Australia and New Zealand have a single market already and both also allow the establishment of domestic airlines that are 100% foreign-owned. QF and NZ are currently attempting to move to a much closer arrangement, with QF taking an equity holding in its partner and both airlines combining operations on a scale not yet seen in the trans-Tasman market.

New Zealand and Singapore are Parties to the APEC Multilateral, which

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134 Ministry of Transport, Singapore. Policies and mission statements are available online at <www.mot.gov.sg/policies_nav/air.htm>.

135 For example, in November 2002 *Business Traveler* [sic] magazine named Changi Airport as the "Best Airport in the World" for the 11th time. A month earlier, the UK/Europe edition, *Business Traveller*, named it "Best Airport Worldwide" for the 15th consecutive year. In 2002 SIA won the "Best International Airline" award from *Conde Nast Traveler* for the thirteenth time in fourteen years. In the same year, the airline was ranked the 50th "Global Most Admired Companies" by Fortune magazine. Outside of Japan, it was the highest ranking Asian company on the list.

permits cross ownership in each other's airlines, albeit while retaining the requirement for effective control. SQ has a small equity holding in NZ. Singapore has no restrictions on the ownership and control of airlines based there, and has publicly stated that it is prepared to move to a community system of ownership and control. Singapore and Australia have a relatively liberal bilateral and are close to concluding an open skies ASA to remove the last capacity and route restrictions.[136]

Once such an ASA is concluded, the next step of a new single aviation market agreement between Australia, New Zealand and Singapore looks both possible and sensible. One factor in favour of such an arrangement, from the Australian perspective in particular, is that it could provide the necessary balance in competition terms for the QF/NZ alliance. A combined QF/NZ duopoly on the trans-Tasman would have a market share of around 90%.[137] Both the Australian Competition and Consumer Commission (ACCC) and the New Zealand Commerce Commission (NZCC) have rejected the initial application by QF/NZ, on the grounds that competition will suffer from such a combination of dominant players. Additional operators on the trans-Tasman are required to allay the concerns of the competition authorities in Australia and New Zealand. Without additional competition, it is unlikely that the QF/NZ proposal will eventually succeed. This in turn will lessen the prospects for a strong regional aviation industry, with QF in particular continuing to feel vulnerable to competition from STAR Alliance partners SQ and NZ.

The concerns of QF, and its desire to see the deal with NZ cemented, could mean that it has to drop its long-time opposition to an open skies deal with Singapore. SQ has for some time been interested in having secure access to

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136 P. Harbison, "Flying in Changing Skies is the Challenge" *Australian Financial Review* (3 December 2002) 63.

137 A. Mitchell, "Qantas still rules our skies" *Australian Financial Review* (28 May 2003) 62.

Australian traffic, to feed this into its long-haul services to Europe. This is why it sought a 50% stake in Ansett Australia in 1999. When that deal was thwarted by NZ (which due to its pre-existing ownership of a half-share in Ansett had a pre-emptive right on the remaining moiety), SQ then took a 25% stake in NZ. With the collapse of Ansett, and the subsequent recapitalisation by the New Zealand Government, SQ's stake in NZ has been reduced to 4.5%. It has again lost secure domestic feed from Australia.

While the apparent solution might therefore be for SQ to establish its own domestic Australian airline, this is not necessarily a commercially viable option. Such an airline would face strong competition from both QF, currently holding around 70% of the market, and Virgin Blue, the low-cost carrier that was established by the Virgin Group shortly after Australia began permitting foreign-owned domestic airlines in 2000.

If Australia and New Zealand sign a new single aviation market agreement with Singapore, then SQ would feel much more confident about establishing an operation in either Australia or New Zealand. Such an airline would be able to offer services to the domestic markets in both countries, as well compete on the trans-Tasman routes. Additionally, it would also be able to operate between Singapore and Australia/New Zealand. This would tie in well with SQ's existing Singapore hub. While SQ would likely want the option of competing with QF on the lucrative trans-Pacific routes from east coast Australian cities to the US west coast, this should not cause QF too much concern if it has secured a closer relationship with NZ.

The trade-off that is therefore possible is for Australia and Singapore to conclude an open skies agreement. At the same time Australia and New Zealand would conclude a new single aviation market agreement with

Singapore. Included in the negotiations for such agreements would be an undertaking by Singapore that SQ would not simply "cherry pick" the trans-Pacific routes, but would establish a domestic airline in either Australia or New Zealand. This airline would then be required to compete in the single aviation market, particularly between Australia and New Zealand.

One option for SQ would be to purchase the existing Virgin Blue operations. This is currently operating domestic Australian services, but cannot operate trans-Tasman services as it is not a SAM airline. If Singapore were included in the SAM, then Virgin Blue could be refinanced and restructured to meet the SAM ownership and control requirements. This would certainly be the most cost-efficient method for SQ to enter the SAM. With SQ entering the market, the way would then be cleared for QF and NZ to conclude their proposed arrangement, and indeed to move to an even closer partnership.

Such a deal could well have a positive flow-on effect for the PIASA. This is because FJ, one of the major opponents of that deal, is closely linked to QF. If QF's position in the South West Pacific aviation market is secured and strengthened by an arrangement with NZ, then FJ may have less to fear from the open market arrangements envisaged by the PIASA. A strengthened QF/NZ would provide FJ with an extremely strong partner which would provide access to an international network.

## D. The External Dimension

The other point to consider in this final section is the issue of external recognition of the SAM. As has been seen, the SAM has no external dimension. This is a similar problem that faces the EC common aviation market. Following the ECJ decision, the Commission is seeking to establish itself as the negotiating

body for the EU. This is to achieve the aim of replacing multiple agreements between Member States and third parties with a single EU agreement, with 15 (soon to be 25) Member States on the one hand and the third party on the other hand. Having one agreement representing all EU Member States that recognises community ownership will give greater effect to the common aviation market. The largest market for EU carriers, the transatlantic, is where the Commission would first like to strike an accord, but the negotiations with the US are likely to be difficult and lengthy. This is because the US is not really interested in the legislative changes that would be required for it to join a common aviation market with Europe.

This author suggests that an alternative option for the Commission is to approach like-minded countries first and conclude an agreement with some of them. The advantage of this is negotiations with like-minded countries will obviously be less difficult than with the US, which has legislatively entrenched positions on the subject. An early agreement would serve to show the EU that the Commission is able to achieve results in this area. It might also act as an impetus to the US, once it sees the advantages that flow from such an arrangement. Some US airlines are already in favour of a change in US position on foreign ownership and control, because they can see the advantages that would flow to them as a consequence.[138]

The Commission could therefore usefully approach Australia, New Zealand and Singapore in order to conclude agreements on a designation clause that recognises EU ownership. While it is likely that all three countries would agree to such a provision, providing that the problem of "free riders" is addressed, a far better outcome for those countries would be for them to first conclude a single aviation market agreement amongst themselves. They could

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138 See *e.g.* the position of UA, *supra* at note 125.

then negotiate as a bloc with the EU, aiming at something along the lines of the Transatlantic Common Aviation Area (TCAA) proposed by the Association of European Airlines (AEA) as the framework for EU-US negotiations.[139] In such a common aviation area, any airline may be designated, provided only that it is owned and controlled by nationals of any of the Parties to the agreement.

The reason that ownership and control is regulated in this way is to encourage other States to accede to the agreement, which the AEA envisages would be possible under the TCAA proposal. In the absence of such a clause, the problem of "free riders" rears its head. Admittedly, an ownership clause on these lines is something less liberal than the "principal place of business and effective regulatory control" model as proposed by ICAO and others. That clause, however, is only really suitable for bilateral agreements. In a multilateral context, where accession is open to any State, one of the advantages of accession will be access to increased capital from nationals other Parties to the agreement.

An "EU-Singapore-Australia-New Zealand" common aviation area would certainly be a most progressive instrument in the regulation of air transport. There are certainly some hurdles to overcome, most notably in competition law issues. Singapore, for example, has little in the way of competition law. Australia and New Zealand have not yet achieved significant harmonisation of their competition law. Having to achieve some kind of agreement with the EU on this subject could pose difficulties. Another issue is the bar on foreign ownership in QF, limited at present to 25% by any single foreign owner and 40% in aggregate.[140] Singapore and New Zealand, as noted, do not have such a legislative limit.

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139 Association of European Airlines, "Towards a Transatlantic Common Aviation Area" (1999).

140 See *supra* at note 67 and accompanying text.

Such hurdles are not insurmountable. QF in particular has long lobbied for a relaxation in the rules applying to the amount of foreign ownership it may have. In the context of a new single aviation market and an agreement with the EU, it is more likely that QF will be supportive than not. There can also be a phase-in of certain provisions in order to give the parties time to harmonise or implement their competition laws. Having concluded such an agreement, the EU could then approach other like-minded groups or commence negotiations with the US, with the advantage of having ironed out some of the difficulties first.

The way is therefore open for an entirely new development in the regulation of air transport, namely the conclusion of the first ASA between two regional economic groups.

## VII. CONCLUSION

The main theme of this thesis has been the development of air transport regulation in the Asia-Pacific region, where there has been significant progress in liberalisation, especially on the issue of ownership and control. The first development considered was the Australia - New Zealand single aviation market arrangements, commencing in 1996. These arrangements have now reached the point where it is becoming necessary for the Parties to move to a common external policy. A combined approach to third countries would deliver additional benefits to the airlines involved. This is especially important given the attempts being made by QF and NZ to enter into a closer equity-based arrangement. As discussed, several commentators are in fact calling for an even closer arrangement, involving political as well as commercial decisions that would create a single Australasian airline operating from both Australia and New Zealand. Such a development would necessarily require that Australia and New Zealand negotiate ASAs as a single entity.

The Australia - New Zealand arrangement was followed by a series of regional open skies agreements, such as between New Zealand and Singapore and Singapore and the US. These bilaterals paved the way for the next major development discussed in this thesis, the APEC Multilateral. This agreement was an important step, not just in the regional context, but in the overall progress of air transport regulation on a global basis. It represents the first multilateral agreement on air transport liberalisation to attract the support of the US. The Agreement is noteworthy for its useful "flags of convenience provision". It also provides for the accession of economic entities as well as States. Market access is liberalised, almost fully so when the Protocol is taken into account. There are also useful innovations in the "doing business" parts of the Agreement. Finally, the Agreement offers a method for improving the

efficiency of multiple-party negotiations. It has nonetheless attracted limited support. The thesis discussed one of the key reasons for this, namely the designation clause. Attention at the time was focussed on liberalising the substantial ownership provisions, meaning that the effective control requirement was left unchanged. Subsequent consideration has led many to the conclusion that this portion of the designation criteria is as much an impediment to increased equity flows for airlines as substantial ownership was thought to be. This author has suggested that a useful amendment to the APEC Multilateral would be to adopt the designation criteria agreed to at the 2003 ICAO World Air Transport Conference. This would insert a requirement for "effective regulatory control", thus severing the link between nationality and equity, while at the same time ensuring that aviation safety is not compromised. Such an amendment could well be the catalyst for a much wider acceptance of the APEC Multilateral, given its other many benefits in terms of market access.

The last Asia-Pacific agreement to be considered is the new Pacific Islands Air Services Agreement. This document is yet to be fully accepted by the Pacific Islands States that negotiated it, although hopefully this will occur during 2003. If adopted, the Agreement would represent an important step in the global liberalisation of air transport, because it would demonstrate that small, less-developed nations may still achieve benefits from opening up their aviation markets, provided this is done in a measured and mutually acceptable manner.

After the discussion of these three main agreements, the thesis considered what might lie in store for the region and for Australia, New Zealand and Singapore in particular. Following the decision of the ECJ in the open skies cases, the Commission has now achieved a mandate to commence discussions on behalf of the EU. Efforts will be made by the EU to negotiate with the US some type of common aviation area. There are significant hurdles to be

overcome in this latter project. The US would have to undertake legislative change to permit increased foreign ownership of its airlines and would also need to permit at least some access to its domestic market by foreign airlines. The prospects for an early agreement are dim.

At the same time, the Commission will also seek to negotiate with other third countries on the issue of ownership and control. The aim of these talks will be to gain recognition of the EU's "community carrier" provisions from those third parties. The Commission is expected to commence these negotiations during 2003. That is why this author suggests that an agreement between the EU on the one hand and a regional grouping consisting of Australia, New Zealand and Singapore on the other hand is a real possibility.

As discussed in this thesis, Australia, New Zealand and Singapore all have remarkably similar outlooks in respect of air transport regulation. There are few policy hurdles to overcome for the three States to join together in a single aviation market. Such a common grouping would then give the three sufficient weight to be able to successfully negotiate as a bloc with the Commission.

This thesis has demonstrated the areas in which aviation policy in these three States is similar to elements of the EU's common aviation policy. This is especially the case with regard to ownership and control. With the granting of the mandate to the Commission, the way would appear to be open for an agreement between the EU on the one hand and Australia, New Zealand and Singapore on the other. One hopes that such an agreement will extend beyond a simple recognition by the Asia-Pacific States of the community carrier principle, and take the shape of a comprehensive and liberal common aviation area between the two blocs.

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