



# LIBERALISATION OF INDIAN AVIATION MARKET: THE WAY FORWARD

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**Abstract** The substantial ownership and effective control requirement in the civil aviation sector has witnessed significant changes in the recent past. This article examines the Indian Government’s policies that seek to further liberalise such requirements. In this context, it seeks to answer whether the unilateral relaxation of nationality requirements by Indian regulators would be in the interests of the Indian aviation market. Furthermore, the paper considers possible alternatives to such unilateral relaxation of rules.

## I. INTRODUCTION

Substantial ownership and effective control is one of the common approaches followed by states for granting license for air carriage and registration of aircraft in their jurisdiction. States mutually grant traffic rights and designate airlines licensed in their jurisdiction to operate flights into each other’s territories, in terms of Air Services Agreements (“ASAs”). ASAs range from the most traditional form (i.e. bilateral agreements entered between states wherein all aspects of the flight, including commercial aspects such as route, frequency, capacity, pricing, etc. are regulated) to liberalised arrangements (i.e. agreements wherein the concerned parties grant right to flight to air carriers registered in the other party’s jurisdiction without regulating the commercial aspects therein).

Most ASAs contain provisions on revocation of traffic rights granted therein, in the event that the substantial ownership and effective control of carriers registered in the contracting states ceases to vest with such states or its nationals.<sup>1</sup> The conventional reasons for the retention of this clause in the ASAs include national defense considerations, safety and security concerns, maintenance of the balance of benefits granted under the ASAs, prevention of non-reciprocal rights being

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<sup>1</sup> Int’l Civil Aviation Org. [ICAO], *ICAO Template Air Services Agreements*, art. 4, (Oct.14, 2016), <http://www.icao.int/Meetings/AMC/MA/ICAN2009/templateairservicesagreements.pdf>.

exercised by third party countries and avoiding the emergence of flags of convenience.<sup>2</sup> However, this trend has been progressively changing and the liberalisation of this requirement has been sought at different levels. Globalisation and liberalisation coupled with increased cost pressures, capital needs, and competition have paved way for relaxation of restrictions on foreign investment and dilution of the rule.<sup>3</sup> Notwithstanding the reduction in rigour, a complete elimination of the ownership and control rule is a farfetched vision as most ASAs would have to be renegotiated for this purpose.

This paper studies certain provisions of the National Civil Aviation Policy<sup>4</sup> (“NCAP”) and the Foreign Direct Investment Policy<sup>5</sup> (“FDI Policy”) in the aviation sector which seek to liberalise the Indian markets and analyses the shortcomings and practicality of such provisions in light of the current state of the Indian aviation market. The paper elucidates probable changes that would help overcome limitations of the current aviation policies.

## II. BRIEF OVERVIEW OF THE LEGAL FRAMEWORK GOVERNING CIVIL AVIATION

The Convention on International Civil Aviation<sup>6</sup> (“Chicago Convention”) is a multilateral instrument that lays down the substantial law that governs international civil aviation.<sup>7</sup> There are currently 191 parties to the Chicago Convention, including India.<sup>8</sup> ICAO is a UN specialised agency, established in 1944 to manage the administration and governance of the Chicago Convention.<sup>9</sup> ICAO is authorised to adopt international standards and recommended practices (“SARPS”) on issues affecting the safety and efficiency of air navigation and designate them as Annexes to the Chicago Convention.<sup>10</sup> Although SARPS do not actually become part of the Chicago Convention, states have an affirmative duty

<sup>2</sup> Int’l Civil Aviation Org. [ICAO], *Manual on the Regulation of International Air Transport*, at 4.4-1 (Oct.14, 2016), [http://www.icao.int/sustainability/Compendium/Documents/InternationalOrganisations/ICAO-doc/ICAO-Doc9626\\_en.pdf](http://www.icao.int/sustainability/Compendium/Documents/InternationalOrganisations/ICAO-doc/ICAO-Doc9626_en.pdf).

<sup>3</sup> *Id.* at 2, 4.4-3.

<sup>4</sup> MINISTRY OF CIVIL AVIATION, *National Civil Aviation Policy 2016*, (Oct.15, 2016), [http://www.civilaviation.gov.in/sites/default/files/Final\\_NCAP\\_2016\\_15-06-2016-3.pdf](http://www.civilaviation.gov.in/sites/default/files/Final_NCAP_2016_15-06-2016-3.pdf)

<sup>5</sup> DEPT. OF INDUSTRIAL POLICY & PROMOTION, MINISTRY OF COMMERCE & INDUSTRY, GOVT. OF INDIA, *Consolidated FDI Policy*, [http://dipp.nic.in/English/Policies/FDI\\_Circular\\_2016.pdf](http://dipp.nic.in/English/Policies/FDI_Circular_2016.pdf) (last updated Jun. 7, 2016).

<sup>6</sup> Int’l Civil Aviation Org. [ICAO], *Convention on International Civil Aviation*, Dec. 7, 1944, (1994) 15 U.N.T.S. 295, [http://www.icao.int/publications/Documents/7300\\_orig.pdf](http://www.icao.int/publications/Documents/7300_orig.pdf).

<sup>7</sup> PAUL STEPHEN DEMPSEY, MCGILL UNIVERSITY INSTITUTE AND CENTRE FOR RESEARCH IN AIR AND SPACE LAW, *PUBLIC INTERNATIONAL AIR LAW*, 43 (1st ed. 2008).

<sup>8</sup> Int’l Civil Aviation Org. [ICAO], *Convention on International Civil Aviation*, Dec. 7, 1944, (1994) 15 U.N.T.S. 295, [http://www.icao.int/publications/Documents/7300\\_orig.pdf](http://www.icao.int/publications/Documents/7300_orig.pdf).

<sup>9</sup> *About ICAO*, Int’l Civil Aviation Org. [ICAO], (Mar. 8, 2017), <http://www.icao.int/about-icao/Pages/default.aspx>.

<sup>10</sup> DEMPSEY, *supra* note 7, at 3, 75.

to harmonise domestic law with SARPS in terms of Articles 37<sup>11</sup> and 38<sup>12</sup> of the Chicago Convention.<sup>13</sup> International Civil Aviation Organisation (“ICAO”) also performs other functions such as monitoring and reporting on air transport sector performance metrics and auditing states’ civil aviation oversight capabilities in the areas of safety and security.<sup>14</sup> The basis for the ASAs is laid down under Article 6 of the Chicago Convention which provides that no scheduled air service<sup>15</sup> may be operated into or over the territory of a contracting state except in accordance with the authorisation granted by such a state.

In India, the Ministry of Civil Aviation is responsible for formulation of national policies and programs for the development and regulation of civil

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<sup>11</sup> Article 37. Adoption of International Standards and Procedures - Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.

To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:

- (a) Communications systems and air navigation aids, including ground marking;
- (b) Characteristics of airports and landing areas;
- (c) Rules of the air and air traffic control practices;
- (d) Licensing of operating and mechanical personnel;
- (e) Airworthiness of aircraft;
- (f) Registration and identification of aircraft;
- (g) Collection and exchange of meteorological information;
- (h) Log books;
- (i) Aeronautical maps and charts;
- (j) Customs and immigration procedures;
- (k) Aircraft in distress and investigation of accidents;

and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.

<sup>12</sup> Article 38. Departures from International Standards and Procedures - Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that States.

<sup>13</sup> DEMPSEY, *supra* note 7, at 3, 77.

<sup>14</sup> *Supra* note 9, at 3.

<sup>15</sup> ‘Scheduled air transport service’ means an air transport service undertaken between the same two or more places and operated according to a published time table or with flights so regular or frequent that they constitute a recognizably systematic series, each flight being open to use by members of the public. See DIR. GEN. OF CIVIL AVIATION, *Minimum Requirements for Grant of Permit to Operate Scheduled Passenger Air Transport Services*, , <http://dgca.nic.in/cars/D3C-C2.pdf> (last updated Jan. 25, 2017).

aviation and the administration of legislations pertaining to the aviation sector, such as the Aircraft Act, 1934<sup>16</sup> and the Aircraft Rules, 1937<sup>17</sup>.<sup>18</sup> The Directorate General of Civil Aviation (“DGCA”) is the regulatory body governing the safety aspects of civil aviation.<sup>19</sup> One of the major functions of the DGCA include granting Air Operator Permit (“AOP”) to Indian carriers and regulation of air transport services operating to/from/within/over India by Indian and foreign operators, including clearance of scheduled and non-scheduled flights of such operators.<sup>20</sup> The Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India (“DIPP”) is responsible for *inter alia* the formulation of the FDI Policy.<sup>21</sup> Any foreign direct investment to be made in India, including under the civil aviation sector would have to be made as per the limits prescribed by and in terms of the FDI Policy. Any change in the substantial ownership and effective control requirement would entail harmonisation of the rules, regulations, policies, etc. laid down by the aforesaid entities.

### III. UNDERSTANDING “SUBSTANTIAL OWNERSHIP” AND “EFFECTIVE CONTROL”

The ICAO Manual on the Regulation of International Air Transport<sup>22</sup> (“Manual”) provides that ownership of an air carrier is usually determined to vest with a party that holds more than 50% of the equity share capital in the said carrier.<sup>23</sup> Whilst addressing the issue of effective control, the Manual states that:

“...while ownership is usually transparent and can often be determined by public or other records of shareholders, effective control may be exercised in a variety of ways, many of which may not be readily apparent.”<sup>24</sup>

Furthermore, the Manual clarifies that:

<sup>16</sup> The Aircraft Act, 1934.

<sup>17</sup> DEPT. OF INDUSTRIES & LABOUR, NOTIFICATION No. V-26, The Aircraft Rules, 1937.

<sup>18</sup> MINISTRY OF CIVIL AVIATION, *Organizational Information*, (Mar. 8, 2017), <http://www.civilaviation.gov.in/aboutus/orgsetup>.

<sup>19</sup> DIR. GEN. OF CIVIL AVIATION, *Organizational Manual*, (Oct.14, 2016), <http://dgca.nic.in/dgca/Organisation%20Manual.pdf>.

<sup>20</sup> *Id.* at 5, 1.

<sup>21</sup> DEPT. OF INDUSTRIAL POLICY & PROMOTION, GOVT. OF INDIA, MINISTRY OF COMMERCE & INDUSTRY, *Role and Functions of the Department of Industrial Policy & Promotion*, (Mar. 8, 2017), <http://dipp.nic.in/English/AboutUs/Roles.aspx>.

<sup>22</sup> The Manual on the Regulation of International Air Transport was published pursuant to the ICAO Assembly Resolution A24-11 in order to provide for a comprehensive and objective source of information in the field. See *Supra* note 2, at 2, (iii).

<sup>23</sup> *Supra* note 2, at 2, 4.4 -2.

<sup>24</sup> *Id.* at 6.

“Most states rely on a case-by-case approach, using either the applicable national laws and regulations concerning corporate responsibility for decision making; or special laws, regulations and policies specifically related to determining who exercises control of air carriers, or a combination of the two.”<sup>25</sup>

Thus, globally an airline is considered to be substantially owned by a state if nationals of that state hold more than 50% of the shares of that carrier. However, in order to determine where the effective control of an air carrier vests, states usually employ a set of guidelines as provided under their national legislation.

#### IV. THE POSITION IN INDIA

The Civil Aviation Requirement or the Minimum Requirements for Grant of Permit to Operate Scheduled Passenger Air Transport Services<sup>26</sup> (“CAR”) issued by the DGCA under Rule 133A<sup>27</sup> of the Aircraft Rules, 1937 read with Rule 134 (1)<sup>28</sup> thereof contains the minimum airworthiness, operational and other general requirements for grant of permit for Scheduled air transport operations.

Accordingly, Paragraph 3 of the said CAR prescribes eligibility criteria for grant of a scheduled Operator’s Permit and the requirements for grant of such permit is that (i) in case of a person, he / she is a citizen of India and (ii) in case of a company or a body corporate, (x) it is registered and has its principal place of business within India; (y) its chairman and at least two-thirds of its directors are citizens of India; and (z) its substantial ownership and effective control is vested in Indian nationals.<sup>29</sup> It is pertinent to note that the said provision is based upon what is contained in Schedule XI of the Aircraft Rules, 1937.

<sup>25</sup> *Supra* note 2, at 2, 4.4 -2.

<sup>26</sup> DIR. GEN. OF CIVIL AVIATION, *Minimum Requirements for Grant of Permit to Operate Scheduled Passenger Air Transport Services*, <http://dgca.nic.in/cars/D3C-C2.pdf> (last updated Jan. 25, 2017).

<sup>27</sup> 133A. Directions by Director-General- (1) The Director-General may, through Notices to Airmen (NOTAMS), Aeronautical Information Publication, Aeronautical Information Circulars (AICs), Notices to Aircraft Owners and Maintenance Engineers and publication entitled Civil Aviation Requirements, issue special directions not inconsistent with the Aircraft Act, 1934 (22 of 1934) or these rules, relating to the operation, use, possession, maintenance or navigation of aircraft flying in or over India or of aircraft registered in India.

(2) The Civil Aviation Requirements under sub-rule(1) shall be issued after placing the draft on the website of the Directorate General of Civil Aviation for a period of thirty days for inviting objections and suggestions from all persons likely to be affected thereby;

Provided the Director General may, in the public interest and by order in writing, dispense with the requirements of inviting such objections and suggestions.

(3) Every direction issued under sub-rule (1) shall be complied with by the person or persons to whom such direction is issued.

<sup>28</sup> 134. Scheduled Air Transport Services- (1) No person shall operate any Scheduled air transport service from, to, in, or across India except with the permission of the Central Government, granted under and in accordance with and subject to the provisions contained in Schedule XI.

<sup>29</sup> *Supra* note 26, at 7.

The FDI Policy, under the Civil Aviation sector, also contains provisions similar to that of the CAR for grant of a Scheduled Operator's Permit.<sup>30</sup>

In terms of the current FDI policy, the term 'control' is defined to:

"... include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements..."

and

"...a company is considered as 'Owned' by resident Indian citizens if more than 50% of the capital in it is beneficially owned by resident Indian citizens and / or Indian companies, which are ultimately owned and controlled by resident Indian citizens..."

Furthermore, in case of Limited Liability Partnership:

"...'control' will mean right to appoint majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of the LLP"

and

"...a Limited Liability Partnership will be considered as owned by resident Indian citizens if more than 50% of the investment in such an LLP is contributed by resident Indian citizens and/or entities which are ultimately 'owned and controlled by resident Indian citizens' and such resident Indian citizens and entities have majority of the profit share."

The national legislation of India does not expressly define the expressions 'substantial ownership' and 'effective control' as applicable to the civil aviation sector, i.e., as parameters to ascertaining the nationality of airlines in order to grant or reject permission to operate. In this regard, the observations of the DGCA on the meaning of these expressions<sup>31</sup>, in its decision for grant of

<sup>30</sup> *Supra* note 5, at 3, 5.2.9.

<sup>31</sup> The DGCA is the authorised body to determine whether an airline's substantial ownership and effective control is vested in the state or the nationals of the state of its registration, in accordance with the provisions of the CAR and hence its observation in this regard gives valuable insight into the administrative process of granting AOPs. *See Supra* note 26, at 7.

Scheduled Air Operators Permit to M/s. TATA SIA Airlines Ltd<sup>32</sup> (“DGCA’s Decision”), is extremely valuable as it throws light on the Indian approach to the grant of AOPs to airlines.

The DGCA’s decision stated that a harmonious construction of the limits of investment allowed in the Civil Aviation sector under the FDI Policy and the provisions of the CAR in respect to the requirements for issue of AOP should make it clear that the condition of ‘Substantial Ownership’ being vested in Indian nationals would be satisfied if 51% of the paid-up capital of a company or a body corporate vested in Indian nationals.<sup>33</sup>

As regards effective control, the DGCA’s decision refers to the definition of control as defined in the Aeronautical Information Circular (AIC) 12/2013,<sup>34</sup> which in turn includes the right of an entity to appoint a majority of directors and to control the management or policy decision of a company or a body corporate.<sup>35</sup> Furthermore, the DGCA’s decision also referred to the other requirements for issuing AOP to a scheduled air transport service prescribed in Clause 1(ii)(b) of Schedule XI of the Aircraft Rules, 1937, viz., the requirement that the chairman and at least two-thirds of all directors should be citizens of India. Thus, it was concluded that if this requirement was complied with, it could be said that effective control vested in Indian nationals as the management of the company was ultimately subject to the decisions of a board whose members were predominantly Indian nationals.<sup>36</sup>

## V. THE NATIONAL CIVIL AVIATION POLICY AND REVIEW OF FOREIGN DIRECT INVESTMENT IN THE AVIATION SECTOR

On June 15, 2016, the NCAP was approved by the Government of India, which brought about major changes to the old rules of the Indian aviation sector. This paper confines itself to the analysis of the changes brought about by the NCAP regarding bilateral traffic rights, which essentially deal with the proposed amendments to the traffic rights currently being granted to foreign airlines under various ASAs.

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<sup>32</sup> DIR. GEN. OF CIVIL AVIATION, *Public Notice*, (Oct. 14, 2016), [http://dgca.nic.in/public\\_notice/PN-SIA.pdf](http://dgca.nic.in/public_notice/PN-SIA.pdf).

<sup>33</sup> *Id.* at 9.

<sup>34</sup> DIR. GEN. OF CIVIL AVIATION, *Guidelines for Foreign Direct Investment in the Civil Aviation Sector*, (Oct.1, 2013), [http://dgca.nic.in/aic/AIC12\\_2013.pdf](http://dgca.nic.in/aic/AIC12_2013.pdf).

<sup>35</sup> 2 (f). “Control” shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements.

<sup>36</sup> *Supra* note 32, at 9.

The NCAP provides for liberalising the legal regime of bilateral rights. It also reflects the government's intention of entering into 'Open Sky'<sup>37</sup> ASAs on a reciprocal basis with other SAARC countries and such other countries that are located entirely beyond a radius of 5,000 km from New Delhi, allowing unlimited flights above the existing bilateral traffic rights level. The NCAP also envisages the allotment of additional capacities (through negotiations in the manner as provided in the NCAP) with other countries that are situated either partly or wholly within a 5,000 km radius from New Delhi.

It is pertinent to note that India has, in line with the NCAP, entered into Open Sky ASAs with six countries, viz., Jamaica, Guyana, Czech Republic, Finland, Spain and Sri Lanka, and has further renegotiated agreements with Oman, Saudi Arabia and Ghana to grant increased traffic rights.<sup>38</sup>

Shortly after the revisions to the NCAP, on June 24, 2016 the FDI policy was revised vide Press Note No. 5 (2016 Series)<sup>39</sup> ("Press Note"), issued by the DIPP, whereby the limit of foreign investment in Scheduled Air Transport Service<sup>40</sup> and Regional Air Transport Service<sup>41</sup> was increased to 100% from the previous cap of 49%. In terms of the revision, investment up to a limit of 49% can be made under the automatic route and investment beyond a limit of 49% can be made under the government approval route. In case of investments made by Non-Resident Indians, up to 100% can be invested under the automatic route.<sup>42</sup>

Despite the increase in the cap for investment, the Press Note states that other conditions to investment, including in the Scheduled Air Transport Service, would remain the same. Thus, in terms of the FDI Policy, substantial ownership and effective control of an airline should still vest with Indian nationals for

<sup>37</sup> An Open Sky ASA is a form of liberalised bilateral agreement wherein all restrictions on market access, pricing and capacity are removed. See *Supra* note 2, at 2, 2.0-2.

<sup>38</sup> PRESS INFO. BUREAU, GOVT. OF INDIA, MINISTRY OF CIVIL AVIATION, *India Signs Open Skies Agreement With Six Countries During ICAN 2016*, (Mar. 8, 2017), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=155471>.

<sup>39</sup> Any amendments made to the FDI Policy by the Government of India are published as press notes. See DEPT. OF INDUSTRIAL POLICY & PROMOTION, MINISTRY OF COMMERCE & INDUSTRY, GOVT. OF INDIA, *Press Note No.5 (2016 Series)*, (Apr. 8, 2017) [http://dipp.nic.in/English/acts\\_rules/Press\\_Notes/pn5\\_2016.pdf](http://dipp.nic.in/English/acts_rules/Press_Notes/pn5_2016.pdf).

<sup>40</sup> See *Supra* note 15, at 4.

<sup>41</sup> 'Regional Air Transport Service' means a Scheduled Air Transport service which operates primarily in a designated region and which on grounds of operational and commercial exigencies may be allowed to operate from its designated region to airports in other regions, except the metro airports of other regions. Regions are identified as North, South, West, East/ North-East coinciding with the Flight Information Regions and the airports in a particular region would be as defined by the Airports Authority of India for the respective regions. See DIR. GEN. OF CIVIL AVIATION, *Minimum Requirements for Grant of Permit to Operate Scheduled Regional Air Transport Service*, <http://www.dgca.gov.in/cars/D3C-C8.pdf> (last updated Jun. 13, 2011).

<sup>42</sup> DEPT. OF INDUSTRIAL POLICY & PROMOTION, MINISTRY OF COMMERCE & INDUSTRY, GOVT. OF INDIA, *Press Note No.5 (2016 Series)*, at para 7, (Apr. 8, 2017) [http://dipp.nic.in/English/acts\\_rules/Press\\_Notes/pn5\\_2016.pdf](http://dipp.nic.in/English/acts_rules/Press_Notes/pn5_2016.pdf).

grant of Scheduled Operator's Permit, thus creating inconsistency between the two provisions. In this regard it is pertinent to note that the aviation secretary, R N Choubey, has also stated that the substantial ownership and effective control norms for issuing AOPs for airlines in India were to be aligned with the new FDI rules.<sup>43</sup> The Ministry of Civil Aviation followed suit in a notification dated November 28, 2016,<sup>44</sup> which proposed a draft amendment of Schedule XI of the Aircraft Rules, 1937. The proposed draft amends, *inter alia*, the eligibility criteria for a company or a body corporate to obtain an air operator certificate.<sup>45</sup> It is to be noted that the proposed amendment completely eliminates the requirement of substantial ownership and effective control being vested in Indian nationals and brings down the proportion of Indian nationals required to be on the board of such company from two-thirds to one-third.

## VI. AIR SERVICES AGREEMENT

The revision to allow 100% FDI in civil aviation sector should be examined in light of the provisions of the several ASAs entered into by India with other countries, in particular the provisions relating to the revocation of traffic rights, in the event substantial ownership and effective control of the carriers ceases to vest with India or its nationals.

A traditional clause on withholding, revocation and limitation of authorisation of traffic rights reads as under:

“Each Party shall have the right to withhold the authorisations with respect to an airline designated by the other Party, and to revoke, suspend or impose conditions on such authorisations,

<sup>43</sup> Saurabh Sinha, *After 100% FDI, Govt to Tweak Airline Ownership Norms*, TIMES OF INDIA, Oct.14, 2016, <http://timesofindia.indiatimes.com/business/india-business/After-100-FDI-govt-to-tweak-airline-ownership-norms/articleshow/52892766.cms>.

<sup>44</sup> MINISTRY OF CIVIL AVIATION, NOTIFICATION G.S.R. 1112(E), (Apr. 8, 2017), <http://www.civilaviation.gov.in/sites/default/files/172867%281%29.pdf>.

<sup>45</sup> “1. Air Operator Certificate to operate Scheduled air transport services in pursuance of sub rules (1) and (1A) of rule 134 (hereinafter referred to as the Air Operator Certificate) may be granted either—

- (i) to a citizen of India, or
- (ii) to a company or a body corporate provided that—
  - (a) it is registered and has its principal place of business within India;

Explanation.- For the purposes of this sub-clause, the expression “principal place of business within India” means that the company or body corporate satisfies the following conditions, namely:-

- (i) it has its headquarters in India where the senior management personnel like the Managing Director, Chief Executive Officer, Chief Financial Officer, etc., have their offices and operate from there on a regular basis;
  - (ii) it holds the meetings of its Board of Directors in India; and
  - (iii) it has its books of accounts at its headquarters in India.
- (b) at least one-third of its Directors are citizens of India and at least one of the posts of Chairman or Managing Director or Chief Executive Officer is held by an Indian citizen.”

temporarily or permanently in the event that they are not satisfied that substantial ownership and effective control are vested in the Party designating the airline, nationals of that Party, or both.”

India has entered into ASAs with many countries including the USA, New Zealand, the UAE, etc., wherein the aforementioned clause is present.<sup>46</sup>

The presence of this clause in these agreements enables other states to revoke the authorisation granted under the ASAs if stipulated conditions of ownership and control are not met. In these circumstances, the move by the Indian government to allow 100% FDI in the aviation sector has raised questions regarding the practicality of the provision.<sup>47</sup>

In this regard, it is pertinent to note that there are certain jurisdictions wherein there are no national laws prescribing ownership and control restrictions on airlines incorporated in its territory and yet for the practical purpose of obtaining rights under the Air Services Agreement, they are subject to restrictions, and hence remain controlled by the nationals of the state where it is incorporated.<sup>48</sup>

## VII. MOMENTUM TO LIBERALISE

Despite growing momentum towards liberalisation and substantial changes, the sector remains heavily regulated, when compared against other sectors.<sup>49</sup> In recent years, there have been a number of participants, such as airlines, states, etc., pushing for a relaxation of the ownership and control requirement. Alternate approaches to substantial ownership and effective control requirement can be observed in certain ASAs wherein traffic rights have been granted to airlines that are incorporated and have their principal place of business within the territory of the designating state.<sup>50</sup> A lenient benchmark suggested by the ICAO involves traffic rights being granted to airlines with their principal place of business or permanent residence within the territory of the designating state and which are under the effective regulatory control of such designating state.<sup>51</sup> Furthermore, agreements amongst communities and regional arrangements currently exist,

<sup>46</sup> See DIR. GEN. OF CIVIL AVIATION, *Bilateral Air Service Agreements*, (Oct.14, 2016) [http://dgca.nic.in/bilateral/bil\\_ind.htm](http://dgca.nic.in/bilateral/bil_ind.htm).

<sup>47</sup> See Sumita Jha, *100% FDI in aviation: Future domestic airline completely foreign owned? ICAO clears fog*, FINANCIAL EXPRESS, Jul. 19, 2016, <http://www.financialexpress.com/industry/100-fdi-aviation-future-domestic-airline-completely-foreign-owned-icao-clears-fog/321114/>.

<sup>48</sup> The national laws of Malaysia do not prescribe ownership and control requirement for incorporation therein. See CHEW PHYE KEAT & CHONG KOK SENG, *THE AVIATION LAW REVIEW* 233 (Sean Gates ed. 2014).

<sup>49</sup> Refer to sector specific FDI guidelines. *Supra* note 5, at 3.

<sup>50</sup> See Air Services Agreement between the Government of Hong Kong and the Government of the Republic of India, Oct.14, 2016, <http://www.doj.gov.hk/lawdoc/ASAINDIAe.pdf>.

<sup>51</sup> *Supra* note 2, at 2, 4.4-5.

wherein ASAs within these communities have liberalised ownership and control clauses.<sup>52</sup>

Several methods have been discussed<sup>53</sup> to achieve an optimal balance, some of which are briefly elucidated hereunder.

### A. Inclusion of market access in air transport under the ambit of World Trade Organization's General Agreement on Trade in Services ("GATS")<sup>54</sup>

Traffic rights and related services are expressly excluded from the ambit of GATS.<sup>55</sup> Inclusion of these services under GATS would require states to grant equal traffic rights to all countries without any discrimination, since the Most Favoured Nation (MFN) Principle<sup>56</sup> would then become applicable to the negotiation of ASAs. It is pertinent to note that the substantial ownership and effective control requirements under the ASAs are contradictory to the MFN Principle, as such a requirement would qualify as exercise of discrimination against airlines based on their nationality whilst granting traffic rights. Hence, inclusion of traffic rights under GATS would require contracting states to do away with the substantial ownership and effective control requirement.

<sup>52</sup> The Scandinavian Airline System, European Common Aviation Area, Andean Pact, The Caribbean Community Air Service Agreement, Plurilateral Open Skies among APEC, the single aviation market arrangement between Australia and New Zealand are examples of agreements amongst communities wherein ASAs have liberalised ownership and control clause. See *Supra* note 2, at 2, 4.4-2. For example, also see INT'L CIVIL AVIATION ORG. [ICAO], *Agreement between the European Community and the Government of the Republic of India on certain aspects of air services*, (Oct.14, 2016), <http://www.icao.int/sustainability/Compendium/Documents/Practices/EU-India-OSA.pdf>.

<sup>53</sup> See Antogni Lykotraftiti, *Discussion paper on Liberalisation of International Civil Aviation – Charting the legal flight path International Transport Forum* (Oct. 14, 2016), <http://www.itf-oecd.org/sites/default/files/docs/dp201518.pdf>.

<sup>54</sup> The General Agreement on Trade in Services (GATS) is the first set of multilateral rules covering international trade in services which came into effect in 1995 negotiated under the auspices of World Trade Organization. GATS provide (i) general principles and obligations (ii) rules for specific sectors and (iii) Member countries' specific commitments to provide access to their markets. See U.N. EDUCATIONAL SCIENTIFIC & CULTURAL ORG. [UNESCO], *Basic Information on GATS*, (Oct. 14, 2016), [http://www.unesco.org/education/studyingabroad/highlights/global\\_forum/gats\\_he/basics\\_gats.shtml](http://www.unesco.org/education/studyingabroad/highlights/global_forum/gats_he/basics_gats.shtml).

<sup>55</sup> See Annex on Air Transport Services.

<sup>56</sup> Without discrimination — a country should not discriminate between its trading partners (giving them equally 'most-favoured-nation' or MFN status); and it should not discriminate between its own and foreign products, services or nationals (giving them "national treatment"); See WORLD TRADE ORGANIZATION [WTO], *Principles of the Trading System*, (Oct. 14, 2016), [https://www.wto.org/English/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/English/thewto_e/whatis_e/tif_e/fact2_e.htm).

## B. Amendment to Chicago Convention

Since Article 6 of the Chicago Convention is the foundation for development of the ASAs, an amendment to this provision would essentially alter the scheme of the ASAs. Hence, it is widely considered as one of the ways to liberalise the aviation industry.

## C. Unilateral waiver of nationality clause in ASAs based on reciprocity

These usually take the form of a one-on-one waiver of the ownership and control requirement by a concerned state on receiving a similar mutual concession from the other state. For obvious reasons, these resemble the few bilateral agreements India has signed in the recent past, as was discussed above. An alternative to such bilateral arrangements is the formulation of multilateral arrangements to waive nationality requirements on a reciprocal basis, normally implemented under the aegis of a preexisting regional organisation.

## D. Inter-regional air transport agreements

A good example of the rationalisation of nationality requirements by states as a part of an overarching effort to uniformise regulations can be seen in the aviation policy of the European Union. Nationality requirements amongst the community's airlines have been completely waived, while the European Union as a bloc now enters into ASAs with other states for flights to and from the European Union. In this regard, it is pertinent to refer to Article 2<sup>57</sup> of the Agreement

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<sup>57</sup> Article 2 - Designation by a Member State

1. The provisions in paragraphs 2 and 3 of this Article shall supersede the corresponding provisions in the Articles listed in Annex II(a) and (b), respectively, in relation to the designation of an air carrier by the Member State concerned, its authorisations and permissions granted by the Republic of India, and the refusal, revocation, suspension or limitation of the authorisations or permissions of the air carrier, respectively.
2. On receipt of a designation by a Member State, the Republic of India shall grant the appropriate authorisations and permissions with minimum procedural delay, provided that:
  - (i) the air carrier is established in the territory of the designating Member State under the Treaty establishing the European Community and has a valid Operating Licence in accordance with European Community law;
  - (ii) effective regulatory control of the air carrier is exercised and maintained by the Member State responsible for issuing its Air Operator's Certificate and the relevant aeronautical authority is clearly identified in the designation; and
  - (iii) the air carrier is owned and shall continue to be owned directly or through majority ownership by Member States and/or nationals of Member States, and/or by other states listed in Annex III and/or nationals of such other states, and shall at all times be effectively controlled by such states and/or such nationals.
3. The Republic of India may refuse, revoke, suspend or limit the authorisations or permissions of an air carrier designated by a Member State where:

between the European Community and the Republic of India, which lays down the understanding of the parties regarding air traffic rights.

These mechanisms are not discussed in detail in this paper since the same has already been done by others and is beyond the scope of this paper.<sup>58</sup>

### VIII. EVALUATING INDIAN POLICY ON THE ISSUE

As discussed above, the release of the NCAP and the revision of the FDI Policy seek to open up the Indian aviation market and relax the nationality requirements by allowing 100% foreign investment in the Civil Aviation Sector. Under these circumstances the author argues that this relaxation is premature for the following reasons:

- The move whilst opening the Indian market to foreign players, does not seek to induce similar treatments from other countries. Indian nationals will still not be able to invest in foreign airlines up to 100% or beyond the threshold laid down under the national laws of the state of its registration.
- This relaxation cannot be practically enforced in the absence of relevant amendments to the nationality clause of the ASAs and hence jeopardizes Indian carriers' rights under the ASAs.
- The move raises the spectre of the domestic sector being vulnerable to domination by foreign carriers, and as a consequence, may negatively affect the long-term health of Indian carriers.

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- (i) the air carrier is not established in the territory of the designating Member State under the Treaty establishing the European Community or does not have a valid Operating Licence in accordance with European Community law;
  - (ii) effective regulatory control of the air carrier is not exercised or not maintained by the Member State responsible for issuing its Air Operator's Certificate, or the relevant aeronautical authority is not clearly identified in the designation;
  - (iii) the air carrier is not owned, directly or through majority ownership, or it is not effectively controlled by Member States and/or nationals of Member States, and/or by other states listed in Annex III and/or nationals of such other states;
  - (iv) the air carrier is already authorised to operate under a bilateral agreement between the Republic of India and another Member State and by exercising traffic rights under this Agreement on a route that includes a point in that other Member State, it would be circumventing restrictions on the traffic rights imposed by that other agreement; or
  - (v) the air carrier designated holds an Air Operator's Certificate issued by a Member State with which the Republic of India does not have a bilateral air services agreement and that Member State has denied traffic rights to the Republic of India.

In exercising its right under this paragraph, the Republic of India shall not discriminate between European Community air carriers on the grounds of nationality.

<sup>58</sup> *Supra* note 53.

Under the NCAP, the Government also seeks to enter into Open Sky Agreements with countries, as discussed above. Open Sky agreements that lift restraints on the commercial aspects of traffic rights will only further open up the Indian market to exploitation, if they are signed under the current circumstances wherein 100% investment by foreign nationals is to be allowed without first securing reciprocity.

## IX. WAY FORWARD FOR LIBERALISING THE INDIAN AVIATION MARKET

After analysing the different complexities involved in the potential liberalisation of the Indian aviation market, the author has sought to narrow down the best possible approaches that India could adopt in its move to reduce constraints of nationality requirements.

Possibilities that require a change of laws, such as inclusion of air transport services in GATS and the amendment of the Chicago Convention can be ruled out outright since these require significant global consensus, which is currently not foreseeable. Comparatively, the other options appear more promising as ways of liberalising requirements governing the Indian aviation sector.

For example, India could endeavour to enter into regional arrangements with other SAARC nations with the aim of relaxing flying rights within the SAARC region. Air traffic rights could then be negotiated as a regional bloc (similar to the European Union) and Open Sky agreements can be entered into with states as a bloc on a mutually reciprocal basis.

## X. CONCLUSION

ASAs should essentially be based upon the principle of 'fair and equal opportunity' that strives to balance measurable benefits and opportunities between states and their carriers. A unilateral relaxation of the stringent measures that are still followed throughout the world would only disadvantage Indian carriers. This is especially so since Indian carries, as measured by levels of productivity, capitalisation, and so on, lag behind other countries.<sup>59</sup> Complete liberalisation/deregulation is a multilateral process and can only be attained through co-operation and consensus building.

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<sup>59</sup> See INT'L AIR TRANSPORT ASSN. [IATA], *Summary of Passenger and Freight Traffic*, (Apr. 8, 2017), [http://www.iata.org/docx/WATS\\_2016-infographic.pdf](http://www.iata.org/docx/WATS_2016-infographic.pdf). Also see *World's largest Airlines*, THE ECONOMIST, Oct. 4, 2016, <http://www.economist.com/blogs/gulliver/2015/06/worlds-largest-airlines>. The International Air Transport Association is the trade association for the world's airlines, representing some 265 airlines or 83% of total air traffic. See About us, INT'L AIR TRANSPORT ASSN. [IATA], (Apr. 8, 2017), <http://www.iata.org/about/pages/index.aspx>.