[Brooklyn Journal of International Law](https://brooklynworks.brooklaw.edu/bjil)

Volume 44 | Issue 1 Article 3

12-31-2018

AGAINST AVIATION ORTHODOXY: INDIA'S FOREIGN INVESTMENT REGIME FOR THE AIRLINE INDUSTRY

Jae Woon Lee

Umakanth Varottil

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JAE WOON LEE[*] & *UMAKANTH VAROTTIL*[**]

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* Assistant Professor, Faculty of Law, The Chinese University of Hong Kong.

** Associate Professor, Faculty of Law, National University of Singapore.
The authors would like to thank the Centre for Asian Legal Studies, Faculty of Law, National University of Singapore for the funding that supported this research. Errors or omissions remain ours.

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INTRODUCTION

Spurred by the growth in travel and tourism, the airline industry has acquired a prominent place in the global economy.[1] Despite gradual liberalization over the last few decades, the industry continues to face significant regulatory barriers, which have arguably failed to keep pace with the times. One such constraint relates to the stringent rules pertaining to foreign ownership of airline companies. This is attributable to the way the regulatory mechanism governing the airline industry was established more than half a century ago and continues to the present day.[2] There is limited visibility of any possible overhaul of the regulatory approaches regarding ownership in the airline industry.

The global regulation of the aviation industry has been premised on the concept of a "flag carrier,"[3] which is subject to national laws, as well as bilateral agreements between nations.[4] The "nationality rule"[5] ensures that an airline is necessarily

1. World Economic Forum, *A New Regulatory Model for Foreign Investment in Airlines* 5 (Jan. 2016), http://www3.weforum.org/docs/IP/2016/MO/WEF_AT_NewRegulatoryModel.pdf.

2. ISABELLE LELIEUR, LAW AND POLICY OF SUBSTANTIAL OWNERSHIP AND EFFECTIVE CONTROL OF AIRLINES 1 (2003).

3. A flag carrier is generally a "nationally owned and operated" air carrier. Dennis A. Duchene, *The Third Package of Liberalization in the European Air Transport Sector: Shying Away from Full Liberalization*, 23 TRANSP. L.J. 119, 123 (1995).

4. LELIEUR, *supra* note 2, at 1; Yu-Chun Chang, George Williams & Chi-Jui Hsu, *The Evolution of Airline Ownership and Control Provisions*, 10 J. AIR TRANSP. MGMT. 161, 161 (2004).

5. The nationality rule stipulates that an airline must be "'substantially owned and effectively controlled' by the citizens of the carrier's home state."

owned and controlled by a state or citizens of such a state.[6] Such a requirement, by which the "substantial ownership and effective control"[7] (SOEC) of an airline must vest in a state or its citizens, substantially limits the flow of foreign investment into the airline industry. This not only hampers capital raising activities by airlines to fund their business, but it also stifles cross-border mergers and acquisitions activity in the industry, thereby impeding the benefits of size and efficiencies that would ultimately accrue to customers in the form of enhanced options, services, and reduced cost.[8] While there have been calls for the abolition of nationality requirements in the airline industry to permit a free flow of capital investment,[9] there also has been significant resistance.[10]

The foreign investment regime governing the airline industry has been the subject of considerable debate, both in legal academia, as well as in the field of air transport management.[11] Given that some of the earliest restrictions emanated from the United States, it is not surprising that a substantial part of the

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Brian F. Havel & Gabriel S. Sanchez, *The Emerging* Lex Aviatica, 42 GEO. J. INT'L L. 639, 648 (2011).

6. Havel & Sanchez, *supra* note 5, at 640.

7. While "substantial ownership" refers to ownership of shares in an airline company, "effective control" deals with management and supervision of the airline's operations. *See* Brian F. Havel, *A New Approach to Foreign Ownership of National Airlines*, 2001 ISSUES AVIATION L. & POL'Y 13201, 13217 (2001–2004).

8. *See* Havel, *supra* note 7, at 13202; Havel & Sanchez, *supra* note 5, at 649; Kirsten Bohmann, *The Ownership and Control Requirement in U.S. and European Union Air Law and U.S. Maritime Law — Policy; Consideration; Comparison*, 66 J. AIR L. & COM. 689, 690 (2001); Antigoni Lykotrafiti, *Consolidation and Rationalization in the Transatlantic Air Transport Market — Prospects and Challenges for Competition and Consumer Welfare*, 76 J. AIR L. & COM. 661, 676, 686 (2011).

9. LELIEUR, *supra* note 2, at 151–52.

10. *See, e.g.*, Angela Edwards, *Foreign Investment in the U.S. Airline Industry: Friend or Foe?*, 9 EMORY INT'L L. REV. 595 (1995).

11. LELIEUR, *supra* note 2; BRIAN F. HAVEL, BEYOND OPEN SKIES: A NEW REGIME FOR INTERNATIONAL AVIATION 164–65 (Kluwer Law Int'l, 2009); Chang, et al., *supra* note 4; Havel & Sanchez, *supra* note 5; Alex Cosmas, Peter Belobaba & William Swelbar, *Framing the Discussion on Regulatory Liberalization: A Stakeholder Analysis of Open Skies, Ownership and Control*, MIT INT'L CENTRE AIR TRANSP. — WHITE PAPER, http://web.mit.edu/airlines/news/news_new_documents_files/Cosmas_ICAT2008_RegulatoryLiberalization.pdf; Havel, *supra* note 7. *See also infra* notes 12–14.

literature deals with U.S. regulation of foreign investment in the airline sector.[12] In the past few decades, there has been an increasing focus on the European Union.[13] More recently, the spotlight has shifted to Asia.[14] This article's goal is to fill a perceptible gap in the literature by embarking on an analysis of the foreign investment regime in India, a country that has not only attained the status of a leading player in the aviation industry, but one that has also enacted significant legal reforms pertaining to foreign investment in the aviation sector. This article also cautiously suggests that India's new regulatory reforms could be a harbinger for other states.

A study of the foreign investment regime in the airline industry in India is both interesting and timely for at least two reasons. First, India has nearly everything that bodes well for the growth of an aviation market. It is a country with an ideal geographical location between the eastern and western hemispheres, a growing middle class population of about three hundred million, and a rapidly developing economy.[15] In 2017, India attained the status of being the third-largest aviation market—after the United States and China—in terms of domestic traffic and the fourth-largest in terms of overall air passenger traffic, including both domestic and international sectors.[16] As one of

12. Edwards, *supra* note 10; Constantine Alexandrakis, *Foreign Investment in U.S. Airlines: Restrictive Law is Ripe for Change*, 4 U. MIAMI BUS. L. REV. 71, 73 (1993–1994); James E. Gjerset, *Crippling United States Airlines: Archaic Interpretations of the Federal Aviation Act's Restriction on Foreign Capital Investments*, 7 AM. U. J. INT'L L. & POL'Y 173, 175 (1991); Jeffrey Donner Brown, Note, *Foreign Investment in U.S. Airlines*, 41 SYRACUSE L. REV. 1269, 1271 (1990); Ved P. Nanda, *Substantial Ownership and Control of International Airlines in the United States*, 50 AM. J. COMP. L. SUPP. 357, 358 (2002).

13. Bohmann, *supra* note 8; Lykotrafiti, *supra* note 8; Allan I. Mendelsohn, *The United States, the European Union and the Ownership and Control of Airlines*, 2001 AVIATION L. & POL'Y 13171, 13173–74 (2003).

14. Jae Woon Lee & Michelle Dy, *Mitigating 'Effective Control' Restriction on Joint Venture Airlines in Asia: Philippines Air Asia Case*, 40 AIR & SPACE L. 232 (2015); Jae Woon Lee & Michelle Dy, *A Commentary on Jetstar Hong Kong Airways Decisions Before the Air Transport Licencing Authority*, 46 HONG KONG L.J. 175 (2016).

15. MINISTRY OF CIVIL AVIATION, NATIONAL CIVIL AVIATION POLICY 2016 1 (June 15, 2016) (India), http://www.civilaviation.gov.in/sites/default/files/Final_NCAP_2016_15-06-2016.pdf.

16. *India Now 3rd Largest Aviation Market in Domestic Air Passenger Traffic: Capa*, LIVE MINT (Mar. 26, 2017), https://www.livemint.com/Politics/H9mJDSrD7DZStOeF8BLcaN/India-now-3rd-largest-aviation-market-in-

the fastest growing aviation markets in the world, India unsurprisingly achieved this status much faster than had been previously predicted.[17]

Second, the Indian government has introduced substantial reforms to liberalize the aviation sector. Historically, and from the time that foreign investment was allowed in the sector, significant limits were imposed on the extent of such investment. Initially, a limit of 40 percent was placed on foreign ownership,[18] which was subsequently enhanced to 49 percent.[19] In 2012, the government removed a barrier that kept foreign airlines from investing in Indian airlines, and permitted them to own up to 49 percent, subject, of course, to the condition that the SOEC remained in Indian hands.[20] More recently, in 2016, limits have been lifted on foreign investments (other than by foreign airlines), which can now compose up to 100 percent ownership of an Indian airline.[21] Investments by foreign airlines, however, are still subject to the 49 percent limit with the SOEC requirements.[22] In the same year, the government also revamped its policy surrounding the civil aviation sector in general.[23] Although this has made India one of the more liberalized markets

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domestic-air-passen.html; *India Becomes 3rd Largest Aviation Market in Domestic Traffic*, TIMES INDIA (Mar. 26, 2017), https://timesofindia.indiatimes.com/business/india-business/india-becomes-3rd-largest-aviation-market-in-domestic-traffic/articleshow/57837992.cms.

17. It earlier was anticipated that India will occupy the third position only by 2022. *India's Cabinet Approves Civil Aviation Policy*, CENTRE AVIATION (June 15, 2016), http://centreforaviation.com/news/cabinet-approves-civil-aviation-policy-565639; Ramesh Vaidyanathan, *India's New Aviation Policy: Will It Be a Game Changer?*, 29 AIR & SPACE L. 1 (2016).

18. Paul Hooper, *Liberalisation of the Airline Industry in India*, 3 J. AIR TRANSP. MGMT. 115, 116 (1997).

19. Press Note No. 4 (2008): FDI Policy for the Civil Aviation Sector, Department of Industrial Policy & Promotion, Ministry of Commerce and Industry, ¶ 3.3 (Mar. 12, 2008) (India), http://dipp.gov.in/sites/default/files/pn4_2008_0.pdf [hereinafter Press Note 4 of 2008].

20. Press Note No. 6 (2012 Series): Review of the Policy on Foreign Direct Investment in the Civil Aviation Sector, Department of Industrial Policy & Promotion, Ministry of Commerce and Industry, (Sept. 20, 2012) (India) [hereinafter Press Note 6 of 2012].

21. Press Note No. 5 (2016 Series): Review of Foreign Direct Investment (FDI) Policy on Various Sectors, Department of Industrial Policy & Promotion, Ministry of Commerce and Industry, (June 24, 2016) (India) [hereinafter Press Note 5 of 2016].

22. *Id.*

23. MINISTRY OF CIVIL AVIATION, *supra* note 15.

for foreign investment in airline companies, certain barriers, such as the SOEC requirements for foreign airline investments, will likely continue to place constraints on significant foreign investment.

Although India has transitioned from a highly restrictive regime for foreign investment in the airline industry to one that is among the most liberal in the world within a span of only two decades, this article argues that the liberalized norms give rise to tension on several counts that is not easy to resolve. For instance, India's aviation policy creates a dichotomy between foreign airline investors, who face a restrictive regime, and non-airline investors, who enjoy a liberal regime.[24] Moreover, the SOEC restrictions that apply to airline investors give rise to several issues in their implementation. This is complicated further by the presence of several interest groups that seek to influence government policy in this area.[25] These are generally incumbent airline companies and their controllers, who seek to raise the bar for new entrants.[26]

Even if Indian domestic law on foreign investments can be addressed, the SOEC requirements under various bilateral agreements between India and other countries, which cater to the operation of flights between those countries, tend to pose a stumbling block toward full liberalization. Unlike domestic laws, which can be reformed unilaterally, India's ability to unlock the investment restrictions under such bilateral agreements is much more circumscribed given that such negotiations occur within the realm of reciprocity. Despite various shortcomings in India's foreign investment policy in the airline sector, the industry has witnessed massive growth.[27] It remains to be seen whether resolving the regulatory problems will unleash further potential for growth in India's airline industry. It will also be illuminating to see how and to what extent India's new reforms will influence other states' policies.

Part I of this article introduces the specific issues that arise in the regulation of foreign investment in the airline industry, with an emphasis on the SOEC restrictions. Part II traces the evolution of the regulatory regime in India governing foreign invest-

24. *See infra* Part III.C.
25. *See infra* Part III.D.3.
26. *Id.*
27. *See supra* text accompanying notes 16–17.

ment in its airline sector. This article finds that a wholly restrictive sector transformed rapidly into a liberal one. Part III delves into a detailed evaluation of India's foreign investment norms, and analyzes various issues and problems emanating therefrom. These include the disparate treatment of foreign airline investors and others and the role of various incumbent players, such as nonresident Indian investors, the state-owned carrier Air India, and an industry lobby, which have influenced the nature of the foreign investment regulation. Part IV addresses issues that India faces in reconciling the treatment of its airlines under bilateral agreements with that conferred under domestic law. Finally, the article concludes with anticipation that India's new approach could impact other states' foreign investment regimes in the airline industry.

I. Foreign Investment Restrictions in the Airline Industry

This article begins with a discussion of foreign investment in the airline industry from a global perspective. Apart from analyzing the regime in various countries, both from the purview of national regulations and of bilateral arrangements entered into by nations, this Part also highlights the background and rationale for tight restrictions on foreign investment in the airline industry. Such a comparative setting will provide the framework by which the regulation of the Indian aviation sector can be analyzed in detail.

A. Substantial Ownership and Effective Control

Foreign ownership restrictions have been the mainstay of the airline industry since the first half of the twentieth century.[28] Their origin can be attributed to a fundamental principle of in-

28. *See* Lelieur, *supra* note 2, at 7; Nanda, *supra* note 12, at 358–60.

ternational law by which a state's sovereignty extends to the airspace above its territory.[29] Such a principle is translated into nationality restrictions through a "double-bolted locking mechanism" consisting of an internal bolt and an external bolt.[30]

The internal bolt is represented by ownership restrictions set out in the national laws and regulations of various countries that impose limitations on foreign investment.[31] For example, most countries prescribe SOEC requirements mandating that their airlines must not only be owned substantially by their own nationals, but that they must also be under effective local control.[32] Substantial ownership requirements are quantitative in nature.[33] For instance, the national rules of Country A may state that foreign nationals or foreign companies may not own more than 49 percent of the shares in a Country A airline. Effective control requirements are, however, trickier, as they are qualitative in nature.[34] Illustratively, an investor X who is a national of Country B may be said to be in effective control of an airline in Country A even though investor X holds less than 49 percent of the shares of an airline. Effective control may be conferred by means other than substantial ownership of airlines, including control through contractual rights and protections that may be conferred upon the foreign investor, by which he or she is able to exercise de facto control over the airline in Country A.

The external bolt is represented by various bilateral air service agreements (ASAs) that two countries will enter into to regulate the flow of air traffic between them.[35] The ASAs prescribe SOEC requirements so that only airlines from a country that is a party to the ASA are entitled to take advantage of the benefits of the agreement. This is achieved by ensuring that each of state that

29. LELIEUR, *supra* note 2, at 7; Havel & Sanchez, *supra* note 5, at 644. Linked to these are restrictions on "cabotage," which prohibit an airline from one country from offering flights on wholly domestic routes in another country. *See* Havel, *supra* note 7, at 13203; Brown, *supra* note 12, at 1273; Bohmann, *supra* note 8, at 690; Lykotrafiti, *supra* note 8, at 666; Havel & Sanchez, *supra* note 5, at 646; Alexandrakis, *supra* note 12, at 85.

30. World Economic Forum, *supra* note 1, at 6; Havel & Sanchez, *supra* note 5, at 651; Havel, *supra* note 7, at 13202.

31. *Id.*

32. Lykotrafiti, *supra* note 8, at 670–71; Havel & Sanchez, *supra* note 5, at 650, 656.

33. Havel & Sanchez, *supra* note 5, at 650.

34. *Id.* at 650–51.

35. *See supra* note 30.

is a party to an ASA "reserves the right to revoke, limit or suspend the traffic rights of any foreign airline designated to operate service under the ASA if that airline is not substantially owned and effectively controlled by the other state party (or by citizens of that other state party)."[36] To illustrate this point, take the case of Countries A and B, which have entered into an ASA to regulate air traffic rights between them. The SOEC requirements embedded into the ASA will ensure that an airline from Country C does not acquire SOEC in an airline in Country B to take advantage of the bilateral arrangements between Countries A and B in the ASA. This would be particularly important if Country B has been able to negotiate a more favorable bilateral arrangement with Country A than has Country C. Effectively, the external bolt will ensure that airlines do not engage in treaty shopping.[37]

Given the bilateral nature of the external bolt, it is cumbersome to unfasten it to allow foreign investment in airlines. The renowned aviation law scholar, Brian Havel, observes: "Countries are caught in a kind of prisoner's dilemma under this system. If a country unilaterally allows foreign ownership and control of its airlines, it risks compromising the access of its airlines to international routes to other countries."[38] Hence, even if countries allow a relaxation of their domestic rules relating to foreign investment (i.e., the internal lock), they may be constrained in liberalizing the restrictions under the ASAs (i.e., the external lock) unless there is bilateral consensus, which may be difficult to achieve.

With this background regarding the genesis of the SOEC requirements, it is instructive to explore the evolution of the rules, both nationally and bilaterally, keeping in mind the rationale,

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36. World Economic Forum, *supra* note 1, at 8.

37. *See* Havel & Sanchez, *supra* note 5, at 649 (noting that "the concessions exchanged between two states cannot be captured by a third state not party to the deal.").

38. Havel, *supra* note 7, at 13203. "Prisoner's dilemma" is a concept in game theory by which two actors could independently choose one of two actions, and their payoffs are dependent upon the interaction between the choices each makes. *See* John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 176–77 (1996). Translating this to the airline industry, Havel notes: "If a country unilaterally allows foreign ownership and control of its airlines, it risks compromising the access of its airlines to international routes to other countries." Havel, *supra* note 7, at 13203.

benefits, and impediments of foreign ownership restrictions in the airline industry.

B. The Origins of Foreign Ownership Restrictions

Foreign investment restrictions in the airline industry have their origins in U.S. domestic law, not least because the United States was a pioneer in the development of the aviation industry. The U.S. Air Commerce Act of 1926 was the first law that required U.S. air carriers to maintain 51 percent of their voting stock under U.S. citizenship.[39] It also stipulated that 66 percent of the members on the board of directors were to be U.S. citizens.[40]

The U.S. government has proffered four main reasons why it has limited the ownership of its airlines to U.S. citizens: (1) the need to protect the fledgling U.S. airline industry; (2) the desire to regulate international air services through bilateral agreements; (3) safety concerns about foreign aircraft gaining access to U.S. airspace; and (4) military reliance on civilian airlines to supplement airlift capacity.[41] Clearly, the U.S. Congress initiated the citizenship requirement to ensure the availability of aircraft for national defense purposes in 1925.[42] At the time, the U.S. Congress and military planners believed that it was necessary to have "government intervention in commercial air carrier development for the dual purpose of training a reserve corps of pilots and maintaining an auxiliary air force."[43] Given that it was in the immediate aftermath of the First World War, the country's political and military leaders naturally inferred a close association between the commercial and military roles of aviation. Essentially, commercial pilots were potential military pilots, and commercial aircraft represented a reserve air fleet in the event of war.[44]

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39. *See* Alexandrakis, *supra* note 12, at 73–74; Edwards, *supra* note 10, at 603; Gjerset, *supra* note 12, at 181–82; Nanda, *supra* note 12, at 363.

40. *Id.*

41. U.S. GENERAL ACCOUNTING OFFICE, AIRLINE COMPETITION IMPACT OF CHANGING FOREIGN INVESTMENT AND CONTROL LIMITS ON U.S. AIRLINES FOREIGN INVESTMENT IN U.S. AIRLINES, GAO/RCED-93-7, at 12–13 (1992), http://www.gao.gov/assets/160/152884.pdf.

42. *See* Alexandrakis, *supra* note 12, at 73.

43. Gjerset, *supra* note 12, at 180–81.

44. Nanda, *supra* note 12, at 379; Chang, et al., *supra* note 4, at 169; Brown, *supra* note 12, at 1272; Bohmann, *supra* note 8, at 696; Lykotrafiti, *supra* note 8, at 664; Alexandrakis, *supra* note 12, at 73.

In the 1930s, the justification for the citizenship requirement expanded from strict national security goals to those within the domain of economics, namely protecting developing industries from foreign competition.[45] Accordingly, the Civil Aeronautics Act of 1938 increased the ownership requirement of voting stock by U.S. nationals from 51 percent to 75 percent for a carrier to qualify as a U.S. operator.[46] The Federal Aviation Act of 1958 further narrowed the ownership restriction by specifically defining what a "citizen of the United States" meant.[47] This legislation was first amended by the Airline Deregulation Act of 1978, and these amendments were later codified in separate sections of Title 49 of the U.S. Code, which continues to address the role of transportation in the United States.[48]

More fundamentally, when a state determines the desired ownership profile of particular, or all, sectors of its economy, the state naturally gives preferences to its own nationals.[49] Havel and the aviation law expert, Gabriel Sanchez, have argued that the right to exclude foreign investment has always been as much a principle of sovereignty as the right to permit it.[50] Accordingly, aviation has been one of the sectors for which foreign investment

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45. Gjerset, *supra* note 12, at 182.
46. Edwards, *supra* note 10, at 603–04.
47. *Id.* at 609–10.
48. 49 U.S.C. § 40102(a)(15) (2006) provides:

> [C]itizen of the United States" means—(A) an individual who is a citizen of the United States; (B) a partnership each of whose partners is an individual who is a citizen of the United States; or (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.

Id.

49. BRIAN HAVEL & GABRIEL SANCHEZ, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL AVIATION LAW 131 (2014).
50. *Id.*

is tightly regulated.[51] Also, as this article discusses later, the United States has not only continued on a restrictive path regarding foreign investment in the airline sector, but its rules in the area are also among the most constraining even from a comparative perspective.[52]

If the United States has been the forerunner in domestic restrictions on foreign investment in its airline industry (i.e., internal lock), it also forged the first bilateral treatment in the field (i.e., external lock). In 1946, the United States entered into the first bilateral ASA, commonly referred to as Bermuda I, with the United Kingdom.[53] Under Bermuda I, traffic rights could be denied by either state if a carrier did not satisfy the SOEC requirements as stipulated in the ASA.[54] Although Bermuda I provided a model form for other bilateral ASAs, the agreement came under considerable strain.[55] The UK withdrew from Bermuda I in 1976, which led to another agreement between the two countries, known as Bermuda II.[56] Subsequently, since the early 1990s, the United States has been pursuing an "open skies" pol-

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51. Although the foreign investment restriction started in the United States, it is important to note that the U.S. airline industry has never been nationalized. From the iconic airlines of the twentieth century, *viz.*, Pan American Airways (commonly known as Pan Am) and Trans World Airlines (commonly known as TWA) to the current "Big 3" airlines, *viz.*, Delta, United Airlines, and American Airlines, the U.S. airlines were never owned substantially by the U.S. government. Paul Stephen Dempsey, *The Rise and Fall of the Civil Aeronautics Board — Opening Wide the Floodgates of Entry*, 11 TRANSP. L.J. 91, 179 (1979); RESTORING OPEN SKIES: THE NEED TO ADDRESS SUBSIDIZED COMPETITION FROM STATE-OWNED AIRLINES IN QATAR AND THE UAE 2 (Jan. 28, 2015), https://skift.com/wp-content/uploads/2015/03/White.Paper-2.pdf.

52. For detailed analyses of how the foreign ownership restrictions have been interpreted by the U.S. regulatory authorities in specific cases, see LELIEUR, *supra* note 2, at 31–40; Alexandrakis, *supra* note 12, at 76–91; Nanda, *supra* note 12, at 365–72; Bohmann, *supra* note 8, at 695–711; Gjerset, *supra* note 12, at 186–92; HAVEL, *supra* note 11, at 138–62. A detailed discussion of such interpretation by the U.S. authorities is beyond the scope of this paper.

53. Edwards, *supra* note 10, at 601; Alexandrakis, *supra* note 12, at 75.

54. Edwards, *supra* note 10, at 601; Alexandrakis, *supra* note 12, at 75; Nanda, *supra* note 12, at 373; Bohmann, *supra* note 8, at 692–93; Lykotrafiti, *supra* note 8, at 669–70.

55. Edwards, *supra* note 10, at 601; Alexandrakis, *supra* note 12, at 75; Nanda, *supra* note 12, at 373.

56. *Id.*

icy with a view to a liberalized aviation sector through the creation of an open environment for international air travel.[57] Despite following an open policy in terms of granting liberalized air traffic rights, the SOEC requirements in bilateral arrangements have continued unabated.[58] In other words, while considerable relaxations have been applied to the business front, tight restrictions have endured on the ownership front. These restrictions continue to inhibit foreign investments in the airline sector.

C. The Expansion of Foreign Ownership Restrictions Around the World

The "double-bolted locking mechanism" has expanded to other countries around the world as well, albeit with subtle variations. For example, in the European Union (EU), the SOEC requirements initially operated on a national basis, i.e. with reference to each individual country.[59] Subsequent reforms have, however, "marked the transition from nationally owned and controlled airlines to community owned and controlled airlines."[60] This has resulted in a fully liberalized aviation market within the EU, as it does away with nationality requirements across various EU nations.[61] The SOEC requirements, however, apply in relation to bilateral ASAs with other non-EU countries.[62] At the same time, it is necessary to note that the evolution of the SOEC requirements in Europe has been riddled with legal battles, which have not been easy to resolve.[63]

Elsewhere in the Asia-Pacific region, most, if not all, states have domestic laws that impose ownership restrictions in the airline industry.[64] Table 1 shows the foreign ownership restrictions of selected Asia-Pacific countries.

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57. Edwards, *supra* note 10, at 607; Nanda, *supra* note 12, at 374; Lykotrafiti, *supra* note 8, at 675–76.

58. Lykotrafiti, *supra* note 8, at 676.

59. *Id.* at 683.

60. *Id.* at 685.

61. Bohmann, *supra* note 8, at 718.

62. Chang, et al., *supra* note 4, at 165.

63. *See, e.g.*, Case C-467/98, Comm'n v. Kingdom of Den., 2002 E.C.R. 1-09519.

64. Lee & Dy, *A Commentary on Jetstar Hong Kong Airways Decisions Before the Air Transport Licencing Authority*¸ *supra* note 14, at 180.

Table 1: Foreign Ownership Limits in Selected Asia-Pacific Countries[65]

Country	Maximum percent of foreign ownership in selected countries
Australia	• 49 percent for international airlines • 100 percent for domestic airlines
China	• 49 percent
Hong Kong	• The only requirement for designation as a Hong Kong carrier is that the carrier's principal place of business be in Hong Kong.
Indonesia	• 49 percent
Japan	• 49 percent
Korea	• 49 percent
Malaysia	• 45 percent for Malaysia Airlines, but the maximum holding by any single foreign entity is 20 percent • 49 percent for other airlines
New Zealand	• 49 percent for international airlines • 100 percent for domestic airlines
Philippines	• 40 percent
Singapore	• The only requirement for designation as a Singapore carrier is that the carrier's principal place of business be in Singapore.
Taiwan	• 49 percent
Thailand	• 49 percent

Most states use the 51/49 model, that is, majority ownership by local interest).[66] Hong Kong and Singapore are unique in that they use principal place of business (PPB) as a replacement for the traditional nationality rule that is based on ownership and control.[67] In other words, the home state is allowed to designate

65. Adapted and updated from Lee & Dy, *A Commentary on Jetstar Hong Kong Airways Decisions Before the Air Transport Licencing Authority*, *supra* note 14, at 181.

66. This has spawned the growth of joint ventures, particularly in the low-cost carrier sector in Southeast Asia. *See, e.g.*, *infra* note 69.

67. Lee & Dy, *A Commentary on Jetstar Hong Kong Airways Decisions Before the Air Transport Licencing Authority*, *supra* note 14, at 182.

a carrier whose PPB is within its territory despite the carrier's being wholly or partially owned by non-nationals of that state. Despite the seemingly liberalized tenor of the PPB formula, however, there continues to be a great deal of uncertainty, as matters relating to management and control of the airline cannot be eschewed altogether in this analysis.[68]

Here, one finds it apposite to explain the boom of joint venture airlines in Asia.[69] Due to the ownership and control restrictions, foreign airlines cannot obtain majority ownership and control of domestic carriers or set up new airlines or subsidiaries in a domestic market.[70] Since the wholly-owned subsidiary strategy is not legally permissible, airlines developed commercial approaches for circumventing ownership and control restrictions. The establishment of joint ventures (JVs) with local interests is a classic example of this.[71]

In Asia, one can find this business model in the likes of AirAsia, Lion Air, Jetstar, Spring Airlines, Tigerair, and Vietjet, all of which have managed to establish a business presence in jurisdictions outside their own through JV arrangements with local investors.[72] In such cases, the JV airlines' domestic equity is owned by individuals or companies with or without prior business experience in the airline industry.[73] In other instances, Asian airlines have invested in companies where the local partner is itself an airline.[74]

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68. This issue came to the fore in Hong Kong. *See* AIR TRANSPORT LICENSING AUTHORITY, ATLA PUBLIC INQUIRY WITH REGARD TO THE APPLICATION FOR LICENSE BY JETSTAR HONG KONG AIRWAYS LIMITED 40 (June 25, 2015) (H.K.), http://www.thb.gov.hk/eng/boards/transport/air/Full%20written%20decision%20(Eng)%2025062015.pdf [hereinafter the ATLA PUBLIC INQUIRY], which has been analyzed in Lee & Dy, *A Commentary on Jetstar Hong Kong Airways Decisions Before the Air Transport Licencing Authority*¸ *supra* note 14. *See also infra* text accompanying notes 78–82.

69. For example, AirAsia owns a 49 percent stake in carriers in India, Thailand and Indonesia and 40 percent in the Philippines, although the question of whether control of management remains with local hands is more contestable. *See* World Economic Forum, *supra* note 1, at 11; Lee & Dy, *Mitigating 'Effective Control' Restriction on Joint Venture Airlines in Asia: Philippines Air Asia Case*, *supra* note 14.

70. Havel & Sanchez, *supra* note 5, at 651.

71. Lee & Dy, *Mitigating 'Effective Control' Restriction on Joint Venture Airlines in Asia: Philippines Air Asia Case*, *supra* note 14, at 238.

72. For a table listing out such JVs, *see id.* at 239–40.

73. *Id.*

74. For a table listing out such JVs, *see id.* at 243–44.

If one considers JV airlines whose local shareholders are not airline companies, an important question comes to mind: who would really control the airline? In such cases, although each foreign airline is only a minority shareholder, it is doubtful that the local majority shareholders would really possess the knowledge and capability to manage and control the airline, which is a highly sophisticated business. Rather, it is likely that such foreign carriers would have de facto control of the airline in question.[75] Nonetheless, many local governments in Asia have obviously relaxed effective control inquiries when they permit JV airlines with local shareholders that are not airline companies.[76]

Despite the general trend toward gradually relaxing effective control restrictions, some governments have applied the effective control requirement more strictly, including those that have migrated to the PPB approach.[77] Although the actual concept that the ATLA applied was PPB based on Hong Kong's Basic Law,[78] the ruling very much involved interpreting "effective control."[79]

Because Hong Kong's Basic Law does not set out any definition of PPB, the ATLA cited relevant case law from other jurisdictions.[80] The cases cited by the ATLA provided it with an opening to link the concept of PPB with control. This, in turn, gave the ATLA the ability to address its concern that airlines licensed in Hong Kong should be actually controlled in Hong Kong as well.[81] In the decision, the ATLA set out the applicable test for deciding

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75. JAE WOON LEE, REGIONAL LIBERALIZATION IN INTERNATIONAL AIR TRANSPORT: TOWARDS NORTHEAST ASIAN OPEN SKIES 187 (2016).

76. *See, e.g.*, *infra* Part III.B (discussing the case of India).

77. The most prominent case is the Hong Kong Air Transport Licensing Authority's (ATLA) decision to reject Jetstar Hong Kong's license application. When Jetstar Hong Kong Airways (with proposed ownership apportioned in the following manner: 51 percent ownership by Shun Tak Holdings, 24.5 percent ownership by Qantas Airways, and 24.5 percent ownership by China Eastern Airlines) applied for a license to operate scheduled air services, an objection was raised by Hong Kong's incumbent airlines, including Cathay Pacific Airways Limited. *See* ATLA PUBLIC INQUIRY, *supra* note 68.

78. ATLA PUBLIC INQUIRY, *supra* note 68. *See also*, Lee & Dy, *A Commentary on Jetstar Hong Kong Airways Decisions Before the Air Transport Licencing Authority*, *supra* note 14.

79. Lee & Dy, *A Commentary on Jetstar Hong Kong Airways Decisions Before the Air Transport Licencing Authority*, *supra* note 14.

80. *Id.* at 188.

81. *Id.*

whether an airline is able to satisfy the requirement. Highlights of the requirement that the ATLA pronounced are as follows:

> (i) The airline has to have independent control and management in Hong Kong, free from directions or decisions made elsewhere.
>
> (ii) The nerve centre has to be in Hong Kong. By nerve centre, the ATLA looks at where and by whom the decisions regarding the key operations of an airline are made. Decisions are not only those concerning day-to-day operations but also those which are relevant and crucial to the business of the airline.
>
> (iii) The core business of an airline is the carriage of passengers and goods for reward, but the decisions as to where the airline can fly (i.e. route and networking) and how much it can charge for the services rendered (i.e. pricing) are two important factors, among others, also considered under the ATLA's rubric. Decisions pertaining to these matters must be independently controlled and managed in Hong Kong.[82]

Judging by the ATLA's approach in the Jetstar case, there remains some doubt about whether the PPB approach constitutes much of a departure at all from the typical SOEC requirements.

Moving on, Australia and New Zealand have adopted a somewhat exceptional approach. Both these states have completely liberalized foreign ownership of domestic airlines. As the first country to do so, New Zealand removed the foreign ownership restriction in 1988;[83] Australia relaxed the ownership rules in 1999.[84] This means that "any foreign person including a foreign airline can acquire up to 100 percent of the equity of an Australian domestic airline."[85] The lifting of the foreign ownership cap was particularly significant in the creation of low-cost carriers.[86] Virgin Blue (now Virgin Australia), a subsidiary of the Virgin Group, was established in 2000 with 100 percent U.K. capital,

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82. ATLA PUBLIC INQUIRY, *supra* note 68.

83. *See* Chia-Jui Hsu & Yu-Chun Chang, *The Influences of Airline Ownership Rules on Aviation Policies and Carriers' Strategies*, 5 PROC. E. ASIA SOC'Y TRANSP. STUD. 557, 565 (2005).

84. Havel & Sanchez, *supra* note 5, at 652; Bohmann, *supra* note 8, at 698; Lee & Dy, *A Commentary on Jetstar Hong Kong Airways Decisions Before the Air Transport Licencing Authority¸ supra* note 14, at 182–83.

85. JEFFREY GOH, THE SINGLE AVIATION MARKET OF AUSTRALIA AND NEW ZEALAND 72 (2001).

86. Hsu & Chang, *supra* note 83, at 566.

and Tiger Airways Australia has been a wholly-owned subsidiary of Singapore's Tiger Airways Holdings Limited since its creation in 2007.[87]

In all, while there are countries like Australia and New Zealand, which have fully liberalized their domestic air segment, and those like Hong Kong and Singapore that have adopted the PPB model, most others continue to apply stringent regulations that set forth nationality requirements for foreign investment in the airline industry. Strict SOEC requirements are the norm rather than the exception. With a maximum limit of 25 percent foreign investment, the United States continues to be one of the most onerous regimes for foreign ownership in the airline industry.[88]

D. Proposals for Reform

Restrictive foreign ownership conditions around the world have left the airline industry far behind in the path of liberalization. Often, the SOEC requirements are ambiguous, leading to substantial uncertainty for industry players.[89] The ambiguity and uncertainty have the effect of conferring considerable discretion to national government authorities to interpret SOEC on a case-by-case basis.[90] Moreover, although nearly a century has elapsed since the origin of the SOEC requirements and the airline industry has come a long way, the regulatory developments have failed to keep pace with reality. In these circumstances, there have been considerable calls for reform of the SOEC requirements, both within national legislation, as well as under bilateral arrangements.[91] One set of proposals argues that the time has come for a complete overhaul of the foreign investment regime in the airline industry by obliterating ownership restrictions altogether.[92] This train of thought finds that safety and security considerations can be addressed through other mechanisms rather than through ownership restraints.[93] Havel

87. *See* Lee & Dy, *A Commentary on Jetstar Hong Kong Airways Decisions Before the Air Transport Licencing Authority¸ supra* note 14, at 182.

88. Havel, *supra* note 7, at 13217.

89. LELIEUR, *supra* note 2, at 6.

90. *Id.*

91. *Id.* at 151–54.

92. *Id.* at 151.

93. *Id.* At the same time, there have been strong protests against such an approach and in favor of the *status quo*. Edwards, *supra* note 10.

calls for a transition from the nationality rule to a norm that considers "an 'establishment,' 'strong link,' or 'corporate affinity'"[94] of an airline toward a state. According to this approach, the focus must be on the country that regulates various aspects of an airline, including safety, security, environmental, taxation and labor issues.[95] The focus is on regulatory connections to a country as opposed to ownership linkages. As the CAPA Centre for Aviation notes:

> Regulatory nationality would refer to the state that oversees the airline's compliance with safety, labour and environmental regulations; where the majority of its aircraft are registered, and where it pays taxes. This would separate the nationality of an airline as determined from a regulatory point of view from the nationality of those owning its shares or making operational decisions.[96]

Although this is similar to the PPB approach followed by Hong Kong and Singapore, the regulatory nationality proposal is somewhat narrower, and seeks to avoid the issues that arose in the case of Jetstar Hong Kong.[97] The aforementioned proposal has its limitations. While some states may be willing to relax or remove their nationality restrictions under domestic law, the ability to lift restraints under bilateral arrangements is more difficult due to the external lock. Due to the prisoner's dilemma, states will be hesitant to make any concessions, and the only way a major reform can be accomplished is if some of the leading countries take the step to lift the foreign ownership restrictions.[98] Proposals have been made, however, for stopgap arrangements through appropriate waivers of nationality requirements under bilateral treaties.[99]

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94. HAVEL, *supra* note 11, at 167.

95. World Economic Forum, *supra* note 1, at 15.

96. *Airline Ownership and Control Rules: At Once Both Irrelevant and Enduring*, CAPA: CENTRE AVIATION (June 5, 2017), https://centreforaviation.com/insights/analysis/airline-ownership-and-control-rules-at-once-both-irrelevant-and-enduring-345816.

97. *Id.* For a discussion on Jetstar Hong Kong, see *supra* text accompanying notes 78–82.

98. HAVEL, *supra* note 11, at 165; Havel, *supra* note 7, at 13215. Both Australia and New Zealand have already demonstrated a commitment in this regard. *See supra* text accompanying notes 83–87.

99. Havel & Sanchez, *supra* note 5, at 662 (noting that a "novel 'short path' approach . . . contemplates that a state's authorized government officials would

In light of the origin, evolution, and diffusion of the ownership restrictions in the airline industry—both through domestic regulation (internal lock) and bilateral arrangements (external lock) as discussed in this Part—this article now embarks upon a detailed examination of the legal regime in India.

II. INDIA'S FOREIGN INVESTMENT REGIME IN THE AIRLINE INDUSTRY

The foreign investment regime in India's airline industry has witnessed a checkered history. After shutting out any kind of foreign investment altogether for several decades, it is only about a quarter of a century ago that Indian airlines were permitted to take on foreign ownership, but with stringent limits.[100] Since then, foreign investment rules have been considerably liberalized, with the process picking up substantial momentum in recent years, as this Part elaborates.

A. A Restrictive Regime Historically

Although private airlines were operating in India in the years following its independence in 1947, the Indian government took the step of nationalizing eight private airlines by enacting the Air Corporation Act in 1953.[101] Since then, the Indian airline industry has constituted a state monopoly, with Air India operating on international routes and Indian Airlines in the domestic sector.[102] It was only in 1994[103] that the state monopoly in the airline industry was ended through the repeal of the Air Corpo-

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declare publicly that they would no longer enforce the nationality clauses in bilaterals with those states which agree reciprocally to do the same.").

100. *See infra* text accompanying notes 103–05.

101. John F. O'Connell & George Williams, *Transformation of India's Domestic Airlines: A Case Study of Indian Airlines, Jet Airways, Air Sahara and Air Deccan*, 12 J. AIR TRANSP. MGT. 358, 360 (2006).

102. V.S. Mani & V. Balakista Reddy, *The History and Development of Air Law in India: A Survey*, *in* AIR LAW & POLICY IN INDIA 23 (S. Bhatt, V.S. Mani & V. Balakista Reddy eds., 1994). *See also* Alan Khee-Jin Tan, *India's Evolving Policy on International Civil Aviation*, 38 AIR & SPACE L. 439, 440 (2013).

103. This followed India's economic liberalization in 1991. *See* Montek S. Ahluwalia, *Economic Reforms in India Since 1991: Has Gradualism Worked?*, *in* INDIA'S ECONOMIC TRANSITION: THE POLITICS OF REFORMS 87 (Rahul Mukherji ed., 2007); Anne O. Krueger & Sajjid Chinoy, *The Indian Economy in Global Context*, *in* ECONOMIC POLICY REFORMS AND THE INDIAN ECONOMY 21 (Anne O. Krueger ed., 2002).

ration Act, which paved the way for the reentry of private players.[104] This development also coincided with the opening up, for the very first time, of the Indian skies to foreign investment.[105] Under the 1994 policy, foreign direct investment (FDI) was permitted up to 40 percent in Indian airline companies, although the participation—direct or indirect—of foreign airlines was prohibited altogether.[106] Moreover, the SOEC was to be vested with Indian nationals, and the airline's chairman, as well as two-thirds of the directors, were to be citizens of India.[107] At the same time, an important concession was made for nonresident Indians (NRIs), who could now invest up to 100 percent in an Indian airline company.[108]

Several private operators took advantage of the liberalization of the airline industries by obtaining scheduled airline status[109] and commencing operations.[110] Of these, only Jet Airways continues to operate services to the present day; it has also been one of the leading players on the Indian aviation scene.[111] Jet Airways was granted the license to operate in 1993.[112] It was established as an Indian company, which was owned by Tail Winds, a company based in the Isle of Man.[113] In turn, Naresh Goyal, the founder of the Jet Airways and an NRI, held 60 percent of the shares of Tail Winds, while two foreign airlines, Gulf Air and

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104. Hooper, *supra* note 18, at 116; Tan, *supra* note 102, at 440; *Aviation Sector: Policy Changes and Their Impact*, HINDU BUS. LINE (Aug. 27, 2013), https://www.thehindubusinessline.com/economy/logistics/aviation-sector-policy-changes-and-their-impact/article23029079.ece.

105. SHARAD KUMAR CHATURVEDI, FOREIGN INVESTMENT LAW AND ITS IMPACT ON LABOUR 75 (2007).

106. *Id.* at 75–76.

107. *Id.*

108. *Id.*

109. A scheduled airline status allows an airline to operate according to published schedules and fares, and must be contrasted with charter airlines. *See* Gautam Gupta, Charter vs. Scheduled Airlines (Fall 2008) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with the Graduate Division, University of California, Berkeley), http://www.nextor.org/pubs/GuptaDissertation2008.pdf.

110. These are Archana, Damania, East-West, Jet Airways, Modiluft and NEPC Airlines. O'Connell & Williams, *supra* note 101, at 360.

111. *Id.* at 359.

112. *Id.* at 360.

113. *Id. See also* JET AIRWAYS (INDIA) LIMITED, PROSPECTUS 61 (Feb. 28, 2005), http://www.cmlinks.com/pub/dp/dp5586.pdf [hereinafter the Jet Airways Prospectus].

Kuwait Airways, each held 20 percent.[114] The precarious nature of India's then-foreign investment policy in the airline industry is reflected in a material revision the government made soon thereafter in 1997, by which it decided to enforce the ban against any investments by foreign airlines in Indian operators.[115] Consequently, Gulf Air and Kuwait Airways divested their shares in Tail Winds to Naresh Goyal, who became the sole owner of the company and indirectly in control of Jet Airways. The ability of NRIs to fully own Indian airline companies is an ongoing, peculiar feature of foreign investment in the aviation industry, and one that has been successfully utilized by companies, such as Jet Airways.[116]

The early 1990s also witnessed an attempt by Singapore Airlines to establish an airline in India as a joint venture with the renowned Tata group.[117] Despite tireless efforts, the companies failed to obtain the requisite license from the Ministry of Civil Aviation due to too much existing capacity.[118] The aversion of Indian regulators to the entry of foreign airlines through equity investment in Indian companies dealt a fatal blow to the Singapore Airlines-Tata venture, which failed to take off.[119] Commentators have argued that the rejection of the Singapore Airlines-Tata proposal was a result of "malignant lobbying"[120] by the existing private operators and by the state-owned Indian Airlines.[121] There is some evidence of the influence of domestic interest groups in determining the shape of India's foreign investment policy in the airline sector.[122]

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114. *Id.* at 61. It is a matter of some curiosity that the two foreign airlines were permitted to invest in Jet Airways despite a policy pronouncement that clearly barred foreign airlines from investing in the equity of an Indian company.

115. *Id.* O'Connell & Williams, *supra* note 101, at 360.

116. *See infra* Part III.D.1.

117. The Tata group is a leading industrial conglomerate headquartered in India with operations around the globe. *See Our Businesses: Tata Companies*, TATA, http://www.tata.com/company/index/Tata-companies (last visited Nov. 17, 2018). The Tata group has also enjoyed the distinction of being one of the earliest players on the Indian aviation scene in the early part of the twentieth century. *See* Hooper, *supra* note 18, at 115.

118. Hooper, *supra* note 18, at 117.

119. *Id.*

120. S.K. Saraswati, *Operating Environment for a Civil Aviation Industry in India*, 7 J. AIR TRANSP. MGMT. 127, 133 (2001).

121. *Id. See also* O'Connell & Williams, *supra* note 101, at 362–63.

122. *See infra* Part III.D.3.

In the ensuing period, a restrictive legal regime began adversely affecting the airline industry, which had a consequential negative impact on India's economy.[123] The Indian government appointed a committee under the chairmanship of Naresh Chandra, which recognized that due to the "highly capital intensive nature of the airlines business, liberal norms for foreign investment is a critical pre-requisite for enhancing India's airlines' access to international capital flows."[124] Interestingly, the committee's report sought to assuage concerns pertaining to national security concerns in the airline industry, and acknowledged the steps taken by other countries to liberalize foreign participation in their airlines.[125] Accordingly, it recommended not only that the foreign investment limit be raised from 40 percent to 49 percent in India's domestic and international airlines, but also that foreign airlines be allowed to invest within the raised limit.[126] The committee's recommendations were accepted, in part, in 2008 when the foreign investment limit was raised to 49 percent,[127] but the doors continued to be shut for foreign airlines.[128]

B. The Entry of Foreign Airlines

The year 2012 witnessed a momentous change. The Indian government permitted foreign airlines to invest in Indian airline companies to the extent of the prescribed limit of 49 percent.[129] There were, however, caveats stipulating stringent conditions for investment by foreign airlines. Such investment could be made only with the prior approval of the government, while non-

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123. O'Connell & Williams, *supra* note 101, at 364.

124. MINISTRY OF CIVIL AVIATION, REPORT OF THE COMMITTEE ON A ROAD MAP FOR THE CIVIL AVIATION SECTOR 26 (Nov. 30, 2003) (India), http://civilaviation.gov.in/sites/default/files/moca_000740.pdf [hereinafter the Naresh Chandra Report].

125. *Id.* at 26–27.

126. *Id.* at 27.

127. DIR. GEN. OF CIVIL AVIATION, GUIDELINES FOR FOREIGN DIRECT INVESTMENT IN THE CIVIL AVIATION SECTOR (June 30, 2008) (India), http://www.dgca.nic.in/aic/aic07_08.pdf; Press Note 4 of 2008, *supra* note 19.

128. Foreign airlines were permitted, however, to invest in cargo airlines. *See infra* text accompanying notes 134–38. This period also saw mergers and acquisitions activity in the airline industry. For example, in the private sector, Air Sahara merged with Jet Airways and Air Deccan with Kingfisher Airlines; in the public sector, Indian Airlines merged with Air India. *See* Tan, *supra note* 102, at 440–41.

129. Press Note 6 of 2012, *supra* note 20, ¶ 2.1.

airline foreign investors could invest under the automatic route without prior governmental approval.[130] An Indian airline receiving investment from a foreign airline would be granted a permit to operate only if: (1) the Indian airline's principal place of business is in India; (2) the Indian airline's chairman and at least two-thirds of its directors are Indian citizens; and (3) the SOEC is vested with Indian nationals.[131] Safety and security concerns were also addressed, as foreign nationals seeking involvement in the Indian airline's business had to clear a security review before deployment.[132] In addition, technical equipment to be imported into India would also require appropriate clearances.[133]

Two additional features of the 2012 policy merit discussion. The first is that foreign airlines were allowed to participate in the equity of Indian cargo airlines, and a higher limit of 74 percent was prescribed on the extent of such investments.[134] For instance, Singapore Airlines could potentially set up a freighter airline in India, subject to the limit prescribed above. Generally, it has been easier to liberalize cargo service than passenger service at a global level.[135] States have traditionally shown far more willingness to provide market access for foreign carriers carrying cargo than passengers.[136] For instance, the Association of Southeast Asian Nations (ASEAN) Single Aviation Market approach has demonstrated that the cargo market is more flexible than the passenger market.[137] The reason why cargo liberalization tends to be less controversial for states and their carriers is

130. *Id.* ¶ 2.2(i).
131. *Id.* ¶ 2.2(iv).
132. *Id.* ¶ 2.2(v).
133. *Id.* ¶ 2.2(vi).
134. *Id.* ¶ 3.
135. Int'l Civil Aviation Org. [ICAO], *Liberalization of Air Cargo Services*, ¶ 1.2, ICAO Doc. ATConf/6-WP/14 (Dec. 13, 2012), http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp014_en.pdf (noting that "as at the end of October 2012, of the 400 plus open skies agreements concluded by States, more than 100 granted Seventh freedom for air cargo or all cargo services, thus providing greater opportunity for the growth of such services.").
136. LEE, *supra* note 75 at 145.
137. IAN THOMAS, DAVID STONE, ALAN KHEE-JIN TAN, ANDREW DRYSDALE, & PHIL MCDERMOTT, DEVELOPING ASEAN'S SINGLE AVIATION MARKET AND REGIONAL AIR SERVICES ARRANGEMENTS WITH DIALOGUE PARTNERS 72 (Final Report, REPSF II Project No. 07/003 2008).

that the participation of foreign carriers in freight transport can help increase the exports of a particular state.[138]

The second feature is that the state-owned airline, Air India, was immunized against participation by foreign airlines because the policy was inapplicable to it.[139] Presumably, this was intended to shield the flag carrier. The reality, however, is that the aviation community criticized this measure by calling it the "Air India Syndrome" because the carrier was protected almost to death, as it allowed other carriers to become more efficient.[140] The 2012 policy had an immediate impact on the airline industry, as three foreign airlines capitalized on the opportunity to invest in India. The first to get off the block was Abu Dhabi-based Etihad Airways, which took a 24 percent stake in Jet Airways.[141] This was followed by the establishment of two new joint venture airlines. One involves a 49 percent stake by Singapore Airlines in Vistara, in which the Indian partner, Tata Sons, holds 51 percent.[142] The other is a 49 percent stake obtained by AirAsia in AirAsia India, with the 49 percent of the remaining stake currently held by Tata Sons and 2 percent of the stake held by two Tata Sons executives.[143] This article subsequently discusses these airline investments in greater detail, with a view to analyzing the impact of the policy.[144]

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138. *Id.*

139. Press Note 6 of 2012, *supra* note 20, ¶ 2.3.

140. Centre for Aviation, *North Asian LCC, Round 1: Inertia Prevails Over Innovation in 2013*, 18 AIRLINE LEADER 36, 38 (Aug. 2013).

141. *See* NISHITH DESAI ASSOCS., JET-ETIHAD: JET GETS A CO-PILOT 1 (2014), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Ma%20Lab/Jet-Etihad_Deal_Dissected.pdf.

142. Nirmala Ganapathy, *Singapore Airlines' New Indian Joint Venture Vistara Unveils Services and Frills*, STRAITS TIMES (Dec. 22, 2014), https://www.straitstimes.com/asia/south-asia/singapore-airlines-new-indian-joint-venture-vistara-unveils-services-and-frills. Singapore Airlines' second attempt to foray into India was successful, after it had to withdraw its previous proposal in the 1990s. *See supra* text accompanying notes 118–21.

143. P.R. Sanjai, *Tata Sons to Buy Out Arun Bhatia from AirAsia India*, LIVE MINT (Mar. 29, 2016), https://www.livemint.com/Companies/5GEBWmucXiPt5gbctu2DaL/Tata-Sons-to-increase-stake-in-AirAsia-India.html.

144. *See infra* Parts III.A.1 and III.A.2.

C. Recent Further Liberalization

The most recent round of liberalization occurred in 2016 in two parts. In June of that year, the government of India further opened up foreign investments in various sectors, including the civil aviation sector.[145] The most drastic change is that foreign investment in Indian airlines is permitted up to 100 percent.[146] Of this, 49 percent can be brought in under the automatic route, while investment beyond that requires prior government permission. While this may seem like complete liberalization of the Indian airline sector to foreign investment, the increased limit has been made unavailable to foreign airlines. In other words, foreign airlines continue to be subject to the 49 percent cap on investment coupled with the SOEC and security restrictions discussed earlier.[147] At the same time, foreign investment in cargo airlines was fully opened up thereby allowing 100 percent participation by foreign investors, including foreign airlines, and thereby once again establishing the intent of the government to put the cargo sector on a different pedestal from that of the passenger sector.[148]

That same month, the government of India, through the Ministry of Civil Aviation, issued the National Civil Aviation Policy (NCAP) 2016 with a view not only to prescribe a comprehensive regulatory policy governing the sector, but also to liberalize the administrative and regulatory setup.[149] While the NCAP 2016 covers a wide range of issues relevant to the aviation sector in general, this article confines its discussion to one important aspect that has direct relevance to the question of foreign investment. Since 2004, the government required that for Indian private carriers to fly on international routes, they must have been flying on domestic routes for five years and must also have a fleet of at least 20 aircraft; this is known as the "5/20 rule."[150] Such a

145. Press Note 5 of 2016, *supra* note 21. The reforms brought about by the press note are now subsumed into India's foreign direct investment policy. *See* DEP'T OF INDUS. POLICY & PROMOTION, CONSOLIDATED FDI POLICY 29 (2017) (India), http://dipp.nic.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17.pdf [hereinafter Consolidated FDI Policy].

146. Press Note 5 of 2016, *supra* note 21, ¶ 7.

147. *See supra* text accompanying notes 129–33.

148. *See supra* text accompanying notes 134–38.

149. MINISTRY OF CIVIL AVIATION, *supra* note 15.

150. *Id.*

scheme, which was unique to India, was considered, however, an impediment to new carriers, especially those such as Vistara and AirAsia, which had only recently begun their operations.[151] At the same time, the existing carriers who had already been subject to this rule only believed this to be fair, as they all had to carry out domestic operations for five years before being allowed to operate internationally.[152] After taking into account various factors, the NCAP 2016 decided to do away with the five-year requirement and provided that "all airlines can commence international operations provided that they deploy 20 aircraft or 20 percent of total capacity (in term[s] of average number of seats on all departures put together), whichever is higher for domestic operations."[153] This will potentially allow the newly-minted Indian carriers with foreign investment, as well as those to be set up in the future, to not only fly domestic routes, but to also accelerate their international foray.[154] This policy arguably works to incentivize foreign investment in Indian carriers, as they can spread their business and risks through both domestic and international operations.

In concluding this article's discussion of the evolution of the Indian legal regime governing foreign investments in the airline industry, one finds that there has been a sea change in regulation over the last quarter of a century. Since 1993, when only two state-owned airlines—Air India and Indian Airlines—were in operation, the airline industry has rapidly expanded and grown to fourteen scheduled operators.[155] The national carrier,

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151. *See infra* Parts III.A.2 and III.D.3.

152. Vaidyanathan, *supra* note 17, at 22; Neelam Mathews, *India Adopts Long-Awaited National Aviation Policy*, AIN ONLINE (June 29, 2016), http://www.ainonline.com/aviation-news/air-transport/2016-06-29/india-adopts-long-awaited-national-aviation-policy.

153. MINISTRY OF CIVIL AVIATION, supra note 15, ¶ 8(b).

154. This is subject to the airlines satisfying the requirements regarding the minimum number of aircraft.

155. DIR. GEN. OF CIVIL AVIATION, LIST OF SCHEDULED OPERATORS, AS ON 20.07.2017 (2017) (India), http://www.dgca.nic.in/operator/sch-ind.htm.

Air India, has only 13 percent of the market share of the industry.[156] Several private carriers have demonstrated strong performance,[157] while some have fallen by the wayside.[158] Ultimately, the regulatory progression in India is a story of a transition from a highly restrictive legal regime to one that is now liberal compared to most other jurisdictions around the world.

With this background, this article now examines the prevalent foreign investment policy in the Indian airline industry, with a view to determining whether the benefits of foreign investment are as strong as they have been portrayed to be.

III. NATIONALITY REQUIREMENTS UNDER INDIA'S DOMESTIC LAW

This Part begins with a discussion of the internal bolt[159] that sets out foreign investment restrictions under Indian domestic law.[160] At the outset, India's current policy on foreign investment in the airline sector appears, from a comparative perspective, to be rather open. While most countries have strict limits on the level of foreign investment,[161] India has adopted a broad-minded approach by allowing foreign investors that are not airline companies to acquire total ownership and control of an Indian airline.[162] In doing so, it joins a select group of countries, such as Australia and New Zealand, that allow 100 percent foreign investment in the industry.[163] In some ways, India's approach is even more liberal than Australia and New Zealand. While those

156. This figure is as of March 2017. Pravin Krishna & Vivek Dehejia, *Privatize Air India, Now*, LIVE MINT (May 29, 2017), https://www.livemint.com/Opinion/Y1PhhD4SiV2LRJemCETfeL/Privatize-Air-India-now.html.

157. As the dominant player in the Indian domestic market, Indigo had a market share of 41.4 percent in March 2017. FE Bureau, *Air Traffic Soars 15% in April; Indigo Stays on Top; Air India Marketshare Flat at 12.9%*, FIN EXPRESS (May 19, 2017), https://www.financialexpress.com/industry/air-traffic-soars-15-in-april-indigo-stays-on-top-air-india-marketshare-flat-at-12-9/675661/.

158. The most prominent airline among those who have suspended their operations is Kingfisher Airlines. *See* Tan, *supra* note 102, at 441.

159. For a discussion of this concept, see *supra* text accompanying notes 30–34.

160. For a discussion on the "external bolt," see *infra* Part IV.

161. *See supra* Table 1.

162. Press Note 5 of 2016, *supra* note 21, ¶ 7.

163. *See supra* text accompanying notes 84–87.

two countries allow 100 percent foreign investment only in domestic airlines (and no more than 49 percent in international airlines), India makes no such distinction. In that sense, foreign investors can invest up to 100 percent in an Indian airline that operates internationally, thereby making it perhaps the most liberal regime in the world.[164]

India's attitude is also comparable to the PPB approach adopted by countries, such as Hong Kong and Singapore. In allowing 100 percent foreign investment without any control constraints for non-airline investors, India has, in some ways, demonstrated a bolder outlook, thereby avoiding some of the control- and management-related issues that cropped up in the Jetstar case in Hong Kong.[165]

The apparent liberalism of the Indian government ends there. There are several factors that impose constraints on foreign investments in the airline industry in practice. First, India is the only country in recent history that makes a distinction in its foreign investment policy on ownership and control between foreign airline investors and non-airline investors.[166] While it displays a flexible and receptive sentiment toward foreign non-airline investors, it has continued to impose shackles on foreign airline investors. This is a significant impediment to foreign investment in India's airline industry. Second, in the case of non-airline investors, India's policy signals an open invitation for foreign ownership up to 49 percent,[167] but it subjects investments beyond

164. *See* Tim Worstall, *India's Civil Aviation Industry Now To Be More Free Than That In The United States*, FORBES (June 20, 2016), https://www.forbes.com/sites/timworstall/2016/06/20/indias-civil-aviation-industry-now-to-be-more-free-than-that-in-the-united-states/ (observing that "the Indian civil aviation industry should now be more economically free than that in the United States"). As this article will further discuss in the next part, however, such international flights require a waiver from the partner states to which the airlines operate based on the air services agreements.

165. *See supra* text accompanying notes 78–82.

166. For an earlier instance, the U.S. Federal Aviation Act of 1958 made it unlawful for any foreign air carrier to acquire control in any manner whatsoever of any citizen of the United States substantially engaged in the business of aeronautics, 49 U.S.C. § 1378(a)(4) (1958), and a presumption of control existed where ownership exceeded 10 percent of the airline. 49 U.S.C. § 1378(f) (1958). The authority of the Department of Transportation under 49 U.S.C. § 1378(a)(4) was terminated as of January 1, 1989. 49 U.S.C. § 1551(a)(7) (1989). *See* PAUL STEPHEN DEMPSEY, PUBLIC INTERNATIONAL AIR LAW 599–600 (2008).

167. These investments are permitted under the automatic route (i.e. without prior government approval).

that limit to the requirement of obtaining prior government approval.[168] As of this writing, there is little, if any, clarity regarding the circumstances under which such approval might be granted and the conditions that the government is likely to impose. This leaves a perplexing question: can the government, exercising its discretion in granting approvals beyond 49 percent investment by foreign non-airline investors, reintroduce the SOEC requirements through the back door? If so, the benefits of liberalization in India's policy may not be as extensive as they appear.

This Part explores the implementation of India's foreign investment policy, first to foreign airline investors, and thereafter to non-airline investors. In doing so, it analyzes, by way of illustration, some recent efforts by foreign investors to obtain shareholdings in Indian airlines, as well as the issues that cropped up during the process and the way they were resolved, either satisfactorily or otherwise. This Part then considers some of the idiosyncrasies of the Indian regime, such as a liberalized approach toward NRI investments and the kid-glove treatment of Air India, and the role of lobbying in shaping foreign investment regulation in India's airline industry.

A. Investments by Foreign Airlines

The SOEC requirements for investments by foreign airlines are now encapsulated in India's Consolidated FDI Policy.[169] Apart from stating that such investment is limited to a maximum of 49 percent of the paid-up capital[170] in the Indian operator, the material wording is as follows:

> A Scheduled Operator's Permit can be granted only to a company:
>
> a) that is registered and has its principal place of business within India;
>
> b) the Chairman and at least two-thirds of the Directors of which are citizens of India; and

168. Press Note 5 of 2016, *supra* note 21, ¶ 7.
169. *See supra* note 145.
170. Under Indian corporate law, "paid-up share capital" is defined to mean the aggregate sum of money received as paid-up in respect of shares issued by a company. Companies Act, 2013, § 2(64).

c) the substantial ownership and effective control of which is vested in Indian nationals.[171]

As this Part elaborates, it is the third condition that has caused a considerable level of consternation. Although the concepts of substantial ownership and effective control in aviation are interrelated, they have distinct characteristics. Substantial ownership is a quantitative restriction that sets a limit on the amount of a national carriers' shares held by foreigners.[172] The limit of 49 percent is placed on the paid-up capital of the company. Therefore, it does not matter whether the investment is in voting shares or non-voting shares, the foreign airline's overall shareholding in the aggregate in the Indian company cannot exceed 49 percent. This may affect the capital raising ability of the Indian company even if it wishes to do so by issuing non-voting shares to foreign airline investor.[173]

The effective control restriction, on the other hand, is a qualitative criterion that focuses on who controls national air carriers.[174] By its very nature, evaluating effective control is trickier than assessing substantial ownership because it is not a mathematical question. The Consolidated FDI Policy defines control 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."[175] Based on this definition, control can be classified into two types.[176] The first is board control,

171. Consolidated FDI Policy, *supra* note 145, ¶ 5.2.9.

172. Even though substantial ownership is seemingly a quantitative question, reasonable minds can differ. Some argue that the concept involves holding a majority of shares (say 51 percent), but others believe that in case of a company with a fragmented shareholding, even a 30 percent shareholding could tantamount to substantial ownership. *See Behind the Invisible Hand*, BUS. STANDARD (Apr. 24, 2016), https://www.business-standard.com/article/opinion/behind-the-invisible-hand-116042400708_1.html.

173. Contrast this with the 25 percent limit available to foreign investments into US airlines, where it is based on the amount of "voting stock." This, too, however, has been subject to varying interpretations by the US regulatory authorities. *See* Alexandrakis, *supra* note 12, at 80–91; Nanda, *supra* note 12, at 365–72; Gjerset, *supra* note 12, at 190–92.

174. Lee & Dy, *Mitigating 'Effective Control' Restriction on Joint Venture Airlines in Asia: Philippines Air Asia Case*, *supra* note 14, at 234.

175. Consolidated FDI Policy, *supra* note 145, ¶ 2.1.8.

176. *See* Umakanth Varottil, *Comparative Takeover Regulation and the Concept of 'Control'*, SING. J.L.S. 208, 218–21 (2015).

which is more straightforward. The contractual documentation between the parties must not give the foreign airline investor the right to appoint a majority of the directors of the Indian company. The second is management, or operational, control, which is thornier. This moves matters to a subjective domain that confers considerable discretion to the regulatory authority to determine whether the foreign airline has management control. Management or operational control ultimately depends on the terms of the contractual arrangements between the parties and has given rise to ambiguities in the Indian context. These are best understood through a brief discussion of the three foreign airline investments that have been made in India since the policy was liberalized in 2012.

1. Existing Airline: Jet Airways

Etihad Airways' 2013 investment in a 24 percent stake in Jet Airways represents a key milestone in the Indian aviation sector, as it was the first significant investment by a foreign airline in an Indian one.[177] In spite of being a relative newcomer to the industry, the Abu Dhabi based Etihad Airways has grown at a scorching pace.[178] In a sector dominated by strong regional rivals, such as Emirates and Qatar Airways, it was imperative for Etihad to adopt a unique model, which was to focus on an inorganic strategy through partnerships and equity investments in other airlines.[179] Within a short span of time, Etihad entered into numerous equity alliance arrangements with airlines across several continents.[180]

177. Nazneen Karmali, *Etihad Buys Stake in India's Jet Airways Amid Protests*, FORBES (Apr. 25, 2013), https://www.forbes.com/sites/naazneenkarmali/2013/04/25/etihad-buys-stake-in-indias-jet-airways-amid-protests/#3aee3fd537b9.

178. *Our History: Overview*, ETIHAD AIRWAYS, https://web.archive.org/web/20130815214410/http://www.etihad.com:80/en-us/about-us/our-story/ (last visited Oct. 27, 2018).

179. *Etihad: Flying Against Convention*, ECONOMIST (June 28, 2014), https://www.economist.com/business/2014/06/28/flying-against-convention.

180. Ivo Pezelj, *Differentiation in Strategy Key to Etihad Airways' Success*, ASPIRE AVIATION (Aug. 7, 2013), http://www.aspireaviation.com/2013/08/07/etihad-airways-equity-alliance-strategy/.

A 24 percent investment in Jet Airways fit elegantly into Etihad's strategy.[181] Etihad, Jet Airways, and the controlling shareholders of Jet Airways entered into an appropriate shareholders' agreement and a commercial co-operation agreement covering matters, such as "administrative costs, sharing of joint resources, better customer service and efficient administration of their respective businesses."[182] Etihad faced considerable difficulties, however, as it navigated through the Indian regulatory maze to obtain the various government approvals required for the investment.

Under the policy governing foreign investment in the civil aviation sector,[183] Etihad was required to obtain the permission of the government of India. Applications were then considered by an inter-ministerial body referred to as the Foreign Investment Promotion Board (FIPB).[184] Even though Etihad was taking only a 24 percent stake in Jet Airways, the FIPB raised concerns on matters pertaining to the SOEC, particularly regarding the board representation and management rights of Etihad.[185] Issues arose as to whether Etihad was obtaining de facto control of Jet Airways.[186] Such concerns were also echoed by other regulators that needed to clear the transaction, such as India's securities regulator, the Securities and Exchange Board of India, and the competition regulator, the Competition Commission of India.[187]

To clear the hurdles imposed by the various regulators, Etihad agreed to amend the provisions of the contractual agreements it had with Jet Airways and its controlling shareholders to considerably dilute the protective provisions.[188] Etihad was therefore

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181. Etihad decided to take a 24 percent stake, rather than utilize the full headroom of 49 percent, in order to avoid making a mandatory offer to buy the shares of all the shareholders of Jet Airways, which would be triggered by an acquisition of 25 percent or more. *See* Varottil, *supra* note 176, at 226.

182. NISHITH DESAI ASSOCS., *supra* note 141, at 2.

183. Press Note 6 of 2012, *supra* note 20.

184. For a brief background regarding the FIPB, see Umakanth Varottil, *Abolition of the Foreign Investment Promotion Board*, INDIACORPLAW (Feb. 25, 2017), https://indiacorplaw.in/2017/02/abolition-of-foreign-investmen.html.

185. NISHITH DESAI ASSOCS., *supra* note 141, at 3.

186. *Id.*

187. *Id.* at 14–16.

188. *Id.* NISHITH DESAI ASSOCS., *supra* note 141, at 2–4. *See also Jet Airways, Etihad Amend Shareholder Agreement*, BUS. STANDARD (May 27, 2013),

compelled to forsake some of its contractual and commercial protection in exchange for ensuring that the transaction would sail smoothly through the Indian regulators.[189] In the end, Etihad had to agree on watered down rights: (1) it settled for only two board nominees out of a total of twelve directors with no majority board control; and (2) it had to give up any veto rights or affirmative votes on key decisions involving the company.[190]

Even though Etihad acquired only 24 percent shares in Jet Airways, it endured an elongated process with the Indian authorities that lasted more than a year before its investment could be cleared.[191] In the process, Etihad had to relinquish the customary rights available to minority shareholders to protect their own interests.[192] It was also subjected to investigations by multiple regulators—sometimes on repeated occasions—before its investment was cleared.[193] Etihad was not even the largest shareholder able to exercise any influence on its own, since the controlling shareholders of Jet Airways held more than double Etihad's stake at 51 percent, thereby exercising legal control.[194]

Etihad had to tread a fine line by clinically devising the contractual arrangements and protections to withstand the Indian regulators' eagle eye. Although it ultimately succeeded in obtaining the regulatory clearances, the price it had to pay was diminished protection and lost time and effort in convincing multiple regulators. The presence of zealous regulators with considerable discretion to interpret control means, however, that parties must be willing to alter their carefully negotiated contractual arrangements to meet the regulators' concerns. In that sense, regulatory discretion conferred through the SEOC requirements penetrates the realm of contractual negotiation when a foreign airline invests in an Indian one.

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https://www.business-standard.com/article/companies/jet-airways-etihad-amend-shareholder-agreement-113052700025_1.html.

189. *Id.*

190. *Id.* at 3–4.

191. Avantika Chilkoti, *Jet Shares Wobble on Deal Delay*, FIN. TIMES (June 17, 2013), https://www.ft.com/content/5e5743c2-ca0d-3527-9287-e0e23930addc.

192. *See supra* text accompanying note 188.

193. *See supra* text accompanying notes 183–87.

194. *See* Kenan Machado & Arirban Chowdhury, *Jet Airways Founder to Take Step for Etihad Deal*, WALL STREET J. (Mar. 20, 2013), https://www.wsj.com/articles/SB10001424127887324103504578371770597009466.

2. Newly-Established Airlines: AirAsia India and Vistara

The liberalization of 2012 also paved the way for two JV airlines in India: AirAsia India and Vistara.[195] Tata Sons, India's leading conglomerate holding company, has a stake in both airlines.[196] While AirAsia India is a low-cost carrier, Vistara is a full-service carrier primarily targeting high-end business travelers.[197]

From the SOEC perspective, the change in the ownership structure of AirAsia India is noteworthy. When AirAsia India secured its Indian air operator certificate in 2013, the company was a three-way joint venture between Tata Sons, businessman Arun Bhatia's Telestra Tradeplace Private Limited, which is an Indian company, and AirAsia, with the partners holding 30 percent, 21 percent, and 49 percent, respectively.[198] Interestingly, Arun Bhatia had a close relationship with AirAsia's founder and group CEO, Tony Fernandes.[199] In June 2014, when AirAsia India commenced domestic services, AirAsia India's ownership changed, as Tata Sons' shareholding increased to 41.06 percent, Telestra Tradeplace's holdings decreased to 9.94 percent, and AirAsia's ownership remained the same at 49 percent.[200] In

195. Unlike Jet Airways, the stocks of these companies are not publicly listed.

196. Sagar Malviya & Kala Vijayraghavan, *Both Vistara and AirAsia in Business to Fly High: Tatas*, ECON. TIMES (Oct. 31, 2016), https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/both-vistara-and-airasia-in-business-to-fly-high-tatas/articleshow/55145804.cms.

197. *Vistara, AirAsia India Look to Expand Fleet Size to 20 Planes as Rules Eased*, HINDUSTAN TIMES (June 16, 2016), https://www.hindustantimes.com/business/vistara-airasia-india-look-to-expand-fleet-size-to-20-planes-as-rules-eased-report/story-YPHidkmbfMCuuObMWrv63M.html.

198. *AirAsia in Expansion Drive*, HERALD (July 1, 2013), https://www.herald.co.zw/airasia-in-expansion-drive/. A public interest challenge was mounted in the Delhi High Court against AirAsia's investment in AirAsia India on the ground that the 2012 FDI policy in the civil aviation sector applied only to investments in existing airlines (i.e., brownfield projects) and not to investments in newly established airlines (i.e., greenfield projects). At the interim stage, the Delhi High Court refused to interfere as this was a policy question to be left to the executive branch of the government to determine. The matter is, however, pending final adjudication. *See* Swamy v. Union of India, (2014) 125 SCC 133 (Del.).

199. *Who is Arun Bhatia?*, BUS. STANDARD (Feb. 21, 2013), https://www.business-standard.com/article/companies/who-is-arun-bhatia-113022100028_1.html.

200. Sanjai, *Tata Sons to Buy Out Arun Bhatia from AirAsia India*, *supra* note 143.

March 2016, the media reported that Arun Bhatia was set to exit AirAsia India after igniting a controversy through his remark that AirAsia India was being controlled by its Malaysian partner.[201] Consequently, Tata Sons bought a 7.94 percent stake from Bhatia.[202] Two Tata Sons executives—AirAsia India chairman Subramaniam Ramadorai and director Ramachandran Venkataramanan—acquired 0.5 percent and 1.5 percent, respectively, from Bhatia in their personal capacity.[203] Ultimately, AirAsia and Tata Sons each hold an equal stake of 49 percent, with Ramadorai and Venkataramanan holding the remaining 2 percent shares in the aggregate.[204]

Vistara's background is less eventful than that of AirAsia India. From the beginning, Vistara's ownership structure has been a 51 percent ownership stake held by Tata Sons and a shareholding of 49 percent by Singapore Airlines.[205] In fact, Tata Sons's joint venture was long-anticipated, originating in the Indian conglomerate's unsuccessful attempts in the 1990s to launch an airline in partnership with Singapore Airlines.[206] Unlike AirAsia India, in which Tata Sons started off with a 30 percent stake and minimal involvement in operations, Vistara was seen as Tata Sons' official reentry into the airline business after a gap of over six decades.[207]

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201. *Id.* For the details of an interview by Arun Bhatia, see Binoy Prabhakar, *AirAsia India Controlled by Malaysian Partner Claims Cofounder Arun Bhatia*, ECON. TIMES (Dec. 11, 2015), https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/airasia-india-controlled-by-malaysian-partner-claims-cofounder-arun-bhatia/articleshow/50129370.cms.

202. Sanjai, *Tata Sons to Buy Out Arun Bhatia from AirAsia India*, *supra* note 143.

203. *Id.*

204. *Tata Sons to Hold 49% Stake in AirAsia India; Arun Bhatia to Exit*, ECON. TIMES (Mar. 29, 2016), https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/tata-sons-to-hold-49-stake-in-airasia-india-arun-bhatia-to-exit/articleshow/51587493.cms.

205. P.R. Sanjai, *Tata-SIA's Vistara Airline Gets India Operating Licence*, LIVE MINT (Dec. 26, 2014), https://www.livemint.com/Companies/BzczCiICRg68yhIecC3IBN/TataSIAs-Vistara-gets-India-operating-licence.html.

206. Aneesh Phadnis, *With Vistara, a Tata Airline Is Reborn*, BUS. STANDARD (Jan. 9, 2015), https://www.business-standard.com/article/companies/with-vistara-a-tata-airline-is-reborn-115010800126_1.html. *See also supra* text accompanying notes 118–21.

207. *Id.*

India's incumbent airlines, however, have accused AirAsia India and Vistara of being controlled by foreigners and have asked for their operating licenses to be suspended.[208] In response to this allegation, the Tata group has argued:

> Majority ownership and effective control of both airlines are with the Indian parties. . . . Further, all the important decisions concerning the day-to-day operations of the airlines are taken by the management teams of these airlines under the overall supervision, control and direction of the respective boards of directors (which include a majority of Indian nationals).[209]

Although the controversy is unabated and a lawsuit,[210] whose outcome is difficult to predict, is in progress,[211] the Jetstar Hong Kong decision can be an important lesson for India. The fact that the conduct of day-to-day management takes place in India is not enough to meet the control criteria. What is more, the terms and tenor of contractual arrangements, such as the shareholders' agreement and any business service agreement, could be important considerations. To be clear, each shareholders' agreement must establish that the Indian airlines, AirAsia India and Vistara, can make their decisions independently from the foreign airline shareholders. Similarly, any business service agreements or commercial co-operation agreements must show that AirAsia India and Vistara have the right to determine their own network, fare structure, and other flight-related matters.

The experiences borne out by investments by foreign airlines is far from satisfactory. The SOEC restrictions have been designed and applied in an ambiguous manner, and uncertainties remain. While the opening of the Indian civil aviation sector in

208. Tarun Shukla, *India's Airlines Team to Try to Block AirAsia Low Cost Carrier*, SKIFT (Feb. 22, 2014), https://skift.com/2014/02/22/indias-airlines-team-to-try-to-block-airasia-low-cost-carrier/.

209. *Statement by Tata Sons on Civil Aviation*, TATA (Feb. 24, 2016), http://www.tata.com/media/releasesinside/statement-tata-sons-civil-aviation. *See also* Arindam Majumder, *Tata Sons Says It Effectively Controls Vistara, AirAsia*, BUS. STANDARD (Feb. 25, 2016), https://www.business-standard.com/article/companies/tata-sons-says-it-effectively-controls-vistara-airasia-116022500044_1.html.

210. *See supra* note 198.

211. Swamy v. Union of India, W.P.(C) 5909/2013 (Del.). The status of the case as of October 25, 2018 is available at http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=234698&yr=2018.

2012 to foreign airlines was a momentous occasion in the industry's evolution, the regulatory regime still leaves much to be desired.

B. Non-Airline Investors

India has fully liberalized foreign investments by non-airline investors in its civil aviation industry by allowing 100 percent foreign ownership. This is beneficial to the Indian airline industry as it allows Indian carriers to raise capital to meet their business needs in a highly competitive environment.[212] It also enables Indian airline companies to undertake initial public offerings on domestic or international stock exchanges, with a view to accommodating foreign investment without quantitative limitations.[213] While, at one level, this approach looks beneficial in attracting foreign investment, there appear to be several hurdles in its implementation.

At the outset, the liberalization seems to have been undertaken in a piecemeal manner. The Consolidated FDI Policy[214] that deals with foreign investments allows 100 percent foreign ownership in the sector without any apparent SOEC restrictions on non-airlines investors.[215] The requirements stipulated by the Director General of Civil Aviation (DGCA), however, have failed

212. P.R. Sanjai, *What Does 100% FDI in Aviation Mean?*, LIVE MINT (June 21, 2016), https://www.livemint.com/Politics/qXiX9p9ViAPzupDjqsnlWN/What-does-100-FDI-in-aviation-mean.html.

213. *Id.* On a related note, several Indian airline companies, including Jet Airways India Limited, SpiceJet Limited and, most recently, InterGlobe Aviation Limited (which operates Indigo), have approached the capital markets in the past. *See* Ravindra N. Sonavane, *Aviation Stocks Rally on Robust Passenger Growth*, LIVE MINT (Jan. 19, 2017), https://www.livemint.com/Money/81cv6H6wbkMsaOzRQJODYL/Aviation-stocks-rally-on-robust-passenger-growth.html.

214. Consolidated FDI Policy, *supra* note 145, ¶ 5.2.9.2.

215. The conditions relating to SOEC apply only to foreign airline investors. See Consolidated FDI Policy, *supra* note 145, ¶ 5.2.9.2, under the heading "Other Conditions," at sub-para. (c). *See also* Sindhu Bhattacharya, *Reasons Why 100% FDI in India's Civil Aviation Could Fail to Take Off*, FIRSTPOST (June 23, 2016), https://www.firstpost.com/business/reasons-why-100-fdi-in-indias-civil-aviation-could-fail-to-take-off-2852118.html; PTI, *Government Working on 'Appropriate Policies' for 100% FDI in Airline*, ECON. TIMES (Mar. 15, 2017), https://economictimes.indiatimes.com/news/economy/policy/government-working-on-appropriate-policies-for-100-fdi-in-airline/articleshow/57655297.cms.

to keep pace with the liberalization in foreign investment.[216] The requirements imposed by the DCGA for grant of a permit to operate scheduled air transport services continue to carry the condition that, in the case of an Indian airline seeking the permit, "substantial ownership and effective control is vested in Indian nationals."[217] The Consolidated FDI Policy and the DGCA requirements are mutually contradictory. The interaction of the legal regimes governing foreign investment and the aviation sector results in an inconceivable situation where an airline may have 100 percent foreign investment, but nevertheless, substantial ownership and effective control need to be vested in Indian hands. Unless the regulations imposed by the DGCA are reformed, investments by non-airline investors that exceed 49 percent or confer SOEC on such foreign shareholders will remain a fanciful hope.

Moreover, foreign investments beyond 49 percent require the approval of the government of India, which will be granted on a case-by-case basis.[218] Yet, there are no signs of how the government will exercise its discretion in considering the applications for majority foreign investment in Indian airlines.[219] More importantly, the government always has the prerogative to introduce the SOEC requirements by way of conditions while granting the approvals for foreign ownership beyond 49 percent, although such SOEC requirements are not evident from the relevant text of the FDI Policy Circular that applies to non-airline

216. *See infra* text accompanying notes 217–22.

217. DIR. GEN. OF CIVIL AVIATION, MINIMUM REQUIREMENTS FOR GRANT OF PERMIT TO OPERATE SCHEDULED PASSENGER AIR TRANSPORT SERVICES ¶ 3.1(b)(iii) (Mar. 1, 1994) (India), http://www.dgca.nic.in/operator/aop-ind.htm.

218. Consolidated FDI Policy, *supra* note 145, ¶ 5.2.9.2(1)(a).

219. Hitherto, government approvals for foreign investment were considered and granted by the FIPB, an inter-ministerial body. *See supra* note 184. In 2017, however, the government abolished the FIPB, and announced the standard operating procedures by which foreign investment applications will be considered by the relevant ministries or sectoral regulators. DEP'T OF INDUS. POLICY AND PROMOTION, MINISTRY OF COMMERCE AND INDUS., STANDARD OPERATING PROCEDURES (SOP) FOR PROCESSING FDI PROPOSALS (June 29, 2017) (India), http://dipp.nic.in/whats-new/standard-operating-procedure-sop-processing-fdi-proposals. Until considerable experience and proper practices have developed under these newly-minted reforms, however, there are likely to be difficulties in their implementation. *See* Prem Rajani & Poorvi Sanjanawala, *Will Abolishing FIPB Make India a More Investor-Friendly Destination?*, VCCIRCLE (June 8, 2017), https://www.vccircle.com/will-abolishing-fipb-make-india-a-more-investor-friendly-destination/.

investors. In other words, there is a risk that the government might not adopt a hands-off approach to foreign investment by non-airline investors, and might use its discretion to curb the ownership and control rights that they might exercise.[220] At a broad level, the policy pronouncement undoubtedly makes India's foreign investment regime in the airline sector fully open; however, matters are not likely to be as straightforward when the policy is applied, especially when non-airline investors seek to obtain more than a 49 percent share ownership in Indian companies. Moreover, this issue remains untested as, to the authors' knowledge, no foreign investor has made an application to the government for foreign investment beyond 49 percent in an Indian airline.[221] It is also unlikely that India's airline sector will witness a foreign investor taking a substantial stake in an Indian company soon.[222]

Even as the dust settles on the new policy reforms allowing foreign investments up to 100 percent in Indian airlines, an announcement by Qatar Airways to set up an airline in India has stirred up a hornet's nest. Since Qatar Airways itself cannot acquire more than a 49 percent share in an Indian airline—and that it will be subject to the SOEC requirements—it has reportedly considered partnering with Qatar Investment Authority, the country's sovereign wealth fund.[223] To begin with, Qatar's proposal sounds rather attractive. The airline's investment will be confined to the 49 percent allowed under the law, with the sovereign wealth fund taking the remaining stake,[224] such that the Indian airline can be owned entirely by the two Qatari entities.[225] There is more to it, however, than meets the eye. First, the Consolidated FDI Policy is unclear about whether the 100 percent limit for foreign investment applies only when there is no participation by a foreign airline, or whether it is possible for a foreign airline to partner with a non-airline investor—as in the

220. Bhattacharya, *supra* note 215 (noting that "any non-airline foreign investor may have to undergo minute scrutiny from government agencies for permission to bring in funds into an Indian carrier").

221. PTI, *supra* note 215.

222. Sanjai, *What Does 100% FDI in Aviation Mean?*, *supra* note 212.

223. FC Bureau, *Qatar Airways Confident of Clearing FDI Hurdles in India*, FIN. CHRONICLE (Mar. 28, 2017), http://www.mydigitalfc.com/my-world/qatar-airways-confident-clearing-fdi-hurdles-india.

224. This would of course have to be with the Indian government's approval.

225. FC Bureau, *supra* note 223.

Qatar case—to fully exploit the rules. Some might argue that the 100 percent limit applies only when there is no involvement by a foreign airline in the proposed transaction.[226] Second, even if the policy were to be interpreted expansively to allow such a partnership, it would be imprudent to expect that the government of India would approve such an investment, given that it might be viewed as circumventing the SOEC requirements applicable to foreign airlines.[227]

For the reasons discussed above, foreign non-airline investors face numerous hurdles in obtaining a significant majority stake in Indian airline companies. After separately analyzing investments by foreign airlines on the one hand, and those by non-airline investors on the other, this article now aims to account for the unique distinction that the Indian foreign investment policy makes regarding ownership by these two types of investors and to consider whether such differentiation is worthy of merit.

C. Reviewing the Dichotomy between Airline and Non-Airline Investors

The regulatory regime in India is unique in that the foreign investment norms draw a line embodied by the SOEC requirements to distinguish between foreign airlines and non-airline investors.[228] A detailed rationale for such a distinction has eluded the public domain.[229] On the surface, it appears to be a neat distinction. The exercise of control by foreign airlines might arguably affect the safety and security concerns and increase any economic threat to the Indian airline sector.[230] As this article has

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226. ERNST & YOUNG, EY INDIA CIVIL AVIATION: EY'S POINT OF VIEW ON AMENDED FOREIGN DIRECT INVESTMENT (FDI) POLICY ON CIVIL AVIATION SECTOR Q.6 (June 24, 2016), http://www.ey.com/Publication/vwLUAssets/Civil_Aviation_Sector.pdf/$FILE/Civil_Aviation_Sector.pdf.

227. FC Bureau, *supra* note 223 (quoting the Aviation Secretary as saying: "We would like to see there is no connection, direct or indirect between a foreign airline and its co-partner investing beyond the 49 per cent stake in an Indian carrier. . . .").

228. *See* World Economic Forum, *supra* note 1, at 12.

229. Steven Philip Warner, *How the IndiGo IPO Leads Us to the Question of 'Right' Foreign Investments in the Aviation Industry*, DOLLAR BUS. (May 29, 2015), https://www.thedollarbusiness.com/news/how-the-indigo-ipo-leads-us-to-the-question-of-right-foreign-investments-in-the-aviation-industry/22755.

230. For a discussion of such rationale in the U.S. context, see *supra* text accompanying notes 41–44.

already highlighted earlier in this part, however, this distinction gives rise to several problems in its practical implementation.

While foreign airlines are likely to be strategic investors, non-airline owners are largely likely to be financial investors.[231] To that extent, foreign airlines can seek to benefit substantially from their investments only if they have other forms of partnership with the Indian airline and possess the capability to participate in at least some of the key strategic decisions of the company.[232] In the case of investments by foreign airlines, much would depend upon the identity of the Indian controllers, who possess SOEC. If the local partner is an established company or group in the airline industry, the investor that is a foreign airline may be more willing to cede full control over the operations of the Indian airline to the local partner.[233] When the Indian partner does not have prior experience in the airline sector, however, matters become somewhat murkier.[234] In such cases, it is likely that the foreign airline investor would seek to exercise a greater say, at least on key decisions, in order to protect its investment in the company.[235] One of the authors has argued that foreign airline investors may, in fact, prefer such a scenario

231. *See* Amy Kazmin & James Crabtree, *AirAsia and Tata to Set Up Indian Airline*, FIN. TIMES (Feb. 20, 2013), https://www.ft.com/content/73924dee-7b54-11e2-8eed-00144feabdc0. For a comparison more generally between strategic and financial investors, see Stefan Arping & Sonia Falconieri, *Strategic Versus Financial Investors: The Role of Strategic Objectives in Financial Contracting*, 62 OXFORD ECON. PAPERS 691 (2010).

232. ET Bureau, *Jet Airways, Etihad Deal Will Be Deep Strategic Alliance: Aviation Experts*, ECON. TIMES (Nov. 26, 2012), https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/jet-airways-etihad-deal-will-be-deep-strategic-alliance-aviation-experts/articleshow/17366082.cms.

233. *See* Lee & Dy, *Mitigating 'Effective Control' Restriction on Joint Venture Airlines in Asia: Philippines Air Asia Case*, *supra* note 14, at 241–44. Even in such a scenario, however, foreign airline investors would like to retain as much control as is legally permissible, in order to fully exploit the commercial benefits of the investment in the Indian airline from a business perspective. This explains the detailed rights initially sought by Etihad in its investment in Jet Airways, although it had to subsequently water them down to pass muster under the Indian foreign investment regulations. *See supra* text accompanying notes 188–90.

234. *See* Rhik Kundu, *Effective Control of AirAsia India Was With Parent, Shows Brand Licence Pact*, LIVE MINT (June 1, 2018), https://www.livemint.com/Companies/bJghd3euHwnx340wkJqS6H/Effective-control-of-AirAsia-India-was-with-Malaysian-parent.html.

235. *Id.*

where there is only one specialist partner, as differences over managerial or operational matters may be difficult to reconcile between two airline partners.[236] A partnership between a foreign airline and a non-airline Indian controlling shareholder, however, might result in a situation where the foreign airline may be deemed to possess de facto control.[237] This is arguably not an appropriate scenario when the only partner in the arrangement that has airline expertise is restrained from contributing such expertise to the full extent due to regulatory compulsions. Such a scenario results in consolidating all powers of control in the hands of a non-specialist Indian partner. Surely, this cannot be desirable from the perspective of fully utilizing management skills and enhancing business efficiency.

Moving to foreign ownership by non-airline investors, there are thorny issues within that realm as well. Such investors are principally expected to invest with a view to obtaining financial returns, rather than to exercise control over the management and policy of the Indian airline.[238] Such investors may purchase a stake through a public offering or private placement of shares by a company that may have capital needs. While such investors are potentially entitled to exercise control,[239] it might very well be that they are uninterested. There is, however, a greater likelihood of a financial investor partnering with a foreign airline, which tips the scale toward the other side of the divide, with the entire transaction being colored by the presence of the foreign airline. This would invoke the SOEC requirements.[240]

For these reasons, it remains to be seen whether the two-part legal regime—for example, one governing foreign airlines as investors and the other concerning non-airline investors—will be beneficial for the Indian aviation sector, or whether such a classification is likely to result in unintended consequences.

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236. Lee & Dy, *Mitigating 'Effective Control' Restriction on Joint Venture Airlines in Asia: Philippines Air Asia Case*, *supra* note 14, at 241.

237. *Id.*

238. *See* Amy Kazmin & Simon Mundy, *Is India Really the Most Open Economy for FDI?*, FIN. TIMES (June 21, 2016), https://www.ft.com/content/bacdacee-3780-11e6-a780-b48ed7b6126f.

239. This is possible because the Consolidated FDI Policy does not impose SOEC requirements on them. *See supra* note 215 and accompanying text.

240. The discussion surrounding the potential entry of Qatar Airways into the Indian aviation scene epitomizes this point. *See supra* text accompanying notes 223–27.

After a discussion of the principal issues governing foreign investment in the Indian airline industry, this article now touches upon other quirks of the regulatory regime, as well as the markets in the Indian financial sector that have a role to play in the shaping and implementation of foreign investment norms.

D. Some Twists in India's Aviation Tale

Law and economics theorists have sought to analyze the role of the aviation industry in shaping government regulation. Theories, such as "interest group politics"[241] and the "regulatory capture theory,"[242] have focused on the influence of industry in molding the regulations that govern it.[243] These theories have been attributed to the way in which regulation of the aviation industry, too, has evolved, particularly in the United States.[244] Often, the interest groups interact in rather complex ways with the government authorities, and as a consequence, discernible trends may not always emerge.

Applying this theory, one finds that Indian regulation in the civil aviation sector has also been subject to influence from various interest groups, either overtly or with a dose of subtlety.[245] Three groups, all of which are incumbents in the Indian airline sector, are worth exploring. They are: (1) the NRI community,

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241. The theory of interest group politics focuses on the role that various interest groups play in the creation of law or public policy. *See* Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. ECON. 1089, 1089 (1991).

242. Similar to interest group politics, the regulatory capture theory postulates that "regulation is supplied in response to the demands of interest groups struggling among themselves to maximize the incomes of their members." Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. 335, 335–36 (1974).

243. *Id.*

244. *See* ELDAD BEN-YOSEF, THE EVOLUTION OF THE US AIRLINE INDUSTRY: THEORY, STRATEGY AND POLICY 141–42 (2005); STEVEN TRUXAL, COMPETITION AND REGULATION IN THE AIRLINE INDUSTRY: PUPPETS IN CHAOS 50–52 (2012); Maja Andlovic & Wilhelm Lehmann, *Interest Group Influence and Interinstitutional Power Allocation in Early Second-Reading Agreements: A Re-Examination of Aviation Emissions Trading*, 21 J. EUR. PUB. POL'Y 802 (2014).

245. *See, e.g.*, VIJAY VIR SINGH & SIDDHARTHA MITRA, REGULATORY MANAGEMENT AND REFORM IN INDIA: BACKGROUND PAPER FOR OECD (2008), https://www.oecd.org/gov/regulatory-policy/44925979.pdf; Rahul Mukherji & Gaurav Kankanhalli, *Civil Aviation in India: An Exploration in the Political Economy of Promoting Competition* (ISAS Working Paper No. 97, Nov. 18, 2009), https://www.files.ethz.ch/isn/109847/96.pdf.

which has received preferential treatment all along with respect to foreign investment;[246] (2) the state-owned Air India, which enjoyed a monopoly for nearly half a century; and (3) the Federation of Indian Airlines, a lobby group comprised of incumbents that has sought to keep the barriers high to restrict new entrants into the Indian airline industry.

1. Investments by NRIs

Ever since private airlines became operational in India in the 1990s, NRIs have received preferential treatment because they have been allowed to invest up to 100 percent shareholder ownership in an Indian airline.[247] This puts them at a significant advantage over other foreign investors. Although the definition of who constitutes an NRI, as well as some of the rules surrounding that, have changed over time, an NRI is currently defined to mean either an Indian citizen who is a resident outside India or is an Overseas Citizen of India (OCI).[248]

Historically, some leading Indian private airlines have been established through the NRI route. The most significant example is that of Jet Airways, which was completely owned by Tail Winds, a company in turn wholly owned by Naresh Goyal, who is an NRI.[249] Tail Winds transferred its shares to Goyal.[250] Following the company's initial public offering and investment by Etihad Airways,[251] Goyal now holds a 51 percent share,[252] and

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246. *See supra* text accompanying note 108.

247. *See supra* text accompanying notes 108–16.

248. Consolidated FDI Policy, *supra* note 145, ¶ 2.1.32. An OCI is defined under section 7A of the Citizenship Act of 1955 to include persons who are of Indian origin and who have been issued an OCI card by the Government of India. An OCI includes a person whose parent or grandparent is or was a citizen of India.

249. *See also supra* text accompanying notes 110–15.

250. This transfer was accomplished in tranches in 2013. *See* NISHITH DESAI ASSOCS., *supra* note 141, at 5–6; Aneesh Phadnis, *Change in Jet Airways Ownership as Tail Winds Transfers Shares to Naresh Goyal*, BUS. STANDARD (May 23, 2013), https://www.business-standard.com/article/companies/change-in-jet-airways-ownership-as-tail-winds-transfers-shares-to-naresh-goyal-113052300995_1.html.

251. For a detailed discussion of Etihad's investment in Jet Airways, see *supra* Part III.A.1.

252. *Shareholding Patterns*, NAT'L STOCK EXCHANGE INDIA, https://www.nseindia.com/corporates/corporateHome.html?id=spatterns (last

thereby meets SOEC requirements. Similarly, there is evidence of NRI investments in InterGlobe Aviation Limited, the company that runs Indigo Airlines.[253] One of its founders, Rakesh Gangwal, is an NRI based in the United States,[254] and continues to own a significant number of shares in the company.[255]

The NRI investment structure has come under some attack as not only being incumbent-friendly, but also as being non-transparent. Critics have argued that the NRI structure can be used to mask the real shareholding structure of the company.[256] The newer entrants to the Indian aviation sector have argued that the NRI route discriminates against foreign airline investors.[257] While NRIs can enjoy massive benefits under India's regulatory regime even though they are residents outside of India, other types of foreign investors, especially foreign airlines, are subject to strict SOEC restrictions. Such an incumbent-friendly policy has come under significant attack from Tony Fernandes, the AirAsia boss, who has ridiculed the situation under which leading Indian airlines have been controlled by NRIs.[258] Fernandes

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visited Nov. 17, 2018) (see the shareholding pattern of Jet Airways (India) Limited as on June 30, 2017). Goyal's shareholding is shown under the category "Individuals (Non-Resident Individuals/ Foreign Individuals)." *Id.*

253. ET Bureau, *FIPB Approves Proposal to Convert Rakesh Gangwal's InDiGo Stake to NRI Category*, ECON. TIMES (Aug. 2, 2014), https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/fipb-approves-proposal-to-convert-rakesh-gangwals-indigo-stake-to-nri-category/articleshow/39427443.cms.

254. *Air Asia Boss Tweet Adds to Aviation Row*, BUS. STANDARD (Feb. 27, 2016), https://www.business-standard.com/article/current-affairs/air-asia-boss-tweet-adds-to-aviation-row-116022700547_1.html.

255. *Shareholding Patterns*, *supra* note 252 (see the shareholding patterns of INDIGO InterGlobe Aviation Limited as on June 30, 2017). Gangwal's shareholding is shown under the category "Individuals (Non-Resident Individuals/ Foreign Individuals)." *Id.*

256. *Subramanian Swamy Says First Find Out Real Owners of Jet Airways*, MONEYLIFE (July 29, 2013), https://www.moneylife.in/article/subramanian-swamy-says-first-find-out-real-owners-of-jet-airways/33857.html.

257. Anirban Chowdhury, *AirAsia Berhad CEO Tony Fernandes Applies for 'Overseas Citizen of India' Status*, ECON. TIMES (Mar. 17, 2016), https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/airasia-berhad-ceo-tony-fernandes-applies-for-overseas-citizen-of-india-status/articleshow/51424163.cms.

258. *Air Asia Boss Tweet Adds to Aviation Row*, *supra* note 254; P.R. Sanjai, *Are Owners of Airlines Living in India, Asks AirAsia's Tony Fernandes*, LIVE

has responded not only through words, but also through his actions.[259] He himself applied for and obtained NRI status relying upon the fact that his father was of Indian origin.[260] The tone of his press statements indicate that such a move is to retaliate against the accusations of incumbent Indian airlines that have alleged that the SOEC relating to AirAsia vests with its foreign owners rather than the Indian partners.[261] It is not entirely clear, however, whether this confers any legal advantage on Fernandes. He may encounter legal hurdles if he seeks to obtain shares in AirAsia India in addition to the 49 percent of shares already held by the AirAsia parent company.[262] Whether the NRI route can be exploited when the NRI invests along with a foreign airline is not a question that the Indian authorities have been called upon to deal with under the current regime.[263] The NRI route remains an oddity among the Indian legal regime's governance of foreign investments in the airline sector and has continued to create a few ripples in the industry.

2. Incumbency of the State-Owned Behemoth

Historically, the privatization of state-owned carriers has been a politically sensitive topic, and it is understandable that countries established ownership and control restrictions for foreign

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MINT (Feb. 28, 2016), https://www.livemint.com/Companies/k8VOnartdbK43Cxf2NHBCI/Are-owners-of-airlines-living-in-India-AirAsias-Tony-Fern.html.

259. Chowdhury, *supra* note 257.

260. *Id.* Shahkar Abidi, *AirAsia Chief Gets Overseas Citizenship of India Card Ahead of New Civil Aviation Policy*, DNA INDIA (June 13, 2016), https://www.dnaindia.com/business/report-airasia-chief-gets-overseas-citizenship-of-india-card-ahead-of-new-civil-aviation-policy-2222997.

261. *See* Abidi, *supra* note 260.

262. The issues would be akin to the type of proposal announced by Qatar Airways to start an airline in India along with the Qatar Investment Authority. *See supra* text accompanying notes 223–27.

263. While Naresh Goyal's investment in Jet Airways and Rakesh Gangwal's in Indigo were made on a standalone basis, any prospective investment by Tony Fernandes in AirAsia India will be colored by the pre-existing investment by the AirAsia parent. In that sense, while the Jet Airways and Indigo situations merely involved NRI investments and were treated as such, one cannot rule out the possibility that the AirAsia case could be categorized under the foreign airline category for purpose of determining the SOEC requirements under Indian law.

investors as part of the process.[264] In India, the dichotomy between foreign investors that are airlines and those that are non-airline investors was even more pronounced in the context of its state-owned carrier, Air India. Since the 2012 policy that opened the Indian skies to foreign airline investors,[265] a clear and categorical exception was carved out by which foreign airlines were not permitted to invest in any shares whatsoever in Air India.[266] In other words, the national carrier was out of bounds for foreign airline investments.

The debate surrounding the prohibition of foreign airline investments in Air India, however, has recently grown louder as the government of India explores methods for privatization of the airline.[267] Such privatization has become necessary given the need to rejuvenate its business, as it has not only ceded market share to leading private carriers, but it also carries a heavy debt burden.[268]

The government's resistance against allowing foreign airlines from investing in Air India was, however, met with criticism. While the need to shield the national carrier against a takeover by a foreign airline due to concerns regarding safety, security and consumer protection was understandable, the solution of not allowing any foreign airline investment at all was an extreme measure. For instance, foreign airlines would be in a position to use their managerial and financial capabilities to accomplish a successful turnaround of the national carrier.[269] By eliminating

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264. World Economic Forum, *supra* note 1, at 9 (discussing the examples of Canada, France, Great Britain and Australia).

265. Press Note 6 of 2012, *supra* note 20, ¶ 3.0.

266. *Id.*

267. *See* Arindam Majumder, *Why National Carrier Air India Could Remain With an Indian Owner*, BUS. STANDARD (Dec. 11, 2017), https://www.business-standard.com/article/companies/gom-likely-to-rule-out-foreign-owner-for-air-india-117090600040_1.html; Mihir Mishra, *Air India Not to Be Sold to Foreign Carriers: FDI Policy*, ECON. TIMES (Aug. 28, 2017), https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/air-india-not-to-be-sold-to-foreign-carriers-fdi-policy/articleshow/60258260.cms; *FDI Policy Rules Out Sale of Stake in Air India to Foreign Airlines*, HINDUSTAN TIMES (Aug. 28, 2017), https://www.hindustantimes.com/india-news/fdi-policy-rules-out-sale-of-stake-in-air-india-to-foreign-airline/story-XDMlzUiEoVWX-mEt2vTS2ZI.html.

268. Akira Hayakawa, *Air India Sale Still Stuck on the Runway*, NIKKEI ASIAN REV. (May 20, 2018), https://asia.nikkei.com/Business/Business-Deals/Air-India-sale-still-stuck-on-the-runway.

269. Mishra, *supra* note 267.

the possibility of a foreign airline's participation, however, the options for resuscitating Air India were confined to a domestic carrier or to a group of foreign non-airline investors. While the domestic carrier, Indigo Airlines, has expressed some interest in Air India's international business as a means of supplementing its own dominion over the domestic sector, it is not clear if any substantial interest has yet been evinced by any significant non-airline investors.[270]

The paternalistic treatment afforded to Air India represented another peculiarity of the foreign investment regime governing India's aviation sector. While the need to impose curbs on investments by foreign airlines is explicable, a total ban against foreign airline investments in Air India is not. The question of whether Air India needs to continue to be treated differently from other Indian airlines from a foreign investment perspective continued to exercise the minds of India's policy-makers.

Finally, in January 2018, the government altered its policy on foreign investment and allowed foreign airlines to invest in Air India so long as they hold—directly or indirectly—no more than a 49 percent stake in the company.[271] Moreover, the policy states that the SOEC of Air India shall continue to be vested in Indian nationals.[272] Clearly, the desire to obtain a suitor for Air India, especially given its precarious financial position, has compelled the government to relent from its earlier position. This change has not made a significant difference in Air India's divestment program, as it failed to receive any bids at all.[273]

3. Lobbying by the Incumbent Airlines

A more visible manifestation of interest group activity lies in the Federation of Indian Aviation (FIA) that was formed in

270. *Id.*

271. Press Note No. 1 (2018 Series): Review of Foreign Direct Investment (FDI) Policy on Various Sectors, Department of Industrial Policy & Promotion, Ministry of Commerce and Industry, (Jan. 23, 2018) (India).

272. *Id.*

273. Mark Thompson, *India Tries to Sell its National Airline. It Got Zero Bids*, CNN MONEY (June 1, 2018), https://money.cnn.com/2018/05/31/investing/air-india-privatization-fails/index.html?utm_medium=social&utm_term=image&utm_source=twCNNi&utm_content=2018-06-01T16%3A42%3A54.

2006.[274] The FIA consists of the leading incumbent airlines, currently including Jet Airways, Indigo, SpiceJet, and GoAir.[275] Although Air India was one of the founding members of the FIA, it subsequently stepped down from the organization.[276]

The FIA has been vocal with respect to reforms or policy initiatives of the government that have an impact on foreign investment in India's airline sector. For example, the FIA vehemently opposed the entry of AirAsia and Vistara into the Indian markets on the grounds that not only would it result in overcrowding of the Indian skies, but also that de facto control over these airlines was likely to be exercised by their foreign airline owners.[277] The FIA has also registered its protest with the government against allowing Qatar Airways to establish an airline in India.[278] The FIA has done this in response to alleged security concerns.[279]

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274. Tarun Shukla, *Air India Exit Leaves Lobby FIA in Jeopardy*, LIVE MINT (Nov. 3, 2014), https://www.livemint.com/Companies/r2zL8DCXQZiompnZgZHf3L/Air-India-exit-leaves-lobby-FIA-in-jeopardy.html. *See also About Us*, FED'N INDIAN AIRLINES, http://www.fiaindia.in/about.html (last visited Oct. 15, 2018) (specifying the FIA's role as the "voice of India's airline industry" that "provides a platform for consensus building amongst the member carriers.").

275. *Our Members*, FED'N INDIAN AIRLINES, http://www.fiaindia.in/member/index.html (last visited Oct. 15, 2018).

276. *See* Shukla, *Air India Exit Leaves Lobby FIA in Jeopardy*, *supra* note 274 (noting Air India's realization that it is preferable for it to convey its views directly to the government rather than to route it through the FIA).

277. Shukla, *India's Airlines Team to Try to Block AirAsia Low Cost Carrier*, *supra* note 208.

278. Tarun Shukla, *Qatar Airways' India Airline Plan May Face Opposition from Airlines Lobby FIA*, LIVE MINT (Mar. 10, 2017), https://www.livemint.com/Companies/bqvjRPPtlYyu7Wy84A6VIL/Qatar-Airways-India-airline-plan-may-face-opposition-from-F.html; Amber Dubey, *Why Are We Scared of Foreign Airlines?*, BUS. STANDARD (Apr. 4, 2017), https://www.business-standard.com/article/opinion/why-are-we-scared-of-foreign-airlines-117040401257_1.html; Suchetana Ray, *Indian Airlines Continue to Oppose 100% FDI. Fear of Qatar Airways' India Plans?*, HINDUSTAN TIMES (June 8, 2017), https://www.hindustantimes.com/business-news/indian-airlines-continue-to-oppose-100-fdi-fear-of-qatar-airways-india-plans/story-tsceIKjwY7uN9FzmlKp8CO.html. Qatar's proposal and the legal issues surrounding its possible foreign investment structure have been discussed. *See supra* text accompanying notes 223–27.

279. *Foreign Players Owning Airlines in India May Trigger Security Issues: FIA*, BUS. STANDARD (May 25, 2017), https://www.business-standard.com/article/economy-policy/foreign-players-owning-airlines-in-india-may-trigger-security-issues-fia-117052501242_1.html; Sindhu Bhattacharya, *Indian Carriers*

The FIA also lobbied to put up a stiff, but ultimately unsuccessful, resistance against liberalizing the 5/20 rule.[280] The FIA's argument was that while the incumbent airlines had to wait five years before flying international routes, any relaxation of that rule will adversely affect them if the newly established airlines can skirt the requirement of the time-period and begin flying immediately.[281] This argument, however, did not cut ice with the government which relaxed the rule anyway.

The composition of the FIA is also somewhat unique in that it creates a schism between various Indian airlines. Its membership currently comprises only the well-established Indian private carriers, and this is so following the departure of Air India from the group. Newly established airlines such as AirAsia and Vistara have not been brought within the fold of the FIA for obvious reasons, given that the FIA has been vehemently opposing the entry of those airlines into India and the benefits conferred upon them by the regulatory policy.[282] Some have argued that the composition of the FIA smacks of "crony capitalism" as it is a proclaimed defender of the interests of the well-established players at the cost of other entrants.[283]

In all, these examples reflect the operation of the interest group theory in the Indian aviation sector that may explain the shape that foreign investment regulation has taken over the years. While the Indian government has seemingly taken bold steps to allow 100 percent foreign investment in this sensitive sector, the problems highlighted in this Part indicate that in practice it is unlikely that foreign investors would be able to enjoy full freedom in entering into and exiting from the Indian market. Several underlying factors continue to inhibit foreign investments, such that it may be difficult to translate the government's overt pronouncements into action.

Are Against Qatar Airways' India Plans and Their Points are Valid; Govt Should Take Heed, FIRSTPOST (May 25, 2017), https://www.firstpost.com/business/indian-carriers-are-against-qatar-airways-india-plans-and-their-points-are-valid-govt-should-take-heed-3481285.html.

280. For a discussion of this rule and its implications, see *supra* text accompanying notes 150–53.

281. Neha Gupta Kapoor, *India's Civil Aviation Ministry Changes 5/20 Rule*, BUS. TRAVELLER (June 16, 2016), https://www.businesstraveller.com/news/2016/06/16/428370/.

282. Shukla, *Air India Exit Leaves Lobby FIA in Jeopardy*, *supra* note 274.

283. *Id.* (quoting a former executive director of Air India).

IV. Treatment under Bilateral Air Services Agreements

Having extensively discussed the nationality requirements under domestic Indian law, this article now addresses some issues that will likely arise under the "external bolt,"[284] wherein SOEC requirements are stipulated in bilateral ASAs[285] between India and other countries. While the Indian government can unilaterally disengage the internal bolt, matters become somewhat complicated given the questions of reciprocity that arise under the ASAs.

This issue is somewhat unique to India. The bilateral treatment problem arises only when a country relaxes the SOEC requirements for foreign investment with respect to its international sector.[286] India is arguably the only country to liberalize foreign investment norms to allow foreign investors without any restrictions on nationalities to take majority ownership and control in airlines that operate internationally.[287] To that extent, how India deals with the bilateral issues may be relevant for other countries that might liberalize their foreign investment in the aviation sector in the future.

To be sure, relaxation of the SOEC requirement at a regional level has been observed over the past few decades. The concept of "community carrier" has been adopted by the EU, ASEAN, and the League of Arab States.[288] The community carrier is an air carrier with an operating license granted by any member state of the community.[289] Designation as a community carrier means that an air carrier in the member state of a given community no longer requires national SOEC, which instead has

284. For a discussion of this concept, see *supra* text accompanying notes 35–38.

285. *See supra* text accompanying note 35.

286. *See* Havel & Sanchez, *supra* note 5, at 649–59.

287. While Australia and New Zealand allow 100 percent foreign investment, they do so only for the domestic sector, where bilateral aspects do not come into play. *See supra* text accompanying notes 83–87. Moreover, while Hong Kong and Singapore follow the PPB approach, they do not appear to eliminate requirements that might attract de facto control. For a discussion of the issues, see *supra* text accompanying notes 78–82.

288. *See* LEE, *supra* note 75, at 45–82.

289. *See* Council Regulation 2407/92 of July 23, 1992, Licensing of Air Carriers, 1992 O.J. (L 240) 1 (EC).

been redefined as community SOEC.[290] For instance, a now-defunct, Luxembourg-registered cargo airline, Cargo Lion, had no Luxembourg national ownership interest; a German national owned 49 percent of it, a Swiss national possessed another 41 percent, and a UK and a Canadian national each had 5 percent.[291]

Apart from the aforementioned developments, on routes governed by an ASA between two states, SOEC restrictions in the agreement require that a state party designate only carriers that are substantially owned and effectively controlled by its own nationals.[292] For instance, the Air Services Agreement between India and the United States stipulates ownership and control restrictions in Article 4, which is entitled Revocation of Authorization: "Either Party may revoke, suspend or limit the operating authorizations or technical permissions of an airline designated by the other Party where: substantial ownership and effective control of that airline are not vested in the other Party, the Party's nationals, or both. . . ."[293]

Under this dispensation, for instance, Jet Airways' traffic rights could be revoked or suspended by the United States if the airline ceases to be substantially owned or effectively controlled by Indian nationals. This external restriction effectively restrains India's national air carriers from attracting sizeable foreign investment. Consequently, Indian airlines will ensure that they limit foreign investment to the previous level of 49 percent. Thus, while the nationality requirements have been liberalized under domestic Indian law (i.e. internal bolt), the restrictions under the ASAs (i.e. external bolt) continue to constrain foreign investment in India's aviation industry. To that extent, the only practical implication of the recent reforms is that an Indian company can now set up an airline with foreign investors while flying only domestic routes. Among existing airlines, GoAir has not

290. PETER P.C. HAANAPPEL, THE LAW AND POLICY OF AIR SPACE AND OUTER SPACE: A COMPARATIVE APPROACH 136 (2003).

291. Havel *supra* note 7, at 13208–09.

292. Barring some exceptions, the ASAs that India has entered into with several countries contain such SOEC restrictions. *See* Tarun Shukla, *Will Foreign Airlines Fly Into India?*, LIVE MINT (Aug. 23, 2016), https://www.livemint.com/Companies/ZgSMp1012FBFMt3udUXP9J/Will-foreign-airlines-fly-into-India.html.

293. Air Transport Agreement Between the Government of India and the Government of the United States of America, India-U.S., Apr. 14, 2005, 7 U.S.T. 275.

started operations on international routes. Hence, it is free to obtain foreign investment of more than 49 percent without being constrained by ASA, so long as it is satisfied with operating only domestic routes.[294]

If India can amend the ownership and control clause in consultation with the country concerned, the foreign investment opportunity for Indian airlines will increase. Indeed, some states are making an effort to liberalize the ownership and control restrictions in their ASAs. In particular, Brazil, Chile, Columbia, Egypt, Indonesia, Switzerland, and Vietnam reported that they are in the process of replacing traditional substantial ownership and control with "principal place of business and effective regulatory control" in their ASAs.[295] Obviously, their bilateral partners must also agree to the change.

With regards to bilateral arrangements, one option is that India can consider the United States' position. The United States

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294. For the future, however, GoAir too has been contemplating operations on international routes. Mihir Mishra & Anirban Chowdhury, *GoAir Says Airline Will be Available to Fly International*, ECON. TIMES (June 2, 2016), https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/goair-says-airline-will-be-available-to-fly-international/articleshow/52554718.cms; *GoAir to Start International Flights by End of 2017*, ASIAN AGE (June 23, 2017), http://www.asianage.com/metros/mumbai/230617/goair-to-start-international-flights-by-end-of-2017.html.

295. See ICAO, *Differences Between Carrier Ownership and Control Principles in Designation Clauses in Air Services Agreements and National Laws Regulating the Subject*, ICAO Doc. ATConf/6-WP/94 (Mar. 7, 2013), http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf.6.WP.94.2.en.pdf; ICAO, *Proposal for the Liberalization of Air Carrier Ownership and Control*, ICAO Doc. ATConf/6-WP/29 (Feb. 13,2013), http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp029_en.pdf; ICAO, *Market Access Restrictions*, ICAO Doc. ATConf/6-WP/59 (Feb. 19, 2013), http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp059_en.pdf; ICAO, *Egyptian Experience in the Liberalization of Air Carrier Ownership*, ICAO Doc. ATConf/6-WP/41 (Feb. 19, 2013), http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp041_en.pdf; ICAO, *Air Carrier Ownership and Control Principle*, ICAO Doc. ATConf/6-WP/84 (Mar. 4, 2013), http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp084_en.pdf; ICAO, *Air Carrier Ownership and Control Clauses in Bilateral Air Services Agreements*, ICAO Doc. ATConf/6-WP/49 (Feb. 14, 2013), http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp049_en.pdf; ICAO, *Vietnam's Air Transport Market, Legislations and Regulations and Policy During 2003–2013*, ICAO Doc. ATConf/6-IP/22 (Mar. 17, 2013), http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-ip022_en.pdf.

has displayed a willingness to ease the restrictions either based on reciprocity or in cases where its interests are not jeopardized by a higher percentage of foreign ownership.[296] Indeed, the United States has selectively waived the nationality clause in cases where the airlines of partner states have been acquired by non-nationals.[297]

To give effect to India's liberalization of domestic norms, however, India must also be able to convince its partners under bilateral ASAs to either amend or waive the nationality restrictions in the form of the SOEC requirements. This would require negotiations on a piecemeal basis with different countries, which would be cumbersome.

In order to overcome such negotiation problems, other methods have been suggested. These include the adoption of model International Civil Aviation Organization (ICAO) clauses "to deal with ownership and control requirements with flexibility without the need to change the existing regime."[298] This would involve using expansive criteria for the interpretation of the SOEC requirements under the bilateral ASAs. It has also been suggested that states, such as India, which have liberalized their foreign investment norms, could publicize their position as it pertains to the conditions upon which they would accept foreign carriers, so that an appropriate network can be created among states to implement the reforms.[299]

It is clear that the domestic reforms that India has introduced would be problematic to implement internationally, given the bilateral nature of the rights governing international air traffic.

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296. Lykotrafiti, *supra* note 8, at 672.

297. Havel & Sanchez, *supra* note 5, at 655; *See also* Quantitative Air Services Agreements Review (QUASAR): Part B: Preliminary Results, ¶ 68, WTO Doc. S/C/W/270/Add.1 (2006), http://www.wto.org/english/tratop_e/serv_e/transport_e/quasar_partb_e.pdf (noting that "substantial ownership requirements, but also the effective control prerequisite, are often waived in practice. Aerolineas Argentinas, for instance, was never denied the right to fly although it had two successive Spanish majority owners. The same was true for Sabena when it was owned by Air France and then by Swissair."). Similarly, the U.S. did not suspend the traffic rights of Cargo Lion. *See* Translux International Airlines SA d/b/a Cargo Lion, D.O.T. Docket OST 98-4329 (1998).

298. Chang, et al., *supra* note 4, at 170. See also ICAO, *ICAO Template Air Service Agreements* (2009), https://www.icao.int/Meetings/AMC/MA/ICAN2009/templateairservicesagreements.pdf.

299. *Id.*

While several possible measures have been bandied about in the literature, it remains to be seen whether a practical solution is yet available.

CONCLUSION

India is a leading player in the global aviation market, so legal reforms surrounding foreign investment in its aviation industry are of wide interest internationally. India has made rapid strides in liberalizing its overly protected airline industry for the last two decades, particularly in order to rescue the troubled domestic airline sector.[300] From being one of the most restrictive markets for foreign investment in the airline industry, it has metamorphosed into one of the most liberal within a relatively short span of time. The most important changes emerged in 2012 when India permitted foreign airlines to invest up to 49 percent in the airline industry and in 2016 when it increased the limit up to which non-airline investors can invest to 100 percent.[301]

Although the reforms appear to be expansive and significant at the outset, there are obvious, as well as invisible constraints, and it is too early to speculate how and to what extent the airline industry will take advantage of the prevailing policy on foreign investment in the airline industry in India. At the same time, some foreign airlines, such as Etihad Airways, AirAsia, and Singapore Airlines, have capitalized on the reforms and have entered the Indian market, while Qatar Airways and other airlines are still waiting in the wings.[302] The liberalization of foreign investment in the Indian airline industry, however, also reveals a story that sketches out the interplay between a complex array of factors. The interaction between Indian governmental authorities, on the one hand, and other interest groups, such as incumbent industry players, the new entrants, and the industry body represented by the FIA, has not been smooth, to say the least. Allegations of regulatory capture and crony capitalism are abundant.[303] In the end, given that the reforms have been brought about through various policy pronouncements issued by the Indian government from time to time, it is not clear whether, and

300. Tan, *supra* note 102, at 462.
301. *See supra* note 21 and accompanying text.
302. *See supra* Parts III.A, III.B.
303. *See supra* Part III.D.

to what extent, the actions of the government are justiciable before a court of law.[304] Thus, it might very well be that courts may have a limited role to play on this count.

If the domestic legal regime governing foreign investment in the airline sector is complicated, the order of magnitude is significantly enhanced in the treatment of SOEC requirements under bilateral ASAs that India has signed with various countries. The ASAs give rise to a patent risk that an Indian airline that has accepted foreign investment in accordance with the fully liberalized policy may not be able to operate international routes with such an ownership structure. Unless the Indian government embarks upon the gargantuan exercise of either negotiating alterations or waivers with its counterparts, no satisfactory long-term solution is likely to emerge.

India's aviation sector has demonstrated strong growth, and will continue to do so, "despite facing numerous policy and regulatory challenges."[305] The entry of three foreign airlines into the Indian markets over the last five years[306] is evidence that there are takers for India's regulatory approach. The further growth potential of the industry, however, can be unleashed through continued redesign of this policy, as well as its effective implementation.

The primary goal of this article has been to analyze the new foreign investment regime in the airline industry in India. A bigger question is whether India's new approach can impact other states. It is worth reiterating that India's status in the international aviation community is exceptional.[307] The fact that such an enormous market made a legislative reform in the SOEC requirement may portend that the nationality norm in the airline industry is no longer unbreakable.

Indeed, the orthodox position that the SOEC requirement is an immutable condition in the airline industry has been facing

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304. Some legal challenges are pending before courts, but courts have not been quick to interfere. *See, e.g., supra* note 198.

305. *India's Aviation Market Surges 20% on Economic Growth and Low Fuel Prices*, CAPA: CENTRE AVIATION (June 3, 2016), https://centreforaviation.com/insights/analysis/iata-indias-aviation-market-surges-20-on-economic-growth-and-low-fuel-prices-283494.

306. Saritha Rai, *Foreign Airlines Jostle for a Piece of India's Airline Market*, FORBES (Sept. 20, 2013), https://www.forbes.com/sites/sritharai/2013/09/20/foreign-airlines-jostle-for-a-piece-of-indias-airline-market/#5c4890902949.

307. *See supra* text accompanying notes 15–17.

challenges. The concept of "community carrier" certainly diluted the nationality requirement. The ownership and control of airlines in EU member states has been redefined as EU ownership and control, rather than national ownership and control requirement.[308] To a lesser extent, ASEAN and the League of Arab States adopted regional agreements that allow community carriers.[309] In Asia, more states have begun to mitigate the effective control inquiries when granting operation of joint venture airlines.[310] These measures do not, however, result directly from the legislative reform of SOEC requirements. Thus, it is arbitrary by its nature and lacks the regulatory certainty and predictability that are much sought after by foreign investors.

India's bold approach is a great step forward. It clearly sets out changes by regulatory reform so that foreign investors will derive greater certainty and comfort with cross-border investment in the airline industry in India. India, once one of the most protective states in the foreign investment regime, has adopted the most liberalized approach. This fact is significant enough to make other states, particularly in Asia, revisit their SOEC requirements on the airline industry. It will be illuminating to see how and to what extent other states are influenced by India's new way forward.

308. *See supra* note 290.

309. *See* 2009 ASEAN Multilateral Agreement on Air Services (MAAS), May 20, 2009; 2010 ASEAN Multilateral Agreement for the Full Liberalisation of Passenger Air Services (MAFLPAS), No. 12, 2010; Agreement for the Liberalization of Air Transport Between the Arab States, Dec. 2004.

310. *See* Lee & Dy, *Mitigating 'Effective Control' Restriction on Joint Venture Airlines in Asia: Philippines Air Asia Case*, *supra* note 14.