2008

Singapore's New Air Services Agreements with the E.U. and the U.K.: Implications for Liberalization in Asia

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I. OVERVIEW

WITHIN THE PAST two years alone, the city-state of Singapore has signed new and highly liberalized air services agreements with both the European Union ("E.U.") and the United Kingdom ("U.K."). The cumulative impact of both agreements sets a dramatic new standard for liberalized bilateral air services agreements, heralding what possibly could be the first fully open aviation market established between "united Europe" and an Asian country. With the simultaneous occurrence of the liberalized deal between the E.U. and the United States, the Singapore agreements will create a powerful impetus for other countries—particularly in the Asian region—to pursue similar accords with the E.U. and the United States. Yet, among themselves, the Asian countries are still years away from implementing an effective multilateral regime for air traffic services, much less a common aviation market. Meanwhile, the need for greater opening up within Asia to counter external competitive pressures from E.U. and U.S. carriers is fast becoming evident.

II. THE SINGAPORE-E.U. AGREEMENT

A. COMMUNITY CARRIER CLAUSE BUT NO ADDITIONAL CAPACITY

On June 9, 2006, Singapore became the first Asian country to sign a new "horizontal" aviation agreement with the E.U.¹ Singapore earlier initialed the agreement in 2005, pursuant to the

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European Commission's so-called "horizontal mandate" to renegotiate air services agreements with third countries. This mandate had, in turn, been the result of the landmark decision of the European Court of Justice in November 2002 that effectively outlawed the standard designation clauses found in the individual E.U. member states' bilateral agreements with third states. The clauses had restricted traffic rights to airlines substantially owned and effectively controlled by nationals of a particular member state and its third state partners, thereby violating provisions of European community law which guaranteed equal utilization of those rights by all carriers in the E.U.

With the signing of the "horizontal" agreement, Singapore joins a host of other countries that allow any E.U. airline to fly

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4 In particular, the existing bilateral agreements limited community carriers' freedom of establishment under Art. 43 (formerly 52) of the European Community Treaty. See Treaty Establishing the European Community art. 43, Nov. 10, 1997, 1997 O.J. (C 340) 3.

5 By the end of November 2007, thirty-one countries had either signed or initiated agreements with the E.U. recognizing community designation. See Bilateral ASA Brought into Legal Conformity since ECJ Judgments on 5 November 2002, http://ec.europa.eu/transport/air_portal/international/pillars/doc/asa_table.pdf [hereinafter Table of Countries]. These countries are Albania, Armenia, Australia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Chile, Croatia, FYR Macedonia, Georgia, Jordan, Kyrgyzstan, Lebanon, Malaysia, Maldives, Moldova, Mongolia, Morocco, Nepal, New Zealand, Pakistan, Panama, Paraguay, Romania, Serbia and Montenegro, Singapore, Ukraine, the United Arab Emirates, the United States, Uruguay, and Vietnam (note that Bulgaria and Romania joined the E.U. on January 1, 2007). Id. In Asia and the Pacific, agreements with the following countries have already been signed: Chile (Oct. 6, 2005), Singapore (June 9, 2006), New Zealand (June 21, 2006), Maldives (Sept. 21, 2006), Malaysia (Mar. 22, 2007), the United States (Apr. 30, 2007), Kyrgyzstan (June 1, 2007) and the United Arab Emirates (Nov. 30, 2007). Air Transport Portal of the European
between any point in the E.U. and that country's territories. This is made possible through the third states' recognition of the "community carrier" designation clause that replaces the traditional nationality clause. At the same time, one must remember that the new "horizontal" agreements create no new or additional rights for carriers from both sides. The existing rights found in the prevailing bilateral agreements between individual E.U. member states and third states continue to govern market capacity on the relevant routes. Hence, for as long as capacity under an existing bilateral agreement is finite, the E.U. carriers will have to share the available capacity among themselves. This is already the subject of legislation in the E.U., with Regulation 847/2004 expected to oversee the question of transparent and non-discriminatory allocation of limited market capacity among community carriers.

The impact of the "horizontal" agreements is thus negligible for now, except where existing capacity is either unlimited or under-utilized. Ultimately, unless the E.U. can persuade third states to tear up their entire bundle of individual bilateral agreements and to re-negotiate an increase in capacity with Europe as a whole, the status quo is likely to prevail for some time. In effect, the "horizontal" agreements are mere palliatives awaiting a more ambitious goal—the negotiation of "open skies" or single market agreements promising highly liberalized or totally unlimited capacity between a unified Europe and individual third states. On this point, the European Commission appears to

Commission, http://ec.europa.eu/transport/air_portal/international/pillars/developments/index_en.htm. Fifty-three other countries have recognized community designation in bilateral agreements with at least one E.U. member state. Table of Countries, supra. In total, 591 bilateral agreements have effectively been updated with community designation, 484 of them through the "horizontal" agreement mechanism. Id.

6 For an example of such a clause, see Singapore-E.U. Agreement, supra note 1, art. 2.

7 Peter Van Fenema, EU Horizontal Agreements: Community Designation and the 'Free Rider' Clause, 31 AIR & SPACE L. 172, 178 (2006).

8 Id. at 178 n.15. However, existing rights "that are ... being exercised ... are grandfathered" and need not be redistributed; "[o]nly unused or additional capacity" will be subject to re-distribution. Id.

have won a tactical advantage—the successful completion of the new E.U.-U.S. agreement in 2007 (effective March 30, 2008) will add new pressure to states that are still resisting European overtures to open up their aviation markets.\(^{10}\)

In this regard, the thirty or so states that have initialed or signed the “horizontal” agreements seem to have signified their full willingness to pursue more open deals with the E.U. Others, however, have been more cautious—Thailand, Indonesia, and South Korea, for instance, have not signed “horizontal” agreements, but instead have negotiated to insert “community carrier” designation clauses when revising their existing bilateral agreements with certain E.U. member states.\(^{11}\) Hence, South Korea, in exchange for an extra designation for its second carrier—Asiana Airlines—to fly the Seoul-Paris route, has accepted “community carrier” designation in its revised bilateral agreement with France.\(^{12}\)

Crucially, however, Korea has reportedly managed to limit the E.U.—through that agreement with France—to only two community carriers on the Seoul-Paris route.\(^{13}\) The Korean government’s insistence on two carriers for each side was partly a result of lobbying by the national flag carrier, Korean Air, which saw unlimited community designation as a threat to Korean carriers.\(^{14}\) Asiana, however, was keen to inaugurate Seoul-Paris flights immediately, and did not think that other E.U. carriers would rush into the route even if Korea accepted the clause.\(^{15}\)


\(^{11}\) See Table of Countries, supra note 5.


\(^{14}\) Korean Air, Asiana at Odds Over Paris Route, supra note 12.

\(^{15}\) See id. For a long time, France resisted Asiana’s entry given that it had only one carrier (Air France), as opposed to Korea’s two. The prevailing understanding was that a second entrant would be permitted once the annual passenger flow between the two countries hit 400,000. Id. Korean Air’s position was that Korea could wait for that target to be reached (given recent steady growth in passenger traffic), and that there was no need to accept the E.U.’s community clause demand in order to trigger the second designation. Id. Korean Air’s stand was thus dictated not so much by potential competition with E.U. carriers, but immediate competition from Asiana. See id. Asiana was less opposed to the clause as it desired quicker entry into the route. Id.
Regardless, the curious result is that any community carriers technically can be designated by France for the route, but no more than two may be designated at any given point in time! This means that only one E.U. carrier (apart from Air France) can be designated for the route.

The deal appears to strengthen the Korean government’s position in negotiating any future, single aviation market deal with the E.U. By not giving in (at least at the initial stage) to a “horizontal” agreement, there might be greater negotiating leverage in the future by way of extracting more E.U. “hard rights” concessions in exchange for unlimited community designations.16

For now, the deal is a classic example of a bilateral agreement that fails to conform to the European Commission’s strict insistence on access for all community carriers.17 Notwithstanding this insistence, the Commission can still exempt and approve such agreements as long as they do not “harm the object and purpose of the Community common transport policy.”18 This provides a procedure for the Commission and member states to reach what are known as “comitology” decisions on such agreements.19

As far as the Korea-France agreement is concerned, it is difficult to imagine how a provision that limits the number of community carriers operating on the Seoul-Paris route still can be consistent with the spirit of freedom of establishment for all carriers. In effect, France can choose to designate only one other E.U. carrier to enjoy the additional capacity (three to four extra flights per week) on the route.20 Yet, it is equally arguable that no community carrier is being discriminated against on grounds

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20 The new agreement increased the number of weekly flights on the Seoul-Paris route from the prevailing seven for carriers from each side, to eleven. Asiana Airlines Allowed to Fly Seoul-Paris Route, KOREA.NET, Jan. 25, 2007, http://www.korea.net/News/News/Newsview.asp?serial_no=20070125004. Asiana is likely to obtain the extra flights on the Korean side.
of nationality. Indeed, France (in accordance with Regulation 847/2004) can choose to designate any other E.U. carrier to enjoy the additional capacity. The real problem is the restricted capacity on the route: from a commercial viability angle, the additional three or four flights a week can be operated only realistically by one other carrier.\textsuperscript{21}

Be that as it may, the E.U. member states remain obliged to negotiate the insertion of “community carrier” clauses in any new or revised bilateral agreements with third states in the absence of over-arching “horizontal” agreements with those states. As shown by the Korean case, such efforts will not always be straightforward since third states may see little incentive to incorporate community designation into their individual bilateral agreements.\textsuperscript{22} Somewhat ironically, member states like France are more likely to be successful in persuading third states to agree (bilaterally) to community designation, because they can offer “hard” rights such as increased capacity for the third states’ carriers.\textsuperscript{23} Even then, the impact of a bilaterally-inserted “community carrier” clause is always restricted because it applies only to routes between two particular states. Thus, any number of E.U. carriers can lobby to mount flights between (only) France and South Korea, though they still would be subject to the available rights and capacity on those routes.

In the short term, the only way to drastically expand capacity to a third state market is for individual E.U. member states to enter into highly liberalized bilateral agreements with that third state. At the same time, the third state must be persuaded to recognize “community carrier” designation, whether by way of a “horizontal” agreement with the European Commission or revised bilateral agreements with those particular E.U. member states. Only then will the extra capacity afforded on the relevant routes be available for use by all community carriers. Third states prepared to do both these steps are likely to be those having strong airlines (resulting in a less-protectionist attitude and less concern about affecting the “balance” between Community

\textsuperscript{21} It would be different if capacity had been doubled or tripled, and Korea still insisted on limiting the number of E.U. carriers to two.

\textsuperscript{22} Alan Khee-Jin Tan, \textit{Liberalizing Aviation in the Asia-Pacific Region: The Impact of the EU Horizontal Mandate}, 31 \textit{AIR \\& SPACE L.} 432, 448 (2006) (“\textit{I}ncreased access may not be \textit{a} adequate incentive[ ] if the relevant routes already face over-capacity or if third country carriers are not interested” in mounting more flights, possibly for lack of aircraft or other capacity.) \textit{Id.}

\textsuperscript{23} Van Fenema, \textit{supra} note 7, at 184.
and home carriers), a relatively small but open market, and/or a desire to establish aviation hubs. Such is the case with Singapore and is precisely the context within which the highly liberalized Singapore-U.K. bilateral agreement was reached in November 2007. Before discussing that agreement, however, other key features of the Singapore-E.U. “horizontal” agreement will be highlighted.

B. No “Free Riders”

The last paragraph of the preamble to the Singapore-E.U. agreement is significant. The parties note that “it is not a purpose of the European Community in this Agreement to increase the total volume of air traffic between the European Community and Singapore, to affect the balance between Community air carriers and air carriers of Singapore, or to prevail over the interpretation of the provisions of existing bilateral air service agreements concerning traffic rights.”

This familiar “balance” clause—found in the “horizontal” agreements with other third states as well—confirms the understanding that such agreements do not affect the prevailing bilateral provisions governing traffic rights and capacity.

What is interesting about the Singapore-E.U. “horizontal” agreement is the specific insertion of the so-called “free rider” clause (more accurately, the anti-“free rider” clause) within Article 2, the main provision on designation, authorization, and revocation. Accepting the community designation clause without conditions would have forced a third state like Singapore to accept any one E.U. state’s designations of carriers from other E.U. states, some of whom have either a restrictive or no bilateral relationship with Singapore.

To protect against such situations, Singapore has negotiated the right to refuse, revoke, suspend, or limit the operating authorization or technical permission of an air carrier designated by any E.U. member state where it can be demonstrated that by exercising traffic rights under this Agreement on a route that includes a point in another Member State, including the operation of a service which is marketed as,

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24 Singapore-E.U. Agreement, supra note 1, Preamble ¶ 8.
25 Other states whose “horizontal” agreements contain such clauses include Chile, New Zealand, Australia, Malaysia, Paraguay, and Uruguay. See Van Fenema, supra note 7, at 182 n.20. It has been estimated that thirty percent of “horizontal” agreements contain such clauses. Id. at 186.
26 Tan, supra note 22, at 448 n.67.
or otherwise constitutes a through service, the air carrier would
in effect be circumventing restrictions on traffic rights imposed
by an agreement between Singapore and that other Member
State.\textsuperscript{27}

Similarly, Singapore can do the same with respect to a design-
nated air carrier which

holds an air operator’s certificate issued by a Member State and
there is no bilateral air services agreement between Singapore
and that Member State and it can be demonstrated that the nec-
essary traffic rights to conduct the proposed operation are not
reciprocally available to the designated air carrier(s) of
Singapore.\textsuperscript{28}

What all this amounts to can be illustrated by the following
eamples. Under the current terms of the Singapore-France bi-
lateral agreement, Air France ("AF") operates a daily flight
(seven times weekly) between Paris and Singapore, while Singa-
pore Airlines ("SQ") flies ten times weekly between the two cit-
ies.\textsuperscript{29} Capacity is thus restricted, similar to the France-Korea
agreement. With the signing of the Singapore-E.U. "horizontal"
agreement, AF could now possibly be designated by the U.K. au-
thorities to fly between the U.K. and Singapore.

At the same time, with the single European aviation market in
full operation and the impending effect of the liberal Singa-
pore-U.K. agreement, AF could technically operate an \textit{unlimited}
number of Paris-London and London-Singapore services that
are either marketed as, or otherwise constitute, a through ser-
vie. Such operations could be mounted by way of one-stop,
same-plane services, or change-of-gauge operations at U.K. air-
ports, bearing a single flight code. Either way, AF would be cir-
cumventing traffic rights restrictions imposed by the Singapore-
France agreement.\textsuperscript{30} The other scenario is equally interesting—
the Slovenian carrier, Adria, could conceivably be designated by
the U.K. authorities to fly the London-Singapore route. How-

\begin{footnotes}
\footnote{27}{Singapore-E.U. Agreement, \textit{supra} note 1, art. 2, \textsection 4(a)(v).}
\footnote{28}{\textit{Id.} art. 2, \textsection 4(a)(vi). Singapore has bilateral air services agreements with all
the E.U. member states (with varying degrees of openness/restrictiveness), save
for Bulgaria, Estonia, Lithuania, Romania, and Slovenia. \textit{See id.} Annex I (listing
countries with bilateral air services agreements with Singapore).}
\footnote{29}{Originally, there were also seven weekly SQ flights. The additional three
flights were only added in October 2007.}
\footnote{30}{Likewise, the anti-"free rider" clause would cover, for example, an Athens-
London and London-Singapore operation mounted by Air France, given that the
Singapore-Greece agreement is also a restrictive one.}
\end{footnotes}
ever, with no air services agreement in existence between Singapore and Slovenia, a Singapore carrier would have no reciprocal rights to fly to the Slovenian capital, Ljubljana.\footnote{31}

The anti-“free rider” clauses thus permit a third state like Singapore to preserve the balance of aero-political relations with certain E.U. states, thereby denying the possibility of “back door” entry via the “horizontal” agreement. While such concessions would be anathema to the European Commission—in that they permit third states to discriminate and do exactly what the “horizontal” agreements seek to proscribe—they are unavoidable to obtain practicably the co-operation of third states.\footnote{32} Indeed, the Singapore agreement makes it absolutely clear that while Singapore shall not discriminate between air carriers of E.U. member states on grounds of nationality, this obligation does not prejudice Singapore’s rights under the “free rider” clauses.\footnote{33} It is also significant that such clauses are found not only in “horizontal” agreements, but also have made their way into recent bilateral agreements signed between individual E.U. member states and third states.\footnote{34} Notably, Singapore inserted these same clauses into its new bilateral agreement with the U.K.\footnote{35}

More straightforward is Article 2’s restatement of the now-familiar requirement governing E.U. member state designations. An air carrier designated by member states must be established “in the territory of the designating Member State and have a valid operating license from a Member State in accordance with Community law.”\footnote{36} The member state responsible for issuing the air operator’s certificate (which need not be the designating member state) must exercise and maintain effective regulatory

\footnote{31}{An “open skies” agreement between the two countries has actually been negotiated and initialed, but is still awaiting ratification on the Slovenian side.}

\footnote{32}{Van Fenema, \textit{supra} note 7, at 183, 185.}

\footnote{33}{Singapore-E.U. Agreement, \textit{supra} note 1, art. 2, ¶ 5.}

\footnote{34}{Van Fenema, \textit{supra} note 7, at 185 (giving the example of the U.K.-New Zealand bilateral agreement of July 2005, which repeats verbatim the “free rider” clauses in the New Zealand-E.U. “horizontal” agreement).}


\footnote{36}{Singapore-E.U. Agreement, \textit{supra} note 1, art. 2, ¶ 3(a)(i). This is in accordance with Council Regulation (EEC) 2407/92 of July 23, 1992 (the Licensing Regulation), which forms part of the requirements laid down following the “Third Package” of liberalizations in the early 1990s. Council Regulation 2407/92, 1992 O.J. (L 240) 1.}
control (for example, safety oversight) over the carrier, with the "relevant aeronautical authority . . . clearly identified in the designation."\(^{37}\)

In addition, the carrier must have "its principal place of business in the territory of the Member State" issuing the valid operating license.\(^{38}\) Further, the carrier must be "owned directly or through majority ownership and . . . [be] effectively controlled by [E.U.] Member States and/or [their] nationals."\(^{39}\) For Singapore-designated carriers, the Agreement requires that "Singapore ha[ve] and maintain[] effective regulatory control of the air carrier,"\(^{40}\) and that the carrier's "principal place of business [be] in Singapore."\(^{41}\) Any breach of the above provisions, including those pertaining to "free riding," will entitle the other party to "refuse, revoke, suspend[,] or limit the operating authorisation or technical permissions" of the relevant air carriers.\(^{42}\)

Interesting here is the entrenchment of the "effective regulatory control" test.\(^{43}\) As between Singapore and the E.U., effective control over a carrier now includes regulatory (for example, safety and security oversight) functions, which are to be exercised on the E.U. end by the member state issuing the air operator's certificate.\(^{44}\) At the same time, there is still an effective economic control requirement, although such control (together with majority ownership) can reside with any E.U. member state(s) and/or their nationals.\(^{45}\)

From Singapore's perspective, however, where ownership and economic control lie is not an issue. For the purposes of Singapore-E.U. aviation relations, a Singapore-designated carrier may be owned (in any shareholding proportion) \textit{and} controlled by

\(^{37}\) Singapore-E.U. Agreement, \textit{supra} note 1, art. 2, ¶ 3(a)(ii). Note also that where the designating member state differs from the member state responsible for regulatory control (the second state), Singapore's rights under the safety provisions that apply to the designating member state also apply to the second state with respect to the adoption, exercise, or maintenance of safety standards and in respect of the operating authorization of the carrier. \textit{See id.} art. 3, ¶ 2.

\(^{38}\) Singapore-E.U. Agreement, \textit{supra} note 1, art. 2, ¶ 3(a)(iii).

\(^{39}\) \textit{Id.} art. 2, ¶ 3(a)(iv). This extends to Iceland, Liechtenstein, Norway, and Switzerland and/or their nationals. \textit{Id.} Annex III.

\(^{40}\) \textit{Id.} art 2, ¶ 3(b)(i).

\(^{41}\) \textit{Id.} art. 2, ¶ 3(b)(ii).

\(^{42}\) \textit{Id.} art. 2, ¶ 4.

\(^{43}\) \textit{Id.} art. 2, ¶ 3(a)(ii).

\(^{44}\) \textit{Id.}

\(^{45}\) This includes the Annex III countries. \textit{See id.} art. 2, ¶¶ 3(a)(ii), (iv).
foreign parties, as long as Singapore is the principal place of business and maintains effective regulatory control over it. In other words, there does not need to be any ownership or economic control by Singaporean interests. This represents one of the farthest departures from the traditional "substantial ownership and effective control" requirement and is also a feature in Singapore's recent bilateral agreements with Greece and the U.K.46 With other relatively progressive countries, however, the "effective control" (meaning economic control) test persists, though the "substantial ownership" prong has been replaced with a place of incorporation and principal place of business criterion.47

In other respects, the "horizontal" agreement provides that Singapore-designated carriers are subject to Community law in relation to tariffs charged for carriage wholly within the E.U.48 This provision is meant to regulate intra-E.U. carriage performed by Singapore-designated carriers such as fifth freedom flights. For Singapore Airlines, this would apply to its Milan-Barcelona operation which currently is its only fifth freedom operation within Europe. The carrier used to ply the Zurich-Manchester route on a fifth freedom basis, but that has been discontinued recently. It has various other fifth freedom rights under existing bilateral agreements with individual E.U. states, but these are not being exercised currently.

46 The clause resembles the "principal place of business and strong links to designating state" model clause proposed in 2003 by the International Civil Aviation Organization ("ICAO"). See Yu-Chun Chang, George Williams & Chia-Jui Hsu, The Evolution of Airline Ownership and Control Provisions, 10 J. AIR TRANSP. MGMT. 161, 166-67 (2004) (reproducing art. X of the Model Clause from the Fifth ICAO Worldwide Air Transport Conference in Table 5). The ICAO clause is meant precisely to replace effective commercial control with effective regulatory control.


48 Singapore-E.U. Agreement, supra note 1, art. 4.
III. THE SINGAPORE-U.K. AGREEMENT

Singapore’s new deal with the U.K. must be placed within the context of the Singapore-E.U. “horizontal” agreement. On November 21, 2007, Singapore and the U.K. signed a landmark Open Skies Agreement (Singapore-U.K. OSA) that removes all restrictions on passenger and all-cargo air services operated by Singapore- and U.K.-designated carriers. The agreement takes full effect on March 30, 2008, superseding the 1971 bilateral air services agreement between the two countries. What is revolutionary about this new agreement is that it goes well beyond conventional “open skies” agreements that provide unlimited third/fourth freedom access, and accords unlimited fifth, seventh, and even eighth and ninth freedom (i.e. “cabotage”) rights for carriers from both sides.

Hence, from March 30, 2008, Singapore-designated carriers such as Singapore Airlines (“SIA”) would be permitted to operate trans-Atlantic flights from London’s Heathrow airport to New York’s John F. Kennedy (“JFK”) airport, whether in the form of fifth or seventh freedom operations. A fifth freedom operation between Heathrow and JFK (with flights originating from and terminating in Singapore) had long been coveted by—but denied to—SIA. The OSA now goes beyond that, and actually accords seventh freedom operations that do not necessitate a Singapore-U.K. or U.K.-Singapore leg. With that, SIA can establish a “hubbing” operation at Heathrow (or at any U.K. airport) if it wants to. This allows it to station aircraft to connect any point in the U.K. with any point in the United States without having to include Singapore as part of the itinerary. At the same

49 Press Release, Singapore Ministry of Transp., Singapore and the United Kingdom Conclude Landmark Open Skies Agreement (Oct. 3, 2007), http://app.mot.gov.sg/data/pr_07_10_03.htm. The Singapore-U.K. OSA had been concluded by negotiators from both sides a month earlier, on October 2, 2007, which was also the date when an accompanying Memorandum of Understanding (“MOU”) took effect. Id.

50 Id.

51 These details are contained in the MOU between the two countries. Id. While the MOU is a confidential document, the description of the unlimited freedoms was released by the Singapore Ministry of Transport. See id. See also S’pore, Britain Sign Open Skies Agreement, STRAITS TIMES (Singapore), Nov. 22, 2007, available at 2007 WLNR 23077767; Ven Sreenivasan, Skies Open for SIA Flights to Britain and Beyond, BUS. TIMES (Singapore), Oct. 4, 2007, available at 2007 WLNR 19390892.

time, a Singapore carrier can now mount and pick up traffic on any number of intra-U.K. flights, either in the form of eighth freedom operations connecting to and from Singapore (e.g., Singapore-Heathrow-Edinburgh), or stand-alone domestic flights (e.g., London Gatwick to Manchester).

The far-reaching implications of the Singapore-U.K. OSA caught aviation observers by surprise.\textsuperscript{53} What led to the sudden turn-around on the part of the U.K. government, long known for protecting its carriers' dominance at Heathrow (particularly British Airways)? Why, after denying SIA's long campaign for fifth freedom access to JFK, had the U.K. government suddenly relented, in fact going beyond to accord both seventh freedom and cabotage rights? The answers, of course, lie in developments and realities extraneous to the OSA.

First, the effective date of March 30, 2008, is no coincidence. That is the very date on which the E.U.-U.S. agreement starts to apply, allowing any number of E.U. (and U.S.) carriers to connect any point in the E.U. with any point in the United States.\textsuperscript{54} Heathrow will henceforth be thrown open (subject to the availability of slots, as discussed below) to a multitude of E.U. and U.S. carriers for flights to and from the United States.\textsuperscript{55} This will increase the number of potential carriers on the lucrative Heathrow-JFK route well beyond the incumbent quartet of British Airways, Virgin Atlantic, United Airlines and American Airlines.\textsuperscript{56} The U.K. government must have recognized that it no longer made sense to block SIA's requests for trans-Atlantic access to JFK, now that carriers from the United States and the entire E.U. could operate out of Heathrow.

\textsuperscript{53} Id.

\textsuperscript{54} See Air Transport Agreement, U.S.-Eur. Union, Apr. 30, 2007, 46 I.L.M. 470. The E.U.-U.S. agreement is truly liberal as far as multiple designation is concerned, and any number of carriers on both sides may connect any point in the E.U. with another in the United States. In contrast, the Korea-France situation contains a "community carrier" clause that is effectively qualified by a quota on the number of E.U. carriers allowed. More Convenient Trip From Seoul to Paris, supra note 13.

\textsuperscript{55} Air France, for instance, has already announced flights from Heathrow, Manchester, and Edinburgh to Los Angeles (with code-shared flights on Delta Air Lines to New York, Atlanta, and Cincinnati). See Air France, Direct Flights to the USA, http://www.airfrance.co.uk/ (click on "Fly Non-Stop to the USA" banner).

\textsuperscript{56} Limited fifth freedom flights on the route are operated by Air India and Kuwait Airways. See Something to Declare, INDEP. (London), May 15, 2004.
Second, and more importantly, the victory for SIA is clearly a hollow one. Heathrow remains extremely slot-constrained, and SIA (and other E.U. carriers for that matter) would find it hugely difficult and expensive to obtain ready slots for operations to and from the United States, whether in addition to, or as part of, its current thrice-daily operations from Singapore. Unless it wants to spend millions of pounds buying several pairs of daily slots, there is no clear advantage for SIA to begin operations out of Heathrow to the United States. Even a daily flight to JFK would not make much commercial sense for SIA in the competition for business travelers, given that it would be pitted against the likes of British Airways and American Airlines with their numerous daily flights from Heathrow.

Given these actual constraints for Singapore carriers, the U.K. government must have reasoned that it (and British carriers) had little to lose in awarding a generous package to Singapore. In exchange, the U.K. obtained reciprocal rights to conduct unlimited fifth and seventh freedom (hubbing) operations out of Singapore (as well as cabotage, though this is meaningless in the Singapore context). Fifth and seventh freedom privileges, however, remain entirely dependent on a third state agreeing to the operation. Any U.K. (or E.U.) carrier wishing to operate such flights to third state Asia-Pacific destinations out of Singapore would have to obtain the consent of the relevant third states. Similarly, the only reason Singaporean carriers can conceive of mounting unlimited fifth freedom flights out of the U.K. to the United States is because Singapore already has an "open skies" agreement with the latter allowing for such operations.

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58 In December 2007, the Italian carrier Alitalia reportedly sold several pairs of slots at Heathrow for a total of €92 million (£67 million or US$135 million), with one pair going for a record price of more than €41 million (£30 million or US$59 million). See Kevin Done, Alitalia Sells Heathrow Slots, FIN. TIMES (Europe), Dec. 27, 2007, available at 2007 WLNR 25448625.

59 British Airways has eight daily flights, American has six, while Virgin has four. United withdrew from the route in October 2006, citing unprofitability, and has since sold its slots to Delta. See Kevin Done, UAL Drops London to New York Flights, FIN. TIMES (Europe), July 29, 2006.

60 Singapore was the first Asian country to sign an "open skies" agreement with the United States (in 1997). The Skies Open Up, ASIAN TRADE, Apr. 16, 1997, http:///web.archive.org/web/20060216043221/http://www.aftaonline.com/aol-archives/industry/Travel+97.htm. This agreement is now superseded by the MALIAT
Looking ahead, the Singapore-U.K. agreement will portend deeply significant aviation developments, particularly in the Asian region. To begin, there is no reason why the U.K. (or for that matter, other E.U. countries, acting individually for now) would not extend the same Singapore-type privileges to other countries in the region such as Australia, Malaysia, and Thailand, in exchange for reciprocal rights. Once that happens, the U.K. (and other E.U.) carriers will then be able to exercise their fifth and seventh freedom privileges out of Singapore (or any other hub airport in the region) to build an extensive intra-Asian network. For Singapore, this would mean that its current preferred status accorded by the U.K. will not last long. Other Asian carriers will soon have the same set of privileges to fly trans-Atlantic from the U.K. to the U.S., assuming their countries have “open skies” agreements with the U.S.\(^\text{61}\) For the U.K. (and the rest of the E.U.), this would be the first step towards creating a fully liberal aviation market with selected Asian countries.

What would all this mean for individual Asian carriers, apart from being able to fly from or through the U.K. (and soon enough, the entire E.U.) to the United States? It comes back to the point made previously by this author, that the ultimate, critical step must be for the Asian countries to liberalize among themselves.\(^\text{62}\) If this is not done, Asian carriers will discover that the E.U. carriers could soon be operating multiple hubs not only in Europe, but in various Asian cities as well. For instance, British Airways could conceivably operate an unlimited number of fifth and seventh freedom flights out of Singapore to cities in Australia, New Zealand, and Indonesia once these countries sign liberal deals with the U.K. This would be on top of British Airways’ ability to launch connecting flights from Singapore to any E.U. destination (and not just U.K. cities). In effect, British Airways could technically gain the ability to operate a hub-and-spokes model out of Singapore and to replicate (at least in part) SIA’s highly successful sixth freedom network out of the latter’s own home turf. If the ability of all other E.U. carriers to do just this is added, and other major cities such as Bangkok and Seoul be-

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\(^{61}\) This also assumes the availability of slots at Heathrow.

\(^{62}\) Tan, supra note 22, at 453.
come potential hubs, too, the competitive pressure for Asian carriers will be significant.

For their part, the Asian carriers will find themselves—at best—able to operate hubs in Europe if their countries conclude open aviation agreements with the E.U. Even then, these carriers will only be able to fly to those countries (such as the United States) with whom their own countries have “open skies” agreements. Crucially, the Asian carriers will not be able to operate multiple hubs in their own backyard, that is, within the Asian region. This is because Asian countries, with few exceptions, have not been prepared to accord generous fifth and seventh freedom rights to one another. Within the Asia-Pacific region, multilateral initiatives such as MALIAT have stalled, given the small number of member states. On the bilateral front, relaxations have tended to be modest, typically taking the form of increased or unlimited third/fourth freedom flights. Fifth freedom rights are jealously guarded, while seventh freedom rights are virtually unheard of. Ownership and control rules remain highly restrictive, with most countries still applying the “substantial ownership and effective control” requirement on each other.

With the possible conclusion of an open aviation agreement between Singapore and the entire E.U., SIA may be able to fly from Singapore to an unlimited number of destinations within the E.U., and to fly from any of these cities to any point in the United States, whether as fifth or seventh freedom operations. However, SIA would not be able to mount similar operations from Bangkok or Hong Kong or Mumbai. Hence, for SIA, Singapore-London-U.S. or even Singapore-Paris-U.S. would be permissible, but not Hong Kong-London-U.S. or Bangkok-Paris-U.S. In contrast, British Airways could possibly mount a Paris-Bangkok-Singapore operation, and even fully use Paris, Bangkok, and Singapore as seventh freedom hubs. There is thus a clear prospect of unequal market penetration. Put another way,

63 Id. at 449.
64 The main fear is MALIAT’s provision for unrestricted fifth freedom rights, and the prospect of strong airlines such as Singapore Airlines seizing on those rights (since Singapore is a party to MALIAT). Id. at 439.
65 Tan, supra note 22, at 450.
66 Tan, supra note 22, at 449.
SIA cannot replicate British Airways' sixth freedom network from the latter's home turf, while British Airways could possibly replicate SIA's from Singapore.

To add to these constraints, it is not altogether clear if a Singapore carrier will be able to enjoy unlimited access to the intra-European market. It may well be that with the conclusion of an open aviation agreement between Singapore and the E.U., Singapore carriers can either have unlimited fifth and seventh freedom privileges within the E.U., or have the right to establish a (wholly-owned) subsidiary to service intra-E.U. routes. Currently, these scenarios are not possible within the terms of the Singapore-E.U. "horizontal" agreement. Taking a page from the U.S. book, the E.U. may well treat such routes as "cabotage" operations that are not open to non-E.U. carriers. In that event, hubbing operations out of an E.U. airport may not be so attractive after all. This will only heighten the imbalance between what carriers from both regions can or cannot do in the other's backyard.

The other (and more significant) development is the impending consolidation of E.U. carriers into several merged entities. With the widespread acceptance of the "community carrier" clause, mergers and acquisitions among E.U. carriers are made possible, without prejudice to the carriers' rights to fly to third states. Clearly, the Air France-KLM and Lufthansa-Swiss mergers mark only the beginning of a comprehensive overhaul of the European airline industry. Indeed, other candidates for merger have appeared on the horizon, notably Alitalia and Iberia. Third states that sign "horizontal" agreements as well as states that go on to conclude future open aviation agreements with the E.U. will see their carriers facing competition from stronger E.U. carriers able to draw capital injections and management control from across the entire European Community. Hence, the concern lies not so much with additional competition by numerous E.U. carriers on individual routes, but with merged E.U. carriers.

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68 Even if the Singapore carrier was permitted to do these options, the market wisdom of doing so is doubtful, given the tremendous competition from low-cost carriers plying intra-E.U. routes.

carriers posing competitive challenges arising from fleet size, multiple network hubbing, and unit cost advantages.

For their part, Asian carriers typically cannot benefit from foreign equity infusions (beyond forty-nine percent) or outright mergers with other carriers because of the foreign ownership and control restrictions in place between most countries. There is thus a critical need for Asian countries to begin liberalizing aviation relations among themselves so as to better meet the competitive forces emerging from outside the region. Asian countries need to liberalize not only by granting more generous fifth and seventh freedom rights for each other’s carriers (so as to facilitate multiple hubbing within the region), but also by relaxing foreign ownership and control restrictions in the countries’ respective bilateral agreements with one another.

Nevertheless, there have been some developments suggesting that the protectionism characterizing government regulation of aviation in Asia is eroding, albeit slowly. In Southeast Asia, for instance, the ten member countries of the Association of Southeast Asian Nations (“ASEAN”) have committed themselves to establishing a single aviation market by the year 2015. Whether this goal is at all realistic is debatable—government protection of national carriers is still widespread in ASEAN, and officials appear to be looking in the direction of unlimited third/fourth freedom rights within the region, as opposed to more liberal fifth or seventh freedom rights. In Northeast Asia, there has been talk of establishing a trilateral common market among China, Japan, and Korea. Not surprisingly, the Koreans—with their small market but efficient airlines—are the strongest proponents of the idea. China and Japan remain cool to the idea,

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and appear content to pursue bilateral relaxations at their own pace.\footnote{See Oum & Lee, supra note 71, at 326, 329.}

Overall, there is some momentum toward internal liberalization within Asia, but this is largely due to the governments’ relative tolerance of low-cost carriers (“LCCs”). Malaysian-owned AirAsia, in particular, has pioneered the model of setting up overseas joint ventures in Thailand and Indonesia in which it holds minority stakes (typically forty-nine percent), with majority ownership residing in local hands.\footnote{See Air Asia, Company Profile: The Story So Far, http://www.airasia.com (last visited May 12, 2008).} Its subsidiaries, Thai AirAsia and Indonesia AirAsia, are legally distinct from the parent carrier, are majority-owned by Thai and Indonesian interests, and are run by their own boards. They operate international routes using the rights contained in Thailand’s and Indonesia’s respective bilateral air services agreements with other countries.

Similarly, Singapore-based Jetstar Asia is majority-owned by Singaporean interests, but the carrier is part of the Australian national carrier Qantas’s Jetstar brand.\footnote{Qantas owns 44.5% of Orangestar, the holding company that owns Jetstar Asia. Competition Commission Singapore, Qantas & Orangestar Co-operation Agreement (Apr. 25, 2006), http://www.ccs.gov.sg/PublicRegister/ND+Qantas+Orangestar.htm.} Additionally, there is Tiger Airways, set up by Singapore Airlines, which has firm plans to establish operations in South Korea and the Philippines using the same model.\footnote{Chan Sue Ling & Haslinda Amin, Tiger Airways Plans More Bases Overseas, INT’L HERALD TRIB., Oct. 3, 2006, available at 2006 WLNR 17101007; Lin Xinyi, Tiger Air to Set Up Base in S. Korea, STRAITS TIMES (Singapore), Nov. 6, 2007, available at 2007 WLNR 21849388.} All these entities are thus scrupulously faithful to the “substantial ownership” rule found in the region’s bilateral air services agreements, but whether their “effective control” truly lies at home is debatable. In each of these instances, the local majority owners are typically non-airline interests with no or minimal experience in the aviation industry.\footnote{Nevertheless, each entity has a CEO distinct from the “parent” carrier’s and a separate governing board made up of local directors in the majority.} The marketing and branding strategy is standardized across the numerous units. Thai AirAsia and Indonesia AirAsia, for instance, have virtually indistinguishable identities with their com-
mon red-and-white livery and a shared internet booking platform with the parent AirAsia in Malaysia.\textsuperscript{78}

Yet the national governments in these countries do not appear to have a problem with the arrangement, as long as majority ownership remains with local interests.\textsuperscript{79} Nor have bilateral partners protested over any perceived lack of "effective control." Crucially, this operational model has allowed the parent carriers to establish multiple hubs and operations across Asia, simultaneously by-passing ownership/control and seventh freedom/hubbing restrictions.

Does this signify a new thinking to liberalization, or is it simply a pragmatic response by Asian governments to deal with the new phenomenon of LCCs? The reality is that these LCC arrangements are \textit{de facto} relaxations to the ownership and control regime.\textsuperscript{80} At the same time, the momentum for further liberalization within the Asian region is undeniable. Further, the individual countries' keenness to engage the E.U. (and the United States) for open aviation agreements cannot but register the point that internal liberalization within Asia, and among Asian countries, is inevitable. The consequences of inaction will become particularly evident when the E.U. completes its grand agenda of unifying its member states' external aviation policy, and the competitive pressure exerted by E.U. carriers is felt all across Asia. In addition, the mood for liberalization within Asia will grow once major markets like China and India decide to open up, both to partners outside and within the region. The rest of the continent will have little choice but to follow suit.

IV. CONCLUSION

The European Commission's relentless move to seal "horizontal" agreements with third states, taken together with individual E.U. member states' offering greater access for third state carriers, will inevitably lead to more Asian countries accepting the "carrots" coming their way. In time, this will lead to the conclusion of fully liberal open aviation agreements between third states and a unified Europe, with the latter increasingly negotiating and behaving like the United States on the aviation stage. Within the Asian region, a growing number of countries—led by

\textsuperscript{78} See Welcome to airasia.com, http://www.airasia.com (last visited May 12, 2008).

\textsuperscript{79} THOMAS & TAN, supra note 67, at 24.

\textsuperscript{80} \textit{Id.}
Singapore—are showing interest in liberalizing aviation relations with the E.U., though not as a negotiating bloc, and not even among themselves.

The consequence is a looming imbalance in the aero-political equation between European and Asian carriers, not just in terms of fifth and seventh freedom/hubbing rights in the region but also in relation to opportunities for equity infusions and mergers across boundaries. Thus, while an E.U. carrier will conceivably be able to establish multiple hubs in both Europe and Asia, an Asian carrier will, somewhat ironically, be limited to hubs in Europe. In addition, while E.U. carriers can merge and become stronger with Community-wide capital injections, Asian carriers continue to labor under restrictive foreign ownership and control conditions.

All these will have a far-reaching impact on the competitive positions of Asian carriers, as they face stronger, leaner, and better-capitalized European competitors in the years to come. Yet, a tipping point will arrive when Asian governments realize the disadvantages of failing to liberalize within their region. Certainly, this moment may not dawn so soon, and there will be protectionist elements holding out and resisting. For now, the agreements that tiny Singapore has signed with the E.U. and the U.K. may seem relatively innocuous in effect, but they are without a doubt a harbinger of interesting times to come.
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