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# Open Skies Policy: The Developing Countries Point of View

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*The concept of open skies policy is an international policy concept which aims to liberalize of rules and regulations on international commercial aviation industry. For developed countries, by allowing air carriers unlimited market access to its partners' markets and the right to fly to all intermediate and beyond points, open skies agreements provide maximum operational flexibility for airline alliances. They may have the best opportunities, as they will be able and in the best position to offer the best product to the better part of the air traffic market. On the contrary, for developing countries, open skies policy may cause more harm to the interests of airlines than bring economic gains to the countries. Further, it will lead to a domination of the international air transportation market by the biggest and most developed countries that finally it will return the situation to monopolistic system. To take care of emerging needs, it would be more appropriate to periodically renegotiate the existing bilateral agreements.*

*Keywords: air transportation law, open skies policy, developing countries*

## I. Introduction

Recent development in the field of international air law, or more specially in international air transportation law, is the trend of liberalization of rules and regulations on international aviation industry. This trend is called as *open skies* policy. In simple words, the concept of *open skies* means that everything is permitted, unless it is expressly forbidden. It means freedom of safe flight, freedom of air traffic carriage, and freedom to do business, while this freedom does not apply where and when flight is forbidden. In other words, *open skies*, is the freedom to overfly the territory of every state with civil aircraft engaged in the

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carriage of passengers and their luggage, cargo and mail for hire, to land in the territory of every state for technical and operational reasons and to embark and disembark traffic regardless of the origin and destination of the traffic. In normal situation, according to Chicago Convention 1944, in air transport nothing is allowed, unless specific permission to deploy a certain aviation activity is given.

Thus, *open skies* policy is an international policy concept which aims to liberalize of rules and regulations on international aviation industry most specially commercial aviation, e.g. opening a free market for the airline industry. More detail formulation of *open skies* is given by H. Wassenbergh<sup>2</sup>, as follows:

- (a) Any designated air carrier of a Party shall be entitled to operate and offer to the public any kind of air service at any frequency with any kind of aircraft in any configuration on any route at any cost-related price to, from, via or within the territory of the other Party or Parties, in any manner it chooses, subject only to internationally agreed and standardized safety, security, and environmental requirements. And:
- (b) The carriage of any traffic by any air service or on any air service in combination with any other modes of transportation to, from, via and within the territory of the other Party or Parties shall be freely permitted to designated air carriers of a Party, on condition that the contract of carriage includes the internationally agreed and standardized provisions.
- (c) Any designated air carrier of a Party shall receive national treatment and full doing-business rights in the territory of the other Party or Parties.
- (d) A designated air carrier of a Party shall be considered as a carrier holding a license issued by that Party in accordance with internationally agreed and standardized criteria, and having its registered office in the territory of that Party. And, finally:
- (e) All commercial operations of designated air carriers shall be subject to internationally agreed and standardized rules of healthy competition.<sup>3</sup>

The primary objectives of *open skies* policy are:

- a. to liberalize the rules for international aviation markets and minimizes governmental intervention – the provisions apply to passenger, all-cargo and combination air transportation and encompass both scheduled and charter services; or
- b. to adjust the regime under which military and other state-based flights may be permitted.<sup>3</sup>

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<sup>2</sup> Wassenbergh, Henri, *Principles and Practices in Air Transportation*, Les Presses ITA, Paris, 1993, p. 63-64.

Literally, the words *open skies* are the opposite of *closed skies* which means the national exercise of sovereignty over the foreign and economic use of the national airspace, then *open skies* means the 'suspension' of such exercise, that is the abolition of national control of the economic use of national airspace.<sup>4</sup> The real problem with *open skies* is who should control the economic use of national airspace once its sovereignty is suspended by declaring an *open skies* regime. The only control, if at all, then is *a posteriori*. The question then is how to regulate, if at all, the *free competition* under *open skies*.<sup>5</sup>

Based on the discussion mentions above the question now is are the developing countries (except some countries, e.g. Middle-East countries, China, Japan, North Korea, Singapore, and Malaysia), which generally their aviation industries are still weak, prepared to face free competition with the developed countries with stronger aviation industries?

## **II. The Application of *Open Skies* in the Developed Countries**

The last twenty five years have seen significantly changes in airline regulation in some developed countries. It was begun by United States in pursuing open skies agreements in 1979 and, by 1982 it had signed twenty-three bilateral air service agreements worldwide, mainly with smaller nations. That was followed in the 1990s by agreements with some individual European states.<sup>6</sup>

In 1992 a big step was taken by the United States and the Netherlands when they signed the first open skies agreement, in spite of objection posited by European Union authorities. The agreement gave both countries unrestricted landing rights on each others' soil, replacing previous normal landing rights which are granted for a fixed destination.<sup>7</sup>

In 2001 the United States signed the Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT) with Brunei, Chile, New Zealand, and Singapore, and later joined by Samoa, Tonga, and Mongolia. In 2007 the United States government also negotiated with the European Commission, as a supranational body, a community Air Service Agreement which

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<sup>3</sup> [http://en.wikipedia.org/wiki/Open\\_skies](http://en.wikipedia.org/wiki/Open_skies) (8/24/2010)

<sup>4</sup> Wassenbergh, Henri, *op.cit.*, p. 82.

<sup>5</sup> *Ibid.*

<sup>6</sup> [http://en.wikipedia.org/wiki/Open\\_skies](http://en.wikipedia.org/wiki/Open_skies) (8/24/2010)

<sup>7</sup> *Ibid.*

includes 27 member states. This EU-US *Open Skies* Agreement was amongst one of the most significant *open skies* agreements concluded in recent years, covering civil aviation traffic between two of the world's three biggest markets.<sup>8</sup>

*Open skies* agreements have vastly expanded international passenger and cargo flights to and from the United States, and thus have been promoting increased travel and trade, enhancing productivity, and spurring high-quality job opportunities and economic growth. *Open skies* agreements do this by eliminating government interference in the commercial decisions of air carriers about routes, capacity, and pricing, freeing carriers to provide more affordable, convenient, and efficient air service for consumers. The U.S. *opens skies* policy has gone hand-in-hand with airline globalization. By allowing air carriers unlimited market access to its partners' markets and the right to fly to all intermediate and beyond points, *open skies* agreements provide maximum operational flexibility for airline alliances. The United States has achieved *open skies* with over 90 partners from every region of the world and at every level of economic development<sup>9</sup>.

#### A. The developing countries position

Developing countries which are generally obtained their independence since World War II, have an opinion that the concept of sovereignty is inherent with their independency. To achieve sovereignty, a state must be recognized as having both *de facto* and *de jure* control over the land, sea and airspace within defined territorial boundaries. As a sovereign state, a country possess the rights to control all over the country, then the concept of trespass applies to any part of the state entered without permission. Hence, everyone who wishes to cross the land border or a ship wants to pass through territorial waters or an aircraft wants to overfly, it is required to get prior permission. Those who enters without permission, at the very least, according to international law be liable to arrest and prosecution by the offended state. At worst, such the case will be considered as an act of war. A well known case as an example of trespass of foreign airspace happened in 1983 when Korean Air Flight 007 strayed into Soviet airspace, then such aircraft was shot down by Soviet military.

<sup>8</sup> Ibid., see also U.S. Department of Transportation at <http://www.state.gov/c/ceb/tr/ata/> (8/24/2010)

<sup>9</sup> Ibid.

Besides, as a general phenomenon in the new independence countries the creation of flag carrier airlines is a national pride and most of them, wholly or partly, are state owned. The role of government in controlling its airspace and 'its' air traffic market with respect to air transport is very dominant. The government is free to designate any national carrier for the utilization of each of the routes and the rights received under the exchange of route and traffic rights in the agreement. The use of a route right by a designated air carrier, together with the traffic and airport rights granted for the commercial exploitation of that route, gives that carrier certain rights, which could be viewed as a property right over the utilization of the route concerned. If it does not use the route right, it loses it, however. Designation thus gives a kind of *property right* to the designated air carrier of the routes which it is allowed to utilize.<sup>10</sup> This situation may be called as *closed skies* which means the national exercise of sovereignty over foreign and economic use of the national airspace.

On the contrary, *open skies* means the 'suspension' of such exercise, that is, the abolition of national control of the economic use of national airspace. Of course, a state can exercise its sovereignty in a liberal manner, but this is still *national control*, either *a priori* or *a posteriori*, unless such liberal exercise of sovereignty is completely based on and is exercised in accordance with internationally agreed standards.<sup>11</sup>

In relation to commercial operation of international air services, it means therefore free competition between carriers of the world. Hence, rules of fair competition should govern the activities in air traffic market place. The real problem with *open skies* then is who should control the economic use of national airspace once its sovereignty is suspended by declaring an *open skies* regime?

The air transport policy of every country is conditioned by its national interest. While the developed countries with stronger airlines favor a liberalized regime, countries with weaker airlines favor a less liberalized regime to safeguard the interest of their national carriers.<sup>12</sup>

Developing countries face many difficulties in managing the aviation indus-

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<sup>10</sup> Wassenbergh, op. cit., p. 83.

<sup>11</sup> Idem, p. 82.

try. Limited finance to operate air transportation which needs a huge investment, inadequate infrastructure and lack of human resource, are general phenomena. The adoption of *open skies* policy by developing countries may cause more harm to the interests of airlines than bring economic gains to the countries, especially through the use of fifth freedom rights. Usually, the governments are not permitting national airlines with less than certain years (e.g. five years) of experience or with less than certain number of aircrafts (e.g. ten aircrafts) of its fleet to fly on international routes, whereas under *open skies* policy all foreign airlines from the states that have made agreement may be able to fly to domestic place(s) and beyond.

In this connection, it should be noted what the Asia Economic Institute said.<sup>13</sup>

“The infrastructure and business environment present in ASEAN countries also provides complications for an ASEAN open sky agreement. It is possible for an open sky agreement to favor the larger aviation powers by providing them with more opportunity. Several countries, like Singapore, have found it relatively easy to set businesses, including airlines. Other ASEAN countries, like Cambodia, whose national airline, Royal Air Cambodge, closed in 1994 after losing USD 20 million, have found it difficult to establish an aviation industry. Financial instability and lack of technical workers within the countries proves to also be a challenge ASEAN members must take into account. A slow transition to an open sky policy, allowing the smaller airlines to establish themselves before entering into competition, allowing the needed growth, improvement of infrastructure, and gaining of skilled workers, is a suggested way to enter into the agreement?”

### III. Concluding remarks

From the discussion mention above, it is obvious that *open skies* policy or liberalization in air transportation is not yet ripe for the developing countries. To enter into real and fair competition under a regime of *open skies* needs a balanced situation<sup>14</sup> amongst the parties in running business on aviation industry. If

<sup>12</sup> See T. Kesharwani, “An open sky policy with Asean?”, *The Economic Times*, [http://economictimes.indiatimes.com/opinion/An-open-sky-policy-with-Asean/articleshow...\(8/24/2010\)](http://economictimes.indiatimes.com/opinion/An-open-sky-policy-with-Asean/articleshow...(8/24/2010)).

<sup>13</sup> Asia Economic Institute: “Open Sky Policy: Future of Free Trade in ASEAN?”, [http://www.asiaeconomic.org/exclusives/ex\\_read/22](http://www.asiaeconomic.org/exclusives/ex_read/22)

not, this will put the bigger and more developed countries with stronger airlines may have the best opportunities, as they will be best able and in the best position to offer the best product to the better part of the air traffic market. Finally, it will lead to a domination of the international air transportation market by the biggest and most developed countries, which it means the situation returns to monopolistic system.

It would be more appropriate to periodically renegotiate the existing bilateral agreements to take care of emerging needs. *Open skies* policy may be adopted later after a detailed study of overall economic gains and losses.

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<sup>14</sup> "A balanced situation would exist when each State could and would participate in international air transportation according to its fitness, willingness and ability", see H.A. Wassenbergh, *Public International Air Transportation La In A New Era*, Kluwer, The Netherlands, p. 126