

# THE PROPOSED SOUTHEAST ASIAN SINGLE AVIATION MARKET

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- ASEAN – 10 member economies, 600 million population: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam
- A Single Aviation Market (SAM) ambition by 2015
- For now, 2008 Multilateral Agreement on Air Services has been adopted, as prelude to the 2015 goal
- Unlimited 3<sup>rd</sup>/4<sup>th</sup>/5<sup>th</sup> freedom among ASEAN capital cities only

# Major Issues/Challenges

- Market Access
- Ownership and Control
- External Relations

## Market Access

- Non-capital cities: no consensus yet, may be included later (stated goal: 2010?)
- Even if successful, support only for unlimited 3<sup>rd</sup>/4<sup>th</sup>/5<sup>th</sup> freedom, and intra-ASEAN only
- No 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> freedoms! Single Market in name only?

## Ownership and Control

- Most states still subscribing to substantial ownership and effective control. Though increasingly, principal place of business.
- Note Singapore's unusually liberal agreement with the U.K. – only effective regulatory control to reside with Singapore. Substantial ownership and effective economic control can reside elsewhere!
- But hope for an ASEAN “community carrier” concept. Substantial ownership can be spread across member states, but effective control to remain with designating state?

## Ownership and Control (cont'd)

- “Community carrier” concept facilitative only – member states need not impose it on own airlines, but will allow access for other member states’ airlines which are structured as such
- Concept only makes sense fully if unlimited ASEAN-wide market access is recognised

## External Relations

- Wholly premature to consider E.U.-type “horizontal mandate”, though inevitable in long run
- Exact “deal” with a third country, e.g. China or India, unclear. A new bilateral that supersedes existing bilaterals?
- Preliminary agreement with China – unlimited 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> freedom between ASEAN and China by 2010. Will this jumpstart/accelerate 2015 intra-ASEAN deadline?

## External Relations (cont'd)

- Even on 3<sup>rd</sup>/4<sup>th</sup>/5<sup>th</sup> freedom basis, more northerly ASEAN states unlikely to agree, as they will lose out to more southerly states' airlines. Illustrate.
- More realistic: unlimited 3<sup>rd</sup>/4<sup>th</sup> freedom only, but restricted to home bases. This adds nothing to several existing bilaterals!
- Stopping at unlimited 3<sup>rd</sup>/4<sup>th</sup> freedom will advantage the Chinese carriers only. They can fly literally from any point in China to any point in ASEAN. But ASEAN airlines can't do the reverse!

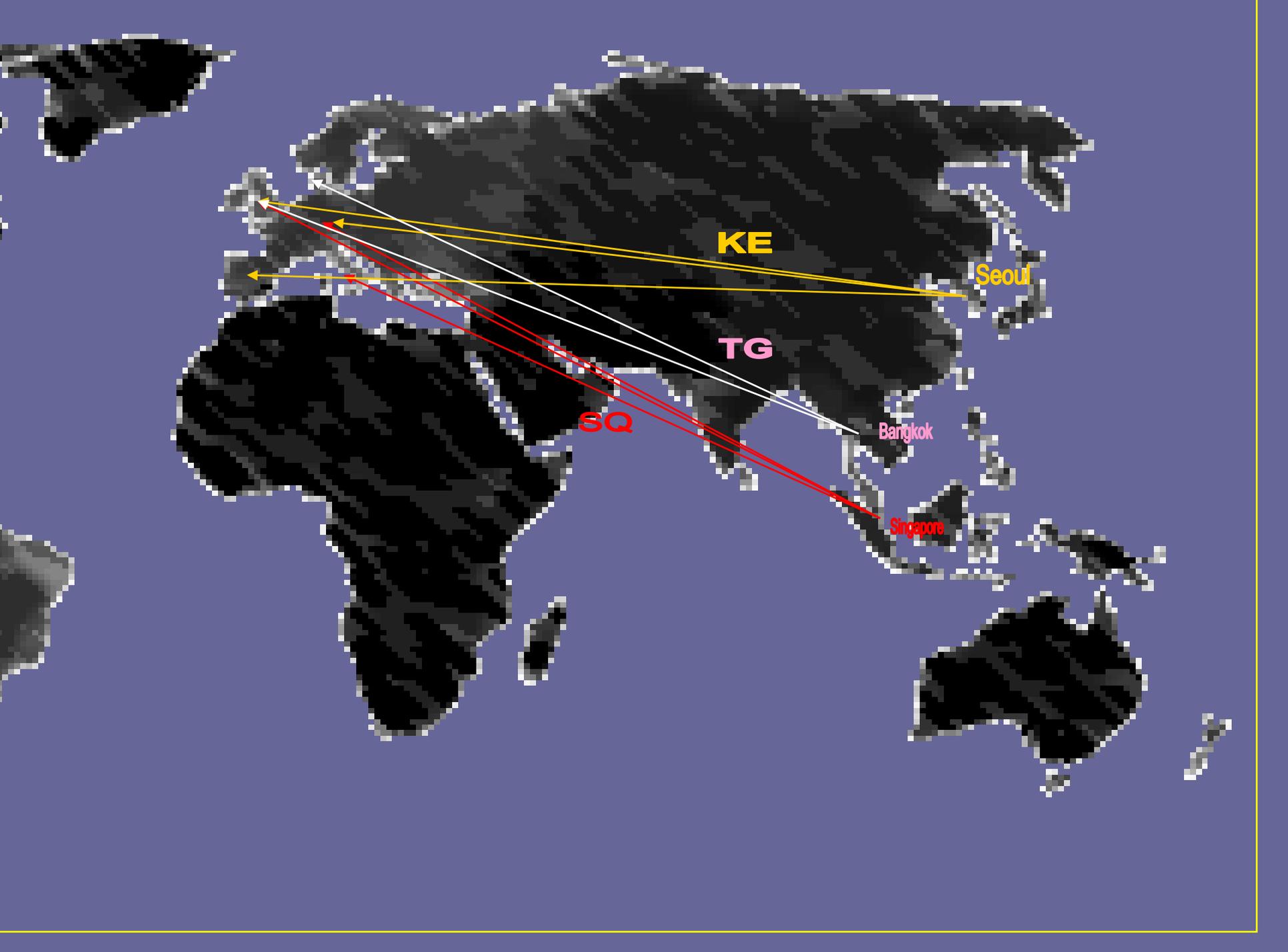
## External Relations (cont'd)

- This is the familiar problem facing a group of small states, when dealing with a larger market. E.U. vs. the U.S.!
- Only solution is to open up INTRA-ASEAN 5<sup>th</sup> and 7<sup>th</sup> freedoms!
- But political will lacking, and governments/national carriers unable to see beyond the ends of their noses! Indonesia still maintaining ban on foreign low-cost carriers that “threaten” its national carrier.

# Hypothetical British Airways Network



This is just ONE airline!



**KE**

Seoul

**TG**

Bangkok

**SQ**

Singapore

## E.U. Horizontal Mandate and Consequences

- Mergers and consolidation among EU airlines, with capital injections from EU sources beyond 49% norm
- Mega-carriers e.g. Air France/KLM, Lufthansa/Swiss. Iberia and Alitalia?
- Leaner, stronger competitors than US airlines!

## Meanwhile, in ASEAN and Asia ..... protectionism looms

- Mergers still impossible
- Asian governments still denying each other's carriers liberalized access (no 5ths, no 7ths)
- Asian carriers still can't operate from multiple bases/hubs; SIA restricted to Singapore, Korean Air to Seoul, and so on.
- Innovation by Low-Cost Carriers - AirAsia "joint venture"/franchise model to get around restrictions. Disguised multiple hubs!
- Fate of Tiger Incheon?

# What next after horizontal mandate?

- Full-fledged Open Skies between unified EU and individual third states?
- EU has already approached Australia and New Zealand.

# US Airlines - Northwest & United



# E.U. Airlines?



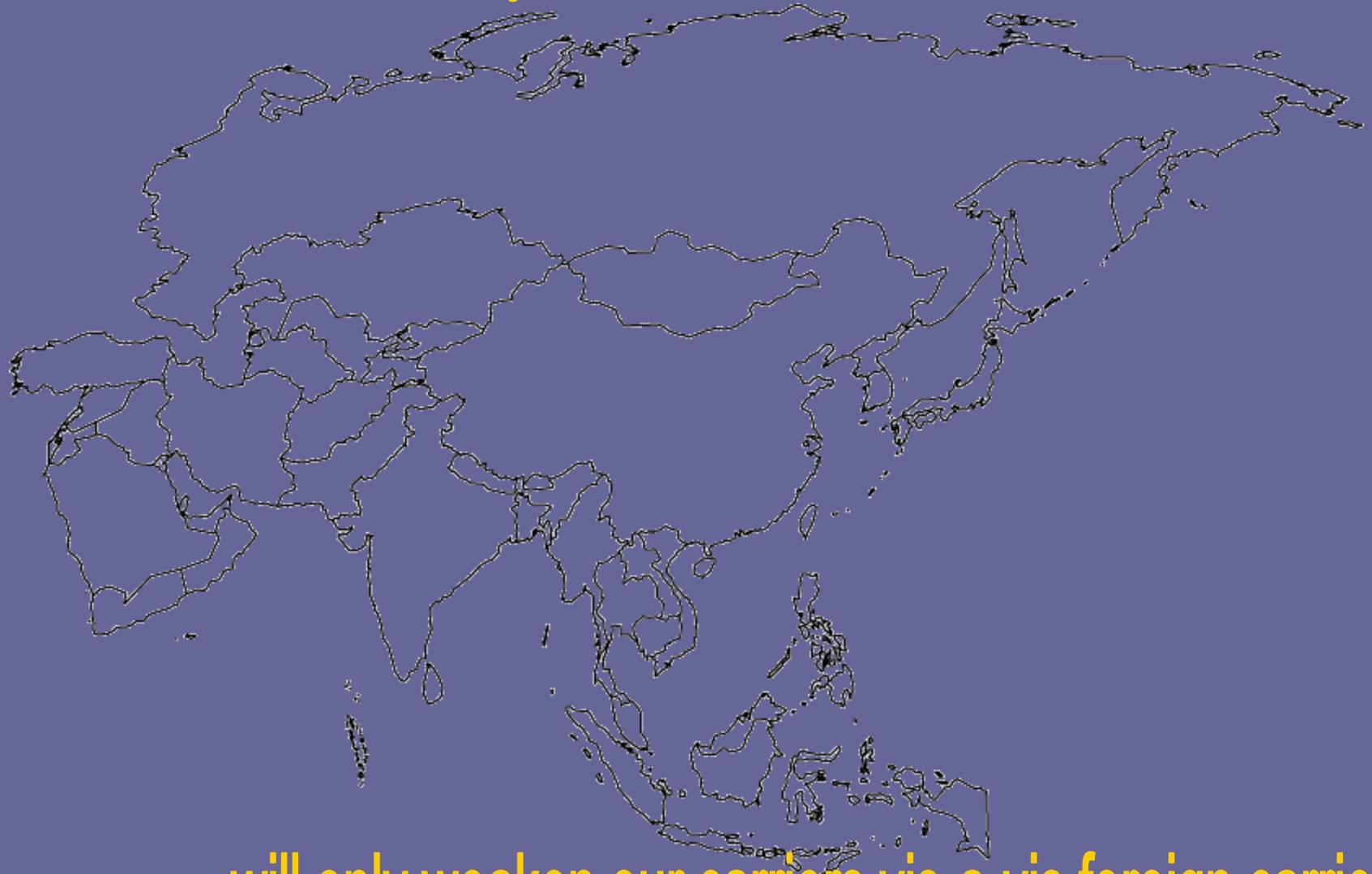
## Conclusions

- Asian carriers cannot respond with an equally comprehensive “spray” or “starburst” of flights – can’t build multiple hubs in Asia
- E.U. carriers can merge across boundaries in Europe, becoming leaner and more competitive. Asian carriers can’t do the same
- In time, the E.U. carriers will build hub in the Western gateway into Asia – Dubai? Abu Dhabi? Mumbai?

## Conclusions (cont'd)

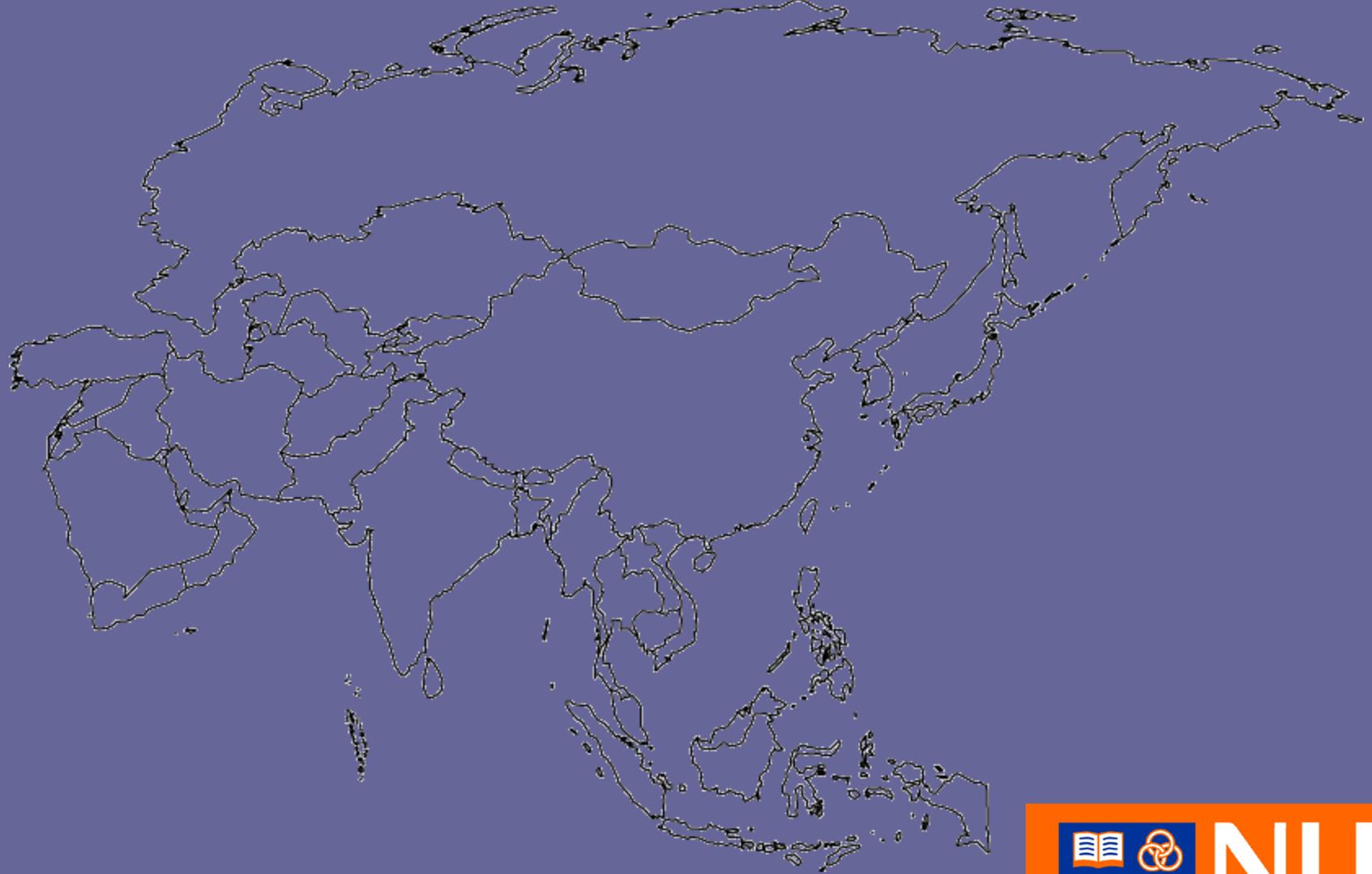
- The solution: Asian governments must start opening up their markets to each other's airlines and relaxing ownership rules.
- ASEAN experiment is but modest first step in this larger game.
- Can it ultimately link up the other regions – Northeast Asia, West Asia, South Asia – into regional bloc??

# An Asia Divided by Protectionist Sentiments .....



..... will only weaken our carriers vis-a-vis foreign carriers

# Thank you



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# PROSPECTS FOR A SINGLE AVIATION MARKET IN SOUTHEAST ASIA

by

Alan Khee-Jin Tan\*

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## ABSTRACT

*The ten member states of the Association of Southeast Asian Nations (ASEAN) are in discussions to establish a Single Aviation Market (SAM) for their region by the year 2015. Given the disparity in their economic development and their airlines' capacities, there is as yet no consensus among the states on liberalizing market access and relaxing airline ownership and control rules. At the same time, there is great uncertainty over how to deal with third states and regions as a more united entity. It is thus unclear if the proposed SAM will ultimately contain truly liberalized provisions that make for a credible "open skies" regime, or will end up being a single market only in name. This article assesses the prospects for achieving agreement on the three key questions of market access, ownership and control, and external relations. It also places ASEAN's decisions within the context of a fast-changing global aviation environment, one that threatens to sideline smaller states that do not begin the process of integrating their markets. The argument is made for ASEAN policy makers to conclude as extensive and ambitious an SAM as possible, so that the region can*

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*negotiate with other states (and its airlines compete with other carriers) from a position of relative strength.*

## R É S U M É

*Les dix États Membres de l'Association des Nations de l'Asie du Sud-Est (ASEAN) sont en train de discuter l'établissement dans la région d'un Marché Unique Aérien (MUA) d'ici l'année 2015. Vu la disparité de leur développement économique ainsi que les différentes capacités de leurs compagnies aériennes, les États ne sont pas encore parvenus à un consensus sur la libéralisation de l'accès aux marchés ainsi que sur les règles concernant la propriété et le contrôle. En même temps il existe une grande incertitude quant à la manière de développer des relations plus unies avec des États tiers. Il n'est toujours pas clair si le MUA proposé créera véritablement un marché déréglementé. Cet article évalue les probabilités d'arriver à un accord sur les trois questions clés: l'accès aux marchés, la propriété et le contrôle, et les relations externes. L'article place les décisions de l'ASEAN dans le contexte du secteur aérien mondial dont la rapide évolution menace de marginaliser les petits États qui n'ont pas encore amorcé les processus d'intégration de leurs marchés. L'auteur soutient que les responsables politiques de l'ASEAN devraient fonder le MUA le plus étendu et ambitieux possible, afin que la région puisse être en position de force pour négocier avec des États tiers et assurer des conditions d'accès aux marchés internationales favorables à ses compagnies aériennes.*

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## I. OVERVIEW

Within the past decade, the ten member States of the Association of Southeast Asian Nations (ASEAN) have taken progressive steps toward liberalizing the air services industry within their region. ASEAN - comprising Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam - has a combined population of 575 million persons and a total GDP at current market prices of around US \$1,282 billion.<sup>1</sup> Efforts to liberalize air transport have generally taken place within the larger context of greater integration across all economic sectors through the progressive harmonization of trade and investment policies. In this regard, air travel is but one of twelve priority sectors designated for economic integration,<sup>2</sup> and is an integral component in the proposed establishment of an ASEAN Economic Community (AEC) by the year 2015.<sup>3</sup>

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<sup>1</sup> ASEAN Secretariat, *Selected Basic ASEAN Indicators (as of 30 April 2008)*, online: ASEAN <<http://www.aseansec.org/stat/Table1.xls>> (last accessed 1 October 2008).

<sup>2</sup> ASEAN Secretariat, *Priority Sectors for Economic Integration*, 25 January 2007, online: ASEAN <<http://www.aseansec.org/Fact%20Sheet/AEC/2007-AEC-002.pdf>> (last accessed 1 October 2008). There were originally 11 priority sectors, with a 12<sup>th</sup> (logistics) added in 2006. The coordinator for the air travel sector is Thailand.

<sup>3</sup> ASEAN Secretariat, *ASEAN Economic Community Blueprint*, online: ASEAN <<http://www.aseansec.org/21083.pdf>> (last accessed 1 October 2008). The original target date for the AEC was 2020, but this was brought forward to 2015 by the ASEAN Economic Ministers Meeting in 2006.

Beginning with modest attempts to create sub-regions for liberalized air travel, ASEAN's phased approach has now reached the stage of unlimited third/ fourth freedom rights between capital cities (taking effect from December 2008) for all member States' carriers.<sup>4</sup> Unlimited fifth freedom rights among capital cities are to be allowed from December 2010.<sup>5</sup> The subsequent stage is to include non-capital and secondary cities, which will thus provide for unlimited third, fourth and fifth freedom rights for member States' carriers throughout the entire region. Seventh freedom rights, however, remain contentious, and appear unlikely to be allowed anytime soon. The prospects are even smaller for liberalizing domestic routes, i.e. continuous (eighth freedom) and pure (ninth freedom) cabotage. At the same time, there is little consensus on relaxing rules on ownership and control of carriers. Concrete liberalization initiatives have thus been taken for market access, but not for other key areas such as ownership and control, harmonized safety regimes, and a common external policy vis-à-vis third States and regions.<sup>6</sup>

Nonetheless, there appears to be general recognition within ASEAN that further liberalization is inevitable, given similar trends in other parts of the world. In particular, increased competition from foreign carriers and the new aero-political dynamics presented by a unified Europe have provided impetus for further liberalization.<sup>7</sup> In this regard, the member States have agreed in principle to the creation of a single aviation market (SAM) mechanism for the entire ASEAN region by 2015, the same deadline for the realization of the AEC.

However, there exists little agreement among the ASEAN member States on what should or should not feature in the SAM, and opinions vary

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<sup>4</sup> Roadmap for Integration of Air Travel Sector (RIATS), Appendix I to the ASEAN Sectoral Integration Protocol for Air Travel signed on 29 November 2004, online: ASEAN <<http://www.aseansec.org/16666.htm>> (last accessed 1 October 2008).

<sup>5</sup> RIATS, *ibid.*

<sup>6</sup> CAPA Consulting, Draft Final Report, *Developing ASEAN's Single Aviation Market and Regional Air Services Arrangements with Dialogue Partners*, 12 May 2008, online: <<http://www.aviation.go.th/doc/public/12-05-2008-CAPA%20SAM%20Draft%20Final%20Report.pdf>> (last accessed 1 October 2008) [CAPA Consulting]. The present author was part of a consultant team that worked on this report, commissioned by the ASEAN Secretariat in early 2008. For an earlier study assessing the wider APEC region, see Centre for Asia Pacific Aviation & APEC Secretariat, *Liberalisation of Air Services in the APEC Region, 1995-2005*, January 2007, online: APEC <[http://www.apec.org/apec/publications/all\\_publications/transportation\\_working.html](http://www.apec.org/apec/publications/all_publications/transportation_working.html)> (last accessed 1 October 2008).

<sup>7</sup> Alan Khee-Jin Tan, "Liberalizing Aviation in the Asia-Pacific Region: The Impact of the EU Horizontal Mandate" (2006) XXXI:6 *Air & Sp. L.* 432, at 447-453.

on contentious matters such as market access, ownership and control, and external relations.<sup>8</sup> The lack of consensus arises largely from the fact that the ASEAN member States have such disparate levels of economic development, with airlines of different sizes and competitiveness receiving varying amounts of protection from their governments.<sup>9</sup> With this context in mind, the present article seeks to assess the prospects for an ASEAN single aviation market and whether the member States are ready for an arrangement that can credibly live up to the promise of truly liberalized "open skies" for the region.

## II. GOVERNMENT AND INDUSTRY DEVELOPMENTS

### A. MULTILATERAL AGREEMENTS AT ASEAN AND APEC LEVELS

The idea for an ASEAN-wide "open skies" regime had been mooted as far back as 1995 by the ASEAN leaders' fifth summit held in Bangkok, Thailand. An open skies policy was thus included as an area of cooperation in a "Plan of Action for Transport and Communications (1994-1996)". At the same time, a Framework Agreement on Services had been adopted to liberalize trade in services beyond the commitments undertaken in the World Trade Organization's General Agreement on Trade in Services (GATS). This provided the foundation for discussing air services, which remain excluded from the GATS save for three limited sectors – aircraft repair and maintenance, sale and marketing of transport services, and computer reservation systems.

In March 1996, the ASEAN Transport Ministers' (ATM) first meeting identified the need to cooperate on the "Development of a Competitive Air Services Policy which may be a gradual step towards an Open Sky Policy in ASEAN". Since then, the concept of progressive liberalization of air transport has been reaffirmed by successive Transport Ministers Meetings and policy documents, including the Hanoi Plan of Action's Transport Action Agenda, the Successor Plan of Action in Transport 1999-2004, the ASEAN Memorandum of Understanding on Air Freight Services, and the Roadmap for ASEAN Competitive Air Services Policy. In November 2004, building upon all of these efforts, the 10<sup>th</sup> ASEAN Transport Ministers' Meeting adopted an Action Plan for ASEAN Air Transport Integration and Liberalization 2005-2015. This Action Plan sets out strategic actions to

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<sup>8</sup> For a summary of country positions, see CAPA Consulting, *supra* note 6, at 216.

<sup>9</sup> Peter Forsyth, John King & Cherry Ann Rodolfo, "Open Skies in ASEAN" (2006) 12:3 J. Air Transport Management 143, at 144-146.

further liberalize air services and promote an enabling environment for a single and unified air transport market in the region.

The Action Plan, together with a companion document known as the "Roadmap for Integration of Air Travel Sector" (RIATS),<sup>10</sup> identifies the key 2015 date for realizing an effective "open skies" regime for the entire ASEAN region. Within this broad objective, specific goals and deadlines were laid down, including the following:

- a. for air freight (cargo) services, significant liberalization by 2006, and full liberalization by 2008;
- b. for scheduled passenger services,
  - unlimited third and fourth freedom flights for all designated points within ASEAN sub-regions by 2005, and for at least two designated points in each country between the ASEAN sub-regions by 2006;
  - unlimited fifth freedom traffic between designated points within the ASEAN sub-regions by 2006 and at least two designated points in each country between the ASEAN sub-regions by 2008;
  - unlimited third and fourth freedom flights between the capital cities by 2008; and,
  - unlimited fifth freedom flights for the capital cities by 2010.

At the 13<sup>th</sup> ASEAN Transport Ministers' Meeting held in Singapore in November 2007, the Ministers reaffirmed their commitment to the RIATS goals, and agreed to expand RIATS to implement the ASEAN open skies policy by 2015 as part of the ASEAN single aviation market (SAM). Concurrently, the text of an ASEAN Multilateral Agreement on Air Services was finalized, containing draft implementing protocols formalizing the liberalized rights and deadlines first laid down by RIATS. The Multilateral Agreement on Air Services is scheduled for adoption at the 14<sup>th</sup> ASEAN Transport Ministers Meeting in the Philippines in November 2008.

The impact of liberalization for ASEAN "sub-regions" has been negligible, since this is targeted mainly at fostering growth in less developed bordering areas such as the Brunei, Indonesia, Malaysia, and Philippines East ASEAN Growth Area (BIMP-EAGA) and the Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT).<sup>11</sup> Of greater importance are

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<sup>10</sup> *Supra* note 4.

<sup>11</sup> For an analysis of these sub-regional initiatives, see Monash International Pty Ltd, *Preparing ASEAN for Open Sky*, REPSF Project 02/008, February 2004, at 64-69, online:

the unlimited third/fourth and fifth freedom rights granted between capital cities, as laid out respectively in Protocols 5 and 6 of the ASEAN Multilateral Agreement on Air Services. The proposed Protocols 7 and 8, designed to extend full third/fourth and fifth freedom rights to all other cities, are still being negotiated by ASEAN transport officials.<sup>12</sup>

As stated earlier, a common liberalization policy for ASEAN States faces significant challenges, largely due to the diversity in member States' aviation-related capacities and priorities. On the one hand, there are States like Singapore and Brunei, which have non-existent or negligible domestic markets to protect, and effectively have only one international airport/destination to offer. These States tend to be extremely liberal in advocating free market access, particularly Singapore which has a very successful national carrier and several new low-cost carriers (LCCs). On the other hand, States like Indonesia, the Philippines and Vietnam have huge domestic markets and numerous large cities from which international operations can be mounted. These States tend to be more protective of their markets.<sup>13</sup>

On the part of the carriers, there are established players such as Singapore Airlines (SIA), Thai Airways International (THAI) and Malaysia Airlines (MAS) which have extensive global networks, while states such as Cambodia, Laos and Myanmar have either fledgling or limited-network international carriers.<sup>14</sup> Amidst such disparities in capacity, national airlines exert varying degrees of influence over their governments, typically resulting in protectionist policies being exercised in their favor. Thus, it is unsurprising that ASEAN member States display such markedly diverse levels of commitment toward air services liberalization.

ASEAN's attempts to achieve a common multilateral stand have borne only modest results. Instead, the liberalization effort has had to depend largely on bilateral initiatives among pairs of States, or on slightly larger "plurilateral" arrangements involving groups of like-minded States. In the latter regard, ASEAN provides for a so-called 2+X formula, allowing for pairs or groups of countries to liberalize earlier between themselves and for others to come on board when they feel ready to do so.<sup>15</sup> The key

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AusAid <[http://www.usaid.gov/au/publications/pdf/asean\\_open\\_skies.pdf](http://www.usaid.gov/au/publications/pdf/asean_open_skies.pdf)> (last accessed 1 October 2008).

<sup>12</sup> The most recent discussions were at the ASEAN Transport Working Group (ATWG) meeting in Kuala Lumpur, Malaysia, on 13-14 August 2008.

<sup>13</sup> CAPA Consulting, *supra* note 6, at 66 and 216.

<sup>14</sup> Forsyth, King & Rodolfo, *supra* note 9, at 145.

<sup>15</sup> Tan, *supra* note 7, at 440.

proponents of this concept have been Singapore, Thailand, and Brunei. On 27 December 2004, these three countries concluded a multilateral agreement that liberalized air passenger services between them. The agreement – known as the Multilateral Agreement for the Liberalization of Air Passenger Services (MALAPS) – came on the heels of a similar agreement reached by the same three countries in February 2004 liberalizing air cargo services.<sup>16</sup>

In essence, MALAPS accords unlimited reciprocal third/fourth freedom rights for the carriers of the State parties, with no restrictions on capacity, frequency, route or aircraft type. It effectively replaces the existing bilateral agreements in place between the State Parties. Notably, MALAPS stops short of according unlimited fifth freedom rights for State Parties' carriers, and reinforces the traditional "substantial ownership and effective control" rule. Thus, parties to the agreement can designate as many airlines as they wish to fly to any number of cities in the other State Parties as long as substantial ownership and effective control of the airlines remain vested in the designating State, its nationals, or both. In sum, the achievements of MALAPS are modest - they do not go beyond what is already commonly found in bilateral arrangements between several ASEAN member states.

In addition to MALAPS, there are several other multilateral agreements of relevance. In December 2003, Cambodia, Laos, Myanmar and Vietnam (collectively known as the CLMV countries) signed a Multilateral Agreement on Air Services that provides for unlimited capacity and traffic rights among them, including fifth freedom rights. This agreement benefits mostly Vietnamese carriers (particularly Vietnam Airlines), as they are the sub-region's most developed. Vietnam Airlines currently operates fifth freedom services linking Hanoi to Phnom Penh, Cambodia via Vientiane, Laos. There are also flights in the reverse direction from Ho Chi Minh City to Vientiane via Phnom Penh.<sup>17</sup> As mentioned earlier, limited "open-skies" agreements are also in place to spur growth within less developed sub-regions linking neighboring ASEAN countries. These reflect the "sub-regional" goals identified in RIATS, and include the BIMP-EAGA and the IMT-GT.<sup>18</sup> To reiterate, these agreements are extremely limited in impact because of the very small air traffic markets found in the relevant sub-regions.

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<sup>16</sup> Multilateral Agreement on the Full Liberalization of All Cargo Air Services, 25 February 2004. Cambodia has since become a party to this cargo agreement.

<sup>17</sup> Vietnam Airlines schedule, online: Vietnam Airlines <<http://www.vietnamairlines.com.vn/Portals/0/quoc08.pdf>> (last accessed 1 October 2008).

<sup>18</sup> *Supra* note 11.

The other significant instrument is the Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT).<sup>19</sup> This agreement was adopted in May 2001 under the auspices of the broader Asia Pacific Economic Co-operation (APEC) grouping.<sup>20</sup> MALIAT establishes a more ambitious liberalization agenda than MALAPS does, reflecting APEC's wider goals of trade liberalization and facilitation. Hence, it provides for unlimited fifth freedom rights for passenger transport and unlimited seventh freedom rights for cargo transport, with an optional Protocol laying down seventh freedom and cabotage rights for passenger transport. Other key MALIAT features include an open route schedule, open capacity and frequency, operational flexibility (including aircraft type, change of gauge, co-terminalization and intermodal rights), multiple designation of airlines, unlimited code-sharing (including third-country code sharing), open pricing, and a minimal tariff filing regime, as well as standard provisions on safety and security.

As regards ownership and control, in particular, a State Party to MALIAT may designate any carrier which is incorporated in and has its principal place of business in its territory, while effective control of the carrier is to be vested in the designating State Party, its nationals, or both.<sup>21</sup> The "place of incorporation/principal place of business" criterion replaces the traditional "substantial ownership" formula found in most bilateral agreements. Theoretically, it allows for airlines from MALIAT State Parties to be owned by foreign interests beyond the customary maximum of 49% in place in most countries, without that airline losing its rights to fly to fellow MALIAT State Parties. However, the fact that the airline must still remain effectively controlled by interests in the designating country shows that APEC member States were not yet prepared to relax the control requirement substantively. MALIAT also contains a provision that allows a country to retain substantial ownership as well as effective control in respect of its *own* airlines in order to comply with its internal laws or regulations.<sup>22</sup>

To date, the MALIAT agreement has only received nine signatures – from Brunei, Chile, the Cook Islands, New Zealand, Samoa, Singapore,

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<sup>19</sup> Text available online: MALIAT

<<http://www.maliat.govt.nz/agreement/englishtext.pdf>> (last accessed 1 October 2008). The New Zealand government is the Depository State for the MALIAT Agreement and its Protocol.

<sup>20</sup> All the ASEAN States are members of APEC except for Cambodia, Laos, and Myanmar.

<sup>21</sup> Arts. 3(2)(a), (b) and 4(1)(a), (c), MALIAT, *supra* note 19.

<sup>22</sup> Art. 3(5), *ibid.*

Tonga, the United States, and most recently Mongolia (for cargo only).<sup>23</sup> Of these, Singapore, Brunei, Chile, New Zealand, and the Cook Islands have accepted the Protocol allowing for seventh freedom and cabotage rights for passenger transport. Despite (or precisely because of) its far-reaching provisions, the Agreement and its Protocol have failed to attract widespread participation among States. The biggest fear arises over the fifth freedom provisions – these allow an airline from any State Party to serve points between two other State Parties on stopover flights. There are also concerns over the relaxation of the ownership clause, since this provides for foreign-capitalized airlines from a State Party to fly freely to and from another State Party.

These twin provisions of MALIAT are at once its most progressive features, and also the biggest impediments to its widespread acceptance.<sup>24</sup> Within ASEAN it appears unlikely that any other member State will join Singapore and Brunei in becoming a party to MALIAT. Indeed, as mentioned earlier, Thailand chose explicitly to conclude a new but limited MALAPS with Singapore and Brunei, instead of acceding to the broader MALIAT. Under the latter, Thailand would have had to offer airlines from Singapore and Brunei unlimited fifth freedom traffic between Bangkok and points in the US. This would not have gone down well, to say the least, with Thai Airways. In essence, the prospect of a formidable carrier like Singapore Airlines exercising fifth freedom rights through their cities is enough to discourage most countries from accepting MALIAT. This is also precisely why Australia has declined to join MALIAT, given Qantas's long-standing resistance to Singapore Airlines' request to mount operations between Australia and the U.S.<sup>25</sup>

In the meantime, some bilateral relaxations have taken place among pairs of ASEAN member States. Apart from the unlimited third/fourth freedom rights in existence among Singapore, Thailand and Brunei as well as among the CMLV countries (which also have fifth freedom rights among themselves), unlimited third/fourth freedom rights also exist bilaterally for several other pairs of ASEAN countries, including Malaysia-Thailand, Vietnam-Singapore, and Vietnam-Indonesia (for passenger services only). In addition, services between Vietnam and Thailand are already unlimited,

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<sup>23</sup> In 2004, MALIAT was amended to allow for accession on a cargo-only basis. Mongolia accepted the Agreement on this basis, and the cargo provisions took effect for Mongolia from 23 February 2008. Peru accepted the main Agreement in 2002 but withdrew altogether in 2005, citing disproportionate advantages to Chilean carriers, Tan, *supra* note 7, at 438.

<sup>24</sup> Tan, *ibid.*, at 438-439.

<sup>25</sup> David Hodgkinson, "Restrictions Across the Pacific: Australia's International Air Services Policy and the Problems of Liberalization" (2006) XXXI:6 Air & Sp. L. 385.

except for the Bangkok – Ho Chi Minh City route which will become fully relaxed only from 2010. Similarly, services between Malaysia and Vietnam are currently unlimited for Vietnamese carriers, and will become so for Malaysian carriers from 2010.

The 2010 date coincides with the RIATS schedule for full liberalization of third/fourth and fifth freedom access among capital cities only. The significance of 2010 appears to have been gradually heeded by most (although not all) member States. As noted above, Vietnam, Thailand and Malaysia seem cognizant of the implications of 2010, but States such as Indonesia and the Philippines have not yet announced any explicit relaxations pursuant to RIATS' 2008 and 2010 deadlines for inter-capital city third/fourth and fifth freedom rights respectively. Indonesia, in particular, is still highly restrictive when according rights to fly to its major cities – Jakarta, Surabaya, Bali, and Medan. In fact, the Indonesian government has, since March 2005, maintained a ban on foreign low-cost carriers (LCCs) flying to these cities.<sup>26</sup> The ban was prospective when it came into force, and does not therefore apply to carriers such as AirAsia and Valuair which had started flights to Indonesia before that date. However, newer LCCs such as Tiger Airways (partly owned by Singapore Airlines) have not been able to launch any flights to the major Indonesian cities as a result of the ban.<sup>27</sup>

In February 2008, one of the most protected routes in the ASEAN region – Singapore-Kuala Lumpur – was significantly relaxed when the Singapore and Malaysian governments opened it up to their respective LCCs, well ahead of the December 2008 deadline.<sup>28</sup> Both sides accorded two daily return flights to each other's carriers – Malaysia designated AirAsia to operate both daily return flights, while Singapore designated Tiger Airways and Jetstar Asia to operate one daily return flight each. The air services agreement between Singapore and Malaysia had hitherto limited services on the route to their national carriers, Singapore Airlines and Malaysia Airlines. Consequently, the two carriers had enjoyed an effective duopoly on the route for more than two decades, with prices being among the highest in the world for the distance covered. From December 2008, both governments have scrapped all restrictions between the two (capital) cities. There is now unlimited capacity on the Singapore-Kuala Lumpur route,

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<sup>26</sup> Ven Sreenivasan, "Ban on budget flights to big Indon cities to stay", *Business Times (Singapore)* (26 January 2007).

<sup>27</sup> Jetstar Asia gets around the ban by having its subsidiary Valuair operate Indonesian flights.

<sup>28</sup> Karamjit Kaur, "First budget flights take off on KL-S'pore route", *The Straits Times (Singapore)* (1 February 2008).

consistent with the RIATS schedule.<sup>29</sup> While this is a welcome development that should portend the entire region's commitment to RIATS, industry players are still awaiting Indonesia's and the Philippines' announcements to open up their respective capitals of Jakarta and Manila.

## B. LOW-COST CARRIERS AND INDUSTRY DEVELOPMENTS

Amidst the prevailing bilateral restrictions, what is especially interesting in the ASEAN context is the emergence of new LCCs that have sought to get around the prohibition on foreign-controlled carriers and seventh freedom operations. In this regard, the Malaysian-owned AirAsia had pioneered an overseas joint venture model in the region when it established Thai AirAsia in Thailand in early 2004.<sup>30</sup> To adhere to Thai domestic law as well as the ownership/control restrictions found in Thailand's bilateral air services agreements with other countries, it was ensured that Thai AirAsia would remain 51% owned by local Thai interests, with AirAsia holding only a minority 49% stake. In 2005, AirAsia owner Tony Fernandes repeated the feat in Indonesia when he bought out a defunct airline called Awair and turned it into Indonesia AirAsia employing the same joint venture ownership model.<sup>31</sup>

Both "subsidiaries" are held out to be technically distinct from the parent AirAsia, with their own IATA flight designator codes, boards of directors (with a majority of local members), and also local CEOs. Majority ownership remains with local concerns that are, notably, non-airline interests with minimal or no experience in the airline business. At the same time, the carriers utilize the international route rights of their respective States. Hence, Thai AirAsia, and Indonesia AirAsia utilize Thailand's and Indonesia's rights under these countries' respective bilateral air services agreements with other countries.<sup>32</sup> Despite the technical differences, the fleets of all three "sister" carriers are painted with the same red-and-white AirAsia livery and marketed by a common branding strategy. Bookings on

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<sup>29</sup> Karamjit Kaur, "More S'pore-KL flights", *The Straits Times (Singapore)* (26 September 2008). From December 2008, there will be over 20 return flights daily offered by Singapore Airlines, Silk Air, Malaysia Airlines, AirAsia, Tiger Airways, and Jetstar Asia.

<sup>30</sup> For LCCs in Asia generally, see Paul Hooper, "The Environment for Southeast Asia's New and Evolving Airlines", 11 (5) *J. Air Transport Management* 335, at 337 and Yose Rizal Damuri & Titik Anas, *Strategic Directions for ASEAN Airlines in a Globalizing World: The Emergence of Low-Cost Carriers in Southeast Asia*, REPSF Project 04/008, October 2005, online: AADCP-REPSF <<http://www.aadcp-repsf.org/docs/04-008-FinalOverview.pdf>> (last accessed 1 October 2008).

<sup>31</sup> "AWAIR changes name to Indonesia AirAsia", *Jakarta Post (Indonesia)* (1 December 2005).

<sup>32</sup> Alan Khee-Jin Tan, "Singapore's New Air Services Agreements with the E.U. and the U.K.: Implications for Liberalization in Asia" (2008) 73:2 *J. Air L. & Com.* 351, at 369-370.

the website are done through a common internet platform, and there is little doubt that management expertise is provided by the (Malaysian) minority owner. For commercial purposes, AirAsia appears to operate as a single indistinguishable carrier out of three hubs – Kuala Lumpur, Bangkok, and Jakarta.

The joint venture model has thus allowed AirAsia to mount what are effectively prohibited seventh freedom flights out of multiple hub airports in the region.<sup>33</sup> As far as the Thai and Indonesian governments are concerned, the question of effective control seems less critical as long as foreign investors own no more than 49% of shares in these airline companies. Nor have bilateral partners objected to any perceived lack of "effective control" on the part of the designating State. Crucially, this operational model has allowed the parent carrier to establish multiple hubs and operations across Asia, simultaneously by-passing ownership/control *and* seventh freedom hubbing restrictions. In short, the industry has found that regulators do not appear unduly concerned about the "effective control" element (which is infinitely harder to define, in any event), as long as majority ownership can be shown definitively to reside in local hands.

The same model has since been employed by Australia's Qantas Airways in setting up subsidiaries of its Jetstar brand in Singapore (Jetstar Asia) and Vietnam (Jetstar Pacific). On its part, Singapore Airlines' low-cost carrier, Tiger Airways, has been exploring joint venture operations in the Philippines and South Korea.<sup>34</sup> As these operations (or planned operations) have shown, the cross-border venture conveniently gets around the restrictive bilateral system that prohibits carriers from setting up multi-hub operations overseas. The fact that the model is tolerated (and even implicitly encouraged) by the governments of Singapore, Thailand, Indonesia, and Vietnam attests to its functional utility in circumventing the restrictive bilateral regime. Hence, whatever the strictures of the bilateral system in ASEAN, there already exists a *de facto* relaxation of the ownership and control restrictions.<sup>35</sup> However, the concern here is that this approach is not reflected in specific policy and remains arbitrary and subject to *ad hoc* conditions.<sup>36</sup>

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<sup>33</sup> *Ibid.*

<sup>34</sup> Tiger's plan in the Philippines involves establishing a joint venture with a local airline called Seair, while its Korean joint venture is with the city of Incheon (home to Seoul's international airport), see Kevin Done, "Tiger Airways plans to expand from Korea base", *Financial Times (London)* (6 November 2007). Both ventures have been facing difficulties, *infra* notes 40 to 43.

<sup>35</sup> CAPA Consulting, *supra* note 6, at 38.

<sup>36</sup> *Ibid.*

In sum, the joint venture model has thrived even within the framework of a restrictive "substantial ownership and effective control" regime. That said, difficulties still abound, caused mainly by the politics that often bedevil the aviation industry. For one thing, AirAsia's attempt to set up a Vietnamese subsidiary called Vina AirAsia has run into problems. In 2007, the Vietnamese government turned down AirAsia's proposal to tie up with the Vietnam Shipbuilding Industry Group (Vinashin) to set up the new carrier.<sup>37</sup> Vietnam Airlines and Jetstar Pacific – the two main Vietnamese airlines – had steadfastly protested AirAsia's plan, with media reports suggesting that Vietnam Airlines was considering an LCC of its own.<sup>38</sup> Qantas, which had bought a 30% stake in Pacific Airlines and re-branded it as Jetstar Pacific with effect from May 2008, had reportedly demanded that no new airline be licensed for three years after its investment in Pacific!<sup>39</sup>

Similarly, Tiger's plan to establish Tiger Incheon in South Korea has also run into difficulties. A group of Korean low-cost carriers – Air Busan, Yeongnam Air, Jeju Air, and Jin Air – has lobbied their government to block the plan, claiming that effective control of Tiger Incheon would be exercised from Singapore.<sup>40</sup> In this regard, the Korean government's apparent reluctance to license Tiger Incheon seems at odds with its otherwise liberal policy of advocating a more open aviation industry in Northeast Asia with greater access for Korean carriers into China and Japan.<sup>41</sup>

In the Philippines, Tiger's current and planned operations continue to upset entrenched airline interests. Tiger's proposal to partner a small local carrier called Seair entails the latter operating aircraft leased from Tiger on

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<sup>37</sup> "Vina AirAsia can't get gov't nod on budget airline", *VietNamNet Bridge* (23 October 2007), online: VietNamNet Bridge <<http://english.vietnamnet.vn/biz/2007/10/750912/>> (last accessed 1 October 2008) and "Surge in flights to trendy destinations", *Straits Times* (Singapore) (1 December 2007).

<sup>38</sup> "Boeing, Airbus, Bombardier compete to sell jets to Vietnam", *Thomson Financial*, (18 September 2007) online: Forbes <<http://www.forbes.com/markets/feeds/afx/2007/09/18/afx4127480.html>> (last accessed 1 October 2007).

<sup>39</sup> VietNamNet Bridge, *supra* note 37.

<sup>40</sup> Karamjit Kaur, "S. Korean budget carriers seek to clip Tiger's wings", *Straits Times* (Singapore) (18 August 2008). Jin Air and Air Busan are low-cost subsidiaries of Korean Air and Asiana respectively. Tiger Airways remains confident that approval will ultimately be given and expects Tiger Incheon to start operations in 2009, see "Singapore's Tiger still keen on regional expansion", *Flightglobal* (23 September 2008), online: Flightglobal <<http://www.flightglobal.com/articles/2008/09/23/316228/singapores-tiger-still-keen-on-regional-expansion.html>> (last accessed 1 October 2008).

<sup>41</sup> For Korean carriers' strategies in Northeast Asia, see Tae Hoon Oum & Yeong Heok Lee, "The Northeast Asian Air Transport Network: Is There a Possibility of Creating Open Skies in the Region?" (2002) 8:5 *J. Air Transport Management* 325

domestic and international routes out of Manila's secondary Macapagal Airport (the former Clark Air Base). As conceived, the venture involved a franchise agreement that would see the aircraft sporting Tiger's colours and the two carriers code-sharing and marketing their flights jointly. The proposed venture drew strong condemnation from established interests such as Philippine Airlines and Cebu Pacific, which filed oppositions to the plan on the ground that Tiger would be using Seair to access domestic operations in the Philippines.<sup>42</sup> In August 2008, after nearly two years of hearings and wranglings, the Philippine Civil Aeronautics Board (CAB) finally cleared an agreement for the lease of two Tiger aircraft to Seair.<sup>43</sup> For now, it looks like Tiger's partnership with Seair will finally take off.

Meanwhile, Tiger's own Singapore-Manila/Clark-Macau operation has regularly been criticized and challenged for allowing it an effective fifth freedom route out of the Philippines.<sup>44</sup> The operation involves a daily flight leaving Singapore for Macau (Flight TR 902), and then proceeding to Manila as the same flight. On the return Manila-Singapore sector, however, the same aircraft takes on a different flight code (TR 507) - that of the daily Manila-Singapore service. Conversely, Flight TR 506 leaves Singapore for Manila daily, and then becomes Flight TR 903 connecting to Macau. TR 903 then returns to Singapore from Macau in the evening.<sup>45</sup> Some segments of the Philippine airline industry had viewed this as an effective seventh freedom operation linking Manila/Clark and Macau. The discomfort with Tiger's operations had led to the carrier having to apply to the Philippine CAB for successive short-term approvals to continue operating its routes.<sup>46</sup> Overall, the Philippine government remains cautious about allowing access to foreign carriers. While it is fairly committed to relaxing entry at

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<sup>42</sup> "Seair seeks Macau, Hong Kong flights", *Manila Times (Philippines)* (18 July 2008), online: <<http://www.manilatimes.net/national/2008/july/18/yehey/business/20080718bus10.html>> (last accessed 1 October 2008).

<sup>43</sup> "CAB approves Seair-Tiger deal on lease of aircraft", *Manila Times (Philippines)* (8 August 2008), online <<http://www.manilatimes.net/national/2008/aug/08/yehey/business/20080808bus7.html>> (last accessed 1 October 2008).

<sup>44</sup> The controversy has deeper roots in the Philippine government's desire to relax fifth and seventh freedom rights for foreign carriers out of Macapagal/Clark Airport. This is strongly resisted by Philippine carriers, see Darwin G. Amojelar, "In budget-fare dog fight, old players hold their own", *Manila Times (Philippines)*, (18 December 2006) online: <<http://www.philskies.net/forum/viewtopic.php?f=1&t=9562>> (last accessed 1 October 2008).

<sup>45</sup> Information from Tiger Airways' schedule, online: Tiger Airways <[http://www.tigerairways.com/flight\\_info/index.php](http://www.tigerairways.com/flight_info/index.php)> (last accessed 1 October 2008).

<sup>46</sup> "Subic, Clark slam CAB for yoyo policies", *Manila Standard (Philippines)*, (28 March 2007) online: <[http://www.manilastandardtoday.com/?page=business3\\_mar28\\_2007](http://www.manilastandardtoday.com/?page=business3_mar28_2007)> (last accessed 1 October 2008).

secondary points such as Clark,<sup>47</sup> it is less ready to do so at the main Ninoy Aquino International Airport in Manila.

Over in Indonesia, the ASEAN region's largest and potentially most lucrative aviation market, the ban on foreign LCCs serving major cities is still in place. As stated earlier, the Indonesian government had in 2005 sealed off its four major cities – Jakarta, Surabaya, Medan, and Bali – to foreign LCCs in an effort to protect its own airlines, particularly the troubled national carrier Garuda.<sup>48</sup> The ban was expressed to be prospective in effect, meaning that existing foreign LCCs which had operations to Indonesia were not affected. One of these was the Singapore-owned Valuair, which had been Singapore's first budget carrier when it was established in 2004. Valuair subsequently ran into financial difficulties and was bought out by Qantas and merged with Jetstar Asia in July 2005. Jetstar has since been compelled to maintain Valuair's separate aircraft, identity, and colours for the sole purpose of preserving its operations to Jakarta.<sup>49</sup> In the meantime, it has actually managed to add on Surabaya, Bali, and Medan as new destinations in Indonesia.

### III. THE PROPOSED SINGLE AVIATION MARKET - IS IT EVEN REALISTIC?

Given the mixed "report card" on the ASEAN member States' collective and individual commitment to liberalization, it is imperative to consider what can realistically be achieved in terms of the ASEAN single aviation market (SAM) by 2015. While there are many key aspects that can be included in any SAM arrangement, the two most fundamental features would obviously be (i) the freeing up of market access to all carriers of the SAM parties; and (ii) the relaxation of airline ownership and control rules. These "twin" features lie at the heart of any meaningful air services liberalization policy. As such, any credible SAM arrangement should provide for the substantial relaxation of market access and ownership/control rules. These will now be considered in turn.

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<sup>47</sup> Even then, the government has vacillated between promoting greater access at Macapagal/Clark and protecting local carriers. In January 2006, the Arroyo administration relaxed access to foreign carriers at Macapagal/Clark (according fifth and seventh freedom rights), only to roll back the scheme six months later after protests by local carriers, see Amojelar, *supra* note 44.

<sup>48</sup> *Supra* note 26. On the Indonesian government's move to protect Garuda, see Heinrich C. Bofinger & John M. King, *ASEAN Air Transport Liberalization: The Current State of Progress and Steps Forward* (2006) at 13-14, unpublished, on file with author.

<sup>49</sup> Bofinger & King, *ibid.*

## A. MARKET ACCESS

There appears to be no in-principle objection among the ASEAN member States to the introduction by 2015 of unlimited third/fourth (and possibly fifth) freedom flights for both passengers and cargo within ASEAN boundaries. As mentioned above, unlimited third/fourth and fifth freedom rights for capital cities are already scheduled for December 2008 and December 2010 respectively.<sup>50</sup> The more immediate question relates to when unlimited access can be extended to the non-capital cities. This is the subject of ongoing discussions by the ASEAN member States.

What will possibly complicate matters is the desire of some ASEAN member States to impose specific conditions on unlimited third/fourth and fifth freedom access. As stated earlier, the Indonesian government draws a distinction between full-service and low-cost carriers, and has banned the latter (apart from those with pre-existing operations) from flying to its major cities.<sup>51</sup> It is still unclear if Indonesia will reverse its policy and open its capital Jakarta to *all* ASEAN carriers (including LCCs) for unlimited third/fourth freedom operations from other ASEAN capitals from December 2008, as is the commitment under RIATS. Indeed, there is no provision in RIATS for distinguishing between full-service carriers and LCCs, and it would be wholly contrary to RIATS if Indonesia were to maintain its ban on LCC operations to Jakarta from December 2008. Indeed, such a policy would be inimical to the future conclusion of an SAM arrangement.

Another possible qualification to unlimited third/fourth and fifth freedom access could arise from the concern of States such as Thailand over carriers designated by other ASEAN countries but which are substantially owned and effectively controlled by foreign (i.e. non-ASEAN) interests. Although no such carrier fitting this description exists as yet, the Thai position would explicitly link market access to ownership/control rules in order to exclude such carriers from enjoying liberalized access.<sup>52</sup> Hence, Thailand is likely to allow unlimited third/fourth and fifth freedom access to carriers from ASEAN countries, except if they are substantially owned and effectively controlled by non-ASEAN interests.<sup>53</sup> As to whether this

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<sup>50</sup> *Supra* note 5.

<sup>51</sup> *Supra* note 26.

<sup>52</sup> CAPA Consulting, *supra* note 6, at 67 and 199.

<sup>53</sup> It appears that the Thai objection will not extend to a carrier that is substantially owned by non-ASEAN interests, but whose principal place of business/incorporation remains in an ASEAN State, with effective control being exercised by the designating state and/or its nationals.

will, in turn, curtail the liberalization of ownership/control rules will be discussed below.

Putting aside the above concerns for now, it appears fairly realistic that unlimited intra-ASEAN third/fourth and fifth freedom rights will *eventually* be granted to all carriers from ASEAN member States (including the LCCs). In this regard, countries such as Cambodia and Myanmar have even raised the intriguing possibility that unlimited fifth freedom rights to external, non-ASEAN points should be given to ASEAN carriers under an SAM arrangement.<sup>54</sup> If carried through, this proposal will improve the flow of passenger and cargo traffic into and out of these countries. For example, a Malaysian carrier could mount fifth freedom operations between Malaysia and China via a point in Cambodia, providing Cambodia with increased passenger/tourist inflow and cargo export capacity. Such arrangements would greatly benefit countries such as Cambodia which have airlines of limited capacity and which rely heavily or wholly on foreign carriers to bring in tourism traffic. However, enshrining such rights in an ASEAN SAM arrangement will require the explicit consent of a third country outside the grouping, and may prove to be more complicated if reciprocity is to be ensured for that country's carriers.<sup>55</sup>

Going forward, the more immediate and critical question for ASEAN member States is whether the proposed SAM should go beyond the identified RIATS goals. For one thing, RIATS does not envisage seventh freedom rights, which is the capacity for a carrier to conduct operations between two foreign points without the aircraft having to begin or end its journey in the its home country. Several ASEAN member States have expressed the view that RIATS is not the end goal, and that the SAM envisioned for 2015 should seek to go beyond RIATS to achieve full liberalization of air travel within ASEAN.<sup>56</sup> Otherwise, the SAM will not take the region appreciably beyond what has already been laid down by RIATS (and the more liberal bilateral agreements). This position has the support of some carriers. Not surprisingly, these include AirAsia, the region's top LCC which has relentlessly pursued its dream of becoming a truly regional carrier. Unlimited seventh freedom rights within ASEAN would mean that carriers like AirAsia would no longer have to resort to the joint venture model analyzed earlier in order to establish multiple hubs in the region.

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<sup>54</sup> CAPA Consulting, *supra* note 6, at 66.

<sup>55</sup> See the discussion on China, *infra* notes 84 to 85.

<sup>56</sup> CAPA Consulting, *supra* note 6, at 67.

However, apart from Singapore and Brunei, none of the ASEAN member States appear to support the inclusion of seventh freedom rights under the proposed SAM.<sup>57</sup> The opposition to opening up cabotage (whether continuous or direct – eighth and ninth freedoms respectively) is even stronger. Here, even Singapore and Brunei (the two countries with no cabotage market to speak of) have been circumspect, wary perhaps of accusations that they are seeking to dominate other members States' domestic markets. Hence, what we have in ASEAN is a very different conception of what a "single aviation market" means. For sure, the ASEAN member States are not yet prepared to consider an EU-type SAM which accords totally unlimited rights to fly between any two points in the single market. It may be that the ASEAN SAM proposed for 2015 will have to fall short of what is commonly understood elsewhere to be a true single market.

Bearing in mind that the process of liberalization for any economic sector is largely progressive and incremental in nature, it is entirely conceivable that the ASEAN SAM will stop short of according unlimited seventh, eighth and ninth freedom rights, but instead lay out a phased approach that eases in relaxations progressively. The experience of the EU and the Australia-New Zealand SAMs is worth noting here. In the EU, full liberalization of market access allowing any EU carrier to operate between any two points in the Community was only achieved gradually. The lifting of restrictions was done in stages, with relaxations for third/fourth freedom access and for cargo coming into place first.<sup>58</sup> By 1997, the initial relaxations for third/fourth, fifth, sixth, and seventh freedom rights for both passenger and cargo transport had been accompanied by the full grant of cabotage (eighth and ninth freedom) rights.

Since the creation of the EU Single Aviation Market, the number of airline routes within the EU has increased by 170%.<sup>59</sup> Compared to 1990, there are now 20% more airlines operating in the EU, with more cities and regions being linked by air transport. Passengers are also enjoying greater choice of destinations and more direct flights. In relation to competition among carriers, the number of routes with more than two competitors rose by 300% between 1992 and 2006, with a corresponding drop in air fares.<sup>60</sup>

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<sup>57</sup> *Ibid.*

<sup>58</sup> Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ L 240 (in force 1 January 1993).

<sup>59</sup> *The European Union's Commitment to Cooperation with the World Aviation Community*, paper presented by Portugal on behalf of the European Community and its member States, ICAO Assembly, 36th session, September 2007, at 2, online:

<[http://ec.europa.eu/transport/air\\_portal/international/doc/icao/info\\_paper\\_icao\\_en.pdf](http://ec.europa.eu/transport/air_portal/international/doc/icao/info_paper_icao_en.pdf)> (last accessed 1 October 2008).

<sup>60</sup> *Ibid.*

Overall, much of the growth can be linked to the explosion in services offered by the LCCs, whose share of seat capacity jumped from 1% in 1993 to 28% in 2006. This has forced the traditional network carriers to develop better products and services as well as offer more competitive pricing.<sup>61</sup>

Under the Australia-New Zealand SAM arrangements,<sup>62</sup> airlines designated by either country can operate unlimited international services between the two countries and continue those services beyond to third countries (i.e. on a fifth freedom basis). These airlines can also operate all-cargo services from either country to third countries on a seventh freedom basis. On their part, the separate category of "SAM airlines" that have to be majority owned and effectively controlled by Australian and New Zealand interests can operate unrestricted services between the two countries and also domestic services in either country. Notably, seventh freedom rights for passengers are not accorded by the SAM, although both countries have committed to negotiating this at a future date.<sup>63</sup>

Consistent with the experience of the EU and the Australia-New Zealand SAMs, the ASEAN SAM can perhaps usefully start off by allowing unlimited seventh freedom all-cargo operations by 2015. As has been demonstrated around the world, freight liberalization tends to be less controversial for governments and their carriers.<sup>64</sup> For one thing, the additional freight capacity offered by foreign carriers helps to boost a State's exports, particularly if its own carriers do not possess adequate cargo capacity. Unlike passenger transport, freight carriage tends to be unidirectional in nature, and seventh freedom operations that allow for successive destinations to be covered are essential for cargo carriers. Given the export-driven nature of ASEAN economies and the fact that most member States' airlines do not operate all-cargo services, it would be realistic and desirable for the ASEAN SAM to embrace full cargo liberalization by 2015.

As for seventh freedom operations for passengers, these are typically viewed to be a threat to local incumbent carriers, since they provide direct competition for passenger traffic. The resistance would be all the greater if the incumbents are not cost-competitive or not known for good passenger

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<sup>61</sup> *Ibid.*

<sup>62</sup> These were agreed to in 1996 and subsequently incorporated in a new "open skies" Air Services Agreement negotiated by both countries in 2000. See generally Jeffrey Goh, *The Single Aviation Market of Australia and New Zealand*, (City: Cavendish, 2001) and Hodgkinson, *supra* note 25, at 386-390.

<sup>63</sup> CAPA Consulting, *supra* note 6, at 69.

<sup>64</sup> Arts. 2(3) and 2(4), MALIAT, *supra* note 19.

service. In the circumstances, only an initially modest introduction of seventh freedom rights would be politically acceptable. One possible relaxation is to allow, from 2015, any carrier from an ASEAN country to connect two cities from two different ASEAN countries on a seventh freedom basis if these are hitherto unconnected by direct flights. This will bring developmental benefits for the two cities/States concerned, without them or their carriers having to underwrite the costs for these new operations.

A possible next step would be to introduce seventh freedom passenger operations between ASEAN capital cities, possibly by 2020 or 2025. This follows RIATS' well-established order of opening up capital cities first, with other cities coming on board only later.<sup>65</sup> Here, some conditions might possibly be attached: there could be a condition, for instance, that only one carrier is designated by each ASEAN member State for the purpose of inter-capital city seventh freedom passenger flights. Alternatively, there could be capacity restrictions in the number of seats that can be offered weekly. These conditions can then be reviewed periodically, with the eventual aim being to allow for full liberalization. An extension to all other cities can then be allowed once the member States are sufficiently comfortable with the inter-capital city arrangement.

As for cabotage operations, the SAM should approach these cautiously but steadily. A phased approach can again act to allay the fears of incumbent carriers. It is possible that member States may be persuaded to allow eighth freedom (continuous cabotage) operations to connect city-pairs that are hitherto unserved. For instance, a Thai carrier could be allowed to mount operations from Bangkok to Balikpapan in Indonesia and then onward to Ambon (in eastern Indonesia) on a restricted eighth freedom basis, provided that the two Indonesian cities are not at that point in time directly served by existing scheduled carriers. The commencement of such rights could be delayed to 2020, with progressive relaxations for all other domestic routes (whether linked by existing services or not) introduced only from 2025 onwards. At that point, some protective conditions can still be maintained, such as a requirement that the foreign operator cannot charge fares for the domestic leg of the flight that are lower than what is available in the market. Such conditions were applied in the early years of market liberalization in the EU to prevent foreign operators from pricing the "add-on" domestic leg marginally to the detriment of domestic competitors.<sup>66</sup>

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<sup>65</sup> *Supra* note 4.

<sup>66</sup> CAPA Consulting, *supra* note 6, at 71.

Finally, there is the thorny issue of true cabotage (or ninth freedom) operations. This is likely to be extremely sensitive for States such as Indonesia and the Philippines, where there are huge domestic markets which local airlines seek to preserve for themselves. Here, instead of introducing a modest phased approach to liberalizing the market, ASEAN member States may wish to consider allowing carriers from other ASEAN countries to establish jointly-owned subsidiaries in order to operate domestic flights. This can even be structured to give the foreign investor a majority share going beyond 49%, as long as local interests retain a significant share.<sup>67</sup> There could even be a stipulation that the local partner must be an existing domestic carrier which will stand to gain from the infusion of foreign capital and management expertise. All these conditions may help ensure a minimal level of capital and management commitment from the foreign carrier that will help to dispel notions that it is simply seeking to "pick and choose" certain lucrative domestic routes.

Alternatively, States may even opt to designate only certain domestic routes to be open to foreign carriers. These could include the so-called "public service obligations" routes that incumbent local carriers often find unprofitable to operate, and which could be usefully offered to interested foreign carriers to operate at their own financial risk. Finally, as an additional concession to States, all of these cabotage relaxations could be expressed as "opt-out" provisions in the ASEAN SAM with a fixed deadline for expiry. In essence, this will allow States that are uncomfortable with offering cabotage rights at the outset to choose not to do so for a certain number of years, and to review their position at some future point.

Conversely, the SAM should also be flexible enough to permit States which are ready to move faster and earlier to do just that. There should thus be a legal mechanism in the SAM providing for States to give early approval for other ASEAN carriers to operate seventh freedom and/or cabotage rights, as long as these do not discriminate among carriers. This will provide room and time for the more cautious States to evaluate their positions without holding back other States, while still creating the necessary momentum for the region to move forward appreciably on liberalization.

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<sup>67</sup> This would purely be a matter of domestic law, as there would be no restrictions imposed by bilateral agreements with other countries. Australia would be an example of a country that allows 100% foreign ownership of a domestic carrier.

## B. OWNERSHIP AND CONTROL

The other critical issue for the SAM to deal with is that of ownership and control. While most bilateral agreements retain the traditional "substantial ownership and effective control" criterion, some of the more progressive agreements have in recent times introduced a "principal place of business/incorporation" formula in place of substantial ownership. This allows carriers to be capitalized by foreign investors beyond the customary 49% limit mandated by the "substantial ownership" rule. The new formula is particularly beneficial for carriers from developing countries that may find it difficult to raise majority local capital to set up or expand their operations.<sup>68</sup> As discussed earlier, the multilateral agreement MALIAT also adopts the "principal place of business/incorporation" criterion, although it retains the "effective control" rule to ensure that interests in the designating States continue to control the carrier.<sup>69</sup>

The problem with the "principal place of business/incorporation" criterion is that it does not go far enough to attract foreign investors who may desire a greater degree of control over and above majority ownership. This will effectively limit the pool of foreign investors to those content with a silent, non-controlling role. This will likely rule out most foreign carriers, whose management direction and expertise may be exactly what the local carrier needs. At the same time, the introduction of the new criterion in a piecemeal bilateral manner is problematic – a State would have to insert the criterion and remove the old "substantial ownership" rule in a large number of its bilateral agreements with other countries before its carriers can effectively benefit from it. This was essentially what MALIAT tried to do in a multilateral fashion.

As far as the proposed ASEAN SAM is concerned, it is conceivable that all the ASEAN member States can be persuaded to accept the "principal place of business/incorporation" criterion in a multilateral arrangement, particularly if this is applied only to carriers from other member States.<sup>70</sup> In other words, some member States are likely to maintain the traditional

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<sup>68</sup> On private and foreign capital for carriers in ASEAN, see Christopher Findlay, *Strategic Directions for ASEAN Airlines in a Globalizing World, Overview*, REPSF Project 04/008, August 2005, at 14-15, online: AADCP-REPSF <<http://www.aadcp-repsf.org/docs/04-008-FinalOverview.pdf>> (last accessed 1 October 2008).

<sup>69</sup> *Supra* note 21.

<sup>70</sup> In this regard, eight ASEAN States had indicated their willingness to depart from the traditional requirement, see CAPA Consulting, *supra* note 6, at 62. The most preferred alternative was the "principal place of business and effective control" formula (this was the choice of at least five States: Brunei, Indonesia, Lao PDR, Malaysia, and Singapore).

ownership formula for their own carriers, citing constitutional or other domestic legal provisions mandating this. The Philippines, for instance, has provisions in its Constitution requiring that all strategic assets – including airlines – must have at least 60% local ownership.<sup>71</sup> However, this is more of a domestic requirement rather than one imposed by international agreements. Thus, it is technically independent from the "substantial ownership" requirement typically found in bilateral air services agreements.

Consequently, the Philippine government is free to accept alternative criteria (such as "principal place of business/incorporation") for *other* ASEAN states' carriers, even if it maintains the traditional "substantial ownership" criterion for its own carriers. The result is that ASEAN States will not object to other member States' carriers (which may not be substantially- or majority-owned by their designating States' interests) to operate flights to and from their cities. In fact, it is wholly realistic for the ASEAN SAM to provide for "principal place of business/incorporation" as the default criterion for all carriers in the ASEAN region, with an opt-out clause allowing member States to continue applying the traditional "substantial ownership" rule to their own carriers if they wish to do so.<sup>72</sup> In this regard, though, the opt-out provision should have a finite "shelf" life or expiry period, in that States availing of it should have to phase it out after five years or so (e.g. up to 2020). Otherwise, it becomes meaningless if State Parties to an SAM agreement can indefinitely hold on to a feature that is fundamentally at odds with the direction of the agreement.

As for the "effective control" requirement, it is unlikely that the more conservative ASEAN States such as Indonesia, the Philippines, Vietnam, or Thailand would agree to its relaxation. For these countries, control over their air carriers is a sensitive political issue. Thailand, for instance, maintains that local interests must continue to exercise effective control over Thai carriers because these carriers are needed to bring home Thai nationals during times of crises, such as when hostilities break out overseas.<sup>73</sup> These ASEAN States are thus unlikely to be impressed by the recent formula used by Singapore in its new bilateral agreement with the United Kingdom that came into force in March 2008.<sup>74</sup> Singapore had adopted the position that "control" over a carrier can be separated into regulatory and economic

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<sup>71</sup> Forsyth, King & Rodolfo, *supra* note 9, at 145.

<sup>72</sup> CAPA Consulting, *supra* note 6, at 63.

<sup>73</sup> CAPA Consulting, *supra* note 6, at 63.

<sup>74</sup> *Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Singapore concerning air services*, art. 4, Part 2(b), online: UK government <<http://www.official-documents.gov.uk/document/cm73/7362/7362.pdf>> (last accessed 1 October 2008).

control. While regulatory control over safety and security matters can and should be mandated to remain with the designating State, economic control need not be.

Hence, for the purposes of the Singapore-UK bilateral agreement, Singapore may designate carriers that are owned and controlled (in an economic sense) by third party foreign interests, as long as Singapore is the principal place of business of the carrier and exercises effective regulatory control over it.<sup>75</sup> This is essentially a variant of the "principal place of business and strong links to designating State" model clause which ICAO recommended at its Fifth Worldwide Air Transport Conference held in 2003.<sup>76</sup> The idea is for regulatory control to remain with the designating State, but for economic control to be relaxed so as to facilitate the infusion of foreign investment as well as management expertise into local carriers. The reality remains that most foreign investors would not want to invest large amounts of capital in a local carrier without obtaining a significant degree of control over their investment.

The separation of "effective control" into its regulatory and economic components could well be a progressive feature of the ASEAN SAM. Realistically, however, it is ahead of its time. What is probably more achievable is to keep the traditional "effective control" concept intact for ASEAN, and to use it as a safeguard to assure member States that they can afford to adopt "principal place of business/incorporation" and abolish "substantial ownership". As an incremental approach, this is already a significant first step, and dilution of control will simply have to come later when the member States are more prepared for it.

At this juncture, it is fitting to raise the idea of an ASEAN "community carrier", akin to what has been established in the EU. In essence, this concept would allow carriers designated under the ASEAN SAM to be majority-owned and effectively controlled – in the aggregate – by nationals of ASEAN member States. For instance, a Cambodian-designated airline with its principal place of business and registered office in Cambodia could be 20% owned by Thai interests, 20% by Malaysian interests, 11% by Cambodian interests, and the remaining 49% shares by

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<sup>75</sup> *Ibid.*

<sup>76</sup> Art. X, Model Clause, Fifth ICAO Worldwide Air Transport Conference, (2003), online: ICAO <[http://www.icao.int/icao/en/atb/atconf5/docs/ATConf5\\_conclusions\\_en.pdf](http://www.icao.int/icao/en/atb/atconf5/docs/ATConf5_conclusions_en.pdf)> (last accessed 1 October 2008). On ownership and control generally, see Peter Haanappel, "Airline Ownership and Control and Some Related Matters", (2001) 26 *Ann. Air & Sp. L.* 90 and Isabelle Lelieur, *Law and Policy of Substantial Ownership and Effective Control of Airlines: Prospects for Change* (Ashgate: Aldershot, 2003).

non-ASEAN interests. A majority (or two-thirds) of the Board of Directors would have to be made up of ASEAN nationals, including the Chairperson.<sup>77</sup> Majority ownership and effective control would thus reside in ASEAN hands.

Such a concept is already being discussed by ASEAN transport officials. Strategically, it is a sensible first step toward strengthening ASEAN for a possible future when the group could be negotiating aviation relations as a united bloc. For now, the concept may even be reconciled with some member States' desire to have an "opt-out" provision requiring their own carriers to be substantially owned and effectively controlled by their nationals.<sup>78</sup> Such "opt-out" provisions are not necessarily inconsistent with the "community carrier" concept, as long as ASEAN States do not prohibit carriers from other member States from operating to their cities if these carriers are constituted in a trans-ASEAN manner. However, as argued above, the "opt out" should only be temporary for it detracts from the longer-term objectives of a truly single aviation market.

In short, the "community carrier" concept calls for ownership and control rules to be relaxed so as to embrace *aggregate* ownership and control by a defined group of SAM States and/or their nationals. As safeguards, member States can continue to require that the principal place of business/incorporation is retained in the designating State, along with effective regulatory control over safety and technical matters. In any event, the "community carrier" concept is merely permissive or facilitative – it does not mean that all carriers in the ASEAN region must *necessarily* have a trans-ASEAN ownership/control structure, only that they can have it if they (and ASEAN investors) wish to. This has been the case in the EU, where Air France and Lufthansa have been allowed to buy into KLM and Swiss International Airlines respectively. In short, there should be no government obstruction against this possibility, as long as safety and technical concerns are addressed.

It is even possible to phase in the ASEAN "community carrier" concept gradually – in the initial years, effective *economic* control can remain with the nationals of the particular designating State, even as a trans-ASEAN majority ownership structure is immediately allowed. In time, as

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<sup>77</sup> This would also be consistent with the "SAM airline" concept found in the Australia-New Zealand SAM, where Australian and/or New Zealand nationals must own a majority of the paid-up capital of the SAM airline, and have effective control by holding at least two-thirds of the positions on the Board, including that of chairperson. In addition, the carrier's head office and operational base must be in Australia or New Zealand.

<sup>78</sup> *Supra* note 71.

the comfort level of member States grows, effective control can then be reposed ASEAN-wide in the aggregate. In sum, it is wholly practicable for a community carrier concept to be in place in an ASEAN SAM by 2015, subject to some or all of the safeguards identified above. Eventually, the region should work toward phasing out these safeguards, preferably by 2020.

Relaxations to the ownership/control regime – beginning with a possible ASEAN "community carrier" concept – are critical if regional carriers are to remain competitive vis-à-vis their foreign counterparts. Indeed, EU carriers can now merge across boundaries and emerge as leaner, better-capitalized entities (as signaled by the Air France-KLM and Lufthansa-Swiss arrangements). Indeed, the projection is that within a decade or two, only a few "super-carriers" will be left in Europe as airline consolidation gains momentum.<sup>79</sup> In the meantime, carriers in ASEAN (and in Asia in general) are still unable to receive foreign equity injections beyond 49%, much less an outright merger with other carriers. The reason for this, of course, is the prevailing foreign ownership and control restrictions in place between most countries. Such restrictions, together with the continuing reluctance to grant each other's carriers more liberal fifth and seventh freedom market access, mean that individual Asian carriers are increasingly vulnerable to the competitive challenges posed by merged EU carriers with multiple bases and superior networks.<sup>80</sup>

### C. EXTERNAL RELATIONS

In proposing an SAM for the region, the ASEAN member States will inevitably have to grapple with the issue of an external strategy vis-à-vis third countries and regions. The EU's experience has demonstrated how a new aero-political landscape is being forged with the European Commission seeking to negotiate a new aviation policy on behalf of all EU member States. Hence, the Commission's "horizontal" mandate strategy has seen it attempting to replace the nationality clause in individual bilateral agreements with a "community carrier" clause.<sup>81</sup> In terms of market access,

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<sup>79</sup> See, e.g. the views of United Airlines CEO Glenn Tilton, reported in Dave Carpenter, "United CEO: U.S. Airlines Over-Regulated", *AFP*, (21 July 2006), online: <<http://www.unitedafa.org/news/pdetails.asp?ID=36>> (last accessed 1 October 2008).

<sup>80</sup> Tan, *supra* note 7, at 451.

<sup>81</sup> See, for instance, the clause contained in the *Agreement between the European Community and the Government of the Republic of Singapore on certain aspects of air services*, OJ L 243, 6 September 2006. The horizontal mandate was the result of the European Court of Justice (ECJ) decisions on 5 November 2002 which effectively invalidated the standard nationality clauses found in the EU member States' bilateral agreements with third states. On the ECJ decisions, see e.g. Martin Bartlik, "The 'Open-Skies' Decision of the European Court of

though, the "horizontal" agreements do not add to the prevailing capacity, since this is still regulated by the individual bilateral agreements.<sup>82</sup> In time, though, the objective is to create highly liberalized or open aviation areas with third States that will wholly free up capacity between the EU and that third State, and that will give full and true effect to the "community carrier" concept.

From the ASEAN perspective, the preliminary question that arises is how a third State is to be engaged by the member States. One way is to induct that State into the ASEAN SAM as a fully-fledged member once the SAM comes into effect. This will entail the third State having to accept all the benefits and obligations (and shortcomings) of the SAM, including relaxing market access and ownership/control provisions on ASEAN's own terms. This approach could be problematic, given that the third State is unlikely to desire full membership if the SAM is not sufficiently attractive for its carriers. For instance, if the SAM does not offer full seventh freedom rights for all parties' carriers (which is very likely), a more liberal-oriented third State may not find sufficient incentives to commit to the SAM. Conversely, more conservative third States with large domestic markets may be unwilling to offer fifth freedom traffic rights for all SAM carriers.

Consequently, the third State is likely to want to negotiate its own terms of engagement with the ASEAN States. In this regard, the only practicable option is to adopt what is known in the region as an "ASEAN-plus" approach, which is essentially a fresh agreement between the ASEAN States, on the one hand, and the third State, on the other.<sup>83</sup> Some or even all the terms of the SAM, as applicable among the ASEAN states *inter se*, may have to be re-negotiated with the third State. This is possibly a more realistic option for ASEAN; indeed, the "ASEAN-plus" approach does not even have to await the adoption of the SAM and can be pursued in parallel or even in advance. A full expansion of the ASEAN SAM to eventually include non-ASEAN countries would then be a longer term goal.

The next issue is whether ASEAN is ready to adopt an EU-style "horizontal" mandate approach vis-à-vis third States. This is theoretically possible. In principle, once the ASEAN "community carrier" concept is agreed to by all member States, this can be inserted into a new bilateral agreement between a united ASEAN, on the one hand, and the third

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Justice: The Advent of a New Era?", (2003) XXVIII Ann. Air & Sp. L. 357 and S. Rutger Jan toe Laer, "The ECJ Decisions: 'Blessing in Disguise?'" (2006) XXXI:1 Air & Sp. L. 19.

<sup>82</sup> Peter van Fenema, "E.U. Horizontal Agreements: Community Designation and the 'Free Rider' Clause" (2006) XXXI:3 Air & Sp. L. 172, at 178.

<sup>83</sup> CAPA Consulting, *supra* note 6, at 184.

State/region, on the other. This will allow all ASEAN SAM carriers, owned and/or controlled in the aggregate by ASEAN interests, to be designated to operate to the third country. However, this is dependent on all ASEAN member States agreeing to have the new agreement supersede the individual bilateral agreements in existence between them and the third State. This is likely to be a longer-term prospect, since some ASEAN member States do not yet conceive of a "horizontal mandate" approach that can automatically update and supersede their existing bilateral arrangements with third States.

What is likely to be realistic and practicable in the immediate term is a less ambitious "framework agreement" between the ASEAN member States and a third State that does not necessarily supersede the existing bilateral agreements. Such an agreement could contain general statements of intent that commit the individual ASEAN States to amend their bilateral agreements with the third State to incorporate new and identifiable rights such as relaxed market access identified by the framework agreement. What is important here is to identify a fixed deadline for such amendments to be effected. While this approach is less than satisfactory in terms of legal effect and clarity, it is far more likely to elicit the acceptance of ASEAN member States, since it leaves to them the discretion to set the pace for concrete liberalization.

At present, there is no consensus among the ASEAN member States as to which of the above approaches is preferable. While there is general agreement to use the "ASEAN-plus-X" formula for negotiations with third States, the member States do not appear to have fully considered whether a new agreement with a third State will displace or automatically amend existing bilateral agreements. That has not stopped ASEAN from entering into preliminary discussions with at least two dialogue partners – China and India – on a possible new aviation agreement between them and these partners.

The discussions with China on a possible ASEAN-China Regional Air Services Agreement are noteworthy. Even though negotiations are at an early stage, a fairly ambitious deadline of 2010 has been identified for the conclusion of a Regional Air Services Agreement and a commitment to implement this agreement in line with the establishment of the ASEAN-China Free Trade Agreement. The substantive features of the proposed Regional Air Services Agreement have also been identified in a document known as the ASEAN-China Aviation Cooperation Framework.<sup>84</sup> These

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<sup>84</sup> Online: ASEAN <<http://www.aseansec.org/21154.htm>> (last accessed 1 October 2008).

include the provision of multiple airline designation and unlimited third/fourth *and* fifth freedom rights for cargo and passenger traffic between ASEAN and China, and the removal of all limitations on frequency, capacity, and type of aircraft.

The above proposals present some interesting issues. The relaxation of third/fourth freedom rights between points in ASEAN and points in China is straightforward enough. China already has fairly liberal third/fourth freedom arrangements with several ASEAN member States such as Thailand, Malaysia, and Singapore. It would thus be beneficial to extend unlimited third/fourth freedom rights to all ASEAN States. This could benefit, in particular, the inbound tourism industries of member States which have yet to negotiate liberal bilateral agreements with China. If such a broad agreement could be achieved, the individual member States would be spared the effort of individually negotiating with China. They would conceivably need only to amend their existing bilateral agreements with China or – as is common practice – to append an extra-bilateral memorandum of understanding containing the modified features to these agreements.

On the other hand, negotiating the relaxation of fifth freedom rights with China is likely to be complicated. To begin with, fifth freedom restrictions within ASEAN itself are still in effect, and are unlikely to be wholly lifted until at least 2015 when the proposed SAM comes into effect. This places the SAM fifth freedom goal to be somewhat of a laggard to the ASEAN-China agreement's 2010 deadline. Indeed, it seems illogical to speak of exchanging fifth freedom rights with China when the ASEAN States themselves have yet to liberalize such rights among themselves! In essence, it is ironic that while the ASEAN States labor over the deadlines for phased liberalization among themselves, their preliminary discussions with China and India have instantly exposed how inadequate their internal arrangements are. The silver lining, hopefully, is that the talks with China should provide ballast for ASEAN member States to abolish fifth freedom restrictions among themselves well ahead of 2015, and to accelerate the RIATS timetable at a more ambitious rate.

There are, however, significant problems. Relaxing fifth freedom rights among ASEAN member States is difficult enough; it will be even more contentious if a third State like China is brought into the picture. Exchanging fifth freedom rights with China will mean that the more northerly ASEAN States closest to China (principally Thailand, Vietnam, and the Philippines) will effectively end up offering lucrative fifth freedom

traffic to Chinese and other ASEAN carriers.<sup>85</sup> Thus, carriers from Indonesia and Singapore, for instance, will be able to pick up traffic in Bangkok or Hanoi or Manila *en route* to any number of Chinese cities. The Thai, Vietnamese and Philippine carriers are likely to protest that there are minimal benefits for them, unless a simultaneous arrangement is inked with, say, Australia to the south, so that they can exercise unlimited fifth freedom rights to Australia through Singapore or Jakarta.

If such objections prevail, what is therefore realistic – at least in the immediate term – is for *only* third/fourth freedom rights to be traded between ASEAN and China. Thus, any carrier from ASEAN will be able to mount any number of flights to and from any number of Chinese cities. However, in the absence of fifth and seventh freedom rights, such flights can be operated *only* from their own home countries, and not through/from neighboring ASEAN countries. This provides no added advantage to those ASEAN States which already have liberal third/fourth freedom access into China. In effect, it will only prove advantageous to the Chinese carriers, in that they will henceforth gain unlimited access to all ASEAN points from all points in China. The only way this advantage can be neutralized is for ASEAN member States to accord each other's carriers the right to fly from any point in ASEAN to any point in China (effectively, seventh freedom rights or the treatment of ASEAN as a true single market). This, as we have seen, was precisely the *raison d'être* for the EU's concerted action vis-à-vis the United States.<sup>86</sup> All this provides further argument for the acceleration of fifth and seventh freedom relaxations *within* ASEAN itself.

In sum, any "ASEAN-plus-China" agreement can start with unlimited third/fourth freedom rights for both sides. However, the ASEAN States must commit to begin parallel negotiations among themselves (ideally in the context of the SAM) to lift fifth and seventh freedom restrictions, and to possibly insert such rights into the agreement with China at a later date. As advocated above, seventh freedom rights could conceivably begin with capital cities only, with other cities to follow later. In the absence of such parallel movements, it would actually not be in the ASEAN States' interest to conclude a limited agreement with China that provides only unlimited third/fourth freedom rights. The same is true for all other third State

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<sup>85</sup> CAPA Consulting, *supra* note 6, at 185.

<sup>86</sup> The EU has succeeded in concluding an open skies agreement with the United States, which came into force on 30 March 2008, *Air transport agreement between the European Community and its Member States and the United States of America*, OJ L 134, 25 May 2007. Even then, there would be no cabotage rights for EU carriers within the US, just as the ASEAN carriers would enjoy no such rights within China. Second-stage negotiations are underway between the EU and the US on ownership/control and investment issues.

partners – principally India, Japan, and Korea - that may show interest in concluding an agreement with ASEAN.

All this is to say that a "horizontal" mandate approach for ASEAN is premature, let alone a common external policy or a joint negotiating body in dealing with third countries.<sup>87</sup> That said, liberalization processes are inevitably incremental in fashion. Consequently, it is not unrealistic for ASEAN to set a timetable to have a "horizontal mandate" approach by 2020 or so, when more of the member States feel more prepared to pursue such goals.<sup>88</sup> The "horizontal mandate" would entail inserting the proposed ASEAN "community carrier" clause (with aggregate ownership and control of carriers residing in ASEAN hands) in new or amended bilateral arrangements with third States. At the same time, the concept of an ASEAN community carrier can only make sense if the carrier is free to fly unhindered across the entire region. As such, the relaxation of fifth and ultimately, seventh, freedom rights within the region appear to be a *sine qua non* for the realization of a credible community carrier. The issues of relaxed market access and the community carrier are thus inextricably linked. Only when relaxation in these areas is assured within ASEAN itself can they be effectively traded with third States without disadvantaging the ASEAN carriers.

#### IV. CONCLUSION

In the final analysis, it is clear that any credible single aviation market arrangement must go far enough to address substantially the three key questions of market access, ownership and control, and external relations. In practical terms, an ASEAN community carrier must be able to fly freely, at the very least, between any two international points within ASEAN. To the extent that most ASEAN member States remain reticent over such issues, there is a risk that the proposed ASEAN SAM will end up being a single market arrangement purely in name, with only modest relaxation being adopted for the regional air transport sector. In the longer term, this will prove to be disadvantageous for the region, given the larger strides taken by more united markets such as the EU in this regard. More ominously, if the Northeast Asian countries get their act together and start liberalizing among themselves substantially, the smaller Southeast Asian countries (and carriers) will find themselves increasingly hampered by their more limited markets and network penetration.

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<sup>87</sup> CAPA Consulting, *supra* note 6, at 183-184.

<sup>88</sup> *Ibid.*, at 205.

That said, liberalization is typically a gradual and staged process, as demonstrated by the experience of the EU itself. The scale of the challenges cannot be under-estimated, given the diversity of economic development among the ASEAN States, the lack of supra-national institutions and a "community law" that drives economic integration, and following from all that, the unrealistic and unflattering comparisons with the EU. At the very least, it is encouraging to note that ASEAN is already in serious discussions on the matter, notwithstanding the lack of agreement among its member States on several critical issues. Farther north, the three Northeast Asian states – China, Japan and Korea – have not even commenced formal talks on a single aviation market arrangement.<sup>89</sup>

It thus behooves upon ASEAN policymakers to conclude as extensive and ambitious an SAM as possible, so as to enable the region to negotiate with Northeast Asia (and eventually with South Asia and other regions) from a position of relative strength and regional unity. This is ultimately the only direction for ASEAN States to move, and it is thus imperative for governments and their carriers to be persuaded to see beyond the ends of their noses in promoting a collective regional interest.

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<sup>89</sup> Discussions in Northeast Asia have so far been initiated by academics and think-tanks, see International Transport Policy Research Unit, University of Tokyo, *Proceedings of the 2<sup>nd</sup> International Seminar on Liberalization and Cooperation in Northeast Asian Skies*, 2 March 2007, online: ITPU <<http://www.pp.u-tokyo.ac.jp/ITPU/seminar/2007-03-02/>> (last accessed 1 October 2008).