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India's New Foreign Direct Investment (FDI) Regime in the Airline Industry: Changes and Challenges

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India's New Foreign Direct Investment (FDI) Regime in the Airline Industry: Changes and Challenges

Jae Woon Lee¹

Abstract

By 2022, India is forecast to become the third-largest civil aviation market after the U.S. and China. Since 2010, the market has grown 27% per annum domestically and 7.7% internationally. Yet there has been an imbalance in regulatory evolution. Consequently, regulators have been holding back even faster expansion and sustainability of India's aviation sector. The Indian Government is finally tackling these challenges and proposing reforms via two policies: the National Civil Aviation Policy 2016 and the Consolidated FDI Policy Circular of 2016. The National Policy proposes deregulation of 22 areas in order to remove constraints and foster growth. The FDI Policy proposes relaxing the FDI rules for important sectors including civil aviation. This paper discusses possible changes in the Indian aviation sector resulting from the FDI policy. This includes to what extent joint venture airlines (such as AirAsia India and Singapore Airlines-backed Vistara) can benefit from the new FDI policy. Are the benefits as expansive and significant as discussed in the media? This paper will also analyze the remaining obstacles preventing Indian airlines from flourishing on the international stage.

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I. Introduction

India has *nearly* everything for the growth of an aviation market. India is a country with an ideal geographical location between the eastern and western hemispheres, a growing middle class population of about 300 million and a rapidly developing economy.² It has the potential to become the 3rd largest civil aviation market by 2022 in terms of domestic and international

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² Ministry of Civil Aviation (Government of India), 'National Civil Aviation Policy 2016' (15 June 2016) p.1, <http://www.civilaviation.gov.in/sites/default/files/Final_NCAP_2016_15-06-2016.pdf> accessed 19 August 2016.

passenger traffic.³ However, there has been an imparity in terms of regulatory evolution. Even the Indian Government openly acknowledges that “the Indian aviation sector has not achieved the position it should have.”⁴

Numerous regulatory barriers have been blamed for being obstacles to the development of India’s aviation market. Hence, in an attempt to facilitate the market, India released “the new Civil Aviation Policy” in late 2015 and finalized it with the moniker, the “National Civil Aviation Policy 2016” (NCAP 2016) in June 2016. The objectives of the NCAP 2016 include “[E]stablish(ing) an integrated eco-system which will lead to significant growth of [the] civil aviation sector” and “[E]nhanc(ing) ease of doing business through deregulation”.⁵

Among the 22 policy areas stated in the NCAP 2016,⁶ the most notable is a partial abolition of the so-called “5/20 rule”. In 2004, the Indian Government stipulated that for Indian carriers to start international operations, they must fly on domestic routes for 5 years and have a fleet of 20 aircraft.⁷ The NCAP 2016 removed the 5 years of domestic flying requirement but retained the 20 aircraft rule.⁸

Interestingly, another government report that is as influential as the NCAP 2016 on India’s airline industry was released, again, in June 2016.⁹ This report, titled the “Consolidated FDI Policy Circular of 2016” (Circular of 2016), was drafted by the Ministry of Commerce and Industry and is much more comprehensive than the NCAP 2016. In the Circular of 2016, the Indian Government announced a radical liberalization of its Foreign Direct Investment (FDI) regime by easing norms for important sectors including defence, pharmaceuticals, and civil aviation.¹⁰ There is a hope that the relaxation of FDI rules will make a positive impact on the Indian aviation sector.¹¹

³ ---- ‘India’s Cabinet approves Civil Aviation Policy’ *Centre For Aviation*, (Sydney 15 June 2016) <<http://centreforaviation.com/news/cabinet-approves-civil-aviation-policy-565639>> accessed 19 August 2016.

⁴ Ministry of Civil Aviation (Government of India), ‘National Civil Aviation Policy 2016’ (15 June 2016) p.1, <http://www.civilaviation.gov.in/sites/default/files/Final_NCAP_2016_15-06-2016.pdf> accessed 19 August 2016.

⁵ Ministry of Civil Aviation (Government of India), ‘National Civil Aviation Policy 2016’ (15 June 2016) p.3, <http://www.civilaviation.gov.in/sites/default/files/Final_NCAP_2016_15-06-2016.pdf> accessed 19 August 2016.

⁶ Namely, a) Regional connectivity; b) Safety; c) Air Transport Operations; d) Route Dispersal Guidelines e) 5/20 Requirement for International Operations; f) Bilateral traffic rights; g) Code-share agreements; h) Fiscal Support; i) Airports developed by State Govt, Private sector or in PPP Mode; j) Airports Authority of India; k) Air Navigation Services; l) Aviation security, Immigration and Customs; m) Helicopters; n) Charters; o) Maintenance, Repair and Overhaul; p) Ground handling; q) Air-cargo; r) Aeronautical ‘ Make in India’; s) Aviation education and skill development; t) Sustainable aviation; u) Miscellaneous; and v) Essential Services Maintenance Act, 1968.

⁷ Ministry of Civil Aviation (Government of India), ‘National Civil Aviation Policy 2016’ (15 June 2016) p.13, <http://www.civilaviation.gov.in/sites/default/files/Final_NCAP_2016_15-06-2016.pdf> accessed 19 August 2016.

⁸ Arindam Majumder, ‘Cabinet clears civil aviation policy, replaces 5/20 condition with 0/20 rule’ *Business Standard* (New Delhi 15 June 2016) <http://www.business-standard.com/article/economy-policy/cabinet-clears-civil-aviation-policy-replaces-5-20-rule-116061500325_1.html> accessed on 19 August 2016.

⁹ Ministry of Commerce and Industry (Government of India), ‘Consolidated FDI Policy Circular of 2016’ (7 June 2016) <http://dipp.nic.in/English/Policies/FDI_Circular_2016.pdf> accessed on 19 August 2016.

¹⁰ Arun S, ‘It’s 100% FDI in most sectors, including defence’ *The Hindu* (New Delhi 20 June 2016) <<http://www.thehindu.com/news/national/modi-reviews-fdi-policy/article8751860.ece>> accessed 19 August 2016.

¹¹ See e.g. Somesh Jha, ‘Foreign investors can have the cockpit to themselves’ *The Hindu* (New Delhi 21 June 2016) <<http://www.thehindu.com/news/national/fdi-in-aviation-foreign-investors-can-have-the-cockpit-to-themselves/article8753145.ece>> accessed 19 August 2016.

This article examines whether and to what extent India's new FDI regime on the airline industry makes a real impact. To do so, it will first explain the general foreign investment restrictions in the airline industry and analyze India's new FDI rules for aviation. After discussing the effective control restriction, it will anticipate possible changes and remaining challenges in India's aviation market.

II. Foreign Investment Restrictions in the Airline Industry

A. Background

Restricting foreign investment in national air carriers has been a norm since the beginning of commercial aviation. Because the aviation industry in the U.S. was developed at an early age, foreign investment restriction has its origins in U.S. domestic law. The U.S. Air Commerce Act of 1926 was the first law that required U.S. air carriers to maintain 51% of voting stock under U.S. citizenship and ensure that 66% of its members on the board of directors were U.S. citizens.¹²

The U.S. government has explained the four main reasons why it has limited ownership of its airlines to U.S. citizens: the need to protect the fledgling U.S. airline industry; the desire to regulate international air services through bilateral agreements; safety concerns about foreign aircraft gaining access to U.S. airspace; and military reliance on civilian airlines to supplement airlift capacity.¹³ Clearly, the U.S. Congress initiated the citizenship requirement to assure the availability of aircraft for national defense purposes in 1925.¹⁴ At the time, the U.S. Congress and the head of the U.S. military believed that it was necessary to have "government intervention in commercial air carrier development for the dual purpose of training a reserve corps of pilots and maintaining an auxiliary air force."¹⁵ Given that it was just several years after the end of the First World War, the country's political and military leaders naturally associated the commercial and military roles of aviation. Essentially, commercial pilots were potential military pilots, and commercial aircraft constituted a reserve air fleet in the event of war.

In the 1930s, justification for the citizenship requirement expanded from strict national security goals to protecting developing industries from foreign competition.¹⁶ Accordingly, the Civil Aeronautics Act of 1938 increased the ownership requirement of voting stocks by U.S. nationals from 51% to 75% for a carrier to qualify as a U.S. operator. The Federal Aviation Act of 1958 further narrowed the ownership restriction by specifically defining what "citizen of the United States" meant. This act was first amended by the Airline Deregulation

¹² See Constantine Alexandrakis, 'Foreign Investment in U.S. Airlines: Restrictive Law is Ripe for Change' (1993-1994) 4 U. Miami Bus. L. Rev. 71, 73-74.

¹³ U.S. General Accounting Office, 'Airline Competition Impact of Changing Foreign Investment and Control Limits on U.S. Airlines Foreign Investment in U.S. Airlines' GAO/RCED-93-7 (1992) 12-13 <<http://www.gao.gov/assets/160/152884.pdf>> accessed 19 August 2016.

¹⁴ See Constantine Alexandrakis, 'Foreign Investment in U.S. Airlines: Restrictive Law is Ripe for Change' (1993-1994) 4 U. Miami Bus. L. Rev. 71, 73.

¹⁵ James E. Gjerset, 'Crippling United States Airlines: Archaic Interpretations of the Federal Aviation Act's Restriction on Foreign Capital Investments' (1991) 7 American University Journal of International Law and Policy 173, 180-181.

¹⁶ See James E. Gjerset, 'Crippling United States Airlines: Archaic Interpretations of the Federal Aviation Act's Restriction on Foreign Capital Investments' (1991) 7 American University Journal of International Law and Policy 173, 182.

Act of 1978, and these amendments were later codified in separate sections of U.S. Code (USC): Title 49 – Transportation, which is still in effect.¹⁷

More fundamentally, when a state determines the desired ownership profile of particular (or all) sectors of its economy, the state naturally gives preferences to its own nationals.¹⁸ As Brian Havel and Gabriel Sanchez have argued, the right to exclude foreign investment has always been as much a principle of sovereignty as the right to permit it.¹⁹ Accordingly, aviation has been one of the sectors for which foreign investment is tightly regulated.

Although the foreign investment restriction started in the U.S., it is important to note that the U.S. airline industry has never been nationalized. From the iconic airlines of the 20th century: Pan American Airways (commonly known as Pan Am) and Trans World Airlines (commonly known as TWA) to the current “Big 3” airlines: Delta, United Airlines, and American Airlines, U.S. airlines were never owned by the U.S. Government.

By contrast, India’s civil aviation sector had been nationalized from 1953 to 1994.²⁰ In March 1994, the Indian Government first opened Indian skies for private and foreign investment by repealing the Air Corporation Act of 1953.²¹ This essentially ended the monopoly of Indian Airlines and Air India in operating domestic flights in India.²² The main aspects of the 1994 policy include:

- FDI up to 40% permitted subject to no direct or indirect equity participation by foreign airlines;
- Investment by Non-Resident Indians in domestic air-transport services permitted up to 100%;
- Foreign airlines prohibited from owning equity stakes in the domestic air transport sector either directly or indirectly;
- Foreign financial institutions allowed to hold equity in the domestic air transport sector provided they do not have foreign airlines as shareholders;
- Foreign investors allowed to have representation (up to 33% of total number of seats) on the Board of Directors of domestic airline companies;
- Maximum fleet size for a scheduled operator increased from 3 to 5; and

¹⁷ 49 U.S. Code, 40102(a), para 15 provides that:

“[C]itizen of the United States” means—

(A) an individual who is a citizen of the United States;

(B) a partnership each of whose partners is an individual who is a citizen of the United States; or

(C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.”

¹⁸ Brian Havel & Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (CUP, New York 2014) 131.

¹⁹ Brian Havel & Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (CUP, New York 2014) 131.

²⁰ Sharad Kumar Chaturvedi, *Foreign Investment Law and Its Impact on Labour* (Deep & Deep Publications, New Delhi 2007) 7; See “A Short History of Tata’s long tryst with Indian Aviation” Quartz

²¹ Sharad Kumar Chaturvedi, *Foreign Investment Law and Its Impact on Labour* (Deep & Deep Publications, New Delhi 2007) 75.

²² ---- ‘Aviation sector: Policy changes and their impact’ *The Hindu* (New Delhi 27 August 2013)

<<http://www.thehindubusinessline.com/economy/logistics/aviation-sector-policy-changes-and-their-impact/article5065182.ece>> accessed 19 August 2016

- Management contracts with a foreign airline not permitted.²³

B. India's New FDI Regime on the Airline Industry

India's FDI rules in aviation have been significantly changed in 2012 and 2016. Until 2012, the doors for foreign airlines to make investments were closed although FDI was permitted up to 49% for other types of foreign investors.²⁴ In September 2012, the Government amended the FDI policy (Review of the Policy on Foreign Direct Investment in the Civil Aviation Sector- Press Note No.6 (2012 Series)), permitting investment by foreign airlines into Indian airlines for up to 49%.²⁵ Thus, the Government decided not to treat foreign airlines differently.

There are two interesting facts related to the 2012 Policy. First is that foreign airlines were allowed to participate in the equity of Cargo airlines and there was no limit on such investments. For instance, Singapore Airlines could set up a freighter airline in India, if they wished. Generally, it has been easier to liberalize cargo service than passenger service at a global level.²⁶ States have traditionally shown far more willingness to provide market access for foreign carriers carrying cargo than passengers. For instance, the ASEAN Single Aviation Market approach has shown that the cargo market is more flexible than the passenger market. The reason why cargo liberalization tends to be less controversial for states and their carriers is that the participation of foreign carriers in freight transport can help increase the exports of a particular state.²⁷

The other interesting fact is that Air India was specifically excluded from investment by foreign airlines.²⁸ Presumably, this was intended to protect their flag carrier. But the reality is that the aviation community criticized this measure by calling it the "Air India Syndrome," through which the Indian flag carrier was protected almost to death, as it allowed other carriers to become more efficient.²⁹

The changes in 2016 are also dramatic to some extent. The new measures allow 100% foreign ownership of India-based airlines, raising the limit from 49%. However, the government

²³ Sharad Kumar Chaturvedi, *Foreign Investment Law and Its Impact on Labour* (Deep & Deep Publications, New Delhi 2007) 75-76.

²⁴ Nishith Desai, 'Jet-Etihad: Jet Gets a Co-Pilot' (2014) <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Ma%20Lab/Jet-Etihad_Deal_Dissected.pdf> accessed 19 August 2016 [13].

²⁵ Ministry of Commerce and Industry (Government of India), 'Review of the Policy on Foreign Direct Investment in the Civil Aviation Sector' (Press Note No.6, 2012) <http://www.dipp.nic.in/English/acts_rules/Press_Notes/pn6_2012.pdf> accessed 19 August 2016.

²⁶ International Civil Aviation Organization (ICAO), 'Liberalization of Air Cargo Services' (ICAO ATConf/6-WP/14, 13 December 2012) (Presented by ICAO Secretariat) <http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp014_en.pdf> accessed 19 August 2016 [1.2] (noting that "[A]s at the end of October 2012, of the 400 plus open skies agreements concluded by States, more than 100 granted Seventh freedom for air cargo or all cargo services, thus providing greater opportunity for the growth of such services.").

²⁷ Ian Thomas, David Stone, Alan Khee-Jin Tan, Andrew Drysdale, & Phil McDermott, 'Developing ASEAN's Single Aviation Market and Regional Air Services Arrangements with Dialogue Partners' (Final Report, June 2008, REPSF II Project No. 07/003) 72.

²⁸ Ministry of Commerce and Industry (Government of India), 'Review of the Policy on Foreign Direct Investment in the Civil Aviation Sector' (Press Note No.6, 2012) <http://www.dipp.nic.in/English/acts_rules/Press_Notes/pn6_2012.pdf> accessed 19 August 2016 [2.3]

²⁹ Centre For Aviation, 'North Asian LCC, Round 1: Inertia prevails over innovation in 2013' *Airline Leader* 18 (Aug-Sep 2013) 36, 38.

maintained the limit on foreign airlines at 49%. Thus, an Indian passenger airline can be 100% owned by a Singapore-based investment company, but not by Singapore Airlines.

C. Comparative Analysis in the Asia-Pacific Region

Most, if not all, states have domestic laws imposing ownership restriction on airlines. The table below shows the foreign ownership restrictions of selected Asia-Pacific countries.

Country	Maximum percent of foreign ownership in selected countries
Australia	<ul style="list-style-type: none"> • 49% for international airlines • 100% for domestic airlines
Canada	<ul style="list-style-type: none"> • 25% of voting equity
Chile	<ul style="list-style-type: none"> • The only requirement for designation as a Chilean carrier (domestic or international) is its principal place of business
China	<ul style="list-style-type: none"> • 49%
Indonesia	<ul style="list-style-type: none"> • 49%
Japan	<ul style="list-style-type: none"> • 49%
Korea	<ul style="list-style-type: none"> • 49%
Malaysia	<ul style="list-style-type: none"> • 45% for Malaysia Airlines, but the maximum holding by any single foreign entity is 20% • 49% for other airlines
New Zealand	<ul style="list-style-type: none"> • 49% for international airlines • 100% for domestic airlines
Philippines	<ul style="list-style-type: none"> • 40%
Singapore	<ul style="list-style-type: none"> • The only requirement for designation as a Singapore carrier is its principal place of business
Taiwan	<ul style="list-style-type: none"> • One third
Thailand	<ul style="list-style-type: none"> • 49%
U.S.	<ul style="list-style-type: none"> • 25% of voting equity

Table 1 - Foreign Ownership Limits in Selected Countries

Most states use the 51/49 model (that is, majority ownership by local interest). Chile and Singapore are unique in that they use “principal place of business” as a replacement for the traditional nationality rule. In other words, it is allowed for the home state to designate a carrier whose principal place of business is within its territory despite the said carrier being wholly or partially owned by non-nationals of that State.

The more unique cases are Australia and New Zealand. Both these states have completely liberalized foreign ownership of domestic airlines. New Zealand removed the foreign ownership restriction in 1988,³⁰ and Australia relaxed the ownership rules in 1999. This

³⁰ See Chia-Jui Hsu & Yu-Chun Chang, ‘The Influences of Airline Ownership Rules on Aviation Policies and Carriers’ Strategies’ (2005) 5 Proceedings of the Eastern Asia Society for Transportation Studies 557, 565 (noting that “[I]n June 1986, the New Zealand Government amended the Air Services Licensing Act (1983) removing specific restrictions on overseas investments in domestic airlines. In policy guidelines issued to the Overseas Investment Commission (OIC), it was stipulated that up to 50 percent investment by foreign airlines was acceptable. In February 1988, the Government approved a temporary increase in Ansett Australia’s

means that “any foreign person including a foreign airline can acquire up to 100% of the equity of an Australian domestic airline.”³¹ The lifting of the foreign ownership cap was particularly significant in the creation of low-cost carriers.³² Virgin Blue (now Virgin Australia), a subsidiary of the Virgin Group, was established in 2000 with 100% U.K. capital, and Tiger Airways Australia has been a wholly-owned subsidiary of Singapore’s Tiger Airways Holdings Limited since its creation in 2007.³³

However, it is still very rare for ownership to be fully liberalized in a country’s domestic law like this. In the vast majority of states, a foreign carrier cannot establish its own airline, be it a new airline or a subsidiary, or buy over an existing airline in a domestic market due to internal restrictions. Although AirAsia Group’s CEO Tony Fernandes hopes to seek 100% ownership of AirAsia’s subsidiary in Indonesia,³⁴ current law does not permit it. Instead, AirAsia needs to find a local partner (therefore, a joint venture) in order to establish an airline outside of its home state, Malaysia.

III. Effective Control - The Other Nationality Restriction in the Airline Industry

A. Difference Between Ownership and Control

In India’s 2016 policy change, the Government makes it clear that when foreign airlines invest in Indian airlines, not only is ownership limited (up to 49%) but control must also be vested in Indian nationals. The actual wording is as follows:

- (iv) A Scheduled Operator’s Permit can be granted only to a company:*
- a) that is registered and has its principal place of business within India;*
 - b) the Chairman and at least two-thirds of the Directors of which are citizens of India; and*
 - c) the substantial ownership and effective control of which is vested in Indian nationals.*

Although the concepts of substantial ownership and effective control in aviation are inter-related, they have distinct characteristics. While substantial ownership is a quantitative restriction that sets a limit on the amount of a national carriers’ shares held by foreigners, effective control restriction is a qualitative restriction that focuses on “who controls” national air carriers.³⁵ By nature, evaluating effective control is trickier than assessing substantial ownership because it is not a mathematical question.

shareholding in Ansett New Zealand to 100 percent, provided a return to 50 percent occurred within two years if a suitable New Zealand shareholder could be found. Seven months later, the Government decided to remove the previous 50 percent limit on investment by foreign airlines. The OIC was thereby able to approve 100 percent investment by any foreign carrier in a domestic airline and as such New Zealand became the first country in the world to remove foreign ownership restrictions on domestic carriers.”)

³¹ Jeffrey Goh, *The Single Aviation Market of Australia and New Zealand* (Cavendish Publishing Limited, London 2001) 72.

³² Chia-Jui Hsu & Yu-Chun Chang, ‘The Influences of Airline Ownership Rules on Aviation Policies and Carriers’ Strategies’ (2005) 5 Proceedings of the Eastern Asia Society for Transportation Studies 557, 566.

³³ In 2014, Tiger Airways Australia became a fully owned subsidiary of Virgin Australia.

³⁴ Farida Susanty, ‘Air Asia seeks full ownership for Indonesian subsidiary’ *The Jakarta Post* (Jakarta 9 June 2016) <<http://www.thejakartapost.com/news/2016/06/09/air-asia-seeks-full-ownership-for-indonesian-subsidiary.html>> accessed on 19 August 2016.

³⁵ Jae Woon Lee & Michelle Dy, ‘Mitigating “Effective Control” Restriction on Joint Venture Airlines in Asia: Philippine AirAsia Case’ (2015) 40 *Air & Space L.* 231, 234.

Some national laws provide rules that, *inter alia*, restrict the nationality of the chairperson and members of the board.³⁶ India’s new FDI policy also provides that “[C]ontrol shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements”.³⁷ However, it is inevitable that the relevant government body must exercise discretion in interpreting effective control because what constitutes “management or policy decisions” cannot be clear-cut in all cases. Generally, administrative bodies (such as Department of Transportation or Civil Aviation Authority) assess the question of effective control. Ownership structures with little or no involvement from foreigners do not normally necessitate extensive analysis.³⁸

Only a few decisions have gone through legal procedure to define the concept of “control” in the airline business and become public. The Jetstar Hong Kong case is of particular interest, which will be discussed in the following section.

B. Effective Control Test for Joint Venture Airlines

Prior to discussing the Jetstar Hong Kong case, it is necessary to explain the boom of joint venture airlines in Asia. Again, due to the ownership and control restrictions, foreign airlines cannot obtain majority ownership and control of domestic carriers or set up new airlines (or subsidiaries) in a domestic market.³⁹ Since the wholly-owned subsidiary strategy is not legally allowed, various commercial approaches by airlines were developed for circumventing ownership and control restrictions, and establishing joint ventures (JV) with local interests is a classic example.⁴⁰

In Asia, we can find the business model in the likes of AirAsia, Lion Air, Jetstar, Spring Airlines, Tigerair, and Vietjet, all of which have managed to establish a business presence in jurisdictions outside their own through JV arrangements with local investors. The tables below show that JV airlines’ domestic equity can be owned by individuals or companies with or without prior business experience in the airline industry.

Country/Territory	Joint Venture Airline	Local Shareholder/s	Foreign Shareholder/s
Indonesia	Indonesia AirAsia	Pin Harris – 20% and Sendjaja Windjaja – 31%	AirAsia Investment Limited (wholly-owned subsidiary of

³⁶ For example, The EU provides a somewhat explicit definition of “effective control.” Article 2(g) of Council Regulation No. 2407/92 of 23 July 1992 on licensing of air carriers defines “effective control” as follows: “Effective control means a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by: (a) the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.”

³⁷ Ministry of Commerce and Industry (Government of India), ‘Consolidated FDI Policy Circular of 2016’ (7 June 2016) <http://dipp.nic.in/English/Policies/FDI_Circular_2016.pdf> accessed on 19 August 2016 [2.1.7].

³⁸ Canadian Transportation Agency, “Interpretation Note: Canadian Ownership Requirement” (5 October 2015) <<https://www.otc-cta.gc.ca/eng/canadian-ownership>> accessed 19 August 2016.

³⁹ Brian Havel & Gabriel Sanchez, ‘The Emerging Lex Aviatica’ (2011) 42 *Georgetown Journal of International Law* 639, 651.

⁴⁰ Jae Woon Lee & Michelle Dy, ‘Mitigating “Effective Control” Restriction on Joint Venture Airlines in Asia: Philippine AirAsia Case’ (2015) 40 *Air & Space L.* 231, 238.

			AirAsia Berhad) – 49%
Indonesia	Indonesia AirAsia X (scheduled to launch services by end 2014)	PT Kirana Anugerah Perkasa (PTKAP) – 51%	AirAsia X Berhad – 49%
Thailand	Thai Lion Air	2 Thai businessmen (names undisclosed) – 51%	Lion Air Group – 49%;
Thailand	Thai AirAsia X	Tassapon Bijleveld – 41% and Julpas Kruesopon – 10%	AirAsia Berhad – 49%;
Singapore	Jetstar Asia	Westbrook Investments Pte. Ltd. – 51%	Qantas Airways – 49%
Japan	Spring Airlines Japan	Various Japanese non-airline related investors (undisclosed) – 67%	Spring Airlines – 33%;
Japan	Japan AirAsia (Scheduled to launch services by 2016)	Octave Japan Infrastructure Fund – 19%; Rakuten Inc. – 18%; Noevir Holdings Co. Ltd. – 9% and Alpen – 5%	AirAsia Investment Limited (wholly-owned subsidiary of AirAsia Berhad) – 49%
India	India AirAsia	Tata Sons – 49%; Telstra Tradeplace – 2%	AirAsia Investment Limited (wholly-owned subsidiary of AirAsia Berhad) – 49%
India	Vistara	Tata Sons – 51%	Singapore Airlines – 49%

Table 2 Joint venture airlines whose local shareholders are not airline companies ⁴¹

Country/Territory	Joint Venture Airline	Local Shareholder/s	Foreign Shareholder/s
Thailand	NokScoot	Nok Mangkang Co. Ltd. (wholly-owned subsidiary of Nok Airlines) – 49% and Pueannammitr Co. Ltd. – 2%	Scoot Pte. Ltd. – 49%
Thailand	Thai AirAsia	Asia Aviation – 55%	AirAsia Investment Limited (wholly-owned subsidiary of

⁴¹ Jae Woon Lee & Michelle Dy, 'Mitigating "Effective Control" Restriction on Joint Venture Airlines in Asia: Philippine AirAsia Case' (2015) 40 *Air & Space L.* 231, 239-240.

			AirAsia Berhad) – 45%
Thailand	Thai Vietjet Air	Kan Air (Somphong Sooksanguan) – 51%	Vietjet – 49%
Philippines	Philippine AirAsia	F&S Holdings – 16%; TNR Holdings – 16%; Alfredo Yao – 13% and Michael Romero – 16%	AirAsia Investment Limited (wholly-owned subsidiary of AirAsia Berhad) – 40%;
Philippines	AirAsia Zest	AirAsia Inc. (Philippine AirAsia) – 49% and Alfredo Yao – 51%	-
Malaysia	Malindo Air	National Aerospace and Defence Industries – 51%	Lion Air – 49%
Vietnam	Jetstar Pacific	Vietnam Airlines – 69% and Saigontourist Travel Services – 1%	Qantas Airways – 30%;
Japan	Jetstar Japan	Japan Airlines- 45.7%; Mitsubishi Corporation – 4.3% and Century Tokyo Leasing – 4.3%	Qantas Airways – 45.7%
Japan	Peach	ANA Holdings – 38.67%; Innovation Network Corporation of Japan – 28% and First Eastern Aviation Holdings Limited – 33.3%	
Taiwan	Tigerair Taiwan	China Airlines – 80% Mandarin Air – 10%	Tigerair – 10%

Table 3 Joint venture airlines with airline companies or subsidiaries thereof⁴²

When we look at the list of JV airlines whose local shareholders are not airline companies, one question comes to mind – who would really control the airline? Although each foreign airline’s share is a minority, it is doubtful that the local majority shareholders really manage and control the airline, which is a highly sophisticated business. Rather, it is likely that the foreign carriers have *de facto* control of the airline in question.⁴³ Nonetheless, many local

⁴² Jae Woon Lee & Michelle Dy, ‘Mitigating “Effective Control” Restriction on Joint Venture Airlines in Asia: Philippine AirAsia Case’ (2015) 40 Air & Space L. 231, 243-244.

⁴³ Jae Woon Lee, *Regional Liberalization in International Air Transport: Towards Northeast Asian Open Skies* (Essential Air and Space Law Series, Eleven International Publishing, The Hague 2016) 187.

governments in Asia have obviously relaxed effective control inquiries when they permit JV airlines with local shareholders that are not airline companies.

Despite the general trend towards gradually relaxing effective control restrictions, some governments have applied the effective control requirement more strictly. The most recent case is the Hong Kong Air Transport Licensing Authority (ATLA)'s decision to reject Jetstar Hong Kong's license application. When Jetstar Hong Kong Airways (Proposed: Shun Tak Holdings – 51%, Qantas Airways – 24.5% and China Eastern Airlines – 24.5%) submitted an application for a licence to operate scheduled air services, it was objected by Hong Kong's incumbent airlines, including Cathay Pacific Airways Limited. Although the actual concept that the ATLA applied was "principal place of business" (PPB) based on Hong Kong's Basic Law,⁴⁴ the ruling had a lot to do with interpreting "effective control".⁴⁵

Because Hong Kong's Basic Law does not set out any definition of PPB, ATLA cited relevant case law in other jurisdictions. The cases cited by ATLA provided them with an opening to link the concept of PPB with control. This then gave them the ability to address their concern that airlines licensed in Hong Kong should be actually controlled in Hong Kong as well.⁴⁶ In the decision, ATLA set out the applicable test in deciding whether an airline is able to satisfy the requirement. Highlights of the requirement that ATLA pronounced are as follows:

- (i) *The airline has to have independent control and management in Hong Kong, free from directions or decisions made elsewhere.*
- (ii) *The nerve centre has to be in Hong Kong. By nerve centre, ATLA looks at where and by whom the decisions regarding the key operations of an airline are made. Decisions are not those of the day-to-day operations only but also those which are relevant and crucial to the business of the airline.*
- (iii) *The core business of an airline is the carriage of passengers and goods for reward and the decisions as to where the airline can fly (i.e. route and networking) and how much it can charge for the services rendered (i.e. pricing) are two important factors, among others, under ATLA's consideration. Decisions pertaining to these matters have to be independently controlled and managed in Hong Kong.⁴⁷*

C. Lessons Learned for the Indian Airline Industry

Currently, there are two JV airlines in India: AirAsia India and Vistara. Tata Sons, India's conglomerate company, has holdings in both airlines. While AirAsia India is a low-cost carrier, Vistara is a full-service carrier primarily targeting high-end business travellers. From an ownership and control perspective, the change in the ownership structure of AirAsia India

⁴⁴ ATLA Public Inquiry with regard to the Application for licence by Jetstar Hong Kong Airways Limited (2015); See also Jae Woon Lee & Michelle Dy, 'A Commentary on Jetstar Hong Kong Airways Decision Before the Air Transport Licensing Authority' (2016) 46 Hong Kong Law Journal 175.

⁴⁵ Jae Woon Lee & Michelle Dy, 'A Commentary on Jetstar Hong Kong Airways Decision Before the Air Transport Licensing Authority' (2016) 46 Hong Kong Law Journal 175.

⁴⁶ Jae Woon Lee & Michelle Dy, 'A Commentary on Jetstar Hong Kong Airways Decision Before the Air Transport Licensing Authority' (2016) 46 Hong Kong Law Journal 175, 188.

⁴⁷ ATLA Public Inquiry with regard to the Application for licence by Jetstar Hong Kong Airways Limited, Summary of ATLA Decision (2015)

<[http://www.thb.gov.hk/eng/boards/transport/air/Summary%20of%20decision%20\(Eng\)%2025062015.pdf](http://www.thb.gov.hk/eng/boards/transport/air/Summary%20of%20decision%20(Eng)%2025062015.pdf)> accessed 19 August 2016.

is noteworthy. When AirAsia India secured the Indian air operator certificate in 2013, the company was a three-way joint venture with Tata Sons, Arun Bhatia's Telestra Tradeplace Pvt Ltd (an Indian company), and AirAsia, holding 30%, 21%, and 49%, respectively. Interestingly, Arun Bhatia had a close relationship with AirAsia's founder and group CEO, Tony Fernandes.⁴⁸

In June 2014 when AirAsia India commenced domestic services, ownership has been changed to 41.06% (Tata Sons), 9.94% (Arun Bhatia), and 49% (AirAsia). In March 2016, the media reported that Arun Bhatia was set to exit AirAsia India after igniting a controversy through his remark that AirAsia India was being controlled by its Malaysian partner.⁴⁹ Consequently, Tata Sons bought a 7.94% stake from Bhatia. Two Tata Sons executives—AirAsia India chairman S. Ramadorai and director R. Venkataramanan—were to buy 0.5% and 1.5%, respectively, from Bhatia in their personal capacity.⁵⁰

Vistara's background is less eventful than AirAsia India. From the beginning, the ownership structure has been 51% by Tata Sons and 49% by Singapore Airlines. In fact, this joint venture was long awaited for by Tata Sons. From the mid-90s, the Tata group made unsuccessful attempts to launch an airline in partnership with Singapore Airlines.⁵¹ Unlike AirAsia India, for which Tata Son started off with a 30% stake and less involvement in operations, Vistara was seen as Tatas' official re-entrance into the airline business after over six decades.⁵²

However, India's incumbent airlines have accused AirAsia India and Vistara of being controlled by foreigners and have asked for their operating licenses to be suspended. In response to their allegation, Tata argued that:

Majority ownership and effective control of both airlines are with the Indian parties... Further, all the important decisions concerning the day-to-day operations of the airlines are taken by the management teams of these airlines under the overall supervision, control and direction of the respective boards of directors (which include a majority of Indian nationals).⁵³

⁴⁸ Bs Reporter, 'Who is Arun Bhatia?' *Business Standard* (Mumbai 21 February 2013) <http://www.business-standard.com/article/companies/who-is-arun-bhatia-113022100028_1.html> accessed 19 August 2016.

⁴⁹ P.R. Sanjai, 'Tata Sons to buy out Arun Bhatia from AirAsia India' *Live Mint* (New Delhi 29 March 2016) <<http://www.livemint.com/Companies/5GEBWmucXiPt5gbctu2DaL/Tata-Sons-to-increase-stake-in-AirAsia-India.html>> accessed 19 August 2016; For the detail of Mr. Bhatia's interview see Binoy Prabhakar, 'AirAsia India controlled by Malaysian partner claims cofounder Arun Bhatia' *The Economic Times* (11 December 2015) <<http://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/airasia-india-controlled-by-malaysian-partner-claims-cofounder-arun-bhatia/articleshow/50129370.cms>> accessed 19 August 2016.

⁵⁰ P.R. Sanjai, 'Tata Sons to buy out Arun Bhatia from AirAsia India' *Live Mint* (New Delhi 29 March 2016) <<http://www.livemint.com/Companies/5GEBWmucXiPt5gbctu2DaL/Tata-Sons-to-increase-stake-in-AirAsia-India.html>> accessed 19 August 2016.

⁵¹ Aneesh Phadnis, 'With Vistara, a Tata airline is reborn' *Business Standard* (Mumbai 9 January 2015) <http://www.business-standard.com/article/companies/with-vistara-a-tata-airline-is-reborn-115010800126_1.html> accessed 19 August 2016.

⁵² Aneesh Phadnis, 'With Vistara, a Tata airline is reborn' *Business Standard* (Mumbai 9 January 2015) <http://www.business-standard.com/article/companies/with-vistara-a-tata-airline-is-reborn-115010800126_1.html> accessed 19 August 2016.

⁵³ Tata, Press Release, 'Statement by Tata Sons on civil aviation' (24 February 2016) <<http://www.tata.com/media/releasesinside/statement-tata-sons-civil-aviation>> accessed 19 August 2016.

Although the legal proceedings are in progress and it is difficult to predict the outcome, the Jetstar Hong Kong decision can be an important lesson for India. The fact that conduct of day-to-day management is taking place in India would not be sufficient to meet the control criteria. What is more, the Shareholders' Agreement and the Business Service Agreement could be important considerations. To be clear, the Shareholders' Agreement must show that the Indian airlines (AirAsia India and Vistara) can make its decisions independently from the foreign airline shareholders. Similarly, the Business Service Agreement, if any, must show that AirAsia India and Vistara have the right to determine their own network, fare structure, and other flight-related matters.

IV. Changes and Challenges

A. Changes

1. Local Airline with Foreign Non-Airline Investor

India has seven major airlines, namely Air India, Jet Airways, Indigo, GoAir, SpiceJet, AirAsia India, and Vistara. Jet Airways, AirAsia India and Vistara already have foreign airlines' stakes so they will be discussed in the next section.

Because of the policy changes, India's existing airlines can benefit from privatization via the bringing in of much-needed cash. In addition, foreign investors can imbue best practices that can improve efficiency, productivity, and customer service, which are needed by Indian airlines. For instance, Air India, the state-owned national carrier, can reduce government's stake to less than 51% while receiving foreign funding.

Because the 49% cap has been increased to 100%, Indigo with 60% equity investment by a British investment company, SpiceJet with 70% by a Chinese investor, and GoAir with 90% by a Saudi Arabian fund can work subject to the Indian government's approval. Importantly, while foreign investment of up to 49% will be automatically approved, anything beyond 49% requires a separate government approval.⁵⁴

2. Local Airline with Foreign Airline Investor

The 2016 Policy did not relax the investment cap for foreign airlines. Thus, as far as foreign airlines' investment is concerned, the current 49% rule remains. Currently, Jet Airways, AirAsia India, and Vistara have foreign airline ownership: by Etihad (24%), AirAsia (49%), and Singapore Airlines (49%), respectively. However, the general trend of FDI relaxation in the airline industry may make other airline investors consider the Indian market more seriously. Gulf carriers would be the logical investors in India and Qatar Airways would be the most likely investor. Qatar Airways, similar to Etihad, has taken an equity acquisition business strategy: it is adding a 10% stake in the LATAM Airlines Group of Latin America and 15% holding in the International Airlines Group of Europe.⁵⁵ It is worth reiterating that

⁵⁴ Ministry of Commerce and Industry (Government of India), 'Consolidated FDI Policy Circular of 2016' (7 June 2016) <http://dipp.nic.in/English/Policies/FDI_Circular_2016.pdf> accessed on 19 August 2016. [5.2.9].

⁵⁵ International Air Transport Association (IATA), 'Joint ventures helping airlines deliver choice to consumers' (5 August 2016) <<http://airlines.iata.org/analysis/joint-ventures-helping-airlines-deliver-choice-to-consumers>> accessed 19 August 2016.

Air India cannot have a foreign airline's investment. Both the 2012 Policy and 2016 Policy make it clear that Air India is an exception from foreign airlines' investment.⁵⁶

3. Foreign Investor Setting Up A New Airline in India

This business model is the most substantial development of the 2016 Policy. Because of the policy, India became part of a very small club of countries that allow 100% FDI in aviation.⁵⁷ As discussed in Section II - C. Comparative Analysis in the Asia-Pacific Region, Australia and New Zealand are two of very few countries that allow similar FDI rules. Very importantly, however, the two states did not exclude foreign airlines from being investors. Thus, Virgin Blue (now Virgin Australia) was established with 100% U.K. capital with the Virgin brand, and Tiger Airways Australia was established with 100% Singaporean capital with the Tiger Airways brand.⁵⁸

Although a foreign investor needs to have the Indian government's approval for more than 49% investment, 100% FDI by NRI (Non-Resident Indians)⁵⁹ is allowed under the automatic route. Interestingly enough, Tony Fernandes, the founder of AirAsia Group, whose father is of Indian Goan origin, is in the process of becoming a NRI.⁶⁰ Thus, if Tony Fernandes decides to establish an airline in India with his own funds after he has become a NRI, the Indian Government should give him the green light.

4. Foreign Airline Setting Up A New Airline with Foreign Investor

Seemingly, this business model is most attractive. This means that European LCC giant Ryanair can start an Indian subsidiary together with a foreign fund or Virgin Group can establish a so-called Virgin India with a foreign investor. However, this business model is not allowed under "the other conditions" clause of the 2016 Policy. When a foreign airline invests in Indian airlines, an operator's permit can be granted only if the substantial ownership and effective control of the company is vested in Indian nationals.⁶¹ Thus, 100% of foreign ownership is not allowed if there is a foreign airline as an investor.

B. Challenges

Despite the substantial changes to the numerical limits of the FDI policy, other uncertainties and challenges remain. The challenges are twofold: one internal and the other external. When

⁵⁶ "The above revised policy is not applicable to Air India" (2012 Press Note No.6 (2012 Series) Paragraph 2.3); "(iii) The policy mentioned at para (c) above is not applicable to M/s Air India Limited." (Consolidated FDI Policy Circular of 2016) 31

⁵⁷ Tarun Shulka, 'Will foreign airlines fly into India' *Live Mint* (New Delhi 15 Aug 2016) <<http://www.livemint.com/Companies/ZgSMp1012FBFmT3udUXP9J/Will-foreign-airlines-fly-into-India.html>> accessed 15 August 2016.

⁵⁸ In 2014, Tiger Airways Australia became a fully owned subsidiary of Virgin Australia.

⁵⁹ Ministry of Commerce and Industry (Government of India), 'Consolidated FDI Policy Circular of 2016' (7 June 2016) <http://dipp.nic.in/English/Policies/FDI_Circular_2016.pdf> accessed on 19 August 2016 ("2.1.30 'Non-Resident Indian' (NRI) means an individual resident outside India who is a citizen of India or is an 'Overseas Citizen of India' cardholder within the meaning of section 7 (A) of the Citizenship Act, 1955. 'Persons of Indian Origin' cardholders registered as such under Notification No. 26011/4/98 F.I. dated 19.8.2002 issued by the Central Government are deemed to be 'Overseas Citizen of India' cardholders").

⁶⁰ P.R. Sanjai, 'Tata Sons to buy out Arun Bhatia from AirAsia India' *Live Mint* (New Delhi 29 March 2016) <<http://www.livemint.com/Companies/5GEBWmucXiPt5gbctu2DaL/Tata-Sons-to-increase-stake-in-AirAsia-India.html>>.

⁶¹ Ministry of Commerce and Industry (Government of India), 'Consolidated FDI Policy Circular of 2016' (7 June 2016) <http://dipp.nic.in/English/Policies/FDI_Circular_2016.pdf> accessed on 19 August 2016 [30].

a foreign airline is an investor of an Indian airline, the Indian airline must guarantee that the foreign airline does not control the airline, apart from the ownership restriction. Quite naturally, an airline investor would want to be involved in the airline business. One international airline investor stated in the media as follows: “[T]he ability to provide strong oversight through equity ownership would be very important. Involvement in decisions like fleet, network, product etc, is important to an experienced airline investor.”⁶²

However, it should be noted that “involvement in decisions like fleet, network, product etc.” can be considered as “effective control”, which may violate Indian law as it currently stands. So long as the effective control restriction remains, foreign airlines’ involvement must be carefully managed.

A more substantial challenge has to do with international flight. Indeed, ownership and control restrictions are embedded in an internal lock (domestic law) as well as an external lock (the air services agreements).⁶³ The regulatory structure can be explained by subdividing ownership and control restrictions into the following matrix:

	Substantial Ownership	Effective Control
Internal Restriction (Domestic Law)	A	B
External Restriction (Air Services Agreements)	C	D

Table 4 Subdivision of Ownership and Control Restrictions

Substantial ownership restriction and effective control restriction by way of domestic law (Subdivision A and Subdivision B) have been discussed in the previous sections. Substantial ownership restriction by way of air services agreements (Subdivision C) and effective control restriction by way of air services agreements (Subdivision D) are reciprocal restrictions.

International air transport has been governed by written air services agreements with states stipulating mutual restrictions on various issues. A bilateral approach (therefore, bilateral air services agreement) is the principal instrument for regulating many aspects of international air transportation. Reportedly, approximately 4,000 bilateral air services agreements are in existence.⁶⁴

On routes governed by an air services agreement between two states, ownership and control restrictions in the agreement require that a state party designate only carriers that are substantially owned and effectively controlled by its own nationals. For instance, the Air Services Agreement between India and the Republic of Korea stipulates ownership and control restrictions in Article 3 (Designation of Airlines) paragraph 4:

⁶² Tarun Shulka, ‘Will foreign airlines fly into India’ *Live Mint* (New Delhi 15 Aug 2016) <<http://www.livemint.com/Companies/ZgSMp1012FBFmT3udUXP9J/Will-foreign-airlines-fly-into-India.html>> accessed 15 August 2016.

⁶³ Brian Havel, *Beyond Open Skies: A New Regime for International Aviation* (Kluwer Law International, Alphen aan den Rijn 2009) 135 and 165.

⁶⁴ International Air Transport Association (IATA), Press Information, ‘Agenda for Freedom Summit’ (Istanbul 25-26 October 2008) <http://www.iata.org/pressroom/Documents/press_summary_of_proposals_aff.pdf> accessed 19 August 2016.

*“4. Each Contracting Party shall have the right to refuse to accept the designation of airlines or to refuse to grant the operating authorisation..., in any case where the said Contracting Party is not satisfied that substantial ownership and effective control of those airlines are vested in the Contracting Party designating the airlines or in its nationals.”*⁶⁵

Thus, Air India’s traffic rights could be revoked or suspended by Korea if Air India ceases to be substantially owned or effectively controlled by Indian nationals. This external restriction effectively restrains India’s national air carriers from attracting sizeable foreign investment. Consequently, Indian airlines would keep the limit of the foreign investment to the previous level of 49%. At the same time, it is important to remember that when foreign investment up to 49% was available, only airlines (AirAsia and Singapore Airlines) have invested in Indian airlines in the form of joint ventures.

The only practical change that may occur is that an Indian company can now set up an airline with foreign investors while flying only domestic routes. Among existing airlines, GoAir has not started international routes so it may have more than 49% of foreign investment and keep focusing on domestic routes.

If India can amend the ownership and control clause in consultation with the country concerned, however, the foreign investment opportunity for Indian airlines will increase. Indeed, some states are making an effort to liberalize the ownership and control restrictions in their air services agreements. In particular, Brazil, Chile, Columbia, Egypt, Indonesia, Switzerland, and Vietnam reported that they are in the process of replacing traditional substantial ownership and control with “principal place of business and effective regulatory control” in their air services agreements.⁶⁶ Obviously, their bilateral partners must agree to the change.

To understand the partner’s perspective better, India can consider the U.S.’s position. The U.S. has shown a willingness to ease the restriction either on the basis of reciprocity or where

⁶⁵ *Republic of Korea and India Air Services Agreement, Signed at Seoul on 16 March 1992*
<http://gem.sciences-po.fr/content/research_topics/trade/RITS/ASA%20EAST%20ASIA/SouthKorea_India_ASA_1992.pdf>
accessed 19 August 2016.

⁶⁶ See International Civil Aviation Organization (ICAO), ‘Differences Between Carrier Ownership and Control Principles in Designation Clauses in Air Services Agreements and National Laws Regulating the Subject’ (ICAO Doc ATConf/6-WP/94) (7 March 2013)
<<http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf.6.WP.94.2.en.pdf>>; ICAO, ‘Proposal for the Liberalization of Air Carrier Ownership and Control’ (ICAO Doc ATConf/6-WP/29) (13 February 2013) <http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp029_en.pdf>; ICAO, ‘Market Access Restrictions’ (ICAO Doc ATConf/6-WP/59) (19 February 2013)
<http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp059_en.pdf>; ICAO, ‘Egyptian Experience in the Liberalization of Air Carrier Ownership’ (ICAO Doc ATConf/6-WP/41) (19 February 2013)
<http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp041_en.pdf>; ICAO, ‘Air Carrier Ownership and Control Principle’ (ICAO Doc ATConf/6-WP/84) (4 March 2013)
<http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp084_en.pdf>; ICAO, ‘Air Carrier Ownership and Control Clauses in Bilateral Air Services Agreements’, (ICAO Doc ATConf/6-WP/49) (14 February 2013) <http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp049_en.pdf>; and ICAO, ‘Vietnam’s Air Transport Market, Legislations and Regulations and Policy During 2003-2013’ (ICAO Doc ATConf/6-IP/22) (17 March 2013)
<http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-ip022_en.pdf> accessed 19 August 2016.

U.S. interests are not jeopardized by a higher percentage of foreign ownership.⁶⁷ Indeed, the U.S. has selectively waived the nationality clause in cases where the airlines of partner states have been acquired by non-nationals.⁶⁸

V. Conclusion

India has made gradual strides in liberalizing her overly protected airline industry for the last two decades, particularly in order to rescue the troubled domestic airline sector.⁶⁹ In this regard, the Indian Government has proposed more comprehensive reforms via two policies: the National Civil Aviation Policy 2016 and Consolidated FDI Policy Circular of 2016. While the National Policy proposes deregulation of 22 areas in order to remove constraints and foster growth, the FDI Policy proposes relaxing FDI rules for important sectors including civil aviation. Essentially, foreign investors would be allowed to own up to 100% stake in the Indian airlines while foreign airlines could own up to 49%.

Although the changes look expansive and significant at the outset, there are visible and invisible constraints on reform and it is too early to say how and to what extent the airline industry would take advantage of the policy. A manifest risk is an uncertainty with regards to the ability to operate international routes with a proposed ownership structure. Under the current Air Services Agreements that India has signed, foreign investment cannot exceed more than 50%. In addition, an elusive concept of “effective control” continues to be a potential risk.

Overall, a lack of coordination is regrettable. A more close coordination between the Ministry of Commerce and Industry and the Ministry of Civil Aviation on their policy circulars, the FDI Policy and the National Aviation Policy, respectively, could have provided the benefits of reform in a more straightforward way.⁷⁰

Indian’s aviation sector will continue to grow despite the regulator’s holding back of even faster expansion and sustainability of India’s aviation sector. The 2012 FDI Policy led to the entry of foreign airline partners, and consequently the ailing local carriers became more competitive. It will be interesting to see how the industry can take advantage of the 2016 reform and what kind of innovative and commercially viable business models will come to the market. (end)

⁶⁷ Antigoni Lykotrafiti, ‘Consolidation and Rationalization in the Transatlantic Air Transport Market –Prospects and Challenges for Competition and Consumer Welfare’ (2011) 76 J. Air L. & Com. 661, 672.

⁶⁸ Brian Havel & Gabriel Sanchez, “The Emerging Lex Aviatica” (2011) 42 Geo. Int’l L.J. 639, 655; See also World Trade Organization (WTO), Council for Trade in Services, ‘*Quantitative Air Services Agreements Review (QUASAR): Part B: PRELIMINARY RESULTS*’ (S/C/W/270/Add.1 2006) at 34, para 68 (noting that “[T]he effective control prerequisite, are often waived in practice. Aerolineas Argentinas, for instance, was never denied the right to fly although it had two successive Spanish majority owners. The same was true for Sabena when it was owned by Air France and then by Swissair.”)

<http://www.wto.org/english/tratop_e/serv_e/transport_e/quasar_partb_e.pdf> accessed 19 August 2016.

⁶⁹ Alan Khee-Jin Tan, ‘India’s Evolving Policy on International Civil Aviation’ (2013) 38 Air & Space Law 439, 462.

⁷⁰ See Tarun Shulka, ‘Will foreign airlines fly into India’ *Live Mint* (New Delhi 15 Aug 2016)

<<http://www.livemint.com/Companies/ZgSMp1012FBFMt3udUXP9J/Will-foreign-airlines-fly-into-India.html>> accessed 15 August 2016 (noting that a top bureaucratic who asked not to be named said “[T]he aviation ministry was clueless. They were not aware of what was to come in case of FDI. With all other sectors (like retail, defence), this also was cleared without consideration of the long-term implications and international rules and regulations.”).

