

OWNERSHIP AND CONTROL OF AIRLINES IN SOUTHEAST ASIA: PROSPECTS FOR AN ASEAN COMMUNITY CARRIER

Executive Summary

In this paper, Alan Khee-Jin Tan explores the prospects for an ASEAN Community Carrier by examining the ownership and control of airlines in Southeast Asia. As many states worldwide consider their airlines to be strategic assets, airlines are bound by strict ownership and control rules. The paper explains the two types of restrictions that exist in the aviation industry which are “internal lock” under the domestic law and “external lock” under the international law. The purpose of this provision is essentially protectionist – it ensures that the benefits in the market between States A and B fall to the nationals of these states, and not those of third countries.

The “internal lock” is explained as the restriction in which airlines can be licensed for operation only if majority ownership and control reside in the nationals of that state. Whereas, the “external lock” is described as the restriction in which air services agreement between States A and B will provide that the designated airlines to operate services between them must be “substantially owned and effectively controlled” by their respective nationals. While individual countries can choose to abolish the “internal lock” simply by amending their own laws, the “external lock” cannot be easily dismantled.

The paper finds that ASEAN’s efforts to liberalize ownership and control through adoption of multilateral air services agreements have clear shortcomings:

- (i) Domestic laws in the individual ASEAN states must explicitly allow for other ASEAN nationals to hold majority ownership and effective control in their airlines so that community carriers can be established and designated.
- (ii) Each ASEAN state must explicitly allow other ASEAN states’ designated community carriers full access into its points.
- (iii) Even if (i) and (ii) are satisfied, an ASEAN community carrier can only fly routes within ASEAN. They cannot fly to points outside the region because of the “substantial ownership and effective control” rule. This makes airlines unwilling to depart from that rule.

The paper then recommends certain amendments for full realisation of the ASEAN Community Carrier which are:

- (i) Amend domestic laws to allow non-national majority ownership and control;
- (ii) Amend the ASEAN agreements to remove the consent of individual states to a community carrier’s operations;
and
- (iii) Amend the air services agreements with non-ASEAN states to recognize an ASEAN community carrier.

The paper also suggests shorter-term solutions that can be pursued while awaiting the long-term changes. It is concluded that in the meantime, a holding company structure that differentiates between voting and non-voting shares may be a viable solution to prevailing over “internal” and “external” locks on ownership and control in ASEAN.



Alan Khee-Jin Tan is Professor of Law at the National University of Singapore (NUS) Law School, specialising in Aviation Law, Maritime Law, Criminal Law and Environmental Law. Born in Penang, Malaysia, he was educated at the Penang Free School and Raffles Junior College in Singapore, subsequently obtaining an LL.B from NUS and an LL.M and J.S.D. from Yale Law School. He was the winner of the Koh Han Kok Prize for International Law at NUS, and his doctoral thesis on the law and politics of shipping regulation won the Ambrose Gherini International Law Prize at Yale Law School.