ORDER: 87-3-32 & 87-8-43
ISSUED: MAR. 9, 1987; AUG. 18, 1987

(RISK REWARD; FOREIGN PUT OPTIONS)

Order 87-3-32

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on 9th day of March, 1987

SERVED MAR 9 1987

In the Matter of	
INTERA ARCTIC SERVICES	Docket 44723
Commercial Air Operations in the United States	

ORDER TO SHOW CAUSE

In July 1986, the Department received information from Mr. Gary Garofalo, representing the Aero Service Division, Western Geophysical Company of America, which called into the question the citizenship of Intera Arctic Services, Inc. (IAS). IAS has registered its Cessna Conquest 441, serial number 441-0121, with the Federal Aviation Administration under section 501(b)(1)(A)(i) of the Federal Aviation Act (the Act), which applies to U.S.-citizen registrants.

The Department considers citizenship in administering the aviation economic regulatory functions under Titles IV and XI of the Federal Aviation Act. In particular, 14 C.F.R. Part 375 (promulgated under section 1108 of Title XI of the Act) is applicable to the navigation within the United States of foreign civil aircraft, which are defined therein as aircraft of foreign registry or aircraft owned, controlled or operated by other than a U.S. citizen. If IAS is not a U.S. citizen, then the aircraft cited above is a "foreign civil aircraft" as defined in Part 375, and it therefore may not be navigated in the United States except as authorized by or under that Part.

Because the FAA and the Office of the Secretary of Transportation (OST) each must determine citizenship -- the FAA in administering Title V of the Act, and OST in administering Titles IV and XI -- information bearing on a registrant's or commercial operator's citizenship is relevant to the determinations by both agencies. Accordingly, OST provided the material it received from Aero Service to the FAA, which in turn solicited IAS' comments. The

FAA has reviewed that information under its regulations applicable to aircraft registration (14 C.F.R. Part 47) and reached an opinion concerning Intera's compliance with that Part. 1/

OST has reviewed the information on which IAS relied in registering the subject aircraft and the comments IAS submitted to FAA on September 11, 1986. Based on all the information before us, which has been placed in this docket, we have tentatively concluded that, as a factual matter, foreign influence over IAS is so significant as to constitute foreign control, thereby preventing IAS from qualifying as a U.S. citizen under Title XI and Part 375. Therefore, any aircraft that IAS owns, controls or operates may not engage in any commercial air operations in this country unless it first obtains a foreign aircraft permit as provided in Part 375.

Under Title IV and Title XI of the Act and applicable CAB/OST precedents, to qualify as a "citizen of the United States," a corporation must be created or organized under the laws of the United States or of any state or territory; its president and two-thirds or more of its board of directors and other managing officers must be U.S. citizens; at least 75 percent of its voting interest must be owned or controlled by U.S. citizens; and, finally, the corporation must, as a factual matter, actually be controlled by U.S. citizens. See section 101(16); Premiere Airlines, Fitness Investigation, 95 C.A.B. 101, at 103 (1985).

In reaching this tentative conclusion, we have carefully considered the relationships of IAS with affiliated companies and, in particular, the measures IAS took to approximate the insulation from foreign control achieved by Page Avjet, an air taxi operator that ultimately was found by the Civil Aeronautics Board to be a U.S. citizen (C.A.B. Order 84-8-12, adopted August 2, 1984). In attempting to conform to Page Avjet, IAS implicitly acknowledges the applicability of appropriate CAB/OST citizenship precedent. However, it fails to meet the standards established by those precedents. IAS is formed as a Texas Corporation having two classes of stock: preferred, of

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1 The FAA opinion concludes that the IAS shareholder agreement may confer upon Intera Technologies too much authority over the management and conduct of IAS's business. In analyzing the agreement, the FAA relied on an analogy to the voting trust provisions of its regulations (14 CFR 47) to suggest amendment of that agreement in order to qualify Intera as a U.S. citizen and maintain its registration under section 501(b)(1)(a)(i). FAA's final determination of these issues under Title V is not, however, dispositive of our own citizenship findings under Title XI. In fact, it has long been recognized that the voting trust arrangements authorized by 14 CFR 47.8 to establish U.S. citizenship under Title V do not necessarily qualify an operator as a U.S. citizen under CAB and OST precedents established in administering Titles IV and XI of the Act.

which there are 4,000 shares of voting stock at $1.00 par value, three-fourths of which are held by individual U.S. citizens, and common, consisting of 18,000 non-voting shares at $.10 par value, all held by Intera Technologies (IT), a corporation acknowledged not to be a U.S. citizen, which is owned jointly by U.S. and Canadian citizens. Its Articles of Incorporation require IAS to continue to have U.S.-citizen management and ownership in such proportions as would satisfy the explicit, numerical citizenship criteria set forth in section 101(16) of the Federal Aviation Act of 1958. The financial interests of the non-voting shareholder(s) are protected by a provision allowing them to sell their shares back to the company upon the occurrence of certain "Purchase Events."

We tentatively find that IAS has failed in several significant respects to place itself beyond the control of its Canadian affiliates. First, although the Canadian equity interest is held in a class of non-voting shares apparently designed to resemble that constructed by Page Avjet, the conditions under which that interest can be surrendered for a cash buyout ("Purchase Events") are so broad as to confer on the Canadian owners virtually unconstrained discretion to exercise or threaten to exercise the buyback provision.

Second, should IAS be dissolved, its voting shareholders would have a superior claim on the assets of the corporation, but that claim would be limited to the $1.00 par value of the paid-in shares plus any previously declared but unpaid dividends. The non-voting shareholders (solely Intera Technologies at the outset) would receive all remaining assets. Articles of Incorporation, IV.B.3. Thus, the U.S. citizen shareholders bear little risk in the event of failure and would be excluded from sharing in the remaining value of the company upon its dissolution, should it be liquidated, regardless of how successful it may have been. The risks and rewards lie with the non-U.S. owners.

Third, the U.S. citizens on whom IAS relies to satisfy the president/CEO citizenship requirement, the Board of Directors composition requirement, and the seventy-five per cent voting stock requirement in 49 U.S.C. 1301(16), Messrs. Lantz and Grandia are in fact key employees of Intera Technologies, although their citizenship as individuals is not questioned. As such, they are in a position to represent the interests of their employer and are ready conduits for the exercise by Intera Technologies of control over IAS, Inc. The chain of control inherent in this relationship alone distinguishes this case from Page Avjet.

Accordingly, we tentatively find that the aircraft described in the first paragraph of this order is a foreign civil aircraft as defined in 14 C.F.R. 375. If this order is made final, that aircraft would not be permitted to be used for commercial operations in the United States unless its operator first obtained a foreign aircraft permit as required by Subpart E of Part 375 and carried such permit aboard the aircraft.

We will give interested persons 21 days following the service date of this order to show cause why the tentative findings and conclusions should not be made final; answers to objections will be due within 14 days thereafter. We expect interested parties to direct any objections to the specific question of Intera's citizenship, supported by appropriate facts. If no substantive objections are filed, we will issue an order making final our tentative findings and conclusions and directing IAS to cease and desist from operating in violation of Part 375.

ACCORDINGLY:

1. We direct all interested parties to show cause why we should not issue an order making final the tentative findings and conclusions stated above;

2. We direct any interested persons having objections to the issuance of such an order to file their objections with the Documentary Services Division, Department of Transportation, 400 Seventh Street, S.W., Washington, D.C. 20590, in Docket 44723 , and serve them upon all persons listed in Attachment A, no later than 21 days after the date of service of this order; answers to objections shall be filed no later than 14 days thereafter;

3. If timely and properly supported objections are filed, we will accord full consideration to the matters or issues raised by the objections before we take further action; 2/

4. In the event no objections are filed, all futher procedural steps shall be deemed waived, and the Department will enter an order making final our tentative findings and conclusions; and

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2 Since we have provided for the filing of objections to this order and answers thereto, we will not entertain petitions for reconsideration.

5. We will serve a copy of this order upon the persons listed in Attachment A.

By:

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

Order 87-8-43

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 18th day of August, 1987

SERVED AUG 24 1987

In the matter of	:	
INTERA ARCTIC SERVICES, INC.	:	Docket 44723
Commercial Air Operations in the United States	:	
Application of	:	
INTERA ARCTIC SERVICES, INC.	:	Undocketed
for a Foreign Aircraft Permit under Part 375 of the Department's Regulations	:	

FINAL ORDER

This order decides two closely related but distinct questions. The first is the narrow legal and factual question of whether Intera Arctic Services, Inc. (IAS), is a United States citizen with respect to the applicability of section 1108(b) of the Federal Aviation Act of 1958, as amended (Act), and 14 C.F.R. Part 375. This issue is the subject of the show-cause proceeding in Docket 44723. We find that IAS is not a U.S. citizen. The second, more complex question is whether it is in the public interest to authorize IAS to use its aircraft to perform certain commercial aerial survey operations in the United States. We conclude that IAS's application for this authority should be denied. 1/

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1 Much of the information and argument in the show-cause proceeding bear on the public interest determination on IAS's application filed with the Office of International Aviation (which usually decides such applications under assigned authority). Moreover, the application concerns operations intended to be performed for the U.S. Geological Survey (USGS) pursuant to competitive award following a June 19, 1987, bid deadline. To expedite resolution of this matter and obviate the need for an IAS petition for review of an adverse staff decision, we are deciding both cases in a single order by the DOT Decisionmaker.

Background

The commercial air operations which are the subject of these proceedings are of a class of aviation activity other than air transportation. 2/ For U.S. aircraft, such operations are subject only to the safety regulation of the Federal Aviation Administration; there is no requirement for economic authority. Foreign civil aircraft, however, are regulated under section 1108(b) of the Act, which provides that they may be navigated in the United States if their homelands afford reciprocal privileges to U.S. aircraft and if the Department so authorizes after finding it to be in the public interest. Because U.S. policy favors competition and gives great weight to the decisions of purchasers of aviation services, most rulings under this section turn on the question of reciprocity.

Part 375 of our Special Regulations (14 C.F.R. Part 375) sets forth the terms and conditions generally applicable to commercial activities and provides for the filing of applications for foreign aircraft permits to authorize commercial operations such as aerial surveys.

Most such applications are filed by Canadian companies. Because of the size and proximity of the United States and Canada, each is a significant potential market for aviation service companies of the other. The United States has long promoted the concept of free transborder competition in the non-air transportation aviation services, such as those at issue here. Canada, however, adheres to a "primary rights" doctrine under which all such services within its territory are reserved to Canadian operators

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2 Air transportation involves the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft. 49 U.S.C. § 1301(24). Non-air transportation commercial operations are those agricultural, industrial, and similar services, performed for compensation or hire, which involve aerial activities such as crop-dusting, fire fighting, banner towing, pipeline and power line surveillance, or geophysical surveys, rather than the carriage from one point to another of persons, property or mail.

unless none is able to perform them. 3/ Thus, any U.S. operator's application is subject to a right of first refusal by any Canadian company. Having failed in several negotiations to influence the Government of Canada to modify its policy, the United States adopted a retaliatory first-refusal policy against Canadian operators. A typical statement of this policy follows:

> The Canadian Government has over the years followed an excessively restrictive policy toward industrial operations by U.S. aviation companies. Canada's "first refusal" policy gives Canadian companies the opportunity to object to and prevent any U.S. company from conducting such operations if Canadians can perform them. We are concerned, no less than the CAB was, over this policy which effectively excludes U.S. companies from operating in Canadian markets. We continue to prefer to achieve an environment in which Canadian and U.S. operators can compete fairly in both countries for business of this type. However, the refusal of the Canadian Government to alter its practices continues to frustrate this goal and requires us to continue a like practice to ensure similar competitive opportunities for U.S. companies.

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3 See, e.g., Applications of Erickson Air-Crane (Canada) Ltd., Canadian Transport Commission Air Transport Comm.ttee Decision 10664, May 1, 1987:

> Pursuant to Committee policy, Canadian air carriers must be owned and controlled by Canadian citizens or permanent residents of Canada. Based on voting share ownership, Erickson Air-Crane (Canada) Ltd. is controlled on a de jure basis by a Canadian citizen. The Committee is of a view, however, that de facto control rests with Erickson Air-Crane, a United States corporation. In reaching this view consideration was given, among other matters, to the actual and proposed voting and non-voting equity participation in Erickson Air-Crane (Canada) Ltd., to the fact that the proposed lessor . . . is Erickson Air-Crane, a U.S. company and to the proposed profit distribution in the form of dividends and asset distribution if liquidation occurs. In order to comply with the Committee's Canadian ownership policy, Canadian air carriers must be owned and controlled both on a de jure and de facto basis by Canadian citizens or permanent residents of Canada. Accordingly the Committee has concluded that Erickson Air-Crane (Canada) Ltd. does not comply with its Canadian ownership policy. (Id. at 1-2.)

Erickson Air-Crane (Canada) Ltd. was granted an exemption from the policy because it "would be engaging in a highly specialized activity, i.e. aerial logging with a type of rotating wing aircraft the lifting capacity of which cannot, at present, be matched by any rotating wing aircraft available from other carriers in Canada." Id. at 2.

> Therefore, unless a Canadian applicant conclusively demonstrates that no U.S. company can perform a particular operation required of a contractor, we will be inclined to deny the Canadian application. 4/

In 1983, before IAS was formed, INTERA Technologies, Inc. (IT) obtained U.S. registration for its Cessna Conquest aircraft (serial number 441-0121) under section 501(b)(1)(A)(ii) of the Act, the provision applicable to non-U.S. citizen registrants. The aircraft had previously been registered in Canada. Because Part 375 at that time defined a "foreign civil aircraft" as one of foreign registry, the re-registration had the effect of removing the Cessna from the jurisdiction of Part 375, even though the aircraft continued to be owned, controlled and operated by a non-U.S. citizen. Aero Service Division, Western Geophysical Company of America (Aero Service), a U.S. competitor, challenged the registration unsuccessfully before the FAA and in court.

In 1984, the Civil Aeronautics Board proposed to amend Part 375 to, among other things, expand the definition of "foreign civil aircraft" to which the Part was applicable to include aircraft owned, controlled, or operated by other than U.S. citizens. 5/ The proposal was made expressly to prevent foreign commercial operators whose homelands excluded U.S. competition from evading public interest scrutiny here. The proposed definition, attacked by IT, was adopted by the Department on March 3, 1986. 6/

In 1985, while the NPRM was pending, the INTERA companies underwent a series of reorganizations which created IAS, then transferred the Cessna survey aircraft to IAS, which again re-registered it, this time under section 501(b)(1)(A)(i) of the Act, which is applicable to U.S. citizen registrants. In requesting the FAA to change the registration, IT/IAS analogized their reorganization to that done in 1984 by Page Airways, a partially foreign-owned air taxi operator, to satisfy CAB citizenship concerns. 7/ Thus, by the time the Part 375 applicability

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4 May 31, 1985, letter from Paul Gretch, Director, Office of Aviation Operations, to R.E. Coleman, Operations Manager, Western VFG Division, Okanagan Helicopters, Ltd., denying the latter's application to perform torpedo-recovery operations in U.S. territorial waters for the United States Navy.

5 SPDR-91, 49 Fed. Reg. 42948, October 25, 1984.

6 Amendment 375-1, 51 Fed. Reg. 7251. On April 30, 1986, IT filed a challenge to the amendment in the U.S. Court of Appeals; it was dismissed as unripe at IT's request on July 10, 1986. Intera Technologies v. DOT, D.C. Cir. No. 86-1251.

7 In re Page Avjet Corporation, CAB Order 84-8-12, August 2, 1984 (hereafter, Page Avjet).

criterion was revised in March of 1986, not only was the former Canadian aircraft registered in the United States, but its owner/operator had obtained an FAA opinion that it was a U.S. citizen. IAS continued to operate the aircraft in this country without Part 375 authority.

Aero Service, in a July 1986 letter to the Director, Office of Aviation Operations, 8/ asked the Department to assert Part 375 jurisdiction over the IAS survey plane. The Aero Service request, which contained information distinguishing the INTERA reorganization from that of Page Avjet, was referred to FAA, which invited IAS to comment. IAS responded to FAA's request.

Statement of the Proceeding

On March 9, 1987, we issued Order 87-3-32 tentatively finding that, under the criteria applied to citizenship determinations under Titles IV and XI of the Act, IAS was not a U.S. citizen and thus would be required to apply under Part 375 for authority for commercial air operations in the United States with any aircraft it owned, controlled or operated. 9/

The show-cause order noted that to qualify as a U.S. citizen for purposes of Titles IV and XI of the Act, a corporation must not only meet the explicit numerical requirements of section 101(16), but must also, as a factual matter, actually be controlled by U.S. citizens. Order 87-3-32 at 2. IAS has ostensibly satisfied the incorporation, officer, director and voting shareholder requirements in section 101(16). At issue in the show-cause proceeding is whether there is effective foreign influence over the IAS officers, directors or voting shareholders. Such foreign influence may be concentrated or diffuse. It need not be identified with any particular nationality. It need not be shown to have sinister intent. It need not be continually exercisable on a day-to-day basis. If persons other than U.S. citizens, individually or collectively, can significantly influence the affairs of IAS, it is not a U.S. citizen for purposes of determining jurisdiction under Title XI. For example, if the non-U.S. citizen owners of the non-voting shares could require IAS to repurchase their stock under a variety of easily satisfied circumstantial criteria, they could, by their ability to withdraw capital, influence the management of the company.

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8 The office responsible for processing Part 375 applications, since renamed Office of International Aviation.

9 On the same date, FAA affirmed most of its earlier conclusions in the registration proceeding. Letter from Irene Howie, Assistant Chief Counsel, to Gary B. Garofalo, Attorney for Aero Service, and Carl B. Nelson, Jr., Attorney for IAS. FAA noted that, except for one buy-back provision, IAS had met customary FAA criteria for insulation from foreign control.

In Order 87-3-32, we tentatively found that IAS had failed in three major respects to insulate itself from control of its foreign affiliates. First, the conditions under which the foreign equity interests can be surrendered for a cash buy-out ("Purchase Events") broadly confer control on the owners of those interests. Second, in the event of dissolution of IAS, the non-voting, non-U.S. interests would receive the vast predominance of the assets, giving those interests the risks and rewards of the success of IAS's operations. Third, two U.S.-citizen directors and management officials of IAS, Messrs. Lantz and Grandia, are also officers of IT, thus giving IT a ready means of control over IAS.

Pleadings in Docket 44723

On March 30, 1987, IAS objected to our tentative conclusions in Order 87-3-32. IAS asserts that it is a Texas corporation, reorganized in 1985 to comply with the citizenship requirements of the Federal Aviation Act; that its reorganization mirrors that approved by the CAB in its Page Avjet decision; and that it remains a U.S. citizen company not subject to the requirements of section 1108(b) of the Act or Part 375, and is entitled to conduct aerial industrial operations within the United States. IAS provides additional details concerning its structure and ownership, and reveals that a Barbados corporation, INTERA Technologies Corporation (ITC), not previously identified in the record, was interposed in the IAS ownership network on January 1, 1987. 10/

In response to our tentative findings and conclusions, IAS states that its present organizational structure does not give effective control to Canadian, or other foreign, interests. IAS states that the parent entity, ITC, has diffuse ownership, being owned 47.1% by Canadians, 41.2% by U.S. citizens, and 11.7% by citizens of other countries. It argues that neither ITC nor IT can be viewed as Canadian, so all references to such ownership in Order 87-3-32 are factually incorrect. It restates its contention that it is in fact a U.S. citizen entity, asserting that its articles of incorporation were drafted in accordance with section 101 of the Act and provide for the issuance of two classes of stock: voting preferred, of which no more than 25 percent may be held by non-U.S. citizens; and nonvoting common, which is held by IT. The articles also provide that its president and two-thirds of its board of directors and management officials must be U.S. citizens.

IAS further states that the buy-back or "purchase events" provisions which we tentatively found placed control in its Canadian affiliates are "virtually" identical to those used by Page Avjet and found acceptable by the CAB. It states that the FAA found these buy-back provisions (with one exception which IAS

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10 A diagram of IAS's ownership is appended to this order.

proposed to rectify) to be "reasonably fashioned" in making its determination that IAS qualified as a U.S. entity under Title V of the Act and 14 C.F.R. Part 47. IAS also contends that the dissolution/liquidation provisions which we tentatively found to indicate foreign control because the preponderance of assets would revert to the nonvoting, non-U.S. interests, also followed the Page Avjet precedent.

IAS also believes that our concern about the control its officers might exercise at the behest of its affiliates is based on incorrect information and is contrary to precedent. It states that since Messrs. Lantz and Grandia also own significant interests in related INTERA companies, there is no basis for a finding that foreign interests could influence their decisions. Moreover, IAS states that the Act does not preclude U.S. citizens with interests in non-U.S. companies from acquiring control of air carriers. 11/

Finally, IAS asserts that, if we decide that it is not a U.S. citizen for the purposes of Title XI of the Act, we should allow it a 60-day grace period to continue operations while attempting a reorganization that would satisfy our concerns. 12/ IAS states that our failure to allow it to continue to operate in some fashion would be contrary to the public interest and would permit its competitor, Aero Service, to be in a monopoly position in providing airborne resource data acquisition.

On April 13, 1987, Aero Service filed an answer to the comments of IAS. Aero Service claims that IAS is not a U.S. citizen, and states that there are significant differences between the present organizational structure of IAS and that of Page Avjet. It states that while Page Flight's by-laws precluded the affiliation of the parent's directors or officers with Page Avjet, IAS's directors and officers are also directors and officers of its foreign parents, IT and ITC, thus allowing a measure of common control absent in the Page Avjet case. Aero Service also states that while Page Flight's by-laws guaranteed that voting shares would be held only by independent U.S.-citizen investors unaffiliated with Page Avjet or any of its non-U.S. citizen affiliates, in the case of IAS Messrs. Lantz and Grandia, who own 75 percent of the voting stock in IAS, are directly involved with managing other INTERA companies and are in a position to exercise extensive control. Aero Service further states that IT, holding 82 percent of all IAS stock, would be in a clear position to influence IAS by

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11 It should be noted that none of the INTERA entities are air carriers within the meaning of the Act.

12 As described below, IAS has filed a contingent request under Part 375 for a foreign aircraft permit to perform an upcoming U.S. Geological Survey operation, in the event that we adopt our tentative findings and do not give it such a grace period.

threatening to exercise the buy-back provisions, while the foreign stockholders in Page Avjet held only 9 percent of the stock and thus could not exercise control because the amount of stock Page would have to buy back was much more manageable. Aero Service believes that these factors, in sum, show a clear distinction from the Page Avjet case and clear control by IAS's parents.

Aero Service states that the Department need not reach in this proceeding the question of whether IAS is controlled specifically by Canadian citizens, only that it is controlled by foreign interests and thus subject to the prior approval requirements of Part 375 (where the actual nationality issue should be addressed). It also states that the question of a possible monopoly is irrelevant, as the goal is not to create a monopoly but to address the lack of reciprocity on the part of Canada towards aerial survey operations by U.S. companies. Finally, Aero Service states that we should not grant IAS any grace period, since it could file for Part 375 authority as a foreign entity.

On April 22, 1987, IAS filed a reply to Aero Service's pleading. 13/ IAS states that Aero Service is incorrect in its analysis of the relative value of the liquidated assets of IAS and Page Avjet. IAS states that in both instances holders of voting shares would receive par value plus declared but unpaid dividends and holders of nonvoting shares would receive the rest; however, the relative percentages cited by Aero Service (82 percent for IAS and 9 percent for Page Avjet) make little difference, since holders of nonvoting Page Avjet shares could, under its certificate of incorporation, own 67 percent of all the company's stock. IAS also states its view that Mr. Lantz, ITC's largest shareholder, is not a conduit for foreign influence, and that a U.S. citizen with interests outside the United States is not precluded by DOT/CAB precedent from acquiring control of U.S. aviation interests. IAS again states that it is not a citizen of Canada, and that a grace period to continue operations would be appropriate should its views not prevail in this proceeding.

On April 30, Aero Service filed an answer to IAS's reply. 14/ It states that the liquidation provision to which IAS refers in its April 22 pleading, under which up to 67 percent of Page Avjet's stock could be held by non-U.S. interests, was part of a submission made to the CAB after it had approved Page Avjet's reorganization plan, and that it therefore has no precedential value here. Aero Service again opposes any grace period for IAS.

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13 IAS's reply was accompanied by a motion for leave to file an otherwise unauthorized document, which we shall grant.

14 Aero Service's answer was accompanied by a motion for leave to file an otherwise unauthorized document, which we shall grant.

We received six other comments to Order 87-3-32. Congressman J. J. Pickle, Arkansas Research Consultants, Inc., Environmental Research Institute of Michigan, MARS Associates, Inc., and the Washington State Department of Natural Resources oppose our tentative findings and conclusions. These commenters believe that IAS has demonstrated that it is a U.S. citizen within the meaning of Title XI of the Act, and point out the positive competitive benefits of IAS's presence in the aerial survey market. Congressman Douglas Applegate supports our tentative findings and conclusions, believing that IAS is a Canadian operator and that the Government of Canada's refusal to give U.S. operators access to Canadian survey markets requires reciprocal action on our part. 15/

Part 375 Application

As noted above, on March 30, 1987, IAS filed a contingent application for a foreign aircraft permit under Part 375 for action should we find it to be other than a U.S. citizen. IAS requests authority to conduct aerial radar surveying on behalf of the U.S. Geological Survey during the period September-November, 1987. It states that IT is seeking a contract with USGS for these services (which it will subcontract to IAS) and does not at this time know the specific geographical area in which the proposed operations will take place. In its request, IAS states that its nationality and domicile, as well as that of its parent, IT, are the United States.

On April 15, 1987, Aero Service filed an answer opposing grant of IAS's application. 16/ Aero Service states that we should dismiss the application as technically defective, as (1) IAS asserts that it is a U.S. citizen but filed a request required only of non-U.S. citizen entities; (2) IAS does not name its supposed foreign nationality; and (3) IAS's request is premature because it has no firm contract for the proposed operations and cannot yet describe the number of flights or locations involved. Aero Service states

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15 The numerous pleadings in Docket 44723 that attest to the value of IAS's services and of its positive effect on competition are relevant, not to the issue of IAS's citizenship, but to the public interest evaluation of IAS's application for a foreign aircraft permit, were it found to require one. After finding, for the reasons set forth below, that IAS is not a citizen, we have considered the merits of its foreign aircraft permit application (which would otherwise be moot). In so doing, we considered all the relevant information supplied by commenters in Docket 44723.

16 On April 7, 1987, Aero Service requested an extension of time until April 15, 1987, to file an answer to IAS's application. On that date the Director, Office of International Aviation, granted Aero Service's request, finding that good cause had been shown.

that, should we decide to process the request, we should deny it. It states that the Canadian ownership interest in ITC, IAS's affiliate, make IAS a Canadian-owned entity; that this ownership, coupled with the presence of Canadian officials in INTERA companies, demonstrate Canadian control of IAS; that Canadian reciprocity is defective in the area of the type of industrial operations at issue here; and that IAS has not shown that grant of its request would be in the public interest notwithstanding the lack of Canadian reciprocity.

On April 22, 1987, IAS filed a reply to the answer of Aero Service. IAS states that it is not a national, domiciliary, or citizen of Canada, and that even if we were to find it to be other than a U.S. citizen we could not deny its request based on a lack of reciprocity with a country of which it is neither a national nor a domiciliary. It states that its application is fully complete, and that it filed early to seek resolution of the question of its ability to operate so that it could respond to the USGS request for proposals for the operations at issue here. Finally, IAS states that grant of its request (should its request be necessary) is clearly in the public interest, as its competition in other aerial survey markets has in past years saved U.S. taxpayers millions of dollars and has prevented Aero Service from enjoying a monopoly position.

Decision on Order to Show Cause

As indicated above, we have decided to finalize our tentative conclusion that IAS is not, for purposes of Title XI of the Act, a citizen of the United States as that term is defined in section 101(16).

In March of 1986, the Department amended Part 375 "to achieve the Congressional purpose reflected in section 1108(b) of the Act that foreign aircraft, operated for commercial purposes within the United States, be permitted to do so only if reciprocity exists with the country of which the owners or operators are nationals." 17/ This is also consistent with the statutory goals for international aviation negotiating policy, which call for "the elimination of operational and marketing restrictions to the greatest extent possible". 18/ Prior to its reorganization, IAS's aircraft was registered as that of a non-U.S. citizen corporation,

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17 61 F.R. 7251. This regulatory change was necessitated by the amendment of §501(b)(1)(A)(ii) of the Act (Pub. L. 95-163) to permit U.S. registration of aircraft by U.S. corporations owned or controlled by foreign nationals. Id. Section 1108(b) allows foreign civil aircraft to be navigated in the U.S. only if the homeland "foreign nation grants a similar privilege" to U.S. aircraft.

18 § 1102(b)(5) of the Act. See also, §102 (a)(12).

and therefore clearly subject to Part 375 as amended. Given the important international transportation policy concerns reflected in our amendment to Part 375, and the fact that this reorganization was apparently undertaken in an effort to keep Part 375 from applying to this aircraft, we must examine IAS's restructuring with care.

IAS's primary and oft-repeated argument in support of its position that it is a citizen of the United States is that it has reorganized its corporate existence to track the situation approved by the Civil Aeronautics Board in the Page Avjet case. We certainly agree that IAS has gone out of its way to mimic those corporate arrangements. There are, however, enough differences between the Page and IAS situations that it will not be necessary for us to consider here whether or not we would have decided that case the same way that our predecessor agency did. Suffice it to say that, in our view and, we think, the Board's, the Page Avjet precedent constitutes the outer limits of what may be permitted under the Act. Because citizenship decisions under the Act are based on an evaluation of all of the facts and circumstances of each individual case taken together, 19/ those who attempt to pattern their conduct on the fringes of what is lawful often overstep the bounds of what is permitted. This is such a case.

In our show-cause order, we found several indicia of control which, when taken together, led to our tentative conclusion that IAS was subject to foreign control. First, we found that the foreign owners 20/ of IAS's nonvoting common shares had a certain amount of leverage over IAS because they could compel IAS to buy them out under so broad a range of circumstances as to confer on them virtually unconstrained discretion. IAS responds that this buy-out provision is virtually identical to that approved in Page Avjet. While we agree that the provisions quoted by IAS are extremely similar, there are differences in the surrounding circumstances, as well as in certain terms IAS did not quote.

The Page buy-out provision set a price of one-half of the net tangible book value per common share (after allowance for liquidation preference of preferred shares), plus six times earnings per common share. The IAS provision sets a price of full net tangible book value per common share (after allowance for

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19 See, e.g., Willye Peter Daetwyler, d/b/a Interamerican Airfreight Co., Foreign Permit, 6 CAB 118 at 120-121 (1971). See, also, Order 83-7-5 at 2-3 (July 1, 1983), and cases cited therein.

20 IAS acknowledges that IT is not a citizen of the United States because it is owned by ITC, a Barbados corporation.

liquidation preference of preferred shares). 21/ Thus, in the Page situation, the buy-out price would be lower if the company was not profitable and, therefore, an unprofitable company would be better able to afford the necessary payment than it would under the IAS buy-out provision.

More significantly, in the Page situation, the noncitizen stockholders held only about 9% of the issued and outstanding stock of all classes. This fact allowed the Board to conclude that the proposed reorganization plan which it approved in Order 84-8-12 was consistent with its instruction in Order 83-7-5 that the buy-out formula "not be excessively burdensome to new [i.e., U.S. voting] shareholders" and its belief that "the combination of the limited rights accruing to Page [the non-U.S. citizen] as a nonvoting common shareholder vis-a-vis the [voting] preferred stockholders, and the buyout provision, would appear to protect Page's investment adequately without giving Page a substantial ability to influence the air taxis [sic] activities." 22/ In sharp contrast, the foreign shareholders of IAS hold about 82% of the issued and outstanding stock of all classes. This would result in a much more onerous situation in the event of a buy-out, and consequently gives the IAS nonvoting common shareholders considerably more influence than those in Page.

The second indicia of influence noted in our show-cause order was that the liquidation provisions are such that the U.S.-citizen voting shareholders bear little risk in the event of failure and would reap little reward if the company were dissolved, regardless of how successful it might have been. Rather, the risks and rewards lie with the non-U.S. citizen owners. IAS does not contest this conclusion, but merely indicates that this provision followed the Page Avjet plan. This assertion is factually correct; however, as discussed below, there are material differences between this case and Page Avjet.

Finally, and most importantly, our show-cause order found that Messrs. Lantz and Grandia, upon whom IAS relies to establish its citizenship, are key employees of IT and therefore "ready conduits for the exercise by Intera Technologies of control over IAS, Inc. The chain of control inherent in this relationship alone distinguishes this case from Page Avjet." 23/ IAS contests this conclusion, arguing that "[t]here is no reasonable basis for

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21 Page Flight filing of October 24, 1984 in Docket 40905; and Section 3, Shareholder Agreement of May 23, 1985 between IAS and IT. (We note that both agreements provide for arbitration if unusual circumstances exist such that the calculation does not represent fair market value.)

22 Order 83-7-5, July 1, 1983, at 5 (emphasis added).

23 Order 87-3-32, at 3.

concluding that either of these individuals is a mere employee and 'ready conduit' for exercise of control by foreign interests." 24/. Rather, they are principal shareholders in the parent, ITC, in which no one citizen group has a majority interest and in which Mr. Lantz is the largest single shareholder.

Although we agree with IAS that Messrs. Lantz and Grandia may be no mere employees of IT and ITC, their relationship with those companies is, in our view, a major means by which foreign control of IAS may be exercised. The fact that these gentlemen are U.S. citizens and major shareholders in IAS's non-U.S. citizen affiliates does not negate foreign control. To the contrary, as major stockholders, they have far more at stake in seeing to it that IT and ITC are successful in carrying out their various activities than a "mere" employer-employee relationship. Bearing in mind that IAS has acknowledged the non-U.S. citizen status of both IT and ITC, and that the latter is owned 47.1% by Canadians and 11.7% by other non-U.S. citizens, it would appear that Messrs. Lantz's and Grandia's fortunes are far more identified and intermingled with those of ITC's foreign shareholders than would be the case of an employee. Thus, we conclude that the potential for foreign influence and control by these gentlemen is far greater than that found to be decisive in Daetwyler, 25/ which IAS seeks to distinguish.

Further on this point, IAS asserts, the Act does not seek to prevent U.S. citizens with interests outside the United States from acquiring control of air carriers and cites the Board's decision in Aloha Airlines, Control by IASCO 26/ in support of its position. Although we agree with the cited dicta from that case, it in no way detracts from our conclusion. Rather, it stands for the proposition that very substantial business dealings between companies can be an indicia of control. While the Board ultimately concluded, after careful examination, that the business dealings in Aloha were benign, we cannot reach the same conclusion here. Rather, we find the business dealings between IAS and its non-U.S. citizen affiliates to be more like the situation found in Daetwyler where the alleged U.S. citizen company would "continue to do business as part of the system of Daetwyler-controlled companies." 27/ Here, it is clear that IAS will continue to

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24 Objections of IAS to Order 87-3-32 at 10.

25 58 CAB 118 at 120. See also, Premiere Airlines, Inc. Fitness Investigation, 95 CAB 101 (1982).

26 77 CAB 295 (1978).

27 58 CAB 118, at 120.

operate as a part of the ITC family of companies. 28/

Finally, notwithstanding the fact that the implementing reorganization plan in Page Avjet included by-law provisions barring any affiliations with non-U.S. citizens by officers or directors of the air taxi involved, IAS argues that this fact was not even discussed in the Page Avjet decision. The apparent thrust of this argument is that the interlocking relationships that distinguish this case from Page are not material differences. We most adamantly disagree. The fact that there were no interlocks between the foreign entity and the air taxi in Page is hardly insignificant. It taxes credulity to believe that the parties to that transaction included such a provision gratuitously, or that the Board would have ignored the absence of interlocks as insignificant. Rather, we assume that this matter was not specifically addressed in any of the Board's public orders because the lack of interlocking relationships was a given factor and not a matter of any controversy or disagreement between the Board and the parties. In any event, it is certainly significant to us.

Based on our evaluation of all of the indicia of control discussed above, we find that IAS is subject to foreign control and is not therefore a citizen of the U.S. for purposes of Title XI of the Act.

We have also decided to deny IAS's request that it be permitted to continue operating as if it were a U.S. citizen for purposes of Title XI while it develops a plan of reorganization designed to meet the requirements of Title XI and section 101(16). IAS cites four cases to support the existence of a "well-established agency practice in favor of restructuring to satisfy the technical citizenship requirements of the Act." 29/ Although two of the cited cases may show some tendency to avoid penalizing a carrier that appears inadvertently to have run afoul of statutory citizenship requirements, this Department does not have a general policy of permitting non-U.S. citizens to operate as though they

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28 For example, IAS's contingent application for a foreign aircraft permit indicates that IT will seek a surveying contract from the U.S. Geological Service and, if successful, plans to have the required flying operations conducted by IAS on a wet-lease basis.

29 Objections of IAS to Order 87-3-32 at 12, citing Dimerco Express Corp. (USA), Order 86-9-68, September 25, 1986; Page Avjet, Order 83-7-5, July 1, 1983; Aero West Fitness Investigation, Order 84-10-105, October 24, 1984; and Premiere Airlines, Inc. Fitness Investigation, Order 82-5-11, May 5, 1982.

were U.S. citizens until they can find some way to evade the requirements. 30/ The other two are fitness cases in which the applicant was not operating and are, thus, totally inapposite. 31/

Page Avjet and Dimerco involved operating air carriers that had properly been issued valid licenses and had subsequently run afoul of the citizenship requirement. Here, in contrast, we have an entity that has no economic license; indeed, all we are deciding in Docket 44723 is that it needs one. Further, IAS has knowingly and deliberately structured itself in its present form, in an apparent attempt to avoid the need to obtain an operating license that a then-pending rulemaking would, if finalized, have otherwise required it to have. Now that that rulemaking has been finalized, we find that IAS's efforts at restructuring have been unsuccessful and that it needs a foreign aircraft permit under Part 375 as amended. Under these circumstances, we do not feel ourselves obliged to permit IAS to keep operating as if it were entitled to the privileges of a citizen of the United States while it attempts, once again, to reorganize itself out of our regulatory requirements. We will therefore deny the request.

Decision on Part 375 Application

Having found that IAS is not a citizen of the United States within the meaning of Title XI of the Act and Part 375 of our regulations, we next turn to IAS's March 30 request for a foreign aircraft permit under Part 375. As noted earlier, we will deny that request.

Part 375 states that we will grant a foreign aircraft permit if the proposed operations meet the requirements of that rule and are in the public interest. Central to the public interest finding is our consideration of "the extent to which the country of the applicant's nationality deals with U.S. civil aircraft operators on the basis of substantial reciprocity." 32/ While IAS contends that its nationality is the United States, "nationality" has a specific meaning within the context of Part 375 that does not support its contention. In its applicability to operations by U.S.-registered aircraft, Part 375 is concerned with companies incorporated in the United States and which have principal offices in the United States (as IAS is and does), but which are dominated

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30 Page Avjet and Dimerco Express Corp. (USA), Order 86-9-68.

31 Aero West Fitness Investigation, Order 84-10-105 and Premiere Airlines, Inc. Fitness Investigation, Order 82-5-11.

32 See 14 C.F.R. § 375.44.

by outside interests. 33/ Nationality, in this regard, refers to the country in which the interest controlling an applicant rests, and its importance lies in our ability to determine the existence or lack of reciprocity.

In considering IAS's application, therefore, we must first consider whether we can determine its nationality within the context of Part 375. We find that the record provides sufficient evidence to make such a determination, and that the country of nationality of IAS, and its parent ITC, is Canada.

As noted earlier, despite substantial involvement of U.S. interests in the ownership and management of IAS and ITC, the predominent ownership of ITC is by citizens of Canada, who hold 47.1% of the company. 34/ Moreover, no other non-U.S. entities hold a significant share of ITC (only 11.7% of ITC's ownership is by such entities). Thus, Canadian interests clearly constitute the major foreign element in ITC, the company that controls IAS. We therefore find it appropriate to consider the state of Canadian reciprocity in making our public interest finding under section 375.44.

Having made this determination, we find that it would not be in the public interest to grant IAS's request. As we noted on pages 2 and 3 of this order, we have long found Canadian reciprocity in the area of aerial survey operations (and other industrial operations) to be defective because of Canada's "primary rights" policy which effectively denies U.S. operators access to analogous business in Canada. We have no indication of any change in Canada's policy, nor has IAS demonstrated any overriding public interest considerations which would cause us to reach a different result. In particular, we are not persuaded by IAS's claims that its absence from the U.S. market would be contrary to the public interest because it would reduce competition. Indeed, increased competition is the result we are trying to achieve. It is our hope that the Government of Canada will reconsider its protectionist policies and agree to a less-restrictive regime in which U.S. and Canadian industrial operators may freely compete for business on both sides of the border. Unless and until the Canadian Government alters its position, however, we cannot allow operators of Canadian nationality free access to U.S. markets.

ACCORDINGLY:

1. We make final our tentative findings and conclusions in Order 87-3-32;

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33 See Amendment 375-1, 61 Fed. Reg. 7251 at 7252, 7253.

34 In addition, the aircraft used by IAS was formerly registered in Canada to an INTERA company.

2. We deny the March 30, 1987, application of INTERA Arctic Services, Inc. for a foreign aircraft permit under 14 C.F.R. Part 375;

3. We grant the motions of INTERA Arctic Services, Inc., and Aero Service Division, Western Geophysical Company of America, for leave to file otherwise unauthorized documents;

4. We deny all other requests for relief in Docket 44723; and

5. We shall serve copies of this order on all parties to Docket 44723.

By:

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

OWNERSHIP OF INTERA COMPANIES