



**ATRP/10**

# **International Civil Aviation Organization**

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## **AIR TRANSPORT REGULATION PANEL**

### **TENTH MEETING**

Montreal, 13 – 17 May 2002

**DOCUMENTATION**

**REPORT OF THE TENTH MEETING OF THE  
AIR TRANSPORT REGULATION PANEL**

**LETTER OF TRANSMITTAL**

To: Chairman, Air Transport Committee  
From: Chairman, Air Transport Regulation Panel

I have the honour to submit herewith the Report of the tenth meeting of the Air Transport Regulation Panel, held at ICAO Headquarters in Montreal from 13 to 17 May 2002.

H.P.T. de Jong  
Chairman

Montreal, 17 May 2002

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## INTRODUCTION

### General

1. The tenth meeting of the ICAO Air Transport Regulation Panel was held at the Headquarters of the Organization in Montreal from 13 to 17 May 2002.
2. The Vice-Chairman of the Air Transport Committee, Ms. Anne McGinley, opened the meeting with a welcoming address. The Director of the Air Transport Bureau, Mr. M. Elamiri, introduced the members of the Secretariat. The President of the Council, Dr. Assad Kotaite, attended the closing session and made a brief address.

### Terms of Reference

3. In accordance with the Terms of Reference, as revised by the Air Transport Committee on 22 November 2001, the Panel will undertake the following tasks to assist in the preparation for the “Worldwide Air Transport Conference: Challenges and Opportunities of Liberalization” (ATConf/5), to be held from 24 to 29 March 2003;
  - a) examination of various key topics, *inter alia*, on air carrier ownership and control, market access, tariff regulation, competition laws, safeguard measures, condition of carriage and consumer interests (code of conduct), dispute resolution and transparency;
  - b) development of a draft template air services agreement (TASA); and
  - c) preparation of a draft text of declaration of global principles for international air transport.
4. The Panel will take into account at all times the interests of all stakeholders and the importance to States of effective participation in international air transport.

### Agenda

5. The Agenda for the Meeting was determined by the Air Transport Committee and comprised the following items (WP/1):
  - 1) Review of the Panel’s tasks and work programme
  - 2) Examination of possible approaches to regulatory liberalization on the following topics:
    - a) air carrier ownership and control;
    - b) market access;
    - c) fair competition and safeguards;
    - d) competition laws/policies;
    - e) consumer interests (e.g. code of conduct);
    - f) product distribution (including CRS);
    - g) dispute resolution; and
    - h) transparency.
  - 3) Review of framework and potential elements of a template air services agreement.

**Attendance**

6. The meeting was attended by 17 Panel Members, Alternates or temporary replacements, accompanied in some cases by Advisers, as well as by Observers from 8 Contracting States and 3 international organizations. A complete list of participants appears in Appendix 1.

**Officers and Secretariat**

7. The Panel elected Mr. H.P.T. de Jong, Panel Member from the Netherlands as Chairman of the meeting.

8. Mr. Vijay S. Madan, Chief of the Economic Policy Section, was Secretary of the meeting. Mr. Chris Lyle, Deputy Director of the Air Transport Bureau, Mr. John Gunther, Mr. Yuan-Zheng Wang, Mrs. Magda Boulos, Mr. Charles Dudley, Mr. Luis Fonseca, and Mr. Toru Hasegawa provided the necessary support, assistance and advice.

**Languages and documentation**

9. Translation and interpretation services were provided in Arabic, English, French, Russian and Spanish by the Language and Publications Branch under the direction of Mr. Y.N. Beliaev. A list of documentation prepared or made available for the meeting appears in Appendix 2.

**AGENDA ITEM 1: REVIEW OF THE PANEL'S TASKS AND WORK PROGRAMME**

10. The Panel reviewed the agenda, working methods for the meeting, the Panel's tasks and its work programme on the basis of four working papers (WP/1, 2, 3 and 4). The Panel noted that in view of the objectives of the fifth Worldwide Air Transport Conference (ATConf/5) and its relatively short duration, the success of the conference will rely heavily on substantial and solid preparatory work. This would be undertaken by the Secretariat with the assistance of the Panel, with the intention of completing all substantive work by the 3rd quarter of 2002 to allow States adequate time to review the material before the conference. In view of this timeframe, the Panel noted that its remaining work, undertaken through correspondence, would need to be completed no later than August 2002 to give the Secretariat the necessary time to finalize the documentation.

**AGENDA ITEM 2: EXAMINATION OF POSSIBLE APPROACHES TO REGULATORY LIBERALIZATION ON THE FOLLOWING TOPICS****Agenda Item 2 a): Air carrier ownership and control****Introduction**

11. The Panel considered this item on the basis of WP/5. In the paper, the Secretariat provided background to the issue, including the basic rationale for the traditional ownership and control criteria as well

as developments at the national, bilateral, regional and multilateral levels. Based on its assessment of the situation, the Secretariat suggested that current efforts should focus on reforming the relevant bilateral provisions and, accordingly, presented an alternative regulatory arrangement for airline designation and authorization. The proposed arrangement, devised by building on Recommendation ATRP/9-4, would require that Parties to a bilateral agreement accept the designation of an airline if that airline has its “principal place of business” in, and “effective regulatory control” by, the designating Party. The arrangement would be accompanied by specific criteria for the two concepts. The specific text of the proposed Article was as follows:

**“Article X: Designation and Authorization**

1. *Each Party shall have the right to designate in writing to the other Party [an airline] [one or more airlines] to operate the agreed services [in accordance with this Agreement] and to withdraw or alter such designation.*
2. *On receipt of such a designation, and of application from the designated airline, [in the form and manner prescribed for operating authorization [and technical permission,] each Party shall grant the appropriate operating authorization with minimum procedural delay, provided that:*
  - a) *the designated airline has its principal place of business\* [and permanent residence] in the territory of the designating Party;*
  - b) *the Party designating the airline has and maintains effective regulatory control\*\* of the airline;*
  - c) *the designated airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transport services by the Party receiving the designation; and*
  - d) *the Party designating the airline is in compliance with the provisions set forth in Article X (Safety) and Article Y (Aviation Security).*
3. *On receipt of the operating authorization of paragraph 2 a designated airline may at any time begin to operate the agreed services for which it is so designated, provided that the airline complies with the applicable provisions of this Agreement.*

Notes:

*\*evidence of principal place of business includes: the airline is established and incorporated in the territory of the designating Party in accordance with relevant national laws and regulations, has substantial amount of its operations and capital investment in physical facilities in the designating Party, pays income tax and registers its aircraft there, and employs a significant number of nationals in managerial, technical and operational positions.*

*\*\*evidence of effective regulatory control includes: the airline holds a valid operating licence or permit issued by the licensing authority such as an Air Operator Certificate (AOC), qualifies the designation criteria of the designating Party such as proof of financial health, ability to meet public interest requirement, obligations for assurance of service, etc); the designating Party has and maintains safety, security oversight programme in compliance with ICAO standards. (The above notes should be an integral part of this Article)”*

12. The Panel also had, as reference, AT-WP/1933 which presented the main results of a recent survey conducted by the Secretariat on States’ policies and practices on air carrier ownership and control.

**Discussion**

13. The Panel noted that many governments and the industry consider this issue as the most important one in the ongoing liberalization of international air transport, having implications for many other aspects of air transport regulation such as market access, safety and security. The traditional criteria used in most existing bilateral agreements are perceived as the major barrier to broader liberalization as well as a constraint for access to international financing. There is a need for appropriate regulatory action to enable airlines to adapt to the fast changing environment. The key to advancing liberalization lies with regulatory arrangements that would address the needs and concerns of States.

14. The Observer from the International Air Transport Association (IATA) was of the view that, in an increasingly globalized environment, the ownership of airlines should be treated in the same manner as other commercial entities. Attention was drawn to a recent policy paper, in which IATA advocated a more radical approach rather than the gradualist one for liberalizing ownership and control, and proposed a broad-based option which would remove all restrictions on ownership and make regulatory control by the designating State as the sole criterion for authorization.

15. With regard to the Secretariat's proposal, it was noted that although the concept was not new, it did for the first time explicitly require "effective regulatory control" by the designating State of its designated airline(s) as a condition for issuing operating authorization by the State receiving the designation. It was suggested that this be made as one of a number of options for liberalizing ownership and control.

16. Some felt that the use of "a" rather than "the" principal place of business would recognize those cases where a designated airline may have more than one principal place of business (such as "hubs" in different countries). Others held that a designated airline should, regardless of its ownership, be based in the territory of the designating Party as a condition for designation. It was pointed out that the issue of ownership and control should not be considered in isolation but in a wider context of liberalization. The principle of reciprocity should be taken into account in using the proposed arrangement. There was also a need for current information on a designated airline's ownership for security purposes.

17. Some members believed that although difficulty had been experienced in the past with regard to achieving global consensus on possible arrangements for inward (foreign) investment and the right of establishment, it might still be useful for ICAO to consider developing appropriate guidance within the overall context of liberalization.

18. An important issue is whether many bilateral partners would accept or negotiate a change in the ownership and control criteria to permit, for example, the use of "principal place of business". A related factor is what number of States would adopt this new criterion as a national one for their airlines; the more States that do so, the greater the potential for its acceptance in bilateral air services agreements.

19. Since the majority of States have used and continue to use the traditional criteria in their bilateral agreements, and given the long process for changing the thousands of bilateral agreements for the use of the new arrangement, some members believed that there might be merit in exploring a more effective and practical solution within the existing framework. What was needed under the current situation is to find a way that would enable States to deal with the ownership and control requirement with flexibility without changing the existing regime but at the same time would provide the certainty required by the airlines to make strategic decisions. One possible approach might be to encourage like-minded States to "pledge" voluntarily and, perhaps in a coordinated manner, to treat the ownership requirement liberally under the

bilateral agreements. If a sufficient number of States agreed to do so, it might create the critical mass needed for a more fundamental change.

20. Finally, the Panel examined the bilateral Article on airline designation and authorization proposed by the Secretariat and agreed to the following amended text:

**“Article X: Designation and Authorization**

1. *Each Party shall have the right to designate in writing to the other Party [an airline] [one or more airlines] [as many airlines as it wishes] to operate the agreed services [in accordance with this Agreement] and to withdraw or alter such designation.*
2. *On receipt of such a designation, and of application from the designated airline, in the form and manner prescribed for operating authorization [and technical permission,] each Party shall grant the appropriate operating authorization with minimum procedural delay, provided that:*
  - a) *the designated airline has its principal place of business\* [and permanent residence] in the territory of the designating Party;*
  - b) *the Party designating the airline has and maintains effective regulatory control\*\* of the airline;*
  - c) *the Party designating the airline is in compliance with the provisions set forth in Article X (Safety) and Article Y (Aviation Security); and*
  - d) *the designated airline is qualified to meet other conditions prescribed under the laws and regulations normally applied to the operation of international air transport services by the Party receiving the designation.*
3. *On receipt of the operating authorization of paragraph 2, a designated airline may at any time begin to operate the agreed services for which it is so designated, provided that the airline complies with the applicable provisions of this Agreement.*

Notes:

*\*evidence of principal place of business includes such factors as: the airline is established and incorporated in the territory of the designating Party in accordance with relevant national laws and regulations, has a substantial amount of its operations and capital investment in physical facilities in the territory of the designating Party, pays income tax, registers and bases its aircraft there, and employs a significant number of nationals in managerial, technical and operational positions.*

*\*\*evidence of effective regulatory control includes but is not limited to: the airline holds a valid operating licence or permit issued by the licensing authority such as an Air Operator Certificate (AOC), meets the criteria of the designating Party for the operation of international air services, such as proof of financial health, ability to meet public interest requirement, obligations for assurance of service; and the designating Party has and maintains safety and security oversight programmes in compliance with ICAO standards.”*

21. The Panel also agreed that, where a State requires (an) additional condition(s) to deal with a specific concern or situation, such (a) condition(s) could be added as appropriate through bilateral negotiations or consultations. The conditions set forth in paragraph 2 of the proposed Article should also be used correspondingly in the Article on revocation of authorization.

### **Conclusions**

22. On the basis of the documentation and its discussion, the Panel reached the following conclusions:

- a) the proposed arrangement in paragraph 20 should be included in the ICAO Template Air Services Agreement (TASA) as one of the options for States to liberalize airline designation and authorization in their air services agreements. However, the text of the article may require further refinement in the context of examination of other regulatory issues before its inclusion in the TASA;
- b) the arrangement would permit States to address potential concerns such as safety and security, including in respect of “flags of convenience”, because the broadened criteria would be used in conjunction with strengthened regulatory controls. Its application could facilitate broader liberalization in such areas as market access, but would not lead to a “laissez-faire” as all regulatory tools remain available and it would be up to each State to determine how and to what extent it wishes to pursue liberalization;
- c) under the above Article, a State which is the authorizing Party would not apply the national ownership and control criteria for issuing the operating authorization to a foreign designated airline. This recognizes that investors have a legitimate right to exercise control over an undertaking proportional to the extent that they have committed funds. It thus helps create a more favourable environment in which airlines can conduct their business according to the market conditions and their commercial needs. At the same time, it would envision a State’s regulatory control, primarily through licensing which can include both economic and operational elements;
- d) the proposed arrangement would not necessitate a State which is the designating Party to change its existing laws or regulations pertaining to national ownership and control for its own national air carrier(s). It would, however, provide the flexibility if and when the State wishes to adjust its policies;
- e) by departing from the national ownership and control criteria, the proposed arrangement strengthens the right of each State to choose the air carrier(s) it wishes in order to utilize the market access rights it has received. The arrangement would benefit all such States whose air carriers need access to international capital, notably including those from the developing countries, thereby enhancing their participation in the air transport system;
- f) the new arrangement would facilitate privatization of State-owned airlines where foreign investment is sought;
- g) the arrangement would not lead to drastic changes to the existing bilateral framework since it could be introduced through the normal bilateral negotiation and consultation process, taking into account reciprocity. Complementing other broadened criteria developed by ICAO, it would facilitate and contribute to the pursuit by States of the general goal of progressive regulatory liberalization; and

- h) the proposed arrangement provides for the advancement towards a more liberalized global environment. However, for it to be a catalyst for further liberalization, it would need to be applied forthwith and as extensively as possible.

23. The Panel further agreed that, in order to encourage wider and more immediate application of this and other options as part of the general pursuit of progressive regulatory liberalization, further work on this agenda item will be carried out by a Working Group on coordinated action by States to liberalize international air carrier ownership and control with the following membership and terms of reference:

#### **Membership**

Mr. C. Stamford, Panel Member from Australia (Rapporteur)

Panel Member from Chile

Panel Member from Germany

Panel Member from India

Panel Member from Japan

Panel Member from Saudi Arabia

Panel Member from Senegal

Panel Member from the Netherlands

Panel Member from United States

Observer from IATA

Observer from the European Commission

#### **Terms of Reference**

Drawing on all relevant material, including existing ICAO guidance, the working papers and discussions of the Tenth Meeting of the Panel and subsequent suggestions from Panel members and Observers, the Working Group will:

- a) identify reasons why States might wish to consider a coordinated action to liberalize international air carrier ownership and control;
- b) formulate options for States that wish to undertake a coordinated action to liberalize international ownership and control, including options for the coordinated implementation by States of the above proposed Article; and
- c) provide a report to the Panel in time for it to be available for the final preparation of ATConf/5.

#### **Agenda Item 2 b): Market access**

24. Consideration of this item was divided into four parts: a) liberalization of market access; b) slot allocation at capacity-constrained airports; c) aircraft leasing in international air transport; and d) liberalization of air cargo service.

## **Part A. Liberalization of market access**

### **Introduction**

25. The Panel considered this item on the basis of WP/6, presented by the Secretariat, which focused on the developments in the area of exchange of basic market access rights and discussed possible areas of work that could be undertaken by ICAO. The Panel also looked at IP/4 which contained the texts of the United States bilateral open skies model agreement and the Multilateral Agreement on the Liberalization of International Air Transportation between five members of the Asia-Pacific Economic Cooperation (APEC).

26. In WP/6, it was noted that despite considerable progress in air transport liberalization during the past decade, disparity remains as to the extent and degree of liberalization among States relating to the exchange of traffic rights. The condition does not seem to have become ripe at this stage to attempt a new global agreement for the exchange of traffic rights. Nevertheless, it would be desirable for ICAO to continue to develop necessary guidance which would facilitate liberalization and help improve harmonization. In this regard, one possible task suggested by the Secretariat was to formalize the Freedoms of the Air (mainly the so-called Sixth to Ninth Freedoms). Another task was to define or describe the terms “full market access” and “open skies agreement” so that they could have a uniform meaning for all users.

### **Discussion**

27. The Panel noted the developments at the bilateral, regional and multilateral levels, particularly information on the exchange of traffic rights in bilateral “open skies” agreements and in regional air transport liberalization arrangements. It was pointed out that market access is a key area in the liberalization process. It is essential for ICAO to take a leading role in developing a clear, viable and well-balanced road map for use by its members to liberalize international air transport at their own choice and pace. Regional agreements may prove to be an easier and faster route to liberalization than the bilateral process because of the large number of bilateral agreements that would have to be updated.

28. With regard to possible work, discussion focused on how best ICAO could facilitate or assist States in liberalization. While some members believed that there were merits for ICAO to develop guidance as suggested in the paper, others felt that it might be difficult to define “full market access” and “open skies agreement” because of the difficulties in dealing with controversial issues such as cabotage, inward investment and right of establishment. The Panel agreed that both theory and practical guidance are important. What might be presently of greater value to States are: a) information about the practical experiences of States with liberalization; and b) a comprehensive analysis of the consequences of the various approaches, including case studies on experience of States on matters such as: factors that led them to enter into liberal agreements (at the bilateral, regional or multilateral levels); benefits expected and obtained; drawbacks or difficulties encountered, etc., in order that liberalization can be better understood, experiences shared and lessons learnt.

29. It was also suggested that in preparing guidance material for States, consideration be given to all aspects of liberalization such as air cargo and non-scheduled or charter operations, both of which are being explored by the World Trade Organization in the context of its review of the General Agreement on Trade in Services (GATS).

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**Conclusions**

30. On the basis of the documentation and its discussion, the Panel reached the following conclusions:

- a) since the 1994 Worldwide Air Transport Conference (AT Conf/4), considerable progress has been made in liberalization with respect to market access, particularly at the regional and subregional levels. More importantly, States have generally become more open and receptive towards liberalization, with many adjusting their policies and practices to meet the challenges of liberalization;
- b) experience in the past decade has confirmed that the existing bilateral and multilateral (including regional) regulatory regimes based on the Chicago Convention can and do coexist, and can each accommodate different approaches to air transport regulation. They continue to provide a viable and flexible platform for States in pursuing liberalization according to their specific needs, objectives and circumstances;
- c) applying the basic GATS principle of most favoured nation (MFN) treatment to traffic rights remains a complex and difficult issue. While there is some support to extend the GATS Annex on Air Transport Services to include some so-called “soft rights” as well as some aspects of “hard rights”, there is no global consensus on whether or how this would be pursued. It is also inconclusive at this stage as to whether the GATS is an effective option for air transport liberalization;
- d) exchange of broader or full market access rights between and among States, while gaining acceptability, is still very country-specific. This has been reflected in the fact that most States which have concluded bilateral open skies agreements did not do so as a general policy, nor even contemplated such arrangements with all their aviation partners, but on a case-by-case basis;
- e) conditions are not ripe at this stage for a global multilateral agreement for the exchange of traffic rights. States would continue to pursue liberalization in this regard at their own choice and own pace, using bilateral, regional or subregional, and/or multilateral avenues, as appropriate; and
- f) ICAO’s existing guidance in the area of market access has been found useful by States. Value would be added by providing information on actual experience with liberalization. It might not be productive for ICAO to undertake work to define such terms as “full market access” and “open skies agreement” given the difficulty in achieving consensus. However, there could be merit in attempting to provide guidance for States as to the end-product of progressive liberalization, particularly in relation to traffic rights, while recognizing the difficulties in dealing with controversial issues such as inward investment and the right of establishment.

**Recommendation**31. **RECOMMENDATION ATRP/10-1****THE PANEL RECOMMENDS:**

- a) that ICAO should continue to closely monitor developments in international air transport liberalization and disseminate relevant information (including liberalization experience) to its member States. ICAO should also continue to develop necessary guidance to facilitate liberalization and improve harmonization, for example, through the template air services agreement (TASA);
- b) that ICAO should develop an inventory of States' practical experience with liberalization in international air transport. In this regard, States which have sought to liberalize air transport arrangements should be encouraged to provide ICAO with relevant information of their experiences (e.g. the rationale for entering into such arrangement, the benefits obtained, drawbacks or difficulties encountered, etc.). In particular, Panel Members with liberalization experience should contribute the relevant information to the Secretary of the Panel as soon as possible, but not later than July 2002; and
- c) that the Secretariat, in its further work for the preparation of documentation for ATConf/5, should take into account the views expressed and suggestions made during the meeting regarding possible analysis and case studies with respect to liberalization.

**Part B. Slot allocation at capacity-constrained airports****Introduction**

32. The Panel considered slot allocation at capacity-constrained airports on the basis of WP/7 and IP/1. This Secretariat documentation demonstrated the steady increase over the past three-year period in fully coordinated airports as well as in independent airport slot coordinators in the IATA Scheduling Conferences. Passenger traffic data suggests that the increasing congestion at airports has a greater impact on international air services than domestic ones. Information was also provided on changes in national regulation, and proposed changes in regional regulation, dealing with the allocation of slots.

33. In WP/7, it was noted that the Conference on the Economics of Airport and Air Navigation Services (ANSCConf 2000) had concluded that ICAO should not become involved in the setting of priorities for slot allocation but should focus on improved procedures which take into account States' obligations under Article 15 of the Convention and relevant bilateral air services agreements. Since the IATA scheduling coordination makes no distinction between whether an airport slot is used for an international or domestic service and is neutral with respect to traffic rights accorded under bilateral air services agreements, the suggestion was made that a consultative group be set up to address cases where traffic rights were denied or impaired. This group, which would be separate from but would not replace the IATA schedule coordination, would provide a means for a host government to take traffic rights into account when significant additional capacity becomes available at a capacity-constrained airport.

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## Discussion

34. In the discussion, there was a concern that the suggested consultative group appeared to duplicate the IATA Airport Coordination Committees. Also, the group's focus on situations where traffic rights for international services were impaired or denied ran the risk that airlines which were unsuccessful in securing slots through the IATA schedule coordination system would subsequently seek to obtain them through government-to-government channels using the relevant bilateral air services agreement.

35. It was pointed out that the IATA system had functioned effectively for many years. Airlines seeking to initiate international air services at capacity-constrained airports may participate in the IATA Schedule Coordination Conferences where they could secure slots from the slots pool for new entrant airlines. This pool is composed of 50 per cent of the slots that become available as a result of increases in capacity and the application of the "use-or-lose" rule.

36. The Panel agreed that it was important for airport slot coordinators to be independent, given their responsibility for the transparent and non-discriminatory allocation of slots at capacity-constrained airports.

37. With regard to possible dispute settlement mechanisms, it was pointed out that the IATA system settles most slot allocation disputes through mediation at several levels; such disputes have rarely had to be referred to the host government or regional regulatory authority. Although bilateral air services agreements were the appropriate mechanism for government-to-government consultations where rights accorded under those agreements cannot be exercised, arbitration of a slot allocation dispute would be particularly impractical as it would not produce the additional capacity necessary to resolve the dispute.

## Conclusions

38. On the basis of the documentation and its discussion, the Panel reached the following conclusions:

- a) any slot allocation process should be fair, non-discriminatory and transparent and should take into account the interests of all stakeholders in conformity with the applicable regulatory regimes and the IATA mechanism. Under the IATA schedule coordination system, incumbent and new entrant airlines both participate in the Schedule Coordination Conferences and new slots becoming available are divided between both types of airlines. There is also a procedure in the IATA coordination process to address situations in which airlines chronically fail to operate the slot time(s) which they have been assigned;
- b) it is important that slot coordinators be independent;
- c) since the IATA system does not take into account obligations under air transport agreements, problems involving air carriers which are unable to exercise their entitled traffic rights because they have not been allocated slots at a capacity-constrained airport may be addressed in the context of discussions on the relevant air services agreement; and
- d) with respect to dispute resolution, the IATA mediation procedure normally resolves slot allocation disputes at one of the several levels at which it operates, and only rarely have disputes been referred to the host government or, in the case of certain European airports, to the European Commission.

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**Part C. Aircraft leasing in international air transport****Introduction**

39. The Panel considered this item on the basis of WP/8 and IP/2. This Secretariat documentation demonstrated the widespread and substantial increase in the use of leased aircraft in international air services within the last few years. There was also an increase both in the number of agreements implementing Article 83 *bis* of the Convention concerning the transfer of certain responsibilities from the State of Registry to the State of the Operator with respect to leased aircraft, and in the number of leasing clauses in bilateral and regional air services agreements. Drawing on the leasing study by the Secretariat (contained in State letter EC 2/82, LE 4/55-99/54 dated 14 May 1999), the recent developments and the bilateral clauses in some air services agreements, a two-part leasing Article was proposed for inclusion in the TASA. The first part covered safety aspects of the use of leased aircraft and the second provided two options for dealing with economic aspects of leasing. The specific text of the proposed Article was as follows:

**“Article X: Lease of aircraft**

1. *The Parties agree that prior to the use of leased aircraft by a designated airline of either Party to perform services under this Agreement, the responsibility for continuing airworthiness and the adequacy of operating and maintenance standards in respect of each such leased aircraft shall be specified in details in the leasing agreement to the satisfaction of the aeronautical authorities of both Parties, taking into account relevant ICAO Standards and Recommended Practices (SARPS) and guidance as well as applicable national [and regional] laws, regulations [and recommendations]. The Parties may conclude an agreement on the transfer of relevant responsibilities under Article 83 bis of the Convention in accordance with relevant ICAO guidance if such an agreement is considered effective and appropriate by both Parties. The Parties further agree to recognize a transfer of responsibilities pursuant to an agreement under Article 83 bis concluded by States not Parties to this Agreement.*

*Option 1*

2. *Subject to paragraph 1 above, the designated airlines of each Party may use:*
  - a) *aircraft leased from entities other than airlines to provide services under this agreement; and*
  - b) *aircraft leased from other airlines, provided all participants in such arrangements hold the appropriate authority and meet the requirements applied to such arrangements.*

*OR*

2. *Subject to paragraph 1 above, the designated airlines of each Party may use leased aircraft to provide services under this agreement provided that:*
  - a) *this would not result in a lessor airline exercising traffic rights it does not have; and*
  - b) *the financial benefit to be obtained by the lessor airline will not depend on the profit or loss of the operation of the designated airline concerned.*

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*Option 2*

3. *The designated airlines of each Party may lease an aircraft from an airline of a State not Party to this Agreement provided:*
- a) *that State accords comparable treatment to the airlines of the Parties on services to, from and via such third country; and*
  - b) *the leasing arrangement complies with paragraphs 1 and 2 of this Article.”*

**Discussion**

40. In the discussion of this topic, it was pointed out that the safety aspects of the proposed leasing Article above required considerable work. It was felt that the scope was unclear, and given the established procedures used by aeronautical authorities in dealing with the safety aspects of leased aircraft in international air services, there was perhaps no need for leasing contracts to be filed with them. Moreover, a specific safety provision for leasing did not appear necessary, given the existence of the general safety Articles in bilateral agreements, the provisions of the Convention and the applicable ICAO standards and recommended practices, as well as the increasing use of agreements implementing Article 83 *bis*.

41. Insofar as the economic aspects of the use of leased aircraft were concerned, subparagraph 2. a) of *Option 1* in the proposed Article which permitted the use of aircraft leased from non-airline entities was regarded as an unnecessary extension of regulation to an area that was not now regulated by States. Subparagraph 2. b) of the second alternative in *Option 1* was also regarded as unnecessary. Finally, it was felt that although reciprocity was considered to be a useful concept to bear in mind in air services agreements, *Option 2* was unlikely to achieve the objective because of the difficulty in obtaining the data necessary to apply it to a situation involving third country airlines.

**Conclusions**

42. On the basis of the documentation and its discussion, the Panel reached the following conclusions:
- a) the safety aspects of the proposed Article on lease of aircraft for the TASA require more work, while recognizing that in some instances safety concerns with leased aircraft may have been addressed using existing ICAO guidance and procedures;
  - b) with respect to the economic aspects of the use of leased aircraft in international air transport, the two proposed options might be based on the following principles:

*Option 1*

The designated airlines of each Party may use aircraft leased from other airlines, provided all participants in such arrangements hold the appropriate authority and meet the requirements applied to such arrangements.

*Option 2*

The designated airlines of each Party may use leased aircraft to provide services under this agreement provided that this would not result in a lessor airline exercising traffic rights it does not have.

**Part D. Liberalization of air cargo service****Introduction**

43. The basic documentation for consideration of this topic were WP/9 and IP/3, presented by the Secretariat. WP/9 provided the background on liberalization of air cargo transport, including regulatory developments at the bilateral and multilateral levels. It identified the distinct features of air cargo transport and the various types of air carriers engaged in the business, as well as some regulatory issues and problems specific to air cargo operations.

44. In exploring possible regulatory arrangements to liberalize international air cargo transport, the Secretariat suggested that liberalization at this stage should focus on all-cargo services, particularly since over 50 per cent of total international air cargo traffic is carried by such operations, and on reducing regulatory constraints in the existing bilateral regulations. Accordingly, it proposed the following as possible measures for liberalizing all-cargo services:

- a) In terms of traffic rights, consideration may be given to grant rights beyond 3rd and 4th Freedoms, because awarding such rights (e.g. 5th to 7th Freedoms) would add flexibility to the planning of air cargo service, particularly in light of the fact that the cargo-traffic flows are often one-way movements.
- b) In the areas of route and operational flexibility, consideration may be given to more liberal provisions allowing, *inter alia*: 1) operation of flights in either or both directions; combination of different flight numbers within one aircraft operation; omission of stops at any point or points; 2) unrestricted frequency, type of aircraft and capacity to be used in conducting the services; 3) conclusion of commercial agreements with other carriers such as blocked space, codesharing and interline arrangements; and 4) combination on the same aircraft of traffic originating in the territories of the Parties concerned as well as from that of the third Parties.
- c) With regard to the ownership and control requirement, the liberalized regulatory arrangement discussed in paragraph 20 may also apply to all-cargo carriers.
- d) The ability to use leased aircraft is very important for air cargo operations because it can enhance the flexibility of the air cargo transport industry by facilitating the development of cargo operation with limited capital. Therefore, leasing should generally be allowed, subject to compliance with relevant safety requirements.
- e) Consideration may be given to more liberal arrangements for other aspects specific to all-cargo operations, including pricing freedoms, intermodal transport, ground handling and warehousing, as well as customs clearance or facilitation.

45. With regard to possible avenues for the introduction of these arrangements, it was suggested that the most practical approach would be to include special cargo provisions in an Annex to the existing bilateral air services agreement. Another alternative would be to develop individual provisions or clauses for selective use by States. A third alternative would be an all-embracing multilateral air cargo agreement.

46. IP/3 contained material produced by the Organisation for Economic Cooperation and Development (OECD) on the liberalization of air cargo transport, including a model bilateral protocol and a multilateral agreement.

## Discussion

47. The Panel noted that air cargo is an important component of air transport and plays an important role in international trade and global economy as well as in national development of many States. States have liberalized air cargo services on a unilateral, bilateral and regional basis. Given the distinct nature of air cargo, there was merit in ICAO developing guidance on liberalized regulatory arrangements for air cargo services separate from those for passenger services, thereby facilitating regulatory reform and catering to the growth and the particular needs of the industry and its users.

48. With respect to the scope of the liberalized arrangements, there was general agreement that it should be limited at the present stage to all-cargo services mainly because: a) they are the most affected by the existing bilateral regulations which are principally designed for passenger services; and b) the inclusion of “non-airline” service providers in such arrangements could add government oversight to a large number of hitherto unregulated services and entities which might not be desirable for the intended liberalization objectives. A view was expressed that such arrangements should not result in undue advantage to all-cargo operators but should be developed in a harmonized manner with combination services.

49. With regard to “doing business” arrangements, the Panel agreed that all airlines with cargo operations should have access, on a non-discriminatory basis, to any common services such as customs clearance and ground handling where such services are liberalized. The need for caution was also expressed for liberalizing warehousing arrangements at the airport area.

## Conclusions

50. On the basis of the documentation and its discussion, the Panel reached the following conclusions:

- a) liberalization of international air cargo transport should, at this stage, focus on possible measures for all-cargo services which may be liberalized separately from passenger services but in harmony with combination services. Where air cargo facilities are liberalized, they should be made available to all the cargo operators. The main target should be arrangements for scheduled international air services since they are the most affected by existing bilateral regulations which are principally designed for passenger services;
- b) consideration should be given to developing regulatory arrangements that would provide for more route and operational flexibility, more traffic rights (particularly “beyond rights”), relaxation of the national ownership requirement, and the use of leased aircraft

as well as other “doing business” arrangements. The measures outlined in paragraph 44 provide a useful basis for further work; and

- c) the most practical approach for the introduction of the liberalized arrangements would be to include the special cargo provisions in an annex to the existing air services agreements. Another alternative remains to develop individual provisions or clauses for selective use by States.

51. Finally, with respect to further work, the Panel noted the Secretariat’s intention to develop, within the context of the TASA, detailed language for the provisions by drawing on relevant clauses from existing liberal bilateral agreements and the draft model agreements produced by the OECD Secretariat, taking into account the views and suggestions of the Panel.

**Agenda Item 2 c): Fair competition and safeguards**

**d): Competition laws/policies**

52. In view of their linkage, the Panel considered the two items together under three topics: a) competition and safeguards; b) sustainability of air carriers and assurance of service; and c) preferential measures.

**Part A. Competition and Safeguards**

**Introduction**

53. The Panel considered the subjects of competition laws and a safeguard mechanism on the basis of WP/10 by the Secretariat. The paper addressed the growing and mutually supportive relationship between liberalization of air transport and application of competition laws, particularly in the cases where States agreed to an open competition system. In a situation of transition to liberalization of international air transport where the States concerned agreed to move towards a less controlled regime of market access in their bilateral arrangements, a continued need was felt for a mutually agreed upon set of participation measures and general description(s) of what would constitute fair and/or unfair competition. The paper identified situations under which further institutional arrangements may be necessary to ensure fair competition in international air transport; and it contained two draft provisions to be considered for inclusion in the TASA, one relating to establishment of a safeguard mechanism and the other to the application of competition laws.

**Discussion**

54. With regard to the need for a safeguard mechanism, a view was expressed that, in the process of progressive liberalization of international air transport where the States concerned agreed to move gradually towards a less controlled regime of market access in their bilateral arrangements by relaxing control on capacity of services in a step-by-step manner, the gradual process itself could serve as a safeguard for fair competition. In other words, a gradual, progressive, orderly and evolutionary approach to liberalization could in itself ensure participation, adaptation and fair competition.

55. The Panel noted that, with regard to the provisions of the draft Article on safeguards, there might be practical difficulties in reaching agreement by all States concerned on a comprehensive list and detailed description of specific actions which, in all situations, would constitute fair and/or unfair competition. For example, certain practices listed in the draft Article on safeguards may, in some instances, not have the effect of being unfair except when applied in combination with other listed practices. However, in specific situations where the States concerned have no competition laws or where a safeguard provision could potentially elaborate on such laws, the use of such a provision remains available. More work is accordingly required to clarify the content of the draft Article on safeguards, as well as its inter-relationship with the draft Article on competition laws so as to avoid any potential conflict between the two provisions.

56. As liberalization proceeds and the number of States with competition laws increases, there might be a case for wider application of general competition law to air transport industry, as with any other industry, in order to ensure fair and equal opportunity to compete. Safeguard mechanisms have a role to play in the interim but, in the long run, air transport cannot remain entirely immune from the application of a broader framework of general competition laws/policies.

57. The application of general competition laws has proven effective in some cases in dealing with matters such as mergers, restrictive practices and abuse of dominant position. In this context, bilateral cooperation agreements entered into by States have proven useful and have helped in achieving more effective enforcement as well as a fair and competitive marketplace. However, more work is needed on the draft Article on competition laws to ensure that the cooperation between competition authorities outlined in the Article does not go beyond the existing cooperative agreements between such authorities. There was also recognition that enforcement cooperation alone would not resolve some significant procedural and substantive differences amongst competition authorities, and that these differences would need to be addressed in the appropriate fora in order to maintain the integrity of competition globally.

58. The Panel noted that the IATA multilateral interline system remains important to global air transport and that continuing immunity is relevant for its core mechanisms. With an increasing number of competition authorities around the world and the need to meet the concerns of multiple jurisdictions, IATA has undertaken a ten-year programme to minimize the number of activities for which immunity from competition laws is requested.

## Conclusions

59. On the basis of the documentation and its discussion, the Panel reached the following conclusions:

- a) liberalization through measures such as the gradual removal of limits on capacity of services or progressive liberalization of routes and traffic rights may, in some instances, be preferred by States as a means to ensure fair competition rather than the application of safeguard measures on an *ex post facto* basis;
- b) problems remain in attempting to identify possible unfair competitive practices, particularly as certain practices listed in the draft Article on safeguards may, in some instances, not have the effect of being unfair except when applied in combination with other listed practices;

- c) the use of the safeguard measures remains available in those cases where the States concerned have no competition laws or where they may elaborate on such laws;
- d) with an increasing number of countries adopting competition laws, there is currently far greater potential for application of general competition law to air transport. Experience indicates that application of general competition law to mergers, restrictive practices and abuse of dominant position involving air transport has been fairly effective;
- e) more work is accordingly required to clarify the content of the draft Article on safeguards and its relationship with the draft Article on competition laws;
- f) more work is required to align the provisions of the draft Article on competition laws with the cooperative arrangements and practices already existing in agreements between competition authorities; and
- g) the IATA multilateral interline system remains important to global air transport. Continuing immunity is relevant for its core mechanisms and adjustments are being made to meet the concerns of competition authorities.

## **Part B. Sustainability of Air Carriers and Assurance of Service**

### **Introduction**

60. The Panel discussed this subject on the basis of WP/11. The paper addressed the issues of sustainability of air carriers and assurance of service, in particular the role of State support to the air transport industry both in a situation of transition to full liberalization of international air transport and as a means of ensuring the sustainability of their own carriers in order to provide the necessary level of assurance of services. It was noted that legitimacy of a State aid or subsidy depends upon its capacity to cause an adverse or distortive effect on trade and competition; and, in the event of failure of market forces to provide suitable solutions with regard to legitimate concerns, States need to ensure that their actions aimed at providing support to their own air transport industry are transparent and do not cause significant adverse impact on competing air carriers.

### **Discussion**

61. In the discussion, it was noted that State aid could play a potentially useful role in the restructuring of government-owned airlines and that, in this context, experience of the European Commission with regulation of State aid could provide a useful case study.

### **Conclusions**

62. On the basis of the documentation and its discussion, the Panel reached the following conclusions:

- a) in a competitive liberalized environment, provision of State support in the form of such financial or other benefits by governments on their own air carriers (but which are not

available to competitors in the same international markets) can potentially distort trade in international air services;

- b) in a situation of transition to full liberalization of international air transport, some States may wish to continue providing assistance and support in order to ensure sustainability of their air transport industry and to address their legitimate concerns relating to assurance of services;
- c) in the event of failure of market forces to provide suitable solutions with regard to legitimate concerns, States that wish to provide support to their own air transport industry should bear in mind the need for transparency, and any significant adverse impact on competing air carriers;
- d) States need to take into account existing ICAO policies in devising measures aimed at correcting a perceived distortive impact within their international markets arising from State support received by foreign airlines from their own respective Governments;
- e) States should also refrain from taking unilateral actions that might lead to retaliatory action by other governments which could result in adversely affecting the ongoing liberalization of international air transport; and
- f) further work may need to be undertaken to gather information on existing mechanisms with regard to assurance of services, including mechanisms for State aid.

## **Part C. Preferential measures**

### **Introduction**

63. WP/12 by the Secretariat provided the basis for consideration of this topic. The paper noted that to ensure the effective and sustained participation of developing countries in international air transport, preferential measures are needed in a situation of transition to liberalization and they form an integral part of the “how to liberalize” process. In view of an overall paucity of documented evidence on the application of non-reciprocal preferential measures granted in favour of developing countries, particularly of practical measures that would assist their air carriers to compete more effectively in the market place, information was sought from Panel Members regarding experience of the actual use of such measures.

### **Discussion**

64. In the discussion, it was felt that not only were more examples of possible preferential measures needed but also more specific information about actual experience of the use of such measures in the bilateral and regional/multilateral agreements among States. It was pointed out that, in view of insufficient attention accorded to this aspect in the past, there was a case for re-emphasizing the use of preferential measures to facilitate liberalization. In this connection, it was suggested that inclusion of an Article on the subject in TASA and updating a list of possible preferential measures (to include, for example, measures to a) deal with the so called Sixth, Seventh and Eighth Freedoms of the Air, and b) to ensure that fares and rates charged by competing air carriers are reasonable) would be conducive to increasing the participation of developing countries in the liberalization process.

65. Another view was expressed that, while preferential measures could prove useful in many cases, it would be difficult to formulate an Article of general applicability on preferential measures for inclusion in TASA. Instead, an annex containing appropriate specific measures may be used on the lines of “Transition Annex” contained in some bilateral agreements.

66. In reference to the proposed regulation by the European Commission concerning protection against subsidization and unfair pricing practices in the supply of airline services from countries not members of the European Community, the Observer from the European Commission clarified that the proposed regulation was intended to remedy possible situations of high level of subsidization that severely distort competition. The instrument was not intended for frequent use but only in exceptional circumstances. In any case, the proposed instrument would not be used to undermine agreements entered into by Member States of the European Community nor the preferential measures agreed to be implemented in specific bilateral air services agreements.

### **Conclusions**

67. On the basis of the documentation and its discussion, the Panel reached the following conclusions:

- a) in order to ensure the effective and sustained participation of developing countries, it is essential that States, in pursuing progressive liberalization of international air transport, give special consideration in their air transport relationships to the interests and needs of the developing countries and, where circumstances warrant, to grant appropriate preferential measures;
- b) although preferential measures, by nature, are likely to be applied on an interim basis during a situation of transition to a liberalized environment in international air transport, their application will help to instil the required level of confidence among various partners to diligently pursue the processes of liberalization. To that extent, preferential measures form an integral part of the “how to liberalize” process;
- c) further work by ICAO on preferential measures should take into account the experience of States, both developed and developing, in the actual application of such measures and the efficacy of such measures to ameliorate the situation of competitive disadvantage faced by air carriers from developing countries and to provide a more balanced operating framework; and
- d) in view of the difficulty in formulating an Article of general applicability on preferential measures for inclusion in the TASA, an annex containing appropriate specific measures may be used on the lines of “Transition Annex” contained in some bilateral agreements.

68. It was agreed that Panel Members will provide information on experience with the application of preferential measures by their countries or by others in their regions, and suggestions for new potential preferential measures, if any, to the Secretary of the Panel as soon as possible, but no later than July 2002.

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**Agenda Item 2 e): Consumer interests****Introduction**

69. The Panel considered the subject of consumer interests relating to air passengers on the basis of WP/13. In this paper, the Secretariat outlined the recent developments and implications of consumer protection measures adopted in the United States, Europe and other regions. In examining possible work with regard to the issue of air passenger interests, the Panel was asked to consider: a) the manner in which regulatory bodies should define the scope and level of service quality provided by airlines; b) the elements that should be dealt with by the voluntary commitments of airlines/imports and the areas that should be complemented by the regulatory measures or be left to the airlines' commercial activities; and c) whether there is a need for multilateral undertakings through ICAO, including the development of a "global code of conduct" for optional use by States for their air carriers and service providers.

**Discussion**

70. In the discussions, the Panel noted the necessity for the clear distinction between voluntary commitments and regulatory measures, bearing in mind that there is a minimum level of service below which no carrier should fall. States tend to rely generally and initially on voluntary commitments undertaken by airlines and airports, which the Panel thought would be a more effective and desirable approach than regulatory measures to address air passenger interests. However, when voluntary commitments are not sufficient, regulatory measures can be used, especially in the areas of denied boarding, disabled passengers and conditions of carriage.

71. Insofar as possible future work was concerned, the Panel believed that it would not be productive for ICAO to develop a global code of conduct in view of the volume of work required and the divergent interests. It was also pointed out that no conflicts have occurred between different regulatory and contractual requirements in various States or regions, because the existing regulatory measures are applied on the country-of-origin basis. The Panel felt that, at present, there was no need to harmonize the existing regimes; it might however be useful if ICAO, in consultation with IATA, were to examine the application and the minimum requirement of contract and conditions of carriage, which would affect the common or compatible industry systems and standards such as multilateral interline system.

**Conclusions**

72. On the basis of the documentation and its discussion, the Panel reached the following conclusions:

- a) it would be non-productive for ICAO to undertake the development of a "global code of conduct" for the protection of consumer interests by attempting to harmonize the existing regimes; and
- b) ICAO should continue to monitor developments regarding voluntary commitments to, and government regulation of, consumer interests and, in consultation with IATA, examine and provide States with information on the content and application of air carrier conditions of carriage internationally.

**Agenda Item 2 f): Product Distribution****Introduction**

73. Given the clear linkage between the subjects of the internet and computer reservation systems (CRSs), the Panel considered them jointly on the basis of WP/14 and WP/15, respectively, which were presented by the Secretariat. These working papers outlined some of the rapid and fundamental changes in airline product distribution and their impact on CRSs. They also highlighted changes in the CRS industry itself and the increasing use of the internet to market air transport through a variety of Web sites. Regulatory developments with respect to CRS at the national and regional levels were also documented. Several instances were provided where the ICAO CRS Code had no applicable provision as a result of industry or regulatory changes and, therefore, the Panel's views were sought as to the need and timing for a review of the ICAO CRS Code as well as the issues which could be addressed in such a review.

**Discussion**

74. The Panel noted that airline marketing was undergoing very rapid and fundamental changes. Consequently, the shape of new models for airline product distribution remained unclear. In this regard, an important issue relates to the extent to which consumers' needs would be met under different scenarios. While the traditional CRSs provide a comprehensive source of neutral information on air services, this is not the case with Web sites on the internet.

75. It was pointed out that a requirement to make publicly available the tariffs and schedules filed by airlines could be effectively met by placing them on the internet.

76. It was also pointed out that the European Commission's approach for its CRS Code recognized that the situation was being driven by competition and by an effort to reduce airline costs. It, therefore, sought to balance the competing interests without stifling innovative changes in the marketing of air transport services on the internet.

77. A view was expressed that, when dealing with this subject, it would be important to bear in mind that CRS is one of the services included in the GATS Annex on Air Transport Services.

**Conclusions**

78. On the basis of the documentation and its discussion, the Panel reached the following conclusions:

- a) if a State decides, for reasons of transparency, that fares and schedules filed with it by airlines should be displayed on the internet, there could be a need to adjust the relevant bilateral agreements in regard of foreign carrier data;
- b) there has been a radical shift from CRS services being provided by a few large companies first to travel agents then to a plethora of Web sites by individual airlines, groups of airlines, and other companies giving consumers direct access to CRSs;

- c) the marketing of international air transport is changing so rapidly that attempting to review the ICAO CRS Code at this time is unlikely to be productive. The scope of application of the Code already potentially applies to the internet, and States can take this up at their discretion according to their particular circumstances; and
- d) ICAO should continue to monitor developments in this area and disseminate relevant information while keeping in mind that CRS is one of the services covered by the GATS Annex on Air Transport Services.

## **Agenda Item 2 g): Dispute resolution**

### **Introduction**

79. The Panel considered the subject of dispute resolution on the basis of WP/16, presented by the Secretariat. The paper indicated that liberalization, globalization and privatization in the air transport sector have brought about increased competition and new market forces that can potentially result in different kinds of disputes. In addition, the growing number of bilateral, especially “open skies” agreements, as well as multilateral agreements have also necessitated new measures in dealing with disputes arising from such arrangements. The focus of WP/16 was to arrive at a mechanism that is adaptable to a liberalized environment; it is equitable, transparent and effective, and can extend its coverage for use in a variety of disputes occurring at the bilateral and multilateral levels.

80. The Secretariat accordingly proposed a new dispute resolution arrangement by building upon ICAO’s work as well as the emerging dispute resolution mechanisms. The mechanism would provide for an intermediate level of mediation between the two stages of consultation and arbitration where either a mediator or a dispute settlement panel may be used to deal with the dispute. This arrangement could be included in the Article on “settlement of disputes” in bilateral and multilateral air services arrangements, with some modifications relating to multi-Party involvement. The specific text of the arrangement was as follows:

#### **“Article X: Dispute settlement**

x. *Any dispute which cannot be resolved by consultations, may at the request of either [any] Party be submitted to a mediator or a dispute settlement panel. Such a mediator or panel may be used for mediation, determination of the substance of the dispute or to recommend a remedy or resolution of the dispute. The Parties shall agree in advance on the terms of reference of the mediator or of the panel, the guiding principles or criteria, the terms of access to the mediator or the panel, including the possibility of interim relief as well as the participation of a third Party impaired by the dispute, bearing in mind the objective and need for a simple, responsive and expeditious process.*

x. *A mediator or the members of a panel may be appointed from a roster of suitably qualified aviation experts maintained by ICAO. The selection of the expert or experts shall be completed within fifteen (15) days of receipt of the request for submission to a mediator or to a panel. If the Parties fail to agree on the selection of expert or experts, the selection may be referred to the President of the Council of ICAO. Any expert used for this mechanism should be adequately qualified in the general subject matter of the dispute.*

x. *A mediation should be completed within sixty (60) days of engagement of the mediator or the panel and any determination including, if applicable, any recommendations, should be rendered within sixty (60) days of engagement of the expert or experts. The Parties may agree in advance that the mediator or the panel may grant interim relief to the complainant, if requested, in which case a determination shall be made initially.*

x. *The Parties shall use their best efforts to implement the decision or determination of the mediator or the panel, unless they agree in advance to be bound by such decision or determination. If the Parties agree in advance to request only a determination of the facts, they shall use those facts for resolution of the dispute.*

x. *The costs of this mechanism shall be estimated upon initiation and apportioned equally, but with the possibility of re-apportionment under the final decision.*

x. *The mechanism is without prejudice to the continuing use of the consultation process or the subsequent use of arbitration, or Termination under Article \_."*

## **Discussion**

81. In the discussions, there was general support that the proposed regulatory arrangement was an acceptable mechanism for settling disputes. It provided States with an option to utilize an intermediate process between consultation and arbitration that could potentially yield quicker results. Some concerns were expressed as to the need to expand the arrangement recommended by ATRP/9 to include disputes beyond unfair practices as well as to cover disputes related to slot allocation at airports. It was, however, pointed out that it may be difficult to restrict the mechanism to unfair practices as it did not seem feasible or useful to define unfair practices or to have them included in air services arrangements. Although slot allocation matters are not generally covered in air services agreements, it was, however, felt that any mechanism to settle air transport disputes should be broad in its concept and application so as to encompass all possible relationships arising in a bilateral or a multilateral dispute. It was also noted that even though the dispute mechanism recommended by ATRP/9 has not been utilized, it could serve as a useful tool for States as and when conflicts arise.

82. Concern was also expressed as to the consideration of third-Party participation in the mechanism. The wording in the proposed Article above relating to the third Party being "impaired by the dispute" raised some questions, and it was suggested that more work should be undertaken to improve the text. In addition, the Panel felt that the use of the term "best efforts" by the Party to implement the decision of the mediation process was a step beyond voluntary mediation and conferred heavy obligations on the Parties. It was pointed out that the phrase "to make the decisions more binding" defeated the purpose of a mediation approach since the objective in a shortened process was to avoid a situation where the Parties felt bound by a decision.

83. Finally, the Panel noted that, without prejudice to the right of the Parties concerned, the proposed dispute resolution procedure should take into consideration the need for access to other dispute mechanisms, including those under general competition laws.

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**Conclusions**

84. On the basis of the documentation and its discussion, the Panel reached the following conclusions:

- a) the proposed regulatory arrangement to be included in the Article on “Dispute Settlement” in the TASA, for the discretionary use of States wishing to move towards liberalization of air services, was considered a useful mechanism to mediate or resolve disputes, but required further refinement to take into account the following elements:
  - i) the arrangement should remain broad in application to cover all types of disputes arising under an air services agreement and would not affect the right of the Parties to have access to other dispute resolution mechanisms, including those under general competition laws;
  - ii) the use of the term “best efforts” should be avoided since it detracts from the mediation aspect of the mechanism; and
  - iii) it was not clear how third-Party participation would be handled in this mechanism;
- b) the arrangement would formalize ICAO’s previous work on dispute resolution in order to provide States with a mediation mechanism for use at their discretion. This arrangement would help settle disputes within the air transport framework and discourage a Party to the dispute from taking unilateral measures that might become an obstacle to liberalization;
- c) the use of the proposed arrangement does not preclude the implementation of the formal arbitration process in an agreement, especially if the mechanism has failed to resolve the dispute to the satisfaction of the Parties involved. It should, however, be expected that the use of formal arbitration would become unnecessary if the Parties to a dispute have chosen to use this arrangement as an effective alternative to resolve time-sensitive issues;
- d) the arrangement would improve on the existing mechanism by settling disputes in a prompt, more cost-effective and efficient manner. Such a mechanism could benefit all States and, in particular, developing countries that face greater economic constraints;
- e) the arrangement would provide an opportunity for the Parties to agree in advance on the scope for the determination of facts and the implementation of the decision to be reached by the mediator or the dispute settlement panel;
- f) in the context of a multilateral TASA, the arrangement would permit the effective participation of Parties concerned in the dispute, provided there is an efficient and timely provision of information; and
- g) transparency may also be enhanced by other means, for example, via the ICAO Web site by making the following available: a) the list of air transport experts, updated periodically, for use as mediators or members of dispute settlement panels; and b) decisions relating to the settlement of disputes under the proposed mechanism, subject to the confidentiality requirements of the Parties concerned.

**Agenda Item 2 h): Transparency****Introduction**

85. The Panel considered this topic on the basis of WP/17, in which the Secretariat addressed the issue of transparency in the international air transport regulatory regime under the Chicago Convention and considered several means by which to improve the implementation of such a principle. Over the years, several Assembly Resolutions have addressed the obligation of States to register with ICAO all arrangements relating to air transport as provided in Articles 81 and 83, including exemptions and specific commitments made under the GATS.

86. WP/17 highlighted some of the problems and implications involving transparency. While over 4000 bilateral air services agreements have reportedly been concluded, only about half such agreements have been registered with ICAO. Although there has been some improved transparency in terms of information being made available, for example through Web sites, this approach is, however, not yet utilized worldwide. The Secretariat proposed a model clause, for the discretionary use by States, to be included in air services agreements and the TASA, addressing two aspects of the issue: a) expediting the registration with ICAO, and b) specifying the responsibility of the registering Party.

**Discussion**

87. In the discussion of the paper, the Secretariat provided clarification as to the obligation of States to register with ICAO in accordance with Articles 81 and 83 of the Convention, all relevant arrangements, including those of a confidential nature, provided that they are not linked to the national security of the States that are Parties to the agreement. The rules for the registration of agreements also take into account that an agreement, once initialled or signed, can be filed with ICAO with the indication that it has not entered into force. Information can be updated subsequently to include the date of entry into force as well as any amendments that may have been carried out in the meantime.

88. The Panel recognized that there was a lack of prompt filing of agreements and a need to more effectively comply with registration of agreements. In particular, the Panel felt that, in view of the ongoing preparations for ATConf/5, there is an urgent need for enhanced transparency with regard to the experiences on liberalization and industry developments occurring worldwide. In order to support the work of ICAO and to avoid additional administrative burden on the Secretariat, it was suggested that States could use a simpler reporting procedure (for example, by electronic means) to provide information to ICAO. Such information could include reporting on recent negotiations and air services agreements as well as the status of liberalization, including sources of information when possible. The reported information should not in any event dispense States from their obligation under the Convention to register their air services agreements with ICAO.

89. The Panel also noted that, as liberalization proceeds, the concept of national interest has evolved to encompass an increasing number of stakeholders. A mutually enhanced relationship between transparency and liberalization has therefore developed thereby enabling stakeholders better access to relevant information. In this respect, Web sites have served as an effective tool in disseminating information.

90. The Panel examined the model clause proposed by the Secretariat and expressed support for it, including a reference to Articles 81 and 83 of the Convention. Such a clause for the optional use of States may serve as a reminder of the registration process and an indication to States as to which Party has the

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responsibility of registering with ICAO, particularly in the case of regional, plurilateral and multilateral agreements.

### **Conclusions**

91. On the basis of the documentation and its discussion, the Panel reached the following conclusions:

- a) there is an urgent need for States to have as much information as possible on experiences of liberalization and related developments in the industry, particularly in view of the ongoing preparations for ATConf/5. In order to support and facilitate the work of ICAO in this regard, a simpler procedure for transmitting information regarding air services agreements would be useful, bearing in mind that it would not replace the obligation of States under the Convention to register agreements with ICAO;
- b) Panel Members should provide, by electronic means to the Secretariat, any publicly available information, including relevant Web sites, on the status of their States' liberalization as well as on recent air services arrangements;
- c) transparency in arrangements assists the process of liberalization by significantly increasing the number of stakeholders; in fact, a mutually enhancing relationship exists between transparency and liberalization; and
- d) the following model clause should be included in the TASA in order to reinforce the obligation for the expeditious registration of air services agreements with ICAO and to avoid confusion as to the responsibility of the registering Party:

#### **“Registration with the International Civil Aviation Organization**

This Agreement and any amendment thereto shall be registered with the International Civil Aviation Organization, in accordance with Articles 81 and 83 of the Convention, by [name of the registering Party]”.

### **AGENDA ITEM 3: REVIEW OF FRAMEWORK AND POTENTIAL ELEMENTS OF A TEMPLATE AIR SERVICES AGREEMENT**

#### **Introduction**

92. The Panel considered the framework and potential elements of a template air services agreement on the basis of ATRP-Memo 02/2 which contained a draft TASA prepared by the Secretariat, WP/18 presented by the Secretariat, WP/28 presented by the Chairman, and IP/4 presented by the Panel Member from the United States.

93. WP/18 noted that the draft TASA was a compilation of provisions including a distillation of the main approaches used by States, from the traditional to the most liberal, in their air services agreements, together with explanatory notes on their application. As drafted, the TASA was intended to

provide all possible options for the discretionary use by States wishing to liberalize, bilaterally or regionally (selectively or in full, verbatim or adapted). The draft TASA included specific model clauses already adopted by ICAO as well as additional clauses developed by the Secretariat on such subjects as air carrier ownership and control, dispute resolution and leasing, which were examined separately under other sub-items of Agenda Item 2. WP/18 also presented two additional clauses covering facilitation (travel document fraud and inadmissible persons) and consultation. The objective was to present to the Conference a revised text following the Panel's consideration of the draft TASA. The Conference would not be expected to endorse the text but to review, in general terms, the concept of a TASA. On the basis of that review, the Council would decide on further development and application of the TASA.

94. Following an initial discussion by the Panel of this item, the Chairman, in WP/28, presented a proposal on further development of the TASA by the Secretariat with the assistance of Panel Members.

95. IP/4 provided the United States model bilateral "open skies" agreement, as well as the text of the Multilateral Agreement on the Liberalization of International Air Transportation between Brunei Darussalam, Chile, New Zealand, Singapore and the United States (i.e. the APEC "Kona" agreement).

### **Discussion**

96. The Panel discussed the concept of the TASA in terms of its objective and approach as well as its structure and content. As a liberalization framework and an aid to States in the liberalization process, the idea of a TASA was considered by the Panel to be a good one since States seem comfortable with, and have confidence in, ICAO guidance. It was felt that ICAO's role and leadership were at stake in this project and that the TASA, appropriately conceived and developed, could be one of the main and most useful outcomes of ATConf/5 as well as a critical ICAO document. However, development of the text and its presentation at ATConf/5 were seen as merely a step in a lengthy process.

97. The Panel considered that the TASA should be a living, comprehensive and practical source document to be modified over time as both new provisions and approaches emerge in air transport relationships. With respect to the presentation of the TASA, the Panel believed that the starting point should be the most liberal provisions available, followed where necessary by less liberal approaches. Furthermore, it was felt that in view of the differing contexts, dynamics and approaches to plurilateral or regional air service agreements, as against the bilateral agreements, a separate TASA should be developed to address the multilateral context. However, efforts should focus initially on refining the bilateral version of the TASA, although a plurilateral/regional version should also be developed and presented at the ATConf/5. It was stressed that both TASAs should reflect the importance of safety and security in a liberalized environment.

98. The Panel reviewed the draft TASA attached to ATRP-Memo 02/2, including the additional provisions on facilitation and consultation in WP/18, and made a number of comments and suggestions as regards structure and content for the Secretariat to take into account in its preparation of a second draft. The revised draft would be sent to Panel Members for their comments before its final preparation for the conference. In the course of discussions, attention was drawn to the importance of including in the explanatory notes appropriate cross-references and identification of any consequences for other parts of the agreement of using particular provisions. Panel Members were requested to follow up on their suggestions made during the review by providing the Secretariat with specific text as well as any comments on the possible consequences of using particular options, and material on their liberalization experiences in air service relationships. The latter could also be provided at ATConf/5 as part of the initial TASA package, with the aim of producing a practical and comprehensive framework for liberalization.

99. As regards the procedure for further development of the TASA concept for the Conference, the Panel accepted the proposals of the Chairman as set out in WP/28.

### Conclusions

100. On the basis of the documentation and its discussion, the Panel reached the following conclusions:

- a) the draft Template Air Services Agreement (TASA) should serve the following two purposes:
    - i) to provide a comprehensive and practical framework for liberalization for States to use at their discretion in their air service relationships, and to specify the most liberal provisions as well as traditional approaches. It would be a ‘living document’ which would be modified over time as new provisions and new approaches emerge in air service relationships; and
    - ii) to serve as useful guidance in the liberalization process. The comprehensive explanatory notes to the provisions included in the TASA would also indicate consequences of adopting particular approaches and provide appropriate cross-references. The TASA presented at ATConf/5 would be complemented by material on States’ experiences with the liberalization process in general as well as with specific approaches;
  - b) the draft TASA should be revised, taking into account the suggestions made at the meeting, including draft texts to be provided subsequently by the Panel Members;
  - c) to assist in the evolution of the TASA and its informative role, Panel Members would provide the Secretariat with information on their experiences with the liberalization process and the use of particular approaches, including the consequences of applying those approaches;
  - d) the Secretariat would prepare a second draft of a TASA, focusing initially on a bilateral context, which would be circulated to Panel Members and Observers for their comments before its development as documentation for ATConf/5. To the extent possible, a separate TASA to address the plurilateral/regional/multilateral context would also be developed for ATConf/5; and
  - e) both draft TASAs will be an initial step in a continuing process and will subsequently be refined and supplemented with additional information.
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**LIST OF PARTICIPANTS**

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**Note:**

Nominees from the following States were unable to attend the meeting: Argentina, Jamaica, Kenya, Lebanon, Poland, South Africa, Tunisia and Venezuela.

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<b>OBSERVERS</b>		<b>COUNTRY / ORGANIZATION</b>
D. Gaupmann	Observer	Austria
T. Tekou	Observer	Cameroon
O. Gorgol	Observer	Czech Republic
M. Elbagoury	Observer	Egypt
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F. Morgan	Observer	European Commission
M. Comber	Observer	International Air Transport
C. Grau	Observer	Association (IATA)
R. Smithies	Observer	

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**LIST OF WORKING AND INFORMATION PAPERS**


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<b>WP and IP No.</b>	<b>Number of pages</b>	<b>Presented by</b>	<b>Title</b>	<b>Agenda Item</b>
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WP/5	6	Secretary	Alternative Regulatory Arrangements for Airline Designation and Authorization	2 a)
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WP/8	5	Secretary	Aircraft Leasing in International Air Transport	2 b)
WP/9	5	Secretary	Liberalization of Air Cargo Service	2 b)
WP/10	7	Secretary	Application of Competition Laws and Safeguard Mechanism	2 c) d)
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WP/23	1	Secretary	Draft Conclusions	2 e)

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WP/24	1	Secretary	Draft Conclusions	2 c) d)
WP/25	1	Secretary	Draft Conclusions	2 f)
WP/26	2	Secretary	Draft Conclusions	2 g)
WP/27	1	Secretary	Draft Conclusions	2 h)
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IP/2	3	Secretary	Recent Developments in Aircraft Leasing	2 b)
IP/3	84	Secretary	Work by the Organisation for Economic Co-operation and Development (OECD) on the Liberalization of Air Cargo Transport	2 b)
IP/4		John H. Kiser	New Bilateral and Regional/Plurilateral Air Services Agreements	2, 3

## PART II — REFERENCE DOCUMENT

Circ 283: *Regulatory Implications of the Allocation of Flight Departure and Arrival Slots at International Airports*

Doc 8632: *ICAO's Policies on Taxation in the Field of International Air Transport*

Doc 9511: *Digest of Bilateral Air Transport Agreements; and Supplements*

Doc 9587: *Policy and Guidance Material on the Regulation of International Air Transport (Second Edition – 1999)*

Doc 9626: *Manual on the Regulation of International Air Transport (1996)*

Doc 9644: *Report of the World Wide Air Transport Conference on International Air Transport Regulation: Present and Future (Montreal, 23 November – 6 December 1994)*

Doc 9790: *Assembly Resolutions in Force (as of 5 October 2001)*

EC 2/82, LE 4/55-99/54 dated 14 May 1999: Study on aircraft leasing and guidelines on the implementation of Article 83 *bis*

EC 3/10-00/7 dated 28 January 2000: Council Resolution on Trade in Services Negotiations

Report of ATRP/9