

CONFERENCE ON THE ECONOMICS OF AIRPORTS AND AIR NAVIGATION SERVICES

(Montreal, 19 - 28 June 2000)

Agenda Item 4: **Determinants of the economic regulation of airports and air navigation services**
Agenda Item 5.2: **Elements for consideration with regard to ICAO policy**

PRIOR CONSULTATION AND HANDLING OF COMPLAINTS

(Presented by the Secretariat)

SUMMARY

This paper addresses prior consultation and means for dealing with complaints regarding charges and related aspects of the provision of airports and air navigation services, including proposals to strengthen ICAO policy and guidance in this area. Proposed action by the Conference is at paragraph 6.1.

1. **Background**

1.1 The rapid growth in the number of airports and, to a lesser extent, air navigation services providers that are independent from direct government management has raised questions about such recourse as their users (primarily but not exclusively air carriers) might have. This is particularly relevant given the inherently monopolistic nature of the provision of airports and air navigation services.

1.2 There is an increasing need to ensure that interests of both the users and providers are balanced, notably as regards charges and particularly where foreign carriers or other users are concerned. This should preferably be achieved through preventive measures including requirements for prior consultation and expeditious local treatment of complaints rather than resort to formal dispute resolution procedures.

2. **Consultation with users**

2.1 Consultations with users regarding charges and airport/air navigation services planning are addressed in the *Statements by the Council to Contracting States on Charges for Airports and Air Navigation Services* (Doc 9082/5)¹ in paragraphs 22 and 23 (airports), and paragraphs 44 to 46 (air navigation

¹Proposed by the Secretariat in ANSCConf-WP/4 to be restructured and retitled *ICAO Policies on Charges for Airports and Air Navigation Services*.

services). It is recommended there: (i) that when significant revision of charges or imposition of new charges are contemplated prior notice should, so far as possible, be given at least two months in advance to the principal users; (ii) that in any such revision of charges users should, so far as possible, be given the opportunity to submit their views and enter into consultation; and (iii) that users be provided with adequate financial information. The purpose is to ensure that the providers give consideration to the views of users and the effects the charges will have on them. In this regard consultation implies no more than discussion between users and providers in an attempt to reach general agreement on any proposed charges; failing such agreement, the airport authorities or air navigation services providers would continue to be free to impose the charges concerned.

2.2 Closely related to consultation concerning charges is the Council recommendation in Doc 9082/5 (paragraphs 23 and 46) addressing the desirability of regular users of airports and/or air navigation services or their representative organizations being consulted as early as practicable when new airports and/or new air navigation services projects are being planned; and the responsibility of users for their part to provide advance planning data to the providers relating to their operations, requirements and other relevant matters.

3. Complaints procedures

3.1 In a number of States private participation or even full private control of airports is taking place (the pace is much slower with regard to air navigation services). In the interest of the parties directly involved, that is the airports (and/or air navigation service providers) and their users, there may well be a need for the functional provision of a neutral party at the local level to preempt and resolve disputes before they enter the international arena (a “first resort” mechanism). Such a function might be included in the terms of reference of an independent body with the much broader responsibilities of overseeing the operations of the autonomous service providers (see ANSCConf-WP/9 which addresses economic regulation) or it might be separately established.

3.2 A first resort mechanism would be flexible and readily applied. The focus would be on conciliation or mediation but it could range to full arbitration or possibly even litigation as described below.

4. Dispute resolution

4.1 *Conciliation and mediation.*- These refer to a means of amicable settlement of a dispute between two or more parties using the impartial assistance of an organization or a prominent expert in the field related to the dispute to assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement. The mediator role is to bring the parties together to discuss and conclude a settlement agreement. Such an agreement after it is signed should be binding for the parties to the dispute.

4.2 *Arbitration.*- Another means of dispute settlement is where the parties agree to refer the disputed issues to arbitration for resolution. Arbitration could be done by a single arbitrator or by an arbitral tribunal usually made up of three arbitrators. The arbitral awards are final and binding on the parties. Arbitration is rarely used in the field of civil aviation because it is a costly and time-consuming process. With regard to user charges only one case of arbitration is known to the Secretariat and in that case, the bilateral air transport agreement between the two States was evoked as it contained a specific clause related to user charges; the arbitration procedures in this particular case took many years and were very costly.

4.3 *Litigation.*- Litigation as a means of dispute settlement is as a rule always available. The right to carry on a legal contest by judicial process is a fundamental right of any person (natural or legal). It differs

from arbitration in that judicial decisions are subject to appeal whereas arbitral awards are final and binding on the parties. Also in the case of arbitration the arbitrators are chosen by the parties themselves, usually from neutral industry experts, and arbitration cases are heard in private with few legal formalities, unlike litigation where legal formalities are strictly observed and the court usually hears the case in public.

4.4 As far as the international arena is concerned, there are special provisions for the settlement of air transport disputes. In the case of airport and similar charges, Article 15 of the *Convention on International Civil Aviation* (Chicago Convention) provides for the ICAO Council, upon representation by an interested Contracting State, to review charges imposed and make recommendations thereon to the State or States concerned.

4.5 The majority of air services agreements include a clause related to user charges reflecting the basic principle in Article 15 that the charges imposed by a Contracting State for the use of airports or air navigation facilities shall not be higher for aircraft of other Contracting States than those paid by its national aircraft engaged in similar international operations; and an undertaking by each party to the agreement to encourage consultations on user charges between the charging authorities and airlines using the services and facilities provided by those authorities. Some air services agreements include in addition a clause reflecting ICAO's cost recovery policy as contained in Doc 9082/5. The dispute resolution mechanism of the air services agreement is generally available for use between the governments concerned.

4.6 The Article 15 mechanism has never been used, perhaps partly due to lack of awareness of its existence. The air services dispute resolution mechanism is also rarely used in the context of airport or air navigation charges. Both mechanisms call for representation at the Contracting State level rather than at the level of the users and providers concerned, which may also have contributed to their limited use and, as illustrated in paragraph 4.2 above, both could be costly and lengthy. Clearly there are potentially significant benefits to be achieved from preemption of the need to resort to such mechanisms, through prior consultation with users and dealing with complaints or resolving disputes at the local level in the first instance.

5. Enhancement of ICAO guidance

5.1 Although existing ICAO policy on consultation with users may have been useful in narrowing the differences between providers and users, it appears that with the rapid growth in financial and organizational autonomy of airports and air navigation services provision, disputes between users and providers regarding charges in particular are likely to increase. Underlying this development is that where governments have ceased to be directly involved in the operation of airports and air navigation services (usually through directorates of civil aviation) and instead vested their operation in autonomous entities separate from the directorates, this has usually been accompanied with the expectation or even instruction for the autonomous body to become financially self sufficient. These circumstances may appear in some instances to have reduced the awareness and possibly the sense of obligation to ensure that, for example, charging practices comply with ICAO policies and principles. Coupled with the monopolistic characteristics of airports and air navigation services, which insulate them to a certain extent from the corrective effects of market forces that govern where competition exists, more situations could arise where users felt the need to seek redress through some means insofar as charges levied on them are concerned.

5.2 In the light of these developments, the Secretariat believes ICAO policy needs to be amplified and strengthened with the main emphasis being placed on guidance aimed at preempting disputes rather than dispute resolution, as follows:

5.2.1 Inclusion in Doc 9082 of a statement to the effect that where an autonomous body or entity is established, whether by a government or private interests, to operate an airport(s) and/or air navigation services, the State should stipulate as a condition for its approval of the new body or entity that it observe all relevant ICAO policies and practices, notably those specified in the *Convention on International Civil Aviation*, its annexes and Doc 9082.

5.2.2 Strengthening of the language in paragraphs 22 and 44 of Doc 9082/5 to remove the words “so far as possible” from the requirement for submission of views and entry into consultation on new or revised charges (see (ii) in para 2.1 above).

5.2.3 Expansion of the language in the same paragraphs to refer to users being provided with “transparent and” adequate financial information (see (iii) in para 2.1 above).

5.3 In addition the Conference is invited to consider whether the concept of a “first resort” mechanism for dealing with complaints as discussed in paragraph 3 above should be included: (i) as a matter of policy in Doc 9082; and (ii) as guidance to be elaborated in the *Airport Economics Manual* (Doc 9562) and the *Air Navigation Services Economics Manual* (Doc 9161) respectively.

6. Action by the Conference

6.1 The Conference is invited to note this paper and:

- a) agree to recommend to the Council changes to Doc 9082 as described in sub-paragraphs 5.2.1, 5.2.2 and 5.2.3 above; and
- b) consider whether the concept of a “first resort” mechanism for dealing with complaints regarding the provision of airports and air navigation services should be included in Doc 9082 and the relevant Manuals as discussed in paragraphs 3 and 5.3 above.

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