



LEGAL COMMITTEE – 36TH SESSION

(Montréal, 30 November – 3 December 2015)

Agenda Item 2 Consideration of the General Work Programme of the Legal Committee

**REVISITING THE INTERNATIONAL AIR SERVICES TRANSIT
AGREEMENT OF 1944 (TRANSIT AGREEMENT)**

(Presented by the Republic of Korea)

1. INTRODUCTION

1.1 Some air law instruments developed under the auspices of IAO have enjoyed almost universal ratification. However, one that has not been so widely accepted is the International Air Services Transit Agreement (the Transit Agreement) (ICAO Doc 7500), which was adopted in Chicago on 7 December 1944. As of October 2015, 130 States are parties to the Transit Agreement, representing about two thirds of ICAO Member States. The Transit Agreement grants the rights of overflight and non-traffic stops for scheduled air services, i.e. the first two freedoms of the air, on a multilateral level.

1.2 ICAO Assembly has regularly adopted resolutions urging States to become parties to the Transit Agreement, and such resolutions have been accepted by unanimous consensus.¹ The 5th Worldwide Air Transport Conference also maintained that States which have not yet become parties to the Transit Agreement should give it urgent consideration.² In the same vein, ICAO sent official letters requesting that States carefully review their positions and take the necessary measures to ratify it.³ Indeed, since 2000, 13 new States have become parties to the Transit Agreement.

1.3 More than seventy years have passed since the Transit Agreement was established. In order to have a fresh look at the Transit Agreement, it is worth examining external changes which have occurred since its adoption: development in the maritime and space laws, national air transport policies, international politics, and environmental concerns.

¹ A38-14 (2013), A37-20 (2010), A36-15(2007).

² ICAO Doc 9819

³ ICAO, *Consideration of Adherence to and Implantation of the IASTA (International Air Services Transit Agreement)* O 1/5-03/77 dated 25 Jul. 2003

2 CHANGES OVER THE PAST SEVENTY YEARS

2.1 Limitations to Sovereignty Over Airspace

2.1.1 The concept of complete and exclusive sovereignty over the airspace above a State's territory has undergone subtle changes due to the developments in maritime law and space law respectively. UN Convention on the Law of the Sea (UNCLOS) of 1982 attempts to strike a balance between the sovereignty of coastal States and the passage rights of other States. Whereas the UNCLOS does not acknowledge innocent overflight above territorial seas, it provides for the right of transit passage over international straits formed by internal waters and territorial seas, as well as the right of archipelagic air routes passage over archipelagic waters and the adjacent territorial seas. Such passage rights imply that complete and exclusive sovereignty over airspace above a State's territory has in effect been modified to the benefit of aviation under certain geographic conditions.

2.1.2 Meanwhile, space law has set vertical limits to a State's sovereignty over airspace. The Outer Space Treaty of 1967 substantially modified the *usque ad coelum* concept, whereby sovereignty extended above airspace to an unlimited height. While the delimitation between airspace and outer space is not clear, States admit that their sovereignty over airspace is no longer infinite and ends where outer space begins. What is more, the Outer Space Treaty ensures free access to all areas of celestial bodies, which led some States to infer that space objects should enjoy passage rights through foreign airspace on their way to and from outer space, although the matter is not clear.

2.2 Air Transport Policies Moving Toward Open Skye

2.2.1 National air transport policies have moved from closed and protective skies toward more open skies over the past seventy years. From the mid-1940s to the mid-1970s, international air transport had been governed by protectively written bilateral air services agreements. The US Airline Deregulation Act of 1978 turned the tide. The first liberalized bilateral air services agreement was reached between the US and the Netherlands in 1978, and subsequently the first open skies agreement between them in 1992. Thereafter, 145 States, representing 76% of the ICAO membership, have concluded more than 400 open skies agreements, which vary in their details and in the extent of openness.⁴

2.2.2 The ICAO Council recently adopted the ICAO long-term vision for international air transport liberalization during its 205th Session. It states that "the Member States of the International Civil Aviation Organization resolve to actively pursue the continuous liberalization of international air transport to the benefit of all stakeholders and the economy at large." The long-term vision testifies that ICAO also supports the liberalization of international air transport, which many member States have promoted for decades.

⁴ ICAO, *Expanding Market Access For International Air Transport*, ICAO Doc ATConf/6-WP/13 (13 December 2012) (Presented by ICAO Secretariat), online: http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp013_en.pdf >.

2.3 **Changes in International Politics**

2.3.1 The Cold War, which fostered a protective attitude toward airspace and discouraged many States from acceding to the Transit Agreement, has come to an end and brought in reduction of East-West tension. While aerial borders of many countries had been mostly closed during the Cold War era, ever more airspace has been made accessible as the globalization proliferate.

2.3.2 For instance, northeast Asian carriers used to take long detours over Alaska when flying to Europe. Similarly, European carriers flying to Asia had to either take the northern route, requiring a fuelling stop in Alaska, or the southern route, with fuelling stops in the Middle East or India. The international political landscape has changed to such an extent that many detouring routes have been replaced by shorter ones, allowing airlines to overfly airspace belong to former Cold War adversary States.

2.4 **Environmental Concerns**

2.4.1 The current emphasis on climate change paves the way for the consideration of the Transit Agreement. Whereas concerns about environmental harms such as noise, emissions and air pollution caused by overflight are likely to induce States to take a protectionist view, barring the access to airspace by foreign airlines is not an effective way to reduce whole emissions from a global standpoint. Restrictions on transitory overflight will result in more greenhouse gas emission, since airplanes will have to take detours and consume more fuels.

2.4.2 The 38th General Assembly noted that “to promote sustainable growth of aviation, a comprehensive approach, consisting of work on ... operational ... measures to reduce emissions is necessary.”⁵ As an important element in the basket of mitigation measures, operational measures to save fuel and reduce emissions have been carefully examined. It is to be noted that the rights of overflight under the Transit Agreement may directly contribute to finding the shortest route and thereby mitigating climate change

3 **CONCLUSION**

3.1 There could be various reasons why the Transit Agreement has failed to achieve such universal acceptance as the Chicago Convention. External changes over the past seventy years as laid out above, though, provide sufficient motives to reconsider the value of the Transit Agreement. The Chicago Convention aims to achieve the sound and economic operation of international air transport services, and the Transit Agreement has the potential to facilitate the economical operation of international scheduled services by allowing airplanes to travel the shortest routes. That ICAO continues to call for the universal adherence to the Transit Agreement deserves further support and acclaim.

— END —

⁵ A38-18 Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection – Climate Change