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**OVERVIEW OF REGULATORY
AND INDUSTRY DEVELOPMENTS
IN INTERNATIONAL AIR TRANSPORT**

(ICAO Secretariat)

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INTRODUCTION

This paper provides a global overview of regulatory and industry trends and developments of international air transport. It is divided into two parts:

- The first part looks at major regulatory movements towards the liberalization of international air transport. It analyses the development in liberalization in sections on bilateral air service agreements, liberalization per region, multilateral agreements and unilateral liberalization processes and policies, as well as connectivity, including air cargo and economic development, competition policy, consumer protection policy and space transport systems.
- The second part reports on the airline industry responses to an ever-changing and more competitive marketplace through sections on airline alliances, mergers and acquisitions and hubs, followed by the status quo on privatization, including public-private partnerships, the airline business models, with a special focus on low cost carriers and ancillary revenues, international air transport developments in the field of unmanned aircraft, e-freight and e-commerce, and developments in space transport.

REGULATORY DEVELOPMENTS

1. LIBERALIZATION

1.1 The main challenge before international civil aviation in the 21st century is the growth in demand for goods and services. Throughout the history of aviation, operations have doubled in volume every fifteen years since the 1970's and ICAO forecasts have already confirmed that flight and passenger volumes will have doubled again by 2030.

1.2 Liberalization has been one of the main drivers of the continuous growth of air traffic and measures enabling expanded market and capital access for air transport have resulted in enhanced connectivity with the corresponding benefits of sustainable economic development at State and regional level and the emergence of strong carriers and airports that are more passenger-friendly. The opening-up of the air transport market has furthermore led to an increased and more efficient utilization of airspace, more competitive fares and more choices for the travelling public.

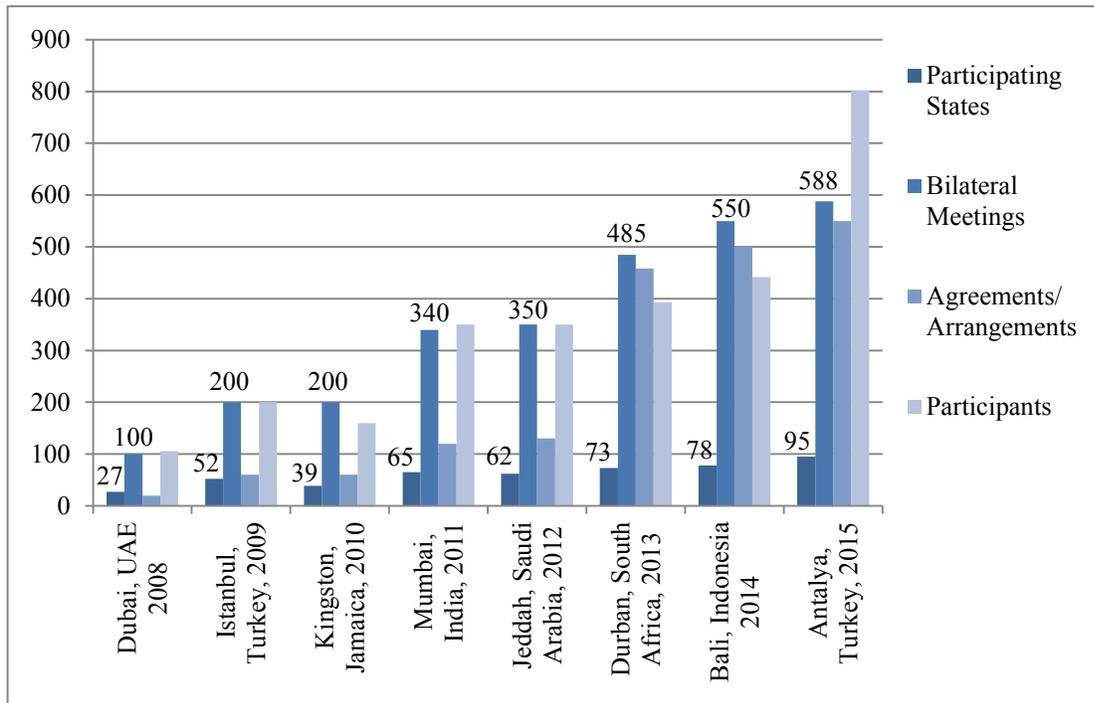
1.3 Liberalizing measures and subsequently enhanced connectivity have an overall positive impact on tourism, employment and the economy at large. Improved connectivity in air cargo enhances the level of productivity, opens up new markets, boosts exports and increases competition and choice in the home market from foreign-based producers. The many States seeking regulatory convergence on liberalization and competition issues on a bilateral and regional level shows the importance of liberalization.

1.4 Bilateral liberalization

1.4.1 Bilateral air services agreements remain the primary vehicles for liberalizing international air transport services for most States. During the past decade, over one thousand bilateral air services agreements (including amendments and/or memoranda of understanding) were reportedly concluded. The vast majority of these agreements and amendments contained some form of liberalized arrangements, such as expanded traffic rights (covering Third, Fourth and in some cases, Fifth Freedom traffic rights),

multiple designation with or without route limitations, free determination of capacity, a double disapproval tariff or free pricing regime and broadened criteria of airline ownership and control.

1.4.2 ICAO continues to provide guidance and assistance to States in the conclusion of bilateral air services agreements using facilities such as the ICAO Air Services Negotiation (ICAN) events. By the end of 2015, a total of 137 States (representing 72% of ICAO membership) have utilized this facility at least once. As from 2008 when the first ICAN event was held, over 2 800 bilateral meetings have been held during these events resulting in the conclusion of over 1 850 bilateral agreements and arrangements.

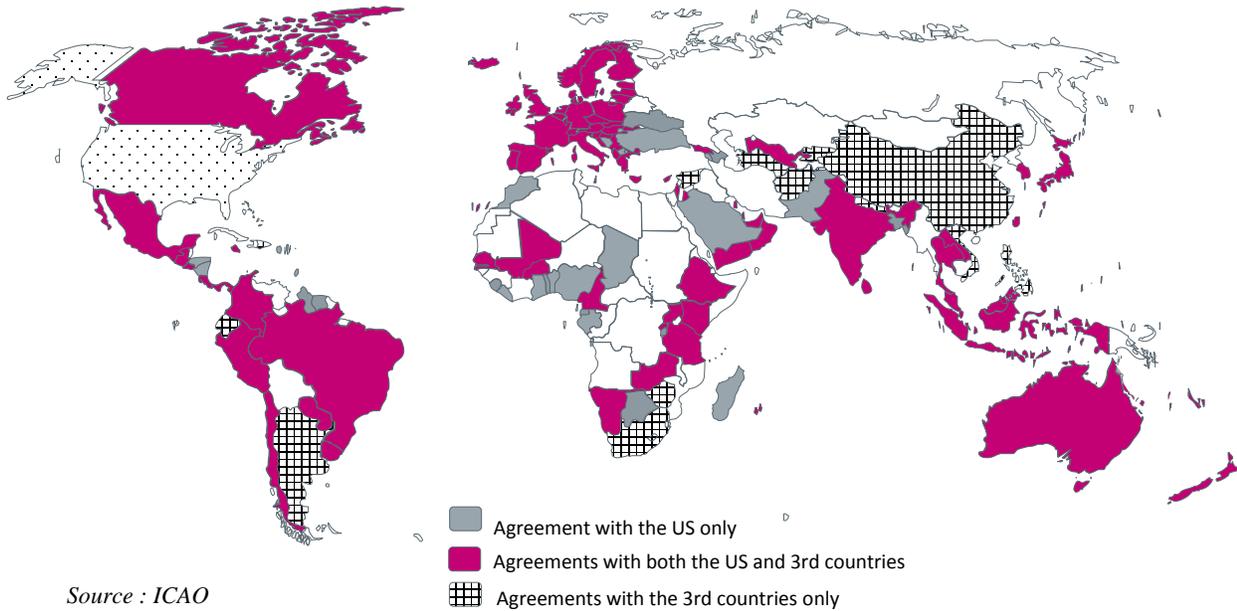


The ICAN 2016 event will be held in Nassau, The Bahamas, from 5 to 9 December 2016.¹

1.4.3 One notable trend is the conclusion of bilateral “open-skies” air services agreements, which provide for full market access without restrictions on Third, Fourth and Fifth Freedom traffic rights, designation, capacity, frequencies, codesharing and tariffs. The first such agreement was concluded in 1992 between the Netherlands and the United States. Since then, an increasing number of Open-skies Agreements (OSAs) have been signed. As of September 2016, over 300 OSAs involving more than 150 States have been concluded. The United States leads with a total of 119 OSAs signed. An increasing number of countries have also signed OSAs with the European Union or any of its members.

¹ Visit <http://www.icao.int/Meetings/ICAN2016/Pages/default.aspx> for more information.

Bilateral Open-skies - 2016



Regional liberalization

1.4.4 The adoption of group approaches to liberalization is used as an alternative means to regulatory change and adjustment for many States, as attested by the conclusion of a substantial number of agreements and arrangements on a regional basis. The regional overviews below show that although the agreements are at different stages of development and implementation, they have the common objective of liberalizing the market amongst the States concerned. More details and a full list of all multilateral and regional agreements is available in Annex A.

Africa

1.4.5 In Africa, the following agreements, arrangements, commitments and/or programmes for liberalization of regional air transport services are currently in operation:

- a) the Yamoussoukro Decision relating to the implementation of the Yamoussoukro Declaration concerning the liberalization of access to air transport markets in Africa (2000); and
- b) the Declaration on the Establishment of a Single African Air Transport Market (SAATM) (2015).

1.4.6 The Yamoussoukro Decision (YD) of 2000 evolved from the Yamoussoukro Declaration of 1988. The YD deals with the liberalization of air transport market access. Its main objectives are to facilitate inter-African connectivity and to develop an inter-African network by removing obstacles, such as restrictions on traffic and limitations on capacity and frequency between city pairs, as well as designation of competent airlines. The YD gives eligible airlines of all African States an aviation space with fair and equal opportunities to compete, based on a common set of harmonized rules and eligibility criteria. Whilst the African States are in the processes of implementing the YD in full, the most notable progress was made at the sub-regional group level, for instance:

- a) the Banjul Accord for an Accelerated Implementation of the Yamoussoukro Declaration (1997) and the Multilateral Air Services Agreement for the Banjul Accord Group (BAG) (2004);
- b) the Agreement on Air Transport of the Economic and Monetary Community of Central Africa (CEMAC) (1999);
- c) the Regulations for the Implementation of Liberalization of Air Transport Services of the Common Market for Eastern and Southern Africa (COMESA) as part of its Air Transport Liberalisation Program (1999); and
- d) the Common Program on Air Transport of the West African Economic and Monetary Union (WAEMU) (2002).

1.4.7 In 2011, the African Union (AU) presented the Agenda 2063, an ambitious plan for the socio-economic development and integration of the continent. The flagship projects to create a Single African Air Transport Market (SAATM) provide a new and strong impetus for the further liberalization of African airspace. During the African Union Summit of 2014, the implementation of the YD was found vital in achieving this goal. In early 2015, at the AU Assembly, the Heads of States and Governments signed the Declaration on the Establishment of a Single African Air Transport Market by 2017 and entrusted the African Union Commission (AUC) with leading and coordinating the implementation thereof. Furthermore, thirteen States have signed a Solemn Commitment for the immediate implementation of the YD towards the establishment of the SAATM and urge other States to join them without delay.

The Americas

1.4.8 In the Americas, the following agreements, arrangements, commitments and/or programmes for liberalization of regional air transport services are currently in operation:

- a) the Decision on Integration of Air Transport of the Andean Community (CAN) (1991);
- b) the Multilateral Air Services Agreement (MASA) of the Caribbean Community (CARICOM) (1998);
- c) the Agreement on Subregional Air Services (Fortaleza Agreement) of the Southern Common Market (MERCOSUR) (1999); and
- d) the Air Transport Agreement of the Association of Caribbean States (ACS) (2008).

1.4.9 The limited number of States in North and Central America, along with the United States' prominent presence in the area, as well as its early bilateral open-skies policy, result in the region's liberalization of air transport being arranged in bilateral agreements between the States concerned. Following the consolidation of small airlines in the sub-region of Central America in the early 90s, other separate but virtually identical open-skies agreements with the United States were concluded in 1997. In 1995, the United States-Canada Aviation Agreement had already entered into force, based mostly on the open-skies model.

1.4.10 In South America and the Caribbean, regional air transport liberalization initiatives have resulted in the adoption of agreements by the Andean Community (CAN), the Caribbean Community

(CARICOM) and the Southern Common Market (MECROSUR), between 1991 and 1999; and the Air Transport Agreement of the Association of Caribbean States (ACS), in 2008. All these initiatives aim to harmonize air transport policies and to liberalize the granting of traffic rights and market access.

Asia and Pacific

1.4.11 In Asia, the following agreements, arrangements, commitments and/or programmes for liberalization of regional air transport services are currently in operation:

- a) the Agreement on the Establishment of Sub-regional Air Transport Cooperation among Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam (CLMV) (1998) and the CLMV Multilateral Agreement on Air Services (2003);
- b) the Memorandum of Understanding on Expansion on Air Linkages between the Indonesia, Malaysia and Thailand-Growth Triangle (IMT-GT) (1995);
- c) the Memorandum of Understanding on Expansion of Air Linkages between Brunei, Indonesia, Malaysia, and Philippines – East ASEAN Growth Area (BIMP-EAGA) (2007);
- d) the Association of Southeast Asian Nations (ASEAN) Multilateral Agreement on Air Services (MAAS) (2009), the ASEAN Multilateral Agreement on the Full Liberalization of Air Freight Services (2009) and the ASEAN Multilateral Agreement on the Full Liberalization of Passenger Air Services (MAFLPAS) (2011); and
- e) the Implementation Framework of the ASEAN Single Aviation Market (ASAM) (2011).

1.4.12 The ASEAN Single Aviation Market is expected to fully liberalize air travel between Member States in the ASEAN region, allowing ASEAN countries and airlines operating in the region to directly benefit from the growth in air travel around the world and also freeing up tourism, trade, investment and service flows between Member States. Since 1 December 2008, restrictions on Third and Fourth Freedoms between capital cities of Member States for air passenger services have been removed, while full liberalization of air freight services in the region took effect from 1 January 2009. On 1 January 2011, full liberalization on Fifth Freedom traffic rights between all capital cities took effect, though some States have yet to accept specific protocols to the agreement.

1.4.13 The achievement of open-skies in the ASEAN region is one of the cornerstones for establishing an ASEAN Single Aviation Market (ASAM). The aim of the ASAM Implementation Framework is to further integrate air services liberalization, enhance aviation safety and security and air traffic management, as well as addressing economic elements such as ownership and control, tariffs, commercial activities, competition policy and consumer protection. In regards to dialogue partner engagement, the Air Transport Agreement between the ASEAN Member States and China was signed in 2010.

1.4.14 Of the remaining big markets in Asia, China and India adopt a gradual and progressive approach in air transport liberalization, whereas Japan and the Republic of Korea apply a more liberal air transport policy with some constraints in regards to airport capacity.

1.4.15 In the Pacific region, members of the Pacific Island Forum (2007) signed the Pacific Island Air Services Agreement (PIASA) to gradually integrate and liberalize air transport services in the region. Divided into three stages, the parties to the agreement first intend to create an Internal Single Aviation Market among themselves. This is to be extended to a Full Single Aviation Market open for accession by

Australia and New Zealand, both of whom have liberalized their air transport markets by concluding and renegotiating bilateral and open-skies agreements. New Zealand is also a party to MALIAT.

Europe and North Atlantic

1.4.16 In Europe, the following agreements, arrangements, commitments and/or programmes for liberalization of regional air transport services are currently in operation:

- a) the Single Aviation Market within the European Union (EU, then European Community); and
- b) the Multilateral Agreement on the Establishment of a European Common Aviation Area (ECAA).

1.4.17 The EU single market for air transport which embraces not only the EU Member States but also members of the European Civil Aviation Conference (ECAC), has fuelled significant growth in air transport within Europe, creating new jobs and delivering more choice and better value for consumers. The EU single market is underpinned by a common regulatory regime designed among other things, to deliver market access and ensure that air carriers can compete on an open, non-discriminatory and fair basis. EU/ECAC Member States continue to explore means to further improving efficiency, competition, and quality within the single market; for example, through their work to develop a Single European Sky.

1.4.18 The EU has pioneered a multilateral approach to liberalization through “horizontal” air transport agreements designed to align Member States’ various bilateral Air Services Agreements (ASAs) with EU law and to extend access to the traffic rights available in those ASAs to all EU air carriers (“EU designation”). An increasing number of bilateral agreements include the EU designation clause, as well as revised provisions concerning the other areas where the EU has an exclusive competence. However, some major partners have shown reluctance to recognize the principle of EU designation.

1.4.19 The EU has also created a “comprehensive” air transport agreement which replaces individual ASAs with a single, all-embracing, liberal agreement between the EU as a whole and the partner country in question (such as the agreements with key aviation partners; for instance, the United States and Canada). Comprehensive agreements with neighboring countries have the long-term objective to establish a wider “common aviation area”. When negotiating comprehensive agreements with partner countries, the EU and its Member States, including other ECAC Member States, seek also regulatory convergence and insist on safeguards for open and fair competition as a condition for agreeing on additional traffic rights.

1.4.20 Negotiations involving a group of States (for example, between one or more States on one hand and a group of States on the other; and between two groups of States) and the involvement of regional economic integration organizations in air service negotiations have introduced a new dimension in international air transport regulation. The EU has been the most active in this respect, for example, by concluding the Euro-Mediterranean Aviation Agreement between the EU, Morocco, Jordan and Israel and the Agreement between the EU and the WAEMU on certain aspects of air services.

Middle East

1.4.21 The Agreement on Liberalization of Air Transport between the Arab States, more commonly known as the Damascus Agreement, was developed through the Arab Civil Aviation Commission (ACAC) in 2004. This Agreement formalizes the Intra-Arab Freedoms of the Air Programme (2000).

1.4.22 The Damascus Agreement provides for unlimited Third, Fourth and Fifth Freedom rights between points in the signatory States. However, since its entry into force in 2007, only eight States have accepted the Agreement, missing out several key States in the area, such as Egypt and Saudi Arabia.

1.5 Multilateral or Plurilateral Liberalization

1.5.1 Most international air services operate under bilateral or regional regimes, but some agreements exist in plurilateral form (i.e. an agreement amongst a few like-minded States but open for others to join).

1.5.2 The Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT), also known as the Kona “Open-skies” Agreement, was concluded in 2000 by five like-minded members of the Asia-Pacific Economic Cooperation (APEC): Brunei, Chile, New Zealand, Singapore and the United States. MALIAT entered into force in the following year, and was subsequently joined by Peru (withdrew in 2005), Samoa, Tonga, Cook Islands and Mongolia (cargo-only).

1.5.3 The International Air Services Transit Agreement (IASTA), which entered into force in 1945, provides for the multilateral exchange of rights of overflight and non-traffic stops for scheduled air services among its Contracting States. The Agreement is a cornerstone of multilateralism in air transport. The number of States which are parties to IASTA is 131 (as of September 2016), but about one-third of ICAO Contracting States, including several with large land masses, remains outside the Agreement.

1.5.4 The General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO) contains an annex on air transport currently covering three so-called “soft” rights, namely aircraft repair and maintenance; selling and marketing of air transport; and computer reservation system (CRS) services. ICAO has maintained an active interest in the evolution of trade in services negotiations, and the reviews conducted by the WTO Council for Trade in Services, with a view to considering the possible further application of the Agreement in the sector, remain of major significance as a precursor to the negotiations on the possible further extension of the GATS coverage to air transport.

1.5.5 The Assembly Resolution A38-14 requested the ICAO Council “to develop and adopt a long-term vision for international air transport liberalization”, including examination of international agreements to liberalize market access, air cargo services, and air carrier ownership and control. The Air Transport Regulatory Panel (ATRP) established a Working Group (WG) to analyze and prepare draft texts. This work is currently still in process and ICAO will give priority to the finalization of these draft texts by the end of 2016 or early 2017 before submitting them to the Air Transport Committee (ATC) and the Council.

1.6 Unilateral Liberalization

1.6.1 In addition to the progress of liberalization at the bilateral, regional and other levels, there has been a shift of regulatory approach taken at the national level, from detailed regulation of airline operations to relying more on market forces. Liberalization policies and measures adopted by States vary widely in terms of their coverage and application. Interesting examples include:

- a) The *Philippines* airline industry was deregulated in 1995 by eliminating certain restrictions on domestic routes and frequencies, but cross-border routes remained operational under bilateral agreements and on the basis of reciprocity. In March 2011, Executive Order 29 authorized the Civil Aeronautics Board (CAB) and the Philippine Air Negotiation and Air Consultation Panels ‘to pursue more aggressively a liberalization policy in international aviation’ and to ‘offer and promote third, fourth, and fifth freedom rights to the country’s

airports other than the Ninoy Aquino International Airport (NAIA) without restriction as to frequency, capacity and type of aircraft, and other arrangements that will serve the national interest as may be determined by the CAB.' This policy will assist 2016 plans to develop the Clark International Airport (CRK), which is only 17,6% utilized, as an alternative airport to decongest air traffic at the Ninoy Aquino International Airport.

- b) **China** has in the past decade pursued a 'proactive, progressive, orderly and safeguarded' approach in opening up its market access for international transport. An experimental step in the gradual liberalization of the Chinese civil aviation industry is the creation of an entirely open aviation policy for the Hainan Province. Hainan is China's second largest island at its south tip and is rich in tourism but depends on resources outside the island. Because air transport was insufficient to satisfy the demands of economic development, the General Administration of Civil Aviation of China (CAAC) opened up Third, Fourth and Fifth Freedom rights in the Hainan Province to all domestic and overseas airlines in 2003, and even granted limited cabotage rights to certain cities in China. The CAAC imposed on a unilateral basis no restrictions on routes and frequencies and did not request reciprocal rights.
- c) **Chile's** commercial air policy aims at ensuring that the country has the best air connectivity, irrespective of the nationality of the air carrier operating these flights. This policy promotes a minimum amount of intervention from the authority in commercial matters and fully opens the skies to all States on a reciprocal basis, including cabotage. As a result of this policy, Chile currently has open-skies agreements with more than 40 States. Another result of this policy has been the positive development of the air transport industry in Chile on an entirely private basis, without State support.
- d) **India** adopted an open-skies policy for air cargo in 1990, even though international civil aviation remained dominated by bilateral agreements specifying not only routes and destinations but also restricting frequency and capacity. In 2005, India signed an open-skies agreement with the United States and other more liberal agreements exist with the South Asian Association for Regional Cooperation (SAARC). In 2016, the Government of India decided to allow open-skies agreements with States beyond a 5 000 km radius of Delhi. It also plans to liberalize the existing rules that require domestic airlines to have a minimum of five years experience and at least 20 aircraft before being eligible to fly international routes, and to allow carriers the flexibility to withdraw capacity on unviable routes.

2. CONNECTIVITY & ECONOMIC DEVELOPMENT

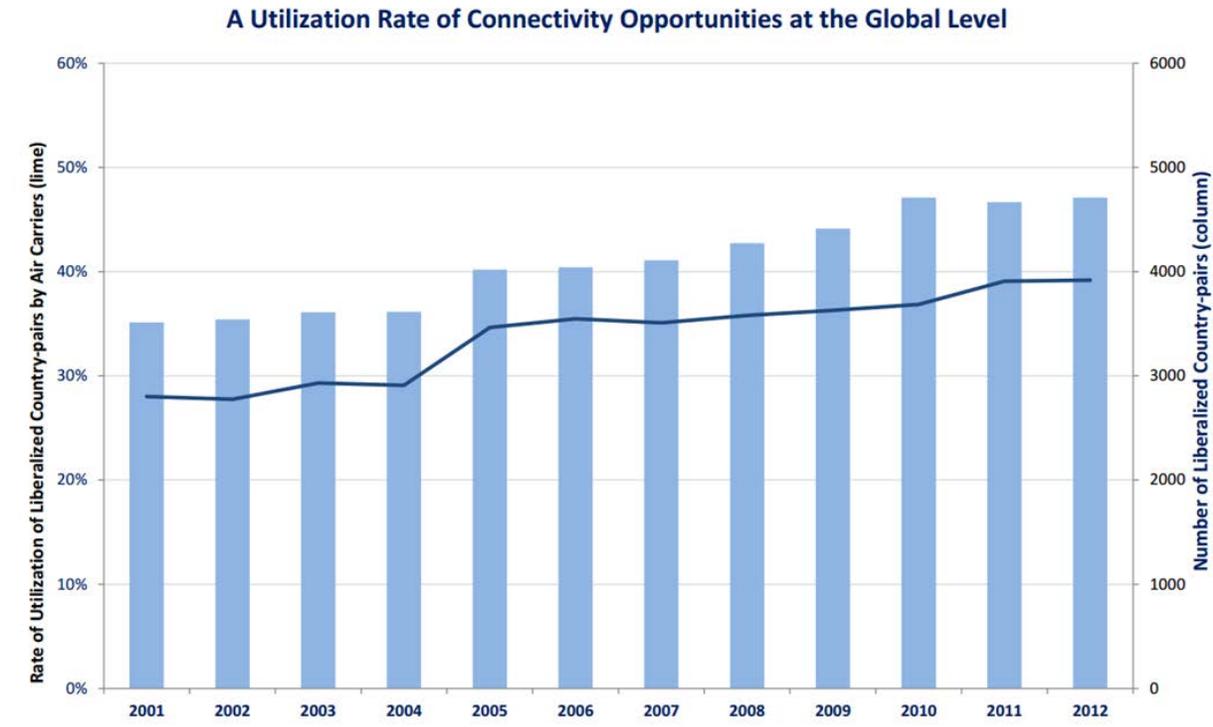
2.1 The continuous opening-up of air transport market through liberalization has an overall positive impact on the growth of air traffic, tourism and the economy at large. A key element to sustainable economic development and growth is the improvement of air transport connectivity. Connectivity is based on the concept that the movement of passengers, mail and cargo involves the minimum of transit points in the shortest possible time, with optimal user satisfaction at the minimum price possible.

2.2 **Passenger Connectivity: Utilization Rate**

2.2.1 In order to directly quantify and measure progress of policy development and effectiveness in terms of connectivity, ICAO developed an indicator – the utilization rate of connectivity opportunities by air carriers – by comparing the number of available markets created by air transport liberalization

(‘available’ connectivity) with the number of those markets having actual air services (‘real’ connectivity).

2.2.2 As shown in the graph below, even though the utilization rate has increased over the years, in 2012 about 60% of available connectivity opportunities do not have direct flights. This means that air carriers are not using the opportunities of liberalized air transport to even half its potential.



2.2.3 In order to optimize utilization, i.e. connectivity, a strong supporting policy framework is required, including measures enabling expanded market, capital access and effective policy implementation to match the commercial and business priorities of air carriers. ICAO has been contributing to improving connectivity in various areas (e.g. charges, market access, consumer protection, etc.) by fostering various initiatives within that framework. This includes, for example, the facilitation of international agreements to liberalize the current restrictions through policy and guidance material.

2.3 Intermodal Connectivity

2.3.1 Intermodal air transportation is the combination of public carriage by aircraft and one or more surface modes of transport of passengers, baggage, cargo and mail. Intermodal connectivity in air transport encompasses all modes of transportation flows and links to, from and within the airport.

2.3.2 Policies to promote aviation and intermodal transport connectivity aim to enhance the mobility of people and businesses travelling or transporting goods through airports by creating efficient and comprehensive transport systems. Close cooperation between the airport, city and government are necessary to link the airport’s infrastructure with the road and railway networks and to enable other initiatives such as package deals to further increase connectivity and user satisfaction.

2.3.3 Increased connectivity combined with ever advancing technological capabilities like high-speed rail can also create competition for airlines. Such alternatives will, however, remain limited to short-haul routes and are at the same time less flexible than the connectivity offered by aviation because of the vast investment required in ‘locked’ infrastructure on the ground.

2.3.4 The importance of good intermodal infrastructure does not only enhance the development and connectivity of airports, but it also supports the sustainable social, economic and environmental development of the region. In this regard, ICAO and the United Nations Settlements Programme (UN-Habitat) work together to support sustainable urban development in Africa through airport infrastructure.

2.4 Air Cargo Connectivity

2.4.1 Although currently only an estimated 0.5 % of the volume of global trade is carried by aircraft, it accounts for 35% of the total value of global trade. By the year 2030, air cargo traffic is expected to have tripled to an estimated 150 million tons of freight handled per year.

2.4.2 Air cargo transport enables nations, regardless of their geographical location, to connect to distant markets and global supply chains in a speedy and reliable manner. One of the largest economic benefits of increased air cargo connectivity lies in its impact on the long-term performance of the wider economy through enhancement of the overall level of productivity. It opens up new markets, boosts exports and at the same time increases competition and choice in the home market from foreign-based producers.

2.4.3 Improved air connectivity is a key element to economic growth and development through air cargo transport. For the full benefits of air cargo connectivity to materialize, intermodal connections and integration, efficient airline operations and seamless airport facilities are essential.

2.4.4 Air cargo thus plays an important role in the global economy. The growth and expansion of air cargo services are beneficial for the sustainable development of air transport and contributes significantly to global trade and economic and social development. However, current regimes are often focused mainly on passenger or combination services, while the distinct features and requirements of air cargo services need to be given due consideration in regard to granting more freedom and operational flexibility. More information on development and liberalization in air cargo can be found in Annex B.



3. COMPETITION POLICY

3.1 As liberalization spreads, globalization increases and the market-economy principle is adopted more widely. The question of how to maintain and promote fair competition in air transport is increasingly becoming an issue. The traditional concepts to ensure fair competition tend to gradually give way to the application of competition laws, particularly in cases where States have agreed to an open competition regime.

3.2 In recent years, the application of competition laws and regulations for the air transport sector has occurred not only with more frequency but has also encompassed an increasing number of issues, ranging from anticompetitive arrangements, abuse of dominant position, collusive behaviors and government support.



3.3 While competition laws exist in many States, as well as within the frameworks of regional bodies, the lack of regulatory convergence in competition regimes hinders the sustainable growth of the industry as it may create certain complexity for airlines operating international air services when they must comply with different rules or practices in different countries. In an effort to increase transparency and promote harmonized regulatory approaches, ICAO has developed a Compendium of Competition Policies and Practices by States.² In addition, a full overview of existing ICAO policy and guidance material on fair competition can be found in Annex C.

3.4 Definition of Competition

3.4.1 In the context of international air transport, competition may be defined as “the existent or potential rivalry between two or more operators, carriers or groups striving for advantage in the same market, including using price and quality of products or services to achieve the desired gains.” One of the fundamental problems is, however, how to distinguish between unfair and normal competitive behaviors. Annex D provides an overview of development in competition in international air transport.

3.4.2 Within the framework of competition and the establishment of international air transport services, the Chicago Convention sets out the general principles of fair and equal opportunity while avoiding discrimination between States. The Resolutions adopted by the 38th Assembly further emphasize that ‘fair competition is an important general principle in the operation of international air services’ and Member States are encouraged ‘to incorporate the basic principles of fair and equal opportunity to compete, non-discrimination, transparency, harmonization, compatibility and cooperation [...] in air service agreements.’

²The Compendium can be found here: <http://www.icao.int/sustainability/Compendium/Pages/default.aspx>

3.5 Competition Provisions in ASA

3.5.1 States have brokered to date thousands of bilateral and multilateral agreements. The ICAO World Air Services Agreements (WASA) on-line database is continuously updated and currently includes 2 743 agreements and arrangements from 197 States, multilateral organizations and past entities, as well as over 1 000 amendments. Of these agreements, 184 are fully liberalized, 383 are dubbed ‘transitional’ and 2 176 are traditional agreements.

3.5.2 While more liberal agreements have become more common, the substantial majority of existing accords remain traditional in format. Liberal agreements typically replace the traditional line of ensuring “fair and equal opportunity ... to operate” with “fair and equal opportunity ... to compete.” Of the registered agreements, 888 have competition clauses referring to the traditional ‘operate’ approach; 244 state that air carriers possess the right to fair and equal opportunities to ‘compete’ in the provision of air services; and 225 contain an additional reference regarding unfair competition practices. More information on competition provisions in air services agreements can be found in Annex E.

3.5.3 Unlike most competition laws which are for general application, aviation-specific rules were also developed by some regional groups. In 2004, the European Commission was granted additional authority in regard to competition in air transport services. Several regional bodies, such as the African Union (AU), the Association of Southeast Asian Nations (ASEAN), the Arab Civil Aviation Commission (ACAC) and the Latin American Civil Aviation Commission (LACAC), have been developing provisions on fair competition using in some cases ICAO’s guidance.

3.6 Regulating Competition

3.6.1 Competition policies and rules apply to four broad categories of activities:

- a) anticompetitive agreements;
- b) abuse of dominant market position;
- c) mergers and acquisitions; and
- d) government support.

3.6.2 *Anticompetitive agreements* are understood as arrangements between operators which prevent, restrict or distort competition. They are generally forbidden. Examples of general prohibition include Article 101 of the Treaty on the Functioning of the European Union (TFEU) and the Sherman Act in the United States. Agreements entered between economic operators are traditionally approached either under the regime of anticompetitive agreements or the control of mergers and acquisitions.

3.6.3 The denomination of *abuse of dominant position* can be broadly grouped into two categories: exclusionary abuses, which aim at driving competitors out of the market; and exploitative abuses, where the dominant company exploits its market power. In international air transport, the most often invoked are the formation of monopolies, the maintenance of predatory pricing regimes and the dumping of capacity.

3.6.4 International *mergers* between carriers from different States are relatively rare except in cases where specific arrangements enable each airline to preserve nationality requirements. Often mergers are prohibited when their effect may ‘substantially lessen competition or tend to create a monopoly’ (Clayton Act, United States) or where it would ‘significantly impede effective competition’ (Regulation 139/2004, EU).

3.6.5 *Government support* or State aid can take many forms. The EU is the only trading bloc in the world to have a regime to control State aid. Article 107 TFEU prohibits ‘any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings.’ The WTO Agreement on Subsidies and Countervailing Measures disciplines the use of subsidies and regulates the actions States can take to counter subsidies.

3.6.6 At the Fifth Worldwide Air Transport Conference (ATConf/5) it was concluded that even in an already liberalized market, States may wish to continue providing some form of assistance to their airlines but that conferral of benefits may distort trade in international air services and may constitute unfair competitive practices, and that States should take transparent and effective measures accompanied by clear criteria and methodology to ensure that aids do not adversely impact on competition in the marketplace.

4. CONSUMER PROTECTION POLICIES

4.1 The protection and improvement of airline passenger rights, along with the continuing liberalization of air transport regulation, have gained greater importance particularly, but not exclusively, in major markets. A significant number of States in recent years have adopted regulatory measures that address some of the issues, such as denied boarding compensation, assistance to passengers in the event of delays and cancellation, price transparency and access for disabled passengers.

4.2 At the industry level, many airlines have adopted voluntary commitments (i.e. non-legally binding self-regulation) to clarify or improve their policies or practices with regard to certain customer services (such as fare offers, ticket refunds, denied boarding, flight delays and cancellations, baggage handling, response to complaints and special passenger needs), often in response to public pressure.

4.3 Consumers benefit from the availability of differentiated product options and can switch to competing airlines if a carrier does not meet their expectations. In principle, consumer comparison shopping should enhance service competition so that the marketplace itself generates better performance. However, in practice, different levels of interest and response to consumer issues have resulted in the emergence of regimes with similar aims and objectives on passenger rights but with differing regulatory, self-regulatory and contractual requirements in various States or regions.

4.4 ICAO has done considerable work in this field, including the development of guidance material in such areas as conditions of carriage, fare guarantee, baggage, tariff disclosure, denied boarding and code sharing. This guidance can be found in Doc 9587, *Policy and Guidance Material on the Economic Regulation of International Air Transport*.

4.5 ICAO Core Principles on Consumer Protection

4.5.1 Passengers can benefit from a competitive air transport sector which offers more choice in fare-service trade-offs and which may encourage carriers to improve their offerings. Passengers, including those with disabilities, can however also benefit from consumer protection regimes. It is important that consumer protection regimes strike an appropriate balance between protection of consumers and industry competitiveness while taking into account the need States have for flexibility due to different social, political and economic characteristics, all without prejudice to the safety and security of aviation.

4.5.2 With a view to introducing some convergence between different consumer protection regimes, ICAO has developed a set of high level non-prescriptive “Core Principles on Consumer Protection.” Recognizing the dynamic nature of the air transport industry, the Core Principles will be a “living

document” which would be refined and improved from time to time in the process of its implementation, based on the experiences gained and feedback received

4.5.3 The Core Principles stipulate that national and regional consumer protection regimes should reflect the principle of proportionality, allow for the consideration of the impact of massive disruptions, and be consistent with the international treaty regimes on air carrier liability (Warsaw Convention, 1929; Montréal Convention, 1999). In addition, efforts should be made to raise awareness of passengers on their rights as air passengers, so as to help them to make informed choices. Passengers should have access to information on their rights and clear guidance on which legal or other protections apply in their specific situation, including the assistance expected, for example in the case of service disruption.

4.5.4 A full list of ‘Core Principles’ that apply before, during and after travel can be found in Annex F. The principles enshrined therein include but are not limited to access to clear and transparent information; to be kept informed regularly throughout the journey; to receive due attention in cases of service disruption; equal access to air transport and efficient complaint handling procedures.

5. SPACE TRANSPORTATION SYSTEMS

5.1 The international legal regime governing air transport is well developed. It deals with issues related to liability, safety, security, navigation capacity and efficiency, air traffic management, environmental protection and economic development, and it is set forth in various treaties, Standards and Recommended Practices, guidance material, procedures, global plans and policies.

5.2 There are five United Nations treaties on outer space but these treaties were drafted at a time when private space transportation and commercial activities in space where the technology for Earth-to-Earth aerospace movements did not yet exist:

- a) The “*Outer Space Treaty of 1967*” on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, adopted by the General Assembly in its Resolution 2222 (XXI), opened for signature on 27 January 1967, entered into force on 10 October 1967.
- b) The “*Rescue Agreement*” on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, adopted by the General Assembly in its Resolution 2345 (XXII), opened for signature on 22 April 1968, entered into force on 3 December 1968.
- c) The “*Liability Convention*” on International Liability for Damage Caused by Space Objects, adopted by the General Assembly in its Resolution 2777 (XXVI), opened for signature on 29 March 1972, entered into force on 1 September 1972.
- d) The “*Registration Convention*” on the Registration of Objects Launched into Outer Space; adopted by the General Assembly in its Resolution 3235 (XXIX), opened for signature on 14 January 1975, entered into force on 15 September 1976.
- e) The “*Moon Agreement*” Governing the Activities of States on the Moon and Other Celestial Bodies, adopted by the General Assembly in its Resolution 34/68, opened for signature on 18 December 1979, entered into force on 11 July 1984.”

5.3 Today, the emergence of space transportation as a commercial activity has drawn attention on the need for regulatory predictability and, in particular, on the necessary clarification of which set of rules

apply to which activity: aviation law or space law, or a combination of these regimes. The industry, regulators and academics have already started brainstorming to explore possible ways of regulating aerospace transportation, mainly under two approaches. The first one is the functionalist approach, which relies on what type of vehicle is being considered – is it an aircraft, a spacecraft or an aerospace vehicle? The second approach is spatialist. It focuses on where the object in question is – is it in the airspace or in the outer space or does it traverse both? However, the international community has not yet agreed on which approach should be applied to the commercial space transportation vehicles. It is unclear where the legal limits of air space expire, and the regime of outer space begins and vice versa.

INDUSTRY DEVELOPMENTS

6. INDUSTRY RESPONSES

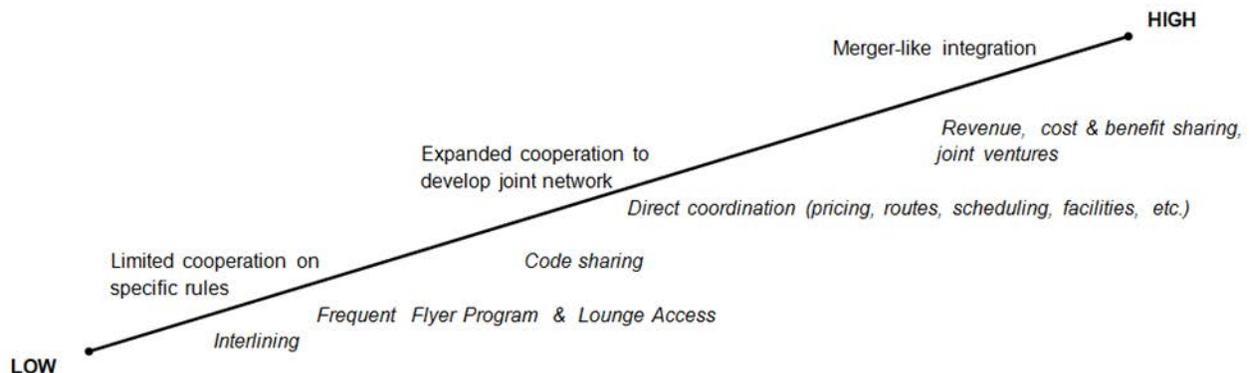
6.1 Along with the trend towards liberalization, the airline industry has continued to undergo major structural transformation to adjust to a dynamic marketplace. Airline strategy and planning have been focusing more on alliances, consolidation and cross-border equity investments to exploit network-based economies of scale and scope. The full-service network model of traditional major airlines has come under scrutiny in an increasingly competitive environment. In addition, e-commerce is now a firmly established facility which has been used extensively by the industry in the marketing and selling of its products. For airports and air navigation services providers, the anticipated demand growth and the new types of traffic generated in large part by liberalization, increase business opportunities but require significant investments in an efficient and timely manner.

7. AIRLINE ALLIANCES

7.1 One of the strong global trends is the formation by airlines of alliances: voluntary unions of airlines held together by various commercial cooperative arrangements. The phenomenon has been evolving since 1997 when Star Alliances was created by five major airlines. The expansion of alliances is a consequence of airlines' response to, inter alia, perceived regulatory constraints (such as bilateral restrictions on market access, ownership and control), a need to reduce their costs and economic incentives to restructure into larger networks as markets become more competitive.

7.2 Forms of cooperation between carriers within alliances vary greatly from limited marketing agreements governing the provision of frequent flyer points to fully integrated cooperative arrangements which involve coordination of prices, capacity, schedules, as well as revenue, cost and profit pooling and sharing. From an antitrust perspective, arrangements with limited cooperation such as interline agreements, pose no concern. The highest degree of cooperation can be observed in metal-neutral joint ventures where carriers engage in revenue, cost and profit sharing; jointly determine prices, capacity and frequency of flights; and cooperate in marketing and sales. It is the latter form of cooperation that has attracted the close scrutiny of antitrust agencies around the world.

Common Types of Airline Alliances



Source : United States Department of Transportation and European Commission, "Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches", November 2010.

7.3 While numerous agreements concern cooperation on a limited scale (for example, code sharing on certain routes), the number of wide-ranging strategic alliances has been on the rise. The most notable are the three largest global alliances – Star Alliance, OneWorld and SkyTeam. These alliances continue to grow with the introduction of new members. Each global alliance group remains unstable with partnership relations becoming intertwined and complex.

Global Alliances

Alliance	Launch Date	Members
Star Alliance (28 member airlines)	May 1997	Air Canada, Lufthansa, SAS, Thai Airways International, and United Airlines (founded the Alliance in May 1997), Air New Zealand (March 1999), All Nippon Airways (October 1999), Austrian Airlines (with Lauda Air and Tyrolean Airways, March 2000), Singapore Airlines (April 2000), Asiana Airlines (March 2003), LOT Polish Airlines (October 2003), Adria Airways (December 2004), Croatia Airlines (December 2004), TAP Portugal (March 2005), Swiss (April 2006), South African Airways (April 2006), Air China (December 2007), Turkish Airlines (April 2008), EgyptAir (July 2008), Brussels Airlines (December 2009), Aegean Airlines (June 2010), Avianca (Jun 2012), Ethiopian Airlines (Dec 2011), Shenzhen Airlines (November 2012), Copa Airlines (June 2012), EVA Air (June 2013), Air India (Jul 2014), Avianca Brazil (July 2015).
Oneworld (14 member airlines)	February 1999	American Airlines, British Airways, Cathay Pacific Airways, Qantas (founded the alliance in February 1999), Iberia (September 1999), Finnair (September 1999), Royal Jordanian (April 2007), Japan Airlines (April 2007), S7 Airlines (November 2010), Air Berlin (March 2012), Malaysian Airlines (February 2013), Qatar Airways (October 2012), SriLankan Airlines (May 2014), LATAM Airlines Group (March 2014).
SkyTeam (20 member airlines)	June 2000	Aeroméxico, Air France, Delta Airlines, Korean Air (founded the alliance in June 2000), CSA Czech Airlines (April 2001), Alitalia (July 2001), KLM Royal Dutch Airlines (September 2004), Aeroflot (April 2006), Air Europa (September 2007), Kenya Airways (September 2007), China Southern Airlines (November 2007), Vietnam Airlines (June 2010), Tarom (June 2010), China Airlines (September 2011), China Eastern Airlines (June 2011), Middle East Airlines (February 2011), Saudia (May 2012), Xiamen Airlines (November 2012), Aerolíneas Argentinas (August 2012), Garuda Indonesia (March 2014).

8. MERGERS AND ACQUISITIONS

8.1 Airlines in many parts of the world have continued the pursuit of the perceived advantages brought by mergers, acquisitions or operational integration under a single holding company. The common motive of this trend is the need to remain competitive. A merger with a competitor may serve to hold and develop the market presence, gain access to new markets, achieve cost savings especially in response to the sharp increase in fuel prices and low-fare competition, and shield themselves from competition through the reduction of capacity on the overlapping routes, thereby increasing the yield.

8.2 With a few notable exceptions, most mergers or acquisitions were achieved within the same State. Until the early 2000's, only a smaller number of attempts at cross-border mergers or acquisitions had been achieved owing to the aero-political, economic and regulatory complexity. Nevertheless, the opportunity for cross-border mergers and acquisitions has been increasing as the economy becomes globalized and many States adopt new policies or rules on foreign investment and control in national airlines, and relax the airline ownership and control conditions in their ASAs.

8.3 Cross-border equity investments have often been carried out as part of a strategy to forge or strengthen alliances in a limited scale, instead of taking a majority stake or pursuing a full-scale merger.

8.4 ATConf/6 recommended that States continue liberalizing air carrier ownership and control and recommended ICAO to work on the development of an international agreement involving all the parties interested (experts, States, aviation stakeholders and interested organizations).

Domestic mergers and acquisitions: major cases since 2000

2000 Acquisition of Canadian Airlines by Air Canada

2001 American Airlines' bankruptcy buyout of Trans World Airlines

2002 Establishment of Alianza Summa by Avianca and Aces (dismantled in 2003)

2002 Establishment of Japan Airlines Corporation by Japan Airlines and Japan Air System

2002-2005 Creation of three Chinese airline groups headed by Air China, China Eastern Airlines, and China Southern Airlines through mergers with other smaller State-owned airlines

2005 Merger of SN Brussels Airlines and Virgin Express (became Brussels Airlines in 2006)

2005 Acquisition of US Airways by America West Airlines (operating as US Airways)

2006 Acquisition of Deutsche BA (dba) by Air Berlin

2007 Merger of Air India and Indian Airlines under National Aviation Company of India

2008 Merger of Delta Airlines and Northwest Airlines (operating as Delta, completed in 2010)

2009 Merger of Vueling Airlines and Clickair (operating under the Vueling name)

2010 Merger of China Eastern Airlines and Shanghai Airlines under common ownership

2010 Merger of Continental Airlines and United Airlines (operating under the United name)

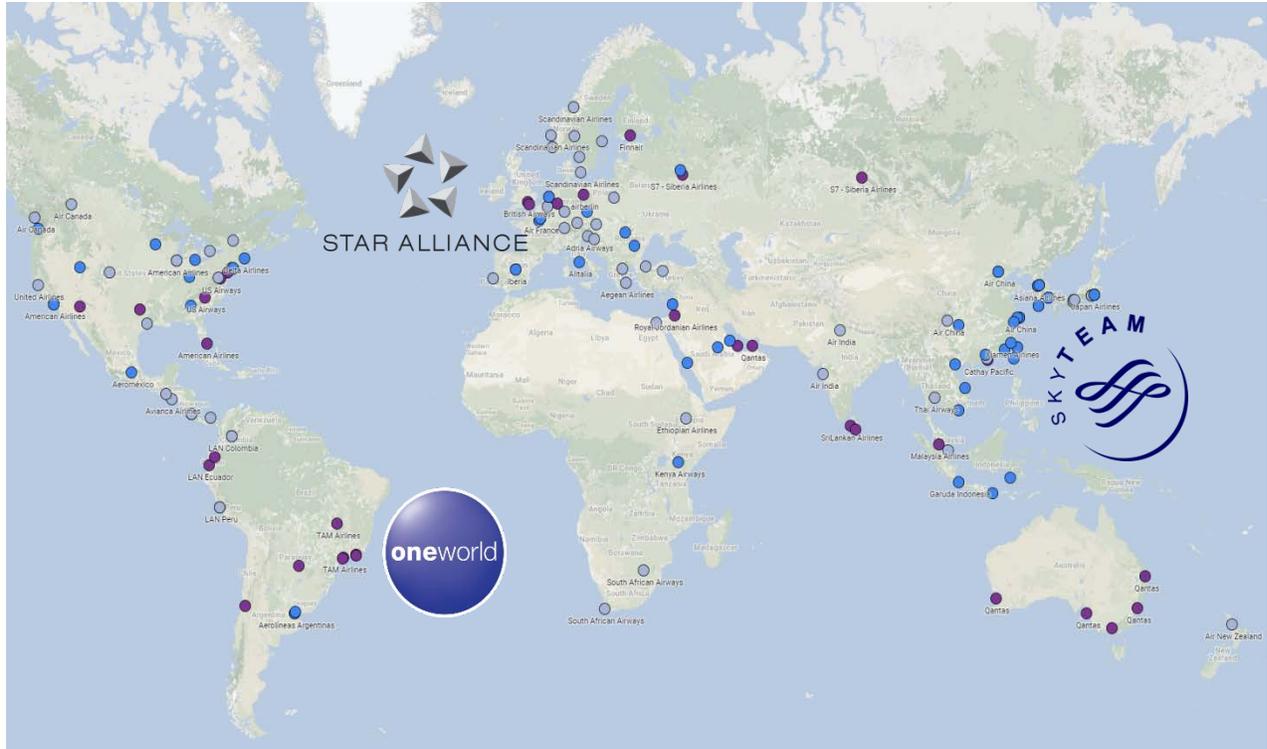
2010	Acquisition of Air Jamaica (Jamaica) by Air Caribbean (Trinidad and Tobago)
2011	Acquisition of Airtran Airway by Southwest Airlines (On 1 March 2012, the company was issued a single operating certificate, technically becoming one airline.)
2011	Merger of Iberia and British Airways which creates the International Airlines Group (IAG) (Both airlines continue to operate under their common brands.)
2011	Merger of Olympic Air and Aegean Airlines
2012	Merger of LAN and TAM which creates the LATAM airlines group
2012	Acquisition of Vueling by International Airlines Group (IAG)
2013- 2015	Merger of US Airways and American Airlines (The American Airlines name remained in the Oneworld Alliance while US Airways left the Star Alliance Group.)
2013	Merger of Airlinair, Brit Air and Regional (France) within Air France group to create HOP!
2013	Acquisition of a 49% stake in Virgin Atlantic by Delta Airlines
2013	Acquisition of 60% stake in Tiger Airways (Singapore) by Virgin Australia (Australia)
2013	Regulatory approval for acquisition of a 49% stake in IAT Airways by Etihad (Abu Dhabi) (IAT airways will be rebranded as Air Serbia.)
2014	Acquisition of Aerounion by Avianca
2015	Acquisition of Aer Lingus by international airlines group (IAG)

Source: ICAO

9. HUBS

9.1 The more common but informal use for the phrase airline hub is an airport that an airline uses as a transfer point to get passengers and freight to their intended destination. It is part of a hub-and-spoke model where travellers moving between airports not served by direct flights change planes en route to their destinations.³ This is as opposed to the point-to-point model (mostly used by LCCs). Hubs began to develop after the airline industry deregulation in 1978.

Hubs by Alliance



Source: Google Map Airline Hubs by Alliances by www.frugalhack.me

9.2 With the deregulation and the agreements between States or groups of States, the concept of the hub has been modified. Secondary hubs with a large share of short-haul traffic are becoming less attractive for the main air carriers. In Europe, for example, certain small hubs are struggling to keep operating, while main ones, which are more focused on the hub-and-spoke model, are facing a strong competition from emerging hubs in other regions. In fact, hubs are a geographical moving concept: the centre of gravity has been steadily moving from the middle of the North Atlantic to the middle of the Mediterranean sea in the last four decades, and is expected to move further to the Gulf region and Asia.

9.3 Hubs are often directly linked to national airlines: Atlanta to Delta Airlines, London to British Airways, Beijing to Air China, Frankfurt to Lufthansa, Dubai to Emirates, are a few of such examples. However, the exception is Delta Airlines who has a hub in Tokyo.

³ The United States Federal Aviation Authority (FAA) ranked hubs the same way airports are ranked, as large, medium, small and non-hubs. Large hub primary airports handle over 1% of the annual passenger boardings. Medium hub primary airports handle 0.25 to 1% of the annual passenger boardings. Small hub primary airports handle 0.05 to 0.25% of the annual passenger boardings. The non-hub primary airports handle less than 0.05% of the annual passenger boardings.

Main Hubs for Airlines by Alliances

ONEWORLD		
Airline	City	Airport
Air Berlin	Berlin	Berlin-Tegel Airport
	Dusseldorf	Dusseldorf Airport
American Airlines	Charlotte	Charlotte Douglas International Airport
	Chicago	O'Hare International Airport
	Dallas	Dallas/Fort Worth International Airport
	Los Angeles	Los Angeles International Airport
	Miami	Miami International Airport
	New York	John F. Kennedy International Airport
		LaGuardia Airport
	Philadelphia	Philadelphia International Airport
	Phoenix	Phoenix Sky Harbor International Airport
Washington DC	Ronald Reagan Washington National Airport	
British Airways	London	Gatwick Airport
		London Heathrow Airport
Cathay Pacific	Hong Kong	Hong Kong International Airport
Finnair	Helsinki	Helsinki-Vantaa Airport
	Brussels	Brussels Airport (Finnair Cargo)
	London	London Heathrow Airport (Finnair Cargo)
Iberia	Madrid	Madrid-Barajas Airport
Japan Airlines	Tokyo	Haneda International Airport
		Narita International Airport
	Osaka	Kansai International Airport
		Osaka International Airport
LATAM Airlines	Santiago	Comodoro Arturo Merino Benítez International Airport
	Buenos Aires	Aeroparque Jorge Newbery
	Bogota	El Dorado International Airport
	Lima	Jorge Chávez International Airport
	Guayaquil	José Joaquín de Olmedo International Airport
Qatar Airways	Doha	Hamad International Airport
Malaysia Airlines	Kuala Lumpur	Kuala Lumpur International Airport
Qantas	Sydney	Sydney Airport
	Brisbane	Brisbane Airport
	Melbourne	Melbourne Airport
	Adelaide	Adelaide Airport
	Dubai	Dubai International Airport
	Perth	Perth Airport
SriLankan Airlines	Colombo	Bandaranaike International Airport
Royal Jordanian Airlines	Amman	Queen Alia International Airport

S7 Airlines	Moscow	Moscow Domodedovo Airport
	Novosibirsk	Novosibirsk Tolmachevo Airport

STAR ALLIANCE		
Airline	City	Airport
Adria Airways	Ljubljana	Ljubljana Jože Pučnik Airport
Aegean Airlines	Athens	Athens International Airport
	Larnaca	Larnaca International Airport
	Thessaloniki	Thessaloniki International Airport
Air Canada	Calgary	Calgary International Airport
	Montréal	Montréal–Pierre Elliott Trudeau International Airport
	Toronto	Toronto Pearson International Airport
	Vancouver	Vancouver International Airport
Air China	Beijing	Beijing Capital International Airport
	Chengdu	Chengdu Shuangliu International Airport
	Shanghai	Shanghai Pudong International Airport
Air India	Delhi	Indira Gandhi International Airport
	Mumbai	Chhatrapati Shivaji International Airport
Air New Zealand	Auckland	Auckland Airport
	Wellington	Wellington International Airport
	Christchurch	Christchurch International Airport
All Nippon Airways	Tokyo	Haneda International Airport
		Narita International Airport
Asiana Airlines	Gimpo	Gimpo International Airport
	Incheon	Incheon International Airport
Austrian Airlines	Vienna	Vienna International Airport
Avianca	Bogota	El Dorado International Airport
	San Salvador	Monseñor Óscar Arnulfo Romero International Airport
	Callao	Jorge Chávez International Airport
Brussels Airlines	Brussels	Brussels Airport
Copa Airlines	Panama	Panama's Tocumen International Airport
Croatia Airlines	Zagreb	Franjo Tuđman Airport
EgyptAir	Cairo	Cairo International Airport
Ethiopian Airlines	Addis Ababa	Bole International Airport
EVA AIR	Taipei	Taiwan Taoyuan International Airport
LOT Polish Airlines	Warsaw	Warsaw Airport
Lufthansa	Frankfurt	Frankfurt Airport
	Munich	Munich Airport
Scandinavian Airlines	Copenhagen	Copenhagen Airport
	Stockholm	Stockholm Arlanda Airport
	Oslo	Oslo Gardermoen Airport
United Airline	Houston	Houston George Bush Intercontinental Airport
	Washington	Washington Dulles International Airport
	Newark	Newark Liberty International Airport
South African Airways	Kempton Park	OR Tambo International Airport
Shenzhen Airlines	Shenzhen	Shenzhen Bao'an International Airport
	Guangzhou	Guangzhou Baiyun International Airport
Swiss International Air	Zurich	Zurich-Kloten Airport

Lines		
Singapore Airlines	Singapore	Singapore Changi Airport
Tap Portugal	Lisbon	Lisbon Humberto Delgado Airport
Turkish Airlines	Ankara	Esenboğa International Airport
	Istanbul	Istanbul Atatürk Airpor
		Sabiha Gökçen International Airport
Thai Airways International	Bangkok	Suvarnabhumi Airport

SKYTEAM		
Airline	City	Airport
Aeroflot	Moscow	Moscow Sheremetyevo Airport
Aerolíneas Argentinas	Buenos Aires	Ministro Pistarini International Airport
		Aeroparque Jorge Newbery
	Cordoba	Cordoba Pajas Blancas Airport
Aeroméxico	Mexico	Mexico City International Airport
Air Europa	Madrid	Madrid-Barajas Airport
Air France	Paris	Paris-Charles de Gaulle Airport
		Paris Orly Airport
	Lyon	Lyon St Exupéry Airport
Alitalia	Rome	Leonardo da Vinci-Fiumicino Airport
China Airlines	Taipei	Taiwan Taoyuan International Airport
China Eastern Airlines	Shanghai	Shanghai Pudong International Airport
	Kunming	Kunming Wujiaaba International Airport
	Xi'an	Xi'an Xianyang Airport
China Southern Airlines	Guangzhou	Guangzhou Baiyun International Airport
	Beijing	Beijing Capital International Airport
Czech Airlines	Prague	Prague Ruzyně Airport
Delta Air Lines	Detroit	Detroit Metropolitan Wayne County Airport
	Georgia	Hartsfield-Jackson Atlanta International Airport
	Hebron	Cincinnati/Northern Kentucky International Airport
	Hennepin	Minneapolis-Saint Paul International Airport
	New York	John F. Kennedy International Airport New York City
	Salt Lake City	Salt Lake City International Airport
	Memphis	Memphis International Airport
	Tokyo	Tokyo Narita International Airport
Garuda Indonesia	Jakarta	Jakarta Soekarno-Hatta International Airport
	Makassar	Makassar -Sultan Hasanuddin International Airport
	Denpasar	Denpasar - Ngurah RAI International Airport
	Medan	Medan - Kuala Namu International Airport
	Balikpapan	Balikpapan Sepinggan International Airport
	Juanda	Juanda International Airport
Kenya Airways	Nairobi	Jomo Kenyatta International Airport
KLM	Amsterdam	Amsterdam Airport Schiphol
Korean Air	Seoul	Incheon International Airport
Middle East Airlines	Beirut	Rafic Hariri International Airport

Saudia	Jeddah	King Abdulaziz International Airport
	Dammam	King Fahd International Airport
	Riyadh	King Khalid International Airport
Tarom	Bucharest	Henri Coanda International Airport
Vietnam Airlines	Hanoi	Noi Bai International Airport
	Ho Chi Minh City	Tan Son Nhat International Airport
Xiamen Air	Xiamen	Xiamen Gaoqi International Airport
	Fuzhou	Fuzhou Changle International Airport

Source: Official sites of Oneworld, Star Alliance, and Skyteam

10. PRIVATIZATION

10.1 Airline Privatization

10.1.1 Privatization of government-owned airlines has been one of the pre-eminent transformations in air transport. The motives for privatization have been highly diverse, ranging from purely economic considerations such as improving operating efficiency and competitiveness, to a more pragmatic desire to reduce the heavy financial burden for governments in financing capital investment for new equipment. Whatever the reasons, the privatization of government-owned airlines has accompanied a more commercially oriented outlook within a liberalized competitive environment. It should be noted that achievement of privatization has not been easy. Many of the initial privatization plans had to be deferred or postponed because of the complexities encountered in the process or the economic condition of the airlines concerned, or local circumstances, although in most such cases the intention to privatize remains.

10.1.2 The uncertainties surrounding the privatization process are also illustrated by a small counter-trend of renewal of government ownership, usually as a temporary measure, as a national interest response to the potential demise of a privatized airline. Aerolíneas Argentinas, Air Jamaica, Air Mauritius, Air Tanzania, BWIA West Indies Airways, LIAT and Pluna Líneas Aéreas Uruguayas are examples of privatized airlines in which the governments raised their shareholdings since 2004. In April 2013, the Government of Poland passed a regulation that paves the way for the privatization of LOT Polish Airlines. Kuwait Airways, Saudi Airlines and TAP are going to be privatized in the near future.

10.2 Airport Privatization and Public – Private Partnership (PPP)

10.2.1 Changes in the ownership and management structure of airports developed slowly until the late 1970's and were primarily limited to the establishment of autonomous authorities owned by governments. Private participation and privatization of airports began in the 1980's, gained momentum in the late 1990's and early 2000's, and slowed down in the late 2000's.

10.2.2 Privatization is the term most commonly used in connection with the changes taking place in ownership and management in the provision of airports. Strictly, privatization denotes either full ownership or majority ownership of facilities and services⁴. It denotes that the private sector has to varying degrees, a role in the ownership and/or management in the provision of airport services, but majority ownership remains with the government. Private participation ranges from fully public (low private participation) to fully private (high participation) management and ownership, as illustrated in the graph below.

⁴ Doc 9980 – Manual on Privatization in the Provision of Airports and Air Navigation Services

Extent of private participation in airport management and ownership



Source: Kuyucak and Vasigh, 2011

10.2.3 In practice, private participation has most often taken four forms: (i) management contract; (ii) lease (which is sometimes called concession); (iii) transfer of minority ownership; and (iv) public-private partnership (PPP). A PPP is an ownership and management structure in which the private and public sectors both participate. In a PPP, the private sector supplies infrastructure assets and services that traditionally have been provided by the government. This technique can offer several benefits. First, since the private sector assumes the financing of the infrastructure investment, it does not immediately add to the government borrowing and debt, and may be a source of government revenue. Second, the private sector management and capacity to innovate may lead to better quality and lower cost of services.

10.2.4 PPP arrangements have generated increasing attention in recent years. They are understandably attractive at times when fiscal spending is constrained. However, it should be noted that they can be complicated to design and implement; and balancing public and private interests can prove challenging. In order for PPPs to deliver expected benefits, a number of important conditions must be met:

- a) clear definition of the business needs and objectives of a project;
- b) ability of the project to attract investors, with a robust cost-benefit analysis;
- c) alignment of the project with government objectives;
- d) favourable legislative and regulatory framework;
- e) efficient risk allocation between public and private sectors;
- f) transparent, fair and non-discriminatory procurement process;
- g) good communication strategy involving public and private stakeholders;
- h) commitment of government throughout the project life cycle; and
- i) realistic expectations of timing.

10.2.5 Finally, when considering the commercialization or privatization of airports, States should bear in mind that they are ultimately responsible for safety, security and economic oversight of these entities⁵. Privatization should not in any way diminish the State's requirement to fulfill its international obligations, notably those contained in the Chicago Convention, its Annexes and in air services agreements, and to observe ICAO's policies on charges⁶.

10.2.6 From the perspective of pricing regulation, in almost all the States where private participation or privatization in the provision of airport services has taken place, regulatory authorities have been

⁵ Doc 9082 – ICAO's Policies on Charges for Airports and Air Navigation Services, Section I, para. 6, refers

⁶ Doc 9562 – Airport Economics Manual, para. 2.27, refers

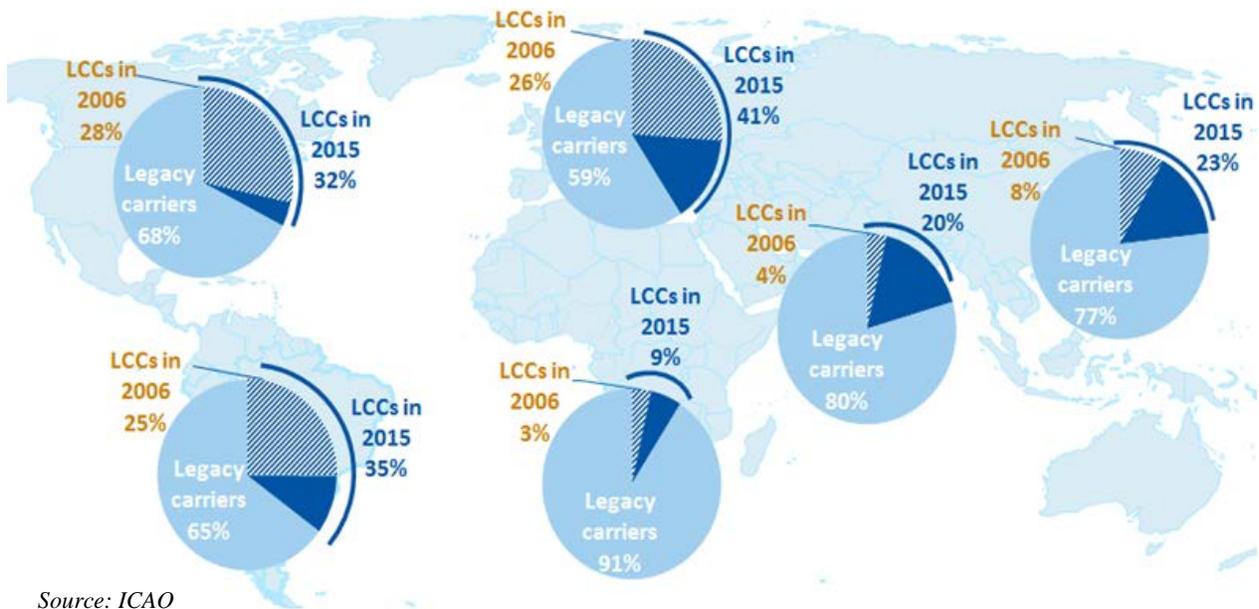
established to ensure that the dominant position is not abused, especially with respect to aeronautical charges.

11. AIRLINE BUSINESS MODELS

11.1 The success of low-cost carriers (LCCs) has proven a challenge for the full-service network model of traditional major airlines, as well as the holiday package business of charter airlines. The common features of the business model of LCCs are, with some variations: point-to-point network (focusing on regional routes), high frequencies, simple low fare structures, high-density single class with no seat assignment, simple in-flight services, staffing flexibility and minimal overheads, and intensive use of electronic commerce (e-commerce) for marketing and distribution. To sustain low-cost structures, these airlines usually operate a single aircraft type with higher daily aircraft utilization. They often use less congested secondary airports to ensure short turnarounds and high punctuality, thus saving in airport related costs. It is the low operating costs that enable LCCs to allocate a large portion of their seats at low fares.

11.2 The low-cost formula has been adopted by many new entrants in the United States following domestic deregulation in 1978. Although only a few of the earlier entrants survived, successful LCCs have established significant sustainable cost advantages and have grown rapidly at the national level. The LCC phenomenon has also been increasingly international and has spread quickly with some successful LCCs investing in airlines in neighboring countries.

LCC Capacity Share by Region

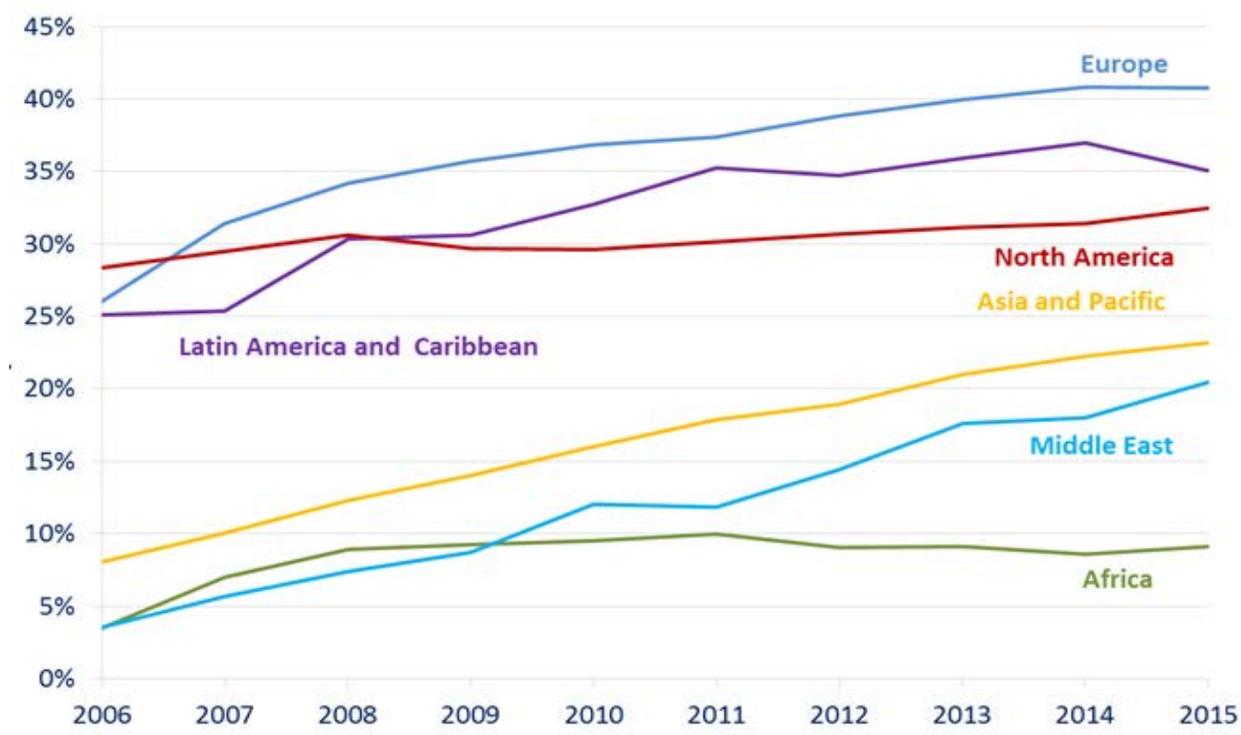


11.3 In 2015, Europe had the highest LCC capacity share among all regions, measured by the number of available seats. During this time, 41% of the available seats within Europe were offered by LCCs. Latin America and the Caribbean had the second highest LCC share, with 35%, followed by North America with 32%, Asia and Pacific with 23%, the Middle East with 20% and Africa with only 9%.

11.4 In terms of LCC market share growth, the Middle East had the largest increase from 4% in 2006 to 20% in 2015 (+16 percentage points). Both Europe and Asia/Pacific had the second largest increase of

+15 percentage points, followed by Latin America and the Caribbean with a growth of +10 percentage points, and Africa increasing by +6 percentage points. North America had the lowest increase from 28% in 2006 to 32% in 2015 (+4 percentage points). The world average Intra-Regional LCC capacity share has grown from 21% in 2006 to 30% in 2015.

Percentage of Available Seats Offered by LCCs



Source: ICAO

11.5 The LCC business model offers low seat prices and charges passengers extra for most supplementary non-ticket services, such as baggage fees and sale of onboard food and services. The importance of these ancillary revenues has further increased and, for many airlines, they account for a huge part of their total revenues. Once largely limited to LCC, ancillary revenue has now become a financial necessity for airlines all over the globe. Airlines continue to find innovative ways to generate more income through additional services. A recent example concerns online upgrade auctions that allow economy class travellers to bid for possible unfilled higher class seats, filling up seats that would otherwise be unused without taking away earnings from existing full-paying business travellers.

11.6 Facing growing costs and competitive pressures, major network airlines and charter airlines have been forced to change their business priorities towards redesigning their business concepts and developing alternative models for their operations. One of the models chosen by the major network airlines is to set up separate organizations or subsidiaries to handle operations on short-haul routes to be able to compete with LCCs and to avoid the potential threat of new entrants. This low-cost “airline within an airline” strategy, despite limited success in earlier attempts, tries to combine key ingredients of the LCC approach with the reputation and quality of their own brand. Again, an “airline within an airline” is a formula that is developed mainly for domestic services but is also extended to international services.

Low-Cost “Airline within an Airline”

Network Airline (parent)	LCCs (subsidiary)	Year
Air Canada	Rouge	2013
Air France-KLM	Transavia.com	2005
	Hop!	2013
Air India	Air India Express	2004
Bmi British Midland	Bmibaby	2002
British Airways	Openskies	2008
Comair	Kulula.com	2001
Garuda Indonesia	Citilink	2001
Iberia	Vueling Airlines*	2004
Korean Air	Jin Air	2008
Mexicana	Click Mexicana	2005
Philippine Airlines	PAL Express	2008
Qantas Airways	Jetstar	2003
	Valuair*	2003
	Jetstar Asia*	2004
	Jetstar Pacific*	2008
Royal Air Maroc	Atlas Blue	2004
Singapore Airlines	Tiger Airways*	2003
South African Airways	Mango	2006
Thai Airways	Nok Air*	2004
Vietnam Airlines	Jetstar Pacific	2009

Source: ICAO

* denotes minority shareholding

12. INTERNATIONAL AIR CARGO TRANSPORT

12.1 Unmanned Aircraft

12.1.1 Unmanned Aircraft are already common in many parts of the world, performing valuable tasks, such as parcel delivery, monitoring crops, inspecting bridges and surveying damage resulting from natural disasters. Cargo drones present themselves as a preferred solution for some countries to serve remote communities and to transport high value cargo at a low cost. Delivering and receiving goods in this way could offer a crucial all-year-round lifeline to business.

12.1.2 The humanitarian aid to remote areas make the development of unmanned aircraft technology most compelling in developing countries. The delivery of urgently needed goods, such as medicine, is ahead of all applications of drones and enables unmanned aircraft to play a vital role during emergencies caused by natural disasters, famines and wars. Air drops by drones could be among the first responses of aid agencies to stem humanitarian crises.

12.1.3 However, the highest possible level of safety must be achieved and maintained. In the case of cargo drones operations, this means ensuring the safety of any other airspace user as well as the safety of persons and property on the ground. Therefore, the demand for small cargo drones flying visual line-of-sight (VLOS) for parcel delivery will continue to be imposed in many countries, while for bigger sizes, the significant restrictions will continue to grow. For example, the United States Federal Aviation Administration (FAA) only allows commercial drones to fly where the drone and its payload weigh less than 55 pounds, if it stays within unaided sight of the pilot and each drone has its own pilot. Commercial drones can only fly during daylight, from 30 minutes before sunrise until 30 minutes after sunset.

Major Cargo Drones Operators

Operator (Nation)	Practices
Amazon (US)	Amazon announced its drone delivery program “Amazon Prime Air” in December 2013. Amazon has developed drones that weigh less than 55 pounds and can carry up to a 5-pound payload.
Flirtey (Australia)	This Australian startup used a drone to deliver medical supplies in rural Virginia in 2015, which led to the drone being displayed at the Smithsonian’s National Air and Space Museum. In 2016, it started to work with 7-Eleven (convenience store chain) to deliver customers’ orders.
Google (US)	The parent company of Google, Alphabet, has gained permission for its “X” research division to test drones weighing less than 55 pounds in designated areas as part of the company’s Project Wing. Project Wing carries out experiments with drones at six approved test ranges, with a view to develop unmanned aircraft and the technology needed to allow them to fly autonomously.
JD.com (China)	JD.com Inc. started to use drones to deliver online purchases to rural shoppers in Jiangsu province in 2016, kicking off the e-commerce giant’s trail operation of using unmanned aircraft for “last mile” distribution in China. The drones can fly up to 10 kilometres to deliver goods from a local distribution centre in Suqian city (Jiangsu province) to a nearby village.
Matternet (US)	A joint project between Swiss WorldCargo and postal logistics firm Swiss Post, tests the automated cargo delivery system for small express packages.
SF Express (China)	Chinese leading integrator invested 5 million in developing big cargo drones which will be capable of carrying 10 to 30 tons of cargo, in total.
Workhorse (US)	United States firm Workhorse has created a system called “HorseFly”. The drone can travel at 50 miles per hour, carry a 10-pound package and fly for 30 minutes. Workhorse’s idea is to address the last mile of delivery (places trucks or vans can’t reach in rural areas.)

12.2 E-freight

12.2.1 Air cargo still operates based on paper processes to facilitate the domestic and international movement of freight. Global customers are now calling for a substantial cut in door-to-door delivery times (from an industry supply chain average of 10 days to six days). This way, air cargo seeks to win back business lost to other modes. Leading parties include ICAO, the International Air Transport Association (IATA), the International Federation of Freight Forwarders Associations (FIATA) and the International Air Cargo Association (TIACA), who continue to set the agenda and encourage take-up of

e-freight to speed up door-to-door delivery times, to reduce the cost of airfreight and to enhance its competitiveness.

12.2.2 The ratification of the Montreal Convention of 1999 established a modern, fair and effective regime for air cargo transport. However, only slightly more than half of ICAO Member States have completed the important step of adhering to the Montreal Convention.

12.2.3 The establishment of the Global Air Cargo Advisory Group (GACAG), founded by Global Shippers Forum (GSF), IATA, FIATA and TIACA, continues to be a useful air cargo coalition whose mission is to transform the process of transporting cargo by air into a paperless one. In 2012, the GACAG developed a Roadmap to 100% e-freight which defines the approach, structure and targets for the e-freight program.

12.2.4 The dramatic growth of e-freight penetration has been observed industrywide. Although progress has been slow, through close cooperation across the entire supply chain, the industry achieved 22% e-AWB (air waybill) penetration in 2014. Inspiring examples include:

- a) Qatar Airways designed and implemented its digital cargo management system (CROAMIS) to manage its end-to-end airline cargo business processes. CROAMIS is a single system serving the airline's entire global cargo network, which facilitates service improvements such as track-and-trace, e-booking and e-freight functions via the Qatar Airways Cargo website. Up to December 2014, Qatar Airways achieved a 34% penetration of e-AWB in its global network.
- b) In June 2014, China Cargo Airlines started an e-AWB pilot at Shanghai Pudong Airport. The airport recorded an eight percent increase in its cargo output in 2014 and a leader among the Chinese airports in terms of processed e-AWBs. In 2015, Shanghai Customs, Shanghai Entry-Exit Inspection and Quarantine Bureau, Shanghai Airport Authority, China Eastern Airlines and Shanghai E-port signed a letter of initiative with IATA to jointly promote e-freight in Shanghai.

12.3 **E-commerce**

12.3.1 E-commerce is increasingly influencing the way enterprises interact among themselves, with consumers and governments. It can be a driver of economic growth, including trade and job creation, even in low-income countries. E-commerce can also be a catalyst for the transition of trade transactions involving micro, small and medium-sized enterprises (MSMEs) from the informal to the formal sector and from domestic to international markets.

12.3.2 The booming of e-commerce poses a chance to improve the load factors of air cargo carriers. Currently, 12% of international trade in merchandise is done through e-commerce. More importantly, 70% of international postal transportation tracked by the Universal Postal Union (UPU) is through air and a double-digit annual growth in the e-commerce market is observed.

12.3.3 Governments in developing countries are becoming increasingly interested in advancing e-commerce in their economies. These countries endeavor to grasp this rapidly growing opportunity, which was worth around \$22.1 trillion in 2015, up 38% from 2013, or risk falling quickly behind. In 2016, the United Nations Conference on Trade and Development (UNCTAD) launched the "eTrade for All" initiatives, seeking to bring together donor countries, international organizations and the private sector to accelerate the progression of e-commerce in the developing world. ICAO is cooperating with

key partners to contribute to its development, including the participation in the “eTrade for All” initiatives and attended WCO’s working group on e-commerce.

12.3.4 E-commerce customers require a quick response, flexible services and more visibility of the total process from pickup to delivery. These demands challenge airlines to further integrate their IT systems with other logistics providers and with e-commerce marketplaces, as well as new solutions to the transport of dangerous goods (lithium batteries, powders and liquids, for example). Major players in the air cargo transport industry have caught up with market changes and have satisfied their customers, while on the other side, online retailer giants started to carry goods on their own fleets or build their own network.

12.3.5 In the last couple of years, the Hong Kong Air Cargo Terminals (Hactl) have seen more bulk e-commerce shipments for fulfillment centers closer to consumers. The Hong Kong Air Cargo Services (Hacis) which is a subsidiary of Hactl integrated logistics support services, has opened its seventh Inland Cargo Depot in mainland China in order to directly target e-commerce business. The Hacis Inland Cargo Depots are the destinations for Hacis SuperLink China Direct. This provides express road feeder service for both general cargo and cross-border e-commerce cargo, supporting B2B and B2C business models and enjoying simplified Customs declarations and clearance.

12.3.6 In the United States, e-commerce giant Amazon has signed up to lease 40 freighters in 2016, 20 from Atlas Air Worldwide Holdings and another 20 from ATSG. Amazon also registered a company in the United States as a non-vessel operating common carrier (NVOCC), which turned Amazon into a freight forwarder. Similarly, Alibaba’s logistics arm, Cainiao Logistics, has created a standard digital shipping bill so shipping companies can save time on input and exchange shipping information. It also helps shippers to plan shipping routes before getting the parcels from senders. About 70% of parcels in China run on Cainiao’s network, which processes 600 million pieces of shipping information per day among 128 warehouses, 40 000 service locations and 1.7 million delivery workers.

13. COMMERCIAL SPACE TRANSPORTATION

13.1 Prospects for commercial space travel are revolutionizing the aerospace industry. Suborbital commercial space flight is on the rise involving the development and use of multiple technologies, including winged vehicles, vertical launched rockets and balloons. However, the emerging suborbital commercial industry is still in its nascent phase.

13.2 As commercial space activities develop, suborbital launches are expected to grow in frequency, increasing space-bound and return traffic, thereby increasing the need for safe locations for launch and re-entry facilities. Suborbital launches are expected to have an impact on areas of aviation safety and air traffic management for the national airspace of the State from which the operation takes place, as well as its contiguous neighbours in certain cases. The two legal regimes governing aviation on the one hand and space activities and space flight on the other, serve different activities and needs of States. Currently, suborbital flights are not operated or classed with set vertical limits of airspace. Because there is no definition of where outer space begins, States need to recognize that conducting these commercial space flight operations in the future may require an integrated international traffic management system supported by an appropriate international legal framework, that will accommodate multiple simultaneous flights to, from and through airspace, as well as near space and outer space.

13.3 While the space transportation industry continues to develop, to date there are no private entities conducting operations nor are there suborbital vehicles that are technically capable of regular longer distance transportation. Commercial service providers are still in the development, design and testing phase for reusable launch vehicles to carry spaceflight participants and payloads on suborbital flights.

Certain vehicles do not operate as aircrafts for the entire flight or part of it, as defined in Annex 7 – *Aircraft Nationality and Registration Marks*. Some vehicles are also intended to place satellites into orbit, which gives rise to further issues regarding their international regulation. International space law does not require the vehicle to complete an orbit for international space law to be applicable to the entire operation, nor does it offer a legal definition of ‘space object’. This further raises the issue of whether vehicles performing suborbital flights are to be properly considered as space objects under international space law. International space law requires space objects to be registered in a national register and to furnish relevant information to the UN Secretary General for its incorporation into a central register, but does not require their certification, nor licensing of on-board or ground personnel. Certain States are regulating this at the national level, while others are considering allowing suborbital test flights.

13.4 As technology, capabilities and operational phases mature, consideration should be given to the commercial activities that will operate internationally and/or domestically, assuming that a variety of new suborbital and space transportation vehicles and programmes will be deployed and operated concurrently in the coming decades.

13.5 These new operations are now conducted in segregated airspace. When they are conducted in non-segregated airspace, they will require a safe and reliable transportation system compatible with the current and future civil aviation system. States may need to implement applicable standards and recommendations in order to effectuate a safety oversight system to support the future needs of the new integrated, interoperable and harmonized air navigation system that takes into account regular national and commercial operations to and from space. Some States have already initiated plans to transform air and space transportation operations and infrastructure toward an integrated national transportation system.

13.6 ICAO and UNOOSA are monitoring developments in this field and building an international platform for closer dialogue between the aviation and space communities, including the perspectives on the latest trends in commercial space transportation and suborbital operations; regulatory and legal frameworks for aerospace operations; and concepts for the evolution of aerospace transportation. One objective of this joint effort is to assist States and relevant stakeholders in assessing integrated approaches to the common safety of international civil aviation and commercial space operations.

13.7 Activities in this area are to be taken with due regard to the respective mandates and procedures of the relevant intergovernmental bodies with competence in this field. In the near future and with respect to ICAO, there may be a need to consider the step by step formal integration of commercial space initiatives into the Global Aviation Safety and Air Navigation Plans (GASP and GANP), and any associated modules within the Aviation System Block Upgrades (ASBUs).

Multilateral / Regional Agreements, Arrangements and Commitments for Liberalization

Agreement / Arrangement	Year of Conclusion	Parties
Africa		
Yamoussoukro Declaration on a New African Air Transport Policy (commitments)	- Adopted on 7 Oct 1988 (by Transport Ministers); - Amended on 9 Sep 1994	All member States of AU
Yamoussoukro Decision (YD) Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalization of Access to Air Transport Markets in Africa (Ministerial Decision) of the African Union (AU), then Organization of African Unity (OAU)	- Adopted on 14 Nov 1999 (by Transport Ministers); - Signed on 12 Jul 2000 (by Heads of State); - EIF on 12 Aug 2000 for 44 States who ratified Abuja Treaty	Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Dem. Rep. of the Congo, Congo, Cote D'Ivoire, Djibouti*, Egypt, Equatorial Guinea***, Eritrea**, Ethiopia, Gabon*, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar*, Malawi, Mali, Mauritania***, Mauritius (withdrew in 2004), Mozambique, Namibia, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia*, South Africa***, Sudan, Swaziland***, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe; [States with * mark did not ratify Abuja Treaty; State with ** did not sign Abuja Treaty; States with *** mark ratified Abuja Treaty after 12 Aug 2000]
Common Market for Eastern and Southern Africa (COMESA) Air Transport Liberalisation Programme	- Adopted in May 1999 (Legal Notice No. 2 of 1999); - Phase I was applied on 1 Oct 1999; - Phase II was put in abeyance in December 2000 awaiting the Competition Regulations of 2004 and the Joined Competition Authority (JCA) of 2008 and its subsequent operationalization.	Angola (withdrew from COMESA activities in 2006)*, Burundi, Comoros*, Dem. Rep. of the Congo*, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libyan Arab Jamahiriya (became a member of COMESA on 3 Jun 2005)*, Madagascar, Malawi*, Mauritius*, Namibia (withdrew from COMESA on 2 May 2004)*, Rwanda, Seychelles*, Sudan, Swaziland*, Tanzania (withdrew from COMESA on 2 Sep 2000)*, Uganda, Zambia and Zimbabwe; [States with * mark did not implement the programme]
Agreement on Air Transport of the Economic and Monetary Community of Central Africa (CEMAC)	- Signed on 4 May 1999 - EIF on 25 Jun 1999	Cameroon, Central African Republic, Republic of Congo, Gabon, Guinea, Tchad
Common Program on Air Transport of the West African Economic and Monetary Union (WAEMU)	- First package was adopted on 27 Jun 2002; - Second package was adopted on 18 Nov 2002;	Benin, Burkina Faso, Cote D'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo
Baniul Accord Group (BAG) Agreement	- Signed on 29 Jan 2004	Cape Verde, Gambia, Ghana, Guinea, Nigeria, Liberia and Sierra Leone
Multilateral Air Service Agreement (MASA) for the BAG	- Signed and provisional application on 29 Jan 2004	Cape Verde, Gambia, Ghana, Guinea, Liberia, Nigeria and Sierra Leone
Declaration on the Establishment of a Single African Air Transport Market (SAATM)	- Adopted on 31 Jan 2015 (Decl.1(XXIV))	All Member States of AU
Solemn Commitment by AU Member States to the Implementation of the YD towards the Establishment of a SAATM by 2017	- Adopted on 31 Jan 2015 (Commitment(XXIV))	Benin, Cape Verde, Congo Republic, Cote D'Ivoire, Egypt, Ethiopia, Kenya, Nigeria, Rwanda, South Africa, Zimbabwe, Ghana and Sierra Leone
America		
Decision on Integration of Air Transport of the Andean Community (CAN, then Andean Pact until 10 Mar 1996)	- Signed & EIF on 16 May 1991 (D297); - Amended on 17 Jun 1992 (D320) and 27 May 1994 (D360, D361); Consolidated on 4 May 2004 (D582)	Bolivia, Colombia, Ecuador, Peru (suspended its obligations under the liberalization program from 27 Aug 1992 to 30 Jul 1997) and Venezuela (withdrew in Apr 2006)
Multilateral Air Services Agreement (MASA) of the Caribbean Community (CARICOM)	- Signed on 6 Jul 1996; - EIF on 17 Nov 1998, initially for eight States	Antigua and Barbuda (EIF in 2001), Bahamas**, Barbados, Belize, Dominica, Grenada, Guyana, Haiti** (became a member of CARICOM in 2002), Jamaica**, Montserrat**, St. Kitts and Nevis, St. Lucia, St. Vincent & The Grenadines (EIF in 2009), Suriname* and Trinidad and Tobago; [States with * mark did not ratify MASA; States with ** mark neither signed nor ratified MASA]
Agreement on Sub-regional Air Services (Fortaleza Agreement) of the Southern Common Market (MERCOSUR)	- Signed on 17 Dec 1996; - EIF on 9 Apr 1999 initially for three States	Argentina (EIF on 16 Feb 2004), Bolivia, Brazil, Chile (EIF on 12 Dec 2000), Paraguay and Uruguay (EIF on 5 Jul 1999)
Air Transport Agreement among the Members States and Associate Members of the Association of Caribbean States (ACS)	- Concluded tentatively on 11 July 2003; - Opened for signature on 14 Feb 2004; - EIF on 19 Sep 2008, initially for 8 States and 2 territories	Antigua and Barbuda*, Bahamas*, Barbados, Belize, Colombia*, Costa Rica**, Cuba, Dominica*, Dominican Republic**, El Salvador*, Grenada*, Guatemala, Guyana*, Haiti**, Honduras*, Jamaica, Nicaragua**, Panama, Saint Kitts and Nevis*, Saint Lucia*, Saint Vincent/Grenadines*, Suriname, Trinidad and Tobago**, Mexico*, Venezuela, Guadeloupe/Guiana/Martinique (France)*, Aruba (Netherlands), Netherlands Antilles (Netherlands) and Turks and Caicos Islands (UK, became an associate member of ACS in 2006)*; [States with * mark did not sign ATA; States with ** mark did not ratify ATA]
Asia and Pacific		
CLMV Multilateral Agreement on Air Services	- Signed on 4 Dec 2003;	Cambodia, Lao People's Dem. Rep., Myanmar and Viet Nam [Preceded by the Agreement on the Establishment of Sub-regional Air Transport Cooperation of CLMV States, Signed & EIF on 14 Jan 1998]
Memorandum of Understanding on Expansion of Air Linkages (IMT-Growth Triangle)	- Signed & EIF on 10 Apr 1995; - Amended on 4 Sep 1996, 12 Jan 2001 and 11 Aug 2006	Indonesia, Malaysia and Thailand

Memorandum of Understanding on Expansion of Air Linkages (BIMP-East ASEAN Growth Area (EAGA) Pacific Islands Air Services Agreement (PIASA) of the Pacific Islands Forum	- Signed & EIF on 12 Jan 2007	Brunei, Indonesia, Malaysia and Philippines
ASEAN Multilateral Agreement on Air Services	- Concluded tentatively on 30 Oct 2002; Opened for signature on 16 Aug 2003; EIF on 13 Oct 2007 initially for 6 States - Concluded on 6 Nov 2008; - Signed on 20 May 2009; - EIF on 13 Oct 2009	Cook Islands, Fiji*, Kiribati, Micronesia*, Nauru, Niue, Palau*, Papua New Guinea, Marshall Islands*, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu; [States with * mark did not sign PIASA] Brunei, Cambodia, Indonesia*, Lao People's Dem. Rep., Malaysia, Myanmar, Philippines*, Singapore, Thailand, Viet Nam; States with * mark did not accept protocols 5 and 6, which provide for third, fourth and fifth freedoms between capital cities
ASEAN Multilateral Agreement on the Full Liberalisation of Air Freight Services	- Signed on 20 May 2009; - EIF on 13 Oct 2009	Brunei, Cambodia, Indonesia*, Lao People's Dem. Rep., Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam; [States with * mark did not ratify or accept protocols 1&2 providing 3,4,5 freedoms to either designated or unlimited airinternational airports, respectively]
ASEAN Multilateral Agreement on the Full Liberalisation of Passenger Air Services	- Signed 12 Nov 2010; - EIF 13 Jun 2011	Brunei, Cambodia*, Indonesia*, Lao People's Dem. Rep.*, Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam. (States with * mark neither ratified not accepted Protocols 1 & 2 which provide 3rd/4th and fifth freedoms, respectively, between secondary cities)
Air Transport Agreement between ASEAN Member States and China	- Signed on 12 Nov 2010;	Brunei, Cambodia, Indonesia, Lao People's Dem. Rep. Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam
Europe and North Atlantic		
Single Aviation Market of the European Union (EU, then European Community until 31 Oct 1993)	- First package was adopted on 14 Dec 1987 with EIF on 1 Jan 1988 (L374); Second package was adopted on 24 Jul 1990 with EIF on 1 Nov 1990 (L217); and the Third package was adopted on 23 Jul 1992 with EIF on 1 Jan 1993; - Full implementation on 1 Apr 1997 (L240); - Simplifying and readjusting on 1 Nov 2008 (L293)	Austria*, Belgium, Bulgaria****, Croatia (EIF 1 Jul 2013), Cyprus***, Czech Republic ***, Denmark, Estonia***, Finland*, France, Germany, Greece, Hungary***, Ireland, Italy, Latvia***, Lithuania***, Luxemburg, Malta***, Netherlands, Poland***, Portugal, Romania****, Slovak Republic***, Slovenia***, Spain, Sweden** and United Kingdom; [States with * mark started to apply third package under EEA agreement on 1 Jan 1994 and switched side from EFTA to EU on 1 Jan 1995; State with ** mark started to apply second package (subsequently third package) under Agreement on Civil Aviation on 6 Jul 1992 and EEA agreement on 1 Jan 1994, and switched side from EFTA to EU on 1 Jan 1995, States with *** applied EIF on 1 May 2004, States with **** applied EIF on 1 Jan 2007]
Agreement on the European Economic Area (EEA), Annex 13 Transport	- Initialled on 22 Oct 1991; Signed on 2 May 1992; - Adjusted on 17 Mar 1993 (Protocol to remove Switzerland); - EIF on 1 Jan 1994; Amended several times since 1994	Austria*, Belgium, Bulgaria***, Croatia ^, Cyprus** , Czech Republic**, Denmark, Estonia**, Finland*, France, Germany, Greece, Hungary**, Iceland, Ireland, Italy, Latvia**, Liechtenstein, Lithuania**, Luxembourg, Malta**, Netherlands, Norway, Poland**, Portugal, Romania***, Slovak Republic**, Slovenia**, Spain, Sweden*, United Kingdom [States with * mark switched side within EEA from EFTA to EU on 1 Jan 1995; States with ** applied provisionally on 1 May 2004, EIF on 6 Dec 2005; States with **** applied provisionally on 1 Aug 2007, EIF 9 Nov 2011; States with ^ applied provisionally on 12 April 2014]
Agreement between the European Community and Swiss on Air Transport	- Agreed on 10 Dec 1998; Signed on 21 Jun 1999; EIF on 1 Jun 2002 (L114); amended on 25 Nov 2005 (L347) and 18 Oct 2006	European Union (then European Community) and Switzerland
Euro-Mediterranean Aviation Agreement with the EU	- Initialled on 14 Dec 2005; Signed & Provisional application on 12 Dec 2006 with Morocco, on 15 December 2010 with Jordan, and on 10 June 2013 with Israel.	All member States of EU and Morocco, subsequently with Jordan and Israel
Multilateral Agreement on the Establishment of A European Common Aviation Area (ECAA)	- Agreed on 20 Dec 2005; Signed on 9 Jun 2006; - Provisional application for some States in 2006-2007	All member States of EU, Albania, Bosnia and Herzegovina, Bulgaria*, Croatia**, The former Yugoslav Republic of Macedonia, Iceland, Montenegro, Norway, Romania*, Serbia and the United Nations Interim Administration Mission in Kosovo (UNMIK); [States with * mark became members of EU on 1 Jan 2007, States with ** mark became members of EU on 1 Jan 2013]
Agreement between the European Community and the West African Economic and Monetary Union on certain aspects of air services	- Signed 30 Nov 2009; - EIF pending	All member States of EU and the West African Monetary Union (Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, Togo)
Other Regions		
Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT, "Kona" agreement)	- Initialled on 2 Nov 2000; signed on 1 May 2001; - EIF on 21 Dec 2001; - Amended on 19 Apr 2004 (EIF on 27 Oct 2005)	Brunei*, Chile (signed on 5 Jan 2001; EIF on 9 Apr 2002; Protocol acceded on 7 Aug 2003, EIF on 10 Dec 2003)*, Cook Islands (acceded on 8 Mar 2006; EIF on 23 Jul 2006)*, Mongolia (acceded on 22 Aug 2007; EIF as cargo-only on 23 Feb 2008), New Zealand*, Peru (acceded on 21 Dec 2001, EIF on 17 May 2002, withdrew on 15 Jan 2005), Samoa (acceded on 4 Jul 2002; EIF on 9 Nov 2002), Singapore*, Tonga (acceded on 19 Sep 2003; EIF on 20 Jan 2004) and United States; [States with * mark are the parties to Protocol]
Agreement on the Liberalization of Air Transport between the Arab States (Arab League)	- Opened for signature on 19 Dec 2004; - EIF on 18 Feb 2007 initially for five States	Algeria*, Bahrain, Egypt, Comoros*, Djibouti*, Iraq, Jordan, Kuwait*, Lebanon, Libyan Arab Jamahiriya*, Mauritania*, Morocco*, Oman, Palestine, Qatar*, Saudi Arabia*, Somalia, Sudan, Syria, Tunisia, United Arab Emirates* and Yemen; [States with * mark did not sign or ratify the agreement]

Other Documents		
Eight Options for More Competitive Air Services with Fair and Equitable Opportunity among APEC Member Economies (commitments)	- Agreed tentatively on 31 Oct 1995; Endorsed on 24 Jun 1997 (by Transport Ministers); - Supported on 19 Sep 1999 (by APEC Leaders); - Revised on 20 April 2004	Australia, Brunei, Canada, Chile, China, Hong Kong SAR (China), Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru (acceded on 15 Nov 1998), Philippines, Republic of Korea, Russian Federation (acceded on 15 Nov 1998), Singapore, Chinese Taipei, Thailand, United States and Viet Nam (acceded on 15 Nov 1998)
Framework Agreement for the Integration of Priority Sectors (Sectoral Integration Protocol for Air Travel) of ASEAN (commitments)	- Signed on 29 Nov 2004; - EIF on 31 Aug 2005	Brunei, Cambodia, Indonesia, Lao People's Dem. Rep., Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam
Declaration on The Sustainable Development of Air Transport in Africa: Key Milestones	- Adopted on 27 Mar 2015	Participants of the Meeting on the Sustainable Development of Air Transport in Africa, held 25-27 March 2015 in Antananarivo, Madagascar
Statement on the Development of Air Transport in North America, Central America, the Caribbean and South America	- Adopted on 9 Oct 2014	Participants of the ICAO Regional Air Transport Conference , held 7-9 October 2014 in Montego Bay, Jamaica
Declaration on The Development of Air Cargo in Africa: Key Milestones	- Adopted on 7 Aug 2014	Participants of the First Meeting on Air Cargo Developments in Africa, held in Lomé, Togo, 5-7 August 2014
Status of the implementation on the establishment of the SAATM	- Jul 2016	

Source : Texts of the agreements and aviation press

Updated: Sept 2016



AIR TRANSPORT REGULATION PANEL (ATRP)

THIRTEENTH MEETING

Montréal, 1 to 4 September 2015

DEVELOPMENT AND LIBERALIZATION OF AIR CARGO

(Presented by the Secretariat)

1. INTRODUCTION

1.1 This paper provides an overview of the economic impact of air cargo services and ICAO Secretariat's work pertaining to air cargo transport.

2. BACKGROUND

2.1 In 2014, 50.4 million tonnes of cargo were carried by air. By the year 2030, air cargo traffic is expected to have tripled to an estimated 150 million tonnes. Air cargo transport has played an increasingly important role in economic development and world trade. It is not only a fast means to distribute specialized, high-value products to discerning customers, but it is also an effective tool of connecting manufactured goods to new and different markets. More information and analysis on the impact of air cargo on economic development is provided in Appendix A.

2.2 In the past two decades, international air cargo services have benefited from an increasing number of liberalized air service agreement. Nevertheless, air cargo operators continue to face various constraints, ranging from limited freedoms under a large number of traditional air services agreements, a regime focused mainly on passenger services and combination services, to operational restrictions, such as night curfews, limited ground-handling rights, and burdensome customs requirements. Given the "one-way" directional nature of air cargo traffic and the emergence of a number of truly global operators in the express delivery sector with hubs in different countries, it has become more evident that the continuation of such restrictions can no longer meet the needs of the air cargo industry and its customers, in a globalized market. The industry, therefore, calls for recognition of the important economic and social roles and distinct features of air cargo operations, and for more commercial freedom and business oriented treatment.

2.3 As agreed at the Fifth Worldwide Air Transport Conference (ATConf/5), air cargo and, in particular, all cargo operations should be considered for accelerated liberalization. In this regard, both States and ICAO can play a role in advancing liberalization. For example, States can, within the existing air service agreement framework, consider granting more freedom and operational flexibility for air cargo services, catering to the distinct features and requirements of air cargo operations and customers. Relevant conclusions of ATConf/5 are reproduced in Appendix B.

- 2.4 The Sixth Worldwide Air Transport Conference (ATConf/6) further concluded that:
- a) air cargo plays an important role in the global economy. The growth and expansion of air cargo services is beneficial for the sustainable development of air transport, and contributes significantly to global trade and economic development; and
 - b) the distinct features of air cargo services need to be given due consideration by States when making air service arrangements.

Relevant conclusions of ATConf/6 is reproduced in Appendix C.

- 2.5 In addressing the issue of air cargo liberalization, ATConf/6 recommended, *inter alia*, that:
- a) ICAO continue to promote its policy guidance on the economic regulation of international air transport, and encourage States to use such guidance in their regulatory practice; and
 - b) ICAO ensure that policies, guidance and other material related to economic regulation remain relevant, current and responsive to changing situations and requirements of States.

3. ICAO'S WORK ON AIR CARGO

3.1 , The Secretariat, in cooperation with stakeholders, endeavours to enhance States' awareness of the ICAO policies and guidance, assist States and regions in implementing them, and promote the sustainable economic development of air transport, including for air cargo, through various approaches. These efforts include, but are not limited to, the items below.

3.2 **Guidance material** - ICAO developed guidance to facilitate air cargo liberalization, such as the model clauses for inclusion in air services agreement (in the form of an annex on air cargo). The model clauses, which were endorsed by ATConf/5, have been included in the ICAO Template Air Services Agreement (TASA) for optional use by States (reproduced in Appendix D).

3.3 **Global and regional events** – Recognizing the important role and economic significance of air cargo transportation to world trade and economy, ICAO convened a Meeting on Air Cargo Development for Africa in Lomé, Togo from 5 to 7 August, 2014, which resulted in the adoption of two documents: the Declaration on Air Cargo Development in Africa: Key Milestones (full text is reproduced in Appendix E); and the Action Plan describing the follow-up work approved by the meeting (reproduced in Appendix F). ICAO, in cooperation with the Civil Aviation Administration of China and Henan provincial government, also held an Air Cargo Development Forum in Zhengzhou, China, from 2 to 5 September 2014. The event attracted some 350 participants from more than 20 States, 11 international and regional organizations and 169 private entities. Such events help raise the awareness of States and other stakeholders of the role and contribution of air cargo transport, as well as ICAO's policies and guidance on the liberalization of the sector.

3.4 **Webpage on Air Cargo Economic Policy** – ICAO refined its webpage dedicated to the Air Cargo Economic Policy. The newly developed webpage enables users to learn about relevant ICAO policies and guidance on air cargo transport, and the impact of air cargo services on economic

development. The webpage can be accessed at: <http://www.icao.int/Security/aircargo/Pages/Liberalizing-Market-Access-for-Air-Cargo-Services.aspx>

3.5 **Voluntary Air Transport Fund** – The Voluntary Air Transport Fund, created by ICAO pursuant to ATConf/6 recommendations, serves as a mechanism for the collection and use of voluntary contributions from States and other donors to support ICAO’s work in the air transport field on a project basis. Subjects pertaining to the projects being studied include: the development of air cargo services; the assessment of the economic impacts of cargo theft and delay; and addressing the air cargo freight index.

3.6 **Air Freight Index** – The idea of a global freight “benchmark ” was brought up by some cargo operators and financial institutions, with the concept often being related to the increasing sophistication of the industry to recognize financial risks and the need for risk management. In this regard, ICAO is working with key partners to build a global commodity index designed to reflect the movement of air cargo shipping costs/rates across individual trading routes. Similar to the existing shipping freight benchmarks (for example, Baltic Dry Index), the Air Freight Index will be baskets of spot freight rates, covering major air transport routes providing an assessment of the price of moving goods by air and its trends and therefore an indicator of global trade for interested users. It will also help improving the transparency of the air cargo market.

APPENDIX A Impact of Air Cargo Services On Economic Development

Information Paper

May 2015



IMPACT OF AIR CARGO SERVICES ON ECONOMIC DEVELOPMENT



Air transport plays a pivotal role for Small Island Developing States (SIDS), Landlocked Developing Countries (LLDCs) and Least Developed Countries (LDCs), allowing them to overcome infrequent boat services or poor infrastructure for ground-transportation. Air cargo service routes are regarded as regional lifelines for these areas.

49.3

million tonnes of freight handled by air in 2013
(Source: Annual Report of ICAO Council: 2013)

ECONOMIC BENEFITS OF AIR CARGO

Air cargo transport enables nations, regardless of their geographic location, to efficiently connect to distant markets and global supply chains in a speedy and reliable manner. This is vital for implementing best international business practices, including just-in-time inventory management and build-to-order production.

35%

of world trade by value are transported by air
(Source: ATAG, "Aviation Benefits Beyond Borders", 2014)

Air cargo services are a tremendous enabler for economic progress in developing countries, since they connect markets across continents. High value electrical components and perishable products such as food and flowers are transported all over the world, providing steady employment and sustainable economic growth to regions that benefit from such trade.

Aviation's speed and reliability are also a key factor in the delivery of urgently needed assistance during emergencies caused by natural disasters, famines and wars. Air drops are among the first response of aid agencies to stem humanitarian crises. Air cargo also plays a vital role in the rapid delivery of medical supplies and organs for transplantations worldwide.

World GDP growth rate can predict the growth-rate of World Air Freight (and vice-versa) with

98% accuracy

(Source: World Bank, "World Development Indicators" 2002)

Business Case: Zhengzhou Airport Economy Zone (ZAEZ)

In November 2011, Chinese city Zhengzhou opened a 5-square-kilometer, customs-free bonded zone on and adjacent to the airport for high-value, time-critical manufacturing and distribution. Foxconn located a manufacturing campus there that employs 240,000 workers assembling Apple's iPhones and other digital devices. Smartphone output from this campus doubled the value of Henan province exports between 2011 and 2012. A number of new projects up to US \$1 billion each are currently under construction in the ZAEZ. These include, among others, Amer International Group, Cainiao Networks, Fair Friend Precision Machinery Park, IBM, and Microsoft. In 2013, there were 48 new major projects signed, worth a total of US \$24.3 billion.

(Source: "Gateway Airports: Commercial Magnets and Critical Business Infrastructure" 2014, By John D. Kasarda, Ph.D.)

According to Air Transport Action Group (ATAG), the largest economic benefit of increased air cargo connectivity lies in its impact on the long-term performance of the wider economy through enhancement of the overall level of productivity. It opens up new markets, boosts exports and at the same time increases competition and choice in the home market from foreign-based producers.

Commodity	Air Traffic 2012* (A330 equivalent)	2002-2012 Compound Annual Growth Rate
Semi-conductors	18	7.5%
Electrical components	15	5.0%
Land vehicles parts	18	5.3%
Aerospace	6	6.1%
Fresh fish, traditional fruits and vegetables	37	2.0%
Exotic fruits, sushi, grand cru	13	6.1%
Pharmaceuticals	12	6.9%
Medical machinery and accessories	5	8.0%

Typical commodities transported by air & their growth rates

*2 trips/day Source: Airbus

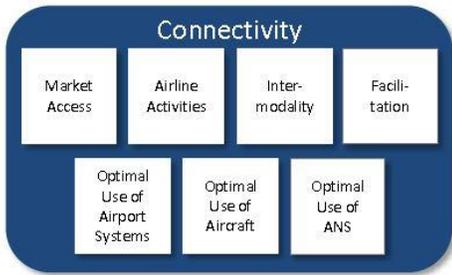
Business Case: Kenya

In Kenya, 90,000 jobs (and 500,000 livelihoods) depend on the cut flower industry, which supports 1.6% of the national economy, generating around \$1 billion in foreign exchange each year. (Source: Kenya Flower Council, 2012) Horticulture has been Kenya's fastest growing sector and is ranked third after tourism and tea as a foreign exchange earner. Over 90% of fresh horticultural products are air freighted. An estimated 70% of the flowers are grown at the rim of Lake Naivasha, northwest of Nairobi. There are good road network connections between the Lake Naivasha growing area and Nairobi's Jomo Kenyatta International Airport, a distance of about 80-100 kilometers. Flowers picked in the morning reach markets in Amsterdam by evening.

(Source: "Air Freight: A Market Study with Implications for Landlocked Countries" The World Bank, 2009)

THE REGULATORY FRAMEWORK

Air transport connectivity is the movement of passengers, mail and cargo involving the minimum of transit points, which makes the trip as short as possible, with optimal user (shipper, consignee or passenger) satisfaction, at the minimum price possible.



In order to optimize connectivity, a strong supporting framework is needed. This includes, among other, market access and liberalization, optimal use of air navigation services, aircraft and airport systems, as well as enhanced facilitation and security procedures. For the full benefits of air connectivity to materialize intermodal connections and efficient airline operations are essential.

ICAO actively contributes to improving connectivity in several areas by fostering various initiatives within that framework. This includes the development by ICAO of international agreements to liberalize air transport, including air cargo services. ICAO also provides support to States to implement multilateral arrangements, such as the Montreal Convention 1999 (MC99)¹, which facilitates the use by airlines of electronic records, including electronic air waybills (e-AWB) and the Cape Town Convention 2001 (CTC 2001)², enabling the acquisition of more modern aircraft.

Improved air connectivity is a key element to economic growth and development through air cargo transport.

¹ Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 1999.

² Convention on International Interests in Mobile Equipment, Cape Town, 2001.



APPENDIX B
ATConf/5 Conclusions on Air Cargo

CONCLUSIONS

From the documentation and ensuing discussion on air cargo under Agenda Item 2.2, the Conference concluded that:

- a) air cargo, and in particular all cargo operations, should be considered for accelerated liberalization and regulatory reform in view of its distinct features, the nature of the air cargo industry and the potential trade and economic development benefits possible from such reform;
- b) States should consider the possibility of liberalizing all cargo services using one or more of the following:
 - i) unilateral liberalization of market access for all cargo services without bilateral reciprocity or negotiation;
 - ii) liberalizing all cargo services through bilateral agreements and negotiations to ensure reciprocity; and
 - iii) using a multilateral/plurilateral approach for the liberalization of all cargo services.

The Conference agreed that States should give consideration to the following model clause as an option for use at their discretion in air services agreements:

ANNEX ON AIR CARGO SERVICES

The Parties agree that:

1. *Every designated airline when engaged in the international transport of air cargo:*
 - a) shall be accorded non-discriminatory treatment with respect to access to facilities for cargo clearance, handling, storage, and facilitation;*
 - b) subject to local laws and regulations may use and/or operate directly other modes of transport;*
 - c) may use leased aircraft, provided that such operation complies with the equivalent safety and security standards applied to other aircraft of designated airlines;*
 - d) may enter into cooperative arrangements with other air carriers including, but not limited to, codesharing, blocked spaced, and interlining; and*
 - e) may determine its own cargo tariffs which may be required to be filed with the aeronautical authorities of either (any) Party.*

2. *In addition to the rights in paragraph 1 above, every designated airline when engaged in all cargo transportation as scheduled or non-scheduled services may provide such services to and from the territory of each (any) Party, without restriction as to frequency, capacity, routing, type of aircraft, and origin or destination of cargo.*

APPENDIX C
ATConf/6 Conclusions on Air Cargo

2.1 .7 CONCLUSIONS

2.1 .7.1 As a result of the documentation considered and ensuing discussion on the subject of air cargo services under Agenda Item 2.1, the Conference concluded that:

- a) air cargo plays an important role in the global economy. The growth and expansion of air cargo services is beneficial for the sustainable development of air transport, and contributes significantly to global trade and economic development;
- b) the distinct features of air cargo services need to be given due consideration by States when making air service arrangements;
- c) States have used various vehicles in liberalizing air cargo services, including bilateral, regional and plurilateral arrangements, some of which are open for other States to join, such as the Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT); and
- d) ICAO guidance on liberalization of air cargo services remains relevant, and its use by States should be encouraged. In this regard, there is broad support for ICAO to play a leadership role in facilitating further liberalization, and some support for ICAO to develop a multilateral agreement specifically focussed on air cargo, taking into account the need to ensure that such agreement does not lead to competitive distortions between all cargo carriers and passenger air carriers transporting freight, and that it is aligned with ICAO's liberalization efforts on overall market access for international air transport.

APPENDIX D

**Annex on Air Cargo Services in the ICAO Template Air Services Agreement (TASA)
(Doc. 9587 Appendix 5, page A5-60)**

<p align="center">Annex III Air cargo services</p>	<p align="center">Explanatory Notes</p>
<p align="center" style="border: 1px solid black; padding: 2px;">Transitional</p> <p>1. Every designated airline when engaged in the international transport of air cargo:</p> <p>a) shall be accorded non-discriminatory treatment with respect to access to facilities for cargo clearance, handling, storage, and facilitation;</p> <p>b) subject to local laws and regulations may use and/or operate directly other modes of transport;</p> <p>c) may use leased aircraft, provided that such operation complies with the equivalent safety and security standards applied to other aircraft of designated airlines;</p> <p>d) may enter into cooperative arrangements with other air carriers including, but not limited to, codesharing, blocked spaced, and interlining; and</p> <p>e) may determine its own cargo tariffs which shall not be required to be filed with the aeronautical authorities of either Party.</p> <p>2. In addition to the rights in paragraph 1 above, every designated airline when engaged in all cargo transportation as scheduled or non-scheduled services may provide such services to and from the territory of each Party, without restriction as to frequency, capacity, routing, type of aircraft, and origin or destination of cargo.</p>	<p><i>Some agreements provide no specific provision on all-cargo operations as the right to operate all-cargo services is usually implicit in the grant of rights wherein the Parties typically grant the right for their designated airlines to transport passengers, cargo and mail on the agreed scheduled international air services. However, other agreements are more specific, referring to "passengers, cargo and mail or in any combination". The agreement may in the route schedule specify particular routes, including restrictions or flexibility as agreed, for all-cargo services, or the routes may be those exchanged for scheduled passenger services.</i></p> <p><i>The purpose of this paragraph is to achieve a fair competitive balance between all air carriers engaged in the transport of international air cargo. Where the main agreement contains a provision which also appears in the Annex (for example, leasing), that provision should be omitted from the Annex.</i></p> <p><i>This paragraph provides the Third through the Seventh Freedoms of the air for only all-cargo services operated on a scheduled or non-scheduled basis. The first two Freedoms overflight and technical stops are not included as they are normally provided in the main agreement. Operational flexibility is described in general terms and includes those elements generally regarded as important for all-cargo operations.</i></p>
<p align="center">Annex III Air cargo services</p>	<p align="center">Explanatory Notes</p>
<p align="center" style="border: 1px solid black; padding: 2px;">Full liberalization</p>	<p><i>The Annex on air cargo services is unlikely to be used in full liberalization and more recent "open skies" agreements in which the rights and operational flexibility in this Annex will be in the main agreement.</i></p>

APPENDIX E

The Declaration on Air Cargo Development in Africa: Key Milestones

Air cargo is a catalyst for economic growth. Roughly 35 per cent of global trade by value is transported via air. Airfreight has allowed otherwise remote African regions to access world markets for agricultural and other products. The success of many economies and operations depends on rapid and reliable delivery in the best possible conditions – and airfreight is often the only transportation means to fulfil these requirements. Air cargo routes provide African countries with quick and efficient access to worldwide supply chains and markets and destinations throughout the continent. It is projected that freight traffic to, from and within Africa will be growing at a pace faster than the world's pace, with emphasis on the international traffic. This trend is indicative of how aviation is helping to expand global market access for African businesses.

The Decision relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalization of Access to Air Transport Markets in Africa (YD, Nov 1999), which was endorsed during the Assembly of Heads of African States held in Lomé, Togo, in July 2000, created the fundamental basis of Africa's strategy for the sustainability of air transport, through a harmonized air transport liberalization framework. Taking into consideration the principal features of air cargo transportation, the African States confirmed the goal to liberalize the access to air transport market in Africa in its entirety, including air cargo operations.

Further to the adoption of the YD and in addition to efforts to address fair competition issues at national level, a number of Regional Economic Communities, sub-regional bodies, AFCAC and the AU have contributed over the years, to the development of harmonized fair competition rules. These efforts need to be supported and their products made use of.

In order to identify regulatory and operational solutions for the development of Air Cargo, its industry and services in Africa, ICAO has decided to convene the ***Meeting on Air Cargo Development in Africa, from 5 to 7 August 2014***. In conclusion to this Meeting, the Directors General of Civil Aviation of the participating States (the “**Participants**”) have decided, supported by air cargo stakeholders present, to state their common understanding of the vital importance of the contribution of air cargo to economic growth in Africa. They have resolved to affirm their intent for implementation of strategic decisions taken during the said Meeting in support of the sustainable development of air cargo transportation, through the signing of this Declaration.

The Opportunities for the development of Air Cargo in Africa	The Way Forward
<p>The Participants have identified a number of opportunities which demand further actions:</p> <ol style="list-style-type: none"> 1. Considering that the air cargo is a catalyst for economic growth all steps are to be taken to foster air cargo services to allow air carriers to operate freely between points anywhere in Africa and beyond, in conformity with the YD. 2. Under a fully liberalized air cargo services environment, many new “highways in the sky” would be created, which would markedly expand the regional and global linkages between suppliers and customers and increase connectivity. Competitiveness would improve, foreign direct investment would increase, and economic development would accelerate. 3. The air cargo supply chain is a combined set of interconnected parties, locations, procedures, and information exchanges that enables cargo to move from its origin to its destination by air. 	<p>Looking ahead, the Participants intend to optimize the benefits of air cargo through the following initiatives:</p> <ol style="list-style-type: none"> 1. High priority should be given by States’ policymakers to the development of a favourable regulatory environment encouraging air cargo development as part of broader government sponsored aviation development and economic growth policy, coordinated across national borders in accordance with the ICAO worldwide framework. 2. Further liberalization of air cargo operations should be promoted through removal of restrictions on traffic rights and limitations on capacity in air services agreements and the relaxation of air carrier ownership and control rules. Work should be carried out with the respective bodies to stimulate faster ratifications of the Convention for the Unification of Certain Rules for International Carriage by Air signed in Montréal on 28 May 1999 (MC99) laying the foundation for the introduction of the electronic documentation. 3. Cooperation should be promoted between different units of the air cargo supply chain within States and on the international arena and cooperation fostered with our partner organizations: World Customs Organization (WCO), International Air Transport Association (IATA), Airports Council International (ACI), International Air Cargo Association (TIACA) and International Federation of Freight Forwarders Associations (FIATA) and African Airlines Association (AFRAA).

<p>4. Security and facilitation of air cargo need to go hand in hand. All parties have a shared responsibility to ensure that air cargo moves safely and securely throughout this chain. At the same time the cargo flow should not be restricted by the lack of effective implementation of the YD and modern methods, like risk-based cargo security measures, E-freight, electronic air waybill (AWB) and electronic transfer of data should be implemented.</p> <p>5. The infrastructure and intermodal transport services play a vital role in political, economic and social development as well as the integration of Africa. While the access to capital remains an issue, ways exist for making projects attractive not only for government financing, but also for joint ventures, like public private partnerships.</p> <p>6. States should give due regard to the distinct features of air cargo services when exchanging market access rights in the framework of air service agreements and grant appropriate rights and operational flexibility so as to promote the development of these services. The removal of the regulatory restrictions on route rights, capacity and designation will allow the existing air cargo operators and new entrants to serve formerly restricted markets and to compete on the basis of price and improved service.</p> <p>7. The economic benefits of further opening the aviation market, in accordance with the YD, would include the multiplier effects generated by additional air cargo transportation for economic activities and would facilitate the inclusion of remote African countries or regions in international trade. But, if aviation charges and taxes are too high, its ability to be an economic catalyst may be compromised.</p>	<p>4. The current security and facilitation requirements in the national security programmes should be reflected; the risk management and coordination with the partner organizations working in the supply chain should be implemented, in particular national regulations should be aligned with the WCO Kyoto Convention. Wide use should be made of such tools as electronic submission of data on goods passing borders, E-freight and AWB.</p> <p>5. Considering the importance and role of infrastructure to support continued development of airports and intermodal transportation infrastructure to meet the demand for air cargo services, full consideration should be given to the available practices for attracting public and private capital.</p> <p>6. Due consideration should be given to the particular importance of air cargo for economic development in long-haul destinations and landlocked or island countries.</p> <p>7. The impact of taxes, charges and other levies on aviation, and thus on economic growth and jobs should be assessed, and action taken in order to limit their possible adverse impact on the growth and development of air cargo services.</p>
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<p>8. New developments in the cargo sector such as new systems, procedures, aircraft performance capabilities, renewable fuels, new supporting infrastructure, a new way to do business and the dynamic surge of e-Cargo create the need for high level educated and skilled professionals to cope with these developments in order to sustain the economic growth in Africa.</p>	<p>8. The urgent need should be recognized to strengthen the continent's expertise, to invest in qualified personnel and promote gender diversity through training to cater to the needs created by the modernization and growing complexity of the air cargo sector. Active participation should be taken in the ICAO Next Generation of Aviation Professionals (NGAP) Symposium from 3-4 December 2014 in Montréal, Canada, and fully support the AFCAC initiative Human Resources Development Fund (HRDF) for Africa supported by ICAO.</p> <p>9. States that have not done so should be urged to accede to the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment signed at Cape Town on 16 November 2001 to facilitate the acquisition of modern and fuel efficient aircraft including freighters, to ensure more economical, reliable and more environmentally friendly cargo operations.</p>
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The Participants, supported by air cargo stakeholders, have decided to meet at two year intervals, in order to assess the progress in implementation of the above actions and take new steps in furtherance of the above initiatives.

Adopted by the Meeting in Lomé, Togo, on 7 August 2014



Col. Latta Dokisime Gnama

Chairman of the Meeting

APPENDIX F

The Action Plan describing the follow-up work approved by the ICAO Meeting on Air Cargo Development in Africa

Actions	Timeframe	Participants	Notes
<p>Market access liberalization</p> <ul style="list-style-type: none"> • Implement the Yamoussoukro Decision of 1999, particularly its provisions on air cargo services to: (i) liberalize market access; (ii) facilitate further liberalization of air cargo services. • The Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (WAEMU) having already a regulatory framework dedicated to the subject, carry-out an annual follow-up of the status of implementation of this action which could be reported to the appropriate entity of coordination of this Action Plan. • Urge States to grant market access rights, including 7th freedom rights, for air cargo services. 	<p>Dec 2015</p> <p>Yearly basis</p> <p>Dec 2014</p>	<p>States, AFCAC, regional organizations, stakeholders with the support of ICAO</p>	
<p>Competition</p> <ul style="list-style-type: none"> • Contribute to the ICAO Air Services Negotiation (ICAN) competition exchange forum for States to promote more compatible regulatory approaches. • Support the efforts of Regional Economic Communities, the African Civil Aviation Commission (AFCAC) and the African Union to develop and apply fair competition rules and to promote more compatible regulatory approaches in international air transport. 	<p>On a yearly basis</p> <p>Continuous</p>	<p>States, AFCAC, regional organizations, stakeholders with the support of ICAO</p>	
<p>Air carrier ownership and control</p> <ul style="list-style-type: none"> • Contribute to the development of international agreement to liberalize air carrier ownership and control. 	<p>Dec 2015</p>	<p>States, AFCAC, regional organizations, stakeholders with the support of ICAO</p>	

Actions	Timeframe	Participants	Notes
<p>Security and Facilitation</p> <ul style="list-style-type: none"> • Use tools such as the electronic submission of data on goods passing borders, E-freight and electronic air waybill (AWB). • Develop and implement Regulated Agent and Known Consignor’s programmes at a national level, in relation with specific requirements established by States. • Establish mechanisms to ensure the sustainable funding of security oversight functions at both State and regional levels. 	<p>Dec 2016</p> <p>As required</p> <p>Dec 2016</p>	<p>States, AFCAC, regional organizations, stakeholders with the support of ICAO</p>	
<p>Safety</p> <ul style="list-style-type: none"> • Pursue implementation of the aviation safety targets for Africa adopted by the Conference of Ministers of Transport (Abuja, July 2012) and endorsed by the Assembly of Heads of State (Jan 2013). • Establish mechanisms to ensure the sustainable funding of safety oversight functions at both State and regional levels. 	<p>Dec 2017</p> <p>Dec 2016</p>	<p>States, AFCAC, regional organizations, stakeholders with the support of ICAO</p>	
<p>Economics and funding</p> <ul style="list-style-type: none"> • New mechanisms to ensure the sustainable funding of economic oversight functions at both State and regional levels. • Promote growth of air cargo services, hence international trade and economic growth in Africa. 	<p>Dec 2016</p> <p>Continuous</p>	<p>States, AFCAC, regional organizations, stakeholders with the support of ICAO</p>	
<p>Infrastructure</p> <ul style="list-style-type: none"> • Increase awareness of ICAO policies and guidance material on funding of infrastructure. • Explore and implement effective financing mechanisms for infrastructure, such as Public Private Partnerships (PPP). • Provide adequate infrastructure to accommodate the growth of air cargo on the continent. 	<p>Continuous</p> <p>Dec 2017</p> <p>As required</p>	<p>States, AFCAC, regional organizations, stakeholders with the support of ICAO</p>	
<p>Charges and taxes</p> <ul style="list-style-type: none"> • Develop analysis and guidance on the impact of taxes and other levies imposed on air transport. 	<p>Dec 2016</p>	<p>States, AFCAC, regional organizations, stakeholders with the support of ICAO</p>	

Actions	Timeframe	Participants	Notes
<p>Training</p> <ul style="list-style-type: none"> • Use ICAO e-learning courses: air transport regulation, forecasting and statistics. • Use air cargo-specific training, including dangerous goods. • Participate at the ICAO Next Generation of Aviation Professionals (NGAP) Symposium from 3-4 December 2014 in Montréal. • Support the establishment of and participate effectively in the AFCAC initiative for Human Resources Development endorsed by the 3rd Session of the Conference of African Ministers of Transport (Malabo, April 2014) and the 24th Session of the AFCAC Plenary (Dakar, July 2014). 	<p>Dec 2015</p> <p>Dec 2015</p> <p>Dec 2014</p> <p>Continuous</p>	<p>States, AFCAC, regional organizations, stakeholders with the support of ICAO</p>	
<p>Promotion of/assistance to ratification of MC99</p>	<p>Continuous</p>	<p>ICAO</p>	
<p>Promotion of/assistance to ratification of Cape Town Convention 2001</p>	<p>Continuous</p>	<p>ICAO</p>	

— END —



INFORMATION PAPER

Existing ICAO Policy and Guidance Material on Fair Competition

(Presented by the Secretariat)

1. INTRODUCTION

1.1 This paper provides information on existing ICAO policy and guidance material regarding fair competition. The paragraphs below present the relevant source information, with the Appendices providing greater detail. Most of the material can be found in the *Policy and Guidance Material on the Economic Regulation of International Air Transport* (Doc 9587), *Assembly Resolutions in Force (as of 4 October 2013)* (Doc 10022), the *Report of the Sixth Worldwide Air Transport Conference* (Doc 10009), and in the *Manual on the Regulation of International Air Transport* (Doc 9626). All these documents are made available at the ATRP secure website under the ATRP/13 folder entitled *References*.

2. PROVISIONS IN THE CHICAGO CONVENTION

2.1 Certain general principles set out in the Convention on International Civil Aviation (Chicago Convention) may relate or apply to fair competition in international air transport. The Preamble of the Convention states “.....*the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically*” (Doc 7300).

2.2 Article 44 of the Convention also states that “*The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to: ... (f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;*” and “(g) *Avoid discrimination between contracting States; ...*” (Doc 7300).

3. ICAO ASSEMBLY RESOLUTIONS

3.1 The Assembly adopted resolutions with passages on fair competition. Assembly Resolution A38-14, *Consolidated statement of ICAO continuing policies in the air transport field*, adopted by the 38th Session held in 2013, contains the following clauses:

3.2 In A38-14, Appendix A, Section II, operative clause 2, the Assembly “...*Urges Member States to take into consideration that fair competition is an important general principle in the operation of international air services; ...*” (Doc 10022, page III-6), and, in operative clause 11, “...*Requests the Council to develop tools such as an exchange forum to enhance cooperation, dialogue and exchange of information on fair competition between States with a view to promoting compatible regulatory approaches towards international air transport; ...*” (Doc 10022, page III-7).

3.3 In A38-14, Appendix A, Section V, operative clause 2, the Assembly “...*Encourages Member States to incorporate the basic principles of fair and equal opportunity to compete, non-discrimination, transparency, harmonization, compatibility and cooperation set out in the Convention and embodied in ICAO’s policies and guidance in national legislation, rules and regulations, and in air services agreements;...*”(Doc 10022, page III-9)

4. CONCLUSIONS AND RECOMMENDATIONS OF AIR TRANSPORT CONFERENCES

4.1 Among the conclusions and recommendations adopted by past ICAO air transport conferences and endorsed by the Council and/or Assembly, some dealt with safeguards, including fair competition, State aids/subsidies and dispute settlement. These have been incorporated as guidance into Doc 9587, except those produced by the Sixth Worldwide Air Transport Conference (ATConf/6).

4.2 The Fourth Worldwide Air Transport Conference (ATConf/4, 1994) considered the subject of safeguards along with market access and a related dispute resolution mechanism. While concluding that the proposed regulatory arrangements on safeguards and the dispute settlement mechanism could “provide a working tool, in concept form, which could serve as a means of ensuring fair competition”, the Conference recommended that further development be undertaken by the Organization. Based on the recommendations, relevant guidance was subsequently produced with the assistance of the Air Transport Regulation Panel (ATRP) (see paragraph 5.1). ATConf/4 also considered the issue of State aids/subsidies, and recommended a regulatory arrangement for consideration by States. The text of the arrangement, as well as related conclusions are contained on page 8-6 in Doc 9587 (reproduced in Appendix A).

4.3 The Fifth Worldwide Air Transport Conference (ATConf/5, 2003) considered, among other topics, how to ensure fair competition in an environment of liberalization (Agenda Item 2.3 Part I), including a proposed model clause on “Safeguards against anti-competitive practices” for optional use by States. The Conference concluded that “liberalization must be accompanied by appropriate safeguard measures to ensure fair competition, and effective and sustained participation of all States”, and agreed that States should consider the addition of the proposed model clauses to their air services agreements. The model clause and related conclusions are found in Doc 9587, Appendix 4, pages A4-8, A4-9 (reproduced in Appendix B).

4.4 ATConf/5 also addressed the issue of State aids/subsidies (Agenda Item 2.3 Part II), and concluded that “in a situation of the transition to liberalization or even in an already-liberalized market, States may wish to continue providing some form of assistance to their airlines. However, States should bear in mind that provision of State aids/subsidies, which confer benefits on national air carriers but are not available to competitors in the same market, may distort trade in international air services and may constitute unfair competitive practices.” It further concluded that while in special cases “where State assistance can produce economic and/or social benefits,[...] States should take transparent and effective measures accompanied by clear criteria and methodology to ensure that aids/subsidies do not adversely impact on competition in the marketplace [...]” (full text in Doc 9587, Appendix 4, page A4-10, reproduced in Appendix C).

4.5 ATConf/6 addressed, among other key issues, the topic of fair competition (Agenda Item 2.4) and adopted Recommendation 2.4/1, which calls for States to consider fair competition as an important general principle in the operation of international air services (full text in Doc 10009, page 27, and reproduced in Appendix D). In its conclusion on safeguards, the Conference recognized that “the guidance developed by ICAO on safeguard measures pertaining to effective participation in international air transport, assurance of service and State aid/subsidies, essential air service, and

avoidance of unilateral action, continues to be relevant, and should be kept current and responsive to changes and States' requirements [...]". It adopted Recommendation 2.5/1, calling for States "to give due regard to the principles agreed upon by the aviation community at the various ICAO fora pertaining to safeguard measures[...]", and for ICAO to "actively promote and encourage States to use the relevant ICAO guidance[...]" (full text in Doc 10009, pages 28-29, reproduced in Appendix D).

5. RECOMMENDATIONS OF THE AIR TRANSPORT REGULATION PANEL

5.1 During the development of ICAO policy guidance on air transport regulation, many tasks were assigned to the Air Transport Regulation Panel (ATRP), including the creation of guidance relating to fair competition and safeguards. Pursuant to the recommendation of ATConf/4, the panel, at its ninth meeting (ATRP/9), developed a "Safeguard Mechanism for Fair Competition" (Recommendation ATRP/9-1) and a related "Dispute Settlement" mechanism (Recommendation ATRP/9-2). These recommendations were approved by the Council and disseminated to States for their guidance in regulatory practice (full texts in Doc 9587, pages 1-28 and 1-29, and reproduced in Appendix E).

6. ICAO TEMPLATE AIR SERVICES AGREEMENTS

6.1 Much of the policy guidance developed by ICAO over the years were adapted and incorporated into the Bilateral Template Air Services Agreements (TASA), which include clauses on Fair Competition. In the 2008 Edition of Doc 9587, the TASA is included in Appendix 5, with each Article having corresponding explanatory notes. The texts of Article 15 - Fair competition, Article 18 - Safeguards, and Article 34 - Settlement of disputes are contained in Doc 9587, Appendix 5, on pages A5-21, A5-30 to 31, and A5-47 to 52 respectively (reproduced in Appendix F).

7. ICAO GUIDANCE MATERIAL (DOC 9626)

7.1 In addition to the policy guidance contained in the Convention, assembly resolutions, council decisions, and the conclusions/recommendations of the air transport conferences and the ATRP, the Secretariat also has produced guidance material in the form of manuals. Doc 9626 (Second Edition - 2004) describes the regulatory practices of States and discusses some related key issues in air transport. The relevant chapters of the manual which cover safeguards and fair competition are as follows:

7.2 In Chapter 2.2 - Structure of Bilateral Regulation, section 2 on typical provisions of bilateral air services agreements, description is given to "a fair and equal opportunity article", "a fair competition article", and "a settlement of disputes article" (pages 2.2-2 to 2-4). Some description on the issue of "predatory pricing" can be found in Chapter 4.3-Air Carrier Tariffs (pages 4.3-10 to 4.3-11). These are reproduced in Appendix G.

APPENDIX A

ATConf/4 proposed regulatory arrangement on State aids/subsidies

(Agenda Item 2.5 – Structural impediments)

“The following arrangement (which could be used both separately and in conjunction with the safeguards mechanism described in para 2.2.4) was designed to deal with the potential adverse effects of State aids/subsidies on international air transport:

Each party would:

- a) recognize that State aids/subsidies which confer financial benefits on a national carrier or air carriers that are not available to competitors in the same international markets can distort trade in international air services and can constitute or support unfair competitive practices; and
- b) accordingly, agree to take transparent and effective measures to ensure that its State aids/subsidies to certain air carriers do not adversely impact on other competing air carriers.”

RELATED ATCONF/4 CONCLUSION

“From its discussion under Agenda Item 2.5 the Conference concluded that:

- a) There was a general recognition that the question of State aids/subsidies was a very complex one (for example, the distinction between what was legitimate investment in an air carrier and what amounted to a State aid or subsidy in particular was not an easy one to make). Furthermore, in the exercise of their socio-economic responsibilities, States would themselves decide on the nature and level of support they would wish to give to their national carriers; in this connection developing countries felt a particular need to sustain the participation of their carriers in international air transport through some form of financial support.
- b) State aids and subsidies per se were not necessarily unfair but some had the potential of being so. The proposed future regulatory arrangement which focused on the potential effect of State aids or subsidies on competing carriers (paragraph 2.5.3.2) provided a step in the direction of a fairer competitive environment, but had to be considered in the overall framework of the matters noted at a) above.

.....”

APPENDIX B

ATConf/5 Conclusions for Agenda Item 2.3 Part I - Safeguards to Ensure fair Competition

(Doc 9587, Appendix 4, page A4-8 to A4-9)

CONCLUSIONS

From the documentation and the ensuing discussion on safeguards to ensure fair competition under Agenda Item 2.3, the Conference concluded that:

- a) liberalization must be accompanied by appropriate safeguard measures to ensure fair competition, and effective and sustained participation of all States. Such measures should be an integral part of the liberalization process and a living tool corresponding to the needs and stages of liberalization. Such measures may include progressive introduction of liberalization, general competition laws, and/or aviation-specific safeguards;
- b) while general competition laws may be an effective tool in many cases, given the differences in competition regimes, the differing stages of liberalization among States and the distinct regulatory framework for international air transport, there may be a need for aviation-specific safeguards to prevent and eliminate unfair competition in international air transport. This may be done by means of an agreed set of anti-competitive practices which can be used, and if necessary modified or added to, by States as indications to trigger necessary regulatory action;
- c) in cases where national competition laws are applied to international air transport, care should be taken to avoid unilateral action. In dealing with competition issues involving foreign air carriers, States should give due consideration to the concerns of other States involved. In this context, cooperation between or among States, especially between or among competition authorities, and between such authorities and aviation authorities, has proved useful in facilitating liberalization and avoiding conflicts;
- d) harmonization of different competition regimes continues to be a major challenge. In cases where disputes arise from the use of aviation-specific safeguards or the application of competition laws, States should seek to resolve their disputes through the consultation and dispute settlement mechanisms available under relevant air services agreements, and in the case of the latter, by making use of the existing ICAO guidance on competition laws contained in *Policy and Guidance Material on the Economic Regulation of International Air Transport* (Doc 9587);
- e) the extraterritorial application of national competition laws can affect cooperative arrangements regarded by many as essential for the efficiency, regularity and viability of international air transport, certain forms of which benefit both users and air carriers alike. Consequently, where antitrust or competition laws apply to such arrangements, decisions should take into account the need for inter-carrier cooperation, including interlining, to continue where they benefit users and air carriers; and
- f) ICAO should continue to monitor developments in this area, and update its guidance material on competition and safeguards, where necessary and in light of the evolution of liberalization.

The Conference agreed that States should give consideration to the following model clause as an option for use at their discretion in air services agreements:

“Safeguards against anti-competitive practices

1. *The Parties agree that the following airline practices may be regarded as possible unfair competitive practices which may merit closer examination:*
 - a) *charging fares and rates on routes at levels which are, in the aggregate, insufficient to cover the costs of providing the services to which they relate;*
 - b) *the addition of excessive capacity or frequency of service;*
 - c) *the practices in question are sustained rather than temporary;*
 - d) *the practices in question have a serious negative economic effect on, or cause significant damage to, another airline;*
 - e) *the practices in question reflect an apparent intent or have the probable effect, of crippling, excluding or driving another airline from the market; and*
 - f) *behaviour indicating an abuse of dominant position on the route.*

2. *If the aeronautical authorities of one Party consider that an operation or operations intended or conducted by the designated airline of the other Party may constitute unfair competitive behaviour in accordance with the indicators listed in paragraph 1, they may request consultation in accordance with Article __ (Consultation) with a view to resolving the problem. Any such request shall be accompanied by notice of the reasons for the request, and the consultation shall begin within 15 days of the request*

3. *If the Parties fail to reach a resolution of the problem through consultations, either Party may invoke the dispute resolution mechanism under Article __ (Settlement of disputes) to resolve the dispute.”*

APPENDIX C

ATConf/5 Conclusions for Agenda Item 2.3 Part II - Sustainability and participation

(Doc 9587, Appendix 4, page A4-10)

2.3.6.1 From the documentation and ensuing discussion on sustainability and participation under Agenda Item 2.3, the Conference concluded that:

- a) in a situation of transition to liberalization or even in an already-liberalized market, States may wish to continue providing some form of assistance to their airlines in order to ensure sustainability of the air transport industry and to address their legitimate concerns relating to assurance of services. However, States should bear in mind that provision of State aids/subsidies which confer benefits on national air carriers but are not available to competitors in the same market may distort trade in international air services and may constitute unfair competitive practices;
 - b) because of the lack of an acceptable quantification method and the existence of various non-monetary measures, it is very difficult to estimate accurately the full scale of State assistance and the impact of specific State assistance on competition. Given this difficulty, States should recognize that any actions against foreign airlines which receive State aids/subsidies might lead to retaliatory action by the affected State and hamper the ongoing liberalization of international air transport;
 - c) there may be some instances where State assistance can produce economic and/or social benefits in terms of restructuring of air carriers and assurance of services. Even in such special cases, however, States should take transparent and effective measures accompanied by clear criteria and methodology to ensure that aids/subsidies do not adversely impact on competition in the marketplace;
 - d) States should consider the possibility of identifying and permitting assistance for essential service on specified routes of a public service nature in their air transport relationships; and
 - e) to ensure the effective and sustained participation of developing countries and to facilitate the liberalization process, States should take into consideration in their air transport relationships the interests and needs of States with less-competitive air carriers and, wherever appropriate, grant preferential and participation measures. Such measures may be incorporated in the "Transition Annex" in their air services agreements.
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APPENDIX D

ATConf/6 Recommendation on Fair Competition (Doc 10009, page 27)

RECOMMENDATION 2.4/1—FAIR COMPETITION

The Conference recommends that:

- a) States should take into consideration that fair competition is an important general principle in the operation of international air services;
- b) States, taking into account national sovereignty, should develop competition laws and policies that apply to air transport. In doing so, States should consider ICAO guidance on competition;
- c) States should give due consideration to the concerns of other States in the application of national and/or regional competition laws or policies to international air transport;
- d) States should give due regard to ICAO guidance in Air Services Agreements (ASAs) and national or regional competition rules;
- e) States should encourage cooperation among national and/or regional competition authorities, including in the context of approval of alliances and mergers;
- f) ICAO should develop tools such as an exchange forum to enhance cooperation, dialogue and exchange of information between Member States to promote more compatible regulatory approaches toward international air transport;
- g) ICAO should develop a compendium of competition policies and practices in force nationally or regionally; and
- h) ICAO should continue to monitor developments in the area of competition in international air transport and update, as necessary, its policies and guidance on fair competition through the Air Transport Regulation Panel (ATRP).

ATCONF/6 RECOMMENDATION ON SAFEGUARD MEASURES (DOC 10009, PAGES 28 AND 29)

Recommendation 2.5/1—Safeguard Measures

The Conference recommends that:

- a) In the liberalization process, States should give due regard to the principles agreed upon by the aviation community at the various ICAO fora pertaining to safeguard measures designed to ensure the sustained and effective participation of all States in international air transport,

including the principle of giving special consideration to the interests and needs of developing countries;

- b) In regulatory practices, States should refrain from taking unilateral action that would negatively affect the common interest of the aviation community and the efficient and sustainable development of international air transport;
- c) ICAO should actively promote and encourage States to use the relevant ICAO guidance on safeguard measures in their regulatory practices, and to share with ICAO and other States their experiences in liberalization; and
- d) ICAO should continue to monitor developments with respect to safeguards, and should keep related guidance current and responsive to changes and needs of States and, where required, work with States, interested organizations and aviation stakeholders to develop further guidance.

APPENDIX E

ATRP Recommendation on Safeguard Mechanism for Fair Competition

(Doc 9587, pages 1-28 to 1-29)

THE PANEL RECOMMENDS THAT:

States wishing to move towards liberalization of air services in their bilateral and multilateral relationships might consider mutually agreeing on the kinds of competitive practices by a carrier or carriers which would be regarded as unfair, including using some or all of the following as signals of possible unfair competitive behaviour meriting closer examination:

- a) charging fares and rates on routes at levels which are, in the aggregate, insufficient to cover the costs of providing the services to which they relate;
- b) the addition of excessive capacity or frequency of service;
- c) the practices in question are sustained rather than temporary;
- d) the practices in question have a serious economic effect on, or cause significant economic damage to, another carrier;
- e) the practices in question reflect an apparent intent or have the probable effect, of crippling, excluding or driving another carrier from the market; and
- f) behaviour indicating an abuse of dominant position on a route.

ATConf/6 Recommendation on Dispute Settlement (Doc 10009, Page 29)

Recommendation ATRP/9-2: Dispute Settlement

THE PANEL RECOMMENDS THAT:

- 1) States wishing to move towards liberalization of air services in their bilateral or regional relationships include in their arrangements, at their discretion, in order to mediate or resolve disputes arising from allegedly unfair competitive practices or abuse of a dominant position, a provision for a dispute settlement mechanism:
 - a) a “High-level” meeting, up to Ministerial level, which parties could use when consultations were unable to resolve a dispute concerning allegedly unfair competitive practices;
 - b) a Mediator or dispute settlement panel, to be constituted from a roster of suitably qualified aviation experts maintained by ICAO. A dispute settlement

panel's determination on the substance of a dispute should preferably be binding on the parties but its decision on the remedy might be recommendatory. Furthermore, a dispute settlement panel should be able to give interim relief along the lines of that contained in the dispute settlement mechanism presented to the Worldwide Air Transport Conference, *via* the panel could be "asked by an involved party to rule first on the need for and continuance of any freeze or reversion to the *status quo ante*; damages could be awarded against the complainant when any such freeze or reversion is found to be unjustified". The parties would, however, need to agree in advance, *inter alia*, on:

- i) the terms of reference, procedures, guiding principles or criteria and terms of access to the dispute settlement panel (including whether the parties only or whether private interests such as airlines would have access), bearing in mind the objective and need for a simple, responsive and expeditious process; and
 - ii) how a decision of the dispute settlement panel and any remedy it might develop would be implemented";
- 2) that ICAO develop and keep up to date, for the purpose of the foregoing mechanism, a list of air transport experts to be available as mediators or members of dispute settlement panels.

APPENDIX F

ICAO Bilateral Template Air Services Agreement (TASA)

1. ARTICLE ON FAIR COMPETITION (DOC 9587, APPENDIX 5, PAGES A5-21)

<p align="center">Article 15 Fair competition</p>	<p align="center">Explanatory Notes</p>
<p align="center" style="border: 1px solid black; padding: 5px;">Traditional</p> <p>Each designated airline shall have a fair opportunity to operate the routes specified in the Agreement.</p> <p align="center" style="border: 1px solid black; padding: 5px;">Transitional</p> <p>Each Party agrees:</p> <p>a) that each designated airline shall have a fair and equal opportunity to compete in providing the international air transportation governed by the agreement; and</p> <p>b) to take action to eliminate all forms of discrimination or unfair competitive practices adversely affecting the competitive position of a designated airline of the other Party.</p> <p align="center" style="border: 1px solid black; padding: 5px;">Full liberalization</p> <p>Each designated airline shall have a fair competitive environment under the competition laws of the Parties.</p>	<p><i>The traditional formulation is based on the phrase in the Convention (Article 44 f)) which refers to every contracting State having "a fair opportunity to operate international air services".</i></p> <p><i>A limited transitional approach would be to apply the fair and equal opportunity to the routes specified in the annex to the agreement. However, a broader version is provided here, as well as in paragraph b).</i></p> <p><i>Under full liberalization, the Parties' competition laws would be used to ensure a fair competitive environment for all designated airlines.</i></p> <p><i>Some States, while fully supporting the application of competition laws, sometimes refer to them in memoranda of consultations rather than in the actual air services agreement.</i></p>

2. ARTICLE ON SAFEGUARDS (DOC 9597, APPENDIX 5, PAGES A5-30 TO 31)

Article 18 Safeguards	Explanatory Notes
<p>1. The Parties agree that the following airline practices may be regarded as possible unfair competitive practices which may merit closer examination:</p> <ul style="list-style-type: none"> a) charging fares and rates on routes at levels which are, in the aggregate, insufficient to cover the costs of providing the services to which they relate; b) the addition of excessive capacity or frequency of service; c) the practices in question are sustained rather than temporary; d) the practices in question have a serious negative economic effect on, or cause significant damage to, another airline; e) the practices in question reflect an apparent intent or have the probable effect, of crippling, excluding or driving another airline from the market; and f) behaviour indicating an abuse of dominant position on the route. <p>2. If the aeronautical authorities of one Party consider that an operation or operations intended or conducted by the designated airline of the other Party may constitute unfair competitive behaviour in accordance with the indicators listed in paragraph 1, they may request consultation in accordance with Article ___ [Consultation] with a view to resolving the problem. Any such request shall be accompanied by notice of the reasons for the request, and the consultation shall begin within 15 days of the request.</p>	<p><i>The provision on Safeguards will only be relevant and applicable if the Parties have agreed to move to a liberalized, even if not a fully "open skies" environment for their designated carriers. The list of airline commercial practices that may be signals of possible unfair competitive practices are indicative only and were developed by ICAO and distributed to Contracting States as a Recommendation. This provision could be used where two States have agreed to move toward a less controlled regime but either one or both parties do not have competition laws, they may need to have a mutually-agreed set of descriptions of what would constitute unfair and/or fair competitive practices as a safeguard measure. Given the particular competitive environment in which the airlines will operate and the competition law regimes applicable to their respective territories, the Parties may decide on other indicators of unfair competitive behaviour which could be included in this provision.</i></p> <p><i>The "safeguard mechanism" consists of the safeguards provision together with the fourth alternative on dispute settlement, a mediation process based on an ICAO Recommendation which is contained in the Dispute Settlement Article.</i></p> <p><i>As an alternative to the safeguard mechanism, Parties could agree on the phasing in of full market access and other provisions, to ease the transition to full liberalization (see Annex IV).</i></p>

Article 18 Safeguards	Explanatory Notes
<p>3. If the Parties fail to reach a resolution of the problem through consultations, either Party may invoke the dispute resolution mechanism under Article ___ [Settlement of disputes] to resolve the dispute.</p>	

3. **ARTICLE ON SETTLEMENT OF DISPUTES
(DOC 9587, APPENDIX 5, PAGES A5 47 TO 52)**

<p align="center">Article 34 Settlement of disputes</p>	<p align="center">Explanatory Notes</p>
<div style="border: 1px solid black; width: fit-content; margin: 0 auto; padding: 2px 10px; text-align: center;"> <p>Traditional</p> </div> <p align="center">Diplomatic channels</p> <p align="center">[See alternatively two "Arbitration" approaches below]</p> <p>1. Any dispute arising between the Parties relating to the interpretation or application of this Agreement [except those that may arise under Article __ (Fair competition), Article __ (Safety), Article __ (Tariffs/Pricing)], the Parties shall in the first place endeavour to settle it by consultations and negotiation.</p> <p>2. If the Parties fail to reach a settlement by negotiation, the dispute shall be settled through diplomatic channels.</p>	<p><i>At the bilateral level, the initial and most successful step in all basic approaches to the settlement of disputes is consultations and/or negotiations. Should that process fail to produce an agreement, or the Parties fail to reach a settlement of the dispute, then three alternatives are provided which includes settlement through diplomatic channels, arbitration and mediation, an intermediate step between consultation and arbitration. The three alternatives link the dispute settlement process to the bilateral agreement. (However, a broad, fair and equal opportunity to compete clause has often been used to address situations not specifically covered by the agreement.)</i></p> <p><i>This provision takes into account an optional wording where there may be a separate consultation process with regard to the article on fair competition or with regard to the article on safety.</i></p> <p><i>This approach relies on diplomatic channels if consultation fails to produce a settlement. It should be recognized that escalating a dispute to higher governmental levels may run the risk of a decision on other than air transport grounds.</i></p>

<p style="text-align: center;">Article 34 Settlement of disputes</p>	<p style="text-align: center;">Explanatory Notes</p>
<p style="text-align: center;">Arbitration</p> <p style="text-align: center;">[See alternatively "Diplomatic channels" above or second "Arbitration" approach below]</p> <p>1. Any dispute arising between the Parties relating to the interpretation or application of this Agreement [except those that may arise under Article __ (Fair competition), Article __ (Safety), Article __ (Tariffs/Pricing)], the Parties shall in the first place endeavour to settle it by consultations and negotiation.</p> <p>2. If the Parties fail to reach a settlement through consultations, the dispute may, at the request of either Party, be submitted to arbitration in accordance with the procedures set forth below.</p> <p>3. Arbitration shall be by a Tribunal of three arbitrators, one to be named by each Party and the third to be agreed upon by the two arbitrators so chosen, provided that the third such arbitrator shall not be a national of either Party. Each Party shall designate an arbitrator within a period of sixty (60) days from the date of receipt by either Party from the other Party of a diplomatic note requesting arbitration of the dispute, and the third arbitrator shall be agreed upon within a further period of sixty (60) days. If either of the Parties fails to designate its own arbitrator within the period of sixty (60) days or if the third arbitrator is not agreed on within the period indicated, the President of the Council of ICAO may be requested by either Party to appoint an arbitrator or arbitrators. If the President is of the same nationality as one of the Parties, the most senior Vice-President who is not disqualified on that ground shall make the appointment.</p> <p>4. The arbitration tribunal shall determine its own procedure.</p> <p style="text-align: center;">[Paragraph 5, option 1 of 2]</p> <p>5. Each Party shall [to the degree consistent with its national law] give full effect to any decision or award of the tribunal.</p> <p style="text-align: center;">[Paragraph 5, option 2 of 2]</p> <p>5. The decision of the tribunal shall be binding on the Parties.</p> <p style="text-align: center;">[Paragraph 6, option 1 of 2]</p> <p>6. The expenses of the tribunal shall be shared equally between the Parties.</p> <p style="text-align: center;">[Paragraph 6, option 2 of 2]</p> <p>6. Each Party shall bear the costs of the arbitrator appointed by it. The other costs of the tribunal shall be shared equally by the Parties, including any expenses incurred by the President of the Council of ICAO in implementing the procedures in paragraph 3 of this Article.</p>	<p><i>Should the process of consultations fail to produce an agreement, or the Parties fail to reach a settlement of the dispute, then this approach relies on settling disputes through arbitration. The arbitration process in bilateral air services agreements has rarely been used in practice, in part because of its costs and the time involved, though also because most disputes do not get beyond the stage of negotiation.</i></p> <p><i>The arbitration process is to provide for the establishment of a three-person arbitration tribunal.</i></p> <p><i>This alternative leaves it to the tribunal to establish its own procedures.</i></p> <p><i>There are different approaches possible on the implementation of a tribunal decision. The arbitral tribunal may hold a conference on the issues to be decided, receive written and oral testimony from both Parties, establish a schedule for reaching a decision, and issue interpretations thereof; and a majority of the tribunal will be sufficient to issue a decision.</i></p> <p><i>There are a number of variations as to the division of the expenses. For example, both Parties may equally share the expenses of the tribunal, or each Party may bear the costs of the arbitrator it appoints and share the other costs of the tribunal.</i></p>

<p align="center">Article 34 Settlement of disputes</p>	<p align="center">Explanatory Notes</p>
<p>7. If and so long as either Party fails to comply with any decision given under paragraph 3, the other Party may limit, withhold or revoke any rights or privileges which it has granted by virtue of this agreement to the Party in default or to the designated airline or airlines in default.</p> <p align="center">[See alternatively, "Diplomatic channels" or first "Arbitration" approach above]</p> <p>1. Any dispute arising between the Parties relating to the interpretation or application of this Agreement [except those that may arise under Article __ (Fair competition), Article __ (Safety), Article __ (Tariffs/Pricing)], the Parties shall in the first place endeavour to settle it by consultations and negotiation.</p> <p>2. If the Parties fail to reach a settlement through consultations, the dispute may, at the request of either Party, be submitted to arbitration in accordance with the procedures set forth below.</p> <p>3. Arbitration shall be by a Tribunal of three arbitrators, one to be named by each Party and the third to be agreed upon by the two arbitrators so chosen, provided that the third such arbitrator shall not be a national of either Party. Each Party shall designate an arbitrator within a period of sixty (60) days from the date of receipt by either Party from the other Party of a diplomatic note requesting arbitration of the dispute, and the third arbitrator shall be agreed upon within a further period of sixty (60) days. If either of the Parties fails to designate its own arbitrator within the period of sixty (60) days or if the third arbitrator is not agreed on within the period indicated, the President of the Council of ICAO may be requested by either Party to appoint an arbitrator or arbitrators. If the President is of the same nationality as one of the Parties, the most senior Vice-President who is not disqualified on that ground shall make the appointment.</p> <p>4. Except as otherwise agreed, the arbitration tribunal shall determine the limits of its jurisdiction in accordance with this Agreement and shall establish its own procedure. At the direction of the tribunal or at the request of either of the Parties, a conference to determine the precise issues to be arbitrated and the specific procedures to be followed shall be held no later than fifteen (15) days after the tribunal is fully constituted.</p> <p>5. Except as otherwise agreed by the Parties or prescribed by the tribunal, each Party shall submit a memorandum within forty-five (45) days of the time the tribunal is fully constituted. Replies shall be due sixty (60) days later. The tribunal shall hold a hearing at the request of either Party or at its discretion within fifteen (15) days after replies are due.</p> <p>6. The tribunal shall attempt to render a written decision within thirty (30) days after completion of the hearing or, if no hearing is held, after the date both replies are submitted. The decision of the majority of the tribunal shall prevail.</p>	<p><i>Should the process of consultations fail to produce an agreement, or the Parties fail to reach a settlement of the dispute, then this approach relies on settling disputes through arbitration. The arbitration process in bilateral air services agreements has rarely been used in practice, in part because of its costs and the time involved, though also because most disputes do not get beyond the stage of negotiation.</i></p> <p><i>The arbitration process is to provide for the establishment of a three-person arbitration tribunal.</i></p> <p><i>This alternative leaves it to the tribunal to establish its own procedures, including the appointment process for the arbitrators, with time frames, to be followed.</i></p>

<p style="text-align: center;">Article 34 Settlement of disputes</p>	<p style="text-align: center;">Explanatory Notes</p>
<p>7. The Parties may submit requests for clarification of the decision within fifteen (15) days after it is rendered and any clarification given shall be issued within fifteen (15) days of such request.</p> <p style="padding-left: 40px;">[See alternatively, "Diplomatic channels" or first "Arbitration" approach above]</p> <p style="padding-left: 40px;">[Paragraph 8, option 1 of 2]</p> <p>8. Each Party shall [to the degree consistent with its national law] give full effect to any decision or award of the tribunal.</p> <p style="padding-left: 40px;">[Paragraph 8, option 2 of 2]</p> <p>8. The decision of the tribunal shall be binding on the Parties.</p> <p style="padding-left: 40px;">[Paragraph 9, option 1 of 2]</p> <p>9. The expenses of the tribunal shall be shared equally between the Parties.</p> <p style="padding-left: 40px;">[Paragraph 9, option 2 of 2]</p> <p>9. Each Party shall bear the costs of the arbitrator appointed by it. The other costs of the tribunal shall be shared equally by the Parties, including any expenses incurred by the President of the Council of ICAO in implementing the procedures in paragraph 4 of this Article.</p> <p>10. If and so long as either Party fails to comply with any decision given under paragraph 3, the other Party may limit, withhold or revoke any rights or privileges which it has granted by virtue of this agreement to the Party in default or to the designated airline or airlines in default.</p> <div style="border: 1px solid black; padding: 5px; margin: 10px auto; width: fit-content;"> <p style="text-align: center;">Transitional and Full liberalization</p> </div> <p>1. Any dispute arising between the Parties relating to the interpretation or application of this Agreement [except those that may arise under Article __ (Fair competition), Article __ (Safety), Article __ (Tariffs/Pricing)], the Parties shall in the first place endeavour to settle it by consultations and negotiation.</p>	<p style="text-align: center;"><i>This alternative developed by ICAO is to address those commercial disputes, such as on pricing, capacity and other competitive practices that arise in a liberalized environment. It could also be used to address disputes beyond unfair practices, for example, disputes related to market access in a less regulatory controlled environment. The mechanism is deliberately broader in scope and could apply to issues not specifically included in the bilateral agreement. It is not intended as a substitute for the formal arbitration process, but rather as a means to resolve disputes in a relatively simple, responsive and cost-effective manner.</i></p>

Article 34 Settlement of disputes	Explanatory Notes
<p>2. Any dispute which cannot be resolved by consultations, may at the request of either Party to the agreement 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.</p> <p>3. The Parties shall agree in advance on the terms of reference of the mediator or of the panel, the guiding principles or criteria and the terms of access to the mediator or the panel. They shall also consider, if necessary, providing for an interim relief and the possibility for the participation of any Party that may be directly affected by the dispute, bearing in mind the objective and need for a simple, responsive and expeditious process.</p> <p>4. 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 an 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.</p> <p>5. 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.</p> <p>6. The Parties shall cooperate in good faith to advance the mediation and to be bound by any decision or determination of the mediator or the panel, unless they otherwise agreed. If the Parties agree in advance to request only a determination of the facts, they shall use those facts for resolution of the dispute.</p> <p>7. The costs of this mechanism shall be estimated upon initiation and apportioned equally, but with the possibility of reapportionment under the final decision.</p> <p>8. The mechanism is without prejudice to the continuing use of the consultation process, the subsequent use of arbitration, or Termination under Article ___.</p>	<p><i>The normal consultation process may resolve such disputes but could also have the effect of prolonging an unfair competitive practice to the commercial detriment of one or more airlines. Consequently, this procedure, which is less formal and time consuming than arbitration, is designed, by means of a panel, to reach a resolution through mediation, fact finding or decision, using the services of an expert or experts in the subject matter of the dispute. The primary objective is to enable the Parties to restore a healthy competitive environment in the airline market place as expeditiously as possible.</i></p> <p><i>"Open skies" agreements also include a similar recourse to refer disputes "for decision to some person or body".</i></p> <p><i>The mechanism requires the Parties to agree in advance on such matters as the purpose of the panel, viz its terms of reference and procedure, and in particular whether the panel is permitted to grant any interim or injunctive relief to the complainant. Such relief could take the form, for example, of a temporary freeze or reversion to the status quo ante.</i></p> <p><i>The two important time frames built in to the mechanism are 15 days for selection of the experts to constitute the panel, and 60 days for the rendering of a decision or determination. Thus the emphasis is on minimizing legal formalities and procedural time-frames, yet allowing adequate time for the panel to arrive at a decision or determination.</i></p>

Article 34 Settlement of disputes	Explanatory Notes
<p>9. If the Parties fail to reach a settlement through mediation, the dispute may, at the request of either Party, be submitted to arbitration in accordance with the procedures set forth below.</p>	<p><i>The use of the mechanism does not preclude the implementation of the arbitration process if that is also provided for in the agreement and if the above mechanism has failed to resolve the dispute to the satisfaction of one or more Parties. Nevertheless, it may be expected that the subsequent use of arbitration should be unnecessary if the Parties have committed to this complementary procedure for resolving certain kinds of commercial and time-sensitive disputes.</i></p> <p><i>The arbitration procedures are the same as outlined in the traditional text.</i></p>

APPENDIX G

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

Description on bilateral air service agreement articles on fair and equal opportunity, and on fair competition (doc 9626, chapter 2.2, page 2.2-2)

A fair and equal opportunity article (or some variant thereof such as “fair and equitable” or “fair”) *sets forth a general principle which each party to an agreement may rely upon to ensure against discrimination or unfair competitive practices affecting its designated carrier(s).* Alternatively, the principle may be stated in a clause in the capacity article or elsewhere in the agreement. The article is sometimes expanded to specifically require consideration of the interests of the other party and its air carrier(s). The opportunity provided is for the designated carrier(s) of each party and may be stated as “to compete” or “to operate”.

A fair competition article, a relatively new inclusion in some recent bilateral agreements, especially liberal ones, *lays down agreed general principles and/or specific provisions governing competition in the provision of air services by the parties’ designated airlines.*

Description on predatory pricing (Doc 9626, Chapter 4.3, pages 4.3-9 to 4.310)

Predatory pricing

The practice of predatory pricing had been regarded as a relatively unlikely or irrational event simply because it would be costly and not credible. Along with liberalization, however, more States have expressed their concern that a major airline with a dominant market position might reduce fares

specifically to drive out smaller rivals, or to discourage future entry, expecting to recoup any losses incurred by subsequently raising its fares above competitive levels. A dominant airline might also engage in predatory pricing to develop its reputation as a tough competitor and to send a “signal” to current and prospective rivals that the potential for profitable entry is slight. In addition, an airline, which receives a subsidy directly or indirectly from the State, could reduce their fares down to levels otherwise impossible to offer.

In dealing with predatory pricing through competition laws and consultation mechanisms, overly inclusive assessment rules may impose a restraint on the ability of airlines to compete vigorously on price, while a no-rule approach may have a risk of greater monopoly power or more collusion among competitors. Although there is no universally accepted clear-cut or so-called “bright-line” rule about what constitutes predatory pricing or how to prove its occurrence, many courts have used an *Areeda-Turner rule*, *i.e. a firm’s pricing is predatory if its price is less than its short-run marginal cost, i.e. an increment to cost that results from producing one more unit of output in a brief time period such that some factors of production cannot be varied without cost, or its average variable cost, i.e. a variable cost divided by output, as a more practical proxy.* In the airline industry, however, a short-run marginal cost of adding some extra passengers is close to zero at any given time once capacity is provided. Therefore, some have suggested the use of a *long-run marginal cost, i.e. an*

increment to cost in a sufficiently lengthy period of time such that all factors of production can be varied without cost, as a yardstick for judging predatory pricing. Since the longer the planning horizon the more likely it is that a fixed cost will become a variable cost, a marginal cost or an average variable cost becomes greater in the long-run.

In addition to these simple cost-based rules, several more complex rules have also been developed. For example, some argue that a firm's pricing is predatory if its output is expanded in response to entry and its price is less than its average variable cost, while others suggest that a price cut made in response to entry is not predatory if a firm keeps its price for a considerable period of time after a new entrant has been driven off. There is also a two-tier approach that focusses first on market structures to examine whether predatory pricing is a workable strategy, followed by a number of cost-based tests.

Most of these rules which try to define illegal action can, however, be difficult to implement in a straightforward way because of the data limitations and the existence of related factors (such as capacity changes, yield management for seat allocation, sales and marketing activities). Given these difficulties, States (and groups of States) tend to rely on a *rule-of-reason approach*, which involves *taking each case on its merits with a thorough examination of the factual circumstances such as market structures and dominant airlines' conduct in a relevant market*, as a starting point for assessing alleged cases (see Chapter 2.3).



AIR TRANSPORT REGULATION PANEL (ATRP)

THIRTEENTH MEETING

Montréal, 1 to 4 September 2015

COMPETITION IN INTERNATIONAL AIR TRANSPORT

(Presented by the Secretariat)

1. INTRODUCTION

1.1 This paper presents information on the research by the Secretariat on the subject of competition in international air transport, in relation to Agenda Items 1 and 2.

1.2 Without purporting to exhaustively cover the area of competition in international air transport, this paper attempts to provide a basic understanding of competition, both at the general level and as applied to international air transport markets, from a theoretical, practical perspective. It also describes the regulation of competition and the differences that exist in approaches taken by different States.

2. BACKGROUND

2.1 Prior to the 1990s, States, individually or collectively, generally either did not apply national competition laws to international air transport, or exempted it from the scope of such laws, sometimes with certain conditions designed to mitigate perceived anticompetitive effects (for example, multilateral traffic conference machinery, tariff coordination and agreements). Consequently, many bilateral air transport agreements contained no clauses dealing specifically with the application of competition laws, although some agreements did include certain competition principles and commitments to avoid unfair practices.

2.2 Since then, with increasing globalization and widespread adoption of the market economy, there has been a marked rise in the adoption of competition laws by States, spreading gradually from developed economies to other parts of the world. As liberalization progresses and takes hold in more States, the traditional concepts to ensure fair competition tend to gradually give way to the application of competition laws, particularly in cases where States have agreed to an open competition regime.

2.3 As illustrated in **Figure 1** below, the liberalization of international air transport, generates additional business opportunities and stimulates economic activities by opening up market access for air carriers. Such expansion, in turn, leads operators to compete for existing or new market shares. Enhanced competition has led many carriers to consider consolidation as a means by which to achieve economies of scale and scope and to respond to consumer demands for more seamless service and global networks. With heightened competition and consolidation comes a potential risk of anticompetitive behaviours.

2.4 Since, in the context of liberalization, States have opted for greater reliance on market or competitive forces, there is a greater need to address potential anticompetitive behaviours by national or regional competition laws and regulations than in the past era of tight government regulation of routes, capacities/frequencies, and fares.

Figure 1 - Relationship Between Air Transport Liberalization, Competition and Safeguards



Source : ICAO

2.5 In recent years, the application of competition laws and regulations to air transport has occurred not only with more frequency but also has encompassed an increasing number of issues, ranging from antitrust immunity, mergers and alliances, abuse of dominant positions, capacity dumping and predatory pricing, sales and marketing, to airport charges and fees, State aid and loan guarantees.

2.6 One of the potential issues associated with the application of national competition laws is the differing, sometimes even conflicting, regimes or practices employed by States. This may create certain complexity for airlines operating international air services when they must comply with different rules or practices in different countries. In addition, the disparity in the stages of development, geographical location, and competitive strength of air carriers may be taken into consideration to ensure proper application and avoidance of disputes in applying them internationally.

3. UNDERSTANDING COMPETITION

3.1 **General definitions of competition** - At a basic level, competition can be understood as *“The action of endeavouring to gain what another endeavours to gain at the same time; the striving of*

two or more for the same object; rivalry". Under a more commercial definition, competition is a "*rivalry in the market, striving for custom between those who have the same commodities to dispose of.*"¹ Competition has also been defined as a situation in which two or more people or groups are trying to get something which not everyone can have.²

3.2 Etymologically, competition may be defined as follows³:

1610s, "***to enter or be put in rivalry with***," from Middle French *compéter* "be in rivalry with" (14c.), or directly from Late Latin *competere* "strive in common," in classical Latin "to come together, agree, to be qualified," later, "strive together," from *com-* "together" (see *com-*) + *petere* "to strive, seek, fall upon, rush at, attack" (see *petition* (n.)).

3.3 Therefore, competition generally implies two or more operating entities striving to gain advantage within the same market(s). In the context of international air transport, competition may be defined as "*the existent or potential rivalry between two or more operators, carriers or groups striving for advantage in the same market, including using price and quality of products or services to achieve the desired gains.*"

3.4 **Relevant market** – The enforcement of the provisions of competition law would not be possible without referring to the market where competition takes place. To understand a market's form or level of competition, it is first essential to delineate the boundaries of the relevant market or, in other words, identify the products and undertakings which are directly competing in a business. The relevant market is one where the competition takes place. The extent to which firms are able to increase their prices above normal competition levels (i.e. market clearing prices) depends on the possibility for consumers to buy substitute goods and the ability for other firms to supply those products.⁴

3.5 A relevant market has two dimensions: product and geography. In transport sectors, however, the product dimension already includes a geographic aspect since passengers, cargo and mail typically use transport in order to travel from one point to the other. More specifically, in the context of the airline industry, the product on which operators are competing is the carriage, for remuneration or hire, of passengers, cargo or mail. Consequently, the delineation of relevant markets in the airline sector starts with the identification of the point of origin (O) and the point of destination (D), the so-called O&D approach.⁵ Besides, the relevant product market is determined according to demand-side substitution and supply-side substitution.

- Demand-side substitution. This takes place when consumers switch from one product to another in response to a change in the relative prices of the products. If consumers are in a position to switch to available substitute products or to begin sourcing their requirements from suppliers located in other areas, then it is unlikely that price

¹ Oxford English Dictionary.

² <http://www.collinsdictionary.com/dictionary/english/competition>.

³ Online Etymology Dictionary, <http://www.etymonline.com/index.php?term=compete>.

⁴ Bellamy, C. W. and G. D. Child (1993): *Common Market Law of Competition*. London, Sweet and Maxwell; Bishop, Simon and Mike Walker (1999): *The Economics of EC Competition Law*. Sweet and Maxwell

⁵ *Airline Competition - Background Paper by the Secretariat*, OECD 2014.

increases will be profitable (i.e. demand is price elastic in terms of cross-price elasticity of demand).

- Supply-side substitution. Sometimes consumers may be unable to react to a price increase (because of a switching cost and a search cost, etc.). Nevertheless, producers may be able to do so by increasing their supply to satisfy the demand of these consumers, for example. If other producers respond to an increase in the relative price of the products supplied by the single supplier by switching production facilities to producing the monopolized collection of products, the increased level of supply may render any attempted price increase unprofitable.
- Ultimately, in the air transport sector, demand-side substitution is the determining factor. To illustrate this, if the price of travel in city-pair A were to increase, it is unlikely that passengers would consider substituting route A with travel to B.

3.6 However, it is important to note that market definition is not uniform worldwide and is also evolving. According to the Organisation for Economic Co-operation and Development (OECD)⁶, there is no consensus on the definition of relevant markets for airlines. While “several competition authorities have adopted the traditional O&D approach, others have adopted narrower or broader definitions taking industry changes into account.” Differences also occur as to whether markets should be further segmented between business and leisure passengers, and between direct and indirect flights.

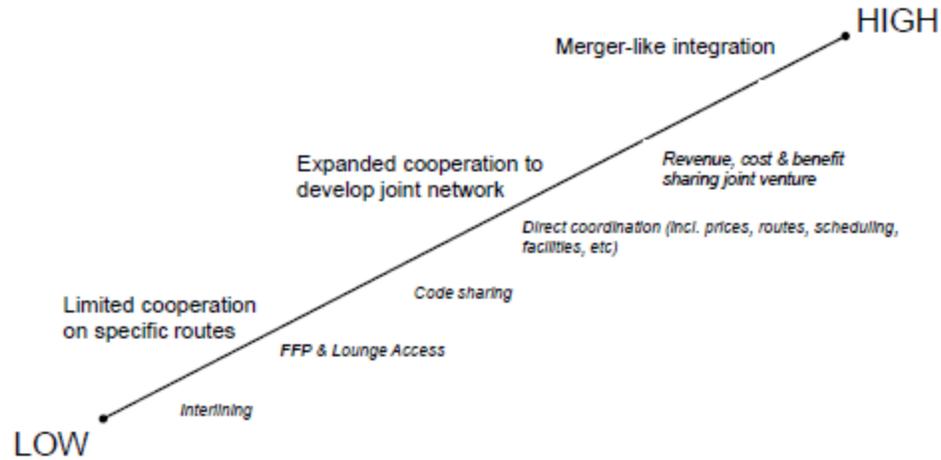
3.7 Finally, it should be pointed out that, from a broader perspective, competition in the airline industry involves not only existing air carriers but also potential entrants (or even “credible” threats of entrance in accordance with the contestable market theory). Over 1 300 new airlines have been set up in the past 4 decades, an average of over 30 each year. Other modes of transportation, such as high-speed trains, cars, traditional trains, ships and buses are all potential substitutes for the carriage of passengers and cargo. Their impact becomes significant when the speed advantage of aircraft becomes less important.⁷

3.8 **The forms of airline cooperation** - As shown in **Figure 3**, cooperation between air carriers covers a broad spectrum of arrangements. These arrangements can be generally characterized as taking the form of tactical or a strategic alliances⁸ or different combinations involving both cooperation and competition between airlines.

⁶ OECD (2014), Annex to the Summary Record of the 121st Meeting of the Competition Committee held on 18-19 June 2014, Executive Summary of the discussion on Airline Competition.

⁷ IATA *Vision 2050*, 2011, p. 25.

⁸ *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches*, Report by the European Commission and the United States Department of Transportation, 2010, p. 5.

Figure 3 - Spectrum of Airline Cooperation

Source: *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches*, Report by The European Commission and The United States Department of Transportation, 16 Nov. 2010

3.9 **Alliances** – Many airlines seek to improve their market prospects through forming partnerships with other air carriers. These alliances may be domestic, regional, intercontinental or global and can be of any size, for any particular purpose or objective, or for any length of time. While numerous agreements concern cooperation on a limited scale (for example, code sharing on certain routes), the number of wide-ranging strategic alliances has been on the rise in recent years. Most notable was the emergence of several competing mega-alliances, which are essentially alliance groupings of geographically spread large and medium airlines with extensive combined global networks. There are three general variants of alliances:

- Tactical alliances, which typically involve only two carriers and cover a limited number of routes, address specific deficiencies in carriers' networks. Cooperation takes place through interline, frequent flyer programme, or code sharing arrangements.
- Strategic alliances, which can be defined as voluntary unions of airlines held together by various commercial cooperative arrangements.⁹ An alliance agreement may, of course, contain a variety of elements found in tactical alliances, such as code sharing, blocked space, cooperation in marketing, pricing, inventory control and frequent flyer programmes, coordination in scheduling, sharing of offices and airport facilities, joint ventures and franchising.
- Global alliances allow air carriers to link their route networks and sell tickets on the flights of their partners. As a consequence, alliances allow a carrier to offer travellers access to a large number of destinations around the world with more convenient and

⁹ ICAO *Manual on the Regulation of International Air Transport* (Doc 9626), 4.8-1.

better coordinated schedules, single on-line prices, single point check-in, coordinated service, and reciprocal frequent flyer programs.

3.10 **Coopetition** – Not all competition occurs in an antagonistic environment, as might be suggested by dictionary definitions. In practice, the inter-airline ties may be substantially closer, an arrangement at times called “coopetition.” The term “coopetition”, created by combining the words cooperation and competition, was coined by Ray Noorda, founder of the networking software company Novell. It was popularized by Adam Brandenburger from Harvard Business School and Barry Nalebuff from Yale School of Management. This situation occurs when competing firms cooperate in some aspects of their production and marketing in order to maximize their profits.¹⁰

3.11 Examples of coopetition activities involve arrangements between competing airlines in what are called “code sharing” agreements, which allow partner airlines to market seats on each other’s flights. Several forms of coopetition can be observed:

- Coopetition on different markets: in this case, the airlines cooperate on certain markets and compete on others. The objective is for each carrier to focus its resources on more profitable markets, while still remaining present on other markets.
- Coopetition on different activities: this situation involves, in the same market, cooperation on certain activities (e.g. schedules, lounge, luggage, etc.) and competition on other activities (pricing, distribution, etc.). The objective here is for each carrier to increase its frequencies without reducing its load factor, and while keeping control over the fares it offers.
- Coopetition on different markets and activities: This scenario combines the first two. Within one specific market, the carriers may cooperate on certain activities (e.g. schedules, lounge, luggage, etc.) while competing on others (pricing, distribution, etc.). Simultaneously, they may compete on some markets, while cooperating on others.

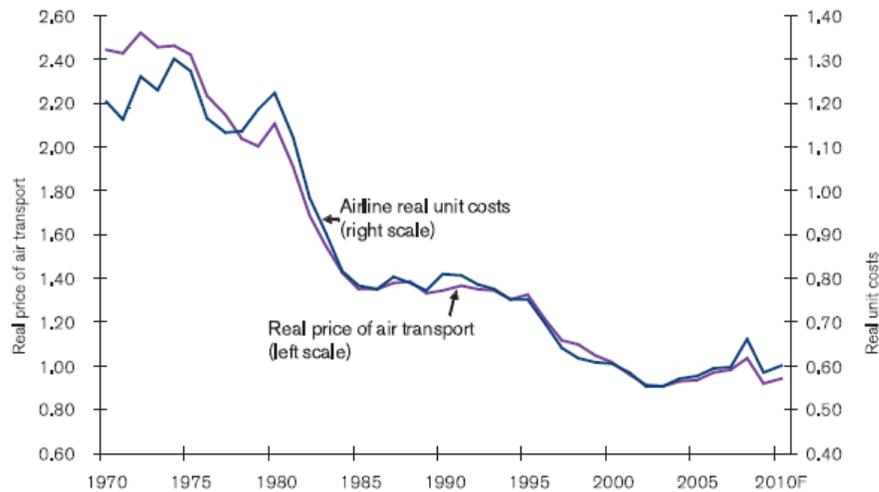
4. COMPETITION IN PRACTICE

4.1 Over the past 40 years the real operating cost of providing air transport services has fallen by more than 60 per cent, as shown in **Figure 4**. This decline in operating costs is driven in part by increasing efficiency of new aircraft, higher utilization of airplanes, and better operational performance of airlines. Increased competition between carriers has also played a role in lowering prices. The inflation-adjusted price for consumers has fallen by a similar extent.¹¹

¹⁰ P. Chiambaretto, Colloque DGAC-CSAC, 2015.

¹¹ IATA *Vision 2050*, 2011, p. 7.

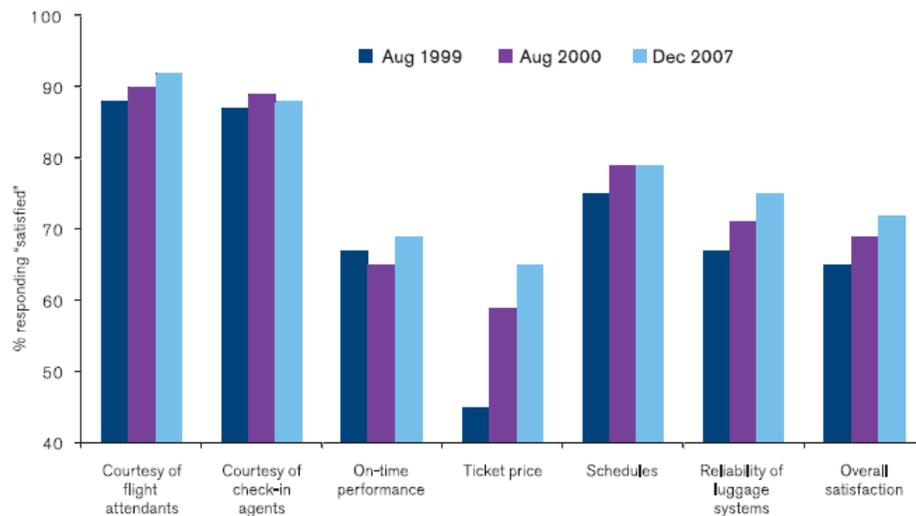
Figure 4 - Real Costs and Real Price of Air Transport



Source: IATA

4.2 Satisfaction of passengers with quality of services and products seems to have improved over time (i.e. direct result from service competition). As shown in **Figure 5**, overall passenger satisfaction increased over the period 1999-2007, and in particular, satisfaction with ticket price increased from around 45 per cent around 65 per cent, while on-time performance was relatively stable, between 65 and 70 per cent.

Figure 5 - Passenger Satisfaction with Different Facets of the Service



Source: IATA

4.3 **The challenges to consolidation** - In many economic sectors, one way for operators to gain market shares, rationalize their operations with a view to achieving economies of scale/scope and

reduce costs (including transaction costs), is to carry out cross-border mergers. However, such cross-border mergers are not always possible in the airline industry. Under bilateral air services agreements, States have traditionally retained the right to withhold, revoke, or impose conditions on the operating permission of a foreign air carrier that is not “substantially owned and effectively controlled” by the designating State or its nationals. This “nationality clause” criterion has been used, since the 1940s, in the overriding majority of air service agreements, and continues to be included in many newly negotiated bilateral accords.

4.4 The rationale for the nationality clause is that it provides a convenient link between the carrier and the designating State by which parties to the agreement can implement a “balance of benefits” policy for the airlines involved, prevent a non-party State through its carrier from gaining, indirectly, an unreciprocated (“free rider”) benefit, and most importantly identify the country that is responsible for safety and security oversight. National defence considerations are also a factor in some cases. The nationality clause made obvious sense in the days when most airlines were State-owned.

4.5 **The need for airline cooperation** - Facing heightened competition on the one hand and the challenges to consolidation on the other, airlines have found various ways by which to expand networks beyond national borders, including alliances, mergers and acquisitions, many of which involved foreign investment or equity exchange.¹² Recent years have seen an extraordinary acceleration of this trend. In Europe, Latin America, and Asia, airlines with foreign or transnational ownership and control, as well as “families” of related carriers in different countries but under a single management, are now a common and growing phenomenon.

4.6 The majority of passengers want to travel “point-to-point” between relatively small cities, and the number of city-pair combinations amounts to thousands. It is difficult for a single airline to offer “from anywhere to anywhere” service using its own aircraft.¹³ Since consumers want network scope and depth, and the economics of providing this may not be possible for a single airline, particularly considering the prohibition of cross-merger mergers, air carriers have been naturally driven to cooperate to varying degrees to join forces. In order to meet the demands of consumers for network scope and depth, airlines have resorted to various degrees of cooperation.

4.7 The impact of global alliances on the airline industry is significant. The marketing power of global alliances, together with their competitive consequences, including their dominance at some hubs, has small and medium-sized airlines concerned about their survival which has prompted these airlines to either develop a particular segment of a market or to compete as low-cost point-to-point airlines. Today, three global airline alliances exist:

- Star Alliance, founded in 1997 by Air Canada, Lufthansa, Scandinavian Airlines System (SAS), Thai Airways International and United Airlines (as of July 2015, it had twenty-eight member airlines. Website: www.star-alliance.com);
- Oneworld, founded in 1998 by American Airlines, British Airways, Cathay Pacific and Qantas (as of June 2015, it had fifteen member airlines. Website: www.oneworldalliance.com); and
- SkyTeam, founded in 2000 by AeroMexico, Air France, Delta Air Lines and Korean Air (as of July 2015, it had twenty member airlines. Website: www.skyteam.com).

¹² ATConf/6-WP/12.

¹³ IATA Economic Briefing, *The Economic Benefits Generated by Alliances and Joint Ventures*, 2011.

4.8 As a result of the competitive advantages alliances provide, member airlines have collectively been able to increase their market share. **Figure 6** shows the share of flights operated between Europe and Asia by each of the alliances. In 2004, the flights operated by the alliances collectively accounted for 30 per cent of all flights in this market.¹⁴ Between 2004 and 2013, several major carriers in Asia and Europe gained membership into an alliance. As a result, the market share operated by alliances increased to 56 per cent in 2013.

Figure 6 - Evolution of Alliances' Market Share (2004-2013)



Source: Al-Sayeh, M.I.T.

4.9 For passengers, the main benefits of alliances are a more streamlined travel experience and larger choice of destinations, since alliances provide airlines with valuable access to destinations that they would otherwise not serve. They also allow passengers to take advantage of frequent flyer miles on other airlines.

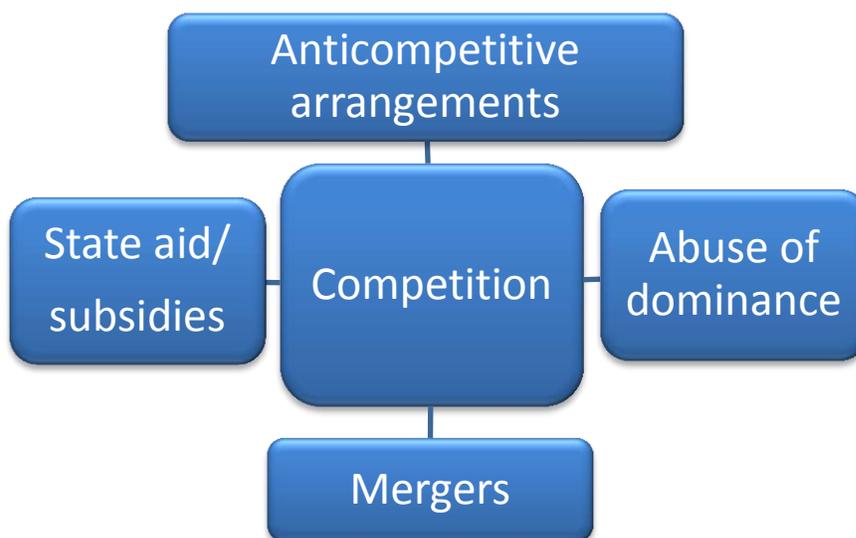
4.10 Although these arrangements possess the potential to improve the utility of passengers and the efficiency of the industry, the effects of alliances are not uniformly positive. Some have attracted considerable attention from regulatory authorities because of their potential impact on market access, competition and consumer interests. Certain proposed major alliances have been examined closely by relevant national and regional regulatory bodies. In some cases, certain regulatory measures were introduced to alleviate the potential anticompetitive aspects of the arrangements. Such measures could include the surrender of a certain number of slots to facilitate other airlines' entry into the market. Regulatory treatment of airline alliances varies amongst States and is mostly on an ad hoc rather than systematic basis, often dictated by general economic and/or political considerations of the States concerned, i.e. a "public interest" test.

¹⁴ *The Rise of the Emerging Middle East Carriers: Outlook and Implications for the Global Airline Industry*, Al-Sayeh, M.I.T. 2014.

5. REGULATING COMPETITION

5.1 The goal of competition policy is to contribute to overall welfare and economic growth by promoting market conditions in which the nature, quality and price of goods and services are determined by competitive market forces.¹⁵ As illustrated in **Figure 7**, competition policies and rules apply to four broad categories of activities: anticompetitive agreements (including cartels); abuse of dominant market position; mergers and acquisitions and government support.

Figure 7 - Main Areas Covered by Competition Rules



Source: ICAO

5.2 Anticompetitive agreements/arrangements

5.2.1 Anticompetitive agreements are understood as arrangements between operators which prevent, restrict or distort competition. They are generally forbidden. One example of general prohibition of such arrangements can be found in Article 101 of the Treaty on the Functioning of the European Union, which prohibits:

“all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- b) limit or control production, markets, technical development, or investment;

¹⁵ OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, p. 58.

- c) share markets or sources of supply;
- d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantages; and
- e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

5.2.2 Agreements entered between economic operators are traditionally approached either under the regime of anticompetitive agreements or the control of mergers and acquisitions. However, in the airline sector, the distinction may be challenging to draw. One reason for this is that, as described previously, airlines have increasingly resorted to horizontal cooperation, ranging from light alliances to deeper cooperation, and even integration, arrangements.

5.2.3 In the United States, the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain interstate and foreign trade. It also outlaws agreements among competitors to fix prices, rig bids, and allocate customers, which are punishable as criminal felonies. The Antitrust Division of the U.S. Department of Justice is responsible for enforcing the Sherman Act and other traditional antitrust laws.

5.2.4 United States air carriers are required to submit cooperative service agreements that they have with each other, such as arrangements for reciprocal code sharing, joint frequent flyer and lounge access, and joint marketing, to the United States Department of Transportation (DoT) for review before implementation.

5.2.5 Even though alliances are the most common horizontal agreements in the airline industry, there exists a broad spectrum of antitrust enforcement tools and mechanisms across countries, as shown by the following diversity of regimes:

- merger control in countries that have a broad merger definition, such as in Brazil, Canada and India;
- specific exemption, authorization or immunity regimes requiring an application from the airline alliance and a case-by-case examination, such as in the United States;
- block exemption regulations for certain types of airline alliances, such as in Israel;
- self-assessment obligation to determine whether the alliance falls under an exception to cartel law, such as in the European Union; and
- residual cartel enforcement, in most jurisdictions.

All these enforcement mechanisms aim to subject alliances to antitrust scrutiny. They differ, however, as to their procedure, timing, remedies and outcome, and sometimes even as to the authority in charge.¹⁶

5.3 Abuse of dominant market position

5.3.1 Behaviour falling under the denomination of abuse of dominant position can be broadly grouped in two categories:

- exclusionary abuses, which aim at driving competitors out of the market;
- exploitative abuses, where the dominant company exploits its market power by, for instance, discriminating, absent any objective economic reasons, between different groups of consumers charging them unfair prices.

5.3.2 In the international air transport field, the most often invoked of these anticompetitive practices are the formation of monopolies, the maintenance of predatory pricing regimes, and the dumping of capacity.

5.3.3 *Monopoly* - When firms hold large market shares, consumers risk paying higher prices and getting lower quality products than compared to competitive markets. However, the existence of a very high market share does not always mean consumers are paying excessive prices since the threat of new entrants to the market can restrain a high-market-share firm's price increases.

5.3.4 In the United States, Section 2 of the Sherman Act¹⁷ is enforced by the Department of Justice, and forbids the monopolization of any part of interstate commerce. An unlawful monopoly exists when one firm controls the market for a product or service, while it has obtained that market power, not because of superior product or service, but by suppressing competition with anticompetitive conducts.

5.3.5 *Predatory pricing* - Generally, predatory practices are understood as situations where a dominant undertaking deliberately incurs losses or foregoes profits in the short term, so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm.¹⁸ Price predation is essentially a strategy to injure competitors by low prices, strategic exclusion, or other means of forcing rivals to bear costs that the predator does not incur itself. Predation through exclusionary pricing and selling strategies is a commonly alleged abuse in the airline industry.

5.3.6 According to the Australian Competition and Consumer Commission (ACCC) -,¹⁹ predatory pricing occurs when a company with substantial market power or share of a market sets its prices at a sufficiently low level with the purpose of:

- eliminating or substantially damaging a competitor;

¹⁶ OECD (2014), Annex to the Summary Record of the 121st Meeting of the Competition Committee held on 18-19 June 2014, Executive Summary of the discussion on Airline Competition.

¹⁷ Sherman Act of July 2, 1890 - 15 U.S.C. § 2.

¹⁸ Information from European Union Institutions and Bodies, Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.

¹⁹ <https://www.accc.gov.au/business/anti-competitive-behaviour/predatory-pricing>.

- preventing the entry of a competitor into that or any other market;
- deterring or preventing a competitor from engaging in competitive.

5.3.7 In the international air transport context, the following definition of predatory pricing was developed by the Fifth Worldwide Air Transport Conference (ATConf/5) in 2003: “charging fares and rates on routes at levels which are, in aggregate, insufficient to cover the costs of providing the services to which they relate.”²⁰

5.3.8 Although there is no universally accepted clear-cut or so-called “bright-line” rule to assess whether the pricing is predatory, many courts have used an *Areeda-Turner rule*, i.e. a firm’s pricing is predatory if its price is less than its *short-run marginal cost*, i.e. an increment to cost that results from producing one more unit of output in a brief time period such that some factors of production cannot be varied without cost, or its *average variable cost*, i.e. a variable cost divided by output, as a more practical proxy. In the airline industry, however, a short-run marginal cost of adding some extra passengers is close to zero at any given time once capacity is provided. Therefore, some have suggested the use of a *long-run marginal cost*, i.e. an increment to cost in a sufficiently lengthy period of time such that all factors of production can be varied without cost, as a yardstick for judging predatory pricing. Since the longer the planning horizon the more likely it is that a fixed cost will become a variable cost, a marginal cost or an average variable cost becomes greater in the long-run.

5.3.9 In addition to these simple cost-based rules, several more complex rules have also been developed. For example, some argue that a firm’s pricing is predatory if its output is expanded in response to entry and its price is less than its average variable cost, while others suggest that a price cut made in response to entry is not predatory if a firm keeps its price for a considerable period of time after a new entrant has been driven off. There is also a two-tier approach that focusses first on market structures to examine whether predatory pricing is a workable strategy, followed by a number of cost-based tests.

5.3.10 Most of these rules which try to define illegal action can, however, be difficult to implement in a straightforward way because of the data limitations and the existence of related factors (such as capacity changes, yield management for seat allocation, sales and marketing activities). Given these difficulties, States (and groups of States) tend to rely on *a rule-of-reason approach*, which involves taking each case on its merits with a thorough examination of the factual circumstances such as market structures and dominant airlines’ conduct in a relevant market, as a starting point for assessing alleged cases (see ICAO *Manual on the Regulation of International Air Transport* (Doc 9626), Chapter 2.3).²¹

5.3.11 *Capacity dumping* - “The airline strategy of adding additional flights to a route in an attempt to drive a competitor out of business or off the route,” capacity dumping, which can also involve using larger aircraft than normal, leads to lower load factors and decreased profitability for a route.²² Under such a strategy, the airline would be better off discontinuing the flight, but it does not do so as it is better able to sustain temporary losses than its competitors with smaller cash reserves. Once they exit the market, the capacity dumper possesses a monopoly and is able to raise fares above the competitive market equilibrium price.

²⁰ Report of the Fifth Worldwide Air Transport Conference (ATConf/5), held on 24-28 March 200 (Doc 9819), concl. 2.3.3.2.

²¹ ICAO *Manual on the Regulation of International Air Transport* (Doc 9626), 4.3-11.

²² <http://www.travel-industry-dictionary.com/capacity-dumping.html>.

5.3.12 Capacity dumping is rather difficult to prove, as many airline routes are interconnected and may initially be unprofitable at first due to the expense of marketing and promoting a new route, procuring additional aircraft, working the frequency into an existing airline timetable, and gaining market share from existing air transport providers along the given segment.

5.4 Mergers

5.4.1 International mergers, between carriers from different States, are relatively rare, except in cases where specific arrangements enable each airline to preserve nationality requirements.²³ A considerable body of rules has developed in the areas of airline mergers. There are strong incentives, from regulators' perspective, to encourage convergence and consistency in the area of cross-border mergers. Besides imposing substantial costs on the merging firms involved, divergent outcomes undermines the public's confidence in the work [of authorities] and risk politicizing antitrust - both of which can have adverse effects on sound and predictable antitrust enforcement".²⁴

5.4.2 In the United States, Section 7 of the Clayton Act²⁵ prohibits business combinations where "... in any line of commerce or in any activity affecting commerce in any sector of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." The Department of Justice and the Federal Trade Commission have developed Horizontal Merger Guidelines. According to these guidelines, mergers should not be permitted to enhance market power, which is likely to happen if the merger encourages one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.

5.4.3 In Europe, the basic standard for the evaluation of a merger is found in the Merger Regulation 139/2004, which provides: "A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

5.4.4 Accordingly, a merger must be notified to the European Commission if it attains certain turnover thresholds in the European Union and globally. The merger must be notified if the combined worldwide turnover of airlines concerned exceeds EUR 5bn and EU-wide turnover of each of at least two airlines concerned exceeds EUR 250m.

5.4.5 In its assessment, the Commission examines whether the merger would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position of the merging entity. This is likely to be the case if the merging parties have high joint market shares as a result of the consolidation and if the existing competitors would be unable to challenge the merging parties' exercise of market power.²⁶

5.5 Government support

5.5.1 The basis for State aid control in the European Union is reflected in Article 107 of TFEU: "save as otherwise provided in the treaties, ***any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring***

²³ Examples include the AirFrance KLM or LAN-Tam cases.

²⁴ J. V. Dick and M. S. Sinick, *Different U.S. and EU Competition Regimes Create Uncertainty for Airline Consolidations*, The Air & Space Lawyer, 2013.

²⁵ 15 U.S.C. § 18 - Clayton Antitrust Act of 1914 (Pub.L. 63-212, 38 Stat. 730, enacted October 15, 1914, codified at 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53.

²⁶ ATConf/6-IP/4, presented by Ireland on behalf of the European Union and its Member States.

certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”

5.5.2 The United States does not have a regulatory regime governing State and local aids and subsidies. However, courts have found certain State assistance to violate the Commerce Clause of the United States Constitution. Measures designed to benefit in-state economic interests by burdening out-of-state competition are deemed to constitute economic protectionism.

5.5.3 The World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures²⁷ disciplines the use of subsidies, and it regulates the actions countries can take to counter the effects of subsidies. For the purpose of this Agreement, a subsidy shall be deemed to exist if:

a-1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
or

a-2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and

b) a benefit is thereby conferred.

6. CONCLUSION

6.1 As previously mentioned, a preliminary definition of competition in international air transport could be the *“the existent or potential rivalry between two or more operators, carriers or groups striving for advantage in the same market, including using price and quality of products or services to achieve the desired gains”* Such tentative definition is to be regarded as work-in-progress, considering the variety and complexity of topics involved.

²⁷ “The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations was signed by ministers in Marrakesh on 15 April 1994. References to the related agreements, including the Agreement on Subsidies and Countervailing Measures, can be found at: https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#kAgreement.

6.2 Nonetheless, beyond the definition of competition, there are significant differences across States in approaches to competition in international air transport. For example, and as mentioned above, market definition in the air transport is evolving and there is no consensus on the relevant markets, nor on whether enforcers should provide guidance on market definition criteria. While some authorities retain the traditional origin-destination (O&D) approach, defining markets by city-pairs or airport-pairs, other have adopted different definitions. Additional segmentation is sometimes made between leisure and business passengers, and between direct and indirect flights. Relevant markets have been broadened to include other means of transportation, such as high-speed rail.²⁸

6.3 Even in markets having similar characteristics of maturity, such as the European Union and the United States, there are differences in regulatory approaches to competition regimes. These differences appear in the area of alliances, with respect to several areas: the competition regime applicable to aviation; the mandates of competition authorities; the tests for competition review; and procedure.

6.4 However, these differences should not be overstated. As shown by the EU-U.S. cooperation endeavour on transatlantic alliances, efforts to foster compatibility can be successful. Several mechanisms can assist in forging a common understanding of the competitive structure of the airline industry. First, continuous cooperation on remedies in order to avoid conflicts or duplications. Second, the exchange of confidential information or documents. Dialogue and exchange of information with stakeholders is also an important element. As mentioned, “given the dynamic nature of the industry, cooperation between the authorities has to be a continuous process. It is essential for both authorities to understand exactly how the industry evolves and how its regulators should respond.”²⁹

— END —

²⁸ OECD (2014), Annex to the Summary Record of the 121st Meeting of the Competition Committee held on 18-19 June 2014, Executive Summary of the discussion on Airline Competition.

²⁹ See *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches*, Report by the European Commission and the United States Department of Transportation, 2010.



AIR TRANSPORT REGULATION PANEL (ATRP)

THIRTEENTH MEETING

Montréal, 1 to 4 September 2015

COMPETITION PROVISIONS OF EXISTING AIR SERVICES AGREEMENTS IN GLOBAL OR REGIONAL FRAMEWORKS

(Presented by the Secretariat)

INTRODUCTION

1.1 This paper provides examples of competition provisions found in existing air services agreements and arrangements, and in global or regional frameworks.

1.2 Note that as provided in ATRP/13-IP/1, the ICAO bilateral and regional/plurilateral Template Air Services Agreement (TASA) also includes an Article on fair competition, which offers wordings for three types of approaches: traditional, transitional and full liberalization (see IP/1 paragraph 6 and Appendix F).

1.3 In the spirit of the Convention on International Civil Aviation (Chicago Convention) signed in 1944 to determine the future of air transport, States sought to form an industry that “operated soundly and economically,” one where all parties promote the principles of fairness and cooperation, acting “on the basis of equality of opportunity.” In holding with this conclusion, States have to date brokered thousands of bilateral and multilateral agreements, which have collectively furthered the prospects for the continued development of civil aviation.

1.4 The ICAO World Air Services Agreements (WASA) on-line database is continuously updated and currently it includes 2660 Agreements and Arrangements from 173 States, as well as over

	Agreements	%	1000 Amendments. Of the Agreements and Amendments, 844 have a competition clauses referring to airlines having the right to fair and equal opportunities to operate air services, 202 state that air carriers possess the right to fair and equal opportunities to compete in providing air services, and 191 of these accords contain an additional reference regarding unfair competition practices . These numbers will continue to increase as new Agreements, Arrangements, and Amendments are signed.
Total	2660		
Full Liberal	147	6%	
Transitional	320	12%	
Traditional	2190	82%	

1.5 The WASA database also contains more qualitative information as to how liberal or prescriptive each agreement, including all amendments, is, labelling each accord as either “full liberalization,” “transitional,” or “traditional.” Currently, there are 147 full liberalization agreements (with an additional 55 amendments), 320 transitional agreements (with 178 attached amendments), and 2190 traditional agreements (with 767 amendments). Of the full liberalization agreements and amendments that have not since been superseded by liberal regional or multilateral accords, since only two were signed prior to 1995.

1.6 The different Competition Clauses are presented as Appendices A to D as follows::

- **Appendix A - Bilateral Air Services Agreements**
- **Appendix B - Regional and Multilateral Agreements or Arrangements**
- **Appendix C - European Union Agreements**
- **Appendix D - Other Agreements/Arrangements**

APPENDIX A:

BILATERAL AGREEMENTS

1.1 Given below are the competition clauses that are included in exemplary bilateral agreements or arrangements¹. They are sorted from more prescriptive to more liberal in their treatment of competition and capacity.

1.2 The first three agreements are typical bilateral accords with predetermined routes, capacities, and/or frequencies. While more liberal agreements have become more common, the a substantial majority of existing accords are of the format below. Note the line “fair and equal opportunity...to operate” air services, and compare it to the language of more liberal agreements, which typically replace the line with “fair and equal opportunity...to compete,” or otherwise emphasize competition and market forces. Last, these traditional, prescriptive agreements continue to be signed in large numbers: the second agreement was concluded in April 2011, and the third in September 2013 .

1.3 **Air Service Agreement: Belgium – United Arab Emirates, March 1990**

1.3.1 Article 8: Principles governing operation of agreed services:

1. *There shall be fair and equal opportunity for the designated airlines of each Contracting Party to **operate** the agreed services on the specified routes between and beyond their respective territories.*
2. *In operating the agreed services, the designated airlines of each Contracting Party shall take into account the interests of the designated airlines of the other Contracting Party so as not to affect unduly the services, which the latter provide on the whole or part of the same routes*
3. *The agreed services provided by the designated airlines of the Contracting Parties shall bear close relationship to the requirements of the public for transportation on the specified routes and shall have as their primary objective the provision, at a reasonable load factor, of capacity adequate to carry the current and reasonably anticipated requirements for the carriage of passengers and cargo including mail originating from or destined for the territory of the Contracting Party which has designated the airline(s). Provision for the carriage of passengers and cargo including mail both taken on board and discharged at points on the specified routes in the territories of States other than that designating the airline(s) shall be made in accordance with the general principles that capacity shall be related to:*
 - a) *traffic requirements to and from the territory of the Contracting Party which has designated the airline(s);*
 - b) *traffic requirements of the area through which the agreed service passes, after taking account of other transport services established by airlines of the States comprising the area; and*

¹ The main source for the following agreements and extracted clauses is ICAO’s World Air Services Agreements on-line database (WASA). Comprising over 3600 agreements, arrangements and amendments, it includes the texts and codified summaries of the main provisions of these documents. Additionally, it contains both agreements registered with ICAO by its member States and non-registered agreements obtained from other sources, such as websites of national authorities

c) the requirements of through airline operation.

1.4 **Air Service Air Agreement: China – Cameroon, April 2011**

1.4.1 Article 10: Principles governing operation of agreed services:

1. *The total capacity to be provided on the agreed services by the designated airlines of the Contracting Parties shall be agreed between the aeronautical authorities of the Contracting Parties before the commencement of the operations, and thereafter according to anticipated traffic requirements.*
2. *There shall be fair and equal opportunity for the designated airlines of each Contracting Party to **operate** the agreed services on the specified routes between their respective territories and beyond.*
3. *In operating the agreed services, the designated airlines of each Contracting Party shall take into account the interests of the designated airlines of the other Contracting Party so as not to affect unduly the services which the latter provided on the whole or part of the same routes.*
4. *Provision for the carriage of passengers and cargo including mail both taken on board and discharged at points on the specified routes in the territories of States other than that designating the airlines shall be made in accordance with the general principles that capacity shall be related to:*
 - a) *traffic requirements to and from the territory of the Contracting Party which has designated the airline;*
 - b) *traffic requirements of the area through which the agreed service passes, after taking account of other transport services established by airlines of the States comprising the area; and*
 - c) *the requirements of through airline operation.*

1.5 **Air Service Agreement: Kuwait –Malta, September 2013**

1.5.1 Article 13: Capacity Provisions:

- 1) *There shall be fair and equal opportunity for the designated airlines of both Contracting Parties to **operate** air services on any route specified in the accordance with paragraph 1 of Article 2 (Granting of Rights and Privileges) of this Agreement between their respective territories.*
- 2) *The agreed air services provided by a designated airline(s) shall **retain as their primary objective the provisions of capacity adequate to current and reasonably anticipated requirements** for the carriage of passengers, mail and cargo, originating from or destined for the territory of the Contracting Party designating the airline. The right of the designated airline of either Contracting Party to embark or disembark at the point in the territory of the other*

Contracting Party international traffic destined for or coming from third countries shall be in accordance with the principles that such traffic will be of a supplementary character and capacity shall be related to:

- a) traffic demands between the territory of the Contracting Party designating the airline and the points on the specified routes;*
- b) traffic requirements of the areas through which the airline passes for the economic operation of the route;*
- c) the requirements of through airline operation.*

1.6 Bilateral Air Services Agreements exist along a scale of attitudes toward competition, ranging from the very prescriptive to the entirely market-driven. The middle is occupied by transitional accords that borrow aspects from each side. In some cases, the body of the agreement may have limitations on capacities or frequencies, but not on city-pairs, or vice-versa. The following agreement possesses a different formulation, as it uses liberal language in the body of the accord – note the presence of “compete” and “commercial considerations of marketplace” – while the Annex contradicts this wording by imposing restrictions on routes, frequencies, and fifth freedom rights.

1.7 **Air Services Agreement: United Republic of Tanzania – Rwanda, September 2009**

1.7.1 Article 3: Exercise of Rights:

- 1) The designated airline shall enjoy fair and equal opportunities to **compete** in providing the agreed services covered by the present Agreement.*
- 2) Neither Contracting Party shall restrict the right of their designated airlines to carry international traffic between their territories*
- 3) Each Contracting Party shall allow the designated airlines to determine the frequency and capacity of the international schedule air services it offers based upon commercial considerations in the marketplace. Consistent with this right, neither Contracting Party shall unilaterally limit the volume of traffic, frequency, number of destinations or regularity of service, or the aircraft type or types operated by the designated airlines or practicing unfair competition against the other Contracting Party, except as may be required for customs, technical, operational, or environmental reasons under uniform conditions consistent with Article 15 of the Convention.*

1.7.2 Annex I

Section 1 Route Schedule

For the designated airline(s) of the United Republic of Tanzania

Route I: Points in Tanzania/Kigali/any beyond points in Africa or elsewhere and vice versa

For the designated airline(s) of the Republic of Rwanda

Route I: Points in Rwanda/intermediate points/points in Tanzania/Kilimanjaro and or Zanzibar, Mwanza and Kigoma

Note: Any point on the above routes may, at the option of the airline concerned, be omitted on any or all flights provided that any service either begins or terminates in the territory of the country designating the airline.

Section II: Frequency

The Designated Airlines of both Contracting Parties may operate up to 14 frequencies per week on the above specified routes.

Section III: Capacity

With regard to capacity, designated airlines of both contracting parties can operate using any type of aircraft

Section IV: Traffic Rights

Air service operations shall be conducted with third and fourth freedom traffic rights; the fifth freedom traffic rights may be exercised only on Sectors where there is no designated airline of the Contracting Party

1.8 The Canadian government has sought to balance air transport liberalization with some amount of protection for domestic interests, particularly where the operations of the country's airlines are "severely limited by discriminatory airport access and/or facilitation issues," the "doing business environment...presents major obstacles," the foreign airline is protected from market forces, resulting in "a markedly unbalanced playing field vis-à-vis Canadian airlines," or "the foreign carrier would be reasonably expected to offer a level of service to such an extent that competition in some markets/routes would be significantly reduced or effectively eliminated – resulting in a net loss for Canada"². The two agreements below reflect these transitional characteristics; note that both Switzerland and China have signed substantially more liberal arrangements with other states during the same timeframe.

1.9 **Air Service Agreement: Canada—China, September 2005**

1.9.1 Article 10: Capacity

1. *There shall be fair and equal opportunity for the designated airlines of both Contracting Parties to **operate** the agreed services on the specified routes.*

2. *In operating the agreed services, the designated airlines of each Contracting Party shall take into account the interest of the designated airline or airlines of the other Contracting Party so as **not to affect unduly the services** which the latter provide on the whole or part of the same routes.*

3. *The agreed services provided by the designated airlines of the Contracting Parties shall bear reasonable relationship to the requirements of the public for transportation on the specified routes and shall have as their primary objective the provision, at a reasonable load factor, of capacity adequate to meet the current and reasonably anticipated requirements for the carriage of passengers and cargo, including mail, between the territory of the Contracting Party which has designated the airline and the countries of ultimate destination of the traffic.*

4. *Provision for the carriage of passengers and cargo, including mail, both taken up and discharged at points on the specified routes in the territories of States other than that designating the airline shall be made in accordance with the general principle that capacity shall be related to:*

(a) traffic requirements to and from the territory of the Contracting Party which has designated the airline;

(b) traffic requirements of the area through which the agreed services pass after taking account of other transport services established by airlines of the States comprising the area; and

(c) the requirements of through airline operation.

² <https://www.tc.gc.ca/eng/policy/ace-blueskypolicy-menu-749.htm>

5. *Capacity to be provided on the agreed services in excess of the entitlements set out in this Agreement may from time to time be agreed between both Contracting Parties or their aeronautical authorities, subject to the approval (expressly or tacitly) of the aeronautical authorities of both Contracting Parties.*

6. *Increases to capacity established in accordance with the provisions of paragraph 5 of this Article shall not constitute a change in capacity entitlements. **Any change to capacity entitlements shall be agreed between the Contracting Parties or their aeronautical authorities.***

1.10 **Amendment to Air Services Agreement: Canada – Switzerland, June 2005**

1.10.1 *Article 5 of the Agreement is superseded in its entirety and the following is substituted therefor:*

1.10.2 Article 5: Capacity

1. *The designated airlines shall enjoy fair and equal opportunities to **operate** the agreed services between the territories of the Contracting Parties.*

2. *The designated airline of each Contracting Party shall take into consideration the interests of the designated airline of the other Contracting Party so **as not to affect unduly** the agreed services of the latter airline.*

3. *The main objective of the agreed services shall be to provide capacity corresponding to traffic demands between the territory of the Contracting Party which has designated the airline and the points served on the specified routes.*

4. *The right of each of the designated airlines to carry international traffic between the territory of the other Contracting Party and the territories of third countries, shall be exercised in conformity with the general principles of normal development to which both Contracting Parties subscribe and subject to the condition that the capacity shall be adapted:*

(a) to traffic demands from and to the territory of the Contracting Party which has designated the airline;

(b) to traffic demands of the areas through which the services passes, local and regional services being taken into account;

(c) to the requirements of through airline operations.

5. *Except as otherwise specified, neither Contracting Party may unilaterally impose any restrictions on the designated airline of the other Contracting Party with respect to capacity, frequency or type of aircraft employed in connection with services over any of the routes specified in the Annex attached to this Agreement. In the event that one of the Contracting Party believes that the operation proposed or conducted by the designated airline of the other Contracting Party unduly affects the agreed services provided by its designated airline, it may request consultations pursuant to Article XIV of this Agreement.*

1.10.3 The remaining agreements in this section are liberal in nature. The first is China's sole fully liberal agreement, signed with Chile, a major proponent of free market arrangements and home to a very open domestic air transport sector. The other agreements are examples from various regions; despite the geographic distance between them, the texts are nearly identical.

1.11 **Air Service Air Agreement: China – Chile, April 2009**

1.11.1 Article 11: Competition among Airlines:

1.11.2 Each Contracting Party shall allow a fair and equal opportunity for the designated airlines of both Contracting Parties to **compete** in providing the international air transportation governed by this Agreement.

1.12 **Air Service Air Agreement: United Arab Emirates – Paraguay, November 2011**

1.12.1 Article 5: Principles Governing Operation of Agreed Service

*Each Contracting Party shall reciprocally allow the Designated Airlines of both Contracting Parties to **compete** freely in providing the international air transportation governed by this Agreement.*

Each Contracting Party shall take all appropriate action within its jurisdiction to eliminate all forms of discrimination and anti-competitive or predatory practices in the exercise of the rights and entitlements set out in the Agreement.

1.13 **Air Service Agreement: Kuwait—Singapore, January 2014**

1.13.1 Article 11: Capacity and Fair Competition

- 1) *There shall be fair and equal opportunity for the designated airlines of both Contracting Parties to compete in operating the agreed services on the specified routes*
- 2) *Each Contracting Party shall **allow each designated airline to determine the frequency and capacity of the international air transport it offers**. Consistent with this right, neither Contracting Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated airlines of the other Contracting Party except as may be required for customs, technical, operational, or environmental reasons under uniform conditions consistent with Article 15 of the [Chicago] Convention.*

1.14 **Air Services Agreement: United Arab Emirates – Afghanistan, September 2013**

1.14.1 Article 5- Principles governing operation of agreed services:

- 1) *Each Contracting Party shall reciprocally allow the Designated Airlines of both Contracting Parties to compete freely in providing the international air transportation governed by this Agreement*
- 2) *Each Contracting Party shall take all appropriate action within its jurisdiction to eliminate all forms of discrimination and anti-competitive or predatory practices in the exercise of the rights and entitlements set out in this Agreement*
- 3) *There shall be no restriction on the capacity and the number of frequencies and/or type(s) of aircraft to be operated by the Designated Airlines of both*

Contracting Parties in any type of service (passenger, cargo, separately or in combination). Each Designated Airline is permitted to determine the frequency and capacity it offers on the Agreed Services.

- 4) *Neither Contracting Party shall unilaterally limit the volume of traffic, frequencies, regularity of service or the aircraft type(s) operated by the Designated Airlines of the other Contracting Party, except as may be required for customs, technical, operational or environmental requirements under uniform conditions consistent with Article 15 of the Convention.*
- 5) *Neither Contracting Party shall impose on the Designated Airlines of the other Contracting Party, a first refusal requirement uplift ratio, no objection fee or any other requirement with respect to capacity, frequencies or traffic which would be inconsistent with the purposes of this Agreement.*

1.14.2 The United States has played a major role in the expansion of liberal agreements through its signing of over 100 Open Skies accords. While each agreement tends to vary slightly, the vast majority hew closely to the model text, reproduced below.

1.15 **US Model Open Skies Agreement Text – last updated: January 2012**

1.15.1 Article 11: Fair Competition

- 1) *Each Party shall allow a fair and equal opportunity for the airlines of both Parties to compete in providing the international air transportation governed by this Agreement.*
- 2) *Each Party shall allow each airline to determine the frequency and capacity of the international air transportation it offers based upon commercial considerations in the marketplace. Consistent with this right, neither Party shall unilaterally limit the volume of traffic, frequency, or regularity of service, or the aircraft type or types operated by the airlines of the other Party, except as may be required for customs, technical, operational, or environmental reasons under uniform conditions consistent with Article 15 of the Convention.*
- 3) *Neither Party shall impose on the other Party's airlines a first-refusal requirement, uplift ratio, no-objection fee, or any other requirement with respect to capacity, frequency, or traffic that would be inconsistent with the purposes of this Agreement.*
- 4) *Neither Party shall require the filing of schedules, programs for charter flights, or operational plans by airlines of the other Party for approval, except as may be required on a non-discriminatory basis to enforce the uniform conditions foreseen by paragraph 2 of this Article or as may be specifically authorized in this Agreement. If a Party requires filings for information purposes, it shall minimize the administrative burdens of filing requirements and procedures on air transportation intermediaries and on airlines of the other Party.*

1.15.2 Some air transport agreements discuss the roles and responsibilities of the respective Parties' domestic competition authorities, either in a standalone article or in a subsection. The two Australian accords below illustrate slightly different models, both existing in the broader framework of a liberal arrangement.

1.16 **Air Transport Agreement: Australia-USA, March 2008**

1.16.1 Article 13 – Competition

- 1) *The Parties recognize that competition among airlines in the U.S.-Australia market is important to promote the objectives of this Agreement, and confirm that they apply their respective competition regimes to protect and enhance overall competition and not to benefit individual competitors.*
- 2) *The Parties recognize that cooperation between their respective competition authorities serves to promote competition in markets and has the potential to promote compatible regulatory results. The Parties agreed that their respective aviation authorities should continue to cooperate on competition matters, taking into account the different responsibilities, competencies and procedures of the authorities.*

1.17 **Air Services Agreement: Australia – New Zealand, August 2002**

1.17.1 Article 14: Competition

- 1) *The competition laws of each Party, as amended from time to time, shall apply to the operation of the airlines of both Parties. Where permitted under those laws, a Party or its competition authority may, however, unilaterally exempt commercial agreements between airlines (including block-space, code-share and other joint service agreements) from the application of its domestic competition law. This does not obligate a Party or its competition authority to provide a reciprocal exemption.*
- 2) *Without limiting the application of competition and consumer law by either Party, if the aeronautical authorities of either Party consider that the airlines of either Party are being subjected to discrimination or unfair practices in the territory of either Party, they may give notice to this effect to the aeronautical authorities of the other Party. Consultations between the aeronautical authorities shall be entered into as soon as possible after notice is given unless the first Party is satisfied that the matter has been resolved in the meantime.*
- 3) *In undertaking the consultations outlined in this Article the Parties shall:*
 - a. *coordinate their actions with the relevant authorities;*
 - b. *consider alternative means which might also achieve the objectives of action consistent with general competition and consumer law; and*
 - c. *take into account the views of the other Party and the other Party's obligations under other international agreements.*

- 4) *Notwithstanding anything in paragraphs 1 to 3 above this Article does not preclude unilateral action by the airlines or the competition authorities of either Party. authorities*

1.17.2 Several international organizations have drafted model bilateral protocols to liberalize various aspects of air services agreements. The OECD has created such an agreement for air cargo services, with a particular focus on traffic rights, commercial presence, operational flexibility, leasing, ground handling, and facilitation. Although the model text is only concerned with air freight, the OECD notes that “similar competition rules should apply to air cargo and passenger services.”

1.18 **OECD Bilateral Protocol**

1.18.1 Article 7. Fair Competition

1. *Each Contracting Party shall allow a fair and equal opportunity for the designated air carriers of the other Contracting Party to compete in providing the international air cargo transportation governed by this Agreement.*

2. *Each Contracting Party shall allow the designated air carrier(s) of the other Contracting Party to determine the frequency, type of aircraft, configuration and capacity to be used in conducting international air cargo transportation pursuant to this Agreement based upon commercial considerations in the marketplace. Consistent with this right, neither Contracting Party shall act to limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated air carriers of the other Party, except as may be required for customs, technical, operational, or environmental reasons under uniform conditions consistent with Article 15 of the Convention. The Contracting Party wishing to apply such conditions must provide, as soon as possible, appropriate evidence to the other Contracting Party of the need for such conditions, so as to allow for any consultations pursuant to Article [...] prior to the date of effectiveness of such conditions.*

3. *Neither Contracting Party shall impose, or permit any person or body under its jurisdiction to impose, on a designated air carrier of the other Contracting Party any requirement or condition, including a first refusal requirement, uplift ratio, or no-objection fee or any other requirement with respect to capacity, frequency or traffic, which is inconsistent with the purposes of this Agreement.*

4. *Neither Contracting Party shall require the filing of schedules, programs for charter flights, or operational plans by the designated air carriers of the other Contracting Party for approval, except as may be required on a non-discriminatory basis to enforce the uniform conditions foreseen by paragraph 2 of this Article.*

APPENDIX B –

REGIONAL AND MULTILATERAL AGREEMENTS OR ARRANGEMENTS

1.1 Given below are the competition clauses that are included in exemplary regional, plurilateral and multilateral agreements or arrangements.

1.2 The predecessor of modern multilateral aviation agreements is the International Air Transport Agreement, opened for signing on December 7, 1944 along with the Convention on International Civil Aviation (Chicago Convention). The Transport Agreement is notable for its relative lack of prescriptive policies, a rarity for the time, and its provision of 5th freedom rights, which gives rise to its alternate name, the Five Freedoms Agreement. Relatively few States chose to sign the accord, largely due to perceptions that the agreement was overly liberal and failed to protect the carriers of states with nascent or conflict-damaged air transport sectors. The sections relating to competition and capacity are reproduced below; note how the third article contains general principles on fifth freedom operations:

1.3 **International Air Transport Agreement (5 Freedoms Agreement), December 1944**

1.3.1 Article I

Section 1

Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:

- 1. The privilege to fly across its territory without landing;*
- 2. The privilege to land for non-traffic purposes;*
- 3. The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;*
- 4. The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses;*
- 5. The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.*

With respect to the privileges specified under paragraphs 3, 4 and 5 of this section, the undertaking of each contracting State relates only to through services on a route constituting a reasonably direct line out from and back to the homeland of the State whose nationality the aircraft possesses.

1.3.2 Article III

Each contracting State undertakes that in the establishment and operation of through services due consideration shall be given to the interests of the other contracting States so as not to interfere unduly with their regional services or to hamper the development of their through services

1.4 **Decision on Integration of Air Transport of the Andean Community (CAN, then Andean Pact until 10 Mar 1996), 1991**

1.4.1 Chapter 3, Article 7

The Member Countries, in compliance with this Decision and pursuant to the provisions of the Andean Air Transport Policy, shall review the operating permits, bilateral

*agreements or other administrative acts in effect between them and shall make any changes in accordance with them; **these they shall orient toward the free exchange of commercial air rights within the Subregion which are in the interest of the community and which ensure healthy competition and the quality and efficiency of international air transport service.***

1.5 **Eight Options for More Competitive Air Services with Fair and Equitable Opportunity among APEC Member Economies, 1994**

1.5.1 **Option 4: Air Freight** *the ASG recommended that APEC economies progressively remove restrictions in the operations of air freight services while ensuring **fair and equitable opportunity for the economies involved.***

1.5.2 **Option 7: Airlines' cooperative arrangements** *The ASG recommended that APEC economies facilitate cooperative arrangements such as code-sharing including third-country code-share and code-share over domestic sectors, joint operations and block space arrangements, where it can be shown to be of benefit to consumers and airline(s), and where there are no anti-competitive effects, and where fair and equitable opportunity for the economies involved can be ensured.*

1.5.3 **Option 8: Market access** *The ASG reached general consensus to recommend that APEC economies take an approach to progressively achieve more liberalised market access under their bilateral air services arrangements, while ensuring fair and equitable opportunity for the economies involved.*

1.6 **Multilateral Air Services Agreement (MASA) of the Caribbean Community (CARICOM), July 1996**

1.6.1 Article 14 – Fair Competition

- 1) *Member States shall allow a fair and equal opportunity for all CARICOM air carriers to compete in the air transportation covered by this Agreement.*
- 2) *Member States shall take all appropriate action within their respective jurisdictions to eliminate all forms of discrimination or unfair competitive practices adversely affecting the competitive position of CARICOM air carriers.*
- 3) *Member States shall take into account the interests of CARICOM air carriers of other Member States so as not to affect unduly the services which the latter provide on the whole, or part, of the same routes on which their carriers provide a service.*
- 4) *Member States shall take into account the requirements of the public for transportation and the need for stability on the specific routes, and shall have as their primary objective the provision, at a reasonable load factor, of capacity adequate to meet the current and reasonably anticipated requirements for the carriage of passengers, cargo and mail on the specified routes.*

- 1.7 **Banjul Accord for an Accelerated Implementation of the Yamoussoukro Declaration, April 1997**
- 1.7.1 Article 10: Competition Rules
- Contracting Parties shall ensure fair opportunity on non-discriminatory basis for the designated airlines to effectively compete, in providing air transport services within their respective territories.*
- 1.8 **Decision Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalization of Access to Air Transport Markets in Africa (Yamoussoukro II Ministerial Decision) of the African Union (AU, then Organization of African Unity (OAU), November 1999**
- 1.8.1 Article 7: Competition Rules
- 7.1 State Parties shall ensure fair opportunity on non-discriminatory basis for the designated African airline, to effectively compete in providing air transport services within their respective territory.*
- 1.9 **Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT, “Kona” agreement), May 2001**
- 1.9.1 Article 11: Fair Competition
- Each Party shall allow a fair and equal opportunity for the designated airlines of all Parties to compete in providing the international air transportation governed by this Agreement.*
- 1.10 **Common Programme on Air Transport of the West African Economic and Monetary Union (UEMOA), June 2002**
- 1.10.1 A- Objectifs, Justification et Résultats Attendus du Programme Commun de Transport Aérien des États Membres de l’UEMOA (*Objectives, justifications, and expected results of the Common Programme*)
- c) Les résultats attendus de la mise en œuvre du programme commun de transport aérien dans les États membres de l’UEMOA sont
- une meilleure compétitivité et une plus grande efficacité des entreprises du secteur aérien : compagnies aériennes, gestionnaires d’aéroports, sociétés d’assistance en escale, catering... etc. pour résister à la concurrence et œuvrer à augmenter de façon significative le trafic passagers, fret et poste
- (The programme’s expected results...are : improved competitiveness and greater efficiency of the airline industry : airlines , airport managers, ground handling companies , catering etc. ... to withstand competition and work to significantly increase passenger traffic , freight and mail;)*
- 1.10.2 VI – Mise En Place d’un Mécanisme pour le Développement du Transport Aérien de l’UEMOA (*Establishment of a mechanism for the development of air transport in UEMOA*)

2 – Objectifs visés (Objectives)

assurer la compétitivité des entreprises de transport aérien face aux compagnies aériennes extérieures; (*ensure the competitiveness of air transport enterprises against external airlines*)

1.11 **Pacific Islands Air Services Agreement (PIASA) of Pacific Islands Forum, August 2003**

1.11.1 Article 2 : Objectives:

*The objectives of this Agreement are : (3) to improve the **competitiveness and efficiency** of airlines operating within the region governed by the Parties*

1.11.2 Article 13: Fair Competition

*1. Each Party shall allow a fair and equal opportunity for the designated airlines of the parties to **compete** in providing the international air transport governed by this Agreement*

1.12 **Air Transport Agreement among the Members States and Associate Members of the Association of Caribbean States, February 2004**

1.12.1 Article 13: Fair Competition

*1) Each Party shall allow a **fair and equal opportunity** to the designated airlines of all Parties to **compete in providing** the international air transport governed by this Agreement.*

2) Each Party shall take all appropriate actions within their respective jurisdictions to avoid and eliminate all forms of unfair competitive practices.

1.13 **Agreement on the Liberalization of Air Transport between the Arab States (Arab League), December 2004**

1.13.1 Article 9: Competition and Non-Discrimination

The designated airline/airlines of any states party shall have equal and fair opportunity to exercise the rights stated in this Agreement with a view to enable it to participate effectively in providing air transport service among them in accordance with the rules of competition provided for in Annex 2, of this Agreement.

1.14 **ASEAN Multilateral Agreement on the Full Liberalisation of Air Freight Services, May 2009**

1.14.1 Article 13: Fair Competition

Each Contracting Party agrees:

*a) that each designated airline shall have a **fair and equal opportunity to compete** in providing the international air freight services governed by this Agreement, and*

b) *to take action to eliminate all forms of discrimination and/or anti-competitive practices by that Contracting Party and/or its designated airlines that it deems to adversely affect the competitive position of a designated airline of any other Contracting Party.*

1.15 **ASEAN Multilateral Agreement on Air Services, May 2009**

1.15.1 Article 12: Fair Competition

Each Contracting Party agrees:

- a) *that each designated airline shall have a fair and equal opportunity to compete in providing the international air services governed by this Agreement; and*
- b) *to take action to eliminate all forms of discrimination and/or anti-competitive practices by that Contracting Party and/or its designated airline(s) that it deems to adversely affect the competitive position of a designated airline of any other Contracting Party.*

1.16 **ASEAN Multilateral Agreement on the Full Liberalisation of Passenger Air Services, November 2010**

1.16.1 Article 12: Fair Competition

Each Contracting Party agrees:

- a) *that each designated airline shall have a fair and equal opportunity to compete in providing the international air services governed by this agreement; and*
- b) *to take action to eliminate all forms of discrimination and/or anti-competitive practices by that Contracting Party and/or its designated airlines that it deems to adversely affect the competitive position of a designated airline of any other Contracting Party.*

1.17 **Air Transport Agreement: ASEAN Member States-China, November 2010**

1.17.1 Article 11 - Fair Competition

Each Contracting Party shall allow a fair and equal opportunity for the designated airline(s) of all the Contracting Parties to compete in providing the international air services governed by this Agreement.

Each Contracting Party agrees to take action to eliminate all forms of discrimination and/or anti-competitive practices by a Contracting Party and/or its designated airline(s) that it deems to adversely affect the competitive position of a designated airline(s) of the other Contracting Parties.

1.18 The OECD has also drafted a model multilateral agreement to “achieve substantial liberalisation of international air cargo services,” much as it proposed a model bilateral air services agreement with provisions for greater market access. The text is very similar to that contained in contemporary Open Skies Agreements.

1.19 **OECD Draft Multilateral Agreement**

1.19.1 Article 11 - Fair Competition

1. *Each Contracting Party shall allow a fair and equal opportunity for the designated air carriers of all Parties to **compete** in providing the international air cargo transportation governed by this Agreement.*

2. *Each Contracting Party shall allow the designated air carrier(s) of another Contracting Party to determine the frequency, type of aircraft, configuration and capacity to be used in conducting international air cargo transportation pursuant to this Agreement based upon **commercial considerations in the marketplace**. Consistent with this right, no Contracting Party shall act to limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated air carriers of the other Parties, except as may be required for customs, technical, operational, or environmental reasons under uniform conditions consistent with Article 15 of the Convention. The Contracting Party wishing to apply such conditions must provide, as soon as possible, appropriate evidence to the other Contracting Parties of the need for such conditions, so as to allow for any consultations pursuant to Article 21 prior to the date of effectiveness of such conditions.*

3. *No Contracting Party shall impose, or permit any person or body under its jurisdiction to impose, on a designated air carrier of any other Contracting Party, any requirement or condition, including a first refusal requirement, uplift ratio, or no-objection fee or any other requirement with respect to capacity, frequency or traffic, which is inconsistent with the purposes of this Agreement.*

4. *No Contracting Party shall require the filing of schedules, programs for charter flights, or operational plans by the designated air carriers of the other Contracting Parties for approval, except as may be required on a non-discriminatory basis to enforce the uniform conditions foreseen by paragraph 2 of this Article.*

APPENDIX C

EUROPEAN UNION AGREEMENTS

1.1 **Single Aviation Market of the European Union (EU, then European Community until 31 Oct 1993), July 1992**

1.2 Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes.

Preamble: Whereas, *taking into account the competitive market situation*, provision should be made to *prevent unjustifiable economic effects* on air carriers;

Article 9, Section 2. Action taken by a Member State in accordance with paragraph 1 shall:

- be non-discriminatory on grounds of nationality or identity of air carriers,
- have a limited period of validity, not exceeding three years, after which it shall be reviewed,
- not unduly affect the objectives of this Regulation,
- *not unduly distort competition* between air carriers,
- *not be more restrictive than necessary* in order to relieve the problems.

1.3 The “Agreement between the European Economic Community and Norway and Sweden on Civil Aviation” and “Agreement between the European Community and Swiss on Air Transport” expand competition provisions of EU agreement to Norway, Sweden and Switzerland, but no major new passages.

1.3.1 **Agreement on the European Economic Area (EEA), Annex 13 Transport, January 1994, last updated July 2015**

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which *have as their object or effect the prevention, restriction or distortion of competition within the common market*, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

1.3.2 In contrast to the pro-competitive passage above, note the more traditional language of the Euro-Mediterranean Aviation Agreement with Jordan — and then contrast its language with the more liberal phrasing of a similar agreement signed with Israel less than three years later. Specifically, the Israeli agreement deletes the earlier reference to “fair and equal opportunities to operate the Agreed Services,” instead stating a “joint objective to have a fair and competitive environment.”

1.4 **Multilateral Agreement on the Establishment of a European Common Aviation Area (ECAA), June 2006**

1.4.1 Rules on Competition and State Aid Referred to in Article 14 of the Main Agreement
Article 1: State monopolies

An Associated Party shall progressively adjust any State monopolies of a commercial character so as to ensure that, by the end of the second period referred to in the Protocol to this Agreement which contains the transitional measures with regard to the Associated Party concerned, *no discrimination regarding the conditions under which goods are procured and marketed* exists between nationals of the Contracting Parties. The Joint Committee shall be informed of the measures adopted to attain this objective.

1.4.2 Article 3: Competition rules and other economic provisions

1. The *following practices are incompatible* with the proper functioning of this Agreement, in so far as they may affect trade between two or more Contracting Parties:

(i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

(ii) abuse by one or more undertakings of a dominant position in the territories of the Contracting Parties as a whole or in a substantial part thereof;

(iii) any State aid which distorts or threatens to distort competition by favouring certain undertakings or certain products.

1.5 **Euro-Mediterranean Aviation Agreement: EU – Morocco, December 2006**

1.5.1 Article 7 - Competitive Environment

Within the scope of this Agreement, the provisions of Chapter II ('Competition and other Economic Provisions') of Title IV of the Association Agreement shall apply, except where more specific rules are contained in this Agreement.

1.5.2 Article 8 – Subsidies

1. *The Contracting Parties recognise that public subsidies to air carriers distort or threaten to distort competition by favouring certain undertakings in the provision of air transport services, that they jeopardise the basic objectives of the Agreement and that they are incompatible with the principle of an open aviation area.*

2. *When a Contracting Party deems it essential to grant public subsidies to an air carrier operating under this Agreement in order to achieve a legitimate objective, it shall see to it that such subsidies are proportionate to the objective, transparent and designed to minimise, to the extent feasible, their adverse impact on the air carriers of the other Contracting Party. The Contracting Party intending to grant any such subsidy shall inform the other Contracting Party of its intention and shall make sure that such subsidy is consistent with the criteria laid down in this Agreement.*

3. *If one Contracting Party believes that a subsidy provided by the other Contracting Party, or, as the case may be, by a public or governmental body of a country other than the Contracting Parties, is inconsistent with the criteria laid down in paragraph 2, it may request a meeting of the Joint Committee, as provided in Article 22*

to consider the issue and develop appropriate responses to concerns found to be legitimate.

4. *When a dispute cannot be settled by the Joint Committee, the Contracting Parties retain the possibility of applying their respective anti-subsidy measures.*

5. *The provisions of this Article shall apply without prejudice to the Contracting Parties' laws and regulations regarding essential air services and public service obligations in the territories of the Contracting Parties.*

1.6 **Air Transport Agreement – Open Skies: EU – USA, April 2007**

1.6.1 Article 14 - Government subsidies and support

1. *The Parties recognise that government subsidies and support may adversely affect the fair and equal opportunity of airlines to compete in providing the international air transportation governed by this Agreement.*

2. *If one Party believes that a government subsidy or support being considered or provided by the other Party for or to the airlines of that other Party would adversely affect or is adversely affecting that fair and equal opportunity of the airlines of the first Party to compete, it may submit observations to that Party. Furthermore, it may request a meeting of the Joint Committee as provided in Article 18, to consider the issue and develop appropriate responses to concerns found to be legitimate.*

3. *Each Party may approach responsible governmental entities in the territory of the other Party, including entities at the State, provincial or local level, if it believes that a subsidy or support being considered or provided by such entities will have the adverse competitive effects referred to in paragraph*

4. *If a Party decides to make such direct contact it shall inform promptly the other Party through diplomatic channels. It may also request a meeting of the Joint Committee.*

5. *Issues raised under this Article could include, for example, capital injections, cross subsidisation, grants, guarantees, ownership, relief or tax exemption, by any governmental entities.*

1.7 **Agreement between the European Community and the West African Economic and Monetary Union on certain aspects of air services, November 2009**

1.7.1 Article 6: Compatibility with competition rules

1. Notwithstanding any other provision to the contrary, nothing in each of the bilateral agreements listed in Part A of the Annexes to this Agreement shall:

(i) favour the adoption of agreements between undertakings, decisions by associations of undertakings or concerted *practices that prevent, distort or restrict competition*;

(ii) reinforce the effects of any such agreement, decision or concerted practice; or

(iii) *delegate to private economic operators the responsibility for taking measures that prevent, distort or restrict competition.*

1.8 **Air Transport Agreement – Open Skies: EU – Canada, December 2009**

1.8.1 Article 14 - Competitive Environment

1. *The Parties acknowledge that it is their joint objective to have a fair and competitive environment for the operation of the air services. The Parties recognise that fair competitive practices by airlines are most likely to occur where these airlines operate*

on a fully commercial basis and are not state subsidised. They recognise that matters, such as, but not limited to the conditions under which airlines are privatised, the removal of competition distorting subsidies, equitable and non-discriminatory access to airport facilities and services and to computer reservation systems are key factors to achieve a fair and competitive environment.

2. If a Party finds that conditions exist in the territory of the other Party that would adversely affect a fair and competitive environment and its airlines' operation of the air services under this Agreement, it may submit observations to the other Party. Furthermore, it may request a meeting of the Joint Committee. The Parties accept that the degree to which the objectives in the Agreement related to a competitive environment may be undermined by a subsidy or other intervention is a legitimate subject for discussion in the Joint Committee.

3. Issues that may be raised under this Article 14 include, but are not limited to, capital injections, cross subsidisation, grants, guarantees, ownership, tax relief or tax exemption, protection against bankruptcy or insurance by any government entities. Subject to paragraph 4 of Article 14, a Party, upon notification to the other Party, may approach responsible government entities in the territory of the other Party including entities at the state, provincial or local level to discuss matters relating to this Article.

4. The Parties recognise the cooperation between their respective competition authorities as evidenced by the "Agreement between the Government of Canada and the European Communities regarding the Application of their Competition Laws" done at Bonn on 17 June 1999. [...]

1.9 **Euro-Mediterranean Aviation Agreement: E.U. – Jordan, December 2010**

1.9.1 Article 7 - Competitive Environment

1. The Contracting Parties reaffirm the application to this Agreement of the principles of Chapter II of Title IV of the Association Agreement.

2. The Contracting Parties acknowledge that it is their joint objective to secure fair and equal opportunities for the air carriers of both sides to operate the Agreed Services. In order to achieve this, it is necessary to have a fair and competitive environment for the operation of air services. The Contracting Parties recognise that fair competitive practices by air carriers are most likely to occur where these air carriers provide air services on a fully commercial basis and are not subsidised.

3. When a Contracting Party deems it essential to grant public subsidies to an air carrier operating under this Agreement in order to achieve a legitimate objective, it shall see to it that such subsidies are proportionate to the objective, transparent and designed to minimise, to the extent feasible, their adverse impact on the air carriers of the other Contracting Party. The Contracting Party intending to grant any such subsidy shall inform the other Contracting Party of its intention and shall make sure that such subsidy is consistent with the criteria laid down in this Agreement.

4. If one Contracting Party finds that conditions exist in the Territory of the other Contracting Party, in particular due to a subsidy, inconsistent with the criteria laid down in paragraph 3 which would adversely affect the fair and equal opportunity of its air carriers to compete, it may submit observations to the other Contracting Party. Furthermore, it may request a meeting of the Joint Committee, as provided for in Article 21 (The Joint Committee) of this Agreement. From the receipt of such a request consultations shall start within 30 days. When a dispute cannot be settled by the Joint Committee, the Contracting Parties retain the possibility of applying their respective anti-subsidy measures.

5. *The actions, referred to in paragraph 4 of this Article, shall be appropriate, proportionate and restricted with regard to scope and duration to what is strictly necessary. They shall be exclusively directed towards the air carrier or air carriers benefiting from a subsidy or the conditions referred to in this Article, and shall be without prejudice to the right of either Contracting Party to take action under Article 23 (Safeguard Measures) of this Agreement.*

6. *Each Contracting Party, upon notification to the other Contracting Party, may approach responsible government entities in the territory of the other Contracting Party including entities at the state, provincial or local level to discuss matters relating to this Article.*

1.10 **Euro-Mediterranean Aviation Agreement: European Union – Israel, July 2013**

1.10.1 Article 7 - Competitive Environment

1. *The Contracting Parties reaffirm the application of the provisions of Chapter 3 ("Competition") of Title IV of the Association Agreement to this Agreement.*

2. *The Contracting Parties acknowledge that it is their joint objective to have a fair and competitive environment for the operation of air services. The Contracting Parties recognise that fair competitive practices by air carriers are most likely to occur where these air carriers operate on a fully commercial basis and are not subsidised, and where neutral and non-discriminatory access to airport facilities, services, and slot allocation is ensured.*

3. *If one Contracting Party finds that conditions exist in the territory of the other Contracting Party, in particular due to subsidy, which would adversely affect the fair and equal opportunity of its air carriers to compete, it may submit observations to the other Contracting Party. Furthermore, it may request a meeting of the Joint Committee, as provided for in Article 22 of this Agreement. Consultations shall start within 30 days of receipt of such a request. Failure to reach a satisfactory agreement within 30 days from the start of consultations shall constitute grounds for the Contracting Party that requested the consultations to take action to refuse, withhold, revoke, suspend or impose appropriate conditions on the authorisations of the air carrier(s) concerned, consistent with Article 4.*

4. *The actions referred to in paragraph 3 shall be appropriate, proportionate and restricted with regard to scope and duration to what is strictly necessary. They shall be exclusively directed towards the air carrier(s) benefiting from the conditions referred to in paragraph 3, and shall be without prejudice to the right of either Contracting Party to take action under Article 23.*

5. *The Contracting Parties agree that the participation of the Israeli Government to help cover additional security expenses incurred by the Israeli air carriers as a result of Israeli Government instructions, is not an unfair competitive practice and is not considered as a subsidy for the purpose of this article provided that:*

- (a) such support covers exclusively costs necessarily incurred by the air carriers of Israel when implementing extra security measures required by the Israeli authorities which are not imposed on, or incurred by, air carriers of the European Union; and*
- (b) such security costs are clearly identified and quantified by Israel; and*

- (c) *the Joint Committee receives, once a year, a report describing the total sum of the security expenses and the rate of participation of the Israeli government in the previous year.*
6. *Each Contracting Party, upon notification to the other Contracting Party, may approach responsible government entities in the territory of the other Contracting Party including entities at the state, provincial or local level to discuss matters relating to this Article.*
7. *The provisions of this Article shall apply without prejudice to the Contracting Parties' laws and regulations regarding public service obligations in the territories of the Contracting Parties*

1.11 **EU recommended fair competition clause**

*The Contracting Parties acknowledge that it is their joint objective to have a fair and competitive environment and fair and equal opportunity for the airlines of both Contracting Parties to **compete** in operating the agreed services on the specified routes. Therefore, the Contracting Parties shall take all appropriate measures to ensure the full enforcement of this objective.*

*The Contracting Parties assert that **free, fair and undistorted competition is important to promote the objectives of this Agreement** and note that the existence of comprehensive competition laws and of an independent competition authority as well as the sound and effective enforcement of their respective competition laws are important for the efficient provision of air transport services. The competition laws of each Contracting Party addressing the issues covered by this Article, as amended from time to time, shall apply to the operation of the air carriers within the jurisdiction of the respective Contracting Party. The Contracting Parties share the objectives of compatibility and convergence of Competition law and of its effective application. They will cooperate as appropriate and where relevant on the effective application of competition law, including by allowing the disclosure, in accordance with their respective rules and jurisprudence, by their respective airline(s) or other nationals of information pertinent to a competition law action by the competition authorities of each other.*

Nothing in this Agreement shall affect, limit or jeopardise in any way the authority and powers of the relevant competition authorities and courts of either Contracting Party (and of the European Commission), and all matters relating to the enforcement of competition law shall continue to fall under the exclusive competence of those authorities and courts. Therefore, any action taken pursuant to this Article by a Contracting Party shall be without prejudice to any possible actions taken by those authorities and courts.

Any action taken pursuant to this Article shall fall under the exclusive responsibility of the Contracting Parties and shall be exclusively directed towards the other Contracting Party and/or to airline(s) providing air transport services to/from the Contracting Parties. Such action shall not be subject to the dispute settlement procedure foreseen in [refer to the relevant Article of the ASA].

Unfair competition

*Each Contracting Party shall **eliminate all forms of discrimination or unfair practices** which would adversely affect the fair and equal opportunity of the airlines of the other Contracting Party to **compete** in providing air transport services.*

Public subsidies and support

Neither Contracting Party shall provide or permit public subsidies or support to their respective airlines if these subsidies or support would significantly and adversely affect, in an unjustified way, the fair and equal opportunity of the airlines of the other Contracting Party to compete in providing air transport services. Such public subsidies or support may include, but are not limited to: cross-subsidisation; the setting-off of operational losses; the provision of capital; grants; guarantees; loans or insurance on privileged terms; protection from bankruptcy; foregoing the recovery of amounts due; foregoing a normal return on public funds invested; tax relief or tax exemptions; compensation for financial burdens imposed by public authorities; and access on a discriminatory or non-commercial basis to air navigation or airport facilities and services, fuel, ground handling, security, computer reservation systems, slot allocation or other related facilities and services necessary for the operation of air services.

When a Contracting Party provides public subsidies or support in the sense of paragraph 6 above to an airline, it shall ensure the transparency of such measure through any appropriate means, which may include requiring that the airline identifies the subsidy or support clearly and separately in its accounts.

Each Contracting Party shall, at the request of the other Contracting Party, provide to the other Contracting Party within a reasonable time financial reports relating to the entities under the jurisdiction of the first Contracting Party, and any other such information that may be reasonably requested by the other Contracting Party to ensure that the provisions of this Article are being complied with. This may include detailed information relating to subsidies or support in the sense of paragraph 6 above. The submission of such information may be subject to its confidential treatment by the Contracting Party requesting access to the information.

Without prejudice to any action undertaken by the relevant competition authority and/or court for the enforcement of the rules referred to in paragraphs 2.5.1 and 2.6.1:

- a) if one Contracting Party finds that an airline is being subject to discrimination or unfair practices in the sense of paragraphs 2.5.1 and 2.6.1 above and that this can be substantiated, it may submit observations in writing to the other Contracting Party. After informing the other Contracting Party, a Contracting Party may also approach responsible government entities in the territory of the other Contracting Party, including entities at the central, regional, provincial or local level to discuss matters relating to this Article. Moreover, a Contracting Party may request consultations on this matter with the other Contracting Party with a view to solving the problem. Such consultations shall start within a period of thirty (30) days of the receipt of the request. In the meantime, the Contracting Parties shall exchange sufficient information to enable a full examination of the concern expressed by one of the Contracting Parties.*
- b) if the Contracting Parties fail to reach a resolution of the matter through consultations within thirty (30) days from the start of consultations or consultations do not start within a period of thirty (30) days of the receipt of the request concerning an alleged violation of paragraphs 5 or 6 above, the Contracting Party which requested the consultation shall have the right to suspend the exercise of the rights specified in this Agreement by the airline(s) of the other Contracting Party by refusing, withholding, revoking or suspending the operating authorisation/permit, or to impose such conditions as it may*

deem necessary on the exercise of such rights, or impose duties or take other actions. Any action taken pursuant to this paragraph shall be appropriate, proportionate and restricted with regard to scope and duration to what is strictly necessary.

APPENDIX D

OTHER AGREEMENTS/ARRANGEMENTS

1. GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

1.1 Article 15: Subsidies

Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects. The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration.

— END —

ICAO CORE PRINCIPLES ON CONSUMER PROTECTION

Preamble

Recognizing that passengers can benefit from a competitive air transport sector, which offers more choice in fare-service trade-offs and which may encourage carriers to improve their offerings, passengers, including those with disabilities, can also benefit from consumer protection regimes.

Government authorities should have the flexibility to develop consumer protection regimes which strike an appropriate balance between protection of consumers and industry competitiveness and which take into account States' different social, political, and economic characteristics, without prejudice to the safety and security of aviation. National and regional consumer protection regimes should i) reflect the principle of proportionality ii) allow for the consideration of the impact of massive disruptions, iii) be consistent with the international treaty regimes on air carrier liability established by the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 1929) and its amending instruments, and the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Montréal, 1999).

Before the travel

Recognizing the variety of air transport products in the market, passengers should have access to information on their rights and clear guidance on which legal or other protections apply in their specific situation, including the assistance expected, for example, in case of service disruption. To help air passengers make informed choices among different price and service offerings, consumer education efforts could be considered to increase awareness of passengers consumer rights and the available avenues for recourse should disputes arise. Efforts should also be made to increase awareness by passengers of airline products available in the market, different airline policies and contractual rights.

Passengers should have clear, transparent access to all pertinent information regarding the characteristics of the air transport product that is being sought, prior to purchasing the ticket, including the following:

- total price, including the applicable air fare, taxes, charges, surcharges and fees;
- general conditions applying to the fare; and
- identity of the airline actually operating the flight, and advice on any change occurring after the purchase as soon as possible.



During the travel

Passengers should be kept regularly informed throughout their journey on any special circumstances affecting their flight, particularly in the event of a service disruption.

Passengers should receive due attention in cases of a service disruption, whether they result in the passenger not boarding the flight or in arriving at the destination significantly later than scheduled. This could include rerouting, refund, care and/or compensation where provided by relevant regulations or otherwise.

Considering that passengers may find themselves in a vulnerable position in situations of massive disruptions, mechanisms should be planned in advance by airlines, airport operators, and all concerned stakeholders, including government authorities, to ensure that passengers receive adequate attention and assistance. Massive disruptions could include situations resulting from circumstances outside of the operator's control that are of a magnitude such that they result in multiple cancellations and/or delays of flights leading to a considerable number of passengers stranded at the airport. Such circumstances could include, for example, events such as meteorological or natural phenomena of a large scale including hurricanes, volcanic eruptions, earthquakes, floods, political instability or similar events and result in large numbers of passengers being stranded away from their home.

Persons with disabilities should, without derogating from aviation safety, have access to air transport in a non-discriminatory manner and to appropriate assistance. To this end, they are encouraged to provide pre-notification of their needs.

After the travel

Passengers should be able to rely on efficient complaint handling procedures that are clearly communicated to them.