



WORKING PAPER

WORLDWIDE AIR TRANSPORT CONFERENCE (ATCONF)

SIXTH MEETING

Montréal, 18 to 22 March 2013

Agenda Item 2: Examination of Key Issues and Related Regulatory Framework

Agenda Item 2.5: Safeguards

SAFEGUARD MEASURES FOR AIR TRANSPORT LIBERALIZATION

(Presented by the Secretariat)

EXECUTIVE SUMMARY

This working paper examines safeguards needed in the air transport liberalization process, covering four specific aspects: the sustained and effective participation of all States in international air transport, assurance of service and State aid/subsidies, essential air services, and the issue of unilateral action. The paper also provides information on related ICAO policy guidance. The issue of safeguards to ensure fair competition is discussed separately in ATConf/6-WP/4 under Agenda Item 2.4.

Action: The Conference is invited to:

- a) review the information and assessments provided in this working paper;
- b) endorse the conclusions presented in paragraph 6; and
- c) adopt the recommendations presented in paragraph 7.

References: ATConf/6 reference material is available at www.icao.int/meetings/atconf6.

1. INTRODUCTION

1.1 Since the advent of air transport liberalization, States have considered safeguards with a view to addressing concerns resulting from the disparity in stages of development, competitive strength of air carriers and geographical conditions.

1.2 The reasons prompting the concerns differ but fall under the following categories:

- a) the desire to have its own air carrier (right of participation);
- b) the desire to secure assurance of service to/from its territory (including by State aids/subsidies);
- c) the desire to provide essential air services;
- d) the desire to achieve a fair competitive market; and
- e) the concern over unilateral regulation imposed by another State.

1.3 This paper discusses the safeguards necessary to address the various challenges cited above, except the safeguards for fair competition, which are addressed separately in ATConf/6-WP/4, Agenda Item 2.4.

2. SUSTAINED AND EFFECTIVE PARTICIPATION

2.1 Participation in international air transport has its roots in the Chicago Convention. Article 44 of the *Convention on International Civil Aviation* (Doc 7300) provides that one of the objectives of ICAO is to “insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines”. The last two air transport conferences (ATConf/4 in 1994 and ATConf/5 in 2003) also agreed that “States have many differing regulatory goals and policies but share a fundamental objective of participation through reliable and sustained involvement in the international air transport system”, and that the interests and needs of developing countries should be given special consideration. Related ATConf/5 conclusions are available on the ATConf/6 website at www.icao.int/meetings/atconf6.

2.2 The continuing trend of the past decade towards liberalization has fostered an environment in which States have an increased opportunity for participation in international air transport by allowing more national airlines to operate services, using the services of foreign airlines, or by embarking on joint-venture operations with foreign or same community airlines. Although there are cases where national air carriers have disappeared, the gap is often filled by other airlines. States have adapted to the concept of liberalization and, while the right of participation is no longer a major concern, ICAO guidance on safeguard measures continues to be valid.

3. ASSURANCE OF SERVICE

3.1 States may need safeguards to ensure continuity of air services to/from their territories. Such a desire is particularly strong for countries experiencing social or economic crisis or where there is an absence of a national air carrier to perform the services, or withdrawal of services, provided by foreign air carriers. Various measures are taken by States to address these concerns including the provision of State aid/subsidies, assistance to national air carriers, particularly for air services of a public service nature, and the conclusion of service assurance arrangements with concerned air operators or parties. In some cases, this support is essential, notably for developing countries and for islands and landlocked countries.

3.2 With widespread liberalization and an increasingly competitive marketplace, States’ concerns over possible loss of air services to/from their territories have subsided considerably. However, concerns over the potential impact of State aid/subsidies on fair competition remain, as many States continue to provide such support or assistance to air carriers.

3.3 The issue of assurance of service has been addressed by ICAO with the development of related policy guidance, including preferential measures to help developing countries. The main thrust of ICAO guidance on the issue of State aid/subsidies is that State assistance in some instances “can produce economic and/or social benefits in terms of restructuring of air carriers and assurance of services. However, States should take transparent and effective measures accompanied by clear criteria and methodology to ensure that aid/subsidies do not adversely impact on competition in the marketplace” (ATConf/5 conclusion). Such policy guidance continues to be relevant, but ICAO needs to monitor developments and keep its policy guidance current and responsive to change.

4. ESSENTIAL AIR SERVICES

4.1 In the regulation of air transport services, States often take special measures to ensure that remote communities in their territories are properly served by air in order to encourage development. Such services, of a public service nature, are supported by States in various ways. While essential service schemes are mainly adopted in a domestic context, similar schemes may also be extended at the international level, for example, to promote economic or tourist development in a regional context. Such a possibility was explored by ICAO, in cooperation with the World Tourism Organization (UNWTO) through the “*Study on the Essential Services and Tourism Development Route Scheme*” (ESTD), which was conducted in 2007. The study can be accessed at http://www.icao.int/sustainability/pages/Eap_ER_Databases_EssentialRouteScheme.aspx.

4.2 Although there is a lack of data on cases where the ESTD scheme has actually been applied by States at the international level, there is merit in continuing to provide ICAO guidance so as to raise State awareness and encourage use of the guidance. In this regard, ICAO should monitor developments and, as experience is gained, share information with States.

5. AVOIDANCE OF UNILATERAL ACTION

5.1 There is general concern over unilateral measures or taken by individual and/or groups of States which impinge on the interests or air transport services of other States. This kind of unilateral action exists in various areas, including safety, security, and economic regulation notably when applying national competition laws and, more recently, in the environmental field. It is widely recognized that unilateral measures can create conflicts, and hence affect the development of international civil aviation.

5.2 As the global intergovernmental body responsible for civil aviation, ICAO is responsible for developing standards for technical regulation of civil aviation and for harmonizing regulatory policies and regimes pertaining to economic aspects of international air transport. In response to concerns over unilateral action affecting international air transport, ICAO has developed policy guidance, including various resolutions calling on States to refrain from taking such action, and guidance on mechanisms for resolution of conflicts or disputes. ICAO policy guidance continues to be relevant and it is imperative that ICAO ensure that the guidance remains t current and responsive to emerging issues.

5.3 Unilateral action is not conducive to the sound and orderly development of international air transport. States, in their regulatory practices, should give due regard to the interest of other States and refrain from applying national/regional laws and regulations that impact air carriers of other countries. States should resolve their conflicts/disputes through consultation and dispute settlement mechanisms within air services agreements, or through other available mechanisms, including ICAO.

6. CONCLUSIONS

6.1 In light of the discussions above, the following may be concluded:

- a) in the liberalization environment of international air transport, there is continued need for safeguards by some States due to the disparity in the stages of development, competitive strength of air carriers and geographical location; and
- b) 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 services, and avoidance of unilateral action, continues to be relevant and should be kept current for use by States according to need.

7. RECOMMENDATIONS

7.1 The following recommendations are proposed for consideration by the Conference:

- a) States should give due regard in the liberalization process both to 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, and to the need to give special consideration to the interests and needs of developing countries;
- b) ICAO should 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
- c) ICAO should continue to monitor developments with respect to safeguards and keep related guidance current and responsive to change.

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