



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 2.1 : Market access

Agenda Item 2.2: Air carrier ownership and control

**THE MULTILATERAL AGREEMENT ON THE LIBERALIZATION OF
INTERNATIONAL AIR TRANSPORTATION:
A BASIS FOR THE FUTURE ECONOMIC REGULATION OF AIR SERVICES**

(Presented by New Zealand)

EXECUTIVE SUMMARY

This paper argues that the framework of exchanging air rights that has developed since the 1940s is no longer fit for purpose in the 21st century. The paper advocates work be started by ICAO as a matter of priority on developing new multilateral solutions to address market access issues and provide the financially risky international airline industry with more open access to global equity markets, noting that to be effective the latter will need a wide degree of consensus. The paper presents the MALIAT as a modern, flexible, interim alternative for like-minded members wishing to use a multilateral instrument to open their air services relationships, whether on a combination or all-cargo only basis.

Action: The Conference is invited to agree to the recommendations presented in paragraph 5.

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

1. INTRODUCTION

1.1 Given that international air transport performs a vital role in the economic and social success of the modern world, it is an anachronism that the economic regulation of international air transport in the 21st century continues to be governed by a framework of restrictions developed in the first half of the 20th century at the end of an age of colonial empires when airliner technology was in its infancy and international tourism was restricted to a wealthy elite. It is difficult to explain to transport users why an industry that is so international in nature should continue to be governed by such a restrictive and fragmented economic regulatory framework. No other international industry, including maritime transport, is subject to such constraints.

1.2 New Zealand welcomes the results of the survey conducted by the Secretariat (reported in ATConf/6-WPs 12, 13 and 24) and agrees that the time has come to use ICAO as a forum to look to replace the existing framework for the economic regulation of international air transport. However, as the international community has found, most recently at the international trade negotiations at the World Trade Organisation, reaching an international consensus involving many members with a wide range of issues and interests can be particularly challenging.

1.3 New Zealand's experience has been that a group of like-minded countries, taking the widely accepted bilateral air services agreement models as a starting point, can develop a plurilateral alternative to the bilateral system. The Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT) (see <http://www.maliat.govt.nz/>), which was deliberately drafted so that membership was not restricted to one particular region, was the result of such an effort.

1.4 For its parties the MALIAT provides a relatively simple means of establishing an open relationship that does not require negotiations.

2. BACKGROUND

2.1 While the Chicago Conference in 1944 made great progress in establishing the basis for the very safe and secure civil aviation system that we benefit from today, it failed to reach agreement on a widely accepted exchange of air rights. Of particular contention was the issue of fifth (and also sixth) freedom rights – whether and to what extent third-country airlines should have access to markets.

2.2 The consequence of this has been the development of a system involving thousands of bilateral air services agreements. This has been a resource intensive process and, while the agreements and related understandings generally follow a standard pattern, the degree of standard language is not as great as it could or should be.

2.3 While in recent years there has been an encouraging trend towards liberalising air services arrangements, any such arrangements outside of the bilateral framework are generally being reached on an exclusive regional basis.

2.4 Since the 1940s, there has been one notable exception to this trend. With the purpose of promoting open skies air services arrangements, the MALIAT was negotiated on 31 October - 2 November 2000 at Kona, Hawaii, and signed at Washington D.C. on 1 May 2001 by Brunei Darussalam, Chile, New Zealand, Singapore and the United States of America. The Agreement entered into force on 21 December 2001. It is open to accession by any state that is party to the multilateral aviation security conventions. Subsequently the Cook Islands, Samoa and Tonga have acceded.

2.5 At the same time a Protocol to the Agreement was also negotiated and was signed by Brunei Darussalam, New Zealand and Singapore. The Protocol provides for parties to exchange seventh freedom passenger and cabotage rights.

2.6 The key features of the MALIAT are: an open route schedule; open traffic rights, including seventh freedom cargo services; open capacity; airline investment provisions which focus on effective control and principal place of business, but protect against flag of convenience carriers; multiple airline designation; third-country code-sharing; and a minimal tariff filing regime.

2.7 At negotiations on 19 April 2004 it was agreed that the MALIAT be amended by the inclusion of a new Article that would allow for accession on a cargo-only basis. This amendment entered into force on 27 October 2005. Mongolia has acceded on this basis.

2.8 Such agreements need to be seen not as threats but as opening up opportunities. Faced with competitive pressures since the MALIAT came into effect alongside other bilateral “open skies” agreements that New Zealand has entered into with partner countries, the New Zealand international airline industry has continued to innovate and thrive.

3. DISCUSSION

3.1 New Zealand is concerned that the current system of thousands of bilateral arrangement is an inefficient way of exchanging air rights leading to uncertainty for airline planning and a lack of standardisation of requirements. While it for a time lead to an industry dominated by flag carriers, the system has done little to strengthen the sustainability of an international airline industry that has a notoriously poor record of financial performance. The system has also supported protectionism and inefficiency at the expense of transport users.

3.2 Whilst there has been a global trend towards liberalisation, in considering what form a new global instrument or instruments should take, we think that there are two key requirements. First, to enable greater competition, along with the removal of route and tariffs restrictions, the artificial distinction between third/fourth freedom and fifth/sixth freedom traffic should be dropped. This should be accompanied by the removal of capacity limits to allow greater competition for passenger and cargo traffic. Second, the threat that an airline might be denied operating authorisation on foreign ownership and control grounds should be removed so that the financially risky airline industry has open access to global capital markets and skilled management. The MALIAT already meets these two requirements. In addition, it goes further by providing the flexibility to commit to a full exchange of seventh and eight freedom rights.

3.3 We appreciate that some non-members of the MALIAT will be concerned that it does not meet all their concerns. For example, some prospective members may wish to see provisions included about airport slot allocation and/or state aids to the airline industry (and related competition considerations). We also accept for some a weakness of the MALIAT is that those intending to join do not have the ability to exclude establishing an open air services relationship with any of the existing parties. We acknowledge that in order to gain wider acceptance, these are the kind of issues that should be considered in looking to draft a new ICAO multilateral instrument or instruments.

4. CONCLUSIONS

4.1 Many in the global airline, airport, tourism and logistics industries, through such initiatives as the IATA “Agenda for Freedom”, and at bodies such as the Airports Council International and the World Tourism Organization are continuously calling for change - for the economic regulatory shackles to be removed from the airline industry.

4.2 Many bilateral air services agreements already provide for their replacement when an appropriate multilateral agreement is reached. New Zealand agrees that the time is right for ICAO to refocus its attention on developing a modern multilateral solution to the exchange of air rights. We are, however, concerned that working to seek consensus on the full range of issues being addressed by this conference would be an difficult and lengthy process.

4.3 A particular priority should be the replacement of designation criteria based on the “substantial ownership and effective control” of airlines with criteria along the lines of the ICAO model text of “principal place of business and effective regulatory control”. Given the network nature of international airlines that serve multiple countries, this needs to be done on the basis of a wide consensus of the ICAO membership.

4.4 In the interim the MALIAT provides modern, flexible solution for like-minded members wishing to establish more open air services relationships on a standardised basis.

5. **RECOMMENDATIONS**

5.1 The Conference is invited to:

- a) urge the Air Transport Regulatory Panel of ICAO to work, as a matter of priority, toward the formulation of a new framework to address the issues of market access, and air carrier ownership and control on a multilateral basis that is fit for purpose in the 21st century; and
- b) request States to consider, in the interim, joining the Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT) as an efficient and effective standardised means of exchanging air rights on an open basis, that also gives the option of joining for all-cargo services only.

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