



ASSEMBLY — 41ST SESSION

ECONOMIC COMMISSION

Item 36: Economics of Airports and Air Navigation Services — Policy

REQUESTING GUIDANCE REGARDING ARTICLE 15 AND AIRSPACE ACCESS

(Presented by the United States)

EXECUTIVE SUMMARY

States may choose if and how they grant or assume obligations to provide airspace access; however, Article 15 of the *Convention on International Civil Aviation*, done at Chicago on 7 December 1944, (hereinafter referred to as the “Chicago Convention”) conditions that sovereign right to preclude charging for airspace access and establishes a national treatment standard for related user charges. To continue to enable global growth and development, it is essential that Contracting States adhere to the rules established by the Convention. Specific guidance and legal analysis have become increasingly necessary for Member States to understand and apply Article 15.

**Action:** The Assembly is invited to direct the ICAO Council and its working bodies to undertake an analysis of Contracting States’ obligations pursuant to Article 15 of the Convention as they relate to States’ sovereign right to exchange the first- and second-freedoms of the air as they see fit. Such an analysis would provide a basis to promote Contracting States’ adherence to Article 15.

<i>Strategic Objectives:</i>	This working paper relates to Strategic Objectives: <i>Air Navigation Capacity and Efficiency</i> and <i>Economic Development of Air Transport</i> .
<i>Financial implications:</i>	No significant financial implications.
<i>References:</i>	Doc 7300, <i>Convention on International Civil Aviation</i> , done at Chicago on 7 December 1944 Doc 9082, <i>ICAO’s Policies on Charges for Airports and Air Navigation Services</i>

## 1. INTRODUCTION

1.1 The practice of charging fees beyond standard, cost-based air navigation charges or establishing certain prerequisites for airspace access has long been a subject of debate within the international aviation community. States have the sovereign right to choose whether they grant airspace access or assume obligations to provide such access; however, Article 15 of the Convention on International Civil Aviation, done at Chicago on 7 December 1944, (the Chicago Convention) conditions that right to preclude charging for airspace access and establishes a national treatment standard for related user charges. To continue to enable global growth and development, it is essential that Contracting States adhere to the rules established by the Chicago Convention. Specific guidance and legal analysis have become increasingly necessary for Member States to understand and apply Article 15.

## 2. DISCUSSION

2.1 States have sovereignty over the airspace above their territories and may choose whether to provide opportunities for airspace access. Most States in the international aviation community are parties to the International Air Services Transit Agreement or otherwise take on obligations to allow the right to fly across the territory of another party through bilateral or multilateral Air Transport Agreements. While States may choose if, when, and how they grant airspace access or assume obligations to do so, Article 15 of the Chicago Convention precludes charging for airspace access and establishes a national treatment standard for related user charges.

2.2 Article 15 establishes that, “No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.” It further states that, “any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher, as to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operation.”

2.3 The Chicago Convention created the rules-based system for international aviation that has enabled the growth of the aviation sector over the last several decades and enabled the transformational growth into the vital engine of global socio-economic growth. It has also been a catalyst for economic development, creating direct and indirect employment, supporting tourism and local businesses, and stimulating foreign investment and international trade. To continue to enable global growth and development, it is essential that Contracting States adhere to the standards established by the Chicago Convention.

2.4 The Preamble of the Chicago 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.” 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;...”

2.5 The practice of charging fees or otherwise requiring compensation beyond standard, cost-based air navigation charges for airspace access has long been a subject of debate and raises doubts over its legality. In the past, some governments have brought attention to the issue of “royalty” payments for airspace access by taking legal action based on the anti-competitive effects given differentiated treatments for carriers based on nationality and lack of transparency.

2.6 Specific guidance and legal analysis have become increasingly necessary for Member States to understand and apply Article 15. In some instances, certain commercial arrangements between airlines have been imposed by contracting States as a prerequisite for airspace access or for preferential overflight routings. The confidential nature of such transactions makes it difficult for aviation authorities to understand the potential market impact of these arrangements between airlines, and under certain circumstances such practices seem inconsistent with the intent of Article 15.

2.7 In an effort to avoid the proliferation of unreasonable air navigation charges – a practice that hampers international air transport – ICAO’s Air Navigation Services Economics Panel (ANSEP) has long emphasized through its updates of ICAO’s *Policies on Charges for Airports and Air Navigation Services*, Doc 9082, that civil aviation authorities should not charge fees where they are not based on services provided. This includes fees related solely to airspace access when no additional services are rendered. Furthermore, ICAO notes that States should ensure that their air navigation service providers maintain appropriate accounts to ensure that air navigation service charges levied on international civil aviation are properly calculated.

2.8 Through the Resolutions adopted at the 40th Session of the Assembly, the Assembly urged Member States to ensure that Article 15 of the Chicago Convention is fully respected. It is the view of the United States that further exploration of the provisions of Article 15 relating to charges imposed by any State solely for the right of transit is warranted to ensure consistent application and the basic principles of sovereignty, fair and equal opportunity and non-discrimination set out in the Chicago Convention.

### 3. ACTION SOUGHT FROM THE ASSEMBLY

3.1 The Assembly is invited to:

3.2 Direct the ANSEP and the Air Transport Regulation Panel (ATRP), in consultation with the Legal Committee, to undertake an analysis of the relationship between States’ obligations pursuant to Article 15 of the Chicago Convention and States’ grants of airspace access. The analysis should look specifically at the question of whether a State’s differential conditioning of grants of airspace access to other States is consistent with the national treatment standard and the principle of non-discrimination set forth in the Chicago Convention.

— END —