



## 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.

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**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.

.....”

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## 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.”*

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## 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.

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## 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.

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APPENDIX F

ICAO Bilateral Template Air Services Agreement (TASA)

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

| <p align="center"><b>Article 15<br/>Fair competition</b></p>   | <p align="center"><b>Explanatory Notes</b></p>   |
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| <div data-bbox="310 657 656 705" style="border: 1px solid black; padding: 5px; margin-bottom: 10px; text-align: center;"> <p><b>Traditional</b></p> </div> <p>Each designated airline shall have a fair opportunity to operate the routes specified in the Agreement.</p> <div data-bbox="310 802 656 850" style="border: 1px solid black; padding: 5px; margin-bottom: 10px; text-align: center;"> <p><b>Transitional</b></p> </div> <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> <div data-bbox="310 1146 656 1194" style="border: 1px solid black; padding: 5px; margin-bottom: 10px; text-align: center;"> <p><b>Full liberalization</b></p> </div> <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<br>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"> <li>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;</li> <li>b) the addition of excessive capacity or frequency of service;</li> <li>c) the practices in question are sustained rather than temporary;</li> <li>d) the practices in question have a serious negative economic effect on, or cause significant damage to, another airline;</li> <li>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</li> <li>f) behaviour indicating an abuse of dominant position on the route.</li> </ul> <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<br>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 style="text-align: center;">Article 34<br/>Settlement of disputes</p>   | <p style="text-align: center;">Explanatory Notes</p>  |
|--|---|
| <div style="text-align: center; border: 1px solid black; width: fit-content; margin: 0 auto; padding: 2px 10px;"> <p>Traditional</p> </div> <p style="text-align: center;">Diplomatic channels</p> <p style="text-align: center;">[See alternatively two "Arbitration"<br/>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;"><b>Article 34</b><br/><b>Settlement of disputes</b></p>   | <p style="text-align: center;"><b>Explanatory Notes</b></p>  |
|--|--|
| <p style="text-align: center;"><b>Arbitration</b></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;"><b>[Paragraph 5, option 1 of 2]</b></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;"><b>[Paragraph 5, option 2 of 2]</b></p> <p>5. The decision of the tribunal shall be binding on the Parties.</p> <p style="text-align: center;"><b>[Paragraph 6, option 1 of 2]</b></p> <p>6. The expenses of the tribunal shall be shared equally between the Parties.</p> <p style="text-align: center;"><b>[Paragraph 6, option 2 of 2]</b></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 style="text-align: center;"><b>Article 34</b><br/><b>Settlement of disputes</b></p>   | <p style="text-align: center;"><b>Explanatory Notes</b></p>   |
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| <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 style="text-align: center;"><b>[See alternatively, "Diplomatic channels" or first "Arbitration" approach above]</b></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> |

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| <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="text-align: center;">[See alternatively, "Diplomatic channels" or first "Arbitration" approach above]</p> <p style="text-align: center;">[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="text-align: center;">[Paragraph 8, option 2 of 2]</p> <p>8. The decision of the tribunal shall be binding on the Parties.</p> <p style="text-align: center;">[Paragraph 9, option 1 of 2]</p> <p>9. The expenses of the tribunal shall be shared equally between the Parties.</p> <p style="text-align: center;">[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><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<br>Settlement of disputes   | Explanatory Notes   |
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| <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> |

| <b>Article 34<br/>Settlement of disputes</b>  | <b>Explanatory Notes</b>  |
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| 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><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> |

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## 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).