



ASSEMBLY — 35TH SESSION

ECONOMIC COMMISSION

Agenda Item 27: Regulation of international air transport services, and outcome of the fifth Worldwide Air Transport Conference

REPORT BY THE COUNCIL ON THE FIFTH WORLDWIDE AIR TRANSPORT CONFERENCE AND TRADE IN SERVICES

SUMMARY

This paper reports on the preparations, results and follow-up work by the Council regarding the fifth Worldwide Air Transport Conference (ATConf/5) and on trade in services developments since the 33rd Session of the Assembly.

Action by the Assembly is in paragraph 5.

REFERENCES

Doc 9819, ATConf/5, *Report of the Worldwide Air Transport Conference*
Doc 9798, A33 – EC, *Report of the Economic Commission of the 33rd Session of the Assembly*
Doc 9790, *Assembly Resolutions in Force (as at 5 October 2001)*
Doc 9587, *Policy and Guidance Material on the Economic Regulation of International Air Transport*
State letter SC 5/1-03/71 dated 25 July 2003

1. INTRODUCTION

1.1 Since the 33rd Session of the Assembly, the main developments in the economic regulation of air carriers and the principal focus of the Organization's work in this field has been the fifth Worldwide Air Transport Conference: Challenges and Opportunities of Liberalization, which was held in Montreal from 24 to 28 March 2003, and trade in services. This paper reports on the Conference and the Council action on its Report (*Report of the Worldwide Air Transport Conference*, Doc 9819) as well as trade in services developments. The paper also proposes some amendments to Appendix A, Economic Regulation, of Assembly

Resolution A33-19, Consolidated Statement of continuing ICAO policies in the air transport field, which will be addressed under Agenda Item 31.

2. **WORLDWIDE AIR TRANSPORT CONFERENCE**

2.1 **Background and preparation**

2.1.1 Following the fourth Worldwide Air Transport Conference in 1994, the Organization undertook an extensive work programme of follow-up action on matters either left unresolved or requested by that Conference. That work was undertaken by the Council, primarily through the Air Transport Regulation Panel (ATRP), and covered such issues as safeguards, air carrier ownership and control, “doing business” matters, preferential measures and codesharing. It resulted in substantial additional policy guidance for Contracting States. The 32nd Session of the Assembly noted this work by the Council, reaffirmed the leadership role of ICAO in this area and stressed the need for ICAO to be proactive. The Council subsequently reported to the 33rd Session on major developments in the air transport industry and in regulatory policy and of its intention to convene another air transport conference to address many of the pertinent and contemporary issues relating to liberalization, in order to meet the needs of States for policy guidance for safeguarded liberalization.

2.1.2 Prior to the 33rd Session the Council had decided, in February 2001, to convene the fifth Worldwide Air Transport Conference. The Conference objectives were to develop a framework for the liberalization of international air transport with safeguards to ensure fair competition, safety and security and including measures to ensure the effective and sustained participation of developing countries. The Conference Agenda, adopted by the Council in December 2001, followed a consultation process with States during 2001. It was structured around four integral components, namely: a preview of the background to and experience of liberalization; an examination of key regulatory issues in liberalization; a review of a template air services agreement; and a global framework for ongoing liberalization, including the role and future work of ICAO. The Council also decided that the Conference should be complemented by a preparatory seminar and an exhibition. The State letter of invitation, providing background to the Conference, the agenda and other organizational arrangements, was sent to States in December 2001.

2.1.3 The Secretariat, with the assistance of the ATRP which met in May 2002, developed extensive documentation on all the agenda items. On the crucial subject of air carrier ownership and control, the Secretariat also conducted during 2001 and 2002 a survey of States’ policies and practices as a basis for developing further the issues and policy options for liberalization in this area. As background documentation for the Conference, the *Manual on the Regulation of International Air Transport* (Doc 9626) and the *Digest of Bilateral Air Transport Agreements* (Doc 9511) were revised and updated.

2.1.4 As part of the preparations and build-up for the Conference, ICAO conducted a series of regional seminars in nearly all regions in late 2002 and early 2003. These meetings gave States and many organizations a good understanding of the issues and the proposals being put forward, and therefore a chance to prepare their own positions as States or groups of States. This also greatly assisted in the management of the Conference. Most substantive documentation was distributed, or made available on the ICAO Web site, well in advance of the Conference.

2.1.5 The 1994 Conference and subsequent work by the Council had provided a foundation of ICAO policy guidance on liberalization upon which the 2003 Conference could build. Proposals by the Secretariat, as well as by States and organizations in their many submissions to the fifth Conference, took that previous work and elaborated, refined or added to its content.

2.2 Participation in and conduct of the Conference

2.2.1 The Conference attendance was high, nearly 800 delegates and observers from 145 States and 26 observer organizations. In the circumstances prevailing in late March 2003, such attendance was indicative of the widespread interest in the objective of the Conference and the issues to be discussed. The associated preparatory seminar, organized in collaboration with other organizations and local academic institutions, also generated a high level of attendance and interest. The exhibition provided information and contacts for participants.

2.3 Results of the Conference

2.3.1 The Conference reached conclusions and decisions on all the topics in its agenda. Given the complexity and breadth of the agenda, the Conference results were extensive. This package of results consisted of: a Declaration of Global Principles for the Liberalization of International Air Transport; two recommendations, one on the liberalization of air carrier ownership and control, and the other on ICAO's future role including relations with the World Trade Organization (WTO-OMC); and seven model clauses for use at States' discretion in their air services agreements. These model clauses cover: designation and authorization, aircraft leasing, an annex on air cargo services, safeguards against anti-competitive practices, a transition annex for participation and preferential measures, settlement of disputes and registration of agreements. In addition, the Conference adopted 67 conclusions for its report covering the full spectrum of topics and issues on the agenda. Among the conclusions was the Conference's approval for the concept and content of the Template Air Services Agreements (TASAs), one for bilateral and the other for regional situations, in their air transport relationships. Throughout the Declaration, recommendations and conclusions are numerous references to actions to be taken by States and by ICAO.

2.3.2 In June 2003 the Council considered the results of the Conference, approved the two recommendations and agreed on certain follow-up actions to be taken by ICAO. The Secretary General subsequently sent to States a State letter (SC 5/1-03/71 dated 25 July 2003) advising of the Conference results, informing them of the follow-up actions and drawing their attention, in an attachment, to the actions directed to States by the Conference. The Conference report was distributed to States as Doc 9819 in July 2003. Additional State letters requiring particular actions, such as the provision of information to ICAO, were sent out following the general one on the Conference results. These additional State letters covered: adherence to the International Air Services Transit Agreement (O 1/5-03/77 dated 25 July 2003); ownership and control (SC 5/6-03/88 dated 26 September 2003, including another survey on States' policies, practices and positions) case studies on liberalization experiences (SC 5/6-03/89 dated 26 September 2003), dispute resolution mechanism and the list of experts for mediation or dispute resolution (SP 38/4.1-03/90 dated 26 September 2003); and transparency (EC 2/16.1-03/105 dated 28 November 2003). The Conference results were given wide dissemination and opportunities were taken by the Secretariat when on mission or when attending meetings of other organizations to draw attention to the Conference and its outcome. All the Conference documentation, including the package of results (presented as the "Consolidated Conclusions, Model Clauses, Recommendations and Declaration"), remains accessible electronically through the ICAO Web site at <http://www.icao.int/icao/en/atb/atconf5/>.

2.4 Assessment of results

2.4.1 The Conference results responded to the Council's call for a global framework for liberalization. The Declaration of Global Principles provides a broadly cast statement of objectives, principles and policies that can be held up by the aviation community as its aeropolitical frame of reference for liberalization over the coming years. Inevitably, given the nature of the evolving globalization and liberalization processes in aviation, the Declaration will, in due course, require a reassessment. However, for current purposes it responds to the need for a framework to guide the aviation community and to inform those outside of aviation.

The various model clauses adopted by the Conference offer practical advice which States can use at their discretion when liberalizing. Among the model clauses, of particular significance are the endorsement of accelerated liberalization of the air cargo sector, the development of a safeguard mechanism for fair competition and an innovative dispute resolution mechanism which builds on early ICAO work, a formula to incorporate participation and preferential measures in the transition to full liberalization, and measures to improve transparency, including the registration process for air services agreements. Moreover, the two TASAs incorporate these models, as well as others previously developed by ICAO. The TASAs are comprehensive framework air services agreements. As they include options for progressive liberalization, alternative language and explanatory notes, they can be used as practical guides and yardsticks in States' air service relationships.

2.4.2 The two recommendations adopted by the Conference address two important issues. The first recommendation, on liberalizing air carrier ownership and control, offers "principal place of business" and "effective regulatory control" as an alternative formula to the traditional "substantial ownership and effective control" clause for air carrier designation and authorization in air services agreements. Its usage by States will serve to open up this aspect of aeropolitical relationships and facilitate greater access to capital and transnational ownership and investment in the airline industry. The Conference sought to reinforce this liberalizing process by urging that States adopt flexible approaches to designation, and the recommendation proposed the use of positive approaches, including unilateral or coordinated action, to accept the use by other States of other than the traditional criteria in practice. The implementation of these formulae should serve to progressively liberalize this pivotal regulatory device with full regard to the need for safety and security.

2.4.3 Air carrier ownership and control is currently addressed in Section II of Appendix A, Economic Regulation, of Assembly Resolution A33-19. As the Conference developed alternative approaches and policy guidance, the Council proposes that A33-19 be updated with references to liberalization of this regulatory device in a flexible manner and to the alternative criteria of "principal place of business" and "effective regulatory control". The proposed wording for both these elements is drawn mainly from the Conference Declaration. The appropriate changes to A33-19 are reflected in the Appendix to this paper.

2.4.4 With regard to ICAO's future role in this field, the subject of the second recommendation, the Conference agreed that ICAO should focus its efforts on facilitating, promoting and assisting States in the liberalization process. That recommendation also addressed ICAO's relations with the WTO-OMC and calls on ICAO to continue to draw attention to its policy on trade in services (currently reflected in Assembly Resolution A33-19), which emphasizes the linkage and interrelationship between safety, security and economic regulation and the Organization's new focus on liberalization. Developments on trade in services and proposed amendments to the ICAO policy as a consequence of the Conference results are addressed in paragraph 3 below.

2.5 Follow-up action and future work of the Council

2.5.1 While the Conference did not leave unresolved any major items, it produced a large number of proposals for further follow-up action mostly aimed at implementation of the Conference decisions, elaborating further policy guidance as circumstances and need arise and in monitoring information and work to assist States in the liberalization process. When reviewing the Conference results, the Council agreed to retain the ATRP for consultation to assist the Secretariat on an *ad hoc* basis. Thus far, the Panel has been used with regard to amendments to the model clause on leasing which the Conference had requested, as well as further refinement of the TASAs. It is expected that the Panel will be used on a regular basis, particularly with respect to amendments and improvement of the TASAs as "living documents" and as regulatory tools for States.

2.5.2 The Conference also requested that a number of informational databases, to aid States in their liberalization work, be established and made accessible. Accordingly, databases on States' policies, practices and positions on air carrier ownership and control and other designation criteria and an inventory of States'

experiences with liberalization including case studies on liberalization have been established. Both these databases have been made accessible through the ICAO Web site. ICAO already maintains a number of other informational databases to enable it to carry out its policy analysis tasks. The long-established bilateral air services agreements database has been updated further since the Conference and made available as *The Database of the World's Air Services Agreements*, in CD-ROM format with a built-in facility to query the database. Following the Conference, additional work was necessary on the *Manual on the Regulation of International Air Transport* (Doc 9626) before its final production and dissemination. Furthermore, an update of the Organization's compilation of its regulatory policy guidance in the *Policy and Guidance Material on the Economic Regulation of International Air Transport* (Doc 9587) will be completed following the current Session of the Assembly.

2.5.3 A primary means of assistance to States, as part of ICAO's "facilitating" task requested by the Conference, is the workshop and seminar programme. The first post-Conference regional regulatory policy seminar was conducted in October 2003 and similar seminars were planned for 2004. Seminars will continue to be conducted as resources permit. The purpose of these seminars is to focus on the practical aspects of liberalization implementation through the exchange of experience and advice among participants. The TASAs also provide a vehicle for discussion of liberalization options in these seminars.

2.5.4 The Council intends to closely monitor developments in the regulatory field with a view to developing additional policy guidance for States, if considered necessary. The Conference recognized that economic regulation of air transport is a rapidly evolving area which is constantly raising issues for potential consideration at the global level. The new negotiating dynamics involving air services agreements by third parties with the European Union's Member States is an example of a significant regulatory development with global implications. It is therefore a matter which the Council will monitor carefully. The Conference follow-up work necessitates an even closer relationship between ICAO and its Contracting States in terms of the exchange of information and experience in order that ICAO can support States in their liberalization efforts. Consideration will be given to convening, on a full cost recovery basis, a global seminar in 2005 to take stock of liberalization, the Conference follow-up and any emerging regulatory issues.

3. **TRADE IN SERVICES**

3.1 The focus of attention in the trade in services field since the 33rd Session of the Assembly has been on the review of the Annex on Air Transport Services in the General Agreement on Trade in Services (GATS) of the WTO-OMC. That review, which began in 2000, also encompassed discussions on expansion of the Annex coverage of international air transport services. Thus far the Annex coverage is limited to aircraft repair and maintenance services, selling and marketing, and computer reservation system (CRS) services.

3.2 At the time of the 33rd Session of the Assembly the Annex review was under way and a number of proposals by Members of the WTO-OMC for possible expansion of the Annex had been tabled. At meetings of the Council for Trade in Services (CTS) of the WTO-OMC in 2001 and in 2002, the review continued, together with discussions on possible additional issues for coverage by the Annex. ICAO attended and/or monitored closely these meetings. Although the review was completed by October 2003, a consensus on expansion of the Annex could not be reached. The convening, timing and outcome of the Conference had an impact on the WTO-OMC consideration of the review and expansion of the Annex. At meetings of the CTS in October 2003 the issue of timing of the next review was discussed and agreement reached that it would commence at the last regular meeting of the CTS in 2005. Effectively this ended the first review process as well as any further discussions on expansion of the Annex. The result of this review, therefore, is that the Annex remains unchanged. In the course of CTS discussions, a number of WTO-OMC Members expressed the view that, notwithstanding the inability to make progress on further expansion during the first review, the Annex

should remain an option for the liberalization of international air transport. It may therefore be expected that the issue of expansion of coverage will again be addressed in the course of the next review.

3.3 ICAO has followed and reviewed developments on the trade in services issue since the 1980s and ICAO's policies have retained certain basic threads. The 33rd Session reviewed that policy and incorporated several additional elements from a Council Resolution adopted in 1999. The current policy is set out in Section IV of Appendix A, Economic regulation, of Assembly Resolution A33-19. While the general thrust of Section IV remains valid, the Council proposes the inclusion in the section on trade in services of elements adopted by the Conference in its Declaration of Global Principles for the Liberalization of International Air Transport. The two main elements concern use of the ICAO-developed regulatory options for liberalization, and the Council exerting a leadership role in facilitating and coordinating the process of liberalization. These new elements were adopted by the Conference in its Declaration as a result of its discussions on the role of ICAO and relations with the WTO-OMC. The Council considers that the addition of these elements, as well as other minor adjustments of wording consequential on the Conference Declaration, will strengthen this Section of the Assembly Resolution and make it clear that ICAO intends to continue its proactive role in the safeguarded and progressive liberalization of international air transport. The Appendix to this paper indicates the proposed changes to the policy on trade in services.

4. **FINANCIAL IMPACT OF THE PROPOSED ACTION¹**

4.1 The proposed work set out in paragraph 2.5 would be undertaken within the resources available under Programme 3.2, Economic Policy of the draft Programme Budget 2005-2007. Programme 3.2 includes a reduction of one General Service post compared to the current triennium.

5. **ACTION BY THE ASSEMBLY**

5.1 The Assembly is invited to:

- a) note this report on the outcome and follow-up work of the fifth Worldwide Air Transport Conference and trade in services developments; and
- b) review the text in the Appendix to this working paper with a view to its adoption under Agenda Item 31.

¹ This information is presented only to indicate the estimated financial impact of the proposed action. The funds allocated to this proposed action will depend upon the final form of the Programme Budget of the Organization for 2005-2006-2007 approved by the Assembly.

APPENDIX

PROPOSED AMENDMENT TO APPENDIX A OF ASSEMBLY RESOLUTION A33-19 - *CONSOLIDATED STATEMENT OF CONTINUING ICAO POLICIES IN THE AIR TRANSPORT FIELD*

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Section II. Cooperation in regulatory arrangements

Whereas certain economic, financial and operational constraints unilaterally introduced at the national level affect the stability of, and tend to create unfair discriminatory trading practices in, international air transport and might be incompatible with the basic principles of the Convention and the orderly and harmonious development of international air transport;

Whereas the provision of regular and reliable air transport services is of fundamental importance to the development of the economies of many developing States, including those dependent on tourism;

Whereas the strict application of the criterion of substantial ownership and effective control for the authorization of an airline to exercise route and other air transport rights could deny to many developing States a fair and equal opportunity to operate international air services and to optimize the benefits to be derived therefrom;

Whereas air carrier designation and authorization for market access should be liberalized at each State's pace and discretion progressively, flexibly and with effective regulatory control in particular regarding safety and security;

Whereas the broadening or the flexible application of the criteria for airline designation and authorization could help create an operating environment in which international air transport may develop and flourish in a stable, efficient and economical manner, and contribute to the participation objectives of States in the liberalization process;

Whereas the realization of developmental objectives among such States is increasingly being promoted by cooperative arrangements in the form of regional economic groupings and functional cooperation symbolic of the affinity and community of interest which is particularly shared among developing States belonging to such regional economic integration movements; and

Whereas the exercise of route and other air transport rights of a developing State having such community of interest by an airline substantially owned and effectively controlled by another developing State or States or its or their nationals sharing the same community of interests will serve to promote the foregoing interests of developing States;

The Assembly:

1. *Urges* Contracting States to avoid adopting unilateral measures which may affect the orderly and harmonious development of international air transport and to ensure that domestic policies and legislation are not applied to international air transport without taking due account of its special characteristics;

2. *Urges* Contracting States to accept such designations and allow such airlines to exercise the route rights and other air transport rights of any developing State or States within the same grouping, under mutually acceptable terms and conditions including air transport agreements negotiated or to be negotiated by the parties concerned;

3. *Urges* Contracting States to recognize the concept of community of interest within regional or subregional economic groupings as a valid basis for the designation by one developing State or States of an airline of another developing State or States within the same regional economic grouping where such airline is substantially owned and effectively controlled by such other developing State or States or its or their nationals;

4. *Urges* Contracting States to give consideration to the use of alternative criteria for airline designation and authorization, including those developed by ICAO and to adopt a flexible and positive approach to accommodate other States in their efforts to liberalize air carrier ownership and control without compromising safety and security.

5. *Invites* Contracting States with experience in various forms of joint operation of international air services to submit to the Council, on a continuing basis, full information concerning their experience, so that the Organization may have in this particular field all information that might be of assistance to Contracting States;

6. *Requests* the Council, when approached, to render all feasible assistance to Contracting States wishing to enter regional or subregional economic groupings with respect to the operation of international air services; and

7. *Requests* the Council to give assistance, when approached, to Contracting States that take the initiative in developing cooperative arrangements for the joint ownership and operation of international air services, directly among themselves or whose airlines develop such arrangements, and promptly circulate to States information concerning such cooperative arrangements.

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Section IV. Trade in services

Whereas on the issue of including aspects of international air transport under the General Agreement on Trade in Services (GATS), ICAO has actively promoted an understanding by all parties concerned of the provisions of the *Convention on International Civil Aviation* and of the particular mandate and role of ICAO in international air transport;

The Assembly:

1. *Reaffirms* the need for ICAO to continue to explore future regulatory arrangements and develop recommendations and proposals to meet the challenges facing international air transport, responding to the internal and external changes affecting it;

2. *Recognizes* that such arrangements should be based on the general goal of gradual, progressive, orderly and safeguarded change towards market access, and the interests of all Contracting States in ensuring their effective and sustained participation in international air transport;

3. *Reaffirms* the primary role of ICAO in developing policy guidance on the regulation of international air transport;

4. *Urges* Contracting States which participate in trade negotiations, agreements and arrangements relating to international air transport to:

- a) ensure internal coordination in their national administrations and in particular the direct involvement of aeronautical authorities and the aviation industry in the negotiations;
- b) ensure that their representatives are fully aware of the provisions of the Chicago Convention, the particular characteristics of international air transport and its regulatory structures, agreements and arrangements;
- c) take into account their rights and obligations vis-à-vis those ICAO Member States which are not members of the World Trade Organization;
- d) examine carefully the implications of any proposed inclusion of an additional air transport service or activity in the GATS bearing in mind, in particular, the close linkage between economic, environmental, safety and security aspects of international air transport;
- e) promote a full understanding of the role **and mandate** of ICAO in developing policy guidance on **economic regulation, including liberalization of international air transport, and consider using this guidance** ~~the regulation of international air transport~~; and
- f) file with ICAO under Article 83 of the Convention copies of any exemptions and specific commitments pertaining to international air transport made under the GATS;

5. *Requests* the World Trade Organization, its Member States and Observers to accord due consideration to:

- a) the particular regulatory structures and arrangements of international air transport and the progressive liberalization taking place at the bilateral, sub-regional and regional levels;
- b) ICAO's constitutional responsibility for international air transport and, in particular, for its safety and security; and
- c) ICAO's existing policy and guidance material on the economic regulation of international air transport and its continued work in the field; and

6. *Requests* the Council to:

- a) **continue to exert the global leadership role in facilitating and coordinating the process of economic liberalization while ensuring safety, security and environmental protection in international air transport**;
- b) pursue in a proactive manner developments in trade in services which might impinge on international air transport and inform Contracting States accordingly; and

- c) promote continued effective **communication**, cooperation and coordination among ICAO, the World Trade Organization, and other intergovernmental and non-governmental organizations dealing with trade in services.

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— END —