

**WORLDWIDE AIR TRANSPORT CONFERENCE: CHALLENGES AND
OPPORTUNITIES OF LIBERALIZATION**

Montreal, 24 to 29 March 2003

**Agenda Item 2: Examination of key regulatory issues in liberalization
2.7: Transparency**

**TRANSPARENCY IN INTERNATIONAL AIR TRANSPORT
REGULATION**

(Presented by the Secretariat)

SUMMARY

This paper addresses the issue of transparency in international air transport regulation, particularly in a liberalized environment. It discusses means to improve the implementation of this fundamental principle through action by States as regards their registration obligation and making regulatory information publicly accessible.

Suggested action by the Conference is in paragraph 6.1.

REFERENCES

Doc 9511, *Digest of Bilateral Air Transport Agreements*
Doc 6685-C/767, *Rules for Registration with ICAO of Aeronautical
Agreements and Arrangements*

1. INTRODUCTION

1.1 The *Manual on the Regulation of International Air Transport* (Doc 9626) defines transparency as “the openness of agreements and understandings reached and accessibility by non-party States and individuals with an interest in their contents”. Transparency is a fundamental principle of the Convention on International Civil Aviation (Chicago Convention) whereby Article 83 establishes the clear and unequivocal obligation of Contracting States to register “forthwith” with the Council of ICAO any

arrangement, which shall be made “public as soon as possible”. Such arrangements would include agreements, memoranda of understanding and side notes relating to bilateral, regional and multilateral air transport agreements between States. Transparency would also include arrangements relating to exemptions and specific commitments made under the General Agreement on Trade in Services (GATS) as regards the Annex on Air Transport Services, as well as agreements for the lease, charter or interchange of aircraft or any similar arrangement under Article 83 bis of the Chicago Convention.

1.2 Transparency is a cornerstone for liberalizing international trade through the GATS which includes air transport as a service sector. To that extent, this principle would impose the obligation to provide public notification of laws, regulations and practices that affect foreign suppliers of air transport services. In a trade context, transparency operates on the theory that exposing trade barriers is essential both to eliminating existing barriers and to discouraging the establishment of new ones.

1.3 The issue of transparency is an essential element in international air transport regulation, particularly in a liberalized environment, where its scope extends beyond a mere obligation on States to register agreements. In the pursuit of liberalization, it is in the interest of States as well as that of the increasing number of parties involved in air services negotiations, that the process becomes more open and transparent in the way information on relevant arrangements and on developments taking place in the industry is recorded and provided to all interested parties. This paper addresses the issue of transparency in the international air transport regulatory regime and its role in the liberalization process, and considers means to improve its implementation and make information more readily accessible to States and interested parties.

2. PREVIOUS ICAO WORK

2.1 Over the years, several Assembly resolutions have addressed the obligation of States to register with ICAO all arrangements relating to air transport, as provided for in Article 83 of the Chicago Convention, and including exemptions and specific commitments made under the GATS. These resolutions have urged States to register such arrangements in accordance with the *Rules for Registration with ICAO of Aeronautical Agreements and Arrangements*, as contained in Doc 6685-C/767, and have indicated that delays or non-compliance of registering such agreements are not desirable for the accuracy and completeness of regulatory information and for enhancing transparency.

2.2 At the 33rd Session of the ICAO Assembly in 2001, the Economic Commission expressed its support for ICAO to continue to reinforce the obligation of all Contracting States to register with ICAO all arrangements relating to air transport. The Assembly in adopting Resolution A33-19 further urged Contracting States to give due consideration to such compliance in order to strengthen ICAO's leadership role in facilitating air transport liberalization and enhancing the transparency of the system.

2.3 ICAO renders public all registered agreements in a quarterly *List of Agreements and Arrangements Concerning International Civil Aviation Registered with ICAO* as well as on the ICAO Web site (<http://icaoww.icao.int/applications/dagmar/main.cfm>). ICAO also maintains an up-to-date database of codified summaries of the main provisions of the bilateral air transport agreements registered with ICAO and publishes it periodically in the *Digest of Bilateral Air Transport Agreements* (Doc 9511). A new looseleaf edition of Doc 9511 covering bilateral air services agreements registered with ICAO up to mid 2002 is expected to be issued in early 2003, with periodical amendments thereafter. However, the database has limited capabilities. For instance, it is not yet available online, it is not linked to the ICAO Web site list of registered agreements, it does not contain the actual texts of agreements and, furthermore, it does not as yet make reference to regional or plurilateral agreements. The Secretariat is exploring ways to address these needs.

3. PROBLEMS AND DISCUSSION

3.1 The problems associated with transparency, and the objective of a more open regulatory regime, relate to the requirement under the Chicago Convention to register air services agreements and arrangements with ICAO, the nature of the registration provision in air services agreements, and the dissemination of and access to information on air services agreements at State level.

3.2 In their need to monitor developments in the bilateral, regional and multilateral field and in particular the impact of the liberalization process, States have relied on ICAO's policy guidance on certain key market aspects, including the use of available information and databases pertaining to cooperative arrangements and air transport service agreements. In this respect, even given appropriate resources, ICAO's objective of maintaining a comprehensive and up-to-date database, such as in Doc 9511, can be fulfilled only to the extent of the transparency of the system and the completeness of the information provided.

3.3 Some air services agreements are not registered with ICAO, in accordance with the requirement of the Convention, or are only registered after lengthy delays. Other agreements, especially side agreements such as memoranda of understanding, are almost always kept confidential and therefore very rarely registered with ICAO. While over 4000 bilateral air services agreements have been reportedly concluded, only about half such agreements (excluding amendments thereto) have been registered with ICAO. Some 25 agreements involving Article 83 bis have been registered currently. No arrangements relating to exemptions and specific commitments made under the GATS have yet been registered. Thus there remains a very large number of reported arrangements yet to be registered with ICAO, notwithstanding the Convention obligation and despite continuous reminders to States through, for example, Assembly resolutions (A33-19, Section I), State letters, regional workshops and missions to States.

3.4 A number of factors have been identified as responsible for the delays in or lack of registration of agreements with ICAO. Basically, air services agreements are treaties in nature and, therefore, in many instances the responsibility for negotiating an agreement and for the final signing lie within different authorities or ministries, in particular foreign ministries. This approach sometimes makes it difficult to follow up on the registration of the agreement with ICAO, as implementation of the agreement invariably rests with the civil aviation authority whereas its negotiation and responsibility for registration may rest elsewhere. The process of negotiating an agreement can also be slow and lengthy and some administrations may therefore not feel an urgency to pursue the process of registration after the negotiated agreement has been signed. The demands associated with other or new negotiations may also intercede so that follow up action is not carried out. In some cases, authorization to commence air services operations is granted to carriers prior to the formal entry into force of the agreement which makes the process of formal entry into force and hence registration less urgent. Some administrations also believe that registration is to be done by either party to the agreement and therefore have not taken the initiative to register it with ICAO. In other cases, human resource constraints and the inability to cope with the heavy workload in relevant departments could be essential reasons for the delay in registration. Finally, the process of formal entry into force, which may include constitutional requirements for legislative approval, may delay or render difficult the registration task.

3.5 With respect to the act of registration pursuant to air services agreements, nearly all bilateral agreements include an article on the registration of the agreement with ICAO. However, the provision usually refers to "shall be registered", without defining the timing of registration and the Party responsible therefor. In this connection, Article 83 of the Convention requires agreements to be registered "forthwith" with ICAO, and Article 6 of the ICAO Rules for Registration indicates that the responsibility to register agreements lies on "each" State, two elements which could be clearly identified in bilateral agreements.

3.6 Notwithstanding the issues outlined in paragraph 3.4 for the delay in or lack of registration of agreements with ICAO, there is, at the national level, a prospect of improved transparency in the international regulatory system by using technology to disseminate information. Information on air services agreements is being made available by a number of government departments through their web sites. For example, the United States, the European Commission and some other government web sites are increasingly using this form of information dissemination. This trend is, however, limited. While such dissemination should be encouraged by ICAO, the issue still remains that transparency would be improved and made beneficial to States and interested parties if it is ensured at worldwide level through ICAO whereby all States attend to their obligation to register their agreements pursuant to the Convention, and the Council attends to its obligation to make the agreements public.

4. CONCLUSIONS

4.1 The Conference is invited to conclude that:

- a) transparency should be regarded as an objective to be pursued within the regulatory framework and as an essential element in the liberalization process. States and interested parties in the regulatory system benefit from improved transparency;
- b) in view of the ongoing liberalization in international air transport and the need to enable ICAO to fulfill its primary role in developing policy guidance, a number of approaches involving States can be used to render the regulatory regime more transparent, including the following:
 - i) States should register with ICAO any unregistered air services agreement in accordance with their obligation under Article 83 of the Convention;
 - ii) States should, as a matter of priority, review their internal procedures and, pursuant to their obligations under Article 83, should develop practical means to improve their registration process. States may consider attributing the responsibility of registering the agreements with ICAO to an official or department where this has not already been done;
 - iii) States should consider making better use of electronic means of disseminating information, such as government web sites for publicly available information on the status of their air transport liberalization as well as for posting information or the texts of relevant air services arrangements; and
- c) ICAO should further encourage States to comply with their obligation to register all agreements and arrangements, ensure the effectiveness of the system of registration and make the database of registered agreements more accessible and useful for States and the public.

5. RECOMMENDED REGULATORY ARRANGEMENT

5.1 To improve the situation referred to in paragraph 3.5, States may wish to include a model clause in their bilateral, regional or plurilateral agreements. This model would address two elements. Firstly, it would expedite the registration with ICAO by defining clearly the timing of registration. In this regard, it should be noted that the ICAO Rules for Registration take into account that an agreement once signed, can be registered with ICAO with the indication that it has not entered into force, if this is the case. Information on the date of entry into force can be provided subsequently. Secondly, the model clause would enable the Parties to designate the Party responsible for the registration of the agreement with ICAO (for example, the designated Party to be the Party of the place of signature of the Agreement).

5.2 The following regulatory arrangement, in the form of a draft model clause, is therefore proposed for consideration by the Conference for Contracting States to use at their discretion in bilateral, regional or plurilateral air services agreements. This provision has also been inserted in the Template Air Services Agreements (see ATConf/5 WP 17):

“Registration with the International Civil Aviation Organization

This Agreement and any amendment thereto shall be registered upon its signature with the International Civil Aviation Organization by [name of the registering Party].”

6. ACTION BY THE CONFERENCE

6.1 The Conference is invited to:

- a) review and adopt the conclusions in paragraph 4.1; and
- b) recommend the adoption of the model clause on transparency in paragraph 5.2.

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