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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
2.6: Dispute resolution

DISPUTE SETTLEMENT IN INTERNATIONAL AIR TRANSPORT

(Presented by International Air Transport Association)

SUMMARY

The liberalization of air transport has consequences for the type of disputes and parties involved and the traditional consultation and arbitration processes may not be suitable. Fair, fast and effective mediation or resolution is important to avoid irreversible damage to the complainant. International Air Transport Association (IATA) proposes an expedited process using the good offices of a mediator or dispute settlement panel, working to a fixed timetable, with the parties agreeing on clear criteria, to implement decisions of a mediator/panel and to accept the possibility of proportional counter-measures in the event of non-implementation of a panel finding.

Action by the Conference is in paragraph 5.1.

1. NEED TO REVIEW DISPUTE SETTLEMENT MECHANISMS

1.1 The continuing liberalization and privatization of international air transport has consequences for the type of disputes that may arise and for the parties who may be involved. In particular, commercial disputes are likely to occur more often.

1.2 Clearly all liberalized markets seek an assurance that fair competition will prevail and that when a dispute arises, fair, fast and effective mediation or resolution is forthcoming before any permanent or irreversible damage takes place. This is of particular concern to developing countries and an improved

[1] Arabic, French and Spanish versions provided by the International Air Transport Association (IATA).

dispute settlement mechanism should be considered as a form of 'safety net' that is more affordable than resorting to arbitration.

1.3 Use of domestic competition laws is not always appropriate, particularly by foreign airlines. In addition, by its nature an international air service will be governed by at least two sets of national competition law that may not be fully and mutually consistent.

1.4 Dispute settlement mechanisms need to be re-examined to reduce the possibility that international disputes may impede the liberalization process.

2. EXISTING ARRANGEMENTS

2.1 **Bilateral Agreements.** The dispute settlement provisions set out in international air service agreements have changed little in the past fifty years. These provisions are usually set down in two articles dealing with consultation and the settlement of disputes, governing the interpretation or application of the agreement. Any matter covered by the agreement is subject to these provisions.

2.1.1 Consultations are most frequently used to resolve differences. Arbitration by a tribunal as envisaged by the dispute settlement article is considered to be costly and time-consuming and as a consequence has been little used.

2.2 **Multilateral Agreements**. The Asia Pacific Economic Cooperation (APEC) Multilateral Agreement (May 2001) introduced an important innovation in recognizing the interest of third parties in a dispute within the framework of a plurilateral/multilateral agreement.

2.2.1 The APEC arbitration process (Article 14) requires that "the Party submitting the dispute to arbitration shall notify all other Parties of the dispute at the same time that it submits its arbitration request."

2.2.2 A third party may intervene in a dispute where its interests are at stake. It is anticipated that this will make the dispute settlement process more transparent and that participation will increase as other States accede to the Agreement.

2.3 **Competition law**. Liberalization involves a relaxation of prescriptive rules as to how carriers act and places reliance on more general market forces and on competition law, which thus becomes the determining element in controlling market behaviour.

2.3.1 This raises the issue as to which competition law should apply and how the underlying principles are to be interpreted, recognizing that national competition legislation differs from one State to another and does not apply to actions taken by another State (sovereign immunity).

2.3.2 In recent years, competition law has been applied more frequently to aviation, particularly by the United States and the European Union in respect of mergers and alliances.

2.3.3 In 1989, ICAO issued guidance material on the avoidance or resolution of conflicts over the application of competition laws. It recognized that companies may resort to certain competitive practices in liberalized markets that might be considered unfair and that there should be some prior agreement as to what these might be and how they should be addressed, as well as provisions for interim relief.

2.3.4 It is clear that national competition laws will not be changed to meet aviation's special requirements and that it will be used more frequently. Existing concerns regarding possible conflicts in the application of competition laws will remain. The ICAO guidance material should be reconsidered as a means of dealing with differences in the future.

2.4 **Other approaches**. Other procedures are also available in principle, including recourse to the International Court of Justice, the Permanent Court of Arbitration and the Dispute Settlement System of the World Trade Organization. In practice however, these are either not applicable or rarely used in practice.

3. OBJECTIVES

3.1 IATA agrees with the Ninth ICAO Air Transport Regulation Panel (Recommendation ATRP/9-2) that there is a need for "a mechanism which could be flexible in its availability and application, could provide an alternative or an intermediate step between the traditional consultation and arbitration processes, would be simple to administer, expeditious and inexpensive, and would engender confidence in the liberalisation process and objective."

3.2 An improved mechanism should be fast. But where a dispute cannot be settled in a timely manner, there should be provision for interim measures. Under the Standard US Open Skies Agreement and the APEC Multilateral Agreement, a Tribunal can recommend interim measures pending final determination.

3.3 While transparency may not be an issue in a dispute involving sovereign parties, it does become important where private interests are concerned. Transparency will help to ensure that a third party is not adversely affected as a result of a dispute or the resolution of a dispute. It will also make rulings more understandable and acceptable.

3.4 Under the dispute settlement article of many bilateral agreements (and the APEC Agreement), the signatories are bound by an Arbitration Tribunal decision and agree to take enforcement measures within the scope of their national laws.

3.5 In the past, disputes have generally been settled through consultations. As a result, the exercise of enforcement mechanisms and sanctions, and hence the issue of effectiveness, has rarely been an issue.

4. REVISED MECHANISM FOR DISPUTE SETTLEMENT

4.1 In view of the above, IATA welcomes the changes proposed by ICAO in the Article on Dispute Settlement considered by ATRP/10 in May 2002.

4.2 The main change is for an expedited settlement process working to a strict timetable, using either the good offices of a mediator or dispute settlement panel drawn from a roster of acknowledged aviation experts, with the possibility for third party intervention.

4.3 This mechanism is without prejudice to the continuing use of the consultation procedure or subsequent recourse to arbitration. Indeed, States should first try to resolve their differences through the consultation process.

4.4 In particular, IATA sees the need for:

a) a mediator or dispute settlement panel available to meet, consider evidence and issue interim (if necessary) and final decisions within a fixed period of time;

b) a clear understanding that States will respect decisions of the mediator (or the dispute settlement panel) and implement them to the extent possible;

c) proportional counter-measures should a State fail or be unable to implement an expedited panel decision; and

d) clear criteria agreed by the parties concerned to be applied by a dispute settlement panel to resolve a dispute.

5. ACTION BY THE CONFERENCE

5.1 The Conference is invited to support the adoption of principles for a revised mechanism for settling disputes and to request the ICAO Council to establish the necessary mechanism.

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