

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

Montreal, 24 to 29 March 2003

DRAFT REPORT ON AGENDA ITEM 2.2

Agenda Item 2: Examination of key regulatory issues in liberalization**2.2: Market access**

Note - Consideration of this item was divided into three parts: 1) liberalization of market access; 2) aircraft leasing; and 3) liberalization of air cargo services.

PART I - LIBERALIZATION OF MARKET ACCESS**2.2.1 Documentation**

Secretariat (WP/8) reviewed recent developments in the liberalization of market access including exchange of basic market access rights as well as airport constraints on market access. Although progress in liberalizing market access had occurred both at the bilateral and at the subregional and regional levels, the Secretariat felt that conditions were still not ripe for a global multilateral agreement for the exchange of traffic rights. The problem of market access at capacity constrained airports and associated issues of slot allocation were highlighted, and the need for States to give due regard to airport capacity constraints and long-term infrastructure needs in liberalizing market access was stressed.

Secretariat (WP/21) reviewed liberalization developments related to market access from the regulatory perspectives of bilateral, regional and plurilateral agreements and arrangements, and from the industry perspective with respect to airline alliances, codesharing and mergers/acquisitions.

Cuba (WP/51) concluded on the basis of its experience that the inclusion of three air transport services in the General Agreement on Trade in Services (GATS) has had little impact due to their limited coverage and that application of the most favoured nation (MFN) principle was unacceptable for air transport. Consequently the present and future of air transport lie with ICAO whose efforts with respect to the gradual, progressive and orderly liberalization achieve an appropriate balance with the interests of States to maintain effective and sustained participation.

Georgia (WP/42) provided its views on ways to achieve not only equal market rights but equal opportunities through commercial agreements between strong and weak airlines.

Georgia (WP/44) described its views of the term “carriage” and the status of the so-called Sixth, Seventh, Eighth and Ninth Freedoms of the air.

India (WP/85) highlighted the problem of imbalance in the provision of air transport services caused by the non-availability of slots at some airports while other airports have adequate capacity to accommodate additional services. This situation goes against the basic principle of reciprocity and is further compounded by night curfews imposed by some States. As remedies, India suggested preferential treatment in the IATA slot allocation process similar to that presently accorded new entrants, and removal of night curfews coupled with strict adherence to ICAO Standards and Recommended Practices (SARPs).

India (WP/86) on the basis of its experience in unilaterally liberalizing air cargo and tourist charter operations commended this approach to other States for these two air transport sectors.

Pakistan (WP/57) explained its rationale for continuing to follow a bilateral approach to market access without eliminating the concept of reciprocity. Pakistan cited a need for a mechanism whereby the airlines of developing countries can obtain airport slots of their choice so as to be able to provide the necessary air links between developed and developing States.

United States (WP/50) believed that unrestricted access to the international market for air service providers is a key component for allowing the air transport sector to maximize its contribution to the global economy. Liberalization momentum should be maintained through the use of open-skies agreements at the bilateral, regional, plurilateral and multilateral levels. Airport congestion had not been a significant constraint on conclusion by States of liberalized air service agreements. There was no evidence to date that progress in liberalization would be enhanced by expansion of the current scope of the GATS Annex on Air Transport Services.

Members of ACAC (WP/64) suggested that ICAO develop guidelines and regulations on slot allocation which would identify a means for obtaining slots at airports for carriers that are unable to access the market at slot-constrained airports, taking into account Article 15 of the Chicago Convention and the principles of transparency, non-discrimination and equal opportunity. ICAO should develop with IATA detailed and clear criteria to safeguard fair competition amongst air carriers so as to enable them to access markets in capacity-constrained airports.

Members of LACAC (WP/99) described the process and measures to achieve more flexible market access in the Latin American region, including harmonization of standards for issuing operating permits, the gradual and orderly granting of Third, Fourth and Fifth freedom rights, beginning at the sub-regional and regional levels, and promoting non-scheduled operations that do not affect scheduled services as well as regional flights between non-traditional airports.

53 African States (WP/79) favoured the gradual liberalization of market access on a regional basis for Africa under the Yamassoukro Decision of 1999. They did not support liberalization of market access on a global basis that would include unrestricted granting of traffic rights beyond the Third and Fourth freedoms of the air. They believed that commercial agreements from which third country airlines could be excluded would be the basis for the exercise of traffic rights in the region and that ICAO, as the body with the broadest perspective on international air transport, should coordinate the evolution of future regulatory arrangements on market access. To ensure their effective participation in international air transport, African carriers should be granted a non-reciprocal preference in the allocation of airport slots.

ACI (WP/91) believed that airport operators should play a leading role in the slot establishment process and oversee the efficient allocation of slots to airlines. When slots are allocated, airlines should be granted usage rights to the slots but not property rights.

ACI (WP/92) supported greater flexibility for airports to expand capacity in a timely and cost-effective manner to meet future traffic growth from liberalization. Speedy implementation of the airport-related recommendations of ICAO's Conference on the Economics of Airport and Air Navigation Services (ANSCoN 2000) will help provide airports with some of the economic and financial tools they need to increase capacity.

ACI (WP/93) concluded that noise-sensitive airports depend on a credible reduction in noise at the source to expand capacity, and advocated more stringent aircraft noise certification standards under ICAO Annex 16.

IATA (WP/27) stressed that the existing IATA schedule coordination provides flexible and fair guidelines for slot allocation global basis, and that national or regional rules can complicate the system, particularly if they are not compatible with the global system. IATA suggested that any slot allocation system should respect such principles as: globally compatible; market-driven and aimed solely at the maximum effective use of airport capacity; transparent, fair and non-discriminatory; and simple, practical and economically sustainable.

ITF (WP/74) advocated that States should actively manage their traffic rights to ensure reciprocity, a balance of benefits, the protection of the public interest dimension and the participation of all States in the provision of air transport services. There should be no further extension of the General Agreement on Trade in Services (GATS) in the air transport sector.

United States (WP/90 - information paper) provided its model open-skies Bilateral Agreement, the Multilateral Agreement on the Liberalization of International Air Transport among seven APEC States (the “MALIAT” or “Kona” agreement) and the Protocol to the Kona agreement as useful examples of recent liberalization instruments.

IFALPA (WP/34 - information paper) believed that liberalizing market access also raises labour and social concerns because of the variations that exist in labour and social laws and policies from one country to another. IFALPA considered that carriers should not be granted cabotage, or Seventh Freedom traffic rights because IFALPA considered that such operations are equivalent to a “flag of convenience”.

ALADA (WP/71 - information paper) recognized that it is not possible, in the medium term, to implement radical changes to the exchange of market access rights, and believed that a transition period which allows regional structures of commercial negotiation should be implemented.

2.2.2 Discussion

2.2.2.1 The Conference noted that allowing States to choose their own pace and path to liberalize market access on a gradual and orderly basis has produced positive results in the liberalization of international air transport and has avoided the unfettered market access which could lead to unfair competition by dominant carriers. Although there were certain risks, small countries which obtain liberalized access to large markets for their airlines through open skies agreements could significantly benefit their trade and tourism sectors. It was important to bear in mind that market access involved more than just traffic rights; there was also a need to liberalize capacity, pricing, non-scheduled operations, and related services such as code-sharing, ground handling and computer reservation systems.

2.2.2.2 There were differing views on the problem of airlines which could not exercise traffic rights because of a lack of airport slots. Some developing countries sought preference in the allocation of slots while other States supported the IATA system as providing common provisions for all States. It was suggested that the abolishment of night curfews would increase airport capacity and go a long way to resolving the problem of airlines unable to exercise traffic rights at certain airports. However, this would create difficult environmental

problems at airports concerned. ICAO had published a study on *Regulatory Implications of the Allocation of Flight Departure and Arrival Slots at International Airports* (Circular 282, 2001). It was suggested that ICAO undertake a further study which would identify a means for obtaining slots at airports for carriers that are unable to access the market at slot-constrained airports, taking into account Article 15 of the Convention and the principles of transparency, non-discrimination and equal opportunity.

2.2.2.3 There was support for not extending the (GATS) Annex on Air Transport Services beyond the three services presently covered, but some States saw merit in including other services as a means to encourage competition.

2.2.2.4 There was widespread agreement that ICAO should continue to take a leading role in developing policy guidance on the regulation of international air transport.

2.2.3 Conclusions

2.2.3.1 From the documentation and ensuing discussion on the liberalization of market access under Agenda Item 1.2, the Conference concluded:

- a) Since the 1994 Worldwide Air Transport Conference (ATConf/4), considerable progress has been made in liberalization of market access, particularly at the regional and subregional levels. More importantly, States have generally become more open and receptive towards liberalization, with many adjusting their policies and practices to meet the challenges of liberalization.
- b) Experience in the past decade has confirmed that the existing bilateral, regional and multilateral regulatory regimes based on the Chicago Convention can and do coexist, and can each accommodate different approaches to air transport regulation. These regimes continue to provide a viable and flexible platform for States in pursuing liberalization according to their specific needs, objectives and circumstances. The number of open-skies and other liberal agreements are evidence that these regimes have been very effective in increasing liberalization, and the momentum should be maintained.
- c) The International Air Services Transit Agreement (IASTA) is important for liberalization and the operation of international air services. States should therefore pursue, and ICAO continue to promote, universal adherence to and implementation of the IASTA.
- d) Applying the basic GATS principle of most favoured nation (MFN) treatment to traffic rights remains a complex and difficult issue. While there is some support to extend the GATS Annex on Air Transport Services to include some so-called “soft rights” as well as some aspects of “hard rights”, there is no global consensus on whether or how this would be pursued. It is also inconclusive at this stage as to whether the GATS is an effective option for air transport liberalization.
- e) While multilateralism in commercial rights to the greatest extent possible continues to be an objective of the Organization, conditions are not ripe at this stage for a global multilateral agreement for the exchange of traffic rights. States should continue to pursue liberalization in this regard at their own choice and own pace, using bilateral, regional

and/or multilateral avenues as appropriate. The proposed ICAO Template Air Services Agreements (TASAs) provide detailed guidance on liberalization options and approaches.

- f) Airport congestion has not thus far been a significant constraint on the conclusion by States of liberalized air services agreements. However, in liberalizing market access, due consideration should be given to airport capacity constraints and long-term infrastructure needs. Problems involving air carriers which are unable to exercise their entitled traffic rights at a capacity-constrained airport may, if necessary, be addressed in the context of discussions on the relevant air services agreements.
- g) Any slot allocation system should be fair, non-discriminatory and transparent, and should take into account the interests of all stakeholders. It should also be globally compatible, aimed at maximizing effective use of airport capacity, simple, practicable and economically sustainable.
- h) ICAO should continue to monitor closely regulatory and industry developments, develop an inventory of States' practical experience with liberalization and disseminate relevant information to Contracting States. ICAO should also continue to keep current the existing guidance material on the economic regulation of international air transport and develop necessary new guidance to facilitate liberalization and improve harmonization, for example, through the TASAs.

PART II - AIRCRAFT LEASING

2.2.4 Documentation

Secretariat (WP/9) documented the increasing importance of airport leasing in the use of market access, describes regulatory approaches of States to the practice, noted potential safety issues and means to address them, and proposed a model regulatory clause covering safety and economic aspects of this practice.

IACA (WP/33) considered it vital that airlines be permitted the freedom to lease aircraft, including crew or not, subject to essential safety requirements.

ITF (WP/73) recommended that States adopt a restrictive approach to leases except in cases where issues which impact on aircraft occupants (passengers and crew) and which relate to unlawful interference, insurance, applicability of employment legislation and the legal jurisdiction applicable are fully resolved in a manner that affords the highest level of safety and of protection to aircraft occupants. The exercise of traffic rights which have not been designated or authorized should be prohibited.

2.2.5 Discussion

2.2.5.1 Leasing was regarded as providing flexibility and benefits to airlines in all States although there were concerns about airlines with a high proportion of wet-leased (with crew, normally from another airline) aircraft and the possibility of blurring the clear line of responsibility for safety and security. Agreements under Article 83 *bis* of the Chicago Convention on the lease, charter and interchange of aircraft, or through the the

bilateral air services agreement could address some safety concerns. It was also necessary to ensure that wet-leasing did not result in an airline using traffic rights for which it was not authorized.

2.2.5.2 There was support in principle for the model clause on leasing proposed by the Secretariat, although it should be clear that this was for the optional use of States at their discretion and certain aspects should be clarified.

2.2.6 Conclusions and Action

2.2.6.1 On the basis of its discussion and the documentation the Conference concluded that:

- a) leasing (both wet and dry) offers considerable benefits to air carriers, enables expanded and more flexible air services and provides opportunities for the establishment of new carriers. However, it also raises economic and safety regulatory issues which need to be addressed;
- b) States should, where necessary, review their regulatory responses to the use of leased aircraft in international services to and from their territory, and should ensure clear responsibility for safety oversight and compliance with minimum safety standards, whether through the inclusion of appropriate provisions in their air services arrangements or by the establishment of agreements pursuant to Article 83 *bis* of the Chicago Convention. In this regard, ICAO *Guidance on the Implementation of Article 83 bis of the Convention on International Civil Aviation* in Circular 295 may be used; and
- c) ICAO should make available to Contracting States, for optional use at their discretion, the model clause on leasing proposed by the Secretariat after amendment and the addition of explanatory notes to:
 - i) clarify the meaning of “appropriate authority”;
 - ii) make a clear distinction with respect to “wet” leased and “dry” leased aircraft; and
 - iii) take into account short-term, *ad hoc* wet leases.

PART III - AIR CARGO

2.2.7 Documentation

Secretariat (WP/10) addressed the distinctive features of international air cargo and its regulatory treatment by States, discussed the need for regulatory change and proposes measures including a proposed annex on air cargo services for greater liberalization of this sector.

India (WP/86) highlighted the measures taken by India in unilaterally liberalizing air cargo operations, and on the basis of its experience, commended this approach to other States for these two aviation sectors.

Korea (WP/100) underlined the necessity for a balanced liberalization of air cargo services with the Third and Fourth freedom traffic rights included initially. If the Fifth and Seventh freedom traffic rights are to be liberalized in the cargo sector, the 8th freedom should also be included for balance between/among the States involved.

Singapore (WP/38) highlighted the benefits of the liberalization of airfreight services and proposed a phased multilateral or plurilateral approach with three elements: 1) designated carriers would exercise Third through the Seventh freedoms of the air for all cargo services operated on a scheduled or non-scheduled basis; 2) non-discriminatory treatment of carriers with respect to access to ground facilities, clearance and other services with cooperative arrangements such as codesharing; and 3) a definitive timeline for the phased and progressive multilateral liberalization of air freight taking into account the varying conditions and levels of development of the various economies. This multilateral air freight liberalization could be achieved independently of the liberalization of passenger services.

United States (WP/49) noting that many air service agreements do not accord air cargo the commercial and operational flexibility to meet user demand in the manner achieved by open-skies agreements, is prepared to pursue air cargo liberalization separately from passenger liberalization where it does not inhibit liberalization of the passenger sector. The imposition of restrictions such as night curfews has a particularly adverse affect on air cargo and States should refrain from such actions as a first resort, but rather implement the balanced approach to noise management contained in Assembly Resolution A33-7.

African States (WP/79) believed any liberalization process in cargo should take account of the realities in economies, resources, size and competitiveness of African airlines and be marked by gradual, progressive, orderly and safeguarded change, differentiation between combined, air cargo and integrated carriers, liberalization of combined cargo and passenger services to follow the same principles as passenger services and complete global liberalization of all cargo and specialized cargo operations.

ACI (WP/94) advocated the liberalization of the air cargo market to encourage the optimum use of airport and airspace capacity and to stimulate world trade and job creation by permitting market forces to determine flows of cargo in the interdependent global marketplace.

TIACA (WP/83) believed all-cargo liberalization should be pursued on a fast track, independently of proposals to liberalize passenger services because it represents a different set of economics from passenger services and can have positive benefits for the world economy. Combination carriers should always be accorded the right to carry cargo with passengers.

ICC (WP/36 - information paper) noting that the overall liberalization of air transport may be a long-term objective, advocated an agreement covering air cargo services in the short term. A successful air cargo agreement could possibly pave the way to the liberalization of the air transport sector, but will require all interested parties to pursue it at national, regional and international levels.

OECD Secretariat (WP/59 - information paper) provided information on an extensive study by the OECD Secretariat on reforming the regulation of air cargo services with its comprehensive air cargo liberalization package for use bilaterally and multilaterally.

2.2.8 Discussion

2.2.8.1 Although there was widespread support for the liberalization of air cargo services as proposed in the Secretariat paper, including measures related to all cargo services, there were concerns that greater liberalization for all cargo services could adversely affect combination services (passengers and cargo). There was also a view that “open skies” agreements were the best means of liberalizing air cargo services.

2.2.8.2 There were differing views on the value of unilateral liberalization of air cargo; and although several States had already done so, there were fears this would cause confusion in the liberalization process and some States preferred to pursue liberalization using the bilateral framework to ensure reciprocity.

2.2.8.3 There was a need to modify the proposed annex on air cargo services to take into account cases where an all cargo airline may not be permitted to operate other modal transport services directly and cases where carriers may have to file cargo tariffs. It was agreed that meeting safety and security requirements was an important aspect of the liberalization of air cargo and for that purpose States could rely on the appropriate ICAO SARPs as well as bilateral, regional and multilateral agreements.

2.2.8.4 It was suggested that ICAO provide information on the experience of States in air cargo liberalization.

2.2.9 Conclusions

2.2.9.1 From the documentation and ensuing discussion on liberalizing air cargo services and Agenda Item 2.2, the Conference concluded that:

- a) air cargo, and in particular all cargo operations, should be considered for accelerated liberalization and regulatory reform in view of its distinct features, the nature of the air cargo industry and the potential trade and economic development benefits possible from such reform;
- b) States should consider the possibility of liberalizing all cargo using one or more of the following:
 - i) unilateral liberalization of market access for all cargo services without bilateral reciprocity or negotiation;
 - ii) liberalizing all cargo services through bilateral agreements and negotiations to ensure reciprocity; and
 - iii) using a phased multilateral/plurilateral approach for the liberalization of all cargo services.

2.2.9.2 The following draft model annex is proposed for consideration by the Conference for Contracting States to use at their discretion in air services agreements.

ANNEX ON AIR CARGO SERVICES

The Parties agree that:

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1. *Every designated airline when engaged in the international transport of air cargo:*
 - a) *shall be accorded non-discriminatory treatment with respect to access to facilities for cargo clearance, handling, storage, and facilitation;*
 - b) *subject to local laws and regulations may use and/or operate directly other modes of transport;*
 - c) *may use leased aircraft, provided that such operation complies with the safety and security standards applied to other aircraft of designated airlines;*
 - d) *may enter into cooperative arrangements with other air carriers including, but not limited to, codesharing, blocked spaced, and interlining; and*
 - e) *may determine its own cargo tariffs which may be required to be filed with the aeronautical authorities of either (any) Party.*

 2. *In addition to the rights in paragraph 1 above, every designated airline when engaged in all cargo transportation as scheduled or non-scheduled services may provide such services to and from the territory of each (any) Party, without restriction as to frequency, capacity, routing, type of aircraft, and origin or destination of cargo.*

— END —