



INTERNATIONAL CIVIL AVIATION ORGANIZATION

Review Meeting of the

Task Force on the Development of a Regional Project on an AFI Integrated Aeronautical Telecommunication Infrastructure

(Dakar, Senegal, 3-5 October 2011)

Agenda item 3: Review of Progress made by the Task Force Teams

GENERAL GUIDELINES ON THE ESTABLISHMENT AND PROVISION OF MULTINATIONAL FACILITIES/SERVICES IN THE AFI REGION

(Presented by the Secretariat)

SUMMARY

This working paper presents the guidelines for a step-by-step process for the development of a multinational air navigation facility/service in the AFI region, as contained in the AFI Air Navigation Plan (Doc 7474), for consideration by the meeting when assessing the progress made by the Technical, Administrative and Finance Teams of the Task Force .

Action by the meeting is contained in paragraph 3.

REFERENCE

- ICAO Doc 7474 – AFI Air Navigation Plan
- ICAO Doc 9702 - AFI/7 Report

1. INTRODUCTION

1.1 The APIRG CNS Sub-group, as part of its assigned work programme, is requested to *give further consideration, as necessary, to the concept of multinational ICAO AFI air navigation facility/service addressed in the AFI/7 Report under Agenda Item 14 (AFI/7, Conclusion 10/6c).*

1.2 The attached guidelines constitute a step-by-step process for the development of a multinational air navigation facility/service in the AFI region, with respect to the AFI Aeronautical Telecommunication Network (ATN) backbone infrastructure.

2. DISCUSSION

2.1 The need for a multinational air navigation facility/service may originate from either the APIRG or a State or a group of States. It is recommended that States consider the areas presented in Attachment to this working paper when assessing the work being carried out by the Task Force Teams.

3. CONCLUSION

3.1 The meeting is invited to refer to the attached provisions relating to the establishment and provision of multinational facilities/services in the AFI region when assessing the need for and implications of establishing a multinational facility/service.

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GENERAL GUIDELINES ON THE ESTABLISHMENT AND PROVISION OF MULTINATIONAL FACILITIES/SERVICES IN THE AFI REGION

General

Planning and development of a multinational air navigation facility/service in the AFI region

The following guidelines constitute a step-by-step process for the development of a multinational air navigation facility/service in the AFI region. The need for a multinational air navigation facility/service may originate from either the APIRG or a State or a group of States. It is recommended that States consider the following areas when assessing the need for and implications of establishing a multinational facility/service:

a) ***purpose of the multinational air navigation facility/service and its operational and technical justifications.***

This should include the overall plan and targets for the development and the establishment of the facility/service.

The likely implications if any, on regulations, working routines, equipment, premises and maintenance should be included. Information on the expected consequences on the overall AFI air navigation system or any part thereof should also be included;

b) ***financial implications and cost-effectiveness.***

Related information should include estimates of the total costs of the multinational facility/service covering, as required, research and development, implementation, operation and maintenance, administration, and capital costs; how all costs incurred prior to the operational phase will be financed; assessing savings which may accrue from the implementation of the facility/service (these can be measured in monetary and/or physical terms, for example, air traffic controller positions, communications facilities, etc.) and comparing these savings to the total cost estimates; proposals as to how cost shares of States participating in the provision of the project are to be determined. Also, assessment needs to be provided on impact on users from charges for the facility/service concerned;

c) ***managerial implications;*** and

d) ***alternative solutions.***

If the establishment of a multinational facility/service will not require an amendment to the AFI Regional Air Navigation Plan, States need only inform the ICAO Regional Office concerned. The regional office, in turn, should report to the APIRG if the establishment of a multinational facility/service will have any potential effect on plans that are under development. The need for an amendment to the regional air navigation plan should be assessed by the State or States involved.

If the establishment of a multinational air navigation facility or service will necessitate an amendment to the regional air navigation plan, the amendment will be carried out in accordance with the established procedures. The State or States involved should contact the ICAO Regional Office concerned. In turn, the regional office could consult the APIRG when required, or if requested by the States establishing multinational facilities/services, to:

a) ensure the continuous and coherent development of the AFI Regional Plan as a whole taking into consideration the effect of such a development on the regional plans of adjacent regions; and

b) identify specific problems in the air navigation field and propose, in appropriate form, action aimed at resolving these problems.

Financial, managerial and other contractual aspects

The participation of States in the provision of a multinational facility/service is based on the assumption that any State having supported and agreed to the implementation of such a facility/service and making use of it should also shoulder its respective share of the costs involved. The participating States would need to formalize in an

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agreement the terms under which the multinational facility/service is to be provided. A primary aim of the agreement should be to ensure that the costs involved are shared among the participating States in a fair and equitable manner.

This part of the guidelines is concerned with the main contractual aspects, and financial, managerial and other issues that should normally be considered when initiating work on a potential multinational facility/service. The basic provisions that would need to be considered for incorporation in such an agreement are outlined, including provisions concerning cost sharing and cost determination. However, the guidance does not extend to the presentation of a draft model agreement or clauses, since circumstances related to the planning, implementation and operation of individual multinational facilities/services may vary considerably.

Note.— The guidelines generally refer to “agreement” as a generic term covering one or more agreements as the case may be.

Types of agreements

An agreement covering the development, implementation, operation and maintenance of a multinational facility/service could either take the form of a formal international treaty or an “administrative agreement”. Both forms establish an international obligation but a treaty requires the signature of the head of state or government and will also require the ratification or approval of the national legislative assembly, which, as a rule, is a time-consuming process. An “administrative agreement”, on the other hand, is at a lower level of requirement in respect of formalities and procedures than a treaty, can be signed by a minister or director of civil aviation or some other authorized person, and could be concluded by an exchange of letters or notes.

It is recommended that, whenever possible, the agreement be established in the form of an “administrative agreement” rather than a formal international treaty because this would allow the agreement to come into force with minimum delay and also permit greater flexibility in incorporating any subsequent modifications required. It is recognized, however, that in some States constitutional or legal circumstances may require the approval of the legislative assembly for financial obligations to be accepted by the State, particularly if these are of a substantial magnitude and/or extend over a period of time. Whatever form is used the agreement(s) should be structured to provide for easy subsequent amendments as developments may require. To this end, material of detail which is more likely to require modifications, and which will not affect the basic provisions of the agreement, should be contained in annexes or appendices.

It is further recommended that whenever possible only one general agreement (treaty/“administrative agreement”) be adopted covering all aspects of the facility/ service concerned through all its phases. However, this may not always be possible. In certain circumstances it might be necessary or preferable to have more than one agreement (treaty/“administrative agreement”) differing in scope and content. In those circumstances the aim should be to cover as many aspects as possible in the “administrative agreement” and limit the use of the treaty to those aspects for which this form of agreement is essential for the States concerned. Recognizing this, one agreement for example, might cover the activities, including pre-financing, to be undertaken by those States that accept the responsibility for bringing the facility/service up to operational status, with another agreement to be concluded between all the States (including the first group of States aforementioned), which would use or be served by the facility/service once it becomes operational. In such circumstances the former agreement would be important because the first group of States would have to ensure the provision of funds from their own resources to ensure the implementation of the facility/service, since no inflow of revenues from charges on users (aircraft operators) would take place until the multinational facility/service becomes operational.

Another possible approach, if required by circumstances, would be for all the participating States to conclude an agreement covering, in general terms, their commitment to participate in the provision of the multinational facility/service, and then to develop a separate agreement covering all aspects relating to the financing and operation of the multinational facility/service.

The various basic provisions that would normally have to be covered in an agreement of this nature are addressed below in the sequence they would usually appear:

a) Objective of the agreement.

In the introductory text the agreement should set out the objective underlying the participating States' decision to jointly arrange for the provision of the multinational facility/service concerned.

b) Obligations of States party to the agreement.

The agreement should at the outset briefly set forth the basic obligations of the participating States. These include the obligation (by a participating State or group of States individually or collectively or as assigned to an organization or agency) to establish and operate the facility/service concerned; the obligation of each participating State to pay its share of the costs involved; the obligation to observe ICAO policies and practices, including those addressing cost recovery by States from aircraft operators, etc.

c) Definition and description of the facility/service.

The agreement should contain a clear and accurate definition and description of the multinational facility/service to be provided and the functions it is to perform, including to the extent possible and desirable, the supporting services required. It may be advisable in certain cases to make specific reference to functions that the multinational facility/service will not be performing.

d) Establishment and operation of the facility/service.

The agreement should specify who will establish and operate the facility/service concerned, namely whether this is to be done by one State, two or more States, an existing international organization, an existing national or international agency, or a new agency to be established specifically for this purpose.

Note.— The decision as to who should provide the facility/service could be influenced, in particular, by the anticipated capital investment and annual costs involved, as well as the extent to which the alternative providers (i.e. a participating State or States, international organization or agency) have been engaged in the function(s) concerned.

e) Legal responsibility.

If an international organization or agency (as referred to in Assembly Resolution A22-19) is to establish and/or operate the facility/service concerned, it will have to be endowed with proper legal responsibility to have the capacity to contract, to acquire and dispose of property and to institute and answer legal proceedings.

f) Liability aspects.

Closely related to legal responsibility are the liability aspects which may have to be addressed in the agreement. This involves such aspects as the determination of the extent to which liability is to be assumed in connection with the provision of the multinational facility/service. Other aspects also include whether the entity providing the facility/service concerned, an international organization or agency or State(s) should alone assume such responsibility or whether this should be shared amongst all the participating States.

g) Managerial aspects:

1) Governing bodies and decision-making arrangements.

The nature of the governing body or bodies required to administer the agreement needs to be established and a description of their functions provided. Should a new agency be established to operate the multinational facility/service, this would need to be stipulated in the agreement, where reference should also be made to the functions and responsibilities of the executive head of the agency and to whom he or she would be responsible. Voting arrangements should be specified. It would need to be decided whether each participating State should have equal voting power (as is, for example, the practice of ICAO). Alternatively, each State's vote may be weighed in

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accordance with a predetermined formula, which would need to be specified, for example, by determining the voting power according to that participant's share of total contributions to the facility/service or agency concerned. A maximum and/or a minimum limit may be set for the number of votes that can be assigned to any individual participant regardless of that participant's share of total contributions.

Another voting aspect which has to be decided on, and specified in the agreement, is whether a simple majority would apply in all cases or whether for particular issues a large majority vote (to be specified) or even unanimity would be required. Where different degrees of majority voting would apply depending on the matter or subject being voted on, these would also need to be clearly identified in the agreement.

2) Organization and staffing.

The agreement should refer to the manner in which the entity actually operating the facility/service would structure or organize its functions. This would apply in particular if the operation is to be assigned to a new agency. Various aspects of staffing (nationality, numbers and type, etc.) will also need to be addressed and, as appropriate, incorporated in the agreement (or an annex to it). If the participating States agree that the multinational facility/service is to be provided by one State or by two or more States (each providing separate components or parts of the project involved), the nationality of staff should not give rise to any problems, and need not be covered in the agreement. However, operation by an international organization or agency may require that certain stipulations be included in the agreement concerning the selection of qualified staff from participating States. Other aspects to be considered, aside from the number and types of staff, are the various elements of conditions of service including status to be accorded to any expatriate staff, tax exemptions, etc., which will reflect on the overall costs of the venture.

3) Consultation.

Provision should be made in the agreement to ensure adequate consultation with States being party to the agreement but not represented on the governing body, and appropriate aircraft operators' organizations. Such consultations should at least be undertaken in advance of any developments that could materially affect cost share to be allocated to these States, user charges, and the quality of the services provided.

h) Financial aspects:

1) Pre-implementation considerations.

The determination and presentation of the costs attributable to the provision of the multinational facility/service concerned should proceed in a manner acceptable to all the participating States. In this context it should be noted that bringing the facility/service up to implementation status can involve the costs of implementation being financed by one or more of the participating States. However, once the facility/service has been implemented, these costs would be capitalized and then included as depreciation (together with accumulated interest) in the overall cost base to be shared among the States participating in the provision of the facility/service concerned.

2) Cost determination.

In order to formalize the manner in which the costs to be shared should be arrived at, the agreement between the States participating in the provision of a multinational facility/service should contain clauses referring to the determination of the related costs. The agreement should also stipulate that the approach towards cost determination be based on that recommended in Chapter 4 of the *Manual on Air Navigation Services Economics* (Doc 9161). Should

more comprehensive instructions, based on Doc 9161, be required, it is preferable that these be presented in an annex in view of their relative volume and detail, and also because it may be expected that they would need to be updated and modified more frequently than the main text of the agreement. (Amendments to the annexes to the agreement would normally be subject to the approval of the governing body of the multinational facility/service). In line with the approach adopted in Doc 9161, the annex would normally contain an inventory of the various

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components of the multinational facility/service (e.g. buildings, equipment, number of staff by function, etc.). It would also cover the determination of annual costs, i.e. operation and maintenance costs, administrative overheads, depreciation and/or amortization and cost of capital as well as special capital outlays. Finally, where a multinational facility/service or any of its components serve other than the multinational functions specified in the agreement (i.e. functions serving one State only, or non-aeronautical functions), instructions should be provided to ensure the accurate determination of the “multinational” costs to be shared among the participating States.

The agreement would also need to specify, normally in an annex, the basic format to be used for the presentation of the annual costs for approval. The scope and detail of the format will depend on the particular circumstances involved.

3) *Cost sharing.*

Once a State has supported and agreed to the implementation of a multinational facility/service and is making use of it, it would be expected to assume responsibility for its share of the costs involved. This basic obligation should be reflected in the agreement between the participating States. The agreement should outline the procedure to be applied for determining the cost share to be borne by each participating State. Any cost-sharing method should, to the extent possible, be equitable, simple and easy to apply. The question of equity should not only be considered in the context of the participating States, but also with respect to the final users (aircraft operators) since it may be assumed that in most instances the participating States would include the costs they incur in the cost base for their air navigation facility charges, where levied. In general, it does not appear feasible to recommend one specific method or approach to cost sharing because the situation will vary, depending particularly on the technical and operational characteristics of the multinational facility/service involved, the views or policies of the participating States on how costs should be shared, and the volume of these costs. In the interest of equity, however, any method of cost sharing should, in principle, be based on the extent of the use of the multinational facility/service concerned by each participating State. Thus, the parameters or keys used to determine each State’s cost share should reflect the extent of such use. However, if the use made of a multinational facility/service can only be measured by applying complex procedures and at a cost which is not commensurate with the costs to be shared, other methods of cost sharing based on readily available and relevant statistical data could be applied. Whatever method is selected it must provide for the just and equitable sharing of the costs involved.

A multinational facility/service might be operated by one or more States with other States contributing their share of the costs involved. In such circumstances, all the States concerned must decide whether or not the total costs should be subject to sharing or if any allowances should be made to reflect any tangible benefits accruing to the State(s) engaged in the actual operation of the facility/service concerned. Such benefits would usually be in the form of employment of nationals, contracts awarded to national companies, etc., with their associated multiplier effect on the economies of the State(s) concerned. It should be noted that the State(s) actually operating the facility/service would, like other States using it, be obliged to pay its (their) share of the total costs to be shared.

4) *Recovery of costs from users.*

As a rule, a multinational facility/service would have to be “multinationally” financed or prefinanced by a State, group of States or by an agency as established under the authority of an agreement by States. However, any of these could recover the costs so incurred from users once the facility/service has been implemented.

Nevertheless, States may also choose to recover less than full costs in recognition of local, regional or national benefits (Doc 9082, paragraph 39 (i) refers). Where an agency has been authorized to recover its costs through charges, the authorizing States would nevertheless need to make up for revenue shortfalls where, for example, the States had decided certain flights should either be exempted from or pay reduced charges. It would be up to each participating State to decide whether or not it wishes to recover its cost share from the users (aircraft operators). A State could either include these costs in its cost base for route facility charges (if it levies such charges), or, alternatively, recover the costs by levying a separate charge (normally a more complex and costly procedure to administer). While the recovery of such cost shares from users might normally not be referred to in an agreement

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on a multinational facility/service, the agreement could include a provision to the effect that such recovery must be based on Article 15 of the Convention as well as the principles and recommendations in Doc 9082. If the participating States were to assign the operation of a multinational facility/service to an international organization or an international agency and decide that it should levy charges on aircraft operators for the purpose of full or partial cost recovery, this would need to be covered in the agreement. In such instances the agreement would usually also stipulate (probably in a separate annex) the charging formula to be used, reductions and exemptions granted, billing and payment arrangements, etc. Such procedures would, of course, need to conform with the provisions of Article 15 of the Convention and Doc 9082.

5) ***Budgeting.***

Proper financial control will require costs and revenues to be estimated in advance. The itemization of the costs should basically correspond with that used for the presentation of costs. This will enable actual costs to be compared with estimated costs, and actual revenues with those estimated.

6) ***Authority to approve the budget.***

The agreement should also stipulate who has the authority to approve the budget and thus authorize the use of funds to meet operating expenses and capital expenditures. This authority would normally be vested in the governing body of the multinational facility/service concerned.

7) ***Financial auditing.***

The financial audit function forms an integral part of the determination of the costs to be shared and the cost share to be borne by each participating State as well as of proper financial control. The agreement between States participating in the provision of a multinational facility/service should therefore specify that an annual financial audit be performed by a certified independent external auditor.

8) ***Taxation and other government levies.***

The subject of tax exemptions and other aspects related to taxation will need to be addressed in the context of the overall operations of the multinational facility/service. Similarly, with regard to other government levies such as custom fees and duties, value added tax, etc., it may also need to be considered whether the import or export, purchase or sale of any equipment, supplies, etc., required for the operation of the multinational facility/service concerned should be exempted from all such levies in the participating States. The inclusion of clauses to that effect would be likely to require an agreement subject to ratification, such as a treaty.

i) Procedures for settlement of disputes.

The agreement should contain stipulations setting out the procedures to be followed for settlement of disputes between the participating States arising from the provision of the facility/service concerned. Regarding the settlement of disputes arising from different interpretations being given to the agreement, the States concerned would have to agree on the procedures for negotiation or arbitration and on the body to which an appeal for a final ruling could be made.

j) Accessions, withdrawals, amendments to and termination of agreement.

The agreement should contain provisions, including those describing the financial implications involved, to:

- cover the subsequent accession by any additional qualifying State(s) after the agreement is in force; and
- specify the procedure to be applied when a signatory State wishes to withdraw from the agreement as well as procedures to follow in the event of termination of the agreement.

Similarly, the agreement should specify the procedures to be followed if amendments are to be made to the main text or to any annexes (for which different procedures would normally apply).

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