

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED
MTN.GNS/W/36
16 May 1988
Special Distribution

Group of Negotiations on Services

Original: English

**INFORMATION ON EXISTING INTERNATIONAL DISCIPLINES
AND ARRANGEMENTS**

At the last meeting of the Group of Negotiations on Services on 22-25 March 1988, it was agreed that three international organizations - the International Telecommunication Union (ITU), the International Civil Aviation Organization (ICAO) and the United Nations Conference on Trade and Development (UNCTAD) - would be invited to reply to a set of questions in order for the GNS to obtain more complete relevant information than that contained in MTN.GNS/W/16. In response to this decision, the attached answers from ICAO are being circulated. The answers from ITU and UNCTAD are circulated as separate addenda to this document.

A copy of the Chicago Convention (Convention on International Civil Aviation) and of ICAO document 9440 "Policy and Guidance Material on International Air Transport Regulations and Tariffs", which may be useful in the context of the replies given, can be consulted in the GATT Secretariat, Group of Negotiations on Services Division (Room 2048).

Response by the International Civil Aviation Organization
(ICAO) to the Questionnaire from the Group of Negotiations on Services (GNS)

Question 1. What is the scope of the mandate of your organization, in particular, the technical, economic and trade-related aspects of the mandate? Could you provide information on present activities in these areas?

ICAO Response:

ICAO's mandate in international air transport matters stems from the Convention on International Civil Aviation signed at Chicago on 7 December 1944 (commonly referred to as the Chicago Convention). The Convention is presently adhered to by 158 Contracting States. ICAO's mandate is recognized in the Agreement between the United Nations and ICAO which came into force on 13 May 1947. In Article 1 of that Agreement the United Nations recognizes ICAO "as the specialized agency responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein".

As the "basic charter" of international air transport the Chicago Convention establishes principles, procedures, rights and obligations for the conduct of this activity and lays down the objectives, administrative arrangements and functions for the organization, ICAO, charged with implementing its provisions.

In the technical field ICAO has a "legislative mandate" (Article 37 of the Convention) to adopt international standards and procedures on a wide range of operational and safety related matters for the conduct of international air transport. Their purpose is to achieve the "highest practicable degree of uniformity in regulations, standards, procedures and organization" on the technical side of international air transport. Under Article 28 Contracting States undertake to provide air navigation facilities (airports and other services) and to adopt the standards established by ICAO. The standards are set out in 18 detailed Annexes to the Convention, of which the following are just a few examples: personnel licensing, rules of the air, operation of aircraft, aircraft nationality and registration, airworthiness of aircraft, facilitation (airport customs and immigration procedures), aeronautical telecommunications, aircraft accident investigation, environmental protection (noise standards and engine emissions), and aviation security. The technical standards are kept under constant review and are amended as necessary by the ICAO Council, which is the permanent executive body of the Organization.

ICAO'S mandate on the economic, regulatory and trade related aspects of international air transport is more general. This is in part a consequence of events at the Chicago Conference in 1944 where efforts to develop a

multilateral régime to govern the economic regulation of international air transport were not successful. However Article 44 lists certain objectives of the Organization which charge it, inter alia, to ensure safe and orderly growth of international air transport, meet the needs for safe, regular, efficient and economical air transport, prevent economic waste caused by unreasonable competition, ensure every Contracting State has a fair opportunity to operate international airlines and avoid discrimination between Contracting States. Pursuant to these objectives ICAO is called upon in Article 55 to "conduct research into all aspects of international air transport which are of international importance" and to "study any matters affecting the organization and operation of international air transport". Furthermore some functions, such as statistics collection and dissemination and facilitation, are specified separately in the Convention. Under this broad mandate the triennial Assembly, which is the principal organ of ICAO, establishes a work programme and authorizes the Council to undertake specific tasks. Some of the activities presently covered in the economic/regulatory field are forecasting and economic planning, the economic implications of noise restrictions, regional economic air transport studies, regulation of international air transport including bilateral air service agreements, statistics, facilitation, monitoring and study of the machinery for the establishment of international fares and rates, and airport and air navigation facility management.

Question 2. What are the main concepts and principles on which the mandate of your organization is based?

ICAO Response:

The original purpose of the Chicago Conference of 1944 was, inter alia, to formulate principles to be followed in drawing up a multilateral convention on air transport, establish a permanent international aviation body and determine the extent of its jurisdiction. The Conference incorporated in the resulting Convention a number of basic principles to govern such arrangements.

The first and foremost principle in the Convention is a restatement in Article 1 of the principle of international law, first codified in 1919 in the Paris Convention (a forerunner of the Chicago Convention), to the effect that "Contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory". From this flow the rights of States to enact regulations governing the conduct of international air transport into and out of their territorial airspace. The freedom of action implicit in Article 1 is not unfettered however as the Convention goes on to codify multilaterally the various rights, obligations and requirements that govern the activities of Contracting States in international air transport.

Other concepts and principles can be found in the Preamble to the Convention where reference is made to the role of international civil aviation in helping to create and preserve friendship and understanding among the nations and peoples of the world, the desirability of avoiding friction and

promoting co-operation, and the establishment of principles and arrangements so that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically. As indicated in the response to Question 1 Article 44 lists certain objectives containing concepts and principles on which ICAO's mandate is based.

Question 3. What is the status of the instruments which form the legal basis of your organization? What is the nature of the commitments undertaken by the signatories of your organization and what is the rationale behind such commitments?

ICAO Response:

The Chicago Convention which entered into force on 4 April 1947 is a multilateral international treaty, i.e. an international agreement governed by international law, as defined in Article 2 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The Convention has now been ratified or adhered to by 158 Contracting States which have thereby established on the international plane their consent to be bound by its provisions.

The Chicago Convention establishes the legal framework for the post-war development of international civil aviation on a global basis. The Convention consists of three main parts. In addition to being the Constitution of ICAO (Part II), it deals in Part I with "Air Navigation" and Part III with "International Air Transport." Although there is no rigid dividing line, it may be said that, in general, "air navigation" refers to the technical and operational aspects of civil aviation and "air transport" to the commercial and economic aspects. With a view to promote the orderly, safe and efficient development of international civil aviation, the Convention defines the rights and obligations of Contracting States in international civil aviation matters. The commitments undertaken by the Parties to the Chicago Convention are set forth in the Preamble, as indicated in the response to Question 2. More specifically, the aims and objectives of the Organization are enumerated in Article 44 of the Chicago Convention some of which are stated in the response to Question 1.

Question 4. Which types of international services transactions are covered by the legal instruments or activities of your organization? Do these instruments or activities encompass, for example, transactions which go beyond cross-border flows of services and require presence of the foreign service provider? If so, describe such transactions and how, to what extent, and under which circumstances they are dealt with.

ICAO Response:

The Chicago Convention applies to civil aircraft operations between Contracting States. Its provisions do not generally concern operations by "state" aircraft, i.e. military, customs and police services. Civil aircraft

operations are normally categorized as scheduled or non-scheduled and are governed under the Convention by different legal régimes. The vast majority of international civil aviation operations are commercial flights by scheduled services. Notwithstanding the different regulatory approaches and different manner in which each category of service is arranged and marketed they both involve the sale of air transport for passengers or freight between points in two or more States. As an international service transaction such sale would normally require the presence of a foreign service provider, the airline, although the sale of international air transportation can be and often is made through intermediaries such as, on the scheduled side, agents or airlines of the State in which the sale takes place, or on the non-scheduled side, tour operators.

The presence, including the rights and obligations, of a scheduled service airline as a foreign service provider is normally dealt with under the terms of a bilateral air service agreement. These agreements exist as a result of the principle of national sovereignty over airspace (Article 1) and the requirement, under Article 6 of the Convention, for special permission or other authorization to operate a scheduled international air service into or over another Contracting State and in accordance with the terms of that permission or authorization. The system which has evolved is a network of more than 1800 individual bilateral air service agreements between States.

Each agreement is a self-contained treaty which deals exclusively with the air transport arrangements between a pair of States. Extraneous or non aviation considerations rarely intrude in either the negotiating process or the outcome. In brief a bilateral air service agreement involves the reciprocal exchange of trading rights for market access by scheduled services and lays down the administrative and operating conditions and the exchange of concessions (e.g. exemption from customs duties and taxation of fuel and equipment which is on board an aircraft). The most important parts of a bilateral air service agreement, and usually the ones that give rise to contention, are those regulatory provisions dealing with market access (the specified routes, rights to carry traffic and number of operators) the control, if any, of capacity (airline frequencies) and tariffs (the establishment and approval process for airline passenger fares and cargo rates). In the case of tariffs most agreements delegate to the airlines the task of establishing tariffs and this may be carried out multilaterally by the International Air Transport Association, an airline trade association. With the exception of certain liberal bilateral agreements governments usually retain final control over tariffs through the approval process set out in the bilateral agreement.

A wide spectrum of regulatory viewpoints exists among States and is reflected in bilateral agreements. In the past decade a number of new liberal approaches, especially on capacity and tariffs, have been developed. In addition bilateral air service agreements are paying increasing attention to commercial arrangements and opportunities for the designated airlines by including detailed provisions on airline representation, local currency sales, currency remittance and ground handling arrangements.

Non-scheduled services are sometimes covered by bilateral air service agreements but are more often outside such arrangements and under Article 5 of the Convention are subject to unilateral controls, regulations and conditions by the Contracting States between which they seek to operate.

While the bilateral system and the regulation of non-scheduled services exist as a consequence of, but outside the Convention, its functioning is a matter of active and continuous attention by the Organization under the terms of various Assembly Resolutions. ICAO monitors and studies the system with a view to developing recommendations and guidance for States, such as adaptable model clauses for optional insertion in bilateral air service agreements. This activity is spelled out further in the response to Question 5 below.

Question 5. To what degree could the activities of your organization be qualified as being of a multilateral, plurilateral or bilateral character? Have there been any attempts to increase the multilateral content? With what results? Are there any linkages between the multilateral activities on the one hand and the plurilateral or bilateral activities on the other hand? If so, are they institutionalized?

ICAO Response:

ICAO's activities in the technical and legal fields are essentially multilateral in character. As indicated in the response to Question 1, the technical work involves the development, review and amendment of Annexes, in order to provide uniformity of technical regulations at the national level on a wide range of matters concerning the safety, regularity and efficiency of air navigation. In the legal field the Organization's activities are directed mainly at the preparation of multilateral legal instruments on various aspects of private and public international air law, such as air carrier liability and aviation security. In both the technical and legal fields technological advances and changes in the air transport operating environment necessitate continuous attention by ICAO. In recent years, for example, new Annexes to the Convention have been developed on environmental protection, aviation security and the safe transport of dangerous goods by air. In the legal field new international legal instruments have been developed on aviation security as well as a model clause on aviation security for bilateral air service agreements. Thus the multilateral content in these fields is continuously expanding.

ICAO's activities in the economic/regulatory field are broad and multilateral but only in a recommendatory manner. Although a multilateral regulatory régime could not be agreed at Chicago, or in several subsequent attempts, the official policy of ICAO continues to be that "multilateralism in commercial rights to the greatest possible extent continues to be an objective of the Organization" (Assembly Resolution A7-15). Multilateralism in the sense of a multilateral exchange of rights, and for governing capacity and tariffs, is no longer under active consideration by the Organization. Nevertheless, within its consultative/ advisory role in air transport matters ICAO seeks accord on a range of issues of interest to States in their regulatory

activities and their bilateral relations. Some examples are the development of guidance including model clauses for bilateral air service agreements on different regulatory approaches towards tariffs and capacity, a definition of "scheduled international air service" for purposes of distinguishing them from non-scheduled services, and guidance for States in their regulation of non-scheduled services. As with the technical and legal aspects of ICAO's work, the multilateral content is continually expanding. As new issues and problems arise in air transport, e.g. computer reservation systems, ICAO, at the initiative of Contracting States, will take up such issues for study and advisory action.

The institutional link between the various ICAO air transport activities is provided by the organizational structure. In recent years in the air transport field an additional forum, the Air Transport Conference, has been established to permit a worldwide multilateral examination of different regulatory problems, especially in the bilateral field, a task which is possible but only to a limited extent in triennial Assemblies. The three Air Transport Conferences that have been held since 1977 have considered and adopted a number of Recommendations for action, either by Contracting States or the ICAO Council, on issues in the air transport economic and regulatory environment.

ICAO's activities do not take a plurilateral form.

Question 6. Are any of the provisions incorporated in the legal instruments of your organization designed to promote economic growth of member countries? If so, describe them.

ICAO Response:

Several provisions of the Chicago Convention are aimed at the planning, development and growth of international civil aviation and, in consequence, at the economic growth of Contracting States. For example, the following of the Organization's objectives set out in Article 44 deal with promoting the growth and development of international air transport: ensure the safe and orderly growth of international civil aviation, encourage the arts of aircraft design, encourage the development of airways, airports and air navigation facilities for international civil aviation and promote generally the development of all aspects of international civil aeronautics. The implementation of these provisions on the technical side is carried out through the Organization's work on Annexes, the formulation of comprehensive regional plans for the provision by Contracting States of infrastructure and services for the operation of international civil aviation and in the technical assistance programme. The objective is implemented on the economic side through ICAO studies, the development of Manuals on specific topics, by the technical assistance programme and, under the regular programme, by the conduct of workshops and visits to Contracting States by air transport experts. These activities are described in more detail in other responses below.

At Chicago another legal instrument, additional to the Chicago Convention, was opened for signature. This was the International Air Services Transit Agreement, under which signatory States exchange multilaterally the rights of overflight and landing for non-traffic purposes by scheduled international air services. This Agreement is currently adhered to by 101 States. It has played an important role in promoting economic growth by opening up the international airways for overflight by scheduled air services.

Question 7. Are any of the provisions incorporated in the legal instruments of your organization designed to promote development of developing countries? Have any specific modalities - legal, economic or financial - been devised to help obtain the development objective? If so, describe them, the way they operate and the results obtained. Has the development objective been determined multilaterally? If so, describe the nature of the objective and the way it has been determined.

ICAO Response:

As indicated in the response to Question 6, the Chicago Convention contains some general objectives aimed at the planning, growth and development of international air transport. It does not incorporate any provisions designed per se to promote development of developing countries. Nevertheless, pursuant to its general mandate in Article 44 and other provisions concerning planning and growth, ICAO devotes a major part of its efforts to assisting developing countries in pursuit of the development objective. International air transport is a capital intensive, technologically advanced industry in which nearly all States seek to play a role.

The principal means by which ICAO assists States has been through its technical assistance programme, the establishment of national and multilateral technical and infrastructure objectives at the regional level and advice, guidance and recommendations on specific air transport subjects. As regards the background of the technical assistance programme, ICAO became a participating and executing agency of the United Nations Development Programme and its predecessor organizations in 1949. Since 1950 the Organization has been guided by Council criteria and by various Assembly Resolutions in its technical assistance work. The Council's guiding criteria governing the provision of technical assistance are regularly updated. The emphasis in the relevant Assembly Resolutions is on establishing an overall technical assistance policy and procedures for the Organization and on maximizing the funding of technical assistance programmes. The implementation of the technical assistance programme is spelled out in greater detail in the response to Question 14 below.

Whereas the overriding objective under the Convention is the safety, regularity and efficiency of international air transport, the development objective in international air transport is determined multilaterally in ICAO through the establishment of Regional Plans, setting forth the facilities, services and procedures, in essence the infrastructure, which are to be provided or employed by Contracting States under their Convention obligations.

The Council establishes these Regional Plans in accordance with Assembly policy and procedures. The principal means by which it identifies the needs and means under the Plans is through regional air navigation meetings. In this way the infrastructure requirements of the air transport system and the objectives and obligations of States are determined multilaterally. The implementation and monitoring of Regional Plans is a constant process under the Organization's regular work programme and with this in view, ICAO has established six of its seven regional offices in developing regions, from which missions to and liaison with Contracting States can be readily carried out.

ICAO's general mandate and work on promoting the development of developing countries is ensured by the Organization's institutional structure and arrangements under the Convention. At Assemblies each Contracting State is entitled to one vote (Article 48). Under Article 50 the composition of the 33 State governing Council is made up of three approximately equal parts: the States of chief importance in air transport; the States which make the largest provision of facilities for international civil air navigation; and, States that will ensure representation by all the major geographic areas. By virtue of the second and third categories the interests of developing States are fully represented on the Council.

Question 8. Are there any provisions in the legal instruments of your organization which have the objective of promoting progressive liberalisation of international services transactions? If so, describe them and how they operate. How do they interact with development objectives?

ICAO Response:

Efforts at the Chicago Conference as well as post-Chicago attempts failed to find a multilateral formula that would permit the maximum access to markets for States with well developed airline industries while at the same time protect the opportunity to participate in international air transport by smaller States. Consequently, the Convention is silent on progressive liberalization as an objective. This does not preclude Contracting States from pursuing the liberalization objective individually or in their bilateral relations with other States. A bilateral air services agreement can be as restrictive or protectionist on market entry, capacity and pricing or as open or liberal on these matters as the partners wish. Bilateralism can be a vehicle for progressive liberalization among pairs of like-minded States or a means for protecting national air transport interests, or it can take an approach falling between these two.

In the past decade the regulatory environment in international air transport has undergone some significant changes and adjustments. The basic framework of bilateralism has not been at issue to any great extent. Instead it has been national regulatory policies, approaches and administrative arrangements which have been reevaluated, established airline arrangements and practices questioned and the appropriate mix of control, competition and co-operation opened to debate. A number of States, often with well established airline industries, have come to view air transport as a mature, developed service industry which is no longer in need of regulatory protection but which

should be subjected to a competitive operating environment and standards. But many other States continue to view air transport in terms of a public utility role and to regard their national airline as a necessity for national development and the maintenance of trade and communication links. This traditional approach is characterized by public ownership of the national airline, close regulatory oversight and protection as well as legal acceptance or condonation of co-operative airline practices internationally. Such an approach may be philosophically based or it may be the result of limited traffic opportunities and an airline industry that is competitively disadvantaged due to a scarcity of human and financial resources. Whatever the regulatory approach or viewpoint air transport is viewed by most States as a matter of vital national interest which, in the international sphere, often involves important foreign policy considerations.

The pursuit of a more competitive or liberalized environment for international air transport has taken place firstly through the negotiation of a number of liberal bilateral air service agreements or agreements with more liberal procedures on the key aspects of competition. ICAO's involvement, apart from monitoring these trends and keeping Contracting States informed, has been to develop, often with the assistance of national experts drawn from a range of policy viewpoints and geographic regions, model bilateral clauses which reflect traditional as well as new liberal approaches, for example on capacity or pricing. Such clauses are recommendatory only and for optional use by States in their bilateral relations. Liberalization has also been addressed on a regional multilateral level such as by the European Civil Aviation Conference, a regional governmental organization closely affiliated with ICAO, and by economic groupings such as the European Communities. The European Communities has recently set 1992 as the target for a liberalized common market in the air transport field.

In non-scheduled air transport the Chicago Convention, possibly reflecting the expectation of the times that non-scheduled operations would not be of much practical importance, established a different legal framework. Article 5 grants to non-scheduled flights the right of overflight (which is granted for scheduled services only through a separate legal instrument, the International Air Services Transit Agreement of 1944, as mentioned in the response to Question 6). It also grants the privilege to carry traffic to and from another State subject to the right of that State "to impose such regulations, conditions or limitations as it may consider desirable". Some bilateral treatment of non-scheduled services exists and in Europe a multilateral agreement has greatly facilitated the expansion of this type of operation. Liberalization of non-scheduled services is therefore a matter treated at the national, bilateral and multilateral levels.

In summary, the role of international air transport in the overall development strategy of States and the extent to which this can be achieved through a liberal or a protective approach is a matter for States individually under the Chicago Convention. It is the framework which is established by the Convention rather than the Convention itself which provides the means for the progressive liberalization of international air transport services and, in recent years, a marked degree of liberalization has taken place within this framework.

Question 9. Are there any provisions incorporated in the legal instruments of your organization designed to ensure a balanced exchange of benefits among member countries? If so, describe how they operate.

ICAO Response:

The Preamble to the Chicago Convention refers to equality of opportunity in the establishment of international air transport services and in Article 44 it is an objective of ICAO to ensure that the rights of Contracting States are fully respected and that every Contracting State has a fair opportunity to operate international airlines. While these provisions relate to participation in the air transport system rather than to its benefits they have served, under a régime of bilateralism, as the basis for certain concepts which are commonly incorporated into bilateral air service agreements as well as practices in the bilateral process. Among the principles commonly inserted in bilateral agreements to govern the operation of the agreed services and in particular the capacity to be mounted by the airlines are: a fair and equal opportunity to (operate)(compete), the airlines should take into account the interests of the airline(s) of the other party; and, in some bilateral agreements, the achievement of equality and mutual benefit (or equitable results) from the agreed services. The majority of agreements contain this latter provision and are known as "predetermination agreements". Capacity under these agreements is determined ab initio by the parties and is usually divided equally between them. Other more open agreements, where there are only either ex post facto or no controls by governments, do not cite a balanced exchange of benefits as a primary objective. Nevertheless, in practice, no matter how liberal or restrictive the controls in an agreement or whatever the respective national approaches towards competition, bilateral negotiations will invariably aim to achieve reciprocity and a general balance in terms of rights, routes and opportunities.

Certain other provisions of the Chicago Convention are relevant, although indirectly, to the objective of a balanced exchange of benefits in that they multilaterally impose limitations on the actions of Contracting States in the operating environment: national laws and regulations relating to the admission or departure of foreign aircraft are to be applied without distinction as to nationality (Article II); airport and other charges for air navigation facilities are not to be higher for foreign aircraft than those paid by the national aircraft (Article 15); and, fuel, oil, spare parts and regular equipment retained on board an aircraft of another Contracting State or imported for use by such aircraft are to be exempt from customs duties or other national or local duties and charges (Article 24). These provisions are usually incorporated by reference or separately in bilateral agreements.

Question 10. How and to what extent is the autonomy of national regulations preserved or affected by the legal instruments of your organisation? Are there any provisions in these instruments which are specifically designed to ensure the respect for those policy objectives that provide the rationale for certain national laws and regulations which relate to the activities of your organization? If so, describe such provisions and how they operate.

ICAO Response:

The autonomy of national law and regulations is fully respected under the terms of the Chicago Convention. With certain exceptions laid down in Article 12 (Rules of the Air governing flights over the High Seas), ICAO's legislative and regulatory functions and activities are not mandatory and thus do not restrict the freedom of action of Member States within the general framework of their legal rights and obligations under the Convention.

All Contracting States participate in the process of drafting Annexes which the Organization develops under Article 37, as well as any possible later amendment of these international standards, since all relevant proposals must be submitted to them for their comments. This continuous consultation process reduces the likelihood that any international standard would be adopted to which a significant number of Member States would be opposed.

An ICAO Contracting State has no legal obligation to implement or comply with an international standard if it finds it impracticable to do so. The non-compulsory character of ICAO's "legislative" functions is reflected in Article 38 of the Chicago Convention which provides that any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, shall give immediate notification to ICAO of the difference between its own practice and that established by the international standard. In any such case, the Council of ICAO shall immediately notify all other Contracting States of the difference which exists between one or more features of an international standard and the corresponding national practice of that State.

Thus, under the provisions of Chapter VI of the Convention, the requirements for compliance with ICAO's technical legislation are sufficiently flexible to accommodate the policy objectives and the economic and technical problems which any of its Contracting States may face.

Question 11. Do the instruments and activities of your organisation cover only governmental actions or do they also extend to private operators? If the latter is the case, what disciplines and procedures apply? In this context, how are competition rules in general, restrictive business practices, and transnational corporations in particular dealt with?

ICAO Response:

The Chicago Convention as a multilateral instrument is primarily addressed to States; the obligations and rights are those of its Contracting States. Nevertheless in the Convention and its technical Annexes the subject matter of many of the provisions is aircraft. Other references in the

Convention distinguish between international scheduled and non-scheduled services and there are references to international airlines. But no distinction is drawn in the Convention or in ICAO's work between private and governmental airlines, or between private and public ownership. The disciplines and procedures established by ICAO apply to aircraft irrespective of their ownership or control and are in no way affected by a recent trend towards privatization of national airlines in a number of States.

Until recent years competition laws were not an issue in international air transport since most States which had competition laws either exempted the air transport industry from the application of these laws or condoned co-operative airline practices, such as in the tariffs establishment field, which would come within the purview of restrictive business practices. The trend in a number of States, particularly over the past decade, towards a reassessment of their regulatory approaches to domestic and international air transport has drawn attention to the role of competition laws in international air transport. Several States have deregulated and have subjected their domestic airline industries to competition rules and have sought to eliminate certain co-operative practices in the airline industry. The application of such laws in the international air transport context has given rise to controversy and some instances of conflicts between States. At the request of Contracting States at a worldwide Air Transport Conference in 1985 the ICAO Council was requested to develop guidance material for the avoidance or resolution of conflicts between States which may arise from the application of competition laws to international air transport. Some guidance material has been developed with the assistance of a Group of national experts and is presently being examined by ICAO's governing bodies.

The nationality of aircraft has had an important bearing on arrangements for international air transport. Several provisions in the Chicago Convention (Articles 17 to 21) deal with the nationality and registration of aircraft. The effect of these provisions is that nationality of aircraft is equated to their State of registry and aircraft cannot have dual nationality, although the State of registry can be changed. Other provisions of the Convention are designed to facilitate the establishment of joint air transport operating organizations or agencies. But the nationality principle has been transposed to the bilateral framework and a common provision of bilateral air service agreements is that the designated airline(s) of each party must be substantially owned and effectively controlled by that party or its nationals. The system has not precluded the establishment of some airlines having multilateral ownership (but single State of registry of each aircraft). However the principle of nationality in a legal framework of national sovereignty over airspace and bilateralism for the conduct of international services has tended to inhibit the emergence of the type of transnational corporation to be found in most other service industries as well as the air transport equivalent of cross traders or "tramp steamers" that exist in the maritime field. Scheduled air services between two other States exist but only in the context of separately and bilaterally agreed traffic rights and routes involving all parties concerned. Also some limited operations between two other States can be found in the non-scheduled services field where the framework, as indicated previously, is essentially one of differing unilateral controls by States.

Question 12. Could you indicate whether certain concepts that are under discussion in the Group of Negotiation on Services are reflected in the legal instruments or activities of your organisation? Such concepts include non-discrimination, most-favoured nation treatment (m.f.n.), national treatment, transparency, market access, standstill, exceptions, and regional economic integration. If any such concepts are reflected, how are they dealt with? Do the methods chosen, and the motivation for the solutions found, take account of the peculiarities of your activities?

ICAO Response:

Certain provisions of the Chicago Convention and the activities of ICAO concern the concepts being discussed in the Group of Negotiations on Services.

Non-discrimination. As indicated in the response to Question 9 the Chicago Convention includes a non-discrimination principle in Article 11 dealing with the applicability of air regulations on admission or departure of aircraft. The principle is also incorporated in Article 15 dealing with airport and air navigation facility charges. Furthermore one of the objectives of ICAO, as spelled out in Article 44, is to avoid discrimination between Contracting States. This is therefore an underlying objective in much of ICAO's work and an important principle in the development of guidance material in the technical economic and regulatory spheres. In addition the concept of non-discrimination is frequently found in the bilateral air service agreement context, for example, with respect to the imposition of airport and air navigation facility charges.

Most-favoured-nation treatment. The most-favoured-nation treatment concept does not appear in the Chicago Convention. It was however considered at and after the Chicago Conference, but was soon discarded. Consequently international air transport has no established MFN tradition; rather it is governed by non-discrimination and by reciprocity and balance in concessions between States.

National treatment. This concept can be found in the Chicago Convention in relation to airport and air navigation facility charges (Article 15). A similar provision is usually incorporated in bilateral air service agreements. The concept can also be found in respect of the establishment of prohibited areas under Article 9. It is another basic underlying provision in ICAO's work. The Council has, for example, established a policy and guidance for States on these matters.

Transparency. Articles 81 and 83 of the Chicago Convention obligate Contracting States to register with ICAO their aeronautical agreements and arrangements. The purpose of these provisions is to ensure transparency in the formalized aviation relations between States and between States and airlines. Bilateral air service agreements between States comprise the vast majority of the filed agreements. Most of the approximately 1 800 bilateral air service agreements presently in existence have been filed with ICAO although a number

of agreements, as well as confidential side agreements which may have the effect of modifying or clarifying the intent of the parties in the main agreement, have not yet been filed. ICAO regularly publishes lists of agreements and arrangements as they are received. With a view to disseminating in summary form the content of bilateral air service agreements and also to assist Contracting States in obtaining a better overview of regulatory trends ICAO has just completed the development of a data base of bilateral air service agreements. All such agreements filed with ICAO have been analysed and codified to identify the existence or not of all the main relevant provisions one could expect to find in an agreement. Summaries of the codified agreements have recently been published. The computerized data base will permit interrogation by a user for analytical purposes.

Market access. Market access in international air transport is governed by Articles 1 (sovereignty), 5 (non-scheduled services) and 6 (scheduled services) of the Chicago Convention. For scheduled services market access to the air traffic to and from another State is granted reciprocally in bilateral air service agreements. The degree of flexibility in the implementation of that access is dealt with in the agreement. The competitive opportunities in market access in international air transport (i.e. designation of airline(s) rights of access to traffic including that in third countries, and the specified routings) are vitally important and often contentious issues in the bilateral bargaining process.

Standstill. The concept of a standstill does not exist in the Chicago Convention. ICAO may in its activities develop guidance or recommendations directed to the removal or reduction of discriminatory practices but such material does not involve application of a standstill.

Exceptions. The exception concept can be found in the Chicago Convention in certain provisions. For example: flight over certain areas can be restricted or prohibited in cases of military necessity or public safety or in exceptional circumstances (Article 9); a Contracting State can refuse to recognize, for the purpose of flight above its own territory, certificates of competency and licences granted to any of its nationals by another Contracting State (Article 32); in certain circumstances States can adopt regulations or practices which differ from the minimum international standards or procedures established in ICAO Annexes but are required to file notices of such differences with ICAO (Article 38).

Regional economic integration. The Convention does not deal directly with regional economic integration although one provision (Article 77) is intended to facilitate the establishment of joint air transport operating organizations or international operating agencies.

As the above response indicates the Chicago Convention has treated several of the concepts presently being considered by the Group of Negotiations on Services, though in differing degrees. This treatment, as written into the Convention, reflects the peculiarities of international air transport and the legal framework under which it operates.

13. Are there any provisions in the legal instruments of your organisation relating to:

- consultation and dispute settlement
- safeguards in the context of trade in services (the right to take emergency actions in specifically defined circumstances)
- subsidies
- state sanctioned monopolies and state enterprises?

ICAO Response:

Consultation and dispute settlement. Several provisions in the Chicago Convention (Articles 84 to 88) deal with the settlement of disputes. The arrangements concern only disagreements between two or more Contracting States over the interpretation or application of the Convention and its Annexes and come into effect if the disagreement cannot be settled by negotiation. Such disagreement can on the application of any State concerned be decided by the ICAO Council. An appeal mechanism exists from the Council decision to an ad hoc arbitral tribunal or to the International Court of Justice. The Council has established rules to govern the settlement of disagreements, differences and disputes between Contracting States. In addition, under the mandatory functions of the Council, set out in Article 54, the Council is required to consider any matter relating to the Convention which any Contracting State refers to it. Under this provision the Council can and does entertain any disputes which may arise between Contracting States. Furthermore certain matters of interpretation or dispute under other multilateral treaties relating to international air transport such as the International Air Services Transit Agreement referred to in the response to Question 8, may be submitted to the ICAO Council for decision.

In the context of bilateral air service agreements provisions on consultation and in many cases machinery for the settlement of disputes through arbitration are commonly included. Some early bilateral agreements provided for referral of disputes to the ICAO Council or to a tribunal established within ICAO for advice or decision. The bilateral practice today is to require direct negotiation or consultation as a first step in resolving a dispute over the interpretation or application of the agreement and, only if that process fails, to refer the matter to an ad hoc arbitration tribunal. Few disputes in bilateral relations reach arbitration, most are resolved by negotiation and consultation. The consultation process is an important, integral part of the bilateral process for implementation and modification of the agreements and States tend to devote considerable attention and resources to consultations on air transport issues with their bilateral partners.

Safeguards. Safeguards exist in respect of the application of the Chicago Convention as well as in the bilateral system. Article 89 of the Convention provides that in the case of war or of a state of national emergency that is notified to the Council the provisions of the Convention shall not affect the freedom of action of the Contracting States involved.

In the bilateral sphere certain provisions are intended to ensure compliance with the agreement's provisions. This is particularly relevant in the tariff and capacity control arrangements. Whether the agreement is protectionist or liberal on these issues the consultation machinery is used to resolve differences arising from airline implementation. For example in a liberal type of agreement where the airlines are given individual control over

the amount of capacity to be mounted or the tariffs to be charged the agreement will normally proscribe all forms of discrimination or unfair competitive practices such as predatory pricing or capacity dumping. Any such practices would be cause to involve the consultation process with a view to remedy. Apart from the consultation/arbitration machinery in bilateral agreements nearly all agreements include a provision for notice of termination.

Subsidies. One of the functions of the Council which are enumerated in Article 54 of the Convention is that of requesting, collecting, examining and publishing information about the costs of airline operation and particulars of subsidies paid to airlines from public funds. Accordingly, as part of its statistical programme, ICAO collects and disseminates information on the finances of international airlines, airports and air navigation route facilities. This includes information on direct subsidies and other forms of payments.

State sanctioned monopolies and State enterprises. As indicated in the response to Question 11 the Chicago Convention makes no distinction between public or private ownership of airlines, whether scheduled or non-scheduled. Notwithstanding the privatization trend also referred to in that response, most national airlines operating internationally, were from their establishment and are still, government-owned enterprises. As regards State-sanctioned monopolies bilateral air service agreements usually include a provision on designation i.e. the notification by each party to the other of the airline or airlines that will exercise that party's rights to operate the agreed services. The agreement may specify single designation (one airline from each party) or multiple designation (more than one). In practice only a handful of States have more than one national airline to designate under their bilaterals. Consequently, although about half the bilateral agreements filed with ICAO provide for multiple designation, de facto, the system, because of the nature of the industry, is predominantly one of single designation.

Question 14. Does your organisation have arrangements designed to provide technical assistance for developing countries with respect to international services transactions? If so, describe their nature and how they are implemented.

ICAO Response:

Reference was made in the response to Question 7 to ICAO's technical assistance programme in aid of the development of developing countries. The basis of technical assistance in civil aviation is the needs of individual States or groups of States, often identified in ICAO's Regional air navigation plans. Projects for technical assistance funding are submitted to the United Nations Development Programme (UNDP). The UNDP has continued to be the main source of funding and on average over the past three decades some five to six percent of the total funds available from the UNDP have been used in the civil aviation sphere. Funding for civil aviation from the UNDP has materially increased over the years but it has also diversified as other forms of funding for execution by ICAO have been found. For example: Trust Funds under which individual governments finance in whole or in part their own technical

assistance or that of other designated States, funding by other institutions involved with development and cost sharing between the UNDP and government funding. Finally ICAO implements a Civil Aviation Purchasing Service which is designed to assist governments in meeting their aviation equipment needs in the most economical and objective manner. It is a comprehensive service which may include preparation of detail specifications for individual equipment or services, preparation and distribution of tenders, award of contract, installation/commissioning and training. Over the past five years civil aviation funding provided by the UNDP and implemented by ICAO has averaged U.S.\$30.9 million per annum while over the same period another U.S.\$20.3 million per annum has been provided and implemented by ICAO from other funding sources.

The types of civil aviation projects that ICAO executes include the establishment or expansion of civil aviation training centres, improvements to the civil aviation infrastructure, the strengthening of civil aviation departments, assistance to national airlines and airport development. In accordance with UNDP policy in depth evaluations of selected sectors are carried out by independent experts.

ICAO's technical assistance programme is regularly monitored, reviewed and adjusted by ICAO's governing bodies to reflect the changing collective needs of international air transport and in meeting the development objectives of individual States.

In addition to its technical assistance programme ICAO also provides assistance to developing States through its regular programme. This assistance takes the form of informal regional meetings to enhance the official performance of government agencies on a variety of subjects in the economic field: air carrier tariffs, forecasting and economic planning, statistics, airport and route facility economics and facilitation (airport customs and immigration procedures) as well as aviation security. Regular visits to developing States by air transport experts based in the ICAO regional offices is another means by which ICAO provides assistance to and liaises with Contracting States on air transport issues.

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