54th CONFERENCE OF DIRECTORS GENERAL OF CIVIL AVIATION ASIA AND PACIFIC REGIONS

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AGENDA ITEM 4: ECONOMIC DEVELOPMENT OF AIR TRANSPORT

PAKISTAN CAA PERSPECTIVE ON ICAO POLICIES/GUIDELINES RELATING TO THE ECONOMIC DEVELOPMENT OF AIR TRANSPORT

(Presented by Pakistan)

SUMMARY

Following the advancements in the aviation industry since Chicago Convention-1944, there have been major paradigm shifts in the way business is conducted by airline operators in today's world. One of the vastly practiced aspect, inter-alia, is the exploitation of the 6th freedom of the air by air carriers and a general lack of regulation guidelines on the same.

Furthermore, in today's dynamic aviation industry, States and associated airline operators thereof are faced with increasing challenges relating to fair competition and safeguards, which this paper attempts to discuss.

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1. INTRODUCTION

1.1 Chicago, 1944, changed the way international Civil Aviation was looked at and thought upon. Following the opportunities presented therein, States and airline operators, alike, have been continuously developing newer ways of carrying out their duties and conducting their respective businesses.

1.2 As a result of the Chicago Convention of 1944 and the conclusion of the International Air Transport Agreement, the ICAO officially categorized and recognized the first five (05) freedoms of the air. These freedoms are the basis on which traffic rights are negotiated between States and are a matter of dire importance to the international air transport community. However, with the passage of time, paradigms changed and airline practices saw major shifts in their undertaking. Consequently, the 6th freedom of the air was conceptualized from the underlying concepts of the 3rd and 4th freedoms of the air and airline operators centered their entire business models on the carriage of 6th freedom traffic. However, along came a general lack of available policy guidelines to regulate such carriage by the States involved.

1.3 Whereas the modern day Aviation industry presented ICAO Member States with enormous potential to expand and build upon, there have been major concerns of both States and airline operators relating to Fair Competition and the Safeguards available to competing airlines in a certain air transport context. Notwithstanding the same, this paper remains cognizant of the rigorous work undertaken by ICAO, Member States, IATA and Academia across the globe. To address such matters, it is felt that the bilateral Air Services Agreements, considered the basic, underlying and fundamental documents governing the conduct of international air services between the Contracting States, do not address the issue under discussion in its warranted detail. Moreover, associated provisions related to Fair Competition and Safeguards are addressed for the purpose of their inclusion only and lack general substance and associated details regarding the said provisions.

2. DISCUSSION

2.1 Whereas traffic rights negotiated as a result of bilateral/multilateral Air Services Agreements primarily include the 3rd, 4th and 5th freedoms of the air, it is a well known reality that some airlines, depending upon their geographical positioning, market demographics and mainly business models, heavily depend on the carriage of the 6th freedom traffic via their respective hubs and thereby follow a hub-and-spoke airline business model. It may be noted here that the carriage of the 6th freedom traffic does not require the exclusive grant of such traffic rights, but only upon the grant of 3rd/4th freedom traffic rights and thereby placing States at a major disadvantage with the non-availability of a well-accepted framework to regulate such traffic carriage.

2.2 Moreover, it is understood that the so-called 6th freedom of the air is secondary in nature and consists of a certain mix of the 3rd and 4th freedoms of the air, but it is pertinent to express here that the carriage of such freedom and its associated potential benefits thereof, have been very detrimental to some airlines that rely upon point-to-point airline business models owing to various factors and therefore cannot take advantage of such consolidation as the hub-and-spoke airline business models. The said circumstance not only places States at a general lack of available regulation techniques towards the exploitation of the so-called 6th freedom of the air but may also lead to decreases in the enormity of bilateral relations that exist amongst States.

2.3 It is also acknowledged that airline operators are free to choose any appropriately suited business model to suit their needs, airlines being commercial entities, but it is felt equally important that some regulation may exist and/or be developed to regulate the so-called 6th freedom of

the air. To the said effect, it is considered a matter of vital and thorough deliberation and debate to ascertain the basic, underlying question as to whether the so-called 6th freedom of the air needs official recognition from ICAO or the otherwise.

2.4 It is believed that developments of certain policy guidelines appropriately regulating the so-called 6th freedom of the air may be more suited and comprehensive after the said matter has officially been recognized. Nonetheless, in the absence of such official classification and recognition, it is considered pertinent that interested ICAO Member States, airline operators and relevant immigration/border control agencies of Member States work together to deliberate upon the subject matter and develop a basic infrastructure that may be used to regulate and monitor the quantum of the so-called 6th freedom traffic by airline operators while operating to/from concerned States.

2.5 As discussed in the foregoing section, the international air transport industry has witnessed major paradigm shifts in the years following 1944 and that trend continues with the passage of time as airline operators optimize business models, adopt dynamic and leaner processes and continuously develop newer ways of dominating competition between competing air carriers. The said circumstance has led to concerns by both States and airline operators regarding Fair Competition and Safeguards.

2.6 Whereas bilateral/multilateral Air Services Agreements, derived from the ICAO Template International Air Transport Agreement, contain provisions regarding Fair Competition and Safeguards, it is felt that such provisions exist for the purpose of their inclusion only and lack a general subject matter detail thereof considered essential for appropriately addressing such related subject matters by the Aeronautical Authorities of concerned States.

2.7 To exemplify, provisions relating to Safeguards from anti-competitive practices, available to competing air carriers include the examination of the following airline practices:

a) charging fares and rates on routes at levels which are, in the aggregate, insufficient to cover the costs of providing the services to which they relate;

b) the addition of excessive capacity or frequency of service;

c) the practices in question are sustained rather than temporary;

d) the practices in question have a serious negative economic effect on, or cause significant damage to, another airline;

e) the practices in question reflect an apparent intent or have the probable effect, of crippling, excluding or driving another airline from the market; and

f) behavior indicating an abuse of dominant position on the route.

2.8 For the subject matter at hand, it is considered that serial number a) – c) above mandate the examination of the most common symptoms of anti-competitive practices, but have a general inadequacy to provide for a quantifiable scale on which to gauge such practices. Arguably, without the presence of a quantifiable scale to gauge the existence and/or the prevalence of such practices as at serial number a) – c) above, there may only be qualitative grounds for Aeronautical Authorities of a concerned Contracting Parties to examine such practices and the same may not hold any scientific/factual weight-age.

2.9 Furthermore, with reference to serial number d) to f) above, an airline operator may argue that such phenomenon are the resultant outcomes of fair competition as well and it may be a natural theory that when faced with competition, one entity has to gain at the expense of another, at least in some instances, if not all.

2.10 Moreover, the above conditions may also lead one to believe that all airline practices other than the above are considered as competitive practices whereas there exists a narrow margin between what constitutes fair competition and what does not and as to the what forms of practices, though different in their very nature, may be collectively termed as being anti-competitive practices.

2.11 In light of the above premise, it is suggested that the following may be considered and deliberated upon by the International Civil Aviation Community:

Anti-competitive Practice	***Possible Discussion Issues***
charging fares and rates on routes at levels which are, in the aggregate, insufficient to cover the costs of providing the services to which they relate;	For this purpose, quantification may be arrived at as to the factors that may be involved in the examination while also consisting of recognition of the existence of differing airline business structures etc. As a frame of reference, the ***Areeda-Turner rule*** relating to the short-run marginal cost of production may also be used.
the addition of excessive capacity or frequency of service;	A quantifiable procedure set to identify, control and eradicate such capacity dumping may also be developed and incorporated to the Air Services Agreements. However, such mechanism may be without prejudice to the right of every airline operator to cater to the needs of the international Civil Aviation industry as per its own judgment.
the practices in question are sustained rather than temporary;	For this purpose, a definite time-set maybe developed and incorporated to the Air Services Agreement. However, such definitive quantification may also possess the capacity to account for differing contextual circumstances as well.
the practices in question have a serious negative economic effect on, or cause significant damage to, another airline;	These provisions require extensive clarity as to what constitutes Fair Competition and what constitutes the otherwise. As it is believed that the mere existence of Fair Competition may present competitive advantages for an airline operator(s) and accumulate negative economic effects for other competing air carrier(s) at the same time. Naturally, when there is competition between business entities, one may benefit at the cost of the other. Therefore, it is suggested that efforts may be undertaken to differentiate these circumstances when they exist in Fair Competition from those that exist in unfair-competition/anti-competitive practices. The same will not only clarify the stance of Contracting States on what constitutes Fair/Unfair Competition, but will also make the
the practices in question reflect an apparent intent or have the probable effect, of crippling, excluding or driving another airline from the market; and	
behavior indicating an abuse of dominant position on the route.	

	Air Services Agreement and the underlying conduct of international air transport operations more comprehensive and appropriate.

3. ACTION BY THE CONFERENCE

3.1 The Conference is invited to:

a) Take note of the contents of this Discussion Paper as relating to major guideline issues pertinent to International Civil Aviation; and

b) Recommend to and encourage the International Civil Aviation Community to work together with the view to consider the resolution of issues raised in this Discussion Paper.

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