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# LIBERALISATION OF AIR CARGO TRANSPORT

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**Summary**

This document has been prepared by the OECD Secretariat to assist Member countries, the aviation industry and other interested parties with the liberalisation of air cargo services. It suggests practical ways and means to promote liberalisation in the air cargo transport sector. Increased market access lies at the heart of air cargo liberalisation but there is also a range of ancillary actions needed to improve the efficiency of international air cargo operations. This document identifies the conceptual issues which need to be addressed and the principles which should guide liberalisation initiatives. It then focuses on two alternative broad implementation approaches that can be taken towards liberalisation of air cargo operations: firstly, by way of amendment to existing bilateral agreements; and secondly, by way of introduction of a new multilateral agreement.

The material presented reflects the outcome of deliberations and contributions during the working group stages made by representatives from Member countries, international and aviation organisations and the air cargo industry who participated in their personal capacity, not necessarily representing the view of their governments or organisations. It suggests specific measures that could be pursued under each approach in liberalising market access and ancillary aspects of air cargo operations. Suggested provisions are outlined for the avenues proposed:

- A Bilateral Protocol to existing air service agreements which focuses on the liberalisation of traffic rights on a bilateral basis for air cargo services, facilitation and ancillary services and other specific air cargo transportation issues that can be dealt with separately under existing bilateral air service agreements; and

- A draft Multilateral Agreement to facilitate early liberalisation of air cargo services without compromising essential safety and security aspects of civil aviation. Such an agreement could provide a means for liberalisation of existing market restrictions and much-needed improvements in facilitation and ancillary services on a multilateral basis.

The latter could provide an effective and efficient alternative approach for a body of interested Member countries wishing to liberalise air cargo services without reliance on re-negotiating a complex web of bilateral air service agreements.

**Background**

ICAO's World Wide Air Transport Conference on International Air Transport Regulation, held in 1994, focussed on the economic regulation of international air transport. It was held against a background of concerns about the future direction and stability of both the regulatory and operating environment and the evolving structural changes in the industry associated with liberalisation, deregulation and privatisation. The Conference recognised the importance of national 'participation' in international air transport and that any regulatory changes should be evolutionary. The Conference concluded that, pursuant to the principle of sovereignty, each State would determine its own path and pace of change in international air transport regulation, on the basis of equality of opportunity and using bilateral, sub-regional, regional and/or global avenues according to circumstances.

Since ICAO's 1994 Conference, progress on the central elements of the regulatory environment, in particular market access, has been somewhat patchy on a global scale - but has been quite substantial in certain markets. Interested governments have focussed on removal and relaxation of restrictive economic regulatory controls. Highlights of government reforms include implementation of the European liberalisation package and other regional liberalisation initiatives, multiple airline designation, transAtlantic 'deregulation' and 'open skies' type arrangements. Considerable progress has been made with air cargo liberalisation in some markets. Airlines have also contributed to change, within the limits of regulatory restrictions, developing competitive airline alliances with global reach. Nevertheless, air transport globally continues to be characterised by a set of regulatory rules and practices far more restrictive than those applying to most other industries operating in international trading environments.

The OECD, since its report on regulatory reform in air transport services generally (see OECD, The Future of International Air Transport Policy, 1997), has continued to explore the possibility of liberalising air transport services. Clearly, it would be preferable to be able to liberalise air transport generally, covering air passenger and air cargo transport. Given the sensitivity to changes in the regulatory framework for air transport - especially international air passenger transport - and the highly political nature of such an undertaking, the Organisation decided to promote liberalisation by focussing its attention first in one distinct segment of the air transport market - the air cargo market.

Air cargo plays a vital role in ensuring the competitiveness and commercial success of a large number of industries across the globe. While in terms of weight, air cargo accounts for only about 2% of all cargo moved world-wide, it actually constitutes over one third of the *value* of the world trade in merchandise. Industry is increasingly dependent on air freight services, with air freight fast becoming a mode of choice for many businesses, as they seek to maximise the quality of service they provide to their customers. Air freight needs a regulatory regime that allows the air cargo industry to provide the services required by its users. Of course, parts of the web of economic, social and international regulations that apply to air passenger traffic also apply to air cargo transportation but air cargo services have specific features and requirements that significantly differ from passenger traffic. Air cargo services are by nature also less subject to national sensitivities and more open to competition than passenger traffic. Furthermore, air cargo transportation is already much more liberal than passenger transportation as evidenced by the special provisions for air cargo in a number of bilateral agreements.

Clearly, it would be preferable to be able to liberalise all forms of international air cargo transport operations whether these take place on all-cargo or combination services, thereby exempting air cargo from the restrictions and limitations imposed on international air passenger transport operations. It could be argued that liberalisation of all-cargo air services alone might create competitive disparities between the 'all-cargo' and 'combi' carriers which each carry about 50 per cent of the total freight. A major difference between all-cargo carriers and combi carriers is the fact that the former need to recoup the total cost per

flight from the cargo carried. The latter have much more flexibility, and must recoup their costs from the passenger/cargo revenue mix. Combination carriers are thus better able to set prices and use the available flexibility in the passenger/cargo mix than all-cargo carriers. At this stage of the development of the market, it is fair to say that the competitive edge in pricing does not lie with all-cargo carriers. Some industry experts even maintain that all-cargo operations and their development are severely hindered by the below cost competition of combination carriers. At the end of the day, however, whether a freight operator wants to utilise all-cargo services or continue to send air cargo in belly hold operations should be a commercial decision, unaffected if possible by the regulatory arrangements applying to air cargo transportation.

Work on air cargo within the Organisation initially included a detailed report on "Regulatory Reform in International Air Cargo Transportation"[1], made available in early 1999, a workshop on the subject held at the OECD's Paris Headquarters on July 5-6, 1999, preparation of a Working Paper entitled "OECD Principles for the Liberalisation of Air Cargo" in June 2000 and a further workshop held in Paris on 4-5 October 2000 to identify the issues and outline possible approaches.

The 1999 Workshop recognised that the different categories of air cargo providers in the logistical chain (combined and all-cargo carriers; integrated /express carriers, freight forwarders and any other indirect provider of air cargo transportation) do not always operate according to the same regulatory regime for the various parts of their operations while competing in the same markets. The workshop considered that any regulatory reform in the sector should take into account the need to establish a regime, which enables, if possible, all categories of air carriers to respond adequately to the needs of the market.

The 2000 Workshop considered proposed liberalisation principles and alternative liberalisation approaches (a protocol to existing air service agreements / a multilateral air cargo agreement) outlined in the OECD documentation. Industry representatives were strongly of the view that current air transport regulatory arrangements were inappropriate for the needs of air cargo transportation and supported the liberalised approaches outlined by the Secretariat. To a large extent, these views were shared by government representatives. A principal outcome was a strong recommendation from industry and government representatives for continuing to consider air cargo liberalisation and to explore new approaches, under the aegis of the OECD.

Following the 2000 Workshop, a revised paper on liberalisation principles and approaches was prepared by the OECD Secretariat taking into account the deliberations of Informal Working Groups that focussed on the key issues. Contrary to the previous version of the document [DSTI/DOT(2000)1], the provisions suggested in Parts III (Bilateral Protocol) and IV (Multilateral Agreement) were restricted to air carriers. The reasons for this were basically threefold: *first* including all sorts of air cargo service providers in the scope of an air cargo regulatory regime could add government oversight to a large number of hitherto unregulated services and entities which might not be desirable or in accordance with the scope of authority under national law; *second* for some ancillary services, jurisdictional and/or policy co-ordination among multiple regulatory bodies, where they exist, might prove difficult for various governments and *third* including all air cargo service providers could be a factor substantially delaying the adoption of any such document as this could necessitate extended and, at various occasions, complicated co-ordination among agencies/ministries concerned. At this stage, the scope of the air cargo liberalisation proposals was restricted to all-cargo services. This aimed to ensure, by having separate regulatory regimes, there would be no regulatory conflict between the liberalised arrangements for all-cargo air services and the regulatory arrangements for air passenger transport services. It also aimed to simplify the regulatory changes required,

1 OECD, "Regulatory Reform in International Air Cargo Transportation," DSTI/DOT(99)1, April 1999 (hereafter, "1999 OECD Study").

facilitate their early introduction and build on the trend towards separate provisions for all-cargo services in bilateral air services agreements.

The final OECD Workshop was held on 21-22 January 2002. This Workshop considered that relaxation of existing restrictions on international traffic rights would allow better market access and improve the industry's ability to meet user requirements. Relaxation of government controls over "ownership and control" of air carriers would allow the development of industry structures and services better suited to global and regional air cargo tasks. There was also support, although not consensus, for broadening the scope of the regulatory reform to encompass liberalisation of international air cargo services generally, whether the cargo was carried on all-cargo services or on combination services carrying passengers and cargo. There was general agreement that liberalisation measures should only be undertaken if essential public interest regulatory controls over aviation safety and aviation security can be assured. Attention also needed to be given to environmental considerations and infrastructure constraints.

The current document, which has been finalised by the Secretariat, reflects the outcomes of the final discussions and deliberations on the alternative regulatory approaches proposed and incorporates two possible instruments. These are:

- A Bilateral Protocol which focuses on the liberalisation of traffic rights for air cargo services, ancillary services and other specific air cargo transportation issues that can be dealt with separately under existing bilateral air service agreements.

- A possible Multilateral Agreement to facilitate early liberalisation of international air cargo services without compromising essential safety and security aspects of civil aviation. Such an agreement could provide a means for liberalisation of existing market restrictions on a multilateral basis.

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# LIBERALISATION OF AIR CARGO TRANSPORT

## Executive Summary

1. Over a period of many years, international air cargo demand has continued to increase more rapidly than international air passenger demand. While patterns of demand were altered dramatically by the events of 11 September 2001, cargo volumes were affected less than passenger volumes. Once the patterns of demand have stabilised, it seems likely that the relative growth differentials between passenger and cargo volumes experienced over many years will be restored. Consequently, expectations are that increasing volumes of air freight will need to be carried on dedicated air cargo services as well as on combination services.

2. Air cargo arrangements need to be as efficient and expeditious as possible, to meet user requirements for air transport of high value and time sensitive freight. Air carriers are still highly restricted, however, in their ability to supply the air cargo services that users are seeking. Widespread regulatory constraints imposed by national governments prevent services being provided by air carriers primarily on the basis of technological and commercial considerations. There are differences between countries and regions as to the availability of cargo-relevant traffic rights, but as a general rule, the current patterns of bilaterally agreed international air service traffic rights – designed principally for passenger traffic - are a major restriction on the most economical operation of aircraft operating networks and air cargo services. Carriers are also constrained by a range of other rules affecting operational and "doing business opportunities". These rules restrain their *corporate and business structures*, notably their *ownership and control* structures, the *possibility to* contract freely with domestic/local carriers abroad, and to diversify into complementary services such as *freight-forwarding*. Taken together, these constraints prevent air carriers from developing the *seamless transport services* needed by domestic and international customers. Air carriers also face severe practical hindrances in undertaking their existing services, including *the time required for customs to clear air cargo* in airports, that erode the advantage of the air mode; quality and costs problems in the ground handling of their cargo; and access problems to airport runways at cargo-relevant periods of the day - notably because of airport curfews and noise restrictions. Of course, the industry will have to work within the limitations of available infrastructure and access provisions, independent of any liberalisation in air cargo services, but could avoid many of the other problems if governments agree to reform air cargo regulatory arrangements.

3. The three international air cargo workshops organised by the OECD Secretariat confirmed there is growing concern about existing restrictions. They provided support for work to facilitate further consideration of air cargo liberalisation, under the aegis of the OECD. The work undertaken by the OECD in conjunction with other interested parties, which is now reflected in this documentation, has focussed on principles for the liberalisation of air cargo services, as well as policy and implementation options for governments wishing to implement such principles in their liberalisation initiatives.

4. Part I of this document provides an overview and identifies and discusses a number of principles central to promoting liberalisation in air cargo services. These principles are arranged in three clusters *(i)* liberalisation of market entry; *(ii)* provision of ancillary services; and *(iii)* trade facilitation.

5. Part II targets practical approaches to implementing liberalised market access arrangements which is a key area requiring regulatory reform. The existing arrangements generally have restrictive market access provisions and often apply different regulatory treatment to the different categories of air carriers: scheduled, non-scheduled and charter operations. This Part puts the principles of market access into effect with practical measures that Member countries can take by way of grants of rights to designated air carriers for air cargo transportation, with consistent treatment of scheduled, non-scheduled or charter services. Options include grants on a bilateral or multilateral basis of international fifth and seventh freedom rights, as well as the longer term prospect of grants of rights for the operation of domestic air cargo services to designated air carriers from other contracting parties. This Part also discusses other desirable liberalisation changes, encompassing matters such as ownership and control and addressing the aviation safety and security requirements that would need to apply and ensuring adequate public interest regulatory controls, under liberalised market access arrangements.

6. Part III focuses on the liberalisation of traffic rights for air cargo services, ancillary services and other specific air cargo transportation issues that can be dealt with separately under existing bilateral air service agreements. It provides, in the form of a protocol to existing bilateral air service agreements, revised approaches to a number of the cargo-specific regulatory barriers that air carriers are currently facing. These include: additional market access by way of traffic rights for international air cargo transport services; maximum scope to diversify into related business activities, the ability to use surface transportation when necessary to provide the most efficient service to customers; and maximum choice in the arrangement of ground handling services, including self-handling. Because air carriers also need great flexibility in their operations to be able to respond to rapid changes in demand, and because the increasingly prevalent wet leasing of aircraft is often treated as a form of charter service, the arrangements are designed to also furnish carriers with maximum operational flexibility. Furthermore, the provisions include undertaking to implement the best customs practices as recommended by the World Custom Organization and other international bodies. The prominent place in world trade and commerce enjoyed today by large, integrated providers of time-sensitive air cargo transportation – transcending the provision of conventional transport and becoming comprehensive providers of logistical services – has resulted in much greater pressure on customs organisations to find additional efficiencies. While these customs provisions are an essential element of Part III and Part IV in this document they may also serve, in their own right, as valuable contributions to discussions on trade facilitation taking place in other organisations and in other strategic contexts.

7. Part IV goes one significant step further and proposes, in the form of a multilateral agreement, a complete set of articles that would facilitate early liberalisation of air cargo services, without compromising in any way essential safety and security aspects of civil aviation. The Agreement would provide the means for effective liberalisation of existing market access restrictions on international air cargo services, and do so on a multilateral basis. Many of the additional provisions set forth in the Multilateral Agreement in this Part of the document are not unfamiliar. They are modelled on provisions and language found in existing liberal bilateral agreements, including so-called “open skies” agreements. Those provisions, deregulating pricing and capacity decisions, facilitating multiple designations, calling for fair competition, and ensuring application of laws for transparency in the levying of user charges, etc., have been in existence for some years now. Unlike traditional air service agreements, the proposed arrangements in Part IV make no distinction between the scheduled, non-scheduled and charter air cargo services that air carriers may wish to provide. Of these largely “aeropolitical” provisions, the ones relating to market access are quite liberal, while the ones concerning aviation safety and security are of crucial importance as any liberalisation of air cargo services must not be at the expense of safety and security. In this regard, there is widespread agreement that the emergence of any kind of “flags of convenience” has to be avoided.

8. During the period Member countries contributed to this OECD work on liberalisation of air cargo regulatory arrangements, there was an increasing focus on the existing economic restrictions on international air transport generally (passenger as well as cargo transportation). There has been considerable interest in the multilateral approach to passenger and cargo liberalisation developed by a small group of like-minded APEC economies and released by the five governments involved in November 2000. There is similarly interest in the prospect of the Transatlantic Common Aviation Area between the United States and the European Union being open also to other states. Nevertheless, given their geographical focus, these initiatives alone will not resolve current concerns with air cargo restrictions.

9. The importance of the initiatives outlined in this document is that they can be taken not only on a bilateral basis or regional basis but also on a widespread multilateral basis to improve air cargo services and allow the early delivery of benefits to national economies generally and to users in all Member countries and other Contracting Parties.

# PART I

# LIBERALISATION OF AIR CARGO SERVICES: OVERVIEW

## A SCOPE OF THE WORK

1. ICAO's World Wide Air Transport Conference on International Air Transport Regulation, held in 1994, recognised the importance of national 'participation' in international air transport and that any regulatory changes should be evolutionary. The Conference concluded that, pursuant to the principle of sovereignty, each State would determine its own path and pace of change in international air transport regulation, on the basis of equality of opportunity and using bilateral, sub-regional, regional and/or global avenues according to circumstances.

2. In any process of regulatory reform, it is important to establish the scope of the work to be undertaken. In terms of scope, it would be desirable to be able to reform and liberalise international air transport generally, and it would therefore be desirable for the work to cover both air passenger and air cargo transport services. However, given the level of sensitivity to changes in the regulatory framework for international air transport, especially international air passenger transport, the OECD Secretariat decided to promote liberalisation by focussing its attention first on one distinct segment of the air transport market - the air cargo market. The intention in doing so is to facilitate reform of air cargo transport first and to then focus on air passenger transport, with the benefit of experience with the former. Otherwise important air cargo reforms would be delayed until air passenger transport itself can be reformed.

3. Within the air cargo transport sector, it would also be desirable for the regulatory reforms to cover all forms of air cargo services. However, while all the reforms considered can be applied to all-cargo services and many can be applied to combination services (*i.e.* carrying passengers and freight), some reforms cannot be applied to combination services without modifying the regulatory environment for air passenger services. While there was some industry support for limiting the scope of the reforms to all-cargo services, there was wider support for applying the reforms where possible to 'air cargo services' generally. The Secretariat adopted this more ambitious approach in developing the regulatory reforms outlined.

4. Of course, all reform which is aimed at improving efficiency may affect to some extent the balance between equity and efficiency outcomes in regulatory arrangements. Experience suggests there will be differing views around the globe about the relative weight to be attached to efficiency and to equity objectives and therefore differences in what will be considered an appropriate balance between the two. In undertaking the work, an effort has been made to ensure the arrangements proposed are transparent not only in terms of their scope but also in terms of the trade-offs to be made.

5. Liberalisation of air cargo services requires reform by governments of a number of inter-related regulatory arrangements and economic restrictions. Deregulation and multiple designation in many aviation markets have shifted the focus from "command and control" economic regulation to competitive entry and pro-competition regulatory approaches. However, the air cargo industry, like the aviation industry generally, is still subject to a greater range of regulatory restrictions than most other industries

operating in international environments. There is tension between remaining elements of traditional economic regulatory arrangements - on the one hand - and the needs of users and the industry for more flexible air cargo services - on the other. Without regulatory reform, air carriers will be unable to provide the air cargo transportation services needed to efficiently meet air cargo user demand. While different reforms have been adopted in many Member countries, not all such reforms have been adopted in all Member countries. This Part sets out the rationale and essential principles for the regulatory reform that is required.

## B. LIBERALISATION OF MARKET ACCESS

6. Currently, the air transport provision of air cargo services is governed predominantly by the sets of bilateral aviation agreements prevailing in all countries. These aviation agreements are often very restrictive, limiting the ability of air carriers to respond to market developments and their ability to exploit the regional and global market potential that would otherwise be available. The present system of bilateral agreements does not comply with two basic principles of the international trade system, namely transparency and non-discrimination. Many bilateral agreements impose nationality restrictions on the air carriers which can provide services and also limit the number of scheduled air carriers that can operate between the two countries concerned. Under the existing extensive web of bilateral agreements, air cargo operators cannot plan international route structures and develop services in full competition with each other (see 1999 OECD Study paragraphs 169-197). The market access liberalisation which would enable them to do so would involve regulatory reform to ease current international and domestic restrictions on air traffic rights, rights of establishment, operational flexibility and pricing freedom.

### 1. International Air Traffic Rights

7. From a strictly economic “ideal” viewpoint, all categories of air carriers should be allowed to make use of the full range of traffic rights for international air cargo transportation and have access to the same opportunities for unimpeded route design and network operations. Open market access and a level playing field for all categories of designated air cargo operators would allow them to respond better to the needs of the market. To be effective, the changes in traffic rights involved would require the agreement of all the governments of the territories in which there is sufficient air cargo demand and to which air cargo carriers therefore wish to operate services. However, it has to be recalled that about 50% of the overall amount of cargo is moved by air in “belly hold” or “combi” operations undertaken pursuant to rights to carry cargo set forth in a world wide web of bilateral air service agreements developed principally for passenger transportation. Rather than continuing to restrict air cargo movement by air carriers and passenger and cargo movements by the designated airlines to the existing bilaterally agreed sets of traffic rights, the ultimate goal of market access liberalisation for air cargo transportation should be the removal of all remaining economic barriers so that air carriers are able to carry out transportation operations principally on the basis of user requirements and commercial considerations.

8. Given the diversity and complexity of bilateral air service agreements, however, it does not seem politically feasible at this stage to radically alter all the existing bilateral air services agreements which govern passenger transportation and provide the legal basis for “belly hold” and/or “combi cargo operations”. An alternative approach, discussed at the ICAO World-wide Air Transport Conference in 1994, would be for States to liberalise their grants of market access progressively; they could enter into agreements which liberalise blocks of market access, such as the all-cargo services segment of the air cargo market. Working within the existing system, the most important practical step in reforming access to the air cargo market would be the granting of additional rights for international air cargo services. This could be done multilaterally, or by amending bilateral agreements selectively, to provide more liberal market

access for designated all-cargo air carriers as well as for air cargo transportation on combination (passenger and cargo) services. Such market access would need to be equally available to all such designated air carriers that meet regulatory requirements.

9. The inclination of some carriers and their governments to regard their competitive position as an indivisible combination of passenger and cargo operations may constitute a continuing barrier in pursuing the changes required. Such thinking could reflect a concern that treating cargo separately could risk losing leverage in passenger negotiations, especially where the carrier does not operate all-cargo services. However, in pursuing the reforms required, governments need to weigh such views against the general economic benefits that can be expected from market access liberalisation and the benefits to air cargo users in particular from the development of pro-competitive regulatory regimes.

10. In pursuing liberalisation of market access for the conduct of air cargo transportation, governments will need to consider the extent to which air cargo services should have access to 5$^{th}$ freedom and 7$^{th}$ freedom traffic rights (carry freight between two countries on a route with origin/destination in its home country; carry freight between two countries by an airline of a third country on a route with no connection with its home country). In a multilateral context, decisions will also be required on whether "beyond" rights are provided that are essentially internal to the Contracting Parties or whether they encompass "external" rights to third countries not party to the Agreement. For "beyond" rights to be effective, in either a bilateral or multilateral context, mirroring rights would need to be provided by "beyond" countries. Awarding 5$^{th}$ and 7$^{th}$ freedom traffic rights would add flexibility to the planning of air cargo services, and would take better into account the fact that air cargo traffic flows are often one way movements. As well, such rights would allow air cargo operators to organise the most direct and efficient services possible, rather than being constrained to routes established principally for passenger services. Triangular operations and better return traffic possibilities would address the "back-haul" issue and enhance the economic and commercial efficiency achieved in air cargo transportation and allow improved services to users.

*Provisions relating to market access are considered in Part II - Liberalisation of Market Access.*

## 2. Domestic Air Traffic Rights

11. Traditionally, Member countries have been very reluctant to grant carriers of other contracting parties access rights to their domestic aviation markets. Arguments offered in support of such a policy position have included: protection of domestic cargo operators (and their workforces); foreign investment policy / restrictions; defence considerations; in some cases, aviation safety and aviation security issues; and a lack of reciprocity or comparable trading benefits in the case of parties without substantial domestic air transportation markets.

12. Market access for air carriers would be greatly increased if a number of countries adopted such an approach, and more widely dispersed freight markets would become available to carriers whose home countries are involved. Importantly, these expanded opportunities would be available to all such designated air carriers, including those who had previously operated only in regional and domestic air cargo markets. If underlining concerns can be addressed, regulatory reform that progressively grants the full range of traffic rights, including cabotage, for air cargo transport, can be expected to lead to air cargo operations that are competitively supplied, freely networked, and cost-efficient. Benefits to users could be expected to be considerable. At least in the short term, however, there may be greater prospects in some countries of improving access to domestic markets by way of liberalisation of inward investment rules.

13. Overall, it is recognised that the objective of full international and domestic traffic rights liberalisation is unlikely to be achieved immediately or in the short term. The most pragmatic approach in the interim may be for governments to adopt a policy of gradual implementation of liberalised access arrangements. Desirably, these arrangements should have a high degree of flexibility and an agreed timeframe for the transition period until the full range of traffic rights can be made available to air cargo carriers.

14. As a final point on market access, some potential contracting parties have already negotiated bilateral agreements between them which are more liberal in some respects than the models contained in Parts III and IV of this document (or indeed any model that would be likely to obtain widespread support). It is therefore important that the multilateral agreement contains an article whereby accession to the agreement does not represent a backward move for any Contracting Party.

### 3. Right of Establishment

15. Traditional bilateral air service agreements require that the air carriers designated by a contracting party be 'substantially owned and effectively controlled' by nationals of that contracting party.[2] Governments have adopted such an approach for a number of policy and regulatory reasons. Traditionally, these have included the perceived national, economic and security benefits of national ownership and control of their designated air carriers. 'Ownership and control' provisions have been seen as a way of assuring national participation in international air transportation.

16. However, the airline crisis following the events of 11 September 2001 and the nature of airline strategic responses highlighted shortcomings in regulatory ownership controls. The restrictive controls on 'substantial ownership and effective control' interfered with the ability of some airlines to deal with the crisis and raise equity funding (e.g. for capital expenditure). With restrictions on inward investment, a number of national carriers struggled to survive. When subject to regulatory controls on ownership, failing airlines are not easily saved - except by their governments - but under competition policy regimes, governments are prevented from offering 'State aid'. By risking airline failures, the regulatory arrangements also increase risks for related industries such as travel and tourism and national economies generally. When failures of some national carriers have occurred, ownership restrictions have presented a barrier to the entry of foreign airlines wishing to operate replacement services.

17. While these difficulties were particularly acute during the airline crisis, national controls on ownership impede the flow of inward investment to contracting states under any circumstances and thus can inhibit the development of their air cargo industries – precisely the opposite of the results that air cargo liberalisation aims to encourage. In 1994, at the ICAO World Wide Air Transport Conference, the ICAO Secretariat proposed broadened criteria for air carrier use of market access, to allow foreign investment and managerial expertise to strengthen the commercial operations of privately owned carriers. The Secretariat noted additional encouragement for inward investment could be achieved by creating a right of establishment of air carriers in that State by foreign nationals.

18. For international air cargo services to become more efficient, restrictions on inward investment and access to capital for air cargo operators should be removed. The changes would be most effective if air carriers were able to determine their ownership and control structures freely, based on their capital and

2 This principle, inter alia, was adopted by the EU in its regulation of 1 January 1993, and was optionally suggested by ICAO in 1994. See ICAO, Report of the WorldWide Air Transport Conference on International Air Transport Regulation: Present and Future, Doc 9644, AT Conf/4 (1994) (hereafter "ICAO WWATC Report"), pp. 21-25).

strategic business needs. This aim could be achieved by departing entirely from the ownership and control requirement and relying on alternative provisions to ensure the integrity of regulatory oversight arrangements is maintained, in the following manner; *first*, a designated air carrier has to be incorporated and is required to have its "principal place of business" in the territory of the Contracting Party that designates it; and *second*, it is required that the designated air carrier be appropriately licensed by the Contracting Party that designates it, and that the designating Party is maintaining and administering adequate safety and security standards.

19. There is widespread support for the view that the requirement that each designated air carrier be licensed by the Contracting Party that designates it means that changes in the ownership and control provisions cannot lead to a "flag-of-convenience" syndrome. This establishes an important protection against abuse of liberalised aviation market rules. An additional safeguard that could be considered to prevent "flags of convenience" would be to retain an 'effective control' provision.

20. The issue of "free-riding" by carriers whose governments have not accepted the market-opening obligations assumed by the Contracting States may be a concern (see ICAO WWATC Report at pp. 24-25). The fear is that air carriers from non-signatory States would merely establish new headquarters in the territory of a Contracting Party and thus enjoy the benefits of the Agreement "free of charge." One response is that such relocation is a non-trivial step for any air carrier to take, and seems relatively unlikely until the Agreement has attracted a large number of Contracting States. Another is that such a carrier might well put at risk its rights in third countries by so doing.

21. An alternative approach, which may provide the assurance required, would be to include anti-"free –rider" provisions in liberalised agreements. By requiring an airline to have its principal place of business in the designating Party, and addressing 'FOC' and 'free rider' concerns directly, this alternative approach would allow the development of industry structures better suited to market requirements, with some in-built protections against air carriers re-locating to other States for fiscal, safety or social/employment reasons.

*Provisions that address these matters are considered in Part II – Liberalisation of Market Access; B. Designation/Authorisation.*

## 4. Operational Flexibility and Pricing Freedom

22. Air cargo carriers and, where consistent with existing bilateral air service agreements, combination carriers should enjoy full operational flexibility in undertaking air cargo transportation, in order to exploit business opportunities and to enhance competition among air transportation providers in air cargo markets.

23. Existing restrictions on their operational flexibility in respect of air cargo services should be lifted as regards: *i)* operations – operation of flights in either or both directions; combination of different flight numbers within one aircraft operation; omittance of stops at any point or points – *ii)* frequency, type of aircraft and capacity to be used in conducting transportation services; and *iii)* the change of aircraft on any flight as well as *iv)* commercial agreements with other carriers including but not limited to blocked space agreements, codesharing and interline agreements. The provisions adopted should also allow combination on the same aircraft of air cargo originating in one Party's territory, air cargo originating in another Party's territory, and air cargo originating in countries not party to the Agreement.

24. Most current bilaterals retain pricing provisions. Leaving pricing to be set by the marketplace without any governmental intervention would certainly be the preferable economic solution; in fact air carriers are already free to set cargo charges in many countries and in such cases the real world is ahead of

current traffic laws and regulations. Given the long history of direct and indirect governmental involvement in pricing for air transportation, a widespread agreement to exclude such requirements may prove difficult to obtain. Nevertheless, liberalised agreements should not contain requirements for filing and approval of prices. Interventions by contracting parties should concern solely the transparent and non-discriminatory application of national competition law. Advance filing of tariff changes can become a mechanism of anti-competitive co-ordination or even cartelisation, as has, for example, occurred in US passenger air transport. Importantly, requiring advance filing could have the unwelcome consequence of immunising such conduct from prosecution under competition law. For these reasons, contracting parties should not require advance filing of tariffs for approval but may require notification to their aeronautical authorities for information purposes for so long as the laws of the Contracting Party require, for reasons of transparency and anti-competitive monitoring.

## 5. Leasing/Safety

25. It is well recognised that the leasing of aircraft is an important and common practice in the airline industry. Current leasing practice enhances the flexibility of the air transport industry, for instance by facilitating the development of cargo operations with limited capital. Leasing bridges temporary shortages of capacity and can reduce cost and debt levels. It can therefore contribute to the strengthening of competition because it allows smaller air cargo carriers to enter a market, which would have not been feasible financially without a leased aircraft. However, the operational control of leasing differs from charter arrangements where operational control of the aircraft and crew remains with the owner of the aircraft.

26. Despite some shared principles regarding the regulation of leasing, a common approach on how to deal with the approval of aircraft leasing has not yet emerged. The regulatory framework can be a source of significant uncertainty because regulations differ from country to country. For regulatory purposes it has been important to distinguish between “dry leasing” where the lease involves only the aircraft, and “wet leasing” where the aircraft, together with the crew, will be leased.

27. “Dry leasing” does not usually give rise to safety or regulatory concerns when the leased aircraft is registered in the State designating the air carrier; or when all [or part] of the safety regulatory functions and duties of the State of registry are transferred to the State of the operator, in accordance with Article 83 *bis* of the Chicago Convention. Article 83 *bis* of the Convention is regarded as useful particularly for dry-leases as it helps strengthen and maintain a desirable safety oversight structure.

28. On the other hand, “wet leasing” can raise important safety issues if the state of the lessor is not adequately observing ICAO safety provisions. Likewise, "wet leasing" can have a social dimension from the viewpoint of the authorities of the lessee seeking to wet-lease aircraft “in” to its operations if those operations displace local labour. These issues require some detailed consideration. In circumstances where safety regulatory functions and duties of the State of registry are not transferred to the State of the operator/lessee, safety issues may come up when the aircraft is registered in a State that fails to monitor its registered aircraft for safety compliance purposes. Care should be had that if an aircraft is temporarily absent from the State of registry, that State either continues to be responsible for safety compliance or transfers safety compliance functions of the State of registry to the state of the operator/lessee. In relation to personnel, wet-leased aircraft generally come with crew from a foreign country who may be licensed by third party aviation authorities (*i.e.* in the State of registry of the aircraft), while the wet-leased aircraft is operated elsewhere, in accordance with the traffic rights of the lessee. Concerns in certain countries arise from the perception that air carriers providing the “wet leased” aircraft appear to be benefitting from long term traffic rights to which they may not be entitled in their own right. Concerns have also been voiced about the impact of “wet leasing” on the labour market and some flight crews oppose this, as they fear that

core labour standards could be lowered and/or their jobs put at risk. On the other hand, wet leasing of this type can serve a useful purpose in helping an airline to determine whether to make a long term investment for new aircraft. Such concerns should be addressed in terms of labour and competition policy rather than on safety regulatory grounds. Worries about these aspects of leasing practices can be adequately addressed by ensuring that safety and labour standards are clearly implemented and strictly met, with no ambiguity about responsibility for their enforcement.

29. A further concern is the different treatment accorded by authorities in some cases between wet-leasing "out" and wet-leasing "in". A country may take the view that wet-leasing "in" is not acceptable in terms of the range of possible regulatory and social concerns and therefore prevent its own national carriers from wet-leasing "in" foreign aircraft and crew. However, the country concerned may still allow wet-leasing "out" of aircraft and crew by its carriers to foreign operators. Such approaches can lead to quite discriminatory outcomes as is the case when foreign air carriers are allowed to use wet-leased aircraft to operate international services to and from the country but the national carriers are prevented from doing the same. As well, such arrangements can discriminate between leasing companies according to nationality, allowing leasing "out" by its own air carriers and leasing businesses but preventing leasing "out" by air carriers and leasing businesses of another country to its own air carriers. Different attitudes towards the above range of issues have led regulators worldwide to impose widely different conditions and limitations on the use of leased aircraft.

30. The air cargo industry seeks greater standardisation and more flexibility—for wet leases in particular. The establishment of simple, agreed standards is needed.

31. In order to achieve a level playing field for all air carriers on an international scale, air cargo carriers should be authorised to contract freely for leasing operations with domestic/local carriers abroad. To achieve this, the legitimate need of Contracting States to be assured of the operational integrity of both dry leased and wet leased aircraft registered in other countries has to be clearly recognised. While recognising that not all significant participants in the international air transport sector are signatories to the Chicago Convention (e.g., Chinese Taipei), it is imperative that an aircraft leased to designated air carriers of a Contracting State meet standards at least *equivalent* to those promulgated by ICAO.

32. Since combination carriers can choose to operate services subject to air traffic rights, privileges and restrictions not applicable to all-cargo operators, or alternatively to operate all-cargo services under the same conditions as all-cargo carriers, they could also benefit from removal of current leasing restrictions.

## C. LIBERALISATION OF ANCILLARY SERVICES

33. Apart from market access issues, air carriers are hampered by the regulatory environment applied to ancillary services; i.e. services considerably influencing the efficiency of the seamless door-to-door services offered by air carriers. Ancillary services cover, for example, intermodal transportation, groundhandling, and forwarding as well as other issues related to air cargo business. From a regulatory point of view, the full range or selected ancillary services can be considered in conjunction with market access issues or can be dealt with on a stand-alone basis.

34. A framework with transparent, non-discriminatory rules on ancillary services seems to be necessary to achieve a balanced, more efficient, broader and more innovative choice of the provision of air cargo services which in turn will benefit industry, shippers and consumers on a global scale.

## 1. Intermodal Transport

35. Today, virtually all sectors rely on intermodal transport services. Air cargo in particular depends to a large extent on other modes of transport since goods are transported from the producers/shippers to airports via surface transport, by air from airport-to-airport and are then channelled via different modes of transport to their final destination. In addition, air cargo often is carried partly by other modes due to geographical reasons or to accommodate distribution networks. Air cargo transport serves as one link in the logistical chain to ensure all user requirements are met, including for services such as time critical deliveries and door-to-door integrated services, which are in high demand by shippers. The operation of intermodal transport services is therefore an important feature of the air cargo industry.

36. Despite its importance to the industry, the intermodal nature of air cargo services is often insufficiently recognised by the regulatory bodies. A more consistent regulatory approach to intermodal issues would allow the present level of uncertainties and multiplicity of regulatory requirements to be reduced and achieve more coherence as well as predictability for air carriers.

37. There is little doubt that industry performance would be improved if modal boundaries – such as those imposed on air carriers - could be completely removed. By creating an air cargo policy framework that comprises liberalised intermodal services, OECD economies could better facilitate the efficient, timely and safe movement and delivery of goods. The interlocking of modes of transport would allow a better response to the changes in the global economy and industry's needs for seamless logistics, in particular in light of the growing e-commerce business. While the desirability of regulatory harmonisation unquestionably remains a long term goal, there would seem to be little prospect of being able to use this work on air cargo liberalisation to achieve such sweeping reform of modal and industry differences.

## 2. Ground handling

38. Ground handling services play a decisive role in the processing of air cargo. Ground handling services comprise *inter alia* ramp-handling, surface transportation, parcel dispatching and storage. These services have a direct impact on handling times, cost and reliability of air cargo deliveries. For these reasons, air carriers regard ground handling as one of the key factors in the efficiency of their operations and in their achieving comparative advantage over other modes of transport.

39. In many instances, current impediments to ground handling services are a serious obstacle for the air transport sector, and for air cargo operators in particular, that can erode the competitive advantage of air transport. Often, restrictions on self-handling, together with a legislated operator monopoly, cause undue handling charges and low quality of handling services.

40. The existing differences in cost and quality of ground handling services are mirrored through varying regulatory frameworks. While some bilateral agreements already contain liberal standard ground handling clauses, a whole range of countries imposes restrictions on ground handling. Whereas in certain countries airport ground handling services are supplied by a monopolist, others have opted for competitive providers and some allow air carriers to perform their own ground handling services and offer this service to other air carriers.

41. Ground handling operations at airports should be available to all air carriers on an efficient, transparent, and non-discriminatory basis. Subject to airport operational limitations, air carriers should be able to choose freely between providing their own ground handling, performing ground handling for other air carriers or together with other air carriers, or selecting among competing ground handling service providers. Restrictions should only be permitted for reasons of security or infrastructure constraints arising

from considerations of airport safety and any restrictions which can not be avoided should be applied on a non-discriminatory basis.

42. By introducing self-handling and/or competition among service providers, the swiftness of ground handling operations will be enhanced, and will have a positive influence on cost and quality of air cargo services.

### 3. Diversification into other services

43. Any regulatory reform in the sector should take into account the importance of establishing a regime which enables all air carriers to respond adequately to the needs of the market. It is important for air carriers to be able to guarantee the quality and manage the competitiveness of the services provided to users. It is therefore important to give air carriers the opportunity to participate in or provide a wide range of services related to their air cargo business - such as freight forwarding, express services and other related activities. Such participation and diversification will allow new forms of global cargo networks to be developed and new innovative services to be offered in accordance with business needs and technological strategies.

44. The objective should be to ensure that all air carriers have the opportunity to compete on a fair and equal basis, not only in the air cargo services they provide, but also in any ancillary services into which they may wish to diversify. In some countries, depending on the nature of their competition legislation, there may be a need for careful action to ensure air carriers and other service providers do not suffer from any abuse of market power.

## D. TRADE FACILITATION

### Customs

45. Industry experts have noted that in many countries Customs clearance procedures account for as much as 20% of average transport time and 25% of average transport costs of imports. While expedited Customs clearance is a crucial issue for the express delivery services industry, reductions in the time and cost of Customs clearance will benefit all air carriers.

46. Given increased security concerns since 11 September 2002, tighter controls may be applied to air cargo, lengthening clearance times. However, it has been argued that the sophisticated and automated clearance procedures included in the draft Agreement can actually improve security. Inspection authorities' and air cargo service providers' interests, therefore, should be mutually supportive, and timely and effective communication between them is crucial.

47. The prominent place in world trade and commerce enjoyed today by time-sensitive air cargo transportation – transcending the provision of conventional transport and becoming comprehensive providers of logistical services – has resulted in much greater pressure on customs organisations to find additional efficiencies. A set of Principles designed to assist the liberalisation of air cargo services would therefore be incomplete without concern for the freedom with which their cargoes can move about, within the global trading system. All commercial consignments crossing national frontiers are subject to the combined requirements of national regulatory regimes. These often draw their force and form from international conventions and other instruments.

48. The main constituent of these regulatory interventions is a set of Customs controls, mainly directed to raise duties and taxes, enforce trade policy, interdict illicit drugs and collect statistical information. It has been thought necessary and useful, therefore, to include in the documentation a set of Articles setting out certain basic elements of simplification of Customs procedures especially important to the aviation industry which must offset relatively high freight charges by providing origin-destination delivery timings which fully reflect the key advantage of rapid air movement.

49. The draft provisions contained in Parts III and IV are based on relevant provisions of Annex 9 of the ICAO Chicago Convention, as recently amended to take account of the revised WCO Kyoto Convention. They also reflect certain principles of the existing WCO Immediate Release Guidelines.

50. These proposals are restricted to a relatively small number of standards, mainly concerned with those procedures applied by Customs during the relatively short time during which they have physical control of the goods and aircraft. In a modern Customs service such release formalities are separated from the complications of fiscal requirements, which are increasingly handled, at a later stage, by post entry data submissions, from approved company computerised systems.

51. Some account is taken, however, of the extra facilitation that may result for the air carrier if his customer is already entitled to premium Customs procedures, by reason of high-quality compliance records or other stipulated qualification. The primary requirement is rapid, preferably immediate release of goods on arrival. This has to take account of key Customs responsibilities. Provisions therefore call for appropriate, in practice, automated, risk-management by Customs and high-quality information and operational reliability from carrier and customer. At the same time it is possible to reduce Customs intervention to a bare minimum for low-value consignments which may yield revenue which is less than, or only about equal to, costs of collection.

52. An additional objective is the convergence of official controls. All administrative interventions can be made at the same time and place, ideally by a single agency, preferably Customs.

53. Aircraft, themselves, encounter few Customs problems, but there are frequent difficulties in securing expeditious and trouble free delivery of spare parts. The EU Commission has identified the use of commercial certificates as a sound basis for Customs control. Substantial quantities of air freight depart and arrive outside normal business hours. It is essential that Customs attendance be available on fair and equitable terms.

54. Finally, in many countries Customs processes are not fully efficient. In a number of countries, inefficiencies are compounded by variable standards of professional integrity. There is an important primary need for a clear, freely available statement of procedural requirements, with associated provisions for an independent appeal tribunal. Technical assistance in the development of such transparent and consistent processes could make a useful contribution to achieving higher standards of integrity and efficiency in Customs processes.

55. The suggested procedural reforms, including risk-assessment, convergence of official controls and pre-arrival notice of intention to release, entail certain “documentary” improvements, interpreting “documentation” as any accepted means of conveying a piece of information or set of data. It should be noted that neither the Chicago nor the Kyoto Conventions define the term “document”.

56. It is essential to bear in mind that:

- Virtually all Customs and other official control authorities still demand certain conventional forms. Many developing countries remain highly dependent on prolix paper documentation.

- While advanced countries may have transferred most Customs entries to electronic media, all sustain a possible requirement for supporting conventional documents, such as an invoice or certificate of origin. A new approach to the rapid clearance of urgently required spare parts is particularly desirable.

- Acute documentary problems, in international trade and transport, can always be traced to procedural causes.

57. The procedural reforms suggested as interim until the coming into force of the revised WCO Kyoto Convention entail substantial "documentary" changes. Given the rapid growth of e-commerce, the pace of innovation in information technology and the need for the air transport industry to respond to such developments, there will be a continuing future need for additional, regular adjustment.

# PART II

# LIBERALISATION OF MARKET ACCESS

## INTRODUCTION

1. Increased market access lies at the heart of air cargo liberalisation and the actions needed to improve the efficiency of international air cargo operations. At the 1994 ICAO Worldwide Air Transport Conference, there was general recognition that market access was the most important element in the regulatory framework of international air transport[3]. Since the 1994 Conference, it has generally been accepted that there is more support for air cargo market access being liberalised through initiatives specific to the air cargo sector – rather than as part of general air services liberalisation. At the same time, there has been recognition that future market access arrangements should be part of a package of arrangements that takes into account the need to promote safe and efficient air carrier operations, the economic and social policies of the States concerned and the interests of all stakeholders in air transport, including users, airports, distribution intermediaries and labour.

2. The OECD Report on Regulatory Reform in Air Cargo Transportation [DSTI/DOT(2000)1] provided an outline of the broad objectives and possible approaches to increasing market access within the air cargo sector. The OECD Secretariat's current work has focussed on the liberalisation of air cargo services operated by designated air carriers and combination airlines, whether scheduled, non-scheduled or charter.

3. As noted in the Overview, the ultimate goal of air cargo market access liberalisation should be the removal of all remaining economic barriers so that air carriers are able to carry out air cargo transportation operations principally on the basis of user requirements and commercial considerations, within the established framework of safety, security and environmental regulation.

4. This Part of the documentation addresses the following aspects, which need to be considered together, in a package of measures necessary for the liberalisation of market access. One of the principal objectives is to be able to provide assurance that such liberalisation can be achieved without compromising aviation safety or aviation security:

A. Traffic Rights - Competitive Market Entry
B. Designation and Authorisation
C. Operational Flexibility
D. Aviation Safety
E. Aviation Security
F. Airport Access
G. National Participation and Win-Win Safeguards

3 ICAO Report of the World Air Transport Conference: para 2.2.5.1

# A. TRAFFIC RIGHTS - COMPETITIVE MARKET ENTRY

## 1. International and domestic rights

### *International rights*

5. Existing bilateral agreements generally provide third and fourth freedom rights to designated airlines to operate scheduled air cargo and passenger services on routes specified in the agreements. In some cases, they provide fifth freedom rights for all scheduled international air services (passenger, combi and all-cargo) while in some other cases, they provide fifth freedom rights for all-cargo services separately. For liberalisation of scheduled air cargo services, States would need to grant at least *fifth freedom* rights and for effective liberalisation, also grant *seventh freedom* rights. To be even-handed, non-scheduled or charter cargo services should be liberalised on the same terms as scheduled cargo services. This will preserve choice for shippers and avoid distorting the competitive environment in which charter operations have proven well-suited to serving several market "niches."

6. Many countries have indicated a willingness to negotiate fifth freedom rights for air cargo services. Some look for a balanced exchange of opportunities and tend to limit situations where foreign airlines could be given more opportunities from the country's home market to third countries than the country's own operators have for third and fourth freedom traffic to the third countries concerned. However, there would appear to be widespread support for the inclusion of 5$^{th}$ freedom operations in bilateral or multilateral liberalisation approaches.

7. To date, a lesser number of countries have been prepared to negotiate 7$^{th}$ freedom traffic rights. Reasons have included an unwillingness to allow foreign airlines to access the same markets as their own carriers, while being exempted from the associated social and financial requirements with which their established airlines must comply. Some believe that it would not be possible to include 7$^{th}$ freedom rights in general liberalisation measures. However, many of the issues raised are not confined to the aviation sector and have been addressed as liberalisation has progressed in other sectors. Overall, there would appear to be increasing support for the inclusion of 7$^{th}$ freedom services, possibly with some qualifications, in bilateral and multilateral air cargo liberalisation.

8. In taking decisions on such rights, consideration needs to be given to whether to include grants of rights for both internal and external fifth and seventh freedoms. Experience with bilateral and multilateral negotiations suggests that it would be extremely difficult to assess the "balance" between Contracting Parties' market access opportunities across the spectrum of third-country markets, in part because the availability of reciprocal access in third countries is not static. A number of countries would now support inclusion of *full* 5$^{th}$ and 7$^{th}$ freedom air cargo traffic rights in bilateral as well as multilateral instruments, even where third countries have not offered reciprocal rights. Of course, this may involve rights between participating States and third countries that may be difficult to use – because the third countries are not party to the Agreement. However, for the benefit of the industry, the best thing to do would be to include them in the Agreement and seek mirroring rights, to be provided by "beyond" countries, in negotiations with those countries. This would seem to be especially the right answer for air cargo transport.

### *Domestic rights*

9. Many countries have always restricted international carrier access to their domestic aviation markets. Reasons for such restrictions were canvassed in the OECD's document on Regulatory Reform in Air Cargo Transportation [DSTI/DOT(99)1]. One important consequence for air cargo transportation is

that such restrictions can limit the range of cargo services available to air freight users. Domestic access restrictions are likely to result in higher freight handling costs and time, in circumstances where the cargo could otherwise be carried direct or more efficiently on the services of international air cargo operators.

10. A general opening of domestic air cargo markets, especially in geographically large markets and those where inadequate surface transport necessitates more reliance on air transport, could be expected to result in improved services to international and domestic users and increased opportunities for international and domestic air cargo operators. Benefits to users would flow from the greater competition under less regulated and more competitive aviation environments. Increased opportunities to air cargo operators could be expected based on lower costs and improved services to users, which are likely to lead to increases in air cargo demand.

11. It is recognised that, in most domestic markets, significant changes in market structure will only occur over time. Concerns expressed about domestic access include that foreign air carriers granted cabotage rights might avoid some of the obligations placed on their domestic competitors, such as a flag carrier's national security role. As a result, some countries are likely to have difficulties with grants of cabotage traffic rights under any circumstances, but particularly in the context of the current international practice regarding ownership and control restrictions. Nevertheless, some changes may be possible - for example, in the context of a liberalised market with a level playing field on security, economic and competition conditions. In such circumstances, the members of the European Community granted each other cabotage rights as part of their single market integration. However, under prevailing circumstances, access to currently protected domestic air cargo markets seems unlikely to be achieved by unilateral action or bilateral negotiations.

12. In the short term, there may be greater prospects in some economies of improving access to domestic markets by way of liberalisation of inward investment rules. Countries that have difficulties in dealing with the grant of cabotage rights may contemplate changing foreign investment rules to allow up to 100% foreign investment in their domestic air carriers. Allowing foreign ownership and control of domestic air carriers would enable foreign air carriers to participate in a Contracting Party's domestic air services markets and improve traffic feed to and from their international services without raising concerns in terms of compliance with domestic financial and social obligations. This approach has been adopted by a number of countries and has the potential to avoid many of the domestic concerns set out above.

## 2. Broad approaches to traffic rights liberalisation

13. As noted in the Principles, the bilateral system of air services agreements has generally worked well. Recognising the pre-eminence of bilateral arrangements, consideration could be given to governments re-negotiating all their bilateral agreements to provide the liberalisation of air cargo transportation which is being sought.

14. Realistically, given the diversity and complexity of the wide range of existing bilateral agreements, it does not seem politically feasible to radically alter all of the many existing bilateral air services agreements which govern passenger transportation on a world-wide basis and provide the legal basis for "belly hold" and/or "combi" air cargo operations. However, there are a number of other possible approaches that can be considered to market access/traffic rights liberalisation for air cargo services.

### *2.1 GATS Understanding on Air Transport and Possible "Conditional MFN"*

*15.* One approach would be to bring air transport fully under the realm of the GATS, so that Most Favoured Nation (MFN) and national treatment would progressively apply to all parties regardless of

reciprocity. The simplest, and most orthodox, course would be for World Trade Organisation (WTO) members to agree to bring aviation services, in their totality, under the disciplines of the GATS, and allow each country to enter their commitments and limitations in their national schedules. Given the special position of air transport, some innovative solutions may need to be found, including possible "Conditional MFN".

### *2.2 Selective Amendment of Bilateral Agreements*

16. Another approach would be for governments to amend bilateral agreements in a *selective* way to provide more liberal market access for air cargo carriers to *substantial* and *important* bilateral air cargo markets (e.g. between countries with high or rapidly growing air cargo demand). A similar approach has already been adopted in a number of cases, with bilateral agreements conferring additional traffic rights (such as fifth or seventh freedom rights) for all-cargo services which can substantially improve market access for air cargo carriers. A similar approach could be pursued further in regional air cargo markets on a plurilateral basis if there were a sufficient number of like-minded States with similar interests in liberalisation.

### *2.3 Multilateral Liberalisation of Grants of Rights*

17. Adoption of a *multilateral* agreement applicable only to air cargo transportation and containing provisions for liberal grants of traffic rights would be a further way governments could remove existing economic restrictions on market access for air cargo services. If there were sufficient support from Member States, a multilateral agreement would offer good prospects of achieving overall objectives for liberal grants of traffic rights and addressing current air cargo services concerns.

## 3. Consideration of options for traffic rights liberalisation

18. In considering these three possible broad options/approaches, it is of course recognised that regulatory reform is often a difficult process that raises various concerns. These usually include such aspects as national interests, competition, industry protection, transition costs, social and regulatory impacts and winners and losers which each State will need to assess on their merits. Any proposed reforms need to recognise the considerable investment many States have made in establishing and developing the prevailing regulatory arrangements as well as the attachment many parties will have to the benefits they receive from these existing arrangements. This means any process of reform will need to overcome considerable inertia before agreement is likely to be reached on liberalising the current arrangements. The negotiating process is also a consideration. Adding rights to an existing bilateral agreement is relatively simple, but extending additional rights to encompass a network of bilaterals can become quite complicated, and for that reason, negotiating a specialised multilateral agreement could well be easier in the long run. As GATS rules now stand, to liberalise air cargo significantly through GATS coverage would require the global negotiation and amendment of the GATS itself and would also require securing market access and either national treatment or a common framework of commitments. Liberalisation through GATS would therefore be a most challenging negotiation option.

19. While difficult, there are compelling reasons for pursuing air cargo market reform on a priority basis, as set out in the Overview paper. Liberalisation can be expected to produce net welfare gains for the national economy as a whole. Studies have shown that aviation traffic flows to and through liberalised aviation markets, which therefore can provide increased opportunities for the parties involved. Air cargo users have a strong interest in the potential benefits of removing current constraints. Of course, it may not always be possible to reach agreement to implement a full and comprehensive liberalisation package.

However, experience with regulatory reform lends support to the view that there are generally some positive steps which can be taken. Given the extent and difficulty of the changes required, there is likely to be advantage in interested States pursuing both bilateral and multilateral approaches as the opportunities arise, as indeed several States already have. Given the fundamental significance to international trade and commerce of efficient air cargo services, the measures discussed in this Part deserve special attention for these reasons alone.

20. The next section outlines in more detail the implementation options available to liberalise air cargo market access, taking into account the principles outlined in Part I as guidance for any liberalisation initiatives. Subsequent sections deal with important policy and regulatory matters inter-related with a liberalisation of traffic rights.

### *3.1 Action under the WTO*

*Coverage by the GATS*

21. A radical deviation from the existing regime, governed as it is by a web of bilateral agreements, would be bring air transport fully under the realm of the GATS, so that MFN and national treatment would progressively apply to all parties regardless of reciprocity. At present, the aspects explicitly covered in the Annex are selling and marketing of air services, aircraft maintenance and computer reservation services. The simplest, and most orthodox, course would be for WTO members to agree to bring aviation services, in their totality, under the disciplines of the GATS, and allow each country to enter their commitments and limitations in their national schedules.

22. While at this stage it remains at best unclear what level of liberalisation this would achieve, proponents argue that it would provide greater transparency and legal certainty than the existing bilateral regimes, increase access and non-discriminatory treatment, promote a more predictable business environment allowing for orderly adjustment, and would give the industry the advantages of the WTO's dispute settlement procedure. Opponents assert that the GATS structure, built on widely varying MFN exemptions, market access and national treatment commitments, would provide less transparency and legal certainty than the existing bilateral regime or a multilateral agreement constructed around an expanded liberal bilateral template.

23. Opponents of expanding GATS coverage of aviation services also point out that, if there are unequal commitments to liberalisation, then there will also be concerns that the asymmetric application of MFN treatment might seriously disadvantage the airlines of the countries who do open up their markets. In particular, countries whose level of trade, economic or political development would not allow them to participate as full competitors, may be reluctant to open up their industries to any substantially increased levels of competition.

24. For these reasons, most governments, even those that are willing to liberalise their aviation sectors, have been reluctant to bring air services fully within the ambit of the GATS.

*A GATS Understanding on Air Transport*

25. Another possibility would be to seek a gradual transition, whose aim would be to allow substantial liberalisation between a core group of like-minded WTO Members first, with a view towards the fuller application of GATS at a later stage. As part of this process, it has been proposed to break up the aviation sector into two parts. The first would deal with the so called "hard traffic rights", which

essentially encompasses the seven air transport freedoms that are the principal subject matter of all bilateral agreements. It is here that concerns have been most widely expressed. The second part would comprise all other components of air transport, including for example ownership and control, ground handling services etc. While still important, these activities are not quite so jealously guarded, and could conceivably be subject to GATS disciplines.

26. Under this scenario, it would be possible to deal with the issue of hard traffic rights in a sectoral Understanding, open only to those WTO members who would be willing to open up those rights to others who subscribed to that Understanding. There are already some precedents in the WTO for such an approach, for example in the field of government procurement, and plurilateral (or variable geometry) approaches have been advocated by some WTO members as one possible means of addressing the "new" issues of investment and competition policy.

27. The creation of such an Understanding amongst like-minded WTO Members would mean that the liberalisation of hard rights could be undertaken in a more controlled manner within this limited group, safe in the knowledge that carriers from illiberal countries would not be able to enter the open markets. Such an Understanding would specify limitations on market access and limitations on national treatment.

28. WTO Members who chose not to join the Understanding would likely be required to take an MFN exemption for their various bilateral agreements (which many have already done), so that they were not obliged to offer MFN treatment in the sector.

29. This approach would introduce hard traffic rights into the WTO structure for limited liberalisation, without hindering the possible coverage and more extensive liberalisation of arguably less sensitive soft rights by the GATS.

30. Under such a scenario (as with the previous one) the core provisions of the GATS would then apply to air transport, opening up foreseen benefits such as use of WTO dispute settlement procedures, disciplines on domestic regulation, legal certainty in foreign markets and fair and equal treatment for all service providers. Only in respect of the most sensitive of issues, that of traffic rights, would there be some additional protection for those Members seeking to move ahead towards greater freedom to provide services.

31. A special GATS Understanding on Air Transport would thus give those Members who participated a secure environment in which to make progress until such time as there is a broader global consensus. Such a restricted and controlled introduction of air services to the GATS may well appeal to a sufficient number of governments who would like to see some liberalisation, without exposing the entire aviation sector to greater competitive pressures.

Opponents of this approach contend that it would set up a false dichotomy between "hard" and "soft" rights, both of which are in fact essential for the provision of air services, and that applying different regimes to them would create less, not more legal certainty, especially in dispute settlement. They are also skeptical of the prospects for assembling a significant number of countries prepared to cover hard rights in this manner and to make market access and national treatment commitments.

*A GATS Understanding on Air Transport and Possible "Conditional MFN"*

32. An orthodox approach would, if it were strictly followed, be offset by a reduction of liberalisation previously achieved bilaterally. Liberal bilaterals bind national treatment for international services, whereas this is altogether discretionary in GATS. Preserving bilateral liberalisation already

achieved would require parties to take MFN exemptions under GATS, and MFN exemptions are in turn deemed illiberal and must, if maintained, be periodically defended.

33. Although MFN as it stands appears difficult to implement and apply to air transport, the special position of air transport may lead negotiators to create an innovative solution. One option would be to combine existing bilateralism with "Conditional MFN". To achieve this, the Annex on Air Transport Services would have to be amended to include a definition of "hard rights", incorporating the notion of reciprocal exchange of access. In practice, this would mean that a member of the WTO would offer to all other WTO members the elements of its most favourable bilateral agreement. Under such an approach, the commitment would only become operational for those members that in return offer the same elements.[4]

34. The advantage of such an innovative approach would be that, whenever a more liberal bilateral agreement is concluded, it will be automatically offered to all other members, provided that they offer the same market access level in return. Again this is a measured way of gradually opening up the aviation sector within the WTO umbrella, but in practical terms this approach could be somewhat cumbersome.

35. It is probably fair to note that because the aviation industry has been so tightly regulated for so long, and because national governments have been used to participating directly in both the regulation and operation of air services, a GATS-centric approach may represent too great a change. One needs to look no further than the extremely limited Air Services Annex concluded at the end of the Uruguay round to see evidence of this reluctance. Therefore at this stage it may be prudent to set sights on something more modest, but with perhaps a greater chance of success.

### *3.2 Selective Amendment of Bilateral Agreements*

36. The OECD's Report on Regulatory Reform in Air Cargo Transportation [DSTI/DOT(2000)1] identified the valuable contribution that a standard set of provisions for liberalising air cargo market access could make to the reform agenda.

37. Governments wishing to liberalise grants of rights for air cargo services may find it useful to consider the following model provisions for granting rights in a bilateral context, which provide optional measures for more open market entry for air cargo carriers.

*Optional Bilateral Provisions for Progressive Liberalisation*

"Notwithstanding the provisions of other air service agreements between the contracting parties, each contracting party grants to the other contracting party the following rights for the conduct of international air cargo transportation by the air carriers designated by the other contracting party. Unless otherwise specified, the grant of rights does not include cabotage:

*First freedom*

The right to fly across its territory without landing.

4 This approach can best be illustrated by the following example: country A and country B have very liberal air service agreements while country A and country C have a less liberal agreement. Under the proposed model country C would be entitled to the same liberal access to country A that country B gets if country C becomes as open as country B. For country A, this would also signify that if country C were to sign a liberal agreement with country X the elements of that agreement would be immediately available to country A and all other countries on the basis of reciprocity.

*Second freedom*

> The right to make stops in its territory for non-traffic purposes.

*Third fourth and fifth freedom*

> The right for the conduct of international air cargo transportation from points behind the territory of the Party designating the air carrier via points in the territory of that Party and intermediate points to points in the territory of the Contracting Party granting the right and beyond.

*Fifth and seventh freedoms*

> The right for the conduct of international air cargo transportation between points in the territory of the Contracting Party granting the right and any other points".

*Comment*

38. A number of contributors suggested it would be useful to include the above grants of rights in a model Protocol that would be available for adoption by Member countries and other States. The Protocol previously developed by the OECD Secretariat for Liberalisation of Ancillary Services (DSTI/DOT(2000)1) covers the removal of a range of non-traffic rights aspects of air cargo operational restrictions. Extending this Protocol to encompass traffic rights would make this a more comprehensive bilateral air cargo liberalisation document.

39. With the support of Member countries for the air cargo liberalisation measures outlined, including agreement on the nature and timings of the traffic rights changes proposed, a Bilateral Air Cargo Protocol could be an effective tool for amending and extending the provisions of established bilateral air services agreements.

40. However, it needs to be recognised that there are limits on the benefits that can be gained from progressive 5$^{th}$ and 7$^{th}$ freedom rights liberalisation through bilateral re-negotiation of air services agreements. This is because the ability of air cargo operators to actually exercise any new traffic rights depends also on the availability of matching 5$^{th}$ and 7$^{th}$ freedoms in the air service agreements the contracting parties have with third countries.

41. One of the disadvantages of traditional bilateral approaches therefore - that is also faced to some extent in a multilateral context - is that there is no certainty as to the rights that will actually be available to operators at a given point in time. The negotiations required may take time and could lead to competitive distortions. Not all contracting parties have the negotiating power necessary, particularly with third countries, to achieve 5$^{th}$ and 7$^{th}$ freedom rights in their bilateral agreements. With no certainty as to the timing or the availability of the necessary air cargo rights, there can be no guarantee that bilaterally-agreed traffic rights will actually be available to allow air carriers to adequately meet user needs for air cargo services.

### *3.3 Multilateral Liberalisation of Grants of Rights*

42. The present system of bilateral agreements does not comply with two basic principles of the international trade system, namely transparency and non-discrimination. For many other reasons, including the disadvantages of trying to take substantial changes to market access for air cargo carriers through a

complex web of bilateral agreements, the international aviation community has been giving further consideration to achieving liberalised market access by way of a multilateral agreement on air cargo transportation. With sufficient international support, a multilateral approach could offer a number of important advantages.

43. Apart from avoiding the need for an extended round of interlocking bilateral negotiations, a multilateral agreement would aim to deliver liberalised market access across Contracting Parties on a widespread basis, ensure the adoption of uniform and consistent provisions and allow the use of simplified market access/traffic rights provisions. Once adopted, a multilateral agreement would provide certainty of access to the liberalised traffic rights provided in the agreement for the air carriers of all the contracting parties involved. Of course, the larger the number of participating States, the more rights previously external to the parties involved become 'internalised' between parties to the Agreement. There would still be the need for negotiations to achieve such rights with third countries not party to the Agreement. However, it could be expected there would be greater prospects of successful outcomes from negotiations with third countries, given the greater negotiating power of the parties involved in the multilateral approach. Countries would probably be more willing to offer broad market access and other opportunities in a negotiating environment where a larger number of parties allows greater reciprocal opportunities than are available in a bilateral setting.

44. Experience suggests that the market access provisions included in a multilateral agreement should be as open and liberal as it is possible to negotiate. Reasons include that once the membership of any multilateral agreement has reached a critical mass, consensus on amending the agreement can become difficult if not impossible to obtain, and any remaining barriers to market access in the agreement may become difficult to remove. This also supports the importance of flexible provisions that facilitate further amendment of the Agreement by like-minded States.

45. Should there be a consensus between States to come to a truly liberalised market as far as international air cargo operations are concerned (for example, allowing open access for air cargo transportation by the airlines of any member to all points covered by the agreement), the Multilateral Agreement should include provisions offering unlimited fifth and seventh freedoms. A multilateral agreement that did not offer unlimited $5^{th}$ and $7^{th}$ freedoms would represent little progress beyond the existing web of bilateral agreements. Desirably it would deliver open access for the designated air carriers of any Contracting Party between the territories of Contracting Parties and other States, so that access would then be subject only to the relevant bilaterals with those other States. A Multilateral Agreement developed on this basis would offer good prospects of achieving overall objectives for liberal grants of traffic rights and addressing current air cargo services concerns.

46. Governments wishing to liberalise grants of rights for air cargo services in a multilateral framework may find it useful to consider the following model provisions, which provide optional measures for more open market entry for air cargo carriers.

*Optional Provisions for Liberalising Multilateral Grants of Rights*

*"Each Contracting Party grants to the other Contracting Parties the following rights for the conduct of international air cargo transportation by the designated air carriers of the other Contracting Parties. [Unless otherwise specified, the grant of rights does not include cabotage]:*

*First freedom*

The right to fly across its territory without landing.

*Second freedom*

The right to make stops in its territory for non traffic purposes.

*Third and fourth freedom*

The right for the conduct of international air cargo transportation by the designated air carriers between points in the territory of the Contracting Party designating the air carrier and points in the territory of the Contracting Party granting the right.

*Internal fifth freedom*

The right for the conduct of international air cargo transportation by any designated air carrier between points in the territory of the Contracting Party granting the right and points in the territories of the other Contracting Parties, provided that at least one of these points is in the territory of the Contracting Party designating the air carrier.

*Internal fifth and seventh freedoms*

The right for the conduct of international air cargo transportation by any designated air carrier between points in the territory of the Contracting Party granting the right and points in the territories of the other Contracting Parties.

*Internal and external fifth freedoms*

The right for the conduct of international air cargo transportation by any designated air carrier between points in the territory of the Contracting Party granting the right and any other points, provided that at least one of these points is in the territory of the Contracting Party designating the air carrier.

*Internal and external fifth and seventh freedoms*

The right for the conduct of international air cargo transportation by any designated air carrier between points in the territory of the Contracting Party granting the right and any other points.

*Internal fifth, seventh and eighth freedoms*

The right for the conduct of international air cargo transportation, including cabotage, by any designated air carrier between points in the territories of Contracting Parties granting the right.

*Eighth freedom*

The right for the conduct of international air cargo transportation, including cabotage, by any designated air carrier between points in the territory of the Contracting Party granting the right.

*Liberalisation by Multilateral Grants of Full International Rights*

47. Full liberalisation of market access – covering grants of international and domestic air cargo rights – would represent the end point in regulatory reform in this area. The path towards full liberalisation

could involve Member countries and other States progressively adopting provisions similar to those set out in the previous sections, testing outcomes at each stage before committing to the next. If the changes were implemented gradually, there could be period of time following each liberalisation initiative to allow for sectoral adjustment.

48. Alternatively, the path to full traffic rights liberalisation for air cargo services could be shorter and more direct. Given positive recent experience with air cargo liberalisation at bilateral and regional levels, and the urgent needs of the air cargo industry for greater operational flexibility, States may well wish to move more quickly than the slow and steady pace implied by stepping through progressive liberalisation initiatives. Given the rapid development and growth in air cargo services and the importance of efficient air cargo operations, there would seem to be quite good prospects of support for like-minded countries taking a bolder approach. More comprehensive reform could allow existing restrictions to be removed more quickly and offer greater prospects of addressing current concerns with the supply of air cargo services.

49. Governments wishing to fully liberalise grants of international rights for air cargo services in a multilateral framework in one step may find it useful to consider the following model provisions:

*Model Provisions for Multilateral Grants of Fully Liberalised International Rights*

Each Contracting Party grants to the other Contracting Parties the following rights for the conduct of international air cargo transportation by the designated air carriers of the other Contracting Parties. Unless otherwise specified, the grant of rights does not include cabotage:

*a) The right to fly across its territory without landing.*

*b) The right to make stops in its territory for non-traffic purposes.*

*c) The right, in accordance with the terms of their designations, to perform scheduled, non-scheduled and charter international air cargo transportation between the territory of the Contracting Party granting the rights and any point or points.*

50. This formulation of market access which is included in the proposed Multilateral Agreement would deliver full international traffic rights liberalisation for air cargo services, providing access to air cargo markets between the territories of the Contracting Parties and to/from any points in other States.

*A Protocol for Cabotage*

51. If cabotage is not included in the grants of rights from the outset, there is likely to be difficulty in gaining the agreement of all Contracting Parties at a later stage. However, the longstanding policy concerns in some countries about the granting of domestic cabotage rights indicates there will be stronger support for a multilateral approach which does not require agreement to cabotage at the outset. The required flexibility could be achieved by the use of a Protocol authorising domestic cabotage, allowing cabotage rights to be granted by signature of the Protocol at a later date. This is the approach adopted in the model Multilateral Agreement developed by some like-minded countries in the APEC context and released in November 2000.

52. Governments wishing to liberalise grants of cabotage rights for air cargo services in a multilateral framework may find it useful to consider the following model provision:

*Cabotage Provisions in a Protocol to a Multilateral Agreement*

*d) In addition to the rights granted in paragraph (c) of Article X, each Contracting Party grants to the other Contracting Parties the rights for air carriers designated by the other Contracting Parties in accordance with Article X of the Agreement, to perform, in accordance with the terms of their designations, air cargo transportation between points in the territory of the Contracting Party granting the right.*

## B. DESIGNATION AND AUTHORIZATION

53. Liberalisation of market access will not be achieved by grants of traffic rights alone.

54. Restrictive provisions relating to ownership and control represent another important regulatory barrier to efficient air cargo operations. Most bilateral agreements confirm the right of each contracting party to designate one or more airlines or air carriers to conduct international transportation under these agreements. Many countries have provisions in their bilateral agreements which require the other country/contracting party to accept the designation of their airline(s)/air carrier(s) provided that, inter-alia, 'substantial ownership and effective control' of that airline/air carrier is vested in the designating Party and/or its nationals.

55. More recently, there has been a shift in policy and practice in many countries, in response to globalisation of aviation markets and the development of global and regional airline alliances. There has been greater recognition that alternatives exist to ownership controls which are now seen to restrict access to capital and reduce the scope for equity arrangements in the development of airline alliances.

56. ICAO's Regulatory Panel has for some time supported the liberalisation of the prevailing provisions relating to 'substantial ownership and effective control'. Concerns with these provisions include the restrictions they impose on investment in the airlines/air carriers to which they are applied and on re-structuring and consolidation in the industry, including through mergers and acquisitions. In the case of privately owned and publicly listed airlines and air carriers, apart from limiting capital flows, experience has shown that provisions relating to 'substantial ownership' can be particularly difficult to administer, in circumstances where changes in the composition of ownership (i.e. shareholdings) can change quickly in response to market conditions. Removal of both "substantial ownership" and "effective control" provisions would allow air carriers to access international capital markets and restructure their operations through mergers, acquisitions and take-overs as market opportunities arise. Such removal would not prevent airlines continuing to enter into alliances on a commercial basis.

57. The two alternative provisions favoured by ICAO's Regulatory Panel relate to 'incorporation' and 'place of business'. ICAO's Policy and Guidance material recommends that States wishing to accept broadened criteria for air carrier use of market access in their bilateral and multilateral air services agreements agree to authorise market access for a designated air carrier which has its principal place of business and permanent residence in the territory of the designating State and has and maintains a strong link to the designating State.

58. Although the phrase "principal place of business" exists in both the Chicago Convention and EU law, there is no precise definition. ICAO's Air Transport Regulation Panel suggests that, in assessing a carrier's principal place of business, a state should take into account whether a carrier has a substantial

amount of its operations and capital investment in physical facilities in the designating state, pays income tax and registers its aircraft there, and employs a significant number of nationals in managerial, technical and operational positions. These criteria should be used to apply the concept of "principal place of business".

59. Removal of regulatory controls on ownership and control of air carriers would need to be accomplished without affecting the integrity of the economic, safety and security regulatory arrangements. The changes must protect in particular against the development of 'flags of convenience' and would desirably also exclude 'free riders' from States not wishing to sign the agreements concerned. There is also the need to ensure that the air carrier does not run into designation problems related to nationality in terms of agreements with third countries.

60. Some States argue strongly that retention of a provision requiring 'effective control' is the surest, most effective and realistic means to preserve the integrity of safety, security, and economic regulatory arrangements, prevent the emergence of 'flags of convenience', avoid compromising rights in third countries, and deal with 'free rider' problems. It has also been argued that removal of effective control provisions may dilute the link between the designating country and the air carrier, and make it difficult to continue to exercise economic and social regulatory control over the air carrier. Some also question whether it would be [politically] feasible to establish different ownership and control rules for all-cargo and combination carriers. Given these considerations, and the reluctance of some countries to completely remove regulatory requirements for both substantial ownership and effective control, removal of controls on 'substantial ownership' and retention of provisions relating to 'effective control' (the approach taken in the 2000 APEC multilateral agreement) is an option worthy of consideration.

61. However, there is considerable support for the view that the requirement that each designated air carrier be licensed by the Contracting Party that designates it is an over-riding control that means that changes in the ownership and control provisions cannot lead to a "flag-of-convenience" syndrome. This establishes an important protection against abuse of liberalised aviation market rules.

62. The proposed Articles on Authorisation and Revocation in the Multilateral Agreement would allow Contracting Parties to dispense with the requirement that the air carrier be 'substantially owned' and, in the Authorisation provision, also allow Contracting Parties to dispense with the requirement that the air carrier be 'effectively controlled' by the Contracting Party designating the air carrier, its nationals or both. However, reflecting the diversity of views on this important issue, the Articles include optional provisions retaining a requirement for designated air carriers to be effectively controlled by the designating Party, its nationals or both (or alternatively by Contracting Parties, their nationals or both).

63. Nevertheless, as well as 'incorporation' and 'place of business' provisions, the proposed Refusal and Revocation Article includes provisions which provide for discretion in their application and are aimed at protecting against any possibility of 'Flags of Convenience' emerging. The provisions proposed, which in the case of (a) below have some similarity to the anti-'Flags of Convenience' clause in the 2000 APEC multilateral agreement, are:

> "Notwithstanding paragraph 2 of Article 3 (Designation and Authorisation), a Contracting Party need not grant authorisations and permissions to an airline designated by another Contracting Party if the party receiving the designation determines that the designated airline is effectively controlled by either:
>
> a) An airline of the receiving country or by nationals of the receiving country who directly or indirectly effectively control one of its airlines.

b) A third country, or by nationals of a third country, which is not a Contracting Party to this Agreement and whose air services arrangements with the receiving Contracting Party are more restrictive in terms of international air cargo transportation rights and privileges than those provided under this Agreement.

64. The provisions in (b) are directed towards preventing the operation of services by "Free Riders".

## C. OPERATIONAL FLEXIBILITY

65. Liberal operational provisions are proposed for inclusion in the Bilateral Protocol and Multilateral Agreement. They would provide operational flexibility, allowing designated carriers commercial discretion in relation to the frequency, type of aircraft and capacity to be used in conducting transportation services; and enable commercial agreements with other carriers including but not limited to blocked space agreements, codesharing and interline agreements. The provisions also allow combination on the same aircraft of traffic originating in one Party's territory, traffic originating in another Party's territory, and traffic originating in countries not party to the Agreement.

Under these provisions, there is also scope for co-operation between air cargo and passenger/combi operators in the form of blocked-space, code-share and franchising to facilitate market access, without the need for all-cargo and combi operators to always mount separate services.

## D. SAFETY PROVISIONS

66. Safety is a key item. [The accident rate of ad-hoc cargo operations is significantly higher when compared to scheduled passenger operations by major carriers]. Safety can and must be maintained in a liberalised air cargo regime by strict adherence, as a minimum, to safety and security standards and practices promulgated by the International Civil Aviation Organisation.

67. One way to promote a strict observance of ICAO's safety standards and recommended practices and to ensure, to the maximum extent possible, that all Contracting Parties are living up to their safety obligations would be to establish a link with ICAO's Safety Oversight Programme. This programme is an effort by which States ensure the effective implementation of safety related SARP (International Standards and Recommendations established by ICAO in accordance with Article 37 of the Convention and incorporated as Annexes to the Convention). The programme incorporates as its core function mandatory safety oversight assessments of States by ICAO, with the consent of the States, and with the objective of offering follow-up advice and technical assistance to enable States to implement SARP's and associated programmes. However, not all States would support integrating the ICAO Audit program into Agreements and some States would oppose singling out particular methods such as ramp inspections.

### *ICAO Model Safety provisions*

68. In commenting on earlier draft provisions, ICAO noted that the ICAO Council had recently approved a model safety clause for use by States in a bilateral or multilateral agreement, which drew on the ECAC model clause but places less emphasis on ramp inspections, and concentrates instead on ensuring the aircraft and the airline operation meet the Standards required pursuant to the Chicago Convention. The text is reproduced below:

"ICAO MODEL CLAUSE ON AVIATION SAFETY

1. Each Party may request consultations at any time concerning the safety standards maintained by the other Party in areas relating to aeronautical facilities, flight crew, aircraft and the operation of aircraft. Such consultations shall take place within thirty days of that request.

2. If, following such consultations, one Party finds that the other Party does not effectively maintain and administer safety standards in the areas referred to in paragraph 1 that meet the Standards established at that time pursuant to the Convention on International Civil Aviation (Doc 7300), the other Party shall be informed of such findings and of the steps considered necessary to conform with the ICAO Standards. The other Party shall then take appropriate corrective action within an agreed time period.

3. Pursuant to Article 16 of the Convention, it is further agreed that, any aircraft operated by, or on behalf of an airline of one Party, on service to or from the territory of another Party, may, while within the territory of the other Party be the subject of a search by the authorised representatives of the other Party, provided this does not cause unreasonable delay in the operation of the aircraft. Notwithstanding the obligations mentioned in Article 33 of the Chicago Convention, the purpose of this search is to verify the validity of the relevant aircraft documentation, the licensing of its crew, and that the aircraft equipment and the condition of the aircraft conform to the Standards established at that time pursuant to the Convention.

4. When urgent action is essential to ensure the safety of an airline operation, each Party reserves the right to immediately suspend or vary the operating authorisation of an airline or airlines of the other Party.

5. Any action by one Party in accordance with paragraph 4 above shall be discontinued once the basis for the taking of that action ceases to exist.

6. With reference to paragraph 2 above, if it is determined that one Party remains in non-compliance with ICAO Standards when the agreed time period has lapsed, the Secretary General of ICAO should be advised thereof. The latter should also be advised of the subsequent satisfactory resolution of the situation."

69. The provisions proposed for inclusion in the Multilateral Agreement are closely based on ICAO's Model Clause.

## E. AVIATION SECURITY

70. Since the events of 11 September 2001, aviation security has become even more important. In February 2002, Member States of the International Civil Aviation Organization (ICAO) endorsed a global strategy for strengthening aviation security worldwide and issued a public declaration at the conclusion of their two-day High-Level, Ministerial Conference held at ICAO Headquarters in Montreal.

71. A central element of the strategy is an ICAO *Aviation Security Plan of Action*, which includes regular, mandatory, systematic and harmonised audits to enable evaluation of aviation security in place in all 187 Member States of ICAO. An indicative cost of the security oversight programme is US$17 million, of which more than US$15 million will have to come from new contributions. The programme will cover initially the period 2002 to 2004 and serve to identify and correct deficiencies in the implementation of ICAO security-related standards.

72. The Plan of Action also includes:

- Identification, analysis and development of an effective global response to new and emerging threats, integrating timely measures to be taken in specific fields including airports, aircraft and air traffic control systems.

- Strengthening of the security-related provisions in the Annexes to the Convention on International Civil Aviation, using expedited procedures where warranted and subject to overall safety considerations, notably to provide for protection of the flight deck.

- Close co-ordination and coherence with audit programmes at the regional and sub-regional level.

- Processing of the results by ICAO in a way which reconciles confidentiality and transparency, and

- A follow-up programme for assistance, with rectification of identified deficiencies.

73. The Meeting declared its commitment, inter-alia, to:

- Ensure that security measures are implemented in a most cost effective way in order to avoid undue burden on civil aviation.

- Ensure to the extent possible that security measures do not disrupt or impede the flow of passengers, freight, mail or aircraft.

- Ensure that security measures are implemented in a manner which is objective and non-discriminatory on the basis of gender, race, religion or nationality;

74. The Meeting endorsed:

- Regular, mandatory, systematic and harmonised aviation security audits to evaluate security in place in all Contracting States at national level and, on a sample basis, at airport level for each State, under the ICAO Aviation Security Mechanism.

- Close co-ordination and coherence with audit programmes at the regional and sub-regional level.

- Processing of the results by ICAO in a way which reconciles confidentiality and transparency, and

- A follow-up programme for assistance, with rectification of identified deficiencies.

75. The Conference called for the Council of ICAO to develop the Plan of Action for adoption not later than 14 June 2002 and implementation commencing immediately thereafter within the shortest feasible time frames.

76. Details of the Plan of Action will be completed after the deadline for completion of this OECD Secretariat report. A number of aspects of the ICAO Plan are likely to deal with security associated with air cargo. The security provisions in the draft Multilateral Agreement may therefore need to be revised in the light of the outcomes of ICAO's work.

77. In considering the draft aviation security provisions to be included in the Multilateral Agreement in the interim, comparison of previous versions was made with the provisions of the multilateral agreement developed by some like-minded economies in the APEC context in 2000. While many of the provisions were identical or similar, some elements appeared only in one model. Given the heightened focus on aviation security, the proposed provisions include all possible elements from both models.

## F. AIRPORT ACCESS

78. Access to airports with high passenger and cargo demand and limited airport capacity to handle such demand was often controlled by traffic and route rights included in traditional bilateral air services agreements. Increasingly such traffic rights restrictions are being replaced by 'open skies' and other competitive entry provisions for the grants of traffic rights. In these cases, alternative regulatory and operational provisions relating to airport "slots", which govern the way in which access to airports will be allocated', have become increasingly important in determining the extent of access available to individual air carriers.

79. At any time, the ability of airlines to access airports depends on airline passenger and air cargo demand and actual airport capacity - which is a function of the airport's unrestricted or maximum capacity and airport operational practices. Airport operational practices, taking into account such matters as curfews, noise abatement, air traffic control and ground handling, can be major factors limiting the actual capacity of the airport. While air cargo carriers - along with scheduled passenger and combi airlines - must work within available airport capacity, airport operational practices can significantly distort competition, as well as limit the ability of airlines to gain access to airports on an equitable basis.

80. Some countries have developed slot allocation mechanisms and others rely on IATA-based schedule co-ordination processes. The regulatory framework within which slot allocation mechanisms are employed at international airports has three levels: a) a basic global level based on Article 15 of the Convention on International Civil Aviation (Chicago, 1944) supplemented by bilateral and regional air services agreements and arrangements on traffic rights for international commercial air services; b) a specific regional regulation on slot allocation for countries of the European Union; and c) national slot allocation rules.

81. At a *Global* level, International access to airports is governed, inter alia, by Article 15 of the Convention on International Civil Aviation, the first sentence of which provides: "Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States". With a clear standard of uniform treatment and the practice of having common traffic points for national and foreign airlines, bilateral agreements, except in rare instances, do not deal with slot allocation or access to specific airports. The national treatment principle carries over to the area of charges for the use of airports for international flights, with airport user charges for national and foreign aircraft being the same for the two types of international services (scheduled and non-scheduled).

82. *Regionally*, slot allocation at airports in the European Union (EU) which have been designated as co-ordinated by the country concerned are governed by Council Regulation No. 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports. In 1999, 63 airports were fully co-ordinated under European slot rules and 11 were co-ordinated. The common rules and the IATA scheduling system share several features. These include the right of air carriers to freely exchange slots, and a requirement to use a slot at a level of 80 per cent to retain it in a succeeding season. Both regimes also have a preference for new entrants (defined as air carriers with fewer than four slots at an airport on the day on which they are requesting slots) for up to 50 per cent of new or unused slots. A key difference

between the two systems is that the IATA system is voluntary whereas the EU common rules are mandatory at airports which EU Member States have designated as co-ordinated.

83. At a *National* level, one of the oldest national regulations on slot allocation is the high density airport rule of the United States Federal Aviation Administration (FAA) which was introduced to meet an airport and air traffic capacity problem in 1968. In 1999, the high density rule applied to two international airports, namely Chicago O'Hare and New York-JFK (both of which are also fully co-ordinated under the IATA scheduling system), and two airports designated as domestic (New York-La Guardia and Washington Reagan). Over the years the rule has evolved, but it retains some features which it shares with the IATA and the European systems, such as air carriers being able to continue to use seasonal slots which have been used in a previous similar season for international services, allowing air carriers to exchange slots on a one-for-one basis, and a preference for new entrants. However, unlike the IATA and the EU systems, slot allocation at high density airports in the U.S. is directly operated by the aeronautical authorities. The high density rule is considerably more complex than either the IATA or the EU system, largely because it creates separate limits for different categories of users within an overall hourly or half-hourly limit on take-offs or landings and because it permits the purchase, sale or lease of slots for certain domestic air services. The high density rule also contains a reciprocity provision similar to that of the EU, permitting its suspension of an air carrier or commuter operator from a country that provides slots to United States air carriers and commuter operators on a more restrictive basis than the United States rule. Following a comprehensive and detailed study conducted by the United States Department of Transportation (DOT) in 1995, legislative changes were introduced in April 2000 to phase out the high density rule at three of the four airports (i.e. Chicago O'Hare from 1 July 2002, New York-JFK and La Guardia from 1 January 2007) with exemptions being used during the transition period.

84. In many countries, particularly in locations of high demand, airport access is often guided by scheduling rules developed by the International Air Transport Association. These rules primarily allocate airport capacity in peak periods and where necessary off peak periods to established and new entrant airlines taking into account factors such as available landing and take-off slots (having regard for grandfathering and 'use it or lose it' conventions) and airport gates and hard-stand pavement availability. Provisions are available to deal with non-scheduled services. In overall terms, the IATA-based slot allocation processes are generally considered to be working well.

85. Of course, there are severe capacity bottlenecks at many 'high-density' airports and increasing congestion at a number of other airports in Member countries. While these capacity shortages often relate predominantly to peak period passenger services, it can be expected that air cargo services in future will be increasingly affected by the capacity shortages and the airport access arrangements in place.

86. In conjunction with liberalisation of market access for airlines by way of grants of air cargo rights, it will be important for Member countries to ensure efficient arrangements for airport access continue to be available, meeting the needs of scheduled and non-scheduled air cargo carriers as well as the scheduled passenger airlines and non-scheduled passenger operations.

87. To date, for the reasons set out above, there has been little need to include specific provisions relating to access to airports in air services agreements. However, in future, such provisions may be required to ensure equitable access to airports slots. Should governments wish to consider including provisions relating to access to slots, the following could be used as a guide:

> *"The Contracting Parties recognise that, to give effect to the rights and entitlements embodied in the agreement, the airlines designated by each Contracting Party under this agreement must have the opportunity to access airports in the territory of the other Contracting Parties on a non-discriminatory basis.*

*In respect of the allocation and grant of time slots (slots) to designated airlines at their airports, each Contracting Party will:*

*(a) In accordance with local slot allocation rules, procedures or practices which are in effect or otherwise permitted, ensure that the designated airlines of the other Contracting Parties*

*(i) Are permitted fair and equal opportunity to secure slots; and*

*(ii)Are afforded no less favourable treatment than any other designated airline in securing slots.*

*(b) Ensure that, in the event of any arrangement or practice that is established in relation to the grant of slots for any designated airline of any Contracting Party, such arrangement or practice is applied to the designated airlines of all Contracting Parties."*

88. In future, in locations of high demand, further consideration may need to be given in due course to whether the prevailing IATA-based approaches and existing government slot allocation rules are sufficient. Given that the IATA arrangements do not have an explicit price basis, in the longer term, price-based alternatives for slot allocation may become available that can not only ensure that sufficient capacity is available to meet the priority requirements of different categories of users, but also ensure an efficient allocation of airport capacity, including the demand for an increasing volume of all-cargo services.

89. Generally, price-based systems can be efficient means of allocating increasingly scarce resources. In assessing possible price-based options, however, considerable care is required given the monopoly characteristics of many airports in respect of the markets they serve. As well, there is the need to ensure slot allocation mechanisms will continue to produce appropriate and equitable outcomes and meet existing international obligations. Without such protections, there is a risk that price-based approaches could lead to unjust discrimination, monopoly rents, displacement of domestic and regional air services by international air services and a predominance of passenger services provided by airlines and from regions with the greatest capacity to pay.

90. Given the complexity of international scheduling of passenger services on the one hand, and the increasing demand for time sensitive air cargo on the other, any proposals for changes to the IATA-based and government slot allocation arrangements would need to be fully assessed for their effectiveness internationally and domestically, as well as in terms of passenger and cargo services and other user categories. Implementation of any revised slot allocation processes would need to be fully co-ordinated internationally.

## G. NATIONAL PARTICIPATION AND WIN-WIN SAFEGUARDS

91. The earlier sections of this Part concentrate on the measures which governments can take to liberalise market access and assure the integrity of the public interest regulatory regime governing international air cargo transportation. While available to all governments, the liberalisation proposals seem particularly appropriate to the needs of OECD Member countries, dependent as their economies are on international freight movements and the efficiency of international air cargo transportation.

92. However, there are many other countries that can be expected to benefit from any liberalisation of international air cargo transportation and that are likely to want to participate as fully as possible in the revised arrangements. Of course, the participation of non-OECD Member countries is to be encouraged, particularly in the context of a Multilateral Agreement for air cargo liberalisation. The wider the participation, the greater would be the expected benefits in terms of improved services to users.

93. In contemplating the package of arrangements that would have the greatest prospects of success, consideration needs to be given in particular to the needs of less developed and developing countries and the position of their air carriers. Less developed countries (LDCs) could be major beneficiaries of improved air cargo transportation, enabling them to access primary and manufactured products from global markets more directly and more efficiently - as well as providing greater access for their producers to world consumer markets. There could also be increased opportunities for their air carriers to participate in global logistics markets in circumstances where they are able to provide the services needed by users at competitive prices.

94. While the opportunities could be considerable, they would require a certain level of 'know-how' and organisation. It would not be surprising if some LDCs and developing countries were not fully prepared for the move from regulated to less regulated air cargo markets. Nor would it be surprising if some of their carriers needed assistance in developing and maintaining their air cargo services during the transition. Of course, the rationale and requirement for any such assistance would need to be considered and established on a case by case basis. However, there may be opportunities in terms of market access, operations and facilitation.

***Market Access***

95. Developing countries committed to participation in the multilateral air cargo arrangements but needing assistance for a transitional period could be assisted by transitional measures related to market access. Transitional assistance might vary from case to case but, as an example, could include privileged access to the liberalised traffic rights granted by the multilateral agreement for a limited period (say five years) while maintaining more restrictive access on routes to their home countries during the same transitional period.

***Commercial and Operational Assistance***

96. Expert advice on marketing and operations could assist air carriers from less developed countries in preparing and operating air cargo services able to compete in world air cargo transportation markets.

***Facilitation Assistance***

97. Consideration could be given to facilitation assistance that might be useful in helping carriers from developing countries, at least temporarily, with ground handling and facilitation. Possible provisions relating to facilitation, which were included as footnotes in earlier drafts of this document, could be re-considered, in the context of discussions with third countries. These provisions were:

> *Subject to airport operational limitations, any designated air carrier of any Contracting Party may be allowed to enter into co-operative arrangements with any other air carrier(s) and any other interested person(s) or body (bodies), provided such arrangements meet the requirements established in respect thereof under the legislation of the Contracting Party or Parties concerned:*
>
> *a. for the purpose of resolving problems caused by insufficient capacity to provide, at any time, customs, technical or operational services and facilities, including handling and other ground services and facilities, and*

*b. for the purpose of achieving a more efficient use of aircraft, staff or facilities, assisting - at least temporarily - developing countries' air carriers or simplifying technical and operational conditions, as long as these arrangements do not, without the approval of the Contracting Party or Parties, result in the independent exercise by any air carrier participating therein of rights which that air carrier is otherwise not permitted to exercise.*

# PART III

# BILATERAL PROTOCOL

1. The Bilateral Protocol presented in this Part could be used to liberalise air cargo services in 'traditional' bilateral air service agreements in which restrictions applied to air cargo operators are similar to those imposed on international air passenger services. The Bilateral Protocol focusses on liberalising restrictions on:

- Traffic rights.
- Commercial presence.
- Operational flexibility.
- Leasing.
- Ground handling, and
- Facilitation.

2. If competition issues are not treated adequately in national economy-wide competition legislation, the additional provisions on fair competition which are included in this Bilateral Protocol may be necessary to deal with the application of pro-competitive approaches to matters such as capacity, frequency or prices as well as preventing anti-competitive conduct by carriers in liberalised air cargo markets. Of course, similar competition rules should apply to air cargo and passenger services.

**PROTOCOL**

**BETWEEN**

**[ ]**

**AND**
**[ ]**

**TO AMEND THE AIR TRANSPORT AGREEMENT OF …….**

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**PREAMBLE**

The Government of [ ] and the Government of [ ]

Desiring to amend their Air Transport Agreement, signed at ……on…, in order to implement their common policy to promote the development of international air cargo transportation based on competition among air carriers in the marketplace,

Recognising that the rights and obligations accruing under this Protocol for the conduct of international air cargo transportation do not apply to the conduct of international air passenger transportation,

have agreed as follows:

The Agreement shall be amended by incorporation of Articles XX as set forth below:

**ARTICLE 1. DEFINITIONS**

For the purpose of this Protocol – unless otherwise stated the term:

"Protocol"
means this Protocol and any amendments thereto.

"Air cargo transportation"
means the public transportation of cargo by aircraft, (whether in scheduled, non-scheduled or charter service) and by surface transportation when such transportation is covered by the same contract of carriage.

"All-cargo service"
means an air service that carries cargo only, whether scheduled, non-scheduled or charter[1].

"Cargo"
means freight and mail, without prejudice to the Acts of the Universal Postal Union and to national legislation concerning postal services, but excluding stores accompanied and mishandled baggage.

"Combination service"
means an air service for the transportation of passengers and air cargo.

"Contracting Party"
means either Party that is signatory to this Agreement.

"Convention"
means the Convention on International Civil Aviation, opened for signature at Chicago on December 7, 1944; and includes: a) any amendment that has entered into force under Article 94(a) of the Convention and that has been ratified by Contracting Parties to this

1. An alternative proposal would be to limit the definition to scheduled services.

Agreement, and b) any Annex or any amendment thereto adopted under Article 90 of the Convention insofar as such Annex or amendment is at any given time effective for Contracting Parties.

"Designated air carrier"

means a scheduled, non-scheduled or charter carrier designated and authorised in accordance with Article XX of this Agreement to conduct international air cargo transportation pursuant to this Agreement.

"Dry lease"

means a lease of an aircraft without crew operated under the commercial[2] control of the lessee and using the lessee's air carrier designator code and rights for the conduct of international air transportation.

"Ground handling"

means services necessary for an aircraft's arrival at, and departure from, an airport, including the loading, unloading, handling and storage of air cargo, but excluding those services provided by air traffic control.

"International air cargo transportation"

means the public transport of cargo by aircraft, through the airspace over the territory of more than one Party, whether in scheduled, non-scheduled or charter operation, including carriage of cargo by means of surface transportation when such carriage is covered by the same contract of carriage.

"International air transportation"

means air cargo transportation that passes through the air space over the territory of more than one Contracting Party to this Agreement.

"Price"

means any rate or charge for the carriage of air cargo, excluding mail, and the conditions governing the availability of such rate or charge.

"Surface transportation"

means carriage by road, rail, maritime and/or inland navigation modes of transport.

"Territory"

means the land areas under the sovereignty, jurisdiction, protection, or trusteeship of a State, and the territorial waters adjacent thereto.

"Wet lease"

means a lease of an aircraft with crew, operated under the commercial[3] control of the lessee and using the lessee's air carrier designator code and rights for the conduct of international air transportation.

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2 It should be noted that some authorities also define leased aircraft as being under the operational control of the lessee.

3. Some authorities also define leased aircraft as being under the operational control of the lessee.

## ARTICLE 2. GRANT OF RIGHTS FOR AIR CARGO TRANSPORTATION[4]

1. Notwithstanding the provisions of other air service agreements between the Contracting Parties, each Contracting Party grants to the other Contracting Party the following rights for the conduct of international air cargo transportation by the air carriers designated by the other Contracting Party:

a) The right to fly across its territory without landing.

b) The right to make stops in its territory for non-traffic purposes.

c) The right, in accordance with the terms of their designations, to perform scheduled, non-scheduled and charter international air transportation between the territory of the Contracting Party granting the rights and any point or points.

2. Unless otherwise specified, nothing in this Article shall be deemed to confer on the airlines of either Contracting Party the rights to take on board, in the territory of the other Contracting Party, cargo carried for compensation and destined for another point in the territory of the other Contracting Party.

## ARTICLE 3. CARGO ON COMBINATION SERVICES

Notwithstanding the provisions of air service agreements currently in force between the Contracting Parties, neither Contracting Party shall prevent any designated airline of the other Contracting Party, in its operation of combination services, from taking on board or unloading cargo at points in its territory in keeping with the rights set forth in paragraph 1.(c) of Article 2, or from enjoying any other right accorded designated airlines by this Agreement, that is not inconsistent with the obligations of such carriers in respect of their operation of combination services[5].

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4. These provisions encompass the following rights:

a) The right to fly across its territory without landing.

b) The right to make stops in its territory for non-traffic purposes.

c) The right for the conduct of international air cargo transportation from points behind the territory of the Party designating the air carrier via points in the territory of that Party and intermediate points to points in the territory of the Contracting Party granting the right and beyond.

d) The right for the conduct of international air cargo transportation between points in the territory of the Contracting Party granting the right and any other points.

Note: The provisions in (a) to (d) include the first four "freedoms" as well as so-called "fifth" and "seventh" freedoms. They do not include cabotage, but with the agreement of the parties involved could be modified to do so.

5. This provision is intended to ensure, to the maximum possible extent, that operators of combination services pursuant to other air service agreements are permitted to carry "belly-hold" cargo (or upper-deck cargo on combi aircraft) consistent with the air cargo traffic rights accorded other operators (e.g. of all-cargo services) by Article 2. Such rights for cargo transportation on combination services are subject only to the restrictions on aircraft movement that result from the more limited rights to carry passenger traffic set forth in those other agreements.

## ARTICLE 4. COMMERCIAL PRESENCE, DIVERSIFICATION INTO OTHER SERVICES, AND OPERATIONS

Designated air carriers of each Contracting Party – either in on-line or off-line mode – shall be allowed to:

1. Establish in the territory of the other Contracting Party offices for the promotion and sale of air transportation as well as such other facilities as may be required for the provision of air cargo transportation.

2. Enter into air cargo related business activities, including the right to engage directly in freight forwarding.

3. Bring in and maintain in the territory of the other Contracting Party - in accordance with the laws and regulations of that other Contracting Party relating to entry, residence and employment - managerial, sales, technical, operational and other specialist staff that may be required for the provision of air transportation and related services.

4. Engage, in the territory of the other Contracting Party, directly and, at that air carrier's discretion through its agents, in the sale of air transportation and related services in the currency of the other Contracting Party or in freely convertible currencies.

5. Issue and use its own air waybills, as well as issue and use air waybills of other air carriers of the other Contracting Party if so authorised by the air carriers and/or regulatory authorities concerned.

6. Use any brand name or corporate identity available to an air carrier under applicable national and international law.

7. Pay for local expenses in the territory of the other Contracting Party, including purchases of fuel, in local currency. At their discretion, the designated air carriers of each Party may pay for such expenses in the territory of the other Party in freely convertible currencies according to local currency regulation.

8. Convert and transmit abroad all local revenues from the sale of air cargo transport services and associated services in excess of sums locally disbursed, without restriction, discrimination or taxation in respect thereof at the rate of exchange applicable as of the date of request for converting and remitting, and shall not be subject to any charge except for normal service charges collected by banks for such transactions.

## ARTICLE 5. LEASING

1. Each designated air carrier shall have the right to hold out and operate air services for the conduct of international air transportation in accordance with this Agreement by the use of owned, dry leased, or wet leased aircraft p*rovided* that:

(a) in the case of leased aircraft, the functions and duties with respect to such leased aircraft under Articles 12, 30, 31 and 32a of the Convention:

(i) are accepted and performed by the aeronautical authorities of the State of the lessee / operator, or

(ii) continue to be performed by the aeronautical authorities of the State of Registry, or

(iii) are, by agreement between the aeronautical authorities, otherwise allocated between the authorities of the State of Registry and the authorities of State of the lessee / operator so as to ensure full compliance with the aforementioned Convention Articles;

*and*

(b) in all cases, the requirements of Article X (Aviation Safety) and Article X (Aviation Security) of this Agreement are met.

2. Nothing in this Agreement shall preclude the Parties from registering, under Article 83bis of the Convention, any agreement reached between aeronautical authorities pursuant to or in accordance with the foregoing provisions.

3. No Contracting Party shall prevent its own air carriers from entering into any type of lease arrangement of aircraft provided that the requirements of Paragraph 1 of this Article are met.

**ARTICLE 6. OPERATIONAL FLEXIBILITY**

1. Designated air carriers, in conducting international air cargo transportation authorised pursuant to this Agreement, shall be permitted to:

a) Operate flights in either or both directions.

b) Combine different flight numbers within one aircraft operation.

c) Serve behind, intermediate, and beyond points and points in the territories of the Contracting Parties (excluding cabotage operations unless otherwise specified) on the routes in any combination and in any order.

d) Omit stops at any point or points.

e) Transfer traffic from any of its aircraft to any of its other aircraft at any point on the routes.

f) Serve points behind any point in its territory with or without change of aircraft or flight number and may hold out and advertise such services to the public as through services.

g) Carry transit traffic through the other Contracting Party's territory.

h) Combine on the same aircraft traffic originating in one Contracting Party's territory, traffic originating in the other Contracting Party's territory, and traffic originating in countries not party to this Agreement.

i) On any flight, change aircraft at any point on the route. These change-of-gauge rights include the ability to change to multiple aircraft at the change of gauge point(s).

j) Use their own equipment and leased equipment under any type or form of lease agreement in accordance with the provisions of Article 5.

k) In operating or holding out the authorised services on the agreed routes, enter into marketing arrangements (including but not limited to blocked space and code-sharing), with:

(i) An air carrier or air carriers of the other Contracting Party.
(ii) An air carrier or air carriers of any State that is not party to this Agreement.

provided that all participants in such arrangements hold the appropriate authority, and meet the requirements, normally applied to such arrangements.

l) Notwithstanding anything contrary in this Agreement, operate code share services to any point behind and/or between the gateway points in the territory of the other Contracting Party, provided that such services are operated by an air carrier of the other Contracting Party.

2. A designated air carrier may use different or identical flight numbers for the sectors of its change-of-aircraft operations; position aircraft in the territory of the other Contracting Party at any airport open to international traffic; and may use other modes of cargo transport including surface transportation providers of the other country for any, all, or part of the routes.

**ARTICLE 7. FAIR COMPETITION**

1. Each Contracting Party shall allow a fair and equal opportunity for the designated air carriers of the other Contracting Party to compete in providing the international air cargo transportation governed by this Agreement.

2. Each Contracting Party shall allow the designated air carrier(s) of the other Contracting Party to determine the frequency, type of aircraft, configuration and capacity to be used in conducting international air cargo transportation pursuant to this Agreement based upon commercial considerations in the marketplace. Consistent with this right, neither Contracting Party shall act to limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated air carriers of the other Party, except as may be required for customs, technical, operational, or environmental reasons under uniform conditions consistent with Article 15 of the Convention. The Contracting Party wishing to apply such conditions must provide, as soon as possible, appropriate evidence to the other Contracting Party of the need for such conditions, so as to allow for any consultations pursuant to Article […] prior to the date of effectiveness of such conditions.

3. Neither Contracting Party shall impose, or permit any person or body under its jurisdiction to impose, on a designated air carrier of the other Contracting Party any requirement or condition, including a first refusal requirement, uplift ratio, or no-objection fee or any other requirement with respect to capacity, frequency or traffic, which is inconsistent with the purposes of this Agreement.

4. Neither Contracting Party shall require the filing of schedules, programs for charter flights, or operational plans by the designated air carriers of the other Contracting Party for approval, except as may be required on a non-discriminatory basis to enforce the uniform conditions foreseen by paragraph 2 of this Article.

**ARTICLE 8. GROUND HANDLING**

1. Each Contracting Party shall, on a non-discriminatory basis, authorise designated air carriers of the other Contracting Party, at their choice, to;

a) Perform their own ground handling (“self-handling”).
b) Perform ground handling for other air carriers; and/or
c) Select among competing ground handling service providers.

2. Ground handling and other ancillary services supplied to designated air carriers shall be open to freely competing services, be cost efficient and available on a non-discriminatory basis to all air carriers. Such services shall be comparable to the kind and quality of services as if self-handling were possible.

3. The ground handling provisions in this Article shall apply on a non-discriminatory basis and be subject to physical constraints resulting from reasonable considerations of airport safety, security or capacity, it being understood that the Contracting Party in whose territory such constraints occur shall provide appropriate evidence thereof. Where such constraints prevent free competition in the provision of ground handling for designated air carriers, suppliers of air cargo handling services should be subject to non-discriminatory public tendering procedures.

**ARTICLE 9. INTERMODAL SERVICES**

Designated air carriers of the Contracting Parties shall be permitted to employ any surface transportation for air cargo to or from any points in the territories of the Contracting Parties or in third countries, including transport to and from all airports with customs facilities, and including, where applicable, the right to transport air cargo in bond. Such air cargo, whether moving by surface or by air, shall have access to airport customs processing and facilities. Designated air carriers may elect to perform their own surface transportation or to provide it through arrangements with other surface carriers, including surface transportation operated by other air carriers. National laws and regulations relating to such intermodal cargo services in the territories of the Contracting Parties shall be applied on a non-discriminatory basis.

**ARTICLE 10. PRICES**

1. Prices for air cargo transportation operated pursuant to this Agreement, encompassing intermodal transportation and ancillary services where applicable, shall not be subject to the approval of either Contracting Party. A Contracting Party may require that prices be filed for information purposes for so long as the laws of that Contracting Party so require.

2. Each Contracting Party shall allow intermodal cargo services to be offered at a single through rate for the air and surface transportation combined, provided that there is transparency for shippers about the possible use of combined air and surface operations.

**ARTICLE 11. CUSTOMS DUTIES AND TAXES**

1. On arriving in the territory of one Contracting Party, aircraft engaged in international air transportation by designated air carriers of the other Contracting Party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts including replacement engines, and aircraft stores and other items intended for or to be used solely in connection with the operation or servicing of aircraft engaged in international air transportation under this agreement, shall be relieved from customs duties, excise taxes, and similar fees and charges imposed by the national authorities, not based on the cost of services provided, provided such equipment and supplies remain on board the aircraft.

2. There shall also be relief, on the basis of reciprocity, from the duties, taxes, fees and charges referred to in paragraph 1 of this Article, with the exception of charges based on the cost of the service provided, for:

a) Aircraft stores introduced into or supplied in the territory of one Contracting Party, and taken on board, within reasonable limits, for use on outbound aircraft engaged in international air transportation by the designated air carrier(s) of the other Contracting Party, even when these stores are to be used on a part of the journey performed over the territory of the Contracting Party in which they are taken on board.

b) Ground equipment, security equipment and spare parts including engines introduced into the territory of a Contracting Party for the servicing, maintenance or repair of aircraft engaged in international air transportation under this agreement by the designated air carrier(s) of the other Contracting Party.

c) Fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of one Contracting Party for use in aircraft engaged in international air transportation under this Agreement by the designated air carrier(s) of the other Contracting Party, even when these supplies are to be used on a part of the journey performed over the territory of the Contracting Party in which they are taken on board.

3. Equipment and supplies referred to in paragraphs 1 and 2 of this Article may be required to be kept under the supervision or control of the appropriate authorities.

4. The reliefs provided for by this Article shall also be available where the designated air carrier(s) of either Contracting Party have contracted with any other air carrier(s) for the loan or transfer in the territory of the other Contracting Party of the items specified in paragraphs 1 and 2 of this Article.

5. A Contracting Party shall use its best efforts to secure for the designated air carrier(s) of the other Contracting Party relief from duties, taxes, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs 1 and 2 of this Article, as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the service.

**ARTICLE 12. CARGO IN TRANSIT OR UNDER BOND**

Cargo in direct transit and not leaving the airport or carried under bond, excluding prohibited and restricted goods, shall, except in respect of security measures, be subject to no more than a simplified control by either Contracting Party. Cargo in direct transit shall be relieved from customs duties and other similar charges. Laws and regulations in respect of cargo in transit shall be applied in a non-discriminatory way.

**ARTICLE 13 EXPEDITING CUSTOMS CLEARANCE**

Each Contracting Party undertakes, with respect to air cargo transportation covered by the Agreement, to implement, at the earliest possible time, the International Convention on the Simplification and Harmonisation of Customs Procedures (as amended) [revised Kyoto Convention]. In the meantime, each Contracting Party shall use its best efforts to implement the Customs practices as enumerated in Annex A.

**ARTICLE 14. ENTRY INTO FORCE**

This Protocol shall enter into force on the day of its signature.

## ANNEX A

## EXPEDITING CUSTOMS CLEARANCE

Each Contracting Party shall, with respect to air cargo transportation covered by this Agreement,

1. *Customs scope of responsibility*

   a) Where the nature of a consignment could attract the attention of different public authorities, e.g. the customs, veterinary or sanitary controllers, Contracting States shall endeavour to delegate authority for release/clearance to customs or one of the other agencies or, where that is not feasible, take all necessary steps to ensure that clearance is co-ordinated and, if possible, carried out simultaneously and with a minimum of delay.

   b) Ensure that, at the request of the person concerned, and for reasons deemed valid by Customs, the latter shall, subject to the availability of resources, perform the functions laid down for the purposes of a Customs procedure or practice outside the designated hours of business and/or away from Customs offices. Any expenses chargeable by Customs shall be limited to the approximate cost of the services rendered.[1]

   c) Provide a legal right for an initial appeal to Customs and, where an appeal to Customs is dismissed, the right of a further appeal to an authority independent of the Customs administration. In the final instance, the appellant shall have the right of appeal to a judicial authority.

   d) Ensure that all relevant information relating to Customs laws and procedures is readily available to any interested person, and that, at the request of the interested person, the Customs shall provide as quickly and accurately as possible, information relating to the specific matters raised by the interested person and pertaining to Customs law or procedures.

   e) Ensure authorities consult with operators and others concerned where practicable when introducing or amending regulations and procedures for the release and clearance of air cargo.

2. *Customs efficiency (rapid, transparent, risk analysis system)*

   a) Ensure that their Customs services limit their data requirements to only those particulars which are deemed necessary for the risk assessment and analysis and release and clearance of air cargo.

   b) Instruct its control agencies to use the UN/ECE layout key as the basis for any new or revised paper documents.

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1 . Costs may include overhead expenses for facilities where the Customs Service is located on-site and the inspectors perform no functions but processing a specific carrier's cargo.

c) Seek to replace supporting certificates and other official paper documents, customarily carried and presented with the goods, by electronic communications between relevant government agencies of the countries concerned, testifying that specific consignments have certification status.

d) Accept airworthiness certificates or other documents showing compliance with aviation requirements for the purpose of Customs verification of imports of spare parts for use in aircraft in international services.

e) Ensure that their Customs services use risk analysis to determine which goods and means of transport should be examined and the extent of that examination, using modern inspection and screening techniques.

f) Ensure that Customs processes include controls based on the audit and acceptance of traders' normal records.

g) Ensure that national legislation provides for:

(i) Electronic commerce methods as an alternative to paper-based documentary requirements, including, particularly, the acceptance and processing of data prior to the arrival of the goods

(ii) Electronic as well as paper-based authentication methods.

h) Encourage all parties concerned, whether public or private, to implement inter-operable systems and to use the appropriate internationally accepted standards and protocols.

i) Establish regulations and contractual arrangements with operators and other parties to provide for transit movements of cargo under bond within the state. Such movements may include:

(i) The transfer of inbound containerised cargo to off-airport facilities for unloading and clearance.

(ii) The unloading of inbound cargo at the first airport of arrival, transfer to another aircraft or other means of transport and subsequent transport to another Customs office for clearance or re-export.

j) Ensure that electronic systems for the release and clearance of air cargo cover the transfer of cargo between air and other means of transport.

3. *Special Customs Provisions*

a) Ensure that spare parts and equipment imported into the territory of a contracting State for incorporation in or use on an aircraft of another contracting State engaged in international air navigation may be admitted free of customs duty, subject to compliance with the regulations of the State concerned, which may provide that the articles shall be kept under customs supervision and control.

b) Provide simplified release and clearance procedures for the equipment and supplies referred to in 3a) above.

c) Provide simplified release and clearance procedures for consignments meeting specified criteria such as:

(i) Certain value limits below which consignments may be cleared immediately on the basis of data from the cargo manifest and air waybill, and relieved from duty or taxes or other charges.

(ii) Certain value limits below which consignments may be cleared immediately on the basis of a simple declaration by the importer (in addition to the cargo manifest and air waybill) and payment of any applicable duties, taxes or other charges.

d) Provide procedures, for consignments not meeting the criteria in c) above, for the immediate release of goods on the basis of minimal, standard, information submitted at a specified time prior to arrival of the cargo and an adequate guarantee for subsequent completion of all documentary requirements and payment of applicable duties, taxes and other charges.

e) Ensure that for authorised persons who meet criteria specified by Customs, including an appropriate record of compliance with Customs requirements and a satisfactory system for managing their commercial records the Customs shall provide for:

(i) Release of the goods on the provision of the minimum information necessary to identify the goods and permit the subsequent completion of the final Goods Declaration.

(ii) Clearance of the goods at the declarant's premises or another place authorised by the Customs.

(iii) Acceptance of a single Goods Declaration for all imports or exports in a given period, where goods are imported or exported frequently by the same person.

(iv) Use of authorised persons commercial records to self-assess their duty and tax liability, and, where appropriate, to comply with other Customs requirements.

(v) Acceptance of lodgement of the Goods Declaration by means of an entry in the records of the authorised person, to be supported subsequently by a supplementary Goods Declaration.

# PART IV

# MULTILATERAL AGREEMENT FOR THE LIBERALISATION OF AIR CARGO SERVICES

The Multilateral Agreement that is presented in this Part could be used to achieve substantial liberalisation of international air cargo services. For services between Contracting Parties, it would:

- Allow more open market access to the air cargo markets for air carriers designated by Contracting Parties to undertake international air cargo transportation
- Relax existing controls on ownership and control of designated air carriers
- Allow operational flexibility to air carriers in providing air cargo services on a commercial basis to meet user requirements
- Deregulate capacity and pricing controls on the conduct of international air cargo transportation
- Allow designated carriers to lease the aircraft they need on a commercial basis, subject to meeting regulatory requirements
- Improve arrangements for ground handling and facilitation of air cargo transportation
- Ensure that essential public interest regulatory controls on matters such as aviation safety and security are maintained under the liberalised multilateral air cargo transportation regime.

# MULTILATERAL AGREEMENT FOR THE LIBERALISATION OF AIR CARGO SERVICES

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# LIBERALISATION OF AIR CARGO SERVICES

## PREAMBLE

Parties to this Agreement

Desiring to facilitate the expansion of international air cargo transport opportunities.

Recognising that efficient, innovative and competitive international air cargo services enhance trade, the welfare of consumers and economic growth.

Desiring to promote the development of international air cargo transportation based on competition among air carriers in the marketplace.

Noting that improvements in the efficiency of air freight also depend on liberalisation of ancillary services, including, in particular, the ability of air carriers to diversify into related commercial activities, including ground handling, intermodal operations, integrated services, customs brokerage and freight forwarding.

Accepting the need for the Parties individually to ensure competition policies in place, foster innovation and growth in the air cargo transport market without impairing equal opportunity for the air carriers of Contracting Parties to compete to provide the air cargo services required.

Recognising the potential benefits over time for consumers and the air cargo industry (including air carriers and their workforces) of greater consistency in the application by Contracting Parties of national competition policies to international air cargo services.

Being Parties to the Convention on International Civil Aviation and the International Air Services Transit Agreement opened for signature at Chicago on the seventh day of December 1944.

Conscious that the successful promotion and liberalisation of international air cargo transportation is dependent on adherence, as a minimum, to safety, security and environmental standards and recommended practices as adopted by the International Civil Aviation Organisation and that the emergence of "flags of convenience" in the aviation sector should be avoided.

Recognising the importance of supporting air cargo efficiency by smooth, economical movement of airfreight consignments across national boundaries, through simple, standard, customs and other official control procedures and documentation.

Recognising that the rights and obligations accruing under this Agreement for the conduct of international air cargo transportation do not apply to the conduct of international air passenger transportation.

Recognising that this Agreement will apply equally to scheduled, non-scheduled and charter services operated by air carriers designated under this Agreement.

Desiring to ensure the highest degree of safety and security in international air cargo transportation and reaffirming their grave concerns about acts or threats against the security of aircraft, which jeopardise the safety of persons or property, adversely affect the operation of air cargo transportation, and undermine public confidence in safety of civil aviation.

Hereby, without prejudice to more liberal[1] provisions covering international air cargo transportation in agreements that may exist or may be undertaken in the future, agree as follows:

## ARTICLE 1. DEFINITIONS

For the purpose of this Agreement – unless otherwise stated the term:

"Agreement"
means this Agreement, and any amendments thereto.

"Air cargo transportation"
means the public transportation of cargo by aircraft, (whether in scheduled, non-scheduled or charter service) and by surface transportation when such transportation is covered by the same contract of carriage.

"All-cargo service"
means an air service that carries cargo only, whether scheduled, non-scheduled or charter.[2]

"Cargo"
means freight and mail, without prejudice to the Acts of the Universal Postal Union and to national legislation concerning postal services, but excluding stores accompanied and mishandled baggage.

"Combination service"
means an air service for the transportation of passengers and air cargo.

"Contracting Party"
means any Party that is signatory to this Agreement, whether an individual State or a group of States.

"Convention"
means the Convention on International Civil Aviation, opened for signature at Chicago on December 7, 1944; and includes: a) any amendment that has entered into force under Article 94(a) of the Convention and that has been ratified by Contracting Parties to this Agreement, and b) any Annex or any amendment thereto adopted under Article 90 of the Convention insofar as such Annex or amendment is at any given time effective for all Contracting Parties.

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1 The term "more liberal" is intended to cover the situation where there are other aviation Agreements whose air services arrangements with the receiving Contracting Party contain provisions that are less restrictive in terms of international air cargo transportation rights and privileges than those provided under this Agreement. This wording may need to be re-considered in the light of circumstances prevailing at the time this Multilateral Agreement is being finalised.

2. An alternative proposal would be to limit the definition to scheduled services.

"Designated air carrier"

means a scheduled, non-scheduled or charter carrier designated and authorised in accordance with Article 3 of this Agreement to conduct international air cargo transportation pursuant to this Agreement.

"Dry lease"

means a lease of an aircraft without crew operated under the commercial control[3] of the lessee and using the lessee's air carrier designator code and rights for the conduct of international air transportation.

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"Ground handling"

means services necessary for an aircraft's arrival at, and departure from, an airport, including the loading, unloading, handling and storage of air cargo but excluding those services provided by air traffic control.

"International air cargo transportation"

means the public transport of cargo by aircraft, through the airspace over the territory of more than one Party to this Agreement whether in scheduled, non-scheduled or charter operation, including carriage of cargo by means of surface transportation when such carriage is covered by the same contract of carriage.

"International air transportation"

means air cargo transportation through the air space over the territory of more than one Contracting Party to this Agreement.

"Principal place of business"

means the State in which an air carrier company maintains its primary corporate headquarters, registers its aircraft, pays income taxes, regularly provides air transportation services, maintains a substantial investment in physical facilities, and employs a significant number of nationals in managerial, technical, and operational positions.

"Price"

means any rate or charge for the carriage of air cargo, excluding mail, and the conditions governing the availability of such rate or charge.

"Surface transportation"

means carriage by road, rail, maritime and/or inland navigation modes of transport.

"Territory"

means the land areas under the sovereignty, jurisdiction, protection, or trusteeship of a State, and the territorial waters adjacent thereto.

"User charges"

means a charge imposed on air carriers for the provision of airport, air navigation or aviation security facilities or services including related services and facilities.

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3. It should be noted that some authorities also define leased aircraft as being under the operational control of the lessee.

"Wet lease"

means a lease of an aircraft with crew, operated under the commercial[4] control of the lessee and using the lessee's air carrier designator code and rights for the conduct of international air transportation.

4. Some authorities also define leased aircraft as being under the operational control of the lessee.

## *I. LIBERALISATION OF COMPETITIVE MARKET ENTRY*

### ARTICLE 2. GRANT OF RIGHTS[5]

1. Each Contracting Party grants to the other Contracting Parties the following rights for the conduct of international air cargo transportation by the designated air carriers of the other Contracting Parties.

a) The right to fly across its territory without landing.

b) The right to make stops in its territory for non traffic purposes.

c) The right, in accordance with the terms of their designations, to perform scheduled, non-scheduled and charter international air cargo transportation between the territory of the Contracting Party granting the rights and any point or points.

2. Unless otherwise specified, nothing in this Article shall be deemed to confer on the airlines of any Contracting Party the rights to take on board, in the territory of another Contracting Party, cargo carried for compensation and destined for another point in the territory of that other Contracting Party.

### ARTICLE 3. CARGO ON COMBINATION SERVICES

1. Notwithstanding the provisions of other air service agreements currently in force between Contracting Parties, no Contracting Party shall prevent any designated airline, in its operation of combination services, from taking on board or unloading cargo at points in its territory in keeping with the rights set forth in paragraph 1.(c) of Article 2, or from enjoying any other right accorded designated

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5. These provisions encompass the following rights:
   a) The right to fly across its territory without landing;
   b) The right to make stops in its territory for non traffic purposes;
   c) The right for the conduct of international air cargo transportation by the designated air carriers between points in the territory of the Contracting Party designating the air carrier and points in the territory of the Contracting Party granting the right;
   d) The right for the conduct of international air cargo transportation by any designated air carrier between points in the territory of the Contracting Party granting the right and points in the territories of the other Contracting Parties, provided that at least one of these points is in the territory of the Contracting Party designating the air carrier.
   e) The right for the conduct of international air cargo transportation by any designated air carrier between points in the territory of the Contracting Party granting the right and points in the territories of the other Contracting Parties.
   f) The right for the conduct of international air cargo transportation by any designated air carrier between points in the territory of the Contracting Party granting the right and any other points, provided that at least one of these points is in the territory of the Contracting Party designating the air carrier.
   g) The right for the conduct of international air cargo transportation by any designated air carrier between points in the territory of the Contracting Party granting the right and any other points.

   The Provisions in (a) to (g) above do not include cabotage but with the agreement of the Parties involved could be modified to do so. As an example, the liberalised rights granted by (e) could be extended to also grant cabotage on international services, with the following form of wording:

   "The right for the conduct of international air cargo transportation, including cabotage, by any designated air carrier between points in the territories of Contracting Parties granting the right."

airlines by this Agreement, that is not inconsistent with the obligations of such carriers in respect of their operation of combination services.[6]

## ARTICLE 4. DESIGNATION AND AUTHORIZATION

1. Each Contracting Party shall have the right to designate one or more of its air carriers for the conduct of international air cargo transportation services in accordance with this Agreement and to withdraw or alter such designations. Such designations shall be transmitted to other Contracting Parties in writing through diplomatic channels and to the Depositary.

2. On receipt of such a designation, and of an appropriate application by the designated air carrier in the form and manner prescribed for operating authorisations and technical permissions, a Contracting Party shall grant appropriate authorisations and permissions with minimum procedural delay, provided that:

a) The designated air carrier is incorporated in, and has its principal place of business in the designating country and holds an AOC issued by the designating Contracting Party.

b) The designated air carrier is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transportation by the Contracting Party receiving the application or applications.

c) The Contracting Party designating the air carrier is maintaining and administering standards set forth in Article 13 (Aviation Safety) and Article 14 (Aviation Security).

d) [The designated carrier is effectively controlled by the designating Party, its nationals or both][The designated carrier is effectively controlled by a Contracting Party or Contracting Parties or their nationals or both][7]

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6. This provision is intended to ensure, to the maximum possible extent, that operators of combination services pursuant to other air service agreements are permitted to carry “belly-hold” cargo (or upper-deck cargo on combi aircraft) consistent with the traffic rights accorded to other operators (e.g. of all-cargo services) by Article 2. Such rights for cargo transportation on combination services are subject only to the restrictions on aircraft movement that result from the more limited rights to carry passenger traffic set forth in those other agreements.

7. Removal of the provision requiring effective control to be vested in a Contracting Party and/or its nationals could give rise to concern. A broader approach to ownership and control of air carriers would clearly be preferable from the viewpoint of cross-border investment and operational flexibility for the industry, which are important in maintaining a healthy well-financed international airline industry. However, there may also be a perceived national interest in retaining ‘effective control’ requirements on other grounds. It was therefore deemed best to include the alternatives in this Article and let States reach their own decisions on this issue. If such removal is not favoured, one option would be include the provision: "effective control of the designated air carrier is vested in Contracting Parties and/or their nationals or both". A less liberal option would be to retain a requirement for effective control to be vested in the designating Contracting Party and/or its nationals or both. An effective control requirement (and a "majority ownership" requirement) appears in the EU's 2407/92, and an “effective control” requirement also appears in US legislation. The need for and form of the ‘FOC’ and ‘free rider’ clauses in Article 5 may need to be reviewed, depending on the decision taken in relation to removal or retention of an ‘effective control’ provision.

**ARTICLE 5. REFUSAL, REVOCATION AND SUSPENSION**

1. Notwithstanding paragraph 2 of Article 4, a Contracting Party may refuse to grant an authorisation or permission, may suspend, limit or revoke such an authorisation or permission, or may impose such conditions as it deems necessary on the conduct of a designated air carrier in any case where such Contracting Party concludes that:

(A) The designated air carrier:

1) Is not incorporated in the territory of the designating Contracting Party.

2) Does not have its principal place of business in the territory of the designating Contracting Party.

3) Does not hold a current AOC issued by the designating Contracting Party.

4) Is effectively controlled by either:

a) An airline of such Contracting Party or by nationals of such Contracting Party who directly or indirectly control one of its airlines, or

b) A third country, or by nationals of a third country, which is not a Contracting Party to this Agreement and whose air services arrangements with the receiving Contracting Party are more restrictive in terms of international air cargo transportation rights and privileges than those provided under this Agreement.

(5) [Is not effectively controlled by the designating Party, its nationals or both][Is not effectively controlled by Contracting Parties to this Agreement, or by their nationals or both][8]

6) Has failed to comply with the laws and regulations referred to in Article 9 (Application of Laws) of this Agreement; or

7) Is subject to action in accordance with Article 14(6).

(B) The other Contracting Party is not maintaining and administering the standards as set forth in Articles 13 (Aviation Safety) and 14 (Aviation Security).

2. Unless immediate action is essential to prevent further non-compliance with subparagraph 1(A)6 and 1(B) of this Article, the rights established by this Article shall be exercised only after consultation with the other Contracting Party concerned. This consultation shall take place in accordance with Article 21.

3. This Article does not limit the rights of a Contracting Party to withhold, revoke, suspend, limit or impose conditions on the operating authorisation or technical permission of a designated air carrier or air carriers of another Contracting Party in accordance with the provisions of Articles 13 (Aviation Safety) and 14 (Aviation Security).

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8. For the reasons outlined in the footnote to Article 4, it was deemed best to include alternative provisions in this Article which could be used to retain control over 'effective control' and let States reach their own decisions on this issue. The need for and form of the 'FOC' and 'free rider' clauses in Article 5 may need to be re-considered, depending on the decision taken in relation to removal or retention of an 'effective control' provision.

## ARTICLE 6. OPERATIONAL FLEXIBILITY

1. Designated air carriers, in conducting international air cargo transportation authorised pursuant to this Agreement, shall be permitted to:

a) Operate flights in either or both directions.

b) Combine different flight numbers within one aircraft operation.

c) Serve behind, intermediate, and beyond points and points in the territories of the Contracting Parties (excluding cabotage operations unless otherwise specified) on the routes in any combination and in any order.

d) Omit stops at any point or points.

e) Transfer air cargo from any of its aircraft to any of its other aircraft at any point on the routes.

f) Serve points behind any point in its territory with or without change of aircraft or flight number and may hold out and advertise such services to the public as through services.

g) Carry air cargo in transit through any other Contracting Party's territory.

h) Combine on the same aircraft air cargo originating in one Contracting Party's territory, air cargo originating in another Contracting Party's territory, and air cargo originating in countries not party to this Agreement.

i) On any flight, change aircraft at any point on the route. These change-of-gauge rights include the ability to change to multiple aircraft at the change of gauge point(s).

j) Use their own equipment and leased equipment under any type or form of lease agreement in accordance with the provisions of Article 9.

k) In operating or holding out the authorised services on the agreed routes, enter into marketing arrangements (including but not limited to blocked space and code-sharing) with:

(i) An air carrier or air carriers of any Contracting Party.

(ii) An air carrier or air carriers of any State that is not party to this Agreement.

provided that all participants in such arrangements hold the appropriate authority and meet the requirements normally applied to such arrangements.

l) notwithstanding anything contrary in this Agreement, market code share services to any point behind and/or between the gateway points in the territory of another Contracting Party, provided that such services are operated by an air carrier of that other Contracting Party.

2. A designated air carrier may use different or identical flight numbers for the sectors of its change-of-aircraft operations; position aircraft in the territory of any other Contracting Party at any airport open to international traffic; and may use other modes of cargo transport including surface transportation providers of any country for any, all, or part of the routes.

## ARTICLE 7. PRICES

1. Prices for air cargo transportation operated pursuant to this Agreement, encompassing intermodal transportation and ancillary services where applicable, shall not be subject to the approval of any Contracting Party. A Contracting Party may require that prices be filed for informational purposes for so long as the laws of that Contracting Party so require.

2. Each Contracting Party shall allow intermodal cargo services to be offered at a single through rate for the air and surface transportation combined, provided that there is transparency for shippers about the possible use of combined air and surface operations.

## ARTICLE 8. COMMERCIAL PRESENCE, DIVERSIFICATION INTO OTHER SERVICES, AND OPERATIONS

Pursuant to this Agreement, designated air carriers of any Contracting Party – either in on-line or off-line mode - shall be allowed to:

a) Establish in the territory of any other Contracting Party offices for the promotion and sale of air transportation as well as such other facilities as may be required for the provision of air cargo transportation.

b) Enter into air cargo related business activities, including the right to engage in freight forwarding.

c) Bring in and maintain in the territory of any other Contracting Party in accordance with the laws and regulations of that other Contracting Party relating to entry, residence and employment - managerial, sales, technical, operational and other specialist staff that may be required for the provision of air transportation and related services.

d) Engage, in the territory of any other Contracting Party, directly and, at that air carrier's discretion through its agents, in the sale of air transportation and related services in the currency of that other Contracting Party or in freely convertible currencies.

e) Issue and use its own air waybills, as well as issue and use air waybills of other air carriers of Contracting Parties if so authorised by the air carriers and/or regulatory authorities concerned.

f) Use any brand name or corporate identity available to an air carrier under applicable national and international law.

g) Pay for local expenses in the territory of any other Contracting Party, including purchases of fuel, in local currency. At their discretion, the designated air carriers of each Contracting Party may pay for such expenses in the territory of the other Contracting Parties in freely convertible currencies according to local currency regulation.

h) Convert and transmit abroad all local revenues from the sale of air cargo transport services and associated services in excess of sums locally disbursed, without restriction, discrimination or taxation in respect thereof at the rate of exchange applicable as of the date of request for converting and transmitting, and shall not be subject to any charge except for normal service charges collected by banks for such transactions.

## ARTICLE 9. LEASING

1. Each designated air carrier shall have the right to hold out and operate air services for the conduct of international air transportation in accordance with this Agreement by the use of owned, dry leased, or wet leased aircraft p*rovided* that:

(a) in the case of leased aircraft, the functions and duties with respect to such leased aircraft under Articles 12, 30, 31 and 32a of the Convention:

(i) are accepted and performed by the aeronautical authorities of the State of the lessee / operator, or

(ii) continue to be performed by the aeronautical authorities of the State of Registry, or

(iii) are, by agreement between the aeronautical authorities, otherwise allocated between the authorities of the State of Registry and the authorities of State of the lessee / operator so as to ensure full compliance with the forementioned Convention Articles;

*and*

(b) in all cases, the requirements of Article 13 (Aviation Safety) and Article 14 (Aviation Security) of this Agreement are met.

2. Nothing in this Agreement shall preclude the Parties from registering, under Article 83bis of the Convention, any agreement reached between aeronautical authorities pursuant to or in accordance with the foregoing provisions.

3. No Contracting Party shall prevent its own air carriers from entering into any type of lease arrangement of aircraft provided that the requirements of Paragraph 1 of this Article are met.

## ARTICLE 10. APPLICATION OF LAWS

1. While entering, within, or leaving the territory of any Contracting Party, each designated air carrier shall comply with the laws and regulations of that Contracting Party relating to the operation and navigation of aircraft.

2. While entering, within, or leaving the territory of any Contracting Party, each designated air carrier and its crew shall comply with the laws and regulations relating to the admission to or departure from its territory of crew and cargo on aircraft as well as the provision of air cargo transport and cargo-related business activities. These regulations include regulations relating to entry, clearance, aviation security, customs and quarantine or, in the case of mail, postal regulations. Obligations on air carriers and their crew relating to admission and departure of crew and cargo on their aircraft extend to persons and parties acting on their behalf.

## ARTICLE 11. FAIR COMPETITION

1. Each Contracting Party shall allow a fair and equal opportunity for the designated air carriers of all Parties to compete in providing the international air cargo transportation governed by this Agreement.

2. Each Contracting Party shall allow the designated air carrier(s) of another Contracting Party to determine the frequency, type of aircraft, configuration and capacity to be used in conducting international air cargo transportation pursuant to this Agreement based upon commercial considerations in the marketplace. Consistent with this right, no Contracting Party shall act to limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated air carriers of the other Parties, except as may be required for customs, technical, operational, or environmental reasons under uniform conditions consistent with Article 15 of the Convention. The Contracting Party wishing to apply such conditions must provide, as soon as possible, appropriate evidence to the other Contracting Parties of the need for such conditions, so as to allow for any consultations pursuant to Article 21 prior to the date of effectiveness of such conditions.

3. No Contracting Party shall impose, or permit any person or body under its jurisdiction to impose, on a designated air carrier of any other Contracting Party, any requirement or condition, including a first refusal requirement, uplift ratio, or no-objection fee or any other requirement with respect to capacity, frequency or traffic, which is inconsistent with the purposes of this Agreement.

4. No Contracting Party shall require the filing of schedules, programs for charter flights, or operational plans by the designated air carriers of the other Contracting Parties for approval, except as may be required on a non-discriminatory basis to enforce the uniform conditions foreseen by paragraph 2 of this Article.

**ARTICLE 12. USER CHARGES**

1. User charges imposed by the competent charging authorities or bodies of each Contracting Party on air carriers of other Contracting Parties shall be just, reasonable, not unjustly discriminatory, and equitably apportioned among categories of users. In any event, any such user charges shall be levied on the air carriers of other Contracting Parties on terms not less favourable than the most favourable terms available to any other air carrier at the time the charges are levied.

2. User charges imposed on the air carriers of other Contracting Parties may reflect, but shall not exceed, the cost of service provision (including a reasonable amount for administrative overhead), by the competent charging authorities or bodies, for the appropriate airport, airport environmental, air navigation, and aviation security facilities and services at the airport or within the airport system. (Such charges may include a reasonable return on assets, after depreciation). Facilities and services for which charges are made shall be provided on an efficient and economic basis.

3. Each Contracting Party shall encourage consultations between the competent charging authorities or bodies in its territory and the air carriers using the services and facilities, and shall encourage the competent charging authorities or bodies and the air carriers to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles of paragraphs 1 and 2 of this Article. Each Contracting Party shall encourage the competent charging authorities to provide users with reasonable notice of any proposal for changes in user charges to enable users to express their views before changes are made.

4. No Contracting Party shall be held, in dispute resolution procedures pursuant to Article 22 to be in breach of a provision of this Article, unless (i) it fails to undertake a review of the charge or practice that is the subject of complaint by another Contracting Party within a reasonable amount of time; and (ii) following such a review it fails to take all steps within its power to remedy any charge or practice that is inconsistent with the Article.

## ARTICLE 13. AVIATION SAFETY[9]

1. Each Contracting Party may request consultations at any time concerning the safety standards maintained by another Contracting Party in areas relating to aeronautical facilities, flight crew, aircraft and the operation of aircraft. Such consultations shall take place within thirty days of that request.

2. If, following such consultations, one Contracting Party finds that another Contracting Party does not effectively maintain and administer safety standards in the area referred to in paragraph 1 of this Article that meet the Standards established at that time pursuant to the Convention on International Civil Aviation (Doc 7300), the other Contracting Party shall be informed of such findings and of the steps considered necessary to conform with the ICAO Standards. Failure by the other Contracting Party to take appropriate corrective action within fifteen (15) days shall be cause for the application of Article 5 of this Agreement.

3. Pursuant to Article 16 of the Convention, it is further agreed that, any aircraft operated by, or on behalf of a designated air carrier of one Contracting Party, on service to or from the territory of another Contracting Party, may, while within the territory of the other Contracting Party be the subject of a search by the authorised representatives of the other Contracting Party, provided this does not cause unreasonable delay in the operation of the aircraft. Notwithstanding the obligations mentioned in Article 33 of the Chicago Convention, the purpose of this search is to verify the validity of the relevant aircraft documentation, the licensing of its crew, and that the aircraft equipment and the condition of the aircraft conform to the Standards established at that time pursuant to the Convention.

4. When urgent action is essential to ensure the safety of an air carrier operation, each Contracting Party reserves the right to immediately suspend or vary the operating authorisation of an air carrier or air carriers of another Party.

5. Any action by one Contracting Party in accordance with paragraph 4 of this Article shall be discontinued once the basis for the taking of that action ceases to exist.

6. Upon a request by a Contracting Party considering that there are serious doubts about the safety oversight capabilities of the competent authority of another Contracting Party according to the standards and recommended practices promulgated pursuant to the Convention, the competent authority of the other Contracting Party shall disclose all or the relevant part of the audit established by ICAO under its Safety Oversight Programme and, where required, any information on follow-up action as required by the audit.

## ARTICLE 14. AVIATION SECURITY

1. The Contracting Parties agree to provide assistance to each other as necessary with a view to preventing unlawful seizure of aircraft and other unlawful acts against the security of aircraft, its cargo and crew, airports and air navigation facilities and any other threat to security of civil aviation.

2. Each Contracting Party shall give consideration to any request from another Contracting Party for special security measures for its aircraft and/or cargo to meet a particular threat.

3. The Contracting Parties shall act in accordance with applicable aviation security standards and appropriate recommended practices established by the International Civil Aviation Organization and designated as Annexes to the Convention; each Contracting Party shall require that operators of aircraft of

9. Articles 13 and 14 could be modified in the light of the ICAO meeting on Security.

its registry and operators of aircraft who have their principal place of business in its territory act in conformity with such aviation security provisions.

4. In accordance with their rights and obligations under international law, the Contracting Parties reaffirm that their obligation to each other to protect the security of civil aviation against acts of unlawful interference forms an integral part of this Agreement. Without limiting the generality of their rights and obligations under international law, the Contracting Parties shall act in conformity with the provisions of the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, signed at Montreal on 24 February 1988 and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991.

5. When an incident, or threat of an incident, of unlawful seizure of aircraft or other unlawful acts against the security of aircraft, cargo and crew, airports and air navigation facilities occurs, the Contracting Parties shall assist each other by facilitating communications intended to terminate rapidly and safely such incident or threat thereof.

6. When a Contracting Party has reasonable grounds to believe that another Contracting Party has departed from the aviation security provisions of this Article, the aeronautical authorities of the first Contracting Party may request immediate consultations with the aeronautical authorities of the other Contracting Party. Failure to reach a satisfactory agreement within fifteen (15) days from the date of such request shall constitute grounds to withhold, revoke, limit or impose conditions on the operating authorisation of a designated air carrier or air carriers of that other Contracting Party. When required by an emergency, a Contracting Party may take interim action prior to the expiry of these fifteen (15) days.

7. Any Contracting Party that has exercised its rights to withhold, revoke, suspend, or limit or impose conditions on the operating authorisation of a designated air carrier in accordance with paragraph 6 of this Article shall notify such action to the Depositary.

## *II. ANCILLARY SERVICES*

### ARTICLE 15. GROUND HANDLING

1. Each Contracting Party shall, on a non-discriminatory basis, authorise designated air carriers of other Contracting Parties, at their choice, to:

a) Perform their own ground handling (“self-handling”).

b) Perform ground handling for other air carriers; and/or

c) Select among competing ground handling service providers.

2. Ground handling and other ancillary services supplied to designated air carriers shall be open to freely competing services, be cost efficient and available on a non-discriminatory basis to all air carriers. Such services shall be comparable to the kind and quality of services as if self-handling were possible.

3. The ground handling provisions in this Article shall apply on a non-discriminatory basis and be subject to physical constraints resulting from reasonable considerations of airport safety, security or capacity. The Contracting Party in whose territory such constraints occur shall provide appropriate evidence thereof on request from another Contracting Party. Where such constraints prevent free competition in the provision of ground handling for designated air carriers, suppliers of air cargo handling services should be subject to non-discriminatory public tendering procedures.

## ARTICLE 16. INTERMODAL SERVICES

Designated air carriers of Contracting Parties shall be permitted to employ any surface transportation for air cargo to or from any points in the territories of the Contracting Parties or in third countries, including transport to and from all airports with customs facilities, and including, where applicable, the right to transport air cargo in bond. Such air cargo, whether moving by surface or by air, shall have access to airport customs processing and facilities. Designated air carriers may elect to perform their own surface transportation or to provide it through arrangements with other surface carriers, including surface transportation operated by other air carriers. National laws and regulations relating to such intermodal cargo services in the territories of Contracting Parties shall be applied on a non-discriminatory basis.

## *III. TRADE FACILITATION*

## ARTICLE 17. CUSTOMS DUTIES AND TAXES

1. On arriving in the territory of any Contracting Party, aircraft engaged in international air transportation by designated air carriers of any other Contracting Party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts including replacement engines, and aircraft stores and other items intended for or to be used solely in connection with the operation or servicing of aircraft engaged in international air transportation under this agreement, shall be relieved from customs duties, excise taxes, and similar fees and charges imposed by the national authorities, not based on the cost of services provided, provided such equipment and supplies remain on board or depart intact with the aircraft.

2. There shall also be relief, on the basis of reciprocity, from the duties, taxes, fees and charges referred to in paragraph 1 of this Article, with the exception of charges based on the cost of the service provided, for:

a) Aircraft stores introduced into or supplied in the territory of any Contracting Party, and taken on board, within reasonable limits, for use on outbound aircraft engaged in international air transportation by the designated air carrier(s) of any other Contracting Party, even when these stores are to be used on a part of the journey performed over the territory of the Contracting Party in which they are taken on board; and

b) Ground equipment, security equipment and spare parts including engines introduced into the territory of any Contracting Party for the servicing, maintenance or repair of aircraft engaged in international air transportation under this agreement by the designated air carrier(s) of any other Contracting Party; and

c) Fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of any Contracting Party for use in aircraft engaged in international air transportation under this agreement by the designated air carrier(s) of any other Contracting Party, even when these

supplies are to be used on a part of the journey performed over the territory of the Contracting Party in which they are taken on board.

3. Equipment and supplies referred to in paragraphs 1 and 2 of this Article may be required to be kept under the supervision or control of the appropriate authorities.

4. The reliefs provided for by this Article shall also be available where the designated air carrier(s) of any Contracting Party have contracted with any other air carrier(s) for the loan or transfer in the territory of any other Contracting Party of the items specified in paragraphs 1 and 2 of this Article.

5. Each Contracting Party shall use its best efforts to secure for the designated air carrier(s) of any other Contracting Party relief from duties, taxes, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs 1 and 2 of this Article, as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the service.

### ARTICLE 18. CARGO IN TRANSIT OR UNDER BOND

Cargo in direct transit and not leaving the airport or carried under bond, excluding prohibited and restricted goods, shall, except in respect of security measures, be subject to no more than a simplified control by each Contracting Party. Cargo in direct transit shall be relieved from customs duties and other similar charges. Laws and regulations in respect of cargo in transit shall be applied in a non-discriminatory way.

### ARTICLE 19. EXPEDITING CUSTOMS CLEARANCE

The Contracting Parties undertake, with respect to air cargo transportation covered by this Agreement, to implement, at the earliest possible time, the International Convention on the Simplification and Harmonisation of Customs Procedures (as amended) [revised Kyoto Convention]. In the meantime the Contracting Parties shall use their best efforts to implement the Customs practices as enumerated in Annex A.

## *IV. FINAL CLAUSES*

### ARTICLE 20. CO-EXTENSIVE AGREEMENTS

This Agreement shall prevail over provisions in agreements concluded between Contracting Parties, to the extent that the same subject matter is governed by this Agreement, except where more liberal[10] agreements dealing with air cargo matters are applicable.

10. The term "more liberal" is intended to cover the situation where there are other aviation Agreements whose air services arrangements with the receiving Contracting Party contain provisions that are less restrictive in terms of international air cargo transportation rights and privileges than those provided under this Agreement. This wording may need to be re-considered in the light of circumstances prevailing at the time this Multilateral Agreement is being finalised.

## ARTICLE 21. CONSULTATIONS

1. Any Contracting Party may request consultations with any other Contracting Party or Parties at any time for the purpose of examining the interpretation and application of any provision of this Agreement, including but not limited to, any actual or proposed measure or any matter that it considers affects the interpretation and application of the Agreement.

2. The requested Contracting Party or Parties shall provide adequate opportunity for such consultations and shall enter into them within fifteen (15) days of the date of delivery of the request, unless otherwise agreed between the Contracting Parties, on matters which the requesting Contracting Party deems and states to be urgent. In all other cases consultations shall commence at the earliest possible date, but not later than sixty (60) days from the date of receipt of the request for consultations, unless otherwise agreed by the Contracting Parties[11].

3. Each Contracting Party participating in such consultations shall prepare and present evidence in support of its position. Prior to the commencement of such consultations the Contracting Parties participating therein shall inform all other Contracting Parties of the nature and date of such consultations. Subject to the consent of the Contracting Parties involved in the consultations, such other Contracting Parties may attend such consultations as an observer. Upon conclusion of the consultations, all other Contracting Parties shall be notified of the results.

## ARTICLE 22. DISPUTE SETTLEMENT

1. Any dispute arising under this Agreement that is not resolved by consultations in accordance with Article 21 may be referred, by agreement of the Contracting Parties involved, to some person or body for decision. If the Parties involved do not so agree, the dispute shall, at the request of one Contracting Party, be submitted to arbitration with respect to another Party in accordance with the procedures set forth below. The Party submitting the dispute to arbitration shall notify the Depositary of the dispute at the same time that it submits its arbitration request. The Depositary shall inform all Contracting Parties of this notification.

2. Arbitration shall be by a panel of three arbitrators to be constituted as follows:

   a) Within thirty (30) days after the receipt of a request for arbitration, each Contracting Party shall name one arbitrator. Within sixty (60) days after these two arbitrators have been named, the Contracting Parties to the dispute shall, by agreement, appoint a third arbitrator, who shall act as President of the arbitral panel.

   b) If either Contracting Party fails to name an arbitrator, or if the third arbitrator is not appointed in accordance with subparagraph (a) of this paragraph, either Contracting Party may request the President of the Council of the International Civil Aviation Organisation to appoint the necessary arbitrator or arbitrators within thirty (30) days. If the President of the Council is of the same nationality as one of the Contracting Parties, the most senior Vice President who is not disqualified on that ground shall make the appointment.

3. Except as otherwise agreed by the Contracting Parties to the dispute, the arbitral panel shall determine the limits of its jurisdiction in accordance with this Agreement and shall establish its own procedural rules. The arbitral panel, once formed, may recommend interim measures pending its final

11. Timings may need further consideration in the light of prevailing circumstances.

determination. At the direction of the arbitral panel or at the request of either of the Contracting Parties, a conference concerning the precise issues to be arbitrated and the specific procedures to be followed shall be held on a date determined by the arbitral panel and in no event later than fifteen (15) days after the third arbitrator has been appointed.

4. Except as otherwise agreed by the Contracting Parties to the dispute or as directed by the panel, the complaining Contracting Party shall submit a memorandum within forty-five (45) days of the time the third arbitrator is appointed, and the reply of the responding Contracting Party shall be due sixty (60) days after the complaining Contracting Party submits its memorandum. The complaining Contracting Party may submit a pleading in response to such reply within 30 days after the submission of the responding Contracting Party's reply and the responding Contracting Party may submit a pleading in response to the complaining Contracting Party's pleading within 30 days after the submission of such pleading. The arbitral panel shall hold a hearing at the request of either Contracting Party or on its own initiative within fifteen (15) days after the last pleading is due.

5. The arbitral panel shall, unless otherwise agreed by the Contracting Parties, attempt to render a written decision within forty-five (45) days after completion of the hearing or, if no hearing is held, after the date the last pleading is submitted[12]. The decision of the majority of the arbitral panel shall prevail.

6. The Contracting Parties to the dispute may submit requests for clarification of the decision within fifteen (15) days after it is rendered and any clarification given shall be issued within fifteen (15) days of such request.

7. In the case of a dispute involving more than two Contracting Parties, multiple Contracting Parties may participate on either or both sides of a proceeding described in this Article. The procedures set out in this Article shall be applied with the following exceptions:

a) With respect to paragraph 2(a), the Contracting Parties on each side of a dispute shall together name one arbitrator.

b) With respect to paragraph 2(b), if the Contracting Parties on one side of a dispute fail to name an arbitrator within the permitted time, the Contracting Party or Contracting Parties on the other side of the dispute may utilise the procedures in paragraph 2(b) to secure the appointment of an arbitrator.

c) With respect to paragraphs 3, 4, and 6, each of the Contracting Parties on either side of the dispute has the right to take the action provided to a Contracting Party.

8. Any other Contracting Party that is directly affected by the dispute has the right to intervene in the proceedings, under the following conditions:

a) A Contracting Party desiring to intervene shall file a declaration to that effect with the arbitral panel no later than 10 days after the third arbitrator has been named.

b) The arbitral panel shall notify the Contracting Parties to the dispute of any such declaration, and the Contracting Parties to the dispute shall each have 30 days from the date such notification is sent to submit to the arbitral panel any objection to an intervention under this paragraph. The arbitral panel shall decide whether to allow any intervention within 15 days after the date such objections are due.

12. Timings may need further consideration in the light of prevailing circumstances.

c) If the arbitral panel decides to allow an intervention, the intervening Contracting Party shall notify all other Contracting Parties to the Agreement of the intervention, and the arbitral panel shall take the necessary steps to make the documents of the case available to the intervening Contracting Party, who may file pleadings of a type and within a time limit to be set by the arbitral panel, within the timetable set out in paragraph 4 of this Article to the extent practical, and may participate in any subsequent proceedings.

d) The decision of the arbitral panel will be equally binding upon the intervening Contracting Party.

9. All Contracting Parties to the dispute, including intervening Contracting Parties shall, to the degree consistent with its national law, give full effect to any decision or award of the arbitral panel.

10. The arbitral panel shall transmit copies of its decision or award to the Contracting Parties to the dispute, including any intervening Contracting Parties. The arbitral panel shall provide to the Depositary a copy of its decision or award, provided that appropriate treatment shall be accorded to confidential business information. The Depositary shall inform the remaining Contracting Parties of the decision or award.

11. Each Contracting Party shall bear the costs of the arbitrator it has nominated as well as of its representation in the arbitral proceeding. Any expenses incurred by the President of the Council of the International Civil Aviation Organization in connection with the procedures of paragraph (2)(b) of this Article shall be born in equal parts by the Contracting Parties.

**ARTICLE 23. IMPLEMENTATION**

Each Contracting Party shall take such legislative or other measures as may be necessary to implement the present Agreement

**ARTICLE 24. SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION**

1. Until its entry into force, this Agreement shall be open for signature at the Depositary by……..and any State invited by them.

2. This Agreement shall be subject to approval or ratification in accordance with the Contracting Parties' own procedures and each Contracting Party shall notify the Depository in writing of the completion of the said approval or ratification procedures, who in turn shall inform all Contracting Parties.

3. Ratification, acceptance, approval and accession shall be effected by the deposit of a formal instrument to that effect with the Depositary.

4 Upon the entry into force of this Agreement, the Depositary shall transmit a certified true copy of this Agreement and all amendments to the International Civil Aviation Organisation pursuant to Article 83 of the Convention for registration and publication as well as to the Secretary-General of the United Nations in accordance with Article 102 of the Charter of the United Nations.

5. After entry into force, any state which is Party to the aviation security conventions listed in Article 14, paragraph 4 may adhere to the Agreement by transmitting written notification of its approval or ratification to the Depositary, who in turn shall inform all Contracting Parties. The notification will come into effect 90 days after it has been received by the Depositary.

6. Any Contracting Party may notify the Depositary in writing that this Agreement shall not apply between that Contracting Party and another Contracting Party or acceding state. The Depositary shall inform all Contracting Parties of this notification. The notification will come into effect 90 days after it has been received by the Depositary. Notification under this paragraph shall not be made on any matter covered by this Agreement.

7. Any Contracting Party that has notified the Depositary pursuant to Paragraph 6 above, may subsequently notify the Depositary in writing that this Agreement shall commence or resume applying between the Contracting Party and another Contracting Party or acceding state. The Depositary shall inform all Contracting Parties of this notification. The notification will come into effect 90 days after it has been received by the Depositary.

8. This Agreement shall enter into force as between the acceding State and all Contracting Parties other than those which, pursuant to paragraph 6 of this Article, have notified the Depositary of the non-application of the Agreement, on the 30$^{th}$ day after the expiry of the 90-day period referred to in paragraph 5 of this Article.

**ARTICLE 25. AMENDMENTS**

1. Any Contracting Party may propose one or more amendments to the present Agreement by communicating the amendments to the Depositary. The Depositary shall circulate such amendments among the Contracting Parties through diplomatic or other appropriate channels for their acceptance.

2. Each proposed amendment circulated in accordance with paragraph 1 of this Article shall be deemed to have been accepted if no Contracting Party communicates an objection thereto to the depository within 6 months following the date of its circulation by the Depository.

3. If no objection has been communicated, the Depositary shall then prepare and transmit a certified copy of the amendment to the Contracting Parties. The amendment shall enter into force for all Contracting Parties 120 days following the date on which the Depositary has informed all Contracting Parties of the acceptance of the amendment by all Contracting Parties.

4. If a majority of Contracting Parties communicates through diplomatic or other appropriate channels objection to the proposed amendment, such amendment shall not be considered as accepted but if agreed by at least a majority of Contracting Parties at the date of proposal of the amendment, negotiations shall be held to consider the proposal.

5. Unless otherwise agreed, the Contracting Party proposing the amendment shall host the negotiations, which shall begin not more than 90 days after agreement is reached to hold such negotiations. All Contracting Parties shall have a right to participate in the negotiations.

6. If adopted by at least a majority of the Contracting Parties attending such negotiations, the Depositary shall then prepare and transmit a certified copy of the amendment to the Contracting Parties for their acceptance.

7. Any amendment circulated in accordance with paragraph 6 shall enter into force, as between the Contracting Parties which have accepted it, 30 days following the date on which the Depositary has received written notification of acceptance from a majority of the Contracting Parties. The Depositary shall inform all Contracting Parties of these notifications.

8. Following entry into force of such an amendment, it shall enter into force for any other contracting party 30 days following the date the Depositary receives written notification of acceptance from that Party. The Depositary shall inform all Contracting Parties of this notification.

**ARTICLE 26. ENTRY INTO FORCE**

This Agreement enters into force [90] days after the deposit of instruments of ratification, acceptance, or approval, in accordance with Article 24 paragraph 2, with the Depositary by at least three of the states identified in Article 24 paragraph 1.

**ARTICLE 27. WITHDRAWAL AND TERMINATION**

Any Contracting Party may withdraw from participation in the Agreement by notifying the Depositary in writing [and through diplomatic channels] of its intention to do so. The Depositary will then notify all other Contracting Parties in writing and through diplomatic channels. The agreement will cease to be in force for that Contracting Party one year after the day that the Depositary received the notification. The Agreement shall remain in force for other Contracting Parties as long as it is adhered to by at least three (3) contracting parties.

**ARTICLE 28. DEPOSITARY**

The [……..] shall be the Depositary of this Agreement

## ANNEX A

## EXPEDITING CUSTOMS CLEARANCE

Each Contracting Party shall, with respect to air cargo transportation covered by this Agreement,

1. *Customs scope of responsibility*

   a) Where the nature of a consignment could attract the attention of different public authorities, e.g. the customs, veterinary or sanitary controllers, Contracting States shall endeavour to delegate authority for release/clearance to customs or one of the other agencies or, where that is not feasible, take all necessary steps to ensure that clearance is co-ordinated and, if possible, carried out simultaneously and with a minimum of delay.

   b) Ensure that, at the request of the person concerned, and for reasons deemed valid by Customs, the latter shall, subject to the availability of resources, perform the functions laid down for the purposes of a Customs procedure or practice outside the designated hours of business and/or away from Customs offices. Any expenses chargeable by Customs shall be limited to the approximate cost of the services rendered.[1]

   c) Provide a legal right for an initial appeal to Customs and, where an appeal to Customs is dismissed, the right of a further appeal to an authority independent of the Customs administration. In the final instance, the appellant shall have the right of appeal to a judicial authority.

   d) Ensure that all relevant information relating to Customs laws and procedures is readily available to any interested person, and that, at the request of the interested person, the Customs shall provide as quickly and accurately as possible, information relating to the specific matters raised by the interested person and pertaining to Customs law or procedures.

   e) Ensure authorities consult with operators and others concerned where practicable when introducing or amending regulations and procedures for the release and clearance of air cargo.

2. *Customs efficiency (rapid, transparent, risk analysis system)*

   a) Ensure that their Customs services limit their data requirements to only those particulars which are deemed necessary for risk assessment and analysis and the release and clearance of air cargo.

   b) Instruct its control agencies to use the UN/ECE layout key as the basis for any new or revised paper documents.

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[1] Costs may include overhead expenses for facilities where the Customs Service is located on-site and the inspectors perform no functions but processing a specific carrier's cargo.

c) Seek to replace supporting certificates and other official paper documents, customarily carried and presented with the goods, by electronic communications between relevant government agencies of the countries concerned, testifying that specific consignments have certification status.

d) Accept airworthiness certificates or other documents showing compliance with aviation requirements for the purpose of Customs verification of imports of spare parts for use in aircraft in international services.

e) Ensure that their Customs services use risk analysis to determine which goods and means of transport should be examined and the extent of that examination, using modern inspection and screening techniques.

f) Ensure that Customs processes include controls based on the audit and acceptance of traders' normal records.

g) Ensure that national legislation provides for:

   (i) Electronic commerce methods as an alternative to paper-based documentary requirements, including, particularly, the acceptance and processing of data prior to the arrival of the goods.

   (ii) Electronic as well as paper-based authentication methods.

h) Encourage all parties concerned, whether public or private, to implement inter-operable systems and to use the appropriate internationally accepted standards and protocols.

i) Establish regulations and contractual arrangements with operators and other parties to provide for transit movements of cargo under bond within the state. Such movements may include:

   (i) The transfer of inbound containerised cargo to off-airport facilities for unloading and clearance.

   (ii) The unloading of inbound cargo at the first airport of arrival, transfer to another aircraft or other means of transport and subsequent transport to another Customs office for clearance or re-export.

j) Ensure that electronic systems for the release and clearance of air cargo cover the transfer of cargo between air and other means of transport.

3. *Special Customs Provisions*

a) Ensure that spare parts and equipment imported into the territory of a contracting State for incorporation in or use on an aircraft of another contracting State engaged in international air navigation may be admitted free of customs duty, subject to compliance with the regulations of the State concerned, which may provide that the articles shall be kept under customs supervision and control.

b) Provide simplified release and clearance procedures for the equipment and supplies referred to in 3a) above.

c) Provide simplified release and clearance procedures for consignments meeting specified criteria such as:

   (i) Certain value limits below which consignments may be cleared immediately on the basis of data from the cargo manifest and air waybill, and relieved from duty or taxes or other charges.

   (ii) Certain value limits below which consignments may be cleared immediately on the basis of a simple declaration by the importer (in addition to the cargo manifest and air waybill) and payment of any applicable duties, taxes or other charges.

d) Provide procedures, for consignments not meeting the criteria in c) above, for the immediate release of goods on the basis of minimal, standard, information submitted at a specified time prior to arrival of the cargo and an adequate guarantee for subsequent completion of all documentary requirements and payment of applicable duties, taxes and other charges.

e) Ensure that for authorised persons who meet criteria specified by Customs, including an appropriate record of compliance with Customs requirements and a satisfactory system for managing their commercial records the Customs shall provide for:

   i) Release of the goods on the provision of the minimum information necessary to identify the goods and permit the subsequent completion of the final Goods Declaration.

   ii) Clearance of the goods at the declarant's premises or another place authorised by the Customs.

   iii) Acceptance of a single Goods Declaration for all imports or exports in a given period, where goods are imported or exported frequently by the same person.

   iv) Use of authorised persons commercial records to self-assess their duty and tax liability, and, where appropriate, to comply with other Customs requirements.

   v) Acceptance of lodgement of the Goods Declaration by means of an entry in the records of the authorised person, to be supported subsequently by a supplementary Goods Declaration.