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**MAJOR REGULATORY ISSUES RELATING  
TO THE DEVELOPMENT OF THE AIR  
TRANSPORT SYSTEM IN ESCWA REGION**

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- The views expressed in this paper are those of the author and do not necessarily reflect those of the Economic and Social Commission for Western Asia.

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## **Major Regulatory Issues Relating to the Development of the Air Transport System with a view to strengthening the sector**

The major regulatory issues relating to the development of the air transport system are many and varied. This paper contains information addressing these issues from different perspectives as follows:

- an overview of economic regulatory developments and issues since 1994;
- legal implications on air transport through the coming into force of Article 83 *bis* of the Chicago Convention;
- major issues in relation to airport and route facility management; and
- guidelines developed by an ICAO meeting regarding multinational facilities and services.

### **AN OVERVIEW OF ECONOMIC REGULATORY DEVELOPMENTS AND ISSUES SINCE 1994**

#### **Introduction**

The World-wide Air Transport Conference (Montreal, 1994) took place against the background of dynamic change in international air transport, brought about by increasing competition, transnationalization of business, globalization of the world economy and the emergence of regional economic groupings, privatization and liberalization of service industries and the introduction of new global trading arrangements for service sectors. In addition to its Recommendation which provides a policy framework for evolution and progressive change in air transport regulation, the Conference, and ICAO's Air Transport Regulation Panel (which subsequently undertook further work on certain topics discussed at the Conference), produced a number of conclusions and future regulatory arrangements designed to assist States in adjusting to a more competitive environment.

This paper provides a brief overview of regulatory trends and developments since the Conference, in the context of the Conference conclusions and guidance.

#### **Air transport relationships and negotiations**

In terms of form, States are continuing to rely primarily on bilateral air service agreements; nearly 300 such agreements, amendments thereto and memoranda of understanding were reportedly concluded in the period 1995-1997.

Two regional air service agreements were concluded in the Western Hemisphere – one by 17 States in the Caribbean and one by six States in South America – and one in Africa, the Banjul Accord. This brings the total of such formal agreements and arrangements to five, counting the existing European Union and the Andean Pact air transport regimes. Each of these agreements have as their underlying purpose a transition to a more efficient, competitive air transport regime within that group of States.

There were also regional approaches aimed at formulating or co-ordinating air transport policies. For example, transport ministers of States in the South American region began discussions on a common air transport policy for the region. In Africa, a Task Force of the African Civil Aviation Commission recommended practical implementation measures for the Yamoussoukro Declaration, such as shifting the focus to sub-regional efforts and to intra and inter-regional airline alliances as well as removing deadlines from the Declaration. In Asia/Pacific, transport ministers of the members of the Asia Pacific Economic Cooperation (APEC) forum endorsed policy options aimed at increasing competitive air services in the region and assigned to a working group the task of developing recommendations for implementation measures.

In terms of regional negotiations, the Commission of the European Union continued negotiating with Switzerland and also began negotiations with States in Eastern and Central Europe with a view to expanding the single European air transport market, which came into full effect in April 1997. In addition, the European Commission began a two-phased negotiation (the first phase of which excluded traffic rights but focussed on competition issues, airline ownership rules and computer reservation systems) with the United States on a common North Atlantic air services regime.

### **Trends in air transport arrangements**

With respect to content, measures to ensure effective and sustained participation in international air transport, regarded as a key element by the Conference, were present in about a third of the three hundred bilateral instruments reportedly concluded in the past three years. The most popular measure was the gradual, negotiated expansion of the number of authorized airlines, traffic points and capacity increases. The concept of full market access – that is, where there are traffic rights to/from/beyond the territory of the bilateral partners as well as tariff and capacity flexibility for the airlines of both bilateral partners – was found in 35 of the bilateral air service agreements and amendments as well as in the Andean Pact and the European Union. Some form of broadened airline ownership and control criteria for the use of market access was included in 33 bilateral agreements, the most prevalent one being “incorporation and principal place of business in the designatiState”. Broadened ownership and control criteria was also contained in one regional agreement concluded since 1995, the Caribbean agreement which used a combination of legal establishment and registration in a Caribbean Community State and “majority ownership and effective control by one or more of such States or their nationals”. Reflecting the increasing importance and extent of the practice, 46 of the bilateral instruments contained provisions dealing with codesharing.

In terms of measures to adjust commercial matters to a more competitive environment, provisions dealing with currency conversion and remittance of earnings as well as those concerning the employment of non-national personnel occurred in about a third of the nearly 300 bilaterals, amendments and memoranda of understanding; sales and marketing of air transport, in about one-quarter; and payment of airline expenses in local currency, in about one-fifth. The right of airlines to perform their own ground handling services was included in about ten per cent of the bilateral agreements; in addition the European Union adopted a liberalized ground handling regime with a phase-in period for certain

airports.

### **Slot Allocation**

Recognizing that a shortage of airport slots (designated times for an aircraft to take off or land) at congested airports was an important physical constraint on market access, the Conference urged States to increase capacity to resolve this problem. In the meantime reliance on the world-wide system of airport scheduling committees of the International Air Transport Association (IATA) would result in the existing capacity being used effectively. However, the slot shortage increased; there are presently airport scheduling committees at 132 international airports. Slot allocation became an issue in bilateral negotiations as well as the approval/disapproval of major airline alliances. The European Union is currently reviewing its regulation on slot allocation and is considering a number of possible amendments to it which would affect international air services at European airports.

### **Leasing**

The concept of full market access presented to the Conference included the use of leased aircraft. Although the use of leased aircraft in international air transport is not new, the practice has been growing substantially in recent years and is likely to gain further impetus from the entry into force on 20 June 1997 of Article 83 *bis* of the Convention on International Civil Aviation concerning the lease, charter or interchange of aircraft. From information available to ICAO, over one-half of 41 bilateral air service agreements involving 38 States which contain a provision dealing with the use of leased aircraft were concluded after 1994. From a regional perspective, the use of leased aircraft is the subject of a European Union Resolution in 1995 and a European Civil Aviation Conference Recommendation on leasing in 1997, the latter following an extensive study. Many States (particularly those which have ratified Article 83 *bis*) are reviewing pertinent policies and practices with respect to the use of leased aircraft. ICAO intends to develop guidance on this matter.

### **Competition law**

The Conference recognized that greater liberalization would lead to the increasing use of competition laws as a regulatory tool to ensure fair competition. The European Commission has proposed applying the competition provisions of the treaty of Rome as well as the bloc exemption regime for intra-European air transport to air transport between European member States and third countries. The proposed authority would allow for consultations and, where necessary, negotiations in the event of a conflict between Community competition law and the laws, regulations or administrative provisions of third countries or the provisions of air service agreements between member States and third countries.

### **Computer reservation systems**

As recommended by the Conference, ICAO completed its review of its Code of Conduct for the Regulation and Operation of Computer Reservation Systems (CRSs) and adopted a revised Code effective 1 November 1996. The revised Code has been drafted so that it can be followed by ICAO Member States which are also parties to the General Agreement on Trade in Services (GATS), which includes computer reservations systems. Against a background of consolidation and ownership changes (in two cases involving public ownership) leading to increasing concentration with respect to major multi-national CRSs, reviews are currently underway of the CRS codes of conduct of the European Civil Aviation Conference and of the European Union and of the national CRS regulations of the United States.

## **Privatization**

The trend of partial or full privatization of government-owned airlines, considered by many States in the broader context of their privatization strategies, has continued since the Conference. Before 1994 some 35 national airlines had been targeted for privatization. Since then, another 26 carriers have joined the list. Of these carriers, 17 have achieved their privatization goals over the last three years, while some 30 carriers are currently at different stages of preparation for privatization. During this period, however, the privatization of several carriers had to be deferred or postponed because of the complexities encountered in the process or the economic condition of the airlines concerned, or local circumstances.

Currently, all North American airlines are privately owned. In Latin America and the Caribbean, with only a few exceptions almost all major carriers are now majority owned by private interests. In Europe, over half of the major western European airlines are privately owned while 7 of the ten remaining government-owned carriers have been targeted for partial or full privatization. Although most national carriers of the Eastern European States (including the CIS) are still majority state-owned, privatization aims have been made known for 10 of them. In Asia and the Pacific region, 16 airlines have been targeted for partial or full privatization while carriers in Japan, Korea, Brunei, Malaysia, the Philippines, Australia and New Zealand as well as carriers based in Hong Kong and Taiwan Province of China are now privately owned. In the Middle East and Africa, almost all national carriers are still government owned. Though privatization aims have been made known for 10 Middle East and 13 African airlines, so far only Kenya Airways has successfully achieved its privatization goal.

## **Transnational ownership**

The Conference concluded that the acceptance of foreign investment in national airlines was a matter for States individually to decide but it was expected that they would continue to adjust their individual foreign investment rules in light of national requirements. Since 1994, the trend of partial foreign ownership of airlines has continued. Several governments have adopted new policies or amended existing rules to relax restrictions on foreign investment in national airlines (e.g. China, Mexico, Australia, New Zealand and Brazil). Furthermore, many airlines continued to make equity investment in foreign carriers, often as part of the strategy to forge or strengthen alliances and expand market access. By the end of 1997, some 50 carriers have stakes in foreign airlines while about 65 airlines have equity owned by foreign investors (including 15 African airlines).

## Alliances

Since 1994 airlines throughout the world continued to form alliances through various cooperative arrangements (such as codesharing, blocked space, cooperation in frequent flyer programmes, joint marketing, service and purchasing, etc.) to redefine, strengthen or expand their market presence and to position themselves in an increasingly competitive environment. While numerous agreements concern co-operation on a limited scale (e.g. codesharing on certain routes), the number of wide ranging strategic alliances has been on the rise in recent years. Most notable was the emergence of the so-called "mega-alliances", which involved some major or a group of major airlines with a combineroute network extending to most parts of the world.

Among such groupings are: the proposed alliance between British Airways and American Airlines, the "Star alliance" formed by Air Canada, United Airlines, Lufthansa, Scandinavian Airlines System, Thai Airways International and Varig, the "Atlantic Excellence" alliance involving Delta Air Lines, Swissair, Sabena and Austrian Airlines, the Northwest Airlines-KLM alliance, and the alliance forged by Air New Zealand, Ansett Australia and Singapore Airlines. Often, each leading member of these alliances also has alliance agreements with many other carriers in different continents of the world (for example, British Airways with Qantas, American Airlines with Canadian Airlines International and Japan Airlines, Lan Chile, Iberia and Aerolineas Argentinas, KLM with Alitalia, Garuda Indonesia and Kenya Airways, Delta with Air France, Air Jamaica).

As such alliance groupings have evolved, some airlines have had to realign their partnership relations (e.g. BA ended its partnership with USAir to ally with American Airlines, Singapore Airlines severed its ties with Delta to join with Lufthansa). Overall, the trend of airline alliances has become widespread but it is still evolving, with many partnership relations becoming more intertwined and complex.

Moreover, with the emergence of wider overlapping alliance groupings competition between alliances is likely to increase. During the last four years, the most active in securing alliance agreements were the major carriers in the Americas and Europe (accounting for 80 per cent of the total agreements concluded), with most major airlines in the Asia Pacific region becoming more involved. Air carriers in the Middle East and the African continent have largely remained outside of this trend although a few alliance agreements have been concluded (e.g. between Kenya Airways and KLM, South African Airways with Lufthansa, Japan Airlines and Thai Airways International, Royal Jordanian with TWA).

As airline alliances proliferate, the subject has invoked considerable attention from regulatory authorities because of its implications for traffic rights, competition and consumer protection. Generally, States have dealt with traffic rights issues arising from alliance arrangements (e.g. third country codesharing) in the context of their bilateral relationships and through negotiation. Some national and regional regulatory bodies have conducted studies of alliances and their implications. ICAO, in 1997, released a major study of the implications of codesharing and has produced recommendatory guidance on the consumer protection aspects of codesharing. Following the proposed alliance agreement between British Airways and American Airlines, the European Commission launched an investigation of this and other existing major alliances, an investigation which is still under way at the time of preparation of this paper. Separately, the United States authorities have imposed certain conditions to ameliorate the anti-competitive aspects when approving requests for antitrust immunity by several major alliances. Furthermore, a link has been drawn in some bilateral negotiations between the grant of regulatory approval for some major alliances and the acceptance of more liberalized or so called open skies bilateral agreements.

## Implications

Each of the above briefly-reviewed regulatory trends and developments has implications for air transport. In particular, the following may be noted; the trend towards regionalism as a means for opening up market access among small groups of States; the inclusion in air transport relationships of participation and other measures designed to move to a less regulated environment; the increasing importance of slots for market access to certain congested markets; the use of leased aircraft in the context of the entry into force of Article 83 *bis* of the Convention (see paragraph below); the extra-territorial application of competition laws; the role of CRS Codes of Conduct; the progress of privatization of national airlines in other regions; the increasing trend towards partial foreign ownership of national airlines; and the increasing importance of airline alliances.

## MAJOR ISSUES IN RELATION TO AIRPORT AND ROUTE FACILITY MANAGEMENT

Major issues in the area of airport and air navigation services provision include developments with regard to the organizational structures under which they are operated, financing and cost recovery. Of pressing relevance in that context are the financial and organizational aspects of the implementation of the ICAO global communications, navigation and surveillance/air traffic management (CNS/ATM) systems concept.

Financial and operational efficiency in **airport and air navigation services management** will be considerably facilitated where airports and air navigation services are provided by means of organizational structures ensuring financial and operational autonomy. The trend towards such autonomy has been a principal factor in the improvement over recent years in the financial situation of airports and air navigation services.

The nature of the provision of air navigation services is undergoing fundamental changes. Growing emphasis is being placed by States on the financial self-sufficiency of their air navigation services, *inter alia* to reduce the burden on government budgets, and costly high capacity technology is available for implementation capable of serving the requirements of several States much more efficiently and at a lower cost than is possible for each of them alone using current technology. Most important though is that all these developments have the potential to improve aviation safety. Also significant is how commercial financial institutions have become more involved in the financing of various air navigation services investments. These institutions are calling for financial management and cost recovery mechanisms of a higher order than currently exists in many areas.

An independent entity or body may be established for the purpose of operating certain facilities and providing specific services, with operational and financial freedom to carry out its functions. Autonomy can take many forms and does not necessarily mean privatization (although privatization is one form of autonomy) since ownership can rest in public or private hands or a mixture of both. A single autonomous entity may operate both airports and air navigation services and that entity may be in the form of a civil aviation authority. Regardless of the organizational form under which air navigation services are provided, according to Article 28 of the Chicago Convention it is the State that is ultimately responsible for the provision and operation of air navigation facilities and services.

The benefits that normally accrue from autonomy are those associated with the introduction of corporate or commercial-type management as opposed to direct government administration and usually result in improved operational efficiency and managerial control. Particularly



important in the context of CNS/ATM systems financing is the improved control autonomy provides over revenue flows both in terms of their generation as well as in their application towards servicing debt obligations such as, for example, loans taken out to finance CNS/ATM systems implementation.

## **LEGAL IMPLICATIONS ON AIR TRANSPORT THROUGH THE COMING INTO FORCE OF ARTICLE 83 *BIS* OF THE CHICAGO CONVENTION**

On 20 June 1997 entered into force Article 83 *bis* of the *Convention on International Civil Aviation* (Chicago Convention, 1944) in respect of States which have ratified the related Protocol. Although the primary objective of this Article is to provide for the international recognition of the transfer of safety oversight responsibilities from the State of Registry to the State of the Operator in the case of lease, charter or interchange of aircraft, it is considered that its implementation can facilitate government tasks and reduce airline costs, thus contributing to the development of the air transport industry.

## **GUIDELINES DEVELOPED BY AN ICAO MEETING REGARDING MULTINATIONAL FACILITIES AND SERVICES**

In view of the technical developments and the corresponding high levels of investments bringing about a fundamental change of growing interest and need for multinational facilities and services, over the years States have provided to users and one another various services such as air traffic control, communications and aeronautical meteorology. While this approach continues to be the general practice because of the financial and managerial implications involved, the approach by technical planning bodies to the possible implementation of multinational facilities and services may be expected to differ from that applied to facilities or services to be implemented by a single State. Consequently, it is to be expected that the States concerned will wish to evaluate, at least in broad terms, the financial implications and the institutional aspects of such facilities before agreeing to their incorporation in the regional plan and before committing themselves to using them. The exercise of the European Air Navigation Planning Group (EANPG) as well as the Africa/Indian Ocean Planning and Implementation Regional Group (APIRG) have recognized the value of using a multinational approach in the provision of facilities and services to a group of States or even regions in order to lower their respective cost.

The following guidance material developed by ICAO (extracts from Doc 9672, report of the Limited Middle East RAN Meeting) is intended to constitute an attachment to the introduction of the Middle East Air Navigation Plan. Furthermore, ICAO's Middle East Air Navigation Planning and Implementation Regional Group (MIDANPIRG) is developing a Communications, Navigation, Surveillance and Air Traffic Management (CNS/ATM) Plan with the assistance of the Middle East States for the use of space technology aimed at improving the safety and efficiency of air navigation. Within the CNS/ATM Plan, ICAO is encouraging States to adopt a co-operative approach in optimizing the efficiency and economy of air navigation.

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## APPENDIX D

### GENERAL GUIDELINES ON THE ESTABLISHMENT AND PROVISION OF A MULTINATIONAL ICAO MID AIR NAVIGATION FACILITY/SERVICE

#### 1. INTRODUCTION

1.1 These guidelines were developed by the LIM/MID (COM/MET/RAC) RAN Meeting (1996) pursuant to Recommendation ANSEP/2-3 approved by the ICAO Council at the sixth meeting of the 146th Session.

1.2 They reflect relevant ICAO provisions and established policies on the Organization's regional planning for and Implementation of facilities/services required for air navigation applicable in the MID Region (Art. 28 of the Chicago Convention and Assembly Resolution A26-8, Appendices K, L and M, refer). They also recognize the principle that costs may be recovered for facilities and services provided for and implemented under the MID/ASIA Regional Plan as approved by the Council (Doc 9082/4, paragraph 34 (ii) refers) and the principles set forth in that document and in the ICAO Manual on Air Navigation Services Economics (Doc 9161/2).

#### 2 . DEFINITION

##### Multinational ICAO MID Air Navigation Facility/Service

2.1 The meeting considered that multinational facilities/services would for some time continue to be the exception rather than the rule when providing for such requirements for air navigation within the MID/ASIA Region. Because of their uniqueness, their impact on the system as a whole as well as their implications for users and providers of the multinational facilities/services, they would need early identification. The following definition of a multinational ICAO MID air navigation facility/service would permit this in a rational manner:

A facility/service specifically identified as such and included in the ICAO MID Regional Plan for the purpose of serving international air navigation in air-space extending beyond the air space serviced by a single State in accordance with the MID Regional Plan."

##### Applicability of ICAO provisions

2.2 Pursuant to Article 28 of the Convention and in One with the ICAO policies concerning the formulation of regional plans and their implementation, any multinational facility/service would be set forth in the Regional Plan as established by the Council. In turn, when establishing the cost basis for route facility charges the council approved principles are to be applied, i.e. the costs to be taken into account should be those assessed in relation to facilities and services provided for and implemented under the MID Regional Plan.

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## **Multinational character**

2.3 In ICAO rules and procedures the term "facility/service" for air navigation is well understood. Contrary to the term "project" or any other term which may relate only to certain segments or phases of an undertaking it does not exclude research, development, operation and eventually the phasing out of a joint venture. In this context, there is therefore no need to depart from the well known term "facility/service" for air navigation. There is, however, room for amplifying the definition by additional elements in order to dissociate the common undertaking from those facilities/services which are provided by one State only.

2.4 The purpose of a multinational facility/service to serve international air navigation in airspace extending beyond the airspace serviced by a single State is a useful and qualifying element. It is a crucial criterion in that it unambiguously discards other possibilities which the machinery for regional planning and implementation of requirements for facilities/services provides for under Article 28 of the Convention, in accordance with Standards and Recommended Practices and relevant Assembly Resolutions, e.g. delegation of airspace, operating agencies, bi- and multilateral agreements or as a last resort, joint financing under Chapter XV of the Convention. While in any such case States would individually remain responsible under Art. 28 for the provision of facilities/services within the area of their jurisdiction a "multinational" facility/service by its very nature would extend beyond the individual airspace of a State.

## **MID Regional Plan**

2.5 Regional plans for facilities, services and procedures are established by the Council, normally on the advice of Regional Air Navigation Meetings. Between such meetings plans are updated, on an ad hoc basis, through the Procedures for the Amendment of approved Regional Plans. In both cases an experimental procedure based on Recommendation No. 2 of the Conference on the Economics of Route Air Navigation Facilities and Airports (1973), applies as follows: in case of an objection to the inclusion of facilities/services in the Plan raised by a State on the grounds that facilities/services are not required for international civil aviation, to the extent feasible, costs of the facilities/services questioned are evaluated.

2.6 That the Middle East Air Navigation Planning and Implementation Regional Group (MIDANPIRG) as well as all parties to the regional planning processes for the continuous management of the MID Air Navigation Plan, continue to pay due regard to the operational requirements, expected technical progress, the likely financial implications for users and providers, and possible alternative solutions and operational cost/benefit considerations.

2.7 The process for development and implementation of multinational facilities/services would be similar to that concerning the inclusion of any facilities/services in the MID Regional Plan and would have the general objective of ensuring continuous and coherent development of the MID Regional Plan as a whole and possible benefits of joint action by participating States.

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### **3. DEVELOPMENT AND PROCESSING OF A PROPOSAL FOR A MULTINATIONAL ICAO MID AIR NAVIGATION FACILITY/SERVICE**

3.1 The following constitutes the step by step development and processing of a proposal for a multinational ICAO MID air navigation facility/service. Comments on individual steps are set forth in subsequent paragraphs.

- A. Proposals for a multinational ICAO MID air navigation facility/service might originate from:
  - a) The Middle East Air Navigation Planning and Implementation Regional Group (MIDANPIRG); or
  - b) A State or a group of States;
  - c) Appropriate regional/international organization recognized by ICAO.
- B. Proposals for such a facility/service should be supported by material relating to the following aspects:
  - a) purpose of the proposal and operational and technical justifications;
  - b) financial implications and cost-effectiveness;
  - c) managerial implications; and
  - d) alternative solutions.
- C. The proposal will be evaluated by MIDANPIRG particularly in respect of requirement, acceptability and cost-effectiveness.
- D. MIDANPIRG will then, if in preliminary agreement, through the Regional Office Bangkok, Cairo, Dakar, Nairobi, and Paris.
  - a) consult with States which would directly be concerned with the provision of the potential multinational facility/service, as well as those States who would be utilizing it; and as necessary concerned international organizations; and
  - b) re-evaluate the proposal in the light of comments made by these States and international organizations and to decide either to proceed or to discontinue the proposal.
- E. MIDANPIRG develops, in consultation with all concerned, a complete proposal for amendment of the MID Regional Plan for processing in accordance with the procedure approved by the Council.

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**Comments on the process**

3.2 In the light of the basic elements as contained in the definition and their obvious consequence of fully integrating the proposal for a multinational MID facility/service into the ICAO planning and implementation processes for the MID Region, it follows that:

- A. Proposals for a multinational ICAO MID air navigation facility/service might originate from:
- a) MIDANPIRG; or
  - b) a State or a group of States;
  - c) appropriate regional/international organization.

3.3 In this context it is recalled that MIDANPIRG at all times takes an active posture. For the permanent and coordinating machinery this is a prerequisite to remain responsive to the specific requirements of the MID/ASIA Region and is reflected in the objectives of the group, namely to:

- a) ensure the continuous and coherent development of the MID/ASIA Regional Plan as a whole taking into consideration the effect of such development on the Regional Plans of adjacent regions; and
- b) identify specific problems in the air navigation field and propose, in appropriate form, action aimed at resolving these problems.

3.4 The MID planning processes and the working methods of MIDANPIRG as reflected in its Procedural Handbook ensure continued intensive information of and coordination with States members of the MID Regions. Although maximum transparency is inherent in these procedures, specific attention is required from the outset when dealing with multinational projects which may have far reaching implications for all concerned. This would include the financial problems which are a major cause of deficiencies in the implementation of the MID Plan.

3.5 The procedures for the amendment of approved Regional Plans and the management of the MID Regional Plan on a continuous basis are described in the Introduction to the current edition of the MID/ASIA Regional Plan Publication (Doc 8700).

3.6 At the time a proposal is originated within MIDANPIRG or submitted for its consideration by a State/group of States, basic information must be available to permit preliminary evaluation.

Therefore, as a principle:

- B. Proposals for such a facility/service should be supported by material relating to the following aspects:

a) purpose of the proposal and operational and technical justifications

This material should include the overall plan and targets for the development and the establishment of the facility/service. The likely implications if any, on regulations, working-routines, equipment, premises and maintenance should be included in the supporting documentation. Information on the expected consequences on the overall MID air navigation system or any part thereof should also be included.

b) financial implications and cost-effectiveness

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

c) managerial implications

As a minimum, information on the organizational infrastructure (operational and administrative) and on staff should be included.

d) alternative solutions

Although it may not normally be expected that all proposals from the outside submitted to MIDANPIRG for consideration will contain relevant information to the extent necessary for preliminary assessment, MIDANPIRG itself should at all times have due regard to any possible alternative which may satisfy the operational requirement in a more cost/effective manner. Such information should be part of the information provided to those who are to be consulted.

3.7 Once necessary information is available, the consequential next phase to be initiated with minimum possible delay is that:

- C. The proposal will be evaluated by MIDANPIRG particularly in respect of requirement, acceptability and cost-effectiveness.
- D. The MIDANPIRG will then, if in preliminary agreement, through the ICAO regional offices in Bangkok, Cairo, Dakar, Nairobi and Paris:
  - a) consult with States which would directly be concerned with the provision of the potential multinational facility/service, as well as those States who would be utilizing it; and
  - b) re-evaluate the proposal in the light of comments made by these States and decide either to proceed or to discontinue the proposal.

3.8 MIDANPIRG terms of reference, as well as the procedures adopted for the conduct of its activities, enable it to receive advice in the field of economics as necessary and appropriate. MIDANPIRG would be in the very best position to establish the need for and the form such assistance should take when considering a proposal for a specific multinational facility/service.

3.9 After completion of the above-mentioned preparatory work the process of including a multinational facility/service in the MID Regional Plan requires that:

- E. MIDANPIRG develops in consultation with all concerned, a complete proposal for amendment of the ICAO Regional Plan for processing in accordance with the procedure approved by the Council.

#### 4. FINANCIAL, MANAGERIAL AND OTHER CONTRACTUAL ASPECTS

##### Introduction

4.1 The participation of States in the provision of a multinational facility/service is based on the assumption that any State having supported and agreed to the implementation of such a facility/service and making use of it, should also shoulder its respective share of the costs involved (4.27 refers). The participating States would need to formalize the terms under which the multinational facility/service is to be provided in an agreement. A primary aim of the agreement should be to ensure that the costs involved are shared amongst the participating States in a fair and equitable manner.

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

*Note.- The guidelines generally refer to "agreement" as a generic term covering one or more agreements as the case may be.*

##### Types of agreements

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

4.4 It is recommended that, whenever possible, the agreement be established in the form of an "administrative agreement" rather than a formal international treaty because this would allow the agreement to come into force with minimum delay and also permit greater flexibility in incorporating any subsequent modifications required. It is recognized, however, that in some States constitutional or legal circumstances may require the approval of the legislative assembly for financial obligations to be accepted by the State, particularly if these are of a substantial magnitude and/or extend over a period of time. Whatever form is

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used, the agreement(s) should be structured to provide for easy subsequent amendments as developments may require. To this end, material of detail which is more likely to require modifications, and which will not affect the basic provisions of the agreement, should be contained in annexes or appendices.

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

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

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

- A. Objective of the agreement
- B. Obligations of States party to the agreement
- C. Definition and description of the facility/service
- D. Establishment and operation of the facility/service
- E. Legal responsibility
- F. Liability aspects
- G. Managerial aspects:
  - a) Governing bodies and decision-making arrangements
  - b) Organization and staffing
  - c) Consultation



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- H. Financial aspects:
    - a) Cost determination
    - b) Cost sharing
    - c) Budgeting
    - d) Authority to approve the budget
    - e) Financial auditing
  - I. Taxation and other government levies
  - J. Procedures for settlement of disputes
  - K. Accessions, withdrawals, amendments to and termination of agreement.

#### **Basic contractual provisions**

- A. Objective of the agreement

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

- B. Obligations of States party to the agreement

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

- C. Definition and description of the facility/service

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

- D. Establishment and operation of the facility/service

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

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

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**E. Legal responsibility**

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

**F. Liability aspects**

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

**G. Managerial aspects**

**a) Governing bodies and decision making arrangements**

4.14 The nature of the governing body or bodies required to administer the agreement needs to be established and a description of their functions provided. Should a new agency be established to operate the multinational facility/service, this would need to be stipulated in the agreement, where reference should also be made to the functions and responsibilities of the executive head of the agency and to whom he or she would be responsible.

4.15 Voting arrangements should be specified. It would need to be decided whether each participating State should have equal voting power (as is for example the practice of ICAO). Alternatively, each State's vote may be weighed in accordance with a predetermined formula, which would need to be specified, for example, by determining the voting power according to that participant's share of total contributions to the facility/service or agency concerned. A maximum and/or a minimum limit may be set for the number of votes that can be assigned to any individual participant regardless of that participant's share of total contributions.

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

**b) Organization and staffing**

4.17 The agreement should refer to the manner in which the entity actually operating the facility/service would structure or organize its functions. This would apply in particular if the operation is to be assigned to a new agency.

4.18 Various aspects of staffing (nationality, numbers and type etc.) will also need to be addressed and, as appropriate, incorporated in the agreement (or an annex to it). If the participating States agree that the multinational facility/service is to be provided by one State or by two or more States (each providing separate components or parts of the project involved), the nationality of staff should not give rise to any problems, and need not be covered in the agreement. However, operation by an international organization

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or agency, may require that certain stipulations be included in the agreement concerning the selection of qualified staff from participating States. Other aspects to be considered, aside from the number and types of staff, are the various elements of conditions of service including status to be accorded to any expatriate staff, tax exemptions, etc., which will reflect on the over-all costs of the venture.

c) Consultation

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

H. Financial aspects

a) Cost determination

**Pre-implementation considerations**

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

**Determination of costs**

4.21 In order to formalize the manner in which the costs to be shared should be arrived at, the agreement between the States participating in the provision of a multinational facility/service should contain clauses referring to the determination of the related costs. The agreement should also stipulate that the approach towards cost determination be based on that recommended in Chapter I of the ICAO Manual on Route Air Navigation Facility Economics (Doc 9161). Should more comprehensive instructions, based on Doc 9161, be required, it is preferable that these be presented in an annex in view of their relative volume and detail, and also because it may be expected that they would need to be updated and modified more frequently than the main text of the agreement.

(Amendments to the annexes to the agreement would normally be subject to the approval of the governing body of the multinational facility/service).

4.22 In line with the approach adopted in Doc 9161, the annex would normally contain an inventory of the various components of the multinational facility/service (e.g. buildings, equipment, number of staff by function, etc.). It would also cover the determination of annual costs, i.e. costs of operation and maintenance, administrative and common costs, and capital costs (depreciation and interest) as well as special capital outlays. Finally, where a multinational facility/service or any of its components serve other than the multinational functions specified in the agreement (i.e. functions serving one State only, or non-aeronautical functions), instructions should be provided to ensure the accurate determination of the "multinational" costs to be shared among the participating States.

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**Presentation of costs**

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

b) Cost sharing

**Responsibility for the sharing of costs**

4.24 As stated in 4.1 above, once a State has supported and agreed to the implementation of a multinational facility/service and making use of it, it would be expected to assume responsibility for its share of the costs involved. This basic obligation should be reflected in the agreement between the participating States.

**Determination of cost share of each participating State**

4.25 The agreement should outline the procedure to be applied for determining the cost share to be borne by each participating State. Any cost sharing method should, to the extent possible, be equitable, simple and easy to apply. The question of equity should not only be considered in the context of the participating States, but also with respect to the final users (aircraft operators) since it may be assumed that in most instances the participating States would include the costs they incur in the cost base for their air navigation facility charges, where levied.

4.26 In general, it does not appear feasible to recommend one specific method or approach to cost sharing because the situation will vary, depending particularly, on the technical and operational characteristics of the multinational facility/service involved, the views or policies of the participating States on how costs should be shared, and the volume of these costs.

4.27 In the interest of equity, however, any method of cost sharing should, in principle, be based on the extent of the use of the multinational facility/service concerned by each participating State. Thus, the parameters or keys used to determine each State's cost share should reflect the extent of such use. However, if the use made of a multinational facility/service can only be measured by applying complex procedures and at a cost which is not commensurate with the costs to be shared, other methods of cost sharing based on readily available and relevant statistical data could be applied. Whatever method is selected it must provide for the just and equitable sharing of the costs involved.

**Tangible national benefits to the State(s) actually operating the multinational facility/service**

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

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## Recovery of costs from users

4.29 As a rule, a multinational facility/service would have to be "multinationally" financed or prefinanced by a State, group of States or, by an agency as established under the authority of an agreement by States. However, any of these could recover the costs so incurred from users once the facility/service has been implemented. Nevertheless, States may also choose to recover less than full costs in recognition of local, regional or national benefits (Doc 9082, paragraph 29 refers). Where an agency has been authorized to recover its costs through charges, the authorizing States would nevertheless need to make up for revenue shortfalls where, for example, the States had decided certain flights should either be exempted from or pay reduced charges.

4.30 It would be up to each participating State to decide whether or not it wishes to recover its cost share from the users (aircraft operators). A State could either include these costs in its cost base for route facility charges (if it levies such charges), or, alternatively, recover the costs by levying a separate charge (normally a more complex and costly procedure to administer). While the recovery of such cost shares from users might normally not be referred to in an agreement on a multinational facility/service, the agreement could include a provision to the effect that such recovery must be based on Article 15 of the Chicago Convention as well as the principles and recommendations in Doc 9082.

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

### c) Budgeting

4.32 Proper financial control will require costs and revenues to be estimated in advance. The itemization of the costs should basically correspond with that used for the presentation of costs (see 4.23 above). This will enable actual costs to be compared with estimated costs, and actual revenues with those estimated.

### d) Authority to approve the budget

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

### e) Financial auditing

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

## I. Taxation and other government levies

4.35 The subject of tax exemptions and other aspects related to taxation will need to be addressed in the context of the over-all operations of the multinational facility/service. Similarly, with regard to other

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

**J. Procedures for settlement of disputes**

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

**K. Accessions, withdrawals, amendments to and termination of agreement**

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

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

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

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