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LEGAL COMMISSION

Agenda Item 36: Report on the establishment of a legal framework with regard to CNS/ATM systems including GNSS

ASSEMBLY RESOLUTION ON A PRACTICAL WAY FORWARD ON LEGAL AND INSTITUTIONAL ASPECTS OF CNS/ATM

(Presented by the United States of America)

SUMMARY

Despite fourteen years of work, no consensus has been possible on proposals to alter the current, effective, long-term legal framework for CNS/ATM. Proponents of change have not met the burden of persuasion. In any case, a convention that cannot be brought into force will be of no help to States and regional organizations implementing CNS/ATM. Instead, ICAO should build on the work that has been done under the existing framework. It should call for practical measures to strengthen regional navigation plans and help Contracting States get the technical and economic assistance they need.

Action by the Assembly is in paragraph 7.

1. INTRODUCTION

1.1 ICAO has worked for fourteen years on a legal framework for, successively, Global Navigation Satellite Services (GNSS) and Communications, Navigation, Surveillance/Air Traffic Management (CNS/ATM). The course of the work is recounted in the Secretariat Working Paper for this agenda item and in its *Final Report on the Work of the Secretariat Study Group on Legal Aspects of CNS/ATM Systems*, the Appendix to C-WP/12197. The effort has involved work by the Legal Committee, the Council, several sessions of the Assembly, two *rapporteurs*, a Panel of Legal and Technical Experts, and a Secretariat Study Group that met eleven times over nearly five years. Along the way, these efforts have produced an over-arching *Charter on the Rights and Obligations of States Relating to GNSS Services* (Assembly Resolution A32-19) and a *Statement of ICAO Policy on CNS/ATM Systems Implementation and Operation* (approved by the Council on 9 March 1994).

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1.2 In addition to these documents, the **existing long-term legal framework** includes the *Convention on International Civil Aviation* (the Chicago Convention), its Annexes, other Assembly Resolutions, associated ICAO guidance and regional navigation plans, and exchanges of letters in 1996 between the United States and the Russian Federation, respectively, and ICAO concerning those States' offers of satellite navigation signals.

1.3 Most recently the Secretariat has summarized the results of the Secretariat Study Group on Legal Aspects of CNS/ATM, in its working paper on this agenda item, and more expansively in its final report on the work of the Study Group to the Council. The Study Group noted in its conclusions the general agreement that there is no legal obstacle to implementation of CNS/ATM and that nothing in the concept is inconsistent with the Chicago Convention. Under the slightly misleading heading "inadequacy of the current legal framework", the Secretariat noted the Group's finding that there were no substantive gaps in the major national liability systems it studied. Indeed, the Group identified only two specific and limited procedural concerns having to do with sovereign immunity and inconvenient forums for claims in some countries.

2. **NO CONSENSUS FOR CHANGE HAS EMERGED, DESPITE NEARLY A DECADE AND A HALF OF WORK**

2.1 The report notes that the Study Group did not reach consensus on the nature of a **contractual framework**, especially whether it could be made mandatory. A contractual framework could help Article 28 States in outsourcing components of the CNS/ATM services that they provide to the public. Proponents of an optional framework recognize that the model clauses already drafted by the Study Group could help standardize implementation in accord with ICAO Standards and provide a starting point for negotiation of a relationship. Proponents of a mandatory regime want a required and uniform link between signal providers and Article 28 States. Unfortunately, there is no *quid pro quo* for signal providers to assume additional obligations beyond meeting ICAO Standards – obligations not now borne by providers of transnational radionavigation aids. With no consensus, this proposal has no chance of being implemented.

2.2 The Study Group, like every other ICAO body that has addressed the question, could not reach consensus on the need for a **convention**. The Secretariat report says, in para. 7.5.1, "the majority view was that, at present, not enough experience had been gained with the implementation, and GNSS in particular, and that it was therefore premature at this point to elaborate and draft an international convention." Implementation of CNS/ATM has been underway for fourteen years, but has not yet exposed problems that require changes to the legal framework.

2.3 Realizing that no consensus was possible on a way forward, the Council, after two meetings devoted to the Secretariat report on the work of the Study Group, passed the matter to this session of the Assembly. In C-WP/12259, *Report on the Establishment of a Legal Framework with Regard to CNS/ATM Systems including GNSS*, the Council notes that there are at least three or four possible approaches, but does not choose one. The matter is "of a high degree of importance", but "[i]t is for the 35th Session of the Assembly to determine what further action could be taken" (para. 3.4). After all this, there is no consensus on the need for change to the existing long-term legal framework, much less consensus on what the changes ought to be.

3. THE EXISTING FRAMEWORK HAS ENABLED SUBSTANTIAL TECHNICAL ACHIEVEMENTS AND, IN THE LEGAL SPHERE, ICAO HAS DEVOTED ITSELF PRIMARILY TO OTHER PROBLEMS

3.1 Meanwhile, there were two noteworthy parallel developments. First, actual technical implementation of CNS/ATM continued apace, using the durable and flexible legal and institutional tools available under the current long-term framework – the same framework that accommodated the introduction of the turbojet engine, radar surveillance, positive control, ground-based intercontinental navigation systems, ETOPs, and many other stunning technical developments. The Air Navigation Commission, the Council, and the relevant Expert Panels are producing binding Standards and Recommended Practices (SARPs) and guidance materials for CNS/ATM to help Contracting States and regional organizations build the systems. The 11th Air Navigation Conference in September–October 2003 noted with approval the accomplishments already attained.

3.2 Second, during the decade that a long-term legal framework for GNSS or CNS/ATM has been at the top of the Legal Committee’s priority list, several other topics have been the subject of the development and adoption of new conventions. Some have even entered into force. That is, other subjects have posed concrete problems that found a consensus in the global community for conventional solutions.

4. PROPOSALS FOR CHANGE THAT HAVE NOT ATTRACTED CONSENSUS

4.1 European regional proposal

4.1.1 The European proposal, contained in a working paper on this agenda item, calls for a mandatory web of contracts binding all participants in CNS/ATM services, grounded in a regional convention. It began as just one “school of thought” in the Study Group, but was eventually elaborated as a proposal of the European members. Members from other regions of the globe studied it with interest, but it received no support from members outside of Europe (including North and South America, Africa, South and East Asia, and the Western Pacific). The proposal is geared for peculiarly European conditions, including plans for centralized control and “tiers” of services, relationships, and charges. When polled, no Study Group member could envision a need, for example, for establishment of the European-proposed “GNSS regional entity” in his or her region. At the 11th Air Navigation Conference, the proposal was formally introduced by Eurocontrol and the European Civil Aviation Conference in substantially its present form. There was no substantive discussion on the topic in the meeting, and the paper was referred to the Council.

4.1.2 The European proposal is characterized as a “contractual framework”, but nevertheless requires a binding State-to-State agreement – regional multilateral convention – to work.

4.1.3 The proposal has received little support outside Europe, apparently because it is a complicated framework modeled on European institutions and optimally gauged to address European regional concerns, especially economic concerns. Indeed, the European proposal seems designed to create the “multi-tiered” structures necessary to assist in the financing of a massive new system, the costs of which must be substantially borne by private sector users, even if mostly by users in sectors other than civil aviation.

4.1.4 The view of some non-European Study Group members was that it is too soon to adopt, as a global model, a complex and controversial structure that is tailored to a particular set of regional conditions and which has not yet been tested on a regional basis. The Assembly should note the proposal and suggest that European States report on their experience after the framework has been introduced and tested for a period of time.

4.2 **Repeated calls for a new convention**

4.2.1 Since the initial Legal Committee work on GNSS, there have been many calls for a new multilateral convention. An example is the other regional paper introduced at the 11th ANC by the African Civil Aviation Conference. These proposals have often failed to not identify concrete problems that can be addressed only by conventional law, or specify the content of a new convention.

4.2.2 The Study Group made a detailed study over two full meetings of possible content for a convention, producing a substantial list of potential topics. No specific proposal received consensus as suitable for a conventional provision. Thus, not only was there no consensus on the need for a convention, there was no consensus on any content for such a convention. The burden of persuasion has not been met.

5. **A PRACTICAL WAY FORWARD – BUILD ON THE SUBSTANTIAL, CORE CONSENSUS THAT DOES EXIST AND ADDRESS REAL-WORLD NEEDS**

5.1 The lack of consensus on any substantial change to the existing long-term legal framework is actually tacit recognition that the technical implementation achieved thus far is due to the existing long-term framework. Indeed, the Study Group achieved a solid consensus that Article 28 of the Chicago Convention, which is the cornerstone of the rights and obligations of Contracting States in the provision of CNS/ATM, should not be amended. This consensus is consistent with the findings of the first rapporteur to address GNSS, Dr. Guldemann of Switzerland, that (a) there was no legal barrier to implementation of CNS/ATM and (b) the concept was fully consistent with the Chicago Convention. Those findings were endorsed by consensus in the 28th Session of the Assembly.

5.2 We have come to understand that any barriers to implementation are perceptual, that is, they are more psychological and political in nature, than they are legal, technical, or institutional. Many observers have said that the problem is simply insufficient confidence in the emerging systems. So, it is not a lack of legal tools that is holding back CNS/ATM, it is lack of political will and the necessary resources – economic, technical, and personnel – that is impeding achievement of ICAO's technical goals.

5.3 Indeed, the concentration of attention and expenditure of time and effort on proposals for a new “long-term legal framework” can actually be seen as diverting resources from implementation. This is inconsistent with ICAO's commitment to the fundamental principle that work on legal issues must not be allowed to delay implementation.

5.4 Moreover, it is not clear what benefits may flow to Contracting States from a new multilateral convention, especially considering that, (1) no useful content of such a convention has been agreed, (2) the implementation achieved so far has not been hindered by a lack of legal tools, and (3) it is a virtual certainty that no new convention (at least as considered thus far over fourteen years) can be ratified and brought into force. Even if a new convention could be developed, it would necessarily overlap the Chicago Convention,

take decades to come into equally wide acceptance, and therefore create a web of inconsistent and conflicting rules. This uncertainty would increase the cost and difficulty of States in implementing CNS/ATM.

5.5 What is clear, however, are the practical needs for implementation. Contracting States need to break through any psychological and political barriers to embracing CNS/ATM concepts. They need to find the means to marshal political will and economic resource. They need vigorous regional navigation plans that focus on rapid, efficient implementation. They need technical assistance, including help with domestic legal regimes. They need financial help, where possible from third party or multilateral sources.

6. CONCLUSIONS

6.1 It is time for ICAO to stop seeking a new “long-term legal framework” for which there is no prospect for consensus and instead concentrate on practical measures to bring CNS/ATM into reality.

6.2 ICAO should adopt a resolution that takes credit for the positive work done during the extended quest for a long-term legal framework and that calls for renewed commitment by ICAO to developing the practical tools for implementation.

6.3 The resolution should also suspend work on legal proposals that have been unable to gain consensus while leaving open the possibility of renewing legal and institutional work if, and only if, actual barriers are identified by the technical officials doing the real-world implementation work.

7. ACTION BY THE ASSEMBLY

7.1 The Assembly is invited to adopt the draft resolution provided in the Appendix hereto.

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APPENDIX**DRAFT RESOLUTION A35-X****A PRACTICAL WAY FORWARD ON LEGAL AND INSTITUTIONAL ASPECTS OF
COMMUNICATIONS, NAVIGATION, SURVEILLANCE/AIR TRAFFIC
MANAGEMENT (CNS/ATM)**

Whereas the global implementation of Communications, Navigation, Surveillance/Air Traffic Management (CNS/ATM) has made substantial progress since its inception at the 10th Air Navigation Conference in 1990 and received enthusiastic endorsement at the 11th Air Navigation Conference in 2003;

Whereas the long-term legal framework for CNS/ATM, namely the Chicago Convention, its Annexes, Assembly Resolutions (especially including the Charter of GNSS Rights and Obligations), associated ICAO guidance (especially including the Statement of ICAO Policy on CNS/ATM Systems Implementation and Operation) regional navigation plans, and exchanges of letters between ICAO and the States operating satellite navigation constellations has enabled the technical implementation achieved thus far;

Whereas ICAO has devoted substantial resources to the study of the legal and institutional aspects of CNS/ATM in the ICAO Assembly, the Council, the Legal Committee, a Panel of Legal and Technical Experts, and a Study Group, building a detailed record and developing an understanding of the issues, challenges, and concerns facing the global community;

Whereas various proposals for a new or substantially altered long-term legal framework have been unable to attract consensus in any ICAO body;

Whereas some regional groups of States have advanced proposals for legal and institutional frameworks suitable to address regional conditions.

The Assembly:

1. *Recognizes* that implementation of CNS/ATM is more likely to be inhibited by lack of resources and political will than a lack of law or institutions;
2. *Reaffirms* the consensus that (a) there are no legal barriers to implementation of CNS/ATM, (b) CNS/ATM is fully consistent with the Chicago Convention, and (c) there is no need to amend the Chicago Convention to implement CNS/ATM;
3. *Urges* the strengthening, elaboration, and acceleration of regional navigation plans to achieve the broadest, most efficient, and most uniform possible implementation of CNS/ATM;
4. *Invites* Contracting States to consider using regional organizations to develop mechanisms necessary to address regional conditions, if needed, so long as they are consistent with the Chicago Convention;

5. *Encourages* the facilitation of technical assistance in implementation through regional navigation plans of CNS/ATM through ICAO, regional organizations, and industry;

6. *Invites* Contracting States to consider development of additional sources of funding, both multilateral and third party, for assistance to States and regional groups in implementation of CNS/ATM; and

7. *Directs* the Secretary General to suspend work toward a new “long-term legal framework” at least until the next regular session of the Assembly. Work on legal issues may be resumed if, and only if, the technical officials doing the implementation work identify concrete problems that cannot be addressed by existing legal and institutional tools.

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