



**WORKING PAPER**

**WORLDWIDE AIR TRANSPORT CONFERENCE (ATCONF)**

**SIXTH MEETING**

**Montréal, 18 to 22 March 2013**

**Agenda Item 1: Global overview of trends and developments**

**Agenda Item 1.1: Industry and regulatory developments**

**AIRSPACE SOVEREIGNTY**

(Presented by the Civil Air Navigation Services Organisation (CANSO))

**EXECUTIVE SUMMARY**

Under the Convention on International Civil Aviation (the Chicago Convention), each State has complete and exclusive sovereignty over the airspace above its territory. While national sovereignty cannot be delegated, the responsibility for the provision of air traffic services can be delegated. And, we are reminded by Assembly Resolution A37-15 (see Appendix) that a State which delegates to another State the responsibility for providing air traffic services within airspace over its territory does so without derogation of its sovereignty.

**Action:** The Conference is invited to agree with the recommendations presented in paragraph 4.

*References:* ATConf/6 reference material is available at [www.icao.int/meetings/atconf6](http://www.icao.int/meetings/atconf6).

**1. INTRODUCTION**

1.1 State Sovereignty is a fundamental principle of international law. However, the term is very often used in a political sense, with differing interpretations depending on context and intention. The notion of sovereignty is dynamic, evolving with the development of the global institutional environment. In aviation, sovereignty refers to the ownership of airspace. In other words, to the exclusive competence of a State to exercise its legislative, administrative and judicial powers within its national airspace.

1.2 However, air navigation services require a global, seamless, and performance-based approach to management of airspace, rather than one based on national borders. For this to materialise, all stakeholders need a fully developed understanding of the meaning of national sovereignty consistent with present and future political, economic and social realities. Such an understanding of the concept of

<sup>1</sup> Arabic, Chinese, French, Russian and Spanish versions provided by CANSO.

sovereignty does not require any amendment to the Convention on International Civil Aviation (the Chicago Convention).

## 2. DISCUSSION

2.1 CANSO's Global Vision for the future of air navigation services recognises that sovereignty remains a fundamental, valid and legitimate principle. It also supports the view that the delivery of cross-border services is not incompatible with the notion of States' sovereignty.

2.2 State sovereignty is closely connected to the definition of States' obligations under Article 28 of the Chicago Convention. The text and spirit of Article 28 do not oblige States to provide air navigation services over their territory themselves. Rather, Article 28 prescribes that when and where States elect to provide facilities and services to support international air navigation, these facilities and services must comply with ICAO Standards and Recommended Practices. In other words, States' responsibilities are of a regulatory and supervisory nature. States are required to take appropriate measures to ensure compliance in respect of safety and operational efficiency.

2.3 National sovereignty cannot be delegated. But the responsibility for the performance of functional responsibilities, such as the provision of air navigation services, can be delegated to third parties. States retain complete freedom to designate a third party service provider, be it a national or foreign entity.

2.4 Delegation to a foreign organisation is not an abandonment of sovereignty; sovereign competences are not impacted. On the contrary, delegation of service provision is an act of sovereignty. The delegating State prescribes the conditions under which the delegation is agreed, and the delegation can be revoked at any time. These rights and obligations of a State to delegate its responsibilities for providing air traffic services over its territory, and that in doing so would not constitute a derogation of its sovereignty was recognised once again during the last ICAO Assembly in 2010 as contained in Resolution 37-15 (see attached extract).

2.5 There are examples of successful cross-border air navigation services provision in all regions of the world. There is a mutual delegation between the USA and Canada; Tonga and Samoa have a delegation to New Zealand; there are various delegations in Europe from and to Finland, France, Norway, Sweden and Switzerland. The legal basis for these delegations is not in question.

2.6 When delegating the functional responsibility for service provision to a foreign entity, the delegating State retains a residual liability under Article 28 of the Chicago Convention. However, that liability is limited to the obligation to ensure that the service delivery activity is properly regulated, the service provider duly certified, and that adequate and effective supervision is exercised.

2.7 The regulatory framework establishes overall safety and efficiency standards. Compliance is monitored through supervisory measures. Performance can be measured against safety, operational efficiency, cost-effectiveness and environmental criteria. Incentives to improve performance can be introduced by a variety of means. The regulatory framework can establish overall performance standards for safety, efficiency and the environment. In addition, delegation arrangements based on time-limited contractual Service Level Agreements (SLAs) that include clear Key Performance Indicators (KPIs) and targets constitute a powerful incentive to perform. Failure to meet the performance criteria will result in a loss of the State mandate.

2.8 One central preoccupation of States in respect of cross-border delegation of services relates to the need to ensure permanent monitoring of national airspace for national security purposes, and to be able to respond to security or military threats at any time. The civil air navigation services provider (ANSP) must therefore be able to support the appropriate military authorities in this task. The security and military risks are primarily mitigated through solid and comprehensive coordination procedures agreed between military authorities and the ANSP. Delegation agreements which include clear KPIs in respect of civil-military coordination also act as incentives for the service provider. Delegation agreements will always need to include a provision reserving the right for the delegating State to withdraw the delegation at any time with immediate effect in the event of a crisis or serious threat to national security.

### 3. CONCLUSION

3.1 Under the Chicago Convention, each State has complete and exclusive sovereignty over the airspace above its territory. That is an undisputable fact. National sovereignty cannot be delegated. However, the responsibility for the performance of functional responsibilities, such as the provision of air navigation services, can be delegated. In fact, delegation of service provision is an act of sovereignty. Within the context of globally harmonised and seamless air navigation services, sovereignty should be seen as an enabler, not a barrier, in making the required changes for a more efficient management of the global air navigation system. Used in a constructive way, sovereignty can proactively drive the necessary improvements in global and regional air traffic management (ATM) performance. This more mature understanding of sovereignty should be actively promoted by all stakeholders in the aviation industry.

### 4. RECOMMENDATIONS

4.1 The Conference is invited to:

- a) recognize that a State can choose to delegate its responsibility for providing air traffic services over its territory, and that it would do so without derogation of its sovereignty (ICAO Assembly Resolution 37-15 Appendix M refers);
- b) urge States to exercise their sovereignty over the airspace above their territory in a proactive manner by delegating the responsibility for the provision of air traffic services to more effective, collaborative cross-border arrangements that will result in tangible improvements in ATM performance; and
- c) request States to work with all relevant aviation industry stakeholders to actively promote a more mature understanding of sovereignty at the political level.

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## APPENDIX

Extract from Resolution A37-15: Consolidated statement of continuing ICAO policies and associated practices related specifically to air navigation.

### APPENDIX M Delimitation of air traffic services (ATS) airspaces

Whereas Annex 11 to the Convention requires a Contracting State to determine those portions of airspace over its territory within which air traffic services will be provided and, thereafter, to arrange for such services to be established and provided;

Whereas Annex 11 to the Convention also makes provision for a Contracting State to delegate its responsibility for providing air traffic services over its territory to another State by mutual agreement;

Whereas both the delegating and the providing State can reserve the right to terminate any such agreement at any time; and

Whereas Annex 11 to the Convention prescribes that those portions of the airspace over the high seas where air traffic services will be provided shall be determined on the basis of regional air navigation agreements, which are agreements approved by the Council usually on the advice of regional air navigation meetings;

The Assembly resolves, with reference to regional air navigation plans, that:

1. the limits of ATS airspaces, whether over States' territories or over the high seas, shall be established on the basis of technical and operational considerations with the aim of ensuring safety and optimizing efficiency and economy for both providers and users of the services;
2. established ATS airspaces should not be segmented for reasons other than technical, operational, safety and efficiency considerations;
3. if any ATS airspaces need to extend over the territories of two or more States, or parts thereof, agreement thereon should be negotiated between the States concerned;
4. the providing State in implementing air traffic services within airspace over the territory of the delegating State shall do so in accordance with the requirements of the delegating State, which shall establish and maintain in operation such facilities and services for the use of the providing State as are mutually agreed to be necessary;
5. any delegation of responsibility by one State to another or any assignment of responsibility over the high seas shall be limited to technical and operational functions pertaining to the safety and regularity of the air traffic operating in the airspace concerned;

and, furthermore, declares that:

6. any Contracting State which delegates to another State the responsibility for providing air traffic services within airspace over its territory does so without derogation of its sovereignty; and

7. the approval by the Council of regional air navigation agreements relating to the provision by a State of air traffic services within airspace over the high seas does not imply recognition of sovereignty of that State over the airspace concerned.

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