

ELEVENTH AIR NAVIGATION CONFERENCE

Montreal, 22 September to 3 October 2003

Agenda Item 6 Aeronautical navigation : issues

LEGAL AND INSTITUTIONAL ISSUES AND THE STATUS OF CNS/ATM

(Presented by the United States)

SUMMARY

ICAO has made excellent progress in implementation of CNS/ATM since the 10th Air Navigation Conference. Its economic, safety, and environmental benefits are already being felt around the globe. From a technical standpoint, no deficiencies in ICAO's legal framework (the Chicago Convention, its Annexes, and ICAO guidance materials) have been found to hinder implementation. Work on legal and institutional issues, which has continued alongside the technical work, should not be permitted to delay technical implementation. The conference is invited to agree to these points.

1. INTRODUCTION

1.1 The Tenth Air Navigation Conference recommended that ICAO endorse the concept of communications, navigation, and surveillance/air traffic management (CNS/ATM) and the Eleventh Air Navigation Conference, with the benefit of a dozen years of experience in building the systems, offers a fine opportunity for assessing progress. This conference is devoted to the details of implementation and other aspects of the future global ATM system. This paper will comment on the proposal made in AN-Conf/11-WP/153, global navigation satellite system (GNSS) legal framework presented by the European Organisation for the Safety of Air Navigation (EUROCONTROL), especially in light of the progress made in the implementation of CNS/ATM.

2. PROGRESS TOWARD CNS/ATM

2.1 The Tenth Conference conceived of CNS/ATM as a seamless global tool that Contracting States could use to carry out their responsibilities for the handling of international air operations (inter alia, under Article 28 of the Chicago Convention) using the most modern and efficient systems technology and relying on satellite-based platforms in all three principal areas-Communications, Navigation, and Surveillance. It was recognized at the time that CNS/ATM was ambitious and far-reaching. To achieve full implementation would require huge efforts from ICAO, Contracting States, regional organizations, and industry. It was impossible to know at the time what problems might be encountered, but the conferees had confidence in the institutional wherewithal of ICAO and its legal and administrative framework to provide the tools and facilitate the political will to get the job done.

2.2 The United States believes that substantial progress has been made. Strictly speaking, CNS/ATM will never be fully implemented, because technological breakthroughs seemingly always outpace the ability to exploit them. At the same time, there have been unexpected diversions and difficulties, not all fully resolved even now. For example, many States have delayed their initial ambitious schedules for phasing out redundant ground-based navigation aids over concerns about vulnerabilities of GNSS.

2.3 Nevertheless, great progress has been made worldwide in all areas of CNS/ATM, not just in the most highly developed States. Extensive use of satellite navigation systems is conducted in oceanic airspace as well as in large areas of domestic airspace. We are even moving rapidly in the implementation of non-precision approaches using satellite systems. We believe that the conference should acknowledge that CNS/ATM implementation is well underway, and that the envisioned improvements in safety and efficiency are already being felt in large measure around the world.

3. LEGAL AND INSTITUTIONAL ISSUES

3.1 This juncture also provides the opportunity to assess the impact of legal and institutional concerns on CNS/ATM. ICAO has a long-term legal framework for its work, consisting of the Chicago Convention, its Annexes, and guidance materials, ranging from Council, Assembly, and Conference decisions, resolutions, and recommendations, to regional navigation plans, to a full range of manuals and other publications.

3.2 The power and flexibility of its legal tools (ICAO can issue Standards that are presumptively binding on Contracting States) has permitted the organization to adapt to technological, political, economic, and social developments that were far beyond the imaginations of the most visionary statesmen when the Chicago Convention was adopted in 1944. For example, the legal framework has adapted to the advent of the jet engine, radar, intercontinental-range navigation and communication aids, positive control, and all-weather en route navigation, approach, and landing, among many others-all without legal or institutional problems.

3.3 The vantage point of a dozen years of experience offers the opportunity to assess whether the long-term legal and institutional framework of ICAO continues to serve without major problems. Contracting States, service providers, and industry organizations have had every opportunity to identify deficiencies in the legal framework. The United States believes that the legal framework does offer continued

serviceability and urges the Conference to recognize this fact accordingly. During the implementation of CNS/ATM, we have discovered no gaps in the legal framework; that is, we have found no problem that cannot be solved because of defects in the legal or institutional tools available to apply to it. Constraints have proved primarily to be of a technical nature or a matter of the lack of resources and political will, not due to a lack of law.

4. ICAO'S WORK ON LEGAL ISSUES CONCERNING CNS/ATM

4.1 For most of the past twelve years, ICAO has been at work on legal issues surrounding CNS/ATM. Most of the work has concerned GNSS, although some attention has lately been paid to legal aspects of communications, surveillance, and air traffic management. Interestingly, during this time, the Council dropped from the work program of the Legal Committee, consideration of a draft convention of air traffic control agency liability due to a lack of interest. From the outset, there have been proposals for changes to the legal framework involving new conventional law, first on the general responsibilities of States using this new navigation system, then more recently limited to liability aspects of GNSS. In the last few years, the Council has also expanded the work to include consideration of legal aspects of all of CNS/ATM, although the debate has continued to focus almost entirely on satellite-based navigation.

4.2 Legal issues have been discussed in the Council, at successive meetings of the Assembly, at the Worldwide CNS/ATM System Implementation Conference in Rio de Janeiro, with the Legal Committee, in a panel of legal and technical experts (known as LTEP), and for the last several years in a Secretariat Study Group. The Secretariat Study Group has made considerable progress in analyzing and identifying the issues. At no point, however, has any ICAO body achieved consensus on a proposal for a new global conventional law.

4.3 At the same time, every ICAO body which has considered legal issues surrounding CNS/ATM, including the FANS Committee, the Worldwide CNS/ATM System Implementation Conference, and the Tenth Air Navigation Conference, has been careful to retain the proviso: Work on legal issues must not be permitted to delay technical implementation of CNS/ATM. This conference should declare the same proviso.

5. THE EUROPEAN REGIONAL CONTRACTUAL FRAMEWORK PROPOSAL

5.1 The European paper, AN-Conf/11-WP/153, GNSS Legal Framework, describes a "contractual" framework that, because it involves the exchange among States of binding rights and obligations, has many of the hallmarks of a regional convention. It is noted that the same proposal has been made in ICAO's legal forums. The proposal is regional in nature and involves negotiation of many detailed agreements and the creation of large international bureaucracies.

5.2 The European paper, however, invites this conference to take action as indicated in paragraph 7 of AN-Conf/11-WP/153.

5.3 The United States believes that this conference should do no such thing, for both procedural and substantive reasons.

5.3.1 *Procedural Reasons that the Conference Should Not Endorse the European Regional Contractual Framework Proposal.*

5.3.2 The European paper invites technical delegations to make a judgment concerning the future of ICAO's long-term legal framework that has a potentially far-reaching legal, social, political, and economic impact. That invitation is far outside the mandate of this Conference.

5.3.3 The Air Navigation Conference is a technical, not a legal, body. It is inappropriate for it to make recommendations on the shape of a new legal framework or to recommend highly speculative, far-reaching future changes to the long-term legal framework.

5.3.4 *Substantive Reasons that the Conference Should Not Endorse the European Regional Contractual Framework Proposal.*

5.3.5 The European Regional Contractual Framework Proposal may well prove to be an effective regional arrangement for the implementation of GNSS in Europe. It is impossible to know its value, however, until it is implemented there and working experience has accumulated. Europe does not need this conference's endorsement to construct its regional legal and institutional arrangements. When it has done so, it should return to ICAO and offer its experience. Contracting States will be in a much better position then to discern whether the European framework might be a suitable model for other regions.

5.3.6 Nevertheless, the European delegations are inviting the conference to endorse the extension of the European Regional Contractual Framework Proposal, not only as a model for other regions, but also as a possible global framework. That is, even though we have no idea how well this concept may work in the *European regional context*, the conference is being invited now to endorse it as a possible *global framework*.

5.3.7 Moreover, the European Regional Contractual Framework Proposal is a variation on other proposals for extensive, binding, legal and institutional arrangements that *have not attracted a consensus* in any of the many legal bodies that have considered them. Indeed, such proposals are still under active consideration in the Secretariat Study Group and the Council, and may be given to the Legal Committee for its next meeting.

6. ACTION BY THE CONFERENCE

6.1 The conference is invited to agree:

- a) that implementation of CNS/ATM, as recommended by the Tenth Air Navigation Conference, is well underway, notwithstanding that there is much left to be done;
- b) that the improvements in safety, efficiency, and environmental performance due to CNS/ATM envisioned by the Tenth Air Navigation Conference are already being felt in large measure around the world;

- c) that ICAO's long-term legal framework-the Chicago Convention, its Annexes, and ICAO guidance materials-offers continued serviceability and no deficiencies have been found to impede technical implementation of CNS/ATM; and
- d) that work on legal and institutional issues must not be permitted to delay technical implementation of CNS/ATM.

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