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ASSEMBLY — 41ST SESSION

LEGAL COMMISSION

Agenda Item 41: Work Programme of the Organization in the Legal Field

SEEKING HARMONIZATION BETWEEN RATIFIED AND NON-RATIFIED RULES UNDER ICAO

(Presented by the Republic of Korea)

REVISION NO. 1

EXECUTIVE SUMMARY

Among the international air instruments, rules that Contracting States have ratified are coexisting with those not ratified by these States. ICAO is seeking ways to encourage each Contracting State to ratify amendments to the international air law instruments. One option is the potential application of the treaty and Agreements to modify multilateral treaties among some parties only. However, because international law does not demand that it be incorporated into domestic laws, there are legal interpretations that there is no discrepancy between ratified rules and unratified rules, but these rules can be compatible in harmony.

Action: The Assembly is invited to:

a) be aware that there is an issue that each Contracting State does not have sufficient information about the amendments to international air law instruments, and accordingly hold actions including not only limited to seminars, symposiums and meetings to make efforts to facilitate Contracting States' knowledge of the amendments; and

b) in regard to such purposes, prepare a meeting at which all Contracting States can share with each other ways to accelerate more ratification of international air law instruments amongst Contracting States including not only limited to tools under international law such as reservation of treaties.

Strategic Objectives:	This working paper is not related to Strategic Objectives.
Financial implications:	Not determined.
References:	Doc 10140, *Assembly Resolutions in Force* (as of 4 October 2019) (A40-28, Appendix C) Doc 7300, *Convention on International Civil Aviation* - Article 94 *Vienna Convention on the Law of Treaties* (1969) – Articles 25, 40, 41 A41-WP/125-LE/9

1. INTRODUCTION

1.1 Since the *Convention on International Civil Aviation* was adopted on 7 December 1944 (Chicago - 1944 "Chicago Convention"), the Chicago Convention has played a leading role in the development of the international aviation industry. There are currently no multinational aviation treaties in the field of aviation other than the Chicago Convention binding upon all of the Contracting States. In accordance with the change in times, ICAO has adopted various kinds of "Protocols of Amendment to the Chicago Convention" in relation to the Chicago Convention. And this allows the issue of Contracting States' ratification to be constantly raised.

1.2 For some time, the ICAO Council as well as the ICAO Legal Committee have sought to discover methods to accelerate the ratification of international air law instruments.

1.3 Apart from the search for methods to accelerate the ratification of international air law instruments, there must also be a search to find a way to interpret the clash between ratified and unratified rules in a way that both rules can coexist harmoniously from the perspective of international law, even when not all States have ratified international air law instruments.

2. VARIOUS METHODS TO ACCELERATE RATIFICATION OF REVISIONS TO THE CHICAGO CONVENTION

2.1 It may be unrealistic to expect all Contracting States to ratify simultaneously the ICAO international air law instruments. Thus, rather than quoting Article 94 ("Amendment of Convention") of the "Chicago Convention," one could consider the option of exercising the reservation of Treaties in accordance with the "Vienna Convention on the Law of Treaties" (hereafter, "VCLT"). Even though the unity of a Treaty may be affected, reservation could be regarded as a tool to accelerate the ratification of revision to the Chicago Convention.

2.2 According to Article 2, paragraph 1, subparagraph d of the VCLT, it states that, "reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Accordingly, Contracting States are entitled to exclude or modify the legal effect of a provision of a Treaty. Further explanation of the reservation is stated from Article 19 to Article 23 of the VCLT.

2.3 There is a need for Contracting States to especially be aware of Article 23 of the VCLT, which describes the procedure regarding reservations.

> "1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.
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> 2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing."

2.4 Another option that could be considered is the option of provisional entry into force among a limited group of interested States, in accordance with Article 25 of the VCLT.

2.5 When a treaty covers an urgent issue but requires ratification, provisional application has been often emphasized. This has important significance because even after the provisional period, there is a requirement on participating States to automatically ratify, and provisional application can be discontinued in mid-point. For example, the "General Agreement on Tariffs and Trade" was provisionally applied for 50 years in accordance with the "Protocol of Provisional Application of the General Agreement on Tariffs and Trade" of 1947, and the "Free Trade Agreement between the Republic of Korea, of the one part and the European Union and its Member States, of the other Part" was also provisionally applied from 1 July 2011 for approximately 4 years and 5 months, and it only came into effect on 13 December 2015. On the working-level, provisional application has been consistently employed. In other words, some States could agree mutually to modify a treaty in regards to international air law instruments that they have particular interests in.

2.6 It is also possible to consider the option where the President of the Council and the Secretary General share the amendments to the international air law instruments and request adopting the amendments during their visit to the Contracting States. It would be of utmost necessity that each Contracting State is notified that there have been amendments made.

3. HARMONIZATION BETWEEN RATIFIED AND NON-RATIFIED RULES

3.1 However, there does not necessarily need to be a clash between non-ratified and ratified rules, and it is possible to harmoniously interpret both laws compatibly. First, international law does not demand to be incorporated into domestic laws. In other words, not incorporating international laws into domestic laws is not necessarily a violation of international laws. Article 40 (Amendment of multilateral treaties), paragraphs 4 and 5 of the VCLT state that:

"4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the un-amended treaty in relation to any party to the treaty not bound by the amending agreement."

3.2 According to the information above, a multilateral treaty does not bind the parties to the existing treaty that have not become a party to the revised agreement, thus if parties to the later treaty does not include all parties to the former treaty, (i) the provisions of the amendment shall be applicable to the

Contracting States to the two treaties if all parties to the former treaty become parties to the later treaty at the same time, or if the former treaty is not terminated or suspended, the provisions of the former treaty shall be applicable only to the extent that its provisions are compatible with those of the later treaty; and (ii) with respect to the parties to both treaties and the parties to either one of the treaties, the treaty to which the two States are both parties at the same time governs the rights and obligations between them, and a State which becomes a party to the treaty after the entry into force of the amended agreement shall, unless otherwise expressly stated by that State, (a) be considered a party to the treaty as amended, and (b) be considered a party to the un-amended treaty in relation to any party to the treaty not bound by the amending agreement.

3.3 As demonstrated above, international air law instruments of a ratifying Contracting State and those of a non-ratifying Contracting State can avoid clashing with one another and be simultaneously valid. There is coexistence among ratified international air law instruments that remain valid between ratifying Contracting States, non-ratified international air law instruments that remain valid between non-ratifying Contracting States, and non-ratified international air law instruments that remain valid between ratifying and non-ratifying Contracting States.

3.4 In addition, how domestic laws will incorporate international laws into the domestic legal sphere and within the domestic legal sphere, how international laws and domestic laws will coexist in each Contracting State is subject to the discretion of each Contracting State, and as such the ratification process and legal procedure of each Contracting State differs accordingly.

4. CONCLUSION

4.1 There is also the additional issue that each Contracting State does not have sufficient information about amendments made to international air law instruments. ICAO needs to continue to make the effort to ensure Contracting States can easily be aware of and understand the amendments.

4.2 There is no clash between a ratifying Contracting State's international air law instruments and those of a non-ratifying Contracting State, and therefore, both remain valid. There is coexistence among ratified international air law instruments that remain valid between ratifying Contracting States, non-ratified international air law instruments that remain valid between non-ratifying Contracting States, and non-ratified international air law instruments that remain valid between ratifying and non-ratifying Contracting States. Thus, a harmonious international law order continues to remain in place.

4.3 Therefore, rather than tackling the issue of a clash between ratified and non-ratified international air law instruments, it is important to recognize that this is a matter that concerns each Contracting State's domestic laws as well as its sovereignty, and that it is important to spread understanding and awareness about amendments to international air law instruments in order to accelerate more ratification amongst Contracting States.

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