



INTERNATIONAL CONFERENCE ON AIR LAW

(Beijing, 30 August – 10 September 2010)

PROPOSAL FOR DELETION OF ARTICLE 4 *TER* OF THE MONTREAL CONVENTION OF 1971 AS AMENDED BY THE AIRPORTS PROTOCOL OF 1988, WITH AMENDMENTS PROPOSED BY THE LEGAL COMMITTEE

(Presented by India)

1. The draft Article 4 *ter* proposed to be inserted in the Montreal Convention of 1971 provides that nothing in this Convention shall affect the rights, obligations and responsibilities under the NPT, BTWC or CWC. It further provides that it shall not be an offence to transport an item or material covered by Article 1, paragraph (1), sub-paragraph (i) of the Convention, if it is transported to or from the territory of a NPT State or under the control of a NPT State provided that it is in accordance with the NPT provisions.
2. The proposed Article 4 *ter* creates a distinction between the NPT States Parties and non-NPT States in regard to offences under the Montreal Convention for the transport of any source material, special fissionable material or equipment or material for their processing, use or production knowing that it is intended to be used in a nuclear explosive activity or unsafeguarded activity, or of any equipment, material, software or related technology if it contributes to the design, manufacture or delivery of a BCN weapon. It provides exemption to NPT States Parties from the scope of the “transport offences” outlined in Article 1 of the Montreal Convention. In other words, transportation of certain materials and equipment shall be an offence for non-NPT States while for the States Parties to NPT, it will not be an offence. Such a discriminatory provision has serious implications for non-NPT States, including India, in the transport of nuclear-related goods and materials.
3. It may be appreciated that the very objective of the Montreal Convention of 1971 is to provide for appropriate measures to ensure the safety of civil aviation against unlawful acts. But the proposed Article 4 *ter* has a direct bearing on the security of States and international peace which are in the domain of the UN Security Council. Therefore, the import of discriminatory regime of NPT into the Montreal Convention is not acceptable to India.
4. It may be pertinent to point out that during the 34th Session of the Legal Committee, the language of sub-paragraph (i) of paragraph 1 of Article 1 of the Montreal Convention was substantially modified to insert a chapeau in the beginning, which means that an offence shall be constituted only if the nuclear-related goods, material, equipment etc. are transported for terrorist activities. In other words, if the transportation takes place for other purposes, it will not be an offence. This being so, there is no point granting any exemption or making any exception in this regard under any other treaty as envisaged in Article 4 *ter*.

5. During the meeting of the ICAO Legal Committee on amendments to Montreal and Hague Conventions held in Montreal in September 2009, India had opposed the inclusion of Article 4 *ter* in the Protocol on account of the reasons outlined above. However, this Article remained unagreed and was put in square brackets for discussion again at the forthcoming ICAO Diplomatic Conference.

6. It may be appreciated that Article 4 *ter* of the Montreal Convention appears to be totally unnecessary on account of the following:-

- a) the proposed amendments in the Montreal and The Hague Conventions are meant for all the States Parties to these Conventions and not for States Parties to other treaties. There is a need to adopt an inclusive approach and obtain the support of all countries to the proposed amendments;
- b) from civil aviation perspective, the Montreal and Hague Conventions are aimed at safety issues in the context of safety concerns such as the acts of hijacking or unlawful interferences with aircraft operations. It is incongruous and unfair to burden these conventions and consequently the air carriers with provisions extraneous to the major points of concern;
- c) the amendment to the Montreal Convention pertains to transport offences from the perspective of terrorism-related challenges and this should not be used to bring in non-proliferation issues within the ambit of ICAO. The proposed Article 4 *ter* has a bearing on the security of countries and issues of peace and security which are not in the domain of ICAO;
- d) the proposed Article 4 *ter* would impose restrictions on peaceful applications of nuclear energy beyond the existing non-proliferation framework and instruments. It will cast the civil aviation safety conventions in the NPT framework and curtail the rights of States not Parties to the NPT. Further, it may not be appropriate for the States Parties to the NPT to seek special privileges in the Montreal Convention;
- e) exceptions provided in Article 4 *ter* for offences committed under Article 1 may create the possibility of proliferation which, in our understanding, is not the intention of the proposed amendments; and
- f) SUA Protocol which followed a similar approach by extending NPT-derived principles for safety of maritime navigation is facing problems in terms of ratification by countries. Using the same approach for amendment to the Montreal Convention will create problems with regard to ratification/accession of countries to the Protocol, and are thus unwarranted and avoidable.

7. In view of the foregoing, India strongly recommends the deletion of Article 4 *ter* of the Montreal Convention of 1971.