

6. International Civil Aviation Organization (ICAO)

Communication transmitted to the Secretariat, 27 July 2022:

Precedents concerning the provisional application of treaties concluded under the auspices of ICAO

There has been one occasion when the provisional application of treaties has occurred at ICAO. The *Protocol for the amendment of the 1956 Agreement on the Joint Financing of Certain Air Navigation Services in Iceland and the Protocol for the amendment of the Agreement on the Joint Financing of Certain Air Navigation Services in Greenland and the Faroe Islands*, both done at Montreal on 3 November 1982, provide, at their respective Articles 13 and 14, for their provisional application from 1 January 1983. However, these Protocols of amendment formally entered into force on 17 November 1989. It should be noted that the *Iceland Joint Financing Agreement* as well as the *Greenland Joint Financing Agreement* have 25 and 24 Contracting States, respectively.

Consideration by ICAO bodies of the provisional application of treaties

Consideration by the ICAO Assembly of a proposal for provisional application of an amendment to the Convention on International Civil Aviation (1989)

During the 27th Session of the ICAO Assembly (Montreal, 19 September—6 October 1989) which adopted an amendment to Article 56 of the *Convention on International Civil Aviation*, signed at Chicago on 7 December 1944 (Chicago Convention) to increase the membership from 15 to 19 of the Air Navigation Commission (ANC), 21 delegations co-sponsored a working paper (A27-WP/67) inviting the Assembly “to express unanimous consent that the amended Article 56 of the Convention should be provisionally applied from 1 January 1990 pending its entry into force”. Article 94 of the Chicago Convention provides that the number of ratifications required for the entry into force of any proposed amendment shall not be less than two-thirds of the total number of Contracting States. Provisional application was proposed in this case, given the length of time anticipated until the formal entry into force of the amendment. A27-WP/67 took the position that the consent of all Contracting States, and not just those represented at the Assembly, was necessary for provisional entry into force of the amendment, and that States not represented at the Assembly would also have to signify their consent. It was also asserted that such a procedure was legally permissible under the general international law of treaties as expressly confirmed in Article 25 of the *Vienna Convention on the Law of Treaties*, 1969 (VCLT). During the consideration of the working paper by the Executive Committee of the 27th Session of the ICAO Assembly, concern was expressed that such an action would strongly affect the manner in which any future amendment of the Chicago Convention was approached. Questions were also raised concerning the form in which unanimous consensus would have to be sought in order to have true force and effect. For example, it was questioned whether delegates to the Assembly were empowered to take such action. One delegation, suggesting that the action proposed should only be used in exceptional circumstances and questioning whether increase in the membership of the ANC could be considered such a circumstance, indicated that it would not participate in any consensus. In view of the reservations that had been expressed, the Executive Committee agreed not to recommend to the Assembly the action proposed concerning provisional application (A27-WP/220).

Consideration by the ICAO Assembly of the problem of the slow progress of ratification of air law instruments (1994)

At the Twenty-Second Meeting of its 143rd Session (16 December 1994), the ICAO Council requested the Secretary General to

“present a paper dealing with the problem of the slow progress of ratification of ICAO international instruments, and the fact that such air law instruments only came into force in respect of the parties which ratified them.”

During its consideration of C-WP/10197 at the Fourth Meeting of its 145th Session (31 May 1995), the Council decided that a paper would be presented to the Legal Commission of the 31st Session of the Assembly held later that year which would include possible solutions to the slow progress of ratification (A31-WP/26).²¹¹

A31-WP/26 differentiated between amendments to the *Chicago Convention*, since these are governed principally by Article 94 of the *Chicago Convention*, and the other international air law instruments adopted under the auspices of the Organization. The paper outlined action taken by the Organization to enhance ratification of international air law instruments, including amendments to the *Chicago Convention*. It examined the level and speed of ratification of these instruments, the procedures for amending the *Chicago Convention* and for the adoption of other international air law instruments, and certain possible legal solutions such as the provisional application of treaties under Article 25, VCLT, entry into force by signature, modification under Article 41, VCLT, and in specific reference to the *Chicago Convention*, an amendment to Article 94 thereto. It further examined possible administrative action to enhance ratification, such as an increase in the number of regional legal seminars and specific missions to States by Legal Bureau staff. A few delegations expressed concern about the slow progress in the ratification of international air law instruments, and suggested that the Legal Committee should be invited to consider the possible solutions envisaged in A31-WP/26.²¹² It was pointed out, *inter alia*, that the constitutional and legislative procedures of some member States sometimes posed difficulties for the provisional application of treaties. The Assembly requested the Council to explore ways and means to expedite the ratification of international instruments taking into account the suggestions made by the Legal Commission.

Consideration by the ICAO Council of the problem of the slow progress of ratification of air law instruments (1996)

Pursuant to the aforementioned Assembly's decision, the Council, at the Fifth Meeting of its 147th Session (28 February 1996), considered C-WP/10360. Noting the slow pace of ratification and the entry into force of various air law instruments described in the working paper and the necessity of remedying the situation, the Council requested the Secretary General to present another paper at its next session identifying the various options available for expediting the entry into force of amendments to the *Chicago Convention* as well as other international air law instruments and, in doing so, to recommend which of

²¹¹ The Legal Commission is a subsidiary body of the ICAO Assembly established at each Assembly Session pursuant to Rule 18 of the *Standing Rules of Procedure of the Assembly of the International Civil Aviation Organization* (Doc. 7600), which states that “[t]he Assembly may establish such commissions as it may consider to be necessary or desirable”. The Legal Commission has responsibility in legal matters and, similarly to the other subsidiary bodies of the Assembly, reports to the Plenary.

²¹² Pursuant to its Constitution (Assembly Resolution A7-5), the Legal Committee is a permanent committee of the Organization, constituted by the ICAO Assembly and responsible to the ICAO Council. It is composed of legal experts designated as representatives of and by Contracting States, and shall be open to participation by all Contracting States. Among its duties and functions, the Legal Committee advises the Council on matters relating to the interpretation and amendment of the *Chicago Convention*, referred to it by the Council; and, by direction of the Assembly or the Council, or on the initiative of the Committee and subject to the prior approval of the Council, to study problems relating to private air law affecting international civil aviation, to prepare drafts of international air law conventions and to submit reports and recommendations thereon.

the issues should be referred to the Legal Committee for consideration. Accordingly, the Council considered C-WP/10418 at the Seventh Meeting of its 148th Session (5 June 1996).

Measures proposed regarding air law instruments in general

C-WP/10418 proposed a number of possible measures to be considered by the Legal Committee to accelerate the rate of ratification and entry into force of international air law instruments, other than amendments to the *Chicago Convention*, namely: *a*) incorporating a new formula for final clauses; *b*) provisional application; *c*) modification between certain States only; and *d*) improving communication between ICAO and Governments in relation to Diplomatic Conferences. These proposals were referred to the Legal Committee. The Council directed the Legal Bureau to prepare a plan of administrative action to accelerate the entry into force of amendments to the *Chicago Convention* and other air law instruments. It was indicated in C-WP/10418 that the elements of such a plan would include, *inter alia*, the preparation of a package of ratification material.

Measures proposed specific to the Chicago Convention

As regards amendments to the *Chicago Convention*, C-WP/10418 also proposed further measures as follows: an amendment of Article 94(a) of the Convention; the provisional application of future amendments to the Convention; the provisional application of existing amendments to the Convention; and a modification of the Convention between certain like minded Contracting States only, in conformity with Article 41, VCLT. The proposals in relation to *Chicago Convention* amendments were referred to the Legal Bureau for further study as to their viability. The Council subsequently, at the Third Meeting of its 149th Session (12 November 1996), examined the further analysis made by the Secretariat concerning certain specific legal options to accelerate the application of amendments to the *Chicago Convention* (C-WP/10505). The Council was invited to refer two of these legal solutions for further consideration by the Legal Committee, *i.e.* the provisional application of Protocols of amendment to the *Chicago Convention*, and the modification of the Convention among a group of interested States, in conformity with Article 41, VCLT. The Council also decided that the matter should be documented for consideration by the Legal Commission of the next ordinary session of the Assembly in 1998, as a follow up to A31-WP/26; the Assembly would be the most appropriate body for establishing a legal and political approach with the objective of finding an acceptable solution for the provisional application of such amendments to air law instruments and to the *Chicago Convention*.

Preference shown in the ICAO Legal Committee for practical rather than legal solutions (1997)

At its 30th Session in April/May 1997, the Legal Committee considered the non-*Chicago Convention* instruments on the basis of LC/30-WP/4-5. A large number of delegations expressed the view that the principal motivation for a State to become bound by an international instrument was the interest in the matter, and that practical measures were preferable to the legal solutions contemplated in the paper, such as provisional application to accelerate ratification and entry into force (Doc. 9693-LC/190, para. 4-26). Solutions of a legal nature were less likely to be effective means of expediting the ratification of international air law instruments than measures of a practical nature relating to administrative action.

Legal Commission of the ICAO Assembly notes administrative action to accelerate ratification of air law instruments (1998)

When the Council considered *Chicago Convention* amendments at the Eighth and Ninth Meetings of its 153rd Session (9 and 11 March 1998) on the basis of a draft Assembly working paper contained in C-WP/10769, it expressed a clear preference for administrative action, as opposed to legal measures, to accelerate ratification and entry into force.

In this regard, A32-WP/10 presented to the Legal Commission of the 32nd Session of the Assembly in September/October 1998, stated that the provisional application of a treaty

“could be used for future amendments (sic) [to the *Chicago Convention*] by having the amendment expressly provide for the possibility of its provisional application, and setting out the conditions related thereto such as the number of provisional consents necessary.”

It further recognized that

“[i]f an Assembly would make a positive determination in a particular case, then delegates possessing appropriate full powers could sign at the Assembly a document expressing the consent of their Government to the provisional application of the Protocol. For those delegations unable to do so during the Assembly, a subsequent letter expressing such consent could be addressed to ICAO as depositary.”

Further to its consideration of the paper, the Legal Commission noted only the administrative action to accelerate the ratification and entry into force of air law instruments presented therein.²¹³

ICAO Council not in favour of fast-tracking an amendment of the Chicago Convention (2015)

The Council, at the Ninth Meeting of its 206th Session (20 November 2015), considered C-WP/14345 concerning, *inter alia*, the possibility of examining alternatives to facilitate the entry into force as early as possible of the amendment to Article 50 (a) (increasing the size of the Council). The President of the Council noted that the majority of the Representatives was clearly not in favour of fast-tracking the entry into force of an amendment to Article 50 (a) (or to Article 56 which would increase the size of the ANC) and considered that it was necessary to respect the provisions of the *Chicago Convention*, in particular Article 94.

²¹³ See: Doc. 9728, A32-LE, pages 10–11.