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DIPLOMATIC CONFERENCE TO ADOPT A MOBILE EQUIPMENT CONVENTION AND AN AIRCRAFT PROTOCOL

(Cape Town, 29 October to 16 November 2001)

PRELIMINARY COMMENTS ON DRAFT CONVENTION AND DRAFT PROTOCOL

(Presented by the Government of the United States of America)

The United States submits these observations in order to convey its general views concerning the draft multilateral Convention and the first specialized Protocol expected to be completed and adopted at the forthcoming diplomatic Conference hosted by the Government of South Africa and to be convened at Cape Town.

1. The Convention offers the opportunity to enable the benefits of asset-based financing to enhance credit and to lower the cost of that financing to all states. Asset-based finance laws allow for credit to be based on the mobile assets themselves, which in turn makes feasible significantly greater financing, especially in developing and emerging states in all regions. In this manner, the resources of the capital markets can be extended to countries for whom that financing has up to now been in limited supply. Sustaining the basic financing and optional remedies provisions are fundamental to that purpose.

2. In addition, the Convention opens the pathway for additional protocols on equipment, including rail, which will be of considerable importance for many markets. This multi-equipment Convention has been a vital part of this process from its origin. Again, the primary benefit would inure to developing countries. We agree that a consolidated text should be prepared, which will serve an important role in practice, but not as a substitute for a multi-equipment treaty. For these reasons, we would not support efforts to restrict this process to any particular type of equipment, and thus to limit its value for developing countries, as has been sought by some.

3. With regard to the Aircraft Protocol, based on projections of end-user airlines and the expected role of international air transportation in the world economy, the importance of rapid implementation of the convention system and its first protocol on aircraft finance has been stressed. The events of recent times however have made this of even greater importance, so that capital markets assistance can be made available to those in need who are willing to adopt and implement this convention.

We will therefore support any appropriate result of the Conference that can ensure implementation of the convention system without delay, since it is now clear that from a technological, funding and legal point of view, that can in fact be accomplished and can be accomplished quickly. This calls for the convention system to be able to be initiated quickly with only three to five ratifications to start with, and by eliminating impediments to rapid implementation that have been sought by some. Interim

arrangements for a registry system should begin promptly after the Convention even before the requisite ratifications are deposited so as to avoid delay.

The United States are prepared to fully support a final text of the basic Convention and its first Protocol, assuming however that it achieves the above goals. We would be pleased to work with others at the forthcoming Conference in order to achieve those purposes.

The following is an explanation of U.S. views on certain key issues for the diplomatic Conference. The issues relate to implementation of the new convention system on an expedited basis.

(A) Establishment and composition of Council functions as Supervisory Authority

Assuming the possibility that the diplomatic Conference may offer to ICAO the role of Supervisory Authority, we need to seek assurances at the Conference that that would in fact be carried out so as to enhance financing for air transport. The Supervisory role, which would be a limited one, should include both major manufacturing and airline user states, which might be drawn from within or outside the Council, and which could be expanded to include signatory or ratifying states consistent with geographic representation.

The proposed structure anticipates that the actual registry, intended to be a very small, high-technology facility, would be contracted out and be responsive to airline users, financing parties and manufacturers. The process could be managed by the Supervisory Authority through a technical advisory group, as has been done for certain other current ICAO projects, to which states could appoint technical experts. We anticipate that such a technical advisory group would do the primary work, which largely reduces to a minimum the need for additional resources for the Secretariat, which under current circumstances is an important budgetary issue. A technical group could be started with the framework already built up by the IRTF (International Registry Task Force), which, since it now has approximately 12 states, is already well known by participants in this process, and would enhance acceptability of the process as well as ratifications.

We should express caution about, but not reject the possibility that the Secretariat itself could be invested with the authority and resources necessary to perform the actual functions of a commercial registry. Aside from resource implications, however, which are important, it would be necessary to waive immunities and open the Secretariat and ICAO to substantial liability exposure, since it is unlikely that the air transportation industry would be willing to accept a registry to which they would have no recourse or only limited recourse. Thus, a proposal of this nature would need to be carefully thought out before it could be considered further.

(B) Expedited implementation of the convention system

While long pressed by airlines and the industry for early action on the whole convention system, rapid implementation has now become even more important, since recent events have placed enormous pressure on the availability of financing for acquisition of newer stage aircraft, which in turn upgrades safety and navigation factors.

Given the recent actual development and prototype testing of an international computer-based registry system by SITA in Geneva, as well as the stated readiness of some other possible service providers, plus the now apparent availability of start up and operational funding from at least several sources, it is now clearly within our ability to achieve rapid implementation, once a small (three to five) number of ratifying states are on board. In fact, an early start up of the registry system would itself be likely to lead to earlier ratification by states.

Under these circumstances, neither we nor ICAO should accept any solution that allows substantial delay. It has become clear that in order to avoid unneeded delay, injurious to airline users, the process for the registry start-up should be initiated shortly after the Conference concludes. We need also to assure that the process will work closely with and be fully compatible with both the airline users and transportation finance participants, without whose full support the system cannot work.

Given these concerns, we will support any workable solution, but we and others also have to be prepared for the possibility that an appropriate solution is not concluded by the Conference, or cannot be set in motion without significant delay, or whose acceptability by the industry is seriously in doubt.

Under those circumstances, we would be prepared to work with others to come up with an interim stop-gap system that could be activated, possibly through an additional protocol, until such time as a full system contemplated by the Convention could be set up.

Additional technical comments

The United States expects to circulate technical comments on specific provisions at the Conference, which could improve but would not alter the direction of substantive provision now set out in the draft Convention and Protocol. These provisions taken together can meet the requisites for financing mobile equipment, and have been the subject of a long and detailed examination in joint sessions of the two international bodies, by the Legal Committee, and endorsed in principle by the governing bodies both of UNIDROIT and ICAO. It is very important to maintain the purpose and effect of those provisions if the new Convention and Protocol are to be able to generate actual benefits. It is also critical to maintain the multi-equipment approach of the basic Convention and separate Protocols for types of equipment.

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