



INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 26 March to 4 April 2014)

COMMENTS ON THE DRAFT TEXT OF THE PROTOCOL TO THE TOKYO CONVENTION OF 1963

(Presented by Japan)

1. RATIONALE FOR SUPPORT OF “OPTION 2” ON ARTICLE VI AS TO AUTHORITIES OF THE IN-FLIGHT SECURITY OFFICER (IFSO)

1.1 Mission of IFSOs

1.1.1 The principal mission of the in-flight security officers (hereafter “IFSOs”) is to prevent or otherwise cope with serious offences such as terrorism including hijacking, which may jeopardize the safety of persons on board the aircraft. This is in fact the scope of mission for IFSOs in most States deploying them, pursuant to a bilateral or multilateral agreement or arrangement, including Japan, and this limited scope should be maintained.

1.1.2 In order to carry out their mission, it is imperative for IFSOs to conceal their presence from perpetrators such as terrorists on board. If IFSOs were to deal with relatively minor cases, in addition to the above-mentioned serious offences under the Protocol to the Tokyo Convention of 1963 (hereinafter “the Protocol”), their presence could be unveiled due to their intervention in those minor cases, and the perpetrators could abuse such knowledge when committing serious offences.

1.1.3 The afore-said limited scope of IFSOs’ mission should be reflected appropriately in the Protocol, including the definition of IFSOs in Article II of the draft text of the Protocol.

1.2 Rationale for Support of “Option 2” on Article 6

1.2.1 Article VI of the draft text of the Protocol, adopted all with square brackets during the 35th Session of ICAO’s Legal Committee, proposes two options pertaining to the powers of the aircraft commander as well as to the intervention of IFSOs. Japan opts for Option 2.

1.2.2 Option 1 intends to give IFSOs the same authority as aircraft commanders, when they have reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1 of the Tokyo Convention of 1963, to impose upon a person reasonable measures including restraint which are necessary, to take reasonable measures; a) to protect the safety of aircraft, or of persons or property therein; or b) to maintain good order and discipline on board. This would inevitably alter the nature of the primary authority of the aircraft commander and give rise to the unnecessary overlap of responsibilities between the aircraft commander and IFSOs. Currently, the aircraft commander has the primary responsibility for maintaining good order and discipline on board the aircraft, in accordance with Article 6, paragraph 1 of the Tokyo Convention of 1963. In our view, the current framework has worked well, and through the discussion during the 35th Session of the Legal Committee and the two preceding sessions of its Sub-Committees, as well as our experience in practical IFSO operations in Japan, urgent necessity has not been identified to

give IFSOs the same authority as the aircraft commanders. With this recognition, together with the need to conceal the presence of IFSOs for effective performance of IFSO's primary duties for suppression of acts of terrorism, it is appropriate to maintain the current framework under the present Tokyo Convention, where the aircraft commander has the primary responsibility for maintaining good order and discipline. Article VI of the Protocol should not adversely affect IFSOs' effective performance in accomplishing their principal mission, which is to prevent serious offences such as terrorism. Therefore, Option 1 is not considered appropriate.

1.2.3 On the other hand, Option 2 intends to maintain the current framework and widely accepted practice under the Tokyo Convention of 1963, while recognizing IFSOs as a new category. Even in the current framework, IFSOs, along with crew members and passengers, may take reasonable preventive measures without aircraft commander's authorization when they have reasonable grounds to believe that action to restrain the person on board is immediately necessary to protect the safety of the aircraft, or of persons or property therein. This framework provides a sufficient legal basis for IFSOs to carry out their duties. For these reasons, Option 2 is more appropriate.

2. PROPOSAL FOR AMENDMENT OF ARTICLE 17 OF THE TOKYO CONVENTION OF 1963 AS TO COOPERATION BY AIRCRAFT COMMANDER FOR INVESTIGATIONS

2.1 If the State's jurisdiction over the offence or act committed on board is expanded to that of the State of landing, whether it is on the mandatory or optional basis, it would become essential for the law enforcement authorities of the State of landing to complete relevant investigations before the departure of the aircraft in question and/or the aircraft commander for the next destination. Especially, in the case of minor offences or acts committed by unruly passengers, the law enforcement authorities cannot practically expect any assistance from other relevant States through the cooperation under mutual legal assistance treaty (MLAT) or by diplomatic channels, since such assistance is supposed to focus principally on serious cases.

2.2 Thus, in order to facilitate the completion of investigation and eventually the prosecution of suspects, it is considered imperative to secure cooperation from aircraft commander to relevant investigation conducted by the law enforcement authorities of the State of landing. In this regard, currently, the obligation of the aircraft commander under Article 9.3 of the Tokyo Convention of 1963 is limited to furnishing the authorities to whom any suspected offender is delivered with evidence and information which, under the law of the State of registration of the aircraft, are lawfully in his possession.

2.3 Therefore, it is necessary to include provisions for securing such cooperation from the aircraft commander to facilitate the investigation by the State of landing. It is hereby proposed to add the following in the draft text of the Protocol:

Article X

The following shall be added as Article 17 bis of the Convention:

The aircraft commander shall make reasonable efforts to cooperate with the Contracting State which is taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offence or act committed on board an aircraft.

2.4 The Government of Japan hopes that its views and positions on the afore-said issues will be duly considered and receive wide support among the Contracting Parties prior to, and during the upcoming sessions of the Diplomatic Conference.