



WORKING PAPER

ASSEMBLY — 38TH SESSION

TECHNICAL COMMISSION

Agenda Item 27 : Aviation Safety – Policy

PROTECTION OF SAFETY INFORMATION: THE BRAZILIAN APPROACH

(Presented by Brazil with support from the other member states of LACAC¹)

EXECUTIVE SUMMARY

The protection of safety information has been one of the main concerns for the future success of the information-based framework on which safety management is based. In the Pan-American region, the Regional Aviation Safety Group (RASG-PA) has been promoting the exchange of experiences and implementation practices. This Working Paper suggests two strategic actions already implemented in Brazil for the protection of safety information, which may be adopted by other States. The first suggestion brings the form and proposal of an amendment to the aeronautical legislation. The second one shows the structure and model of a course for judges and public prosecutors, focused on the role of the judiciary branch on flight safety.

Action: The Assembly is invited to:

- a) note the information provided;
- b) encourage States to adopt a legal framework for the protection of safety information based on the principles contained in the proposed model detailed in the Appendix; and
- c) endorse the development of ICAO guidance material on the subject matter, taking into account the principles described herewith.

<i>Strategic Objectives:</i>	This working paper relates to the Safety Strategic Objective.
<i>Financial implications:</i>	Expected that this is covered in the draft budget.
<i>References:</i>	<ul style="list-style-type: none">● ICAO Global Aviation Safety Plan (2007) Initiative III (GSI 3): Efficient Reporting of Errors and Incidents; Regional Aviation Safety Group, Pan America, Project GSI 3: Proposal for Amendment to Aeronautical Legislation to Protect Safety Information Sources● 2010 High-level Safety Conference-WP/85, Conclusions and Recommendations● ICAO Code of Conduct on Sharing of Safety Information● 2013 38th Session of the Assembly – A38-WP on Protection of Safety Information Sources

¹ LACAC is composed of 22 members: Argentina, Aruba, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, México, Nicaragua, Panamá, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela

1. INTRODUCTION

1.1 In 2003, the ICAO started specific activities aimed at developing guidance for the protection of safety data and information sources against inappropriate use. The work done by means of a multidisciplinary effort from the ICAO, the States and the aviation industry culminated in March 2006 with Attachment E to Annex 13 (Legal Guidance for the Protection of Information gathered from Safety Data Collection and Processing Systems – SDCPS). This document provides legal guidance for the States to adjust their laws and regulations in order to protect information from safety data sources against inappropriate use.

1.2 In the 36th ICAO Assembly in 2007, all Contracting States were invited, by means of the Resolution A36-9, to review their legislations or regulations necessary for the protection of safety information, based, to the extent possible, on the legal guidance developed by ICAO and contained in Attachment E to Annex 13.

1.3 In 2007, after the occurrence of two major civil aviation accidents in Brazil, the Brazilian National Congress invited the Aeronautical Accident Investigation and Prevention Center (CENIPA), the organization responsible for the theme in Brazil, to assist congressmen and legislative advisers in the preparation of a federal bill dealing with protection of safety information, as well establish the jurisdiction and independence of the aeronautical investigations.

1.4 In the current Latin American scenario, Brazil is the country closest to having a federal law to protect safety information.

1.5 In this context, the CENIPA perceived the need of a strategy to reach another extremely important group: the judiciary authorities. In consequence, since 2011, Brazil has offered a course for judges and public prosecutors named "The Role of the Judiciary Branch in Flight Safety". Tens of judiciary authorities have taken this course with the CENIPA's technical support. In its syllabus, the course promotes a study of operational safety information protection issues, as well as the technical-judicial incompatibility between the investigation conducted by the aeronautical authority and the judicial process.

2. DISCUSSION

2.1 The States wishing to review their aeronautical legislation for purposes of protection of the safety data collection and processing systems (SDCPS) will have to make coordinated and integrated efforts before their respective Legislative Branch political authorities. This has to be a basic premise, because the issues involved in the protection of safety information tend to be controversial, and, many times are not well understood by those who are not directly involved with the air activity. If this approach strategy with the legislative branch is not previously planned and established, any initiative to write proposals of amendments to the aeronautical legislation will be innocuous. In Brazil, the interaction between the aeronautical and the political communities was motivated by the serious aircraft accidents that had happened in the country.

2.2 For composing the very content of a legislative proposal, the States must comply with the instructions contained in Attachment E to Annex 13. Another suggestion is to review the document approved by RASG-PA (Proposal for Amendment to Aeronautical Legislation to Protect Safety Information Sources) in October 2012. From the document mentioned above, it is possible to obtain suggestions for the composition of a legislative content that is appropriate to one's specific reality.

2.3 The proposal for amendment to the Brazilian Code of Aeronautics, while establishing an important focus on the protection of information sources which feed the aeronautical accident and incident investigations, also forbids the use of data from voluntary reporting systems, stressing that they are not allowed to be used for purposes of proof in judicial processes and administrative procedures, and will only be provided by means of a judicial requisition.

2.4 With the purpose of collaborating, and based on the aforementioned proposal for amendment to the Brazilian aeronautical legislation, a suggestion for a generic bill has been written, containing twelve articles with comments, and included in the appendix to this working paper.

2.5 Nevertheless, it was possible to observe in Brazil that the development of an ideal information protection environment within an aviation system must go beyond the relationship between the industry and the regulating organization, and the relationship between employee and employer in the aviation service providers. There is a group that does not belong to the air activity, but that must be motivated to understand the aspects capable of reducing risks in aviation: judges and public prosecutors.

2.6 After coordination with the Center of Judiciary Studies of the Military Justice of the Union, a course was structured with duration of five days and workload of 22 hours. The judges and public prosecutors are typically invited by the Military Justice of the Union to attend the course. In the syllabus of the course, there are disciplines featuring topics, such as flight safety, characteristics of an aeronautical accident investigation, protection of safety information, penal and processual law in the light of the aeronautical accident, where all the approaches present studies of concrete cases of the Brazilian reality. In addition, visits of air traffic control units, Air Defence System and CENIPA are part of the course.

2.7 One of the requirements for earning a course completion certificate is the handing in by the student of a scientific article concerning flight safety issues. The compilation of several scientific articles written by the very judges, dealing with subjects and juridical agreements aimed at strengthening the safety of air activity is an invaluable asset. The publication of such articles, in a language and logical structure appropriate to the juridical realm, fosters the development of a specialized doctrine serving as the foundation for the issuance of judicial decisions, therefore allowing aviation safety values to be taken into account in the judicial activity.

2.8 In Brazil, two judicial decisions have recently been made in convergence with aviation safety, as far as the protection of information is concerned: the first decision was made by the Brazilian Federal Justice in the case-files of a criminal process involving a commercial aircraft accident; and the second one, made by the military justice, involving a military aircraft. In both decisions, the judges guaranteed the secrecy of safety information, the forbiddance of the use of aeronautical authority investigation data by the police organizations, the forbiddance of the use of voluntary reporting information, in addition to the recognition of the aeronautical authority priority in relation to the access to, and custody of, the wreckage. Thus, jurisprudence is another source of right that is being increasingly influenced by such actions of approach with the judiciary branch.

3. CONCLUSION

3.1 The themes discussed in this document may serve as an additional guide for the Contracting States in the development of their respective proposals of amendment to the aeronautical legislation for approval by the legislative branch.

3.2 The set of themes involving the protection of safety information needs to go beyond the composition of a legislative proposal. To the extent possible, it has to be consolidated both in the juridical doctrine and in the jurisprudence.

3.3 Judges and public prosecutors need be motivated to understand these themes related to the protection of safety information outside the juridical environment. By discussing themes concerning aviation safety, independence of aeronautical investigations, and protection of safety information, this course for judges and public prosecutors has developed a doctrine that will serve as a primary source of law, besides having already produced concrete results, in which the Brazilian judiciary branch issued judicial decisions convergent with such objectives, a scenario that will strengthen the power of the legislation to support and protect safety information.

APPENDIX

PROPOSED BILL FOR THE PROTECTION OF SAFETY INFORMATION - BRAZIL

Investigation and Prevention of Aeronautical Accidents

Chapter I

On the Investigation

Art. 1. The investigation of aeronautical accidents and incidents has the sole objective of preventing further accidents and incidents, by means of the identification of the factors that may have, either directly or indirectly, contributed to the occurrence, and by the issuance of operational safety recommendations.

Comment: This provision restricts the purpose of the aeronautical investigation in order to prevent conflicts arising from its utilization by other State agencies or by third parties.

Art. 2. The investigation of aeronautical accidents shall comprise the practices, techniques, processes, procedures, and methods used for the identification of acts, conditions or circumstances which, either in isolation or in conjunction, represent a hazard to the integrity of people, aircraft and other assets, solely for the benefit of prevention of aeronautical accidents, incidents or ground occurrences.

Comment: This provision extends the restricted purpose of the aeronautical investigation to all existing aeronautical investigation tools.

§ 1 The investigation shall consider the facts, hypotheses, and known precedents in the identification of the possible factors contributing to the occurrence or to the worsening of the consequences of aeronautical accidents and incidents.

Comment: This provision grants broad cognition to the investigators, seeking to provide them with maximum prevention effectiveness, in a way that even hypotheses may be included in the investigation, bringing forth a material difference in relation to a judicial process.

§ 2 The aeronautical investigation authority may decide either not to conduct an aeronautical investigation, or discontinue an investigation in progress, in the cases where an intentional illicit act is found to be connected with the causation of the event, and if the investigation is not expected to bring any benefits to the prevention of future aeronautical accidents and incidents, without detriment to notifying the competent police authority.

Comment: Some occurrences may have a criminal origin, and investigating them may not be of interest to the aeronautical investigation authority. It is important to grant discretionary power to this kind of authority, be it for the purpose of staying away from the investigation or maintaining it, even when dealing with accidents connected with criminal actions.

Art. 3. The aeronautical investigation shall be conducted in a way that makes it independent of any other investigation related to the same event.

Comment: This provision establishes the independence of the aeronautical investigation, and, therefore, the need of other instances of the State to conduct their own investigations, preventing appropriation of the aeronautical investigation data in case of omission by other state agencies.

Art. 4. The aeronautical investigation shall neither preclude the institution of other investigations nor provide for their need, even if for purposes of prevention. Since it aims at preserving human life by means of air transport safety, it shall have precedence over concomitant and non-concomitant procedures related to the access and custody of items of interest for the investigation.

Comment: This provision endorses the previous one, and gives priority to the aeronautical investigation, in view of the possibility of conflicts related to the custody of and access to the wreckage. Such priority is founded in the Principle of Human Life Preservation, a paramount value for the aeronautical investigation.

Art. 5. If, in the course of an aeronautical investigation, evidence of crime arises, related or not to the chain of events leading to the accident, one must make pertinent communication of it to the competent police authority.

Comment: Optative provision, which assigns the aeronautical investigator with the obligation to notify the event to the police authorities. In Brazil, it is a duty-bound issue, attributed by the legal norm.

Chapter II

On the competence to conduct an aeronautical investigation

Art. 6. The investigation of a civil aircraft event shall be conducted by the aeronautical investigation authority, who will decide on the institution of an investigation commission, whose presidency will be assigned to a qualified professional accredited by the investigation organization.

§ 1 With priority over other requisitions, the aeronautical investigation authority is entitled to request from the competent organizations and entities the technical awards, examination reports, including autopsies, and copies of other documents of interest to the investigation.

§ 2 To the aeronautical investigation commission, within the limits established by the aeronautical investigation authority, is guaranteed access to the accident aircraft, its wreckage and objects transported by it, as well as to the installations, equipment, documents and any other elements necessary for the Investigation, wherever their location may be.

Comment: The three provisions above aim at defining the competence for the conduction of an aeronautical investigation, preventing manipulation of the composition of the commission on account of foreign interests. They also bring limits to the competence of commission members, in addition to the coercive power of requisition by the aeronautical authority in relation to documents held by third parties or even by other public organizations.

Art. 7. The aeronautical investigation is concluded with the issuance of a final report, a document that represents the statement of the investigation authority on the possible contributing factors of a given aeronautical accident, and that presents recommendations concerning solely the benefit of operation safety of the air activity.

Comment: this provision prevents the manipulation of not- yet conclusive data of an aeronautical investigation. The rule also points out the final limits of the safety recommendations, preventing their use for purposes other than the prevention of future accidents, with an inappropriate apportion of blame or liability, just based on the fact that someone is the addressee of a safety recommendation.

Chapter III

On professional secrecy and information protection

Art. 8. The following are protected information sources:

I – recordings of the communications between air traffic control units, as well as their respective transcripts;

II – recordings of conversations in the cockpit, along with their transcripts;

III – data from the voluntary occurrence notification systems;

IV – recordings of communication between the aircraft and air traffic control units, along with their transcripts;

V – Recordings of flight data, and the graphs extracted or transcribed from them, or extracted and transcribed from them;

VI – Data from either automatic or manual data collecting systems; and

VII – other records used in the activities of investigation.

§ 1 For the benefit of the aeronautical investigation, the aeronautical authority shall have priority for the access to and custody of the sources mentioned in the caput.

§ 2° The source of information referred to in item III, as well as the analyses and conclusions of the aeronautical investigation shall not be utilized for purposes of proof in the judicial processes and administrative proceedings, and shall only be provided by means of a judicial requisition, in conformity with the article 9 of this Law.

§ 3 All information for the benefit of an aeronautical investigation and other related activities shall only be provided in a spontaneous manner and based on the legal assurance of its exclusive use for purposes of prevention.

Comment: the provisions list the sources by means of which an entire Aviation System is fed, limiting the use of some of the sources in judicial processes, as well as imposing processual secrecy to all of them. These are the most important provisions of the whole bill. The setting of limits to the use of such sources in judicial processes is opposable to the voluntary information and to the investigation conclusions. The former ones, on account of the confidence deposited by the informers and contributors of the system; and the latter ones, on account of the very technical incompatibility between the aeronautical investigation

procedure and its police/judicial counterpart, since the aeronautical investigation has purpose which is different from one of the judicial investigation. Furthermore, the aeronautical investigation may utilize hypotheses and indirect conditions in its analyses, a technique that is rejected in the judicial cognition. In the aeronautical Investigation, this is allowed, because it brings a broader comprehensiveness to the Studies aimed at preventing the event from recurring

§ 4 Except for the benefit of the aeronautical investigation and other activities of prevention, an aeronautical investigation professional is not allowed to disclose his or her sources and respective contents, and is forbidden to give testimonies or perform expert activities in judicial or administrative processes strange to the aeronautical investigation organization.

Comment: This provision bestows the aeronautical investigator with the right of refusing to testify, while forbidding him/her to work in the function of expert, thus ensuring a higher level of protection to the investigation activities and to the information he/she has had access to. With the “right of refusing to testify” and “forbiddance to work as an expert” prescribed by law, such protection is given more stability by force of the rule, no longer depending on a judicial evaluation.

Art. 9. The sources and information whose utilization in a judicial or administrative enquiry or process has been allowed are protected by processual secrecy.

Comment: this provision grants secrecy to all items of information and reinforces that there is restriction for the use of some sources in judicial processes (Item III of the art. 8).

Art. 10. The aeronautical investigation authority, or the person appointed by him/her, is entitled to decide on the convenience of publicizing, with no detriment to the prevention of accidents and legal provisions, information relative to the aeronautical investigation in progress and respective information sources.

Comment: this provision explains the power to publicize a certain phase of the Investigation before the issuance of the final report, in response to the desire of the society provided that there is no damage to the main objective of the investigation: prevention.

Chapter IV

On the access to the aircraft wreckage

Art. 11. The civil aircraft involved in an aeronautical accident or incident may be interdicted by the aeronautical investigation authority, taking into account that:

I – the notification of interdiction shall be signed by the aeronautical investigation authority and, if possible, by the aircraft operator or his/her representative;

II – pending authorization granted by the aeronautical investigation authority, the interdicted aircraft may be put in operation for purposes of maintenance; and

III – the operator is held responsible for the compliance of any contractual obligations concerning the aircraft.

Comment: This provision bestows the aeronautical investigation authority with power to embargo and interdict an aircraft in order to guarantee the development of an aeronautical investigation, solving a contingent conflict between the owner and the operator of the aircraft.

Art. 12 Except for the purpose of saving lives, preserving people's safety, or preservation of evidence, no accident aircraft may be searched or removed, unless authorization is granted by the aeronautical investigation authority, which will have custody of the items of interest for the investigation up to their release in the terms of this Law.

Comment: this provision points out, once again, the priority of the aeronautical Investigation over the other organizations of the State, solving a serious difficulty concerning access to the wreckage by the aeronautical investigator in the moments following the mishap, when many conflicts with other authorities end up occurring. It brings a better guaranty of evidence preservation to the aeronautical investigation, since the pieces of evidence will only be accessed under the supervision of qualified personnel, with prescribed exceptions respected.

— END —