



WORKING PAPER

ASSEMBLY — 41ST SESSION

TECHNICAL COMMISSION

Agenda Item 30: Aviation Safety and Air Navigation Policy

30.3 Relevant Outcomes of the High-level Conference on COVID-19, Safety Stream (HLCC 2021)

ICAO EFFORTS TO ENHANCE THE CREDIBILITY AND TRANSPARENCY OF ANNEX 13 AIRCRAFT ACCIDENT INVESTIGATIONS

(Presented by Canada and co-sponsored by Costa Rica, Dominican Republic, the European Union and its Member States¹, the other Member States of the European Civil Aviation Conference², Kenya, Mexico, New Zealand, Oman, Senegal, and EUROCONTROL)

EXECUTIVE SUMMARY

This paper outlines the importance of enhancing the credibility and transparency of air accident investigations conducted in accordance with Annex 13 – *Aircraft Accident and Incident Investigation* in the context of the downing of an aircraft, and of ensuring that the work initiated by ICAO to address this question is made a priority.

Action: The Assembly is invited to:

- a) reaffirm that sound, credible safety recommendations with high level of uptake are integral to accident prevention and global aviation safety, and contingent on Annex 13 implementation;
- b) underscore the importance of reviewing, and when necessary adapting Annex 13 and/or associated guidance material to help the State of Occurrence in mitigating real or perceived conflict-of-interest situations in the context of the downing of an aircraft;
- c) commend the valuable progress and commitment made by ICAO experts to address this issue, and their contribution to global civil aviation safety from that perspective; and,
- d) request ICAO to make this expert-led work a priority, including for the 2023-2025 Triennium.

<i>Strategic Objectives:</i>	This working paper relates to the Safety Strategic Objectives.
<i>Financial implications:</i>	The ICAO activities referred to in this paper are expected to be undertaken within the resources available in the 2023-2025 Regular Budget, or through voluntary contributions, if necessary.

¹ Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.

² Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Iceland, Moldova, Monaco, Montenegro, North Macedonia, Norway, San Marino, Serbia, Switzerland, Türkiye, Ukraine, and the United Kingdom.

<i>References:</i>	Annex 13 — <i>Aircraft Accident and Incident Investigation</i> Doc 9962, <i>Manual on Accident and Incident Investigation Policies and Procedures</i> Doc 9756, <i>Manual of Aircraft Accident and Incident Investigation</i> High-Level Conference on COVID-19 Report (Doc 10160) – Agenda Item 5 ICAO Safety Report: Universal Safety Oversight Audit Programme – Continuous Monitoring Approach results; 1 January 2016 to 31 December 2018
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1. INTRODUCTION

1.1 Sound, credible air accident investigations and safety recommendations with high global uptake are integral to international aviation safety and accident prevention, as highlighted in Assembly Resolution A36-10. Annex 13 — *Aircraft Accident and Incident Investigation* Standards and Recommended Practices (SARPs) are fit-for-purpose in the majority of cases and are generally well-designed to support the delivery of credible Final Reports and Safety Recommendations, when fully implemented.

1.2 Despite this, Annex 13 and the associated guidance material do not fully address instances where a State is involved in the downing of an aircraft or an unlawful act that likely caused the accident, therefore placing the State of Occurrence in a conflict of interest, whether real or perceived. If left unreviewed and when necessary unmitigated, this conflict of interest puts at risk the credibility of the safety investigation and its potential to prevent future accidents. In these rare instances, having implemented core elements of Annex 13 may not be enough to mitigate conflict-of-interest related issues. Recognizing the fundamental principle of ICAO State sovereignty and understanding the onus placed on the State of Occurrence in any air accident investigation in its territory, Annex 13 needs to be reviewed and when necessary adapted to this context, to support the State of Occurrence in mitigating the conflict of interest in which it is placed.

1.3 Since their inception, Annex 13 SARPs have been improved and adapted continuously thanks to the diligent and proficient work of ICAO experts. Based on a recognition that conflict-of-interest situations in the context of the downing of an aircraft can undermine the credibility and uptake of Annex 13 safety recommendations, ICAO has established an expert working group to look at the issues posed in this specific context and develop ways to address them. At the 2021 High-Level Conference on COVID-19, the Safety Stream voiced encouragement for this expert-led work. The completion of this work is crucial in ensuring that Annex 13 can continue to support the delivery of credible Final Reports and safety recommendations, should such a situation repeat itself.

2. AIR ACCIDENT INVESTIGATIONS AND CREDIBLE SAFETY RECOMMENDATIONS

2.1 The sole objective of Annex 13 investigations is the prevention of future accidents and incidents. For this purpose, to determine the underlying causes and deliver credible safety recommendations, Annex 13 generally provides that these investigations must, *inter alia*:

2.1.1 Be conducted by independent and competent investigation authorities, remain completely independent from judicial or criminal investigations and avoid apportioning blame or liability; and,

2.1.2 Have access to all relevant information and evidence, through appropriate State of Occurrence measures to preserve the integrity of said evidence, and through institutional arrangements, clear processes and effective coordination with judicial authorities.

2.2 As an integral part of the independence of the process, investigation leads should be at liberty to direct any relevant safety recommendations at any of the parties involved, including at the State of Occurrence. In addition, to uphold its credibility and ensure that ICAO Member States will take timely action to prevent future occurrences, the investigation must proceed without delay and be as transparent as possible, while maintaining rigour and respecting non-disclosure obligations.

3. CONFLICT OF INTEREST AFTER THE DOWNING OF AN AIRCRAFT

3.1 While Annex 13 SARPs are effective in almost all scenarios, they do not fully address rare instances where a State, including the State of Occurrence responsible for an investigation, may be involved in the downing of an aircraft or another unlawful act that likely caused the accident. In this scenario, the State of Occurrence is automatically placed in a conflict of interest, either real or perceived, that undermines the credibility of the air accident investigation that it would lead. This is a result of the potential for any of its actions to be perceived as an attempt to either minimize responsibility, or to apportion blame if another State is involved, whether or not these actions are intended as such.

3.2 Conflict-of-interest situations in the context of the downing of an aircraft may create incentives for an investigating State or its accident investigation authorities to deviate from or unduly use the flexibility provided in Annex 13 SARPs in a way that undermines the transparency and credibility of the investigation. Recalling the core elements of Annex 13 presented above, this may include overriding institutional arrangements that would normally ensure the independence of air accident investigation authorities, mishandling or improperly preserving evidence, undue delays in investigation processes and the lack of transparency of investigation proceedings.

3.3 In the absence of clear SARPs or guidance to mitigate this conflict of interest, even if the State of Occurrence appears to meet Annex 13 SARPs, the credibility of its safety recommendations may be negatively affected in a way that significantly reduces their global uptake. This hinders Annex 13 SARPs' capacity to prevent future occurrences – its core objective.

3.4 ICAO State sovereignty is a fundamental principle of the Chicago Convention. The State of Occurrence plays a central role in implementing and overseeing the core elements of Annex 13 mentioned above, including in ensuring the preservation and timely access to evidence located within that same State. In the context of the downing of an aircraft, the onus remains on the State of Occurrence to take an appropriate course of action to mitigate said conflict of interest. Reviewing and when necessary adapting Annex 13 to support the State of Occurrence in navigating this particular context and conflict-of-interest issues could help enhance the transparency, credibility and uptake of safety recommendations, and as such, the effectiveness of Annex 13 SARPs.

Annex 13 Implementation

3.5 While this real or perceived conflict of interest and the absence of clear SARPs or guidance to help the State of Occurrence mitigate it are concerns on their own, the issue is exacerbated when the State of Occurrence has not fully implemented Annex 13. This includes the implementation of core elements of Annex 13 mentioned above, such as establishing independent air accident investigation authorities and appropriate institutional arrangements between air accident investigation authorities and judicial authorities, without which conflict-of-interest perceptions become very challenging to manage.

3.6 According to the latest data from ICAO Universal Safety Oversight Audit Programme's (USOAP) website (retrieved July 28, 2022), the effective implementation global average for the accident investigation section is 57%, the lowest of all sections. Furthermore, the most recent USOAP report (2016-2018) highlights both "establishing an independent accident investigation authority and investigation processes" and "ensuring proper coordination and separation between the Annex 13 investigation and the judicial investigation" as recurrent issue areas. The implementation of these two core elements is a base minimum in mitigating conflicts of interest in the context of the downing of an aircraft.

ICAO Expert Work

3.7 The *Standards and Recommended Practices for Aircraft Accident Inquiries* were first adopted and designated by the Council as Annex 13 in 1951. Since that time, ICAO experts have continuously adapted Annex 13's SARPs and guidance to the current realities of global civil aviation safety to safeguard the relevance and proper function of aircraft accident and incident investigations.

3.8 At ICAO's October 2021 High-Level Safety Conference on COVID-19, the Safety Stream recognized the benefit of a review of Annex 13 to better address conflict-of-interest scenarios and voiced encouragement for referring this issue to the appropriate expert group.

3.9 ICAO has initiated work to review Annex 13 to enhance the credibility and transparency of air accident investigations in the context of the downing of an aircraft and consider ways to address gaps in how conflicts of interest, real or perceived, are managed in these instances. ICAO experts' progress so far, as well as their commitment to address this question, demonstrate a strong willingness to contribute to global civil aviation safety. This work must be made a priority to ensure ICAO experts can take timely action to maintain the effectiveness of Annex 13 SARPs and guidance in supporting the delivery of credible safety recommendations.

4. CONCLUSION

4.1 Annex 13 has served ICAO Member States well in the majority of cases and has helped to successfully deliver credible Final Reports and safety recommendations, when its SARPs are implemented and followed. Despite this, Annex 13 SARPs and guidance material have yet to address instances where a State may be implicated in the downing of an aircraft or an unlawful act that likely caused the accident.

4.2 The work recently initiated by ICAO to review and when necessary to adapt Annex 13 and address these issues is of the utmost importance in improving the credibility and transparency of air accident investigations in these circumstances, and thus, in ensuring that Annex 13 can effectively play its role in incident and accident prevention and global civil aviation safety.

4.3 As such, the Assembly is invited to: (a) reaffirm that Annex 13 implementation and credible safety recommendations are integral to accident prevention; (b) underscore the importance of reviewing and when necessary adapting Annex 13 and/or guidance material to help the State of Occurrence mitigate conflict-of-interest situations in the context of the downing of an aircraft and see that they are adequately addressed; (c) commend the commitment made by ICAO experts to address this issue and when necessary to develop appropriate SARPs and/or associated guidance material; and, (d) request ICAO make a priority of this ongoing expert work, including during the 2023-2025 Triennium.