



WORKING PAPER

COUNCIL — SPECIAL MODEL SESSION

**Subject No. XX: Challenges related to the projected shortages of skilled aviation personnel
(or specific NGAP Themes as determined and conveyed)**

**Dealing with the negative impact of using air accident investigation reports as evidence to
criminalize aviation professionals for honest mistakes: two Brazilian initiatives**
(Presented by Brazil)

EXECUTIVE SUMMARY

This Working Paper presents to the Council two successful initiatives undertaken by the Brazilian Air Accident Investigation Authority as a response to the growing negative trend to use air accident reports as evidence to criminalize aviation professionals for honest mistakes, which can have a significantly deleterious impact on the air accident investigation process and air safety.

Action: The Council is invited to:

- a) use the Brazilian educational workshop as a model for other nations; and
- b) propose guidance to Member States on how to establish effective mechanisms, such as the Brazilian amendment to its national Aeronautical Code, for dealing with this issue.

Financial implications:

It is not possible to determine the financial implications at this moment.

References:

ICAO Annex 13

INTRODUCTION

1.1 Annex 13 of ICAO's Standards and Recommended Practices states that "the sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability."¹ In addition, section 5.4.1 of Chapter 5 provides that "any investigation conducted in accordance with the provisions of this Annex shall be separate from any judicial or administrative proceedings to apportion blame or liability."² Section 5.4.3 of the same Chapter also recommends that "a State should ensure that any investigations conducted [under the provisions of this Annex] has unrestricted access to all evidential material without delay and are not impeded by administrative or judicial investigations or proceedings."³ Chapter Five further provides that States shall not make accident investigation records available for any purpose other than the accident investigation unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations.⁴ Finally, Chapter 8 of Annex 13 requires States to establish both mandatory and voluntary incident reporting systems to facilitate collection of information on actual or potential safety deficiencies, and specifically states that "a voluntary incident reporting system shall be non-punitive and afford protection to the sources of the information," noting that a non-punitive environment is fundamental to voluntary reporting.⁵

1.2 Implicit in the afore-mentioned provisions is the recognition that the success of an air accident investigation is almost entirely dependent on the voluntary reporting of information from the aviation professionals involved in the accident, and that the disclosure of this information to accident investigators is essential in preventing the occurrence of future accidents. This need for voluntary disclosure of information has been used as justification for the promotion of a 'just culture' among aviation professionals whereby they are shielded from criminal investigations and prosecution in those cases where the evidence demonstrates that the accident was not caused by an individual or individuals who had a clear intent to cause harm. Just culture provides the environment necessary for voluntary disclosure, whereby an aviation professional involved in an accident can trust that whatever information they provide to the accident investigation will not be used against them in a criminal prosecution.

1.3 Despite the fact that there is a generally accepted agreement regarding the necessity for a just culture environment in air accident investigations, there is an increasing global trend to criminalize aircraft accidents through the criminal investigation and prosecution of pilots and other professionals involved in those accidents. This tendency can be illustrated by the increase number of criminal prosecutions involving aviation accidents: between 1956 and 1999, only 27 accidents were criminally investigated, while from 2000-2009, there were 28 such cases.⁶ Independent of the reasons for this trend, it is evident that criminalization of air accidents has a negative impact on aviation safety because criminal investigations and prosecutions undermine the concept and purpose of just culture which in turn compromises the accident investigation process. Additionally, the use of accident investigation reports as evidence to criminalize aviation professionals for honest mistakes is even worse and may ruin the accident investigation process.

¹ ICAO, *International Standards and Recommended Practices, Annex 13 to the Convention on International Civil Aviation*, 10th ed. (July 2010) at 3-1 [hereinafter *Annex 13*].

² *Annex 13, supra* at 5-3.

³ *Ibid.*

⁴ *Ibid* at 5-4.

⁵ *Ibid* at 8-1.

⁶ NTSB Bar Association, "Aviation Professionals and the Threat of Criminal Liability—How Do We Maximize Aviation Safety?" (2002) 67 J Air L & Com 875, 991 [NTSB Bar Association].

1.4 In view of the preceding, this Working Paper will discuss two successful initiatives taken by the Brazilian Air Accident Investigation Authority (CENIPA) to deal with this problem, and will propose that similar initiatives be undertaken on a global basis by other Member States.

2. BACKGROUND

2.1 In recent years, there has been a significant increase in the number of criminal investigations of air accidents, including the prosecution of professionals involved in the accidents even though their actions were, by any objective standard, honest mistakes, and did not involve any intent to cause harm. Brazil is no exception in this regard.

2.2 Additionally, accident reports produced by the Brazilian Air Accident Investigation Authority have begun to be used in criminal proceedings throughout the country, entirely undermining the just culture principles that are essential to the air accident investigation process. The consequences of criminalization can be illustrated by one particular accident in which air traffic controllers refused to cooperate in providing any information to accident investigators for fear of facing potential criminal prosecution.⁷

2.3 Given the serious nature of this problem and the potentially profound negative impacts criminalization of air accidents can have on air safety, the Brazilian Air Accident Investigation Authority decided to act in order to prevent undermining the voluntary disclosure system and the impartiality of the air accident investigation process in the country. This Working Paper will present those initiatives.

3. CONSIDERATION OF ISSUES

3.1 Two problems had to be addressed in Brazil. First, there was a clear need to prevent the use of information obtained through an accident investigation proceeding as evidence in a concurrent or subsequent criminal prosecution. Second, there was recognition that the principles animating a just culture environment had to be maintained so that accident investigators could determine the causes of accidents, in turn avoiding the occurrence of future similar accidents. It became clear that this objective could not be achieved unless accident investigation reports were precluded from being used as evidence in criminal proceedings. The only way this could transpire in Brazil would be having a law protecting the use of such information in criminal prosecutions and educating the Courts regarding the negative impacts of criminal prosecutions on the air accident investigation process and the safety of aviation.

3.2 The Brazilian Air Accident Investigation Authority approached this challenge with two different but complementary initiatives: i) it created a workshop to educate judges regarding the negative impact of criminal prosecutions of aviation professionals for honest mistakes and the use of accident investigation report as evidence for these prosecutions; and ii) it elaborated a project of law (2453/2007) in order to amend the Brazilian Aeronautical Code and protect accident investigation proceedings by prohibiting the use of investigatory material in criminal prosecutions.

⁷ In “Justiça restringe o uso de investigação SIPAER em ação judicial”, Revista SIPAER at 42.

3.3 The workshop, entitled “The Challenges in Aeronautical Law and Military Administrative Law” was subsequently approved and ratified by the National School of Magistrates, and was promoted by the Federal Regional Tribunal of the 5th Region (TRF 5th) in Recife in 2011⁸.

3.4 It was attended by judges, prosecutors and police organizations. The principal topics of the program included the Chicago Convention, Annex 13, Aviation Risks, Aerodrome Protection Zones, and a specific case study of accident investigations in which the reports of those investigations were later used as evidence in judicial investigations. One main objective of the course was to differentiate those rare accident cases where there was a clear intent to cause harm from the vast majority of accident cases, where, if human error was involved in the cause of the accident, such error was an honest mistake⁹.

3.5 The Workshop was considered a success and was very well received by the judicial community. The Brazilian Air Accident Investigation Authority was able to subsequently identify changes in new accident investigations whereby a greater independence was promoted among the various authorities involved in different investigative proceedings. Additionally, there was a decision by a federal judge, who limited the access of the accident investigator report to police and public attorneys involved in the criminal investigation and prosecution of the case. The basis for this decision was Section 3.1 of Annex 13, item 3.1, whereby the judge observed that there is an incompatibility between an accident investigation report, which is not produced or designed to apportion blame or liability, and the judicial proceedings, which are initiated with the main objective to apportion responsibility and liability.¹⁰

3.6 Additionally, Chapter VI of the Brazilian Aeronautical Code (law 7.565/86), which regulates the Aeronautical Accidents Prevention and Investigation System (SIPAER) was amended by the Law 12.970 of May 2014. This amendment provides that data obtained from the voluntary notification of information from aviation professionals involved in an accident as well as the analysis and conclusions of the accident investigation authority shall not be used as evidence in judicial and administrative proceedings, and can only be provided to judicial and administrative proceedings upon a judicial request. Moreover, the permissible sources of evidence may only be used after a judge hears the judicial representative of SIPAER.¹¹ The amendment further regulates that all information provided by aviation professionals during the course of an accident investigation must be voluntary and based on the legal warranty of its exclusive use for prevention of future accidents.¹² The information obtained during the investigation of air accidents may not be disclosed, and the accident investigator is forbidden to reveal sources or the contents of the report. Finally, the accident investigation also must be independent from any other investigation, and precede other official inquiries concerning the sources of the investigation.¹³

3.7 This amendment protects the air accident investigation process by providing, *inter alia*, secrecy, independence, and priority over other investigations. More importantly, pursuant to this new law, information acquired in an accident investigation cannot be used as evidence in a judicial proceeding. These changes in the law, particularly when used in concert with the educational workshop discussed above, both work to promote a just culture among aviation professionals, which assist accident investigators to determine the causes of accident so as to avoid future similar accidents.

⁸ *Ibid* at 42.

⁹ *Ibid* at 42.

¹⁰ *Ibid* at 43.

¹¹ Law 12.970/14 at articles 88-I, III, paragraph 2 & 88-K.

¹² *Ibid* at article 88-I, paragraph 3.

¹³ *Ibid* at 88-B, 88-I, paragraph 1 and 88-J.

4. FINANCIAL IMPLICATIONS

4.1 Depending on the structure and specific objectives, those workshops can be held by Member States, ICAO or Regional Offices, therefore is not possible to determine the financial implications at this moment. Regarding the law which protects the use of accident investigation reports as evidence in criminal prosecutions, it depends on each member State domestic legislative process and it is not possible to define the financial implications without analysing each case in particular.

5. ACTION

5.1 Sharing successful experiences regarding the problem of criminalization of air accidents would be highly useful in encouraging Member States to implement similar measures in order to avoid the chilling effect that criminal investigations and prosecutions of air accidents have on the voluntary disclosure of aviation professionals involved in the accident.

5.2 The Council is invited to:

- a) Utilize the Brazilian educational workshop as a model for other Member States; and
- b) Propose guidance to Member States on how to establish other effective mechanisms, such as Brazil's amendment to its national Aeronautical Code, to shield their national air accident investigations from unjustified criminal prosecutions that aim to criminalize honest professional mistakes.

6. CONCLUSION

6.1 Despite the fact that Annex 13 provides that the sole purpose of an air accident investigation is to prevent future accidents and not apportion blame or liability, there is a current global trend to utilize information obtained through the air accident investigation as a basis for prosecuting aviation professionals involved in the accident for honest mistakes. This can have a significantly negative impact on aviation safety, as it compromises just culture principles particularly the voluntary disclosure of information by aviation professional regarding the causes of an accident, which is an essential component of an air accident investigation.

6.2 Brazil has encountered this problem in recent years. As a result, the Brazilian Air Accident Investigation Authority implemented two initiatives: an Educational Workshop for judges and prosecutors involved in the decision of such cases, and an amendment to the national Aeronautical Code designed to preclude the use of information obtained in an accident investigation as evidence in criminal prosecutions. Both initiatives have been considered a success.

6.3 Brazil believes that sharing its experiences with other Member States regarding this issue can assist in the promotion of aviation safety globally and therefore the Council is invited to promote the initiatives discussed in this paper in order to achieve this objective.