

19th COSCAP NA STEERING COMMITTEE MEETING

**COSCAP NA Phase 1V
Level 2 Activities – Legal Framework**

(Presented by the CTA)

SUMMARY

The Purpose of this paper is to introduce a methodical approach in clarifying, reviewing and potentially enhancing the COSCAP NA Level 2 functions to Member States. Level 2 functions primarily involves the provision of oversight related types of activities such as inspections and audits conducted by the COSCAP NA on behalf of the State through a formal written agreement.

1.0 Phase IV Objectives where it is Desirable to Enhance Level 2 Types of Activities:

1.1 In the COSCAP NA Phase IV, emphasis will be provided in the actual **implementation** of the ICAO Annexes and associated National Regulations. In order to assist in achieving this goal, it would be desirable for the COSCAP NA to clarify and enhance its provision of Level 2 types of activities. To achieve this, a methodical approach is suggested.

1.2 As a first step, it is important to understand the different types of classification of the “level of services” a COSCAP can provide. ICAO has identified the classification of the functions of the RSOO/COSCAP as being Level 1, 2 and 3. Detailed explanations of those levels may be found in Appendix I.

1.3 Currently the COSCAP NA operates mostly under Level 1 with as specified below:

1.3.1 Level 1:

- Under Level 1, advisory assistance is provided to a member State or a group of States.
- No formal agreement is established directly between the COSCAP and the State, for oversight functions.
- The COSCAP may coordinate the use or release of an inspector to carry out inspections and audits for a State’s civil aviation authority (CAA). In this case, the inspector acts in his/her individual capacity and the member State grants all required authorizations.
- Level 1 functions also include training, the harmonization of the aviation safety regulations of member States and the development of guidance manuals and other documentation

1.3.2 Level 2:

- Under Level 2, in addition to carrying out all Level 1 functions, the COSCAP would also provides operational assistance to a State or group of States on the basis of a formal and binding agreement.
- The operational assistance includes the conduct of audits, inspections and other investigations on industry entities.
- The State issues certificates, licences and approvals on the basis of the operational assistance provided.
- Under Level 2, the COSCAP employed experts are empowered or granted delegated authority to carry out inspectorate activities that support the certification and surveillance responsibilities of the State.

1.3.3 What do States Need:

States normally require advise, training, technical assistance and **oversight activities**. Currently the COSCAP NA is not providing oversight activities. Note that these kinds of activities are clearly outlined within the Job Descriptions (Experts) located within the COSCAP NA Phase IV Programme Document including specific oversight related functions. See Appendix 1

2.0 Step-by-Step Approach

2.1 Identification of Phase IV Objectives: First step would be to identify those Phase 1V Programme Document objectives where it may be desirable to introduce level 2 types of activities. Two of these objectives have been identified as such:

NOTE: underlined areas demonstrate the areas where level 2 activities may be required.

IMMEDIATE OBJECTIVES AND OUTPUTS

1. Immediate Objective 3

Assist Members to have the capability to conduct safety oversight of air operators, maintenance organizations, aerodromes and air navigation service providers.

Output 3.1

Where Members lack the capability to do safety oversight independently, provide assistance to Members for the conduct of surveillance, inspection and certification of air operators, maintenance organizations, aerodromes and air navigation service providers.

2.2 Determine if Member States have Proper Delegation of Power within their Key Legislation

2.2.1 If a CAA/DGCA wishes to delegate certain oversight functions including any powers, duties and other functions to a person other than those employed (and duly authorized) by the CAA/DGCA/State/SAR, the authority to do so must be clearly outlined within the hosting State/SAR's aeronautical legislation.

An example of a proper Delegation of Power Clause:

*4.3 (1) The Minister may authorize **any person or class of persons** to exercise or perform, subject to any restrictions or conditions that the Minister may specify, any of the powers, duties or functions of the Minister under this Part, other than the power to make a regulation, an order, a security measure or an emergency direction.*

States/SARs chose to place this delegation within their Aeronautics Act (AA) or Core Regulation. The important thing about this clause is that it is open to “any person or class of persons” hence can be easily delegated to anybody. The CAA/DGCA may restrict the scope of the delegation as deemed necessary. NOTE: This is subject to any other State legislation as deemed applicable (i.e. immigration laws etc.)

2.2.2 If the Minister/DGCA/CAA decides to delegate any powers, duties or functions to “any person or class of persons”, a **Letter of Delegation** must be issued to that person(s) that is **pursuant to the Delegation Clause**. This delegation letter may contain any restrictions or conditions accordingly. Without this letter, a person cannot exercise any powers, duties or functions of the Minister/DGCA/CAA. In addition, a delegation credential (card) must be issued to this person if conducting oversight activities in the field (i.e. inspections, audits). Note that the card can be temporary in nature depending on the duration of the oversight related activities.

2.2.3 As part of the legal tools, a formal legal agreement between parties can also meet legal “delegation” requirements accordingly. Note: The IFAPM (Appendix 3) needs to be reviewed and amended as required to ensure legality.

2.2.4 At a COSCAP SA SC side meeting which was held on October 23, 2018 (during the 55th DGCA Conference in Fiji), the Chairman of COSCAP SA requested that the CTA obtain a legal opinion from ICAO in regards to the possible inclusion of an addendum to the COSCAP SA Phase V Programme Document. The wording of the proposed addendum that was submitted to ICAO can be found in Appendix 4. ICAO's subsequent response also may be found in Appendix 4.

2.2.5 In relation to this discussion paper, the ICAO's response in Appendix I, makes mention that **States may lawfully delegate safety oversight functions**. Therefore, provided that States have legal tools in place and have lawfully delegated oversight functions (as described in 2.0 of this paper), there is nothing that prevents the CAA/DGCA to establish an arrangement with “any person(s) or class of persons” accordingly.

2.2.6 In relation to 2.2.5 above, provided that States have lawfully delegated safety oversight, it would not be in the prevue and/or rights of any organization to “not recognize” the oversight activity provided to the State accordingly.

2.2.7 A commitment on ICAO’s part to recognize oversight assistance provided by the COSCAP NA will place ICAO in a potential actual or perceived conflict of interest in view of ICAO’s role in the USOAP-CMA.

2.3 Identify gaps within the Legal Framework and Propose Corrective Actions as Necessary:

Pending approval from the SCM the following steps would be conducted by the CTA in order ensure that the proper legal framework is in place as described above:

- a) Conduct a research of each Member State/SAR Delegation of Power legal instruments
- b) Identify gaps within the legal instruments that are currently in place.
- c) Make recommendations on how to address the gaps
- d) Review other legal tools which could enable a formal Delegation of Power
- e) Develop Delegation of Power template for the purpose of delegating oversight function to “another person”
- f) Review and amend as deemed necessary the current COSCAP NA IFAPM. See appendix 3
- g) Coordinate with ICAO to validate legal framework including the bilateral agreement between the COSCAP NA

3.0 Actions of the Steering Committee

The SC is invited to:

- 1) Review the identified objective and determine if enhancing Level 2 types of activities are desirable within the COSCAP NA.
- 2) Review and approve the steps in **2.3** above so that the CTA may begin the research and activities required to enhance level 2 types of activities as specified in Appendix 2.

Appendix 1 CTA Job Description Function 4

Serves as Chief Technical Advisor (Flight Operations) and assists Members in the implementation of the provisions related to the Flight Operations in Annex 6, achieving results such as:

- Undertake the overall coordination and administration of the Programme Steering Committee to serve as a regional forum for matters related to safety oversight and to harmonize to the extent practicable regulations, policies, and procedures related to air operator certification and supervision.
- Drawing from available resources, as required, develop a series of manuals related to the certification and surveillance of air operators to be used by Members to conduct such activities.
- Organize and conduct workshops and/or seminars and provide on-the-job training on job functions for regional and national Flight Operations Inspectors, in order to qualify them in the full range of tasks related to flight operations.
- Perform State Safety Oversight functions and duties for and on behalf of a Member under delegated authority and supervision of the respective civil aviation administrations.
- Together with the regional expert /national inspectors as determined, conduct training activity for initial / refresher courses on flight operations related subjects.
- During missions to participant Members and when requested to conduct a certification or safety audit, provide on-the-job training to flight operations inspectors from those Members.
- Assist the regional expert /national inspector in the development and execution of an annual, regional flight operations surveillance programme, including safety audits, ramp inspections etc. in consonance with the programmes of each of the Members. Also perform these functions independently when and as required.
- Provide requisite technical assistance to civil aviation administration of the Members in one or more of the eight critical areas involved in Safety Oversight as and when necessary.

Appendix 2

Reference for classifications: Report on the ICAO Evaluation of Regional Safety Oversight Organizations

CLASSIFICATION OF THE FUNCTIONS OF THE RSOO/COSCAPs

4.1 Increase usage of the term RSOO in the ICAO Annexes requires that greater clarity be given to the functions carried out by the different types of RSOO. The Forum therefore agreed that the level of complexity of the functions of an RSOO, as a safety oversight provider, should be classified as follows:

1. Level 1 – Advisory and coordinating functions
2. Level 2 – Operational assistance functions
3. Level 3 – Certifying agency functions

Under Level 1, an RSOO provides advisory assistance to a member State or a group of States. No formal agreement is established directly between the RSOO and the State, for the delegation of functions for regulating, certifying or supervising industry entities. An RSOO may coordinate the use or release of an inspector to carry out inspections and audits for a State's civil aviation authority (CAA). In this case, the inspector acts in his/her individual capacity and the member State grants all required authorizations. Level 1 functions also include training, the harmonization of the aviation safety regulations of member States and the development of guidance manuals and other documentation. Other activities carried out by a number of RSOOs under Level 1 include coordinating and managing the surveillance of foreign air operators and facilitating the acceptance of a member State's approved maintenance organizations (AMOs), approved training organizations (ATOs) and approved aeromedical centers, by other States within the RSOO's region.

4.3 Under Level 2, the RSOO, in addition to carrying out all Level 1 functions, also provides operational assistance to a State or group of States on the basis of a formal and binding agreement. The operational assistance includes the conduct of audits, inspections and other investigations on industry entities. The State issues certificates, licences and approvals on the basis of the operational assistance provided. The RSOO can also conduct surveillance over the respective document holders. Under Level 2, the RSOO is empowered or granted delegated authority to carry out inspectorate activities that support the certification and surveillance responsibilities of the State.

4.4 Under Level 3, the RSOO, in addition to carrying out both Level 1 and Level 2 functions, is formally delegated by a binding agreement with a State (or group of States), to issue certificates, licenses and approvals on its (or their) behalf. The State retains responsibility under the Chicago Convention for safety oversight and for any certificates, licenses and approvals issued by the RSOO. The State exercises this responsibility by

monitoring the RSOO's capabilities. These certifying functions are carried out by RSOOs that are either empowered by a common legislative framework or are delegated authority through separate agreements with a State or group of States. The RSOO must at least be therefore empowered to accept legally binding delegations from its member States. To date, only two RSOOs (EASA and IAC) are empowered to carry out.

Appendix 3

1) Proposed Addendum to the COSCAP NA IFAPM:

Addendum under. Article 2 Functions **and/or** Section D1.3.2.

New Paragraph to be added at Article 2 as follows:

ICAO will recognize oversight related assistance provided by the COSCAP NA provided that:

- a) The State who is receiving the assistance has promulgated in the State aviation legislation, a Delegation of Power article to delegate authority (for the purpose of conducting safety oversight) to "any persons" other than employees of the CAA/DGCA;
- b) Pursuant to a) above, that the proper Delegation of Authority is provided by the State to the expert who is providing the safety oversight activity, and
- c) The oversight provided by the expert was satisfactorily conducted in accordance with the State's National Oversight policy and procedures and in conformance with the ICAO Annexes as deemed applicable.

IFAPM D.1.3.2 Requirement of Letter of Authority from Member CAA

The Members receiving assistance from the core team of Programme professionals or from national experts/inspectors provided by Members referred to in paragraph D.1.3.1 (ii) (b) above must notify the entity to be inspected/ audited/ assisted the names of these foreign experts/inspectors and designate them as officials to carry out the said inspection/ audit/ assistance functions on its behalf.

IFAPM Article 2 Functions.

Services at request: Undertaking tasks for the benefit of a Member or groups of Members, on "as requested" basis:

- (a) providing assistance in the implementation of regulations, standards, procedures manuals and other guidance material;
- (b) execution of suitable safety oversight functions on behalf of COSCAP-NA members, such as annual safety inspections/audits, certification/recertification of air operators, maintenance organizations, airports and ATS systems, establishment and implementation of Safety Management Systems;

- (c) assisting the inspectors in specific safety oversight tasks and providing them with on-the-job training;
- (d) providing assistance in resolving safety-related deficiencies identified by ICAO_USOAP CMA activities and providing quality assurance functions; and
- (e) any other specific tasks falling within the scope of the objectives of COSCAP-NA requested by a Programme Member or a group of Members and decided by the Steering Committee.

Appendix 4

ICAO Legal Opinion

Upon review of the proposed Addendum to Programme Document RSA97902 Phase V, it is observed that such a commitment on ICAO's part to "recognize oversight assistance provided by the COSCAP-SA" will place ICAO in a potential actual or perceived conflict of interest in view of ICAO's role in the USOAP-CMA.

While States may lawfully delegate safety oversight functions within the confines of the Chicago Convention, the concept of ICAO "recognition" of services or assistance performed by delegated entities gives rise to legal issues (including conflicts of interests concerns) which are currently under consideration by the Secretariat within the context of the proposed Global Aviation Safety Oversight System (GASOS). However, definitive Secretariat guidance in this regard is still pending the outcome of the Ad-Hoc Legal Advisory Group that was formed to study these matters in light of the foregoing,

I am unable to endorse the proposed Addendum for the Secretary General's approval and signature as requested