# Report of the Rapporteur of the Legal Committee on the Examination of the Role of the International Explosives Technical Commission under the Convention on the Marking of Plastic Explosives for the Purpose of Detection

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## 1. Introduction

In 2020, during the Council's deliberations on the appointment of members to the International Explosives Technical Commission ("IETC" or the "Commission") established under the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, done at Montreal on 1 March 1991 (the "MEX Convention"),[1] several States raised concerns regarding the continuing relevance of the Commission's mandate and the relative priority of its work moving forward.[2]

On 23 November 2022, the Council requested that the Secretariat "explore possible legal options for amending the role, functions, and working methods of the [International Explosives Technical Commission ("IETC")]" and launch a study by a third-party entity "to assess the role and relevance of the IETC in connection with the practical and operational activities of detection agents in aviation security."[3]

Although the Council has recognized the continuing value and significance of the MEX Convention, it has also noted that the objectives of the IETC, as articulated in the existing text of the MEX Convention, have already been achieved. Consequently, on 11 March 2024, the Council invited the Legal Committee ("LC") of the International Civil Aviation Organization ("ICAO" or the "Organization") to consider the inclusion of an additional agenda item in its work programme to examine "an evaluation on potential solutions to redefine the role and functions of the IETC, or alternatively, to terminate the IETC on the basis that it had fulfilled its initial mandate."[4] In doing so, the Council further recommended that the LC consider both

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[1] See *Convention on the Marking of Plastic Explosives for the Purpose of Detectio*n, done at Montreal on 1 March 1991 (ICAO Doc 9571) [*MEX*] or [*MEX Convention*].

[2] See ICAO Letter LE 3/36.1, Terms of Reference for the Rapporteur (on file with the author). See also ICAO, C-WP/15167.

[3] See ICAO, C-DEC 227/3.

[4] See ICAO-C-DEC 231/2 at 4.

the resource implications and the temporal dimensions associated with any proposed course of action.[5]

On 28 June 2024, the 39th Session of the LC decided to include on its work programme an item "[r]eview of the role of the international explosives technical commission under the Convention on the Marking of Plastic Explosives for the Purpose of Detection." The Council later confirmed such decision.[6]

By letter dated 7 May 2025, and pursuant to Article 17 of the *Rules of Procedure for the Legal Committee* (Doc7669-LC/139/7), Dr. Alice Serpa Braga Della Nina, LC's Chairperson, appointed the author of this Report as Rapporteur until the next session of the LC.[7]

The Rapporteur's terms of reference, entitled "*Review of the Role of the International Explosives Technical Commission under the Convention on the Marking of Plastic Explosives for the Purpose of Detection*," set out a clear and focused mandate. In order to advance the work on this agenda item, the Rapporteur is tasked with evaluating potential courses of action, including whether an amendment to the MEX Convention may be required to redefine the role and functions of the IETC, or, alternatively, whether the Commission should be brought to an end on the basis that it has fulfilled its original purpose.[8]

In this context, the terms of reference envisage a two-fold deliverable. First, the preparation of a comprehensive study reviewing the role and continued relevance of the IETC. Secondly, and only if such analysis leads to the conclusion that an amendment to the Convention is warranted, the Rapporteur is expected to submit a draft amendment text for consideration by the LC.[9]

A preliminary report was submitted by the Rapporteur on 19 September 2025 and made available to the 42nd Session of the ICAO Assembly (23 September – 3 October 2025).[10]

This Report has been structured to address, in a systematic and methodical manner, the mandate entrusted to the Rapporteur. Rather than adopting a purely descriptive approach, the Report proceeds through a progressive analytical framework, moving from an examination of the MEX Convention itself to a critical assessment of its operation in practice, and ultimately to the identification of legally and institutionally viable courses of action.

It begins with a detailed analysis of the MEX Convention, its historical development, objectives, and institutional architecture, including the functions of the IETC and its relationship with the Council. The Report also analyses the way the MEX Convention was designed to evolve through amendments to its Technical Annex, as well as to the notable

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[5] *Ibid*.
[6] See ICAO Doc 10218-LC/39, Report of the Legal Committee 39th Session, Montreal, 25-28 June 2024 at 3.3.
[7] See ICAO Letter LE 3/36.1 (on file with the author).
[8] *Ibid*.
[9] *Ibid*.
[10] See Alejandro Piera Valdés, "Preliminary Report of the Rapporteur of the Legal Committee on the Examination of the Role of the International Explosives Technical Commission under the Convention on the Marking of Plastic Explosives for the Purpose of Detection", available online: https://www.icao.int/sites/default/files/2025-09/Preliminary-Report_Role_IETC_19_September_2025.pdf.

absence of a built-in mechanism for amending its substantive provisions—an issue that lies at the very centre of the present inquiry. Building upon this foundation, the Report then undertakes a critical evaluation of the MEX Convention and the IETC, examining both their contributions and their limitations, including questions relating to implementation, institutional relevance, and adaptability over time.

On that basis, the Report turns to the legal and institutional responses that may be available to the Organization. It considers, in a structured and comparative manner, the general framework governing treaty amendment under international law, ICAO's established practice, and evolving approaches in other regimes, highlighting the procedural complexity associated with formal amendment in the absence of a dedicated mechanism. It further examines recent developments concerning the role of technology in treaty-making, which illustrate the emergence of more flexible and efficient approaches that may, in time, inform ICAO's own practices. Against this broader context, the Report then evaluates the range of options available —including the maintenance of the *status quo*, the adoption of interpretative measures, and the possibility of formal amendment—while also identifying several ancillary observations relating to the modernization of ICAO's institutional processes in the legal field.

Ultimately, as this Report demonstrates, in the absence of a robust technical basis for reform, a measured approach—centred on maintaining the existing framework while introducing targeted interpretative clarification—emerges as the most proportionate and legally sound course of action.

## 2. The MEX Convention

This section provides a detailed examination of the MEX Convention, situating it within its historical, legal, and institutional context. It sets out the origins of the instrument, the circumstances that led to its adoption, and the objectives it seeks to achieve, thereby offering the necessary foundation for understanding its normative structure and underlying rationale.

In doing so, the section analyses the MEX Convention's principal obligations, its institutional design, and the role and functions of the IETC within that framework. It further examines the mechanisms through which the MEX Convention was intended to evolve—particularly through amendments to the Technical Annex—while highlighting the absence of a built-in procedure for amending its substantive provisions.

### 2.1.Background

On 21 December 1988, Pan Am Flight 103 disintegrated over the town of Lockerbie, Scotland, resulting in the deaths of all 259 persons on board and 11 individuals on the ground.[11] The subsequent accident investigation, conducted by the British authorities, concluded that the disaster had been caused by the detonation of plastic explosives concealed within a portable radio cassette player.[12] Forensic analysis later confirmed that the substance employed was

[11] See Roderick D. van Dam, "A New Convention on the Marking of Plastic Explosives for the Purpose of Detection" (1991) Air & Space Law, Vol 16, Issue 4/5 at 168 [*Roderick D. van Dam*].
[12] See J. V. Augustin, "The Convention on the Marking of Plastic Explosives for the Purpose of Detection" 17 Annals Air & Space L. 33 (1992) at 33 [*Augustin*]; K. P. R. Smart, "The Lockerbie Investigation: Understanding of the Effects of the Detonation of Improvised Explosive Devices on Aircraft Pressure Cabins" Trans Chem E,

semtex, a commercially manufactured explosive produced in Semtín, in the district of Pardubice, Czechoslovakia.[13]

The magnitude of the Lockerbie bombing was further underscored by other discoveries. On the very day of Pan Am bombing, British police recovered approximately 48 kilograms of semtex during a search of a flat in Battersea, London. A portion of this material had already been divided into individual charges and wrapped in adhesive tape, suggesting its preparation for imminent operational use. The seizure also yielded timing devices and power units, indicating that the explosive was intended for assembly into functional bombs.[14]

Pan Am Flight 103 was not the only instance in which plastic explosives were employed with devastating effect against civil aviation.[15] Less than a year later, UTA Flight 772 was destroyed over the Sahara Desert by a device containing similar plastic explosives, again concealed within checked luggage. Both incidents demonstrated the capacity of such materials, when diverted to illicit purposes.[16]

The destruction of Pan Am Flight 103 and UTA Flight 772 thus represented stark examples of the death and devastation that could result from the unlawful use of unmarked plastic explosives. Together, they highlighted the urgent need for a comprehensive international legal framework to regulate the manufacture, transfer, and detection of such substances to protect the safety and security of international civil aviation and the international community.[17]

Plastic explosives constitute a legitimate and well-established category of materials, with extensive applications in both military operations and civilian industries, including mining, landscaping, and construction. Yet, when diverted for terrorist purposes, these materials assume an acutely hazardous character. Their threat arises not merely from their

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Vol 75, Part B, August 1997; Michael Milde, "Draft Convention of the Marking of Explosives" Annals of Air & Space Law Vol XV (1990) at 158 [*Michael Milde, Draft Convention*]; Lutando Simphiwe Tswanya, "Analysis of the Convention on the Marking of Plastic Explosives for the Purpose of Detection, (1991) Master Thesis, Institute of Air & Space Law, McGill University at 57 [Tswanya].

[13] The earliest documented instance of Semtex being employed in the United Kingdom occurred in March 1972, when an explosive device was placed at the residence of the Jordanian Ambassador in Kensington, London. Semtex was notable for its distinctive properties. Although comparatively lightweight, it possessed a remarkably high explosive yield. Moreover, as a plastic explosive with minimal odor, it was extremely difficult to detect using the technologies available at the time. Semtin Glassworks in Pardubice, Czechoslovakia initially manufactured the explosive. Such enterprise was subsequently renamed the Eastern Bohemian Chemical Works and, later, Synthesia. In the same period, Semtex was also employed in letter bombs sent to the United Kingdom by airmail from various foreign locations, underscoring both its accessibility and its appeal to those engaged in clandestine operations. See A. W. Feraday, "The Semtex-H Story" in Jehuda Yinon (ed.), *Advances in Analysis and Detection of Explosives: Proceedings of the 4th International Symposium on Analysis and Detection of Explosives, September 7-10, 1992, Jerusalem, Israel* (Kluwer Academic Publishers: Dordrecht, 1992) at 67.

[14] See A. W. Feraday, "The Semtex-H Story" in Jehuda Yinon (ed.), *Advances in Analysis and Detection of Explosives: Proceedings of the 4th International Symposium on Analysis and Detection of Explosives, September 7-10, 1992, Jerusalem, Israel* (Kluwer Academic Publishers: Dordrecht, 1992) at 70.

[15] For an interesting analysis of various liability issues surrounding the bombing of Pan American Flight 103 see Laurie M. McQuade, "Tragedy as a Catalyst for Reform: The American Way?" (1996) 11:2 Conn J. Int'l L. 325; John P. Grant, "Beyond the Montreal Convention" (2004) 36: Issues 2 & 3 Case W. Res. J. Int'l L. 453.

[16] See Marian Nash (Leich) "Contemporary Practice of the United States relating to International Law" 88 Am. J. Int'l L. 89 (1994).

[17] See comments by the United States at the closing of the Diplomatic Conference. See ICAO Doc 9801-DC/4, International Conference on Air Law (Convention on the Marking of Plastic Explosives for the Purpose of Detection), Montreal, 12 February – 1 March 1991, Volume I Minutes at 163 [*MEX Convention Proceedings Volume I*].

immense destructive potential, but also from the substantial difficulties that their effective detection continues to present to security authorities.[18]

At the time, there was widespread concern regarding the potential use of plastic explosives by terrorists. Contemporary assessments underscored what was described as "an alarming increase in acts aimed at the total destruction of aircraft in flight resulting in the deaths of all persons on board." Within the spectrum of threats facing the international aviation sector, the in-flight detonation of such explosives was regarded as the most acute danger, owing to both its catastrophic human consequences and its destabilizing implications for international air transport security. This concern was far from hypothetical. Plastic explosives—most notably semtex - had been employed in terrorist attacks against civil aviation and other high-value targets, thereby demonstrating the practical reality of the threat. These incidents highlighted the vulnerabilities inherent in civil aviation infrastructure and operations, particularly in relation to detection technologies and preventive regulatory measures. They also served to galvanize international attention on the urgent need for a coordinated legal and institutional framework to address the risks associated with the diversion and misuse of plastic explosives.[19]

As Milde observes, plastic explosives possess a few distinctive physical and chemical characteristics that make them particularly attractive for both legitimate and illicit uses. They are stable under varying temperatures, waterproof, flexible, and can be hand-moulded into diverse shapes, allowing concealment in seemingly innocuous objects such as letters, books, toys, or small household appliances.[20] Moreover, they are generally inert to shock and flame, safe to handle under ordinary conditions, and require a detonator to initiate an explosion. These features, while beneficial in authorized military and industrial applications, simultaneously render plastic explosives highly susceptible to diversion for unlawful purposes.[21]

Against this backdrop, the international community came to view existing international security treaties as insufficient to confront the specific dangers posed by plastic explosives. With respect to detection, it was broadly recognized that supplementary and more specialized measures were necessary. This sense of urgency was reinforced by the prevailing perception at the time that significant quantities of unmarked plastic explosives were already in circulation, thereby heightening the potential for their misuse in acts of terrorism, including those targeting civil aviation.[22]

### 2.2.Preparatory work

On 9 January 1989, a few weeks after the Pan Am Flight 103 bombing, the ICAO Council's Committee on Unlawful Interference ("UIC") convened to exchange information and to propose the establishment of a group of specialists. On 31 January 1989, the Council adopted a resolution urging States "to expedite research and development on detection of explosives on a security equipment, to continue to exchange such information and to consider how to achieve an international regime for the marking of explosives for the purpose of

[18] See Michael Milde, *International Air Law & ICAO*, (Netherlands: Eleven International Publishing 2012) at 253 [*Michael Milde, International Air Law*].
[19] See Michael Milde, "Aviation Safety and Security – Legal Management" (2004) 29 Annals of Air & Space Law 1 at 12 [*Michael Milde, Aviation Safety*].
[20] See Michael Milde, *International Air Law* at 253.
[21] *Ibid*.
[22] See MEX Convention Proceedings Volume I at 16.

detection."[23] The Council also created the Ad Hoc Group of Specialists on the Detection of Explosives ("AH-DE"), which held its first meeting from 6 to 10 March 1989.[24] One of AH-DE's main conclusions was that "it was technically possible to mark the plastic explosives by a specific additive that would make them detectable."[25]

Meanwhile, the United Nations Security Council ("UNSC") had adopted Resolution 635 on 14 June 1989, urging ICAO "to intensify its work aimed at preventing all acts of terrorism against international civil aviation, and in particular its work on devising an international regime for the marking of plastic or sheet explosives for the purpose of detection."[26]

Later that month, on 29 June 1989, the Council approved the AH-DE's recommendation to include the item "[p]reparation of a new legal instrument regarding the marking of explosives for detectability", as the highest, overriding priority in the LC's Work Programme.[27]

Following this decision, at the 27th Session of the ICAO Assembly held in September–October 1989, the United Kingdom and Czechoslovakia submitted a joint proposal calling for the drafting of an international treaty to address the problem of unmarked plastic explosives.[28] In line with this proposal, the Assembly instructed the Council to convene a LC meeting — preferably in the first half of 1990—for the preparation of a draft international instrument.[29] The objective was its subsequent adoption at a diplomatic conference, in accordance with ICAO procedures set out in Assembly Resolution A7-6.[30]

Thereafter, on 4 December 1989, the United Nations General Assembly ("UNGA") adopted Resolution 44/29 "[u]rging [ICAO] to intensify its work on devising an international regime for the marking of plastic or sheet explosives for the purpose of detection."[31]

The LC's Chairman appointed a Rapporteur, which presented his report in September 1989.[32] The Legal Sub-Committee held its session in Montreal from 9 to 19 January 1990. The main purpose of this meeting was to prepare a draft convention. The LC met from 27 March through 12 April 1990.

Subsequently, from 18 to 22 June 1990, the LC and the AH-DE held a joint session.[33] On 4 July 1990, the Council decided to convene a Diplomatic Conference,[34] scheduled to take

[23] See ICAO C-DEC 126/7.
[24] See Augustin at 33. See also ICAO, C-DEC 126/3.
[25] See Michael Milde, *International Air Law* at 253.
[26] See UNSC Resolution 635 dated 14 June 1989.
[27] C-DEC 127/20 (Closed).
[28] See ICAO A27-WP/115, EX/37. See also Michael Milde, *International Air Law*, at 254.
[29] See ICAO, A27-8. The Assembly also instructed States to expedite research on explosive-detection technologies and to participate actively in developing an international regime for the marking of explosives.
[30] See ICAO, A27-9, *Acts of unlawful interference aimed at the destruction of civil aircraft in flight*.
[31] See United Nations General Assembly Resolution 44/29 dated 4 December 1989.
[32] See Michael Milde, *International Air Law*, at 254.
[33] See MEX Convention Proceedings Volume I Minutes at 4.
[34] According to Roderick D. van Dam, the Diplomatic Conference engaged in extensive deliberations on a wide range of issues. However, the most contentious matters may be summarized as follows: (i) whether the scope of the MEX Convention ought to be confined exclusively to plastic explosives, given that the instrument addresses matters extending beyond the immediate domain of international civil aviation; (ii) the obligations imposed upon States, particularly with respect to prohibiting and effectively preventing the manufacture within their territories

place from 12 February to 1 March 1991. To finalize the technical annex to the draft instrument, the AH-DE held another meeting from 26 to 30 November 1990. Finally, on 7 December 1990, the Council endorsed the progress achieved by the AH-DE and reconfirmed the dates of the forthcoming diplomatic conference.[35]

It is noteworthy that in 1990 alone, ICAO convened at least one meeting of the Sub-Committee, one LC session, a meeting of the AH-DE, as well as a joint session between the AH-DE and the LC. Such an intensive schedule was, and remains, unprecedented. Given ICAO's budgetary constraints, the convening of so many meetings within a single year would ordinarily have been impossible. This illustrates not only the Organization's determination to bring the law-making process to a swift conclusion, but also—though less visibly—the considerable exogenous political pressure prevailing at the time.

From 12 February to 1 March 1991, the Diplomatic Conference was convened in Montreal.[36] The proceedings were inaugurated with a solemn address by Javier Pérez de Cuéllar, then UN Secretary-General.[37] Although anecdotal, this episode illustrates the exceptional significance and political pressure surrounding the law-making process. In the history of ICAO, it remains the only instance in which the UN Secretary-General has personally attended a Diplomatic Conference convened under the auspices of ICAO.

After extensive discussions, on 1 March 1991, the Convention was adopted by consensus. On the same date, 41 States signed the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*. It entered into force on 21 June 1998.[38] To date, the MEX Convention has 157 States Parties.[39]

The Convention was negotiated and adopted in just over two years, a pace that stands as an exception rather than the rule in the field of civil aviation international treaty-making.[40]

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of such explosives, as well as the import and export of unmarked plastic explosives; (iii) the scope of permissible exceptions for the activities of military and police authorities, provided these were not inconsistent with the object and purpose of the MEX Convention; (iv) the modalities and timelines for the disposal of existing stockpiles; (v) the institutional role of the Council; and (vi) the role of the IETC, together with the function of the Technical Annex. See Roderick D. van Dam at 169-170.

[35] See MEX Convention Proceedings Volume I at 4.

[36] Jennings indicates that a diplomatic conference "is the usual procedure for so-called "law-making" and codificatory conventions." See Robert Y. Jennings, "Treaties" in Mohammed Bedjaoui (Ed.), *International Law: Achievements and Prospects* (Paris: Martinus Nijhoff Publishers – Unesco, 1991) at 137.

[37] See MEX Convention Proceedings Volume I at 4.

[38] Dr. Kenneth Rattray, Solicitor General and Chief Delegate of Jamaica, served as Chair of the Diplomatic Conference that led to the adoption of the MEX Convention. See MEX Convention Proceedings, Volume I at 34. He would later preside as Chair of the Diplomatic Conference that adopted the *Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal Convention of 1999). During the opening discussions of the Diplomatic Conference, one State proposed the adoption of a resolution encouraging manufacturing States to implement the marking of explosives even before the MEX Convention entered into force. See MEX Convention Proceedings Volume I at 39.

[39] See ICAO, *Convention on the Marking of Plastic Explosives for the Purpose of Detection done at Montreal on 1 March 1991*, available online https://www.icao.int/sites/default/files/secretariat/legal/CurrentListofParties/MEX_EN.pdf. During the opening of the Diplomatic Conference, UN Secretary-General, Javier Pérez de Cuéllar expressed "the hope that all States, in particular those which produce plastic explosives, will become parties to the new instrument and that the convention will enter into force without delay." See MEX Convention Proceedings Volume I at 17.

[40] See Michael Milde, *International Air Law,* at 253-55. It should be noted that ICAO's technical bodies first met to consider this matter between January and February 1989. The Legal Sub-Committee subsequently met from 9 to 19 January 1990, followed by the Legal Committee (LC), which convened from 27 March to 12 April 1990. The MEX Convention was ultimately adopted in Montreal on 1 March 1991. In order to apply an objective and

No other treaty developed under ICAO's auspices has been concluded in such a short period of time.[41] By contrast, most international instruments require between five and ten years to be finalized. For instance, the negotiation process leading to the adoption of the *Protocol to Amend the Convention on Offences and Certain other Acts Committed on Board Aircraft*, done at Montréal on 4 April 2014 extended over five years, while the deliberations culminating in the adoption of the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* and the *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft,* both done at Beijing on 10 September 2010 spanned nine years.[42]

### 2.3.Objectives

The MEX Convention rests on the premise that international law provides a legitimate basis for obligating States to adopt measures ensuring that plastic explosives are marked with chemical detection agents.[43] To this end, the MEX Convention requires "States Parties to mark plastic explosives they manufacture with a chemical agent which can be detected by commercially available detectors. Three such chemical agents are identified in the Technical Annex to the [MEX] Convention."[44] Moreover, States Parties are prohibited from manufacturing such explosives within their territories unless they contain the prescribed additive and are further required to prevent the import and export of unmarked plastic explosives. That said, the MEX Convention does not prohibit the use, production, or development of plastic explosives for their numerous legitimate applications in the military, law enforcement, and industrial sectors.[45] The overarching objective of these provisions is the progressive reduction and eventual elimination of the availability of unmarked plastic explosives.[46]

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consistent methodology for assessing the time required for the development and adoption of ICAO treaty instruments, this Report calculates the relevant period from the first formal meeting of ICAO's technical bodies at which the need for an international legal instrument is considered, through to the date of adoption of that instrument by the Diplomatic Conference specifically convened for such purpose.

41 At the eighth plenary meeting of the Diplomatic Conference, the United Kingdom observed that, given the complexities of the subject, it was a remarkable achievement to have produced a complete text, agreed by consensus and ready for signature within such a short period. See MEX Convention Proceedings, Volume I, at 162.

42 See Alejandro Piera, *Greenhouse Gas Emissions from International Aviation: Legal and Policy Challenges* (The Hague: Eleven International Publishing, 2015) at 341-342 [*Piera*].

43 See MEX Convention, Preamble.

44 See ICAO, C-WP/15167 at 2.

45 See Marian Nash (Leich) "Contemporary Practice of the United States relating to International Law" 88 Am. J. Int'l L. 89 (1994) at 90.

46 The MEX Convention does not primarily concern itself with the creation of international criminal offenses, the punishment of individuals, or extradition arrangements. Rather, its principal focus lies in imposing obligations upon States to ensure the marking and control of plastic explosives, as well as the systematic destruction of unmarked stockpiles. See Christopher C. Joyner, "International Extradition and Global Terrorism: Bringing International Criminals to Justice", 25 Loy. L.A. Int'l & Comp. L. Rev. 493 (2003) at 527. In advancing his proposal for a draft convention, Rapporteur Mr. A.W.G. Kean recommended the "creation of new international offences, consisting of failing to take those measures or of countering their effect." He further suggested the inclusion of provisions relating to prosecution and extradition, thereby situating the proposed instrument within a more traditional international aviation security / criminal-law framework. However, both the Subcommittee meeting and the LC session rejected the Rapporteur's proposal. See Augustin at 38. Furthermore, it was observed during the negotiations that the mere possession of unmarked plastic explosives, in and of itself, was not sufficiently heinous to warrant classification as an international crime. Acts of violence involving the use of such explosives against civil aviation were, moreover, already addressed within the framework of existing international aviation security conventions. As noted by Marian Nash this consideration militated against the creation of new

The rationale underpinning this regime lies in the distinctive threat posed by plastic explosives to civil aviation and public security.[47] These materials combine considerable destructive potential with acute difficulties of detection in the absence of chemical markers.[48] It was therefore considered that the mandatory marking of plastic explosives would constitute a significant contribution to the prevention of unlawful acts.[49]

### 2.4.Scope

As John Augustin notes, "the legal regime is composed of 'two interrelated parts' the body of the [MEX] Convention proper, which contains the main obligations of States Parties, and a Technical Annex, described as an integral part of the [MEX] Convention, with the technical elements."[50]

At the Sub-Committee discussions, various States supported the idea of a new convention dealing primarily "with marking of plastic and sheet explosives at the production level to make detection of their presence easier and more effective with the use of the available technology."[51]

During the negotiations leading to the adoption of the MEX Convention, several States also advocated for a broader scope. Some proposed that the instrument should extend to other types of explosives and incorporate additional methods for identifying manufacturers.[52] One State indicated that "if at some future date there should be a number of serious incidents involving explosives other than plastic or sheet explosives, it should be possible to put in place very quickly a legal regime governing those other types."[53] Similarly, the International Air Transport Association ("IATA") underscored that although the "scope was satisfactory as a starting point, but that the door should be left open possibly to cover at a further stage other types of explosives that were also used for terrorist activities and sabotage."[54]

*A contrario*, the Union of Soviet Socialist Republics, the United States, Cuba, France, Venezuela, Japan, Ethiopia, Côte d'Ivoire, China and Mexico were against expanding the scope of the draft convention.[55] These States argued that the work of the AH-DE had been directed specifically toward plastic and sheet explosives.[56] According to them, and all research, experiments, and testing regarding this initiative had been conducted on that basis. Expanding the scope of the convention to other types of explosives risked undermining the progress

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international criminal offences within the scope of the MEX Convention. See Marian Nash (Leich) "Contemporary Practice of the United States relating to International Law" 88 Am. J. Int'l L. 89 (1994) at 90.

[47] See ICAO, LC/39-WP/3-2.

[48] See MEX Convention, Preamble.

[49] See At Michael Milde, Aviation Safety at 12. See also Vita Ivashchenko, "International Anti-Terrorist Legal Actions" available online at https://elar.navs.edu.ua/server/api/core/bitstreams/affbab18-6813-47e3-afd5-701141b653b4/content; Attila Sipos, "The Dogmatics and Modernization of International Conventions on Aviation Security" (2020) ELTE Law Journal 1at 159; National Research Council, *Containing the Threat from Illegal Bombings*, National Academies Press (1998).

[50] See Augustin at 36.

[51] See ICAO Doc 9801-DC/4 "International Conference on Air Law (Convention on the Marking of Plastic Explosives for the Purpose of Detection) Montreal, 12 February -1 March 1991 Volume II Documents [*MEX Convention Proceedings Volume II*] at 11.

[52] See Tswanya at 69.

[53] See MEX Convention Proceedings Volume I at 38.

[54] *Ibid* at 30-31.

[55] *Ibid* at 38.

[56] *Ibid* at 38.

already achieved.[57] To fulfil the mandate given by the UNSC, the UNGA, and the Council, it was necessary to limit the MEX Convention to the marking of plastic explosives for detection—an approach likely to secure rapid and broad ratification.[58] Future technological developments identifying other categories of explosives could be addressed through a protocol to the convention.[59] Augustin says that "it seems that speed of entry into force was deemed more desirable than possibly increase effectiveness in the longer term."[60]

The scope of the MEX Convention nonetheless transcends the confines of civil aviation, embodying a more comprehensive commitment to the safeguarding of public security and to the eradication of terrorism in all its forms.

### 2.5.Obligation of States

The MEX Convention imposes upon States Parties a series of specific obligations designed to control and progressively eliminate the availability of unmarked plastic explosives. These include the following:

i) States are required to take the necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives within their territories. As Augustin underscores, this obligation necessarily entails the adoption of appropriate domestic legislation, without which States would lack the legal and institutional capacity to ensure compliance with the MEX Convention's requirements.[61] States must mark plastic explosives by introducing, during the manufacturing process, one of the detection agents defined in the Technical Annex to the MEX Convention.[62]
ii) States must aid the IETC in its functions.[63]
iii) States must prevent the movement of unmarked plastic explosives into or out of their territory, except in cases involving transfers for military or police purposes that are consistent with the objectives of the MEX Convention.[64] This would allow, for instance, to move unmarked plastic explosives to another State in the context of a military arrangement. [65]
iv) With respect to existing unmarked explosives manufactured in, or brought into, the territory of a State Party prior to the entry into force of the MEX Convention, each State Party is required to prevent uses inconsistent with the object and purpose of the MEX Convention, to exercise strict and effective control over such existing stockpiles. Each State Party shall ensure that any such stockpiles not held by authorities performing military or police functions are, within a period not exceeding three years from the date on which the MEX Convention enters into force for that State: (i) destroyed or consumed; or (ii) marked or rendered permanently ineffective. [66]

[57] *Ibid*.
[58] *Ibid*.
[59] *Ibid*.
[60] See Augustin at 38.
[61] See Augustin at 37.
[62] See ICAO, LC/39-WP3-2 at 1.
[63] See MEX Convention, Art. VIII, paragraph 1.
[64] According to Marian Nash, these exceptions could be the case of military sales and assistance programs, as well as joint cross-border military exercises. See Marian Nash (Leich) "Contemporary Practice of the United States relating to International Law" 88 Am. J. Int'l L. 89 (1994) at 91.
[65] See Augustin at 38.
[66] See Marian Nash (Leich) "Contemporary Practice of the United States relating to International Law" 88 Am. J. Int'l L. 89 (1994) at 91.

v) States are permitted to engage in trade solely with marked plastic explosives and are required to exercise strict control over any existing stockpiles. In addition, they must either consume or destroy their military reserves of unmarked explosives within fifteen years of the MEX Convention's entry into force, while non-military holders are afforded a shorter compliance period of three years. Notably, ICAO does not verify State compliance with these obligations.[67]

vi) States must "exercise strict and effective control over the possession and transfer of possession of unmarked explosives" manufactured prior the entry into force of the MEX Convention.[68]

vii) Any unmarked plastic explosives manufactured after the entry into force of the Convention for that State must be destroyed as soon as possible, with two limited exceptions: (i) explosives incorporated, and actually used, as integral parts of military devices within three years of the MEX Convention's entry into force, and (ii) restricted quantities maintained exclusively for purposes of research, testing, training, or forensic science.[69]

### 2.6. The Duties and Functions of the Council under the MEX Convention

The MEX Convention assigns to the Council a series of institutional responsibilities designed to facilitate its effective implementation. First, the Council is required to "take appropriate measures to facilitate the implementation of the MEX Convention, including the provision of technical assistance and measures for the exchange of information relating to technical developments in the marking and detection of explosives."[70] In addition, it must communicate to all States Parties and relevant international organizations the information submitted by States Parties regarding their implementation of the MEX Convention.[71] The Council also bears responsibility for appointing members to IETC,[72] reporting the findings of that Commission to States Parties,[73] and transmitting to the Commission any comments received from States with respect to proposed amendments to the Technical Annex.[74] Furthermore, in consultation with the Commission, the Council may itself propose amendments to the Technical Annex.[75] Finally, the Council is tasked with convening sessions of the Commission and with approving its rules of procedure, thereby ensuring the institutional continuity of the MEX Convention's technical regime.[76]

During the discussions held within the Sub-Committee, the LC, and ultimately at the Diplomatic Conference, many States voiced serious reservations as to whether the functions and duties contemplated under the MEX Convention could appropriately be entrusted to the Council. Michael Milde, then serving as Director of the ICAO Legal Bureau and acting as Executive Secretary of the Diplomatic Conference, clarified, however, that no constitutional obstacles stood in the way of the Council's assumption of such responsibilities.[77]

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[67] See ICAO, C-WP/15167 at 2.
[68] See MEX Convention Art. IV.
[69] See Marian Nash (Leich) "Contemporary Practice of the United States relating to International Law" 88 Am. J. Int'l L. 89 (1994) at 91.
[70] See MEX Convention, Art. IX.
[71] *Ibid*, MEX Convention, Art. VIII, paragraph 2.
[72] *Ibid*, MEX Convention, Art. V, paragraph 1.
[73] *Ibid*, MEX Convention, Art VI, paragraph 2.
[74] *Ibid*, MEX Convention, Preamble.
[75] *Ibid*, MEX Convention, Art. VII, paragraph 1.
[76] *Ibid*, MEX Convention, Art. VII, paragraph 2.
[77] See Milde, Draft Convention, at 175.

## 2.7.Amendments to the MEX Convention

The drafts emerging from both the Sub-Committee and the Legal Committee did not contain a concrete text on the final clauses of the MEX Convention. Nevertheless, extensive discussions were held at both meetings on the provision governing the entry into force.[78] In this context, the United States submitted a proposal on the final clauses, with particular emphasis on the requirements governing the Convention's entry into force. Consideration was given to the threshold necessary for this purpose, which envisaged a minimum number of ratifying States, including a specified proportion of manufacturing States. The proposal, however, did not explicitly address procedures for introducing an amendment to the MEX Convention itself.

As is standard practice, the Secretariat tabled a working paper at the Diplomatic Conference identifying the subjects to be addressed in the final clauses. [79] According to the Secretariat, these included: (i) the settlement of disputes concerning interpretation and application of the MEX Convention; (ii) permissible reservations, if any; (iii) the date and place of the opening for signature and subsequent signatures; (iv) the determination of which States may sign the MEX Convention; (v) requirements for ratification, acceptance, approval, or accession; (vi) designation of the depositary; (vii) registration of the MEX Convention with the UN and ICAO; (viii) provisions for denunciation; (ix) procedures for amendment of the MEX Convention; (x) notices to be given to the depositary; and (xi) closing provisions identifying the authentic languages, the number of originals, and the date of signature.[80]

More specifically, the Secretariat proposed concrete language to govern the possible amendment of the MEX Convention at a later stage.[81] At that time, the draft text prepared by the Secretariat read as follows:

> [1. *Any proposal for the amendment of this Convention shall be communicated to the Council of the International Civil Aviation Organization which will decide in accordance with its procedures, on the convening of an international conference of States entitled to become party to this Convention.*
>
> *2. The decisions of an international conference referred in paragraph 1 of this Article shall be taken by the vote of two-thirds of the States present and voting, unless by the same majority the conference decides to apply a different rule.*
>
> *3. Any amending agreement shall become binding between States which ratify or accede to such amending agreement*].[82]

[78] See MEX Convention Proceedings Volume II at 157-159.
[79] *Ibid* at 193. The Secretariat even clarified that "a provision on amendment of the Convention [did] not appear strictly necessary. The [previous international aviation security instruments developed under the auspices of ICAO did] not contain any provision on their amendment." *Ibid*. According to the Secretariat, such proposal only paraphrases the principles contained in Vienna Convention on the Law of Treaties of 1969 [*VCLT*]. *Ibid*.
[80] See MEX Convention Proceedings Volume II at 193.
[81] At the Diplomatic Conference there were extensive discussions on whether the MEX Convention require a built-in amendment mechanism. See Tswanya at 98.
[82] See MEX Convention Proceedings Volume II at 197.

Under the Secretariat's proposal, which at the Diplomatic Conference was supported by Venezuela, Tunisia, India, Mali, Algeria, Gabon and Morocco,[83] any amendment to the MEX Convention would have been subject to the Council's oversight. The proposal did not specify a minimum number of States required to trigger the process. In theory, one State could have submitted the amendment proposal.

The Council, acting in accordance with its established procedures (for example, the *Procedure for approval of draft conventions on international air law* set out in Appendix B of Assembly Resolution A42-5), would have determined whether to convene an international conference of States Parties for the consideration of the proposed amendment.[84]

Although the proposal itself was silent on this point, the reference to 'in accordance with its procedure' implied that, should the Council decide to initiate the process of amending the MEX Convention, it would have instructed the LC to include the matter in its work programme. In other words, the Secretariat's proposal could not be understood as conferring upon the Council the authority to convene a conference of States directly, without the prior involvement of the LC.

This formulation thus preserved the Council's predominant role in the law-making function but also keeping ICAO's institutional framework. At such conference, decisions would have been adopted by a two-thirds majority of the States present and voting, while retaining the possibility for the conference itself to establish alternative voting procedures by the same majority.[85] The proposed mechanism provided that any amendment would become binding only upon those States that chose to ratify or accede to it. In other words, the amendment would not have been subject to a collective entry-into-force threshold; rather, it

[83] For instance, Mali argued that "the [VCLT] only provided a broad outline, thereby granting an opportunity for individual conventions to meet their own special requirements; in this respect, the draft Convention on the Marking of Explosives for the Purpose of Detection dealt with a special subject for which no precedent existed in the annals of ICAO". See MEX Convention Proceedings Volume I at 138. Mali further underlined that States should not "preclude the possible need to amend the document at a future date". *Ibid* at 138.

[84] These States "all favored including an article along the lines of the [proposed text advanced by the Secretariat]." See MEX Convention Proceedings Volume I at 101.

[85] The two-thirds majority requirement represents the standard practice for substantive decisions at ICAO-led Diplomatic Conferences. The Rules of Procedure applicable to the Conference that adopted the MEX Convention provided that "[d]ecisions of the Conference on all matters of substance shall be taken by a two-thirds majority of the Representatives present and voting." See MEX Convention Proceedings Volume II at 123. In practical terms, this meant that approval of the final text of the MEX Convention required the support of two-thirds of the delegations of States present and voting at such Diplomatic Conference. In the event, however, the proceedings were characterized by consensus, and most, if not all, substantive issues were resolved without recourse to a vote. This stands in contrast to the 2010 Diplomatic Conference that adopted the Beijing instruments, where numerous substantive issues were subjected to formal voting procedures. Moreover, Milde explains that the "Diplomatic Conference normally takes its decisions by two-thirds majority of the present and voting. Voting "yes" or "no" is always divisive and confrontational and it should be avoided as much as possible. In case of a vote only the positive and negative votes are counted, the abstentions do not count - thus even in a much-divided house the dissenting delegations may abstain or not vote and thus prevent the thwarting of the wishes of other delegations. It would be, of course, much preferable to adopt a new instrument by consensus without a vote - that does not necessarily mean a true "unanimity" but signals that all delegations "can live" with the result with different degrees of enthusiasm. Many international instruments have been adopted this way, and the true consent is expressed in due course by ratification of the instrument." See Michael Milde, "ICAO Legal Committee and Progress in the Development of International Air Law - The 35th Session of the ICAO Legal Committee Drafts a Protocol on Unruly Passengers" (on file with the author).

would have operated exclusively based on individual State consent. The amendment's effect would have been confined to consenting States.[86]

At the Diplomatic Conference, the Secretariat nevertheless clarified that an explicit provision on the amendment of the MEX Convention did not appear strictly necessary, noting that previous international aviation security instruments developed under ICAO auspices contained no such provisions.[87] In its view, the proposed clause merely restated the principles already embodied in the *1969 Vienna Convention on the Law of Treaties* ("VCLT"). It is correct that the Secretariat's proposal merely reflected the standard ICAO practice then in place for the negotiation and approval of instruments amending treaties.[88] It would not have introduced any significant innovation. In retrospect, however, and considering subsequent developments, this clarification proved most unfortunate, as it led States to assume that a specific built-in amendment clause was unnecessary in the MEX Convention. Yet experience has demonstrated that a carefully drafted provision addressing the amendment of an international instrument can play a critical role in facilitating its negotiation, adoption, entry into force and the introduction of subsequent changes.

The United Sates, Austria, Australia, Chile, Argentina[89], Ecuador and Canada were in favour of deleting any clause from the draft text addressing a procedure to amend the MEX Convention.[90] A reading of the minutes of the Diplomatic Conference reflects that there was fear amongst some of the participating States that an express provision governing the potential amendment of the treaty may conflict or create confusion with the ultra-detailed process for the formulation and approvals of amendments to be introduced into the Technical Annex. Similarly, those against any express reference to an amendment procedure cited the fact that none of the previous international aviation security conventions contained specific clauses

[86] The VCLT stipulates that the adoption of a treaty text at a diplomatic conference is ordinarily effected by a two-thirds majority of the States present and voting, save where the conference itself, by the same majority, determines to apply an alternative rule of procedure. See Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, United Nations, Treaty Series, Vol. 1155, p. 331, Art. 9, paragraph 2 [*VCLT*].

[87] While this assessment is accurate, it overlooks the fact that, in the absence of a built-in amendment mechanism, any modification to the MEX Convention would necessarily have to proceed through ICAO's standard practice for treaty adoption. As will be elaborated below, the preparatory stages and negotiations preceding a Diplomatic Conference are inherently protracted, thereby delaying the adoption of any amendment. As it stands, the mechanism serves as a disincentive to adopt or amend any international instrument under the auspices of ICAO.

[88] At the Diplomatic Conference some delegations, whilst expressing support for the concept of an express provision dealing with a built-in amendment mechanism in the MEX Convention, had also indicated that there may be a need for modifications to the MEX Convention. On the other hand, other States had expressed the view that they were not in favour of that text. They were not in favour of an express provision in the MEX Convention dealing with that matter as such. During the discussions at the Diplomatic Conference, it had been clearly recognized by all delegations that the draft provided a special regime governing the introduction of changes in the Technical Annex. This was an essential part of the MEX Convention. To avoid any confusion, other changes to other parts of the MEX Convention could be dealt with in the manner prescribed in the VCLT. The Commission of the Whole agreed to adopt the final clauses without any reference to a specific convention amendment procedure. See MEX Convention Proceedings Volume I.

[89] At the Diplomatic Conference Argentina favored a provision of the final clauses without any explicit reference to an amendment mechanism in the MEX Convention. Moreover, while acknowledging that although the Technical Annex may be subject to various amendments, Argentina "did not anticipate any future need to amend the [MEX] convention itself." According to Argentina, "[t]he establishment of a new amending procedure could moreover give rise to differences in interpretation and would not eliminate the need to convene an international conference". Se MEX Convention Proceedings Volume I at 100.

[90] *Ibid*.

addressing this issue. Moreover, it was thought that this has already been properly addressed by standard practice at ICAO and the general rules of the VCLT.[91]

Notwithstanding the foregoing, Japan suggested concrete language that would have retained a built-in mechanism into the MEX Convention to address the process and requirements for introducing potential amendments into the treaty. According to Japan, "[a]ny proposed amendment to this [MEX] Convention shall be approved by a two-thirds vote of the States Parties participating in the international conference.[92] Such amendment shall enter into force in respect of States which have ratified, accepted, approved or acceded to the amendment when two-thirds of the States Parties, including five or more producer States, have deposited their instrument of ratification, acceptance, approval or accession, unless by the same majority the Conference decides to apply a different rule."[93]

Japan contended that the VCLT, while setting out general principles governing treaty amendment, did not adequately reflect the particularities of specific instruments. In its view, reliance on the VCLT alone risked overlooking the special features and technical exigencies inherent in certain treaty regimes. Japan further recalled that several international instruments recently adopted under the auspices of the UN had incorporated detailed amendment provisions within their own texts, thereby providing tailored mechanisms better suited to their subject matter and institutional framework.[94] Germany and the United States strongly opposed the Japanese proposal.[95]

The rationale underlying the Japanese proposal was to incorporate into the MEX Convention a mechanism allowing the instrument to be amended more expeditiously, should circumstances so require. In part, the proposal mirrored the logic of the provision governing the MEX Convention's entry into force, namely the establishment of a high threshold of ratifications, including the requirement that at least five of the ratifying States be producer States.

Had the Japanese proposal been accepted, the Council would have been excluded from the amendment process. Amendments could have been submitted directly by any number of States to a conference of States Parties, thereby bypassing ICAO's established procedures for the adoption of international instruments—such as the convening of the Sub-Committee and the LC, or the appointment of a rapporteur. While this mechanism might have accelerated the adoption of amendments, it would also have eliminated the Council's supervisory role. Substantively, the Japanese proposal required that a proposed amendment be approved by a two-thirds majority of States Parties at the conference. Entry into force, however, was subject to a more stringent twofold threshold: first, ratification, acceptance, approval, or accession by two-thirds of the States Parties; and second, inclusion within that majority of at least five producer States, unless the conference decided otherwise by the same voting majority. This formulation established a high barrier to entry into force, evidently designed to ensure not only

[91]For example, during the Diplomatic Conference the delegate of the United States observed that the inclusion of the Secretariat's proposal on the final clauses - particularly with respect to the mechanism for amending the treaty - "would essentially be nothing more than a repetition of the relevant provisions of the Vienna Convention on the Law of Treaties." See MEX Convention Proceedings, Volume I at 101. John Augustin writes that "delegates at the Conference believed that the [MEX] Convention would be amended in accordance with the provisions of the *1969 Vienna Convention on the Law of Treaties.*" See Augustin at 47.

[92] See also MEX Convention Proceedings Volume II at 255.

[93] See MEX Convention Proceedings Volume I at 136.

[94] See MEX Convention Proceedings Volume I at 137.

[95] *Ibid* at 136.

broad participation but also the assent of those States possessing industrial and manufacturing capacity.

Several delegations, while supporting in principle the inclusion of an express provision on a built-in amendment mechanism, noted that modifications to the MEX Convention might in fact be necessary over time. Other States, however, opposed the insertion of such a clause altogether, maintaining that no explicit reference to amendment procedures should appear in the text of the Convention. During the Diplomatic Conference, it was generally acknowledged that the draft already established a special regime for introducing changes to the Technical Annex, which constituted an essential element of the MEX Convention. To avoid any overlap or ambiguity, the President of the Diplomatic Conference suggested that amendments to other parts of the MEX Convention could be addressed through the general rules contained in the VCLT. On this basis, the Commission of the Whole decided to adopt the final clauses without including a specific amendment procedure in the MEX Convention itself.[96] The plenary of the Diplomatic Conference also fully endorsed this proposal.[97]

The approach adopted at the Diplomatic Conference with respect to potential amendments to the MEX Convention has not facilitated the introduction of changes to the instrument. It is evident that an amendment of the MEX Convention itself was not regarded as the most urgent concern. Rather, the priority had been to establish a mechanism capable of ensuring that necessary technical updates could be incorporated efficiently, a goal that was achieved through the procedure created for amending the Technical Annex. The situation is less satisfactory, however, regarding modifications to the substantive provisions of the MEX Convention. In this respect, the drafting choices made in 1991 stand in marked contrast to contemporary treaty practice. Most recent multilateral conventions contain express provisions governing amendments, often carefully tailored to balance legal certainty with the need for adaptability. Properly designed built-in mechanisms, considering the nature of the subject matter, the political sensitivities of States, and the relevant legal considerations, can prove indispensable. Such provisions not only streamline the process of reform but also reduce costs and time, thereby facilitating negotiation, adoption, entry into force, and potentially even enhancing the prospects for ratification. As Milde wisely notes "threats to aviation security requires constant updates of the legal regulatory framework."[98]

## 2.8.The IETC

The MEX Convention establishes the IETC, an advisory, though non-permanent body, entrusted with addressing the sensitive technical questions essential to achieving the objectives of the instrument.[99] More specifically, the IETC's mandate is to evaluate developments in the manufacture, marking, and detection of explosives. In carrying out this function, the IETC is required to transmit its findings, through the Council, to all States Parties as well as to relevant international organizations. Where appropriate, it may also propose amendments to the Technical Annex of the MEX Convention, thereby serving as the principal mechanism through which the treaty can be adapted to evolving technological and security challenges. Put differently, the IETC is vested with the task of identifying and specifying the categories of

[96] See MEX Convention Proceedings Volume II at 239.
[97] *Ibid* at 263-269, & 271 (text for final approval).
[98] See Michel Milde, Draft Convention, at 156.
[99] See Augustin at 44.

explosives to which the MEX Convention is to apply.[100] Ideally, the IETC should take decisions by consensus.[101]

Although the IETC's mandate was essentially confined to making recommendations for amendments to the Technical Annex, at the Diplomatic Conference the United States proposed that its scope be broadened. It suggested that the IETC might be tasked not only with monitoring technical developments relevant to the MEX Convention but also with considering the desirability of additional instruments addressing related issues. This proposal, however, did not gain traction and was ultimately not retained.[102]

The IETC is composed of between fifteen and nineteen specialists with direct and substantial expertise in the production, detection, or research of explosives.[103] Members are appointed by the Council for three-year terms, with the possibility of reappointment.[104] Under the MEX Convention, the Council is required to convene the IETC at least once annually, either at ICAO Headquarters or at other locations and times, "as directed or approved by the Council."[105] As the Secretariat has noted, the Council retains broad discretion to determine the place and frequency of sessions.[106] In other words, it is not strictly necessary to convene sessions annually, nor that such sections be held in Montreal.

The IETC held its inaugural meeting from 13 to 15 December 1999 and has since met on nine occasions, most recently from 28 to 29 June 2022, which, owing to global circumstances, was conducted virtually.[107] In its early years, the IETC was supported by the AH-DE, a technical advisory body that provided specialized input until its dissolution in 2010.[108] The AH-DE's functions were subsequently integrated into the Aviation Security Panel's Working Group on Technology, now operating under the title of the Working Group on Innovation in Aviation Security.[109]

### 2.9. The IETC: *ex ante* or *ex post* role

An issue of particular interest concerns whether the functions of the IETC are more accurately characterized as pre-blast (preventive or *ex ante*) or post-blast (reactive or *ex post*) in nature. As noted above, pursuant to the MEX Convention, the principal mandate of the IETC is to evaluate technical developments relating to the manufacture, marking, and detection of plastic explosives, and to formulate recommendations to the Council concerning amendments to the Technical Annex. Within this framework, the primary contribution of the IETC is clearly situated in the preventive dimension of the MEX Convention.

[100] See MEX Convention, Arts V & VI. See also ICAO C-WP/15167.
[101] See MEX Convention, Art. VI.
[102] See MEX Convention Proceedings Volume I at 67.
[103] See MEX Convention, Art. 5
[104] *Ibid*.
[105] See MEX Convention, Art. 5.
[106] See ICAO, LC/39-WP/3-2. See also ICAO, IETC/1 "Report of the First Session of the International Explosives Technical Commission" (15/12/1999) at 1-1 [IETC Report 1].
[107] From 1999 until 2010, the IETC met 8 times. See ICAO, C-WP/15167. The IETC held its 10th and last meeting from 28-29 June 2022. See ICAO, C-WP/15442 at 2. IETC's ninth Meeting which took place in 2021 was also held virtually.
[108] See IETC Report 1. See also ICAO, LC/39-WP/3-2 at 1.
[109] See ICAO, C-WP/15167.

More specifically, the IETC's functions are oriented toward minimizing the risk of the unlawful use of plastic explosives by enhancing their detectability and regulating their technical characteristics. A central element of this preventive role lies in the MEX Commission's ability to recommend amendments to the Technical Annex, particularly regarding to the identification of approved detection agents and the specification of minimum concentration levels. Through this mechanism, the MEX Convention is enabled to evolve in step with technological advancements and emerging threats. In addition, the IETC's technical deliberations contribute to the progressive harmonization of international standards governing the marking and detection of explosives, thereby reducing regulatory fragmentation and strengthening the overall effectiveness of the preventive regime.

Although the IETC is not vested with enforcement powers, its outputs provide critical guidance to States Parties in the discharge of their obligations to ensure that plastic explosives are duly marked and thus capable of detection, which constitutes a cornerstone of the MEX Convention's preventive architecture.

By contrast, the MEX Convention does not confer upon the IETC any direct operational or investigative mandate in the aftermath of an incident involving plastic explosives. In practice, where a major aviation security incident were to occur, the technical and operational response within ICAO would more likely fall within the remit of other specialized bodies, notably the Aviation Security Panel ("AVSEC Panel"), which has traditionally been engaged in the analysis of significant AVSEC events. In fact, the IETC has never met on urgent basis.

Furthermore, if issues such as detection failures, the emergence of new explosive compositions, or techniques designed to circumvent existing detection measures were identified in the context of a specific incident, the initial technical assessment would typically be undertaken by national authorities, potentially with input from ICAO's AVSEC Panel. The findings of such analyses could subsequently be transmitted to the ICAO Secretariat and, where appropriate, brought to the attention of the IETC. Should the subject matter fall within its competence, the Council may then decide to convene the Commission to examine the relevant technical developments.

Even in such circumstances, however, the IETC's mandate remains circumscribed. Its function is not to conduct incident investigations or to attribute responsibility, but rather to assess the technical implications of emerging developments in the manufacture, marking, and detection of explosives, with a view to determining whether amendments to the Technical Annex are warranted. Accordingly, while the IETC may be informed by post-blast developments, its institutional role remains fundamentally anchored in the *ex ante*, preventive logic of the MEX Convention.

### 2.10. The relationship between IETC and the Council

The IETC functions under the authority of the Council.[110] In this respect, while serving as Executive Secretary of the Diplomatic Conference, and in the context of clarifying the relationship between the Council and the IETC, Michael Milde emphasized that the Commission was intended to perform an advisory role only.[111] Its members acted in their individual capacity, and it was never envisaged that the IETC would take final decisions.[112]

[110] See Tswanya at 84.
[111] See MEX Convention Proceedings Volume I at 68.
[112] *Ibid* at 68.

Rather, its recommendations required the approval of a policy-making body.[113] At the same time, during the negotiations leading up to the Diplomatic Conference, it was acknowledged that establishing a separate international executive body outside ICAO for this purpose would have been costly, complex, and time-consuming. Considering this, Milde underscored the prevailing consensus that the rule-making authority should be vested in the Council.[114]

Augustin echoed Milde's assessment but went further, stressing that the IETC's findings were not binding. The Council retained the discretion to accept, reject, or amend any recommendation that the IETC submits. Shortly thereafter, while explaining to the Council the procedure for approving recommendations to the Technical Annex, the ICAO Secretary General noted that the Council would be required to take policy decisions in light of the nature of the proposed amendments, given its authority to determine whether or not such amendments should be transmitted to States Parties.[115] Moreover, the Council reserved the right to introduce modifications to any proposal. As Augustin observed, this rationale went unchallenged by any Council member, thereby confirming the non-binding character of the IETC's recommendations and the Council's full autonomy in relation to the IETC's work.[116]

### 2.11. Amendments to the Technical Annex

As noted above, one of the principal functions of the IETC is to propose amendments to the Technical Annex, which constitutes an integral component of the MEX Convention.[117] To date, the Technical Annex has been amended only twice.[118] The first amendment, which entered into force on 27 March 2002, removed *ortho*-Mononitrotoluene (o-MNT) from the original list of detection agents. The second amendment, effective 19 December 2005, revised the minimum concentration level of 2,3-Dimethyl-2,3-dinitrobutane (DMNB).[119]

Under the MEX Convention, the IETC submits proposed amendments directly to the Council, which enjoys full discretion as to whether to transmit them to States Parties. Upon transmission, States are granted a 90-day period—calculated from the date of the Council's notification—to submit comments.[120] The MEX Convention further provides that the Council must invite any State Party that has submitted comments or objections to engage directly with the IETC.[121] In turn, the IETC is obliged to review and consider such feedback and report back to the Council.[122] Following consultations with the IETC, affected States Parties, and producer States, the Council may circulate the proposal to all States Parties for adoption.[123] At this stage, if fewer than five States Parties submit written objections within ninety days of notification, the amendment is deemed adopted and enters into force 180 days thereafter, or within such other period as the Council may determine.[124]

[113] *Ibid*.
[114] *Ibid*.
[115] See ICAO, C-WP/9355.
[116] See Augustin 45.
[117] See MEX Convention, Art. X.
[118] See ICAO, C-WP/15167 at 3.
[119] *Ibid*.
[120] See MEX Convention, Article VII.
[121] *Ibid*.
[122] See MEX Convention, Art. VI.
[123] *Ibid*.
[124] *Ibid*.

Should five or more States Parties object, the Council is required to remit the proposal to the IETC for further analysis and reconsideration.[125] The MEX Convention nevertheless affords a second opportunity for dissenting States. In this respect, a Party that initially objected to an amendment may subsequently express its consent to be bound by depositing an instrument of acceptance or approval.[126] The MEX Convention, however, is silent as to the manner in which a State may exercise this option and whether any timeline exists for expressing such acceptance or approval. It may reasonably be inferred that a State can provide its consent by submitting a formal letter to the Secretary General at any time.

In addition, where five or more States Parties object to a proposed amendment, the Council retains discretionary authority to submit the matter to a Conference of all States Parties, thereby elevating its consideration to a broader diplomatic forum.[127]

The rationale underlying this procedure was to embed within the MEX Convention a built-in mechanism that would provide the necessary flexibility to adapt to evolving technical developments, encourage consultation between the IETC, States Parties, and ICAO, and prevent the technical dimensions of the MEX Convention from becoming static or obsolete.[128]

### 2.12. IETC's Rules of Procedure

The Commission is institutionally accountable to the Council, to which it submits its reports. The Council, in turn, communicates the Commission's findings to the States Parties and to other relevant international organizations.[129]

In terms of internal organization, the Commission is required to elect from among its members a Chairperson and Vice-Chairpersons. These officers hold office for a term of one year, or until their successors are elected, thereby ensuring continuity in the event of procedural delay.[130] In practice, this has not been achieved, given that the Commission's meeting have not taken place annually. A Secretary, formally designated by the Secretary General, supports the Commission. This function is typically entrusted to a member of the ICAO Secretariat.[131]

The Council exercises extensive authority over the Commission. It is responsible for convening the latter's sessions, approving its work program, and adopting its rules of procedure, together with any amendments thereto.[132]

Participation in the Commission's sessions is circumscribed. *Ex officio* access is granted to the President of the Council, the Secretary General, Representatives to the Council (or their alternates), and officials of the ICAO Secretariat. The President of the Council may also authorize the attendance of observers, either designated by States or by international organizations. In practice, requests for observer status are typically submitted by States not

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[125] *Ibid*.
[126] *Ibid*.
[127] *Ibid*.
[128] See Michael Milde, "27th Session of the ICAO Legal Committee", Air Law, XV 3 (1990) at 163 [*Michael Milde 27th Session of LC*]. See also Augustin at 36.
[129] See ICAO, Rules of Procedure for the International Explosives Technical Commission (IETC) [*IETC Rules of Procedure*]. On 1 March 2000, the Council approved these ICAO IETC Rules of Procedure. See ICAO C-DEC 159/5.
[130] See IETC Rules of Procedure, Rule 2.
[131] *Ibid*.
[132] *Ibid*, Rules 3 & 4.

represented on the Commission. Observers are entitled to participate in deliberations but lack voting rights.[133] They may submit proposals; however, such proposals are only placed before the plenary for discussion if endorsed by at least two members of the Commission.[134]

The decision-making procedures of the Commission reflect a balance between consensus and majority rule. As a matter of principle, recommendations to the Council concerning amendments to the Technical Annex of the Convention should be adopted by consensus, which underscores the technical sensitivity and political significance of such amendments. Where consensus proves unattainable, decisions require a two-thirds majority of the Commission's members. For matters other than amendments to the Technical Annex, decisions are adopted by a simple majority of members present and voting. Upon the conclusion of each session, the Secretariat prepares a formal report, which is then transmitted to the Council for its consideration and approval.

### 2.13. Interpretation of Article IV

In June 2002, the IETC recommended an amendment to Part 2 of the Technical Annex consisting in increasing the minimum concentration of 2,3-Dimethyl-2,3-Dinitrobutane (DMNB) from 0.1 per cent to 1.0 per cent by mass.[135] This proposal was subsequently accepted by the Council, and the corresponding amendment to the Technical Annex duly entered into force.[136]

Notwithstanding its technical nature, the amendment gave rise to a significant question of interpretation concerning the treatment of explosives that had been manufactured and marked in full compliance with the requirements of the MEX Convention prior to the entry into force of the revised concentration threshold.[137] In particular, uncertainty emerged as to whether such explosives—now rendered non-compliant as a result of the amendment—should be subject to the same obligations as unmarked explosives, including their destruction, consumption, marking, or rendering permanently ineffective within the timeframes prescribed by Article IV of the MEX Convention.[138]

In response to this uncertainty, the Council invited the IETC to examine whether additional provisions should be incorporated into the MEX Convention or its Technical Annex to clarify the legal status of these explosives. The issue was of a technical nature but carried important practical and regulatory implications for States Parties, as it directly affected existing stockpiles that had been lawfully produced under the prior technical, regulatory framework.[139]

The IETC, having considered the matter, proposed the inclusion of a new paragraph in the Technical Annex.[140] The intent of this proposal was to clarify that explosives which, at the time of their manufacture, satisfied the applicable requirements of the Annex, but which no longer met those requirements following a subsequent amendment, should thereafter be subject

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[133] *Ibid*, Rule 5 & 6.
[134] *Ibid*, Rule 5 & 6.
[135] See ICAO, A35-WP/62.
[136] *Ibid*.
[137] *Ibid*.
[138] *Ibid*.
[139] *Ibid*.
[140] *Ibid*.

to the regime established under Article IV, paragraphs (2) and (3), from the date of entry into force of the amendment.[141]

In practical terms, the IETC's recommendation entailed that such explosives—while originally compliant—would be assimilated to the category of regulated stockpiles requiring corrective action. Accordingly, States Parties would be required to ensure that all such explosives not held by military or police authorities would, within a period of three years from the entry into force of the amendment, be either destroyed, consumed for purposes consistent with the MEX Convention, marked in accordance with the updated requirements, or rendered permanently ineffective.[142] A parallel, albeit longer, timeframe of fifteen years would apply to those stockpiles held by military or police authorities, to the extent that such explosives were not incorporated into duly authorized military devices.[143]

The Council subsequently referred the matter to the LC, requesting its advice on the most appropriate legal avenue to address the issue. In particular, the LC was invited to consider whether the proposed clarification could be accommodated within the scope of the Technical Annex, whether a formal amendment to the MEX Convention would be required, or whether the matter could be resolved through an interpretative approach, notably by applying Article IV mutatis mutandis.

In its deliberations, the LC took the view that the issue, while not devoid of practical significance, did not rise to the level of requiring a formal amendment to the MEX Convention.[144] Such a course of action would have entailed engaging the full treaty-making process within ICAO, which is widely recognized as both time-consuming and procedurally complex. Against this background, a few delegations expressed support for a more pragmatic solution, namely the adoption of an interpretative instrument capable of clarifying the application of the existing provisions of the MEX Convention without altering its text.

The LC ultimately recommended that the matter be addressed through an interpretation of Article IV, applied *mutatis mutandis* to explosives that had become non-compliant solely because of amendments to the Technical Annex. This recommendation was subsequently endorsed by the Council, which resolved to submit the issue to the Assembly with a view to the adoption of an appropriate resolution reflecting this interpretative approach.

The Assembly, acting upon the Council's recommendation, adopted a resolution clarifying that explosives which had been manufactured in conformity with the Technical Annex as in force at the time, but which ceased to comply following the increase in the minimum concentration of DMNB, should be treated analogously to existing stocks of unmarked explosives for the purposes of Article IV. Accordingly, such explosives would be subject to the same obligations concerning their destruction, consumption, marking, or rendering permanently ineffective within the applicable time limits.[145] The resolution further clarified that this interpretative approach would apply, by analogy, to any future amendments to the Technical Annex, unless a State Party expressly indicated its objection.[146]

[141] *Ibid*.
[142] *Ibid*.
[143] *Ibid*.
[144] *Ibid.*
[145] See ICAO, *A35-2, Application of Article IV of the Convention on the Marking of Plastic Explosives for the Purpose of Detection*.
[146] *Ibid*.

This episode is particularly instructive from an institutional and legal perspective. It demonstrates that, in circumstances where the issue at hand is technical in nature and does not implicate the fundamental structure of the MEX Convention, it is both possible and appropriate to resort to interpretative instruments—such as Assembly resolutions—to ensure legal certainty and coherence in the application of the treaty. Such an approach allows ICAO and its Member States to address practical implementation challenges in a timely and efficient manner, without resorting to the formal amendment of the MEX Convention, with all the procedural complexity, financial cost, and temporal delays that such a process entails. Accordingly, the recourse to an interpretative resolution in this context stands as a practical and effective alternative, providing clarity and predictability to States Parties while preserving the integrity and stability of the MEX Convention.

## 3. A Critical Evaluation of the MEX Convention

Following the detailed examination of the MEX Convention and its institutional framework in Section 2, the present section adopts a more evaluative perspective. Whereas the preceding section focused on the historical origins, structure, and operational mechanisms of the MEX Convention—including the creation, composition, and functions of the IETC—Section 3 seeks to assess the effectiveness of that framework considering its stated objectives and the evolving security landscape. In doing so, it builds directly upon the descriptive foundation established in Section 2, moving from explanation to critical analysis.

This section examines both the strengths and the structural limitations of the MEX Convention and of the IETC as its principal technical body. It considers the MEX Convention's positive contributions to international security, including its role in addressing a significant regulatory gap and promoting the detectability of plastic explosives, while also evaluating the extent to which its implementation has been effective in practice. At the same time, it analyses key shortcomings, including the narrow scope of the instrument, the absence of enforcement mechanisms, its limited adaptability, and the broader institutional challenges arising from its multi-sectoral reach beyond aviation.

Against this analytical backdrop, the section further considers whether the current role and functions of the IETC remain justified, or whether there may be a need to reassess its mandate considering contemporary developments. It also addresses the central question that underpins this Report—namely, whether the MEX Convention continues to operate effectively in its current form, or whether its institutional arrangements, including the IETC, warrant reconsideration. The analysis developed in this section thus provides the substantive basis for the options and recommendations explored in the sections that follow.

### 3.1. Positive Contributions of the MEX Convention

Adopted in less than twenty-seven months, the MEX Convention represented the fastest process of drafting, negotiation, and adoption of any international aviation security instrument under the auspices of ICAO. For this reason, the outcome of the Diplomatic Conference was widely regarded as an outstanding success. Significantly, the MEX Convention was the first global treaty to address specifically the problem of plastic explosives—a regulatory gap made starkly evident by major aviation disasters such as Pan Am Flight 103 and UTA Flight 772.

The MEX Convention establishes binding obligations requiring States to mark plastic explosives with chemical agents, thereby rendering them detectable by conventional screening technologies. It further obliges States to eliminate unmarked stockpiles within prescribed deadlines, whether through destruction or controlled consumption. In addition, the MEX Convention created the IETC, tasked with monitoring technical advances and submitting recommendations to the ICAO Council. Since its adoption, most States engaged in the manufacture of plastic explosives have become parties to the MEX Convention, thereby promoting regulatory harmonization and substantially reducing the volume of unmarked stockpiles. Taken together, these achievements demonstrate that the MEX Convention significantly strengthened international aviation security by closing a critical gap in detection—a gap that, in the past, had directly contributed to some of the most devastating accidents in the history of civil aviation.

### 3.2. Implementation of the MEX Convention

Within ICAO, the success of an international treaty is frequently assessed by reference to the number of States that have ratified it. On this view, broad participation is equated with effectiveness. At present, ICAO counts 193 Member States. Similarly, 157 States are parties to the MEX Convention.[147] Measured solely against this benchmark, the MEX Convention might therefore be considered a success. Yet the assessment changes significantly if success is evaluated not by formal adherence but by the degree of actual implementation at the domestic level. It must be recalled that, like other international aviation security instruments, the MEX Convention requires the adoption of national legislation to give effect to the obligations it imposes.

In this respect, ICAO faces a notable informational deficit. The most recent comprehensive data on implementation of aviation security treaties date back to 1999–2000. ICAO's reporting at the time revealed that in 1999 only forty-five States had adopted national legislation to implement these instruments.[148] By 2000, that number had risen only marginally to fifty States—representing approximately 26 percent of ICAO's membership.[149] These figures provide a clear indication of the limited extent to which international aviation security obligations had been incorporated into domestic legal systems.

The difficulty is particularly pronounced in civil law jurisdictions, where States frequently ratify international aviation security conventions yet fail to enact the requisite

[147] It is interesting to note that Liechtenstein and Niue are parties to the MEX Convention but are not Contracting States to the Chicago Convention. See Convention on the Marking of Plastic Explosives for the Purpose of Detection, done at Montreal on 1 March 1991, available online: https://www.icao.int/sites/default/files/secretariat/legal/CurrentListofParties/MEX_EN.pdf.

[148] See ICAO, C-WP/11103.

[149] *Ibid*.

domestic legislation to give normative force to the obligations therein. Unlike many human rights instruments, which may operate with a measure of self-executing effect, aviation security treaties presuppose deliberate legislative incorporation. In consequence, ratification often translates merely into the formal designation of certain conduct as a criminal offence, while the absence of implementing measures deprives such provisions of enforceability by leaving them bereft of specific penalties. In such circumstances, the treaty risks being rendered nugatory, a symbolic commitment without juridical consequence. It bears emphasis that these conventions impose upon States a duty not only to define acts as criminal offenses, but also to ensure the effective imposition of sanctions—penal consequences that give tangible expression to the normative prescriptions of the international regime.

In the absence of more recent reporting, and lacking evidence to suggest a significant improvement since 2000, it is reasonable to conclude that the overall level of implementation has remained limited. There is little basis to assume that the MEX Convention constitutes an exception to this trend. On the contrary, the available evidence strongly suggests that its rate of domestic implementation mirrors the broader pattern of under-enforcement.

The MEX Convention was a pioneering response to aviation terrorism, by creating a global standard for marking plastic explosives. Its major achievement was harmonizing State practices and reducing the legal availability of undetectable stockpiles. However, its effectiveness has waned because of its narrow scope, weak enforcement, and failure to adapt to the evolving tactics of terrorist groups. Today, it is a necessary but incomplete instrument, requiring complementary measures to address modern threats.

### 3.3.Multi-sectoral reach

A central structural challenge inherent in the MEX Convention lies in the breadth of its regulatory reach, which extends well beyond the aviation sector. While the instrument was conceived as a direct response to an aviation-related incident—namely the destruction of Pan Am Flight 103—its operative provisions are not confined to civil aviation. Rather, the obligations it imposes on States, including the requirement to ensure the marking of plastic explosives through chemical additives, are of a general nature and apply across multiple industries and sectors.

As a result, the implementation of the MEX Convention typically requires the involvement of a range of domestic authorities that operate outside the traditional aviation regulatory framework. Responsibilities may be distributed among agencies overseeing defence, internal security, customs, industrial production, and trade, among others. This multi-sectoral dimension necessarily gives rise to coordination challenges at the national level. In practice, several States have encountered difficulties in establishing effective inter-agency mechanisms to ensure coherent and consistent implementation of the MEX Convention's requirements.[150]

[150] See ICAO, WP/15442 at 2.

### 3.4. Institutional and normative weakness of the MEX Convention

As mentioned above, the MEX Convention only applies to plastic explosives. Although there were voices at the Diplomatic Conference advocating in favour of a broader scope, the majority made a conscious decision to limit its applications to plastic explosives only. One can only speculate that this policy decision was taken to ensure the rapid adoption of the international instrument, as well as its prompt ratification by the international community. The international pressure was mounting. Less than a year after Lockerbie, there was also another major aircraft accident where plastic explosives were used. ICAO needed to produce results. Expanding the MEX Convention's scope could have delayed its adoption.

To fully apprehend the circumstances and prevailing international climate at the time of the MEX Convention's adoption, it is instructive to revisit the words spoken in the closing remarks of Dr. Kenneth Rattray, President of the Diplomatic Conference. His reflections not only encapsulated the spirit of cooperation that animated the negotiations but also underscored the profound sense of urgency with which States approached the task of fortifying the legal architecture against acts of unlawful interference. Dr. Rattray's statement stands as a testament to the collective will of the international community to transcend political divisions in the pursuit of a universal legal instrument, one that would strengthen the normative framework safeguarding international civil aviation and, by extension, the security of the traveling public.

On the final day of the proceedings, Dr. Rattray captured the historical moment with eloquence and gravity, declaring:

> [*The MEX Convention was adopted*] *"against the background of a world struggling to preserve peace and tranquillity in the shadows of hostilities; against a background of an atmosphere of fear in a world struggling to find a fair solution to the issues of conflicts but, above all, with a resolve that the international community and, in particular, the international aviation community, should not continue to be so vulnerable to acts of senseless and wanton terror."* [151]

With the benefit of time, the MEX Convention's limited scope has now proved to be one of its major weaknesses. As it stands, the MEX Convention represents just one element within broader international efforts to prevent terrorists from using explosives against civil aviation. Modern trends have shifted towards improvised explosives devices, made amongst others, dual-use chemicals.

In addition, adding chemical markers to explosives for detection does not solve the problem of existing unmarked stockpiles. These include non-military explosives diverted from commercial channels, unmarked military reserves, and explosives produced or improvised by terrorist groups, which remain inherently unmarked.[152] The 15-year window for militaries to destroy or use unmarked stockpiles may have been excessively long. Arguably, the shorter 3-year deadline for civilian holders was much stronger but monitoring and compliance was not necessarily in place.

[151] See MEX Convention Proceedings Volume at 176.
[152] See ICAO C-WP/15167 at 3.

Another notable limitation of the MEX Convention resides in the absence of an enforcement mechanism. Although its provisions are legally binding, ICAO lacks the authority to conduct factory inspections, monitor stockpiles, or verify the destruction of unmarked plastic explosives. As a result, the effectiveness of the regime is contingent almost exclusively upon the political will and administrative capacity of States to implement their obligations. By contrast, the *Chemical Weapons Convention* ("CWC") establishes a far more rigorous compliance framework.[153] In this respect, the Organization for the Prohibition of Chemical Weapons ("OPCW") is expressly mandated to undertake on-site inspections, thereby providing a robust verification system to ensure adherence to the treaty's requirements.[154]

The MEX Convention primarily addresses the manufacture, possession, movement, and control of unmarked plastic explosives. Its principal objective is to reduce the availability of such explosives within legitimate markets by imposing obligations on States to regulate and eliminate unmarked stockpiles. Notwithstanding this framework, terrorists' intent on committing unlawful acts increasingly manufacture, acquire, or improvise their own explosives, often entirely outside formal industrial supply chains. In this respect, the MEX Convention does not extend to the innovative and adaptive methods employed by non-State actors in developing improvised explosive devices. Put differently, when assessed against the contemporary challenges of preventing acts of unlawful interference, the MEX Convention reveals a significant structural limitation: it regulates only one segment of the potential supply chain, while leaving unaddressed the evolving practices of non-State actors that now represent some of the most pressing threats to civil aviation security.

Another significant shortcoming of the MEX Convention lies in its absence of a built-in mechanism to facilitate the timely introduction of amendments necessary to ensure that the instrument remains responsive to current, emerging, and pressing needs. The Diplomatic Conference thus missed a valuable opportunity to incorporate a flexible amendment procedure that could have enabled the MEX Convention to evolve in line with technological developments and shifting security challenges. In consequence, any proposed modification to the MEX Convention must proceed through the traditional processes of international treaty-making within ICAO—procedures that are inevitably protracted, and resource-intensive.

It would be however manifestly unfair to assess the role and relevance of the IETC and the MEX Convention solely through the prism of contemporary aviation security requirements, whether in the field of explosives detection or in the prevention of acts of unlawful interference against international civil aviation. The global security landscape has undergone profound transformations in the decades since the MEX Convention's adoption. The terrorist attacks of 11 September 2001 ushered in a radically new regulatory environment for aviation security. To suggest that the drafters of the MEX Convention should have anticipated the subsequent evolution of explosives technology and their appalling potential for misuse against civil aviation and the international community at large would be to impose upon them an unreasonable and anachronistic burden of foresight.

It must be recalled that, as originally conceived, the MEX Convention was designed to address a clearly defined and immediate threat. Both prior to and following the bombing of Pan Am Flight 103, a series of attacks had been perpetrated against civilian targets using

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[153] See *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* [Chemical Weapons Convention].
[154] *Ibid*.

unmarked plastic explosives. Confronted with this urgent reality, the Diplomatic Conference deliberately chose to craft an instrument that was narrow in scope, single-minded in purpose, and responsive to the exigencies of the moment. The drafters did not possess the luxury of time to elaborate a comprehensive regime encompassing every conceivable dimension of explosives detection and their potential for monstrous use against civilian populations. As is so often the case in international lawmaking, the quest for perfection was subordinated to the imperative of timely action—the recognition that the "perfect" is frequently the enemy of the "good." The international community was observing closely, demanding swift results. In this sense, the MEX Convention was the right response to the needs of its time. Yet, given these very circumstances, it was almost inevitable that its significance and relevance would diminish with the passage of time and the evolution of global security threats.

### 3.5. Assessing the Ongoing Relevance of the IETC

The question whether the IETC continues to serve a meaningful function within the framework of the MEX Convention must be approached with caution. It is undeniable that, over time, the IETC has experienced a decline in visibility and practical output.[155] The Council itself noted in 2020 that the Commission had not convened during the preceding decade, thereby prompting renewed reflection as to its continued relevance.[156] Subsequent discussions within ICAO further underscored the fact that developments in detection science, together with the emergence of alternative technical bodies within the Organization, had reduced the IETC's prominence within the aviation security sphere. The Secretariat has also acknowledged that a considerable proportion of contemporary explosives detection technologies deployed in airports no longer rely exclusively on chemical detection agents, but instead combine bulk detection, trace detection, X-ray technologies, computed tomography, and canine screening as part of a broader, layered security approach.

These developments are important, but they are not conclusive. The decline in the IETC's activity, the narrowness of its mandate, and its partial eclipse by broader ICAO technical bodies do not, in and of themselves, establish that the Commission has ceased to serve any useful purpose.[157] Still less do they justify, without more, a substantial amendment to the MEX Convention or the termination of an organ expressly established by it. The principal difficulty lies in the absence of a sufficiently robust technical basis upon which such a conclusion could responsibly be drawn. In fact, in March 2024, the ICAO Secretariat submitted a proposal to commission a third-party study aimed at assessing the role and continued relevance of the IETC. To that extent, a budget of CAD$ 400,000 was assessed.[158] During its 231st Session, the Council took note of this recommendation but determined that, in light of prevailing resource constraints and the existence of more pressing organizational priorities, it

[155] See ICAO, LC/39-WP/3-2. See also ICAO, IETC/9 "Ninth Session of the International Explosives Technical Commission" (IETC) 17-19 May 2021 at 2-1 [*IETC Report 9*]. Since 2005, the IETC has not advanced any substantive recommendations for the amendment of the Technical Annex to the MEX Convention. Instead, its role has been reduced to functioning largely as a forum where States Parties exchange information on technological developments in the field of explosives detection. The Council has noted that this diminished output raises questions regarding the Commission's continued relevance, especially given the rapid pace of innovation in detection science and the shifting threat landscape in civil aviation security. See also ICAO C/MIN 227/3.

[156] See ICAO, LC/39-WP/3-2.

[157] *Ibid*.

[158] See ICAO, C-WP/15558 at 4.

was not necessary to pursue such a study at that juncture.[159] As a result, ICAO currently lacks the benefit of an independent and comprehensive technical assessment capable of establishing whether the functions of the IETC have truly become redundant, or whether they continue to retain relevance in contexts not fully captured by an aviation-specific analysis.

That gap is not incidental; it is decisive. The MEX Convention was adopted under ICAO auspices, but its effects are not confined to civil aviation. Its obligations extend into a broader regulatory space encompassing customs administration, police authorities, border enforcement, military structures, and other sectors in which plastic explosives may be produced, transferred, controlled, or detected. ICAO is institutionally well placed to assess the state of aviation security technologies. It is far less evident that the Organization is equally positioned to determine, without external technical input, whether developments in those technologies have rendered the MEX Convention's marking logic obsolete across all affected sectors and jurisdictions.[160] What may appear increasingly marginal within the ecosystem of major airports and advanced screening systems may continue to have significance in other enforcement contexts, particularly in States where highly sophisticated technology is not uniformly available, affordable, or deployed. The consultations undertaken during this Report do not support the proposition that modern detection technologies have definitively displaced the role served by chemical markers in all contexts. Nor is there conclusive evidence that all States possess the same technical capacity to detect both marked and unmarked plastic explosives without reliance on the normative and technical framework established by the MEX Convention.

It follows that, while the IETC's practical relevance may have diminished within certain dimensions of ICAO's work, there is presently no sufficiently sound evidentiary basis for concluding that the Commission has outlived its utility in a broader legal and operational sense. In the absence of the technical study that would have enabled the Organization to assess that question with greater confidence, the prudent conclusion is not that the MEX Convention must now be amended, but rather that the case for amendment has not been made. A substantial modification of the MEX Convention—whether to redefine the IETC's functions or to terminate it altogether—would therefore be premature. On the present record, the most defensible position is one of restraint: to acknowledge the reduced institutional prominence of the IETC, while recognizing that this is not the same thing as proving its obsolescence.

### 3.6.Does the MEX Convention require an amendment?

The Council instructed the LC to examine whether an amendment to the MEX Convention is required to redefine the role and functions of the IETC or, alternatively, to consider its termination on the basis that it may have fulfilled the mandate originally envisaged at the time of its creation. In the letter appointing the present Rapporteur pursuant to Rule 17 of the Rules of Procedure for the Legal Committee (Doc 7669-LC/139/7), the Chairperson of

[159] See ICAO, C-DEC 231/2 at 4.

[160] The IETC has recognized that if a recommendation to amend the Technical Annex were to arise in the future, it would be essential to carefully assess the operational and financial consequences for States Parties. Such an assessment should consider not only the duties of civil aviation authorities but also the potential impact on non-aviation entities, including military bodies, customs administrations, and police authorities, all of which could be directly affected by the implementation of any amendment. See IETC Report 9 at 3-1.

the LC entrusted this study with that precise mandate, thereby reiterating in full the terms of reference previously defined by the Council during its deliberations in March 2024.

The question that accordingly arises is whether the MEX Convention should now be amended either to redefine the IETC's mandate or to bring its functions to an end altogether. That question, however, cannot be approached in the abstract, nor can it be answered solely from the standpoint of present-day developments in aviation security. Any such inquiry must be grounded in the broader legal, technical, and institutional context in which the MEX Convention operates.

As explained throughout this Report, the MEX Convention has been an exceptionally valuable international instrument in responding to what, in the late 1980s and early 1990s, was perceived as an urgent and serious threat: the manufacture, circulation, and potential misuse of unmarked plastic explosives. The MEX Convention was negotiated and adopted with unusual speed, under considerable international pressure, and with a consciously narrow focus. Yet that narrow focus should not obscure the fact that the MEX Convention filled a major regulatory void. It was the first global instrument specifically designed to address the risks associated with plastic explosives by requiring the incorporation of chemical detection agents, thereby materially enhancing their detectability and reducing the likelihood of their unlawful use.

From an institutional standpoint, the creation of the IETC was no less significant. It represented a deliberate attempt to establish a specialized technical mechanism through which developments in the manufacture, marking, and detection of explosives could be monitored and, where appropriate, translated into adjustments to the Technical Annex. In conjunction with the Council's supervisory authority, this institutional design introduced a degree of flexibility that enabled the MEX Convention to remain technically responsive, at least during its earlier years, to evolving scientific knowledge and operational requirements.

In its formative phase, the IETC fulfilled an important and constructive role. By evaluating developments in explosives technology and proposing amendments to the Technical Annex, the Commission helped preserve the MEX Convention's technical relevance. In practice, it also served as a forum through which States and experts could exchange information and develop a more coherent understanding of applicable detection methodologies and technical standards.

It is equally true, however, that over time the IETC appears to have experienced a gradual decline in practical relevance. Its limited output, infrequent meetings, and the absence of any significant proposal to amend the Technical Annex since 2005 have understandably prompted institutional reflection. Its mandate remains intrinsically narrow, confined to plastic explosives, and it has increasingly been overshadowed within the aviation context by other ICAO bodies—most notably the Aviation Security Panel and its working groups—which address a broader range of detection technologies and produce more operationally oriented outputs. Moreover, the IETC has no operational or enforcement powers; its role is purely advisory, and its recommendations are not binding on either the Council or the States Parties.

Yet these considerations, significant though they are, do not in themselves provide a sufficient legal or policy basis for redefining the IETC's mandate, still less for terminating it. The difficulty lies precisely in the absence of a sufficiently robust technical foundation upon which such a decision could responsibly be made. As the Report records, the ICAO Secretariat proposed in March 2024 that a third-party study be commissioned to assess the continuing role and relevance of the IETC. The Council took note of that recommendation but decided that it was not necessary to pursue such a study at that time.[161]

That decision is entirely understandable from a budgetary and managerial standpoint. Nevertheless, the consequence is clear: the Organization presently lacks the benefit of an independent, comprehensive, and technically grounded assessment capable of establishing whether the IETC has in fact become obsolete, whether its functions should be redefined, or whether other sectors continue to depend—directly or indirectly—upon the normative and technical architecture that the MEX Convention and the IETC help sustain.

This point is of central importance. Within ICAO, the debate as to the relevance of the IETC has naturally tended to be framed through the lens of civil aviation security. ICAO is institutionally well placed to understand what contemporary detection technologies can do in the aviation environment. It is considerably less clear, however, whether the Organization possesses an equivalent level of insight into the technical, operational, and regulatory realities that prevail in other sectors affected by the MEX Convention. The latter is not confined to aviation. Its implications extend beyond airports and civil aviation screening systems into other domains in which plastic explosives may be regulated, detected, transferred, controlled, or interdicted, including customs administration, police enforcement, border management, immigration control, military and security structures, and certain industrial or commercial settings.

Accordingly, to redefine the IETC's role—or, more drastically, to terminate it—without first undertaking a serious technical assessment would be to proceed based on only partial knowledge. It would entail drawing conclusions from the aviation sector and extrapolating them to a convention whose legal and operational effects are manifestly broader. That, in the view of this Rapporteur, would carry significant risk. What may appear redundant or outdated within the ecosystem of modern aviation security may continue to perform an important residual function elsewhere. Detection technologies that are increasingly sophisticated and widely deployed in major international airports may not be available, affordable, or systematically used in customs operations, land-border control, police investigations, or other national enforcement environments. Nor can it safely be assumed that all States—particularly developing States—have access to the same level of technology or possess comparable technical capacity.

Moreover, consultations undertaken during this Report do not support the conclusion that current detection technologies have definitively rendered chemical markers obsolete across all applications. While there is a widespread perception that modern systems can detect marked and unmarked plastic explosives with increasing effectiveness, no expert consulted could confirm unequivocally that such technologies now perform, in all sectors and all jurisdictions,

[161] See ICAO, C-DEC 231/2 at 4.

the same functional role as chemical markers. The issue is therefore not merely whether aviation screening has evolved, but whether the original logic of the MEX Convention has lost relevance across the full range of contexts in which the MEX Convention operates. On the present record, that proposition has not been demonstrated.

It must also be recalled that Annex 17 — *Aviation Security* does not impose a specific obligation on States to deploy technologies capable of detecting plastic explosives, whether marked or unmarked. The obligations contained in Annex 17 are outcome-based rather than technology-specific. States retain discretion as to how they satisfy their aviation security obligations. It follows that advances in detection capability, even within aviation, do not automatically displace the continued legal and practical relevance of a treaty framework built upon marking requirements and technical standardization.

Against this background, any attempt to redefine the IETC's mandate—or, *a fortiori*, to terminate it—without the benefit of an independent technical assessment would, in the view of this Report, be premature. It would risk producing consequences that have not been adequately studied, particularly in sectors outside aviation where ICAO's institutional knowledge may be necessarily more limited. The danger is not merely theoretical. A decision taken on the assumption that aviation technologies have rendered the IETC obsolete could inadvertently weaken or destabilize aspects of the MEX Convention's broader regulatory function in customs, policing, border security, or other enforcement environments where the role of marking may remain materially relevant.

For these reasons, there is at present no sufficiently sound basis for concluding that the MEX Convention should be amended to redefine the IETC's role or terminate its functions. Such a course would require a firmer evidentiary and technical foundation than is currently available. In the absence of that foundation, restraint is warranted.

The only area in which a limited adjustment appears justifiable concerns the procedural rigidity of the provisions governing the appointment of experts. It would seem both sensible and proportionate to afford the Council greater flexibility to appoint experts on an *ad hoc* basis, aligned with the actual convening of IETC meetings, rather than adhering strictly to the prescribed three-year appointment cycle set forth in the MEX Convention. This would not alter the substance of the MEX Convention, nor would it prejudge the broader question of the IETC's long-term relevance. Rather, it would merely adapt its working methods to present practical realities.

Even so, such a modest procedural clarification does not warrant activating ICAO's full treaty-making machinery. As demonstrated elsewhere in this Report, that process is lengthy, resource-intensive, and disproportionate when measured against the limited and essentially administrative nature of the adjustment contemplated. It is for that reason that, as explained below, this Report recommends the adoption of an Assembly Resolution clarifying that the Council retains discretion with respect to the frequency and timing of the appointment of experts to the IETC, in a manner analogous to its existing authority to determine when and where the Commission's meetings are convened. Such an approach would provide practical clarity while avoiding the significant legal, financial, and institutional burdens associated with formal amendment of the MEX Convention.

## 4. Options

Building upon the analytical conclusions reached in the preceding section, Section 4 turns to the identification and examination of the legal and institutional pathways available to address the future of the IETC. In accordance with the mandate entrusted to the Rapporteur, this section moves from diagnostic analysis to the consideration of practical and legally viable courses of action. It introduces, in a structured manner, the principal alternatives that may be pursued, including the maintenance of the status quo, the adoption of interpretative mechanisms, and the possibility—albeit not advocated in this Report—of initiating a formal amendment process.

The subsections that follow develop a systematic assessment of these alternatives, examining their respective legal foundations, procedural implications, and institutional consequences to provide a coherent framework for informed decision-making.

### 4.1.No amendment. Maintaining the *status quo*

The maintenance of the *status quo* must not be understood as institutional inertia or as a reluctance to confront legitimate questions concerning the present-day relevance of the IETC. Properly understood, it is a reasoned legal and policy conclusion grounded in the evidence presently available—or, more precisely, in the absence of evidence sufficient to justify more far-reaching reform.

To recommend that the MEX Convention remain unchanged in its essential structure is not to deny that the IETC has become less active, or that the technological and institutional environment has evolved considerably since 1991. It is, rather, to recognize that no substantial change should be introduced into a treaty framework of this kind unless there exists a sufficiently firm technical, legal, and institutional basis for doing so. On the present record, that threshold has not been met.

As noted elsewhere in this Report, no independent technical study has been carried out to determine whether the IETC has in fact exhausted its utility, whether its mandate should be recalibrated, or whether the MEX Convention's regulatory premise has ceased to be relevant across the sectors to which it applies. The Council's decision not to pursue the study proposed in 2024 is entirely understandable considering resource constraints and other pressing organizational priorities. Yet that decision has an unavoidable consequence: the Organization does not presently possess the kind of objective and comprehensive assessment that would justify reopening the MEX Convention for substantive amendment. In such circumstances, the argument for preserving the existing framework is not merely a default position; it is the only position that avoids the risk of legislating based on incomplete knowledge.

This is particularly important because the MEX Convention extends beyond aviation. The temptation to judge the continued relevance of the IETC solely by reference to developments in airport screening and modern aviation detection systems must be resisted. The MEX Convention operates in a wider legal and regulatory environment, one that also implicates customs authorities, law enforcement bodies, border agencies, military institutions, and other administrative structures. A conclusion that the IETC has become unnecessary in the aviation context does not necessarily entail the same conclusion for those other sectors. Nor can it safely be assumed that current technologies are uniformly deployed across all States or all operational environments. The *status quo* therefore represents the option most consistent with legal prudence, institutional caution, and respect for the multi-sectoral reach of the MEX Convention.

At the same time, maintaining the *status quo* does not mean preserving every aspect of current practice in an inflexible manner. The Report identifies a limited and proportionate area in which clarification appears warranted: the practical exercise of the Council's discretion in relation to the appointment of experts and the convening of meetings of the IETC. Here, the case for interpretative clarification is considerably stronger than the case for formal amendment. The MEX Convention already affords the Council significant latitude in determining when and where the IETC should meet. It is both reasonable and consistent with the object and purpose of the MEX Convention to clarify, through an interpretative Assembly Resolution, that comparable flexibility may be exercised with respect to the timing and frequency of the appointment of experts. Such an approach would not alter the MEX Convention's substantive obligations, disturb its institutional balance, or prejudge the broader question of the IETC's long-term future. It would simply align institutional practice with operational realities in a manner that is efficient, proportionate, and legally sound.

For these reasons, the maintenance of the *status quo*, combined with the possible adoption of an interpretative resolution by the Assembly, emerges as the most balanced and defensible course presently open to the Organization. It preserves the integrity of the MEX Convention, avoids the disproportionate burdens of formal treaty amendment, and reflects an appropriate degree of restraint in circumstances where the evidentiary basis for structural reform remains insufficient. In short, it is not merely the least disruptive option; it is, on the current state of the record, the most appropriate one.

With respect to the convening of meetings, the MEX Convention provides that the IETC shall meet at least once annually at ICAO Headquarters, or at such other place and time as may be directed or approved by the Council. While this provision establishes a *prima facie* expectation of annual meetings, it simultaneously confers upon the Council a considerable degree of discretion to determine their frequency and location considering operational requirements and institutional priorities. In practice, this discretion has guided the evolution of the IETC's working methods. Although meetings were initially held on an annual basis following the entry into force of the MEX Convention, this practice has not been consistently maintained since 2011. Rather, the Council has embraced a more pragmatic, needs-based approach, convening meetings on an *ad hoc* basis as circumstances require. Within this framework, the ICAO Secretariat performs a critical supporting function by continuously monitoring developments in aviation security and related domains at both the national and international levels, thereby enabling the Council to assess when the convening of the IETC is warranted.

Turning to the appointment of experts, at least two alternative approaches may be contemplated within the parameters of a *status quo* scenario. The first approach would limit the appointment of experts to instances where the convening of an IETC meeting is foreseeable. Under this model, appointments would be made on an *ad hoc* basis, aligned with operational necessity. In practice, this may result in experts serving beyond the nominal three-year term established in Article V of the MEX Convention, thereby giving rise to potential questions regarding strict conformity with its provisions, which stipulate that members shall be appointed for a period of three years and may be eligible for reappointment.

Notwithstanding this potential tension, the approach offers tangible administrative advantages. It would substantially reduce the burden on both the ICAO Secretariat and States Parties associated with the periodic identification and nomination of suitably qualified candidates in the absence of an imminent need for the IETC to convene. It should be underscored that the identification of appropriate experts is inherently complex. The MEX Convention requires demonstrable and substantial expertise in the manufacture, detection, and research of explosives—qualifications that extend beyond the conventional profile of aviation security personnel. Experience suggests that States have, at times, proposed candidates with strong aviation security backgrounds but without the requisite level of technical expertise in explosives, and that such candidates have nonetheless been appointed by the Council. This practice may not be fully aligned with the letter and underlying intent of Article V.

The principal limitation of this first approach lies in its potential impact on institutional responsiveness. Should a pressing need arise for the IETC to convene, the time required to identify, vet, and nominate appropriately qualified experts for appointment by the Council could be considerable, thereby delaying the Commission's ability to operate effectively in time-sensitive circumstances.

The second alternative would consist in preserving continuity in the composition of the IETC through the periodic extension of the mandates of its existing members, as was undertaken by the Council in March 2024. Under this approach, the Council would renew the appointments of current members at regular intervals—for example, in successive three-year cycles—while maintaining the principle that meetings of the IETC should be convened on an *ad hoc* basis, as necessary. This model offers enhanced institutional continuity and operational readiness, while remaining fully consistent with Article V of the MEX Convention, which expressly contemplates the possibility of reappointment.

However, this approach is not without its practical constraints. Over time, the repeated renewal of the same cohort of experts may give rise to attrition-related risks, including unavailability due to retirement, changes in professional obligations, or other forms of disengagement. Such developments could ultimately jeopardize the Commission's ability to satisfy the minimum membership threshold of fifteen experts required for its proper functioning under the MEX Convention. Inevitably, the ICAO Secretariat would be required, at some stage, to undertake the identification and nomination of new candidates, thereby reintroducing the administrative and practical challenges that this approach seeks, in part, to mitigate.

In this regard, a calibrated approach may merit consideration. The ICAO Secretariat could, as a matter of practice, combine the renewal of a core group of experienced members with the gradual introduction of new experts, thereby preserving institutional memory while ensuring the continued vitality and compliance of the Commission's composition. In all cases, particular attention should be paid to ensuring that appointed or reappointed members are both willing and able to discharge effectively the responsibilities entrusted to them under the MEX Convention.

### 4.1.1. An interpretative Assembly Resolution

In addition to maintaining the *status quo*—namely, refraining from introducing significant structural or substantive amendments to the Convention—it may nonetheless be both prudent and desirable to enhance legal certainty and institutional clarity with respect to certain aspects of its practical implementation. Consideration should be given to clarifying the scope of the Council's discretion in relation to the appointment of experts to the IETC on an *ad hoc*, needs-based basis, as well as its authority to convene meetings of the Commission only where circumstances so warrant.

In this regard, the present Report proposes an approach analogous to that previously adopted in the interpretation of Article IV of the MEX Convention following the IETC's recommendation to amend Part 2 of the Technical Annex. As demonstrated by that precedent, interpretative action through an institutional instrument—rather than formal amendment of the treaty text—can provide effective clarification while preserving the stability and integrity of the MEX Convention.

Should this approach be followed, the LC may wish to recommend that the Council advance the matter through the submission of a working paper to the forthcoming 43rd Session of the ICAO Assembly. The objective would be the adoption of an Assembly Resolution articulating an agreed interpretative understanding of the MEX Convention.

In essence, such a Resolution would invite ICAO Member States to recognize that the Council retains full authority and prerogative to determine, in a flexible and pragmatic manner, both (i) the timing and frequency of the appointment of experts to the IETC, and (ii) the convening of its meetings. This would include the possibility of appointing experts on an as-needed basis, rather than adhering rigidly to a fixed three-year appointment cycle, and of convening meetings of the Commission only when justified by operational or technical necessity, rather than on a strictly annual basis.

Importantly, such an approach would not entail any modification of the MEX Convention's substantive obligations, nor would it alter the institutional balance established therein. Rather, it would serve to clarify the way existing provisions may be applied in practice, consistent with the object and purpose of the MEX Convention. In this sense, it represents a measured and proportionate response, aligning institutional practice with contemporary operational realities.

From a legal and practical perspective, the adoption of such an interpretative resolution presents no material risks or drawbacks. On the contrary, it offers a pragmatic mechanism for enhancing flexibility and efficiency in the functioning of the IETC, without triggering the complex, resource-intensive, and time-consuming process of formal treaty amendment.

## 4.2. Introducing an Amendment to the MEX Convention

Given that the Council has also requested an examination of possible alternatives for introducing formal amendments to the MEX Convention—particularly with a view to redefining the role and functions of the IETC or, alternatively, to consider its termination—it is appropriate to address, albeit cautiously, the available institutional avenues.

While this Report does not support such a course of action, it is acknowledged that any amendment to the MEX Convention, including a redefinition of the IETC's mandate or its potential discontinuation, could in principle be pursued through ICAO's established treaty-making procedures. This approach, though procedurally robust and legally sound, would constitute the most orthodox—and, arguably, the most appropriate—mechanism from the standpoint of legal certainty and institutional legitimacy.

Nevertheless, alternative avenues may also be contemplated, albeit as less optimal solutions. These include the adoption of an Assembly Resolution, the convening of a Conference of the Parties, or the adoption of a decision by the Council. Each of these options presents distinct legal, procedural, and institutional implications, and their respective advantages and limitations are examined in detail in the sections that follow.

### 4.2.1. Traditional ICAO-treaty based amendment

The termination of the IETC and/or modification of its role and functions may be carried out by relying on ICAO's traditional treaty-amendment procedure. In practice, this would involve placing the matter on the agenda of the LC, convening at least one of its sessions, obtaining the Council's approval of a draft amendment, transmitting the proposed text to the States Parties, and subsequently convening a Diplomatic Conference no earlier than six months after the circulation of the notification.

To the extent that sufficient consensus were secured in advance, a Diplomatic Conference could, in principle, be convened for a relatively brief duration. In practice, however, the standard pattern has been that such meetings extend over a period of approximately ten days to two weeks. In any event, the text adopted by a Diplomatic Conference would still require subsequent ratification by the States Parties. Recent experience within ICAO demonstrates that achieving a significant number of ratifications within a relatively short timeframe has proven challenging, unless the process is actively championed by influential industry stakeholders or by a coalition of particularly interested States. At present, it is doubtful that an amendment to the MEX Convention would be sufficiently compelling to mobilize such external advocacy, thereby diminishing the likelihood of rapid ratification.

The principal advantage of this option lies in its full conformity with ICAO's long-standing treaty practice. By adhering to orthodox channels, it avoids the interpretive uncertainties inherent in the alternative approaches considered above and guarantees both the legitimacy and the durability of the outcome. The disadvantages, however, are equally clear. Even under the most optimistic scenario, the process would extend over a period of two to three years merely to secure adoption of the amendment, while also imposing substantially greater financial and human resource burdens than the other options available. For an organization already operating under severe budgetary constraints, this inevitably raises the question of whether recourse to such a cumbersome mechanism is justifiable—either from the standpoint of cost-effectiveness or considering the urgency, or lack thereof, of the need for reform.

### 4.2.2. Council's Decision

As outlined in detail above, the IETC functions as the Council's advisory body in matters pertaining to plastic explosives. Its recommendations are not binding upon the Council, and still less upon the States Parties. Rather, the MEX Convention vests in the Council a series of oversight functions and duties in relation to the IETC's work. Among these is the responsibility to review, assess, and determine whether to transmit proposals for amendments to the Technical Annex to the States Parties. In effect, the Council acts as a liaison between the IETC and the States Parties.

On this basis the Council could then decide to terminate the IETC or redefine its role, particularly considering the limited relevance of tasks remaining to be assigned to such an entity. In communicating such a decision to the Member States, the Council might stipulate that the termination would take effect on a specified date, unless five or more States Parties were to object to the proposed course of action. This approach would, in essence, mirror the mechanism established in Article VI of the MEX Convention for the introduction of amendments to the Technical Annex.

It may be argued that this option presents an advantage in its relative ease and speed of execution, while entailing no significant financial cost. Its principal weakness, however, lies in the fact that it would rest on the application of an analogous mechanism and on the attribution of authority to the Council that the MEX Convention does not expressly confer. In other words, it would entail a reconfiguration of the institutional design and a redistribution of prerogatives not contemplated by the MEX Convention's drafters. The inherent risk in such creative interpretation is that it could set a precedent for reinterpreting other international instruments in ways that exceed their original intention, an outcome that could introduce unnecessary legal uncertainty and institutional challenges.

#### 4.2.3. The Conference of Parties

Throughout its text, the MEX Convention refers to the Conference of all States Parties only in the limited context of the mechanism for introducing amendments into the Technical Annex. In this respect, where the Council transmits to the States Parties a recommendation of an amendment formulated by the IETC, but five or more States object, the MEX Convention empowers the Council to convene a Conference of all States Parties. It may reasonably be inferred that this mechanism was incorporated into the treaty as a safeguard against the possibility that a small number of States might arbitrarily or capriciously obstruct the adoption of an amendment—for example, on political rather than technical grounds. Notably, however, the Council has never invoked this procedure.

By analogy, one might envisage the Council convening a Conference of all States Parties for the purpose of considering the termination of the IETC. Such a meeting, scheduled immediately prior to the ICAO Assembly, could be organized with a concise and clearly defined agenda. Provided that, adequate consultations had been undertaken in advance and consensus largely secured, deliberations at the Conference would not necessarily be protracted or contentious. Notification of the meeting could be circulated six months in advance, thereby ensuring both procedural regularity and sufficient preparation time.

The principal advantage of this option lies in the fact that the decision to terminate the IETC, or to introduce changes into its functions, would rest not with the Council alone, but with the collective body of all States Parties. Moreover, the process would likely be relatively swift and less resource-intensive than resorting to the full ICAO treaty-making procedure. Once the Conference of all States Parties reached a decision, it would not appear strictly necessary for each State Party to subject that determination to its domestic ratification process.

The drawback, however, mirrors that of the previous option: the MEX Convention does not expressly confer authority either upon the Council or upon the Conference of all States Parties to undertake such a course of action. Consequently, the same legal and institutional risks associated with creative reinterpretation—namely, the potential for precedents that extend beyond the drafters' original intent—apply with similar force to this alternative.

#### 4.2.4. An Assembly Resolution

In theory, the Assembly could also adopt a resolution purporting to terminate the IETC. However, such an approach would be far from ideal, both from a legal and an institutional perspective. An Assembly Resolution, by its very nature, does not possess the same normative force as an amendment to the MEX Convention. While it may carry important political weight and provide interpretative guidance, it cannot modify the treaty's operative provisions or alter the institutional architecture created by the MEX Convention. The IETC is expressly established by the MEX Convention itself; accordingly, its formal termination would ordinarily require an equivalent legal act, namely an amendment adopted in accordance with the applicable treaty-making procedures. Attempting to achieve the same outcome through a non-binding instrument would therefore risk creating a disconnect between the MEX Convention's text and institutional practice.

## 5. International Legal Framework to Amend Conventions, ICAO Practice and Treaty Practice outside ICAO

Section 4 has identified the principal alternatives available in addressing the future of the IETC, including the possibility of maintaining the *status quo* or, alternatively, pursuing a formal amendment to the MEX Convention with a view to redefining its role and functions or bringing its mandate to an end. As already noted, this Report does not recommend the introduction of such an amendment. Rather, it supports the preservation of the current institutional framework, complemented, where appropriate, by the adoption of an interpretative resolution by the ICAO Assembly at its forthcoming 43rd Session.

Notwithstanding this position, it remains necessary—and indeed consistent with the mandate entrusted to the Rapporteur—to examine the legal, institutional, and procedural framework that would govern a potential amendment to the MEX Convention, should the Council ultimately decide to pursue that course of action. It is for this reason that the present section is included. Its purpose is not to revisit the substantive merits of amendment, but rather to provide the LC with a clear understanding of the applicable rules and practical implications associated with such an undertaking.

To that end, the subsections that follow examine, first, the general regime governing treaty amendment as codified in the *Vienna Convention on the Law of Treaties* ("VCLT"), and, secondly, the long-standing institutional practice of ICAO in the absence of built-in amendment mechanisms. Attention is devoted to the structural limitations that arise in instruments such as the MEX Convention, which remains silent on the process for its own modification. To place these constraints in proper perspective, the analysis further considers comparative treaty practice beyond ICAO, where a discernible trend has emerged toward the incorporation of express amendment provisions within the text of multilateral instruments. These mechanisms—typically addressing matters such as the initiation of amendments, the role of conferences of States Parties, voting thresholds, and conditions for entry into force—are designed to facilitate adaptability while reducing the procedural burden traditionally associated with treaty revision. Their absence in most ICAO instruments, with limited exceptions, remains a defining feature of the Organization's legal architecture.

Finally, this section also briefly reflects on more recent developments in international practice concerning the use of technological tools in treaty-making. As evidenced in recent work undertaken within the United Nations system, there is a growing recognition that digital platforms and, where appropriate, hybrid or virtual modalities may offer opportunities to enhance efficiency, reduce costs, and broaden participation in international negotiations. While ICAO has historically relied on more traditional, in-person processes—reflecting, in part, the complexity and sensitivity of its work—these emerging practices may, in due course, merit careful consideration as the Organization continues to refine and modernize its treaty-making procedures.

### 5.1.The VCLT Framework for Treaty Amendment

On the premise that every State possesses the capacity to conclude treaties,[162] it necessarily follows that each State also retains the authority to participate in the amendment of such instruments.[163] The VCLT, which codifies "[a]n important part of the custom and case law"[164], indicates that any treaty may be amended by agreement between the parties.[165] Unless a treaty itself prescribes a specific amendment procedure, the general rules for introducing such amendments are those set out in the VCLT, which may be summarized as follows:

i) Notification**:** The proposal to amend must be communicated to all States Parties. While the VCLT does not expressly indicate who bears responsibility for this function, in practice it is ordinarily carried out by the treaty's depositary.[166] The VCLT imposes no threshold as to the number of States that must act jointly to request the amendment of an international instrument.

ii) Right of participation: Each State Party is entitled to take part in the decision-making process regarding the proposed amendment. Although the VCLT provides little detail on this point, the right is generally understood to encompass the prerogative of submitting comments to the depositary or, where

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[162] Robert Y. Jennings says that "the treaty is far and away the most important instrument known to international law and relationships; and it is also, in volume, range, and uniquity, the most important source of international law." See Robert Y. Jennings, "Treaties" in Mohammed Bedjaoui (Ed.), *International Law: Achievements and Prospects* (Paris: Martinus Nijhoff Publishers – Unesco, 1991) at 136.

[163] In international law, although similar, there is a distinction between an "amendment" and a "modification" of a treaty. Shaw supports the view that an "amendment" refers to the certain changes of the international instrument affecting all party, whereas a "modification" implies an alteration of such instrument but rather affecting particular parties. See M. N. Shaw, *International Law*, 3rd Ed. (Cambridge: Cambridge University Press, 1995) at 581. Jennings writes that "it should be added that this distinction, thought theoretically valid, is not always so clear in practice and the one situation may well change into the other one." See Robert Y. Jennings, "Treaties" in Mohammed Bedjaoui (Ed.), *International Law: Achievements and Prospects* (Paris: Martinus Nijhoff Publishers – Unesco, 1991) at 149. See also Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 1998) at 630-632.

[164] See Robert Y. Jennings, "Treaties" in Mohammed Bedjaoui (Ed.), *International Law: Achievements and Prospects* (Paris: Martinus Nijhoff Publishers – Unesco, 1991) at 136.

[165] See VCLT Art. 40.

[166] *Ibid*.

applicable, expressing an objection either to the convening of a diplomatic conference or to the introduction of the amendment itself.[167]

iii) Negotiation and conclusion: Each State Party is further entitled to participate fully in the negotiation and conclusion of the agreement designed to modify the treaty. Correspondingly, every State Party retains the right to accede to the amended treaty.[168]

iv) Binding effect: An amendment agreement does not bind a State that is already party to the original treaty unless that State expressly becomes a party to the amending agreement.[169]

v) Status of New Parties: A State that was not a party to the original treaty but subsequently accedes solely to the amending agreement will be regarded as a party to the treaty as amended.[170]

### 5.2. Practice at ICAO

None of the international aviation security conventions establish specific rules governing their amendment.[171] The same observation applies more broadly to other treaties developed under the auspices of ICAO, including those in which the LC participated in the drafting process leading to their eventual adoption.[172]

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[167] *Ibid*.

[168] *Ibid*.

[169] *Ibid*.

[170] *Ibid*.

[171] See *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, signed at Tokyo on 14 September 1963, United Nations, Treaty Series, vol. 704, No. 10106; *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970, United Nations, Treaty Series, vol. 860, No. 12325*; Convention for the Suppression of Unlawful Act against the Safety of Civil Aviation*, signed in Montreal on 23 September 1971, United Nations, Treaty Series, vol. 974, No. 14118; *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, *supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971*, adopted in Montreal on 24 February 1988, United Nations, Treaty Series, vol. 1589, No. A-1418; *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, done at Beijing on 10 September 2010; *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, done at Beijing on 10 September 2010, *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft*, done at Montreal on 14 April 2014.

[172] See *Convention on the International Recognition of Rights in Aircraft*, signed at Geneva on 19 June 1948; *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, signed at Rome on 7 October 1952; *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929*, done at The Hague on 28 September 1955; *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, signed at Guadalajara on 18 September 1961; *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955*, signed at Guatemala City on 8 March 1971; *Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929*, signed at Montreal on 25 September 1975; *Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929,* signed at Montreal on 25 September 1975; *Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929*, signed at Montreal on 25 September 1975; *Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929*, signed at Montreal on 25 September 1975; *Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface Signed at Rome on 7 October 1952*, signed at Montreal on 23 September 1978; *Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999*; *Convention on Compensation for Damage Caused by Aircraft to Third Parties, signed at Montreal on 2*

There are, however, two notable exceptions. The first is the *Convention on International Civil Aviation*, signed at Chicago on 7 December 1944 ("Chicago Convention"). Pursuant to its provisions, any proposed amendment may be submitted directly to the Assembly. Such a proposal is adopted if it secures the approval of two-thirds of the States present and voting. The amendment subsequently enters into force for those Contracting States that have ratified it once it has been ratified by the number of States specified by the Assembly, which in any event cannot be fewer than two-thirds of ICAO's total membership.[173] In practice, this means that an amendment to the Chicago Convention can be negotiated and adopted in less than a year. The proposal does not need to go through the ICAO treaty making process.

The second example is the *Convention on International Interests in Mobile Equipment* and the *Protocol on Matters Specific to Aircraft Equipment*, both signed in Cape Town on 16 November 2001 ("Cape Town Convention and Aircraft Protocol"). The Cape Town Convention established the *Review Conferences of States Parties*, which may be convened by the depositary, in consultation with the Supervisory Authority, as necessary. These conferences are empowered to examine whether modifications to the treaty framework or its institutional arrangements are desirable. Any amendment to the Cape Town Convention must be approved by at least a two-thirds majority of the States Parties participating in the Review Conference and enters into force, for those States that ratify, accept, or approve it, once three States have completed that process. This notably low threshold reflects the approach adopted for the Convention itself, which entered into force upon ratification by only five States. The Aircraft Protocol contains a parallel mechanism, with the sole difference that entry into force of an amendment requires ratification, acceptance, or approval by eight States.[174]

In the absence of a specific provision within an ICAO-sponsored treaty governing amendment procedures, the applicable process is shaped by three elements:(i) the long-standing ICAO practice; (ii) the *Procedure for Preparation of Draft Conventions* set out in Attachment A of ICAO Doc. 7669-LC/139/7, and (iii) Appendix B, *Procedure for Approval of Draft Conventions* of ICAO Assembly Resolution A42-5.

Consistent with ICAO practice, the preliminary stages of treaty-making typically begin outside the immediate domain of the LC.[175] This is especially true in the context of the

*May 2009*; and *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft, signed at Montreal on 2 May 2009*.

[173] See Chicago Convention, Art. 94. In 2016, the Assembly approved proposals to increase the Council membership to 40 States and the Air Navigation Commission to 21 members. See *Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 50] (a)*, signed in Montreal on 6 October 2016 and the *Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 56]*, signed in Montreal on 6 October 2016.

[174] See *Protocol to the Convention on International Interest in Mobile Equipment on Matters specific to Aircraft Equipment*, signed at Cape Town on 16 November 2001, Art. XXXVI.

[175] In principle, recourse to international treaty-making is justified only when certain conditions are present. First, the issue in question must be of such magnitude that it warrants regulation through a binding multilateral instrument rather than more limited or *ad hoc* arrangements. Second, the matter must be of an inherently international character, such that it cannot be adequately addressed through the domestic legal systems of individual States. In other words, the problem must transcend the confines of national jurisdiction and call for a coordinated international response. Third, and perhaps most crucially, even at the preliminary stages of negotiation there must exist a demonstrable degree of consensus—whether within the broader international community or among a critical mass of States—that the matter merits collective regulation. International law, at its core, is the expression of the will of States. However well-drafted a treaty text may be, it cannot be imposed upon States absent their consent. Culled from a personal conversation between Prof. Dr. Michel Milde and the Rapporteur (May 2011).

negotiation of new instruments, although the same procedure has also been followed with respect to the amendment of existing treaties. Generally, the process is triggered when a particular problem is identified as requiring resolution through international treaty. A small group of States, the Secretariat, or industry stakeholders may recommend the establishment of a working or study group to assess the issue.[176]

Where sufficient support for such an initiative exists, the ICAO Council ordinarily approves it. Upon the completion of the group's deliberations, and where the findings recommend either the preparation of a new instrument or further legal study, the Council may then instruct the LC to include the matter in its work program. In some cases, the inclusion of the subject matter into the LC's work program may also be done prior to the establishment of the small working group or the task force.

At this stage, the LC proceeds in accordance with the *Procedure for Preparation of Draft Conventions*, which does not operate as a prescriptive code but rather serves as a set of guiding principles for the preparation of draft conventions. The Chairperson of the LC typically appoints a rapporteur, who prepares a report for submission either to the Sub-Committee or directly to the LC, depending on the Chairperson's instructions and whether a Sub-Committee meeting has been convened. In certain instances, the rapporteur may also advance a preliminary draft text of a proposed convention. The process usually includes meetings of both the Sub-Committee and the LC, although convening both is not strictly required. Sub-Committee meetings typically involve the participation of 25–35 States, whereas the LC is open to the full ICAO membership. The dual-meeting structure serves two principal purposes: first, to maximize State participation; and second, to build the broadest possible consensus while avoiding the submission of a draft text with excessive unresolved issues to the Diplomatic Conference.

Historically, the meetings of small working groups, Sub-Committees, and the sessions of the LC have been conducted predominantly in person. Only on one occasion has ICAO resorted to virtual modalities to conduct an LC session. The 38th Session of the Legal Committee, held from 22 to 25 March 2022, considered a proposal to amend its Rules of Procedure to expressly allow for the use of virtual meetings. While the proposal did not ultimately receive the endorsement of the Committee's plenary, the experience gained during that session—conducted entirely through virtual means—demonstrated that such modalities are both viable and capable of supporting meaningful deliberation among Member States. The potential for expanding the use of virtual meetings merits renewed and careful consideration. Developments across other international organizations indicate a clear and growing trend

[176] Pursuant to the LC's Rules of Procedure, working group meetings, subcommittee meetings, and LC sessions require translation and interpretation services. While this requirement is understandable for subcommittee meetings and LC sessions—given the significantly larger number of participants and the risk of disadvantaging States if only one language were used—it may be excessive for smaller bodies such as working or study groups. These smaller groups generally consist of 10–15 members, most of whom are fluent in English. In practice, English is typically used as the working language. Providing interpretation and translation in such settings imposes considerable costs, as language services represent the most significant expense in convening meetings. Indeed, the organization has at times designated certain smaller study groups as "task forces" precisely to avoid triggering the rule, thereby reducing translation and interpretation costs. Accordingly, the rule should be amended to clearly exempt smaller groups, such as working and study groups, from the requirement to provide translation and interpretation services. This adjustment would align the rule with established practice and generate meaningful cost savings for the organization. See ICAO Doc. 7669-LC/139/7, *Legal Committee – Constitution – Procedure for Approval of Draft Conventions - Rules of Procedure*, Rule 44.

toward the adoption of virtual and hybrid formats as a means of enhancing efficiency, broadening participation, and reducing the financial and logistical burdens associated with traditional in-person meetings. These arrangements have proven particularly effective in facilitating more frequent interactions, allowing institutions to respond more dynamically to evolving legal and policy issues without compromising the quality of their outputs.[177]

In practice, for most treaties and their amendments, a single meeting of the Sub-Committee and one session of the LC have sufficed. An exception occurred in the process leading to the adoption of the Beijing Convention and Protocol, which required two Sub-Committee meetings—a deviation from the general rule. Unlike the process that led to the MEX Convention, the Sub-Committee and LC meetings are not usually held within the same year, as evidenced by the procedures followed for the most recent instruments adopted under ICAO auspices.

Once the LC concludes its deliberations and determines that a draft convention is ready for submission to the Member States, it transmits a report to the ICAO Council recommending the convening of a Diplomatic Conference. The LC functions in an advisory capacity, and its recommendations are not binding upon the Council.[178] The Council may either reject the proposal or, alternatively, circulate the draft convention to Member States and relevant international organizations.[179] Should the Council resolve to convene a Diplomatic Conference, the opening date must be set at least six months after the transmission of the draft text.[180] In such cases, the Council may append comments and invite States and organizations to submit written observations within a minimum period of four months.[181]

The *Procedure for the Approval of Draft Conventions*, as reflected in ICAO Assembly Resolution A42-5, provides the possibility of convening a Diplomatic Conference in conjunction with a regular session of the Assembly, which is ordinarily held in September–October every three years. In practice, this would allow a Diplomatic Conference to be scheduled immediately prior to the Assembly session. Such an arrangement could generate cost savings for participating States by consolidating travel and logistical expenses. At the same time, however, it would impose a significantly heavier administrative and workload burden upon the ICAO Secretariat. While this option has seldom been explored in practice, it should not be dismissed out of hand. It is submitted that this option warrants careful consideration, particularly in the context of convening a conference to examine the potential amendment of a convention in circumstances where the issues at stake are not unduly complex and where a significant degree of consensus already exists. In other words, it is not suggested that a diplomatic conference be convened prior to the Assembly, for example, to adopt a new treaty regulating greenhouse gas emissions from international aviation—an issue that remains highly contested and fiercely debated. If the Convention were to be amended, a Diplomatic

[177] Within the ICAO context, a more flexible approach—combining in-person sessions with virtual or hybrid meetings—could offer significant advantages. Virtual modalities present an opportunity to convene the Legal Committee, or its substructures, with greater regularity and at lower cost, thereby improving continuity and momentum in its work. At the same time, periodic in-person sessions could be retained for more complex or sensitive deliberations requiring direct engagement. Such a calibrated, hybrid approach would not only align ICAO with contemporary institutional practices but would also strengthen the overall effectiveness and responsiveness of its treaty-making and legal advisory functions.

[178] See ICAO A42-5, Appendix B.

[179] *Ibid*.

[180] *Ibid*.

[181] *Ibid*.

Conference could be convened in close temporal proximity to the 43rd Session of the ICAO Assembly, scheduled for September–October 2028, either immediately preceding or following that session, to promote efficiency and optimize the use of institutional and logistical resources.

In the absence of built-in amendment mechanisms, ICAO's treaty-making process exhibits both notable strengths and undeniable limitations. Among its advantages, the process is highly participatory, encompassing multiple stages of engagement for Member States. The convening of meetings at both the Sub-Committee and LC levels, together with the appointment of a Rapporteur, ensures that issues are subject to extensive debate and technical scrutiny. Moreover, the preliminary establishment of small working or study groups facilitates the identification of matters that genuinely warrant regulation through international treaty-making, while the Council's supervisory role guarantees that the Organization's human and financial resources are allocated in a manner consistent with institutional priorities.

Notwithstanding these strengths, the process suffers from several structural drawbacks. Chief among them is the tendency to treat all international instruments as though having the same degree of complexity, urgency, and importance. For example, introducing limited amendments to the MEX Convention does not present the same level of technical or political difficulty as revising the *Convention for the Unification of Certain Rules for International Carriage by Air*, done at Montreal on 28 May 1999, an instrument applied daily across nearly the entire world. Yet the same procedural framework is applied in both contexts, irrespective of the magnitude of the issue at stake. The result is a process that is excessively time-consuming, bureaucratic, and costly, thereby discouraging States from viewing international treaty-making as a practical instrument for addressing civil aviation problems with a transnational dimension.

This perception has tangible consequences. For instance, in the context of discussions on the enforcement mechanisms required for the Carbon Offsetting and Reduction Scheme for International Aviation ("CORSIA"), negotiators quickly dismissed the possibility of pursuing an international treaty. The reasons were evident: the procedure was too protracted, the outcome too uncertain, and the ratification process so lengthy that entry into force could not realistically be expected within a useful timeframe.[182]

The delays associated with ICAO treaty-making are considerable. Most instruments developed under ICAO auspices have required at least three to four years for negotiation and adoption, with the notable exception of the MEX Convention, which was concluded within 27 months. This figure does not include the additional years often needed to secure sufficient ratifications for entry into force. Furthermore, the existing procedural rules neither explicitly prohibit nor expressly permit the convening of virtual meetings of the Sub-Committee, the LC, or the Diplomatic Conference. By contrast, other international organizations have already begun to embrace such modalities as a means of expediting treaty-making processes. Examples of these practices will be considered in the following sections of this report.

Another aspect of ICAO's treaty-making procedure that merits reconsideration is the requirement that, once the Council has approved the convening of a Diplomatic Conference, the conference may not be held earlier than six months from the date on which the notification is transmitted to States. While such a delay may have been justified historically—when communications were slower and logistical arrangements more demanding—its rationale

[182] See Piera at 319-352.

appears less compelling in the contemporary context, where instantaneous connectivity and digital coordination are the norm. The strict six-month interval risks impeding the timely adoption of instruments, particularly in circumstances where urgent regulatory or security needs call for an expedited process. A recalibration of this requirement could therefore enhance the responsiveness and effectiveness of ICAO's international law-making function.

### 5.3.Treaty Practice with Built-In Amendment Mechanisms outside ICAO

The *Convention on the Physical Protection of Nuclear Material* establishes a detailed procedure for the amendment of its provisions. Any State Party may submit a proposed amendment to the depositary, which is then required to circulate the proposal to all States Parties. Should a majority of States Parties request it, the depositary must convene a conference to consider the proposal, with the stipulation that such a conference cannot be held earlier than thirty days following the issuance of invitations. Adoption of an amendment at the conference requires the approval of two-thirds of all States Parties. The amendment enters into force thirty days after two-thirds of the States Parties have deposited their instruments of ratification, acceptance, or approval with the depositary. For any remaining State Party, the amendment enters into force on the date that the respective instrument of ratification, acceptance, or approval is deposited.[183] The *International Convention for the Suppression of Acts of Nuclear Terrorism* likewise adopts a very similar approach with respect to its amendment procedure.[184]

In a more simplified and less prescriptive fashion, the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* provides that one-third of the States Parties, or ten States Parties—whichever is higher—may submit a request for amendment to the Secretary-General of the International Maritime Organization ("IMO"). The Secretary-General is then obliged to convene a conference to consider the proposal. Unlike more detailed treaty frameworks, this instrument leaves it to the conference itself to determine the applicable procedural and substantive rules governing the amendment process.[185] The *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*[186] and the *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*[187] adopt the same approach with respect to its amendment procedure, leaving the determination of detailed procedural rules to the conference of States Parties.[188]

The *International Convention for the Suppression of the Financing of Terrorism* illustrates a particularly interesting interplay between the treaty itself and its Annex,

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[183] See *Convention on the Physical Protection of Nuclear Material*, adopted in Vienna on 26 October 1979, United Nations, Treaty Series, vol. 1456, No. 24631, Art. 20 [Convention on the Protection of Nuclear Material].

[184] See *International Convention for the Suppression of Acts of Nuclear Terrorism*, adopted by the General Assembly of the United Nations on 13 April 2005, U.N. Doc. A/RES/59/290, Annex, Art. 26.

[185] See *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done in Rome on 10 March 1988, United Nations, Treaty Series, vol. 1678, No. 29004, Art. 20 [*SUA Convention*].

[186] See *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, done at Rome on 10 March 1988, Art. 8, United Nations, Treaty Series, vol. 1678, No. 29004.

[187] See *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, signed in London on 14 October 2005, Art. 20.

[188] The *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* follows essentially the same amendment procedure. The only distinction lies in the threshold required to initiate the process: it may be triggered by one third of the States Parties, or by five States Parties—whichever represents the higher figure. See *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, signed in London on 14 October 2005, United Nations, Treaty Series, vol. 1678, No. 29004, Art. 11.

which is central to understanding the procedure for introducing amendments.[189] This Convention establishes a general framework by criminalizing the provision or collection of funds with the knowledge that they are to be used for the commission of terrorist acts.[190] The definition of those acts, however, is not contained in the Convention but rather in its Annex, which, at the time of adoption in 1999, incorporated nine pre-existing international instruments related to the prevention and suppression of terrorism.[191] In this sense, the Annex serves a complementary role: it specifies the underlying conduct that qualifies as an international criminal offense.[192] The instruments listed include treaties addressing, inter alia, unlawful interference with civil aviation, attacks against internationally protected persons, maritime safety, and hostage-taking.[193] With the passage of time, however, the Annex has become increasingly outdated, as a number of new international counter-terrorism instruments have been adopted since 1999.[194] To address this, it establishes a mechanism by which the Annex may be amended. Any State Party may submit to the depositary a proposal to update the Annex, but such amendment is limited to the addition of new treaties that are (i) open to participation by all States, (ii) in force, and (iii) ratified, accepted, approved, or acceded to by at least twenty-one States Parties to this Convention. Once these conditions are satisfied, the depositary is obliged to circulate the proposal to all States Parties.[195] Unless one third of the States Parties submit a written objection within 180 days of its circulation, the proposed amendment is deemed to have been adopted.[196] Nevertheless, even after adoption, the amendment to the Annex enters into force only upon ratification. Specifically, it becomes effective thirty days after the deposit of the twenty-second instrument of ratification, acceptance, or approval, but only for those States Parties that have completed this procedural step.

The *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ("CITES") constitutes a landmark international agreement designed to regulate trade in specimens of wild animals and plants so as to ensure that such trade does not imperil their survival.[197] By establishing a comprehensive framework of rules governing the import, export, and re-export of listed species, CITES seeks to reconcile the imperatives of conservation with the realities of international commerce.[198] CITES further offers a compelling illustration of a treaty incorporating a built-in amendment mechanism.[199] Under its procedural framework, the initiation of the amendment process requires a request by at least one third of the States Parties to convene a Conference of the Parties for the purpose of considering proposed changes.[200] Such proposal must be submitted to the Secretariat. Any such amendment may only be adopted if it subsequently obtains the approval of a two-thirds majority of the Parties present and voting at the Conference of Parties.[201] This procedural design underscores both the participatory

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[189] See *International Convention for the Suppression of the Financing of Terrorism*, adopted by the General Assembly of the United Nations on 9 December 1999, U.N. Doc. A/RES/54/109, Annex, at 23 [C*onvention on the Financing of Terrorism*].
[190] *Ibid*.
[191] *Ibid*.
[192] *Ibid*.
[193] *Ibid*.
[194] *Ibid*
[195] *Ibid*.
[196] *Ibid*.
[197] See *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, signed at Washington on 3 March 1973.
[198] *Ibid*.
[199] *Ibid*.
[200] *Ibid*.
[201] *Ibid*.

nature of the regime and its aspiration to balance flexibility with broad consensus in the progressive development of its normative framework.

On 19 June 2023, States adopted the *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* ("BBNJ Agreement").[202] This instrument, which complements the *United Nations Convention on the Law of the Sea* ("UNCLOS"), establishes a legal framework for the protection of marine biodiversity in areas beyond national jurisdiction, while simultaneously promoting equitable access to and sustainable use of such resources. Notably, the BBNJ Agreement incorporates a built-in amendment mechanism. Pursuant to this procedure, any Party may submit a proposed amendment to the Secretariat. Where at least one half of the Parties respond favourably to the request within six months of the communication's circulation, the amendment is to be placed on the agenda for consideration at the subsequent meeting of the Conference of the Parties.

More recently, on 24 December 2024, the General Assembly adopted, by Resolution 79/243, the *United Nations Convention against Cybercrime*.[203] This instrument represents the first comprehensive global treaty addressing criminal activities committed through information and communications technology systems.[204] It equips States with a range of measures to prevent and combat such offenses and, importantly, strengthens international cooperation, particularly in the sharing of electronic evidence related to serious crime.[205] This Convention also establishes a specific framework for its own amendment.[206] It provides that, five years after the treaty's entry into force, any State Party may propose an amendment by transmitting it to the Secretary-General of the United Nations.[207] The Secretary-General must then communicate the proposal to all States Parties and to the Conference of the States Parties to the Convention, which is tasked with considering and deciding upon the amendment.[208] The treaty emphasizes consensus-building as the primary method of decision-making. However, if all efforts to reach consensus fail, the amendment may, as a last resort, be adopted by a two-thirds majority of the States Parties present and voting at the Conference.

Although numerous international instruments addressing the prevention and suppression of terrorism, many of which have been developed under the auspices of ICAO, lack any built-in mechanism for their amendment, contemporary treaty practice reveals a discernible shift.[209] As illustrated above, more recently concluded instruments increasingly

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202 See United Nations General Assembly, A/CONF.232/2023/4, *United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*.

203 See United Nations General Assembly A/RES/79/243, *United Nations Convention against Cybercrime; Strengthening International Cooperation for Combating Certain Crimes Committed by Means of Information and Communications Technology Systems and for the Sharing of Evidence in Electronic form of Serious Crimes*.

204 *Ibid*.

205 *Ibid*.

206 *Ibid*.

207 *Ibid*.

208 *Ibid*.

209 See for instance the *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on 15 December 1997, U.N. Doc. A/RES52/164, Annex; *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, signed at Tokyo on 14 September 1963, United Nations, Treaty Series, vol. 704, No. 10106; *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970, United Nations, Treaty Series, vol. 860, No. 12325*; Convention for the Suppression of Unlawful Act against the Safety of Civil Aviation*, signed in Montreal on 23 September 1971, United Nations, Treaty Series, vol. 974, No. 14118; *Convention on the Prevention and Punishment of Crimes*

incorporate detailed provisions governing the procedures by which they may be amended. This evolution reflects an unmistakable tendency toward enhancing institutional adaptability, ensuring that the constituting instruments remain responsive to emerging challenges. In this respect, the inclusion of explicit amendment rules may be regarded as both a more efficient and a more expedient approach to the progressive development of international law.

### 5.4. Built-In Amendment Clauses as a Tool for Treaty Adaptability

Any built-in amendment mechanism must be carefully designed to address several procedural and substantive issues. These should include:

i) the determination of who is entitled to initiate the amendment process, and to whom such a request must be submitted.
ii) the threshold that must be met for an amendment proposal to proceed to formal consideration.
iii) the identification of the entity vested with the authority to convene a conference of the Parties or a diplomatic conference.
iv) the time frame within which such a conference must be held.
v) the decision-making threshold required at the conference itself for the adoption of an amendment proposal. Customary practice indicates that such proposals must be approved by a two-thirds majority of the States present and entitled to vote; and
vi) the level of participation—expressed in terms of the number of States—that is required for the amendment to enter into force, together with the procedural act (ratification, acceptance, or approval) by which such consent must be expressed.

### 5.5. Treaty-Making in the Digital Age: Insights from the United Nations Report on Technology

On 10 July 2025, the Secretary-General of the United Nations submitted a report addressing the role of technology in shaping contemporary treaty-making practice.[210] The report underscores that a number of States have already succeeded in concluding negotiations and adopting treaties with the aid of technological tools.[211] One State, in particular, reported that it had relied exclusively on a digital platform for the successful conclusion of a multilateral agreement.[212] Others emphasized the utility of virtual breakout rooms and similar technologies in facilitating online rounds of treaty negotiations. The OPCW observed that it has, in fact, employed virtual negotiations since as early as 1997.[213] Several States, however, clarified that

*against Internationally Protected Persons, including Diplomatic Agents*, adopted by the General Assembly of the United Nations on 14 December 1973, United Nations, Treaty Series, vol. 1035, No. 15410; *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on 17 December 1979, United Nation, Treaty Series, vol. 1316, No. 21931; *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, *supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971*, adopted in Montreal on 24 February 1988, United Nations, Treaty Series, vol. 1589, No. A-1418; *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, done at Beijing on 10 September 2010; *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, done at Beijing on 10 September 2010, *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft*, done at Montreal on 14 April 2014.

[210] See United Nations General Assembly, A/80/132, *Report of the Secretary General on the Role of Technology in Shaping Treaty-Making Practice*.

[211] *Ibid*.

[212] *Ibid*.

[213] *Ibid*.

their use of virtual meetings remained confined to the preparatory stages of treaty-making, with the final adoption of the instrument continuing to occur in person. Likewise, the act of signature remains anchored in the traditional requirement of a physical, ink-based format.[214]

What emerges from these developments is a discernible trend: the long-standing reliance on protracted, face-to-face meetings is gradually being complemented—if not partially supplanted—by more efficient virtual sessions. Although the adoption of such practices does not resolve every challenge associated with treaty-making, it nonetheless contributes to greater efficiency and a more rational allocation of both human and financial resources.[215]

The report also highlights a divergence in practice concerning formalities. While several UN specialized agencies acting as depositaries continue to require handwritten originals for multilateral treaties, some States have embraced the use of electronic signatures supported by blockchain or other certification systems.[216] With respect to electronic notifications, the Food and Agriculture Organization ("FAO") and the UN Secretary-General permit the submission of electronic copies of instruments of ratification, accession, or approval, with originals to follow.[217] By contrast, other specialized agencies—including the International Labor Organization ("ILO"), the Organization of American States ("OAS"), UNESCO, and ICAO—continue to require upon originals for deposit.[218]

Taken together, these experiences suggest that technology offers a remarkable opportunity to broaden participation, enhance transparency, and introduce greater efficiency and cost savings into the treaty-making process. Against this backdrop, it may be timely for ICAO's Legal Affairs and External Relations Bureau ("LEB") to examine the potential integration of technological tools to expedite and streamline the treaty-making process. In the absence of such innovations, States, the Organization, and industry stakeholders may increasingly turn to alternative mechanisms to address legal problems with a clear international dimension.

### 6. Additional recommendations

While the primary focus of this Report has been to assess whether the Convention should be amended to redefine the role and functions of the IETC or to consider its termination, the analysis undertaken in the preceding sections has also brought into sharper relief several broader institutional observations. These do not constitute central recommendations addressed directly to the future of the IETC; rather, they represent lessons emerging from the present

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[214] *Ibid*.

[215] Virtual meetings are by no means a panacea. While they offer certain clear advantages—such as reduced costs for participants and greater flexibility in scheduling—they also present several well-documented drawbacks. First, in the context of ICAO-convened meetings attended by Member States, the most significant cost element is interpretation, a requirement that remains regardless of whether the meeting is held in person or virtually. Under the Rules of Procedure of the LC, interpretation into all ICAO working languages is mandatory for Sub-Committee meetings, LC sessions, and even meetings of working groups. By contrast, ICAO Secretariat Task Forces and Study Groups are not subject to the same requirement, irrespective of the modality of the meeting. Second, virtual meetings often face logistical challenges arising from the differing time zones of participants' jurisdictions, which can complicate efforts to find suitable meeting times. Third, experience suggests that maintaining participants' attention and engagement becomes increasingly difficult in virtual sessions that extend beyond three hours; concentration tends to wane, and deliberations risk becoming less effective as a result.

[216] See United Nations General Assembly, A/80/132, *Report of the Secretary General on the Role of Technology in Shaping Treaty-Making Practice*.

[217] *Ibid*.

[218] *Ibid*.

exercise, which may usefully inform ICAO's approach to treaty-making and institutional design more generally.

First, the Report has highlighted the structural constraints inherent in legal instruments that lack built-in mechanisms for their own amendment. As demonstrated throughout the Report, the absence of such provisions significantly complicates the process of adapting a treaty to new circumstances. Any modification must then rely on the full machinery of traditional treaty-making, with all the procedural and temporal burdens that such a process entails. Comparative practice outside ICAO shows a clear and sustained evolution in a different direction: modern multilateral instruments increasingly incorporate express amendment clauses, often carefully calibrated to the technical and political characteristics of the regime in question. These mechanisms—defining who may initiate amendments, the role of conferences of States Parties, decision-making thresholds, and entry-into-force requirements—are designed to enhance adaptability without sacrificing legal certainty. The experience with the present Convention underscores the value of that approach and suggests that future ICAO instruments may benefit from the deliberate inclusion of such provisions at the drafting stage.

Secondly, the analysis has revealed the need to reconsider the degree of procedural rigidity embedded in ICAO's treaty-making framework. The Organization has traditionally relied on a uniform and highly structured approach, applying broadly similar processes to instruments of very different complexity, scope, and urgency. This may result in disproportionate procedural burdens in situations where limited or technical adjustments are under consideration.

Thirdly, the Report has drawn attention to the potential role of technological innovation in supporting the modernization of ICAO's working methods. Experience within the United Nations system and other international organizations demonstrates that virtual and hybrid modalities can, when appropriately deployed, facilitate participation, reduce costs, and allow for more regular interaction among States. The 38th Session of the Legal Committee provided a practical illustration of this possibility. While the proposal to formally amend the Rules of Procedure to allow for virtual meetings was not endorsed, the session itself confirmed that meaningful deliberations can take place in such a format.

In this respect, there is a strong case for revisiting the issue with a view to adopting a more flexible model, combining in-person meetings with virtual or hybrid sessions. Such an approach would allow the Legal Committee, and potentially its substructures, to meet more frequently and to sustain momentum in its work, while preserving in-person engagement for matters requiring more intensive negotiation. The objective would not be to replace traditional formats, but to complement them in a manner consistent with efficiency, cost-effectiveness, and institutional accessibility.

Fourthly, and as a corollary to the above, there may be merit in reassessing certain temporal and procedural constraints that no longer reflect contemporary operational realities. For example, the fixed timelines associated with the convening of diplomatic conferences—which were historically justified by communication and logistical considerations—may, in certain cases, operate to delay unnecessarily the adoption of instruments where a sufficient degree of consensus has already been achieved. A more flexible approach to such requirements could contribute to enhancing the responsiveness of ICAO's normative framework, without undermining the safeguards that ensure fairness and participation.

Finally, the Report has underscored, in several contexts, the importance of ensuring closer alignment between legal decision-making and technical expertise. The present exercise itself illustrates the risks inherent in undertaking structural reform in the absence of a sufficiently robust technical basis. Looking forward, the Organization may wish to consider more systematic mechanisms for integrating independent technical assessment into its decision-making processes, particularly in areas—such as aviation security—where legal frameworks are closely intertwined with rapidly evolving technological environments.

These observations are not intended to expand the scope of the present mandate. Rather, they are offered as reflections derived from the analysis conducted in this Report and as potential points of reference for future institutional development. Together, they suggest that the challenges encountered in the context of the MEX Convention are not unique but are indicative of broader dynamics affecting international treaty-making, including within ICAO. Addressing those dynamics will require not only legal precision but also a willingness to adapt processes and structures in a measured and pragmatic manner.

## 7. Conclusions

This Report has addressed the mandate entrusted to the Rapporteur: to evaluate whether an amendment to the Convention is required to redefine the role and functions of the IETC or, alternatively, to consider its termination. In undertaking that task, the Report has proceeded in a structured sequence, moving from an examination of the MEX Convention and its institutional design to a critical evaluation of its operation in practice, and ultimately to the assessment of the legal and institutional options available to the Council and the Legal Committee.

While providing a brief introduction to the appointment process of this Rapporteur, section 1 clarifies the exact mandate entrusted in the Rapporteur and the scope of the task. Section 2 has provided the necessary legal and historical foundation for the inquiry. It has examined the circumstances that led to the MEX Convention's adoption, its objectives, the obligations it imposes on States Parties and on the Council, and the institutional place of the IETC within its architecture. It has also shown that, while the Convention contains a mechanism for amending the Technical Annex, it does not include a built-in procedure for amending its substantive provisions. That omission is not merely technical; it lies at the heart of the present study, because any proposal to redefine the IETC's role or to terminate it would necessarily confront the procedural consequences of that drafting choice.

Section 3 has moved from description to evaluation. It has demonstrated that the MEX Convention was, at the time of its adoption, an important and timely response to a clearly identified threat, and that it succeeded in filling a significant regulatory gap by establishing a global legal framework for the marking and control of plastic explosives. It has also shown, however, that both the MEX Convention and the IETC have become subject to evident limitations, including a narrow substantive scope, limited adaptability, an absence of enforcement mechanisms, and a gradual reduction in the practical visibility of the IETC within ICAO's broader institutional landscape. Yet the same section has also made clear that these observations, while important, do not in themselves justify a substantial amendment to the MEX Convention. The Report also underscores that, in the absence of the independent technical assessment proposed in 2024 but not pursued by the Council, there is no sufficiently robust evidentiary basis for concluding that the IETC should be redefined, much less terminated.

That conclusion is of decisive importance. The Council's decision not to pursue a third-party technical study—understandable though it was in light of cost and competing institutional priorities—means that the Organization currently lacks a comprehensive and independent assessment of whether the IETC has in fact exhausted its utility across the full range of contexts affected by the MEX Convention. This is especially significant because the MEX Convention is not confined to aviation. As the Report has repeatedly emphasized, its implications extend to sectors such as customs, police enforcement, border control, and other regulatory or operational environments in which the detectability of explosives may remain relevant in ways not fully captured by aviation-centric analysis. To amend the MEX Convention in the absence of that technical foundation would therefore risk substituting partial institutional perception for fully informed judgment.

Section 4 has accordingly examined the principal options available to the Council and the Legal Committee. It has done so not merely by listing legal possibilities, but by evaluating their viability, proportionality, and consistency with the MEX Convention's existing framework. Among these alternatives, particular weight has been given to the maintenance of the status quo. That approach rests on the conclusion that no material or structural amendment to the MEX Convention is presently warranted, whether to expand its scope, to redefine the IETC's mandate, or to terminate the Commission. In the circumstances presently before the Organization, the status quo is not a passive default; it is a legally reasoned and institutionally prudent option.

At the same time, the Report has not confined itself to a simple recommendation of institutional immobility. On the contrary, it has identified a limited but important area in which interpretative clarification is both justified and desirable—namely, the practical flexibility available to the Council in relation to the appointment of experts and the convening of meetings of the IETC. In this regard, the Report has pointed to the possibility of an interpretative Assembly Resolution, analogous in logic to the approach previously adopted in relation to Article IV of the MEX Convention. Such a resolution would not amend the MEX Convention or alter its substantive balance. Rather, it would clarify, in a proportionate and efficient manner, that the Council may exercise discretion as to the frequency and timing of appointments and meetings, thereby aligning practice with operational realities without triggering the burdens of formal treaty amendment.

Section 5 has then broadened the inquiry by placing a potential amendment to the MEX Convention within the larger framework of treaty law and institutional practice. It has shown that, under the general rules reflected in the VCLT and under ICAO's own long-standing approach, amending an instrument that lacks a built-in amendment mechanism is a complex, time-consuming, and resource-intensive undertaking. By contrast, comparative treaty practice outside ICAO increasingly reveals a different tendency: modern instruments are far more likely to contain specific provisions governing their own amendment, often through mechanisms designed to combine legal certainty with institutional adaptability. The section has also highlighted more recent developments concerning technology and treaty-making, illustrating how other organizations are beginning to rely more extensively on virtual and hybrid modalities to reduce costs and improve responsiveness. All of this reinforces a central point of the Report: if the amendment route were to be pursued, it would not only be substantively difficult to justify on the present record, but procedurally disproportionate to the problem it seeks to solve.

Section 6, finally, has drawn together several additional observations that arise from the analysis but do not form part of the core recommendation. These *obiter dicta* reflections concern broader lessons for ICAO's treaty-making practice, including the value of incorporating built-in amendment clauses in future instruments, the need for greater procedural flexibility and proportionality in the legal process, and the potential merits of exploring virtual or hybrid meeting modalities more systematically. These are not recommendations directed to the immediate future of the IETC as such. They are, rather, institutional lessons drawn from the difficulties revealed by the present exercise and offered as a contribution to ICAO's broader reflection on how its legal framework may continue to evolve.

The principal conclusion of this Report may therefore be stated with clarity. At present, there are no sufficient legal, institutional, or evidentiary grounds to support a substantial amendment to the MEX Convention to redefine the IETC's mandate or to terminate it. The absence of a comprehensive independent technical study is not a secondary inconvenience; it is a central analytical limitation. In those circumstances, restraint is not only advisable—it is required. The most balanced and legally defensible course is to maintain the existing framework while introducing, if the Council so wishes, limited interpretative clarification through an Assembly Resolution on the practical exercise of the Council's authority in relation to appointments and meetings. **Appendix A** to this Report provides a proposal for an Assembly Resolution.

Two observations quoted elsewhere remain particularly apt in closing. Speaking at the Diplomatic Conference of 1991, Dr. Kenneth Rattray reminded delegates that the adoption and entry into force of international treaties "must not be seen as a reason for complacency or relaxation of effort but, rather, should serve as a catalyst for intensified efforts through international cooperation." [219] In a similar spirit, Dr. Michael Milde observed that the technical character of the challenges confronting international civil aviation requires "continuing evolution and adjustment."[220] Those reflections capture the underlying spirit of this Report. The challenge for ICAO is not merely to preserve existing legal instruments, nor to amend them reflexively, but to ensure that institutional adaptation is guided by evidence, proportionality, and sound legal judgment. In the case of the Convention and the IETC, that discipline presently points toward continuity with carefully measured clarification, rather than structural reform.

[219] See MEX Convention Proceedings Volume I at 176.
[220] See Michael Milde, Draft Convention, at 174.

## Appendix A: Draft Assembly Resolution

**Application of Articles V and VI of the Convention on the Marking of Plastic Explosives for the Purpose of Detection with Respect to the Appointment of Experts and the Convening of the International Explosives Technical Commission**

***The Assembly:***

*Recognizing* the continuing importance of the *Convention on the Marking of Plastic Explosives for the Purpose of Detection* in contributing to the prevention of unlawful acts against civil aviation and in establishing an international framework for the marking and control of plastic explosives;

*Recalling* that the International Explosives Technical Commission (IETC) was established by the Convention as an advisory technical body entrusted with evaluating developments in the manufacture, marking, and detection of explosives, and with making recommendations, where appropriate, concerning amendments to the Technical Annex;

*Recalling* further that the Convention entrusts the Council with responsibility for convening the IETC, approving its rules of procedure, appointing its members, and supervising the institutional functioning of the technical regime established by the Convention;

*Noting* that the Council has, in practice, exercised discretion with respect to the timing and frequency of meetings of the IETC, including by convening such meetings on an *ad hoc* basis as circumstances require;

*Noting* further the recommendation contained in__________ that, while no substantial amendment to the Convention is presently warranted, legal certainty and institutional clarity could usefully be enhanced through an interpretative resolution clarifying the Council's discretion with respect to the appointment of experts and the convening of meetings of the IETC;

*Bearing in mind* that the maintenance of the existing treaty framework, combined with limited interpretative clarification, constitutes a proportionate and legally sound means of aligning institutional practice with contemporary operational realities, without disturbing the substantive obligations or institutional balance established by the Convention;

*Noting* the precedent established by Resolution A35-2, in which the Assembly interpreted the application of Article IV of the Convention *mutatis mutandis* to ensure legal certainty and coherence in the operation of the treaty without formally amending its text;

***The Assembly:***

*Invites* States to recognize that, for the purposes of the effective implementation of the Convention, the Council retains discretion with respect to the timing and frequency of the convening of meetings of the IETC, including the possibility of convening such meetings on an *ad hoc* basis where circumstances so warrant;

*Recognizes* further that, in the same manner, the Council may exercise its authority with respect to the appointment and reappointment of experts to the IETC in a flexible and pragmatic manner, considering the operational need for the convening of the IETC and the practical requirements of its effective functioning;

*Urges* ICAO Member States that are Parties to the Convention to recognize, in their mutual relations, that the Council's authority under Articles V and VI of the Convention may be exercised in a manner that permits the appointment or reappointment of experts to the IETC on a needs-based basis, consistent with the object and purpose of the Convention and with the effective functioning of the Commission;

*Urges* further ICAO Member States that are Parties to the Convention to recognize, in their mutual relations, that the Council may determine, in light of institutional priorities, operational requirements, and the evolution of relevant technical developments, when and where meetings of the IETC should be convened, without the necessity of adhering in all circumstances to a fixed annual meeting pattern;

*Affirms* that the foregoing interpretation is intended solely to clarify the practical application of the Convention and does not modify its substantive obligations, alter the technical mandate of the IETC, or disturb the institutional balance established by the Convention;

*Declares* that this resolution is adopted for the purpose of promoting the efficient functioning of the Convention's existing framework.