



ASSEMBLY — 39TH SESSION

LEGAL COMMISSION

Agenda Item 45: Work programme of the Organization in the legal field

Agenda Item 47: Other issues to be considered by the Legal Commission

CONFLICTS OF INTEREST IN CIVIL AVIATION

(Presented by Canada, Mexico, Nigeria and the United States)

EXECUTIVE SUMMARY

Conflicts of interest may hamper effective, independent and impartial regulation thereby posing risks to aviation safety and security. Following a survey conducted by the ICAO Secretariat it was concluded that it would be useful for all States to have a framework dealing with conflicts of interest in civil aviation given the prevalence of such situations in the civil aviation activities of States. The 36th Session of the Legal Committee, following consideration of the report on the survey, agreed that work should continue on the subject of conflicts of interest in civil aviation.

Action: The Assembly is invited to:

- a) Urge States to develop frameworks to detect, avoid, mitigate and manage conflicts of interest in civil aviation and to share best practices in that regard; and
- b) Adopt the resolution proposed in the Appendix to this working paper.

<i>Strategic Objectives:</i>	This working paper relates to all Strategic Objectives.
<i>Financial implications:</i>	The activities referred to in this working paper will be undertaken subject to the resources available in the 2017-2019 Regular Programme Budget and/or from extra budgetary contributions.
<i>References:</i>	A37-WP/80 (Consideration of guidance on conflicts of interest) A39-WP/12 (Work programme of the Organization in the Legal Field) State Letter LE 4/69-14/40, dated 11 June 2014 United Nations Convention Against Corruption of 2003 (UNCAC) Doc 8335, <i>Manual of Procedures for Operations Inspection, Certification and Continued Surveillance</i> Doc 9734, <i>Safety Oversight Manual, Part A, "The Establishment and Management of a State's Safety Oversight System"</i> Doc 9734, <i>Safety Oversight Manual, Part C, "The Establishment and Management of a State's Security Oversight System"</i> Annex 19: <i>Safety Management</i> Doc 10061, <i>Report – Legal Committee 36th Session</i>

1. INTRODUCTION

1.1 “Consideration of Guidance on Conflicts of Interest” was introduced to the General Work Programme of the Legal Committee through a proposal in the working paper A37-WP/80 presented by the United States. It was expressed in A37-WP/80 that reasonably consistent rules across the sector to establish and preserve a clear separation between civil aviation authorities and the activities that they oversee were desirable. In the given context, it was suggested to consider conflicts of interest (“COI”) situations in three distinct areas: 1) financial interests in regulated entities; 2) the movement of individuals from positions in government to industry and vice versa; and 3) the practice of designating or seconding personnel to carry out oversight functions on behalf of the Civil Aviation Authority. The consideration of these elements was deemed appropriate with a view to fostering the objective, disinterested exercise of regulatory responsibilities.

2. BACKGROUND

2.1 A COI is typically defined as a situation in which an official has private interests that may or be perceived to improperly influence or interfere with the performance of his or her official duties and responsibilities. Such improper influence or perceived interference could be attributed to situations involving financial interest, family, emotional life, political or national affinity of the official. COI may also be found at the level of an organization. An organizational COI arises where an organization fails or is impeded to act impartially due to outside activities or relationships it has with other entities.

2.2 In the field of civil aviation, such COI may arise, principally, in two different scenarios:

- a) First, through interactions between a department of the Government or its regulatory agencies with operating entities that are subject to regulation (such as air operators, aviation training organizations, approved maintenance organizations, design organizations, production organizations, air navigation service providers and aerodrome operators). Examples of COI situations that could arise in the course of such interactions include:
 - i) direct or indirect financial interests in regulated entities;
 - ii) movement of individuals between jobs in the regulatory and regulated entities (also referred to as “revolving door” situations);
 - iii) performance of regulatory duties by seconded or designated staff of the regulated entities;
 - iv) partnerships or arrangements between regulatory and regulated entities to advance the commercial interests of the regulated entities at the expense of the public interest (leading to what is also referred to as “regulatory capture”); and
 - v) lobbying of policy or rule-making bodies on behalf of or in favour of regulated entities;
- b) Second, through relationships between different organs or entities of the State involved in civil aviation activities, which could include:
 - i) overlap of functions between regulatory bodies and the government or its other organs such as the military, police, customs and investigative bodies;

- ii) ownership or control of regulatory and operator entities by the State; and
- iii) combination of regulatory and service provision functions in the same or related entities.

2.3 It is possible that COI (real or perceived), arising from such interactions or relationships, may hamper effective, independent and impartial regulation.

2.4 Generally, States may have developed legal and institutional frameworks to deal with COI in response to the requirements of domestic law or with reference to international treaties, such as the United Nations Convention Against Corruption of 2003 (UNCAC)¹, or to guidelines or codes of best practice developed by international organizations such as the Organisation for Economic Cooperation and Development (OECD) or by relevant professional bodies. Civil aviation authorities in a given State might be subject to government-wide COI frameworks, to frameworks that apply specifically only to them, or to some combination of such frameworks.

2.5 ICAO has also promulgated certain guidance on COI, identifying the need to mitigate potential COI with respect to staff carrying out inspection duties and calling for clear separation of authority between regulatory and state controlled regulated entities². Furthermore, a Standard is promulgated in Annex 19 - *Safety Management*, in particular paragraph 3.2, which read together with paragraph 3.3 in Appendix 1, requires States to establish and implement a safety oversight system ensuring that personnel performing safety oversight functions are provided with guidance that addresses ethics, personal conduct and the avoidance of actual or perceived COI in the performance of official duties.

2.6 ICAO's Universal Safety Oversight Audit Programme (USOAP) findings in this area have been that, in a number of States, where operator or service provider functions are carried out by the State, there is no distinct separation of responsibilities between the regulatory bodies and air operators, aerodrome operators, service providers and aviation training centres and that most States that use experts seconded by the State's civil aviation administration or other organization in the State as investigators, have not established measures to avoid possible COI. Under the Universal Security Audit Programme (USAP), it is reported that "22 per cent of States have not ensured that the functions and responsibilities of the various entities within the civil aviation security system are clearly defined to ensure that there are no overlaps of responsibilities"³.

3. ICAO SURVEY ON COI AND ITS FINDINGS

3.1 ICAO undertook a survey to identify existing mechanisms and measures in States for dealing with COI as it relates to civil aviation administrations and their personnel carrying out regulatory

¹ UNCAC has 176 State parties. See for instance, Article 7(4) of UNCAC, "Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest."

² See Paragraph 5.3.3 Doc 8335, *Manual of Procedures for Operations Inspection, Certification and Continued Surveillance*; Paragraphs 2.4.9 and 3.4.4 Doc 9734, *Safety Oversight Manual, Part A, "The Establishment and Management of a State's Safety Oversight System"*; and Paragraph 2.4.2.3 Doc 9734, *Safety Oversight Manual, Part C, "The Establishment and Management of a State's Security Oversight System"*

³ Universal Security Audit Programme-Analysis of Audit Results, Reporting Period: November 2002 to June 2013, ICAO, Fifth Edition – 2013, at page 52.

functions in civil aviation. 43 States, or just about 22 percent of ICAO's membership, have responded to the survey. Two territories and one international organization also provided responses. In general, all but four of the States that responded to the Survey confirmed that they have a legal and/or institutional framework dealing generally with COI. In most cases that framework is established in the form of legislation, code of conduct, contractual employment conditions or a combination of all these. In most cases (86 percent) monitoring of compliance with COI rules is carried out by an independent body such as a government ombudsman or through internal mechanisms established by the civil aviation agency or administration. Most States (63 percent) deemed the level of enforcement of COI to be sufficient while some considered it to be insufficient (21 percent).

3.2 Financial interests in regulated entities as well as social interests of individuals, (leading in some cases to corrupt practices, nepotism and favouritism), movement of individuals between jobs in the regulatory and regulated entities, the involvement of the State in regulated activities or entities and lobbying in favour of regulated entities were identified as being among the most prevalent sources of COI. Other situations such as the exertion of political pressure on regulators to favour regulated entities were cited as an additional source of COI.

3.3 The State is involved in civil aviation activities as an operator or service provider in many States (82 percent), the most prevalent activities in which States are engaged in being the provision of air navigation services, aircraft and aerodromes operations and the management of aviation training organizations. Moreover, some civil aviation administrations depend on government subvention or revenue from regulated activities to support regulatory activities. Furthermore the percentage of States that have aircraft on the civil register that are used for military or police operations (49 percent) and those that do not (51 percent) is roughly the same. These relationships and activities are subject to aviation safety and security oversight by the civil aviation administration which could raise the potential for vested organizational COI, whereby civil aviation regulators could be unduly influenced or impeded from acting impartially in dealing with regulated entities due to common ownership and control by the State or because of having commercial interests in those entities.

3.4 Many States (67 percent) have established measures to avoid or manage the overlap between different agencies having a role in the regulation of aviation safety and security. Measures such as the establishment of inter-agency coordination committees, programs and guidelines were cited.

3.5 Personnel from an air operator or service provider are used to carry out licensing, certification, approval or surveillance duties and responsibilities and to carry out aircraft accident and incident investigations in a significant number of States (49 percent and 40 percent respectively). However a majority of States (51 percent) indicated that they had established mechanisms for the management of COI of personnel carrying out these functions. Moreover in most States (79 percent) accident investigation is carried out by an independent organization or entity that is separate from the civil aviation administration.

4. DOES COI POSE RISKS TO CIVIL AVIATION SAFETY AND SECURITY?

4.1 Those States that encountered COI situations in civil aviation activities indicated that they became known mostly through self-disclosure by the concerned official, USOAP or USAP audit

report, report by an independent oversight body, internal review and press reports, in that order. Exposure of COI situations through the occurrence of a safety or security related incident was cited in a small number of cases (5.3 percent). Exposure by whistle-blowers was cited in one case. Most States (79 percent) did not find or consider the lack of a framework to be a source of concern for aviation safety or security while a substantial majority of States (84 percent) affirmed that COI situations have not been linked to or found to be a contributing factor to the occurrence of a serious aviation safety or security incident.

4.2 Direct or indirect interest in regulated entities, partnerships or arrangements between regulatory and regulated entities to advance the commercial interests of the regulated entities at the expense of the public interest (leading to what is also referred to as “regulatory capture”) and the combination of regulatory and service provision functions in the same or related entities were identified, in that order, as the three leading situations that States considered would put aviation safety and security most at risk. Other situations listed in paragraph 2.2.2 above, including movement of individuals between jobs in the regulatory and regulated entities and performance of regulatory duties by seconded or designated staff of the regulated entities, were also identified but to a lesser extent. Political pressure being applied on the national aviation administration was one other situation not included in the list in paragraph 2.2.2 above that was identified as a risk to aviation safety and security.

4.3 While a majority of States (77 percent) were of the view that existing ICAO guidance material on COI in civil aviation is adequate or somewhat adequate, most (75 percent) still felt that States could benefit from the harmonization of COI practices and measures for dealing with COI in civil aviation. Most States (collectively 61 percent) felt that rules or guidance on COI could be developed in the form of Standards, Standards and recommended practices or recommended practices only while other States were of the view that guidance disseminated in an ICAO manual or circular could be sufficient (27.91 percent). One specific suggestion put forward was to develop a model code on managing COI in civil aviation while at the same time making necessary adjustments to other ICAO documents “dealing with the qualifications of personnel and representatives.”

5. FUTURE WORK

5.1 A small number of States (less than 10 percent) felt that their COI framework had not been effective in addressing COI in civil aviation, citing the lack of a binding framework and the overlapping relationships between state entities involved in civil aviation as the main barriers to success. States that found their COI framework to be effective, credited staff sensitization and the existence of preventive and enforcement measures for the success.

5.2 A number of measures were proposed to improve the effectiveness of the COI framework, including: (i) pay parity between personnel of the regulatory bodies and the regulated entities (ii) recruitment of additional personnel dedicated to carry out licensing, certification, approval or surveillance duties and responsibilities; (iii) separation of regulatory bodies from service provision entities; (iv) fostering a COI avoidance culture; and (v) increased regulation of COI.

5.3 A substantial majority of States (75 percent) agree that there is benefit in harmonizing practices and measures for dealing specifically with COI in civil aviation and that it is necessary for ICAO to develop rules or guidance on this subject for use by States (77 percent) while others (16 percent) chose not to take a position at this time. In fact, just one State expressed the view that there would be no benefit from further work by ICAO in this area.

**6. RECOMMENDATIONS OF THE 36TH SESSION OF
LEGAL COMMITTEE**

6.1 At the Legal Committee deliberations, many delegates opined that it is useful for all States to have a framework for managing COI in civil aviation given the prevalence of COI situations as expressed by States in their responses to the ICAO Survey. It could therefore be of benefit for ICAO to urge States that have not done so to establish a framework on COI that applies to civil aviation activities. The Legal Committee felt that this could be done through an Assembly Resolution whose objective would be to promote awareness of potential conflicts of interest in civil aviation and the need to take measures to avoid or mitigate risks from COIs to aviation safety and security. The Assembly Resolution could also respond to the expressed need to improve the effectiveness of existing COI frameworks through fostering a COI avoidance culture and increased regulation.

APPENDIX

CONFLICTS OF INTEREST IN CIVIL AVIATION

RESOLUTION XX/1

Conflicts of interest in civil aviation

Recognizing that conflicts of interest may hamper effective, independent and impartial safety regulation of civil aviation and thereby pose risks to the safety and security of international civil aviation;

Recalling that the item “Consideration of Guidance on Conflicts of Interest” was added to the General Work Programme of the Legal Committee by the 37th Session of the Assembly and subsequently was endorsed by the Legal Committee, the Council and the 38th Session of the Assembly, which elevated its priority;

Aware that under the United Nations Convention Against Corruption adopted by the General Assembly on 31 October 2003, States have the obligation to endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest;

Considering that ICAO guidance material identifies the need for States *inter alia* to establish a strategy to mitigate potential issues arising from conflicts of interest in civil aviation; and

Convinced of the need for States to share information concerning policies and measures used to detect, avoid, mitigate and manage conflicts of interest in civil aviation;

The Assembly:

1. *Urges* States which have not done so to consider establishing a formal legal framework to detect, avoid, mitigate and manage conflicts of interest in civil aviation;
2. *Invites* States to examine at the national level the adequacy of their domestic legal regimes on measures and practices to detect, avoid, mitigate and manage conflicts of interest in civil aviation, with a view to ensuring and improving transparency and accountability in civil aviation regulatory activities; and where necessary to enact legislation and establish systems, codes and practices which promote the awareness of potential conflicts of interest in civil aviation;
3. *Urges* States to ensure the enforcement of rules and measures to detect, avoid, mitigate and manage conflicts of interest relating to safety oversight in civil aviation;
4. *Mandates* the Council to facilitate the collection, analysis, dissemination and promotion of best practices addressing conflicts of interest for the benefit of Member States, taking advantage of existing expertise in the States and within the United Nations and other relevant international organizations;
5. *Requests* the Secretary General to continue to collect information from States and relevant

intergovernmental organizations, concerning policies and measures used to detect, avoid, mitigate and manage conflicts of interest in civil aviation, in order to advance the study of this issue;

6. *Requests* the Secretary General to develop a reference document identifying all provisions in the Annexes and manuals relating to conflicts of interest;

7. *Mandates* the Legal Committee to keep the issue of conflicts of interests in civil aviation under regular review; and

8. *Calls upon* States to extend to the Secretary General their full support and assistance in the implementation of the present resolution, including the provision of expertise and information.

— END —