
THE PROPOSED INTERNATIONAL AERONAUTICAL MONETARY FUND — LEGAL AND PRACTICAL IMPLICATIONS

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ABSTRACT

The proposed international aeronautical monetary fund has its genesis in the Latin American Civil Aviation Commission (LACAC) which proposed the inauguration of the fund to finance air navigation services provided by the satellite based Communications, Navigation, Surveillance/Air Traffic Management (CNS/ATM) system. It was the consensus of LACAC that the fund should be created by international agreement with an international bank established to receive and administer the financing of the CNS/ATM. The overriding principle of the aeronautical monetary fund remained that its administration should be supervised by the International Civil Aviation Organization. This paper will introduce the conceptual and practical evolution of the aeronautical monetary fund from its inception to date and analyze its legal and practical implications for the future of civil aviation.

INTRODUCTION

The proposed international aeronautical monetary fund has its genesis in the Latin American Civil Aviation Commission (LACAC) which, at its Panel meeting on 13–14 June 1994 held in Salvador, Brazil, proposed the inauguration of the fund to finance air navigation services provided by the satellite based Communications, Navigation, Surveillance/Air Traffic Management (CNS/ATM) system. It was the consensus of LACAC that the fund should be created by international agreement and that the entity which would receive and administer the financing of the CNS/ATM system under the fund should be an international bank established for that purpose. The overriding principle of the aeronautical monetary fund remained, however, that its administration should be supervised by the International Civil Aviation Organization (ICAO).¹

The LACAC initiative was in response to the introduction of satellite technology to future air navigation systems which ICAO has been energetically involved in since 1993.² These new air navigation systems would be operated through a satellite network dedicated to the air transport industry. In order to ensure such an exclusive dedication to air transport users of a satellite system, the costs that have to be incurred would also be substantial. These costs that would enable the transition of air navigation from currently used navigation systems to satellite technology would have to be absorbed by a funding source in

order that an efficient and effective CNS/ATM system be implemented globally.

This paper will introduce the conceptual and practical evolution of the aeronautical monetary fund from its inception to date and analyze its legal and practical implications for the future of civil aviation.

Characteristics of the Fund

Eight members³ of LACAC presented its proposals for the aeronautical monetary fund to the aviation community during the 31st Session of the ICAO Assembly in September 1995. Citing the reason for the proposal as the difficulties faced by governments and airlines to obtain financing at reasonable costs for the modernization of airlines, airport infrastructure, air traffic services and navigation aids, LACAC introduced the proposal as a means to contribute to the balanced development of international air transport.⁴

The objective of the fund, according to LACAC, was to provide the financial resources necessary to meet the most pressing needs of LACAC member states for the construction and modernization of airport infrastructure, air traffic services and navigation aids. Also included in the list of beneficiaries were airline fleets which needed expansion and modernization.⁵

LACAC proposed that the fund be created through an international convention open to ICAO contracting states. The Convention would necessitate adherence by states if their airlines, airports and other initiatives were to benefit from the fund. The fund would be totally autonomous and politically independent from the control of individual or collective governments.

The money that formed the fund would come from the user — the airline — and any other interested financial institution and would be collected semi-annually in accordance with procedure agreed upon between the parties to the Convention.

It was also proposed that the fund be administered by a Board of Governors (one appointed by each member government), five Executive Directors elected by the Board and a Managing Director who should ideally be a senior member of the international banking community and elected by the Executive Directors. The administration of the fund included audit of accounts to be carried out annually by a specialized international firm of accountants. Inherent in the audit principles was a proposal for absolute transparency devoid of diplomatic immunity and commercial confidentiality.

The advantage of the fund was identified by LACAC primarily as self sufficiency. Other advantages were the improvement of air navigation facilities world wide by both the developed and developing world and the possibility of making available credit facilities through the fund to civil aviation bodies and the air transport industry.

Perhaps the most significant factor of the LACAC proposal is that the aeronautical monetary fund would act as a tool which would promote the implementation of ICAO's Strategic Action Plan.

The ICAO Strategic Action Plan (SAP), which was adopted by the ICAO Council on 7 February 1997, is primarily aimed at promoting the principles enshrined in the Chicago Convention⁶ in the most efficient manner so that the challenges posed by modern exigencies of civil aviation are met. The SAP would accomplish the following:

- a) Ensure that ICAO maintains its position as the main standard-setting body for international civil aviation;
- b) Encourage national ratification of instruments of international air law and implementation of ICAO Standards and Recommended Practices to the greatest extent possible so as to maintain a common aviation system world wide;
- c) Ensure that ICAO continues to focus on the exploration and development of aviation issues of a multilateral nature in the fields of legal, economic, and technical regulation and thereby remains a world forum for these issues;
- d) Identify priorities for ICAO and seeking to ensure that sufficient resources are made available to respond to the major challenges concerned; and
- e) Develop a continued efficient and cost-effective mechanism in ICAO for the management of technical cooperation activities.⁷

The issues that have been identified by ICAO for the triennium 1996–1998 as requiring the above action are:

- a) Communications, Navigation and Surveillance/Air Traffic Management (CNS/ATM)
- b) Airport and airspace congestion
- c) Commercial developments and economic regulation
- d) Financial resources
- e) Unlawful interference
- f) Human factors in flight safety
- g) Environmental protection
- h) Human resources
- i) Enhancement of ICAO Standards
- j) Safety oversight

The legal aspects of these issues form separate studies by themselves and have largely been addressed elsewhere.⁸ However, for the purposes of identifying a link between the aeronautical monetary fund and the primary areas of

importance for civil aviation as identified by the Strategic Action Plan, it is evident that CNS/ATM, airport and airspace congestion alleviation, and safety take a preeminent place in requiring financial resources for global implementation. Of primary relevance therefore are the legal issues that underline the justification of creating the fund and an overall legal analysis which would inquire whether the application of finances from an established aeronautical monetary fund to the above areas would be consistent with established ICAO policy.

Of course, it is an incontrovertible fact that the SAP cannot be implemented unilaterally by ICAO without the cooperation of its member states. Fundamentally, and from a legal standpoint, the position of ICAO in the international aviation community is not one that is compatible with being absolutely legislative in capacity. ICAO sets guidelines on civil aviation and facilitates the adoption of treaties and regulations, with the approval of its member states. It is then up to the member states themselves to implement them. The SAP is therefore essentially a two-sided issue and may be adequately subsumed by the adage "one cannot clap with one hand." The obligations of ICAO member states are paramount in giving teeth to ICAO's Standards and Recommended Practices and other guidelines, as much as in satisfying or otherwise accepting treaties of air law that they themselves have adopted under ICAO auspices.

It is therefore essential that ICAO contracting states recognize the compelling need to address the issue of the establishment of the aeronautical monetary fund in the context of its supportive role in financing on a global scale the key elements of the Strategic Action Plan of ICAO.

In the context of the above observations on the relevance of the fund to the implementation of the ICAO Strategic Action Plan, it is significant that the LACAC proposal called upon the ICAO Assembly to request the Council to establish a working group to study the need, appropriateness and usefulness of establishing an international aeronautical monetary fund for the above mentioned purposes.

Although the Executive Commission of the 31st ICAO Assembly, which considered the LACAC proposal, had great sympathy for the objectives of the proposal it was generally noted that the establishment of an international convention was both a complex and time consuming undertaking needing careful thought and detailed consideration of the issues involved before it attains fruition. While some members of the Commission recommended the consideration of more innovative financial instruments to realize funding for CNS/ATM, others, such as the observer for the International Air Transport Association (IATA - which is the association of commercial air carriers), strongly opposed the proposal on the grounds that it was inconsistent with ICAO policies to create a fund which was financed by users of civil aviation.⁹

The Commission concluded that the proposal for the creation of an international aeronautical monetary fund was laudable, and indeed, a valuable one but thought it fit to leave it to the ICAO Council to decide how best the proposal should be pursued further. The Commission recommended that the Council

should consider whether it would be appropriate to list the proposal as an item for discussion at the upcoming conference on the economics of CNS/ATM systems in Rio de Janeiro in May 1998.

Legal Issues

The main thrust of the proposal for the establishment of the aeronautical monetary fund was in the levy of an additional one U.S. dollar per every passenger ticket sold. Using this concept in the context of 1996, where the airlines of the 185 ICAO contracting states carried 1,380 million passengers,¹⁰ it is reasonable to assume that the fund would have generated at least 1,380 million U.S. dollars in the first year of its operations if it were established in 1996. The ICAO forecast that airline passenger traffic will grow at an average rate of 5 percent annually until 2003 means the fund will also grow larger by 5 percent annually in the foreseeable future.¹¹

At least one commentator has acknowledged the practical and political possibility of establishing an aeronautical monetary fund for the financing of the CNS/ATM system's implementation world wide. Saeed A. Al-Ghamdi, the Representative of Saudi Arabia on the Council of ICAO observes:

The precedents set by the joint financing agreements between Denmark and Iceland for the provision of air navigation services over the North Atlantic, and the existence of intergovernmental organizations such as the International Maritime Satellite Organization (Inmarsat), are examples of what international cooperation can accomplish when the political will exists. Similar cooperation is possible in the implementation of the CNS/ATM systems despite the massive size of the financial requirement.¹²

Mr. Al-Ghamdi lists numerous advantages of the proposed levy, some of which are the provision of unified satellite-based CNS coverage for air traffic movements in every region of the world based on ICAO's Standards and Recommended Practices; global adherence to safety criteria and regulatory parameters through world wide implementation of CNS/ATM systems; limitation of the financial burden imposed on users (airlines) due to the lack of adequate services around the world; meeting the rate of growth predicted for the air transport industry in the 21st century; and guaranteeing the implementation of the principles of the Chicago Convention and the promotion of harmonized global planning and implementation of the future air navigation systems.¹³

The most critical issues that have to be addressed in the assessment of the feasibility of establishing an aeronautical monetary fund are:

- 1) Whether the imposition of an additional levy on air transport users is inconsistent with already existing ICAO policy on charges; and
- 2) Whether the establishment of the fund is practical.

The seminal principle which mandates ICAO as the organization responsible for the international regulation of civil aviation is found in Article 44 (a) of the

Chicago Convention which requires the Organization to insure the safe and orderly growth of international civil aviation throughout the world. The word “insure” devolves upon ICAO the responsibility to make absolutely certain that international civil aviation grows safely and in an orderly manner. ICAO is also required, by Article 44(d), to meet the needs of the people of the world for safe, regular, efficient and economical air transport. Therefore, there is no room for doubt that the contracting states of ICAO, by the Chicago Convention itself, will hold ICAO accountable for ensuring safety and efficiency in air transport. In this context, even though ICAO has performed an admirable task in introducing a highly adequate CNS/ATM system for air navigation, it still has to make certain that these air navigation systems are implemented globally. Article 54(i) of the Chicago Convention authorizes the Council to request, collect, examine, and publish information relating to the advancement of air navigation and the operation of international air services, including information about the costs of operation and particulars of subsidies paid to airlines from public funds. This provision enables the ICAO Council to make an exhaustive study of the financial outlay needed for the 185 contracting states of ICAO to implement not only the CNS/ATM system but also related programs such as safety oversight which is often dependent on the availability of proper air navigation facilities and training in the States concerned.

The ICAO Council can also, by virtue of Article 69 of the Chicago Convention, intervene in instances where the Council believes that a state does not have adequate air navigation facilities and make recommendations for remedying the situation. Following this, a contracting state may conclude an arrangement with the Council for giving effect to such recommendations, as provided for by Article 70. More importantly, Article 71 of the Chicago Convention empowers the ICAO Council, at the request of a state, to provide, man, maintain, and administer the state’s air navigation facilities and airports for the safe, regular efficient and economical operation of air services of the other contracting states. Article 71 also empowers the Council to specify just and reasonable charges for the use of the facilities provided.

Article 77 of the Chicago Convention enables all the 185 contracting states of ICAO to form a joint air transport operating organization to pool their services on any routes or regions. The provision does not exclude the possibility of states pooling parts of revenue obtained from their air carriers’ services — such as an additional one U.S. dollar to be charged from each passenger of the pooled services — to be remitted to the joint air transport operating organization.

It is therefore clear that the Chicago Convention abundantly provides for the administration of air navigation services by the ICAO Council on a global scale, consequent to a detailed study of the cost implications of such administration. The Convention also provides for the pooling of air services for purposes of collecting revenue, which could be deposited in an international organization formed for that purpose.

The Joint Financing Paradigm

A regional analogy of financing of air navigation services which is administered by ICAO already exists in the nature of the joint financing agreements.

The operation of joint financing in civil aviation became necessary in the context of non-stop transatlantic flights North of the 45th Parallel, which is covered by the Flight Information Region (FIR) of Iceland. Air navigational facilities offered by Iceland are indispensable for aircraft flying within this region. Since major storm tracks converge very near Iceland and that area of the Atlantic around Iceland is favorable to the re-development of certain types of storms and to the formation of secondary depressions, it is generally during unfavorable meteorological conditions that the greatest number of aircraft operate in the vicinity of Iceland and traffic becomes congested, requiring full utilization of the air traffic control and flight information services offered by Iceland, such services were required to be given for the safe operation of international air services in the North Atlantic. At the North Atlantic Route Service Conference, held in Dublin in March 1946, a recommendation was made inter alia, that Iceland should provide an Area Control Centre in Reykjavik and certain telecommunications and meteorological services for the North Atlantic Region. These recommendations were approved subsequently by the PICAQ¹⁴ Council on 17 April and 1946 and 9 May 1946.¹⁵ During the Conference, the delegation from Iceland made a statement to the effect that Iceland would not be able to provide the services recommended by the Conference, owing to the magnitude of aircraft crossings that required services. On 16 May 1947, as a follow-up to its statement, Iceland submitted to ICAO a request for financial and technical aid in regard to the air traffic control, communications, and meteorological services in Iceland in accordance with Chapter XV of the Chicago Convention. The ICAO Council, on 25 June 1947 concluded that the request of Iceland constituted prima facie grounds for aid to be rendered in the manner sought.¹⁶

Article 68 in Chapter XV of the Convention brings the joint financing concept into immediate focus, and extends the concept of sovereignty as enunciated in Article 1 by providing that each contracting State may designate the air route(s) to be followed within its territory by any international air service. If States have control over the designation of air routes over their own territories, it automatically follows that ICAO, which is charged by the Convention to develop the principles and techniques of air navigation¹⁷ and foster the planning and development of international air transport by inter alia encouraging the development of airways, airports and air navigation facilities for international civil aviation,¹⁸ should adopt measures to improve air navigation facilities world wide. The concept of joint financing is therefore a measure to improve air navigation facilities and airports throughout the world. As discussed earlier, the seminal provision that reflects the philosophy of the concept is seen in Article 70 of the Convention which provides that a contracting state may arrange with the ICAO Council to implement the Council's recommendations relating to the

improvement of air navigation facilities either by bearing all costs involved or by jointly financing such implementation process with the Council.¹⁹ A joint financing agreement between a contracting state and the ICAO Council is calculated to facilitate the use of land by the Council at reasonable terms,²⁰ provide technical assistance by the Council,²¹ and funding by the Council—all in pursuance of the objective of improving or developing air navigation facilities. Funding for a joint financing project is provided by the states whose airlines use the routes in question.²²

Another provision which is relevant to the establishment of the monetary fund is Article 75 which provides for the discharge of obligations by a contracting state under the joint financing agreement by taking over from the Council, its airports and other facilities that were handed over to the Council in pursuance of a joint financing agreement. The state may then pay the Council whatever monies that had been incurred in the development of air navigation in the territory of that state. The Council shall then return the funds to the states who paid them. This reimbursement is done on guidelines already set by the Convention.²³

States' obligations to provide air navigation services to the international community stem from Article 28 of the Convention, which provides that each contracting state undertakes to provide, in its territory, such facilities as airports, radio and meteorological services, and other air navigational facilities while adopting standards of communication and collaborating with a unified communications methodology.

The ICAO Assembly, by Assembly Resolution A1-65, established the general policy of ICAO relating to the joint support of air navigation services. The ensuing Joint Financing Agreement in 1948 has since been replaced by the Agreement of 1956²⁴ which has been amended by the Montreal Protocol of 1982.²⁵ This agreement requires Iceland to operate and maintain air navigation services without interruption²⁶ and provided for reimbursement of 95 percent of the costs to be made to Iceland by contracting states to the Agreement.²⁷

Assembly Resolution A14-37 made further provision in 1962 for increased participation by "user states" in joint financing agreements that were contemplated between the Council and the States involved. At its 16th Assembly in 1968, the ICAO Assembly issued guidelines for the implementation of economic aspects of joint financing agreements.²⁸ Since its inception, ICAO has held several conferences on joint financing: in Geneva, 8-26 June 1948 on the subject of Iceland; in London, 20 April-12 May 1949 on Greenland and the Faroes; and in Geneva 6-24 September 1956 for the revision of the Danish and Icelandic arrangements.

There are now 22 contracting states to the Icelandic Agreement and they reimburse 95 percent of the total costs of air navigation services under the agreement, which amounts to approximately \$15 million. Of this sum, user charges levied on airlines account for 80 percent of the total cost. ICAO's involvement

in the Joint Financing Agreement has been succinctly described by Gerald Fitzgerald :

Through its participation in joint financing schemes, contemplated by Chapter XV of the Chicago Convention, ICAO has made an important pioneering contribution by developing legal, consultative and administrative techniques to be used in the management of such schemes... The ICAO programme... was a great success in the North Atlantic area... through the use of innovative administrative and legal techniques, ICAO has demonstrated that it is possible to use the services of a neutral, inter-governmental organization for the administration of a complicated system of air navigation services required by the international community.²⁹

The joint financing agreements, and their successful implementation under ICAO's administration over the years, has amply demonstrated that, given the political will of States, it is practically impossible to establish and administer a fund which implements a global CNS/ATM system and other related areas of current importance to civil aviation.

Conclusion

It is important to consider the aeronautical monetary fund as a supplemental fund which would finance the installation and maintenance of the CNS/ATM systems and other related air navigational facilities and training related thereto in states which do not have the infrastructure and facilities. It would, of course, be established and used for a limited time, until the systems so funded can be maintained independently by states on a global scale.

The aeronautical monetary fund should be independent and mutually exclusive of charges levied by states for the provision of air navigation services. The basic principle underlying the philosophy of the additional levy should be consistent with the policy followed by ICAO as recommended by the Conference on Airport and Route Facility Management (Montreal, 29 October – 9 November 1991) that states should refrain from imposing charges for services and functions which are not associated with international civil aviation.³⁰

In order to ensure that the fund is made up of levies imposed equitably, it is advisable that those users whose states do not need financial assistance for the implementation of the CNS/ATM system are also charged the additional levy on their passenger tickets so that all airline passengers would contribute to the fund. In this context ICAO Council policy is clear. It states that providers of a service may require users to pay their share of the costs incurred on the basis that an equitable cost recovery system should take into account total air navigation costs incurred on behalf of aeronautical users and allocate such costs to categories of users.³¹

In practical application, this would mean that the additional levy for the aeronautical monetary fund should be charged on passengers who use the services provided on the basis that the costs incurred by the state concerned in providing the service has to be recovered. This policy, which would not discriminate

between users of developed states and states which need assistance, would prima facie give rise to a common aeronautical monetary fund. To ensure that the allocation of air navigation services costs among aeronautical users should be carried out in a manner equitable to all users, the ICAO Council could, under powers vested by Article 54 (i) of the Chicago Convention, acquire through states basic utilization data in respect of air navigation services, thus ensuring the equitable subscription of funds by a system of professional accounting.

The only difficulty with this methodology of levy is that airline passengers would be paying a sum of money (in addition to the usual user charges levied for air navigation services) beforehand, to fund a service in futuro, thus causing "prefunding." This impinges the basic "cost recovery" principle attached to ICAO policy on charges — that charges could be only levied to defray costs actually incurred — and would require a modality which could justify such a levy, on the basis of a definite identification of the benefits accrued to international civil aviation by the aeronautical monetary fund.

In order to circumvent the argument that the proposed aeronautical monetary fund, if funded purely for air navigation services rendered, would be inconsistent with existing ICAO policy, the funding mechanism may even be constructed on a general basis devoid of the connotation of charges for services rendered. If the levy on each passenger ticket could be implemented on the basis of creating a monetary fund which could be available to any applicant purely on the principle that monies of such a fund would be available for states to implement aviation policy in keeping with the SARPs of ICAO, the obstacle posed by the possible argument that the fund would be based on "pre-funding" for services in futuro could be obviated. With stronger reason, there is a compelling need at the present time to ensure aviation safety and an additional levy could easily be justified on that basis. Financial transactions conducted through the fund could be done along the lines of accepted international banking and interest policy.

The philosophy of the monetary fund could be based on the same postulate on which ICAO is run — i.e. that although States contributions to the sustenance of ICAO vary, the service provided by ICAO to all its member states is equal. As discussed earlier, the aeronautical monetary fund could exist only until needed, after which it could be disbursed on an equitable basis to be worked out by ICAO member states. The independence of the aeronautical monetary fund from any given objective such as the funding of CNS/ATM systems implementation or the implementation of safety oversight could even give the fund sufficient flexibility to supplement ICAO's budget in the implementation of ICAO's work program, when the need arises.

Any state may have access to financial support from the aeronautical monetary fund on a loan basis at a predetermined and common payment method based on interest. The ICAO Council, as administrator of the fund, could decide on the merits of each application for assistance. The collection of monies under the fund may be handled by a professional collector.

ENDNOTES

1. ICAO is the specialized agency of the United Nations responsible for the regulation of international civil aviation. It has a membership of 185 contracting states.
2. See R.I.R. Abeyratne, *Legal and Regulatory Issues in International Aviation*, Transnational Publishers: New York, 1996 at p. 261.
3. Argentina, Brazil, Columbia, Costa Rica, Cuba, Dominican Republic, El Salvador, and Panama, hereinafter referred to as LACAC for ease of reference.
4. ICAO Assembly working Paper A31-WP/73, EX/26. App 2.
5. *Ibid.*
6. Convention on International Civil Aviation, opened for signature at Chicago on 7 December 1944, entered into force on 4 April 1947. ICAO Doc, 7300/6.
7. See ICAO Assembly Working Paper A29-WP/39 EX/8 APPENDIX at p. 8.
8. See R.I.R. Abeyratne, *Aircraft Engine Emissions and Noise, Environmental Policy and Law*, Vol. 24 No. 5, September 1994 pp. 238–250.
9. See A-31-WP/206. EX/87, 30/9/95 Corrigendum 2/10/95.
10. Annual Report of the council, 1996 (ICAO, Doc 9685) at p. 2.
11. See ICAO Projects Long Term Moderate Traffic Growth of 5 percent per year, a paper published by the ICAO Secretariat in ICAO Journal, December 1994 at p. 20.
12. Saeed A. Al Ghamdi, *Alternative Approach to Implementation of CNS/ATM systems Would Improve User Charge*, ICAO Journal, April 1993, p. 19 at 20.
13. *Ibid.*
14. Provisional International Civil Aviation Organization — the predecessor of the ICAO.
15. Report on the conference of Air Navigation Services in Iceland, Geneva, 8–26 June 1948, ICAO Doc 7000-JS/550, at p. 7.
16. *Id.* At 8.
17. *Id.* Article 44.
18. *Id.* Article 44 (C).
19. *Id.* Article 69.
20. *Id.* Article 72.
21. *Id.* Article 74.
22. *Id.* Article 73.
23. *Id.* Article 76.
24. Agreement on the Joint Financing of Certain Air Navigation Services in Iceland (1956), ICAO Doc 9586-JS/682.
25. *Ibid.*
26. *Id.* Article III (1).
27. *Id.* Article VII (1).
28. Assembly Resolution A 16–10.
29. Gerald F. Fitzgerald, *ICAO and the Joint Financing of Certain Air Navigation Services* X11 *Annals Air and Space L.* 1987, 57, 59, 60.
30. Report on the Conference on Airport and Route Facility Management, ICAO Doc 9579 - CARFM (1991), Recommendation 2/24 at p. 38.
31. Statements by the Council to Contracting States on Charges for Airports and Air Navigation Services, Fifth Edition – 1997, Doc 9082/5, para 32–33 at p. 10.

