

Invoking ICAO Article 38 – Filing a Difference

Sofema Aviation Services (SAS) considers the process whereby member states may file a difference with ICAO SARP's

Introduction

Invoking Article 38 of the Chicago Convention is formally known in the aviation community as "Filing a Difference."

- It is not a legal defense mechanism used in court, but a formal administrative procedure where a Member State officially notifies the International Civil Aviation Organization (ICAO) that it does not (or cannot) comply with a specific international standard.

Here is the breakdown of how a state invokes this article and the necessary steps required to do so.

When to Invoke Article 38 (The Triggers)

A Member State *must* invoke Article 38 by notifying ICAO if any of the following three scenarios apply:

- **Impracticability:** The State finds it physically or legally impossible to comply with a new International Standard.
- **Difference in Regulation:** The State prefers to keep its own national regulations which differ from the ICAO Standard (e.g., the State requires a higher safety standard or a different procedure).
- **Failure to Amend:** The State cannot bring its own regulations into alignment with an amended ICAO Standard within the required timeframe.

The Necessary Steps

Step 1: Gap Analysis - Before invoking Article 38, the State's Civil Aviation Authority (CAA) must perform a technical review of its national regulations against the ICAO Annexes.

- The CAA compares its national law with the ICAO Standards and Recommended Practices (SARPs).
- If the national regulation does not match the ICAO Standard exactly, a "difference" exists.

Step 2: Formal Notification (The "Invoke" Action) - The State must officially notify ICAO of this difference. Historically this was done via paper letters, but it is now almost exclusively done digitally.

- **System:** The State uses the Electronic Filing of Differences (EFOD) system, which is part of the ICAO USOAP (Universal Safety Oversight Audit Programme) dashboard.

- **Action:** The designated National Continuous Monitoring Coordinator (NCCMC) or authorized user logs in and specifically flags the ICAO Standard they are not complying with.
- **Details Required:** The State must describe:
 - The specific provision (Annex reference).
 - The category of difference (see below).
 - A description of the national practice (what the State does instead).
 - The intent (if/when they plan to comply in the future).

Step 3: Classification of the Difference - When filing, the State must classify the type of difference so other nations understand the operational impact. Common categories include:

- **Category A (More Exacting):** The State's rules are stricter than ICAO's (e.g., ICAO requires 100 flight hours; the State requires 150).
- **Category B (Different Character):** The State uses a completely different method to achieve the same safety outcome.
- **Category C (Less Protective):** The State's rules are less stringent than ICAO standards (this often raises safety concerns for other States).

Step 4: Publication in the AIP - Invoking Article 38 is not a secret between the State and ICAO; it must be public knowledge for pilots and operators.

- The State must publish the difference in its **Aeronautical Information Publication (AIP)**.
- This is typically located in the **GEN 1.7** section of the AIP.
- This ensures that international airlines flying into that country are aware that the local procedures differ from the global standard.

Critical Deadlines

- **New Amendments:** When ICAO adopts a new amendment to a standard, they send a "State Letter." The State has 60 days from the date of adoption to notify ICAO if they will *not* comply.
- **Immediate Notice:** If a State changes its own laws in a way that creates a new difference, they must notify ICAO immediately.

Consequence of Invoking Article 38

Once Article 38 is invoked (the difference is filed):

1. **ICAO's Obligation:** ICAO is legally required to notify all other Member States of the difference.
2. **Mutual Recognition:** If the difference renders the State's safety standards lower than ICAO's (Category C), other nations are **not** obliged to recognize that State's certificates or licenses (under Article 33).
3. **Safety Oversight:** Significant differences may trigger questions during ICAO safety audits (USOAP) regarding the State's capability to oversee safe aviation operations.

Summary Checklist for the State

1. Identify the specific ICAO Standard in the Annex.
2. Draft the text describing the national deviation.
3. Log into the ICAO EFOD system.
4. Input the difference and select the Category (A, B, or C).
5. Publish the details in **AIP Section GEN 1.7**.

Next Steps

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