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CHAPTER III

THE CHICAGO CONVENTION

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I. INTRODUCTION

Upon invitation from the United States, representatives of 54 nations met at Chicago from November 1 to December 7, 1944, to "make arrangements for the immediate establishment of provisional world air routes and services" and "to set up an interim council to collect, record and study data concerning international aviation and to make recommendations for its improvement."¹

In Chicago, draft proposals were submitted by the United States, the United Kingdom, and Canada, and by Australia and New Zealand jointly. In addition to the normal working committees (Executive, Nominations, Steering, Credentials, and Rules and Regulations), the Conference established four technical committees: (1) Multilateral Aviation Convention and International Aeronautical Body (to establish a

¹ http://www.icao.int/icao/en/chicago_conf/intro.html (visited Feb. 7, 2008).

permanent multilateral convention and international aeronautic organization); (2) Technical Standards and Procedures (to create international technical standards and procedures); (3) Provisional Air Routes (to perfect arrangements for provisional air routes); and (4) Interim Council (to establish an interim council to function in international aviation pending ratification of a full convention).² In a mere 37 calendar days, the Chicago Conference drafted the following agreements:

1. [T]he Convention on International Civil Aviation, was concluded and opened for signature. . . . [T]his instrument provided a complete modernization of the basic public international law of the air. It was intended to replace the Paris Convention on Aerial Navigation of October 13, 1919, and did so when it came into effect on April 4, 1947. It also provided the constitution for a new permanent international organization, the International Civil Aviation Organization, which . . . replaced the previous international organization of more limited scope, the International Commission for Air Navigation.
2. The International Air Services Transit Agreement, commonly known as the Two Freedoms agreement, was concluded and opened for signature. This agreement had been accepted by 36 states as of June 30, 1947. . . .
3. The International Air Transport Agreement, commonly known as the Five Freedoms agreement, was also concluded and opened for signature. . . . The number of accepting states reached a maximum of 17, but it is now declining, 4 having denounced the agreement. . . .
4. A standard form of bilateral agreement for the exchange of air routes was prepared and recommended by the Conference as part of its final act. This standard form has subsequently been widely used and has done much to bring a measure of consistency into the many new bilateral agreements which have been necessary.
5. An Interim Agreement on International Civil Aviation was completed and opened for signature. It came into effect on June 6, 1945, thereby providing an interim basis for many phases of international civil aviation and a constitution for the Provisional International Civil Aviation Organization. The interim agreement was replaced when the convention came into effect on April 4, 1947.

² http://www.icao.int/icao/en/chicago_conf/intro.html (visited Feb. 7, 2008).

6. Finally, a world-wide common basis was established for the technical and operational aspects of international civil aviation. . . . The technical recommendations prepared at Chicago . . . have served as a guide to practice throughout the world and have been of basic importance in the extraordinary expansion of international civil aviation which has occurred since 1945.³

The Chicago Convention of 1944 accomplished two principal achievements. First, it recognized and codified certain principles of substantive public international law. Second, it established an international organization and vested it with jurisdiction to accomplish certain objectives, and prescribed the procedures to govern the exercise of its jurisdiction. This Chapter provides a succinct overview of these two functions.

II. THE CHICAGO CONVENTION AS A SOURCE OF INTERNATIONAL AIR LAW

Though as we have seen, the Chicago Conference was unable to accomplish a multilateral exchange of traffic rights (except as a side agreement), it nevertheless laid down a body of substantive law that has been highly influential since its promulgation. Professor John Cobb Cooper identified four basic principles governing public international air law:

1. *Territorial Sovereignty.* Every State has, to the exclusion of all other States, the unilateral and absolute right to permit or deny entry into the area recognized as its territory and similar right to control all movements within such territory.
2. *National Airspace.* The territory of a sovereign State is three dimensional, including within such territory the airspace above its national lands and its internal and territorial waters.
3. *Freedom of the Seas.* Navigation on the surface of the high seas and flight above such seas are free for the use of all.
4. *Nationality of Aircraft.* Aircraft have the characteristic of nationality similar to that developed in maritime law applicable to ships. Thus aircraft have normally a special relationship to a particular State which is entitled to make effective the privileges to which such aircraft may be entitled and such State is also reciprocally responsible for the international good conduct of such aircraft.⁴

³ http://www.icao.int/icao/en/chicago_conf/intro.html (visited Feb. 7, 2008).

⁴ John Cobb Cooper, *Backgrounds of International Public Air Law*, 1 YEARBOOK OF AIR AND SPACE LAW 3 (1967).

A. NATIONAL SOVEREIGNTY OVER AIRSPACE

Article 1 of the Chicago Convention recognizes the pre-existing rule of customary international law, that "every State has complete and exclusive sovereignty over the airspace above its territory." Territory is defined by Article 2 as "the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of each State."

There is no corresponding right in Air Law to the Maritime Law concept of "freedom of the seas" or the right of "innocent passage".⁵ While a maritime vessel could freely participate in international trade and commerce at any seaport of a State with which it had peaceful relations, an aircraft could not even land at a foreign airport without that State's permission, express or implied. Though Article 5 of the Convention authorized certain rights of innocent passage for nonscheduled flights, scheduled flights were limited under Article 6 to those situations in which the permission or authorization of the underlying State was conferred

As we saw in the last Chapter, the Law of the Sea Convention provides clarification as to the territorial rights of coastal States vis-à-vis aircraft. Article 3 of the Law of the Sea Convention extends the jurisdiction of coastal States to 12 miles, while Article 38 establishes a right of transit in the straits for military and commercial aircraft.⁶

Although States enjoy "complete and exclusive sovereignty" over their airspace, this does not mean that contracting States can act with unconstrained freedom in their airspace. In fact, much of the rest of the Chicago Convention circumscribes the unlimited freedom purportedly conferred by Article 1, imposing a variety of requirements upon contracting States. It is necessary that this be so in order to effectuate the overriding purpose of the Convention – to create uniformity of Air Law across national boundaries. Former ICAO Council President Assad Kotaite made this point on the willingness of States to acquiesce to intrusions on their "complete and exclusive sovereignty":

The adherence of States to international law is

⁵ Where the two regimes share common ground, so to speak, is their common prohibition of cabotage. Foreign-flag ocean vessels cannot offer domestic transport (between two ports in the same nation) by sea or river without permission.

⁶ I. H. PH. DIEDIKRS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 33 (6TH ED. 1997).

voluntary, not due to external coercion. International law is both obligatory (when States adhere to Conventions and treaties) and voluntary (because it is the decision of States freely to adhere to it). ICAO has no enforcement power, so in a sense the weakness of international law is also its strength: weakness because there is no authority to impose it, but strength because this situation obliges States to work things out in the common interest, on an equal basis. International law is not designed to protect the interest of States, but rather to protect the persons flying.⁷

For example, though States have "complete and exclusive" sovereignty over the airspace above their territory, they are not free to blow a commercial aircraft out of the sky that strays into it. A significant amendment to the Chicago Convention, Article 3bis, adopted after a Soviet military aircraft (a Suchoi 15 interceptor) shot down Korean Airlines flight 007 which had strayed over Soviet territory, killing all 269 people aboard, reaffirms the customary international law principle that "every State must refrain from resorting to the use of weapons against civil aircraft in flight".⁸ However, a State may require civil aircraft flying above its territory without permission to land at a designated airport. But "in the case of interception, the lives of persons on board and the safety of aircraft must not be endangered."⁹ Article 3bis is careful not to restrict the rights and obligations of States as set forth in the UN Charter. This would include Article 51 of the Charter, which guarantees States the right of self-defense if an armed attack occurs.

Article 9 of the Chicago Convention allows contracting States to establish "prohibited areas"¹⁰ of reasonable extent and location restricting or prohibiting aircraft of other States from flying therein, if necessary for military or public safety purposes. The State may not discriminate against foreign aircraft operating in international aviation vis-à-vis its domestic aircraft. Moreover, in exceptional circumstances, or during national emergencies, or if necessary for public safety, a State may temporarily restrict or prohibit flights over a portion or all of its

⁷ Assad Kotaite, *My Memoirs* 42 (ICAO 2013).

⁸ MICHAEL MILDE, *INTERNATIONAL AIR LAW AND ICAO* 53 (Eleven 2008).

⁹ Chicago Convention, Art. 3bis.

¹⁰ Annexes 2, 4 and 15 of the Convention further define the relevant terms. A *prohibited area* is defined air space in which the flight of aircraft is totally prohibited. A *restricted area* is defined airspace within which flight is restricted in accordance with specified conditions. A *danger area* is defined air space within which activities dangerous to flight may exist.

territory without distinction as to the nationality of the aircraft.¹¹ This was the legal foundation for the decision of the United States to suspend all non-military flights for three days following the aerial terrorist attacks unleashed on the World Trade Center and the Pentagon on September 11, 2001.

Article 35 allows a State to regulate or prohibit, on a non-discriminatory basis, the flight over its territory "munitions of war or implements of war". It may require an aircraft flying through its territory to land at a customs airport,¹² to observe its air regulations,¹³ and rules of the air,¹⁴ as well as its entry and clearance regulations.¹⁵

B. RIGHTS OF OVERFLIGHT AND TRAFFIC RIGHTS

Scheduled Aircraft. The general rule on traffic rights is set forth in Article 6 of the Chicago Convention: "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization." This provision is the foundation for the negotiation of air transport agreements between nations, for without permission to fly across another's territory, a scheduled aircraft may not enter another's airspace.¹⁶

Non-scheduled Aircraft. Although the operations of scheduled aircraft are restricted, aircraft engaged in non-scheduled flights enjoy the right to fly into or across the territory of another State, and to make stops for non-traffic purposes (first and second freedom rights). However, the State flown over has the right to require the non-scheduled aircraft to land, and to follow prescribed routes, or to obtain special permission for such flights.¹⁷

Cabotage. Each State may restrict cabotage rights (the carriage of domestic traffic between two points within the State) to its domestic airlines. States may not "enter into any arrangements which specifically

¹¹ Chicago Convention, Art. 89. Article 89 of the Chicago Convention allows a State, during war or national emergency, to suspend all the obligations of the Convention.

¹² Chicago Convention, Art. 10.

¹³ Chicago Convention, Art. 11.

¹⁴ Chicago Convention Art. 12.

¹⁵ Chicago Convention Art. 13.

¹⁶ Michael Milde, *The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later?*, XIX ANNALS OF AIR & SPACE L. 401, 420 (1994).

¹⁷ *Chicago Convention*, Art. 5.

grant any such privilege on an exclusive basis . . . [or] obtain any such exclusive privilege from any other State.¹⁸

State Aircraft. As noted above, State aircraft may not fly over or land on the territory of another State "without authorization by special agreement or otherwise, and in accordance with the terms thereof."¹⁹

Pilotless Aircraft. Pilotless aircraft may not fly over the territory of a contracting State "without special authorization and in accordance with the terms of such authorization." Such flights must be "controlled as to obviate danger to civil aircraft."²⁰

C. NATIONALITY: REGISTRATION, CERTIFICATES & LICENSES

Aircraft Nationality. Professor John Cobb Cooper described aircraft nationality as "in some respects, the most important principle in aeronautical law" According to Cooper, "The possession of a nationality is the basis for the intervention and protection by a State; it is also a protection for other States for the redress of wrongs committed by those on board against their nationals."²¹

Article 6 of the Paris Convention had provided that "aircraft possess the nationality of the State on the register of which they registered", and Article 7 provided that "no aircraft shall be entered on the register of one of the contracting States unless it belongs wholly to nationals of such State." Under Article 8, aircraft could not validly be registered in more than one State. Similar provisions were included in the Madrid and Havana Conventions.²² However, the Havana Convention abandoned the notion that registration must be had only in the State of the nationality of the owner, and instead left it to the registering State to establish the criteria pursuant to which it would allow its flag to be carried, as in Maritime Law.²³ In fact, the Paris Convention itself was amended in 1929 to allow each State to be the sole

¹⁸ *Chicago Convention*, Art. 7.

¹⁹ *Chicago Convention*, Art. 3(c).

²⁰ *Chicago Convention*, Art. 8.

²¹ John Cobb Cooper, *Backgrounds of International Public Air Law*, 1 YEARBOOK OF AIR AND SPACE LAW 3, 31(1967).

²² Manley Hudson, *Aviation and International Law*, 1 AIR L. REV. 183, 198 (APR. 1930).

²³ John Cobb Cooper, *Backgrounds of International Public Air Law*, 1 YEARBOOK OF AIR AND SPACE LAW 3, 34 (1967).

determinor of the criteria pursuant to which aircraft may be registered in it.²⁴

The Chicago Convention provides that, "Aircraft shall have the nationality of the State in which they are registered."²⁵ Aircraft may not be registered in more than one State, though registration may be changed from one State to another.²⁶ Registration, and transfers thereof, shall be according to the domestic laws of the registering State.²⁷ The Paris Convention's requirement that aircraft be effectively owned and controlled by citizens of the registering State did not make its way into the Chicago Convention, though there is a requirement that registering States provide data to ICAO concerning the ownership and control of aircraft.²⁸ though it appears this provision has never been applied.²⁹

Some aircraft are leased to carriers that do not fly to the State of registration, making it difficult for the registering State to monitor the aircraft's airworthiness. For example, many Irish leasing companies own aircraft that never fly to Ireland. Article 83bis allows the registration functions to be transferred to another State better able to fulfill such regulatory requirements.

The issue of whether aircraft or airline ownership was tied to nationality was left to national law. But since cabotage rights normally were conferred only to airlines owned by nationals of the registry State, and often nationality was a domestic law prerequisite of registry, the result would be the same in much of the world. Moreover, the "substantial ownership and effective control" requirement was included in both the Transit and Transport Agreements adopted at Chicago, and in most of the bilateral air transport agreements concluded since. So, the practice of most States has long been to restrict airline certification to companies owned and controlled by its citizens. That tradition began to be assaulted with the European Union's promulgation of rules prohibiting member States from imposing such requirements on

²⁴ John Cobb Cooper, *Backgrounds of International Public Air Law*, 1 YEARBOOK OF AIR AND SPACE LAW 3, 34-35 (1967).

²⁵ *Chicago Convention*, Art. 17.

²⁶ *Chicago Convention*, Art. 18.

²⁷ *Chicago Convention*, Art. 19.

²⁸ *Chicago Convention*, Art. 21.

²⁹ MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 76 (Eleven 2008). The Convention also refers to the possibility of establishing joint operating organizations, and gives the Council the power to determine how the nationality provisions should be applied to aircraft operated by international operating agencies, though this authority has rarely been invoked. *Id.* at 77-79. *Chicago Convention*, Art. 77-79.

European 'community carriers'.³⁰ Today, any airline owned controlled by Europeans may fly between any points in the European Union, even wholly domestic (cabotage) routes.

State Duties. Professor Joseph Gertler observed that States play a dual role: "the role as guarantors in relation to other governments with respect to the risks of aircraft operations abroad, and the protecting role manifested in the acquisition of necessary rights through international agreements, and in the powers to authorise [sic] selected aircraft operators or carriers for the exercise of such rights."

Registering States have several duties vis-à-vis registered aircraft. According to Professor Cooper, "each State is reciprocally responsible for the international good conduct of the aircraft having its nationality."³¹ Article 12 of the Chicago Convention requires that States insure that aircraft flying over their territory or carrying their nationality mark shall comply with the rules and regulations governing flight there in force. Over the high seas, the rules in force are those established under the Convention (i.e., SARPs promulgated by ICAO), subject to the standards of safety and navigation promulgated by ICAO. The laws of the State of registry would apply to aircraft in flight over the high seas. Moreover, as in Maritime Law, the owners and operators of the aircraft could look to the State of registry for protection against unlawful conduct by other States.

As noted above, the registering State must make available to other contracting States, or ICAO, information concerning the registration and ownership of aircraft registered in it, on demand.³² The State must provide such aircraft with a certificate of airworthiness,³³ and issue certificates of competency and licenses for pilots and flight crew on such aircraft.³⁴ The State must also issue licenses for aircraft radio equipment.³⁵

³⁰ See Paul Stephen Dempsey, *EUROPEAN AVIATION LAW* (Kluwer 2004).

³¹ John Cobb Cooper, *Backgrounds of International Public Air Law*, 1 *YEARBOOK OF AIR AND SPACE LAW* 3, 31(1967).

³² *Chicago Convention*, Art. 21.

³³ *Chicago Convention*, Art. 31, and Annex 8. In practice, the airworthiness certificate is initially issued by the State of aircraft manufacture, then validated by the State of the owner or operator of the aircraft.

³⁴ *Chicago Convention*, Art. 32. Should an accident occur, the registering State may appoint observers to the formal accident investigation. *Id.* Art. 26, and Annex 13.

³⁵ *Chicago Convention*, Art. 30.

Other States, in turn, have a duty to recognize certificates of airworthiness and personnel certificates of competency and licenses as valid, but only so long as the requirements under which they are issued "are equal to or above the minimum standards which may be established" by ICAO.³⁶ States also have a duty to render assistance to aircraft in distress within their territory.³⁷

Aircraft Requirements. Certain obligations are imposed upon aircraft operating in international navigation.³⁸ Every international aircraft must display its nationality and registration marks.³⁹ Certain documents must be carried aboard the aircraft, including its certificate of registration, its certificate of airworthiness, the licenses for each member of the crew, its journey log book, its radio license, the names and places of embarkation and destination of any passengers aboard, and a manifest and detailed declarations of any cargo aboard.⁴⁰

Airline Nationality. Airline nationality is nowhere addressed in the Chicago Convention, though it has become an important part of bilateral air transport agreements, as well as the multilateral Transit and Transport Agreements, whose "substantial ownership and effective control" requirements have effectively precluded adoption of the maritime law notion of "flags of convenience" into international aviation. An airline may fly aircraft registered in States other than its State of incorporation, or principal place of business.

D. AIRCRAFT CATEGORIZATION

³⁶ *Chicago Convention*, Art. 33.

³⁷ *Chicago Convention*, Art. 25.

³⁸ Articles 29 and 32 restrict their application to aircraft and pilots operating in "international navigation". Presumably, the term means nothing more than the rules set forth in the Convention apply to international, as opposed to domestic, air transport. Documents and licenses are required by Chicago to be carried and presented on international flights, but not domestic flights. Of course, the State can itself require they be required on domestic flights.

Part III is labeled "International Air Transport". It addresses an eclectic smorgasbord of items that are thrown together with no common denominator - airline reporting requirements, airports and joint pooling and regional organizations - except in their relation to the powers of the Council. It seems to be related to the Constitutional organizational details of ICAO which precede Part III. The entire treaty addresses International Air Transport, and international navigation.

³⁹ *Chicago Convention*, Art. 20.

⁴⁰ *Chicago Convention*, Art. 29, 34 and Annex 6.

Though it nowhere defines the term "aircraft",⁴¹ the Chicago Convention distinguishes between civil and State aircraft, manned and unmanned (or pilotless) aircraft, and scheduled and non-scheduled services.

Under Article 3, the Chicago Convention explicitly applies "only to civil aircraft," and not to State aircraft.⁴² This exemption from their applicability to State aircraft exists in a number of multilateral Conventions.⁴³ Under the Chicago Convention certain types of aircraft are presumptively State aircraft, including "Aircraft used in military, customs and police services . . ." ⁴⁴ Some commentators argue for a functional approach to the determination of whether an aircraft should be categorized as civil or State – that it is not the technical design, registration marks, ownership or crew of the aircraft that determines whether it is a State aircraft; it is instead the function for which it is used.⁴⁵ Thus, a commercial air carrier's Boeing 747 flying troops might be classified a military aircraft, while an F-14 flying emergency serum to arrest an outbreak of disease might be considered a civil aircraft.⁴⁶

Paradoxically, although the Chicago Convention purports not to be applicable to State aircraft, in fact, several provisions specifically do apply to State aircraft. Article 3(d) provides that when issuing regulations for State aircraft, the contracting State "will have due regard for the safety of navigation of civil aircraft." Traffic rights are circumscribed by Article 3(c), which provides that State aircraft may not fly over or land on the territory of another State "without authorization by special agreement or otherwise, and in accordance with the terms thereof."⁴⁷ Article 3bis restricts the "use of weapons against civil aircraft in flight", and presumably this restricts State military aircraft from firing upon commercial airliners.

⁴¹ *But see* Annex 7. In Annex 7, ICAO has defined an aircraft as, "Any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface." This definition includes balloons to airplanes and helicopters, and even kites, but excludes hovercraft and rockets.

⁴² MICHAEL MILDE, *INTERNATIONAL AIR LAW AND ICAO 59-72* (Eleven 2008).

⁴³ These include the Geneva Convention on the International Recognition of Rights in Aircraft of 1948, the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of 1952, the Tokyo Convention of 1963, the Hague Convention of 1970, the Montreal Convention of 1971, and the Montreal Conventions of 2009.

⁴⁴ *Chicago Convention*, Art. 3(b).

⁴⁵ MICHAEL MILDE, *INTERNATIONAL AIR LAW AND ICAO 71* (Eleven 2008).

⁴⁶ Michael Milde, *The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later?*, XIX ANNALS OF AIR & SPACE L. 401, 418 (1994).

⁴⁷ *Chicago Convention*, Art. 3(c).

It is unclear whether the Chicago Convention applies to suborbital and orbital commercial launch vehicles. The Chicago Convention applies to "civil aircraft".⁴⁸ But it is unclear whether a commercial aerospace vehicle constitutes a civil aircraft. Though the original Convention did not define the term "aircraft", in Annex 7, ICAO defined an aircraft as, "Any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface." This would not include a rocket. Functionally, the NASA Space Shuttle would not fall under the Convention on its ascent via rocket, but might on its descent, though it would still be exempt as a "state aircraft" under Article 3. A private launch, however, might fall within the safety and navigation provisions of the Convention and its Annexes. This issue will be discussed in greater detail in the concluding Chapter of this book

III. THE CHICAGO CONVENTION AS THE CONSTITUTION OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

A. OBJECTIVES

Although the Chicago Conference failed in its attempt to formulate a comprehensive economic charter for international civil aviation or to effectuate an exchange of traffic rights, it laid the foundation for the postwar establishment of the International Civil Aviation Organization [ICAO].⁴⁹ The Provisional International Civil Aviation Organization [PICAO] functioned from June 6, 1945, until April 4, 1947, when the Chicago Convention had sufficient ratifications to enter into force. ICAO began operations April 4, 1947, and that same year was included under the umbrella of the United Nations' Economic and Social Council [ECOSOC]. Headquartered in Montreal, ICAO was given responsibility for regulating the many technical aspects of international civil aviation.⁵⁰

ICAO's objectives are defined by Article 44 of the Chicago Convention:

⁴⁸ *Id.*

⁴⁹ See ANDREAS LOWENFELD, AVIATION LAW II-5 (1972).

⁵⁰ Michael Milde, *The Chicago Convention -- After Forty Years*, IX ANNALS OF AIR & SPACE L. 119, 121 (1984) [hereinafter cited as Milde]. FITZGERALD, ICAO NOW AND IN THE COMING DECADES, IN INTERNATIONAL AIR TRANSPORT: LAW ORGANIZATION AND POLICIES FOR THE FUTURE 47, 52 (N. MATTE ED. 1976).

- Ensure the safe and orderly growth of international civil aviation throughout the world.
- Encourage the arts of aircraft design and operation for peaceful purposes.
- Encourage the development of airways, airports and air navigation facilities for international civil aviation.
- Meet the needs of the people of the world for safe, regular, efficient and economical air transport.
- Prevent economic waste caused by unreasonable competition.
- Ensure that the rights of the Contracting States are fully respected and that every Contracting State has a fair opportunity to operate international airlines.
- Avoid discrimination between Contracting States.
- Promote safety of flight in international air navigation.
- Promote generally the development of all aspects of international civil aeronautics.

Note that the Chicago Convention gives ICAO responsibility beyond safety and navigation to "foster the planning and development of international air transport so as to . . . prevent economic waste caused by unreasonable competition . . .", and "avoid . . . discrimination between contracting States . . .".⁵¹ However, ICAO has focused its energies primarily on issues surrounding air safety and navigation, leaving its potential jurisdiction over economic issues largely unexplored.⁵² One source asserts that the Chicago Convention established ICAO as "an international organization with wide quasi-legislative and executive powers in the technical regulatory field and with only consultative and advisory functions in the economic sphere."⁵³ But with World Trade Organization in Geneva, and its General Agreement on Trade in Services [GATS] taking more of an interest in the economic affairs of airlines (and having already asserted jurisdiction over airline manufacturing), some member States have urged ICAO to assert its dormant powers under the

⁵¹ *Chicago Convention*, supra, Art 44(e), (g). BRIAN F. HAVEL & GABRIEL S. SANCHEZ, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL AVIATION LAW* (Cambridge 2014).

⁵² Among the responsibilities given ICAO by the *Chicago Convention* are to meet the world's needs for ". . . safe, regular, efficient and economical air transport . . ." and to "[p]revent economic waste caused by unreasonable competition . . ." *Chicago Convention*, Art. 44.

⁵³ Michael Milde, *The Chicago Convention – After Forty Years*, IX ANNALS OF AIR & SPACE L. 119, 121 (1984). See also, FitzGerald, *ICAO Now and in the Coming Decades*, in INTERNATIONAL AIR TRANSPORT: LAW ORGANIZATION AND POLICIES FOR THE FUTURE 47, 52 (N. MATTE ED. 1976) [hereinafter cited as FitzGerald].

Chicago Convention in this arena. ICAO has issued recommendations on a number of economic issues, including the extraterritorial application of competition laws, tariff setting, approval and enforcement, bias in computer reservations systems, and discrimination in airport, navigation and user fees, and airline nationality requirements.⁵⁴

B. ORGANIZATION

ICAO is comprised of an Assembly, a Council and a Secretariat. The principal officers of ICAO are the President of the Council,⁵⁵ and the Secretary General. Comprised of representatives from all Contracting States, the ICAO Assembly is the sovereign body of ICAO. Each contracting State has one vote, though the members of the European Union in recent years have voted as a bloc. The Assembly meets every three years, reviewing in detail the work of the Organization, setting policy for the forthcoming years, and passing a triennial budget. The Assembly elects the members of the Council, the governing body, for a three-year term.

The Council is comprised of members from 36 States (originally 27 States), elected every three years by the Assembly from three categories: “(1) the States of chief importance in air transport; (2) the States not otherwise included which make the largest contribution to the provision for facilities for international civil air navigation; and (3) the States not otherwise included whose designation will insure that all major geographic areas of the world are represented on the Council”⁵⁶ Unlike the executive institutions of its U.N. siblings, the Council is a permanent body. It elects its President and appoints the Secretary General and members of permanent commissions. It submits annual reports to Assembly. The Council is generally responsible for implementing ICAO objectives.

The Council adopts Standards and Recommended Practices as Annexes to the Chicago Convention.⁵⁷ In the development of Standards,

⁵⁴ For a discussion of these activities, see PAUL DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 276-93 (Transnational 1987).

⁵⁵ ICAO has had relatively few Presidents. At this writing, there have been but five:

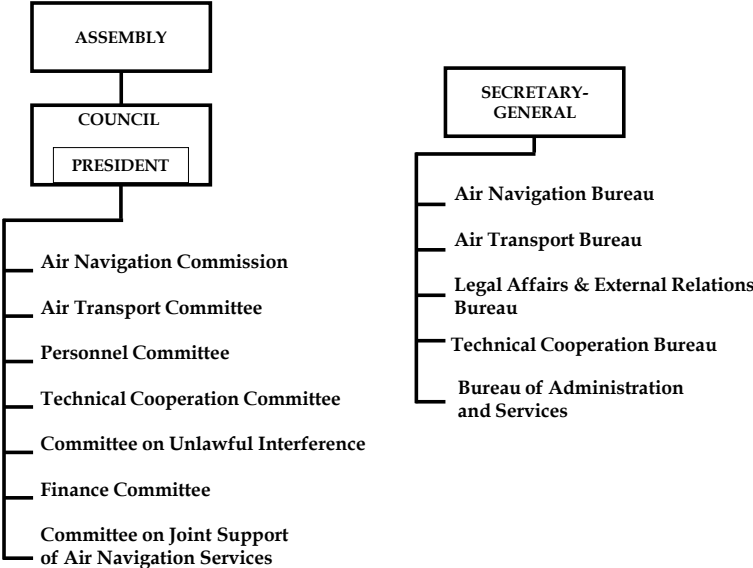
- [Edward Pearson Warner \(United States\)](#) (1947-1957)
- [Walter Binaghi \(Argentina\)](#) (1957-1976)
- [Assad Kotaite \(Lebanon\)](#) (1976-2006)
- [Roberto Kobeh Gonzalez \(Mexico\)](#) (2006-2012)
- Benard Aliu (Nigeria)(2012-present)

⁵⁶ Chicago Convention, Art 50(b).

⁵⁷ Chicago Convention Art.54(l).

the Council is assisted by the Air Navigation Commission in technical matters, the Air Transport Committee on economic matters, and the Committee on Unlawful Interference on aviation security matters.

The Secretariat is headed by the Secretary General. It is divided into five principal divisions: the Air Navigation Bureau, the Air Transport Bureau, the Technical Co-operation Bureau, the Legal Affairs and External Relations Bureau, and the Bureau of Administration and Services. The following chart graphically depicts the major organizational components of ICAO:



Articles 43-96 of the Chicago Convention essentially constitute the organic constitution of ICAO.

The States attending the Chicago Conference conceded the need for uniform technical standards; consequently, the jurisdiction of the ICAO was extended to the unification and standardization of law on such matters as aircraft licensing, airworthiness certification, registration of aircraft, international operating standards, and airways and communications controls.⁵⁸ Given the difference of opinion of the major aviation powers at Chicago, it is less clear what role ICAO has on

⁵⁸ R. THORNTON, INTERNATIONAL AIRLINES AND POLITICS 32, 34 (1970) [hereinafter cited as R. THORNTON].

economic issues.

Perhaps because the Chicago Convention was drafted before the United Nations Charter, ICAO is unique in terms of its organizational structure among agencies within the U.N. family. For example, its Council is a permanent body, unlike the executive institutions of its U.N. siblings. Moreover, it was vested with both quasi-legislative power (in its ability to adopt standards and recommended practices [SARPS]), and quasi-judicial power (in its ability to settle disputes arising under the Chicago Convention).⁵⁹ Pursuant to Chapter XVIII of the Chicago Convention, ICAO holds quasi-judicial authority to resolve aviation disputes between States arising the Convention or the Annexes thereto. Dispute resolution is the subject of Chapter XIII, below.

C. STANDARDS AND RECOMMENDED PRACTICES: THE PROCESS OF ADOPTION

The ICAO Council is authorized to adopt SARPs on issues affecting the safety and efficiency of air navigation and, for convenience, designate them as Annexes to the Chicago Convention. SARPs become effective as Annexes to the Convention not less than three months after they are approved by a two-thirds vote of the Council, unless during that period they are disapproved by a majority of the members of the ICAO General Assembly. Typically, they are not issued until after extensive consultation with member States, and consensus is achieved, a process that takes two years or longer.

Article 37 of the Chicago Convention provides that “the International Civil Aviation Organization will adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:

- “a) Communication systems and air navigation aids, including ground marking;
- “b) Characteristics of airports and landing areas;
- “c) Rules of the air and air traffic control practices;
- “d) Licensing of operating and mechanical personnel;
- “e) Airworthiness of aircraft;
- “f) Registration and identification of aircraft;
- “g) Collection and exchange of meteorological information;

⁵⁹ Michael Milde, *The Chicago Convention--After Forty Years*, IX ANNALS OF AIR & SPACE L. 121, 123 (1984).

"h) Log books;
"i) Aeronautical maps and charts;
"j) Customs and immigration procedures;
"k) Aircraft in distress and investigation of accidents;
"l) and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate."

Note that neither security nor environmental issues are explicitly identified as tasks on which ICAO should focus. Jurisdiction over those issues is found in paragraph l) above.

Article 54 of the Chicago Convention provides, *inter alia*, that the Council shall:

- l) "Adopt in accordance with the provisions of Chapter VI international standards and recommended practices; for convenience, designate them as Annexes; and notify all contracting States of the action taken;
- m) "Consider recommendations of the Air Navigation Commission for amendment of the Annexes and take action in accordance with the provisions of Chapter XX"

Article 57 provides that the Air Navigation Commission shall: "Consider, and recommend to the Council for adoption, modifications of the Annexes." The process may be summarized as follows:

- First, proposed technical SARPS are reviewed by the Air Navigation Commission;
- Proposed SARPS are "vetted" to States for comment and consultation;
- The Council approves new SARPS by a two-thirds majority;
- The "Green Edition" is circulated to member States four months before the Effective Date;
- A majority of States can veto the SARPS by registering their disapproval (though this has never happened);
- States also may "opt out" by registering their differences;⁶⁰

⁶⁰ Chapter XX Article 90 of the Chicago Convention provides:

- a) The adoption by the Council of the Annexes described in Article 54, subparagraph l), shall require the vote of two-thirds of the Council at a meeting called for that purpose and shall then be submitted by the Council to each Contracting State. Any such Annex or any amendment of an Annex shall become effective within three months after its submission to the Contracting States or at the end of such longer period of time as the Council may prescribe, unless in the meantime a majority of the Contracting States register their disapproval with the Council.

- After the Effective Date, the Secretariat issues a “Blue Edition” of the SARPS; and
- States are expected to comply except to the extent they have registered differences.

A “standard” is “any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention.”⁶¹ Though States have an obligation under the Chicago Convention to keep their own regulations “uniform, to the greatest possible extent” with SARPs,⁶² it appears that the language of the Convention gives a contracting State a means of avoiding implementation of standards on the basis of impracticality.⁶³ Thus, some States may find it impractical to comply on the basis of insufficient human or financial resources, or its unique geographic or technological characteristics. Under such circumstances, the State has a duty to immediately notify ICAO “of the differences between its own practice and that established by the international standard.”⁶⁴ However, failure to comply has its price, for other States have no duty to recognize the delinquent State’s certificates of airworthiness and competency and licenses.⁶⁵ As we shall see in the next Chapter, some States have “blacklisted” the airlines of a delinquent State.⁶⁶ A State could also register a complaint before the Council over whether it truly is “impracticable” for another State to comply with a standard.⁶⁷ Further, since 1999, ICAO’s Universal Safety and Oversight Audit Program has identified noncompliant States in what is essentially a “name and shame” approach to delinquency.⁶⁸

However, recommended practices are viewed as merely desirable;

b) The Council shall immediately notify all Contracting States of the coming into force of any Annex or amendment thereto.

⁶¹ Assembly Resolution A36-13, Appendix A. ICAO Doc 9902, Assembly Resolutions in force as of 28 September 2007 <http://www.icao.int/icaoonet/dcs/9902/index.html>

⁶² Chicago Convention Art. 12.

⁶³ MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 159-60 (Eleven 2008).

⁶⁴ Chicago Convention Art. 38.

⁶⁵ Chicago Convention Art. 33.

⁶⁶ Professor Milde notes, “non-compliance with SARPs could eliminate the State concerned from any meaningful participation in international air navigation and air transport . . .” MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 161 (Eleven 2008).

⁶⁷ Chicago Convention Art. 84. See BRIAN F. HAVEL & GABRIEL S. SANCHEZ, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL AVIATION LAW 60-61 (Cambridge 2014).

⁶⁸ MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 168-69 (Eleven 2008).

member States need not notify the Council of their intent to comply, although they are so encouraged.⁶⁹ A “recommended practice” is “any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation and to which Contracting States will endeavour to conform in accordance with the Convention.”⁷⁰ At best, recommended practices (or in some context, “best practices”) are soft law.⁷¹

ICAO also issues Procedures for Air Navigation Services [PANS],⁷² and Regional Supplementary Procedures [SUPPS].⁷³ These involve procedures that have not yet reached a sufficient degree of maturity for adoption as SARPS or do not contain material of a more permanent character that would warrant adoption of it as an Annex. Still another form of rulemaking that has been employed by the Council is the Technical Instructions which provide detailed explanations of how Annexes are to be implemented. ICAO also publishes guidance materials.

The ICAO Council has adopted Annexes addressing the following substantive areas:

Annex 1 - Personnel Licensing⁷⁴

⁶⁹ BIN CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 25 (1965). "A Recommended Practice is any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation, and to which Contracting States will endeavour to conform in accordance with the Convention. States are invited to inform the Council of non-compliance." <http://www.icao.int/icao/en/anb/mais/> (visited Feb. 4, 2008).

⁷⁰ *Id.*

⁷¹ BRIAN F. HAVEL & GABRIEL S. SANCHEZ, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL AVIATION LAW* 63 (Cambridge 2014).

⁷² "Procedures for Air Navigation Services (or PANS) comprise operating practices and material too detailed for Standards or Recommended Practices - they often amplify the basic principles in the corresponding Standards and Recommended Practices. To qualify for PANS status, the material should be suitable for application on a worldwide basis. The Council invites Contracting States to publish any differences in their Aeronautical Information Publications when knowledge of the differences is important to the safety of air navigation." <http://www.icao.int/icao/en/anb/mais/> (visited Feb. 4, 2008).

⁷³ "Regional Supplementary Procedures (or SUPPs) have application in the respective ICAO regions. Although the material in Regional Supplementary Procedures is similar to that in the Procedures for Air Navigation Services, SUPPs do not have the worldwide applicability of PANS." <http://www.icao.int/icao/en/anb/mais/> (visited Feb. 4, 2008).

⁷⁴ *Chicago Convention*, Art 37(d).

Annex 2 - Rules of the Air⁷⁵
Annex 3 - Meteorology
Annex 4 - Aeronautical Charts⁷⁶
Annex 5 - Units of Measurement to be used in Air-Ground
Communications
Annex 6 - Operation of Aircraft, International Commercial Air
Transport
Annex 7 - Aircraft Nationality and Registration Marks
Annex 8 - Airworthiness of Aircraft⁷⁷
Annex 9 - Facilitation of International Air Transport⁷⁸
Annex 10 - Aeronautical Telecommunication⁷⁹
Annex 11 - Air Traffic Services⁸⁰
Annex 12 - Search and Rescue⁸¹
Annex 13 - Aircraft Accident Inquiry⁸²
Annex 14 - Aerodromes⁸³
Annex 15 - Aeronautical Information Services
Annex 16 - Environmental Protection
Annex 17 - Security -- Safeguarding International Civil Aviation
Against Acts of Unlawful Interference
Annex 18 - Safe Transport of Dangerous Goods by Air
Annex 19 - Safety Management⁸⁴

D. STATE IMPLEMENTATION OF SARPs

Contracting States agree "to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures and organization . . ." in compliance with ICAO's standards,⁸⁵ unless

⁷⁵ *Id.* Art. 37(c).

⁷⁶ *Id.* Art. 37(i).

⁷⁷ *Id.* Art. 37(e).

⁷⁸ *Id.* Art. 37(j).

⁷⁹ *Id.* Art. 37(a).

⁸⁰ *Id.* Art. 37(a).

⁸¹ *Id.* Art. 37(k).

⁸² *Id.* Art. 37(k).

⁸³ *Id.* Art. 37(b).

⁸⁴ PAUL DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 275 (1987). Annex 19 was added in 2013.

⁸⁵ Chicago Convention, Art. 37. "A Standard is defined as any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention."

<http://www.icao.int/icao/en/anb/mais/> (visited Feb. 4, 2008).

they find it “impracticable to comply”, in which case they shall so notify the Council.⁸⁶ Hence, it is the State implementation of laws and regulations that assures compliance with the global uniform standards by airlines, airports, air navigation service providers, aircraft manufacturers and maintenance providers, and other constituents of the aviation industry.

Under Article 12, SARPs are directly binding on all flights over the high seas. Aside from the high seas, Annexes are not self-executing, and depend upon the willingness of member States to promulgate national laws and regulations and implement and enforce them vigilantly. Under Article 12 of the Chicago Convention, it is the responsibility of every member State to keep its own regulations uniform "to the greatest possible extent" with the Standards and Recommended Practices promulgated by ICAO. Under Article 37, States are obliged to "collaborate in securing the highest practicable degree of uniformity" in their domestic law, regulations and procedures with SARPs. But, as noted above, if they find it "impracticable to comply", under Article 38, they are to notify ICAO of differences between their own practices and those established by the SARPs. Domestic implementation is essential if the uniformity required for safety in aviation is to be achieved.

Domestic implementation was much enhanced by the safety and security audit programs launched by ICAO, beginning with the Mandatory Universal Safety Oversight Audit Programme (USOAP) established in 1999; the 35th General Assembly passed a Resolution restructuring the program to adopt *systems approach* to audits from 1 Jan 2005. After 9/11, ICAO launched the Universal Security Audit Programme (USAP). In 2008, transparency, audit results posted on ICAO website.

ICAO also serves as the forum for the drafting of international conventions on aviation issues. For example, in the area of aviation security, ICAO served as the institution which prepared, and facilitated the adoption and acceptance of the *Tokyo Convention of 1963*, the *Hague Convention of 1970*, the *Montreal Convention of 1971*, the *Beijing Convention and Protocol of 2012*, and the *Montreal Convention and Protocol of 2014*.⁸⁷ In the Private International Air Law sphere, several conventions and protocols which have sought to update the *Warsaw Convention of 1929* on

⁸⁶ Chicago Convention Art. 38.

⁸⁷ *Id.* at 349-66, 443-49.

carrier liability have been drafted under ICAO auspices. These include the *Hague Protocol of 1955*, the *Guadalajara Convention of 1961*, the *Guatemala City Protocol of 1971*, the *Montreal Protocols of 1975*, the *Montreal Convention of 1999*, and the *Montreal Conventions of 2001*.⁸⁸ In addition to the role it has played in regulating the technical aspects of international civil aviation, ICAO has also succeeded in simplifying numerous economic aspects of the industry, such as facilitating customs procedures and documentation. ICAO also assists the aviation industry by serving as a center for the collection and standardization of statistical data.⁸⁹

As to its quasi-judicial authority, ICAO has been asked to exercise its quasi-judicial dispute resolution functions on only five occasions: *India v. Pakistan* (1952) – involving Pakistan's refusal to allow Indian commercial aircraft to fly over Pakistan; *United Kingdom v. Spain* (1969) – involving Spain's restriction of air space at Gibraltar; *Pakistan v. India* (1971) – involving India's refusal to allow Pakistani commercial aircraft to fly over India; *Cuba v. United States* (1998) – involving the US refusal to allow Cuba's commercial aircraft to fly over the United States; and *United States v. Fifteen European States* (2003) – involving EU noise emission regulations.⁹⁰ We shall review these decisions in Chapter XIII, below. In no decision did the ICAO Council render a formal decision on the merits. However, ICAO was able to mediate the disputes. As a political body, ICAO may be ill-equipped to serve as a neutral adjudicator of disputes in the manner envisioned by its founders.⁹¹

Created by the Paris Convention of 1919, CINA had 33 member States. In 1955, ICAO had 66 members. A half century later, 189 States, virtually the entire world community, were members of ICAO. Today, ICAO is one of the largest of the U.N. family of specialized agencies.⁹² At this writing, ICAO has more than 190 member States.

How does a State become a member of the International Civil Aviation Organization? Article 16 of the Vienna Convention on the Law of Treaties provides, “Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of

⁸⁸ PAUL DEMPSEY & MICHAEL MILDE, *INTERNATIONAL AIR CARRIER LIABILITY: THE MONTREAL CONVENTION OF 1999* (McGill 2005); PAUL STEPHEN DEMPSEY, *AVIATION LIABILITY LAW* (LexisNexis 2nd ed. 2013)

⁸⁹ R. THORNTON, *INTERNATIONAL AIRLINES AND POLITICS* 32-34 (1970).

⁹⁰ See PAUL STEPHEN DEMPSEY, *LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION* 293-302 (Transnational 1987).

⁹¹ *Id.*, 300.

⁹² Int'l Civil Aviation Org., *Memorandum on ICAO, Addendum* (1984).

a State to be bound by a treaty upon: (a) their exchange between the contracting States; (b) their deposit with the depositary; or (c) their notification to the contracting States or to the depositary, if so agreed." The ratification of, or accession to, international treaties is accomplished by filing instruments of ratification or accession as provided for in the treaty.⁹³

Normally, ratification is the process by which the State Parties that negotiated and signed the Convention adhere themselves legally to it. Typically, multilateral Conventions explicitly provide for States to express their consent to be bound by signature subject to ratification, acceptance or approval.⁹⁴ "Accession" is the act whereby a State accepts the opportunity to become a party to a treaty or Convention already negotiated, signed and ratified by other States. It has the same legal force and effect as ratification. Accession is completed when the instrument of accession is deposited with the depositary State. The conditions pursuant to which accession may occur and the procedure required ordinarily are expressed in the provisions of the treaty or Convention.⁹⁵

Article 92 of the Chicago Convention provides for ratification by signatory States. Article 92 provides for adherence to the Convention by

⁹³ United Nations glossary, available at: http://www.wunrn.com/news/2009/05_09/05_25_09/052509_un.htm (visited March 1, 2013).

⁹⁴ United Nations, Participating in Multilateral Treaties § 3.3.2 at: http://untreaty.un.org/ola-internet/assistance/handbook_eng/chapter3.htm#note5 (visited March 1, 2013).

⁹⁵ The government of the United Kingdom takes the following position with regard to ratification and accession to multilateral treaties such as the Warsaw Convention:

Ratification is the formal expression by a State of its consent to be bound by a treaty which it has earlier signed. (Acceptance and approval are other terms having the same effect).

Accession is the means by which a State which cannot sign a multilateral treaty (usually because no more signatures are allowed) can consent to be bound by it. . . .

The act of ratification (or acceptance, approval or accession) consists, in the case of a multilateral treaty, of the deposit of a formal document with the depositary of the treaty. . . .

For multilateral treaties, instruments of ratification (or acceptance, approval or accession) must be deposited with the State or international organisation which is the depositary of the treaty.

UK FOREIGN AND COMMONWEALTH OFFICE, INSTRUMENTS OF RATIFICATION (Nov. 3, 2009), at <http://www.fco.gov.uk/en/publications-and-documents/treaties/practice-procedures/instruments-ratification> (visited March 1, 2013) [emphasis supplied].

members of the United Nations, and States that remained neutral during WWII. The depositary State for ratification or adherence is the United States, which hosted the diplomatic conference which drafted the Convention.⁹⁶

The United Nations takes the position that notification by newly independent States to the Secretary General of a “general” declaration of succession is not a valid instrument of succession with respect to any treaty deposited with the United Nations. The U.N. considers a succeeding State as a party to a treaty solely on the basis of receipt of a formal document similar to an instrument of ratification or succession – a notice from the Head of State, Head of Government or Minister of Foreign Affairs specifying the treaty(s) by which the State intends to be bound. General declarations usually indicate that a review of the treaties binding the territory of a State prior to independence and that the State will specify in due course which treaties it will be bound by and which shall be considered as having lapsed. Those declarations also typically provide that pending completion of the review, it should be “presumed” that each treaty has been succeeded by the newly independent State. The United Nations takes the position that, “such a presumption, while it could possibly be used by other States as a basis for practical action, can certainly not be taken as a formal and unambiguous acknowledgement of the obligations contained in a given treaty, since it can be unilaterally reversed at any time in respect of any treaty.”⁹⁷

⁹⁶ Under Article 93, other States might be admitted by a vote of 4/5 of the Assembly and assent of any State invaded or attacked by it during WWII.

⁹⁷ United Nations, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties § 303-04 ST/LEG/Y/Rev. 1 (United Nations, New York 1999). The Vienna Convention on Succession of States in Respect of Treaties of 1978 concurs with this view. Article 9(1) addresses the unilateral declaration by a successor State regarding treaties of the predecessor State. It provides, “Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States Parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.”

The Convention also addresses notification of succession of a newly independent State to the treaties of its colonial parent. Article 22(3) thereof provides:

Unless the treaty otherwise provides, the notification of succession shall:

(a) be transmitted by the newly independent State to the depositary, or, if there is no depositary, to the parties or the contracting States;

(b) be considered to be made by the newly independent State on the date on which it is received by the depositary or, if there is no depositary, on the date on which it is received by all the parties or, as the case may be, by all the contracting States. Vienna Convention on Succession of States in respect of Treaties of 1978, done at Vienna on 23 August 1978, entered into force on 6 November 1996. United Nations, Treaty Series, vol. 1946, p. 3

The Chicago Convention allows signatory States to ratify the Convention,⁹⁸ Allies and neutral States during WWII to adhere to the Convention,⁹⁹ and other States to be admitted to the Convention by a four-fifths vote of the Assembly.¹⁰⁰ Should a State be barred or expelled from membership in the United Nations, it shall likewise be suspended from membership in ICAO.¹⁰¹

The Republic of China [ROC] one of the founding members of ICAO.¹⁰² But as a result of Cold War Politics, in 1971, shortly after the ouster of the representatives of the ROC from the United Nations,¹⁰³ the ICAO Council decided "to recognise the representatives of the Government of the People's Republic of China [PRC] as the only legitimate representatives of China to the International Civil Aviation Organization".¹⁰⁴ Taiwan's participation in and involvement with ICAO effectively ceased on 19 November 1971.¹⁰⁵

⁹⁸ Chicago Convention Art. 91.

⁹⁹ Chicago Convention Art. 92.

¹⁰⁰ Chicago Convention Art. 93.

¹⁰¹ Chicago Convention Art. 93bis.

¹⁰² The ROC signed the Chicago Convention on 7 December 1944 and its instrument of ratification was deposited on 20 February 1946: see United Nations Treaty Collection, online: <<http://treaties.un.org/>>. See also Stefan Talmon, "The Recognition of the Chinese Government and the Convention on International Civil Aviation" (2009) 8 Chinese J Int'l L 135, at 137.

¹⁰³ UNGA, *Restoration of the lawful rights of the People's Republic of China in the United Nations*, UN Doc A/RES/2758 (XXVI) (25 October 1971). In the language of the resolution, representatives of the People's Republic of China were recognised as "the only legitimate representatives of China to the United Nations", and the representatives of the ROC were thereby expelled "from the place which they unlawfully occupy at the United Nations and in all the organizations related to it". Though there was no mention of or reference at all to Taiwan, the UN resolution effectively expelled Taiwan from all UN bodies, including ICAO. Indeed, Article 93bis of the *Chicago Convention*, *supra* note 2, holds:

A State which has been expelled from membership in the United Nations shall automatically cease to be a member of the International Civil Aviation Organization unless the General Assembly of the United Nations attaches to its act of expulsion a recommendation to the contrary.

¹⁰⁴ ICAO, *Representation of China in ICAO*, ICAO Doc. 8987-C/1004, 47-49 (8 July 1971). One issue is whether Taiwan is a State under international law. Based on the constitutive theory of statehood, best exemplified by the Montevideo Convention on the Rights and Duties of States (26 December 1933, 156 LNTS 19 (entered into force 26 December 1934)), a State exists if it satisfies the four criterion of having a permanent population; a defined territory; government; and capacity to enter into relations with the other States (Article 1). The Article 3 of the Montevideo Convention further notes that under international law, the "political existence of the state is independent of recognition by the other States". In the case of *Parent c. Singapore Airlines Ltd.*, 2003 CarswellQue 2437, the Superior Court of Quebec reviewed the 1933 Montevideo Convention and concluded that Taiwan is indeed a sovereign State (at paras 58-60). An English translation is available in *Parent & Others v. Singapore Airlines Limited and the Civil Aeronautics Administration*, 133 International Law

III. SUMMARY & CONCLUSIONS

Established by the Chicago Convention, ICAO was given responsibility for regulating the many technical aspects of the international civil aviation. Consequently, the jurisdiction of the ICAO was extended to such matters as aircraft licensing, airworthiness certification, registration of aircraft, international operating standards, and airways and communications controls. Today, ICAO is one of the largest specialized agencies in the United Nations family.¹⁰⁶

The Chicago Convention has been viewed as among the most successful multinational agreements in history. It set forth many of the guiding principles of Public International Air Law. But a half century after its promulgation, several political and industry leaders were calling for the convening of a second Chicago Convention to update and expand the multilateral exchange of aviation rights and responsibilities.

Reports 264 (2008). The Singapore High Court decision in *Anthony Woo v Singapore Airlines* came to the opposite conclusion. See Olufemi A Elias, *The International Status of Taiwan in the Courts of Canada and Singapore*, SING. YEARBOOK INT'L L 93 (2004), and PS Hsieh, *An Unrecognized State in Foreign and International Courts: the Case of the Republic of China on Taiwan*, 28 MICH. J. INT'L L 765 (2008).

¹⁰⁵ Exclusion of Taiwan from ICAO creates a potentially dangerous situation for the uniformity, and therefore the safety, of air navigation. In terms of aviation, Taiwan is responsible for air navigation in the heart of the congested East-Asian aviation corridor, one of the densest and fastest-growing air traffic corridors in the world, which stretches from Japan and Korea in the north to Southeast Asia. The Taipei Flight Information Region (FIR) was created in 1953 by ICAO and covers an area spanning 180,000 square nautical miles of airspace, providing air traffic control, aircraft communications, and meteorology for over 1.3 million flights annually. No less than 14 international and 4 domestic airways crisscross the Taipei FIR, and more than 60 airlines must traverse the airspace over and around Taiwan to exploit some of the busiest and most lucrative flight routes in the world bridging North and South-East Asia with destinations in North America and Europe.

Taiwan is linked to 117 cities globally through 181 passenger routes and 86 freight routes. Every week, there are approximately 150 flights to and from Europe, 400 to and from the US, over 650 flights across the Taiwan Strait to Mainland China. Airports in Taiwan processed over 45 million passengers in 2012, of which close to 35 million were international, cross-Straits or transit passengers. The country's main international portal, Taoyuan International Airport, is the 13th busiest air freight hub in the world and the 13th busiest airport by international passenger traffic, while Taiwan's two major airlines, China Airlines and EVA Airways, are among the top ten air cargo carriers in the world. See Paul Stephen Dempsey & Kuan-Wei Chen, *Aviation Safety and Security Requires Global Uniformity: Taiwan, the Gap in the Global Aviation System*, XXXVIII ANNALS OF AIR AND SPACE LAW 515 (2013).

¹⁰⁶ ICAO, MEMORANDUM ON ICAO ADDENDUM (1984). See generally, ANTHONY SAMPSON, EMPIRES OF THE SKY: THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 38 (1984).

IV. APPENDIX

A. NEW ZEALAND AIR LINE PILOTS' ASSOCIATION v. ATTORNEY-GENERAL

New Zealand Court of Appeal
[1997] 3 NZLR 269

KEITH J:

These appeals arise from the crash of an [aircraft in which three passengers and one crew member died and 14 others were seriously injured. The New Zealand Airline Pilots' Association (ALPA)] contends that the powers of a District Court Judge to issue a search warrant under § 198 of the Summary Proceedings Act 1957 and of Transport Accident Investigation Commission [TAIC] to prepare and publish a report under the Transport Accident Investigation Commission Act 1990 are limited by the provisions of a paragraph of annex 13, titled "Aircraft Accident and Incident Investigation" (8th ed., July 1994), to the Chicago Convention on International Civil Aviation. . . .

We begin with the central international text, the Convention on International Civil Aviation 1944 (commonly known as the Chicago Convention) to which New Zealand became an original party in April 1947. . . .

Several articles of the convention indicate that different exercises of the power under art 37 will have different binding force. . .

The rules for flight over the high seas, adopted under art 37, are to apply without change; no government discretion is contemplated. By contrast the rules of the air applicable to other flights will require further action by the contracting states which have some limited flexibility in giving effect to the standards established under the convention. That flexibility is, however, more limited than that provided for in the general terms of art 37.

When the convention moves from rules governing flight (ch II) to measures facilitating air navigation (ch IV) -- or from the air to the land -- a more relaxed position on the extent of contracting states' obligations is adopted.

The making of the annexes is in the hands of two expert bodies set up under the convention, the ICAO Council and the contracting states both as a group and individually. The Air Navigation Commission, consisting of 19 members with suitable qualifications and experience in the science and practice of aeronautics and chosen by the council, proposes annexes concerning air navigation (arts 56 and 57). The Air Transport Committee, appointed from representatives of members of the council and responsible to it, proposes annexes relating to the facilitation of international air transport; as well it advises the council on economic matters (art 54(d)). These two bodies are assisted in their work in the preparation of annexes by subcommittees and conferences attended by government representatives. For instance the Air Navigation Commission has been helped in the preparation of successive versions of annex 13 by which representatives of many contracting states have attended.

Proposals go from the Air Navigation Commission and the Air Transport

Committee (which give contracting states the opportunity to comment on their drafts) to the council which has the power, by a vote of two-thirds of its members, to adopt annexes and amendments to them (see arts 90 and 54). That lawmaking power of the council is however subject to a veto of member states, . . . under art 90(a)

A thorough scholarly study based on the convention provisions and on the first 20 years of practice relating to ICAO technical legislation came to this conclusion about the obligatory character of the standards which result:

"With some exceptions to be discussed below, the Contracting States have no legal obligation to implement or to comply with the provisions of a duly promulgated Annex or amendment thereto, unless they find it 'practicable' to do so. This conclusion is supported both by the language of the Convention as well as by the practice of the Organization."

(Thomas Buergethal, Law-Making in the International Civil Aviation Organization (1969) p 76. See similarly Edward Yemin, Legislative Powers in the United Nations Specialised Agencies (1969) p 149.)

So far as annex 13 is concerned we begin with the text of the crucial provision in its 8th edition, as adopted in 1994:

"Disclosure of records

5.12 The State conducting the investigation of an accident or incident, where it occurred, shall not make the following records available for purposes other than accident or incident investigation, unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations:

- a) all statements taken from persons by the investigation authorities in the course of their investigation;
- b) all communications between persons having been involved in the operation of the aircraft;
- c) medical or private information regarding persons involved in the accident or incident;
- d) cockpit voice recordings and transcripts from such recordings; and
- e) opinions expressed in the analysis of information, including flight recorder information.

These records shall be included in the final report or its appendices only when pertinent to the analysis of the accident or incident. Parts of the records not relevant to the analysis shall not be disclosed." . . .

A note to the provision elaborates reasons for the protection:

"Information contained in the records listed above, which includes information given voluntarily by persons interviewed during the investigation of an accident or incident, could be utilized inappropriately for subsequent disciplinary, civil, administrative and criminal proceedings. If such information is distributed, it may, in the future, no longer be openly disclosed to investigators. Lack of access to such information would impede the investigative

process and seriously affect flight safety."

The annex expressly contemplates parallel proceedings. Two provisions emphasise both the purpose and the independent character of the investigation. Chapter 3 begins with a statement of the "Objective of the Investigation":

"3.1 The sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability."

Moreover,

"5.4 The accident investigation authority shall have independence in the conduct of the investigation and have unrestricted authority over its conduct. The investigation shall include the gathering, recording and analysis of all available relevant information, if possible the determination of the causes, and the completion of the Final Report followed, if appropriate, by safety recommendations. When possible the scene of the accident shall be visited, the wreckage examined and statements taken from witnesses."

But that is immediately followed by a recommendation which acknowledges that there may well be proceedings additional to the accident investigation:

"5.4.1 Recommendation. -- Any judicial or administrative proceedings to apportion blame or liability should be separate from any investigation conducted under the provisions of this Annex."

That recommendation is complemented by a standard headed "Co-ordination -- Judicial authorities" which gives a certain priority to the latter:

"5.10 The State conducting the investigation shall recognize the need for co-ordination between the investigator-in-charge and the judicial authorities. Particular attention shall be given to evidence which requires prompt recording and analysis for the investigation to be successful, such as the examination and identification of victims and readouts of flight recorder recordings. . . .

Note 2. -- Possible conflicts between investigating and judicial authorities regarding the custody of flight recorders and their recordings may be resolved by an official of the judicial authority carrying the recordings to the place of readout, thus maintaining custody." . . .

On their face these provisions contemplate -- consistently of course with arts 37 and 38 and, to the extent that it is relevant, art 26 -- that contracting States will exercise some freedom in deciding how far to give effect to the standards included in the annex. That understanding is supported by the following passage in the foreword to the annex:

"Use of the text of the Annex in national regulations. The Council, on 13 April 1948, adopted a resolution inviting the attention of Contracting States to the desirability of using in their own national regulations, as far as is practicable, the precise language of those ICAO Standards that are of a regulatory character and also of indicating departures from the Standards, including any additional national regulations that were important for the safety or regularity of air navigation. However, the Standards and Recommended

Practices of Annex 13 while of general applicability will, in many cases, require amplification in order to enable a complete national code to be formulated."

The extent of state freedom in deciding how and how far to implement the annex and especially para 5.12 also appears from the national legislation that has been brought to our attention and from related notifications of difference under art 38 of the convention. In Austria, Denmark, Finland, Iceland, the Netherlands, Norway, Sweden and Switzerland, the law does not prevent the use of CVRs in judicial proceedings (although in Denmark a Court Order would be needed and, it is said, has never been sought). Similarly, American legislation provides that parts of a cockpit voice recording not made public by the National Transportation Safety Board may be obtained by discovery if the Court decides that that is necessary to enable a party to receive a fair trial. Any such discovery is limited to the trial, 49 USC Section 1154.

By contrast the Australian and Canadian legislation is protective of the recordings, but even there the protection is limited. In both countries the protection does not extend to civil proceedings for damages (although under the Australian legislation a Court Order is needed) and the prohibition on their use in criminal cases in Australia is limited to proceedings against crew members -- and not for instance against air traffic controllers, the operator of the aircraft or the manufacturer. . . .

New Zealand has also notified a difference from the paragraph. The notification appears to have been first given in 1982:

"No absolute guarantee can be given that the records listed in 5.12 will not be disclosed. All practical steps will be taken, however, to minimize the extent and occurrence of such disclosures."

(Supplement to Annex 13, (6th ed, . . . 5 February 1982), New Zealand 1.) . . .

The relevant texts and their history lead us to the conclusion that annex 13 and in particular para 5.12 (especially its first sentence) do not impose on contracting states an absolute rule of full binding force. Specifically, states have considerable flexibility in determining the extent of the protection of the information covered by the paragraph. A major reason for that flexibility is that different countries can and do strike different balances between the competing public interests in protecting the information and allowing access to it. Among those who may have a proper interest in access are criminal law enforcement agencies, licensing and regulatory bodies, private litigants and the public. It follows -- as indeed the paragraph quoted earlier from the foreword to the present edition of annex 13 acknowledges -- that amplifying national legislation will probably be required to enable a complete national code. The annex cannot stand alone. . . .

As Lord Atkin said for the Privy Council in *Attorney-General for Canada v. Attorney-General for Ontario* [1937] AC 326 at p 347, it is well established that while the making of a treaty is an Executive act, the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. The stipulations of a treaty duly ratified by the Executive do not, by virtue of the treaty alone, have the force of law.

We accordingly turn to the relevant legislation

[T]he Chicago Convention, together with its annexes, like many other major multilateral treaties, is implemented by the state parties to it and has effect in their law in a variety of ways:

(a) Basic provisions about sovereignty over airspace, which incorporate principles of customary international law, are reflected in fundamental constitutional arrangements and leave the state parties free to exercise the authority recognised by international law.

(b) Some provisions are implemented in the exercise of prerogative or other non-statutory administrative powers, such as: participating in meetings and elections; providing information; participating in joint operating organisations; and meeting budgetary obligations . . .

(c) At the other extreme, some provisions may be directly incorporated by statute into national law with their actual text providing the content of the law. The primary relevant instances are the rules of the air provided for in art 12 and annex 2. . .

(d) In other cases, the substance of the treaty provisions but not their precise words may appear more or less clearly in legislation. For instance a 1996 amendment to the Civil Aviation Act (§ 53A) relating to flights without authority or for an improper purpose gives effect to an amendment (art 3BIS) to the Chicago Convention. . .

(e) Other articles and annexes provide the basis for the conferral and exercise of delegated power and may also constrain the exercise of the power -- as with the regulation and rule-making powers . . . Several provisions of the 1944 convention expressly contemplate or require the making of national laws. They are not always written in such a way as to be capable of direct application in national law; to use an expression to be found in some constitutional systems, the provisions are not self-executing.

(f) The rules and regulations made under the powers referred to in (e) above sometimes give direct effect to the treaty text ((c) above) or may be less direct ((d) above). . .

The broad point is that some of the provisions of the convention and annexes are appropriate in their subject-matter and drafting for direct application in the law of New Zealand, others require detailed national legislation, while still others do not call for national legislation at all. . .

The conclusion is clear: the Chicago Convention as a whole does not form part of the law of New Zealand. We should perhaps make it explicit that that conclusion does not call into doubt the obligation and the ability of New Zealand to comply with the convention and annexes. Rather the point is that the giving of full effect to the provisions of those texts in the law of New Zealand is required in some cases and not in others, and that, if national legal effect is needed, the effect might be given more or less directly.

[Reviewing the domestic law of New Zealand, the Court concluded] we cannot see how it can possibly be said that Parliament has made annex 13, and in particular the first sentence of para 5.12, part of the law of New Zealand. It has simply failed to manifest such a purpose. This conclusion . . . does not mean that New Zealand is in breach of its obligations in respect of para 5.12. . .

It is convenient to answer at this point an ALPA argument that the filing

of that difference . . . confirms that the paragraph is in force under New Zealand law. One part of the answer is provided by the purpose and scope of the power to file a difference under art 38: it assumes that the national law in issue does not give full effect to the annex in question. At least 20 countries have at one stage or other taken that position since para 5.12 has become a standard. The second part of the answer is that the review of the New Zealand legislation shows that the first sentence of para 5.12 of the 1994 edition of the annex has not become part of New Zealand law. . . .

Appeal dismissed.

B. INTERNATIONAL CIVIL AVIATION ORGANIZATION, MAKING AN ICAO STANDARD

1. Development of SARPs

For technical SARPs, proposals are analysed first by the Air Navigation Commission, or ANC. Depending on the nature of the proposal, the Commission may assign its review to a specialized working group.

Meetings are, of course, the main vehicle for progress in the air navigation field, although much of the preparatory work is accomplished by correspondence. It is through a variety of meetings that most of the work is finalized and the necessary consensus reached.

In the development, a number of consultative mechanisms are used: Air Navigation meetings are divisional-type meetings devoted to broad issues in the air navigation fields. They can be either divisional meetings dealing with issues in one or more related fields or air navigation conferences normally having a "theme" covering issues in more than one field. All Contracting States are invited to participate in these meetings with equal voice. Interested international organizations are invited to participate as observers.

ANC panels are technical groups of qualified experts formed by the ANC to advance, within specified time frames, the solution of specialized problems which cannot be solved adequately or expeditiously by the established facilities of the ANC and the Secretariat. These experts act in their expert capacity and not as representatives of the nominators.

Air Navigation study groups are small groups of experts made available by States and international organizations to assist the ICAO Secretariat, in a consultative capacity, in advancing progress on technical tasks.

Council technical committees are established to deal with problems involving technical, economic, social and legal aspects, for the resolution or advancement of which expertise is required that is not available through the normal Council means, are also instrumental in developing ICAO SARPs.

In summary, technical issues dealing with a specific subject and requiring detailed examination are normally referred by the ANC to a panel of experts. Less complex issues may be assigned to the Secretariat for further examination, perhaps with the assistance of an air navigation study group.

2. Review of Draft SARPs

These various groups report back to the Air Navigation Commission in the form of a technical proposal either for revisions to SARPs or for new SARPs, for preliminary review. This review is normally limited to consideration of controversial issues which, in the opinion of the Secretariat or the Commission, require examination before the recommendations are circulated to States for comment.

The original recommendations for core SARPs along with any alternative proposals developed by the Air Navigation Commission are submitted to Contracting States and selected international organizations for comment. Detailed technical specifications for complex systems are made available to States upon request and are submitted to a validation process. States are normally given three months to comment on the proposals.

Standards developed by other recognized international organizations can also be referenced, provided they have been subject to adequate verification and validation.

The comments of States and international organizations are analysed by the Secretariat and a working paper detailing the comments and the Secretariat proposals for action is prepared.

The Commission undertakes the final review of the recommendations and establishes the final texts of the proposed amendments to SARPs, PANS and associated attachments. The amendments to Annexes recommended by the Commission are presented to the Council for adoption under cover of a "Report to Council by the President of the Air Navigation Commission".

3. Adoption/Publication of Annex Amendments

The Council reviews the proposals of the Air Navigation Commission and adopts the amendment to the Annex if two-thirds of the members are in favour.

Within two weeks of the adoption of an Annex amendment by the Council, an interim edition of the amendment, referred to as the "Green Edition", is dispatched to States with a covering explanatory letter. This covering letter also gives the various dates associated with the introduction of the amendment.

Policy prescribes that Contracting States be allowed three months to indicate disapproval of adopted amendments to SARPs. A further period of one month is provided for preparation and transit time, making the Effective Date approximately four months after adoption by Council.

There should be a period of four months between an amendment's Effective Date and its Applicability Date. However, this can be longer or shorter as the situation requires. The Notification Date is normally one month prior to the Applicability Date.

Provided a majority of States have not registered disapproval, the amendment will become effective on the Effective Date.

On the Notification Date, which is one month prior to the Applicability Date, the States must notify the Secretariat of any differences that will exist between their national regulations and the provision of the Standard as amended. The reported differences are then published in supplements to Annexes.

Immediately after the Effective Date, a letter is sent announcing that the

amendment has become effective and the Secretariat takes action to issue the "Blue Edition" which is the form of the amendment suitable for incorporation in the Annex or PANS.

On the Applicability Date, States must implement the amendments unless, of course, they have notified differences. To limit the frequency of Annex and PANS amendments, the Council has established one common applicability date for each year. This date is chosen from the schedule for the regulation of amendments to Aeronautical Information Regulation and Control (AIRAC) for the month of November.

The result of this adoption procedure is that the new or amended Standards and Recommended Practices become part of the relevant Annex.

It takes on average 2 years from the Preliminary Review by the ANC to the applicability date. Although this process may seem lengthy at first glance, it provides for repeated consultation and extensive participation of States and international organizations in producing a consensus based on logic and experience.

Cooperation and consensus have thus provided international aviation with the vital infrastructure for safe and efficient air transport. The third "C", compliance, brings this comprehensive regulatory system to life.

4. Approval/Publication of other Annex Material and Procedures

Attachments to Annexes, although they are developed in the same manner as Standards and Recommended Practices, are approved by Council rather than adopted.

Regional Supplementary Procedures, because of their regional application, do not have the same line of development as the previously mentioned amendments; they also must be approved by Council.

The proposed amendments to PANS are approved by the Air Navigation Commission, under power delegated to it by the Council, subject to the approval by the President of the Council after their circulation to the Representatives of the Council for comment.

Manuals and circulars are published under authority of the Secretary General in accordance with principles and policies approved by Council.

5. Implementation of SARPs/Universal Safety Oversight Audit Programme

Under the Convention on International Civil Aviation, the implementation of SARPs lies with Contracting States. To help them in the area of safety, ICAO established in 1999 a Universal Safety Oversight Audit Programme. The Programme consists of regular, mandatory, systematic and harmonized safety audits carried out by ICAO in all Contracting States.

The objective is to promote global aviation safety by determining the status of implementation of relevant ICAO SARPs, associated procedures and safety-related practices. The audits are conducted within the context of critical elements of a State's safety oversight system. These include the appropriate legislative and regulatory framework; a sound organizational structure; technical guidance; qualified personnel; licensing and certification procedures; continued

surveillance and the resolution of identified safety concerns.

Since its inception, the Programme has proved effective in identifying safety concerns in the safety-related fields under its scope, while providing recommendations for their resolution. The Programme is being gradually expanded to include aerodromes, air traffic services, aircraft accident and incident investigation and other safety-related fields.

While providing additional assistance in the form of regional safety oversight seminars and workshops, the programme also provides ICAO with valuable feedback to improve existing SARPs and create new ones.

The experience gained with the safety oversight programme was successfully adapted to aviation security. In 2002, the Universal Security Audit Programme was launched to similarly help States identify deficiencies in the implementation of security-related SARPs. The format may in the future be applied to other areas of civil aviation.