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CHAPTER IV

SAFETY*

SYNOPSIS

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I. INTRODUCTION

Law without compliance and enforcement is like poetry – it is pleasing to the ear, but has little to do with the practical world in which we live.[1] The study of efforts to achieve uniformity in international norms and compliance with international legal obligations reveals mixed success, even in areas where there is widespread consensus for the need to have international harmony. Given the inherent sovereignty of States, the heterogeneous levels of economic ability, and the diversity of political priorities, securing compliance with international obligations is rarely an effortless task.[2] This Chapter addresses legal norms governing international aviation safety, as well as both unilateral and multilateral efforts to achieve State compliance with those international legal obligations.

International commercial aviation provides a useful case study of how the world community seeks to achieve mutual self-interest by securing global harmony in law. The interplay between conventional international law, quasi-legal standards promulgated by international organizations, and national laws, regulations, and procedures offers

[1] Professor John Norton Moore put it more eloquently:

> For the rule of law is not simply normative systems and broad acceptance of the authoritativeness of such laws. Rather, it is such systems coupled with patterns of community compliance. And sadly, while many modern normative systems have patterns of high community compliance, others still have failure rates with catastrophic consequences for human dignity and progress. Surely, *the* greatest weakness of the contemporary international system is not the absence of authoritative norms, or underlying intellectual understanding about the need for such norms, but rather the all-too-frequent absence of compliance.

John Norton Moore, *Enhancing Compliance With International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881, 884 (1999). Professor Dr. Michael Milde also put it well, writing that, "without enforcement law tends to lose its binding nature and degenerates into a pious Statement of principles detached from the reality." Michael Milde, *Enforcement of Aviation Safety Standards – Problems of Safety Oversight*, 45 GER. J. AIR & SPACE L. 3, 15 (1996).

[2] *See* Paul Stephen Dempsey, *Compliance and Enforcement in International Law - Oil Pollution of the Marine Environment by Ocean Vessels*, 6 NW J. INT'L L. & BUS. 459 (1984).

insights as to how complex international enterprises, such as commercial aviation, play on the world stage.

In 1944, the world community acknowledged the need to achieve safety in international aviation through uniformity in law[3] by establishing an organization to govern international aviation, conferring upon it quasi-legislative power to prescribe standards governing international aviation safety, and obliging member States to implement these standards through their domestic laws.[4] Despite the efforts of major aviation nations and international organizations, those goals are only sluggishly being achieved. Thus, aviation safety can serve as a case study to inquire into the ability and willingness, on the one hand, or inability and unwillingness, on the other, of States to conform to their international obligations and the means by which they can be encouraged, or coerced, to comply.

This inquiry is important for another less theoretical and more practical reason. Safety and security are two sides of the same coin. The regulation of both is designed to avoid injuries to persons and property, and the deprivation of man's most valuable attribute – life. Yet the two are quite different, as well. Safety regulation focuses on preventing *accidental* harm. Security regulation focuses on preventing *intentional* harm. Like the common law difference between fault-based negligence and intentional torts, the latter involves more culpability than the former, and is deterred by more serious penalties.

Since the tragic events of September 11, 2001, security has become a paramount concern in international aviation.[5] Yet a passenger is ten times more likely to lose his life in an aviation safety-related accident than in an aviation terrorist event.[6] Hence, the study of aviation safety is of far more practical importance than the more emotionally driven study of aviation security. Safety must be among the highest priorities in commercial aviation.[7]

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[3] As Professor Dr. Michael Milde observed, "Civil aviation could not have evolved without world wide uniformity in regulations, standards and procedures in relation of air navigation." Milde, *supra*, at 4.

[4] Paul Stephen Dempsey, *The Role of the International Civil Aviation Organization on Deregulation, Discrimination & Dispute Resolution*, 52 J. AIR L. & COM. 529, 533 (1987).

[5] *See, e.g.*, Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT'L L. 649, 656 (2003) [hereinafter cited as *Dempsey*].

[6] John Saba, *Worldwide Safe Flight: Will the International Financial Facility for Aviation Safety Help It Happen?* 68 J. AIR L. & COM. 537, 538 (2003).

[7] The Honorable L. Welch Pogue, US delegate to the Chicago Conference of 1944 and Chairman of the US Civil Aeronautics Board, observed that "safety should be the

All statistical evidence indicates that international aviation has become decidedly safer in recent decades.[8] Though much of that positive result can be attributed to improvements in technology, much can also be attributed to improvements in the law and its more universal implementation. It is the latter subject that is the focus of this Chapter.

This Chapter will address the following questions:

1. What are the means by which legal obligations in the area of aviation safety have become binding upon States?
2. What are the substantive conventional international laws and standards governing international aviation safety?
3. What has been the level of national compliance with, and implementation of, such laws and standards?
4. What means have been employed, unilaterally and multilaterally, by which compliance has been monitored and encouraged, or sanctions for noncompliance imposed?

The legal predicate for such bans is clear. Article 1 of the Convention on International Civil Aviation [Chicago Convention],[9] recognized that each State holds "complete and exclusive sovereignty over the airspace above its territory", while Article 6 provides that commercial operations in another State's airspace are prohibited unless permitted or authorized. Prohibiting one's domestic airlines from flying remains within the exclusive prerogative of a State.[10]

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preoccupation of everyone involved in the operation of an airline [including] those engaged in manufacturing airline replacement parts and supplies, and . . . all employees of governments engaged in the oversight or the regulation of airlines." L. Welch Pogue, *Personal Recollections from the Chicago Conference: ICAO, Then, Now, and in the Future*, XX ANNALS OF AIR & SPACE L. 35, 42 (1995).

[8] John Saba, *Worldwide Safe Flight: Will the International Financial Facility for Aviation Safety Help It Happen?* 68 J. AIR L. & COM. 537 at 655 (2003).

[9] *Convention on International Civil Aviation, done* Dec. 7, 1944, 61 STAT. 1180, T.I.A.S. NO. 1591, 15 U.N.T.S. 295. *See* Paul Stephen Dempsey, *The Role of the International Civil Aviation Organization on Deregulation, Discrimination, and Dispute Resolution*, 52 J. AIR L. & COM. 529 (1987).

[10] For example, the US banned Frank Lorenzo from holding a certificate of public convenience and necessity on the grounds that he was unfit to operate an airline. In determining whether a new applicant is fit, willing and able to hold a certificate, the US Department of Transportation (DOT) assesses whether the applicant: (1) has the managerial and operational ability to conduct the proposed operations; (2) has sufficient financial resources available to commence operations without undue risk; and (3) will comply with its statutory and regulatory obligations under the law (or in the regulatory language often used, has demonstrated satisfactory "compliance disposition"). See *Application of Air Illinois, Inc.*, DOT ORDER 86-2-25 (1986). Once issued, the certificate is not

In addition to addressing the issue of aviation safety generally, this Chapter also addresses the issue of the lawfulness of blacklisting airlines (and often, all airlines of the State of registration) on the basis of safety- and security-related deficiencies. This potentially confronts another provision of the Chicago Convention – Article 33 – which requires that the certificates of airworthiness of the registering State be recognized as valid by other contracting States so long as the standards imposed by the registering State "are equal to or above the minimum standards which may be established from time to time pursuant to this Convention."

Any chronological review of the development of international aviation law must begin with the "Constitution" of international civil aviation, the Chicago Convention of 1944 [Chicago Convention].[11] That multilateral agreement created the International Civil Aviation Organization [ICAO][12] and gave it quasi-legislative authority to promulgate standards and recommended practices [SARPs] as Annexes to the Chicago Convention.[13] These standards are binding upon member

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perfected until the applicant has been certified by the FAA to conduct operations (under Part 121 of the Federal Aviation Regulations [FARs]) and has obtained adequate liability insurance: 14 CFR Parts 121 and 205. The applicant must produce a Certificate of Insurance on OST Form 6410 evidencing adequate liability insurance on all its aircraft; and an FAA Certificate and Operations Specification authorizing such operations. In reviewing Frank Lorenzo's fitness to operate a new airline, the Administrative Law Judge (ALJ) concluded (*ATX, Inc. Fitness Investigation*, 1993 WL 534627, at 63 (1993)):

> Mr. Lorenzo's companies have lived on the edge of the law and have not desisted from improper conduct until lawsuits or governmental action deterred them from further transgressions. Since air safety is of paramount importance, the Department cannot take the risk of certifying an air carrier whose owner exhibits such manifest contempt for the legal process.

On appeal, the DOT concurred with its ALJ, concluding that because of Lorenzo's involvement with ATX, its managerial competence and compliance disposition were lacking. This conclusion was based on DOT's review of safety, service and financial failure at Lorenzo's prior airlines, as well as the widespread lack of personal good faith and trustworthiness in his business dealings and legal and regulatory proceedings: *ATX, Inc., Fitness Investigation*, DOT ORDER 94-4-8 (1994). See PAUL STEPHEN DEMPSEY & LAURENCE GESELL, AIR COMMERCE & THE LAW (COAST AIRE, 2005) at Ch. 4.

[11] *Convention International Civil Aviation*, Art. 1, 61 STAT. 1180 15 U.N.T.S. 185 (Dec. 1944) *reprinted in* XVIII ANNALS OF AIR AND SPACE L. 5 (1993) [hereinafter *Chicago Convention*.]

[12] ICAO is composed of 190 contracting States, and thereby encompasses virtually the entire civil aviation community. The basic aims and objectives of ICAO are to ensure the safe and orderly growth of international civil aviation throughout the world and to promote safety of flight in international air navigation. *See* Assad Kotaite, *Security of International Civil Aviation-Role of ICAO*, VII ANNALS OF AIR & SPACE L. 95 (1982) (discussing role of ICAO in the international aviation community).

[13] R.I.R. Abeyratne, *Some Recommendations for a New Legal and Regulatory Structure for the Management of the Offense of Unlawful Interference with Civil Aviation*, 25 TRANSP. L.J.115 at 146-47 (1998) [hereinafter cited as Abeyratne].

States that fail to notify ICAO of the differences in their domestic law.[14]

Next, this Chapter will examine unilateral and multilateral efforts to facilitate conformity with international legal obligations in the realm of aviation safety. It will then turn to a substantive review of the international and domestic aviation safety requirements, focusing on the requirements as set forth in the Chicago Convention and its Annexes, the U.S. model Civil Aviation Safety Act [CASA], and U.S. domestic law. SARPs are effective only if implemented by member States usually through their domestic laws, regulations and procedures. Finally, this Chapter will examine the propriety and efficacy of those activities under general theories of international relations and principles of international law.

II. THE DEVELOPMENT OF THE INTERNATIONAL LAW OF AVIATION SAFETY

A. THE CONVENTIONAL LAW OF INTERNATIONAL CIVIL AVIATION

As World War II entered its final stages, several prominent members of the international community expressed concern over the postwar development of international civil aviation.[15] They realized that this brave new world would require multilaterally negotiated solutions to a growing number of political, economic and technical problems.[16] In response to these concerns, the United States hosted an international conference in the hope that it would lay the foundation for the future

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[14] "Standards" are mandatory, and usually include the verb "shall" or "will." At the first ICAO Assembly, the standards were defined as "any specification . . . 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 the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention." ICAO Ass. Res. A1-31. In contrast, a "recommended practice" only has advisory or recommendatory connotations and includes the verb "shall." Abeyratne, *supra*, at 144. ICAO also issues Procedures for Air Navigation Services [PANS] and Regional Supplementary Procedures [SUPPS]. *Id*. These involve procedures that have not yet reached a sufficient degree of maturity for adoption as SARPs or contain material of a more permanent character that would warrant adoption of it as an Annex. *Id*. Another form of rulemaking that has been employed by the Council are the Technical Instructions, which provide detailed explanations of how Annexes are to be implemented. *Id*. ICAO was also given quasi-judicial power to adjudicate disputes between States over the *Chicago Convention*. *See* Dempsey, *supra,* note 4, at 561.

[15] ANTHONY SAMPSON, EMPIRES OF THE SKY: THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 65-66 (1984).

[16] *Id*.

growth of the industry.[17]

Although the Chicago Conference failed in its attempt to formulate a comprehensive economic policy for international civil aviation, or to effectuate an exchange of traffic rights,[18] it laid the foundation for the postwar establishment of the ICAO,[19] headquartered in Montreal,[20] and gave the organization jurisdiction over the many technical aspects of international civil aviation.[21] Most of ICAO's work has been focused on aviation safety, navigation, and security,[22] though it also has been the

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[17] *Id.*, 62-69. MCGILL CENTER FOR RESEARCH OF AIR & SPACE LAW, LEGAL, ECONOMIC AND SOCIO-POLITICAL IMPLICATIONS OF CANADIAN AIR TRANSPORT 521-22 (1980) [citations omitted]. The second World War not only transformed the scope of the airlines but produced two contradictory political attitudes to the air. The horrors of air warfare, culminating in the atomic bomb on Hiroshima, generated a new insistence that both military and civil aircraft should be separated from national ambitions and put under international control. Yet every government was more convinced that it must protect and advance its own airlines, as the lifeline to its trade and security. SAMPSON, *supra*, at 57

[18] Andras Vamos-Goldman, *The Stagnation of Economic Regulation Under Public International Air Law: Examining Its Contribution to the Woeful State of the Airline Industry*, 23 TRANSP. L.J. 425, 431 (1996). However, the Chicago Conference drafted two side agreements – the Transit Agreement and the Transport Agreement – and a draft bilateral air transport agreement.

[19] *See* ANDREAS LOWENFIELD, AVIATION LAW § II-5 (1972). Today, IACO is a member of the United Nations' family of international organizations. *Id*.

[20] *Id*. The participants in the Chicago Conference hoped to reach agreement with respect to both (a) safety, communications and technology, and (b) economic regulatory issues of entry, rates, frequency and capacity. The Convention created ICAO and gave it important responsibilities over the former questions, which it has performed quite well. But ICAO was given only limited general policy directions over the more controversial economic issues, and until relatively recently, the organization steered clear of them. *Id*.

[21] ICAO came into being on April 4, 1947, when the *Chicago Convention* entered into force. It began operations in 1947 under the umbrella of the United Nations. GERALD F. 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). Michael Milde, *The Chicago Convention – After Forty Years*, IX ANNALS OF AIR & SPACE L. 119 (1984).

[22] *Chicago Convention*, *supra*, Annex 17. Annex 17 is supplemented by the ICAO SECURITY MANUAL FOR SAFEGUARDING CIVIL AVIATION AGAINST ACTS OF UNLAWFUL INTERFERENCE (ICAO DOC. 8973) (6TH ED. 2002) and its STRATEGIC ACTION PLAN. Abeyratne, *supra*, at 121-130. In addition, several multilateral conventions have been drafted under ICAO auspices, including:

The *Tokyo Convention* of 1963 requires that a hijacked aircraft be restored to the aircraft commander and the passengers be permitted to continue their journey. *Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. NO. 6768, 704 U.N.T.S. 219, *reprinted in* 58 AM. J. INT'L L. 566 (1959), and XVIII ANNALS OF AIR & SPACE L. 169 (1993), and PAUL STEPHEN DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 433 (1987).

The Hague Convention of 1970 declares hijacking to be an international "offense" and requires the State to which an aircraft is hijacked to extradite or exert jurisdiction over the hijacker and prosecute him, imposing "severe penalties" if he is found guilty. *Convention for the Suppression of Unlawful Seizure of Aircraft*, Dec. 16, 1970, 22 U.S.T. 1641,

forum for updating liability and other Private International Law regimes in civil aviation.[23] Indeed, ICAO's principal objective is "ensuring the safety of international civil aviation worldwide . . . ."[24]

Article 12 of the Chicago Convention requires every contracting State to keep its regulations uniform, to the greatest extent possible, with those established under the Convention.[25] Article 37 attempts to achieve uniformity in air navigation, by requiring that every contracting State cooperate in achieving the "highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft personnel, airways and auxiliary services in all matters in which uniformity will facilitate and improve air navigation."[26] The sentence that follows provides, "[T]o this end [ICAO] shall adopt and amend from time to time . . . international standards and recommended practices and

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T.I.A.S. NO. 7192, *reprinted in* 10 I.L.M. 133 (1971), XVIII ANNALS OF AIR & SPACE L. 201 (1993), and PAUL STEPHEN DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 441 (1987).

The Montreal Convention of 1971 not only expands the definition of "offense" to include communications of false information and unlawful acts against aircraft or air navigation facilities, but also requires prosecution thereof. *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, Sept. 23, 1971, 24 U.S.T. 567, 974 U.N.T.S. 177 (entered into force on Jan. 26, 1973, with 150 ratifications), *reprinted in* XVIII ANNALS OF AIR & SPACE L. 225 (1993), and PAUL STEPHEN DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 445 (1987). *See* PAUL STEPHEN DEMPSEY, ET. AL. AVIATION LAW & REGULATION § 9.13 (1992).

The Montreal Protocol of 1988. *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* (added airport security to the international regime). ICAO DOC. 9518, *reprinted in* XVIII ANNALS OF AIR & SPACE LAW 253 (1993).

The Montreal Convention of 1991 prevents the manufacture, possession, and movement of unmarked explosives. *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, *reprinted in* 10 I.L.M. 115, XVIII ANNALS OF AIR & SPACE L. 269 (1993)

For a review of the work ICAO has done in the area of security, *see* DEMPSEY, *supra*, and Paul Stephen Dempsey, *Aerial Terrorism: Unilateral and Multilateral Responses to Aircraft Hijacking*, 2 CONN. J. INT'L L. 427 (1987).

[23] *See, e.g.*, Paul Stephen Dempsey, *Pennies From Heaven: Breaking Through the Liability Limitations of Warsaw*, XXII ANNALS OF AIR & SPACE L. 267, 271 (1997).

[24] ICAO ASSEMB. RES. 32-11.

[25] "The elimination of the multitude of conflicting national aeronautical regulations, through the domestic implementation of the regulatory SARPs prescribed in the Annexes, would be an immense step forward in facilitating international civil aviation." THOMAS BUERGENTHAL, LAW MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 102 (1969).

[26] *Chicago Convention*, *supra*, art.1, 61 STAT. 1180 15 U.N.T.S. 185 (Dec. 1944) *reprinted in* XVIII ANNALS OF AIR AND SPACE L. 5 (1993).

procedures" addressing various aspects of air navigation.[27] Therefore, ICAO's 190 member States have an affirmative obligation to conform their domestic laws, rules, and regulations to the international leveling standards adopted by ICAO.[28]

In 1948, the ICAO Council adopted a resolution encouraging contracting States to adopt "so far as practicable, the precise language of those ICAO Standards that are of a regulatory character . . . ."[29] ICAO has drafted its Annexes in a way to "facilitate incorporation, without major textual changes, into national legislation."[30] Annex 1 (Personnel Licensing),[31] Annex 6 (Operation of Aircraft),[32] and Annex 8 (Airworthiness of Aircraft)[33] require ICAO's 190 member States to promulgate domestic laws and regulations to certify airmen, aircraft, and aircraft operators as airworthy and competent to carry out safe operations in international aviation.[34] Subject to the notification of differences, the legal regime effectively assumes that States are in compliance with these safety mandates.[35] Thus, although member States retain the right to restrict particular aircraft from their skies,[36] they lose the right to ignore the safety mandates of the relevant international organization – ICAO.[37] This assumption of universal compliance goes further, with the Chicago Convention requirement that an airman or operator certificate, or certificate or airworthiness, properly issued by

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[27] *Id*.

[28] *Id*.

[29] *Id*. Annex 1 (Personnel Licensing).

[30] *Id*.

[31] *Id*.

[32] *Id*. Annex 6 (Operation of Aircraft).

[33] *Id*. Annex 8 (Airworthiness of Aircraft).

[34] *Id*.

[35] However, Prof. Buergenthal insists no such presumption is warranted. BURGENTHAL, *supra*, at 67.

[36] BIN CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT 3 (1962); *see* SAMPSON, *supra*, at 69-70. Dr. Michael Milde summarized the principle of sovereignty as embraced by the *Chicago Convention*:

> The *Convention on International Civil Aviation*—the cornerstone of legal regulation of international civil aviation for the past forty years—is based on the principle of complete and exclusive sovereignty of States over their airspace. . ., except with special permission or authorization. Consequently, the granting of the economic rights to carry traffic remains a sovereign prerogative of each contracting State and is dealt with in bilateral agreements on air services which take into consideration mutual economic benefits of the States concerned and the proper balance of interest between such States.

Milde, *supra*, at 121-22.

[37] *See* SAMPSON, *supra*, at 69-70.

one contracting State shall be recognized as valid by all others.[38]

Under Article 33, States are obliged to recognize the validity of the certificates of airworthiness and personnel licenses issued by the State in which the aircraft is registered, so long as the standards under which such certificates or licenses were rendered are at least as stringent as those established under the Chicago Convention.[39] But this principle of mutual recognition works only if all States are implementing the SARPs with an equal degree of diligence. For much of the 20th century, too often, it was too difficult or impossible to tell.[40] The negative implications of Article 33 are that if a State fails to comply "with the minimum standards which may be established from time to time pursuant to this Convention", then other States are not obliged to recognize the validity of the Certificates of Airworthiness issued by the delinquent State, and may therefore ban its aircraft from their skies, even when they have conferred traffic rights to the State pursuant to Article 6 of the Convention. This is an important incentive for compliance with the international obligations established by ICAO.

B. INTERNATIONAL STANDARDS AS SOFT LAW, OR HARD LAW?

The ICAO Council[41] is authorized to adopt international standards and recommended practices [SARPs] on issues affecting the safety and

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[38] *Chicago Convention*, *supra*, art. 33.

[39] A similar provision was included in Article 13 to the *Paris Convention* of 1919, the predecessor of the *Chicago Convention*. US courts have recognized the duty of the FAA to abide by its Article 33 *Chicago Convention* obligation to recognize as valid licenses issued by another signatory State, provided that the requirements underlying such licenses are equal or superior to those required under the Annexes. *Professional Pilots v. FAA*, 118 F.3D 758, 768 (D.C. CIR. 1997); *British Caledonian Airways v. Bond*, 665 F.2D 1153, 1162 (D.C. CIR. 1981). *See also*, *In the Matter of Evergreen Helicopters*, (2000 FAA LEXIS 247 (2000)).

[40] As one scholar noted in 1995, "Very low levels of response by States to amendments to annexes, completely inadequate response levels regarding the notification of differences to standards, and perhaps even instances of misrepresentation of national regulatory provisions and responsibilities, evidence shortcomings of the present ICAO framework in the field of safety oversight." Roderick D. van Dam, *Recent Developments in Aviation Safety Oversight*, XX ANNALS OF AIR & SPACE L. 307, 317 (1995). Dr. John Saba observed, "Many States still fail to remedy aviation safety deficiencies, often due to a lack of will, means, and/or ability to do so." Saba, *supra*, at 544.

[41] The ICAO Council, not the Assembly, is the supreme body of the agency because it holds the power to exercise both the quasi-legislative and quasi-judicial powers of the agency. *See* Peter Ateh-Afac Fossungu, *The ICAO Assembly: The Most Unsupreme of Supreme Organs in the United Nations System: A Critical Analysis of Assembly Sessions*, 26 TRANSP. L.J. 1, 2 (1998).

efficiency of air navigation[42] and, for convenience, designate them as Annexes to the Chicago Convention.[43] Though designated as Annexes for convenience, the SARPs do not actually become part of the Convention.[44] Thus, the question arises as to whether SARPs are "soft law" or "hard law."[45]

Although there is an obligation to attempt to achieve uniformity in law under Article 37, Article 38 of the Chicago Convention provides that any State finding it impracticable to comply with SARPs, or which has or

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[42] SARPs, designated for convenience as Annexes to the Convention, shall be effective in a period of time not less than three months after they are approved by a two-thirds vote of the ICAO Council, unless a majority of States register their disapproval within that period. *Chicago Convention*, *supra*, at Arts. 37, 54(l), 90.

[43] *Id.*, 54(l). The ICAO Council has adopted the following Annexes:

Annex 1: Personnel Licensing
Annex 2: Rules of the Air
Annex 3: Meteorology
Annex 4: Aeronautical Charts
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 Aircraft
Annex 9: Facilitation of International Air Transport
Annex 10: Aeronautical Telecommunication
Annex 11: Air Traffic Services
Annex 12: Search and Rescue
Annex 13: Aircraft Accident Inquiry
Annex 14: Aerodromes
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

DEMPSEY, *supra*, at 275.

[44] Amendments to the *Chicago Convention* require a two-thirds vote of the members of the ICAO General Assembly and ratification by not less than two-thirds of the contracting States. *Chicago Convention*, *supra*, Art. 94. In contrast, the predecessor convention – the Paris Convention of 1919 – created the *Commission Internationale de la Navigation Aerienne,* and gave it power to promulgate Annexes thereto as binding amendments to the Convention. That is one of the reasons the United States, unwilling to vest lawmaking authority in an international organization, failed to ratify the *Paris Convention*.

[45] Christine Chinkin writes: "The complexity of international legal affairs has outpaced traditional methods of law-making, necessitating management through international organizations, specialized agencies, programmes, and private bodies that do not fit the paradigm of Article 38(1) of the Statute of the [International Court of Justice]. Consequently the concept of soft law facilitates international co-operation by acting as a bridge between the formalities of law-making and the needs of international life by legitimating behavior and creating stability." CHRISTINE CHINKIN, COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (DINAH SHELTON ED. 2000).

adopts regulations different therefrom, "shall give immediate notification" to ICAO of the differences.[46] The Council is then obliged immediately to notify other States of such noncompliance.[47] Thus, if a State submits its objection in a timely fashion on grounds of the impracticability of compliance, it may reject an Annex either in whole or part.[48] This "opt out" provision arguably makes the SARPs only "soft law," for the SARPs can hardly be deemed binding if States are free to reject them on the subjective self-determination that it would be "impracticable to comply."[49]

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.[50] Typically, they are not issued until after extensive consultation with member States, and consensus is achieved, a process that takes two years or longer. Indeed, member States are obliged by Article 37 of the Chicago Convention to collaborate in achieving the "highest practicable degree of uniformity" in the adoption of SARPs.

If the requirement for immediate notification of non-compliance is triggered by the date on which the SARP becomes effective, or from the date on which they are notified of its adoption,[51] it would seem a State would be bound if it failed to notify ICAO of the difference promptly, or in fact, *immediately*. But if the immediate notification requirement is triggered by the discovery by a State of the impracticability of compliance with SARPs, then such notification can come at any time –

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[46] With respect to amendments to the SARPs, under Article 38 of the *Chicago Convention*, any State that does not amend its own regulations to comply therewith, must notify ICAO within 60 days; and the ICAO Council shall, in turn, notify member States of the differences. *Chicago Convention*, *supra*, Art. 38.

[47] *Id*. Art. 38.

[48] BUERGENTHAL, *supra*, at 67. "With some exceptions . . . the Contracting States have no legal obligation to implement or comply with the provisions of a duly promulgated Annex or amendment thereto, unless they find it 'practicable' to do so." *Id.*, 76. Burgenthal also argues that "contracting States have retained the right to depart from the provisions of an existing standard *any time* they decide to so, provided only that they notify the Organization accordingly." *Id.*, 78. This interpretation is inconsistent with the literal language of Article 38, which requires "immediate notification" as to differences between domestic law and the SARPs and notification "within sixty days" of differences between domestic law and ICAO amendments to the SARPs. *Chicago Convention*, *supra*, art. 38.

[49] *Chicago Convention*, *supra*, art. 38. Milde, *supra*, at 5. However, to date, no SARPs have ever been rejected by the ICAO General Assembly. *Id*.

[50] *Chicago Convention*, *supra*, art. 90(a).

[51] *Id*. art. 90(b).

indeed, years or decades after the standards become effective. In practice, States have notified ICAO of impracticality of compliance with SARPs at any time, or indeed, not at all, thereby violating the plain meaning of the phrase "immediate notification".[52] Given the way Article 38 is worded, "immediate notification" of an inability to comply with newly promulgated SARPs should mean immediately upon its promulgation.

Article 38 also provides that notification of a difference between a State's domestic law and an amendment to a SARP must be made within sixty days of the adoption of the amendment. Failure to notify ICAO within the 60 day period would therefore lead to a presumption of compliance, and arguably, binding applicability. Why would a State have an open window *ad infinitum* to opt out for any newly promulgated SARP, and only a sixty-day opt out period for any amendment thereto? Literally, Article 38 must mean that if a State finds it impracticable to comply, it must immediately so notify the Council upon being notified that a SARPs has been adopted by it, and within 60 days of an amendment. It would have been cleaner draftsmanship and a far more meaningful notification requirement, had the Convention explicitly addressed the need to notify promptly after SARPs promulgation, and provided that a State that failed to notify would be deemed in compliance and bound thereby.

Blending the requirements of Articles 37 and 38, a State has an affirmative duty to harmonize its domestic law with the SARPs.[53] This duty is emasculated by the ability of a State to opt-out if it deems it impracticable to comply.[54] If it finds impracticality, it has a duty to notify ICAO immediately (though it is unclear whether it must notify immediately after the promulgation of the SARPs or immediately upon discovering the impracticality), unless it is an amendment to a SARPs, in which case it must notify ICAO within 60 days.[55] But in practice, these notification requirements are hollow, as they have been ignored by most States.

In effect, this peculiar process creates something of a paradox in international law. Article 1 of the Chicago Convention recognizes that all member States reserve complete and exclusive sovereignty over the

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[52] *Id*.
[53] *Id*.
[54] *Id*. arts. 37, 38.
[55] *Id*.

airspace above their territories.[56] Article 37 gives ICAO the authority to promulgate Annexes to the Chicago Convention, and member States must comply with the Annex standards and procedures[57] unless they promptly object under Article 38. Most do not exercise their right to object, either because they agree to the standards imposed upon them, or because their transport or foreign ministries lack a sophisticated understanding of the obligations to which they have been subjected, or of their duty to notify ICAO of the impracticability of compliance. In fact, although States have an obligation to notify ICAO of differences between the standards and procedures set forth in the Annexes and their domestic legislation, and are encouraged to notify ICAO even if there are none,[58] the overwhelming majority of States do neither.[59] As we shall see below, the ICAO audit programmes have significantly elucidated the degree of State compliance with certain Annexes. However, the failure of States to notify ICAO of differences between their domestic laws and

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[56] In the *Chicago Convention* of 1944, the world community reaffirmed a basic principle that had been the foundation of its predecessor, the Paris Convention of 1919: "The Contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." *Chicago Convention*, *supra*. PAUL STEPHEN DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 387 (1987). *See* Abeyratne, *supra*, at 136 (1998).

[57] *See* DEMPSEY, *supra*, at 387; Abeyratne, *supra*, at 136. *Compare Chicago Convention*, *supra*, art. 1. (In the *Chicago Convention* of 1944, the world community reaffirmed a basic principle that had been the foundation of its predecessor, the Paris Convention of 1919: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory") with *Paris Convention*. DEMPSEY, *supra*, at 387.

[58] *Chicago Convention*, *supra*, Annex 15.

[59] With respect to the overwhelming number of Annexes, between 1984-1994, fewer than half the States notified ICAO of differences to amendments of Annexes. Abeyratne, *supra*, at 131. Dr. Abeyratne concludes, "It is impossible at the present time to indicate with any degree of accuracy the State of the implementation of regulatory Annex material." *Id.*, 132. ICAO attributes this failure to notify to four causes:

> Insufficient communication between ICAO and recipient States; loss of documentation by recipients and delays in delivering the documentation to the responsible party beyond the target date for replies; organizational structures of civil aviation authorities which render difficulties n identification of, and routing to, the responsible party;
>
> Insufficient resources within States to expeditiously consider and process ICAO documentation and to implement the relevant standards into their national legislation;
>
> Difficulty in comprehending and interpreting Annex material as well as subject matter which is beyond the level of expertise of the recipient administration; and
>
> Possible lack of understanding about the role of States in the consultation phase of the development of ICAO Standards.

Id., 132-33. Dr. Abeyratne adds, "More fundamentally, it is always a possibility that States may have insufficient resources either to implement Standards or to advise ICAO of non-compliance with relevant Standards. *Id.*, 133. He reaches identical conclusions in R.I.R. Abeyratne, *Prevention of Controlled Flight into Terrain: Regulatory and Legal Aspects*, 27 TRANSP. L.J. 159, 167-68 (2000).

regulatory practices and the SARPs created tremendous uncertainty as to whether uniformity is being achieved, a condition potentially dangerous in an area such as aviation safety.[60] There is no explicit sanction in the Convention for failing to notify.[61]

But a State fails to comply with the SARPs at its own peril, for as noted above, there are implicit sanctions that are potentially severe. Pursuant to Article 33 of the Chicago Convention, a State that fails to comply may find its airman, aircraft, air carrier, and/or airport certifications and licenses not recognized as valid by a foreign government, thereby terminating their operation to, from, or through foreign territories, isolating it from the global economy.[62] When economically powerful States, such as the United States or the European Union, blacklist a nation's carriers, the economic impact can be severe. Under such circumstances, private sector insurance coverage for airlines and airports may be impossible to obtain.[63] Moreover, the delinquent government would be responsible, and arguably liable, should an aircraft collision or other aviation tragedy occur, the proximate cause of which was the failure of the government to comply with a relevant SARP.[64] Hence, whatever *de jure* "soft law" attributes SARPs may have, they appear to have corresponding *de facto* "hard law" attributes as well.[65]

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[60] For example, as of 2000, 55 States had notified ICAO of the differences between their domestic laws and Annex 1; 21 States notified ICAO that there were no differences; and 109 provided no notification whatsoever. *See Chicago Convention*, *supra*, Supplement to Annex 1 (Personnel Licensing). For an earlier summary of the poor response rates of member States to their conformity with the requirements of the Annexes to the *Chicago Convention*, Michael B. Jennison, *The Chicago Convention and Safety After 50 Years*, XX ANNALS OF AIR & SPACE L. 283, 291 (1995). One should not assume that the failure of a State to report its differences means that it has none. BUERGENTHAL, *supra*, at 99.

[61] *Chicago Convention*, *supra*.

[62] *Id*.

[63] *Id*.

[64] One might argue that the failure to notify ICAO of differences results in a presumption of full compliance with the standards at issue, and that such States should bear full legal liability for any harmful consequences of their non-compliance. *See* Michael Milde, *The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later*?, XIX ANNALS OF AIR & SPACE L. 401, 426 (1994). In the same way, States may also be liable for the negligent provision of air traffic services. *See* Paul Stephen Dempsey, *Privatization of the Air: Government Liability for Privatized Air Traffic Services*, XXVIII ANNALS OF AIR & SPACE L. 95 (2003).

[65] Herbert V. Morais, *The Quest for International Standards: Global Governance vs. Sovereignty*, 50 KAN. L. REV. 779, 780-81 (2002).

> "For the most part, international standards have been developed and disseminated as norms or principles for voluntary acceptance by countries and other persons. In this sense, international standards would not be legally binding norms and would

Finally, there is one major area in which the SARPs are decidedly "hard law". Article 12 of the Chicago Convention provides, *inter alia*, that: "over the high seas, the rules in force shall be those established under this Convention."[66] Hence, ICAO has lawmaking authority over 72% of the Earth's surface.[67] This jurisdictional scope, which is unparalleled by any other international organization, in effect, makes ICAO a paradigm of global governance.[68]

C. BILATERAL REQUIREMENTS

Article 6 of the Chicago Convention provides, "No scheduled international air service may be operated over and 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."[69] The failure of the Chicago Convention to address economic regulatory issues led to a series of bilateral negotiations between States. In 1946, the United States and the United Kingdom concluded a bilateral air transport agreement (popularly referred to as *Bermuda I*) which exchanged traffic rights (sometimes referred to as "hard rights") between the two States, and provided a mechanism for regulating rates.[70] For four decades, Bermuda I was the template by which US bilateral agreements were negotiated, and for a number of other nations as well.[71]

Bermuda I also addressed various "soft rights" issues.[72] One such issue addressed was safety. Bermuda I provides that the certificates of airworthiness, competency, and licenses issued by one contracting State

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> be generally viewed as 'soft law.' However, it is important to recognize at the same time that several standards have taken the form of binding legal rules established by international treaty or national legislation, and, in these cases, the standards constitute 'hard law."

Id. However, the SARPs over the high seas under Annex 2 apply without exception. *See Chicago Convention*, *supra*, Annex 2.

[66] *Chicago Convention*, *supra*, Art. 12.

[67] *Id*.

[68] *Id*.

[69] *Chicago Convention*, Art. 6.

[70] *Id*.

[71] *See* Paul Stephen Dempsey, *Turbulence in the 'Open Skies': The Deregulation of International Air Transport*, 15 TRANSP. L.J. 305, 314-18 (1987). The principal areas in which other nations diverged from the Bermuda I model was on its absence of predetermination of capacity and pooling provisions. *Id*.

[72] *Air Services Agreement*, Feb. 11, 1946, U.S.-U.K., 60 STAT. 1499, T.I.A.S. NO. 1507; *reprinted in* DEMPSEY, *supra*, at 419.

shall be honored as valid by the other.[73] Subsequent agreements have repeated, and elaborated on, this succinct clause.[74]

A typical, modern "open skies" bilateral agreement is the US-Singapore bilateral air transport agreement.[75] It repeats Bermuda I's reciprocal recognition clause, but adds that such recognition is contingent on the application by the State of registry of requirements for such licensing or certification at least as stringent as those set forth in the Chicago Convention and its Annexes, echoing Article 33 of the Chicago Convention.[76] It further provides that either State may request consultations concerning the aviation safety standards maintained by the other.[77] Following such consultations, should one State conclude that the other does not maintain safety standards at least as stringent as those required under the Chicago Convention and its Annexes, the other State shall be notified of the deficiency and the steps necessary to cure it.[78] The State exhibiting the deficiency must then take appropriate corrective action.[79] In the event the other State fails to take such action in a reasonable time, the State concerned about the deficiency may "withhold, revoke, suspend, or limit the operating authorization or technical permission" of the other's flag-carriers.[80]

There is no corresponding provision in the bilateral air transport agreements to the Chicago Convention's "opt out" provision if a State finds it impracticable to comply with a SARP. Hence, the impracticality argument arguably is not a defense to noncompliance, allowing the concerned State party to the bilateral to restrict the air services of the noncompliant State over its territory.

The legal question boils down to a conflict between Article 33 of the Chicago Convention, obliging a State to accept a foreign carrier's

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[73] Air Services Agreement, *supra*, at art. 4. "Soft rights" include such things as obligations for nondiscriminatory treatment, and are distinguished from "hard rights" which include such things as authorization to fly certain routes.

[74] A typical, modern approach is found in the so-called multilateral "APEC Multilateral Agreement". It repeats Bermuda I's reciprocal recognition clause, but adds that such recognition is contingent on the requirements for such licensing or certification are at least as stringent as those set forth in the Chicago Convention and its Annexes, echoing Article 33 of the Chicago Convention.

[75] *Air Transport Agreement, Apr. 8, 1997, U.S.-Singapore*, 3 CCH AVI. ¶ 26,495A.

[76] *Id*. arts. 1(d); 6(1).

[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] *Id.*, Art. 6(2).

certificate of airworthiness if the registering State has met or exceeded its obligations as specified in the relevant SARPs (as amended by that State's notification of differences on grounds of impracticability of compliance under Article 38), and Article 6, prohibiting international air service without the permission or authorization of the territorial State, and only pursuant to the terms of such permission or authorization. If a bilateral air transport agreement requires compliance with SARPs irrespective of the State's impracticality of compliance therewith, flights would not be pursuant to the terms of such permission or authorization.

So, would Article 33 trump Article 6, or would Article 6 trump Article 33? One could argue that in the context of safety, Article 33 would take precedence, as it is located in Chapter V of the Chicago Convention, "Conditions to Be Fulfilled with Respect to Aircraft". If aircraft are unairworthy because of SARPs deficiencies, that question would seem to be better addressed among the aircraft airworthiness provisions of Chapter V. And there, certificates of airworthiness may only be denied if the registering State falls below the minimum standards established in SARPs. SARPs include the unilateral ability of States to "opt-out" of whatever standards with which it finds impracticable to comply under Article 37.

Article 6 is housed in Chapter II, "Flight over Territory of Contracting States". Though several of its provisions address safety,[81] Articles 5, 6 and 7 address traffic rights. Article 6 provides the foundation for the exchange of traffic rights, usually accomplished through bilateral air transport agreements. It is unclear whether a State can amend its obligations under Article 33 to recognize the validity of the certificates of airworthiness issued by another State in compliance with the SARPs as promulgated under the Chicago Convention via what is essentially a contract (i.e., a bilateral air transport agreement).

It would seem that its obligation to the Chicago Convention is one to the world of 190 ICAO member States, one that could not be abrogated by a separate bilateral agreement. It would also seem that picking and choosing the States with which it will recognize certificates of airworthiness under Article 33 would undermine the Convention's repeated goals of achieving uniformity in safety standards worldwide – a fundamental purpose of the Chicago Convention. Thus, a State could

[81] For example, Article 8 restricts pilotless flights, Article 9 allows establishment of prohibited areas, Article 11 provides that the territorial State's air regulations govern flights above it, and Article 12 requires the registering State ensure compliance with the territorial State's regulations.

only legitimately deny another State's entry (so long as it held traffic rights) if the registering State was failing to comply with its obligations under the SARPs, which would be a factual question that would include an assessment of which standards it had opted out. If a State wanted to terminate traffic rights, the termination clause of the relevant bilateral air transport agreement would provide the procedure. Usually, a bilateral termination clause imposes a one year "wind down" after formal notice of renunciation.

III. DOMESTIC COMPLIANCE WITH INTERNATIONAL AVIATION SAFETY REQUIREMENTS

A. TO COMPLY, OR NOT TO COMPLY: THAT IS THE QUESTION

The system of universal trust and mutual recognition established by the Chicago Convention was jeopardized by the fact that many States were not conforming to the SARPs. [82] Some States were too poor to establish effective air navigation and safety agencies or, if established, to fund or staff them adequately so as to enable them to fulfill their mandate.[83] Others had not promulgated laws and regulations to fulfill their obligations under the SARPs.[84] In some States, civil aviation does not receive the attention governmental leaders accord other ministries and agencies deemed "more important."[85] Like most specialized United

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[82] Professor Michael Milde observed that:

> [T]he vast law-making work of the Council in the drafting of the [SARPs] represents the most visible and monumental achievement of ICAO during its existence, contributing significantly to safe and orderly air navigation. However, the real and effective level of implementation of [SARPs] by the contracting States on a global level is a matter of grave concern and doubt.

Milde, *supra*, at 425-26.

[83] In 1992, the ICAO Assembly recognized that many States "may not have the regulatory framework or financial and technical resources to carry out the minimum requirements of the *Chicago Convention* and its Annexes." ICAO ASSEMB. RES. 29-13.

[84] *Id*.

[85] Dr. John Saba enumerates four major reasons why States fail to comply with their obligations under the *Chicago Convention* Annexes:

> Primary aviation legislation and regulations may be either non-existent or inadequate (for example, a failure to provide adequate enforcement powers);
> Institutional structures that regulate and supervise aviation safety often do not have the authority and/or autonomy to effectively satisfy their regulatory duties;
> Human resources in many States may be plagued by a lack of appropriate expertise largely do to inadequate funding and training (and trained staff may leave government jobs for better-paying jobs in the aviation industry); and
> Financial resources allocated to civil aviation safety are insufficient since many

Nations agencies, ICAO possessed no enforcement power to sanction violators.[86]

In 1992, the ICAO General Assembly explicitly called upon States to reaffirm their safety obligations, particularly those in Annexes 1 and 6 of the Chicago Convention, and urged them to "review their national legislation implementing those obligations and to review their safety oversight procedures to ensure effective implementation . . . ."[87] ICAO encouraged member States to "promote global harmonization of national rules" for the implementation of the SARPs and "to use in their own national regulations, as far as practicable, the precise language of ICAO regulatory standards in their application of ICAO standards and seek harmonization of national rules with other States in respect of higher standards they have in force or intend to introduce."[88] Three years later, the ICAO Secretariat reached the discouraging conclusion that it was "impossible to indicate with any degree of accuracy or certainty what the State of implementation of regulatory Annex material really is, because a large number of contracting States have not notified ICAO of their compliance with or differences to Standards in the Annexes for some considerable time."[89] Though ICAO had attempted to facilitate compliance by the publication of numerous manuals instructing member States on how to comply,[90] many States either could not, or would not, implement their international legal aviation safety obligations.

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developing/LDC countries to not consider this a high priority compared to other demands such as health care, education, irrigation and poverty.

Saba, *supra*, at 545.

[86] Dennis Morris, *Up in the Air: Can the Principle of National Sovereignty Underlying the Chicago Convention Satisfy the Future Needs of International Aviation*?, 20 L.A. L. REV. 34, 42 (1997). The only enforcement power ICAO has addresses the dispute settlement authority of the Council under Chapter XVIII of the *Chicago Convention*. If an airline fails to comply with a Council decision, its operations shall be suspended by all contracting States, and its government shall lose its vote in the ICAO General Assembly. *See Chicago Convention*, *supra*, art. 87-88. Because the Council has never rendered a decision on the merits, these provisions have never been invoked.

[87] ICAO ASSEMB. RES. 29-13.

[88] ICAO ASSEMB. RES. 29-3.

[89] C-WP/10218, ¶ 4.9, *quoted in* Milde, *supra*, at 8-9.

[90] *See*, *e.g.*, ICAO DOC. 8335 — *Manual of Procedures for Operations Inspection, Certification and Continued Surveillance*; ICAO DOC. 8984 — *Manual of Civil Aviation Medicine*; ICAO DOC. 9376 — *Preparation of an Operations Manual*; ICAO DOC. 9379 — *Manual of Procedures for Establishment and Management of a State's Personnel Licensing System*; ICAO DOC. 9388 — *Manual of Model Regulations for National Control of Flight Operations and Continuing Airworthiness of Aircraft*; ICAO DOC. 9389 — *Manual of Procedures for an Airworthiness Organization*; ICAO DOC. 9642 — *Continuing Airworthiness Manual*; ICAO DOC. 9734 — *Safety Oversight Audit Manual,* Part A — *The Establishment and Management of a State's Safety Oversight System*; and ICAO DOC. 9735 — *Safety Oversight Audit Manual*.

B. UNILATERAL OVERSIGHT OF STATE COMPLIANCE WITH INTERNATIONAL OBLIGATIONS: NAME AND SHAME

1. THE COURTS CLIP THE WINGS OF THE UNITED STATES: *BRITISH CALEDONIAN v. BOND*

Unilateral enforcement of international obligations must follow the procedural requirements embodied in those obligations.[91] This was the lesson of *British Caledonian Airways Ltd. v. Bond*,[92] the only case in which the United States has been brought before a court for violating the Chicago Convention.

On May 25, 1979, an engine fell off the wing of American Airlines flight 191, a DC-10, shortly after take-off from Chicago O'Hare International Airport.[93] All 271 people on board the aircraft perished in the crash.[94] Three days later, the Federal Aviation Administration [FAA] issued an Emergency Airworthiness Directive [EAD] requiring all US operators of DC-10s to inspect engine pylons. The following day, the FAA issued another EAD grounding all domestic DC-10s.[95] On June 5, 1979, the FAA Administrator issued an Emergency Order of Suspension (SFAR 40) for all airworthiness certificates for domestic DC-10 aircraft, and also prohibited the operation in US airspace of all foreign-registered DC-10 aircraft.[96] While one can only speculate as to the motives, the suspension of foreign-flag aircraft arguably enhanced the safety of US residents who might board them and also equalized the relative financial impact on US carriers.

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[91] Occasionally, a national court has to intervene to force a governmental unit to abide by the nation's international obligations. Professor Kumm observes, "Whatever the reasons for widespread State compliance with international law, however, problems of noncompliance remain sufficiently widespread for national judicial actors to have a potentially significant role in the enforcement of international law." Mattias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 VA. J. INT'L L. 19, 23 (2003). US courts have embraced various theories to enforce treaty obligations, including honor, natural law, contracts, and national interest. Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT. L. 313, 324-29 (2001).

[92] *British Caledonian Airways v. Bond*, 665 F. 2D 1153 (D.C. CIR. 1981). The case is discussed in Troy A. Rolf, *International Aircraft Noise Certification*, 65 J. AIR L. & COM. 383, 400-02 (2000).

[93] *British Caledonian*, 665 F.2D at 1155.

[94] *Id*.

[95] *Id*.

[96] *Id*.

Several foreign-flag carriers objected.[97] In *British Caledonian Airways v. Bond*,[98] the US Court of Appeals for the District of Columbia Circuit found that the relevant airworthiness standards were properly promulgated by ICAO and set forth in Annex 8.[99] The court also found that Article 33 of the Chicago Convention requires that "the judgment of the country of registry that an aircraft is airworthy must be respected, unless the country of registry is not observing the 'minimum standards' [of Annex 8]."[100] It found that the requirements of Article 33 were self-executing, requiring no implementing legislation by the US Congress.[101]

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[97] *Id.*, 1156.

[98] *British Caledonian Airways v. Bond*, 665 F. 2D 1153 (D.C. CIR. 1981).

[99] *Id.*, 1160.

[100] *Id*.

[101] Certain provisions of the *Chicago Convention* impose direct obligations upon member States and require no implementing legislation.101 According to the US Court of Appeals for the District of Columbia, these include:

> Article 5 – The right of non-scheduled aircraft to fly over another contracting State or land for non-traffic purposes in another contracting State's territory, subject to certain conditions;
> Article 8 – Pilotless aircraft may not be flown in another State's territory without its permission;
> Article 15 – Airports shall provide uniform and nondiscriminatory conditions, fees, and charges to aircraft of any contracting State;
> Article 16 – Contracting States are free to search aircraft on landing or departure and inspect the certificates and other documents required by the Convention;
> Article 20 – All aircraft shall bear appropriate nationality and registration marks;
> Article 24 – Fuel, oil, spare parts, regular equipment, and aircraft stores aboard an aircraft shall be free from customs duties;
> Article 29 – Specified documents must be carried aboard aircraft;
> Article 32 – Pilots and operating crews must be licensed;
> Article 33 – Certificates of airworthiness that satisfy the requirements of the *Chicago Convention* issued by the State of registry must be recognized as valid by other Contracting States.

However, other Articles require implementing legislation or regulations, including:

> Article 12 – Each contracting State must promulgate rules and regulations governing flight and the maneuver of aircraft, and such regulations must be uniform, to the greatest possible extent, with those established under the *Chicago Convention*;
> Article 14 – Each State must take effective measures to prevent the spread of communicable diseases;
> Article 22 – Each State must adopt measures to facilitate and expedite navigation to prevent unnecessary delays, particularly in implementing immigration, quarantine, customs, and clearance procedures;
> Article 23 – Each State must establish customs and immigration procedures consistent with the practices established or recommended under the *Chicago Convention*; and
> Article 28 – Each State must provide air navigation facilities, operational practices and rules, and aeronautical maps and charts.

British Caledonian Airways v. Bond, 665 F.2D 1153, 1161 (D.C. CIR. 1981).

Hence, States have much to do to fulfill their commitments under the *Chicago Convention*.

Nonetheless, the US Congress had mandated, under former Section 1102 of the Federal Aviation Act of 1958 that, in exercising and performing his powers and duties, the FAA Administrator must "do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries."[102]

The court concluded that:

> [B]ecause the Administrator at no time questioned whether the foreign governments met the minimum safety standards set by the ICAO, his issuance of SFAR 40 and his refusal to rescind the order after the foreign governments had revalidated the airworthiness certificates for aircraft flying under their flags would appear to have violated Article 33 and, therefore, section 1102.[103]

There was but a single proper way for the FAA to restrict a foreign-flag carrier based upon the airworthiness of its aircraft: "If doubts about airworthiness exist, one country may refuse to recognize another country's certificate of airworthiness, but only if the certificating nation has not observed the minimum standards of airworthiness established in Annex 8 pursuant to Articles 33 and 37 of the Chicago Convention."[104] The FAA Administrator had failed to do this. Ten years later, the US would launch a program to ferret out those nations not in compliance with Annex 8.[105]

2. US AIRPORT SECURITY AUDITS

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[102] *Id.*, 1162, *citing* Section 1102 of the *Federal Aviation Act of 1958*, 49 U.S.C. § 1502 -1102, 49 U.S.C. § 40105(b).

[103] *Id.*, 1162-63. The FAA also argued that Article 9 of the *Chicago Convention* gave it the authority to restrict the flight of foreign aircraft into the United States. Article 9(b) authorizes a State "in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or any part of its territory, on condition that such restriction or prohibition shall be applicable without distinction of nationality . . . ." *Chicago Convention*, *supra*, art. 9(b). The *British Caledonian* court held that "Article 9 is aimed at restricting the territorial access of all aircraft, rather than restricting the movements of particular types of aircraft. . . . Article 9 permits a country to safeguard its airspace when entry by all aircraft would be dangerous or intrusive because of conditions on the ground. Article 9 does not allow one country to ban landing and take-off because of doubts about the airworthiness of particular foreign aircraft, in derogation of Article 33." *British Caledonian*, 655 F. 2D AT 1164.

[104] *British Caledonian*, 665 F.2D AT 1164

[105] 49 U.S.C. § 44907(e).

The Foreign Airport Security Act of 1985[106] required the FAA to assess the security procedures of foreign airports and foreign air carriers that serve the United States. In order to be allowed to serve airports in the United States, foreign airlines must adopt and implement security procedures established by the US government.[107] Foreign airlines also are required to maintain effective security programs.[108]

To be open to service to and from the United States, foreign airports are assessed by the DOT to determine whether they satisfy the requirements established by ICAO under Annex 17. The DOT conducts a security audit of foreign airports, and if it finds that an airport has failed to take appropriate security measures, it notifies the appropriate authorities of its decision and recommends steps to achieve compliance.[109] If the airport fails to comply, the DOT publishes a notice that the airport is noncompliant in the *Federal Register,* posts its identity prominently at major US airports, and notifies the news media.[110] It may also "withhold, revoke, or prescribe conditions on the operating authority" of an airline that flies to that airport, and the President may prohibit an airline from flying to or from said airport from a point in the United States.[111]

At various times, the DOT has decertified[112] and recertified[113]

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[106] PUB. L. 99-83. *See* PAUL DEMPSEY, WILLIAM THOMS & ROBERT HARDAWAY, AVIATION LAW & REGULATION § 9.25 (BUTTERWORTH 1993).

[107] 49 U.S.C. § 44906.

[108] 49 U.S.C. § 44906:

> The Under Secretary of Transportation for Security shall continue in effect the requirement of section 129.25 of title 14, Code of Federal Regulations, that a foreign air carrier must adopt and use a security program approved by the Under Secretary. The Under Secretary shall not approve a security program of a foreign air carrier under section 129.25, or any successor regulation, unless the security program requires the foreign air carrier in its operations to and from airports in the United States to adhere to the identical security measures that the Under Secretary requires air carriers serving the same airports to adhere to. The foregoing requirement shall not be interpreted to limit the ability of the Under Secretary to impose additional security measures on a foreign air carrier or an air carrier when the Under Secretary determines that a specific threat warrants such additional measures. The Under Secretary shall prescribe regulations to carry out this section.

[109] 49 U.S.C. § 44907.

[110] 49 U.S.C. § 44907.

[111] 49 U.S.C. § 44907.

[112] *See e.g.,* DOT ORDER 98-1-24 (1998) (Port-au-Prince International Airport, Haiti); DOT ORDER 92-10-17 (1992) (Murtala Mohammed International Airport, Lagos, Nigeria); DOT ORDER 95-9-15 (1995) (Eldorado International Airport, Bogotá, Colombia); DOT ORDER 96-3-50 (1996) (Hellenikon International Airport, Athens, Greece); DOT ORDER 95-8-12 (1995) (Ninoy Aquino International Airport, Manila, Philippines); DOT ORDER 85-7-45 (1985)

various foreign airports—including Lagos, Bogotá, Athens, Manila, Port-au-Prince, and Beirut—on the basis of FAA security audits. Where the DOT Secretary has concluded that "a condition exists that threatens the safety or security of passengers, aircraft, or crew traveling to or from that airport; and the public interest requires an immediate suspension of transportation between the United States and that airport,"[114] the Secretary has suspended US and foreign airlines from serving the United States to or from that airport[115] and has imposed fines upon carriers violating the prohibition.[116] The DOT also has denied code-sharing approval[117] to destinations in nations on the Department of State's list of governments that support terrorism (e.g., Syria).[118] Given the significant economic penalty for denial of the opportunity to serve the US market, these moratoria have been highly effective in encouraging governmental and airport authorities to attain security compliance.

3. US SAFETY AUDITS

Airlines in certain developing nations have a higher accident rate than in developed parts of the world.[119] The United States became sufficiently concerned with the absence of universal norms in

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(Lebanon).

[113] *See e.g.*, 2000 DOT AV. LEXIS 128, DOT ORDER 2000-2-6 (2000) (Port-au-Prince International Airport, Haiti); DOT ORDER 99-12-19 (1999) (Murtala Mohammed International Airport, Lagos, Nigeria); DOT ORDER 96-12-44 (1996) (Eldorado International Airport, Bogotá, Colombia); DOT ORDER 96-5-18 (1996) (Hellenikon International Airport, Athens, Greece); DOT ORDER 96-3-2 (1996) (Ninoy Aquino International Airport, Manila, Philippines).

[114] 49 U.S.C. § 44907(e). DOT ORDER 93-8-15 (1993).

[115] DOT ORDER (Murtala Mohammed International Airport, Lagos, Nigeria); DOT ORDER 94-12-22 (1994) (denial of application of Nigeria Airlines for an exemption to resume service to the United States): DOT ORDER 85-7-45 (1985) ("Effective immediately, and until further order of the Department, the holder and its agents shall not sell in the United States any transportation by air which includes any type of stop in Lebanon."); DOT ORDER 85-7-14 (1985) ("Recent terrorist activities by groups based in Lebanon have brought into serious question the security of aircraft transiting that country. Given the unstable State of events in Lebanon, and the possibility of interference with U.S.-bound aircraft while on the ground in that country, we find that the public interest requires us to terminate, effective immediately, all the authority MEA currently holds to conduct scheduled operations to and from the United States on its own behalf.").

[116] DOT ORDER 93-10-26 (1993) (Middle East Airlines).

[117] Code-sharing is a means whereby one airline offers seats on the two-letter airline code and flight number of another, principally in order to deceive consumers that on-line, as opposed to interline, service is being performed. *See* Paul Stephen Dempsey, *Predation, Competition & Antitrust Law: Turbulence in the Airline Industry*, 67 J. AIR L. & COM. 685 (2002).

[118] DOT ORDER 94-4-43 (1994) (Damascus, Syria).

[119] Carole Shifrin, *Unanimous Aviation Commission Lays Out Blueprint for Change*, AVIATION. WEEK & SPACE TECH. 42, 42 (1998).

international aviation that it established an International Aviation Safety Assessment Program [IASA] in 1991.[120]

DOT Secretary Federico Pena announced that the IASA program had been inaugurated "after a series of accidents and incidents arising in the US involving foreign commercial aircraft . . . ."[121] Ostensibly, the IASA was launched in response to the incident involving Avianca Airlines flight 52, which crashed at Cove Neck, New York, on January 25, 1990, after running out of fuel, killing all seventy-three people aboard.[122] Aviation defense attorney George Tompkins, points out, however, that a closer look at that event reveals that US FAA Air Traffic Control [ATC] may have been at least as culpable as the pilots flying the aircraft for the miscommunication that caused the crash. In reaching this conclusion, Tompkins notes the fact that the plane ran out of fuel after its scheduled landing at New York Kennedy International Airport was delayed for two hours subsequent to its initial landing clearance.[123] True, it may have been an old aircraft not maintained according to SARPs requirements, but these deficiencies were not the proximate cause of the crash.[124]

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[120] *See generally*, Shadrach Stanleigh, "*Excess Baggage*" *at the F.A.A.: Analyzing the Tension Between "Open Skies" and Safety Policing in U.S. International Civil Aviation Policy*, 23 BROOK. J. INT'L L. 965 (1998).

[121] George N. Tompkins, Jr., *Enforcement of Aviation Safety Standards*, XX ANNALS OF AIR & SPACE L. 319, 324 (1995). The US government often has been "reactive" rather than "proactive" in addressing aviation safety issues. Three crashes between 1956 and 1958, one involving a crash into a high school, prompted Congress to promulgate the Federal Aviation Act of 1958, the prevailing US aviation safety legislation. *See* LAURENCE GESELL & PAUL STEPHEN DEMPSEY, AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY 419-20 (COAST AIRE 2005).

[122] Anthony Broderick & James Loos, *Government Aviation Safety Oversight – Trust, But Verify*, 67 J. AIR L. & COM. 1035, 1039 (2002).

[123] George Tompkins contends, "The accident could very likely have been avoided had the Colombian airline been subject to the same standards of operation as a domestic U.S. airline." Mark Lee Morrison, *Navigating the Tumultuous Skies of International Aviation: The Federal Aviation Administration's Response to Non-Compliance With International Safety Standards*, 2 S.W. J. OF L & TRADE AM. 621, 642 (1995). But Tompkins never identifies which Annex or SARPS the Columbian government violated that would have averted the crash. George Tompkins, Jr., *Enforcement of Aviation Safety Standards*, XX ANNALS OF AIR & SPACE L. 319, 324-25 (1995). The only other crash of a foreign-flag aircraft in the US within the preceding five years was a midair collision of an Aeromexico DC-9 with a small private aircraft on approach to Los Angeles International Airport on August 31, 1986. *Id*. That too, appeared to have been an ATC error. *Id*.

[124] *Id*. This was also true after the ValuJet crash in the Everglades. The FAA grounded all 53 aircraft for violations having nothing to do with the explosion of improperly packed oxygen canisters in the cargo hold of ValuJet's aircraft. One wonders whether, if ValuJet's fleet was so unsafe that it had to be grounded, why did it take a crash to inspire the FAA to order such suspension?

Hence, when Secretary Pena was pointing to "a series of accidents and incidents in the US involving foreign commercial aircraft" as the predicate for inaugurating the IASA program, it appears the US government should instead have focused at least as much energy on FAA ATC errors.[125] Other sources have revealed that before IASA was inaugurated, certain US-flag carriers had complained to DOT that "airlines operating under non-US flags were able to undercut the US carriers because of the substantially lower costs of inadequate foreign safety regulations."[126] This implies that the policy issue may have been driven by airline economics rather than airline safety.

Nevertheless, despite a weak factual predicate, the FAA began to send out teams to meet with officials of the foreign Civil Aviation Authorities [CAAs] and airlines and review relevant records.[127] They would collect evidence to discern whether the foreign CAA and airlines were in compliance with SARPs.[128] Specifically, IASA focused on:

1. Whether the CAA has developed or implemented laws or regulations in accordance with ICAO standards;
2. Whether it lacks the technical expertise or resources to license or oversee civil aviation;
3. Whether it lacks the flight operations capability to certify, oversee, and enforce air carrier operations requirements;
4. Whether it lacks aircraft maintenance requirements; and
5. Whether it lacks appropriately trained inspector personnel required by ICAO standards.[129]

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[125] Tompkins, supra, at 324. *See* Paul Stephen Dempsey, *Privatization of the Air: Government Liability for Privatized Air Traffic Services*, XXVIII ANNALS OF AIR & SPACE LAW 95 (2003).

[126] Broderick & Loos, *supra*, at 1039.

[127] Jennison, *supra*, at 621.

[128] 57 FED. REG. 38,342 (Aug. 24, 1992).

[129] Mark Lee Morrison, *Navigating the Tumultuous Skies of International Aviation: The Federal Aviation Administration's Response to Non-Compliance With International Safety Standards*, 2 S.W. J. OF L & TRADE AM. 621, 626 (1995). Another source summarized them differently:

> Whether the State had promulgated a law authorizing the appropriate governmental agency to adopt regulations necessary to satisfy the minimum standards set forth in the Annexes;
> Whether the current regulations meet ICAO standards;
> Whether procedures exist to implement those regulations;
> Whether air carrier certification, inspection, and surveillance programs meet those requirements; and
> Whether the State has sufficient organizational and personnel resources to implement those functions.

Olga Barreto, *Safety Oversight: Federal Aviation Administration, International Civil Aviation*

In 1994, the FAA fitted IASA with teeth.[130] The FAA announced that it would publicly disclose the results of its audits, and would classify countries into three categories, restricting the operations of those airlines registered in noncompliant States:

- Category I (Acceptable) – these States were fully in compliance with the SARPs;
- Category II (Conditional) – these States were not in compliance with the SARPs, and their existing flag-carrier operations to the US could not be expanded until they were;
- Category III (Unacceptable) – these States were also not in compliance with the SARPs but had no flag-carrier service to the US and could not begin such service until they were in compliance.[131]

Of the first thirty countries audited, the FAA determined that nine

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Organization, and Central American Aviation Safety Agency, 67 J. AIR L. & COM. 651, 656 (2002). The FAA summarizes IASA as follows:

> Under the International Convention on Civil Aviation (Chicago Convention) each country is responsible for the safety oversight of its own air carriers. Other countries can only conduct specific surveillance activities, principally involving inspection of required documents and the physical condition of aircraft.
> FAA conducts the International Aviation Safety Assessment Program (IASA), assessing the Civil Aviation Authority (CAA) of each country that has carriers operating to the United States. Because of the provisions of the Chicago Convention and national sovereignty, FAA is not permitted to evaluate a foreign carrier within its own sovereign state.
> An IASA assessment determines if the foreign CAA provides oversight to its carriers that operate to the United States according to international standards. The International Civil Aviation Organization (ICAO), a United Nations agency, and Annexes 1, 6, and 8 of the Chicago Convention develop those standards.
> If the CAA meets standards, FAA gives that authority a Category 1 rating. Category 1 means the air carriers from the assessed state may initiate or continue service to the United States in a normal manner and take part in reciprocal code-share arrangements with U.S. carriers.
> IASA ratings (MS Excel) are released to the public.
> **What happens if a CAA does not meet ICAO standards?**
> If the CAA does not meet standards, FAA gives that CAA a Category 2 rating.
> Category 2 means the air carriers from the assessed state cannot initiate new service and are restricted to current levels of any existing service to the United States while corrective actions are underway.

http://www.faa.gov/passengers/international_travel/

[130] 59 FED. REG. 46, 332 (SEPT. 8, 1994) (to be codified at 14 C.F.R. pt. 129.

[131] *Id*.

African and Latin American governments had inadequate oversight.[132] The US Secretary of Transportation encouraged Americans flying to those counties either to use US-flag carriers or carriers of other countries that provide adequate safety oversight.[133] In other words, one could fly safely on US-flag carriers, on an airline from a State that had passed its IASA audit, or on foreign-flag carriers that had flunked their IASA audit so long as they "wet-leased" their aircraft and crew from a US-flag airline.[134]

The initial IASA audits revealed that two thirds of the countries were not fully complying with ICAO standards. Deficiencies found in FAA assessments were almost identical to the deficiencies found by ICAO, during 1993, in its safety surveillance project surveying six Asian countries. These deficiencies included:

- inadequate and in some cases nonexistent regulatory legislation;
- lack of advisory documentation;
- shortage of experienced airworthiness staff;
- lack of control on important airworthiness related items such as issuance and enforcement of Airworthiness Directives, Minimum Equipment Lists, investigation of Service Difficulty Reports, etc.;
- lack of adequate technical data;
- absence of Air Operator Certification [AOC] systems,
- nonconformance to the requirements of the AOC System
- lack or shortage of adequately trained flight operations inspectors including a lack of type ratings;
- lack of updated company manuals for the use by airmen;
- inadequate proficiency check procedures; and
- inadequately trained cabin attendants.[135]

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Publicly announcing which States had deficient safety oversight would have a deleterious economic impact upon their air carriers, and their tourism industries, thereby encouraging, albeit grudgingly, increased compliance with their legal obligations under the SARPs.[136]

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[132] Shirlyce Manning, *The United States' Response to International Air Safety*, 61 J. AIR L. & COM. 505, 534 (1996). The nine countries were Belize, the Dominican Republic, Honduras, Nicaragua, Paraguay, Uruguay, Ghana, Gambia, and Zaire. Morrison, *supra*, at 642.

[133] Tompkins, *supra*, at 326.

[134] Morrison, *supra*, at 624. A "wet lease" is the lease of an aircraft with crew. A "dry lease" is the lease of an aircraft without crew.

[135] http://www.faa.gov/safety (visited August 10, 2006).

[136] *Id*.

The FAA subsequently reduced its compliance categories from three to two:

- Category I – in compliance with the SARPs;
- Category II – not in compliance with the SARPs.[137]

The consequences of being designated a Category II State are:

1. The air carriers from the assessed State are restricted to current levels of any existing service to/from the United States;
2. No reciprocal code-share arrangements between air carriers for the assessed State and U.S. carriers are allowed; and
3. The carrier's aircraft are subject to additional inspections at U.S. airports.

As revealed in Table 4.1, as of 2007, more than twenty States found themselves on the FAA list of noncompliant States.

Table 4.1 - FAA Flight Standards Service: International Aviation Safety Assessment (IASA) Program 03/07/2007

Country	Category	Country	Category
Argentina	1	Denmark	1
Aruba	1	Dominican Republic	1
Australia	1	Ecuador	1
Austria	1	Egypt	1
Bahamas	1	El Salvador	1
Bangladesh	2	Ethiopia	1
Belgium	1	Fiji	1
Belize	2*	Finland	1
Bermuda	1	France -Guadeloupe	1

[137] FEDERAL AVIATION ADMINISTRATION: INTERNATIONAL AVIATION SAFETY ASSESSMENT (PHASE 2 ASSESSMENT RESULTS DEFINITIONS), *at* http://www.faa.gov/avr/asa/iasadef5.htm (visited April 26, 2004). Category I States were deemed in compliance with SARPs. Category II States were not in compliance. *Id.* If a nation fell into Category II, it would not be allowed to expand service to the United States until it achieved Category I status. A Category II nation that did not serve the United States would be allowed to begin service only if it wet-leased aircraft from a Category I nation. *Id. Public Disclosure of the Results of Foreign Civil Aviation Authority Assessments*, 59 FED. REG. 46,332 (SEPT. 8, 1994) (to be codified at 14 C.F.R. PT. 129).

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Bolivia	1	-French Polynesia	
Brazil	1		
Brunei Darussalam	1	Gambia	2*
Bulgaria	2	Germany	1
Canada	1	Ghana	2
Cape Verde	1	Greece	1
Cayman Islands	1	Guatemala	1
Chile	1	Guyana	2
China	1	Haiti	2*
Colombia	1	Honduras	2*
Costa Rica	1	Hong Kong	1
Cote D' Ivoire	2	Hungary	1
Czech Republic	1	Iceland	1
Dem. Rep. of Congo (Formerly Zaire)	2*	India	1
		Indonesia	2
Ireland	1	Pakistan	1
Israel	1	Panama	1
Italy	1	Paraguay	2*
Jamaica	1	Peru	1
Japan	1	Philippines	1
Jordan	1	Poland	1
Kiribati	2*	Portugal	1
Kuwait	1	Qatar	1
Luxembourg	1	Romania	1
Marshall Islands	1	Russia	1
Malta	1	Saudi Arabia	1
Malaysia	1	Singapore	1
Mexico	1	South Africa	1
Morocco	1	South Korea, Rep. of	1
Nauru	2	Spain	1
Netherlands	1	Suriname	1
Netherlands Antilles:	1	Swaziland	2*
-Curacau,		Sweden	1
-St. Martin,		Switzerland	1
-Bonaire,		Taiwan	1
-Saba,		Thailand	1
-St.Eustatius		Turkey	1
New Zealand	1	Ukraine	2
Nicaragua	2*	United Arab Emirates	1
Norway	1	United Kingdom	1
Oman	1	-Anguilla	
Org. of Eastern Caribbean States: Eastern Caribbean CAA	1	-British Virgin Islands	
		-Montserrat	
		-Turks and Caicos	

members:	Uruguay	1
-Antigua & Barbuda,		
-Dominica, -Grenada,	Uzbekistan	2
-St. Vincent and The		
Grenadines, -St. Lucia,	Venezuela	1
-St. Kitts and Nevis	Western Samoa	1
	Zimbabwe	2*

Category I:	Meets ICAO Standards
Category II:	Does Not Meet ICAO Standards

Note - For those countries not serving the U.S. at the time of the assessment, an asterisk "*" will be added to their Category II determination.

Note also that this process is dynamic. Between 2004 and 2007, Argentina, Ecuador, Greece, Venezuela, and Uruguay were moved from Category II to Category 1, while Ghana and the Ukraine fell from Category I to Category II.

By 2014, the following States were designated Category II by the FAA:

Bangladesh
Barbados
Curacao
Ghana
India
Indonesia
Nicaragua
St. Maarten
Uruguay

The fact that the US has signed Open Skies agreements with developing nations tilts the commercial benefits strongly in the US direction when it blacklists that nation's air services. The case of Venezuela is interesting. In 1995, the FAA flunked Venezuela's aviation safety after the Avianca crash in New York three years earlier. The FAA then failed to revisit the question, though the ICAO safety oversight team twice examined Venezuela's safety regime and found improvements. Meanwhile, the US-flag carriers (i.e., Continental and Delta Air Lines) began to dominate the US-Venezuela market. In January 2006, the Venezuelan government threatened to halt US carrier flights to Venezuela. The FAA thus was incentivized to reevaluate

Venezuela's safety rating, and gave it a passing grade.[138]

4. EU BLACKLISTING OF AIRLINES

Blacklisting a State's aircraft from one's skies is nothing new. During war, the airlines of a belligerent State are banned. During most of the Cold War, the US refused to allow the world's largest airline, Aeroflot, to fly to the US, while the Soviet Union banned most western aircraft from its vast airspace. After Fidel Castro came to power in Cuba, its airlines were banned from serving US cities.[139] Hence, politically-motivated bans have long been pursued.

A of crashes in 2004-2005 caused the European States to come together to coordinate their independent lists of banned airlines:[140]

- In June 2004, an Egyptian Flash Airlines Boeing 737 aircraft with 133 French nationals on board crashed into the Red Sea. The carrier had been on Switzerland's blacklist.
- In August 2005, a West Caribbean Airways Boeing MD-82 crashed in Venezuela killing all 160 passengers, 152 of them French tourists.
- Also, in August 2005, a crash in Greece of a Helios Airways Boeing 737 killed all 121 people on board.[141]

Several European States had previously blacklisted certain airlines from their skies:

- The United Kingdom had banned aircraft operated by airlines from Equatorial Guinea, The Gambia, Liberia and Tajikistan, as well as Sierra Leone's Star Air and Air Universal, Cameroon Airlines, Albanian Airlines and the Democratic Republic of Congo's Central Air Express.
- France banned North Korea's Air Koryo, the United States' Air

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[138] Jim Landers, *When the FAA Goes Abroad, It Returns with New Baggage*, DALLAS MORNING NEWS, JUNE 2, 2006.

[139] Overflight rights also were denied Cuba's airlines until Cuba brought a complaint before the International Civil Aviation Organization. Both the US and Cuba had ratified the multilateral Air Transit Agreement, conferring First and Second Freedom rights to the other; hence, the US ban on Cuban flights was unlawful. *See* Paul Stephen Dempsey, *Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation*, 32 GA. J. INT'L & COMP. L. 231 (2004).

[140] Ron Pradinuk, *Why So Mum on Air Safety?*, WINNIPEG SUN, APR. 2, 2006, at C11.

[141] Dan Bilefsky, *EU Puts 92 Foreign Airlines On Its First Safety Blacklist*, INTERNATIONAL HERALD TRIBUNE, MAR. 24, 2006, at 4.

Saint Thomas, Liberia's International Air Services, Lineas Aer de Mozambique, and Thailand's Phuket Airlines.

- Belgium banned airlines from the Ukraine, Republic of Central Africa, Egypt, Armenia, Democratic Republic of Congo, Libya, Nigeria, Ghana and Rwanda.
- Switzerland banned airlines from Azerbaijan, Egypt, Bulgaria, Lebanon and Nigeria.[142]

The EU promulgated regulations governing operating bans on foreign carriers in late 2005.[143] The Regulation provides that bans are to be imposed "according to the merits of each individual case", evaluating "whether the air carrier is meeting the relevant safety standards". The phrase "relevant safety standards" is defined as "the international safety standards contained in the Chicago Convention and its Annexes as well as, where applicable, those in relevant Community law."[144]

In other words, an air carrier may be banned from European skies even if it meets the requirements of the Chicago Convention and its Annexes, if it nonetheless violates the safety standards "in relevant Community law." It is difficult to comprehend how the EU can lawfully impose requirements beyond those contained in the Annexes to the Chicago Convention, for its member States are parties to the Chicago Convention and have an obligation to be bound by it. Though the EU itself is not a party to the Chicago Convention, its members are and they are bound by Article 33 to recognize as valid the certificates of airworthiness issued by the registering State so long as they comply with the SARPs, irrespective of whether they comply with "relevant community law."

Three broad areas are assessed under the EU Regulation: (1) evidence of serious safety deficiencies; (2) the lack or willingness of an air carrier to address safety deficiencies; and, (3) the lack or ability or willingness of the governmental authorities responsible for safety oversight to address safety deficiencies.[145] Only the third of these criteria correspond to a State's right to ban aircraft as formulated in the Chicago Convention scheme. And only one of the three subcategories of item three references that Convention: "audits and related corrective action plans established under ICAO's Universal Safety Oversight Audit

[142] EU Listed the Unsafe Airlines, Austria Today, Mar. 21, 2006.
[143] REGULATION (EC) NO. 2111/2005 (DEC. 14, 2005).
[144] *Id.*, Art. 2(j).
[145] *Id*, Annex.

Programme"; then it goes on to add "or under any applicable Community law." Hence, under the Regulation, Community safety standards hold a virtually equal status to SARPs. The EU concedes: "The safety audits of the International Civil Aviation Organisation (ICAO) constitute a pillar and one of the common criteria which are used to impose an operating ban."[146] Excuse me. One of the criteria? Under the Chicago Convention, the only legal mechanism for rejecting an air carrier's certificate of airworthiness is failure to comply with ICAO standards. One wonders where EU aviation lawyers study Air Law.

On March 22, 2006, the European Union published a consolidated blacklist of 92 airlines to be banned from EU skies. The blacklist is updated every three months. The list is dominated by African airlines and includes 50 carriers from the Democratic Republic of Congo, 13 from Sierra Leone, 11 from Equatorial Guinea, 6 from Swaziland, 3 from Liberia as well as airlines in Kazakhstan, Thailand, and North Korea.[147] The following is the initial list of blacklisted airlines prohibited from flying EU skies:

- Afghanistan: Ariana Afghan Airlines
- Comores: Air Service Comores
- Democratic Republic of Congo: Africa One, African Company Airlines, Aigle Aviation, Air Boyoma, Air Kasai, Air Navette, Air Tropiques, Air Transport Office, Blue Airlines, Business Aviation, Butembo Airlines, Compagnie Africaine d'Aviation, Cargo Bull Aviation, Central Air Express, Cetraca Aviation Service, CHC Stelavia, Comair, Compagnie Africaine d'Aviation, C0-ZA Airways, Das Airlines, Doren Aircargo, Enterprise World Airways, Filair, Free Airlines, Galaxy Corporation, GR Aviation, Global Airways, Goma Express, Great Lake Business Company, International Trans Air Business, Jet Aero Services, Kinshasa

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146 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1136&format=HTML&aged=0&language=EN&guiLanguage=en "The key conclusions to be drawn from this latest update of the list are twofold:

- a) the list acts a strong incentive to remedy safety deficiencies; withdrawal from the list is indeed possible, when the parties concerned put effectively in place sound corrective action to comply with all relevant safety standards;
- b) the concept of a Community list is increasingly proving to serve as a preventive rather than punitive instrument for safeguarding aviation safety. This is illustrated by the numerous instances where the Community has successfully addressed potential safety threats well ahead of resorting to the drastic measure of imposing restrictions."

Id.

147 Dan Bilefsky, *EU Puts 92 Foreign Airlines On Its First Safety Blacklist*, INTERNATIONAL HERALD TRIBUNE, Mar. 24, 2006, at 4.

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Airways, Kivu Air, Lignes Aériennes Congolaises, Malu Aviation, Malila Airlift, Mango Mat, Rwabika Bushi Express, Safari Logistics, Services Air, Tembo Air Services, Thom's Airways, TMK Air Commuter, Tracep, Trans Air Cargo Services, TRACO, Uhuru Airlines, Virunga Air Charter, Waltair Aviation, Wimbi Diri Airways

- Equatorial Guinea: Air Consul, Avirex Guinee Equatoriale, Compagnie Aeree de Guinee Equatoriale, Ecuato Guineana de Aviacion, Ecuatorial Cargo, Guinea Ecuatorial Airlines, Getra, Jetline Inc, KNG Transavia Cargo, Prompt Air GE SA, Union de Transport Aereo de Guinea Ecuatorial
- North Korea: Air Koryo
- Kazakhstan: BGB Air, GST Aero Air Company
- Kyrgyzstan: Phoenix Aviation, Reem Air
- Liberia: International Air Services, Satgur Air Transport, Weasua Air Transport
- Rwanda: Silverback Cargo Freighters
- Sierra Leone: Aerolift, Afrik Air Links, Air Leone, Air Rum, Air Salone, Air Universal, Destiny Air Services, First Line Air, Heavylift Cargo, Paramount Airlines, Star Air, Teebah Airways, West Coast Airways
- Swaziland: African International Airways, Airlink Swaziland, Jet Africa, Northeast Airlines, Scan Air Charter, Swazi Express Airways
- Thailand: Phuket Airlines
- The following air carriers were banned from flying certain types of aircraft:
- Bangladesh: Air Bangladesh
- Democratic Republic of Congo: HBA
- Libya: Buraq Air[148]

The list is updated regularly. Airlines that can prove they meet EU safety standards can have their companies removed from the list.[149] The impact of blacklisting is severe. It causes an airline to suffer:

- Loss of traffic in blacklisted markets;
- Tarnished reputation in flown markets;
- Higher aircraft insurance rates, or inability to procure insurance for blacklisted airlines or tour operators that book them;

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[148] http://ec.europa.eu/transport/air/safety/doc/flywell/2006_03_22_flywell_list_en.pdf
[149] Christina Mackenzie, *Testing takeoff for European Aviation Safety Agency*, INTERNATIONAL HERALD TRIBUNE, JUNE 5, 2006, at 11.

- Inability to lease aircraft; and
- Higher cost of capital by commercial banks.

In June 2006, the EU added two additional carriers (Surinam's Blue Wing and Kyrgyzstan's Star Jet) to the no-fly list; restricted Sudan's Air West to the limitation that it can fly only wet-leased aircraft to the EU; and removed the restrictions on Mauritania's airlines and Libya's Buraq Air.[150] There were 176 carriers on the June 2006 list, all but 12 from the five African States listed above. By 2008, the EU had blacklisted all the airlines of the Democratic Republic of the Congo, Equitorial Guinea, Indonesia, the Kyrgyz Republic, Liberia, Sierra Leone, and Swaziland, as well as:

- AIR KORYO Democratic People Republic of Korea
- AIR WEST CO. LTD Sudan
- ARIANA AFGHAN AIRLINES Afghanistan
- MAHAN AIR Islamic Republic of Iran
- SILVERBACK CARGO FREIGHTERS Rwanda
- TAAG ANGOLA AIRLINES Angola
- UKRAINE CARGO AIRWAYS Ukraine
- UKRAINIAN MEDITERRANEAN AIRLINES Ukraine
- VOLARE AVIATION ENTREPRISE Ukraine[151]

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The criteria employed by the EU for blacklisting included: (1) with respect to Bangladesh, the Democratic Republic of Korea, Kyrgyzstan and Libya a finding that they had "not exercised an adequate oversight… in accordance with their obligations under the Chicago Convention"; (2) with respect to the Democratic Republic of the Congo, Equatorial Guinea and Swaziland, a finding that they did not "have the ability to provide adequate oversight to…airlines and ensure that they operate in accordance with ICAO standards"; and (3) with respect to Equatorial Guinea, Kyrgyzstan and Sierra Leone, a finding was made that their airlines had a principal place of business in another State, in contravention of Annex 6 to the Chicago Convention.[152] Many of the criteria employed by the EU, however, were not Chicago Convention-based; and some airlines were banned without a finding of any Chicago Convention or SARPs deficiency.

By 2009, the EU had blacklisted more than 250 airlines. By 2011,

[150] Martial Tardy, *EU Updates Blacklist of Unsafe Carriers*, AVIATION DAILY (JUNE 21, 2006) 2.
[151] http://ec.europa.eu/transport/air-ban/pdf/list_en.pdf
[152] COMMISSION REGULATION (EC) OF 474/2006 (MAR. 22, 2006).

the EU had blacklisted. 273 airlines from 20 countries.[153] By 2013, it had blacklisted 295 airlines from the following States:

Afghanistan 5
Angola 13
Benin 9
Republic of Congo 9
Dem.Rep. of Congo 51
Djibouti 1
Equatorial Guinea 5
Eritrea 3
Ghana 1
Indonesia 52
Kazakstan 28
Kyrgyz Republic 14
Liberia 1
Gabon 7
Mozambique 16
Philippines 32
Sao Tome & Principe 11
Sierra Leone 7
Sudan 18
Surinam 1
Swaziland 1
Zambia 1
Kazakstan 28
Kyrgyz Republic 14
Liberia 1
Gabon 7
Mozambique 16
Philippines 32
Sao Tome & Principe 11
Sierra Leone 7
Sudan 18
Surinam 1
Swaziland 1
Zambia 1

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Note that the EU blacklist is of airlines and is based principally on ramp inspections of aircraft landing in EU member states. As the EU concedes:

[153] http://ec.europa.eu/transport/air-ban/doc/list_en.pdf

> The civil aviation authorities of Member States of the European Union are only able to inspect aircraft of airlines that operate flights to and from Union airports; and in view of the random nature of such inspections, it is not possible to check all aircraft that land at each Union airport. The fact that an airline is not included in the Community list does not, therefore, automatically mean that it meets the applicable safety standards. Where an airline which is currently included in the Community list deems itself to be in conformity with the necessary technical elements and requirement as prescribed by the applicable international safety standards, it may request the Commission to commence the procedure for its removal from the List.[154]

In contrast, the US blacklist is of States, and is based on FAA inspections of SARPs compliance in the State of registration. These are vastly different approaches to addressing the problem of unsafe aircraft.

For example, if one airline of a registering State is blacklisted, a presumption might be appropriate that the other airlines of that State also have deficiencies, perhaps attributable to the deficiencies of regulatory oversight by the registering State. Thus, if the EU blacklists Air Phuket, why did it not also blacklist Thai International Airways? The answer may lie in the fact that the EU blacklisting program does not assess State compliance with SARPs, but instead focuses on ramp inspections of aircraft. The State may be appropriately complying with SARPs, but a particular aircraft may have "fallen between the cracks."

The net result may be that States will be incentivized to fly their newest planes to the EU, and their older and more poorly maintained aircraft to States without a blacklisting program. Already, the noise regulations of developed States have moved the older-generation 707s and 727s to the routes between developing countries. Thailand's Phuket Airlines announced it was splitting itself into two companies, one of which would fly domestic Thailand and southeast Asian routes with its aging Boeing 737-200 aircraft. The EU banned all aircraft in Ariana Afghan Airlines' fleet except one A-310, registration number F-GYYY (registered in France). Hence, only the newer, safer planes of poorer States will fly to the developed world, while the less developed world will be left with aging, unsafe and noisy aircraft. Moreover, when a less

[154] http://ec.europa.eu/transport/modes/air/safety/air-ban/doc/list_en.pdf

developed State's airlines are banned from Europe, only European airlines will fly the routes in question. Some may object to the colonialist look of all that.[155]

Moreover, one must note the incongruity of EU policy as reflected in its approach toward Angola. In 2007, after a crash of TAAG, the national carrier, the EU announced it was banning all flights of TAAG to the EU. At the time, TAAG flew to Paris and Lisbon, while Air France, British Airways and TAP Air Portugal flew to the Angolan capital, Luanda. Angola retaliated by banning all EU carriers from flying to Angola. The EU then reversed course, concluding, "Progress made by the civil aviation authority of Angola and the air carrier TAAG Angola Airlines to resolve progressively any safety deficiencies are recognised. In that context, the cooperation and assistance agreement signed between the civil aviation authorities of Angola and of Portugal allowed the airline to operate again into Portugal only with certain aircraft and under very strict conditions."[156] Excuse me. If TAAG is unfit to fly to all EU member States but Portugal, then why is it fit to fly to Portugal? Does Angola's former status as a Portuguese colony somehow make TAAG fit to fly to Lisbon but not Paris? Or was this just a political compromise to avert a trade war in the air transport sector?

The US focus on States, rather than airlines, also poses a pragmatic political problem. It is one thing to blacklist States in Latin America and Africa. But it is doubtful that the US would have the courage to blacklist all the carriers of Saudi Arabia, the Russian Federation or China, even if significant SARPs deficiencies existed. Some speculate that the US already succumbed to the energy politics of Venezuela and Ecuador by elevating both to Category I following threats of economic retaliation. Nonetheless, the US did at one point drop Israel to Category II, despite the enormous political influence that State wields on the US government.

C. MULTILATERAL OVERSIGHT OF STATE COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

As it often does, US unilateralism did not sit well with the world community.[157] Indeed, certain nations responded with hostility to the

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[155] Created in 2002, the European Aviation Safety Agency took over the safety responsibilities theretofore handled by the Joint Aviation Authorities of the EU member States in 2007.

[156] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1136&format=HTML&aged=0&language=EN&guiLanguage=en

[157] Jennison, *supra*, at 291-97

blacklisting of their airports and airlines, alleging that a desire for an economic advantage motivated the United States[158] to impose an unfair trade practice.[159] Some criticized the United States as having "unfairly blemished all of Latin American aviation", while simultaneously withholding condemnation of more politically important States, such as Russia and China.[160] Others complained of the "inconsistent application of policy, an absence of transparency, a lack of coordination with ICAO, and an absence of documented operating guidance to both inspectors and those subject to assessment."[161] Though the consensus was that the SARPs should be honored, it was believed that no single nation should be their policeman, since multilateral cooperation was preferable to unilateral insistence.[162] Article 55 of the Chicago Convention gives the Council the authority to investigate "any situation which may appear to present avoidable obstacles to the development of international air navigation."[163] The IASA program led to a growing chorus of nations asking ICAO to step in and assume these duties.[164]

In response,[165] in 1994, the ICAO General Assembly passed Resolution A32-11, which established ICAO's Safety Oversight Programme [SOP] to assess member State compliance with SARPs and to assist States whose compliance was deficient.[166] Under the SOP, ICAO began to review member States' aviation safety regulation and oversight systems.[167] By 1997, SOP assessments had revealed that although 75% of

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158 *Id*. at 297.

159 Morrison, *supra*, at 638.

160 Manning, *supra*, at 638. There were "vocal protests by a number of Latin American States that they had been victimized." Doug Cameron, *Safer Than Ever*, AIRLINE BUS. 62 (Oct. 1997). Many Latin American States "believed the FAA had unfairly picked them for review, arguing that other countries, such as China and Russia, which reportedly had serious problems complying with ICAO's international safety standards, were treated in a better way because the United States considered them to be more important trading partner." Barreto, *supra*, at 659.

161 Broderick & Loos, *supra*, at 1042. However, others believed that taking the issue to ICAO would result in "enough veto, or stagnation, or simply inertia to kill th[e] initiative stone dead." Comment, *Safety in Isolation*, 146 FLIGHT INT'L 3 (Sept. 14, 1994).

162 *Safety in Isolation*, *supra*, at 3.

163 *Chicago Convention*, *supra*, art. 55(e). The triggering language requires a request of the Council by a contracting State. *Id*.

164 *See* Broderick & Loos, *supra*, at 1043.

165 "It is evident that the U.S. unilateral action became a potent catalyst for ICAO to understand that continuing lethargic attitudes to aviation safety are not tolerable to a large segment of the ICAO membership and to focus ICAO's attention to real priorities." Milde, *supra*, at 12.

166 Jacques Ducrest, *Legislative and Quasi-Legislative Functions of ICAO: Towards Improved Efficiency*, XX ANNALS OF AIR & SPACE L. 343, 357-58 (1995).

167 That same year the European Union began its Safety Assessment of Foreign Airlines

member States had laws establishing a CAA, only 51% had given it adequate legal status, 29% had adequate funding, 22% had adequate staffing and qualified inspectors, and 13% had adequate inspector training.[168]

At the same time, however, the SOP was criticized because of its voluntary, under-funded, and confidential nature.[169] Yet ICAO was reticent to publicize delinquency for fear that member States would resist the voluntary audit program. Article 38 of the Chicago Convention requires both member State notification of noncompliance to the Council, and the Council's notification thereof to all member States.[170] In addition, Article 54 requires the Council to notify member States of "any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council."[171] Thus, the confidentiality of the SARPs delinquencies manifestly violated these explicit requirements.[172] Moreover, by 1999, The ICAO audit team had concluded that 40% of the countries assessed had deficient safety oversight systems.[173]

In response, ICAO replaced the SOP with a more meaningful *mandatory* Universal Safety Oversight Audit Programme [USOAP] in 1999. USOAP safety audits began by evaluating member State compliance with Annexes 1, 6, and 8.[174] For example, the ICAO safety audit of the United States government focused on the following issues and found substantive deficiencies in US laws and procedures vis-à-vis the SARPs obligations:

- Whether there is a clear policy covering the regulation of airworthiness, operations, and personnel licensing;
- Whether an appropriate system is in place for the certification of commercial aircraft operators and the approval of maintenance organizations;
- Whether periodic training is given to inspectors and licensing personnel, and whether appropriate training records are

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[SAFA]. Cameron, *supra.* Two years earlier, ICAO had declined a US request that ICAO perform safety audits of States whose flag carriers served the US *Id.*

[168] Broderick & Loos, *supra*, at 1049.

[169] *Id.*; Saba, *supra,* at 544.

[170] *Id.*

[171] *Id.*, art. 54(j). *Id*. art. 54(k).

[172] *Id.*, arts. 38, 54(j), 54(k).

[173] Saba, *supra*, at 542.

[174] *See* SAFETY OVERSIGHT AUDIT MANUAL, ICAO DOC. 9735 (1ST ED. 2000).

maintained;

- Whether appropriate reference material, including ICAO documentation, is available;
- Whether provisions existed for the revocation of licenses and certificates if unsafe conditions are identified; and
- Whether adequate budgetary arrangements exist to enable the CAA to carry out its obligations and responsibilities in the most efficient and effective manner.[175]

The following year, the FAA amended IASA to "make use of other sources of information on CAA compliance with minimum international standards for safety oversight."[176] These "other sources" would include ICAO and the European Joint Aviation Authorities (JAA), among others.[177] Hence, once ICAO finally began pursuing mandatory, transparent safety audits, the United States was willing to pay them deference. ICAO safety audits involve a three-stage process:

- *Pre-audit phase.* Information provided by the State in the State Aviation Activity Questionnaire (SAAQ) and Compliance Checklists (CCs) is reviewed to analyze the type of organization for safety oversight provided, the implementation of Annexes provisions and the differences from SARPs identified by the States.

- *On-site phase.* The State is visited by an ICAO audit team to validate the information provided by the State and conduct an on-site audit of the State's system and overall capability for safety oversight.

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[175] ICAO UNIVERSAL SAFETY OVERSIGHT AUDIT PROGRAMME: *Confidential Final Audit Report of the Federal Aviation Administration of the United States*, at http://www.faa.gov/avr/iasa/finrep.doc (last visited April 26, 2004). These, in fact, were the criteria under which the US aviation safety program was evaluated. ICAO audits are conducted under the procedures set forth in SAFETY OVERSIGHT AUDIT MANUAL, ICAO DOC. 9735 (1ST ED. 2000) to determine whether the SARPs of Annexes 1, 6, and 8 as well as related provisions in other Annexes and their relevant guidance material and practices are being implemented. The audit team typically reviews the national legislation through which Annexes 1, 6, and 8 are followed. In particular, they examine whether the State has an adequate civil aviation safety organization, properly certifies and oversees flight operations and aircraft airworthiness, ground and flight personnel qualifications, training programs, and maintains a comprehensive safety awareness system and procedures for accident prevention. *Id*.

[176] *Changes to the International Aviation Safety Assessment (IASA) Program*, 65 FED. REG. 33,752 (MAY 25, 2000) (to be codified at 14 C.F.R. pt. 129).

[177] The European Civil Aviation Conference also has implemented a program of ramp inspections at the airports of its 41 member States.

- *Post-audit phase.* This includes preparation of the audit interim report, the development by the State of its corrective action plan, and the completion of the audit final report, which is made available to Contracting States in their entirety through a secure website.[178]

By 2004, ICAO had audited 181 States for safety compliance and performed 120 audit follow-up missions. USOAP had significant impact on the issue of filing of differences. In the bilateral Memorandum of Understandings signed between the audited States and ICAO (as approved by the Council), all audited differences "shall be deemed to have been notified to ICAO", and ICAO incorporates these differences in the Supplements to its Annexes, therefore notifying all ICAO member States. ICAO now has a vast database with respect to conformity and compliance with Annex 1 (Personnel Licensing), Annex 6 (Operation of Aircraft), and Annex 8 (Airworthiness of Aircraft). This grew with the expansion of USOAP to the other safety-related Annexes in 2005. Specifically, the second round of USOAP audits focused on implementation of the safety-related provisions in Annexes 1, 6 and 8, as well as Annex 11 (Air Traffic Services),[179] Annex 13 (Accident Investigation),[180] and Annex 14 (Aerodromes).[181] Moreover, the 35th meeting of the ICAO General Assembly in 2004 passed a resolution requiring the Secretary General to make the results of the audit available to all member States, and to post them on the secure portions of the ICAO web site.[182]

In 2005, the ICAO Council approved a procedure for disclosing information about a State having significant SARPs deficiencies in its aviation safety obligations. Under Article 54(j) of the Chicago Convention, the matter will be brought to the attention of the Council and, after all other alternatives for States to rectify their deficiencies have been employed, the Council may decide to make a recommendation or

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[178] Source: ICAO website.

[179] *Chicago Convention*, *supra*, Annex 11.

[180] *Id.*, Annex 13. *See generally*, Samantha Sharif, *The Failure of Aviation Safety in New Zealand: An Examination of New Zealand's Implementation of Its International Obligations Under Annex 13 of the Chicago Convention on International Civil Aviation*, 68 J. AIR L. & COM. 339 (2003); Evan P. Singer, *Recent Developments In Aviation Safety: Proposals to Reduce the Fatal Accident Rate and the Debate Over Data Protection*, 67 J. AIR L. & COM. 499, 506 (2002); and Col. Luis E. Ortiz & Dr. Griselda Capaldo, *Can Justice Use Technical And Personal Information Obtained Through Aircraft Accident Investigations?*, 65 J. AIR L. & COM. 263, 272-77 (2000) (recommending certain amendments to Annex 13).

[181] *Chicago Convention*, *supra*, Annex 14.

[182] ICAO G.A. RES. 16.2/1 (superseding Assembly Res. 33-8).

determination.[183]

A more significant action was taken in 2006, when aviation directors general from 153 of 190 member States agreed that by March 23, 2008, the names of those States that fail to agree to full transparency of their USOAP audits will be posted on the ICAO website. By 2006, more than 100 States agreed to transparency.[184] ICAO and the International Air Transport Association [IATA] also signed a memorandum of understanding, "to share safety-related information from their respective audit programs to better identify potential safety risks and prevent aircraft accidents", as well as share accident and incident monitoring, and "experts from each organization will be allowed to participate as observers in audit missions of the other, upon request."[185] IATA established an Operational Safety Audit [IOSA] program for air carriers in 2003. Its audit standards focus on eight areas:

- Corporate Organization and Management Systems
- Flight Operations
- Operational Control – Flight Dispatch
- Aircraft Engineering and Maintenance
- Cabin Operations
- Ground Handling
- Cargo Operations
- Operational Security[186]

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The principal deficiencies discovered by the initial FAA and ICAO safety audit programmes involved: (1) the absence of basic aviation laws; (2) the failure of CAAs to enforce safety laws and regulations; and (3) the failure of national laws to conform to the standards set forth in the Chicago Convention Annexes.[187] Deficiencies related to the SARPs included:

> Improper and insufficient inspections by State authorities before the certification of air operators, maintenance organizations and aviation training schools; licenses and certificates improperly issued, validated, and

[183] ICAO, ANNUAL REPORT OF THE COUNCIL, DOC. 9862 (2005).
[184] *The Net Tightens*, FLIGHT INT'L (JULY 18, 2006). By September 2006, 79 States had made their USOAP audits publicly available on the ICAO web site. By Nov. 2008, 161 State audit results were posted at: http://www.icao.int/fsix/auditRep1.cfm
[185] *Airline News*, AIRGUIDE MAGAZINE (APR. 24, 2006).
[186] IATA, IATA OPERATIONAL SAFETY AUDIT: DESIGNED FOR THE AVIATION INDUSTRY (2007).
[187] Cameron, *supra*, at 62

> renewed without due process; procedures and documents improperly approved; failure to identify safety concerns; and failure to follow-up on identified safety deficiencies and take remedial action to resolve such concerns.[188]

It remains to be seen what will result should the US or EU find a particular State deficient, when, conversely, ICAO's audits concludes it is reasonably compliant with SARPs. In such a situation, it might be argued that a refusal to allow the entry of such a State into another's airspace would violate Article 33 of the Chicago Convention, which requires that certificates of airworthiness issued by the State of registry are to be recognized as valid by other contracting States if issued pursuant to requirements equal to or above the SARPs. Having promulgated the SARPs, it would seem that ICAO would be in a superior position to determine compliance with their requirements.

As can be expected, a catastrophic turn of events often leads to the quick passage and implementation of changes to existing laws. "In the aftermath of the tragic events of September 11, 2001, the 33rd ICAO General Assembly passed several resolutions strongly condemning the use of aircraft as weapons of mass destruction."[189] One such resolution called upon ICAO to establish a security audit program modeled on USOAP.[190] As a result, ICAO inaugurated the Universal Security Audit Programme [USAP] to assess State compliance with Annex 17 (security).[191] By 2008, 90 member States had been audited; 41.6% of audited States lacked implementation of Critical Elements of Safety Oversight.

ICAO has recognized that, for economic reasons, many States simply cannot comply without significant technical and economic assistance dedicated to improving navigation facilities and equipment,[192] training and personnel, and laws and regulations.[193] Some States lack the economic ability to comply; others lack the will. ICAO has attempted to facilitate improvements in safety by establishing the International

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[188] Saba, *supra*, at 544.

[189] ICAO ASSEMB. RES. A33-1, A33-2, A33-3 AND A33-4, ICAO, 33RD SESS., at 1-13. It was also recommended that Annex 17 be applied to domestic air transportation, the first time that ICAO had strayed into the domestic arena. *See Dempsey*, *supra*, at 689-90.

[190] *See* Michael Milde, *Aviation Safety Oversight: Audits and the Law*, 26 ANNALS OF AIR & SPACE L. 165, 175 (2001).

[191] *Chicago Convention*, *supra*, Annex 17; *see* Milde, *supra*, 177.

[192] BUERGENTHAL, *supra*, at 112.

[193] Saba, *supra*, at 549-51.

Financial Facility for Aviation Safety [IFFAS]. IFFAS seeks to provide developing nations with financial assistance in meeting their international legal obligations in the arena of aviation safety, particularly those deficiencies identified in the USOAP audits.[194] However, the major problem with getting IFFAS up and running was funding.[195] The World Bank also has taken a fresh look at the air transport sector and begun to inject capital into developing States to improve safety and navigation. Some States also began to pool their resources, creating regional organizations (such as the Central American Corporation for Air Navigation Services [COCESNA] to oversee safety.[196]

In 2014, ICAO adopted Annex 19 – Safety Management Systems. An SMS is a management system for the management of safety by an organization. Safety management System should, at minimum:

a) identify safety hazards;
b) ensure the implementation of remedial action necessary to maintain agreed safety performance;
c) provide for continuous monitoring and regular assessment of the safety performance; and
d) aim at a continuous improvement of the overall performance of the safety management system.[197]

The SMS framework includes four components and twelve elements representing the minimum requirements for SMS implementation:

1. Safety policy and objectives:
   - ✓ Management commitment and responsibility
   - ✓ Safety accountabilities
   - ✓ Appointment of key safety personnel
   - ✓ Coordination of emergency response planning
   - ✓ SMS documentation

2. Safety risk management:
   - ✓ 2.1 Hazard identification
   - ✓ 2.2 Safety risk assessment and mitigation

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[194] ICAO, ASSEMB. RES. A33-10, ICAO, 33RD SESS., at 35-37. *See* Saba, *supra*; R.I.R. Abeyratne, *Funding an International Financial Facility for International Safety*, XXVIII ANNALS OF AIR & SPACE L. 1, 5 (2002).
[195] Saba, *supra*, at 573.
[196] On the development of regional initiatives to address aviation safety, *see* Saba, *supra*, at 548; Barreto, *supra*, at 672-75; Abeyratne, *supra*, at 133.
[197] Source: ICAO.

3. Safety assurance"
- ✓3.1 Safety performance monitoring and measurement
- ✓3.2 The management of change
- ✓3.3 Continuous improvement of the SMS

4. Safety promotion
- ✓4.1 Training and education
- ✓4.2 Safety communication

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IV. THE SUBSTANTIVE AVIATION SAFETY OBLIGATIONS UNDER INTERNATIONAL AND DOMESTIC LAW

SARPs are effective only if they are embraced in the domestic law and governmental institutions and procedures. As we have seen, member States have an obligation to follow SARPs to the maximum practicable extent. This section examines how States do that.

As noted above, soon after the United States and ICAO began to audit State compliance, it was discovered that some States either had not established a civil aviation code or regulatory agency, or had promulgated legal and regulatory requirements that fell short of the SARPs.[198] ICAO noted that States should develop comprehensive legislation and regulations implementing the SARPs or "select a comprehensive and detailed code established by another Contracting State."[199]

The U.S. Department of Transportation has the authority to assist foreign nations in improving aviation safety.[200] In order to assist States in achieving compliance, the FAA drafted a model Civil Aviation Safety Act [CASA] and model aviation regulations,[201] based in part on U.S. aviation statutes[202] and regulations.[203] The model CASA and model

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[198] *Chicago Convention*, *supra*, Annex 8.

[199] *Id*.

[200] 49 U.S.C. § 40113(e).

[201] Barreto, *supra*, at 662-64.

[202] The principal aviation statutory provisions of the United States are found in Title 49 of the United States Code, known as the *Federal Aviation Act of 1958*. The relevant statutory provisions governing civil aviation are set forth in 49 U.S.C. §§101-727; 49 U.S.C. §§1101-1155, (Subtitle II - Other Government Agencies, Chapter 11 - National Transportation Safety Board [NTSB]); 49 U.S.C. §§5101-5127, (Subtitle III - General and Intermodal Programs, Chapter 51 - Transportation of Hazardous Material); 49 U.S.C. §§40101-46507,

regulations are both posted on the FAA website.[204]

Model statutes are often a means of achieving uniformity. In few areas is the achievement of uniformity as important as in international civil aviation. Two aircraft operating in the same airspace, under two different standards, procedures, rules and regulations, could collide, killing the crew and passengers aboard.

Subtitle VII - Aviation Programs (Part A - Air Commerce and Safety).

[203] In part, these model regulations tracked many of the requirements set forth in the FAA's own comprehensive safety regulations:
4 C.F.R. Part 1 (Definitions and Abbreviations)
14 C.F.R. Part 21 (Certification Procedures for Products and Parts)
14 C.F.R. Part 23 (Airworthiness Standards: Normal, Utility, Acrobatic, and Commuter Category Airplanes)
14 C.F.R. Part 25 (Airworthiness Standards: Transport Category Airplanes)
14 C.F.R. Part 27 (Airworthiness Standards: Normal Category Rotorcraft)
14 C.F.R. Part 29 (Airworthiness Standards: Transport Category Rotorcraft)
14 C.F.R. Part 31 (Airworthiness Standards: Manned Free Balloons)
14 C.F.R. Part 33 (Airworthiness Standards: Aircraft Engines)
14 C.F.R. Part 35 (Airworthiness Standards: Propellers)
14 C.F.R. Part 43 (Maintenance, Preventive Maintenance, Rebuilding, and Alteration)
14 C.F.R. Part 45 (Identification and Registration Marking)
14 C.F.R. Part 47 (Aircraft Registration)
14 C.F.R. Part 61 (Certification: Pilots, Flight Instructors, and Ground Instructors)
14 C.F.R. Part 63 (Certification: Flight Crewmembers Other Than Pilots)
14 C.F.R. Part 65 (Certification: Airmen other than Flight Crewmembers)
14 C.F.R. Part 67 (Medical Standards and Certification)
14 C.F.R. Part 91 (General Operating and Flight Rules)
14 C.F.R. Part 97 (Standard Instrument Approach Procedures)
14 C.F.R. Part 119 (Certification: Air Carriers and Commercial Operators)
14 C.F.R. Part 121 (Operating Requirements: Domestic, Flag, and Supplemental Operations
14 C.F.R. Part 125 (Certification and Operations: Airplanes Having a Seating Capacity of 20 or more Passengers or a Maximum Payload Capacity of 6,000 Pounds or more; and Rules Governing Persons On Board Such Aircraft)
14 C.F.R. Part 129 (Operations: Foreign Air Carriers and Foreign Operators of U.S.-Registered Aircraft Engaged in Common Carriage)
14 C.F.R. Part 133 (Rotorcraft External-Load Operations)
14 C.F.R. Part 135 (Operating Requirements: Commuter and On Demand Operations and Rules Governing Persons On Board Such Aircraft)
14 C.F.R. Part 137 (Agricultural Aircraft Operations)
14 C.F.R. Part 141 (Pilot Schools)
14 C.F.R. Part 142 (Training Centers)
14 C.F.R. Part 145 (Repair Stations)
14 C.F.R. Part 147 (Aviation Maintenance Technician Schools)
14 C.F.R. Part 183 (Representatives of the Administrator)

[204] The model CASA is at: *Civil Aviation Safety Act of 2002*, version 2.3 (Oct. 2002), http://www.faa.gov/safety/programs_initiatives/oversight/iasa/model_aviation/media/CAL.doc (visited August 10, 2006) [hereinafter CASA]. The model regulations are at: Model Aviation Regulatory Document, version 2.3, http://www.faa.gov/avr/iasa/calr.htm (visited April 26, 2004).

The following is a descriptive summary of the international legal requirements in the Chicago Convention and Annexes, the model domestic legislation of the CASA, and the requirements under U.S. domestic law.

A. CIVIL AVIATION AUTHORITY: ESTABLISHMENT AND ADMINISTRATION

The CASA establishes an autonomous Civil Aviation Authority [CAA]. Most States have a department of civil aviation, or a ministry of transport, or an equivalent governmental institution. Under the CASA, the CAA shall exercise its responsibilities consistent with the "public interest," defined as "the promotion, encouragement, development and regulation of civil aviation so as to best promote safety."[205]

The CAA is headed by a Director of Civil Aviation appointed by the head of State with the advice and consent of the legislative body for a term of years, removable only for cause.[206] Qualifications of the Director are: (1) fitness for the discharge of the agency's responsibilities; (2) "significant management or similar technical experience in a field directly related to aviation"; and (3) the absence of any financial interest in any aeronautical enterprise, and other employment.[207] No CAA employee may participate in any proceeding in which the Director has a financial interest.[208]

The Director's primary responsibility is to "encourage and foster the safe development of civil aviation . . . ."[209] The Director has specific authority to:

- "Develop, plan for, and formulate policy with respect to the use of the navigable airspace;"[210]
- acquire, establish, operate, and improve air navigation facilities;[211]

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[205] CASA § 202.
[206] *Id.* § 201(a). Protecting the Director of Civil Aviation from removal prior to the end of his term is necessary to ensure that he is free to make decisions shielded from political retribution.
[207] *Id.* § 203. These requirements attempt to ensure that the person chosen for the position is qualified and less likely to have ethical problems while in office.
[208] *Id.* § 801(b). These ethical requirements are designed to ensure that decision-making is objective, and not influenced by the decision maker's financial benefit.
[209] *Id.* § 406.
[210] *Id.* § 407(a).
[211] *Id.* § 408.

- prescribe air traffic rules and regulations;[212]
- regulate aviation security;[213]
- establish training schools;[214]
- investigate accidents and take any corrective action necessary to prevent similar accidents in the future;[215]
- certificate and inspect aircraft, airmen, and air operators;[216]
- validate the certification and inspection actions of another State;[217]
- prevent flights by unairworthy aircraft or unqualified airmen;[218]
- regulate the transportation of dangerous goods;[219] and
- maintain a system of the national registration of civil aircraft.[220]

The Director is given certain administrative authority on behalf of the CAA to acquire property,[221] enter into contracts for services,[222] exchange information with foreign governments,[223] and delegate authority to a subordinate.[224]

The U.S. aviation market is sufficiently large that it requires four agencies to administer various aspects of aviation.

- *The National Transportation Safety Board* [NTSB][225] handles aircraft accident investigations mandated under Annex 13[226] and

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[212] *Id.* § 409.
[213] *Id.* § 410.
[214] *Id.* § 411.
[215] *Id.* § 412.
[216] *Id.* § 413.
[217] *Id.* § 414.
[218] *Id.* § 416.
[219] *Id.* § 417.
[220] *Id* § 501(a).
[221] *Id* § 302.
[222] *Id* § 303.
[223] *Id* § 304.
[224] *Id* § 305.
[225] *Federal Aviation Act* 49 U.S.C. § 1101 Annex VI. 49 C.F.R PARTS 800-831.
[226] 49 U.S.C. §§ 1131-32. The NTSB describes its responsibilities as follows:
The [NTSB] is the agency charged with fulfilling the obligations of the United States under Annex 13 to the Chicago *Convention on International Civil Aviation* (Eighth Edition, July 1994), and does so consistent with State Department requirements and in coordination with that department. Annex 13 contains specific requirements for the notification, investigation, and reporting of certain incidents and accidents involving international civil aviation. In the case of an accident or incident in a foreign State involving civil aircraft of U.S. registry or manufacture, where the foreign State is a signatory to Annex 13 to the *Chicago Convention* of the International Civil Aviation Organization, the State of occurrence is responsible for the investigation. If the accident or incident occurs in a foreign State not

administrative appeals of decisions of the Administrator of the FAA.[227] Though it has no authority to issue regulations, the NTSB does have the responsibility to make regulatory recommendations to the FAA to avoid future accidents.[228]

- *The Transportation Security Administration* of the US Department of Homeland Security regulates aviation security.[229]
- *The Office of the Secretary of Transportation* has jurisdiction over economic regulatory issues such as airline financial fitness, competition policy, and consumer protection.[230] The Secretary of Transportation is statutorily commanded to assign and maintain safety as "the highest priority in air commerce."[231]
- The *Federal Aviation Administration* [FAA] was established by the Federal Aviation Act of 1958 and subsequently became a part of the U.S. DOT upon its creation in 1967.[232] The FAA is headed by an Administrator, appointed by the President with the advice and consent of the Senate, and serves for a term of five years.[233] The FAA Administrator is required to consider the maintenance

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bound by the provisions of Annex 13 to the *Chicago Convention*, or if the accident or incident involves a public aircraft (Annex 13 applies only to civil aircraft), the conduct of the investigation shall be in consonance with any agreement entered into between the United States and the foreign State.
Accident/Incident Investigation Procedures, 62 FED. REG. 3806 (JAN. 27, 1997); 49 C.F.R. PT. 831

[227] 49 U.S.C. § 1133.

[228] DEMPSEY, ET AL, *supra*, at § 12.67

[229] *Dempsey*, *supra*, at 717-19.

[230] For a review of the legislation passed by the United States to address aviation security, *see* Dempsey, *supra*, at 427.

[231] 49 U.S.C. § 40101(a)(1).

[232] 49 U.S.C. subtitle I. In the mid-1950s, a series of accidents brought to the surface an underlying need for significant safety enhancement in aviation. In 1956, a Trans World Airlines Constellation collided with a United Airlines' DC-7 over the Grand Canyon. In early 1957, a Douglas Aircraft company-owned DC-7 collided with an Air Force F-89 over Sunland, California. The DC-7 crashed into a junior high school, killing three and injuring seventy others. In 1958, a third significant accident involved the collision of a United Airlines' DC-7 and an Air Force F-100 near Las Vegas, Nevada. Congress reacted with the promulgation of the Federal Aviation Act of 1958, PUB. L. 85-726; 49 U.S.C. § 1300 *et seq.*, and the creation of the Federal Aviation Agency (later to become the Federal Aviation Administration (FAA) under the Department of Transportation Act of 1966). The accident investigation and recommendation responsibilities of the U.S. Civil Aeronautics Board (which had been created in 1938) were transferred to the FAA initially and were re-delegated to the National Transportation Safety Board, made independent in 1974. PAUL STEPHEN DEMPSEY & LAURENCE GESELL, AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY 229-31 (1997); ROBERT HARDAWAY, AIRPORT REGULATION, LAW AND PUBLIC POLICY 19, 21 (1991).

[233] The five-year term was added in an FAA Appropriations bill in 1996 in order to give the agency some stability. Theretofore, the agency had been headed by a string of Administrators, and therefore been denied continuity of leadership.

and enhancement of safety and security as among the highest priorities in the public interest.[234] The FAA is charged with promoting aviation safety, ensuring the safe and efficient utilization of the national airspace,[235] and providing oversight of the U.S. airport system.[236] Although it does not own and operate airports (they are owned and operated by local institutions, usually governments),[237] the FAA issues airport operating certificates, regulates them, and provides financial support to them.[238] The FAA handles all other aspects of airman, aircraft, airport, and airline safety as well as providing air traffic control and navigation services.[239] Under U.S. law, actions of the Secretary of Transportation and of the FAA Administrator must be consistent with the international obligations imposed by the Chicago Convention.[240]

The FAA has broad authority to conduct investigations.[241] The Administrator may delegate authority for issuance of pertinent orders, directives, and instructions.[242] Given the size of commercial and general aviation in the United States, many investigatory and oversight functions have been delegated, of necessity, to subordinate institutions[243] and

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[234] 49 U.S.C. VII, 49 U.S.C. § 40101 *et seq.*

[235] Navigation of U.S. airspace by foreign air carriers is governed by 40 U.S. § 41703.

[236] The FAA Administrator is charged with:
promoting aviation safety;
promoting aviation security;
ensuring the safe and efficient utilization of the national airspace;
overseeing of the US airport system; and
supporting national defense requirements.

[237] *See, e.g.,* Paul Stephen Dempsey, *Local Airport Regulation: The Constitutional Tension Between Police Power, Preemption & Takings*, 11 PENN ST. ENVT'L L. REV. 1 (2002) (discussing the tension between local and federal regulation of aviation and airports.)

[238] 49 U.S.C. § 44706; 14 C.F.R PARTS 71-109.

[239] DEMPSEY ET AL, *supra,* at §§ 12.48-12.54.

[240] 49 U.S.C. § 40105(b).

[241] DEMPSEY, ET AL, *supra,* at § 12.04.

[242] 49 U.S.C. § 106(f)(2)(c); 14 C.F.R Part 11-B Procedural Rules.

[243] Within the FAA, the safety oversight activities have been delegated to the Associate Administrator for Regulation and Certification (AVR). Its principal organizational units are:
Flight Standard Services (AFS)—personnel licensing, certification and surveillance of operators and the airworthiness related to air carrier operations and aircraft maintenance;
Aircraft Certification Services (AIR)—airworthiness activities related to design and manufacturing;
Office of Aviation Medicine (AAM)—medical certification of aviation personnel, research, occupational health, and substance abuse abatement.
The AFS oversees the region's airlines, establishes requirements for instrument procedures

private persons.[244] The FAA Administrator also holds broad rulemaking authority.[245]

B. AGENCY PROCEDURES

Under the CASA, the Director of Civil Aviation is given broad legal authority.[246] Subject to the requirements set forth in the national Administrative Procedure Act,[247] the Director has the authority to conduct investigations,[248] take depositions and other evidence,[249] and issue subpoenas.[250] The Director may also issue orders, rules, and regulations (so long as they meet the minimum requirements of the Chicago Convention Annexes),[251] to take effect within a reasonable time.[252] Before the Director amends, modifies, suspends, or revokes any certificate, the Director must notify the holder thereof and afford him the opportunity to be heard.[253] The right to be represented by an attorney is also conferred.[254] Adverse decisions may be appealed by the certificate holder.[255]

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and flight inspection and coordinates these requirements with FAA headquarters in Washington, D.C. The AFS secures compliance with FAA regulations, programs, standards, and procedures governing the inspection, certification, and surveillance of commercial and general aviation. It also examines, certifies and oversees flight and ground personnel, examiners, and air agencies. Within each region, field activities are performed by the Flight Standard District Offices (FSDO), which are responsible for the day-to-day administration of the licensing process. *See generally*, DEMPSEY, ET AL, *supra,* at § 12.04.

[244] The FAA delegates certain certification and surveillance responsibilities to private persons under 14 C.F.R. PART 183. The FAA Administrator has broad authority to enter into contracts to fulfill its mandate. 49 U.S.C. § 106(l)(6).

[245] The FAA Administrator has discretion to issue such regulations, standards, and procedures as the agency deems appropriate. 49 U.S.C. § 40113(a). The Administrator is authorized to issue, rescind, and revise such regulations as may be necessary to carry out the FAA's mission. 49 U.S.C.§ 40106(f)(3).

[246] CASA, *supra,* 84.

[247] *Id.* § 403.

[248] *Id.* § 802(b).

[249] *Id.* § 803(d).

[250] *Id.* §§ 401(c), 803(b).

[251] *Chicago Convention*, *supra*.

[252] CASA, *supra,* at § 402(a). Procedurally, the FAA usually prepares a Notice of Proposed Rule Making setting forth the proposed rule and reasons therefore. The NPRM is then published in the *Federal Register* to allow public comment during a period of 60 to 120 days. Thereafter, a final rule is published in the Federal Register at least thirty days before its entry into force. Exceptions to this process may be imposed in emergency situations. 49 C.F.R Part 11.

[253] CASA, *supra*, at § 610(c).

[254] *Id.* § 801(c).

[255] *Id.* § 601(d), 806. The decision shall be stayed unless the Director informs the court that an emergency exists and safety requires the immediate effectiveness of the order. CASA §

The Director also has broad authority to temporarily dispense with due process requirements under circumstances when it is essential in the interest of safety to meet an emergency.[256] The Director also possesses the authority to grant exemptions from the CAA's rules and regulations if such exemption is consistent with the "public interest."[257] The Director may exempt foreign aircraft and airmen from certification requirements or operating restrictions.[258]

The Director has certain transparency requirements, including the responsibility to publish "all reports, orders, decisions, rules and regulations" issued under the CASA.[259] Every official act must be entered into the record, and the proceedings must be open to the public, unless the Director determines that public disclosure would be contrary to the national interest.[260]

In the United States, federal agencies are subject to the Constitutional requirement of providing due process of law prior to the deprivation of liberty and property.[261] The Administrative Procedure Act[262] requires notice and an opportunity to be heard (usually) before one is deprived of a governmental entitlement, such as an operating license.[263] With some exceptions, federal agencies such as the FAA are also subject to certain transparency laws. This includes the Government in the Sunshine Act,[264] which requires their meetings ordinarily be open to the public, as well as the Freedom of Information Act,[265] which requires that agencies ordinarily make available their internal documents available to the public upon demand.[266] Exceptions exist for various reasons, including national security.[267]

The FAA also holds broad emergency powers to suspend or

601(d). Upon review, the facts shall be conclusive if supported by substantial evidence. CASA § 806(d).

[256] *Id.* § 402(b).

[257] *Id.* § 405(a).

[258] *Id.* § 611(b).

[259] *Id.* § 401(b).

[260] *Id.* § 801(d).

[261] U.S. CONST. AMEND. V.

[262] 5 U.S.C. §§ 551-59, 701-06.

[263] *Id.*

[264] 5 U.S.C. § 552b.

[265] 5 U.S.C. § 552(b).

[266] *Id.*

[267] *Id.*

revoke various operating and airworthiness licenses and certificates.[268] At various times, it has used such power to suspend operations of a certain aircraft type,[269] to suspend operations of an airline,[270] or to suspend the operations of the entire airline industry.[271] Certain decisions rendered, or sanctions imposed, in the United States by the Administrator may be appealed to the NTSB.[272] For example, the FAA Administrator's decision to deny airman certification may be appealed to the NTSB.[273] Decisions of the NTSB may, in turn, be appealed to a U.S. Court of Appeals.[274] The FAA Administrator may promulgate regulations, and grant exemptions from them.[275]

C. PERSONNEL LICENSING

Article 32 of the Chicago Convention requires that member States issue certificates of competency and licenses to the pilot and operating crew of every aircraft registered in said State and flown in international aviation.[276] With respect to flights above its territories, each State may refuse to recognize such certificates and licenses issued by another State to its own nationals.[277]

Article 33 provides that certificates of competency and licenses

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[268] 49 U.S.C. § 40106 ("Emergency Powers").

[269] *Id*. For example, in 1979, after a crash in Chicago, the FAA grounded all DC-10 aircraft until it could determine the cause and prescribe a remedy.

[270] ValuJet began operations in October 1993 with three aircraft. By 1996, it flew a fleet of 53 aircraft. On May 11, 1996, an oxygen canister exploded in the cargo hold in ValuJet Flight 592, causing it to crash in the Everglades and killing all 110 persons aboard. The FAA then accelerated and intensified its Special Emphasis Review of the carrier's operations which had begun the preceding February. In June 1996, ValuJet entered into a Consent Order with the FAA under which ValuJet agreed to suspend its operations and provide information demonstrating its qualifications to hold FAA operating authority. On August 29, 1996, the FAA returned the carrier's FAA operating certificate to it. *See* Application of ValuJet Airlines, DOT Order 96-9-36 (1996); Paul Stephen Dempsey, *Predation, Competition & Antitrust Law: Turbulence in the Airline Industry*, 67 J. AIR L. & COM. 685, 688 (2002).

[271] After four commercial aircraft were commandeered by Al-Qaeda operatives on the morning of September 11, 2002 (two were flown into the New York World Trade Center and one into the Arlington, Va., Pentagon) the FAA issued an emergency order grounding all commercial aircraft from flying for three days.

[272] 49 U.S.C. § 1133.

[273] 49 U.S.C. § 44703; DEMPSEY ET AL, *supra*, at §§ 12.02, 12.08

[274] 49 U.S.C. § 1153; DEMPSEY, ET AL, *supra*, at § 12.09.

[275] 49 U.S.C. § 44701(a)(2).

[276] Article 29 requires that flight crew members carry their licenses on board the aircraft they fly. *Chicago Convention*, *supra*, art. 29.

[277] *Id*. art. 32

shall be recognized as valid by other contracting States so long as the requirements under which they were issued were equal to or greater than the minimum standards established by ICAO.[278]

First adopted in 1948, Annex 1 to the Chicago Convention addresses personnel licensing.[279] Under it, no one may act as a flight crewmember without a valid license in compliance with the Annex.[280] To secure a license or type rating,[281] the applicant must satisfy age,[282] knowledge,[283] experience,[284] flight instruction,[285] and skill[286] requirements.[287] The licensing process also must include a medical fitness evaluation.[288] Similar requirements are established for flight navigators, flight engineers,[289] and aircraft maintenance personnel.[290]

The CASA defines an "airman" as a flight crew member (the person in command of the aircraft, the pilot, or navigator), mechanic (the person in charge of the inspection, maintenance, overhaul, or repair of aircraft or aircraft engines, propellers, or appliances), and the flight operations officer.[291] No one may serve in any capacity as an airman unless he holds an airman certificate and, once issued, the holder may not violate its terms and conditions.[292] An airman certificate may be issued "if the Director finds, after investigation, that such person possesses the proper qualifications for, and is physically able to, perform the duties pertaining to the possibility for which the airman certificate is

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[278] *Id*. art. 33.
[279] *Id*. Annex 1
[280] *Id.* § 1.2.1.
[281] Type ratings are established for aircraft and for operating an aircraft under instrument flight rules [IFR]. The second-in-command of an aircraft requiring more than a single pilot must also hold a type rating for that aircraft. *Id*. § 2.1.7.
[282] The minimum age is 17 years. *Id*. § 2.3.1.1. The minimum age for commercial pilots is 18 years. *Id.* § 2.4.1.1. The minimum age for an airline transport pilot license is 21 years. *Id.* § 2.5.1.1.
[283] *Id.* §§ 2.3.1.2, 2.4.1.2, 2.5.1.2.
[284] The applicant may not have less than 40 hours of flight time. *Id.* § 2.3.1.3. Applicants for a commercial pilots' license must have 200 hours of flight time, or 150 hours if completed during a course of approved training. *Id.* § 2.4.1.3.1. Applicants for an airline transport pilot license must have 1,500 hours of flight time.
[285] *Id.* §§ 2.3.1.4, 2.4.1.4, 2.5.1.4.
[286] *Id.* §§ 2.3.1.5, 2.4.1.5, 2.5.1.5.
[287] *Id*., §§ 2.1.1.3, 2.4.1.6, 2.5.1.6.
[288] *Id.* § 1.2.4, and Ch. 6.
[289] *Id.* Ch. 3.
[290] *Id.* Ch. 4.
[291] CASA, *supra*, § 102(b)(6).
[292] *Id*. § 611(a)(2). Certificates need not be issued to foreign nationals. *Id*. § 608(c).

sought . . . ."[293] The airman certificate shall contain such terms and conditions as necessary to assure civil aviation safety.[294] Airmen have an affirmative obligation to comply with the requirements of the CASA and the rules and regulations promulgated thereunder.[295]

In the United States, the FAA issues all licenses specified in Annex 1 and validates foreign licenses.[296] After investigation, if it is found that the applicant is physically able[297] to perform the duties required for the airman certification and possesses the appropriate qualifications, the Secretary will issue a certificate designating the capacity in which the applicant is authorized to operate and the class, restrictions, and aircraft types for which certification is valid.[298] The certificate specifies its terms, conditions, duration, physical fitness test, and any other qualifications deemed necessary in the interest of safety.[299] The FAA may prohibit a foreign national from receiving an airman certificate, or condition receipt upon reciprocal foreign treatment.[300]

D. AIRCRAFT AIRWORTHINESS CERTIFICATION

Article 31 of the Chicago Convention requires that every aircraft flown internationally must carry a certificate of airworthiness by the State in which it is registered.[301] Under Article 33, such certificates of airworthiness must be recognized by other States, provided that the

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[293] *Id.* § 601(b).
[294] *Id.* § 602(c).
[295] *Id.* § 608(c).
[296] In the United States, certification of airmen is governed by 14 C.F.R Part 61. (Certification: Pilots, Flight Instructors, and Ground Instructors), Part 63 (Certification: Flight Crew members other than Pilots), Part 65 (Certification: Airmen Other Than Flight Crew members), Part 67 (Medical Standards and Certification), and 14 CFR 141 (Pilot Schools). These are complemented by FAA handbooks, such as FAA ORDER 8710.3C — Pilot Examiner's Handbook, FAA ORDER 1380.53.D — Staffing Guide: Certification Engineers & Flight Test Pilot; FAA ORDER 3000.22 — Air Traffic Services Training; FAA Order 3120.4J — Air Traffic Technical Training; FAA ORDER 3140.1 — Flight Standards Service National Training Program; FAA ORDER 3930.3 — Air Traffic Control Specialist Health Program FAA ORDER 7220.1A — Certification and Rating procedures (ATC) FAA Order 8080.6B — Conduct of Airmen Knowledge Tests. FAA designated Aeronautical Medical Examiners (AME) conduct medical certification pursuant to 14 C.F.R. § 97, and the FAA *Aeromedical Certification Manual*.
[297] The applicant must hold an FAA airman medical certificate. DEMPSEY, ET AL, *supra*, at § 12.11-12.13.
[298] 49 U.S.C. § 44703. For example, mechanics and repairmen hold a different certification than do pilots. DEMPSEY, ET AL, *supra*, at § 12.32-12.34.
[299] 49 U.S.C. § 44703. DEMPSEY, ET AL, *supra*, at § 12.02.
[300] 49 U.S.C. § 44711.
[301] *Chicago Convention*, *supra*, art. 31.

requirements under which they were issued met or exceeded ICAO SARPs.[302] Article 12 of the Chicago Convention requires every State to adopt rules of the air to insure that aircraft flying over its territory, and aircraft carrying its nationality mark, will comply with the laws regulating the flight and maneuver of aircraft there in force.[303]

Article 83*bis* of the Chicago Convention entered into force on June 20, 1997. It provides that when the operator of a leased, chartered, or interchanged aircraft has his principal place of business or permanent residence in another State, the State of registry may delegate to the State of the operator those functions that that State of registry can more properly perform, if it so consents to such delegation.[304] For example, Ireland could delegate to Australia the responsibility to oversee the airworthiness of aircraft owned by Irish leasing companies, but operated by Qantas.

Annexes 6 and 8 address aircraft operation and airworthiness.[305] First adopted in 1948, Annex 6 addresses the "Operation of Aircraft."[306] Its provisions go beyond flight operations,[307] however, and include aircraft instruments and equipment,[308] maintenance,[309] and security.[310]

Annex 8 addresses "Airworthiness of Aircraft" in detail.[311] In it, ICAO acknowledges that its requirements:

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[302] *Id*. art. 33.

[303] Article 30 of the *Chicago Convention* provides that aircraft operating in international aviation may carry radio equipment only if a license to install and operate it has been issued by the State in which the aircraft is registered, and only used by flight crew. The use of such equipment shall be governed by the State over which the aircraft is flown. *Id.* art. 30.

[304] Protocol Relating to an Amendment to the *Convention on International Civil Aviation* [Art. 83 bis] (Oct. 6, 1980), ICAO Doc. 1318, *reprinted in* XVIII ANNALS OF AIR & SPACE L. 149 (1993). *See generally*, RUWANTISSA ABEYRATNE, AVIATION IN CRISIS 109-12 (ASHGATE 2004); Benoit Verhaegen, *The Entry Into Force of Article 83bis: Legal Perspectives in Terms of Safety Oversight*, XXII ANNALS OF AIR & SPACE L. 269, 271-73 (1997).

[305] *Id*. Annexes 6, 8.

[306] Annex 6 is divided into three parts: Part I — *International Commercial Air Transport — Aeroplanes*; Part II — *International General Aviation — Aeroplanes*; and Part III — *International Operations — Helicopters*. In the United States, 14 C.F.R PART 121- *Operating Requirements: Domestic, Flag, and Supplemental Operations* implements the requirements of Annex 6, Parts I and III ¶¶ 4.2.1.6 and 2.2.16. *Id*.

[307] *Id*.

[308] *Id*.

[309] *Id*.

[310] *Id*.

[311] Annex 8 is divided into four parts: Definitions; Administration; Aeroplanes; and Helicopters. *Id*. Annex 8.

> would not replace national regulations and that national codes of airworthiness containing the full scope and extent of detail considered necessary by individual States would be necessary as the basis for the certification of individual aircraft. Each State would establish its own comprehensive and detailed code of airworthiness, or would select a comprehensive and detailed code established by another Contracting State.[312]

The model CASA is such a code.

Annex 8 addresses flight performance,[313] aircraft structures,[314] design and construction,[315] engines,[316] propellers,[317] powerplants,[318] instruments and equipment,[319] operating limitations,[320] and continuing airworthiness requirements.[321] It requires that a Certificate of Airworthiness be issued by the State on the basis of satisfactory evidence that the aircraft complies with the relevant airworthiness requirements.[322] To demonstrate airworthiness, there must be an "approved design" comprised of drawings, specifications, reports, inspections, and flight testing.[323] When a certificate of airworthiness is based upon satisfactory evidence, a subsequent State may rely on the earlier State's certification. When a particular type of aircraft is first registered, the State issuing the certificate is required to so advise the nation in which the aircraft was designed, which shall, in turn, forward to the State of registry any information it has found necessary to ensure continued airworthiness or safety of that type of aircraft.[324] Aircraft that have been damaged, have fallen into disrepair, or have otherwise become less than airworthy shall not be flown until they are made airworthy again.[325]

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[312] *Id.*
[313] *Id.* Ch. 2.
[314] *Id.* Ch. 3.
[315] *Id.* Ch. 4.
[316] *Id.* Ch. 5.
[317] *Id.* Ch. 6.
[318] *Id.* Ch. 7.
[319] *Id.* Ch. 8.
[320] *Id.* Ch. 9.
[321] *Id.* Ch. 10. Similar requirements are imposed on helicopters. Annex 8.
[322] *Id.* § 3.1.
[323] *Id.* §§ 3.1, 3.2, and 3.3.
[324] *Id.* §§ 4.2.1, 4.2.2.
[325] *Id.* 8 § 6.2.

Under the CASA, no one may lawfully operate an aircraft that does not have an airworthiness certificate, nor may a certified aircraft be operated in violation of its terms and conditions.[326] An airworthiness certificate may be issued if the aircraft conforms to the appropriate type certificate and, after inspection, is found to be in a safe condition.[327] The Director of Civil Aviation has the responsibility to inspect aircraft, engines, propellers, and appliances, and, if they are found not to be airworthy, to prohibit their use in civil aviation.[328]

The FAA holds broad authority to prescribe minimum standards for the design, material, construction, quality of assembly and performance of aircraft, engines, and propellers; it may also issue type, production, and airworthiness certificates.[329] The FAA also certifies the airworthiness of aircraft,[330] and provides comprehensive inspection of aircraft and air operators.[331]

E. NATIONALITY, OWNERSHIP, AND REGISTRATION REQUIREMENTS

The nationality of aircraft is addressed in Articles 17-21 of the Chicago Convention.[332] Aircraft have the nationality of the State in which they are registered[333] and may not be registered in more than a single State.[334] Aircraft must bear appropriate registration and nationality marks.[335]

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[326] CASA, *supra*, § 611(a)(1).

[327] *Id*. § 603(b).

[328] *Id*. § 608.

[329] 49 U.S.C. §§ 44702 & 44704. DEMPSEY, ET AL, *supra*, at §§ 12.22-12.23.

[330] Airworthiness functions of the FAA are provided by two services. The Aircraft Certification Service (AIS) issues: (a) initial airworthiness certificates; (b) type certificates, for new aircraft designs; (c) supplemental type certificates (STCs), for design modifications to existing aircraft; and (d) Production Certificates, to authorize a manufacturer to build an aircraft in accordance with an approved design. The Flight Standards Service (AFS): (a) establishes certification standards for air carriers and commercial operators; (b) provides certification inspection and surveillance activities to ensure proper aircraft maintenance; and (c) manages the systems for registry of civil aircraft. DEMPSEY, ET AL, *supra*, at §§ 12.18-12.21.

[331] The FAA has developed two comprehensive handbooks - FAA ORDER 8400.10, *Air Transportation Operations Inspector's Handbook*, and FAA ORDER 8700.1, *General Aviation Operations Inspector's Handbook* – to guide its Aviation Safety Inspectors (Operations).

[332] *Chicago Convention*, *supra*, arts. 17-21

[333] *Id.* art. 17.

[334] *Id*. art. 18.

[335] *Id*. art. 20.

Aircraft nationality and registration marks are addressed by Annex 7, first adopted by ICAO in 1949. It requires that nationality, common, and registration marks be affixed to the fuselage of the aircraft, and be visible at all times.[336] The nationality or common mark must be listed before the registration mark.[337] The letters must be in capital Roman type, numbers must be in Arabic, of equal height, and without ornamentation.[338]

The CASA requires the Director to establish and maintain a system of aircraft registration.[339] An aircraft may be registered if it is owned by citizens or the government of the country where registry is sought and is not registered in another country.[340] The Director must also establish a national system for recording title in aircraft and aircraft parts.[341]

In the United States, no aircraft may be operated unless it is registered at the FAA's Aeronautical Center in Oklahoma City.[342] Eligibility for registration is limited to aircraft not registered in another country,[343] and aircraft owned by U.S. citizens, permanent residents, and U.S. corporations.[344]

F. AIR CARRIER OPERATOR CERTIFICATION

Under the CASA, in promulgating standards, rules, and regulations and in certificating air operators, the Director of Civil Aviation must take into account the carrier's responsibility to perform air transportation consistent with the "highest possible degree of safety in the public interest."[345] One may not operate an airline without an air operator certificate.[346] Such a certificate shall be issued if the applicant "is properly and adequately equipped and has demonstrated the ability to conduct a safe operation" consistent with the procedures, rules, and

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[336] *Id.* § 3.1.
[337] *Id.* § 2.2.
[338] *Id.* § 4, 5.1.
[339] CASA, *supra*, at § 501(a)
[340] *Id.* § 501(c).
[341] *Id.* § 502. An international registry has been established under the Cape Town Convention.
[342] 49 U.S.C. § 44101 *et. seq.*.
[343] *See IAL Aircraft Holding v. Federal Aviation Administration*, 206 F. 3RD 1042, 1043 (2000).
[344] 49 U.S.C. § 44102. DEMPSEY, ET AL, *supra*, at § 12.30.
[345] CASA, *supra*, at § 601(b).
[346] *Id.* § 611(a)(4).

regulations established by the CAA.[347]

Aircraft operators have an affirmative duty to maintain, overhaul, and repair their equipment in a manner consistent with CASA and the rules and regulations promulgated thereunder.[348] They also have a duty to maintain operations consistent with such regulatory requirements and the "public interest."[349] They may not employ an air operator who does not have a proper airman certificate,[350] nor may they operate aircraft in contravention of any rule, regulation, or conditions set forth in its certificate.[351]

The FAA issues air carrier operating certificates.[352] The FAA has established a Certification, Standardization, and Evaluation Team [CSET] for the certification of commercial airlines.[353] An air carrier operator has significant responsibility to "inspect, maintain, overhaul, and repair all aircraft . . . in its fleet."[354]

G. AIR CARRIER ECONOMIC REGULATION

In the Chicago Conference of 1944, the United States strongly resisted conferring economic regulatory authority to an international body. However, Article 44 of the Chicago Convention provides that among ICAO's "aims and objectives" is a responsibility to "Prevent economic waste caused by unreasonable competition". By and large, this mandate has lain dormant, and ICAO has instead focused its efforts on the technical issues of navigation, safety and security.

The SARPs do not address economic regulatory issues.[355] The CASA expresses ambivalence about economic regulation. It not only includes a provision requiring air carriers to establish fitness as a condition of entry, but CASA also encourages States to vest such

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[347] *Id.* § 604(b).
[348] *Id.* § 608(a).
[349] *Id.* § 608(b)
[350] *Id.* § 611(a)(3).
[351] *Id.* § 611(a)(5). Air operators must designate an agent for service of process. *Id.* § 804.
[352] 49 U.S.C. § 44705; 14 C.F.R PART 121.
[353] Airline oversight is provided by a dedicated Certificate Management Office (CMO). The CMO oversees the Airline Transport Pilot License [ATPL] and Type Ratings issued under 14 C.F.R PART 121. DEMPSEY, ET AL, *supra*, at § 12.40.
[354] DEMPSEY, ET AL, *supra*, at § 12.27.
[355] CHINKIN, *supra.*

responsibility in an agency separate from the CAA.[356]

The term "airline" used to describe air carriers stems from economic regulation. A line was a route between two cities authorized by the appropriate governmental institution in an air carrier's certificate or permit. Traditionally, economic regulation consisted of the regulation of entry (routes), pricing (rates), intercarrier agreements, and in some States, frequency and capacity.

In some States, the Department of Civil Aviation, or its Director General, would designate which carrier(s) would be authorized to serve domestic or international routes in comparative route proceedings. Typically, air carriers would offer evidence as to how many carriers the route could profitably support, and why its competitive offering would serve the public interest. International route designation typically would be authorized under a bilateral air transport agreement. In the United States, from 1938 to 1978, certificates for operating authority were issued if the proposed operations were "consistent with the public convenience and necessity" and the air carrier applicant was "fit, willing and able" to provide the proposed operations – financially and managerially – and comport with the law; rates filed by carriers in their tariffs were approved if "just and reasonable" and "nondiscriminatory." Carrier selection is still a function of the U.S. Department of Transportation in those markets not under an "open skies" bilateral air transport agreement.

Although the Airline Deregulation Act of 1978 [ADA] eliminated the requirement that an applicant for domestic operating authority prove the consistency of its proposed operations with the "public convenience and necessity,"[357] the ADA in no way reduced the statutory burden that an applicant prove that it is "fit, willing, and able to perform such transportation properly and to conform to the provisions of this chapter and the rules, regulations, and requirements of the [DOT]. . . ."[358] In determining whether a new applicant is fit, the DOT assesses whether the applicant: (1) has the managerial and operational ability to conduct the proposed operations; (2) has sufficient financial resources available to commence operations without undue risk; and (3) will comply with its

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[356] CASA, *supra*.

[357] Paul Stephen Dempsey, *The Rise and Fall of the Civil Aeronautics Board - Opening Wide the Floodgates of Entry*, 11 TRANSP. L.J. 91, 137 (1979).

[358] The *Federal Aviation Act* requires DOT to find a carrier fit, willing, and able before it issues it an operating certificate. 49 U.S.C. §§ 41101-41112; *See* 14 C.F.R. § 204. Fitness remains an ongoing requirement even after initial certification. 49 U.S.C. § 41110(e).

statutory and regulatory obligations under the law (or, in the regulatory language often used, has demonstrated a satisfactory "compliance disposition").[359] In initial certification of an airline, the DOT Office of the Secretary evaluates the financial, managerial, and operational fitness of an applicant in determining whether it will issue it a Certificate of Public Convenience and Necessity.[360] The fitness of foreign airlines is also evaluated before they are issued a permit to serve points in the United States.[361]

Under what is commonly referred to as "Section 402" of the Federal Aviation Act, in order to serve the United States, a foreign carrier must secure a permit.[362] In order to receive a permit, an applicant must demonstrate that it is "fit, willing, and able" to perform the proposed service, that it has been designated by the government where it is registered to serve the route in question under an applicable bilateral air transport agreement (or, in the absence of bilateral rights, on the basis of comity and reciprocity), and that issuance of the permit would be in the

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[359] *See Application of Air Illinois, Inc.*, DOT ORDER 86-2-25 (1986).

[360] DEMPSEY ET AL , *supra*, at §§ 12.41-12.44

[361] *Id.*, § 12.45

[362] 49 U.S.C. §§ 41301-07. The FAA regulations specifically require compliance with Annex 6 to the *Chicago Convention*. 14 CFR §§ 211.20, 211.21, 294.83. The FAA describes the process as follows:

> The international requirements governing air safety are contained in the *Convention on International Civil Aviation*, 61 STAT. 1180 (*Chicago Convention*) and its related Annexes, primarily Annex 6 and Annex 8. A basic precept of the international scheme is that sovereign States that accept the Convention's obligations will comply with them.
>
> If a particular foreign air carrier of a sovereign State desires to conduct foreign air transportation operations into the United States, it must file an application with the Office of the Secretary of Transportation (OST) for a foreign air carrier permit under section 402 of the Federal Aviation Act of 1958, as amended, or for an exemption under section 416(b) of the Act. Parts 211 and 302 of the Economic Regulations of OST (14 CFR parts 211 and 302) prescribe the requirements for issuance of these authorities. Consistently with international law, certain safety requirements for operation into the United States are prescribed by the FAA's part 129 (14 CFR part 129). Before OST issues a foreign air carrier permit or exemption, it notifies the FAA of the application and request the FAA's evaluation of the applicant's capability for safe operations. This practice and procedure has been in effect for many years. OST does not issue a foreign air carrier permit or exemption, and FAA does not issue part 129 operations specifications unless the FAA is satisfied that a foreign air carrier is capable of conducting safe operations within the United States.

Information Concerning FAA Procedures for Examining and Monitoring Foreign Air Carriers, 57 Fed. Reg. 38342 (August 24, 1992) (to be codified at 14 C.F.R. Pt. 119). In issuing a § 402 permit, or an exemption to provide service under 49 U.S.C. § 41301. The DOT issues a boiler-plate order requiring that all aircraft serving the United States satisfy Annex 6 requirements. *See*, *e.g.*, *Saudi Arabian Airlines*, 2004 DOT AVIATION LEXIS 270 ; *Air Jamaica Ltd.*, 2004 AVIATION LEXIS 189 (MAR. 8, 2004).

"public interest."[363] The DOT may impose any reasonable conditions, amendments, or modifications to such permit once issued, or it may simply suspend or revoke it.[364] Once certificated, the FAA Administrator has the authority to evaluate the ongoing technical and financial capability of commercial airlines.[365]

H. SCHOOLS AND APPROVED MAINTENANCE ORGANIZATIONS

No ICAO Annex presently addresses aviation training organizations.[366] The CASA authorizes the examination and rating of civilian flight, repair, and maintenance schools, as well as Approved Maintenance Organizations.[367]

I. AIR NAVIGATION FACILITIES

Air traffic control and flight information services are governed by Annex 11 to the Chicago Convention – Air Traffic Services.[368] Under the CASA, the Director of Civil Aviation may prescribe "minimum safety standards for the operation of air navigation facilities."[369] The Director is authorized to issue certificates to airports and establish minimum safety standards for their operation.[370] An airport certificate shall be issued when, after investigation, it is determined that the applicant "is properly and adequately equipped and able to conduct a safe operation in accordance with [CASA] and the rules, regulations, and standards promulgated thereunder."[371] In the United States, the FAA provides air navigation and air traffic control services.[372]

J. TRANSPORTATION OF DANGEROUS GOODS

Annex 18 of the Chicago Convention details the requirements for "The Safe Transport of Dangerous Goods by Air."[373] Under the CASA,

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[363] 49 U.S.C. § 41302.
[364] 49 U.S.C. § 41304.
[365] 14 C.F.R PART 119 (2001).
[366] CASA, *supra.*
[367] *Id.* § 605.
[368] *Chicago Convention*, *supra,* Annex 11 (Air Traffic Seminars).
[369] CASA, *supra,* at § 607(a).
[370] *Id.* § 607(b)(1).
[371] *Id.,* § 607(b)(2).
[372] DEMPSEY, ET AL, *supra,* at §§ 12.48-12.50.
[373] *Chicago Convention*, *supra,* Annex 18 (The Safe Transport of Dangerous Good by Air)

the transportation of dangerous goods must conform explicitly to the requirements of Annex 18.[374] This is the only place in which CASA expressly refers to an Annex.[375] Civil and criminal penalties may be imposed for their violation.[376]

In the United States, the transportation of hazardous material is subjected to comprehensive regulation.[377] The Associate Administrator for Hazardous Material Safety, in the DOT's Research and Special Programs Administration, has jurisdiction over the transportation of dangerous goods by air.[378] The regulations incorporate the ICAO Technical Instruction by reference.[379]

K. PENALTIES FOR NONCOMPLIANCE

The requirements established in the CASA, together with the orders issued and rules and regulation promulgated thereunder may be enforced in the domestic courts.[380] The Director may establish and impose civil penalties for the violation of the CAA or any rules, regulations, or orders issued thereunder.[381] The number of penalties imposed in any case shall be governed by the "nature, circumstances, extent, and gravity of the violation committed and . . . the degree of culpability, history of prior offences, ability to pay, effect on ability to continue to do business, and such other matters as justice may require."[382] Aircraft may be subject to the imposition of liens for penalty payment[383] and, if necessary, seizure.[384]

Under the CASA, criminal penalties, including imprisonment, may be imposed upon any person who knowingly forges, counterfeits, or alters a certificate, or knowingly uses a fraudulent certificate.[385] Fines may be imposed upon anyone who fails to keep or preserve, or

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[374] CASA, *supra*, at § 608(e); *Chicago Convention*, *supra*, Annex 18 (The Safe Transport of Dangerous Goods by Air).
[375] CASA, *supra*, at § 608.
[376] *Id.*, 701(f), 702(l).
[377] 49 U.S.C. §§ 5101-27 (2003).
[378] 49 C.F.R. Pts. 171-80 (2001). DEMPSEY ET AL, *supra*, at §§ 12.53-12.57.
[379] 49 C.F.R. Pt. 171.11 (2001)
[380] CASA, *supra*, at § 807.
[381] *Id* at § 701(a). Penalties shall be adjusted for inflation periodically. *Id.*, § 701(d).
[382] *Id.*, § 701(c).
[383] *Id.*, § 701(e).
[384] *Id.*, § 808(b).
[385] *Id.*, § 702(a).

mutilates, alters, or even fails to keep or preserve reports, records, and accounts in the manner prescribed. This includes the filing of false reports or records.[386] Fines and imprisonment may be imposed upon anyone who refuses to testify or produce records in response to a subpoena issued by the Director,[387] or anyone who removes any part of a civil aircraft involved in an accident or any property aboard said aircraft.[388]

Fines and imprisonment may be imposed upon one who:

- intentionally interferes with air navigation by establishing a false, light or signal;[389]
- conveys false information,[390]
- interferes with an aircraft crew member in the performance of his responsibilities while in flight[391] or with aircraft operations;[392] or
- assaults, intimidates or threatens any flight crewmember, including flight attendants and stewards.

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More serious penalties are prescribed for any such act involving the use of a deadly or dangerous weapon.[393] Possession of a concealed deadly or dangerous weapon, or placement of a bomb or other explosive or incendiary device, aboard an aircraft, or an attempt thereto, shall result in fines and imprisonment.[394] Where the act results in the death of another person, imprisonment for life may be imposed upon one who commits or attempts to commit aircraft piracy.[395]

In the U.S., The FAA Administrator has been given comprehensive licensing[396] and enforcement responsibilities.[397] A certificate may be modified, amended, suspended, or revoked in the interest of safety.[398]

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[386] *Id.*, § 702(c).
[387] *Id.*, § 702(d).
[388] *Id.*, § 702(k).
[389] *Id.*, § 702(b).
[390] *Id.*, § 702(j).
[391] *Id.*, § 702(f)(1).
[392] *Id.*, § 702(i).
[393] *Id.*, § 702(f)(2).
[394] *Id.*, § 702(h)(1). An explicit exception exists for law enforcement officers under certain circumstances. *Id.*, § 702(h)(3).
[395] *Id.* § 702(e)(1). Jurisdiction may exist even if the aircraft is not in flight at the time the act or aerial piracy was committed, so long as the aircraft would have been in the jurisdiction of the State seeking to exercise it had the act of piracy been completed. *Id.*
[396] 49 U.S.C. § 44702.
[397] 49 U.S.C. § 106.
[398] 49 U.S.C. §§ 44709, 44710; DEMPSEY, ET AL., *supra,* at § 12.06.

Civil[399] and criminal[400] penalties may be imposed by the FAA Administrator in an administrative adjudication.[401] The FAA Administrator may bring a civil action in federal court seeking judicial enforcement of a regulation or the terms of a certificate.[402]

V. THE THEORETICAL PARADIGM OF COMPLIANCE WITH AND ENFORCEMENT OF INTERNATIONAL LAW

Most States comply with most of their international obligations in the commercial arena.[403] Some do so out of a desire to enjoy reciprocal benefits.[404] Since international treaties are concluded on the basis of consent, most nations find compliance in their self-interest.[405] Where they have had a role in the process of law-making, and where they perceive the process to have been fair, nations are more likely to abide by their internal obligations.[406] Voluntary compliance with international legal obligations is sometimes obtained by virtue of the moral force of the rule.[407] If the substantive law is deemed fair and just and reflective of widely accepted norms of conduct, it will receive more universal

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[399] 49 U.S.C. § 1155(a); DEMPSEY, ET AL, *supra*, at § 12.62.

[400] 49 U.S.C. § 1155(b); Dempsey, et al, *supra*, at § 12.65.

[401] 49 U.S.C. § 46301 et *seq*.; 14 C.F.R § 13.11. DEMPSEY, ET AL, *supra*, at § 12.05

[402] 49 U.S.C. § 46106.

[403] Under a "managerial model," Abram and Antonia Chayes embrace a cooperative problem-solving approach as preferable to the enforcement model of compliances. They contend that the willingness of States to comply with principles of international law is attributable to three factors: (1) compliance reduces transactions costs by avoiding the need to recalculate the costs and benefits of a decision; (2) treaties are consent-based instruments that serve the interests of the participating States; and (3) a general norm of compliance advances State compliance in any particular instance. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 3 (1995).

[404] HANS MORGENTHAU, POLITICS AMONG NATIONS 283 (3D ED. 1960).

[405] John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 147 (1996); John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1, 123 (1997).

[406] Thomas Franck has advanced "legitimacy theory" as an explanation for compliance with international law – the notion that States will obey rules they perceive to have "come into being in accordance with the right process." Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 706 (1988).

[407] Franck insists the principal reason that States comply with international law is the perceived fairness of the rules. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995).

acceptance.[408] Other nations comply out of enlightened self-interest in preserving stability, order, and predictability in an increasingly interdependent global economy.[409] Still others weigh the benefits of compliance against the costs of non-compliance, including the retaliatory conduct of other States.

Under the Chicago Convention, SARPs may be adopted by two-thirds of the ICAO Council, which is itself comprised of only thirty-six member States.[410] Thus, twenty-four member States – less than 13% the 190-member ICAO Assembly – can promulgate SARPs.[411] Other States are given the right to participate in the Council's deliberations,[412] though relatively few actually do.[413] But, ICAO's process includes providing draft SARPs to all member States, inviting their comments and

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[408] Some observers contend that State compliance with international law depends upon its perceived legitimacy, which in turn depends on the process by which created, its consistency with generally accepted norms, and its perceived fairness and transparency. Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 833 (1990). According to Professor Hathaway, "The fairness model, like the managerial model, thus points not to State calculations of self-interest as the source of State decisions to act consistently with international legal obligations, but instead to the perceived fairness of the legal obligations. Compliance with international law, in this view, is traced to the widespread normative acceptance of international rules, which in turn reflects the consistency of the rules with widely held values and the legitimacy of the rulemaking process." Oona A. Hathaway, *Do Human Rights Treaties Make a Difference*?, 111 YALE L.J. 1935, 1958 (2002).

[409] *See generally*, ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 127-140 (1982) (discussing rationales behind compliance with international laws, treaties, and agreements).

[410] *Chicago Convention*, *supra*, art. 50(a). Originally, the ICAO Council had 21 members. With the growth of ICAO membership, and the fact that the Council is the dominant body within the agency, the Convention has been amended on several occasions to increase the size of the Council. *Id.*

[411] *Id.*, arts. 54(l), 90(a), 94. In the ICAO Assembly, each State has one vote. *Id.* art. 48(b). However, the 25-member European Union tends to vote as a bloc, effectively giving Europe 25 votes.

[412] *Id.* art. 53.

[413] Professor and former ICAO Legal Advisor, Michael Milde observes:

> The leadership of the advanced States asserts itself convincingly in the elaboration of the international Standards while many other States are relegated to the position of onlookers hardly able to openly oppose the 'motherhood' initiatives aimed at enhancement of aviation safety and hardly ready to implement them. The result is a continuing, creeping stagnation in the process of law-making in ICAO. While on the surface the evolution of the Standards continues, fewer States (as percentage of the total membership) participate in the relevant meetings, fewer States send timely substantive comments on the proposed amendments to Annexes and, worst of all, only very few States communicate to ICAO whether they are in fact in compliance with the new Standards . . . .

Milde, *supra*, at 7.

objections, and attempting to achieve consensus.[414] In practice, SARPs are adopted unanimously by the Council.[415]

Some have been troubled by the process of law-making by elites;[416] however, one must also recognize that the Chicago Convention includes an "opt-out" process whereby individual States can refuse to adopt an Annex they find impracticable.[417] Theoretically, a majority of States could effectively veto a SARP, though this has never occurred.[418] The Assembly also has the power to amend the Chicago Convention[419] and to elect the Council members who adopt SARPs.[420] Thus, representative democracy is at play. Moreover, proposed SARPs are widely circulated for comment, not only to member States, but also to regional and industry organizations, in an attempt to achieve consensus before the Council formally votes. The process is time-consuming, and may sometimes result in less stringent obligations than if the Council were unilaterally to promulgate SARPs without input and consensus-building.

Institutions like ICAO not only promulgate standards governing national behavior, but they also are participatory institutions in which members are given an opportunity to debate the relevant issues of the day.[421] Their members are educated by ICAO on how to comply, and encouraged regularly to comply.[422] Hence, institutionalism itself – the existence of an organization with a well defined mission and focused agenda – can facilitate compliance with international legal obligations.[423]

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[414] *Id.*

[415] *Id.*

[416] *See* Peter Ateh-Afac Fossungu, *The ICAO Assembly: The Most Unsupreme of Supreme Organs in the United Nations System: A Critical Analysis of Assembly Sessions*, 26 TRANSP. L.J. 1 (1998).

[417] *Id.*

[418] *Id.*

[419] *Chicago Convention*, *supra*, art. 94. The Convention has only rarely been amended, however.

[420] *Chicago Convention*, *supra*, art. 49(b).

[421] Institutionalist theory is among the most prominent of international relations theories. It begins with the recognition of the anarchic nature of the international system, and posits that institutions can improve the likelihood of cooperation. Institutionalists believe institutions can promote cooperation even in the absence of a common government or other formal governance structure by providing "a stable environment for mutually beneficial decision-making as they guide and constrain behavior." William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U.J. INT'L L. & POL'Y 227, 235-245 (1997) (quoting Duncan Snidal, *Political Economy and International Institutions*, 16 INT'L REV. L. & ECON. 121, 127 (1996)).

[422] *Id.*

[423] *Id.*

Ideally, an international organization can channel conflict so as to permit settlement with minimal disruption.[424] It is important that the leaders of an international organization provide leadership so that its essential purposes and mission are fulfilled.[425]

The U.S. model CASA and draft aviation regulations stand on a different footing from the SARPs.[426] Although, in essence, the CASA embraces the most important requirements established by the SARPs, no nation other than the United States participated in the drafting of the model statute.[427] Some nations will, nonetheless, adopt CASA purely on administrative efficiency grounds. It is simpler, quicker and easier to use the model statute as a template for a developing nation's aviation laws and regulations than drafting such legal material from scratch. Economists characterize it as an effort to reduce transactions costs.[428] Other nations will respond politically and reject the CASA model outright because of the identity of its author.[429] The CASA largely follows the Federal Aviation Act of 1958.[430] Ostensibly, some nations will be more comfortable adopting a U.S.-drafted model statute than adopting a U.S. law.

Looking beyond the legislative process, however, when examining the substantive law, it is clear that the Annexes address technical issues of aviation navigation and safety in a relatively objective and neutral way.[431] These issues themselves tend not to be politically contentious.[432] Therefore, one would rate them highly for fairness. The achievement of aviation safety is clearly in the self-interest of all States.[433] The Annexes

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[424] Dempsey, *supra,* note 4, at 561.

[425] *Id*.

[426] *Id*.

[427] *Id*.

[428] *See* Paul Stephen Dempsey, *Market Failure and Regulatory Failure As Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition*, 46 WASH. & LEE L. REV. 1 (1988). Aceves argues that "transaction costs affect all contractual arrangements, including the development and operation of international institutions." William J. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and The Concept of State Practice*, 17 U. PA. J. INT'L ECON. L. 995, 1003 (1996).

[429] Aceves, *supra*, at 1004.

[430] CASA, *supra, at*84.

[431] *Chicago Convention*, *supra*.

[432] Technical issues of aviation navigation and safety can be contentious, such as during the height of the Cold War, a Soviet Sukhov military aircraft shot down Korean Airlines flight 007.

[433] Rules should be fashioned with a view to assuring compliance with them, so that the enforcement issue is never reached. ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW (1981). David S. Ardia, *Does The Emperor Have No Clothes?*

are also drafted in a way to encourage their adoption into each contracting State's domestic law.[434] Hence, on these grounds, one would anticipate a high degree of compliance.

There are also instances of compliance inspired by the desire to avoid the costs of noncompliance such as, for example, the adverse publicity and negative world opinion to which the uncooperative nation may be subjected if it is perceived as a delinquent.[435] Rational, self-interested States[436] comply with international obligations because of a concern for both the adverse reputational impacts and direct sanctions that might be triggered by violations of law.[437] Even absent an explicit threat of sanctions, the mere possibility of reciprocal noncompliance or retaliation often has a prophylactic effect in dissuading delinquency.[438] Exposing the wrongdoer, such as by blacklisting its commercial enterprises, may lead others to isolate or punish the recalcitrant State until the delinquency is remedied.[439]

Initially the United States, and then ICAO, monitored State

Enforcement of International Laws Protecting the Marine Environment, 19 MICH. J. INT'L L. 497 (1998).

[434] *Chicago Convention*, *supra*.

[435] Dr. Milde observes that "Enforcement need not be perceived as a 'policing' or punitive measure; full transparency and publicity of the relevant facts may create pressure of the public opinion prompting a corrective action by the government concerned with ICAO assistance." Milde, *supra*, at 15.

[436] Rational choice theory posits that, "individuals engage in purposive, means-ends calculation in order to attain their goals—that is, they select actions so as to maximize their utility." Alexander Thompson, *Applying Rational Choice Theory to International Law: The Promise and Pitfalls*, 31 J. LEGAL STUD. 285, 287 (2002). Some scholars have applied game theory to the issue of compliance with international legal obligations. *See*, *e.g.*, Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFFALO L. REV. 679 (2003).

[437] Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002). Neorealists maintain international law has little or no impact on State behavior, and that compliance with international law can be explained as accidental coincidence between international law - whose content is defined by powerful States - and national self-interest. Francis A. Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT'L L.J. 193 (1980).

[438] DEMPSEY, ET AL, *supra*, at 312. The impact upon a State arising from its loss of reputation as a result of violating legal obligations may be sufficiently significant to deter delinquency. Aceves, *supra,* at 254.

[439] "If rule violations cannot be effectively identified, the incentives to transgress from such rules are significant. Like the Law Merchant of medieval Europe, there must be a mechanism that paints the scarlet letter of noncompliance on rule violators. . . . [I]f parties are provided with adequate information regarding rule violations, there may be no need for formal sanctioning mechanisms to ensure cooperation. Compliance can be gained through decentralized punishment by informed parties." Aceves, *supra*, at 251-52.

compliance with the SARPs.[440] More recently, the EU began to consolidate member States' findings of deficient aircraft, and blacklisted the operating airlines. The US and EU published the report cards (known more commonly as "blacklists"). Many ICAO member States also published their USOAP audit report cards. The economic impact was immediately felt by the airlines and tourism industries of the failing nations.[441] If it isn't safe to fly somewhere, or on some airline, consumers will vote with their feet, so to speak, and purchase travel elsewhere. Hence, efforts by the US, ICAO, and more recently the EU, to "name and shame" are important measures to expose delinquencies and thereby encourage compliance.

What if States still do not comply with their international obligations? The fundamental problem of enforcement of international legal obligations is that there is nothing comparable to the domestic courts and their police enforcement mechanism at the international level.[442] Domestically, nations usually play the paternalistic role of maintaining law, order, and domestic tranquility within their borders; but internationally, their conduct has been likened to that of "primitives, warring [tribes], juvenile delinquents, or other uncivilized groups."[443] The conceptual domestic model of courts and sheriffs which efficiently determine legal rights and obligations and execute judgments is inappropriate in the community of nations, where authority and power are dispersed among numerous actors, and the legal system is essentially primitive in nature.[444] A nation which seeks implementation of its legal

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[440] *Chicago Convention*, *supra*.

[441] Aceves, *supra*.

[442] William Reisman, *The Role of Economic Agencies in the Enforcement of International Judgments and Awards: A Functional Approach*, 19 INT'L ORG. 921, 932 (1965). Nevertheless, the absence of a formal sheriff or his equivalent at the international level does not mean that there is no public order system of law. Indeed, while it is difficult to organize the consensual coercive and retaliatory mechanisms of compliance and enforcement into a conceptual framework, there nevertheless exists "an international public order system and it is sustained by a complex web of sanction expectations of varying degrees of intensity." *Id*.

[443] Lauri McGinley, *Ordering a Savage Society: A Study of International Disputes and a Proposal for Achieving Their Peaceful Resolution*, 25 HARV. INT'L L. J. 43, 47 (1984). Hans Morgenthau has written of international law, "[T]here can be no more primitive and no weaker system of law enforcement than this, for it delivers the enforcement of the law to the vicissitudes of the distribution of power between the violator of the law and the victim of the violation." HANS MORGENTHAU, POLITICS AMONG NATIONS 312 (6TH ED. 1985). According to Morgenthau, "It is an essential characteristic of international society, composed of sovereign States, which by definition are the supreme legal authorities within their respective territories, that no such central lawgiving and law-enforcing authority can exist there." *Id.,* 296.

[444] McGinley, *supra*, at 46; Reisman, *supra,* at 932; WILLIAM REISMAN, SANCTIONS AND

rights in the international arena cannot rely upon some higher authority to enforce them.[445]

Yet that does not mean that international law is unenforceable.[446] A State seeking to force another State to comply with its international legal obligations may, instead, rely on various means of "self-help" remedies, including coercion.[447] From the earliest early days of "classic international law," and its expression in the writings of Hugo Grotius and other scholars, to contemporary international legal system, coercion and reprisals have played a fundamental role in nation-State dispute resolution.[448]

ENFORCEMENT, IN 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 282 (C. BLACK & R. FALK ED. 1971).

[445] DEMPSEY ET AL, *supra*, at 312.

[446] As Professor Zoller observes:

> [T]he main difference between internal and international society lies in the fact that in the latter physical coercion is not organized and has never been transferred to a State system. In other words, the law is not enforced by an officer. This does not mean, however, that it is not enforced at all. It is therefore misleading to believe that international law is not "guaranteed law" on the ground that there is no enforcing authority above the State. International law is indeed guaranteed mainly by self-interest without the help of a specialized enforcing agency.

ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES. xii-xiii (1984).

[447] The use of reprisals has been historically justified on the basis of compelling another State to consent to a satisfactory settlement of a dispute created by its own international delinquency. Reprisals are admissible not only, as some writers maintain, in case of denial or delay of justice or other ill-treatment of foreign citizens prohibited by international law but in all other cases of an international delinquency for which the injured State cannot get reparation through negotiations, or other amicable means, be it noncompliance with treaty obligations or any other internationally illegal act. Professor Schachter noted that "in the absence of a system of community enforcement, international law has traditionally sanctioned coercive measures by the successful party as "self-help" to compel the recalcitrant party to carry out the judicial decision or arbitral award imposing obligations upon it." Oscar Schachter, *The Enforcement of International Judicial and Arbitral Decision*, 54 AM. J. INT'L L. 1, 6 (1960). *See* JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 90 (1954). Whilst the use of force by one State against another State to obtain execution is now generally regarded as illegal, there appears to be no bar to a creditor State taking diplomatic measures or employing economic sanctions to obtain satisfaction. J.L. SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION 264, 268 (1959). *See* BURLEIGH CUSHING RODICK, THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW 55-57 (1928).

[448] *See* HERSCH LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 136 (7TH ED. 1952). *See also* L. PFANKUCHEN, A DOCUMENTARY TEXTBOOK IN INTERNATIONAL LAW 637 (1940); and JOHN BRIERLY, THE LAW OF NATIONS (6TH ED. 1963).

Prior to the development of modern international law, the principle of complete national sovereignty dominated international relations, such that nations were free to act autonomously or independently of other States, with an exclusive right to judge the lawfulness of their own conduct. For purposes of this analysis, the period coinciding with the term "modern international law" is used to refer to the post-World War I era, which

Some commentators have posed the question of whether the use of economic coercive means may be deemed illicit when directed against a State for purposes of achieving political ends.[449] The fundamental rights of nations are founded upon the idea of natural equality, a residuum of the state of nature existing among human groups before their entry into the collective body politic.[450] Yet, the very efficacy of international law is, itself, jeopardized in the absence of effective sanctions by which its requirements can be enforced.[451] Hence, there should be standards by which one assesses the legitimacy of coercion. In assessing the lawfulness of economic reprisals,[452] one source identified three succinct

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expressed the explicit denunciation of the use of force. The Covenant of the League of Nations clearly forbids the use of force by nations, and subsequent international conventions and treaties explicitly limited the nature of State sovereignty vis-à-vis a State's responsibility to other nations in the international community. Inevitably, conflicting economic and political objectives resulted in conflict and confrontation. However, there was no alternative but to accept forceful aggression, violent coercion and retaliation as legitimate instruments of dispute resolution. Until the strongly worded prohibition on violent coercion of Article 2(4) of the Charter of the United Nations, the use of force was the common means of obtaining redress and ensuring enforcement in the international legal order. Dempsey, *supra,* at 319; Zoller, *supra,* at 4.

[449] J. Depray Muir, *The Boycott in International Law*, 9 J. INT'L L. & ECON. 187, 192 (1974); *see also* Derek Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L L. 1, 5 (1972). As this author noted elsewhere: "It does appear desirable . . . in an efficient system of world public order, that forms of coercive activity which might be unnecessarily or unreasonably destructive to the essential values of an innocent target State, or which might significantly endanger international peace and security, be effectively regulated or even prohibited." Paul Stephen Dempsey, *Economic Coercion and Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto*, 9 CASE W. RES. J.INT'L L. 253, 261 (1977). *See generally*, James Boorman, *Economic Coercion in International Law: The Arab Oil Weapon and the Ensuing Judicial Issues*, 9 J. INT'L & ECON. 205 (1974). (analyzing the demand and need for oil as a device whereby other nations may be coerced into compliance.)

[450] BRIERLY, *supra*. CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 18 (P. CORBETT TRANS. 1957).

[451] Dempsey, *supra,* note 4, at 560.

[452] Coercive enforcement mechanisms which classic international law designated as "reprisals" derived from the acts of withholding, taking or destroying any form of property of a foreign State or its nationals. They could be carried out for a variety of reasons: as a show of strength in foreign policy, to punish another State for any action judged to be reprehensible, or in warfare to compel an enemy to respect certain basic rules and to punish it for not having respected them. Zoller, *supra*, at 37. The premise or theory behind early public reprisals was that the international system must be based on a just and equal social order. A breach of law always disrupts that order and is likely to lead to injustice among nations. Justice rests upon a foundation of equality of nations. Should this equality be distorted by a breach of law, justice calls for its reestablishment. Thus, the injured State has the natural right to retaliate in order to restore equality, or to punish in order to return the "status quo ante." The early scholars and philosophers of international law found violent reprisals to be permissible and necessary tools of law enforcement. *Id*.

According to Grotius, the law of nations has two components: the *jus natural* or

requirements:

1. A prior international delinquency against the claimant State;
2. Redress by other means must be either exhausted or unavailable; and
3. The economic measures must be limited to the necessities of the case and proportionate to the wrong.[453]

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As to the requirement of a prior international delinquency, in the *British Caledonian* case, the court held that the United States may not unilaterally suspend the aircraft of foreign-flag airlines unless the States in which they are registered have not abided by their obligations under the Chicago Convention and it Annexes.[454] Otherwise, the US is obligated to accept that State's certificate of airworthiness.[455] Hence,

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natural law of nations, which is a secularized law of nature, and the *jus gentium* or voluntary law of nations. The natural law of nations is based on reason; the voluntary law is based on will, *i.e.*, the consent of States. *See* R. BRYANT, A WORLD RULE OF LAW, A WAY TO PEACE 38 (1977). Referring to nation-State conflict, Grotius saw peace as the only worthy end for which war should be waged. In his conclusion, he claims that man must never resort to simple barbarism but must fight only to enforce principles of justice which spring from man's rational nature. Grotius developed the concept of "Just War;" that is, that international law determines the principal cases of resort to war, such as punishment of a State which violates the basic principles of international law. *See*, JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 14 (2D ED. 1959). Dempsey, *supra*, at 319. In addition, Grotius argued that war could be legitimately waged and hostages taken as security for the fulfillment of a treaty. HUGO GROTIUS, DE JURE BELLI AC PACIS Ch. XX § LIII. Grotius argued that law without sanctions would fail. Thus, Grotius recognized the permissibility of reprisals and sanctions used to enforce international obligations. *Id*.
A later critic of Grotius, Samuel von Pufendorf (1632-1694), stressed that the availability of overwhelming coercive force is the most effective means to encourage lawful behavior of States. For example, Pufendorf argued, "Those who cannot be brought to a better way of life by reason, can be kept in order only by terror." SAMUEL VON PUFENDORF, VII THE LAW OF NATIONS Book § 11 (1672).
Emerich de Vattell (1714-1767), in his THE LAW OF NATIONS, espoused the right of reprisal even more strongly than either Grotius or Pufendorf. Thus, from the 16th to the mid-18th centuries, an effort was made to construct a conceptual legal framework around the use of armed might as a legitimate means of enforcing standards of international behavior. *See* B. FERENZ, ENFORCING INTERNATIONAL LAW (1983).

[453] Derek Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L L. 1, 9-10 (1972) [citations omitted]. This author has taken a similar position: "A determination that the predominant purpose of the acting State was to cause an illegitimate deprivation or destruction of values of the target State, rather than a virtuous attainment of ends (that is, maximization of legitimate values) might be considered as *prima facie* . . . evidence of illegality." Paul Stephen Dempsey, *Economic Coercion and Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto*, 9 CASE W. RES. J.INT'L L. 253 at 261-62 (1977); *see* DEMPSEY ET AL, *supra*, at 330.

[454] *British Caledonian*, 665 F.2D 1153 (D.C. CIR. 1981)

[455] *Id*.

before a State prohibits the operations of an air carrier within its borders, it must first legitimately conclude that the registering State has failed in its obligations under the Chicago Convention and the Annexes thereto.

As for the exhaustion of alternative remedies requirement, the modern bilateral air transport agreements lay out a process of notification and consultation prior to suspension.[456] Failing a negotiated settlement, an aggrieved State may file a formal complaint with the ICAO Council for adjudication under Article 84 of the Chicago Convention.[457] In the six decades since its promulgation, the ICAO Council has exhibited no enthusiasm for adjudicating disputes and, in fact, has never reached the merits on any adjudication (though it has successfully used its 'good offices' to help mediate several).[458]

Finally, regarding proportionality, the prohibition of an unsafe aircraft from one's airspace, or the suspension of service to and from an unsafe airport, appears tailored to the wrong and designed to secure a precise, and proportionate, remedy.[459] The imposition of sanctions is designed to cause sufficient economic stress on the delinquent State's airlines and its economy so that it sees the utility of complying with the SARPs.[460] The ultimate remedy, of course, is compliance, whether achieved through enthusiastic endorsement of the principles codified in the international rule, or through reluctant and grudging acquiescence to achieve relief from real or potential coercion.[461]

Still some States do not comply because, quite frankly, they cannot.[462] Some States are simply too poor to adequately fund their aviation ministries, to hire technically competent inspectors and regulators, or to invest in airport and air navigation infrastructure.[463] Some States simply lack the financial or human resources to comply.[464] This is where the developed world needs to help the developing world, in providing grants, loans and technical assistance to facilitate compliance.[465] No level of coercion can compel a nation to do something

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[456] Dempsey, *supra*, at 330
[457] *Chicago Convention*, *supra*, Art. 84. Dempsey, s*upra*, at 330.
[458] Dempsey, *supra*, at 330.
[459] *Id.*
[460] *Id.*
[461] *Id.*
[462] *Id.*
[463] *Id.*
[464] *Id.*
[465] *Id.*

it cannot.[466] The IFFAS program is a step in the right direction.[467] So too, is the development of regional air transport organizations that pool resources and share expertise to facilitate regional compliance.[468]

VI. CONCLUSION

Like a constitution, the Chicago Convention created a quasi-legislative body, ICAO. The Convention gave ICAO the power to fill in the details by promulgating requirements, and giving contracting States the responsibility to implement them.[469] For decades, ICAO successfully promulgated standards, fulfilling the first part of the mandate.[470] But many contracting States ignored their responsibilities to fulfill the second part of that mandate, and promulgate domestic laws, and implementing procedures to fulfill their international obligations.[471] ICAO blithely turned a blind eye to such delinquency.[472] The fundamental objective of achieving uniformity in international aviation safety and navigation – an area where uniformity is manifestly desirable - was thwarted for many years.

The story of the development of uniform international rules governing aviation safety by the relevant international organization and the means by which they were initially ignored, and then gradually implemented, can serve as a useful case study of how compliance is pragmatically achieved in international law – through encouragement, persuasion, assistance, investigation, publicity, and, if all else fails, reprisals. The interplay between recalcitrant States and economically powerful States determined to investigate, expose, and sanction delinquency, is the classic conflict between a powerful State determined to exert its will over a weaker State. Here, that dynamic prompted target States to ask the relevant international organization – ICAO – to exert its authority to monitor and facilitate compliance – in effect, to fulfill its constitutional mandate under the Chicago Convention to achieve safety in international aviation by creating uniform standards adopted universally. Consensus was achieved that ICAO oversight was needed, and highly preferable to the unilateral monitoring and sanctions

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[466] *Id.*

[467] *See* Saba, *supra*, at 537; Ruwantissa Abeyratne, *Funding an International Financial Facility for International Safety*, XXVIII ANNALS OF AIR & SPACE L. 1 (2002).

[468] *See* Abeyratne, *supra*, at 133; Barreto, *supra,* at 672-75.

[469] *Chicago Convention*, *supra.*

[470] Abeyratne, *supra*.

[471] *Id.*

[472] Milde, *supra*, at 16.

imposed by a single powerful nation like the United States. Global compliance with international regulations is more universally accepted when mandates are a product of an international organization, rather than products of a single, albeit powerful, nation.

As a consequence, ICAO, today, is a much more effective organization than it was a decade or two ago, and the Chicago Convention's goal of achieving uniformity in international aviation safety and navigation is becoming more universally achieved. This is a development in the traveling public's best interest. The interplay between unilateral and multilateral enforcement roles revealed here offers useful lessons which can help facilitate the success of global governance in other contexts.

VII. APPENDIX

A. BRITISH CALEDONIAN AIRWAYS v. BOND

665 F.2d 1153 (D.C. Cir. 1981)

ROBB, Circuit Judge:

On the afternoon of May 25, 1979, American Airlines DC-10 Flight 191 crashed on take-off from Chicago's O'Hare International Airport, killing all 271 persons on board. Early reports indicated that the left wing pylon and the engine attached to it had separated from the wing as the aircraft took off. Later investigations showed that as the engine-pylon assembly tore loose from the wing, it severed hydraulic and electrical lines, which caused one set of wing slats to retract. The retraction of these slats, which govern slow speed lift, in turn caused asymmetrical lift of the aircraft. The crew responded by slowing the aircraft speed, which normally is the appropriate remedial measure for loss of engine power. However the crew did not know that the damage had raised the stall speed. Therefore, as the crew reduced the speed, the left wing stalled-lost the ability to sustain lift-and the airplane rolled and fell to the ground.

On May 28, 1979, in response to a recommendation of the National Transportation Safety Board, the FAA [Administrator Langhorn Bond] issued an Emergency Airworthiness Directive to all operators of U.S.-registered Model DC-10 aircraft, instructing them to inspect the pylon attach points on their aircraft. In keeping with agency practice, the FAA dispatched that directive to all foreign operators of DC-10 aircraft as well. The inspections undertaken in response to the May 28 directive revealed cracks in the pylon mounting assemblies of certain airplanes, . . . and other defects, including a failure of the spar web (a major structural component of the pylon) in a United Airlines DC-10 aircraft. . . . Accordingly, the FAA issued another Emergency Airworthiness Directive on May 29, 1979, requiring more thorough inspections at more frequent intervals. In addition, the Administrator of the FAA grounded all domestic DC-10s, pending the more thorough investigations, and again notified foreign operators of the

latest developments.

By June 2 the Safety Board had identified a relationship between a pattern of cracks in the pylons and a maintenance technique that violated the procedure recommended by McDonnell Douglas, the designer and manufacturer of the aircraft. McDonnell Douglas recommended removing the engine from the pylon before removal and reinstallation of the pylon to the wing attachment fittings. . . . However, the Safety Board discovered that some maintenance personnel removed the pylon and the attached engine as a unit, using a forklift to transport the pylon-engine assembly away from the wing for inspection and repair. When reinstalling the pylon-engine assembly, the forklift operator had limited control over the precise placement of the pylon aft bulkhead into the wing structure. Vertical misalignment of even a fraction of an inch was thought to have caused the pylon flange to strike the forward lug of the wing fitting, which cracked the flange

On June 6, 1979, the Administrator of the FAA determined that the public safety required him to issue an Emergency Order of Suspension, which prohibited the operation of all U.S.-registered Model DC-10 aircraft by suspending the type certificate for all DC-10s and terminating the effectiveness of the individual airworthiness certificates for each U.S.-registered DC-10 aircraft. Later that day the Administrator issued SFAR 40, which expanded the scope of the earlier prohibition by prohibiting the operation within U.S. airspace of all foreign-registered DC-10 aircraft. . . .

On June 25, 1979, representatives of member states of the European Civil Aviation Conference met in Paris with a delegation from the United States and requested rescission of SFAR 40 as to those DC-10 aircraft for which certificates of airworthiness had been re-issued. . . . In a statement issued June 25 the representatives of the European States took the position that

> According to Article 33 of the Chicago Convention, certificates of airworthiness issued by the State of registry have to be recognized by the other Contracting States. There is no doubt that the requirements under which these certificates were issued are equal to or above the minimum standards established under the Chicago Convention. . . . No evidence has been presented by the United States authorities to the effect that the requirements under which European States have issued their certificates of airworthiness fall short of . . . minimum standards. . . .

[Under Article 33 of the Chicago Convention], the judgment of the country of registry that an aircraft is airworthy must be respected, unless the country of registry is not observing the "minimum standards." Annex 8 to the Chicago Convention contains the international standards of airworthiness contemplated by Article 33 and specifically provided for in Article 37. Annex 8 was adopted and is periodically amended by the Council of the International Civil Aviation Organization (ICAO), pursuant to Article 90 of the Chicago Convention.

Because the Chicago Convention itself provides that the ICAO, and not the individual contracting states, will adopt the airworthiness standards now contained in Annex 8, we cannot say that Article 33 requires legislative implementation by Congress. In contrast, several provisions of the Chicago

Convention clearly require the contracting states, as distinguished from ICAO, to take the necessary steps under national law to implement the purposes of those provisions. For example, pursuant to Article 22:

> Each contracting State agrees to adopt all practicable measures, through the issuance of special regulations or otherwise, to facilitate and expedite navigation by aircraft between the territories of contracting States, and to prevent unnecessary delays to aircraft, crews, passengers and cargo, especially in the administration of the laws relating to immigration, quarantine, customs and clearance.

See also Articles 12, 14, 23, and 28. Other provisions of the Convention, such as Article 33, set forth rights or obligations of the contracting states and their flag carriers that require no legislation or administrative regulations to implement them. For example, the first paragraph of Article 5 provides that "(e)ach contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory. . . ." See also Articles 8, 15, 16, 20, 24, 29, 32, and 35. We think these provisions state rules that may not be qualified or modified through legislation or administrative regulations enacted by the individual signatory nations, consistent with the international obligations undertaken by each nation that is a party to the Convention. Article 33 is such a provision and we therefore hold that it was intended to operate upon ratification of the Convention and promulgation of the minimum airworthiness standards-that is, we conclude that Article 33 is self-executing. . . .

Section 1102 of the Federal Aviation Act of 1958, 49 U.S.C. § 1502 (1976), requires the Administrator, in exercising and performing his powers and duties, to "do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries." As we have said, Article 33 of the Chicago Convention requires each contracting state, including the United States, to recognize as valid the certificates of airworthiness issued by the other contracting states, as long as those certificates are issued under requirements that are equal to or above the minimum standards established by the International Civil Aviation Organization. Section 1102 of the FAA requires the Administrator to discharge his duties consistently with the obligation assumed by the United States in Article 33. Because the Administrator at no time questioned whether the foreign governments met the minimum safety standards set by the ICAO, his issuance of SFAR 40 and his refusal to rescind the order after the foreign governments had revalidated the airworthiness certificates for aircraft flying under their flags would appear to have violated Article 33 and, therefore, section 1102. . . .

For authority to issue SFAR 40 the Administrator relies in particular on section (b) of Article 9, which allows each contracting state to restrict or prohibit flying over all or any part of its territory "in exceptional circumstances or during a period of emergency, or in the interest of public safety." We agree with the petitioners and amicus Northwest Airlines, however, that the government's interpretation of Article 9(b) disregards the context of that provision and hence

does not reflect its true meaning.

Article 9 appears in Chapter II of the Convention-"Flight Over Territory of Contracting States"-while Article 33 is in Chapter V-"Conditions to Be Fulfilled With Respect to Aircraft." In addition, Article 9 is marginally annotated with the phrase "Prohibited Areas". We think Article 9 is aimed at restricting the territorial access of all aircraft, rather than at restricting the movements of particular types of aircraft. Thus, Article 9(a) authorizes a permanent prohibition on flight over "certain areas" (strategically sensitive areas), while Article 9(b) permits a government, in "exceptional circumstances", temporarily to restrict or prohibit "flying over the whole or any part of" that country's territory. In short, Article 9 permits a country to safeguard its airspace when entry by all aircraft would be dangerous or intrusive because of conditions on the ground. Article 9 does not allow one country to ban landing and take-off because of doubts about the airworthiness of particular foreign aircraft, in derogation of Article 33. If doubts about airworthiness exist, one country may refuse to recognize another country's certificate of airworthiness, but only if the certificating nation has not observed the minimum standards of airworthiness established in Annex 8 pursuant to Articles 33 and 37 of the Chicago Convention. As we have emphasized, the Administrator at no time questioned the foreign governments' compliance with the minimum standards of airworthiness. . . .

The government further argues that a provision of the various bilateral aviation agreements authorized the FAA Administrator to take emergency action banning landings and take-offs in the United States by foreign-registered DC-10s. The standard form of bilateral air transport agreement used by the United States provides in Article 4 as follows:

1. Each Party may revoke, suspend or limit the operating authorizations or technical permissions of an airline designated by the other Party where:
   a) substantial ownership and effective control of that airline are not vested in the other Party or the other Party's nationals;
   b) that airline has failed to comply with the laws and regulations referred to in Article 5 of this Agreement (Application of Laws); or
   c) the other Party is not maintaining and administering the Standards as set forth in Article 6 . . . (Safety and Airworthiness).
2. Unless immediate action is essential to prevent further non-compliance with subparagraphs (1)(b) or (1)(c) of this Article, the rights established by this article shall be exercised only after consultation with the other Party. . . .

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We agree that this provision allows the United States to take immediate action, without consultations, if such action is necessary to prevent further non-compliance with U.S. laws and regulations (subparagraph (1)(b)) or with the applicable airworthiness standards (subparagraph (1)(c)). However this provision cannot help the Administrator here, for the reason that none of these alleged justifications for revoking, suspending or limiting operating authorizations was identified or relied on by the Administrator when he issued SFAR 40 or when he refused to recognize the foreign airlines' revalidated certificates of airworthiness. We recognize the diplomatic sensitivity of an allegation that a foreign nation has been derelict in complying with law or relevant standards; but if the government wishes to rely on the dereliction it

must grasp that nettle. . . .

The DC-10 aircraft was type-certificated in the United States according to Federal Aviation Administration regulations. 14 C.F.R. Part 25 (1979). On June 6, 1979, shortly before the issuance of SFAR 40, the FAA Administrator issued an Emergency Order of Suspension, which suspended the DC-10 type certificate. According to the government, as long as the U.S.-type certificate was suspended, the FAA could refuse to recognize foreign certificates of airworthiness, since those certificates were based on the U.S.-type certificate. . . .

Annex 8 of the Chicago Convention provides that a contracting state may recognize as valid an airworthiness certificate of a foreign contracting state if the foreign state issued the certificate on the basis of satisfactory evidence that the aircraft is in compliance with appropriate airworthiness requirements, that is, a comprehensive and detailed national airworthiness code that is consistent with the standards of Annex 8. Annex 8 includes requirements relating to the design, construction, material, specifications, and performance for safe operation. Id. Specifically, Part II, sections 3.1, .2, and .3, require an "approved design" consisting of drawings, specifications, reports and other appropriate documentation, inspections during construction, and flight testing to show compliance with the applicable airworthiness requirements. Id. When a certificate of airworthiness is based upon such satisfactory evidence, Annex 8 permits a subsequent state of registry to rely on this original certificate of airworthiness for the particular type of aircraft as "satisfactory evidence" upon which it can predicate its own certificate of airworthiness. If the original or "type" certificate is suspended, then, according to the government, the "satisfactory evidence" upon which subsequent certificates of airworthiness were issued by foreign nations no longer exists, and the certificates need not be recognized as valid. We express no opinion as to the validity of this argument. It is enough to say that the record does not show that the foreign nations which issued certificates of airworthiness to the petitioners based those certificates on the U.S.-type certificate for the DC-10. Indeed, the British Civil Aviation Authority expressly stated that in re-issuing its certificates of airworthiness, it "took account of FAA type certification as a useful basis, but called for additional substantiation in a number of areas, including fail safe and fatigue and made use of Douglas fatigue test information not required by FAA in their evaluation." The FAA has characterized this type of independent determination of airworthiness as "considerably risky." We believe however that the multilateral and bilateral agreements intend the states of registry to resolve questions of safety and continuing airworthiness that may arise after the original airworthiness and type certificates were issued. Therefore, we reject this justification for the Administrator's action in issuing SFAR 40 and in refusing to recognize the re-issued certificates of airworthiness. . . .

For the foregoing reasons we conclude that the Administrator's action in issuing SFAR 40 violated various multilateral and bilateral civil aviation agreements, which in turn violated section 1502 of the Federal Aviation Act of 1958. Accordingly, that action must be set aside under 49 U.S.C. § 1486(d) (1976).

B. AIR NEW ZEALAND v. DIRECTOR OF CIVIL AVIATION

New Zealand High Court
Auckland

[2002] 3 NZLR 796

BARAGWANATH, J.

This case raises an important question of the practical and principled operation of the International Convention on Civil Aviation 1944, known as the Chicago Convention (the convention), as it is expressed in the domestic law of New Zealand by the Civil Aviation Act 1990. The international authorities conflict.

Air New Zealand seeks an order requiring the New Zealand Director of Civil Aviation to register on the New Zealand register a Fokker 27-500 aircraft which has been physically in New Zealand for nearly six years although it remains registered on the Indian register. The High Court of New Zealand . . . has declared that the owner of the aircraft is Air Wisconsin, a subsidiary of the international carrier, United Airlines, and that Air New Zealand is entitled to a lien over the aircraft for the sum of $810,410.63 plus interest. Air Wisconsin supports Air New Zealand's claim. The Director resists the claim on the grounds that he is prohibited from registering the aircraft by § 6(2) of the (New Zealand) Civil Aviation Act 1990 which provides:

> (2) No aircraft shall be registered in . . . New Zealand if it is registered in any other country.

Air New Zealand contends that the continued Indian registration is contrary to the law of India and should be disregarded, as being a nullity. The Director responds that this Court neither has, nor should purport to exercise, jurisdiction to review what is in law an Act of State of the Indian Government which is immune from consideration by the Courts of New Zealand. . . .

The fundamental question is whether a New Zealand Court has any authority to assume jurisdiction to examine the operation in India of the activities of that sovereign state and whether to do so would infringe basic precepts of international law. There is usually very good reason for Courts of one state to exercise great care when invited to adjudicate in a manner touching upon the function of the Executive of another state. The authorities employ a range of concepts, variously termed and sometimes overlapping, including state immunity, non-justiciability, Act of State and judicial abstention. In *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at p 422 Lord Denning adopted the statement of Sir Robert Phillimore in *The Charkieh* (1873) LR 4 A & E 59, 97:

> " 'The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign State.' Applying this principle, it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. Not on whether 'conflicting

rights have to be decided', but on the nature of the conflict. Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: . . . ."

Professor Malcolm Shaw has observed (Malcolm N Shaw, *International Law* (4th ed), p 129):

> "[t]he concept of non-justiciability applies with regard to . . . foreign executive acts."

[S]imilar policy is to be found in the US, notably in the decision of the Supreme Court in *Banco Nacional De Cuba v Sabbatino* 376 US 398 (1964) which concerned Cuban retaliatory appropriation of assets of US citizens. In holding that the lawfulness of this expropriation could not be examined in the US Courts, Harman J traced the American Act of State doctrine back to an English case of 1674, *Blad v Bamfield* (1674) 3 Swans 604. He cited as the leading US statement of principle *Underhill v Hernandez* 168 US 250 (1897) at p 252 per Fuller CJ:

> "Every sovereign State is bound to respect the independence of every other sovereign State. . . . Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." . . .

The high water mark of Air New Zealand's case is the evidence of its expert as to the law of India, Mr Mitter, who presciently stated:

> "In a situation where there is no cooperation from the old owner or a legal contest by the old owner, the DGCA is likely to require a court of law to declare the ownership of the aircraft. This stand of the DGCA would be in conformity with the declared policy of the Central Government which is stated in the CAR Notification . . . . Notwithstanding the validity of the judgement of a foreign court of law, in this regard, the DGCA could well ask the new owner to obtain an identical judgement from an Indian Court of Law." . . . "It is well known that courts in India are overburdened and a matter of this nature could take up to 3 - 4 years to be decided."

But the consequences of resource difficulty in processing cases, within a legal system whose Judges are internationally respected, come nowhere near the kind of evidence of gross breach of international law norms that under current doctrine is required in order to override the application of the Act of State principle as a matter of the public policy of the Court of the forum. In the US Federal cases I respectfully prefer the dissenting judgments, which recognise the principle of international comity underlying the Act of State doctrine, to the majority opinions.

In the current state of New Zealand statute law, to allow the present application would . . . cross the boundary between interpretation and amendment of legislation by departing substantially from a fundamental feature of the Civil Aviation Act with important practical repercussions which the Court is not equipped to evaluate. Any change that could accommodate Air New

Zealand's claim is in my opinion one to be made by Parliament, which would be unlikely to do so except in conjunction with the other States members of the International Civil Aviation Organization.

Moreover Air New Zealand's pleaded claim to a mandatory order against the Director faces very powerful policy arguments against change of the current law which are fatal to such argument in the present case. For the New Zealand Court to order the entry of the aircraft on the New Zealand register would give rise to conflicting registrations in two sovereign states, contrary to the scheme of the convention that there should be single registration. The result would be chaotic. Which state's certificate of airworthiness would be carried by the aircraft in terms of arts 29(b) and 31 of the convention? Which state would provide the certificate of airworthiness and licences of personnel required by arts 31 and 32?

It is likely that in the future means will be found to enable the Courts of one state to act in concert with those of another; there is an emerging doctrine of cooperation among judiciaries in transnational matters. While states are rightly protective of their own independence and the legitimacy of their government, which in most cases will enjoy the legitimacy of the democratically expressed will of its people, there is increasing recognition of the need for states to act in aid of one another in respect of cross-border transactions . . . .

[W]hatever may occur in the future, as current law and convention stand, to accept jurisdiction, even for the limited purpose of making an interim declaration as to the New Zealand situation with a view to assisting the Indian Courts, would go beyond the authority of the New Zealand Court and trespass upon the territory both of the New Zealand Executive, which is responsible for our dealings with other states, and that of the sovereign State of India. The present case must be determined under the current law, which includes the Act of State doctrine. Whatever other avenues may exist, no relief is available from this Court.

For these reasons the application fails and is dismissed. Costs are reserved.

C. R v. SECRETARY OF STATE FOR TRANSPORT

United Kingdom Queen's Bench Division (Crown Office List)

[1989] 2 All ER 481, [1988] 1 WLR 990

SCHIEMANN J.

Pegasus Holidays (London) Ltd are travel operators. They are in the business of arranging holidays for people going abroad from this country. They made arrangements for their clients to travel on chartered Romanian aeroplanes flown by Romanian pilots. This is only possible under our law if they have a permit from the Secretary of State for Transport. They have such a permit. It came to the ears of the Secretary of State, after this permit had been operating for a while, that five of the Romanian pilots who were flying in this country (in part under permit and in part under other similar permits) had failed a test which they had voluntarily undertaken which is conducted by the Civil Aviation Authority (the CAA) to test the competence of pilots. When the Secretary of State

heard this, he provisionally suspended the permit that he had given, causing of course a fair amount of chaos to the holiday-makers who were on the point of leaving to go to their destinations because the plane could not fly, the permit having been suspended. It is the suspension of that permit which is under attack in these proceedings for judicial review . . . .

The decision to suspend is under attack on three grounds: the first one is unfairness; the second is irrationality; and the third is non-compliance with the Chicago Convention [of] 1944 . . . .

The parts of the convention on which counsel for the applicants relies are essentially arts 32 and 33. Article 32(a), headed 'Licences of personnel' . . . .

In essence counsel says that it would be contrary to the convention for a state to impose a system of double checking on the competence of pilots of a certain nationality as a condition of permitting flights. This he says would be discrimination contrary to the terms of art 11 of the convention and contrary to the purposes of the convention [which prohibits discrimination as to nationality] . . . .

The submission by counsel for the applicants is that by his decision and subsequent statements the Secretary of State is calling into question and refusing to recognise the validity of Romanian crew licences and that this can be the only explanation of the total ban on Romanian pilots which in substance is the result of the temporary revocation.

In reply to that, on the face of it, forceful submission, counsel for the Secretary of State makes a number of points, the first one of which was that the Romanians themselves have not complained. I am not impressed by that because it is clear from the correspondence that in any event the Romanians are not happy with it and that they are concerned. Indeed, we have been told that they are flying over to London to try and sort the matter out on Monday. A more impressive point is that it is legitimate for the Secretary of State to draw a provisional inference that all Romanian pilots are not competent because he has seen that such of them as have taken the test have failed it in one respect or another. I emphasise that we are dealing here with a provisional inference made on very limited information for a very short period of time. Counsel says that the Secretary of State had to act in a hurry. I am not very much impressed by that, although of course one has considerable sympathy with the Secretary of State. It would not give him powers which he otherwise did not have, so one has to see whether or not he has those powers. Is there anything in art 33 which prevents him from exercising the power of provisional suspension which he has purported to exercise? It is clear from art 33 in its proviso that in relation to any particular pilot or any particular certificate or licence, power is foreseen in the convention for the appropriate authority, which in this case is the Secretary of State, to see whether a particular requirement, under which certificates or licences were issued, is up to the appropriate standard. . . .

The real complaint that counsel for the applicants has is that in effect all Romanian pilots are being blacked in this way. It is a forceful submission, but, in my judgment, it is wrong and for this reason, that what has been suspended in the present case is a licence under which any Romanian pilot was entitled to fly. It was reasonable, in my judgment, to suspend the licence to fly in the case of the pilots who had failed the test and since the licence that was being suspended

applied to all Romanian pilots, the only way that licence could be dealt with was by suspending it in its totality. . . .

I remind myself that I am dealing here with a provisional action on behalf of the Secretary of State and I do not see anything in the convention which prevents him from taking this provisional action in these particular circumstances. Whether he is entitled to go further and take a more permanent form of action it is not for me to say, but I have given some indication, which I hope will be of help to the parties of my view as to the relevance of the convention.

For the reasons which I have given, this challenge fails. In consequence I have not had to consider the arguments on discretion and I say nothing in this judgment about them.

Application dismissed.

D. HONDURAS AIRCRAFT REGISTRY, Ltd. v. GOVERNMENT OF HONDURAS

129 F.3d 543 (11th Cir. 1997)

WOOD, Jr., J.

At first glance one may wonder how plaintiffs, a Honduran corporation and its subsidiary, a Bahamian corporation, can bring a suit against the defendants Government of Honduras and Director General [of Civil Aeronautics] Chirinos (collectively, "Honduras") in the Southern District of Florida. In fact, that is the issue we must decide in this case. Honduras filed a motion to dismiss, claiming immunity under the Foreign Sovereign Immunities Act ("FSIA") and on other grounds. The district court denied defendants' motion to dismiss and ordered the case to proceed. . . . Honduras appeals. . . .

Plaintiff Honduras Aircraft Registry, Ltd., is a Honduran subsidiary corporation, fifty-one percent of which is owned by Hondurans. Plaintiff Honduras Aircraft Registry Bureau, Ltd., a Bahamian parent corporation, owns the remainder. The subsidiary company was incorporated in Honduras in May 1992. Two Miami-based businessmen with airline knowledge, one of whom had Honduran contacts, established these two closely related corporations to facilitate negotiating with Honduran officials the contract at issue in this appeal. . . .

The negotiations resulted in a contract . . . [that] provided that the Government of Honduras would upgrade and modernize the Honduran civil aeronautics program to comply with international aviation laws, and that the plaintiff companies would provide goods and services to aid Honduras in achieving this goal. . . .

Under the Chicago Convention of the International Civil Aviation Organization (ICAO), to which Honduras and the United States are both signatories, nations may delegate to private entities the authority to issue Certificates of Airworthiness on behalf of the authorizing government. Those private entities . . . known as Designated Airworthiness Representatives ("DAR"). To fulfill the contract at issue here, plaintiff companies recruited DARs in the United States, Kenya, Switzerland, South Africa and the United Kingdom. Plaintiffs also provided the equipment and economic assistance to inspect planes

outside Honduras.

In 1994, the leadership of Honduras changed. In August of that year Honduras, without prior notice to plaintiff companies, abrogated the contract. . . . The plaintiff companies claim they fully performed under the contract during its existence, but allege that Honduras breached the contract and was unjustly enriched because it did not pay plaintiffs for the goods and services that they had already furnished under the contract. Plaintiffs also allege that [DG] Chirinos tortiously interfered with plaintiffs' business relationships by advising third parties that the aircraft already registered by plaintiffs' efforts were not properly registered and that the contract with plaintiffs was unlawful. The plaintiffs claim this interference caused the grounding of a minimum of twenty aircraft that they had previously processed, and they seek damages in excess of one million dollars. . . .

The FSIA regulates subject matter jurisdiction and provides the only basis for courts in this country to acquire jurisdiction over a foreign state. It provides that a foreign state is immune from the jurisdiction of the United States unless an FSIA statutory exemption is applicable. . . . The only statutory exemption to foreign sovereign immunity at issue in this case is the commercial activity exemption at *28 U.S.C. § 1605(a)(2)*. It provides that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-- . . .
>
> > (2) in which the action is based upon a commercial activity carried on in the United. States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

28 U.S.C. § 1605(a)(2). The statute defines a "commercial activity" as:

> Either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). Honduras claims the commercial exemption does not apply because plaintiff companies' causes of action are based upon the sovereign acts, not commercial acts, of Honduras. For sovereign acts the defendants presumptively enjoy immunity. . . .

The Supreme Court explained the FSIA statutory definition of commercial activity in [*Saudi Arabia v. Nelson,* 507 U.S. 349 (1993)] when it noted that a state engages in commercial activity "where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns. Put differently, a foreign state engages in commercial activity . . . only where it acts in the manner of a private player within the market." . . . . Honduras argues that the inspection and registration of aircraft are powers peculiar to sovereigns, as private persons cannot grant airworthiness certificates and register aircraft. . . .

Only Honduras could actually admit aircraft to its registry--that is a part

of sovereignty upon which others may not encroach. But this case involves more than the exercise of that sovereign right. Apparently Honduras did not have the resources or the technical expertise to conduct its own aircraft inspections or to set up a registry. Its civil air program needed people with the know-how, ability and the economic resources to establish a data bank, write regulations, train government people, and do and provide the other things needed to register, inspect and certify aircraft. Honduras therefore ventured into the marketplace to find the expertise and resources needed to accomplish those tasks. All of those underlying activities were commercial in nature and of the type negotiable among private parties. After receiving the plaintiff companies' proposal, Honduras first directed that one of the companies be incorporated in Honduras, and it then contracted with the plaintiffs for certain goods, services, and other economic assistance to support its new civil air program. Contracting with the plaintiff companies was, in context, an easy way for Honduras to not only upgrade and expand its civil air program even outside Honduras, but also to derive a profit in the process. By hiring the plaintiffs, Honduras overcame its own economic and expertise deficiencies. Honduras could have stayed out of the marketplace by keeping this project all under the sovereignty umbrella. It could have explored the possibility of hiring plaintiffs and plaintiffs' personnel as government employees. Instead, however, Honduras exercised its business judgment and contracted in the marketplace with non-government companies to do and supply what it needed. Without plaintiff companies' private help Honduras likely would not have had a new aircraft inspection and certification service.

The foregoing discussion serves only to clarify and put in context why and how the parties came to the contract. The FSIA limits what we may consider in determining whether an activity is commercial in character. Only the "nature" of the act, not the "purpose" or "motivation" for the act, is determinative. For example, in ascertaining whether the FSIA commercial exception applies, it is irrelevant that Honduras may have had a possible profit motive or that Honduras may have intended only to fulfill its unique sovereign objectives. . . .

Within those limitations, therefore, we must determine whether the FSIA commercial exception applies. It is undisputed that a foreign sovereignty is "absolutely immune" from the jurisdiction of foreign courts for its sovereign and public acts. *See Restatement (Third) of the Foreign Relations Law of the United States § 451* (1987). A foreign state loses its immunity if it engages in commercial activity, however, because then it is exercising the same powers that a private citizen might exercise. . . . That is, a foreign state is commercially engaged when it acts like an ordinary private person, not like a sovereign, in the market.

The plaintiff companies state that this is exactly what Honduras did--it entered the marketplace to shop for goods and services in connection with setting up the desired new civil aviation program. Honduras disagrees, and argues that it would be impossible for a private person to contract with another private person to establish a government aircraft registry. Private entrepreneurs could not register aircraft under their own "private flag" as Honduras can under the Honduran flag. It is not disputed that sovereign states have sovereign rights not only over their physical territory, but also in the airspace above. We agree that actually registering aircraft under the Honduras flag is an act peculiar to its

sovereignty and cannot fall within the FSIA commercial activity exception. Plaintiffs, however, are not contending that the contract gave them the right to register aircraft, and they are not bringing this lawsuit to obtain that right. Instead, they contracted to provide goods and services to Honduras in connection with its expanded civil air program by inspecting and certifying aircraft airworthiness so that Honduras would be able to appropriately register the aircraft under its flag. They merely seek to enforce that contract.

The complicated part about this particular contract, though, is that it involves both commercial rights and Honduras' sovereign right to register aircraft. If possible, we must attempt to determine if these two distinct rights are separable. Honduras cannot plausibly argue that purchasing such things as office equipment, manuals, training, personnel, promotional and similar services, and being supplied even financial help, are exclusively sovereign tasks and that Honduras may thus escape its contractual duty to pay for them. [The contract acknowledges it] was for "technical assistance." . . . [T]he agreement does not give plaintiffs the sovereign right to register aircraft under the Honduran flag. It provides only that plaintiffs would provide the means and do the technical work so that Honduras itself could then register the aircraft in accordance with the contract. Any party, sovereign or not, could contract for those goods and services. When Honduras commercially entered the market it did so as a private player to secure certain technical assistance and whatever else it needed to upgrade and expand its civil air program. Honduras did not enter the technical assistance market to regulate that market as a sovereign, but to participate in it as an individual could. The *Weltover* court in making that distinction contrasted a government's regulation of the currency market with a government's contract "to buy army boots or even bullets" for its army which the court labeled commercial activity. *See* [*Republic of Argentina v. Weltover,* 504 U.S.607, 614 (1992)] That same distinction applies to the present case. . . .

Honduras seeks in the alternative to have the case dismissed under the act of state doctrine. . . . The act of state doctrine limits, for prudential rather than jurisdictional reasons, the courts in this country from inquiring into the validity of a recognized foreign sovereign's public acts committed within its own territory. . . . [U]nderlying the doctrine are "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign affairs." . . . Accepting jurisdiction of this issue, our standard of review is different from that applied under the FSIA in the denial of the motion to dismiss. More is involved than accepting what the complaint alleges as true. The act of state doctrine does not limit courts' jurisdiction as the FSIA does, but it is flexibly designed to avoid judicial action in sensitive areas. . . .

The district court found Honduras' act of state doctrine argument to be without merit. The court discussed some of the underlying principles of the doctrine, but its reason for finding the doctrine inapplicable appears to be that this case involves a perceived commercial exception to the doctrine as under the FSIA. However, there is no commercial exception to the act of state doctrine as there is under the FSIA. The factors to be considered . . . may sometimes overlap with the FSIA commercial exception, but a commercial exception alone is not enough. The district court may have been correct in holding the doctrine was no

bar to this case, but whatever the result may be it must be reached only after consideration of the pertinent factors. On this issue, therefore, we must vacate the result reached and remand to the district court for further consideration under the controlling factors mentioned above. . . .

The district court's decision as to the application of the FSIA is AFFIRMED, as to the act of state doctrine it is VACATED and REMANDED for further consideration, and the appeal as to forum non conveniens is DISMISSED without prejudice.

E. THE CONVENTION ON INTERNATIONAL CIVIL AVIATION: ANNEXES RELEVANT TO SAFETY

(Adapted from the summary prepared by the International Civil Aviation Organization)

1. ANNEX 1: PERSONNEL LICENSING

As long as air travel cannot do without pilots and other air and ground personnel, their competence, skills and training will remain the essential guarantee for efficient and safe operations. Adequate personnel training and licensing also instill confidence between States, leading to international recognition and acceptance of personnel qualifications and licences and greater trust in aviation on the part of the traveller.

Standards and Recommended Practices for the licensing of flight crew members (pilots, flight engineers and flight navigators), air traffic controllers, aeronautical station operators, maintenance technicians and flight dispatchers , are provided by Annex 1 to the Convention on International Civil Aviation. Related training manuals provide guidance to States for the scope and depth of training curricula which will ensure that the confidence in safe air navigation, as intended by the Convention and Annex 1, is maintained. These training manuals also provide guidance for the training of other aviation personnel such as aerodrome emergency crews, flight operations officers, radio operators and individuals involved in other related disciplines.

Today's aircraft operations are so diverse and complex that protection must be provided against the possibility, however remote, of total system breakdown due to either human error or failure of a system component. The human being is the vital link in the chain of aircraft operations but is also by nature the most flexible and variable. Proper training is necessary so as to minimize human error and provide able, skilful, proficient and competent personnel.

Annex 1 and ICAO training manuals describe the skills necessary to build proficiency at various jobs, thereby contributing to occupational competency. The medical standards of the Annex, in requiring periodic health examinations, serve as an early warning for possible incapacitating medical conditions and contribute to the general health of flight crews and controllers.

The Human Factors programme addresses known human capabilities and limitations, providing States with basic information on this vital subject as well as the material necessary to design proper training programmes. ICAO's objective is to improve safety in aviation by making States more aware of, and responsive to, the importance of human factors in civil aviation operations.

Licensing is the act of authorizing defined activities which should otherwise be prohibited due to the potentially serious results of such activities being performed improperly. An applicant for a licence must meet certain stated requirements proportional to the complexities of the task to be performed. The licensing examination serves as a regular test of physical fitness and performance ensuring independent control. As such, training and licensing together are critical for the achievement of overall competency.

One of ICAO's main tasks in the field of personnel licensing is to foster the resolution of differences in licensing requirements and to ensure that international licensing standards are kept in line with current practices and probable future developments. This is ever more crucial as the flight crew will be exposed to increasing traffic density and airspace congestion, highly complicated terminal area patterns and more sophisticated equipment. To accomplish this task, Annex I is regularly amended to reflect the rapidly changing environment.

2. ANNEX 7: AIRCRAFT NATIONALITY AND REGISTRATION MARKS

How are aircraft classified and identified, and how can you tell aircraft nationality?

These are but two of the questions answered in the briefest ICAO Annex, which deals with aircraft nationality and registration marks, and, in a separate table, classifies aircraft by how they maintain sustained flight in the air.

The Annex is based on Articles 17 to 20 of the Chicago Convention. The ICAO Council adopted the first Standards concerning this issue in February 1949, based on recommendations from the first and second sessions of the Airworthiness Division, held in 1946 and 1947 respectively. Since then only four amendments have been made to the Annex. The latest edition is the fifth one, issued in 2003.

The first amendment introduced the definition of a "rotorcraft", and modified requirements related to the location of nationality and registration marks on wings. The second amendment redefined the word "aircraft", the use of which became effective in 1968; it also implemented a decision that all air-cushion-type vehicles, such as hovercraft and other ground-effect machines, should not be classified as aircraft.

Since Article 77 of the Convention permits joint operating organizations, Amendment 3 was introduced to define "Common Mark", "Common Mark Registering Authority" and "International Operating Agency", to enable aircraft of international operating agencies to be registered on other than a national basis. The determining principle of the related provisions is that each international operating agency must be assigned a distinctive common mark by ICAO, this being selected from a series of symbols included in the radio call signs allocated by the International Telecommunication Union (ITU).

The fourth amendment, adopted in 1981, introduces provisions related to registration and nationality marks for unmanned free balloons.

The fifth amendment, adopted in 2003, introduces a new requirement for the Certificate of Registration to carry an English translation if issued in a language other than English.

The Annex sets out procedures for selection by ICAO Contracting States

of nationality marks from the nationality symbols included in the radio call signs allocated to the States of Registry by the ITU.

It sets standards for the use of letters, numbers and other graphic symbols to be used in the nationality and registration marks, and spells out where these characters will be located on different types of airborne vehicles, such as lighter-than-air aircraft and heavier-than-air aircraft.

This Annex also calls for the registration of the aircraft, and provides a sample of this certificate for use by ICAO Contracting States. This certificate must be carried in the aircraft at all times, and an identification plate, bearing at least the aircraft's nationality, or common mark and registration mark, must be affixed in a prominent position to the main entrance.

Years of considerable effort permit the classification of aircraft to be as simple as possible, and yet encompass as many types of flying machines as the human mind can devise.

3. ANNEX 8: AIRWORTHINESS OF AIRCRAFT

In the interest of safety, an aircraft must be designed, constructed and operated in compliance with the appropriate airworthiness requirements of the State of Registry of the aircraft. Consequently, the aircraft is issued with a Certificate of Airworthiness declaring that the aircraft is fit to fly.

To facilitate the import and export of aircraft, as well as the exchange of aircraft for lease, charter or interchange, and to facilitate operations of aircraft in international air navigation, Article 33 of the Convention on International Civil Aviation places the burden on the State of Registry to recognize and render valid an airworthiness certificate issued by another Contracting State, subject to the condition that the airworthiness requirements under which such a certificate is issued or rendered valid are equal to or above the minimum standards which may be established by ICAO from time to time pursuant to the Convention. These minimum standards are contained in Annex 8, the first edition of which was adopted by the Council on 1 March 1949.

Annex 8 includes broad standards which define, for application by the national airworthiness authorities, the minimum basis for the recognition by States of Certificates of Airworthiness for the purpose of flight of aircraft of other States into and over their territories, thereby achieving, among other things, protection of other aircraft, third parties and property. It is recognized that ICAO Standards would not replace national regulations and that national codes of airworthiness containing the full scope and extent of detail considered necessary by individual States would be required as the basis for the certification of individual aircraft. Each State is free to develop its own comprehensive and detailed code of airworthiness or to select, adopt or accept a comprehensive and detailed code established by another Contracting State. The level of airworthiness required to be maintained by a national code is indicated by the broad standards of Annex 8 supplemented, where necessary, by guidance material provided in ICAO's Airworthiness Technical Manual (Doc 9760).

Annex 8 is divided into four parts. Part I includes definitions; Part II deals with procedures for certification and continuing airworthiness of aircraft; Part III includes technical requirements for the certification of new large aeroplane

designs; Part IV deals with helicopters.

One of the supporting clauses in the definitions used in the Annex defines the environment in which an aircraft is expected to perform as "anticipated operating conditions". These are conditions which are known from experience or which can be reasonably envisaged to occur during the operational life of the aircraft, taking into account the operations for which the aircraft is made eligible. They also include conditions relative to the weather, terrain surrounding the aerodromes from which the aircraft is expected to operate, functioning of the aircraft, efficiency of personnel and other factors affecting safety in flight. Anticipated operating conditions do not include those extremes which can be effectively avoided by operating procedures and those extremes which occur so infrequently that higher levels of airworthiness to meet them would render aircraft operations impracticable.

Under the provisions related to continuing airworthiness of aircraft, the State of Registry must inform the State of Design when it first enters in its register an aircraft of the type certified by the latter. This is to enable the State of Design to transmit to the State of Registry any generally applicable information it has found necessary for the continuing airworthiness and for the safe operation of the aircraft. The State of Registry must also transmit to the State of Design all continuing airworthiness information originated by it for transmission, as necessary, to other Contracting States known to have on their registers the same type of aircraft.

To assist States in establishing contact with appropriate national airworthiness authorities, necessary information has been provided in an ICAO circular (Circ 95) which is available on the ICAO-Net.

The technical standards dealing with certification of aeroplanes are limited at present to multi-engined aeroplanes of over 5700 kg maximum certificated takeoff mass. These standards include requirements related to performance, flying qualities, structural design and construction, engine and propeller design and installation, systems and equipment design and installation, and operating limitations including procedures and general information to be provided in the aeroplane flight manual, crash worthiness of aircraft and cabin safety, operating environment and human factors and security in aircraft design.

The performance standards require that the aeroplane shall be capable of accomplishing the minimum performance specified in the Annex at all phases of flight, in the event that the critical power-unit has failed and the remaining power-units are operated within their take-off power limitations, be capable of safely continuing or abandoning its take-off. After the initial take-off phase, the aeroplane must be capable of continuing climb up to a height at which the aeroplane can continue safe flight and landing, while the remaining power-units are operating within their continuous power limitations.

The aeroplane must be controllable and stable under all anticipated operating conditions without exceptional skill, alertness or Strength on the part of the pilot, even in the event of failure of any power-unit. Furthermore, the stall characteristics of the aeroplane must be such as to give the pilot clear warning, and it should be possible for the pilot to maintain full control of the aeroplane without altering engine power.

Requirements for detailed design and construction provide for a reasonable assurance that all aeroplane parts will function reliably and effectively. Functioning of all moving parts essential to safe operation must be demonstrated by suitable tests, and all materials used must conform to approved specifications. Methods of fabrication and assembly must produce a consistently sound structure which must be protected against deterioration or loss of strength due to weathering, corrosion, abrasion or other causes, which could pass unnoticed. Means must be provided which will automatically prevent emergencies or enable the crew to deal with them effectively, and design should minimize the possibility of in-flight fires, cabin depressurization and toxic gases in the aeroplane and the aircraft against lightning and static electricity.

Special consideration is given to requirements dealing with design features which affect the ability of the flight crew to maintain controlled flight. The layout of the flight crew compartment must be such as to minimize the possibility of incorrect operation of controls due to confusion, fatigue or interference. It should allow a sufficiently clear, extensive and undistorted field of vision for the safe operation of the aeroplane.

Aeroplane design features also provide for the safety, health and well being of occupants by providing an adequate cabin environment during the anticipated flight and ground and water operating conditions, the means for rapid and safe evacuation in emergency landings and the equipment necessary for the survival of the occupants following an emergency landing in the expected external environment for a reasonable time-span.

Requirements for the certification of engines and accessories are designed to ensure that they function reliably under the anticipated Operating conditions. An engine of the type must be tested to establish its power or thrust from characteristics, to ensure that operating parameters are satisfactory and to demonstrate adequate margins of freedom from detonation, surge or other detrimental conditions.

Tests must be of sufficient duration and must be conducted at such power and other operating conditions as are necessary to demonstrate the reliability and durability of the engine.

Following the recent events of hi-jacking and terrorist acts on board aircraft, special security features have been included in aircraft design to improve the protection of the aircraft. These include special features in aircraft systems, identification of a least-risk bomb location, and strengthening of the cockpit door, ceilings and floors of the cabin crew compartment.

4. ANNEX 12: SEARCH AND RESCUE

Search and rescue services are organized to respond to persons apparently in distress and in need of help. Prompted by the need to rapidly locate and rescue survivors of aircraft accidents, a set of internationally agreed Standards and Recommended Practices has been incorporated in ICAO's Annex 12 - Search and Rescue (SAR).

The Annex, which is complemented by a three-part Search and Rescue Manual dealing with SAR organization, management and procedures, sets forth the provisions for the establishment, maintenance and operation of search and

rescue services by ICAO Contracting States in their territories and over the high seas. Proposals for Annex 12 were originally made in 1946. By 1951, the proposals had been reviewed and revised to meet international civil aviation requirements, and were embodied as Standards and Recommended Practices in the first edition of Annex 12.

Containing five chapters, the Annex details the organization and cooperative principles appropriate to effective SAR operations, outlines required necessary preparatory measures and sets forth proper operating procedures for SAR services in actual emergencies. One of the first aspects addressed in the organizational chapter is the requirement for States to provide SAR services within their territories and over those portions of the high seas or areas of undetermined sovereignty as determined in Regional air navigation agreements and approved by the Council of ICAO. This chapter also deals with the establishment of mobile SAR units, the means of communication for these units and the designation of other elements of public or private services suitable for search and rescue activity.

Provisions concerning equipment requirements of rescue units reflect the need to give adequate assistance at the scene of accidents, due regard being given to the number of passengers involved. Cooperation between the SAR services of neighbouring States is essential to the efficient conduct of SAR operations.

This important aspect is covered in depth in Chapter 3, which requires ICAO Contracting States to publish and disseminate all information needed for the expeditious entry into their territories of rescue units of other States. It is also recommended that persons qualified in the conduct of aircraft accident investigation accompany rescue units in order to facilitate accident investigation.

Chapter 4, which deals with preparatory measures, sets forth the requirements for collation and publication of information needed by SAR services. It specifies that detailed plans of operation must be prepared for the conduct of SAR operations and indicates the necessary information for inclusion in the plans.

Preparatory measures required to be undertaken by rescue units, training requirements and removal of aircraft wreckage are also covered. A search and rescue operation is a dynamic activity requiring uniformly comprehensive operating procedures that are sufficiently flexible to meet extraordinary needs. Beginning with the requirement to identify and categorize the emergency situation, Chapter 5 details action to be taken for each category of event.

Three distinct phases categorize emergency situations. The first is the "Uncertainty Phase" which is commonly declared when radio contact has been lost with an aircraft and cannot be re-established or when an aircraft fails to arrive at its destination. During this phase the Rescue Coordination Centre (RCC) concerned may be activated. The RCC collects and evaluates reports and data pertaining to the subject aircraft. Depending on the situation, the uncertainty phase may develop into an "Alert Phase", at which time the RCC alerts appropriate SAR units and initiates further action.

The "Distress Phase" is declared when there is reasonable certainty that an aircraft is in distress. In this phase, the RCC is responsible for taking action to assist the aircraft and to determine its location as rapidly as possible. In

compliance with a predetermined set of procedures, the aircraft operator, State of Registry, air traffic services units concerned, adjacent RCCs and appropriate accident investigation authorities are informed; a plan for the conduct of the search and rescue operation is drawn up and its execution is coordinated.

Procedures are detailed in Chapter 5 for SAR operations involving two or more RCCs, for authorities in the field and for terminating or suspending SAR operations. Other procedures deal with actions to be taken at the scene of an accident and by a pilot-in-command intercepting a distress transmission.

An Appendix to the Annex provides three sets of signals, the first of which are signals for use by aircraft and surface craft during the conduct of a SAR operation. The second and third sets consist of ground-to-air visual signals for use by survivor and ground rescue units.

5. ANNEX 13: AIRCRAFT ACCIDENT AND INCIDENT INVESTIGATION

The causes of an aircraft accident or serious incident must be identified in order to prevent repeated occurrences. The identification of causal factors is best accomplished through a properly conducted investigation. To emphasize this point, Annex 13 states that the objective of the investigation of an accident or incident is prevention.

Annex 13 provides the international requirements for the investigation of aircraft accidents and incidents. It has been written in a way that can be understood by all participants in an investigation. As such, it serves as a reference document for people around the world who may be called on, often without any lead time, to deal with the many aspects involved in the investigation of an aircraft accident or serious incident. As an example, the Annex spells out which States may participate in an investigation, such as the States of Occurrence, Registry, Operator, Design and Manufacture. It also defines the rights and responsibilities of such States.

The ninth edition of Annex 13 consists of eight chapters, an appendix and four attachments. The first three chapters cover definitions, applicability and general information. Chapter 3 includes the protection of evidence and the responsibility of the State of Occurrence for the custody and removal of the aircraft. It also defines how that State must handle requests for participation in the investigation from other States.

All States that may be involved in an investigation must be promptly notified of the occurrence. Procedures for this notification process are contained in Chapter 4. The same chapter outlines the responsibilities for conducting an investigation depending on the location of the occurrence, e.g. in the territory of an ICAO Contracting State, in the territory of a non-contracting State, or outside the territory of any ICAO State. Following the formal notification of the investigation to the appropriate authorities, Chapter 5 addresses the investigation process.

Responsibility for an investigation belongs to the State in which the accident or incident occurred. That State usually conducts the investigation, but it may delegate all or part of the investigation to another State. If the occurrence takes place outside the territory of any State, the State of Registry has the responsibility to conduct the investigation.

States of Registry, Operator, Design and Manufacture who participate in an investigation are entitled to appoint an accredited representative to take part in the investigation. Advisers may also be appointed to assist accredited representatives. The State conducting the investigation may call on the best technical expertise available from any source to assist with the investigation.

The investigation process includes the gathering, recording and analysis of all relevant information; the determination of the causes; formulating appropriate safety recommendations and the completion of the final report.

Chapter 5 also includes provisions regarding: the investigator-in-charge, flight recorders, autopsy examinations, coordination with judicial authorities, informing aviation security authorities, disclosure of records, and re-opening of an investigation. States whose citizens have suffered fatalities in an accident are also entitled to appoint an expert to participate in the investigation.

Chapter 6 contains the Standards and recommended practices dealing with the development and publication of the final report of an investigation. The recommended format for the final report is contained in an Appendix to the Annex.

Computerized databases greatly facilitate the storing and analysing of information on accidents and incidents. The sharing of such safety information is regarded as vital to accident prevention. ICAO operates a computerized database known as the Accident/Incident Data Reporting (ADREP) system, which facilitates the exchange of safety information among Contracting States. Chapter 7 of Annex 13 addresses the reporting requirements of the ADREP system which is by means of Preliminary and Accident/Incident Data Reports.

Chapter 8 of Annex 13 deals with accident prevention measures. The provisions in this chapter cover incident reporting systems, both mandatory and voluntary, and the necessity for a non-punitive environment for the voluntary reporting of safety hazards. This chapter then addresses database systems and a means to analyse the safety data contained in such databases in order to determine any preventive actions required. Finally, it recommends that States promote the establishment of safety information sharing networks to facilitate the free exchange of information on actual and potential safety deficiencies. The processes outlined in this chapter form part of a safety management system aimed at reducing the number of accidents and serious incidents worldwide.

6. ANNEX 18: THE SAFE TRANSPORT OF DANGEROUS GOODS BY AIR

More than half of the cargo carried by all modes of transport in the world is dangerous cargo – explosive, corrosive, flammable, toxic and even radioactive. These dangerous goods are essential for a wide variety of global industrial, commercial, medical and research requirements and processes. Because of the advantages of air transport, a great deal of this dangerous cargo is carried by aircraft.

ICAO recognizes the importance of this type of cargo and has taken steps to ensure that such cargo can be carried safely. This has been done by adopting Annex 18, together with the associated document Technical Instructions for the Safe Transport of Dangerous Goods *by Air. Other codes have existed for regulating the carriage of dangerous goods by air, but these did not apply internationally or were*

difficult to enforce internationally and, moreover, were not compatible with the corresponding rules of other transport modes.

Annex 18 specifies the broad Standards and Recommended Practices to be followed to enable dangerous goods to be carried safely.
The Annex contains fairly stable material requiring only infrequent amendment using the normal Annex amendment process. The Annex also makes binding upon Contracting States the provisions of the Technical Instructions, which contain the very detailed and numerous instructions necessary for the correct handling of dangerous cargo. These require frequent updating as developments occur in the chemical, manufacturing and packaging industries, and a special procedure has been established by the Council to allow the Technical Instructions to be revised and reissued regularly to keep up with new products and advances in technology.

The ICAO requirements for dangerous goods have been largely developed by a panel of experts which was established in 1976. This panel continues to meet and recommends the necessary revisions to the Technical Instructions. As far as possible the Technical Instructions are kept aligned with the recommendations of the United Nations Committee of Experts on the Transport of Dangerous Goods and with the regulations of the International Atomic Energy Agency. The use of these common bases by all forms of transport allows cargo to be transferred safely and smoothly between air, sea, rail and road modes.

The ICAO requirements for the safe handling of dangerous goods firstly identify a limited list of those substances which are unsafe to carry in any circumstances and then show how other potentially dangerous articles or substances can be transported safely.

The nine hazard classes are those determined by the United Nations Committee of Experts and are used for all modes of transport.

Class 1 includes explosives of all kinds, such as sporting ammunition, fireworks and signal flares. Class 2 comprises compressed or liquefied gases which may also be toxic or flammable; examples are cylinders of oxygen and refrigerated liquid nitrogen. Class 3 substances are flammable liquids including gasoline, lacquers, paint thinners, etc. Class 4 covers flammable solids, spontaneously combustible materials and materials which, when in contact with water, exit flammable gases (examples are some powdered metals, cellulose type film and charcoal). Class 5 covers oxidizing material, including bromates, chlorates or nitrates; this class also covers organic peroxides which are both oxygen carriers and very combustible. Poisonous or toxic substances, such as pesticides, mercury compounds, etc., comprise Class 6, together with infectious substances which must sometimes be shipped for diagnostic or preventative purposes. Radioactive materials are in Class 7; these are mainly radioactive isotopes needed for medical or research purposes but are sometimes contained in manufactured articles such as heart pacemakers or smoke detectors. Corrosive substances which may be dangerous to human tissue or which pose a hazard to the structure of an aircraft are dealt with in Class 8 (for example, caustic soda, battery fluid, paint remover). Finally, Class 9 is a miscellaneous category for other materials which are potentially hazardous in air transport, such as magnetized materials which could affect the aircraft's navigational systems.

Annex 18 and the Technical Instructions became effective on 1 January 1983 and applicable on 1 January 1984 when all of the Contracting States of ICAO were expected to conform to the ICAO requirements and to give them legislative recognition.