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Compliance & Enforcement in International Law: Achieving Global Uniformity in Aviation Safety

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Compliance & Enforcement in International Law: Achieving Global Uniformity in Aviation Safety

Paul Stephen Dempsey*

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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. 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


\[\text{\textsuperscript{2}}\] 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.

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.\(^3\) This article addresses legal norms governing international aviation safety, as well as both unilateral and multilateral efforts to achieve state compliance with those international legal obligations.

Commercial international 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 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\(^4\) 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.\(^5\) 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

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\(^4\) As Professor Dr. Michael Milde observed, "[c]ivil aviation could not have evolved without world wide uniformity in regulations, standards and procedures in relation of air navigation." Milde, *supra* note 2, at 4.

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 community. Yet a passenger is ten times more likely to lose his life in an aviation safety-related accident than in an aviation terrorist event. 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.

All statistical evidence indicates that international aviation has become decidedly safer in recent decades. Though much of that positive result can be attributed to improvements in technology, much can also be attributed to improvements in the law. It is the latter subject that is the focus of this article.

This article will attempt to answer 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?


8 The Honorable L. Welch Pogue, U.S. delegate to the Chicago Conference of 1944 and Chairman of the U.S. Civil Aeronautics Board, observed that "safety should be the 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*, 20 ANNALS OF AIR & SPACE L. 35, 42 (1995).

9 Saba, *supra* note 7, at 655.
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?

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). This multilateral agreement created the International Civil Aviation Organization (ICAO) and gave it quasi-legislative authority to promulgate standards and recommended practices (SARPs) as Annexes to the Chicago Convention. These standards are arguably binding upon member states that fail to notify ICAO of the differences in their domestic law.

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11 ICAO is composed of 188 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 the safety of flight in international air navigation. See Assad Kotaite, Security of International Civil Aviation—Role of ICAO, 7 ANNALS OF AIR & SPACE L. 95 (1982) (discussing the role of ICAO in the international aviation community).

12 Abeyratne, supra note 1, at 146-47.

13 "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." Abeyrante, supra note 1, 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, The Role of the International Civil Aviation Organization, supra note 5, at 561.
Next, this article 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. Finally, this article will examine the propriety and efficacy of those activities under general theories of international relations and principles of international law.

II. The Development of International Aviation Safety Law

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. They realized that this brave new world would require multilaterally negotiated solutions to a growing number of political, economic and technical problems. In response to these concerns, the United States hosted an international conference in the hope that it would lay the foundation for the future growth of the industry.

Fifty-two nations attended the International Civil Aviation Conference in Chicago in November of 1944. The initial optimism for creating a comprehensive agreement covering all aspects of aviation, economic and technical, soon faded as economic and political rivalries emerged between a number of the conference's more prominent members, particularly the United States and the United Kingdom.

15 Id.
16 Id.
17 Id. Virtually all of the major civil aviation powers of the prewar era were represented. The Soviet Union was invited but declined to attend the Chicago Conference, presumably because the pro-fascist governments of Spain and Portugal were present. With World War II not yet over, the Axis nations (i.e., Germany, Italy, and Japan) were not invited. Id.
18 Id. at 62-69. See also McGILL CENTER FOR RESEARCH OF AIR & SPACE LAW, LEGAL, ECONOMIC AND SOCIO-POLITICAL IMPLICATIONS OF CANADIAN AIR TRANSPORT
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,\textsuperscript{19} it laid the foundation for the postwar establishment of the ICAO,\textsuperscript{20} headquartered in Montreal,\textsuperscript{21} and gave the organization jurisdiction over the many technical aspects of international civil aviation.\textsuperscript{22} Most of ICAO's work has been focused on aviation safety,

\textsuperscript{19} See \textsc{Sampson}, supra note 14, at 57.

The system, whereby all over the world scheduled international air services are performed on the basis of bilateral air transport agreements is a result of the failure of the 1944 Chicago Conference and the subsequent failure of P.I.C.A.O. and I.C.A.O. to agree upon a multilateral exchange of traffic rights for scheduled international air services. A multilateral agreement in the exchange of traffic rights was impossible in 1944 because of the widely divergent views of the two key aviation powers at the time, the U.S.A. and the U.K., on the economics of international air transport. The U.K. was then champion of a system of strict intergovernmental regulation of international air transport, whereas the U.S. advocated a system of free competition between international air carriers.

\textsc{McGill Center for Research of Air and Space Law}, supra, at 521-22.

\textsuperscript{20} \textsc{Andreas Lowenfied}, \textit{Aviation Law} § II-5 (1972). Today, IACO is a member of the United Nations' family of international organizations. \textit{id.}

\textsuperscript{21} \textit{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. \textit{Id.}

navigation, and security,\textsuperscript{23} though it also has been the forum for updating liability and other private law regimes in civil aviation.\textsuperscript{24}

Indeed, ICAO's principal objective is "ensuring the safety of

\textsuperscript{23} Chicago Convention, \textit{supra} note 10, Annex 17. Annex 17 is supplemented by the \textit{ICAO Security Manual for Safeguarding Civil Aviation Against Acts of Unlawful Interference} (ICAO Doc. 8973) (6\textsuperscript{th} ed. 2002) and its \textit{Strategic Action Plan}. Abeyrante, \textit{supra} note 1, at 121-130. In addition, several multilateral conventions have been drafted under ICAO auspices, including:


- 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, T.I.A.S. No. 7192, \textit{reprinted in} 10 I.L.M. 133 (1971), \textit{18 ANNALS OF AIR & SPACE L.} 201 (1993), and Dempsey, \textit{Law & Foreign Policy in International Aviation}, \textit{supra}, at 441.


For a review of the work ICAO has done in the area of security, see Dempsey, \textit{Aviation Security}, \textit{supra} note 6, at 688, and Paul Stephen Dempsey, \textit{Aerial Terrorism: Unilateral and Multilateral Responses to Aircraft Hijacking}, 2 \textit{CONN. J. INT'L L.} 427 (1987).

international civil aviation worldwide . . . . 25

Certain provisions of the Chicago Convention impose direct obligations upon member states and require no implementing legislation.26 According to the U.S. 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 Chicago 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.27

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.

---


27 British Caledonian Airways v. Bond, 665 F.2d 1153, 1161 (D.C. Cir. 1981). This case will be discussed in detail below.
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.\textsuperscript{28}

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

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.\textsuperscript{29} Article 37 of the Convention 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."\textsuperscript{30} The sentence that follows provides that, "[t]o this end [ICAO] shall adopt and amend from time to time... international standards and recommended practices and procedures" addressing various aspects of air navigation.\textsuperscript{31} Therefore, ICAO’s 188 member states have an affirmative obligation to conform their domestic laws, rules, and regulations to the international leveling

\textsuperscript{28} *Id.*

\textsuperscript{29} "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).

\textsuperscript{30} Chicago Convention, *supra* note 10, art. 37.

\textsuperscript{31} *Id.*
standards adopted by ICAO.\textsuperscript{32}

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..."\textsuperscript{33} ICAO has drafted its Annexes in a way to "facilitate incorporation, without major textual changes, into national legislation."\textsuperscript{34} Annex 1 (Personnel Licensing),\textsuperscript{35} Annex 6 (Operation of Aircraft),\textsuperscript{36} and Annex 8 (Airworthiness of Aircraft)\textsuperscript{37} require ICAO's 188 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.\textsuperscript{38} Subject to the notification of differences, the legal regime effectively assumes that states are in compliance with these safety mandates.\textsuperscript{39} Thus, although member states retain the right to restrict particular aircraft from their skies,\textsuperscript{40} they lose the right to ignore the safety mandates of the

\textsuperscript{32} Id.


\textsuperscript{34} Id.

\textsuperscript{35} Id.


\textsuperscript{38} Id.

\textsuperscript{39} However, Professor Buergenthal insists no such presumption is warranted. BURGENTHAL, supra note 29, at 67.

\textsuperscript{40} BIN CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT 3 (1962); see SAMPSON, supra note 14, 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.
governing international organization – ICAO.41 This assumption of universal compliance goes further with the Chicago Convention requirement that an airman or operator certificate, or certificate or airworthiness, issued by one contracting state shall be recognized as valid by all others.42

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.43 But this principle of mutual recognition works only if all states are implementing the SARP with an equal degree of diligence. Too often, it is too difficult or impossible to tell.44 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,"445 then other states are not obliged to recognize the validity of the certificates of airworthiness issued by the delinquent state, and may therefore ban such aircraft from their skies. This is an important incentive for compliance with the international obligations established by ICAO.

Milde, supra note 22, at 121-22.

41 See SAMPSON, supra note 14, at 69-70.

42 Chicago Convention, supra note 10, art. 33.

43 A similar provision was included in Article 13 to the Paris Convention of 1919, the predecessor of the Chicago Convention. U.S. 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).

44 As one scholar noted in 1995, "[v]ery 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, 20 ANNALS OF AIR & SPACE L. 307, 317 (1995). Dr. John Saba observed, "[m]any States still fail to remedy aviation safety deficiencies, often due to a lack of will, means, and/or ability to do so." Saba, supra note 7, at 544.

45 Chicago Convention, supra note 10, art. 33.
B. International Standards as Soft Law, or Hard Law?

The ICAO Council\textsuperscript{46} is mandated to adopt international standards and recommended practices (SARPs) on issues affecting the safety and efficiency of air navigation\textsuperscript{47} and, for convenience, designate them as Annexes to the Chicago Convention.\textsuperscript{48} Though designated as Annexes for convenience, the SARPs do not actually become part of the Convention.\textsuperscript{49} Thus, the question arises as to

\begin{itemize}
\item 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).
\item 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, \textit{supra} note 10, arts. 37, 54(l), 90.
\item Id. 54(l). The ICAO Council has adopted the following Annexes:
\begin{itemize}
\item Annex 1: Personnel Licensing
\item Annex 2: Rules of the Air
\item Annex 3: Meteorology
\item Annex 4: Aeronautical Charts
\item Annex 5: Units of Measurement to be Used in Air-Ground Communications
\item Annex 6: Operation of Aircraft, International Commercial Air Transport
\item Annex 7: Aircraft Nationality and Registration Marks
\item Annex 8: Airworthiness of Aircraft
\item Annex 9: Facilitation of International Air Transport
\item Annex 10: Aeronautical Telecommunication
\item Annex 11: Air Traffic Services
\item Annex 12: Search and Rescue
\item Annex 13: Aircraft Accident Inquiry
\item Annex 14: Aerodromes
\item Annex 15: Aeronautical Information Services
\item Annex 16: Environmental Protection
\item Annex 17: Security—Safeguarding International Civil Aviation Against Acts of Unlawful Interference
\item Annex 18: Safe Transport of Dangerous Goods by Air
\end{itemize}
\item 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, \textit{supra} note 10, art. 94. In contrast, the
\end{itemize}
whether SARPs are "soft law" or "hard law."

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 adopts regulations different therefrom "shall give immediate notification" to ICAO of the differences. The Council is then obliged to immediately notify other states of such noncompliance. 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. 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

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.

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.


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 note 10, art. 38.

Id.

Buergenthal, supra note 29, 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. at 76. Buergenthal 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. at 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 note 10, art. 38.
"impracticable to comply."\textsuperscript{54}

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.\textsuperscript{55} Typically, they are not issued until after extensive consultation with member states, and consensus is achieved, a process that sometimes takes years. 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 noncompliance is triggered by the date on which the SARPs becomes effective, or from the date on which they are notified of its adoption,\textsuperscript{56} it would seem a state would be bound if it failed to notify ICAO of the difference promptly, or in fact, \textit{immediately}. 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 – indeed, years or decades after a SARPs becomes effective. In practice, states are free to notify ICAO of impracticality of compliance with SARPs at any time, or indeed, not at all.\textsuperscript{57}

Moreover, Article 38 is curiously worded, for it 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. But why would a state have an open window \textit{ad infinitum} to opt out for any newly promulgated SARP, and only a sixty-day opt out period for any amendment thereto? It would have been cleaner draftsmanship and a far more meaningful notification requirement, had the Convention addressed the need for prompt notification after the SARPs promulgation, and that a state that failed to notify would

\textsuperscript{54} Chicago Convention, \textit{supra} note 10, art. 38. Milde, \textit{supra} note 2, at 5. However, to date no SARPs have ever been rejected by the ICAO General Assembly. \textit{Id.}

\textsuperscript{55} Chicago Convention, \textit{supra} note 10, art. 90(a).

\textsuperscript{56} \textit{Id.} art. 90(b).

\textsuperscript{57} \textit{Id.}
be deemed in compliance and bound thereby.

Putting together the requirements of Articles 37 and 38, a state has an affirmative duty to harmonize its domestic law with the SARPs.\(^5\) This duty is emasculated by the ability of a state to opt-out if it deems it impracticable to comply.\(^6\) 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.\(^6\) And 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 signatory states reserve complete and exclusive sovereignty over the airspace above their territories.\(^6\) Article 37 gives ICAO the authority to promulgate Annexes to the Chicago Convention, and member states must comply with the Annex standards and procedures\(^6\) unless they promptly object under Article 38. Most do not exercise their right to object under Article 38, 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 so notify ICAO. 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,\(^6\) the overwhelming majority of states do neither.\(^6\)

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\(^5\) Id.

\(^6\) Id. arts. 37, 38.

\(^6\) Id.

\(^6\) 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 note 10. DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION, supra note 23, at 387. See Abeyrante, supra note 1, at 136.

\(^6\) See DEMPSEY, LAW AND FOREIGN POLICY IN INTERNATIONAL AVIATION, supra note 23, at 387; Abeyrante, supra note 1, at 136.

\(^6\) International Standards and Recommended Practices: Aeronautical Information
As we shall see below, the ICAO audit programs 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 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. There is no explicit sanction in the Convention for failing to notify.


64 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 note 1, at 131. Dr. Abeyratne concludes, "[i]t is impossible at the present time to indicate with any degree of accuracy the state of the implementation of regulatory Annex material." Id. at 132. ICAO attributes this failure to notify to four causes:

1. 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 in identification of, and routing to, the responsible party;
2. Insufficient resources within states to expeditiously consider and process ICAO documentation and to implement the relevant standards into their national legislation;
3. Difficulty in comprehending and interpreting Annex material as well as subject matter which is beyond the level of expertise of the recipient administration; and
4. Possible lack of understanding about the role of states in the consultation phase of the development of ICAO Standards.

Id. at 132-33. Dr. Abeyratne adds, "[m]ore 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. at 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).

65 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 note 10, 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, 20 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 note 29, at 99.

66 Chicago Convention Annex 15, supra note 63.
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. 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. Private sector insurance coverage for airlines and airports may be impossible to obtain. 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. Hence, whatever de jure "soft law" attributes SARPs may have, they appear to have corresponding de facto "hard law" attributes as well.

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." Hence, ICAO has law-making authority over 72% of the earth's surface.

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67 Id.
68 Id.
69 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?, 19 ANNALS OF AIR & SPACE L. 401, 426 (1994).
71 Chicago Convention, supra note 10, art. 12.
72 Id.
jurisdictional scope, which is unparalleled by any other international organization, in effect, this makes ICAO a paradigm of global governance.\textsuperscript{73}

C. Bilateral Requirements

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 between the two nations, and provided a mechanism for regulating rates.\textsuperscript{74} For four decades, Bermuda I was the template by which U.S. bilateral agreements were negotiated, and for a number of other nations as well.\textsuperscript{75}

Bermuda I also addressed various "soft rights" issues.\textsuperscript{76} One such issue addressed was safety. Bermuda I provides that the certificates of airworthiness, competency, and licenses issued by one contracting state shall be honored as valid by the other.\textsuperscript{77} Subsequent agreements have repeated, and elaborated on, this succinct clause.\textsuperscript{78}

A typical, modern "open skies" bilateral agreement is the U.S.-Singapore bilateral air transport agreement.\textsuperscript{79} It repeats Bermuda I's reciprocal recognition clause, but adds that such recognition is contingent on the requirements for such licensing or certification

\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} See Paul Stephen Dempsey, Turbulence in the 'Open Skies': The Deregulation of International Air Transport, 15 TRANSP. L.J. 305, 314-18 (1987), [hereinafter Dempsey, Turbulence in 'Open Skies']. 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.
\textsuperscript{77} Air Services Agreement, supra note 75, 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. Id.
\textsuperscript{78} Id.
\textsuperscript{79} Air Transport Agreement, Apr. 8, 1997, U.S.-Singapore, 3 CCH Avi. ¶ 26,495a.
are at least as stringent as those set forth in the Chicago Convention and its Annexes, echoing Article 33 of the Chicago Convention.\(^8\) It further provides that either state may request consultations concerning the aviation safety standards maintained by the other.\(^8\) 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.\(^8\) The state must then take appropriate corrective action.\(^8\) 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.\(^8\)

### III. Domestic Compliance with International Aviation Safety Requirements

#### A. To Comply, or Not to Comply: That is the Question

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.\(^8\)

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. Some states were too poor to establish comprehensive air navigation and safety agencies or, if established, to fund them sufficiently so that

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\(^8\) Id. arts. 1(d), 6(1).
\(^8\) Id.
\(^8\) Id.
\(^8\) Id.
\(^8\) Id. at art. 6(2).
\(^8\) Id. at art. 6(2).
\(^8\) Id. at art. 6(2).
\(^8\) Milde, supra note 69, at 425-26.
they could properly fulfill their mandate. Others had not promulgated laws and regulations to fulfill their obligations under the SARPs. In some states, civil aviation does not receive the attention governmental leaders accord other ministries and agencies deemed “more important.” Like many specialized United Nations agencies, ICAO possessed no enforcement power to sanction violators.

In 1992, the ICAO 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

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86 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.

87 Id.

88 Dr. John Saba enumerates four major reasons why states fail to comply with their obligations under the Chicago Convention Annexes:

1. Primary aviation legislation and regulations may be either non-existent or inadequate (for example, a failure to provide adequate enforcement powers);

2. Institutional structures that regulate and supervise aviation safety often do not have the authority and/or autonomy to effectively satisfy their regulatory duties;

3. Human resources in many states may be plagued by a lack of appropriate expertise largely due to inadequate funding and training (and trained staff may leave government jobs for better-paying jobs in the aviation industry); and

4. Financial resources allocated to civil aviation safety are insufficient since many developing countries do not consider this a high priority compared to other demands such as health care, education, irrigation, and poverty.

Saba, supra note 7, at 545.

89 Mark Lee Morrison, Navigating the Tumultuous Skies of International Aviation: The Federal Aviation Administration's Response to Non-Compliance With International Safety Standards, 2 SW. J.L. & TRADE AM. 621, 642 (1995). 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 note 10, arts. 87-88. Since the Council has never rendered a decision on the merits, these provisions have never been invoked.
implementation..."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." 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." Though ICAO had attempted to facilitate compliance by publishing numerous manuals instructing member states on how to comply, many states either could not, or would not, implement their international legal aviation safety obligations.

B. Unilateral Oversight of State Compliance with International Obligations

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. This was the lesson of British Caledonian Airways

91 ICAO Assemb. Res. 29-3.
92 C-WP/10218, ¶4.9, quoted in Milde, supra note 2, at 8-9.
94 Occasionally, a national court has to intervene to force a governmental unit to abide by the nation’s international obligations. Professor Kumm observes, "[w]hatever
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 tore off the wing of American Airlines flight 191, a DC-10, shortly after take-off from Chicago O'Hare International Airport. All 271 on board the aircraft perished in the crash. Three days later, the Federal Aviation Administration (FAA) issued an Emergency Airworthiness Directive (EAD) requiring all U.S. operators of DC-10s to inspect engine pylons. The following day, the FAA issued another EAD grounding all domestic DC-10s. 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 prohibited the operation in U.S. airspace of all foreign-registered DC-10 aircraft. While one can only speculate as to the motives, the suspension of foreign-flag aircraft arguably enhanced the safety of U.S. residents who might board them and also equalized the relative financial impact on U.S. carriers.

Several foreign-flag carriers objected. In *British Caledonian Airways*, the D.C. Circuit Court of Appeals found that the relevant airworthiness standards were properly promulgated by ICAO and set forth in Annex 8. 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

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96 *British Caledonian*, 665 F.2d at 1155.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.* at 1156.

101 *Id.* at 1160.
Annex 8]."¹⁰² It found that the requirements of Article 33 were self-executing, requiring no implementing legislation by the U.S. Congress. But Congress had mandated, under former Section 1102 of the Federal Aviation Act of 1958, that the FAA Administrator must, in exercising and performing his powers and duties, "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."¹⁰³

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 1102.¹⁰⁴

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

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¹⁰² Id.


¹⁰⁴ Id. at 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 note 10, 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.

27 of the Chicago Convention."  The FAA Administrator had failed to do this. Ten years later, the U.S. would launch a program to ferret out those nations not in compliance with Annex 8.  

2. United States Airport Security Audits

The United States began auditing foreign venues for compliance with ICAO SARPs with its review of foreign compliance with Annex 17 – Security. In 1985, Congress required the FAA to assess the security procedures of foreign airports and foreign air carriers that serve the United States. This Act required the FAA to conduct a security audit of foreign airports, and if it found that an airport failed to comply with Annex 17, it notified the appropriate authorities of its discovery and recommended steps to achieve compliance. If the airport failed to correct the deficiency, the FAA published a notice that the airport failed its security audit in the Federal Register, posted its identity prominently at major U.S. airports, and notified the news media. The FAA could 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 or to a point in the United States.

Where the U.S. Secretary of Transportation 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

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105 *British Caledonian*, 665 F.2d at 1164.
110 *Id.*
111 *Id.*
between the United States and that airport," he could suspend U.S. and foreign airlines from serving the United States to or from that airport and impose fines upon carriers violating the prohibition. On the basis of unsatisfactory security audits and other security concerns, the U.S. Department of Transportation (DOT), the parent agency of the FAA, announced its intention to suspend air service between the U.S. and Beirut in 1985, Lagos in 1992, Manila and Bogotá in 1995, Athens in 1996, and Port-au-Prince in 1998. The DOT also has denied code-sharing approval to destinations in nations on the Department of State's

112 Id.
113 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.").
115 See supra note 114.
116 Id.
117 Id.
118 Id.
120 Code-sharing is a means whereby one airline offers seats on the two-letter airline code and flight number of another airline, principally in order to deceive consumers that on-line, as opposed to interline, service is being performed. Paul Stephen Dempsey, Carving the World into Fiefdoms: The Anticompetitive Future of Commercial Aviation, 27 ANNALS OF AIR & SPACE L. 247, 253 (2002).
list of governments that support terrorism.\textsuperscript{121} Given the significant economic penalty for denial of the opportunity to serve the U.S. market, these moratoria have been highly effective in encouraging governmental and airport authorities to attain security compliance.\textsuperscript{122} After the tragic events of September 11, 2001, the U.S. Congress transferred the U.S. Foreign Assessment Program to the newly-created Transportation Security Administration [TSA], and subsequently moved that agency from DOT to the nascent U.S. Department of Homeland Security.\textsuperscript{123}

3. \textit{United States Safety Audits}

Airlines in certain developing nations have a higher accident rate than in developed parts of the world.\textsuperscript{124} The United States became sufficiently concerned with the absence of universal norms in international aviation that it established an International Aviation Safety Assessment Program (IASA) in 1991.\textsuperscript{125}

DOT Secretary Federico Pena announced that the IASA program had been commenced "after a series of accidents and incidents arising in the U.S. involving foreign commercial aircraft . . . ."\textsuperscript{126} 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.\textsuperscript{127} Aviation Defense Attorney, George Tompkins, points out, however, that a closer look at that event reveals that U.S. 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

121 See, e.g., DOT Order 94-4-43 (1994) (Damascus, Syria).
122 See Dempsey, Aviation Security, supra note 6, at 705-07.
123 Id. at 717.
ran out of fuel after its scheduled landing at New York Kennedy International Airport was delayed for two hours after its initial landing clearance. Therefore, while it may have been an old aircraft not maintained according to SARPs requirements, these deficiencies were not the proximate cause of the crash.

Hence, when Secretary Pena was pointing to "a series of accidents and incidents in the U.S. involving foreign commercial aircraft" as the predicate for inaugurating the IASA program, it appears the U.S. government should instead have focused at least as much energy on FAA ATC errors. Other sources have revealed that before IASA was inaugurated, certain U.S.-flag carriers had complained to DOT that "airlines operating under non-U.S. flags were able to undercut the U.S. carriers because of the substantially lower costs of inadequate foreign safety regulations." This implies that the policy issue was 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 to review relevant records. They collected evidence to determine whether the foreign CAA and airlines were in compliance with SARPs. Specifically, IASA focused on:

1. Whether the CAA has developed or implemented laws or regulations in accordance with ICAO standards;

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128 George Tompkins contends, "[t]he 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." Morrison, supra note 89, at 642. But Tompkins never identifies which Annex or SARPS the Columbian government violated that would have averted the crash. Tompkins, supra note 126, at 324-25. The only other crash of a foreign-flag aircraft in the U.S. 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.

129 Id. This was also true after the ValuJet crash in the Everglades. The FAA grounded all fifty-three 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 a suspension?

130 Tompkins, supra note 126, at 324.

131 Broderick & Loos, supra note 127, at 1039.

132 Jennison, supra note 65, at 292-97.

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.\textsuperscript{134}

In 1994, the FAA fitted IASA with teeth.\textsuperscript{135} IASA 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 U.S. 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 U.S. and could not begin such service until they were in compliance.\textsuperscript{136}

Of the first thirty countries audited, the FAA determined that nine, mostly Latin American governments, had inadequate

\textsuperscript{134} Morrison, supra note 89, at 626. Another source summarized them differently:

1. 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;

2. Whether the current regulations meet ICAO standards;

3. Whether procedures exist to implement those regulations;

4. Whether air carrier certification, inspection, and surveillance programs meet those requirements; and

5. Whether the state has sufficient organizational and personnel resources to implement those functions.


\textsuperscript{136} Id.
oversight.\textsuperscript{137} The U.S. Secretary of Transportation encouraged Americans flying to those counties either to use U.S.-flag carriers or carriers of other countries that provide adequate safety oversight.\textsuperscript{138} In other words, one could fly safely on U.S.-flag carriers, on an airline from a nation 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 U.S.-flag airline.\textsuperscript{139} 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.\textsuperscript{140} 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 because:
  - The CAA lacks technical expertise, resources, and organization to properly license or oversee air carrier operations;
  - The CAA does not have adequately qualified and trained technical personnel;
  - The CAA does not provide adequate inspector guidance to ensure compliance with the SARPs; or
  - The CAA does not have sufficient documentation and records nor inadequate oversight of air carrier operations.\textsuperscript{141}

\textsuperscript{137} 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 note 89, at 642.

\textsuperscript{138} Tompkins, supra note 126, at 326.

\textsuperscript{139} Morrison, supra note 89, at 624.

\textsuperscript{140} Id.

\textsuperscript{141} FEDERAL AVIATION ADMINISTRATION: INTERNATIONAL AVIATION SAFETY ASSESSMENT (PHASE 2 ASSESSMENT RESULTS DEFINITIONS), at http://www.faa.gov/avr/asa/iasadef5.htm (last visited April 26, 2004). Category I states were deemed in compliance with SARPs. Category II states were not in compliance. \textit{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. \textit{Id.} Public Disclosure of the Results of Foreign Civil Aviation Authority Assessments,
As revealed in Table 1, as of 2004, more than twenty-five states found themselves on the FAA list of noncompliant states, including several relatively economically advanced nations, such as Argentina, Uruguay, and Venezuela.

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* indicates countries not serving the U.S. at the time of the assessment

The IASA program led to a growing chorus of nations asking ICAO to step in and assume these duties.142

C. Multilateral Oversight of State Compliance with International Obligations

Once again, U.S. unilateralism did not sit well with the world community.143 Indeed, certain nations responded with hostility, alleging that a desire for an economic advantage motivated the United States144 to impose an unfair trade practice.145 Some criticized the United States as having “unfairly blemished all of Latin American aviation” while withholding condemnation of more politically important states, such as Russia and China.146 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.”147 Though the consensus was that

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142 See Broderick & Loos, supra note 127, at 1043.
143 Jennison, supra note 65, at 291-97
144 Id. at 297.
145 Morrison, supra note 89, at 638.
146 Manning, supra note 137, at 537. 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 note 134, at 659.
147 Broderick & Loos, supra note 127, 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).
the SARPs should be honored, it was believed that no single nation should be their policeman, since multilateral cooperation was preferable to unilateral insistence.\(^{148}\) Article 55 gives the Council the authority to investigate “any situation which may appear to present avoidable obstacles to the development of international air navigation.”\(^{149}\)

In response,\(^{150}\) 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.\(^{151}\) Under the SOP, ICAO began to review member states’ aviation safety regulation and oversight systems.\(^{152}\) By 1997, SOP assessments had revealed that although 75% of 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.\(^{153}\)

At the same time, however, the SOP was criticized because of its voluntary, under-funded, and confidential nature.\(^{154}\) ICAO was reticent to publicize delinquency for fear that member states would resist the voluntary audit program. But, this confidentiality violated the articles of the Chicago Convention.\(^{155}\) Article 38 of the Chicago Convention requires both member state notification of noncompliance to the Council and the Council’s notification

\(^{148}\) Safety in Isolation, supra note 147, at 3.

\(^{149}\) Chicago Convention, supra note 10, art. 55(e). The triggering language requires a request of the Council by a contracting state. Id.

\(^{150}\) “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 note 2, at 12.


\(^{152}\) That same year the European Union began its Safety Assessment of Foreign Airlines [SAFA]. Cameron, supra note 146. Two years earlier, ICAO had declined a U.S. request that ICAO perform safety audits of States whose flag carriers served the U.S. Id.

\(^{153}\) Broderick & Loos, supra note 127, at 1049.

\(^{154}\) Id. Saba, supra note 7, at 544.

\(^{155}\) Chicago Convention, supra note 10, art. 38.
thereof to all member states. 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." Thus, the confidentiality of the SARPs violations manifestly violated these explicit requirements. Moreover, by 1999, IASA had concluded that 40% of the countries assessed had deficient safety oversight systems.

In response, ICAO replaced the SOP with a more meaningful mandatory Universal Safety Oversight Audit Programme (U.S.OAP) in 1999. U.S.OAP safety audits began by evaluating member state compliance with Annexes 1, 6, and 8. For example, the ICAO safety audit of the United States government focused on the following issues and found substantive deficiencies in U.S. 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 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.

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156 Id.
157 Id. arts. 54(j), 54(k).
158 Id. arts. 38, 54(j), 54(k).
159 Saba, supra note 7, at 542.
161 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 U.S. aviation safety program was evaluated. Id. ICAO
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." These "other sources" would include ICAO and the European Joint Aviation Authorities (JAA), among others. Hence, once ICAO finally began pursuing mandatory, transparent safety audits, the United States was willing to pay them deference.

By 2004, ICAO had audited 181 states for safety compliance and performed 120 audit follow-up missions. U.S.OAP 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 for almost all contracting states with respect to conformity and compliance with Annex 1 (Personnel Licensing), Annex 6 (Operations), and Annex 8 (Airworthiness). This will grow with the expansion of U.S.OAP to the other safety-related Annexes in 2005. Specifically, the second round of U.S.OAP audits will focus on implementation of the safety-related provisions in Annex 1 (Personnel Licensing), Annex 6 (Operation Of Aircraft), Annex 8 (Airworthiness of Aircraft), Annex 11 (Air Traffic Services), Annex 13 (Accident Investigation), and audits are conducted under the procedures set forth in Safety Oversight Audit Manual, supra note 160, 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. Id. The audit team typically reviews the national legislation through which Annexes 1, 6, and 8 are followed. Id. 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.


163 The European Civil Aviation Conference also has implemented a program of ramp inspections at the airports of its 41 member states.


165 International Standards and Recommended Practices: Aircraft Accident Investigation, International Civil Aviation Organization, Convention on International
Annex 14 (Aerodromes). 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.

The principal deficiencies discovered by the initial FAA and ICAO safety audit program were: (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. 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 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.

As can be expected, a tragic 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.”


168 Cameron, supra note 146, at 62.

169 Saba, supra note 7, at 544.

170 IACO 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,
One such resolution called upon ICAO to establish a security audit program modeled on U.S.OAP. As a result, ICAO inaugurated the Universal Security Audit Programme (U.S.AP) to assess state compliance with Annex 17 (Security), an issue that took on greater urgency after the tragic events of September 11, 2001.

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, training and personnel, and laws and regulations. ICAO has also attempted to facilitate improvements in safety by establishing the International 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 U.S.OAP audits. The major problem, however, was proper funding for IFFAS. 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.

IV. The Substantive Aviation Safety Obligations Under International and Domestic Law

As noted above, soon after the United States and ICAO began to audit state compliance, it was discovered that some states either

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the first time that ICAO had strayed into the domestic arena. See Dempsey, The Role of the International Civil Aviation Organization, supra note 5, at 689-90.


Chicago Convention, supra note 10, Annex 17; see Milde, supra note 171, at 177.

Dempsey, The Role of the International Civil Aviation Organization, supra note 5, at 649.

See Dempsey, supra note 29, at 112.

Saba, supra note 7, at 549-51.


Saba, supra note 7, at 573.

On the development of regional initiatives to address aviation safety, see Saba, supra note 7, at 548; Barreto, supra note 134, at 672-75; Abeyratne, supra note 1, at 133.
had not established a civil aviation code or regulatory agency or had promulgated legal and regulatory requirements that fell short of the SARPs.\(^ {179} \) 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.”\(^ {180} \)

The U.S. Department of Transportation has the authority to assist foreign nations in improving aviation safety.\(^ {181} \) In order to assist states in achieving compliance, the FAA drafted a model Civil Aviation Safety Act (CASA) and model aviation regulations,\(^ {182} \) based in part on U.S. aviation statutes\(^ {183} \) and regulations.\(^ {184} \) The model CASA and model regulations are both

\(^{179}\) Chicago Convention, supra note 10, Annex 8.

\(^{180}\) Id.


\(^{182}\) Barreto, supra note 134, at 662-64.


\(^{184}\) In part, these model regulations tracked many of the requirements set forth in the FAA’s own comprehensive safety regulations:

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

14 C.F.R. Part 125 (2004) (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)

A. Civil Aviation Authority: Establishment and Administration

The CASA establishes an autonomous Civil Aviation Authority (CAA). 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."\(^{186}\)

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 a specified number of years, removable only for cause.\(^{187}\) 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.\(^ {188}\) No CAA employee may participate in any proceeding in which the Director has a financial interest.\(^{189}\)

The Director's primary responsibility is to "encourage and foster the safe development of civil aviation . . . ."\(^{190}\) The Director has specific authority to:

- Develop, plan for, and formulate policy with respect to the use of the navigable airspace;\(^ {191}\)
- acquire, establish, operate, and improve air navigation facilities;\(^ {192}\)
- prescribe air traffic rules and regulations;\(^ {193}\)
- regulate aviation security;\(^ {194}\)

\(^{186}\) CASA, supra note 185, § 202.

\(^{187}\) 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.

\(^{188}\) 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.

\(^{189}\) Id. § 801(b). These ethical requirements are designed to ensure that decisionmaking is objective, and not influenced by the decisionmaker's financial benefit.

\(^{190}\) Id. § 406.

\(^{191}\) Id. § 407(a).

\(^{192}\) Id. § 408.

\(^{193}\) Id. § 409.
• establish training schools;\textsuperscript{195}
• investigate accidents and take any corrective action necessary to prevent similar accidents in the future;\textsuperscript{196}
• certify and inspect aircraft, airmen, and air operators;\textsuperscript{197}
• validate the certification and inspection actions of another state;\textsuperscript{198}
• prevent flights by unairworthy aircraft or unqualified airmen;\textsuperscript{199}
• regulate the transportation of dangerous goods;\textsuperscript{200} and
• maintain a system of the national registration of civil aircraft.\textsuperscript{201}

The Director is given certain administrative authority on behalf of the CAA to acquire property,\textsuperscript{202} enter into contracts for services,\textsuperscript{203} exchange information with foreign governments,\textsuperscript{204} and delegate authority to a subordinate.\textsuperscript{205}

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)\textsuperscript{206} handles aircraft accident investigations mandated under Annex 6\textsuperscript{207} and appeals

\begin{itemize}
\item \textsuperscript{194} Id. § 410.
\item \textsuperscript{195} Id. § 411.
\item \textsuperscript{196} Id. § 412.
\item \textsuperscript{197} Id. § 413.
\item \textsuperscript{198} Id. § 414.
\item \textsuperscript{199} Id. § 416.
\item \textsuperscript{200} Id. § 417.
\item \textsuperscript{201} Id. § 501(a).
\item \textsuperscript{202} Id. § 302.
\item \textsuperscript{203} Id. § 303.
\item \textsuperscript{204} Id. § 304.
\item \textsuperscript{205} Id. § 305.
\item \textsuperscript{207} 49 U.S.C. §§ 1131-32 (2004). The NTSB describes its responsibilities as follows:
\end{itemize}

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
decisions of the Administrator of the FAA. Though it has no authority to issue regulation, the NTSB does have the responsibility to make regulatory recommendations to the FAA to avoid future accidents. The Transportation Security Administration of the U.S. Department of Homeland Security regulates aviation security. The Office of the Secretary of Transportation has jurisdiction over economic regulatory issues such as airline financial fitness, competition policy, and consumer protection. The Secretary of Transportation is statutorily commanded to assign and maintain safety as "the highest priority in air commerce."

The FAA was established by the Federal Aviation Act of 1958 and subsequently became a part of the U.S. Department of Transportation upon its creation in 1967. The FAA is headed by

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 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.


211 For a review of the legislation passed by the United States to address aviation security, see Dempsey, Aviation Security, supra note 6, at 691-719 and DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION, supra note 23, at 287.
213 49 U.S.C. subtitle I (2004). 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
an Administrator, appointed by the President with the advice and consent of the Senate, and serves for a term of five years. The FAA Administrator is required to consider the maintenance and enhancement of safety and security as among the highest priorities in the public interest. The FAA is charged with promoting aviation safety, ensuring the safe and efficient utilization of the national airspace, and providing oversight of the U.S. airport system. Although it does not own and operate airports (they are owned and operated by local institutions), the FAA issues airport operating certificates, regulates them, and provides financial support to them. The FAA handles all other aspects of airman, aircraft, airport, and airline safety as well as providing air traffic control and navigation services. Under U.S. law, actions of the Secretary of Transportation and of the FAA Administrator

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).

214 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 it had been denied continuity of leadership.


217 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 U.S. airport system; and
- supporting national defense requirements.


220 DEMPSEY ET AL., AVIATION LAW & REGULATION, supra note 23, §§ 12.48-12.54.
must be consistent with the international obligations imposed by the Chicago Convention.  

The FAA has broad authority to conduct investigations. The Administrator may delegate authority for issuance of pertinent orders, directives, and instructions. 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 and private persons. The FAA Administrator also holds broad rulemaking authority.

B. Agency Procedures

Under the CASA, the Director of Civil Aviation is given broad

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222 DEMPSEY ET AL., AVIATION LAW & REGULATION, supra note 24, § 12.04.
224 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 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., Aviation Law and Regulation, supra note 23, § 12.04.


226 The FAA Administrator has discretion to issue such regulations, standards, and procedures as the agency deems appropriate. 49 U.S.C. § 40113(a) (2004). 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) (2004).
legal authority. Subject to the requirements set forth in the national Administrative Procedures Act, the Director has the authority to conduct investigations, take depositions and other evidence, and issue subpoenas. The Director may also issue orders, rules, and regulations, so long as they meet the minimum requirements of the Chicago Convention Annexes, to take effect within a reasonable time. Before the Director amends, modifies, suspends, or revokes any certificate, the Director shall notify the holder thereof and afford the holder the opportunity to be heard. The right to be represented by an attorney is also conferred. Adverse decisions may be appealed by the certificate holder.

The Director 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. 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.” The Director may exempt foreign aircraft and airmen from certification requirements or operating restrictions.

The Director has certain transparency requirements, including
the responsibility to publish “all reports, orders, decisions, rules and regulations” issued under the CASA. 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.

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. The Administrative Procedure Act requires notice and an opportunity to be heard, in most cases, before one is deprived of a governmental entitlement, such as an operating license. With some exceptions, federal agencies such as the FAA are also subject to certain transparency laws. This includes the Government in the Sunshine Act, which ordinarily requires their meetings to be open to the public, as well as the Freedom of Information Act, which ordinarily requires that agencies make available their internal documents available to the public upon demand. Exceptions exist for various reasons, including national security.

The FAA also holds broad emergency powers to suspend or revoke various operating and airworthiness licenses and certificates. At various times, it has used such power to suspend operations of a certain aircraft type, to suspend operations of an airline, or to suspend the operations of the entire airline

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240 Id. § 401(b).
241 Id. § 801(d).
242 U.S. CONST. AMEND. V.
244 Id.
246 Id.
247 Id.
248 Id.
250 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.
251 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 kill 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
industry. Certain decisions rendered, or sanctions imposed, in the United States by the Administrator may be appealed to the NTSB. For example, the FAA Administrator's decision to deny airman certification may be appealed to the NTSB. Decisions of the NTSB may, in turn, be appealed to a U.S. Court of Appeals. The FAA Administrator may promulgate regulations, and grant exemptions from them.

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. 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.

Article 33 provides that certificates of competency and licenses 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.

First adopted in 1948, Annex 1 to the Chicago Convention

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252 After four commercial aircraft were commandeered by Al-Qaeda operatives on the morning of September 11, 2001 (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. Dempsey, Aviation Security, supra note 6, at 712.


254 49 U.S.C. § 44703 (2004); DEMSEY ET AL., AVIATION LAW & REGULATION, supra note 23, §§ 12.02, 12.08


257 Article 29 requires that flight crew members carry their licenses on board the aircraft they fly. Chicago Convention, supra note 10, art. 29.

258 Id. art. 32.

259 Id. art. 33.
addresses personnel licensing. Under it, no one may act as a flight crewmember without a valid license in compliance with the Annex. To secure a license or type rating, the applicant must satisfy age, knowledge, experience, flight instruction, and skill requirements. The licensing process also must include a medical fitness evaluation. Similar requirements are established for flight navigators, flight engineers, and aircraft maintenance personnel.

Under the CASA, an "airman" is defined 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. 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. 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

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260 Chicago Convention Annex 1, supra note 33.
261 Id. § 1.2.1.
262 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.
263 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.
264 Id. §§ 2.3.1.2, 2.4.1.2, 2.5.1.2.
265 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.
266 Id. §§ 2.3.1.4, 2.4.1.4, 2.5.1.4.
267 Id. §§ 2.3.1.5, 2.4.1.5, 2.5.1.5.
268 Id., §§ 2.1.1.3, 2.4.1.6, 2.5.1.6.
269 Id. § 1.2.4.
270 Id. arts. 17-21.
271 Id. arts. 22-28.
272 CASA, supra note 185, § 102(b)(6).
273 Id. § 611(a)(2).
The airman certificate shall contain such terms and conditions, and physical fitness tests as necessary to assure civil aviation safety. Certificates need not be issued to foreign nationals. Airmen have an affirmative obligation to comply with the requirements of the CASA and the rules and regulations promulgated thereunder.

The FAA issues all licenses specified in Annex 1 and validates foreign licenses. After investigation, if it is found that the applicant is physically able 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. The certificate specifies the terms, conditions, duration, physical fitness test, and any other qualifications deemed necessary in the interest of safety. The FAA may prohibit a foreign national from receiving an airman certificate or condition receipt upon

274 Id. § 601(b).
275 Id. § 602(c).
276 Id. § 602(d).
277 Id. § 608(c).
278 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 C.F.R. 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.
reciprocal foreign treatment.\textsuperscript{282}

\textit{D. Aircraft Airworthiness Certification}

Article 31 of the Chicago Convention requires that every aircraft flown internationally must be provided with a certificate of airworthiness by the state in which it is registered.\textsuperscript{283} Under Article 33, such certificates of airworthiness must be recognized by other states, provided that the requirements under which they were issued met or exceeded ICAO SARPs.\textsuperscript{284} 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.\textsuperscript{285}

Article 83bis of the Chicago Convention entered into force on June 20, 1997. It provides that when the owner 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.\textsuperscript{286}

Annexes 6 and 8 address aircraft operation and airworthiness.\textsuperscript{287} First adopted in 1948, Annex 6 addresses the “Operation of Aircraft.”\textsuperscript{288} Its provisions go beyond flight

\begin{itemize}
\item \textsuperscript{282} 49 U.S.C. § 44711.
\item \textsuperscript{283} Chicago Convention, supra note 10, art. 31.
\item \textsuperscript{284} Id. art. 33.
\item \textsuperscript{285} 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. \textit{Id.} art. 30.
\item \textsuperscript{287} Chicago Convention Annex 6, supra note 36; Chicago Convention Annex 8, supra, note 37.
\item \textsuperscript{288} Annex 6 is divided into three parts: Part I — \textit{International Commercial Air Transport — Aeroplanes}; Part II — \textit{International General Aviation — Aeroplanes}; and Part III — \textit{International Operations — Helicopters.} In the United States, 14 C.F.R Part
operations, however, and include aircraft instruments and equipment, maintenance, and security. Annex 8 addresses "Airworthiness of Aircraft" in detail, acknowledging that its requirements:

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.

The model CASA is such a code.

Annex 8 addresses flight performance, aircraft structures, design and construction, engines, propellers, powerplants, instruments and equipment, operating limitations, and continuing airworthiness requirements. 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. To demonstrate airworthiness,

\[121\text{. Operating Requirements: Domestic, Flag, and Supplemental Operations} \]

implements the requirements of Annex 6, Parts I and III. Chicago Convention Annex 6, supra note 36.

\[289 \text{Id.}\]

\[290 \text{Id.}\]

\[291 \text{Id.}\]

\[292 \text{Id.}\]

\[293 \text{Annex 8 is divided into four parts: Definitions, Administration, Aeroplanes, and Helicopters. Chicago Convention Annex 8, supra note 37.}\]

\[294 \text{Id.}\]

\[295 \text{Id. ch. 2.}\]

\[296 \text{Id. ch. 3.}\]

\[297 \text{Id. ch. 4.}\]

\[298 \text{Id. ch. 5.}\]

\[299 \text{Id. ch. 6.}\]

\[300 \text{Id. ch. 7.}\]

\[301 \text{Id. ch. 8.}\]

\[302 \text{Id. ch. 9.}\]

\[303 \text{Id. ch. 10. Similar requirements are imposed on helicopters. Id. Annex 8.}\]

\[304 \text{Id. § 3.1.}\]
there must be an "approved design" comprised of drawings, specifications, reports, inspections, and flight testing. 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. Aircraft that have been damaged, have fallen into disrepair, or have otherwise become less than airworthy shall not be flown until they are airworthy again.

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. 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. 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.

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. The FAA also certifies the airworthiness of aircraft and 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

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305 Id. §§ 3.1-3.3.
306 Id. §§ 4.2.1, 4.2.2.
307 Id. § 6.2.
308 CASA, supra note 185, § 611(a)(1).
309 Id. § 603(b).
310 Id. § 608.
312 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
provides comprehensive inspection of aircraft and air operators.\textsuperscript{313}

\textit{E. Nationality, Ownership, and Registration Requirements}

The nationality of aircraft is addressed in Articles 17-21 of the Chicago Convention.\textsuperscript{314} Aircraft have the nationality of the state in which they are registered\textsuperscript{315} and may not be registered in more than a single state.\textsuperscript{316} Aircraft must bear appropriate registration and nationality marks.\textsuperscript{317}

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.\textsuperscript{318} The nationality or common mark must be listed before the registration mark.\textsuperscript{319} The letters must be in capital Roman type, numbers must be in Arabic, of equal height, and without ornamentation.\textsuperscript{320}

The CASA requires the Director to establish and maintain a system of aircraft registration.\textsuperscript{321} 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.\textsuperscript{322} The Director must also establish a national system for recording title in aircraft and aircraft parts.\textsuperscript{323}

\begin{thebibliography}{99}

\bibitem{314} Chicago Convention, \textit{supra} note 10, arts. 17-21.

\bibitem{315} \textit{Id.} art. 17.

\bibitem{316} \textit{Id.} art. 18.

\bibitem{317} \textit{Id.} art. 20.


\bibitem{319} \textit{Id.} § 2.2.

\bibitem{320} \textit{Id.} §§ 4, 5.1.

\bibitem{321} \textit{CASA}, \textit{supra} note 185, § 501(a).

\bibitem{322} \textit{Id.} § 501(c).

\bibitem{323} \textit{Id.} § 502.
\end{thebibliography}
In the United States, no aircraft may be operated unless it is registered at the FAA's Aeronautical Center in Oklahoma City. Eligibility for registration is limited to aircraft not registered in another country, as well as those aircraft owned by U.S. citizens, permanent residents, and U.S. corporations.

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." One may not operate an airline without an air operator certificate. 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 regulations established by the CAA.

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. They also have a duty to maintain operations consistent with such regulatory requirements and the "public interest." They may not employ an air operator who does not have a proper airman certificate, nor may they operate aircraft in contravention of any rule, regulation, or certificate.

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325 See IAL Aircraft Holding v. Federal Aviation Administration, 206 F. 3rd 1042, 1043 (2000).
327 CASA, supra note 185, § 601(b).
328 Id. § 611(a)(4).
329 Id. § 604(b).
330 Id. § 608(a).
331 Id. § 608(b).
332 Id. § 611(a)(3).
333 Id. § 611(a)(5). Air operators must designate an agent for service of process. Id. § 804.
The FAA may issue an air carrier operating certificate. The FAA has established a Certification, Standardization, and Evaluation Team (CSET) for the certification of commercial airlines. An air carrier operator has significant responsibility to "inspect, maintain, overhaul, and repair all aircraft... in its fleet."

G. Air Carrier Economic Regulation

At 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 laid 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. 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 responsibility in an agency separate from the CAA.

In the United States, 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," 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

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335 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. pt. 121. DEMPSEY ET AL., AVIATION LAW & REGULATION, supra note 23, § 12.40.
336 Id. § 12.27.
337 See, e.g., CHINKIN, supra note 50, at 33.
338 CASA, supra note 185.
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 statutory and regulatory obligations under the law (or, in the regulatory language often used, has demonstrated a satisfactory "compliance disposition"). 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. The fitness of foreign airlines is also evaluated before they are issued a permit to serve points in the United States.

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. In order to receive a permit, an

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342 DEMPSEY ET AL., AVIATION LAW & REGULATION, supra note 23, §§ 12.41-12.44.

343 Id. § 12.45


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 C.F.R. 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 C.F.R. 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
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 “public interest.”

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

H. Schools and Approved Maintenance Organizations

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

I. Air Navigation Facilities

Air traffic control and flight information services are governed by Annex 11 – Air Traffic Services. Under the CASA, the Director of Civil Aviation may prescribe “minimum safety standards for the operation of air navigation facilities.”

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348 CASA, supra note 185.
349 Id. § 605.
350 Chicago Convention Annex 11, supra note 164.
351 CASA, supra note 185, at § 607(a).
Director is authorized to issue certificates to airports and establish minimum safety standards for their operation. 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." In the United States, the FAA provides air navigation and air traffic control services.

J. Transportation of Dangerous Goods

Annex 18 details the requirements for "The Safe Transport of Dangerous Goods by Air." Under the CASA, the transportation of dangerous goods must conform explicitly to the requirements of Annex 18. This is the only place in which CASA expressly refers to an Annex. Civil and criminal penalties may be imposed for their violation.

In the United States, the transportation of hazardous material is subjected to comprehensive regulation. 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. The regulations incorporate the ICAO Technical Instruction by reference.

K. Penalties for Noncompliance

The requirements established in the CASA, together with the

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352 Id. § 607(b)(1).
353 Id. § 607(b)(2).
356 CASA, supra note 185, § 608(e); Id.
357 CASA, supra note 185, § 608.
358 Id. §§ 701(f), 702(l).
orders issued and rules and regulation promulgated thereunder may be enforced in the domestic courts.\(^{362}\) The Director may establish and impose civil penalties for the violation of the CAA or any rules, regulations, or orders issued thereunder.\(^{363}\) 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."\(^{364}\) Aircraft may be subject to the imposition of liens for penalty payment\(^{365}\) and, if necessary, seizure.\(^{366}\)

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.\(^{367}\) Fines may be imposed upon anyone who fails to keep or preserve, or 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.\(^{368}\) Fines and imprisonment may be imposed upon anyone who refuses to testify or produce records in response to a subpoena issued by the Director\(^{369}\) or anyone who removes any part of a civil aircraft involved in an accident or any property aboard said aircraft.\(^{370}\)

Fines and imprisonment may be imposed upon one who intentionally interferes with air navigation by interfering with, or establishing a false, light or signal.\(^{371}\) Fines and imprisonment may also be imposed for the conveyance of false information.\(^{372}\) Fines may be imposed upon anyone who interferes with an aircraft crew

\(^{362}\) CASA, *supra* note 185, at § 807.

\(^{363}\) *Id.* § 701(a). Penalties shall be adjusted for inflation periodically. *Id.* § 701(d).

\(^{364}\) *Id.* § 701(c).

\(^{365}\) *Id.* § 701(e).

\(^{366}\) *Id.* § 808(b).

\(^{367}\) *Id.* § 702(a).

\(^{368}\) *Id.* § 702(c).

\(^{369}\) *Id.* § 702(d).

\(^{370}\) *Id.* § 702(k).

\(^{371}\) *Id.* § 702(b).

\(^{372}\) *Id.* § 702(j).
member in the performance of his responsibilities while in flight or interferes with aircraft operations. Fines and imprisonment may be imposed upon anyone who "assaults, intimidates, or threatens" any flight crewmember, including flight attendants and stewards. More serious penalties are prescribed for any such act involving the use of a deadly or dangerous weapon. 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. 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.

In the U.S., The FAA Administrator has been given comprehensive licensing and enforcement responsibilities. A certificate may be modified, amended, suspended, or revoked in the interest of safety. Civil and criminal penalties may be imposed by the FAA Administrator in an administrative adjudication. The FAA Administrator may bring a civil action in federal court seeking judicial enforcement of a regulation or the terms of a certificate.

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373 Id. § 702(f)(1).
374 Id. § 702(i).
375 Id. § 702(f)(2).
376 Id. § 702(h)(1). An explicit exception exists for law enforcement officers under certain circumstances. Id. § 702(h)(3).
377 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.
380 49 U.S.C. §§ 44709, 44710 (2004); Dempsey et al., Aviation Law & Regulation, supra note 23, § 12.06.
381 49 U.S.C. § 1155(a) (2004); Dempsey et al., Aviation Law & Regulation, supra note 23, § 12.62.
382 49 U.S.C. § 1155(b) (2004); Dempsey et al., Aviation Law & Regulation, supra note 23, § 12.65.
V. The Theoretical Paradigm of Compliance with and Enforcement of International Law

Nations generally comply with most of their international obligations in the commercial arena. Some do so out of a desire to enjoy reciprocal benefits. Since international treaties are concluded on the basis of consent, most nations find compliance in their self-interest. 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. Voluntary compliance with international legal obligations is sometimes obtained by virtue of the moral force of the rule. If the substantive law is deemed fair and just and reflective of widely accepted norms of conduct, it will receive more universal acceptance. Other nations comply out of enlightened

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385 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).


388 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).

389 Franck insists the principal reason that states comply with international law is the perceived fairness of the rules. Id.

390 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
self-interest in preserving stability, order, and predictability in an increasingly interdependent global economy.391 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.392 Thus, twenty-four member states – less than 13% the 188-member ICAO Assembly – can promulgate a SARP.393 Other states are given the right to participate in the Council’s deliberations,394 though relatively few actually do.395 But, ICAO’s process includes providing draft SARPs to all member states, inviting their comments and objections, and

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.


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

392 Chicago Convention, supra note 10, art. 50(a). Originally, the ICAO Council had 21 members. Id. 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.

393 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. Id.

394 Id. art. 53.

395 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 note 2, at 7.
attempting to achieve consensus. In practice, SARPs are adopted unanimously by the Council.

Some have been troubled by the process of law-making by elites; 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. Theoretically, a majority of states could effectively veto a SARP, though this has never occurred. The Assembly also has the power to amend the Chicago Convention and to elect the Council members. 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 both 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. Their members are educated by

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396 Id.
397 Id.
399 Id.
400 Id.
401 Chicago Convention, supra note 10, art. 94. The Convention has only rarely been amended, however.
402 Chicago Convention, supra note 10, art. 49(b).
403 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)) [hereinafter Aceves, Institutionalist Theory].
ICAO on how to comply, and encouraged regularly to comply. 404 Hence, institutionalism itself – the existence of an organization with a well defined mission and focused agenda – can facilitate compliance with international legal obligations. 405 Ideally, an international organization can channel conflict so as to permit settlement with minimal disruption. 406 It is important that the leaders of an international organization provide leadership so that its essential purposes and mission are fulfilled. 407

The U.S. model CASA and draft aviation regulations stand on a different footing from the SARPs. 408 Although, in essence, the CASA embraces the most important requirements established by the SARPs, no nation other than the U.S. participated in the drafting of the model statute. 409 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. 410 Other nations will respond politically and reject the CASA model outright because of the identity of its author. 411 The CASA largely follows the Federal Aviation Act of 1958. 412 Ostensibly, some nations will be more comfortable adopting a U.S. drafted model statute than adopting a U.S. law.

404 Id.
405 Id.
406 Dempsey, The Role of the International Civil Aviation Organization, supra note 5, at 561.
407 Id.
408 Id.
409 Id.
411 Aceves, The Economic Analysis of International Law, supra note 410, at 1004.
412 CASA, supra note 185.
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. These issues themselves tend not to be politically contentious. Therefore, one would rate them highly for fairness. The achievement of aviation safety is clearly in the self-interest of all nations. The Annexes are also drafted in a way to encourage their adoption into each contracting state’s domestic law. 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. Rational, self-interested states 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. Even absent an explicit threat of sanctions,
the mere possibility of reciprocal noncompliance or retaliation often has a prophylactic effect dissuading delinquency.\footnote{Dempsey, Law & Foreign Policy in International Aviation, supra note 23, 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, Institutionalist Theory, supra note 403, at 254.} Exposing the wrongdoer may lead others to isolate or punish until delinquency is remedied.\footnote{Aceves, Institutionalist Theory, supra note 403, at 251-52.}

Initially the United States, and then ICAO, monitored state compliance with the SARPs.\footnote{Chicago Convention, supra note 10.} The U.S. published the report cards issued by the ICAO. The economic impact was immediately felt by the airlines and tourism industries of the failing nations.\footnote{Aceves, The Economic Analysis of International Law, supra note 410, at 1034. 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.\ldots \text{[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. \textit{Id.}} If it isn’t safe to fly somewhere, or on some airline, passengers will vote with their feet, so to speak, and travel elsewhere. Hence, efforts by the U.S., and more recently ICAO, 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.\footnote{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} 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." 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. A nation which seeks implementation of its legal rights in the international arena cannot rely upon some higher authority to enforce them.

Yet that does not mean that international law is unenforceable. A state seeking to force another state to comply

426 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, "there 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, "[i]t 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. at 296.


428 DEMPSEY ET AL., AVIATION LAW & REGULATION, supra note 23, at 312.

429 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.

with its international legal obligations may, instead, rely on various means of "self-help" remedies, including coercion.\textsuperscript{430} 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.\textsuperscript{431}

\textsuperscript{430} 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. Oscar Schachter, The Enforcement of International Judicial and Arbitral Decision, 54 AM. J. INT’L L. 1, 6 (1960). 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. Id. 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." Id. See also 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 also BURLEIGH CUSHING RODICK, THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW 55-57 (1928).

\textsuperscript{431} See HERSCH LAUTERPACHT, 2 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). There is a notable difference, however, in the way international law is viewed and enforced today in contrast to the pre-World War I era:

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 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
Some commentators have posed the question of whether the use of economic coercive means may be deemed illicit when directed against a nation for purposes of achieving political ends. 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. Yet, the very efficacy of international law is, itself, jeopardized in the absence of effective sanctions by which its requirements can be enforced. Hence, there should be standards by which one assesses the legitimacy of coercion. In assessing the lawfulness of economic reprisals, one source identified three 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, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION, supra note 23, at 319.


433 See, e.g., BRIERLY, supra note 431. See also CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 18 (P. Corbett trans., 1957).

434 Dempsey, Compliance and Enforcement in International Law, supra note 3, at 560.

435 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. ZOLLER, supra, note 429, at 37. 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. Id. The premise or theory behind early public reprisals was that the international system must be based on a just and equal social order. Id. A breach of law always disrupts that order and is likely to lead to injustice among nations. Id. Justice rests upon a foundation of equality of nations. Id. Should this equality be distorted by a breach of law, justice calls for its reestablishment. Id. Thus, the injured state has the natural right to retaliate in order to
succinct 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.\textsuperscript{436}

In the \textit{British Caledonian} case, the court held that the United

restore equality, or to punish in order to return the "status quo ante." \textit{Id}. The early scholars and philosophers of international law found violent reprisals to be permissible and necessary tools of law enforcement. \textit{Id}.

According to Grotius, the law of nations has two components: the \textit{jus natural} or natural law of nations, which is a secularized law of nature, and the \textit{jus gentium} or voluntary law of nations. The natural law of nations is based on reason; the voluntary law is based on will, \textit{i.e.}, the consent of states. \textit{See} R. \textsc{Bryant}, \textsc{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. \textit{See} \textsc{Julius Stone, Legal Controls of International Conflict} 14 (2d ed. 1959). \textsc{Dempsey, Law \& Foreign Policy in International Aviation, supra} note 23, at 319. In addition, Grotius argued that war could be legitimately waged and hostages taken as security for the fulfillment of a treaty. \textsc{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. \textit{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, "[t]hose who cannot be brought to a better way of life by reason, can be kept in order only by terror." \textsc{Samuel von Pufendorf, VII The Law of Nations Book} § 11 (1672).

Emerich de Vattell (1714-1767), in his \textsc{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. \textit{See} B. \textsc{Ferenz, Enforcing International Law} (1983).

\textsuperscript{436} Derek Bowett, \textit{Economic Coercion and Reprisals by States}, 13 \textsc{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 \textit{prima facie}... evidence of illegality." \textsc{Dempsey, Economic Coercion and Self Defense in International Law, supra} note 432, at 261-62; \textit{see also} \textsc{Dempsey, Law \& Foreign Policy in International Aviation, supra} note 23, at 330.
States may not unilaterally suspend foreign-flag airlines unless the states in which they have registered have not abided by their obligations under the Chicago Convention and it Annexes.\textsuperscript{437} Otherwise, the U.S. is obligated to accept that State’s certificate of airworthiness.\textsuperscript{438}

As for the exhaustion of alternative remedies, the “open skies” bilateral air transport agreements lay out a process of notification and consultation prior to suspension.\textsuperscript{439} Failing a negotiated settlement, the United States can file a formal complaint with the ICAO Council for adjudication under Article 84 of the Chicago Convention.\textsuperscript{440} 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 resolve several.\textsuperscript{441}

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.\textsuperscript{442} 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.\textsuperscript{443} The ultimate remedy, of course, is compliance, whether compliance is 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.\textsuperscript{444}

Still some nations do not comply because, quite frankly, they cannot.\textsuperscript{445} Some nations are simply too poor to adequately fund

\textsuperscript{438} Id.
\textsuperscript{439} DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION, supra note 23, at 330.
\textsuperscript{440} Chicago Convention, supra note 10, art. 84.
\textsuperscript{441} DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION, supra note 23, at 330.
\textsuperscript{442} Id.
\textsuperscript{443} Id.
\textsuperscript{444} Id.
\textsuperscript{445} Id.
their aviation ministries, to hire technically competent inspectors and regulators, or to invest in airport and air navigation infrastructure.\textsuperscript{446} Some nations simply lack the financial or human resources to comply.\textsuperscript{447} This is where the developed world needs to help the developing world, in providing grants, loans and technical assistance to facilitate compliance.\textsuperscript{448} No level of coercion can compel a nation to do something it cannot.\textsuperscript{449} The IFFAS program is a step in the right direction.\textsuperscript{450} So too, is the development of regional air transport organizations that pool resources and share expertise to facilitate regional compliance.\textsuperscript{451}

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.\textsuperscript{452} For decades, ICAO successfully promulgated standards, fulfilling the first part of the mandate.\textsuperscript{453} But many contracting states ignored their responsibilities to fulfill the second part of that mandate, and promulgate domestic laws implementing their international obligations.\textsuperscript{454} For many years ICAO blithely turned a blind eye to such delinquency.\textsuperscript{455} 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,

\textsuperscript{446} Id.
\textsuperscript{447} Id.
\textsuperscript{448} Id.
\textsuperscript{449} Id.
\textsuperscript{450} See Saba, supra, note 7 at 537; Ruwantissa Abeyratne, Funding an International Financial Facility for International Safety, 28 ANNALS OF AIR & SPACE L. 1 (2002).
\textsuperscript{451} See Abeyratne, supra note 1, at 133; Barreto, supra note 134, at 672-75.
\textsuperscript{452} Chicago Convention, supra note 10.
\textsuperscript{453} Abeyratne, supra note 450, at 5.
\textsuperscript{454} Id.
\textsuperscript{455} Milde, supra note 2, at 16.
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 in monitoring and facilitating 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 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.