Adapting the Existing Regime for the Contemporary World to Achieve Global Civil Aviation Safety: A Developing Country Perspective

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September 2009

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Master of Laws (LL.M.)

ACKNOWLEDGEMENTS

At first, I would like to thank my professors and colleagues at the Institute of Air and Space Law for their strong support and assistance in completing this thesis. I would like to admit that, without their support and assistance, it would not have been possible for me to complete the thesis. Special thanks to my supervisor, Professor Armand de Mestral, for his extraordinary supervision. I am really proud of my supervisor who has given his valuable time, guidance, and precious recommendations for this thesis. Thanks to Rachel Pachoud, one of my beloved McGill friends, for the correction of the French translation of the Abstract.

Finally, I owe thank to my family members for their kind support and encouragement.

Thank you all very much!

ABSTRACT

Due to lack of compliance with and enforcement of legal and regulatory norms concerning civil aviation safety, the global civil aviation safety has remained and continues to remain at risk. To remedy this deficiency, both multilateral and unilateral initiatives have been launched. This thesis discusses on both of those initiatives and concludes that, although useful mechanism, none of these can ensure complete global civil aviation safety. Most importantly, "Blacklisting" under those unilateral initiatives is harming the financially and technically weak developing countries to such an extent that those feeble countries are becoming permanently disabled even to continue their aviation activities which is hazardous for the entire world. To adapt the existing regime for the contemporary world to achieve global civil aviation safety, this thesis reviews and suggests some useful reform proposals.

RÉSUMÉ

La sécurité dans le domaine de l'aviation civile a été et demeure en danger, à cause du défaut de conformité et d'application des normes législatives et réglementaires. Afin de remédier à ces défaillances, des initiatives unilatérales et multilatérales ont été lancées. Ce mémoire traite de ces deux types d'initiatives, et en conclut que bien que ces mécanismes soient utiles, aucun d'entre eux n'est en mesure d'assurer une sécurité totale dans le domaine de l'aviation civile. Par ailleurs, les initiatives unilatérales de « mise sur liste noire » nuisent aux pays en voie de développement, qui sont financièrement et techniquement faibles, à tel point, que ces pays affaiblis, deviennent handicapés de manière permanente, allant jusqu'à remettre en cause la poursuite de leur activité aéronautique, ce qui représente un aléa au niveau mondial. Afin d'adapter le régime actuel au monde contemporain, et d'atteindre un niveau de sécurité total dans le domaine de l'aviation civile, cette thèse réexamine et suggère quelques propositions de réforme qui pourraient être utiles.

GLOSSARY

ADI	Attitude Director Indicator.
AFDD	Audit Findings and Differences Database.
AFS	Automatic Flight System.
AIP	Aeronautical Information Publication.
AP	Auto Pilot.
ATC	Air Traffic Control.
CAA	Civil Aviation Authority.
CAP	Captain.
CASB	Canadian Aviation Safety Board.
CASSAP	Corporate Aviation Safety and Security Audit Program (FSF).
CCs	Compliance Checklists.
CIS	Commonwealth of Independent States.
CRM	Crew Resource Management.
CWT	Center Wing Fuel Tank.
DGCA	Directors General of Civil Aviation (ICAO).
DGCAM	Directorate General of Civil Aviation and Meteorology.
DOT	Department of Transportation (US).
EASA	European Aviation Safety Agency.
EC SAFA	European Community Safety Assessment of Foreign Aircraft.
ECAC	European Civil Aviation Conference.
EU	European Union.
FAA	Federal Aviation Administration (US).
FCOM	Flight Crew Operational Manual.
FD	Flight Director.
FL	Flight Level.
FMC	Flight Management Computer.
FP	Foxtrot Papa.
FSF	Flight Safety Foundation.
FSIX	Flight Safety Information Exchange (ICAO).
FTA	Free Trade Agreement.
F/O	First Officer.
GPWS	Ground Proximity Warning System.
IAEA	International Atomic Energy Agency.
IASA	International Aviation Safety Assessments (US).
IATA	International Air Transport Association.
ICAO	International Civil Aviation Organization.
ICJ	International Court of Justice.
IFFAS	International Financial Facility for Aviation Safety (ICAO).

ILS	Instrument Landing System.
IMF	International Monetary Fund.
IMO	International Maritime Organization.
INAC	National Civil Aviation Institute of Venezuela.
IOSA	IATA Operational Safety Audit.
IRRS	Integrated Regulatory Review Service (IAEA).
ISARPs	IATA Standards and Recommended Practices.
JAA	Joint Aviation Authorities.
MENA	Middle East and North Africa.
MOU	Memorandum of Understanding.
NAFTA	North American Free Trade Agreement.
NSOC	National Safety Oversight Coordinator.
NTSB	National Transportation Safety Board (US).
PIC	Pilot-in-Command.
SAAQ	State Aviation Activity Questionnaire.
SAFA	Safety Assessment of Foreign Aircraft.
SARPs	Standards And Recommended Practices.
SB	Service Bulletin.
SOA	Safety Oversight Audit Section (ICAO).
SOP	Standard Operating Procedure.
SSA	Safety and Security Audits Branch (ICAO).
THS	Horizontal Stabilizer.
UN	United Nations.
US	United States.
USOAP	Universal Safety Oversight Audit Programme (ICAO).
WTO	World Trade Organization.

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INTRODUCTION

Among those issues that have remained a challenge for the policy makers of the civil aviation sector from the inception of commercial air transport, aviation safety possesses the top position.[1] The alarming fact that aviation accidents are occurring continuously killing many people has warranted and continues to warrant this top position to aviation safety. Although a huge number of those occurrences have been caused by pilots' error, lack of compliance with and enforcement of the existing legal and regulatory norms concerning aviation safety is no less responsible.[2] To ensure compliance with and enforcement of such norms, different initiatives, both multilaterally and unilaterally, have been launched. Those unilateral initiatives involve blacklisting either any country or any airline or any aircraft of an airline.

This thesis demonstrates that those initiatives, although useful tool, cannot ensure complete global civil aviation safety in reality. In this regard, it has been shown that, while the multilateral initiatives can ensure safety to a large extent, the unilateral initiatives can ensure safety to a very limited extent and, hence, multilateral initiatives are preferable to unilateral initiatives to remedy the lack of compliance with and enforcement of the existing norms concerning aviation safety.

Chapter 1 provides an introduction to contemporary global civil aviation safety. Chapter 2 briefly describes the background and procedure of those different initiatives. Chapter 3 addresses the question: can the existing multilateral initiatives achieve global civil aviation safety? Chapter 4 analyzes whether or not the existing unilateral initiatives are appropriate mechanisms to achieve global civil aviation safety. Chapter 5 reviews and suggests some essential reform proposals required to adapt the existing regime for the current world to ensure global civil aviation safety.

[1] See c. 1, section 1.1, below.
[2] See Annex, Table 3, below; c. 1, section 1.2, below.

Chapter 1: An Introduction to Contemporary Global Civil Aviation Safety

1.1 The Importance of Ensuring Global Civil Aviation Safety

Safety is one of the most important features of the transportation sector. From the inception of commercial aviation, this issue has achieved paramount importance to the whole world.[3] Safety remains a challenge for the policy makers of the aviation sector today. The United Nations body, namely, International Civil Aviation Organization (hereinafter ICAO), which is responsible for the civil aviation of its Member States, is still working on global civil aviation safety.[4] Though the tragic events of September 11, 2001 made security "a paramount concern in international aviation",[5] safety-related accidents are still ten times more responsible than aviation terrorist events for passenger fatalities.[6] This is also evident from the latest Annual Report[7] of the Council of the ICAO which reveals that in 2008 there were 30 fatal aircraft accidents with 571 passenger fatalities while there were 23 acts of unlawful interference with only 11 fatalities.[8]

The three worst recent aviation accidents, namely, the Air France crash on 1 June 2009 which claimed 228 lives, the Caspian Airlines crash on 15 July 2009 which claimed 168 lives, and the Yemenia Airways crash on 30 June 2009 which claimed 152 lives,[9] demonstrate the importance of ensuring civil aviation safety. According to the International Air Transport Association (hereinafter IATA), until June 2009, there have been 8 fatal accidents which claimed 478 lives in 2009.[10] Those recent accidents emphasize the need to do more work in the area of civil aviation safety.

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[3] See Paul Stephen Dempsey, *Public International Air Law* (Montreal: McGill University, Institute and Center for Research in Air & Space Law, 2008) at 67 [Dempsey, *Public*].

[4] See online: Strategic Objectives of ICAO, ICAO <http://www.icao.int/icao/en/strategic_objectives.htm> (The ICAO Council adopted six strategic objectives on 17 December 2004 for the period of 2005 - 2010. One of those strategic objectives is to enhance global aviation safety.) (visited September 2, 2009).

[5] Dempsey, *Public*, *supra* note 3 at 67.

[6] See John Saba, "Worldwide Safe Flight: Will the International Financial Facility for Aviation Safety Help It Happen?" (2003) 68 J. Air L. & Com. 537 at 538 (HeinOnline).

[7] *Annual Report of the Council – 2008*, ICAO Council, 2008, ICAO Doc. 9916, online: ICAO <http://www.icao.int/icaonet/dcs/9916/index.html> (visited September 2, 2009).

[8] See *ibid.*

[9] See Annex, Table 2, below.

[10] Online: Fact Sheet – Safety, International Air Transport Association <http://www.iata.org/pressroom/facts_figures/fact_sheets/safety.htm> (visited September 2, 2009).

Safety can be defined as a public good.[11] "The ideal public good has two main qualities: its benefits are nonrivalrous in consumption and nonexcludable."[12] It can be described as a global public good since the benefits are quasi universal in terms of countries, people and generations and, hence, the beneficiary of safety is humanity as a whole.[13] Even the contracting parties to the Chicago Convention[14] of 1944 regarded civil aviation safety as paramount and above politics, like humanitarian aid.[15] Furthermore, between the two primary goals of any airline, namely, ensuring safety and achieving profitability, safety comes first.[16]

In this connection, one should note the following statement of Dr. Assad Kotaite, the former President of the Council of ICAO: "Aviation safety is global in nature. For the entire system to be safe, all elements must be equally safe."[17] The view that global solutions must be sought to solve the existing difficulties of aviation safety was also adopted by the aviation legal experts during the 2008 Annual Meeting and Conference of the American Bar Association's Forum on Air and Space Law.[18] The need for a global solution to fix the lack of civil aviation safety can also be realized from the assertion by

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[11] For a good discussion on the concept of public goods, see Kaul, Inge., Grunberg, Isabelle. & Stern, Marc., eds., *Global Public Goods: International Cooperation in the 21st Century* (New York: Oxford University Press, 1999).

[12] Inge Kaul, Isabelle Grunberg and Marc A. Stern, "Defining Global Public Goods" in Kaul, Inge., Grunberg, Isabelle. & Stern, Marc., eds., *Global Public Goods: International Cooperation in the 21st Century* (New York: Oxford University Press, 1999) 2 at 3, online: Oxford Scholarship Online <http://www.oxfordscholarship.com/>.

[13] *Ibid*. at 2-3 ("Global public goods must meet two criteria. The first is that their benefits have strong qualities of publicness—that is, they are marked by nonrivalry in consumption and nonexcludability. These features place them in the general category of public goods. The second criterion is that their benefits are quasi universal in terms of countries (covering more than one group of countries), people (accruing to several, preferably all, population groups), and generations (extending to both current and future generations, or at least meeting the needs of current generations without foreclosing development options for future generations)."[footnote omitted] at 2).

[14] *Convention on International Civil Aviation*, 7 December 1944, 61 STAT. 1180, T.I.A.S. NO. 1591, 15 U.N.T.S. 295, Can. T.S. 1944 No. 36, ICAO Doc. 7300/9 [*Chicago Convention*].

[15] Thomas Whalen "Lift the sanctions" *Airline Business* (26 October 2006) 90, online: Flightglobal <http://www.flightglobal.com/articles/2006/10/26/210232/lift-the-sanctions.html> (visited August 29, 2009).

[16] Paul Stephen Dempsey & Laurence E. Gesell, *Airline Management: Strategies for the 21st Century*, 2nd ed. (Chandler, Arizona: Coast Aire Publications, 2006) at 42.

[17] ICAO, ICAO News Release, PIO 15/02, "COUNCIL OF ICAO ESTABLISHES GLOBAL FINANCING FACILITY FOR AVIATION SAFETY" (9 December 2002), online: ICAO <http://www.icao.int/icao/en/nr/2002/pio200215_e.pdf> (visited September 2, 2009).

[18] Pascal Zamprelli, "Air & Space Law: global concern, global perspective needed for new rules" *McGill Reporter* (25 September 2008), online: McGill Reporter <http://reporter.mcgill.ca/2008/09/air-space-law-global-concern-global-perspective-needed-for-new-rules/> (visited September 2, 2009).

the AviAssist[19] that the immense growth of aviation worldwide demonstrates that lack of safety in one region of the world increasingly influences aviation safety in other regions.[20] Therefore, more concentration on the improvement of aviation safety from a global perspective is essential.

1.2 Factors Responsible for Aviation Accidents

"Table 3: Principal Causes of the Aviation Accidents"[21] provides that there are 22 causes of aviation accidents. That Table is prepared on the basis of 102 worst aviation accidents listed in "Table 2: 102 Worst Aviation Accidents".[22] Among those causes, the most responsible are: (a) Mistake / Failure of the Pilot(s) / Crew (including their negligence, recklessness, etc.) (40%); (b) Lack of oversight, deficient training program provided by the Oversight Authority or the concerned CAA (21%); (c) Deficiency in the Operator's authority, organizational structure, training program, etc. (20%); (d) Mistake of / deficiency in the ATC (19%); (e) Bad Weather (11%); (f) Negligence, reckless, etc. on the part of Pilot(s) / Crew (11%); (g) Lack of / deficient technology (9%); and (h) Mistake / Failure of the Pilot of another aircraft (9%). Due to the restriction on the length of this thesis, the thesis will deal with causes (b), (c), (d) and (g).

In fact, at present, the major difficulty with regard to aviation safety is the lack of compliance with and enforcement of the existing legal and regulatory norms concerning safety. Those four causes relate to this difficulty. The Chicago Convention, the base of the establishment of ICAO, contains many provisions which provide for the maintenance of aviation safety. Furthermore, the ICAO Council has adopted Annexes[23] to the Chicago

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[19] AviAssist is an independent Foundation that identifies threats to aviation safety, analyses the problems and works on practical solutions to them. The Foundation provides pro-active safety support to aviation organisations (government and industry) in the 22 States of the ICAO East and Southern African (ESAF) region. It is a regional affiliate of the Flight Safety Foundation. See online: AviAssist Foundation <http://www.aviassist.org/pages/website_pages.php?pgid=2> (visited September 2, 2009).

[20] Frances Fiorino, "Incident-Prone African Aviation Gets Help From FSF, AviAssist" *Aviation Daily [McGraw-Hill Companies, Inc.]* 372:46 (4 June 2008) 4 (WLeC, AVDAILY).

[21] See Annex, Table 3, below.

[22] See Annex, Table 2, below.

[23] ICAO Council adopts Standards And Recommended Practices from time to time to meet the current global need as Annexes to the *Chicago Convention*, *supra* note 14. *Chicago Convention*, *supra* note 14, art. 54(l). For a brief discussion on all of those Annexes see online: ICAO <http://www.icao.int/cgi/goto_m.pl?icaonet/anx/info/annexes_booklet_en.pdf> (visited September 2,

Convention most of which concern aviation safety. These Annexes provide detailed guidelines on aviation safety, and all the contracting States of the Chicago Convention need to comply with those guidelines to attain international safety standard.

However, the lack of compliance with and enforcement of the existing legal and regulatory norms has meant that these norms are not always realized in practice. It is alarming that the Chicago Convention is one of the contributory factors to this problem. Two articles, namely, articles 37 and 38,[24] are responsible for this. Both of those articles allow any given contracting State of the Chicago Convention to avoid implementing the Annexes to the Chicago Convention. Although article 37 asks all the contracting States "to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization",[25] any State can avoid doing everything possible by itself since the phrase "highest practicable degree of uniformity"[26] has not been defined. Article 38 facilitates any Contracting State to deviate from any standards or procedures of any Annexes to the Convention if the State finds it "impracticable to comply" with them.[27] What is "impracticable"? The Convention provides no guidance. Again, although the deviating contracting State must notify the ICAO of such "differences between its own practice and that established by the international standard",[28] the concerned State can avoid notifying since no defined time limit has been set for that purpose.[29]

1.3 Initiatives Undertaken: Both Multilaterally and Unilaterally

To remedy the deficiency of lack of compliance with and enforcement of the existing legal and regulatory norms concerning civil aviation safety, several initiatives have been undertaken both multilaterally and unilaterally.

2009). Though designated as Annexes for convenience, these Standards And Recommended Practices do not actually become part of the *Chicago Convention*, *supra* note 14. See *Chicago Convention*, *supra* note 14, art. 94.

[24] *Chicago Convention*, *supra* note 14, arts.37, 38.

[25] *Ibid.*, art. 37.

[26] *Ibid.*

[27] See *ibid*., art. 38.

[28] See *ibid.*

[29] See *ibid.*

In 1999, the ICAO established a "*mandatory*"[30] Universal Safety Oversight Audit Programme (hereinafter USOAP) pursuant to Assembly Resolution A32-11[31] "to promote global aviation safety through the regular auditing of safety oversight systems in all ICAO Contracting States. Specifically, the USOAP audits focus on the State's capability for providing safety oversight by assessing whether the critical elements of a safety oversight system have been implemented effectively. The audit teams also determine the State's level of implementation of safety-relevant ICAO Standards and Recommended Practices (SARPs), associated procedures, guidance material and practices."[32]

In addition to the USOAP of the ICAO, there exist two other multilateral initiatives, namely, IATA Operational Safety Audit (IOSA) Programme established by the IATA and the Corporate Aviation Safety and Security Audit Program (CASSAP) established by the Flight Safety Foundation.[33]

Before the establishment of the USOAP, the US Federal Aviation Administration (hereinafter FAA) established an International Aviation Safety Assessments (hereinafter IASA) Program in 1991 which focuses on a country's ability to comply with SARPs concerning aircraft operations and maintenance established by the ICAO.[34] Under this unilateral initiative, States are assessed by the FAA and then the result is publicly disclosed. A state that is found not in compliance with the ICAO standards is classified as a Category 2 State and restrictions on the operations to the US are imposed on the flag-carriers of that delinquent State until the deficiency is rectified.

There exists another unilateral initiative, this one performed by the EU. This is the Safety Assessment of Foreign Aircraft (hereinafter SAFA) Programme. The EU has

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[30] Dempsey, *Public*, *supra* note 3 at 103 [emphasis in original].

[31] *Establishment of an ICAO Universal Safety Oversight Audit Programme*, ICAO Assembly Res. A32-11, 32nd Sess., ICAO Doc. 9902, I-86, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> (visited September 2, 2009).

[32] See online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/USOAP/Pages/default.aspx> (visited September 2, 2009).

[33] "Flight Safety Foundation is an independent, nonprofit, international organization engaged in research, auditing, education, advocacy and publishing to improve aviation safety." Online: About Flight Safety Foundation, Flight Safety Foundation <http://www.flightsafety.org/about_fsf.html> (visited September 2, 2009).

[34] Dempsey, *Public*, *supra* note 3 at 90. See online: International Aviation Safety Assessments (IASA) Program, Federal Aviation Administration <http://www.faa.gov/about/initiatives/iasa/> (visited September 2, 2009).

launched the SAFA Programme through Directive 2004/36/CE[35] which was adopted on 21 April 2004, i.e. after the launch of the USOAP. According to this Directive, international safety standards will be enforced within the Community by means of imposing inspections on third-country aircraft landing at airports located in the EU Member States.[36] The European Aviation Safety Agency (hereinafter EASA) is responsible for the coordination of the SAFA Programme.[37]

[35] EC, *Directive 2004/36/CE of the European Parliament and of the Council of 21 April 2004 on the safety of third-country aircraft using Community airports*, [2004] O.J.L 143/76 [*Directive 2004/36/CE*].
[36] See *ibid.*
[37] EC, *Commission Regulation (EC) No 768/2006 of 19 May 2006 implementing Directive 2004/36/EC of the European Parliament and of the Council as regards the collection and exchange of information on the safety of aircraft using Community airports and the management of the information system*, [2006] O.J.L 134/16.

Chapter 2: Different Initiatives to Ensure Compliance with & Enforcement of International Law on Aviation Safety

This Chapter briefly describes the background and procedure of the different initiatives to ensure compliance with and enforcement of relevant international law on aviation safety. Both multilateral and unilateral initiatives are focused in this Chapter.

2.1 Multilateral Initiatives

2.1.1 Universal Safety Oversight Audit Programme (USOAP)

The ultimate goal of the USOAP is to promote global aviation safety through the mandatory and regular auditing of safety oversight systems in all International Civil Aviation Organization (ICAO) Contracting States.[38] The USOAP was established in January 1999 by the ICAO pursuant to Assembly Resolution A32-11,[39] which replaced the previous voluntary safety oversight assessment programme, in response to widespread concerns about the adequacy of aviation safety oversight around the world.[40]

Specifically, the USOAP audits focus on the State's capability for providing safety oversight by assessing whether the critical elements of a safety oversight system have been implemented effectively.[41] There are eight critical elements that ICAO considers essential:[42]

a) Primary Aviation Legislation,

b) Specific Operating Regulations,

c) State's Civil Aviation System and Safety Oversight Functions,

d) Technical Personnel Qualification and Training,

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[38] See *Establishment of an ICAO Universal Safety Oversight Audit Programme*, ICAO Assembly Res. A32-11, 32nd Sess., ICAO Doc. 9902, I-86, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> [*ICAO Res. A32-11*] (visited September 2, 2009). See "Annual Civil Aviation Report" (1999) 54:6 ICAO Journal 7 at 30, online: ICAO Journal, ICAO <http://www.icao.int/icao/en/jr/1999/> (visited September 2, 2009). See online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/USOAP/Pages/default.aspx> (visted September 2, 2009).

[39] *ICAO Res. A32-11*, *ibid.*

[40] See online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/USOAP/Pages/default.aspx> (visited September 2, 2009).

[41] *Ibid.*

[42] Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Documents/USOAP%20Overview%20-%20public.pdf> (visited September 2, 2009).

e) Technical Guidance, Tools and the Provision of Safety Critical Information,

f) Licensing, Certification, Authorization and Approval Obligations,

g) Surveillance and Inspection Obligations, and

h) Resolution of Safety Concerns.

The audit teams also determine the State's level of implementation of safety related ICAO Standards And Recommended Practices[43] (hereinafter SARPs), associated procedures, guidance material and practices.[44] The USOAP is administered by the Safety Oversight Audit (SOA) Section of the ICAO Safety and Security Audits (SSA) Branch.[45] There are eight Programme principles, which have been developed to guide the USOAP activities and have been endorsed by the ICAO Council.[46] These principles are:

(a) Sovereignty;

(b) Universality;

(c) Transparency and Disclosure;

(d) Timeliness;

(e) All-Inclusiveness;

(f) In a Systematic Manner, with Consistency and Objectivity;

(g) Fairness; and

(h) Quality.[47]

The scope of the USOAP was initially limited to three Annexes[48] to the Chicago Convention[49] of 1944, namely, Annex 1 (Personnel Licensing), Annex 6 (Operation of

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[43] ICAO Council adopts Standards And Recommended Practices from time to time to meet the current global need as Annexes to the *Chicago Convention*, *infra* note 49. *Chicago Convention*, *infra* note 49, art. 54(l). Though designated as Annexes for convenience, these Standards And Recommended Practices do not actually become part of the *Chicago Convention*, *infra* note 49. See *Chicago Convention*, *infra* note 49, art. 94.

[44] See online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/USOAP/Pages/default.aspx> (visited September 2, 2009).

[45] See online: Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/Pages/default.aspx> (visited September 2, 2009).

[46] Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Pages/USOAPPrinciples.aspx> (visited September 2, 2009).

[47] *Ibid.*

[48] ICAO Council adopts Standards And Recommended Practices from time to time to meet the current global need as Annexes to the *Chicago Convention*, *infra* note 49. *Chicago Convention*, *infra* note 49, art. 54(l). For a brief discussion on all of those Annexes see online: ICAO <http://www.icao.int/cgi/goto_m.pl?icaonet/anx/info/annexes_booklet_en.pdf> (visited September 2, 2009). Currently, there are 18 Annexes: Annex 1: Personnel Licensing, Annex 2: Rules of the Air, Annex 3: Meteorological Service for International Air Navigation, Annex 4: Aeronautical Charts, Annex 5: Units of

Aircraft) and Annex 8 (Airworthiness of Aircraft). The 35th Session of the ICAO Assembly resolved that the USOAP had to be expanded to cover the safety-related provisions in all safety-related Annexes and also to implement a comprehensive systems approach for the conduct of safety oversight audits.[50] Accordingly, the conduct of audits under the comprehensive systems approach was launched on 1 January 2005.[51]

In preparation for the audit, the State appoints a National Safety Oversight Coordinator (NSOC) and completes the State Aviation Activity Questionnaire (SAAQ) and Compliance Checklists (CCs) for the safety related ICAO Annexes.[52] The SOA requested all the Contracting States to appoint the NSOC to facilitate the audit process and coordination with the Contracting States, who would act as a focal point between the SOA and the concerned State.[53] The NSOC plays an active role in all the phases of the new comprehensive systems approach.[54]

The new comprehensive systems approach, which takes approximately 2 years to complete,[55] consists of three phases:[56]

1. *Pre-audit phase (12 months)*: During this phase, the information provided by the State in the SAAQ and CCs is reviewed by the SOA to analyze the type of organization established by the State for safety oversight, the implementation of

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Measurement to be Used in Air and Ground Operations, Annex 6: Operation of Aircraft, Annex 7: Aircraft Nationality and Registration Marks, Annex 8: Airworthiness of Aircraft, Annex 9: Facilitation, Annex 10: Aeronautical Telecommunications, Annex 11: Air Traffic Services, Annex 12: Search and Rescue, Annex 13: Aircraft Accident and Incident Investigation, Annex 14: Aerodromes, Annex 15: Aeronautical Information Services, Annex 16: Environmental Protection, Annex 17: Security - Safeguarding International Civil Aviation against Acts of Unlawful Interference, Annex 18: The Safe Transport of Dangerous Goods by Air.

[49] *Convention on International Civil Aviation*, 7 December 1944, 61 STAT. 1180, T.I.A.S. NO. 1591, 15 U.N.T.S. 295, Can. T.S. 1944 No. 36, ICAO Doc. 7300/9 [*Chicago Convention*].

[50] *Transition to a Comprehensive Systems Approach for Audits in the ICAO Universal Safety Oversight Audit Programme (USOAP)*, ICAO Assembly Res. A35-6, 35th Sess., ICAO Doc. 9902, I-87, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> [*ICAO Res. A35-6*] (visited September 2, 2009).

[51] Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Pages/Background.aspx> (visited September 2, 2009).

[52] Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Pages/AuditProcess.aspx> (visited September 2, 2009).

[53] Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Documents/USOAP%20Overview%20-%20public.pdf> (visited September 2, 2009).

[54] *Ibid*.

[55] *Ibid.*

[56] Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Pages/Background.aspx> (visited September 2, 2009).

Annexes provisions and the differences from the SARPs identified by the States.[57] This allows the ICAO to tailor the audit in accordance with the level and complexity of aviation activities in the State and to determine the duration of the audit and the size and required composition of the audit team.[58] The following actions are taken during this phase: Letter to the States advising of the audit schedule, Audit notification letter sent to the State, Team leader assigned, Signed Memorandum of Understanding (MOU) returned to the ICAO, the SOA reviews and analyzes documentation using SOA audit tools, States update the SAAQ and CCs, Specific audit protocols selected, State advised on team composition and tentative work programme, and Audit team members' briefing.[59]

2. *On-site phase*: During this phase, an ICAO audit team visits the State to validate the information provided by the State and to conduct an on-site audit of the State's system and overall capability for safety oversight.[60] The activities performed during this phase are: Opening meeting with State authorities, Conduct on-site audit in line with agreed work programme, Daily team briefings and briefing with the National Coordinator, Development and compilation of draft safety oversight audit report and Closing meeting with the State authority.[61] The on-site audit is carried out to facilitate the concerned State to fulfill its safety oversight obligations under the Chicago Convention of 1944.[62]
3. *Post-audit phase (Maximum 9 months)*: This phase encompasses all the activities following the on-site audit.[63] These activities are: the State starts work on corrective action plan, the SOA sends interim safety oversight audit report, the State submits corrective action plan and comments, the SOA submits final safety oversight audit report to the State, the State comments on final safety oversight

[57] *Ibid.*
[58] *Ibid.*
[59] Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Pages/AuditProcess.aspx> (visited September 2, 2009).
[60] Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Pages/Background.aspx> (visited September 2, 2009).
[61] Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Pages/AuditProcess.aspx> (visited September 2, 2009).
[62] See online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Pages/Background.aspx> (visited September 2, 2009).
[63] *Ibid.*

audit report (if any) and the Final safety oversight audit report published.[64] In accordance with the ICAO Assembly Resolution A35-6,[65] the audit final reports are made available to Contracting States in their entirety through a secure website, along with information derived from the Audit Findings and Differences Database[66] (AFDD).[67] In 2008, all Contracting States audited under the USOAP gave their consent for the ICAO to release the results of audits conducted in their territory.[68] The information is accessible by anybody on the ICAO's Flight Safety Information Exchange (FSIX) website.[69]

Moreover, the SOA conducts regional safety oversight seminar/workshops aimed at State officials and the aviation industry in general, with the objective of increasing the awareness of States regarding their safety oversight responsibilities.[70]

The comprehensive systems approach for the conduct of the USOAP consists of the following safety related Annexes to the Chicago Convention of 1944:[71]

Annex 1 - Personnel Licensing,

Annex 2 - Rules of the Air,

Annex 3 - Meteorological Service for International Air Navigation,

Annex 4 - Aeronautical Charts,

Annex 5 - Units of Measurement to be Used in Air and Ground Operations,

Annex 6, Part I - Operation of Aircraft,

Annex 6, Part II - Operation of Aircraft,

Annex 6, Part III - Operation of Aircraft,

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[64] Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Pages/AuditProcess.aspx> (visited September 2, 2009).

[65] *ICAO Res. A35-6*, *supra* note 50.

[66] Audit Findings and Differences Database (AFDD) was developed to record actual findings and differences identified during the audits. Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/EN/SSA/SOA/USOAP/Pages/Background.aspx> (visited September 2, 2009).

[67] Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Pages/Background.aspx> (visited September 2, 2009).

[68] ICAO, ICAO News Release, PIO 17/08, "Initiatives on Safety, the Environment and Air Transport Policies Highlight 2008" (30 December 2008), online: ICAO <http://www.icao.int/icao/en/nr/2008/pio200817_e.pdf> (visited September 2, 2009).

[69] *Ibid.* As of September 2, 2009, the address of the Flight Safety Information Exchange (FSIX) website is <http://www.icao.int/fsix/safety.cfm>.

[70] Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Pages/Background.aspx> (visited September 2, 2009).

[71] Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Pages/ScopeofAudit.aspx> (visited September 2, 2009).

Annex 7 - Aircraft Nationality and Registration Marks,

Annex 8 - Airworthiness of Aircraft,

Annex 10, Volume I - Aeronautical Telecommunications,

Annex 10, Volume II - Aeronautical Telecommunications,

Annex 10, Volume III - Aeronautical Telecommunications,

Annex 10, Volume IV - Aeronautical Telecommunications,

Annex 10, Volume V - Aeronautical Telecommunications,

Annex 11 - Air Traffic Services,

Annex 12 - Search and Rescue,

Annex 13 - Aircraft Accident and Incident Investigation,

Annex 14, Volume I - Aerodromes,

Annex 14, Volume II - Aerodromes,

Annex 15 - Aeronautical Information Services,

Annex 16, Volume I - Environmental Protection,

Annex 16, Volume II - Environmental Protection,

Annex 18 - The Safe Transport of Dangerous Goods.

As a result of this expansion to cover all safety-related Annexes to the Chicago Convention of 1944, in many States, the ICAO has to deal with several entities besides the civil aviation authority responsible for safety oversight and investigation tasks.[72] In 2008, the systems and procedures of the USOAP were again certified ISO 9001:2000 compliant by Moody Certification of North America.[73] Since the current cycle of audits under the comprehensive systems approach will expire on 2010, the ICAO is considering applying a continuous monitoring approach for the USOAP beyond 2010.[74]

Chart 1: Evolution of the USOAP briefly depicts the evolution of the USOAP from its inception, i.e. from 1995, to date and beyond.

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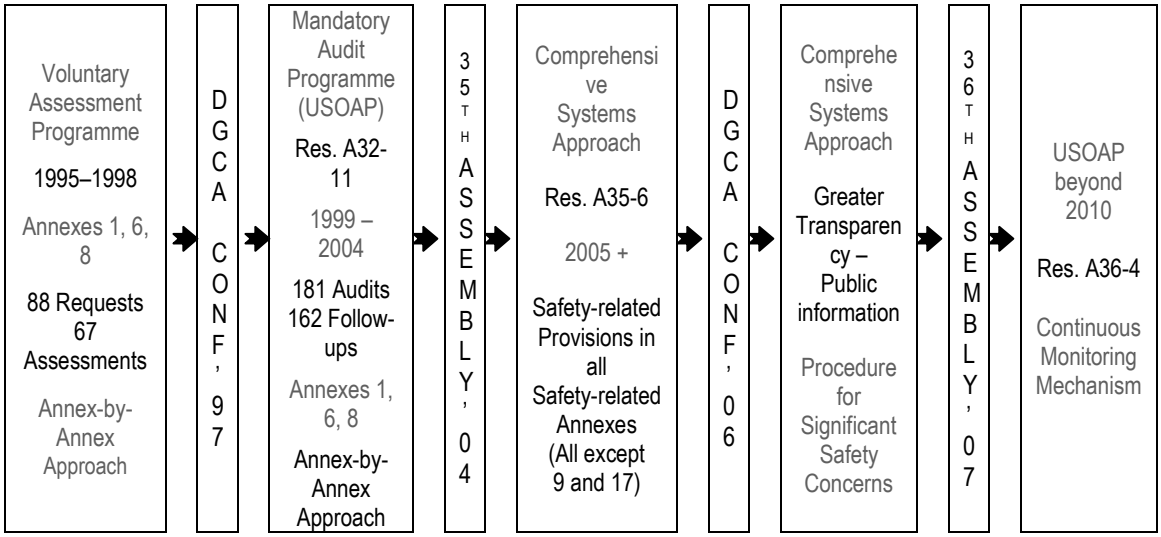
[72] Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/usoap/Documents/USOAP%20Overview%20-%20public.pdf> (visited September 2, 2009).

[73] ICAO, ICAO News Release, PIO 17/08, "Initiatives on Safety, the Environment and Air Transport Policies Highlight 2008" (30 December 2008), online: ICAO <http://www.icao.int/icao/en/nr/2008/pio200817_e.pdf> (visited September 2, 2009).

[74] *Application of a Continuous Monitoring Approach for the ICAO Universal Safety Oversight Audit Programme (USOAP) beyond 2010*, ICAO Assembly Res. A36-4, 36th Sess., ICAO Doc. 9902, I-96, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> (visited September 2, 2009).

CHART 1: EVOLUTION OF THE USOAP



Source: Online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO, <http://www2.icao.int/en/ssa/soa/usoap/Documents/USOAP%20Overview%20-%20public.pdf> (visited September 2, 2009).

2.1.2 IATA Operational Safety Audit (IOSA) Programme

The IOSA Programme is an internationally recognized and accepted evaluation system designed to assess the operational management and control systems of an airline.[75] In 2003, the IOSA Programme was launched, based on over 700 safety IATA Standards and Recommended Practices (ISARPs) contained in the IOSA Standards Manual.[76] There are two objectives of the IOSA Programme: (a) to improve airline operational safety through the audit programme using internationally harmonized standards; and (b) to improve airline efficiency by eliminating redundant audits.[77] According to the IATA, safety auditing is an integral part of IATA's Six-Point Safety Programme.[78]

There are substantial differences between the ICAO administered USOAP and the IATA administered IOSA Programme. Whereas the USOAP is directed to an ICAO

[75] Online: IATA Operational Safety Audit, International Air Transport Association <http://www.iata.org/ps/certification/iosa/index.htm> (visited September 2, 2009).
[76] IATA, "IATA Operational Safety Audit: Designed for the Aviation Industry", online: IATA Operational Safety Audit, International Air Transport Association <http://www.iata.org/NR/rdonlyres/6FA92165-B9A3-4CE7-8B8F-45DDBA0F6553/0/IOSA_FINAL_noSpreads.pdf> (visited September 2, 2009). The latest IOSA Standards Manual can be found in the IOSA website. As of September 2, 2009, the address of the IOSA website is <http://www.iata.org/ps/certification/iosa/index.htm>.
[77] IATA, "IATA Operational Safety Audit: Designed for the Aviation Industry", *ibid*. note 76.
[78] *Ibid.*

Contracting State, the IOSA Programme is directed to an airline. Although the application of the USOAP is limited to the ICAO Contracting States, the IOSA Programme is not limited to the IATA members only; "[the] IOSA is an audit programme for ALL airlines".[79] Again, while the USOAP is confined to safety-related Annexes to the Chicago Convention of 1944, the IOSA Programme relies on the IATA established ISARPs.

ISARPs are derived from all relevant ICAO SARPs, in particular Annexes 1, 6, and 8 to the Chicago Convention of 1944, as well as from regulations of the Joint Aviation Authorities (JAA) of Europe, the Federal Aviation Administration (FAA) of the United States (US), and industry best practices.[80] The IOSA audit standards are based on eight areas which, according to the IATA, contribute to airline operational safety.[81] These eight areas are:[82]

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

To help airlines prepare for the IOSA Programme, the IOSA Standards Manual and associated guidance material, are available free of charge to anybody on the IOSA website.[83] The IOSA Standards Task Forces, comprised of the IATA and airline operations experts, refine and improve the IOSA Standards to meet the current need.[84]

The IATA, through a rigorous process, accredits Audit Organisations to conduct the IOSA audits.[85] According to the IATA, these Audit Organisations use only highly

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[79] *Ibid.*
[80] *Ibid.*
[81] *Ibid.*
[82] *Ibid.*
[83] As of September 2, 2009, the address of the IOSA website is <http://www.iata.org/ps/certification/iosa/index.htm>.
[84] IATA, "IATA Operational Safety Audit: Designed for the Aviation Industry", *supra* note 76.
[85] *Ibid.*

qualified and experienced airline auditors on their teams.[86] The IOSA Auditors are trained by the IATA Endorsed Training Organisations.[87]

Airlines that have undergone an IOSA Audit by an IATA accredited Audit Organisation and have cleared all findings, enter the IOSA Registry.[88] The IOSA Registry is a listing of all IOSA Registered Operators and is updated on a continuous basis.[89] Being on the IOSA Registry means an airline meets the ISARPs.[90] It is mandatory for all IATA member airlines to become IOSA Registered Operator.[91] It is important to note that the IOSA is an audit of an airline's operational procedures and documentation; it is not a physical inspection of aircraft.[92] To maintain their status on the IOSA Registry, airlines must undergo, and complete, an IOSA audit every two years.[93] The IOSA Registry is accessible through the IOSA Registry website.[94]

The IOSA Audit Report is the final official record of the audit and contains information regarding the conduct and results of the audit.[95] Unlike the USOAP, the IOSA Audit Report is confidential since the Report is considered the property of the Auditee airline subject to extensive Quality Control verification by the IATA.[96] Unless the Auditee airline grants approval, none except the IATA can view the IOSA Audit Report.[97] It is worth noting that the IOSA Programme is ISO 9001:2000 certified.[98]

2.1.3 Corporate Aviation Safety and Security Audit Program (CASSAP)

The Flight Safety Foundation (FSF), which is an independent, nonprofit, nonpolitical international organization dedicated entirely to aviation safety, performs the

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[86] *Ibid.*
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*
[91] Online: IOSA Registry, International Air Transport Association <http://www.iata.org/ps/certification/iosa/registry.htm> (visited September 2, 2009).
[92] IATA, "IATA Operational Safety Audit: Designed for the Aviation Industry", *supra* note 76.
[93] *Ibid.*
[94] As of September 2, 2009, the address of the IOSA Registry website is <http://www.iata.org/ps/certification/iosa/registry.htm>.
[95] IATA, "IATA Operational Safety Audit: Designed for the Aviation Industry", *supra* note 76.
[96] *Ibid.*
[97] *Ibid.*
[98] *Ibid.*

CASSAP.[99] Under this Program, the FSF provided safety services for aircraft operators, aviation organizations and national civil aviation authorities worldwide.[100] The Foundation is dedicated to an important goal: improving aviation safety.[101] Under this Program, the FSF assesses the operator's policies, procedures and practices including:[102]

- Organizational Elements;
- Safety Management;
- Flight Operations;
- Training;
- Personnel;
- Maintenance;
- Facilities and Support Equipment;
- Aircraft Configuration; and
- Security.

The audit team assesses the current operator conditions and performance in accordance with the accepted industry practices.[103] The CASSAP is strictly confidential.[104] The FSF does not disclose, without permission from the client, either the fact of agreement by an organization to conduct the safety audit or the results of the audit.[105]

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[99] See online: Corporate Audit Services, Flight Safety Foundation <http://www.flightsafety.org/corporate_audit.html#> (visited September 2, 2009).
[100] See *ibid.*
[101] *Ibid*.
[102] FSF, "Corporate Aviation Safety and Security Audit Program: Taking Safety and Security Seriously", online: Flight Safety Foundation <http://www.flightsafety.org/pdf/audit_brochure.pdf> (visited September 2, 2009).
[103] See online: Corporate Audit Services, Flight Safety Foundation <http://www.flightsafety.org/corporate_audit.html#> (visited September 2, 2009).
[104] *Ibid.*
[105] *Ibid.*

2.2 Unilateral Initiatives: Blacklisting

2.2.1 US Blacklisting: The International Aviation Safety Assessments (IASA) Program

The US FAA established the IASA program through public policy in August of 1992.[106] According to the FAA, the IASA program focuses on a country's ability, not the individual air carrier, to adhere to the ICAO SARPs.[107] The purpose of the IASA is to ensure that all foreign air carriers that operate to or from the US are properly licensed and with safety oversight provided by a competent Civil Aviation Authority (CAA) in accordance with the ICAO SARPs.[108]

In obtaining information relevant to its assessment, the FAA meets with the foreign CAA responsible for providing the safety oversight to its carriers, reviews pertinent records and meets with officials of the subject foreign air carriers.[109] The FAA then analyzes the collected information to determine whether the CAA complies with the ICAO standards regarding the oversight provided to the air carriers under its authority.[110] This determination is part of the basis for the FAA recommended courses of action to the Department of Transportation (DOT) on the initiation, continuation, or expansion of air service to the US by the carriers overseen by that CAA.[111]

In 1994, the FAA decided to publicly disclose the results of FAA assessment.[112] According to Professor Dempsey, by this decision the FAA fitted the IASA Program with teeth.[113] In connection with this policy, the FAA established three categories of ratings for countries to signify the status of a CAA's compliance with minimum international safety

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[106] Online: International Aviation Safety Assessments (IASA) Program, Federal Aviation Administration <http://www.faa.gov/about/initiatives/iasa/> (visited September 2, 2009).
[107] See *ibid.*
[108] Online: International Aviation Safety Assessments (IASA) Program, Federal Aviation Administration <http://www.faa.gov/about/initiatives/iasa/more/> (visited September 2, 2009).
[109] See *Changes to the International Aviation Safety Assessment (IASA) Program*, 65 Fed. Reg. 33751 – 33753 (2000) (to be codified at 14 C.F.R. Part 129), online: Federal Register Online via GPO Access <http://www.gpoaccess.gov/fr/index.html> [*Changes to the IASA Program*] (visited September 2, 2009).
[110] *Ibid.*
[111] *Ibid.*
[112] *Public Disclosure of the Results of Foreign Civil Aviation Authority Assessments*, 59 Fed. Reg. 46332 (1994) (to be codified at 14 C.F.R. Part 129), online: Federal Register Online via GPO Access <http://www.gpoaccess.gov/fr/index.html> (visited September 2, 2009). The results of FAA assessments are accessible by anybody on the IASA website at <http://www.faa.gov/about/initiatives/iasa/> (visited September 2, 2009).
[113] Paul Stephen Dempsey, *Public International Air Law* (Montreal: McGill University, Institute and Center for Research in Air & Space Law, 2008) at 92.

standards: Category I (Acceptable), Category II (Conditional), and Category III (Unacceptable).[114] Category II or III applied to countries whose CAAs were found not providing safety oversight in compliance with the minimum ICAO standards.[115] The FAA placed a country in Category II if one of its carriers provided air service to the US at the time of the FAA assessment and in Category III if none of its carriers provided air service to the US at the time of the FAA assessment.[116] Carriers from Category II countries were permitted to maintain, but not expand, current levels of service under heightened FAA surveillance.[117] Carriers from Category III countries were not permitted to commence service to the US.[118]

The FAA reduced these Categories from 3 to 2.[119] It was argued that this reduction was necessary to eliminate confusion that resulted from having two different categories regarding non-compliance with the ICAO standards.[120] Now, the FAA maintains two ratings, namely, Category 1 and Category 2, for the status of countries at the time of the assessment.[121] These two Categories are defined as follows:[122]

- *Category 1, Does Comply with ICAO Standards:* A country's civil aviation authority has been assessed by the FAA inspectors and has been found to license and oversee air carriers in accordance with the ICAO aviation safety standards.[123]
- *Category 2, Does Not Comply with ICAO Standards*: The FAA assessed this country's CAA and determined that it does not provide safety oversight of its air carrier operators in accordance with the minimum safety oversight standards established by the ICAO.[124]

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[114] See *Changes to the IASA Program*, *supra* note 109.
[115] *Ibid.*
[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid.*
[119] *Ibid.*
[120] *Ibid.*
[121] Online: IASA Results Definitions, International Aviation Safety Assessments (IASA) Program, Federal Aviation Administration <http://www.faa.gov/about/initiatives/iasa/definitions/> (visited September 2, 2009).
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid.*

The list of Category 2 States is called the Blacklist in this thesis. A State is found not complying with the ICAO standards and, hence, is placed in Category 2 if one or more of the following deficiencies are identified:[125]

(1) The country lacks laws or regulations necessary to support the certification and oversight of air carriers in accordance with minimum international standards;
(2) The CAA lacks the technical expertise, resources, and organization to license or oversee air carrier operations;
(3) The CAA does not have adequately trained and qualified technical personnel;
(4) The CAA does not provide adequate inspector guidance to ensure enforcement of, and compliance with, minimum international standards; and
(5) The CAA has insufficient documentation and records of certification and inadequate continuing oversight and surveillance of air carrier operations.

Category 2 consists of two groups of countries.[126] Countries that fall within one group are those that were previously placed in Category II, i.e. those having existing operations to the US at the time of the assessment.[127] While in Category 2 status, carriers from these countries will be permitted to continue operations at current levels under heightened FAA surveillance and expansion or changes in services to the US by such carriers are not permitted, although new services will be permitted if operated using aircraft wet-leased from a duly authorized and properly supervised U.S. carrier or a foreign air carrier from a Category 1 country that is authorized to serve the US using its own aircraft.[128] Countries that were previously classified Category III, i.e. those which do not have existing air services to the US at the time of the assessment, fall within the second group.[129] Carriers from these countries will not be permitted to commence service to the US while in Category 2 status, although they may conduct services if operated using aircraft wet-leased from a duly authorized and properly supervised U.S. carrier or a foreign air carrier from a Category 1 country that is authorized to serve the US with its

[125] See *Changes to the IASA Program*, *supra* note 109.
[126] *Ibid.*
[127] *Ibid.*
[128] *Ibid.*
[129] *Ibid.*

own aircraft.[130] No other difference is made between these two groups of countries while in Category 2 status.[131]

2.2.2 EU Blacklisting: European Community Safety Assessment of Foreign Aircraft (EC SAFA) Programme

The European Union (EU) has launched the European Community Safety Assessment of Foreign Aircraft (hereinafter EC SAFA) Programme through Directive 2004/36/CE[132] (the so-called "SAFA Directive") which was adopted on 21 April 2004. According to this Directive, international safety standards will be enforced within the Community by means of ramp inspections on third-country aircraft landing at airports located in the Member States.[133]

The EC SAFA Programme was established by the European Commission and, according to Commission Regulation (EC) NO. 768/2006,[134] the European Aviation Safety Agency (EASA) is responsible for the coordination of this Programme as of 1 January 2007. The European Commission carries overall responsibility and has the legislative powers.[135] The Member States that are engaged in the EC SAFA Programme are *obliged* to perform SAFA Ramp Checks on the aircraft of third country operators flying into their state, and, when needed, take appropriate corrective measures in addition to disseminate the results of these inspections to other participants in the EC SAFA Programme.[136]

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[130] *Ibid.*
[131] *Ibid.*
[132] EC, *Directive 2004/36/CE of the European Parliament and of the Council of 21 April 2004 on the safety of third-country aircraft using Community airports*, [2004] O.J.L 143/76 [*Directive 2004/36/CE*].
[133] See *Directive 2004/36/CE*, *ibid.*
[134] EC, *Commission Regulation (EC) No 768/2006 of 19 May 2006 implementing Directive 2004/36/EC of the European Parliament and of the Council as regards the collection and exchange of information on the safety of aircraft using Community airports and the management of the information system*, [2006] O.J.L 134/16 [*Regulation 768/2006*].
[135] EC, *Notices from European Union Institutions and Bodies: Report from the Commission on the European Community SAFA Programme (Safety Assessment of Foreign Aircraft) (Aggregated Information — Report — 1 January to 31 December 2007)*, [2008] O.J.C 231/1 [*Report 2008*].
[136] See *Directive 2004/36/CE*, *supra* note 132. Currently, 42 Member States, including the EU Member States, are engaged in the EC SAFA Programme. The 42 Member States engaged in the EC SAFA Programme are: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Republic of Georgia, Romania, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden,

Previously, the European Civil Aviation Conference (ECAC) launched the *voluntary* SAFA programme in 1996.[137] The ECAC Member States participating in the programme were *requested* to perform SAFA Ramp Checks on foreign operators flying into their territory.[138] Under that programme, the operational management was performed by the JAA, the associated body of the ECAC.[139]

Commission Regulation (EC) No. 2111/2005,[140] provides a provision for a decision making process whereby an airline may be banned from European airspace for safety reasons. Those airlines will then appear on a list, often referred to as the "Community list". This list is called the Blacklist in this thesis. Pursuant to Commission Regulation (EC) No. 2111/2005, the Community list and any modification thereto are published immediately in the Official Journal of the EU and the air carriage contractors, the national CAAs, the EASA and airports in the territory of the Member States are obliged to bring the Community list to the attention of passengers.[141] The Community list is accessible by public on the European Commission's Transport website.[142]

The EU Blacklist is divided into two groups: Annex A and Annex B. Annex A comprises those air carriers which are subject to a ban within the Community for all their operations.[143] Annex B is formed with those air carriers which are subject to operational restrictions within the community.[144] The operational restrictions consist of a prohibition on the use of the specific aircraft or specific aircraft types mentioned in Annex B.[145]

Switzerland, The former Yugoslav Republic of Macedonia, Turkey, United Kingdom, Ukraine. *Report 2008*, *supra* note 135.

[137] Online: European Civil Aviation Conference <http://www.ecac-ceac.org/index.php?content=securite> (visited September 2, 2009).

[138] Online: EC SAFA Programme, European Aviation Safety Agency, E.U. <http://www.easa.eu.int/ws_prod/s/s_safa.php> (visited September 2, 2009).

[139] *Ibid.*

[140] EC, *Regulation (EC) No 2111/2005 of the European Parliament and of the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC*, [2005] O.J.L 344/15 [*Regulation 2111/2005*].

[141] *Regulation 2111/2005*, *ibid.*, art. 9.

[142] As of September 2, 2009, the address of European Commission's Transport website where the Community list is published is <http://ec.europa.eu/transport/air-ban/flywell_en.htm>.

[143] EC, *Commission Regulation (EC) No 474/2006 of 22 March 2006 establishing the Community list of air carriers which are subject to an operating ban within the Community referred to in Chapter II of Regulation (EC) No 2111/2005 of the European Parliament and of the Council*, [2006] O.J. L 84/14, art. 2(1) [*Regulation 474/2006*].

[144] *Regulation 474/2006, ibid.*, art. 2(2).

[145] *Ibid.*

Nevertheless, in both of those cases, those Blacklisted carriers could be permitted to exercise traffic rights by using wet-leased aircraft of an air carrier which is not subject to an operating ban, provided that the relevant safety standards are complied with.[146]

Ramp Inspections carried out under the EC SAFA Programme follow a procedure common to all Member States and are then reported on using a common format.[147] Generally, all inspection results need to be communicated by the State which performed the inspections to the other EU Member States and to the European Commission.[148] If an inspection identifies significant irregularities, these will be taken up with the airline and the oversight authority.[149] Where irregularities have an immediate impact on safety, inspectors can demand corrective action before they allow the aircraft to leave.[150] If rectification of the deficiencies requires more time or needs to be performed at another airport, the Authority of the State of inspection may, in coordination with the State of operator or the State of registry of the aircraft concerned, decide to authorize a positioning flight[151] and also prescribe the necessary conditions under which the aircraft can be allowed to fly to that specific airport.[152]

All reported data is stored centrally in a computerized database set up by the EASA.[153] The information held within this database is reviewed and analyzed by the EASA on a regular basis.[154] The European Commission and Member States are informed of any potentially safety hazards identified.[155] On behalf of and in close cooperation with

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[146] EC, *Commission Regulation (EC) No 298/2009 of 8 April 2009 amending Regulation (EC) No 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community*, [2009] O.J. L 95/16.
[147] *Report 2008*, *supra* note 135. See especially *Directive 2004/36/CE*, *supra* note 132, art. 4, and Annex II, as amended by EC, *Commission Directive 2008/49/EC of 16 April 2008 amending Annex II to Directive 2004/36/EC of the European Parliament and of the Council regarding the criteria for the conduct of ramp inspections on aircraft using Community airports*, [2008] O.J.L 109/17 [*Directive 2008/49/EC*]. Annex II of *Directive 2004/36/CE*, *supra* note 132, as amended by *Directive 2008/49/EC,* details the procedure of ramp inspection.
[148] *Directive 2004/36/CE*, *supra* note 132, art. 5.
[149] *Ibid.*, art. 4.
[150] *Ibid.*, art. 7, and Annex II, para. 6.5, as amended by *Directive 2008/49/EC*, *supra* note 147.
[151] A positioning flight is a flight to a specific destination without passengers or cargo onboard.
[152] *Directive 2004/36/CE*, *supra* note 132, art. 7, and Annex II, para. 6.5, as amended by *Directive 2008/49/EC*, *supra* note 147.
[153] *Report 2008*, *supra* note 135.
[154] *Regulation 768/2006*, *supra* note 134, art. 2.
[155] *Ibid.*, art. 2(2)(4)(b).

the European Commission, the EASA will develop qualitative criteria with the aim to achieve a more focused approach regarding the SAFA inspection priorities.[156]

Oversight authorities of the Member States engaged in the EC SAFA Programme are free to choose which aircraft to inspect.[157] Some authorities carry out random inspections while others try to target aircraft or airlines that they suspect may not comply with the ICAO standards.[158] A checklist of 54 inspection items is used during a SAFA Ramp Check.[159] Because the turn-around time[160] may not be sufficient to go through the full checklist, not all 54 items may be inspected.[161] Under the SAFA policy, no delay of an aircraft can be caused except for safety reasons.[162]

It should be noted that, under the EC SAFA Programme, the requisite safety standard is higher than the ICAO safety standard. According to article 2(j) of Commission Regulation (EC) No. 2111/2005,[163] the "'relevant safety standards' means the international safety standards contained in the Chicago Convention and its Annexes as well as, where applicable, those in relevant Community law." Moreover, according to paragraph 3, Annex II of Directive 2004/36/EC,[164] as amended by Directive 2008/49/EC,[165] when inspecting the technical condition of an aircraft, it shall be checked against the aircraft manufacturer's standards in addition to the ICAO Standards and the ICAO European Regional Supplementary Procedures.[166]

Commission Regulation (EC) No. 768/2006[167] puts an obligation on the EASA to prepare for the European Commission on a yearly basis a proposal for a public aggregated information report regarding the information collected from the Member States in

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[156] *Ibid.*, arts. 2 and 4.
[157] Online: EC SAFA Programme, European Aviation Safety Agency, E.U. <http://www.easa.eu.int/ws_prod/s/s_safa.php> (visited September 2, 2009). See *Directive 2004/36/CE*, *supra* note 132, art. 4, and Annex II, as amended by *Directive 2008/49/EC*, *supra* note 147.
[158] *Ibid.*
[159] *Directive 2004/36/CE*, *supra* note 132, Annex II, para. 4.1, as amended by *Directive 2008/49/EC*, *supra* note 147.
[160] The time between arrival and departure is called the turn-around time.
[161] *Report 2008*, *supra* note 135.
[162] See *Directive 2004/36/CE*, *supra* note 132, art. 4(5).
[163] *Regulation 2111/2005*, *supra* note 140, art. 2(j).
[164] *Directive 2004/36/CE*, *supra* note 132.
[165] *Directive 2008/49/EC*, *supra* note 147.
[166] See *ibid.*, Annex.
[167] *Regulation 768/2006*, *supra* note 134, art. 5(2).

accordance with article 6(2) of Directive 2004/36/EC.[168] The aggregated report is published by the European Commission in all European languages.

[168] *Directive 2004/36/CE*, *supra* note 132.

Chapter 3: Can the Existing Multilateral Initiatives Achieve Global Civil Aviation Safety?

3.1 Introduction

The existing multilateral and unilateral initiatives are endeavoring to achieve global civil aviation safety by ensuring compliance with and enforcement of the existing legal and regulatory norm regarding civil aviation safety. In the immediately preceding Chapter,[169] both multilateral and unilateral initiatives have been briefly described. This Chapter and the next Chapter deal with the multilateral initiatives and the unilateral initiatives, respectively, chiefly to determine whether or not those can attain global civil aviation safety. This Chapter demonstrates that multilateral programs are preferable to unilateral blacklisting in achieving global civil aviation safety. Section 3.2 discusses the advantages that would be accrued to the entire world by embracing those multilateral initiatives. Section 3.3 analyzes the extent of effectiveness of those multilateral initiatives to ensure global civil aviation safety. Section 3.4 examines the legality of those multilateral tools. Section 3.5 considers the prevailing deficiencies of those multilateral programs in ensuring global civil aviation safety. Section 3.6 provides the conclusion of this Chapter. The conclusion is that, though the multilateral initiatives are very effective in ensuring global civil aviation safety, the existing loopholes have to be filled in order to attain complete global civil aviation safety.

3.2 Benefits to the Globe

This section is devoted to the consideration of the benefits that would be accrued to the entire world by embracing the multilateral initiatives which are directed to achieve global civil aviation safety.

Since aviation is a global industry, a global solution is imperative to cure any problem of this industry. Dr. Assad Kotaite, the former President of the Council of ICAO, stated, "Aviation safety is global in nature. For the entire system to be safe, all elements

[169] See c. 2, above.

must be equally safe."[170] The view that global solution must be sought to solve the existing difficulty of aviation safety was also forwarded by the aviation legal experts during the 2008 Annual Meeting and Conference of the American Bar Association's Forum on Air and Space Law.[171] The need for a global solution to fix the lack of civil aviation safety can also be realized from the assertion by the AviAssist[172] that the immense growth of aviation worldwide has demonstrated that lack of safety in one region of the world increasingly influences aviation safety in other regions.[173] The multilateral programs, by reason of their global nature, provide for a global solution to cure the lack of civil aviation safety.

Multilateral initiatives help to maintain peace and harmony in the world. Peace is the supreme goal of the human society. The importance of maintaining peace is self-evident for the well-being of the whole world. Peace is a public good.[174] As a contributor to preserve peace, multilateral initiatives are consistent with the UN Charter[175] that established the United Nations. This clearly facilitates to satisfy the aims and objectives of the Chicago Convention[176] of 1944 which include safe and orderly growth of international civil aviation throughout the world, operation of civil aviation for peaceful purposes, safe air transport, full respect to the rights of contracting States, fair and equality of opportunity to operate international airlines for contracting States and promote safety of flight.[177]

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[170] ICAO, ICAO News Release, PIO 15/02, "COUNCIL OF ICAO ESTABLISHES GLOBAL FINANCING FACILITY FOR AVIATION SAFETY" (9 December 2002), online: ICAO <http://www.icao.int/icao/en/nr/2002/pio200215_e.pdf> (visited September 2, 2009).

[171] Pascal Zamprelli, "Air & Space Law: global concern, global perspective needed for new rules" *McGill Reporter* (25 September 2008), online: McGill Reporter <http://reporter.mcgill.ca/2008/09/air-space-law-global-concern-global-perspective-needed-for-new-rules/> (visited September 2, 2009).

[172] AviAssist is an independent Foundation that identifies threats to aviation safety, analyses the problems and works on practical solutions to them. The Foundation provides pro-active safety support to aviation organisations (government and industry) in the 22 States of the ICAO East and Southern African (ESAF) region. It is a regional affiliate of the Flight Safety Foundation. See online: AviAssist Foundation <http://www.aviassist.org/pages/website_pages.php?pgid=2> (visited September 2, 2009).

[173] Frances Fiorino, "Incident-Prone African Aviation Gets Help From FSF, AviAssist" *Aviation Daily [McGraw-Hill Companies, Inc.]* 372:46 (4 June 2008) 4 (WLeC, AVDAILY).

[174] For a good discussion on the concept of public goods see Kaul, Inge., Grunberg, Isabelle. & Stern, Marc., eds., *Global Public Goods: International Cooperation in the 21st Century* (New York: Oxford University Press, 1999).

[175] *Charter of the United Nations,* 26 June 1945, Can. T. S. 1945 No. 7.

[176] *Convention on International Civil Aviation*, 7 December 1944, 61 STAT. 1180, T.I.A.S. NO. 1591, 15 U.N.T.S. 295, Can. T.S. 1944 No. 36, ICAO Doc. 7300/9 [*Chicago Convention*].

[177] See *ibid.*, art. 44, pmbl.

The presence of more audited systems can cause uncertainty in the airline industry. People love one-stop high quality service. Too much service denotes too much hassle. Too much service requires too much attention which would imply that it is better to cease operation rather to continue operation. The aviation business involves huge investment and suffers from both severe business risk and severe financial risk.[178] If uncertainty prevails in such a risky industry, it would be unreasonable to expect private sector investment, which is essential for the improvement of the civil aviation safety, especially of the economically weak States.[179] The ICAO has recognized that there are some feeble States who lack the financial resources to meet the minimum international aviation safety standard.[180] This recognition has led the ICAO to launch the International Financial Facility for Aviation Safety [IFFAS].[181] These weak States will be termed "feeble States" in this thesis. Therefore, the presence of uncertainty in a highly risky business, like the aviation industry, is a curse for the industry. The multilateral initiatives can help the industry in this regard by providing one-stop, standard, and acceptable service. In the current circumstances, in the absence of the unilateral initiatives, the States are required to focus only on the USOAP and the IATA member airlines only on the IOSA since the CASSAP is an entirely voluntary programme. Focusing on only one high standard multilateral initiative can set certainty in the aviation industry.

Those multilateral initiatives are blessing for those States which lack necessary resources, whether technical or financial, to discharge their oversight responsibility to ensure civil aviation safety. Particularly, two reasons deserve credit for this:

(a) less expensive nature of those multilateral initiatives; and

(b) systematic, less time consuming, fare and high quality detailed approach under those initiatives.

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[178] See Paul Stephen Dempsey & Laurence E. Gesell, *Airline Management: Strategies for the 21st Century*, 2nd ed. (Chandler, Arizona: Coast Aire Publications, 2006) c. 4 [Dempsey & Gesell, *Airline Management*].

[179] See e.g. Ruwantissa Abeyratne, "Blacklisting of Airlines by the European Union and the Disclosure of Safety Critical Information" (2008) Issues in Aviation Law & Policy ¶ 5261.

[180] See *International Financial Facility for Aviation Safety (IFFAS)*, ICAO Assembly Res. A36-5, ICAO Doc. 9902, I-96, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> (visited September 2, 2009).

[181] See *ibid.*

Multilateral initiatives entail either no payment or less payment.[182] Furthermore, it can be expected that the standard of audits performed under those initiatives would be high and the systematic comprehensive procedure involved can efficiently detect the safety deficiency.[183] This expectation is not immaterially founded by reason of the fact that both the USOAP and the IOSA are ISO 9001:2000 certified.[184] Therefore, those initiatives facilitate the feeble States to identify their safety deficiencies and to discharge their oversight responsibility properly.

Multilateral initiatives, especially the IOSA, are playing a great role in favor of alliances.[185] At present, alliances have become popular to the airlines.[186] It has become the rule of the game of airlines business.[187] It appears that four motivating factors have increased popularity of alliances among airlines:

(a) the desire to achieve greater economies of scale, scope, and density;

(b) the desire to reduce costs by consolidating redundant operations;

(c) the need to improve revenue by reducing the level of competition wherever possible as markets are liberalized; and

(d) the desire to skirt around the nationality rules which prohibit multinational ownership and cabotage.[188]

Although alliances have not been very successful yet, the airlines must follow the current trend since global alliances are still in their embryonic stage.[189] The aviation safety standard of the alliance partners is very important for the success of the alliance. Moreover, the aviation safety standard of a current or prospective partner of the alliance is very important for any airline to make a right decision. The multilateral initiatives are helping the airlines in this regard by providing them with high quality and reliable safety

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[182] See c. 2, section 2.1, above.
[183] See section 3.3, below.
[184] ICAO, ICAO News Release, PIO 17/08, "Initiatives on Safety, the Environment and Air Transport Policies Highlight 2008" (30 December 2008), online: ICAO <http://www.icao.int/icao/en/nr/2008/pio200817_e.pdf> (visited September 2, 2009); IATA, "IATA Operational Safety Audit: Designed for the Aviation Industry", online: IATA Operational Safety Audit, International Air Transport Association <http://www.iata.org/NR/rdonlyres/6FA92165-B9A3-4CE7-8B8F-45DDBA0F6553/0/IOSA_FINAL_noSpreads.pdf> (visited September 2, 2009).
[185] See also David Hodgkinson, "IOSA: The Revolution in Airline Safety Audits" (2005) 30 Air & Space L. 302 at 303ff (Kluwer Law International).
[186] See generally Dempsey & Gesell, *Airline Management*, *supra* note 178, c. 13.
[187] See generally *ibid.*
[188] *Ibid.* at 620.
[189] See also *ibid.*, c. 13.

related information without any cost. It is worth mentioning here that the U.S. FAA has recognized the IOSA as a program that may be used by U.S. carriers to meet their obligation to conduct safety audits of their code-share partners.[190]

3.3 Extent of Effectiveness to Ensure Global Civil Aviation Safety

Multilateral initiatives can be greatly effective in ensuring global civil aviation safety in several ways. This section principally considers the effectiveness of the USOAP of the ICAO.

Multilateral initiatives can ensure uniformity of law that is the principal objective of the Chicago Convention and one of the most important elements in ensuring aviation safety. As mentioned earlier,[191] lack of compliance with and enforcement of current legal and regulatory norms concerning civil aviation safety is the greatest headache of the world now. To rectify this problem, uniformity of law must be ensured. Because diversity of law will require diverse types of standard and this diversity can cause difficulty for the State and the airlines to comply and enforce the law and, consequently, jeopardize the aviation safety. Again, in a global industry, like the aviation, where the activity is not confined to national borders, where aircraft inevitably cross the border of one or more countries countless times a day, maintaining uniformity of law is requisite. For example, if different countries maintain different navigational rules, aircraft accident will occur frequently. This clearly impairs global civil aviation safety.

To appreciate the effectiveness of multilateral initiatives in ensuring global civil aviation safety appropriately, the historical background of those initiatives needs to be considered. In this instance, the thesis first of all considers the USOAP.

The problem of lack of compliance with international obligation under the Chicago Convention on the part of the contracting States is not a new one. Actually, this

[190] Federal Aviation Administration, Washington Headquarters Press Release, 26-04, "FAA Recognizes International Safety Audit Program" (2 July 2004), online: Washington Headquarters Press Release, Federal Aviation Administration <http://www.faa.gov/news/press_releases/news_story.cfm?newsId=5703> (visited September 2, 2009).
[191] See c. 1, above.

problem is as old as the Chicago Convention.[192] As noted earlier,[193] this problem became acute by reason of the opt-out provision of the Convention, namely, article 38.[194] Yet, the Convention did not create any machinery or procedures for the enforcement of compliance with international obligation under the Convention.[195] Most importantly, the necessity of providing oversight to ensure compliance was not felt seriously by the ICAO until the launching of the US IASA Program.[196]

The US FAA established the IASA program through public policy in August of 1992 following a series of accidents and findings of shortcomings of foreign carriers during ramp inspections at US airports.[197] The US took the lead since the ICAO had not shown initial leadership in this respect.[198] For years the ICAO silently and passively endured an alarming fact that many States did not comply with their safety related obligation and failed in their explicit legal duty under article 38 to notify their departure from or non-implementation of the SARPs.[199] Although the ICAO Secretariat experts were aware of this deficiency, "the ICAO leadership was too 'diplomatic' and timid to bring the problem into the open and to address it."[200] However, the unilateralism of the US did not sit well with the world community.[201] Criticisms like, unfairness, motivated by economic consideration, inconsistent application of policy, an absence of transparency, a lack of coordination with the ICAO, etc. were lodged against the US unilateral

[192] See e.g. Zachary D. Detra, *The Legitimacy of the International Civil Aviation Organization's Universal Safety Oversight Audit Programme* (LLM Thesis, McGill University Faculty of Law, Institute of Air and Space Law, 2006) at 56 [unpublished].
[193] See c. 1, above.
[194] *Chicago Convention*, *supra* note 176, art. 38.
[195] Michael Milde, "International Air Law and ICAO" in Marietta Benkö, ed., *Essential Air and Space Law*, vol. 4 (Utrecht, Netherlands: Eleven International Publishing, 2008) at 166 [Milde, "International Air Law"].
[196] See generally Paul Stephen Dempsey, *Public International Air Law* (Montreal: McGill University, Institute and Center for Research in Air & Space Law, 2008) at 101 – 107 [Dempsey, *Public*]; Milde, "International Air Law", *ibid.* at 166 – 169.
[197] Online: International Aviation Safety Assessments (IASA) Program, Federal Aviation Administration <http://www.faa.gov/about/initiatives/iasa/> (visited September 2, 2009); Milde, "International Air Law", *supra* note 195 at 166.
[198] Milde, "International Air Law", *supra* note 195 at 167.
[199] *Ibid.*
[200] *Ibid.*
[201] Dempsey, *Public*, *supra* note 196 at 101.

initiative.[202] The US IASA program led to a growing chorus of nations asking the ICAO to step in and assume those duties.[203]

Responding to this, the ICAO launched the voluntary safety oversight assessment programme to assess member State compliance with SARPs and to assist States whose compliance was deficient.[204] Under this voluntary programme, the ICAO commenced to review member States' safety regulation and oversight system.[205] Under this voluntary programme, a team of experts (either the ICAO staff members or experts seconded from national administrations) were sent to any member State on request to make an on-the-spot evaluation of the implementation of ICAO safety standards and of the oversight capability of the State concerned.[206] The main focus was on three Annexes[207] to the Chicago Convention, namely, Annex 1 (Personnel Training and Licensing), Annex 6 (Operations of Aircraft) and Annex 8 (Airworthiness).

However, this programme was criticized because of its voluntary, under-funded and confidential nature.[208] On November 1997, the ICAO convened a Conference of the

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[202] See e.g. *ibid.* at 101 – 102.
[203] *Ibid.* at 102.
[204] *Ibid.*
[205] *Ibid.*
[206] Milde, "International Air Law", *supra* note 195 at 167.
[207] ICAO Council adopts Standards And Recommended Practices from time to time to meet the current global need as Annexes to the *Chicago Convention*, *supra* note 176. *Chicago Convention*, *supra* note 176, art. 54(l). Though designated as Annexes for convenience, these Standards And Recommended Practices do not actually become part of the *Chicago Convention*, *supra* note 176. See *Chicago Convention*, *supra* note 176, art. 94. For a brief discussion on all of those Annexes see online: ICAO <http://www.icao.int/cgi/goto_m.pl?icaonet/anx/info/annexes_booklet_en.pdf> (visited September 2, 2009). Currently, there are 18 Annexes: Annex 1: Personnel Licensing, Annex 2: Rules of the Air, Annex 3: Meteorological Service for International Air Navigation, Annex 4: Aeronautical Charts, Annex 5: Units of Measurement to be Used in Air and Ground Operations, Annex 6: Operation of Aircraft, Annex 7: Aircraft Nationality and Registration Marks, Annex 8: Airworthiness of Aircraft, Annex 9: Facilitation, Annex 10: Aeronautical Telecommunications, Annex 11: Air Traffic Services, Annex 12: Search and Rescue, Annex 13: Aircraft Accident and Incident Investigation, Annex 14: Aerodromes, Annex 15: Aeronautical Information Services, Annex 16: Environmental Protection, Annex 17: Security - Safeguarding International Civil Aviation against Acts of Unlawful Interference, Annex 18: The Safe Transport of Dangerous Goods by Air.
[208] Dempsey, *Public*, *supra* note 196 at 103. "[T]he SOP [Safety Oversight Programme] was criticized because of its voluntary, under-funded, and confidential nature. ICAO was reticent to publicize delinquency for fear that member States would resist the voluntary audit program. Article 38 of the Chicago Convention requires both member State notification of noncompliance to the Council, and the Council's notification thereof to all member States. 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 delinquencies manifestly violated these explicit requirements. Moreover, by 1999, IASA had concluded that 40% of the countries assessed had deficient safety oversight systems." *Ibid.* at 103 [footnotes omitted].

Directors General of Civil Aviation [DGCA] on "Global Strategy for Safety Oversight" the purpose of which was to chart new strong strategies for safety audits of ICAO member States in general, "with confidentiality of the findings only for the period set for correction of the identified shortcomings and closely correlated to the need to provide technical assistance to [S]tates in need."[209] This global conference was an unprecedented occurrence in the ICAO history, the Chicago Convention does not provide for such types of conference and, hence, the conference had no law-making power.[210] This exceptional conference adopted *unanimously* thirty-eight recommendations calling for regular, mandatory, systematic and harmonized safety audits of all member States to be carried out by the ICAO.[211]

The ICAO Council endorsed these recommendations of the Conference,[212] and the ICAO established the mandatory USOAP in January 1999 pursuant to Assembly Resolution A32-11,[213] which replaced the previous voluntary safety oversight assessment programme.[214] The procedure of the USOAP has been detailed in the preceding Chapter.[215] The legality of the USOAP has been discussed in a subsequent section of this Chapter.[216] Commenting on the present USOAP, Milde states, "ICAO just seems to have acquired an unprecedented power of enforcement of the safety standards of international civil aviation."[217]

One should note that the ICAO is not the only international organization under the UN system that possesses such an oversight system to ensure compliance with and enforcement of international legal and regulatory norm. Most importantly, control over compliance with international law has been specially developed in the practice of

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[209] Milde, "International Air Law", *supra* note 195 at 168.
[210] *Ibid.*
[211] *Ibid.*
[212] *Ibid.* at 169.
[213] *Establishment of an ICAO Universal Safety Oversight Audit Programme*, ICAO Assembly Res. A32-11, 32nd Sess., ICAO Doc. 9902, I-86, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> [*ICAO Res. A32-11*] (visited September 2, 2009).
[214] See online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/USOAP/Pages/default.aspx> (visited September 2, 2009).
[215] See c. 2, section 2.1.1, above.
[216] See section 3.4.1, below.
[217] Milde, "International Air Law", *supra* note 195 at 169.

international organizations operating in the domain of specialized cooperation.[218] International organizations, e.g., the International Atomic Energy Agency (IAEA), the International Monetary Fund (IMF), the International Maritime Organization (IMO), etc., possess oversight mechanism. Below is a brief discussion on the oversight mechanisms of some of those organizations.

The International Atomic Energy Agency (IAEA): The IAEA is the world's nuclear inspectorate, with more than four decades of verification experience.[219] Inspectors work to verify that safeguarded nuclear material and activities are not used for military purposes.[220] The IAEA inspects nuclear and related facilities under safeguards agreements with more than 145 States around the world.[221] Most agreements are with States that have internationally committed themselves not to possess nuclear weapons.[222] These agreements are concluded pursuant to the global Non-Proliferation Treaty,[223] for which the IAEA is the verification authority.[224]

The Integrated Regulatory Review Service (IRRS) of the IAEA greatly resembles the USOAP of the ICAO. However, unlike the USOAP, the IRRS is a voluntary programme. The IAEA legal and governmental infrastructure related peer review services are aimed at providing advice and assistance to Member States *on request* to strengthen and enhance the effectiveness of the Member State regulatory infrastructure, including effective independent regulatory bodies.[225] The IRRS is constructed in modular form to cover each of the following legal and governmental infrastructure review areas:[226]

- Legislative and governmental responsibilities

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[218] I. I. Lukashuk, "Control in Contemporary International Law" in William E. Butler, ed., *Control Over Compliance With International Law* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1991) 5 at 7.
[219] Online: Our Work: Verification, IAEA <http://www.iaea.org/OurWork/SV/index.html> (visited September 2, 2009).
[220] *Ibid.*
[221] *Ibid.*
[222] *Ibid.*
[223] *Treaty on the Non-Proliferation of Nuclear Weapons*, 25 May 1970, T.I.A.S. NO. 6839, 729 U.N.T.S. 168, Can. T.S. 1970 No. 7.
[224] Online: Our Work: Verification, IAEA <http://www.iaea.org/OurWork/SV/index.html> (visited September 2, 2009).
[225] Online: Integrated Regulatory Review Services, IAEA <http://www-ns.iaea.org/reviews/rs-reviews.htm> (visited September 2, 2009).
[226] *Ibid.*

- Regulatory body responsibilities and functions
- Organization of the regulatory body
- Authorization process
- Regulations and guides
- Review and assessment
- Inspection and enforcement
- Management systems for regulatory bodies.

The IRRS approach is based on self-assessment methodology designed to support the continuous improvement concept of the Member States.[227] Initially, the Member State conducts a self-assessment as regards IAEA safety standards using the IRRS guidelines and associated questionnaires, to identify strengths and potential improvements to weakness in the regulatory framework and regulatory practices.[228] *At the request of the Member State*, the IAEA carries out an independent peer review mission to review the results of the self-assessment and actions planned.[229] In a follow-up phase 18-24 months after the IRRS, implementation of the actions will be reviewed.[230] This further review could be carried out by the Member State or on request by the IAEA.[231] It is worth noting that the control activities of the IAEA have been highly rated by governments.[232]

The International Monetary Fund (IMF): The IMF is mandated to oversee the international monetary system and monitor the economic and financial policies of its 186 member countries.[233] This activity is known as surveillance.[234] During this process, the IMF highlights possible risks to domestic and external stability and advises on needed policy adjustments.[235] In this way, it helps the international monetary system serve its essential purpose of facilitating the exchange of goods, services, and capital among countries, thereby sustaining sound economic

[227] *Ibid.*
[228] *Ibid.*
[229] *Ibid.*
[230] *Ibid.*
[231] *Ibid.*
[232] Lukashuk, *supra* note 218.
[233] Online: Factsheet – IMF Surveillance, IMF <http://www.imf.org/external/np/exr/facts/surv.htm> (visited September 2, 2009).
[234] *Ibid*.
[235] *Ibid.*

growth.[236] There are two main aspects to the IMF's work: multilateral surveillance, or oversight of the world economy; and bilateral surveillance, which comprises appraisal of and advice on the policies of each member country.[237]

The IMF continuously reviews global and regional economic trends.[238] Its key instruments of global and regional surveillance are two semi-annual publications, the World Economic Outlook and the Global Financial Stability Report.[239]

IMF economists monitor members' economies on a continuous basis, and regularly visit member countries to exchange views with the government and central bank.[240] The focus is on whether there are risks to domestic and external stability that argue for adjustments in economic or financial policies.[241] During their mission, IMF staff also often meets with other stakeholders to help evaluate the country's economic policies and direction.[242] Upon its return to headquarters, the mission submits a report to the IMF's Executive Board for discussion.[243] The Board's views are subsequently transmitted to the country's authorities.[244] In recent years, surveillance has become increasingly transparent.[245] Almost all member countries now agree to publication of a Public Information Notice, which summarizes the views of IMF staff and the Executive Board.[246]

Surveillance in its present form was established by Article IV of the IMF's Articles of Agreement,[247] as revised in the late 1970s following the collapse of the Bretton Woods system of fixed exchange rates.[248] Under Article IV,[249] member countries undertake to collaborate with the IMF and with one

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[236] *Ibid.*
[237] *Ibid.*
[238] *Ibid.*
[239] *Ibid.*
[240] *Ibid.*
[241] *Ibid.*
[242] *Ibid.*
[243] *Ibid.*
[244] *Ibid.*
[245] *Ibid.*
[246] *Ibid.*
[247] *Articles of Agreement of the International Monetary Fund*, 25 March 1947, T.I.A.S. NO. 1501, 2 U.N.T.S. 39, Can. T. S. 1944 No. 37 [*Articles of Agreement*].
[248] Online: Factsheet – IMF Surveillance, IMF <http://www.imf.org/external/np/exr/facts/surv.htm> (visited September 2, 2009).
[249] *Articles of Agreement*, *supra* note 247, art. IV.

another to promote the stability of the global system of exchange rates.[250] In particular, they commit to running their domestic and external economic policies in keeping with a mutually agreed code of conduct.[251] For its part, the IMF is charged with:

(i) overseeing the international monetary system to ensure its effective operation; and

(ii) monitoring each member's compliance with its policy obligations.[252]

To ensure that surveillance remains effective, the IMF is constantly reviewing its policy framework.[253] In June 2007, the policy framework of surveillance received its first major update since the 1970s, with the adoption of the Executive Board's Decision on Bilateral Surveillance over Members' Policies.[254] The Decision clarifies that country surveillance should be focused on assessing whether countries' policies promote external stability.[255] This means that surveillance should mainly focus on monetary, fiscal, financial, and exchange rate policies and assess risks and vulnerabilities.[256]

The International Maritime Organization (IMO): The main task of the IMO has been to develop and maintain a comprehensive regulatory framework for shipping and its remit today includes safety, environmental concerns, legal matters, technical co-operation, maritime security and the efficiency of shipping.[257] The IMO is a specialized agency of the United Nations with 168 Member States and three Associate Members.[258] Though inspection and monitoring of compliance with international obligations are the responsibility of member States, the Voluntary IMO Member State Audit Scheme has been adopted to play a key role

[250] Online: Factsheet – IMF Surveillance, IMF <http://www.imf.org/external/np/exr/facts/surv.htm> (visited September 2, 2009).
[251] *Ibid.*
[252] *Ibid.*
[253] *Ibid.*
[254] IMF, *Bilateral Surveillance over Members' Policies*, IMF Executive Board Decision, 2007, online: IMF <http://www.imf.org/external/np/sec/pn/2007/pn0769.htm#decision> (visited September 2, 2009).
[255] Online: Factsheet – IMF Surveillance, IMF <http://www.imf.org/external/np/exr/facts/surv.htm> (visited September 2, 2009).
[256] *Ibid.*
[257] Online: International Maritime Organization <http://www.imo.org/> (visited September 2, 2009).
[258] *Ibid.*

in enhancing implementation of IMO standards.[259] The Voluntary IMO Member State Audit Scheme is intended to provide an audited Member State with a comprehensive and objective assessment of how effectively it administers and implements those mandatory IMO instruments which are covered by the Scheme.[260] The Audit Scheme is quite similar to the USOAP of the ICAO. However, this oversight tool is entirely a voluntary programme.

Since it is a voluntary programme, the IMO cannot enter any member State at its will. Upon receiving a request for audit from a Member State, the IMO Secretary-General will appoint an audit team leader who will discuss and agree the scope of the audit with the Member State.[261] The audit will commence after the signing of a Memorandum of Co-operation by the Secretary General and by the Member State.[262] The Memorandums set out the scope of the audit and the responsibilities of the Secretary-general and the Member State for the successful completion of the audit.[263]

From the foregoing, it can be realized why the ICAO decided to launch the USOAP and why the member States of the ICAO are not severely objecting to the USOAP. The approval of all member States audited under the USOAP to release the results of audits conducted in their territory is clearly an indicator of worldwide acceptance of the USOAP.[264] The information is accessible by anybody on the ICAO's Flight Safety Information Exchange (FSIX) website.[265]

Now, we will briefly look at the historical background of the IOSA programme. An increase in the number and cost of safety audit requirements provided the chief impetus for the development of the IOSA programme.[266] The growing popularity of code-sharing[267] is partly responsible for this proliferation since many governments, particularly

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[259] *Ibid.*
[260] Voluntary IMO Member State Audit Scheme, online: International Maritime Organization <http://www.imo.org/> (visited September 2, 2009).
[261] *Ibid.*
[262] *Ibid.*
[263] *Ibid.*
[264] "Initiatives on Safety", *supra* note 184.
[265] *Ibid.* As of September 2, 2009, the address of the Flight Safety Information Exchange (FSIX) website is <http://www.icao.int/fsix/safety.cfm>.
[266] Hodgkinson, *supra* note 185 at 303.
[267] Code-sharing "essentially allows one carrier to market its product as another's. Two carriers will share their two-letter designator codes in the Computer Reservations Systems [CRSs], used by travel agents to

the US, required their national airlines to audit foreign code-share partners.[268] Other factors that persuaded the launching of the IOSA programme include "redundant and overlapping audits, no common audit standards, no defined auditor qualifications, uneven audit results, no sharing of audits and an inefficient use of resources."[269] It is worth noting that the IOSA was designed to complement the USOAP.[270]

The eight USOAP Principles are very important to persuade any State to consent to the audit programme.[271] These principles are: (a) Sovereignty; (b) Universality; (c) Transparency and Disclosure; (d) Timeliness; (e) All-Inclusiveness; (f) In a Systematic Manner, with Consistency and Objectivity; (g) Fairness; and (h) Quality.[272] The fact of consent on the part of any State without any compulsion, whether directly or indirectly, is vital for the success of any programme devised by any international organization.

The first principle that the USOAP respects the sovereignty of the audited State is crucial since sovereignty is the most important of all the four elements which constitute a State.[273] Though the USOAP is mandatory, the audit team does not enter any State before obtaining the consent of the respective State.[274] Similarly, the other multilateral initiatives do not attack the sovereignty of any State. For example, the IATA looks at the airline not the concerned State. Although the airlines are the flag carrier of any State, any carrier that wants to become an IOSA Registered Operator requests the IATA to assess them. Therefore, sovereignty is upheld. When the audited State sees that its sovereignty has not been compromised as a result of the audit, it would happily consent to be audited by the international organization.

"Universality", the second USOAP principle, is another factor that can help the improvement of the global civil aviation safety. This is due to the fact that global civil

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reserve and sell seats, so that an interline flight falsely appears to be an on-line connection. They allow airlines the advantage of offering pseudo on-line connections and the potential to draw greater traffic as a result of having one carrier listed in the computer reservations systems, on timetables and in advertisements, rather than two connecting carriers." Dempsey & Gesell, *Airline Management*, *supra* note 178 at 623.

[268] Hodgkinson, *supra* note 185 at 303.

[269] *Ibid.* at 304 [footnote omitted].

[270] *Ibid.* at 305.

[271] See generally Anthony J. Broderick & James Loos, "Government Aviation Safety Oversight – Trust, But Verify" (2002) 67 J. Air L. & Com. 1035 at 1045 (HeinOnline).

[272] See c. 2, above.

[273] The four constituent elements of a State are: sovereignty, permanent population, defined territory and government.

[274] See c. 2, section 2.1.1, above.

aviation safety is global in nature and, hence, any problem of the safety is a global problem that must be solved by universally applicable tool.[275] Since all the multilateral initiatives look at the problem of aviation safety universally and endeavoring to remedy the problem through universal application of the oversight programmes, those programs can significantly improve the global civil aviation safety.

The third USOAP principle "transparency and disclosure" is important to increase public confidence in the audit system and to better inform the public about the aviation safety condition of any audited State, respectively. These are very important for the enhancement of the aviation safety. It is worth mentioning here that one of the greatest criticisms against the unilateral blacklisting is lack of transparency.[276] Disclosure of the audit results can act as a weapon against the safety-deficient countries in several ways which can induce those countries to satisfy their international civil aviation safety obligation as soon as possible. Such effect of the disclosure of the audit results is provided in detail in the next Chapter[277] in the context of blacklisting. However, this USOAP principle, i.e. transparency and disclosure, and its effects on safety are not equally applicable to other multilateral initiatives by reason of their confidential nature. The IOSA Audit has, to some extent, mitigated this lack by publicly disclosing the list of IOSA Registered Operators.[278] To become an IOSA Registered Operator, an airline must secure a pass mark under the IOSA Programme.

The remaining USOAP principles demonstrate that the procedures associated with this multilateral initiative can to a large extent successfully detect any aviation safety deficiency on the part of any State. If one reviews the entire process of the USOAP,[279] one would conclude that the systematic, less time consuming, fare and high quality detailed approach under the Programme can diagnose safety deficiency better than any other initiatives, whether multilateral or unilateral.[280] It is undeniable that detection of safety deficiency is vital for the improvement of aviation safety. Other multilateral initiatives also involve systematic, non-discriminatory and high-class comprehensive

[275] For more see section 3.2, above.
[276] See c. 4, below.
[277] *Ibid.*
[278] See c. 2, section 2.1.2, above.
[279] For the entire process of the USOAP see c. 2, section 2.1.1, above.
[280] See e.g. Broderick & Loos, *supra* note 271 at 1053; Abeyratne, *supra* note 179; Milde, "International Air Law", *supra* note 195 at 169.

procedure which can better serve to detect civil aviation safety deficiency than the unilateral initiatives can do.

The ICAO can better perform than any single or group of States to detect whether or not any given State does not comply with its international obligations under the Chicago Convention.[281] This is due to the fact that the ICAO was established by the Chicago Convention as the guardian of the Convention and the ICAO Council adopts the Annexes to the Chicago Convention on the basis of which a country is judged as to whether or not it has met its international safety obligations under both the USOAP and the unilateral initiatives that lead to blacklisting.[282] A creator knows about his creation better than anybody else. Since the ICAO promulgates the SARPs as Annexes to the Chicago Convention that contain the aviation safety requirements, it would seem that the ICAO would be in a superior position than any other State to determine compliance with their requirements.[283] For the same reason, the IATA accredited Audit Organization can deal with the ISARPs[284] better than any other State.

Since those multilateral initiatives are run on the basis of consensus and agreement from the States, the co-operation from the audited State can be higher than it can be in the case of unilateral initiatives. In practice, States do not like domination by any other State. Such domination is considered as an attack on the sovereignty of the State concerned. In fact, most of the countries view the unilateral process of blacklisting by the developed countries as one of the methods of exerting their domination over others.[285] Therefore, it is no surprise that the co-operation from the audited State would be lesser in the case of unilateral initiatives than it would be in the case of multilateral initiatives. With greater co-operation those multilateral programs can produce better result in terms of improving civil aviation safety.

Even though there might be some form of agreement to perform the audit between the developed State performing the audit and the audited State, the latent purpose of

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[281] See generally Dempsey, *Public*, *supra* note 196 at 106.
[282] See *ibid.*
[283] *Ibid.*
[284] There are 700 safety IATA Standards and Recommended Practices (ISARPs) contained in the IOSA Standards Manual. ISARPs are derived from all relevant ICAO SARPs, in particular Annexes 1, 6, and 8 to the Chicago Convention of 1944, as well as from regulations of the Joint Aviation Authorities (JAA) of Europe, the Federal Aviation Administration (FAA) of the United States (US), and industry best practices. See c. 2, section 2.1.2, above.
[285] See Broderick & Loos, *supra* note 271 at 1045.

entering into such arrangement might not be improving civil aviation safety. In fact, an agreement between an international organization and a State significantly differs from an agreement between two States. Generally, in the former case, the agreement is concluded to serve one or more international interests. In the latter case, the agreement is concluded to serve the interest between the two States, which might be any economic interest. In most of the cases, the audited States expressly or tacitly yield to those unilateral audits conducted by the developed States in fear of isolation from the lucrative markets of the developed States.[286] However, such fear is absent in the case of the multilateral initiatives. Since aviation safety is an international interest and is a global problem, multilateral initiatives can serve better.

Multilateral initiatives can garner more co-operation from the audited State in another way. Multilateral initiatives do not discriminate between States and apply equally to all the States in a systematic and regular way.[287] This is also apparent from the USOAP principle "fairness". This non-discriminatory nature of the multilateral initiatives can achieve more respect from all the States. Roger Fisher asserted:

> An international limitation will usually appear to be fairer if it is *stated* in reciprocal or general terms, rather than as binding upon only one or certain countries. The impact of a treaty on each country will necessarily be different since no two countries are in exactly the same circumstance. Yet compliance is likely to be increased if the obligation is defined in such a way that by its terms it falls equally upon both countries.[288]

The mandatory nature of the USOAP is very useful in ensuring civil aviation safety. Previously, under the voluntary safety oversight audit programme, the ICAO audit team could only perform the audit if requested by the contracting State of the ICAO. John Saba criticized the previous voluntary programme in the following terms: "The SOP [Safety Oversight Programme] was plagued by not only the lack of financing (since contributions were voluntary), but also by the fact that audits were voluntary and were only carried out when requested by the Member State, thus the SOP could not always be

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[286] For more on how the developed countries are viewed as lucrative markets to the developing countries see c. 4, below.

[287] See generally John Saba, "Worldwide Safe Flight: Will the International Financial Facility for Aviation Safety Help It Happen?" (2003) 68 J. Air L. & Com. 537 at 543 (HeinOnline).

[288] Roger Fisher, *Improving Compliance with International Law* (Charlottesville: University Press of Virginia, 1981) at 108 [emphasis in original].

applied where the need was greatest."[289] Saba argues that the mandatory USOAP has filled the gaps of the previous voluntary programme.[290] Dempsey regarded the mandatory USOAP as more meaningful than the previous voluntary programme.[291] The IOSA of the IATA is also mandatory for the IATA member airlines.[292]

The worldwide call for multilateral initiatives against the unilateral US IASA Program prompted the introduction of those multilateral programs.[293] For example, Caribbean countries objected to the region's civil aviation agencies being given air safety oversight ratings by the US FAA, saying this should be done instead by an international organization.[294] One senior regional official of the Caribbean region expressed that such ratings should be the responsibility of the ICAO, and not a national agency such as the FAA.[295] One should also note that the US FAA itself asked the ICAO to assume the oversight responsibility.[296] Furthermore, the mandatory USOAP superseded the previous voluntary safety oversight programme of the ICAO due to worldwide concern about the adequacy of aviation safety oversight around the world.[297] Therefore, it is reasonably desirable that the world acceptance of those multilateral initiatives as well as of the results of those multilateral initiatives would be greater than that would be in the case of any unilateral initiatives like the blacklisting. Again, there would be increased sense of responsibility to meet their international civil aviation safety obligation and, hence, more compliance with the existing legal and regulatory norms concerning safety, on the part of almost all countries of the world since they advocated the establishment of those multilateral initiatives against the unilateral initiatives.

The results of those audits performed under the multilateral initiatives would be more reliable than the blacklists by the US and the EU for the above reasons. Not only the

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[289] Saba, *supra* note 287 at 543.
[290] *Ibid.*
[291] Dempsey, *Public*, *supra* note 196 at 103.
[292] See online: IOSA Registry, International Air Transport Association <http://www.iata.org/ps/certification/iosa/registry.htm> (visited September 2, 2009).
[293] See Broderick & Loos, *supra* note 271 at 1045.
[294] Canute James Journal of Commerce Special, "Caribbean nations rip US air safety plan, want other oversight" *Journal of Commerce* (8 December 1997) 14A (WLeC, JCOMMERCE).
[295] *Ibid.*
[296] See e.g. "FAA Asks ICAO For Safety Assessment" *Aviation Daily [McGraw-Hill Companies, Inc.]* 334:11 (15 October 1998) 92 (WLeC, AVDAILY); "ICAO Boosts Safety Oversight, Renews Call For More Power" *Aviation Daily [McGraw-Hill Companies, Inc.]* 328:40 (27 May 1997) 340 (WLeC, AVDAILY).
[297] See online: Universal Safety Oversight Audit Programme, Safety and Security Audits (SSA) Branch, ICAO <http://www2.icao.int/en/ssa/soa/USOAP/Pages/default.aspx> (visited September 2, 2009).

countries but also their respective citizens will have greater confidence in those audit results. It is true that the US and the EU cannot rely on those audits which they demonstrate by continuing and launching their own audit programs, respectively. However, if one refers to the audit results of the USOAP one would conclude the disbelief on the part of the US and the EU as unreasonable.[298] One example would illustrate this point. Both Russia and China are always suspected of not complying with their international civil aviation safety obligation. Table 2, Table 4, Table 5 and Table 6 provide support for this suspicion.[299] Furthermore, regarding Russia's aviation safety standard, Giovanni Bisignani, IATA Director General and CEO, stated: "Despite having 8 carriers on the IOSA registry, Russia's safety record is well below international standards with 1 accident for every 155,000 flights on western built aircraft. This is far worse than the global average of 1 accident for every 1.2 million flights."[300] Interestingly, China and Russia are not blacklisted under any of the unilateral initiatives.[301] However, the USOAP audit results show that both China and Russia have not properly complied with their international aviation safety obligation.[302] The USOAP audit results also reveal lack of compliance on the part of the US and the EU member States.[303]

This higher reliability on those multilateral initiatives can have a deterrent effect on those countries which will be found not complying with their safety related obligations in several ways. Since those results are more reliable than the blacklists, those results would provide valid ground to any country to ban the safety-deficient country's airlines.[304] Furthermore, the greater confidence in those results along with the public availability of those audit results will facilitate the traveling public to make reasoned judgment in their choice of carrier. This will definitely act as a personal ban against the airlines of the non-compliant countries. By reason of this deterrent effect, the safety-

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[298] The information is accessible by anybody on the ICAO's Flight Safety Information Exchange (FSIX) website at <http://www.icao.int/fsix/safety.cfm> (visited September 2, 2009).
[299] See Annex, below.
[300] IATA, "Remarks of Giovanni Bisignani at a Press Conference in Moscow" (16 April 2009), online: International Air Transport Association <http://www.iata.org/pressroom/speeches/2009-04-16-01.htm> (visited September 2, 2009).
[301] For more on the biased nature of unilateral blacklisting of the US and the EU see c. 4, section 4.6, below.
[302] See online: Flight Safety Information Exchange, ICAO <http://www.icao.int/fsix/safety.cfm> (visited September 2, 2009).
[303] See *ibid.*
[304] See generally Milde, "International Air Law", *supra* note 195 at 169.

deficient countries would find it in their best interest to immediately comply with their international aviation safety obligations. However, whether or not the audit results are really available to the traveling public is suspected. This is addressed in a subsequent section of this Chapter.[305]

Any country or carrier found non-compliant under the multilateral initiatives runs another risk of failing to obtain necessary insurance. This is frightening by reason of two facts. First, any State party to the Montreal Convention[306] of 1999 would be found in violation of article 50[307] of this Convention if it permits its carriers to do business without insurance. Second, any other country may refuse the carriers from the non-compliant country to do business without sufficient insurance coverage.

Another deterring effect of being found deficient under those multilateral initiatives, especially the USOAP, may be the reduction of resale value of the aircraft of the delinquent State or carrier. This is deterring for both the concerned carriers and the concerned States since the necessity of capital in the airline industry is huge and the proceeds from the sale of used aircraft, not as scrap, can be a useful source of new capital.[308]

It can be argued that together all those multilateral initiatives can make greater contribution for the sound improvement of the global civil aviation safety. Most importantly, the focus of the USOAP on the country and the focus of the IOSA on an airline can do a great job for this purpose. Dr. Assad Kotaite, then President of the ICAO Council, welcomed the IOSA Programme "as complementary to ICAO's Universal Safety Oversight Audit Programme for States. IOSA can evolve into an integral component of States' overall efforts towards optimum aviation safety."[309] Dramatic growth in air traffic as well as in the technical complexity of aviation have made it essential that all those

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[305] See section 3.5, below.

[306] *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, 2242 U.N.T.S. 309, ICAO Doc. 9740 (entered into force 4 November 2003).

[307] *Ibid.*, art. 50. Article 50 states, "States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention."

[308] See Dempsey & Gesell, *Airline Management*, *supra* note 178, c. 3.

[309] IATA, Press Release, 29, "IATA Rolls Out Worldwide Safety Audit Programme – Qatar Airways is First Participant" (29 September 2003), online: Press Releases & Briefs, International Air Transport Association <http://iata.org/pressroom/pr/2003-09-29-01.htm> (visited September 2, 2009).

multilateral programs should remain in operation with their current different focus for the welfare of the global civil aviation safety.

Some comments regarding those multilateral initiatives need to be mentioned here. Commenting on the current status of the USOAP, Milde noted:

> This is a significant development in international practice and international law. The ICAO SARPs (that in legal theory do not have a strong legal power) have been elevated to the level of global concern that is to be 'enforced' by the international organization – not by any 'force' but by the implied threat of publicly revealing any shortcomings and failures in the implementation of SARPs. The power of publicity, embarrassment and loss of credibility within the international community cannot be underestimated – it could be a very powerful 'enforcement measure', possibly eliminating the defaulting State's carriers from international operations. ICAO just seems to have acquired an unprecedented power of enforcement of the safety standards of international civil aviation.[310]

Commenting on both USOAP and IOSA, Abeyratne noted:

> A concerted global audit programme, such as the ICAO USOAP within the Global Aviation Safety Plan (GASP) might well be a more effective tool [than the unilateral blacklisting], as it has the potential to address core issues and global safety concerns. There is also the highly effective International Air Transport Association (IATA) Operational Safety Audit (IOSA) Programme which is an internationally recognised and accepted evaluation system designed to assess the operational management and control systems of an airline. IOSA uses internationally recognised quality audit principles, and is designed so that audits are conducted in a standardised and consistent manner.
> Inherent in the IOSA Programme is a degree of quality, integrity, and security such that mutually interested airlines and regulators can all comfortably accept IOSA audit reports. As a result, the industry will be in a position to achieve the benefits of cost-efficiency through a significant reduction in audit redundancy.[311]

3.4 The legality of the Multilateral Initiatives

Questions regarding the legality of the multilateral initiatives must arise. The effectiveness of the multilateral programs to ensure global civil aviation safety depends to a large extent on the legality of those programs. Because, if proved illegal, those multilateral initiatives will be rejected, especially by those countries which negligently do

[310] Milde, "International Air Law", *supra* note 195 at 169.
[311] Abeyratne, *supra* note 179 [footnote omitted].

not fulfill their international aviation safety obligation. This section considers the legality of the multilateral initiatives.[312]

3.4.1 Legality of the Universal Safety Oversight Audit Programme (USOAP)

Concerning the USOAP, one might argue that it has no legal basis due to the fact that neither the Chicago Convention nor the Annexes to the Convention authorize such an audit programme. Since the USOAP is a mandatory Programme, it is highly likely that such an argument might come from any contracting State of the ICAO. This argument cannot be rebutted by counter-arguing that Assembly Resolution A32-11,[313] pursuant to which the USOAP was established, lends authorization to the USOAP since Resolutions passed by any international body, like the ICAO, do not have any legal status in themselves. Again, such Resolutions are not legally binding on any State per se. Milde argues, "[s]o far the entire program hinges on the unanimous views of the DGCAs Conferences and unanimous Resolution of the Assembly – neither of which is a source of international law in the proper sense of the world."[314]

Since the State to be audited expressly agrees to the USOAP, especially by signing the MOU, a form of bilateral agreement, it can be argued that the USOAP is legal. However, this argument might not satisfy any unwilling State since this country would respond by not signing the MOU to establish the illegality. In such a circumstance, the ICAO has the option to adduce different provisions of the Chicago Convention, specifically articles 44, 47, 54(b), 54(i), and 55(c),[315] to establish the legal basis for the USOAP. All those provisions must be interpreted in accordance with the Vienna Convention[316] of 1969, which has codified the law of treaties and provides guidance in treaty interpretation. Since the Vienna Convention has codified the customary international law of treaties and is now in force, this Convention is, at least theoretically,

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[312] For a good discussion on the legality of the USOAP see Detra, *supra* note 192, c. 3.
[313] *ICAO Res. A32-11*, *supra* note 213.
[314] Milde, "International Air Law", *supra* note 195 at 169.
[315] *Chicago Convention*, *supra* note 176, arts. 44, 47, 54(b), 54(i), 55(c).
[316] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, Can. T.S. 1980 No. 37 [*Vienna Convention*].

equally applicable to all the States of the world.[317] No State can deny the application of the Vienna Convention on the ground that it has not ratified it.[318]

It appears from article 44 that ensuring safety of civil aviation is one of the most important aims and objectives of the ICAO.[319] In fact, the main purpose of the Chicago Convention is to ensure civil aviation safety and the ICAO is responsible to attain this purpose. Article 54(b) provides that one of the mandatory functions of the ICAO Council is to discharge its duties and obligations as laid down in the Chicago Convention.[320] According to article 54(i), the ICAO Council must request, collect, examine and publish information relating to the advancement of air navigation and the operation of international air service, in short, information relating to aviation safety.[321] Article 55(c) allows, but not requires, the ICAO Council to conduct research into all internationally important aspect of air transport and air navigation, communicate the results of its research to the contracting States, and facilitate the exchange of aviation related information between contracting States.[322] Since safety is undoubtedly an internationally important aspects of air transport and air navigation, the ICAO Council can exert its power granted under article 55(c) of the Chicago Convention. Most importantly, article 47 provides that the ICAO "*shall* enjoy in the territory of each contracting State such legal capacity as may be necessary for the performance of its functions. Full juridical personality *shall* be granted wherever compatible with the constitution and laws of the State concerned."[323]

According to paragraph 1, article 31 of the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[324] According to paragraph 2, article 31, the context for the purpose of the interpretation of a treaty includes the text of the treaty, preamble and annexes to the treaty.[325] Therefore, the

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[317] Paul Stephen Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (Montreal: McGill University, Institute and Center for Research in Air & Space Law, 2005) at 45.
[318] See generally *ibid.*
[319] See *ibid.*, art. 44.
[320] *Ibid.*, art. 54(b).
[321] *Ibid.*, art. 54(i).
[322] *Ibid.*, art. 55(c).
[323] *Ibid.*, art. 47 [emphasis added].
[324] *Vienna Convention*, *supra* note 316, art. 31(1).
[325] *Ibid.*, art. 31(2).

Vienna Convention requires that the entire Chicago Convention along with its Preamble[326] and Annexes must be considered while interpreting even a single provision of the Chicago Convention. Furthermore, all the contracting States to the Chicago Convention must respect the principle of *pacta sunt servanda*, i.e. every treaty in force is binding upon the parties to it and must be performed by them in good faith.[327]

Therefore, it appears that together all those provisions demonstrate that the USOAP is legal under the Chicago Convention as a method of ensuring global civil aviation safety. The fact that all Contracting States audited under the USOAP gave their consent for the ICAO to release the results of audits conducted in their territory points to the acceptance of the USOAP.[328] Although it is true that the Chicago Convention and its accompanying Annexes do not expressly provide for the USOAP, in my opinion, the Programme is certainly legal under the Convention itself. However, still there exists confusion that needs to be removed.

3.4.2 Legality of the IATA Operational Safety Audit (IOSA) Programme

Like the USOAP, the legality of the IOSA can be questioned by the IATA member airlines, since it is also mandatory for them. Any non-member airline will not question since for them the IOSA is not mandatory. Any intending member cannot also argue since it is a requirement of becoming IATA member. If any airline does not want to become an IATA member, they need not bother about it. Therefore, the problem is with the IATA member airlines.

It is true that the IATA accredited Audit Organization can legally perform the IOSA audit only when the IATA member airline agrees. However, those airlines cannot disagree as long as they remain IATA member airlines. The IATA member airlines are bound to conform to the rules and regulations of the IATA as a condition of their membership. Therefore, the IOSA is legal. It is reprehensible if any airline wants to enjoy the facility of the IATA as a member but does not want to be bound by the rules and regulations of this international organization as a member.

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[326] *Chicago Convention*, *supra* note 176, pmbl.
[327] *Vienna Convention*, *supra* note 316, art. 26.
[328] See "Initiatives on Safety", *supra* note 184.

3.4.3 Legality of the Corporate Aviation Safety and Security Audit Program (CASSAP)

Unlike the USOAP and the IOSA, the legality of the CASSAP will hardly be at stake since it is not a mandatory program. The CASSAP is carried out by the Flight Safety Foundation, an independent, nonprofit, international organization engaged in research, auditing, education, advocacy and publishing to improve aviation safety,[329] only when requested by the airline or the country.

3.5 Existing Deficiencies in the Multilateral Initiatives

It would be a hyperbole to claim that the multilateral initiatives are perfect in addressing global civil aviation safety deficiency. Still, there exist some deficiencies that need to be rectified to ensure complete safety.

The existence of aviation accidents indicates that those multilateral initiatives have not sufficiently improved the global civil aviation safety. Most importantly, the three recent nastiest accidents, namely, the Air France crash on 1 June 2009 which claimed 228 lives, the Caspian Airlines crash on 15 July 2009 which claimed 168 lives, and the Yemenia Airways crash on 30 June 2009 which claimed 152 lives,[330] all of which obtained pass mark under both the USOAP and the IOSA Programme, have put a large red question mark on the effectiveness of those initiatives. Those multilateral initiatives can be declared effective only when the avoidable aircraft accident rate would reduce to zero.

It is arguable whether or not all the multilateral initiatives have successfully informed the public about the civil aviation safety standard of any State or airline. Informing the traveling public about the safety standard of any airline and / or the State of Operator is crucial from two perspectives:

(1) To keep the traveling public safe by allowing them to avoid unsafe airlines through proper use of the valuable information; and

[329] Online: Flight Safety Foundation <http://www.flightsafety.org/about_fsf.html> (visited September 2, 2009).
[330] See Annex, Table 2, below.

(2) To persuade the delinquent country or the airline to elevate their safety standard to international level to avoid decrease in traffic and, consequently, loss.

The confidential nature of both the IOSA and the CASSAP dictates that those are not available to the public. Concerning the IOSA, it will be an exaggeration to claim that the public properly understands the meaning of "IOSA Registered Operator." The most important question is: Does the general population know about the existence of those multilateral initiatives? Frankly speaking, I did not have any knowledge about the existence of those initiatives before coming to study in McGill. More interestingly, I learned about the CASSAP only after I had commenced writing my thesis. Therefore, by reason of their confidential nature and lack of knowledge on the part of the public about the existence of those audits programs, the public are deprived from acquiring important information about the safety culture of any given airline.

Again, though the results of audits conducted under the USOAP are accessible by anybody on the ICAO's Flight Safety Information Exchange (FSIX) website,[331] it cannot be confidently claimed that the USOAP has successfully informed the public about the civil aviation safety standard of any State or airline. Like the other multilateral programs, I learned about the USOAP after coming to study in McGill. Moreover, it took considerable time for me to read out the USOAP audit report properly and to understand the associated documents appropriately. Therefore, in this situation, it will be nothing more than an impossible dream to expect that people will know properly about the safety standard of any State or airline and will be able to make reasoned decision while choosing which carrier to board on. Furthermore, it will be excessive to expect that any country or any airline will endeavor to inform the prospective traveler about any aviation safety deficiency of the country or the airline, as a general rule.

The mandatory nature of the USOAP is affected by reason of the fact that the ICAO audit team needs to receive the signed MOU from the contracting State before carrying out the audit.[332] Although, as shown above, the ICAO audit team may perform the audit without the consent of the contracting State under the Chicago Convention,[333] such an initiative has the potential for disturbing the peace due to the political dimension

[331] The web address is <http://www.icao.int/fsix/safety.cfm> (visited September 2, 2009).
[332] See e.g. Saba, *supra* note 287 at 555.
[333] See section 3.4.1, above.

associated with this initiative. Similarly, the mandatory nature of the IOSA is also affected due to the fact that if any airlines do not have an interest to remain IATA member it will not allow the IOSA accredited Audit Organization to perform the audit.

The continuation of the US IASA Program and the establishment of the EC SAFA Programme after the multilateral initiatives were launched denote that those multilateral initiatives have failed to gain 43 States' confidence.[334] For the ICAO, this fact is alarming since about 23% of its contracting States cannot rely on its oversight programme.[335] This is one of the greatest criticisms against the effectiveness of those multilateral programs to sufficiently address the aviation safety deficiencies.

One very important criticism against the IOSA Programme is that it is disturbing the uniformity of law by introducing and maintaining its own ISARPs. ISARPs are derived not only from all relevant ICAO SARPs but also from regulations of the JAA of Europe, the US FAA, and industry best practices.[336] The necessity of attaining uniformity of law to improve civil aviation safety has been discussed several times in this thesis.[337] Although it is true that the IATA is not bound to honor the rules and regulations promulgated by the ICAO as well as the Chicago Convention, the IATA member airlines, which are registered with any one of the 190 contracting States of the Chicago Convention and the ICAO, must comply with their obligation under the Chicago Convention. Achieving at least minimum safety standard under the Chicago Convention by complying with the SARPs promulgated by the ICAO must be the first priority of any airline of any contracting State of the Convention. In such circumstances, those ISARPs are not only disturbing the uniformity of law but also appearing as an onerous burden on the member airlines of the IATA. The result of this would greatly disrupt the existing aviation safety culture and would deteriorate, rather than improve, the global civil aviation safety.

Another important limitation of the IOSA Programme has been admitted by the IATA itself. The IATA has acknowledged that the IOSA is an audit of an airline's

[334] There are currently 42 European countries who participate in the EC SAFA Programme. Therefore, in total 43 countries (US + 42 European countries) are maintaining the unilateral blacklists.
[335] The ICAO has 190 contracting States.
[336] See IATA, "IATA Operational Safety Audit: Designed for the Aviation Industry", *supra* note 184.
[337] See sections 3.2, 3.3, above; see c. 4, below.

operational procedures and documentation; it is not a physical inspection of aircraft.[338] The example of the recent fatal accident of the Yemenia Airbus A310-300 on 30 June 2009 is very important here. Though the carrier is an IOSA Registered Operator, the safety of the aircraft involved in the accident was questioned.[339] It appeared that the particular aircraft had been banned from France due to a certain number irregularities in its technical equipment.[340] Therefore, the failure of the IOSA Programme to ensure the safety of a particular aircraft is unambiguously crucial to ensure safe air travel for the passengers. The IATA must take action to eliminate this deficiency in the IOSA Programme.

3.6 Conclusion: Need Supplement or Modernization or Replacement?

Aviation is a global industry. "By its very nature, aviation shrinks the planet, integrating disparate cultures and economies, and facilitating a peaceful, prosperous and cooperative global order."[341] In such a global industry, it is very usual that any country's citizen can board on any country's carrier. Furthermore, aviation safety is vital not only for those who are on board the aircraft but also for those who are on the land.[342] Therefore, multilateral initiatives are always preferable to the unilateral initiatives to deal with any civil aviation safety related deficiencies.

However, from the aforesaid, it can be comprehended that there still remain some lacunas which make those multilateral initiatives less effective to ensure global civil aviation safety. Therefore, some more works have to be accomplished. Chapter 5 deals with in detail the ways to fill those gaps of the existing multilateral initiatives.

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[338] IATA, "IATA Operational Safety Audit: Designed for the Aviation Industry", *supra* note 184.
[339] Laurence Peter, "Yemen airline's safety questioned" *BBC News* (1 July 2009), online: BBC News <http://news.bbc.co.uk/2/hi/europe/8128114.stm> (visited September 2, 2009).
[340] "France 'banned Yemen crash plane'" *BBC News* (30 June 2009), online: BBC News <http://news.bbc.co.uk/2/hi/africa/8126576.stm> (visited September 2, 2009).
[341] Zamprelli, *supra* note 171.
[342] See also Saba, *supra* note 287 at 540.

Chapter 4: Blacklisting: Is it an Appropriate Mechanism to Achieve Global Civil Aviation Safety?

4.1 Introduction

Blacklisting by the US and the EU significantly contributes to the way of achieving global civil aviation safety. It can be regarded as one of the most effective means to ensure compliance with and enforcement of the existing legal and regulatory norm concerning civil aviation safety. Nevertheless, in practice, the extent of effectiveness of blacklisting to achieve the goal is limited. Section 4.2 explores the limited avenues where this drastic measure can be proved effective to ensure global civil aviation safety. Section 4.3 discusses the limitations of blacklisting to ensure global civil aviation safety. Section 4.4 analyzes the legality of this mechanism. Section 4.5 discusses the potentiality of blacklisting to bring about international crisis and, as a consequence, to unbalance existing world peace. Section 4.6 examines whether or not the process involved is biased. Section 4.7 criticizes this mechanism on several other grounds. Section 4.8 provides the conclusion of this Chapter. The conclusion is that global civil aviation safety cannot be attained even by fully and appropriately applying this mechanism at its present condition.

4.2 Extent of Effectiveness to Ensure Global Civil Aviation Safety

It can be argued that blacklisting acts as a useful sanction, both directly and indirectly, against those States who fail to satisfy the international safety standard. It has already been mentioned that the major impediment to achieving safe global civil aviation is the lack of compliance with and enforcement of the existing legal and regulatory norms regarding safety.[343] To overcome this deficiency, the necessity of a meaningful sanction is manifest. Blacklisting, though to a certain extent, helps to overcome this existing deficiency.

Blacklisting acts as a direct sanction since the blacklisted States or the blacklisted airlines lose their privilege to fly to and, as a consequence, to continue their businesses to

[343] See c. 1, above.

those States who have blacklisted. There exist a number of indirect sanctions associated with blacklisting. One of these indirect sanctions is the transparency caused as a result of making the blacklist available to the public worldwide.

The transparency caused by the blacklisting is a useful tool to continuously pressure the deficient aviation countries to improve their safety standards to meet their international safety obligations.[344] Through its wide publication, these blacklists could have an impact worldwide.[345] Although the ban does not legally extend to flights outside the US and the EU, these blacklists are available to all the travelers of the world on the internet.[346] The availability of those lists to the traveling public means that they are in a better position to take appropriate decisions concerning their choice of airlines which, as a consequence, would act as a personal ban.[347] This would, in effect, adversely affect the tourism and travel industry of the blacklisted country and the country of the blacklisted air carrier.[348]

It can be argued that blacklisting is equivalent to stigma. Certainly, blacklisting is a grave attack on the reputation of the blacklisted country and the blacklisted carrier. In such circumstances, making the blacklist publicly available would persuade the blacklisted country into taking positive steps to eliminate the stigma.

Blacklisting can act as a severe economic weapon to force the rogue States to comply with their civil aviation safety related obligations.[349] This is the most effective among all the indirect sanctions imposed by the blacklisting.[350] There exist several ways by which the blacklisting would have a deleterious economic impact upon the blacklisted air carriers and the air carriers of the blacklisted countries.

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[344] See especially Paul Stephen Dempsey, *Public International Air Law* (Montreal: McGill University, Institute and Center for Research in Air & Space Law, 2008) at 93, 105 [Dempsey, *Public*]. See generally David Learmount, "'White list' points to ICAO black sheep INTRODUCTION" *Flight International* [*Reed Business Information, UK*] (1 April 2008) (WLeC, FLTINTL). See also "The net tightens" *Flight International* [*Reed Business Information, UK*] (1 April 2008) (WLeC, FLTINTL).

[345] See Alan D. Reitzfeld & Cheryl S. Mpande, "EU Regulation on Banning of Airlines for Safety Concerns" (2008) 33 Air & Space L. 132 at 152 (Kluwer Law International).

[346] *Ibid.*

[347] See *ibid.*

[348] See Dempsey, *Public*, *supra* note 344 at 93.

[349] See David Learmount, "Effective sanctions" *Flight International* [*Reed Business Information, UK*] (4 December 2007) (WLeC, FLTINTL).

[350] See e.g. *ibid.*

Blacklisting may cause the blacklisted country to find its aviation sector isolated from the global economy.[351] The economic impact of such isolation can be severe.[352] A carrier which finds itself in Annex A of the blacklist of the EC SAFA Programme loses all its aviation businesses from 42 economically powerful States.[353] Although wet leasing of aircraft of an air carrier that is not subject to an operating ban is permitted to the blacklisted air carrier to continue its business,[354] it is always preferable to do business using owned aircraft.[355] While comparing the benefits of an owned aircraft and a leased aircraft, Dempsey and Gesell noted, "the short-term benefits of leasing results in a sacrifice of the long-term values of ownership."[356] Moreover, parking aircraft entails incurring huge expense since, in the airline industry, most costs are incurred irrespective of whether or not the aircraft is on the ground.[357] It should be realized that airlines have high fixed costs, and, hence, parking raises costs.[358] Certainly, blacklisting exposes the blacklisted to severe economic risks.

One should note the relationship between the demand for air transport and the economy.[359] Demand for air transport grows steadily during economic upturns and plummets during downturns.[360] The growth of demand allows more latitude for the carriers to raise yields and thereby profitability.[361] On the contrary, the decrease of

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[351] See Dempsey, *Public*, *supra* note 344 at 79.
[352] *Ibid.*
[353] Currently, 42 Member States, including the EU Member States, are engaged in the EC SAFA Programme. The 42 Member States engaged in the EC SAFA Programme are: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Republic of Georgia, Romania, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, United Kingdom, Ukraine. EC, *Notices from European Union Institutions and Bodies: Report from the Commission on the European Community SAFA Programme (Safety Assessment of Foreign Aircraft) (Aggregated Information — Report — 1 January to 31 December 2007)*, [2008] O.J.C 231/1 [*Report 2008*].
[354] EC, *Commission Regulation (EC) No 298/2009 of 8 April 2009 amending Regulation (EC) No 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community*, [2009] O.J. L 95/16.
[355] See generally Paul Stephen Dempsey & Laurence E. Gesell, *Airline Management: Strategies for the 21st Century*, 2nd ed. (Chandler, Arizona: Coast Aire Publications, 2006) at 155 – 163 [Dempsey & Gesell, *Airline Management*].
[356] Dempsey & Gesell, *Airline Management*, *ibid.* at 157.
[357] *Ibid.*, c. 2.
[358] *Ibid.*, c. 2.
[359] See *ibid.* at 60 – 69.
[360] See *ibid.* at 62 – 63, 136.
[361] *Ibid.* at 62.

demand demonstrates unsustainable loss to the carriers since the airline business involves high fixed costs.[362] In fact, the airline economy is highly influenced by external factors.[363] Since the US and most of the EU countries fall within the High Income and the Upper Middle Income category, according to the classification prepared by the World Bank,[364] it is reasonably comprehensible that losing business in those countries denotes making loss at an unsustainable level.

"Table 1: Regional Distribution of Scheduled Traffic in 2008"[365] shows that the demand for the civil aviation in the European and the North American region is higher than in other regions of the world. No economist is required to explain the connection between demand and business. Demand and business are inextricably interwoven: more demand, more business; lesser demand, lesser business. Therefore, the impact of blacklisting on the economy of the blacklisted country is crystal clear.

Another negative economic impact of blacklisting is associated with obtaining insurance. For the blacklisted countries and air carriers, it may be impossible to obtain private sector insurance coverage for airlines while in the blacklist.[366] Furthermore, the blacklisted country would fail to obtain such insurance coverage for airports.[367] In this connection, it is vital to mention that, under article 50 of the Montreal Convention of 1999,[368] States Parties to this Convention are under an obligation to require their carriers to maintain adequate insurance coverage.[369] Therefore, it would be a violation of the Montreal Convention, if the blacklisted country is one of the States Parties to this convention and authorizes its carriers to do business without such insurance. There remains another risk that any country, whether or not a Party to the Montreal Convention, may refuse the carriers from the blacklisted countries to do business without sufficient insurance coverage.

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[362] See *ibid.* at 106 – 107, 122, 136.
[363] See *ibid.*, c. 2, 3.
[364] The World Bank, "World Bank list of economies (April 2009)", online: Country Classification, Data & Statistics, The World Bank <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (visited September 2, 2009).
[365] See Annex, Table 1, below.
[366] See Dempsey, *Public*, *supra* note 344 at 79.
[367] *Ibid.*
[368] *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, 2242 U.N.T.S. 309, ICAO Doc. 9740 (entered into force 4 November 2003).
[369] *Ibid.*, art. 50.

Furthermore, blacklisting can largely reduce the resale value of the blacklisted aircraft or of the aircraft of the blacklisted carrier. This is frightening for both the concerned carriers and the concerned States since the necessity of capital in the airline industry is huge and the proceeds from the sale of used aircraft, not as scrap, can be a useful source of new capital.[370] This is another negative economic impact of blacklisting.

The importance of air transport is increasing day-by-day. At present, the entire economic sector of a country depends to a large part on civil aviation.[371] Participation in the global economy without safe and dependable airline service is next to impossible.[372] The popularity of air transport as a means of transporting cargo is increasing due to the speed of this mode.[373] The importance of air cargo in the contemporary world can be realized from the following statement of the IATA:

> Air Cargo is a US$50 billion business that transports 35% of the value of goods traded internationally and a critical part of the airline business which, as a whole, is the US$490 billion heart of a value chain that supports 32 million jobs and US$3.5 trillion of economic activity. It is an important industry that is critical to global business. Air Cargo is a US$50 billion business that transports 35% of the value of goods traded internationally and a critical part of the airline business which, as a whole, is the US$490 billion heart of a value chain that supports 32 million jobs and US$3.5 trillion of economic activity. It is an important industry that is critical to global business.[374]

Therefore, the future of the blacklisted countries and air carriers is reasonably predictable from an economic perspective. Blacklisting implies no right to participate in the global economy.

As noted earlier, blacklisting would adversely affect the tourism and travel industry of the blacklisted country and the country of the blacklisted air carrier. This is another way by which blacklisting would have a devastating economic impact upon the blacklisted. Air transportation is an integral part of the world tourism and travel industry which is arguably the world's largest single industry.[375] The industry accounts for about

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[370] See Dempsey & Gesell, *Airline Management*, *supra* note 355, c. 3.
[371] See *ibid*. at 3.
[372] See generally *ibid.* at 2 – 4.
[373] See *ibid.*
[374] Online: IATA Cargo, International Air Transport Association <http://www.iata.org/whatwedo/cargo> (visited September 2, 2009).
[375] Dempsey & Gesell, *Airline Management*, *supra* note 355 at 4.

5.5% of the world's Gross National Product [GNP].[376] Despite the current economic recession, the tourism and travel industry remains a critical economic sector worldwide and one that provides significant potential for economic growth and development internationally.[377] Blanke and Chiesa notes that a growing national tourism and travel sector contributes to employment, raises national income, and can improve a country's balance of payments.[378] They argue that the sector is, therefore, "an important driver of growth and prosperity and, particularly within developing countries, it can play a leading role in poverty reduction."[379] This suggests that being blacklisted by the developed countries is equivalent to being expelled from the "Heavens."[380]

Becoming blacklisted carries with it the risk that other countries may follow the lead of the US and the EU and ban them as well.[381] This is another indirect sanction of the blacklisting that warrants prompt action on the part of the blacklisted, whether the State or the airlines, to upgrade its overall safety standard to internationally accepted level.

The process of blacklisting involves monitoring either the safety of the operating aircraft under the EC SAFA Programme or the ability of the CAA to satisfy its international obligation under the US IASA Program. It is true that those monitoring are essential to detect and correct unsafe conditions.[382] There is no denying the fact that the continuing airworthiness process under the EC SAFA Programme is an essential tool to improving aviation safety both in the short term and in the long term.[383] The same argument is equally applicable in the case of the US IASA Program, where the CAAs are monitored and categorized accordingly by the FAA.

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[376] *Ibid.* For operational and analytical purposes, the World Bank's main criterion for classifying economies is gross national income (GNI) per capita. Previously, this term was referred to as gross national product, or GNP. Online: Country Classification, Data & Statistics, The World Bank <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (visited September 2, 2009).
[377] Executive Summary in Jennifer Blanke & Thea Chiesa, eds., *The Travel & Tourism Competitiveness Report 2009: Managing in a Time of Turbulence* (Geneva: World Economic Forum, 2009) xiii, online: Explore the Travel & Tourism Competitiveness Report 2009, World Economic Forum <http://www.weforum.org/documents/TTCR09/index.html> (visited September 2, 2009).
[378] *Ibid.*
[379] *Ibid.*
[380] See e.g. Paul Stephen Dempsey, "Blacklisting: Banning the Unfit from the Heavens" (2007) 32 Ann. Air & Sp. L. 29.
[381] See generally Reitzfeld & Mpande, *supra* note 345 at 152.
[382] See Thaddée Sulocki & Axelle Cartier, "Continuing Airworthiness in the Framework of the Transition from the Joint Aviation Authorities to the European Aviation Safety Agency" (2003) 28 Air & Space L. 311 at 329 (Kluwer Law International).
[383] See *ibid.*

It can be argued that the USOAP has to be supplemented by blacklisting.[384] This is so because, under the USOAP, the ICAO only publishes the results of the audits.[385] Though it is true that the transparency of audit results is a useful tool to put continuous pressure on the delinquent country to comply with its international safety obligations, it does not work in all cases. In the absence of effective sanction, some economically balanced States, though possessing the ability to ensure aviation safety, may be negligent towards attaining the international safety standard. In those circumstances, the sanctions imposed by blacklisting would be an effective tool as a supplement to the USOAP. Moreover, as Olivier Onidi argues, two factors, namely, dramatic growth in air traffic and dramatic growth in the technical complexity of aviation, have made ICAO's role of maintaining an effective safety system "virtually unsustainable."[386] According to Onidi, for these two factors, the ICAO seems to be helpless in effectively addressing the safety deficiencies found during the USOAP audit.[387] In light of the current growth rate of the aviation industry, it has become crucial that blacklisting should act as a supplement to, not supplant, the USOAP. Onidi argues this is why the US and the EU have introduced the drastic measure blacklisting in order to assess the safety level of carriers flying to their territory transporting their citizens or goods.[388]

4.3 Limitations of Blacklisting to Ensure Global Civil Aviation Safety

It is apparent that blacklisting is really an effective sanction against the delinquent aviation States. In fact, Indonesia's signing of "groundbreaking declaration" with the ICAO, under which it committed to wide-ranging initiatives to improve the safety of its civil aviation system, immediately after being blacklisted by both the EU and the US

[384] See generally Gilbert Guillaume, "ICAO at the Beginning of the 21st Century" (The 8th Beaumont Memorial Lecture, 5 February 2008), (2008) 33 Air & Space L. 313 at 314 (Kluwer Law International).
[385] See e.g. Olivier Onidi, "A Critical Perspective on ICAO" (2008) 33 Air & Space L. 38 at 40 (Kluwer Law International).
[386] *Ibid.* at 39.
[387] *Ibid.* at 40.
[388] *Ibid.* at 40.

provides practical support to that conclusion.[389] However, it still has certain limitations which obstruct it to ensure complete global civil aviation safety.

The first of these limitations concern the transparency caused as a result of publicly disclosing those blacklists. It is questionable whether or not all travelers know about the existence of blacklists. To be honest, I did not have any knowledge about the existence of those blacklists before coming to study in McGill. If I had not come here, I might not have learned that Bangladesh and one of the aircraft of the Biman Bangladesh Airlines, the flag carrier of Bangladesh, have been blacklisted by the US and the EU, respectively. Although the EU has taken initiatives by enacting Commission Regulation (EC) No. 2111/2005[390] to inform the travelers of the blacklists, it is questionable whether or not all the air travelers of the world, except the citizens of the 42 European countries and those whose itinerary is linked to those European countries, know about the blacklist.

It will be excessive to expect that the blacklisted countries or the country of the blacklisted air carrier would publicly disclose the fact of being blacklisted. It is a rule of thumb that nobody wants to expose his / her weaknesses. For example, though blacklisted by both the US and the EU, the CAA of Bangladesh and the Biman Bangladesh Airlines have concealed that fact. If one visits the official websites of that CAA[391] and the air carrier,[392] he / she would conclude that there exists no blemish. Blacklisting does not provide an acceptable solution to this problem.

Blacklisting does not restrict the operation of the blacklisted carriers and the aircraft outside the US and the EU. Therefore, those developed countries are compelling the blacklisted countries and the airlines to pass on their unsafe aircraft to the rest of the world.[393] One of the reasons for continuing operation with the unsafe aircraft is to mitigate the high fixed costs associated with airlines business. Because, as noted earlier,

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[389] Geoffrey Thomas, "Which way airline safety?" *Air Transport World [Penton Media, Inc.]* 46:2 (1 February 2009) 24 (WLeC, AIRTRANWLD).

[390] EC, *Regulation (EC) No 2111/2005 of the European Parliament and of the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC*, [2005] O.J.L 344/15.

[391] As of September 2, 2009, the address of the official website of Civil Aviation Authority of Bangladesh is <http://www.caab.gov.bd/>.

[392] As of September 2, 2009, the address of the official website of Biman Bangladesh Airlines is <http://www.biman-airlines.com/>.

[393] See Dempsey, *Public*, *supra* note 344 at 101.

airlines have high fixed costs and, hence, parking these banned aircraft or aircraft of banned countries or airlines raises costs up. Furthermore, since blacklisting largely reduces the resale value of the blacklisted aircraft or the aircraft of the blacklisted carriers, the concerned carriers find it better to use these aircraft than to sell them at this reduced price. Reduction of value of aircraft is precarious since proceeds of sale of aircraft can be a useful source of new capital required for the improvement of aviation safety. Therefore, the rest of the world has remained unsafe and, due to blacklisting by the US and the EU, is becoming more unsafe for air travelers as well as for the inhabitants. It should be borne in mind that aviation safety is vital not only for those who are on board the aircraft but also for those who are on the land.[394]

It would be a blunder on the part of the US and the EU to consider that they have successfully saved their own citizens by blacklisting foreign airlines or country. In fact, leaving the rest of the world unsafe would be dangerous to the nationals of the US and the EU Member States as well.[395] How can they be so sure that none of their citizens would board on any of those unsafe aircraft? The most recent air crash of Yemenia Airbus A310 on 30 June 2009 which killed 152 of 153 passengers including 66 French nationals is sufficient to rectify their wrong belief.[396] Aviation is by its nature a global industry. Airlines do not impose any nationality restriction on passengers. In fact, airlines are hungry to arrest the maximum number of passengers of any nationality. In such situation, any country's national can board on any country's aircraft. Therefore, the threat of death due to lack of safety remains and applies to the whole world.

The process concerning blacklisting is not concerned with whether or not the concerned State possesses the financial ability to make things right. It will be wrong to state that all the blacklisted countries did not comply with the requisite safety standards *intentionally*: "[s]ome States lack the economic ability to comply; others lack the will."[397] Blacklisting is useful as a sanction for the unwilling delinquent States and not for the economically weak States. The ICAO has also recognized that there are some feeble

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[394] See also John Saba, "Worldwide Safe Flight: Will the International Financial Facility for Aviation Safety Help It Happen?" (2003) 68 J. Air L. & Com. 537 at 540 (HeinOnline).
[395] See e.g. Miranda Anger, "International Aviation Safety: An Examination of the U.S., EU, and the Developing World", Comment, (2007) 72 J. Air L. & Com. 141 at 171 (HeinOnline).
[396] See e.g. "France 'banned Yemen crash plane'" *BBC News* (30 June 2009), online: BBC News <http://news.bbc.co.uk/2/hi/africa/8126576.stm> (visited September 2, 2009).
[397] Dempsey, *Public*, *supra* note 344 at 107.

States who lack the financial resources to meet the minimum international aviation safety standard.[398] This recognition has led the ICAO to launch the International Financial Facility for Aviation Safety [IFFAS].[399] These weak States are termed "feeble States" in this thesis. The harsh effect of blacklisting by the developed countries on the economy of the blacklisted country, as articulated above, implies that those feeble States, if blacklisted, will discover themselves in an abysmal economic situation without any means of redress. This is another limitation, probably the most serious of all, of blacklisting in ensuring global civil aviation safety.

Abeyratne argues that blacklisting is a politically punitive measure rather than a solution toward improving aviation safety.[400] According to Abeyratne, this is the most significant limitation of blacklisting.[401] This political application of blacklisting would turn the aviation industry of the blacklisted State less attractive to the private sector investment and, as a consequence, the struggling industry would fail to receive necessary funding to improve its civil aviation safety standard. Even if blacklisting is not political in nature, it could have a destructive effect on the investment environment of the blacklisted State in a different way. The existence of two types of blacklisting is disturbing the aim of the Chicago Convention[402] of 1944 to achieve the uniformity of law.[403] This lack of uniformity of law would cause uncertainty which has the effect of discouraging private sector investment in the civil aviation industry of the blacklisted country. The aviation industry, by its nature, involves huge investment and suffers from both severe business risk and severe financial risk.[404] If uncertainty prevails in such a risky industry, it would be unreasonable to expect private sector investment. From this perspective, blacklisting would have drastic effect on the economy of those feeble States, who cannot attain even the minimum international safety standard due to lack of both financial and technical

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[398] See *International Financial Facility for Aviation Safety (IFFAS)*, ICAO Assembly Res. A36-5, ICAO Doc. 9902, I-96, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> (visited September 2, 2009).
[399] See *ibid.*
[400] Ruwantissa Abeyratne, "Blacklisting of Airlines by the European Union and the Disclosure of Safety Critical Information" (2008) Issues in Aviation Law & Policy ¶ 5261.
[401] *Ibid.*
[402] *Convention on International Civil Aviation*, 7 December 1944, 61 STAT. 1180, T.I.A.S. NO. 1591, 15 U.N.T.S. 295, Can. T.S. 1944 No. 36, ICAO Doc. 7300/9 [*Chicago Convention*].
[403] See section 4.4, below.
[404] See Dempsey & Gesell, *Airline Management*, *supra* note 355, c. 4.

resources. This denotes that the civil aviation safety standard would deteriorate more by reason of blacklisting.

As asserted by the AviAssist,[405] the immense growth of aviation worldwide has demonstrated that lack of safety in one region of the world increasingly influences aviation safety in other regions.[406] Therefore, any unilateral measure like the present blacklisting to ensure aviation safety in a defined zone can increase danger in the remaining parts of the world and, according to the AviAssist's assertion, might influence the aviation safety of even those defined zones. The consequence of such an action is manifest: decreasing international civil aviation safety.

Another important fact is that the European Commission acknowledged the limited effectiveness of the EC SAFA Programme. It has been stressed that the SAFA inspections are limited to on-the-spot assessments and *cannot substitute for proper regulatory oversight*.[407] Furthermore, it is acknowledged that ramp inspections serve as pointers, *but they cannot guarantee the airworthiness of a particular aircraft*:[408] "[t]he fact that an airline is not included in the Community list does not… automatically mean that it meets the applicable safety standards."[409] Particularly, in the recent aggregated report,[410] the European Commission stated:

> Based upon the SAFA inspections performed over the last few years, experience shows that these give a general indication of the safety of foreign operators. *However, this indication is limited* in the sense that no full picture is obtained about the safety of any particular aircraft or operator. This is due to the fact that certain aspects are difficult to assess during an inspection (e.g. Crew Resource Management, full airworthiness status, etc.) owing to the limited time available to perform an inspection and consequently the limited level of detail possible during such an inspection.[411]

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[405] AviAssist is an independent Foundation that identifies threats to aviation safety, analyses the problems and works on practical solutions to them. The Foundation provides pro-active safety support to aviation organisations (government and industry) in the 22 States of the ICAO East and Southern African (ESAF) region. It is a regional affiliate of the Flight Safety Foundation. See online: AviAssist Foundation <http://www.aviassist.org/pages/website_pages.php?pgid=2> (visited September 2, 2009).

[406] Frances Fiorino, "Incident-Prone African Aviation Gets Help From FSF, AviAssist" *Aviation Daily [McGraw-Hill Companies, Inc.]* 372:46 (4 June 2008) 4 (WLeC, AVDAILY).

[407] Online: EC SAFA Programme, European Aviation Safety Agency, E.U. <http://www.easa.eu.int/ws_prod/s/s_safa.php> (visited September 2, 2009). See *Report 2008*, *supra* note 353.

[408] *Ibid.*

[409] EC, *Legal Notice*, online: List of airlines banned within the EU, Transport, European Commission <http://ec.europa.eu/transport/air-ban/list_en.htm> (visited September 2, 2009).

[410] *Report 2008*, *supra* note 353.

[411] *Ibid.* [emphasis added].

In light of this limitation, it can be contended that the EC SAFA Programme has to be either reformed or abolished since the Programme cannot serve the purpose, namely, civil aviation safety, for which the Programme has been devised. The limited effectiveness of the EU blacklisting has also been voiced by Mr. Antonio Tajani, the European Commission Vice President responsible for Transport Policy, after the recent air crash of the Yemenia Airbus A310 when he said: "If we want to achieve better safety I'm convinced that we need to have a worldwide blacklist, *the European blacklist works pretty well in Europe*".[412] Other limitations of the unilateral blacklisting are noted in the following sections of this Chapter.

4.4 Is Blacklisting Legal?

This section is devoted to the analysis of the legality of blacklisting. To ascertain the legality of this unilateral action, mainly the relevant provisions of the Chicago Convention of 1944, the "Constitution" of the international civil aviation, have been considered. Due consideration has also been given to the Vienna Convention[413] of 1969, which has codified the law of treaties and provides guidance in treaty interpretation. It is noteworthy that, since the Vienna Convention has codified the customary international law of treaties and is now in force, this Convention is, at least theoretically, equally applicable to all the States of the world.[414] No State can deny the application of the Vienna Convention on the ground that it has not ratified it.[415]

The following provisions of the Chicago Convention can be relied on by the US and the EU Member States to establish the legality of the blacklisting: articles 1, 6, 12, 16 and 33. According to article 1, every State has complete and exclusive sovereignty over the airspace above its territory.[416] Article 6 further provides that, to operate over or into the territory of another contracting State, every scheduled international air service must

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[412] "EU wants world aviation blacklist" *BBC News* (30 June 2009), online: BBC News <http://news.bbc.co.uk/2/hi/europe/8126431.stm> (visited September 2, 2009) [emphasis added].
[413] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, Can. T.S. 1980 No. 37 [*Vienna Convention*].
[414] Paul Stephen Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (Montreal: McGill University, Institute and Center for Research in Air & Space Law, 2005) at 45.
[415] See generally *ibid.*
[416] *Chicago Convention*, *supra* note 402, art. 1.

obtain special permission or due authorization from that State and must operate pursuant to the terms of such permission or authorization.[417] Article 12 provides, *inter alia*, that each contracting State has an obligation to adopt measures to insure that every aircraft flying over or maneuvering within its territory shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force.[418] According to article 16, the appropriate authorities of each of the contracting States shall have the right, without unreasonable delay, to search aircraft of the other contracting States on landing or departure, and to inspect the certificates and other documents prescribed by this Convention.[419] According to article 33, each contracting State must recognize the certificates of airworthiness and certificates of competency and licenses issued or rendered valid by other contracting States provided that the requirements under which these certificates were issued or rendered valid are equal to or above the minimum standard set by the Convention.[420] In other words, article 33 authorizes all the contracting States to refuse to recognize certificates issued or rendered valid by other contracting State which do not meet the minimum safety standard set by the Convention.

From the aforesaid, it can be deduced that article 1 of the Chicago Convention is the strongest of all these provisions to authorize all the contracting States to deny foreign aircraft to fly into or over their territory in recognition of their sovereignty. It is undeniable that the concept of sovereignty is crucial for all the independent countries of the world. Any limitation on the independence of a sovereign nation cannot be presumed.[421] Nevertheless, article 1 cannot be said to have granted the contracting States unfettered freedom of aviation.[422] Actually, if one reads the entire Chicago Convention, one would come to the conclusion that the Convention does not authorize unrestricted freedom of aviation to the contracting States.[423]

In this respect, one must consider the Vienna Convention. According to paragraph 1, article 31 of the Vienna Convention, a treaty shall be interpreted in good faith in

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[417] *Ibid.*, art. 6.
[418] *Ibid.*, art. 12.
[419] *Ibid.*, art. 16.
[420] *Ibid.*, art. 33.
[421] See generally, *S. S. "Lotus" (France v. Turkey)* (1927), P.C.I.J. (Ser. A) No. 10 at para. 38 (Oxford Reports on International Law).
[422] See Dempsey, *Public*, *supra* note 344 at 44.
[423] *Ibid.*

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[424] According to paragraph 2, article 31, the context for the purpose of the interpretation of a treaty includes the text of the treaty, preamble and annexes to the treaty.[425] Therefore, the Vienna Convention requires that the entire Chicago Convention along with its Preamble[426] and Annexes[427] must be considered while interpreting even a single provision of the Chicago Convention. Therefore, the above provisions of the Chicago Convention, which lend support to the US and the EU to justify their unilateral act of blacklisting, must be read accordingly.

The main object of the Chicago Convention was to ensure uniformity of law.[428] One author regarded this object as the "overriding purpose of the [Chicago] Convention".[429] This object has also been expressed in some provisions of the Convention. Article 12 requires, *inter alia*, that every contracting State must keep its aviation regulations *uniform*, to the greatest extent possible, with those established under the Convention.[430] Moreover, the first paragraph of article 37 provides: "Each contracting State undertakes to collaborate in securing the highest practicable degree of *uniformity* in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters which such *uniformity* will facilitate and improve air navigation."[431] The ICAO's commitment to attain the object of the Chicago Convention is also evident from the Resolutions adopted by the ICAO Assembly,

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[424] *Vienna Convention*, *supra* note 413, art. 31(1).
[425] *Ibid.*, art. 31(2).
[426] *Chicago Convention*, *supra* note 402, pmbl.
[427] ICAO Council adopts Standards And Recommended Practices from time to time to meet the current global need as Annexes to the *Chicago Convention*, *supra* note 402. *Chicago Convention*, *supra* note 402, art. 54(l). For a brief discussion on all of those Annexes see online: ICAO <http://www.icao.int/cgi/goto_m.pl?icaonet/anx/info/annexes_booklet_en.pdf> (visited September 2, 2009). Currently, there are 18 Annexes: Annex 1: Personnel Licensing, Annex 2: Rules of the Air, Annex 3: Meteorological Service for International Air Navigation, Annex 4: Aeronautical Charts, Annex 5: Units of Measurement to be Used in Air and Ground Operations, Annex 6: Operation of Aircraft, Annex 7: Aircraft Nationality and Registration Marks, Annex 8: Airworthiness of Aircraft, Annex 9: Facilitation, Annex 10: Aeronautical Telecommunications, Annex 11: Air Traffic Services, Annex 12: Search and Rescue, Annex 13: Aircraft Accident and Incident Investigation, Annex 14: Aerodromes, Annex 15: Aeronautical Information Services, Annex 16: Environmental Protection, Annex 17: Security - Safeguarding International Civil Aviation against Acts of Unlawful Interference, Annex 18: The Safe Transport of Dangerous Goods by Air.
[428] See Dempsey, *Public*, *supra* note 344 at 67.
[429] *Ibid.* at 44.
[430] *Chicago Convention*, *supra* note 402, art. 12.
[431] *Ibid.*, art. 37 [emphasis added].

especially, Resolution A36-2.[432] Blacklisting compromises uniformity of law since the procedures of assessment, under these two types of blacklisting, are not uniform.[433]

While the US IASA Program focuses on the foreign State, particularly the State's CAA, the EC SAFA Programme focuses on the aircraft of foreign State.[434] Under the EC SAFA Programme, only those foreign aircraft using Community airports are assessed.[435] However, under the IASA Program, the CAAs of both the countries which have and which do not have existing air services to the US at the time of the FAA assessment are assessed.[436] Under the EC SAFA Programme, aircraft, which do not meet the aviation safety standard, will be completely banned from serving any of the 42 European States until the standard is met.[437] On the other hand, under the IASA Program, only those States which do not have existing air services to the US at the time of the FAA assessment are banned.[438] Unlike the IASA Program, ramp inspection is carried out under the EC SAFA Programme.[439] Under the IASA Program, the FAA assesses the foreign CAA on the basis of ICAO safety standard.[440] However, under the EC SAFA Programme, the requisite safety standard is higher than the ICAO safety standard.[441] The negative effect of these differences on the object of the Chicago Convention to achieve uniformity of law is profound.

Blacklisting conflicts with the Preamble[442] to the Chicago Convention in various ways. According to the first paragraph of the Preamble, "the future development of

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[432] *Unified strategy to resolve safety-related deficiencies*, ICAO Assembly Res. A36-2, ICAO Doc. 9902, I-91, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> (visited September 2, 2009) [*ICAO Res. A36-2*].
[433] For a brief discussion on these procedures, see c. 2, above.
[434] See c. 2, section 2.2, above.
[435] *Ibid.*
[436] *Ibid.*
[437] *Ibid.*
[438] *Ibid.*
[439] *Ibid.*
[440] *Ibid.*
[441] *Ibid.* See EC, *Regulation (EC) No 2111/2005 of the European Parliament and of the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC*, [2005] O.J.L 344/15, art. 2(j); EC, *Directive 2004/36/CE of the European Parliament and of the Council of 21 April 2004 on the safety of third-country aircraft using Community airports*, [2004] O.J.L 143/76, Annex II, as amended by EC, *Commission Directive 2008/49/EC of 16 April 2008 amending Annex II to Directive 2004/36/EC of the European Parliament and of the Council regarding the criteria for the conduct of ramp inspections on aircraft using Community airports*, [2008] O.J.L 109/17.
[442] *Chicago Convention*, *supra* note 402, pmbl.

international civil aviation can greatly help to *create and preserve friendship and understanding* among the nations and peoples of the world".[443] The second paragraph of the Preamble expresses the desire "*to avoid friction* and *to promote… cooperation* between nations and peoples upon which the peace of the world depends".[444] The third paragraph provides that the contracting States agreed to the Convention "in order that international civil aviation may be developed in a *safe and orderly manner* and that international air transport services may be established on the basis of *equality of opportunity* and operated *soundly and economically*".[445] Since blacklisting can develop into international crisis,[446] is upsetting the main object of the Chicago Convention, namely, ensuring uniformity of law, can compel the blacklisted feeble States to cease their civil aviation activities, and is biased[447] it is contrary to the entire Preamble. Hence, blacklisting is illegal since it infringes the Preamble to the Chicago Convention.

The aims and objectives of the Chicago Convention as set forth in article 44[448] must also be considered.[449] One may disagree with me by arguing that these aims and objectives have to be observed only by the ICAO since the expression is "The aims and objectives of the [International Civil Aviation] Organization" and not "The aims and objectives of this Convention". This argument is baseless since, according to article 43 of the Convention,[450] the ICAO has been established by the Convention and, therefore, the aims and objectives of the ICAO are the aims and objectives of the Convention itself. An Organization will never be entrusted to achieve any aims and objectives by the Convention which are not the aims and objectives of the same Convention through which the Organization has been established. According to article 44, the aims and objectives of the Convention are, *inter alia*, safe and orderly growth of international civil aviation throughout the world, operation of civil aviation for peaceful purposes, safe air transport,

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[443] *Ibid.* [emphasis added].
[444] *Ibid.* [emphasis added].
[445] *Ibid.* [emphasis added].
[446] See section 4.5, below.
[447] See section 4.6, below.
[448] *Chicago Convention*, *supra* note 402, art. 44.
[449] See e.g. *The Safety Deficiencies Arising Out of the United States Sanctions Against the Civil Aviation of the Islamic Republic of Iran*, ICAO Assembly Economic Commission, 36th Sess., Working Paper, Agenda Item 40, ICAO Doc. A36-WP/275/EC/34 (2007), online: ICAO <http://www.icao.int/icao/en/assembl/a36/wp/wp275_en.pdf> (visited September 2, 2009).
[450] *Chicago Convention*, *supra* note 402, art. 43.

full respect to the rights of contracting States, fair and equality of opportunity to operate international airlines for contracting States and promote safety of flight. The foregoing discussion manifests that the unilateral blacklisting is contrary to the aims and objectives, if not all, of the Chicago Convention as expressed in article 44.

The US and the EU Member States should not forget their obligation under article 4 of the Chicago Convention that prohibits all the contracting States to use civil aviation for any purpose inconsistent with the aims of the Convention.[451] Since it is now apparent that blacklisting is not only inconsistent with the aims of the Convention but also an impediment to achieving the aims of the Convention, the US and the EU are violating the Chicago Convention by continuing the process of blacklisting.[452] Furthermore, from the travaux préparatoires of the Chicago Convention, it appears that a joint proposal by the US, the UK and Canada that parties to this Convention should agree to reject the use of civil aviation as an instrument of national policy in their international relations was incorporated in substance in article 4 of the Convention.[453] Since blacklisting is biased against the weak States, the US and the UK, one of the EU Member States, are underestimating their own proposal and violating article 4.[454]

The EU blacklisting infringes article 33[455] of the Chicago Convention. As noted earlier, article 33 obliges each contracting State to recognize other contracting State's issued or validated certificates provided these certificates meet the *minimum standard set by the Convention*.[456] The importance of article 33 is also reflected in the judgment of the U.S. Court of Appeals for the District of Columbia in *British Caledonian v. Bond*.[457] Since the requisite safety standard under the EC SAFA Programme is higher than the ICAO safety standard,[458] it violates article 33. In this respect, one might argue that the EU cannot violate article 33 since it is not a party to the Chicago Convention. However, this

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[451] *Ibid.*, art. 4.
[452] See generally Thomas Whalen, "Lift the sanctions" *Airline Business* (26 October 2006) 90, online: Flightglobal <http://www.flightglobal.com/articles/2006/10/26/210232/lift-the-sanctions.html> (visited September 2, 2009).
[453] *Ibid.*
[454] See section 4.6, below.
[455] *Chicago Convention*, *supra* note 402, art. 33.
[456] *Ibid.*
[457] *British Caledonian Airways Ltd. v. Bond*, 665 F.2d 1153 (D.C. Cir. 1981), 214 U.S. App. D.C. 335 (WLeC, ALLCASES) [*British Caledonian v. Bond*].
[458] See c. 2, section. 2.2.2, above.

argument cannot stand since all the 42 Member States engaged in the EC SAFA Programme are also parties to the Chicago Convention and, hence, must comply with article 33.[459]

It can be argued that both preparing the blacklists and making these lists available to the public are *ultra vires* to the authority accorded to the contracting States by the Chicago Convention, since the Convention does not contain any terms to this effect. Under the Convention, any contracting State can only impose ban on other contracting State's right to fly to its territory subject to the relevant provisions of the Convention. An act that is *ultra vires* to the authority of any State cannot be regarded as legal.

It is true that the Chicago Convention facilitates the adoption of bilateral agreements between States for the purpose of carrying on air services between them.[460] Bilateral air transport agreements are international trade agreements in which the governmental aviation authorities of two countries establish a regulatory mechanism for the operation of commercial air services between them.[461] As "treaties", bilateral agreements are subject to the Vienna Convention.[462] In almost all cases, air services between countries are governed by the bilateral agreement. In the absence of a formal agreement, the relationship between two countries is governed by reciprocity and comity.[463] Therefore, banning or restricting operation as well as blacklisting any country's aircraft clearly violate the bilateral agreement between them. The US and the EU Member States are recurrently infringing their bilateral agreements by continuing the process of blacklisting. In this connection, it should also be noted that the US and the EU can never legalize their unilateral action by inserting any clause in the bilateral agreements to this effect. This is so since, according to article 82,[464] the contracting States of the Chicago Convention are in an obligation not to enter into any agreement which is inconsistent with the Convention, and since blacklisting inevitably is contrary to the Chicago Convention, as shown above.

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[459] See Dempsey, *Public*, *supra* note 344 at 97.
[460] See generally *ibid.*, c. IX.
[461] *Ibid.* at 518.
[462] Michael Milde, "International Air Law and ICAO" in Marietta Benkö, ed., *Essential Air and Space Law*, vol. 4 (Utrecht, Netherlands: Eleven International Publishing, 2008) at 107.
[463] Dempsey, *Public*, *supra* note 344 at 519.
[464] *Chicago Convention*, *supra* note 402, art. 82.

Therefore, it can be concluded that blacklisting is illegal. The US and the EU Member States should respect the principle of *pacta sunt servanda*, i.e. every treaty, whether the Chicago Convention or the bilateral agreements, in force is binding upon the parties to it and must be performed by them in good faith.[465] In accordance with article 27 of the Vienna Convention,[466] the Chicago Convention prevails over both the US IASA Program and the EC SAFA Programme and these cannot be invoked as justification for the non-performance of the Chicago Convention.

4.5 The Contribution of Blacklisting to International Crisis: A Catalyst for Unbalancing World Peace

Blacklisting can endanger the healthy relationship between two States and can develop into an international crisis. This is clearly contrary to the aims and objectives of the Chicago Convention which include safe and orderly growth of international civil aviation throughout the world, operation of civil aviation for peaceful purposes, safe air transport, full respect to the rights of contracting States, fair and equality of opportunity to operate international airlines for contracting States and promote safety of flight.[467] Rather than facilitating the achievement of the aims and objectives of the Chicago Convention, the unilateral blacklisting may create chaos which would never be beneficial for the sound development of the global civil aviation.

Moreover, international crises can lead to disturbing the peace of the world. The importance of maintaining peace is self-evident for the well-being of the entire world. Any action that disturbs the peace is undesirable and should be ceased at any cost. Any unilateral action that risks the maintenance of world peace is against the UN Charter[468] which established the United Nations.

This section records some examples of the international crisis fueled by the unilateral blacklisting by the US, the EU and the Member States of EU.

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[465] *Vienna Convention*, *supra* note 413, art. 26.
[466] *Ibid.*, art. 27.
[467] See *Chicago Convention*, *supra* note 402, art. 44, pmbl.
[468] *Charter of the United Nations,* 26 June 1945, Can. T. S. 1945 No. 7.

Example 1: Venezuela v. United States

In February 2006, the Venezuelan government threatened to halt US flights to Venezuela following its downgrading from Category 1 to Category 2 status by the US FAA.[469] That demotion allowed US-flag carriers to dominate the US-Venezuela aviation market.[470] The US FAA rendered its decision to downgrade in 1995 and did not re-examine the matter after that time, though the ICAO safety oversight team twice audited Venezuela's civil aviation safety standard after the decision and found improvement.[471] That threat from the Venezuelan government caused severe pressure on the US-flag carriers to accommodate passengers flying to Venezuela during the Easter holiday.[472] In response to that threat, the US threatened to suspend flights by Venezuelan airlines if that threat was carried out.[473] Originally, civil aviation authorities in Venezuela set a March 1, 2006 deadline for the ban.[474] After that "threat-counter-threat" event, Venezuela and the US government negotiators reached an agreement to abandon carrying out the threat by the Venezuelan government until April 25.[475] However, the threat from the Venezuelan government prompted the US to send its FAA to Venezuela to review Venezuela's safety standard.[476] It was also quite obvious that the FAA would raise Venezuela's safety standard to Category 1.[477] Simultaneous to the decision to suspend the threat by the Venezuela, the U.S. Ambassador William Brownfield told that inspectors from the FAA's IASA Program would stay in Venezuela working with the INAC, the CAA of Venezuela, "as long as it is necessary to find a permanent solution to relevant issues to the benefit of

[469] "Venezuela" *Air Transport World [Penton Media, Inc.]* 43:5 (1 May 2006) 16 (WLeC, AIRTRANWLD) ["Venezuela"]; "Caracas: American planes, go home!" *National Post [Toronto]* (18 March 2006), WP. 12, (ProQuest, Canadian Newsstand) ["Caracas"].
[470] Dempsey, *Public*, *supra* note 344 at 96.
[471] *Ibid.* See also Adrian Schofield, "FAA Audit Upgrades Venezuela to Category 1 Safety Standard" *Aviation Daily [McGraw-Hill Companies, Inc.]* 364:16 (24 April 2006) 3 (WLeC, AVDAILY).
[472] Lori Ranson, "Carriers Can Keep Flying To Venezuela, For Now" *Aviation Daily [McGraw-Hill Companies, Inc.]* 363:61 (31 March 2006) 2 (WLeC, AVDAILY).
[473] "Caracas", *supra* note 469.
[474] Ranson, *supra* note 472.
[475] "Venezuela", *supra* note 469.
[476] Dempsey, *Public*, *supra* note 344 at 96.
[477] See e.g. "Venezuela", *supra* note 469; Ranson, *supra* note 472.

all parties involved."[478] Finally, the FAA elevated Venezuela's status from Category 2 to Category 1 and, therefore, the crisis came to an end.[479]

Example 2: Rwanda v. Belgium

The publication of the European blacklist provoked a wave of retaliatory moves.[480] In 21 February 2006, the Rwandan authorities in Kigali grounded an SN Brussels Airbus A330-300.[481] The Belgian Prime Minister alleged that this action was a retaliatory move against a ban on Silverback Cargo Freighters from Belgian airspace.[482] Silverback Cargo Freighters was founded in Rwanda in 2002.[483] Rwanda allowed it to return to Brussels following intervention from the Belgian prime minister.[484]

Example 3: Cameroon v. France

Another retaliatory move was taken by the Cameroon authorities on 19 February 2006 against France. The Cameroon authorities grounded and held for several days an Air France Airbus A340-300 after a landing incident at Douala during a rainstorm prompted an inspection of the aircraft.[485] In 2005, France blacklisted the Cameroon Airlines, the Cameroon-flag carrier, for nearly two months.[486] Air France suggested that the delay in deference was influenced by the French blacklisting of 2005.[487]

The incident occurred in heavy rain with thunderstorms in the vicinity of the airport.[488] According to Air France, while the aircraft was "just about to land" during that inclement weather, the captain decided to go around, but the main wheels of the aircraft touched down before the aircraft climbed away, prompting the captain to seek a technical inspection.[489] Fortunately, the aircraft landed safety on its second attempt.[490] Air France

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[478] Luis Zalamea, "Venezuelan's INAC Suspends Planned Ban On U.S. Flights" *Aviation Daily [McGraw-Hill Companies, Inc.]* 363:57 (27 March 2006) 3 (WLeC, AVDAILY).
[479] "US FAA" *Air Transport World [Penton Media, Inc.]* 43:6 (1 June 2006) 16 (WLeC, AIRTRANWLD).
[480] Turner, "Europe poised to publish blacklist" *Flight International* [*Reed Business Information, UK*] (14 March 2006) (WLeC, FLTINTL) [Turner, "Europe"].
[481] *Ibid*.
[482] *Ibid.*
[483] Online: Silverback Cargo Freighters <http://www.silverbackcargo.com/inside.php?about> (visited September 2, 2009).
[484] Turner, "Europe", *supra* note 480.
[485] *Ibid.*; Learmount, "Air France A340 held after go-around incident" *Flight International* [*Reed Business Information, UK*] (28 February 2006) (WLeC, FLTINTL) [Learmount, "Air France"].
[486] Turner, "Europe", *supra* note 480.
[487] Learmount, "Air France", *supra* note 485.
[488] *Ibid.*
[489] *Ibid.*

argued that, although its technical crew cleared the aircraft for service, the airline awaited a similar approval from the CAA of Cameroon which was delayed despite the fact that the aircraft had sustained no serious damage and should have returned to service immediately.[491]

Example 4: Angola v. European Union

One of the most recent examples of international crisis was the tension instigated by the EU blacklisting that existed between Angola and the EU. TAAG Angola Airlines was banned by the EU due to safety concern on 28 June 2007 following a crash of an aircraft of the TAAG Angola Airlines on the same day.[492] At least five people were reported to have been killed in that incident.[493] The European Commission decided to prohibit the operations of TAAG Angola Airlines in the EU from 4 July 2007.[494] Angola hit back by deciding to ban the EU carriers from its airspace following the EU decision.[495] When blacklisted by the EU, Angolan Deputy Minister of Transports for Civil Aviation, Helder Preza, told that the reasons put forward by the EU to ban the TAAG Angola Airlines from flying in Europe were somewhat groundless.[496]

4.6 Is Blacklisting Biased?

This section demonstrates that blacklisting is biased. In this section, an empirical study has been carried out drawing upon the facts of 102 worst aviation accidents occurred from the inception to the most recent time to determine the main causes of the accidents, the locations where they frequently occur and these countries whose flag-

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[490] *Ibid.*
[491] *Ibid.*
[492] "Angolan plane crash 'kills five'" *BBC News* (28 June 2007), online: BBC News <http://news.bbc.co.uk/2/hi/africa/6250408.stm> (visited September 2, 2009).
[493] *Ibid.*
[494] Madhu Unnikrishnan, "Angola Bans EU Airlines In Retaliation For Black List" *Aviation Daily [McGraw-Hill Companies, Inc.]* 369:4 (6 July 2007) 5 (WLeC, AVDAILY).
[495] *Ibid.*
[496] "European Union Flight Ban Groundless - Deputy Minister" *ANGOP [Angola Press]* (30 June 2007), online: Angola Press <http://www.portalangop.co.ao/motix/en_us/noticias/transporte/European-Union-Flight-Ban-Groundless-Deputy-Minister,c03d643b-5041-495c-b884-d594fe303bbb.html> (visited September 2, 2009).

carriers are mostly involved. These determinations are used to demonstrate that blacklisting is biased.

"Table 2: 102 Worst Aviation Accidents"[497] lists and provides the name of the State of the operator and of the operator involved in the accident, location and causes of the accidents. These causes are mainly derived from the investigation report of the accidents. In the absence of investigation report, causes are mentioned in accordance with the best possible factual evidence. "Table 3: Principal Causes of the Aviation Accidents",[498] "Table 4: Top 5 States whose flag-carriers are mostly involved",[499] and "Table 5: Top 5 Most Frequent Locations of Accidents"[500] provide the conclusions drawn from the Table 2.

It appears from Table 2 and Table 3 that the focus of the IASA Program and the EC SAFA Programme, on the concerned CAA and the airline, respectively is correct to ensure aviation safety. These two processes could at least reduce the accident rate to 50% since causes 1, 4, 5, 7, 11, 12, 13, 15, 18, 20, 21 and 22 in Table 3 are beyond the purview of these programmes. Again, causes 5, 15 and 22 cannot be rectified. However, if one looks at Table 4 and Table 5, he would not agree to the potential effectiveness of blacklisting to reduce the accident rate to 50%. Because these two Tables are informing us that the US, some of the economically and militarily powerful countries engaged in the EC SAFA Programme, namely, France and Spain, and either or both economically and militarily powerful countries, namely, Russia, China, Japan, are mostly involved in those accidents. However, those countries are not blacklisted. All the blacklists reveal that almost all the blacklisted countries are developing countries who do not pose a threat to the US or the EU either or both economically or militarily. In fact, those blacklists are dominated by the feeble States. In light of this fact, it can be argued that the process of blacklisting is unfair: this process is biased.

One might argue against using Table 4 and Table 5 as indicators of "culpable" countries since the North America and the EU together account for 65.1% of the world traffic (both international and domestic) in accordance with 2008 data and, hence, the

[497] See Annex, Table 2, below.
[498] See Annex, Table 3, below.
[499] See Annex, Table 4, below.
[500] See Annex, Table 5, below.

culpability should be measured in accordance with kilometers flown by the country concerned.[501] It is true that when such criterion is considered, the accident rates in those developed regions appear to be significantly lower than the rest of the world. "Table 6: Regional Industry Accident Rates (Western Jets Hull Losses / Million Sectors)"[502] demonstrates that accident rates in the North American and European zone are significantly lower than the rest of the world. However, it is alarming that accident rates rose during 2008 compared with 2007 in the Commonwealth of Independent States (CIS), in Latin America and the Caribbean, in the Middle East and North Africa (MENA), in North America and in Europe.[503] However, accident rates are modestly decreasing in Africa, Asia-Pacific and North Asia.[504]

Let us consider the case of Russia. Can the US and the EU blacklist Russia or any of its airlines?[505] Preferential treatment accorded to Russia by the EU is apparent from different Regulations establishing the EU blacklist of air carriers passed by the European Commission.[506] While the EU does not hesitate to blacklist Angolan airlines in spite of the threat from the Angolan authorities,[507] it leaves the matter of banning the Russian airlines to the relevant national authority of Russia in lieu of blacklisting those airlines.[508]

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[501] See Annex, Table 1, below.
[502] See Annex, Table 6, below.
[503] IATA, "Annual Report 2009" (2009) at 22, online: International Air Transport Association <http://www.iata.org/nr/rdonlyres/a33bc4b3-431b-4690-be6d-6788900c8ae3/0/iataannualreport2009.pdf> (visited September 2, 2009).
[504] See *ibid.*
[505] See Dempsey, *Public*, *supra* note 344 at 101.
[506] See EC, *Commission Regulation (EC) No 715/2008 of 24 July 2008 amending Regulation (EC) No 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community*, [2008] O.J.L 197/36; EC, *Commission Regulation (EC) No 331/2008 of 11 April 2008 amending Regulation (EC) No 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community*, [2008] O.J.L 102/3; EC, *Commission Regulation (EC) No 1400/2007 of 28 November 2007 amending Regulation (EC) No 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community*, [2007] O.J.L 311/12; EC, *Commission Regulation (EC) No 787/2007 of 4 July 2007 amending Commission Regulation (EC) No 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community*, [2007] O.J.L 175/10; EC, *Commission Regulation (EC) No 235/2007 of 5 March 2007 amending Regulation (EC) No 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community*, [2007] O.J.L 66/3; EC, *Commission Regulation (EC) No 1543/2006 of 12 October 2006 amending Regulation (EC) No 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community referred to in Chapter II of Regulation (EC) No 2111/2005 of the European Parliament and of the Council and as amended by Regulation (EC) No 910/2006*, [2006] O.J.L 283/27.
[507] See section 4.5, example 4, above.
[508] See generally Martial Tardy, "EU Blacklists Indonesian Airlines" *Aviation Daily [McGraw-Hill Companies, Inc.]* 368:64 (29 June 2007) 3 (WLeC, AVDAILY).

Regarding Russia's aviation safety standard, Giovanni Bisignani, IATA Director General and CEO, asserted: "Despite having 8 carriers on the IOSA registry, Russia's safety record is well below international standards with 1 accident for every 155,000 flights on western built aircraft. This is far worse than the global average of 1 accident for every 1.2 million flights."[509] It can be assumed, if not concluded, that Russia has not been banned by the US and the EU to accommodate "political reality." However, is it a justifiable ground to ban the weak, feeble States for aviation safety deficiency? Certainly, it is not.

Support for the argument that blacklisting is unfair and biased can also be found in the statement of Belgian CAA official after Hewa Bora, a flag-carrier of Congo, was banned by the UK CAA. The Belgian CAA official insisted that, while Belgium CAA had found Hewa Bora "marginally acceptable" in safety terms, the UK CAA, *on the basis of Belgium's own data*, moved to ban the operator from entering EU airspace.[510] The Belgian CAA was reluctant to ban Hewa Bora since, as stated by the Belgian CAA official, the bilateral operation between Congo and Belgium was viewed too valuable from economic perspective by Belgium.[511] From this statement, it can be reasonably assumed that the UK CAA did not hesitate to ban Hewa Bora since the UK had seen no economic interest in allowing Congo to fly to the UK. Is it fair to allow a foreign airline to continue service until an interest is involved? This implies that bad relation with anyone of the 42 EU States or failing to attract anyone of the 42 EU States makes a feeble State more vulnerable to the EU blacklisting.

This is equally true in the case of the US IASA Program. The case of Venezuela, as mentioned in example 1, section 4.5,[512] indicates that the US IASA Program is focusing not really on the ability of the CAA of a given State to fulfill its international aviation safety obligation but on the ability of the particular State to fulfill the economic desire of the US.[513] If the economy of the US gains from continuing service, the country

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[509] IATA, "Remarks of Giovanni Bisignani at a Press Conference in Moscow" (16 April 2009), online: International Air Transport Association <http://www.iata.org/pressroom/speeches/2009-04-16-01.htm> (visited September 2, 2009).
[510] Turner, "EC blacklist plan tests spirit of co-operation between states" *Flight International* [*Reed Business Information, UK*] (28 March 2006) (WLeC, FLTINTL).
[511] *Ibid.*
[512] See section 4.5, above.
[513] "Some speculate that the US already succumbed to the energy politics of Venezuela and Ecuador by elevating both to Category 1 following threats of economic retaliation." Dempsey, *Public*, *supra* note 344 at 101.

remains in the "whitelist", i.e. Category 1, though it should be placed in Category 2 for significant safety deficiency.

Several countries and their respective airlines also criticized the blacklisting by the developed countries as being biased against the economically and / or militarily weak countries. For example, just before the establishment of the voluntary safety oversight assessment programme of the ICAO, Latin American nations and their respective airlines, most of which were blacklisted under the US IASA Program, believed that the they were being unfairly picked on by the FAA for review.[514] They claimed that other countries, like China and Russia, which had not been assessed under the US IASA Program at that time, and which they felt the US considered more important trading partners, were being treated by the FAA with kid gloves.[515]

From the foregoing, it is now evident that blacklisting is an instrument of national policy of the developed countries. The developed countries employ this mechanism to serve their own purpose. This mechanism has nothing to do with improving global civil aviation safety. This is a clear breach of article 4 of the Chicago Convention.[516] The joint proposal by the US, the UK and Canada to the Chicago Conference that parties to the Convention should agree to reject the use of civil aviation as an *instrument of national policy in their international relations* was incorporated in substance in article 4.[517] Have the US and the UK, one of the EU Member States, forgotten their own proposal?

4.7 Miscellaneous: More Criticisms against Blacklisting

More criticisms can be made against blacklisting. This section contains some more constructive criticisms against blacklisting.

Actually, the airline industry has not favored the blacklists as a safety tool.[518] To the airline industry, blacklists are punitive and do nothing directly to improve safety.[519]

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[514] Jane Levere, "Sore over safety." *Airline Business* 12:2 (February 1996) 52 (Expanded Academic ASAP).
[515] *Ibid.*
[516] *Chicago Convention*, *supra* note 402, art. 4.
[517] See generally Whalen, *supra* note 452.
[518] See Anne Paylor, "Black cloud, silver lining" *Air Transport World [Penton Media, Inc.]* 43:2 (1 February 2006) 50 (WLeC, AIRTRANWLD).
[519] *Ibid.*

The IATA has strongly opposed blacklists as being ineffective in improving safety.[520] While the EU was considering the issue of setting up and publishing the EU blacklist, an IATA spokesman criticized the move saying that blacklists could confuse customers because they do not distinguish between major and minor problems.[521] In reply to the question why he was cynical about the benefits of the EU blacklist, IATA Director General and CEO Giovanni Bisignani mentioned the following grounds: lack of common standard, lack of transparency, lack of definitions on how to get off the list, lack of independence, proneness of the blacklist to become political issue and preparation of the blacklist only on the basis of a single evaluation of an aircraft.[522]

If the blacklisting was fair and adequately served the continued need to achieve global civil aviation safety, the ICAO would never launch the USOAP Programme while the US IASA was operative. In fact, the worldwide call for multilateral initiatives against the unilateral US IASA Program prompted the introduction of those multilateral initiatives.[523] Furthermore, if both these types of blacklisting were serving well, the ICAO Assembly would never have adopted several resolutions, namely, Resolutions A29-3,[524] A36-2,[525] A36-3,[526] A36-6,[527] A36-7,[528] etc. which call for the uniformity and harmonization of law, strategy, etc. in the field of civil aviation safety. Most importantly, the ICAO Assembly adopted significant number of Resolutions during its 36th Session which held in September 2007, i.e. after the launch of both types of blacklisting.[529] One

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[520] *Ibid*.
[521] Martial Tardy, "EU Considers Publishing Blacklist Of Unsafe Carriers" *Aviation Daily [McGraw-Hill Companies, Inc.]* 355:17 (29 January 2004) 2 (WLeC, AVDAILY).
[522] Cathy Buyck, "IATA director general and CEO Giovanni Bisignani" *Air Transport World [Penton Media, Inc.]* 42:12 (1 December 2005) 41 (WLeC, AIRTRANWLD).
[523] See Anthony J. Broderick & James Loos, "Government Aviation Safety Oversight – Trust, But Verify" (2002) 67 J. Air L. & Com. 1035 at 1045 (HeinOnline). See c. 3, above.
[524] *Global Rule Harmonization*, ICAO Assembly Res. A29-3, ICAO Doc. 9902, I-80, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> (visited September 2, 2009).
[525] *ICAO Res. A36-2*, *supra* note 432.
[526] *Implementation Support and Development (ISD) Programme — Safety*, ICAO Assembly Res. A36-3, ICAO Doc. 9902, I-95, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> (visited September 2, 2009).
[527] *State Recognition of the Air Operator Certificate of Foreign Operators and Surveillance of their Operations*, ICAO Assembly Res. A36-6, ICAO Doc. 9902, I-93, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> (visited September 2, 2009).
[528] *ICAO Global Planning for Safety and Efficiency,* ICAO Assembly Res. A36-7, ICAO Doc. 9902, II-29, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> (visited September 2, 2009).
[529] The US IASA Program was launched in August 1992 and the EC SAFA Programme was launched under the supervision of the EASA from 1 January 2007. See c. 2, above.

should recall that, in accordance with paragraph (c), article 48 of the Chicago Convention of 1944,[530] the Assembly takes decisions by a majority of votes cast. From these facts, it can be implied that the rest of the world has tacitly rejected the blacklisting conducted by the US and the EU.[531] It is worth mentioning that, just before the initiative of publishing the EU blacklist, the ICAO has indirectly expressed its reservation about the use of such list in a News Release[532] on 26 August 2005 by noting that it has already a "unified strategy to resolve safety-related deficiencies".[533]

While multilateral initiatives like the USOAP and the IOSA are in operation, it is quite unreasonable to adopt unilateral initiatives like blacklisting. The adoption of these unilateral initiatives implies that those multilateral initiatives are insufficient to ensure global civil aviation safety. If multilateral initiatives, which operate on the basis of consensus, are ineffective, how can unilateral initiatives be effective where such consensus is absent? No State likes another State to be their policeman.[534] Again, since SARPs are promulgated by the ICAO, this Organization is in better position than the US and the EU to determine whether or not any given State has failed to comply with its international obligation.[535] Ironically, the EU considers the ICAO list of delinquent States as applicable only at international level and, for this reason, it does not publish the ICAO list.[536] Are the third countries' airlines EU's *domestic* airlines? Or, are all the third countries' airlines deemed in *domestic* operation when those carriers operate to and from the EU?

There are numerous examples where ban has been imposed on the basis of accidents, in some cases only one accident. Examples include the US FAA's ban on all

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[530] *Chicago Convention*, *supra* note 402, art. 48(c).
[531] See e.g. Abeyratne, *supra* note 400; Paylor, *supra* note 518.
[532] ICAO, ICAO News Release, PIO 10/05, "ICAO Council President Calls for Increased Global Transparency in Sharing of Aviation Safety Information" (26 August 2005), online: ICAO <http://www.icao.int/icao/en/nr/2005/pio200510_e.pdf> (visited September 2, 2009).
[533] Paylor, *supra* note 518; "EC moves forward on blacklist" *Air Transport World [Penton Media, Inc.]* 42:10 (1 October 2005) 7 (WLeC, AIRTRANWLD).
[534] Dempsey, *Public*, *supra* note 344 at 102.
[535] *Ibid.* at 106.
[536] EU, Press Release, MEMO / 06 / 127, "Questions and answers on the aviation blacklist" (22 March 2006), online: Rapid, Press Releases, EUROPA <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/127&format=HTML&aged=0&language=EN&guiLanguage=en> (visited September 2, 2009).

DC-10 of all countries after the crash of American Airlines DC-10 on 25 May 1979,[537] and the EU's ban on TAAG Angola Airlines following a crash of an aircraft of the same carrier on 28 June 2007.[538] It has already been shown that an accident cannot be a reliable indicator of safety deficiency of the country or the airline concerned.[539] Moreover, in most of the cases, it takes considerable amount of time to detect the cause of the accident. In some cases, the cause remains unknown. Therefore, it is not appropriate to blacklist on the basis of the fact of an accident. In the case of FAA's decision concerning DC-10, the court ruled that the decision violates article 33[540] of the Chicago Convention.[541] In the case of TAAG, it is believed, at the time of this writing, that the accident was related to baggage and cargo security, i.e. terrorism.[542]

Another important limitation of the EU blacklisting process, acknowledged by the European Commission itself, is that absolute verification of the exact identity is not possible in all cases owing to a total lack of information surrounding some airlines that might be operating on the border of, or altogether outside, the recognized international aviation regime.[543] Therefore, there remains a risk that some airlines, though operating in good faith, may find itself in the Community list simply for using the same trading name as the blacklisted airline.[544] The drastic effect of such a mistake on an innocent player can be easily apprehended. What is the benefit to the civil aviation safety of adopting and retaining an identification system which cannot identify properly? One incident of improper / mistaken identification is sufficient to shake the public confidence on any identification procedure like the EC SAFA Programme.

It is true that the world-wide aviation accident rate is continuously decreasing.[545] The global accident rate, involving both scheduled and non-scheduled operations, in 2008

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[537] See *British Caledonian v. Bond*, *supra* note 457.
[538] See section 4.5, example 4, above.
[539] See section 4.6, above.
[540] *Chicago Convention*, *supra* note 402, art. 33.
[541] *British Caledonian v. Bond*, *supra* note 457.
[542] Jim Mathews, "Angola Working To Boost TAAG After Two-Year European Ban" *Aviation Daily [McGraw-Hill Companies, Inc.]* 376:45 (2 June 2009) 5 (WLeC, AVDAILY).
[543] EC, *Legal Notice*, *supra* note 409.
[544] *Ibid.*
[545] See ICAO, ICAO News Release, PIO 03/09, "ICAO Releases Preliminary Safety and Security Statistics for 2008" (19 March 2009), online: ICAO <http://www.icao.int/icao/en/nr/2009/pio200903_e.pdf> (visited September 2, 2009).

is lower than the 2007 rate.[546] Some people concerned with the civil aviation exalted the unilateral blacklisting for this overall decreasing accident rate.[547] However, blacklisting does not deserve such approval. As a rule of thumb, less presence of traffic in the street implies less chance of accident. Since blacklisting has caused a large number of aircraft to be parked idle or has incapacitated those aircraft to participate in the dense air-traffic routes, the chance of accident has lessened automatically. Therefore, the reason for the decreasing accident rate is not the effect of the improvement of aviation safety as a consequence of blacklisting. Again, those admirers of blacklisting should note the fact of increasing accident rate in North American and European region in 2008 compared with 2007 accident rate.[548] Those admirers should also note that 2009 is going to be the worst aviation year in terms of accidents with three nastiest aviation accidents, namely, the Air France crash which claimed 228 lives on 1 June 2009, the Caspian Airlines crash which claimed 168 lives on 15 July 2009, and the Yemenia Airways crash which claimed 152 lives on 30 June 2009.[549]

Blacklisting can give rise to market concentration. This is not only true in the case of EU blacklisting but also in the case of US blacklisting since the US does not cease its aviation operation to all the Category 2 States.[550] Market concentration facilitates monopoly which means an increase in the airfare price. Obviously, price increase is disadvantageous to the consumers. Since consumers of air travel in the developed State - blacklisted State aviation market include those from both the blacklisted State and developed State, blacklisting would not be a blessing for the citizens of the developed State itself. Those developed countries would fail to motivate their own citizens to pay more in exchange for increased aviation safety due to blacklisting. Because, in the most recent times, the aircraft of those developed countries have been involved in the worst aviation accidents. On 1 June 2009, an Air France Airbus A330 crashed and destroyed in the Atlantic Ocean which is the worst aviation accident in 2009 and "acquired" 23rd position in the list of 102 worst aviation accidents, at the time of this writing.[551] On 20

[546] *Ibid.*; See Annex, Table 6, below.
[547] See e.g. Thomas, *supra* note 389.
[548] See Annex, Table 6, below.
[549] See Annex, Table 2, below.
[550] Category 2 consists of two groups of countries. For details of these two groups see c. 2, above.
[551] See Annex, Table 2, below.

August 2008, a Spanair aircraft had an accident which was the worst in 2008 and "secured" 65th position in the list of 102 worst aviation accidents, at the time of this writing.[552] One aviation accident is sufficient to create fright in the consumers' mind about the airline and to worsen the safety reputation of the airline. Actually, publishing the list of aviation accidents, instead of publishing the blacklist, would prove more effective to inform the passengers about the safety standard of the airlines on which they intend to fly. Again, since such list would not impose any direct ban on any airlines it would not give rise to market concentration. However, the list of aviation accidents should not be published solely since it would not increase aviation safety. Detailed recommendations on the ways to achieve global civil aviation safety are contained in the next Chapter.

Blacklisting is detrimental to the citizens of the developed countries, who prepare and maintain the blacklist, in several other ways. If Venezuela's threat to ban US carriers had materialized on the eve of the summer of 2006, then these US carriers serving the US – Venezuela market would have lost more.[553] Again, it would not be prudent to ignore the economic prospect of continuing aviation relationships in those blacklisted countries or blacklisted airlines' countries. The feeble countries are suitable for business investment for various reasons: lower labor cost, lower tax burden, lower price of raw materials, etc. which exist in those economically deprived countries. Some of those feeble countries are or can be a great source of mineral resources, raw materials, etc. for the developed world. This is not because of the quantity but because of the availability of those resources in affordable price in those countries. Therefore, cutting entire aviation relationship would translate into cutting business relationships which would never be advantageous for the developed countries itself.

Cutting aviation relationships with the feeble countries would be a blunder on the part of the developed countries in another way. It has already been mentioned that blacklisting the feeble countries without any means of redress would destroy the economy of these feeble countries.[554] Business profitability depends on demand. If there is no

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[552] *Ibid.*
[553] See Staff, "American Has The Most To Lose If Venezuela Bans Flights" *Aviation Daily [McGraw-Hill Companies, Inc.]* 364:1 (3 April 2006) 1 (WLeC, AVDAILY).
[554] See section 4.3, above.

demand, there is no business. Demand increases when the average income of the buyer increases. If the feeble countries become poorer this would not be beneficial to the developed countries since these developed countries would lose their potential buyer. Moreover, the developed countries should take into account the fact of market maturity. Market shifts frequently in accordance with the shift of demand. Therefore, ceasing blacklisting the feeble countries would bring welfare for the developed countries.[555]

Once developed does not imply developed forever. The world has already witnessed a number of empires which cannot be found anymore. Therefore, naturally these feeble countries would become developed in future when the current developed countries might be in distress. Will it be good if the current feeble countries would imitate the current developed countries' unilateral harsh behavior at that time in the future? Obviously, it will never be good for the affected countries as well as for the entire world.

It can be argued that the US and the EU are not eligible to blacklist foreign countries or foreign airlines since those developed countries are not perfectly maintaining their own aviation safety. Still in recent times, the aircraft of those developed countries have been involved in a number of accidents. Furthermore, accident rate increased in the North American and European regions in 2008 compared with 2007 the accident rate.[556] A person must be pure and perfect to be qualified as a judge in any given case. A wrongdoer is not qualified for becoming a judge. A wrongdoer's decision would not be respected or be doubted. In this connection, one interesting comment on blacklisting by the US and the EU made in a magazine article deserves mentioning: "Given the current lack of (or apparent need for) credibility among the list-builders, creating these lists can turn into a cottage industry, sort of like writing an Internet blog. Come to think of it, exactly like an Internet blog."[557]

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[555] See generally Roger Fisher, *Improving Compliance with International Law* (Charlottesville: University Press of Virginia, 1981) at 59.
[556] See Annex, Table 6, below.
[557] "Blacklists…or…the Grace L. Ferguson Storm Door & Airline Rating Co." *Air Transport World [Penton Media, Inc.]* 42:12 (1 December 2005) 68 (WLeC, AIRTRANWLD).

4.8 Conclusion: Blacklisting is not an Appropriate Mechanism to Achieve Global Civil Aviation Safety

It is clear from the above discussion that, although the practice of 'Blacklisting' by developed countries to ensure global civil aviation safety is a useful tool, this unilateral action cannot ensure global civil aviation safety in practice. This mechanism can ensure, to a certain extent, the safety of the citizens of the blacklisting countries as well as of those passengers from other countries who travel to and from those developed countries. Nevertheless, the need to improve aviation safety is imperative. The Chicago Convention did not come to save the developed world only. In fact, the focus of the drafters of the Convention was on the entire world, not on a particular part of the world. As noted above, there are some feeble States who cannot comply with the international aviation safety standard for the lack of money. Assisting these feeble States is essential to maintain safety in the entire world since, as noted earlier, deficiency in safety in one part of the world can affect the standard in other part of the world.[558]

No sane person would argue against establishing and maintaining peace in the world. International civil aviation can greatly contribute to achieving that purpose. Each year, aviation accidents claim a huge number of human lives. The lack of safety is responsible for a significant number of those accidents. The lack of safety can increase aviation accidents which can hinder the sound growth of the international civil aviation and, consequently, destroy peace. The next Chapter discusses the possible ways to ensure global civil aviation safety.

[558] See section 4.3, above.

Chapter 5: Essential Reforms: Adapting the Existing Regime for the Current World

5.1 Introduction

In the previous Chapters, it has been demonstrated that more work has to be done to ensure global civil aviation safety. This work should be shouldered not only by the multilateral organizations but also by individual States. In this connection, one should realize the need for uniformity in both laws and approaches for the welfare of global civil aviation. It is worth noting that the ICAO has taken valuable initiatives in achieving such uniformity and this can be understood from some of the Assembly Resolutions passed by the ICAO Assembly, namely, Assembly Resolution A29-3: Global Rule Harmonization,[559] Resolution A36-2: Unified strategy to resolve safety-related deficiencies,[560] and Resolution A36-7: ICAO Global Planning for Safety and Efficiency.[561] This Chapter reviews and suggests some reform proposals to ensure global civil aviation safety taking into special account the need for uniformity in both laws and initiatives. The next section considers the available avenues that can be utilized to modernize the Chicago Convention[562] of 1944. Section 5.3 discusses on the ways to modernize the existing multilateral initiatives. Section 5.4 reviews some proposals so that the existing unilateral initiatives of the developed countries can be adapted for the contemporary world. Section 5.5 is devoted to considering the appropriate forum for challenging the legality of unilateral blacklisting of the developed countries. Section 5.6 suggests some ways to improve the civil aviation safety standard of the feeble States. Section 5.7 provides the conclusion of this Chapter.

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[559] *Global Rule Harmonization*, ICAO Assembly Res. A29-3, ICAO Doc. 9902, I-80, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> (visited September 2, 2009).

[560] *Unified strategy to resolve safety-related deficiencies*, ICAO Assembly Res. A36-2, ICAO Doc.9902, I-91, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> [*ICAO Res. A36-2*] (visited September 2, 2009).

[561] *ICAO Global Planning for Safety and Efficiency,* ICAO Assembly Res. A36-7, ICAO Doc.9902, II-29, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> [*ICAO Res. A36-7*] (visited September 2, 2009). This Resolution has superseded Assembly Resolution 33-16 on the ICAO Global Aviation Safety Plan (GASP). To learn about Assembly Resolution 33-16, see *ICAO Global Aviation Safety Plan (GASP)*, ICAO General Assembly Res. A33-16, ICAO Doc.9848, II-19, online: ICAO <http://www.icao.int/icaonet/dcs/9848/index.html> (visited September 2, 2009).

[562] *Convention on International Civil Aviation*, 7 December 1944, 61 STAT. 1180, T.I.A.S. NO. 1591, 15 U.N.T.S. 295, Can. T.S. 1944 No. 36, ICAO Doc. 7300/9 [*Chicago Convention*].

5.2 Modernizing the Chicago Convention of 1944

Though it is true that the Chicago Convention of 1944 has served the world well for over sixty years,[563] some modernization is required to ensure compliance with and enforcement of legal and regulatory norms regarding civil aviation safety. One should note that the world has changed a lot since the date of effectiveness of the Convention.[564] In light of this dramatic change, some amendment is essential in the field of civil aviation safety. Following are some reform proposals concerning only safety.

First of all, articles 37 and 38 need to be amended. Article 37 should be amended by merely deleting the phrase "the highest practicable degree of".[565] With regard to article 38, the word "impracticable" should be replaced by the word "impossible".[566] Moreover, the word "immediate" should be substituted in favor of any defined time limit for notification to the ICAO of any differences.[567] In the context of article 38, Professor Dempsey argued, "[i]t would have been cleaner draftsmanship and a far more meaningful notification requirement, had the Convention explicitly addressed the need to notify promptly after SARPs promulgation, and provided that a State that failed to notify would be deemed in compliance and bound thereby."[568] I also agree with this recommendation.

To remove all the confusion and to give it more strength, "a solid legal basis" is required for the ICAO to operate the USOAP.[569] In this respect, I agree with Detra that the following provisions should be included in Chapter VII of the Convention:[570]

> (a) The contracting States recognize the authority of the International Civil Aviation Organization to establish and operate a universal safety oversight audit programme, comprising regular, mandatory, systematic, and harmonized safety oversight audits consistent with the provisions of this Convention.

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[563] See generally Michael Milde, "International Air Law and ICAO" in Marietta Benkö, ed., *Essential Air and Space Law*, vol. 4 (Utrecht, Netherlands: Eleven International Publishing, 2008) at 194 [Milde, "International Air Law"].
[564] See generally *ibid.*
[565] Zachary D. Detra, *The Legitimacy of the International Civil Aviation Organization's Universal Safety Oversight Audit Programme* (LLM Thesis, McGill University Faculty of Law, Institute of Air and Space Law, 2006) at 96 [unpublished].
[566] *Ibid.*
[567] See e.g. Paul Stephen Dempsey, *Public International Air Law* (Montreal: McGill University, Institute and Center for Research in Air & Space Law, 2008) at 77 [Dempsey, *Public*].
[568] *Ibid.*
[569] See Detra, *supra* note 565 at 93; Milde, "International Air Law", *supra* note 563 at 204.
[570] Detra, *supra* note 565 at 94 – 95.

(b) Unless adequate prior notice is given by a contracting State for cause, each contracting State agrees to the conduct of regular, scheduled safety oversight audits by an international Civil Aviation Organization safety oversight audit team covering the safety-related provisions in the areas pertaining to all safety-related Annexes to this Convention.[571]

If this is done, it would be an unprecedented development within any international organization of the UN system.[572] However, lack of political will on the part of the contracting States can appear as a stumbling block in this respect.[573] All States should recognize the importance of ensuring aviation safety, arguably a global public good,[574] for the interest of the entire world.

5.3 Modernizing the Multilateral Initiatives

As has been noted in Chapter 3,[575] the existing multilateral initiatives need to be modernized in order to ensure global civil aviation safety. Some reform proposals have been mentioned below.

As has been shown in the preceding Chapters,[576] one of the most effective means to persuade States to comply with their international safety obligation is informing the traveling public about the safety standard of the concerned State. However, it has also been shown that the existing mechanisms have failed to effectively inform the public about the safety standard of the concerned State.[577] In this respect, the ICAO, as the global forum for civil aviation, should initiate the necessary actions to inform the public. In this respect, the ICAO can do the following:

(a) In addition to publishing the audit results of the audits performed under the USOAP, the ICAO should prepare a list categorizing States into three groups. This list should be used for ICAO's own purposes. The first group should

[571] *Ibid.* at 94.
[572] See Milde, "International Air Law", *supra* note 563 at 169.
[573] See generally Gilbert Guillaume, "ICAO at the Beginning of the 21st Century" (The 8th Beaumont Memorial Lecture, 5 February 2008), (2008) 33 Air & Space L. 313 at 315 (Kluwer Law International).
[574] For a good discussion on the concept of public goods, see Kaul, Inge., Grunberg, Isabelle. & Stern, Marc., eds., *Global Public Goods: International Cooperation in the 21st Century* (New York: Oxford University Press, 1999).
[575] See c. 3, above.
[576] See c. 3 and c. 4, above.
[577] See c. 3, section 3.5, and c. 4, section 4.3, above.

comprise of States who comply with their safety related obligation. The second group should comprise the States who, though having the ability, do not comply with their safety related obligation recklessly or negligently. The third group should comprise those feeble States who do not (actually, cannot due to lack of financial ability) comply with their safety related obligation.

(b) Then the ICAO should make the list of first group of States publicly available entitling it as "White List".

(c) In this regard, just posting the "White List" on the ICAO's designated website would not be sufficient. The following measures can be taken:

  (i) All contracting States should be made responsible for making the list available to the traveling public.

  (ii) The list should be made viewable at all the ticket distribution points: airlines should reveal the list on their ticket purchasing website; travel agents should duly inform the prospective passenger about the list, etc.

  (iii) All the international airports and domestic airports, which connect to the international airports, must have large easily noticeable billboard of the "White List".

  (iv) In all the places from where the list can be viewed, a clear definition of "White List" must be enclosed. The definition must be available in all the international languages as well as in the native language. In the definition, the States in the "White List" must be highly praised to attract more passengers for safe air travel and, consequently, to entice delinquent States to upgrade their safety standard.

(d) A new Annex on the USOAP must be promulgated detailing the entire process of the USOAP. This would better inform the contracting States about the USOAP.

Regarding the IOSA of the IATA, the following reform initiatives should be undertaken:

(1) Under the IOSA programme, only ICAO promulgated SARPs must be used instead of ISARPs of the IATA;

(2) The IATA should cooperate with the ICAO in preparing the "White List" of States. Whenever any deficiency is found on the part of any airlines, it should promptly inform the ICAO about the deficiency.

(3) Although whether or not any airlines is an "IOSA Registered Operator" can be known from the IATA's website, the list must be made more publicly available by adopting several other means. For example, at all the ticket distribution points, the list must be made available. Furthermore, like the "White List" of the ICAO, a clear definition of "IOSA Registered Operator" must be appended with the list.

(4) Under the IOSA programme, the IATA must commence physical inspection of aircraft. The matter has become very important due to the Yemenia Airbus A310-300 accident on 30 June 2009.[578] No airlines should be allowed to enter the IOSA Registry unless it possesses a fleet of safe aircraft or, if there are one or more dangerous aircraft, it undertakes not to fly with the unsafe aircraft.

It is worth mentioning that it is unreasonable to expect that those suggested amendments, especially, with regard to the USOAP of the ICAO, would be materialized easily and immediately. As noted earlier, lack of political will on the part of the contracting States can appear as a stumbling block in the modernization of the Chicago Convention.[579] This argument is equally applicable in all respects where ICAO's initiative is required since it is an international Organization made up of its member States. Onidi criticizes the ICAO as follows: "Instead of being faced with an Organization that is tune with current developments and confronting these challenges head-on, one detects *stagnation and inaction*. At times, rather than seizing the initiative, one finds ICAO more prone to slowing down or even trying to block those that have the will and the means to take action."[580] The ICAO should take prompt initiatives to overcome those deficiencies first. Otherwise, no development in the field of aviation safety that can benefit the entire

[578] For more on this see c. 3, section 3.5, above.
[579] See generally Guillaume, *supra* note 573 at 315.
[580] Olivier Onidi, "A Critical Perspective on ICAO" (2008) 33 Air & Space L. 38 at 40 (Kluwer Law International) [emphasis in original].

world would occur. Milde forwards some valuable recommendations that have the effect of speeding up the work of the ICAO and eliminating the blemishes of the Organization.[581]

5.4 Adapting the Unilateral Initiatives of the Developed Countries for the Current World

In light of the fact that the unilateral initiatives cannot ensure global civil aviation safety, some reform proposals have been suggested below:

(a) The developed countries must cease preparing blacklists of States or of airlines in favor of the ICAO "White List". Those countries should collaborate with the ICAO in preparing ICAO's own list of States where countries should be categorized into three groups.[582]

(b) The developed countries should continue to monitor third party aircraft operating from and to those developed countries according to the Chicago Convention and not more. In this respect, they should treat feeble States differently from other States. Any deficiency found during monitoring should be promptly notified to the ICAO so that the ICAO can make better decision in categorizing States into three groups.

(c) The developed countries should come forward to assist the feeble States both technically and financially. Thanks to the assistance programs initiated by both the US and the EU to improve, *inter alia*, aviation safety of Africa.[583]

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[581] Milde, "International Air Law", *supra* note 563 at 193 – 205.

[582] See section 5.3, above.

[583] See online: International Issues, Office of the Assistant Secretary for Aviation and International Affairs, US Department of Transportation <http://ostpxweb.dot.gov/aviation/intlaffairs.htm> (visited September 2, 2009); EC, Commission, *Communication from the Commission to the European Parliament and to the Council – Partnership between the European Union and Africa – Connecting Africa and Europe: working towards strengthening transport cooperation* (Brussels: EC, 2009) COM(2009) 301 final, online: EUR-Lex <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2009v_doc=301> (visited September 2, 2009); Online: Regional Cooperation, International Relations, Transport, European Commission <http://ec.europa.eu/transport/international/regional_cooperation/africa_en.htm> (visited September 2, 2009).

Some more reform proposals regarding technical and financial assistance to feeble States have been discussed in a subsequent section of this Chapter.[584]

5.5 Appropriate Forum for Challenging the Legality of Unilateral Blacklisting

In Chapter 4, it has been shown that the unilateral blacklisting is illegal.[585] Now, the question comes regarding the appropriate forum for challenging the legality of unilateral blacklisting. On this matter, the thesis considers three institutions, namely the ICAO, the International Court of Justice (ICJ) and the World Trade Organization (WTO).

5.5.1 The International Civil Aviation Organization

As the global forum for civil aviation matters, the ICAO deserves the priority in this respect. According to article 84 of the Chicago Convention,[586] if negotiations between the governments fail to resolve any conflict, they may resort to the ICAO Council for decision.[587] The dispute settlement procedure has been detailed under Chapter XVIII of the Chicago Convention. It is worth noting that "[t]he ICAO has been more successful in assisting the consensual resolution of disputes than have most of the other organs of the U.N.."[588]

However, for several reasons, the legality of blacklisting should not be challenged in the ICAO Council. One of the reasons is that the history does not suggest so. Milde phrased it in the following terms:

> The history of the attempts within ICAO to apply the machinery of Chapter XVIII during the past sixty years is not encouraging. It may be said that the mechanism does not work to anybody's satisfaction and that it has been a failure. Only five cases were presented to the Council during sixty years of ICAO under Chapter XVIII and in none of them did the Council issue a decision on the merits of the case.[589]

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[584] See section 5.6, below.
[585] See c. 4, section 4.4, above.
[586] *Chicago Convention*, *supra* note 562, art. 84.
[587] See Dempsey, *Public*, *supra* note 567 at 700.
[588] *Ibid.* at 703 [footnote omitted].
[589] Milde, "International Air Law", *supra* note 563 at 188.

Another reason is that since the ICAO Council is composed of Representatives of States it would not act as an impartial body. This reason gets strength from the Minutes of the ICAO Council meeting held on 29 July 1971, "where several Representatives requested a postponement of a vote (re Pakistan v. India) to consult with their respective administrations to obtain instruction. It would be unthinkable for a judge to request 'instructions' from a national administration or anybody else."[590]

One further reason is that some provisions of Chapter XVIII, namely, articles 86 and 87,[591] have never been used.[592] Regarding article 84,[593] Guillaume argues that that provision "no longer corresponds to the modern concept of international justice."[594] In such circumstances, resort must be sought to other international organizations.

5.5.2 The International Court of Justice

The ICJ acts as a world court.[595] "The Court has a dual jurisdiction: it decides, in accordance with international law, disputes of a legal nature that are submitted to it by States (jurisdiction in contentious cases); and it gives advisory opinions on legal questions at the request of the organs of the United Nations or specialized agencies authorized to make such a request (advisory jurisdiction)."[596] Only States may apply to and appear before the ICJ.[597] "The Court can only deal with a dispute when the States concerned have recognized its jurisdiction."[598] Article 35, paragraph 1, of the Statute[599] provides that the Court shall be open to the States parties to the Statute, and article 93, paragraph 1, of the UN Charter[600] provides that all Members of the UN are *ipso facto* parties to the

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[590] *Ibid.* [footnote omitted].
[591] *Chicago Convention*, *supra* note 562, arts. 86, 87.
[592] Guillaume, *supra* note 573 at 316.
[593] *Chicago Convention*, *supra* note 562, art. 84.
[594] Guillaume, *supra* note 573 at 316.
[595] Online: Jurisdiction, ICJ <http://www.icj-cij.org/jurisdiction/index.php?p1=5> (visited September 2, 2009).
[596] *Ibid.*
[597] Online: Contentious Jurisdiction, Jurisdiction, ICJ <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1> (visited September 2, 2009).
[598] *Ibid.*
[599] *Statute of the International Court of Justice,* 26 June 1945, Can. T. S. 1945 No. 7, art. 35(1).
[600] *Charter of the United Nations,* 26 June 1945, Can. T. S. 1945 No. 7, art. 93(1).

Statute. Article 86 of the Chicago Convention[601] also recognizes the jurisdiction of the ICJ on civil aviation matters.

Again, the history is not in favor of submitting any case to the ICJ challenging the legality of unilateral blacklisting. At the time of this writing, only 12 cases dealing with aviation matters have been filed with the ICJ.[602] Out of those 12 cases, only in one case, i.e. *Libya v. United States*,[603] the ICJ rendered a "decision on the merits of the complaint… and it likely would have reached the merits"[604] in *Iran v. United States*,[605] "had the US not settled the case on the court house steps."[606] Therefore, ICJ may not be the best forum for challenging the legality of the blacklisting.

5.5.3 The World Trade Organization

"Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed (or rejected) by the WTO's full membership. Appeals based on points of law are possible.

However, the point is not to pass judgement. The priority is to settle disputes, through consultations if possible. By July 2005, only about 130 of the nearly 332 cases had reached the full panel process. Most of the rest have either been notified as settled "out of court" or remain in a prolonged consultation phase — some since 1995."[607]

As noted earlier,[608] the unilateral blacklisting breaches the existing bilateral air transport agreement between the developed country preparing the blacklist and the

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[601] *Chicago Convention*, *supra* note 562, art. 86. However, article 86 has never been used. See Guillaume, *supra* note 573 at 316.
[602] For a list of those twelve cases see Dempsey, *Public*, *supra* note 567 at 668 – 669.
[603] *Case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie (Libya v. United States)*, [1992] 31 I.L.M. 662 (WLeC, ILM).
[604] Dempsey, *Public*, *supra* note 567 at 730.
[605] *Case concerning the aerial incident of 3 July 1988 (Iran v. United States)*, [1996] I.C.J. Rep. 9 (WLeC, INT-ICJ).
[606] Dempsey, *Public*, *supra* note 567 at 730.
[607] Online: Understanding the WTO: Settling Disputes: A Unique Contribution, WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> (visited September 2, 2009).
[608] See c. 4, section 4.4, above.

blacklisted country or airline's country. Bilateral air transport agreements are international trade agreements in which the governmental aviation authorities of two countries establish a regulatory mechanism for the operation of commercial air services between them.[609] Therefore, the issue of challenging the legality of unilateral blacklisting can be filed with the WTO in the form of commercial dispute between the two concerned States. Onidi argues that in an environment, where market access liberalization becomes more generalized, the forum to regulate the market aspects of air services in the longer run is the WTO.[610] It should be borne in mind that although, increasingly, commercial disputes are resolved before the WTO,[611] the WTO has yet to be granted jurisdiction over commercial aviation, except in a very limited sphere.[612] It appears that, at present, there exists no satisfactory dispute settlement process. In such an environment, the WTO should be granted greater jurisdiction to deal with aviation issues in view of the fact of its success in settling dispute and help the world in avoiding international crisis that can unbalance the world peace.

5.6 Ways to Improve the Civil Aviation Safety Standard of the Feeble States

The thesis has already demonstrated that one of the greatest impediments of ensuring global civil aviation safety is the feeble States who do not possess the financial ability to upgrade their civil aviation safety standard. Some ways have been mentioned below that can help to overcome this difficulty.

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[609] Dempsey, *Public*, *supra* note 567 at 518.
[610] Onidi, *supra* note 580 at 42.
[611] Dempsey, *Public*, *supra* note 567 at 666.
[612] Dempsey, *Public*, *supra* note 567 at 666, n. 3. "At this writing, only three sectors of aviation activity have been brought under the General Agreement on Trade in Services [GATS] Annex on Air Transport Services: (1) aircraft repair and maintenance; (2) the sale and marketing of air transport services; and (3) computer reservations systems." *Ibid* .Professor Armand de Mestral, who has supervised this thesis and is the only legal academic to have served on all types of FTA, NAFTA and WTO dispute settlement and arbitration panels, argues that beyond those three sectors it is difficult to see what might be the jurisdiction of the WTO Dispute Settlement Body. Randall Lehner argues that more aviation issues should be swept under the GATS umbrella. See Randall D. Lehner, "Protectionism, Prestige, and National Security: The Alliance Against Multilateral Trade in International Air Transport" (1995-1996) 45 Duke L. J. 436 (HeinOnline).

It is always preferable to find solution within the existing means. Therefore, some existing provisions of the Chicago Convention, especially, articles 69 – 79,[613] should be utilized to help the feeble States.

Chapter XVI[614] of Chicago Convention is very important. This Chapter provides for the joint aviation activities between two or more contracting States and pooling their air services. The ICAO Council should astutely use its function under article 78 according to which it may suggest to contracting States concerned to form joint organizations.[615] Whenever any feeble State is identified under the USOAP system, the ICAO should try to find a suitable developed country with which the feeble State maintains good relation and should suggest those two States to form joint organization.[616] In this respect, the ICAO should ensure that no feeble State is left without assistance and no developed country is overburdened. The ICAO should assume a supervisory role in this respect to ensure that any given developed country is appropriately assisting the feeble State to upgrade its safety standard. The developed countries that have existing assistance program should collaborate with the ICAO in continuing their own program and should accept ICAO's supervisory role in this matter.

The current trend of establishing regional organizations, like, the European Aviation Safety Agency, the Central American Corporation for Air Navigation Services, etc., is a welcome development in this respect.[617] This trend denotes that those countries have realized the benefit of forming such regional organization that is permitted under article 77[618] of the Chicago Convention. It can be reasonably expected that those organizations will greatly contribute in improving the aviation safety culture of the

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[613] *Chicago Convention*, *supra* note 562, arts. 69 – 79. It is worth noting that article 69 has never been used. See Guillaume, *supra* note 573 at 316.
[614] *Chicago Convention*, *supra* note 562, c. XVI.
[615] *Ibid.*, art. 78.
[616] Under Assembly Resolution A29-13, the ICAO Assembly has decided to call on all States able to do so to provide requesting States with technical cooperation in the form of financial and technical resources to enable those States to carry out their responsibilities for safety oversight of air carrier operations. *Improvement of Safety Oversight*, ICAO Assembly Res. A29-13, ICAO Doc. 9902, I-85, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> (visited September 2, 2009).
[617] See e.g. John Saba, "The Credibility of the International Financial Facility for Aviation Safety in an Environment Where Security and Survival Are Air Transport Priorities" (2003) 31 Transp. L.J. 1 at 11 (HeinOnline).
[618] *Chicago Convention*, *supra* note 562, art. 77.

respective region.[619] Those regional organizations should cooperate with and take guidance from the ICAO Regional Office of that region in this respect. This is crucial in achieving uniformity of law and approaches. The ICAO should take immediate steps to properly implement Assembly Resolutions A27-17,[620] A33-9,[621] A36-2,[622] A36-3,[623] and A36-7.[624]

The establishment of International Financial Facility for Aviation Safety [IFFAS] by the ICAO is a welcome development. The IFFAS is a mechanism to provide financial support toward achieving the objectives of improving aviation safety through the implementation of the necessary measures mainly identified by the USOAP.[625] The objective of the IFFAS is to finance safety-related projects for which States cannot otherwise provide or obtain necessary financial resources.[626] The fund is autonomous and independent of the control of individual or collective States and their governments.[627] Participation to the fund is purely on a voluntary basis.[628] The IFFAS should be used as a last resort for those feeble States which cannot attract necessary finance from any developed countries. This should be done to ensure that no feeble State has been left unfunded. The ICAO should continue its effort to make the IFFAS an effective programme.

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[619] See e.g. Saba, *supra* note 617 at 11.
[620] *Relationship between ICAO and Regional Civil Aviation Bodies*, ICAO Assembly Res. A27-17, ICAO Doc. 9902, I-49, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> (visited September 2, 2009).
[621] *Resolving deficiencies identified by the Universal Safety Oversight Audit Programme and encouraging quality assurance for technical cooperation projects*, ICAO Assembly Res. A33-9, ICAO Doc.9902, I-89, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> (visited September 2, 2009).
[622] *ICAO Res. A36-2*, *supra* note 560.
[623] *Implementation Support and Development (ISD) Programme — Safety*, ICAO Assembly Res. A36-3, ICAO Doc.9902, I-95, online: ICAO <http://www.icao.int/icaonet/dcs/9902/index.html> (visited September 2, 2009).
[624] *ICAO Res. A36-7*, *supra* note 561. This Resolution has superseded Assembly Resolution 33-16 on the ICAO Global Aviation Safety Plan (GASP).
[625] Online: International Financial Facility for Aviation Safety, Air Transport Bureau, ICAO <http://www.icao.int/iffas/index.html> (visited September 2, 2009).
[626] *Ibid.*
[627] *Ibid.*
[628] *Ibid.*

5.7 Conclusion

Above are some reform proposals that should be immediately materialized for the sake of ensuring global civil aviation safety. It cannot be claimed that the accident rate would reduce to zero if the above proposals are realized. However, the accident rate would definitely reduce to a large extent if those proposals are realized.

CONCLUSION

A safe, secure and environment friendly commercial aviation is desirable for the benefit of the entire world. Aviation, which by its very nature a global industry, is currently playing a vital role for the overall development of the whole world being an integral part of the transportation. "By its very nature, aviation shrinks the planet, integrating disparate cultures and economies, and facilitating a peaceful, prosperous and cooperative global order."[629]

However, a safe, secure and environment friendly aviation is yet to be achieved. With regard to aviation safety, the major stumbling block is lack of compliance with and enforcement of existing legal and regulatory norms concerning safety. The world has taken initiatives, both multilaterally and unilaterally, to overcome this difficulty. However, this thesis has demonstrated, in respect of multilateral initiatives, that there still remain some lacunas which make those multilateral initiatives less effective to ensure global civil aviation safety. Regarding unilateral initiatives, i.e. the practice of 'Blacklisting' by the US and the EU, it has been shown that those unilateral efforts, though useful tool, cannot ensure global civil aviation safety in practice. Those unilateral initiatives can ensure, to a certain extent, the safety of the citizens of the blacklisting countries as well as of those passengers from other countries who travel to and from those developed countries. Furthermore, by reason of blacklisting under those unilateral initiatives, some feeble States, who cannot attain the international aviation safety standard due to lack of sufficient money, will become permanently disabled to conduct aviation activity at all.

In view of this fact of failure by those initiatives to ensure global civil aviation safety, this thesis has reviewed and suggested some reform proposals which should be materialized immediately. It can be expected that the materialization of those proposals would cause the accident rate to reduce to a large extent, if not to zero. The world community should concur to materialize those proposals by avoiding entangling any political issue with aviation safety for the sake of welfare of humanity.

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[629] Pascal Zamprelli, "Air & Space Law: global concern, global perspective needed for new rules" *McGill Reporter* (25 September 2008), online: McGill Reporter <http://reporter.mcgill.ca/2008/09/air-space-law-global-concern-global-perspective-needed-for-new-rules/> (visited September 2, 2009).

ANNEX

Table 1: Regional Distribution of Scheduled Traffic in 2008

By ICAO statistical region of airline registration	Aircraft kilometers (millions)	Aircraft departures (thousands)	Passengers carried (thousands)	Passenger-kilometers performed (millions)	Passenger load factor (%)	Tonne-kilometers performed		Tonne-kilometers available (millions)	Weight load factor (%)
						Freight (millions)	Total (millions)		
Europe	9426	7569	649090	1220991	76	41064	152374	228777	67
Percentage of world traffic	27.3	28.8	28.6	28.5		26.3	27.7	26.1	
Africa	890	558	47015	103285	67	2127	12027	21904	55
Percentage of world traffic	2.6	2.1	2.1	2.4		1.4	2.2	2.5	
Middle East	1366	667	81744	233469	74	11139	33181	55598	60
Percentage of world traffic	4.0	2.5	3.6	5.5		7.1	6.0	6.4	
Asia & Pacific	7888	5395	604099	1149693	73	56004	161423	256399	63
Percentage of world traffic	22.9	20.6	26.6	26.8		35.8	29.4	29.3	
North America	13017	10255	755498	1385766	80	40702	168887	274474	62
Percentage of world traffic	37.8	39.1	33.3	32.4		26.0	30.7	31.4	
Latin America & Caribbean	1881	1801	133678	189665	69	5272	21844	38057	57
Percentage of world traffic	5.5	6.9	5.9	4.4		3.4	4.0	4.3	
Total	**34469**	**26245**	**2271123**	**4282870**	**76**	**156309**	**549735**	**875209**	**63**

Source: *Annual Report of the Council – 2008* ICAO Council, 2008 ICAO Doc. 9916, online: ICAO <http://www.icao.int/icaonet/dcs/9916/9916_en.pdf> (visited September 2, 2009).

Table 2: 102 Worst Aviation Accidents

Fatalities (Excluding Ground Fatalities)	State of the Operator/ Operator Involved in the Accident	Date of the Accident (dd/mm/yyyy)	Location of the Accident	Investigation Report Status	Cause of the Accident (Only of Civil Aircrafts)
583	US / Pan Am	27/03/1977	Spain	Final	A *misunderstanding* between the control tower and the KLM, which had arisen from the mutual use of usual terminology giving rise to misinterpretation, caused the KLM aircraft to take off without take-off clearance. In combination with a number of other coinciding circumstances, this premature take-off of the KLM aircraft resulted in a collision with the Pan Am aircraft, because the latter was still on the runway since it had missed the correct intersection.
583	Netherlands / KLM	27/03/1977	Spain	Final	
520	Japan / JAL	12/08/1985	Japan	Final	Deterioration of flight characteristics and loss of primary flight controls due to rupture of the aft pressure bulkhead with subsequent ruptures of the tail, vertical fin and

					hydraulic flight control systems. The reason for the aft pressure bulkhead rupture was that its strength was reduced by the fatigue cracks propagating in the spliced portion of the bulkhead's webs. The initiation and propagation of the fatigue cracks are attributable to the *improper repairs of the bulkhead*, conducted in 1978, and since the fatigue cracks were not found in the later maintenance inspections, this contributed to the accident.
349	Kazakhstan / Kazakhstan Airlines	12/11/1996	India	Final	The *unauthorized descending* by the Kazak aircraft to FL-140 and failure to maintain the assigned FL-150.
349	Saudi Arabia / Saudi Arabian	12/11/1996	India	Final	
346	Turkey / THY	03/03/1974	France	Final	The accident was the result of the ejection in flight of the aft cargo door on the left-hand side. The underlying factor in the sequence of events leading to the accident was the *incorrect engagement of the door latching mechanism before take-off*. This defective closing of the door resulted from a combination of various factors: a) incomplete application of Service Bulletin 52-37; b) incorrect modifications and adjustments which led, in particular, to insufficient protrusion of the lock pins and to the switching off of the flight deck visual warning light before the door was locked; c) the circumstances of the closure of the door during the stop at Orly, and, in particular, the absence of any visual inspection, through the view-port to verify that the lock pins were effectively engaged, although at the time of the accident inspection was rendered difficult by the inadequate diameter of the view-port; d) Finally, although there was apparent redundancy of the flight control systems, the fact that the pressure relief vents between the cargo compartment and the passenger cabin were inadequate and that all the flight control cables were routed beneath the floor placed the aircraft in grave danger in the case of any sudden depressurization causing substantial damage to that part of the structure. *All these risks had already become evident, nineteen months earlier, at the time of the Windsor accident, but no efficacious corrective action had followed.*
329	India / Air India	23/06/1985	Atlantic Ocean	Final	Suspected terrorism.
301	Saudi Arabia / Saudi Arabian	19/08/1980	Saudi Arabia	Final	Factors contributing to the fatal results of this accident were 1) the failure of the captain to prepare the cabin crew for immediate evacuation upon landing and his failure in not making a maximum stop landing on the runway, with immediate evacuation, 2) the failure of the captain to properly utilize his flight crew throughout the emergency 3) the failure of concerned authorities' management personnel to ensure that its personnel had adequate equipment and training to function as required during an emergency.

290	Iran / Iran Air	03/07/1988	Indian Ocean	Final	Shot down by the US.
275	Iran / Iranian Revolutionary Guard	19/02/2003	Iran	Preliminary	N/A
271	US / American Airlines	25/05/1979	USA	Final	Contributing to the cause of the accident were: a) the *vulnerability of the design* of the pylon attach points to maintenance damage; b) the vulnerability of the design of the leading edge slat system to the damage which produced asymmetry; c) *deficiencies in FAA surveillance and reporting systems* which failed to detect and prevent the use of improper maintenance procedures; d) *deficiencies in the practices and communications among the operators, the manufacturer, and the FAA* which failed to determine and disseminate the particulars regarding previous maintenance damage incidents; and e) the intolerance of prescribed operational procedures to this unique emergency.
269	South Korea / KAL	01/09/1983	Pacific	---	Shot down by Russia.
264	China / China Airlines	26/04/1994	Japan	Final	a) The *First Officer (F/O) inadvertently triggered the GO lever*. It is considered that the *design of the GO lever* contributed to it: normal operation of the thrust lever allows the possibility of an inadvertent triggering of the GO lever. b) The crew engaged the Auto Pilots (APs) while GO AROUND mode was still engaged, and continued approach. c) The F/O continued pushing the control wheel in accordance with the Captain's (CAP) instructions, despite its strong resistive force, in order to continue the approach. d) The movement of the Horizontal Stabilizer (THS) conflicted with that of the elevators, causing an abnormal out-of-trim situation. e) There was *no warning and recognition function to alert the crew* directly and actively to the onset of the abnormal out-of-trim condition. f) The CAP and F/O did not sufficiently understand the Flight Director (FD) mode change and the AP override function. It is considered that *unclear descriptions of the Automatic Flight System (AFS) in the Flight Crew Operating Manual (FCOM) prepared by the aircraft manufacturer* contributed to this. g) The CAP's judgment of the flight situation while continuing approach was inadequate, control take-over was delayed, and appropriate actions were not taken. h) The Alpha-Floor function was activated; this was incompatible with the abnormal out-of-trim situation, and generated a large pitch-up moment. This narrowed the range of selection for recovery operations and reduced the time allowance for such operations. i) The CAP's and F/O's awareness of the flight conditions, after the Pilot-in-Command (PIC) took over the controls and during their recovery operation, was inadequate

					respectively. j) Crew coordination between the CAP and the F/O was inadequate. k) The *modification prescribed in Service Bulletin SB A300-22-6021 had not been incorporated into the aircraft.* l) The *aircraft manufacturer did not categorize the SB A300-22-6021 as "Mandatory"*, which would have given it the highest priority. The *airworthiness authority of the nation of design and manufacture did not issue promptly an airworthiness directive pertaining to implementation of the above SB.*
261	Canada / Nationair	11/07/1991	Saudi Arabia	---	---
260	US / American Airlines	12/11/2001	USA	Final	The in-flight separation of the vertical stabilizer as a result of the loads beyond ultimate design that were created by the *first officer's unnecessary and excessive rudder pedal inputs*. Contributing to these rudder pedal inputs were *characteristics of the A300-600 rudder system design and elements of the American Airlines Advanced Aircraft Maneuvering Program*.
259	US / Pan Am	21/12/1988	UK	Final	Terrorist bomb explosion.
257	New Zealand / Air New Zealand	28/11/1979	Antarctica	Final	Reprogramming of the aircraft's flight plan by the ground crew who then failed to inform the flight crew and, hence, no fault on the part of pilots was involved.
256	US / Arrow Air	12/12/1985	Canada	Final	No exact cause could be determined. However, The Canadian Aviation Safety Board (CASB) believed that the weight of evidence supported the conclusion that, shortly after lift-off, the aircraft had experienced an increase in drag and reduction in lift which had resulted in a stall at low altitude from which recovery had not been possible. The most probable cause of the stall had been determined to be ice contamination on the leading edge and upper surface of the wing. Other possible factors such as a loss of thrust from the number four engine and inappropriate take-off reference speeds might have compounded the effects of the contamination. Four members of the CASB filed a dissenting opinion with a different probable cause: "An in-flight fire that may have resulted from detonations of undetermined origin brought about catastrophic system failures."
234	Indonesia / Garuda	26/09/1997	Indonesia	---	Probably mistake of the air traffic controller and the bad weather.
230	US / TWA	17/07/1996	USA	Final	An explosion of the center wing fuel tank (CWT), resulting from ignition of the flammable fuel/air mixture in the tank. However, the source of ignition energy for the explosion could not be determined with certainty. Contributing factors to the accident were the *design and certification* concept that fuel tank explosions could be prevented solely by precluding all ignition sources and the *design and certification of the Boeing 747 with heat sources located beneath the CWT with no means to reduce the heat transferred into the CWT or to render the fuel vapor in the tank nonflammable.*
229	Switzerland	02/09/1998	Canad	Final	1. *Inadequacy of the aircraft certification standards for*

	/ Swissair		a		*material flammability.* 2. Flammable cover material on the thermal acoustic insulation blankets used in the aircraft was most likely the first material to ignite. Once ignited, other types of cover materials exhibited flame propagation characteristics and did not meet the proposed revised flammability test criteria. 3. The type of circuit breakers used in the aircraft was similar to those in general aircraft use, and was not capable of protecting against all types of wire arcing events. The fire most likely started from a wire arcing event. 4. A segment of in-flight entertainment network power supply unit cable exhibited a region of resolidified copper on one wire that was caused by an arcing event. This copper was determined to be located in the area where the fire most likely originated. This arc was likely associated with the fire initiation event; however, it could not be determined whether this arced wire was the lead event. 5. *There were no built-in smoke and fire detection and suppression devices in the area where the fire started and propagated, nor were they required by regulation.* The lack of such devices delayed the identification of the existence of the fire. 6. There was a reliance on sight and smell to detect and differentiate between odor or smoke from different potential sources. This reliance resulted in the misidentification of the initial odor and smoke as originating from an air conditioning source. 7. *There was no integrated in-flight firefighting plan in place for the accident aircraft, nor was such a plan required by regulation.* In the absence of such a firefighting plan, the crew concentrated on preparing the aircraft for the diversion and landing without aggressively attempting to locate and eliminate the source of the smoke. 8. *There was no requirement that a fire-induced failure be considered when completing the system safety analysis required for certification.* The fire-related failure of silicone elastomeric end caps installed on air conditioning ducts resulted in the addition of a continuous supply of conditioned air that contributed to the propagation and intensity of the fire. 9. The loss of primary flight displays and lack of outside visual references forced the pilots to be reliant on the standby instruments for at least some portion of the last minutes of the flight. In the deteriorating cockpit environment, the positioning and small size of these instruments would have made it difficult for the pilots to transition to their use, and to continue to maintain the proper spatial orientation of the aircraft.
228	South Korea / Korean Air	06/08/1997	Guam	Final	The *CAP's failure* to adequately brief and execute the non-precision approach and the *F/O's and flight engineer's failure* to effectively monitor and cross-check the CAP's execution of the approach. Contributing to these failures were the *CAP's fatigue* and Korean Air's *inadequate flight crew training*. Contributing to the accident was the *FAA's*

					intentional inhibition of the minimum safe altitude warning system and the *FAA's failure to adequately to manage the system*.
228	France / Air France	01/06/2009	Atlantic Ocean	Preliminary	----
225	China / China Airlines	25/05/2002	Pacific	Final	1. Structural failure in the aft lower lobe section of the fuselage. 2. *Improper repair*, mainly, of the tail strike after the 1980 tail strike accident. 6. Failure of *Maintenance inspection of B-18255 to detect* the ineffective 1980 structural repair and the fatigue cracks that were developing under the repair doubler. However, the time that the fatigue cracks propagated through the skin thickness could not be determined.
223	Austria / Lauda Air	26/05/1991	Thailand	Final	The Accident Investigation Committee of the Government of Thailand determines the probable cause of this accident to be uncommanded in-flight deployment of the left engine thrust reverser, which resulted in loss of flight path control. The specific cause of the thrust reverser deployment has not been positively identified.
217	Egypt / EgyptAir	31/10/1999	Atlantic Ocean	Final	The NTSB determined that the probable cause of the accident was the airplane's departure from normal cruise flight and subsequent impact with the Atlantic Ocean as a result of the *relief F/O's flight control inputs*. The reason for the relief first officer's actions was not determined.
213	India / Air India	01/01/1978	India	---	*Irrational control inputs by the CAP* following complete unawareness of the attitude as his Attitude Director Indicator (ADI) had malfunctioned. The crew failed to gain control based on the other flight instruments.
200	Uzbekistan / Aeroflot / Uzbekistan	10/07/1985	Uzbekistan	---	Probably flight crew's wrong operation of the aircraft.
196	China / China Airlines	16/02/1998	Taiwan	Final	1. The aircraft was higher than the normal path; 2. Inadequate crew coordination between the CAP and the F/O; 3. During 12 seconds, the crew did not counteract the pitch up tendency due to the thrust increase after go around, and then the reaction of the crew was not sufficient.
191	Netherlands / Martinair Holland	04/12/1974	Sri Lanka	Final	Collision with rising terrain as the crew descended the aircraft below safe altitude owing to *incorrect identification of their position vis-à-vis the airport*. This was the result of dependence on Doppler and Weather Radar Systems on board PH-MBH which left room for misinterpretation.
189	Dominican Republic / Birgenair, opf. Alas Nacionales	06/02/1996	Atlantic Ocean	Final	*Failure of the crew* to recognize the activation of the stick shaker as a warning of imminent entrance to the stall and to execute the procedures for recovery from the onset of loss of control.
188	Jordan / Alia	03/08/1975	Morocco	---	---
187	Brazil / TAM Brasil	17/07/2007	Brazil	Preliminary	Probably bad weather.
183	Iceland / Loftleidir	15/11/1978	Sri Lanka	Final	a) *Failure of the flight crew* to conform with the laid down approach procedures; b) *Failure of the co-pilot* to provide the CAP with the

					required altitude and sink rate call outs at various levels; c) *Failure of the CAP* to initiate a missed approach procedure at the appropriate height when the runway was not visible; d) According to the Icelandic Directorate of Civil Aviation, *inadequate maintenance of ILS facilities*; e) *Erroneous information supplied by the radar controller*; f) The *lack of an operational approach lighting system at Bandaranaike Airport*.
183	Poland / LOT	09/05/1987	Poland	Final	Destruction of engine no.2 resulting in disconnection of the longitudinal control system from the control column, cabin depressurization, damage to the electric system and fire.
181	Colombia / Avianca	27/11/1983	Spain	Final	The PIC, without having any precise knowledge of his position, set out to intercept the ILS on an incorrect track without initiating the published instrument approach maneuver; in so doing he descended below all; the area safety minima until he collided with the ground. Contributory factors were: a) *Inaccurate navigation by the crew*, which placed them in an incorrect position for initiating the approach maneuver; b) *Failure of the crew* to take corrective action in accordance with the operating instructions of the ground proximity warning system; c) Deficient teamwork on the flight deck; d) *Imprecise position information supplied to the aircraft by approximation controller*; e) The approximation controller, in failing to inform the aircraft that radar service had terminated, did not maintain a proper watch on the radar scope.
180	Slovenia / Inex Adria Aviopromet	01/12/1981	France	Final	1. The direct cause of the accident was that, while descending, the crew drove the airplane to find itself in cloud underneath the security altitude and, after being warned by the GPWS alarms, the crew unsuccessfully attempted to resume altitude. 2. Failure of the crew to take prompt initiative for the preparation of the approach. Two factors contributed to this failure: (a) no logical order to guide the crew to review and to memorize various parameters; (b) the presence of a young child on the seat observer of the cockpit. 3. There was no logical order since *misunderstandings developed in the message exchanged between the crew and the air traffic controller* due to use of imprecise language by both.
178	Russia / Aeroflot	11/08/1979	Ukraine	---	Probably the *air traffic controller's mistaken belief* that he had duly ordered one of the aircrafts to climb higher so that the collision with the other aircraft could be avoided.
178	Moldova / Aeroflot / Moldova	11/08/1979	Ukraine	---	
176	UK / British Airways	10/09/1976	Croatia	Final	1) The direct cause of the accident was the struck of the Inex Adria's aircraft's wing into the middle side of the fuselage of the aircraft of the British Airways; 2) *Improper ATC operation*;
176	Slovenia / Inex Adria Aviopromet	10/09/1976	Croatia	Final	3) *Non-compliance with regulations* on continuous listening to the appropriate radio frequency of ATC and *non-performance of look-out duty* from the cockpits of either aircraft.

176	Suriname / Surinam Airways	07/06/1989	Suriname	Final	a) As a result of *the CAP's glaring carelessness and recklessness* the aircraft was flown below the published minimum altitudes during the approach and consequently collided with a tree. b) *Failure of Surinam Airways' (SLM) operational management to observe the pertinent regulations as well as the procedures* prescribed in the SLM Operations Manual *concerning qualification and certification during recruitment and employment of the crew members* furnished by Air Crew International.
176	Nigeria / Alia Royal Jordanian Airlines, opf. Nigeria Airways	22/01/1973	Nigeria	---	---
174	Russia / Aeroflot / East Siberia	11/10/1984	Russia	---	Probably mistake of the air traffic controller and the bad weather.
174	Russia / Aeroflot / International	13/10/1972	Russia	---	Probably bad weather.
170	France / UTA	19/09/1989	Niger	Final	Terrorist bomb explosion.
170	Russia / Pulkovo	22/08/2006	Ukraine	Preliminary	Probably bad weather.
169	Kenya / Kenya Airways	30/01/2000	Cote d'Ivoire	Final	The following elements contributed to the accident: a) The pilot flying action on the control column put the airplane into a descent without the crew realizing it, despite the radio altimeter callouts; b) The GPWS warnings that could have alerted the crew to an imminent contact with the sea were masked by the priority stall and over-speed warnings, in accordance with the rules on the prioritization of warnings; c) The conditions for a takeoff performed towards the sea and at night provided no external visual references that would have allowed the crew to be aware of the direct proximity of the sea.
168	Iran / Caspian Airlines	15/07/2009	Iran	Preliminary	Unknown.
167	Mexico / Mexicana	31/03/1986	Mexico	---	Probably chemical explosion of the tire on the left hand main gear resulting from a chemical reaction between the tire and the *air that had been used instead of nitrogen to service the tire*.
167	Pakistan / PIA	28/09/1992	Nepal	---	---
163	Kazakhstan / Aeroflot / Kazakhstan	07/07/1980	Kazakhstan	---	Probably bad weather.
162	Japan / All Nippon	30/07/1971	Japan	---	Probably failure of the trainee of the other aircraft, a North American F-86F fighter of the Japan Air Self Defense Force, to watch out for traffic when the aircraft of the All Nippon approached.

160	China / China Northwest	06/06/1994	China	---	AP induced oscillations caused the aircraft to shake violently. It appeared that the AP yaw-channel had been connected to the bank control and the bank-channel to the yaw controls. This *wrong connection was done the previous evening 'in the field' rather than in a workshop.*
160	Colombia / West Caribbean Airways	16/08/2005	Venezuela	Preliminary	---
160	US / American Airlines	20/12/1995	Colombia	Final	Aeronautica Civil determines that the probable causes of this accident were: 1. The *flight crew's failure* to adequately plan and execute the approach to runway and their inadequate use of automation; 2. *Failure of the flight crew* to discontinue the approach, despite numerous cues alerting them of the inadvisability of continuing the approach; 3. The *lack of situational awareness of the flight crew* regarding vertical navigation, proximity to terrain, and the relative location of critical radio aids; 4. *Failure of the flight crew* to revert to basic radio navigation at the time when the FMC-assisted navigation became confusing and demanded an excessive workload in a critical phase of the flight. Contributing to the cause of the accident were: 1. The flight crew's ongoing efforts to expedite their approach and landing in order to avoid potential delays; 2. The flight crew's execution of the GPWS escape maneuver while the speed brakes remained deployed; 3. FMC logic that dropped all intermediate fixes from the display(s) in the event of execution of a direct routing; 4. FMC-generated navigational information that used a different naming convention from that published in navigational charts.
159	Libya / Libyan Arab Airlines	22/12/1992	Libya	---	---
159	South Africa / SAA	28/11/1987	Indian Ocean	---	Probably fire of an unknown origin which had possibly: 1) incapacitated the crew; 2) caused disorientation of the crew due to thick smoke; 3) caused crew distraction; 4) weakened the aircraft structure, causing an in-flight break-up.; 5) burned through several control cables; 6) caused loss of control due to deformation of the aircraft fuselage.
158	Nigeria / Nigerian AF	26/09/1992	Nigeria	---	N/A.
156	Pakistan / PIA	26/11/1979	Saudi Arabia	Final	An in-flight fire in the cabin area which resulted in panic among the passengers and smoke in the cockpit, eventually incapacitating the flight crew. The cause of the cabin fire was not determined. However, three possibilities were considered: (a) a leaking gasoline or kerosene stove, carried aboard by Hajj pilgrim passengers. Pressure differential could have caused a poorly sealed gasket to leak fuel; (b) an electrical fire; (c) sabotage.
156	Germany /	14/08/1972	Germa	---	Probably the *leak of a hot-air tube* in the rear of the

	Interflug		ny		airplane allowed the hot air to escape during operation that subsequently weakened the insulation material of electricity wires and the airplane controls. *The hot-air tube contained that leak for some time.* Probably, immediately after takeoff on the ill-fated flight, a short circuit occurred. Sparks with a temperature of up to 2000 degrees Celsius caused substantial melting and ultimately a fire in the nr. 4 cargo bay which was located in the rear of the plane. The fire weakened the fuselage structure, causing the tail section to fail in-flight.
155	US / USAF	04/04/1975	Vietnam	---	N/A
155	US / USAF	12/05/1968	Vietnam	---	N/A
155	Spain / Spantax	03/12/1972	Spain	---	Probably bad weather.
154	Spain / Spanair	20/08/2008	Spain	Preliminary	Probably technical difficulties.
154	Brazil / Gol	29/09/2006	Brazil	Final	a) Relatively to the crew of the aircraft of ExcelAire, the following active failures were identified: lack of an adequate planning of the flight, and insufficient knowledge of the flight plan prepared by the ExcelAire; non-execution of a briefing prior to departure; unintentional change of the transponder setting; failure in prioritizing attention; failure in perceiving that the transponder was not transmitting; delay in recognizing the problem of communication with the ATC; and non-compliance with the procedures prescribed for communications failure. b) The low situational awareness of the pilots as well as of the ATC. c) The lack of experience of the pilot in the aircraft and its avionics. d) Improper organizational decisions and processes adopted by ExcelAire. e) The failure by the ATC to observe procedures according to the circumstances and to perform appropriately. g) Insufficient training to the crews of the ExcelAire aircraft. h) Improper communication between the ATC and the crews of ExcelAire aircraft. i) The failure of the crews of the ExcelAire aircraft to perform their duties properly. j) Improper judgment of the crews of the ExcelAire aircraft. k) Lack of oversight by the ExcelAire.
154	US / ExcelAire	29/09/2006	Brazil	Final	
154	Turkey / THY	19/09/1976	Turkey	---	Probably attempted landing at an airport which was not the scheduled destination airport.
154	US / Northwest Airlines	16/08/1987	USA	Final	The *flight crew's failure* to use the taxi checklist to ensure that the flaps and slats were extended for take-off. Contributing to the accident was the *absence of electrical power to the airplane take-off warning system* which thus did not warn the flight crew that the airplane was not configured properly for take-off. The reason for the absence of electrical power could not be determined.
152	Yemen / Yemenia Airways	30/06/2009	Comoros	Preliminary	Unknown
148	Spain /	19/02/1985	Spain	Final	Confidence by the flight crews on the automatic capture

	Iberia				performed by the Altitude Alert System, the misinterpretation of its warnings, as well as a probable misreading of the altimeter made the crew to fly below the safety altitude. Worth noting point is that the CAP declined the air traffic controller's offer of a direct clearance to the approach fix, which was located at 13 DME from the airport, and decided to fly the standard approach procedure.
148	Egypt / Flash Airlines	03/01/2004	Egypt	Final	Unknown.
146	UK / Dan-Air Services	25/04/1980	Spain	Final	The CAP, without taking into account the altitude at which he was flying, took the aircraft into an area of very high ground, and for this reason he did not maintain the correct safety distance above the ground, as was his obligation. Contributing factors were: a) the performance of a maneuver without having clearly defined it; b) imprecise navigation on the part of the CAP, showing his loss of bearings; c) lack of teamwork between CAP and co-pilot; d) the short space of time between the information given and the arrival at 'Foxtrot Papa' (FP); e) the fact that the holding was not published; f) the *information concerning the holding pattern at FP, which was transmitted by ATC, was ambiguous and contributed directly to the disorientation of the crew*; g) no minimum safe altitude computed for holding pattern; h) track for holding pattern at 'FP' was unrealistic.
145	Russia / Vladivostokavia	04/07/2001	Russia	Final	Probably wrong operation by the pilots.
145	US / Pan Am	09/07/1982	USA	Final	The airplane's encounter during the lift-off and initial climb phase of flight with a microburst-induced wind shear which imposed a downdraft and a decreasing headwind, the effects of which the pilot would have had difficulty recognizing and reacting to in time for the airplane's descent to be arrested before its impact with trees. Contributing to the accident was *the limited capability of current ground based low level wind shear detection technology* to provide definitive guidance for controllers and pilots for use in avoiding low level wind shear encounters.
144	Nigeria / ADC Airlines	07/11/1996	Nigeria	Final	a) The *untidy traffic separation by the radar controller*. b) The *error of judgment* by the pilot to continue his turn to heading 330 M to avoid another aircraft and his subsequent collision avoidance maneuver.
144	US / Independent Air	08/02/1989	Portugal	Final	a) The *non-observance by the crew of established operating procedures* published in the appropriate aeronautical charts; b) Transmission by the ATC of a value higher than the actual value; c) Deficient communications technique on the part of the co-pilot; d) *Violation by the ATC of established procedures* by not requiring a complete read back of the descent clearance;

					e) *Non-adherence by the crew to the operating procedures* published in the appropriate company manuals; f) *General crew lack of interest in dealing with the mistakes they made* relating to the minimum sector altitude, which was known by at least one of the crew members, and to the ground proximity alarms; g) *Non-adherence to standard phraseology both by the crew and by ATC* in some of the air-ground communications; h) *Limited experience of the crew* in international flights; i) *Deficient crew training*; j) Use of an unauthorized route; k) The operational flight plan, whose final destination was not the destination airport's beacon, was not developed in accordance with the AIP Portugal.
143	Colombia / Avianca	17/03/1988	Colombia	Final	a) PIC diverted attention from operation of aircraft and failed to exercise adequate and constant supervision over the performance of his co-pilot; b) PIC tolerated inappropriate interference with cockpit discipline by authorized persons with access to the flight deck; c) PIC continued VFR flight into IMC. d) Non-crew pilot in cockpit interfered constantly with the normal operation of the aircraft which distracted the crew from the efficient execution of their duties. e) Lack of teamwork on the part of the crew. f) The *PIC wrongly decided to hurry to mitigate the effects of the delays* already experienced by ignoring the ATC's recommendation to wait.
143	Bahrain / Gulf Air	23/08/2000	Bahrain	Final	(a) The CAP did not adhere to a number of Standard Operating Procedures (SOPs). (b) In spite of a number of deviations from the standard flight parameters and profile, the F/O did not call them out, or draw the attention of the CAP to them, as required by SOP's. (c) A perceptual study indicated that during the go-around after the orbit, it appears that the flight crew experienced spatial disorientation, which could have caused the CAP to perceive (falsely) that the aircraft was 'pitching up'. He responded by making a 'nose-down' input, and as a result, the aircraft descended and flew into the shallow sea. (d) Neither the CAP nor the F/O perceived, or effectively responded to, the threat of increasing proximity to the ground, in spite of repeated hard GPWS warnings. (e) A *lack of training* CRM contributing to the flight crew not performing as an effective team in operating the aircraft. (f) *Inadequacy in the airline's A320 training programmes*. (g) The airline's flight data analysis system was not functioning satisfactorily, and the flight safety department had a number of deficiencies. (h) Cases of non-compliance, and inadequate or slow responses in taking corrective actions to rectify them, on the part of the airline in some critical regulatory areas, were identified during three years preceding the accident. (i) *Safety oversight factors*: A review of about three years

					preceding the accident indicated that despite intensive efforts, the DGCAM as a regulatory authority could not make the operator comply with some critical regulatory requirements.
141	Russia / Vnukovo Airlines	29/08/1996	Norway	Final	Eighteen significant factors have been identified as leading the flight to the disaster. For example, inadequate planning, unsatisfactory crew resource management and monitoring, a lack of a suitable procedure for offset localizer approaches in connection with an inappropriate rule requiring the landing course to be set instead of the localizer course, not solving navigational problems at safe altitude, not discontinuing the approach when procedural uncertainties exist, limited knowledge of the operating language and the actual airspace with respect to service given.
141	China / China Southern	24/11/1992	China	---	Probably failure of the crew to notice that nr.2 power level remained at idle when it should be active.
141	Guinea / UTA	25/12/2003	Benin	Final	a) The difficulty that the flight crew encountered in performing the rotation with an *overloaded airplane* whose forward center of gravity was unknown to them; b) The *operator's serious lack of competence*, *organization and regulatory documentation*, which made it impossible for it both to organize the operation of the route correctly and to check the loading of the airplane; c) The *inadequacy of the supervision exercised by the Guinean CAA* and, previously, by the authorities in Swaziland, in the context of safety oversight. d) The dispersal of effective responsibility between the various actors, in particular the role played by the owner of the airplane, which made supervision complicated. e) The failure by the operator to call on service companies to supply information on the airplane's loading. f) The CAP's agreement to undertake the take-off with an airplane for which he had not been able to establish the weight. g) The short length of the runway at Cotonou. h) The time of day chosen for the departure of the flight, when it was particularly hot. i) The very wide margins which appeared to exist due to the use of an inappropriate document to establish the airplane's weight and balance sheet. j) The existence of a building one hundred and eighteen meters after the runway threshold.
141	Congo / Trans Service Airlift	18/12/1995	Angola	---	Probably due to overloading.
137	Brazil / VASP	08/06/1982	Brazil	---	Probably negligence of the CAP.
137	US / PSA	25/09/1978	USA	Final	1) The *failure of the flight crew* of the aircraft of PSA to comply with the provisions of a maintain-visual-separation clearance, including the requirement to inform the controller when visual contact was lost; 2) the *ATC procedures* in effect which authorized the controllers to use visual separation procedures in a

					terminal area environment when the capability was available to provide either lateral or vertical separation to either aircraft. 3) the *failure of the controller* to advise PSA's aircraft of the direction of movement of the Cessna; 4) the *failure of the pilot of the Cessna* to maintain his assigned heading; and 5) the *improper resolution by the controller* of the conflict alert.
134	US / Delta Airlines	02/08/1985	USA	Final	The *flight crew's wrong decision* to initiate and continue the approach into a cumulonimbus cloud which they observed to contain visible lightning; the *lack of specific guidelines, procedures and training* for avoiding and escaping from low-altitude wind shear; and the lack of definitive, real-time wind shear hazard information.
134	Indonesia / Indonesian AF	05/10/1991	Indonesia	---	N/A
133	Colombia / SAM Colombia	19/05/1993	Colombia	---	Probably thunderstorm activity in the area and the terrorist attack on the destination airport's VOR/DME which was unserviceable.
133	Iran / Iran Air Tours	08/02/1993	Iran	---	Collision between two aircrafts.
133	Japan / All Nippon	04/02/1966	Japan	---	Not determined.
132	Russia / Aeroflot / Leningrad	28/06/1982	Belarus	---	Probably the failure of the horizontal stabilizer jackscrew of the aircraft *due to fatigue*.
132	US / USAir	08/09/1994	USA	Final	A loss of control of the airplane resulting from the movement of the rudder surface to its blow down limit. The rudder surface most likely deflected in a direction opposite to that commanded by the pilots as a result of *a jam of the main rudder power control unit servo valve secondary slide to the servo valve housing offset from its neutral position and over travel of the primary slide*.
131	Philippines / Air Philippines	19/04/2000	Philippines	Preliminary	---
131	Portugal / TAP	19/11/1977	Portugal	Final	a) Very bad weather conditions at the time of landing; b) Possible existence of conditions for hydroplaning; c) Landing at a speed of Vref + 19 knots; d) Landing long with a long "flare"; e) Sudden directional correction after touch down on the runway.
130	Russia / Aeroflot/International	16/11/1967	Russia	---	---
130	France / Air France	03/06/1962	France	Final	The accident was due to the concurrence of: 1) a considerable out-of-trim condition producing major loads on the control column at VR and VLOF which may have seemed prohibitive to the PIC; and 2) a failure of the trim servo motor control system which prevented the PIC from rectifying the faulty setting of the stabilizer and, consequently, from reducing the reaction at the control column. These factors led the PIC to discontinue take-off, but it was too late.

130	Angola / TAAG	08/11/1983	Angola	---	According to Angolan authorities, technical failure. However, a rebel group claimed to have shot it down.
129	China / Air China	15/04/2002	South Korea	Final	Inappropriate operation by all the pilots.
129	US / USAF	18/06/1953	Japan	---	N/A
128	China / Xiamen Airlines	02/10/1990	China	---	Probably due to attempted Hijacking.
128	US / United Airlines	16/12/1960	USA	Final	The aircraft *proceeded beyond its clearance limit and the confines of the airspace* allocated to the flight by ATC. A contributing factor was the *high rate of speed* of the aircraft as it approached the Preston Intersection, coupled with *the change of clearance* which reduced the en route distance along Victor 123 by approximately 11 miles.
128	US / TWA	30/06/1956	USA	Final	The pilots did not see each other in time to avoid the collision. Although it was not possible to determine why they had not seen each other, but the evidence suggested that it had resulted from any one or a combination of the following factors: 1) Intervening clouds reducing time for visual separation; 2) Visual limitations due to cockpit visibility, and; 3) Preoccupation with normal cockpit duties; 4) Preoccupation with matters unrelated to cockpit duties such as attempting to provide the passengers with a more scenic view of the Grand Canyon area; 5) Physiological limits to human vision reducing the time opportunity to see and avoid the other aircraft, or; 6) Insufficiency of en-route air traffic advisory information due to inadequacy of facilities and lack of personnel in ATC.

Source: Online: 100 worst accidents, Worst Accidents, Statistics, Aviation Safety Network, Flight Safety Foundation <http://aviation-safety.net/statistics/worst/worst.php?list=worstcoll> (visited from June 15, 2009 to August 30, 2009).

Table 3: Principal Causes of the Aviation Accidents

No	Causes	Accountability (%)
1	Mistake / Failure of the Pilot(s) / Crew (including their negligence, recklessness, etc.)	40
2	Lack of oversight, deficient training program provided by the Oversight Authority or the concerned CAA	21
3	Deficiency in the Operator's authority, organizational structure, training program, etc.	20
4	Mistake of / deficiency in the ATC	19
5	Bad Weather	11
6	Negligence, reckless, etc. on the part of Pilot(s) / Crew	11
7	Lack of / deficient technology	9
8	Mistake / Failure of the Pilot of another aircraft	9
9	Lack of training / experience of the Pilot / Crew	7
10	Improper inspection / maintenance	7
11	Problem with the aircraft's radar system, programming, warning system, etc.	7
12	Terrorism, unlawful interception, etc.	7
13	Defect(s) of the aircraft attributable to the manufacturer	6
14	Mistake of the operator of ground operations	5
15	Unavoidable Accidents	5

16	Lack of regulation	5
17	Old / defective aircraft	4
18	Misunderstanding between the ATC and the Pilot	3
19	Improper repair	3
20	Dangerous Airport due to lack of facility for landing and take-off	2
21	Presence of unauthorized / authorized but not in-charge person in the cockpit	2
22	Problem with the visibility (due to weather, night condition, etc.)	2

Table 4: Top 5 States whose flag-carriers are mostly involved

Name of the State	Number of Accidents committed within these 101 cases
United States	19
Russia	8
China	7
Colombia, Iran	4
France, Japan, Spain, Brazil, Nigeria	3

Table 5: Top 5 Most Frequent Locations of Accidents

Location	Number of Occurrences committed within these 101 cases
United States	10
Spain	7
Japan	5
Russia, Brazil, Atlantic Ocean	4
China, Colombia, France, Nigeria, Saudi Arabia, Ukraine, India, Iran	3

Table 6: Regional Industry Accident Rates (Western Jets Hull Losses / Million Sectors)

Region	**2005**	**2006**	**2007**	**2008**	**Difference between 2008 and 2007**
Africa	9.21	4.31	4.09	2.12	**- 1.97**
Asia Pacific	1.00	0.67	2.76	0.58	**- 2.18**
Russia & CIS	0.00	8.60	0.00	6.43	**+ 6.43**
Europe	0.33	0.32	0.29	0.42	**+ 0.13**
Latin America	2.59	1.80	1.61	2.55	**+ 0.94**
MENA	3.84	0.00	1.08	1.89	**+ 0.81**
North America	0.19	0.49	0.09	0.58	**+0.49**
North Asia	0.00	0.00	0.88	0.00	**- 0.88**
Industry	**0.76**	**0.65**	**0.75**	**0.81**	**+ 0.06**

Source: Online: Fact Sheet – Safety, International Air Transport Association <http://www.iata.org/pressroom/facts_figures/fact_sheets/safety.htm> (visited September 2, 2009).

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