

**IMPLICATIONS OF TRANSPARENCY IN THE  
INTERNATIONAL CIVIL AVIATION ORGANIZATION'S  
UNIVERSAL SAFETY OVERSIGHT AUDIT PROGRAMME**

by

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## **ABSTRACT**

In recent years the need for greater transparency within international organizations has been a focal point for the international community. The result of numerous debates has represented significant changes of the public information disclosure policies of organizations' programs, resolutions, and decisions. The International Civil Aviation Organization has been a pioneer and innovator in this respect. Not only the vast majority of its documentation is accessible to the public, but also it has transformed one of its surveillance programs into a window of information for the international aviation community. The disclosure of the Universal Safety Oversight Audit Programme's information has generated different results. In order to analyze the implications of transparency within the program, the author analyzes its evolution process to achieve full transparency and assesses the subsequent results of disclosing audit information in the following areas: safety, economic and political, and legal.

## **RÉSUMÉ**

La nécessité d'une plus grande transparence au sein des organisations internationales constitue depuis ces dernières années une préoccupation essentielle pour l'ensemble de la communauté internationale. De nombreux débats ont permis un changement significatif de la politique de divulgation de l'information publique relative aux programmes, aux résolutions et aux décisions de ces organisations. L'Organisation de l'aviation civile internationale a été à la fois pionnière et innovatrice en matière de transparence. En effet la grande majorité de sa documentation est désormais accessible au public. Elle a, de même, mis en oeuvre la transformation de l'un de ses programmes de surveillance afin de créer une fenêtre d'accès à l'information au profit de la communauté aéronautique internationale. La divulgation de l'information relative au Programme universel d'audit de supervision de la sécurité a généré des résultats variés. Afin d'étudier les implications de la transparence dans le cadre de ce programme, l'auteur analysera l'évolution du processus permettant de parvenir à une transparence totale et évaluera les effets de la divulgation d'information d'audit dans trois principaux domaines: la sécurité, l'économie et la politique ainsi que dans le domaine juridique.

## TABLE OF CONTENTS

<b>ACKNOWLEDGEMENTS</b>	<b>I</b>
<b>ABSTRACT</b>	<b>II</b>
<b>RÉSUMÉ</b>	<b>III</b>
<b>INTRODUCTION</b>	<b>1</b>
<b>CHAPTER ONE: THE INTERNATIONAL CIVIL AVIATION ORGANIZATION AND THE UNIVERSAL SAFETY OVERSIGHT AUDIT PROGRAMME</b>	<b>3</b>
<b>1.1 THE INTERNATIONAL CIVIL AVIATION ORGANIZATION</b>	<b>3</b>
<b>1.2 REGULATORY FUNCTION OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION</b>	<b>7</b>
1.2.1 INTERNATIONAL STANDARDS AND RECOMMENDED PRACTICES	7
1.2.2 DEVELOPMENT PROCESS OF STANDARDS AND RECOMMENDED PRACTICES	9
1.2.3 COMPLIANCE WITH STANDARDS AND RECOMMENDED PRACTICES	11
1.2.4 ENFORCEMENT OF STANDARDS AND RECOMMENDED PRACTICES	13
<b>1.3 FOUNDATIONS OF THE UNIVERSAL SAFETY OVERSIGHT AUDIT PROGRAMME</b>	<b>14</b>
<b>1.4 PROCESS AND POLICY OF THE UNIVERSAL SAFETY OVERSIGHT AUDIT PROGRAMME</b>	<b>18</b>
1.4.1 SAFETY OVERSIGHT	18
1.4.2 AUDIT POLICY AND PRINCIPLES	21
1.4.3 SAFETY OVERSIGHT AUDIT PROCESS	23
1.4.4 SAFETY OVERSIGHT AUDIT REPORT	26
1.4.5 STATE'S CORRECTIVE ACTION PLAN	28
<b>CHAPTER TWO: EVOLUTION PROCESS TO ACHIEVE FULL TRANSPARENCY IN THE UNIVERSAL SAFETY OVERSIGHT AUDIT PROGRAMME</b>	<b>30</b>
<b>2.1 EVOLUTION OF THE PROCESS TO ACHIEVE FULL TRANSPARENCY</b>	<b>31</b>
2.1.1 UNIFIED STRATEGY TO RESOLVE SAFETY-RELATED DEFICIENCIES	31
2.1.2 TRANSPARENCY AND DISCLOSURE IS BORN AS A PRINCIPLE (1997-1998)	36
2.1.3 SHARING AUDIT FINDINGS' ANALYSIS (1998-2000)	39
2.1.4 DISPLAY OF NON-CONFIDENTIAL AUDIT SUMMARY REPORTS (2001-2002)	40
2.1.5 DISPLAY OF AUDIT REPORTS ON ICAO'S WEBPAGE AND CREATION OF THE PROCEDURE OF TRANSPARENCY AND DISCLOSURE (2004-2005)	43
2.1.6 PUBLICATION OF FINAL SAFETY OVERSIGHT AUDIT REPORTS ON THE PUBLIC WEBSITE AND THE NEW CONCEPT OF SIGNIFICANT SAFETY CONCERN (2005-2008)	50
2.1.7 SIGNIFICANT SAFETY CONCERN AND RELATED MECHANISM (2006-2008)	54
2.1.8 IMPLEMENTATION OF THE PROCEDURE OF TRANSPARENCY AND DISCLOSURE (2005-2008)	55
2.1.9 DEVELOPMENT OF A CONTINUOUS MONITORING APPROACH (2007-2008)	57
2.1.10 CURRENT SITUATION OF AUDIT INFORMATION UNDER THE TRANSPARENCY AND DISCLOSURE PRINCIPLE	58

<b>2.2</b>	<b>COOPERATION AND ASSISTANCE AND THE UNIVERSAL SAFETY OVERSIGHT AUDIT PROGRAMME</b>	<b>59</b>
2.2.1	INITIATIVES OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION	60
2.2.2	PARTNERSHIPS AND ALLIANCES	62
<b>2.3</b>	<b>CONCLUSION</b>	<b>65</b>

## **CHAPTER THREE: OUTCOMES OF TRANSPARENCY IN THE UNIVERSAL SAFETY OVERSIGHT AUDIT PROGRAMME**

**67**

<b>3.1</b>	<b>SAFETY OUTCOMES</b>	<b>68</b>
3.1.1	SAFETY OUTCOMES – THE INTERNATIONAL CIVIL AVIATION ORGANIZATION PERSPECTIVE	68
3.1.2	SAFETY OUTCOMES – THE CONTRACTING STATE PERSPECTIVE	79
<b>3.2</b>	<b>ECONOMIC AND POLITICAL OUTCOMES</b>	<b>80</b>
3.2.1	US INTERNATIONAL AVIATION SAFETY ASSESSMENTS PROGRAM	82
3.2.2	EUROPEAN UNION LIST OF AIR CARRIERS SUBJECT TO AN OPERATING BAN WITHIN THE COMMUNITY	86
3.2.3	CONCLUSION ON ECONOMIC AND POLITICAL OUTCOMES	88
<b>3.3</b>	<b>LEGAL OUTCOMES</b>	<b>89</b>
3.3.1	TYPES OF CONTRACTING STATES ACCORDING TO THEIR ACTIONS AFTER THE AUDIT	90
3.3.2	INTERNATIONAL OBLIGATIONS OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION	92
3.3.2.1	Obligation of Transparency	92
3.3.2.2	Obligation of Assistance	94
3.3.3	INTERNATIONAL OBLIGATIONS OF STATES	97
3.3.4	NATIONAL OBLIGATIONS OF STATES	98
<b>3.4</b>	<b>CONCLUSION</b>	<b>99</b>

## **CONCLUSIONS**

**101**

## **ATTACHMENT A**

**104**

## **ATTACHMENT B: ACRONYMS AND ABBREVIATIONS**

**105**

## **BIBLIOGRAPHY**

**107**

## INTRODUCTION

The Convention on International Civil Aviation with one-hundred-ninety signatories represents one of the most successful treaties in the history of international law. This treaty created the International Civil Aviation Organization (ICAO), a United Nations agency that comprises the majority of independent States in the world,<sup>1</sup> which is responsible of adopting Standards and Recommended Practices (SARPs) “to promote the orderly, safe and efficient development of international aviation.”<sup>2</sup>

To measure if a State effectively implements the SARPs contained in the Annexes of the Chicago Convention, ICAO developed the Universal Safety Oversight Audit Programme (USOAP) to conduct regular, mandatory, systematic and harmonized safety audits in all Contracting States. These audits assess each Contracting State’s capability for safety oversight, effective execution of a safety oversight system as well as its level of implementation of safety-related SARPs, the safety oversight system’s critical elements, associated procedures, guidance material, and safety-related practices.

Initially, the results of the USOAP audits were strictly confidential. This characteristic was established to create a link of trust between the Audited State and the auditor: ICAO. However, this process has evolved from strictly confidential to fully transparent. Currently, audit results are posted on the ICAO public website, the final safety oversight audit reports are distributed to all Contracting States through the secure website, and a process exists to inform all Contracting States about any significant safety concern detected during the audits.

The transparency achieved in the USOAP has had different outcomes in different areas. The purpose of this research is to identify and analyze the results of transparency in three

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<sup>1</sup> As of 19 August 2008 the total count of independent States is 194. See Bureau of Intelligence and Research, “Independent States in the World”, Fact Sheet (19 August 2008), online: U.S. Department of State <<http://www.state.gov/s/inr/rls/4250.htm>>.

<sup>2</sup> Thomas Buergenthal, *Law-Making in the International Civil Aviation Organization* (Syracuse, N.Y.: Syracuse University Press, 1969) at 4 [Buergenthal].

main fields: safety, economic and political, and legal. To achieve this purpose this thesis will thoroughly assay the program, the process to achieve full transparency and finally the outcomes achieved from the release of the audit information.

Certainly, sharing safety-related information is sensitive because of its potential consequences; however, if the appropriate balance is achieved between the safety information disclosed and its usage, every State should be able to resolve their deficiencies identified by the USOAP and States concerned by unattended risks created by other States' lack of implementation should be able take appropriate actions to protect their aviation interests. On the other hand, if this balance is not achieved, safety-related information displayed by ICAO could be misused to obtain an advantage or leverage, based on an economic or political consideration, which is forbidden under the principles of the USOAP.

Besides its implications for the USOAP, transparency seems to be a key element strengthening a regime based in compliance with soft law developed by international organizations. For public international law, where “the body of rules and principles of action which are binding upon civilized states in their relations with one another,”<sup>3</sup> this soft law element might be an alternative to acquire the desired compliance with international regulations. Moreover, norms adopted other than by the traditional reliance upon formal treaties – such as the ICAO SARPs – could, because of their flexibility and versatility, acquire a notable level of implementation among the members of the international community, especially if transparency is added to the surveillance procedures for verifying implementation. As is going to be demonstrated, SARPs (which are the universally accepted minimal requirements set by ICAO to cover all technical and operational aspects of international civil aviation) have improved levels of compliance and implementation among the ICAO community due to transparency, which is strengthening this type of international norm. Therefore, the scheme developed by ICAO could serve other international organizations as an example of an effective system of commitment and “quasi-enforcement” power accompanying adopted regulations.

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<sup>3</sup> James Leslie Brierly, *The Law of Nations: an introduction to the international law of peace* (Oxford: Clarendon Press, 1963) at 1.



## **CHAPTER ONE: The International Civil Aviation Organization and the Universal Safety Oversight Audit Programme**

In 1998, the 32<sup>nd</sup> Session of the ICAO Assembly, held in Montreal, established a universal program to promote global aviation safety, by auditing each Contracting State's level of implementation of universally accepted requirements set by ICAO to cover all safety-related technical and operational aspects of international civil aviation codified by SARPs and its capability for safety oversight.

The program was developed due to the awareness among Contracting States that there was a lack of implementation of safety-related SARPs. It started as a voluntary assessment with strictly confidential results and then, it evolved into a mandatory and transparent audit program. Currently, the USOAP encompasses three phases: preparation, audit and follow-up. The complete cycle is designed to assure the status of compliance and implementation of the SARPs in each Contracting State in a specific timeframe.

The description of ICAO (including its structure and regulatory function) and the USOAP (including its background, foundations, process and policy) in Chapter One will allow to: i) acknowledge and understand the principal elements of the USOAP; ii) indicate the need of a “quasi-enforcement” power to make Contracting States compliant with SARPs; and iii) set the contextual frame of the introduction and development of transparency as a core element of the program. It is important to mention that the argumentation and criticism of the concepts mentioned in this chapter fall out of the scope of this research.

### **1.1 The International Civil Aviation Organization**

Aviation was born on November 21<sup>st</sup>, 1783 when the first human flight took place. Jean-François Pilâtre de Rozier and François Laurent Marquis d'Arlandes flew the first hot

air balloon invented by Michel and Jacques-Étienne Montgolfier about 3,000 feet above Paris<sup>4</sup>. Five months after this flight, the first piece of legislation regarding the flying activity was promulgated: a police directive established that no balloon flight was permitted without prior authorization.<sup>5</sup>

Internationally, the first attempt to regulate aerial activity was the Convention Relating to the Regulation of Aerial Navigation (Paris Convention), signed at the Paris Peace Conference in 1919. This treaty dealt primarily with technical, operational and organizational aspects of civil aviation. It also created the *Commission Internationale de la Navigation Aérienne* (CINA), an international body conceived to monitor and regulate civil aviation through the adoption of Annexes as amendments of the Convention.<sup>6</sup>

The Second World War accelerated the technical development of aviation and made routine international transportation by air possible. These advances, coupled with the economic and political environment of the post war world prompted the United States of America to sponsor an international conference to establish a legal framework to regulate this activity. Fifty-two nations attended the International Civil Aviation Conference held at Chicago on 1 November 1944. The result of the Conference was the agreement to implement “certain principles and arrangements 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.”<sup>7</sup> This agreement became the Convention on International Civil Aviation (Chicago Convention) which came into force on 4 April 1947 and established the International Civil Aviation Organization, also known as ICAO. Today, one-hundred-ninety States are signatories to the Chicago Convention.<sup>8</sup>

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<sup>4</sup> See Gene Gurney, *A Chronology of World Aviation* (New York: F. Watts, 1965) at 1.

<sup>5</sup> See I.H. Ph. Diederiks-Verschoor, *An Introduction to Air Law* (Alphen aan den Rijn: Kluwer Law International; Frederick, MD: Sold and distributed in North, Central and South America by Aspen Publishers, 2006) at 2.

<sup>6</sup> See *Ibid.*, at 5.

<sup>7</sup> *Convention on International Civil Aviation*, Dec. 7, 1944, 15 U.N.T.S. 295, ICAO Doc. No. 7300/9 § preamble [Chicago Convention].

<sup>8</sup> See ICAO, “List and current status of International Air Law Multilateral Treaties”, online: The International Civil Aviation Organization <<http://www.icao.int/icao/en/leb/chicago.pdf>>.

The objectives of ICAO “are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport,”<sup>9</sup> in order to, *inter alia*, “insure the safe and orderly growth of international civil aviation throughout the world”; “encourage the development of airways, airports, and air navigation facilities for international civil aviation”; “meet the needs of the peoples of the world for safe, regular, efficient and economical air transport”; “insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines”; “avoid discrimination between contracting States”; “promote safety of flight in international air navigation”; and “promote generally the development of all aspects of international civil aeronautics.”<sup>10</sup> In order to perform its functions, ICAO relies on different organisms: the Assembly, the Council, the Secretariat and such other bodies as may be necessary<sup>11</sup>, such as: the Air Navigation Commission (ANC), the Air Transport Committee (ATC)<sup>12</sup>, the Committee on Joint Support of Air Navigation Services, the Unlawful Interference Committee, the Legal Committee and the Finance Committee.<sup>13</sup>

The Assembly is the sovereign body of ICAO. It is a collegiate organism composed of representatives from all Contracting States. It meets every three years with a mandate to: i) elect the Contracting States to be represented on the Council; ii) examine and take action on the reports of the Council; iii) establish subsidiary commissions necessary or desirable; iv) vote its budgets and determine the financial arrangements of the Organization; and v) consider proposals for the modification or amendment of the provisions of the Chicago Convention and recommend them to the Contracting States.<sup>14</sup>

The Council serves as the permanent governing body of the Organization. It is elected by the Assembly for a three year term and is composed of thirty-six States. The selection

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<sup>9</sup> Chicago Convention, *supra* note 7 § Article 44.

<sup>10</sup> *Ibid.*

<sup>11</sup> See *Ibid.*, Article 43.

<sup>12</sup> The Air Navigation Commission and the Air Transport Committee are expressly mentioned in the Articles 51 and 54 of the Chicago Convention.

<sup>13</sup> The Committee on Joint Support of Air Navigation Services and the Legal Committee were constituted during the First Assembly.

See *Resolutions adopted by the First Assembly*, Res. A1-7, A1-46 and A1-58, ICAO Doc. 4411 (1947) at 7, 8, 48, 49 and 58 [Resolutions adopted by the First Assembly].

<sup>14</sup> See Chicago Convention, *supra* note 7 § Articles 48 and 49.

process shall ensure that three groups of States must be represented: States of chief importance in air transport, States which make the largest contribution to the provision of facilities for international civil air navigation and States whose designation will insure that all the major geographic areas of the world are represented on the Council.<sup>15</sup>

The Secretariat, which is headed by the Secretary General, is divided into five divisions: the Air Navigation Bureau (ANB),<sup>16</sup> the Air Transport Bureau,<sup>17</sup> the Technical Co-operation Bureau,<sup>18</sup> the Legal Bureau,<sup>19</sup> the Bureau of Administration and Services<sup>20</sup> and various specialized offices and branches that report directly to the Secretary General. The bureaux are divided into Sections which correspond each to an area of responsibility in one or more related fields.

In order to facilitate the planning and implementation of ground services and facilities essential for international air transport operations, air navigation regions<sup>21</sup> were delimited. These regions were the response to both the diversity of operational and technical problems inherent in different parts of the world, and the consultations processes required to plan the air navigation facilities and services among the Member States of each Region, due to the technological, financial, geographical and climatological conditions that prevail in certain areas of the world. Today, the regional offices are located in: Bangkok for the Asia and Pacific regions; Cairo for the Middle East region; Dakar for Western and Central African regions; Lima for the South American region; Mexico for the North American region,

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<sup>15</sup> See Buerghenthal, *supra* note 2 at 7 and 8. See also Chicago Convention, *supra* note 7 at Article 50.

<sup>16</sup> The Air Navigation Bureau function is to develop technical studies for the ANC and recommendations for Standards and Recommended Practices for the Council.

<sup>17</sup> The Air Transport Bureau provides expert assistance required by ICAO in the air transport field.

<sup>18</sup> The Technical Co-operation Programme assists States in the project implementation with neutrality, transparency and objectivity.

<sup>19</sup> The Legal Bureau provides advice and assistance to the Organization and Member States on constitutional, administrative, procedural, international law, air law, commercial law, labour law and related matters. Also it is responsible for the depositary functions of ICAO under several treaties.

<sup>20</sup> The Bureau of Administration and Services provides administrative support required by ICAO.

<sup>21</sup> See *Resolutions adopted by the Interim Assembly*, Res. A-3, PICA Doc. 1837 (1946) at 4 [Resolutions adopted by the Interim Assembly].

Central American and Caribbean regions; Nairobi for Eastern and Southern African regions; and Paris for the European and North Atlantic regions.<sup>22</sup>

## 1.2 Regulatory Function of the International Civil Aviation Organization

### 1.2.1 International Standards and Recommended Practices

The Chicago Convention established ICAO “to promote the orderly, safe and efficient development of international aviation.”<sup>23</sup> In order to accomplish this purpose, Article 37 of the Convention empowers ICAO to adopt international standards and recommended practices<sup>24</sup> which are currently contained in eighteen Annexes.<sup>25</sup>

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<sup>22</sup> See ICAO, “Regional Offices”, online: The International Civil Aviation Organization <[http://www.icao.int/icao/en/m\\_rao.html](http://www.icao.int/icao/en/m_rao.html)>.

<sup>23</sup> Buerghenthal, *supra* note 2 at 4.

<sup>24</sup> **Article 37. Adoption of international standards and procedures.** 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 in which such uniformity will facilitate and improve air navigation.

To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:

- (a) Communications systems and air navigation aids, including ground marking;
- (b) Characteristics of airports and landing areas;
- (c) Rules of the air and air traffic control practices;
- (d) Licensing of operating and mechanical personnel;
- (e) Airworthiness of aircraft;
- (f) Registration and identification of aircraft;
- (g) Collection and exchange of meteorological information;
- (h) Log books;
- (i) Aeronautical maps and charts;
- (j) Customs and immigration procedures;
- (k) Aircraft in distress and investigation of accidents;

and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.

<sup>25</sup>

- 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 the 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

The concepts of “international standards” and “recommended practices” are not defined by the Chicago Convention. However, during the First Assembly in 1947, ICAO adopted the following definitions to provide a uniform understanding with respect to International Standards and Recommended Practices (referred together as SARPs) to be adopted and amended from time to time.<sup>26</sup>

“Standard” means any specification for physical characteristics, configuration, materiel, performance, personnel, or procedure, the uniform application of **which is recognized as necessary** for the safety or regularity of international air navigation and to which Member States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention. [emphasis added]

“Recommended practices” means any specification for physical characteristics, configuration, materiel, performance, personnel, or procedure, the uniform application of **which is recognized as desirable** in the interest of safety, regularity, or efficiency of international air navigation, and to which Member States will endeavour to conform in accordance with the Convention. [emphasis added]

Although these definitions were developed for “use of the Organization in relation to [only] air navigation matters,”<sup>27</sup> the Council adopted similar definitions relating to air transport<sup>28</sup> contained in Annex 9, which deals with facilitation of international air transport.

In accordance with Article 54 1) of the Chicago Convention, the Council of ICAO is responsible for adopting and incorporating SARPs to the Annexes of the Convention. This

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Annex 12: Search and Rescue

Annex 13: Aircraft Accident 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: Safe Transportation of Dangerous Goods by Air

<sup>26</sup> See Resolutions adopted by the First Assembly, *supra* note 13 at 27 - 29.

<sup>27</sup> *Ibid.*

<sup>28</sup> **Standard:** Any specification, the uniform observance of which has been recognized as practicable and as necessary to facilitate and improve some aspect of international air navigation, which has been adopted by the Council pursuant to Article 54 1) of the Convention, and in respect of which non-compliance must be notified by Contracting States to the Council in accordance with Article 38.

**Recommended Practice:** Any specification, the observance of which has been recognized as generally practicable and as highly desirable to facilitate and improve some aspect of international air navigation, which has been adopted by the Council pursuant to Article 54 1) of the Convention, and to which Contracting States will endeavour to conform in accordance with the Convention.

“quasi-legislative”<sup>29</sup> power has been a crucial element to achieve worldwide uniformity in regulations, standards and procedures. The elaboration and regular updating of SARPs are “the real centers of gravity of ICAO’s work and give to ICAO a unique position and responsibility in the world.”<sup>30</sup>

Because of the technical complexity involved in operational matters, SARPs are formulated in broad terms and restricted to essential requirements. The detailed technical specifications are usually placed either in Appendices to Annexes or in specific manuals called Procedures for Air Navigation Services (PANs), Regional Supplementary Procedures (SUPPs), Guidance Material and Circulars. These documents are designed to facilitate implementation of SARPs and are amended periodically to ensure their contents reflect current practices and procedures. Additionally, the differences to SARPs notified by Member States are also part of the Annexes published in Supplements.<sup>31</sup>

### **1.2.2 Development Process of Standards and Recommended Practices**

The development of air navigation SARPs starts in the ANC and the formulation of facilitation of international air transport SARPs in the ATC.<sup>32</sup> Both groups are aided by experts in order to achieve the highest level of professionalism in the development of SARPs. To perform this task, they work in the following sub-sections: divisional meetings, panels, study groups and technical committees – it must be noted that all Contracting States and some international organizations are invited to participate in the formulation and development or amendment of SARPs.

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<sup>29</sup> It is considered quasi-legislative power “since the adopted international standards and recommended practices are not binding on the ICAO member States against their will”.

See Boteva, *infra* note 32 at 34.

<sup>30</sup> Michael Milde, “Enforcement of Aviation Safety Standards – Problems of Safety Oversight” (1996) 45 Z.L.W. Jg. 3 at 4 [Milde].

<sup>31</sup> See ICAO, “Forms of Standards and Recommended Practices”, online: The International Civil Aviation Organization <<http://www.icao.int/icao/en/anb/mais/index.html>>.

<sup>32</sup> See Maglena Boteva, *A New Century and a New Attitude Towards Safety Oversight in the Air Transportation* (LLM Thesis, McGill University Faculty of Law, Institute of Air and Space Law, 2000) [unpublished] at 26 and 27 [Boteva].

Once recommendations for SARPs and alternative proposals are mature enough, the ANC or ATC submits them to the Contracting States and selected international organizations for comments.<sup>33</sup> The States and organizations are given a period of three months within which to consider the proposals and submit their observations. Because of the active participation of Contracting States in the development of SARPs, consensus is often reached among them during their formulation. Nonetheless, comments made by any Contracting State or international organization are carefully analyzed and considered by ANC or ATC before the final draft is submitted to the Council.

Article 90 of the Chicago Convention establishes the procedure for adoption and amendment of SARPs. According to this Article, the Council has the right to review the proposals of the ANC or the ATC and if two-thirds of the members are in favour the proposal is adopted as an Annex or amendment.<sup>34</sup> This “quasi-legislative” power of the Council is subject to the veto of the Contracting States. In other words, the Annex adopted or amended by the Council would not become effective if a “majority of the Contracting States register their disapproval with the Council.”<sup>35</sup> The usual time for submitting the notification of disapproval by a Member State ranges between three and four and a half months.<sup>36</sup> The Article mentioned above provides that “the Council shall immediately notify all Contracting States of the coming into force of any Annex or amendment thereto.”<sup>37</sup> In order to comply with that mandate and provided that a majority of States have not registered disapproval, the Council notifies all Contracting States through the proposal sent and the amendment will become effective on the date marked as the *effective date*.

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<sup>33</sup> See Buergenthal, *supra* note 2 at 62 and 63.

<sup>34</sup> “The council has interpreted the phrase ‘vote of two-thirds of the Council’ to the effect that the vote ‘... required under Article 90 of the [Chicago Convention] for the adoption of an Annex should be interpreted as the vote of two-thirds of the total membership of the Council.” Today, the adoption of an Annex requires 26 votes in favour.

See *Ibid.*

<sup>35</sup> Chicago Convention, *supra* note 7 § Article 90.

<sup>36</sup> See Buergenthal, *supra* note 2 at 66.

<sup>37</sup> Chicago Convention, *supra* note 7 § Article 90, b).



### 1.2.3 Compliance with Standards and Recommended Practices

The method of compliance with SARPs, in accordance with Article 37 of the Chicago Convention, is the undertaking of a State “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 in which such uniformity will facilitate and improve air navigation.”<sup>38</sup> Additionally, Article 38 of the Chicago Convention establishes:

#### **Article 38. Departures from international standards and procedures**

Any State which *finds it impracticable to comply* in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, *shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard*. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that State. [emphasis added]

Interpreting the Articles mentioned above *a contrario sensu*, if a Contracting State does not give any notification of differences to ICAO, it should be assumed that its regulations and practices are fully compliant with the newly adopted or amended SARPs or procedures. However, this assumption is not necessarily valid for all Contracting States. Audit results confirm that there are States which fail to notify differences and/or to fully comply with amended SARPs<sup>39</sup> showing that a “considerable number of States [have] deficiencies under

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<sup>38</sup> *Ibid.* Article 37.

<sup>39</sup> See Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety. *The Status of Safety Oversight*, 6<sup>th</sup> Sess., Theme 1: The status of aviation safety today, ICAO DGCA/06-WP/3 (2006) at 3 [DGCA/06-WP/3].

[the] Annexes”<sup>40</sup> of the Chicago Convention. In fact, audit results revealed that over 50% of the Audited States have not established a formal mechanism to review Annex provisions or amendments against national regulations.<sup>41</sup>

In this scenario, two different kinds of differences from the SARPs are identified: i) differences notified by States in accordance with Article 38 of the Chicago Convention; and ii) audited differences identified through audit mechanisms developed by ICAO, such as the USOAP.

In so far, the legal status and the binding force of the SARPs, in accordance with the Articles mentioned, have been argued vigorously. As Prof. Milde has said, “some interpretations would attribute to the Standards the full force of a source of international law equivalent to an international convention, other views consider the Standards to be no more than guidance material or ‘soft law’,”<sup>42</sup> in particular in view of the freedom reserved to States to ‘disapprove’ the Annex or to depart from it by filing a difference.”<sup>43</sup>

It is important to highlight that due to technical improvements SARPs are updated constantly to enhance safety. Under this context, if ICAO (empowered by one-hundred-ninety Contracting States able to participate in the creation and adoption of SARPs) results the ideal venue to develop the latest uniform specifications recognized as necessary for the safety or regularity of international air navigation, its member States must conform and take the appropriate actions to comply and implement the SARPs into their national legislation and regulations – especially if they have participated in the process of development and adoption; or in the event of impossibility of compliance, a notification of differences to the Council is compulsory under Article 38 of the Convention. Nevertheless, the final decision for compliance falls upon the State.

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<sup>40</sup> Ruwantissa Abeyratne, “Blacklisting of Airlines by the European Union and the Disclosure of Safety Critical Information” *Issues in Aviation Law and Policy* 14:5 (May 2008) 1135 at 1140 [Abeyratne].

<sup>41</sup> See *Ibid.*

<sup>42</sup> The term *soft law* is defined as “guidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding.” From my perspective, if States have the possibility to reject the SARPs application arguing its impracticability to comply with them, SARPs can hardly be considered as binding. *Black’s Law Dictionary*, 8<sup>th</sup> ed., s.v. “soft law”.

<sup>43</sup> Milde, *supra* note 30 at 4.

#### 1.2.4 Enforcement of Standards and Recommended Practices

Analyzing the SARPs system developed by ICAO, the enforcement issue cannot be disregarded. Enforcement, according to the Black's Law Dictionary means "the act or process of compelling compliance with a law, mandate, command, decree, or agreement."<sup>44</sup>

The ability of ICAO to enforce the SARPs, under the powers conferred by the Chicago Convention, is vague and inexplicit. Under Article 54 j) of the Chicago Convention, the Council has the mandate to "report to contracting States any infraction of [the] Convention, as well as any failure to carry out recommendations or determinations of the Council."<sup>45</sup> This "accusation" system "could be used to report any failure to present the annual report on implementation of the safety Standards or failure to file a difference under Article 38 of the Chicago Convention."<sup>46</sup> However, the Convention does not describe the procedure, degree of confidentiality and/or the scope of the report. Furthermore, the Council lacks a sanction power correlated to infractions to the Convention or failures to carry out recommendations or determinations of the Council. In this situation, and due to the political nature of the organization, ICAO has pursued alternative solutions to encourage compliance which are supported by the consensus of the international community.<sup>47</sup>

Trying to achieve a balance within the scope of the convention and the political factors that necessary affects the actions and decisions of ICAO, the 35<sup>th</sup> Assembly directed the Council "to develop a procedure to inform all Contracting States, within the scope of Article 54 j) of the Chicago Convention, in the case of a State having significant compliance shortcomings with respect to ICAO safety-related SARPs."<sup>48</sup> The action taken by the Council was to develop a procedure that will be analyzed in depth in the following Chapter Two.

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<sup>44</sup> *Black's Law Dictionary*, 8<sup>th</sup> ed., s.v. "enforcement".

<sup>45</sup> Chicago Convention, *supra* note 7 § Article 54 j).

<sup>46</sup> Milde, *supra* note 30 at 17.

<sup>47</sup> Milde, *supra* note 30 at 7.

<sup>48</sup> *Resolutions adopted at the 35<sup>th</sup> Session of the Assembly*, Res. A35-7, ICAO Provisional Edition (2004) at 26 [Resolutions adopted at the 35<sup>th</sup> Session of the Assembly].

Ultimately, the objective of SARPs' enforcement is to achieve the highest level of safety in air transport operations. However, this objective may not be attained because, as Buergenthal mentions, "many of the delinquent States simply do not as yet have the technical and administrative personnel [and/or the financial resources] to fully discharge their obligations under [the Chicago Convention]." <sup>49</sup> ICAO has not been empowered with sanction powers in case of non-compliance with the SARPs. However, transparency of the audit results has served as a "quasi-enforcement" power that transformed ICAO's nature and SARPs' compliance. Today, the Organization is able to inform States about non-compliances and States are able to act accordingly. The introduction of transparency in the USOAP has been an achievement and an innovation for international organizations that certainly has transformed ICAO in particular.

### 1.3 Foundations of the Universal Safety Oversight Audit Programme

In the history of ICAO, the first acknowledgement that the notification of differences from SARPs was not satisfactory can be traced back to Resolution A7-9 adopted during the 7<sup>th</sup> Assembly in 1953. The Assembly recognized a "lack of positive evidence as to the **degree** of implementation on a worldwide basis of International Standards, Recommended Practices and Procedures" <sup>50</sup> [**emphasis added**]. Therefore, the Council was instructed to develop a program to encourage the notification of differences by States, pursuant to Article 38 of the Chicago Convention, in order to have a better knowledge of the level of implementation of SARPs among the Contracting States. <sup>51</sup> During the following Assemblies, Member States continued expressing their concern through several Resolutions <sup>52</sup> about the absence of notification of differences between their national legislations and the adopted SARPs. The Executive Committee of the 27<sup>th</sup> Assembly

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<sup>49</sup> Buergenthal, *supra* note 2 at 101.

<sup>50</sup> *Resolutions and Indexes to Documentation*, Res. A7-9, ICAO Doc. 7417 (1953) at 23.

<sup>51</sup> *Ibid.*

<sup>52</sup> Resolution A10-29; Resolution A12-16; Resolution A18-13, Appendix F; Resolution A21-21; Resolution A22-18, Appendix D; Resolution A23-11, Appendix D; Resolution A24-7, Appendix D; Resolution A26-8, Appendix D and Resolution A27-10, Appendix D.

reported in Agenda Item number 7 that a “serious situation concerning non-notification of differences from Standards”<sup>53</sup> existed. However, no Resolution was taken to rectify the situation.

In 1992, during the 29<sup>th</sup> Assembly the term oversight was used for the first time. The Assembly recognized the States’ responsibility for safety oversight and urged them to review their national legislation implementing those obligations and their safety oversight procedures to ensure implementation of SARPs.<sup>54</sup> It was not until 7 June 1994 that the Council established a Safety Oversight Assessment Programme (SOAP) sanctioned by the 31<sup>st</sup> Assembly. The SOAP was conducted after the voluntary request made by the participating State and its findings were treated with strict confidentiality. The objectives of the program were to ensure the effective implementation of SARPs and associated procedures in areas of personnel licensing, operation of aircraft and airworthiness of aircraft<sup>55</sup> by Contracting States. The results of the forty five audits conducted by ICAO under the SOAP showed an alarming gap between the notifications made by the States and the level of compliance with the SARPs. It was evident that there was a need for a mandatory audit program if improvement was to occur.<sup>56</sup>

In 1997, a conference in Montreal of Directors General of Civil Aviation on “Global Strategy of Safety Oversight” (DGCA/97) took a step forward in the evolution of the oversight process. The Conference noted a critical need for increased attention to global aviation safety and developed a strategy for enhancing the global capacity for safety oversight through an assertive and effective program established to conduct regular, mandatory, systematic and harmonized safety audits in all Contracting States with confidential results maintained for a period set to allow for correction of shortcomings and

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<sup>53</sup> Executive Committee. *Reports and Minutes*, Assembly 27<sup>th</sup> Sess., Agenda Item 7: Long-term policy on Annexes to the ICAO Convention – Notification of differences from Standards, ICAO Doc. 9545, A27-EX (1989) at 15.

<sup>54</sup> See *Assembly Resolutions in Force*, Res. A29-13, ICAO Doc. 9600 (1992) at I-47.

<sup>55</sup> See Michael Milde, “Aviation Safety Oversight: Audits and the Law” (2001) XXVI Ann. Air & Sp. L. 165 at 173 [Milde].

<sup>56</sup> See Zachary D. Detra, *The Legitimacy of the International Civil Aviation Organization’s Universal Safety Oversight Audit Program* (LLM Thesis, McGill University Faculty of Law, Institute of Air and Space Law, 2006) [unpublished] at 58 [Detra].

technical assistance to States.<sup>57</sup> Based on the DGCA/97 action plan, the Council approved the establishment of the USOAP in 6 May 1998.

In October 1998, the 32<sup>nd</sup> Assembly unanimously adopted a regular, mandatory, systematic and harmonized USOAP applicable to all Contracting States starting on 1 January 1999. The Assembly asked the States to sign a bilateral memorandum of understanding with the Organization to be audited regarding the implementation of the *standards* contained in the Annexes 1 (Personnel Licensing), 6 (Operations of Aircraft) and 8 (Airworthiness of Aircraft) upon ICAO's initiative.<sup>58</sup> The audits conducted to identify the deficiencies of these three Annexes are known as the **initial audit cycle** (Safety Oversight Audits conducted between 1999 and 2004).

In the 33<sup>rd</sup> and 35<sup>th</sup> Sessions of the ICAO Assembly the program was expanded to audit not only Annexes 1, 6 and 8, but also Annexes 11 (Air Traffic Services), 13 (Accident and Incident Investigation), 14 (Aerodromes) and every safety-related *standard* contained in all Annexes of the Chicago Convention in order to encompass a “*comprehensive systems approach*, which would cover all safety-related Annexes and focus on the States' overall capability for safety oversight.”<sup>59</sup> The audits conducted under the *comprehensive systems approach* are known as **CSA audit cycle** (Safety Oversight Audits conducted between 2005 and 2010).

Due to the success in the implementation of the *comprehensive systems approach* for audits in the USOAP, the 36<sup>th</sup> Assembly directed the Council to examine the feasibility of a new approach based on the concept of *continuous monitoring* methodology to be implemented in 2010 based on safety-risk analysis principles and continuous data gathering.<sup>60</sup> If developed and endorsed the concept of *continuous monitoring approach*, the audits to be conducted under this approach will be known as **CMA audit cycle**.

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<sup>57</sup> See Milde, *supra* note 55 at 174.

<sup>58</sup> See *Assembly Resolutions in Force*, Res. A32-11: Establishment of an ICAO Universal Safety Oversight Audit Programme, ICAO Doc. 9730 (1998) at I-48 [Doc. 9730]. Also see Milde, *supra* note 55 at 174.

<sup>59</sup> *Safety Oversight Audit Manual*, ICAO Doc. 9735 AN/960 (2006) § 2.5.3 [Safety Oversight Audit Manual].

<sup>60</sup> See Session of the ICAO Council. *Report of the Executive Committee on Agenda Item 13*, 36<sup>th</sup> Sess., ICAO Doc. A36-WP/329 (2007) § 13.7.

On the other hand, during the 35<sup>th</sup> Assembly, the concept of establishing regional and sub-regional safety oversight organizations which could assist States in complying with their obligations under the Chicago Convention was endorsed. This last point is especially relevant because of its proactive nature; rather than using methods that could damage the image of a State and therefore its aviation development, close collaboration and assistance would serve as a tool for improvement in the level of compliance with SARPs. As will be discussed later, ICAO has always been non-punitive. The regional oversight program was advocated to promote the improvement of safer practices in a proactive manner.

After seven years of experience with USOAP, ICAO conducted a Directors General of Civil Aviation Conference to reach consensus on a Global Strategy for Aviation Safety in the 21<sup>st</sup> century, held at Montreal in March 2006 (DGCA/06). The initiator of the DGCA/06 was the increasing number of accidents during 2005 in comparison with the average rate of 2004.<sup>61</sup> As the former President of the ICAO Council, Assad Kotaite mentioned in the opening remarks of the Conference, the accidents that occurred in 2005 “were timely reminders that systemic deficiencies identified under the Universal Safety Oversight Audit Programme since 1999 were still present.”<sup>62</sup>

The Conference functioned as an x-ray of the existing safety situation and of the way forward envisioned by ICAO. The DGCA/06 analyzed several subjects including: status of aviation safety, status of safety oversight, initiatives by States and industry to promote a safer air transport system, alternatives to improve aviation safety, transparency and sharing

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<sup>61</sup> “Regarding safety in 2005, there were 18 aircraft accidents involving passenger fatalities on scheduled air services worldwide for aircraft with a maximum take-off mass of more than 2250 kg, usually seven passengers or more. (...) The total number of passenger fatalities was 713. In 2004, there were 203 passenger fatalities from nine accidents.

The increase in passenger fatalities led to an increase in the accident rate as measured in fatalities per 100 million passenger-kilometres. In 2004, 203 fatalities resulted in an accident rate of 0.01, while in 2005, 713 fatalities produced a rate of 0.02.”

ICAO, “ICAO Releases Preliminary Safety and Security Statistics for Air Carrier Operations in 2005”, PIO 03/06, online: The International Civil Aviation Organization <[http://www.icao.int/cgi/goto\\_m.pl?icao/en/nr/2006/index.html](http://www.icao.int/cgi/goto_m.pl?icao/en/nr/2006/index.html)>.

<sup>62</sup> Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety. *Report approved by the Conference and Published by authority of the Secretary General*, 6<sup>th</sup> Sess., ICAO Doc. 9866, DGAC/06 (2006) at ii-2 [ICAO Doc. 9866].

of safety information, management of aviation safety, strategies to resolve safety-related deficiencies, enhancement of safety oversight and a safety framework for the 21st century.<sup>63</sup> As it is going to be addresses thoroughly in Chapter Two, the most relevant recommendations adopted in the DGCA/06 were related to full transparency.<sup>64</sup>

The 36<sup>th</sup> Assembly adopted Resolution A36-2 entitled *Unified strategy to resolve safety-related deficiencies*, in which a call was made for transparency of safety critical information regarding the audit results and “to apply and review the procedures to inform Contracting States, within the scope of Article 54 j) of the Chicago Convention, in the case of a State having significant shortcomings with respect to ICAO safety related SARPs in order for other Contracting States to take action in an adequate and timely manner.”<sup>65</sup> This important decision marked a final shift in the confidentiality that the audit reports historically had. This decision will be analyzed in order to assess its repercussions and new concepts flowing from the full transparency scheme adopted by ICAO.

As demonstrated through the history of ICAO, the implementation of SARPs has been a priority among the Contracting States. However, it took forty-five years for the Organization to develop a program designated to improve State aviation oversight, and hence, aviation safety: the central value of the industry because of its objective to protect passengers and goods transported by air.

## **1.4 Process and Policy of the Universal Safety Oversight Audit Programme**

### **1.4.1 Safety Oversight**

As mentioned before, the USOAP was created to promote global aviation safety by auditing States to determine their capability for safety oversight; their effective execution of

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<sup>63</sup> See *Ibid.*, at iv-1 to iv-3.

<sup>64</sup> See Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety. *Conclusions and Recommendations*, 6<sup>th</sup> Sess., ICAO DGAC/06 (2006) at 3-5 and Corrigendum No. 1.

<sup>65</sup> *Resolutions adopted by the 36<sup>th</sup> Session of the Assembly*, Res. A36-2, ICAO Provisional Edition (2007) at 2 [Resolutions adopted by the 36<sup>th</sup> Session of the Assembly].



a safety oversight system; and the status of implementation of safety-relevant SARPs, associated procedures, guidance material and safety related practices. Since August 2006, the USOAP and the ICAO Universal Security Audit Programme (USAP)<sup>66</sup> are integrated and are managed and run by the Safety and Security Audits (SSA) Branch, a single audit entity integrated to the office of the Secretary General.<sup>67</sup>

But what is exactly safety oversight? It is a process by which a State ensures the effective implementation of SARPs and associated procedures contained in the Annexes of the Chicago Convention through the enactment of a legislative framework comprising the primary aviation legislation and the establishment of an oversight agency (typically a Civil Aviation Authority (CAA)).<sup>68</sup> With an appropriate safety oversight, the State should ensure that its national aviation industry is at or above the safety levels established by the SARPs. In other words, each Contracting State is responsible that every aircraft on its registry, the operators authorized and personnel licensed by it shall comply with the applicable regulation.

To fulfill this purpose, ICAO developed a comprehensive system based in the Chicago Convention and its Annexes, the respective PANs and guidance material. Among the documentation drafted by ICAO, the Safety Oversight Manual outlines the duties and

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<sup>66</sup> During the 33rd Assembly, Contracting States were very concerned about the terrorist events of 11 September 2001. Therefore, it adopted Assembly Resolution A33-1 which urged all Contracting States to intensify efforts to fully implement and enforce multilateral conventions on aviation security and security-related SARPs. The Secretary General was directed to address the threats to civil aviation, to review the ICAO aviation security programme, including Annex 17 and to consider the establishment of an ICAO Universal Security Oversight Audit Programme. On 10-20 February 2002 a High-Level Ministerial Conference on aviation security held at Montreal developed the ICAO Aviation Security Plan of Action, which included the establishment of regular, mandatory, systematic and harmonized audits to make possible the evaluation of aviation security in all Contracting States. During the 166th Session of the Council, the Aviation Security Plan of Action was adopted unanimously creating the USAP which was ratified by the 35th Assembly in Resolution A31-10. Although, the mechanism of implementation for USOAP and USAP are similar, it is necessary to address one of the fundamental differences, specifically that the USAP findings are strictly confidential. This characteristic is relevant because recently, ICAO has been pushing for a certain degree of transparency in the security audits results. Indeed, aspects of national security are involved in the USAP and unlawful events must be treated in a different manner than safety-related concerns. But, the transparency level of USOAP is the result of an evolutionary process that started with strict confidentiality regarding the audit reports.

<sup>67</sup> See Session of the ICAO Council. *Administrative integration of the Universal Safety Oversight Audit Programme (USOAP) and the Universal Security Audit Programme (USAP)*, 178<sup>th</sup> Sess., Subject No. 14.5: Safety Oversight, ICAO Doc. C-MIN 178/4 (2006) § 39.

<sup>68</sup> See *Safety Oversight Manual*, ICAO Doc. 9734 AN/959 (2006) § 2.1.1 [Safety Oversight Manual].

responsibilities of States with respect to aviation safety oversight. It identifies several critical elements<sup>69</sup> to achieve complete aviation safety oversight including:<sup>70</sup>

- ❖ **Primary aviation legislation:** A comprehensive and effective aviation legislation consistent with the State's aviation activity and compliant with the requirements contained in the Chicago Convention should be developed and implemented.
- ❖ **Specific operating regulations:** The State is responsible to create the necessary regulations to address the national requirements emanating from the primary aviation legislation in accordance with the SARPs.
- ❖ **State civil aviation system and safety oversight functions:** The CAA established should be supported by adequate staff and provided with appropriate financial resources. This authority must have stated safety regulatory functions, objectives and policies.
- ❖ **Technical personnel qualification and training:** The State is responsible of establishing a minimum knowledge, training and experience requirements for the technical personnel performing safety oversight functions to acquire, maintain and enhance their competences.
- ❖ **Technical guidance, tools and the provision of safety-critical information:** Technical personnel of the CAA shall use this kind of information to perform their safety oversight functions in accordance with the established requirements and in a standardized manner.
- ❖ **Licensing, certification, authorization and approval obligations:** A previous process granting a license, certificate, authorization and/or approval should ensure that the personnel and organizations are able to perform an aviation activity under the minimal safety requirements desired.

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<sup>69</sup> The Safety Oversight Manual establishes that "critical elements are essentially the safety defence tools of a safety oversight system and are required for the effective implementation of safety-related policy and associated procedures. States are expected to implement safety oversight critical elements in a way that assumes the shared responsibility of the State and the aviation community."

*Ibid.* at § 3.1.1.

<sup>70</sup> See *Ibid.* at ii and iii.

- ❖ **Surveillance obligations:** Inspections and audits should be implemented to proactively ensure that an authorized aviation activity still meets the established safety requirements.
- ❖ **Resolution of safety concerns:** A process to resolve identified deficiencies by the CAA impacting aviation safety should be implemented.

The critical elements described above are the basic elements that a State must cover to have a healthy aviation industry, airspace and infrastructure. In addition to the international nature of these activities and in a world where globalization plays a fundamental role in the economy, every State pursues to transport people and goods to and from its territory free of safety-related risks. Therefore, Contracting States are required to establish and manage an effective national safety oversight system aligned with the SARPs, which takes into account the effective implementation of the critical elements of a safety oversight system and addresses all aviation related activities. However, the financial constraints imposed by this obligation have also had a significant bearing on the fundamental objectives of the Convention. It has been observed that these constraints may be the root cause of non-implementation of minimum international Standards.<sup>71</sup>

#### 1.4.2 Audit Policy and Principles

The USOAP has five primary objectives related to compliance with safety-related goals.<sup>72</sup> Additionally, the Safety Oversight Audit Manual introduces three benefits<sup>73</sup>

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<sup>71</sup> *Ibid.* at 2-10.

<sup>72</sup> The Safety Oversight Audit Manual establishes: “The primary objectives of an ICAO safety oversight audit are to:

- observe and assess the State’s adherence to ICAO Recommended Practices, associated procedures, guidance material and safety-related practices;
- determine the degree of conformance of the State in implementing ICAO Standards;
- determine the effectiveness of a State’s implementation of a safety oversight system, through the establishment of legislation, regulations, licensing, certification and control capabilities;
- determine State capability for safety oversight; and
- provide advice to Contracting States to improve their safety oversight capabilities.

*Ibid.* § 3.2.

<sup>73</sup> “In addition to the above primary objectives, the Programme would also benefit global aviation safety by the disclosure of audit information through:

- a) the dissemination of the final safety oversight audit report to all Contracting States;

derived from the disclosure of the audit information, which in my opinion, are the result of ICAO's decision of publishing the audits results. After all, it must be recognized that the objectives and the benefits have the same final goal, which is to achieve the *highest practicable degree* of uniformity in regulations, standards, procedures and organization in relation to the SARPs established by ICAO.

Likewise, the USOAP is based in the following fundamental accepted auditing principles: sovereignty, universality, transparency and disclosure<sup>74</sup> – this principle will be discussed in depth in the following section of this research, timeliness, all-inclusiveness, in a systematic manner, with consistency and objectivity, fairness and quality.

To monitor and assess the audit principles and policies of the USOAP, it was established an independent quality assurance mechanism. ICAO decided to seek the certification of the USOAP under the International Organization for Standardization (ISO) to enhance the quality implementation and to strengthen the confidence of States in its management. The former SOA (Safety Oversight Audit) Section was audited by AOQC Moody International Inc. and found to be compliant with ISO 9001-2000 requirements on 18 October 2002 and recertified for another three years in 2005. The SSA, actual audit entity heading of the USOAP, was audited in December 2007 resulting in its certification.<sup>75</sup>

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b) the dissemination of safety-related information from the Audit Findings and Differences Database (AFDD), maintained by SOA; and

c) the publication in Annex Supplements of differences to SARPs.

*Ibid.* § 3.2.

<sup>74</sup> “Transparency and disclosure (...) USOAP audits shall be conducted under an auditing process which is fully transparent and open for examination by all concerned parties. (...) There shall be full disclosure of final audit reports and the reports shall provide sufficient information for Contracting States to make informed determination as to the safety oversight capability of other States.”

*Ibid.* § 3.4.3.

Notice that this principle is related to the *concerned parties*. The instrument of agreement for the conduct of the audit and the follow-up action is the State-specific MOU, document approved by the ICAO Council and signed by the Secretary General and the appropriate authority of the State to be audited. This document legally establishes that in the concerned parties are: the audited State and ICAO.

<sup>75</sup> See Session of the ICAO Council. *Progress Report on ICAO Audit Activities: USOAP and USAP*, 184<sup>th</sup> Sess., Subject No. 14.5: Safety Oversight, ICAO Doc. C-WP/13171 (2008) § 4.1 and 4.2 [C-WP/13171].

### 1.4.3 Safety Oversight Audit Process

Currently, ICAO is responsible for *inter alia* the following actions:<sup>76</sup>

1. Manage the USOAP
2. Implement the *comprehensive systems approach* in the conduction of the safety oversight audits
3. Follow-up the implementation of Corrective Action Plans and provide advice to States
4. Coordinate regional activities related to the USOAP

In order to put in practice these obligations, ICAO developed a *comprehensive system approach* for the conduct of safety oversight audits that comprises three phases. During the **first** phase (PRE-AUDIT) the State's organization is determined. This includes its establishment for safety oversight; the implementation of SARPs; and the identification of differences. The process is completed through a review of the documents developed by the State, a State Aviation Activity Questionnaire (SAAQ) and Compliance Checklists (CCs).

In the **second** phase (ON-SITE), an audit team visits the State and validates the information provided. This validation process includes a review of its organization and processes, procedures and programs established to fulfill the required safety oversight obligations. During this phase, the audit team will draft the audit findings and recommendations related to the critical elements for safety oversight and the level of compliance of the national regulations with the Chicago Convention, safety-related SARPs, PANs and guidance material.

Finally, the **third** phase (POST-AUDIT) starts when an interim safety oversight audit report is prepared and submitted. It finishes with the publication of the Final Safety Oversight Audit Report on the ICAO website. The State undergoing the audit and the audit team are responsible for the development and submission of the audit reports and the

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<sup>76</sup> See Safety Oversight Audit Manual, *supra* note 59 § 1.4.

State's Corrective Action Plan and comments, with special attention to the significant safety concerns<sup>77</sup> identified during the audit.<sup>78</sup> The implementation of the Corrective Action Plan presented by Audited State is followed closely by the audit team.<sup>79</sup> To give the reader a graphic description of this process, the following chart shows the activities taken place in an audit including their respective timeframes.

<b>AUDIT PROCESS</b>	
<b>PRE-AUDIT (12 months)</b>	
Activity	Timeframe
1. Letter to States advising audit schedule	12 months or more prior to audit
2. Audit notification letter to State	12 months prior to audit
3. Team leader assigned	9 months prior to audit
4. Signed MOU returned to ICAO	minimum 6 months prior to audit
5. SSA review and analysis of documentation using SSA audit tools	starting 12 months prior to audit
6. Specific audit protocols selected	3 months prior to audit
7. State advised on team composition and tentative work program	2 months prior to audit
8. Audit team members' briefing	1 day prior to audit
<b>ON-SITE (days)</b>	
Activity	
1. Opening meeting with State authorities	
2. Conduct on-site audit in line with agreed work program	
3. Daily team briefings and briefing with National Coordinator	
4. Development and compilation of draft safety oversight audit report contained in specialized protocols	
5. Closing meeting with State authorities	

<sup>77</sup> "A significant safety concern occurs when a holder of an authorization or approval does not meet the minimum requirements established by the State and by the Standards set for in the ICAO Annexes are not met, resulting in an imminent safety risk to international civil aviation."

Session of the ICAO Council. *Review of the Memorandum of Understanding (MOU) relating to the conduct of safety oversight audits under the comprehensive systems approach*, 179<sup>th</sup> Sess., 12<sup>th</sup> Mtg., Subject No. 14.5: Safety Oversight, ICAO Doc. C-MIN 179/12 (2006) § 49 [C-MIN 179/12].

<sup>78</sup> During the 12<sup>th</sup> Meeting of the 179<sup>th</sup> Session of the Council, a mechanism was approved to deal with significant safety concerns identified during safety oversight audits under the *comprehensive systems approach*. When a preliminary significant safety concern is identified, it should be described to the audited State during the debriefing of the audit results. As soon as possible, but no later than fifteen calendar days of the conclusion of the on-site phase of the audit, ICAO should provide an official notification to the State of the existence of any significant safety concerns requiring immediate corrective action. At the time of this notification, the State will be requested to provide the corrective action within a prescribed time frame.

If the State fails to provide the immediate corrective action to resolve the significant safety concern, the State will be contacted to determine why such action has not been provided and the results will be reported to the Council. Unresolved significant safety concerns will be made available to all Contracting States through the secure website of ICAO.

See Session of the ICAO Council. *Review of the Memorandum of Understanding (MOU) relating to the conduct of safety oversight audits under the comprehensive systems approach*, 179<sup>th</sup> Sess., 12<sup>th</sup> Mtg., Subject No. 14.5: Safety Oversight, ICAO Doc. C-WP/12774 (2006) § 2.3 [C-WP/12774]; and C-MIN 179/12, *supra* note 77 § 51.

<sup>79</sup> See Safety Oversight Audit Manual, *supra* note 59 § 2.5.4.

<b>POST-AUDIT (up to 9 months)</b>	
Activity	Timeframe
1. State starts work on corrective action plan	
2. If a significant safety concern is identified, SSA sends official notification (following the mechanism authorized); if not resolved appropriately a notification is posted in the ICAO secure website.	within 15 days of identification
3. SSA sends interim safety oversight audit report	within 90 days of audit
4. State submits corrective action plan and comments	within 60 days of receiving interim safety oversight audit report
5. SSA submits final safety oversight audit report to State	within 60 days of receiving corrective action plan
6. State comments on final safety oversight audit report (if any)	within 30 days of receiving final oversight audit report
7. Final safety oversight audit report published	within 30 days of receiving State's comments

- ❖ *Safety Oversight Audit Manual*, ICAO Doc. 9735 AN/960 (2006), Figure 5-1. The safety oversight audit process.
- ❖ Session of the ICAO Council. *Review of the Memorandum of Understanding (MOU) relating to the conduct of safety oversight audits under the comprehensive systems approach*, 179<sup>th</sup> Sess., Subject No. 14.5, ICAO Doc. C-WP/12774 (2006) § 2.3 and Session of the ICAO Council.

During the 36<sup>th</sup> Assembly, ICAO informed that the audits conducted under the *comprehensive systems approach* have increased States' awareness on their safety oversight responsibilities; have efficiently indicated the States' degree of compliance with ICAO provisions and the implementation of the critical elements of a safety oversight system; and have allowed significant safety concerns' identification.

From the described procedure and taking into consideration the scope of this research, the POST-AUDIT phase is relevant and will be analyzed in the following chapters. The post audit activities were central to the evolution which finally achieved full transparency through the publication of the final report. The publication itself and the sensitive content of the audit's report are crucial. Once the Safety Oversight Audit Report is public, it can serve as proof that an Audited State is not complying with the SARPs. This "proof" can be used unilaterally by other States against the aviation activities of the non-compliant State. This has the potential to cause significant economic damages. It should also be noted that

the use of the audit's report information by Contracting States for purposes other than those related to safety are expressly prohibited by Resolution A32-11.<sup>80</sup>

The *comprehensive systems approach* developed by ICAO to conduct the safety audits allows the audit team to tailor each audit to the State's level of complexity of its aviation activities and to the mechanisms developed by the State conduct its safety oversight responsibilities. The information submitted by the Audited State is used to determine the duration and periodicity of the visits, as well as the size of the audit teams. In general terms, States are supposed to be visited at least once every six years<sup>81</sup> with follow-up visits conducted on an as-needed basis. During the 36<sup>th</sup> Assembly, it was noted that in 2010, at the conclusion of the current audit cycle, ICAO will have automated data about States' compliance with the safety-related provisions contained in the Annexes of the Chicago Convention. Because of this, the Assembly directed the Council develop a proposal to be presented to the next Assembly of various options for the continuation of the program beyond 2010, including the concept of continuous monitoring, continuous data collection, State's updated data, ICAO regional inputs, selected on-site audit visits and safety risk analysis.<sup>82</sup>

#### **1.4.4 Safety Oversight Audit Report**

The final step in the audit process is the publication of the Final Safety Oversight Audit Report. This document contains an "objective reflection of the results of the safety oversight audit."<sup>83</sup> The main objective of the report is to inform the Audited State of the status of implementation of SARPs, procedures, safety-related guidance material and good aviation safety practices. It also measures the level of the State's capability for safety oversight based on the level of effective implementation of the critical elements of safety oversight. It further serves as a recommendation for the resolution and correction of

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<sup>80</sup> See Doc. 9730, *supra* note 58.

<sup>81</sup> See Safety Oversight Audit Manual, *supra* note 59 § 2.5.5.

<sup>82</sup> See Session of the ICAO Assembly. *Vision for the future of USOAP following completion of the current audit cycle (2005-2010)*, 36<sup>th</sup> Sess., Agenda Item 13: Progress report on the implementation of the ICAO Universal Safety Oversight Audit Programme (USOAP) under the comprehensive systems approach, ICAO Doc. A36-WP/80 (2007) § 2.3.

<sup>83</sup> Safety Oversight Audit Manual, *supra* note 59 § 6.1.



identified deficiencies. It demonstrates the need to initiate corrective actions by the State. Finally, it provides ICAO with information on differences to SARPs. It includes the information found in the interim safety oversight audit report,<sup>84</sup> the Corrective Action Plan and its comments, and the progress made on the implementation of the Corrective Action Plan.<sup>85</sup>

The Audited State has thirty calendar days after the draft of final audit report is submitted for review to make any comments and submit any information related. Finally, the Safety Oversight Audit Manual in paragraph 6.3.2 establishes that within thirty days after receiving the State's final comments the Final Safety Oversight Audit Report should be uploaded in the secure website of ICAO. This provision reflects the previous decision regarding disclosure of information contained in the audit's reports. As mentioned before, since 23 March 2008, the results obtained from the USOAP are publicly displayed on the ICAO public website. Today, all Contracting States audited under the USOAP have given their consent to release the results of the audits conducted in their territory.<sup>86</sup> However, the consent given was either to disclose the initial audit cycle or the CSA cycle results. This

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<sup>84</sup> The contents of the interim safety oversight audit report are:

Part 1 - Introduction

- a) Background
- b) Team composition
- c) Acknowledgement

Part 2 - Objectives and activities of the mission

Part 3 - Audit results

- a) Primary aviation legislation
- b) Specific operating regulations
- c) State civil aviation system and safety oversight functions
- d) Technical personnel qualification and training
- e) Technical guidance, tools and provision of safety critical information
- f) Licensing, certification, authorization and approval obligations
- g) Surveillance obligations
- h) Resolution of safety concerns

Part 4 - Visit to the industry/service provider

Part 5 - Summary of State Aviation Activity Questionnaire (SAAQ)

Part 6 - Compliance checklists

Part 7 - Follow-up action

Part 8 - Audit findings and recommendations

Part 9 - Graphical results of the audit

*Ibid.* § 6.2.

<sup>85</sup> See *Ibid.* § 6.1.1 and 6.3.1.

<sup>86</sup> See ICAO, "All Audited States now authorize ICAO to post audit results on public website", online: The International Civil Aviation Organization <[http://www.icao.int/icao/en/nr/2008/pio200804\\_e.pdf](http://www.icao.int/icao/en/nr/2008/pio200804_e.pdf)>.

difference is important because, generally, the information agreed to be posted by the Audited State is the one that reflects the best level of compliance achieved.

#### **1.4.5 State's Corrective Action Plan**

The final step in the audit process is the development and implementation of a Corrective Action Plan which must address all the findings and recommendations pointed by the audit team. The objective of this Plan is to bring the State's regulatory framework in compliance with the SARPs. It should include the detailed information of the actions to be taken and the respective timeframes. Also, it must be signed by the legal representative of the CAA or the government official designated for this purpose.<sup>87</sup>

The complete process of the USOAP is based on a *comprehensive systems approach* with standard auditing procedures that ensure that audits are completed consistently and in accordance with a systematic, objective and internationally accepted process. As mentioned before the objective of the safety oversight audits is to identify safety-related deficiencies and to propose a Corrective Action Plan to solve them. It is important to mention that through the Safety Oversight Audit Manual, no mention of public disclosure is made, even though, it is stressed the necessity of transparency and disclosure between the Audited State and ICAO, named together as *concerned parties*. Due to the current scheme regarding transparency of the audit reports the Manual may require an up-date that reflects current practices.

From the beginning, this process was supposed to be a tool for the Audited State to identify its deficiencies in order to develop a strategy to achieve a better level of implementation of SARPs. Since findings are now displayed publicly by the express consent of each State, the primary objective of the Final Report may have been changed from identification of deficiencies for improvement to information of safety unresolved deficiencies. In this scenario, if disclosure and transparency of information is not balanced with the concept of safety improvement, this trend might have an adverse effect regarding

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<sup>87</sup> See Safety Oversight Audit Manual, *supra* note 59 § 6.4.

the accomplishment of the *highest practicable degree* of uniformity in regulations, standards and procedures developed by ICAO, due to unilateral or multilateral actions that States can take from the information displayed in the Final Audit Report.

In summary, the legal foundations of the USOAP rely on Assembly Resolutions and Council Decisions, its evolution reflects the link of trust between the Organization and its members towards the program and the continuous need to verify how States are performing with respect to newly adopted SARPs and oversight capabilities. Through the USOAP, ICAO does not intend to categorize, fail or pass a Contracting State. The main objective of the program is to assess the level of compliance with the adopted SARPs in order to help audited States to elaborate a Corrective Action Plan and to implement it adequately to resolve the deficiencies identified during the audit.

The establishment of the contextual framework of the adoption, implementation and enforcement of SARPs and the background, foundations, process and policy of the USOAP lead us to the analysis of the evolution to achieve full transparency and its positioning as one of the core elements of the Program.

## **CHAPTER TWO: Evolution Process to Achieve Full Transparency in the Universal Safety Oversight Audit Programme**

Since its creation in 1999, the USOAP has satisfactorily met the challenges of its mandate in conducting safety oversight audits of all Contracting States. It has been fully supported and has proven to be an essential tool for auditing and improving the status of implementation of SARPs and safety oversight critical elements. Additionally, it has made possible the continuing determination of safety concern areas.<sup>88</sup> However, the USOAP has progressed and has experienced modifications that originated new trends in its implementation. Transparency, regarded as an aid in resolving safety-related deficiencies identified by the USOAP, has helped in determining the level of implementation of the SARPs and the safety oversight status of audited States. Additionally, it has been used to determine effective actions to increase compliance and implementation of these international regulations.

The following chapter presents the analysis of the evolution process – which lasted eleven years – to achieve full transparency agreed by Contracting States during sessions of the Assembly, Council meetings, and Directors General of Civil Aviation conferences. In addition, it shows relevant outcomes from the development of the program that are tightly related to the goal of achieving full transparency and the effects of unilateral misuse of safety information derived from the USOAP. The examination of the evolution path of this element will demonstrate that transparency was acquired by consensus of all Contracting States and therefore, the USOAP has gain the trust of the aviation community by releasing the audit reports to its members and the results to the public. As a result, the analysis of this evolution process will set up the basis for the comprehension of the outcomes of disclosing the audit information.

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<sup>88</sup> See Session of the ICAO Assembly. *Progress Report on the Implementation of the ICAO Universal Safety Oversight Audit Programme (USOAP)*, 35<sup>th</sup> Sess., Agenda Item No. 16: Improvement of Safety Oversight, ICAO Doc. A35-WP/67 (2004) § 4 [A35-WP/67].

## 2.1 Evolution of the Process to achieve Full Transparency

### 2.1.1 Unified Strategy to Resolve Safety-Related Deficiencies

During the 33<sup>rd</sup> Assembly, ICAO reviewed the deficiencies identified by the USOAP and recognized that some States did not have the financial, technical or human resources to manage them without assistance. Therefore, it was resolved that ICAO should use all its expertise to assist Contracting States in need.<sup>89</sup> Following that recommendation, the 171<sup>st</sup> Session of the Council requested the Secretary General to develop a strategy in that direction.

The Secretary General informed the 35<sup>th</sup> Assembly that while the overall results of the USOAP were encouraging, the analysis of the one-hundred-fifty-three audit follow-up missions conducted by 31 July 2004 revealed that some States had not made satisfactory progress resolving safety deficiencies which had been identified in the initial audits and thirty-six audited States had not made appropriate progress implementing their Corrective Action Plans.<sup>90</sup> To solve this situation, an action to assist States with the development of sustainable solutions to resolve safety deficiencies through a *unified strategy* was proposed to the Assembly. This unified strategy included the following aspects: uniform implementation of SARPs; mutual recognition of airworthiness certificates and licenses issued in accordance with the adopted SARPs; increased transparency and disclosure of audit results; enhancement of safety oversight performance; and cooperation, assistance and partnerships between ICAO, Contracting States, airspace users and air navigation services providers.<sup>91</sup>

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<sup>89</sup> See Resolutions adopted at the 33<sup>rd</sup> Session of the Assembly, Res. A33-9, ICAO Provisional Edition (2001) at 32 and 33 [Resolutions adopted at the 33<sup>rd</sup> Session of the Assembly].

<sup>90</sup> See A35-WP/67, *supra* note 88 § 2.2.

<sup>91</sup> See Session of the ICAO Assembly. *Unified strategy to resolve safety-related deficiencies*, 35<sup>th</sup> Sess., Agenda Item 16: Improvement of safety oversight, ICAO Doc. A35-WP/63 (2004) [A35-WP/63].

Members of the European Civil Aviation Conference (ECAC)<sup>92</sup> presented an opinion to the 35<sup>th</sup> Assembly contained in a document entitled “Views on the proposed ICAO unified strategy to resolve safety-related deficiencies” in which they expressed their concern with the minority of States who had failed to make satisfactory progress in the implementation of their respective Corrective Action Plans. They also commented about some of the principles of the unified strategy with a view to increasing the strategy’s effectiveness.

The principles of importance to the ECAC Members were transparency, increased disclosure of audits results and assistance to States in enhancing their safety oversight capabilities. With respect to transparency and increased disclosure, ECAC Members explained their view that increased information sharing amongst States including transparency and disclosure of USOAP results and a thorough analysis of the Audit Finding and Differences Database<sup>93</sup> (AFDD) were vital to the recognition of certificates and licenses issued in accordance with the Chicago Convention. They supported full disclosure of the audit report – at that time confidential – and the development of a procedure under Article 54 j) of the Chicago Convention in “which all Contracting States would be notified about any significant/major shortcomings regarding compliance with ICAO safety-related SARPs by an individual State.”<sup>94</sup> This recommendation will be analyzed in depth in a subsequent section (2.1.5) due to its importance for the purposes of this research. There seemed to be less support for the proposal to assist States in technical or financial need to resolve safety-related deficiencies due to practical difficulties noted. ECAC Members did ask the Council to develop specific assistance mechanisms to help States develop or implement an action plan following the USOAP audit. However, no specific action was

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<sup>92</sup> 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, Romania, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine and The United Kingdom.

<sup>93</sup> As a fundamental part of the USOAP, the Safety Oversight Audit (SOA) Section developed the AFDD designed to identify and quantify safety concerns at State, Regional and Global levels. The goal was to identify actions required to resolve safety concerns on the basis of accurate factual information. This database has in fact generated statistical analysis with respect to the critical elements audited by ICAO. It also has been useful categorizing this information into State, Regional and Global findings, identifying the major deficiencies and giving detailed perspective of the level of compliance in the implementation of each Annex of the Chicago Convention.

<sup>94</sup> Session of the ICAO Assembly. *Views on the proposed ICAO unified strategy to resolve safety-related deficiencies*, 35<sup>th</sup> Sess., Agenda Item 16, ICAO Doc. A35-WP/205<sup>1</sup> (2004) at 3 [A35-WP/205<sup>1</sup>].

proposed beyond the Secretariat's initial proposal or the programs already in place at that time.<sup>95</sup> It must be noted that the ECAC's proposal was directly related to disclosure and transparency but not to the remaining elements proposed by the Secretariat to develop the unified strategy.

Indeed, the unified strategy developed by ICAO envisioned a combination of the following elements to resolve the safety-related deficiencies identified by the USOAP: uniform implementation of SARPs; mutual recognition of airworthiness certificates and licenses issued in accordance with the adopted SARPs; increased transparency and disclosure of audit results; enhancement of safety oversight performance; and cooperation, assistance and partnerships between ICAO, Contracting States, airspace users and air navigation services providers.

After the debate of these views, the 35<sup>th</sup> Assembly adopted Resolution A35-7 which directed the Council to implement a “unified strategy based on the principles of increased transparency, cooperation and assistance and [the fostering], where appropriate, [of a] partnership [between] States, users, air navigation service providers, industry, financial institutions and other [stakeholders] to analyse causes [and to] establish and implement sustainable solutions in order to assist States in resolving safety-related deficiencies;”<sup>96</sup> additionally, from the fifteen actions adopted in this Resolution five mandates and one associated practice were related to transparency and disclosure of information<sup>97</sup> and nine were designated to promote cooperation, assistance and partnerships.<sup>98</sup>

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<sup>95</sup> See *ibid.*

<sup>96</sup> Resolutions adopted at the 35<sup>th</sup> Session of the Assembly, Res. A35-7, *supra* note 48 at 27.

<sup>97</sup> “The Assembly:

1. Urges all Contracting States to share with other Contracting States critical safety information which may have an impact on the safety of international air navigation and to facilitate access to all relevant safety information;
2. Encourages Contracting States to make full use of available safety information when performing their safety oversight functions, including during inspections as provided for in Article 16 of the Convention;
3. Directs the Council to further develop practical means to facilitate the sharing of such safety information among Contracting States;
4. Reminds Contracting States of the need for surveillance of all aircraft operations, including foreign aircraft within their territory and to take appropriate action when necessary to preserve safety;
5. Directs the Council to develop a procedure to inform all Contracting States, within the scope of Article 54 j) of the Chicago Convention, in the case of a State having significant compliance shortcomings with respect to ICAO safety-related SARPs;

In response, the Council created the Unified Strategy Programme (USP), administered by the ANB to implement the unified strategy to resolve safety-related deficiencies. This program is supported by two main pillars: i) assistance to States' CAAs through the elaboration and implementation of Corrective Action Plans while encouraging partnerships and regional cooperation and ii) use and sharing of safety-related information among Contracting States.

During the DGCA/06, the Secretariat presented a report entitled *Unified strategy to resolve safety-related deficiencies* which contained two main actions<sup>99</sup> taken by ICAO in order to accomplish the mandate of Resolution A35-7:

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(...)

Associated practice

1. The Council should develop ways in which all relevant information from the Audit Findings and Differences Database (AFDD) could be made available to all Contracting States through the use of the ICAO secure website.”

*Ibid.* at 26 and 27.

<sup>98</sup> “The Assembly:

(...)

6. Directs the Council to promote the concept of regional or sub-regional safety oversight organizations;

7. Requests the Secretary General to continue to foster coordination and cooperation between USOAP and audit programmes of other organizations related to aviation safety, and specifically with IATA and Eurocontrol;

8. Urges Contracting States to further develop regional and sub-regional cooperation and, whenever feasible, partnership initiatives with other States, industry, air navigation service providers, financial institutions and other stake holders to strengthen safety oversight capabilities in order to foster a safer international civil aviation system and to better discharge their individual responsibilities;

9. Encourages States to foster the creation of regional or sub-regional partnerships to collaborate in the development of solutions to common problems to build their individual safety oversight capability;

10. Encourages all States able to do so to participate in, or provide tangible support for, the strengthening and furtherance of regional safety oversight organizations;

11. Invites Contracting States to use the services of the ICAO Technical Cooperation Bureau (TCB) to resolve deficiencies identified by the USOAP;

12. Invites Contracting States experiencing difficulties in financing measures necessary to correct safety-related deficiencies identified through USOAP to take advantage of the funding opportunity offered by the International Financial Facility for Aviation Safety (IFFAS);

14. Directs the Council to adopt a flexible approach for the provision of assistance through the ICAO Regional Offices to support regional and sub-regional organizations responsible for safety oversight tasks and to implement an efficient system to monitor implementation of the unified strategy.

(...)

15. Requests the Secretary General to investigate ways in which the identification of measures may be undertaken at national and regional levels to support States' development of ATM safety oversight capabilities and procedures.”

*Ibid.* at 26 and 27.

<sup>99</sup> See Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety. *Unified Strategy to resolve safety-related deficiencies*, 6<sup>th</sup> Sess., Theme 2: Improving aviation safety, ICAO Doc. DGCA/06-WP/7 (2006) § 2 and 3 [DGCA/06-WP/7].



1. ICAO supported four initiatives to assist Contracting States in need to develop and implement their Corrective Action Plans: i) establishment and management of regional or sub-regional safety oversight organizations (RSOOs); ii) training of SARPs implementation teams; iii) cooperative Development of Operational Safety and Continuing Airworthiness Programmes (COSCAPs); and partnerships between States and the industry, air navigation service providers, financial institutions and other stakeholders.
2. ICAO launched a web-based information tool named Flight Safety Information Exchange (FSIX) that provides access to safety-related information through the ICAO secure website in order to exchange it among Contracting States.

From the evolution of this outcome at this point, the original four elements<sup>100</sup> that should pursue the unified strategy to resolve safety-related deficiencies mandated by the 35<sup>th</sup> Assembly, two elements played the main role in the agenda of the DGCA/06: cooperation, assistance and partnerships to resolve safety-related deficiencies and increased transparency and disclosure.

This seeming uncertainty concerning the unified strategy perceived in the DGCA/06 was clarified during the 36<sup>th</sup> Session of the Assembly. The recommendations of the DGCA/06 were reaffirmed by giving priority to assist Contracting States' safety oversight systems through partnerships and alliances and enhancing transparency of audit results and the exchange of safety information. Additionally, proactive activities to improve safety-related deficiencies were approved. One important example of such activity is the development of the Comprehensive Regional Implementation Plan for Africa (AFI-PLAN).<sup>101</sup>

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<sup>100</sup> 1) Uniform implementation of SARPs; 2) Mutual recognition of airworthiness certificates and licenses issued in accordance with the adopted SARPs; 3) Increased transparency and disclosure of audit results; 4) Enhancement of safety oversight performance; and 5) Cooperation, assistance and partnerships between ICAO, Contracting States, airspace users, air navigation services providers and the industry.

<sup>101</sup> See Session of the ICAO Assembly. *Progress report on the implementation of the ICAO Unified Strategy Programme (USP)*, 36<sup>th</sup> Sess., Agenda Item 12: Progress report on the implementation of the ICAO Unified Strategy Programme (USP), ICAO Doc. A36-WP/53 (2007) § 2.6.2.

The original unified strategy to resolve safety-related deficiencies was created because of the concern of several Contracting States with deficiencies identified in the USOAP. The unified strategy approach was intended to be an inclusive system that encompassed several streams in order to fulfill its objective. With respect to transparency and disclosure, the original aim was to gather sufficient data to identify common regional deficiencies and propose common solutions in order to improve safety in a harmonized way. The cooperation and assistance provided to States in the implementation of the Corrective Action Plan serve as important means to improve compliance with SARPs. As will be explained, both elements work together to achieve the homogeneity in the implementation of SARPs. In addition, it is important to highlight that the complete unified strategy was focused to two elements: increased transparency and disclosure, and cooperation and assistance. Due to the scope of this research, the first element is the one that will be analyzed in depth; however, both elements work in parallel and should pursue the improvement of safety practices among States.

### **2.1.2 Transparency and Disclosure is Born as a Principle (1997-1998)**

The origin of the process to achieve full transparency of audit results can be tracked to the DGCA/97. At this time what was to become the USOAP was known as the Safety Oversight Assessment Program (SOAP). A recommendation was drafted to reflect that greater transparency and increased disclosure should be implemented in the release of audit results by expanding the information in summary reports. If this were done, these reports could be used by other States to form an opinion as to the safety oversight status of the assessed States. An important factor considered in the recommendation was that a reasonable time should be given to States to remedy the deficiencies noticed in the audits before such report would be disclosed.<sup>102</sup>

It must be noted that the recommendations of the DGCA/97 never had binding force, but the rationale of greater transparency envisaged during the DGCA/97 was accepted by

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<sup>102</sup> See Session of the ICAO Assembly. *Transition to the ICAO Universal Safety Oversight Audit Programme*, 32<sup>nd</sup> Sess., Agenda Item No. 17: Safety Oversight, ICAO Doc. A32-WP/61 (1998) § 3.1.

the 32<sup>nd</sup> Assembly, when the program was transformed from the SOAP – a voluntary and confidential assessment program – to the USOAP – a mandatory and transparent audit program. In Assembly Resolution A32-11 was decided “that greater transparency and increased disclosure be implemented in the release of audit result.”<sup>103</sup> Importantly, the Assembly urged all Contracting States “to ensure that the results of the audits be used for safety-related purposes only.”<sup>104</sup>

To reach the Resolution mentioned above the following comments were presented by Contracting States to the 32<sup>nd</sup> Assembly:

1. ECAC Members mentioned that “greater transparency and increased disclosure should be implemented” and that “timely publication of the summary reports giving appropriate information would also be an essential part of” the commitment between ICAO and States to achieve the universal aspect of the program. ECAC invited the Assembly to adopt a Resolution in which States would “accept universal and *transparent assessments* to be performed by ICAO.” [emphasis added]<sup>105</sup>
2. The North American Aviation Trilateral (NAAT) entered into by Canada, Mexico and the United States of America<sup>106</sup> highlighted that if non-compliance with safety oversight provisions was identified, States receiving air services from non-compliant States have the opportunity to “initiate bilateral consultations about their safety concerns or take other appropriate action in a prompt manner to protect civil

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<sup>103</sup> See *Resolutions adopted at the 32<sup>nd</sup> Session of the Assembly*, Res. A32-11, ICAO Provisional Edition (2001) at 21 [Resolutions adopted at the 32<sup>nd</sup> Session of the Assembly].

<sup>104</sup> *Idem.*

<sup>105</sup> Session of the ICAO Assembly. *A European view of the ICAO Safety Oversight Programme*, 32<sup>nd</sup> Sess., Agenda Item No. 17: Safety Oversight, ICAO Doc. A32-WP/84 (1998) § 2 and 11.1, a).

The following thirty-seven Contracting States presented this document on behalf of ECAC: Albania, Armenia, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Monaco, The Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey and The United Kingdom.

<sup>106</sup> On 1 January 1994 the North American Free Trade Agreement (NAFTA) between Canada, Mexico and United States became effective. Shortly thereafter, aviation officials from the NAFTA countries agreed to form the North American Aviation Trilateral (NAAT) along with the Trinational Safety Steering Committee to oversee aviation safety issues.

aviation operations in their territories.”<sup>107</sup> NAAT encouraged the Council “to expand the summary reports of ICAO audits to contain sufficient detailed information so that other Contracting States can form an opinion as to the safety oversight status of the audited States.”<sup>108</sup>

3. Fifty-three African States presented an opinion urging ICAO to make “systematic and mandatory the audit/assessments under the ICAO Safety Oversight Programme and develop technical cooperation mechanisms with a view to assisting States which so wish to remedy their possible shortcomings highlighted by ICAO experts audits.”<sup>109</sup> However, they stated that audit findings were intended to be confidential and they did not express any intention to share audit results.

From a review of the documentation presented to the Assembly and described above, it can be concluded that forty-one States were in favor of releasing the audit information as opposed to fifty-three States that did not appear to agree to such a release. The Resolution adopted by the Assembly that greater transparency and increased disclosure should be implemented in the release of audit results was taken by consensus. This action reflects that Contracting States were in the same line of thinking regarding this important achievement.

It would seem to be noteworthy that the opinion of NAAT specifically intended to seek a consultation process – a procedure contained in the majority of air transport bilateral and multilateral agreements as the appropriate means of dispute resolution.<sup>110</sup> From this

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<sup>107</sup> Session of the ICAO Assembly. *Enhancing the ICAO Safety Oversight Program*, 32<sup>nd</sup> Sess., Agenda Item No. 17: Safety Oversight, ICAO Doc. A32-WP/91 (1998) § 2.2 and 3.1, b). Bolivia adhered to the opinion presented by NAAT in the ICAO Doc. A32-WP/91 Corrigendum.

<sup>108</sup> *Ibid.*

<sup>109</sup> Session of the ICAO Assembly. *Safety Oversight*, 32<sup>nd</sup> Sess., Agenda Item No. 17: Safety Oversight, ICAO Doc. A32-WP/158 (1998) § 2.2.3 and 3.1, 1.

The opinion was presented by Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroun, Cape Verde, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, San Tome & Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, United Republic of Tanzania, Zambia and Zimbabwe.

<sup>110</sup> Most bilateral and multilateral air transport agreements require consultation by governments over disputes before any retaliatory action is taken.

See generally Bin Cheng, “Dispute Settlement in Bilateral Air Transport Agreements”, *Settlement of Space Law Disputes* 97 (1979).

perspective, it is legally correct to start the dispute resolution process if one party is not satisfied with the adequate execution of a clause contained in a bilateral agreement, in this case the safety clause. Therefore, if a State engaged in an agreement of this nature has agreed to implement and maintain the minimum safety requirements established by ICAO and if it fails to fulfill this obligation, the direct legal consequence will be to start the process established in the agreement to remedy this situation. In the majority of the bilateral and multilateral agreements, a consultation process is the appropriate action to follow. However, as it is going to be argued in Chapter Three, unilateral and retaliatory actions based only on political or economic basis, such as banning an airline based on safety-related information, is expressly prohibited by the mandate of the Assembly of using the USOAP's information for other purposes than safety-related.<sup>111</sup>

Finally, it is important to mention that the 32<sup>nd</sup> Assembly was silent regarding the scope and degree of transparency and disclosure to be implemented in the release of audit results. However, the first intention seems to have been to take the necessary steps to identify safety related deficiencies and propose corrective actions to achieve the *highest practicable degree* of uniformity with SARPs.

### **2.1.3 Sharing Audit Findings' Analysis (1998-2000)**

Following the mandate of the 32<sup>nd</sup> Assembly to increase transparency and disclosure in the release of audit information, the 163<sup>rd</sup> Session of the ICAO Council agreed on "posting the analysis of the audit findings at global and regional levels on a password protected ICAO safety oversight webpage."<sup>112</sup> However, the Council noted and agreed with concerns expressed by the ANC with respect to confidentiality given the sensitivity and details of the information, therefore various levels of protection were implemented.<sup>113</sup> With respect to the evolution process to achieve full transparency in the audit results, this was the very first concrete step. Following the rationale of the mandate of the 32<sup>nd</sup> Assembly and the

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<sup>111</sup> See Resolutions adopted at the 32<sup>nd</sup> Session of the Assembly, Res. A32-11, *supra* note 103.

<sup>112</sup> Session of the ICAO Council. *Summary of the Minutes of the 10<sup>th</sup> Meeting*, 163<sup>rd</sup> Sess., ICAO Doc. C-MIN/10 (2001) § 20, f).

<sup>113</sup> See *Ibid.*

following related Sessions of the ICAO Council, it is evident that the original aim of greater transparency and disclosure was to identify common areas of opportunity to resolve safety deficiencies. In other words, proactive action was intended to achieve safer skies globally, regionally and at a State level. This statement is reaffirmed with the importance given by the Assembly to use for only safety-related purposes the sensitive information derived from the USOAP.

#### **2.1.4 Display of Non-Confidential Audit Summary Reports (2001-2002)**

During the 33<sup>rd</sup> Assembly, eight fundamental principles<sup>114</sup> were developed to assure States of the validity of the audit process to Contracting States (previously mentioned in section 1.4.2). In relation to Transparency and Disclosure it was proposed that “ICAO [should] publish a non-confidential audit summary report of each complete audit. The summary report shall contain sufficient information to enable Contracting States to form an opinion as to the safety oversight status of the Audited State.”<sup>115</sup> It was also proposed that the information displayed within the summary reports should include the improvements, if any, made by the State in order to have accurate and up to date information of the safety oversight status of the Audited State. This last point is crucial because the summary reports were initially based only on the audited results and not on the actual situation of the State once a Corrective Action Plan was implemented and the State’s SARPs implementation and safety oversight was improved. Actually, States are able to upload their improvements in the ICAO website, however these facts are not verified by the SSA until an on-site audit or follow-up mission is conducted.

Even though Transparency and Disclosure were extensively discussed during the 33<sup>rd</sup> Assembly no Resolution was made concerning disclosure of summary reports.<sup>116</sup> The only

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<sup>114</sup> Sovereignty; Universality; Transparency and disclosure; Timeliness; All-inclusiveness; Systematic, consistent and objective; Fairness; and Quality.

<sup>115</sup> Session of the ICAO Assembly. *Report on the ICAO Universal Safety Oversight Audit Programme*, 33<sup>rd</sup> Sess., Agenda Item No. 15: Improvement of safety oversight, ICAO Doc. A33-WP/47 (2001) § 2.4 [A33-WP/47].

<sup>116</sup> See Resolutions adopted at the 33<sup>rd</sup> Session of the Assembly, Res. A33-8 and Res. A33-9, *supra* note 89 at 31 to 34.

Resolution related to sharing information was the request made to the Secretary General “to solicit information from States that have successfully resolved major deficiencies and publish the results, so that other Contracting States may benefit from each other’s experience.”<sup>117</sup> According to a literal interpretation of Resolution A33-9, the mandate was to publish the resolution of deficiencies and it should not be misunderstood as a mandate to publish the summary reports. Therefore, it can be concluded that the aim and spirit of this Resolution were to give attention to Contracting States’ efforts in resolving deficiencies identified by the USOAP.

Following the 33<sup>rd</sup> Assembly, during its 165<sup>th</sup> Session, the ICAO Council decided to share non-confidential and safety-enhancing information in order to enhance global aviation safety.<sup>118</sup> A webpage was recommended as the means to share this type of information with States, ICAO bureaux and offices, and international and regional organizations.<sup>119</sup> This website was intended to include all audits and follow-up summary reports published listed by State, as well as information relating to the successful resolution of safety deficiencies.<sup>120</sup> In 2002, the webpage on the ICAO-Net dedicated to USOAP became fully operational and provided links to all audit and follow-up summary reports published.<sup>121</sup> At this point, only Contracting States and the Secretariat, including Regional Offices, had access to the information displayed on the ICAO webpage.

The resolution taken by the Council to post the audit and follow-up summary reports on the ICAO’s secure website was the second step in the process of evolution towards full transparency. According to the progress reports presented by the Secretary General that

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The United States of America presented the only document related to this issue in which it suggested that the summary of the audit report should be comprised of eight sections, one each to depict the findings and recommendations for each of the eight critical elements covered by the USOAP.

See Session of the ICAO Assembly. *Enhancing the Quality and Usefulness of ICAO Audit Information*, 33<sup>rd</sup> Sess., Agenda Item No. 15: Improvement of safety oversight, ICAO Doc. A33-WP/66 (2001) § 2.3.

<sup>117</sup> Resolutions adopted at the 33<sup>rd</sup> Session of the Assembly, Res. A33-9, *supra* note 89 at 34.

<sup>118</sup> See Session of the ICAO Council. *Summary of Decisions*, 165<sup>th</sup> Sess., Subject No. 14.5: Progress of the ICAO Universal Safety Oversight Audit Programme, ICAO Doc. C-DEC 165/11 (2002) § 3, d).

<sup>119</sup> See Session of the ICAO Council. *Progress of the ICAO Universal Safety Oversight Audit Programme*, 165<sup>th</sup> Sess., Agenda Item No. 14.5: Safety Oversight, ICAO Doc. C-WP/11749 (2002) § 3.3.

<sup>120</sup> See Session of the ICAO Council. *Progress of the ICAO Universal Safety Oversight Audit Programme*, 166<sup>th</sup> Sess., Agenda Item No. 14.5: Safety Oversight, ICAO Doc. C-WP/11815 (2002) § 4.

<sup>121</sup> See Session of the ICAO Council. *Progress of the ICAO Universal Safety Oversight Audit Programme*, 167<sup>th</sup> Sess., Agenda Item No. 14.5: Safety Oversight, ICAO Doc. C-WP/11913 (2002) § 3.2.

justified this decision, the analysis of the results helped in the identification of areas where work might be required (reviewing SARPs, developing guidance material, conducting training sessions, among others). The AFDD provided support to the Organization to make determinations on implementing specific SARPs, developing guidance material or conducting training activities.

It is important to mention that the decision to display summary reports made by ICAO was taken by the Council, a body composed at that time by thirty-three Contracting States. Prof. Milde has argued that since less than 18% of ICAO's Contracting States<sup>122</sup> took the decision to display the USOAP information, this decision could be considered "dubious legally binding"<sup>123</sup> among all Contracting States. However, various groupings of Contracting States sign *Rotation Agreements for Representation* to the Council, including: i) Abis Group; ii) Central American Group; iii) East European States; iv) Maghreb States; v) Nordic States; vi) Colombia and Venezuela; vii) South American Group/*Acuerdo de Rotación Sudamericana A.R.S.*; viii) Southern African Development Community/S.A.D.C.; and ix) Caribbean States.<sup>124</sup> The States comprised in the *Rotation Agreements for Representation* mentioned above plus the States represented in the Council comprise just over 50% of ICAO Members. From my perspective, the decisions of the Council, taking into consideration these *Rotation Agreements for Representation*, are adopted by a highly representative body and cannot be seen the imposition of a small minority.

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<sup>122</sup> ICAO "Contracting States (188) (As of 20 June 2002)", online: The International Civil Aviation Organization <<http://www.icao.int/icao/en/members.htm>>.

<sup>123</sup> See Michael Milde, "The ICAO Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety" (2006) XXXI Ann. Air & Sp. L. 475 at 476.

<sup>124</sup> The Abis Group is integrated by Austria, Belgium, Ireland, Luxembourg, The Netherlands and Switzerland; The Central American Group is integrated by Belize, Costa Rica, Salvador, Guatemala, Honduras, Nicaragua and Panama; The East European States group is integrated by Czech Republic, Hungary, Romania, Slovakia and Slovenia; The Maghreb States group is integrated by Algeria, Morocco and Tunisia; The Nordic States group is integrated by Denmark, Finland, Iceland, Norway and Sweden; Rotation between Colombia and Venezuela is integrated by Colombia and Venezuela; The South American Group/*Acuerdo de Rotación Sudamericana A.R.S.* is formed by Bolivia, Chile, Ecuador, Paraguay, Peru and Uruguay; The Southern African Development Community/S.A.D.C. group is integrated by Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe; and The Caribbean States integrated by Antigua and Barbuda, Bahamas, Barbados, Cuba, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, St. Kitts and Nevis, Suriname and Trinidad y Tobago.

See Memoranda of the Aviation Security Aviation Section (ASA) [n.d. 2007?] titled as "Groups of ICAO Member States with Rotation Agreements for Representation".



In sum, the Council sought to implement greater transparency and increased disclosure of audit results with special caution that the information would be used only for safety-related purposes. Additionally, its goal was to seek common deficiencies in order to propose collective solutions. Posting and using audits summaries drafted by ICAO according to the progress reports of the USOAP achieved this purpose. It must nevertheless be noted that the decision to summarize the audits and publish them was not taken by the consensus of the ICAO Assembly. These decisions were taken by the Council unanimously.

On the other hand, as will be discussed in the following Chapter, the implications of publishing sensitive information involve not only the possible actions of ICAO as an international organization, but also the unilateral actions taken by States or groups of States. Furthermore, ICAO has the mandate to assure that the actions of Contracting States derived from the audit results are intended to pursue the resolution of safety-related deficiencies of States in order to achieve the *highest practicable degree* of compliance with the SARPs and therefore safer civil aviation practices.

#### **2.1.5 Display of Audit Reports on ICAO's Webpage and Creation of the Procedure of Transparency and Disclosure (2004-2005)**

Prior to the 35<sup>th</sup> Assembly, a concern was expressed in the Council by the representative of France about “the continuing trend regarding the growing number of States which, for various reasons, have not shown much progress in the implementation of their corrective action plans and in the resolution of identified deficiencies at the time of their initial audits.”<sup>125</sup> Because of this, the French representative proposed that audit reports should be published in their entirety as a means of increasing transparency. Furthermore, he proposed that safety-related deficiencies should be reported to the Council in accordance with Article 54 j) of the Chicago Convention.

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<sup>125</sup> Session of the ICAO Council. *Progress Report on the Implementation of the ICAO Universal Safety Oversight Audit Programme (USOAP)*, 172<sup>nd</sup> Sess., Agenda Item No. 14.5: Safety Oversight, ICAO Doc. C-WP/12289 (2004) § 2.5.

Under Article 33 of the Convention:

[C]ertificates of airworthiness and certificates of competency and licenses issued or rendered valid by the Contracting State in which the aircraft is registered, shall be recognized as valid by the other Contracting States, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to [the Chicago] Convention.<sup>126</sup>

The obligation imposed by Article 33 is that if national regulations relating to the issuance of certificates and licenses are equivalent to or more stringent than the said minimum standards established by ICAO, then Contracting States have the obligation to recognize those certificates and licenses as valid. A *contrario sensu* if national regulations do not meet the minimum ICAO's standards then there is no obligation to recognize as valid the certificates and licenses issued under its jurisdiction.<sup>127</sup> The mutual recognition of certificates and licenses in combination with the public dissemination of information obtained from the audits reports produce safety and economic consequences, all of which will be studied in Chapter Three.

On the other hand, the representative of France underscored the fact that in accordance with the mandatory functions of the Council established in Article 54 j) of the Chicago Convention, it is obliged "to report to Contracting States any infraction of the Convention, as well as any failure to carry out recommendations or determinations of the Council."<sup>128</sup> He stressed that this "warning" should be issued only after all available means had been deployed to remedy the identified deficiencies. Finally, the French representative emphasized that:

[A] State could not be prevented from taking unilateral measures against a specific operator if it considered that that operator did not meet the minimum safety requirements [and indeed France] had done so, as had other States. In acknowledging

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<sup>126</sup> Chicago Convention, *supra* note 7 § Article 33.

<sup>127</sup> See Session of the ICAO Council. *Summary Minutes of the 14<sup>th</sup> Meeting*, 172<sup>nd</sup> Sess., Agenda Item No. 14.5: Safety Oversight, ICAO Doc. C-MIN 172/14 (2004) § 7 [C-MIN 172/14].

<sup>128</sup> Chicago Convention, *supra* note 7 § Article 54 j).

States' right not to recognize the validity of certificates of airworthiness and certificates of competency and licenses if they did not meet the minimum standards established pursuant to the Convention, Article 33 was enabling States to restrict access to their respective airspace.<sup>129</sup>

Representatives of Argentina, Australia, Brazil, Mexico, Cameroon, Canada, China, Costa Rica, Cuba, Czech Republic, Germany, Italy, Mauritius, Nigeria, Russian Federation, Sweden, United States, and Venezuela supported this view favouring greater transparency.<sup>130</sup> A comment was also made that deficiencies must be addressed within a multilateral framework without the suggestion of coercive measures or the possibility of unilateral action by States. This subject was later presented to the 35<sup>th</sup> Assembly under Agenda Item No. 16: Improvement of Safety Oversight.

Within the *Unified Strategy to Resolve Safety-Related Deficiencies to assist Contracting States experiencing difficulties in correcting safety deficiencies*, a document presented to the 35<sup>th</sup> Session of the Assembly to improve safety oversight under Agenda Item No. 16, the point of Transparency and Increased Disclosure suggested the following actions:<sup>131</sup>

1. Beyond the current practice of distributing non-confidential audit reports and follow-up summaries to all Contracting States, additional information from the AFDD could be made available to all Contracting States through the use of the ICAO secure website.
2. CAAs may identify safety deficiencies and take appropriate measures affecting specific foreign air operators based on safety-related information (such as: ramp checks, non-ICAO audit programs, incident and accident reports and ICAO audit reports).

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<sup>129</sup> See C-MIN 172/14, *supra* note 127 § 28.

<sup>130</sup> *Ibid.* § 28-42.

<sup>131</sup> See A35-WP/63, *supra* note 91 § 5.

3. ICAO should facilitate safety-related information, including information contained in audit reports, to permit identification of non-compliant States.
4. While States may take unilateral measures in the interest of safety in their airspace, the Council proposed a multilateral approach to address safety-related deficiencies.

The following views were presented to the 35<sup>th</sup> Assembly:

1. The United States of America and Canada fully supported the provisions related to transparency and disclosure mentioned above contained in the *Unified Strategy to Resolve Safety-related Deficiencies*.<sup>132</sup>
2. ECAC Members agreed with the transparency and disclosure suggestions of the document presented to the Assembly and invited the 35th Assembly to: i) set a procedure, within the ambit of Article 54 j) of the Chicago Convention, to notify all Contracting States about any significant shortcomings regarding compliance with safety related SARPS by an individual State; ii) develop specific assistance mechanisms for States not in a position to develop or implement an action plan; iii) facilitate the sharing of relevant safety-related information among States and interested parties; iv) make the full final reports of the ICAO auditing teams available; and v) provide access to the AFDD.<sup>133</sup>

With only two opinions on the subject, the Assembly adopted by consensus the following Assembly Resolutions A35-6 and A35-7 related to Transparency and Disclosure:

A35-6 The Assembly:

(...)

7. Directs the Secretary General to make the final safety oversight audit reports available to all Contracting States and also to provide access to all

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<sup>132</sup> See Session of the ICAO Assembly. *The comprehensive systems approach for audits in the ICAO Universal Safety Oversight Audit Programme*, 35<sup>th</sup> Sess., Agenda Item No. 16: Improvement of Safety Oversight, ICAO Doc. A35-WP/106 (2004) § 2.4 and 4.1, b) and *Corrigendum* No. 1.

<sup>133</sup> See A35-WP/205<sup>1</sup>, *supra* note 94 § 21.

relevant information derived from the Audit Findings and Differences Database (AFDD) through the secure website of ICAO;

Note.- The audit final report contains the audit findings, recommendations, State's action plan and comments, as well as the comments of the Safety Oversight Audit Section on the State's action plan.

#### A35-7 The Assembly:

(...)

1. Urged all Contracting States to share with other Contracting States critical safety information which may have an impact on the safety of international air navigation and to facilitate access to all relevant safety information;
2. Encouraged Contracting States to make full use of available safety information when performing their safety oversight functions, including during inspections as provided for in Article 16 of the Convention;
3. Directed the Council to further develop practical means to facilitate the sharing of such safety information among Contracting States;
4. Reminded Contracting States of the need for surveillance of all aircraft operations, including foreign aircraft within their territory and to take appropriate action when necessary to preserve safety;
5. Directed the Council to develop a procedure to inform all Contracting States, within the scope of Article 54 j) of the Chicago Convention, in the case of a State having significant compliance shortcomings with respect to ICAO safety-related SARPs; and
6. Directed the Council to develop ways in which all relevant information from the Audit Findings and Differences Database (AFDD) could be made available to all Contracting States through the use of the ICAO secure website.<sup>134</sup>

Only summaries of the audit reports were distributed through the secure site of ICAO before the 35<sup>th</sup> Assembly directed the Secretary General to make the final safety oversight audit reports available to all Contracting States and also to provide access to all relevant information derived from the AFDD. The Assembly also directed the Council to develop a procedure to inform all Contracting States, in the case of a State having a significant compliance concern with respect to the implementation of the safety-related SARPs. These two actions taken by the Assembly regarding Transparency and Disclosure were highly significant and could be considered as the third step of the evolutionary process aimed to achieve full transparency and disclosure. The first step was taken when the Assembly gave a very generic mandate that greater transparency and increased disclosure should be

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<sup>134</sup> Resolutions adopted at the 35<sup>th</sup> Session of the Assembly, Res. A35-6 and Res. A35-7, *supra* note 48 at 26.

implemented in the release of audit results. The second step was taken when non-compliant States were identified. However, this scheme was eventually going to be shaped to reach a specific target: States that demonstrate severe and persistent safety oversight shortfalls after all assistance alternatives have been exhausted should be exposed to allow other States to protect their aviation industry, airspace, passengers and goods from a safety risk. Thus, pursuant to Resolutions A35-6 and A35-7, through the *Progress report on the implementation of the ICAO Universal Safety Oversight Audit Programme*, the Secretary General informed ICAO Contracting States that as of 31 October 2004, all audit summary reports were published and distributed to Contracting States in addition with relevant information from the AFDD.<sup>135</sup>

In case of a State having significant compliance shortcomings with respect to safety-related SARPs, the Secretariat came up with a *Procedure of Transparency and Disclosure* within the scope of Article 54 j) of the Convention.<sup>136</sup> Three different scenarios<sup>137</sup> were

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<sup>135</sup> See Session of the ICAO Council. *Progress report on the implementation of the ICAO Universal Safety Oversight Audit Programme*, 173<sup>rd</sup> Sess., Agenda Item No. 14.5: Universal Safety Oversight Programme, ICAO Doc. C-WP/12314 (2004) § 2.1.1.

<sup>136</sup> See Session of the ICAO Council. *Procedure of Transparency and Disclosure*, 174<sup>th</sup> Sess., Agenda Item No. 14.5: Safety Oversight, ICAO Doc. C-WP/12497 (2005) [C-WP/12497].

<sup>137</sup> SCENARIO 1: A State that participates in the USAOP process and has persistently poor results. This State has very few resources to devote to safety oversight. It may lack even a basic regulatory framework and have few or no qualified personnel to participate in certification and surveillance of operators. When the level of aviation activity in this State is examined, it is clear that the State engages in a relatively low level of aviation activity that is essential to the support of its economy.

This indicates a deliberate balance between oversight capability and essential aviation activity.

Assistance will be offered assistance under the unified strategy.

Such a State would not be the object of special Council consideration regarding the procedure for transparency and disclosure under Article 54 j).

SCENARIO 2: A State may have difficulties managing the safety and effectiveness of its air navigation facilities. The specific air navigation deficiencies will be routinely tracked through the long-standing regional planning process. When the USOAP audit occurs, there will likely be findings and recommendations regarding the State's ability to manage air navigation safety issues.

The State will receive appropriate assistance under the unified strategy to resolve their safety oversight shortfalls.

This State will not be the subject of special Council consideration regarding the procedure for transparency and disclosure under Article 54 j).

SCENARIO 3: A State demonstrates severe and persistent safety oversight shortfalls. This State may not have participated fully, or at all, in the USOAP audit process. The data available regarding this State's limited safety oversight capabilities may be limited. Also, data indicates that this State is engaging in aviation activities that seem implausible, given what is known about that State's safety oversight capability.

In this case the first action would be to obtain better information about the State's safety oversight capabilities and aviation activities. All efforts would be made to do this through collaboration with the State. A special USOAP mission may be recommended and ICAO may choose to request this State to provide currently valid aircraft registry and ownership information, with reference to Article 21 of the Convention. It is possible this

envisaged flowing from significant/persistent compliance shortfalls and where ultimately all other alternatives have been exhausted. In essence, the matter would be brought to the attention of the Council, which could make recommendations as appropriate. If the State in question fails to carry out such recommendations, all Contracting States should be informed, in accordance with Article 54 j) of the Chicago Convention. The procedure was designed to be non-discriminatory, and was not intended to disadvantage States that lack resources. It is not to be misused for political or economic reasons; therefore proper safeguards, with associated principles and safety risk indicators<sup>138</sup> were to be weighed and applied.<sup>139</sup>

The procedure was presented and approved unanimously by the Council on 13 June 2005, during the thirteenth meeting of the 175<sup>th</sup> Session of the Council.<sup>140</sup> However, some Council members raised additional considerations.

In particular, the French representative noted that the procedure should only be used a last resort. Before its actual implementation, a dialogue between the concerned State and ICAO's Secretariat must be conducted and if the State does not address the Secretariat's comments, a second dialogue would be started with the Council. After the explanations

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State will be unable to support such validation efforts, or could be prevented from participating because of external forces. As information is developed, this State would receive priority consideration for assistance under the unified strategy.

If the State was unwilling or unable to participate in such activities, the case would be presented to the ICAO Council for special consideration and possible future action under the procedure for transparency and disclosure under Article 54 j). This would be necessary because the safety risk posed by this State's operators is not contained, the transparency mechanisms under Assembly Resolution A35-7 are not effective, and progress towards resolution is not being made.

<sup>138</sup> The following safety risk indicators should be taken into account in determining that a level of risk to safety which may warrant action by Council has been reached:

- 1) Failure to participate in USOAP audit process.
- 2) Failure to complete the State Aviation Activity Questionnaire and compliance checklists.
- 3) Failure to participate in an on-site audit under USOAP.
- 4) Failure to submit an acceptable corrective action plan.
- 5) Failure to resolve the safety-related deficiencies identified in the USOAP audit.
- 6) Level of activity inconsistent with safety oversight capability.
- 7) Nature of activity inconsistent with safety oversight capability.
- 8) Aircraft accident and incident data associated with a State's safety oversight responsibilities and obligations.

<sup>139</sup> See C-WP/12497, *supra* note 136 § 1 and 6.

<sup>140</sup> See Session of the ICAO Council. *Summary Minutes of the Thirteenth Meeting*, 175<sup>th</sup> Sess., Agenda Item No. 14.5: Safety Oversight, ICAO Doc. C-MIN 175/13 (2005) § 44, c).

provided by the State, the Council would send a recommendation or decision. ICAO would only put in practice the *Procedure of Transparency and Disclosure* if the Council's recommendation or decision is not implemented, and upon a re-examination by the Council in the presence of the State in question to ascertain that nothing had been done.<sup>141</sup>

#### **2.1.6 Publication of Final Safety Oversight Audit Reports on the Public Website and the New Concept of Significant Safety Concern (2005-2008)**

During the DGCA/06 held in 2006, the Secretariat presented significant issues of concern arising from audits and follow-ups conducted between 1999 and 2004. Seven Contracting States had not been audited by ICAO as of the date of the Conference (Afghanistan, Burundi, Iraq, Liberia, Sierra Leone, Solomon Islands and Somalia); seven Contracting States had not submitted a Corrective Action Plan and therefore had not been visited for audit follow-up missions (Central African Republic, Djibouti, Equatorial Guinea, Guinea-Bissau, Micronesia, Nauru, and Sao Tome and Principe); in eight States the audit follow-up missions were not conducted (Chad, Congo, Eritrea, Kiribati, Libyan Arab Jamahiriya, Marshall Islands, Rwanda and Swaziland); and four States had not been visited for follow-up for other reasons (Andorra and San Marino were judged not necessary because of the absence of civil aviation activity and Israel and Democratic Republic of the Congo could not be visited).<sup>142</sup> Additionally, in its report on the *Unified strategy to resolve safety-related deficiencies*, the Secretariat informed the DGCA/06 about the launching of the FSIX contained in the secure website of ICAO to provide and exchange safety-related information among the Contracting States.<sup>143</sup>

Regarding the specific topic of Transparency and Disclosure of the USOAP, the Secretariat presented a working paper to the DGCA/06 proposing that the final audit reports should be available not only to Contracting States, but also to the industry and the public in general through the ICAO public website. Until this proposal, the audits were conducted

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<sup>141</sup> *Ibid.* § 16.

<sup>142</sup> See DGCA/06-WP/3, *supra* note 39 § 4.

<sup>143</sup> See DGCA/06-WP/7, *supra* note 99 § 3.1.



under a Memorandum of Understanding (MOU) signed between the Audited State and ICAO in which the full version of the Audit Reports were confidential. The document suggested that Directors General of Civil Aviation generally entitled to sign the Memoranda of Understanding for the initial cycle of audits, in consultation with their respective governments, would have to authorize the full release of the final safety oversight audit reports derived from the initial and current audit cycles so as to allow them to be posted on the ICAO public website<sup>144</sup>. Additionally, the Secretariat proposed a mechanism to resolve as soon as possible significant safety concerns identified by the USOAP.<sup>145</sup>

Austria, on behalf of the European Community and its Member States,<sup>146</sup> other States Members of ECAC<sup>147</sup> and EUROCONTROL, urged ICAO to make available the USOAP reports to all Contracting States and urged the Council to inform States about infractions to the Convention pursuant to Article 54 j) and k).<sup>148</sup>

On the other hand, a group of African States<sup>149</sup> presented a document which, though supporting the principle of transparency and sharing of safety information, urged that the safety audit reports be transmitted only to Contracting States through the ICAO secured

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<sup>144</sup> See Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety. *Transparency and Sharing of Safety Information*, Theme 2: Improving aviation safety, ICAO Doc. DGCA/06-WP/5 Revised (2006) § 2.13.

<sup>145</sup> See Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety. *Enhancing Safety Oversight*, Theme 2: Improving aviation safety, ICAO Doc. DGCA/06-WP/9 (2006) § 5.2.

<sup>146</sup> Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and The United Kingdom.

<sup>147</sup> Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Georgia, Iceland, Moldova, Monaco, Norway, Romania, Serbia and Montenegro, Switzerland, The former Yugoslav Republic of Macedonia, Turkey and Ukraine.

<sup>148</sup> See Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety. *Proposals for further Improvement of Aviation Safety Worldwide*, Theme 2: Improving aviation safety, ICAO Doc. DGCA/06-WP/11<sup>1</sup> Revised (2006) § 6.1, a) and f).

<sup>149</sup> Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, United Republic of Tanzania, Zambia and Zimbabwe.

website. They nevertheless encouraged States to disseminate directly relevant safety information to stakeholders and members of the public.<sup>150</sup>

The Member States of the Latin American Civil Aviation Commission<sup>151</sup> showed concern about the improper use of information on aviation safety and therefore asked ICAO to monitor any improper use of information on aviation safety surveillance and to promote a clear, objective and positive perception of safety conditions in the State when adopting any agreement related to the publication of the safety oversight audits.<sup>152</sup>

The following recommendations<sup>153</sup> were adopted after discussing the views presented by the States represented in the DGCA/06:

1. States should give consent to ICAO to publish on the ICAO public website the results of their initial safety oversight audits and reports as soon as possible.
2. States should have the opportunity to provide their own comments in the ICAO audit website noting the progress made since the completion of the audit.
3. States should authorize ICAO to display publicly the safety oversight audit information conducted under the *comprehensive systems approach*.
4. Contracting States should consent to publish all relevant information as soon as possible and, in any case, not later than 23 March 2008.
5. ICAO would make public the names of the States that have not authorized release of their audit results and/or place this information on the public website.
6. ICAO should develop a mechanism to enable the rapid resolution of significant safety concerns identified under USOAP.

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<sup>150</sup> See Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety. *Free flow and protection of safety information*, Theme 2: Improving aviation safety, ICAO Doc. DGCA/06-WP/26 (2006) § 4.1, b), c) and d).

<sup>151</sup> Argentina, Aruba, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela.

<sup>152</sup> See Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety. *Transparency and Protection of Safety Information against Improper Use*, Theme 2: Improving aviation safety, ICAO Doc. DGCA/06-WP/30 Revised (2006) § 2.3 and 4.1, a) and c).

<sup>153</sup> ICAO Doc. 9866, *supra* note 62 at 3-4, 3-5 and 3-11.

During its 178<sup>th</sup> Session, the Council endorsed the Declaration drafted by the Conference,<sup>154</sup> giving it legal effect.

To accomplish the mandates of the Declaration drafted by the DGCA/06, the former Memorandum of Understanding was modified as endorsed by the Council to:<sup>155</sup>

1. Allow the Audited State to provide further information and comments before the final safety oversight audit report will be made available to all Contracting States through the secure website of ICAO.
2. Allow the Audited State to report about the actions taken to remedy the identified deficiencies in order to update the safety oversight audit follow-up report which will be made available to all Contracting States.
3. Empower ICAO to upload on the public area of the FSIX website a chart that reflects the State's level of implementation of the critical elements of a safety oversight system (some States elect to post the full report due to the results achieved).
4. Inform the Audited State about any preliminary significant safety concerns identified during the audit and an explanation of an approved mechanism to deal with it.

As recommended by the DGCA/06, an ICAO news release dated 28 March 2008 noted that six States had not given their consent for the release of audit information: Iran (Islamic Republic of), Kazakhstan, Kiribati, Sierra Leone, Swaziland and Zimbabwe. Subsequently, on 16 July 2008, ICAO issued a news release stating that “*all Member States* [audited] have given their consent for ICAO to release the results of audits conducted in their territory” [emphasis added].<sup>156</sup>

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<sup>154</sup> See Session of the ICAO Council. *Summary of Decisions*, 178<sup>th</sup> Sess., 1<sup>st</sup> Mtg., Subject No. 14.5: Outcome of the Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety 2006, ICAO Doc. C-DEC 178/1 (2006) § 26.

<sup>155</sup> See C-WP/12774, *supra* note 78 at A-5.

<sup>156</sup> ICAO, “All Audited States now authorize ICAO to post audit results on public website”, online: The International Civil Aviation Organization <[http://www.icao.int/icao/en/nr/2008/pio200804\\_e.pdf](http://www.icao.int/icao/en/nr/2008/pio200804_e.pdf)>.

The distribution of the safety oversight audit reports through the secure website and the disclosure of the safety oversight audit results to the public could be considered as the fourth step to achieve full transparency. Since 2008, there is public acknowledgement of the real level of implementation of safety-related SARPs and of the safety oversight capabilities of all Contracting States audited. In addition, the public can access the results of the audits reflected in a chart that shows the lack of implementation of the critical elements for safety oversight of every Contracting State.

In addition, it must be said that the transparency achieved by the USOAP is remarkable and an innovation in the international community. As will be discussed in the next Chapter, in addition to its safety, economic and political implications, transparency of USOAP results opens the door for an analysis of the “quasi-enforcement” powers over aviation regulations developed by ICAO, thus of the effectiveness of its “soft law”.

#### **2.1.7 Significant Safety Concern and Related Mechanism (2006-2008)**

A *significant safety concern* occurs “when a holder of an authorization or approval does not meet the minimum requirements established by the State and by the Standards set forth in the ICAO Annexes are not met, resulting in an imminent safety risk to international civil aviation.”<sup>157</sup>

On 29 November 2006, the Council approved the following mechanism to deal with significant safety concerns beyond audit reports and Corrective Action Plans, to allow such concerns to be addressed as soon as possible:<sup>158</sup>

1. If a preliminary significant safety concerns is identified during the course of a safety oversight audit, it will be described to the Audited State during the debriefing of the audit results.

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<sup>157</sup> C-MIN 179/12, *supra* note 77 § 49.

<sup>158</sup> See C-WP/12774, *supra* note 78 § 2.2 and 2.3.

2. ICAO will officially: i) notify the Audited State about the existence of any significant safety concern within fifteen days of the conclusion of the on-site phase, and ii) request a corrective action to be taken by the State within a stipulated timeframe.
3. If the State fails to provide the corrective action to resolve the significant safety concern, the State will be contacted to determine why such action was not satisfied and the results will be reported to the Council.
4. Unresolved significant safety concerns will be notified to all Contracting States through the ICAO secure website.

As of 30 April 2008, the Secretary General notified to the Council that six States had not resolved significant safety concerns identified. The details of these concerns were posted on the SOA secure website. Additionally, two States were notified that they have significant safety concerns and were asked to submit an action plan within the specified timeframe.<sup>159</sup> Due to the sensitivity of this information, the identity of States subject to this procedure remains confidential to the public and the matter is discussed in closed sessions of the Council.

#### **2.1.8 Implementation of the Procedure of Transparency and Disclosure (2005-2008)**

On 12 August 2005 the Council sent a State Letter to all Contracting States informing them about the approved *Procedure of Transparency and Disclosure*<sup>160</sup> and an individual letter to those States which had not submitted a Corrective Action Plan or where a follow-up mission could not be conducted.<sup>161</sup> During the DGCA/06, the Secretary General presented significant issues of concern arising from audits and follow-ups conducted

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<sup>159</sup> See C-WP/13171, *supra* note 75 § Appendix A.

<sup>160</sup> See Session of the ICAO Council. *Implementation of the Article 54 j) of the Chicago Convention in the Field of Safety and Safety Oversight*, 176<sup>th</sup> Sess., Agenda Item No. 13: Work programmes of the Council and its Subsidiary Bodies, ICAO Doc. C-WP/12588 (2005) § 1.2.

<sup>161</sup> See Session of the ICAO Council. *Progress Report on the Implementation of the ICAO Universal Safety Oversight Audit Programme under the Comprehensive System Approach*, 177<sup>th</sup> Sess., Agenda Item No. 14.5: Safety Oversight, ICAO Doc. C-WP/12614 (2006) § 7.1.

between 1999 and 2004. The following chart describes the situation presented to the Conference:<sup>162</sup>

States not audited	States without action plan	States without follow-up missions	States not visited for follow-up missions
Afghanistan	Central African Republic	Chad	Andorra
Burundi	Djibouti	Congo	San Marino
Iraq	Equatorial Guinea	Eritrea	Israel
Liberia	Guinea-Bissau	Kiribati	Democratic Republic of the Congo
Sierra Leone	Micronesia	Libyan Arab Jamahiriya	
Solomon Islands	Nauru	Marshall Islands	
Somalia	Sao Tome and Principe	Rwanda	
		Swaziland	

After the Transparency and Disclosure Procedure was implemented, the status of States regarding significant issues of concern arising from audits and follow-ups conducted improved enormously. The following chart describes the activities performed as of 21 July 2008 under the initial audit cycle:

States not audited	States without action plan	States without follow-up missions	States not visited for follow-up missions
Afghanistan	Micronesia	Chad	
Burundi		Congo	
Iraq		Eritrea	
Somalia		Kiribati	

**Note 1:** Liberia was audited on 10 May 2006; Sierra Leone was audited on 12 May 2006; Solomon Islands were audited on 4 April 2006; Central African Republic was audited on 16 March 2007; Djibouti State requested assistance, ICAO responded and it was audited on 14 March 2008; Equatorial Guinea State submitted an action plan and was audited on 18 May 2007; Guinea-Bissau State submitted an action plan and was audited on 14 April 2008; Nauru was audited on 10 March 2008; Sao Tome and Principe is scheduled to be audited in October 2008; Libyan Arab Jamahiriya State was audited on 26 June 2007; Marshall Islands State is scheduled to be audited in September 2008; Rwanda was audited on 22 November 2007; Swaziland requested assistance, ICAO responded and was audited on 24 July 2007; Andorra was audited on 28 February 2007; San Marino was audited on 2 March 2007; Israel was audited on 31 January 2007; and Democratic Republic of the Congo was audited on 26 September 2006.

**Note 2:** Afghanistan, Burundi, Iraq, Somalia, Micronesia, Chad, Congo, Eritrea and Kiribati are scheduled to be audited sometime in 2010.<sup>163</sup>

<sup>162</sup> See DGCA/06-WP/3, *supra* note 39 § 4.

<sup>163</sup> See Activity Schedule of ICAO Universal Safety Oversight Audit Programme 2005 – 2006 – 2007 – 2008 – 2009 – 2010 (21 July 2008).

Additionally, the Secretary General established an Audit Results Review Board (ARRB) in order to work with States that have significant deficiencies with respect to SARPs and/or do not participate fully in ICAO's safety oversight and audit processes.<sup>164</sup>

The 36<sup>th</sup> Assembly specifically directed the Council to apply the *Procedure of Transparency and Disclosure* in the case of a State having significant shortcomings with respect to SARPs.<sup>165</sup> This procedure was invoked and considered for the first time in closed session during the 184<sup>th</sup> Session of the Council. Besides the legal effect of the procedure, it has a particular political strength because the State's deficiencies and unwillingness to resolve them are exposed and questioned in front of the States represented in the Council and not just posted on the ICAO webpage.

### **2.1.9 Development of a Continuous Monitoring Approach (2007-2008)**

ICAO has always had a proactive and evolving approach towards its programs. As has been described, the USOAP started as a voluntary confidential assessment ending in a mandatory transparent comprehensive audit program. The 36th Assembly "directed the Council to examine the feasibility, among the various options that could be considered, of a new approach based on the concept of continuous monitoring, to be implemented at the end of the current audit cycle in 2010." The Resolution further "directed the Council to make appropriate changes to USOAP to incorporate the analysis of safety risk factors, including the corresponding guidance material, and apply them on a universal basis."<sup>166</sup> The Secretariat is currently preparing the new approach for the USOAP including the option of a continuous monitoring approach (CMA), which is to be presented to the next session of the Assembly.

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<sup>164</sup> See Session of the ICAO Assembly. *Progress Report on the Implementation of the ICAO Universal Safety Oversight Audit Programme (USOAP) under the Comprehensive System Approach*, 36<sup>th</sup> Sess., Agenda Item No. 13: Progress report on the implementation of the ICAO Universal Safety Oversight Audit Programme (USOAP) under the comprehensive systems approach, ICAO Doc. A36-WP/64 (2007) § 2.12.1 [A36-WP/64].

<sup>165</sup> See *Resolutions adopted by the 36<sup>th</sup> Session of the Assembly*, Res. A36-4, *supra* note 65 at 6.

<sup>166</sup> *Ibid.* at 6.

### **2.1.10 Current Situation of Audit Information under the Transparency and Disclosure Principle**

For nine years as it evolved, the Transparency and Disclosure principle was based on confidence and trust among the Organization, States, airspace users, air navigation services providers and financial institutions. As a result, the USOAP developed the following elements, principles and tools which, when combined, serve as a transparent mechanism for the conduct of audits and the display of the information obtained from them.

- ❖ The AFDD is designed to identify and quantify safety concerns in a State and at Regional and Global levels.
- ❖ Final safety oversight audit reports and a chart showing the State's level of implementation of the critical elements of a safety oversight system are uploaded in the FSIX public website.
- ❖ The mechanism to enable the resolution of significant safety concerns is being used by ICAO to convey all such concerns to Contracting States through the secure website.
- ❖ The *Procedure of Transparency and Disclosure* within the scope of Article 54 j) of the Chicago Convention has been approved.
- ❖ The ARRB helps Contracting States to resolve significant compliance deficiencies.

As is demonstrated by the commitments made by States regarding the sharing of audit information, transparency enjoys a high degree of acceptance among the States. Even though we can consider that the system could take a further step towards full transparency by mandating public disclosure of complete audit reports of both audit cycles, follow-up missions, States' Corrective Action Plans and their respective improvements, such audit information is in fact now being shared and used by those who can actually take appropriate measures to resolve deficiencies or to protect their interest (i.e. ICAO and Contracting States). Therefore, we can consider that at this point, the USOAP enjoys full transparency with a view to achieving the *highest practicable degree* of uniformity with the SARPs, as mandate by the Chicago Convention.



Finally, it must be said that transparency alone does not accomplish the objectives of the SARPs. Many States do not meet an acceptable level of its implementation. They might not make adequate use of the programs developed by ICAO to improve this implementation (e.g. USOAP) because of the lack of technical, financial or human resources. This is why it is important to review the different options that States have to comply with ICAO's safety regulations, to which subject the thesis now turns.

## **2.2 Cooperation and Assistance and the Universal Safety Oversight Audit Programme**

The level of development of each Nation is different. In the aviation industry, States are influenced by their civil aviation activity, tourist development, business opportunities, technical improvements, human resources, etc. The financial situation of a State is a determining factor in the implementation of SARPs. It also plays an important role in the audits because the same resources are needed for its conduct, as well as for the creation of the Corrective Action Plan and its implementation. Sadly, many Contracting States do not have the means to fully comply with the obligations imposed by the Chicago Convention, its Annexes and the programs developed by ICAO.

According to the ICAO Safety Oversight Audit Manual “the objective of the [USOAP] is to promote global aviation safety through auditing Contracting States, on a regular basis, to determine States’ capability for safety oversight by assessing the effective implementation of the critical elements of a safety oversight system and the status of States’ implementation of safety-relevant ICAO [SARPs], associated procedures, guidance material and safety-related practices.”<sup>167</sup> In practical terms this objective cannot be reached without appropriate cooperation and assistance of ICAO, the Contracting States in general, the aviation industry, air navigation service providers, regional organizations, financial institutions and other stakeholders.

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<sup>167</sup> Safety Oversight Audit Manual, *supra* note 59 § 3.1.

ICAO has promoted different alternatives to improve the implementation of SARPs listed in the Corrective Action Plans. The purpose of the following section is to provide a general overview of the options that Contracting States have to comply with their obligations. However, the complete study of the cooperation and assistance programs developed by ICAO, Contracting States, the aviation industry and financial institutions could be the subject of another thesis.

### **2.2.1 Initiatives of the International Civil Aviation Organization**

Because of the technical, financial and human requirements of States which might impede implementation of SARPs, ICAO has been a pioneer in the development of sources of support to assist them in resolving safety-related shortcomings. In the following sections, a selection of programs and initiatives is described.

#### **a) Technical Co-operation Bureau**

The ICAO Technical Co-operation (TCB) Bureau was created in 1952 to help States to improve their civil aviation structure through projects implemented under ICAO's Technical Co-operation Programme. ICAO provides assistance to States experiencing difficulties in the implementation of SARPs and safety oversight through the TCB, including: i) provision of information and guidance on possible financial and technical sources of assistance; ii) fostering the implementation of ICAO SARPs, with whatever assistance is appropriate; iii) conduct seminars on safety oversight; iv) training of officials within the framework of TRAINAIR; and v) development of guidance material to resolve deficiencies. In addition, the TCB assists States to obtain financial resources to fund assistance projects and to foster and facilitate the use of bilateral and multilateral agreements for projects between States and international or regional organizations to achieve this purpose.<sup>168</sup>

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<sup>168</sup> See Resolutions adopted at the 33<sup>rd</sup> Session of the Assembly, Res. A33-9, *supra* note 89 at 32 and 33.

Due to the non-profit status of ICAO, it has the possibility to offer more favourable and cost-effective conditions and to render its advice based on technical and financial considerations. Annually, the TCB is involved in approximately one-hundred-twenty projects per year with an average annual budget of US\$55 million and can obtain privileged conditions for States purchasing equipment through the Organization in accordance with the *United Nations Standard Basic Assistance Agreement*.<sup>169</sup>

#### **b) Implementation Support and Development Branch**

The Implementation Support and Development (ISD) Branch was created on 15 June 2007 as a result of the consolidation of the USP and the Coordinated Assistance and Development. Its primary objective is to support Contracting States in implementing their corrective action plans in order to meet their aviation safety obligations. In coordination with the TCB, the ISD fosters partnerships and other collaborative agreements among States, industry, international financial institutions and other stakeholders. It also provides technical support for regional efforts (e.g. COSCAPs); reviews the effectiveness of any ICAO implementation support; identifies and determines if States are candidates for remedial assistance; ensures that projects follow the guidelines of ICAO's strategic objectives, the Global Aviation Safety Plan (GASP) and the Global Aviation Safety Roadmap; among others.<sup>170</sup>

#### **c) International Financial Facility for Aviation Safety**

During the 33<sup>rd</sup> Assembly, the International Financial Facility for Aviation Safety (IFFAS) was established to help Contracting States to implement effectively their safety oversight responsibilities. The IFFAS was the result of a proposal made by a group of States for “the establishment of an international aeronautical monetary fund to finance

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<sup>169</sup> See Caribbean/South American Regional Air Navigation Meeting. *The Role of ICAO's Technical Co-Operation Programme in the Implementation of the CAR/SAM Air Navigation Plan*, 3<sup>rd</sup> Mtg., Agenda Item No. 13: Implementation of the CAR/SAM Air Navigation Plan, with particular emphasis on shortcomings and deficiencies in the air navigation field affecting safety, ICAO Doc. CAR/SAM/3-WP/31 (1999) § 2.4, 2.5 and 2.6.

<sup>170</sup> See ICAO, “ISD Branch”, online: The International Civil Aviation Organization <<http://www.icao.int/atb/sfbranch/files/ISD-BRANCH%20flyer.pdf>>.

investments in airports and air navigation services infrastructure under conditions that would be more flexible and less onerous than the conditions usually applicable in financial markets.”<sup>171</sup> It is designed to fund the implementation of corrective measures proposed by the USOAP process.

#### **d) ICAO Regional Offices**

As mentioned in Chapter One, the ICAO Regional Offices were created to facilitate the planning and implementation of ground services and facilities essential for international air transport operations in delimited air navigation regions.<sup>172</sup> Under the *comprehensive systems approach* of the USOAP, the ICAO Regional Offices are responsible of monitoring the implementation of States’ corrective action plans and providing advice and support to Contracting States as part of their regular mission.<sup>173</sup>

Because of the role of the ICAO Regional Offices as the operative arm of ICAO in a particular region, they are familiar with the specific regional and environmental requirements. They are able to identify causes for common difficulties experienced by States within their jurisdiction in order to develop tailored solutions to common problems including the establishment of sub-regional safety oversight organizations.<sup>174</sup>

### **2.2.2 Partnerships and Alliances**

Acknowledging that Contracting States will need support in the development and implementation of their corrective action plans (especially States without sufficient technical, human and/or financial resources), ICAO proposed, under the *Unified Strategy to Resolve Safety-Related Deficiencies*, a partnership system to analyse causes and develop and implement solutions. From the vast array of partnerships, the following are the most representative and effective when dealing with resolving safety-related deficiencies:

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<sup>171</sup> See Resolutions adopted at the 33<sup>rd</sup> Session of the Assembly, Res. A33-10, *supra* note 89 at 32 and 33.

<sup>172</sup> See Resolutions adopted by the Interim Assembly, Res. A-3, *supra* note 21 at 4.

<sup>173</sup> See Safety Oversight Manual, *supra* note 68 § 3.10.1.

<sup>174</sup> See A35-WP/63, *supra* note 91 (2004) § 6.5.

- ❖ Partnerships between a State and ICAO for the development of sustainable solutions to resolve safety deficiencies resulting from insufficient safety oversight in individual States or groups of States.
- ❖ Partnerships between States limited to technical cooperation projects where experts assist a State authority in the development and implementation of its safety oversight capability.
- ❖ Partnerships between States sharing experts for the development of regulations, procedures and training. An example of this solution has been the COSCAPs<sup>175</sup> implemented in several sub-regions.

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<sup>175</sup> The Cooperative Development of Operational Safety and Continuing Airworthiness Programme (COSCAP) is a cooperation effort between ICAO through the TCB and a groups of States implemented in regional or sub-regional organizations:

- SRVSO (Argentina, Bolivia, Brazil, Chile, Cuba, Ecuador, Panama, Paraguay, Peru, Uruguay and Venezuela, and two special observers: Airbus and EMBRAER)
- ACSA (Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Dominican Republic, Haiti and Panama)
- RASOS (Barbados, East Caribbean, Guyana, Haiti, Jamaica, Suriname, and Trinidad and Tobago).
- EASA (Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, Switzerland, the Netherlands, and the United Kingdom)
- PASO (Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Salomon Islands, Tonga, Tuvalu, and Vanuatu)
- COSCAP-SEA (Brunei Darussalam, Cambodia, Hong Kong (China), Indonesia, LAO PDR, Macao (China), Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam)
- COSCAP-SA (Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan, and Sri Lanka)
- COSCAP-NA (People's Republic of China, People's Democratic Republic of Korea, Japan, Mongolia, Republic of Korea)
- COSCAP-UEMOA (Benin, Burkina Faso, Ivory Coast, Guinea-Bissau, Nigeria, Senegal, and Togo)
- COSCAP-SADC (Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe)
- COSCAP-AM (Argentina, Bolivia, Brazil, Chile, Cuba, Ecuador, Panama, Paraguay, Peru, Uruguay, and Venezuela)
- COSCAP-BANJUL ACCORD GROUP (Cape Verde, Gambia, Ghana, Guinea, Liberia, Nigeria, Sierra Leone)
- COSCAP-CIS (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan)
- COSCAP-GULF STATUS (Bahrain, Kuwait, Qatar, UAE, Yemen)
- COSCAPs in the process of being established: COSCAP-CEMAC (Central Africa); COSCAP (Middle East) COSCAP (North Africa)

See Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety. *Regionalisation of Safety*, 6<sup>th</sup> Sess., Theme 2: Improving Aviation Safety, ICAO Doc. DGCA/06-WP/31 Revised (2006).

- ❖ Partnerships between States in the establishment of sub-regional organizations responsible for the performance of safety oversight tasks, such as the Regional Aviation Safety Oversight System for the Caribbean (RASOS); the Central American Agency for Aviation Safety (ACSA); and the Pacific Aviation Safety Organization (PASO).
- ❖ Partnerships between States, industry, air navigation service providers, other stakeholders and financial institutions with the objective of assisting States in improving their safety oversight. Examples include the GASP<sup>176</sup> developed by ICAO; the Global Aviation Safety Roadmap,<sup>177</sup> developed by ACI, Airbus, Boeing, CANSO, FSF, IATA and IFALPA for ICAO; and the Comprehensive Regional Implementation Plan for Aviation Safety in Africa (AFI-Plan),<sup>178</sup> among others.

The main reasons why regional organisations are functional mechanisms to resolve safety deficiencies in international civil aviation are because: i) many deficiencies are common to certain areas; ii) they allow the pooling of resources and therefore, reduction of costs; and iii) they promote cooperation and assistance for States through ICAO's direction and principles in order to achieve harmonization and compliance with the adopted SARPs.

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<sup>176</sup> The Global Aviation Safety Plan is a strategic document which provides the planning methodology that leads to global harmonization in the area of safety. It was developed with the close coordination and participation of industry and both provide a common framework to ensure that regional, sub-regional, national and individual initiatives are coordinated to deliver a harmonized, safe and efficient international civil aviation system.

See ICAO, "Global Aviation Safety Plan", online: The International Civil Aviation Organization <[http://www.icao.int/icao/en/anb/gasp/docs/GASP\\_en.pdf](http://www.icao.int/icao/en/anb/gasp/docs/GASP_en.pdf)>.

<sup>177</sup> In 2006, during the Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety, was adopted Global Aviation Safety Roadmap developed by the Industry Safety Strategy Group (ISSG), International Air Transport Association (IATA), Airbus, Airports Council International (ACI), Boeing, Civil Air Navigation Services Organization (CANSO), International Federation of Air Line Pilots' Associations (IFALPA) and the Flight Safety Foundation (FSF) for ICAO to provide a common frame of reference to coordinate and guide safety policies and initiatives globally, thus reducing the accident risk for commercial aviation.

See Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety. *Global Aviation Safety Roadmap*, 6<sup>th</sup> Sess., Theme 1: The status of aviation safety today, ICAO DGCA/06-IP/1 Revised (2006).

<sup>178</sup> The 181<sup>st</sup> Session of the ICAO Council adopted the Comprehensive Regional Implementation Plan for Africa (AFI-Plan) to rectify safety and infrastructure deficiencies identified by the USOAP, the IOSA and the APIRG. The plan establishes program management modalities by applying the methodology and process of the Global Aviation Safety Roadmap. The AFI-Plan allocated to the implementation of the initial phase of the plan an estimated of USD \$ 3.8 million.

See Session of the ICAO Council. *Report on a Comprehensive Regional Implementation Plan for Africa*, 181<sup>st</sup> Sess., Agenda Item No. 14: Regional Air Navigation Planning, ICAO Doc. C-WP/12957 (2007) § 2 and 3.

As was described previously, ICAO, Contracting States, other international organizations, air navigation service providers, and financial institutions<sup>179</sup> are promoting global, regional and national programs to foster cooperation and assistance to resolve safety-related deficiencies. Today, it is difficult to argue that a State cannot improve its level of compliance with the SARPs or cannot implement its Corrective Action Plan. The ingredients required in this formula are transparency and sharing of information combined with the political will of the State to fulfill its obligations, as well as its commitment to fully cooperate with the implementation of the assistance and guidance provided.

## 2.3 Conclusion

This Chapter has shown that the evolutionary process to achieve full transparency in the USOAP was a gradual transition and started with the conception of the program. It was consolidated through the *Unified Strategy to Resolve Safety-Related Deficiencies* and culminated with the display of safety oversight audit reports on the ICAO secure website and sharing of audit results to the public in March 2008. The original aim of the Transparency and Disclosure principle was and continues to be first, to gather sufficient

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<sup>179</sup> It must be noted that World Bank is an active funding actor in aviation infrastructure projects and regional initiatives for the enhancement of aviation safety. The World Bank Air Transport Fiscal Year 2007 Annual Report informed about 25 major projects in all regions of the International Bank for Reconstruction and Development / International Development Association (Africa, Latin America & Caribbean, South Asia, Middle East & North Africa, Europe & Central Africa), as well as 15 active International Finance Corporation investments and several advisory mandates. The World Bank Group air transport portfolio volume grew by 5%, to US\$ 1.07 billion.

The main focus of the funding remained on Africa. However, other projects are implemented and in preparation in Eastern and Southern Africa and the East Africa Community States.

Individually, the most notable improvements were in Guatemala (receiving FAA IASA category 1); Afghanistan (implementing the air traffic management and airport rehabilitation project); Egypt (Airports Development Project in progress); Russia and Saudi Arabia (provided by reimbursable technical assistance on airport related mandates); Brazil (investment programs including the Brazilian low cost carrier GOL); Cambodia (investment programs in Phnom Penh International Airport); Georgia (investment program in the Tbilisi International Airport); Serbia, Rwanda, Cameroon and Samoa (investment programs in advisory mandates for air carriers); Saudi Arabia, Jordan, and Nigeria (investment programs in advisory mandates for airports).

From the World Bank Report and the interventions of its representatives, it is plausible that many of these assistance programs are the result of external relations built with ICAO, IATA and States.

See World Bank Air Transport Fiscal Year 2007 Annual Report, WBG Doc. WGB FY07 (2007).

data to identify common deficiencies and to propose common solutions in order to improve safety in a harmonized way; second, to use the information only for safety-related purposes; and third, to proceed through cooperation and assistance to achieve uniformity in the implementation of SARPs. Having described the foundations for the transparent dissemination of safety oversight audit information by ICAO to Contracting States and the public, the next Chapter will assess the practical impacts of this process for aviation safety, the economics and politics of Contracting States, and indeed for international law.



## **CHAPTER THREE: Outcomes of Transparency in the Universal Safety Oversight Audit Programme**

Besides promoting global aviation safety, transparency in the USOAP has produced additional economic, political and legal benefits. The outcomes started to show just after the first step to achieve full transparency in the program (see section 2.1.3), but the peak was achieved when the safety oversight audit reports were shared to all Contracting States (section 2.1.6).

This Chapter assesses the outcomes of the actions taken by ICAO and its member States using a critical approach. It attempts to determine whether the program is fulfilling its original purpose and what, if any, are the limitations to using information generated by the USOAP. In order to do so, the chapter distinguishes among three sets of outcomes: safety, economic and political, and legal.

The first outcomes to be analyzed relate to safety. The analysis here reveals that releasing audit information has had a positive impact on the level of implementation of SARPs and oversight capabilities of Contracting States. This is principally because the information generated shows where and how to improve deficiencies, pools resources to improve safety, and serves as a “quasi-enforcement” power.

On the other hand, economic and political factors play an important role when dealing with sensitive safety information. Indeed, as feared, USOAP information can be misused for purposes other than safety-related ones, such as unjustified restriction of operations or non-recognition of certificates or licenses.

Finally, some interesting and important legal outcomes can also be identified. The display of audit information can help to generate customary practices reinforcing international obligations.

### 3.1 Safety Outcomes

#### 3.1.1 Safety Outcomes – The International Civil Aviation Organization Perspective

The mandatory USOAP has helped States to identify and correct deficiencies in the implementation of SARPs. Since its creation, the program has had a markedly positive impact on aviation safety. The achievement was the result of a combination of forces, but transparency played a fundamental role.

As described in the previous Chapter, three main events that changed the USOAP dramatically can be identified: i) adoption of the Universal Safety Oversight Audit Programme on 1 January 1999 (initial audit cycle); ii) adoption of the *comprehensive systems approach* on 1 January 2005 (CSA audit cycle); and iii) greater transparency achieved through the publication of the final audit results on 28 March 2008.

The first report of the initial audit cycle of the USOAP presented to the 33<sup>rd</sup> Assembly indicated that one-hundred-eighty States and five territories representing 97% of all Contracting States had been audited as of August 2001. Seminars and workshops were attended by six-hundred participants and three auditor training courses were conducted.<sup>180</sup> Because of the confidentiality of the audit results at that time, all the information was displayed in general terms without making reference to a particular State. It is important to mention that this report only covered audits of Annexes 1, 6 and 8. The principle audit findings reported to the Assembly were:<sup>181</sup>

1. Absence of an appropriate legislative framework;
2. Lack of an appropriate established and funded civil aviation organization;
3. Absence of an appropriate safety management system;<sup>182</sup>

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<sup>180</sup> See A33-WP/47, *supra* note 115 § 3.

<sup>181</sup> See *Ibid.* § 6.

<sup>182</sup> A Safety Management System (SMS) allows operators to integrate their diverse safety activities into a coherent system to reduce the safety risks that might produce an aviation accident or incident. The safety activities that might be integrated into an operator's SMS include: a) hazard and incident reporting; b) Flight Data Analysis (FDA); c) Line Operations Safety Audit (LOSA); and d) cabin safety.

4. Lack of appropriately qualified and experienced technical personnel;
5. Inadequate certification and licensing systems;
6. Absence of basic surveillance systems;
7. Lack of a system for the resolution of safety issues; and
8. Organization problems arising mainly from a lack of commitment by governments to support their CAA, manifested as: inability to attract, recruit, and retain adequate personnel and inadequate support staff, equipment, facilities and guidance material.

Additionally, the AFDD, developed to identify safety concerns at a State, regional and global levels, identified the following deficiencies:<sup>183</sup>

- I. **Primary aviation legislation and civil aviation regulations:** i) absence of an established system for analyzing and integrating recently adopted SARPs into national regulations; ii) inability to identify differences between national regulation and adopted SARPs; iii) lack of appropriate systems to amend national regulations; and iv) absence of the necessary empowerment of civil aviation administrators to conduct inspections and enforce civil aviation regulations.
- II. **Civil aviation organization:** i) absence of qualified and experienced technical staff; ii) in some States lack of an adequate establishment; iii) inadequate training policies and programs; iv) lack of appropriate documents and equipment; and iv) inadequate funding to CAAs.
- III. **Personnel licensing and training:** i) lack of appropriate procedures and systems relating to examinations of license applicants; ii) lack of appropriate procedures and systems regarding medical assessments; iii) deficiencies regarding the absence of established systems for processing license applications, validations and issuance; iv) usage of training institutes' services without assessing their capabilities.
- IV. **Aircraft operations:** i) Air Operator Certificates (AOC) issued almost on demand without requiring the applicant to demonstrate an adequate organization, method of control and supervision of operations, training programs or maintenance; ii) absence

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*Safety Management Manual (SMM)*, ICAO Doc. 9859 AN/460 (2006) § 16.1.2.

<sup>183</sup> See A33-WP/47, *supra* note 115 § 7.4 - 7.14.

of periodic and continuing supervision of AOC holders; and iii) lack of established requirements for air operators for the development and submission of training programs, flight safety and accident prevention programs.

- V. **Airworthiness of aircraft:** i) lack of adequate approval and surveillance of maintenance organizations; ii) failure to have regulations and directives for issuance and renewal of Airworthiness Certificates; iii) absence of flight permits; and iv) absence of maintenance manuals and requirements.

The report presented to the 35<sup>th</sup> Assembly in 2004 indicated that one-hundred-eighty-one Contracting States, three territories and two Special Administrative Regions of China were audited as of 31 July 2004. Following the Resolution A32-11 mandate of “greater transparency and increased disclosure [...] in the release of audit results [only] for safety-related purposes,”<sup>184</sup> the report made public for the first time the identity of the eight audited States that failed to submit a Corrective Action Plan to rectify the deficiencies identified by the audits: Central African Republic, Congo, Djibouti, Equatorial Guinea, Guinea-Bissau, Micronesia, Nauru, and Sao Tome and Principe. The report indicated that this situation was mainly related to the lack of resources and expertise among these countries. In addition and primarily for security reasons, at that time ICAO did not conduct audits in seven Contracting States: Afghanistan, Burundi, Iraq, Liberia, Sierra Leone, Solomon Islands and Somalia.<sup>185</sup>

The report indicated that the AFDD was improved and that the data collected in the audits and audit follow-up missions continued to enable ICAO to identify and quantify safety oversight-related deficiencies and to prioritize possible solutions. It was noted that the success of the USOAP was strictly linked with States’ commitment to implement the recommendations contained in their Corrective Action Plans.

The information displayed in the progress report was done, again, in general terms, in other words, without making reference to a particular State with the exceptions previously

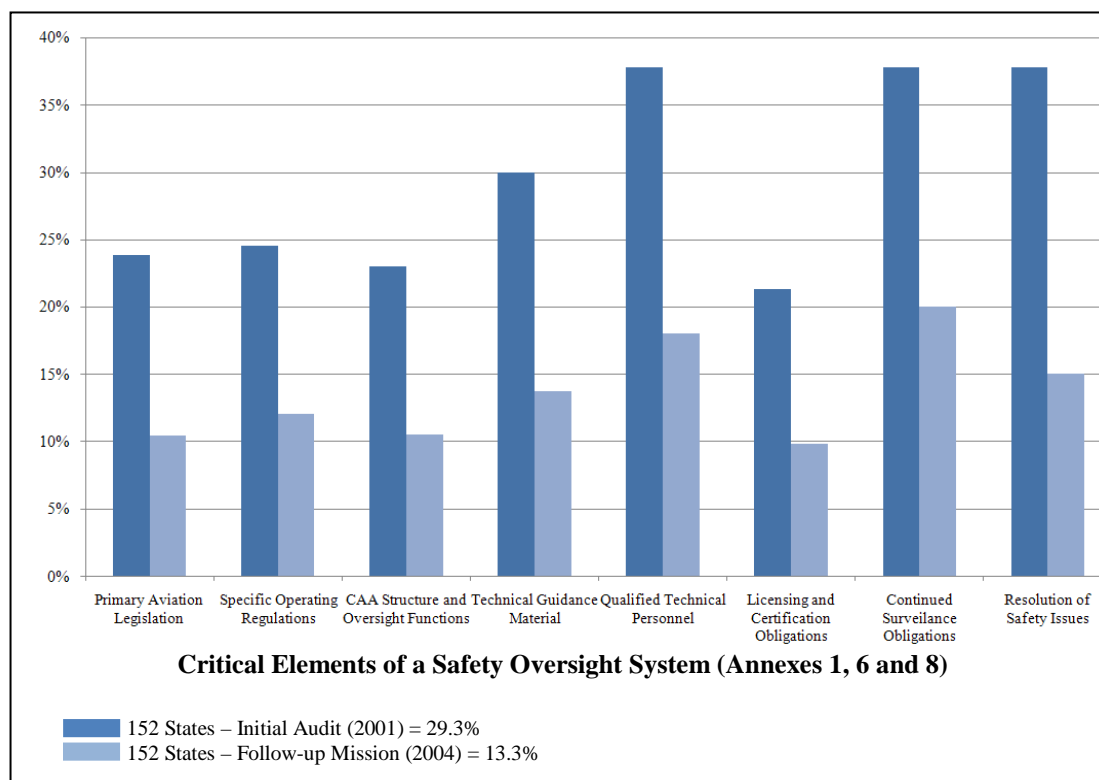
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<sup>184</sup> Resolutions adopted at the 32<sup>nd</sup> Session of the Assembly, Res. A32-11, *supra* note 103 at 21.

<sup>185</sup> See A35-WP/67, *supra* note 88 § 3.

noted. The report assessed the improvements achieved from the last report to the 33<sup>rd</sup> Assembly. It contained a review of the follow-up missions relating to Annexes 1, 6, and 8 as of 31 July 2004, comparing a sample of one-hundred-fifty-two Contracting States, three territories and two Special Administrative Regions of China. The report showed significant progress in the implementation of the Corrective Action Plans (although thirty-six States reported experiencing problems implementing them) and revealed that 24% of Contracting States (not identified) did not make progress as expected.<sup>186</sup> It also presented a chart showing a comparison at the global level between the lack of effective implementation identified during the initial audits and after the audit follow-ups missions.<sup>187</sup>

**CRITICAL ELEMENTS OF A SAFETY OVERSIGHT SYSTEM  
COMPARISON INITIAL AUDIT – FOLLOW UP MISSIONS  
– Lack of Effective Implementation (%) –**



<sup>186</sup> The report mentioned that States not having the appropriate improvements represented about 24% of the audited States. The main reason of this situation was describe as “resource-related problems” and for very few States due to “lack of political will”.

<sup>187</sup> See A35-WP/67, *supra* note 88 § 2 and Appendix A.

Generally, the data analysis identified two areas that seem to be the most critical challenge: Qualified Technical Personnel and Continued Surveillance Obligations (over safety oversight functions and aircraft operations). Overall, the analysis of the data obtained from the audits enable ICAO to identify the safety-related deficiencies, develop and propose solutions, resulting in a significant reduction in the category effective implementation of the SARPs contained in Annexes 1 (Personnel Licensing), 6 (Aircraft Operations) and 8 (Airworthiness of Aircraft). There was an overall improvement of the implementation of SARPs among Contracting States of 16% after the follow-up missions, meaning that in 16% of cases it was possible to acknowledge individual deficiencies and propose plausible corrective actions within an acceptable timeframe so as to improve the implementation of adopted SARPs.

It must be noted that the efficacy and success of the program remained tied to the actions taken by the Audited State. It was the publicly acknowledged commitment of the State that actually made a difference. Therefore, any of its outcomes could be considered as a result of transparency, although the program itself contributed to increased awareness of deficiencies and demonstrated improvement in those areas. Under these circumstances, transparency could be considered to be an efficient motivator of State's action, leading to positive change, although only in a fraction of cases.

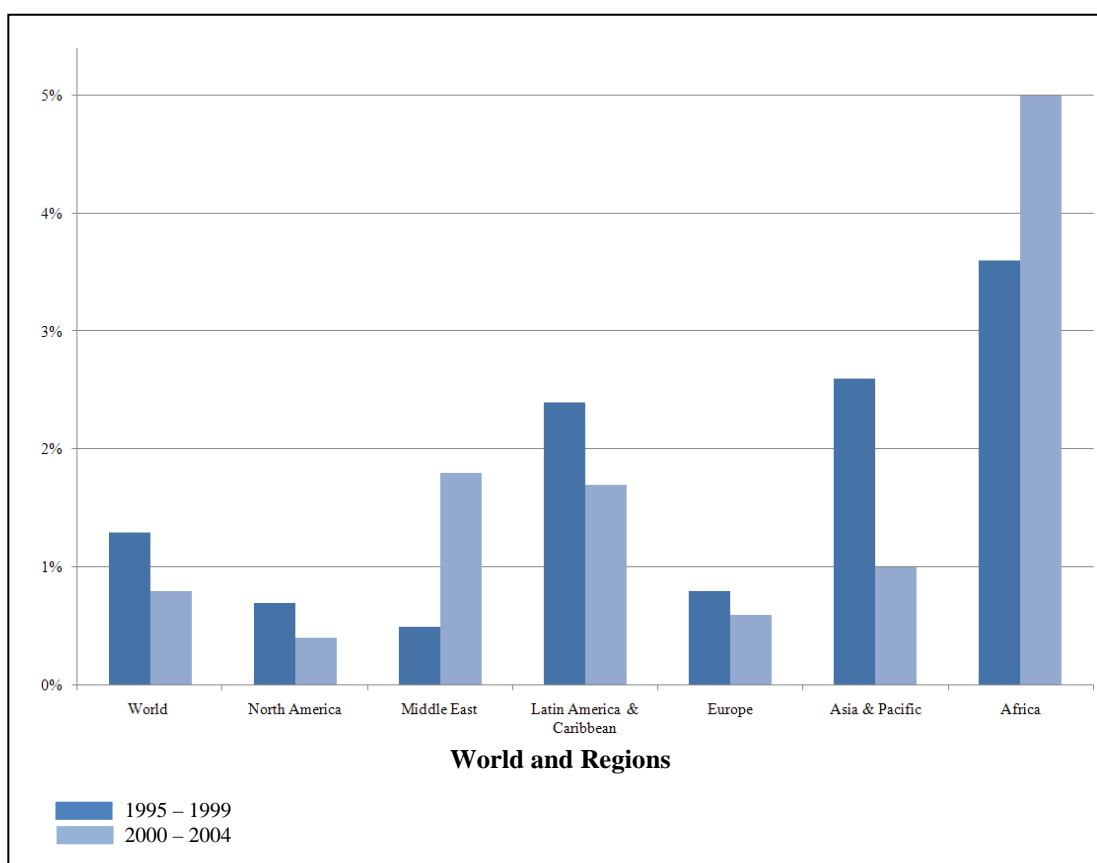
This improved SARP implementation and concomitant strengthening of safety oversight capabilities had tangible results. The rate of safety related accidents involving passenger fatalities in scheduled air transport operations worldwide for the period of 1994-1999 was 1.3 per million scheduled departures; this rate was reduced to 0.8 per million scheduled departures for the period of 2000-2004, representing an overall reduction of just over 60%.<sup>188</sup>

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<sup>188</sup> See Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety. *Worldwide and Regional Trends in Aviation Safety*, 6<sup>th</sup> Sess., Theme 1: The status of aviation safety, ICAO Doc. DGCA/06-WP/2 (2006) § A-3.

Regionally, five year average rates show substantial differences.<sup>189</sup> As shown in the following chart, some regions have higher rates of accidents. In Africa, the rate increased from 3.6 to 5.0, more than six times the world average; in the Middle East the rate increased from 0.5 to 1.8; in Latin America and the Caribbean the rate decreased from 2.4 to 1.7; the Asia-Pacific Region reduced its average rate from 2.6 to 1; Europe reduced its rate from 0.8 to 0.6 and North America (United States and Canada) from 0.7 to 0.4, thus displaying fatal accident rates lower than the world average.

### AVERAGE RATE OF FATAL ACCIDENTS PER MILLION DEPARTURES IN SCHEDULED AIR TRANSPORT OPERATIONS



International civil aviation is a very safe mode of transportation. However, the averages show that there are many challenges to be addressed to achieve a further reduction in

<sup>189</sup> Regional rates uses five-year averages due to the volatility inherent in the annual accident rates caused by the small aerial activity in regions such as Africa and the Middle East.

accident rates. It is noteworthy that some regions experienced an increase in their accident rates over the period. This situation was the combination of multiple factors, such as: the increase of operations in a specific region, the inability to implement minimum safety standards, and the absence of safety oversight functions, among others.

As described above, the data collected through the first set of audits represented a valuable tool to enhance safety, although Africa and the Middle East stood out as moving in the wrong direction. In order to have an even better level of compliance with the safety-related Annexes of the Chicago Convention, ICAO then took two main actions towards the evolution of the program: the comprehensive assessment of the safety-related deficiencies contained in all Annexes of the Chicago Convention and the increased communication of the deficiencies identified between the Audited State, ICAO and all contracting States.

The first USOAP report utilizing these new terms of reference was presented to the 36<sup>th</sup> Assembly in 2007 and updated during the 184<sup>th</sup> Session of the ICAO Council. The report noted that conduct of audits under the comprehensive systems approach (CSA audit cycle) started in April 2005 and that a total of ninety Contracting States<sup>190</sup> had been audited as of 30 April 2008. Globally, the updated report showed that the lack of implementation of the Critical Elements of Safety Oversight was 41.6%.<sup>191</sup> This percentage cannot be compared with the previous graph because it represents the level of implementation of all safety-related SARPs contained within the Annexes of the Chicago Convention and not just the three Annexes assessed in the previous cycle.

The following graph shows the degree of implementation of the Critical Elements of a Safety Oversight System disclosed to the 184<sup>th</sup> Session of the Council:

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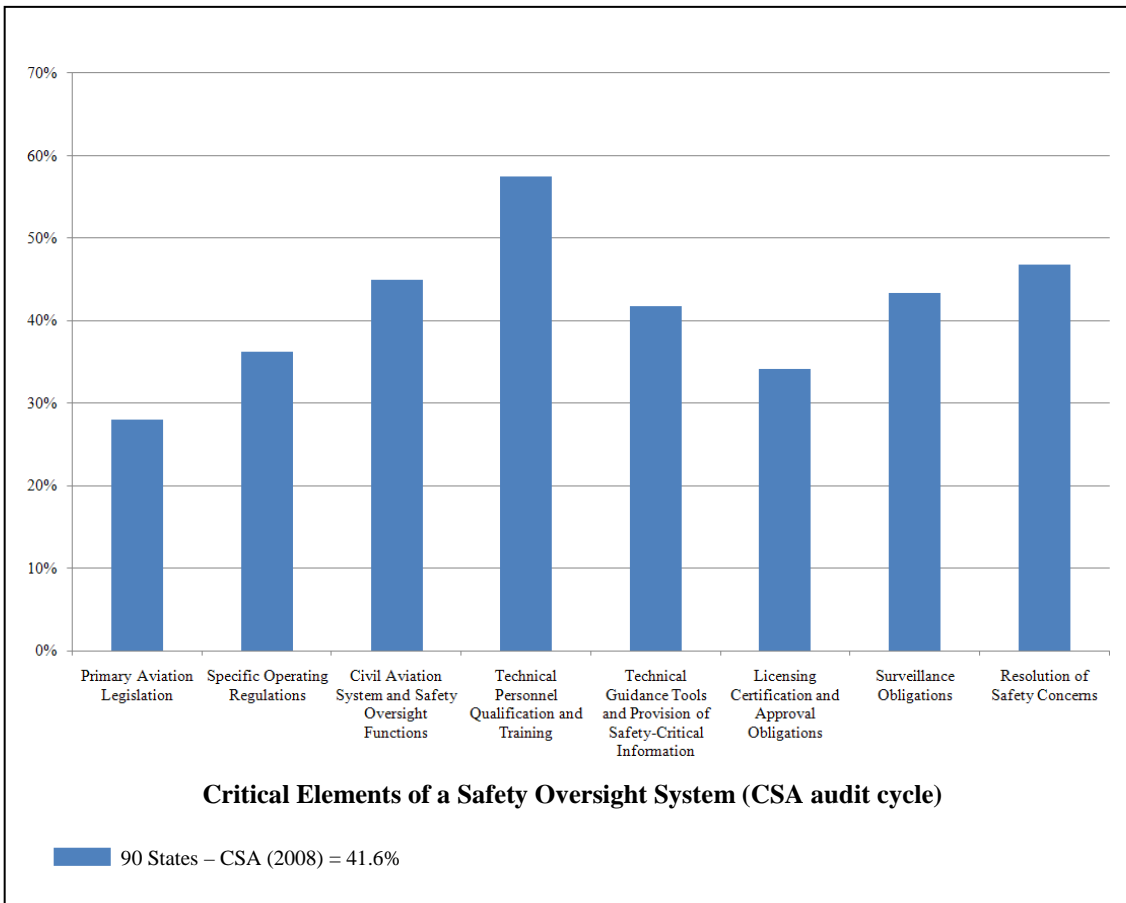
<sup>190</sup> As of 31 July 2008 ICAO has 190 Contracting States. Therefore, the sample covers almost half of the members States of the Organization (47.37%).

See ICAO, "Contracting States", online: The International Civil Aviation Organization <[http://www.icao.int/cgi/goto\\_m.pl?cgi/statesDB4.pl?en](http://www.icao.int/cgi/goto_m.pl?cgi/statesDB4.pl?en)>.

<sup>191</sup> See C-WP/13171, *supra* note 75 § Appendix A.



## CRITICAL ELEMENTS OF A SAFETY OVERSIGHT SYSTEM – Lack of Effective Implementation (%) –



As of this report, the entire audit reports were already placed in the secure site of the ICAO webpage. The Council had endorsed the DGCA/06 recommendation to release in the public area of the FSIX website the final safety oversight audit results and the level of implementation of the critical elements of a safety oversight system for each State represented in the attached chart (Attachment A).

The current cycle of safety audits (CSA audit cycle) does not contemplate follow-up missions. It is expected that a baseline on the level of effective implementation of the critical elements and the compliance with SARPs in all safety-related Annexes will be established in order to conduct the respective follow-up missions or a transition to a continuous monitoring approach (CMA) of States' safety oversight capabilities. Under the

CMA, the future activities of the USOAP could be based on pre-established risk indicators, the results of the audit and the implementation of the Corrective Action Plan, accident and incident rates, increase in aviation activity, and the overall situation in the State.<sup>192</sup>

Certainly, the USOAP has been useful in increasing Contracting States' awareness of their safety oversight responsibilities, their degree of compliance with ICAO provisions and implementation of the critical elements. Additionally, the program has allowed the identification of safety concerns relative to all safety-related Annexes. Regarding the subject of transparency, it cannot be seen as an isolated element because it is only one part of the current system, in combination with: a uniform implementation of SARPs; mutual recognition of airworthiness certificates and licenses issued in accordance with the SARPs; enhancement of safety oversight performance; and cooperation, assistance and partnerships between ICAO, Contracting States, airspace users, air navigation services providers and the industry.<sup>193</sup>

As mentioned in Chapter One, ICAO does not have enforcement powers. Therefore, transparency is seen as a key element in encouraging Contracting States to become compliant with SARPs. ICAO, as an international organization, acts under the legal powers attributed to it by its members, and they intentionally withheld any enforcement powers. Specifically, due to the particular nature of the SARPs as soft law, ICAO has its "hands tied behind its back" if it tries to enforce them legally, even though SARPs are intended to promote global aviation safety, ICAO cannot act, even when enforcement might benefit all States. Nevertheless, the States have granted ICAO limited power to inform the public about the audit reports<sup>194</sup> and the Council has the possibility to apply the *Procedure of Transparency and Disclosure*. In both cases, the intent is to inform expose a non-compliant State to public scrutiny.

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<sup>192</sup> See A36-WP/64, *supra* note 164 § 3.

<sup>193</sup> See A35-WP/63, *supra* note 91.

<sup>194</sup> This power was conferred by each Contracting State according to the ICAO News Release ICAO, "All Audited States now authorize ICAO to post audit results on public website", online: The International Civil Aviation Organization <[http://www.icao.int/icao/en/nr/2008/pio200804\\_e.pdf](http://www.icao.int/icao/en/nr/2008/pio200804_e.pdf)>.

As Prof. Dempsey mentions, “there are also instances of compliance inspired by the desire to avoid the costs of non compliance such as [...] the adverse publicity and negative world opinion to which the uncooperative nation may be subjected if it is perceived as a delinquent.”<sup>195</sup> ICAO achieves delegated enforcement since the problem for a delinquent State is not only that it faces shame or bad public opinion, but that its carriers might be excluded by Contracting States on the strength of audit results. In practical application, ICAO uses transparency to inform every State having certified operations flying to or through the airspace of the non-compliant State so that appropriate measures can be taken to avoid any safety risk. While this process may operate as planned, other economic and political mechanisms, such as a technical assistance and cooperation may also be brought to bear to achieve the same goals. Today, transparency in the USOAP is been used as a “quasi-enforcement” power by ICAO and has proven to improve aviation safety; especially among States that before the public disclosure of its level of implementation with the adopted SARPs and oversight capabilities did not have the political commitment to comply.

For donors such as the International Air Transport Association (IATA) who are asked to invest funds for technical cooperation and assistance programs it is crucial to have access to information showing tangible results and improvements in aviation safety. As Giovanni Bisignani, Director General and Chief Executive Officer of IATA, observed at the ICAO-McGill Conference on Aviation Safety, Security and Environment – The Way Forward, held in Montreal in September 2007, “ICAO’s Universal Safety Oversight Audit Programme [under the comprehensive system approach] plays an important role, growing in relevance with increasing transparency.”<sup>196</sup> Not only do external donors and contributors perceive transparency to be a core element with regard to assistance, the ICAO Council bases assistance programs, such as the Implementation Support Development (ISD) Programme, on transparency and sharing of critical information and analysis of the safety-

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<sup>195</sup> Paul Stephen Dempsey, “Blacklisting: Banning the Unfit from the Heavens” (2007) XXXII Ann. Air & Sp. L. 29 at 60 [Dempsey].

<sup>196</sup> Giovanni Bisignani, “Keynote address delivered at the 2007 ICAO-McGill Conference on Aviation Safety, Security and Environment – The way forward” (2007) XXXIII Ann. Air & Sp. L. 496 at 498.

critical information for determining effective means to assist Contracting States that still have deficiencies.<sup>197</sup>

On the other hand, IATA produces a yearly Regional Industry Accident Rates (IATA and non-IATA Western-built Jets: Hull Losses per million sectors) which shows the following results:<sup>198</sup>

Region	2005	2006	2007
Africa	9.21	4.31	4.09
Asia & Pacific	1.00	0.67	2.76
Russia & C.I.S. States	0.00	8.60	0.00
Europe	0.33	0.32	0.29
Latin America	2.59	1.80	1.61
Middle East & North Africa	3.84	0.00	1.08
North America	0.19	0.49	0.09
North Asia	0.00	0.00	0.88
Industry	0.76	0.65	0.75

From this data we can distinguish a significant decrease in the accident rate in Africa, Latin America and the Middle East. These three regions were considered central to the improvement of safety and several efforts were made to achieve it. The USOAP played a fundamental role in this achievement because it served as a mechanism to identify deficiencies. Technical cooperation and assistance certainly helped to raise the level of compliance with safety-related SARPs and therefore the reduction of accident occurrences.

In conclusion, in order to achieve positive results in resolving safety deficiencies, transparency needs to be balanced with technical cooperation and assistance, not only because many Contracting States do not have sufficient infrastructure or means to comply with the SARPs developed by ICAO, but also because donors are most interested in the commitment to aviation safety that States in need must demonstrate. Transparency has helped to identify deficiencies, tailor solutions to overcome those deficiencies, has served as a “quasi-enforcement” power in the implementation of SARPs, and has increased

<sup>197</sup> See Abeyratne, *supra* note 40 1135 at 1144.

<sup>198</sup> IATA, “Fact Sheet – Safety”, online: International Air Transport Association <[http://www.iata.org/pressroom/facts\\_figures/fact\\_sheets/safety.htm](http://www.iata.org/pressroom/facts_figures/fact_sheets/safety.htm)>.

confidence among actors the aviation industry regarding cooperation and assistance programs.

### **3.1.2 Safety Outcomes – The Contracting State Perspective**

Recognition of certificates and licences issued by another State as valid is fundamental for commercial operations. Indeed, the mutual recognition of licenses and certificates between States exploiting air traffic rights implies that these States are satisfied with other States' level of compliance with ICAO's minimal safety provisions and the safety oversight provided. The satisfaction of the requirements can be performed directly through bilateral agreements (through a safety clause and individual inspections) or by analyzing legitimate data of the State concerned, such as the audit results obtained from the USOAP. If the summaries or the audit results of the USOAP show that a State is not satisfying the minimum safety requirements, the "State authority cannot reasonably assume without verification that the condition for recognition stated in Article 33 is actually being met by another State."<sup>199</sup>

As mentioned before, all States are able to obtain full audit reports through the ICAO website. Because these reports provide accurate safety-related information, any State can have an idea of the safety status of another State. Once this information is acknowledged, States are encouraged to take appropriate actions when necessary to preserve safety, in accordance with Resolution A35-7.<sup>200</sup> The "appropriate actions" could be materialized in the increase of safety measures or the non-recognition of certificates and licenses resulting in a denial of operations started at an "unsafe" State. Therefore, as Prof. Dempsey mentions "a state could only legitimately deny another State's aircraft (so long as it held traffic rights) if the registering State was failing to comply with its obligations under the SARPs."<sup>201</sup>

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<sup>199</sup> Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety. *Mutual Recognition*, 6<sup>th</sup> Sess., Theme 2: Improving aviation safety, ICAO Doc. DGCA/06-WP/8 (2006) § 1.2.

<sup>200</sup> Resolutions adopted at the 35<sup>th</sup> Session of the Assembly, Res. A35-7, *supra* note 48 at 26.

<sup>201</sup> Dempsey, *supra* note 195 at 41.

Before the USOAP, most States were generally confident that other members were fulfilling their safety obligations under the Convention and usually recognized their certificates and licences. However, the USOAP results showed that some States were issued or rendered valid certificates and licences without meeting the applicable SARPs. Consequently, if a State does not fully-comply with the minimum safety-related standards developed by ICAO, the certificates and licences issued by it could be subject of non recognition by other States. As a result, other States could restrict operations of its certificate holders. Undoubtedly, this situation is perfectly legal and desirable from a safety perspective. Nevertheless, such restrictions have also been used for other purposes not safety-related, which is not in accordance with ICAO and USOAP policy and aims. Use of USOAP information should be inclusionary and de-politicized to encourage the improvement of safety aviation practices among Contracting States. However, since States enter into air services agreements for economic reasons – to allow their operators to provide commercial services to another State and vice versa – sometimes economic and political considerations are hidden behind a “safety measure” taken by a Contracting State to restrict operations from another State. This leads us to the study of the economic and political outcomes of transparency in the USOAP.

### **3.2 Economic and Political Outcomes**

The exchange of traffic rights is derived from the rights conferred by Articles 1 and 6 of the Chicago Convention through bilateral or multilateral negotiations between States. Bilateral agreements can be defined as “international trade agreements in which the governmental aviation authorities of two nations establish a regulatory mechanism for the performance of commercial air services between their respective territories and, in many cases, beyond.”<sup>202</sup>

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<sup>202</sup> Paul Stephen Dempsey, *Public International Air Law Volume I*, (faculty of Law, McGill University, 2007) at 175.

On 11 February 1946, the United States of America and the United Kingdom concluded a bilateral air transport agreement which exchanged traffic rights between the two nations regulating fares, capacity and a dispute resolution mechanism, the so-called *Bermuda I* Agreement. This agreement became a prototype used by several States in their respective air transport negotiations. In addition to the core clauses, the issue of safety was also contemplated in a provision stipulating that certificates of airworthiness and licenses issued or rendered valid by one State should be recognized as valid by other Contracting State when operations had been agreed between the parties. In further agreements, the same clause served as a model until ICAO proposed a modern approach on 12 June 2001.<sup>203</sup> This model clause has incorporated the concept that the recognition of certificates and licenses is reliant on their compliance, at least, with the minimum requirements established by the Chicago Convention and its Annexes, making clear reference to Article 33 mentioned above.

As mentioned before in Chapter Two, some States simply could not or would not comply with the SARPs and some international actors began to take actions in response. The most tangible and significant examples of such unilateral actions are the United States

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<sup>203</sup> ICAO MODEL CLAUSE ON AVIATION SAFETY

1. Each Party may request consultations at any time concerning the safety standards maintained by the other Party in areas relating to aeronautical facilities, flight crew, aircraft and the operation of aircraft. Such consultations shall take place within thirty days of that request.
2. If, following such consultations, one Party finds that the other Party does not effectively maintain and administer safety standards in the areas referred to in paragraph 1 that meet the Standards established at that time pursuant to the Convention on International Civil Aviation (Doc 7300), the other Party shall be informed of such findings and of the steps considered necessary to conform with the ICAO Standards. The other Party shall then take appropriate corrective action within an agreed time period.
3. Pursuant to Article 16 of the Convention, it is further agreed that, any aircraft operated by, or on behalf of an airline of one Party, on service to or from the territory of another Party, may, while within the territory of the other Party be the subject of a search by the authorized representatives of the other Party, provided this does not cause unreasonable delay in the operation of the aircraft. Notwithstanding the obligations mentioned in Article 33 of the Chicago Convention, the purpose of this search is to verify the validity of the relevant aircraft documentation, the licensing of its crew, and that the aircraft equipment and the condition of the aircraft conform to the Standards established at that time pursuant to the Convention.
4. When urgent action is essential to ensure the safety of an airline operation, each Party reserves the right to immediately suspend or vary the operating authorization of an airline or airlines of the other Party.
5. Any action by one Party in accordance with paragraph 4 above shall be discontinued once the basis for the taking of that action ceases to exist.
6. With reference to paragraph 2 above, if it is determined that one Party remains in non-compliance with ICAO Standards when the agreed time period has lapsed, the Secretary General of ICAO should be advised thereof. The latter should also be advised of the subsequent satisfactory resolution of the situation.

See Session of the ICAO Council. *Summary of Decisions*, Subject No. 14.3.4 Report of the ANC – Model Clause on Aviation Safety, 163<sup>rd</sup> Sess., ICAO Doc. C-DEC 163/8 (2001) § 9.

International Aviation Safety Assessments (IASA) and the European Union Safety Assessment of Foreign Aircraft (SAFA) Program. These initiatives are nominally based on safety grounds, but have other implications for States involved in these processes. It must be noted even though transparency of the USOAP reports and summaries is not a core element of these processes; it is relevant because the information displayed could be considered as official since the reporting agency is ICAO.

### **3.2.1 US International Aviation Safety Assessments Program**

The International Aviation Safety Assessments (IASA) Program was established in August of 1992 to address the concern that some States were not implementing the safety standards required by ICAO. This program was a response to an Avianca Airlines flight 52 accident at Cove Neck, New York on 25 January 1990.<sup>204</sup> In addition to safety concerns, “other sources have revealed that before IASA was inaugurated, certain US-flag carriers have complained to [Department of Transport] that airlines operating under non-US flags were able to undercut the US carriers because of the substantially lower costs of inadequate foreign safety regulations. This [statement could suggest] that the policy issue was driven by airline economics rather than airline safety.”<sup>205</sup>

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<sup>204</sup> On 25 January 1990, Avianca Airlines flight 052 (Boeing 707-321b registered in Colombia) crashed in a wooded residential area in Cove Neck, Long Island, NY. The flight crew was placed in holding 3 times by ATC for a total of about 1 hour and 17 minutes. During the 3<sup>rd</sup> period of holding, the crew reported to the ATC that could not hold longer than 5 min, that it was running out of fuel, and that it could not reach its alternate airport in Boston. Subsequently, the crew executed a missed approach to JFK International Airport. While trying to return to the airport, the aircraft experienced a loss of power to all 4 engines and crashed approximately 16 miles from the airport. Of the 158 persons aboard, 73 were fatally injured.

The National Transportation Safety Board determined that the probable causes of the accident was the failure of the crew to adequately manage the airplane's fuel load, and their failure to communicate an emergency fuel situation to the ATC before fuel exhaustion occurred. Contributing to the accident was the crew's failure to use an airline operational control dispatch system to assist them during the international flight into a high-density airport in poor weather. Also contributing to the accident was inadequate traffic flow management by the FAA and the lack of standardized understandable terminology for pilots and controllers for minimum and emergency fuel states. The Safety Board also determined that wind shear, crew fatigue and stress were factors that led to the unsuccessful completion of the first approach and thus contributed to the accident.

See Accident Database & Synopses, “NTSB Identification: DCA90MA019”, online: National Transportation Safety Board <[http://www.nts.gov/NTSB/brief.asp?ev\\_id=20001212X22401&key=1](http://www.nts.gov/NTSB/brief.asp?ev_id=20001212X22401&key=1)>.

<sup>205</sup> Broderick & Loos, *Government Aviation Safety Oversight – Trust, But Verify* (2002) 67 J. Air & Com. 1035 at 1039, cited in Dempsey, *supra* note 195 at 46.



The IASA program sends teams to the assessed State to review its national laws, its aviation authority's organizational structure, qualifications of the personnel, aviation safety regulations, licensing systems and air carriers procedures of certification against the standards<sup>206</sup> of ICAO, in order to collect data to assign a rating (Category 1 – in compliance; Category 2 – not in compliance) to the CAA of the State regarding its level of compliance with the standards adopted by ICAO.<sup>207</sup>

In the first round of assessments, the Federal Aviation Administration (FAA) rated nine States,<sup>208</sup> mostly Latin American, as Category 2. In 1994, the US Department of Transportation publicly announced its findings regarding safety oversight and encouraged the passengers to choose US-flag carriers when safety oversight was considered deficient by the FAA. This public disclosure certainly had an adverse economic impact upon non-compliant States' carriers and tourism industries.<sup>209</sup> As of June 2008, twenty States are considered non-compliant with ICAO standards by the FAA: Bangladesh, Belize, Côte d'Ivoire, Democratic Republic of Congo, Gambia, Ghana, Guyana, Haiti, Honduras, Indonesia, Kiribati, Nauru, Nicaragua, Paraguay, Philippines, Serbia and Montenegro, Swaziland, Ukraine, Uruguay and Zimbabwe.<sup>210</sup>

As suggested before, this determination produces and sometimes is influenced by economic and political grounds. Prof. Paul Dempsey gives two examples of this situation:

1. In 1995, the FAA flunked Venezuela's aviation safety after the Avianca crash in New York three years earlier. The FAA then failed to revisit the question, though the ICAO safety oversight team twice examined Venezuela's safety regime and found improvements. Meanwhile, the US flag carriers Continental and Delta began to dominate the US-Venezuela market. In January 2006, the Venezuelan

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<sup>206</sup> Note that only *standards* as defined by ICAO are binding on a State.

<sup>207</sup> See Boteva, *supra* note 31 at 89-94.

<sup>208</sup> Belize, Dominican Republic, Honduras, Nicaragua, Paraguay, Uruguay, Ghana, Gambia and Zaire. See M.L. Morrison, "Navigating the Tumultuous Skies of International Aviation: The Federal Aviation Administration's Response to Non-Compliance with International Safety Standards" (1995) 2 Sw. J. Trade Am. 621 at 626.

<sup>209</sup> See Dempsey, *supra* note 195 at 48.

<sup>210</sup> See FAA, "International Aviation Safety Assessments (IASA) Program, Results (MS Excel)", online: Federal Aviation Administration <[http://www.faa.gov/safety/programs\\_initiatives/oversight/iasa/?CFID=3308078&CFTOKEN=b92fcf02b2914d78-8BC11DDC-1372-4138C9C0D46092E1498E&jsessionid=1230cde4194cf5d79346](http://www.faa.gov/safety/programs_initiatives/oversight/iasa/?CFID=3308078&CFTOKEN=b92fcf02b2914d78-8BC11DDC-1372-4138C9C0D46092E1498E&jsessionid=1230cde4194cf5d79346)>.

government threatened to halt US Carrier flights to Venezuela. The FAA thus was motivated to re-evaluate Venezuela's safety rating, and gave it a passing grade.

2. Though, nowhere in print, there has been widespread talk of how Ecuador was elevated to Category 1 by the FAA, having been on the Category 2 list, after Ecuador threatened to cancel oil exploration contracts with the US oil firms.

Thus, for safety, economic or political reasons States can move from one Category to another in the IASA ratings. Between 2004 and 2008 Argentina, Ecuador, Greece and Venezuela upgraded from Category 2 to Category 1, while Ghana and the Ukraine fell from Category 1 to Category 2.<sup>211</sup>

On the other hand, USOAP information about eleven Contracting States rated as Category 2 shows that some of them have made progress in resolving the deficiencies identified during its audit and/or follow-up missions. The progress recorded is exemplified in the following chart (although this information is displayed by ICAO, it is not meant to categorize States).

#### **CRITICAL ELEMENTS OF A SAFETY OVERSIGHT SYSTEM LACK OF EFFECTIVE IMPLEMENTATION (%)<sup>212</sup>**

<b>Contracting State</b>	<b>Initial Audit</b>	<b>Follow-up Mission</b>
Bangladesh	28.18% (March 2000)	10.03% (November 2004)
Belize	47.97% (March 2001)	19.39% (August 2003)
Côte d'Ivoire	59.82% (May 2000)	34.55% (March 2004)
Democratic Republic of Congo	N/A*	-
Gambia	I/P** (March 1999)	I/P** (February 2003)
Ghana	21.86% (April 2001)	16.70% (May 2003)
Guyana	40.47% (March 2001)	24.40% (June 2003)
Haiti	40.39% (March 2001)	28.59% (February 2004)
Honduras	57.36% (July 2000)	11.80% (May 2004)
Indonesia	-	-
Kiribati	N/A*	-
Nauru	N/A*	-
Nicaragua	-	-
Paraguay	35.55% (August 1999)	0.00% (September 2001)

<sup>211</sup> See Dempsey, *supra* note 195 at 49.

<sup>212</sup> See ICAO, "List of States that have authorized ICAO to release information on their Safety Oversight Audit conducted between 1999 and 2004", Graph, online: The International Civil Aviation Organization <<http://www.icao.int/fsix/auditRep1.cfm>>.

Philippines	-	-
Serbia and Montenegro	-	-
Swaziland	N/A*	-
Ukraine	-	-
Uruguay	13.45% (April 2001)	8.23% (May 2004)
Zimbabwe	30.61% (June 2001)	14.19% (July 2004)
N/A*: Information is not incorporated in the public site of ICAO.		
I/P**: Information is in process.		
-: No information available in the public site of ICAO.		

It is remarkable and interesting to note that other States rated as Category 1 are in between the highest (Côte d'Ivoire with 34.55% after the Follow-Up Mission) and lowest (Uruguay with 8.23% after the Follow-Up Mission) percentages of lack of implementation of the SARPs of the Contracting States rated as Category 2 by the FAA, without any explanation about this difference. In the cases of Ecuador and Venezuela, their safety status is not as good as Uruguay, however, both are rated as Category 1, suggesting that the affirmations made by Prof. Paul Dempsey that political and economic factors influence these measures are correct. Finally, it is notable that Brazil, China, Portugal and Switzerland are also between these ranges of level of compliance, but they have never been rated as Category 2 by the FAA.

### **CRITICAL ELEMENTS OF A SAFETY OVERSIGHT SYSTEM LACK OF EFFECTIVE IMPLEMENTATION (%)<sup>213</sup>**

<b>Contracting State</b>	<b>Initial Audit</b>	<b>Follow-up Mission</b>
Brazil	37.37% (April 2000)	10.14% (June 2003)
China	17.50% (September 1999)	11.06% (August 2001)
Dominican Republic	30.96% (March 2000)	10.22% (February 2003)
Ecuador	16.23% (October 2000)	5.26% (April 2003)
Ethiopia	37.52% (April 1999)	11.18% (November 2001)
Hungary	41.53% (January 2001)	23.73% (August 2003)
Morocco	31.70% (November 1999)	10.47% (July 2004)
Portugal	27.89% (November 2000)	16.93% (May 2003)
Samoa	12.61% (June 2001)	27.04% (May 2003)
Switzerland	20.89% (November 2000)	8.87% (October 2003)
Tonga	46.15% (December 2000)	36.54% (May 2003)
Venezuela	60.68% (August 1999)	11.73% (July 2004)

<sup>213</sup> See *Ibid.*

A question arises following the interpretation of the information presented in this chart. ICAO's audits have shown that the level of compliance of several States, categorized as non-compliant by the FAA, has improved. As Prof. Dempsey suggests, it is debatable that the refusal to allow the entry of States listed as Category 2 into another's airspace violates Article 33 of the Chicago Convention when ICAO has recorded officially, that these States have improved their level of compliance with the SARPs. Having adopted the SARPs, it would seem that ICAO would be in a superior position to determine compliance with their requirements.<sup>214</sup> It must be noted that ICAO, due to its nature, does not have any economic or political influence when conducting the audits and follow-ups; on the contrary its assessments are truly objective.

### **3.2.2 European Union List of Air Carriers Subject to an Operating Ban within the Community**

In 1996, ECAC launched the SAFA to assess compliance with the standards contained in the Annexes of the Chicago Convention through ramp inspections of aircraft landing in an ECAC member State.<sup>215</sup> The main difference between SAFA on the one hand and USOAP and IASA on the other is that the assessments are performed on carriers based on ramp inspections rather than on States based on safety oversight responsibilities and level of compliance with the SARPs. By 2001, the European Union member States were obliged to "ensure that third-country aircraft suspected of non-compliance with international safety standards landing at any of its airports open to international air traffic [should] be subject to ramp inspections."<sup>216</sup>

On 14 December 2005, the European Parliament and the Council of the European Union promulgated Regulation (EC) No. 2111/2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing passengers of the identity of the operating air carriers. This regulation established a "list of

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<sup>214</sup> See Dempsey, *supra* note 195 at 31.

<sup>215</sup> See Detra, *supra* note 56 at 58.

<sup>216</sup> EC, *Council Directive 2004/36/CE of April 2004 on the safety of third-country aircraft using Community airports*, [2004] O.J.L. 143/76.

air carriers that are subject to an operating ban in the Community [...]. Each [European] State shall enforce, within its territory, the operating bans included in the Community list in respect of the air carriers that are the subject of those bans.”<sup>217</sup> Additionally, the regulation establishes that the decision to blacklist an air carrier is based “upon the merits of each case”<sup>218</sup> taking into consideration whether the carrier meets *the relevant safety standards*.<sup>219</sup>

As of 24 July 2008 one-hundred-fifty-six airlines from the following States are subject to an operational ban within the European Community, resulting in a prohibition from flying in EU skies: Democratic Republic of Korea, Sudan, Afghanistan, Rwanda, Angola, Ukraine, Democratic Republic of Congo, Equatorial Guinea, Indonesia, Kyrgyz Republic, Republic of Gabon, Sierra Leone and Swaziland.<sup>220</sup>

In this particular case and in accordance with the EC No. 2111/2005, air carriers may be restricted or prohibited from European skies if they violate the safety standards “in relevant community law,” even if the countries of origin are in compliance with the applicable SARPs. This measure could be interpreted to be in contradiction with Article 33 of the Chicago Convention, because every ICAO State is supposed to recognize as valid the certificates and licenses issued by the registering State if they comply with the minimum SARPs contained in the Annexes of the Chicago Convention. Nevertheless, every State has complete and exclusive sovereignty over the airspace above its territory; therefore, every State could set higher safety standards to conduct air commercial operations, but only if they are demanded to all carriers performing them over its territory.

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<sup>217</sup> EC, *Council Regulation 2004/36/CE of 14 December 2005 on the 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 § Article 3.

<sup>218</sup> See *Ibid.*, § Annex.

<sup>219</sup> Relevant safety standards are defined as “the international safety standards contained in the Chicago convention and its Annexes, as well as, where applicable, **those in relevant community law**.” [**Emphasis added**]. *Ibid.*, § Article 2 j).

<sup>220</sup> See EU, “List of Air Carriers of Which all Operations are Subject to a Ban within The Community”, online: European Commission <[http://ec.europa.eu/transport/air-ban/pdf/list\\_en.pdf](http://ec.europa.eu/transport/air-ban/pdf/list_en.pdf)>.

Like under IASA, the restriction of operations under SAFA produces economic and political consequences. It is possible that older and less well maintained aircraft would be left to operate to States not employing a blacklisting program, while new and appropriately maintained aircraft will be used to operate within the European territory, with the consequence that developing States will be left with less safe aircraft. Furthermore, the economic impact of a prohibition to operate in Europe on the blacklisted airlines may result in the dominant position of European carriers which would fly all the routes approved exclusively.

Both programs, the US assessments and the EU blacklists, generate an adverse impact against a State or an airline, respectively, resulting in economic losses for the State's transportation and tourism industries and economy generally. The travelling public might choose to fly other air carriers or to visit other destinations. Even given these considerations, it must be acknowledged that blacklisting measures have proven to be useful in encouraging compliance with the Annexes of the Chicago Convention among States by exposing SARP implementation deficiencies.

### **3.2.3 Conclusion on Economic and Political Outcomes**

The information contained in the USOAP reports and summaries should not be misused. This information should serve a safety purpose only and, if used, should not be discriminatory. If a government is not satisfied with aviation safety oversight in another State, the logical response should be not simply to revoke the permit or authorization of the foreign carrier of the deficient country to operate, but also restricting all operations to that country, which means stopping operations of its own air carriers to that State as well.<sup>221</sup>

Transparency and sharing of safety information are fundamental tenets of a safe air transport system. The disclosure initiative taken by ICAO was intended to foster mutual trust between States, increase public confidence in air travel, and help maintain in a non-

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<sup>221</sup> See George N. Tompkins, Jr., "Enforcement of aviation safety standards" (1995) XX-I Ann. Air & Sp. L. 319 at 326.

discriminatory manner the integrity of the safest and most efficient means of mass transportation ever created. If little by little the safety goal of the disclosure of information is modified by economic or political interests, the essence of the USOAP and the trust of all Contracting States gained at this point would be prejudiced.

Furthermore, although duplicative, unilateral programs created to assess the same factors as the USOAP could in some cases result in an improvement of safety; they are also waste effort and resources both from the auditor and auditee perspective. The need for parallel programs has become debatable to the degree that the USOAP performs a thorough assessment all the safety-related provisions contained in the Annexes of the Chicago Convention and shares the entire audit reports with all Contracting States. Indeed, USOAP auditors are often drawn from the expertise of the very countries that set up parallel audit procedures. Under these circumstances, it might be more beneficial for parties to reallocate resources to resolve deficiencies or to aid in the implementation of Corrective Action Plans.

Finally, it is worth adding that, ICAO could in principle also assess the use of safety information by Contracting States to verify that it is used for safety-related purposes only. If ICAO has developed a program that has proved to be useful in improving safety aviation practices, it could also develop, as a part of the program, another area of assessment regarding the use of safety information and incorporate it into the audit report. Such action could lead to diminution of the use of economical or political grounds to blacklisting airlines or States.

### **3.3 Legal Outcomes**

The principle of transparency in the USOAP generated several new legal obligations for ICAO and Contracting States. In order to have a better understanding of these obligations,

three types of States should be distinguished depending upon the actions taken after the Audit.<sup>222</sup>

### **3.3.1 Types of Contracting States According to their Actions after the Audit**

Contracting States react differently towards the audit and the subsequent actions that need to be performed to achieve the *highest practicable degree* of uniformity in safety-related regulations, standards, procedures and organization. Some States react by actively supporting the USOAP, as manifested through its acceptance, the efforts made during the audit, and the submission and implementation of the Corrective Action Plan – all resulting in a significant improvement in their safety oversight level of compliance with the SARPs. Other States simply cannot act due to the lack of appropriate resources. Still others do not act because of a lack of political commitment to adopt and implement the recommendations made to resolve their safety deficiencies. For academic purposes, these types of States will be classified as: Unreservedly Proactive States, Reservedly Proactive States and Recalcitrant States.

To establish an objective differentiator, the *Safety Oversight Audit Manual* was analyzed to identify the following actions expected from the Contracting State by ICAO prior to, during and after the audit.<sup>223</sup>

1. Signature and return of the revised MOU;
2. Acceptance of their respective Audit Schedule proposed by ICAO;
3. Submission of the SAAQ and CCs ninety days before the on-site audit, and specific documentation submitted six months in advance;
4. Cooperation and assistance with the audit team during the On-site Audit;
5. Attendance and cooperation during the closing meeting of the On-site Audit;

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<sup>222</sup> ICAO does not promote categorization or differentiation among Contracting States; therefore, the proposal suggested in this research, consisting in the division of States regarding its actions after the USOAP is responsibility of the author.

<sup>223</sup> See Safety Oversight Audit Manual, *supra* note 59 § Chapter 5.



6. Proposal of the appropriate corrective measures, if a significant safety concern is identified;
7. Development of a Corrective Action Plan based on the interim safety oversight audit report;
8. Submission of the Corrective Action within sixty calendar days after receiving the interim safety oversight audit report;
9. Implementation of the Corrective Action Plan as scheduled;
10. Submission of updated information until corrective actions are completed;
11. Submission of comments on the final Safety Oversight Audit Report;
12. Consent to publish the final audit results in the ICAO public website; and
13. Cooperation and assistance with the follow-up mission.

Bearing this inventory of actions in mind, the following characteristics of States have been identified:

1. **Unreservedly Proactive States:** In this category are those States that fulfill the thirteen actions expected by ICAO towards the USOAP within an appropriate time and without hindrance. It was noted that States included in this category had experienced important improvements in their percentages of implementation of SARPs and safety oversight responsibilities.
2. **Reservedly Proactive States:** this category is composed of States that had expressed a solid commitment to comply with the actions expected by ICAO towards the USOAP, but do not have the appropriate means to fulfill them. Several States in this category have sought assistance and have shown improvements in their percentages of implementation of SARPs and safety oversight responsibilities but have not taken all of the thirteen actions expected by ICAO.
3. **Recalcitrant States:** States that demonstrate severe and persistent safety oversight deficiencies and show all or some of the following characteristics:
  - Failure to participate in USOAP audit process

- Failure to complete the SAAQ and CCs
- Failure to participate in the on-site audit
- Failure to submit an acceptable Corrective Action Plan
- Failure to resolve the safety-related deficiencies identified in the USOAP audit
- Level of activity inconsistent with safety oversight capability
- Nature of activity inconsistent with safety oversight capability

The States considered under this category do not show sufficient political will or commitment to improve their safety oversight functions or level of compliance with the SARPs. Additionally, these States do not demonstrate significant improvements in their follow-up missions and, if significant safety concerns are acknowledged by ICAO, they might be candidates for the *Procedure of Transparency and Disclosure* adopted by the ICAO Council in 13 June 2005.

### **3.3.2 International Obligations of the International Civil Aviation Organization**

#### **3.3.2.1 Obligation of Transparency**

At the time that the Chicago Convention was signed, its Contracting States “agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner.”<sup>224</sup> To achieve this objective, States undertake “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 in which such uniformity will facilitate and improve air navigation”<sup>225</sup> contained in the Annexes of the Chicago Convention. The “quasi-legislative” power conferred to ICAO to prescribe SARPs and expect States to implement them through their domestic laws created a system of universal trust and mutual recognition among States.

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<sup>224</sup> Chicago Convention, *supra* note 7 § preamble.

<sup>225</sup> *Ibid.* § Article 37.

It is desired that every State will take all the appropriate measures to have the maximum level of compliance with the SARPs. However, in accordance with Article 38 of the Chicago Convention, if a State finds it impracticable to comply or to bring its regulations into full accord with the international standards, it is required to give immediate notification to ICAO of those differences. On the other hand, the ICAO Council has the obligation to inform all States “of the differences which exists between one or more features of an international standard and the corresponding national practice of [a Contracting] State.”<sup>226</sup> This obligation is directly referenced to “notified differences” by the Contracting States.

Meanwhile, the evolution of the USOAP gave origin to “audited differences” which are not contemplated in the Chicago Convention or its Annexes. The “audited differences” are considered as deficiencies identified through the USOAP falling short of the safety oversight obligations of a Contracting State or below adequate compliance with the SARPS. The question that arises is whether the Council also has an obligation to notify the “audited differences” to all Contracting States?

In addition to the obligation prescribed by the Articles mentioned above, the Council’s obligation to inform all Contracting States about the “audited differences” with the SARPs seems to be justified by the following mandates:

1. The Assembly Resolution A32-11 mandates “greater transparency and disclosure to audits”
2. Article 54 j) requires ICAO to “report to Contracting States any [...] failure to carry out recommendations or determinations of the Council”. This legal obligation was invoked for the first time adopting the Resolution A36-2 *Unified strategy to resolve safety-related deficiencies*, which directed the Council to “to apply and review the procedures to inform Contracting States, within the scope of Article 54 j) of the Chicago Convention, in the case of a State having

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<sup>226</sup> *Ibid.* § Article 38.

significant shortcomings with respect to ICAO safety related SARPs in order for other Contracting States to take action in an adequate and timely manner.”<sup>227</sup>

3. The recommendation of the DGCA/06 endorsed by the Council entitles ICAO to upload the final safety oversight audit results in the public area of the FSIX website, with prior consent of the pertinent State.<sup>228</sup> While this is not an official notification of differences, it effectively allows every Contracting State to verify the level of compliance with the SARPs of all members of ICAO.

Under the current regime, ICAO does not have the same obligation to inform Members of “audited differences” as it has to notify them of “notified differences”. At this time, the only obligation regarding the audited differences is to have absolute transparency in the public disclosure of the final audit results, Corrective Action Plans and comments of States discussing improvements. As has been observed, the confidentiality of the SARPs deficiencies manifestly violated the explicit requirements of Articles 38 and 54 j). Still, from my perspective, at this stage ICAO has only a passive transparency obligation, rather than an active information obligation with respect to the “audited differences,”<sup>229</sup> with exception of the recently adopted *Procedure of Transparency and Disclosure* that is only applied in very extreme cases.

### **3.3.2.2 Obligation of Assistance**

The principal argument for technical cooperation and assistance rendered by ICAO to States is contained in Article 44 of the Chicago Convention, which establishes:

#### **Article 44 Objectives**

The aims and objectives of the Organization are *to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport* so as to:

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<sup>227</sup> Resolutions adopted by the 36<sup>th</sup> Session of the Assembly, Res. A36-2, *supra* note 65 at 2.

<sup>228</sup> As mentioned above, as of 16 July 2008 all Contracting States had authorized ICAO to post its audit results on the public ICAO website. See *supra* note 156.

<sup>229</sup> Dempsey, *supra* note 195 at 55.

- (a) Insure the safe and orderly growth of international civil aviation throughout the world;
- (b) Encourage the arts of aircraft design and operation for peaceful purposes;
- (c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;
- (d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;
- (e) Prevent economic waste caused by unreasonable competition;
- (f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
- (g) Avoid discrimination between contracting States;
- (h) Promote safety of flight in international air navigation;
- (i) Promote generally the development of all aspects of international civil aeronautics. [emphasis added]

A literal interpretation of this Article makes clear that one of the principal objectives of ICAO is to foster the development of international air transport. From this perspective, the development and implementation of programs focused on technical cooperation and assistance in order to help Contracting States to achieve a better level of compliance with the international regulations developed by ICAO is in conformity with this objective. This is especially so where these programs promote the safe and orderly growth of international civil aviation throughout the world.

The Resolution A35-7 *Unified Strategy to Resolve Safety-Related*<sup>230</sup> adopted during the 35<sup>th</sup> Assembly outlined nine specific actions with respect to the promotion of different strategies directed to resolve deficiencies found through the USOAP, with special consideration given to Reservedly Proactive States.

The Assembly:

(...)

6. Directs the Council to promote the concept of regional or sub-regional safety oversight organizations;

7. Requests the Secretary General to continue to foster coordination and cooperation between USOAP and audit programmes of other organizations related to aviation safety, and specifically with IATA and Eurocontrol;

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<sup>230</sup> See Resolutions adopted at the 35<sup>th</sup> Session of the Assembly, Res. A35-7, *supra* note 48 at 26 and 27.

8. Urges Contracting States to further develop regional and sub-regional cooperation and, whenever feasible, partnership initiatives with other States, industry, air navigation service providers, financial institutions and other stake holders to strengthen safety oversight capabilities in order to foster a safer international civil aviation system and to better discharge their individual responsibilities;
  9. Encourages States to foster the creation of regional or sub-regional partnerships to collaborate in the development of solutions to common problems to build their individual safety oversight capability;
  10. Encourages all States able to do so to participate in, or provide tangible support for, the strengthening and furtherance of regional safety oversight organizations;
  11. Invites Contracting States to use the services of the ICAO Technical Cooperation Bureau (TCB) to resolve deficiencies identified by the USOAP;
  12. Invites Contracting States experiencing difficulties in financing measures necessary to correct safety-related deficiencies identified through USOAP to take advantage of the funding opportunity offered by the International Financial Facility for Aviation Safety (IFFAS);
  14. Directs the Council to adopt a flexible approach for the provision of assistance through the ICAO Regional Offices to support regional and sub-regional organizations responsible for safety oversight tasks and to implement an efficient system to monitor implementation of the unified strategy.
- (...)
15. Requests the Secretary General to investigate ways in which the identification of measures may be undertaken at national and regional levels to support States' development of ATM safety oversight capabilities and procedures.

The unified strategy to resolve safety-related deficiencies based the analysis of the causes of deficiencies and the development of solutions on a global, regional, sub-regional or State level. To achieve this purpose, ICAO, through the TCB and the Regional Offices, promotes regional or sub-regional safety oversight organizations; promotes the development of regional and sub-regional cooperation and partnership initiatives to generate solutions to common safety-related problems; and promotes financing schemes to correct safety-related deficiencies; among others.

Consequently, ICAO seems to have assumed an obligation to develop programs that promote the resolution of safety-related deficiencies identified by the USOAP with the main objective of achieving the *highest practicable degree* of uniformity in safety-related

regulations, standards, procedures and organization. Indeed, this obligation has been accomplished through the development of the programs to help States to comply with the SARPs and to assist them in acquiring affordable means of funding Corrective Action Plans.

### **3.3.3 International Obligations of States**

The first and most important obligation of the Contracting States with respect to the USOAP is to follow the actions expected by ICAO regarding the standard auditing procedures and the significant elements of these procedures applied in the USOAP contained in the *Safety Oversight Audit Manual*.<sup>231</sup> This obligation has its origin in two sources: the MOU signed prior the conduct of the audit and Article 37 of the Chicago Convention, which establishes:

#### **Article 37 Adoption of international standards and procedures**

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 in which such uniformity will facilitate and improve air navigation.

All the efforts and recommendations of the USOAP are directed at the resolution of deficiencies identified during the audit in order to achieve a better degree of uniformity with the SARPs. The fundamental objective of achieving uniformity of international aviation practices is to have safer air transport services in every region of the world. However, if for any reason a State does not have sufficient means to complete the actions expected by ICAO during the USOAP, such as the development of a Corrective Action Plan or its implementation, it has the duty to seek assistance from the facilities available within ICAO and/or other contributors, such as the World Bank. The obligation to seek assistance when needed could be considered parallel to that of ICAO and/or other

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<sup>231</sup> See Safety Oversight Audit Manual, *supra* note 59 § Chapter 5.

Contracting States with sufficient means, airspace users, air navigation services providers and the industry to render this assistance.

The revised MOU under which audits are currently performed requires the States subject to the audit to agree on the conduct of the audit and to comply with the actions expected by ICAO before, during and after the audit.

With respect to transparency, the MOU establishes two obligations: i) the audited Contracting State is to authorize ICAO to make available the final audit report available in its entirety through the secure website of the Organization and ii) it is to notify ICAO of any difference or non-compliance with Standards contained in any Annex.

#### **3.3.4 National Obligations of States**

The principle of transparency in the USOAP produced a broad channel of communication between ICAO and Contracting States. With the information contained in the secure site (which is available just to States) and in the public webpage any interested party can have a very good idea about the level of compliance with the SARPs and the degree of implementation of the safety oversight responsibilities of almost any State in the world. Therefore, once a State is recognized as a justified and persistent safety risk; the aviation community has the duty to act.

The 35<sup>th</sup> Assembly reminded “Contracting States of the need for surveillance of all aircraft operations, including foreign aircraft within their territory and *to take appropriate actions when necessary to preserve safety*” [emphasis added].<sup>232</sup> As mentioned before, these appropriate actions are equivalent to the non-recognition of certificates and licenses that serve as a justification to stop operations with that State on safety grounds. Even though this practice is legal and actually is desired in a safety environment, it has also legal limitations of which States need to be aware.

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<sup>232</sup> Resolutions adopted at the 35<sup>th</sup> Session of the Assembly, Res. A35-7, *supra* note 48 at 26.



The first limitation is generated by the mandate of the 32<sup>nd</sup> Assembly contained in its Resolution A32-11: *Establishment of an ICAO universal safety oversight audit programme*. The Assembly urged “all Contracting States to ensure that the results of the audits be used for safety-related purposes only,”<sup>233</sup> restricting the use of the audit results from retaliation, punishment and/or political or economic interests.

The second limitation is found in paragraph g) of the Article 44 of the Chicago Convention, which establishes that an objective of the Organization is to “avoid discrimination between Contracting States.” If actions are going to be taken to preserve safety, they must be taken towards every single State in the same conditions. It would be considered illegal to “select” one State for its level of compliance with the SARPs and to limit its commercial operations if these measures are not taken with regard to every Contracting State meeting the same criteria. As demonstrated within this Chapter, some States apparently<sup>234</sup> take discriminatory measures, acting in contravention of the explicit mandate of the Chicago Convention.

In this perspective the obligation to take the appropriate actions, such as the non-recognition of the certificates and licenses granted by Recalcitrant States, is necessary to avoid any safety risk. This obligation must be exercised by States in order to protect their aviation industry, airspace, territory and nationals, from potential harm that might be produced by a State not fulfilling its safety international obligations and/or not taking the appropriate steps to resolve its deficiencies. It is emphasized that these measures should be taken only for safety purposes and not for economic or political grounds.

### **3.4 Conclusion**

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<sup>233</sup> Resolutions adopted at the 32<sup>nd</sup> Session of the Assembly, Res. A32-11, *supra* note 103 at 21.

<sup>234</sup> The affirmation of this statement should be done after a thorough investigation of every single case, situation that falls out of the scope of this research; that is why it is left as a suggestion acquired from data analyzed.

The USOAP has achieved its full transparency objective and has produced several significant outcomes in different areas. The identification and analysis of the results of transparency reveals that sharing safety-related information can indeed be sensitive because of its potential economic and political consequences. Nevertheless, sharing safety-related information has proved to be highly beneficial in resolving deficiencies identified by the USOAP and warning States about unattended risks created by other States' lack of implementation, thus allowing complying States the opportunity to take appropriate actions to protect their aviation industry. Furthermore, transparency works as a “quasi-enforcement” tool to achieve better implementation of and compliance with SARPs. In sum, transparency has proven to be beneficial as long as the information disclosed serves safety-related purposes only.

## CONCLUSIONS

It is worth highlighting the most salient conclusions of this thesis, which has sought to analyze the evolutionary process that achieved full transparency for the USOAP:

ONE. Aviation safety is a concept in motion. SARPs are updated constantly to enhance safety and States are expected to implement them. Therefore, there is a continuous need to monitor how States are performing with respect to newly adopted SARPs. Recurrent follow-up missions and on-site audits generate high costs to ICAO, which is funded by its members. Thus, an efficient monitoring system based on the real needs of each State and an efficient use of the data collected by the USOAP will have to become even more clearly articulated goals for the Program.

TWO. ICAO, as an internationally recognized body that is part of the U.N. system, could serve as the sole agency for determining appropriate implementation of the SARPs. It is necessary to maintain the link of trust between the Organization and its members. Unilateral audits that assess the same objectives as the USOAP should be avoided especially since they give rise to the risk that economic and political goals and consequences will be taken into consideration when performing them. The success of the USOAP is based on trust in ICAO and its activities. If trust and recognition are its pillars, redundancy of efforts with different parallel programs having the same objective seems to be a waste of resources and effort. These resources could be better allocated by assisting States having financial or technical difficulties but displaying a strong political will to implement their Corrective Action Plans and improve on deficiencies identified by the USOAP.

THREE. The USOAP information must be used only for safety related purposes. This does not mean that the aviation industry is not allowed to use it. Safety-related information must serve as a tool to achieve a safer, harmonious and homogeneous aviation activity, and should be inclusionary and de-politicized. In other words, information obtained from the

conduct of the audits should serve as an engine to encourage the improvement of aviation safety practices among States.

FOUR. All the legal foundations of the USOAP rely on Assembly Resolutions and Council Decisions without an adequate justification established originally in the Chicago Convention. From my perspective, the success and importance of the USOAP justify the possibility of fundamental amendments to the Chicago Convention so as to ensure the ongoing legitimacy of the USOAP and indeed of many other practices that ICAO has had to adopt to respond to the evolution of the aviation industry.

FIVE. The USOAP Transparency Principle has been used as a “quasi-enforcement” tool by ICAO. Today, States, international organizations, financial institutions and passengers have access to the safety oversight results of a large number of States, which has mostly positive but some negative implications. Transparency used as a “quasi-enforcement” power has improved aviation safety; especially among States that, before the public disclosure of their level of implementation of the SARPs, did not have the political will to comply. International organizations are authorities without legal mechanisms to make States comply with the international law developed by them. Transparency has proven to be an efficient “quasi-enforcement” tool for ICAO and this may serve as a model for other international institutions.

SIX. Transparency needs to be balanced by technical cooperation and assistance. A refrain of this thesis has been that many States do not have sufficient infrastructure or means to comply with the standards developed by ICAO. However, their strong political commitment to aviation safety supported by multilateral assistance rendered by partnerships and alliances has proven to be a key element in the improvement of the implementation of SARPs and safety oversight systems.

SEVEN. It is intrinsic to international law that if a group of parties empower an organization to develop directives in a specific area, those parties must comply with them especially if those parties are involved in the development of the directives. In the case of

air transport, States unify their practices with the sole purpose of achieving the highest level of safety. Therefore, it would be irrational to be part of an international organization, such as ICAO, and not take all the appropriate actions to comply with its SARPs.

EIGHT. The development of the USOAP entails that ICAO and its Contracting States are now bound by the following obligations:

- The obligation of ICAO to inform all Contracting States about safety-related deficiencies.
- The obligation of ICAO to promote Cooperation and Assistance to help States resolve their safety-related deficiencies.
- The obligation of each State to use its best efforts to complete the cycle of the USOAP.
- The obligation of each State to resolve safety-related deficiencies identified by the USOAP.
- If a State does not have the economic or technical resources to resolve its deficiencies, then has the obligation to seek assistance to achieve this goal; on the contrary, if a State has sufficient economic and/or technical resources to help other States in need, it must provide this assistance.
- A State, acknowledging that another State is not fulfilling the safety requirements established by ICAO, has the obligation to take the appropriate measures to protect its airspace and its nationals from flying with carriers certified by a State displaying these deficiencies and to prevent its carriers from flying to that State.

Taken together, these obligations are designed to achieve the highest level of compliance with the SARPs. Transparency cannot be pursued in isolation from that broader objective. Rather, it must be understood as part of a multifaceted unified strategy to improve aviation safety having the following elements: implementation of SARPs; mutual recognition of airworthiness certificates and licenses where SARP implementation has achieved the highest practicable degree of uniformity; enhancement of safety oversight performance; and cooperation, assistance and partnerships between ICAO, Contracting States, airspace users, air navigation services providers and the aviation industry.

## ATTACHMENT A

<b>SAFETY OVERSIGHT AUDIT RESULTS UNDER THE COMPREHENSIVE SYSTEMS APPROACH</b>										
<b>State:</b> (State)		<b>Audit period:</b>		<b>DD to DD/MM/YYYY</b>						
<b>Level of Implementation of the Critical Elements of a Safety Oversight System</b>										
<b>CRITICAL ELEMENT</b>	1     =     Not implemented									
	10    =    Fully implemented									
	■     =     State's level of implementation									
	◻     =     Global average									
	1	2	3	4	5	6	7	8	9	10
Primary aviation legislation	■	◻	◻	◻	◻	◻	◻	◻	◻	◻
Specific operating regulations	◻	◻	◻	◻	◻	◻	◻	◻	◻	◻
State civil aviation system and safety oversight functions	◻	◻	◻	◻	◻	◻	◻	◻	◻	◻
Technical personnel qualification and training	◻	◻	◻	◻	◻	◻	◻	◻	◻	◻
Technical guidance, tools and the provision of safety-critical information	◻	◻	◻	◻	◻	◻	◻	◻	◻	◻
Licensing, certification, authorization and approval obligations	◻	◻	◻	◻	◻	◻	◻	◻	◻	◻
Surveillance obligations	◻	◻	◻	◻	◻	◻	◻	◻	◻	◻
Resolution of safety concerns	◻	◻	◻	◻	◻	◻	◻	◻	◻	◻

## **ATTACHMENT B: Acronyms and abbreviations**

**AAMAC.** Autorité Africaine et Malgache de l'Aviation Civile

**ACI.** Airports Council International

**ACSA.** Central American Agency for Aviation Safety

**AFDD.** Audit Finding and Differences Database

**AFI-PLAN.** Comprehensive Regional Implementation Plan for Africa

**ANB.** Air Navigation Bureau

**ANC.** Air Navigation Commission

**AOC.** Air Operator Certificates

**ARRB.** Audit Results Review Board

**ATC.** Air Transport Committee

**CAA.** Civil Aviation Authority

**CANSO.** Civil Air Navigation Services Organisation

**CC(s).** Compliance Checklists

**CINA.** Commission Internationale de la Navigation Aérienne

**CMA.** Continuous Monitoring Approach

**COSCAP(s).** Cooperative Development of Operational Safety and Continuing Airworthiness Programme(s)

**DGCA/97.** Directors General of Civil Aviation Conference on Global Strategy of Safety Oversight of 1997.

**DGCA/06.** Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety of 2006.

**ECAC.** European Civil Aviation Conference

**EUROCONTROL.** European Organisation for the Safety of Air Navigation

**FAA.** Federal Aviation Administration

**FSF.** Flight Safety Foundation

**FSIX.** Flight Safety Information Exchange

**GASP.** Global Aviation Safety Plan

**IASA.** International Aviation Safety Assessments

**IATA.** International Air Transport Association  
**ICAO.** International Civil Aviation Organization  
**IFALPA.** International Federation of Air Line Pilots' Associations  
**IFFAS.** International Financial Facility for Aviation Safety  
**ISD.** Implementation Support and Development Branch  
**ISO.** International Organization for Standardization  
**LACAC.** Latin American Civil Aviation Commission  
**MOU.** Memorandum of Understanding  
**NAAT.** North American Aviation Trilateral  
**PANs.** Procedures for Air Navigation Services  
**PASO.** Pacific Aviation Safety Organization  
**RASOS.** Regional Aviation Safety Oversight System for the Caribbean  
**RSOO(s).** Regional or Sub-Regional Safety Oversight Organization(s)  
**SAAQ(s).** State Aviation Activity Questionnaire(s)  
**SAFA.** European Union Safety Assessment of Foreign Aircraft Program  
**SARPs.** Standards and Recommended Practices  
**SOA.** Safety Oversight Audit Section  
**SOAP.** Safety Oversight Assessment Programme  
**SSA.** Safety and Security Audits Branch  
**SUPPs.** Regional Supplementary Procedures  
**TCB.** Technical Co-operation Bureau  
**USAP.** Universal Security Audit Programme  
**USOAP.** Universal Safety Oversight Audit Programme  
**USP.** Unified Strategy Programme



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