THE LEGITIMACY OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION'S UNIVERSAL SAFETY OVERSIGHT AUDIT PROGRAMME

by

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ABSTRACT

Based on the International Civil Aviation Organization's (ICAO's) evolution into the realm of safety regulation, which is unforeseen by the Chicago Convention, this thesis analyzes the legitimacy of the Universal Safety Oversight Audit Programme (USOAP) and ICAO's authority to regulate the sovereign states that enable its existence as an international organization. It concludes that ICAO's creation and operation of the USOAP is legitimate and sustainable based on: (1) an examination of international organizations generally; (2) the history and evolution of aviation safety audits; and (3) the relevant provisions of the Chicago Convention. Possible amendments to the Chicago Convention with the purpose of enhancing the USOAP are also considered and recommended.

RÉSUMÉ

Cette thèse vise les nouvelles politiques de l'Organisation de l'aviation civile internationale (OACI) dans le domaine de la réglementation de la sûreté. Convention de Chicago, ne contient aucune mention expresse autorisant le programme universel d'audits de sûreté (PUAS) et l'autorité de l'OACI qui a pour objet de porter jugement sur les politiques des Etata souverains membres de cette organisation internationale. Cette thèse conclut que la création et l'opération par l'OACI du PUAS est politiquement légitime et légalement justifiable. Cette conclusion est basée sur : (1) un examen des politiques d'autres organisations internationales ; (2) l'histoire et l'évolution des audites de la sûreté d'aviation ; et (3) les dispositions appropriées de la Convention de Chicago. Des amendements éventuels à la Convention de Chicago en vue d'augmenter la PUAS sont également considérés et recommandés.

ACRONYMS AND ABBREVIATIONS

ADA	Anti-Dumping Agreement
BASA	Bilateral Air Service Agreement
FAA	U.S. Federal Aviation Administration
ECAC	European Civil Aviation Conference
GATT	General Agreement on Tariffs and Trade
DGCA	Directors General of Civil Aviation
IAEA	International Atomic Energy Agency
IASA	International Aviation Safety Assessment Program
ICAO	International Civil Aviation Organization
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
ISO	International Organization for Standardization
ITU	International Telecommunications Union
MOU	Memorandum of Understanding
SARPs	Standards and Recommended Practices
SAFA	Safety Assessment of Foreign Aircraft Programme
SOAP	Safety Oversight Assessment Programme
USDOT	U.S. Department of Transportation
USOAP	Universal Safety Oversight Audit Programme
WTO	World Trade Organization

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INTRODUCTION

Following two of the safest years in aviation history since 1945, the 11 fatal commercial jet airplane accidents claiming 805 lives in 2005 provided an alarming message to the international aviation community that, when it comes to aviation safety, improvement is always necessary.[1] Indeed, as a response to the accidents, the International Civil Aviation Organization (ICAO) held a two-day conference of the world's directors general of civil aviation (DGCA), which focused on "shaping a renewed global strategy for aviation safety."[2] Convened in Montreal from the 20th to the 22nd of March 2006 and unforeseen by the constitutional rules of ICAO,[3] the DGCA Conference on a Global Strategy for Aviation Safety concluded that "[e]ven though air transport is a very safe mode of transportation, there is a need to achieve a further reduction in the number of accidents and especially fatal accidents to maintain the public confidence in the safety of the global air transport system."[4] A cornerstone of the DGCA's strategy for reducing accidents focuses on improving state-based safety oversight, which bears a close relation to aviation safety.

Under the *Convention on International Civil Aviation*—the Chicago Convention, oversight of the aviation industry is left to sovereign states, which have responsibilities under the Convention to ensure that their aircraft and operators comply with the applicable international standards developed by ICAO. Given a strong international

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[1] In 2004, nine accidents claimed 203 fatalities, which demonstrated an improvement from 2003 where international scheduled air services saw six fatal crashes with 334 fatalities. See "Annual Review of Civil Aviation" (2004) 59:6 ICAO Journal 4 at 20; "Annual Review of Civil Aviation" (2005) 60:5 ICAO Journal 5 at 24. Boeing Commercial Airplanes, "Statistical Summary of Commercial Jet Airplane Accidents: Worldwide Operations 1959-2005" at 6, online: Boeing <http://www.boeing.com/news/techissues/>. See Francis Schubert, "Legal Barriers to a Safety Culture" (2004) XXIX Ann. Air & Sp. L. 19 at 21.

[2] "New safety focus, essential Council President emphasizes" (2005) 60:6 ICAO Journal 23 at 23.

[3] See Michael Milde, "The ICAO Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety (Montreal, 20 to 22 March 2006): A Commentary" (2006) XXXI Ann. Air & Sp. L. 475 at 475.

[4] Conclusions and Recommendations, ICAO Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety (Montreal, 20 to 22 March 2006), online: ICAO <http://www.icao.int/icao/en/dgca/Concl_recom_en.pdf>.

interest, created by the inherently transnational nature of aviation, in ensuring that all states effectively discharge their responsibilities under the Convention, ICAO now assesses state oversight related to safety aspects of aviation through a program of regular, mandatory, and universal audits. ICAO's operation of this program, the Universal Safety Oversight Audit Programme (USOAP), has been said to signal "a step toward global governance in a field of global interests."[5]

Based on ICAO's evolution into the realm of regulation, which is unforeseen by its constituent instrument, the Chicago Convention, this thesis analyzes the legitimacy of the USOAP and ICAO's authority to regulate the very sovereign states that enable its existence as an international organization. The analysis begins with an overview and introduction of international organizations generally, their creation, powers and limits, and a survey of selected international organizations and their regulatory authority. Next, examination turns to a description of aviation safety oversight audits, unilateral and multilateral, their evolution, and foundations. Then, based on the foregoing, an analysis of the relevant Chicago Convention provisions and rules of customary international law leads to the conclusion that the USOAP's creation and operation are arguably legitimate and sustainable. Finally, given the legitimacy and desirability of the USOAP, possible amendments to the Chicago Convention to enhance its operation and results are proposed and their implementation is analyzed.

[5] Michael Milde, "Aviation Safety Oversight: Audits and the Law" (2001) XXVI Ann. Air & Sp. L. 165 at 177.

CHAPTER I.

AN INTRODUCTION TO INTERNATIONAL ORGANIZATIONS AND THEIR REGULATORY FUNCTION

This Chapter examines generally the foundations and historical development of international organizations and their evolution into transnational regulatory bodies. The Chapter begins with a survey of the foundations and history of international organizations followed by a brief description of the U.N. System. Then, the focus shifts to the rationales for the creation of international organizations and the critiques of their existence including consideration of whether international organizations are democratic and to what extent there exist safeguards to control their authority. Finally, before concluding, the Chapter provides a description of six empirical examples of specialized international organizations that carry out a regulatory program, including a brief introduction to ICAO.

Through the course of description, the Chapter concludes that although traditionally the formation and continued existence of international organizations occurred by will of sovereign states alone, current practices suggest that international organizations: (1) have personality distinct from their member states; (2) are capable of incremental institutional growth; and (3) are, consequently, becoming competent as regulatory bodies. In this climate, where traditional notions of sovereignty are seemingly eroding, the stage is set for the emergence of transnational governance in specialized fields.

As noted commentators have stated, "valid generalization about the law and law-making processes of [international] organizations cannot be obtained without comparing their constituent instruments and institutional practice."[1] Thus, the generalized description and analysis in this Chapter provide relative grounding and background for

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[1] Thomas Buergenthal, *Law Making in the International Civil Aviation Organization* (New York: Syracuse University Press, 1969) at 2.

the following chapters, which look with particularity at ICAO and the legitimacy of the USOAP.

Although this Chapter relies on generalization and comparison as methods for analysis, it is worth noting at the outset that specialized international organizations, despite their structural and constitutional similarities, have each "tended to develop an institutional personality or *modus operandi* of its own."[2] Put another way, the laws of an international organization are "*lex specialis*, a law proper to each organization, lacking general implications."[3] Recognizing the specialized nature of the laws of international organizations, recent commentators have noted, however, the existence of certain areas of general principles.[4] This Chapter proceeds on the basis and existence of such principles.

A. Foundations and history

An understanding of the foundations and history of international cooperation through organizations will offer insight into the competence of international organizations to make and enforce laws. Furthermore, such an understanding highlights the utilities and purposes behind state involvement in international organizations.

1. Foundations of intergovernmental cooperation

The creation of a relatively stable system of sovereign states[5] established an environment within which states, as actors, had the necessary authority to meet, negotiate, and cooperate in an intergovernmental setting. It was the "Peace of Westphalia [which ended the Thirty Years War in 1648] and the Treaty of Utrecht in 1713 [that] laid the basis for the sovereign state system in Europe, a system later extended to the rest of

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[2] *Ibid.* at 1.

[3] C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge: Cambridge University Press, 2005) at 15.

[4] *Ibid.* at 16.

[5] Clive Archer, *International Organizations* (London: Routledge, 2001) at 3.

the world."[6] In this system, the state is the supreme actor; *non est potestas super terram quae comparetur ei*, and, *inter alia*, has the absolute right to territoriality, non-intervention by other states, and sovereign equality.[7] Although showing signs of erosion, this global system of sovereign states prevails today and provides the basis upon which such states convene and establish intergovernmental organizations. The facts that non-state actors, such as corporations and industry organizations have participatory roles in international organizations,[8] and that such organizations are growing into transnational regulatory bodies evinces such erosion.[9] One commentator notes that international organizations have "empowered (or in some cases disempowered) other non-state actors, including business associations, representatives of multilateral corporations, and trade unions, by permitting or denying them access to the inner sanctum of IO lawmaking."[10] Nonetheless, the principle of sovereignty remains fundamental when it comes to determining the competence of international organizations.

2. *Historical summary of international organizations*

Although the current status of state participation in international organizations is widespread, one must only look back a couple of centuries to pinpoint the origins of modern international institutionalization.[11] The first modern international organizations open to universal membership, now specialized agencies of the United Nations, the International Telegraph Union (now the International Telecommunications Union) and

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[6] *Ibid.* at 3-4.

[7] *Ibid.* at 4.

[8] See Ram Jakhu, "International Telecommunication Union and Regulation of Use of Radio Frequencies and Orbital Positions" in Ram Jakhu, ed., *Law of Space Applications: Documents and Materials* (2006) [unpublished, archived at McGill University Faculty of Law Library] 88 at 100 (recognizing that the ITU Convention allows private industry to participate in ITU conferences and studies as Sector Members).

[9] Jose E. Alvarez, "International Organizations: Then and Now" (2006) 100 Am. J. Int'l L. 324 at 335 [Alvarez, "Now and Then"] (stating that "[e]ven as IOs have softened the contours of international law, they appear to be softening the categories of lawmaking actors themselves").

[10] *Ibid.* at 333.

[11] Jose E. Alvarez, *International Organizations as Law Makers* (New York: Oxford University Press, 2005) at 18 [Alvarez, "Law Makers"]; John W. Head, "Supranational Law: how the move toward multilateral solutions is changing the character of international law" (1994) 42 U. Kan. L. Rev. 605, 623.

the International Postal Union, were created in 1865 and 1874, respectively.[12] Both organizations were established by states to enhance cooperation with regard to specific areas of social conduct with transnational implications: namely communication by telegraph and parcel services.

In 1899 and 1907, The Hague peace conferences provided important groundwork for future intergovernmental cooperation and achieved some notable accomplishments, including: near universal membership (representatives from 44 states in 1907), the procedural practice of passing recommendations by majority vote instead of unanimity,[13] the Convention for the Pacific Settlement of International Disputes, and the creation of the Permanent Court of Arbitration. Perhaps the first major attempt at a general international organization with global membership, however, was the predecessor to the United Nations, the League of Nations.[14] Established under the Treaty of Versailles during World War I in 1919,[15] the League sought to react to the devastating results of World War I and undertook the "all-important purpose of maintaining international peace."[16] The rise of World War II rendered the League of Nations a practical failure, and its formal demise, through a simple resolution, came on April 18, 1946.[17] Although the League was not long lasting, its creation served as the foundation for future, more sophisticated, intergovernmental cooperation.

During World War II, the world saw impressive growth in technology, from transportation to communications to weaponry. Such advances, in turn, created needs for international coordination and cooperation. These needs are demonstrated by the explosion in the number of international organizations from 37 in 1909 to 132 in 1956 to

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[12] "History of the UN," online: The United Nations <http://www.un.org/aboutun/history.htm>.

[13] Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2002) at 17.

[14] History of the UN, *supra* note 12.

[15] *Ibid.*

[16] Alvarez, "Law Makers", *supra* note 11 at 20.

[17] Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions* (London: Sweet & Maxwell, 2001) at 13.

a peak of 378 in 1985.[18] In addition to the need for technical coordination, the end of the war created a desire to maintain international peace and ensure security. Although many of the post-World War II organizations had foundations outside the United Nations, its creation, along with its specialized agencies, satisfied many of the international society's post-war needs and represented the most significant developments in international cooperation during the 20th Century.

3. *Overview of the U.N. system*

In the wake of World War II, the U.N. Charter was signed on June 26, 1945 at the United Nations Conference on International Organization held in San Francisco.[19] The U.N. Charter is a multilateral treaty, which, while "establishing or restating the rights and duties of the signatory states,"[20] also serves as the constitution for the United Nations as an organization. According to the terms of the Charter, the United Nations is not a "super-state or anything resembling a world government."[21] Instead, states maintain their sovereignty and submit to the United Nations only on the basis of voluntary cooperation.[22]

Structurally, the United Nations is divided into a plenary organ—the General Assembly, an executive organ—the Security Council, and a support branch entrusted with mainly administrative functions—the Secretariat.[23] Most international organizations share a similar structure.

The General Assembly consists of representatives from all U.N. member states; each state has one vote. The General Assembly "is a deliberative organ which proceeds

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[18] Alvarez, "Law Makers", *supra* note 11 at 20.

[19] History of the UN, *supra* note 12.

[20] Sands & Klein, *supra* note 17 at 24.

[21] *Ibid.* (citing to the I.C.J. in the 1949 Reparations case).

[22] *Ibid.*

[23] *Ibid.* at 27.

via recommendation rather than binding decision."[24] Assembly resolutions, except for those regarding internal administrative matters such as budget obligations and elections, have no binding legal effect on the member states.[25] Of importance to this study, however, is the manner in which an Assembly resolution may have a "quasi-legislative" result. For example, when an Assembly resolution is taken by consensus it may constitute evidence of state practice and *opinio juris* and, consequently, become binding on the member states as a matter of customary international law.[26]

By comparison to the General Assembly, the Security Council is composed of only 15 member states, five of which are permanent and 10 are elected by the General Assembly for two-year terms. The Council has the primary responsibility for maintaining international peace and security.[27] It does so, acting on behalf of the member states and according to the Principles of the Organization, through the issuance of binding decisions. The decisions are made binding by the fact that the member states grant to the Council authority to act on their behalf[28] and further agree to be bound by the decisions of the Council.[29] Because Council authority is founded through consent, its authority is not absolute and its decisions must be rendered within the scope of consent, *inter vires*, to be enforceable.

To carry out its mandate to maintain international peace and security, the Council has two means of enforcement action.[30] The first means is the pacific settlements of

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[24] *Ibid.* at 29.

[25] *Ibid.*

[26] Generally, "before a usage may be considered as amounting to a customary rule of international law, two tests must be satisfied. These tests relate to: (i) the material, and (ii) the psychological aspects involved in the formation of the customary rule." I.A. Shearer, *Starke's International Law* (London: Butterworths, 1994); See Barry E. Carter & Phillip R. Trimble, *International Law* (New York: Aspen Law & Business, 1999) at 134. The first material test refers to regular and repetitive state practice; the second, to *opinio juris*, that states recognize the practice as a custom and therefore binding. If an Assembly resolution leads to both elements of the test being met, it may result in the creation of a customary rule of international law.

[27] Sands & Klein, *supra* note 17 at 40.

[28] *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, art. 24.

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

[30] Sands & Klein, *supra* note 17 at 43.

international disputes that are likely to disrupt international peace and security.[31] The second means is enforcement action, both with and without military action, but is only available to the Council in the event that the first means fails.[32]

In addition to the United Nations itself, which is composed of the organs mentioned above, the U.N. System includes the specialized agencies, which are "international organizations of limited competence linked to the UN by special agreements."[33] Like the United Nations, the specialized agencies are open for universal membership; however, the agencies differ given their limited, usually technical competence and their separate legal personality.[34]

In creating the specialized agencies, the hope of the founders was to separate technical matters from those matters inherently political.[35] In practice, however, commentators deny the existence of a bright line between technical and political matters.[36] There currently exist 19 of these mostly technical, specialized agencies, each with its specific and limited area of competence.[37] Although each differs to some extent based on function and authority, "their structure is broadly similar, comprising in most cases a plenary organ, an organ of limited composition (vested with some degree of

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[31] U.N. Charter, *supra* note 28, c. VI.

[32] *Ibid.*, arts. 41, 42.

[33] Sands & Klein, *supra* note 17 at 77.

[34] *Ibid.*

[35] *Ibid.* at 78.

[36] *Ibid.* at 79.

[37] In no particular order, the specialized agencies are: the International Labour Organization (ILO), Food and Agriculture Organization (FAO), United Nations Educational, Scientific, and Cultural Organization (UNESCO), the World Health Organization (WHO), the International Monetary Fund (IMF), the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO), the International Telecommunications Union (ITU), the Universal Postal Union (UPU), the World Meteorological Organization (WMO), the World Intellectual Property Organization (WIPO), the International Fund for Agricultural Development (IFAD), the United Nations Industrial Development Organization (UNIDO), the World Tourism Organization (WTO), and the World Bank Group consisting of the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). See "Organization Chart of the United Nations," online: UN <http://www.un.org/aboutun/chart.html>.

normative and executive power), and a secretariat which constitutes the administrative backbone of each organization."[38] Unlike the United Nations, however, the "plenary organ is often entrusted with significant powers, and [] the organ of limited composition conversely finds itself in a situation of relative subordination."[39] Being the product of multilateral treaties entered into by sovereign states, the agencies only enjoy that authority given them by the member states.[40]

Like the U.N. Charter, the multilateral treaties that create international organizations generally serve two functions: (1) as an agreement on substantive matters—the "external law";[41] and (2) as a constituent instrument of the organization being created—the "internal law."[42] As a treaty, the constituent provisions are subject to interpretation under the Law of Treaties.[43] In line with such provisions, interpretation arguably should take account for the "intrinsically evolutionary nature of a constitution."[44] Without allowance for such incremental growth, the continued effectiveness of an organization is called into question.[45] Indeed, international "jurisprudence tends to favour a more extensive view taking into account the object pursued by the organization rather than the text of its constituent instrument."[46]

The U.N. Charter presents an example of a constituent instrument that has experienced growth through interpretation based on a practical need for expansion.

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[38] Sands & Klein, *supra* note 17 at 83.

[39] *Ibid.*

[40] Either expressly or by implication.

[41] Sands & Klein, *supra* note 17 at 441.

[42] *Ibid.*

[43] See *Vienna Convention on the Law of Treaties of 1969*, 23 May 1969, 1155 U.N.T.S. 331, arts. 31, 32. See also Sands & Klein, *supra* note 17 at 442.

[44] Sands & Klein, *supra* note 17 at 449 (citing *Certain Expenses Case*, Advisory Opinion, [1962] I.C.J. Rep. 151, 157).

[45] Sands & Klein, *ibid.* at 450.

[46] *Ibid.* at 451. See *Reparations for Injuries Case*, Advisory Opinion, [1949] I.C.J. Rep. 174; *Parliament v. Council*, C-70/88, [1990] E.C.R. I-2041, ¶¶ 23, 27.

Specifically, the U.N. Charter makes no express mention of peacekeeping missions.[47] Rather, peacekeeping "was a practical invention, the doctrinal expression of which was a reflection of the 1956 Suez experience."[48] The United Nation's improvisational role as a peacekeeper has been said to "transform[] Chapters VI and VII of the UN Charter to permit the contracting out of the use of force."[49] Despite such transformation, "UN member states [] have not been troubled by the lack of precise legal basis for Security Council authority over peacekeeping, both during the Cold War and since the advent of complex peace operations."[50]

In summary, the climate for international cooperation through organization has evolved from sparse and powerless based on the reality of state coexistence, to relatively comprehensive, diverse, and capable and based on notions of cooperation.[51] In fact, no longer are sovereign states the only actors participating in international organizations—in the ITU[52] and ISO,[53] for example, private industry and non-governmental organizations can achieve participatory status.[54] Additionally, it seems the legal nature of international organizations has shifted; more precisely, developments have occurred in the manner in which international organizations relate to the member states that created them.[55] In addition to being forums for the expression of views and opinion, international organizations, by consent of the member states, have legal personality, are capable of institutional incremental growth, conduct research, and carry out quasi-legislative and, at times, regulatory authority capable of binding member states. Thus, there exist a handful

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[47] John Gerard Ruggie, "UN forces: whither—or whether?" in *Constructing the World Polity: Essays on International Institutionalization* (London: Routledge, 1998) 240 at 244.

[48] *Ibid.*

[49] Alvarez, "Now and Then", *supra* note 9 at 333.

[50] Saira Mohamed, "From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council" (2005) 105 Colum. L. Rev. 809 at 821.

[51] See Klabbers, *supra* note 13 at 18.

[52] See Jakhu, *supra* note 8.

[53] See Overview of the ISO, Who can join the ISO, online: ISO <http://www.iso.org/iso/en/aboutiso/introduction/index.html#ten>.

[54] See Alvarez, "Now and Then", *supra* note 9 at 332-36.

[55] Klabbers, *supra* note 13 at 35-36.

of indicators that evidence an evolution encompassing the erosion of traditional notions of sovereignty and international organization.

In a system of sovereign state actors, the need for coordinating international conduct is apparent; however, why are states willing to subject themselves to organizations with authority to regulate national sovereign conduct? The next section considers the justifications behind state participation in international organizations with regulatory competence. Then, the focus will shift to the critiques of granting international organizations such regulatory authority.

B. Theoretical approaches to state participation in international organizations

Generally speaking, "[s]tates create intergovernmental organizations for the purpose of accomplishing generally shared social or economic objectives."[56] So too, do professional organizations, corporations, and even individuals. As seen in the historical overview above, many such shared objectives arise out of technological developments, which create transnational conduct and require international coordination; but does such coordination necessarily require legislative and enforcement capabilities on the part of an international organization?

A multitude of theories and explanations exist regarding why sovereign states cooperate in intergovernmental organizations. An understanding of such theories helps explain not only why states cooperate, but why states would energize mere intergovernmental forums for cooperation, into organizations, which function as actors, and are arguably distinct in nature from their member states.[57]

A brief and simplistic overview of four of the predominant theories follows. At the outset, however, it is worth noting that the classifications summarized below are not

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[56] Carter & Trimble, *supra* note 26 at 147.

[57] "An organization is most clearly an actor when it is most distinctly an 'it', an entity distinguishable from its member states." Archer, *supra* note 5 at 79 (quoting I.L. Claude, *Swords into Plowshares* (New York: Random House, 1971) at 13). See Alvarez, "Now and Then", *supra* note 9 at 334 (stating that "IOs cannot be dismissed as the mere agents of their collective principals, namely their state members").

absolute and, "in reality, scholars within these various schools have borrowed from each other, both with respect to methodology as well as substantive conclusions."[58]

1. Realism

Arguably, "the most dominant strand of international relations theory, at least since the Second World War, is what is known as 'realism', or, nowadays, 'neo-realism'."[59] According to realists, the world is one without order, where states, as the primary actors,[60] are pitted against each other in pursuit of relative gains in power.[61] Given a state's struggle for additional power, a primary tenant of realism is that rational-states necessarily act in a self-interested manner. Accordingly, it is rational for a state to enter into agreements with other states on the basis of cooperation, if the agreement serves the interest of that state and results in a relative gain in power (a relative increase may, in absolute terms, be a decrease in power[62]).

Given realist reasoning, therefore, it may also be rational for a state to allow itself to be subjected to the regulatory authority of an international organization, if such an arrangement also results in a relative gain in power. Notwithstanding the practical objectives of an organization, a state may find membership attractive on the basis that the organization filters the international distribution of authority and places that state in a better relative position than it would have been in absence of the organization. Furthermore, a world power, for instance, may look to membership in an organization to crystallize its current authority and provide predictability in an otherwise anarchic

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[58] Alvarez, "Law Makers", *supra* note 11 at 45.

[59] Klabbers, *supra* note 13 at 29 (citing E. H. Carr, *The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations* (London: MacMillan, 1946) as the starting point of modern realism); *contra* Alvarez, "Law Makers", *supra* note 11 at 17.

[60] Klabbers, *supra* note 13 at 29.

[61] *Ibid.* (citing the seminal work by Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf, 1954)).

[62] Klabbers, *ibid.* at 32 (citing Kenneth N. Waltz, *Man, the State, and War* (New York: Columbia University Press, 1959) at 198; Joseph M. Grieco, "Anarchy and the Limits of Cooperation" (1988) 42 *International Organization*, 485-508).

system. As pointed out by commentators, however, "realists [] have a hard time explaining forms of co-operation that apparently go against the national self-interest."[63]

2. *Institutionalism*

Related to and founded upon realist notions of the state as the primary actor in an environment of anarchy, institutionalism adds to realist thinking by suggesting that international institutionalization modifies the anarchic nature of the world order: "Whereas Institutionalists would agree that states are the primary actors in the international system and that, absent institutions, states are engaged in the pursuit of power, they would contend that the presence of institutions modifies the organizing principle of anarchy."[64] As described by Robert Keohane: "International institutions are important for states' actions in part because they affect the incentives facing states, even if those states' fundamental interests are defined autonomously. International institutions make it possible for states to take actions that would otherwise be inconceivable."[65]

In essence, according to institutionalists, international institutions temper state behavior by providing options through additional information, understanding, opportunity, and rules,[66] which all "facilitate the achievement of common ends."[67]

3. *Functionalism*

Another predominant theory that seeks to explain state involvement in intergovernmental organizations is the functionalist theory. "To a functionalist, [international organizations] are simply agencies called into being by states, sustained by

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[63] Klabbers, *ibid.* at 30.

[64] Anne-Marie Slaughter, "Liberal International Relations Theory and International Economic Law" (1995) 10 Am. J. Int'l L. 721 at 724 (citing Friedrich Kratochwil & John Gerard Ruggie, "International Organization: a State of the Art on an Art of the State," (1986) 40 Int'l Org. 753 at 762).

[65] Robert O. Keohane, "Neoliberal Institutionalism: A Perspective on World Politics" in Robert O. Keohane, *International Institutions and State Power: Essays in International Relations Theory* (Boulder: Westview Press, 1989) 1 at 5.

[66] *Ibid.* at 1, 3.

[67] Slaughter, *supra* note 64 at 726.

states, and actually potentially directed by states on the supposition that the organization's existence and operation are useful to themselves."[68] As such, functionalists believe that advances in technology and social conduct give rise to international cooperation, "not ideology or politics."[69] Because functionalists view cooperation as a response to social change and development, they recognize that such responses improve in effectiveness over time as a result of states "learning."[70]

It follows, therefore, that a state's willingness to accept the regulatory authority of an international organization arises from prior experience and recognition that granting international organizations law-making authority is, functionally, the most effective and efficient means of regulating the transnational conduct at issue. For example, if states had created an intergovernmental organization that served merely as a forum for the exchange of ideas and, through experience, learned that such organizational structure was insufficient for purposes of international coordination, the states might next look to giving the organization authority to create uniform regulations. With this method of reasoning, over time and as a result of experience, international organizations will become more sophisticated, if function demands.

4. Idealism

Situated at the opposite end of the spectrum from the realists are the idealists, whose thinking "is based on a sunny view of human nature."[71] Idealism, founded in the writings of Immanuel Kant,[72] suggests that "democracies are naturally inclined to co-

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[68] Alvarez, "Law Makers", *supra* note 11 at 25 (citing Sands & Klein, *supra* note 17 at 1).

[69] *Ibid.* ("[F]unctionalist historians note, IOs did not emerge immediately after the rise of states, but centuries after, in the wake of 19th-centruy technical developments that made more essential (and facilitated) transnational communication and travel." *Ibid.*).

[70] *Ibid.* at 26.

[71] Klabbers, *supra* note 13 at 30.

[72] *Ibid.*

operate or, at least, not go to war with one another."[73] As such, cooperation is natural, and interaction with other states leads to further cooperation rather than conflict.

Accordingly, from an idealist perspective, it makes tacit sense that states increasingly entrust international organizations with legislative capabilities—more comprehensive and sophisticated means of organization are the result of prior collaborations and cooperation.

In summary, depending on one's particular world view, a case can be made to explain why sovereign states cooperate in forming organizations that have authority to regulate their conduct.

C. Critiques of state participation in international organizations

Although proliferation of state participation in international organizations with regulatory authority is undisputed, the creation of and participation within such organizations is not without critics. The focus of critique, in large part, is founded on the perception that dominant states are able to use intergovernmental organizations to marginalize minority structures of government while mandating that the less powerful states adopt mainstream approaches: currently democracy and capitalism. This antithesis leads to the following questions: (1) whether international organizations are themselves democratic; and, (2) whether any safeguards are in place to limit the power of international organizations that act as regulators.

1. Are international organizations democratic?

Critics who question the democratic value of international organizations "argue that international organizations are created through hegemony"[74] and necessarily reflect the world order within which they exist. Therefore, in a system where a few states

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[73] *Ibid.*

[74] Kelly-Kate S. Pease, *International Organizations: Perspectives on governance in the Twenty-First Century* (New Jersey: Prentice Hall, 2003) at 79.

command, those states will use their economic and political power to structure a system that benefits their interests at the expense of the less powerful states.[75] In other words, "international organizations are tools that core states use to exploit and control the weak. Periphery societies are controlled politically because they are given a voice in organizations like the UN in which that voice carries very little weight."[76]

Given this unbalanced difference in voice, the "core" states have the ability to use the international organization as both a "carrot" and a "stick." If "periphery" states buy into the system being advanced by the core, they reap the benefits of membership in the organizations. As an example, a periphery state that complies with the International Monetary Fund's (IMF) terms of conditionality, which are generally founded in democratic and capitalist notions,[77] may receive the benefit of receiving financial aid in the form of balance of payments support. On the other hand, periphery states "that do not embrace capitalism or who threaten core economic interests are subject to intervention"[78] or are excluded from participation, and consequent benefits, by the core states acting through the international organization.[79] Given the IMF example above, if a state chose not to accept the conditional terms imposed by the IMF, it would be barred from receiving the balance of payments support requested.

Evidence of the imbalance of power described by the critics of international organizations is perhaps easily found in the creation and structure of the United Nations. As mentioned above in the overview of the United Nations, it is the Security Council, an organ of limited membership (15 members, a third of which is permanent), which is vested with the "real" power in the United Nations.[80] The permanence of these five members, which maintain veto power, traps the United Nations in a snapshot of the world

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[75] This argument assumes that the powerful few will act rationally according to realist notions.

[76] Pease, *supra* note 74 at 81.

[77] See *ibid.*

[78] *Ibid.*

[79] *Ibid.* (examples include the U.S. invasions of "the Dominican Republic, Grenada, and Panama . . . ." *Ibid.*).

[80] See *supra* note 39 and accompanying text.

order taken immediately following the Second World War.[81] Although the other two-thirds of the Council add a democratic element to its existence, the creators of the organization, given their status as World War II victors, ensured their prominence in world politics in perpetuity—which is, of course, expected behavior based on realist patterns of thought.

Although the structure of the United Nations itself serves, to a certain extent, as support for the critique of international organizations, the specialized agencies may not have the same effect. The primary basis for this distinction is founded in the structural differences between the United Nations and the specialized agencies; namely, that in the majority of the specialized agencies, the plenary organ is the more powerful.[82] Unlike the executive organs, which are composed of limited membership, the plenary is composed of representatives from all member states, each with equal voting status. In this arena, the peripheral states, which are many, have the advantage over the core, which are few. The International Telecommunications Union serves as an empirical example of an organization in which the peripheral states have used numbers to their advantage.[83]

Taking decisions or adopting resolutions by consensus further enhance the democratic value of international organizations. Although the constituent instruments of some international organizations, such as the WTO,[84] call for general decision-making by consensus, even those with majority-voting structures, like the United Nations itself, have increasingly used the consensus approach. When a decision is taken by consensus, it may

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[81] According to Sands & Klein:

The assumption made in 1945 that these five named states were the "great Powers" was, of course a political judgment. The actual naming of them in the Charter *introduces a static element into this instrument*, for it cannot be assumed that these identical five will necessarily remain the five "great Powers," and indeed in the case of at least two it cannot realistically be said that they do so today.

Sands & Klein, *supra* note 17 at 41.

[82] *Ibid.* at 83.

[83] The lesser-developed states were able to use their majority status toward the creation of an *a priori* approach, as opposed to first-come-first-served, for the allocation of certain broadcasting frequencies. See Jakhu, *supra* note 8 at 121.

[84] Mitsuo Matsushita, Thomas J. Schoenbaum & Petros C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (Oxford: Oxford University Press, 2004) at 12.

serve as evidence of state practice resulting in the eventual creation of customary rules of international law[85] that bind states and even invalidate subsequently enacted and conflicting treaty provisions.[86] Although it is time consuming, the consensus approach has democratizing effects based on the fact that each and every state, regardless of economic, military, or political strength has the right to veto the proposed decision by voicing an objection.[87] A consensus arises only when there is no objection to the proposed decision by any state capable of objecting. Thus, in theory, decisions resulting from a consensus embody the genuine will of the international community, including the minority states.

Consistent with those views espoused by critics, it seems, therefore, that international organizations may not represent perfect specimens of democracy. But then again, "perfect is generally the enemy of good." Although the structures of international organizations may create relative imbalances in authority and influence, critics should not overlook the benefits that accrue to all states as a result of intergovernmental cooperation. It has been noted, for example, that "many international organizations have institutional frameworks that allow them to achieve more than would be the case if their members acted separately or only co-operated on an ad hoc basis."[88] That said, given the apparent existence of imbalances in authority, the important consideration is whether sufficient safeguards are in place to control the core states' ability to abuse their power and discretion in an organization that has the authority to bind the conduct of the international community.

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[85] See *supra* note 26 and accompanying text. In recent years, the U.N. General Assembly has made an effort to take decisions by consensus rather than through voting, which demonstrates a desire to further democratize international cooperation. UN in Brief, online: United Nations <http://www.un.org/Overview/uninbrief/uninbrief_toprint.html>.

[86] See Vienna Convention, *supra* note 43, art. 53.

[87] Karen Halterson Cross, "King Cotton, Developing Countries and the 'Peace Clause': The WTO's US Cotton Subsidies Decision" (2006) 9 J. Int'l Econ. L. 149 at n. 3.

[88] Archer, *supra* note 5 at 79.

2. *Checks on authority*

Generally speaking, principles do exist to prevent states, and international organizations as distinct actors, from using the regulatory authority of an international organization in an abusive manner. Although there are others, the prohibition of *ultra vires* action, the existence of customary rules of international law, and the principle of sovereignty (non-intervention), all work to limit the powers of international organizations.

a) Prohibition of *ultra vires* conduct

As established within their constituent instrument, international organizations do not have competence to bind their members outside the scope of their mandate. Put another way, "[i]nternational organizations, it is generally agreed, can only work on the basis of their legal powers."[89] Actions or conduct by an international organization outside the scope of its mandate are *ultra vires* and, consequently, voidable.[90] So what encompasses an international organization's mandate or legal powers?

The most fundamental source of international organizational authority is that expressly enumerated by a treaty and termed attributed powers. The doctrine of attributed powers restricts the actions of international organizations to those expressly stated in a treaty and, therefore, intended by the drafters. However, the problem inherent with leaving international organizations with nothing more than that which is contained in the treaty is that international organizations become "little more than the mouthpieces of their member-states, and, if that is so, then their very *raison d'être* comes into question."[91] The doctrine of implied powers seeks to theoretically remedy this logical problem.

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[89] See Klabbers, *supra* note 13 at 60.

[90] *Ibid.* See Amerasinghe, *supra* note 3 at 194-96.

[91] Klabbers, *supra* note 13 at 65.

According to the doctrine of implied powers, international organizations also possess in addition to their attributed powers, as a result of treaty interpretation, those powers that "flow from a grant of express powers, and [] limited to those that are 'necessary' to the exercise of powers expressly granted."[92] Although the original formulations of the principle required that the implication be tied to an express treaty provision, the International Court of Justice has loosened the requirement, requiring only that the implication be linked to the functions and objectives of the organization.[93] Unlike attributed powers, however, actions taken by international organizations under implied authority are not per se valid; rather, they are *presumed* to be valid and within the competence of the organization.[94] Because some commentators argue that, under the more recent formulation, the doctrine of implied powers is too broad and the doctrine of attributed powers is too rigid, a third source of powers has evolved—inherent powers.[95]

The inherent powers doctrine posits that international organizations, "once established, would possess inherent powers to perform all those acts which they need to perform to attain their aims . . . ."[96] Recent dissatisfaction with the implied powers doctrine has contributed to the popularity of this functions-based formulation. Given the current state of affairs, however, international organizations surely possess that authority expressly stated in an instrument; likewise, when they act in fulfillment of one of their stated purposes, there exists a presumption that the action is not *ultra vires*.[97]

In summary, the effect of the prohibition on *ultra vires* action is to limit the ability of an international organization to take binding actions to those that the member states

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[92] *Ibid.* at 68 (quoting the famous dissent by Judge Hackworth in the *Reparation for Injuries Case, supra* note 45). See Amerasinghe, *supra* note 3 at 172.

[93] Klabbers, *ibid.* at 68-69. *Reparation for Injuries Case*, *supra* note 45 at 182. In that opinion, the majority stated: "Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." *Ibid.*

[94] Sands & Klein, *supra* note 17 at 295.

[95] Klabbers, *supra* note 13 at 75.

[96] *Ibid.*

[97] See *Certain expenses of the United Nations*, Advisory Opinion, [1962] I.C.J. Rep. 151 at 168; see also, Sands & Klein, *supra* note 17 at 295.

had intended in drafting the enabling convention or constitution. In theory, therefore, a state, even a less powerful state, cannot be the subject of regulation beyond that which it negotiated and agreed upon in the enabling instrument. It should be noted, however, the principle itself does not stop international organizations from committing *ultra vires* acts; rather, it enables nullification of the validity of such acts.

As discussed *supra*, however, interpretation of an international organization's constituent instrument may allow for incremental growth in the organization's functions and authority.[98] Based on such an occurrence, an *ultra vires* act according to a literal interpretation of an instrument may become permissive—*inter vires*—using a teleological approach,[99] which takes the objects pursued by the international organization into account.[100]

b) Rules of customary international law

The existence of customary rules of international law also works to limit the conduct of international organizations. "It is a well-established principle of treaty law that provisions of a treaty that contravene *jus cogens* are invalid. Thus, as a general rule, "agreement cannot override *ius cogens*."[101] Likewise, an international organization working pursuant to an international agreement cannot violate rules of customary international law, despite the fact that an agreement purports to grant it authority to do so.[102] This rule limits the conduct of international organizations by using established principles of state practice as the measuring stick. Although rules of customary international law are indeed created in a setting with hegemony and consequent influences of power, they by their very nature represent the practice and recognition of most, if not all, states.

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[98] See *supra* notes 41-50 and accompanying text.

[99] See Sands & Klein, *supra* note 17 at 450. See also Amerasinghe, *supra* note 3 at 44-48.

[100] Sands & Klein, *supra* note 17 at 451.

[101] Amerasinghe, *supra* note 3 at 214 (citing Article 53 of the 1969 Vienna Convention on the Law of Treaties).

[102] *Ibid.*

c) State sovereignty

A third, and perhaps slowly diminishing, limit on the authority of international organizations is the principle of state sovereignty. As mentioned in the historical account above, the international order is founded on the existence of sovereign states as the supreme actors; however, the regulatory authorities vested in today's international organizations are, if nothing else, challenging traditional notions. Nonetheless, the principle of sovereignty still has the potential to limit the conduct of international organizations.

As a general principle, international organizations do not have competence to regulate regarding matters of national concern and jurisdiction.[103] For example, Article 2(7) of the U.N. Charter, often seen as a limit on U.N. authority, states in relevant part: "Nothing in the present Charter shall authorize Nations to intervene in matters which are essentially within the domestic jurisdiction of any State . . . ."[104] This general principle limits the ability of international organizations to violate the sovereign rights and integrity of states, especially those with less power. That said, states are increasingly willing to define matters as international in nature thus removing them from their exclusive jurisdiction.[105]

As a corollary of sovereignty, it should not be understated that international organizations, unless they are vested with supranational authority,[106] exist and possess authority only by will of their member states.[107] Although international organizations may develop distinct personality,[108] it is still the states, through representatives, which comprise the organs. States are, therefore, in control and have authority to alter an

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[103] Sands & Klein, *supra* note 17 at 25.

[104] U.N. Charter, *supra* note 28, art. 2(7).

[105] See Michael Milde, "Aviation Safety Oversight: Audits and the Law" (2001) XXVI Ann. Air & Sp. L. 165, at 177.

[106] The European Community for example.

[107] *Case of the SS Lotus,* (1927) P.C.I.J. (Ser. A) no. 10, 18.

[108] Amerasinghe, *supra* note 3 at 66.

international organization's authority (attributed powers[109]), through amendment to the creating instrument,[110] or even dissolve its existence, by uniform withdrawal from the instrument.[111]

In the end, although international organizations may not represent perfect democracies, arguably there do exist principles that operate to safeguard the states from both the unwarranted actions of international organizations, and from core states using international organizations as a means of imposition. Furthermore, as a final resort, if states object to the operation or practices of an organization, they, as sovereign states, always maintain the option to voice such opposition by not joining the organization—international organizations do not have authority to bind non-members through action, decision, or otherwise.[112]

D. Empirical examples

The purpose of this section is to survey six international organizations that carry out regulatory functions, with an eye toward describing the types of regulatory action taken and the legal authority behind such functions. By way of introduction, the evolving trends as manifested in the examples below warrant explication.

First, it will be recognized that each example arises within fields where harmonization of national conduct or systems of regulation through compliance with applicable international standards is desirable. Furthermore, the areas of regulation seek to protect the safety and welfare of the international community—the area of conduct being regulated is a matter of international concern.[113] Finally, the states have allowed the international organizations to create programs for ensuring their compliance with the

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[109] Klabbers, *supra* note 13 at 63.

[110] Vienna Convention, *supra* note 43, arts. 39, 40. See Amerasinghe, *supra* note 3 at 447.

[111] Vienna Convention, *ibid.*, art. 54. Amerasinghe, *ibid.* at 464.

[112] Vienna Convention, *supra* note 43, art. 34 (stating that "[a] treaty does not create either obligations or rights for a third state without its consent").

[113] Milde, *supra* note 105 at 177.

applicable standards. Such programs, as evidenced below, often come in the form of an audit program whereby the international organization reviews state compliance with agreed upon international standards and then reports its findings to the international community. At this point in time, the programs rely on publication of the audit findings and the international community's consequent responses as the enforcement mechanism—if states do not comply, they suffer internationally. The list of empirical examples that follows is not exhaustive, but is certainly illustrative of such trends.

1. International Maritime Organization (IMO)

Somewhat similar to the mandate given to ICAO, the "IMO's purposes are to provide machinery for co-operation among governments in the field of governmental regulation and practices relating to technical matters affecting shipping engaged in international trade and to encourage the adoption of the highest possible standards in matters of maritime safety and efficiency in navigation."[114] As a specialized agency of the United Nations, the IMO is composed of a Council, consisting of 32 members, an Assembly, and a Secretariat, the administrative backbone.[115] The IMO also has four committees: the Maritime Safety Committee, the Legal Committee, the Marine Environment Protection Committee, and the Technical Co-operation Committee.[116] Unlike most other specialized agencies, the IMO Council is the organ vested with the most authority—even recommendations that formally come from the Assembly are actually those of the Council.[117] In practice, the relationship between the IMO Council and Assembly is more like that of the United Nations than the other specialized agencies.[118]

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[114] Sands & Klein, *supra* note 17 at 102. *Convention on the International Maritime Organization*, March 6, 1948, 289 U.N.T.S. 48, art. 1 [IMO Convention].

[115] IMO Convention, *supra* note 114, art. 11.

[116] *Ibid.*

[117] Sands & Klein, *supra* note 17 at 103.

[118] *Ibid.*

Generally, maritime regulation works such that the IMO establishes uniform regulations, drafted in the form of technical treaties, which are to be implemented by the member states in their national legislations and enforced accordingly.[119] The result is that the IMO acts as a supranational law-maker and the states as enforcers of the policy. In the interest of uniformity, however, the IMO has also developed an oversight function; whereby, it investigates state implementation of the IMO regulations, either on the basis of state reporting[120] or, more recently, audits,[121] using such information for the creation of so-called "white lists"[122] in which the non-complying states go unnamed.

Both enforcement mechanisms, audits and the creation of white lists, are intended to "achieve harmonized and consistent global implementation of IMO regulations, which [according to the IMO] is key to realizing the IMO objectives of safe, secure and efficient shipping on clean oceans."[123] The two systems, however, have different legal sources.

The authority to create white lists is founded in the provisions of a multilateral agreement.[124] Such lists are created on the basis that member states, upon signing technical treaties, have an obligation to implement and enforce the mandatory standards; the lists, therefore, stigmatize non-compliance and are created by the Maritime Safety Committee out of authority defined by an annex to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers. Based on the list, the other member states act as the "real" means of international enforcement on the basis that they have authority to deny ships from non-white-list ports entry into their ports.[125]

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[119] IMO Convention, *supra* note 114, art. 2.

[120] See the *International Ship and Port Facility Security Code*, SOLAS/Conf. 5/34, annex 1 (2002) [ISPS Code].

[121] See *Voluntary IMO Member State Audit Scheme*, IMO Res. A.946(23) (2003).

[122] See *1995 STCW Convention Annex*, Reg. I/7(3.2); see also, Rachel B. Bralliar, "Protecting U.S. Ports with Layered Security Measures for Container Ships" (2005) 185 Mil. L. Rev. 1 at 31 (stating that the creation of a white list "implies a 'black list' by negative inference").

[123] Voluntary IMO Member State Audit Scheme, online: IMO <http://www.imo.org/Safety/mainframe.asp?topic_id=841> [IMO Audit Scheme].

[124] ISPS Code, *supra* note 120.

[125] *See ibid.*, ISPS Code, pt. B, § 4.33.

The effect is obvious: non-white-list states are excluded from white-list ports and, therefore, international commerce.

The Voluntary IMO Member State Audit Scheme, however, is founded on the basis of individual consent given by the audited member state. Prior to undergoing an audit, the member state enters into a memorandum of cooperation with the Secretary-General of the IMO, which defines the scope and time frame of the audit and gives the IMO authority to conduct the audit.[126] Although the audits are said to be "voluntary," the international community can surely use their economic weight to coerce state participation in the audit program.

In summary, although the original IMCO Convention says nothing about audits or white lists, the IMO has evolved into an organization which, in addition to being a law-maker, has significant oversight and enforcement capabilities targeted at reaching the goals of the organization.

2. *International Monetary Fund (IMF)*

The IMF is part of the World Bank Group and was conceived at the same time as the World Bank in 1944 at the Bretton Woods Conference.[127] To summarize, the IMF's purposes are:

> [T]o promote monetary co-operation through a permanent institution providing machinery for consultation and collaboration on monetary problems, to facilitate the expansion of balanced growth of international trade, . . . to make the Fund's resources available to members as to enable them to correct maladjustments in their balance of payments and, generally, to shorten the duration of any disequilibrium in the international balance of payments of members.[128]

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[126] *See* IMO Audit Scheme, *supra* note 123.

[127] Sands & Klein, *supra* note 17 at 92.

[128] *Ibid.*

The IMF carries out its mandate through the Board of Governors, the plenary organ, the Executive Board, who carries out the policy of the Board of Governors, and the Managing Director, equivalent to the Secretary-General in the other agencies.[129]

In practice, the IMF, "under certain conditions, provides balance of payments support to member states who request it."[130] Balance of payment problems occur when a state cannot find sufficient financing to cover its payments.[131] The IMF locates sufficient financing by making IMF currencies available for purchase by members: "the member State purchases foreign currency from the Fund in exchange for an equivalent sum in its own currency."[132] The Fund carries out conditional balance of payments support by means of "providing financial aid under the condition that an adjustment policy aimed at restoring the balance of payments equilibrium is carried out."[133] Adjustment programs are dictated by the IMF as a lender, and involve "economic reform through reducing government spending, adjusting exchange rates, fighting inflation and other measures."[134] More specifically, through the adjustment programs, borrowing states must "adopt 'adequate safeguards' . . . to ensure that the resources are made available temporarily and used in accordance with the purposes of the fund."[135] Thus, the ability of a state to purchase currency from the IMF is conditioned on the borrowing state's compliance with the adjustment program as defined in the stand-by documents. If the compliance with the adjustment program is halted by the state, so too is the state's ability to purchase.

To ensure that states follow the plans dictated in the stand-by documents, the IMF may request consultations at any time.[136] Furthermore, under Article VI of the Articles of Agreement, the IMF conducts "surveillance [or monitoring] over the exchange rate

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[129] *Ibid.*

[130] Eirk Denters, *Law and Policy of IMF Conditionality* (The Hague: Kluwer Law International, 1996) at 1.

[131] Fact sheet on IMF Lending, online: IMF <http://www.imf.org/external/np/exr/facts/howlend.htm>.

[132] Denters, *supra* note 130 at 1.

[133] *Ibid.* at 4.

[134] *Ibid.* at 3.

[135] *Ibid.* at 7 (citing art. I(v) of the Articles of Agreement).

[136] *Ibid.* at 111.

policies of its members in order to ensure the effective operation of the international monetary system."[137] In practice, therefore, the IMF in essence conducts economic audits of its sovereign members as part of its lending program.

Although there is no formal enforcement mechanism in the IMF scheme, the ability to refuse members' requests to purchase currency ensures that states will carry out the terms of the adjustment program. If one accepts the definition that "regulation" is the "act or process of controlling by rule or restriction,"[138] the IMF clearly acts in a regulatory manner—it controls its members. The means for IMF control, however, exist in contrast to those carried out by the IMO, which are more structured and overtly regulatory in nature.

3. *World Trade Organization*

The World Trade Organization (WTO), founded on the *Marrakesh Agreement Establishing the World Trade Organization*[139] (WTO Agreement), creates a multilateral system of liberalized trade based on and encompassing the General Agreement on Tariffs and Trade (GATT), which was updated in 1994 (GATT 1994). According to Article III of the WTO Agreement, "[t]he WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements."[140] Although the WTO Agreement serves as a constitution for the WTO and establishes a multilateral system for the conduct of trade,[141] it is its regulation of national legislation that finds relevance in the context of this study.

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[137] IMF Surveillance Fact sheet, online: IMF <http://www.imf.org/external/np/exr/facts/surv.htm>.

[138] *Black's Law Dictionary*, 7th ed., *s.v.* "regulation".

[139] *Marrakesh Agreement Establishing the World Trade* Organization, April 15, 1994, 1867 U.N.T.S. 3.

[140] *Ibid.*, art. III(1).

[141] See Mary E. Footer, *An Institutional and Normative Analysis of the World Trade Organization* (Boston: Martinus Nijhoff, 2006) at c. 1, 18.

The GATT 1994,[142] which exists as the WTO's umbrella treaty for trade in goods,[143] gives contracting states the right to establish anti-dumping legislation in Article VI, the Anti-Dumping Agreement (ADA),[144] which elaborates such rights and establishes rules for implementation. Anti-dumping laws enacted by states react to instances of "dumping," which, according to the ADA, occurs when a product is

> introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[145]

Because the producer is protected in his home market, he can afford to subsidize his exports and consequently sell at a price lower than domestic producers that cannot afford to do the same.[146] If a contracting state decides to enact anti-dumping measures, it must "do so in accordance with the provisions of the ADA"[147]—only if a contracting state chooses to enact anti-dumping legislation, are they under a hard obligation to comply with the applicable provisions of the ADA. The ADA does not, however, govern or pass judgment on dumping; rather, it dictates how and when a contracting state may respond

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[142] *General Agreement on Tariffs and Trade 1994*, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [GATT 1994].

[143] Understanding the WTO – Uruguay Round, online: WTO <http://www.wto.org/English/thewto_e/whatis_e/tif_e/fact5_e.htm>.

[144] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [ADA].

[145] ADA, *surpa* note 139, art. 2.1. See also Edwin Vermulst, *The WTO Anti-Dumping Agreement: A Commentary* (New York: Oxford, 2005) at 1 [emphasis in original]. See also Anti-dumping – Technical Information, online: WTO < http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm> (defining dumping as "a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country").

[146] See Vermulst, *Ibid.* at 2.

[147] *Ibid.* at 4 (stating also that the "WTO rules do not oblige WTO members to adopt anti-dumping legislation . . . . However, WTO members that do adopt and utilize anti-dumping legislation, must do so in accordance with the provisions of the ADA" *Ibid.*).

to dumping practices of a foreign producer.[148] It is in this manner that the ADA regulates state conduct.

In addition to regulating how states respond to dumping, the ADA also creates a system for investigating and substantiating alleged dumping practices, whereby authorities from a complaining state, on behalf of its domestic industry, may,

> [i]n order to verify information provided or to obtain further details, . . . carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation."[149]

Based on the ADA, the WTO accordingly regulates state conduct in regard to the manner in which it may respond to a price dumping situation and gives authorities from a complaining state a basis to enter the sovereign territory of another contracting state for the purpose of investigating its industry, if dumping is alleged.

4. International Labor Organization

The International Labour Organization (ILO) is a U.N. specialized agency responsible for the promotion "of social justice and internationally recognized human and labour rights."[150] Created in 1919, the ILO carries out its mandate by formulating "international labour standards in the form of Conventions and Recommendations setting minimum standards of basic labour rights: freedom of association, the right to organize, collective bargaining, abolition of forced labour, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work related issues."[151]

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[148] See Understanding the WTO: the agreements, online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm>.

[149] ADA, *supra* note 144, art. 6.7.

[150] About the ILO, online: ILO <http://www.ilo.org/public/english/about/index.htm>.

[151] *Ibid.*

Based on a tripartite structure, the plenary, called the International Labour Conference, meets annually with the purpose of formulating and adopting, through a two-thirds vote of delegates present at the conference,[152] international labour standards and recommendations, which are then to be implemented by the member states.[153] When a convention containing standards is adopted by a conference, member states undertake within certain time requirements, to "bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action."[154] Even if a convention is not ratified by the competent state authority, the state is under an obligation to report "at appropriate intervals . . . the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention."[155]

Based on these and additional reporting obligations imposed on member states, the ILO operates a supervisory system and complaint procedure to improve/ensure state compliance. Through a committee of experts, the ILO "each year examines whether member states have fulfilled their obligation to submit adopted instruments to their legislative bodies for consideration."[156] The reports of the committee are published on the Internet for the international public's review.[157] The impact of the supervisory system is enhanced through the complaint system provided for in the ILO Constitution, which gives the member states "the right to file a complaint with the International Labour Office

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[152] International Labour Organisation Constitution, art. 19, online: ILO <http://www.ilo.org/public/english/about/iloconst.htm> [ILO Constitution].

[153] Structure of the ILO, online: ILO <http://www.ilo.org/public/english/depts/fact.htm>.

[154] ILO Constitution, *supra* note 152, art. 19(5)(a).

[155] *Ibid.*, art. 19(5)(e).

[156] The Impact of the Regular Supervisory System, online: ILO <http://www.ilo.org/public/english/standards/norm/applying/impact.htm>.

[157] *Ibid.*

if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles."[158]

Although the onus of regulation, of reporting and filing complaints, lies with the member states themselves, the ILO, its Constitution and conventions establish an international system whereby member states' compliance with their obligations is monitored and, in effect, regulated.

5. *International Atomic Energy Agency*

Since 1957, the International Atomic Energy Agency (IAEA) has worked under the IAEA Statute with its member states "to promote safe, secure and peaceful nuclear technologies."[159] In so doing, one of the functions of the IAEA is to "establish or adopt . . . standards of safety for protection of health and minimization of danger to life and property."[160] Based on such standards, since 1989, the IAEA through a committee of international experts, the International Regulatory Review Team (IRRT), has operated a system for voluntary safety assessments. The IRRT "provides advice and assistance to Member States to strengthen and enhance the effectiveness of their nuclear safety regulatory body whilst recognizing the ultimate responsibility of each Member State for regulating nuclear safety."[161]

6. *International Civil Aviation Organization*

Finally, as a brief introduction serving as the basis for elaboration in the following chapters, the ICAO is a specialized agency of the United Nations that has as its objective: the development of

> principles and techniques of international air navigation and to foster the planning and development of international air transport so as

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[158] ILO Constitution, *supra* note 152, art. 26.

[159] About the IAEA, online: IAEA <http://www.iaea.org/About/index.html>.

[160] Statute of the IAEA, art. III(A)(6), online: IAEA: <http://www.iaea.org/About/statute_text.html>.

[161] Safety Assessment Reviews, online: IAEA <http://www.iaea.org/About/statute_text.html#A1.3>.

> to . . . [*inter alia*] [i]nsure the safe and orderly growth of international civil aviation throughout the world; . . . [i]nsure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airline; . . . [and to p]romote safety of flight in international air navigation.[162]

The United States invited delegations to Chicago, Illinois, from November 1 to December 7, 1944 to develop and agree upon a legal framework for the post-World War II development of international civil aviation.[163] The Chicago Conference resulted in the signing of the Convention on International Civil Aviation (the Chicago Convention), which came into force on April 4, 1947 and, accordingly, the creation of ICAO.[164]

The Chicago Convention serves two functions: (1) it operates as the constitution for the creation and operation of ICAO; and (b) it is "a multilateral agreement that seeks to promote the orderly, safe, and efficient development of international aviation."[165] From a constitutional standpoint, the Chicago Convention creates the Assembly (a plenary body), the Council (a uniquely permanent executive body,[166] now with 36 members), and "such other bodies as may be necessary."[167] Through such need, the Assembly has created the Legal Committee, the Committee on Joint Support of Air Navigation Services, and the Finance Committee "to assist the ICAO Assembly and Council to discharge the functions that the functions that the Convention assigns to them."[168] Additionally, the Chicago Convention provides express provision for the creation of the Air Transport Committee[169] and the Air Navigation Commission,[170]

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[162] *Convention on International Civil Aviation*, Dec. 7, 1944, 15 U.N.T.S. 295, ICAO Doc. No. 7300/8, art. 44 [Chicago Convention].

[163] Buergenthal, *supra* note 1 at 4.

[164] *Ibid.* at 3.

[165] *Ibid.* at 4.

[166] Paul Stephen Dempsey, "Aviation Security: The Role of Law in the War against Terrorism" (2003) 41 Colum. J. Transnat'l L. 649 at 662 [Dempsey, "Aviation Security"].

[167] Chicago Convention, *supra* note 162, art. 43.

[168] Buergenthal, *supra* note 1 at 9.

[169] Chicago Convention, *supra* note 162, art. 54(d).

[170] *Ibid.*, art. 54(e).

which, as its main duty, "[c]onsider[s], and recommend[s] to the Council for adoption, modifications of the Annexes to [the Chicago Convention]."[171]

Furthermore, the Chicago Convention calls on the Council to appoint "a chief executive officer . . . called the Secretary General, and make provision for the appointment of such other personnel as may be necessary . . . ."[172] The Secretary General oversees such personnel, which make up the Secretariat and are divided into five departments: the Air Navigation Bureau, the Air Transport Bureau, the Legal Bureau, the Technical Cooperation Bureau, and the Bureau of Administration and Services.[173]

From a substantive standpoint, based on the recommendations of the Air Navigation Commission, and in accordance with Chapter VI of the Chicago Convention, it is a mandatory function of the Council to adopt "international standards and recommended practices."[174] Out of convenience, the international standards and recommended practices (SARPs) are designated as Annexes to the Convention.[175] Although the standards are binding on the member states, the recommended practices "are viewed as merely desirable; member states need not notify the Council of their intent to comply with such practices, although they are encouraged to do so."[176] The SARPs, which currently span 18 Annexes,[177] form the technical basis for unifying national

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[171] *Ibid.*, art. 57.

[172] *Ibid.*, art. 54(h).

[173] Bureaux' Activities, online: ICAO <http://www.icao.int/icao/en/m_bureaux.html>. See also Buergenthal, *supra* note 1 at 11.

[174] Chicago Convention, *supra* note 162, art. 54(l).

[175] *Ibid.*

[176] Dempsey, "Aviation Security", *supra* note 166 at 663. For the remainder of this thesis, use of the acronym "SARP" will contemplate the binding standards, not the recommended practices.

[177] The Annexes are as follows: Annex 1: Personnel Licensing; Annex 2: Rules of the Air; Annex 3: Meteorological Service for International Air Navigation; Annex 4: Aeronautical Charts; Annex 5: Units of Measurement to be Used in Air and Ground Operations; Annex 6: Operation of Aircraft; Annex 7: Aircraft Nationality and Registration Marks; Annex 8: Airworthiness of Aircraft; Annex 9: Facilitation; Annex 10: Aeronautical Telecommunications; Annex 11: Air Traffic Services; Annex 12: Search and Rescue; Annex 13: Aircraft Accident and Incident Investigation; Annex 14; Aerodromes; Annex 15: Aeronautical Information Services; Annex 16: Environmental Protection; Annex 17: Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference; and Annex 18: The Safe Transport of

systems and regulation pertaining to international civil aviation. It is the SARPs, and state obligations relating to their implementation under the Chicago Convention, which form the basis of ICAO's most developed regulatory program,[178] the Universal Safety Oversight Audit Programme, and, consequently, the basis of discussion for the remainder of this thesis.

E. Conclusion

Throughout this Chapter, focus has been on the foundations and history of international organizations with regulatory authority, the theories behind and critiques of the existence of such organizations, and the description of some representative examples of international organizations with regulatory authority. Regardless of the theoretical world view that one selects to support, explain, or object to, state participation in international organizations, states, in practice, seem increasingly willing to allow international organizations authority to regulate conduct that was once in the realm of states' exclusive jurisdiction. This trend suggests that perhaps international organizations are more than mere instrumentalities of their member states; rather, they are capable of shaping state action through the creation of binding rules, the dissemination of information, and, even, regulation.

From the examples provided in the last section, it is evident that whether the specialized area of regulation is marine safety, economic welfare, labor conditions, atomic energy standards, or aviation safety, states are allowing themselves to be the subjects of regulation in light of their sovereign right to object in areas where conduct is

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Hazardous Goods by Air. See Annexes to the Convention on Civil Aviation, online: ICAO <http://www.icao.int/cgi/goto_m.pl?icaonet/anx/info/annexes_booklet_en.pdf>.

[178] In 2002, ICAO initiated the Universal Security Audit Programme (USAP), which is the security equivalent to the USOAP and seeks to assist states in fulfilling their security obligations created by Annex 17 of the Chicago Convention. See Aviation Security Audit Section, online: ICAO <http://www.icao.int/icao/en/atb/asa/index.html>. The first security audit took place in Nov. 2002 and all member states will have undergone an initial security audit by 2007. *Ibid.* See *Declaration on Misuse of Civil Aircraft as Weapons of Destruction and Other Terrorist Acts Involving Civil Aviation*, Res. A33-1, online: ICAO <http://www.icao.int/cgi/goto_m.pl?icao/en/assembl/a33/>. Although this thesis is focused on the USOAP specifically, its analysis and conclusions may have relevance to other writers in their assessments of the USAP.

inherently transnational in character and, therefore, seemingly a matter of international concern. In this sense, it is almost as if states are finding that the benefits that accrue out of an internationally regulated system outweigh those experienced from going about matters independently on the basis of sovereignty. The reasoning is obvious, if a state takes the later course, so too might others, creating a system filled with unpredictable externalities.

CHAPTER II.

HISTORY AND DESCRIPTION OF AVIATION SAFETY AUDITS

It is this Chapter's objective to examine with specificity one manner in which the ICAO member states have approached the problems associated with enforcement of state obligations under the Chicago Convention: the Universal Safety Oversight Audit Programme (USOAP). Although now a mandatory and universal system of safety audits, the USOAP has evolved from less developed multilateral assessment programs, which were conceived by the international community in response to a safety-awakening created by unilateral assessment programs—namely, the U.S. International Aviation Safety Assessment Program (IASA) and the E.U. Safety Assessment of Foreign Aircraft Programme (SAFA).

In examining the evolution of USOAP, it is first necessary to describe the obligations that the Chicago Convention imposes on its members, the manner in which states have discharged such obligations, why there exists a need for audits, and their purpose. Next, analysis will turn to an examination of the legal basis, structure, and development of the unilateral assessment programs: IASA and SAFA. Then, the focus will shift to the multilateral approach, specifically, the USOAP and its development and attributes. Finally, preceding the conclusion, which evaluates the effectiveness of audits, a brief comparison of the unilateral and multilateral approaches will touch on their strengths and weaknesses.

A. The Chicago Convention and a need for safety audits

Notwithstanding the methods that states use for the enforcement of obligations, the Chicago Convention establishes a climate for international aviation that respects the state as the primary actor. Indeed, in its first article, the Chicago Convention proclaims: "The contracting States recognize that every State has complete and exclusive

sovereignty over the airspace above its territory."[1] Based on this recognition of state sovereignty, the Convention also, however, places on the states an affirmative obligation to "adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark . . . shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force."[2] Based on this provision, states must take two actions: (1) enact rules and regulations relating to the flight and maneuver of aircraft; and (2) adopt measures to insure compliance with such regulations. Thus, the Convention creates both legislative and enforcement obligations.[3]

In addition, toward a harmonized system of regulating civil aviation, a state must undertake "to keep its own regulations . . . uniform, to the greatest possible extent, with those established from time to time under [the Chicago] Convention."[4] Given the transnational nature of aviation, significant inconsistencies in the rules and regulations from one state to the next would be a burden on the "the safe and orderly growth of international civil aviation throughout the world."[5]

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[1] *Convention on International Civil Aviation*, Dec. 7, 1944, 15 U.N.T.S. 295, ICAO Doc. No. 7300/8, art. 1 [Chicago Convention].

[2] *Ibid.*, art. 12.

[3] See Haile Belai, "Audit analysis helps set priorities for addressing safety oversight deficiencies" (2002) 57.1 ICAO Journal 19 at 19-20. Captain Belai instructs that "[a]lthough the incorporation of ICAO annex provisions leads to the achievement of the ultimate goal of implementation, it should be emphasized that safety requires more than the promulgation of regulations. Effective application of regulations and procedures and the monitoring of their implementation are equally essential." *Ibid.*

[4] Chicago Convention, *supra* note 1, art. 12.

[5] *Ibid.*, art. 44. For a similar line of reasoning see *Raymond Kassel v. Consolidated Freightways Corporation of Delaware*, 455 U.S. 329 (1981). In this case, the U.S. Supreme Court held that an Iowa regulation, unique to Iowa, which prohibited the use of 65-foot semi-trucks within its boarders, was an unconstitutional burden on U.S. interstate commerce because of the effect that it had on semi-truck operators.

In summary, the Chicago Convention establishes a system for civil aviation based on sovereignty and, therefore, one reliant on national systems of oversight for aviation activities.[6]

1. National system of oversight: creation and implementation of the Annexes

As summarized above, by signing the Chicago Convention, states oblige themselves to regulate the airspace over their territory and maintain their regulations to promote uniformity with the standards contained in and established from time to time under the Chicago Convention.[7] This scenario, however, begs the question: from where do such standards come?

It is a mandatory function of the ICAO Council to adopt standards and, similarly, non-binding recommended practices.[8] Out of convenience, the Standards and Recommended Practices (SARPs) are "designate[d] as Annexes to [the Chicago] Convention."[9] In maintaining the SARPs, the Council shall "consider recommendations of the Air Navigation Commission (Air Nav Commission) for amendment of the Annexes."[10] Annexes and amendment thereto become binding on the states following adoption by the Council, through a two-thirds vote, and submission to the contracting states.[11] Unless a majority of the contracting states register their disapproval of the Annex or amendment within the prescribed time, the Annex or amendment become effective at the expiration of the prescribed time.[12] The Council has an obligation to

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[6] Chicago Convention, *supra* note 1, art. 2 (defining a state's territory as "the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such state").

[7] See *ibid.*, art. 12.

[8] *Ibid.*, arts. 54(l), 37(a)-(k).

[9] *Ibid.*

[10] *Ibid.*, art. 54(m).

[11] *Ibid.*, art. 90.

[12] *Ibid.*

"immediately notify all contracting States of the coming into force of any Annex or amendment thereto."[13]

As an aside, currently the ICAO Council, considering the recommendations of the Air Nav Commission, maintains 18 Annexes, which cover topics such as licensing of personnel, rules of the air, airworthiness of aircraft, and air traffic control services.[14] The current system for audits covers the "safety-related provisions in all safety-related Annexes and their associated guidance materials."[15]

Once the Council makes notification to the contracting states of the adoption of an Annex or an amendment thereto, the contracting states are bound according to the terms of the Convention to implement and enforce the standards as part of their national regulatory system. The next section examines with greater detail the origins and extent of such obligations.

a) Obligations imposed by the Chicago Convention

By virtue of Article 12, as already summarized, states have an affirmative obligation to enact and enforce legislation that is consistent with the SARPs contained in the Annexes to the Chicago Convention. This obligation is both affirmed and, indeed, softened by Article 37, which states in relevant part:

> 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 which such uniformity will facilitate and improve air navigation.[16]

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[13] *Ibid.*

[14] See *supra* Chapter I, note 17. See *ICAO* Annexes to the Chicago Convention, online: ICAO <http://www.icao.int/cgi/goto_m.pl?icaonet/anx/info/annexes_booklet_en.pdf>.

[15] *Safety Oversight Audit Manual*, ICAO Doc. 9735-AN/960, § 1.3.2 [ICAO Audit Manual]. Safety related provisions are included in all of the Annexes except Annexes 9 (on Facilitation) and 17 (on Security). *Ibid.*

[16] Chicago Convention, *supra* note 1, art. 37.

Given Article 37, contracting states are not under a strict or hard duty of uniformity, rather they merely "undertake to collaborate in securing the *highest practicable degree* of uniformity . . . ."[17] Although a state must act in good faith and enact legislation to the highest practicable degree,[18] commentators from even the early years of the Chicago Convention realized that Article 37, "[r]ealistically speaking . . . is no obligation at all, for a state can always find the necessary 'practical' reasons to justify non-compliance with or deviations from international standards."[19] In the event that a contracting state cannot, however, comply with a standard, it triggers a different obligation under Article 38.

States that find it impracticable to comply with an international standard have an alternative obligation under Article 38 to notify the international community of the difference between their legislation and the international standard:

> Any State which finds it impracticable to comply with any 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.[20]

By examination of the Chicago Convention alone, therefore, states have a qualified obligation to comply with the international standards contained in the Annexes. To the extent that a state finds it impracticable to comply with the standard, it has a strict obligation to notify the international community of the differences between its national legislation and the international standard. Accordingly, notwithstanding practice, Articles 37 and 38 of the Chicago Convention create a presumption of compliance with

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[17] *Ibid.* [emphasis added].

[18] *The Vienna Convention on the Law of Treaties*, 23 May 1969, 155 UNTS 331, art. 26 (*pacta sunt servanda*).

[19] Thomas Buergenthal, *Law-Making in the International Civil Aviation Organization* (Syracuse: Syracuse University Press, 1969) at 78.

[20] Chicago Convention, *supra* note 1, art. 38.

the Annexes, and thus uniformity, unless a state has filed a difference with ICAO within the prescribed time limits.[21]

In practice, at least *ante*-USOAP, given the traditional lack of participation from states when it comes to filling differences, "it is totally unrealistic to assert that a state's failure to notify any differences indicates that it has none to report.[22] In fact, Buergenthal goes so far as to argue that the practice of states and the ICAO Council in response to such state practice, in effect, "transformed what was intended to be a 'contracting-out' provision into a hybrid procedure that has both 'contracting-out' and 'contracting-in' characteristics."[23] Buergenthal finds support for this argument in the practice of the Council to begin to "request the contracting states 'to notify [ICAO], before the dates on which the standards will become applicable, of the date or dates by which it will have complied with the provisions of the standards.'"[24]

Although Buergenthal may properly describe the then-empirical practice of states, his analysis in no way alters the *de jure* obligations of the contracting states under Articles 37 and 38. After all, by the terms of the Chicago Convention, amendment to the Convention may only occur through the procedures described in Article 94.[25]

In summary, therefore, contracting states to the Chicago Convention are responsible for creating national systems of regulation for the oversight of aviation activities in their territory. The states have a qualified obligation to obtain uniformity with the international standards *to the highest extent practicable*; to the extent impracticable, states have the duty to file notification of the differences between its national legislation and the international standard with ICAO to place the international

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[21] Buergenthal, *supra* note 19 at n. 154 (citing *Resolution of Adoption of Amendments to Annex 6*, ICAO Doc. 7188 C/828 (1953) at 26-28).

[22] Buergenthal, *supra* note 19 at 99.

[23] *Ibid.* at 100.

[24] *Ibid.* at 99 (quoting *Revised Form of Resolution of Adoption of an Annex*, Doc. 7361 (C/858), Appendix A (1953) at 199).

[25] See Chicago Convention, *supra* note 1, art. 94 (requiring a two-thirds vote of the assembly for an amendment to come into force).

aviation community on notice. Whether other states can rely on a states' silence as indicating that the non-filing state has complied with an international standard is debatable and forms a primary impetus behind the need for safety audits that result in clarity and predictability.

b) Representative examples of how states discharge their Chicago Convention obligations

States discharge their obligations under the Chicago Convention in a number of fashions, from enacting complex regulatory regimes[26] to simply incorporating the entire texts of the Annexes by reference in their national aviation legislation.[27] Although the latter requires no technical knowledge for adoption of the legislation itself, actual implementation and enforcement of the legislation does. As such, in the end, whether a state has sophisticated or simple legislation, the practical implementation and oversight obligations are roughly the same—the extent of oversight needed may vary from state to state, however, based on the types and amounts of aviation activities being carried out in or over the territory of a given state.

2. Why are safety audits/assessment necessary?

Safety audits are needed for two reasons: first, as suggested, some states have been unwilling or unable to discharge their obligation to either implement the SARPs or file differences with ICAO based on impracticability;[28] and second, both independent and ICAO-based studies have shown a strong correlation between non-compliant systems of

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[26] See generally Title 14 (Federal Aviation Regulations) of the U.S. Code of Federal Regulations and the U.S. Federal Aviation Act, 49 U.S.C. § 40101-50105.

[27] See *Review of the practices concerning the fostering of implementation of SARPS and PANS with particular reference to those not directly associated with the implementation of regional plans*, ICAO Doc. A15-WP/28 (TE/5) (1965) at 2.

[28] See *Improvement of Safety Oversight*, Res. A29-13, ICAO Doc. 9602 (1992) at I-39 [Improvement of Safety Oversight].

national oversight and higher accident rates.[29] For example, a study conducted in early 1997 that analyzed airline safety records found that "[f]or the five-year period ending 30 June, 1996, the fatal accident rate of the countries complying with ICAO standards was about 8 times better than that of the countries found not to comply with ICAO safety oversight standards."[30] This tie between compliant oversight and aviation safety demonstrates a compelling need for programs that ensure states are fulfilling their international obligation to carry out a compliant system of oversight.

3. What is the purpose of safety audits/assessment?

Although the precise purpose of each program is articulated in its own fashion and described below, the general, and perhaps obvious, purpose of safety audits is to improve national systems of aviation oversight and, therefore, aviation safety. Put another way, "[t]he regulation of [aviation safety] is designed to avoid injuries to persons and property, and the deprivation of man's most valuable attribute—life."[31]

B. Unilateral approaches to safety assessment

As demonstrated by their participation in ICAO, states have a substantial interest in the safety of international aviation. Not only is it the concern of states that their citizens be safe in their travels abroad; states also have an interest in ensuring that the aircraft flying over their territory are worthy of flight and operated by personnel with adequate experience and licenses to ensure the safety and interests of that state's citizens

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[29] Anthony Broderick and James Loos, "Government Aviation Safety Oversight--Trust, but Verify" (2002) 67 J. Air L. & Com. 1035 at 1055. See John Saba, "Worldwide Safe Flight: Will the International Financial Facility for Aviation Safety Help It Happen?" (2003) 68 J. Air. L. & Com. 537 at 545 (stating that "audit findings show a direct relationship between two factors: the higher the non-compliance to SARPs, the higher the aviation accident and incident rates in that region."). See Belai, *supra* note 3 at 19-20 (stating that "there is a close association between the audit findings and accident and incident rates at the regional level").

[30] Broderick & Loos, *ibid.* (citing Global Airline Safety - The Problem and Possible Solutions, presented at the ICAO Conference on Safety Oversight in the CAR Region, Montego Bay (Oct. 22-24, 1997)).

[31] Paul Stephen Dempsey, "Compliance & Enforcement in International Law: Achieving Global Uniformity in Aviation Safety" (2004) 30 N.C.J. Int'l L. & Com. Reg. 1 at 4.

on the ground.[32] Based on such interests, and perhaps discontent with the pace of international enforcement, some states have unilaterally conducted safety assessments based on compliance with the ICAO Annexes. Before analyzing the particulars of these state and regionally based assessment programs, however, it is necessary to examine the legal basis for such action by individual state actors.

1. Legal foundation for unilateral assessments

As already mentioned *supra*, the Chicago Convention, like the world order as a whole, is founded on the principle of sovereignty. The opening article of the Chicago Convention restates this principle of customary international law: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."[33] This notion of sovereignty expressed under the treaty, however, is not absolute. The Chicago Convention gives certain aircraft of a contracting state the right to over-fly the territory of other contracting states:

> Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing.[34]

Accordingly, the Chicago Convention limits a state's sovereignty by giving non-scheduled aircraft of other contracting states the "first freedom" right to over-fly; and the "second freedom" right to land for non-traffic purposes.[35] Notice, however, the aircraft seeking to over-fly or land in the territory of another contracting state is under the

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[32] See Saba, *supra* note 29 at 540-41.

[33] Chicago Convention, *supra* note 1, art. 1.

[34] *Ibid.*, art. 5.

[35] *Ibid.* See H.A. Wassenbergh, *Regulatory Reform in International Air Transport* (Deventer: Kluwer Law and Taxation, 1986) at 7.

obligation to observe the terms of the Chicago Convention;[36] furthermore, that aircraft's operation in and over foreign territory is subject to the over-flown state's right to require the aircraft to land.[37] Finally, aircraft over-flying another state's territory are subject to the rules and regulations of that state.[38] If an aircraft does not comply with such regulations, which are in theory supposed to reflect the Annexes to the Chicago Convention, based on the principle of sovereignty and Article 5 of the Chicago Convention, a state can force the aircraft to land and suspend flight over its territory until it complies with the regulations there in force. Contracting states, therefore, have the right to prevent non-scheduled aircraft in violation of its regulations and the Chicago Convention from operating over its territory. Scheduled international air services require examination of different provisions.

Article 6 of the Chicago Convention prohibits scheduled air services over or into foreign territory without the permission of the over-flown state: "No scheduled international air service may be operated over or into the territory of a contracting State, *except with the special permission or other authorization of that State*, and in accordance with the terms of such permission or authorization."[39] As such, before a foreign carrier may operate scheduled service into another territory, its state of registry must have entered into an agreement with the other state giving that carrier permission or authorization to conduct operations over or into the foreign territory.

Based on this system, a contracting state has the right to exclude all foreign carriers, if it wishes; this situation, however, is unlikely to occur because its carriers would probably not be given a reciprocal right to conduct services in other states' territories. This legal environment forms the basis for bilateral air service agreements

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[36] Chicago Convention, *supra* note 1, art. 5.
[37] *Ibid.*
[38] *Ibid.*, art. 12.
[39] *Ibid.*, art. 6 [emphasis added].

(BASAs), whereby rights are bargained for and exchanged between states.[40] Although further examination of the contents of BASAs is not necessary at this point, it is important to understand that states have the right to prohibit scheduled international service into or over their territory. Based on this absolute right, states clearly also have the authority to authorize services and determine the terms under which services may continue under the agreement: for example, states often require that foreign air carriers obtain and maintain a permit from its civil aviation administration (CAA) and comply with the applicable aviation regulations before being allowed access to operate.[41]

In summary, although certain non-scheduled aircraft enjoy a right to over-flight and technical landings into the territory of another contracting state, such right is subject to compliance with the applicable regulations.[42] Furthermore, in regard to scheduled international air services, states have the right to absolutely prohibit such services into or over their territory.[43] Accordingly, states also have the authority to choose to allow foreign air carriers to conduct services in or over their territory subject to the conditions of its choice. Such conditions may require that the air carrier seeking to conduct foreign services be capable of conducting such services in a safe manner and receive a permit to operate foreign services from the state's CAA. Issuance of a permit by a state's CAA may require assurances of adequacy or an audit of the state of registry's oversight regime before a particular carrier is allowed to operate scheduled air services into or over its territory.

The U.S. International Aviation Safety Assessment Program carried out by the U.S. Federal Aviation Administration (FAA) is an example of a permitting regime that includes assessments of foreign aviation oversight.

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[40] Bilateral does not necessarily equate to reciprocal; a state can exchange anything for air service privileges.

[41] See discussion on IASA *infra*.

[42] Chicago Convention, *supra* note 1, art. 5.

[43] *Ibid.*, art. 6.

2. *International Aviation Safety Assessment Program (IASA)*

Following a series of aviation crashes involving foreign carriers,[44] the U.S. government began to question the oversight activities of foreign governments and,[45] accordingly, created the foundations for the IASA program in 1991.[46] According to the FAA, "[t]he purpose of the IASA is to ensure that all foreign air carriers that operate to or from the United States are properly licensed and with safety oversight provided by a competent Civil Aviation Authority (CAA) in accordance with ICAO standards."[47] The following subsections will examine the background of IASA and provide an overview of the program and its procedures.

a) Background

As suggested above, before an air carrier may conduct air services into the United States, the air carrier must submit an application for and receive a foreign carrier permit issued by the U.S. Department of Transportation (USDOT).[48] Before issuing a permit to the applicant, the USDOT must first determine that the applicant is: (1) fit, willing, and able to provide foreign air services in compliance with the applicable regulations; (2) is the/an air carrier designated by the state of registry under the BASA with the United States; and finally (3) that the foreign air service to be provided is in the public interest.[49] This provision allows the United States to consider the safety capabilities of the air carrier, which necessarily implicates the oversight of the state of registry. Furthermore, by requiring that the air carrier be designated by the state of registry in a BASA, it

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[44] Meglena Boteva, *A New Century and a New Attitude Towards Safety Oversight in Air Transportation* (LLM Thesis, McGill University Faculty of Law, Institute of Air and Space Law, 2000) [unpublished] at 86.

[45] Paul Stephen Dempsey, *supra* note 31 at 27. See International Aviation Safety Assessment (IASA) Program, online: FAA <http://www.faa.gov/safety/programs_initiatives/oversight/iasa/more/>.

[46] Information Concerning FAA Procedures for Examining and Monitoring Foreign Air Carriers, 57 Fed. Reg. 38342 (1992) [FAA Procedures].

[47] International Aviation Safety Assessment (IASA) Program, *supra* note 45.

[48] Federal Aviation Act, 49 U.S.C. § 41301.

[49] *Ibid.*, § 41302.

ensures that the state of registry has entered into a bilateral with the United States and agreed to the conditional safety provisions contained in that agreement.[50]

The permitting process—the ability of the USDOT to grant or deny air carrier permits—forms the basis of U.S. authority to assess national oversight programs prior to allowing foreign air carriers to fly over or into U.S. territory. Safe carrier operation and sufficient national oversight, evidenced by compliance with applicable regulations and the Annexes, by the state of registry become conditions precedent to the issuance of a permit, without which a carrier cannot operate into the United States. It is, however, important to note that the United States has no regulations, or jurisdiction for that matter, to require foreign governments to comply with their obligations under the Chicago Convention; rather "the legal thread that gives efficacy to the IASA program runs primarily through the DOT legal authorities"[51] and its ability to consider national oversight as part of an air carrier's permit application. The required contents and procedure for review of an application for a foreign carrier permit are prescribed by regulation.[52]

b) Overview and procedures of IASA

When the FAA receives an application according to the terms of a BASA[53] from a foreign air carrier for a permit to conduct services into the United States, it seeks to obtain the following types of information before issuing a permit:

> 1. Whether the foreign air carrier holds a proper Air Operator Certificate (AOC), issued by its Civil Aviation Authority (CAA);
> 2. Whether the CAA provides oversight of the foreign air carrier sufficient to ensure safe operations, in accordance with the Chicago Convention and

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[50] See Michael Jennison, "The Chicago Convention and Safety after Fifty Years" (1995) XX Ann. Air & Sp. L. 283 at 292 (stating that "adherence to ICAO oversight standards is reaffirmed in the economic bilateral agreements that the United States negotiates under Articles 5 and 6 of the Convention").

[51] Broderick & Loos, *supra* note 29 at 1040.

[52] Federal Aviation Regulations, 14 C.F.R. pts. 129, 211, 302.

[53] Broderick & Loos, *supra* note 29 at n. 16 (stating that "[b]ilateral Air Transport Agreements contain a basic safety clause requiring adherence to the safety provisions of the Convention." *Ibid.*).

any applicable bilateral air transport agreement; and
3. Whether the foreign air carrier has an organization, the personnel, the management, and equipment necessary to conduct safe air transportation operations into the United States.[54]

Based on the second consideration, "if the FAA has not made a positive assessment of that country's safety oversight capabilities, the FAA Flight Standards Service will direct its appropriate international field office to schedule an FAA assessment visit to the CAA of the applicant's country."[55] The assessment is based on the Annexes to the Chicago Convention and once completed, the findings are compiled and either a positive or negative recommendation is made to the USDOT in regard to whether a permit should be issued to the foreign air carrier.[56] A positive recommendation is appropriate when a state is meeting its minimum safety obligations imposed by the Chicago Convention.[57]

In the event of a negative recommendation regarding a state whose air carrier is already conducting service into the United States, representatives from the FAA request formal consultations with the CAA of the foreign state with an aim toward rapidly rectifying the areas of non-compliance with the Annexes.[58] During consultations, the air carrier may not expand its service into or over U.S. territory.[59] In the event of a negative recommendation regarding a state whose air carrier is making an initial application for a foreign air carrier permit, the application for a permit will be denied and consultations will not be initiated; however, the FAA will make a reassessment of the CAA after receiving evidence that the CAA has complied with the minimum safety obligations imposed by the Chicago Convention.[60]

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[54] FAA Procedures, *supra* note 46 at 38343.

[55] International Aviation Safety Assessment (IASA) Program, *supra* note 45. Public Disclosure of the Results of Foreign Civil Aviation Authority Assessments, 59 Fed. Reg. 46332, 46333 (1994) [Public Disclosure].

[56] International Aviation Safety Assessment (IASA) Program, *supra* note 45.

[57] *Ibid.*

[58] *Ibid.*

[59] *Ibid.*

[60] *Ibid.*

Although initially IASA was carried out primarily in the course of permitting foreign air carriers, in 1994 IASA undertook to publicly disclose the results of the oversight assessments.[61] This change has been said to have given IASA "teeth."[62] At the outset, it should be noted that the assessments are of states, not air carriers, and compliance is gauged by evaluating whether a state has complied with its obligations under the Chicago Convention. The purpose of making the results of the assessments public is "to allow the public to make informed travel decisions by providing information regarding international aviation safety standards and compliance."[63] The on-site oversight assessments collect data and ensure compliance with the SARPS on the following bases:

> 1. Whether the CAA has developed or implemented laws or regulations in accordance with ICAO standards;
> 2. Whether it lacks the technical expertise or resources to license or oversee civil aviation;
> 3. Whether it lacks the flight operations capability to certify, oversee, and enforce air carrier operations requirements;
> 4. Whether it lacks aircraft maintenance requirements; and
> 5. Whether it lacks appropriately trained inspector personnel required by ICAO standards.[64]

The results of the assessment are then converted into one of two categories: Category I, those in compliance with the SARPS; and Category II, those not in compliance with the SARPS.[65] The results of the audits are subsequently made public to facilitate the objective of the program.

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[61] FAA Procedures, *supra* note 46 at 43332.

[62] Dempsey, *supra* note 31 at 29.

[63] FAA Procedures, *supra* note 46 at 43333.

[64] Dempsey, supra note 31 at 29-30 (quoting Mark Lee 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).

[65] Initially IASA employed three categories: acceptable, conditional, and unacceptable. FAA Procedures, *supra* note 43 at 43332.

c) IASA results

As of April 2006, the FAA had publicly disclosed the results of 99 CAAs assessments. At that time, 22 of the assessed states were not in compliance with their minimum safety obligations imposed by the Chicago Convention.[66] Ten of the 22 states in non-compliance were conducting operations into the United States at the time of the assessment. Although such statistics represent improvement from 2004 when 25 states were on the non-compliance list, one must question which particular program is behind such improvement: IASA, SAFA, USOAP, or some combination.

3. Safety Assessment of Foreign Aircraft Programme (SAFA)

The Safety Assessment of Foreign Aircraft Programme (SAFA), which was established by the European Civil Aviation Conference (ECAC) in 1996, is unlike IASA in the sense that SAFA seeks to assess compliance with the Chicago Convention Annexes by performing ramp inspections of the aircraft while at an ECAC member state airport.[67] Although compliance with the Annexes themselves are not obligatory on the air carriers, the air carriers should be made subject to national regulation and oversight which reflects the standards contained in the Annexes. The SAFA, therefore, assesses oversight in an indirect manner—whether or not the results of oversight are being achieved as evidenced by air carrier compliance. The focus, however, is on air carriers, not states.

In practice, inspectors within the ECAC member states conduct on-the-spot ramp inspections on both a random and targeted basis.[68] The ramp-checks are guided by a checklist with 54 inspection items and check, *inter alia*, the following: licenses of pilots, procedures and manuals that should be carried in the cockpit; compliance with such procedures by the flight and cabin crew; safety equipment in cockpit and cabin; cargo

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[66] FAA Flight Standards Service, International Aviation Safety Assessment Program, online: FAA <http://www.faa.gov/safety/programs_initiatives/oversight/iasa/media/iasaws.xls>.

[67] Safety Assessment of Foreign Aircraft, online: Joint Aviation Authorities Europe <http://www.jaa.nl/safa/safa.html>.

[68] *Ibid.*

carried in the aircraft; and the apparent condition of the aircraft.[69] Since the beginning of the program in 1996, "ECAC States have performed more than 27,000 SAFA inspections."[70]

In 2004, by EC Directive, the European Union (EU) member states were legally obliged to perform inspections and participate in SAFA:[71] "Each Member State shall put in place the appropriate means 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 shall be subject to ramp inspections."[72] The EC Directive also provides requirements for the exchange of information between member states,[73] procedures for the protection of information,[74] procedures for the grounding of aircraft, [75] and the procedures for banning or conditioning the landing of an operator's aircraft at an airport.[76] Of particular interest is that the directive gives the authority of an inspector to ground an aircraft where "non-compliance with international safety standards is clearly hazardous to flight safety . . ." until corrective action by the operator is taken.[77] More recently, the EU has given the SAFA additional bite.

By regulation, in 2005 the European Parliament established the basis for creation of a list of air carriers that are banned from operating in the European Community:

> With a view to reinforcing air safety, a list of air carriers that are subject to an operating ban in the Community (hereinafter referred to as the Community list) shall be established. Each Member State shall enforce,

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[69] *Ibid.*

[70] *Ibid.*

[71] *Ibid.* See EC, *Council Directive 2004/36/CE of 21 April 2004 on the safety of third-country aircraft using Community airports*, [2004] O.J. L. 143/76 [EC Directive].

[72] EC Directive, *supra* note 71, art. 4.

[73] *Ibid.*, art. 5.

[74] *Ibid.*, art. 6.

[75] *Ibid.*, art. 7.

[76] *Ibid.*, art. 9.

[77] *Ibid.*, art. 7.

> within its territory, the operating bans included in the Community list in respect of the air carriers that are the subject of those bans.[78]

The so-called "black list" is comprised of air carriers that do not comply with common criteria as established by the Annexes to the Chicago Convention and, where applicable, Community standards.[79]

On March 22, 2006, the European Union published the first Community list of air carriers subject to an operating ban within the community.[80] The Community list is the product of each member state reporting to the Commission of the European Communities the air carriers that are subject to an operating ban in its national territory.[81] In all, there are 104 air carriers that made the list and five states from which all air carriers whether identified individually or not are banned from operating over or into the Community.[82]

Although the SAFA differs substantially in its approach, both SAFA and IASA use the basic foundation of sovereignty to perform assessments, either on-site CAA or on-ramp inspections, and exclude air carriers that present a threat to their citizen's interests and safety. Although both the United States and European Union operate their programs under authority confirmed by the Chicago Convention—the right to exclude scheduled air services as discussed *supra*—both programs have attracted criticism based on the deleterious effects they have on state and air carrier reputation and economic viability.[83] Such criticism led the international community to develop multilateral approaches to auditing national systems of aviation safety oversight through ICAO.

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[78] EC, *Council Regulation 2004/36/EC of 14 Dec. 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC*, O.J. L. 344/15, art. 3.

[79] *Ibid.*, Annex.

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

[81] *Ibid.*, ¶ 2.

[82] *Ibid.*, Annex A.

[83] See Shirlyce Manning, "The United States' Response to International Air Safety" (1996) 61 J. Air L. & Com. 505 at 536-37 (discussing the IASA results on Latin American countries in particular).

C. Multilateral approaches: ICAO

Although the formation of programs with the purpose of auditing state compliance with the standards set forth in the Chicago Convention is a relatively new concept, the problem of member states not performing their international obligations, either to implement a standard or file a difference, is as old as the Chicago Convention. In fact, in 1956, the Tenth Session of the ICAO Assembly recognized in a resolution that "the reporting by states pursuant to Article 38 of the Convention . . . is not entirely satisfactory."[84] A decade later, in 1966, similar concern is evidenced by the fact that "ICAO ha[d] utilized some of the funds made available to it under U.N. economic and technical development programs to dispatch ICAO Technical Assistance Missions to various Contracting States"[85] with the purpose of aiding those, mostly developing, nations advance their rudimentary or non-existent aviation legislation.[86] It was not until the early 1990s, however, when ICAO started working toward a multilateral program to enforce the obligations created under the Chicago Convention.

Indeed, in 1992, the ICAO membership demonstrated a renewed interest in improving aviation safety through the improved implementation of the SARPs by endorsing "the development of a Strategic Action Plan designed to provide a vehicle for increasing the effectiveness of ICAO,"[87] which included as one of its chief objectives: "to foster the implementation of ICAO Standards and Recommended Practices to the greatest extent possible worldwide."[88]

Furthermore, in 1992, the 29th Session of the Assembly adopted Resolutions A29-13 and A29-3, both of which articulate the Assembly's desire to improve national

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[84] *Reporting of Differences by States*, Res. A10-29, ICAO Doc. 7707 A-10-P/16 (1956) at 45.

[85] Buergenthal, *supra* note 19 at 108.

[86] *Ibid.* at 107.

[87] Boteva, *supra* note 44 at 66 (citing ICAO, *Annual Report of the Council - 1993: Projects given special attention during 1993*, ICAO Doc. 9622 at 32).

[88] Boteva, *ibid.* at 68 (citing Ruwantissa I.R. Abeyratne, "ICAO's Strategic Action Plan--A Legal Analysis" (1996) 45 Z.L.W. 231 at 232ff).

oversight. Resolution A29-13, for instance, recalled that "states are responsible for safety oversight of air carriers based in their territory and for safety oversight of aircraft on their national registries,"[89] and, accordingly, urged "the contracting states to review their national legislation implementing those obligations and to review their safety oversight procedures to ensure effective implementation."[90] Resolution A29-3, concerned with harmonization of national regulations, requested that the ICAO Council "pursue the enhancement of ICAO Standards and to study the feasibility of establishing a multilateral monitoring mechanism."[91] The stage was seemingly set for multilateral action.[92]

1. ICAO Safety Oversight Assessment Programme (voluntary)

The United States in the early 1990s undoubtedly contributed to international cries for multilateral action. Professor Dempsey describes the international community's sentiments in the following manner: "Though the consensus was that the SARPs should be honored, it was believed that no single nation should be their policeman, since multilateral cooperation was preferable to unilateral insistence."[93]

Accordingly, in 1994, the ICAO Council responded by agreeing "to establish a Safety Oversight Program incorporating, as its core function, safety oversight assessments of States, on a voluntary basis, by an ICAO team."[94] On June 7, 1995, the "Council approved the Safety Oversight Program, as well as the related mechanism for

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[89] Improvement of Safety Oversight, *supra* note 28.

[90] *Ibid.*

[91] *Global Rule Harmonization*, Res. A29-2, ICAO Doc. 9602 (1992) at I-37.

[92] "The adoption of Resolution 29-13 marked the beginning of ICAO's rapid transition from an organization that had written, but not in any way policed, aviation safety standards to an organization that today puts the promotion of proper safety oversight at the top of its priority list." Broderick & Loos, *supra* note 29 at 1045.

[93] Dempsey, *supra* note 31 at 33-34. See also Broderick and Loos, *supra* note 42 at 1045 (stating that "many countries called for a more 'balanced' multilateral approach, rather than the unilateral program of the U.S.").

[94] Boteva, *supra* note 44 at 70. See *Approval of the Report on the Improvement of Safety Oversight*, ICAO Doc. C-WP/10069 (1994).

financial and technical contributions from member States,"[95] which was later approved by the 31st Session of the Assembly and became operational in March of 1996.[96]

The Safety Oversight Assessment Programme (SOAP) in its initial form had four characteristics: the assessment; funded by state contributions; on a voluntary basis; and with confidential findings.[97] Following the first 45 audits conducted under the SOAP, ICAO released some interesting statistics that "clearly showed the opportunity for improvement that awaited an effective mandatory audit program."[98]

A step in the direction of such mandatory audits occurred in Montreal from the 10th to the 12th of November 1997 at the unprecedented conference of the Directors General of Civil Aviation (DGCA), which was "devoted exclusively to the issue of air safety and formulating a global strategy for improving safety oversight."[99] At the 1997 Conference of the DGCA, the delegations considered the: current status of safety oversight;[100] results from the ICAO SOAP;[101] a summary of corrective actions taken by audited states;[102] issues of dealing with confidentiality and sovereignty issues;[103] enhancement of the ICAO SOAP;[104] the expansion of the ICAO SOAP to other technical fields;[105] and the establishment of a global strategy for safety oversight.[106]

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[95] Broderick & Loos, *supra* note 29 at 1045.

[96] *Ibid.* at 1046.

[97] *Ibid.*

[98] *Ibid.* at 1046.

[99] Boteva, *supra* note 44 at 72.

[100] *Report of the Directors General of Civil Aviation Conference on a Global Strategy for Safety Oversight*, ICAO Doc. 9707 (1997) at 1-1 [Report of DGCA/97].

[101] *Ibid.* at 1-2 (summarizing *Results from the ICAO safety oversight programme*, DGCA/97-WP/2 (1997)).

[102] *Ibid.* at 1-3 (summarizing *Progress on corrective actions taken by States*, DGCA/97-WP/3 (1997)).

[103] *Ibid.* at 1-4 (summarizing *Dealing with confidentiality and sovereignty issues*, DGCA/97-WP/4 (1997)).

[104] *Ibid.* at 1-5 (summarizing *Enhancement of the ICAO safety oversight programme*, DGCA/97-WP/5 (1997)).

[105] *Ibid.* at 1-7 (summarizing *Expansion of the ICAO safety oversight programme to other technical fields*, DGCA/97-WP/6 (1997)).

[106] *Ibid.* at 1-10. (summarizing *Beyond oversight: action plan for global aviation safety*, DGCA/97-WP/9 (1997)).

Discussion and consideration of the SOAP assessment results "revealed that many States, 'in spite of their best intentions and efforts', were facing serious difficulties in fulfilling their safety oversight obligations."[107] As a result, the "DGCA Conference resulted in unanimous agreement to significantly change the mandate of the safety oversight programme."[108] Additionally, the conference made 38 recommendations, with the following bearing the most relevance on this discussion:

> a) that regular, mandatory, systemic and harmonized safety audits be introduced, to include all Contracting States and to be carried out by ICAO;
>
> b) that greater transparency and increased disclosure be implemented;
>
> c) that the program be expanded to include other technical fields at the appropriate time; and
>
> d) that the ICAO Council ensure the allocation of adequate resources for the implementation of the audit programme.[109]

Based on the recommendations made by the DGCA Conference and on an action plan submitted by the Secretary General, on May 6, 1998, "the Council decided to recommend to the 32nd Session of the Assembly the establishment of an ICAO Universal Safety Oversight Audit Programme."[110]

2. *ICAO Universal Safety Oversight Audit Programme (mandatory)*

a) Development

At the 32nd Session, the ICAO Assembly adopted Resolution A32-11. By the terms of the Resolution, the Assembly resolved:

> that a universal safety oversight audit programme be established, comprising regular, mandatory, systematic and harmonized safety audits,

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[107] Boteva, *supra* note 44 at 72 (quoting Report of DGCA/97, *ibid.* at ii-3).

[108] ICAO Audit Manual, *supra* note 15, § 2.2.2.

[109] *Ibid.*

[110] *Ibid.*, § 2.3.2.

> to be carried out by ICAO; that such universal safety oversight audit programme shall apply to all Contracting States; and that greater transparency and increased disclosure be implemented in the release of audit results.[111]

Furthermore, the Assembly directed "the Council to bring into effect, from 1 January 1999, a universal safety oversight audit programme accordingly, including a systematic reporting and monitoring mechanism on the implementation of safety-related Standards and Recommended Practices"[112] and urged "all Contracting States to agree to audits to be carried out upon ICAO's initiative, but always with the consent of the State to be audited, by signing a bilateral Memorandum of Understanding with the Organization, as the principle of sovereignty should be fully respected . . . ."[113]

In comparison to the ICAO SOAP, the USOAP established in 1998 embodies the following characteristics: it is an audit rather than assessment; it is universal and, therefore, mandatory; it has a greater degree of transparency; and it is funded through the ICAO budget rather than contribution by member states.[114]

The USOAP received further expansion in 2001 at the 33rd Session of the Assembly. Through Resolution A33-8, the Assembly resolved

> that USOAP be expanded to include, in addition to Annexes 1 (Personnel Licensing), 6 (Operation of Aircraft), and 8 (Airworthiness of Aircraft), audits of Annexes 11 - *Air Traffic Services* and 14 - *Aerodromes* as of 2004, and other safety related fields, such as aircraft accident incident investigation (Annex 13 - *Aircraft Accident and Incident Investigation*), provided resources would be available for further expansion.[115]

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[111] *Establishment of an ICAO Universal Safety Oversight Audit Programme*, Res. A32-11, ICAO Doc. 9739 (1998) at I-48.

[112] *Ibid.*

[113] *Ibid.*

[114] Broderick & Loos, *supra* note 29 at 1051.

[115] ICAO Audit Manual, *supra* note 15, § 2.4.2.

Based on the recommendations from the Air Navigation Commission and the Secretariat, however, the "Council decided to delay the expansion of the Programme by one year and proposed to the 35th Session of the Assembly the transition of the Programme to a comprehensive systems approach for the conduct of safety oversight audits."[116]

In consideration of the Council's recommendation, the 35th Session of the Assembly adopted Resolution A35-6, which superseded Resolution A33-8 and resolved "that the ICAO Universal Safety Oversight Audit Programme be further expanded to include the safety-related provisions contained in all safety-related Annexes to *the Convention on International Civil Aviation* as of 2005."[117]

b) Objectives, principles, and procedures of USOAP

> The objective of the [USOAP] is to promote global aviation safety through auditing Contracting States, on a regular basis, to determine State's capability for safety oversight by assessing the effective implementation of the critical elements of a safety oversight system and the status of State's implementation of safety relevant ICAO [SARPs], associated procedures, guidance material and safety-related practices.[118]

In reaching the objectives of the programme as a whole, the audits themselves pursue the following primary objectives: (1) to observe and assess state adherence to the ICAO SARPs; (2) to determine the degree to which a state has implemented the standards; (3) the effectiveness of such implementation; (4) the state's capability for safety oversight; and (5) to provide advice to states on how to improve their oversight capabilities.[119] The Audit Manual further identifies the dissemination of information arising from the audit findings, including the final safety oversight audit report, as an objective for the benefit of the programme.[120]

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[116] *Ibid.*, § 2.4.4.

[117] *Transition to a Comprehensive Systems Approach for Audits in the ICAO Universal Safety Oversight Audit Programme (USOAP)*, Res. A35-6, ICAO Doc. 9848 (2004) at I-58 [ICAO Res. A35-6].

[118] ICAO Audit Manual, *supra* note 15, § 3.1.

[119] *Ibid.*, § 3.2.

[120] *Ibid.*

To meet the objectives identified in the Manual, the audits are to be carried out according to Internationally Accepted Auditing Principles, which include: recognition of national sovereignty, universality (all contracting states are subject to the audits), transparency and disclosure, timeliness, all-inclusiveness, in a systemic manner, with consistency and objectivity, fairness, and quality.[121]

Given that the USOAP has added a new dimension to the work of ICAO—enforcement—a new section was created to carry out and manage the audit programme: the Safety Oversight Audit Section (SOA). The SOA is a section within the Air Navigation Bureau and is housed at the ICAO headquarters in Montreal.[122] In addition to the SOA staff in Montreal, the SOA relies on temporary audit team members, who are "experts seconded to the Programme by Contracting States . . . [and] are considered ICAO staff members [during an ICAO safety oversight audit assignment]."[123] Audit team members are subject to "minimum qualification and experience requirements as may be established from time to time."[124] The audit teams themselves, "consist of an audit team leader and specialist auditors for the disciplines included in the scope of the audit."[125]

Chapter 5 of the Universal Safety Oversight Audit Manual contains detailed procedures to be applied in the safety audits. Given the principle of universality, ICAO uses a 12-month fixed audit schedule for identifying the states subject to audits; the manual urges states "to accept their respective audit schedule contained in the plan . . . ."[126] Once a state is scheduled for an audit, ICAO notifies the states of the schedule at least 12 months in advance of the audit.[127] Then, in coordination with each state to be audited, a series of pre-audit activities are carried out to prepare for the audit,

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[121] *Ibid.*, § 3.4.
[122] *Ibid.*, § 4.1.
[123] *Ibid.*, § 4.1.4.
[124] *Ibid.*, § 4.2.
[125] *Ibid.*, § 4.5.
[126] *Ibid.*, § 5.2. See *ibid.*, § 5.17 for the Criteria for Scheduling States for an ICAO Audit.
[127] *Ibid.*

which include: signing the Memorandum of Understanding (MOU), selecting audit protocols, and briefing audit team members.[128] Next, during the on-site audit activities the audit team meets with the state authorities, conducts the on-site audit consistent with the agreed work programme, and develops a draft report.[129] Finally, following the on-site audit, the post-audit activities begin: the state begins work and submits a corrective action plan and the SOA submits its final safety oversight audit report to the state upon which the state comments leading to the publication of the final safety oversight audit report.[130]

c) Legal basis for conducting audits

Although the next Chapter deals entirely with examining the legal basis upon which ICAO has created and carries out USOAP, a description of the instrument that gives the audit teams authority to enter a state and conduct an audit is worth mention at this point. As mentioned above, as part of the pre-audit activities, a state to be audited signs a MOU, which gives the audit mission authority to conduct the audit in light of that state's sovereignty. By signing the MOU, the state "agrees to the conduct of a safety oversight audit by an ICAO safety oversight team covering the safety-related provisions in the areas pertaining to all safety related Annexes to the *Convention on International Civil* (Chicago, 1944) . . . ."[131] In addition to giving ICAO authority to conduct the audit, the MOU also defines the scope, terms, and procedure of the audit.[132] It is on the basis of the MOU that ICAO, as an international organization, receives the authority to enter the sovereign territory of a member state and conduct the so-called mandatory audit.

D. Comparison: Unilateral v. Multilateral approaches

Unilateral and multilateral approaches to conducting safety assessments or audits are roughly similar in purpose and scope. Both seek to improve national safety oversight,

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[128] See *ibid.*, § 5.2.
[129] *Ibid.*
[130] *Ibid.*
[131] *Ibid.* at Appendix B.
[132] See *ibid.*

and therefore aviation safety, through state compliance with the international standards contained in the Annexes to the Chicago Convention. The main differences, however, are the actors, the legal basis for action, and the manner in which the international community respects the program.

The unilateral programs are carried out by a state actor, or in the case of the European Union, a single regional actor. Both the European Union and the United States through their respective programs use access to their sovereign territories as an incentive for states to comply with the international standards. Either states comply with their obligations, or their commercial aviation operators lose access to desirable markets. For example, the United States cannot force Togo to comply with its obligations under the Chicago Convention, but it can exclude Togolese aircraft from U.S. territory until Togo complies. Unilateral action is, therefore, based on the principle of sovereignty and operable only at the will of the other state. Togo may not like its choices, but as a sovereign state the United States has the ability to place Togo, and all other states for that matter, in such a position.

The multilateral programs, however, are and have been carried out by the international community through ICAO. The multilateral audits seek to enforce the international obligations actually created under the Chicago Convention, via authority granted to the organization by the member states—the states consent to the audits. It is this difference that may, ultimately, make multilateral approaches more effective. The audits are carried out by the international community, not a single state and, accordingly, the results have the appearance of being neutral (technical) and, therefore, perhaps more legitimate.[133] Although "[i]t is evident that the U.S. unilateral action became a potent catalyst for ICAO to understand that continuing lethargic attitudes to aviation safety are not tolerable to a large segment of the ICAO membership and to focus ICAO's attention

[133] See Dempsey, *supra* note 31 at 34.

to real priorities,"[134] perhaps its usefulness is coming to an end as the ICAO program grows in scope and effect.

E. Conclusion: Are audits effective at improving aviation safety?

The emergence of both unilateral assessment and multilateral assessment and audit programs have created actual results[135]—through states upgrading their national oversight programs—and awareness that will surely lead to additional improvement over time. In 2004, for instance, the IASA was said to have "resulted in at least 19 countries upgrading their safety oversight programs to better meet the standards set by ICAO."[136]

Likewise, ICAO has declared substantial successes through USOAP and the members seem willing to expand, fund, and participate in the program.[137] That said, at this point in time, specific "results of the ICAO safety oversight audit have been kept confidential to the State concerned . . . ."[138] In general terms, however, ICAO has submitted that:

> [T]he first cycle of the ICAO [USOAP] has demonstrated that most of the ICAO Contracting States have made progress in improving their safety oversight capability. However, several States still do not have the capacity to exercise properly their safety oversight responsibilities and it is not certain that some of them will ever have the human and financial

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[134] Michael Milde, "Enforcement of Aviation Safety Standards - Problems of Safety Oversight" (1996) 45 Z.L.W. 3, 12.

[135] Carrier based audit initiatives, such as the International Air Transport Association (IATA) Operational Safety Audit Programme (IOSA), are also contributing to safety climate in aviation. Unfortunately, the IOSA is outside the scope of this examination given its focus on carriers rather than state oversight. For more information on the IOSA visit "IATA Operational Safety Audit Program," online: IATA <http://www.iata.org/ps/services/iosa/index.htm>.

[136] Broderick & Loos, *supra* note 29 at 1055.

[137] See ICAO Res. A35-6, *supra* note 117.

[138] Michael Milde, "The ICAO Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety (Montreal, 20 to 22 March 2006): A Commentary" (2006) XXXI Ann. Air & Sp. L. 475 at 476.

> resources and the volume of activity necessary to support an independent safety oversight system. . . .[139]

Specific audit results are expected to be made public on the ICAO website in August of 2006,[140] "thus giving world-wide publicity to any deficiencies exi[s]ting in a particular state."[141] Unfortunately, roughly only 40 percent of the 189 ICAO member States have agreed to release details of their audit reports.[142] Although the real test of the USOAP will be whether international civil aviation actually becomes safer—meaning fewer incidents and fatalities—any improvement in safety oversight must not be understated.

According to the Chief of the Safety Oversight Audit Section in the Air Navigation Bureau, "USOAP has been successful in identifying deficiencies, recommending solutions and encouraging States to rectify safety-related problems, but the continuing success of the programme depends on the will of each State to implement the action plans, and thereafter, to maintain the standards established."[143]

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[139] Conclusions and Recommendations, ICAO Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety (Montreal, 20 to 22 March 2006), online: ICAO <http://www.icao.int/icao/en/dgca/Concl_recom_en.pdf>, reprinted in Milde, *ibid.* at 478.

[140] State Consent List, Flight Safety Information Exchange, online: ICAO <http://www.icao.int/fsix/stateConsent1.cfm> [State Consent List].

[141] Milde, *supra* note 138 at 476.

[142] *Ibid.* See State Consent List, *supra* note 140 (Seventy-seven states have given consent to ICAO for the online release of details relating to their audit reports).

[143] Belai, *supra* note 3 at 20.

CHAPTER III.

ICAO AUTHORITY TO OPERATE USOAP AND ENFORCE FINDINGS

Based on the analysis that follows, the USOAP is a program with legitimate foundations and its operation is in harmony with the Chicago Convention; furthermore, although the implementation obligations created by the Chicago Convention are soft in nature, this reality does not undermine the effectiveness of the USOAP, which uses the hard obligation of recordation of differences along with international peer pressure to compel state implementation of the SARPs.

This Chapter takes the discussion from last Chapter's empirical description of the USOAP to a legal analysis of its legitimacy and enforceability based on the provisions of the Chicago Convention, principles of general customary international law, and the bilateral agreements entered into between the audited states and ICAO. In so doing, the first section discusses the provisions of the Chicago Convention that provide authority to the Council for creation of the USOAP and its operation. Then, the analysis will consider whether principles of custom add to such legitimacy. Next, examination will turn to whether the hard law-soft law distinctions between Articles 37 and 38 of the Convention undermine the program and defeat the purposes of its operation. Finally, after considering the legitimizing implications of the bilateral MOUs, the focus will shift to the machinery for enforcing the audit findings contained in Chapter XVIII of the Convention.

A. Chicago Convention provisions and related considerations

Although the "auditing authority conferred on ICAO [through USOAP] amounts to a major 'empowerment' of ICAO [that] the Convention is silent on [and] was never contemplated at the Conference in 1944,"[1] the USOAP has been operated without a single protest or complaint by a state, which suggests that despite legal implications,

[1] Michael Milde, "Chicago Convention at Sixty - Stagnation or Renaissance?" (2004) XXIX Ann. Air & Sp. L. 443 at 463 [Milde, "Chicago Convention at Sixty"].

practically, the program exists and is capable of operation. Furthermore, the analysis of the relevant Chicago Convention Provisions that follows suggests that the USOAP exists in harmony with the Chicago Convention, which through interpretation adds additional legitimacy to its *de facto* creation and operation.

Due to the fact that the Chicago Convention is a multilateral international treaty, interpretation thereof is generally guided by the international law of treaties.[2] Accordingly, the Chicago Convention, "shall be interpreted in . . . accordance with the ordinary meaning to be given to terms of the treaty in their context and in light of its object and purpose."[3] For purposes of interpretation, the text of a treaty includes, *inter alia*, the "text, including its preamble and annexes."[4] Furthermore, if interpretation according to the ordinary meaning of a provision leaves the meaning ambiguous, obscure, or leads to a result which is manifestly absurd or unreasonable, then "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty . . . ."[5]

In harmony with the interpretive principles cited above and as discussed in Chapter I,[6] because the Chicago Convention is the constituent instrument of ICAO, interpretation of its provisions should include consideration of the "intrinsically evolutionary nature of a constitution."[7] The drafters of the Chicago Convention would not have intended to create an organization that was ineffective or useless; accordingly, allowance for incremental growth through interpretation that enhances the continued effectiveness of ICAO is both proper and desirable.[8] The USOAP seeks to improve state

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[2] *The Vienna Convention on the Law of Treaties*, 23 May 1969, 155 UNTS 331, art. 1 [Vienna Convention].

[3] *Ibid.*, art. 31(1).

[4] *Ibid.*, art. 31(2).

[5] *Ibid.*, art. 32.

[6] See *supra* Chapter I, text accompanying notes 40-45.

[7] Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions* (London: Sweet & Maxwell, 2001) at 449 (citing *Certain Expenses Case*, 1962 I.C.J. Reps at 157).

[8] See *ibid.* at 450.

compliance with the terms of the substantive provisions of the Chicago Convention while improving aviation safety; both improvements enhance the object, purpose, and effectiveness of the organization.[9]

1. Analysis of the relevant Chicago Convention provisions

As discussed in the previous Chapter, by recommendation of the Assembly, it was the Council that brought the USOAP into being.[10] It is accordingly whether creation of the USOAP fits within the scope of functions and authority of the Council that forms the narrow scope of legal analysis concerning legitimacy of the program.

In establishing the limited member Council, the drafters of the Chicago Convention vested the Council with both mandatory[11] and permissive functions.[12] It is these provisions that define the legally permissive action of the Council—action outside these enumerated, and their related implied, functions would be *ultra vires* and, accordingly, void as a matter of customary international law.[13] Despite the fact that the Assembly by consensus directed the creation of the USOAP, the Council may not do that which it is without authority to do. The following is a survey of the Council functions relevant to the creation of USOAP.

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[9] See *supra* Chapter I, notes 41-50 and accompanying text (discussing incremental constitutional growth of international organizations).

[10] *Establishment of an ICAO Universal Safety Oversight Audit Programme*, Res. A32-11, ICAO Doc. 9739 (1998) at I-48 [ICAO Res. A32-11]. The Assembly certainly had express authority to direct the Council to create the USOAP on the basis of Article 49(h) of the Chicago Convention, which gives the Assembly the authority to "[d]elegate to the Council the powers and authority necessary or desirable for the discharge of the duties of the Organization and revoke or modify the delegations of authority at any time."

[11] *Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295, ICAO Doc. 7300/6, art. 54 [Chicago Convention].

[12] *Ibid.*, art. 55.

[13] See *supra* Chapter I, Section (C)(2)(a), for a discussion on the prohibition of *ultra vires* actions by international organizations.

a) Article 54(b)

Under Article 54(b) of the Chicago Convention, the Council has the mandatory function to "[c]arry out the directions of the Assembly . . . ." By resolution, the 32nd Session of the ICAO Assembly, *directed* "the Council to bring into effect, from 1 January 1999, a universal safety oversight audit programme accordingly, including a systematic reporting and monitoring mechanism on the implementation of safety-related Standards and Recommended Practices."[14] Given the Council's mandatory function to work at the direction of the Assembly, *i.e.* the international community, and the Assembly's direction to bring the USOAP into effect, the Council clearly had constitutional authority to create USOAP. Although Article 54(b) does not give express mandate for the creation of the USOAP specifically, it does give express mandate for the Council to act at the direction of the Assembly—the Council necessarily has the authority to do that which the Assembly directs.

Even without the Assembly's express direction, however, the Council could still defend the creation of the USOAP on the basis of implied authorities created by the provisions considered below. As was articulated in Chapter I, in addition to express authority, international organizations also have implied authorities that "flow from a grant of express powers, and [are] limited to those that are 'necessary' to the exercise of powers expressly granted."

b) Article 54(i)

It is a mandatory function of the Council "to request, collect, examine and publish information relating to the advancement of air navigation and the operation of international air services, including information about the costs of operation and particulars of subsidies paid to airlines from public funds."[15]

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[14] ICAO Res. A32-11, *supra* note 10.

[15] Chicago Convention, *supra* note 11, art. 54(i).

First, it is necessary to comment on the scope of this function. The "council shall request, collect, examine and publish information" *only* if it relates to the "advancement of air navigation and the operation of international air services." Accordingly, one must determine if aviation safety oversight relates to the advancement of air navigation or the operation of international air services. The answer is perhaps undeniable—a uniform system of safety oversight, which includes minimum safety standards, can do nothing but improve air navigation and the operation of international air services. In fact, the Assembly recognized this reality in the course of expanding the USOAP to all of the safety-related provisions in the Annexes: "the effective implementation of State action plans is essential to *enhance* the overall safety of *global air navigation.*"[16] Furthermore, given the inherently close relationship between aviation safety and operation of international air services, information relating to safety oversight is consistent with the scope of the function described in Article 54(i). Since safety oversight is seemingly a legitimate subject for the Council's Article 54(i) function, it is necessary to next determine how the provision allows the Council to carry out its function.

Assigning ordinary meaning to the words of this provision: "to request" would entail asking for something to be given or done.[17] Likewise, "to collect" means to gather together or assemble;[18] "to examine" means to inspect or scrutinize carefully;[19] and "to publish" means to issue for sale or distribution to the public.[20] Based on the ordinary definitions of the actions allowed in this function, the Council may ask for information from the states relating to safety oversight, gather or assemble such information on its own initiative, carefully inspect or scrutinize such information, and make such information public.

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[16] *Transition to a Comprehensive Systems Approach for Audits in the ICAO Universal Safety Oversight Audit Programme (USOAP)*, Res. A35-6, ICAO Doc. 9848 (2004) at I-58 [emphasis added].

[17] The Random House Dictionary of the English Language, *s.v.* "request".

[18] *Ibid.*, *s.v.* "collect".

[19] *Ibid.*, *s.v.* "examine".

[20] *Ibid.*, *s.v.* "publish".

In the context of the safety audits, Article 54(i) clearly gives the Council the authority to ask states for information relating to safety oversight, assemble that information into a report, and then disseminate the report to the public. Furthermore, if the Council has authority to take such actions, it may also delegate its authority to an agent, such as the Safety Oversight Audit Section, for the conduct of action under its authority.[21] In summary, this provision seems to give authority to the operational side of USOAP; that is conducting the audits, compiling reports based on the audits, and publishing the results.

c) Article 55(c)

The Council has the discretionary power "to conduct research into all aspects of air transport and air navigation which are of international importance, communicate the results of its research to the contracting states, and facilitate the exchange of information between contracting states on air transport and air navigation matters."[22] This provision, if nothing else, bolsters the authority of the Council to create USOAP discussed above and may even, independently legitimize the creation and operation of USOAP.

By definition, "to research" means to conduct "a systematic inquiry into a subject in order to discover or revise facts, theories, etc."[23] Safety oversight is an aspect of air transport and air navigation of international importance.[24] Furthermore, the USOAP, by its very nature, is a systematic inquiry established to discover facts relating to the subject of state implementation of safety oversight measures based on the Standards set forth in the Annexes to the Chicago Convention.

In addition to legitimizing the audit function of the safety audits, Article 55(e) provides a basis for making public the results of the USOAP: the Council may

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[21] See Chicago Convention, *supra* note 11, art. 55(b).

[22] Chicago Convention, *supra* note 11, art. 55(e).

[23] Random House, *supra* note 17, *s.v.* "research".

[24] See ICAO Res. A32-11, *supra* note 10.

"communicate the results of its research to the contracting States."[25] Again, the USOAP appears to be in harmony with the terms and authority granted to the Council in the Chicago Convention.

d) Article 54(k)

Finally, the Council has a mandatory obligation "to report to the Assembly any infraction of this Convention where a Contracting State has failed to take appropriate action within a reasonable time after notice of infraction." Although this provision is quite specific when it comes to the Council's obligation to report to the Assembly once it has knowledge of an uncorrected infraction by a contracting state, it is nothing less than vague when it comes to expressing from where the Council is to ascertain information regarding an infraction.

A narrow interpretation of Article 54(k) would, in isolation, leave the Council with no investigatory capacity and, consequently, reliant on the member states to report infractions. On the other hand, a more liberal interpretation based on the interpretive principles described above, would suggest that given the Council's stated duty to report, the Council also enjoys the implied or accessory authority to discover infractions. The later interpretation arguably gives more effect to the provision in light of its context, object, and purpose.[26] Given the other provisions relating to the functions of the Council, which grant research and information collecting capacities,[27] it would seem illogical to refuse the Council such authority in this instance.

Accordingly, under Article 54(k), the Council arguably has the authority to investigate for state compliance with the terms of the Chicago Convention and report such infractions to the Assembly. The USOAP is quite consistent with this function on

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[25] Chicago Convention, *supra* note 11, art. 55(e).

[26] See Vienna Convention, *supra* note 2, art. 31(1).

[27] Chicago Convention, *supra* note 11, art. 54(i), 55(c).

the basis that its audits are an "objective review of a State's aviation framework to verify compliance with the provisions of the Chicago Convention . . . ."[28]

e) Summary of enabling provision implications

Each of the provisions cited above has relied to a certain extent on the existence of implied authority on the part of the Council. In other words, no provision of the Chicago Convention expressly calls for the creation of USOAP; however, the Council's authority to create such a program is implied from the attributed powers that it does have, therefore, creating a presumption that the USOAP's creation and operation are valid.[29] The Assembly's creation of the Legal Committee in 1947 was based on similar authority and supports the thesis that the Council's action in regard to USOAP was permissive.

Like the situation involving the creation of USOAP, there is no provision in the Chicago Convention that expressly gives authority to the Assembly to create a body like the Legal Committee. Indeed, in 1947, with the absence of an express provision, the Assembly pointed to a general provision and based the creation of the Legal Committee on nothing more than implied authority: "the Assembly authority for the adoption of the Legal Committee constitution was considered to be found in Article 49(k) of the Convention, which provides that the Assembly may 'deal with any matter within the sphere of action of the Organization not specifically assigned to the Council.'"[30] This use of implied authority for the creation of a new program within ICAO operates to a certain extent as precedent and supports the use of implied authority by the Council in its creation of USOAP. Despite the Assembly's lack of express authority, the Legal

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[28] *Safety Oversight Audit Manual*, ICAO Doc. 9735-AN/960, § 1.5 (*s.v.* "Audit") [ICAO Audit Manual].

[29] See *supra* Chapter I, Section (C)(2)(a).

[30] Gerald F. FitzGerald, "The International Civil Aviation Organization and the Development of Conventions on International Air Law (1947-1978)" III Ann. Air & Sp. L. 51 at 56. FitzGerald further states that "specific reference to this article was made in a draft constitution proposed by the United Kingdom Delegation to the 1st Session of the Assembly in 1947. *Ibid.* (citing *International Civil Aviation Organization, Legal Committee, Constitution - Objects - Statutes (Skeleton Draft)*, Doc. 4223 A1-LE/34 (1947) at 1).

Committee has endured the test of time and, as a body, has contributed to the success of ICAO in reaching its objectives.

In summary, and given this historical precedent, on an independent basis and certainly in concert, the provisions of Articles 54 and 55 lead one to the same conclusion as that reached by Professor Milde at the inception of the program in 2002, that "the performance of safety audits would be in harmony with the existing constitutional framework of ICAO . . . ."[31] Although in harmony from a post hoc perspective, the USOAP exists without express constitutional foundation in the Chicago Convention; nor did the Council point to a specific express function when creating the program. Although consistency with the provisions of the Chicago Convention may be paramount as a matter of defending the USOAP's operation in light of legal protest charging *ultra vires* action, perhaps its creation can find no more legitimate source than the collective will of the international community—need there be a more legitimate source?

2. *Consent of the states*

Despite the lack of a specific constituent authority for the creation of USOAP, the Council founded the USOAP following a unanimous resolution of the Assembly.[32] Furthermore, ICAO has successfully operated USOAP since its creation without a single objection from the contracting states to the Chicago Convention signaling a *de facto* expansion of ICAO's functions. Recently, Professor Milde has devalued this reality by stating that "[c]onsensus is no more than a silent 'non-objection'; a State may have serious legal objections to the introduction of supervisory authority of ICAO but can hardly be seen as objecting to safety and goes along with the consensus."[33] However, the

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[31] Michael Milde, "Aviation Safety Oversight: Audits and the Law" (2001) XXVI Ann. Air & Sp. L. 165, at 176 [Milde, "Aviation Safety Oversight"].

[32] *Ibid.* at 174-75.

[33] Michael Milde, "The ICAO Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety (Montreal, 20 to 22 March 2006): A Commentary" (2006) XXXI Ann. Air & Sp. L. 475 at 476 [Milde, "Directors General"].

very fact that states "feel" unable to object to the operation of USOAP, despite their sovereign rights, suggests that in practice the program manifests a binding quality.

The scenario whereby an international regulatory authority is created through state practice and consent bears resemblance to the process for creating international law through custom. As discussed in Chapter I, rules of customary international law are "obligations inferred from the general practice of states followed out of a sense of legal obligation (*opinio juris*)."[34] For usage or practice to crystallize into binding custom, two factors are generally identified: (1) the material aspect, meaning "there must in general be a recurrence or repetition of the acts which give birth to the customary rule";[35] and (2) the psychological aspect, "better known as *opinio juris sive necessitates* . . . or the mutual conviction that the recurrence is the result of a compulsory rule."[36] In summary, therefore, for a usage to become a custom there must be a pattern of practice and states must act consistently with such practice out of a sense of obligation, not out of "comity or courtesy only."[37]

In addition to rules of law, "[t]he practice of international organs, [] whether by conduct or declarations, may lead to the development of customary rules of international law concerning their status, or their *powers* and responsibilities."[38] For example, in "its Advisory Opinion holding that the International Labour Organisation had power to regulate internationally the conditions of labour of persons employed in agriculture, the Permanent Court of International Justice founded its view to a certain extent on the practice of the Organisation."[39]

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[34] Barry E. Carter & Phillip R. Trimble, *International Law* (New York: Aspen Law & Business, 1999) at 253.

[35] I.A. Shearer, *Starke's International Law* 11th ed. (London: Butterworths, 1994) at 33.

[36] *Ibid.*

[37] *Ibid.*

[38] *Ibid.* at 32 [emphasis added].

[39] *Ibid.* at 32. See *Competence of the International Labour Organisation* (1922) P.C.I.J. (Ser. B), No. 2 & 3 at 39-41.

Given the contracting states' practice of accepting the USOAP's operation,[40] it is foreseeable that ICAO's authority to operate USOAP, an international regulatory function, could constitute a binding international custom. It is the *practice* of the contracting states to the Chicago Convention to accept ICAO's audit authority, and their lack of protest, regardless of reason, may evidence the states' belief that they are bound by the program, which constitutes *opinio juris*, the psychological component of the two-prong test advanced above. Therefore, the existence of custom could form a sufficient legal ground to defend ICAO's authority in the event of a legal challenge.

3. *Political influences*

In addition to the legal considerations that support the creation and continuation of the USOAP, there also exist practical, political considerations. Both safety improvement and the issue of state compliance with the SARPs generally, are affected by the existence of practical realities. The following remark adds clarity to this point:

> However weak the legal status of ICAO Standards may appear in theory, in practice the Standards assert themselves with a persuasive objective force comparable to the law of gravity – a disregard of the ICAO standards would entail serious consequences possibly eliminating the State concerned from any meaningful participation in international air navigation and air transport.[41]

Much like disregard for the ICAO SARPs could and likely would have deleterious effects, so too would a delegation's overt rejection of a program with the stated purpose of improving aviation safety. Such a rejection would be synonymous to speaking out

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[40] Michael Milde, "Aviation Safety and Security – Legal Management" (2004) XXIX Ann. Air. & Sp. L. 1at 5 [Milde, "Aviation Safety and Security"] (stating that "[w]hatever theoretical doubts we may have on the legal basis of the international auditing and enforcing machinery of ICAO, its tacit acceptance indicates that States of the international community have a genuine interest to maintain global and universal safety and security of international civil aviation."). This statement is further supported by the consensus reached at the DGCA's 2006 conference on aviation safety, where the states reaffirmed their support of the USOAP, albeit at a meeting unforeseen by the Chicago Convention. If nothing else, the conclusions reached at the DGCA conference represent evidence of state practice.

[41] Michael Milde, "Enforcement of Aviation Safety Standards - Problems of Safety Oversight" (1996) 45 Z.L.W. 1 at 6 [Milde, "Enforcement of Aviation Safety Standards"].

against the improvement of health care or the reduction of disease—both would be unpopular and subject to response by the international community. This consideration surely has led to the support of the USOAP and will likely contribute to its longevity.

4. Limits on authority?

Although ICAO could seemingly defend its authority to operate the USOAP if challenged, the structure of the Chicago Convention and the obligations that it imposes on the contracting states *legally* limits operation of the USOAP. Setting all political considerations aside, the USOAP can do no more than compel states to fulfill their hard obligations under the Chicago Convention—that is, file appropriate differences when a state's implementation of policy differs from the international standard.[42] This structure may not be legally optimal, but as will be shown below in the analysis of Article 38, in practice, perhaps it is effective.

a) Article 37 implications

To summarize from the last Chapter, contracting states to the Chicago Convention, according to Article 37, "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."[43]

In practice, Article 37 places an obligation on states to implement the ICAO SARPS so as to secure the highest practicable degree of uniformity.[44] Obviously, absolute uniformity would be achieved if all states would implement all of the standards in the Annexes; the Convention, however, only requires states to undertake to implement to the highest extent practicable. Practicability is relative and for each state to determine independently: "Subject to the general requirement of good faith in implementation of

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[42] Chicago Convention, *supra* note 11, art. 37.

[43] *Ibid.*

[44] See Milde, "Aviation Safety Oversight", *supra* note 31 at 168.

international obligation, only the State concerned can be the ultimate judge of what is 'practicable' in the given circumstances."[45] As such, because a sovereign state can always find a practical reason to render an action impracticable, Article 37 has been criticized as imposing "no obligation at all."[46]

To this end, the USOAP cannot compel a state to do that which, to it, is impossible: *ultra posse nemo tenetur*. However, through the auditing process, as dictated by the ICAO Safety Oversight Manual, which engages the state in an open and frank dialogue with aviation experts through meetings, the audit activities, the formation of a corrective action plan and audit report, and follow-up audits, the state may find practicable implementation of certain international standards once impracticable. Although the result is perhaps less impressive than would be the case if states were under a hard legal obligation to implement the standards, any improvement in implementation consequently improves the safety of international aviation. For it has been observed that the "concept of global safety oversight . . . involves a system which is only as strong as its weakest link."[47]

This structural limitation may, however, be merely a current impediment to a multilateral regulatory regime with full enforcement capabilities. If Milde is correct, that "we are approaching a general understanding that aviation safety and implementation of ICAO safety standards are not a matter of exclusive jurisdiction, but rather a matter of legitimate international concern,"[48] what prevents amendment to the Chicago Convention that would require implementation as a hard obligation? Such a change, discussed at length in the next Chapter, would elevate USOAP from a program with the ability to

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[45] Milde, "Enforcement of Aviation Safety Standards", *supra* note 41 at 5. Professor Milde further adds that the legal maxim *ultra posse nemo tenetur*, or impossibility of performance, is not unknown in international law. *Ibid.*, at n. 12 (citing Article 61 of the Vienna Convention).

[46] Thomas Buergenthal, *Law-Making in the International Civil Aviation Organization* (Syracuse: Syracuse University Press, 1969) at 78.

[47] Roderick D. van Dam, "Recent Developments in Aviation Safety Oversight" (1995) XX Ann. Air & Sp. L. 307 at 315.

[48] Milde, "Aviation Safety Oversight", *supra* note 31 at 177.

facilitate implementation improvements and compel recordation of differences,[49] to a program that would render the recordation of differences futile due to actual international harmonization.

Although this "step toward global governance in a field of global interests"[50] is in the periphery at this point due to, *inter alia*, a lack of human and financial resources,[51] if indeed we approached aviation safety as a common interest, we could solve its problems with global resources. In 1963, writing on matters of public order in space, McDougal, Lasswell, and Vlasic advanced a distinction between inclusive and exclusive, common interests.[52] Their framework is instructive regarding the matter at hand. If international civil aviation is an activity of common interest, then the areas of its regulation may be divided on the basis of the inclusive-exclusive continuum[53]—those areas for exclusive, unilateral control and those for inclusive, shared control.[54] Obviously, matters of international civil aviation relating to national security would come under the exclusive control of a state; however, competence to regulate safety of aircraft engaged in international service is inherently inclusive—"outcomes significantly affect the entire world arena or large segments of it."[55] This quality, accordingly, justifies procedures that bring more than one state into control[56] and suggests that international regulation of aviation safety is indeed warranted. At this point, however, actual shared control under the Chicago Convention only comes under Article 38.

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[49] Seen *infra* Section I(A)(2)(b).

[50] Milde, "Aviation Safety Oversight", *supra* note 31 at 177.

[51] See Conclusions and Recommendations, Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety, online: ICAO < http://www.icao.int/icao/en/dgca/Concl_recom_en.pdf>.

[52] Myers S. McDougal, Harold D. Lasswell & Ivan A. Vlasic, *Law and Pubic Order in Space* (New Haven: Yale University Press, 1963) at 150-56. See Myers S. McDougal & William T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (New Haven: Yale University Press, 1962) at fn. 1 (stating that an "exclusive claim is . . . authority over . . . specified activities which other states cannot share with the claimant state." Whereas, an inclusive claim is "authority over . . . specified activities which the claimant state can . . . share with another").

[53] See McDougal, Lasswell & Vlasic, *ibid.* at 150.

[54] See *ibid.* at 151, 153.

[55] *Ibid.* at 150.

[56] *Ibid.* at 151.

b) Article 38 implications

According to Article 38, contracting states to the Chicago Convention, "which find[] it impracticable to comply in all respects with any such international standard or procedure . . . shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard."

As discussed in the last Chapter, this provision, unlike Article 37, creates a hard obligation to which the contracting states must adhere unconditionally—the failure to file a difference under Article 38, accordingly, constitutes a breach of a state's obligations under the Chicago Convention. This legal reality, as discussed in the last Chapter, however, has not been sufficient to motivate all states to fulfill their international obligation.

The practical reality of non-compliance may in part be explained by the legal maxim that an unenforced law is in reality no law at all.[57] States have not fulfilled their legal obligation under Article 38 because, in the past, there existed no consequences for non-compliance. Indeed, based on a system that, in theory, presumed that states were in compliance if no difference was filed, "the comfortable silence of States [might] prevent some public embarrassment . . . ."[58] States were able to easily skirt such embarrassment on the basis that there were no means for the international community to discover other than that reported by the state in question. The USOAP closes this loophole by adding transparency to the 1944 system of filing differences.

Although the main objective of the USOAP is "to promote global aviation safety through auditing Contracting States . . . to determine States' capability for safety

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[57] Oliver Wendell Holmes, *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920) at 172 (stating that unenforced law is "empty words").

[58] Michael Milde, "The Chicago Convention – Are major amendments necessary or desirable 50 years later?" (1994) XIX-I Ann. Air & Sp. L. 401 at 426 [Milde, "Amendments After 50"].

oversight,"[59] the audit reports are prepared to, among other things: "provide ICAO with information on differences to ICAO Standards; and provide other Contracting States with sufficient information on the status of safety oversight activities in the audited State to enable them to form an opinion on the State's capability for safety oversight."[60] No longer do states have the convenient option of avoiding international embarrassment by remaining silent and giving the appearance of compliance with international standards. The degree of implementation and, likewise, the states' practices regarding filing notifications of differences are now subject to international transparency and scrutiny.

The USOAP, therefore, in regard to Article 38 of the Chicago Convention, prevents a system where states can hide behind the so-called "opt-out" provision. States no longer have a monopoly on information concerning the actual status of their implementation of the SARPs. Accordingly, contracting states have only two real options: implement the applicable international standards, or file notification of the appropriate differences with ICAO. Given that the second option means a state must acknowledge to the international community that its aviation oversight system does not meet the minimum international safety standards—a source of embarrassment, this system of enforcing the hard obligation to file notification of differences may, in theory, likely lead to vast improvements in implementation—something that ICAO may not ask of states through application of law given the soft obligations imposed by Article 37.

In summary, although at law, a system of enforcement can only compel performance consistent with a hard legal obligation, in the case of the USOAP such enforcement may lead to improved compliance with a soft obligation. This result rests on the existence of transparency and the power of the international community to exclude a non-compliant state from the aviation game—a game with vast economic implications. With operation of the USOAP, which creates a system within which states must discharge their obligations, the Chicago Convention *finally* has the potential to operate in

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[59] ICAO Audit Manual, *supra* note 28, § 3.1 (Programme Objective).
[60] *Ibid.*, § 6.1.

its intended manner. Its ability to compel performance with soft obligations, while respecting and protecting state sovereignty seemingly demonstrates the genius of the Chicago Convention drafters.

5. *Summary: Synthesis of provisions*

Through analysis this section has found that the USOAP is, obviously, without express legal grounding in the Chicago Convention. This conclusion does not, however, end the analysis; rather, from the provisions of the Chicago Convention examined above, the Council does have express authorities that seemingly imply the authority required to create a program like USOAP, therefore, creating a presumption of the USOAP's validity. The Assembly's creation of the Legal Committee in 1947 serves as a precedent for such an occurrence. Furthermore, creation of the USOAP is in harmony with the Council's mandatory and discretionary functions, which adds legitimacy to the operation of the program. This section further asserted that whether there was support for the USOAP in the Chicago Convention or not, it evolved as a product of the collective will of the states—whether they actually had objection or not[61]—and the Council's authority to operate the USOAP could be sustained as a matter of custom in the face of challenge.

Given the apparent legal sustainability of the USOAP, its operation was then analyzed in light of the obligations imposed by the Chicago Convention. Despite the legal limits imposed by Article 37, through Article 38, analysis suggested that the USOAP might have positive results both in relation to the filing of notification of differences and implementation of the SARPs. Based on this analysis, one may conclude that the soft obligations imposed by Article 37 do not undermine the practical possibilities of this comprehensive multilateral audit regime. Even though USOAP can only properly compel states to file differences under Article 38, such an improvement may be all that is needed to subject states to the "gravity-like" realities associated with

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[61] See Milde, "Directors General", *supra* note 33 at 476.

the SARPs and non-compliance.[62] Accordingly, although the soft obligation of Article 37 appears to be a structural weakness, it is only so in an environment where states don't comply with their hard obligations under Article 38. In an environment where states have no choice but to comply and file notice of their deficient system of aviation oversight, public acknowledgement of their deficiency subjects them to international opinion, scrutiny, and pressures, which given the fear of being excluded from international aviation, works as a strong incentive capable of inducing implementation of the SARPs and, therefore, compliance with otherwise soft obligations.[63]

This conclusion and, therefore, effective operation of the USOAP is conditioned on states having no alternative, other than implementation of the standards, to filing a notification of a difference with ICAO. The effectiveness of USOAP could, however, likely benefit from amendment to the Chicago Convention described in the next Chapter.

B. Bilateral Memoranda of Understanding

The last Chapter described the bilateral MOUs entered into between an audited state and ICAO prior to conducting an audit. Although it was there concluded that the MOU gives authority to ICAO to enter the sovereign territory of an audited state, it is now necessary to examine whether the signing of these bilateral agreements adds to the legitimacy of the program as a whole.

At this point in time, all of the contracting states to the Chicago Convention have undergone an audit under the USOAP. Based on this fact, one can conclude that every contracting state has also signed an MOU agreeing to the operation of an audit in its territory. Although the MOU only provides ICAO with authority to conduct a single audit on an established date,[64] logically speaking, consent to an audit also inferentially establishes consent to the general operation of the USOAP. It is unlikely that a state

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[62] See Milde, "Enforcement of Aviation Safety Standards", *supra* note 41.

[63] See Paul Stephen Dempsey, "Compliance & Enforcement in International Law: Achieving Global Uniformity in Aviation Safety" (2004) 30 N.C. J. Int'l L. & Com. Reg. 1 at 62.

[64] *Generic Memorandum of Understanding, Safety Audit Oversight Manual*, in *supra* note 28, Annex B-2.

could claim to oppose a program, yet accept an action under the program. Therefore, in addition to the MOU providing access to conduct the audits, it also provides evidence of state consent of a program. Even if the USOAP was established by consensus, and not unanimity, each state has now agreed to an audit and, accordingly, inferentially consented to the program. As the conclusions above suggest, in the realm of international law making, state consent still matters.[65]

C. Article 84: Settlement of disputes

Because actual enforcement of the Chicago Convention is not part of ICAO or the USOAP's mandate, the contracting states are left with this task. In addition to general principles of international law, Chapter XVIII of the Chicago Convention provides the procedure through which states may compel other contracting states to discharge their obligations under the convention. This section examines such provisions, the history of their use, and their applicability to operation of the USOAP.

Although commentators have questioned the strength of the dispute settlement provisions of the Chicago Convention,[66] it remains that Chapter XVIII is a tool available for use by the contracting states. Use of this Chapter has specifically been advanced for use in cases where states have failed to meet their safety-related obligations under the Convention:

> if a member State determines that the safety standards of another member State do not meet, in any respect, the minimum safety standards of ICAO, the matter should be brought to the attention of ICAO for resolution by the Council of ICAO in accordance with the dispute resolution procedures set

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[65] See Duncan B. Hollis, "Why State Consent Still Matters – Non-state Actors, treaties, and the changing sources of international law" (2005) 28 Berk. Int'l L. J. 137 at 141 (citing Ian Brownlie, Principles of Public International Law 4 (6th ed. 1995); Louis Henkin, General Course on Public International Law, in IV Recueil Des Cours 46 (1989) ("State consent is the foundation of international law. The principle that law is binding on a State only by its consent remains an axiom of the political system, an implication of State autonomy.")).

[66] Milde, "Amendments After 50", *supra* note 49 at 441 (stating that Chapter XVIII is one of the weakest and least effective parts of the Chicago Convention).

forth in Articles 84, 85, 86 and 87 of the Chicago Convention, as appropriate.[67]

With the existence of the USOAP, the ability to determine whether states have met the minimum safety standards of ICAO or their obligation to file differences will be greatly improved by virtue of the audits and the creation of the audit report available for review by the contracting states. Although, as discussed *supra*, this publicity will likely be enough to compel many states to comply with their obligations, in some instances refuge to other means of enforcement may be necessary or desirable.

1. Description of provisions, history of use, and effectiveness

Given Chapter XVIII of the Chicago Convention, the ICAO Council is said to possess an adjudicatory function. According to Article 84, "if any disagreement between two or more contracting states relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any state concerned in the disagreement be decided by the Council." Chapter XVIII further makes provision for appeal from Council decisions,[68] arbitration procedures,[69] and penalties in the case that an airline[70] or state[71] does not comply with the decision rendered. In addressing disputes under Chapter XVIII, the Council must follow the Rules for the Settlement of Differences, which represents "a rather strict, formalistic and legalistic procedure which would be appropriate for any court of law."[72]

Though it is mandatory function of the Council to decide the disputes described in Article 84, the adjudicatory capacity of the Council is questionable. Commentators for

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[67] George N. Tompkins, Jr., "Enforcement of Aviation Safety Standards" (1995) XX-I Ann. Air & Space L. 319 at 322.

[68] Chicago Convention, *supra* note 11, arts. 84, 86.

[69] *Ibid.*, art. 85.

[70] *Ibid.*, art. 87.

[71] *Ibid.*, art. 88.

[72] Michael Milde, "Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO)" in Karl-Heinz Böckstiegel, ed., *Settlement of Space Law Disputes: The present state of the law and perspectives of further development* (Berlin: Carl Heymanns Verlag KG, 1979) at 88 [Milde, "Dispute Settlement"].

example have noted that the Council is not a proper judicial body: "[t]he Council is composed of *States* (not independent individuals) and its decisions would always be based on policy and equity considerations rather than on purely legal grounds."[73] This fact, however, may add to the effectiveness of Chapter XVIII by providing an incentive for states to settle their disputes through negotiation outside the Council. This position receives support from at least one writer: "It may well be that the very existence of this adjudication procedure has been a contributing factor in encouraging the Contracting States to resolve their differences without resorting to it."[74]

In addition to the normal deterrents of litigation, namely political risk and economic costs,[75] the political realities of Council decisions provide further incentive to settle disputes outside Chapter XVIII. This calculation may help to explain why "[i]n the thirty-two years of ICAO experience the judicial machinery of Chapter XVIII has been invoked only three times."[76] Although the judicial machinery itself may be weak and seemingly worthless, its ineffectiveness may actually induce settlement by other means and its existence leaves an option to states nonetheless.

2. *Applicability of Chapter XVIII to USOAP*

Although the USOAP is a universal and mandatory program, it is better viewed as collaboration between the audited state and ICAO with the objective of improving safety oversight capabilities than as an adversarial process aimed at flagging non-compliance with international standards. However, if there arose such a case where an audit exposed a state's non-compliance with treaty obligations, and where negotiation failed to result in

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[73] *Ibid.* at 93. Professor Milde receives support for his argument from the first president of the Council, Dr Edward Warner, "who wrote in April 1945 (2 years before ICAO came into existence): "No international agency composed of representatives of States could be expected to bring judicial detachment to the consideration of particular cases in which large national interests were involved . . . . The Council as a whole can hardly be expected to function judicially. *Ibid.* (citing Dr. E. Warner, "The Chicago Air Conference", Foreign Affairs, April 1954.).

[74] Buergenthal, *supra* note 46 at 123.

[75] See *ibid.*

[76] Milde, "Dispute Settlement", *supra* note 72 at 90.

compliance, there is no reason why a state "concerned in the disagreement" could not submit application to the Council for settlement of the dispute under Article 84. Given the apparent ineffectiveness of Chapter XVIII, mere application may compel the desired result through further negotiation.[77] If not, the Council may find occasion to render its first substantive decision under the Chapter XVIII procedures. In light of such a decision, the Assembly has the authority to suspend the "voting power in the Assembly and in the Council of any contracting State that is found in default"[78] as a means of promoting compliance.

In any event, one should note that the Council, like other contracting states, can only compel action in light of a legal obligation—it cannot enforce that which a state is not obliged to do. Thus, in regard to safety oversight, a state would have to make application to the Council, on the basis of Article 38, that another state has failed to file notification of a difference when obliged to do so. Breach of Article 37, consequently, would not form the basis for an application under Chapter XVIII.

3. *Breach of treaty obligation—other considerations*

Given the ineffective nature of Chapter XVIII, in the case of a contracting state unwilling to comply with its obligations, the other contracting states also have at their disposal options under the law of treaties and customary international law. For example, in response to a material breach of Article 38 regarding safety standards—as revealed by an audit report—a state may have a claim for suspending or terminating its Bilateral Air Services Agreement (BASA) with the non-compliant state on the basis that the breach of the Chicago Convention might also constitute a breach under the provisions of the BASA. BASAs often require state compliance with minimum safety standards contained in the Chicago Convention Annexes.[79]

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[77] See *supra* note 74 and accompanying text.

[78] Chicago Convention, *supra* note 11, art. 88.

[79] See *Air Transport Agreement*, India and United States of America, 14 April 2005, art. 6, online: Directorate General of Civil Aviation, India < http://dgca.nic.in/bilateral/usa_asa.pdf> [Air Transport

Generally speaking, "[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."[80] This provision, which is generally considered to constitute a customary rule of international law,[81] gives non-breaching states the authority to take action against a breaching state to promote compliance with international law. For purposes of suspending or terminating a treaty, the term "material breach" is defined as, *inter alia*, "the violation of a provision essential to the accomplishment of the object or purpose of the treaty."[82] Unsafe air transport would certainly undermine the object and purpose of any air transport agreement. Indeed, some BASAs expressly provide that non-compliance with minimum safety standards established by the Chicago Convention creates a basis for the non-breaching state to revoke rights under, or suspend operation of, the agreement[83]—on the basis of the agreement—notwithstanding the customary remedies. Although infrequently used, "[t]he law of permitted response to breach of agreement is a potentially powerful mechanism for promoting compliance with international law."[84]

D. Conclusion

Through the course of this Chapter, the analysis has affirmed the legitimacy of the USOAP and argued that its operation will, theoretically, result in improved

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Agreement]. See Laurence E. Gesell & Paul Stephen Dempsey, *Air Transportation: Foundations for the 21st Century*, 2nd ed. (Chandler: Coast Aire Publications, 2005) at 757 [Gesell & Dempsey, "Air Transportation"] (citing Paul Dempsey, "Aviation Security: The Role of Law in the War against Terrorism" (2003) 41 Colum. J. Transnat'l L. 649). See also Laurence E. Gesell & Paul Stephen Dempsey, *Aviation and the Law*, 4th ed. (Chandler: Coast Aire Publications, 2005) at 880 (describing the content of the Bermuda I bilateral agreements).

[80] See Vienna Convention, *supra* note 2, art. 60(1). See John Norton Moore, "Enhancing Compliance with International Law: A neglected remedy" (1999) 39 Va. J. Int'l L. 881 at 884-893.

[81] Moore, *ibid.* at 891.

[82] Vienna Convention, *supra* note 2, art. 60(3)(b).

[83] Air Transport Agreement, *supra* note 79, art. 4(1)(c). Most modern bilaterals, notwithstanding Article 60 of the Vienna Convention, through their dispute settlement provisions, generally require consultation prior to taking retaliatory action against the breaching state. See Gesell & Dempsey, "Air Transportation", *supra* note 79 at 757.

[84] Moore, *supra* note 80 at 1015.

implementation of the standards and, accordingly, serve as more than mere means for improving the recordation of differences—even though such a result, by itself, could have profound effects in improving the safety of international civil aviation. Given the conclusions of this Chapter, the next will consider whether amendment to the Chicago Convention is either necessary or desirable.

CHAPTER IV.

THE CHICAGO CONVENTION: IS IT TIME FOR CHANGE?

Although the prior chapters of this thesis have suggested that the functions and authority of international organizations are in reality capable of incremental, institutional growth without formal amendment to their constitutions, this Chapter considers the possibility of amending the Chicago Convention with regard to operation of the USOAP, areas for amendment that could enhance the already effective utility of the USOAP, the procedures for amendment under Article 94 of the Chicago Convention, and whether a new multilateral agreement could serve as a reasonable alternative to formal amendment of the Convention.

Although amendment to international agreements and the Chicago Convention, in particular, could supply the basis for an entire thesis, this Chapter is merely intended to consider the issue of amendment in light of the narrow topic at hand: the legitimacy and efficacy of the USOAP under the Chicago Convention. Thus, although some description and analysis of the procedures and application of the relevant provisions of the Convention is necessary, an in-depth study will be left to other, more courageous writers—both past and future.

Before considering the practical implications of amendment to the Chicago Convention and the alternatives thereto, it is first necessary to consider theoretically whether the notion of sovereignty—and the fact that states could collectively alter their course and select a means to ensuring safety oversight entirely different than USOAP—renders amendment to the Convention undesirable or purposeless.

A. Amendment to the Chicago Convention and its effect in light of state sovereignty

The fact that states are sovereign and generally may, in accordance with international law, change their collective direction at any time should not prevent a treaty amendment that has present value and function. First, although states are indeed sovereign actors, their freedom to act is at times limited by international law. Once party

to a treaty, for example, states must discharge their obligations imposed by that treaty[1] until they withdrawal individually or the treaty is terminated collectively according to the procedures specified either in the treaty or as imposed by international law generally.[2] This limit on sovereignty provides order to the international climate and prevents states from doing what they please when they want. Second, the mere possibility of future dissent or revision should not bar presently rational enactments of law.

In law making generally, there exists the maxim, *leges posteriors priores contrarias abrogant*, which stands for the proposition that when the provisions of a later statute are opposed to those of an earlier, the earlier statute is considered repealed.[3] A legal effect of this maxim is that "one Parliament can[not] bind a subsequent Parliament by its ordinances. . . ."[4] This reality, however, does not prevent Parliaments from enacting legislation on a regular basis—they enact and amend in light of the fact that the next Parliament may repeal, amend, or add to the provisions of their current enactment.

The same is true for the creation or amendment of international agreements[5]—although states collectively may in the future choose to be bound by a different provision; such a reality should not preclude a current action that is presently popular, seemingly correct, and acceptable to the relevant parties. Accordingly, although theoretically nothing prevents states from collectively changing their future course of action in accordance with applicable provisions of international law, this fact should not restrain the international community from making agreements or amendments thereto.

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[1] *Vienna Convention on the Law of Treaties of 1969*, 1155 U.N.T.S. 331, art. 26 [Vienna Convention].

[2] *Ibid.*, art. 65.

[3] Herbert Broom, *A Selection of Legal Maxims, classified and illustrated* (Philadelphia: T. & J. W. Johnson, 1850) at 63.

[4] *Ibid.*

[5] See Vienna Convention, *supra* note 1, arts. 30, 59 (stating that "[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." *Ibid.*, art. 30(3)).

B. Need for change and recommended changes

In 2004, commenting on the status of the USOAP, Professor Milde suggested that "[t]o 'solidify' the fragile nature of the consensus reached by the DGCAs, by the 'High Level Ministerial Conference' and by the Assembly it would appear highly desirable to give this new authority of ICAO a solid legal basis in an appropriate amendment of Chapter VI of the Convention."[6] Milde further recommended that "the adoption of such an amendment would test the real political will of States to empower the ICAO in this manner and would represent a significant evolution in international law."[7] Accordingly, this section considers two amendments to the Chicago Convention: the first would provide "a solid legal basis" for ICAO to operate USOAP by adding an express enabling provision to the Convention; the second proposed amendment would improve the effectiveness of the USOAP, and that of the Chicago Convention generally, by transitioning the treaty obligation under Article 37 to implement the SARPs from a soft obligation without real legal force, to a hard obligation capable of *legal* enforcement. Both of these amendments, as detailed below, would assist the USOAP in reaching its full potential and create a climate, politically impossible in 1944, whereby states would be required to harmonize systems related to international civil aviation in the name of safety.

1. USOAP authorization provision

As has been noted throughout this study, the USOAP exists and is operated without express authorization in the Chicago Convention. Through an amendment, as proposed below, the international community could make a strong declaration that aviation safety is an international interest worthy of a defined, permanent, and transnational regulatory regime capable, as the statistics suggest,[8] of reducing the number

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[6] Michael Milde, "Chicago Convention at Sixty – Stagnation or Renaissance?" (2004) XXIX Ann. Air & Sp. L. 444 at 463 [Milde, "Chicago Convention at Sixty"].

[7] *Ibid.*

[8] See *supra* Chapter II.

of unnecessary casualties that inhibit the civil aviation industry each and every year. Although such an amendment would certainly require substantial time, negotiation, and thought on the part of the ICAO delegations, this author recommends the following course as justified by the discussion below:

> *(a) The contracting States recognize the authority of the International Civil Aviation Organization to establish and operate a universal safety oversight audit programme, comprising regular, mandatory, systematic, and harmonized safety oversight audits consistent with the provisions of this Convention.*
>
> *(b) Unless adequate prior notice is given by a contracting State for cause, each contracting State agrees to the conduct of regular, scheduled safety oversight audits by an International Civil Aviation Organization safety oversight audit team covering the safety-related provisions in the areas pertaining to all safety-related Annexes to this Convention.*

Subsection (a) of the above-proposed amendment would provide express authorization for ICAO's continued operation of the USOAP. Borrowing from the careful drafting of Article 3*bis*, which acts as a codification of an existing principle of customary international law regarding the use of weapons against civil aircraft in flight, subsection (a) would codify the practical execution of the USOAP without undermining the force or legitimacy of the USOAP's operation, pre-amendment.

Subsection (b) would multilaterally give ICAO the authority to actually conduct the audits on the sovereign territory of the audited states. Although this provision gives ICAO the authority to actually conduct audits, it does not alter the substantive rights and obligations of the contracting states. In recognition of Article I of the Convention, which declares state sovereignty, states may exercise their sovereignty and exclude an ICAO mission by giving prior notice and cause for the exclusion—in other words, a state may

"opt out." Like the "impracticability" standard contained in Articles 37 and 38, it is expected that states could always find "cause" for exclusion.[9]

Given the Convention's amendment procedures, discussed *infra*, the placement of the Amendment could affect how and when the amendment becomes effective. Although Professor Milde logically recommends addition of a USOAP authorization amendment to Chapter VI of the Convention, on International Standards and Recommended Practices, inclusion of the amendment in Chapter VII, on Organization, may provide advantages. Chapter VII is institutional in character and its amendment may not provoke the contention likely with amendment of Chapter VI; furthermore, if the amendment is considered institutional in nature, and not affecting the *inter se* relations of states, the amendment, through state consent, could take effect for the organization at the point of receiving the minimum ratifications rather than universal ratification. Given that the amendment is the same no matter where it is placed, drafting may be the important factor in this regard.

2. *Hard obligations*

In addition to the USOAP authorization amendment proposed in the last section, the safety of international aviation could possibility benefit from a substantive modernization of state obligations in regard to implementation of the SARPs. As the status quo suggests, successful operation of the USOAP is feasible in light of the current structure, whereby states are under an obligation to harmonize their domestic laws to the highest extent practicable—to the extent impracticable, it must file immediate notification of a difference between its law and the applicable standards.[10]

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[9] Thomas Buergenthal, *Law Making in the International Civil Aviation Organization* (Syracuse: Syracuse University Press 1969) at 78. See also *supra* Chapter IV, text accompanying notes 37-40.

[10] See Paul Stephen Dempsey, "Compliance & Enforcement in International Law: Achieving Global Uniformity in Aviation Safety" (2004) 30 N.C. J. Int'l L. & Com. Reg. 1 at 16.

However, if international aviation safety is truly a common international interest transcending state borders,[11] should states serious about participating in the international market not be willing to do everything necessary to harmonize standards and create a climate suitable for the safe operation of international aviation? If so, perhaps it is time for states to discuss the creation of a hard obligation for harmonization of the SARPs. If such an amendment was made, the USOAP could *legally* enforce implementation rather than mere recordation.

The desired result could be easily effectuated by merely removing the "the highest practicable degree of" portion of Article 37 such that the amended provision would read "*Each contracting State undertakes to collaborate in securing uniformity in regulations . . . .*" Likewise, Article 38 could be retained with one minor change: removing "impracticable" and adding "impossible." The amended version would read in relevant part: "*Any State which finds it impossible to comply in all respects with any such international standards . . . shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard.*" Although a state's use of Article 38 would be an admission of non-compliance, the need for filing notice of a difference would still exist and such recordation should be encouraged. A culture of cooperation would be a more productive means of reaching harmonization than a climate of conflict perpetuated by finger-pointing and blame.[12] In the event of non-cooperation, given the amendment, enforcement of an international obligation would, however, be a viable option.

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[11] Michael Milde, "Aviation Safety Oversight: Audits and the Law" (2001) XXVI Ann. Air & Sp. L. 165, at 177 [Milde, "Aviation Safety Oversight"](stating that "[w] are approaching a general understanding that aviation safety and implementation of ICAO safety standards are not a matter of exclusive jurisdiction, but rather a matter of legitimate international concern").

[12] See W. Rutherford, "Aviation Safety: a model for health care?" (2003) Quality and Safety in Health Care 162 at 162-163 (describing the utility of a "culture of safety").

C. Amendment process under Chicago Convention

Given the proposed amendments to the Chicago Convention described above, it is necessary to discuss the procedures for amendment under Article 94 of the Convention, summarize its use, identify problems with its operation, and assess whether amendment is a viable option for strengthening the USOAP.

Although amendment of the Chicago Convention, a multilateral treaty, is governed generally by the Law of Treaties as expressed in the Vienna Convention of 1969, Article 40 of that Convention states that "[u]nless the treaty [being amended] otherwise provides, the amendment of multilateral treaties shall be governed by [the Vienna Convention]." As such, the Vienna Convention amendment procedures serve as a default for situations where a treaty does have express amendment provisions. Because the Chicago Convention does have an amendment provision, that provision, Article 94, governs its amendment.

1. Amendment Procedure

Albeit extremely poorly drafted,[13] Article 94 of the Chicago Convention sets forth a fairly straightforward procedure for amendment of the Convention.[14] Its provisions provide:

> (a) Any proposed amendment to this Convention must be approved by a two-thirds vote of the Assembly and shall then come into force in respect of States which have ratified such amendment when ratified by the number of contracting States specified by the Assembly. The number so specified shall not be less than two-thirds of the total number of contracting States.
>
> (b) If in its opinion the amendment is of such a nature as to justify this course, the Assembly in its resolution recommending adoption may provide that any State which has not ratified within a specified period after

[13] Buergenthal, *supra* note 9 at 201.

[14] Milde, "Chicago Convention at Sixty", *supra* note 6 at 449.

> the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention.

Being that an amendment only comes into force between the states which have ratified the amendment, Article 94 uses the "classic (and now somewhat antiquated) consensual method."[15] Accordingly, amendments made to the convention do not apply to the states *egra omnes* upon receiving the minimum number of ratifications as determined by the assembly.[16] Furthermore, although the Assembly could use Article 94(b) to ensure that an amendment takes effect in relation to all member states *inter se*, this "modified unanimity formula" has not yet been used by the Assembly.[17]

Adding confusion to this antiquated procedure is the lack of clarity arising out of Article 94(a), which requires that "[a]ny proposed amendment to this convention must be approved by a *two thirds* vote of the Assembly."[18] Two-thirds defined how? Although Buergenthal identifies four equally tenable interpretations of this two-thirds requirement,[19] at the request of the Assembly, the Legal Commission of ICAO ruled in 1947 that "correct interpretation of Article 94(a) . . . is that any proposed amendment to the Convention must be approved by a vote of two-thirds of the Contracting States represented by accredited delegations at any Assembly of the Organization."[20] Because Article 48(c) of the Convention requires only a majority of the contracting states to "constitute a quorum for the meetings of the Assembly," it is conceivable that an amendment to the Convention may take effect by a vote of less than half of the contracting states: two-thirds of 50 percent plus one.[21] Although this reality would likely

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[15] Michael Milde, "The Chicago Convention – Are major amendments necessary or desirable 50 years later? (1994) XIX Ann. Air & Sp. L. 401 at 406 [Milde, "Amendments After 50"].

[16] Discussed *infra* Section I (c)(2).

[17] See Buergenthal, *supra* note 9 at 199-202.

[18] [emphasis added].

[19] Buergenthal, *supra* note 9 at 202.

[20] *Ibid.* (citing ICAO Doc. 4409 (A1-LE/69), p. 1 (1947)). See also Rule 54 of the *ICAO Assembly's Standing Rules of Procedure*, ICAO Doc. 7600/2 (1963), which states that article 94(a) shall be interpreted as meaning "two-thirds of the total number of Contracting States represented at the Assembly and qualified to vote at the time the vote is taken." Buergenthal, *supra* note 7 at 203.

[21] See Buergenthal, *supra* note 9 at 204.

encourage the attendance of state delegations, one must question whether the Legal Commission intended such a result.

In addition to the terms of Article 94, the Assembly must also adhere to the 1950 resolution, A4-3,[22] which Milde has said "serves as a 'mantra' and excuse for the leadership of the Organization for inaction and claims that the Convention is untouchable . . . ."[23] The relevant provisions of this still-in-force, and seemingly outdated, resolution resolved that amendment to the Convention may be appropriate when either or both of the following tests is deemed satisfied: "(i) when it is proved necessary by experience; (ii) when it is demonstrably desirable or useful."[24] The Resolution further declares that the Convention should be amended by specific provision only, that Article 94 of the Convention should be maintained in its current form, and that the Council should not submit proposed amendments to the Assembly unless the Council deems such amendment urgent.[25] According to Milde, "the Resolution discourages innovations or updating and protects the *status quo*."[26]

In summary, to amend the Convention, either the Council, if it deems such an amendment urgent, or a state, in writing to the Council for transmission of the proposed amendment and its recommendations to the states prior to the Assembly meeting, may propose the amendments, discussed above, to the Convention. I think both amendments could prove "demonstrably desirable [and] useful" and are arguably "necessary by experience."[27] After all, safety is a chief concern of the organization, and traditional implementation of the SARPs under the current Article 38 has been less than impressive. Once in front of the Assembly, the amendment would need a two-thirds vote of the delegations present at the Assembly and would come into effect between the parties that

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[22] *Policy and Programme with Respect to the Amendment of the Convention*, Res. A4-3, Doc. 7017 A4-P/3 (1950) at 2 [ICAO Res. A4-3].

[23] Milde, "Chicago Convention after Sixty", *supra* note 6 at 449.

[24] ICAO Res. A4-3, *supra* note 22.

[25] *Ibid.*

[26] Milde, "Chicago Convention after Sixty", *supra* note 6 at 449.

[27] See ICAO Res. A4-3, *supra* note 22.

ratify the amendment when the number of ratifications determined by the Assembly is achieved. This problem resulting from the structure of Article 94 may present substantial challenges to successful amendment of the Convention—the historical attempts of amendment under Article 94 provide evidence of such difficulties.

2. *Problems with the amendment procedure under Article 94*

In addition to the actual procedures under Article 94(a) and Resolution A4-3, which seem to have the effect of inhibiting change to the Convention, the fact that successful amendments do not apply *egra omnes* presents substantial difficulties with making substantive revisions such as those envisioned above.

As mentioned above, the Chicago Convention relies on the somewhat antiquated method of amending by consensus.[28] The virtue of such a method is that the international obligations that a state agreed to in the original treaty may not be altered without that state's consent: "this modified unanimity formula leaves the rights and obligations of the non-consenting States unaffected by the amendment . . . ."[29] It is a method that by its very terms protects state sovereignty and accordingly limits an international organization's ability to develop over time. Furthermore, if the multilateral treaty in question also serves as the constitutional instrument of an international organization, as the Chicago Convention does to ICAO, the consensus approach can cause organizational problems by creating two "equally binding yet conflicting sets of fundamental laws . . . ."[30] Although an amendment to Article 94 of the Convention could cure this problem, perhaps for fear of not being able to achieve universal ratifications for such an amendment under the current Article 94,[31] ICAO has concocted through practice an alternative method for amendment of the Convention relating to administrative matters

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[28] See Milde, "Amendments After 50", *supra* note 15.

[29] Buergenthal, *supra* note 9 at 200.

[30] *Ibid.*

[31] *Ibid.* at 209.

bearing no relevance on the substantive rights and obligations of the states under the Chicago Convention.[32]

Given the burden that the consensus system imposes on organizational administration, ICAO has started a practice of applying institutional amendments "as soon as they have entered into force even though they have not been ratified by all Contracting States."[33] Based on this practice, the institutional element of an amendment comes into force as to ICAO and its operations upon receiving the minimum ratification as dictated by the Assembly, but will not affect the *inter se* relations of states having not ratified the amendment.[34] Based on institutional necessity, this procedure is thought to be consistent with Article 94, which can be interpreted to apply only to *inter se* amendments.[35]

This practice, although certainly inapplicable to the recommended amendment regarding Article 38, may supply a basis for authorizing the USOAP through an amendment to Chapter VI of the Convention. After all, the authority of ICAO to operate the USOAP does not affect state relations *inter se*—it involves the capacity of ICAO as an institution to carry out a specific function. Accordingly, it is tenable that ICAO may operate the USOAP based on an amendment upon its effective date, rather than upon unanimous ratification of the amendment under a strict application of Article 94. As the unpopularity associated with speaking out against safety currently prevents states from opposing the USOAP,[36] this same political restraint may allow application of amendment according to ICAO's invented practice.

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[32] *Ibid.* at 210 (stating that "the practice of the Organization indicates that over the years ICAO has indirectly accomplished much of what it could not achieve directly by formal amendment of Article 94").

[33] *Ibid.* at 212 (citing ICAO Doc. C-WP/3456, Annex I at 21 (1961)).

[34] See *Ibid.* at 212-13.

[35] *Ibid.* at 13.

[36] Michael Milde, "Enforcement of Aviation Safety Standards - Problems of Safety Oversight" (1996) 45 Z.L.W. 1 at 6.

In summary, therefore, the amendment process inherent in the Chicago Convention creates challenges to the operation and evolution of ICAO as an organization, and of particular concern here, to the probability of adopting, if nothing else, the substantive portions of the above described amendments. If, however, a USOAP authorization amendment could be interpreted as institutional in nature, its probability for application would be greatly improved given ICAO's practices. If, on the other hand, such amendment is thought to be substantive in nature, affecting the *inter se* relations of states, then the antiquated procedures under Article 94(a) would be applicable to both of the proposed amendments. As the history of substantive amendment to the Chicago Convention demonstrates, such amendments have been greatly unsuccessful.

3. History of use

Although the Chicago Convention has seen six amendments of the institutional sort—concerning issues such as number of seats on the Council, declaring the existence of the authentic Russian text of the Convention, and budgetary matters—to date, over 62 years after the Convention's drafting, only two substantive amendments have taken force.[37] The first, Article 83*bis*, concerns the transfer of certain functions and responsibilities that the Convention attaches to the state of registry to the state of the operator;[38] and the second, Article 3*bis*, restates the customary principle prohibiting the use of weapons against civil aircraft in flight.[39] Although both amendments have received widespread ratification, the fact that a sizable number of states have yet to ratify renders the amendments inapplicable to such states' *inter se* relations, and may accordingly "lead to legally absurd situations."[40]

The fact that the Assembly has only used Article 94(a) twice for substantive revision and neither amendment has received unanimous ratifications, rendering the

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[37] See Milde, "Chicago Convention at Sixty", *supra* note 6 at 452.
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.* at 451.

Convention "a patchwork of disparate provision,"[41] leads one to question whether Article 94(a) is a desirable means for implementing the proposed USOAP amendments; perhaps it is time to consider use of Article 94(b).

4. Use of Article 94(b)

Given ICAO's goal to achieve universal membership, the Assembly has been unwilling to invoke Article 94(b) of the Convention, which permits the Assembly to provide in the resolution recommending adoption that "any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention." The Assembly may use this procedure, if it concludes "that the amendment is of such nature as to justify" its use. Its non-use suggests "that only amendments of a fundamental or all-persuasive character that radically alter the basic conception of the Convention will prompt the Assembly to apply Article 94(b)."[42]

Although authorization of the USOAP surely does not rise to such status, amending Article 38 and the obligations there imposed would certainly "radically alter the basic conception of the Convention" and may serve has an interesting opportunity for the Assembly to clear the dust off this never used provision. Furthermore, although fear of losing members was once a concern of ICAO,[43] the essential nature of international civil aviation to the modern economy would leave states with no option but to ratify the amendment forthwith. Article 94(b) provides the Assembly with a useful tool—the use of which could be a means to innovation.

D. Alternatives to amendment: new multilateral agreement

Given the problems inherent with formal amendment to the Chicago Convention, the states might be inclined to consider negotiating, drafting, and adopting a new

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[41] *Ibid.*

[42] Buergenthal, *supra* note 9 at 222.

[43] See *Ibid.*

multilateral treaty with regard to the authorization of the USOAP as an alternative to amendment of the Chicago Convention. Although nothing would prevent states from drafting and adopting such an agreement, it seems that the states would have little or nothing to gain—adopting a new amendment presents many of the same challenges experienced through Article 94.

A new treaty would only apply to those states that agree and consent to be bound by the new treaty[44]—application would only be universal if every state party to the Chicago Convention also agreed and consented to be bound by the terms of the new agreement—thus duplicating the primary problem of amendment by consensus under Article 94: non-*egra omnes* application. Furthermore, because the USOAP is so intimately associated with ICAO, and therefore, the Chicago Convention, it seems illogical to draft a new agreement that in reality seeks to amend a current agreement that has an express amendment procedure.

E. Conclusion

In summary, although alternatives to amending the Chicago Convention certainly exist, it seems the Chicago Convention itself provides the machinery necessary for the contemplated amendments. Article 94 is not the most efficient nor desirable method for Amendment—it represents the result of diplomatic compromise and legal thinking in a climate far different than today's. However, as lawyers, we must constantly seek and ultimately find creative solutions within the same legal framework that initially instigated the problem at hand.[45]

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[44] Vienna Convention, *supra* note 2, arts. 9, 11.

[45] I am reminded of the story involving NASA engineers' successful efforts to save the Apollo 13 astronauts, Jim Lovell, Fred Haise and Jack Swigert, by designing an air filtration device out of "an ingenious combination of space-suit hoses, cardboard, plastic stowage bags, and the command-module [air filtration] canisters, all held together with duct tape." Carolyn Russo, *Artifacts of Flight, Smithsonian National Air and Space Museum* (New York: Harry N. Abrams, 2003) at 96.

CONCLUSION

The analysis of international organizations generally, and of the USOAP specifically, evidences that international organizations are developing into more than mere forums for state interaction; rather, they are distinctly independent bodies with competence to regulate and change the behavior of sovereign states. Furthermore, given constitutional foundations of international organizations, their authorities and functions are capable of incremental growth, through interpretation of their constituent instruments, to sustain their usefulness and allow them to fulfill the purposes and objectives envisioned by their creators—especially in light of drastic changes in social conduct and technological advancement.

The USOAP, created and implemented by ICAO, demonstrates such development. In the Chicago Convention, ICAO's constitution, there is no mention of the USOAP, audits, nor regulatory authority; yet, in practice, ICAO conducts a system of regular, universal, and mandatory audits. This thesis demonstrates that even without express provision, the USOAP is a legitimate expansion of ICAO's functions and its creation and operation exist in harmony with the provisions of the Chicago Convention.

Furthermore, the analysis leads to the conclusion that although Article 37, in recognition of state sovereignty, limits the authority of ICAO and, therefore, the USOAP, it does not undermine the USOAP's operation, nor its potential to substantially contribute to the safety of international aviation. Indeed, given the hard obligation to file appropriate differences under Article 38, the USOAP forces states to either implement the SARPs or suffer the political and economic consequences of actually notifying/admitting differences. This difficult choice was surely envisioned by the drafters; however, prior to the USOAP, states had a third more attractive option: bluff—avoid implementation and filing differences. States had the ability to hide behind the general assumption that no notification of difference equated to implementation of the SARPs—there was no mechanism in place to call a bluff. Today, that is no longer the case, and the USOAPs operation closes a long-standing loophole that limited the effect

and possibilities associated with the harmonized system of international civil aviation intended by the Chicago Conference.

If safety of international aviation is indeed a matter for inclusive rather than exclusive control and interest, perhaps the time is approaching to take the next step toward a system of global governance and give ICAO the authority to enforce implementation and execution of the SARPs on the basis of a hard obligation through formal amendment to the Chicago Convention. Although such an amendment would not solve problems associated with a lack of necessary financial and human resources suffered by many states and regions, it could provide a basis for solving such problems with international resources.

Effective and harmonized systems of aviation safety oversight based on international standards are in the international interest, and their improvement and development must continue to be a priority of states, despite the concept of sovereignty.

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