

Civil Aviation Safety in Russia: The State of Compliance

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To Corentin

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ABSTRACT

Considering that civil aviation safety is one of the most important elements in all aviation-related activities, this thesis presents the state of compliance of aviation safety in the Russian Federation. In the former Soviet Union, the authorities made sure that the rest of the world knew that its territory was impenetrable. In the 1980s, their attack on the civilian flight KE 007 of the Korean Airlines, which led to the crash of the aircraft and the death of innocent civilian passengers, demonstrated that when it came to guarding their territory, they showed little concern for the lives of innocent civilians. The first chapter focuses on how the Russian Federation managed the necessary transition from the Soviet-era system to a modernized aviation system with the objective of ensuring aviation safety. The second chapter presents the development of the ICAO Universal Safety Oversight Audit Programme since the 1990s and details the compliance of Russian air law with international standards and recommended practices related to aviation safety. The last chapter highlights the necessity for the European Union and Russia to have working arrangements to conduct safety assessments of foreign aircraft to ensure aviation safety. This chapter also highlights the advantages of concluding comprehensive air transport agreements between them to harmonize their aviation relations and to solve pending issues, such as improving market opportunities for both sides, compliance with Community law by including an EU Community carrier clause in bilateral agreements with Russia, and implementation of a phase-out of trans-Siberian overflight payments.

RÉSUMÉ

Dans le contexte où la sécurité de l'aviation civile est l'objectif fondamental pour le bon déroulement de tout type d'activités aériennes, ce mémoire présente l'état de conformité de la sécurité aérienne en Russie. Sous l'Union soviétique, le reste du monde a rapidement compris que le territoire russe était impénétrable. Dans les années 80, les autorités russes n'ont pas hésité à abattre l'aéronef civil, le vol KE 007 de la compagnie Korean Airlines, provoquant sa destruction et la mort de passagers innocents. Par ces actes, l'Union soviétique démontrait qu'elle priorisait en tout état de cause le principe de la souveraineté territoriale. Le premier chapitre de ce mémoire présente la démarche entreprise par la Russie pour la transition de l'ancien système soviétique au nouveau système russe d'aviation civile, toujours avec l'objectif d'assurer la sécurité aérienne. Le deuxième chapitre aborde le développement du Programme universel d'audits de la sécurité de l'OACI depuis les années 90 et détaille le niveau de conformité de la législation aérienne en Russie avec les normes et pratiques recommandées relativement à la sécurité. Le dernier chapitre insiste sur la nécessité des ententes de travail entre l'Union européenne et la Russie sur les évaluations de sécurité des aéronefs étrangers et sur les avantages que procure un éventuel accord global sur le transport aérien aux deux parties. Un tel accord harmonise leurs relations et aide les deux parties à améliorer les opportunités de marché, à se conformer au droit communautaire en incluant une clause de désignation de l'Union dans leurs accords bilatéraux, et à s'entendre sur l'abolition des paiements pour transiter dans l'espace aérien sibérien.

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ABBREVIATIONS

Air & Space L.	<i>Air & Space Law</i>
AN.	<i>Aviation Navigation</i>
Ann. Air & Sp. Law	<i>Annals of Air and Space Law</i>
ATC	<i>Air Traffic Control</i>
CAN TS	<i>Canadian Treaty Series</i>
CEPS	<i>Centre for European Policy Studies</i>
CFDP	<i>Council of Foreign and Defense Politics</i>
CINA	<i>Commission internationale de la navigation aérienne</i>
CIS	<i>Commonwealth of Independent States</i>
C-Min.	<i>Council Minutes</i>
C-WP	<i>Council Working Paper</i>
COM	<i>Communication</i>
CVR	<i>Cockpit Voice Recorder</i>
CSA	<i>Comprehensive Systems Approach</i>
Dec.	<i>Decision</i>
DFDR	<i>Digital Flight Data Recorder</i>
DGCA	<i>Directors General of Civil Aviation</i>
Doc.	<i>Document</i>
EASA	<i>European Aviation Safety Agency</i>
EC	<i>European Community</i>
ECAC	<i>European Civil Aviation Conference</i>
ECJ	<i>European Court of Justice</i>

ECPR	<i>European Consortium for Political Research</i>
ECR	<i>European Court Reports</i>
Ed.	<i>Edition</i>
EEC	<i>Economic European Community</i>
EJIL	<i>European Journal of International Law</i>
EU	<i>European Union</i>
GA	<i>General Assembly</i>
GASP	<i>Global Aviation Safety Plan</i>
IAC	<i>Interstate Aviation Committee</i>
IASA	<i>International Aviation Safety Assessments</i>
IATA	<i>International Air Transport Association</i>
ICAN	<i>International Commission for Air Navigation</i>
ICAO	<i>International Civil Aviation Organization</i>
ILM	<i>International Legal Materials</i>
J. Air Law & Com.	<i>Journal Air Law and Commerce</i>
JAA	<i>Joint Aviation Authorities</i>
KAL	<i>Korean Airlines</i>
KE	<i>ICAO code for Korean Airlines</i>
LL.M.	<i>Master of Laws</i>
LNTS	<i>League of Nations Treaty Series</i>
Mil. L. Rev.	<i>Military Law Review</i>
Mtg.	<i>Meeting</i>
No.	<i>Number</i>
OJL	<i>Official Journal of the European Communities: Legislation</i>

OPACI	Organisation provisoire de l'aviation civile internationale
PCA	<i>Partnership and Cooperation Agreement</i>
PICAO	<i>Provisional International Civil Aviation Organization</i>
PIO	<i>Press and Information Office</i>
Res.	<i>Resolution</i>
S.	<i>Section</i>
SAFA	<i>Safety Assessment of Foreign Aircraft</i>
SARPs	<i>International Standards and Recommended Practices</i>
SC	<i>Security Council</i>
Sess.	<i>Session</i>
SG	<i>Secretary General</i>
UN	<i>United Nations</i>
UNTS	<i>United Nations Treaty Series</i>
USSR	<i>Union of Soviet Socialist Republics</i>
USOAP	<i>Universal Safety Oversight Audit Programme</i>
WTO	<i>World Trade Organization</i>
ZLW	Zeitschrift für Luft – und Weltraumrecht

Introduction – The Evolution of the participation of the Soviet Union to International Civil Aviation

A. International Civil Air Law and the Soviet Union

The involvement of Russia in international civil aviation has evolved significantly since the times of the Union of the Soviet Socialist Republics.¹ In November 1944, the Soviet Union boycotted the Chicago Conference,² which gave birth to the *Convention on International Civil Aviation*.³ More than 25 years later, the Soviet Union acceded to the Chicago Convention on 15 October 1970.⁴ Thus, when its accession became effective on 14 November 1970, the Soviet Union became a member State of the International Civil Aviation Organization (ICAO).⁵ The Soviet Union delayed acceding to the Convention because international obligations were perceived as a burden for the Soviet Union and the terms of such conventions were viewed as international interference in sovereign Soviet affairs.⁶ In the 1970s and the 1980s, the Soviet Union did not fully respect its international obligations according to the Chicago Convention. This was despite the fact that it had not expressed any reservations regarding any major legal principle in the Convention when acceding to it.⁷ The Soviet Union at first denied any role in the crash of

¹ This State is also known as the USSR or the Soviet Union [*Soviet Union*].

² See I.H.Ph. Diederiks-Verschoor, *infra* note 45.

³ *Convention on International Civil Aviation*, *infra* note 34. For a list of member States to the Chicago Convention, see International Civil Aviation Organization, *Current List of Parties to the Multilateral Air Law Treaties - Convention on International Civil Aviation* (Montreal: ICAO, 2010), online: ICAO http://www2.icao.int/en/leb/List%20of%20Parties/chicago_en.pdf.

⁴ ICAO, *Status of the Russian Federation with regard to International Air Law Instruments* (Montreal: ICAO, 2010), online: ICAO http://www.icao.int/icao/en/leb/StatusForms/Russian_federation_en.pdf [ICAO].

⁵ *Ibid.*

⁶ See specifically Captain J. Schenkman, *infra* note 31.

⁷ In accordance with article 38 of the Chicago Convention, the Soviet Union expressed some differences to ICAO between its domestic standards and the international standards but on technical aspects, such as the

flight KAL 007 in Soviet airspace in 1983. Also, Soviet authorities refused to participate in the first investigation into that crash.⁸ The member States of the United Nations considered these Soviet actions to be violations of the Chicago Convention and its Annex 13.⁹ After the collapse of the Soviet Union in 1991, the Russian Federation informed the ICAO that it was the official legal successor of the Soviet Union and, henceforth, it would continue the Soviet membership¹⁰ of the ICAO and in all concluded international agreements.¹¹

By a letter dated 26 December 1991, the Ministry of Foreign Affairs of the Russian Federation informed the President of the Council of ICAO that “the membership of the Union of Soviet Socialist Republics in the International Civil Aviation Organization and all its organs as well as in all the conventions, agreements and other international legal instruments concluded by or under the auspices of the International Civil Aviation Organization henceforth is continued by the Russian Federation and that therefore in the International Civil Aviation Organization the title ‘the Union of Soviet Socialist Republics’ shall be replaced by the title ‘the Russian Federation’”.¹²

use of the metric system. See Heiko van Schyndel, *Essential Air and Space Law – Aviation Code of the Russian Federation* (Utrecht: Eleven International Publishing, 2010) at 1.

⁸ M. Milde, “KAL 007 - "Final" Truth and Consequences”, *infra* note 60. For a detailed explanation on the crash of KE 007, see below Section B of the Introduction of the present paper.

⁹ *Ibid.* ICAO, *International Standards and Recommended Practices – Annex 13 to the Convention on International Civil Aviation: Aircraft Accident and Incident Investigation*, *infra* note 77.

¹⁰ ICAO membership is universal and no State or territory with significant aviation interests stands outside ICAO. By exception, China’s policy, supported by an important segment of the international community, considers Taiwan as part of its territory. Then Taiwan is not a Contracting States in ICAO. See M. Milde, “Chicago Convention at Sixty – Stagnation or Renaissance?”, *infra* note 93.

¹¹ At the same time, contrary to most of the former Republics, Russia never declared its own independence, permitting it to take the international place and importance of the USSR at the end of 1991. It enjoyed full international prerogatives of USSR, such as seat of permanent member on the United Nations Security Council. For an explanation of the legal succession of the Soviet Union and of Aeroflot, see H. van Schyndel, *supra* note 7 at 4-6.

¹² *Letter dated 26 November 1991 of the Minister of Foreign Affairs of the Russian Federation* cited in ICAO, *Status of the Russian Federation with regard to International Air Law Instruments - Notes*, *supra* note 4.

Before exploring the role that the Soviet Union decided to play in international civil aviation, questions such as what international civil air law is and how it has evolved, should be answered.

As part of public international law, “[a]ir law is a body of rules governing the use of airspace and its benefits for aviation, the general public and the nations of the world.”¹³ Civil air law implies that it applies to civil aircraft and not to state aircraft, which do not fall within the scope of the present thesis.¹⁴ Air law is made up of seven legal sources, which comprise the body or rules referred to in the above-mentioned definition. These sources are categorized as follows: multilateral conventions, bilateral agreements, general principles of international law, national law, judicial decisions, contracts between states and airline companies, and contracts between airline companies.¹⁵ The first source of air law is multilateral conventions. Since its creation with the adoption of the 1919 Paris Convention, air law has acquired an international dimension. The rapid technological developments in aviation required legislative experts to produce written law that would keep pace with those developments. Air law is almost solely written law and thus, custom as a source of law is set aside.¹⁶ Also, air law includes national laws and customs, which must incorporate international standards and take into account recommended practices in

¹³ I.H.Ph. Diederiks-Verschoor, *infra* note 45 at 1. Public international air law is the whole of legal norms applying to the relations between states and international organizations regarding the operation and the use of aircraft. I.H.Ph. Diederiks-Verschoor, *Ibid.* at 5. It is different from private international law, which is the corpus of rules applying to relations between private persons in those activities. *Ibid.* at 4. The common formula of “air law” is of general acceptance in academia, as the use of “aviation law”, even if this designation is still used in some manuals, is now archaic. The expression “air transportation law” is also utilized but it represents only one area of air law, and using it generally would limit the extent that air law covers in reality.

¹⁴ *Convention on International Civil Aviation*, *infra* note 34, s. 3. A state aircraft is an aircraft used in military, customs and police services.

¹⁵ I.H.Ph. Diederiks-Verschoor, *infra* note 45 at 4-9.

¹⁶ *Ibid.* at 5.

civil aviation. Finally, all stakeholders in civil aviation, notably the state, the owners of aircraft, the operators of aircraft, the passengers, the owners of the carried goods, accept that all implementing measures protecting their rights and defining their obligations are found in international agreements and Conventions.

The legal framework of international civil aviation was conceived progressively in the period between the two World Wars. This was because of the utility aircraft had acquired during wartime. Before and during the First World War, aircraft were viewed as a military weapon and “aviation was perceived primarily as a potential threat to the safety of States”.¹⁷ “The war demonstrated the incredible potential on state commerce and the incredible destructiveness that air power could wreak during all-out war”.¹⁸ States “worried about the military aspects of aircraft development. After the war ended, legal experts and politicians from all over the world recognized the profound impact that air transportation would have on challenging the traditional notions of “ borders” and “ownership of the airspace”.¹⁹ The importance of multilateral treaties concerning air law began with the *Convention Relating to the Regulation of Aerial Navigation*²⁰ signed in 1919, which is considered as the first formal legal instrument regulating air navigation.²¹

¹⁷ Michael Milde, “Some questions marks about the Price of “Russian Air”” (2000) 2 Z.L.W. 147 at 151.

¹⁸ Major Stephen M. Shrewsbury, “September 11th and the Single European Sky: Developing concepts of Airspace Sovereignty?” (2003) 68 J. Air L. & Com. 115 at 129.

¹⁹ See John Cobb Cooper, “Background of International Public Air Law” in René H. Mankiewicz, ed., *Yearbook of Air and Space Law* (Montreal: McGill University Press, 1967) at 4. See also Manley O. Hudson, “Aviation and International Law” (1930) 1:2 *Air Law Review* 183 at 187.

²⁰ *Convention relating to the Regulation of Aerial Navigation*, 13 October 1919, L.N.T.S. 1922 No. 297 at 173 (entered into force on 11 July 1922, the Soviet Union is not a party) [*Paris Convention*] online: University of Mississippi School of Law http://www.spacelaw.olemiss.edu/library/aviation/IntAgr/multilateral/1919_Paris_conevention.pdf.

²¹ ICAO, *The Postal History of ICAO: The 1919 Paris Convention: The starting point for the regulation of air navigation* (Montreal: ICAO, 2010), online: ICAO

The Convention included the recognition of complete and exclusive sovereignty of States over airspace above their territory and, in the form of technical annexes, standards regarding airworthiness, certificates of competency for crew members, movement of military aircraft, etc. It also created the first formal organization for the oversight of international aviation activities: the International Commission for Air Navigation (ICAN).²² It became obvious that the fast-growing aviation industry required more extensive international cooperation and a legal infrastructure. The Soviet Union did not take part in the Paris Convention and did not subsequently become a member of it. Still, the Soviet Decree of 17 January 1921 permitted foreign aircraft to transit Soviet frontiers once they obtained special permission and were made subject to special regulations.²³ Later, the Soviet “air code”, promulgated on 27 April 1932, affirmed the exclusive sovereignty of the Soviet Union above its “lands and waters and also over its territorial waters (marginal seas) out to the twelve-mile limit which it has long claimed.”²⁴

http://www.icao.int/icao/en/hist/stamps/1919_the_paris_convention.htm. This Convention was in force for 33 nations in 1940 and was replaced by the Chicago Convention in 1947. See for details on the Paris Convention, I.H.Ph. Diediriks-Verschoor & H.A. Wassenberg, “Dr. J.F. Lycklama à Nijeholt (1846-1947)” (1994) 19 Air & Space L. 8 and the cited list of literature.

²² *Convention relating to the Regulation of Aerial Navigation*, *supra* note 20, s. 34. See ICAO, *History: the Beginning* (Montréal: ICAO, 2010), online: ICAO http://www.icao.int/cgi/goto_m.pl?icao/en/hist/history01.htm. Also see, ICAO, *Bref historique administratif de CINA et OPACI* (Montreal: ICAO, 2010), online: ICAO http://www.icao.int/icao/fr/adb/wla/arch_f.htm [ICAN].

²³ J.C. Cooper, “Background of International Public Air Law”, *supra* note 19 at 22. But foreign aircraft must obtain the Soviet permission to fly over the Soviet airspace. Otherwise, the Soviet authorities will not tolerate aerial intruders and will attack them. Major T. J. refers to “a separate and distinct Soviet practice” from the international one regarding civil and military aerial intruders. See Major J. T. Phelps II, *infra* note 63 at 296-297.

²⁴ J.C. Cooper, *ibid.* at 23.

Then came the Ibero-American Convention²⁵, which was signed in Madrid in 1926, and the Pan-American Convention²⁶ signed in Havana in 1928. The provisions of the former were very similar to the provisions of the Paris Convention. But this time, it was ratified by Latin American states that were invited by the Spanish Government hosting the Conference. The latter was initiated by the United States because the Americas also wanted their own Convention on air navigation. Compared to the Paris Convention, the Pan-American Convention was not as successful because there was no provision on the establishment of a commission similar to the ICAN and no technical annexes to the Convention. Consequently, it did not reach the objective of uniformity in air navigation regulations for the states in America.²⁷ The entry into force of the Chicago Convention in 1947 brought about the end of ICAN and the establishment of ICAO. ICAN member States consented to its dissolution and the transfer of all its assets to its successor.²⁸

The second essential legal instrument on which international civil aviation is founded is the Chicago Convention. On 1 November 1944, the United States organized a conference on international civil aviation in Chicago inviting 55 States or authorities representing “all members of the United Nations; nations associated with the United

²⁵ *Ibero-American Convention on Air Navigation*, 1 November 1926, [*Ibero-American Convention*]. See also ICAO, *The Postal History of ICAO: 1926: The Ibero-American Convention* (Montreal: ICAO, 2010), online: ICAO http://www.icao.int/icao/en/hist/stamps/1926_the_iberio_american_convention.htm.

²⁶ *Pan American (or Inter-American) International Convention on Commercial Aviation*, 20 February 1928, [*Pan-American Convention*]. ICAO, *The Postal History of ICAO: 1928: The Havana Convention* (Montréal: ICAO, 2010), online: ICAO http://www.icao.int/cgi/goto_m.pl?icao/en/hist/history01.htm. http://www.icao.int/icao/en/hist/stamps/1928_the_havana_convention.htm.

²⁷ I.H.Ph. Diederiks-Verschoor, *infra* note 45.

²⁸ ICAO, *The Postal History of ICAO: From PICAO to ICAO: Organizational Similarities*, *infra* note 37.

Nations in this war; and the European and Asiatic neutral nations”.²⁹ The Soviet Union was invited as one of the principal Allies but on its way to Chicago and at the last minute, declined the invitation.³⁰ The apparent reason for the Soviet absence was the participation of Portugal, Spain, and Switzerland. The Soviet Union considered their policies during the Second World War, which was still going on at that time, as inimical towards it.³¹ But, in reality, it was because of “the obvious “closed border” and secretive policy of the USSR which was apparent long before the true onset of the Cold War”.³²

At the end of the conference more than a month later, fifty-two states³³ signed four agreements reflecting an international compromise on civil aviation: the *Convention on International Civil Aviation*,³⁴ the *International Air Services Transit Agreement*³⁵ the

²⁹ ICAO, “Invitation of the United States of America to the Conference” in ICAO, *Chicago Conference* (Montreal: ICAO, 2006), online: ICAO http://www.icao.int/cgi/goto_m.pl?/icao/en/chicago_conf/invitation.html.

³⁰ J.C. Cooper, *The Right to Fly* (New York: Henry Holt and Company, 1947) at 162.

³¹ I.H.Ph. Diederiks-Verschoor, *infra* note 45 at 14, footnote 2. See specifically Soviet News Agency, Declaration, *New York Times* (30 October 1944) in Captain J. Schenkman, *International Civil Aviation Organisation* (Geneva: Droz, 1955) at 75.

³² M. Milde, “Some questions marks about the Price of “Russian Air””, *supra* note 17 at 152.

³³ ICAO, *Foundation of the International Civil Aviation Organisation (ICAO)* (Montréal: ICAO, 2010), online: ICAO <http://www.icao.int/icao/en/hist/history02.htm>. Originally, fifty-five States and Authorities were invited to the Conference but Saudi Arabia did not accept the invitation and the Soviet Union informed at the last minute of its non-participation. In total, fifty-two Delegations attended the Conference and two Ambassadors, of Denmark and of Thailand, participated to it in their personnel capacity. See M. Milde, “The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later?”, *infra* note 43.

³⁴ *Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295, ICAO Doc. 7300/9 (entered into force on 4 April 1947, accession by the Soviet Union on 15 October 1970), online: ICAO <http://www.icao.int/icaonet/dcs/7300.html> [*Chicago Convention*]. The Russian text of the Chicago Convention was signed in 1977. See *Protocol Relating to an Amendment to the Convention on International Civil Aviation [Final Paragraph, Russian Text]*, ICAO Doc. 7209 incorporated in Doc. 7300 (entered into force on 17 August 1999), online: ICAO <http://www.icao.int/icao/en/leb/FinRu.pdf>.

³⁵ *International Air Services Transit Agreement*, 7 December 1944, 84 U.N.T.S. 389, ICAO Doc. 7500 (entered into force on 30 January 1945, the Soviet Union is not a party) [*Transit Agreement*]. Specifically, Article 6 of the Chicago Convention states that freedoms can be permitted or authorized for scheduled flights. The Transit Agreement authorized the two following freedoms: firstly, the right to fly into or to

International Air Services Transport Agreement,³⁶ and the *Interim Agreement on International Civil Aviation*.³⁷ As the principal agreement adopted during the Conference, the Convention also served as the constitution of ICAO.³⁸ As already mentioned, the Soviet Union has been a signatory to the Chicago Convention since 1970. Even if the Transit Agreement, which brings about mutual exchange of transit rights, has, until now, gained the support of 126 States, the Soviet Union and Russia are not members to it.³⁹ This means that “it did not grant, on a multilateral basis, to other States the basic non-commercial “right to fly” for scheduled transport in transit without landing or landing for non-traffic purposes.”⁴⁰ The much less popular Transport Agreement, which concerns the mutual exchange of traffic rights and which received little support from 11 States, was also not accepted by the Soviet Union and Russia, because of the over importance it

transit non-stop over one contracting State's territory without prior permission and, secondly, the right to stop for non-traffic purposes (fuel and maintenance), also without prior permission.

³⁶ *International Air Services Transport Agreement*, 7 December 1944, 171 U.N.T.S. 387 (entered into force on 2 February 1945, the Soviet Union is not a party) [*Transport Agreement*]. Article 6 of the Chicago Convention provides also for the adoption of the three additional freedoms set in the Transport Agreement. The third, fourth and fifth freedoms mean respectively: the right of one contracting State to transport passengers and cargo from their country (A) to another contracting State's country (B); the right to transport them from country B back to country A; and the right to fly from country B to a third country (C).

³⁷ *Interim Agreement on International Civil Aviation*, 7 November 1944, 171 U.N.T.S. 345 (entered into force on 6 June 1945, the Soviet Union is not a party) [*PICAO Agreement*]. See ICAO, *The Postal History of ICAO: From PICAO to ICAO: Organizational Similarities* (Montréal: ICAO, 2010), online: http://www.icao.int/icao/en/hist/stamps/from_picao_to_icao_organizational_similarities.htm.

³⁸ The ICAO is a specialized agency of the United Nations that was established when the Chicago Convention came into force in 1947. Chicago Convention, *supra* note 34, s. 43 [ICAO]. See M. Milde, *Public International Law and ICAO* (Utrecht: Eleven International Publishing, 2008).

³⁹ For a list of member States to the Transit Agreement, see ICAO, *Current List of Parties to the Multilateral Air Law Treaties - International Air Services Transit Agreement* (Montreal: ICAO, 2010), online: ICAO http://www2.icao.int/en/leb/List%20of%20Parties/transit_en.pdf. The ICAO Assembly resolutions have been urging all States to become parties to this Agreement so the basic objective of the Chicago Convention, that international air transport services may be “operated soundly and economically”, would be achieved. See specifically the last resolution on the subject in 2009: *Consolidated Statement of Continuing ICAO Policies in the Air Transport Field*, A36-15, ICAO Assembly, 36th session, Appendix A, Section I, paragraph 2 (2009), online: ICAO http://www.icao.int/icaonet/dcs/9902/9902_en.pdf.

⁴⁰ M. Milde, “Some questions marks about the Price of “Russian Air””, *supra* note 17 at 153. Concerning the non-scheduled transport, article 5 of the Chicago Convention is the legal provision to guarantee the right to transit.

accorded to the sovereignty of its territory.⁴¹ As for the PICAQ Agreement, which was valid until the

Chicago Convention entered into force on 4 April 1947, the Soviet Union was not its member. It should be remembered that “[t]he most important work accomplished by the Chicago Conference was in the technical field because the Conference laid the foundation for a set of rules and regulations regarding air navigation as a whole which brought safety in flying a great step forward and paved the way for the application of a common air navigation system throughout the world.”⁴²

Today, the Chicago Convention is still a monumental piece of international civil air law.⁴³ In 1944, the Convention represented the minimum common denominator expressing, at the time, the political will of the negotiating contracting States.⁴⁴ This comprehensive legal instrument balanced the conflicting interests of the States, expressed during the Conference by four trends of thought coming from the United States, Great Britain, Canada, and Australia and New Zealand during the preparatory work of the

⁴¹ For a list of member States to the Transport Agreement, see ICAO, *Current List of Parties to the Multilateral Air Law Treaties - International Air Services Transport Agreement* (Montreal: ICAO, 2010), online: ICAO http://www2.icao.int/en/leb/List%20of%20Parties/Transport_en.pdf.

⁴² ICAO, *Foundation of the International Civil Aviation Organisation (ICAO)*, *supra* note 33.

⁴³ Nevertheless, the author M. Milde summarized the amendments needed to update the Chicago Convention. See M. Milde, “Chicago Convention at Sixty – Stagnation or Renaissance?”, *infra* note 93, and M. Milde, “The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later?” (1994) 19:1 Ann. Air & Sp. L. 401.

⁴⁴ M. Milde, “Chicago Convention at Sixty – Stagnation or Renaissance?”, *ibid.* at 99.

Conference.⁴⁵ As the foundation of the current system of international aviation transportation, the Convention supersedes all the previously mentioned Conventions.⁴⁶ Besides providing for the constitution of ICAO, the Chicago Convention recalls and regulates the most important principles in civil aviation, including the objective of aviation safety.⁴⁷ The latter objective is recognized as “the objective with the highest overall priority”⁴⁸ since the establishment of ICAO sixty-three years ago.⁴⁹ The safety of flights is the fundamental principle for all types of aviation activities, including commercial, non-commercial, general aviation or other air transport activities.⁵⁰

As aviation safety is the most essential element in all aviation-related activities,⁵¹ this thesis will present the state of compliance of aviation safety in the Russian Federation. The brief introduction on air law in the Soviet Union will be completed by the presentation of the role and responsibility of the USSR in the crash of Korean Airlines flight KE 007 in its airspace and the effect it had on international aviation relations. The first chapter will focus on how the Russian Federation managed the necessary transition

⁴⁵ I.H.Ph. Diederiks-Verschoor, *An Introduction to Air Law*, 8th ed. (The Hague: Kluwer Law International, 2006) at 13. See also J.C. Cooper, *The Right to Fly*, *supra* note 30.

⁴⁶ I.H.Ph. Diederiks-Verschoor, *ibid.* at 7.

⁴⁷ *Convention on International Civil Aviation*, *supra* note 34, s. 44 (a), (d), and (h); preamble, paragraph 3.

⁴⁸ ICAO, *ICAO Global Safety Plan (GASP)*, Res. A32-15, ICAO Assembly, 32nd Sess., Doc. 9730 (1998) at first whereas clause, and ICAO, *ICAO Global Safety Plan (GASP)*, Res. A33-16, ICAO Assembly, 33rd Sess., Doc. 9790 (2001) 66 at first whereas clause, online: ICAO http://www.icao.int/icao/en/res/a33_16.htm. See ICAO, *ICAO Global Aviation Safety Plan (GASP): Brief Historical and Introduction* (Montréal: ICAO, 2004), online: <http://www.icao.int/icao/en/anb/gasp/GaspIntroNew.htm>.

⁴⁹ Ludwig Weber, *International Civil Aviation Organization: An Introduction* (Alphen aan den Rijn: Kluwer Law International, 2007) at 6.

⁵⁰ ICAO, *ICAO Global Aviation Safety Plan (GASP)*, *supra* note 48. See also ICAO, *ICAO Global Aviation Safety Plan (GASP)*, 2nd ed. (Montreal: ICAO, 2004), online: <http://www.icao.int/icao/en/anb/gasp/GASP.html>.

⁵¹ D. Olsen, “Striving for Aviation Safety” in ICAO (ed.), *100 Years of Civil Aviation* (Montreal and London: ICAO and ICS Ltd, 2003) at 114.

from the Soviet-era system to the modern system with the objective of ensuring aviation safety. The second chapter will present the development of the ICAO Universal Safety Oversight Audit Programme since the 1990s and will give details of the compliance of Russian air law with the international standards and recommended practices⁵² related to aviation safety. The last chapter will point out the necessity for the European Union and Russia to have working arrangements to conduct safety assessment of foreign aircraft to ensure aviation safety. Also, this chapter will highlight the advantages of concluding comprehensive air transport agreements between them to harmonize their aviation relations and to solve pending issues, such as market opportunities improvement for both sides, compliance with Community law by including the EU designation clause in their bilateral agreements, implementation of a phase-out of trans-Siberian overflight payments (royalties), and the cooperation on security, safety, and environment.

It is important to specify that this thesis will focus on the safety of aviation, which is different from the security of aviation. The author L. Weber explains that “[w]hile the term aviation safety relates to the technical and operational safety of flight, the term aviation security relates to safeguarding civil aviation against acts of unlawful interference.”⁵³ Furthermore, the author P. S. Dempsey clarifies that the “[s]afety regulation focuses on preventing accidental harm. Security regulation focuses on preventing intentional harm.”⁵⁴ This distinction between these two ICAO objectives does

⁵² See the definition of SARPs, *infra* subsection 1 (ICAO’s Mandate) of section A of Chapter 1.

⁵³ L. Weber, *International Civil Aviation Organization: An Introduction*, *supra* note 49.

⁵⁴ Paul S. Dempsey, *Public International Air Law*, *infra* note 139 at 67.

not change the fact that they are considered of equal importance and thus complement each other. They “have in practice come to be regarded as two sides of the same coin”.⁵⁵

Since the beginning of international civil aviation with the Paris Convention in 1919, aviation safety has been the fundamental principle for states, although this principle has often been challenged when individual states prioritize protecting their national interests based on the principle of state sovereignty. The Cold War obviously had an important impact on aviation relations between the United States and the Soviet Union, which also affected their respective Allies. Under the Soviet regime, the priority was the protection of the sovereignty of its territory, including its airspace, by using weapons against civil aircraft, even at the cost of the lives of innocent passengers.⁵⁶

B. The Flight KE 007: The Crash of A Civil Aircraft in the Russian Airspace

The crash of flight KE 007 “ranks among the worst man-made aviation catastrophes and is a painful reminder and illustration of the cruelty, callousness, lawlessness and inhumanity in the Cold War attitudes of the former USSR.”⁵⁷ The Soviet authorities made it clear to the rest of the world that Soviet territory was impenetrable.⁵⁸ Still, its disregard for the lives of the victims in this tragedy provoked a profound revulsion worldwide.

⁵⁵ L. Weber, *International Civil Aviation Organization: An Introduction*, *supra* note 49 at 7.

⁵⁶ M. Milde, “Some questions marks about the price of the “Russian Air””, *supra* note 17.

⁵⁷ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE007 – Ten Years Later)” (1993) in M. Milde and P. S. Dempsey, *Public International Air Law- Cases and Materials*, vol. II (Montreal: McGill University, 2005) at 179.

⁵⁸ M. Milde, “Some questions marks about the Price of “Russian Air””, *supra* note 17 at 154.

Nevertheless, the “glasnost” policy of the mid-1980s brought about a limited openness of the Soviet airspace as the Soviet Union authorized some foreign airlines to fly the trans-Siberian routes, despite its poor and basic Air Navigation Services.⁵⁹ In some cases, this inadequate technology, which was far below the state of the art, may have jeopardised the safety of passengers and the crew of foreign airlines flying through Soviet airspace.

1. Description of the Crash

On 1 September 1983, at the height of the Cold War, a Soviet military aircraft attacked a civilian aircraft from the Korean Airlines soon after it took off from Anchorage, Alaska en-route to Seoul, South Korea, a segment of the scheduled flight from New York to Seoul.⁶⁰ The flight KE 007 deviated from its flight plan and entered Soviet airspace over the Kamchatka Peninsula and Sakhalin Island, “two of Soviet Union’s military most sensitive areas in the Far East.”⁶¹ For the first 48 hours after the event, the Soviet Union initially denied any knowledge of the fatal incident.⁶² Later, it confessed to the “termination” of the “espionage” aircraft, pretending that it was due the violation of its sovereign airspace and to the pilot’s failure to heed warning signals and

⁵⁹ *Ibid.*

⁶⁰ Bin Cheng, “The Destruction of KAL flight KE 007” (1985) in M. Milde and P. S. Dempsey, *Public International Air Law- Cases and Materials*, vol. I (Montreal: McGill University, 2005) at 282. The technical description of the crash of flight KE 007: the Boeing 747-230B was hit by at least one of the 2 air-to-air missiles fired by Soviet SU-15 fighter aircraft. The situation was considered as an attack of a civil aircraft by military aircraft. This attack caused in-flight damages. The detonation led rapidly to the decompression of the aircraft cabin. The civil aircraft experienced controllability problems, as the Digital Flight Data Recorder and Cockpit Voice Recorder were interrupted 1 minute 44 seconds after the attack. The radar data indicated that the aircraft flew for a few minutes in a descending spiral after the attack. At the end, it collided with the sea and sank. The aircraft destructed on impact and there was no survival among the passengers and crew. See M. Milde, “KE 007 - “Final” Truth and Consequences” (1993) 42 Z.L.W. 357.

⁶¹ Masahiko Kido, “The Korean Airlines Incident on September, 1, 1983, and Some Measures Following It” (1997) J. Air L. & Com. 1049. See also B. Cheng, *ibid.*

⁶² M. Milde, “KE 007 - “Final” Truth and Consequences”, *supra* note 60 at 358.

orders to stop the aircraft.⁶³ The Soviet lies about the circumstances of the shooting down of the aircraft provoked a global disapproval and led to bitter discussions within the United Nations.⁶⁴

2. Discussions Before the UN Security Council

On 6 September 1983, the United States delegation⁶⁵ presented to the UN Security Council the lies of the Soviet Union by providing transcripts from the Japanese authorities of the transmissions of the Soviet interceptor at the moment it was attacking the civil aircraft.⁶⁶ This proved that the aircraft was their real target, and that even if its navigation lights and strobe light were on, no effort was made by the Soviet authorities to identify the aircraft, to communicate with it or to request it to land.⁶⁷ Then, seventeen member States put forward a draft resolution stating that the use of force by military

⁶³ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE 007 – Ten Years Later)”, *supra* note 57 at 179. For a description of the Soviet justification to shoot-down KE 007, see the preliminary USSR investigation report on the crash communicated to the Secretary General of ICAO in ICAO, “Destruction of Korean Air Lines Boeing 747 over Sea of Japan, 31 August 1983: Report of ICAO Fact-Finding Investigation (1983)”, *infra* note 83 at 283. The Soviet authorities had a similar reaction of shooting a civil aircraft in two other cases: a 1955 Soviet attack of an Air France aircraft flying through one of the corridors of Berlin, and a 1978 attack of another KAL aircraft also entering in the Soviet airspace. See William J. Hughes, “Aerial Intrusions by Civil Airlines and the use of Force” (1980) 45 J. Air L. & Com. 595. For the Soviet justification and the explanation on the aircraft destruction, see also Major John T. Phelps II, “Aerial Intrusions by Civil and Military Aircraft in Time of Peace” (1985) 107 Mil. L. Rev. 255 at 295-296. The author concludes that the Soviet “explanation and justification for the attack was a carbon copy of almost every other incident in which their interceptors have attacked an aerial intruder.”

⁶⁴ UN, “United Nations Security Council Considerations”, *infra* note 65 at 1125-1136. See also M. Milde, “KE 007 - "Final" Truth and Consequences”, *supra* note 60.

⁶⁵ See M. Kido, *supra* note 61 at 1050. On the same day of the tragedy, the United States, with the support of four other member States - Korea, Japan, Canada and Australia -, requested an urgent meeting of the UN Security Council to discuss about the crash. UN, “United Nations Security Council Considerations” (1983) 22 I.L.M. 1109-1113.

⁶⁶ For the text of the transcript, see ICAO, Council Working Paper, ICAO Doc. C-WP/7764, Attachment, Appendix D at D to D-4. See also UN, “United Nations Security Council Considerations”, *supra* note 65 at 1121-1125 [UN Security Council].

⁶⁷ M. Milde, “KE 007 - "Final" Truth and Consequences”, *supra* note 60 at 358.

aircraft on civil aircraft is incompatible with rules on international behaviour and elementary consideration for humanity.⁶⁸ Obviously, the resolution was opposed by the Soviet Union, which, as one of the five permanent members of the Security Council, vetoed it.⁶⁹ Consequently, some Western States decided to suspend the landing rights of Aeroflot on their territories for a period up to 60 days.⁷⁰ Also, the International Federation of Air Line Pilots Association recommended that aircraft belonging to its members not fly to the Soviet Union for a total period of sixty days.⁷¹

3. From the UN Security Council to ICAO

Due to the fact that the discussions on the tragedy of KE 007 were blocked at the UN Security Council, they took place instead at ICAO, since it is another UN forum. It is, however, “governed by a majority of states and [is] not granting a privileged position to the “great powers””.⁷² A few days before the ICAO Assembly held its triennial regular session, Canada and the Republic of Korea requested the Council to have an Extraordinary Session on 15-16 September 1983.⁷³ It was agreed that this session took

⁶⁸ UN, “United Nations Security Council Considerations”, *supra* note 65 at 1138. Australia, Belgium, Canada, Colombia, Fiji, France, Germany, Federal Republic of, Italy, Japan, Malaysia, Netherlands, New Zealand, Paraguay, Philippines, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America, *Revised Draft Resolution*, UNSC, UN Doc. S/15966/Rev.1, 12 September 1983, online: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N83/228/39/PDF/N8322839.pdf?OpenElement>. Reproduced in UN, “United Nations Security Council Considerations”, *supra* note 65 at 1148.

⁶⁹ UN, “United Nations Security Council Considerations”, *ibid.* at 1138-1148. *Charter of United Nations*, 26 June 1945, Can. T.S. No. 7, s. 23 and 27. See M. Milde, “KE 007 - “Final” Truth and Consequences”, *supra* note 60.

⁷⁰ B. Cheng, *supra* note 60 at 285.

⁷¹ *Ibid.*

⁷² M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE 007 – Ten Years Later)”, *supra* note 57 at 180.

⁷³ ICAO, Council Resolution, C/1077, ICAO Doc. 9416, C-Min. Extraordinary (1983).

place as “[n]ever before in the history of ICAO did the Council engage in an acrimonious discussion showing such a profound shock, revulsion and indignation caused by the conduct of a member State”,⁷⁴ referring to the conduct of the Soviet Union. Going further than the draft resolution presented at the UN Security Council, the resolution adopted by the ICAO Council, but opposed by the Soviet Union, deplored the shooting down of the commercial aircraft, and underlined the incompatibility of the use of armed force against civil aircraft with the norms governing international behaviour and elementary consideration of humanity, and also with the rules of the Chicago Convention and the SARPs in its annexes.⁷⁵ Finally, the resolution underlined the legal consequences for the Soviet Union that must be interpreted as “the State responsibility for an unlawful act and liability to compensate the damage caused”.⁷⁶ By imposing legal consequences, the Council expressed a strong legal censure of Soviet actions. Since the Soviet Union refused to abide by its legal obligation to hold the investigation,⁷⁷ the resolution instructed the ICAO Secretary General to institute an investigation into the facts and the

⁷⁴ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE 007 – Ten Years Later)”, *supra* note 57 at 180.

⁷⁵ ICAO, “International Civil Aviation Organization Considerations” (1983) 22 I.L.M 1149-1150.

⁷⁶ M. Milde, “KE 007 - "Final" Truth and Consequences”, *supra* note 60.

⁷⁷ ICAO, “Preliminary information” presented by the USSR, ICAO Doc. C-WP/7764, Attachment, Appendix F. Chicago Convention, *supra* note 66, s. 26. According to that Article, it is the legal duty of the State where the accident took place to institute an investigation in accordance with ICAO Standards, unless the State had filed a difference under article 38 of the Chicago Convention. It is also the legal duty of that State to give an opportunity to the State where the aircraft is registered to appoint observers to be present at the inquiry. The standards related to the investigation are set in ICAO, *International Standards and Recommended Practices – Annex 13 to the Convention on International Civil Aviation: Aircraft Accident and Incident Investigation*, 8th ed. (Montreal: ICAO, 1994). That Annex aims at preventing accidents and incidents by determination of the circumstances and causes in order to preserve life and avoid accidents in the future, and not at searching for liability or blame of actors. Peter Martin, “Aircraft Accident Investigation and Airworthiness – A Practical Example of the Interaction of Two Disciplines with some Reflections on Possible Legal Consequences” (1994) 19:3 Air & Space L. 158. The States that can participate to the investigation can be the State of registry (standard 5.19), the State of operator (Standard 5.19), the State of manufacturer (standard 5.22), any State providing on request information, facilities or experts (standard 5.24.1), and any State having a special interest in an accident by virtue of fatalities to its citizens upon making a request (recommended practice 5.27). The Soviet Union did not file any difference concerning Article 26 of the Convention and, moreover, it refused to organise the investigation.

technical aspects concerning the flight and the destruction of the aircraft.⁷⁸ Finally, it urged all parties to fully cooperate in the investigation.⁷⁹

4. ICAO First Investigation 1983-1984: the Interim Report

Under the authority of the Council, the ICAO Secretary General assigned a team of ICAO civil servants of disinterested nationalities to carry out the first investigation.⁸⁰ The Soviet Union did not assist effectively in the process and limited the ICAO team's access to the evidence on Soviet territory and its territorial waters.⁸¹ It only shared limited information from the results of its own investigation.⁸² On 13 December 1983, the Council made its report public.⁸³ It was viewed as a technical report without any focus on the substance of the investigation.⁸⁴ It was difficult to reach any concrete conclusions as the only solid evidence of the cause of the deviation of the flight from its flight path was still in the possession of the Soviet Union.⁸⁵ During a meeting on 6 March 1984 of its

⁷⁸ M. Milde, "Legal Aspects of Aircraft Accident Investigation (KE 007 – Ten Years Later)", *supra* note 57 at 180.

⁷⁹ ICAO, ICAO, Council Resolution, C/1077, *supra* note 73.

⁸⁰ M. Milde, "Legal Aspects of Aircraft Accident Investigation (KE 007 – Ten Years Later)", *supra* note 57 at 182. As the author explains "in spite of the concept of independence and impartiality to which all international civil servants are sworn, the Secretary General made sure that the members of the team were of "neutral" nationalities and eliminated from consideration experts whose States were directly involved in the matter or vocally censored the USSR action."

⁸¹ *Ibid.*

⁸² M. Kido, *supra* note 61 at 1053.

⁸³ ICAO, "Destruction of Korean Air Lines Boeing 747 over Sea of Japan, 31 August 1983: Report of ICAO Fact-Finding Investigation (1983)", ICAO Working Paper, ICAO Doc. C-WP/7764, Attachment, in part in (1984) 23 I. L.M. 864. This report was named the "Lambert Report" after the Secretary General of ICAO at the time (1976-1988), Yves Lambert. See ICAO, "Former Secretaries General: Yves Lambert - Biography", online: ICAO <http://www.icao.int/icao/en/biog/lamber.htm>.

⁸⁴ M. Milde, "KE 007 - "Final" Truth and Consequences, *supra* note 60 at 359.

⁸⁵ M. Milde, "Legal Aspects of Aircraft Accident Investigation (KE 007 – Ten Years Later)", *supra* note 57 at 182. The author summarizes the conclusions of the report. First, the technical report excluded that there was "premeditated deviation (of the civil aircraft) from the flight plan route for intelligence gathering purposes". Secondly, there was no evidence that the crew was aware of any deviation. Thirdly, the report

111th Session, the Council adopted a resolution on the findings of the investigation.⁸⁶ Interestingly, this resolution was “condemnatory, principled, hard-hitting and straightforward”.⁸⁷ “In this resolution, ICAO achieved much for the future safety of international civil aviation, as well as for the principles of international law and morality”.⁸⁸ The Council reached the legal conclusion that the Soviet Union had violated international law. For this reason, it had to face international responsibility.⁸⁹ Specifically, it concluded that the Soviet Union’s conduct violated the norms governing international behaviour, elementary considerations of humanity, the rules in the Chicago Convention, and the SARPs in its Annexes.⁹⁰

The significant work of ICAO following the Council Resolution of 6 March 1984 contributed to the development and codification of more international legal regulations of air safety. First and foremost, the ICAO Assembly adopted, during its 25th Extraordinary

pointed out that the Soviet Union thought the aircraft was an intelligence one, and made no effort to identify it via in-flight visual observation. It also concluded that the accident was caused by the hit of at least one of the two air-to-air missiles fired from one of the USSR interceptor aircraft following a directive from the pilot's ground command and control unit to end the flight of KE 007. It mentioned that the deviation of the civil aircraft from its plan route was of about 500 kilometres. Finally, it explained that with the absence of the DFDR and the CRV of the civil aircraft, there was insufficient information to support any of the two theories on the cause of the deviation. The report was sent to ICAO’s Air Navigation Commission (ANC), which found it difficult to “validate and to endorse” one of the two theories. M. Milde, “KE 007 - "Final" Truth and Consequences, *supra* note 60. For an explanation of the two theories, the “Heading Mode” theory and the “Mis-input” theory, see M. Kido, *supra* note 61 at 1054-1054.

⁸⁶ ICAO, Council Meeting, 111th session, 6th Mtg., C-Min.111/6.

⁸⁷ M. Milde, “KE 007 - "Final" Truth and Consequences”, *supra* note 60 at 360.

⁸⁸ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE 007 – Ten Years Later)”, *supra* note 57 at 183.

⁸⁹ M. Milde, “KE 007 - "Final" Truth and Consequences”, *supra* note 60 at 360.

⁹⁰ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE 007 – Ten Years Later)”, *ibid.* at 183. The first part of the resolution summarizes the investigation report. The second part of the resolution underlines that the use of force by the Soviet Union was considered as a violation of international law and comes with generally recognized consequences. The resolution concludes that it is also a great threat to the safety of international civil aviation and is incompatible with the Chicago Convention and with elementary consideration of humanity. The ICAO Council condemned the use of force leading to the destruction of the KE 007 and to the tragic loss of 269 lives. Finally, it insisted that USSR failed to cooperate to the investigation. The Council deplored it as USSR refuses the visit of the investigation team and to provide information relevant to the investigation.

Session on 10 May 1984, by “consensus” without a formal vote,⁹¹ an amendment to the Chicago Convention in order to add the Article 3bis.⁹² This Article declares that member States recognize that they must refrain from using armed force against civilian aircraft in flight and, if interception of the civilian aircraft is considered necessary, the lives of the passengers and the safety of the aircraft must not be compromised. “The new Article 3bis restates the rule of customary international law concerning the prohibition of the use of weapons against civil aircraft in flight”.⁹³ Secondly, another legal development, as important but not as manifest as the Assembly Resolution, was the amendment of Annex 2 to the Chicago Convention. During its 117th Session on 10 March 1986, the Council decided in favour of this amendment⁹⁴ because it provides, for the first time⁹⁵, a

⁹¹ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE007 – Ten Years Later)”, *ibid.* at 184. See also M. Milde, “KE 007 - "Final" Truth and Consequences”, *supra* note 60 at 361.

⁹² ICAO, Council Meeting, 117th session, 2nd Mtg., C-Min. 117/2 (1986). *Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 3bis]*, 10 May 1984, ICAO Doc. 9436, incorporated in Doc. 7300/9 (entered into force on 1 October 1998, ratified by the Soviet Union on 24 August 1990), online: ICAO <http://www.icao.int/icaonet/dcs/7300.html> [Article 3 bis]. Chicago Convention, *supra* note 34, s. 3bis. See M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE 007 – Ten Years Later)”, *ibid.* at 183. For analyse of the scope of Article 3bis, see B. Cheng, *supra* note 60 at 290. In Russia, the Federal Law “On Counteraction of Terrorism” of 6 March 2006 allows to shoot down aircraft used by terrorists as flying weapons. After the Russian Military has repeatedly requested it, this law was finally adopted in order to prevent attacks with hijacked airplanes similar to the attacks on 11 September 2001 in the United States.

⁹³ M. Milde, “Chicago Convention at Sixty – Stagnation or Renaissance?” in M. Milde and P. S. Dempsey, *Public International Air Law- Cases and Materials* (Montreal: McGill University, 2005) at 101. Until now, 140 States have ratified the Article 3bis. Then, 50 still did not accept the “codified rule prohibiting the use of weapon against civil aircraft in flight, although some of them may feel bound by such prohibition on the basis on customary international law”. *Ibid.* at 102. The United States is among the States, which have not ratified the Article 3bis, but it has to be noted that their “rules of engagements” are known to be among the strictest one worldwide. *Ibid.* at 102, footnote 35. For the list of member States who have ratified the Article 3bis: ICAO, *Current List of Parties to the Multilateral Air Law Treaties –Protocol relating to an Amendment to the Convention on International Civil Aviation: Article 3bis* (Montreal: ICAO, 2010), online: ICAO http://www2.icao.int/en/leb/List%20of%20Parties/3bis_en.pdf. For a summary of the adoption process of Article 3bis, see M. Kido, *supra* note 61 at 1063-1067.

⁹⁴ ICAO, Council Meeting, 117th session, *supra* note 92. The Amendment 27 to International Standards – Rules of the Air (Annex 2 to the Convention on International Civil Aviation) was adopted after a marathon of deliberations in the Air Navigation Commission and the Council and a two third majority was just reached in conformity with article 90 of the Convention. ICAO, *International Standards and Recommended Practices - Annex 2 to the Convention on International Civil Aviation: Rules of the Air*, 10th ed., ICAO Doc. AN 2 (ICAO: Montreal, 2005). See specifically M. Milde, “Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2)” 1986 11 Ann. Air & Sp. L. 105.

comprehensive set of Standards relating to the interception of civil aircraft and, as well, of “Special Recommendations”.⁹⁶ Even if the latter are not legally binding, the Council invited member States to notify ICAO of any departure from them.⁹⁷ This way, “a large degree of uniformity has been introduced for interception procedures”⁹⁸ and thus, “the safety of international civil aviation will be enhanced.”⁹⁹

5. ICAO Second Investigation 1992-1993: the Final Report

Almost 10 years after the catastrophe of flight KE 007, international actions were taken in order to unveil the truth of the tragedy and the related pending problems. On 21 December 1991, the world witnessed the spectacular collapse of the Soviet Union with the dismantling of the Berlin Wall. This meant the end of almost seventy years of Communist rule and the transformation of the bipolar world – “Western” capitalist and democratic States under the leadership of the United States and the “Eastern” Communist States under the leadership of the Soviet Union - to a multipolar one.¹⁰⁰ The end of the

⁹⁵ M. Milde, “Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2)”, *ibid.* at 129. As the author notes this adopted Amendment is “a landmark of the quasi-legislative work of the Council of ICAO”.

⁹⁶ For the guidance material on the subject, see ICAO, *Manual concerning Interception of Civil Aircraft*, 2nd ed., ICAO Doc. 9433 (Montreal: ICAO, 1990).

⁹⁷ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE007 – Ten Years Later)”, *supra* note 57 at 184.

⁹⁸ M. Milde, “Interception of Civil Aircraft V. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2)”, *supra* note 94 at 129.

⁹⁹ *Ibid.*

¹⁰⁰ With the exception of the Baltic States, the rest of the former Soviet Republics immediately joined Ukraine and Russia in creating the Community of Independent States (CIS) in order to coordinate their diplomacy and military policies and to create a common market. The Baltic States were already out of the Russian influence. The Soviet collapse ended one of the last colonial empires in the world, which was installed by the czars of Russia and perpetuated by the communist regime. Nevertheless, the Soviet Union presented itself as the “champion of anticolonialism and of national liberation”. See M. Milde, “The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later?”, *supra* note 43 at 404.

Cold War brought “an era of openness, confidence and cooperation as to the safety and the security of States”.¹⁰¹ This was an opportune time for the Russian Federation, successor of the Soviet Union, to make efforts to attempt to solve pending issues with the rest of the world. And one such issue was the investigation of the tragedy of flight KE 007.

In October 1992, while visiting the Republic of Korea, President Boris Yeltsin handed over to the Korean authorities the presumed originals of the Digital Flight Data Recorder and Cockpit Voice Recorder.¹⁰² This gesture was perceived as one of openness and reconciliation. On this occasion, the Russian President termed the incident "the criminal act of a criminal regime".¹⁰³ Later, it was found that the given evidence was in reality a copy of the CRV tape and the empty containers of the CRV and the DFDR.¹⁰⁴ In November 1992, the Russian Federation, the United States, Japan and the Republic of Korea held a closed meeting in Moscow and they came to the decision to “jointly request ICAO to complete its 1983-1984 investigation – this time with full support, co-operation and full evidence to be made public by all parties without any restriction.”¹⁰⁵ During the 137th session of the ICAO Council on 14 December 1992, the four States at the Moscow meeting submitted their individual requests¹⁰⁶ and, four days later, the Council decided in

¹⁰¹ M. Milde, “Some questions marks marks about the Price of “Russian Air””, *supra* note 17 at 152.

¹⁰² M. Milde, “KE 007 - "Final" Truth and Consequences”, *supra* note 60 at 361. For the details about Cockpit Voice Recorder and Digital Flight Data Recorder, see *supra* note 60 [CVR and DFDR].

¹⁰³ Margaret Shapiro, *infra* note 129.

¹⁰⁴ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE 007 – Ten Years Later)”, *supra* note 57 at 184.

¹⁰⁵ *Ibid.*

¹⁰⁶ ICAO, Council Working Papers, 137th session, ICAO doc. C-WP/9684 and C-WP/9685 (1992). ICAO, Memorandum of the Council President, AK/333, 14 December 1992.

favour of the completion of the 1983 investigation.¹⁰⁷ This was something that should have been the legal duty of the Russian Federation to investigate.¹⁰⁸ However, it did not express any willingness to carry out the process of investigation and, moreover, the 1993 ICAO Report did not contain any reference to this legal obligation of the Russian Federation.¹⁰⁹ In January 1993, Russia released, directly to the ICAO regional office in Paris, the original CRV and DFDR¹¹⁰ and the vast amount of the transcripts of the transmissions between the Soviet air defence centres and their interceptor military aircraft.¹¹¹

Completing the 1984 interim investigation report, this second report¹¹² was also disappointing as it was again highly technical. Also, it did not reveal the final truth and final legal consequences regarding the responsibility and the liability of the accident.¹¹³ Besides releasing substantial additional data on the tragedy and revealing that the aircraft wreckage was “found already in September 1983 by the Soviet divers in international waters” and supporting the “Heading Mode”¹¹⁴ theory confirming that the deviation was

¹⁰⁷ ICAO, Council Meeting, 137th session, ICAO doc. C-Min.137/15 (1992).

¹⁰⁸ M. Milde, “KE 007 - "Final" Truth and Consequences”, *supra* note 60 at 364.

¹⁰⁹ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE007 – Ten Years Later)”, *supra* note 57 at 181.

¹¹⁰ M. Kido, *supra* note 61 at 1056.

¹¹¹ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE007 – Ten Years Later)”, *supra* note 57 at 185.

¹¹² ICAO, *Destruction of the Korean Airlines Boeing 747 on 31 August 1983-Report of the Completion of the ICAO Fact-Finding Investigation Regarding the Shooting Down of (Flight KE 007)*, ICAO, Council Working Paper, C-WP/9781, June 1993; Appendix thereto; Addendum No. 1 thereto 8 June 1993; Information Paper No. 1 related to C-WP9781; Memorandum of the Secretary General, SG 1352/93 (Revised), 14 June 1993, attached Russian Federation, Information Paper (Revised) to C-WP/9781. ICAO News Release PIO 8/93, Revised, 16 June 1993.

¹¹³ M. Milde, KE 007 - "Final" Truth and Consequences”, *supra* note 60 at 363-365.

¹¹⁴ For an explanation of the theory of the “Heading Mode”, see *supra* note 85.

caused by a constant magnitude heading which the crew was not aware of¹¹⁵, the report had only one legal conclusion¹¹⁶: the Soviet Union did not comply with the SARPs on the interception of a civil aircraft before deciding to attack flight KE 007.¹¹⁷ However, it mentioned that the Soviet Union did not make any exhaustive efforts to identify the aircraft. During its 139th Session on 14 June 1993,¹¹⁸ the Council adopted a resolution on this second investigation report. Compared to the resolution on the 1984 investigation report, this resolution only recalled the unusually strong 1984 resolution without repeating or endorsing its principles.¹¹⁹ Furthermore, it failed to formally support the findings of the 1993 report.¹²⁰ The resolution did not address the question of international responsibility for an unlawful act and did not formulate policy guidance regarding the consequences of the crash.¹²¹ Nevertheless, it appealed urgently to all contracting States to ratify the Protocol introducing article 3*bis* in the Chicago Convention, which the Russian Federation has since ratified.¹²² Overall, the ICAO investigation on flight KE 007 did not officially state the true “proxima causa” of the tragedy, that is the missile intentionally fired by the Soviets with the objective of destroying the airliner.¹²³

¹¹⁵ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE007 – Ten Years Later)”, *supra* note 57 at 185. See also M. Kido, *supra* note 61 at 1057.

¹¹⁶ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE007 – Ten Years Later)”, *ibid.* at 187.

¹¹⁷ M. Milde, “KE 007 - "Final" Truth and Consequences”, *supra* note 60 at 360.

¹¹⁸ ICAO, Council Resolution, 139th session, 7th mtg. (1993).

¹¹⁹ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE007 – Ten Years Later)”, *supra* note 57 at 179 and 188. See ICAO Council, Minutes, 111th session, *supra* note. See also M. Milde, “KE 007 - "Final" Truth and Consequences”, *supra* note 60 at 365.

¹²⁰ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE007 – Ten Years Later)”, *supra* note 57 at 185 and 188.

¹²¹ *Ibid.*

¹²² ICAO, Council Resolution, 139th session, *supra* note 118, clause 5. For the Article 3*bis* of the Chicago Convention, see explanation *infra* notes 92-93.

¹²³ M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE007 – Ten Years Later)”, *supra* note 57 at 188.

Some authors have expressed that three facts are undeniable: the carelessness or negligence of the Korean aircraft crew is one of the major factors causing the deviation; the Soviet military use of force against flight KE 007 without any warning about their intrusion is an abuse of self-defence; and the “proximity of an RC-135 (a United States intelligence aircraft) and flight KE 007 northeast of Kamchatka Peninsula resulted in confusion and the assumption by the U.S.S.R. that the aircraft was an RC-135.”¹²⁴ As it was the end of the Cold War and the interested parties in this incident – the Soviet Union, the United States and Japan¹²⁵ – wished to “avoid mutual fault, and building upon the new peaceful relation among them”,¹²⁶ the final investigation report was rapidly drafted. The political accommodation “based on national interests of these States led to the termination of the tragedy without clearing the truth of the incident”.¹²⁷ This international compromise did not advance the development of the principles of law and justice and the report achieved nothing for the 269 victims and their families.¹²⁸

On the 10th anniversary of the tragedy of flight KE 007, the Russian Government purportedly issued its own report on the investigation, reaching two conclusions.¹²⁹ The

¹²⁴ M. Kido, *supra* note 61 at 1059-1060. The ICAO investigation report of 1993 notes the proximity of the RC-135 and flight KE 007 near the Soviet airspace. See ICAO, *Destruction of the Korean Airlines Boeing 747 on 31 August 1983-Report of the Completion of the ICAO Fact-Finding Investigation Regarding the Shooting Down of (Flight KE 007)*, ICAO, *supra* note 112 at 60, conclusion 3.23. The American RC-135 intelligence aircraft routinely operated in the area. See Major J. T. Phelps II, *supra* note 63 at 296.

¹²⁵ On 29 July 1985, these three States signed a “Memorandum of Understanding Concerning Air Traffic Control” (1986) 25 I.L.M. 74. After they hold three discussions on the enhancement of aviation safety in the northern part of the Pacific Ocean, The Soviet Union, the United States and Japan adopted this memorandum so to prevent the repetition of an aerial incident similar to KE 007. See M. Kido, *supra* note 61 at 1062-1063.

¹²⁶ M. Kido, *ibid.* at 1060.

¹²⁷ *Ibid.*

¹²⁸ M. Milde, “KE 007 - “Final” Truth and Consequences”, *supra* note 60 at 366. See also M. Milde, “Legal Aspects of Aircraft Accident Investigation (KE 007 – Ten Years Later)”, *supra* note 57 at 188.

¹²⁹ Margaret Shapiro, “Russians Blame KAL Downing on Airliner’s Pilots” *Washington Post* (31 August 1993) A12.

first conclusion is that the crew of Korean Air Line made a multitude of mistakes and errors leading to the intrusion of the aircraft into Soviet airspace.¹³⁰ Their second conclusion is that Soviet authorities are not to blame for this tragedy.¹³¹ As the author M. Milde rightly notes, the Russian investigation obviously did not conform to Article 26 of the Chicago Convention and its Annex 13, since the Soviet Union, which is the State where the accident occurred, did not institute the investigation.¹³²

The international actions implemented after the tragedy of flight KE 007 are considered deficient for the safety of civil aviation.¹³³ Occasionally, the interest of an individual state concerning its territorial sovereignty is in opposition to public interest in international aviation safety. In spite of the reality of international politics, the international community has the obligation to look for the best ways to achieve uniformity in the area of safety of international civil aviation, such as the Universal Safety Oversight Audit Programme managed by ICAO. The development of this programme will show the importance that the ICAO member States have progressively accorded to it throughout the last two decades, making it the international reference mechanism producing a global image on the level of aviation safety compliance of States.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² M. Milde, "KE 007 - "Final" Truth and Consequences", *supra* note 60 at 367.

¹³³ M. Kido, *supra* note 61 at 1070.

Chapter 1 – Required Uniformity in Aviation Safety and Necessary Transition from the Soviet to the Russian Aviation Safety

The positive evolution of civil aviation results from the global uniformity in regulations, standards and procedures related to air navigation.¹³⁴ Uniformity in international air law is essential to ensure global aviation safety, and thus can be achieved with the important work of ICAO and the member States' respect of their international obligations. The safety of flight has mainly been promoted through an extensive collection of technical standards and recommended practices, commonly known as "SARPs". The latter are very effective and can ensure the safe, efficient and orderly evolution of international civil aviation in the future by following "the four 'C's' of aviation summarized by the ICAO: cooperation, consensus, compliance and commitment."¹³⁵ This refers to "cooperation in the formulation of SARPs, consensus in their approval, compliance in their application, and commitment of adherence to this [on-going] process."¹³⁶ While cooperation and consensus fall within the mandate of ICAO, compliance and commitment lie in the mandate of individual member States. Both mandates need to be fulfilled in order to achieve uniformity.

¹³⁴ M. Milde, "Enforcement of Aviation Safety Standards – Problems of Safety Oversight" (1996) 45:1 Z.L.W. 4.

¹³⁵ ICAO, *Making an ICAO Standard – Origin of Proposals for SARPs*, *infra* note 143.

¹³⁶ *Ibid.*

A. The way To Ensure Uniformity In Aviation Safety

To make an international standard or a recommended practice in international civil aviation law, essential actions are required from ICAO and from the members States. On the one hand, the 190 member States of ICAO must cooperate to formulate and approve the SARPs. On the other hand, individual member States must make their national laws comply with the SARPs and engage in following the continuous process of developing the SARPs. Finally, ICAO has implemented a mandatory international safety oversight audit programme to verify the level of compliance of member States.

1. The Mandate of ICAO

To begin with ICAO, the branch responsible for ensuring the safe, efficient and orderly evolution of international civil aviation is its Council, which has the quasi-legislative power to adopt SARPs in the form of Annexes to the Chicago Convention.¹³⁷ Since the creation of ICAO in 1947, the Council adopted 18 Annexes to the Convention.¹³⁸ “Though designated as Annexes for convenience, the SARPs do not actually become part of the Convention”.¹³⁹ They do not possess “the same legally binding force as the articles of the main body of the Convention”.¹⁴⁰ This could be

¹³⁷ *Convention on International Civil Aviation*, *supra* note 34, s. 37 paragraph 2. See also P.S. Dempsey, *Public International Air Law*, *infra* note 139 at 69-70.

¹³⁸ See for a summary of each of the 18 annexes, ICAO, *The Convention on International Civil Aviation: Annexes 1 to 18*, online: ICAO http://www.icao.int/icaonet/anx/info/annexes_booklet_en.pdf.

¹³⁹ Paul S. Dempsey, *Public International Air Law* (Montreal: Institute of Air and Space Law, McGill University, 2008) at 75. *Convention on International Civil Aviation*, *supra* note 34, s. 54 (l).

¹⁴⁰ L. Weber, *International Civil Aviation Organization: An Introduction*, *supra* note 49 at 34.

explained by the principle that SARPs do not require any ratification and that they are considered more as “technical international legislation”.¹⁴¹ Then, the ICAO standards are considered as “soft law in theory and are not equal to the legal force of the Convention itself.”¹⁴² Thus, the question arises, what exactly are “Standards” and a “Recommended Practices” and what legal effect do they have?

A Standard is defined as any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as *necessary* for the safety or regularity of international air navigation and to which Contracting States will *conform* in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is *compulsory* under Article 38 of the Convention.¹⁴³

A Recommended Practice is any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as *desirable* in the interest of safety, regularity or efficiency of international air navigation, and to which Contracting States will *endeavour* [sic] *to conform* in accordance with the Convention. States are *invited* to inform the Council of non-compliance.¹⁴⁴

¹⁴¹ *Ibid.*

¹⁴² M. Milde, “Enforcement of Aviation Safety Standards – Problems of Safety Audits?” (2000), M. Milde and P. S. Dempsey, *Public International Air Law- Cases and Materials*, *infra* note 57 at 163.

¹⁴³ This definition is not in the Chicago Convention. Initially, it was adopted at the first ICAO Assembly in 1947. ICAO, *Definition of International Standards and Recommended Practices*, Res. A1-31, ICAO Assembly, 1st Sess., Doc. 4411 (1944), online: ICAO http://www.icao.int/icao/en/assembl/a01/wp/p/A1_p45.djvu. The new definition is taken in the sense of Articles 37, 38 and 54 of the Chicago Convention. See ICAO, *Consolidated Statement of Continuing Policies and Associated Practices Related to Air Navigation*, Res. A29-7, ICAO Assembly, 29th Sess., Doc. 9600, Appendix A, (1992), online: ICAO http://www.icao.int/icao/en/assembl/a29/docs/a29_res01.djvu. See L. Weber, *International Civil Aviation Organization: An Introduction*, *supra* note 49 at 36. See also ICAO, *Making an ICAO Standard* (Montreal: ICAO, 2004), online: ICAO <http://www.icao.int/icao/en/anb/mais/> [emphasis added].

¹⁴⁴ ICAO, *Definition of International Standards and Recommended Practices*, *ibid.* This definition is taken in the sense of Articles 37 and 54 of the Chicago Convention. See L. Weber, *ibid.* See ICAO, *Making an ICAO Standard*, *ibid.* [Emphasis added].

In summary, the difference between ICAO Standards and Recommended Practices is that “standards are binding, at least in the absence of a notification of the Council of a member State's inability to comply”¹⁴⁵ and “[r]ecommended practices are viewed as merely desirable; member States need not notify the Council of their intent to comply, although they are so encouraged”.¹⁴⁶ The SARPs regulate all operational and technical aspects of the international civil aviation, “such as safety, personnel licensing, operation of aircraft, aerodromes, air traffic services, accident investigation and the environment. Without SARPs, our aviation system would be at best chaotic and at worst unsafe.”¹⁴⁷

However, how does ICAO develop SARPs? Since a big majority of annexes – sixteen out of eighteen ICAO Annexes – concern technical matters, the Air Navigation Commission – which is under the umbrella of the ICAO Council and assisted by the Air Navigation Bureau of the ICAO Secretariat – prepares and reviews the proposed technical SARPs.¹⁴⁸ Afterwards, the member States examine the proposed SARPs and they can provide comments and make consultations, if necessary.¹⁴⁹ Then, the Council can

¹⁴⁵ P. S. Dempsey, “The Chicago Convention as the Constitution of an International (Civil Aviation) Organisation” (Presentation during the Course on Public International Air Law, Fall 2008, online: McGill University <http://www.mcgill.ca/files/iasl/ASPL633-ICAO.pdf>). The ICAO has marked the difference between the international standards and recommended practices by a respective print image in the text of Annexes. While the international standards, constituting most of the text of the 18 annexes, are “shown as consecutive paragraphs in normal print, recommended practices are usually designated as such and are printed in italics. See L. Weber, *ibid.* at 35, footnote 137.

¹⁴⁶ P. S. Dempsey, *Ibid.*

¹⁴⁷ ICAO, *Making an ICAO Standard*, *supra* note 143.

¹⁴⁸ *Convention on International Civil Aviation*, *supra* note 34, s. 57 paragraph a. For a description of the preparation and review of draft SARPs, see ICAO, *Making an ICAO Standard: Development of SARPs and Review of Draft SARPs – Adoption procedure*, *supra* note 143, online: ICAO <http://www.icao.int/icao/en/anb/images/adoptionannex.jpg>.

¹⁴⁹ ICAO, *Making an ICAO Standard: Review of Draft SARPs*, *supra* note 143.

approve new SARPs with a two-thirds majority.¹⁵⁰ Within two weeks from the date of the adoption of the SARPs, the “Green Edition” is circulated to member States, which have four months before the Effective Date to register their disapproval.¹⁵¹ This way, the proposed SARPs can be vetoed by a majority of member States. However this situation has never occurred.¹⁵² Nevertheless, the member States can also opt out by filing their differences and immediately notifying ICAO.¹⁵³ Subsequent to the Effective Date, a “Blue Edition” of the SARPs is published. The member States are required to comply, except to the extent of the difference they filed.¹⁵⁴ In the end, the new or amended SARPs are considered as part of the related Annex to the Chicago Convention.¹⁵⁵ The overall process of making SARPs can take approximately two years from the review phase to the applicability date.¹⁵⁶ This may seem like a long and cumbersome process. However, considering the multiple consultations and the broad implication of States and international organizations in reaching a consensus, the process is successful in ensuring the great development of international aviation rules. Investigations of an aircraft crash, such as the tragedy of flight KE 007,¹⁵⁷ often rely on the SARPs. Even countries outside of the ICAO¹⁵⁸ rely on them. In practice, ICAO has successfully promulgated the SARPs since 1947, thus fulfilling its part of the mandate. If necessary, ICAO can also amend the

¹⁵⁰ *Convention on International Civil Aviation*, *supra* note 34, s. 90.

¹⁵¹ ICAO, *Making an ICAO Standard: Adoption/Publication of Amend Annexes*, *supra* note 143.

¹⁵² P. S. Dempsey, “The Chicago Convention as the Constitution of an International (Civil Aviation) Organisation”, *supra* note 145.

¹⁵³ *Convention on International Civil Aviation*, *supra* note 34, s. 38.

¹⁵⁴ ICAO, *Making an ICAO Standard: Adoption/Publication of Amend Annexes*, *supra* note 143.

¹⁵⁵ *Ibid.*

¹⁵⁶ For a detailed table on the process and timeline to adopt SARPs, see ICAO, *Making an ICAO Standard: Adoption/Publication of Amend Annexes - Timeline*, *supra* note 143, online: ICAO <http://www.icao.int/icao/en/anb/images/timeline.jpg>.

¹⁵⁷ For a description and analysis of the crash of KE 007, see section B of the Introduction.

¹⁵⁸ Miranda, Anger, “International Aviation Safety: An Examination of the U.S., EU and the Developing World” (2007) 72 J. Air L. & Com. 141 at 159. Per example, Taiwan is not a member State of ICAO but it does rely of SARPs. See “Taiwan Safety Council Report on SIA Crash Draws Criticism” (2002) Aviation Daily 5.

SARPs and procedures related to the safety, regularity and efficiency of air navigation, as they must be kept up-to-date according to the relevant amendment procedures.¹⁵⁹

2. The Mandate of Individual States

The second element needed to reach uniformity in international air law is for the member States to comply with the SARPs in their domestic legal systems and to continuously engage in their development. Each member State of ICAO has the responsibility that their own regulations follow the SARPs to the maximum practicable extent.¹⁶⁰ Indeed, all member States are obliged to collaborate in securing the highest practicable degree of uniformity in their domestic law, regulations and procedures with SARPs.¹⁶¹ Still, as mentioned above in the SARPs adoption process, if a State finds it impracticable to comply with international standards and procedures, it must notify ICAO of the differences between its own practices and the international standards already adopted.¹⁶² It is important to note that the notification obligation is not mandatory when recommended practices are concerned.¹⁶³ Nonetheless, the member States could always inform the Council of their non-observance. If a State chooses not to notify, “[t]here is not explicit sanction in the Convention (...) [b]ut [when] a State fails to comply with

¹⁵⁹ *Convention on International Civil Aviation*, *supra* note 3434, s. 37 paragraph 2, 54(m) and 90.

¹⁶⁰ *Convention on International Civil Aviation*, *ibid.*, s. 12. See P. S. Dempsey, “The Chicago Convention as the Constitution of an International (Civil Aviation) Organisation”, *supra* note 145.

¹⁶¹ *Convention on International Civil Aviation*, *supra* note 34, s. 37 paragraph 1.

¹⁶² *Convention on International Civil Aviation*, *ibid.*, s. 38. See L. Weber, *International Civil Aviation Organization: An Introduction*, *supra* note 49 at 35, footnote 137.

¹⁶³ See in fine of the definition of a recommended practice in ICAO, *Definition of International Standards and Recommended Practices*, *supra* note 143.

SARPs (...)there are implicit sanctions that are potentially severe.”¹⁶⁴ A non-compliant State can have its certificates and licenses of airman, aircraft, air carrier, and/or airport dishonoured by other States. Then, this non-compliance of the State may lead to the termination of “their operation to, from, or through foreign territories, isolating it from the global economy.”¹⁶⁵

In reality, many member States did not comply with their obligations to fulfill their mandate for various reasons. Some States were too poor to establish effective air navigation and safety agencies.¹⁶⁶ And even if the agencies existed, some States would not have the funds to operate them efficiently in order to fulfill their mandate. Others had not promulgated laws and regulations to respect their obligations under the SARPs.¹⁶⁷ And in some States, civil aviation did not receive proper attention from government leaders, who accorded more importance to other ministries and agencies.¹⁶⁸ In those cases, if the member States did not file a difference regarding their situation compared to the SARPs, the ICAO could not have “any clear and objective information on the degree of implementation of the technical Annexes in the field. This situation presented a major safety issue”.¹⁶⁹ On the other hand, ICAO did not halt the misconduct of these States even if the non-compliance was brought to its attention.¹⁷⁰ For many years, the objective of uniformity in international air law was impeded. “It was not until the last decade of the

¹⁶⁴ Article 38 of the Convention only refers to international standards and procedures, and does not mention recommended practices regarding the obligation to immediately notify the Council of their difference. P. S. Dempsey, *Public International Air Law*, *supra* note 139 at 79.

¹⁶⁵ P. S. Dempsey, *ibid.* *Conventions on International Civil Aviation*, *supra* note 34, s. 33.

¹⁶⁶ *Ibid.* at 83-84.

¹⁶⁷ *Ibid.* at 84.

¹⁶⁸ *Ibid.*

¹⁶⁹ L. Weber, *International Civil Aviation Organization: An Introduction*, *supra* note 49 at 90.

¹⁷⁰ M. Milde, “Enforcement of Aviation Safety Standards – Problem of Safety Oversight”, *supra* note 134 at 8 and 15.

20th Century that a major problem of actual implementation of the SARPs was noted and raised serious concerns.”¹⁷¹ This is one lacuna in the Chicago Convention and no effort has been made to procure a proper legal, constitutional and institutional basis for new fields of activity in aviation since 1944. At that point, it became obvious that this would have implications for global aviation safety. Hence, the need for some enforcement of the implementation of SARPs by means of international safety oversight audits also became evident. The resolutions of the ICAO Assembly often recalled the member States to act together in order to improve the oversight of aviation safety through an international audit of national safety oversight.¹⁷²

3. ICAO’s Safety Oversight Programme

In the last two decades, the ICAO and the member States collaborated to create standard-setting activities to verify the degree of adherence to international standards by member States. It created a monitoring audit programme to verify the compliance of States with the SARPs. At first, the programme was implemented based on requests by voluntary member States and, later, became mandatory in 1999. This was expanded in three consecutive phases, which will be described below.

¹⁷¹ M. Milde, “Chicago Convention at Sixty – Stagnation or Renaissance?”, *supra* note 93 at 106. For a summary of statistics of ICAO member States non-compliance, see M. Milde, “Enforcement of Aviation Safety Standards – Problems of Safety Oversight”, *ibid.* at 8.

¹⁷² ICAO, *Improvement of Safety Oversight*, Res. A29-13, *infra* note 173; ICAO, *Establishment of an ICAO Universal Safety Oversight Audit Programme*, *infra* note 183; ICAO, *Continuation and Expansion of the ICAO Universal Safety Oversight Audit Programme*, *infra* note 196; ICAO, *Resolving Deficiencies Identified by the Universal Safety Oversight Audit Programme, and Encouraging Quality Assurance for Technical Cooperation Projects*, *infra* note 196.

a) Safety Oversight Programme (1995-1998) – Voluntary Assessment Programme

As its first safety oversight programme, ICAO established a voluntary assessment programme in 1995. This programme consisted of an assessment conducted by ICAO, on a request by the member States of the national civil aviation regulation and oversight systems in accordance with SARPs contained in Annex 1, 6 and 8,¹⁷³ and, also, offering assistance to States failing to comply.¹⁷⁴ The latter was appreciated more by all member States than the “International Aviation Safety Assessment Program”, which is the unilateral American monitoring audit and sanctions system already established in 1991 and enhanced in 1994.¹⁷⁵ The programme was to some extent a response to the opposition or criticism of member States with regards to the American programme verifying the compliance of a foreign State with ICAO’s SARPs.¹⁷⁶ Many Latin American States, criticising the American process, perceived that the FAA was more indulgent with some

¹⁷³ ICAO, *Improvement of Safety Oversight*, Res. A29-13, ICAO Assembly, 29th Sess., Doc. 9602 (1992), online: ICAO <http://www.icao.int/icao/en/assembly/a29/index.html>. In 1992, the Assembly of ICAO adopted a resolution noting the concern that some of ICAO's contracting States might experience difficulties in carrying out their safety oversight obligations, reaffirmed that individual State's obligation for safety oversight is one of the tenets of the Chicago Convention, and called on States to provide financial and technical resources to enable other States to carry out their responsibilities for safety oversight of air carrier operations. See ICAO, *The Postal History of ICAO: The Universal Safety Oversight Audit Programme* (Montréal: ICAO, 2010), online: ICAO http://www.icao.int/icao/en/hist/stamps/the_universal_safety_oversight_audit_programme.htm and M. Milde, “Enforcement of Aviation Safety Standards – Problems of Safety Audits?” (2000), *supra* note 142 at 165. The audits were limited to Annex 1 on personnel licensing, Annex 6 on operation of aircraft and Annex 8 on airworthiness of aircraft as a beginning point of the international safety oversight. See ICAO, *The Convention on International Civil Aviation: Annexes 1 to 18*, *supra* note 138 and ICAO, *Report of the DGCA Conference on a Global Strategy for Safety Oversight*, *infra* note 184. See also ICAO, *Report to Council by the President of the Air Navigation Commission*, ICAO doc. C-WP/10898, 16 June 1998 at 2. For a summary of the guidelines for this safety oversight program, see M. Milde, “Enforcement of Aviation Safety Standards – Problems of Safety Oversight”, *supra* note 142 at 13-14.

¹⁷⁴ Jacques Ducrest, “Legislative and Quasi-Legislative Functions of ICAO: Towards Improved Efficiency” (1995) *Ann. Air & Sp. L.* 343 at 357-358.

¹⁷⁵ The United States Federal Aviation Administration (FAA) created this programme [*IASA*]. For an explanation of the IASA, see P. S. Dempsey, *Public International Air Law*, *supra* note 139 at 90-96. See also M. Milde, “Enforcement of Aviation Safety Standards – Problems of Safety Oversight”, *supra* note 142 at 10 and M. Milde, “Enforcement of Aviation Safety Standards – Problems of Safety Audits?” (2000), *supra* note 134 at 163-165.

¹⁷⁶ P. S. Dempsey, *Ibid.* at 102.

countries, such as Russia, than with them.¹⁷⁷ They thought the United States would be more flexible in their evaluation with Russia, even if it had important SARPs deficiencies; it was still a more politically significant State and a more important trading partner.¹⁷⁸ “The IASA program led to a growing list of nations asking ICAO to step in and assume these duties.”¹⁷⁹

During this first programme, operational from 1995 to 1998, member States put forward 88 requests and ICAO produced 67 assessments, which were not made public due to the strict principle of confidentiality.¹⁸⁰ Critics revealed that the voluntary and confidential nature of the programme deprived the system of transparency and credibility, and that programme under-funding was an obstacle in assisting States failing to comply with the SARPs. Without any constitutional basis in the Convention, the World Conference of Directors General of Civil Aviation “formulated a consensus to create within ICAO a “regular, mandatory, systematic and harmonized safety audits (..), which should include all contracting States””.¹⁸¹ Consequently, the voluntary assessment programme expanded into the Universal Safety Oversight Audit programme in 1999.¹⁸²

¹⁷⁷ P. S. Dempsey, *ibid.*

¹⁷⁸ Olga Barreto, “Safety Oversight: Federal Aviation Administration, International Civil Aviation Organisation and Central American Aviation Safety Agency” (2002) 67 J.Air L. & Com. 651 T 656.

¹⁷⁹ See P. S. Dempsey, *Public International Air Law*, *supra* note 139 at 102.

¹⁸⁰ ICAO, “Overview of the ICAO Universal Safety Oversight Audit Programme” (Presentation for the public, March 2010) at 13, online: ICAO <http://www2.icao.int/en/ssa/soa/usoap/Documents/USOAP-public.pdf>.

¹⁸¹ M. Milde, “Chicago Convention at Sixty – Stagnation or Renaissance?”, *supra* note 93 at 107.

¹⁸² P.S. Dempsey, *Public International Air Law*, *supra* note 139 at 103.

b) USOAP – First phase (1999-2001): Mandatory Audit Programme

In 1998, the ICAO Assembly adopted a resolution which formally established the “Universal Safety Oversight Audit Programme”, commonly known as the “USOAP”.¹⁸³ The resolution endorsed the consensus of the Directors General of Civil Aviation on the creation of this multilateral mandatory oversight system.¹⁸⁴ Constituting the initial phase of the mandatory ICAO safety oversight programme,¹⁸⁵ the USOAP was an answer, to some degree, to the criticism made by Professor Michael Milde¹⁸⁶ and other authors regarding “the lack of international enforcement or even a reference list of the actual implementation of the SARPs”.¹⁸⁷

Becoming operational on 1 January 1999, the following principles are included in the programme:

- [R]egular, mandatory, systematic and harmonized safety audits, which shall be carried out by ICAO;
- such programme shall apply to all contracting States;
- greater transparency and increased disclosure shall be implemented in the release of audit results; and
- the programme shall comprise a systematic reporting- and monitoring-mechanism on the implementation of safety-related standards and recommended practices.¹⁸⁸

¹⁸³ ICAO, *Establishment of an ICAO Universal Safety Oversight Audit Programme*, Res. A32-11, ICAO Assembly, 32nd Sess., Doc. 9730 (1998), online: ICAO <http://www.icao.int/icao/en/assembly/a32/resolutions.pdf>.

¹⁸⁴ ICAO, *Report of the DGCA Conference on a Global Strategy for Safety Oversight*, ICAO, 1997, Doc. 9707 [Directors General Conference].

¹⁸⁵ The author L. Weber describes the USOAP in three phases. See L. Weber, *International Civil Aviation Organization: An Introduction*, *supra* note 49 at 91.

¹⁸⁶ See M. Milde, “Future Perspectives of Air Law” in K.H. Böckstiegel, ed., *Perspectives of Air Law, Space Law and International Business Law for the Next Century* (Cologne: Schriften zum Luft – und Weltraumrecht, 1995) at 16.

¹⁸⁷ I.H.Ph. Diederiks-Verschoor, *supra* note 45 at 15-16.

¹⁸⁸ L. Weber, *International Civil Aviation Organization: An Introduction*, *supra* note 49 at 91. See ICAO, *Report of the DGCA Conference on a Global Strategy for Safety Oversight*, *supra* note 184; ICAO, *ICAO Oversight Audit Manual*, 2nd ed. (Montreal: ICAO, 2006), Doc. 9735, online: ICAO

As for the voluntary assessment programme, the audits determined the status of implementation of SARPs, associated procedures, guidance material and safety-related practices in Annexes 1, 6, and 8 to the Chicago Convention.¹⁸⁹ Performed by ICAO audit teams with experts from the Secretariat and from member States other than the audited States, this Annex-by-Annex approach audit was done according to an administrative framework, including a standard Memorandum of Understanding and the ICAO Safety Oversight Manual.¹⁹⁰ The mandate of this programme was to audit all member States and to provide a complete report for the next regular session of the Assembly in 2001.¹⁹¹ Thus, the USOAP became legally binding for all contracting States and gave ICAO the functions of supranational supervision-enforcement machinery.¹⁹² Since this auditing authority does not exist in any other UN organization, ICAO is the only international organization with super-state powers.¹⁹³ This safety oversight audit is built on a fragile basis, as it is not included in the constitution of ICAO.¹⁹⁴

<http://www.icao.int/osg/isd/afi/Reference%20Material%5CSafety%20Oversight%20Manuals%5CDoc9735.pdf>.

¹⁸⁹ For a summary of the concerned Annexes, see *supra* note 138.

¹⁹⁰ L. Weber, *International Civil Aviation Organization: An Introduction*, *supra* note 49 at 91. See ICAO, *ICAO Safety Oversight Manual*, 1st ed. (Montreal: ICAO, 2006), Doc. 9734, online: ICAO www.icao.int/AFIRAN08/docs/9734_parta_cons_en.pdf and http://www.icao.int/afiran08/docs/9734_partb_cons_en.pdf.

¹⁹¹ ICAO, “Universal Safety Oversight Audit Programme (USOAP) – Background”, <http://www2.icao.int/en/ssa/soa/usoap/Pages/Background.aspx>.

¹⁹² M. Milde, “Chicago Convention at Sixty – Stagnation or Renaissance?” *supra* note 93 at 107.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

c) USOAP - Second phase (2001-2004): Follow-Up Audits

From 2001 to 2004, ICAO conducted follow-up audits in order “to validate the implementation of the corrective action plans submitted by audited States, to identify any problems encountered by States in such implementation, and to determine the need for external assistance to resolve specific safety concerns.”¹⁹⁵ Progressively, the centre of the activity shifted to the question of how the deficiencies found in the USOAP can be removed and how quality assurance for future technical cooperation can be promoted.¹⁹⁶ In 2001, ICAO adopted two resolutions providing policy guidance concerning this question and its gradual enforcement. From 1999 to 2004, under the first two phases of the USOAP, ICAO conducted a total of 181 audits of member States¹⁹⁷ and 162 follow-ups,¹⁹⁸ including audits on the Russian Federation’s aviation infrastructure.

d) Comprehensive Systems Approach (CSA) - Third phase (2004-2007)

In 2004, during its 35th session, the Assembly adopted a new resolution on the safety-monitoring programme expanding the safety oversight audits from an Annex-to-

¹⁹⁵ ICAO, “Universal Safety Oversight Audit Programme (USOAP) – Background”, *supra* note 191.

¹⁹⁶ ICAO, *Continuation and Expansion of the ICAO Universal Safety Oversight Audit Programme*, Res. A33-8, ICAO Assembly, 33rd Sess., Doc. 9790 (2001) at I-54, online: ICAO http://www.icao.int/icaonet/dcs/9790/9790_en.pdf; ICAO, *Resolving Deficiencies Identified by the Universal Safety Oversight Audit Programme, and Encouraging Quality Assurance for Technical Cooperation Projects*, Res. A33-9, ICAO Assembly, 33rd Sess., Doc. 9790 (2001) at I-55, online: ICAO http://www.icao.int/icaonet/dcs/9790/9790_en.pdf. See L. Weber, *International Civil Aviation Organization: An Introduction*, *supra* note 49 at 91.

¹⁹⁷ Under the USOAP, ICAO also audited two special administrative regions of China and three State territories. See ICAO, “Universal Safety Oversight Audit Programme (USOAP) – Background”, *supra* note 191 at 28.

¹⁹⁸ ICAO, *Annual Report of the Council 2001*, ICAO Doc. 9786 (2001) at 12, online: ICAO http://www.icao.int/icao/en/pub/rp01_en.djvu. See also ICAO, “Overview of the ICAO Universal Safety Oversight Audit Programme”, *supra* note 180.

Annex approach to a comprehensive systems approach.¹⁹⁹ From January 2005 to December 2010,²⁰⁰ USOAP audits were conducted according to “safety-related provisions in all safety related-annexes”²⁰¹. This entails that USOAP audits would cover all Annexes, except Annex 9 on facilitation and Annex 17 on security.²⁰² Today, the USOAP is a reality of ICAO and almost all States have been audited under this program.²⁰³ As of 1 March 2010, ICAO had completed 149 CSA audits out of 190 member States.²⁰⁴ In addition to monitoring the level of effective implementation of the SARPs and the safety practices and procedures of the audited States, audits also verify the level of implementation of the following eight critical elements of the State safety oversight system: primary aviation legislation; specific operating regulations; civil aviation system and safety oversight functions; technical personnel qualification and training; technical guidance tools and provision of safety-critical information; licensing certification and approval obligations; surveillance obligations and resolution of identified safety concerns.²⁰⁵

Moreover, the last resolution of the Assembly allowed taking more actions to render the audit results more transparent and instructed the Secretary General to “make all

¹⁹⁹ ICAO, *Transition to a Comprehensive Systems Approach for Audits in the ICAO Universal Safety Oversight Audit Programme (USOAP)*, Res. A35-6, ICAO Assembly, 35th Sess., Doc. 9848 (2004) at I-57, online: ICAO http://www.icao.int/icaonet/dcs/9848/9848_en.pdf.

²⁰⁰ See ICAO, “Universal Safety Oversight Audit Programme (USOAP)”, online: <http://www2.icao.int/en/ssa/soa/usoap/Pages/default.aspx>. The new CSA is composed of three phases: pre-audit phase, on-site phase and post-audit phase. See ICAO, “Overview of the ICAO Universal Safety Oversight Audit Programme”, *supra* note 180 at 19-21.

²⁰¹ ICAO, “Overview of the ICAO Universal Safety Oversight Audit Programme”, *supra* note *ibid*.

²⁰² *Ibid*.

²⁰³ ICAO, News Release, PIO 13/6, “Five Years After the 11 September 2001 Tighter Standards and Increased Security” (6 September 2001) online: ICAO http://www.icao.int/cgi/goto_m.pl?icao/en/nr/2006/pio200613_e.pdf.

²⁰⁴ ICAO, “Overview of the ICAO Universal Safety Oversight Audit Programme”, *supra* note 180 at 29.

²⁰⁵ ICAO, “Overview of the ICAO Universal Safety Oversight Audit Programme”, *ibid*. at 6-11. See also P. S. Dempsey, *Public International Air Law*, *supra* note 139 at 64.

final audit reports available (...), including all audit findings, recommendations, and the audited States' action plan and comments" to all member States of ICAO through the Audit Findings and Differences Database managed by ICAO.²⁰⁶ Finally, during the same session, the Assembly adopted another resolution²⁰⁷ for a unified strategy to resolve deficiencies related to safety in accordance with the principles of "increased transparency, sharing of information, cooperation and assistance, as well as a combination of measures to assist the States in resolving safety-related deficiencies".²⁰⁸ Thus, in 2005, the Council agreed on a procedure to disclose information of a delinquent member State facing important shortcomings with SARPs.²⁰⁹ In March 2006, the Directors General of Civil Aviation, representing more than 80% of the contracting States, met to discuss ways to ensure greater transparency and public information. They finally agreed that names of the States refusing full transparency of their USOAP audits by March 2008, would systematically be published on the ICAO website.²¹⁰ As of May 2011, 186 member States out of 190 agreed to disclose some information of their USOAP audit report for at least

²⁰⁶ ICAO, *Transition to a Comprehensive Systems Approach for Audits in the ICAO Universal Safety Oversight Audit Programme (USOAP)*, Res. A35-6, *supra* note 199 at clause 7. See ICAO, "Universal Safety Oversight Audit Programme (USOAP) – Background", *supra* note 191.

²⁰⁷ ICAO, *Unified Strategy to Resolve Safety-Related Deficiencies*, Res. A35-7, ICAO Assembly, 35th Sess., ICAO Doc. 9848 (2004) at I-60, clause 13, online: ICAO http://www.icao.int/icaonet/dcs/9848/9848_en.pdf.

²⁰⁸ *Ibid.* at I-60.

²⁰⁹ ICAO, *Annual Report of the Council*, ICAO Doc. 9862 (2005), online: ICAO http://www.icao.int/icao/en/pub/rp05_en.pdf.

²¹⁰ ICAO, *Directors General of Civil Aviation Conference on Global Strategy for Aviation Safety (DGCA/06)*, ICAO Doc. 9866 at Recommendation 2/1, online: ICAO http://www.icao.int/icaonet/dcs/9866/9866_en.pdf. With the release of USOAP information to the public via the Flight Safety Information Exchange posted on ICAO website, it is possible for the first cycle of audits (1999-2004) to access to either a summary of the audit report, a graph or the entire report. Contracting States had until March 2008 to sign a release consent form authorizing ICAO to disclose their audit report information of their choice. For CSA audits (2005-2010), the public can access to graph illustrating the level of implementation of critical elements; the amended memorandum of understanding to allow for the disclosure to the public, and finally, to the exchange of letters for States already audited. See ICAO, *Status of Release Consent Provided by States of USOAP Audit Report Information* (Montréal: ICAO, 2011) (last updated on 26 May 2011), online: ICAO www.icao.int/fsix/safety.cfm [FSIX].

one cycle of safety oversight audits.²¹¹ Afghanistan, Burundi, Iraq and Somalia, where no initial audit was conducted and no CSA audit was scheduled, did not consent to the release of any future USOAP results. During its 36th session in 2007, the Assembly adopted a resolution directing the Council to analyse the feasibility of a new approach founded on the Continuous Monitoring Approach for the USOAP after 2010.²¹² The CMA “involves the sharing of information by States, in real time, on the performance of their respective national safety oversight systems. This process should further enhance the ability of States to identify deficiencies and allocate resources in a more targeted way, in order to correct the deficiencies promptly.”²¹³ This new approach for the USOAP will begin in January 2013 following a two-year transition for the complete implementation of the CMA.²¹⁴ Another resolution, also adopted during that Assembly session, insists on the urgency for member States to share among themselves their critical safety information impacting on safety aviation. Moreover, it directs the Council to promote and develop safety oversight through regional and sub-regional cooperation and possible partnership initiatives with all stakeholders active in this domain.²¹⁵

²¹¹ ICAO, *Status of Release Consent Provided by States of USOAP Audit Report Information*, *ibid*.

²¹² ICAO, *Application of a Continuous Monitoring Approach for the ICAO Universal Safety Oversight Audit Programme (USOAP) Beyond 2010*, Res. A36-4, ICAO Assembly, 36th Sess., ICAO Doc. 9902 (2007) at I-96, online: ICAO http://www.icao.int/icaonet/dcs/9902/9902_en.pdf [CMA].

²¹³ ICAO News Centre, *Key Topics - Aviation Safety*, 37th Session of the Assembly, online: <http://www2.icao.int/en/Assembly37newsroom-public/Site%20Documents/Safety.pdf>.

²¹⁴ ICAO, *The Transition of the USOAP to a Continuous Monitoring Approach*, ICAO Council Working Paper, 189th Sess., C-WP/13497 (2010) at Appendix C, online: ICAO <http://www.icao.int/ICDB/HTML/English/Representative%20Bodies/Council/Working%20Papers%20by%20Session/189/C.189.WP.13497.EN/C.189.WP.13497.appC.EN.pdf>.

²¹⁵ ICAO, *Unified Strategy to Resolve Safety-Related deficiencies*, Res. A36-2, ICAO Assembly, 36th Sess., *supra* note 212 at I-91. This resolution supersedes resolution A35-7. See ICAO, *Unified Strategy to Resolve Safety-Related Deficiencies*, Res. A35-7, *supra* note 207.

e) Exchange of Safety Audits Information – 2010

On 1 April 2010, at the conclusion of a High-Level Safety Conference in Montreal, ICAO was tasked to create a strategy to further reduce the global accident rate through the sharing of safety-related information among member States and the air transport industry.”²¹⁶ In order to facilitate the analysis of key safety indicators, the delegations of participating States, including the Russian Federation,²¹⁷ together with aviation organizations and industry representatives agreed that ICAO establish a global exchange of safety audits information. They also recommended that ICAO elaborate a system permitting the general public to have access to pertinent safety information enabling them to make well-informed decisions regarding air transportation safety. Thus, ICAO would have to ensure that the available information is used only to enhance aviation safety and not to aim at economic gain. During the Conference, the ICAO, the US Department of Transportation, the European Commission and the IATA signed a Declaration of Intent on the development of a global safety information exchange agreement.²¹⁸ They admitted that actions to normalize their audits information from their respective oversight programs²¹⁹ might take twelve to eighteen months.²²⁰ They also

²¹⁶ ICAO News Centre, News Release, PIO 04/10, “Strong Consensus Reached at ICAO Safety Conference on Ways to Reduce Accidents” (1 April 2010), online: ICAO <http://icaopressroom.wordpress.com/2010/04/01/strong-consensus-reached-at-icao-safety-conference-on-ways-to-reduce-accidents/>.

²¹⁷ See ICAO, *High-Level Safety Conference – Final List of Participants* (Montreal: ICAO, 2010), online: ICAO <http://www2.icao.int/en/HLSC/Lists/List%20of%20Participants/Attachments/3/Final%20HLSC-ListofParticipants.pdf>.

²¹⁸ « Sécurité en avion : signature d’un accord pour créer un échange mondial d’information », online : Déplacements Pros http://www.deplacementspros.com/Securite-en-avion-signature-d-un-accord-pour-creer-un-echange-mondial-d-information_a4889.html.

²¹⁹ These organizations have an oversight safety program. For IATA Operational Safety Audit (IOSA), see IATA, *IATA Operational Safety Audit*, online: IATA <http://www.iata.org/ps/certification/iosa/Pages/index.aspx>. For the IASA of the US FAA, see O. Barreto,

needed to ensure the conformity of their programs with local laws and policies for the optimization of the information exchange.²²¹ Finally, the participants approved the creation of a new Annex to the Convention on International Civil Aviation, dedicated exclusively to safety management principles.²²² Recently, during the 37th session of ICAO Assembly, the four civil aviation organizations formally engaged to create a Global Safety Information Exchange, or GSIE, with the objective of reducing the risk of accidents and strengthening the overall level of aviation safety worldwide.²²³ The level of compliance of the Russian air law and the SARPs was evaluated at the end of the 1990s and during the first decade of the twenty-first century.

f) USOAP Available Conclusions on Russia

For the purpose of the present thesis, access to FSIX revealed that Russia was audited both under the initial cycle - USOAP - and under the current cycle – CSA- and that it consented to the release of some audits information.

More specifically, Russia was initially audited during the first phase of the USOAP in October 2000. During the second phase of the process, a follow-up audit was

supra note 178. For SAFA of the European Commission, see *infra* note 422. For the USOAP, see *supra* note 181 and more.

²²⁰ « Sécurité en avion : signature d'un accord pour créer un échange mondial d'information », *supra* note 218.

²²¹ *Ibid.*

²²² ICAO, *High-Level Safety Conference – Report* (Montreal: ICAO, 2010) at 3-8.

²²³ ICAO News Centre, News Release, PIO 10/10, “States and Industry Agree to Share Critical Safety Information” (28 September 2010), online: ICAO <http://www2.icao.int/en/Assembly37newsroom-public/Documents/States%20and%20Industry%20Agree%20to%20Share%20Critical%20Safety%20Information.pdf>.

conducted in September 2003.²²⁴ In February 2008, it consented to the audit executive summary and the graph being released to the public.²²⁵ Under the CSA, ICAO conducted an audit in September 2008. Russia gave its consent to disclose the USOAP status chart revealing the level of implementation for the eight critical elements.²²⁶ In summary, the available audit information on Russia concludes that most problems of implementation are in the areas of qualified personnel. Improvements in that field would contribute to the better implementation of a sound organizational structure and to the resolution of some safety concerns. In the areas of appropriate legislative framework, technical guidance, licensing and certification procedures, and continued surveillance, Russia has almost fully complied. Overall, one can conclude that Russia has an average level of compliance with the safety critical elements and the SARPs. In the next section, the presentation of Russia's aviation legislation and system will demonstrate the areas of compliance with SARPs as well as the areas of non-compliance.

B. Transition From the Soviet to the Russian Soviet Safety Aviation

Russia and its predecessor, the Soviet Union, have a long tradition of, and experience in, aviation. Under the Soviet regime, the sector of aviation had technically a “good safety standard and (...) [had] always fulfilled its task of acting as a kind of

²²⁴ ICAO, *List of States that have authorized ICAO to release information on their Safety Oversight Audit conducted between 1999 and 2004* (Montréal: ICAO, 2008), online: ICAO <http://www.icao.int/fsix/auditRep1.cfm>.

²²⁵ *Ibid.*

²²⁶ ICAO, *USOAP Status for States which have authorized the release of information including progress validated by ICAO* (Montréal: ICAO, 2008), online: ICAO http://www.icao.int/fsix/auditRep1_icvm.cfm.

political, economic and social glance for the country”.²²⁷ Changes in the law and in the legal framework could not keep pace with the rapid break-up of the Soviet Union. The Russian aviation industry and, specifically its representative “Aeroflot”, faced many problems that have not been overcome easily. Many problems called for specific solutions, notably the distinction between private and public functions, the distribution of private sector functions in aviation, such as flight operations, airports, maintenance, the distribution of functions with the government body supervising aviation, and the possibility of delegating functions to intergovernmental institutions.²²⁸ From those solutions resulted the possibility for the Russian Federation to comply with the SARPs and to participate in ensuring the uniformity of international air law.

1. The Soviet Union and their Civil Aviation System

a) The Soviet Model

The Soviet Union created Aeroflot in order to deal with every aspect of civil aviation on its territory and within its distinct Soviet model of command economy maintained by an undemocratic form of government.²²⁹ Aeroflot constituted “*the*” Soviet civil aviation and, thus, it was “a state owned monopoly and an unprecedented mix of corporate operating business enterprise, regulating and self-regulating administrative

²²⁷ H. van Schyndel, *supra* note 7 at 1.

²²⁸ *Ibid.* at 7-25.

²²⁹ M. Milde, “The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later?” *supra* note 43 at 404.

agency, part of a Ministry, operator of airports and of the air traffic services”.²³⁰ From a Western perspective, the state was the only entrepreneur – that means the State managed the “companies” and, therefore, the entire Soviet Union was one immense State corporation divided into state structures making individual decisions, which in fact were business-related corporate decisions. These structures and their decisions were different from the State administration units and the administrative acts in the Western world.²³¹ Under the Soviet regime, the traditional administrative activity of licensing concerned only the registration process. The issuance of “permits”, as in the Western world, was not necessary, considering that the requirement of doing business was independent from the State, and control by the authorities was non-existent in the Soviet Union.²³² Consequently, a future privatization of a part of this economy would essentially be the privatization of one part of the State.

The civil aviation structure in the Soviet Union was formed by three different entities. Firstly, the Soviet Ministry of Civil Aviation²³³ was the central organization “geographically and functionally responsible for the entire civil aviation in the Soviet Union”.²³⁴ There were also more than thirty area-directorates performing their activities in their region for the MGA. These local entities, in reality the Ministry itself, organized all functional areas of aviation such as the organization and performance of flights, the running of the airports, the handling of passengers, cargo and aircraft, and all other

²³⁰ M. Milde, “Some questions marks about the Price of “Russian Air””, *supra* note 17 at 152.

²³¹ H. van Schyndel, *supra* note 7 at 2.

²³² *Ibid.*

²³³ In the Russian language, the entity is known as the “Ministerstve grazhdanskoy aviicii” [MGA]. See *ibid.* at 3.

²³⁴ *Ibid.* at 2.

facilities and institutions related to aviation: maintenance, air traffic control, etc.²³⁵ The third entity is “Aeroflot”, which, as a working term, essentially means the “air fleet”, and whose name was not of a company representing a legally independent economic entity.²³⁶ However, to pave the way for international legal relations, the law stated that Aeroflot had the status of a legal entity exclusively for international air traffic.²³⁷ With that specific status, Aeroflot’s responsibilities were exercised under the name “Aeroflot-Soviet Airlines Central Administration of International Air Traffic”.²³⁸ This agency was located at the airport Moscow-Sheremetyevo and was tasked with individual operations, notably airport and air traffic control at the Moscow-Sheremetyevo airport, and the maintenance of the air cargo complex.²³⁹ In its best times, Aeroflot was “the largest single airline in the world”, as it developed a vast national and international network on routes defined by traditional restrictive bilateral agreements, always trying to fence its share of benefit and its risks by pooling arrangements.²⁴⁰ The Soviet Union wanted to be first in the world aviation, as aviation strongly symbolized their national pride. Long before becoming a member of ICAO in 1969, the Soviet Union was a meticulous observer of the ICAO standards because its national legislation conformed to Annexes 1, 2, 6 and 8.²⁴¹ This compliance ensured that Soviet personnel had the opportunity to operate over or into the territory of ICAO member States and to sell Soviet aviation products abroad.²⁴²

²³⁵ *Ibid.*

²³⁶ *Ibid.* In Article 3 (1) of the Aviation Code of the USSR of 11 May 1983, Aeroflot and civil aviation were used as synonyms.

²³⁷ *Ibid.* Article 3 (2) of the Aviation Code of the USSR of 11 May 1983.

²³⁸ In the Russian language, the entity is known as the “Centralnoye upravleniye mezhdunarodnym vosdushnym soobchtcheniyem grazhdanskoj aviacii” [*Aeroflot- Soviet Airlines CUMVS-GA*]. See H. van Schyndel, *supra* note 7 at 3.

²³⁹ *Ibid.*

²⁴⁰ M. Milde, “Some questions marks about the Price of “Russian Air””, *supra* note 17 at 153.

²⁴¹ M. Milde, “Enforcement of Aviation Safety Standards – Problems of Safety Oversight”, *supra* note 134 at 6, footnote 14.

²⁴² *Ibid.*

In the 1980s, the service quality of Aeroflot was considered sub-standard and not competitive by Western standards. The same was true of Russian-produced aircraft. Aeroflot's fleet began to age and to fall significantly behind the efficiency, economy, speed, capacity, environmental concerns and comfort of western technology.²⁴³ Furthermore, Aeroflot was very secretive about its safety record and, even after the Soviet Union became an ICAO member, the aircraft accident statistics did not reveal any accident or incident of Soviet aircraft in the Soviet territory.²⁴⁴ By the end of the 1980s, steps had already been taken to ensure the independence of activities in the sector of aviation, such as the growing international air transport activities of the regional area-directorates, especially the ones established outside Russian Territory.²⁴⁵ Because of the start of the process of independence, the Soviet Council of Ministers approved the reorganization of Aeroflot international activities on 2 April 1988.²⁴⁶ From this point on, the Aeroflot-Soviet Airlines CUMVS-GA was only covering the international activities of the fleet stationed at Moscow-Sheremetyevo airport, representing, back then, 90% of the international air transportation.²⁴⁷ The regional area-directorates could now have their international activities, independent from the CUMVS-GA, by using the name "Aeroflot – Soviet Airlines".²⁴⁸ Finally, to deal with commercial matters of the whole Soviet international aviation, the "Commercial Administration for Civil Aviation at the Ministry of Civil Aviation" was founded as an umbrella organization.²⁴⁹

²⁴³ M. Milde, "Some questions marks about the Price of "Russian Air"", *supra* note 17 at 153.

²⁴⁴ *Ibid.*

²⁴⁵ H. van Schyndel, *supra* note 7 at 3.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ In the Russian language, the entity is known as the "Mezdunarodnoye kommertcheskoye upravleniye grazhdanskoy aviacii pri Miniisterstve grazhdanskoy avicii" [MKU]. See H. van Schyndel, *supra* note 7 at

In 1991, a law passed by the Supreme Soviet of the remaining Soviet Union transferred ownership of Soviet assets to the relevant Republic on whose territory they were normally located.²⁵⁰ As far as aviation was concerned, all institutions, facilities and aircraft became the property of the Republic where the institution or facility was situated or the aircraft normally based. While the reorganization and the transfer of the State ownership were taking place, the regional area-directorates or operators became more independent and less represented by the MKU for all international activities.²⁵¹ As the MKU umbrella eroded and the remaining functions between the MKU and the CUMVS-GA became less important, these two entities merged and the “Commercial Product Union Aeroflot – Soviet Airlines” was created in June 1991.²⁵² The Ministerial Decree of the Soviet Ministry of Civil Aviation of 20 July 1991 stated that the PKO Aeroflot – Soviet Airlines was the legal successor of the CUMVS-GA. Since then, it has specified its name as “PKO Aeroflot – Russian International Airlines”, and has been the designated air carrier in the air services agreements of the former USSR and later of Russia.²⁵³ Moreover, the new PKO has the clearing functions for regional “Aeroflot – Soviet Airlines” regarding international traffic.²⁵⁴ The collapse of the Soviet regime in 1991 left the aviation industry in very poor conditions. Aeroflot was “without reliable integrated and co-ordinated air traffic control services; hundreds of new, badly equipped and unregulated airlines competed to succeed the former monolithic Aeroflot.”²⁵⁵ Therefore,

3. Civil aviation commercial matters include commercial administration, international clearing centre, and international representations.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.* [PKO Aeroflot-Soviet Airlines].

²⁵³ *Ibid.* at 4 [PKO Aeroflot – Russian International Airlines].

²⁵⁴ *Ibid.*

²⁵⁵ M. Milde, “The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later?”, *supra* note 43 at 404.

the safety record of Aeroflot was alarming because of improper regulation, enforcement, equipment, spare parts and fuel.”²⁵⁶ For the Russian Federation, the aviation industry was also one of the strategic areas to develop in a market economy.

b) Transition from a Command Economy to a Market Economy

In the Soviet command economy system, the operational units were completely integrated in the state administration. This model could not continue under the aviation system in Russia. Flexibility in operational decisions and the opening up of the corporation to foreign investors were essentially needed in the new market-economy system.²⁵⁷ Considering that the complex phenomenon of aviation is an enormously important element of the Russian economy, it was not appropriate to leave it entirely, and in an un-prepared state, to market forces. Many factors needed to be considered for the transition to a market-economy. State influence and presence were necessary for four specific reasons.²⁵⁸ Firstly, medium-term economic obligations in aviation existed in the former Soviet Union and (as they still do in Russia) because of the geography of the country, and the state and structure of the other means of transport. It is important that aviation in remote areas be regulated and supported by the state, as has been the case for decades in Europe and the United States. Secondly, aviation is a vital comprehensive activity. The former Soviet Union had relatively old equipment and investments were needed to upgrade it. Thus, the state had to plan the funding of the aviation sector since

²⁵⁶ *Ibid.*

²⁵⁷ H. van Schyndel, *supra* note 7 at 9.

²⁵⁸ *Ibid.* at 8-9.

there were only a few private Russian and Western investors who were interested in investing in Russia. Thirdly, aviation in Russia still has the function of representing the state, as is the case in several other countries also. Consequently, Russian aviation policy has to plan the structure in which recently state-owned units can have their place. Finally, aviation in Russia still has both civil and military components. In reality, Russia has to take steps to progressively withdraw military influence from civil aviation. The long tradition of military influence, including close personal relationships among aviation officials, should be removed from the civil aviation sector once the distribution of functions between civil and military bodies are clearly defined. Essentially, all of the above provides evidence that the restructuring of aviation in Russia cannot solely depend on market economy rules. The state must outline the structures in aviation law and aviation policies where new entities can be properly established.²⁵⁹

2. The Russian Safety Aviation: The New Aviation Code

The disintegration of the Soviet monopolistic structures of civil aviation started because of two reasons. The first is the dissolution of the Soviet Union. The second reason is the embrace of market economy principles by the governments of Russia and by the other States of the Commonwealth of Independent States. Russia had to develop and maintain the aviation sector because of the immense size of the country, the aviation infrastructure, the lack of alternative transport modes, the remoteness of some parts of the

²⁵⁹ *Ibid.* at 9.

country, and its role as a super power.²⁶⁰ Therefore, the process of restructuring started with the substantial drafting and adoption of a new Aviation Code.

The lack of a legal basis for the separation between the newly emerging private sector and the reduced state administration was another obstacle in the development of the Russian aviation sector. The 1991 Minsk Agreement on the creation of the CIS²⁶¹ produced legal uncertainty and made Russia operate its aviation industry in a legal vacuum. Actually, the Agreement stated that, until the adoption of a new aviation code in the post-Soviet states, the Soviet legislation, including the 1983 Aviation Code, should stay in force as long as it did not conflict with their Constitutions. Russia resolved the problem by drafting and adopting a new aviation code that entered into force on 1 April 1997.²⁶² Two objectives explained the necessity to draft a new code based on the legal traditions of continental Europe. The first objective was to integrate changes regarding the more technical aspects of aviation. The second objective was to include the legal basis of a market-oriented restructuring of the aviation industry in Russia. Compared to the former Soviet aviation system, the restructuring gave airlines the possibility to operate as companies, and not as part of the state administration, to create the possibility of

²⁶⁰ *Ibid.* at 1.

²⁶¹ *Agreement Establishing the Commonwealth of Independent States*, Republics of Russia, Belarus and Ukraine, 8 December 1991, *Informatsionny Vestnik "Sodruzhestvo"* 1992, No 1, 31 I.L.M. 138, online European Navigator <http://www.ena.lu/1991minskagreement> (entered into force on 21 December 1991). See Sergei A. Voitovich, "The Commonwealth of Independent States: An Emerging Institutional Model" (1993) E.J.I.L. 403 at 404.

²⁶² On 26 June 1996, the bill for the new Aviation Code was introduced in the State Duma. After it was referred to the committees for further voting, the delegates of the leading committee, the Committee on Industry, Construction, Traffic and Energy, adopted the draft bill in the first reading on 19 July 1996. Following the discussion in the plenum of 27 December 1996, the draft bill was adopted in the second reading. During the third and final reading in the State Duma, the bill was adopted on 19 February 1997. The adopted law was presented to the Federation Council for adoption on 24 February 1997. Then, it was presented to President of the Russian Federation on 6 March 1997. On 19 March 1997, the President signed and executed the Aviation Code, which was published on 24 March 1997 in the Collection of Legislation of the Russian Federation. See H. van Schyndel, *supra* note 7 at 35-36.

separating airports from airlines, and to create the possibility of defining a new role for the state administration mainly as a certifying, licensing and supervising authority.²⁶³ The aviation code needed to be integrated vertically in the hierarchy of legal norms: the general principles of international aviation law; the State Constitution; the ordinary law and the subordinate regulations, which are the by-laws.²⁶⁴ As the new aviation code is integrated horizontally in the category of ordinary laws regulating the technical aspects of aviation, the air transport administration regulate other aviation issues that often need to be amended through the subordinate regulations.²⁶⁵ Besides the code, other laws also play a role in aviation as they materially relate to the regulation of Air Transport.²⁶⁶ They form the subsidiary law and concern the laws governing certain administrative units, which require a relatively high level of regulation, and the laws dealing with financing, granting of loans, and registration of aircraft. Also, other laws do not materially relate to the regulation of air transport, and concern, instead, areas of a more general nature such as company and commercial law, competitions and antitrust law, labour law and possibilities of relief against government decisions.

To reach the second objective of integrating the market economy concepts in the new aviation code, the economic structures of the Russian Federation must undergo

²⁶³ *Ibid.* at 27. According to this author, the word “possibility” is used deliberately as the new Aviation Code did not transform Russian aviation into new structures. It provides instead the legal basis to lead these new opportunities. The Russian government is the instance deciding to go move ahead or not on those openings.

²⁶⁴ For an explanation on the integration of the new air code in the Russian legislation, see H. van Schyndel, *supra* note 7 at 28-32. Concerning the vertical integration of the Code, article 3 of the Russian Aviation Code stipulates that international agreements supersede the dispositions in the Code, in case of a conflict of legal norms. For the horizontal integration of the Code into the national legislation, *Aviation Code of the Russian Federation*, *infra* note 280, s. 2.

²⁶⁵ H. van Schyndel, *supra* note 7 at 30.

²⁶⁶ *Ibid.* at 31-32.

substantial changes. Russia took steps toward a “double separation of powers” of the former state administration. The first separation concerns the relationship between the Parliament and the Administration.²⁶⁷ In Soviet times, bills were drafted by the administration and basically consisted of authorizations for the administration to adopt legal regulations. However, this procedure was not an effective one and, thus, both entities needed to be separated. In the Russian Federation, the law approved by the Parliament must define the essential issues in civil aviation to be regulated by a law. The technical details of those issues are regulated by subordinated regulations of the administration. The Aviation Code must include an explicit authorization, which exposes the content, purpose, and extent of the aviation subjects, or the proper regulation. For example, the rules of the air, the regulations for the licence of airfields, aircraft and other air transport appliances and airline personnel, are regulated at the governmental level, as the code formulates only basic provisions for those subjects and entrusts the biggest part of the regulation of these matters to the subordinated regulations. The Aviation Code describes the circumstances under which the administration is granted powers to regulate technical details. This power gives the administration the flexibility that is essential to react rapidly to new developments or to the experts’ point of view, especially to incorporate the SARPs in Russian law quickly and without any political interference. The involvement of the Parliament in the process of incorporating the SARPs would be too burdensome and long.

The second separation concerns the relationship between the operations and the private functions, and the administration and the public functions in Russia. As in many

²⁶⁷ *Ibid.* at 36-37.

other free-market legal systems, the aviation code makes the distinction between administrative powers (government and its agencies) and operational activities (usually private sector). In other words, the code stipulates when and how the administration is allowed to exercise their powers of control and monitoring. The powers of intervention not set out in the law concerning other individual decisions are left to the commercial entities, which are certified, licensed and supervised by the administration. These operational units independent from the state, are either completely new enterprises or are former state-owned enterprises transformed into privately organized entities by the process of corporatization or privatization. Compared to the 1983 Soviet Aviation Code under which the private sector was non-existent, the 1997 Russian Aviation Code concentrates on activities of civil aviation related to the new private enterprise system.²⁶⁸

The transformation of enterprises started at a different pace in the former Soviet Union with the introduction of the general legal, economic and social basis of the foundation of enterprises, of the rights and obligations of the entities of entrepreneurship²⁶⁹ and, later, of the privatization of state-owned and municipal enterprises.²⁷⁰ Under the Russian Federation, aviation enterprises and assets could, as stated in the “State Programme of Privatization of State-owned and Municipal Enterprises in the Russian Federation” created in 1992, only be privatized pursuant to a decision by the State Committee for the Management of the State Property,²⁷¹ taking into consideration the opinion of the Ministry of Industries. Moreover, Decree No. 721 of the President of the Russian

²⁶⁸ *Ibid.* at 37.

²⁶⁹ Under the Soviet regime, this legal basis is Law of the RSFSR of 25 December 1990 “About the Enterprises and Enterprise Activity”. See *ibid.* at 34.

²⁷⁰ Law of the RSFSR of 3 July 1991 “On the Privatization of State-Owned and Municipal Enterprises in the RSFSR”, in the version of the Amendment Law of 5 July 1992: this law regulated the organizational and legal basis for the reorganization of ownership structures of production facilities in the Russian Federation. *Ibid.*

²⁷¹ In the Russian language, the Committee is known as “Goskominushchestvo”.

Federation of 1 July 1992 “On Organizational Measures to Corporatize State Enterprises, Voluntary Associations of State Enterprises” provided, among other things, different forms of privatization: “privatization from above”, privatization of the entire enterprise as one entity, “privatization from below”, and the creation of several individual enterprises. With the first form of privatization, Aeroflot – Soviet Airlines became one entire enterprise called PKO, and through the second type of privatization, five additional subsidiaries of the former CUMVS petitioned for individual privatization.²⁷² Finally, the Decree of the Government of the Russian Federation of 1 April 1993 on the Corporatization of Aeroflot – Soviet Airlines prescribed that six²⁷³ of the former legal entities of the PKO “Aeroflot – Soviet Airlines” were transformed into a joint-stock corporation through the consolidation of their capital. The remaining subsidiaries of PKO were only allocated the capital that appeared on their balance sheets before their petition for individual privatization in September/October 1992, and not exceeding two million Roubles. The fleet was not allocated to them as they had requested in their petition.

²⁷² The five subsidiaries are: Zolotaya Zvesda (Gold Star) operating the air fleet TU 154; Russkiy Vitjaz (The Russian Knight) operating the IL 76; Russian Airlines operating the A 310-300 leased from Aeroflot; the agency Moscow Airways; and the cargo complex Sheremetyevo 2. See H. van Schyndel, *supra* note 7 at 35.

²⁷³ Those six entities of PKO are PKO itself, the CUMVS, the MKU, Sheremetyevo airport and the subsidiary “Moscow Airways”. *Ibid.* at 34.

Chapter 2 - International Legal Requirements in Civil Aviation and the Russian Legislation

The effectiveness of the SARPs can only be ensured if these requirements are incorporated in the national law of the member States of ICAO. The author Paul S. Dempsey outlined eleven international legal requirements listed in the Chicago Convention and its Annexes:²⁷⁴ civil aviation authority; agency procedures; personnel licensing; aircraft airworthiness certification; nationality, ownership, and registration requirements; air carrier operator certification; air carrier economic regulation; schools and approved maintenance organizations; air navigation facilities; transportation of goods; and penalties for noncompliance. By adopting its new Aviation Code and regulations, Russia satisfied its international obligations of complying with the SARPs. In this subsection, it is proposed to briefly describe each of the eleven international legal requirements, followed by a summary of the corresponding articles of the Russian Aviation Code.

A. Civil Aviation Authority in Russia: Establishment and Administration

The legal requirement of civil aviation authority refers to the State regulatory system, including basic aviation laws and the structure of administration. There is no SARP to ensure the uniformity of the state regulatory system. However, ICAO proposes in a manual that such a system must satisfy two preconditions: the adoption and

²⁷⁴ *Convention on International Civil Aviation*, *supra* note 34, s. 37 paragraph 2. See also P.S. Dempsey, *Public International Air Law*, *infra* note 139 at 109-128.

promulgation of an aviation code and the creation of an appropriate administrative agency, commonly known as the civil aviation agency.²⁷⁵ Most of the ICAO member States had created a department of civil aviation, a ministry of transport or a similar governmental institution. Russia adopted a new Aviation Code in 1997, updated constantly, and five agencies for the administration of all aviation activities.

The break-up of the Soviet Union at the end of 1991 affected the aviation structure. Almost overnight, Aeroflot with more than thirty former area-directorates, located in the newly independent States, became independent entities.²⁷⁶ The legal succession of Aeroflot is limited to its competence in international traffic, for which it had the exclusive status of a legal entity. As for the regional operators, they were already independent of the CUMVS-GA following the approval of the USSR Council of Ministers in 1988.²⁷⁷ The Russian government adopted a decree on 28 July 1992 changing the name “Aeroflot – Soviet Airlines” to “Aeroflot – Russian International Airlines” representing the competence of Aeroflot for Russian international traffic located at the Moscow-Sheremetyevo.²⁷⁸

The distribution of the functions in aviation administration was a concrete split of the entities performing flights - Aeroflot, flight departments and flight brigades - from the state. The former Soviet Ministry for Civil Aviation, the MGA, was transformed into the

²⁷⁵ UN ICAO, *Manual of Procedures for Operations Inspection, Certification and Continued Surveillance*, 4th ed. Doc 8335 (Montreal: ICAO, 1995) at 2.1, online: ICAO http://www.icao.int/fsix/Library/Ch2_StructureCAA_ICAOdoc8335.pdf [CAA].

²⁷⁶ H. van Schyndel, *supra* note 7 at 1.

²⁷⁷ *Ibid.* at 7. For the explanation on the independence of the regional operators, see above subsection 1 - The Soviet Union and their Civil Aviation System of section 1 of chapter 1.

²⁷⁸ *Ibid.*

“Department of Air Transport”²⁷⁹ within the newly established Ministry of Transport of the Russian Federation. With companies developing outside the state administration and having the power to individually make economic decisions, the state essentially kept two main functions, monitoring and control. This aviation administration was, on the one hand, responsible for the implementation of the laws mainly related to technical and security areas²⁸⁰ and stating the operations of the independent companies. On the other hand, the aviation administration adopted regulations and planning to set up the conceptual and political framework, and to shape the scope of the operations of the companies. While experts proposed different models for the structure of this aviation administration,²⁸¹ the separation model - separating the old Soviet aviation administration structure from the new Russian one - was selected. In the new Aviation Code that entered into force in 1997, the term “specialized authorized body” or “authorized body” is used to refer to the new aviation agencies in Russia, which at the time were yet to be created.²⁸² The responsibilities of the several aviation administrative tasks specified in the Decree of the President of the Russian Federation No. 382 of 15 March 1996, “On Perfecting the System of State Control of the Transportation Complex in the Russian Federation and in the “Regulations on the Federal Aviation Authority of Russia” were approved by the Decree No. 994 of 13 August 1996.

Today, Russian civil aviation is mainly administered by five agencies. First, the Ministry of Transport of the Russian Federation, headed by the Minister of Transport,

²⁷⁹ In Russian language, this entity is known as “Departament vozdushnovo transporta” [DVT]. *Ibid.* at 15.

²⁸⁰ *Aviation Code of the Russian Federation*, federal law of 19 March 1997 No. 60-FZ, s. 27, trans. by Elmar Gjemulla, H. van Schyndel, Andrew Muriel and Neil Budd, in H. van Schyndel, *supra* note 7 at 63-125

²⁸¹ *Ibid.* at 16-19.

²⁸² *Ibid.*, s. 6.

Igor E. Levitin, regulates the entire transport system, including air transport, sea, inland water, rail, automobile, city electric transport and industrial transport.²⁸³ Second, the Federal Service of Supervision in the Sphere of Transport, headed by the Director, Alexander V. Neradko, controls and supervises the observance of Russian legislation, including international agreements signed by Russia, in the fields of civil aviation, sea, inland water, rail, automobile and industrial transport.²⁸⁴ The third agency is the Federal Agency of Air Transport, headed by the Director – Nicolai V. Shipil, and it has the power to license the activities related to the transportation of passengers and cargo by air.²⁸⁵ The fourth agency is the Interstate Aviation Committee,²⁸⁶ headed by the Director, Tatiana G. Anodina. Established on 6 December 1991 by a majority of the former Soviet republics and located in Moscow, the IAC is the permanent executive body of the Interstate Council on Aviation and Air Space Use. This Committee coordinates the activities related to the use of airspace and air traffic control²⁸⁷, certifies aircraft, aerodromes and

²⁸³ *Ibid.*, s. 24. For a detailed description of the Ministry's activities, consult the website of the Ministry www.mintrans.ru.

²⁸⁴ In the Russian language, this agency is called "Rostrans Nadzor". *Ibid.*, s. 18, 27-30, 65(1). Aiming at guaranteeing the safety of aircraft flights, the aviation security and high quality of operations and services, is in charge of State control over civil aviation activities (article 27). The performance of this control must be done according to Russian aviation legislation and international agreements ratified by Russia (article 28), which requires the establishment of inspection services according to federal aviation regulations (article 29). The rights and duties of aviation inspectors are to be governmentally approved (article 30). Legal entities and individuals must comply with inspectors' demands to conduct inspections (article 31). For a detailed description of the activities of the Federal Service of Supervision in the Sphere of Transport, see www.rostransnadzor.ru.

²⁸⁵ *Ibid.*, s. 9. This body replaced the former DVT in the Russian Ministry of Transport and is now a legally independent state body. For more information on its role, see its website www.gsga.ru. See also *supra* note 279.

²⁸⁶ In the Russian language, this entity is known as "Mezhhgosudarstvenniy Aviacionniy Komitet [IAC]. For more information on its role, see website www.mak.ru. This agency was created following the Agreements of 30 December 1991 concluded at the end of the first summit in Minsk of the CIS. In total, fifteen agreements were adopted, including one specifically on aviation, the Intergovernmental Agreement on Civil Aviation and Air Space Use signed on 30 December 1991. See Rachel Walker, *Six Years that Shook the World: Perestroika – the Impossible Project* (Manchester & New York: Manchester University Press and St-Martin's Press, 1993) at 290.

²⁸⁷ *Aviation Code of the Russian Federation*, *supra* note 280, s. 11-19.

equipment²⁸⁸, investigates air accidents, provides for the unification of aviation rules, develops a coordinated policy in the field of air transport, and coordinates development and implementation of interstate scientific and technical programs. Russia delegated the overall authority of several functions in aviation, including aircraft certification²⁸⁹ and civil aircraft accident investigation²⁹⁰ to the IAC²⁹¹. Finally, the Department on Certification and Aviation Rules of the IAC, headed by the Director, Vladimir V. Bespalov, is the Aviation Registry, responsible for aircraft certification.²⁹²

B. Russian CAA Procedures

The member States of ICAO must ensure the constitutional requirement that due process of law is respected by their civil aviation agencies in situations such as the suspension or revocation of operating and airworthiness licenses and certificates. The agency also needs to conform to transparency requirements such as the organization of public meetings and the availability of internal documents to the public upon request. In Russia, a certificate and/or a licence can be suspended and/or limited by the Aviation Authorities responsible for their issuance, or be revoked following the procedure adopted by the federal aviation authorities, which are the Ministry of Transport and the Federal Agency of Air Transport, operating under the Constitution of the Russian Federation.²⁹³

²⁸⁸ *Ibid.*, s. 48.

²⁸⁹ *Ibid.*, s. 8.

²⁹⁰ *Ibid.*, s. 95-99.

²⁹¹ The delegation of functions was done in accordance with a Presidential Decree of 5 May 1992 and a Russian Minister Decree of 23 April 1994. See H. van Schyndel, *supra* note 7 at 21.

²⁹² *Aviation Code of the Russian Federation*, *supra* note 280, s. 33.

²⁹³ *Ibid.*, s. 10.

C. Personnel licensing in Russia

Concerning international aviation, the Chicago Convention requires that each member State issue certificates of competency and licenses to the pilot and other members of the operating crew for every aircraft registered in that State.²⁹⁴ The aircraft crew must always carry their licenses on board the aircraft in which they fly. Concerning flights over its territory, a member State can refuse to recognize those certificates and licenses when issued by another member State to its nationals.²⁹⁵ When the certificates of competency and licenses are issued by another member State, each member State has the obligation to recognize their validity if they are at least equal to the minimum standards adopted by ICAO.²⁹⁶ The proper training and licensing of aviation personnel contributes to the efficiency and safety operations in aviation. Annex 1²⁹⁷ to the Chicago Convention contains the SARPs for the licensing of flight crew members (pilots, flight engineers and flight navigators), air traffic controllers, aeronautical station operators, maintenance technicians and flight dispatchers. ICAO has produced training manuals²⁹⁸ helping the States to organize adequate training for these jobs and for other aviation personnel, notably aerodrome emergency crews, flight operations officers, radio operators and individuals involved in other related disciplines. It requires that all flight crew members must hold a valid license. In order to obtain a license, six requirements must be fulfilled:

²⁹⁴ *Convention on International Civil Aviation*, *supra* note 34, s. 32(a).

²⁹⁵ *Ibid.*, s. 32(b).

²⁹⁶ *Ibid.*, s. 33.

²⁹⁷ ICAO, *International Standards and Recommended Practices – Annex 1 to the Convention on International Civil Aviation: Personnel Licensing*, 10th ed., ICAO Doc. AN 1 (Montreal: ICAO, 2006).

²⁹⁸ See ICAO, *Manual of Procedures for Establishment and Management of a State's Personnel Licensing System*, 1st ed., ICAO Doc. 9379 (Montreal: ICAO, 1983). See also, ICAO *Manual on the Approval of Flight Crew Training Organizations*, 1st ed., ICAO Doc 9841, (Montreal: ICAO, 2006).

“The applicant must satisfy age, knowledge, experience, flight instruction, and skill requirements”,²⁹⁹ and finally, the person applying as flight a crew member or controller must pass a medical fitness evaluation.³⁰⁰

In the Russian Federation, the Federal Agency of Air Transport issues all licences specified in Annex 1 and must approve the list of posts for aviation personnel.³⁰¹ The definition of aviation personnel of the Russian Aviation Code covers genuinely all aviation personnel performing aviation activities³⁰² in civil aviation, state aviation, and experimental aviation.³⁰³ The civil aviation personnel must possess a competency certificate or attestation to practise.³⁰⁴ To receive an attestation, the applicant must satisfy all requirements of the selected post defined by federal aviation regulations.³⁰⁵ Persons holding a criminal record, dealing with mental illness or a drug addiction, or those who have been dismissed from service on disciplinary grounds, cannot occupy a position as a member of the aviation personnel.³⁰⁶ The Federal Service of Supervision is tasked with state control over activities of aviation personnel.³⁰⁷ If issued by a foreign State, the attestation must be recognised as valid in Russia if it complies with the international standards to which it already agreed, and also, in accordance with the federal aviation regulations.³⁰⁸ Certified educational institutions³⁰⁹ by the Agency train specialists to

²⁹⁹ P. S. Dempsey, *Public International Air Law*, *supra* note 139 at 116.

³⁰⁰ *Ibid.* at 117.

³⁰¹ *Aviation Code of the Russian Federation*, *supra* note 280, s. 52(1) in fine.

³⁰² *Ibid.*, s. 52(1).

³⁰³ *Ibid.*, s. 52(2).

³⁰⁴ *Ibid.*, s. 8(2) and 53 (1) in principio.

³⁰⁵ *Ibid.*, s. 8 (3) and 53 (1) in fine.

³⁰⁶ *Ibid.*, s. 52 (3).

³⁰⁷ *Ibid.*, s. 53 (2).

³⁰⁸ *Ibid.*, s. 55.

³⁰⁹ *Ibid.*, s. 8 (1).

develop the qualifications in order to occupy one of the aviation positions on the approved list.³¹⁰

The Aviation Code defines specifically the crew of an aircraft. It includes the captain and the other flight crew members, and the cabin crew, which includes the operators and stewards.³¹¹ The requirements for the post of captain of the aircraft are very demanding. He/she is required to possess a valid attestation of pilot, and training and experience to pilot an aircraft independently.³¹² The captain is the chief in command³¹³ of the aircraft as he is responsible for discipline and order on the aircraft and must take all necessary measures to guarantee the safety of the people on board as well as of the aircraft. In principle, the flight crew of a Russian aircraft operating in commercial civil aviation must consist of only Russian nationals.³¹⁴ They are generally allowed on non-commercial flights, that is in general aviation.³¹⁵ However, the Russian Federal Law of 18 July 2006 added the possibility for foreign nationals to be part of a flight crew of a Russian aircraft in commercial aviation if two conditions are met.³¹⁶ They must be part of the flight crew for a period of training with the aim of receiving a license and not fulfil the duties of commanding officer of the Russian aircraft. Reportedly, this amendment became necessary as agreements of the supply of Russian aircraft to foreign customers

³¹⁰ *Ibid.*, s. 54(1).

³¹¹ *Ibid.*, s. 56(1). The composition of an aircraft crew is established according to the requirements in the federal aviation regulations. *Ibid.*, s. 56(2).

³¹² *Ibid.*, s. 57(1).

³¹³ The captain has specific rights to ensure its role of commanding officer and any person on board must abide to its instructions. *Ibid.*, s. 58. In case of an emergency, the captain and the other crewmembers must take all measures for the safety of passengers and of the aircraft. *Ibid.*, s. 58(2) and 59-60.

³¹⁴ *Ibid.*, s. 56(4) in principio.

³¹⁵ *Ibid.*, s. 21(3). See H. van Schyndel, *supra* note 7 at 52.

³¹⁶ *Ibid.*, s. 56(4) in fine.

also provided for training of all respective flight crew, in accordance with the international practise.³¹⁷

D. Aircraft Airworthiness Certificate In Russia

The Chicago Convention and its annexes 6³¹⁸ and 8³¹⁹ contain the minimum requirements regarding aircraft airworthiness. According to the Convention, every aircraft flying internationally must have a certificate of airworthiness issued by the State of registry.³²⁰ The other States, besides the State of registry, must recognize such a certificate as long as it satisfies the SARPs.³²¹ Every State must adopt rules of the air for aircraft flying over its territory, and aircraft carrying its nationality mark, to comply with the existing laws regarding aircraft flight and manoeuvre.³²² The State of registry may consent to the delegation of the above functions to the State of the aircraft operator under the condition that the operator has its principal place of business or permanent residence in that State.³²³ The SARPs on aircraft operation are provided in Annex 6 to the Convention. This Annex addresses more issues than what its title suggests. It deals with

³¹⁷ See H. van Schyndel, *supra* note 7.

³¹⁸ ICAO, *International Standards and Recommended Practices – Annex 6 to the Convention on International Civil Aviation: Operation of Aircraft - Part I – International Commercial Air Transport – Aeroplanes*, 8th ed., ICAO Doc. AN 6 (Montreal: ICAO, 2001). As the present thesis concentrates on international commercial air transport of passengers, only Part I of Annex 6 is of concern. Part II and Part III of the Annex 6 deal with general aviation and helicopters.

³¹⁹ ICAO, *International Standards and Recommended Practices – Annex 8 to the Convention on International Civil Aviation: Airworthiness of Aircraft*, 10th ed., ICAO Doc. AN 8 (Montreal: ICAO, 2005). This Annex is counts for parts: Part I on definitions; Part II on administration; Part III on Aeroplanes and Part IV on Helicopters. This present thesis will not refer to the last Part of Annex 8.

³²⁰ *Convention on International Civil Aviation*, *supra* note 34, s. 31.

³²¹ *Ibid.*, s. 33.

³²² *Ibid.*, s. 12.

³²³ *Ibid.*, s. 83bis.

operations of flight, but also with aircraft instruments and equipment, and maintenance and security. Annex 8 provides detailed rules on aircraft airworthiness. Each State must establish its own national comprehensive and detailed code or adopt one established by another member State. The extent of the details depends on what each State considers necessary for the certification of individual aircraft. The airworthiness of aircraft deals with flight performance, aircraft structures, design and construction, engines, propellers, power plants, instruments and equipment, operating limitations, and continuing airworthiness requirements. A certificate of airworthiness can only be issued by the State if a type certificate was obtained previously. To obtain the latter certificate, it must be demonstrated that the design of the aircraft has been approved, with proofs of drawings, specifications, reports, inspections, and flight-testing.³²⁴ Once the airworthiness requirements are satisfied, the State issues a certificate that a successive State may rely on. If the State of registry, that is the State issuing the certificate of airworthiness, is not the State of design, that is the State issuing the type certificate, the first State must forward the information on the airworthiness certificate to the second State. In return, the second State must relay all information of the aircraft to the first State in order to guarantee the continuing airworthiness³²⁵ or safety of the aircraft. When there is no satisfactory evidence of airworthiness in cases of damaged aircraft, aircraft in disrepair or those that are not airworthy, the aircraft cannot fly until it is made airworthy again.

³²⁴ ICAO, *International Standards and Recommended Practices – Annex 8 to the Convention on International Civil Aviation: Airworthiness of Aircraft*, *supra* note 319, ch. 10.

³²⁵ Thaddée, Sulocki and Axelle Cartier, “Continuing Airworthiness in the Framework of the Transition from the Joint Aviation Authorities to the European Aviation Safety Agency” (2003) 28 Ann. of Air and Sp. L. 311 at 318-319. The authors specifies objective standards for continuing airworthiness for large aeroplanes are addressed in Part III of Annex 8, which also contains administrative procedures for continuing airworthiness of aircraft introducing roles of the State of design and the State of registry in Part II, Chapter 4, Article 4.2.1.1.

In the Soviet Union, from 1945 to 1973, GosnIIga, the State Research Institute of Air Force, and the Flight Research Institute, were responsible for the certification of Soviet aircraft according to the Air Force standards and the Soviet airworthiness standards for civil aircraft. In principle, the Ministry of Aviation Industry and the Ministry of Civil Aviation approved the airworthiness certification documents. The Ministry of Civil Aviation was responsible for aircraft registration and the issuance of airworthiness certificates. In 1973, the Aviation Registry was created by a Resolution of the Soviet Council of Ministers.

Russia has delegated its responsibility to an authorized body, the IAC, for aircraft registry,³²⁶ for the issuance or validation of type certificates,³²⁷ and for the issuance, renewal, validation, amendment, cancellation, and suspension of airworthiness certificates.³²⁸ Airworthiness standards must be determined by federal aviation regulations and must be respected by the Russian administration when issuing an airworthiness certificate and by the legal entities dealing with the design, testing, serial production and exploitation of aircraft, engines and propellers.³²⁹ The certification procedures are mandatory for any company or physical person of the States that signed the Intergovernmental Agreement on Civil Aviation and Use of Airspace in Minsk in 1991.³³⁰ Furthermore, the Russian agencies having administrative authority in other areas are as follows. The Ministry of Transport, in collaboration with the IAC, is responsible

³²⁶ *Aviation Code of the Russian Federation*, *supra* note 280, s. 33.

³²⁷ *Ibid.*, s. 37.

³²⁸ *Ibid.*, s. 8, 10, 36(1)-(2).

³²⁹ *Ibid.*, s. 35.

³³⁰ For an explanation of the CIS agreement on civil aviation, see *supra* note 286. The certification procedures have been adopted in accordance with Aviation Regulations Part 21 on Aircraft Certification Procedures". See www.mak.ru/information/listofaviationregulations.

for developing, issuance, and amendment of airworthiness standards,³³¹ and the Federal Service of Supervision is responsible for establishing an airworthiness inspection organization and an organization in charge of airworthiness engineering operations to assist in covering the functions and responsibilities of State oversight.³³² Finally, the Federal Agency of Air Transport is in charge of the issuance, renewal, validation, amendment, cancellation, and suspension of operations approvals and licenses.³³³ The Russian Aviation Code requires that the designers and manufacturers of aircraft have the obligation to obtain the type certificate.³³⁴ To do so, they have to satisfy the parameters of aircraft worthiness and follow the certification procedure in the federal aviation regulations.³³⁵ Also translated as a “certificate of exploitation readiness” in the Russian Aviation Code, the type certificate confirms that this new type of civil aircraft, its engines and its propellers conform with the airworthiness requirements for civil aircraft and environmental protection, and that their design is recognized as a standard type.³³⁶ Referred to in the Russian Aviation Code as the “flight readiness certificate”, the airworthiness certificate is issued when a type certificate has already been obtained³³⁷ and the tests and check-ups which have been run during the production of the series of the standard aircraft confirm that the designs and parameters of the civil aircraft, aviation aircraft and propellers comply with the type aircraft and the quality of their manufacturing respects the airworthiness standards.³³⁸ The developer of the type aircraft,

³³¹ *Aviation Code of the Russian Federation*, *supra* note 329. Directives, bulletins, orders, etc., must be consistent with the airworthiness regulations.

³³² *Ibid.*, s. 30 and 37(7).

³³³ *Ibid.*, s. 9, 10, and 36(1)-(2).

³³⁴ *Ibid.*, s. 8(1).

³³⁵ *Ibid.*, s. 37(1) in principio-(2).

³³⁶ *Ibid.*, s. 37(1) in fine.

³³⁷ *Ibid.*, s. 37(1) in principio.

³³⁸ *Ibid.*, s. 37(3).

engines and propellers is responsible for the compliance with the airworthiness standards and environmental protection during their development, testing and exploitation.³³⁹ The responsibility for compliance of every produced aircraft with the type certificate rests with the manufacturer.³⁴⁰ Finally, civil aircraft, engines and propellers manufactured in a foreign State and delivered to Russia where they will be operated must respect the certification procedure in the federal aviation regulations.³⁴¹

E. Aircraft in Russia: Nationality, Ownership and Registration Requirements

The Chicago Convention addresses specifically the nationality of aircraft.³⁴² All aircraft must have the nationality of the State where they are registered.³⁴³ An aircraft can be registered only in one State.³⁴⁴ For aircraft operated in international air transport, relevant nationality or common marks, and registration marks must appear on the fuselage of the aircraft and be visible at all times.³⁴⁵ The nationality or common mark must come before the registration mark.³⁴⁶ Marks take the form of capital letters of Roman type and Arabic numerals, of equal height, and without any ornamentation.³⁴⁷

³³⁹ *Ibid.*, s. 37(4) in principio.

³⁴⁰ *Ibid.*, s. 37(4) in fine.

³⁴¹ *Ibid.*, s. 37(9).

³⁴² *Convention on International Civil Aviation*, *supra* note 34, s. 17-21.

³⁴³ *Ibid.*, s. 17.

³⁴⁴ *Ibid.*, s. 18.

³⁴⁵ *Ibid.*, 20. Also, ICAO, *International Standards and Recommended Practices – Annex 7 to the Convention on International Civil Aviation: Aircraft Nationality and Registration Marks*, 5th ed., ICAO Doc. AN 7 (Montreal: ICAO, 2003).

³⁴⁶ ICAO, *International Standards and Recommended Practices – Annex 7 to the Convention on International Civil Aviation: Aircraft Nationality and Registration Marks*, *ibid.*

³⁴⁷ *Ibid.*

Each State must promulgate laws and regulations for the registration or the transfer of registration of the aircraft.³⁴⁸

In the Soviet Union, the changes in aviation in the late 1980s and early 1990s had important consequences on the identities of these new carriers and airports. As the former Soviet Republics became new countries, some previously domestic flights acquired an international status. Foreign carriers from the West and Far East could use some of these airports. Moreover, the aircraft on those new routes operated international flights. Thus, the SARPs, including the ones for aircraft registration, needed to be followed by the aviation entities.³⁴⁹

Russia has delegated the responsibility of the registration of aircraft to the department responsible for certification and aviation rules for the IAC, which is the Aviation Registry.³⁵⁰ On 20 February 1992, the Chairman of the IAC approved the mission of the Aviation Registry with its three principal functions. First, the Registry manages the development of aviation regulations common for the IAC member States, including regulations for certification of aircraft, aircraft components and production and repairs facilities, airworthiness requirements for aircraft engines, auxiliary power units and propellers, regulations for continued airworthiness, aircraft noise and emission requirements, etc. The second function of the Registry is the management of certification

³⁴⁸ *Convention on International Civil Aviation*, *supra* note 34, s. 19.

³⁴⁹ Within months from the dissolution of the Soviet Union, three other carriers, besides Aeroflot, were registered in Russia. TRANSAERO, ALAK, and Orelavia were progressively known in the world of aviation.

³⁵⁰ *Aviation Code of the Russian Federation*, *supra* note 280, s. 33(2).

and issuance of certificates.³⁵¹ Finally, the last function is the supervision over implementation of aviation regulations, together with the authorities of the IAC member states. The Registry is a small, supervisory organization relying heavily on expertise in the manufacturer's design bureaus and government research institutes, such as GosNIIGA located in Moscow.³⁵² The users, the design bureaus and the manufacturers finance the registry. According to Russian regulations adopted by the Ministry of Transport³⁵³, all civil aircraft operating in air transport must be registered in the IAC Aviation Registry in order to obtain a registration certificate.³⁵⁴ If an aircraft is registered in another State's registry, it could be registered in the IAC Registry and receive a Russian registration certificate accordingly, upon the condition that an agreement on the maintenance of airworthiness is concluded between both States.³⁵⁵ The aircraft registered in the IAC Aviation Registry acquires Russian nationality marks.³⁵⁶ In the following situations, the registration of the civil aircraft must be revoked from the Registry: the destruction of the registered civil aircraft or its removal from operation, the aircraft being taken abroad in case of its sale or transfer of its ownership to a foreign state, to a foreign citizen, to a person without citizenship or to a foreign legal entity, and finally, in case of violation of

³⁵¹ The Aviation Registry issue the certification documents, such as: design organization certificate; type certificate for aircraft, engine, auxiliary power unit or propeller; provisional type certificate; aircraft type noise certificate, appliance design approval letter; production certificate; materials production certificate; airworthiness certificate – initial airworthiness certificate for aircraft, export airworthiness certificate for individual aircraft (new one) and special airworthiness certificate (provisional, experimental); overhaul and repair station certificate; certificate for accrediting the certificate centre; certificate for accrediting the test laboratory; certificate of delegating functions of independent inspection; and certificate of IAC Aviation Registry representative. For a complete list and details on the certification documents that can be issued, see the IAC website <http://www.mak.ru/english/english.html/certificates>.

³⁵² The State Research Institute of Civil Aviation (GosnIIga) – specializes in testing civil aircraft, aviation engines and equipment, as well as developing the safest and economically most viable methods of their operation. See H. van Schyndel, *supra* note 7 at 22.

³⁵³ *Aviation Code of the Russian Federation*, *supra* note 280, s. 33(7)

³⁵⁴ *Ibid.* s. 33(1). The legal entity or the person owning the aircraft must pay a state duty (registration fees) to get the registration certificate. The Russian law on taxes and fees determines the amount of the fees. *Aviation Code of the Russian Federation*, *ibid.*, s. 33(8). See also H. van Schyndel, *ibid.* at 48.

³⁵⁵ *Ibid.* H. van Schyndel, *supra* note 7 at 41.

³⁵⁶ *Ibid.*, s. 33(4).

any requirement related to the state registration of a civil aircraft.³⁵⁷ When the registration of the aircraft is revoked, the certificate of registration is no longer valid and must be returned to the IAC Aviation Registry.³⁵⁸ Concerning all aspects of registration of the ownership rights and other property rights in an aircraft, the Aviation Code should deal with them according to the rules of the state registration of realty in the Russian Civil Code.³⁵⁹ Finally, a lien on a civil aircraft should be registered in the IAC Aviation Registry.³⁶⁰ Once the information on a civil aircraft is entered in the Aviation Registry, the aircraft is given the nationality and the registration marks. These marks must be affixed to the aircraft according to the procedure adopted by the Ministry of Transport.³⁶¹

F. Russian Air Carrier Operator Certification

The Russian Aviation Code defines an operator as “a natural person or a legal entity who owns aircraft as property, on lease or on other legal basis, operates the said aircraft for flights and holds an operator’s certificate.”³⁶² Russian aviation entities and individual entrepreneurs hold the right to perform commercial activities in civil aviation when they receive a State license.³⁶³ The Federal Agency of Air Transport of Russia can issue a licence for commercial aviation operations according to strict requirements and

³⁵⁷ *Ibid.*, s. 33(5).

³⁵⁸ *Ibid.*, s. 33(6).

³⁵⁹ *Civil Code of the Russian Federation*, s. 131, online: Russian Civil Code <http://www.russian-civil-code.com/PartI/SectionI/Subsection3/Chapter6.html>.

³⁶⁰ *Aviation Code of the Russian Federation*, *supra* note 280, s. 33(9).

³⁶¹ *Ibid.*, s. 34(1) and (6).

³⁶² *Ibid.*, s. 61(3).

³⁶³ *Ibid.*, s. 62.

various licensing procedures set out in Russian regulations.³⁶⁴ The aircraft operator must demonstrate that its fleet is registered, that it holds all required documents, and that it can perform flights safely by fulfilling requirements, such as the economic performance/financial fitness requirement.³⁶⁵ Also, the operators must already possess the required aircraft certificates to operate them.³⁶⁶ Once the operator satisfies the basic requirements, and after a special commission led by the First Deputy Director of the Federal Agency of Air Transport has approved the request, the operator's certificate is issued.³⁶⁷ The certificate (an attestation or a copy) must always be carried among mandatory documents aboard the aircraft when operated.³⁶⁸ Foreign operators must also obtain a license to operate their aircraft according to the legislation in Russia, which recognises the validity of such a license issued by a foreign State in accordance with the SARPs.³⁶⁹ The responsibilities of the operator are mainly to respect the rules of air operation and of the technical maintenance of the civil aircraft detailed in the operation

³⁶⁴ *Ibid.*, s. 9(1). H. van Schyndel, *supra* note 7 at 9, 38 and 53. The various procedures on licensing are contained in Regulation No. 850 of 23 August 1993 "On the Licensing of Transport and Other Activities in Air Transport". The Federal Law of 7 November 2007 renders the Aviation Code in conformity with the law "On Licensing of Certain Activities". To do so, the former list detailing the licensing activities was deleted and was replaced by a reference to the "legislation of the Russian Federation".

³⁶⁵ See H. van Schyndel, *ibid.* at 9-10. Minister of Traffic of Russia, Directive on "Certification of Air Transportation Operators in the Russian Federation Manual", No. 106 of 10 December 1992. The "Instruction for Operators' Certification Procedures of the Air Transport of the Russian Federation", approved by the Order of the Minister of Transport No. 106 of 10 December 1993 is establishing the requirement for "financial fitness". The European Union request, as a priority condition, for the foreign operators to fulfill the requirement for "economic performance/financial fitness". See EC, *Council Regulation 2407/92 of 23 July on licensing of air carrier*, [1992] O.J. L. 240/1.

³⁶⁶ *Ibid.*, s. 9(3).

³⁶⁷ H. van Schyndel, *ibid.* at 10 footnote 12. The validity of the certificate is one year for international air service and two years for domestic air service. After one year of domestic operations and succeeding a special evaluation, a domestic airline can operate internationally.

³⁶⁸ *Ibid.*, s. 67(1). Beside the operator's certificate, the following documents are mandatory on board of an aircraft: the registration certificate; the airworthiness certificate; the flight logbook and sanitary journal, flight operation manual; the permission for airborne radio, if installed in the aircraft; appropriate documents for each crew member; and, if required, other documents stipulated by the Russian authorized bodies.

³⁶⁹ *Ibid.*, s. 67(2)-(3). The recognition of the validity of the operator's certificate is a principle in *Chicago Convention*; *supra* note 34, s. 33. The SARPs related to the operator's certificate are included in ICAO, *International Standards and Recommended Practices – Annex 6 to the Convention on International Civil Aviation: Operation of Aircraft - Part I – International Commercial Air Transport – Aeroplanes*, *supra* note 318.

documents of the civil aircraft, to maintain the aircraft's airworthiness in conformity with the airworthiness certificate, and finally, to provide information on the technical condition of the aviation technology of the aircraft and the particularities of its operation to the appropriate aviation body.³⁷⁰ In case the operator fails to respect its responsibilities or if the aircraft is considered unsafe to fly, the Federal Agency of Air Transport has the power to suspend, revoke, or cancel licenses and certificates from the Aviation Registry.³⁷¹ For this reason, the operator would have to suspend its operations until the situation is corrected by fulfilling the requirements mentioned in its licence.

G. Air Carrier Economic Regulation in Russia

In 1944, the United States, Great Britain, Canada, and Australia-New Zealand disagreed on various points regarding giving economic regulatory authority to ICAO.³⁷² Nevertheless, the member States agreed to give limited economic powers to the organization, although they were mainly administrative and advisory, as mentioned in the Convention.³⁷³ Even if Article 44 of the Chicago Convention presents the responsibility of “preventing economic waste caused by unreasonable competition” among the aims and

³⁷⁰ *Ibid.*, s. 37(5) and (8).

³⁷¹ *Aviation Code of the Russian Federation*, *supra* note 280, s. 10, 37(6), and 65(2). See H. van Schyndel, *supra* note 7 at 10.

³⁷² J. Cooper, *The Right to Fly*, *supra* note 30 at 163-173.

³⁷³ Those limited economic powers of ICAO consist of research; study of operation of international air transport, including ownership of international services trunk routes; investigation of situations appearing to present avoidable obstacles to development of air navigation; collection and publication of information, including cost of international operations and subsidies from public funds;” and under special circumstances, administration of airports and facilities necessary for international air services. *Ibid.*, at 162-163. The powers to fix or control rates, allocate routes, or control operating frequencies or capacity have not been delegated to ICAO, but stayed under the control of each member State of ICAO.

objectives of ICAO,³⁷⁴ this mandate was not developed. Rather, ICAO has rigorously elaborated the technical issues of navigation, safety and security. There is not one mention of economic regulatory issues in the SARPs in the whole eighteen Annexes.³⁷⁵ Usually, the economic regulation in the majority of States embodies the regulation of entry (routes), pricing (rates), inter-carrier agreements and, sometimes, frequency and capacity.³⁷⁶ Some States delegate the power to designated air carriers permitted to fly domestically and internationally to their civil aviation agency. For domestic routes designation, air carriers would usually demonstrate how many carriers the route could profitably sustain and the reasons for which its competitive contribution would respect public interest.³⁷⁷ Usually, States party to a bilateral air transport agreement decide on designation of international routes.

The Russian Aviation Code defines civil aviation as “aviation with the purpose of meeting the needs of the individuals and the economy” and commercial civil aviation as “[c]ivil aviation used for the rendering of services (through the transportation of passengers, luggage, cargo and mail)”.³⁷⁸ After the dissolution of the Soviet Union, the operational tasks in civil aviation were assigned to private companies or corporatized companies.³⁷⁹ The operational functions were distributed to air carriers, airports and technical maintenance organizations. The transition from a command economy to a

³⁷⁴ *Chicago Convention*, *supra* note 34, s. 44(e).

³⁷⁵ P.S. Dempsey, *Public International Air Law*, *supra* note 139 at 123.

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*

³⁷⁸ *Aviation Code of the Russian Federation*, *supra* note 280, s. 21(1)-(2).

³⁷⁹ H. van Schyndel, *supra* note 7 at 9-10. The difference between a privatized company and a corporatized company is that in the first case the state is a shareholder among others and in the second case, the company is transformed into a partnership or stock corporation (ltd, plc.) and its shares principally continue to be held by the state.

market economy was a substantial responsibility for the Russian authorities, and this necessitated the adoption of economic regulations, even if limited.³⁸⁰ Concerning air carriers, Russia kept the distinction between scheduled flights and charter flights,³⁸¹ as is still the case in Western Europe.³⁸² Hence, tariffs and capacities in international flights can fluctuate according to competition and a certain form of protection for the new air carriers, still not fully competitive, must be included in the air service agreements.³⁸³ The Aviation Code of Russia describes exactly the rules and criteria for the definition of transport costs and does not limit the right of aviation companies to fix tariffs.³⁸⁴ Nevertheless, additional regulation was needed for the new Russian airlines and the operators willing to operate international flights since “Aeroflot” was the only designated carrier mentioned in more than one hundred bilateral air service agreements concluded by the Soviet Union. Even if Russia rapidly undertook renegotiation of the bilateral agreements to include a clause on the designation of multiple air carriers, several old agreements stayed valid in their original form. Hence, new airlines could only operate international traffic under the name of Aeroflot. A transitional solution was needed: “Aeroflot – Russian International Airlines” concluded commercial contracts with some of the new carriers so they could fly under its name. This understanding was temporary as it would certainly lead to many problems and this palliative was basically inconsistent with the bilateral agreements. Such an agreement would have worked if both Aeroflot and other airlines were part of or owned by the same state administration. Bilateral agreements required that air transport be provided by the designated carrier mentioned in

³⁸⁰ *Ibid.* at 11.

³⁸¹ See *Aviation Code of the Russian Federation*, *supra* note 280, s. 100-104.

³⁸² H. van Schyndel, *supra* note 7 at 10.

³⁸³ *Ibid.*

³⁸⁴ *Aviation Code of the Russian Federation*, *supra* note 280, s. 64.

the agreements and not by another carrier external to the sphere of competence of the designated carrier. Even if there are a good number of airlines in Russia, “Aeroflot – Russian International Airlines” is the “designated carrier” in the majority of bilateral air services agreements and operates about 70% of the international air transport of all Russian airlines.³⁸⁵ As regards foreign airlines willing to operate international air transport in Russian air space, all air freedoms must be concluded in a bilateral agreement between the Russian Federation and the State of registry of the foreign operator. Otherwise, the foreign operator must obtain permission from the Federal Agency in accordance with the Russian procedure. If foreign operators want to fly within Russia, they must be granted permission by the Federal Agency.³⁸⁶

Under the new Russian market economy, the state or municipalities, or natural persons or legal entities can own, from now on, property in civil aviation.³⁸⁷ In the early 1990s, assets and duties in civil aviation, all formerly owned by the Soviet Union, were distributed between airlines and airports according to Russian Law. The Russian privatization authority³⁸⁸ and the Ministry of Transport ensure the development and the implementation of the “Special Conditions for Corporatization and Private Airports”.³⁸⁹ The annex to the Special Conditions, titled the “Main Principles of separating independent airports from air transport enterprises”, defined assets that were not part of the share capital of an airport,³⁹⁰ and that, consequently, could be made the object of a

³⁸⁵ M. Milde, “Some questions marks about the Price of “Russian Air””, *supra* note 17 at 153.

³⁸⁶ *Aviation Code of the Russian Federation*, *supra* note 280, s. 63(5).

³⁸⁷ *Ibid.*, s. 7.

³⁸⁸ In Russian language, this entity is known as the “Goskomimuchtchesvo” [GKI].

³⁸⁹ H. van Schyndel, *supra* note 7 at 12 [*Special Conditions*].

³⁹⁰ *Ibid.* The assets that are not part of the share capital of an airport: equipment, assets and property of ATC centres; facilities and systems structures, flight radio-technical maintenance and communications (except

lease to joint stock companies on a long-term basis, from ten to fifty years, an exception being made for the ATC structures and facilities.³⁹¹ According to the Main Principles of Separation, the distribution of the duties in civil aviation is between the enterprises, meaning the airlines and the airports. On the one hand, an airline is “an integrated flight-technical and commercial facility design to transport passengers, cargo and post by air.”³⁹² First, the airline may use its own or leased aircraft fleet to make available and sell services and undertake duties in the interests of the national economy. Secondly, the following typical structural units must be part of the airline: flight detachment, aviation technical base, flight attendant services, air communication agency, and parts of the personnel responsible for the commercial sector, supply, and other functions. Thirdly, the airline must rent or provide interdependent systems, preparation of meals, passenger service, cargo, and post processing. Also, it may own or rent facilities, buildings, and necessary equipment to perform these activities. Fourthly, it may use its own personnel at registration counters, and arrival and departures counters to provide assistance for its flights and other interdependent systems and facilities. Finally, the airline has to rent the relevant technological equipment of an airport. In principle, all other enterprise services, besides the ones of the airline, are included in the structure of the airport. An airport is defined as “an integrated engineering and commercial facility, designed for the arrival

internal airport communication and computers); class A, B, C, D, and E airports serving federal needs; take-off, landing, taxi, side-by and terminal safety runways, aircraft parking sites and aprons; airport fences; radio and lighting equipment facilities; and ATC energy supply system and airport communications systems [*Main Principles of Separation*].

³⁹¹ *Ibid.*, at 12 footnote 16. The exception concerns enterprises that cannot be subject to privatization or capitalization, such as: systems and means of Air Traffic Control of airports and aviation enterprises, connected with the unified system of ATC of lower and higher air space; Interdependent Civil Aviation Unit in Moscow; and Meteorological centres and flight testing stations, including the meteorological centre of “Sibavia”.

³⁹² *Ibid.* For an airline, there are 5 main duties mentioned in the present text.

and departure of aircraft and for serving air transport.”³⁹³ The following structural units need to be part of the airport: use of the airfield and airport buildings, refuelling and storage facilities, and maintenance of technical facilities for heating, electricity, transportation and communications. The responsibilities of the airport are the arrival and departure of aircraft and their technical and commercial servicing, passenger care, ATC within the airport vicinity, and the leasing and granting of concessions for facilities, buildings, and equipment.

Furthermore, the Main Principles of Separation also provide for the distribution of assets between the two enterprises, such as the following: aircraft, aviation engines, spare parts and materials for aircraft, facilities, buildings, structures, special transport and equipment designated exclusively for operations of aircraft belonging to airlines. The remaining equipment not allotted to the airline is for the airport.³⁹⁴ Additionally, the financial and administrative assets³⁹⁵ are allocated between the airline and the airport, such as assets on clearing accounts, stocks, payments, debits, credits, loans, bank deposits and the authorized capital of joint stock companies. Regarding the assets to pay salaries, to encourage employee activities and social requirements, they are apportioned proportionately to the number of employees as a basic salary fund. The other assets, notably production modernization and various long-term investments, are divided proportionately to the value of capital funds. Airlines can also use hangars and related structures and sites for servicing aircraft near the hangars, buildings occupied or used

³⁹³ *Ibid.* at 13. For an airport, there are 5 main duties mentioned in the present text. To become independent airports, an airport must be capable of taking class 1 (having a take-off weight of more than 75 tonnes) and class 2 (having a take-off weight between 30 and 75 tonnes) aircraft and of handling over a half of million people annually as of 1991. *Ibid.* at 13-14.

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

primarily by airline personnel, and adjoining areas with site-security procedures carried-out. The airport has rights to the remaining territory used by the aviation enterprise as part of the land plot for future developments. Airports provide land, buildings, equipment and services to the airlines according to the principle of equal access.

The state and the commercially organized entities can be shareholders of the same companies. When the state considers that there is a need for serving public interest,³⁹⁶ it must own a majority of the shares in the specific company, called a corporation. For example, the State holds 51% in Aeroflot and the employees of the airline hold the other 49 % of the shares, and it holds 100% of the shares in Moscow-Sheremetyevo airport. Furthermore, Russian aviation infrastructure is now open to possible foreign investment. To invest in aviation entities in Russia, the foreign investors must fulfil three conditions: the foreign investment of one entity must be limited to 49% of the issued capital, the manager of the entity must be a Russian citizen and the number of foreign directors must not exceed one-third of the total number of the Board members.³⁹⁷ The new, modern and westernized investment system in the Aviation Code should reassure the foreign investors, as it was designed to prevent investment money disappearing into the black hole of a remote budget.³⁹⁸

³⁹⁶ In Russia, the rules specific to the privatization and corporatization of airports are the following. Airports must have an open access for all persons observing the rules for the use of the airport, even if they are service enterprises. This is easier to secure when an airport is public institution, i.e. a corporatized company, as the state hold a majority of shares in the airport company and it must observe the constitutional principle of equal treatment. Moreover, other principles need to be followed. If an airport becomes a private company, a license is needed and could only be delivered after the hearing of concerned members of the public. If an airport becomes a public institution, only the registration is needed, but is subject to the same requirements as a license. Finally, for both forms of organization of an airport, the full extent of operations granted in the license or the registration of the company must implemented. *Ibid. Aviation Code of the Russian Federation*, *supra* note 280, s. 40-51.

³⁹⁷ *Ibid.*, s. 61(2).

³⁹⁸ H. van Schyndel, *supra* note 7 at 42-43.

H. Schools and Approved Maintenance Organizations in Russia

The endorsement, recognition or approval of aviation training organizations or programmes is not addressed in the SARPs.³⁹⁹ In Russia, aircraft maintenance can be organized as a private enterprise in the private sector.⁴⁰⁰ A maintenance organization must be part of an aviation company and cannot constitute a separate company by itself.⁴⁰¹ At the same time, this organization can contract the maintenance work of other aviation companies. The state entities responsible for qualitative checks and standards may delegate those tasks to the maintenance organization.

I. Russian Air Navigation Facilities

Annex 11 to the Chicago Convention addresses air traffic services consisting of air traffic control and flight information services.⁴⁰² The “unified system of air traffic control” in Russia is the property of the federal authorities.⁴⁰³ The organization of the exploitation of air space includes, among other components, “the organisation of air traffic which covers the air traffic service (control); the organization of air traffic flow

³⁹⁹ P.S. Dempsey, *Public International Air Law*, *supra* note 139 at 125. The only exception mentioned on ICAO website is the Regional Training Centres delivering the ICAO Aviation Security Training Programme and ICAO Government Safety Inspectors Training Programme, ICAO, “Personnel Licensing - Frequent Asked Questions”, Air Navigation Bureau, online: ICAO <http://www.icao.int/icao/en/trivia/peltrgFAQ.htm>.

⁴⁰⁰ *Aviation Code of the Russian Federation*, *supra* note 280, s. 9(1) and 62.

⁴⁰¹ *Ibid.*, s. 61.

⁴⁰² ICAO, *International Standards and Recommended Practices – Annex 11 to the Convention on International Civil Aviation: Air Traffic Services*, 13th ed., ICAO Doc. AN 11 (Montreal: ICAO, 2001).

⁴⁰³ *Aviation Code of the Russian Federation*, *supra* note 280, s. 7.

management; the organization of air space for the purpose of ensuring the air traffic service (control) and the air traffic flow management”.⁴⁰⁴ The IAC is in charge of the coordination of air traffic control in Russia⁴⁰⁵ and the Russian Government issues the regulations on the single system of air traffic control.⁴⁰⁶ As in the Western World, Russia also experienced problems with ATC personnel. Russian employment law permitted the general right to strike and strikes were legal. The Air Traffic Control personnel exercised their right and legal strikes took place four times (1992, 1995, 1997, 1998) in the 1990s. On each occasion they caused major air traffic disruptions in the Russian airspace. In 1999, the Aviation Code⁴⁰⁷ was finally amended to prohibit air traffic control personnel from striking or from resorting to other kinds of work interruption with the purpose of pressing for their demands in connection with work disputes or other conflicts. The goal of that amendment was to protect the rights and the legal interests of the citizens and to ensure national security and state defence. In February 2004, a small number of delegates in the State Duma presented a bill for annulling the prohibition to strike. However, it was rejected in the first reading. Moreover, Russia has to deal with another problem complicating the use of its air space, namely foreign aircraft flying in Russia. Only international routes and airports are available because the “[a]irspace is not classified in Russia, but it can be considered as Class C”.⁴⁰⁸ Globally, regular VFR does not exist. Only at a lower level is VFR controlled using air traffic control. High altitude airways are mostly NDB-based with only a few VORs around the country. Flights levels are metric.

⁴⁰⁴ *Ibid.*, s. 14(1)4).

⁴⁰⁵ H. van Schyndel, *supra* note 7 at 23.

⁴⁰⁶ *Ibid.*, s. 14(2)

⁴⁰⁷ The Federal Amendment Law of 8 July 1999 referred in Heiko van Schyndel, *Aviation Code of the Russian Federation, Essential in Air and Space law*, *supra* note 7 at 47.

⁴⁰⁸ Lonied Koshelev, President AOPA-Russia, in: 14(2) Bulletin 2 (2009) in H. van Schyndel, *ibid.* at 42 fn 36.

Any flight operation touching domestic airways or non-international airports would require an escort navigator and extensive procedures to obtain permission from both the Ministry of Foreign Affairs and the Air Navigation Authority.

J. Transportation of dangerous goods in Russia

Annex 18 addresses the requirements for “safe transport of goods by air”.⁴⁰⁹ In Russia, the transportation of “hazardous cargo”, such as “weapons, ammunition, explosive, contaminants, highly inflammable substances, radioactive substances” must be performed according to Russian laws, federal aviation regulations and international agreements to which Russia is a party.⁴¹⁰

K. Penalties of non-compliance: civil aviation enforcement

In principle, the civil aviation agency or other authorized administrative bodies can introduce and enforce civil penalties when there is a violation of any requirement in the aviation code of one state, or of any orders, rules and regulations promulgated accordingly.⁴¹¹ If the delinquent refuses to act upon the civil penalties, the domestic

⁴⁰⁹ ICAO, *International Standards and Recommended Practices – Annex 18 to the Convention on International Civil Aviation: The Safe Transport of Dangerous Goods by Air*, 3rd ed., ICAO Doc. AN 18 (Montreal: ICAO, 2001).

⁴¹⁰ *Aviation Code of the Russian Federation*, *supra* note 280, s. 113.

⁴¹¹ P.S. Dempsey, *Public International Air Law*, *supra* note 139 at 128-129.

courts can also impose them. Criminal penalties can also be imposed if a person intentionally commits a crime related to civil aviation.

In Russia, in case of violation of the aviation legislation,⁴¹² a guilty person is responsible according to the legislation of the Russian Federation. For safety reasons, the Federal Agency of Air Transport has the mandate to issue licenses and also to suspend, limit or revoke them in accordance with the procedure detailed in the federal aviation regulations.⁴¹³ The Federal Service of Supervision in the Sphere of Transport must take “measures provided by the legislation of the Russian Federation for preventing and (or) curtailing violations federal regulations of the exploitation of air space”,⁴¹⁴ and the delinquent natural person or the legal entity should be responsible for the committed violation.⁴¹⁵ In case a person causes an immediate threat to flight safety and refuses to obey the instructions of the captain of the aircraft, the latter has the right to take all necessary measures, even enforcement measures, against him/her.⁴¹⁶ The captain can also decide to land at the nearest airport in order to remove the person from the aircraft or, in case of a criminal offence, deliver him/her to the police or other law-enforcement bodies.⁴¹⁷ In case an individual entrepreneur of an aviation entity does not comply with the requirements in certificates or in licenses, violates these requirements and/or performs its activity without the proper mandatory license or certificate, penalties such as removal, suspension or restriction of documents can be imposed. Other sanctions established by the

⁴¹² For the enumeration of elements composing the Russian aviation legislation, see *Aviation Code of the Russian Federation*, *supra* note 280, s. 3. This subject was also discussed in subsection a) of section 2 of Part B of the present thesis.

⁴¹³ *Ibid.*, s. 9-10.

⁴¹⁴ *Ibid.*, s. 18(2).

⁴¹⁵ *Ibid.*, s. 19.

⁴¹⁶ *Ibid.*, s. 58(2) in principio.

⁴¹⁷ *Ibid.*, s. 8(2) in fine.

legislation of the Russian Federation, included in the Code on Administrative Offences⁴¹⁸ can also be applied.

Chapter 3 – Safety Aviation Relations between the European Union and the Russian Federation

The EU air carriers flying to third countries encounter limitations to their commercial freedom, resulting in fewer chances for air carriers for getting potential passengers. Traditionally, bilateral agreements regulate the international commercial aviation relations between individual states. These agreements limit the number of air carriers on the selected routes, the number of flights and the possible destinations. The EU decided to expand its aviation policy to other states in order to overcome these limitations and to act on three specific points to develop aviation relations in conformity with its policy.⁴¹⁹ The first point the EU needs to work on is the revision of all bilateral agreements in accordance with the operation freedom provided by the European single market. This way, legal certainty is secured and all EU air carriers have equal treatment when flying internationally. Second, the EU is working to create a common aviation area with neighbouring countries in the Mediterranean and to the east. Finally, the EU is organizing open aviation areas with other strategic foreign partners. Consequently, greater international relations contribute to open markets and guarantee high standards of safety and security in international air transport.

⁴¹⁸ *Ibid.*, s. 65(2)-(3).

⁴¹⁹ EC, Commission, *Mobility & Transport-Air-International Aviation: Russia* (Brussels: EC, 2009), online: Europa http://ec.europa.eu/transport/air/international_aviation/country_index/russia_en.htm.

Russia is a major aviation neighbour and the largest international aviation market of the European Union. In recent years, an annual growth of 10% to 25% of traffic between the European Union and Russia confirms the importance of reaching a proper aviation agreement. Once the agreement to solve the problem of royalties for Siberian overflight signed by Russia and also the EU designation clause is part of the bilateral agreements with Russia, the implementation of their global aviation agreement could begin and enhance their cooperation in the aviation market and in aviation safety.⁴²⁰ However, aviation safety in the EU is fundamental and is ensured by the European Aviation Safety Agency by the Safety Assessment of Foreign Aircraft Program and by the mechanism of blacklisting of unsafe foreign air carriers.⁴²¹

A. Safety of Foreign Carriers in the European Union: the EASA and the SAFA Programme

The European Community decided to globally enforce the SARPs on the Community's territory in order to ensure the confidence of the aviation system in the interest of the European citizens living in the areas serviced by EU airports and those who are passengers of a third-country aircraft.⁴²² The EC is effectively enforcing these

⁴²⁰ *Ibid.*

⁴²¹ M. Anger, *supra* note 158 at 151 and 167 [EASA; SAFA].

⁴²² EASA, *Safety Assessment Of Foreign Aircraft (EC SAFA Programme) – What Is the EC SAFA Programme?* (Cologne: EASA, 2010), online: EASA <http://www.easa.europa.eu/approvals-and-standardisation/safety-assessment-of-foreign-aircraft-SAFA.php#> [EC].

standards on foreign aircraft by operating the SAFA programme, which consists of performing ramp inspections on third-country aircraft landing at EU airports.⁴²³

First operational in September 2003,⁴²⁴ the EASA was established as a Community agency and is the real aviation safety authority in Europe.⁴²⁵ The EASA has the power to establish mandates advising the European Community to enact regulations on aviation safety. Once the Community issues regulations, they become part of EU law and also automatically part of the national law of the EU member States.⁴²⁶ It has the mandate to adopt common standards to ensure the highest level of safety. The EASA is also responsible for monitoring the uniform application of these standards across the European Union and for promoting them at the international level.⁴²⁷ As the strong central regulatory authority in Europe, the EASA has been in charge of the European Community SAFA programme since 1 May 2007. Earlier, this programme was run by the European Civil Aviation Conference,⁴²⁸ which developed it following the crash of an aircraft departing from Turkey leading to the deaths of several German tourists.⁴²⁹

⁴²³ EC, *Regulation 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation 1592/2002 and Directive 2004/36/C*, [2008] O.J. L 79/1 at s. 9, online: Europa <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008R0216:EN:HTML>. The Article 69 of the Regulation states the repealing of EC, *Directive 2004/36/CE of the European Parliament and of the Council of 21 April 2004 on the safety of third-country aircraft using Community airports*, [2004] O.J. L. 143/76.

⁴²⁴ M. Anger, *supra* note 158 at 151.

⁴²⁵ EC, *Regulation 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation 1592/2002 and Directive 2004/36/C*, *supra* note 423 [EASA Regulation].

⁴²⁶ *Ibid.*, at 154.

⁴²⁷ See I.H.Ph. Diederiks-Verschoor, *supra* note 45 at 85.

⁴²⁸ In 1994, the Safety Assessment of Foreign Aircraft Programme was established activity of ECAC and was coordinated by the Joint Aviation Authorities JAA, *Safety Assessment of Foreign Aircraft Programme* (Hoofddorp : JAA, 2006) online : JAA <http://www.jaa.nl/safa/safa.html>. The JAA is an associated body of ECAC since 1989. The EU member States had to join the JAA, to adopt the Joint Aviation Requirements (JAR), to recognize products designed, manufactured, operated and maintained under common rules and

For each member State of the Community and for States who have signed a specific SAFA Working Arrangement with the EASA, foreign aircraft may be inspected. All concerned States must make their inspections in accordance with a common procedure and their reports according to a common format. Even if these States must legally conduct inspections on third country aircraft, they can also inspect aircraft from other member States engaged in the SAFA programme. The purpose of SAFA inspections is to perform on-the-spot assessments, and can in no way replace the appropriate regulatory oversight of a member State. These inspections are, in fact, indicators, and cannot ensure the airworthiness of a specific aircraft. The aircraft to be inspected⁴³⁰ is selected by the safety oversight agency of the member States involved in the programme. Their selection of aircraft is either made randomly or on the assumption that some aircraft or airlines may not operate in accordance with the ICAO standards. The EASA and the IAC signed Working Arrangements on airworthiness on 16 July 2004,⁴³¹ which was

procedures, and to recognize certification of products, organizations and personnel. JAA was responsible for overseeing an arrangement between an increasing number of ECAC member States through cooperation in development and in implementation of common safety standards and procedures. This responsibility is now transferred to the EASA.

⁴²⁹ Micheal Taverna, "Quality Seal: France Pushes for New Label, Tougher Rules To Weed Out Unsafe Foreign Carriers" (1985) *Aviation Week & Space Technology* 38.

⁴³⁰ When the inspections are conducted, the inspectors need to check several elements, such as licences of the pilots; procedures and manuals that should be carried in the cockpit; compliance with these procedures by flight and cabin crew; safety equipment in cockpit and cabin; cargo carried in the aircraft; and the technical condition of the aircraft. See EASA, *Safety Assessment Of Foreign Aircraft (EC SAFA Programme) – What Is Checked?*, *supra* note 422.

⁴³¹ Working Arrangement on Airworthiness Between The European Air Safety Agency And The Interstate Aviation Committee, 16 July 2004, St-Petersburg, online: IAC <http://www.mak.ru/english/english.html/information>.

followed by a series of implementing procedures of the Arrangements.⁴³² In 1992, Russia delegated its powers related to airworthiness to the IAC.⁴³³

Information on important findings is directly communicated to all parties involved. When more serious findings are identified, the oversight authority of the State of inspection will contact its counterpart authority in the State of registry or the State of operation of the airline to share the findings and request corrective action. Moreover, the oversight authority must inform the captain of the aircraft and the management team of the airline of these findings. If some irregularities can have an instant adverse effect on aviation safety, meaning that they risk the safety of the aircraft, its crew and passengers, the targeted airline and the oversight authority of the State of inspection will agree to corrective action before the aircraft is permitted to depart. Finally, when rectification of the irregularities creates a delay, or if it must be done at another airport, the oversight authority of the State of inspection can, with the coordination of the State responsible for the aircraft, approve a positioning flight⁴³⁴ and impose conditions before authorizing the aircraft to fly to the assigned airport. All information resulting from oversight authority inspections are collected in an EASA database.⁴³⁵ When safety hazards are identified,

⁴³² EASA, *International Cooperation – Working Arrangements – Russia*, online: Europa <http://www.easa.europa.eu/rulemaking/international-cooperation-working-arrangements.php>.

⁴³³ See section D - “Aircraft Airworthiness Certificate In Russia” of chapter 2 of the present thesis.

⁴³⁴ A positioning flight is “a flight operated to a precise destination without passengers or cargo onboard.” See EASA, *Safety Assessment Of Foreign Aircraft (EC SAFA Programme) – Results*, *supra* note 422.

⁴³⁵ All reported data is stored centrally in a computerized database set up by EASA. The database also holds supplementary information, such as lists of actions carried out following inspections. The complete database information is subject to a regular reviews and analyzed by EASA. EC, *Commission Regulation 768/2006 of 19 May 2006 implementing Directive 2004/36/EC of the European Parliament and of the Council as regards the collection and exchange of information on the safety of aircraft using Community airports and the management of the information system*, [2006] O.J. L. 134/16. The Directive 2004/36/EC was repealing in 2008 without prejudice to the implementing measures on collection of information, ramp inspection and exchange of information. See EC, *Regulation 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European*

they are directly communicated to the European Commission and the member States of the Community. The EASA is also responsible for developing, in close collaboration with and on behalf of the European Commission, the qualitative criteria in order to reach a more centered approach corresponding to the priorities of the SAFA inspections. In principle, the State of inspection shares the inspection results with the other EU Member States and with the European Commission. If a potential safety threat is identified during inspections, or if an inspection finds non-compliance with international safety standards that can pose a potential safety threat, the inspection report must be communicated instantly to each member State of the EU and the European Commission. In such a case, the European Community can decide to ban the aircraft or the airline from operating within the Community.

In December 2005, the EU introduced a regulation permitting the blacklisting of certain airlines or aircraft from flying within the European Community.⁴³⁶ The first list of air carriers banned from flying in the EU was published in March 2006. This list is regularly updated every three months. According to specific criteria judging airworthiness, the EU analyzes the operations of individual air carriers and can decide to ban one aircraft or more of the same airline company, or place the entire airline under operational restrictions within the EU. By aiming at creating and guaranteeing a unified European sky, the Community approach reflects the lack of faith it has in individual civil aviation authorities, since the airlines traffic over the EU territory can only be controlled

Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation 1592/2002 and Directive 2004/36/C, supra note 423, whereas 34.

⁴³⁶ EC, *Regulation 2111/2005 of the European Parliament and of the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36*, [2005] O.J. L. 344/15.

efficiently by the EU. The blacklist is an efficient dissuasive measure in order to prevent accidents by identifying at the earliest possible moment “serious safety deficiencies with potentially disastrous consequences. Without providing a full guarantee, it has also functioned as a strong incentive to airlines and civil aviation authorities to continuously improve safety.”⁴³⁷

The EU almost banned a Russian airline from operating its aircraft in its airspace. The Russian aviation agency issued a safety clearance to Pulkovo Airlines to allow it to operate its fleet. In August 2006, the airline operated its domestic regular flight 612 with the aircraft Tupolev-154 with 170 passengers and crew on board. En route from Anapa to Saint Petersburg, the airplane crashed near Donetsk in the eastern part of Ukraine and no one survived. When the EU analysed the individual Russian airline, it concluded that the aircraft crashed because of unsafe aircraft conditions.⁴³⁸ This airline was about to be placed on the Community list when the Russian aviation authorities immediately informed the EU that it was in the process of implementing corrective measures and that Pulkovo would rapidly comply with them.⁴³⁹ Russia invited the Commission to verify the situation after a few weeks and take decisions accordingly.⁴⁴⁰ In October 2006, the airline

⁴³⁷ EC, News Release, MEX/10/0111, “News from the Communication Directorate General's midday briefing” (1 November 2010), online: Europa <http://europa.eu/rapid/pressReleasesAction.do?reference=MEX/10/0111&format=HTML&aged=0&language=en>.

⁴³⁸ David Kaminski-Morrow, “EC admits to concerns over Russian carrier Pulkovo” (26 September 2006), online: Flight Global <http://www.flightglobal.com/articles/2006/09/26/209233/ec-admits-to-concerns-over-russian-carrier-pulkovo.html>.

⁴³⁹ Emilie Drab, “Actualités: La liste noire se complexifie” *AéroContact* (13 October 2006) online: http://www.aerocontact.com/news/ac_news_art.php?ID=02955&PHPSESSID=e0e5ca64d97f7a12f73ead9a4f16c578; See also “L’Union européenne peut pousser la compagnie aérienne “Poulkovo” au bord de la fallite” *RIA Novosti* (20 September 2006) online: [RIA Novosti http://fr.rian.ru/russia/20060920/54082011.html](http://fr.rian.ru/russia/20060920/54082011.html).

⁴⁴⁰ *Ibid.*

merged with Russia State Transport Company, a company owned by the Russian Government, forming the airline Rossiya.⁴⁴¹ The IAC, the body responsible for accident investigation in Russia, determined that the crash happened when the aircraft entered a stall condition due to excessive angle of attack and lack of airspeed in manual flight mode due to insufficient control and cooperation among the flight crew members resulting from the lack of training of the crew.⁴⁴² The Russian Ministry of Transport announced that the aircraft Tupolev-154 would be removed from all fleet transporting passengers by 2012.⁴⁴³ Since the Community published its first list of blacklisted airlines, Russian airlines have been absent from the list.⁴⁴⁴

B. European Union and Russia: Towards a Common Aviation Area Agreement?

In promoting the development of aviation relations between the EU and Russia, the European Commission reported in 2005 that the full opening of both aviation markets would generate annual economic benefits of 680 million Euros for both parties.⁴⁴⁵ It would stimulate investment and competition and, at the same time, improve passenger and air cargo services. The liberalisation of both markets would create jobs in the aviation

⁴⁴¹ D. Kaminski-Morrow, "Russian Aviation Safety Agency Finds 'Inadequate Training' Led Crew To Stall Pulkovo Tu-154 In August Donetsk Crash Probe" (19 February 2007), online: Flight Global <http://www.flightglobal.com/articles/2007/02/19/212142/russian-aviation-safety-agency-finds-inadequate-training-led-crew-to-stall-pulkovo-tu-154-in.html>.

⁴⁴² *Ibid.*

⁴⁴³ "Les avions Tu-154 et Tu-134 retirés du service d'ici 5 ans" *RIA Novosti* (17 February 2007), online: RIA Novosti <http://fr.rian.ru/russia/20070217/60885742.html>.

⁴⁴⁴ EC, *Air Safety – List of Airlines Banned Within The EU*, online: Europa http://ec.europa.eu/transport/air-ban/doc/list_en.pdf (the list was updated recently on 23 November 2010).

⁴⁴⁵ EC, Commission, *Communication from the Commission – A Framework for Developing Relations with Russian Federation in the Field of Air Transport*, COM (2005) 77 final (Brussels : EC, 2005) at 7, online : Europa http://ec.europa.eu/transport/air_portal/international/doc/reference/background/com_2005_0077_en.pdf

industry, would reduce tourists' and travellers' expenditures and support services to the extended aviation industry.⁴⁴⁶ Russia is an increasingly significant tourist market for the EU. In 2002, the total number of tourists going to Russia grew by 7.3%, compared to the European average of 2.3%.⁴⁴⁷ Passenger traffic to Europe constitutes Russia's largest external aviation market, representing 75% of its passenger traffic.⁴⁴⁸ In return, Russia can potentially become the second largest foreign aviation market, after the American market.⁴⁴⁹ With high economic growth in Russia and the constant increase of international air travel during the last decade, it is forecast that passenger traffic between the CIS and Western European countries will grow annually by 6.8% until 2025.⁴⁵⁰ Cargo traffic from Europe to the CIS will grow by 5.8% and from CIS to Europe by 3.6%.⁴⁵¹ Adopting a comprehensive air transport agreement would help the development of opportunities which could in turn benefit the Russian market and also procure equal opportunities for both aviation industries. First steps towards reaching such an agreement have already been taken.

On 2 March 1989, the exchange of credentials between the European Economic Community and Russia, and the opening of the Soviet permanent mission in Brussels

⁴⁴⁶ Airbus, *Global Market Forecast: The Future of Flying 2006-2025* (Blagnac: Airbus, 2006) at 44 and 45, online: Airbus http://www.airbus.com/store/mm_repository/pdf/att00008552/media_object_file_AirbusGMF2006-2025.pdf.

⁴⁴⁷ EC, Commission, *Communication from the Commission – A Framework for Developing Relations with Russian Federation in the Field of Air Transport*, *supra* note 445 at 6.

⁴⁴⁸ In 2009, 10.7 million passengers travelled between Russia and the EU. Russians' first destination in Europe is Germany representing 39% of the frequencies between Russia and EU, followed by Spain with 12%, France with 11%, United Kingdom with 8.5%, Finland with 7%, and important traffic in new EU member States Poland and Czech Republic. See EC, Commission, *Communication from the Commission – A Framework for Developing Relations with Russian Federation in the Field of Air Transport*, *supra* note 445 at 3, 5-6.

⁴⁴⁹ EC, Commission, *Mobility & Transport-Air-International Aviation: Russia*, *supra* note 419.

⁴⁵⁰ Airbus, *supra* note 446.

⁴⁵¹ *Ibid.*

established official relations. On 23 December 1991, the European Community recognized Russia as the successor of the Soviet Union. In November 2003, Russia obtained the EU status as a transition country towards a market economy, which put an end to perceptions that Russia was a managed-socialist country. As the first step towards a genuine and strong economic and political partnership, Russia and the EU signed a Partnership and Cooperation Agreement on 24 June 1994 in Corfu Island.⁴⁵² The PCA concentrated on an extensive economic cooperation programme covering all economic sectors and planning a permanent political dialogue,⁴⁵³ allowing the conclusion of transport agreements to improve Russia's transport sector rendering it more competitive and better integrated within the enlarged EU transport network.⁴⁵⁴ The PCA entered into force on 1 December 1997. It was valid for ten years⁴⁵⁵ and could be extended for another period. The EU and Russia scheduled different types of meetings and the format of Summit meetings was often privileged. The second significant step was the launching of the four "Common Spaces" - on economy; liberties, security and justice; external safety; and research and education, including cultural aspects – by the EU and Russia during the St-Petersburg Summit in May 2003. The third step was taken when the EU and Russia signed the plans, on 10 May 2005 during the Moscow Summit, for the establishment of the four common spaces, for which concretisation actually constitutes the core of the EU-

⁴⁵² EC, *Agreement on Partnership and Cooperation between EC and Russia* (Brussels: EC, 1997), online: Europa http://ec.europa.eu/comm/external_relations/ceeca/pca/pca_russia.pdf [PCA].

⁴⁵³ EC, *ibid.*, s. 43.

⁴⁵⁴ EC, *Delegation of the European Union to Russia* (Brussels: EC, 2010), online: Europa http://ec.europa.eu/delegations/russia/index_en.htm.

⁴⁵⁵ In 2007, EU-Russian relations will have to deal with the commonly known "factor 2007": the problem of renewal of legal basis of their relations as their PCA will expired on 1 December 2007. Next year will be marked by several events impacting on the EU-Russian relations, such as PCA expiration, Croatia, Romania and Bulgaria possible accession to EU, accession of Russia to WTO, and EU restructuring following its future constitution. See "L'Union européenne est l'un des principaux partenaires économiques et politiques de la Russie" *RIA Novosti* (23 November 2006), online: [RIA Novosti http://fr.rian.ru/analysis/20061123/55930505.html](http://fr.rian.ru/analysis/20061123/55930505.html).

Russia cooperation.⁴⁵⁶ The Common Economic Space is of great importance for the aviation sector.⁴⁵⁷ The fourth step took place on 4 October 2005 during their 16th Summit in London, when the EU and Russia agreed on flexible cooperation principles: they chose the sectorial dialogue as their principal form of cooperation, implying the creation of thematic working groups of their interest; and they decided about the rules of procedure for some sectors, among which transport is a theme.⁴⁵⁸ Later during the year, the EU Council and the European Commission kept continuous contact with Russia, which they consider as a strategic neighbouring partner. The fifth step was the approval of the EU Council regarding the initiatives of the European Commission to develop strong and fruitful aviation relations with Russia in the form of a comprehensive agreement on air transport. The Commission's mandate was elaborated as part of the EU's increasing role in external aviation relations following the decisions of the European Court of Justice in the "open-skies" cases of 5 November 2002.⁴⁵⁹ The ECJ confirmed the exclusive powers of the European Commission on different significant external aviation aspects, in line with the Commission's White Paper *European transport policy for 2010: time to decide*, which addressed the Community's necessity to negotiate external aviation relations through a sole voice for the justification and promotion of their industrial, social and

⁴⁵⁶ *Ibid.*

⁴⁵⁷ Joint Statement from EU and Russia (31 May 2003) during the EU-Russia Summit in St-Petersburg, May 2003, online: Europa http://ec.europa.eu/comm/external_relations/russia/sum05_03/js.htm.

⁴⁵⁸ "L'Union européenne est l'un des principaux partenaires économiques et politiques de la Russie", *supra* note 455.

⁴⁵⁹ *Commission v. United Kingdom*, C-466/98 [2002] E.C.R. I-9427; *Commission v. Denmark*, C-467/98 [2002] E.C.R. I-9519; *Commission v. Sweden*, C-468/98 [2002] E.C.R. I-9575; *Commission v. Finland*, C-469 [2002] E.C.R. I-9627; *Commission v. Belgium*, C-471 [2002] E.C.R. I-9681; *Commission v. Luxembourg*, C-472/98 [2002] E.C.R. I-9741; *Commission v. Austria*, C-475/98 [2002] E.C.R. I-9797; *Commission v. Germany*, C-476/98 [2002] E.C.R. I-9855 [ECJ decisions].

environmental interests.⁴⁶⁰ Finally, the sixth step proposed by the Commission to Russia is the framework to develop a common aviation area in order to plan the improvement of market opportunities for both parties, the guarantee of Russian compliance with Community law, the abolition of existing trans-Siberian overflight payments, the promotion of aviation laws approximation if necessary, the creation of joint mechanisms for cooperation on security, safety, and environmental standards, and the nurturing of aerospace industrial cooperation.⁴⁶¹

Since the ECJ decision in 2002, the Commission is actively assessing the compliance of the bilateral air service agreements between the EU member States and third countries. The bilateral agreements between an individual member State and a non-EU country must include the Community designation clause and must not go against the SARPs adopted by ICAO. The EU designation clause in a bilateral agreement recognizes that the terms apply equally to all EU airlines, not just to airlines of the member State party to the agreement. The SARPs contained in the Chicago Convention and its Annexes must be respected to ensure uniformity in aviation safety. Most bilateral agreements between the EU member States and third countries have since been adapted. However, Russia is one of the few notable exceptions.⁴⁶² At the latest Transport Council, on 15 June 2010 in Luxembourg, a number of States urged the Commission to choose dialogue rather than infringement proceedings, even if the Commission's efforts to settle this question

⁴⁶⁰ EC, Commission, *White Paper – European transport policy for 2010: time to decide* (Luxembourg: EC, 2001) at 93, online: Europa http://ec.europa.eu/transport/strategies/doc/2001_white_paper/lb_com_2001_0370_en.pdf.

⁴⁶¹ EC, Commission, *Communication from the Commission – A Framework for Developing Relations with Russian Federation in the Field of Air Transport*, *supra* note 445 at 10.

⁴⁶² EC, European External Action Service, *EU-Russia Common Spaces: Progress Report 2009* (Brussels: EC, 2010) at 28, online: Europa http://eeas.europa.eu/russia/docs/commons_spaces_prog_report_2009_en.pdf.

with Russia have proved futile so far.⁴⁶³ Last October, however, the European Commission initiated infringement procedures against twenty-five EU member States because their bilateral agreements with Russia do not include the EU designation clause and include provisions concerning Siberian overflights.⁴⁶⁴ The Commission argued that, on the one hand, these clauses and provisions are in breach of EU antitrust law and EU airlines should not be forced to conclude a commercial agreement with the direct

⁴⁶³ Isabelle Smets, “Air Transport: Infringement Proceedings on Aviation Agreements with Russia” *All Business* (15 November 2010), online: All Business <http://www.allbusiness.com/legal/transportation-law-transportation-industry-aviation/15297277-1.html>.

⁴⁶⁴ In October 2010, the European Commission initiated infringement procedures against France, Germany, Austria and Finland. See EC, Commission, News Release, IP/10/1425, “Air transport: Commission launches infringement procedures against France, Germany, Austria and Finland over agreements with Russia on Siberian overflights” (28 October 2010), online: Europa <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1425&format=HTML&aged=0&language=EN&guiLanguage=fr> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/14252>. See Cathy Buick, “EC initiates infringement procedures over overflight fees” *Air Transport World* (29 October 2010), online: ATW <http://atwonline.com/international-aviation-regulation/news/ec-initiates-infringement-procedures-over-overflight-fees-102>. In January 2011, the European Commission also sent letters of formal notice to Belgium, Denmark, Italy, Luxembourg, The Netherlands, Sweden and the UK. See EC, Commission, News Release, IP/11/74, “Air transport: Commission launches infringement procedures against seven Member States over agreements with Russia on Siberian overflights” (27 January 2011), online: Europa <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/74&format=HTML&aged=0&language=EN&guiLanguage=fr>. In February 2011, the Commission sent letters of formal notice to Cyprus, Ireland, Poland, Portugal, Slovakia and Spain. See EC, Commission, News Release, IP/11/186, “Air transport: Commission launches infringement procedures against six Member States over agreements with Russia on equal treatment of EU airlines and Siberian overflights” (16 February 2011), online: Europa <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/186&format=HTML&aged=1&language=EN&guiLanguage=en>. In March 2011, the Commission sent letters of formal notice to Estonia, Greece, Hungary, Lithuania, Malta and Slovenia. See EC, Commission, News Release, IP/11/298, “Air transport: Commission launches infringement procedures against six Member States over agreements with Russia on equal treatment of EU airlines and Siberian overflights” (14 March 2011), online: Europa <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/298&format=HTML&aged=0&language=EN&guiLanguage=en>. In April 2011, the Commission sent letters of formal notice to the Czech Republic and Bulgaria. See EC, Commission, News Release, IP/11/424, “Air transport: Commission launches infringement procedures against two Member States over agreements with Russia on equal treatment of EU airlines and Siberian overflights”, (6 April 2011), online: Europa <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/186&format=HTML&aged=1&language=EN&guiLanguage=en>. In May 2011, Romania received a letter of formal notice from the Commission. See EC, Commission, News Release, IP/11/586, “Air transport: Commission launches infringement procedure against Romania over agreement with Russia on equal treatment of EU airlines” (19 May 2011), online: Europa <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/586&format=HTML&aged=0&language=EN&guiLanguage=en>.

competitor Aeroflot.⁴⁶⁵ This situation could cause competition distortions to the disadvantage of both the EU air carriers and the consumers. On the other hand, it notes that the overflight provisions also may be in breach of Article 15 of the Chicago Convention. It is of the opinion that “[t]his creates serious practical problems, putting at risk route rights, for example, for airlines taken over by a carrier from another EU member state”. These twenty-five member States have two months starting after the reception of the letters of formal notice to provide a response to the Commission. If they fail to answer adequately, the Commission may demand in a form of a reasoned opinion, they amend their agreements with Russia.

From the Russian side, the Deputy Minister of Transport, Valery Okulov, declared that his government was ready to review the existing bilateral agreements with the EU member States in order to modernize them and to preserve their bilateral character.⁴⁶⁶ However, he insisted that that national aviation authorities of each member State should be responsible for flight safety. Russia seems more in favour of a bilateral approach procuring advantages to airlines of individual member States than to agreeing to include the multilateral EU designation clause in bilateral agreements. In connection with the issue of the inclusion of EU designation clause in bilateral agreements, Russia threatened in February 2010 to ban Austrian Airlines flights into Russia after Lufthansa in Germany became its owner. This issue related to the nationality of Austrian Airlines is described in the last section of the current chapter. Concerning the overflight payments, the Community and Russia reached an agreement in 2006, which is detailed in the following

⁴⁶⁵ *Ibid.*

⁴⁶⁶ “Russia Ready to Review Bilateral Air Service Agreements” *RIA Novosti* (9 November 2010), online: RIA Novosti <http://en.rian.ru/russia/20101109/161263507.html>.

section. The Russian Federation has yet to sign the agreement. Enhanced cooperation with the Russian Federation in the field of aviation, as proposed by the Commission in 2005, could only start after the implementation of the specific agreement on the overflight payments.⁴⁶⁷

With the realisation of the global aviation agreement with Russia, the EU also aims to reinforce its aviation industrial cooperation by providing new market opportunities and significant economic benefits. It would pursue current joint projects in the conception, production, training and safety certification between major European and Russian companies. For example, the opening of the Engineering Centre Airbus in Russia (ECAR) in cooperation with the Russian company Kaskol in 2003 can be cited as one result of that agreement.⁴⁶⁸ The EU-Russian industrial cooperation in aviation could take the form of common standards research and development, training programmes, and support to Russian air traffic management system and airport infrastructure. In addition to the future EU-Russia global aviation agreement, the Russian Defence Minister, Sergei Ivanov, who was recently elected Chairman of the OAK Board of Directors, was convinced that Russian accession to WTO would act as an incentive, boosting competition in the aviation industry.⁴⁶⁹ As the EU has made Russian accession to the WTO conditional to Russia signing the agreement on overflight payments, Russian authorities feel pressured and are less inclined to rapidly ratify the agreement.

⁴⁶⁷ EC, Commission, *Mobility & Transport-Air-International Aviation: Russia*, *supra* note 419.

⁴⁶⁸ EC, Commission, *Communication from the Commission – A Framework for Developing Relations with Russian Federation in the Field of Air Transport*, *supra* note 445.

⁴⁶⁹ “WTO accession poses no danger to aviation industry”, 12 December 2006, online: RosBusinessConsulting <http://www.rbcnews.com/free/20061212154243.shtml>.

C. Unlawful Practice of the Russian Federation concerning royalties in exchange for the right for airlines to transit over its territory

According to Article 15 of the Chicago Convention, all Member States recognize the right of free transit of non-commercial flights over the territories of all member states. The Russian Aviation Code and other Russian laws do not contain any clause about the obligation of foreign airlines to pay royalties for passage over Russian territory. Nevertheless, this practice has existed for more than thirty years since the Soviet Union introduced the system of Siberian overflight fees in 1969. At the time, European airlines were not affected by this system as they did not have the right to transit the Soviet territory further than the city of Moscow.⁴⁷⁰ When the transit flights to Asia were permitted in the mid-1980s,⁴⁷¹ European airlines were obliged to conclude “commercial agreements” with Aeroflot, upon an authorization by the Soviet civil aviation agency.⁴⁷² Later, when Russia became the successor of the Soviet Union at the end of the Cold War, it continued the system of overflight fees. The bilateral agreements between the EU member States and Russia refer to those agreements on the basis of which royalties have been paid. Without being explicitly written in bilateral agreements, the agreement was elaborated for foreign airlines to pay, in addition to normal air navigation charges, royalties for their passage over the Russian territory using the Siberian routes between the EU, Japan, China and South Korea.⁴⁷³ It is unclear if the money from the royalties went

⁴⁷⁰ Tuomas Forsberg and Antti Seppo, “Power Without Influence? The EU and Trade Disputes with Russia” (Paper presented at the European Consortium for Political Research, September 2008) at 9-10, online: ECPR <http://www.jhubc.it/ecpr-riga/virtualpaperroom/054.pdf>.

⁴⁷¹ *Ibid.*, at 10.

⁴⁷² M. Milde, “Some questions marks about the Price of “Russian Air”” *supra* note 17 at 155.

⁴⁷³ *Ibid.*, at 154.

to Aeroflot or to the Russian civil aviation authorities.⁴⁷⁴ Nevertheless, Aeroflot collected a colossal amount of money disbursed by the EU airlines, approximately 420 million US Dollars in the year 2007-2008, compared to 330 million US Dollars in 2005, and 250 million USD in 2004.⁴⁷⁵ Allegedly, royalties are also paid by Asian airlines.⁴⁷⁶ Besides threatening the constructive cooperation and progress in aviation safety between Russia and other countries, this Russian practice is against universal practice and constitutes a clear violation of article 15 in fine of the Chicago Convention, clearly stipulating that “[n]o fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of an aircraft of a contracting State or persons or property thereon.”⁴⁷⁷ Russia is the only country in the world collecting these fees.⁴⁷⁸ It does not request these royalties in a transparent manner or impose them with discrimination since not all trading partners are concerned with this practice.⁴⁷⁹ The airlines of the European Union prefer to operate flights on routes over the Russian territory, since they procure a commercial viable access to the Far East and since the Chinese aviation market is growing, making this route essential for their own economic profitability.⁴⁸⁰ For EU airlines, flying around Siberia, which is a distance that totals about 1500 additional kilometres, in addition to the significant increase in fuel

⁴⁷⁴ EC, European Parliament, Committee on Regional Policy, Transport and Tourism, Explanatory Statement to the *Draft Report on the external relations of the European Union in the field of transport*, 2002/2085 (INI) (2002) at 12.

⁴⁷⁵ EC, Commission, *Mobility & Transport-Air-International Aviation: Russia*, *supra* note 419. See also T. Forsberg and A. Seppo, *supra* note 470 at 10.

⁴⁷⁶ M. Milde, “Some questions marks about the Price of “Russian Air”” *supra* note 17 at 154.

⁴⁷⁷ *Convention on International Civil Aviation*, *supra* note 34, s. 15. See also *ibid.* at 157.

⁴⁷⁸ T. Forsberg and A. Seppo, *supra* note 470 at 10.

⁴⁷⁹ M. Milde, “Some questions marks about the Price of “Russian Air”” *supra* note 17 at 149. See also *ibid.*

⁴⁸⁰ EC, Commission, *Communication from the Commission – A Framework for Developing Relations with Russian Federation in the Field of Air Transport*, *supra* note 445. The affected European airlines are notably, Lufthansa, Air France, British Airways, KLM, Finnair and SAS. See T. Forsberg and A. Seppo, *supra* note 470 at 10.

costs, is more costly compared to the Russian overflight payments.⁴⁸¹ However, EU cargo operators decided to fly around the Russian territory in order to avoid the excessive royalties payments as they considered them too costly.⁴⁸² Still, Russian cargo operators, especially Aeroflot, enjoy an unfair advantage over all non-Russian airlines targeted by the policy on royalties when operating cargo services from Western Europe to the Far East transiting through Russia.⁴⁸³

Having been denied for too long by airlines and international organizations such as ICAO, IATA and ECAC,⁴⁸⁴ the EU has found a way for Russia to accept the existence of its illegal practice. In 2002, the European Commission put pressure on Russia to acknowledge, to gradually reduce and finally abolish Trans-Siberian overflight royalties by connecting the issue with Russia's accession to WTO.⁴⁸⁵ Even the European Parliament had the will to adopt a resolution supporting the possibility of creating a "Russian Aviation Modernization Fund" to compensate the loss of earnings caused by the abolition of the Russian royalties system. If these royalties were paid directly to the Russian civil aviation authorities, they could then use the Fund upon the condition that they provide proof of the alleged money flow.⁴⁸⁶ In May 2004 during WTO negotiations, the European Commissioner, Pascal Lamy, obtained a commitment from the Russian

⁴⁸¹ John W. Miller and Daniel Michaels, "Gauging the economy: Russia, EU Airline-Fee Pact But Clash Over Natural-Gas Rules" *Wall Street Journal* (25 November 2006) A4 (ProQuest).

⁴⁸² T. Forsberg and A. Seppo, *supra* note 470 at 10.

⁴⁸³ For more information about Russian cargo operators between Europe and Asia, see Phil Hastings, "The Russian Connection - Cargo operators say Russia's most important commodity may be the air space it owns between Europe and Asia", 2004, online: Air Cargo World http://www.aircargoworld.com/features/0204_2.htm.

⁴⁸⁴ M. Milde, "Some questions marks about the Price of "Russian Air"" *supra* note 17 at 148.

⁴⁸⁵ EC, Commission, *Mobility & Transport-Air-International Aviation: Russia*, *supra* note 419.

⁴⁸⁶ EC, European Parliament, Committee on Regional Policy, Transport and Tourism, *supra* note 474 at 7 paragraph 10.

Minister, German Gref, to abolish the royalties by December 2013 at the latest.⁴⁸⁷ It was also agreed that the royalties should be replaced in 2013 by an “open system and an un-discriminated cost-based calculation.”⁴⁸⁸ To date, Russia has never respected this commitment and its Ministry of Transport is of the opinion that the overflight fees are not royalty payments, but “a system of business relations, which takes into consideration the interests of all “economic subjects”. It declares that the fees are lower than the sums that the EU is alleging. Moreover, Russia claims that, without the revenues from the fees, Aeroflot’s future can be compromised.⁴⁸⁹ In March 2006, the EU Council gave a clear mandate to the Commission to reach an agreement on the abolition of the royalties with Russia, reaffirming that a solution is a prerequisite for Russia’s accession to the WTO.⁴⁹⁰ The mandate contained four essential points: 1) the complete abolition of the royalty payments by 31 December 2013; 2) the progressive reduction of the royalty payments from 2006 to 2013, the transition period; 3) the suppression of obligatory commercial agreements by 2013 at the latest; and 4) the gradual removal of restrictions on overflights over Russian territory on routes from Europe to Asia and complete elimination of all non-technical restrictions by 2013 at the latest. Although the EU and Russia were unable to negotiate a mandate for a wide-ranging agreement during the Helsinki Summit,⁴⁹¹ they succeeded, on 24 November 2006 during parallel negotiations to the summit, to finally

⁴⁸⁷ EC, Council, *Council conclusions on Siberia*, 2721st Council Meeting on Transport, Telecommunications and Energy (Brussels: EC, 2006).

⁴⁸⁸ T. Forsberg and A. Seppo, *supra* note 470 at 11.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ EC, Council, *Council conclusions on Siberia*, *supra* note 487.

⁴⁹¹ The summit failed to conclude the major negotiation mandate because of Poland’s opposition based on a trade dispute with Russia and of concerns over energy policy, as EU depends on Russia’s important role as energy supplier. In Russia, Gazprom has the natural-gas monopoly and plans to acquire EU distribution assets and pipeline shares. EU is trying to counterbalance its Russian natural-gas dependency by intending to impose all natural-gas companies operating in the EU to separate pipeline network control and retail distribution operations. Such rules would definitely be opposed by Russia and also by Germany, as it would also force unbundling for its major gas companies. See J. W. Miller and D. Michaels, *supra* note 481.

reach an agreement on the Siberian overflight payments.⁴⁹² This agreement fulfills the EU condition of Russian accession to the WTO.

Concerning the current system, the agreement aims at the complete suppression of the mandatory commercial agreement with Aeroflot for the use of Trans-Siberian routes, to the abolition of royalty payments by 31 December 2013, on which date airlines will have to pay only the normal air navigation charges according to the Chicago Convention, and to the progressive reduction of royalty payments starting in 2010 to 2013. The new agreement will supersede the provisions of existing bilateral agreements. Concerning the transitional period starting with the entering into force of this agreement, EU airlines will recognize the free right of overflight on Trans-Siberian routes for new operations, and the possibility to get new frequencies by means of bilateral negotiations. With those two last principles, the EU wants a guarantee from Russia that it will permit more flights for EU airlines over Russian airspace.⁴⁹³ Concerning the new system, the agreement confirms that payments after 2014 shall be cost-based, transparent and non-discriminatory between all foreign airlines and will be in conformity with the Chicago Convention.⁴⁹⁴ It affirms that EU airlines will keep the overflight frequencies currently leased from Aeroflot.⁴⁹⁵ The timetable and the transitional steps will be discussed later. Compared with the European Commission's negotiation mandate, the agreement fully satisfies the first

⁴⁹² Daniel Dombey and Andrew Bounds "Siberian flight pact aids EU-Russia summit" *Financial Times* (25 November 2006), online: The Financial Times <http://www.ft.com/cms/s/96f562ac-7c29-11db-b1c6-0000779e2340.html>.

⁴⁹³ Bruce Barnard, "Russia, EU in air pact" *The Journal of Commerce* (27 November 2006) 1 (ProQuest).

⁴⁹⁴ T. Forsberg and A. Seppo, *supra* note 470 at 11.

⁴⁹⁵ EC, Commission, News Release, IP/06/1626, "EU and Russia agree on abolition of € 300 million Siberian overflight payments" (24 November 2006), online: Europa <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1626&format=HTML&aged=0&language=EN&guiLanguage=en>.

mandate point, which is the complete abolition of royalties by 31 December 2013. It also partially satisfies the second mandate point, the progressive reduction of royalties being recognized, yet starting in 2010, instead of 2006. The third mandate point is over satisfied, as the mandatory commercial agreements have been completely suppressed as of now. Finally, the fourth mandate point is fulfilled, as current restrictions on overflights are henceforth non-existent for new operations and new frequencies have been negotiated for EU airlines. As the Commission mandate requested, the new agreement supersedes the existing bilateral agreements. During the EU-Russia Summit in Samara in May 2007, Russia was supposed to sign the agreement. Nevertheless, it informed the EU that it could not sign it as approval by the Russian government would come later.⁴⁹⁶ If the agreement had been signed, the new principles would have been included in valid bilateral agreements between Russia and EU Member States, subject to appropriate relevant amendments.⁴⁹⁷ The agreement needed to be ratified by respective parties, the twenty-seven EU member States and Russia, before entering into force. Even if EU airlines favour the agreement, they remain unconvinced of its success as Russia made a similar promise in 2004 and never implemented it.⁴⁹⁸ The EU hoped that Russia would sign the agreement at the Aviation Summit planned in November 2007. Again it did not happen: just before the Summit, Russia indicated that it could not ratify the agreement, this time

⁴⁹⁶ T. Forsberg and A. Seppo, *supra* note 470 at 12.

⁴⁹⁷ EC, Commission, News Release, IP/06/1626, "EU and Russia agree on a bolition of € 300 million Siberian overflight payments" (24 November 2006), online: Europa <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1626&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁴⁹⁸ J. W. Miller and D. Michaels, *supra* note 481.

because of the dispute it had with the German Lufthansa Cargo which resulted in the German carrier being refused permission to use Russian airspace for flights to Asia.⁴⁹⁹

The Summit was postponed because Russia was still reluctant to sign the agreement and the dispute with Lufthansa increased the gap between Russia and the EU. The Russian authorities communicated their clear position, “that the Agreement would not be signed nor implemented until the negotiations on Russia's accession to WTO are completed.”⁵⁰⁰ Russian experts from the Council on Foreign and Defence Policy,⁵⁰¹ a Russian non-governmental organization working closely with Russian parliamentary and governmental institutions, criticized the EU's decision to re-schedule the aviation summit to a later date. They argued that the EU's decision was in fact a form of boycott leading to the loss of an opportunity to discuss the important issue of overflight payments with senior officials of the Russian government and managers of the aircraft industry.⁵⁰² They consider that the EU's opinion that overflight fees violate WTO rules is in fact a myth, since they believe that these rules do not govern air traffic and the 2004 agreement.⁵⁰³ Finally, they admit that the EU's decision to cancel the summit, even if it responds to Russian concerns regarding the EU's great demands, is not strategic as they could use this opportunity to promote other issues, beside the fees, related to the bilateral aviation

⁴⁹⁹ T. Forsberg and A. Seppo, *supra* note 470 at 12. A palliative solution was found concerning the dispute with Lufthansa: Russia granted access to its airspace to Lufthansa Cargo until February 2008, while solutions on the feasibility of moving its hub from Kazakhstan to Siberia should be identified. See Mathias Roth, “Bilateral Disputes between EU Member States and Russia” (Brussels: Center for European Policy Studies, 2009), online: CEPS <http://www.ceps.eu/book/bilateral-disputes-between-eu-member-states-and-russia>.

⁵⁰⁰ EC, European External Action Service, *supra* note 462.

⁵⁰¹ “The Council for Foreign and Defence Policy (CFDP)” (Moscow: Russian Profile, 2010), online: Russian Profile <http://www.russiaprofile.org/page.php?pageid=resources-ngos-politics-cfdp>.

⁵⁰² T. Forsberg and A. Seppo, *supra* note 470 at 13.

⁵⁰³ *Ibid.*

relations with Russia. Still, those critics cannot neglect the fact that the EU succeeded in getting an agreement with Russia on the overflight fees abolishment. Although it might have failed to persuade Russia, the politicisation of the issue should probably lead sooner than later to the ratification of the agreement by Russia.

D. Refusal of the Russian Federation to recognise the Community carrier Clause and its questioning on the nationality of Austrian Airlines

In times of mergers and restructuring of airlines, the Commission is interested by the protection of air services agreements with Russia. The Russian Ministry of Transport mentioned the possibility of a ban of Austrian Airlines from its airspace starting in January 2010 because of owing to a dispute regarding the nationality of the carrier. Russian authorities are of the opinion that the Austrian Airlines was no longer of Austrian nationality since Lufthansa acquired the airline in September 2009. Indeed, in August 2009, the Commission approved the merger of the Austrian Airlines Group and Lufthansa and the contribution of Österreichische Industrieholding AG (ÖIAG) to the relief of the debt of Austrian Airlines.⁵⁰⁴ Thus, they believe that the airline is now excluded from the application of the current bilateral aviation agreement with Austria.⁵⁰⁵

⁵⁰⁴ “Green Light for Merger of Austrian Airlines and Lufthansa” *Breaking Travel News* (28 August 2009), online *Breaking Travel News* <http://www.breakingtravelnews.com/news/article/green-light-for-merger-of-austrian-airlines-and-lufthansa>. As of September 2010, Austrian Airlines owns 48,9% 100 by a Lufthansa-owned subsidiary based in Austria owns, which is a separate company that has 96.55 per cent of Austrian Airlines’ shares. A private foundation, registered and domiciled in Austria, possesses the remaining 50.2%. See Pitta Clark, “Russia threatens to ban Austrian flights” *Financial Times* 28 February 2010), online: *The Financial Times* <http://www.ft.com/cms/s/0/e27168fa-24a2-11df-8be0-00144feab49a.html#axzz1Oe8lBbAZ>. Austrian Airlines is operating for 44 weekly flights to Russian, including the main cities of Moscow and St Petersburg.

⁵⁰⁵ Joshua Chaffin “EU legal move targets Russian flight fees” *Financial Times* (27 October 2010), online:

Russia is acting the same way with Switzerland and the United Kingdom because Lufthansa is also giving subsidiaries to Swiss International Air Lines and British Midlands. According to the IATA Director General and Chief Executive Officer, Giovanni Bisignani, Russia and the EU member States must negotiate to create new bilateral traffic rights.⁵⁰⁶ He believes that the dispute could have been solved during the first half of 2010 if Russia received its share in return, such as more slots at EU airports.⁵⁰⁷ Russian airlines have enhanced their safety standards to obtain more access to international markets, such as the EU market. In February 2010, Russia threatened again to ban Austrian Airlines to fly to Russia. Thus, Russia is still questioning the Austrian ownership and control of the air carrier as it is actually owned by and controlled by a German air carrier. Russia considered the initial information sent in 2009 by Austrian Airlines as unsatisfactory, obliging the airline to operate on a temporary permit.⁵⁰⁸

Traditionally, the legal framework for air transport between countries is defined through bilateral air service agreements between the respective governments. These agreements determine the designation of airlines with their specific traffic rights to fly to specific destinations, and the ownership of these airlines. Within Europe, the situation changed significantly in the early 1990s when a single European aviation market was created.

The Financial Times <http://www.ft.com/cms/s/0/64b6143c-e208-11df-a064-00144feabdc0.html#axzz1Oe8lBbAZ>.

⁵⁰⁶ Michael Knigge, "Moscow's muscle flexing about overflight rights aims beyond Switzerland" *Deutsche Welle World* (9 June 2010), online: Deutsche Welle World <http://www.dw-world.de/dw/article/0,,5666895,00.html>.

⁵⁰⁷ Kurt Hoffman "Russia toughening stance on airline nationality" *Air Transport World* (18 December 2009), online: Air Transport World <http://atwonline.com/news/russia-toughening-stance-airline-nationality-0309>.

⁵⁰⁸ Pitta Clark, *supra* note 504.

The "Open Skies" Court rulings of 2002 were a further crucial achievement in developing the Community policy on air transport limiting the powers of member States in the domain. The EU's Court of Justice stated that provisions limiting the benefits of bilateral agreements to nationals of the member States concerned are in breach of the provisions on freedom of establishment included in the EC Treaty.⁵⁰⁹ The freedom of establishment gives the right for any EU enterprise to do business in the Community without discrimination.⁵¹⁰ Hence, bilateral agreements between Member States and third countries must now include an "EU designation" clause to guarantee that EU airlines are entitled to operate under the same conditions anywhere in the EU. In other words, the European law required that bilateral agreements carry an "EU designation clause", forcing third countries to recognise Community carriers without considering the nationality of airline. Nevertheless, Russia is still one of the few third countries in the world that refuse this fundamental change. The EC is preoccupied by the agreements with Russia as they do contain a nationality clause discriminating EU carriers and consequently giving exclusively the international traffic rights to air carriers owned by nationals of parties to the agreements.⁵¹¹ Under these agreements inconsistent with EU law, the merger of airlines does not automatically include the transfer of rights to fly to newly joined company.⁵¹² In other words, an airline bought by an airline from another Member State can lose all its traffic route rights.⁵¹³

⁵⁰⁹ EC, Commission, *Consolidated Version of the Treaty Establishing the European Community* [2002] O.J. L. 325/1, art. 43-49.

⁵¹⁰ *Ibid.*, s.43.

⁵¹¹ EC, Commission, *Communication from the Commission on the consequences of Court judgements of 5 November 2002 for European air transport policy*, *supra* note **Error! Bookmark not defined.** at 34-36.

⁵¹² "Russia threatens ban on aviation airlines" *Financial Times* (1 March 2010), online: The Financial Times <http://www.ft.com/cms/s/0/0e9a6fd2-24d3-11df-8be0-00144feab49a.html>.

⁵¹³ "EC launches procedures against four EU Member States over Russia air" *Eye for Transport* (29 October 2010), online Eyes for Transport <http://www.eyefortransport.com/content/ec-launches-procedures->

To bring agreements into compliance with EU law, a member State can hold traditional negotiation “leading to the inclusion of model clauses that establish Community competence, notably on ownership and control and on the right of establishment.”⁵¹⁴ To guarantee a harmonised approach and the compliance of new agreements with Community law, member States must proceed according to a framework set out in the EC Regulation 847/2004.⁵¹⁵ This regulation requests the amendment of the bilateral agreements by including any relevant standard clause, such as the Community carrier clause, and notifies the Commission.⁵¹⁶ The EU designation clause aims for EU carriers to benefit from the right of establishment within the EU, including non-discriminatory access to air routes to non-EU countries where traffic rights are available. With this clause, member State can designate any licensed EU carrier with an establishment in its territory. The freedom of right of establishment can only be preserved under the condition that member States must to provide equal treatment to EU Carriers with an establishment in their territory.⁵¹⁷ The common EU rules define a Community carrier as a carrier, which obtained its licence and air operation certificates from one of the member States, has its principal place of business and registered office in the EU, has air transport as its main occupation, and is majority owned by EU Member States or nationals. The EU establishment principle imposes three pre-requisites: stable and

[against-four-eu-member-states-over-russia-air-agreements.](#)

⁵¹⁴ Richard Smithies, “Regulatory Convergence – Extending the Reach of EU Aviation Law” (2007) 72 J. Air L. & Com. 3 at 7.

⁵¹⁵ EC, European Parliament and Council, *Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries* [2004] O.J. L. 157/7 at 8, online: Europa <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:195:0003:0006:EN:PDF>.

⁵¹⁶ *Ibid.*, s. 1(1).

⁵¹⁷ Philippe Burghelle-Vernet, “Prospects for Enhancing EU-Russia Aviation Relations (lecture presented to the EC-Russia Aviation Seminar, 18 October 2010) online: Federal Agency of Air Transport http://www.favt.ru/favt_new/sites/default/files/FC_Presentation_for_Russian_authorities_and_airlines_Moscow.pdf

permanent organizational structure, including safety arrangements, effective and real exercise of air transport activity, and respect of national legislation in place.

Russia is not subject to EU law, but all member States must comply with EU law and their bilateral agreements with Russia must be in conformity with EU Law. Since October 2010, the European Commission has launched infringement procedures against 25 Member States after actively assessing the compliance with EU law of their bilateral aviation agreements with Russia.⁵¹⁸ Ultimately, if these member States, including Austria, cannot solve the problematic nationality clause, the termination clause contained in their bilateral agreements may be invoked.

Conclusion

In 1919, after the First World War, States adopted the Paris Convention to regulate civil navigation and to ensure global aviation safety. The Soviet Union was never a party to this Convention. Still, it opened its airspace restrictively to foreign air carriers. In 1921, a Soviet Decree authorized foreign aircraft to transit Soviet frontiers upon the condition that they received prior special permission from the Soviet authorities and were subject to special regulations. However, these permissions consisted of an exception to the state exclusive sovereignty principle. The Soviet authorities always functioned in accordance with that principle, which was codified in its Air Code of 1932.

⁵¹⁸ See EC, Commission, News Release, *supra* note 464.

In 1944, the Soviet Union declined an invitation to participate in the Chicago Conference because it apparently disapproved of the participation of Portugal, Spain, and Switzerland, which, in its opinion, were pursuing policies hostile to it during the Second World War. In fact, the absence of the Soviet Union was due to its closed borders and secretive policies, which were evident long before the actual start of the Cold War. The Conference ended in the same year with the adoption of other fundamental legal instruments. The first was the Chicago Convention, the most important convention regulating civil aviation, including the essential objective of aviation safety and the constitution of ICAO, which was ratified by the Soviet Union in 1970. Second, the Transit Agreement, which consists of a mutual exchange of transit rights, was not ratified by the Soviet Union, nor later by Russia. In other words, it did not permit, on a multilateral basis, for States to have the basic right to transit for scheduled transport. On that basis, the Soviet Union would justify Siberian overflight payments by European and Asian air carriers. Third, the Transport Agreement, which provides the mutual exchange of traffic rights, was also rejected by the Soviet Union and Russia, because of the over importance it accorded to the sovereignty of its territory. Today, the Chicago Convention is still considered a monumental achievement of international civil air law and represents the minimum common denominator for States to ensure aviation safety. Russia agreed to grant transit and traffic rights to other States when concluding bilateral air service agreement with individual States.

Under the Soviet regime, the authorities protected the sovereignty of airspace was by using weapons against civil aircraft, even when it led to the deaths of innocent

passengers. The Soviet authorities made it clear to the rest of the world that its territory was impenetrable. In August 1983, soon after the crash of Korean Airlines flight KE 007 on its territory, the Soviet authorities initially denied any knowledge of the fatal incident. Eventually, they confessed to the “termination” of the civil aircraft, alleging that it was an espionage aircraft violating its sovereign airspace that had ignored its many warnings. The Soviet actions in the tragedy provoked a global outrage, leading to bitter discussions in the United Nations. At the beginning of September, the United States provided the transcripts from the Japanese authorities regarding the transmissions of the Soviet interceptor proving that the Soviet Union was lying about its role in the tragedy. With sixteen other member States, the United States requested that the UN Security Council adopt a resolution stating that the use of force by military aircraft against civil aircraft is incompatible with rules of international behaviour and basic considerations for humanity. Obviously, the resolution was not adopted because the Soviet Union, one of the five permanent members of the Security Council, vetoed it. After this attempt to condemn the Soviet actions failed, the case was debated on the forum of ICAO. The Council agreed to adopt a resolution deploring the destruction of the commercial aircraft, and underlined the incompatibility of the use of armed force against civil aircraft with the norms governing international behaviour and elementary consideration of humanity, and also with the rules in the Chicago Convention and the SARPs in its annexes. As the Soviet Union neglected to conduct the investigation in accordance with Annex 13, the ICAO Secretary General was asked to institute an investigation to investigate the facts and the technical aspects concerning the destruction of the aircraft. The Council report, made public in December 1983, was described as technical and without any focus on the substance of the investigation. Indeed, it was difficult to reach solid conclusions since the only firm

evidence on the cause of the air crash was still in the possession of the Soviet Union. In March 1984, the Council adopted a striking resolution reaching the legal conclusions that the Soviet Union violated the norms governing international behaviour, elementary considerations of humanity, the rules in the Chicago Convention, and the SARPs in its Annexes. For that reason, it had to face international responsibility. Consequently, two months later, the ICAO Assembly adopted an amendment to the Chicago Convention by “consensus”, adding Article 3bis. This Article recognized that member States must refrain from using armed force against civil aircraft in flight and, if interception of the civil aircraft becomes necessary, the lives of the passengers and the safety of the aircraft must not be compromised.

The end of the Cold War was an opportune time for the Russian Federation, the successor of the Soviet Union, to make efforts to attempt to solve pending issues with the rest of the world, such as the investigation of the tragedy of flight KE 007. The ICAO decided to conduct a second investigation to complete the first one, even if it was still the legal duty of the Russian Federation to conduct it. In January 1993, Russia released the original evidence, explaining what really happened to flight KE 007, directly to the ICAO regional office in Paris. Completing the 1984 interim investigation report, this second report was also disappointing as it was again highly technical. The report had only one legal conclusion: the Soviet Union did not comply with the SARPs on the interception of a civil aircraft before deciding to attack it and shoot it down. Overall, the ICAO investigation on KE 007 did not officially state the true “proxima causa” of the tragedy which was the intentional firing of a missile at the aircraft by the Soviets with the objective of destroying it. Some authors voiced the opinion that three facts are

undeniable: the carelessness or negligence of the Korean aircraft crew is one of the major factors causing the deviation; the Soviet military's use of force against flight KE 007 without any warning about their intrusion is an abuse of self-defence; and the proximity of an American intelligence aircraft to flight KE 007 led the Soviet Air Command to mistakenly consider flight KE 007 as a spy aircraft. The international actions implemented after the tragedy of flight KE 007 are considered deficient for the safety of civil aviation. Occasionally, the guarding of their territorial sovereignty by states goes against public interest in international aviation safety, as was the case here. Nevertheless, the international community has the obligation to find the best ways to reach uniformity in aviation safety.

Uniformity in international air law can be reached with the important work of ICAO and the respect of member States for their international obligations. Since it was created in 1947, the members States of ICAO have constantly cooperated and reached consensus for adopting and upgrading the SARPs. The individual member States comply to their maximum possible extent and commit to enforce them. During the last two decades, ICAO has created a monitoring audit programme to verify the compliance of States with the SARPs. At first, the programme was implemented based on the voluntary requests of member States, and later it became mandatory in 1999. Until 2004, ICAO conducted the USOAP based on an Annex-to-Annex approach. From 2005 to 2010, the USOAP is conducted using a comprehensive approach, which covers all Annexes related to safety, except Annex 9 on facilitation and Annex 17 on security. As for the format of the USOAP after 2010, the Council analyses the feasibility of a new approach founded on the Continuous Monitoring Approach. This approach ensures that States share their

information, in real time, on the performance of their respective national safety oversight system. Predicted to begin in 2013, it aims at increasing their ability to identify deficiencies and allocate resources in a more targeted way to overcome the deficiencies rapidly. Last October, the ICAO Assembly formally worked with the US Department of Transport, the IATA and the European Union, to create a Global Safety Information Exchange in order to reduce the risk of accidents and to strengthen the overall level of aviation safety worldwide.

During the Cold War, the Soviet Union created Aeroflot in order to deal with every aspect of civil aviation on its territory. This was done under the distinct Soviet model of a command economy controlled by an undemocratic government. However, for a long time before becoming a member of ICAO in 1969, the Soviet Union had been a meticulous observer of ICAO standards. Its national legislation conformed to Annexes 1, 2, 6 and 8. This compliance allowed Soviet aircraft and personnel to operate in the territories of ICAO member States and to sell Soviet aviation products abroad. The collapse of the Soviet regime in 1991 left the aviation industry in a very poor state. Air traffic control services and new airlines were not reliable enough to fulfil the vacuum left by Aeroflot. Therefore, the safety record of Aeroflot that existed at that time was doubtful since aviation regulations and their enforcement, and the equipment and material resources were inadequate. In the Soviet command economy system, the operational units were completely integrated in the state administration. This model could not continue under the aviation system in Russia. The governments of Russia and of the other States of the Commonwealth of Independent States progressively welcomed market economy and constitutional concepts. With the integration of market economy concepts in the new

aviation code, the economic structure of the Russian Federation underwent substantial changes. Russia took clear steps toward a “double separation of powers” of the former state administration. First, the functions of the Parliament were separated from the ones of the Administration. Secondly, the Administration and the public functions were separated from the operations and the private functions. As in many other free-market legal systems, the aviation code makes the distinction between administrative powers (government and its agencies) and operational activities (usually private sector). Compared to the 1983 Soviet Aviation Code under which the private sector was non-existent, the 1997 Russian Aviation Code concentrates on activities of civil aviation relating to the new private enterprise system. Moreover, a governmental decree in April 1993 prescribed the corporatization of Aeroflot, which was transformed into a joint-stock corporation through the consolidation of most of its capital.

Today, the safety situation has positively changed in Russia. The available USOAP information on Russia concludes that most of the problems that it encounters today are related to the availability of qualified personnel. Improvements in that area would contribute to a better implementation of a sound organizational structure. This would lead to a resolution of some safety concerns. In the areas of appropriate legislative framework, technical guidance, licensing and certification procedures, and continued surveillance, Russia has almost fully complied. Overall, one can conclude that Russia has an average level of compliance with the safety critical elements and the SARPs. Professor Paul S. Dempsey summarized the SARPs related to aviation safety in eleven international legal requirements included in the Chicago Convention and its Annexes. To comply and to ensure the effectiveness of the SARPs, individual member States of ICAO must

incorporate them in their national laws and enforce them on their territory. The summary of the audit reports on Russia revealed that the Russian Aviation Code and procedures comply with these requirements in aviation safety. The Russian Government satisfies the first requirement as it adopted a new Aviation Code in 1997, which is constantly updated, and has set up five agencies for the administration of all Russian aviation activities. Today, Russian civil aviation is mainly administered by five entities: the Ministry of Transport, which regulates the entire transport system, including air transport; the Federal Service of Supervision in the Sphere of Transport controls and supervises the observance of Russian legislation, including in the field of civil aviation; the Federal Agency of Air Transport which has the power to license the activities related to the air transportation of passengers and cargo; the Interstate Aviation Committee which coordinates the activities related to the use of airspace and air traffic control, certifies aircraft, aerodromes and equipment, investigates air accidents, provides for the unification of aviation rules, develops a coordinated policy in the field of air transport, coordinates development and implementation of interstate scientific and technical programs, and, finally, the IAC Aviation Registry, which is responsible for aircraft certification. The second requirement is also satisfied since, in Russia, a certificate and/or a licence can be suspended, limited by the Aviation Authorities responsible for its issuance, or be revoked following the procedure adopted by the Ministry of Transport and the Federal Agency of Air Transport, working under the Constitution of the Russian Federation. Russia also satisfies the third requirement as the Federal Agency of Air Transport issues all licences specified in Annex 1 and approves the list of posts for aviation personnel. A foreign licence must be recognised as valid in Russia if it complies with international standards and with the federal aviation regulations. Russian law now provides the possibility for foreign

nationals to be part of a flight crew of a Russian aircraft in commercial aviation if they train for the requisite period and obtain a license. However, they cannot become commanding officers of a Russian aircraft. The fourth requirement has been fulfilled by Russia since the airworthiness certification of aircraft is a responsibility delegated to the IAC. However, the Ministry of Transport, in collaboration with the IAC, is responsible for the airworthiness standards and the Federal Service of Supervision is tasked with the State airworthiness oversight. As for the fifth requirement, Russia also delegated the responsibility of the registration of aircraft to the IAC Aviation Registry. An aircraft registered in another State could later be registered in the IAC Registry and receive a Russian registration certificate accordingly, upon the condition that an agreement on the maintenance of airworthiness is concluded between Russia and the first State of registration. Russia also respects the sixth requirement as Russian entities and individual entrepreneurs can only exercise the right to perform commercial activities in civil aviation when they receive a State license. The Federal Agency of Air Transport of Russia can issue a licence for commercial aviation operations when the aircraft operator demonstrates that its fleet is registered, that it holds all required documents, including the aircraft certificates, and that it can perform flights safely as it fulfills, among other conditions, the economic performance/financial fitness requirement. According to Russian legislation, foreign operators must also hold a license to operate their aircraft and Russia recognizes the validity of a licence issued by a foreign State in accordance with the SARPs. The seventh requirement is satisfied as Russia promulgated economic regulation for air carriers. After the dissolution of the Soviet Union, the operational tasks in civil aviation were assigned to air carriers, airports and technical maintenance organizations, now operating as private or corporatized companies. The transition from a

command economy to a market economy was a substantial responsibility for the Russian authorities. They had to adopt economic regulation concerning the difference between scheduled flights and charter flights, the tariffs and capacities regarding international flights, the designation of multiple air carriers in the air service agreements, the transport costs and the right of aviation companies to fix tariffs. Even if there are a good number of airlines in Russia, Aeroflot is still the “designated carrier” in the majority of bilateral air services agreements and operates about 70% of the international air transport of all Russian airlines. If foreign airlines want to operate international flights in Russian air space, the Russian Federation and the State of registry of the foreign operator must agree on the air freedoms in a bilateral agreement. The eighth requirement is also met by Russia as aircraft maintenance is mostly carried out by private enterprises in the private sector. As part of an aviation company, a maintenance organization can also contract the maintenance work of other airlines and can decide about qualitative checks and standards, provided that these tasks have been delegated by the state. The ninth requirement concerning air navigation services is partially satisfied as the IAC is in charge of the coordination of air traffic control in Russia and the Russian Government issues the regulations regarding the single system of air traffic control. However, Russia needs to deal with a problem complicating the use of its airspace by foreign aircraft. These aircraft can only fly on international routes and airports, since the Russian air space is not classified. Globally, regular VFR does not exist. Russia respects the tenth requirement concerning the transportation of hazardous cargo; it must be performed according to Russian laws, federal aviation regulations and international agreements to which Russia is a party. Finally, the eleventh requirement is fulfilled by Russia as sanctions are imposed on individuals and entities who violate civil aviation regulations.

Verifying how Russia complies with the international requirements also helps to identify shortcomings in Russian aviation safety. The European Community decided to globally enforce the SARPs on the Community's territory through, among other means, the SAFA programme. The EASA is in charge of the programme, which involves performing ramp inspections on third-country aircraft landing at EU airports. The EASA and the IAC signed Working Arrangements on airworthiness on 16 July 2004, which was followed by a series of implementing procedures of the Arrangements. The EC member States and the IAC must conduct ramp inspections of Russian or foreign aircraft operating in European skies in accordance with a common procedure and a common report format. Depending on the findings, information is communicated to all concerned entities in order to rectify the irregularities or to solve problems related to foreign aircraft and to always ensure aviation safety. If a potential safety threat is identified during inspections, or if an inspection detects non-compliance with international safety standards, and if this problem can pose a potential safety threat, the inspection report is communicated instantly to each member State of the EU and the European Commission and, in such a case, the EC can decide to ban or to restrict operations of the aircraft and/or airline within the Community. In March 2006, the first list of air carriers banned from flying in the EU was published and it is regularly updated. However, since its first release, Russian airlines have been absent from the list. The Community blacklist is an efficient dissuasive measure which prevents aviation accidents by identifying, at the earliest possible time, serious safety deficiencies. This measure cannot guarantee full safety, but it is a strong incentive for air carriers and civil aviation authorities to constantly enhance safety.

Russia and the European Union are currently working together on enhancing aviation safety through negotiations in order to achieve a comprehensive air transport agreement. For the moment, their relations are strained. Solutions have been identified to improve market opportunities for both sides, such as compliance with Community law, implementation of a phase-out of trans-Siberian overflight payments, and cooperation on security, safety, and the environment. Still, bilateral agreements between individual member States of the European Union and Russia do not completely comply with Community law as they have yet to include the clause on Community carriers in order for all airlines of EU member States to be able to fly to Russia. Moreover, last October, the European Commission initiated infringement procedures against twenty-five member States because their bilateral agreements with Russia does include the traditional nationality clause and provisions concerning Siberian overflights. According to the European Commission, the airline nationality clause and the royalties provisions are in breach of EU antitrust law. Indeed, EU airlines should not be forced to conclude a commercial agreement with Aeroflot. Furthermore, the provisions on overflight payments are in breach of Article 15 of the Chicago Convention. Russia may be ready to the Community carrier clause, which would solve its dispute concerning Austrian Airlines. The EU member States would have to give advantages in exchange, such as additional slots at EU airports. Finally, the conclusion of a comprehensive air transport agreement is conditional on the ratification by Russia of the specific agreement on the abolition of Siberian overflight payments reached in 2006, which the EU has imposed as a condition for Russia to become a member of WTO.

Community law demands higher standards than SARPs, which represent the minimum rules of civil aviation in the world. When an individual State is in breach of these rules, this constitutes a threat to international aviation safety and could lead to aviation accidents. Fortunately, international and national aviation safety oversight programmes contribute largely in identifying deficiencies and in correcting them. It took decades of discussions before the USOAP was finally established. The Chicago Convention is still silent on the essential empowerment conferred on ICAO with its safety auditing authority. Resolutions of ICAO are the legal basis for this empowerment, which was never foreseen at the Chicago Conference in 1944. Still, as Professor Micheal Milde remarks, “it would appear highly desirable to give to this new authority of ICAO a solid legal basis in an appropriate amendment of Chapter VI of the Convention.” However, amending the Chicago Convention remains another issue of discussion.

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