

The Credibility of the *International Financial Facility for Aviation* “Safety” In An Environment Where “Security” And “Survival” Are Air Transport Priorities

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I. INTRODUCTION

The air transport world’s priorities have been significantly affected by a number of factors in recent years including the tragic September 11,

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The author drafted this article primarily on the basis of person-to-person interviews with a number of ICAO officers from the Secretariat and Representatives on the Council of the ICAO, starting in the spring of 2002 through June, 2004. The author attended relevant ICAO Council meetings during the 166th session (May/June 2002) and the 167th session (December 4, 2002) and refers to applicable Secretariat documentation. The author also interviewed the Secretary of the Governing Body of the IFFAS in July, 2004. This article does not discuss developments since July, 2004. Since the author is not a member of the IFFAS apparatus, the author thereby cautions that there may be developments outside of his knowledge that may affect the validity of some comments and conclusions.

The author has written this article in his personal capacity such that its contents should in no way be attributed to the ICAO, its officers or specific State Representatives. The purposes of this article are to describe and analyze the nature and scope of the IFFAS and associated issues. The author seeks to provide decision-makers and citizens with the necessary information to make intelligent choices and not to advocate any particular position.

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2001 World Trade Center and Pentagon events, the Iraq war, the SARs scare, macroeconomic slowdowns, and soaring fuel costs. These crises have resulted in the air transport industry having to manage declining traffic and revenues, skyrocketing costs, and ultimately significant airline consolidation, restructuring, and bankruptcies.

“Survival” and “security” have become the principal catchwords of today’s commercial air transport industry as concerns about the continuing and obvious crisis in aviation “safety” appear to have been put on the backburner. Given fixed and sometimes declining budgets, States and airlines must select priorities – if more money is spent on aviation security and airline survival, necessarily less money may be spent elsewhere, as on improving aviation safety.

A particularly striking reality is that aviation-associated deaths are disproportionately caused by *safety* related problems as compared to *security* deficiencies. This discrepancy is powerfully demonstrated in a study a few years ago prepared by the International Civil Aviation Organization (“ICAO”). In the ten year period of 1992-2001, aviation accident-related deaths due to safety problems (for example, controlled flight into terrain caused 33.77 percent of such deaths) were about ten times more likely than deaths due to security breaches (3.87 percent of deaths were caused this way—this includes passenger and crew deaths of the aircraft not only in the September 11, 2001 events but also in the inadvertent shooting down of a plane over the Ukraine in that same year).¹

National, regional, and international political and economic interventions and shocks are constantly disturbing the balance among the priorities of survival, security, and safety. Most countries are concerned with the survival of their principal carriers – whether publicly or privately owned—although with liberalization, increasingly less so. However, different priorities are attached to aviation safety and security. On one hand, most developing and less developed countries (“LDCs”) consider aviation “safety” issues of paramount importance. On the other hand, the developed countries tend to attribute more significance to aviation “security.”

On the international level, the ICAO is a United Nations specialized agency that has tried to balance both the safety and security priorities of its 188 developed and developing Member [Contracting] States. This has been done so that the ICAO may satisfy its responsibility—under the *Chicago Convention of 1944*²—to insure the “safe and orderly growth of

1. Culled from a presentation at an ICAO seminar regarding statistics accumulated by the ICAO, *Accident Reporting, Air Navigation Commission Briefing 3* (June 6, 2002).

2. *Convention on International Civil Aviation*, Chicago Dec. 7, 1944, ICAO Doc. 7300/8 (8th ed. 2000) 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter *Chicago Convention*]. This is the Constitution of ICAO. In article 43 of this Convention, it is stipulated that: “An organization to be

international civil aviation throughout the world.”³ This article focuses on the safety side of the ICAO’s challenges with respect to the process of making the International Financial Facility for Aviation Safety (“IFFAS”) an operational and effective mechanism since June 2003.⁴

This article will examine the role of the IFFAS assisting certain LDC countries and regions that lack the financial resources to remedy aviation safety deficiencies identified by the USOAP mechanism. Our discussion will be divided into five parts.

- The problem: Non-remedied safety aviation deficiencies
- Solutions: Existing mechanisms to help solve the problem
- The IFFAS: Structure and procedures
- The IFFAS: Funding mechanisms
- The IFFAS: Nature and Scope of the assistance provided
- Conclusion

II. THE PROBLEM: NON-REMEDIED AVIATION SAFETY DEFICIENCIES

Most commentators will agree that aviation safety should remain a

named the International Civil Aviation Organization is formed by the Convention. It is made up of an Assembly, a Council, and such other bodies as may be necessary.” *Id.* at art. 43.

The ICAO decision-making process includes three principal levels:

- (1) The Assembly may establish a policy priority by resolution. The Assembly, composed of representatives from all Contracting States, is the sovereign body of ICAO. It meets every three years, reviewing in detail the work of the Organization and setting policy for the coming years. It also votes a triennial budget. *See id.* at arts. 48-49.
- (2) The ICAO Council deliberates on and formulates the structures and/or rules based on this resolution. This is the governing body which is elected by the Assembly for a three-year term, is composed of thirty-three States. The Assembly chooses the Council Member States under three headings: States of chief importance in air transport, States which make the largest contribution to the provision of facilities for air navigation, and States whose designation will ensure that all major areas of the world are represented. As the governing body, the Council gives continuing direction to the work of ICAO. It is in the Council that Standards and Recommended Practices are adopted and incorporated as Annexes to the Convention on International Civil Aviation. *See id.* at arts. 50, 54, 57.
- (3) The Secretariat supports both the Assembly and the Council through research and implementation. The Secretariat, headed by a Secretary General, is divided into five main divisions: the Air Navigation Bureau, the Air Transport Bureau, the Technical Co-operation Bureau, the Legal Bureau, and the Bureau of Administration and Services. *See International Civil Aviation Organization, About ICAO—How It Works*, at http://www.icao.org/cgi/goto_m.pl?/icao/en/howworks.htm.

The ICAO’s headquarters are in Montreal, Canada. *See International Civil Aviation Organization, About ICAO—Premises*, at http://www.icao.org/cgi/goto_m.pl?/icao/en/premises.htm. For more information about the ICAO, *see generally* <http://www.icao.org>.

3. *Chicago Convention*, *supra* note 2, at art. 44(a).

4. For a comprehensive and detailed review of the origins of IFFAS, positions for and against IFFAS, existing financing mechanisms as alternatives to IFFAS, *see* John Saba, *Worldwide Safe Flight: Will the International Financial Facility for Aviation Safety Help It Happen?*, 68 J. AIR L. & COM. 537 (2003) [hereinafter *Worldwide Safe Flight*].

principal concern of responsible authorities. Most countries—developed, developing, and less developed countries—acknowledge that there is an acute need to help Less Developed Countries remedy aviation safety deficiencies since their resources, financial and otherwise, are insufficient. However, States and their domestic air transport industries disagree as to what mechanisms and procedures are preferred to meet this need. Internationally, the ICAO developed the IFFAS mechanism to address this real problem.

A. THE PROBLEM

All States—developed and developing/LDC—have two important reasons for remedying the aviation safety deficiencies of developing and LDC countries. First, passengers and third parties on the ground—irrespective of citizenship—are at risk of death or injury through aircraft accidents and crashes anywhere in the world.⁵ Accordingly, some have stated that civil aviation safety is an indivisible and global regime such that any recognized aviation safety deficiency in one country threatens the safety of the entire global civil aviation system.⁶

Statistical evidence supports this proposition. Internationally, if the aviation accident rate is assumed to be held constant, at the 1996 level, and projected growth rates double traffic volume over the next ten to twelve years, it is projected that by 2015 there may be a serious accident every week.⁷ Regionally, one study indicates that the developed regions of North America, Western Europe, and Australia have the lowest fatal aviation accident rates, while developing countries have much higher accident rates.⁸ For example, airlines of Eastern Europe and the Commonwealth of Independent States have the highest accident rate (indeed, fifty times higher than Western Europe).⁹ Moreover, airlines from Africa, Asia, and Central/South America have accident rates at least twice as high as the world average.¹⁰ Thus, it is evident that passengers and third parties on the ground are put at risk by developing/LDC countries' air-

5. Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (May 10, 2002 & Jan. 14, 2003). It should be noted that Dr. Cherif assumed the position of Secretary-General of the ICAO on August 1, 2003, succeeding Mr. Renato Claudio Costa Pereira.

6. *Id.*

7. COMMISSION OF THE EUROPEAN COMMUNITIES, A EUROPEAN COMMUNITY CONTRIBUTION TO WORLD AVIATION SAFETY IMPROVEMENT 3 (July 16, 2001) [hereinafter EU CONTRIBUTION] (quoting David Hinson, FAA Administrator).

8. *Id.* at 13 (reproducing a chart from AIRCLAIMS LIMITED, SPECIAL REPORT FOR IAPA: STUDY OF FATAL ACCIDENT DATA, PASSENGER FLIGHTS FOR AND NUMBER OF FLIGHTS, FIVE YEAR ROLLING AVERAGE, WESTERN-BUILT JET AIRCRAFT 1989 TO 1998 (Feb. 4, 1999)). The period referred to here is 1994 to 1998.

9. EU CONTRIBUTION, *supra* note 7, at 3.

10. *Id.* at 13.

craft and aviation infrastructure deficiencies. Developed country aircraft operators and citizens not only fly internationally to developing/LDC country destinations, but developed country airports also receive flights from developing/LDC country aircraft operators.¹¹

A second reason for improving aviation safety in developing/LDC States is that global economic development is closely related to a vibrant transportation industry and, more specifically, a vital air transport industry, particularly. Notably, air transport permits billions of developed country tourists to travel to developing/LDC countries, thereby accelerating their economic development specifically¹² and contributing to the over \$3.5 trillion USD to the travel and tourism industry, about twelve percent of the world's Gross Domestic Product (GDP).¹³ Furthermore, global markets require fast and efficient transportation of not only perishable goods from the developing/LDC countries to the developed countries, but also finished products sent from the developed to developing countries.¹⁴ Needless to add, the air transport industry and economic development depends on the traveling public's confidence that air travel is safe.¹⁵

B. THE USOAP IDENTIFIES THE EXTENT OF THE PROBLEM

The world has become aware of the extent of aviation safety deficiencies, particularly among certain developing and LDC countries, largely because of the Universal Safety Oversight Audit Programme ("USOAP")¹⁶ of the ICAO. This process has involved three main

11. *Id.* at 5.

12. *Id.* at 6.

13. Ruwantissa I.R. Abeyratne, *Funding an International Financial Facility for Aviation Safety*, 1 J. WORLD INVESTMENT 383, 383-84 (2000) (quoting Dr. Kotaitte, ITA Press 284, at 10 (Apr. 1 - 5, 1997)).

14. EU CONTRIBUTION, *supra* note 7, at 6.

15. *Id.*

16. ICAO's mandatory USOAP regime was created in November 1998. In the following three-year period, the ICAO Assembly mandated initial audits, conducted under the auspices of ICAO's Air Navigation Bureau, that were to verify State compliance (i.e., effective implementation) of the Standards and Recommended Practices (SARPs) in three Annexes concerned largely with the aircraft itself: Annexes One (personnel licensing), Six (flight operations), and Eight (aircraft airworthiness including design, certification, and maintenance). *Id.* at 16. The USOAP reinforces preliminary evidence of aviation safety deficiencies provided by other programs.

The first audits/assessments were those of the United States' Federal Aviation Administration International Aviation Safety Assessment (IASA) program initiated in 1992. By the end of the 1990s, the IASA had determined that over forty percent of the countries assessed had insufficient oversight systems. *Id.* at 14.

This Program continues to assess whether a non-US Civil Aviation Authority (CAA) complies with international (ICAO) standards for aviation safety oversight of the air carriers under its authority. The FAA is evaluating the safety oversight system of each country, not the safety of

elements.

First, in order to achieve the required minimum levels of aviation safety globally, ICAO has established a broad range of standards and recommended practices (SARPs),¹⁷ guidelines and procedures that it expects will be implemented by airlines, airport authorities, air navigation services, government authorities, and other concerned entities.¹⁸

Second, the USOAP was developed as a response to concerns about gaps in worldwide compliance with these minimum international aviation safety standards and recommended practices. The ultimate objective of the USOAP is to promote global aviation safety consistent with the ICAO's broader Global Aviation Safety Plan (GASP).¹⁹ The USOAP is

its individual airlines. It assesses only whether the oversight system is adequate to ensure that ICAO minimum standards are met, not the higher standards applicable in the U.S., the European Community, and some other countries. For a more in depth explanation, see *id.*

A significant regional mechanism is the European Safety Assessment of Foreign Aircraft (SAFA) Program, established by the European Civil Aviation Conference (ECAC) and Europe's Joint Aviation Authority (JAA) with support from the European Commission. *Id.* at 15.

The SAFA Program provides European States with a surveillance tool so that they are made aware of and can act on proven deficiencies. It is largely based on safety information gathered from all possible sources and on ramp-checks of foreign aircraft. The Program is applied to all foreign aircraft using a European Civil Aviation Conference (ECAC) country's airports. The SAFA is neither an assessment of a State's oversight capability nor a substitute for safety oversight assessments. *Id.*

17. The ICAO Council has adopted eighteen technical Annexes to the *Chicago Convention*, establishing Standards and Recommended Practices (SARPs) that are designed to ensure a minimum level of safety for international civil aviation through technical uniformity. In turn, each State is responsible to assure adherence to these SARPs. See FEDERAL AVIATION ADMIN., FAA HANDBOOK FOR FAA ORDER 8400.10 CHG 15, VOL. 1 GENERAL CONCEPTS, DIRECTION, GUIDANCE, & DEFINITIONS, CH. 3 INTERNATIONAL AVIATION, SEC. 2 ICAO AND THE ICAO ANNEXES, 1-69, available at http://www.faa.gov/avr/afs/faq/8400/8400_vol1/1_003_02.pdf (updated June 26, 2002).

18. See INTERNATIONAL CIVIL AVIATION ORGANIZATION, FUNDING AVIATION SAFETY: THE INTERNATIONAL FINANCIAL FACILITY FOR AVIATION SAFETY (IFFAS) cl. 1, at 1 (2004) [hereinafter IFFAS BULLETIN] (on file with ICAO).

19. *ICAO Global Aviation Safety Plan (GASP)*, Res. A33-16, *complied in Assembly Resolutions in Force*, at II-19, ICAO Doc. 9790 (Oct. 2001) [hereinafter *GASP Resolution*].

One of the primary objectives of ICAO is to promote the safety of civil aviation worldwide. With 188 Contracting States, and its active involvement in global aviation safety issues, ICAO is well-positioned to assume a coordinating role with respect to the many safety initiatives under way worldwide all with the common aim of reducing the number and rate of aviation accidents. Recognizing this, in 1997 the Air Navigation Commission proposed an ICAO Global Aviation Safety Plan (GASP) to the ICAO Council. In 1998, the 32nd Session of the Assembly adopted Resolution A32-15: Global Aviation Safety Plan, which, amongst other things, urged all Contracting States to support the various elements of GASP. A progress report on GASP was submitted to the 33rd Session of the Assembly in 2001 which then adopted Resolution A33-16, containing an updated GASP and superseding Resolution A32-15.

The GASP serves to focus the safety-related activities within ICAO on those safety initiatives, either planned or in progress, which offer the best safety dividend in terms of reducing accident numbers and rates worldwide. See Upali Wickrama & Ruwantissa Abeyratne, *New*

mandatory and applies to all Member States in a systematic and regular way.²⁰

Third, the USOAP was created to reconcile a discrepancy between State legal obligations and lack of action to satisfy these obligations.²¹ On one hand, the *Chicago Convention* and its Annexes impose a duty on individual States to assure aviation safety. If these obligations are not fully respected by States, air safety deficiencies arise and States have an obligation under Article 38 of the *Chicago Convention* to notify the ICAO of any differences between their national regulations and practices and the international standards contained in the Annexes.²² On the other hand, despite these legal obligations, many contracting States have been discovered to not properly satisfy their duty by not applying and/or misinterpreting relevant SARPs.²³

It should be understood that the ICAO uses such instruments as the USOAP to help “national aviation authorities in reducing the number of accidents and fatalities worldwide, while placing emphasis on regions where occurrences remain high.”²⁴

The ICAO has been very successful with the USOAP, with 180 Contracting States and five territories having been audited by ICAO teams between January 1, 1999 and December 31, 2002.²⁵ The results of these initial audits have been analyzed and submitted to the audited States. As expected, there were many cases of aviation safety deficiencies resulting from State non-compliance with the SARPs including: improper and insufficient inspections by State authorities before the certification of air operators; maintenance organizations and aviation training schools; licenses and certificates improperly issued, validated, and renewed without due process; procedures and documents improperly approved; failure to identify safety concerns; and failure to follow-up on identified safety defi-

Mechanism Would Provide Means of Raising Funds for Important Infrastructure Projects, 56 ICAO J. 29, 29-30 (2001).

20. EU CONTRIBUTION, *supra* note 7, at 16. The USOAP rectifies the failings of its predecessor, the ICAO Aviation Safety Oversight Programme (SOP), created by the ICAO Assembly in October 1995. The SOP was plagued by not only the lack of financing since contributions were voluntary, but also by the fact that audits were voluntary and were only carried out when requested by the Member State, thus the SOP could not always be applied where the need was greatest. *See id.*

21. Capt. Haile Belai, *Audit Analysis Helps Set Priorities for Addressing Safety Oversight Deficiencies*, 57 ICAO J. 19, 20 (2002).

22. *Chicago Convention*, *supra* note 2, at art. 38.

23. Belai, *supra* note 21, at 19. This discrepancy became a prominent issue when disclosed by the ICAO at a November 1997 conference of Directors-General of Civil Aviation.

24. IFFAS BULLETIN, *supra* note 18, at cl. 1.

25. INTERNATIONAL CIVIL AVIATION ORGANIZATION, ANNUAL REPORT OF THE COUNCIL – 2002 11 (2002) [hereinafter ANNUAL REPORT 2002].

ciencies and take remedial action to resolve such concerns.²⁶

The USOAP audits and follow-up procedures²⁷ indicated that, while many States have remedied their non-compliance after the audits, many States still fail to remedy aviation safety deficiencies, often due to a lack of will, means, and/or ability to do so.²⁸ Serious difficulties in fulfilling safety oversight obligations apply to specific States and regions disproportionately. Indeed, in many regions, audit findings show a direct relationship between two factors: the higher the non-compliance to SARPs, the higher the aviation accident and incident rates in that region.²⁹

Developed and certain developing countries have the means and the ability, and therefore, do remedy deficiencies. However, many developing/LDC States have not committed adequate resources to the task.³⁰ There are four major reasons why such audited States may lack the will, means, and/or ability to remedy their safety deficiencies:

1. Primary aviation legislation and regulations may be either non-existent or inadequate (for example, a failure to provide adequate enforcement powers).³¹
2. Institutional structures that regulate and supervise aviation safety often do not have the authority and/or autonomy to effectively satisfy their regulatory duties.³²
3. Human resources in many States may be plagued by a lack of appropriate expertise largely due to inadequate funding and training (and trained staff may leave government jobs for better-paying jobs in the aviation

26. Belai, *supra* note 21, at 19.

27. The USOAP provides that the ICAO, with the agreement and participation of the State concerned, can proceed to the establishment of an Approved Action Plan. This plan is intended to assist States to take the necessary recovery actions to remedy the deficiencies identified by the safety audit so that they may fully comply with the ICAO Annexes.

28. See *Progress of the ICAO Universal Safety Oversight Audit Programme*, at 3, ICAO Working Paper C-WP/11815 (Apr. 18, 2002). The ICAO Air Navigation Commission (ANC) has a "follow-up" audit program "to validate the implementation of States corrective action plans, to identify any problems encountered by States in such implementation, and to determine the need for external assistance to resolve safety concerns identified in the course of the audits." *Id.* at 2.

Indeed, the ICAO has conducted an analysis of a sample of thirty-four States that compares their rate of non-compliance with specific critical elements of safety oversight in the initial and follow-up (a few years later) audits. While in the initial audit there was 21.8% non-compliance, in the audit follow-up a few years later, non-compliance dropped to only 7.2%. See *id.* at app. B. It should be noted that these follow-up statistics reveal two important trends: positively, many cases of aviation safety deficiencies have been remedied; but negatively, "some of the States visited have not been able to implement their corrective action plan and require assistance to do so." *Id.* at 3. To the end of 2002, sixty-seven Contracting States had received an audit follow-up mission. See ANNUAL REPORT 2002, *supra* note 25, at 11.

29. Belai, *supra* note 21, at 19-20.

30. EU CONTRIBUTION, *supra* note 7, at 4.

31. *Id.*

32. *Id.*

industry).³³

4. Financial resources allocated to civil aviation safety are insufficient since many developing/LDC countries do not consider this a high priority compared to other demands such as health care, education, irrigation, and poverty.³⁴

The most important of the four challenges just mentioned, however, is that certain countries lack sufficient financial resources to comply with these ICAO requirements.³⁵ ICAO has long recognized that whenever particular countries and regions do not remedy the safety deficiencies in their aviation systems, this may jeopardize aviation safety globally. Thus, the ICAO has sought to find and/or establish less onerous and rigid mechanisms than normal financial markets to help the needy developing/LDC States fund the remedy of the audited aviation safety deficiencies.

III. SOLUTIONS: EXISTING MECHANISMS TO HELP SOLVE THE PROBLEM

Today, it is clear that there is a crisis of non-remedied aviation safety deficiencies in particular States and regions of the world. While the ICAO has been performing the *safety* audits of most countries, a question has arisen as to the purpose of these safety audits.

Some critics of the slow process in remedying safety aviation deficiencies have asked questions with respect to the objective of USOAP audits. Is it negative, such that audit results information is used as a way to blacklist certain States, airlines, and airports for safety deficiencies? Is it positive, such that audit results information may be used as a tool to improve international aviation safety?

Let us turn to existing approaches (technical and financial) that may help remedy aviation safety deficiencies in the developing/LDC countries. It must be recognized that assuring that all States fully comply with minimum aviation safety standards is a much more expensive and demanding undertaking than the auditing/assessment process.

A. TECHNICAL ASSISTANCE

To help needy developing/LDC States remedy aviation safety deficiencies, they are often directed to apply to existing and/or evolving technical cooperation and assistance institutions and programs at the international, regional, bilateral, multilateral, and plurilateral levels.

33. *Id.*

34. *Id.*

35. IFFAS BULLETIN, *supra* note 18, at cl. 1.

1. *International Technical Assistance*

The development of international civil aviation since World War II has resulted in a decrease in aviation safety deficiencies in developing/LDC countries. They have gradually acquired equipment, facilities, and services so as to comply with ICAO's minimum international standards, SARPs, primarily through the work of the ICAO's Technical Co-operation Bureau ("TCB")³⁶ and Technical Co-operation Programme ("TCP").³⁷

This progress can significantly be attributed to the funding of the TCB through the United Nations Development Programme ("UNDP"),³⁸ that for many years approved financing to assist in remedying aviation safety deficiencies of developing countries.³⁹ However, over the last ten years, UNDP funding priorities have changed to reallocate funding from a lower priority item, like civil aviation, in favor of health, education, agriculture, water purification, and poverty reduction. Thus, civil aviation projects are expected to be self-financed through a variety of public and private funding sources, but no longer the UNDP, with the ultimate goal being that commercial revenues provide cost recovery.

Despite a lack of UNDP funding, the ICAO Council has approved the TCB funding project feasibility studies for appropriate aviation infra-

36. See International Civil Aviation Organization, *TCB, The Technical Co-Operation Bureau of ICAO*, at <http://www.icao.int/icao/en/tcb/TCBgreeting.html> (last visited Dec. 12, 2004). The Technical Cooperation Bureau (TCB) of the ICAO provides advice and technical assistance to developing and LDC countries for civil aviation. The TCB receives administrative fees to fund itself by carrying out civil aviation projects in developing/LDC countries with three main funding sources: (1) the United Nations Development Programme (UNDP) (this is a declining source); (2) Developing countries' self-funding sources; and (3) other financing institutions. *Id.*

37. See James Ott, *Civil Aviation Directors to Explore Expanded Safety Role for ICAO*, AVIATION WK. & SPACE TECH., Aug. 18, 1997, at 41. The Technical Cooperation Programme (TCP) of the ICAO focuses on aeronautical training. Again, there has been a decline in funding by the UNDP. However, this reduction has been partly compensated by governments that increasingly provide partial financing for their own civil aviation projects through cost-sharing, and/or trust funds provided by third parties such as other governments. See James Ott, *ICAO Faces Daunting Issues*, AVIATION WK. & SPACE TECH., Oct. 3, 1994, at 55 [hereinafter *Daunting Issues*].

38. *Daunting Issues*, *supra* note 37, at 55. The United Nations Development Programme (UNDP) is the United Nations' largest provider of grants for "sustainable human development." The UNDP grants assistance only at the request of governments and in response to their priority needs that must be incorporated into national and regional plans. The funds are primarily spent to secure international and national expertise, technical services, and equipment. In the mid-1990s, the UNDP often gave over \$30 million USD annually for projects that the ICAO implemented. However, the ICAO has progressively received less money from this source. For example, in the case of the ICAO, "UNDP core funding in 2002 amounted to [only] \$752,000 . . . ICAO project expenditures under the UNDP programme, which was mostly cost sharing and included projects for which ICAO acted as Implementing Agency, were \$26.6 million in 2002, compared with \$52.4 million in 2001." See ANNUAL REPORT 2002, *supra* note 25, at 38-39.

39. *Daunting Issues*, *supra* note 37, at 55.

structure safety-related projects (e.g., traffic forecasts, radar installation) in developing/LDC countries.⁴⁰ While the ICAO, through the TCB, provides some technical assistance to needy countries by preparing feasibility studies, the TCB can only prepare limited studies that are less than the complete and more detailed project reports than the financing institutions want.⁴¹

2. *Regional Technical Cooperation*

Several different regional technical cooperation/self-help approaches are being tried that many developed countries support. One approach involves certain countries organizing themselves regionally for a common aviation purpose with a view of rationalizing their costs and the regional employment of the needed resources.⁴² For example, while six countries may not be able to afford to hire four safety oversight inspectors each, they may be able to pool their resources and maybe hire ten inspectors for their region.⁴³ This concept has been applied regionally by six Central American Member States in the Central American Corporation for Air Navigation Services: *Corporacion Centroamericana de Servicios de Navi-gacion Aerea* (“COCESNA”) regional association respecting their oversight/monitoring and upgrading of their aviation infrastructure.⁴⁴ The mechanisms to collect whatever charges or taxes are necessary to finance these activities are regionally developed and applied.⁴⁵ A second approach involves groups of more economically developed developing countries (for example, North Africa) helping neighboring regions of poorer developing/LDC countries (for example, sub-Saharan Africa) to finance and implement aviation infrastructure upgrades.⁴⁶

40. Interview with A.P. Singh, Representative of India on the Council of ICAO (May 15, 2002). It should be noted that since the time of the interview, Ambassador Singh has become the Director of the Bureau of Administration and Services of ICAO. These studies are presently funded by two methods: (1) by voluntary contributions of a generous third country that wants to help a particular country and its project; or (2) a few hundred thousand dollars transferred annually to the TCB from a small internal ICAO trust fund (this fund was established by the ICAO to hold dues paid in arrears and to be spent for ICAO-related purposes) for the purpose of the preparation of project documents for remedial action in countries, generally. (The TCB has decided to direct part of these funds to country-specific feasibility studies). *Id. See also* INTERNATIONAL CIVIL AVIATION ORGANIZATION, ANNUAL REPORT OF THE COUNCIL – 2001 45 (2001).

41. Interview with A.P. Singh, Representative of India on the Council of ICAO (May 15, 2002).

42. Interview with Daniel Galibert, Former President of the Air Navigation Commission of ICAO (May 7, 2002).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

3. *Bilateral, Multilateral and Plurilateral Technical Assistance*

Developed donor States often prefer to provide assistance to developing/LDC countries in civil aviation safety projects through bilateral, multilateral, or plurilateral mechanisms. However, there are two limitations to this approach that are shared with the international assistance framework: first, recipient developing/LDC countries frequently channel resources to priorities like health, education, agriculture, water purification, and poverty reduction rather than civil aviation; and second, most developed donor States insist that civil aviation projects be largely self-financed through public and private funding sources with an ultimate objective of revenues assuring cost recovery.

a. *Bilateral Technical Assistance*

Some developed donor States prefer that their limited technical assistance money help particular regions, sub-regions or individual countries, using a bilateral and directed approach, rather than international mechanisms, for three main reasons. First, such an approach may assure that the money is spent in the area that the donor State desires.⁴⁷ Second, this approach often provides more transparency, accountability, and effective auditing, than international assistance mechanisms. Countries like the United States may already have mechanisms (e.g., the FAA) to achieve these goals.⁴⁸ Third, developed countries may want to help by using a “bottom up” bilateral and regional approach, rather than the “top down” use of international mechanisms, since funds are channeled to recipient neighbor countries and regions benefiting the donor’s political and economic interests. For example, Canada and the United States are involved in such projects with Inter-American Development Bank cooperation.⁴⁹ Suggestions have been made that more developed countries in East Asia, like Japan and Korea, might do something similar to help their Asian neighbors.⁵⁰

Bilateral assistance assumes a special character when donor States are members of a regional group like the European Union. European Union (“EU”) States individually—and, possibly in the future, through a variety of European Union mechanisms—are already channeling some technical assistance to those countries regionally close to them in Eastern

47. Interview with Jonathan Aleck, Former Representative of Australia on the Council of ICAO (July 29, 2002).

48. Interview with Edward W. Stimpson, Representative of the United States on the Council of ICAO (May 14, 2002).

49. Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26 & Aug. 15, 2002).

50. *Id.*

Europe and Africa.⁵¹ France's civil aviation regulatory authority ("DGAC") is helping former colonies, Cambodia and Vietnam, to develop and upgrade their civil aviation codes to be consistent with Europe's Joint Aviation Requirements ("JARs").⁵²

b. Multilateral Technical Assistance

Multilateral technical assistance is best illustrated by the EU and its Commission that encourages EU initiatives to improve aviation safety globally. Thus, the European Commission has proposed initiatives including cooperation with Europe's Joint Aviation Authority ("JAA") and EUROCONTROL to assist future EU members from Central and Eastern Europe and to finance safety recovery programs.⁵³ Moreover, discussions continue with respect to not only the joint and complementary goals and priorities of EU Member States, but also to the need to establish a co-ordination mechanism for actions taken by EU Member States to avoid duplication of governmental spending.⁵⁴

c. Plurilateral Technical Assistance

A developing concept, structure, and process of technical assistance is plurilateralism, which expands associates to include not only recipient and donor States bilaterally, multilaterally, and/or internationally but also "the efforts, experience and . . . resources of international [e.g., ICAO, IATA] and regional organizations, aviation manufacturers, financial and other funding institutions. . . ."⁵⁵

The concept of plurilateral group can be traced back to the 1995 precedent of the Asia-Pacific Economic Community ("APEC") Transportation Ministers that convened a Group of Experts on Aviation Security, Safety and Assistance ("GEASA") to review and recommend the best ways to improve safety and provide assistance in their region.⁵⁶ This approach continues today in the Asia-Pacific region.⁵⁷ ICAO rendered this

51. See, e.g., Netherlands Embassy, *Aviation*, at http://www.netherlandsembassy.or.ke/nl/economie_han-del/aviation.html.

52. See Sofreavia Group, *Technical & Operational Support*, at http://www.sofreavia.fr/pages/tech_ass-tec_assup.html#TA.

53. EU CONTRIBUTION, *supra* note 7, at 11.

54. See *id.* at 11-12.

55. *GASP Resolution*, *supra* note 19, at 11-19. This explanation of the GEASA (Group of Experts on Aviation Security, Safety and Assistance) concept was formalized within the ICAO framework in its Resolution A33-16 Global Aviation Safety Plan (2001). The Assembly provided the quoted phraseology to resolve clause 14 of the Resolution. *Id.*

56. See Transport Canada Civil Aviation, *Background*, at <http://www.tc.gc.ca/CivilAviation/International/APEC/Background.htm>.

57. Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26, 2002).

mechanism as an internationally recognized approach when it established its Global Aviation Safety Plan (“GASP”) in 2001⁵⁸ and during the 33rd Assembly of September/October 2001 acknowledged the existence and desirability of the mechanism of a “plurilateral” group of senior aviation experts being empowered to study their region’s aviation safety problems and make recommendations.⁵⁹

Some countries are applying this framework in their own regions. For example, Canada and the United States participated, in the period of April 4-5, 2002, at a GEASA with experts from seven South/Central American and Caribbean countries, the ICAO, the Inter-American Development Bank (“IDB”), and the Central American Oversight Agency (“ACSA”).⁶⁰ The EU is studying this approach, particularly in reference to technical assistance to Eastern Europe and Africa.⁶¹

B. FINANCIAL ASSISTANCE

Financial assistance is clearly a second important approach for developing/LDC countries to remedy their USOAP audited aviation safety deficiencies including borrowing from: (1) commercial banks; (2) regional development banks and funds; (3) international banks and other institutions; and (4) export credit agencies and bilateral development institutions.

1. Commercial banks

Commercial banks are reluctant to lend money to developing/LDC countries. Both the aviation industry generally and the type of clients, LDCs, are considered too high risk given the small return on investment in the aviation industry.

2. Regional Development Banks and Funds

A promising source of financing to assist countries is regional development banks and affiliated funds. The main such banks include the Islamic Development Bank (“IDB”),⁶² African Development Bank

58. *GASP Resolution*, *supra* note 19, at II-19.

59. *Id.*

60. Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26, 2002); Interview with Edward W. Stimpson, Representative of the United States on the Council of ICAO (May 14, 2002).

61. Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26, 2002).

62. For a more detailed discussion, see *Establishment of an International Financial Facility for Aviation Safety (IFFAS)*, at app. B-2, ICAO Council Working Paper C-WP/11840 (May 21, 2002) [hereinafter *IFFAS Working Paper*].

(“AFDB”),⁶³ Asian Development Bank (“ADB”),⁶⁴ and Inter-American Development Bank (IADB, also called the IDB).⁶⁵

The availability and extent of the financial assistance provided by these banks and funds suffer from three principal constraints:

- These mechanisms generally attach little priority to the improvement of aviation infrastructure and services, preferring to channel funds to such objectives such as reducing poverty.⁶⁶ The Inter-American Development Bank is a special case since it expands its loan priorities to include not only poverty reduction but also sector reform and modernization.⁶⁷ Indeed, the upgrading of the aviation sector might be interpreted as within the IDB’s priorities, as illustrated in late 2001 by the IDB’s Multilateral Investment Fund (MIF), which created a \$10 million line of activity to help Latin American and Caribbean countries improve airport security in the aftermath of the September 11th World Trade Centre tragedy.⁶⁸ For example, recently the MIF approved almost one half million dollars as a grant to Nicaragua to support a project to strengthen security at Managua’s international airport.⁶⁹
- The lending policies and practices of such banks and funds apply such demanding criteria that loans tend to be limited to creditworthy countries; therefore, this effectively excludes the more needy but credit risky developing/LDC countries.⁷⁰
- There is no mechanism to help the potential financial assistance recipients to professionally prepare project proposals and satisfy project management requirements and documentation procedures when they apply to regional development banks.⁷¹

Regional development banks sometimes partner with a donor and recipient State. For example, in recent years the Netherlands (i.e., its Ministry of Transport, through its Aviation Technical Assistance Programme) and the European Investment Bank jointly provided seed

63. *Id.* at app. B-1.

64. *Id.* at app. B-2, 3.

65. *Id.* at app. B-1.

66. Interview with A.P. Singh, Former Representative of India on the Council of ICAO (May 15, 2002). At the time of the interview, Ambassador Singh indicated that these banks follow a procedure that effectively excludes loans to LDCs for remedying aviation safety deficiencies. These banks stipulate to the applicant LDC that there is a fixed amount available for the country’s development with “soft”/concessional loans; however, these banks stipulate a number of priorities, such as programs for poverty alleviation, education, water supply purification, health care, and rural road infrastructure that do not include aviation infrastructure improvement. *Id.*

67. *IFFAS Working Paper*, *supra* note 62, at app. B-1.

68. *Id.*

69. *Id.*

70. Interview with A.P. Singh, Former Representative of India on the Council of ICAO (May 15, 2002).

71. Interview with Jonathan Aleck, Former Representative of Australia on the Council of ICAO (Apr. 30, 2002).

money, expertise, and/or equipment to aviation-related projects in Tanzania.⁷²

3. *International Banks and Other Institutions*

Current international mechanisms are not very helpful in financing aviation safety deficiency projects. First, the United Nations Development Programme (“UNDP”) has dramatically reduced its financing of aviation infrastructure, training, and the like. Second, other international financing mechanisms are sector specific and do not generally extend loans or other assistance in the aviation sector (for example, the United Nation’s Food and Agriculture Organization (“FAO”) restricts its efforts to the agricultural sector). Third, the World Bank is not presently involved in the aviation sector.

4. *Export Credit Agencies and Bilateral Development Institutions*

Export credit agencies exist in many developed countries to assist and/or subsidize the domestic production and provision of aviation infrastructure and equipment. These institutions may eventually be used to help finance safety-related aviation infrastructure equipment and projects. A key limitation, however, is that these exports must be creditworthy—a requirement that certain aviation safety improvements in the developing/LDC countries do not meet. Export credit agencies include the Export Development Corporation (“EDC”) (Canada), *Compagnie Française d’Assurance pour le Commerce Extérieur* (“COFACE”) (France), *Hermes* (Germany), Export Credits Guarantee Department (“ECGD”) (United Kingdom), and Export-Import Bank (“Ex-Im Bank”) (USA).⁷³

Bilateral development agencies operate in some developed countries. In principle, these agencies may get involved in particular cases to remedy aviation safety deficiencies of LDCs; however, in practice they generally do not. Such agencies include Canadian International Development Agency (“CIDA”) (Canada), *Agence Française de Développement* (“AFD”) (France), Department for International Development (“DFID”) (United Kingdom), and United States Agency for Interna-

72. Interview with Bert Kraan, Senior Project Manager, Safety and Security, Department of Civil Aviation of the Netherlands (May 28, 2002). One project involves an estimated \$10 million USD to provide air navigation and communications equipment; another project requires an estimated \$13 million USD to install a back-up power supply in Tanzanian airports for the emergency cases when power goes down due to inclement weather. *Id.*

73. See International Civil Aviation Organization, *ICAO Study of an International Financial Facility for Aviation Safety (IFFAS)*, app. A, at <http://www.icao.int/icao/en/atb/iffas/appendices.htm>.

tional Development (“USAID”).⁷⁴

IV. THE IFFAS: STRUCTURES AND PROCEDURES

The objective of ICAO’s Global Aviation Safety Plan and many national aviation safety policies is to reduce the number of accidents and fatalities irrespective of the volume of air traffic. Moreover, the emphasis in corrective action is in those regions where the number of accidents and fatalities are high.⁷⁵ As this paper has demonstrated, certain states, particularly LDCs, do not themselves have sufficient resources to comply with the international safety standards.⁷⁶ Moreover, existing technical and financial mechanisms are inadequate in helping such states fund the remedy of their USOAP aviation safety deficiencies.

The search for a mechanism to finance aviation safety projects started formally in 1995 as the 31st Session of the ICAO Assembly deliberated on a proposal by eight States, the members of the Latin American Civil Aviation Commission [“LACAC”], on the need, appropriateness, and usefulness of establishing an International Aeronautical Monetary Fund (“IAMF”) as a funding mechanism for aviation safety projects in countries lacking the necessary resources.⁷⁷ Subsequently, an extensive 1998 Secretariat study demonstrated that not only was there a need to finance aviation safety-related projects in certain developing/LDC countries, but also there were no funding mechanisms within the existing aviation system to provide financing for these needs.⁷⁸

In 2001, the 33rd Session of the Assembly adopted Resolution A33-10,⁷⁹ entitled *Establishment of an International Financial Facility for Aviation Safety (IFFAS)*. This Resolution endorsed the IFFAS concept and requested that the ICAO Council pursue the establishment of an IFFAS as “a matter of priority early in the 2002-2004 triennium. . . .”⁸⁰ as well as

74. *Id.*

75. ICAO State Letter M11/3-04/58 from Chairman, Governing Body of IFFAS & ICAO Secretary General 1 (June 30, 2004) [hereinafter State Letter June 2004] (on file with ICAO).

76. *Id.*

77. See *Executive Committee, Agenda Item 22: Strategic Action Plan*, at 2, ICAO Executive Committee Working Paper A31-WP/73 EX/26 (1995) (on file with ICAO archived files). This study was based on a recognition that many States had problems financing investments in airports, air navigation services infrastructure, and the like, necessitating a search for less onerous and rigid mechanisms than normal financial markets.

78. International Civil Aviation Organization, *ICAO Study of An International Financial Facility For Aviation Safety (IFFAS), Background* [hereinafter *IFFAS Study*] at http://www.icao.org/cgi/go-to_m.pl?/applications/search.

79. See *Establishment of an International Financial Facility for Aviation Safety (IFFAS)*, Res. A33-10, compiled in *Assembly Resolutions in Force*, at I-56, ICAO Doc. 9790 (Oct. 2001) [hereinafter *IFFAS Resolution*]. The 2001 Assembly benefited from an in-depth Secretariat study prepared and submitted to the Assembly for consideration.

80. *Id.* at cl. 3.

assure appropriate management, administrative, and legal strategies for the IFFAS.⁸¹

Accordingly, on December 4, 2002, during its 167th Session, the ICAO Council studied, approved, and adopted the proposed Administrative Charter of the IFFAS. Thus, the IFFAS was officially established after lengthy deliberations and a “consensus” being achieved among deeply divided positions.⁸²

The primary purpose for creating the IFFAS is to provide financial assistance for aviation safety-related projects to those Contracting States, primarily LDCs, that have difficulty securing necessary funding through existing financing mechanisms and procedures when they seek to remedy aviation safety deficiencies principally discovered by the USOAP.⁸³ The IFFAS is oriented to provide access to such funding under conditions that are “more flexible and less onerous than those usually available in financial markets.”⁸⁴ In this context, Dr. Assad Kotaite, President of the Council, stated:

Aviation safety is global in nature. For the entire system to be safe, all elements must be equally safe. IFFAS is yet another tool at the disposal of Contracting States in their on-going efforts to ensure that every citizen of the planet can fly safely to and from any destination in the world.⁸⁵

81. See *id.* at cl. 3(b)-(d).

82. Culled from discussions at the 167th Session of the ICAO Council on Dec. 4, 2002. “Consensus” is a tool that the President of the ICAO Council, Dr. Assad Kotaite, uses to avoid confrontational votes and to eventually arrive at decisions in Council proceedings.

At the 167th Session of the ICAO Council on December 4, 2002, the Council passed a Resolution related to the establishment of the IFFAS that states:

Considering that the ICAO Assembly, in Resolution A33-10, requested the Council to pursue the establishment of IFFAS as a matter of priority early in the 2002-2004 triennium on the basis, inter alia, of an administrative charter;

THE COUNCIL:

1. Approves and adopts the Administrative Charter of the International Financial Facility for Aviation Safety establishing IFFAS as set out in the Attachment hereto; and
2. Urges Contracting States, international organizations and public and private parties associated with international civil aviation to make voluntary contributions to IFFAS.

Council Resolution Relating to the Establishment of the International Financial Facility for Aviation Safety (IFFAS), ICAO Council (Dec. 4, 2002), available at <http://www.icao.int/iffas>.

83. Press Release, International Civil Aviation Organization, Council of ICAO Establishes Global Financing Facility for Aviation Safety (Dec. 9, 2002), available at <http://www.icao.int/icao-en/nr/2002/pio200215.htm>.

84. IFFAS BULLETIN, *supra* note 18, at cl. 2. At the same time, the Council adopted a Resolution relating to transitional arrangements for the implementation of the IFFAS during the transitional period between December 4, 2002 and June 13, 2003. The transitional rules and their implementation are outside the scope of this paper. For more details on these rules, see *Report of the Council Working Group—Establishment of an International Financial Facility for Aviation Safety (IFFAS)*, at cls. 2.16 - 2.21 & att. 3, app. A, ICAO Council Working Paper C-WP/11907 (Nov. 22, 2002) [hereinafter *Establishment Working Paper*] (on file with ICAO).

85. *IFFAS Governing Body Appointed*, ICAO Council (Sept. 29, 2003) [hereinafter *Governing Body*], available at <http://www.icao.int/iffas>.

The IFFAS became functional on June 18, 2003, with the appointment of the Governing Body by Dr. Kotaite, by the authority delegated to him by the ICAO Council.⁸⁶

A. THE PRINCIPAL OBJECTIVE AND FUNCTION OF THE IFFAS

The overriding objective of the IFFAS is to function as a “not for profit fund” to help finance projects that “remedy or mitigate safety-related deficiencies”⁸⁷ “for which States cannot otherwise provide or obtain the necessary financial resources.”⁸⁸

To achieve this primary objective of financially assisting countries in improving aviation safety, the IFFAS follows two key guidelines: first, the IFFAS will only financially facilitate needy projects and countries, notably LDCs, that lack the resources to remedy aviation safety deficiencies;⁸⁹ and second, the Universal Safety Oversight Audit Programme (“USOAP”), as an element of ICAO’s Global Aviation Safety Plan (“GASP”), is considered the preferred instrument to help the IFFAS identify the greatest needs in choosing and prioritizing projects to be funded.⁹⁰

86. *Id.* See *infra* text accompanying notes 112-25 for a discussion of the actual states appointed to the Governing Body.

87. *Administrative Charter of the International Financial Facility For Aviation Safety*, attachment to *Council Resolution Relating to the Establishment of the International Financial Facility for Aviation Safety (IFFAS)*, at art. 2.1, ICAO Council (Dec. 4, 2002) [hereinafter *Administrative Charter*], available at <http://www.icao.int/iffas>. Article 2.1 of this Administrative Charter provides:

IFFAS shall be a not for profit fund, embodying a mechanism to provide financial assistance for safety-related projects for which States cannot otherwise provide or obtain the necessary financial resources. The principal area of application of assistance shall be to remedy or mitigate safety-related deficiencies identified through the ICAO Universal Safety Oversight Audit Programme (USOAP) as an element of the Global Aviation Safety Plan (GASP).

Id.

88. *IFFAS Resolution*, *supra* note 79, at cl. 2(a).

89. *Id.*

90. *Id.* In addition to the principles established in Resolution A33-10, aviation safety is one of the most important factors in civil aviation, and it is recognized by the ICAO Strategic Action Plan as being a major element of consideration within the ICAO. In clause 2 of Assembly Resolution A33-9, resolving deficiencies identified by the Universal Safety Oversight Audit Programme and encouraging quality assurance for technical cooperation projects, it urges the Secretary General to ensure that the ICAO provides, when requested, reasonable assistance within available resources, to help States to obtain the necessary financial resources to fund assistance projects by Contracting States, industry organizations, or independent consultants. *Id.* Unlike the broader mandate of the 1998 ICAO Assembly, today’s IFFAS is no longer to be concerned with financially assisting either the components of CNS/ATM systems or the improvement and expansion of airport and air navigation services infrastructure.

B. IFFAS IS AN AUTONOMOUS FUND

IFFAS is independent of the control of States and their governments, individually, or collectively.⁹¹

Furthermore, consistent with the Assembly guidelines provided in Resolution A33-10, the IFFAS Administrative Charter provides that the ICAO and IFFAS operate as distinctive entities. Legally, the IFFAS “shall keep ICAO harmless with regard to all claims, demands, or legal actions by third parties arising from or relating to the operation of IFFAS.”⁹² Financially, the IFFAS is to be funded completely independent of the ICAO Program Budget.⁹³

The IFFAS does experience, however, some overlap with ICAO. First, any services provided by the ICAO are to be “only upon request of participating States and on a cost-recovery basis.”⁹⁴ Second, IFFAS is “driven by a management strategy developed on the principles of, and in conformity with the existing ICAO legal regime.”⁹⁵

Nevertheless, there are important outstanding issues of the relationship of the IFFAS with the ICAO as well as governance. Is the IFFAS under the ICAO’s control or is it really a distinct and independent entity? It is expected that a “muddling through” experience will eventually settle these issues. Pragmatically, to simplify and expedite the process, on December 4, 2002, the ICAO Council adopted the working group’s recommended approach of creating the IFFAS within the ICAO, without a separate legal status.⁹⁶ This approach was a compromise between two conflicting positions on the long-run status of the IFFAS in relationship to the ICAO.⁹⁷

On one hand, some have argued that, from birth, the IFFAS should have been established as an entity independent and distinct from the

91. IFFAS BULLETIN, *supra* note 18, at cl. 3.

92. *Administrative Charter*, *supra* note 87, at art. 3.3.

93. *IFFAS Resolution*, *supra* note 79, at cl. 2(b)(4); *see also Administrative Charter*, *supra* note 87, at art. 3.3 (“IFFAS shall operate with complete independence from ICAO’s Regular Budget.”).

94. *IFFAS Resolution*, *supra* note 79, at cl. 2(b)(5).

95. *Report by the Council on the International Financial Facility for Aviation Safety (IFFAS)*, at cl. 2.2(a), ICAO Assembly Working Paper A35-WP/54 (June 24, 2004) [hereinafter *Assembly Working Paper*] (on file with ICAO).

96. *Establishment Working Paper*, *supra* note 84, at cl. 2.4.

97. *Id.* at 2.8. The Council accepted reconciling both positions, reiterating the working group view that the Assembly Resolution A33-10 has some ambivalence. On the one hand, an IFFAS is to have “complete independence from ICAO’s Programme Budget” and “any administrative or other services” are to be provided “only upon request by participating States and on a cost recovery basis.” On the other hand, the Assembly Resolution makes only one reference to the “existing ICAO legal regime” in the context of creating a management strategy so that the IFFAS structure conforms to that regime, although it may not necessarily fall within that regime. *Id.*

ICAO with transparency and accountability not linked to the ICAO in most respects. This view is legalistic, focusing on Assembly Resolution A33-10's requirement that IFFAS funding must have "complete independence from ICAO's Programme Budget" and "any administrative or other services" are to be provided "only upon request by participating States and on a cost-recovery basis."⁹⁸ On the other hand, others have suggested that while in the short-run the IFFAS may start under the ICAO's control, in the long-run, the IFFAS may pick up momentum and eventually be spun out of the ICAO as an autonomous and distinct entity,⁹⁹ just as "a baby must be nurtured before it goes out on its own."¹⁰⁰

A challenge remains to distinguish and clearly identify the IFFAS from the rest of the ICAO since the IFFAS is operating not only under the ICAO legal regime without a separate legal status but also independently of the ICAO's Program Budget.¹⁰¹ Thus, the IFFAS Governing Body's accountability to the ICAO is clearly stated. However, although the ICAO Council may delegate certain functions to the IFFAS Governing Body, the Council and the ICAO Member States remain responsible for everything done by or in the name of the IFFAS, as long as it is part of the ICAO.¹⁰² Accordingly, some intriguing legal questions arise as to the ICAO's potential legal liabilities for IFFAS activities including non-performing loans extended by the IFFAS to client States. In recognition that a poor strategy for IFFAS could have devastating financial effects on the ICAO, the IFFAS Governing Body has been mandated by the ICAO Council, responsible for approving the proposals, to study various options, including insurance and contingency funds to cover risks.¹⁰³ It is generally agreed that whatever the IFFAS may ultimately do, it is important that steps be taken to ensure that it does not become a liability to the ICAO or the ICAO Program Budget.¹⁰⁴

Overall, the IFFAS is a quasi-independent and self-financed entity, outside of the ICAO's budget. There are two important benefits of the

98. *IFFAS Resolution*, *supra* note 79, at cl. 2(b)(4)-(5); see also *Establishment Working Paper*, *supra* note 84, at cl. 2.8.

99. It is suggested that this approach is legally consistent with the provisions of Assembly Resolution 33-10. One reference provides that the "management strategy" of the IFFAS should be "developed on the principles of, and in conformity with, *the existing ICAO legal regime*. . . ." *IFFAS Resolution*, *supra* note 79, at cl. 3(c) (emphasis added).

100. Interview with A.P. Singh, Former Representative of India on the Council of ICAO (May 15, 2002).

101. *Establishment Working Paper*, *supra* note 84, at cl. 2.8.

102. *Id.* at cl. 2.9.

103. *Id.* at cls. 2.10 - 2.11. There is no doubt that whatever liability protection is undertaken should be proportionate to the risk, recognizing that the risks to IFFAS and ICAO presently are minimal.

104. Interview with Jonathan Aleck, Former Representative of Australia on the Council of ICAO (Dec. 18, 2002).

IFFAS being under the ICAO's supervisory umbrella, at least for the first few years of its existence

First, the IFFAS provides an ICAO solution to an ICAO objective. The ICAO supervises the IFFAS in assuring that a State's aviation safety deficiencies identified through the ICAO's auditing process [i.e., the USOAP] are remedied.¹⁰⁵

Second, the ICAO provides administrative and technical service support to the IFFAS to minimize IFFAS costs on a cost-recovery basis. Some possible support functions by ICAO include ICAO Secretariat processes that may be used to procure client State aviation goods and services, as well as to assure their delivery at quality standards. For example, ICAO's Technical Cooperation Bureau ("TCB") may not only help procure the client State's aviation goods and services, but may also finally certify their delivery at quality assured standards. Moreover, ICAO Secretariat technical experts and lawyers may be used to minimize the costs accrued by the LDC's in preparing detailed project reports. Indeed, in the early stages of the IFFAS of today, "the first objective has been to minimize the administrative costs [of IFFAS] by using, on a cost recovery basis, the internal resources of ICAO to the extent possible. . . ." – this applies to the secretariat functions and to the membership of the Expert Panel.¹⁰⁶ Needless to add, if the IFFAS disburses its money through the ICAO, the work will probably, but not necessarily, return to ICAO mechanisms such as to the TCB.¹⁰⁷

C. MEMBERSHIP AND PARTICIPATION

Consistent with the Assembly mandate, the Administrative Charter draws some distinctions among "members," "contributors," "participants," and possible "beneficiaries."¹⁰⁸ The IFFAS membership, as well as contributors, is voluntary and broad-based to include not only ICAO Contracting States but also public and private international aviation-related organizations, airlines, airports, air navigation service suppliers, manufacturers of airframes, engines and avionics, other members of the aerospace industry, and civil society.¹⁰⁹ Moreover, States voluntarily both

105. Interview with A.P. Singh, Former Representative of India on the Council of ICAO (May 15, 2002).

106. *Assembly Working Paper*, *supra* note 95, at cl. 3.1.

107. Interview with A.P. Singh, Former Representative of India on the Council of ICAO (May 15, 2002).

108. *See Establishment Working Paper*, *supra* note 84, at cl. 2.5.

109. *See id.* at cls. 2.5 – 2.6. *See also IFFAS Resolution*, *supra* note 79, at cl. 6; *Administrative Charter*, *supra* note 87, at art. 3.4. Article 3.4 of this Administrative Charter provides:

Subject to Article V, IFFAS shall derive its resources from voluntary contributions made by ICAO Contracting States, international organizations (public and private) working in the field of international aviation or associated with it, airlines, airports, air

participate in the IFFAS and benefit from IFFAS assistance.¹¹⁰

D. KEY STRUCTURES

The IFFAS operates with two main constituent institutions: the Governing Body and a Secretariat.

1. *The Governing Body*: Conforming to the Assembly requirements, the IFFAS includes a Governing Body, appointed by the ICAO Council, whose members are nominated by participating States and other participating parties.¹¹¹ They receive no remuneration.¹¹² Furthermore, the administrative charter provides that the ICAO President of the Council and the Secretary General have a right to participate in the meetings of the Governing Body without a voting right.¹¹³

On a general level, the Governing Body is responsible for the implementation of IFFAS policies and oversight of the organization's activities. The IFFAS decides what projects to fund and on what terms,¹¹⁴ but with obvious accountability to the ICAO in general and the ICAO Council in particular.¹¹⁵ Moreover, it both promotes IFFAS and negotiates with potential project participants.¹¹⁶

The Governing Body's mandate and functions are specifically stipulated in the Administrative Charter where it is stated that the Governing Body shall:

- a) formulate the policy or policies for the activities of IFFAS;
- b) approve the annual work programme and budget of IFFAS after consultations with the Council;
- c) receive, examine and approve the financial statements of IFFAS;
- d) monitor and evaluate the activities of IFFAS and review and report on them on an annual basis to the ICAO Council, participating States and other participating parties;
- e) actively promote participation in IFFAS by Contracting States and other participating parties;
- f) negotiate arrangements with the parties referred to in e) above regarding participation in IFFAS;
- g) propose to the ICAO Council from time to time ways and means of enhancing the financial resources of IFFAS, with a view to ensuring the effectiveness and continuity of its operation; and

navigation services providers, manufacturers of airframes, engines, avionics and other aircraft components, other members of the aerospace industry, and civil society. . . .

110. *IFFAS Resolution*, *supra* note 79, at cls. 2(b)(1), 5(b).

111. *Administrative Charter*, *supra* note 87, at arts. 6.1 - 6.2.

112. *IFFAS BULLETIN*, *supra* note 18, at cl. 3.

113. *Administrative Charter*, *supra* note 87, at art. 6.4 (conforming to Resolution A33-10); *see IFFAS Resolution*, *supra* note 79, at cl. 3(b).

114. *Establishment Working Paper*, *supra* note 84, at cl. 2.5.

115. *Id.* at cl. 6.7(d).

116. *Id.* at cl. 6.7.

- h) develop and keep up to date a compendium of the working procedures of IFFAS to serve as a procedural manual.¹¹⁷

The Governing Body is assisted by an Expert Panel for the selection and prioritization of projects needing IFFAS help.¹¹⁸ This Expert Panel provides technical, economic and financial advice to the Governing Body on particular projects.¹¹⁹ It is the Expert Panel that initially reviews all applications for funding and then refers its recommendations to the Governing Body.¹²⁰ Furthermore, the Expert Panel plays an important role in “quality control” during and after the selection and implementation of any projects financed through IFFAS.¹²¹

As mentioned above, the IFFAS became functional on June 18, 2003, when the President of the Council, Dr. Assad Kotaite, by authority delegated to him by the Council, appointed eight Contracting States to the Governing Body of the IFFAS – Argentina, Chile, Egypt, France, India, Netherlands, Nigeria, and Pakistan.¹²² Thus, since the Administrative Charter allows for a minimum of eight and a maximum of eleven members, there are presently three vacant seats that could be filled by representatives by representatives of international or regional organizations.¹²³ The IFFAS Governing Body sat for its first meeting on November 24, 2003.¹²⁴ This has been followed by two other meetings in January 14, 2004 and May 17, 2004.¹²⁵

2. *The Secretariat*: The IFFAS Secretariat structure is and will remain lean in order to avoid imposing a heavy financial burden on IFFAS assets.¹²⁶ Indeed, the Governing Body operates under a paramount princi-

117. *Administrative Charter*, *supra* note 87, at art. 6.7.

118. IFFAS BULLETIN, *supra* note 18, at cl. 6.

119. Interview with Jean-Claude Bugnet, Secretary of the Governing Body of IFFAS (July 15, 2004).

120. State Letter June 2004, *supra* note 75, at 1.

121. *Id.*

122. *Governing Body*, *supra* note 85, at 1.

123. Interview with Jean-Claude Bugnet, Secretary of the Governing Body of IFFAS (July 15, 2004).

124. *Assembly Working Paper*, *supra* note 95, at cl. 2.5.

125. *Id.* 1st Meeting: November 24, 2003: The Governing Body elected its Chairman and Vice-Chairman, and appointed its Secretary. It established the Expert Panel, appointed its Members and its Secretary, and adopted its terms of reference. Moreover, the Governing Body referred to the Expert Panel five applications already received for funding projects under IFFAS and asked the Expert Panel to report on prioritization for selection of these projects. *Id.*

2nd Meeting: January 15, 2004: The Governing Body, on the basis of the First Report of the Expert Panel, agreed that one project be selected as a “pilot project” for IFFAS assistance. This project will be discussed *infra* in Section IV. *Id.*

3rd Meeting: May 17, 2004: The Governing Body reviewed the IFFAS Financial Statements for 2003 and estimates for 2004. *Id.* The other decisions will be addressed *infra* in the text accompanying notes 155-59.

126. State Letter June 2004, *supra* note 75, at 2.

ple of avoiding undue overhead burden on the IFFAS.¹²⁷ An interesting example of this “lean” operation attitude is that the Secretary of the IFFAS, Mr. Jean-Claude Bugnet, only discharges this role on a part-time basis since he is also, *inter alia*, the Chief, Joint Financing Section, of ICAO’s Air Transport Bureau.¹²⁸

V. THE FUNDING MECHANISMS OF THE IFFAS

Assembly Resolution A33-10 assured that the establishment of the IFFAS does not constitute another mandatory foreign aid instrument transferring funds from developed countries to needy developing/LDC countries. Moreover, reiterating certain points already discussed, this Resolution, and pursuant Council actions, provided three requirements for IFFAS funding:

- (1) IFFAS is to be developed, established, and operated with “complete independence from ICAO’s Programme Budget.”¹²⁹ However, the IFFAS mechanism is complementary to existing ICAO funding mechanisms;¹³⁰
- (2) IFFAS will be assisted by ICAO with the provision of any administrative or other services only upon request of participating States on a cost-recovery basis;¹³¹
- (3) IFFAS is “funded by voluntary contributions from Contracting States, international organizations, as well as public and private parties associated with international civil aviation.”¹³²

Let us briefly review the last two elements of funding mentioned.

A. IFFAS WILL BE ASSISTED BY ICAO

The Administrative Charter incorporates limited ICAO “staffing to support [the IFFAS] and to cover daily executive and administrative functions.”¹³³ First,

127. *Id.*

128. Interview with Jean-Claude Bugnet, Secretary of the Governing Body of IFFAS (July 15, 2004).

129. *IFFAS Resolution*, *supra* note 79, at cl. 2(b)(4).

130. *Assembly Working Paper*, *supra* note 95, at cl. 2.2(c).

131. *Id.* at 2.2(d).

132. *Id.* at 2.2(b).

133. *IFFAS Resolution*, *supra* note 79, at art. 3(b)(2). One opinion on the nature of the staff servicing of the IFFAS argues that Assembly Resolution A33-10 provides for a management structure within the ICAO legal regime. Thus, according to Article 54(h) of the *Chicago Convention*, any staff benefiting from ICAO status is under the authority of the ICAO’s chief executive officer, appointed by the Council, for example, the Secretary General. Moreover, such staff shall be subject to rules established by Council, per Article 58 of the Convention, Staff Regulations. An example may be taken in this regard from the African Civil Aviation Commission (AFCAC), the European Civil Aviation Conference (ECAC), and the Latin American Civil Aviation Commission (LACAC), where staff are officially ICAO staff and have contracts signed by the Secre-

[i]n consultation with the Governing Body and the President of the Council of ICAO, the Secretary General of ICAO shall appoint [to IFFAS]: (a) an ICAO official to act as Secretary to the Governing Body of IFFAS; and (b) an ICAO official to act as Secretary to the [Expert Panel advisory group].¹³⁴

The first and present appointment to both tasks is Jean-Claude Bugnet, Chief, Joint Financing Section, Air Transport Bureau.¹³⁵

Second, “in consultation with the Governing Body and the President of the Council of ICAO, and in response to a request from the [IFFAS] Governing Body, the Secretary General of ICAO may . . . provide IFFAS with administrative assistance in addition to the appointments” just mentioned,¹³⁶ all on a full-time or part-time, and “on a full cost-recovery basis.”¹³⁷

Beyond this, the Administrative Charter incorporates certain operational policies and procedures for the IFFAS that reflect the Assembly’s guidelines. It is agreed that IFFAS governance and its management principles are to be based on:

- transparency, sound, simple management,¹³⁸
- accountability with administrative and financial guidelines to be stipulated and followed.¹³⁹

B. VOLUNTARY CONTRIBUTIONS

In respect to the third element, the Administrative Charter provides that contributions to the IFFAS are voluntary for both funding projects in States and for operating the IFFAS itself.¹⁴⁰ The primary funding sources are more specifically stipulated as follows:

tary General, under the “service” authority of whom they stand. *Establishment of an International Financial Facility for Aviation Safety – Questions and Answers*, at cl. 2.8, ICAO Council Study Group Working Paper CSG IFFAS-WP/1 (Apr. 16, 2002) [hereinafter *Counsel Questions & Answers*], available at <http://www.icao.int/iffas/>.

134. *Administrative Charter*, *supra* note 87, at art. 8.1.

135. Interview with Jean-Claude Bugnet, Secretary of the Governing Body of IFFAS (July 27, 2004).

136. *Administrative Charter*, *supra* note 87, at art. 8.2.

137. *Id.* at art. 8.3.

138. *IFFAS Resolution*, *supra* note 79, at cl. 3(d).

139. *Id.* at cl. 3(d)(1)-(2). There will be “clear criteria and procedures for the granting of loans and conducting any other financial transactions” using ICAO standards, policies, and procedures. *Id.* at cl. 3(d)(3). Moreover, there are to be safeguards to ensure the proper, effective, and efficient application of funds from participating States. *Id.* at cl. 3(d)(4). This suggests that there will have to be a clear distinction and identification of funds used for the administration of the IFFAS and for financial assistance provided toward safety-related projects. *Counsel Questions & Answers*, *supra* note 133, at cl. 2.10. Moreover, there are to be “measures to assure quality control and to assess effectiveness and efficiency at all levels” and adequate “provisions for the auditing of accounts.” *IFFAS Resolution*, *supra* note 79, at art. 3(d)(5)-(6).

140. *Administrative Charter*, *supra* note 87, at art. 9.2.

- a) voluntary contributions from Contracting States and other contributing parties;
- b) interest earned on loans;
- c) miscellaneous income from bank deposits and investments;
- d) contributions resulting from the crediting of any amount of Contracting States' shares of any distributable surplus from the ICAO Regular Budget; or
- e) other voluntary contributions by way of pledge, loans from banks for reinvestment in projects based on the line of credit from international, regional and sub-regional development banks and financial institutions.¹⁴¹

There are presently three main sources of "voluntary contributions." First, IFFAS voluntary contributions by States in 2002 amounted to \$222,709 US dollars.¹⁴² This amount is largely accounted for by States having been encouraged to contribute to the IFFAS by annually crediting their share of any distributable surplus, that is held in trust by the ICAO, from the ICAO Program Budget to the IFFAS account.¹⁴³ Contributions by individual states amounted to \$304,991 US dollars during 2003 and another \$120,000 US dollars for 2004 as of June 15, 2004.¹⁴⁴

A second source of funding is the special allocation by the Council to IFFAS pursuant to the 34th Session [Extraordinary] of the ICAO Assembly in Montreal from March 31 to April 1, 2003.¹⁴⁵ This Assembly decided, *inter alia*, to channel to IFFAS certain funds on a non-recurrent basis – these funds were arrears of three full years or more that ICAO had received from Contracting States and held under a special long-outstanding arrears account.¹⁴⁶ The portion transferred to IFFAS in 2003 was \$1,055,190 US dollars, including accrued interest.¹⁴⁷

A third funding source is other interested parties who are en-

141. *Id.* at art. 9.1.

142. *Assembly Working Paper, supra* note 95, at app. B.

143. *IFFAS Resolution, supra* note 79, at art. 5(a), (c). The first and earliest commitments, around the time that the Administrative Charter was adopted in December 2002, was that forty-seven ICAO Member States had contributed \$222,709 USD to the IFFAS project, as part of their share of the ICAO program budgetary surplus with the average contribution of \$4,745 USD, and over one-third of these contributions coming from France \$90,700 USD. Culled from discussions at the 167th Session of the ICAO Council (Dec. 4, 2002).

144. *Assembly Working Paper, supra* note 95, at app. B.

145. *Id.* at cl. 2.3.

146. *Id.*

147. *See id.* at app. B. The Council, seeking guidance on how to allocate the over \$3 million USD in surplus contributions among IFFAS, aviation security and other purposes, submitted the question to the 34th Session of the ICAO Assembly. The Assembly deliberations decided that the surplus of contributions should be split three ways equally among IFFAS, aviation security purposes [AVSEC] and safety oversight. *Financing of Aviation Security Activities and IFFAS in Relation to Assembly Resolutions A33-10 and A33-27*, ICAO Assembly 34th Session (Extraordinary), at cl. 2.2, ICAO Doc. A34-WP/3 (Dec. 2, 2003).

couraged to make voluntary contributions.¹⁴⁸ A few such entities have already made or promised contributions. The *Agence Intergouvernementale de la Francophonie* actually contributed \$105,900 US dollars in March, 2004, to finance the hiring of an associate expert dedicated to the Secretariat of the IFFAS.¹⁴⁹ The European Commission has promised, but to date not contributed, 200,000 _ (approximately \$245,000 US dollars) for 2004.¹⁵⁰ However, consistent with the Assembly's expectations, it is hoped that the interested parties will expand to include private and public international aviation-related organizations, airlines, airports, air navigation service suppliers, aircraft/engine/avionics manufacturers and civil society, such that they are all encouraged to make voluntary contributions in the future.¹⁵¹

The relatively small amount of money presently committed to the IFFAS mechanism, approximately \$ 1.6 million US dollars by the end of 2003, given its mandate, brings us to the questions suggested at the time the IFFAS was established. A number of states expressed reservations on the issue of "where is the money going to come from"¹⁵² to manage and develop the IFFAS. On one hand, IFFAS proponents suggested that the small initial seed money was a great start and that once the IFFAS actively solicits contributions, the funds would pour in. On the other hand, IFFAS skeptics argued that the paltry contributions reflected a lack of strong support for the IFFAS mechanism.¹⁵³ Thus, a risk exists that the under-funded IFFAS accounts could be drained with a long-run risk of the IFFAS possibly withering away.¹⁵⁴ Moreover, many of the usual major contributors to ICAO initiatives have still not made any significant contributions.

A positive development is that the Governing Body of the IFFAS has placed a significant priority to the "mobilization of funds," including considering an Action Plan for this purpose in its May 17, 2004, meet-

148. *IFFAS Resolution*, *supra* note 79, at cl. 6.

149. Interview with Jean-Claude Bugnet, Secretary of the Governing Body of IFFAS (July 27, 2004).

150. *Assembly Working Paper*, *supra* note 95, at app. B. The amount stipulated is based on the exchange rate as of August 1, 2004.

151. *IFFAS Resolution*, *supra* note 79, at cl. 6. *See also Administrative Charter*, *supra* note 87, at art. 3.4.

152. Interview with Jonathan Aleck, former Representative of Australia on the Council of ICAO (July 29, 2002); Interview with Edward W. Stimpson, Representative of the United States on the Council of ICAO (May 14, 2002); Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26 & Aug. 15, 2002).

153. Culled from discussions at the 166th Session of the ICAO Council (June 6 & 10, 2002), and 167th Session (Dec. 4, 2002).

154. *Id.*

ing.¹⁵⁵ Consistent with the proposals of this meeting, on June 30, 2004, a State Letter specifically dedicated to IFFAS was sent to all Contracting States and international organizations interested in IFFAS.¹⁵⁶ This letter included a reminder of the provisions of Assembly Resolution A33-10 encouraging participation in IFFAS as well as an attachment including the IFFAS Information Bulletin.¹⁵⁷ Moreover, to “get the message out” the Governing Body agreed that regional IFFAS focal points should be designated to help sensitize states to the usefulness of IFFAS in the improvement of aviation safety worldwide.¹⁵⁸ It has also been suggested that the purview of these regional focal points might be broadened for day-to-day contacts with applicants and potential donors as well as to maintain a list of organizations visited or to be visited.¹⁵⁹

The reality that IFFAS funding is based on the principle of voluntary contributions has two principal limitations. First, legal reservations have been put forward respecting the question of whether sub-national entities can legally contribute to a fund, like IFFAS, that is created by an international treaty mandated institution like the ICAO.¹⁶⁰ Second, since the membership, participation, and funding of the IFFAS are based on the concept of voluntarism, IFFAS revenues might fluctuate wildly, such that the vagaries of contributor whims will possibly affect the quantity and quality of projects in which the IFFAS can and will assist.

In the long-run, the sources of funding for the IFFAS – and if voluntary only, the generosity of the funding sources – will ultimately affect the capacity of the IFFAS to assist needy developing/LDC client States to finance projects to remedy safety deficiencies. This issue will remain a paramount concern of IFFAS. In the end, for the IFFAS to be successful, a solution must be developed to increase its sources and amount of funding such that there are funding mechanisms to complement voluntary contributions,¹⁶¹ however, such a discussion is outside the scope of this paper.

155. *Summary of Decisions: May 17, 2004, Governing Body of IFFAS*, at cl. 10-11, IFFAS Doc. GB-SD/3 (May 25, 2004) [hereinafter *Governing Body Decisions*].

156. State Letter June 2004, *supra* note 75, at 1.

157. *Governing Body Decisions*, *supra* note 155, at cl. 10; *see also* State Letter June 2004, *supra* note 75, at 2.

158. *Governing Body Decisions*, *supra* note 155, at cl. 10.

159. *Id.* at cl. 11. This idea was proposed by Mr. Tom Kok from the Directorate General of Civil Aviation of the Netherlands in a presentation to the IFFAS Governing Body in its May 17, 2004 meeting. *Id.*

160. Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26 & Aug. 15, 2002).

161. *See Worldwide Safe Flight*, *supra* note 4, at 576-77 for details.

VI. THE NATURE AND SCOPE OF THE ASSISTANCE PROVIDED BY THE IFFAS

A. NATURE OF IFFAS SUPPORT

IFFAS has three distinct levels of possible support. First, it will usually offer loans.¹⁶² Second, in some cases, it will offer a combined loan and subsidy/grant.¹⁶³ Third, in exceptional needy cases, IFFAS may consider offering grants.¹⁶⁴ The recovery of loans is ensured through a guarantee offered by a State or a reputable financial institution.¹⁶⁵

At this stage, it is important to emphasize that IFFAS does not restrict its mandate to the actual provision of funds. "In addition to its essential function of directly funding projects, in whole or in part within the limits of its own financial resources, IFFAS also acts as a *catalyst and a facilitator*, helping States or groups of States obtain funding from other sources for safety-related projects."¹⁶⁶ This paper returns to this point, *infra* in the Conclusion, as an IFFAS with restricted funding sources increasingly might have to assume a catalyst and facilitator role of third party financial assistance since IFFAS lacks funds itself.

B. SELECTION OF PROJECTS

All applications are assessed by the Expert Panel that is composed of recognized experts in the technical, financial and economic fields.¹⁶⁷

The IFFAS attaches priority to in selecting projects on the basis of three criteria:

- a) The project must be safety-related [normally the deficiency identified through the USOAP]
- b) The projects should be submitted by Least Developed Countries
- c) The project should be on a regional or sub-regional basis.¹⁶⁸

The third criterion incorporates the Council requirement that the IFFAS' operational policies and procedures apply globally "a framework of common guidelines and operating rules . . . with flexibility for implementation" regionally.¹⁶⁹ This is consistent with the policy of the ICAO Council

162. IFFAS BULLETIN, *supra* note 18, at cl. 5.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Assembly Working Paper, supra* note 95, at cl. 3.2 (emphasis added).

167. IFFAS BULLETIN, *supra* note 18, at cl. 6.

168. *Id.*; see also *Assembly Working Paper, supra* note 95, at cl. 2.6.

169. *IFFAS Resolution, supra* note 79, at cl. 2(b)(3). It has been suggested that the regional applicability of the IFFAS will be in cooperation with regional financial institutions and such regional bodies as the African Civil Aviation Commission (AFCAC), the European Civil Aviation Conference (ECAC), and the Latin American Civil Aviation Commission (LACAC). *Counsel Questions & Answers, supra* note 133, at cl. 2.14.

cil that has favored the idea of the global application of principles on a regional basis – a view promoted by the Assembly. Indeed, during the 34th (Extraordinary) Session of the Assembly, Assembly Resolution A34-1 specified that the arrears allocated to the IFFAS could be used “to finance *pilot projects*, in whole or in part, which are to be carried out under the auspices of IFFAS for the benefit of a specified group or groups of States at the *regional or sub-regional level*, but in no case to be made available to any single State as a sole borrower or grantee under IFFAS.”¹⁷⁰

On a practical and technical level, the IFFAS has developed a synergy with the USOAP Unit and Technical Cooperation Bureau in the evaluation and selection of projects proposed for IFFAS assistance – this includes the identification of specific elements that could be financed by IFFAS.¹⁷¹

On an administrative and procedural level, the IFFAS Governing Body has approved a standard application form for assistance from IFFAS that is accessible on the Internet. This form should improve accessibility to IFFAS by assisting potential applicants with comprehensive information; therefore, the IFFAS will be able to expedite its processing of information and the evaluation of prospective projects.¹⁷²

It is interesting that the IFFAS is paying particular attention to “follow-through procedures” to ensure that expected benefits are not only achieved but also maintained.¹⁷³

C. A PILOT PROJECT

The IFFAS Governing Body, at its second meeting on January 15, 2004, on the basis of the first report of the Expert Panel, agreed to one particular project to be selected as a “pilot project” to be assisted by the IFFAS.¹⁷⁴ To date, there have been five applications for project authorization, but this constitutes the first and only acceptance.¹⁷⁵ This project is sub-regional based and satisfies most of the established criteria of eligibility.¹⁷⁶ The project is the *Cooperative Development of Operational Safety and Continuing Airworthiness Programme* (“COSCAP”) presented by the West African Economic and Monetary Union (“UEMOA”) on behalf

170. *Assembly Working Paper, supra* note 95, at cl. 2.3 (emphasis added).

171. *Id.* at cl. 2.6.

172. *Governing Body Decisions, supra* note 155, at cl. 9.

173. *Id.*

174. *Executive Committee, Agenda Item 18: International Financial Facility for Aviation Safety (IFFAS)*, at cl. 2.5, ICAO Executive Committee Working Paper A35-WP/54 EX/17 (June 25, 2004).

175. *Id.*

176. *Id.*

of its eight member states – seven of these countries are Least Developed Countries.¹⁷⁷ The proposed assistance was in the nature of a combined loan and grant with a specific commitment that the money be used to hire three experts.¹⁷⁸

It should be highlighted that this project is consistent with the IFFAS objective of helping needy states remedy aviation safety deficiencies that have been identified through the USOAP. Moreover, the Technical Cooperation Bureau has been significantly involved in this project as foreseen at the time of the creation of the IFFAS. In addition to other funding entities, notably France and the European Commission, the World Bank and African Development Bank may have a future role in this project.¹⁷⁹

VII. CONCLUSION

This paper suggests that there is a generally acknowledged need to remedy aviation safety deficiencies identified through the USOAP in certain States and regions. Although the *Chicago Convention* imposes a duty on the State to remedy any such divergences from the SARPs requirements, the ICAO has some discretionary power to assist needy developing/LDC States to remedy their identified aviation safety deficiencies as the ICAO pursues its broad objective of global aviation safety under the GASP. The IFFAS, as a quasi-independent entity, appears to have the potential of helping ICAO discharge its responsibilities in this area. Nevertheless, the IFFAS, as it appears to be presently doing, must operate under tight management principles that provide transparency, accountability, effectiveness, and quality control.

There are certain issues that remain to be clarified. One question is whether the IFFAS is a “mechanism,” some other corporate body, a bank, or a fund.¹⁸⁰ The IFFAS clearly presently is a skeleton organization with minimal funds and sources of funding. The IFFAS is certainly far less than a full-fledged bank. However, it appears to be developing as an umbrella organization. Developing/LDC countries are beginning to benefit from the IFFAS not only as a facilitator and catalyst for third party funding¹⁸¹ but also complementary instrument to existing mechanisms of tech-

177. *Id.*

178. *Governing Body Decisions, supra* note 155, at cl. 7.

179. Interview with Jean-Claude Bugnet, Secretary of the Governing Body of IFFAS (July 15 & 27, 2004).

180. *Establishment Working Paper, supra* note 84, at cl. 2.4.

181. The author originally stated this recommendation in *Worldwide Safe Flight, supra* note 4, at 579. This aspect of the author's position appears to be advocated by certain Council representatives in various ways, *see* Interview with Sanat Kaul, Representative of India on the Council of ICAO (June 1, 2004).

nical assistance, at the international, regional, bilateral, multilateral, and plurilateral levels, and financial assistance, including regional development and international banks and funds, export credit agencies, and bilateral development institutions. As mentioned above, given the IFFAS' limited funding sources, it can be expected that it will increasingly discharge a catalyst and facilitator role as opposed to being the actual funding provider in most cases.

A second important issue centers on finding a good source of funding and membership beyond the voluntarism principle since the IFFAS, as presently constituted, has not only a voluntary membership and participation, but also is funded through voluntary contributions.¹⁸²

In the short-term, it can be expected that by the next plenary session of the ICAO Assembly in September/October 2004, Contracting States, whether members, participants, and/or financial supporters of the IFFAS, will be able to review at least one pilot project where financial assistance has been channeled to remedy certain aviation safety deficiencies identified by the ICAO's USOAP. Furthermore, while presently there is a commitment toward a regional implementation of the IFFAS's objectives, we can expect that increasingly a role may be played by ICAO regional offices in implementing IFFAS objectives.

This article is intended to present a balanced perspective to political leaders and their citizens on the problem of and solutions to assisting certain developing/LDC countries that lack the will, ability, and/or means to remedy their USOAP identified aviation safety deficiencies. Irrespective of whether the IFFAS and/or other mechanisms are preferred to address this issue, it is evident that a real safety deficiency exists, threatening lives, property, and economic interests worldwide.¹⁸³

The issue of assuring the "survival" of a viable air transport industry should remain a paramount priority of decision-makers. However, an unfortunate and unnecessary gap exists today between developed and developing/LDC country perceptions of the crises in aviation "security" and "safety." On one hand, particular developed countries consider the pursuit of improved international aviation "security" to be an unquestioned principal objective. Indeed, they recognize an "ability-to-pay" principle respecting aviation security such that wealthier States may financially assist poorer States with security deficiencies. Ironically, many of these same countries tend to advocate a "user pay" concept concerning aviation safety such that the costs to help in correcting safety deficiencies, for example, through an IFFAS mechanism, should be defrayed by the user

182. As mentioned above, the Assembly mandated that the IFFAS is not to burden the regular program budget of the ICAO. See, e.g., *Assembly Working Paper, supra* note 95, at cl. 2.2.

183. The author originally stated this recommendation in *Worldwide Safe Flight, supra* note 4, at 580.

country even if it may not have the required resources – financial, technical and/or human. On the other hand, many developing/LDC countries argue that the pursuit of global aviation “safety” is so vital that the “ability-to-pay” principle applies to permit the equitable transfer of resources from the developed states to those countries experiencing deficiencies in safety. These same developing states suggest that security system upgrade costs, including some of those in the developing countries, should be paid for by the user countries, the developed countries, because they have a much higher risk of security breaches.¹⁸⁴

Politically determined priorities and the economic limitation of scarce resources should not discourage international decision-makers from fairly balancing the channeling of resources to civil aviation “security” and “safety.” Both civil aviation security and safety constitute a global and indivisible system such that if civil aviation security and/or safety are jeopardized in one State or region, security and/or safety are threatened worldwide. The interests of the sovereign State and world community require a respect for both priorities to assure the development of the air transport industry and protect passenger lives and property. Indeed, in the area of global safety, the IFFAS is a worthwhile attempt at working toward safe flight.

To conclude: the citizens of our world have a right to expect that adequate resources will be allocated to both goals — safety and security. They should hope for no more; but expect nothing less.

184. *Id.* at 580-81.