

Aviation Safety in Crisis: The Option of The International Financial Facility for Aviation Safety (IFFAS)

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I. INTRODUCTION

“Security” has become the catchword of the air transport industry since September 11, 2001. The skyrocketed priority attached to pursuing security at virtually all costs is understandable given the dramatic and tragic World Trade Center and Pentagon events as well as the subsequent

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The author has drafted this article primarily on the basis of person-to-person interviews from the Spring of 2002 through early 2003 with a number of ICAO officers from the Secretariat as well as representatives on the Council of ICAO of Algeria, Australia, Canada, China, France, India, Ireland, and the United States and the alternate representatives of France and Greece. He also attended relevant ICAO Council meetings during the 166th session (May/June, 2002; particularly, June 7th and 10th) and the 167th session (December 4th, 2002) as well as refers to Secretariat applicable documentation.

This paper is up-to-date as of mid-January, 2003. Thus, the author acknowledges that developments may occur after this date that 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 ICAO, its officers or specific state representatives. The purposes of the article are to describe and analyze the nature and scope of the problem as well as the various prominent proposed solutions. 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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“War on Terrorism” launched by the United States Government. Accordingly, numerous political, economic, and legal aviation-related issues have come to be ultimately analyzed from the perspective of the security filter.

On the other hand, a lurking monster of a problem remains on how to handle the continuing, growing, and very obvious crisis in aviation “safety.” The devastating statistics of deaths due to different aviation accident causes raise the question whether so much of the world’s limited resources should be diverted from promoting aviation safety to enhancing aviation security. The deficiencies in the area of safety continue to cause disproportionately more aviation-related deaths when compared to deaths caused by security deficiencies. One illustrative study indicates that in the period from 1992-2001, aviation accident-related deaths were about ten times more likely to occur (33.77%) due to controlled safety issues, such as flight into terrain than were due to security breaches (approximately 3.87%).¹ Indeed, this latter statistic even included the deaths of the passengers and crew of the aircrafts that were flown into the World Trade Center, the Pentagon, a field in Pennsylvania in September 2001, and the inadvertent shooting down of a plane over the Ukraine in that same year.²

The International Civil Aviation Organization (ICAO), a United Nations specialized agency headquartered in Montreal, Canada, has the responsibility to regulate and promote civil aviation internationally. Furthermore, the ICAO specifically is concerned, *inter alia*, with balancing the world’s concern for aviation security and safety issues. The *Chicago Convention of 1944* mandates ICAO to insure the safe and orderly growth of international civil aviation throughout the world.³ Indeed, Dr. Assad Kotaite, President of the Council of the ICAO, has given context to this issue when he states that “[t]he international aviation community cannot afford to relax its vigilance . . . ICAO would continue to take timely action to ensure safety and security standards are in effect, and that deficiencies are properly and efficiently addressed.”⁴

Today, the ICAO must reconcile a schism in perceptions as to whether security or safety should be given priority in attention and resources. Although the Developed countries tend to prioritize aviation “security,” most Developing and Less Developed countries (LDC) attri-

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

2. *Id.*

3. *Convention on International Civil Aviation*, Chicago Dec. 7, 1944, at art. 44(a), ICAO Doc. 7300/6 (8th ed. 2000) 61 Stat. 1180, T.I.A.S. No. 1591, available at <http://www.iasl.mcgill.ca/airlaw/-ublic/chicago/chicago1944a.pdf> [hereinafter *Chicago Convention*].

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

bute more significance to aviation “safety” issues. The sad state of reality today is that whether either, both, or neither issue receives prioritization appears too often to depend upon the political dynamics of national, regional, and global interests rather than principles and recognized needs.

The manner in which the ICAO has tried to bridge the gap between Developed and Developing states on this issue is a case study in the slow and evolutionary processes of international institutional decision-making. The framework of the ICAO decision-making includes three key elements: (1) the Assembly often establishes by resolution a policy priority; (2) the ICAO Council generally deliberates on and formulates the structures and/or rules on the basis of this resolution; and (3) the Secretariat supports both institutions by providing research and ultimately implementation.⁵

With the backdrop of “security” as the aviation world’s priority concern today, this paper will focus on the “safety” side of the ICAO’s challenges by examining the policy positions, decisions, and actions taken by the ICAO and its 188 member states respecting the creation of an International Financial Facility for Aviation Safety (IFFAS).

The evaluation of the issue surrounding the creation of the IFFAS will be within the framework of four topics: first, a study of the nature and scope of the aviation safety problem, including the process of identifying specific aviation safety deficiencies, particularly through the ICAO’s Universal Safety Audit Program (USOAP); second, a review of existing technical and financial assistance mechanisms that may help remedy aviation safety deficiencies in the Developing/LDC countries; and third, an examination of proposed mechanisms, including the IFFAS, to help remedy the identified safety deficiencies; fourth, a few concluding remarks and suggestions.

II. THE PROBLEM: AVIATION SAFETY

An important problem today is that aviation safety remains far from being at an acceptable level. While the challenge of aviation safety enhancement persists in Developed states, it is particularly acute in Developing and LDC countries. Indeed, this paper postulates that most countries – Developed, Developing, and LDC – recognize that there is a need to help LDCs remedy aviation safety deficiencies since they generally lack resources, financial and otherwise, to remedy these deficiencies. However, states and their domestic air transport industries disagree as to what approaches and mechanism(s) are the best to address this need.

When addressing the deficiencies of aviation safety in Developing

5. See generally International Civil Aviation Organization, *Memorandum on ICAO*, at <http://www.icao.int/icao/en/pub/memo.pdf>.

and LDC countries, it is heuristic to distinguish and discuss both the nature and scope/extent of the problem.

A. THE NATURE OF THE AVIATION SAFETY PROBLEM

The coinciding interests of Developed and Developing/LDC states provide reasons for improving aviation safety in the Developing/LDC world on three principal levels: (1) the safety of travelers and third parties on the ground; (2) economic development worldwide; and (3) aviation industry growth in Developed countries.

1. *Safety of Travelers and Third Parties on the Ground*

Civil aviation safety can be argued to be indivisible and global in nature such that any known aviation safety deficiency in one country, wherever it may be located, jeopardizes the safety of the entire global civil aviation system. Thus, passengers and third parties on the ground of different nationalities/citizenship are put at risk of death or injury through aircraft accidents and crashes anywhere in the world.⁶

On a global level, over one and a half billion passengers have been carried annually on average by the world's airlines in the last few years, and this number is expected to double by 2010.⁷ The number of aviation accidents has been gradually increasing while the number of passenger fatalities has only decreased slightly over the last two decades.⁸ Indeed, it has been suggested that, "[i]f the accident rate were to be held constant at the 1996 level, . . . the projected growth in traffic could result in a serious accident every week by 2015."⁹

On a regional level, it is apparent that accident rates vary significantly. A study that includes fatal aviation accident rate data for the period of 1994 to 1998 suggests that the Developed regions of North America, Western Europe, and Australia, have the lowest accident rates.¹⁰ On the other hand, Developing countries have much higher accident rates. Accordingly, airlines from the Eastern European states, including the Commonwealth of Independent States, have the highest accident rate, nearly fifty times higher than in Western Europe.¹¹ Fur-

6. Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (May 10, 2002 & Jan. 14, 2003).

7. Commission of the European Communities, *A European Community Contribution to World Aviation Safety Improvement*, July 16, 2001, at 3 (quoting David Hinson, FAA Administrator) [hereinafter *EU Contribution*].

8. *Id.*

9. *Id.*

10. *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)).

11. *Id.* at 3.

thermore, airlines from Africa, Asia, and Central/South America have accident rates at least twice as high as the world average, with the African rate being four times higher than the world average.¹²

In view of these statistics, there is no doubt that passengers and third parties on the ground are put at risk by Developing/LDC country's aircraft and aviation infrastructure deficiencies. Aviation is a global industry such that safety deficiencies in any part of the world can have an effect elsewhere. It must be recognized that not only do Developed country aircraft operators and citizens fly internationally but also Developed country airports receive flights from non-Developed country aircraft operators. A study of the Commission of the European Union (EU) concerning the risks to EU passengers and third parties on the ground might be extended to similarly apply to North Americans and others from Developed countries:

“Safety deficiencies world-wide and the failure by a number of countries to meet their international obligations concerning the implementation and enforcement of international safety standards has an unacceptable impact on the European Union. EU airlines operate globally and EU citizens travel widely all over the world and constitute an important percentage of passengers. The airports of the Community are also major destinations or stopovers for foreign carriers and aircraft. The safety of their operations is thus a matter of direct and immediate concern to the European Union, which is committed to ensure the safety of citizens living near airports and travelling to non-EU destinations or travelling on non-EU airlines.”¹³

2. *Economic Development Worldwide*

A second reason for improving aviation safety in Developing/LDC states is that global economic development/growth is intimately linked to a vibrant transportation industry and particularly the vital air transport industry. Three important factors emphasize this linkage.

First, the travel and tourism industry must be kept healthy and growing since today it accounts for over US \$3,500 billion of economic production, or around twelve percent of the world's Gross Domestic Product.¹⁴ Air transport is probably the pivotal element in this growth. Indeed, it has stimulated the transport of billions of Developed country tourists to Developing/LDC countries and permitted the latter to economically develop at an accelerated rate.¹⁵

Second, global markets require fast and efficient transportation of perishable goods from the Developing/LDC countries to the Developed

12. *Id.* at 13.

13. *Id.* at 5.

14. Abeyratne, *supra* note 4, at 383.

15. *EU Contribution*, *supra* note 7, at 6.

countries that, in turn, send back high value finished goods.¹⁶

Third, it is essential that the level of aviation safety be improved throughout the world to build up the confidence of the traveling public. Most experts agree that the welfare of the air transport industry and, in turn, economic growth is significantly dependent on the traveling public's confidence that air travel is safe and secure.¹⁷

3. *Aviation Industry Growth in Developed Countries*

A final reason for improving aviation safety in Developing/LDC states is that Developed countries find increased safety facilitates the growth of their aerospace manufacturing industry. Aerospace suppliers in North America and Western Europe have found it easier to sell more aviation goods and services to Developing/LDC countries when the latter adopt Developed country standardized and uniform air safety regulations for aircraft, air traffic, and airport services.¹⁸

B. THE SCOPE OF THE AVIATION SAFETY PROBLEM

The recognition of the scope of the aviation safety problem in Developing/LDC countries has gone from anecdotal evidence to a confirmed proof basis. This is largely a result of the Universal Safety Oversight Audit Program (USOAP) of the ICAO that has been in effect since January 1999.¹⁹ Nevertheless, other national, notably, that of the USA, and regional, for example, European, initiatives have also provided some evidence of the extent of the problem.

The first audits/assessments, providing some evidence of aviation safety deficiencies, were those of the United States' Federal Aviation Administration International Aviation Assessment (IASA) program. This program was initiated in 1992 and 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.²⁰ The FAA is concerned with the safety oversight system of each country but not the safety of the country's individual airlines.²¹ By the end of the 1990s, IASA had determined that over forty percent of the countries assessed had insufficient oversight systems.²²

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 5.

20. *Id.* at 14.

21. *Id.*

22. *See id.* This determination is part of the basis for FAA recommended courses of action to the Department of Transportation (DOT) on the initiation, continuation, or expansion of air service to the United States by the carriers overseen by that CAA. The IASA program applies to

A significant regional mechanism is the European Safety Assessment of Foreign Aircraft (SAFA) Programme. This program was established by the European Civil Aviation Conference (ECAC) and Europe's Joint Aviation Authority (JAA) with support from the European Commission.²³ This Program provides European States with a surveillance tool so that they are made aware of and can act on proven deficiencies.²⁴ It is largely based on safety information gathered from all possible sources and on ramp-checks of foreign aircraft.²⁵ The program is applied to all foreign aircraft using an ECAC country's airports. Information and results of checks are held in a common database at JAA Headquarters, and all results are confidential.²⁶ The SAFA is neither an assessment of a State's oversight capability, nor a substitute for safety oversight assessments. Nevertheless, this program contributes upstream to such assessments by drawing attention to possible deficiencies in a country's oversight system.²⁷

This paper is particularly interested in the international framework for auditing/assessing aviation safety deficiencies that has been carried out under the ICAO's Universal Safety Oversight Audit Program (USOAP).²⁸ On a general level, the USOAP was created as a response to

all foreign countries with air carriers proposing or having existing air service to the United States under an economic authority issued by the DOT. The FAA is evaluating *the safety oversight system of each country, not the safety of 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. *Id.*

In May 2000, the FAA decided to use only two categories in the future – *Category 1*: countries in compliance with minimum international (ICAO) standards for aviation safety; and *Category 2*: countries not in compliance with minimum international standards for aviation safety. Countries with Category 1 status will be permitted normal operations to the U.S.A. Category 2 will consist of two sub-groups of countries. The first sub-group of countries is those that have air carriers with existing operations to the U.S.A. at the time of the assessment – these carriers will be permitted to continue operations at current levels, but they are subject to increased FAA surveillance and are not permitted to expand or change services to the U.S.A. while in category 2. The second sub-group of countries is those that do not have air carriers with existing operations to the U.S.A. at the time of the assessment. Carriers from these countries will not be allowed to initiate service to the U.S.A. while in Category 2 status. *Id.* at 14.

23. *Id.* at 15.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* The High Level Group that met in 1996 concluded that the European Community should use its legal powers to make SAFA mandatory for the EU Member States. The European Commission has therefore drafted a proposal for a directive to be handled by the Community legislative process.

28. ICAO's present day Universal Safety Oversight Audit Programme (USOAP) has its roots in the ICAO Assembly of October 1995. ICAO Contracting States endorsed the implementation of the ICAO Aviation Safety Oversight Program (SOP). This Program was designed to ensure the effective implementation by States of the Standards and Recommended Practices (SARPs) included in ICAO Annexes one (personnel licensing), six (flight operations), and eight

concerns about worldwide compliance with minimum aviation safety standards with the ultimate objective of promoting global aviation safety consistent with the ICAO's Global Aviation Safety Plan (GASP).²⁹ Indeed, the USOAP has been such a successful program that even the United States, and its IASA, increasingly defer to this ICAO audit mechanism.³⁰ On a more specific level, the USOAP was established to address a dichotomy between the legal responsibility of states to assure aviation safety and the failure and/or inability of many states to properly discharge this responsibility.³¹ Since this dichotomy has been a particularly prominent issue for Developing/LDC countries, it is important to examine it in more depth.

On the one hand, individual States have a responsibility to assure aviation safety under the terms of the *Chicago Convention* and its Annexes. The ICAO, through its Council, has adopted eighteen technical Annexes, to the *Chicago Convention*, establishing Standards and Recommended Practices (SARPs) that are designed to ensure, *inter alia*, a minimum level of safety for international civil aviation through technical uniformity.³² In turn, each State is responsible for assuring adherence to

(aircraft airworthiness). This Program's primary task was the safety oversight audits/assessments of States by ICAO, on a voluntary basis. A related purpose was that ICAO was to offer follow-up advice and technical assistance as necessary to enable such States to implement ICAO SARPs and associated procedures. *Id.* at 16.

The assessment is the safety audit of the country's actual level of compliance with international standards. This is carried out by assessing whether regulatory authorities have the legal means, the resources, the workforce and expertise to meet their international safety supervisory responsibilities. *Id.*

There were a number of disadvantages with this initial ICAO Program. First, it was limited by the need for voluntary contributions from Member States and by ICAO's own continuing funding problems. Second, since the program was voluntary, it could not always be applied where the need was greatest – audits/assessments were only carried out when requested by the State concerned. *Id.*

Since November 1998, the Program has been renamed the ICAO *Universal Safety Oversight Audit Programme (USOAP)*. ICAO Member States have decided that this new program should apply to all of them in a systematic and regular way. Moreover, the audit results are to be published if a State has made no significant improvement in remedying its deficiencies after a follow-up audit/assessment. *Id.*

The USOAP provides that ICAO, with the agreement and participation of the State concerned, can proceed to the establishment of an Approved Action Plan. This plan is supposed 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. *Id.*

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

30. *See id.* at 20.

31. *Id.*

32. *See* Federal Aviation Admin., *FAA Handbook for FAA Order 8400.10 CHG 15, Vol. 1 General Concepts, Direction, Guidance, & Definitions, Ch. 3 International Aviation, Sect. 2 ICAO and the ICAO Annexes*, 1-69, 1-69, available at http://www.faa.gov/avr/afs/faa/8400/8400_vol11_003_02.pdf (updated June 26, 2002).

these SARPs.³³ For example, certain Annexes provide for aircraft safety in the form of design, continuing airworthiness, safe operations, and safe air traffic flow, including the necessary Air Traffic Management and airport infrastructure within a State.³⁴ 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.³⁵

On the other hand, despite this legal obligation, a growing number of contracting States and signatories to the *Chicago Convention* have been found not to be applying and/or misinterpreting relevant SARPs.³⁶ This deficiency became a prominent issue when disclosed by ICAO at a November 1997 conference of Directors General of Civil Aviation.

To reconcile this dichotomy in a constructive and gradualist manner, the ICAO initiated the USOAP. This program attempts not only to give effect to ICAO's Global Aviation Safety Plan (GASP) generally but also to specifically determine the scope of the problem of aviation safety deficiencies worldwide.³⁷ In the period from 1999 to 2001, the ICAO Assembly mandated initial audits, conducted under the auspices of ICAO's Air Navigation Bureau, that were to verify state compliance with the SARPs in three Annexes concerned largely with the aircraft itself – personnel licensing (Annex One), operation of aircraft (Annex Six), and airworthiness of aircraft, such as design, certification, and maintenance (Annex Eight).³⁸

The USOAP has been a dramatic success for the ICAO: 177 states and five territories have been audited, with only nine states remaining to be audited by ICAO teams between January 1, 1999 and December 31, 2001.³⁹ Moreover, the results of these initial audits have been analyzed and submitted to the audited states.⁴⁰ It is not surprising that many cases of aviation safety deficiencies resulting from state non-compliance with the SARPs were discovered. Some of the identified shortcomings include: 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 ap-

33. *Id.*

34. *Id.* at 1-71 – 1-72.

35. *Chicago Convention*, *supra* note 3, at art. 38.

36. *See* Belai, *supra* note 29, at 19.

37. *Id.*

38. *See id.*

39. *Id.*

40. *Id.*

proved; failure to identify safety concerns; and failure to follow-up on identified safety deficiencies and take remedial action to resolve such concerns.⁴¹

The analysis of the audit findings confirms that not only many states experience serious difficulties in fulfilling their safety oversight obligations, but also that there is a need to address safety oversight implementation issues in certain regions.⁴² Furthermore, preliminary studies indicate that in many regions there often appears to be a direct relationship between two variables: the more there are audit findings indicating a lack of effective implementation of SARPs, the higher the aviation accident and incident rates in that region.⁴³

While the data gathered and analyzed by ICAO is based on information collected at the time of the audit, it should be acknowledged that many states have already acted to remedy identified safety deficiencies. 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.”⁴⁴ 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 audits.⁴⁵ While in the initial audit there was 21.8% non-compliance, in the audit follow-up three years later, non-compliance drops to only 7.2%.⁴⁶ 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.”⁴⁷

The evidence from both studies suggests a clear dichotomy between Developed and most Developing and LDC countries. Most cases of remedied deficiencies originate with Developed and better off Developing countries that have the means and ability to do the necessary corrections. However, many Developing/LDC States are facing serious difficulties in satisfying their safety obligations. The most common cause for these deficiencies is that certain States have not committed adequate resources to

41. *Id.*

42. *Id.*

43. *Id.*

44. *Progress of the ICAO Universal Safety Oversight Audit Programme*, at 2, ICAO Council Working Paper C-WP/11815 (Apr. 18, 2002).

45. *Id.* at app. B.

46. *Id.*

47. *Id.* at 3.

the task – in many cases because they lack the necessary means and ability. The major reasons for the aviation safety deficiencies fall into four categories: primary aviation legislation and regulations, institutional structures, human resources, and financial resources.⁴⁸

- *Primary aviation legislation and regulations:* Many of the States audited have legislative and regulatory problems. These states either have not promulgated basic aviation law and related regulations or their existing aviation legislation and/or regulations are out of date and fail to address essential considerations, such as a failure to provide adequate enforcement powers.⁴⁹
- *Institutional structures:* Certain States are institutionally challenged because the organizations responsible for regulating and supervising aviation safety do not have the authority and/or independence to fulfill their regulatory tasks effectively.⁵⁰
- *Human resources:* Many States lack sufficient qualified experts for the effective satisfaction of the safety responsibilities of States. This inadequacy, in turn, may be attributed to three key factors: (a) human and financial resources are often not available for necessary expert training; (b) even where these resources are available for training, trained staff often leave for better-paid jobs in the aviation industry; and, (c) the entities in charge of safety oversight or air traffic services are generally government departments such that salaries are often fixed at low levels and cannot be changed without disrupting the whole governmental pay structure.⁵¹
- *Financial resources:* Many states do not allocate the necessary funds that their entities in charge of civil aviation safety require to carry out their responsibilities.⁵² In the case of many Developing/LDC countries, improving air safety is not a high priority on the political agenda when compared to other subjects such as health care, education, irrigation, and poverty.⁵³ Furthermore, when a charging system has been put in place to recover costs from users, the revenues are often put into the general state coffers rather than earmarked back to the functioning of these entities so that they may work to improve aviation safety.⁵⁴

ICAO's audits have peaked the world's awareness that there is a serious problem of gaps in aviation safety, particularly among certain De-

48. *EU Contribution, supra* note 7, at 4.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

veloping and LDC countries. The problem is that this group of states has not – and probably will not – remedy their aviation safety deficiencies by properly implementing ICAO SARPs due to a lack of will, means, and/or ability to do so. The challenge is to find some existing and/or new mechanisms to help these needy states not only to upgrade their legislative and/or regulatory regimes, including rules, structures, and procedures, but also to secure adequate and trained personnel and sufficient funding for these purposes.

III. REMEDYING AVIATION SAFETY DEFICIENCIES: EXISTING MECHANISMS

Today, as just explained, there is a crisis of un-remedied aviation safety deficiencies in particular states and regions of the world. The traveling public has increasingly become aware of this problem in a stressful environment of rising expectations for a high standard of aviation safety and security. While ICAO has been performing the safety audits, and maybe soon will be doing the security audits of most countries, a question has arisen as to the purpose of these safety audits.

Some experts, concerned with the reality that so little is being done at a slow pace to remedy the problem, pose the dilemma this way. Do USOAP audits of ICAO states have a destructive purpose? In other words, should the audit results be used as a tool to generate information that ultimately results in blacklisting certain states for safety deficiencies so that their airlines and airports will be closed down? Or, do these audits have a constructive purpose, so that their results may be used as a way to generate information that ultimately results in improving international aviation safety?

As one astute international civil servant pointed out: when the international community sends the policeman/detective (i.e. ICAO and its USOAP) to investigate what is wrong in a country's aviation system, once the problems are diagnosed, should not a doctor be sent to help that state remedy its problems? A disagreeing international official has replied that the ICAO's mandate is limited to being a policeman/detective – the ICAO legally may not be a doctor and lacks the money for treatments. Thus, the question becomes: what doctor(s) (i.e., mechanisms) should be provided and what treatment(s) should be applied?

The design and implementation of projects to remedy aviation safety deficiencies is clearly required to improve aviation safety worldwide. However, the process of assuring that all states fully comply with minimum aviation safety standards is a much more expensive and demanding process than audits and/or assessments. There are a number of existing technical and financial mechanisms that have, in the past, assisted, or may

be directed in the future to assist, Developing/LDC countries that need to remedy aviation safety deficiencies.

A. TECHNICAL ASSISTANCE

The needy Developing/LDC states are often asked to apply to existing and/or evolving technical co-operation and assistance institutions and programs at the international, regional, bilateral, multilateral, and plurilateral levels to assist them in remedying their aviation safety deficiencies. It is worthwhile to briefly examine some of these institutions and programs and their ability to solve problems.

1. *International technical assistance*

The worldwide growth and development of civil aviation in the last half century has been significantly promoted and enhanced through the formulation and implementation of the SARPs by the ICAO. The gradual decrease in aviation safety deficiencies in Developing/LDC countries is largely attributed to the work of both the ICAO Technical Co-operation Bureau (TCB)⁵⁵ and the ICAO Technical Co-operation Program (TCP).⁵⁶ They have worked to assure that at least some civil aviation equipment, facilities, and services of many needy countries conform to the international SARPs.

An important caveat indicates that past achievements are no guarantee of future success. In the past, much of the success of the TCB has been due to the significant financing provided by the United Nations Development Program (UNDP)⁵⁷ that permitted the moneys to be spent to

55. 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, 2002). The Technical Cooperation Bureau of 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 on behalf of three principal sources of financing: (a) the United Nations Development Program (UNDP), (b) Developing countries self-financing sources, and (c) other funding institutions. *Id.*

56. See James Ott, *Civil Aviation Directors to Explore Expanded Safety Role for ICAO*, AVIATION WEEK & SPACE TECH., Aug. 18, 1997, at 41. The Technical Cooperation Program (TCP) of ICAO is an important part of ICAO's mission with a continuing emphasis on aeronautical training. As with the TCB itself, there has been a gradual decline in funds provided by the UNDP. However, this decrease has been at least partly compensated by increased funding by governments partly self-financing their civil aviation projects, through cost-sharing, and/or trust funds provided by third parties like other governments. See James Ott, *ICAO Faces Daunting Issues*, AVIATION WEEK & SPACE TECH., Oct. 3, 1994, at 55.

57. See James Ott, *ICAO Faces Daunting Issues*, AVIATION WEEK & SPACE TECH., Oct. 3, 1994, at 55. The United Nations Development Program (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 disbursed primarily for international and national

assist in remedying aviation safety deficiencies of Developing countries.⁵⁸ However, over the last decade, there has been a dramatic decline in UNDP funding of the TCB.⁵⁹ Internationally, as well as nationally, limited funds available for all types of technical co-operation have resulted in a change of funding priorities in favor of the health, education, and agriculture sectors, as well as water purification and poverty reduction. Thus, resources have often been diverted away from a lower priority item like civil aviation. Moreover, the present UNDP approach is to require that Developing/LDC countries execute projects themselves such that these countries are forced to look for necessary funding elsewhere. These developments should be understood in the contemporary global economic philosophy that relies on market forces to resolve so many problems. In line with this view, civil aviation projects are expected to be self-financed through a variety of public and private funding sources, but no longer the UNDP, with an ultimate goal that commercial revenues must provide cost recovery.

Constrained by declining UNDP funding, but wanting to respond to the deficiencies identified by the USOAP in Developing/LDC countries, the ICAO has tried to stimulate the activities of its TCB in the field. Accordingly, the ICAO Council has approved the funding by the TCB to fund project feasibility studies for appropriate aviation infrastructure safety-related projects, for example, traffic forecasts and radar installation, in Developing/LDC countries.⁶⁰ These studies are presently funded two key ways: first, by voluntary contributions of a generous third country that wants to help a particular country and its project; or, second, a few hundred thousand dollars transferred annually to the TCB from a small internal ICAO trust fund, which was established by the ICAO to hold dues paid in arrears and to be spent for ICAO-related purposes, for the purpose of, *inter alia*, the preparation of project documents for remedial action in countries generally.⁶¹ The TCB has decided to direct part of these funds to country-specific feasibility studies.⁶²

There is no question that the ICAO in good faith, through the TCB, is providing technical assistance to needy countries by preparing feasibility studies. However, the problem is that the TCB, restrained by a tight budget, can only prepare limited studies that are less than the complete

expertise, technical services, and equipment. Since the early 1980's, funding for technical cooperation projects has fallen sharply. *Id.*

58. *Id.*

59. *Id.*

60. Interview with A.P. Singh, Representative of India on the Council of ICAO (May 15, 2002). See also, INTERNATIONAL CIVIL AVIATION ORGANIZATION, ANNUAL REPORT 45 (2001).

61. *Id.*

62. *Id.*

and more detailed (i.e. “bankable”) Project Reports that the financing institutions want.⁶³

2. *Regional technical cooperation*

A variety of regional technical cooperation models are beginning to be explored and established.

One regional self-help concept that is evolving 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.⁶⁴ For example, while six countries may not be able to afford to hire three safety oversight or airworthiness inspectors each, they may pool their resources and maybe hire eight inspectors for their region. This concept has been applied by six Latin American member states in the COCESNA regional association respecting their oversight/monitoring, and upgrading of their aviation infrastructure.⁶⁵ The mechanisms to collect whatever charges or taxes are necessary to finance these activities are regionally developed and applied.⁶⁶ Many Developed countries are supportive of this self-help concept.⁶⁷

Another idea being explored and particularly supported by certain Developed countries is that groups of richer Developing countries, like North Africa, might help neighboring regions of poorer Developing/LDC countries such as sub-Saharan Africa in financing and implementing aviation infrastructure upgrading necessary to remedy safety oversight deficiencies.

3. *Bilateral, Multilateral, and Plurilateral technical assistance*

Another existing approach to providing assistance to Developing/LDC countries' in civil aviation safety projects is that Developed donor states provide help in a bilateral, multilateral, or plurilateral framework. At this level, as with international cooperation, certain similar constraints must be recognized. Again, since technical co-operation funds are limited, other priorities, like health, education, agriculture, water purification, and poverty reduction often divert resources away from a lower priority item like civil aviation. Furthermore, most donor Developed countries take a view that market forces should underpin civil aviation projects. These projects are expected to be significantly self-financed

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

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

65. *Id.*

66. *Id.*

67. *Id.*

through a variety of public and private funding sources with an ultimate goal that commercial revenues must provide cost recovery.

a. Bilateral technical assistance

A number of donor Developed countries apply, or intend to apply, a bilateral and directed approach to technical assistance helping targeted regions, sub-regions or individual countries. In some cases, these countries prefer spending their limited technical assistance funds in this way rather than using international mechanisms for three key reasons.

First, it is suggested that a bilateral approach helps the donor state insure that the money is spent where the donor state intended that it be spent.⁶⁸

Second, this approach may often provide a higher degree of transparency, accountability, and effective auditing than international assistance mechanisms. This is particularly true when a country already has its own mechanisms to assure that these objectives will be achieved. For example, the U.S. can rely on its FAA.⁶⁹

Third, this approach permits Developed countries to focus their assistance efforts to recipient countries and regions not only closer to them but also to where political and economic interests are more evident. In effect, some Developed countries are starting to provide “bottom up” assistance bilaterally and regionally using their own facilities rather than “top down” using international mechanisms. A great model is being provided by both Canada and the United States that are involved in projects with the cooperation of the Inter-American Development Bank which channels technical assistance to their neighbors in the Americas.⁷⁰ Similarly, the Western European 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 Europe and Africa. Suggestions have been made that more developed countries in East Asia, like Japan and Korea, might do something similar to help their Asian neighbors.

This state-based bilateral approach might be broadened into a “pluralilateral” approach, as explained below.

It is important to emphasize that state-based bilateral assistance is still popular, even when donor states are part of a strong regional grouping. Although European Union states are working to coordinate their ef-

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

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

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

forts in helping improve aviation safety in Developing/LDC countries, most actions taken or planned are on a bilateral basis. The following are some examples:

- *France* – The DGAC, France’s civil aviation regulatory authority, is helping several countries including Cambodia and Vietnam to develop or upgrade their civil aviation codes to be consistent with the Joint Aviation Requirements (JARs) of Europe’s Joint Aviation Authority.⁷¹
- *Netherlands* – The Netherlands tends to invoke the safety clause of their Air Service Agreements as the normal basis for technical assistance actions. They currently have projects in Tanzania, Kenya (responding to increased services to Nairobi), and Surinam (helping establish a civil aviation regulatory authority). They have also expressed interest in projects to improve aviation safety in Eastern and Central Europe as well as southern Africa.⁷²
- *UK and Germany* – The relatively small funds they allocate toward upgrading aviation safety in Developing/LDC countries tends to be mostly channeled through the European Union’s mechanisms. Bilateral projects are limited.⁷³

b. Multilateral technical assistance

The best example of potentially significant multilateral technical assistance is the European Union. The European Commission is an active entity encouraging European Union initiatives to improve aviation safety through an effective global approach. Accordingly, the European Commission has proposed initiatives including co-operation with Europe’s Joint Aviation Authority (JAA) and EUROCONTROL to assist future EU members, from Central and Eastern Europe, and the provision of resources to finance safety recovery programs.⁷⁴ There has been discussion of the joint and complementary aims and priorities of EU member states as well as the need to establish a co-ordination mechanism for actions taken by EU member states to avoid duplication of governmental spending.⁷⁵

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

72. See Netherlands Embassy, *Aviation*, at <http://www.netherlandsembassy.or.ke/nl/economie/-handel/-viation.html>.

73. See Welcome to Germany, *Welcome to the Federal Foreign Office, Relations Between the United Kingdom & Germany*, at http://www.auswaertigesamt.de/www/en/laenderinfos/aender/rint_html?-type_id=4&land_id=189.

74. See *EU Contribution*, *supra* note 7, at 11.

75. *Id.* at 11-12.

c. Plurilateral technical assistance

Plurilateralism is a relatively new and evolving concept, structure, and process of technical assistance. This approach broadens the primary partners of technical assistance to include not only recipient and donor states on a bilateral, multilateral, or international basis, but also “the efforts, experience and . . . the resources of . . . international [e.g. ICAO & IATA] and regional organizations, aviation manufacturers and operators, financial and other funding institutions. . . .”⁷⁶ Thus, this group of senior aviation experts is mandated to study the aviation safety issues of their region and recommend the best ways to improve safety and provide assistance regionally.⁷⁷

This approach is more commonly called the “GEASA” (Group of Experts on Aviation Security, Safety and Assistance) approach based on the precedent of the Asia-Pacific Economic Community (APEC).⁷⁸ In 1995, APEC Transportation Ministers convened such a group of experts to review and recommend the best ways to improve safety and provide assistance in their region.⁷⁹ This approach was first formalized and internationally recognized during ICAO’s 33rd Assembly of September/October, 2001.⁸⁰

Some countries are presently applying this model in their own regions consistent with ICAO’s blessings. Canada and the United States recently participated (Apr. 4 – 5, 2002) at a GEASA consisting of experts of seven South/Central American and Caribbean countries as well as the ICAO, the Inter-American Development Bank (IDB), and the Central American Oversight Agency (ACSA).⁸¹ Canada and the USA are apparently receptive to further participation and potential assistance to needy projects and their countries within a GEASA framework.⁸²

This concept of plurilateralism is being examined, and eventually might be applied by the Western European states as well. Suggestions have been made that through a variety of European Union mechanisms, Western Europe could direct its technical assistance to Eastern Europe and Africa. Furthermore, the APEC countries, the originators of the GEASA model, are already directing their assistance to the Asia-Pacific

76. See ICAO *Global Aviation Safety Plan (GASP)*, Res. A33-16, *complied in Assembly Resolutions in Force*, at II-19, ICAO Doc. 9790 (Oct. 1998) [hereinafter *GASP Resolution*].

77. *Id.*

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

79. *Id.*

80. *GASP Resolution*, *supra* note 76, at II-19.

81. 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, 2002).

82. *Id.*

region.⁸³

B. FINANCIAL ASSISTANCE

Developing/LDC countries with inadequate resources may seek not only technical assistance but also financial assistance to remedy their USOAP audited aviation safety deficiencies. It is worthwhile to briefly review the four main options of bank borrowing to which these countries may apply: (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*

Generally, commercial banks are reluctant to lend money to Developing/LDC countries because of a belief that the aviation industry generally and the type of clients in these circumstances particularly (i.e. LDCs) are too high risk given the traditionally small return on investment in the aviation industry.

2. *Regional Development Banks and Funds*

The Regional Development Banks and affiliated Funds are a more hopeful source of financing to assist needy countries to remedy their aviation safety deficiencies. However, the nature and scope of the assistance that these banks and funds may provide is limited by two key factors. First, these institutions primarily seek to reduce poverty in the donor countries with either no or minimal priority attributed to financing the improvement of aviation infrastructure and services; and, second, these banks have lending policies and practices that apply such stringent criteria that loans are largely restricted to creditworthy countries, effectively precluding the more credit risky Developing/LDC countries that generally will need financing to remedy aviation safety deficiencies.⁸⁴

It is heuristic to briefly review the approach of each of the four more important regional development banks when they are asked to finance aviation-related projects:

- **Islamic Development Bank (IDB):** This Bank does not appear to have any mandate to financially assist countries in remedying their aviation safety deficiencies. The Special Assistance Office of this Bank is primarily concerned with promoting the development of Muslim communities in education and health, as well as alleviating

83. *Civil Aviation Background*, *supra* note 78.

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

their suffering due to war or natural disasters.⁸⁵

- African Development Bank (AFDP): This Bank does have a precedent of financially assisting member countries in aviation projects. For example, in April 2001, this Bank granted a loan to the Moroccan Government for an airport improvement and extension of airport capacity project.⁸⁶ Nevertheless, the priority of the African Development Bank and Fund is to reduce poverty with no significant mention of airport or air navigation service infrastructure upgrading.⁸⁷
- Asian Development Bank (ADB): This Bank does have precedents of financially assisting member countries in aviation projects. For example, in 1997 this Bank started a technical assistance project to find resources to aid ten minor airports that lack navigational aids, adequate length runways, and suitable terminal buildings.⁸⁸ Nonetheless, the ADB has committed its largest fund, the Asian Development Fund (ADF), to promoting the reduction of poverty through sustainable development.⁸⁹

In line with the priority of fighting poverty, the ADB, like the African Development Bank, follows 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.⁹⁰

- Inter-American Development Bank (IADB or sometimes called the IDB): This Bank has the broadest scope of priorities of the Development Banks that includes not only poverty reduction but also sector reform and modernization.⁹¹ The upgrading of the aviation sector might be construed as within the IDB's priorities as exemplified in late 2001 by the IDB's Multilateral Investment Fund (MIF) creating a \$10 million line of activity to help Latin American and Caribbean countries improve airport security in the

85. *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*].

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

87. *Id.*

88. *Id.* at app. B-3.

89. *Id.* at app. B-2.

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

91. *IFFAS Working Paper*, *supra* note 85, at app. B-1.

aftermath of the September 11, 2001 World Trade Center tragedy.⁹² For example, the MIF recently approved almost one-half million dollars as a grant to Nicaragua to support a project to strengthen security at Managua's international airport.⁹³

The critics of this Bank suggest that such loans and grants are only a temporary phenomenon that reflects the Developed world's obsession with security today.

At this point, it should be highlighted that the processing of Developing/LDC country loan and grant applications by the regional development banks would certainly be facilitated if the applicants could professionally prepare project proposals, satisfy project management requirements, and documentation procedures. This means that there is a clear need for some mechanism to be developed to facilitate the potential recipients in getting their financial assistance.⁹⁴

An interesting development is the emergence of a possible new hybrid model, which through a coincidence of interests, incorporates a tripartite group working together of not only parties in a bilateral relationship, often a donor and recipient state relationship, but also a regional development bank. A recent example of this is in the Netherlands. Its Ministry of Transport, through its Aviation Technical Assistance Program, and the European Investment Bank have jointly financed a number of projects in Tanzania by providing seed money, expertise, and/or equipment.⁹⁵ One project involves around US \$10 million to provide air navigation and communications equipment while a second project involves around US \$13 million to install a back-up power supply in Tanzanian airports for the emergency cases when power goes down due to such events as inclement weather.⁹⁶

3. *International Banks and other institutions*

On the international level, it has already been discussed that the United Nations Development Program (UNDP) has dramatically reduced its financing of aviation infrastructure, training and the like. Furthermore, other existing international financing institutions and programs are sector specific and do not generally extend loans or other assistance

92. *Id.*

93. *Id.*

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

95. See Welcome to Germany, *Welcome to the Federal Foreign Office, Relations Between the United Kingdom & Germany*, at http://www.auswaertigesamt.de/www/en/laenderinfos/laender/print_-html?type_id=14&land_id=189.

96. Interview with Bert Kraan, Senior Project Manager, Safety and Security, Department of Civil Aviation of the Netherlands (May 28, 2002).

in the aviation sector. For example, the FAO restricts its efforts to the agricultural sector.

The International Bank for Reconstruction and Development (i.e., the World Bank) is not significantly involved today in the aviation sector. However, under the right conditions, it possibly might become a significant participant in the future.

4. *Export Credit Agencies and Bilateral Development Institutions*

In Developed countries, the domestic production and provision of aviation infrastructure and equipment often is helped and/or subsidized by export credit agencies. These institutions may be willing to help finance safety-related aviation infrastructure equipment and projects. Nevertheless, these exports must be creditworthy, a criterion that many of the aviation safety improvements in the Developing/LDC countries will probably not satisfy. Examples of export credit agencies include *Compagnie Française d'Assurance pour le Commerce Extérieur* (COFACE) [France], Export Credits Guarantee Department (ECGD) [United Kingdom], Export Development Corporation (EDC) [Canada], Export-Import Bank (Ex-Im Bank) [USA], and *Hermes* [Germany].⁹⁷

Developed countries also often have bilateral development agencies. While in theory these agencies might get involved in certain dire cases of remedying aviation safety deficiencies of LDCs, in practice they generally do not. Examples of such agencies include: *Agence Française de Développement* (AFD) [France], Canadian International Development Agency (CIDA) [Canada], Department for International Development (DFID) [United Kingdom], Foreign Ministry [Netherlands], and the U.S. Agency for International Development (USAID).⁹⁸

IV. REMEDYING AVIATION SAFETY DEFICIENCIES: PROPOSED MECHANISMS

There has been an almost worldwide consensus in recognizing the need to identify aviation safety deficiencies. Moreover, the ICAO receives almost universal praise for its success in identifying these deficiencies through its USOAP program.

However, this international consensus breaks down on the issue of whether the ICAO should help Developing/LDC countries remedy their identified aviation safety deficiencies when these states lack the ability and means to do so on their own. Thus, the question is whether ICAO has

97. 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>.

98. *Id.*

a role in helping the remedy of identified aviation safety deficiencies, and if so, how?

The following discussion is divided into three parts:

- (A) What is the role of ICAO in assisting the remedy of identified aviation safety deficiencies? – This involves contrasting arguments for and against a broad role of ICAO in this area;
- (B) If there is an ICAO role, what is the IFFAS? – This discussion is on the history, functions/objectives, and proposed structure and operations of the IFFAS;
- (C) Where does the IFFAS go from here? – This section examines important outstanding questions respecting the IFFAS.

A. WHAT IS THE ROLE OF ICAO IN ASSISTING THE REMEDY OF IDENTIFIED AVIATION SAFETY DEFICIENCIES?

To start, it must be recognized that the ICAO is committed to intensify and broaden its activities to audit the level of implementation of SARPs. The main challenge that the ICAO is confronting, but has not resolved, is to establish an effective framework for ensuring that states really comply with their the ICAO commitments in a uniform way. On the one hand, the ICAO has recently committed itself primarily through the USOAP to conduct mandatory, permanent, and universal auditing/assessment of the way its contracting states apply certain standards of the *Chicago Convention Annexes* for which they are responsible.⁹⁹ On the other hand, since the ICAO has no legal power to oblige the states to accept the necessary audits and inspections, it has to form bilateral agreements with each of them on a voluntary basis.¹⁰⁰ Thus, the USOAP is in effect a voluntary program.¹⁰¹

The present consensus is to expand the USOAP to cover all safety-related SARPs, with the next stage being those related to air traffic management, airport services and security.¹⁰² However, the ICAO must confront a number of limitations in proceeding with its USOAP auditing based on other Annexes to the *Chicago Convention*. Not only are there budgetary constraints but also a perception that non-remedied safety deficiencies exist in states that represent only one percent of international aviation activities.¹⁰³ While a significant part of the aviation activities of Developed country operators occur in such Developing/LDC countries, there is reason to question the effectiveness of the current approach of trying to remedy the deficiencies.

99. See Belai, *supra* note 29, at 19.

100. *EU Contribution*, *supra* note 7, at 7.

101. *Id.*

102. See Abeyratne, *supra* note 4, at 383.

103. *EU Contribution*, *supra* note 7, at 7.

The existing mechanisms of technical and financial assistance, discussed above, are often referred to as possible ways to address the problem. Moreover, other options have also been studied as possible ways of funding aviation safety projects in general – some of which may, or may not, be helpful to Developing /LDC countries.

One option is to establish autonomous entities such as publicly owned corporations that are adequately funded.¹⁰⁴ However, in the Developing/LDC world it is clear that adequate funding is unlikely given limited resources and other pressing priorities like health, education, agricultural and industrial modernization, and poverty fighting.

Our economic world is increasingly moving in the direction of “liberalization” and “commercialization.”¹⁰⁵ Accordingly, the second option is the privatization of air navigation services and airport facilities.¹⁰⁶ Furthermore, a third alternative is financing through an investment banking mechanism.¹⁰⁷ Nevertheless, the second and third options are unrealistic in most Developing/LDC countries cost-recovery and a positive return-on-investment is unlikely given insufficient revenues because of low traffic volume.

The fourth option involves pre-funding the needed resources through a charges and/or fees system levied on airline passengers.¹⁰⁸ This is a worthwhile idea with precedent. However, a key drawback of this mechanism is that individual Developing/LDC countries may be challenged in their ability to collect the money and by the relatively small amounts collected. Furthermore, this mechanism works better if it is applied regionally, a possible approach, or best, internationally, an extremely unlikely approach.

In the context of the limitations of existing and most proposed mechanisms for helping needy Developing/LDC countries remedy their aviation safety deficiencies, there has been much debate as to whether an international institutional solution might not be better. Consequently, the debate has shifted specifically to two opposite visions of an ICAO role. Although there are many different viewpoints in between the extremes, let us briefly review the two main visions for and against a broad role of the ICAO, particularly through an IFFAS mechanism.

1. *The vision of Proponents of a strong IFFAS favoring a broad role of the ICAO*

The proponents of an expanded ICAO role in assisting the remedy of

104. Abeyratne, *supra* note 4, at 384.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

aviation safety deficiencies identified in needy Developing/LDC countries are primarily found among the Developing and LDC states.

At this point, it should be emphasized that the IFFAS structure sought to discharge the function of assisting in the remedy of aviation safety deficiencies identified in needy Developing/LDC countries and is generally envisaged as a quasi-independent entity.¹⁰⁹ The IFFAS is to be a self-financed entity, outside of the ICAO's regular Program Budget, and made up of voluntary state are members and participants.¹¹⁰ The ICAO's "broadened" role through the proposed IFFAS is limited to three main areas: first, the ICAO supervises the IFFAS in assuring that any deficiencies identified through the ICAO's auditing process are remedied; second, the ICAO provides administrative and technical service support to IFFAS to minimize IFFAS costs on a cost-recovery basis. For example, the ICAO's Secretariat processes might be used not only to help procure the client state's aviation goods and services but also finally certify their delivery at quality assured standards through the Technical Cooperation Bureau, and, third, the ICAO's audited finance processes authorize payment to the suppliers, not the client states, of the goods and services contracted.¹¹¹

There are four often-cited main arguments of the proponents of the ICAO's broadened role through a strong IFFAS.

First, on a general level, the proponents of a strong IFFAS have a broad definition of the ICAO's role and scope of responsibilities. They argue that the ICAO's functions are not limited to monitoring, auditing, establishing global standards, and recommending practices, but extend to the regulation and enforcement of minimum universal standards established by it. Accordingly, in their view, the ICAO must not only disclose aviation safety deficiencies through its USOAP program but also assist those Developing/LDC countries that lack the means to remedy these deficiencies.¹¹² Consequently, the 33rd Assembly of ICAO has committed itself to establishing a mechanism, defined as an International Financial Facility for Aviation Safety (IFFAS), with the "objective of financing safety-related projects for which States cannot otherwise provide or obtain the necessary financial resources" to help remedy "safety-related deficiencies identified through the ICAO [USOAP]."¹¹³

109. 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*].

110. *Id.*

111. *Id.*

112. Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (May 10, 2002).

113. *IFFAS Resolution*, *supra* note 109 at cl. 2; Interview with Taieb Cherif, Representative

Second, on the legal level, some proponents of a strong IFFAS emphasize that an IFFAS, assisting needy states in remedying aviation safety deficiencies, may be a mechanism that reconciles the ICAO and the States' obligations to regulate and assure safe civil aviation under the *Chicago Convention* in the following way:¹¹⁴

- The *Chicago Convention's* spirit, as stated in its Preamble, is that "the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world . . . [and] it is desirable . . . to promote . . . cooperation that between nations and peoples. . . ." ¹¹⁵
- There is a pivotal objective in the *Chicago Convention* that requires the ICAO, as the entity responsible for the international regulation of civil aviation, to "insure the safe and orderly growth of international civil aviation throughout the world."¹¹⁶ The word "insure" places upon ICAO the responsibility to assure that international civil aviation grows safely and in an orderly manner. Moreover, the ICAO is obliged to "meet the needs of the peoples of the world for safe, regular, efficient, and economical air transport."¹¹⁷ Therefore, the *Chicago Convention* provides that the Contracting States of the ICAO will hold the ICAO accountable for ensuring safety and efficiency in air transport.¹¹⁸
- The ICAO Council can intervene in cases where the Council believes that "the airports or other air navigation facilities . . . of a contracting State are not reasonably adequate for the safe, regular, efficient, and economical operations of international air services. . . ." ¹¹⁹ Furthermore, it can be argued that the Council has an obligation to make recommendations for remedying the situation as it is stated that the Council "shall consult with the State directly concerned, and other States affected, with a view to finding means by which the situation may be remedied, and may make recommendations for that purpose."¹²⁰ Later, a Contracting State may conclude an arrangement with the Council for giving effect to such recommendations.¹²¹

of Algeria on the Council of ICAO (May 10, 2002) (emphasizing this provision of the Assembly resolution to give legal context to this position).

114. Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (May 10, 2002).

115. *Chicago Convention*, *supra* note 3, at pmb1.

116. *Id.* at art. 44(a).

117. *Id.* at art. 44(d).

118. Abeyratne, *supra* note 4, at 393.

119. *Chicago Convention*, *supra* note 3, at art. 69.

120. *Id.*

121. *Id.* at art. 70.

- In this viewpoint, the ICAO must not limit itself to identifying and informing the audited states of aviation safety deficiencies through its USOAP. Accordingly, the ICAO and its Council have an added responsibility of recommending remedies and assisting needy countries if they are not able to rectify these problems on their own.¹²²

Third, on the practical level, proponents of a strong IFFAS emphasize the shortcomings of existing mechanisms of technical and financial assistance that presently provide Developing/LDC countries minimal help to remedy aviation safety deficiencies. These proponents agree with any proposed improvements to the structures, programs, policies, and procedures of existing entities to facilitate the needy countries securing of assistance. However, they go one significant step further by suggesting that, *inter alia*, an IFFAS should be created.¹²³ There is a broad spectrum of ideas on how the IFFAS is to function and to be structured.

Fourth, the proponents of the ICAO's broader role through a strong IFFAS have an interesting legal and hypothetical challenge to those who are against an active role of the ICAO in helping remedy safety deficiencies. Suppose that a state has actual or implied/constructive knowledge,¹²⁴ that a certain country is not respecting its international obligations under the *Chicago Convention* since aviation safety deficiencies have been identified through the ICAO USOAP. Two questions then may be asked, does this state's knowledge confer a responsibility on it to inform its citizens of the deficiency in the nonconforming country such that its citizens might avoid the airspace and/or aircraft of the nonconforming country for safety reasons? If the informed state, despite this knowledge, fails to inform its citizens of these risks and one of its citizens is injured or dies in a plane crash, is the plaintiff's state legally responsible for such effects as wrongful death or damages? Although this paper does not intend to address the complicated sovereign immunity issues that

122. Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (May 10, 2002).

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

124. See *Establishment of an ICAO Universal Safety Oversight Audit Programme*, Res. A33-11, compiled in *Assembly Resolutions in Force*, at I-50, ICAO Doc. 9790 (Oct. 1998). The process of implying that one state has knowledge of another state's aviation safety deficiencies must be qualified. The USOAP is constrained by a memorandum of understanding, signed with the states, that established the Universal Safety Oversight Audit program in 1999 and provides that the results of the audits of all states are known by ICAO; however, each individual state's audit results are confidential and may only be disclosed to other states and entities if the state agrees to the disclosure. Nevertheless, states do become aware of individual deficiencies through bilateral exchanges and other ways. Furthermore, certain countries, for example, the U.S. through its FAA and International Aviation Safety Assessment (IASA) program, have their own auditing mechanisms that give them actual knowledge.

might arise, it should be recognized that there might be judiciable legal principles at stake.

2. *The vision of Opponents of a strong IFFAS favoring a restricted role of the ICAO*

There are a number of arguments that have been made against an expanded role of the ICAO in assisting the remedy of aviation safety deficiencies identified.

First, on a general level, the opponents of a strong IFFAS have a more fundamental definition of the ICAO's role and scope of responsibilities. They argue that the ICAO's functions are limited to monitoring, auditing, and establishing global standards and recommended practices. They argue that the ICAO is not, and should not, broaden its responsibilities to include the regulation and enforcement of minimum universal standards established by it. In this view, the *Chicago Convention* imposes the obligation to regulate and enforce the SARPs established by the ICAO on the States, not on the ICAO.

Accordingly, in this view, the ICAO should restrict itself to only identifying aviation safety deficiencies through its USOAP program. Indeed, under the *Chicago Convention* only the States, not the ICAO, are responsible to remedy aviation safety deficiencies within their territory. It is argued that the IFFAS mechanism takes the ICAO beyond its traditional and recognized role by assisting those countries that lack the means to remedy their deficiencies.¹²⁵

Second, the opponents of an increased role of the ICAO in helping Developing/LDC countries remedy deficiencies suggest that an IFFAS is redundant since the ICAO already has existing technical cooperation mechanisms that may be substituted for an IFFAS. However, this argument has been challenged by IFFAS proponents. For example, while the IFFAS would be a financial facility or a mechanism to provide financial support through loans and/or grants to States, the Technical Co-operation Bureau has a different responsibility of providing technical and financial assistance to States in the development and implementation of technical cooperation projects, as well as in the mobilization of funds.¹²⁶

Third, the opponents of an expanded role of the ICAO in this area highlight the varying success, including examples of existing mechanisms of technical and financial assistance that help Developing/LDC countries remedy aviation safety deficiencies. They suggest an assortment of im-

125. This position has been stated in various ways by some of the Developed states.

126. See International Civil Aviation Organization, *IFFAS – Frequently Asked Questions – International Financial Facility for Aviation Safety*, at http://www.icao.org/cgi/goto_m.pl?applications/-search [hereinafter *IFFAS Website*].

provements to these existing structures, programs, policies and procedures that might facilitate the needy countries in securing more assistance in the future.

Fourth, the opponents of IFFAS sometimes suggest that an IFFAS-type project would place the ICAO into an unconventional role, according to a “strict constructionist” interpretation of the *Chicago Convention*, in which it lacks the experience, expertise, and appropriate financing. Thus, they argue that it is at least inappropriate, and possibly illegal under the *Chicago Convention*, for the ICAO to enter what is effectively the banking business.

Fifth, certain opponents of IFFAS state that the IFFAS is potentially anti-competitive. This argument by certain national carriers of Developed states that an IFFAS may give an unfair advantage to certain Developing world carriers. The logic is that any assistance to Developing states to remedy aviation safety deficiencies constitutes an indirect subsidy of that country’s carrier(s).

B. WHAT IS THE INTERNATIONAL FINANCIAL FACILITY FOR AVIATION SAFETY (IFFAS)?

The debate continues over whether the ICAO should have a role in helping needy Developing/LDC countries remedy their aviation safety deficiencies identified in the ICAO’s auditing program. Nevertheless, the ICAO Assembly over the last few years has mandated such a role in committing to the establishment of an IFFAS. Accordingly, the ICAO Council, during its 166th and 167th Sessions, has tried to give effect to that role through reconciling the conflicting visions of an IFFAS. Indeed, on December 4, 2002, during its 167th Session, the Council approved and adopted the draft Administrative Charter of IFFAS, thereby establishing the IFFAS.¹²⁷ Since December 4, 2002 and until June 13, 2003, transitional rules approved and adopted by the Council apply requiring the ICAO Secretary-General to prepare a work program, a timetable, a proposed budget, and other activities to effectively launch the IFFAS until the Governing Body of IFFAS assumes control.¹²⁸ The process of arriving at this point is worth briefly reviewing.

1. *The History of IFFAS*

The official birth of the concept of an International Financial Facility

127. Culled from discussions at the 167th Session of the ICAO Council (Dec. 4, 2002).

128. See *Establishment of an International Financial Facility for Aviation Safety*, at 5, ICAO Council Working Paper C-WP 11907 (Nov. 22, 2002) [hereinafter *Establishment Working Paper*]. The transitional rules and their implementation are outside the scope of this paper.

for Aviation Safety (IFFAS) dates back to 1995.¹²⁹ At that time, the 31st Session of the ICAO Assembly considered a proposal from a group of States, the eight members of the Latin American Civil Aviation Commission (LACAC)¹³⁰ to study the need, appropriateness and usefulness of establishing an International Aeronautical Monetary Fund (IAMF).¹³¹ These countries expressed the difficulties of many governments to finance investments in, *inter alia*, airport and air navigation services infrastructure.¹³² They argued that there was a need to find means that would be more flexible and less onerous than those usually available in financial markets.¹³³

Preliminary work on the IAMF proposal was carried out in the 1995-1998 triennium period of the ICAO.¹³⁴ Subsequently, the IAMF concept was endorsed by two significant bodies, the Directors-General of Civil Aviation Conference on a Global Strategy for Safety Oversight in 1997 and the Worldwide Communications, Navigation, Surveillance/Air Traffic Management Systems (CNS/ATM) Implementation Conference in 1998.¹³⁵

In 1998, the 32nd Session of the ICAO Assembly endorsed plans for further study on the creation of a fund in ICAO's next triennium of 1998-2001.¹³⁶ The Assembly was especially moved by an extensive Secretariat study carried out in 1998. The Study demonstrated that there exists a need to finance aviation safety-related projects in certain countries, such as Developing/LDC countries, and that there was no existing funding mechanisms or collection modalities within the existing aviation system to provide funding for their needs.¹³⁷

The 1998 Assembly favored a much broader scope to the IAMF's financial assistance responsibilities than today's IFFAS. It was to help not only projects related to the ICAO safety oversight program but also the global implementation of components of CNS/ATM systems and improvement and expansion of airport and air navigation services infrastructure, where this is aimed at overcoming identified safety

129. See generally *Executive Committee, Agenda Item 22: Strategic Action Plan*, ICAO Executive Committee Working Paper A31-WP/73 EX/26 (1995).

130. The IAMF proponent countries in LACAC were Argentina, Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, El Salvador and Panama. *Id.* at 1.

131. *Id.* at 2.

132. *Id.*

133. *Id.*

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

135. *Id.*

136. *Id.*

137. *Id.*

deficiencies.¹³⁸ Subsequently, an in-depth Secretariat Air Transport Bureau Study was prepared and submitted to the 2001 ICAO Assembly for consideration.¹³⁹

In 2001, the 33rd Session of the Assembly adopted Resolution A33-10, the Establishment of an International Financial Facility for Aviation Safety (IFFAS).¹⁴⁰ This resolution noted the work carried out during the triennium, endorsed the IFFAS concept, and, *inter alia*, requested that the Council “pursue the establishment of an IFFAS as a matter of priority early in the 2002-2004 triennium, having regard to the applicable laws of Contracting States. . . .”¹⁴¹ The Assembly also expects the Council to formulate appropriate management, administrative, and legal strategies toward the initial implementation of the IFFAS within the 2002-2004 triennium.¹⁴²

2. *The ICAO Council deliberates and acts*

In discharging its Assembly-mandated obligation to establish an IFFAS, the ICAO Council has faced many challenges within a context of deeply divided positions.

Initially, the dispute between proponents and opponents of an IFFAS focused on conflicting interpretations of the nature and scope of the obligation imposed on the ICAO Council by its Assembly. Proponents emphasized a mandatory obligation of the Council to create an IFFAS by focusing on the words “the establishment of” an IFFAS. Opponents preferred to stress that that the Resolution includes the words “to pursue” the establishment of an IFFAS that means a feasibility study, maybe even a Business Plan, is required before an IFFAS is created.

Despite the countervailing pressures, the Council has proceeded to examine a number of studies and associated draft proposals over its last few sessions.

In its 165th Session in January and February 2002, the Council considered a Working Paper prepared by the Secretariat on the IFFAS.¹⁴³ However, since the Council was unable to make a decision at that time, it asked the President to create a study group of Council members and prepare another paper to be discussed at the 166th Session.¹⁴⁴

138. *IFFAS Study*, *supra* note 134, at 3.

139. *See id.*

140. *IFFAS Resolution*, *supra* note 109, at cl.1.

141. *Id.* at cl. 3.

142. *See IFFAS Website*, *supra* note 126.

143. *Establishment of an International Financial Facility for Aviation Safety (IFFAS)*, at 1, ICAO Secretary General Working Paper C-WP/117855 (Feb. 13, 2002).

144. *IFFAS Working Paper*, *supra* note 85, at 1. 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. For example, in the 165th session of the Council in January and

Subsequently, in the ICAO Council's 166th session in May and June 2002 deliberations over the paper emanating from the IFFAS Study Group continued to have many questions respecting the functions, structure, and the proposed administrative charter of the IFFAS. The Council concluded that further work was necessary for the completion of the draft Administrative Charter and requested the President, in consultation with member Representatives, establish a small working group of six Council members to revise the charter taking into account the reservations expressed in the 9th and 10th Council meetings. The working group was asked to report back to the Council at its 167th session in November and December 2002.¹⁴⁵

On December 4, 2002, during its 167th Session, the ICAO Council examined the new text of the Administrative Charter prepared by the working group. It approved and adopted the draft Administrative Charter of IFFAS, thereby establishing IFFAS.¹⁴⁶ At the same time, the Council adopted a Resolution relating to transitional arrangements for IFFAS that, *inter alia*, requires the Secretary-General of the ICAO to perform certain responsibilities under the Charter, which must be discharged during a transitional period, between December 4, 2002 and June 13, 2003, for the implementation of IFFAS in a timely and effective manner.¹⁴⁷ The ICAO Council is to select a Governing Body that will assume control of the IFFAS during this period.¹⁴⁸

The lengthy negotiation process has resulted in an IFFAS that today is either accepted, or at least tolerated, by most states since there is a widespread recognition of the need for the IFFAS, or something equivalent, to address the remedying of aviation safety related deficiencies in needy states.

3. *The functions/objectives of the IFFAS*

The 2001 ICAO Assembly provides, in Resolution 33-10, that the IFFAS mission is a mechanism for "financing safety-related projects for which States cannot otherwise provide or obtain the necessary financial resources. . . ."¹⁴⁹ Accordingly, since the IFFAS must identify the greatest needs of participating States requiring IFFAS financial assistance, the USOAP is considered the preferred tool to select projects to be funded

February 2002, the Council was unable to reach a consensus on two important but complicated papers. This resulted in the decision to proceed with further study in two distinct study groups that were to meet in parallel, but with different states as members in each group.

145. This decision was reached on June 10th, 2002, at the 166th session of the ICAO Council.

146. Culled from discussions at the 167th Session of the ICAO Council (Dec. 4, 2002).

147. *Establishment Working Paper*, *supra* note 128, at 5-6, attachment 3 & app. A.

148. *Id.*

149. *IFFAS Resolution*, *supra* note 109, at cl. 2(a).

on a priority basis.¹⁵⁰

The IFFAS objectives are more restricted than those suggested in the 1998 ICAO Assembly. This 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. This IFFAS will only focus on financially facilitating needy projects and countries to help provide resources to remedy aviation safety deficiencies identified through the USOAP.

4. *The proposed structure and operation of the IFFAS*

The 2001 ICAO Assembly provided in Resolution 33-10 a number of principles to guide the Council in establishing a framework for an IFFAS structure and its operational procedures. The Council is requested to report back to the Assembly at its next session in the fall of 2004 on the progress of the IFFAS.¹⁵¹

It is relevant to review and comment on a few of the main principles emanating from the Assembly underpinning the proposed structure and operation of the IFFAS. The Council has attempted to respect the Assembly's wishes as reflected in the draft Administrative Charter that established the IFFAS on December 4, 2002.

First, the Assembly made the ICAO Council responsible for the establishment of IFFAS as well as granted the Council an oversight function.¹⁵² The Assembly specifically provided that the IFFAS would be established on the basis of a transitional Administrative Charter or memorandum for signature by participating parties.¹⁵³ This charter is to spell out principles of operation of the IFFAS and requires a Council resolution approving the charter.¹⁵⁴ Thus, it appears that the December 4, 2002 approval and adoption of the IFFAS draft Administrative Charter largely satisfies this requirement.

Second, the Assembly asked for four main components to be incorporated in the IFFAS as reflected in the draft Administrative Charter:

150. *Id.* at cl. 3(d)(3). 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 ICAO. Resolution A33-9, in clause two, urges the Secretary General to ensure that 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. See *Resolving Deficiencies Identified by the Universal Safety Oversight Audit Programme and Encouraging Quality Assurance for Technical Cooperation Projects*, Res. A33-9, compiled in *Assembly Resolutions in Force*, at I-50, ICAO Doc. 9790 (1998).

151. *IFFAS Resolution*, *supra* note 109, at cl. 7.

152. *Id.* at cl. 1.

153. *Id.* at cl. 3(a).

154. See *IFFAS Website*, *supra* note 126.

a. *Participation* has two aspects:

(i) *Membership*: The IFFAS membership is to be voluntary.¹⁵⁵ A Contracting State becomes a member of IFFAS by making voluntary contributions and accepting the administrative charter of IFFAS.¹⁵⁶ Thus, IFFAS might operate within the existing ICAO legal regime. However, IFFAS membership, as well as contributors, will be broad-based to include not only ICAO Contracting States, but also private and public 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.¹⁵⁷

(ii) *Participation* in IFFAS is voluntary.¹⁵⁸ However, a State's eligibility for benefits is dependent upon that State's "contributions or other participation."¹⁵⁹ While it can be argued that this latter clause unfortunately implies that the States most in need will be least able to significantly contribute, it is expected that the states most in need will only have to demonstrate a willingness to participate. Subsequently, the draft Administrative Charter draws some distinctions among participants, contributors, and possible beneficiaries in Article V.¹⁶⁰

b. *Funding*: The IFFAS will be funded completely independent of the ICAO Program Budget.¹⁶¹ Any services provided by the ICAO are to be "only upon request of participating States and on a cost-recovery basis."¹⁶²

(i) *Voluntary contributions*: Contributions to IFFAS will be voluntary.¹⁶³ This voluntarily provided finance applies to both funding projects in States and for operating IFFAS itself.¹⁶⁴ An example of such voluntary funding at work is that states are 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.¹⁶⁵ As of January 1, 2003, forty-seven ICAO member states have contributed US \$222,709.¹⁶⁶ Furthermore, the European Commission has

155. *IFFAS Resolution, supra* note 109, at cl. 5(b).

156. *See IFFAS Website, supra* note 126.

157. *See IFFAS Resolution, supra* note 109, at cl. 6.

158. *Id.* at cl. 2(b)(1).

159. *Id.* at cl. 2(b)(2).

160. *Establishment Working Paper, supra* note 128, at 3.

161. *IFFAS Resolution, supra* note 109, at cl. 2(b)(4).

162. *Id.* at cl. 2(b)(5).

163. *Id.* at cl. 5(a).

164. *Establishment Working Paper, supra* note 128, at 3.

165. *IFFAS Resolution, supra* note 109, at cl. 5(a) & 5(c).

166. Culled from discussions at the 167th Session of the ICAO Council (Dec. 4, 2002).

pledged €200,000 for the 2002 and 2003 years.¹⁶⁷ Other interested parties, like private and public international aviation-related organizations, airlines, airports, air navigation service suppliers, aircraft/engine/avionics manufacturers, and civil society, are also encouraged to make voluntary contributions in the future.¹⁶⁸

- c. *Governing Body* – The structure of the IFFAS will include a “governing body, incorporating adequate representation from amongst the States and other contributing parties. . . .”¹⁶⁹ In the draft charter, the ICAO President of the Council and the Secretary General would have a right of participation in the meetings of the Governing Body without a voting right.¹⁷⁰ This Governing Body will be responsible for running the IFFAS and deciding what projects to fund and on what terms.¹⁷¹
- d. *Staff* – There is also to be “staffing to support [IFFAS] and to cover daily executive and administrative functions.”¹⁷² This requirement is provided for in the draft Administrative Charter.

Third, the Assembly provided that certain principles should govern the creation and operation of IFFAS.

- *Global application of principles on a regional basis.* There will be a global “definition of a framework of common guidelines and operating rules with flexibility for implementation” regionally.¹⁷³
- *Governance and the relationship with the ICAO* has been subject to

167. *Id.*

168. *IFFAS Resolution*, *supra* note 109, at cl. 6.

169. *Id.* at cl. 3(b)(1).

170. *Id.* at cl. 3(b)(1).

171. *Establishment Working Paper*, *supra* note 128, at 3.

172. *IFFAS Resolution*, *supra* note 109, at cl. 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, as per Article 58 of the Convention, Staff Regulations. An example may be taken in this regard from African Civil Aviation Commission (AFCAC), European Civil Aviation Conference (ECAC), and Latin American Civil Aviation Commission (LACAC) where staff are officially ICAO staff and have contracts signed by the Secretary General, under the “service” authority of whom they stand. *See IFFAS Website*, *supra* note 126.

173. *IFFAS Resolution*, *supra* note 109, at cl. 2(b)(3). It has been suggested that the regional applicability of IFFAS will be in cooperation with regional financial institutions and such regional bodies as the African Civil Aviation Commission (AFCAC), European Civil Aviation Conference (ECAC), and Latin American Civil Aviation Commission (LACAC). *See IFFAS Website*, *supra* note 126.

conflicting interpretations. On the one hand, some argue that since the Assembly Resolution 33-10 clearly provides that the “management strategy” of the IFFAS should be “developed on the principles of, and in conformity with, the existing ICAO legal regime,”¹⁷⁴ as well as any independence of the IFFAS from ICAO involvement is expressly restricted to independence from the ICAO’s Program Budget; therefore, the creation of a new legal entity with its own legal personality is not permitted. This view considers that the appropriate legal basis for the IFFAS is enshrined in Chapter XV of the *Chicago Convention*, particularly Articles 69 and 70.¹⁷⁵ On the other hand, others argue that the Council may approve the creation of a separate entity. This dispute is discussed in greater detail later in this paper.

- *Governance and the management principles* are to be based on transparency, sound and simple management,¹⁷⁶ and accountability with clear administrative and financial guidelines to be stipulated and followed.¹⁷⁷ There will be “clear criteria and procedures for the granting of loans and conducting any other financial transactions. . .” using ICAO standards, policies, and procedures.¹⁷⁸ Moreover, there are to be safeguards to ensure the proper, effective, and efficient application of funds from participating States.¹⁷⁹ 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.¹⁸⁰ Indeed, there are also to be “measures to assure quality control and to assess effectiveness and efficiency at all levels”¹⁸¹ and adequate “provision for the auditing of accounts.”¹⁸² Some have argued that the ICAO auditing system in the “existing ICAO legal regime” of external and internal auditors could be made formally and directly applicable to IFFAS on a cost recovery basis.¹⁸³

174. *IFFAS Resolution*, *supra* note 109, at cl. 3(c).

175. *See IFFAS Website*, *supra* note 126. *See also Chicago Convention*, *supra* note 3, at arts. 69 & 70.

176. *IFFAS Resolution*, *supra* note 109, at cl. 3(d).

177. *Id.* at cl. 3(d)(1) & 3(d)(2).

178. *Id.* at cl. 3(d)(3).

179. *Id.* at cl. 3(d)(4).

180. *See IFFAS Website*, *supra* note 126.

181. *IFFAS Resolution*, *supra* note 109, at cl. 3(d)(5).

182. *Id.* at cl. 3(d)(6).

183. *See IFFAS Website*, *supra* note 126.

C. WHERE DOES THE IFFAS GO FROM HERE? – IMPORTANT OUTSTANDING QUESTIONS

The rest of this paper examines three key questions associated with the nature, scope and development of the IFFAS.

- (1) Should the scope of the functions and structure of the IFFAS provide for a “Big” or “Small” initial operation? What is the compromise approach?
- (2) Where is the money going to come from to start and develop the IFFAS?
- (3) Should the IFFAS be part of the ICAO or a distinct and independent entity?

(1) BIG or SMALL IFFAS start-up – and the compromise

The first important issue is the division of state positions into two distinct visions of the IFFAS and its role in remedying the aviation safety deficiencies of Developing/LDC countries identified in the USOAP. The first vision is that the IFFAS should start “Big,” effectively as a bank, with a significant structure and lending powers. The second vision is that the IFFAS should start “Small” with a limited structure and restricted powers as a facilitator and intermediary. In essence, it would help needy countries seek financial and technical assistance through existing mechanisms and regionally implement its projects.

IFFAS starting “Big”

The vision of an IFFAS starting “Big” with a maximum scope of functions and structure is an attractive option for the Developing/LDC countries, especially by those who expect to benefit from the IFFAS financial assistance.¹⁸⁴ This vision conceives that the IFFAS might assume certain functions of an international bank that directs money to remedy aviation safety deficiencies identified by the ICAO audits in needy countries. IFFAS would have a significant role with broad powers to lend, a sophisticated structure, and deep-pocket financing.

At this point, it should be restated that the IFFAS structure sought to discharge the function of assisting in the remedy of aviation safety deficiencies identified in needy Developing/LDC countries, and is a quasi-independent and self-financed entity, outside of the ICAO’s budget. The ICAO has three main functions in relationship to the IFFAS including: first, the ICAO supervises the IFFAS in assuring that any deficiencies identified through the ICAO’s auditing process are remedied; second, the ICAO provides administrative and technical service support to IFFAS to

184. Culled from public pronouncements that advocate limits on potential abuses made by ICAO’s Secretary General, Renato Costa Pereira.

minimize IFFAS costs on a cost-recovery basis. For example, ICAO's Technical Cooperation Bureau would not only help procure the client state's aviation goods and services but also finally certify their delivery at quality assured standards; and, third, the ICAO's audited finance processes will authorize payment to the suppliers, not the client states, of the goods and services contracted. In the end, the client states will have to pay back the loans secured through the IFFAS process.

Generally, those that adhere to this view consider that significant conditions should be attached to IFFAS loans. Nevertheless, a few potential recipient countries are lobbying that the IFFAS might impose minimal conditions on the loans such that the LDCs may, in many cases, remedy the deficiencies themselves and spend the money as they wish.

This starting "Big" approach has been subject to a number of criticisms for going too far and too fast without adequate funding. Developed countries, that in effect will be the donors to the IFFAS, often suggest that the IFFAS should not start "Big". Their main argument is centered on the issue of determining who is going to control the IFFAS assistance money. The Developed countries generally view the IFFAS as an indirect form of "foreign aid" from the Developed to the Developing/LDC countries. However, the donor Developed countries, the largest contributors to the ICAO, resist giving up control of how the assistance will be spent in the recipient Developing/LDC countries, the smallest contributors to the ICAO, on the basis of the following reasons:

- The Developed countries are reluctant to delegate power over foreign aid project priorities and spending to another institution, like the IFFAS, since the IFFAS' objective decision-making may be compromised by the assistance recipient states controlling the IFFAS. Although ultimately they may concede some control to the IFFAS, it must be recognized that most Developed countries prefer to choose the projects and the regions where the money is spent.¹⁸⁵
- The Developed countries are reluctant to permit the recipient states to remedy the deficiencies themselves and spend the money as they wish.
- Some commentators question why ICAO, through the IFFAS, should lend money at concessional rates to countries and for projects that existing banks might not find viable for lending.¹⁸⁶

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

186. Interview with Jonathan Aleck, Representative of Australia on the Council of ICAO (Apr. 30, 2002). This reflects his summary of other state positions rather than necessarily his own.

IFFAS starting "Small"

The vision of an IFFAS starting "Small" with a minimum scope of functions and structure tends to be accepted, with reservations, by many Developed and potential donor countries. Moreover, some Developing countries are increasingly finding certain versions of this vision attractive.

This vision refuses to grant IFFAS a broad function of being the actual lending institution, particularly since it is believed that IFFAS will not, and should not, raise enough money to make significant loans. Many countries argue that some of the traditionally large contributors to such ICAO projects, like IFFAS, will only participate if a proper "Business Plan is drafted that will attract funds."¹⁸⁷ To date, they have not seen a satisfactory Business Plan.

Despite these reservations, IFFAS opponents propose that if an IFFAS is created, it should have restricted functions acting "in-between" existing technical assistance and lending mechanisms, such as international, regional development, or national banks and the recipient LDCs. First, the IFFAS should act as a facilitator to the LDCs by providing information and helping prepare professional, meaning bankable/detailed, project proposals and reports. Recall that the TCB only prepares less sophisticated feasibility studies. Second, the IFFAS should act as an intermediary/broker. Moreover, such an IFFAS would be an umbrella organization with its head office, probably in Montreal, providing financial information, and administrative/quality assurance including oversight services to the needy states and approved projects. However, the work of such an IFFAS would probably be implemented regionally.¹⁸⁸

In this view, IFFAS should start with a restricted role, a smaller structure, voluntary membership, voluntary, limited, and interim financing until the next General Assembly in the autumn of 2004. IFFAS would start with a few pilot projects and develop a track record and credibility so that its progress may be evaluated in the future.¹⁸⁹ The guiding management principles, reiterating Assembly Resolution A33-10, would be accountability, efficiency, effectiveness, and transparency.¹⁹⁰

This gradualist and evolutionary approach, in turn, has three apparent main sub-groups of States, going from the fewest reservations to the most reservations on the nature and scope of IFFAS.

- Certain Developing countries, while sympathetic to the idea of

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

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

189. *Id.*

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

starting the IFFAS “Big”, are willing to accede to the gradualist approach so that at least the urgent need of LDCs are addressed as soon as possible. Some of these countries that attribute a broader scope to IFFAS’ intermediary/broker role such that the IFFAS may not only help arrange the bank loan for the LDC but also become a small stakeholder for bigger loans/assistance projects.

- Certain Developed countries substantially agree with the start small approach to an IFFAS. However, they want an IFFAS that is subject to and imposes a very strong battery of legal, administrative, and financial controls.¹⁹¹
- Certain Developed countries have reluctantly acceded that an IFFAS will be created. Nevertheless, they may be reluctant to contribute funds since they prefer other mechanisms, particularly, bilateral and regional, to address the problem. They argue that the IFFAS should start as a small entity that is subject to the strongest possible legal, administrative, and financial controls. Furthermore, these states have been especially adamant not to approve the IFFAS until the functions and structure of IFFAS are clearly defined and agreed upon.¹⁹²

The Compromise

The draft Administrative Charter coming from the ICAO Council on December 4, 2002 is a rather interesting compromise developed by the Working Group that prepared it. The Working Group deliberated on whether the IFFAS should provide grants or loans, and this deliberation crossed over and fortuitously blurred the “Big” versus “Small” IFFAS controversy.

In the Working Group, some argued that the IFFAS should only provide outright grants to remedy needy country safety deficiencies identified by an ICAO audit. It was suggested that this would permit the IFFAS to avoid many banker’s loan-making problems, including having to address the credit-worthiness of the beneficiaries, interest rates, appropriate repayment periods, and bad debts. Furthermore, it was argued that an advantage of grants is that they recognize the probability that the benefi-

191. In my interpretation of public declarations at the 166th ICAO Council meetings, countries like Australia, France, Ireland, and Italy assume this view in various ways. Interview with Bert Kraan, Senior Project Manager, Safety and Security, Department of Civil Aviation of the Netherlands (May 28, 2002) (expressing that the Netherlands appears to also be in this school of thought). See *EU Contribution*, *supra* note 7, for a report by the European Union and its Commission supporting this view.

192. In the author’s interpretation of public declarations at the 166th ICAO Council meetings, countries like Canada, Japan, and the USA (and Germany, Spain, and the United Kingdom to a lesser extent) appear to assume this view in various ways.

ciaries would largely be countries, at least in the early days of IFFAS, which already would be unable to pay their minimum rate contributions to the ICAO, meaning that they would find it difficult to meet any schedule of loan repayments.¹⁹³

On the other hand, the majority in the Working Group considered that the IFFAS should be designed to be self-financing and that beneficiary countries would feel a greater commitment to a project financed by a loan that had to be repaid. This view is closer to the spirit of Assembly Resolution A33-10.¹⁹⁴

The draft Administrative Charter bridged both views. In accordance with the second approach, it ascribes to IFFAS the primary function of disbursing loans at concessional interest rates. However, in recognition of the merit of those favoring grants, the IFFAS has the flexibility of awarding grants and zero interest loans in exceptional circumstances where the Governing Body deems it appropriate and necessary.¹⁹⁵

(2) *Where is the money going to come from to fund the IFFAS?*

A key and often-repeated question is: “where is the money going to come from”¹⁹⁶ to start and develop the IFFAS? The sources of funding the IFFAS will effect the IFFAS’ ability to assist its potential Developing/LDC client in financing an aviation safety-related project.

This issue is particularly pivotal if the IFFAS should start “Big” as a bank because it would eventually need access to billions of dollars. On the other hand, even if the IFFAS starts “Small” as primarily a facilitator, the amount of start-up funds required are estimated between U.S. \$5 million and \$60 million dollars, depending upon what state or expert makes the estimate and what assumptions are applied.

On a general level, the IFFAS concept appears to imply that the Developing/LDC countries are to be the IFFAS recipients while the Devel-

193. *Establishment Working Paper, supra* note 128, at 3. Australia was a particularly strong proponent of this position. It was suggested that an IFFAS should provide outright grants and subsidies – rather than loans as presently envisaged – to countries needing assistance. Such assistance – money and expertise – could be used to facilitate efforts to obtain further necessary assistance from other sources. The principal advantage of this proposal is that in many cases it could target the assistance money directly to the specific aviation projects and needy LDC countries. Moreover, this would be achieved without further burdening countries that already suffer from incredible debt loads and are seriously challenged to pay back the principal and small interest on IFFAS loans. Interview with Jonathan Aleck, Representative of Australia on the Council of ICAO (July 25, 2002 & July 29, 2002).

194. *Id.*

195. *Id.*

196. Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26, 2002 & Aug. 15, 2002); Interview with Jonathan Aleck, Representative of Australia on the Council of ICAO (July 25, 2002 & July 29, 2002); Interview with Edward Stimpson, Representative of the United States on the Council of ICAO (May 14, 2002).

oped countries will be the contributors. However, the Assembly Resolution of A33-10 in 2001 assured that the IFFAS was not considered another mandatory foreign aid mechanism.¹⁹⁷ Furthermore, this Resolution provided the framework of possible IFFAS funding subject to three principles, already mentioned above: first, the IFFAS financing is constrained such that the IFFAS is to be developed, established, and operated with “complete independence from the ICAO’s Programme Budget;”¹⁹⁸ second, as a short-term step, states are encouraged to make “voluntary contributions to finance the preparatory work in development of the IFFAS;”¹⁹⁹ third, in the short to long run, other interested parties like private and public international aviation-related organizations, airlines, airports, air navigation service suppliers, aircraft/engine/avionics manufacturers, and civic society are also encouraged to make voluntary contributions to IFFAS.²⁰⁰

The main basis of IFFAS funding appears to be “voluntary contributions” in both the short and long run.²⁰¹ In the short run, the amount of seed money for the IFFAS actually committed by January 1, 2003 has been rather paltry relative to the expectations created:

- Forty-seven ICAO member states have contributed U.S. \$222,709.²⁰² These funds come largely from within the ICAO as these states have chosen to commit at least part of their share of the ICAO program budgetary surplus to the IFFAS project. The average contribution is around U.S. \$4,745 dollars with over one-third of all contributions originating from one country.²⁰³
- The European Commission has pledged €200,000 for each of the years of 2002 and 2003.²⁰⁴
- At the December 4, 2002 ICAO Council meeting, there was a question of whether over US three million dollars held in arrears under a special account of long-outstanding arrears could be allocated to fund the IFFAS.²⁰⁵ The Council, seeking guidance on interpreting clause three, which governs the incentives for settling

197. *IFFAS Resolution*, *supra* note 109, at cl. 2(b)(1).

198. *Id.* at cl. 2(b)(4).

199. *Id.* at cl. 5(a). Indeed, to facilitate the contribution of initial seed money to get the IFFAS launched, states are encouraged to credit “any amount of their share of any distributable surplus from the ICAO Programme Budget to the IFFAS account which will be held in trust by ICAO.” *Id.* at cl. 5(c).

200. *Id.* at cl. 6.

201. *Id.* at cl. 5(a).

202. The amounts and interpretations are based on this writer’s notes and culled from discussions at the 167th Session of the ICAO Council (Dec. 4, 2002).

203. *Id.* The one country contributing one-third of all contributions is France at U.S. \$90,700. *Id.*

204. *Id.*

205. *Id.*

such arrears, of Assembly Resolution A33-27, has submitted the question to the Extraordinary 34th Session of the ICAO Assembly to be held in Montreal in March 31 to April 1, 2003.²⁰⁶

This relatively small amount of seed money presently committed to the IFFAS mechanism has been interpreted two opposite ways. On the one hand, IFFAS proponents suggest that this is a great start and that once the IFFAS is formally created and actively starts soliciting contributions, the funds will pour in. On the other hand, IFFAS skeptics suggest that the limited amount of the contributions reflects a lack of strong support for the concept such that there is a risk that the money might soon be exhausted and the IFFAS will collapse as a fiasco.²⁰⁷ Furthermore, many of the usual major contributors to such ICAO initiatives have indicated that they will not pledge money to the IFFAS until such time as their reservations are addressed.

The IFFAS clearly requires other sources of funding. As discussed earlier, other interested parties, like private and public international aviation-related organizations, airlines, airports, air navigation service suppliers, aircraft/engine/avionics manufacturers, and civil society, are also encouraged to make voluntary contributions in the future.²⁰⁸ To date, no contributions have come from these sources. However, there is some optimism that funds will start coming from these and other contributors once an effective informational and promotional program begins respecting the IFFAS. The Transitional Rules of the IFFAS require that the ICAO Secretary-General “prepare and submit to the Council during the 168th Session (i.e. early 2003), a work program, a timetable and a projected budget”²⁰⁹ for “preparatory work which is necessary to initiate and ensure the effective and efficient operation of IFFAS.”²¹⁰ More specifically, the Secretary-General is mandated to spend money from the exclusively IFFAS account on such matters as “raising and securing funds and accumulating capital, with a view to providing for the necessary administration and essential operations of IFFAS. . .”²¹¹ Accordingly, the ICAO Secretariat is working on a framework for an informational/promotional program to seek contributions and support from, *inter alia*, states, organizations, banks, airlines, airports, aerospace manufactures, and civil society in general.²¹²

206. *Id.*

207. The interpretations are based on this writer’s notes of various positions voiced and culled from discussions at the 166th Session of the ICAO Council (June 6, 2002 & June 10, 2002).

208. *IFFAS Resolution*, *supra* note 109, at cl. 6.

209. *Establishment Working Paper*, *supra* note 128, at app. A, *Transitional Rules*, cl. 10.

210. *Id.* at app. A, *Transitional Rules*, cl. 8.

211. *Id.* at app. A, *Transitional Rules*, cl. 9(a).

212. Culled from discussions at the 167th Session of the ICAO Council (Dec. 4, 2002).

At this point, it is important to evaluate the advantages and disadvantages of a variety of possible models of sources of funding for the IFFAS mechanism in the long run: first, there is the “voluntary contribution” funding source that has already been mentioned; second, there are two existing analogous ICAO models; and third, a worldwide charge/levy on airline passengers.

a. Voluntary Contributions: To start, the A33-10 Assembly Resolution appears to emphasize that “voluntary contributions” by states and other interested parties in aviation will be the IFFAS’ primary source of funding.²¹³ To date, this has been the primary mechanism relied upon.

There are two main disadvantages to such a source of funding. First, on the legal level, concerns have been expressed by a number of countries whether sub-national entities could legally contribute to a fund, like the IFFAS, that is created by an international treaty mandated organization like the ICAO.²¹⁴ Second, pragmatically, an important challenge to such financing is that the IFFAS revenue stream might become very volatile and fluctuate wildly with the vagaries of contributor whims. This might affect the quantity and quality of projects in which the IFFAS can and will assist. Thus, it is worthwhile examining other funding mechanisms that may complement voluntary contributions.

b. Existing Analogous ICAO Models: There are two working models presently operating within the ICAO context that may at least partly serve as a template for the IFFAS to generate a steady revenue stream and assure cost-recovery. First, there is the TCB experience discussed earlier. Second, a regional analogy of financing of air navigation services that has been successfully administered by the ICAO over many years already exists in the nature of the joint financing agreements.

Joint financing agreements constitute proof that it is possible to establish and administer a fund that implements the ICAO SARPs on air navigation through the implementation of global safety standards.²¹⁵ Many years ago, twenty-three ICAO Contracting States signed the Icelandic and Danish Joint Financing Agreements under the auspices of the ICAO.²¹⁶ These signatory states currently assume financial responsibility and recover costs through user charges for the provision and operation of certain air navigation and traffic facilities and services provided for civil aircraft flying north of the 45th latitude across the North Atlantic.²¹⁷ Al-

213. *IFFAS Resolution*, *supra* note 109, at cl. 5(a).

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

215. See Abeyratne, *supra* note 4, at 397.

216. *Id.*

217. See *id.* at 397-98, providing the following background information:

- The Danish and Icelandic Joint Financing Funds were created after World War II to en-

though these joint financing models are helpful precedents, it must be emphasized that the creation of an IFFAS is distinctive in the nature and scope of its functions as well as structure.²¹⁸

sure the availability of air navigation services needed for the safety of civil aviation over the North Atlantic;

- Installations in Greenland, Iceland and the Faroe Islands put into place and used during the war were retained to service civil flights after the war;
- Since Denmark and Iceland were only modest users of the services, it would not have been fair to ask them to bear the full costs of the services benefiting all users operating flights over the North Atlantic;
- In the early years of the Joint Financing Agreements there were no user charges; the costs of the services were financed by the States parties to the Joint Financing Agreements on the ratio of the crossings by airlines of their States over crossings by airlines of all the States parties to the Agreements;
- In the 1970's, a user charge mechanism was introduced to provide for the recovery of the costs allocable to international civil aviation;
- The Joint Financing Agreements ensure that funds are available on a timely basis to provide the stipulated services and that the Governments of Denmark and Iceland do not have to bear the costs of services for which they are only modest users;
- The Joint Financing Agreements are administered by the ICAO Secretariat under the direction of the ICAO Council and the Council's Joint Support Committee; and
- The role of the Joint Support Committee includes mainly the approval of cost estimates, actual costs, audit reports, assessments on contracting Governments, user charges, adjustments, and payments to the Provider States. It also considers proposals for new projects and new capital expenditures for the services provided by Denmark and Iceland under the Joint Financing Agreements.

Today there are now twenty-three contracting States to the Icelandic Agreement and they reimburse ninety-five percent of the total costs of air navigation services under the Agreement. In 2000, this amounted to approximately \$21 million. User charges levied on airlines account for 90% of the total cost. *Id.* at 397.

See *id.* at 395-96, for a good explanation of the legal basis – *Chicago Convention* and Assembly resolutions, *inter alia* – of these agreements.

218. *Id.* at 398-99. In the past, when the prevalent concept discussed was a proposed International Aeronautical Monetary Fund (rather than the more limited IFFAS today), Dr. Abeyratne pointed out a number of fundamental differences between the International Aeronautical Monetary Fund (that may be considered similar to the IFFAS for analogy purposes below) and the Joint Financing mechanism. To facilitate the comparison, IFFAS is put in brackets after each reference to the International Aeronautical Monetary Fund below.

- The Joint Financing Funds and the International Aeronautical Monetary Fund [similarly IFFAS] serve two different purposes. The Joint Financing Funds were created in order to finance services essential to international civil aviation. These services needed to be operated by Denmark and Iceland because of the geographical location of Greenland, Iceland and the Faroe Islands in the North Atlantic. The services had to be financed by the various States which airlines were major users of those service in due fairness to Denmark and Iceland which were and still are only modest users of the services. In the case of the International Aeronautical Monetary Fund [similarly IFFAS], this Fund [similarly IFFAS] is destined to finance services required by specific States in great part for their own purposes in ensuring safety and efficiency in their territories. Therefore, the International Aeronautical Monetary Fund [similarly IFFAS] has a commercial value to the States requesting assistance, being considered as an absolute grant or as a loan with which acts to the benefit of the beneficiary State. The Joint Financing mechanism, on the other hand, effects the reimbursement of expenses;

c. *User Charge/Levy*: There is a third source of possible IFFAS funding that was proposed and rejected by the ICAO Assembly, largely because of Developed countries concerns, at the time of the defunct for-bearer of the IFFAS, the International Aeronautical Monetary Fund. The defeated concept was to apply a mandatory worldwide charge/levy of an additional one U.S. dollar per every passenger ticket sold. For example, if this formula had been applied to the scheduled traffic volume for the year before the World Trade Center tragedy, the year of 2000, when commercial airlines carried 1,647 million passengers,²¹⁹ the proposed fund would have generated at least 1.647 billion U.S. dollars.

An important question is whether the user charge/levy concept should be revisited given the broad imposition of such charges recently to fund aviation security programs in many Developed states. Possibly, the political climate today may make user charges/levies more palatable. A heuristic exercise is to use the same year 2000 figures just mentioned and estimate the revenues that might be generated for an IFFAS if the charge is not applied globally and only applied to a hypothetical twenty percent

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- The two Joint Financing Funds provide services, which are similar and recurring every year. It is possible to administer these Funds with a minimum staff and a few meetings of the Joint Support Committee every year. There are also proposals for new projects and new capital expenditures but these are linked to the services to be provided under the Joint Financing Agreements. In the case of the International Aeronautical Monetary Fund [similarly IFFAS] there would be as many different projects as there are requests. It may require great effort by the staff concerned in evaluating each of the proposed projects, which may invariably be very different from each other. Furthermore, it may require significant resources to administer the numerous projects retained and to follow-up on each of the approved projects. The administrative workload involved could be very heavy and may require more than a Section staffed at minimum. The same problem could confront the special panel, task force or Board, as the case may be, which may be required to decide upon the validity or necessity of numerous non-recurring projects. As opposed to this scenario, the Joint Support Committee, which is mandated to oversee the Joint Financing mechanism, can follow-up more easily the provision of the services under the Joint Financing Agreements due the recurring aspects of most of the activities provided by Denmark and Iceland;
 - The Danish and Icelandic Joint Financing Agreements have no political implications since the services financed are necessary for the international aviation community. The International Aeronautical Monetary Fund [similarly IFFAS], on the other hand, is established to consider the request for assistance by each State on a piecemeal basis;

The Joint Financing Funds are now financed mostly by users through a user charge imposed on flights crossings the area determined in the Agreements. The contracting States still contribute for a small portion of the costs, which cannot be attributed to international civil aviation. There is an adjusting mechanism of the user charges and the assessments to contracting Governments through which they may no more and no less than the audited actual costs of the services. The International Aeronautical Monetary Fund [similarly IFFAS] would have no such mechanism in operation. *Id.* at 398-99.

219. Figures culled from World Tourism Organization reports as reflected in the INTERNATIONAL CIVIL AVIATION ORGANIZATION, ANNUAL REPORT OF THE COUNCIL – 2000, 2 ICAO Doc.9770 (2000).

of the passenger tickets sold in the Developing/LDC states and possibly a few Developed countries. Almost 330 million US dollars would be generated for the year 2000. Is such a one dollar charge/levy per ticket to improve global aviation safety exorbitant when one considers the much larger charges/levies being applied by many Developed countries to fund aviation security?

In the long-run, for IFFAS to be successful, a solution must be developed soon on how to adequately fund both it and its projects. Some commentators have suggested that if a solution is not found, there is a danger of the IFFAS becoming a structure that is an empty shell. The IFFAS may create excessive expectations that are unrealizable as needy LDCs line up for money that never comes. Moreover, there is always the danger that the IFFAS may divert resources from worthwhile programs like the Technical Cooperation Bureau.²²⁰

(3) *Should the IFFAS be part of the ICAO or a distinct and independent entity?*

The third important issue is whether the proposed IFFAS should be under the ICAO's control or operate as a distinct and independent entity. A related question deals with the nature of IFFAS, is it to be a "mechanism", a bank, some other corporate body, or a fund?²²¹

The ICAO Council decision on December 4, 2002 was to create an IFFAS within the ICAO, without a separate legal status, to simplify and expedite the process.²²² A brief review of the opposing arguments voiced that resulted in this compromise is a heuristic example of Council decision-making.

There have been two main conflicting views of the long-run status of IFFAS in relationship to the ICAO. On the one hand, many Developed countries have argued that from birth, IFFAS must be established as an entity independent and distinct from the ICAO. On the legal side, they emphasize 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 by request by participating States and on a cost-recovery basis."²²³

On the other hand, some have argued that in the short-run IFFAS may start under ICAO's control. However, in the long-run it may eventually evolve into an independent and distinct entity. It is suggested that

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

221. *Establishment Working Paper*, *supra* note 128, at 3.

222. *Id.*

223. *IFFAS Resolution*, *supra* note 109, at cl. 2(b)(4) & 2(b)(5). See *Establishment Working Paper*, *supra* note 128, at 4.

this approach is legally consistent with the provisions of Assembly Resolution 33-10 that in 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*.”²²⁴ In this view, an IFFAS under the ICAO’s supervisory control and requiring IFFAS Governing Board approval of IFFAS projects may still be consistent with the Assembly imposed requirement of not putting any burden on the ICAO’s regular program budget if a long run financing approach is determined. For example, if the TCB and/or voluntary and/or joint financing approach(es) is followed.²²⁵

Pragmatically, the ICAO Council adopted the Working Group’s recommendation of creating the IFFAS within the ICAO to simplify and expedite the process.²²⁶ Since the expectation is that IFFAS is to be operated under the ICAO legal regime, it has been understood that that it would not have a separate legal status at this time.²²⁷ However, since it is to be operated independently of ICAO’s regular budget, the means of distinguishing IFFAS from the rest of the ICAO must clearly be identified.²²⁸

Some interesting legal issues are unresolved given that the IFFAS is not only to operate under the ICAO umbrella without an independent legal status but also to remain independent of ICAO’s Program Budget. To start, a clear statement of accountability of the IFFAS Governing Body to the ICAO must be articulated. Moreover, while the ICAO Council may devolve various tasks onto the IFFAS Governing Body, the Council, and the ICAO member states cannot avoid assuming responsibility for what is done by or in the name of an IFFAS that is part of the ICAO.²²⁹ For example, what is the ICAO’s potential legal liability for non-performing loans extended by IFFAS to client states? Indeed, will the ICAO, through its Council, cover bad IFFAS loans and other potential legal liabilities associated with IFFAS activities? Is the ICAO financially capable to do so? In recognition that a poorly thought out strategy for IFFAS

224. *IFFAS Resolution*, *supra* note 109, at cl. 3(c) (emphasis added).

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

226. *Establishment Working Paper*, *supra* note 128, at 4. 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 by 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.*

227. *Id.* at 5.

228. *Id.* at 3.

229. *Id.* at 4.

could have devastating financial repercussions for the ICAO, various insurance, contingency funds and other options are to be studied by the IFFAS Governing Body and ultimately approved by the ICAO Council to cover these and other risks.²³⁰ There is no doubt that whatever liability protection is undertaken, it should be proportionate to the risk while recognizing that the risks to IFFAS and ICAO are minimal during the transitional period from December 4, 2002 to June 13, 2003.²³¹ However, one commentator sums up the overall concern best when he states, "whatever IFFAS may ultimately do, it is important that steps be taken to insure that it does not become a liability to the ICAO or the ICAO Program Budget."²³²

Despite these reservations, ICAO proponents argue that, on a pragmatic level, in the long-run IFFAS will pick up momentum and may eventually be spun out of ICAO. They point out a number of advantages arising from permitting the IFFAS to be under the ICAO supervisory umbrella in the first few years of its existence. These benefits arise at the time that the IFFAS must facilitate a needy state's securing of a loan from a financial institution and/or provide seed money, a loan or a guarantee to the LDC itself.

- First, as stated earlier, ICAO supervises the IFFAS in assuring that any deficiencies identified through ICAO's auditing process are remedied.²³³ Thus, IFFAS provides an ICAO solution to an ICAO objective. The IFFAS specifically remedies a state's aviation safety deficiencies identified in the USOAP, recognizing that in turn the USOAP was created to satisfy the objectives of ICAO's Global Aviation Safety Plan.²³⁴
- Second, as mentioned above, ICAO provides administrative and technical service support to IFFAS on a cost-recovery basis.²³⁵ For example, the ICAO's Secretariat processes might be used to help procure the client state's aviation goods and services and finally certify their delivery at quality assured standards through the Technical Cooperation Bureau. Furthermore, the costs of technical experts, lawyers, and others can be minimized in the LDC's preparation of its "bankable"/detailed project report by using existing internal ICAO staff rather than paying exorbitant fees to outside

230. *Id.* at 5.

231. Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (Jan. 14, 2003).

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

233. *IFFAS Resolution*, *supra* note 109, at cl. 3(d)(6).

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

235. *Establishment Working Paper*, *supra* note 128, at 4.

experts. Needless to add, if the IFFAS disburses its money through ICAO, the work will probably, but not necessarily, come back to ICAO mechanisms, for example, to the TCB.²³⁶

- Third, ICAO's audited finance processes authorize payment to the suppliers – not to the client states – of the goods and services contracted. This assures transparency, accountability, effectiveness, and integrity in the process.

V. CONCLUSION

While the concept of an IFFAS may exceed certain state expectations of the ICAO, it appears to be achievable under agreed conditions. On the one hand, the need for improved aviation safety in certain states and regions remains unquestioned, as the ICAO has identified aviation safety deficiencies through the USOAP. On the other hand, the extent of the ICAO's role in assisting the remedy of these deficiencies is still to be determined. While the *Chicago Convention* clearly imposes an obligation on the state to correct divergences from the minimum SARP requirements, arguably this does not appear to preclude the ICAO from assisting 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.

Now that the IFFAS is developed, it must be materialized with not only a complete definition of the nature and scope of its functions and structure but also adequate funding. There are two key pre-conditions, imposed by the Assembly and given effect by the Council, to the establishment of the IFFAS that impose financial constraints on the nature and extent of its development: first, the IFFAS is to be constituted of a voluntary membership and participation; second, it is to be funded primarily through voluntary contributions as the Assembly stated that the IFFAS is not to burden the regular program budget of the ICAO. On the one hand, in the short-run, its growth may be stymied since certain states, including significant Developed countries, will probably opt out of membership in and contributions to the IFFAS. On the other hand, in the long run, the IFFAS concept may be able to survive and eventually even flourish, if a reasonable and strong source of funding is ultimately found. Accordingly, it is argued that membership must be broadened to include not only state members but also private and public international organizations, airlines, manufacturers, and other entities as suggested in the Assembly Resolu-

²³⁶ Interview with A. P. Singh, Representative of India on the Council of ICAO (May 15, 2002).

tion A33-10.²³⁷

In the medium to long term, it can be expected that by the next complete ICAO Assembly the voluntary members and funding of the IFFAS will channel assistance to a few pilot projects to remedy certain aviation safety deficiencies identified by the ICAO's USOSAP in particular LDC countries. Certain IFFAS skeptics, most opponents have now become skeptics, pessimistically believe that the initial under-funding will doom the IFFAS mechanism. On the other hand, IFFAS proponents optimistically believe that many member state skeptics may eventually decide to join as members and voluntary contributors as the IFFAS is successful in completing pilot projects.

Insofar as the IFFAS is less than a full-fledged bank, it probably will grow as an umbrella organization. Thus, as a facilitator to the benefit of Developing/LDC countries, it might be complementary to existing and developing mechanisms of technical assistance at the international, regional, bilateral, multilateral, and plurilateral levels and in financial assistance, including regional development and international banks and funds, export credit agencies, and bilateral development institutions. Needless to add, the IFFAS will need to operate under tight management principles that provide transparency, accountability, effectiveness, and quality control.

The IFFAS may not always be strictly international in operation and execution. There may be a regional implementation of the ICAO's objectives. One idea that has been discussed by the ICAO Council is the possibility of a regional charge/levy that is collected and disbursed by the IFFAS for aviation-related projects in those Developing/LDC countries that have difficulty organizing themselves for this purpose.²³⁸ Furthermore, there may be a role for ICAO regional offices to implement IFFAS objectives.

The purpose of this article is to provide a balanced view of the problem and possible solutions so that decision-makers and their populations may make informed choices. There are many arguments that can be made for and against whether or not an IFFAS, some other mechanism, or no mechanism is needed to address the problem of assisting certain Developing/LDC countries lacking the will, ability, and/or means to remedy their USOAP identified aviation safety deficiencies. Nevertheless, one cannot question that a real need exists that ultimately threatens lives, property, and economic interests worldwide.

237. Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (May 10, 2002).

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

In this context, there is a tragic irony, inconsistency, and division between Developed and Developing/LDC country perceptions of the crises in aviation “security” and “safety.” For instance, certain Developed countries attribute such primacy to global aviation “security” that they apply an “ability-to-pay” principle permitting the generous transfer of resources from richer states to poorer states with security deficiencies when the poorer countries lack the means to remedy them. Many of these same Developed countries appear to argue that the costs to assist in remedying safety deficiencies, for example, through an IFFAS mechanism, should be paid for by the user country (i.e., the “user pay” principle) even if it lacks the necessary resources. While many Developing/LDC countries argue that global aviation “safety” is so important that the “ability-to-pay” principle applies and permits the generous transfer of resources from the Developed world to those states with safety deficiencies. These same Developing countries argue that security system upgrade costs, including some of those in the Developing countries, should be paid for by the user countries, often the Developed countries, since they have a much higher risk of security breaches.

In the end, the economic reality of limited resources and politically dictated priorities should not interfere with the world’s politicians finding a way to balance the priority attached to not only civil aviation “security” but also “safety.” Civil aviation security and safety each constitute a global and indivisible system such that if civil aviation security and/or safety are threatened in one country or region, security and/or safety breaks down and is threatened worldwide. The sovereign and international political will must be directed to recognize that state interests and passenger lives depend upon channeling sufficient resources to both objectives at the same time and, at a minimum, with equal priority.

The citizens of the world can hope for no more. Needless to add, they have a right to expect no less.