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**MOVING TOWARD CAPE TOWN CONFIDENCE:  
A PROPOSAL TO AMEND THE CHICAGO  
CONVENTION'S ANNEX 7 AND BOLSTER RELIANCE  
ON THE CAPE TOWN CONVENTION'S AIRCRAFT  
DE-REGISTRATION PROVISIONS**

LAWRENCE DILLON KING III\*

I. INTRODUCTION

**T**HE CAPE TOWN CONVENTION REGIME (CTC)<sup>1</sup> is increasingly looking as though it will become the preferred

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<sup>1</sup> In this article, the CTC refers to the international legal regime resulting from the combined effect of the Convention on International Interests in Mobile Equipment (Cape Town Convention) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Aircraft Equipment Protocol) on the international aircraft financing and leasing industry. The Cape Town Convention deals more broadly with “mobile equipment of high value or particular economic significance.” Convention on International Interests in Mobile Equipment pmbL., Nov. 16, 2001, 2307 U.N.T.S. 285 [hereinafter Cape Town Convention], <http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf> [https://perma.cc/39YF-TQS7]. The Aircraft Equipment Protocol is intended to “implement the [Cape Town Convention] as it relates to aircraft equipment.” Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment pmbL., Nov. 16, 2001, 2367 U.N.T.S. 599 [hereinafter Aircraft Equipment Protocol], <http://www.unidroit.org/english/conventions/mobile-equipment/aircraftprotocol.pdf> [https://perma.cc/FJ4W-N8YW]. Due to the importance of both instruments with respect to aircraft financing and leasing, and specifically this article’s analyses and conclusions, the abbreviation CTC is commonly used throughout the article to refer to the combined effect of both instruments for clarity and brevity. Where necessary though, the instruments are also referred to individually as the Cape Town Convention and the Aircraft

legal foundation upon which nations across the globe bolster their aircraft financing and leasing industries. As practitioners in the field know, facilitating the ability to finance and lease aircraft and aircraft equipment is crucial to spurring growth in the field of aviation. Increased access to financing brings with it significant benefits realized not only by businesses in the field, but also by the everyday consumer of air travel—the passenger.<sup>2</sup> Historically, one of the biggest obstacles to the aircraft financing and leasing industry was the lack of a substantive legal framework that established uniform rules and a clear system of remedies for rule violations.<sup>3</sup> That lack of clarity led to a number of major problems,<sup>4</sup> caused decreased financier confidence,<sup>5</sup> and was a driving force behind the push for the CTC.<sup>6</sup>

The CTC, on the other hand, helps to solve this problem and restore confidence. It embodies a substantive property law regime that, *inter alia*, creates secured interests in aircraft, establishes rules prioritizing those interests, and provides for actual,

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Equipment Protocol. For more information on the Cape Town Convention and the Aircraft Equipment Protocol, see INT'L INST. FOR THE UNIFICATION OF PRIV. L. [UNIDROIT], <http://www.unidroit.org/> [<https://perma.cc/J5SR-A5LP>].

<sup>2</sup> Lorne Clark & Jeffrey Wool, *Entry into Force of Transactional Private Law Treaties Affecting Aviation: Case Study—Proposed UNIDROIT/ICAO Convention as Applied to Aircraft Equipment*, 66 J. AIR L. & COM. 1403, 1408–10 (2001).

<sup>3</sup> See B. Patrick Honnebier, *The Cape Town Convention and the Aircraft Equipment Protocol: Protecting the Registered Secured Interests of Airline Lessees*, 30 AIR & SPACE L. 27, 27–28 (2005).

<sup>4</sup> Although countless others exist, the case of Kingfisher Airlines in India is one of the most commonly cited examples of the devastating potential of the pre-CTC system. That scenario involved a German financier that suffered “tremendous” and unnecessary financial losses due to its leasing of two Airbus aircraft to the Indian airline. Dean N. Gerber & David R. Walton, *De-registration and Export Remedies under the Cape Town Convention*, 3 CAPE TOWN CONVENTION J. 49, 49–51 (2014). As Gerber and Walton emphasize, the aircraft financier suffered these losses almost exclusively due to the lack of clear, unambiguous access to the ability to de-register the aircraft in India, despite the fact that the aircraft were actually repossessed by the financier. *Id.* Gerber and Walton go on to say that this case, had it been resolved under the CTC, would have been resolved differently. *Id.* at 50 n.2.

<sup>5</sup> See PROFESSOR SIR ROY GOODE, OFFICIAL COMMENTARY TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT para. 2.4–2.6 (3d ed. 2013) [hereinafter SIR GOODE'S OFFICIAL COMMENTARY]; *cf.* Gerber & Walton, *supra* note 4, at 49 n.1 (discussing the importance of an aircraft financier's ability to ensure prompt access to necessary remedies—in particular, aircraft de-registration and export—in the event of default, a risk analysis which can often lead to a financier's decision to not finance an aircraft at all).

<sup>6</sup> See Clark & Wool, *supra* note 2, at 1412–13.

meaningful remedies to parties that have been wronged under the regime.<sup>7</sup> And it does so in a comprehensive manner.<sup>8</sup>

As with any convention, however, the CTC is not without its problems. A comprehensive international convention can be a source of confusion, rather than confidence, when some of its provisions overlap with other previously established instruments. This is particularly true of international conventions dealing with aviation law, a field within which any new instruments are potentially affected by (if not subordinate to) a host of other instruments already in effect.<sup>9</sup> The CTC is no exception. For instance, one of the remedies specifically provided to creditors under the CTC—the de-registration remedy—is only necessary given the registration requirements and provisions of the Chicago Convention.<sup>10</sup> Yet the word “de-registration” itself is never mentioned in the Chicago Convention,<sup>11</sup> as will be discussed further in Section III.

An ambiguity like this has the potential to cause confusion and decrease confidence in an important regime such as the CTC. This problem, then, provides the determinative questions for this article. Does the Chicago Convention prescribe—or should it prescribe—rules governing what constitutes an appropriate process (or method) of aircraft de-registration? If not, then is it appropriate for the International Civil Aviation Organization (ICAO)<sup>12</sup> to expressly clarify that neither the Chicago

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<sup>7</sup> See Honnebier, *The Cape Town Convention and the Aircraft Equipment Protocol*, *supra* note 3, at 27–28.

<sup>8</sup> *See id.*

<sup>9</sup> The most obvious example is the Chicago Convention, which entered into force on April 4, 1947, and is the cornerstone of international aviation law. *See Current Lists of Parties to Multilateral Air Law Treaties*, INT’L CIVIL AVIATION ORG. [ICAO], <http://www.icao.int/Secretariat/Legal/Lists/Current%20lists%20of%20parties/AllItems.aspx> [<https://perma.cc/3DWL-HCUY>].

<sup>10</sup> *See infra* notes 92, 94–95 and accompanying text.

<sup>11</sup> *See infra* note 51 and accompanying text.

<sup>12</sup> The Chicago Convention led to the creation of ICAO and “sets forth the constitutive provisions regarding ICAO, including its objectives, organs and institutional structure and status as an international intergovernmental organization.” LUDWIG WEBER, *INTERNATIONAL CIVIL AVIATION ORGANIZATION: AN INTRODUCTION 1* (Pablo Mendes de Leon ed., 2007). In particular, ICAO is tasked with “[t]he adoption of international standards and recommended practices (SARPS) in the form of Annexes to the [Chicago] Convention, and amendments thereto.” *Id.* at 23. Having adopted 18 Annexes thus far, “one of its major functions in practice is to keep these 18 Annexes up-to-date by adopting appropriate amendments.” *Id.* This makes it ICAO’s role, likely through amending or adopting an Annex, to expressly clarify this issue if such a clarification is necessary, which this article argues is the case.

Convention nor ICAO intends to prescribe or control any such process?

Ultimately, as will be argued *infra*, ICAO should clarify that it defers control over governing the aircraft de-registration process to other legal instruments, such as the CTC, which are more integrally affected by the process itself. This would help mitigate some of the confusion surrounding the de-registration remedy under the CTC, which is minimizing its effectiveness. Specifically, this article argues that Annex 7 of the Chicago Convention should be amended to clarify that the Chicago Convention's terms are intended to defer control over the de-registration process itself to other more appropriate instruments.

In Section II, this article will discuss the Vienna Convention on the Law of Treaties (the Vienna Convention), and lay out its rules of treaty interpretation which will be applied in later sections. In Section III, this article will discuss the Chicago Convention and its registration requirements. This section will discuss the object and purpose of the Chicago Convention, its specific registration provisions, and why de-registration methods do not further the purpose of the Chicago Convention. In Section IV, this article will discuss the CTC and its de-registration remedies, as well as why those remedies are integral to the CTC's purpose, and why the CTC is the more appropriate regime to govern de-registration. In Section V, this article will discuss how ICAO has recently facilitated the aircraft financing and leasing industry's growth and how doing so in this case would yield a benefit. In Section VI, this article will propose an amendment to Annex 7 of the Chicago Convention clarifying the Chicago Convention's limited role in governing de-registration. The proposed amendment would clearly establish that ICAO takes a deference-based approach towards governing the process of aircraft de-registration, which would further the ability of other legal instruments—like the CTC—to implement effective, unambiguous rules for the de-registration process. In Section VII, this article will further emphasize why the current lack of clarity creates problems and how the proposed amendment would help restore clarity and accelerate the growth of the aviation industry.

## II. THE VIENNA CONVENTION'S RULES OF TREATY INTERPRETATION

First, before delving into the interpretation of any international treaty, an interpreter should identify the framework that

will be applied to interpret that treaty.<sup>13</sup> For the purposes of this article, the Vienna Convention on the Law of Treaties (the Vienna Convention)<sup>14</sup> will be used as the interpretive framework.<sup>15</sup> This section will highlight its general interpretive rules so that they can be applied to the Chicago Convention and to the CTC in the following sections.

Broadly speaking, the Vienna Convention provides a two-pronged method for interpreting a treaty. The first prong is the “general rule of interpretation,” which provides that such an agreement “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>16</sup> It further provides that “context” refers to the text of the agreement, “including its preamble and annexes,” as well as “[a]ny agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty” and “[a]ny instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”<sup>17</sup> Furthermore, in addition to context, an interpreter should consider “[a]ny subsequent agreement between the parties” or “[a]ny subsequent practice in the application of the treaty . . . regarding its interpretation,” as well as any international law that applies to the relationship between the parties.<sup>18</sup> Finally, a term is deemed to have “special meaning” if such a meaning was intended to be given to that term by the parties.<sup>19</sup>

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<sup>13</sup> This is especially true for the purposes of this article, which interprets both the Chicago Convention, clearly a public law treaty, and the CTC, which embodies both public and private law aspects. *Cf.* Clark & Wool, *supra* note 2, at 1403–04 (discussing the CTC’s embodiment of “private versus public law concepts and air law versus non-air law practices” and how to view “entry into force questions” in that context).

<sup>14</sup> Vienna Convention on the Law of Treaties arts. 31–33, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>15</sup> Although there is some debate on the subject of whether the totality of the Vienna Convention should be applied to private law treaties, the interpretive guidelines set forth in Articles 31–33 have been consistently used for that purpose and are undoubtedly useful in such interpretations. *See* Jürgen Basedow, *Uniform Private Law Conventions and the Law of Treaties*, 11 UNIF. L. REV. 731, 741–46 (2006). For more information on this debate, see generally *id.*, which provides an in-depth discussion of why the Vienna Convention should be utilized in the context of private law treaties.

<sup>16</sup> Vienna Convention, *supra* note 14, art. 31(1).

<sup>17</sup> *Id.* art. 31(2).

<sup>18</sup> *Id.* art. 31(3).

<sup>19</sup> *Id.* art. 31(4).

The second prong under the Vienna Convention provides for a “supplementary means of interpretation” in Article 32.<sup>20</sup> This supplementary means is to be utilized in two circumstances: to either “confirm the meaning” uncovered through the general rule’s application or “determine the meaning” where the application of the general rule “[l]eaves the meaning ambiguous or obscure or [l]eads to a result which is manifestly absurd or unreasonable.”<sup>21</sup> Article 32 further provides that this supplementary means of interpretation “includ[es] the preparatory work of the treaty and the circumstances of its conclusion.”<sup>22</sup> In the following sections, this framework is applied to the Chicago Convention and the CTC with an emphasis on interpreting provisions relevant to aircraft de-registration.

### III. REGISTRATION AND DE-REGISTRATION UNDER THE CHICAGO CONVENTION

To understand the importance of the CTC’s de-registration remedies—and how any action by ICAO could strengthen those remedies—one must begin with the Chicago Convention’s registration rules. The Chicago Convention forms the foundation for much of international aviation law and resulted in the creation of ICAO.<sup>23</sup> As discussed in more detail *infra*, without the Chicago Convention’s aircraft registration requirement there would be no need for any de-registration remedy under the CTC.<sup>24</sup> Accordingly, the Chicago Convention and its provisions relating to aircraft registration and de-registration are analyzed in this section, followed by an analysis of the CTC’s provisions relating to aircraft registration and de-registration in Section IV.

#### A. OBJECT AND PURPOSE OF THE CHICAGO CONVENTION

To determine the object and purpose of a treaty, interpreters often begin with the preamble. The preamble of the Chicago Convention provides as follows:

WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and under-

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<sup>20</sup> *Id.* art. 32.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *The History of ICAO and the Chicago Convention*, INT’L CIVIL AVIATION ORG. [ICAO], <http://www.icao.int/about-icao/History/Pages/default.aspx> [https://perma.cc/CZF3-TZPA].

<sup>24</sup> *See infra* notes 92, 94–95 and accompanying text.

standing among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

WHEREAS it is desirable to *avoid friction* and to *promote* that *cooperation* between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically.<sup>25</sup>

Of course, the Chicago Convention, which entered into force in 1947, has been in existence for quite some time.<sup>26</sup> As such, the treaty and its specific provisions have been interpreted countless times. It has been said that the Chicago Convention's preamble and provisions reflect a counterbalancing objective: the promotion of the aviation industry from an economic standpoint while increasing aviation safety.<sup>27</sup> It is with this purpose in mind, then, that the provisions of the Chicago Convention should be interpreted.<sup>28</sup> Specifically, Subsection II.B analyzes the aircraft registration requirements under Chapter III of the Chicago Convention in light of this purpose.

#### B. AIRCRAFT REGISTRATION UNDER THE CHICAGO CONVENTION

One of the foundational elements of the Chicago Convention is its aircraft registration requirements.<sup>29</sup> Specifically, Article 17 provides that “[a]ircraft have the nationality of the State in which they are registered.”<sup>30</sup> This is the major mechanism by which the Chicago Convention achieves its safety goals.<sup>31</sup> It does this by then assigning responsibilities and liabilities to the State

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<sup>25</sup> Convention on International Civil Aviation pmbl., Dec. 7, 1944, 15 U.N.T.S. 295 [hereinafter Chicago Convention] (emphasis added).

<sup>26</sup> See *supra* note 9 and accompanying text.

<sup>27</sup> See RONALD I.C. BARTSCH, INTERNATIONAL AVIATION LAW: A PRACTICAL GUIDE 19 (2012); JIEFANG HUANG, AVIATION SAFETY THROUGH THE RULE OF LAW: ICAO'S MECHANISMS AND PRACTICES 17–22 (Pablo Mendes de Leon ed., 2009).

<sup>28</sup> See Vienna Convention, *supra* note 14, art. 31.

<sup>29</sup> Cf. RUWANTISSA I.R. ABEYRATNE, AVIATION TRENDS IN THE NEW MILLENNIUM 15 (2001) (“The most fundamental characteristic of an aircraft at international law is its nationality.”).

<sup>30</sup> Chicago Convention, *supra* note 25, art. 17.

<sup>31</sup> See ABEYRATNE, *supra* note 29, at 14–15.



of registry.<sup>32</sup> In other words, it first requires the party or parties in control of an aircraft to proclaim that aircraft's "nationality"<sup>33</sup> with respect to a specific Member State and second, assigns to that Member State certain responsibilities with respect to maintaining certain levels of safety.<sup>34</sup> Therefore, the Chicago Convention (and by extension ICAO) can regulate safety by ensuring that one State—the State in which the aircraft is registered—takes international responsibility for an aircraft if violations of its provisions exist.<sup>35</sup>

Equally as important for the purposes of this article, though, is the next provision. Article 18 provides that "[a]n aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another."<sup>36</sup> There are two significant aspects of this article. First, this article (as indicated by its title) prevents "dual registration" of an aircraft in more than one State at a time.<sup>37</sup> In other words, an aircraft cannot, for example, be validly registered in both Canada and the United States simultaneously. Second, it provides for the ability to change the State of registration.<sup>38</sup> In other words, if the aircraft is originally registered in Canada, its registration may be changed to the United States.

The single State of registry requirement itself is essential to furthering the aviation safety purpose of the Chicago Convention. Allowing only one State to register an aircraft, and thereby take responsibility for that aircraft with respect to a number of safety concerns (e.g. that aircraft's "airworthiness"), allows for efficient and effective regulations in that regard.<sup>39</sup> Therefore, the requirement that one State take on the responsibility that flows from registering that aircraft is tantamount to the Chicago Convention's ability to serve its aviation safety purpose.

An important preliminary question to ask is whether the Chicago Convention prescribes, or even promotes, any particular

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<sup>32</sup> For instance, Article 31 of the Chicago Convention requires the State of registry to "issue[ ] or render[ ] valid" that aircraft's certificate of airworthiness. Chicago Convention, *supra* note 25, art. 31; see BRIAN F. HAVEL & GABRIEL S. SANCHEZ, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL AVIATION LAW 328–29 (2014).

<sup>33</sup> See Chicago Convention, *supra* note 25, art. 17.

<sup>34</sup> See *supra* notes 29–32 and accompanying text.

<sup>35</sup> See HAVEL & SANCHEZ, *supra* note 32, at 328–29.

<sup>36</sup> Chicago Convention, *supra* note 25, art. 18.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See *supra* notes 29–32 and accompanying text.

registration process. The answer to that question is that it does neither.<sup>40</sup> The text of the Chicago Convention itself, in Article 19, provides that “registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations.”<sup>41</sup> In fact, it only requires, under Article 21, that the registering State report that registration to ICAO and make certain data regarding that registration available upon request.<sup>42</sup> In other words, assuming that the registering State has reported that registration to ICAO and has collected appropriate data about that registration, the Chicago Convention leaves governance of the registration and transfer of registration processes within a particular State up to that State.<sup>43</sup> For instance, the Chicago Convention allows the United States to determine that it will not allow non-U.S. citizens to register aircraft in its country.<sup>44</sup>

This passiveness towards process-related issues makes sense in light of the Chicago Convention’s aviation safety purpose as well. The single-State registration requirement is only necessary to promote aviation safety to the extent that the single-State status is ensured.<sup>45</sup> As long as the registration mechanism is fulfilled, the Chicago Convention’s aviation safety purpose can be enforced by holding the violating State of registry responsible.<sup>46</sup> This is true regardless of *how* that State registered its aircraft, so long as the aircraft *is* registered.<sup>47</sup> Finally, this is confirmed through the supplementary means of interpretation by subsequent state practice, given that a number of States have inter-

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<sup>40</sup> Nothing in the text of the Chicago Convention or its Annexes prescribes a specific process by which States should register their aircraft. *See generally* Chicago Convention, *supra* note 25.

<sup>41</sup> *Id.* art. 19.

<sup>42</sup> *Id.* art. 21.

<sup>43</sup> Havel and Sanchez address the issue in the following manner:

Each State has complete flexibility, however, in deciding what requirements it will impose for registration including whether it will insist (as the United States has) that only its own citizens may own aircraft placed on its register and whether (where ownership and operation are separated, as in a lease) the registering entity should be the owner or the operator or both.

HAVEL & SANCHEZ, *supra* note 32, at 341.

<sup>44</sup> *Id.*

<sup>45</sup> *Cf. supra* note 39 and accompanying text (emphasizing that the registration requirements of the Chicago Convention are important simply because of the responsibility a State assumes after registering aircraft).

<sup>46</sup> *See* HAVEL & SANCHEZ, *supra* note 32, at 328–29.

<sup>47</sup> *Id.* at 340–41.

preted this provision to give themselves freedom in tailoring the registration of aircraft to their own needs.<sup>48</sup>

This leads to the issue of the Chicago Convention and whether it controls, or should control, the de-registration of aircraft. Two major issues for the purposes of this article are whether de-registration is an implicit element in the concept of transferring registration under the Chicago Convention and if so, whether any particular method of aircraft de-registration prior to re-registration is contemplated or furthers the Chicago Convention's purpose. Both issues are explored in Subsection III.C *infra*.

### C. CHICAGO CONVENTION PROVISIONS RELEVANT TO DE-REGISTRATION

This article argues that ICAO should explicitly defer control over the *process* of de-registering aircraft. Specifically, ICAO should make it clear, by amending Annex 7 of the Chicago Convention, that the Chicago Convention should not be construed as an obstacle to other legal instruments that do appropriately govern that process. This is supported by the fact that, as will be discussed *infra*, the Chicago Convention was drafted to leave the process of de-registration, implicit in its registration requirement provisions, outside of its scope.

The Chicago Convention does not promote or prescribe any particular de-registration process.<sup>49</sup> Applying the Vienna Convention's rules of treaty interpretation to the Chicago Convention's relevant provisions leads to that conclusion. First, those rules require an interpreter to look to the text of the Chicago Convention with respect to whether any specific de-registration method or process is mandated.<sup>50</sup> A review of the Chicago Convention shows no explicit mention of de-registration.<sup>51</sup> Instead, the Chicago Convention only implicitly recognizes the concept of de-registration as an extrapolation of the prohibition on dual registration, juxtaposed with the ability to transfer registration.<sup>52</sup>

As such, one must look at the explicit registration requirements to determine the extent to which any de-registration process is implicitly promoted, if at all. Again, the text of the treaty

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<sup>48</sup> See *id.*

<sup>49</sup> See Chicago Convention, *supra* note 25, ch. III.

<sup>50</sup> See Vienna Convention, *supra* note 14, art. 31(1).

<sup>51</sup> See *generally* Chicago Convention, *supra* note 25.

<sup>52</sup> See *id.* art. 18.

with respect to registration requirements indicates that the treaty neither prescribes nor promotes any process for registering aircraft. In fact, it does quite the opposite, with Article 19 explicitly leaving the regulation of aircraft “registration or *transfer of registration*” process to Member States.<sup>53</sup> If no particular method of registration itself is promoted, then it would hardly make sense to promote any particular method of de-registration. This is also confirmed by a careful interpretation of the Chicago Convention’s registration provisions.

Two terms mentioned in Articles 18 and 19 have the potential to implicate the concept of de-registration. The first is the term “changed” in Article 18, which provides that an aircraft’s “registration may be changed from one State to another.”<sup>54</sup> The second is the term “transfer of registration” in Article 19, which provides that “transfer of registration of an aircraft in any contracting State shall be made in accordance with its laws and regulations.”<sup>55</sup> Both of these Articles and their relevant terms are discussed individually with regard to whether a process of de-registration is implicated.

### 1. *Analyzing Article 18*

Applying the Vienna Convention’s “ordinary meaning” rule,<sup>56</sup> dictionary definitions of words are logical starting points for understanding how those words should operate within a treaty. *Merriam-Webster’s Collegiate Dictionary* defines the verb part of speech for “change,” in pertinent part, as follows: “to make different in some particular,” “to replace with another,” and “to undergo transformation, transition, or substitution.”<sup>57</sup> The noun part of speech is defined, in pertinent part, as follows: “the act, process, or result of changing” and “substitution.”<sup>58</sup> Probably the conceptually closest definition to the Chicago Convention’s provision allowing for aircraft registration to “be changed” from one State to another is the “transition” definition. In this way, a party in control of an aircraft could “transition” the registration of its aircraft from one State to another. This understanding would seem to imply that some method or process, however informal, of transitioning registration is neces-

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<sup>53</sup> *Id.* art. 19 (emphasis added).

<sup>54</sup> *Id.* art. 18.

<sup>55</sup> *Id.* art. 19.

<sup>56</sup> Vienna Convention, *supra* note 14, art. 31(1).

<sup>57</sup> *Change*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

<sup>58</sup> *Id.*

sary to accomplish an aircraft registration's changing. Although the part of speech of "change" used in the Chicago Convention is a verb, the "process" definition for the noun part of speech seems to confirm that understanding of the ordinary meaning of "change." However, it is also important to note that none of those definitions seem to reference the concept of any formal renouncement process necessary before initiating "change."<sup>59</sup>

The term "change" probably cannot be considered an intrinsically legal term. As such, it is not surprising that *Black's Law Dictionary* does not define the term "change" as a stand-alone term.<sup>60</sup> Although it does define a number of terms that include the word "change," only one of which can truly be said to provide even limited help in interpreting "change" under Article 18. That term is a "change-of-ownership clause." *Black's Law Dictionary* defines a change-of-ownership clause as "[a] provision in an oil-and-gas lease specifying what notice must be given to a lessee about a change in the leased land's ownership before the lessee is obliged to recognize the new owner."<sup>61</sup> The concept of a formal process prior to recognizing new ownership seems to be helpful at first. However, given that this is a type of provision specific to changing ownership of oil and gas leases—a very different proposition than changing the registration of an aircraft—it is of limited significance in interpreting Article 18. A general lack of any legally operative definition of change tends to reflect that the word has little legal significance independent of its ordinary meaning.<sup>62</sup> Therefore, given the fact that the term "change" does not intrinsically bear any legal significance, the ordinary meaning of "change" bears more weight than it otherwise would.<sup>63</sup> The ordinary meaning of "change" tends to indicate that the drafters of the Chicago Convention, in using the word, may have contemplated that allowing a party to change an aircraft's State of registry would implicitly require some sort of process or method of accomplishment; however, it

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<sup>59</sup> This is important because the process of de-registration, as it stands under the CTC, is effectively a formal renouncement of the aircraft's previous registration in the first State as a prerequisite for changing registration to the new State. The term "change" itself, under these definitions, does not seem to require such a formal renouncement process.

<sup>60</sup> See generally BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>61</sup> *Change-of-Ownership Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>62</sup> In other words, given the dearth of any legal definition of change, it is logical to conclude that the drafters of the Chicago Convention likely intended to give meaning to the ordinary definition of change.

<sup>63</sup> See Vienna Convention, *supra* note 14, art. 31(1), (4).

also tends to indicate that the drafters did not intend to prescribe or promote any sort of formal process for de-registering aircraft in Article 18.

The immediate context of the term “change” is important, as well.<sup>64</sup> Located within Chapter III, “Nationality of Aircraft,” Article 18 is immediately followed by Article 19, which makes “registration or transfer of registration” subject to the laws and regulations of contracting States.<sup>65</sup> The drafters of the Chicago Convention could have easily prescribed rules for the appropriate transfer of registration from one State to another, but they did not.<sup>66</sup> Instead, they explicitly put the establishment of such rules within the domain of the relevant contracting State.<sup>67</sup> Again, this indicates that the Chicago Convention’s drafters, even if they had contemplated the need for a formal de-registration process for the purposes of Article 17, deferred to the States regarding the governing any such process. In other words, the term “change” in context indicates that the Chicago Convention does not prescribe or promote any de-registration process.

This makes sense in light of the aviation safety purpose of the Chicago Convention as well. The process of de-registering an aircraft, assuming that process entails only requisite documentation (e.g. the CTC remedy), does not implicate aviation safety concerns.<sup>68</sup> By contrast, exporting an aircraft out of one jurisdiction and into another would implicate aviation safety concerns.<sup>69</sup> Such an export would almost certainly entail actual operation of the aircraft. Simply stated, if the aircraft is in working condition, the easiest way to export an aircraft is to fly it out of the current jurisdiction and into the target jurisdiction.<sup>70</sup>

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<sup>64</sup> *See id.* art. 31.

<sup>65</sup> Chicago Convention, *supra* note 25, art. 19.

<sup>66</sup> *See id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Cf.* Gerber & Walton, *supra* note 4, at 62 (quoting, with respect to the CTC-envisaged de-registration process, SIR GOODE’S OFFICIAL COMMENTARY, *supra* note 5, para. 3.36 (stating that the CTC’s de-registration remedy should not be subject to any safety laws or regulations given that the de-registration remedy “is intended to be purely documentary” and its “purpose is to dispense with the need for the authority to investigate any external facts”)). Gerber and Walton go on to say that the CTC’s “de-registration remedy should made available without safety regulations being relevant” given that “de-registration of an aircraft does not mean that the aircraft is necessarily required to move and therefore that it must be capable of lawful, safe operation.” *Id.*

<sup>69</sup> *Id.* at 62–63.

<sup>70</sup> *Cf. id.* (discussing the operation of an aircraft to export it).

That operation of the aircraft necessarily implicates safety concerns.<sup>71</sup> On the other hand, where the process of de-registering an aircraft merely requires the appropriate completion and submission of paperwork, no operation of the aircraft is needed. In fact, such a de-registration itself would require nothing that would implicate aviation safety concerns as contemplated by the Chicago Convention's purpose.<sup>72</sup> Therefore, it makes sense that the Chicago Convention does not prescribe any process for changing an aircraft's registration because no formal process, or lack thereof, makes aviation any safer.

## 2. Analyzing Article 19

Again, the best place to start is with the ordinary meaning of "transfer." *Merriam-Webster's Collegiate Dictionary* defines, in pertinent part, "transfer" as follows: "to convey from one person, place, or situation to another"; "to cause to pass from one to another"; "to make over the possession or control of"; and "to move to a different place, region, or situation; [especially] to withdraw from one educational institution to enroll at another."<sup>73</sup> The concepts both of moving to a different place or region, particularly withdrawing from one institution in order to enroll in another, and of causing to pass from one to another seem to be conceptually closest to the idea of any de-registration process.

Unlike "change," though, the word "transfer" has special, legal significance, which should also be considered. *Black's Law Dictionary* defines "transfer" as follows: "Any mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance" and "[a] conveyance of property or title from one person to another."<sup>74</sup> Both of these would seem to describe the idea of transferring an aircraft's registration from one State to another. If the drafters of the Chicago Convention had the first definition in mind, involving "disposing of or parting with . . . an interest in an asset," they likely contemplated that some method of aircraft de-registration is implicitly neces-

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<sup>71</sup> Cf. WEBER, *supra* note 12, at 6 (stating "the term aviation safety relates to the technical and operational safety of flight").

<sup>72</sup> See Gerber & Walton, *supra* note 4, at 62. This concept will be more thoroughly discussed in Section IV *infra* in the context of the CTC's specific de-registration provisions.

<sup>73</sup> *Transfer*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

<sup>74</sup> *Transfer*, BLACK'S LAW DICTIONARY (10th ed. 2014).

sary in transferring registration as provided for in Article 19. If they had the second in mind, de-registration may not have been consciously contemplated to any significant extent. However, it seems likely given both the ordinary meaning and legal significance of the word “transfer,” that the drafters did in fact contemplate that some form of de-registration was an implicit element of transferring registration.

If that is the case, the phrase “transfer of registration” in the context of Article 19 lends even more credence to the fact that the Chicago Convention does not purport to control how aircraft are de-registered. This is because the substantive provision of Article 19 makes it clear that the Chicago Convention defers governance of any process for accomplishing the transfer of registration to other legal instruments or entities to the extent that the transfer does not violate the relevant State’s laws.<sup>75</sup> The implication is that the process of transferring registration—which would encompass de-registration—is not of major concern to the Chicago Convention. In other words, if de-registration was contemplated as an implicit element of the phrase “transfer of registration,” then *any* process for de-registering aircraft is acceptable under the Chicago Convention, provided that process accords with the relevant national laws.<sup>76</sup> Still, even if de-registration was not contemplated as such, the result is effectively the same: that the Chicago Convention does not prescribe or promote any particular de-registration process.<sup>77</sup>

#### IV. REGISTRATION AND DE-REGISTRATION UNDER THE CTC

This section will focus on the CTC and its de-registration provisions. Interpreting and analyzing these CTC provisions will confirm the interpretation of the Chicago Convention in Section III *supra* and illustrate the benefit of definitively establishing a deference-based approach by ICAO to the governance of de-registration. For this illustration to be effective, though, it is

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<sup>75</sup> See Chicago Convention, *supra* note 25, art. 19.

<sup>76</sup> See *id.*

<sup>77</sup> This second scenario is a logical conclusion based on the fact that the drafters of the Chicago Convention could not possibly have prescribed or promoted any particular process of aircraft de-registration if they did not contemplate a de-registration mechanism in the first place. Regardless, it seems that they did contemplate such a mechanism, but instead chose to defer the governance of its process to other legal frameworks, such as that of the States. See *supra* notes 67–69 and accompanying text.



necessary to understand the CTC and how its provisions—most importantly, its de-registration remedy—should be interpreted. In exploring the CTC and the extent to which it deals with de-registration, the Vienna Convention rules will again be applied to interpret those relevant provisions.

#### A. OBJECT AND PURPOSE OF THE CTC

First, it is important to determine the object and purpose of the Cape Town Convention itself, as it provides the foundation for the regime. The preamble of the Cape Town Convention reads as follows:

AWARE of *the need* to acquire and use mobile equipment of high value or particular economic significance and *to facilitate the financing of the acquisition and use* of such equipment in an efficient manner,

RECOGNISING the advantages of asset-based financing and leasing for this purpose and *desiring to facilitate* these types of transaction by establishing clear rules to govern them,

MINDFUL of the need to ensure that interests in such equipment are recognised and protected universally,

DESIRING to provide broad and mutual economic benefits for all interested parties,

BELIEVING that such rules must reflect the principles underlying asset-based financing and leasing and *promote the autonomy of the parties* necessary in these transactions,

CONSCIOUS of the need to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection,

TAKING INTO CONSIDERATION the objectives and principles enunciated in existing Conventions relating to such equipment.<sup>78</sup>

In analyzing the language used by the preamble, phrases like “the need . . . to facilitate the financing of the acquisition and use of . . . equipment” and “desiring to facilitate [asset-based financing and leasing] transaction[s]” makes it clear that a major object of the Cape Town Convention is to protect private

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<sup>78</sup> Cape Town Convention, *supra* note 1, pmb. (emphasis added).

parties as they enter into asset-based financing and leasing transactions of a cross-border nature involving mobile equipment.<sup>79</sup>

The Aircraft Equipment Protocol's preamble merely echoes the Cape Town Convention's preamble. In fact, no individualized "purpose" is mentioned, except that the Cape Town Convention's provisions should be implemented with a direct focus on "aircraft equipment" and "the particular requirements of aircraft finance."<sup>80</sup> Again, taken together, the emphasis of the CTC is on the importance of facilitating the ability of entities with sufficient resources to finance aircraft and aircraft equipment assets.<sup>81</sup> Thus, it is with this purpose in mind that one should interpret the de-registration provisions promulgated under the CTC.

#### B. THE CTC'S DE-REGISTRATION REMEDIES

The CTC is revolutionary in that it, inter alia, creates *sui generis* security interests in aircraft and aircraft equipment.<sup>82</sup> In other words, prior to the CTC, there was no substantive property law treaty that uniformly governed and protected security interests in cross-border, aircraft financing and leasing transactions.<sup>83</sup> The CTC, in fact, provides a number of remedies for creditors in resolving violations of their secured interest in aircraft and aircraft equipment. In particular, Article IX of the Aircraft Equipment Protocol gives creditors two specific rights which

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<sup>79</sup> See *id.*; B. Patrick Honnebier, *The Convention of Cape Town on International Interests in Mobile Equipment: The Solution of Specific European Property Law Problems*, 3 EUR. REV. PRIV. L. 377, 381 (2002).

<sup>80</sup> Aircraft Equipment Protocol, *supra* note 1, pmb1.

<sup>81</sup> See *supra* notes 79–80 and accompanying text. This is confirmed in Sir Goode's *Official Commentary*, which was developed with the approval of the International Institute for the Unification of Private Law (UNIDROIT) and can be found in a number of scholarly publications. See SIR GOODE'S OFFICIAL COMMENTARY, *supra* note 5, para. 2.6; see also Clark & Wool, *supra* note 2, at 1405; Honnebier, *The Convention of Cape Town*, *supra* note 79, at 381, 384. Specifically, the Cape Town Convention and the Aircraft Equipment Protocol together "are designed to fulfil five key objectives," the first four of which are tools or instruments designed to protect transacting parties, the fifth of which describes those four preceding tools as the "means to give intending creditors greater confidence in the decision" to enter into such transactions. SIR GOODE'S OFFICIAL COMMENTARY, *supra* note 5, para. 2.6.

<sup>82</sup> See Jeffrey Wool & Andrej Jonovic, *The Relationship between Transnational Commercial Law Treaties and National Law—A Framework as Applied to the Cape Town Convention*, 2 CAPE TOWN CONVENTION J. 65, 74 (2013); see also Honnebier, *The Convention of Cape Town*, *supra* note 79, at 377.

<sup>83</sup> See Honnebier, *The Convention of Cape Town*, *supra* note 79, at 377; Wool & Janovic, *supra* note 82, at 74.

they may exercise in the event of a debtor's default: (1) the right to "procure the *de-registration* of the aircraft"; and (2) the right to "procure the *export* and *physical transfer* of the aircraft object from the territory in which it is situated."<sup>84</sup> As this article focuses on how ICAO should approach the process of de-registering an aircraft object, though, the de-registration remedy will be more heavily discussed in this article.

The Aircraft Equipment Protocol contemplates two effective "paths" for procuring the de-registration of aircraft objects as a remedy.<sup>85</sup> The first path is for a creditor to seek a proper court order or grant of relief, as recognized under Article X(6) of the Aircraft Equipment Protocol, and to submit that order to the relevant registering authority.<sup>86</sup> The second path, provided by Article XIII and Articles IX(5)-(6) of the Aircraft Equipment Protocol, "is available if the debtor provided an irrevocable de-registration and export request authorization (IDERA)[,] which was lodged with the requisite authorities."<sup>87</sup> Both of these processes, though, in addition to the export and physical transfer remedy, seem to be limited by the phrase "subject to any applicable safety laws and regulations."<sup>88</sup> However, this issue has been specifically addressed by Professor Sir Roy Goode in the *Official Commentary to the Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment* (Sir Goode's *Official Commentary*), which provides as follows:

The duty to honour the IDERA is subject to any applicable safety laws and regulations (Article XIII(3)). These will normally be applicable only to export and physical delivery, *not to deregistration*. As with the court route, the IDERA route is intended to be *purely documentary*; the purpose is to dispense with the need for the authority to investigate any external facts.<sup>89</sup>

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<sup>84</sup> Aircraft Equipment Protocol, *supra* note 1, art. IX (emphasis added).

<sup>85</sup> In their article *De-registration and Export Remedies under the Cape Town Convention*, Gerber and Walton referred to these paths as "routes," describing them as "two separate and distinct Protocol-driven approaches for a financier to achieve de-registration and export of an aircraft in a default scenario, the conditions and terms of each varying somewhat depending upon which route is taken." Gerber & Walton, *supra* note 4, at 54.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 62.

<sup>89</sup> SIR GOODE'S OFFICIAL COMMENTARY, *supra* note 5, para. 3.36 (emphasis added).

In other words, because both of these processes of de-registration are “intended to be purely documentary”<sup>90</sup> laws and regulations aimed at safety concerns, they are irrelevant to the process of de-registration, despite their acknowledged relevance to the export remedy.<sup>91</sup>

C. HYPOTHETICAL ILLUSTRATING THE NEED FOR THE CTC’S DE-REGISTRATION REMEDY

It is also important to question why there is even a need for the de-registration remedy provided by the CTC. As mentioned *supra*, the CTC’s security interest framework overlaps in a number of places with other international aviation treaties. The major area of overlap creating the need for a de-registration remedy under the CTC is with the Chicago Convention’s prohibition on dual registration.<sup>92</sup>

The need for a strong, unambiguous de-registration remedy is illustrated by the following hypothetical. Suppose a commercial airline in State A wants to lease an aircraft from a leasing company in State B. A bank in State C, then, in exchange for a security interest in the aircraft, agrees to finance the leasing company’s purchase of an aircraft from an aircraft manufacturer in State D. After purchasing the aircraft, the leasing company enters into a lease agreement with the airline as it initially requested. Finally, upon acquiring the aircraft from the leasing company, the commercial airline registers the aircraft in State A and begins to operate the aircraft to transport passengers.<sup>93</sup>

Assume further, however, that after operating the aircraft for a short period of time, the commercial airline falls into financial disrepair and defaults on the lease between itself and the leasing

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<sup>90</sup> *Id.*

<sup>91</sup> See Gerber & Walton, *supra* note 4, at 62–63. For more information on the technical aspects of the de-registration and export remedies, see generally *id.*, discussing in great detail the necessity of a financier’s ability to combine these remedies, as well as the extent to which these remedies are available under the CTC.

<sup>92</sup> See *id.* at 51; see also Professor Sir Roy Goode, Official Commentary to the Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment para. 3.23 (rev. ed. 2008) (describing the de-registration remedy under Article IX of the Aircraft Equipment Protocol as “remov[ing] the Chicago Convention nationality registration” so as to allow “re-registration in another Contracting State”).

<sup>93</sup> This scenario is a simplified version of a fairly typical structure for aircraft financing and leasing transactions. Cf. Gerber & Walton, *supra* note 4, at 50–51 (describing the comparable facts of the Kingfisher case and emphasizing the importance of the de-registration remedy in such a context).

company. As a result, the leasing company, in an appropriate effort to mitigate losses, decides to repossess the aircraft and re-lease it to another commercial airline in State E. The problem is that the leasing company, even if it can successfully regain physical possession of its aircraft, would need to procure the aircraft's de-registration in State A. This is necessary because the State E airline will likely refuse to enter into a lease without the ability to register the aircraft in its own state, given the Chicago Convention's dual registration prohibition, prior to initiating operation.<sup>94</sup> As a result, without the ability to procure de-registration, a leasing company may be left with an aircraft no other airline is willing to take, rendering the aircraft effectively worthless.<sup>95</sup>

If applicable,<sup>96</sup> the CTC would govern such a scenario. Under that regime, the defaulting commercial airline would be a "debtor" and the leasing company a "creditor."<sup>97</sup> As a CTC creditor, the leasing company would have access to the CTC's de-registration remedy, which it would be able to exercise to de-register the aircraft in State A and re-lease it in State E. If not, the leasing company, like the financier in the Kingfisher case, may face substantial losses without the ability to promptly de-register its aircraft.<sup>98</sup>

As illustrated by this hypothetical, the de-registration remedy under the CTC necessarily implicates significant Chicago Convention concerns under Article 18.<sup>99</sup> Specifically, it illustrates one of the major questions addressed in this article's analysis: to what extent does the Chicago Convention (or ICAO) control the process of de-registration, given that other instruments (e.g. the CTC) hold themselves out as controlling that process? The next subsection explores why control over that process is more suited to other legal instruments, such as the CTC, than to the Chicago Convention or ICAO.

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<sup>94</sup> The ability to successfully de-register an aircraft is a condition precedent to re-registering that aircraft in a new state. See SIR GOODE'S OFFICIAL COMMENTARY, *supra* note 5, para. 5.11.

<sup>95</sup> See Gerber & Walton, *supra* note 4, at 50–51.

<sup>96</sup> The CTC applies if "the debtor is situated in a Contracting State." Cape Town Convention, *supra* note 1, art. 3(1); see Aircraft Equipment Protocol, *supra* note 1, art. II (adopting the Cape Town Convention's applicability provisions as its own). This is true regardless of whether the creditor at issue is a Contracting State or not. Cape Town Convention, *supra* note 1, art. 3(2).

<sup>97</sup> See Cape Town Convention, *supra* note 1, art. 1(i)–(j).

<sup>98</sup> See Gerber & Walton, *supra* note 4, at 50–51.

<sup>99</sup> See *id.*

D. WHY THE CTC IS THE MORE APPROPRIATE REGIME TO  
REGULATE DE-REGISTRATION

The CTC's purpose would be significantly contravened in a number of ways by an inability to explicitly recognize a specific de-registration process. The purpose of the CTC, as mentioned *supra*, is to facilitate the aircraft financing industry by protecting parties with secured interests in aircraft equipment (such as aircraft financiers). One of the most fundamental of these protections is the de-registration remedy provided by the CTC, which itself relies upon a specific methodology to be valid.<sup>100</sup> Therefore, prescribing a specific process for de-registration is absolutely essential to further the purpose of the CTC.

By contrast, not prescribing a specific de-registration process does not contravene the aviation safety purpose of the Chicago Convention. There is a strong argument that clear deference to other more appropriate legal instruments (e.g. the CTC) would be in furtherance of the Chicago Convention's other major purpose—facilitating the growth of the aviation industry. This argument follows from the idea that the advent of aviation financing and leasing has significantly increased the economic potential of the aviation industry<sup>101</sup> and benefits everyone involved, including the passenger.<sup>102</sup> In fact, one of the major arguments asserted in favor of the CTC's prompt entry into force is that “[a]ccess to financing . . . will enhance aviation safety, the most fundamental objective of all actors in the air transport sector.”<sup>103</sup> The CTC is directly aimed at “facilitat[ing] the efficient financing and leasing of mobile equipment,” such as aircraft, to “assist in the development of cost-effective modes of transport . . . to bring significant economic benefits to countries at all stages of economic development.”<sup>104</sup> In other words, the CTC is meant to establish a reliable financing and leasing regime as a tool for increasing the economic potential of the aviation industry. Mitigating unnecessary ambiguity in other important legal instruments like the CTC, then, would actually be in furtherance of the Chicago Convention's dual purposes.

Still, even despite the comprehensive nature of the CTC, some of its provisions themselves (including the de-registration

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<sup>100</sup> See *supra* notes 84–91 and accompanying text.

<sup>101</sup> See SIR GOODE'S OFFICIAL COMMENTARY, *supra* note 5, para. 2.1.

<sup>102</sup> See *supra* note 2 and accompanying text.

<sup>103</sup> Clark & Wool, *supra* note 2, at 1410.

<sup>104</sup> SIR GOODE'S OFFICIAL COMMENTARY, *supra* note 5, para. 2.1.

remedy) can create confusion with respect to how they may be exercised. For instance, one major issue is that the automatic nature of the de-registration remedy seems to be qualified by the phrase “subject to any applicable safety laws and regulations,” which has been used to allow a State to inappropriately make the de-registration remedy more difficult to exercise.<sup>105</sup> Although there are certainly other sources of the confusion, anything that can minimize confusion and risk will give creditors more confidence in the CTC<sup>106</sup> and, in turn, facilitate the growth of the aviation industry. Therefore, if ICAO could clarify that it expressly defers governing the process of de-registration to other legal instruments, in accordance with the Chicago Convention, then it would be furthering its facilitation purpose without contravening its safety purpose.

Accordingly, despite the fact that the Chicago Convention and the CTC do overlap to a certain extent, the distinguishable requirements under the respective treaties provides an opportunity for ICAO to clarify its limited role regarding de-registration. This would allow for more predictability under the CTC, while not making aviation any less safe in the process. In fact, ICAO has made similar steps in the past with respect to its flexibility towards the developments in the aviation financing and leasing industry, which is discussed in the next section.

#### V. THE TREND TOWARD ICAO'S ACCEPTANCE OF THE DEVELOPMENTS IN THE AIRCRAFT FINANCING AND LEASING INDUSTRY

ICAO's trend toward accepting the developments in the aircraft financing and leasing industry is a positive indication that ICAO can, and would, be willing to help minimize ambiguity in aircraft financing and leasing regimes. Particularly in recent

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<sup>105</sup> See Gerber & Walton, *supra* note 4, at 62.

<sup>106</sup> As with any legal instrument, interested parties want to be confident that the framework, in this case the CTC, will work properly in the event of a problem arising. *Cf.* Wool & Jonovic, *supra* note 82, at 72 (emphasizing the importance of a party's ability “to fully rely on these CTC provisions” in the context of national regulations implementing the CTC's terms). This is especially true for parties to aircraft financing and leasing transactions, which involve extremely valuable assets such as aircraft equipment. Even a relatively small boost in confidence could make the difference between a creditor deciding to finance or lease an aircraft and that creditor avoiding the transaction entirely. *Cf.* Gerber & Walton, *supra* note 4, at 49 n.1 (discussing an asset financier's basic risk analysis and how uncertainty with respect to its ability to access its asset in the event of default can cause the financier to avoid the transaction entirely).

years, ICAO has been successful in framing itself flexibly in a way that furthers both Chicago Convention purposes of advancing aviation safety and facilitating the economic developments that are occurring in the industry in other spheres.<sup>107</sup>

This is especially the case with respect to ICAO's efforts in facilitating the aircraft financing and leasing industry. For example, ICAO assisted in the development of the Aircraft Equipment Protocol itself when the Cape Town Convention seemed to be slowing to a halt in terms of progress.<sup>108</sup> An internal example of ICAO's efforts towards flexibility in terms of accepting the trends of the aircraft financing and leasing industry is that ICAO amended the Chicago Convention to include, *inter alia*, Article 83 *bis*, which allows for the transfer of some of the State of registry obligations<sup>109</sup> to the State of operation in situations where an aircraft is operated in a jurisdiction that is different than the State of registry.<sup>110</sup> The motivation behind this amendment was the increasing trend of aircraft financing transactions occurring in a cross-border context, where the operator is located in one State and the financier or security holder is in another.<sup>111</sup> Given that the Chicago Convention was not clear with respect to whether such a transfer agreement would be valid under the terms of the treaty, ICAO felt it was necessary to clarify that it did not prohibit this kind of transfer of responsibilities to the State of operation, so long as it meets certain baseline requirements (i.e. it has been registered with ICAO and made public).<sup>112</sup> This shows not only that it is possible for ICAO to make such clarifications of its own scope known with respect to the Chicago Convention, but also that ICAO is willing to do so to facilitate the aircraft financing and leasing industry.

In fact, the amendment to the Chicago Convention that added Article 83 *bis* has been a success. ICAO established an "Article 83 *bis* Task Force" in 2014 to explore and attempt to solve the problems that may be associated with "the implementation

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<sup>107</sup> See HUANG, *supra* note 27, at 37–40.

<sup>108</sup> See HAVEL & SANCHEZ, *supra* note 32, at 352.

<sup>109</sup> Article 83 *bis* does *not* allow for the transfer of *all* of the State of registry's responsibilities, only those enumerated in Article 83 *bis*. See Chicago Convention, *supra* note 25, art. 83 *bis*.

<sup>110</sup> See HUANG, *supra* note 27, at 33.

<sup>111</sup> See *id.*

<sup>112</sup> See Chicago Convention, *supra* note 25, art. 83 *bis* (b).



of Article 83 *bis* by some member States.”<sup>113</sup> The work accomplished by the Article 83 *bis* Task Force, as presented to ICAO’s Legal Committee during its 36th session in 2015, was heavily applauded by the Legal Committee’s delegations, which “generally expressed strong support for” all of the Task Force’s recommendations.<sup>114</sup> All of this activity is evidence of ICAO’s promotion of the aviation financing and leasing industry through what in a large respect amounts to amending the Chicago Convention. As a result, it supports the fact that the Chicago Convention should be interpreted flexibly in this case to allow for other important legal instruments (e.g. the CTC) with promising potential to have their full, intended effect so long as doing so does not undermine the Chicago Convention’s purpose or provisions.<sup>115</sup>

Although it is likely that the majority of Member-states of both the Chicago Convention and the CTC can and will reconcile the registration overlap appropriately, there is still a risk that some will not. Specifically, there is the risk that a Member-state will inappropriately claim, for instance, that the CTC’s IDERA remedy, or the framework in place for registration and de-registration by a foreign state, is not contemplated under the Chicago Convention to “justify” its refusal to de-register an aircraft.<sup>116</sup> This risk has the potential to do serious damage to the CTC, given the significance of the IDERA remedy to the proper functioning of the treaty. Any decrease in certainty with respect to whether the CTC’s remedies will provide a potential financier with real protection in practice increases transaction costs and decreases that financier’s incentive to enter into the transac-

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<sup>113</sup> See Int’l Civil Aviation Org. [ICAO], *Report of the 36th Session of the Legal Committee*, para. 2.5, ICAO Doc. LC/36 (Nov. 30–Dec. 3, 2015) [hereinafter ICAO Report].

<sup>114</sup> *Id.* paras. 2.13–2.20.

<sup>115</sup> As mentioned *supra*, the Vienna Convention’s general rule of interpretation contemplates certain subsequent agreements or instruments regarding the treaty as being useful to interpretation. See Vienna Convention, *supra* note 14, art. 31(2)–(3). This would include the ICAO activity and agreements surrounding Article 83 *bis*, which bolster the interpretation that the Chicago Convention is meant to facilitate the growth of the aviation industry so long as the method of growth does not bring with it unbearable safety implications. See *id.* This would include the facilitation of other treaties or legal instruments, especially to the extent that those other instruments do not implicate safety issues under the Chicago Convention.

<sup>116</sup> *Cf.* Gerber & Walton, *supra* note 4, at 51 (discussing the possibility of a State purposefully misinterpreting the CTC’s remedies to inappropriately justify benefiting itself).

tion.<sup>117</sup> Of course, on the other hand, an increase in certainty would increase the reliability of the CTC's protections, and as a result, the number of entities deciding to finance or lease aircraft.

Again, this shows why it is appropriate for ICAO to make it clear that it leaves the process of de-registration up to other legal instruments. Ultimately, one of the Chicago Convention's purposes is to facilitate the growth of the aviation industry. The Cape Town Convention's major purpose is to facilitate that growth through drastically decreasing the risk of entering into aircraft financing and leasing transactions. Therefore, any clarification emphasizing that the Chicago Convention's registration provisions do not hinder other instruments' constructs of de-registration—an issue that almost entirely avoids safety implications as mentioned *supra*—would itself further the Chicago Convention's purpose of facilitating growth in the aviation industry.

## VI. PROPOSAL TO AMEND ANNEX 7 OF THE CHICAGO CONVENTION

With the foregoing in mind, ICAO should clarify its limited role with respect to the governing of aircraft de-registration. Such a clarification by ICAO has the potential to yield exponential benefits to the aircraft financing and leasing industry and, consequently, the aviation industry on the whole. One of the biggest ways modern ICAO contributes to creating a uniform understanding of international aviation laws is through Annexes to the Chicago Convention.<sup>118</sup> Specifically, ICAO should undertake to amend Annex 7 to the Chicago Convention—"Aircraft Nationality and Registration Marks."<sup>119</sup> In that Annex, ICAO should formally defer the governance of de-registration processes to other legal instruments, provided that one baseline requirement is met: for the Annex 7 deferral to apply, "de-registration process" means only such processes that are "purely documentary."<sup>120</sup> The amendment should not only recognize that

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<sup>117</sup> See SIR GOODE'S OFFICIAL COMMENTARY, *supra* note 5, para. 2.1; Gerber & Walton, *supra* note 4, at 49; see also *supra* note 5 and accompanying text.

<sup>118</sup> See *supra* note 12.

<sup>119</sup> *Annexes to the Convention on International Civil Aviation*, INT'L CIVIL AVIATION ORG. [ICAO] annex 7, [http://www.icao.int/safety/AirNavigation/NationalityMarks/annexes\\_booklet\\_en.pdf](http://www.icao.int/safety/AirNavigation/NationalityMarks/annexes_booklet_en.pdf) [<https://perma.cc/5CV3-XFRK>].

<sup>120</sup> This requirement, or some version of this basic principle, would ensure that the amendment to Annex 7 does not implicate safety concerns. See *supra* notes 89–91 and accompanying text.

aircraft de-registration is an element of transferring registration under Article 17, but also expressly state that neither the Chicago Convention nor ICAO intends to exert governance or control over those de-registration processes, provided that those processes contemplate aircraft de-registration as an exclusively documentary endeavor. The result of this clarification would be to instill further confidence in important legal instruments, such as the CTC, which are more appropriate for defining and governing *how* aircraft or aircraft equipment should be de-registered.

This is not the first time such an amendment has been proposed. In fact, in reviewing the 36th session report of ICAO's Legal Committee, it is clear that a general amendment regarding what rules govern de-registration was suggested.<sup>121</sup> Although the report of the Legal Committee is not specific with respect to what this amendment should entail or how it should be accomplished, this author believes that the best approach is explicit deference of control over de-registration processes. Such an amendment would contribute to a more uniform understanding of the Chicago Convention's—and ICAO's—approach to aircraft de-registration and would allow for further reliance on legal instruments that have the potential to yield large benefits in aviation. Ultimately, that type of express clarification would have a tremendously positive effect on growing the aviation industry without compromising aviation safety in the slightest.

## VII. CONCLUSION

Aircraft de-registration, although not explicitly mentioned in the Chicago Convention, is a necessary element in transferring an aircraft's registration in compliance with the Chicago Convention's single-state aircraft registration requirement. At the same time, interpretation of the Chicago Convention's registration provisions indicates that ICAO should defer governance of de-registration processes to other entities or legal instruments. By electing not to interfere with how registration or its transfers are accomplished, the Chicago Convention protects the opportunity for more appropriate instruments such as the CTC to develop rules that control the de-registration process.

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<sup>121</sup> ICAO Report, *supra* note 113, para. 2.17. Specifically, the ICAO Report notes that one delegate suggested that "consideration should eventually be given by the Secretariat to amend Annex 7 to the Chicago Convention so as to provide States with international rules governing de-registration of aircraft." *Id.*

However, the Chicago Convention's failure to specifically mention the de-registration issue may unnecessarily create ambiguity in future interpretations by interested parties. This creates the potential for either confusion or intentional, self-serving misinterpretation with respect to whether the Chicago Convention (or ICAO) controls de-registration. This is especially true on the issue of whether those other more appropriate instruments that do specifically establish de-registration rules (e.g. the CTC) are at all in conflict with the Chicago Convention. Given the necessity of a clear, readily exercisable de-registration remedy for aviation financiers and lessors, either of those situations (innocent misinterpretation or otherwise) drastically undercuts the value of legal instruments that do control de-registration, such as the CTC.

To remedy this issue, ICAO should amend Annex 7 of the Chicago Convention to do two things: (1) explicitly recognize de-registration as an element of transferring an aircraft's registration; and (2) clearly and expressly defer governance over the process of de-registering aircraft to other legal instruments. However, to ensure that the aviation safety purpose of the Chicago Convention is not contravened, the amendment should also stipulate that it defers governance of the de-registration process to other regimes only to the extent that the regime-at-issue's de-registration process embodies the "purely documentary" essence described in Sir Goode's *Official Commentary* as existing under the CTC. Such an amendment would increase confidence in the CTC and other important instruments that integrally require the ability to control the process of de-registration. The result would be exponential benefit to the aviation industry's growth without sacrificing safety.