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**INTERNATIONAL CIVIL AVIATION ORGANIZATION
INITIATIVES VERSUS INDUSTRY INITIATIVES:
A LOOK AT HOW COMMERCIALY MOTIVATED
TRANSACTIONS INCREASE AVIATION SAFETY**

JENNIFER ANN URBAN*

Civil aviation safety is an indivisible and global regime such that any recognized aviation safety deficiency in one country threatens the safety of the entire global civil aviation system.¹

— Dr. John Saba, Air and Space Professor

I. INTRODUCTION

THIRTY YEARS AGO, it was implausible to imagine that with the click of a button on your phone you would be able to schedule a private jet for a business flight the next day. Today, that implausibility has become reality in a world where air travel has steadily continued to increase and where aircraft manufacturers are struggling to keep up with the demand. Companies like JetSmarter² and BlackJet³ allow customers to book a private flight or a seat on a private flight using an app on their cell phone. These two companies are only two examples of new aircraft finance and manufacturing paths the aviation industry is heavily pursuing to handle the increase in air travel customer demand.

Aircraft leasing has skyrocketed in the last decade and has significantly contributed to the expansion of the aviation industry.

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¹ John Saba, Adjunct Professor, McGill U. Inst. of Air & Space, Presentation at the Air Transport, Air & Space Law and Regulation Workshop and Conference: Aviation Safety: Worldwide Safe Flight 77 (Apr. 14, 2009), https://www.mcgill.ca/iasl/files/iasl/Workshop_15-Saba.pdf [<https://perma.cc/C9QE-547Q>].

² FAQ, JETSMARTER, <https://jetsmarter.com/faq/> [<https://perma.cc/N7FH-3375>].

³ Welcome, BLACKJET, <https://www.blackjet.com/welcome/> [<https://perma.cc/3FA8-ES5G>].

The traditional way to obtain an aircraft is through cash-based transactions, but it is extremely expensive and requires a great deal of capital. Instead, operating leases permit airlines to obtain aircraft and expend less capital.⁴ For example, operating leases allow airlines to lease aircraft for a specific amount of time to accurately meet the demand for air travel. The airlines then do not have to use their precious capital and get to maintain their liquid assets.⁵ In 1980, only 1.7% of Boeing's aircraft were leased; but by 2012, Boeing had leased 37.7% of its aircraft.⁶ The number of leased Boeing aircraft is predicted to increase to greater than 50% by 2020.⁷ According to the KGAL Group, a German based asset manager, "[t]he trend toward aircraft leasing has gained momentum as a result of the deregulation and liberali[z]ation of aviation."⁸ This aircraft leasing trend does not look like it will slow down any time soon, and the aviation industry has to quickly address how to handle issues that arise because of it.

The issue that this article will address is whether the aircraft leasing phenomena is promoting aviation safety better than International Civil Aviation Organization (ICAO) initiatives. It will be argued that industry initiatives are more effective than ICAO initiatives because the industry is focused on filling safety gaps using commercial transactions, which makes it easier for the industry to garner support. The article will first present the background information on two ICAO initiated treaties and one industry initiated treaty. Next, it will compare the two different treaty systems. Third, it will address the reasons why industry initiated international treaties are better at gathering support and adequately addressing issues than ICAO initiated international treaties. Finally, it will explain where ICAO's focus should be and how ICAO and the industry can work together to better aviation as a whole and promote a safe aviation environment.

⁴ *Aircraft Leasing – A Promising Investment For Institutional Investors*, KGAL GROUP 3, http://www.kgal-group.com/fileadmin/kgal/documents/pdf_WhitePaper/KGAL_WhitePaper_Aircraft-Leasing.pdf [https://perma.cc/4UJ3-SLTV]; see BRIAN F. HAVEL & GABRIEL S. SANCHEZ, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL AVIATION LAW* 330 (2014).

⁵ *Aircraft Leasing*, *supra* note 4.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

II. BACKGROUND

International treaties have been necessary guides throughout the aviation industry's history. Many countries and organizations have worked together to address different issues where international correlation and cooperation is required.

A. ICAO

ICAO has been one of the leading organizations in advancing international aviation and was created by the Convention on International Civil Aviation (Chicago Convention).⁹ According to ICAO's overall objectives, found in Article 44 of the Chicago Convention, it was established "to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport."¹⁰ Since its creation in 1944, it has become clear that ICAO's number one priority is safety.¹¹ Three of the main objectives set forth in Article 44 are focused on safety, to "[i]nsure the safe and orderly growth of international civil aviation throughout the world; . . . [m]eet the needs of the peoples of the world for safe, regular, efficient[,] and economical air transport; . . . [and] [p]romote safety of flight in international air navigation."¹²

ICAO created its Legal Committee in 1947 for the purpose of drafting international aviation treaties.¹³ Each of the 191 Member States gets one vote in the committee, and a majority must agree for a decision to be made on draft text of international treaties.¹⁴ Although this democratic procedure allows for participation from many actors, it can have its downfalls. For example, while a draft of a treaty may end up getting passed, Member States that voted for the draft may not agree with the final product and then decline to sign it. Because they are focused on specific events that prompt them to initiate international treaties, members of ICAO may not see the safety gaps that actually exist

⁹ John Cobb Cooper, *The Chicago Convention—After Twenty Years*, 19 U. MIAMI L. REV. 333 (1965).

¹⁰ LUDWIG WEBER, *INTERNATIONAL CIVIL AVIATION ORGANIZATION: AN INTRODUCTION* 5 (Pablo Mendes de Leon ed., 2007).

¹¹ *Safety Report*, INT'L CIVIL AVIATION ORG. (2015) http://www.icao.int/safety/Documents/ICAO_Safety_Report_2015_Web.pdf [<https://perma.cc/EGM2-5DYU>].

¹² WEBER, *supra* note 10, at 5.

¹³ *Id.* at 27–28.

¹⁴ *Id.* at 28; *About ICAO*, INT'L CIVIL AVIATION ORG., <http://www.icao.int/about-icao/Pages/default.aspx> [<https://perma.cc/3YKK-L7Z5>].

within the industry. Industry professionals are better situated to recognize safety gaps within the aviation industry due to these problems possibly affecting their everyday work. Although ICAO, as an organization, is usually only seen as the depository for international conventions and that the conventions are acts of the Member States themselves at a Diplomatic Conference,¹⁵ ICAO has been known to take a very active role in the preparation of international conventions and protocols.¹⁶ ICAO has acted as the main initiator of many of the international aviation treaties. In 2009, ICAO initiated the implementation of two international conventions on issues that it found pertinent.¹⁷

B. UNLAWFUL INTERFERENCE COMPENSATION CONVENTION

The Convention on Compensation for Damage to Third Parties Resulting from Acts of Unlawful Interference Involving Aircraft (Unlawful Interference Compensation Convention) was initiated by ICAO at the International Conference on Air Law in Montreal on May 2, 2009.¹⁸ Many scholars claim that the Unlawful Interference Compensation Convention was mainly in response to the September 11th terrorist attacks on the United States because the attacks significantly pushed ICAO to speed up its work on third party liability issues.¹⁹ Although this event was extremely tragic, the aviation industry was not necessarily in need of the Unlawful Interference Compensation Convention.²⁰ According to aviation legal expert Michael Jennison, “the terrorist attacks of [September 11th] expanded our awareness of the potential for third-party damage from aircraft, such accidents

¹⁵ “The [Chicago] Convention does not specifically mention any competences of [ICAO] for the development and adoption of international conventions or protocols in the field of air law.” WEBER, *supra* note 10, at 37.

¹⁶ *Id.*

¹⁷ *Current Lists of Parties to Multilateral Air Law Treaties*, INT’L CIVIL AVIATION ORG., <http://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx> [<https://perma.cc/T7VX-STA7>].

¹⁸ Convention on Compensation for Damage Caused to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft, May 2, 2009, ICAO Doc. 9920 [hereinafter Unlawful Interference Compensation Convention], http://www.jus.uio.no/english/services/library/treaties/07/7-01/icao_damage_unlawful.xml [<https://perma.cc/FNT4-RYNE>].

¹⁹ Michael Gill, *Scratching Beneath the Surface: The Unlawful Interference Convention 2009*, in FROM LOWLANDS TO HIGH SKIES: A MULTILEVEL JURISDICTIONAL APPROACH TOWARDS AIR LAW 227, 230–31 (Pablo Mendes De Leon ed., 2013).

²⁰ *Id.* at 230.

are relatively uncommon over the long haul.”²¹ There are three main parts to this Convention.

First, when the damage is caused by an aircraft in flight, the operator will be liable to pay for the damages that are within the extent of this convention.²² Even if the air carrier is not liable for the damages and is actually a victim as well, the Convention’s risk allocation principle still requires the air carrier to pay for damages up to a certain amount.²³ The amount the carrier is required to pay depends on the aircraft’s weight at takeoff and is capped at 1.05 billion dollars.²⁴ Article 24²⁵ of the Convention gives the aircraft operator the right of recourse against the person or organizations that actually caused the event, such as al-Qaeda and the actual terrorists who took part in the September 11th attacks.²⁶ Although the right to recourse allows for the operators to possibly recoup their money from the actors at fault, it is unlikely that the persons responsible for the attack have the financial means to cover these damages and that the operators or their home State would be able to actually enforce a recourse judgment.²⁷ It is implausible to believe that the United States would get paid by al-Qaeda or from the deceased terrorists’ estates.

Second, damages that exceed the 1.05 billion dollar cap would be paid for by the International Civil Aviation Compensation Fund up to 4.5 billion dollars.²⁸ This fund is made up of a “mandatory amounts collected in respect of each passenger and each tonne of cargo departing on an international commercial flight from an airport in a State Party.”²⁹ The duty to collect these amounts and put them into the Fund lies with the operator and it is unlikely the operator would want to take on this

²¹ Michael Jennison, *Rescuing the Rome Convention of 1952: Six Decades of Effort to Make a Workable Regime for Damage Caused by Foreign Aircraft to Third Parties*, 10 *UNIFORM L. REV.* 785, 794 (2005).

²² Unlawful Interference Compensation Convention, *supra* note 18, art. 3.1.

²³ Gill, *supra* note 19, at 232–33.

²⁴ *Id.* at 233–34.

²⁵ Article 24 states “[t]he operator shall have a right of recourse against: (a) any person who has committed, organized or financed the act of unlawful interference; and (b) any other person.” Unlawful Interference Compensation Convention, *supra* note 18, art. 24.

²⁶ *Id.*; *9/11 Attacks*, HISTORY, <http://www.history.com/topics/9-11-attacks> [<https://perma.cc/JUL4-N57U>].

²⁷ HAVEL & SANCHEZ, *supra* note 4, at 321–22.

²⁸ Gill, *supra* note 19, at 234.

²⁹ Unlawful Interference Compensation Convention, *supra* note 18, art. 12.1(a); Gill, *supra* note 19, at 235–36.

additional task.³⁰ Some scholars argue that the Fund, along with other parts of the Unlawful Interference Compensation Convention, would not work sufficiently if an event similar to the September 11th terrorist attacks were to occur in the future.³¹

Third, the operator will have unlimited liability for any damages that exceed the first two limits if it is proven that “the operator or its employees have contributed to the occurrence of the event by an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result.”³² If the operator can prove that it had an oversight program in place that would point out specific employees who may participate in these types of situations, then technically the Unlawful Interference Compensation Convention allows them to possibly avoid this liability, but it is hard to see how this exception would play out in an actual case.³³ Many aviation scholars believe that States have an obligation to help airlines cover these types of damages, but others claim that State obligation would cause even less signatories to the Unlawful Interference Compensation Convention.³⁴

Even though the Unlawful Interference Compensation Convention has ICAO’s support, it struggles to gain support from the aviation industry. This lack of support and signatories is the reason that the Unlawful Interference Compensation Convention is not yet in force.³⁵ As of April 2016, it had only eleven signatures, two ratifications, and four accessions.³⁶ It is impor-

³⁰ Gill, *supra* note 19, at 235–36.

³¹ HAVEL & SANCHEZ, *supra* note 4, at 324.

³² Unlawful Interference Compensation Convention, *supra* note 18, art. 23.2; Gill, *supra* note 19, at 236.

³³ Gill, *supra* note 19, at 236.

³⁴ *Id.*

³⁵ According to Article 40:

This Convention shall enter into force on the one hundred and eightieth day after the deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession on condition, however, that the total number of passengers departing in the previous year from airports in the States that have ratified, accepted, approved or acceded is at least 750,000,000 as appears from the declarations made by ratifying, accepting, approving or acceding States. If, at the time of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession this condition has not been fulfilled, the Convention shall not come into force until the one hundred and eightieth day after this condition shall have been satisfied.

Unlawful Interference Compensation Convention, *supra* note 18, art. 40.1.

³⁶ See Appendix A *infra*.

tant to note that none of the countries who have participated, by either signing the Unlawful Interference Compensation Convention or depositing an instrument of ratification, acceptance, approval, or accession, were States heavily involved in the aviation industry, such as the United States, the United Arab Emirates or European countries.³⁷ The lack of industry and international support is likely due to the Unlawful Interference Compensation Convention's unfair nature in monetarily punishing someone other than the person or organization responsible.³⁸

C. GENERAL RISKS CONVENTION

The Convention on Compensation for Damage Caused by Aircraft to Third Parties (General Risks Convention) was also initiated by ICAO at the International Conference on Air Law in Montreal on May 2, 2009.³⁹ The September 11th terrorist attacks also sparked the development of the General Risks Convention as a way to publicly fund increases in insurance coverage for these types of events.⁴⁰ This agreement was one step in modernizing the 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1952 Rome Convention) and can be seen as the failed 1933 Rome Convention's⁴¹ successor.⁴² The General Risks Convention allows for equitable compensation to third-party victims for damages not caused by unlawful interference, which it notes will help keep stability within the international aviation industry.⁴³ It bases the determination of strict liability damages of third-parties on the weight of the aircraft.⁴⁴ It mixes the liability system for passenger and

³⁷ See Appendix A *infra*.

³⁸ Gill, *supra* note 19, at 242.

³⁹ Convention on Compensation for Damage Caused by Aircraft to Third Parties, May 2, 2009, ICAO Doc. 9919 [hereinafter General Risks Convention], <http://www.awg.aero/assets/docs/GRC%20-%20Final.pdf> [<https://perma.cc/5GFF-5J9E>].

⁴⁰ HAVEL & SANCHEZ, *supra* note 4, at 324.

⁴¹ The 1933 Rome Convention was an attempt to create uniform international laws regarding surface damage caused by aircrafts outside of their national borders. *Id.* at 315.

⁴² General Risks Convention, *supra* note 39; HAVEL & SANCHEZ, *supra* note 4, at 322–23.

⁴³ HAVEL & SANCHEZ, *supra* note 4, at 322–23.

⁴⁴ *Id.* at 323.

cargo liability with the liability system for surface damages, which seems to be disliked by many States.⁴⁵

Although the General Risks Convention has a bit more support than the Unlawful Interference Compensation Convention,⁴⁶ it also is not in force due to the lack of support and signatories.⁴⁷ As of April 2016, it had only thirteen signatures, two ratifications, and five accessions.⁴⁸ Much of its support came from the same States that supported the Unlawful Interference Compensation Convention.⁴⁹ The difference in support between the two was that Chile and Nigeria signed only the General Risks Convention and the Democratic Republic of Congo and Gabon only acceded to the General Risks Convention.⁵⁰ Again, the General Risk Convention lacked support from any States with large interests in the aviation industry. One reason why it was not supported by more States is because many States have domestic laws covering the same issues it is meant to solve and therefore find it unnecessary.⁵¹ It has more support from

⁴⁵ *Id.* at 322–23.

⁴⁶ *Convention on Compensation for Damage Caused by Aircraft to Third Parties – List of Parties*, INT'L CIVIL AVIATION ORG., http://www.icao.int/secretariat/legal/List%20of%20Parties/2009_GRC_EN.pdf [<https://perma.cc/FPD2-FBCH>] [hereinafter *General Risks Convention – List of Parties*]; *Convention on Compensation for Damage Caused to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft – List of Parties*, INT'L CIVIL AVIATION ORG., http://www.icao.int/secretariat/legal/List%20of%20Parties/2009_UICC_EN.pdf [<https://perma.cc/P576-FPLJ>] [hereinafter *Unlawful Interference Compensation Convention – List of Parties*].

⁴⁷ According to Article 23 of the General Risks Convention:

1. This Convention shall enter into force on the sixtieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Depositary between the States which have deposited such instruments. An instrument deposited by a Regional Economic Integration Organization shall not be counted for the purpose of this paragraph.

2. For other States and for other Regional Economic Integration Organizations, this Convention shall take effect sixty days following the date of deposit of the instrument of ratification, acceptance, approval or accession.

General Risks Convention, *supra* note 39, art. 23.

⁴⁸ See Appendix B *infra*; see also *General Risks Convention – List of Parties*, *supra* note 46.

⁴⁹ Compare *General Risks Convention – List of Parties*, *supra* note 46, with *Unlawful Interference Compensation Convention – List of Parties*, *supra* note 46.

⁵⁰ See Appendix B *infra*; see also *General Risks Convention – List of Parties*, *supra* note 46.

⁵¹ HAVEL & SANCHEZ, *supra* note 4, at 323.

developing nations that do not have sufficient domestic laws in place for liability issues within the aviation industry.⁵²

D. CAPE TOWN CONVENTION ON MOBILE EQUIPMENT AND PROTOCOL ON AIRCRAFT EQUIPMENT

The Convention on International Interests in Mobile Equipment, also known as the Cape Town Treaty,⁵³ and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, also known as the Cape Town Protocol on Aircraft Equipment⁵⁴ (collectively, the Cape Town Convention), were initiated by the aviation industry at the Diplomatic Conference in Cape Town, South Africa, on November 16, 2001.⁵⁵ The Aircraft Protocol specifically applies principles within the Cape Town Convention to the needs of the aviation finance area, such as specific deregistration and exportation of aircraft.⁵⁶ The purpose of the Cape Town Convention was to facilitate international aviation finance transactions and to help interest holders employ remedies in the case of default by the debtor in these transactions.⁵⁷

The Cape Town Convention provides three key benefits.⁵⁸ First, it established a right of repossession in an instance where the debtor of aircraft or aircraft engine defaults.⁵⁹ Second, it created the International Registry to allow for creditor priority when they register their “International Interest.”⁶⁰ Third, it es-

⁵² *Id.* at 324.

⁵³ Convention on International Interests in Mobile Equipment, 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/6BT7-4WLR].

⁵⁴ Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, 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/JAE6-X4JV].

⁵⁵ PROFESSOR SIR ROY GOODE, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT OFFICIAL COMMENTARY 1 (rev. ed. 2008).

⁵⁶ ROY GOODE ET AL., *TRANSNATIONAL COMMERCIAL LAW* 479 (2d ed. 2012).

⁵⁷ I.H. PH. DIEDERIKS-VERSCHOOR, *AN INTRODUCTION TO AIR LAW* 362 (9th ed. 2012).

⁵⁸ RONALD I.C. BARTSCH, *INTERNATIONAL AVIATION LAW: A PRACTICAL GUIDE* 26 (2012).

⁵⁹ *Id.*

⁶⁰ *Id.*

established the rights of other interested parties who have registered their specific interests in aircraft or aircraft parts.⁶¹

The Cape Town Convention has been extremely successful at gaining support from States around the world. According to Sir Roy Goode, “[t]he perceived importance of these two instruments is attested by the fact that no fewer than 20 participating States signed them during the closing ceremony.”⁶² As of April 2016, the Cape Town Convention had 64 parties and 28 signatures.⁶³ The substantial amount of support for the Cape Town Convention made apparent the aviation industry’s need for an international treaty focused on commercial transactions and default remedies that also helped fill safety gaps.

III. COMPARISON OF THE TWO DIFFERENT TREATY SYSTEMS

Aviation scholar, G. Nathan Calkins Jr., made the following statement when discussing the 1933 Rome Convention, which also applies to the Unlawful Interference Compensation Convention and the General Risks Convention: “The relatively small number of countries to ratify indicates either that there is little need for such a convention or that the convention is not properly responsive to that need.”⁶⁴ Due to the lack of industry support it seems as though the first option by Calkins is correct in that these two conventions were not necessary. Although ICAO’s intentions were good, it was focused on creating policies that addressed safety needs it believed were necessary due to past events, when really these Conventions did not address the critical safety needs facing the aviation industry at the current time and in the future.⁶⁵ The Chicago Convention’s designation of

⁶¹ *Id.*

⁶² GOODE, *supra* note 55.

⁶³ See Appendix C; see also *Convention on International Interests in Mobile Equipment – List of Parties*, INT’L CIVIL AVIATION ORG., http://www.icao.int/secretariat/legal/List%20of%20Parties/CapeTown-Conv_EN.pdf [https://perma.cc/R6ZW-Y7PF] [hereinafter *Cape Town Convention – List of Parties*]; *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment – List of Parties*, INT’L CIVIL AVIATION ORG., http://www.icao.int/secretariat/legal/List%20of%20Parties/CapeTown-Prot_EN.pdf [https://perma.cc/6JG5-E6ZP] [hereinafter *Aircraft Equipment Protocol – List of Parties*].

⁶⁴ G. Nathan Calkins Jr., *Principles and Extent of Liability Under the Revision of the Rome Convention Proposed by the ICAO Legal Committee*, 17 J. AIR L. & COM. 151 (1950), *quoted in* Gill, *supra* note 19, at 243.

⁶⁵ See ERWIN VON DEN STEINEN, NATIONAL INTEREST AND INTERNATIONAL AVIATION 179 (Pablo Mendes de Leon ed., 2006).

safety issue oversight to ICAO was heavily supported because of the industry need for uniform safety standards, but the industry did not see as much of a need or benefit from the implementation of the Unlawful Interference Compensation Convention and General Risk Convention.⁶⁶

The International Institute for the Unification of Private Law⁶⁷ (UNIDROIT) recognized the industry need for uniform global standards on aircraft financing measures back in the 1980s; however, its slow progress resulted in the failure to address this need for nearly sixteen years.⁶⁸ In 1994, UNIDROIT created the Aviation Working Group to try and ramp up its progress, but real movement toward a solution was not made until 1996 when The Boeing Company⁶⁹ (Boeing) requested ICAO and the International Air Transport Association⁷⁰ (IATA) aid UNIDROIT in its efforts. Boeing was focused on at the very least the development of uniform global standards on aircraft equipment.⁷¹ This initiative, taken by a private company working within the aviation industry, helped spark the establishment of the overall Cape Town Convention and its Aircraft Protocol.⁷² The Cape Town Convention allows for States to make declarations of whether to adopt certain rules, which is much more flexible than most international treaties.⁷³ The drafters of the Cape Town Convention purposefully established this flexibility and customization tool to better fit with each State's national laws, so that the likelihood of support from many States would increase.⁷⁴ The Cape Town Convention is a great model for future international commercial aviation treaties.⁷⁵

⁶⁶ HAVEL & SANCHEZ, *supra* note 4, at 176.

⁶⁷ *History and Overview*, INT'L INST. FOR THE UNIFICATION OF PRIV. L., <http://www.unidroit.org/about-unidroit/overview> [<https://perma.cc/2ZKH-YCFC>].

⁶⁸ HAVEL & SANCHEZ, *supra* note 4, at 351–52.

⁶⁹ *General Information*, BOEING, <http://www.boeing.com/company/> [<https://perma.cc/LQC5-QRUH>].

⁷⁰ *About Us*, INT'L AIR TRANSPORT ASS'N, <http://www.iata.org/about/pages/index.aspx> [<https://perma.cc/CCP3-Y3D4>].

⁷¹ Angie Boliver, Comment, *Square Pegs in a Round Hole? The Effects of the 2006 Cape Town Treaty Implementation and its Impact on Fractional Jet Ownership*, 72 J. AIR L. & COM. 529, 530 (2007).

⁷² HAVEL & SANCHEZ, *supra* note 4, at 352.

⁷³ *Id.* at 354–55.

⁷⁴ *Id.*

⁷⁵ *Id.* at 380.

IV. INDUSTRY INITIATIVE BETTER PROMOTES SAFETY AND ECONOMICS

As stated by the former Assistant Secretary for Aviation and International Affairs at the U.S. Department of Transportation, Karan Bhatia, “the [Cape Town] treaty is a very practical and useful way of promoting aviation safety in partnerships with countries across the globe.”⁷⁶ The aviation industry initiative taken with the Cape Town Convention allowed for many safety concerns to be further addressed and improved economics on both a public sector and private sector level. The Cape Town Convention has been more effective at promoting safety than either the Unlawful Interference Compensation Convention or the General Risks Convention.

The Cape Town Convention specifically helped operators in developing countries finance aircraft using a discounted interest rate, as long as these States agreed to adopt specific “creditor-friendly provisions.”⁷⁷ These finance measures allow developing States and their air carriers to obtain better aircraft, especially when their current aircrafts are outdated and are more prone to have safety issues.⁷⁸ The use of updated aircraft by developing countries utilizing these finance structures will enhance safety internationally.⁷⁹

By using less complicated finance models and operating leases, not only could smaller operators with less capital obtain aircraft in better condition, they also could pass adequately maintained older aircraft on to other air carriers.⁸⁰ In the past, airlines in developing countries have been known to buy older aircraft from more developed countries, such as the United States and the United Kingdom, yet these developing countries do not possess the necessary maintenance expertise to maintain

⁷⁶ *Cape Town Treaty: Hearing Before the Subcomm. on Aviation of the H. Comm. of Transp. and Infrastructure*, 108th Cong. (2004) (statement of Karan Bhatia, Assistant Secretary, Aviation and International Affairs), <http://testimony.ost.dot.gov/test/pasttest/04test/Bhatia1.htm> [<https://perma.cc/7MGN-L9TQ>].

⁷⁷ HAVEL & SANCHEZ, *supra* note 4, at 377; Vadim Linetsky, *Economic Benefits of the Cape Town Treaty*, AVIATION WORKING GRP. (Oct. 18, 2009), <http://www.awg.aero/assets/docs/economicbenefitsofCapeTown.pdf> [<https://perma.cc/GHN9-WU7Q>].

⁷⁸ *Cape Town Treaty: Hearing*, *supra* note 76.

⁷⁹ *Id.*

⁸⁰ RUWANTISSA I.R. ABEYRATNE, AVIATION TRENDS IN THE NEW MILLENNIUM 13 (2001).

these aircraft.⁸¹ Even though the accident rate increases when operating older aircraft, with proper maintenance it is possible to safely operate these aircraft.⁸² Many aircraft operators in these developing States lack financial resources to keep older aircraft in adequate shape to be safely used.⁸³ Failure of equipment is cited as one of the main causes of aircraft crashes in developing States.⁸⁴

According to Air and Space Professor, John Saba, “[seventy percent] of aviation accidents occur in the developing . . . countries when they account for only [fifteen percent] of the aviation traffic.”⁸⁵ In Western European countries, there is approximately one fatal aircraft incident per one million departures.⁸⁶ Comparatively, in African nations there are approximately thirteen fatal aircraft incidents per one million departures.⁸⁷ The increase in aircraft accidents in developing countries is due in part to limited resources, the lack of properly trained technicians, and the inability to afford or obtain necessary maintenance parts.⁸⁸

Although there has been a push for uniform international safety policies regarding aircraft, most of the new policies focus on authorizing new aircraft design not aircraft maintenance.⁸⁹ The Cape Town Convention provides for commercial transactions that address proper aircraft maintenance by the lessor, rather than a lessee in a developing State. Better aircraft maintenance results in safer aircraft being flown all over the world, not just in developed States. Aircraft leasing allows lessors, such as Boeing and Airbus,⁹⁰ to require that lessees return the aircraft

⁸¹ Clinton V. Oster, Jr. et al., *Improving Air Safety: Long-Term Challenges*, 17 *ISSUES IN SCIENCE & TECH.*, no. 2, 2001; Erik Sherman, *The Downside of America's Big Used Airplane Export Push*, CBS MONEYWATCH (July 21, 2011, 9:52 AM), <http://www.cbsnews.com/news/the-downside-of-americas-big-used-airplane-export-push/> [<https://perma.cc/J9NR-XGRC>].

⁸² Saba, *supra* note 1, at 25; Oster et al., *supra* note 81.

⁸³ Saba, *supra* note 1, at 48.

⁸⁴ Oster et al., *supra* note 81.

⁸⁵ Saba, *supra* note 1, at 36.

⁸⁶ Oster et al., *supra* note 81.

⁸⁷ *Id.*

⁸⁸ Richard Korman, *Are Some Airlines Just Too Dangerous to Fly?*, *PACIFIC STANDARD* (Sept. 21, 2009), <https://psmag.com/are-some-airlines-just-too-dangerous-to-fly-26d3cc9cc9ed#.wzq4ce489> [<https://perma.cc/4UJW-7T78>].

⁸⁹ Oster et al., *supra* note 81.

⁹⁰ *Company*, AIRBUS, <http://www.airbus.com/company/> [<https://perma.cc/WD8X-W7BU>].

for maintenance procedures.⁹¹ The aircraft lessor has an interest in the aircraft being maintained properly so that once the lease ends the lessor can possibly lease the aircraft again.⁹² This works in conjunction with the international policy that “[a]ircraft maintenance must always be performed in a coordinated manner that is largely determined by the manufacturer and the State of Design and Certification.”⁹³ An added interest of the lessee, besides having safe aircraft to operate is that proper maintenance by the lessor makes it less likely the aircraft will be “black-listed”⁹⁴ by developed nations due to being unsafe to fly.⁹⁵ By moving aircraft maintenance from a lessee in a developing country to a lessor in a developed country, it ensures that proper maintenance is done, in turn verifying that the aircraft is safe for operation.

The State where an aircraft is registered is responsible for overseeing the aircraft is safe to fly, even if the aircraft is operating in another State.⁹⁶ The State of Registration should require that aircraft operating in other States be sent back to it so that the aircraft can be “serviced and maintained under local supervision and by locally licensed technicians.”⁹⁷ Some States will allow for aircraft to be serviced at repair stations in other States if

⁹¹ Aaron A. Goerlich, *Operational Control Best Practices*, NAT’L BUS. AVIATION ASS’N 18 (Oct. 30, 2012), <https://www.nbaa.org/events/amc/2012/news/presentations/1030-Tue/NBAA2012-1030-Goerlich-OpControl.pdf> [<https://perma.cc/S63T-ZLN9>].

⁹² Engine Lease Finance Corporation, Presentation at the IATA 9th Maintenance Cost Conference: Airline Maintenance Costs: An Engine Lessor’s Perspective (Sept. 12, 2013), https://www.iata.org/whatwedo/workgroups/Documents/MCC-2013-DUB/Day2/1045-1130_Airline_Mtce_Costs_Engine_Lessors_Perspective_ELFC.pdf [<https://perma.cc/5EW7-PAF5>]; see DONALD H. BUNKER, *INTERNATIONAL AIRCRAFT FINANCING: GENERAL PRINCIPLES* 501–02 (1st ed. 2005).

⁹³ DIEDERIKS-VERSCHOOR, *supra* note 57, at 264.

⁹⁴ “Blacklisting” is when airlines are put on a State’s list of airlines that are not allowed to operate within its borders because they have not met specific safety standards. The United States and the European Union (EU) are the two most common States that have airline blacklists. The EU’s airline blacklist is called the EU Safety list which it defines as “a list of airlines which the European Commission . . . decided to subject to either a complete or a partial operating ban within the [EU], for failure to adhere to the applicable international safety standards.” *The EU Air Safety List*, EUR. COMMISSION, http://ec.europa.eu/transport/modes/air/safety/air-ban/index_en.htm [<https://perma.cc/2KS6-ZYWV>]; see Rick Seaney, *The Worst Airlines in the World*, ABC NEWS (July 8, 2009), <http://abcnews.go.com/Travel/BusinessTraveler/worlds-worst-airlines/story?id=8024779> [<https://perma.cc/T8KD-RZC5>].

⁹⁵ Korman, *supra* note 88.

⁹⁶ HAVEL & SANCHEZ, *supra* note 4, at 343.

⁹⁷ *Id.*

the stations have previously been approved by the State of Registration.⁹⁸

V. ICAO'S NEW FOCUS

As illustrated in the previous section, international treaties regarding commercial transactions are better at promoting safety than treaties that are not commercially motivated. ICAO's focus should be on helping make these commercial transactions easier for the aviation industry, rather than on initiating new, non-commercially motivated treaties. ICAO should use its resources to create new programs that further advance industry initiatives, like the Cape Town Convention. If ICAO focuses on measures that make the leasing of aircraft easier, it will in turn make the aviation industry safer.

One example of an effective ICAO initiative is the No Country Left Behind (NCLB) project.⁹⁹ NCLB was developed in 2014 to focus on ICAO's work helping States properly implement its Standards¹⁰⁰ and Recommended Practices¹⁰¹ (SARPs).¹⁰² According to ICAO, "[t]he main goal of this work is to help ensure that SARP implementation is better harmonized globally so that all States have access to the significant socio-economic benefits of safe and reliable air transport."¹⁰³ States are not required to comply with recommended practices, but States must comply

⁹⁸ *Id.*

⁹⁹ *No Country Left Behind*, INT'L CIVIL AVIATION ORG., <http://www.icao.int/about-icao/nclb/Pages/default.aspx> [<https://perma.cc/4ADN-VTTB>].

¹⁰⁰ A Standard is defined as:

Any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which contracting states will conform in accordance with the [Chicago] convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the [Chicago] convention.

BARTSCH, *supra* note 58, at 59.

¹⁰¹ A Recommended Practice is defined as:

Any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation, and to which contracting states will endeavor to conform in accordance with the convention. States are invited to inform [the] Council of non[] compliance.

Id.

¹⁰² *No Country Left Behind*, *supra* note 99.

¹⁰³ *Id.*

with standards. If a State cannot implement a standard, it must notify the ICAO council to have an exception approved.¹⁰⁴ One reason for the standard exception and the voluntariness of recommended practices is that some States may not have the financial means or technological capabilities to be able to adequately implement SARPs.¹⁰⁵

IATA has developed best practices for aircraft leases and through work done under NCLB, ICAO is helping to make commercial transactions easier.¹⁰⁶ The lack of financial resources in developing States results in substandard aircraft maintenance procedures, but if ICAO focuses on making it simpler to lease aircraft, these leases help solve this maintenance issue.¹⁰⁷ Through NCLB work, ICAO assists States that have not had the resources to implement SARPs, resulting in safer aviation practices both within those States and internationally.¹⁰⁸

VI. CONCLUSION

The ratification of the Cape Town Convention helped establish that industry initiative is better at promoting aviation safety than ICAO. The Cape Town Convention uses socio-economic measures of aircraft leasing to fill safety gaps, especially in developing nations. Also, aircraft leasing measures under the Cape Town Convention help aircraft manufacturers keep up with the demand for aircraft. Because the Convention provides actual ways to address commercial needs within the aviation industry while promoting safer air travel, it was able to collect support from all types of players in the international aviation community. The lack of support for the Unlawful Interference Compensation Convention and General Risks Convention illustrates ICAO's misplaced focus on developing international treaties that are not commercially motivated and are insufficient at filling safety gaps within the aviation industry. ICAO should focus on developing programs that advance industry initiatives, therefore helping to decrease the amount of aviation safety gaps. Overall, ICAO and the industry should work together on commercially motivated international agreements and standards to promote a safer aviation environment.

¹⁰⁴ BARTSCH, *supra* note 58, at 58–59.

¹⁰⁵ *Id.*

¹⁰⁶ See INT'L AIR TRANSPORT ASS'N [IATA], GUIDANCE MATERIAL AND BEST PRACTICES FOR AIRCRAFT LEASES (2d ed. 2015).

¹⁰⁷ Saba, *supra* note 1, at 50.

¹⁰⁸ *No Country Left Behind*, *supra* note 99; see BARTSCH, *supra* note 58, at 59.

APPENDIX A

Unlawful Interference Compensation Convention¹

State	Signature?	Ratification, Acceptance, Approval or Accession?	Date of Deposit of Instrument
Benin	Yes – January 21, 2013	No	Not Applicable
Burkina Faso	Yes – March 20, 2013	No	Not Applicable
Cameroon	Yes – October 25, 2011	No	Not Applicable
Congo	Yes – May 2, 2009	Ratification	October 1, 2014
Cote d'Ivoire	Yes – May 2, 2009	Ratification	February 19, 2016
Ecuador	No	Accession	August 19, 2013
Ghana	Yes – May 2, 2009	No	Not Applicable
Kuwait	No	Accession	July 4, 2014
Montenegro	No	Accession	July 18, 2012
Panama	Yes – June 15, 2009	No	Not Applicable
Serbia	Yes – May 2, 2009	No	Not Applicable
Sierra Leone	No	Accession	November 25, 2015
South Africa	Yes – September 30, 2010	No	Not Applicable
Uganda	Yes – May 2, 2009	No	Not Applicable
Zambia	Yes – May 2, 2009	No	Not Applicable

¹ *Unlawful Interference Compensation Convention – List of Parties, supra* note 46.

APPENDIX B
General Risks Convention¹

State	Signature?	Ratification, Acceptance, Approval or Accession?	Date of Deposit of Instrument
Benin	Yes – January 21, 2013	No	Not Applicable
Burkina Faso	Yes – March 20, 2013	No	Not Applicable
Cameroon	Yes – October 25, 2011	No	Not Applicable
Chile	Yes – September 29, 2009	No	Not Applicable
Congo	Yes – May 2, 2009	Ratification	October 1, 2014
Cote d'Ivoire	Yes – May 2, 2009	Ratification	February 4, 2015
Democratic Republic of the Congo	No	Accession	July 21, 2014
Ecuador	No	Accession	October 30, 2014
Gabon	No	Accession	February 4, 2014
Ghana	Yes – May 2, 2009	No	Not Applicable
Kuwait	No	Accession	April 8, 2014
Montenegro	No	Accession	March 3, 2012
Nigeria	Yes – October 8, 2009	No	Not Applicable
Panama	Yes – June 15, 2009	No	Not Applicable
Serbia	Yes – May 2, 2009	No	Not Applicable
South Africa	Yes – September 30, 2010	No	Not Applicable
Uganda	Yes – May 2, 2009	No	Not Applicable
Zambia	Yes – May 2, 2009	No	Not Applicable

¹ *General Risks Convention – List of Parties, supra* note 46.

APPENDIX C

Cape Town Convention¹

State	Signature?	Ratification, Acceptance, Approval or Accession?	Date of Deposit of Instrument	Entered Into Force for Aircraft Equipment Date
Afghanistan	No	Accession	July 25, 2006	November 1, 2006
Albania	No	Accession	October 30, 2007	February 1, 2008
Angola	No	Accession	April 30, 2006	August 1, 2006
Australia	No	Accession	May 26, 2015	September 1, 2015
Bahrain	No	Accession	November 27, 2012	March 1, 2013
Bangladesh	No	Accession	December 15, 2008	April 1, 2009
Belarus	No	Accession	June 28, 2011 (Convention); September 27, 2011 (Protocol)	January 1, 2012
Bhutan	No	Accession	July 4, 2014	November 1, 2014
Brazil	No	Accession	November 30, 2011	March 1, 2012
Burkina Faso	No	Accession	December 12, 2014 (Convention) ²	Not Applicable
Burundi	Yes – November 16, 2001	No	Not Applicable	Not Applicable
Cabo Verde	No	Accession	September 26, 2007	January 1, 2008
Cameroon	No	Accession	April 19, 2011	August 1, 2011
Canada	Yes – March 31, 2004	Ratification	December 21, 2012	April 1, 2013
Chile	Yes – November 16, 2001	No	Not Applicable	Not Applicable

¹ *Cape Town Convention – List of Parties, supra* note 63; *Aircraft Equipment Protocol – List of Parties, supra* note 63.

² Burkina Faso has not signed or deposited an instrument for the Protocol.

State	Signature?	Ratification, Acceptance, Approval or Accession?	Date of Deposit of Instrument	Entered Into Force for Aircraft Equipment Date
China	Yes – November 16, 2001	Ratification	February 3, 2009	June 1, 2009
Colombia	No	Accession	February 19, 2007	June 1, 2007
Congo	Yes – November 16, 2001	Acceptance	January 25, 2013 (Convention); March 13, 2013 (Protocol)	May 1, 2013
Costa Rica	No	Accession	August 26, 2011 (Convention) ³	Not Applicable
Cote D'Ivoire	No	Accession	February 9, 2015 (Convention); March 1, 2016 (Protocol)	July 1, 2016
Cuba	Yes – November 16, 2001	Ratification	January 28, 2009	May 1, 2009
Democratic Republic of Congo	No	Accession	May 6, 2016	September 1, 2016 ⁹
Denmark	No	Accession	October 26, 2015	February 1, 2016
Egypt	No	Accession	December 10, 2014	April 1, 2015
Ethiopia	Yes – November 16, 2001	Ratification	November 21, 2003	March 1, 2006
Fiji	No	Accession	September 5, 2011 (Convention); May 30, 2012 (Protocol)	September 1, 2012
France	Yes – November 16, 2001	No	Not Applicable	Not Applicable
Gabon	No	Accession	April 16, 2010 (Convention) ⁴	Not Applicable

³ Costa Rica has not signed or deposited an instrument for the Protocol.

⁴ Gabon has not signed or deposited an instrument for the Protocol.

State	Signature?	Ratification, Acceptance, Approval or Accession?	Date of Deposit of Instrument	Entered Into Force for Aircraft Equipment Date
Germany	Yes – September 17, 2002	No	Not Applicable	Not Applicable
Ghana	Yes – November 16, 2001	No	Not Applicable	Not Applicable
India	No	Accession	March 31, 2008	July 1, 2008
Indonesia	No	Accession	March 16, 2007	July 1, 2007
Ireland	No	Accession	July 29, 2005 (Convention); August 23, 2005 (Protocol)	March 1, 2006
Italy	Yes – December 6, 2001	No	Not Applicable	Not Applicable
Jamaica	Yes – November 16, 2001	No	Not Applicable	Not Applicable
Jordan	Yes – November 16, 2001	Ratification	August 31, 2010	December 1, 2010
Kazakhstan	No	Accession	January 21, 2009 (Convention); June 1, 2011 (Protocol)	October 1, 2011
Kenya	Yes - November 16, 2001	Ratification	October 13, 2006	February 1, 2007
Kuwait	No	Accession	October 31, 2013	February 1, 2014
Latvia	No	Accession	February 8, 2011	June 1, 2011
Lesotho	Yes – November 16, 2001	No	Not Applicable	Not Applicable
Luxembourg	No	Accession	June 27, 2008	October 1, 2008
Madagascar	No	Accession	April 10, 2013	August 1, 2013
Malawi	No	Accession	January 16, 2014	May 1, 2014

State	Signature?	Ratification, Acceptance, Approval or Accession?	Date of Deposit of Instrument	Entered Into Force for Aircraft Equipment Date
Malaysia	No	Accession	November 2, 2005	March 1, 2006
Malta	No	Accession	October 1, 2010	February 1, 2011
Mexico	No	Accession	July 31, 2007	November 1, 2007
Mongolia	No	Accession	October 19, 2006	February 1, 2007
Mozambique	No	Accession	January 30, 2012 (Convention); July 18, 2013 (Protocol)	November 1, 2013
Myanmar	No	Accession	December 3, 2012	April 1, 2013
Netherlands	No	Accession	May 17, 2010	September 1, 2010
New Zealand	No	Accession	July 20, 2010	November 1, 2010
Nigeria	Yes – November 16, 2001	Ratification	December 16, 2003	March 1, 2006
Norway	No	Accession	December 20, 2010	April 1, 2011
Oman	No	Accession	March 21, 2005	March 1, 2006
Pakistan	No	Accession	January 22, 2004	March 1, 2006
Panama	Yes – September 11, 2002	Ratification	July 28, 2003	March 1, 2006
Republic of Moldova	No	Accession	June 26, 2015 (Convention) ⁵	Not Applicable
Russian Federation	No	Accession	May 25, 2011	September 1, 2011
Rwanda	No	Accession	January 28, 2010	May 1, 2010
San Marino	No	Accession	September 9, 2014	January 1, 2015
Saudi Arabia	Yes – March 12, 2003	Ratification	June 27, 2008	October 1, 2008

⁵ Republic of Moldova has not signed or deposited an instrument for the Protocol.

State	Signature?	Ratification, Acceptance, Approval or Accession?	Date of Deposit of Instrument	Entered Into Force for Aircraft Equipment Date
Senegal	Yes – April 2, 2002	Ratification	January 9, 2006	May 1, 2006
Seychelles	No	Accession	September 13, 2010 (Convention) ⁶	Not Applicable
Singapore	No	Accession	January 28, 2009	May 1, 2009
South Africa	Yes - November 16, 2001	Ratification	January 18, 2007	May 1, 2007
Spain	No	Accession	June 28, 2013 (Convention); November 27, 2015 (Protocol)	March 1, 2016
Sudan	Yes – November 16, 2001	No	Not Applicable	Not Applicable
Sweden	No	Accession	December 30, 2015	April 1, 2016
Switzerland	Yes – November 16, 2001	No	Not Applicable	Not Applicable
Syrian Arab Republic	No	Accession	August 7, 2007 (Convention) ⁷	Not Applicable
Tajikistan	No	Accession	May 31, 2011	September 1, 2011
Togo	No	Accession	January 27, 2010	April 1, 2012
Tonga	Yes – November 16, 2001	No	Not Applicable	Not Applicable
Turkey	Yes – November 16, 2001	Ratification	August 23, 2011	December 1, 2011
Ukraine	Yes – March 3, 2004	Ratification	July 31, 2012	November 1, 2012
United Arab Emirates	No	Accession	April 29, 2008	August 1, 2008

⁶ Seychelles has not signed or deposited an instrument for the Protocol.

⁷ Syrian Arab Republic has not signed or deposited an instrument for the Protocol.

State	Signature?	Ratification, Acceptance, Approval or Accession?	Date of Deposit of Instrument	Entered Into Force for Aircraft Equipment Date
United Kingdom	Yes – November 16, 2001	Ratification	July 27, 2015	November 1, 2015
United Republic of Tanzania	Yes - November 16, 2001	Ratification	January 30, 2009	May 1, 2009
United States	Yes – May 9, 2003	Ratification	October 28, 2004	March 1, 2006
Vietnam	No	Accession	September 17, 2014	January 1, 2015
Zimbabwe	No	Accession	May 13, 2008 (Convention) ⁸	Not Applicable
European Community ⁹	No	Accession	April 28, 2009	August 1, 2009

⁸ Zimbabwe has not signed or deposited an instrument for the Protocol.

⁹ Regional Economic Integration Organization.