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WORLDWIDE SAFE FLIGHT: WILL THE INTERNATIONAL FINANCIAL FACILITY FOR AVIATION SAFETY HELP IT HAPPEN?

JOHN SABA*

I. INTRODUCTION

THE AIR TRANSPORT WORLD's priorities have been dramatically transformed since September 11, 2001. The United States Government's launch of a "war on terrorism" as a result of the tragic World Trade Centre and Pentagon events has catapulted "security" into the forefront of global air transport concerns.

* D.C.L., LL.M., LL.B., M.A., B.A., McGill University, Montreal, Canada. Dr. John Saba is both an Adjunct Professor at the Institute of Air and Space Law (Faculty of Law) as well as a Lecturer in Economics at McGill University in Montreal, Canada. He was also the Project Manager to the Air Transport Bureau of the International Civil Aviation Organization's (ICAO) Seminar prior to the 5th Worldwide Air Transport Conference in Montreal, March 22 - 23, 2003. For five years during the late 1990s, he was President of the primary subsidiary of a NASDAQ-traded information technology company.

The author drafted this article primarily on the basis of person-to-person interviews with a number of ICAO officers from the Secretariat and Representatives on the Council of the ICAO of Algeria, Australia, Canada, China, France, India, Ireland and the United States, as well as the alternate Representatives of France and Greece, in the spring of 2002 through early 2003. The author also attended relevant ICAO Council meetings during the 166th session (May/June 2002) and the 167th session (December 4, 2002) and refers to applicable Secretariat documentation. Since the author is in no way a member of the IFFAS apparatus, the author thereby cautions that there may be developments outside of his knowledge that may affect the validity of some comments and conclusions.

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

Dr. Saba may be contacted at: jsaba@hotmail.com or jesaba@aol.com.
The irony of this "war" is that it is unintentionally exacerbating the financial dilemma of an industry already squeezed with exorbitant losses. These losses are the result of first, declining revenues cause by a global macroeconomic slowdown, decreasing passenger traffic, and lower airline pricing power; and second, increasing costs resulting from challenges such as skyrocketing fuel prices and security upgrade requirements. This combination inevitably leads to significant airline consolidation, restructuring, and bankruptcies.

The current environment of increasing security and large financial losses makes other very urgent and continuing problems appear as though they are being put on the back burner. The growing and obvious crisis in aviation “safety” is one of the most important problems that may become a victim of the fundamental economic principle of choice under scarcity. Given fixed and sometimes declining budgets, States and airlines must choose priorities – if more money is spent on security, necessarily less money may be spent elsewhere, as on budgetary items related to aviation safety.

The dilemma is that safety associated problems continue to cause disproportionately more aviation-related deaths when contrasted to deaths caused by security deficiencies. This discrepancy is powerfully demonstrated in a recent study of the International Civil Aviation Organization (ICAO). In the 10-year period of 1992-2001, aviation accident-related deaths due to safety problems (for example, controlled flight into terrain caused 33.77 percent of such deaths) were about ten times more likely than deaths due to security breaches (3.87 percent of deaths were caused this way—this includes passenger and crew deaths of the aircraft not only in the September 11, 2001 events but also in the inadvertent shooting down of a plane over the Ukraine in that same year).\(^1\)

The air transport industry’s financial balancing act is continually being shaken by the vicissitudes of national, regional and international politics. On one hand, most developing and less developed countries (LDCs) attribute more importance to aviation “safety” issues. On the other hand, the developed countries tend to prioritize aviation “security.” Somehow government and industry budgeting must fairly account for both priorities.

\(^1\) Accident Reporting, Air Navigation Commission Briefing, International Civil Aviation Organization 3 (June 6, 2002).
A United Nations specialized agency, the ICAO, has tried to balance both priorities as it fulfills its obligation—under the Chicago Convention of 1944— to insure the safe and orderly growth of civil aviation throughout the world. The ICAO has tried to reconcile differing positions among its 188 developed and developing Member [Contracting] States on the balance and priority to be attached to safety and security.

This paper focuses on the safety side of the ICAO’s challenges with respect to the creation of an International Financial Facility for Aviation Safety (IFFAS). In early December 2002, after lengthy deliberations, the Council of the ICAO established an IFFAS to assist Contracting States of the Organization in financing aviation safety-related projects identified principally through the ICAO Universal Safety Oversight Audit Programme (USOAP). The USOAP, since its creation in January 1999, has helped identify deficiencies in the implementation of safety-related ICAO Standards and Recommended Practices (SARPs) in ICAO Contracting States. The primary purpose of the IFFAS is to provide financial assistance to those States (primarily developing countries and LDCs) that have difficulty in securing the necessary money through existing financing mechanisms and procedures in order to apply corrective measures to the aviation safety gaps discovered by the USOAP.

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2 Convention on International Civil Aviation, opened for signature, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention]. In Article 43 of this Convention, it is stipulated that: “An organization to be named the International Civil Aviation Organization is formed by the Convention. It is made up of an Assembly, a Council, and such other bodies as may be necessary.” Id. at art. 43. The ICAO decision-making process includes three principal levels: (1) the Assembly may establish a policy priority by resolution; (2) the ICAO Council deliberates on and formulates the structures and/or rules based on this resolution; and (3) the Secretariat supports both the Assembly and the Council through research and implementation. The ICAO’s headquarters are in Montreal, Canada.

3 Id. at art. 44(a).

4 ICAO Press Release, Council of ICAO Establishes Global Financing Facility for Aviation Safety (Dec. 9, 2002) [hereinafter ICAO Press Release]. The ICAO Universal Safety Oversight Audit Programme (USOAP) will be discussed in greater detail below. See infra part II(B).

5 The ICAO (i.e., its Council) has adopted 18 technical Annexes to the Chicago Convention, establishing Standards and Recommended Practices (SARPs) that are designed to ensure a minimum level of safety for international civil aviation through technical uniformity. In turn, each State is responsible to assure adherence to these SARPs.

The President of the Council of the ICAO, Dr. Assad Kotaite, summarized the ICAO's position respecting IFFAS thus: "Aviation safety is global in nature. For the entire system to be safe, all elements must be equally safe. IFFAS is yet another tool at the disposal of Contracting States in their on-going efforts to ensure that every citizen of the planet can fly safely to and from any destination in the world." He added: "The Council was unanimous on the importance of the mechanism to aviation safety and in its contribution to furthering the ICAO's mandate of encouraging the safe and orderly development of international civil aviation."

This article examines the challenges posed by the USOAP, identified deficiencies, and the IFFAS mechanism within the context of the principles highlighted by Dr. Kotaite. Thus, four topics will be studied: first, the nature and extent of the aviation safety problem; second, existing solutions and approaches (technical and financial) to help remedy aviation safety deficiencies in the developing/LDC countries (particularly as identified by the ICAO's USOAP); third, proposed mechanisms (including the IFFAS) to help correct the identified safety deficiencies; and fourth, a conclusion as to whether the IFFAS is a valuable mechanism, even experimentally, to address the problem of assisting certain needy developing/LDC countries in correcting their aviation safety deficiencies.

II. THE PROBLEM: AVIATION SAFETY DEFICIENCIES

Most countries—developed, developing, and less developed countries—acknowledge that there is an acute need to help LDCs remedy aviation safety deficiencies since their resources, financial and otherwise, are insufficient. However, States and their domestic air transport industries disagree as to what mechanisms and procedures are preferred to meet this need. This article reviews not only the nature but also the extent of the problem.

A. DEFINING THE PROBLEM: WHY REMEDY AVIATION SAFETY DEFICIENCIES IN LESS DEVELOPED COUNTRIES?

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

Statistical evidence supports this proposition. Internationally, if the aviation accident rate is assumed to be held constant (at the 1996 level) and projected growth rates double traffic volume over the next ten to twelve years, it is projected that by 2015 there may be a serious accident every week. Regionally, one study indicates that the developed regions of North America, Western Europe, and Australia have the lowest fatal aviation accident rates, while developing countries have much higher accident rates. For example, airlines of Eastern Europe and the Commonwealth of Independent States have the highest accident rate (indeed, 50 times higher than Western Europe). Airlines from Africa, Asia, and Central/South America have accident rates at least twice as high as the world average. Thus, it is evident that passengers and third parties on the ground are put at risk by developing/LDC countries’ aircraft and aviation infrastructure deficiencies. Developed country aircraft operators and citizens not only fly internationally to developing/LDC country destinations, but developed country airports also receive flights from developing/LDC country aircraft operators.

A second reason for improving aviation safety in developing/LDC States is that global economic development is closely connected to a vibrant transportation industry, generally and a vital air transport industry, particularly. Global economic development is associated with four factors:

1) Air transport permits billions of developed country tourists to travel to developing/LDC countries, thereby accelerating

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

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


12 See EU Contribution, supra note 10, at 5.
their economic development specifically\textsuperscript{13} and contributing to the over $3.5 trillion USD to the travel and tourism industry (about 12 percent of the world’s Gross Domestic Product).

2) Global markets require fast and efficient transportation of not only perishable goods from the developing/LDC countries to the developed countries, but also finished products sent from the developed to developing countries.\textsuperscript{14}

3) The air transport industry and economic development depends on the traveling public’s confidence that air travel is safe.\textsuperscript{15}

4) Developed country aerospace suppliers sell more aviation products to developing/LDC countries when the latter adopt developed country standardized and uniform air safety regulations for aircraft, air traffic, and airport services.\textsuperscript{16}

B. THE EXTENT OF THE PROBLEM

The world has become aware of the extent of aviation safety deficiencies, particularly among certain developing and LDC countries, largely because of the Universal Safety Oversight Audit Programme (USOAP) of the ICAO. The USOAP reinforces preliminary evidence of aviation safety deficiencies provided by other programmes.

The first audits/assessments were those of the United States’ Federal Aviation Administration International Aviation Safety Assessment (IASA) programme initiated in 1992. By the end of the 1990s, the IASA had determined that over 40\% of the countries assessed had insufficient oversight systems.\textsuperscript{17} A significant regional mechanism is the European Safety Assessment of Foreign Aircraft (SAFA) Programme, established by the European

\begin{footnotes}
\textsuperscript{13} \emph{Id.} at 6.
\textsuperscript{14} \emph{Id.}
\textsuperscript{15} \emph{Id.}
\textsuperscript{16} \emph{Id.}
\textsuperscript{17} This Programme continues to assess whether a non-US Civil Aviation Authority (CAA) complies with international (ICAO) standards for aviation safety oversight of the air carriers under its authority. The FAA is evaluating the safety oversight system of each country, not the safety of its individual airlines. It assesses only whether the oversight system is adequate to ensure that ICAO minimum standards are met, not the higher standards applicable in the U.S., the European Community, and some other countries. For a more in depth explanation, see \textit{EU Contribution, supra} note 10, at 14.
\end{footnotes}
Civil Aviation Conference (ECAC) and Europe’s Joint Aviation Authority (JAA) with support from the European Commission.\textsuperscript{18}

ICAO’s mandatory USOAP\textsuperscript{19} regime was created in November 1998. In the following three-year period, the ICAO Assembly mandated initial audits (conducted under the auspices of ICAO’s Air Navigation Bureau) that were to verify State compliance (i.e., effective implementation) of the Standards and Recommended Practices (SARPs) in three Annexes concerned largely with the aircraft itself: Annexes 1 (personnel licensing), 6 (flight operations), and 8 (aircraft airworthiness including design, certification, and maintenance).

There were three main reasons for creating this programme. First, the USOAP is a response to concerns about worldwide compliance with minimum international aviation safety standards. Its ultimate objective is to promote global aviation safety consistent with the ICAO’s Global Aviation Safety Plan (GASP).\textsuperscript{20}

Second, the programme is mandatory and applies to all Member States in a systematic and regular way. It rectifies the failings of its predecessor, the ICAO Aviation Safety Oversight Programme (SOP), created by the ICAO Assembly in October 1995. The SOP was plagued by not only the lack of financing (since contributions were voluntary), but also by the fact that audits were voluntary and were only carried out when requested by the Member State, thus the SOP could not always be applied where the need was greatest.\textsuperscript{21}

Third, the USOAP was created to reconcile a discrepancy between State legal obligations and lack of action to satisfy these obligations. On one hand, the Chicago Convention and its Annexes impose a duty on individual States to assure aviation safety. If these obligations are not fully respected by States, air safety deficiencies arise and States have an obligation under Article 38 of the Chicago Convention to notify the ICAO of any

\textsuperscript{18} The SAFA Programme provides European States with a surveillance tool so that they are made aware of and can act on proven deficiencies. It is largely based on safety information gathered from all possible sources and on ramp-checks of foreign aircraft. The Programme is applied to all foreign aircraft using a European Civil Aviation Conference (ECAC) country’s airports. The SAFA is neither an assessment of a State’s oversight capability nor a substitute for safety oversight assessments. See EU Contribution, supra note 10, at 15.

\textsuperscript{19} Id.


\textsuperscript{21} Id.
differences between their national regulations and practices and the international standards contained in the Annexes. On the other hand, despite these legal obligations, many contracting States have been discovered to not properly satisfy their duty by not applying and/or misinterpreting relevant SARPs.

The ICAO has been very successful with the USOAP, with 180 Contracting States and five territories having been audited by ICAO teams between January 1, 1999, and December 31, 2002. The results of these initial audits have been analyzed and submitted to the audited States. As expected, there were many cases of aviation safety deficiencies resulting from State non-compliance with the SARPs including: improper and insufficient inspections by State authorities before the certification of air operators; maintenance organizations and aviation training schools; licenses and certificates improperly issued, validated, and renewed without due process; procedures and documents improperly approved; failure to identify safety concerns; and failure to follow-up on identified safety deficiencies and take remedial action to resolve such concerns.

As expected, the USOAP audits and follow-up procedures have indicated that, while many States have remedied their non-compliance after the audits, many States still fail to remedy aviation safety deficiencies, often due to a lack of will, means, and/or ability to do so. The analysis of the audit findings confirms

See supra note 5 for a discussion on ICAO (i.e., its Council) having adopted 18 technical Annexes to the Chicago Convention, establishing SARPs.

This discrepancy became a prominent issue when disclosed by the ICAO at a November 1997 conference of Directors-General of Civil Aviation.


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

ICAO Council, Working Paper No. C-WP/11815, Apr. 18, 2002, at 2. The ICAO Air Navigation Commission (ANC) has a “follow-up” audit programme “to validate the implementation of States' corrective action plans, to identify any problems encountered by States in such implementation, and to determine the need for external assistance to resolve safety concerns identified in the course of the audits.” Id. Indeed, the ICAO has conducted an analysis of a sample of 34 States that compares their rate of non-compliance with specific critical elements of safety oversight in the initial and follow-up (a few years later) audits. While in the initial audit there was 23.7% non-compliance, in the audit follow-up a few
that the serious difficulties in fulfilling safety oversight obligations apply to specific States and regions disproportionately. Indeed, in many regions, audit findings show a direct relationship between two factors: the higher the non-compliance to SARPs, the higher the aviation accident and incident rates in that region.28

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

1) Primary aviation legislation and regulations may be either non-existent or inadequate (for example, a failure to provide adequate enforcement powers).

2) Institutional structures that regulate and supervise aviation safety often do not have the authority and/or autonomy to effectively satisfy their regulatory duties.

3) Human resources in many States may be plagued by a lack of appropriate expertise largely due to inadequate funding and training (and trained staff may leave government jobs for better-paying jobs in the aviation industry).

4) Financial resources allocated to civil aviation safety are insufficient since many developing/LDC countries do not consider this a high priority compared to other demands such as health care, education, irrigation, and poverty.29

Recognizing the nature and extent of the problem, the challenge is to find some existing and/or new mechanisms to help the needy developing/LDC States remedy the audited aviation safety deficiencies.

III. SOLUTIONS: TODAY'S APPROACHES

Today, it is clear that there is a crisis of unremedied aviation safety deficiencies in particular States and regions of the world.

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28 Belai, supra note 25, at 19-20.
29 See EU Contribution, supra note 10, at 4.

years later, non-compliance dropped to only 8.7%. See id. at app. B graph, Critical Elements of a Safety Oversight System – Lack of Effective Implementation (%). It should be noted that these follow-up statistics reveal two important trends: positively, many cases of aviation safety deficiencies have been remedied; but negatively, “some of the States visited have not been able to implement their corrective action plan and require assistance to do so.” Id. at 3. To the end of 2002, 67 Contracting States had received an audit follow-up mission. See Annual Report of the Council (2002), supra note 24, at 11.
While the ICAO has been performing the safety (and soon will be doing security) audits of most countries, a question has arisen as to the purpose of these safety audits.

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

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

A. Technical Assistance

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

1. International Technical Assistance

The worldwide development of civil aviation since World War II has resulted in a reduction in aviation safety deficiencies in developing/LDC countries. They have gradually acquired equipment, facilities, and services so as to conform to ICAO's minimum international standards (SARPs) primarily through the work of the ICAO's Technical Co-operation Bureau (TCB) and Technical Co-operation Programme (TCP).30

30 The Technical Cooperation Bureau (TCB) of the ICAO provides advice and technical assistance to developing and LDC countries for civil aviation. The TCB receives administrative fees to fund itself by carrying out civil aviation projects in developing/LDC countries with three main funding sources: (1) the United Nations Development Programme (UNDP) (this is a declining source); (2) Developing countries' self-funding sources; and (3) other financing institutions.

31 The Technical Cooperation Programme (TCP) of the ICAO focuses on aeronautical training. Again, there has been a decline in funding by the UNDP. However, this reduction has been partly compensated by governments that increasingly provide partial financing for their own civil aviation projects (through cost-sharing) and/or trust funds provided by third parties such as other governments.
This progress can significantly be attributed to the funding of the TCB through the United Nations Development Programme (UNDP), which for many years approved financing to assist in remediying aviation safety deficiencies of developing countries. However, over the last ten years, UNDP funding priorities have changed to divert funding from a lower priority item, like civil aviation, in favor of health, education, agriculture, water purification, and poverty reduction. Thus, civil aviation projects are expected to be self-financed through a variety of public and private funding sources (but no longer the UNDP), with the ultimate goal being that commercial revenues provide cost recovery.

Despite a lack of UNDP funding, the ICAO Council has approved the TCB funding project feasibility studies for appropriate aviation infrastructure safety-related projects (e.g., traffic forecasts, radar installation) in developing/LDC countries. While the ICAO, through the TCB, provides some technical assistance to needy countries by preparing feasibility studies, the TCB can only prepare limited studies that are less than the com-

32 The United Nations Development Programme (UNDP) is the United Nations' largest provider of grants for "sustainable human development." The UNDP grants assistance only at the request of governments and in response to their priority needs that must be incorporated into national and regional plans. The funds are primarily spent to secure international and national expertise, technical services, and equipment. In the mid-1990s, the UNDP often gave over $30 million USD annually for projects that the ICAO implemented. However, the ICAO has progressively received less money from this source. For example: Generally, "UNDP-funded projects, including cost sharing in which most of the funds were provided by the Government, recorded a [significant further] decrease in 2002. Expenditures on inter-country projects decreased 55% from $3,563,905 in 2001 to $1,616,295 in 2002 and country project expenditures decreased 62% [between 2001 and 2002]." See Annual Report of the Council (2002), supra note 24, at 39. In the case of the ICAO, "UNDP core funding in 2002 amounted to [only] $752,000 . . . ICAO project expenditures under the UNDP programme, which was mostly cost sharing and included projects for which ICAO acted as Implementing Agency, were $26.6 million in 2002, compared with $52.4 million in 2001." Id. at 38.

33 These studies are presently funded by two methods: (1) by voluntary contributions of a generous third country that wants to help a particular country and its project; or (2) a few hundred thousand dollars transferred annually to the TCB from a small internal ICAO trust fund (this fund was established by the ICAO to hold dues paid in arrears and to be spent for ICAO-related purposes) for the purpose of the preparation of project documents for remedial action in countries, generally. (The TCB has decided to direct part of these funds to country-specific feasibility studies). Interview with A.P. Singh, Representative of India on the Council of ICAO (May 15, 2002). See also, International Civil Aviation Organization, Annual Report of the Council (2001), Doc. 9786, at 45.
plete and more detailed project reports that the financing institutions want.34

2. Regional Technical Cooperation

Several different regional technical cooperation/self-help approaches are being tried that many developed countries support. One approach involves certain countries organizing themselves regionally for a common aviation purpose with a view of rationalizing their costs and the regional employment of the needed resources. For example, while six countries may not be able to afford to hire four safety oversight inspectors each, they may be able to pool their resources and maybe hire ten inspectors for their region (this concept has been applied regionally by six Central American Member States in the Central American Corporation for Air Navigation Services: Corporacion Centroamericana de Servicios de Navigacion Aerea (COCESNA) regional association respecting their oversight/monitoring and upgrading of their aviation infrastructure). The mechanisms to collect whatever charges or taxes are necessary to finance these activities are regionally developed and applied.35 A second approach involves groups of more economically developed developing countries (for example, North Africa) helping neighboring regions of poorer developing/LDC countries (for example, sub-Saharan Africa) to finance and implement aviation infrastructure upgrades.36

3. Bilateral, Multilateral and Plurilateral Technical Assistance

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

34 Id.
35 Interview with Daniel Galibert, President of the Air Navigation Commission of ICAO (May 7, 2002).
36 Id.
a. Bilateral Technical Assistance

Some developed donor States prefer that their limited technical assistance money help particular regions, sub-regions or individual countries, using a bilateral and directed approach, rather than international mechanisms, for three main reasons. First, such an approach may assure that the money is spent in the area that the donor State desires.\footnote{Interview with Jonathan Aleck, Representative of Australia on the Council of ICAO (July 29, 2002).} Second, this approach often provides more transparency, accountability, and effective auditing, than international assistance mechanisms. Countries like the United States may already have mechanisms (e.g., the FAA) to achieve these goals.\footnote{Interview with Edward W. Stimpson, Representative of the United States on the Council of ICAO (May 14, 2002).} Third, developed countries may want to help by using a “bottom up” bilateral and regional approach (rather than the “top down” use of international mechanisms), since funds are channeled to recipient neighbor countries and regions benefiting the donor’s political and economic interests. For example, Canada and the United States are involved in such projects (with Inter-American Development Bank cooperation). Suggestions have been made that more developed countries in East Asia, like Japan and Korea, might do something similar to help their Asian neighbors.\footnote{Interviews with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26 & Aug. 15, 2002).}

Bilateral assistance assumes a special character when donor States are members of a regional group like the European Union. European Union (EU) States individually—and, possibly in the future, through a variety of European Union mechanisms—are already channeling some technical assistance to those countries regionally close to them in Eastern Europe and Africa. France’s civil aviation regulatory authority (DGAC) is helping former colonies, Cambodia and Vietnam, to develop and upgrade their civil aviation codes to be consistent with Europe’s Joint Aviation Requirements (JARs).

b. Multilateral Technical Assistance

Multilateral technical assistance is best illustrated by the EU and its Commission that encourages European Union initiatives to improve aviation safety globally. Thus, the European Commission has proposed initiatives including cooperation with Eu-
urope’s Joint Aviation Authority (JAA) and EUROCONTROL to assist future EU members (from Central and Eastern Europe) and to finance safety recovery programmes. Moreover, discussions continue with respect to not only the joint and complementary goals and priorities of EU Member States, but also to the need to establish a co-ordination mechanism for actions taken by EU Member States to avoid duplication of governmental spending.40

c. Plurilateral Technical Assistance

A developing concept, structure, and process of technical assistance is plurilateralism, which expands associates to include not only recipient and donor States (bilaterally, multilaterally, and/or internationally) but also “the efforts, experience and... resources of international [e.g., ICAO, IATA] and regional organizations, aviation manufacturers, financial and other funding institutions.”41 The ICAO established a Global Aviation Safety Plan (GASP) in 2001 and during the ICAO’s 33rd Assembly of September/October 2001 acknowledged the existence and desirability of this group of senior aviation experts being empowered to study their region’s aviation safety problems and recommend the best ways to improve safety and provide assistance regionally.42 Thus, the ICAO has rendered the mecha-
nism of the Group of Experts on Aviation Security, Safety and Assistance (GEASA) as an internationally recognized approach based on the 1995 precedent of the Asia-Pacific Economic Community (APEC) Transportation Ministers that convened such a group of experts to review and recommend the best ways to improve safety and provide assistance in their region. This approach continues today in the Asia-Pacific region.43

Some countries are applying this framework in their own regions. For example, Canada and the United States participated, in the period of April 4-5, 2002, at a GEASA with experts from seven South/Central American and Caribbean countries, the ICAO, the Inter-American Development Bank (IDB), and the Central American Oversight Agency (ACSA).44 The European Union is studying this approach, particularly in reference to technical assistance to Eastern Europe and Africa.45

B. Financial Assistance

Financial assistance is clearly a second important approach for developing/LDC countries to remedy their USOAP audited

the best safety dividend in terms of reducing accident numbers and rates worldwide.

The objectives of the ICAO Global Aviation Safety Plan are to:

a) reduce the number of accidents and fatalities irrespective of the volume of air traffic; and

b) achieve a significant decrease in worldwide accident rates, placing emphasis on regions where these remain high.

This should be achieved by:

a) identifying repetitive causes for accidents on a worldwide and a regional basis and recommending specific actions;

b) enhancing identification of all elements that can impair safety, such as shortcomings and deficiencies in the air navigation system or lack of compliance with ICAO Standards and Recommended Practices (SARPs), and recommending corrective actions; and

c) enhancing the cooperation between Contracting States or groups of States with ICAO in order to improve ICAO’s own capability to compile, assess and disseminate safety-related information.

1.3 The ICAO Global Aviation Safety Plan will therefore identify those tasks and programmes likely to produce the best safety dividend in terms of reducing accident numbers and rates both on a worldwide and on a regional basis. . . . . . .

43 Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26, 2002).
44 Stimpson, supra note 38; see also Dupuis, supra note 43.
45 Dupuis, supra note 43.
aviation safety deficiencies including borrowing from: (1) commercial banks; (2) regional development banks and funds; (3) international banks and other institutions; and (4) export credit agencies and bilateral development institutions.

1. Commercial banks

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

2. Regional Development Banks and Funds

A promising source of financing to assist countries is regional development banks and affiliated funds. The main such banks include the Islamic Development Bank (IDB),46 African Development Bank (AFDB),47 Asian Development Bank (ADB),48 and Inter-American Development Bank (IADB, also called the IDB).49

The availability and extent of the financial assistance provided by these banks and funds suffer from three principal constraints. First, these mechanisms generally attach little priority to the improvement of aviation infrastructure and services, preferring to channel funds to such objectives such as reducing poverty.50 The IDB is a special case since it broadens its loan priorities to include not only poverty reduction but also sector reform and modernization. Indeed, the upgrading of the aviation sector might be interpreted as within the IDB’s priorities, as illustrated in late 2001 by the IDB’s Multilateral Investment

47 Id. at app. B-1.
48 Id. at app. B-2, 3.
49 Id. at app. B-1.
50 Interview with A.P. Singh, Representative of India on the Council of ICAO (May 15, 2002). It should be noted that since the time of the interview, Ambassador Singh has become the Director of the Bureau of Administration and Services of ICAO. At the time of the interview, Ambassador Singh indicated that these banks follow a procedure that effectively excludes loans to LDCs for remediying aviation safety deficiencies. These banks stipulate to the applicant LDC that there is a fixed amount available for the country’s development with “soft”/concessional loans; however, these banks stipulate a number of priorities (such as programmes for poverty alleviation, education, water supply purification, health care, rural road infrastructure, etc.) that do not include aviation infrastructure improvement.
Fund (MIF), which created a $10 million line of activity to help Latin American and Caribbean countries improve airport security in the aftermath of the September 11th World Trade Centre tragedy (for example: recently the MIF approved almost one half million dollars as a grant to Nicaragua to support a project to strengthen security at Managua’s international airport).\footnote{Working Paper No. C-WP/11840, supra note 46, at app. B-1.}

Second, the lending policies and practices of such banks and funds apply such demanding criteria that loans tend to be limited to creditworthy countries; therefore, this effectively excludes the more needy but credit risky developing/LDC countries.\footnote{Singh, supra note 50.}

Third, there is no mechanism to help the potential financial assistance recipients to professionally prepare project proposals and satisfy project management requirements and documentation procedures when they apply to regional development banks.\footnote{Interview with Jonathan Aleck, Representative of Australia on the Council of ICAO (Apr. 30, 2002).}

Regional development banks sometimes partner with a donor and recipient State. For example, recently the Netherlands (i.e., its Ministry of Transport, through its Aviation Technical Assistance Programme) and the European Investment Bank jointly provided seed money, expertise, and/or equipment to aviation-related projects in Tanzania.\footnote{Interview with Bert Kraan, Senior Project Manager, Safety and Security, Department of Civil Aviation of the Netherlands (May 28, 2002).}

3. International Banks and Other Institutions

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

\footnote{One project involves an estimated $10 million USD to provide air navigation and communications equipment; another project requires an estimated $13 million USD to install a back-up power supply in Tanzanian airports for the emergency cases when power goes down due to inclement weather.}
4. Export Credit Agencies and Bilateral Development Institutions

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

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

IV. REMEDYING AVIATION SAFETY DEFICIENCIES: PROPOSED MECHANISMS

On one hand, there is an international consensus of the need to identify aviation safety deficiencies worldwide (with almost universal praise for the ICAO’s successful USOAP programme). On the other hand, there is much disagreement as to whether the ICAO is the best mechanism to help developing/LDC countries remedy their identified aviation safety deficiencies when these States lack the ability and means to do so. Thus, the question is, does the ICAO have a role in helping remedy identified aviation safety deficiencies—and, if so, how?

The following discussion is divided into three issues: 1) determining the nature and scope of the ICAO’s role in assisting the remedy of identified aviation safety deficiencies, which includes a study of arguments for and against a broad role for the ICAO in this area; 2) if there is an ICAO role, describing the history, functions/objectives, and proposed structure and operations of the IFFAS; and 3) the future of the IFFAS.
A. ISSUE 1: DETERMINING THE ICAO'S ROLE IN ASSISTING THE REMEDY OF IDENTIFIED AVIATION SAFETY DEFICIENCIES

The ICAO is committed through the USOAP to perform mandatory, permanent and universal auditing/assessment of the way its contracting States apply certain standards (found in the three Chicago Convention Annexes mentioned earlier) for which they are responsible. However, the USOAP is also, in effect, a voluntary programme since the ICAO has no legal power to obligate the States to accept these audits and inspections. The ICAO must conclude bilateral agreements with each of the States on a voluntary basis.55

The present consensus is to expand the USOAP to cover the auditing of the implementation of all safety-related SARPs. The next phase is to add auditing of SARPs related to air traffic management, airport services and security. However, the ICAO faces two constraints in broadening the USOAP mandate: first, a restricted budget makes such audits very expensive; and second, non-remedied safety deficiencies persist in States that represent only one percent of international aviation activities.56

The challenge is to find appropriate mechanisms—beyond the technical and financial assistance discussed above—to fund aviation safety projects, particularly in developing/LDC countries.57 One option that has been suggested is to establish independent entities such as publicly owned corporations; however, in the developing/LDC world, adequate funding is unlikely given limited resources and other pressing priorities like health, education, agricultural and industrial modernization, and reducing poverty. A second possibility proposed is to privatise air navigation services and airport facilities. A third alternative considered is to provide financing through an investment banking mechanism. At this point, it is recognizable that the last two options are unrealistic in most developing/LDC countries since cost-recovery and a positive return-on-investment is unlikely given inadequate revenues due to low traffic volume.

A fourth option suggests pre-funding of the solutions through a charges/fees system imposed on airline passengers. A disadvantage of this mechanism is that specific developing/LDC

55 See EU Contribution, supra note 10, at 7.
56 Id.
countries may be unable to collect enough to recover costs. Moreover, this approach works better if it is applied regionally or best, internationally, which is extremely unlikely.

In the context of the limitations of existing and proposed mechanisms for assisting needy developing/LDC countries remedy their aviation safety deficiencies, there has been much debate as to whether the ICAO should assume a broad role, particularly through an IFFAS mechanism.

1. The Case for a Strong IFFAS: Favouring a Broad ICAO Role

There are five main arguments suggested to encourage the development of a strong IFFAS with a broad ICAO role. It must be recognized that largely developing and LDC States are the principal proponents of an expanded ICAO role in assisting the remedy of aviation safety deficiencies identified in their countries.

First, these developing and LDC States envision an IFFAS structure that is a quasi-independent, self-financed entity (i.e., outside of the ICAO’s regular Programme Budget) made up of States that volunteer to be members and participants in its activities.

Second, many of the proponents of an expanded role of the ICAO through the IFFAS argue that the ICAO might be restricted to three main responsibilities: (1) to supervise the IFFAS and make certain that any deficiencies identified through its auditing process are remedied; (2) to supply administrative and technical service support to the IFFAS (to minimize IFFAS costs) on a cost-recovery basis; and (3) to authorize payment to the suppliers—not the client States—of the goods and services contracted through its audited finance processes.

Third, advocates of a strong IFFAS define the ICAO’s role and scope of functions broadly. In line with this reasoning, they cite two principal arguments. First, these proponents argue that the ICAO’s responsibilities are not limited to monitoring, auditing, and establishing global standards and recommended practices, but also to applying to the regulation and enforcement of the minimum universal standards it formulates. Thus, the ICAO

58 For example, the ICAO’s Secretariat processes might be used not only to help procure the client State’s aviation goods and services, but also to finally certify their delivery at quality assured standards through the Technical Coopera-

59 Singh, supra note 50.
must not only disclose aviation safety deficiencies through its USOAP programme, but must also help developing/LDC countries that do not have the means to remedy these deficiencies.⁶⁰ As a result, the ICAO’s 33rd Assembly decided to establish a mechanism (named the International Financial Facility for Aviation Safety (IFFAS)) with the purpose of “financing safety-related projects which States cannot otherwise provide or obtain the necessary financial resources” to help remedy “safety-related deficiencies identified through the ICAO USOAP.”⁶¹

Second, some proponents of a strong IFFAS also emphasize that an IFFAS (in assisting needy States remedy aviation safety deficiencies) may be a mechanism that reconciles the legal obligations of the States and the ICAO under the Chicago Convention.⁶² On one hand, States have a legal obligation to regulate and assure safe civil aviation within their jurisdiction. On the other hand, according to the Chicago Convention, the ICAO is responsible for ensuring worldwide safety and efficiency in air transport.⁶³ Indeed, the ICAO Council can intervene in cases where the Council believes that “the airports or other air navigation facilities . . . of a Contracting State are not reasonably adequate for the safe, regular, efficient, and economical operations of international air services.”⁶⁴ Furthermore, it can be argued that the Council has an obligation to make recommendations for remedying the situation since the Council “shall consult directly with the State concerned, and others affected, with a view to finding means by which the situation may be remedied, and

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⁶⁰ Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (May 10, 2002).

⁶¹ See ICAO Assembly, Resolution A33-10, Oct. 2001, art. 2(a) [hereinafter Resolution A33-10]; Cherif, supra note 60 (emphasizing this provision of the Assembly resolution to give legal context to this position).

⁶² Cherif, supra note 60.

⁶³ Id. The logic resulting in this conclusion is as follows: There is a pivotal objective in the Chicago Convention that requires the ICAO (as the entity responsible for the international regulation of civil aviation) to “insure the safe and orderly growth of international civil aviation throughout the world.” Chicago Convention, supra note 2, at art. 44(a).

The word “insure” places upon the ICAO the responsibility to assure that international civil aviation grows safely and in an orderly manner. Furthermore, the ICAO is obliged to “meet the needs of the peoples of the world for safe, regular, efficient and economical air transport.” Chicago Convention, supra note 2, at art. 44(d). Therefore, the Chicago Convention provides that the Contracting States of the ICAO will hold the ICAO accountable for ensuring safety and efficiency in air transport. See Abeyratne, supra note 57, at 393.

⁶⁴ Chicago Convention, supra note 2, at art. 69.
may make recommendations for that purpose."65 Later, a Contracting State may conclude an arrangement with the Council for giving effect to such recommendations.66 Thus, proponents of a broad role for the ICAO argue that the ICAO must not restrict itself to identifying and informing the audited States of aviation safety deficiencies through its USOAP. Accordingly, the ICAO and its Council have the added responsibility of recommending remedies and assisting needy countries if they are not able to rectify these problems on their own.67

Fourth, advocates of a strong IFFAS highlight the failure of existing technical and financial assistance mechanisms to help developing/LDC countries in remediying aviation safety deficiencies.68

Fifth, an interesting legal and hypothetical challenge has been suggested by some of those who want an active role for the ICAO in helping remedy safety deficiencies. They focus on potential State liability because of a State’s prior knowledge (actual or implied/constructive)69 that a specific country is not respecting its international obligations under the Chicago Convention – the State has knowledge of these safety gaps since aviation safety deficiencies have been identified through the ICAO USOAP. Thus, the issue is whether such a State’s prior knowledge implies an obligation on it to inform its citizens of the deficiency in the non-conforming country such that its citizens might avoid the airspace and/or aircraft of the non-conforming country for safety reasons. If the informed State, despite this knowledge, fails to inform its citizens of these risks, and one of its citizens is injured or dies in a plane crash, is the plaintiff’s State legally liable for such effects in wrongful death damages? While this article does not address complex sovereign immunity

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65 Id.
66 Id. at art. 70.
67 Cherif, supra note 60.
68 Singh, supra note 50.
69 The process of implying that one State has knowledge of another State’s aviation safety deficiencies must be qualified. The USOAP is constrained by a memorandum of understanding (signed by the States) that established the Universal Safety Oversight Audit program in 1999, which provides that the results of the audits of all States are known by the ICAO; however, each individual State’s audit results are confidential and may only be disclosed to other States and entities if the State agrees to the disclosure. Nevertheless, States do become aware of individual deficiencies through bilateral exchanges and other ways. Furthermore, certain countries (for example: the USA through its FAA and International Aviation Safety Assessment (IASA) programme) have their own auditing mechanisms that give them actual knowledge.
issues that might result, it must be acknowledged that litigable principles may arise in such a case.

2. The Case Against a Strong IFFAS: Preferring a Limited ICAO Role

There are four important arguments that have been suggested in building the case for a more limited role of the ICAO in assisting the remedy of aviation safety deficiencies identified in developing/LDC countries. Primarily, but not exclusively, developed States have suggested these concerns.

First, advocates of this position suggest that the ICAO’s functions should be narrowly construed to be limited to only the monitoring, auditing, and establishing of global SARPs. Moreover, it is argued that the ICAO should restrict itself to identifying aviation safety deficiencies through its USOAP programme and not expand the scope of responsibilities to include the regulation and enforcement of minimum universal standards established by it. This view rationalizes that, according to the Chicago Convention, the obligation to regulate and enforce the SARPs established by the ICAO is imposed only on the States (not on the ICAO), therefore, the States, not the ICAO through an IFFAS, are responsible for fixing aviation safety deficiencies within their territory.

Second, the opponents of an increased role of the ICAO emphasize the success of existing technical and financial assistance mechanisms that help developing/LDC countries remedy aviation safety deficiencies. For example, it has been argued that an IFFAS duplicates the ICAO’s existing technical cooperation mechanisms. Furthermore, various improvements to the existing structures, programmes, policies, and procedures are sometimes proposed to facilitate needy States in securing assistance.

Third, it has been argued that an IFFAS would effectively cause the ICAO to enter the banking business. Thus, ICAO finds itself in an unconventional role (possibly violating the Chi-

70 See ICAO/Air Transport Bureau Website on the IFFAS, available at www.icao.org (last visited Sept. 1, 2003) [hereinafter IFFAS Website]. This argument has been challenged by IFFAS proponents. For example, while the IFFAS will be a financial facility or a mechanism to provide financial support (loans and/or grants) to States, the Technical Cooperation Bureau has a different responsibility of providing technical and financial assistance to States for the development and implementation of technical cooperation projects, as well as for the mobilization of funds.
icago Convention) in which it lacks experience, expertise, and appropriate financing.

Fourth, the carriers of certain developed States have argued that an IFFAS is potentially anti-competitive in that it gives an indirect subsidy to certain developing/LDC country carriers through its assistance to the developing/LDC States to remedy aviation safety deficiencies.

B. ISSUE 2: DESCRIBING THE INTERNATIONAL FINANCIAL FACILITY FOR AVIATION SAFETY (IFFAS)

There is an ongoing debate of the nature and scope of the ICAO's role in helping needy developing/LDC countries remedy their aviation safety deficiencies identified in the ICAO's USOAP. However, it is clear that the ICAO Assembly has mandated such a role in requiring the ICAO Council to establish an IFFAS. Thus, the Council, during its 166th and 167th Sessions, tried to reconcile the conflicting visions of an IFFAS, and on December 4, 2002 (during its 167th Session), the Council established an IFFAS by approving and adopting its draft Administrative Charter. Since December 4, 2002, and until June 13, 2003, transitional rules (approved and adopted by the Council on December 4, 2002) applied, which required the ICAO Secretary-General to prepare a work programme, a timetable, a proposed budget, and to engage in other activities to effectively launch the IFFAS until the governing body of the IFFAS assumes control. It is heuristic to study the IFFAS in terms of: (1) its his-

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

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

THE COUNCIL:

1. **Approves and adopts the Administrative Charter of the International Financial Facility for Aviation Safety** establishing IFFAS as set out in the Attachment hereto; and

2. **Urges Contracting States, international organizations and public and private parties associated with international civil aviation to make voluntary contributions to IFFAS.**


72 The transitional rules and their implementation are outside the scope of this paper. For more details on these rules, see ICAO Council, Working Paper No. G-WP/11907, Nov. 22, 2002, 2.16 – 2.21 & attachment 3, app. A.
1. The History of IFFAS

The idea of creating a financial mechanism to assist certain States with their aviation needs in international air transport has been discussed at the ICAO for a long time. The original concept originated in 1946 and proposed a "common fund" for the provision of airports and air navigation facilities. Subsequently, the joint financing mechanisms developed under which 23 Contracting States to the Icelandic and Danish Agreements currently assumed—and continue to assume—financial responsibility for the provision and operation of certain facilities and services provided for civil aircraft flying across the North Atlantic. The costs incurred are recovered through user charges.73

In the early 1980s, a novel concept fed the idea of an international aviation financial mechanism, the concept now known as Communications, Navigation, Surveillance/Air Traffic Management (CNS/ATM) systems. This stimulated the ICAO to address specific financial effects arising out of the sharing of satellite systems for air navigation.74

The birth and development of the IFFAS concept has assumed the active involvement of the three principal institutions of the ICAO, the Assembly, the Council, and the Secretariat in a supporting role.

a. Assembly of ICAO Initiates

In 1995, the 31st Session of the ICAO Assembly approved the concept of an International Financial Facility for Aviation Safety (IFFAS). This was the result of a deliberation on a proposal by eight States (members of the Latin American Civil Aviation Commission (LACAC)) to study the need, appropriateness, and usefulness of establishing an International Aeronautical Monetary Fund (IAMF). These countries argued that many States had problems financing investments in airports, air navigation ser-
vices infrastructure, and the like, necessitating a search for less onerous and rigid mechanisms than normal financial markets.  

The IAMF concept was studied by the ICAO Secretariat in the 1995-1998 triennium period of the ICAO and was endorsed by certain important civil aviation bodies. In 1998, the 32nd Session of the ICAO Assembly endorsed plans for further study on the creation of a fund in the ICAO's next triennium (1998-2001). Indeed, an extensive Secretariat study carried out in 1998 demonstrated that not only was there a need to finance aviation safety-related projects in certain developing/LDC countries, but also there were no funding mechanisms within the existing aviation system to provide financing for these needs. The 1998 Assembly envisioned a broader scope to the IAMF's financial assistance responsibilities than the IFFAS of today.

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

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75 The context of these developments is outlined in ICAO Assembly (31st Session), Working Paper No. A31-WP/73, EX/26, (1995) at 2.


77 See Study of IFFAS, supra note 73, at ch. 1, available at www.icao.org. The broader role of the IAMF was to help not only projects related to the ICAO safety oversight programme but also the global implementation of components of CNS/ATM systems, and improvement and expansion of airport and air navigation services infrastructure, where this is aimed at overcoming identified safety deficiencies.

78 Resolution A33-10, supra note 61. The 2001 Assembly benefited from an in-depth Secretariat Study prepared and submitted to the Assembly for consideration. See Study of IFFAS, supra note 73.

79 Resolution A33-10, supra note 61, at art. 3.

80 See IFFAS Website, supra note 70, available at www.icao.org.
b. The Council of the ICAO Deliberates, Establishes and Implements

In discharging its Assembly-mandated obligation to establish an IFFAS, the ICAO Council has, through applying the principle of "consensus," navigated through deeply divided positions. Moreover, the Council decision-making process has involved mandating and considering a number of studies and associated draft proposals from various working groups over its last few sessions (165th, 166th, and 167th).82

On December 4, 2002 (during its 167th Session), the ICAO Council studied, approved, and adopted the proposed Administrative Charter of the IFFAS (prepared by a working group), thereby establishing the IFFAS.83 At the same time, the Council adopted a Resolution relating to transitional arrangements for the implementation of the IFFAS during the transitional period (between December 4, 2002 and June 13, 2003). Important immediate results of these Council actions were that the ICAO Secretary-General performed certain duties and the ICAO

82 "Consensus" is a tool that the President of the ICAO Council, Dr. Assad Kotaite, uses to avoid confrontational votes and to eventually arrive at decisions in Council proceedings. For example, in the 165th Session of the Council (Jan./Feb. 2002), the Council was unable to reach a consensus on two important but complicated papers. To facilitate the eventual development of a consensus, the Council decided to proceed with further study by creating two distinct study groups (of different State members) that met in parallel. The first paper resulted in a study group that dealt with establishing the IFFAS as a mechanism to help remedy USOAP identified aviation safety deficiencies (the concern of this article). The second paper resulted in a study group that addressed war risk insurance issues resulting from the aftermath of the September 11th, 2001, tragedy (not the concern of this article). ICAO Council, Working Paper No. C-WP/117855, Feb. 13, 2002, at 1.1.

Subsequently, in its 166th Session (May/June 2002), the ICAO Council and its deliberations over the paper emanating from the IFFAS Study Group (ICAO Council, Working Paper No. C-WP/11840, May 21, 2002) continued with many questions respecting the functions, structure, and the draft proposed administrative charter of the IFFAS. The Council concluded that further work was necessary for the completion of the draft Administrative Charter and requested that the President, in consultation with member Representatives, establish a small (six Council members) working group to revise the charter, taking into account the reservations expressed in the (9th and 10th) Council meetings. The working group reported back to the Council at its 167th Session (Nov./Dec. 2002) with many proposals on the creation of the IFFAS. The Council adopted, with some modification, most of the proposals.

83 Culled from discussions at the 167th Session of the ICAO Council on Dec. 4, 2002.
Council selected a Governing Body that has assumed control of the IFFAS.\textsuperscript{84}

2. The Principal Objective and Function of the IFFAS

The overriding objective of the IFFAS is to function as a "not for profit fund" to help finance projects that "remedy or mitigate safety-related deficiencies"\textsuperscript{85} "for which States cannot otherwise provide or obtain the necessary financial resources."\textsuperscript{86} To achieve this primary objective of financially assisting countries in improving aviation safety, the IFFAS follows two key guidelines: first, the IFFAS will only financially facilitate needy projects and countries that lack the resources to remedy aviation safety deficiencies;\textsuperscript{87} and second, the Universal Safety Oversight Audit Programme (USOAP) (as an element of ICAO's Global Aviation Safety Plan (GASP)) is considered the preferred instrument to help the IFFAS identify the greatest needs in choosing and prioritizing projects to be funded.\textsuperscript{88}

\textsuperscript{84} As stated earlier, the transitional rules and their implementation are outside the scope of this paper. For more details on these rules, see Working Paper No. C-WP/11907, \textit{supra} note 72.

\textsuperscript{85} ICAO Council, Administrative Charter of the IFFAS, at art. 2.1. \textit{See IFFAS Website, supra note 70, available at www.icao.org.} Article 2.1 of this Administrative Charter provides:

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

\textit{Id.}

\textsuperscript{86} \textit{Resolution A33-10, supra} note 61.

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} \textit{Id.} In addition to the principles established in Resolution A33-10, aviation safety is one of the most important factors in civil aviation, and it is recognized by the ICAO Strategic Action Plan as being a major element of consideration within the ICAO. In clause 2 of Assembly Resolution A33-9, (resolving deficiencies identified by the Universal Safety Oversight Audit Programme and encouraging quality assurance for technical cooperation projects) who urges the Secretary General to ensure that the ICAO provides, when requested, reasonable assistance within available resources, to help States to obtain the necessary financial resources to fund assistance projects by Contracting States, industry organizations, or independent consultants. \textit{See IFFAS Website, supra} note 70, \textit{available at www.icao.org.} Unlike the broader mandate of the 1998 ICAO Assembly, today's IFFAS is no longer to be concerned with financially assisting either the components of CNS/ATM systems or the improvement and expansion of airport and air navigation services infrastructure.
3. The Developing Structure and Operation of the IFFAS

In Resolution A33-10, the Assembly gave the ICAO Council the general responsibility to establish the IFFAS, specific guidelines that it be constituted of five main components in terms of the structure and operational procedures, and granted the Council an oversight function. The ICAO Council has largely satisfied the Assembly mandate by approving and adopting the IFFAS transitional Administrative Charter on December 4, 2002. This Administrative Charter incorporates the following five key elements that are in various stages of implementation:

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

2) Consistent with the Assembly guidelines, the IFFAS Administrative Charter provides that the ICAO and IFFAS will operate as distinctive entities. On one hand, legally the IFFAS “shall keep ICAO harmless with regard to all

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89 Resolution A33-10, supra note 61, at art. 7. The Assembly has asked the Council to report back to the Assembly (at its next session in the fall of 2004) on the progress of the IFFAS.
90 Id. at art. 3(a). This charter spells out principles of operation of the IFFAS and requires a Council resolution approving the charter. See IFFAS Website, supra note 70, available at www.icao.org.
92 See id.; see also Resolution A33-10, supra note 61, at art. 6; see IFFAS Website, supra note 70, available at www.icao.org. Article 3.4 of this Administrative Charter provides:

Subject to Article V, IFFAS shall derive its resources from voluntary contributions made by ICAO Contracting States, international organizations (public and private) working in the field of international aviation or associated with it, airlines, airports, air navigation services providers, manufacturers of airframes, engines, avionics and other aircraft components, other members of the aerospace industry, and civil society.

Id. at art. 3.4.
93 Resolution A33-10, supra note 61, at arts. 2(b)(1), 5(b).
claims, demands or legal actions by third parties arising from or relating to the operation of IFFAS."94 On the other hand, financially, the IFFAS is to be funded completely independent of the ICAO Programme Budget.95 More specifically, any services provided by the ICAO are to be "only upon request of participating States and on a cost-recovery basis."96

The Administrative Charter provides that the sources of funding of the IFFAS are generally voluntary and relatively limited, and stipulated as follows:

a) voluntary contributions from Contracting States and other contributing parties;
b) interest earned on loans;c) miscellaneous income from bank deposits and investments;
d) contributions resulting from the crediting of any amount of Contracting States' shares of any distributable surplus from the ICAO Regular Budget; or
e) other voluntary contributions by way of pledge, loans from banks for reinvestment in projects based on the line of credit from international, regional and sub-regional development banks and financial institutions.97

The result is that contributions to the IFFAS will be voluntary for both funding projects in States and for operating the IFFAS itself.98 For example, States are encouraged to contribute to the IFFAS by annually crediting their share of any distributable surplus (that is held in trust by the ICAO) from the ICAO Programme Budget to the IFFAS account.99 Accordingly, as of January 1, 2003, 47 ICAO Member States had contributed $222,709 USD. Furthermore, the European Commission has pledged 200,000 Euros for each of the years of 2002 and 2003.100 Other interested parties (such as private and public interna-

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95 Resolution A33-10, supra note 61, at art. 2(b)(4). See also IFFAS Website, supra note 70, available at www.icao.org. Article 3.3 of this Administrative Charter provides: "IFFAS shall operate with complete independence from ICAO's Regular Budget." Id.
96 Resolution A33-10, supra note 61, at art. 2(b)(5).
97 Administrative Charter, supra note 94, at art. 9.1.
98 Working Paper No. C-WP/11907, supra note 72, at art. 2.4.
99 Resolution A33-10, supra note 61, at art. 5(a), (c).
100 Culled from discussions at the 167th Session of the ICAO Council at the ICAO headquarters, Montreal, Canada (Dec. 4, 2002).
tional aviation-related organizations, airlines, airports, air navigation service suppliers, aircraft/engine/avionics manufacturers, civil society, etc.) are also encouraged to make voluntary contributions in the future.101

3) Conforming to the Assembly requirements, the IFFAS includes a Governing Body, appointed by the ICAO Council, whose members are nominated by participating States and other participating parties.102 In the charter, the ICAO President of the Council and the Secretary General have a right to participate in the meetings of the Governing Body without a voting right.103 This Governing Body is responsible for running the IFFAS and deciding what projects to fund and on what terms,104 but with obvious accountability to the ICAO in general and the ICAO Council in particular. This is clear from a careful reading of the specific functions outlined in the Administrative Charter where it is stated that the Governing Body shall:

a) formulate the policy or polices for the activities of IFFAS. . . ;

b) approve the annual work programme and budget of IFFAS after consultations with the Council;

c) receive, examine and approve the financial statements of IFFAS;

d) monitor and evaluate the activities of IFFAS and review and report on them on an annual basis to the ICAO Council, participating States and other participating parties;

e) actively promote participation in IFFAS by Contracting States and other participating parties;

f) negotiate arrangements with the parties referred to in e) above regarding participation in IFFAS;

g) propose to the ICAO Council from time to time ways and means of enhancing the financial resources of IFFAS, with a view to ensuring the effectiveness and continuity of its operation; and

101 Resolution A33-10, supra note 61, at art. 6. See also Administrative Charter, supra note 94, at art. 3.4.

102 Administrative Charter, supra note 94, at arts. 6.1, 6.2.

103 Id. at art. 6.4. This conforms to Resolution A33-10, supra note 61, at art. 3(b).

h) develop and keep up to date a compendium of the working procedures of IFFAS to serve as a procedural manual.\textsuperscript{105}

The IFFAS Governing Body is not yet functional. In fact, it has not yet met. The President of the Council, by authority delegated to him by the Council, on June 18, 2003, appointed eight members to the Governing Body. The Administrative Charter allows for a minimum of eight and a maximum of 11 members. The other three seats may be reserved for regional organizations and the private sector that might contribute to the IFFAS later. The IFFAS governing body is expected to sit in its first meeting in October 2003.\textsuperscript{106}

4) The Administrative Charter incorporates limited ICAO “staffing to support [the IFFAS] and to cover daily executive and administrative functions.”\textsuperscript{107} First, “in consultation with the Governing Body and the President of the Council of ICAO, the Secretary General of ICAO shall appoint to IFFAS: (a) an ICAO official to act as Secretary to the Governing Body of IFFAS; and (b) an ICAO official to act as Secretary to the Expert Panel”\textsuperscript{108} (advisory group). Second, “in consultation with the Governing Body and the President of the Council of ICAO, and in response to a request from the [IFFAS] Governing Body, the Secretary General of ICAO may... provide IFFAS with administrative assistance in addition to the appointments” just mentioned,\textsuperscript{109} all on a full-time or part-time, and “on a full cost-recovery basis.”\textsuperscript{110}

\textsuperscript{105} Administrative Charter, \textit{supra} note 94, at art. 6.7.
\textsuperscript{106} Culled from private discussions with members of the ICAO Secretariat, at the Montreal, Canada headquarters (Sept. 4, 2003).
\textsuperscript{107} \textit{Resolution A33-10, supra} note 61, at art. 3(b). One opinion on the nature of the staff servicing of the IFFAS argues that Assembly Resolution A33-10 provides for a management structure within the ICAO legal regime. Thus, according to Article 54(h) of the Chicago Convention, any staff benefiting from ICAO status is under the authority of the ICAO’s chief executive officer, appointed by the Council, i.e. the Secretary General. Moreover, such staff shall be subject to rules established by Council, per Article 58 of the Convention (Staff Regulations). An example may be taken in this regard from the African Civil Aviation Commission (AFCAC), the European Civil Aviation Conference (ECAC), and the Latin American Civil Aviation Commission (LACAC), where staff are officially ICAO staff and have contracts signed by the Secretary General, under the “service” authority of whom they stand. \textit{See IFFAS Website, supra} note 70, available at www.icao.org.
\textsuperscript{108} Administrative Charter, \textit{supra} note 94, at art. 8.1.
\textsuperscript{109} \textit{Id.} at art. 8.2.
\textsuperscript{110} \textit{Id.} at art. 8.3.
5) The Administrative Charter incorporates certain operational policies and procedures for the IFFAS that reflect the Assembly's guidelines. First, it is agreed that IFFAS governance and its management principles are to be based on transparency, sound, simple management,\textsuperscript{111} and accountability with clear administrative and financial guidelines to be stipulated and followed.\textsuperscript{112}

Disputes exist, however, on issues of governance and the relationship with the ICAO. On one hand, some argue that Assembly Resolution 33-10 states that IFFAS's "management strategy" should be "developed on the principles of, and in conformity with, the existing ICAO legal regimes,"\textsuperscript{113} meaning that the creation of a new legal entity with its own legal personality is not envisaged.\textsuperscript{114} For example, in this view, there is an ICAO auditing system in the "existing ICAO legal regime," that could be made formally and directly applicable to IFFAS. The IFFAS being under the ICAO's umbrella, would be subject to the external (and possibly internal) auditor's jurisdiction and the ICAO might recover the additional costs from the IFFAS.\textsuperscript{115} On the other hand, some commentators have disagreed with this position and suggest that the Council should eventually approve the creation of a separate and autonomous entity with transparency and accountability not linked to the ICAO in most respects.

A second issue related to the IFFAS' operational policies and procedures is that respecting the Assembly's desires, the Council has consistently favoured the idea of the global application of

\textsuperscript{111} Resolution A33-10, supra note 61, at art. 3(d).

\textsuperscript{112} Id. at art. 3(d)(1), (2). There will be "clear criteria and procedures for the granting of loans and conducting any other financial transactions" using ICAO standards, policies, and procedures. Id. at art. 3(d)(3). Moreover, there are to be safeguards to ensure the proper, effective, and efficient application of funds from participating States. Id. at art. 3(d)(4). This suggests that there will have to be a clear distinction and identification of funds used for the administration of the IFFAS and for financial assistance provided toward safety-related projects. See IFFAS Website, supra note 70, available at www.icao.org. Moreover, there are to be "measures to assure quality control and to assess effectiveness and efficiency at all levels" and adequate "provision for the auditing of accounts." Resolution A33-10, supra note 61, at art. 3(d)(5)-(6).

\textsuperscript{113} Resolution A33-10, supra note 61, at art. 3(c).

\textsuperscript{114} See IFFAS Website, supra note 70, available at www.icao.org. This view considers that the appropriate legal basis for the IFFAS is enshrined in Chapter XV of the Chicago Convention, particularly articles 69 and 70.

\textsuperscript{115} See IFFAS Website, supra note 70, available at www.icao.org. There is an interesting discussion as to "What system of quality control and auditing would the IFFAS employ?"
principles on a regional basis. Accordingly, the IFFAS will apply globally "a framework of common guidelines and operating rules with flexibility for implementation" regionally.\(^\text{116}\)

In sum, the IFFAS is a quasi-independent and self-financed entity (i.e., outside of the ICAO’s budget). Some commentators have interpreted that the ICAO has three main functions in relationship to the IFFAS: first, the ICAO supervises the IFFAS in assuring that any deficiencies identified through the ICAO’s auditing process are remedied; second, the ICAO provides administrative and technical service support to the IFFAS (to minimize IFFAS costs) on a cost-recovery basis (for example, ICAO’s Technical Cooperation Bureau may not only help procure the client State’s aviation goods and services, but may also finally certify their delivery at quality assured standards); and third, the ICAO’s audited finance processes will authorize payment to the suppliers—not the client States—of the goods and services contracted. In the end, the client States will have to pay back the loans they secure through the IFFAS process.

C. ISSUE 3: THE FUTURE OF THE IFFAS

The remainder of this paper examines three outstanding questions associated with the nature, scope, and development of the IFFAS from today until the future: (1) the IFFAS has been created on a compromise basis as neither a "Giant" nor a "Dwarf;" (2) sources of funding the IFFAS; and (3) the status of the IFFAS as part of the ICAO or as a distinct and independent entity.

1. The IFFAS as neither a "Giant" nor a "Dwarf"

The draft Administrative Charter emanating from the ICAO Council on December 4, 2002, reflects an intriguing compromise developed by the working group that prepared it. The working group deliberated on whether the IFFAS should provide grants or loans, and this deliberation bridged the schism that has divided States into two distinct visions of the IFFAS and

\(^{116}\) Resolution A33-10, supra note 61, at art. 2(b)(3). It has been suggested that the regional applicability of the IFFAS will be in cooperation with regional financial institutions and such regional bodies as the African Civil Aviation Commission (AFCAC), the European Civil Aviation Conference (ECAC), and the Latin American Civil Aviation Commission (LACAC). See IFFAS Website, supra note 70, available at www.icao.org.
its role in remedying the aviation safety deficiencies of developing/LDC countries identified in the USOAP.

a. The Giant

The first vision has been that the IFFAS should begin as a "Giant." This vision conceives that the IFFAS might assume certain functions of an international bank that directs money to remedy aviation safety deficiencies identified by ICAO audits in needy countries. The IFFAS would have broad powers to lend, a sophisticated structure, and deep-pocket financing. This approach has been particularly popular among developing/LDC countries (especially by those who expect to benefit from the IFFAS financial assistance).\(^\text{117}\)

The Giant IFFAS idea has been criticized by developed countries that often consider the IFFAS as an indirect form of "foreign aid" from the developed to the developing/LDC countries. Many donor developed countries are reluctant to give up control of how the assistance will be spent in the recipient developing/LDC countries by delegating power over foreign aid project priorities and spending to another institution (like IFFAS); these countries generally prefer to choose the projects and the regions where the money will be spent.\(^\text{118}\) Moreover, there is a resistance to allowing recipient States to remedy the deficiencies themselves and spend the money as they wish. These criticisms have given birth to an alternative view of the IFFAS as a Dwarf.

b. The Dwarf

This view suggests a gradualist and evolutionary approach where the IFFAS should start as a "Dwarf." Rather than being a lending institution, the IFFAS should begin with a limited structure and restricted powers. The IFFAS would be a facilitator by providing information and helping prepare professional "bankable" detailed project proposals and reports, and an intermediary by helping needy countries seek financial and technical assistance through existing mechanisms such as international, regional development, or national banks. Many developed and some developing countries have favored this approach.

\(^{117}\) Singh, supra note 50. The author culled the nature of this position in discussions with Representative Singh, who does not agree with all the elements of this position.

\(^{118}\) Stimpson, supra note 38.
This IFFAS would operate as an umbrella entity with its head office (probably in Montreal) providing financial (information), administrative, and quality assurance (i.e., oversight) services to needy countries and approved projects. However, the work of such an IFFAS would probably be implemented regionally. In this view, the IFFAS would initially work on a few pilot projects so as to build a track record and credibility for future assessment. The guiding management principles, reiterating Assembly Resolution A33-10, would be accountability, efficiency, effectiveness, and transparency.

*The Compromise*

The draft Administrative Charter coming from the ICAO Council on December 4, 2002, is a rather interesting compromise developed by the working group that prepared it. The working group deliberated on whether the IFFAS should provide grants or loans, and thus tenuously bridged the Giant and Dwarf dispute.

On one hand, some in the working group suggested that the IFFAS should only provide outright grants to remedy needy country USOAP identified safety deficiencies. This would avoid bankers' problems in making loans, such as the credit-worthiness of the beneficiaries, interest rates, appropriate repayment periods, and bad debts. Moreover, grants recognize the probability that the initial beneficiaries of the IFFAS would be countries that already suffer from incredible debt loads and are seriously challenged to pay back the principal and small interest on IFFAS loans.

On the other hand, the majority in the working group considered that the IFFAS should be designed to be self-financing and

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120 *Id.*

121 Stimpson, *supra* note 38.

122 Working Paper No. C-WP/11907, *supra* note 72, at 2.7. The Representative of Australia, in terms of his personal position—as a member of the Council, from Australia, but participating in the work of the group on an individual/independent basis—was a strong advocate of this position. It was suggested that an IFFAS should provide outright grants and subsidies—rather than loans as presently envisaged—to countries needing assistance. Such assistance—money and expertise—could be used to facilitate efforts to obtain further necessary assistance from other sources. The main benefit of this proposal is that it could channel assistance money directly to the particular aviation projects and needy LDC countries. Interview with Jonathan Aleck, Representative of Australia on the Council of ICAO (July 25 & 29, 2002).
that beneficiary countries would feel a greater commitment to a project financed by a loan that had to be repaid. This view is closer to the spirit of Assembly Resolution A33-10.\(^{123}\)

The draft Administrative Charter follows the second approach and states that the IFFAS will provide “financial assistance... primarily by way of loans... [and] usually... at concessionary interest rates and... [with] short, medium or long term duration.”\(^ {124}\) However, in recognition of the advantages of grants, the IFFAS has the flexibility of awarding grants and zero interest loans in exceptional circumstances where the Governing Body deems it appropriate and necessary.\(^ {125}\) In all cases, however, “projects considered for financial assistance shall be subject to detailed technical, financial and economic appraisal.”\(^ {126}\)

2. **Sources of Funding of the IFFAS**

The issue of “where is the money going to come from”\(^ {127}\) to start and develop the IFFAS is probably the biggest concern of all interested parties. Whether the IFFAS begins as a Dwarf or a Giant, millions of dollars of start-up capital are required. The sources of funding for the IFFAS will ultimately affect the capacity of the IFFAS to assist needy developing/LDC client States to finance projects to remedy safety deficiencies.

Assembly Resolution A33-10 assured that the establishment of the IFFAS does not constitute another mandatory foreign aid instrument transferring funds from developed countries to needy developing/LDC countries. Moreover, as discussed earlier, this Resolution provided three requirements for IFFAS funding: (1) IFFAS is to be developed, established, and operated with “complete independence from ICAO’s Programme Budget,”\(^ {128}\) (2) to launch the IFFAS, States are encouraged to make “voluntary contributions to finance the preparatory work in the development of the IFFAS,”\(^ {129}\) and (3) other interested parties are also encouraged to make voluntary contributions to IFFAS.\(^ {130}\)

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\(^{124}\) Administrative Charter, supra note 94, at art. 4.5.

\(^{125}\) Id.

\(^{126}\) Id. at art. 4.6.

\(^{127}\) Aleck, supra note 37; Stimpson, supra note 38; Dupuis, supra note 39.

\(^{128}\) Resolution A33-10, supra note 61, at art. 2(b)(4).

\(^{129}\) Id. at art. 5(a).

\(^{130}\) Id. at art. 6.
As of September 1, 2003, the voluntary contributions promised from various sources totaled approximately two million dollars. There are presently three main sources of “voluntary contributions.” First, States have voluntarily committed various sums to the IFFAS specifically. A second source of funding is the over $3 million USD in arrears received from Contracting States and held under a special long-outstanding arrears account. The Council, seeking guidance on how to allocate these surplus contributions among IFFAS, aviation security and other purposes, submitted the question to the 34th Session [Extraordinary] of the ICAO Assembly in Montreal March 31 to April 1, 2003. The Assembly deliberations decided that the surplus of contributions should be split three ways equally among IFFAS, aviation security purposes [AVSEC] and safety oversight. A third funding source is other interested parties who are encouraged to make voluntary contributions in the future. Accordingly, the European Commission was the first such contributor pledging 200,000 Euros for each year of 2002 and 2003.

The relatively small amount of seed money presently committed to the IFFAS mechanism has been subject to two conflicting interpretations. On one hand, IFFAS proponents suggest that this is a great start and that once the IFFAS actively solicits contributions, the funds will pour in. On the other hand, IFFAS skeptics argue that today’s paltry contributions reflect a lack of strong support for the IFFAS mechanism. Thus, a risk exists that the under-funded IFFAS accounts might soon be drained, causing the IFFAS to collapse. Moreover, many of the usual major contributors to ICAO initiatives have indicated that they

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131 The first and earliest commitments, around the time that the Administrative Charter was adopted in December 2002, was that 47 ICAO Member States had contributed $222,709 USD to the IFFAS project (as part of their share of the ICAO programme budgetary surplus with the average contribution of $4,745 USD, and over one-third of these contributions coming from France $90,700 USD). The amounts and interpretations are based on this writer’s notes and culled from discussions at the 167th Session of the ICAO Council at ICAO headquarters, Montreal, Canada (Dec. 4, 2002).


133 Culled from private discussions with members of the ICAO Secretariat, at the Montreal, Canada headquarters (Sept. 4, 2003).

134 Resolution A33-10, supra note 61, at art. 6.

135 Culled from private discussions with members of the ICAO Secretariat and Council members, at the Montreal, Canada headquarters (Dec. 4, 2002).

136 The interpretations are based on this writer’s notes of various positions voiced and culled from discussions at the 166th Session of the ICAO Council.
will only pledge money to the IFFAS when their main reservations are addressed, such as the drafting of a proper "Business Plan that will attract funds."\textsuperscript{137}

The IFFAS clearly requires more funding both in terms of the variety of sources and total amount received. Accordingly, on an administrative level, in preparation of the money search, the ICAO Secretary-General has had to satisfy the Transitional Rules of the IFFAS requiring him to "prepare and submit to the Council during the 168th Session (February 2003), a work programme, a timetable and a projected budget."\textsuperscript{138} On a financial level, to address the challenge of increasing the funding intake, the Secretary-General was mandated to spend money from the exclusive IFFAS account on such matters as "raising and securing funds and accumulating capital, with a view to providing for the necessary administration and essential operations of IFFAS..."\textsuperscript{139} Thus, in support of the fund search, the ICAO Secretariat continues to work on a framework for an informational/promotional programme to seek contributions and support from States, organizations, banks, airlines, airports, aerospace manufactures, and civil society in general.\textsuperscript{140}

The reality that IFFAS funding is based on the principle of voluntary contributions has two principal limitations. First, legal reservations have been put forward respecting the question of whether sub-national entities can legally contribute to a fund (like IFFAS) that is created by an international treaty mandated institution like the ICAO.\textsuperscript{141} Second, since the membership, participation and funding of the IFFAS are based on the concept of voluntarism, IFFAS revenues might fluctuate wildly, such that the vagaries of contributor whims will possibly affect the quantity and quality of projects in which the IFFAS can and will assist.

\textsuperscript{137} Dupuis, \textit{supra} note 39.

\textsuperscript{138} Working Paper No. C-WP/11907, \textit{supra} note 72, at app. A, Transitional Rules, at art.10. This is required for "preparatory work which is necessary to initiate and ensure the effective and efficient operation of IFFAS." \textit{Id.} at app. A, Transitional Rules, at art. 8.

\textsuperscript{139} \textit{Id.} at app. A, Transitional Rules, at art. 9(a).

\textsuperscript{140} Culled from discussions with various members of the ICAO Secretariat at the ICAO headquarters, Montreal, Canada (Mar./Apr. 2003).

\textsuperscript{141} Dupuis, \textit{supra} note 39.
Other funding mechanisms will eventually likely have to be used to complement voluntary contributions. While these mechanisms are outside the scope of this paper, it is worth mentioning some of the options. First, there are two working models presently operating within the ICAO context that may at least partly serve as a template for the IFFAS to generate a steady revenue stream and assure cost-recovery—there is not only the TCB experience discussed earlier, but also a regional analogy of joint financing agreements to fund air navigation services that has been successfully administered by the ICAO over many years.\textsuperscript{142}

Second, another possible source of IFFAS funding (that was proposed and rejected by the ICAO Assembly at the time of the defunct forbearer of the IFFAS—the International Aeronautical Monetary Fund) is to apply a mandatory charge/levy to every passenger ticket sold (e.g., an additional one U.S. dollar per ticket). This charge might be applied world-wide and/or regionally. On the global level, an example is to apply this formula to the scheduled traffic volume of 2002. Since the commercial airlines of the 188 ICAO Contracting States carried approximately 1,615 million passengers,\textsuperscript{143} the proposed fund would have generated at least $1.615 billion USD. On the regional level, the ICAO Council has discussed the possibility of a regional charge/levy that is collected and disbursed by the IFFAS (for aviation-related projects) in those developing/LDC countries that have difficulty organizing themselves for this purpose.\textsuperscript{144} Even if such a charge is not applied globally, and only applied to a hypothetical 20 percent of the passenger tickets sold in the developing/LDC States (and possibly a few devel-

\textsuperscript{142} See Abeyratne, \emph{supra} note 57, at 397-99 for details. Joint financing agreements are mentioned earlier in this paper. They constitute proof that it is possible to establish and administer a fund that implements the ICAO SARPs on air navigation through the implementation of global safety standards. \textit{Id.} at 397. Many years ago, 23 ICAO Contracting States signed the Icelandic and Danish Joint Financing Agreements under the auspices of ICAO. These signatory States currently assume financial responsibility for the provision and operation of certain air navigation and traffic facilities and services provided for civil aircraft flying across the North Atlantic, north of the 45th latitude, and the costs incurred are recovered through user charges. \textit{Id.} at 397-98. Although these joint financing models are helpful precedents, it must be emphasized that the creation of an IFFAS is distinctive in the nature and scope of its functions as well as structure. \textit{Id.} at 398-99.

\textsuperscript{143} Annual Report of the Council (2002), \emph{supra} note 24, at 2.

\textsuperscript{144} Interview with Daniel Galibert, President of the Air Navigation Commission of ICAO (May 7, 2002).
oped countries), over $320 million USD would have been generated in 2002.

In the long-run, for the IFFAS to be successful, a solution must be developed soon to increase its sources and amount of funding. Accordingly, this leads to an ethical question that involves political priorities: is a one U.S. dollar charge/levy (per ticket) excessive—whether applied globally or regionally—given the high risks to aviation safety discussed in this paper and the willingness of so many governments to impose much larger charges/levies to fund aviation security?

3. The Status of IFFAS as Part of the ICAO or a Distinct and Independent Entity

The third important issue is whether the proposed IFFAS should be under the ICAO's control or should be a distinct and independent entity. Pragmatically, to simplify and expedite the process, on December 4, 2002, the ICAO Council adopted the working group's recommended approach of creating the IFFAS within the ICAO, without a separate legal status. This approach was a compromise between two conflicting positions on the long-run status of the IFFAS in relationship to the ICAO. On one hand, some have argued that, from birth, the IFFAS must be established as an entity independent and distinct from the ICAO. This view is legalistic, focusing on Assembly Resolution A33-10’s requirement that IFFAS funding must have “complete independence from ICAO’s Programme Budget” and “any administrative or other services” are to be provided “only by request by participating States and on a cost recovery basis.” On the other hand, others suggest that while in the short-run the IFFAS may start under the ICAO's control, in the long-run, the IFFAS may pick up momentum and eventually be spun out of

146 Id. at 2.8. The Council accepted reconciling both positions, reiterating the working group view that the Assembly Resolution A33-10 has some ambivalence. On the one hand, an IFFAS is to have “complete independence from ICAO’s Programme Budget” and “any administrative or other services” are to be provided “only by request by participating States and on a cost recovery basis.” On the other hand, the Assembly Resolution makes only one reference to the “existing ICAO legal regime” in the context of creating a management strategy so that the IFFAS structure conforms to that regime (although it may not necessarily fall within that regime). Id.
147 Resolution A33-10, supra note 61, at art. 5(c); Working Paper No. C-WP/11907, supra note 72, at art. 2.8.
the ICAO as an autonomous and distinct entity\textsuperscript{148} (just as "a baby must be nurtured before it goes out on its own.").\textsuperscript{149}

A challenge remains to distinguish and clearly identify the IFFAS from the rest of the ICAO since the IFFAS will operate not only under the ICAO legal regime without a separate legal status but also independently of the ICAO’s Programme Budget.\textsuperscript{150} Thus, the IFFAS Governing Body’s accountability to the ICAO must be clearly stated. However, although the ICAO Council may delegate certain functions to the IFFAS Governing Body, the Council and the ICAO Member States remain responsible for everything done by or in the name of the IFFAS (as long as it is part of the ICAO).\textsuperscript{151} Accordingly, some intriguing legal questions arise as to the ICAO’s potential legal liabilities for IFFAS activities including non-performing loans extended by the IFFAS to client States. In recognition that a poor strategy for IFFAS could have devastating financial effects on the ICAO, the IFFAS Governing Body has been mandated by the ICAO Council (that must approve the proposals) to study various options, including insurance and contingency funds to cover risks.\textsuperscript{152} It is generally agreed that whatever the IFFAS may ultimately do, it is important that steps be taken to ensure that it does not become a liability to the ICAO or the ICAO Programme Budget.\textsuperscript{153}

There are three important benefits of the IFFAS being under the ICAO’s supervisory umbrella, at least for the first few years of its existence. First, the IFFAS provides an ICAO solution to an ICAO objective. The IFFAS remedies a State’s aviation safety deficiencies identified in the USOAP (a programme established to satisfy the goals of the ICAO Global Aviation Safety Plan).\textsuperscript{154}

\textsuperscript{148} It is suggested that this approach is legally consistent with the provisions of Assembly Resolution 33-10. One reference provides that the “management strategy” of the IFFAS should be “developed on the principles of, and in conformity with, the existing ICAO legal regime” (emphasis added). Resolution A33-10, supra note 61, at art. 3(c).

\textsuperscript{149} Singh, supra note 50.

\textsuperscript{150} Working Paper No. CWP/11907, supra note 72, at 2.8.

\textsuperscript{151} Id. at 2.9.

\textsuperscript{152} Id. at 2.10 - 2.11. There is no doubt that whatever liability protection is undertaken should be proportionate to the risk, recognizing that the risks to IFFAS and ICAO are minimal during the transitional period from December 4, 2002 to June 13, 2003. Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (Jan. 14, 2003).

\textsuperscript{153} Interview with Jonathan Aleck, Representative of Australia on the Council of ICAO (Dec. 18, 2002).

\textsuperscript{154} Singh, supra note 50.
Second, the ICAO provides administrative and technical service support to the IFFAS on a cost-recovery basis. Some possible support functions include ICAO Secretariat processes that may be used to procure client State aviation goods and services, as well as to assure their delivery at quality standards (as certified through the TCB), and ICAO Secretariat technical experts and lawyers who may be used to minimize the costs accrued by the LDC's in preparing detailed project reports. Furthermore, if the IFFAS disburses its money through the ICAO, the work will probably, but not necessarily, return to ICAO mechanisms to the TCB.155

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

V. CONCLUSION

This paper suggests that there is a generally acknowledged need to remedy aviation safety deficiencies identified through the USOAP in certain States and regions. Although the Chicago Convention imposes a duty on the State to remedy any such divergences from the SARPs requirements, the ICAO appears to have the discretionary power to assist needy developing/LDC States to remedy their identified aviation safety deficiencies as the ICAO pursues its broad objective of global aviation safety under the GASP. The nature and scope of the ICAO's role through the IFFAS is still being determined. Nevertheless, the IFFAS must operate under tight management principles that provide transparency, accountability, effectiveness, and quality control.

There are certain issues that remain to be clarified. One question is whether the IFFAS is a “mechanism,” a bank, some other corporate body, or a fund.156 Insofar as the IFFAS is less than a full-fledged bank, it probably will grow as an umbrella organization. Developing/LDC countries will certainly benefit from the IFFAS as a facilitator and complementary instrument to existing mechanisms of technical assistance (at the international, regional, bilateral, multilateral, and plurilateral levels), and financial assistance (including regional development and international banks and funds, export credit agencies, and bilat-

155 Id.
eral development institutions). A second important issue centers on finding a good source of funding beyond the voluntarism principle since the IFFAS, as presently constituted, has not only a voluntary membership and participation, but also is funded through voluntary contributions.¹⁵⁷

In the medium to long term, it can be expected that by the next plenary session of the ICAO Assembly (Fall 2004), Contracting States—whether members, participants and/or financial supporters of the IFFAS—will be able to review a few pilot projects where financial assistance has been channeled to remedy certain aviation safety deficiencies identified by the ICAO's USOAP in particular LDC countries. Furthermore, there may be not only a regional implementation of the ICAO's objectives but also a role played by ICAO regional offices in implementing IFFAS objectives.

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

An unfortunate and unnecessary schism exists today between developed and developing/LDC country perceptions of the crises in aviation “security” and “safety.” On one hand, particular developed countries consider the pursuit of improved international aviation “security” to be an overwhelming objective. Indeed, they recognize an ability-to-pay principle respecting aviation security such that richer States may financially assist poorer States with security deficiencies. Ironically and possibly inconsistently, many of these same countries tend to argue a user pay principle respecting aviation safety such that the costs to assist the remedying of safety deficiencies (for example, through an IFFAS mechanism) should be paid for by the user country even if it lacks the necessary resources. On the other hand, many developing/LDC countries suggest that the pursuit of global aviation “safety” is so important that the ability-to-pay principle should be applied to allow the generous transfer of resources from the developed world to those States with safety

¹⁵⁷ As mentioned above, the Assembly mandated that the IFFAS is not to burden the regular programme budget of the ICAO.
deficiencies. These same developing countries argue that most security system upgrade costs (including some of those in the developing countries) should be paid for by the user countries (i.e., the developed countries) since they have a much higher risk of security breaches.

To conclude, the economic constraint of scarce resources and politically dictated priorities should not divert the world's political leaders from fairly balancing the resources allocated to civil aviation "security" and "safety." Both civil aviation security and safety constitute a global and indivisible system such that if civil aviation security and/or safety are threatened in one State or region, security and/or safety are jeopardized worldwide. The interests of the sovereign State and international community necessitate respect for both priorities to promote the air transport industry's development and protect passenger lives and property.

The bottom line is that the citizens of our world have a right to expect that sufficient resources will be committed to both objectives — safety and security.