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THE CHICAGO CONVENTION: ARTICLE 33 AND 
THE SFAR 40 EPISODE

STEPHEN D. McCREEARY*

IF THE BENEFITS offered by air transport are to be fully utilized, today's world of civil aviation demands extensive international cooperation. Concerns for safety dictate the broadest possible standardization and uniformity in aircraft, airports, air traffic control, and the like. International use of the airways requires agreement on the freedom of air navigation.1 Foreseeing these needs, the United States sent out feelers toward the close of World War II seeking to arrange an international aviation conference. This effort resulted in the Convention on International Civil Aviation2 which convened at Chicago, Illinois, between November 1 and December 7, 1944.3

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1 See INTERNATIONAL CIVIL AVIATION ORGANIZATION, FACTS ABOUT ICAO PUBLIC INFORMATION OFFICE 1 (Aug. 1985). This brochure provides that "there must be international standardization, agreement between nations in all the technical and economic and legal fields so that the air can be the high road to carry man and his goods anywhere and everywhere without fetter and without halt." Id.


3 The occurrence of two world wars in less than a generation influenced many nations to seek means of international cooperation as World War II drew to a close. Examples include the United Nations for politics, the International Monetary Fund for financial matters, and the International Court of Justice for legal disputes. The Chicago Convention was the aviation counterpart, stating in its preamble that "it is desirable to avoid friction and to promote that cooperation between nations and people upon which the peace of the world depends . . . ." Chicago Convention, supra note 2, at Preamble. After its formation under the
The work of the Convention generated the document now known simply as the Chicago Convention, a treaty covering a broad range of international civil aviation issues. In concluding this agreement, the drafters believed they had "agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner." The subject matter of safety and of orderly development overlapped when the issue of determining airworthiness for purposes of international navigation was considered. To assist convenient use of the freedoms of air navigation on which the Chicago Convention had agreed, but protect host nations from unsafe aircraft, the drafters adopted Article 33. This Article provided that airworthiness certificates of foreign States would be recognized, provided they had been issued under conditions which achieved certain minimum standards set out elsewhere in the Chicago Convention.

In 1979, this system of reciprocal recognition met with a serious challenge. In response to grave safety concerns surrounding the design of the McDonnell Douglas DC-10 aircraft, the United States denied to foreign DC-10s customary air navigation rights in the United States for a period of five weeks. The action was taken on grounds that the airworthiness of the foreign operated aircraft was suspect, notwithstanding foreign certificates of airworthiness. To prevent the operation of DC-10s on foreign registry in United States airspace, the Administrator of the Federal

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Chicago Convention, the ICAO became affiliated with the United Nations and was recognized as its specialized agency for civil aviation. See K. Power, History and Explanation of the International Civil Aviation Organization 1 (1980) (unpublished document available from the author of this article).

4 The Chicago Convention produced three other agreements: (1) the Interim Agreement, (2) the International Air Transport (Five Freedoms) Agreement, and (3) the International Air Services Transit (Two Freedoms) Agreement. See K. Power, supra note 3, at 2.

5 Chicago Convention, supra note 2, at Preamble.

6 The Chicago Convention itself agreed on the first and second freedoms of air navigation for non-scheduled flights. The first freedom permits transit through the airspace of another sovereign, and the second freedom permits non-traffic (noncommercial or emergency) stops in foreign territory. See id. at Art. 5.

7 Id. at Art. 33.
Aviation Administration issued Special Federal Aviation Regulation No. 40 (SFAR 40). The operative provisions of the regulation stated:

Section 1. [N]o person may land or takeoff any Model DC-10 airplane within the United States, except as authorized under § 2 or otherwise authorized by the Administrator.

Section 2. This regulation does not apply to a foreign registered Model DC-10 airplane which, at the time this regulation takes effect, is enroute to a place in the United States or is at a place within the United States. These airplanes may depart from the airport at which they are located, or at which they arrive, for a place outside the United States, using the most direct, feasible route, and without passengers or cargo on board.

This unilateral United States action was not calmly received by several European carriers flying DC-10s. Legal action was promptly brought in the United States seeking vindication of the Article 33 reciprocal recognition rule. The British Civil Aviation Authority took an interest in this litigation, opposing the United States position as amicus curiae. Later, a larger group of European carriers commenced a second action to recover money damages.

This paper discusses these two court cases brought in the wake of SFAR 40 and attempts an analysis of Article 33 of the Chicago Convention. The paper begins by recounting the events leading up to the SFAR 40 dispute. There follows a detailed look at the ensuing foreign carrier litigation. The paper next describes the background behind Article 33 and the development of Annex 8 to the Chicago Convention, which sets out the minimum airworthiness standards. The latter part of the paper is devoted to an examination of policy considerations that arise when States find themselves in fundamental disagreement over a safety issue but confronted by the mutual recognition rule.

" Id.
I. THE LITIGATION OVER SFAR 40

A. Factual Background

SFAR 40 was issued in the aftermath of the crash of a McDonnell Douglas DC-10 at Chicago’s O’Hare International Airport on May 25, 1979. The American Airlines aircraft achieved a maximum altitude of 350 feet before rolling sharply to the left and impacting some twenty-seven seconds after liftoff. The loss of life totalled 273, including all 258 passengers, the 13 crew members, and 2 persons on the ground. In addition, two other persons on the ground were injured. The disaster was the worst in United States aviation history, and, at the time, the fourth worst ever. The crash raised particular concern because it appeared to involve the “inflight structural failure of a turbo-prop or jet airliner [which] is a virtually unheard of phenomenon.”

A massive investigation of the crash was immediately undertaken by the National Transportation Safety Board. Preliminary investigations revealed that there “could be no contention of low level wind shear, vortex turbulence, sabotage or any other outside cause.” When all eye-witness accounts reported loss on takeoff of the engine attached under the left wing — observations consistent with the post-crash location of the engine found rolled to the left side of the runway — attention was directed to

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11 Kennelly, supra note 10, at 273.

12 Id. at 274.

13 Id. at 274. Kennelly notes that it had been “almost 20 years since a similar occurrence, when two Lockheed Electras suffered loss of wings during flight.” See id. at 287 n.75.

14 Id. at 274.

15 Id. at 284 n.55. The DC-10 is fitted with three engines, one under each wing and one in the tail section. See id. at 283-85.

16 Id. at 286.
the airworthiness of the aircraft itself. The subject of particular focus was the engine mount pylon assembly attaching the engine to the wing. If failure of the pylon could be attributed to improper maintenance, the concern would be limited to those aircraft that had not been properly maintained, and inspections would reveal the extent of the problem and the curative measures required. Immediately following the crash, however, the possibility of a defect in design, which would implicate the airworthiness of all DC-10s, could not be ruled out.

While it quickly became clear that failure of the pylon mounting assembly had precipitated the crash, it was not clear what had caused the pylon to fail. Given such uncertainty in a matter so immediately connected to public safety, the FAA took forceful precautionary measures. Emergency Airworthiness Directives were issued on May 28 and May 29, 1979, requiring mandatory inspections of all DC-10s registered in the United States. The information contained in the airworthiness directives was conveyed to foreign DC-10 operators as well. As the inspections ordered under the airworthiness directives revealed evidence of further cracking in the pylons,

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17 Id. at 274.
18 Id.
19 Id. at 285-86. Ultimately, the cause of the crash was fully explained by loss of the left wing engine and supporting assembly, which severed the hydraulic wing flap controls and electrical warning system as it broke away. The left wing flaps retracted from takeoff position on their own, thus raising the airspeed necessary to sustain lift. The crew responded properly to loss of engine power by slowing airspeed but were unaware, due to loss of the warning system, of the increased stall speed. When the left wing stalled, the plane banked radically down and left, leading to impact. Id.; see also British Caledonian Airways Ltd. v. Bond, 665 F.2d 1153, 1155 (D.C. Cir. 1981).
20 British Caledonian, 665 F.2d at 1155.
21 Id. The effect of the airworthiness directives was to ground the aircraft involved until the required measures were completed.
22 Id. Under Annex 8, part II, section 4.2.2 of the Chicago Convention, the State of the manufacturer of an aircraft is required to transmit "mandatory continuing airworthiness information" to any State which has advised the State of the manufacturer that it has the aircraft entered on its registry. Note 1 advises that "[a]mong such information is that issued by Contracting States in the form of airworthiness directives." Chicago Convention, supra note 2, at Annex 8, pt. II, § 4.2.2 (7th ed. 1983).
the FAA issued an Emergency Order of Suspension early on the morning of June 6, 1979.23 This order "prohibited the operation of all U.S.-registered Model DC-10 aircraft by suspending the type certificate for all DC-10s and terminating the effectiveness of the individual airworthiness certificates for each U.S.-registered DC-10 aircraft."24 Recognizing that this order would not prohibit operation of foreign-registered DC-10s in United States airspace, the FAA also issued SFAR 40, effective at 6:00 p.m. the same day.25

The European air carriers and aviation authorities responded swiftly to the DC-10 crisis. With Yugoslavia as the lone exception,26 thirteen of the fourteen nations in the European Civil Aviation Conference (ECAC) with DC-10s on their registers "provisionally suspended the individual airworthiness certificates for each of their DC-10 aircraft."27 Between June 14 and 18, 1979, the European carriers and their counterpart national aviation authorities met at Zurich and concluded a three-part inspection and maintenance package to permit withdrawal of the provisional suspensions. On June 19, the British Civil Aviation Authority withdrew the provisional suspension, thereby recertifying the British DC-10 fleet, but additionally issued an airworthiness directive conditioning return to service on adherence to the agreed upon inspection and maintenance program.28 Within several days, the remaining ECAC nations affected — except for Turkey, whose recertification was anticipated shortly — had followed suit.29

When SFAR 40 remained in effect to forbid European

23 See British Caledonian, 665 F.2d at 1155.
24 Id.
25 Id.
27 British Caledonian, 665 F.2d at 1156. The ECAC is comprised of a total of 21 nations. Id.
28 Id.
29 Brown, supra note 26, at 31.
DC-10 traffic to the United States, the reaction of the European carriers and civil aviation authorities was predictable. The president of Swissair summed up their feelings as follows: "The European authorities are not so likely to automatically follow the FAA in the future. . . . They received a heavy impact from the FAA grounding action and they are likely to do something so as not to be so helpless in the future. . . . We cannot jeopardize our operations because of the U.S.'s political problems." It was noted that the British Civil Aviation Authority, which has a reputation "for a cautious and conservative approach to aircraft safety, voted unanimously to recertify all DC-10 aircraft on the British registry." Further, none of the remaining ECAC members without DC-10s registered any opposition to DC-10 operation in their airspace.

Delegates from the ECAC met with United States representatives in Paris on June 25, 1979, to request rescission of SFAR 40. The European delegation pointed to the obligations of reciprocal recognition of airworthiness certificates under Article 33 of the Chicago Convention. Their request, however, was refused. Just as at the earlier Zurich meeting, the United States representatives offered only the option of flight over the United States, and refused landing privileges. SFAR 40 remained in effect until July 13, 1979, when it was rescinded by order of the FAA.

B. British Calendonian Airways Ltd. v. Bond

In British Caledonian Airways Ltd. v. Bond, four European carriers challenged the validity of SFAR 40 in the

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30 Id. at 31-32.
31 Id.
32 Id. at 31.
33 British Caledonian, 665 F.2d at 1156.
34 Id.
35 Brown, supra note 26, at 32.
37 665 F.2d 1153 (D.C. Cir. 1981). The named respondent was Langhorne Bond, Administrator of the FAA.
District of Columbia Circuit Court of Appeals. They alleged that the regulation violated Article 33 of the Chicago Convention calling for reciprocal recognition of national certificates of airworthiness issued by the contracting States. Article 33 reads:

Article 33. Recognition of Certificates and Licenses

Certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the contracting State in which the aircraft is registered, shall be recognized as valid by the other contracting States, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.

There was disagreement as to whether the Chicago Convention was in force between all nations involved. The petitioners maintained that violation of Article 33 in turn violated section 1102 of the Federal Aviation Act of 1958. Section 1102 instructed the Administrator in carrying out his duties to "do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign

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38 In addition to British Caledonian, the petitioners were Lufthansa, Swissair and Balair. Id. at 1156. Alitalia appeared as an intervenor. Northwest Airlines appeared as amicus curiae in support of the foreign airlines. Id. at 1157.

40 Id. at 1156-57.

41 Chicago Convention, supra note 2, at Art. 33.

42 Fifty-two nations met in Chicago to conclude the Convention on International Civil Aviation. The Convention was signed and opened for signature on December 7, 1944, to come into force 30 days after the filing of the 26th instrument of ratification. The United States ratified the Chicago Convention on July 25, 1946, and filed on October 9, 1946. The Chicago Convention came into force on April 4, 1947. Today, more 150 than nations have ratified or adhered to the Chicago Convention. See K. Power, supra note 3, at 3; see also Public Information Office, International Civil Aviation Organization, The Convention On International Civil Aviation, The First 40 Years 3 (Jan. 1984).

43 Id. at 1154.
countries.”

The FAA challenged the jurisdiction of the court and launched a full defense against the alleged violations. As to jurisdiction, the government challenged justiciability of the dispute on three threshold grounds, two of which were closely connected. The government argued that the case was moot, that Article 33 was a non-self-executing provision, and that in any event the issues raised presented political questions.

The District of Columbia Circuit rejected each argument in turn. As to mootness, the government contended that the case was moot because SFAR 40 had been rescinded long before the issue reached court. The court applied the two-part mootness test set forth in Weinstein v. Bradford. In Weinstein, the United States Supreme Court devised an exception to the mootness doctrine where “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.” In finding that the case was not moot under this test, the British Caledonian court stated:

[I]t is not so unusual for the aviation authorities to be at first uncertain as to the precise cause of a crash. As long as the FAA Administrator asserts that he has the legal authority, under such circumstances, to disregard valid airworthiness certificates issued by nations with whom the United States has entered into binding aviation agreements, these nations reasonably can expect to be subjected to the same action at some time in the future.

The government next maintained that the petitioner foreign carriers could not seek judicial remedy because

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44 49 U.S.C. § 1502(a) (1982). Section 1502 replaces section 1102, which was repealed by Pub. L. 91-258, title 1, section 52(a) May 21, 1970.
45 British Caledonian, 665 F.2d at 1157.
46 Id.
47 423 U.S. 147, 149 (1975).
48 Id. at 149 (cited in British Caledonian, 665 F.2d at 1158).
49 British Caledonian, 665 F.2d at 1158.
Article 33 of the Chicago Convention and additional bilateral treaties relied upon by the petitioners were non-self-executing and thus conferred no rights on private parties such as the airlines. The government argued that the remedy for any breach which might have occurred would be a matter for diplomatic resolution between nations, not by private litigants. The court stated that whether Article 33 was to be regarded as self-executing must be determined by the intention of the signatories to the Chicago Convention. This intention, in turn, was to be determined from the language of the agreement or, where ambiguous, the negotiating history. After quoting the language of Article 33, the court stated, "Thus, under Article 33, the judgment of the country of registry that an aircraft is airworthy must be respected, unless the country of registry is not observing the 'minimum standards.'" The court compared Article 33 to various other Chicago Convention provisions, some self-executing, some not, and noted that under the terms of the Chicago Convention it was not the individual nations but ICAO which was to adopt the minimum standards. The court concluded that Article 33 was self-executing.

Related to the non-self-executing argument was the FAA position that determining the issue of compliance with the treaty provisions would necessarily entangle the court in political questions which it was ill-suited to an-

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50 Id. at 1159. The court stated that the additional reliance placed on bilateral agreements "does not affect our analysis of the legality of SFAR 40." Id. at 1159 n.3. The court declined to enter into close analysis of the bilateral agreements, focusing instead on the alleged Article 33 violation. Id. at 1160. This paper also adopts that approach.
51 Id. at 1159.
52 Id. at 1159-60.
53 Id. at 1160.
54 Id.
55 Id. at 1160-61. The court noted that Article 37 of the Chicago Convention obligates ICAO to adopt international airworthiness standards. See id. at 1160 n.5. The airworthiness standards adopted by ICAO pursuant to Article 37 are set forth in Annex 8 to the Chicago Convention.
56 British Caledonian, 665 F.2d at 1161.
swer or which were reserved to the executive branch. The court rejected the suggestion that in addressing this case it would place itself in the position of determining foreign carrier compliance with minimum standards, finding instead that its only duty was "to determine whether the FAA Administrator acted consistently with and followed the procedures mandated by the various international agreements." This was strictly a legal question. The court stated that "failure to observe the minimum safety standards in issuing airworthiness certificates is the only ground on which one country may question the airworthiness judgment of the country of registry."

Noting that the Administrator had not questioned compliance with minimum standards, the court viewed itself "faced with the purely legal issue of whether an administrative order . . . comported with applicable treaty requirements." In denying the justiciability challenge on all counts, the court concluded that it had jurisdiction to address the issues raised by SFAR 40.

At this juncture, the court ventured the following view of the legality of SFAR 40 under both international and domestic law:

> Because the Administrator at no time questioned whether the foreign governments met with the minimum safety standards set by the ICAO, his issuance of SFAR 40 and his refusal to rescind the order after the foreign governments had revalidated the airworthiness certificates for

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57 Id. at 1161. The FAA contended that there were no judicially discernable and manageable standards from which a court could determine whether the minimum safety provisions of relevant international agreements had been implemented. Id.
58 Id. at 1161-62.
59 Id. at 1162.
60 The court stated that "[a]t oral argument, government counsel conceded in response to a direct inquiry that the FAA did not question that the foreign governments had met the minimum safety standards. Rather, the government claimed to have 'reserved' that position as a fall-back . . . ." Id. at 1162 n.8. The court refused to accept this position, stating "[W]e cannot . . . abandon our refusal to accept post-hoc rationalizations for administrative actions." Id.
61 Id. at 1162.
62 Id.
aircraft flying under their flags would appear to have violated Article 33 and, therefore, Section 1102. Nonetheless, the FAA presented four arguments to support the legality of the regulation. First, the FAA argued that Article 9(b) of the Chicago Convention itself constituted an exception to the Article 33 reciprocal recognition obligation. Article 9(b) provides:

Each contracting State reserves also the right, in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or any part of its territory, on condition that such restriction or prohibition shall be applicable without distinction of nationality to aircraft of all other States.

The FAA argued that the exceptional circumstances of the DC-10 crash had created an emergency for public safety justifying a restriction on DC-10 flight over the whole of the United States. But after reviewing Article 9 in its entirety to place subpart (b) in context, and observing that Article 9 appeared in Chapter II entitled “Flight Over Territory of Contracting States,” while Article 33 was to be found in Chapter V entitled “Conditions to be Fulfilled With Respect to Aircraft,” the court rejected the FAA interpretation for failing to reflect the “true meaning” of Article 9(b). The court’s own interpretation was succinctly expressed:

We think Article 9 is aimed at restricting the territorial access of all aircraft, rather than at restricting the movements of particular types of aircraft . . . . In short, Article 9 permits a country to safeguard its airspace when entry by all aircraft would be dangerous or intrusive because of conditions on the ground. Article 9 does not allow one country to ban landing and take-off because of doubts

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63 Id. at 1162-63.
64 Id. at 1163.
65 Id.
66 Chicago Convention, supra note 2, at Art. 9(b).
67 British Caledonian, 665 F.2d at 1163.
68 Id.
about the air-worthiness of particular foreign aircraft, in derogation of Article 33.69

Second, the FAA contended that certain provisions of the bilateral aviation agreements70 permitted the SFAR 40 action. The court agreed that the provisions of these agreements could permit immediate unilateral action on airworthiness grounds.71 This defense was unavailable on the facts, however, because none of the justifications spelled out in the agreements for taking such action were "identified or relied on by the Administrator when he issued SFAR 40 or when he refused to recognize the foreign airlines' revalidated certificates of airworthiness."72

The third FAA contention was that validity of the foreign national airworthiness certificates rested on the United States type certificate73 for the DC-10 aircraft. The United States had provided the original type certificate for the McDonnell-Douglas DC-10.74 The FAA argued that when the type certificate was temporarily suspended under the June 6, 1979, Emergency Order, there was no underlying airworthiness design certificate on which the foreign nations could base individual DC-10 airworthiness certificates.75 This, the FAA said, permitted the government to deny recognition to the foreign airwor-

69 Id.
70 Bilateral aviation agreements were in place between the United States and the governments of each of the petitioners. See id. at 1159 n.3. These agreements contained additional clauses permitting immediate action by a party under specified circumstances related to airworthiness. Id.
71 Id. at 1164.
72 Id.
73 The FAA controls issuance of domestic airworthiness certificates in a three-stage process under 49 U.S.C. § 1423. The first stage grants a type certificate for the design of the aircraft. See 49 U.S.C. § 1423(a)(1982). The second stage grants a production certificate to permit duplicates of the type design. See id. § 1423(b). The final stage is the airworthiness certificate itself for each individual aircraft. Id. § 1423(c). While the individual airworthiness certificates will be concerned with such matters as proper maintenance and absence of damage to the aircraft it must also be supported by the underpinning type certificate. Id.
74 Type Certificate No. 422WE for the DC-10 aircraft was issued by the FAA on July 29, 1971. Construction of the aircraft involved in the Chicago crash was completed on October 29, 1971. See Kennelly, supra note 10, at 283 n.50.
75 British Caledonian, 665 F.2d at 1164.
thiness certificates, thus justifying SFAR 40.\(^{76}\)

The court found this argument unpersuasive.\(^{77}\) It noted the permissive nature of Annex 8, which provided in relevant part that "[t]he new State of Registry, when issuing another Certificate of Airworthiness or rendering the original certificate valid, may consider prior issuance of the Certificate of Airworthiness by a Contracting State as satisfactory evidence, in whole or in part, that the aircraft is airworthy . . . ."\(^{78}\) Without ruling on the specific issue raised by the FAA as to what would occur if the State of registry had relied entirely on a foreign (i.e., United States) type certificate subsequently suspended, the court held that the record did not disclose exclusive reliance on the United States DC-10 type certificate.\(^{79}\) The court pointed out the evidence to the contrary:

Indeed, the British Civil Aviation Authority expressly stated that in reissuing its certificates of airworthiness, it "took account of FAA type certification as a useful basis," but called for additional substantiation in a number of areas, including fail safe and fatigue and made use of Douglas fatigue test information not required by FAA in their evaluation.\(^{80}\)

More generally, the court reached the important conclusion that "the multilateral and bilateral agreements intend the States of registry to resolve questions of safety and continuing airworthiness that may arise after the original airworthiness and type certificates were issued."\(^{81}\)

The final FAA argument raised a number of provisions of the Federal Aviation Act related to control of airspace, public safety, and the issuance of airworthiness certificates, which the FAA contended took priority over the

\(^{76}\) Id.
\(^{77}\) Id. at 1164-65.
\(^{79}\) British Caledonian, 665 F.2d at 1165.
\(^{80}\) Id.
\(^{81}\) Id.
section 1102 duty. The court felt that all sections relied upon except one had "no relation to airworthiness decisions but simply define general functions of the Administrator." As to the remaining section granting authority to issue airworthiness certificates, the court found that its application was limited to United States flag aircraft. Noting that the Chicago Convention mutual recognition system had been in place for more than ten years prior to enactment of the Federal Aviation Act in 1958, the court concluded, "We believe that in section 1502 [§ 1102 in the 1958 Act] Congress commanded the Administrator to respect that system, and we reject the suggestion that Congress granted the Administrator the authority to override section 1502 by invoking the generalized language of other sections of the Act." 

In a lucid, well-reasoned opinion which respects the international law regime established under the Chicago Convention for the international control of airworthiness of aircraft, the District of Columbia Circuit "set aside" the action of the FAA Administrator in issuing SFAR 40. The court gave direct meaning to the clear language of Article 33, finding that it requires that the aviation authority of each member State respect the airworthiness judgment of other member States, provided the minimum standards of Annex 8 are met. In failing to do so, the court found, SFAR 40 violated both international law under Article 33 and United States domestic law expressed in section 1102.

\[\text{See id. at 1165-68.}\]
\[\text{Id. at 1166.}\]
\[\text{Id. at 1168.}\]
\[\text{Id.}\]
\[\text{Id. There is reason for some concern over the conclusion of the court that Article 33 is self-executing, a ruling which may have been necessary to grant relief to the private party petitioners, but which may also hold implications for the doctrine of sovereign immunity. See Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985). Further discussion of the sovereign immunity issue appears at infra note 105.}\]
\[\text{See id. at 1162-63, 1168.}\]
C. Balair Ltd. v. United States of America

As one basis for refusing to find the case moot, the District of Columbia Circuit in *British Caledonian* noted that the foreign airlines intended "to take any judgment in their favor to the Court of Claims in an attempt to recover money damages." Because the circuit court had exclusive jurisdiction to review the legality of the FAA SFAR 40 action, the circuit judges reasoned it necessary to rule on the case so that the airlines could determine whether their damages claims could be pressed.

In *Balair v. United States*, ten European carriers followed up the success in *British Caledonian* by claiming damages not in the Court of Claims, but in the United States District Court for the District of Columbia. The total damages claimed exceeded $100 million. The plaintiffs based their argument for jurisdiction exclusively on federal question jurisdiction under 28 U.S.C. section 1331 and the Alien Tort Statute set forth at 28 U.S.C. section 1350. The government moved to dismiss, alleging lack of subject-matter jurisdiction. The government contended that only an express waiver of sovereign immunity could expose the United States to an award of money damages and that no such waiver was contained in the Chicago Convention, the bilateral agreements or the jurisdictional legislation relied on by the plaintiffs. After

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*Id.* at 1153.

*Id.* at 1158 n.2.

*Id.*


*Id.*

*Id.*

*Id.*

*Id.*

*Id.*

*Id.* at 17,693.

*Id.*

*Id.* at 17,694 n.2.

*Id.*

*Id.* at 17,693.
reviewing several cases, the district court agreed that waiver of United States governmental immunity must be express, concluding that "unless an express waiver of sovereign immunity to suit for damages can be found in either 28 U.S.C. §§ 1331 or 1350 or the Agreements alluded to above, this Court does not have jurisdiction to entertain plaintiffs' suit." Concerning federal question jurisdiction, the court stated that absent some other provision explicitly waiving immunity, the "courts have consistently held that section 1331 does not waive the federal government's sovereign immunity to suit." A similar conclusion was reached under the section 1350 Alien Tort Statute. The court stated, "Like section 1331, this section does not contain an explicit waiver of the government's sovereign immunity." In this regard, the Balair court viewed the 1980 decision of the District of Columbia Circuit in Canadian Transport Co. v. United States as controlling. In Canadian Transport, the circuit court ruled that adoption of the treaty itself did not constitute a waiver of immunity. The District of Columbia Circuit stated that "[i]n the absence of specific language in the treaty waiving the sovereign immunity of the United States, the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom." The Balair court found no specific language in the Chicago Convention or the bilateral agreements whereby the

97 Id. A flavor of the law cited by the district court may be had from United States v. Mitchell, 445 U.S. 535, 538 (1980), (quoting United States v. King, 395 U.S. 1, 4 (1969), "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' ")
98 Id.
99 Id.
100 Id.
101 663 F.2d 1081 (D.C. Cir. 1980).
102 Id. at 1092. The treaty at issue in Canadian Transport afforded to the plaintiff "secure passage into ports and rivers in the United States." Id. The action for damages arose when the plaintiff's vessel was denied entry to the port at Norfolk, Virginia, by the United States Coast Guard. Id.
103 Canadian Transp., 663 F.2d at 1092, (cited in Balair, 18 Av. Cas. (CCH) at 17,694).
United States had waived immunity. Accordingly, the government's motion to dismiss for want of subject-matter jurisdiction was granted.\textsuperscript{104}

While this paper will not attempt a detailed analysis of the reasoning of the district court in \textit{Balair}, it is suggested that the result is probably correct. Through the Administrator of the FAA, the United States had taken actions subsequently held by the District of Columbia Circuit to violate international treaty law. These actions, however, were directed in territorial scope exclusively to areas within United States sovereignty, though their effects may have been felt elsewhere. In essence, the issuance of SFAR 40 was a sovereign act which, if authorized by a foreign nation, would probably go unquestioned by United States courts under the Act of State Doctrine.\textsuperscript{105}

\textsuperscript{104} \textit{Balair}, 18 Av. Cas. (CCH) at 17,694.

\textsuperscript{105} The decision of the district court is couched in terms of sovereign immunity. In deciding questions of sovereign immunity applicable to foreign states, however, the district courts apply the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. sections 1602-11 (1982). Additionally, the United States traditionally asserts sovereign immunity in foreign courts on the same basis as contained in the FSIA. When it is realized that section 1605(a)(1) vitiates immunity where "the foreign state has waived its immunity either explicitly or by implication," the question arises as to why, as a matter of policy, United States courts should grant greater immunity to the United States sovereign (specific waiver only) than to foreign sovereigns. Or, stated differently, why should the United States sovereign enjoy greater immunity in its own courts than it enjoys in foreign courts?

These questions are not raised as a challenge to the reasoning of the \textit{Balair} court, since it is accepted that \textit{Balair} accurately sets out the law on United States sovereign immunity in United States courts. These questions are instead directed to the apparent disparity in United States law which permits the United States, but not foreign sovereigns, to escape the effects of implied waiver. To eliminate this disparity, the \textit{Balair} court would be required to search also for an implied waiver by the United States. Bearing in mind the circuit court holding in \textit{British Calendonian} that Article 33 was self-executing, an affirmative conclusion on implied waiver might have been difficult to avoid. The suggestion in the text, however, is that the disparity of treatment may be justified by the Act of State Doctrine, a principle applied in United States (and some foreign) courts which leaves to the executive branch the proper response to certain foreign sovereign acts, even in circumstances where sovereign immunity would not bar adjudication. See Callejo v. Bancomer, 764 F.2d 1101 (5th Cir. 1985), for a discussion of the Act of State Doctrine in such circumstances; \textit{see also} Kirgis, \textit{Understanding the Act of State Doctrine's Effect}, 82 AM. J. INT'L. L. 58 (1988).

The breach of international law found by the \textit{British Calendonian} court also raises the question of what the outcome of \textit{Balair} might have been had it followed the
II. INTERNATIONAL OBLIGATIONS UNDER THE CHICAGO CONVENTION

In *British Caledonian* the District of Columbia Circuit Court determined, essentially through elucidating the true scope and meaning of Article 33, that SFAR 40 violated international law. The various defenses claimed by the FAA to permit exceptions to the article were each found wanting by the court. The legal obligations under Article 33 extended to, and remained unqualified by, the emergency circumstances present shortly after the DC-10 crash. In large measure, the court drew its interpretation from the language of the article itself. This section will look behind that language and examine Article 33 in closer detail.

Before embarking on this discussion, it will be helpful to outline the complexities which have crept into the concept of airworthiness since the adoption of the Chicago Convention. The issue of mutual recognition of certificates of airworthiness may arise in two distinct contexts. The first involves the original certificate of airworthiness which may be required for export or import of aircraft. The second relates to certification of airworthiness for purposes of international air navigation. While mutual recognition of airworthiness certificates would be a great convenience in both contexts, the dynamics urging in-

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recent Second Circuit decision in *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), *cert.granted*, 108 S. Ct. 1466 (1988). In Hess, the Second Circuit found that the Alien Tort Statue conferred jurisdiction against a sovereign independently of the FSIA for torts alleging a breach of international law. The answer again may lie in the Act of State Doctrine, which bars judicial inquiry only for acts within the territory of the sovereign. The acts addressed in Hess occurred on the high seas, while the United States act of implementing SFAR 40 was confined to its own borders.

106 *British Caledonian*, 665 F.2d at 1162-68.

107 Id.

108 Id.

109 The litigation spawned by SFAR 40 illustrates the disruption caused by lack of mutual recognition in the air navigation context. In the context of airworthiness for export, see Note, *International Aviation Law: Bilateral Airworthiness Agreements for Export and Import of Aircraft and Aeronautical Products*, 9 SuffolK Transnat'L L.J. 303, 306 n.4 (1985) (BAAs [bilateral aviation agreements] for export are designed
ternational cooperation may differ significantly when one nation is seeking to sell an aircraft to another, as opposed to looking to navigate aircraft in another State. As will be seen, Article 33, at least in its present scope as developed by ICAO, does not extend to the export/import context.  

Further, there are three types of international agreements which raise the airworthiness issue: (1) Article 33 of the multilateral Chicago Convention, (2) bilateral aviation agreements (BAAs) which deal with commercial matters such as flight route allocation but which also include provisions on recognition of airworthiness certificates for navigation purposes, and (3) BAAs for export/import. With regard to airworthiness, types (1) and (2) are directed solely to air navigation, although there is nothing in the language of the airworthiness clauses to confirm that the export/import context is excluded. The airworthiness clause typically used in type

to reduce the repetitive certification processes which cause an undue burden on the international aviation community).

There are several bases on which to reasonably distinguish the need for mutual recognition in the export/import context from that in the air navigation context. First, an exporting State which oversees the manufacture of aircraft or an importing State which will be asked to enter the aircraft on its own registry may sensibly demand more exacting compliance with its own standards. Second, the failure of reciprocal recognition of airworthiness for export/import purposes may impede commercial activity in the purchase and sale of aircraft, but it does not raise the same insurmountable problems with respect to operation of the international civil aviation system as does refusal to recognize airworthiness certificates for purposes of air navigation. If an export transaction is held up, time is available to comply with the foreign airworthiness requirements or to reach bilateral accord on mutual recognition. The system of international air transport will not grind to a halt in the meantime. For these reasons, the FAA expresses the view that "while the Annex 8 standards are adequate in establishing minimum international standards to assure freedom of air transport, these standards alone are not considered adequate for United States export/import airworthiness certification." See Note, supra note 109, at 323 n.84 (citing interview with FAA Director of Office of Airworthiness).

See Chicago Convention, supra note 2.

Portions of the standard form used by the United States for this type of BAA are set out in British Caledonian, 665 F.2d at 1164.

The standard United States form for this type of agreement is reproduced at 3 Av. L. Rep. (CCH) ¶ 26,411 (1974).
(3) mirrors the Article 33 language,\textsuperscript{114} although these agreements are intended to deal only with airworthiness for export. Because airworthiness clauses in the export agreements may be identical to Article 33, but the unqualified reciprocal recognition rule does not apply with equal force in the export context, it may be mistakenly thought that rule has also been diluted for air navigation under Article 33. It is important to bear these distinctions in purpose in mind when evaluating the scope of Article 33.

A. The History and Development of Article 33

Article 33 has its genesis in the American draft presented to the Chicago Convention. Article 20(c) of the American draft provided: "Certificates of airworthiness . . . issued or rendered valid by the Contracting State whose nationality the aircraft possesses, shall be recognized as valid by the other Contracting States,"\textsuperscript{115} provided minimum standards to be set by the ICAO Council were met. With minor drafting changes, this provision was adopted as Article 33.\textsuperscript{116}

It appears that the original aims of the authors of the Chicago Convention as to airworthiness standards were ambitious. In keeping with the goals of uniformity and standardization sought by the Chicago Convention as a whole — goals intended to promote the safety of international civil aviation — the drafters envisioned a detailed international code for the airworthiness of aircraft. Under the direction of an international airworthiness bureau, it was felt such a code would "ultimately render unnecessary any reference to the several differing national codes to meet the requirements of international air navigation

\textsuperscript{114} See Note, supra note 109, at 323 n.83 (in most BAAs in effect between the United States and foreign States, the reciprocal recognition rule expressed in Article 33 of the Chicago Convention is generally reproduced).

\textsuperscript{115} 1 PROCEEDINGS OF THE INTERNATIONAL CIVIL AVIATION CONFERENCE OF 1944 561 (1948) [hereinafter PROCEEDINGS] (a two-volume set published by the Department of State).

\textsuperscript{116} See 2 PROCEEDINGS at 1385-86.
and the export of aircraft."  

However, the enormity of such an undertaking, particularly in light of the rapid technical advances in the field, soon got the better of ICAO. While ICAO had a mandate under Article 37 to publish minimum international airworthiness standards, in 1956 ICAO abandoned the concept of a detailed international code. The decision was made instead that Annex 8 should include "broad Standards which defined, for application by the competent national authorities, the complete minimum international basis for the recognition by States of certificates of airworthiness for the purpose of the flight of aircraft of other states into or over their territories." Each State was under an obligation to "establish its own comprehensive and detailed code of airworthiness, or . . . select a comprehensive and detailed code established by another Contracting State." Each national code was required to comply with the broad Annex 8 standards.

In 1957, an Airworthiness Committee was formed under the direction of the Air Navigation Commission to monitor national code compliance. The Airworthiness Committee's enforcement criterion forbade national standards which were "appreciably lower" than those permitted by Annex 8. Following further modification of doctrine in the early 1970s, ICAO dropped this specific standard for compliance. On March 15, 1972, ICAO published the current airworthiness policy containing the following provisions:

c) international airworthiness Standards adopted by the Council are recognized as being the complete interna-

117 PROCEEDINGS at 706.
118 Annex 8, supra note 78, at 5 (emphasis added).
119 Id.
120 Id.
121 Id. The Air Navigation Commission is one of five permanent "Secretariats" established by the Chicago Convention. The others are the Air Transport Bureau, the Technical Assistance Bureau, the Legal Bureau and the Bureau of Administration and Services. See Chicago Convention, supra note 2.
122 The entire 1972 policy statement is relevant but too lengthy for full quotation. See Annex 8, supra note 78, at 6.
tional code necessary to bring into force and effect the rights and obligations which arise under article 33 of the Convention;

d) the technical airworthiness Standards in Annex 8 shall be presented as broad specifications stating the objectives rather than the means of realizing these objectives; ICAO recognizes that national codes of airworthiness containing the full scope and extent of detail considered necessary by individual States are required as the basis for the certification by individual States of airworthiness of each aircraft. . . .

These developments illustrate two significant changes to the ICAO efforts to regulate airworthiness which had followed the adoption of Article 33. First, ICAO had abandoned efforts to formulate a detailed international code, relying instead on "comprehensive and detailed national airworthiness codes" which were to meet the generalized objectives of Annex 8. Second, while it appears that a role in certifying airworthiness of aircraft for export was initially contemplated, ICAO had ultimately limited its role to air navigation, leaving export/import to be dealt with in bilateral agreements.

It has been argued to the contrary that Article 33 was never intended to cover certificates of airworthiness for export, but only air navigation. The following passage is relied upon by one commentator in support of this view:

The Council concluded that the advantages that would accrue from the establishment, in lieu of bilateral agreements, of a standard procedure, whereby the certificate of an aircraft complying with the applicable ICAO Standards would be unconditionally validated or renewed by the importing State, would not be sufficient to justify prejudicing the development of Annex 8 to serve its primary purpose.
as a means of implementing Articles 33 and 37 of the Convention.\textsuperscript{125}

Whatever may have been the original intent, Article 33 is clearly not now intended to cover the issue of airworthiness for export/import. Numerous bilateral aviation agreements have come to occupy this field.\textsuperscript{126} Whether this occurred as a matter of original intent, or as a result of ICAO abandoning a detailed international code in the mid-1950s, however, really does not matter in the context of SFAR 40. Rights of air navigation, not export/import privileges, were under attack by SFAR 40. On the issue of air navigation, there is no doubt that Article 33 was intended to control.

Brief comment should be made concerning the commercial Bilateral Aviation Agreements which also address the airworthiness for navigation issue. It was this form of BAA which was raised by the petitioners and dealt with by the District of Columbia Circuit in \textit{British Caledonian}.\textsuperscript{127} From the reasons given by the court, it may be inferred that the mutual airworthiness recognition rules of these agreements may supplement or supplant the Article 33 obligations,\textsuperscript{128} although in issuing SFAR 40 these agreements had not been complied with either. While such a bilateral approach could frustrate the aspirations of the Chicago Convention for a uniform, universal system, it seems proper that two nations must be permitted to amend their obligations \textit{inter se} if both desire to do so.

The true intent of Article 33 has also been explored by examining in aviation conventions leading up to the Chi-


\textsuperscript{126} See Note, supra note 109, at 303 n.1 (listing 24 such agreements to which the United States is a party).

\textsuperscript{127} See \textit{British Caledonian}, 665 F.2d at 1164.

\textsuperscript{128} The circuit court agreed that the provisions in such agreements "[allow] the United States to take immediate action, without consultations, if such action is necessary to prevent further non-compliance... with the applicable airworthiness standards..." Id.
cago Convention. In the Paris Convention of 1919, a provision on mutual recognition much like Article 33 was included. The Havana Convention of 1928, however, contained a provision permitting refusal to recognize foreign airworthiness certificates if domestic airworthiness standards were not met. One commentator concludes that given a precedent for both approaches, "[t]he drafters of the Chicago Convention deliberately chose to adopt the model . . . of the Paris Convention. Article 33 reproduces the unqualified recognition principal."129

B. A Close Look at Annex 8

Annex 8 warrants careful attention both because it sets forth the minimum airworthiness standards and because its language strongly suggests it is the State of registry which is to have the final say on airworthiness determination. Part II of Annex 8 dealing with administrative matters is particularly important. As to airworthiness certificates generally, subsection 2.2 provides in part:

2.2. A Contracting State shall not issue or render valid a Certificate of Airworthiness for which it intends to claim recognition pursuant to Article 33 of the Convention on International Civil Aviation, unless the aircraft complies with a comprehensive and detailed national airworthiness code established for that class of aircraft by the State of Registry or by any other Contracting State.131

This provision indicates the State of registry may, under its own or an adopted national airworthiness code, issue a certificate for which it claims Article 33 recognition.

129 Richard, supra note 125, at 197. Richard cites the Balair brief in British Caledonian: "The reciprocal recognition rule stated in [the Paris Convention] was unqualified as to certificates of airworthiness, but explicitly qualified as to certificates of pilot competency — a distinction carried forward in the respective articles of the Chicago Convention (Article 33 as contrasted with Article 32)." See id. at 197 n.3.

130 Annex 8 was amended in 1982 to add a provision dealing with exchange of information on faults, malfunctions, and defects in aircraft. This provision appears at subsection 4.2.4. The provisions of section 4 are otherwise unchanged from those in place during the currency of SFAR 40 in 1979.

131 Annex 8, supra note 78, § 2.2.
Concerning continuing airworthiness, such as was at issue in the DC-10 incident, subsection 4.1 states, "The continuing airworthiness of an aircraft shall be determined by the State of Registry . . . ." Subsection 4.2 provides for the mutual exchange of "mandatory continuing airworthiness information" between the State of manufacture and the State of registry, but adds in a note that "[t]he Contracting State which has an aircraft entered on its register is responsible for taking whatever action it deems necessary upon receipt of mandatory continuing airworthiness information." These provisions clearly express that the State of registry is to make the final decisions regarding continuing airworthiness.

The obligations to exchange ongoing airworthiness information have also been argued to indicate limits to the obligations of the State of manufacture. In evaluating these obligations, it has been stated that the sole duty of the State of manufacture under Annex 8 is "to communicate all relevant airworthiness information to the State of Import with a view to allowing the latter to make enlightened judgments in the exercise of its responsibility." In essence, Article 33 does not contemplate separate type certificates and individual aircraft certificates, nor distinct airworthiness assessments related to each. Judgment on airworthiness as a whole, both as to the individual aircraft and as to the adequacy of the underlying type design, is left to the State of registry. While "the new State of Registry may, at its discretion, consider prior issuance of the certificate of airworthiness by a contracting State as satisfactory evidence of airworthiness . . . [t]he responsibility for such airworthiness determination . . . is entirely its own." This view of the limited nature of the

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132 Id. § 4.1.
133 Id. § 4.2.2, Note 2.
134 For further discussion of these provisions of Annex 8, see Richard, supra note 125, at 198-201.
135 Id. at 200.
136 Id. at 202.
137 Id. at 200.
responsibility for airworthiness of the State of manufacture has been supported by foreign aviation authorities. Rellying on Annex 8 and detailed national codes to set adequate standards for air navigation, including those circumstances where a State of manufacture is asked to receive its own exported aircraft, "[t]he [ICAO] Council has urged Contracting States not to impose on visiting aeroplanes operational requirements other than those established by the State of Registry, provided those requirements are not lower than the standards of [part of Annex 6] and 2.2 of Part III of this edition of Annex 8."

C. International Safety Disputes and the Reciprocal Recognition Rule

The fundamental issue in British Caledonian was who should have the final say on questions of airworthiness. Should it be the State in whose territory the aircraft will operate, which has a paramount interest in the safety of its own citizens? Or should it be the State of registry for the aircraft, a choice which would foster the smooth operation of international civil aviation? SFAR 40 asserted that the first principle should prevail; the obligations agreed to under Article 33 sought to promote the second. This section looks beyond the international legal obligations interpreted by the District of Columbia Circuit and examines, on policy grounds, which principle should govern.

Official United States policy has offered staunch support to the Chicago Convention. Existing policy in 1980 was stated as follows: "[T]he U.S. favors and encourages compliance with the Convention on International Civil Aviation and recommends that ICAO Standards and Recommended Practices be applied to U.S.

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138 See id. at 200, noting the attitude of the British Civil Aviation Authority.
139 Annex 8, supra note 78, at 7.
140 655 F.2d 1153 (D.C. Cir. 1981).
141 K. Power, supra note 3, at 12 (the United States, being a primary benefactor as well as originator, has supported fully the aims and objectives of ICAO).
national aviation practices as soon as practicable” and “the accomplishments of ICAO to date, particularly in promoting safety of international aviation and in facilitating international air commerce, have fully demonstrated the need for the continuance of cooperative efforts in fostering the development of international civil aviation.”  

Indeed, as early as the summer of 1946, as Congress was considering ratification of the Chicago Convention, the executive branch declared that “the Board [now DOT/FAA] pursuant to section 1102, must act ‘consistently with any obligation assumed by the United States in such agreement and, therefore, within the broad policy’ declared in the agreement.”  

While the broad policy of the Chicago Convention would not forbid the Civil Aeronautics Board or its successors from regulating such commercial matters as foreign carrier qualification for section 402 permits, or the setting of domestic airport landing fees, the thrust of the United States position was to accord strong support to the need for international cooperation addressed in the Chicago Convention.

Despite this strong pro-Chicago Convention policy, Administrator Bond felt it essential to issue SFAR 40 in view of the specific safety concerns raised by the DC-10 crash.

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142 Id. In light of SFAR 40, however, the suggestion that “[i]n accordance with the ICAO Convention, the U.S. will not impose restrictions or obligations on other ICAO Member States regarding the competency of its personnel or its airworthiness” must be questioned, at least in circumstances where the United States strongly disagrees with other Contracting States over potential safety problems.  
See id.  
144 Foreign Permit Investigation, 34 C.A.B. 837, 839 (1961); see also 40 Op. Att’y Gen. 451, 452 (1946) (before foreign air carrier permits are issued by the United States to foreign airlines, they must qualify under the provisions of the Civil Aeronautics Act) (quoting message of President to Congress on June 11, 1946).  
145 See Indianapolis Airport Auth. v. American Airlines, Inc., 793 F.2d 1262, 1266 (7th Cir. 1984). The court states:  
As a treaty of the United States . . . the Convention has the force of a federal statute. But it does not regulate airport fees. It establishes a Council with broad powers and the Council has recommended standards that require that landing fees and other airport charges be reasonable, but these standards . . . are not intended to have the force of law.  

Id.
and subsequent investigation. Though almost certainly aware of the international law difficulties posed by such an order,\footnote{See British Caledonian, 665 F.2d at 1156. The fact that Administrator Bond was most probably aware of the Article 33 obligations at the time SFAR 40 was issued is immaterial. The real period of dispute was that following recertification by the European Civil Aviation Authorities between June 19 and June 25, 1979, and July 13, 1979, when the FAA rescinded SFAR 40. By that point, Administrator Bond and his staff were without doubt alerted to the Article 33 obligations at the Zurich and Paris meetings.} he feared a grave threat to public safety if the DC-10 aircraft was indeed of defective design. When the European Civil Aviation Authorities resolved their own airworthiness concerns more rapidly than the FAA, Administrator Bond refused to compromise his own safety concerns, as would have been required to comply with Article 33. This action of issuing and maintaining SFAR 40 after European recertification has been described as "made in defiance of international law,"\footnote{Richard, supra note 125, at 214.} and was held by the District of Columbia Circuit to violate United States treaty obligations. But, properly conceived, should international aviation law place a national aviation authority in the dilemma faced by Administrator Bond of whether to compromise domestic views on safety or breach the reciprocal recognition rule? Or, alternatively, should there be sufficient flexibility to permit unilateral action when specific factors give rise to a disagreement about safety?

Both safety and promotion of a convenient system of international navigation must be fundamental objectives of international aviation law. In routine circumstances, the latter objective is well served by the Article 33 reciprocal recognition principle.\footnote{See Chicago Convention, supra note 2.} This system avoids the enormous repetition of certification efforts which would be necessary were each State to independently certify all aircraft operating in its airspace. It additionally avoids a risk of uneven application of certification standards for ulterior purposes. Where a \textit{bona fide} disagreement regarding safety exists between States, however, the benefits of con-
venience and assurance of fair play are outweighed in the mind of the concerned State by the paramount interest in ensuring safety. This primary objective so overwhelms all other aviation objectives, including an efficient international navigation system, that no State with legitimate safety concerns can be asked or expected to compromise those concerns to further other international aviation goals. Where safety concerns are sufficiently strong, such a State would be prepared to watch international air travel come to a halt, rather than operate under conditions considered unsafe according to its own national standards.\(^{149}\)

Certainly every State, including the United States, must recognize that it cannot engage in unfettered or indiscriminate unilateral action and hope to retain the benefits of a smoothly operating international air navigation system. Such a system necessarily entails reciprocal concessions of otherwise exclusive territorial sovereignty and deference to the airworthiness determinations of other States. In return, similar international recognition of one's own airworthiness decisions is granted. The degree of cooperation which has been achieved through the Article 33 and Annex 8 system of mutual respect and minimum standards, and the benefits flowing therefrom, should not be lightly disturbed. Before risking damage to this delicate balance of international cooperation, a State should be certain that there is a true dispute related to safety, examine whether its safety concerns might be redressed without unilateral action, and, finally, weigh the strength of its concern for safety against the damage threatened to the less crucial but still very important objective of ease of international navigation. Where the per-

\(^{149}\) In general, it would be expected that the disagreement over safety would not extend to the entire international air navigation system, but rather would be limited to a matter such as a specific aircraft, specific carrier, or perhaps a particular airport. The risk to the system as a whole is present primarily through the risk of retaliation. What this article suggests is that even in the face of retaliation leading to complete breakdown, a State with a serious safety concern would not compromise that concern for the dubious benefit of an international navigation system which it regarded as at least in part unsafe.
ceived threat to safety remains intolerable despite the inconvenience which may result to international travel, however, that State should, under international law, be left room to act according to its own views on safety.\footnote{Even should exercise of unilateral action be carefully circumscribed as suggested here, the mere opportunity of such action may be criticized as inviting abuse. Certainly, unscrupulous states might, for ulterior political or economic motives, allege a spurious safety concern about the aircraft of a particular state. This risk is certainly present, and perhaps of foremost concern to the United States. But it is also a cost which must be accepted if states wish to retain some flexibility to determine \textit{bona fide} safety concerns according to their own standards. The problem may also be more theoretical than real. Where such conduct would occur, the relationship between the states involved could be expected to be such that exchange of air traffic would be minimal or nonexistent. Further, even absolute international obligations under such circumstances would likely pose a minimal barrier to unilateral conduct.}

Where a situation occurs which fits these criteria, as did the DC-10 crisis, providing a degree of flexibility in the international law framework amounts to a practical imperative. The SFAR 40 dispute arose between the United States, which claimed a policy strongly favoring international cooperation under the Chicago Convention system, and a group of sophisticated Western European aviation nations whose airworthiness judgment the United States would be expected to be most inclined to respect. Even in these favorable circumstances, the United States was not prepared to compromise an overriding safety concern. International law should recognize this practical imperative and accept that international legal obligations alone cannot overcome significant safety disagreements. Compromise of legitimate national concerns about safety cannot be compelled. However, international law should also recognize the risk posed by such disagreements for the international navigation system and strive to put in place a mechanism for minimizing the duration of disputes and the damage arising therefrom.

ICAO's retreat from setting detailed international airworthiness standards also suggests that a more restrictive interpretation of the Article 33 obligations might now be appropriate. Those obligations might properly be limited
to routine circumstances, recognizing the need for greater flexibility in the exceptional circumstances of a serious safety disagreement. When the language of Article 33 was developed in 1944, it was anticipated that a uniform international airworthiness code would be developed by ICAO. Had it been possible to successfully establish and keep current such a code—an approach which at least in concept would have encouraged a single global airworthiness determination — stronger grounds would exist to refuse to derogate from Article 33 obligations even in exceptional circumstances.\(^{151}\) With the relinquishing of detailed standards to national codes, however, the enhanced reasons to insist on compliance with national standards in the export/import context led to widespread use of bilateral agreements outside the Chicago Convention system for those transactions. Similarly, where a significant safety disagreement exists and the reasons to insist on compliance with national airworthiness standards become compelling, there is equal reason to suggest that the obligations under Article 33 should be regarded as less than absolute.

Even if some flexibility for unilateral action is an unavoidable necessity when a significant safety dispute arises, such action may impose heavy economic costs and severely strain international relations. While this paper suggests that international law cannot reasonably prohibit unilateral action in all circumstances, an international forum should be provided to facilitate the quickest possible resolution of safety disagreements and thus end the need

\(^{151}\) Common standards alone would not solve all differences in airworthiness judgment. Interpretation and application of those standards will continue to play a role. Indeed, many states have adopted outright or patterned their airworthiness codes closely after the United States Federal Aviation Regulations [FARs], which have accordingly come to comprise something of an international airworthiness code. A notable exception to this pattern is the United Kingdom. See Note, supra note 109, at 321 n.69.

In the DC-10 dispute, several of the European nations involved, including Germany and Switzerland, were interpreting national codes identical to the United States FARs; Italy was interpreting a code based on the United States FARs. The safety disagreement arose notwithstanding these common standards. \textit{Id.}
for unilateral action. It is in this role that ICAO might best serve, perhaps through the Airworthiness Committee, which could draw upon its expertise in evaluating airworthiness.\footnote{See Convention on International Civil Aviation, The First 40 Years, supra note 42, at 20, which describes the composition and purposes of the Airworthiness Committee:}

Several general considerations should guide the structure of whatever mechanism is used to help resolve international safety disagreements. Most importantly, no obligation should be forced on the State concerned about safety to compromise its safety concerns.\footnote{Naturally, if contracting states could agree upon compulsory jurisdiction and adjudicatory powers for a dispute resolution forum such as the Airworthiness Committee, an airworthiness determination could be concluded through an international tribunal. Tribunal decisions might be enforced by ostracizing those States refusing to comply with such airworthiness determinations. While such a system is certainly an option, potential drawbacks include delay and problematic enforcement proceedings against a State remaining concerned over safety problems. It is suggested that a process which aims toward consensus is superior.} There should, however, be an obligation placed on States taking unilateral action to promptly approach the Airworthiness Committee or other body and set out the compelling basis for such action. Should the issue be raised, the Airworthiness Committee should offer preliminary comments on the \textit{bona fides} of the safety concerns. Immediate consultations would then be arranged where all affected States would jointly attempt to resolve differences. The Airworthiness Committee could assist as mediator, either from the outset or at the request of any State involved. In the meantime, an effort should be made to minimize unequal economic impact from the dispute, perhaps through another body within ICAO. Throughout the consultation process, the ever-present risk of retaliation, threatening...
escalating damage to international navigation, would pro-
vide a built-in incentive to resolve matters quickly and
avoid allegations of contrived disagreements or bad faith
negotiations.

Imposing such obligations would not necessarily in-
volve an amendment to Article 33. Many obligations re-
lated to airworthiness, such as that to provide mandatory
continuing airworthiness information, have been incorpo-
rated into Annex 8. As demonstrated by the District of
Columbia Circuit in *British Caledonian*, Annex 8 is to be
consulted in assessing the proper scope of Article 33.154
Were Annex 8 amended to specify procedures contem-
plating possible unilateral action, Article 33 might appro-
priately receive a less unqualified interpretation. An
amendment to Annex 8 could include additional criteria
thought to be sensible, such as whether the State of manu-
facture might indeed be given special deference over de-
sign-related safety issues. The Chicago Convention itself
provides Annex amending procedures.155 Under Article
90, the ICAO Council may adopt amendments and addi-
tions to Annex 8 by a two-thirds majority vote. The
amendments become effective three months after commu-
nication to contracting States unless a majority of States
register their disapproval.156

**CONCLUSION**

A viable system of international air navigation demands
extensive cooperation in many areas. With regard to air-
worthiness, as long as States continue to make individual
airworthiness assessments, some basis for reciprocal rec-
ognition of national airworthiness judgments is essential.
The drafters of the Chicago Convention sought to insure
such cooperation among contracting States by adopting
Article 33, a reciprocal recognition rule qualified only by
the right to insist on compliance with minimum standards.

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154 *See British Caledonian*, 665 F.2d at 1160-61, 1164-65.
155 *See Chicago Convention, supra* note 2, at Art. 90.
156 *Id.*
With the growth of a complex, highly developed network of international commercial aviation, the practical implications of this rule to daily operations became increasingly important. Any deviation from this rule promises heavy financial impact on today's international carriers. It was such economic consequences, and the threat they might be repeated, that propelled the European carriers into court in *British Caledonian*\(^{157}\) and *Balair*.\(^{158}\)

This paper has sought to accord full weight to this important air navigation objective, both in recognizing the existing legal obligations under Article 33 and in suggesting these should not be lightly upset. The hand-wringing dilemma faced by Administrator Bond during the DC-10 crisis, however, has prompted a re-examination of considerations which intrude on the Article 33 obligation. This paper argues that national concerns for safety in such crisis conditions must be recognized as paramount, even at the expense of the international navigation system. This is not because the State with the safety concerns should be favored as necessarily more cautious. Indeed, although raised in good faith, such concerns may ultimately prove ill-founded, a fact which other States will maintain was apparent all along. Rather, it is because a State not convinced of safety must be recognized as entitled to place that safety concern above all else. Accordingly, in extraordinary circumstances, international aviation law should contemplate limited flexibility to the reciprocal recognition rule, sponsor a forum to resolve safety disagreements as rapidly as possible, and cultivate the penalties available within the system to discourage abuse.

\(^{157}\) *British Caledonian*, 665 F.2d at 1153.  
\(^{158}\) 18 Av. Cas. (CCH) at 17,692.