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Theme 2: Improving aviation safety

Topic 2.4: Mutual recognition

HOST STATES SHOULD EXERCISE THEIR RIGHTS UNDER ARTICLE 33 OF THE CHICAGO CONVENTION: HOW TO ENSURE SAFETY COMPLIANCE BY FOREIGN CARRIERS

(Presented by the United States)

SUMMARY

The State of the Operator is responsible for ensuring its air carriers' compliance with ICAO Standards and Recommended Practices (SARPs) before they enter foreign or international airspace. The State of Registry (which can be different from the State of the Operator) is responsible for issuing airworthiness certificates that meet SARPs. Unfortunately, safety assessment programs conducted by ICAO, some Contracting States, and industry have disclosed widespread safety oversight deficiencies. host States have the right (and most likely the obligation under domestic law) to question whether foreign air carriers receive safety oversight that meets SARPs. They should do so on a reciprocal, consensual basis that gives foreign carriers and the State of the Operator appropriate procedural protections, without prejudice to the right to take emergency action if warranted. The host State should give notice, ask for consultations, use the ICAO safety oversight checklist, and give the State of the Operator the opportunity to cure deficiencies. ICAO should consider amending Annexes 1, 6 and 8 to provide guidance on ensuring safety compliance of foreign carriers.

Action by the Conference is in paragraph 4.

1. INTRODUCTION

1.1 Article 33: *Recognition of certificates and licenses* of the Chicago Convention on International Civil Aviation provides as follows:

“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.”

2. DISCUSSION

2.1 No state has the right to send its carriers into foreign or international airspace without providing safety oversight that meets international standards. This is a fundamental principle of international civil aviation.

2.2 The potential for death and injury from aviation accidents puts safety at the heart of the core responsibilities of States — the health, safety, and well-being of the population. The host State has the right to question whether foreign carriers receive safety oversight that meets Standards. Many States have the obligation to do so under domestic law. The host State has the right to enforce its operating rules governing foreign carriers, and it has the right to insist that the State of the Operator carries out surveillance and enforcement that meets Standards. It has the right to ensure that airworthiness certificates issued by the State of Registry meet standards. The host State has the right to be in close continuing communication with the State of the Operator about safety concerns over any foreign operator.

2.3 States have an affirmative right to insist on compliance. By the same token, the State of the Operator has the right to have its licenses and certificates observed, so long as it can demonstrate compliance with Standards. These licenses and certificates are not one-time findings. They represent a continuing obligation of the State of the Operator to ensure continued compliance by its carriers with international and domestic safety requirements.

Why should States exercise their Article 33 rights?

2.4 ICAO’s Universal Safety Oversight Audit Programme (USOAP) and other assessment programs carried out by some Contracting States and industry organizations have demonstrated widespread lack of compliance with Annex 1 — *Personnel Licensing*, Annex 6 — *Operation of Aircraft*, and Annex 8 — *Airworthiness of Aircraft*. When USOAP began, most States fell substantially short of compliance with Standards. Even after more than a decade, indications are that perhaps a quarter of Contracting States still have meaningful deficiencies in safety oversight.

2.5 If there is any doubt at all, a host State should exercise its Article 33 rights with respect to every State that sends carriers into its airspace. If more States had exercised their host State rights under Article 33 as soon as these deficiencies came to light, beginning ten to fifteen years ago, States might more readily have found the resources and political will to cure them.

How does a State exercise its Article 33 rights?

2.6 Analysis should focus on the State of the Operator, which has responsibility for safety oversight under the Convention, not the individual carriers. It is the host State and the State of the Operator that exchange mutual rights and obligations under the Convention. The host State's regulatory authority over a foreign carrier is limited. Foreign carriers generally operate at sufferance, in accord with express bilateral agreement or under comity and reciprocity, but the State of Operator is responsible for licensing, certification, and continuing oversight. The host State may exercise surveillance in the form of ramp checks and insist on access to aircraft and presentation of documents, in accordance with Article 16: *Search of Aircraft*, of the Convention, but it cannot unilaterally regulate and oversee the details of aircrew licensing, airworthiness, and carrier operation.

2.7 In case of doubt, the host State may insist that the State of the Operator demonstrate its compliance with Standards and Recommended Practices (SARPs) and do this on a consensual, reciprocal basis.

Elements of a program

2.8 The host State might do well to follow these steps:

2.9 *Homework.* Analysis should start with USOAP reports and the results of other assessments, to the extent that they are available. The USOAP summary results are available to Contracting States through ICAO-Net. The host State can always ask that the State of the Operator provide the full USOAP report, along with follow-up data, to give more background. The host State can supplement with its own spot observations and ramp checks of foreign aircraft. Officials should bear in mind, however, that although anecdotal evidence may be indicative of problems, it does not constitute an evaluation of the infrastructure and systematic measures needed for sustained compliance. Follow-up through informal discussions with foreign Civil Aviation Authority (CAA) officials and with foreign air carrier personnel.

2.10 *Apply international standards.* Focus on SARPs — Annexes 1, 6 and 8 — not the host State's national legislation and regulations. The host State can insist, of course, on compliance with its operating rules for foreign carriers established in accord with Article 11 of the Convention.

2.11 *Ask for consultations.* Notice and the right to reply are critical elements of the exercise of Article 33 rights. A course of action that could potentially have economic impact on one or more foreign carriers ought to observe the appropriate procedural obligations.

2.11.1 Any State may ask any other State for consultations on any subject at any time, and aviation safety concerns are no exception. Both sides may avail themselves of the consultation clause of their economic air services bilateral agreement, if there is one, and if it has appropriate consultation or dispute resolution mechanisms. Indeed, if the agreement has such a safety clause, the host State may be obligated to consult.

2.11.2 There are a number of model safety clauses. The ICAO Council has adopted a model safety clause and circulated it to Contracting States by State letter AN 6/42-01/84, dated 14 September 2001. Attachment A contains the Council Resolution and Attachment B sets out the model clause. The model clause covers safety concerns over "aeronautical facilities, flight crew, aircraft and the operation of aircraft" and mandates consultations within thirty days (paragraph 1 refers).

2.11.3 The United States uses a more comprehensive model clause in its open-skies and other economic bilateral agreements with more than seventy countries. Our model clause, attached hereto, reaffirms the parties' commitment to compliance with multilateral safety obligations — while making no substantive change to them — and subjects safety concerns to the agreement's consultation and dispute resolution mechanisms.

2.12 *Conduct on-site discussions with CAA officials.* Face-to-face consultations at the State of the Operator's facility are appropriate if concerns can not be resolved by less formal means. USOAP assessment teams include experts in each of the several disciplines involved in carrying out obligations under the Annexes. It might also be wise to include legal counsel in the consultations, since fully a quarter of the USOAP checklist turns on legal matters — organic legislation, operating regulations, guidance materials, enforcement systems. An on-site assessment need only be a snap-shot — rather than the through-going evaluation that a standardization body might conduct — to provide assurance that the CAA reasonably meets Standards.

2.13 *Use the USOAP checklist.* The checklist, although only an outline, is a reasonably comprehensive guide to the subject matter of Annexes 1, 6, and 8, set out in an organized fashion, with references to the appropriate SARPs. It provides an organized framework for discussion, and the State of the Operator can fill it out in advance of the consultation. The checklist is even valuable as a self-assessment tool to gage compliance with Standards. The discussions might, as appropriate, include a visit to the carriers that operate to the host State's airports, not to assess the carrier directly, but to verify the effectiveness of the CAA's oversight of the carrier.

2.14 *Give the State of the Operator an opportunity to cure deficiencies.* Once immediate, emergency concerns are resolved, it is usually feasible for a host State to allow foreign carriers to continue to operate, perhaps with some restrictions, while stepping up ramp checks and other permissible forms of oversight. Meanwhile, the State of the Operator should expedite measures to come into compliance with international standards. The USOAP process, like some of the measures undertaken by Contracting States, involves development of an action plan to cure deficiencies and follow-up visits.

2.15 *Emergency cases are different.* In case of a bona fide safety emergency, the host State can of course act unilaterally and quickly. An aircraft that is unsafe should not be allowed to operate. The model clause transmitted in State letter AN 6/42-01/84 says: "When urgent action is essential to ensure the safety of an airline operation, each Party reserves the right to immediately suspend or vary the operating authorization of an airline or airlines of the other party"(paragraph 4 refers). It goes on to say: "Any action by one Party in accordance with paragraph 4 above shall be discontinued once the basis for taking the action ceases to exist" (paragraph 5 refers). The host State should coordinate any emergency action informally as quickly as possible, preferably simultaneously, but should in any case ask for consultations as soon as possible afterward.

How should States not exercise Article 33 rights?

2.16 It is not appropriate to rely entirely on a few ramp checks or third-party anecdotal evidence, and States should not ban individual carriers in non-emergency situations, rather than calling the State of the Operator to account. Nor should States act peremptorily, without consultation and an opportunity for the State of the Operator to demonstrate compliance with Standards or cure deficiencies.

Transparency

2.17 host States should make public their criteria for actions concerning safety compliance of foreign carriers.

3. CONCLUSION

3.1 States should:

- a) enact operating rules for foreign carriers in accord with Article 11 of the Convention;
- b) establish a program to monitor foreign carriers and trigger action when safety concerns arise; and
- c) follow the guidelines set out above and apply appropriate procedural safeguards to carriers and foreign governments.

4. ACTION BY THE CONFERENCE

4.1 The Conference is invited to recommend that the Council should consider adopting more detailed guidance for oversight of foreign carriers, perhaps in the appropriate safety oversight Annexes.

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APPENDIX

UNITED STATES MODEL SAFETY CLAUSE

Article 6

Safety

1. Each Party shall recognize as valid, for the purpose of operating the air transportation provided for in this Agreement, certificates of airworthiness, certificates of competency, and licenses issued or validated by the other Party and still in force, provided that the requirements for such certificates or licenses at least equal the minimum standards that may be established pursuant to the Convention. Each Party may, however, refuse to recognize as valid for the purpose of flight above its own territory, certificates of competency and licenses granted to or validated for its own nationals by the other Party.
2. Either Party may request consultations concerning the safety standards maintained by the other Party relating to aeronautical facilities, aircrews, aircraft, and operation of the designated airlines. If, following such consultations, one Party finds that the other Party does not effectively maintain and administer safety standards and requirements in these areas that at least equal the minimum standards that may be established pursuant to the Convention, the other Party shall be notified of such findings and the steps considered necessary to conform with these minimum standards, and the other Party shall take appropriate corrective action. Each Party reserves the right to withhold, revoke, or limit the operating authorization or technical permission of an airline or airlines designated by the other Party in the event the other Party does not take such appropriate corrective action within a reasonable time.

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