From participation towards compliance: The role of private actors in the making of SARPs by ICAO

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§ 1
Introduction

Everyday, thousands of airplanes take off from airports across the world, fly over and land in different countries, sometimes literally in the other extreme of the globe. But if the countries are different, the concerns for uniformity in these operations are similar. Many of them are addressed by standards approved by the International Civil Aviation Organisation (ICAO), the international body charged with the responsibility of regulating air navigation. The process of enacting such standards is a complex one and accords a particularly significant participatory role to some private international organisations, such as the International Air Transport Association (IATA). Simultaneously, a considerable level of compliance seems to have been achieved, namely by airlines.

The present paper frames such procedures within a global administrative outline, mainly addressing the procedure for standard-making and the role of private actors therein. Its core normative claim is that the efficacy of this international regulatory scheme does not depend mostly on the compulsory or non-compulsory character of their enactments. It will be submitted that the level of compliance with ICAO standards is explained by the concurrence of five factors (its technical nature; the underlying safety concerns; the participatory mechanisms for IATA as the airlines' representative organisation; the high

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degree of proceduralisation; and the existence of oversight mechanisms), which might be used in other global administrative law realms.

This paper is divided in four main parts. To begin with, the international regulatory framework for air navigation will be described (§ 2). The following chapter aims at understanding the administrative law features of such procedure and especially the position of private international organisations therein (§ 3). Next, the problem of compliance with the standards will be addressed (§ 4). Lastly, inferences to global administrative law will be made (§ 5).

§ 2
The international regulatory framework of air navigation

2.1. The institutional framework of ICAO

ICAO is a specialised agency of the United Nations which was established by the Chicago Convention on International Civil Aviation[1], which was signed on 7 December 1944, by 52 States. Nowadays, 190 States are signatories to it[2].

ICAO is the permanent body charged with the administration of the principles laid out in the Chicago Convention[3]. The Organisation's structure is composed by four bodies: the Assembly, the Council, the Secretariat and several committees[4].

The Assembly is the sovereign body, in which every contracting State is represented according to an equality basis[5].

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1 Convention on International Civil Aviation, Dec. 7, 1944.

2 *See* http://www.icao.int/cgi/goto_m.pl?cgi/statesDB4.pl?en [all websites mentioned in this paper were last visited on April 15 2007].

3 Chicago Convention, art. 44.

4 This four parts structure is the most usual one in global bodies – *see* Sabino Cassese, "Administrative law without the State?" 37 N.Y.U. J. INT'L L. & POL. 663 (2005), 678.

5 Chicago Convention, art. 49.

The Council works as its executive committee[6]. It is composed of experts from 36 States who are elected by the Assembly[7] and of a President elected by the Council[8]. It has several functions[9], amongst which is that of "[adopting and amending] […] international standards and recommended practices" (SARPs)[10]. To perform its functions, the Council is assisted by several bodies, the most relevant of which are the Air Navigation Commission (ANC) and the Air Transport Committee (ATC)[11].

The ANC is composed of 19 members who "shall have suitable qualifications and experience in the science and practice of aeronautics"[12]. Its functions are all related to *air navigation*, whereas the ATC's tasks are within the field of *air transport*[13]. The ANC has advisory, organisational and delegated competences by the Council[14]. In its activity, it is assisted by the ANC Panels, which are *ad hoc* temporary bodies composed of qualified experts[15].

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6 Chicago Convention, art. 50(a), as amended by the 28th (Extraordinary) Session of the Assembly on 26 October 1990.

7 Chicago Convention, art. 50(b); ICAO, STANDING RULES OF PROCEDURE OF THE ASSEMBLY, Doc 7600/5, 1990, rules 55-63, http://www.icao.int/icaonet/dcs/7600/7600_cons_en.pdf.

8 Chicago Convention, art. 51.

9 Chicago Convention, arts. 54 and 55. It is worth mentioning the adjudicatory competence of the Council – Chicago Convention, art. 84; on this function *see*, *e.g.*, ALETH MANIN, L'ORGANISATION DE L'AVIATION CIVILE INTERNATIONALE (Paris 1970), 255-298; THOMAS BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANISATION (New York 1969), Part III.

10 Chicago Convention, art. 56(l) and (m).

11 Chicago Convention, art. 54(d) and (e). There are, nonetheless, important differences in their status – *see* Menachem Sheffy, "The Air Navigation Commission of the ICAO" 25 J. AIR L. & COM. 281 (1958), 292-293.

12 Chicago Convention, art. 56, as amended by the 27th Session of the Assembly on 6 October 1989.

13 Whereas *air navigation* takes care of the aircraft, its equipment, its crew and the facilities serving it – and therefore is for the most part technical in nature –, *air transport* is concerned with the actual movement of passengers and cargo between airports – which makes it mainly economical (tariffs and other commercial aspects) and administrative (customs and immigration). *See* Sheffy, "The ANC", 299.

14 Chicago Convention, arts. 57(a), 57(b) and 55(b), respectively. The first two correspond to Sheffy's typology – *see* "The ANC", 297-298.

15 ICAO, ANC PROCEDURAL GUIDEBOOK, C-DEC 176/12, 2.1.2 (hereinafter GUIDEBOOK); ICAO, DIRECTIVES FOR PANELS OF THE ANC, Doc 7984/4, 1980, 1, 2.1, 3.1 and 3.2. Normally a panel comprises 12 to 15 members, nominated by the ANC under proposal from States and international

ICAO's Secretariat corresponds to its bureaucratic structure. Comprising a body of civil servants and the ICAO Secretary General[16], it is assisted by Air Navigation study groups, which are temporary consultative bodies[17].

2.2. IATA and civil aviation regulation

Several private international organisations[18] exist in the field of civil aviation. Among these, IATA has a particularly relevant role in ICAO, having been granted the status of "standing observer" of the ANC and of the ATC activities[19/20].

IATA was founded in 1945. It represents the airline industry and, by focusing both on the technical and the commercial fields, it combines "the features of an international trade association and global standard setter"[21]. One of its objectives is to cooperate "with [ICAO] and other relevant international organisations"[22]. The members of this trade association are around 250 airlines, representing 94% of international scheduled air traffic[23].

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organisations. Panel members are participating in their personal, expert capacity – ICAO, DIRECTIVES FOR PANELS OF THE ANC, 4.1, 4.2, 4.4, 4.5, 5.2, 5.3.1, 5.3.3., 6.2, 7.2.

16 Chicago Convention, arts. 54 (h) and 58-60.

17 ICAO, MEMORANDUM ON AIR NAVIGATION STUDY GROUPS, AMOSSG-Memo/1, December 1999, Appendix B, http://www.icao.int/anb/SG/AMOSSG/memos/memo-01.pdf.

18 On this concept, *see* ILC, "Relations between States and Intergovernmental Organisations", in 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1963 (New York 1964), 167.

19 ICAO, GUIDEBOOK, 2.1.2. The Fédération Aéronautique Internationale is also a standing observer of both bodies' meetings, whereas the International Federation of Air Line Pilots' Associations is only a standing observer of the ANC's meetings – *see* ICAO Assembly Res. A1-11.

20 Additionally, IATA can be: (i) a member of other Committees of the Council – *see* ICAO, RULES OF PROCEDURE FOR STANDING COMMITTEES OF THE COUNCIL, Doc 8146-C/930/4, 1999, http://www.icao.int/icdb/PDF/Spanish/Publications/Documents/Doc.8146.sp/doc.8146.sp.pdf, articles 16 and 40 (in Spanish); (ii) invited to participate in Council meetings – *see* ICAO INTERNAL REGULATION OF THE AIR NAVIGATION COMMISSION, Doc 8229-AN/876/2, 1975, rules 14 and 19; and (iii) to participate in the Assembly – *see* ICAO Assembly Res. A5-3; ICAO, STANDING RULES OF PROCEDURE OF THE ASSEMBLY, rules 5, 25 and 44(c).

21 Lorne Clark, "IATA and ICAO: The first fifty years" 19:2 ANNALS OF AIR & SPACE L. 125 (1994), 126.

22 IATA, ARTICLES OF ASSOCIATION, art. IV(1) and (3), http://www.iata.org/iata/sites/agm/file/2005/file/agm61_articles_association_amended.pdf.

23 *See* http://www.iata.org/about/.

There are very strong ties between ICAO and IATA. The schedule of its Operations Committee (a subsidiary body which develops the industry positions ahead of ICAO meetings) is very much drawn upon ICAO's agenda[24]. Indeed, as an Author puts it, "there are few, if any parallels in the modern world of the degree of symbiosis which exists between" ICAO and IATA[25]. Even the location of their headquarters reflects that strong connection: both sit nearby in Montréal. In practice, IATA's support is essential for ICAO's activities: whenever the former gives it to a particular project of act, "there is a fair chance of it being adopted and successfully applied in practice; conversely, if IATA is opposed to [it], its chances of securing adoption are greatly reduced"[26]. It appears to be possible, therefore, to talk of interdependence between ICAO and IATA[27]. The participation of IATA in the SARPs-making procedure will demonstrate this point.

§ 3
The administrative law features of SARPs enacting

3.1. The concept of SARPs and its legal status

a) The main regulatory tools of ICAO are SARPs. Before advancing to the procedure itself, two previous issues ought to be addressed: the very concept of SARPs and its legal force.

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24 J.W.S. BRANCKER, IATA AND WHAT IT DOES (Leiden 1977), 18-19, 91-92; RICHARD CHUANG, THE INTERNATIONAL AIR TRANSPORT ASSOCIATION. A CASE-STUDY OF A QUASI-GOVERNMENTAL ORGANISATION (Leiden 1972), 53.

25 Clark, "IATA and ICAO", 125.

26 ISABELLA DIEDERIKS-VERSCHHOR, AN INTRODUCTION TO AIR LAW (8th ed.) (Alphen aan den Rijn 2006), 51.

27 Clark, "IATA and ICAO", 125-131; William Hildred, "The interdependence of ICAO and IATA", in THE FREEDOM OF THE AIR (Leyden 1968), 40-51.

SARPs are designated as Annexes to the Chicago Convention[28]. These Annexes, however, are not part of the Convention itself and hence its approval is not regulated by the Convention's amendment process. It rather merely requires "the vote of two thirds of the Council at a meeting called for that purpose"[29]. As the Council is composed by 36 members, only 24 votes are need. This means that the vote of less than 13% of all 190 contracting States is enough to approve a SARP. Additionally, for them to come into force it is only necessary that the simple majority of contracting States does not oppose to it by registering their disapproval[30]. Similarly, not only Annexes do not have the same binding force as the Convention, but the States are also given the option of *contracting-out* in case they find it impracticable to comply with promulgated SARPs[31]. Additionally, SARPs are not self-executing and lack direct effect[32]; they should therefore be implemented by national authorities. All these characteristics seem to fit particularly well a regime whose norms are of technical nature and which require frequent revision due to changes in information and circumstance[33].

Altogether, these features give Annexes an atypical character[34]. Some authors call it legislative[35] and others quasi-legislative competences[36], still others "a kind of delegation of legislative power"[37], and some others administrative functions. Due to the fact that SARPs

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28 Chicago Convention, art. 56(l) and (m).

29 Chicago Convention, art. 30(a).

30 Chicago Convention, art. 90(a). For more details on this aspect, *see* § 3.3, *infra*.

31 Chicago Convention, art. 38.

32 MANIN, L'OACI, 148-154. Except for few articles, enumerated by Paul Stephen Dempsey, "Compliance & enforcement in international law" 30 N.C.J. INT'L L. & COM. REG. 1 (2004-2005), 9.

33 As it is noted by Richard B. Stewart, "U.S. administrative law: A model for global administrative law?" 68 L. & CONTEMP. PROBS. 63 (2005), 91. Still, ICAO tries to reduce the frequency with which SARPs are amended – *see* ICAO Assembly Res. A35-14, para. 2 of Appendix A.

34 Sheffy, "The ANC", 431.

35 EDWARD YEMIN, LEGISLATIVE POWERS IN THE UNITED NATIONS AND SPECIALIZED AGENCIES (Leyden 1969), 114-160.

36 NICOLAS MATEESCO MATTE, TREATISE ON AIR-AERONAUTICAL LAW (Montréal / Toronto 1981), 212; BIN CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT (London 1962), 63.

37 ANDREAS LOWENFELD, AVIATION LAW (New York 1972), at § 5.2, V-136.

are approved by subsidiary bodies and due to the very detailed technical nature of the standards at stake, they seem to correspond to administrative rulemaking[38]. Still, the exact determination of the correct expression is based on a not necessarily desirable (or even useful) analogy with the functions of the State and should not be overemphasised[39].

From a substantial point of view, then, SARPs are air regulations of technical nature. Until now, 18 annexes have been approved, of which only Annexes 9, 17 and 18 do not deal directly with air navigation[40]. In the first ten years of the Chicago Convention, 378 amendments to the Annexes were adopted; until 1996, around 800[41].

There are two types of SARPs: (i) *standards* and (ii) *recommended practices*. They both concern specifications "for physical characteristics, configuration, matériel, performance, personnel or procedure"[42]. A substantial difference, however, sets them apart. Whereas the uniform application of *standards* is considered "necessary" to ensure "the safety or regularity of international air navigation", the uniform application of *recommended practices* is merely "desirable" to attain such objectives and the States such only "endeavour to conform". The difference resides, then, on the necessary character of the first to attain safety and regularity[43]. This difference is clearly seen in the ICAO directives, which determine the textual formulations of SARPs: a *standard* shall contain a statement specifying an obligation

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38 Benedict Kingsbury, Nico Krisch & Richard B. Stewart, "The emergence of global administrative law" 68 L. & CONTEMP. PROBS. 15 (2005), 17.

39 Kingsbury, Krisch & Stewart, "The emergence", 24 and 53-54 (enumerating the constraints on transposing tools from domestic administrative law). As Cassese wisely summarises, "we still do not know global legal «grammar» while we know our native legal terminology all too well" – *see* "The Globalisation of law" 37 N.Y.U. J. INT'L L. & POL. 973 (2005) 987.

40 *See* a brief description of the content of each of the Annexes in ICAO, THE CONVENTION ON INTERNATIONAL CIVIL AVIATION. ANNEXES 1 TO 18, http://www.icao.int/cgi/goto_m.pl?icaonet/anx/info/annexes_booklet_en.pdf.

41 Paul Michael Krämer, "Future perspectives of air law", in PERSPECTIVES OF AIR LAW, SPACE LAW, AND INTERNATIONAL BUSINESS LAW FOR THE NEXT CENTURY (Munich 1996), 31.

42 ICAO Assembly Resolution A35-14, Appendix A; *see* also the Foreword to each of the Annexes to the Chicago Convention, and ICAO, DIRECTIVES TO DIVISIONAL-TYPE AIR NAVIGATION MEETINGS AND RULES OF PROCEDURE FOR THEIR CONDUCT, Doc 8143-AN/873/3, 1983, Part II, 2.1.1, 2.1.2, http://www.icao.int/icao/en/dgca/8143_3ed.pdf (hereinafter ICAO, DIRECTIVES).

43 Similarly, BIN CHENG, INTERNATIONAL AIR TRANSPORT, 70.

by means of "shall" while a *recommendation* requires only that "should" is included in the main statement[44].

b) The actual legal status of SARPs is not consensual among scholars, much due to the ambiguity of the formulation of the relevant articles of the Chicago Convention. The crucial point in this chapter, however, is to merely offer a general framework for the understanding of its role within the aforementioned instrument.

According to the Chicago Convention, each contracting State "undertakes to collaborate in securing the highest practicable degree of uniformity" in the application of SARPs, and to give immediate notification to ICAO of "the differences between its own practice and that established by the international standard", should it find it "impracticable to comply in all respects" with promulgated SARPs[45].

From these rules, scholars seem to agree on one point[46]: article 38 of the Chicago Convention deprives SARPs of binding force, at least before the end of the notification period[47]. In other words: insofar as contracting States are allowed to notify differences at least for a certain period of time, only after the end of such period might SARPs acquire (whichever) binding force. Additionally, this shows that, if States can choose not to be bound by the promulgated SARPs (by notifying differences), the binding legal force of the latter does not depend on themselves (*i.e.*, it is not inherent to SARPs), but arises from the omission (be it voluntary or not) of notification of differences by member States.

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44 ICAO, DIRECTIVES, Part II, 2.1.4 (a) and (b).

45 Chicago Convention, arts. 37 and 38. Flights over the high seas, however, must respect approved SARPs (Chicago Convention, art 12).

46 Dempsey, "Compliance & enforcement", 13-19; BUERGENTHAL, LAW-MAKING, 76-88; YEMIN, LEGISLATIVE POWERS, 139-144, 149-; Charles Alexandrowicz, "The Convention on Facilitation of International Maritime Traffic and international technical regulation" 15:3 INT'L & COMP. L.Q. 621 (1966), 264; BIN CHENG, INTERNATIONAL AIR TRANSPORT, 64-67. The points of agreement identified in the text constitute their minimum common denominator.

47 For more details on what the *notification period* is, *see infra*, § 3.4.

3.2. The administrative procedure of SARPs enacting

It is now time to turn to the administrative procedure of SARPs enacting. It is a complex procedure, with the participation of several organs. However, the Chicago Convention is silent in most of these issues and that the relevant rules are spread throughout a variety of documents. After gathering all the sources, one can divide the procedure in five main stages[48], which will now be summarised.

(i) *The preliminary stage*

ICAO's bodies, contracting States or international organisations are entitled to formulate proposals for new SARPs or amendments thereto, without any specific requirement for the presentation of such a proposal[49].

Once the proposal has been presented, the Council has to include it in the triennial planning. This requires that the subject passes a double test: (i) not to be unsolvable (negative test) by other means, and (ii) to be mature (positive test)[50]. The inclusion of the subject in the ANC planning is aimed at convening an AN meeting to develop the proposed SARP. From the initial tentative identification of the meeting to its convening, it takes *circa* 36 months to be completed[51]. It is therefore a very long procedure.

After the identification of the object of the meeting, the ANC shall issue an *Air navigation working paper* (AN-WP) on the need for the meeting and establish a tentative agenda. The States and selected international organisations are given three months to comment on both points. The ANC then issues a new AN-WP to analyse the comments received and to recommend (or not) that the Council should convene a meeting on the topic. The Council then decides.

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48 With a different division of phases, MANIN, L'OACI, 97-124; YEMIN, LEGISLATIVE POWERS, 125-136.

49 ICAO, MAKING AN ICAO STANDARD, p. 4, http://www.icao.int//icao.en/anb/mais/index.html.

50 Sheffy, "The ANC", 302, 435-436.

51 *See* its description in ICAO, GUIDEBOOK, Attachment 1 to Chapter 6.

Shortly after the approval of the organisation plan, the gathering of documentation for the meeting starts. States and selected international organisations are encouraged to prepare documentation on specific agenda items (or others not included in the programme)[52].

(ii) *The development stage*

The task of making recommendations for SARPs belongs to divisional-type air navigation meetings (*air navigation conferences* or *divisional meetings*)[53].

Attendance of the meeting is open to all contracting States and other entities (including international organisations) invited by the Council. However, whereas the former are given the right to vote, the representatives of the latter can only serve as observers (and consequently are deprived of such right).

As for the meeting itself, observers are given the right to attend all sittings; they are provided with all documentation; and they can further introduce motions or amendments to motions in all sessions. There are, nonetheless, three main limitations to this right. On the one hand, the motion at stake must not be a privileged one[54]. On the other hand, a motion or an amendment moved by an observer shall not be discussed until it has received the support of two seconders, who must be representatives of the contracting States. Lastly, no points of order regarding the observance of the rules of procedure can be made.

In its written report, a summary of the discussions must be included, taking account of the minority views, of points of divergence and of the extent of agreement

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52 ICAO, DIRECTIVES, Part I, 4.1, 5.1, 5.2, 6.2 to 6.5; Part III, 6.1; ICAO, GUIDEBOOK, 6.2.9 (d), 6.2.12 (b), 6.2.14 , 6.2.18, 6.2.20, 6.2.21, Attachment 1 to Chapter 6.

53 ICAO, DIRECTIVES, Part I, 1.1, 2.2.

54 These are reserved for representatives of the contracting States and comprise: (i) motions for the adjournment of a sitting; (ii) motions for the deferral of discussion of a subject indefinitely or for some time; (iii) motions for the referral of the matter to a subordinate body of the meeting; and (iv) motions for the closure of consideration of the matter under discussion in favour of taking a decision thereon forthwith. *See* ICAO, DIRECTIVES, Part III, 11.1(c), 11.2, 12(b), 13.1.

reached in the discussion. Based on the report, a new AN-WP – commonly referred to as 'consolidation' – is issued[55].

(iii) *The review stage*

Next, the ANC starts its preliminary review. At this stage, the analysis of the ANC is limited in scope[56].

If the ANC decides to proceed with the proposal, the recommendations are then sent to States and international organisations for comment[57], who have three and a half months to reply. Late replies are still considered[58].

When comments are received, the Secretariat prepares an AN-WP which must incorporate the replies, present the Secretariat's comments to it and its proposals for ANC action. The ANC then establishes the final text of the proposed amendments to SARPS for consideration by the Council. After such review, the Secretariat prepares a report for the Council in a document entitled Council Working Paper (C-WP)[59].

(iv) *The adoption stage*

The Council then decides to adopt the proposed SARPs by means of a Resolution of Adoption. Its approval requires "the vote of two thirds of the Council at a meeting called for that purpose".

After its approval, an interim edition of the amendment – called "green edition" – is dispatched to States soon after the *adoption date*[60].

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55 ICAO, GUIDEBOOK, 2.5.11, 4.2.5, 4.2.10 to 4.2.12, 4.2.37, 6.2.32; ICAO, DIRECTIVES, Part I, 7.1, 8.3; Part II, 6.5.2, 6.5.3.1; Part III, 1, 2.1, 2.2, 9, 10.7, 10.8, 16.3, 17.2, 17.3.

56 ICAO, GUIDEBOOK, 4.2.5, 4.2.10 to 4.2.12 and 4.2.37; ICAO, DIRECTIVES, Part I, 8.3.

57 This compulsory consultation sub-phase knows two narrow exceptions – *see* ICAO, GUIDEBOOK, 4.2.13, 4.2.24.

58 ICAO, GUIDEBOOK, 4.2.5, 4.2.17 to 4.2.19; ICAO, DIRECTIVES, Part I, 8.1, 8.3.1.

59 ICAO, GUIDEBOOK, 4.2.14 to 4.2.16, 4.2.22, 4.2.23; ICAO, DIRECTIVES, Part I, 8.1, 8.3.1.

60 *See* article 30(a) of the Chicago Convention; ICAO, GUIDEBOOK, 4.2.25, 4.2.30, 4.2.32; ICAO, DIRECTIVES, Part I, 8.3.2.

(v) *The entry into force*

If a majority of States do not register their disapproval, the amendment becomes effective on the *effective date*[61], the verification of which the States are informed. The Secretariat then proceeds to the issuance of the "blue edition" (a suitable replacement to the pages of the Annex or of a new edition of the Annex itself). The "blue edition" has to be dispatched to the States shortly after the *effective date*[62].

Before proceeding, the concepts of *effectiveness* and of *applicability* within the SARPs-making procedure ought to be determined. Within this context, *effectiveness* means the status of a duly promulgated act, *i.e.*, one which cannot be validly withdrawn or modified by the Council without a formal amendment process[63]. *Applicability*, on the other hand, refers to the actual entry into force of the Annex or, in other words, to the moment from which contracting states have a legal obligation to implement it[64].

On the *notification date* – determined by the Resolution of Adoption – the States must notify the Secretariat of any differences that will exist between their national regulations and the SARP concerned. The differences might exist due to, *e.g.*, impossibility of bringing its own regulations into full accord with the SARP in due time. The notification of differences does not amount to a rejection of the SARP or of the amendment thereto; for that aim, States can register their disapproval. It is rather a means of information for all members to be aware of the existence and specificities of diverse standards in different States, whence the reported differences are published in supplements to Annexes[65].

After the *effective date*, further four months are generally required for the Annexes to be applicable, *i.e.*, for States to be *prima facie* obliged to implement the amendments unless they have notified differences[66].

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61 *See* article 90(a) of the Chicago Convention; ICAO, DIRECTIVES, Part I, 8.3.2.

62 ICAO, GUIDEBOOK, 4.233 to 4.2.36.

63 YEMIN, LEGISLATIVE POWERS, 131.

64 BUERGENTHAL, LAW-MAKING, 69-76.

65 *See* Chicago Convention, art. 38; ICAO, GUIDEBOOK, 4.3.4, 4.3.8, 4.3.9.

66 ICAO, GUIDEBOOK, 4.2.26 to 4.2.29.

3.3. The role of IATA as a standing observer to ICAO in the making of SARPs: an administrative law account

a) From the above description, it is now beyond doubt that IATA – among other international organisations – has a relevant role in the making of SARPs. It is now time to systematise the administrative law features of this standard-making procedure.

It seems to be possible and useful to identify a framework right (*droit cadre*) of participation of IATA in these procedures within which other functionally instrumental or derivative rights can be devised in inter-relations of *precision*, *ends/means* and *assessment*[67]. The use of this 'umbrella' does not result in loosing apprehensibility. On the contrary: the result is actually greater than the mere sum of the various legal positions, permitting a broader and dynamic understanding of the right in question.

The framework right here at stake would be a *right to participate in the formation of SARPs*, made up of several other more precise rights. The several components from which it can be distilled are enumerated next.

(i) *Right to present proposals of new SARPs or amentdments thereto*

As it has been shown, proposals for new Annexes or amendments thereto can be put forward by international organisations, apparently in the same terms as ICAO's bodies and contracting States can do so[68].

This – by itself – demonstrates the ease of initiating new technical work. The most relevant point of this feature, however, is that it is a plenary power: no restrictions are imposed to the proposals presented, not even of time or of more formal nature (such as being supported by a certain number of contracting States). The subject of the proposal is not either required to have a causal connection with the field of activity of IATA or the

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67 A similar idea has been proposed by Robert Alexy in the field of fundamental rights: the concept of fundamental right *as a whole* (*als Ganze*) – *see* ROBERT ALEXY, THEORIE DER GRUNDRECHTE (English translation) (Oxford 2002), 159-162 (the translator used the term "complete constitutional right", but "constitutional right *as a whole*" seems to be more adequate to translate "*als Ganze*").

68 Within this chapter, references to the applicable procedural rules will be omitted as long as they can be easily obtained in the previous chapter, so as to avoid unnecessary repetitions.

interests of its associates (or its' own) – it can therefore concern the operation of aircraft, but also search and rescue.

(ii) *The comment-and-notice mechanism*

The second right that IATA is entrusted with is the possibility of providing ICAO with feedback regarding several documents at numerous stages of the SARPs-making procedure, with particular incidence in the preliminary stage. Later in the procedure, IATA is also assigned the power to present remarks to the 'consolidation' after the preliminary ANC review. On all these cases, IATA is given a sufficient period of time to submit its observations (at least three months). In addition, the comments received are to be analysed, taken into account and also attached to or in some way incorporated in the final document. All indicates that the observations are taken seriously.

This mechanism thus combines two administrative law features.

On the one hand, from an institutional perspective, it makes IATA a consultative or an advisory body. This enables IATA to have their views and relevant information presented before a decision is taken, thereby ensuring that the critical issues to its perspective are identified and adequately pondered.

On the other, from a functional standpoint, it simultaneously imposes upon ICAO a duty of reason-giving[69] in the analysis of the remarks obtained. This forces ICAO to formally justify policy choices. To the minimum, it compels the deciding bodies to a certain degree of decisional consistency, which might promote responsiveness, at least through reputational influences and incentives (if not by other means)[70]. To the maximum, it might constitute and incentive to observe fairness and due process[71].

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69 Furthermore, it ought not to be forgotten that the 'consolidation' must include the report of the minority views and of points of divergence expressed during the meeting, therefore enhancing transparency.

70 Stewart, "Accountability and the discontents of Globalisation: U.S. and E.U. models for regulatory governance", Paper presented at the N.Y.U. School of Law N.Y.U. School of Law Hauser Colloquium on Globalisation and its Discontents [hereinafter N.Y.U. Globalisation Colloquium], 2006, 22-23.

71 Both these two administrative law traits are key features of a sound rulemaking system according to Daniel C. Esty, "Good governance at the supranational scale: Globalizing administrative law" 115 YALE L.J. 1490 (2006), 1527-1530.

Either way, despite similarities to the domestic procedures, its purpose is more than to contribute to the informed and responsive character of the decisions taken. It foremost corresponds to an effort to gradually build consensus[72]: successive circulation of different documents and imposition of its reasoned analysis stimulates dialogue and contributes to reach compromise solutions.

(iii) *The preparation of documentation for divisional-type AN meetings*

During the preparation of AN meetings, international organisations are asked to prepare documentation on specific agenda items.

Functionally, this faculty is parallel to the previously enounced one: it allows IATA to submit evidence and arguments to ICAO in the view of a forthcoming decision.

Institutionally, nonetheless, there is a difference worth mentioning: if the notice-and-comment device makes IATA a consultant organisation to ICAO, the power of contributing to the preparation of the documentation for AN meetings entrusts it with an assisting or supportive role.

(iv) *Access to all documentation*

IATA is further given the right to accede all documentation otherwise obtained by ICAO. During the meetings, *e.g.*, they are awarded the exact same treatment as that given to the representatives of contracting States in what the availability of papers is concerned.

It seems to be beyond contention that access to information makes ulterior participation meaningful and whence it is instrumental to participatory rights[73].

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72 Similarly to what happens in ISO, as argued by Eran Shamir-Borer, "The evolution of administrative-law type principles, mechanisms and practices in the International Organisation for Standardization (ISO)", Paper presented at the N.Y.U. Globalisation Colloquium, 2006, 32.

73 On the importance of information as a non-decisional responsiveness-promoting measure, *see* Stewart, "Accountability", 19-21.

(v) *The participation of IATA in the AN meetings as an observer*

To begin with, IATA can attend and participate in all AN meetings. Additionally, IATA can submit motions or amendments thereto in all components of the meetings – except for those concerning rules of procedure and motions mainly referring to the dismissal or postponement of agenda items, provided that two contracting States seconders support the motions or amendments it proposes.

Attendance at meetings and actual participation in the discussion – especially when decisions to propose amendments to the Council are made – are of great importance. Even without the right to vote, IATA can largely influence decisions by being able to engage in the debates held among voting members. Moreover, the right to propose motions in the conditions laid down *supra* further enhances IATA's ability to condition the discussions[74].

(vi) *The participation in subsidiary bodies*

Apart from participating in the AN meetings, IATA is also allowed to be a member of ANC Panels and of AN study groups.

In these bodies, IATA is *prima facie* granted a right of decisional participation once all the appointed members of such bodies have voting capacity. Nonetheless, the distinctive feature of its participation in these bodies is that they are committees of independent experts[75], acting in their personal capacity. Consequently, their connection to IATA itself is rather tenuous[76]. This seems to confirm the rule suggested by Richard

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74 Characterising these features as non-decisional participation mechanisms which promote the effectiveness of certain accountability mechanisms and of certain responsiveness-enhancing practices, *see* Stewart, "Accountability", 21-23.

75 Mario Savino, "The role of transnational committees in the European and global orders" 6:3 GLOBAL JURIST article 5 (2006), http://www.bepress.com/gj/advances/vol6/iss3/art5/, 8-9. This characteristic renders these bodies a mixture of transgovernmental and transnational committees, as they are composed by both national civil servants nominated by contracting States and by individuals nominated by other international organisations, be it of private or of public nature. In addition, they have non-plenary composition, just a few contracting States being able to nominate members.

76 The extent to which their consultative preparatory activity can effectively influence the final decision is yet to be measured according to empirical data.

Stewart according to which decisional participation is only granted as a last resort and then only to the minimal content[77].

b) All in all, these features are united in their ultimate end: attributing to IATA the status of a *dialogical participant*[78], *i.e.*, that of an addressee of an act or regulation under development to which elaboration it has the possibility to contribute. At least to this extent, IATA is certainly a subject of global administrative law. It creates a "triangular relationship": international organisations-States-privates[79].

With this in mind, the justification to aggregate all these administrative law elements into one composite right with a main core and connected ancillary obligations becomes clearer: all the elements are part of a whole and condition themselves mutually. As Richard Stewart has put it, "transparency permits more effective participation. Participation allows for presentation of evidence and argument that decision-makers must, under prevailing norms, consider in the reasons they give. The reasons given for decisions can be more effectively evaluated with the benefit of information obtained through transparency and the benchmark provided by the evidence and argument presented by the participants"[80].

As it has been structured, this right has a strong legitimacy-building objective[81] rather than a defence purpose. It encourages the participation of the widest possible range of private actors, in several occasions, and provides for means to ensure that their comments are effectively considered.

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77 Stewart, "Accountability", 25.

78 As opposed to *co-constitutive participation*, in which the will of the private is, to the same extent as that of the Administration, the source of an administrative decision (it is the case, *e.g.*, of contracts celebrated with public bodies). *See* J.M. Sérvulo Correia, "O direito à informação e os direitos de participação dos particulares no procedimento e, em especial, na formação da decisão administrativa" 9/10 LEGISLAÇÃO 133 (1994), 147-152.

79 Cassese, "A global due process of law?", Paper presented at the N.Y.U. Globalisation Colloquium, 2006, 49.

80 Stewart, "Accountability", 23.

81 Cassese, "A global due process?", 55. On the functions of participation, *see* DAVID DUARTE, PROCEDIMENTALIZAÇÃO, PARTICIPAÇÃO E FUNDAMENTAÇÃO (Coimbra 1996), 159-177.

§ 4

Compliance with SARPs

4.1. Compliance by contracting States and compliance by airlines

In the previous chapter, we have concluded that IATA is the holder of a *right to participate in the formation of SARPs*. It is now time to enquire whether such right actually attains the aim it foresees: compliance with the SARPs approved by ICAO through the above described procedure.

Before addressing the issue of observance of SARPs, a previous question is required: whose compliance with SARPs are we referring to?

According to the *classical model of international regulatory regimes*[82], national governments are required to implement internationally approved standards. In the present case, the contracting States are bound to incorporate and enforce the Annexes in the respective domestic jurisdictions.

Nonetheless, it is not clear that ICAO fits such classical model. To begin with, during the SARPs-making procedure, private entities are not only addressed during the implementation phase, but also during its development. Additionally, it includes an element of the *multi-level governance model*: ICAO does supervise the implementation of its standards by national authorities. More: after analysing the regime beyond formal rules, we can conclude that after all its purpose is to achieve the "coordinated regulation of private conduct"[83]. Bearing this in mind, it is possible to evaluate the adherence of airlines to the SARPs which directly concern their operations. The latter would comprise the SARPs included in Annexes 1, 6, and 8 (personnel licensing, operation of aircraft and airworthiness of aircraft, respectively).

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82 For a brief description of one such model and its alternatives, *see* Kingsbury, Krisch & Stewart, "The emergence", 23-25.

83 Kingsbury, Krisch & Stewart, "The emergence", 23.

Then, instead of focusing the analysis solely on the classical perspective, we will focus on the compliance of airlines with SARPs. One *caveat* ought to be made, though: the following study does not mean that private entities such as IATA are legally bound to the SARPs themselves.

4.2. From unilateralism to ICAO's Universal Safety Oversight and Security Audit Programme (USOAP)

Measuring compliance with SARPs is not an easy task because most States did not notify differences. For example, between 1984 and 1994, less than half of the contracting States notified ICAO of any differences. The result was that no-one knew accurately which standards were implemented in which contracting State and which were not[84].

To overcome such issue, ICAO had no enforcement power to sanction non-compliant States. The only tool it could use was technical assistance, mostly through its regional offices[85].

As a reaction to this situation of objective uncertainty, several jurisdictions (especially the U.S.) started themselves to enforce SARPs[86]. Both the good results and the criticisms directed towards unilateralism prompted ICAO to develop of a programme of its own.

Three years after the establishment of the *Safety Oversight Programme* (SOP)[87] in 1994, the ICAO Assembly approved a more comprehensive programme – the USOAP –, based on "regular, mandatory, systematic and harmonized safety audits" of "universal" character

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84 ICAO Assembly, Working Paper A31-WP/56 EX/19 (1995), 2.6 and 2.7.

85 BUERGENTHAL, LAW-MAKING, 107-108, 113.

86 On both unilateralism and the rise and development of ICAO's USOAP, *inter alia*, Dempsey, "Compliance & enforcement", 20-38; Milde, "Aviation safety and security – legal management" 29 ANNALS OF AIR & SPACE L. 1 (2004), 3-7; Id., "Aviation safety oversight: Audits and the law" 26 ANNALS OF AIR & SPACE L. 165 (2001), 170-176.

87 ICAO Assembly, Resolution A29-13 Doc 9600 A29RES, http://www.icao.int/cgi/goto_m.pl?icao/en/assembl/a29/index.html.

with "greater transparency" to compliance with Annexes 1, 6 and 8[88]. In later sessions of the Assembly, the USOAP's scope has further been expanded to Annexes 11, 14 and the core of 13[89]. Until today, practically all 190 contracting States have been subjected to safety audits and hosted follow-up missions. The results of the programme have been good[90]. The main implementation flaws and countries with difficulties have been identified, which allows ICAO to address them with dedicated attention and increased assistance[91]. Additionally, States now have a much clearer picture of which States comply with which SARPs.

However, the USOAP only refers to the implementation by contracting States. It is now time to turn to the airlines directly.

4.3. IATA's Operational Safety Audit (IOSA)

IOSA was launched by IATA in 2003. It is a global safety assessment programme directed at evaluating the operational management and control systems of airlines[92].

All airlines can request an IOSA safety audit. Furthermore, for an airline to become a member of IATA it is now necessary to first undergo one such audit; and all current members must have committed to an IOSA audit by the end 2006, to carry out their audit by 2007 and to complete any corrective action and be registered by end 2008 in order to

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88 ICAO Assembly, Resolution A32-11, para. 1, http://www.icao.int/cgi/goto_m.pl?icao/en/assembl/a32/. For the framework of the USOAP, *see* ICAO Assembly, Working Paper A32-WP/61 EX/23 (1998), Part 4.

89 ICAO Assembly, Resolution A33-8, http://www.icao.int/cgi/goto_m.pl?icao/en/assembl/a33/; ICAO Assembly, Resolution A35-6, http://www.icao.int/icao/en/assembl/a35/a35_res_prov_en.pdf.

90 *See* its implementation reports and related documents: ICAO Assembly, Working Paper A33-WP/47 EX/10 (2001) and Addendum no. 1; ICAO Assembly, Working Paper A33-WP/48 EX/11 (2001); ICAO Assembly, Working Paper A35-WP/67 EX/21 (2004), and its Addendum no. 1.

91 ICAO Assembly, Working Paper A33-WP/49 EX/7 Revised (2001).

92 *See* http://www.iata.org/ps/services/iosa/index.htm. For a brief summary, *see* ICAO Assembly, Working Paper A33-WP/83 EX/33 Revised (2001), presented by IATA. Its most relevant documents are available at http://www.iata.org/ps/services/iosa/index.htm.

maintain their membership. They further have to complete an IOSA audit every two years[93].

IOSA standards are (not only but mostly) derived from all relevant ICAO Standards, in particular Annexes 1, 6, and 8, and industry best practices and organisational structures[94]. One can therefore say that an IOSA registered airline is compliant with Chicago Convention Annexes 1, 6, and 8, which directly cover airline operations and others through safety management systems.

Up to the present moment, 148 operators have been registered, which indicates that the overall result of such programme – *i.e.*, compliance with ICAO SARPs – seems to be promising.

§ 5
Implications for global administrative law

5.1. Rationale

If global administrative law is mainly a feature of the last twenty-five years[95], ICAO's regulatory powers were established in the late 1940s, making it a global administrative law body *avant la lettre*.

Using the typology of international regulatory regimes drafted by Kingsbury, Kirsch and Stewart, the ICAO system can be summarised as follows: an international regulatory body established by a treaty which adopts and oversees the implementation of global regulatory standards, which are adopted by subsidiary administrative bodies rather than by

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93 For a description of IOSA's internal structure and procedure, *see* Lindsey Sabec, "FAA approves IATA's Operational Safety Audit (IOSA) Program" 32 TRANSP. L.J. 1 (2004-2005), 16-19.

94 IATA, IOSA STANDARDS MANUAL (2nd ed.) (Montréal/Geneva 2007), I, http://www.iata.org/ps/services/iosa/index.htm.

95 Stewart, "The global regulatory challenge to U.S. administrative law" 37 N.Y.U. J. INT'L L. & POL. 695 (2005)", 695.

agreement among contracting States[96]. Some of its elements are typical of complex regimes: the existence of subsidiary norms which regulate the conduct of member States; the approval of the latter by an administrative body; and its implementation by contracting States with the objective of regulating private sector actors. It gets more complex because other international organisations also have competences in this area[97].

ICAO itself claims that its SARPs-making procedures correspond to four cardinal "*Cs*": *cooperation* in formulation, *consensus* in their approval, *compliance* in their application and *commitment* of adherence to this on-going progress[98]. To which extent is this true? What can other global bodies learn from the example of ICAO?

Thomas Buergenthal has argued, almost four decades ago, that the more flexible SARPs have encouraged States to participate in ICAO and have proven to be a more effective approach to the regulation of aviation[99].

What about the airlines? It will be submitted that the efficacy of ICAO's regulatory scheme in what airlines are concerned is explained not by its legal binding character, but by five different factors.

5.2. Technical nature

ICAO's extensive rule-making powers are mostly of technical nature rather than of political nature[100], *i.e.*, it does not deal with questions around which political disagreement exists[101]. Additionaly, ICAO has been able to employ or have the contracting States recruit technical experts whose credibility is acknowledged. Perhaps even more significantly,

96 Kingsbury, Krisch & Stewart, "The emergence", 21; Stewart, "The global regulatory challenge", 700. The description corresponds to what these Authors call type (i).

97 Stewart, "U.S. administrative law", 98-100.

98 ICAO, MAKING AN ICAO STANDARD, p. 3.

99 BUERGENTHAL, LAW-MAKING, 120.

100 BUERGENTHAL, LAW-MAKING, 57-58.

101 This is only valid for SARPs, though, as the ICAO Council has engaged in matters of high politics while in its adjudicatory capacity – JOSÉ E. ALVAREZ, INTERNATIONAL ORGANISATIONS AS LAW-MAKERS (Oxford 2005), 253.

ICAO favours the perception that its activity is mere technocratic regulation, which might encourage compliance[102].

Still, this feature *a se* does not seems to be sufficient to explain the efficacy of the ICAO system, once one of the features of global administrative law that distinguishes it from national administrative law seems to be that more decisions are made by technical experts committees[103].

5.3. Safety concerns

The second relevant factor is the fact that most of the SARPs to which airlines' compliance is required are safety-related. Indeed, it is the case of Annexes 1, 6, and 8, which regulate personnel licensing, operation of aircraft and airworthiness of aircraft.

Safety[104] is a paramount value for ICAO[105]. In a field like civil aviation, one such objective can only be achieved through a considerable degree of uniformity in the application of the relevant international norms: SARPs. In case of non-observance of SARPs by an airline, the first to suffer negative consequences might be the airline itself. In light of this, airlines have very few incentives to disrespect approved ICAO standards. In reality, the disregard of ICAO standards is even unconceivable under certain circumstances, both from the perspectives of airlines and of national governments. Lack of compliance in regard to communications or navigational aids could compel foreign operators to avoid the airspace and airports of a particular country for safety reasons. Similarly, non-standard airports would not be used by the operators for fear of losing their insurance coverage.

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102 Alvarez, "Do liberal States behave better? A critique of Slaughter's liberal theory" 12 EUR. J. INT'L L. 183 (2001), 226 and 227, n. 207. The expertise claim, however, is not absent of negative points: *see* Francesca Bignami, "Three generations of participation rights before the European Commission" 68 L. & CONTEMP. PROBS. 61 (2004), 76-77.

103 Cassese, "Administrative law without the State", 669.

104 *Safety* is opposed to *security* for these purposes: whereas the former focuses on preventing accidental harm, the latter refers to the prevention of intentional harm. Still, both seek to avoid injury to people and damage to property – *see* Dempsey, "Compliance & enforcement", 4.

105 According to the Chicago Convention, art. 44(a), (d) and (h), and its Preamble.

As Michael Milde suggestively puts it, in practical reality the ICAO standards are "as strong as the law of gravity, as compliance is unavoidable in practice"[106]. And this is in great part due to their object: ensure safety.

5.4. Participation

As it has been shown, IATA enjoys a *right to participate in the formation of SARPs*. From an institutional point of view, this is a right conferred to a private actor before a global institution[107].

If it is true that participation can result in capture by special interests[108], it is not less true that it induces compliance. Extensive participation in several forms, within pluralistic organs, avoiding confrontations and seeking consensus will contribute to the acceptance of the outcomes, especially by those affected by decisions, when they feel the procedures were fair, due process was provided[109] and their points of view were exposed and pondered.

Whether or not this right amounts to a right to due process does not seem to be the most relevant question to be asked by now[110]. The truth is that at least without judicial review, participation will hardly ever be the equivalent of domestic due process[111]. Even so, the case of ICAO no less than confirms that co-operation is one of the keywords of global administrative law[112].

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106 The examples from the previous paragraph were drawn from Milde, "Aviation safety and security", 3; Id., "Aviation safety oversight", 169.

107 It corresponds to category (v) of the taxanomy put forward by Cassese, "A global due process?", 8-9, and developed 42-46.

108 Krisch & Kingsbury, "Introduction: Global governance and global administrative law in the international legal order" 17:1 EUR. J. INT'L L. 183 (2006) 4; Esty, "Good governance", 1531.

109 Esty, "Good governance", 1530-1534.

110 Sceptical about the expansiveness of due process as a right in the global arena, *see* Carol Harlow, "Global administrative law: The quest for principles and values" 17 EUR. J. INT'L L. 187 (2006), 204-207. Affirming it is still in a "nascent state of development", *see* Stewart, "Accountability", 24.

111 Cassese, "A global due process?", 55.

112 Stewart, "The global regulatory challenge", 703.

5.5. Proceduralisation

Albeit disperse, the ICAO regime is populated with decisional rules – to be exact, rules which define who makes decisions and how[113].

The considerable degree of legalisation and institutionalisation attained by ICAO based on formal legal acts approved through established rules and processes and by clearly identified decision-makers is a feature of systematic and sound rulemaking organisations[114].

It has a double effect. At the outset, it enhances procedural legitimacy by promoting predictability, consistency and responsive regulation[115]. Moreover, it reduces the likelihood of opposition to SARPs by a significant number of participants (be it contracting States or private organisations such as IATA)[116], thus promoting consensus.

5.6. Oversight mechanisms

If all the above enumerated factors are essential to give an account of the reasons for compliance with SARPs by private actors, they are not enough. Otherwise, the lack of SARPs observance before the implementation of USOAP and IOSA would not be explained. Such programmes – especially when of universal, mandatory and transparent character – undeniably constitute decisive incentives for airlines to adhere to SARPs.

This reason *a se*, however, cannot be deemed to be the sole or even the primary factor to explain respect for SARPs. Let us explain why. If the rules imposed were not of technical nature, but were rather subject to political discussion, and if ICAO's credibility were not beyond doubt, its acceptance would be a lot more problematic. If safety was not their object, one of the core incentives for airlines not to infringe SARPs would disappear. If IATA were not given any participatory rights and were simply excluded from the

113 Stewart, "Accountability", 8.

114 Esty, "Good governance", 1527-1530.

115 Stewart, "The global regulatory challenge", 718-719; Esty, "Good governance", 1521-1523.

116 BUERGENTHAL, LAW-MAKING, 63.

decision-making procedures, nothing would ensure that its interests and concerns were taken into account and that airlines would recognise both of them in the SARPs. If the decisional rules were not clear that might undermine the whole reliability of the system globally considered.

It therefore seems to be the conjunction of all these factors that explains the level of compliance with SARPs by airlines.

§ 6
Conclusion

Some Authors have considered that the elaboration of SARPs is "the most spectacular achievement of ICAO"[117]. The thorough analysis of its enacting procedures and of the role of private actors therein has shown that it is at least a complex albeit overall effective regime. Whether it might be a model for other international regulatory schemes is a different question, as the five determining factors for compliance that we have identified do not seem to be easy to combine.

[117] Milde, "Chicago Convention at sixty", 461.