

THE RISE OF GLOBAL STANDARDS.
ICAO'S STANDARDS AND RECOMMENDED PRACTICES

*Francesco Giovanni Albisinni**

Abstract

This article aims, using the examination of the regulation of aviation safety by the International Civil Aviation Organization (ICAO) as a case analysis, to demonstrate how the relationship between bureaucratic power and political authority, a recognized problem in public law studies, has shifted into a new context.

Global regulatory regimes express a great variety of standards. This involves critical issues, regarding both sovereignty and legitimacy. Sovereignty, because the increasing number of 'rule-makers' implies a redefinition of the role of States, and legitimacy, because global regulatory regimes do not follow traditional paths of legitimacy as defined within the model of national public powers.

Standards adopted by ICAO have a high degree of effectiveness, considering they are not formally binding. This effectiveness is due to the role assigned to standards in the ICAO Convention, and to the various tools used for ensuring compliance, which are primarily procedural. The adoption of a Universal Security Audit Programme for member States ensures control over the implementation of standards. Consequently, the development of this regulatory system is not merely adopted and 'proposed' to member States, but strongly fostered far beyond the initial understanding. But there is also another crucial factor to be considered. Technicality promotes uniformity, at least on a formal level. The need for a 'common framework' of technical rules, as safety standards are, is better met through a global regulatory regime, expression of bureaucratic power, rather than through a political authority. The balance between these two elements, however, is not clearly defined, and finds at the global level a new dimension of comparison.

* PhD in Administrative Law, University of Roma Tre.

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1. Introduction**1.1. Global standards as a relevant area of critical issues on sovereignty and legitimacy**

Global regulatory regimes express a great variety of standards¹.

As has been observed, “standards are exemplary measures against which people and things are judged. They can be informal, resembling norms and habits; they can also be formal, resembling laws or written codes of conduct or embedded in material objects. Both formal and informal standards are involved in nearly every aspect of human life”, but “formal standards [...] are those that are primarily invoked in global governance”².

In fact the ‘production’ of formal standards is one of the major features of global regulatory regimes³, though not always

¹ See B. Kingsbury, N. Krisch, R.B. Stewart, *The emergence of Global Administrative Law*, 68 *Law Contemp. Probs*, 15-61 (2005).

² A. Loconto, J.V. Stone, L. Busch, *Tripartite Standards Regime*, in George Ritzer (eds.), *The Wiley-Blackwell Encyclopedia of Globalization* (2012), 1.

³ See S. Cassese, *Il diritto Globale. Giustizia e democrazia oltre lo Stato* (2009); Id., *The global polity: global dimensions of democracy and the rule of law* (2012); M.

considered crucial, especially if the analysis is limited to the 'institutional charters' (of global regimes). However, as has been noted, "institutional charters do not reveal how organs in ICAO, IMO, WMO, FAO, and the WHO, for example, have responded to changes in the world just as the Security Council has responded to perceived changes in security threats"⁴. Powers and functions outlined in 'institutional charters' do not always reveal to what extent different tools used by the 'administrative' bodies follow the aims of global regulatory regimes.

This implies the emergence of various forms of soft law that are not easily placed within traditional sources of international law⁵.

Issues regarding the relationship between States and global regulatory regimes, and resulting implications regarding sovereignty and legitimacy, can be better understood by looking at the '*normative product*' resulting from the activity of global regulatory regimes.

There are in fact relevant implications for sovereignty and legitimacy.

The phenomenon of supranational sources of law (difficult to entirely understand through classic tools of international law) concerns "the central problem of sovereignty: what are powers reserved to government; who exercises which of them, and how should they be exercised?"⁶. Assigning the role of rule-makers to bodies outside national States produces institutional and regulatory outcomes which, even if can hardly be qualified as a clear "transfer of sovereignty", causes indeed wide allocation of regulatory and decisory power, due to the creation of a new institution, as the pattern in the European Union can confirm⁷. It

Bussani, *Il diritto dell'Occidente. Geopolitica delle regole globali* (2010). Specifically on the exercise of legislative functions by International Organizations, see J.E. Alvarez, *International Organizations as Law-makers* (2006) and D. Sarooshi, *International Organizations and their exercise of sovereign powers* (2005).

⁴ J.E. Alvarez, *International Organizations* cit. at 3, 218.

⁵ *Ibidem*, 257.

⁶ D. Sarooshi, *International Organizations* cit. at 3, 7.

⁷ As the Court of Justice of the European Communities highlighted since 1963 in the well known decision *Van Gend & Loos*, 5 February 1963, Case 26/62, "van Gend & Loos v. Netherlands", observing that "this Treaty [the ECC Treaty] is more than an agreement which merely creates mutual obligations between the contracting states. This view is [...] confirmed more specifically by the

also appears that States are not always entirely free to decide whether to adhere or not to a global regulatory regime. Even if it is theoretically possible to withdraw, it is very unrealistic: participation is the most effective way to influence rules that also affect, directly or indirectly, non-member Countries⁸. The idea that States are bound, on supranational level, only by *consensus*, has been contested by Hart, where he states that “[t]here is no way of knowing what sovereignty states have, till we know what the forms of international law are and whether or not they are mere empty forms”⁹. According to Hart, sovereignty of States is strictly connected to supra-national law. With this in mind, the examination of ICAO regulatory regime enables to verify to what extent sovereignty of States is limited¹⁰. The idea of legislative power controlled exclusively by States¹¹ does not reflect the complexity of contemporary international relations. Rules ‘produced’ elsewhere may have a profound effect on a State’s domestic legal systems¹²: “most citizens greatly underestimate the extent to which most nations shipping laws are written at the IMO in London, air safety laws at the ICAO in Montreal, food standards at the FAO in Rome, intellectual property laws in Geneva at the WTO/WIPO, banking laws by the G-10 in Basle, chemical regulations by the OECD in Paris, nuclear safety standards by IAEA in Vienna, telecommunication laws by the ITU in Geneva and motor vehicle standards by the ECE in Geneva”¹³.

There are implications regarding *legitimacy*, because we have to face the experience of rules coming from sources having a legitimacy different than State or State legislation¹⁴, but which are

establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens” [italics added].

⁸ G. della Cananea, *Al di là dei confini statuali. Principi generali del diritto pubblico globale* (2009), 201.

⁹ H.L.A. Hart, *The concept of law* (1994, 2nd), 224.

¹⁰ See D. Sarooshi, *International Organizations* cit. at 3.

¹¹ An idea which has indeed, authoritative advocates: see *Bundesverfassungsgericht*, 2 BvE 2/08 vom 30 juni 2009, in which States are considered “Masters of Treaties”, and therefore are always free to decide whether to adhere or not to supra-national regimes.

¹² M. Bussani, *Il diritto dell’Occidente* cit. at 3, 88.

¹³ K. Braithwaite, P. Drahos, *Global Business Regulations* (2000), 488.

¹⁴ L. Torchia, *Diritto amministrativo, potere pubblico e società nel terzo millennio o della legittimazione inversa*, in S. Battini, G. D’Auria, G. della Cananea, C.

effective¹⁵ and able to introduce “measures against which people and things are judged”. The idea that global regulatory regimes require the same democratic standards that are now applied to States is controversial¹⁶: those forms of legitimacy, which do not follow traditional paths of direct democracy, are situated by their nature at the crossroads between bureaucratic, technical power and political authority.

1.2. The aviation safety SARPs by ICAO, as paradigm of the relationship between technical power and political authority

The International Civil Aviation Organization (hereinafter ICAO) is the global ruler of “aviation safety”, which may be considered a merely technical subject, but really has a key role in developing the regulation of air transportation. Issues concerning aviation safety have global relevance. Typically, the consequences of a journey by aircraft (particularly if “safety” is not properly considered) could have an effect at supra-national level; so that the same technical features of the activity and its cross-border nature encourages the adoption of a global regulation in this field.

Aviation safety does not only involve issues related to the prevention of accidents, but has a broader meaning, connected to all risk management activities concerning air transportation and travelling.

It has been defined by the ICAO Air Navigation Commission¹⁷ as the “state of freedom from unacceptable risk of injury to persons or damage to aircraft and property”¹⁸ and also as “a condition in which the risk of harm and damage is limited to an acceptable level”¹⁹.

Franchini, A. Massera, B.G. Mattarella, G. Napolitano, A. Sandulli, L. Torchia, G. Vesperini (eds.), *Il diritto amministrativo oltre i confini* (2008), 61.

¹⁵ See O. Dilling, M. Herberg, G. Winter, *Exploring Transnational Administrative Rule-making*, in O. Dilling, M. Herberg, G. Winter (eds.), *Transnational administrative rule-making. Performance, legal effects and legitimacy* (2011), 4-7.

¹⁶ See A. Buchanan, R.O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *Ethics Int'l Aff.*, 405-437 (2006).

¹⁷ It is a Commission established by the ICAO Council, see *infra*, par. 2.

¹⁸ ICAO Working Paper AN-WP/7699, *Determination of a Definition of Aviation Safety*, 11 December 2001, paragraph 2.2.

¹⁹ ICAO, Doc 9735, *Safety Oversight Manual*.

These definitions that refer to *unacceptable or acceptable* level of risk indicate a dynamic concept, constantly changing, involving not only technical assessments, but also legal, financial, and management issues.

It is therefore a task that involves a high degree of expertise, which may not be easily accomplished by a single State, especially developing Countries.

Some scholars have disputed the idea that a single State is not able to manage aviation safety by itself, arguing, with specific reference to the U.S. system, that “the Congress of the United States has the greatest influence on the level of safety, or acceptable risk under which we operate. Congress, of course, writes the law that govern the operation and development of the National system. Congress also controls the budget of the Department of Transportation and in turn, the Federal Aviation Administration”²⁰.

From this point of view the national dimension is not excluded at all, and maintains central relevance, since these issues are solved through the adoption of rules of law, where the only constraints for States come from signed international treaties.

This approach does not appear entirely satisfactory. Aviation is in fact an activity which by its very nature cannot be confined within national borders, due to the fact that risks associated to air transportation and travelling are likely to spread globally. So a single State, even if exercising sovereignty on its own territory, is unable to independently manage the “*safety*” of international civil aviation without the cooperation of other States. As has been rightly pointed out, “global risks require global management and call for concerted international action”²¹. This *concerted international action* produced, as a result (significant though not fully satisfactory), the signing of a treaty, namely the Convention on International Civil Aviation (hereinafter the Convention).

This Convention has established a defined global regulatory system, creating an “*international administration*”²²,

²⁰ F.M. Isaac, *Is It Safe Up There?*, 28 *Transp. L. J.* 185 (1998).

²¹ J. Huang, *Aviation Safety through the Rule of Law. ICAO's Mechanisms and Practices* (2009), 8.

²² According to the taxonomy proposed by B. Kingsbury, N. Krisch, R.B. Stewart, *The emergence of Global Administrative Law* cit. at 1, 21.

invested with relevant regulatory power. A first key issue concerns the delegation of powers to the organization, and the actual exercise of functions among the bodies that constitute it (see par. 2). The analysis shows that plenary, representative bodies (as the Assembly in the ICAO case) may not be considered the organizational core of global regulatory regimes: the true regulatory power is entrusted mainly to a body with 'administrative' features (the Council), with the fundamental contribution of smaller entities (Air Navigation Commission and Panels), raising problems regarding the participation in the formations of standards. The adoption procedure of standards is therefore carefully examined (see par. 3.2), highlighting how the recourse to proceduralisation allows to overcome the gap between democratic legitimacy and effectiveness.

The exam of organizational and institutional dimensions is essential to understand the influence of global regulatory regimes on national legal orders. But the most significant issue involves the analysis on the 'normative product' of the global regulatory regime, ICAO Standards and Recommended Practices (SARPs, see par. 3.1). It is possible to demonstrate that, although they are not explicitly part of the Convention, they give effective content to its provisions, due the express mention within some articles of the Convention, and therefore gain, in some cases, binding value. SARPs impose, in addition, procedural and substantial limits on States, regarding the possibility of non compliance (see par. 4.1). This leads to the idea of duty of cooperation in establishing an international order, that does not halt to the original transfer of powers, but has further consequences, and involves actors not entrusted, at national level, with legislative functions. The implementation of SARPs by States confirms this hypothesis: usually national legislations refers to ICAO standards with a procedural mechanism which assigns binding value to them, through the mediation of administrative bodies, excluding political evaluation. Implementation is fostered also through procedural tools (see par. 4.2): the Universal Safety Oversight Audit Programme, although does not *per se* increase the binding strength of SARPs, eases their implementation, evidencing critical points in each State experience.

The analysis shows, finally, how the global dimensions of interests protected (as aviation safety) promotes the institution of

a global regulatory regime, with relevant consequences in terms of transformation of the role of States, that shifts significantly from the law-making process to the implementation phase.

2. The institutional framework of ICAO

ICAO is a specialized agency of the United Nations, which was established by the Convention²³.

In 1944 the original signatory States were 52, but to date 191 States have signed the Convention²⁴. Membership to ICAO is directly linked with adherence to the Convention. Adherence of the original signatories was declared by the ratification addressed to the Government of the United States, the depository of the Convention²⁵. Today, member States of the United Nations, may become members of the ICAO by adhering to the Convention²⁶.

The aims of the ICAO are the administration and development of the principles set out in the Convention²⁷. As noted by a scholar, the way this task is organized “emphasizes the predominantly technical nature of the mandate of the Organization”²⁸.

The promotion of *aviation safety* has always been a central element of the activity of ICAO²⁹ and has been achieved mostly through development and continuous updating of a comprehensive set of *Standards And Recommended Practices* (SARPs), set out in the Annexes of the Convention³⁰. These Annexes have been supplemented by a comprehensive audit

²³ Art. 43 of the Convention on International Civil Aviation.

²⁴ As indicated at the date of October 31, 2013 by the ICAO website, <http://www.icao.int/MemberStates/Member%20States.English.pdf> visited on April 20, 2015.

²⁵ Art. 91 (a) of the Convention on International Civil Aviation.

²⁶ Art. 92 (a) of the Convention on International Civil Aviation.

²⁷ According to art. 44 of the Convention on International Civil Aviation, “[t]he aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport [...]”.

²⁸ L. Weber, *International Civil Aviation Organization* (2011), 17.

²⁹ ICAO Assembly Resolution A37-5 reaffirm that “the primary objective of the Organization continues to be that of ensuring the safety of international civil aviation worldwide”.

³⁰ See *infra*, par. 3.

system to monitor the implementation of technical safety standards by ICAO member States (Universal Safety Oversight Audit Programme)³¹.

The Organization is composed of three main bodies (the Assembly, the Council, the Secretariat) and several Committees.

The Assembly is the main policy-making body of ICAO. Each contracting State has a seat in the Assembly and one vote, on an equal basis³². Decisions are taken by majority of the votes cast³³. In most cases, however, decisions are taken by *consensus*. The Assembly meets in ordinary session once every three years. Therefore, although the Assembly has the power to “delegate to the Council the powers and authority necessary or desirable for the discharge of the duties of the Organization and revoke or modify the delegations of authority at any time”³⁴, it is unlikely that it will use these powers to adopt detailed decisions capable to strictly define limits for the Council operations.

The Assembly highlights the main principles and objectives that ICAO must pursue, but it is the Council that makes administrative and regulatory decisions, with those objectives in mind. The Council is the real executive governing body of the organization, a “permanent body responsible to the Assembly”³⁵. It is composed of thirty-six states, elected by the Assembly³⁶. It is important to note that in electing the members of the Council, the Assembly shall give adequate representation to different criteria³⁷:

- 11 States are chosen among those of chief importance in air transport;
- 12 States are chosen among those which make the greatest contribution to the provision of international air navigation facilities;

³¹ See *infra*, par. 4.2.

³² Art. 48 (b) of the Convention on International Civil Aviation.

³³ There are also quorum requirement to be fulfilled for the meetings of the ICAO Assembly.

³⁴ Art. 49 (h) of the Convention on International Civil Aviation.

³⁵ Art. 50 (a) of the Convention on International Civil Aviation.

³⁶ Art. 50 (b) of the Convention on International Civil Aviation. The number of the member of the Council has raised over the years: the original text of the Convention provided for just twenty-one members of the Council.

³⁷ Art. 50 (b) of the Convention on International Civil Aviation.

- 13 States are chosen among those whose designation will ensure that all the major geographic areas of the world are represented on the Council.

This mechanism is aimed at guaranteeing adequate representation of different interests within the Council, which is the organizational core of ICAO, where most relevant decisions are adopted³⁸.

In other words: legitimacy is sought through representation of interests.

The Council has several different tasks, but, as noted earlier, the most relevant is to make regulations. The Council is entrusted with the adoption of international Standards and Recommended Practices³⁹. Decisions of the Council usually require approval by a majority of the members⁴⁰, but in the case of adoption or amendments of SARPs, a majority of two-thirds is required: this means that the approval of 25 members of the Council is necessary⁴¹. The Council is assigned another major role relevant to the subject in question: it administrates and supervises the *audit system* which verify how States implement ICAO Standards⁴². It is important to underline that a specific audit system is not expressly mentioned in the Convention, but has been “created”, on the legal basis of the substantive provision of art. 54 (j) of the Convention⁴³.

The Secretariat is the ICAO bureaucratic structure. The Secretary General is the chief executive officer of ICAO, and is appointed by the Council⁴⁴.

The Air Navigation Commission (ANC), established by the Council under art. 54 (e) of the Convention, is the main technical body of the ICAO. Its main task is to “consider, and recommend to the Council for adoption, modifications of the Annexes to this Convention”⁴⁵. So its role in the adoption of SARPs is clearly

³⁸ See *infra*, par. 3.2.

³⁹ Art. 54 (l) of the Convention on International Civil Aviation.

⁴⁰ Art. 52 of the Convention on International Civil Aviation.

⁴¹ Articles 54 (l) and 90 of the Convention on International Civil Aviation.

⁴² See *infra*, par. 4.2.

⁴³ Which gives to the Council the task to “[r]eport to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council”.

⁴⁴ Art. 54 (h) of the Convention on International Civil Aviation.

⁴⁵ Art. 57 (a) of the Convention on International Civil Aviation.

crucial, and consequently it's important to highlight the method of appointment of ANC members. Scholars have observed that "[t]hese [powerful democratic] States have long played a disproportionately large role in selecting key personnel to steer international organizations"⁴⁶. The ANC is composed of nineteen members⁴⁷, appointed by the Council in their personal capacity as experts⁴⁸ (not as representatives). Members are chosen from candidates nominated by Contracting States, and the term lasts three years⁴⁹. This short term, the required majority of Members of the Council to appoint the Members and President of the ANC, and the voting by secret ballot⁵⁰ are countermeasures designed to overcome problems regarding the dominant influence of developed countries.

Panels may also be set up by the ANC or the Council, creating small groups of experts, with a relevant role in the adoption of SARPs⁵¹. These *ad hoc* temporary bodies of qualified experts contribute significantly to the tasks carried out by ANC⁵². They are directly appointed by the ANC and act in small groups⁵³, improving efficiency at the expense of a wider participation in the deliberative process.

The appointment and promotion of ICAO Officers is regulated by the ICAO Service Code, which largely reflects principles laid down in the United Nations Staff Regulations and Staff Rules. They ensure the highest standards of efficiency, competence and integrity, and take into account the importance of recruiting staff on as wide a geographical basis as possible⁵⁴. Staff

⁴⁶ E. Benvenisti, *The Law of Global Governance* (2014), 19.

⁴⁷ Since 2005. The number of member of the ANC was originally fifteen.

⁴⁸ Art. 56 of the Convention on International Civil Aviation requires that «these persons shall have suitable qualifications and experience in the science and practice of aeronautics».

⁴⁹ ICAO, Rules of Procedure for the Council, Doc 7559/8, art. 16.

⁵⁰ ICAO, Rules of Procedure for the Council, Doc 7559/8, Appendix D.

⁵¹ See *infra*, par. 3.2.

⁵² Art. 1 of ICAO, Directives for Panel of the Air Navigation Commission, Doc 7984/5, states that "[t]he purpose of a panel of the ANC is to advance, within specified time frames, the solution of specialized problems or the development of standards for the planned evolution of air navigation which cannot be advanced within the ANC or established resources of the Secretariat".

⁵³ 15 to 20 members, according to art. 2.3 of ICAO, Directives for Panel of the Air Navigation Commission, Doc 7984/5.

⁵⁴ ICAO Service Code, art. 4.1.

of the organization are appointed by the Secretary General, but the Council has established a Commission for the Processing of Applications for the Director Level, that operates in accordance with consolidated procedures for the appointment of Directors set out in the ICAO Service Code.

3. Standards And Recommended Practices

3.1. Standards and Recommended Practices adopted by ICAO

The 96 articles of the Convention lay down the principles of international civil air navigation, but they certainly cannot deal with all the provisions relating to air traffic.

Moreover, the more detailed the provisions, the quicker they are subject to technological obsolescence. For this reason art. 54 (1) of the Convention, gives the Council the power to “[a]dopt ... international standards and recommended practices; for convenience designate them as Annexes to this Convention”. Therefore “Annexes” are mentioned in the Convention, but are adopted by the Council in a separate and subsequent manner⁵⁵, and concern, at least at first glance, technical provisions.

There is also another reason that justifies the Annexes. It is the need for uniformity. When it comes to technical rules, it becomes a need shared by all States. For this purpose, the Convention provides a specific obligation for each contracting State to “undertake[s] the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation”⁵⁶. *Uniformity* is therefore intended as a value, something that can ensure a higher degree of *safety*⁵⁷. To ensure uniformity, and therefore safety, is assigned to the ICAO the task

⁵⁵ See *infra*, par. 3.2.

⁵⁶ Art. 37 of the Convention on International Civil Aviation.

⁵⁷ It should be observed, however, that for decades – since the institution of the ICAO – many States did not implement SARPs, and also failed in the duty to notify differences from SARPs in national legal systems. See M. Milde, *International Air Law and ICAO* (2012), 178. It is only since 1995, with the establishment of the ICAO safety oversight program by the Council (see *infra*, par. 4.2), that the perception of the need of uniformity has become sharper.

of issuing Standards and Recommended Practices in all matters that concern, even indirectly, *aviation safety*⁵⁸.

Standards and Recommended Practices are both considered *Annexes*.

A Standard is defined by ICAO as “any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention”⁵⁹.

A Recommended Practice is defined by ICAO as “any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation and to which Contracting States will endeavour to conform in accordance with the Convention”⁶⁰.

It should be underlined that, although the Annexes are not formally inserted within the text of the Convention, the reference made to them in the same text assigns to the Annexes an effectiveness comparable to that of the provisions of the Convention itself.

The provisions of the Convention mention standards, especially in matters of safety, where contracting States must meet certain requirements. Some examples may be mentioned regarding specific provisions of the Convention.

Art. 28, with reference to air navigation system, states that each contracting State must:

⁵⁸ Standards and Recommended Practices can deal with: “(a) Communications systems and air navigation aids, including ground marking; (b) Characteristics of airports and landing areas; (c) Rules of the air and air traffic control practices; (d) Licensing of operating and mechanical personnel; (e) Airworthiness of aircraft; (f) Registration and identification of aircraft; (g) Collection and exchange of meteorological information; (h) Log books; (i) Aeronautical maps and charts; (j) Customs and immigration procedures; (k) Aircraft in distress and investigation of accidents; and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate”, art. 37 of the Convention on International Civil Aviation.

⁵⁹ Assembly Resolution A36-13, Appendix A. ICAO Doc 9902.

⁶⁰ Assembly Resolution A36-13, Appendix A. ICAO Doc 9902.

- provide in its territory airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, “in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention”⁶¹;

- adopt and put into operation the appropriate standard systems of communications procedures, codes, markings, signals, lighting and other operational practices and rules, “which may be recommended or established from time to time, pursuant to this Convention”⁶²;

- collaborate on international measures to secure the publication of aeronautical maps and charts, “in accordance with standards which may be recommended or established from time to time, pursuant to this Convention”⁶³.

Art. 33 sets up a system of mutual recognition of certificates and licenses, based on the standards “which may be established from time to time pursuant to this Convention”. This provision expressly moves from the assumption that standards have a dynamic content, not to be considered definitive, but open to change – to be *established from time to time*. States agree in advance to each other’s level of compliance of ICAO’s safety provisions, even those not yet established in the Convention, but to be introduced in the future by the Council, as the body designated for the adoption and amendment of standards.

Art. 39 (a) states that an aircraft that does not meet the requirements of international standards of airworthiness must declare on its airworthiness certificate any details of divergence from standards. The same rule, according to art. 39 (b) of the Convention, applies to a person holding a license that does not fully satisfy the conditions laid down in international standards for that license. A certificate or license so endorsed prohibits international air navigation, unless approved by the State whose territory is entered⁶⁴. If someone uses a certificate which does not respect international requirements as defined in Standards, a State may ban them from flying in its territory.

⁶¹ Art. 28 (a) of the Convention on International Civil Aviation.

⁶² Art. 28 (b) of the Convention on International Civil Aviation.

⁶³ Art. 28 (c) of the Convention on International Civil Aviation.

⁶⁴ Art. 40 of the Convention on International Civil Aviation.

In all these cases, the text of the Convention expressly refers to Standards and Recommended Practices and establishes relevant legal consequences in case of non compliance (e.g. prohibiting flight in the territory of a member State). The above mentioned examples appear relevant, as long as they expressly mention standards in the text of the Convention. At the same time standards can add specific content to the general provisions of Convention. In those cases, Standards and Recommended Practices are not merely secondary rules, established by the Convention and not necessarily binding for member States which may decide whether to implement them or not; they instead assign effective content to the provisions of the Convention.

ICAO has developed, over the past seventy years, 19 Annexes. Most of them contain both Standards and Recommended Practices. Almost every Annex has been amended.

The content of SARPs is peculiarly relevant with reference to *safety*. Annexes related to safety include:

- Annex 1, regarding *Personnel Licensing*, which sets standards on skill, competence and training of pilots, air and ground personnel, and other requirements to meet in order to be authorized in exercising defined activities;
- Annex 2, regarding *Rules of the Air*, which sets standards on air travel and conditions in which visual flight or instrument flight is allowed;
- Annex 6, regarding *Operation of Aircraft*, which standardizes operational rules on aircraft;
- Annex 8, regarding *Airworthiness of Aircraft*, which sets standards on the airworthiness requirements. Certificates of Airworthiness are issued by contracting States, based on their national regulation (often heavily influenced by SARPs), but respecting SARP requirements ensures recognition of the Certificate in other member States;
- Annex 11, regarding *Air Traffic Services*, which sets standards on air traffic control, flight information and alerting services;
- Annex 13, regarding *Aircraft Accident and Incident Investigation*, which provides international requirements for the investigation of aircraft accidents and incidents;

- Annex 14, regarding *Aerodromes*, which sets standards on the planning of airports, from physical characteristics to airspace requirements;
- Annex 19, regarding *Safety Management*, which is mostly based on existing provisions, consists of the provision of a Safety Management System to re-enforce the role of States in managing safety at national level.

The institutional and regulatory model of ICAO, therefore, relies on Annexes to develop a systematic and integrated framework of rules, able to assign effective content to the provisions of the Convention.

Licenses of Personnel and *Airworthiness* offer clear examples in this direction. Both “are issued or rendered valid by the State in which the aircraft is registered”⁶⁵. So it would appear that the competence to issue certificates and licenses is entirely entrusted to States. In fact States are assigned the role of execution bodies to implement the rules already established and adopted at an inter-institutional level, rather than national.

Indeed, art. 33 of the Convention provides:

“Certificates and licenses issued or rendered valid by the contracting State ... 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 established from time to time pursuant to this Convention”.

As already noted, minimum standards are established by Annexes, adopted by the Council and not directly and expressly accepted by the contracting States in advance. A single State can decide to implement standards different from those introduced by the Annexes, but in this case other member States can deny recognition to such certificates or licenses issued by that State. In other words: *recognition* of one State’s license in another State is not based on a general principle of *equivalence*, which admits only limited exceptions on a single case comparison of protected interests⁶⁶ (as happens in cases of *mutual recognition* in UE law on the basis of articles 34-36 of the Treaty on the Functioning of the

⁶⁵ Articles 31 and 32 of the Convention on International Civil Aviation.

⁶⁶ See L. Torchia, *Il governo delle differenze: il principio di equivalenza nell’ordinamento europeo* (2006), 53-129.

European Union), but operates on the basis of implementation of specific standards already in use.

Annex No. 13, regarding investigation of accidents and incidents involving aircraft⁶⁷, offers a clear example of the content of SARPs. The “State of Occurrence” (in the territory of which an accident or incident occurs) has a duty to investigate in case of an accident⁶⁸ involving an aircraft registered in another member State, and shall take all reasonable measures to protect the evidence and to maintain safe custody of the aircraft and its contents, for such a period as may be necessary for the purposes of an investigation⁶⁹. If the accident occurs in the territory of a non-member State, the “State of Registry” (of the aircraft involved) should endeavour to institute and conduct an investigation in cooperation with the “State of Occurrence” (of the accident) but, failing such cooperation, should itself conduct an investigation with such information as is available⁷⁰. If the location of the accident or the serious incident cannot definitely be established as being in the territory of any State, the “State of Registry” shall institute and conduct any necessary investigation of the accident⁷¹. SARPs therefore regulate the relationship between the aeronautical authorities involved: this relationship must be based on full cooperation in the exchange of information and documentation, and on disclosure, with other States involved, of evidence collected.

Such a complex and broad set of standards, undoubtedly containing technical prescriptions, cannot just be reduced to a set of *technical rules*, as long as each option is selected comparing substantive interests and expresses a political decision of some sort. E.g.: greater *safety* implies higher costs, while – as already explained⁷² – the model established by the ICAO Air Navigation

⁶⁷ The purpose of this investigation, according to paragraph 3.1 of Annex 13, is “the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability.”

⁶⁸ Which is an occurrence associated with the operation of an aircraft, in which a person is fatally or seriously injured, according to Chapter 1 of Annex 13.

⁶⁹ Paragraph 5.1 of Annex 13.

⁷⁰ Paragraph 5.2 of Annex 13.

⁷¹ Paragraph 5.3 of Annex 13.

⁷² See *supra*, par. 1.2.

Commission⁷³ is not that of an abstract and absolute absence of risk but rather the establishment of “an acceptable level” of risk⁷⁴.

It is therefore crucial to scrutinize how SARPs are approved, whether through a general participation in the decision-making process or within smaller groups, which have different consequences in terms of legitimacy.

3.2. The Adoption Procedure of SARPs

SARPs are adopted by the Council⁷⁵. This important regulatory function is not entrusted to the plenary body (the Assembly), but to a more restricted one. A closer analysis of the procedure highlights how the content of SARPs are actually shaped at an earlier stage than the adoption by the Council⁷⁶.

The procedure is the same for the adoption of new SARPs and for the amendments of already existing SARPs. For many years the number of Annexes remained at 18, and only recently has Annex No. 19 been added, but the existing Annexes have been subject to a continuous process of amending and updating, usually introducing new prescriptions.

Early proposals⁷⁷ regarding SARPs are analyzed first by the Air Navigation Commission. Several consultative mechanisms can be used⁷⁸: meetings, inviting all contracting States; panels of technical experts⁷⁹. As already mentioned, “ANC panels are technical groups of qualified experts formed by the ANC to advance, within specified time frames, the solution of specialized problems which cannot be solved adequately or expeditiously by the established facilities of the ANC and the Secretariat. These

⁷³ It is a Commission established by the ICAO Council, see *infra*, par. 2.

⁷⁴ ICAO Working Paper AN-WP/7699, Determination of a Definition of Aviation Safety, 11 December 2001, paragraph 2.2; ICAO, Doc 9735, Safety Oversight Manual.

⁷⁵ Art. 54 (l) of the Convention on International Civil Aviation.

⁷⁶ ICAO, Making an ICAO Standard, <http://www.icao.int/safety/airnavigation/Pages/standard.aspx>.

⁷⁷ A proposal can be submitted by member States, a body of ICAO and other international organizations.

⁷⁸ L. Weber, *International Civil Aviation Organization* cit. at 28, 189.

⁷⁹ See ICAO Doc 7984/5, Directives for Panels of the Air Navigation Commission.

experts act in their expert capacity and not as representatives of the nominators”⁸⁰.

There are also other bodies with a consultative capacity, such as Air Navigation study groups⁸¹ or Council technical Committees⁸², but “[i]n summary, technical issues dealing with a specific subject and requiring detailed examination are normally referred by the ANC to a panel of experts. Less complex issues may be assigned to the Secretariat for further examination, perhaps with the assistance of an air navigation study group”⁸³.

The first effective version of proposed standards is that drafted by the panel of experts. This proposal is submitted to the Air Navigation Commission for preliminary review, usually limited to controversial issues.

After this phase, the proposals of the panel with eventual amendments by ANC are transmitted to member States to get their comments. Usually States have three months to comment on the proposals. Comments of States are analyzed by the Secretariat, which prepares a working paper to illustrate them.

The ANC makes a final review of the proposed text of SARPs. The Annexes so amended are submitted to the Council for adoption. The final decision on the proposed SARPs rests with the Council.

The Council is given the task of adopting the final text, with a majority of two thirds of its members⁸⁴. There are 36 member States on the Council⁸⁵; a majority of two thirds corresponds to 25 members, while the total numbers of ICAO members is 191⁸⁶; this shows that a very small number of member states is entrusted with the relevant power to adopt the text of the Annexes.

The text so adopted by the Council is submitted to each contracting State.

The Annexes so approved will become effective 3 months after submission to member States, unless within this period the

⁸⁰ ICAO, Making an ICAO Standard.

⁸¹ It assists the Secretariat with advisory functions.

⁸² Established by the Council.

⁸³ L. Weber, *International Civil Aviation Organization* cit. at. 28, 191.

⁸⁴ Art. 90 (a) of the Convention on International Civil Aviation.

⁸⁵ See *supra*, par. 2.

⁸⁶ See *supra*, par. 2.

majority of them register their disapproval⁸⁷. The power of the Council is limited by this procedure, but it must be stressed that since the signing of the Convention, this veto power assigned to the States has never been exercised. Moreover, the large number of members creates a situation where it is difficult to obtain the veto majority requested (more than 90 States) in the short period of only 3 months. The competence of the Council therefore encounters many fewer *de facto* limits than may appear at first sight.

This analysis of the procedure reveals that a relevant role is assigned to panels of experts and technical sub-commissions. The recourse to these technical bodies is aimed at increasing the effectiveness of the decision making process, which it does, but it has two relevant consequences.

First of all it reduces the participation of States in the decision making process, due to its composition and structure. As the groups are intended to be small⁸⁸, a large number of members are excluded.

Moreover, the technical composition of these groups emphasizes the gap between industrialized and developing countries, as it is unlikely the latter will be able to participate effectively on all sub-commissions.

In these cases the gap between democratic legitimacy and effectiveness of global regulators emerges with particular intensity. To overcome those critical issues, it has become common practice for the *Air Navigation Commission*, which must approve the technical standards drafted by the relevant bodies, to notify the result of their activity to contracting States as well, in order to allow comments⁸⁹.

The recourse to proceduralisation is therefore considered a crucial tool, aimed at allowing a wider participation and contribution of States that can't regularly take part in the technical bodies' work. This enables those States to express opinions on the proposed rules at the time of their drafting, even if in a position of

⁸⁷ Art. 90 of the Convention on International Civil Aviation.

⁸⁸ Paragraph 2.1 of the Directives for Panels of the Air Navigation Commission states that "[t]he ANC shall establish panels normally comprising 15 to 20 members, keeping in mind the need for expeditious and efficient handling of panel business."

⁸⁹ J. Huang, *Aviation Safety through the Rule of Law* cit. at 21, 57.

objectively less influence than those of the States regularly present in the technical bodies. The relevance of panels is therefore still crucial. The Air Navigation Commission has proposed, in 2013, a full reform of the panels' organization and functioning⁹⁰, in order to better support the complete air navigation work program and to enhance participation, according to objectives of the Twelfth Air Navigation Conference, held in 2012, confirming the importance of this issue.

4. The implementation of SARPs

4.1. Value of the Standards and implementation by States

SARPs, according to art. 90 of the Convention, "become effective" after a specific procedure⁹¹. Their "entrance into force" concerns only the international level, as there are no indications regarding the legal status at national level. States, in fact, do not have a formal explicit obligation. They have a general obligation, to "collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation"⁹².

The complex system defined by SARPs has therefore to be implemented by States. SARPs are the tools that guarantee uniformity. Implementation, though, may be subject to exception.

Art. 38 of the Convention states that "[a]ny State which finds it impracticable to comply in all respect with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard".

⁹⁰ ANC AN-WP/8735, Modernization of Panels of the Air Navigation Commission.

⁹¹ See *supra*, par. 3.2.

⁹² Art. 37 of the Convention on International Civil Aviation.

So States have the chance to differ their national regulation and practices from standards and procedures⁹³. But this exception has both procedural and substantial limits.

Regarding the substantial limit, it is possible to differ from standards only if it is “impracticable to comply” to them, or if it is considered *necessary* to adopt different regulations. The decision of non-implementation is not subject to the discretionary, sovereign choice of a State. It is instead a choice that must meet specific requirements.

Regarding the procedural limit, a State must notify ICAO, within 3 months, the differences between its own practice and that established by the international standards. This allows the ICAO and other member States to recognize deficiencies in a national air regulation system, and if necessary prevent possible risks. States have therefore the right to differ from SARPs, but must give adequate motivation for non-compliance.

This particular system has led to uncertainty regarding the juridical nature of SARPs. Some authors believe that States have no legal obligation to implement or to comply with the provisions of Annexes, unless they find it ‘practicable’ to do so⁹⁴. But the need to interpret the obligations of member States, bearing in mind the purpose of the Convention, leads to a different conclusion. The main focus of the provisions regarding Annexes⁹⁵, as already highlighted, is not the freedom of action of the member States, but the achievement of uniformity of international standards. In addition, a close look at interests protected by the Convention clarifies that the objectives pursued⁹⁶ shape a normative system which embodies a common interest of all States. Certain safety

⁹³ Art. 38 of the Convention on International Civil Aviation does not expressly refer to “Recommended practices”, although art. 90 states that Annexes (which include also Recommended practices) “become effective” at the end of the adoption procedure. J. Huang, *Aviation Safety through the Rule of Law* cit. at 21, 62 notes, however, “that subsequent ICAO Assembly resolutions have tended to blur the distinctions between standards [and] recommended practices”.

⁹⁴ T. Buergenthal, *Law-making in the International Civil Aviation Organization* (1969), 76.

⁹⁵ The reference is to articles 37 and 38 of the Convention on International Civil Aviation.

⁹⁶ I.e. art. 44, (a) of the Convention on International Civil Aviation, regarding “the safe and orderly growth of international civil aviation throughout the world”.

obligations, therefore, are not to be considered just reciprocal between member States, but for higher aims. The adherence to the international aviation regulatory system is not only linked to the principle of State sovereignty and the freedom of action of States, but also to the duty of cooperation in establishing an international order. This duty implies the implementation of Annexes in domestic legal orders, with exceptions subject to the above mentioned limits. There is also another reason that fosters implementation: non-compliance affects significantly the participation in international air navigation and air transport, and this reduction therefore represents a strong incentive (to give compliance) for States⁹⁷.

States have implemented SARPs through different techniques.

In the Italian system, Annexes are implemented “through administrative tools” (*in via amministrativa*)⁹⁸, and the bodies entrusted are the Ministry of Transportation and ENAC⁹⁹, in accordance with guiding standards of a Presidential Decree¹⁰⁰: among these guiding standards, it must be highlighted the “[t]end[ency] to achieve uniformity of legislation with international regulations”¹⁰¹. Rules regarding issue, renewal, integration, suspension and revocation of licenses are exclusively those of Annex No. 1 of the Convention, due to the express mention in the national rule¹⁰². Presidential Decree July 4, 1985, n. 461, states, in addition, that Standards usually have to be implemented as binding norms, unless it is “impracticable to comply, as ascertained by a motivated decree”¹⁰³. The theoretical choice, in the Italian system, is between implementation or non-implementation, when impracticable. But the approach generally applicable means the Standards have to be implemented in a way to give them binding force.

⁹⁷ M. Milde, *International Air Law and ICAO* cit. at 57, 172.

⁹⁸ Art. 690 of the Royal Decree 30th March 1942, n. 327, “Codice della navigazione”.

⁹⁹ Italian Authority for Air Navigation.

¹⁰⁰ Presidential Decree July 4, 1985, n. 461.

¹⁰¹ Art. 2 of the Presidential Decree July 4, 1985, n. 461.

¹⁰² Art. 731 of the Royal Decree 30th March 1942, n. 327, “Codice della navigazione”.

¹⁰³ Art. 1 of the Presidential Decree 4th July 1985, n. 461.

According to the Australian Air Navigation Act, “[t]he Governor General may make regulations, not inconsistent with this Act, ... for the purpose of carrying out and giving effect to the Chicago Convention, ... any Annex to the Convention relating to international Standards and Recommended practices (being an Annex adopted in accordance with the Convention) and the Air Transit Agreement”¹⁰⁴. In this case implementation is not provided by law, but at a lower level. In Finland, the Certificate of Airworthiness is issued by the Finnish Transport Safety Agency: “[d]etailed regulations on the design, manufacture, equipment, properties and maintenance of aircraft, parts and appliances, as well as on the content and arrangement of inspections and tests required for approval” are adopted by the Finnish Agency, “based on the standards and recommendations referred to in the Chicago Convention”¹⁰⁵.

In developing countries, the inclusion of international safety standards may occur by “mere reference to the title, number and year of issue of such standard or amendment or to any other particulars by which such standard or amendment is sufficiently identified, without quoting the text of the standard or amendment so incorporated”¹⁰⁶ by the Director of the Aviation Agency, reinforcing the idea of a distinct set of rules that does not need further elaboration for the implementation in the national legal system.

The Federal Aviation Administration of United States has, pursuant to art. 83 of the Convention, the power to “exchange with that country [the Administration entitled with air safety regulation functions] all or part of their respective functions and duties with respect to registered aircraft under the following articles of the Convention: Article 12 (Rules of the Air); Article 31 (Certificates of Airworthiness); or Article 32a (Licenses of Personnel)”¹⁰⁷. This provision outlines a normative equivalence in the exercise of regulatory functions of national administration of different States, due to the common ‘normative basis’ shared by these bodies. Furthermore, the Federal Aviation Administration has undertaken, without any express indication by the legal

¹⁰⁴ Art. 26 of the Australian Air Navigation Act, 1920.

¹⁰⁵ Sec. 22 of the Aviation Act, Finland, 2009.

¹⁰⁶ South Africa, Civil Aviation Act, n. 13/2009.

¹⁰⁷ § 44701, Sec. 49, USA Code, 2011.

provisions that regulate its activity, a progressive action, to uniform its framework for "Safety Management" to the ICAO system¹⁰⁸, observing that "FAA supports harmonization of international standards, and has worked to make U.S. aviation safety regulations consistent with ICAO standards and recommended practices"¹⁰⁹.

The result of this summary comparative analysis shows that in most cases internal legislation refers to ICAO Standards, with a procedural mechanism which gives them binding value through the mediation of administrative bodies. No relevance is given to political evaluations. From this point of view, national administrative bodies are no longer acting as an expression of internal politics, but rather as *longa manus* of the international organization.

Art. 1 of the Convention emphatically states that "[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory". But this reaffirmed *sovereignty* lacks much of its meaning. It is '*diluted*' in the various subsequent steps, and the rule '*produced*' within the international framework enters the internal legal systems on its own strength.

4.2. Compliance through Universal Safety Oversight Audit Programme

Safety audits are an essential element of ICAO's work to improve safety.

As has been seen, the Convention imposes several obligations on States, mainly to encourage the highest practicable degree of *uniformity* in regulations and practices, in any matter where it will help and improve air navigation. Therefore, a State that finds it impracticable to comply must notify differences of its national regulation from ICAO Annexes.

These obligations, however, were not always respected by contracting States. Without the filing of differences by states, neither ICAO nor other member States had any clear and objective information on the degree of implementation of Annexes.

¹⁰⁸ Federal Aviation Administration Advisory Circular No. 120-92.

¹⁰⁹ Federal Aviation Administration Advisory Circular No. 150/5200-37.

In 1998, therefore, ICAO established the Universal Safety Oversight Audit Programme (USOAP)¹¹⁰. The Program is founded on the following elements:

- it consists of regular, mandatory¹¹¹, systematic and harmonized safety audits, which shall be carried out by ICAO;
- it is applicable to all member States;
- it aims at ensuring transparency and disclosure in the release of audit results;
- it introduces a systematic reporting and monitoring mechanism in the implementation of safety-related SARPs.

Audits are performed by ICAO teams, composed of experts from the Organization and from member States, other than the audited state. Every member State has signed a Memorandum of Understanding, which gives the consent to audit.

USOAP has gone under several phases¹¹².

In the first phase of audits, almost 180 States were visited and audited.

Between 2001 and 2004 numerous follow-up audits were performed, and the focus shifted to a problem-solving approach, rather than merely highlighting critical areas.

In the third phase (2004-2010), further steps to increase transparency were made, and final audit results are now made available to all contracting States, giving widespread and accessible information on the critical points emerging in the application of ICAO standards in a given State.

Recent developments involve the setting up of a “continuous monitoring approach”, with a continuous data exchange between contracting States and ICAO, regarding implementation of safety-related SARPs and findings of audits.

Such a system does not *per se* increase the binding strength of SARPs, but eases their implementation¹¹³, by highlighting

¹¹⁰ ICAO, Assembly Resolution, A32-11. Establishment of an ICAO Universal Safety Oversight Audit Programme.

¹¹¹ ICAO, Assembly Resolution, A32-11 refers to “mandatory ... audits, to be carried out by ICAO”. The circumstance that almost every Member state signed, with ICAO, a bilateral memorandum of understanding, giving consent to the audit in their country, does not exclude the importance of the expression. As J. Huang, *Aviation Safety through the Rule of Law* cit. at 21, 75 notes, “the ICAO audit practice has customarily developed into a mandatory safety regime in the true legal sense of the word”.

¹¹² See ICAO Annual Report, 2012; ICAO, Safety Report, 2014.

critical points in each national legal system and putting pressure on any State for non compliance by exposing it publicly.

5. Concluding Remarks. A new balance between technical power and political authority

SARPs are the most important tool for the regulation of safety in air transportation. The development and widespread use of standards has several implications.

First of all, national law appears to be an inadequate tool to regulate such a complex sector as aviation safety for two main reasons. It is difficult to keep up with situations that need to be regulated, because in this sector technological development is continuous, and has a great influence on safety: the law is not able to sustain this pace, and something else (namely, standards) must take its place. National laws also lack another crucial factor: *uniformity*. If uniformity is perceived as a value that can promote safety, the space for special rules is decreasing. Instead standards seem a better way to fulfill the need for a 'common framework' of technical rules.

This leads to a significant change in the role of the Nation-state, and alters the importance of national public actors in the global arena. Traditionally, the body that expressed the supremacy of national States was the Parliament, probably the clearest example of exercise of sovereign power. But just as legislative action is losing importance, so are parliaments. A central role is gained by administration, both at national and supra-national level. This role is gained on the basis of an initial transfer of powers. Institutions, however, are inclined to 'expand' the scope of their delegation, in the name of effectiveness, especially if appointed with regulatory functions. National sovereignty, in its parliamentary expression, is losing relevance, while political authority is giving place to bureaucratic power.

This is happening not only at global level, but also in more developed systems such as the European Union. In a recent case, the Court of Justice of the European Union was called to evaluate

¹¹³ See, for data regarding the effective implementation by States, the ICAO Safety Report 2014, 6.

the legitimacy of a provision introduced by an EC Regulation¹¹⁴, which, recurring certain requirements, assigns the European Securities and Markets Authority (ESMA) the power to prohibit or impose conditions on short sale or similar financial transactions, therefore giving ESMA the right to take individual measures directed at natural or legal persons. The United Kingdom contested this delegation of power, arguing that it was lacking a legal basis in EU Treaties. The Court considered, among other reasons, that the delegation of power to ESMA was legitimate, because “the EU legislature, in its choice of method of harmonisation and, taking account of the discretion it enjoys with regard to the measures provided for under Article 114 TFEU, may delegate to a Union body, office or agency powers for the implementation of the harmonisation sought. That is the case in particular where the measures to be adopted are dependent on specific professional and technical expertise and the ability of such a body to respond swiftly and appropriately”¹¹⁵. There are significant differences between the EU legal system and global regulatory regimes, but this functional and technical approach, relevant in this case, is often followed at global level¹¹⁶. What is not formally ‘binding’ seeks implementation through effectiveness, which can be achieved by encouraging participation in the phase of defining standards¹¹⁷, and the reference to a dimension beyond States, which needs uniformity or at least a shared solution through specific professional and technical expertise. This argument is pivotal: this “dimension”¹¹⁸ of international law and institutions that operate within it make it necessary to reconsider interests protected (in this case, aviation

¹¹⁴ Article 28 of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps.

¹¹⁵ Court of Justice of the European Union, JUDGMENT OF THE COURT (Grand Chamber), 22 January 2014, C-270/12, “United Kingdom v. European Parliament and Council of the European Union”.

¹¹⁶ J.G.S. Koppell, *World rule. Accountability, legitimacy, and the design of global governance* (2010), 7, refers to “the triumph of functional global governance”.

¹¹⁷ See, regarding the regulation of the financial sector, M. Moschella – S. Pellizzari, *International Financial Standards: Assessing Effectiveness from the Private Sector Perspective*, 1 Pòlemos, 41-50 (2009).

¹¹⁸ See B. Kingsbury - L. Casini, *Global Administrative Law Dimensions of International Organizations*, 6 Int’l Org. L. Rev. 319-358 (2009).

safety), which are no longer clearly referable to single States. They instead merge together, leading to the concept of “disaggregated sovereignty”¹¹⁹, which emphasizes the relational dimension of public institutions, rather than the affirmation of their supremacy. In fact, the global legal order does not overlap, as another layer, national legal system, but instead the two are inextricably linked, because neither the national nor the supra-national level of government are able to maintain a monopoly of relations with the parties that compose it¹²⁰.

To some extent, States are an essential component for the genesis of the organization, through the adherence to a treaty or international convention, in this case the ICAO. Delegation by national States is in fact one of the most important ways of establishing an international organization, which brings benefits to States who have established it¹²¹.

But once a global regulatory regime is instituted, it establishes its identity and exercises its powers *per se*, providing answers to the challenges of uniformity regulation that lie beyond the national level, challenges that are global by their own nature. As a consequence, the role of States shifts from the law-making process to the implementation phase, due to the ‘domestic’ monopoly of coercive power. But as well as the function, the actors also change, widening powers of national administrative bodies through the reference to the global legal order.

¹¹⁹ A.M. Slaughter, *A New World Order* (2004), 266.

¹²⁰ S. Cassese, *Oltre lo Stato* (2006), 10.

¹²¹ D.G. Hawkins, D.A. Lake, D.L. Nielson, M.J. Tierney, *Delegation under anarchy: states, international organizations, and principal agent theory*, in D.G. Hawkins, D.A. Lake, D.L. Nielson, M.J. Tierney (eds.) *Delegation and Agency in International Organizations* (2006), 13-23 enlighten specialization, policy externalities, collective decision-making, dispute resolution and credibility.