

NOTES

REGULATORY PROCEDURES OF ICAO AS A MODEL FOR IMCO

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One of the most interesting features of modern international law is the regulatory activity of inter-governmental organizations.¹ The success of these organizations, particularly of the specialized agencies of the United Nations, has revealed that such a functional approach in international law will serve the family of nations best. However, as Schwarzenberger rightly points out :

“The limitations of the powers of these institutions appear more significant than the deceptively wide scope of their jurisdiction. Institutions of this type offer improved techniques of international co-operation. Even in relation to members, these activities remain largely optional and as yet hardly indicate any general movement towards international government on a world scale.”²

The procedures of the International Civil Aviation Organization (ICAO) concerning promulgation of international regulations constitute an excellent example of improved techniques based on optional acceptance by States. The regulatory procedures of ICAO have proven so successful that they will probably serve as a model for a “Convention on Facilitation of International Maritime Traffic” which is being prepared by the Inter-governmental Maritime Consultative Organization (IMCO) for adoption in the spring of 1965.

The Regulatory Procedures of ICAO

The Chicago Conference on International Civil Aviation of 1944 followed the pattern of the Paris Convention³ when it inserted in the Chicago Convention provisions for the establishment of a permanent

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¹ The Yearbook of International Organizations (1962/63) enumerates 147 inter-governmental organizations.

² Schwarzenberger, “Reflections on the Law of International Institutions”, 13 *Curr. Leg. Probl.* 283 (1960).

³ International Convention relating to the Regulation of Aerial Navigation, Paris, Oct. 13, 1919; in Hudson, 1 *International Legislation* 359 (1931).

international organization.⁴ In recognition of the successful work of the International Commission for Air Navigation (ICAN),⁵ the Chicago Conference also conferred certain regulatory powers on the newly established organization. The Council and its subordinate bodies, the Air Navigation Commission, the Air Transport Committee, the Committee on Joint Support of Air Navigation Services and the Finance Committee, provide the continuing direction of the work of the organization. One of the major duties of the Council is to adopt "international standards" and "recommended practices"⁶ and to incorporate these as Annexes to the Convention.⁷

In comparing the legal status of the Chicago Annexes with that of the Paris Annexes, one notes a remarkable departure from the Paris model. The Paris Convention provided that the technical regulations contained in the Annexes had a binding effect, obliging the members of ICAN to implement them. By contrast, the regulations made under the Chicago Convention have no such binding force.⁸ A review of certain features of the Chicago Convention will clearly indicate the difference.

First one should note that it is within the discretion of each member State to implement the regulations of ICAO only "to the greatest possible extent" (Art. 12), or "so far as its laws permit" (Art. 26). Other escape clauses require that the regulations be implemented only in so far as the States "may find it practicable".⁹ Secondly, it will be observed that according to Article 90 of the Chicago

⁴ Convention on International Civil Aviation, Chicago, Dec. 7, 1944, Art. 43; in Peaslee, *2 International Governmental Organizations* 989 (2nd ed., 1961).

⁵ Usually known under its French name "Commission Internationale de la Navigation Aérienne" (CINA). This Commission was established by the Paris Convention.

⁶ With regard to Annex 9 (Facilitation), the Council of ICAO defined "standards" and "recommended practices" as follows: "*Standards*: Any specification, the uniform observance of which has been recognized as *practicable* and as *necessary* to facilitate and improve some aspect of international air navigation, which has been adopted by the Council pursuant to Article 54(1) of the Convention, and in respect of which non-compliance must be notified by States to the Council in accordance with Article 38. *Recommended Practice*: Any specification, the observance of which has been recognized as *generally practicable* and as *highly desirable* to facilitate and improve some aspect of international air navigation, which has been adopted by the Council pursuant to Article 54(1) of the Convention, and to which Contracting States will endeavour to conform in accordance with the Convention." See Foreword to Annex 9, 4th ed (1960). *Italics added*.

⁷ Articles 37 and 54(1) of the Chicago Convention.

⁸ The only exception being the legislative function with respect to the Rules of Flight over the High Seas (Art. 12; Annex 2).

⁹ The identical or comparable phrase appears in Articles 22, 23, 25, 28 and 37.

Convention the majority of ICAO's members can prevent a regulation from coming into force :

"... Any such Annex or any amendment of an Annex shall become effective within three months after its submission to the contracting States or at the end of such longer period of time as the Council may prescribe, unless in the meantime a majority of the contracting States register their disapproval with the Council..."

This change from international legislation under ICAN to quasi-legislation under ICAO¹⁰ is due to the fundamental objective of the Chicago Convention, the establishment of a uniform system for air navigation with a universal adherence. To achieve this universality, the drafters, of course, had to take into account the policy of the United States which during World II had become the greatest air power. Although a signatory to the Paris Convention, the United States for political reasons did not join ICAN¹¹ and in 1928 initiated a separate regional treaty, the Habana Convention.¹² The reluctance of the United States to confer legislative power on an international organization led at the Chicago Conference to the creation of a new procedure for the adoption of international regulations. According to the Chicago Convention, member States are permitted to depart from ICAO's regulations. The only obligation which the Chicago Convention explicitly imposes on the members of ICAO in this respect is the duty of each State to notify ICAO of any differences that exist between its national regulations and the international standards contained in the Annexes.¹³ In the words of Article 38 of the Convention :

"Any State which finds it impracticable to comply in all respects 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.

¹⁰ The "legislative principle" allows international organizations to act as international legislatures, whereas the "consent principle" permits only quasi-legislation. See Bowett, *The Law of International Institutions* 6 (1963).

¹¹ For a variety of reasons, Brazil, China, Columbia, Germany, Hungary, Turkey and the U.S.S.R. similarly refused to join ICAN. However, the Paris Convention embraced 22 European States with their colonies, 4 States from Latin America, 3 States from Asia, Canada, the Union of South Africa, Australia and New Zealand.

¹² Pan-American Convention on Commercial Air Navigation, Habana, Feb. 20, 1928; in Hudson, *4 International Legislation* 2354 (1931).

¹³ This method of "opting-out" or "contracting-out" is also applied to the regulatory procedures of the World Health Organization (Art. 22) and the World Meteorological Organization (Art. 8).

In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take.

In any such case, the Council shall make immediate notification to all other States of the difference which exists between one or more features of an international standard and the corresponding national practice of that State."

A careful reading of this Article reveals that this obligation to notify is only with respect to "international standards"; no notification is necessary in the case of "recommended practices".¹⁴ The drafters of the Chicago Convention felt that important regulations, such as those dealing with the safety of air navigation,¹⁵ should be drawn up as "standards". Departures from such regulations could, however, be expected to be minor. Nevertheless, the knowledge of even a minor departure from an international "standard" may be of great importance for the safety of air navigation. Therefore, in order to enable ICAO to ensure safety, notification of all departures from "standards" was made mandatory for the member States.

There is, however, in practice not much difference between "standards" and "recommended practices". Following the invitation by ICAO to extend the notification of differences to "recommended practices", the member States of ICAO now also notify their departures from "recommended practices".

IMCO's Draft for a Convention on Facilitation .

The functions of IMCO are, *inter alia*, "to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practical standards in matters concerning maritime safety and efficiency of navigation".¹⁶ It is obvious that such duties, especially those relating to improving the standards of maritime safety, confer upon IMCO a degree of regulatory competence. But neither the IMCO Convention itself, nor the "Convention on Safety of Life at Sea" of 1948¹⁷ or the "Convention for the Preven-

¹⁴ *Supra*, note 6.

¹⁵ Annex 2 (Rules of the Air); all its regulations are "standards".

¹⁶ Convention on the Inter-governmental Maritime Consultative Organization, Geneva, March 6, 1948; having received 21 ratifications, it came into force on March 17, 1958; see Peaslee, *1 International Governmental Organizations* 904 (2nd. ed., 1961).

¹⁷ *3 United States Treaties and Other International Agreements* 3451 (1955).

tion of Pollution of the Sea by Oil" of 1954,¹⁸ contain any simplified amending procedure comparable to that of ICAO.¹⁹ This omission in the relevant maritime conventions may be explained by the fact that the annexes to these conventions contain material of a relatively static nature which does not require continuous amendments as is the case with most of the Annexes to the Chicago Convention.

At present, the traditional procedures for the amendment of multilateral treaties is applied to the amendment of the maritime annexes, in consequence of which, full-scale conferences must be convened. Such conferences, i.e. meetings of the Assembly of IMCO, took place in 1960 and 1962; in 1960 to bring up-to-date the standards of the Safety of Life at Sea Convention; and in 1962 to amend the Prevention of Pollution of the Sea by Oil Convention. However, the forthcoming "Convention on Facilitation of International Maritime Traffic" is expected to replace these traditional amending procedures by the same flexible procedure as applied successfully by ICAO.²⁰ The draft of this Convention, now under consideration by an Expert Group in the Secretariat of IMCO, resembles, in regard to technical provisions, the pattern of the Chicago Convention. While the draft Convention consists of a small number of articles setting up the objectives of the Convention, all the technical regulations, such as "standards" and "recommended practices",²¹ are to be included in a comparatively extensive Annex which will be subject to an uncomplicated amending procedure.

The details of this procedure have not yet been elaborated. There are, however, the following principles which the Expert Group agreed upon:

1. "The provisions of the Annex are of a nature that calls for a more flexible amendment procedure than is usual in respect of the articles of a Convention.

¹⁸ *Final Act of Conference and Text of the International Convention for the Prevention of Pollution of the Sea by Oil* (Cmd. 9197, 1954).

¹⁹ For example, the recommendations for amendments to the Safety Regulations are not only subject to the approval of the Council, but they also require adoption by the Assembly of IMCO (Art. 30 of the IMCO Convention).

²⁰ See IMCO Doc. FAL/EG. 11/7 (Expert Group on Facilitation of Travel and Transport, 2nd session, agenda item 7, "Report of the Group of Experts").

²¹ The draft Convention's definitions of "standards" and "recommended practices" closely follow those of ICAO. Art. 5 of the draft Convention prescribes that: "For the purpose of the present Convention, a) "standards" are those provisions whose uniform application by Contracting States is deemed to be necessary and practicable in order to facilitate international maritime traffic; b) "recommended practices" are other provisions whose application by Contracting States is regarded as desirable in order to facilitate international maritime traffic".

2. Because of the technical nature of the standards and recommended practices, any amendments should go through a body of experts set up by the Organization. Whatever its title, this body would constitute a piece of machinery through which all amendments would pass.

3. Once such a body had, in one way or another, been set up within the Organization, and had recommended amendments, it would be for the Assembly or Council to take the final decisions as to whether such amendments should be communicated to the Contracting States with a view to their acceptance by them.

4. To be effective, the proposed body of experts would need to have sufficiently wide powers, and to meet at least every two years...²²

These principles reveal some similarity with the procedure of ICAO in that the body of experts would have to submit its recommendations for the final decision to one of the competent organs of IMCO, i.e. the Council or the Assembly. Furthermore, considering the experience of ICAO's Facilitation Division, which is in charge of the preparatory work for the amendment of Annex 9 (Facilitation) of the Chicago Convention, the two-year interval for the meetings of IMCO's body of experts seems quite reasonable.²³

An interesting feature of the IMCO draft Convention is the fact that the contracting parties shall be under the obligation "not to establish any regulations and formalities which are less favourable than the standards". As a consequence, the "standards" of IMCO will have a stronger legal status than ICAO's "standards". On the other hand, since the "recommended practices" of IMCO are to be implemented at the discretion of the member States, their legal effect will be identical with that of the "recommended practices" of ICAO.²⁴

It is significant that the IMCO draft Convention does not follow the complicated wording of Article 38 of the Chicago Convention, but follows rather the practice of ICAO. Thus the parties to the future convention shall be obligated to give notification not only of departures from "standards", but also of departures from "recommended practices". Article 6 (a) of the draft provides accordingly:

"Any Contracting State which finds it impracticable to comply with any of the standards or recommended practices as set out in the Annex to this Convention shall notify to the Inter-Governmental Maritime Consultative Organization, hereinafter referred to as "the Organization", any differences between such standards or recommended practices and its own requirements with the reasons therefor within two months of the entry into force of the Convention in respect of that Contracting State."

²² Two other principles, not of particular relevance to this survey, have been omitted.

²³ The Facilitation Division of ICAO held its sessions in 1946, 1948, 1951, 1955, 1959 and 1963.

²⁴ Art. 4 of the draft Convention.

In regard to the publication of such departures, IMCO shall inform its members only of differences concerning the "standards", whereas the notification of departures from "recommended practices" shall be done only upon request.²⁵

One can say, in summary, that IMCO's draft Convention constitutes a noteworthy piece of international law-making. The international regulations which will be laid down in the Annex to the future Convention are expected to bring uniformity and simplification of domestic regulations, in that they will eliminate some documentary requirements, standardize and simplify the remaining forms, and provide uniform facilities at international harbours. Such regulations will be amended under a procedure which not only largely embodies well-tested ICAO practices but also marks an improvement in comparison with the relevant provisions of the Chicago Convention. It is to be hoped that the principles incorporated in this draft will find support at the diplomatic conference which will be convened in spring 1965 for adoption of the new convention.

²⁵ Art. 6(b) of the draft Convention. Such distinction is in the author's opinion neither necessary nor desirable.