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REGULATORY COOPERATION WITH COUNTERPART AGENCIES ABROAD: THE FAA'S AIRCRAFT CERTIFICATION EXPERIENCE

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I. INTRODUCTION

The character and pace of world developments suggest that if American administrative agencies ever could afford to engage in regulatory policy without regard to the policies and practices of administrative agencies abroad, that era has come to a close. The substantive problems facing American agencies have parallels, to a greater or lesser extent, in the problems facing those agencies' counterparts in foreign countries. The policies and procedures developed by governments abroad should frequently be of interest and benefit to American regulators, and those developed here may be of utility abroad.

The case for international regulatory cooperation does not, however, rest entirely on the exchange of information about the current regulatory landscape. As the experience of certain agencies engaged in international regulatory dialogue demonstrates, there are still unresolved problems and potentially more efficient solutions. In areas of fast-changing technology or fast-evolving standards and expectations, regulatory bodies may find that they actually need, or could profitably share, the resources of other governments in addressing common problems. In their continuous efforts at improving performance, agencies have become increasingly aware that

contemporary regulation entails a powerful research and development burden that is best shared among many state actors.[1]

However substantial the agencies' interest in regulatory cooperation with foreign counterparts, that interest is at least matched by the prospective advantage of such cooperation to regulated interests and to those affected by those interests. Economic interests generally prefer an orderly regulatory environment with a high degree of correspondence, if not uniformity, among the standards imposed upon them by public authorities in the various markets they serve. The internationalization of business has put the need for that kind of environment on an international scale. It accordingly points in the direction of greater and more deliberate intergovernmentalism in regulatory matters than one generally associates with the American administrative process.

I have knowingly chosen the general term cooperation to denote the kind of intergovernmentalism described in this Article. But it should be obvious that cooperation can take a wide variety of forms, from the casual and unsystematic sharing of information, at one extreme, to a firm commitment to concerted regulatory action, at the other. In between fall a number of different patterns, such as regular consultations, reciprocal participation in foreign agency rulemaking, and various forms of joint study, research and rule development.

However slight may be its present development, international regulatory cooperation is not an entirely new phenomenon. We have long known the existence of international organizations charged with harmonizing or at least developing minimum standards in different regulatory fields. Bilateral and multilateral treaties have formalized international cooperation, and in some instances established common standards. International technical standards bodies do exist, and when their products are adopted as national standards, they too foster a more orderly regulatory environment. The fact remains, however, that a very small fraction of overall American regulatory activity is governed by such formal structures and arrangements and, even where it is, it is rarely governed by them comprehensively.

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1. The FAA has acknowledged economies in research and development costs as a principal reason for its establishment with the European Joint Aviation Authorities of a Joint Cabin Safety Research Group for purposes of shared technological research and development. *See* OPEN SESSION CONCLUSIONS AND ACTIONS, SIXTH FAA-JAA MEETING, Bordeaux, France (June 1989) (on file with *Law and Policy in International Business*); MINUTES OF THE OPEN SESSION, SIXTH FAA-JAA MEETING, BORDEAUX, FRANCE pt. VIb (June 1989) (on file with *Law and Policy in International Business*).

If the extent of commonality in regulatory problems is as great as it appears to be, and if the private interest in an orderly world-wide regulatory environment is so pronounced, then international regulatory cooperation may call for wider and more consistent practice than it now receives. In fact, in its allusion to rulemaking activity, the term regulatory cooperation may understate the potential scope for intergovernmentalism in administrative action. Much of the administrative process looks little like rulemaking or standard-setting. Many observers have pointed out that routine agency conduct, daily administration and individual decisionmaking constitute the bulk of that process, and intergovernmentalism may have a distinct though less easily recognizable role to play in those forms of activity as well.

This Article examines in some detail the practice and experience of one agency, the Federal Aviation Administration, and more particularly its Aircraft Certification Service, that has of recent years consciously engaged in forms of concerted activity with certain counterpart agencies abroad. This "case study" is of particular interest because the FAA's practice of intergovernmentalism includes, but also goes beyond, cooperation in rulemaking to embrace a certain amount of cooperation in more routine aspects of administration. The study may also be of interest because the intergovernmentalism engaged in largely involves cooperation with a body—the European Joint Aviation Authorities--that is itself an illustration of highly concerted regulatory activity among the component European states, and therefore a model of sorts that may or may not be appropriate for consideration by American agencies acting in certain domains.

This Article is largely descriptive of the FAA's interaction with counterpart agencies and of the respects in which that interaction has been thought to facilitate the agency's task and to improve its performance of functions. However, the Article will also call attention to certain difficulties and complications that the process has generated, and on occasion point out what might loosely be called lessons learned. Lastly, and appropriately for what was originally an Administrative Conference study, it briefly considers the legal constraints, if any, on the kind of intergovernmentalism that the FAA practices and that other agencies may have an interest in practicing.

II. THE FAA'S REGULATORY FRAMEWORK FOR AIRWORTHINESS CERTIFICATION

Aircraft safety regulation began in the United States in 1926 with passage of the Air Commerce Act.[2] That legislation was superseded in 1938 by the Civil Aeronautics Act[3] and in 1958 by the Federal Aviation Act.[4] The latter represents the current legal framework for regulation of aircraft. The Federal Aviation Act, like its predecessors, is predicated on the need for a safe civil aviation system—one that can enhance public safety and at the same time promote the development of aviation through enhanced public confidence in the system. The Act directs the Federal Aviation Administration (FAA) to conduct "[t]he regulation of air commerce in such manner as to best promote its development and safety."[5] To this end, the FAA has created and maintained an Aircraft Certification Service whose view and whose raison d'etre are that both aviation safety and public confidence in aviation safety presuppose safe aircraft.[6]

A. *Registration and Certification*

The airworthiness regulation of individual aircraft is based upon two closely related ideas: registration and certification. The Federal Aviation Act requires that all aircraft operated in the United States be registered if

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2. Pub. L. No. 69-254, 44 Stat. 568, *repealed by* Federal Aviation Act of 1958, tit. XIV, § 1401(b), 72 Stat. 806.

3. Pub. L. No. 75-706, 52 Stat. 977, *repealed by* Federal Aviation Act of 1958, tit. XIV, § 1401(b), 72 Stat. 806.

4. Pub. L. No. 85-726, 72 Stat. 731 (codified as amended at 49 U.S.C. app. §§ 1301-1551 (1988)).

5. 49 U.S.C. app. § 1303(1) (1988). The Airline Deregulation Act of 1978, amending the Federal Aviation Act § 102 (a)(2), declared that deregulation should result in no diminution of air safety standards. 49 U.S.C. app. § 1307 (1988).

The Supreme Court, in the context of holding that the FAA is shielded by the Federal Tort Claims Act's "discretionary function" exemption from tort liability for alleged negligence in certificating commercial aircraft, emphasized that the agency "has a statutory duty to *promote* safety in air transportation, not to insure it." United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 821 (1984).

6. Opening Remarks of M. Craig Beard, Director, Aircraft Certification Service, Federal Aviation Administration, at the 1989 Annual Conference of the ABA Forum on Air and Space Law (June 6, 1989) [hereinafter Beard Remarks].

According to the FAA's regulatory handbook, aviation safety is the principal objective of the agency's regulatory activity. FED. AVIATION ADMIN., FAA ORDER 2100, FAA REGULATORY HANDBOOK § 1-2 (1990) [hereinafter FAA REGULATORY HANDBOOK]. On the other hand, the FAA asserts that "the public interest is not served if standards and regulations go beyond the needs of safety, efficient use of the airspace, national defense, and the general public interest." *Id.* § 1-4b.

eligible for registration.[7] The obligation to register falls upon the aircraft's owner.[8] Aircraft eligible for registration include those that are *both* (A) owned by an American citizen, permanent resident alien, or (if the aircraft is based and primarily used here) by a corporation doing business under the laws of the United States or any state, *and* (B) not registered under the laws of a foreign country.[9] Thus, if an aircraft is registered abroad, it does not need to be registered in the United States, nor may it be. Within limits, then, owners of aircraft may have a choice from among several jurisdictions in which to register the aircraft. In making that choice, owners usually prefer the country where they reside or conduct their business.[10] As for the United States as place of registry, the Federal Aviation Act positively requires the Secretary of Transportation to issue a certificate of registration to the owner of any aircraft eligible for American registration who requests it.[11]

As a practical matter, aircraft registration as such has limited significance. Registration basically confers upon an aircraft a kind of nationality and serves as conclusive evidence of that nationality. It also gives the aircraft a unique identification number, much as automobile registration specifically identifies a motor vehicle. On the other hand, American law expressly provides that registration is not evidence of ownership of an aircraft in any proceeding in which that matter might be in issue.[12]

Aircraft registration derives its importance chiefly from the certification process to which it is linked. The Federal Aviation Act requires that any civil aircraft registered in the United States have a valid airworthiness certificate before it may lawfully be operated.[13] The aircraft also must conform to the terms of that certificate.[14] Accordingly, certification rather

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7. 49 U.S.C. app. § 1401(a) (1988).

8. *Id.*

9. *Id.* app. § 1401(b).

10. *Id.*

11. *Id.* app. § 1401(c).

12. *Id.* app. § 1401(f).

13. *Id.* app. § 1430(a)(1).

14. *Id.* The section makes it unlawful "[f]or any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate." *Id.* Parallel provisions require certification (and compliance with certification terms) of airmen, *id.* § 1430(a)(2)-(3), operating air carriers, *id.* § 1430(a)(4), aircraft producers, *id.* § 1430(a)(7), and airport operators, *id.* § 1430(a)(8).

In addition, when a non U.S.-registered aircraft is to be operated in the U.S. under lease or charter by a U.S.-certificated air carrier, the aircraft will require an FAA airworthiness certificate. FED. AVIATION ADMIN., FAA ADVISORY CIRCULAR NO. AC 21-23, at 21 (1987) [hereinafter FAA ADVISORY CIRCULAR NO. AC 21-23].

than registration most directly serves the government's interest in aviation safety.

Although certification is the procedure by which the FAA determines the safety of individual aircraft, certification itself actually occurs rather late in the regulatory process. In order for an aircraft to receive an airworthiness certificate, it first must be shown to conform to an aircraft type design that has been certified by the Federal Aviation Administration.[15] The FAA also issues certificates of approval for aircraft production quality control systems, though these (unlike type design certificates) are not, strictly speaking, prerequisites to the issuance of airworthiness certificates.[16] All three kinds of certificates—design, production and airworthiness—are expressly contemplated in the Federal Aviation Act.[17] In point of fact, the FAA regulates the design and manufacture not only of complete aircraft, but also of certain aircraft appliances and component parts which it considers eligible for separate certification.[18] Aircraft and aircraft components are referred to collectively for these purposes as "civil aeronautical products."[19] In addition, the FAA separately licenses pilots, aircraft mechanics, repair stations, and the like.[20]

B. *Airworthiness Regulations*

If airworthiness certification takes place against the backdrop of prior design and production certification, the latter two kinds of certification in turn proceed on the basis of previously adopted FAA design and production regulations. Put differently, the FAA ensures the airworthiness of U.S.-registered aircraft first by adopting safety regulations on aircraft design and production, then by certifying particular designs and production quality control methods as in compliance with those regulations, and finally by certifying that individual aircraft conform to a certified design and certified production process. The basic standards are found in Title 14 of the Code of Federal Regulations in the form of Federal Aviation Regulations (FARs), organized by various categories of aircraft design in FARs 21 through 35.[21] The regulations governing design and production,

15. 49 U.S.C. app. § 1423(c).

16. *Id.* app. § 1423(b).

17. *Id.* app. § 1423(a)-(c).

18. *Id.* app. § 1423(a)(1) ("The Secretary of Transportation is empowered to issue type certificates for aircraft, aircraft engines, and propellers . . . ."); *id.* § 1403.

19. A civil aeronautical product is defined as "any civil aircraft, or aircraft engine, propeller, appliance, material, part, or component to be installed thereon." FAA ADVISORY CIRCULAR No. AC 21-23, *supra* note 14, at ii.

20. 49 U.S.C. app. §§ 1422, 1427.

21. 14 C.F.R. pts. 21-35 (1992).

like airworthiness standards themselves, are generally the products of traditional administrative rulemaking under the Administrative Procedure Act.[22] On the other hand, the airworthiness certification of civil aeronautical products is a species of individual administrative decisionmaking. Part III of this Article more fully presents the regulatory process just described, but from the regulated industry's point of view.

C. *Compliance and Enforcement*

Naturally, the FAA's involvement in air safety issues does not end with initial airworthiness certification of an aircraft or component. The agency has established programs to monitor the safety performance of aircraft in service and to direct corrective actions on the part of manufacturers, owners and operators if unsafe situations are later deemed to arise.[23] Regulations known as Airworthiness Directives (ADs) may be issued to require design modifications, special inspections or special operating procedures, or to define new operational limitations for aircraft.

The FAA also has need of a mechanism for dealing with eventual noncomplicance with civil aviation standards on any of the matters covered by the FAA certification procedures, that is to say, for enforcement. If noncompliance is detected prior to the issuance of the relevant certificate, then the result will be denial of the certificate. Failure to comply with the terms of a certificate once issued, on the other hand, may result in a range of administrative sanctions, including revocation of the relevant certificate.[24] Internal FAA guidelines seek to channel the agency's discretion in determining the appropriate sanction for any such violation.[25]

The FAA enforcement program applies equally to all activities regulated by the agency. When violations occur—whether involving the production or maintenance of aircraft (the subject matter of the certification upon which this Article focuses) or the operation of airports or of aircraft—enforcement action may be indicated.[26] Internal FAA guidelines describe the processes of surveillance, investigation, reporting and referral of matters for appropriate enforcement action.[27] These activities are un-

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22. 5 U.S.C. §§ 551-559, 701-706 (1988 & Supp. II (1991). The Act gives the Secretary of Transportation authority to promulgate minimum airworthiness standards for aircraft and component parts. 49 U.S.C. app. § 1421(a) (1988).

23. *Id.* § 1429(a).

24. *Id.* app. § 1429.

25. *See* FED. AVIATION ADMIN., FAA ORDER 2150.3A, COMPLIANCE AND ENFORCEMENT PROGRAM 1 (1988) [hereinafter COMPLIANCE AND ENFORCEMENT PROGRAM].

26. 49 U.S.C. app. § 1429.

27. *See generally* COMPLIANCE AND ENFORCEMENT PROGRAM, *supra* note 25.

derstandably directed primarily at manufacturers so far as the production of aircraft is concerned and at air carriers with respect to aircraft maintenance. Actions on other matters will be directed toward certificated maintenance personnel, certificated maintenance facilities (known as "repair stations") and even aircraft operators if they operate an aircraft in noncompliance with an airworthiness directive. Details of the FAA's compliance and enforcement program lie outside the scope of this study and will not be examined further in the sections that follow. Suffice it to say that an airworthiness inspector who finds an aircraft not to be in condition for safe operation must promptly notify the aircraft owner or operator and report to the agency. The subsequent factual investigation yields a violation report. The same would be true, for example, of allegations that an aircraft manufacturer failed to maintain a quality control system during aircraft production. FAA guidelines urge both careful adherence to regulations and attention to mitigating or otherwise unusual circumstances ("firmness" and "fairness").[28] However, air carriers appear, in keeping with section 601(b) of the Federal Aviation Act, to be held to an especially high standard, namely " 'to perform their services with the highest possible degree of safety in the public interest.' "[29]

Enforcement, with a view to promoting compliance with the established safety standards, is achieved through both informal administrative action (warning letters or letters of correction) and formal legal action. Statutory methods for the latter include amendment, suspension and revocation of certificates,[30] civil and criminal penalties,[31] and aircraft seizures,[32] supported by judicially enforceable orders, including cease and desist orders and injunctions.[33] Considerable emphasis is placed by the FAA on guidelines for choosing between administrative and legal enforcement action,[34] and, within the latter, for the use of discretion in setting sanctions.[35] The

28. *Id.* at 14.

29. *Id.* at 16 (quoting 49 U.S.C. app. § 1421(b) (1988)).

30. 49 U.S.C. app. § 1429.

31. *Id.* §§ 1471-1472.

32. *Id.* § 1472(b)(3).

33. *Id.* § 1487.

34. Administrative action may be favored when no significantly unsafe condition exists, no incompetence is demonstrated, the violation is not deliberate, and the violator's history and attitude are positive. COMPLIANCE AND ENFORCEMENT PROGRAM, *supra* note 25, at 17.

35. *See id.* at 22-23. For example: 1) sanctions are not initially proposed with a view to downward negotiation; 2) all mitigating circumstances are considered at the outset; 3) all significant enforcement actions should be coordinated with the Office of Chief Counsel to ensure consistency; 4) record-keeping or "paper" violations are considered serious and any falsification of records will incur the most severe sanctions; 5) voluntary reporting of violations is marginally rewarded; 6) the compliance history of the offender is considered; 7) financial circumstances do not constitute an excuse or

FAA states as a matter of principle that a legal sanction should be selected in each case that is sufficient to punish the particular violation and to serve as a deterrent and example to others.[36]

Significantly, guidelines suggest that certificate action (amendment, suspension or revocation) should be the FAA's primary enforcement tool, but that civil penalty action may be preferred when disruption of service will have a substantial adverse impact on the public not outweighed by safety considerations.[37] An Assistant Chief Counsel is responsible for deciding whether to seek suspension or revocation of an aircraft registration certicate for any reason rendering the aircraft ineligible for registration.[38] Any decision to initiate certificate action triggers the adjudicatory-style provisions of the Federal Aviation Act, initially a notice of proposed certificate action, followed by an opportunity to answer and be heard,[39] possibly including an informal conference and a reevaluation of the case. Any person whose certificate is impaired by an order issued by the FAA may appeal to the National Transportation Safety Board (NTSB) which, after notice and hearing, may modify or reverse the FAA order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the order.[40] When an order is appealed to the NTSB, the legal office that issued the order will represent the FAA at an evidentiary hearing before an NTSB administrative law judge.[41] Either party may appeal from the ALJ's initial decision to the full Board, whose review is limited to considering whether the decision is based on erroneous findings of material facts, a departure from law or NTSB policy, an abuse of discretion, or a prejudicial procedural error.[42] Within sixty days after the Board issues its final decision and order, the certificate holder may petition the Court of Appeals for judicial review.[43] Where enforcement

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ground for mitigation; 8) the FAA's failure to discover violations over a long period is no excuse, though enforcement action may be inappropriate where the FAA affirmatively misled a carrier about compliance issues. *Id.*

36. *Id.*

37. *Id.* at 18.

38. *Id.* at 35.

39. 49 U.S.C. app. § 1429. The notice sets out the facts alleged, the regulations in issue and the action proposed; it also advises the respondent of the several alternative responses available, including voluntary surrender of the certificate. *Id.*

40. *Id.*

41. Procedures before the NTSB are contained in the NTSB Rules of Practice in Air Safety Proceedings, 49 C.F.R. pt. 821 (1992).

42. 49 U.S.C. app. § 1429(a); *see also* COMPLIANCE AND ENFORCEMENT PROGRAM, *supra* note 25, at 142-44.

43. 49 U.S.C. app. § 1486(a). In the case of NTSB decisions adverse to the FAA, the agency has no right of appeal. *Id.* at 1486.

action other than certificate action is taken (for example, civil penalties, aircraft seizures, cease and desist and other orders, injunctions, or criminal prosecution), substantially different procedures obtain.[44]

D. *Aircraft and Airport Operations*

The FAA naturally also has safety considerations to bear in mind that have more to do with the operation of aircraft in American airspace than with the certification of aircraft and their component parts. The territoriality-based system of airworthiness certification makes it entirely likely that an aircraft will enter the space of a jurisdiction in which neither its generic design, nor its production, nor its individual airworthiness has been certified. For the most part, the nations of the world do not formally require that a craft conform to the national standards of design, production or airworthiness of every jurisdiction where the craft flies. However, the Chicago Convention of 1944, and the international standards and practices administered by the International Civil Aviation Organization (ICAO) created under that convention, seek to assure that aircraft registered in one signatory country meets certain minimum safety standards when operating in the airspace of another signatory country.[45]

Every country also has an evident interest in seeing to it that craft flying in its airspace or landing or taking off at its airports be compatible with the local air control system. Throughout the world, we accordingly find operating rules designed to bring international aviation into line with existing national air controls. The FAA's operating rules are found at 14 C.F.R. Parts 71 through 109. It is plainly essential that all craft used in international aviation meet design standards that will enable them to satisfy the operating conditions imposed by every state in which they may expect to venture. These operating rules apply more broadly than might be expected. For example, FAA regulations require that these rules be followed not only by foreign-registered craft entering the United States but also by American-registered craft wherever they may happen to operate.

Although the FAA's safety agenda thus transcends issues of certification of design, production and individual aircraft, it is these issues that are the focus of the present Article.

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44. *See* RICHARD FALLON, ADMIN. CONF. OF THE U.S. REPORT: IMPOSING CIVIL MONEY [PENALTIES] FOR VIOLATIONS OF THE FEDERAL AVIATION REGULATIONS: IMPLEMENTING A FAIR AND EFFECTIVE SYSTEM (1990).

45. INT'L CIVIL AVIATION ORG., MEMORANDUM ON ICAO 11 (1981) [hereinafter MEMORANDUM ON ICAO] (on file with Law & Policy in International Business).

III. THE FAA'S AIRWORTHINESS CERTIFICATION PROCESS AND THE AERONAUTICAL INDUSTRY

The preceding section of this Article demonstrates how, under the American regulatory scheme, the registration of individual aircraft is linked to the prior processes of certifying aircraft design and aircraft production quality control methods. The importance of these processes can be particularly well gauged by examining regulatory realities from the aeronautical industry's point of view.

A. *Aircraft Design Certification*

An aircraft manufacturer ordinarily will seek design certification, in the form of a "type certificate," for every model of aircraft it places on the market. As indicated earlier, design certification is required not only for aircraft as such, but for component parts such as aircraft engines, propellers and appliances as well.[46] Fresh approval is also required for any major modification of a type-certificated design.[47] More specifically, the Federal Aviation Act invites any interested person—normally a manufacturer—to apply to the Secretary of Transportation for the type-certification of an aircraft or component part.[48] The FAA then conducts an investigation and, in rare instances, holds hearings.[49] It is also authorized by statute to require that the applicant conduct certain physical and performance tests to show that the product design meets FAA standards as set out in the agency's published design regulations and is otherwise safe.[50] If satisfied in all respects, the FAA issues the design certificate.[51] Such certificates may be of limited duration and may contain specific

46. While "type certificates" are issued for the design approval of aircraft, aircraft engines and propellers, 14 C.F.R. § 21.11-.53 (1992), design approval of appliances and articles of equipment to be manufactured outside of the United States take the form of "letter[s] of TSO design approval" to signify that they meet the performance standards of an FAA technical standard order, *id.* § 21.617(a).

47. In such cases, either a "supplemental type certificate" will be issued, or the existing certificate will be appropriately amended. *See generally* 14 CFR §§ 21.111-.199 (1992).

48. 49 U.S.C. app. § 1423(a)(2) (1988).

49. *Id.*

50. The FAA regulations containing design requirements are set out in Federal Aviation Regulations (FAR) 23 through 35, 14 C.F.R. pts. 23-35 (various products), and 21, 36, and 91, *id.* pts. 21, 36, 91 (noise standards), as well as Special Federal Aviation Regulation (SFAR) 41, *id.* pt. 21 (certain small airplanes). The FAA also has promulgated a series of Technical Standard Orders (TSO) for certain component parts. *See id.* § 21.601 (1992).

51. The FAA must find "that such aircraft, aircraft engine, propeller, or appliance is of proper design, material specification, construction, and performance for safe operation, and [that the design] meets the minimum standards, rules and regulations prescribed." 49 U.S.C. app. § 1423(a)(2).

terms and conditions.[52] The fact that the FAA has issued a type certificate or other form of design approval does not relieve the certificate holder of principal responsibility for non-compliance with FAA airworthiness standards or for unsafe design features.[53]

The simplest situation is one in which an American manufacturer of aeronautical products seeks certification by the FAA of one of its designs. In this situation, the manufacturer files directly with the FAA an application for design approval.[54] These regulations provide for the FAA or its designees to conduct the technical inspections and evaluations required for certification. The FAA aircraft certification staff involved in the certification process consists of engineers, flight test pilots, and aviation safety inspectors.[55]

However, a manufacturer typically requests certification of its designs not only—perhaps not even—in the country of its nationality or the place of manufacture, but in those jurisdictions where it foresees that the ultimate purchasers of its products may seek to register them. This results from the fact already mentioned that the airworthiness certification of individual aircraft within any given country depends upon the aircraft's conformity to a design type that has previously been certified within that same country. More specifically, an FAA type design approval for a product assembled abroad is a prerequisite to the import of the product for eventual registration in the United States, to its operation here under lease or charter by a U.S.-certificated air carrier or operator, or to its installation on an aircraft carrying an American airworthiness certificate.[56] In fact, the FAA does not normally grant type design approvals for foreign-manufactured products unless intended for placement on the U.S. registry, or for operation by a U.S. operator under lease or charter.[57]

In the United States, as in many other countries, the procedures for issuance of type certificates are somewhat different for foreign-manufactured imports than for domestic products. As a later section of this Article explains, the FAA's findings of compliance for imported products may be based primarily on the inspections and evaluations performed by the agency's counterpart in the exporting country.[58] The FAA's type certifica-

52. *Id.*

53. United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 815-16 (1984).

54. The procedures for issuance of type certificates to U.S. manufacturers are set out in Federal Aviation Regulation 21.21, 14 C.F.R. § 21.21 (1992).

55. *See S.A. Empresa,* 467 U.S. at 807.

56. 14 C.F.R. § 21.183(c).

57. FAA ADVISORY CIRCULAR NO. AC 21-23, *supra* note 14, at 21.

58. *Id.* at 22.

tion procedures for imported goods are set out in Federal Aviation Regulation 21.29.[59]

Just as the airworthiness of individual aircraft is dependent on their continuing conformity with approved design and production standards, so these standards too are subject to ongoing monitoring.[60] The FAA's review of the safety performance of approved aircraft designs and of the quality of approved production and maintenance systems may lead it to require that specified changes be made in order for them to retain their certification.

B. *Aircraft Production Certification*

This kind of certification is closely linked to the design certification just discussed. According to the Federal Aviation Act, a production certificate is to be issued upon a manufacturer's showing that multiple articles or "duplicates" of an aircraft or aircraft component covered by a design certificate will conform to that certificate.[61] Thus, a production certificate is granted upon demonstration of a quality control system offering reasonable assurances that the aircraft actually produced will conform to the basic design for which a type certificate has been issued or that has otherwise been approved, and that it will be in a condition for safe operation. The FAA is authorized to make or require such tests or inspections as may be necessary to satisfy this standard, and may impose a time limit and other conditions on any production certificate issued.[62] A type certificate or other form of FAA design approval must have been issued before a production certificate can be issued; however, a production certificate is not itself a prerequisite for issuance of an airworthiness certificate for the aircraft produced.[63] It simply facilitates the process by which the latter certification may be achieved and is accordingly advantageous to the aircraft manufacturer and owner alike.

Unlike FAA design certification, which may be sought by any manufacturer, domestic or foreign, who anticipates registration of aircraft of that design within the United States, FAA production certificates are available exclusively to American aircraft manufacturers.[64] Products imported to

59. 14 C.F.R. § 21.29 (1992).

60. *Id.* § 21.99.

61. 49 U.S.C. app. § 1423(b) (1988).

62. *Id.; see* Federal Aviation Regulation 21, subpts. F, G, 14 C.F.R. §§ 21.121–.165 (1992). The FAA's emphasis on the quality of the production process is to be contrasted with certain other countries' emphasis on the substantiality of the manufacturer's organization.

63. 14 C.F.R. §§ 21.133, .173.

64. *Id.* § 21.137.

the United States for FAA airworthiness certification or approval must be accompanied by an export certificate of airworthiness issued by the aircraft certification authority of the country of manufacture.[65] The export certificate attests to the aircraft's conformity to the FAA certificated design and to its being in a condition for safe operation.[66] Thus, the purpose that would otherwise be served by issuance of an FAA production certificate is served through another procedure.

C. *Airworthiness Certification*

As previously stated, FAA airworthiness certification is required of any aircraft registered in the United States.[67] An airworthiness certificate attests to the conformity of each aircraft with the specifications of an FAA-approved aircraft design and to its being in condition for safe operation.[68] Thus, issuance of a design certificate is an absolute prerequisite to the issuance of an airworthiness certificate (as well as to approval of products for installation on U.S.-registered aircraft). Airworthiness certificates, like the other kinds of certificates, may be issued for a limited duration and subject to specific terms and conditions.[69] Specifically, it is an FAA requirement, and a requirement of most other countries, that aircraft subject to regulation not only meet the relevant standards initially, but also continue to do so.[70] Thus, aircraft must remain in conformity with an FAA-certified design and be maintained in a safe condition. The FAA accordingly also certifies replacement parts, maintenance personnel, and repair stations.[71]

It frequently happens that the owner of a registered aircraft wants to modify the aircraft in a way that will place it out of conformity with the then-approved design specifications. Accordingly, a significant civil aircraft modification industry has developed in the United States. The FAA has established procedures to certificate design modifications and to help assure that aircraft so modified conform to the approved design change.[72]

Although the FAA is required by law to make the findings necessary for the approval of a design and for the airworthiness certification of U.S.-registered aircraft, it does have latitude in deciding how such findings are

65. *Id.* § 21.183(c).
66. *Id.*
67. 49 U.S.C. app. § 1430(a)(1) (1988).
68. *Id.* § 1423(c).
69. *Id.*
70. The requirement for the United States is found at 14 C.F.R. § 21.181(a)(1) (1992).
71. 14 C.F.R. § 21.500.
72. *Id.* §§ 21.95, .97, .99.

to be made.[73] This means some freedom of choice not only over the kind of evidence to be accepted, but also over the extent to which the FAA itself must exercise independent technical judgment. This latitude has allowed the FAA to enter into cooperative arrangements with selected countries for dealing with the certification of designs or products previously certificated overseas or otherwise imported from abroad. This network of country-to-country agreements is described in section VC of this Article.

IV. THE CASE FOR INTERNATIONALIZING AIRWORTHINESS AND RELATED STANDARDS

There are over thirty countries in addition to the United States having a significant aeronautical product manufacturing industry, each with a civil aviation authority regulating such manufacture and operating under that country's laws. Even the briefest account of the FAA's certification activities demonstrates the practical necessity of harmonizing the design, production, and airworthiness standards found among these various countries, as well as the operating rules that govern air traffic within them. The factual interdependence characterizing aviation regulation in today's world surfaces at every stage of the FAA's certification activities.

A. *Industry Incentives*

The import and export of aviation products is an important feature of the multibillion dollar American aeronautical industry. Unless airworthiness standards are reasonably similar around the world, aircraft manufacturers cannot effectively engage in that manufacture on an international basis. As already noted, the entitlement of an individual craft to airworthiness certification essentially turns on the craft's conformity with an approved aircraft design, which in turn must satisfy applicable airworthiness regulations.[74] Since aeronautical products will eventually have to earn individual airworthiness certification in all countries where their own operators contemplate registering them, manufacturers must be cognizant of airworthiness and design standards in every country in which they see, directly or indirectly, a market. Unless a design offers reasonable confidence in that respect, it is unlikely to prove very attractive on the international market for aircraft. This is true no less for trade in component aeronautical parts than for trade in completed aircraft.

A factor further dramatically favoring the internationalization of airworthiness standards is the growing international character of aircraft

73. *See* 49 U.S.C. app. § 1421(a)(3).

74. 14 C.F.R. § 21.183(c) (1988).

manufacture itself. Major European aircraft and engines are today being manufactured internationally. Components of virtually every U.S.-assembled aircraft and aircraft engine are being designed and manufactured all over the world. Likewise, the European Concorde (SST) is a product of France and the United Kingdom; the Fokker F28/100 a product of the Netherlands, Germany, the United Kingdom, and France; the Airbus 300, 310, and 320 a product of France, the United Kingdom, Germany, Belgium, and Spain; the ATR 42/72 a product of France and Italy; and the SAAB 340 a product of the United Kingdom and Sweden. Additionally, parts and equipment for these planes come from Greece, Ireland, Portugal, Austria, Switzerland, Denmark, Finland, and Norway, not to mention non-European sources.

Among the prime movants in the early 1970s of a system of European Joint Aviation Authorities—discussed more fully later in this Article—was AECMA, the European aeronautical manufacturers association. AECMA's purpose was to stem the proliferation of European airworthiness codes, the emergence of needless national variants, and the growth of discrepancies in the interpretation and implementation even of those provisions in common. In existence at the time were a set of British standards, a French code similar to the FAA's, a German translation of the American standards, and a host of national variations in the other European countries. Quite apart from their inefficiencies in a global setting, regulatory discrepancies raise a prospect of unequal treatment of like products, and therefore a risk of disguised protectionism. From the European point of view, the case for internationalizing airworthiness standards has only been strengthened by the emergence of a very significant European aeronautical manufacturing industry over the last fifteen years. Increasingly, it is the European manufacturer of aeronautical products whose research, development and marketing paths are being cleared by the prospect of harmonized airworthiness standards.

Aircraft operators represent another segment of industry that has encouraged heightened international cooperation on the FAA's part in the airworthiness field. Operators plainly derive an interest in orderly airworthiness regulation from their obligation to register and maintain to standards the craft they operate. In addition, U.S.-manufactured and U.S.-registered aircraft are with some frequency being leased to foreign carriers or operators for use outside the United States.[75] The latter need to keep such aircraft in conformity both with FAA- and foreign-approved designs. Moreover, American operators are permitted to operate foreign-registered

75. FED. AVIATION ADMIN., EXPORT/IMPORT AIRWORTHINESS CERTIFICATION OF CIVIL AERONAUTICAL PRODUCTS, FAA-P-8110-1 28 (1987) [hereinafter FAA EXPORT/IMPORT].

aircraft provided those aircraft likewise conform to an FAA-approved design. These and other industry developments favor an approximation of national airworthiness requirements and suggest an opening of regulatory channels with foreign airworthiness authorities.[76]

B. *Foreign Government Incentives*

The harmonization of airworthiness standards stands to bring related advantages to the different national regulatory bodies affected. The nations that initially formed the European Joint Aviation Authorities did so in part in order to overcome difficulties encountered in certificating aircraft that had been manufactured (and possibly also certificated) in countries having somewhat different airworthiness standards. The European regulators plainly and simply sought to facilitate the import and export of aviation products, as well as the certification of joint aviation products.

A similar logic suggested harmonization on a wider scale, including and especially with the United States. The international aviation industry was traditionally centered in this country, and it made little sense to the Europeans (except from a short-sighted protectionist point of view) to maintain airworthiness standards that impeded the flow of American-made aircraft to European users or of American-made aeronautical parts for use in European products.

The European authorities were also in search of a comprehensive set of airworthiness standards. Given the variation among European standards then in place, coupled with the powerful influence over them of the existing American standards, the latter exerted a particular appeal. On the other hand, the pace of technological change in the aviation field (plus a measure of national pride) made it unthinkable that the Europeans would simply adopt the FAA's accumulation of regulations and in effect "freeze" the Federal Aviation Regulations as they then stood. Collaboration of a more flexible and ongoing nature was indicated. Although civil aviation is probably not unique in this respect, it is a field marked by technological complexity and rapid development. Among the attractions of the Joint Aviation Authorities to the separate European governments was the difficulty each had been experiencing, and expected to continue experiencing, in maintaining regulatory competence in all fields. Collaboration with the United States authorities offered similar promise not only on account of their accumulated regulatory and technical experience, but also the continuing expertise they could be expected to bring to the solution of newly emerging problems.

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76. *Id.* at 24-29.

C. *American Government Incentives*

Faced with the realities of a more diversified aeronautical manufacturing environment, American regulatory authorities have come rather quickly to share their European counterparts' enthusiasm for the harmonization of standards. To begin with, harmonization increases the ease with which American-made products will be welcome for certification and eventual registration abroad. But it is also simply no longer the case, if ever it was, that the FAA can concern itself solely with the conformity of American aviation technology to the needs of air safety. With non-American craft, non-American component parts, and joint aeronautical products assuming an ever larger share of the international market, the FAA needs to be equipped to make airworthiness judgments about designs or products with which it may not be initially familiar and that were conceived against the background of different foreign country airworthiness standards.

I have previously adverted to the government's perceived economic advantage in addressing technological problems jointly with foreign governments. A good example of concerted action of this sort was the convening, at the FAA's invitation, of an international conference on aging aircraft in the aftermath of the 1985 JAL 747 air disaster and the 1988 Aloha accident. The conference, attended by the regulatory authorities and representatives of manufacturers and operators in twenty countries, led to the creation of an International Airworthiness Assurance Task Force on Aging Aircraft and resulting research and development on aircraft fatigue, corrosion, repair and maintenance, and flight loads.

Thus far, the discussion of industry and government incentives has focused exclusively on the virtues of a harmonized regulatory environment. As any student of the contemporary administrative process knows, however, rulemaking as such constitutes a small part of that process. The design, production, and airworthiness standards with which this study is concerned also require implementation. They need to be applied with respect to particular type designs, particular production processes, and individual craft. The implementation stage of the administrative process opens up large opportunities for collaboration among national airworthiness authorities and corresponding government savings. These opportunities, which obviously present risks as well as promise, are best illustrated by the workings of the many bilateral airworthiness agreements to which the United States is a party. As the discussion in Part VC of this Article shows, the mutual recognition of airworthiness certification contemplated by the bilateral agreements depends in turn, as a practical matter, on a certain level of commonality among national regulatory standards. Thus,

the prospect of mutual cooperation in the airworthiness enforcement process has served as yet an additional impetus to regulatory harmonization.

V. The Existing International Framework of Aviation Regulation

The forms of international regulatory cooperation engaged in by the FAA are not taking place in an historical vacuum. Over the years, the traditional territoriality-based system of aviation regulation has at various points taken on a distinct international dimension. Although aviation regulation remains a nationally organized activity, the realities of economic and regulatory interdependence have given certain aspects of international cooperation an ever-increasing importance in that regulatory domain.[77] Even the Federal Aviation Act expressly recognizes that international agreements will figure prominently in American aviation regulation.[78]

A. *The Chicago Convention: The International Civil Aviation Organization*

The Convention on International Civil Aviation[79] (or the Chicago Convention), which dates from 1944 and now counts over 150 signatory states,[80] represents an undertaking by those states to adopt and enforce a common minimum set of international standards for aircraft, air traffic controller, and pilot certification. The Convention resulted from a conference on international civil aviation held in Chicago toward the end of World War II, by which time the need for orderly development of civil aviation had become apparent.[81] The Convention's basic idea is that each state party undertakes not to reexamine the soundness of aircraft or pilots

77. At the time drafting of the Convention on International Civil Aviation began in 1944, most air routes were confined within national boundaries. Int'l Civil Aviation Organization, The Convention on International Civil Aviation: The First Thirty-Five Years 3 (1979) on file with *Law and Policy in International Business* [hereinafter The First Thirty-Five Years]. "International routes, where they existed, consisted mostly of short trans-border hops." *Id.*

78. See Federal Aviation Act § 1102, which requires that the Administrator exercise his authority "consistently with any obligation assumed by the United States in any. . .agreement that may be in force between the United States and any . . . [other] countries, and shall take into consideration any applicable laws and requirements of . . . [other] countries." 49 U.S.C. app. § 1502.

79. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention]. Although the Convention accepts the principle that every state has complete sovereignty over its airspace, *id.* art. 1, it provides for the adoption of international standards and practices of air navigation, *id.* art. 37. Each state agrees to help secure the highest practicable degree of uniformity in regulations and procedures. *Id.*

80. Memorandum on ICAO, *supra* note 45, at 5 (1981).

81. *Id.* at 5-6.

entering its airspace when the craft or pilots, as the case may be, are already certified by the authorities of another Convention state as meeting the ICAO standards. The agreement to extend such "full faith and credit" to foreign country certification naturally depends on the existence of a common international minimum standard for aircraft, air traffic controllers and pilots, as well as uniform visual and instrument flight rules.[82] It is through its various annexes (particularly Annex 8 on "Aircraft Design and Quality Control") that the Convention establishes these minimum standards in the form of International Standards and Recommended Practices (SARPs). The development and improvement of standards is entrusted under the Convention to the Montreal-based International Civil Aviation Organization (ICAO). Altogether, ICAO has adopted seventeen annexes covering a wide spectrum of aviation specifications. Each state party to the organization is entitled to representation at meetings of the ICAO Assembly, which take place at least once every three years. The Assembly makes its decisions by majority vote,[83] but most of ICAO's work is accomplished through its thirty-member Council, assisted by a standing committee of experts known as the Commission[84] and by various technical panels.[85] The American delegate to ICAO enjoys ambassadorial rank.

The ICAO mechanism also presupposes that the participating states will in fact establish and enforce regulations that satisfy ICAO standards. ICAO standards are not self-executing and each state is charged with implementing them.[86] Article 38 of the Convention requires that a state notify ICAO if it finds it impracticable to comply with an ICAO standard and indicate the respect in which national standards fall short.[87] Although the FAA generally has no problem in satisfying ICAO standards—and considers it official policy to satisfy them[88]—it contemplates a number of situations in which noncompliance might occur. These circumstances are unfortunately very broadly conceived.[89] On the other hand, the FAA has

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82. *See id.* arts. 33, 37 (discussing the development of international airworthiness standards).

83. *Id.* art. 48(c).

84. *Id.* art. 56. The Commission is also comprised of representatives of aircraft manufacturers and of the leading manufacturing states. *See* MEMORANDUM ON ICAO, *supra* note 45, at 15–17.

85. *Id.* Specifications proposed for adoption as SARPs, and normally incorporated in Convention annexes, are developed by the Air Navigation Commission upon consultation with all contracting states, and then submitted to the Council for approval by a two-thirds majority. *Id.* at 18. Following their adoption and provided a majority of contracting states does not disapprove them, SARPS become effective at dates set by the Council. *Id.*

86. Chicago Convention, *supra* note 79, art. 1.

87. *Id.* art. 38.

88. FAA REGULATORY HANDBOOK, *supra* note 6, § 13-3.

89. Situations justifying noncompliance include the following:

adopted practices designed to minimize the likelihood of noncompliance.[90]

In addition to developing the minimum airworthiness specifications embodied in Annex 8,[91] ICAO has formulated detailed Procedures for Air Navigation Services (PANS), which are considered too detailed to be appropriate for inclusion in the SARPs.[92] Once approved by the ICAO Council, they are simply recommended to contracting states for national adoption.[93] ICAO also produces an Airworthiness Technical Manual that contains nonbinding guidance material designed to assist member states in developing and improving their own national airworthiness requirements.[94]

Under the Chicago Convention, the state of registry of an aircraft is required to inform the state of manufacture when it initially enters on its registry an aircraft of a type certified by the latter. This will enable the state of manufacture to notify all states of registry of any information about the aircraft's continuing airworthiness of which it becomes aware. Conversely, the state of registry must bring all continuing airworthiness information about a given aircraft type to the attention of the state of manufacture so that the latter may transmit it to all other contracting states known to have such aircraft on their registers.

In sum, the International Civil Aviation Organization has produced more a framework for international cooperation in airworthiness than an

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(1) Implementation would be detrimental to the national interest.

(2) Implementation cannot be effected without obtaining new or amended legislation.

(3) Necessary funds are not available.

(4) Implementation would work a substantial hardship on the various aviation activities of the United States.

(5) Existing national practices provide a greater degree of safety.

(6) Implementation would conflict with the principles upon which United States requirements are established.

Id. § 13-3(a).

90. FAA offices are required to ensure that ICAO standards are consulted and presumably observed prior to issuing an NPRM or final rule. Such offices are further required, whenever advised of a new or amended ICAO standard, to review FAA regulations, determine whether a difference exists and, if so, either seek to amend the FAA standard or process a notice to ICAO of the difference. Finally, these offices have a standing duty to review existing differences to determine whether it is appropriate to rescind notices that are no longer apt, to initiate amendments to FAA standards to produce compliance, to propose amendments to the relevant ICAO standards, or to maintain existing differences. *See id.* § 13-4(a) to (c).

91. Chicago Convention, *supra* note 79.

92. MEMORANDUM ON ICAO, *supra* note 45, at 18.

93. *Id.*

94. *Id.* at 20-21.

airworthiness code as such.[95] Moreover, rather than establish a common inspection system among the member states, it simply requires that each state inspect locally-manufactured aircraft in accordance with a state-approved inspection system and ensure that such aircraft conform with the corresponding approved design.[96]

The ICAO framework must be counted a limited one from several points of view. First, the organization lacks any inspection capability and engages in no enforcement activity whatsoever. Its standards, though binding on the state parties to the Convention, appear, as a practical matter, to be widely disregarded by many of those parties. In the second place, the standards that emerge from the process of consensus-building through negotiation among 150 different states tend to represent a lowest common denominator in airworthiness; the FAA in any event does not regard them as adequate from an air safety point of view.[97] Accordingly, the FAA is not obligated to and does not accept export certificates of airworthiness for the import of aeronautical products into the United States merely because those products satisfy the criteria of Annex 8 or because the exporting country is a Convention party.[98] Consideration was at one time given to establishing uniform rather than minimum standards under the Convention, but this was not done, partly because agreement could not be reached as to whose national standards—those of the United States or the United Kingdom— should form the basis for the Convention's standards. Finally, the ICAO rules take the form of performance rather than design standards and therefore do not satisfy any given state's need for a comprehensive airworthiness code. All in all, from a procedural and a substantive viewpoint alike, the ICAO mechanism continues to leave essential responsibility for airworthiness regulation in national hands.[99]

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95. Thus, ICAO has developed a system of uniform aeronautical symbols and terms and recommends ways of facilitating the flow of air traffic, particularly along heavily travelled routes. It has proposed ways of simplifying customs, immigration, public health and other procedures for passengers, crews, baggage, cargo and mail, and established minimum essential services and facilities at international airports. Improved airport and aircraft security has been its latest concern.

96. THE FIRST THIRTY-FIVE YEARS, *supra* note 77, at 16.

97. *See* FAA EXPORT/IMPORT, *supra* note 75, at 10. The Convention's requirement of the highest practical degree of uniformity in regulations does not necessarily facilitate adoption of the highest standards.

98. *Id.*

99. It is recognized that ICAO Standards would not replace national regulations and that national codes of airworthiness containing the full scope and extent of detail considered necessary by individual States would be required as the basis for the certification of individual aircraft. Each State is free to develop its own comprehensive and detailed code of airworthiness or to select a comprehensive and detailed code established by another Contracting State.

American participation in ICAO raises the question of how national representatives see to it that the positions they adopt at international regulatory gatherings reflect the views of other government agencies interested in the outcome of such activity. Although the United States is represented at Montreal by an official of the Federal Aviation Administration, international aviation necessarily interests other agencies as well. To this end, there has been created an Interagency Group on International Aviation, bringing together representatives of the Departments of Commerce, Labor, State and Transportation, and the Office of United States Trade Representative.[100]

B. *GATT, the Standards Code, and the Trade Agreements Act of 1979*

National airworthiness standards are affected not only by the level of agreement, albeit modest, reached through ICAO, but also by international agreements respecting nontariff trade barriers. The 1979 Tokyo Round of multilateral trade negotiations under the auspices of GATT[101] produced two related instruments of importance to the subject of airworthiness, namely the Agreement on Trade in Civil Aircraft (the Aircraft Agreement)[102] and the Agreement on Technical Barriers to Trade (the Standards Code).[103] Article 3 of the Aircraft Agreement provides in effect that the Standards Code shall apply to trade in civil aircraft, in particular to "civil aircraft certification requirements and specifications on operating and maintenance procedures."[104]

The Standards Code has as its principal objective to ensure that national air transport safety measures are not employed and do not function as disguised trade barriers.[105] To that end, the Code requires that national

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THE FIRST THIRTY-FIVE YEARS, *supra* note 77, at 16.

100. *See* FED. AVIATION ADMIN., FAA ADVISORY CIRCULAR NO. AC 21-18, at 2 (1982) [hereinafter FAA ADVISORY CIRCULAR NO. AC 21-18].

101. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5-6, 55 U.N.T.S. 187 [hereinafter GATT]. The current amended version of the GATT appears at 4 Vol. B.I.S.D. 1 (1969).

102. Agreement on Trade in Civil Aircraft, *done* Apr. 19, 1979, 31 U.S.T. 619, 26 Supp. B.I.S.D. 162 [hereinafter GATT Aircraft Agreement].

103. Agreement on Technical Barriers to Trade (Relating to Product Standards), *done* Apr. 19, 1979, 31 U.S.T. 405, 26 Supp. B.I.S.D. 8 [hereinafter GATT Standards Code].

104. The GATT Aircraft Agreement defines civil aircraft as "all aircraft other than military aircraft," including engines and other parts and components, "whether used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification or conversion of civil aircraft." GATT Aircraft Agreement, *supra* note 102, arts. 1, 3.

105. GATT Standards Code, *supra* note 103, art. 2.1.

certification authorities grant foreign manufacturers in signatory countries (and hence foreign products) the same market access as they grant to domestic manufacturers.[106] More specifically, those authorities are required to accept test results, certificates or marks of conformity issued by the country of export whenever they have reasonable assurance that the procedures were performed by competent bodies using appropriate methods.[107] The Code further calls upon states to express their national standards whenever possible in terms of performance rather than design, to develop their standards and certification systems in accordance with open and public procedures, and to provide less developed countries technical assistance in their own development of such systems.[108] Like GATT violations generally, violations of the Standards Code are subject to established dispute resolution procedures. The Standards Code and Aircraft Agreement are implemented in the United States by titles IV and VI of the Trade Agreements Act of 1979, effective January 1, 1980,[109] and the United States is represented in GATT-related procedures by the Office of United States Trade Representative.[110]

C. *Bilateral Airworthiness Agreements*

As indicated earlier, the International Civil Aviation Organization has not undertaken to promulgate a uniform international airworthiness code, though its minimum standards mechanism does enable pilots and aircraft to cross national borders in the course of international aviation. ICAO accordingly does not adequately assist manufacturers and others engaged in the international marketing of aeronautical products in facilitating the registration and certification of such products by their prospective owners and operators in different jurisdictions. Even before ICAO was established, or the Standards Code promulgated, the United States began entering into bilateral airworthiness agreements with selected countries, that is, countries in whose standards and procedures we had particular confidence and therefore to whose judgments about airworthiness we might be prepared to grant full faith and credit.

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106. *Id.*

107. *Id.* art. 5.2.

108. *Id.* arts. 7, 11.

109. Trade Agreements Act of 1979, 19 U.S.C. §§ 2531-2533 (1988).

110. *Id.* § 2541.

The United States entered into its first bilateral airworthiness agreement with Canada in 1929, in the form of an executive agreement.[111] Twenty-six such government-to-government agreements have been concluded between the United States and countries deemed to have both a competent aviation authority and aeronautical product manufacturing industry.[112] The FAA has begun work with a number of additional countries (including China and the former Soviet Union) to broaden its number and range of bilateral airworthiness agreements.[113] The decision whether to enter into a bilateral agreement with a given country—a decision made by the FAA in consultation with an interagency group on international aviation—depends upon a number of considerations. These include: (1) the quality of the foreign state's airworthiness laws and regulations; (2) the technical competence and efficacy of the foreign aviation authority; (3) the design and manufacturing capabilities of the local industry; and (4) the prospects for export of the country's aeronautical products to the United States.[114] No federal statute or regulation or international treaty requires such agreements. They have been entered into, at the initiative of the United States or a foreign country, only as and when the FAA determines that the other country has an aeronautical product manufacturing industry of significance whose products may be exported to the United States.[115] Bilateral agreements typically come into effect upon the exchange of diplomatic notes, with a State Department official signing for the United States.[116] They normally allow a contracting state that has lost confidence in another country's airworthiness authority or standards, in its discretion, to terminate its agreement with that country after a specified time following the giving of written notice.[117]

Bilateral airworthiness agreements differ substantially in scope. The more limited among them merely facilitate the other country's export of

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111. *See* William J. Sullivan, Ass't Dir. Aircraft Certification Service, Fed. Aviation Admin., Address Concerning A Framework for the Development of Compatible Cabin Safety Standards (undated) (on file with *Law and Policy in International Business*).

112. FAA ADVISORY CIRCULAR NO. AC 21-18, *supra* note 100, at i. These countries are Argentina, Australia, Austria, Belgium, Brazil, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Indonesia, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Poland, Romania, Singapore, South Africa, Spain, Sweden, Switzerland, and the United Kingdom.

113. *See* SULLIVAN, *supra* note 111.

114. *Id.*

115. *Id.*

116. *Id.*

117. A typical clause to this effect reads: "Either Contracting State may terminate (the) Agreement at the expiration of not less than 60 days after giving written notice of that intention to the other State." This is understood to allow termination for any reason within the discretion of the country invoking the right. FAA ADVISORY CIRCULAR NO. AC 21-18, *supra* note 100, at 3.

component parts manufactured to previously FAA-approved designs, while the more complete cover the import and export of an entire range of aeronautical products.[118] Generally speaking, however, bilateral airworthiness agreements obligate the aviation authorities of each country to treat as established the airworthiness of a civil aeronautical product imported from the other country (including those partially or wholly manufactured there) once the product is shown to have been certified by the other country's competent authorities. Bilateral agreements commonly read: " . . . the importing State shall give the same validity to the certification made by the competent aeronautical authority of the exporting State as if the certification had been made by the importing country's own competent aeronautical authority in accordance with its own applicable laws, regulations, and requirements."[119] Aviation authorities of the importing state thereby give the fullest credit possible to the airworthiness functions performed by the exporting state under the latter's own domestic certification system, thus avoiding the burdens and costs of essentially duplicative testing and certifying. On the other hand, even though two states have entered into such an agreement, the airworthiness criteria and practices prevailing in the two states may not be identical. That is to say, the importing state may impose additional or more stringent criteria than the exporting state and may require that those criteria be met. Accordingly, bilateral airworthiness agreements typically go on to provide:

> The . . . aeronautical authorities of the importing State shall have the right to make acceptance of any certification by the aeronautical authorities of the exporting State dependent upon the product meeting any additional requirements which the importing State finds necessary to ensure that the product meets a level of safety equivalent to that provided by the applicable laws, regulations and requirements which would be effective for a similar product produced in the importing State.[120]

The FAA emphasizes that these accords do not constitute trade agreements so much as agreements for technical cooperation.[121] This is demonstrated by the fact that the FAA treats an aircraft as "imported" for these purposes only if it is intended to be placed on the U.S. registry, and other

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118. *Id.*

119. Agreement on Certificates of Airworthiness for Imported Aircraft, Dec. 28, 1972, U.S.-U.K., 23 U.S.T. 4309, 4310.

120. *Id.*

121. FAA ADVISORY CIRCULAR NO. AC 21-23, *supra* note 14, at i-ii; FAA ADVISORY CIRCULAR NO. AC 21-18, *supra* note 100, at 2.

civil aeronautical products only if intended for installation on U.S.-registered aircraft.[122] On the other hand, the FAA considers bilateral airworthiness agreements essential for these purposes. It generally will not issue approvals of imported civil aeronautical products for purposes of U.S. certification unless such an agreement is in effect with the exporting country.[123] As a result, the United States has sought to enter into bilateral agreements with all countries having an aeronautical manufacturing industry whose products are likely to be exported to the United States. The situation is different so far as the export of American-manufactured civil aeronautical products are concerned. These may be exported to and imported by countries having no bilateral airworthiness agreement with the United States.[124]

A freer mobility of aircraft and aircraft components is of obvious utility to all parties in the international chain of aircraft manufacture and distribution, especially as aircraft and aircraft components are increasingly sold for use in a jurisdiction other than that where they have been designed and manufactured. Bilateral airworthiness agreements contribute to freer mobility at each of the certification stages set out earlier in this Article: acceptance of new aeronautical design technologies, conformity of aircraft to previously accepted designs, and the assessment of production processes. The subsections that follow show how industry and government savings can flow from a national authority's reliance on technical investigations that have been adequately performed by counterpart agencies abroad.

1. Design Certification Under Bilateral Airworthiness Agreements

Federal Aviation Regulation 21 provides that type certificates may be issued under either the standard procedures of FAR 21.21 (for approval of U.S.-manufactured products) under FAR 21.29 (for approval of imports to the United States).[125] Under the standard procedures, the FAA essentially conducts its own technical inspections and evaluations for purposes of establishing conformity with American airworthiness standards, while under FAR 21.29, such findings may be based primarily on the

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122. FAA ADVISORY CIRCULAR NO. AC 21-23, *supra* note 14, at ii.

123. *See* 14 C.F.R. § 21.29(a) (1992). The FAA implements its bilateral airworthiness agreements through its export and import certification regulations under Federal Aviation Regulation 21. *See id.* §§ 21.29, .183(c), .500, .502, .617.

124. Most European countries do not require bilateral airworthiness agreements for these purposes.

125. 14 C.F.R. §§ 21.21, .29(a) (1992).

inspections and evaluations, and ultimately the certifications, performed by the civil authority of the exporting state.[126]

FAR 21.29 contemplates issuance by the FAA of a type certificate for a product to be manufactured in a country with which the United States has a bilateral airworthiness agreement and then imported into the United States.[127] As a preliminary matter, an applicant must demonstrate that the product for which design certification is sought is in fact destined for export to the United States and that the product falls within the scope of the relevant bilateral airworthiness agreement.[128] As to its merits, the application must include proof to the FAA of certification by the foreign authority that the product in question has been tested and meets FAA airworthiness standards.[129] The application must contain all the required technical data, with manuals, placards, listings, and instrument markings in the English language.[130] Commonly the application will identify the foreign country airworthiness standards upon which the foreign authority originally based its design approval, and will cite the American airworthiness standards that are believed thereby also to be satisfied. It will normally also identify any unusual design features that the applicant or the foreign authority believes may necessitate issuance by the FAA of a special condition,[131] an exemption, or an equivalent safety finding. It is ultimately for the FAA, of course, to determine whether in fact the airworthiness standards and practices applied by the foreign authority correspond with American certification requirements.[132]

As a practical matter and in accordance with FAA preferences, the foreign aviation authority itself, rather than the foreign manufacturer, will file the application for FAA design certification. In this event, the manufacturer submits the application and supporting materials to its own certification authority with a request that the whole be forwarded to the FAA certification office responsible for the country in which the manufacturer

126. *Id.* § 21.29(a)(1).

127. *Id.* § 21.29(a).

128. *Id.*

129. *Id.* § 21.29(a)(1)(i)-(ii).

130. *Id.* § 21.29(a)(3).

131. A special condition needs to be issued if the FAA finds that its airworthiness standards do not contain adequate or appropriate safety standards for a product (or a product feature) because of a novel design characteristic of that product or feature. The issuance of FAA special conditions is done through the public rulemaking procedures set out in FAR 11 and is designed to yield such safety criteria for a given product as the FAA finds necessary to establish a level of safety equivalent to that established in the ordinarily applicable airworthiness standards. *See id.* §§ 21.16, .101.

In principle, FAA special conditions issued for imported products are the same as would be issued for a similar product made in the United States.

132. FAA ADVISORY CIRCULAR NO. AC 21-23, *supra* note 14, at 22.

is located. For example, the application for an FAA type certificate for the Airbus A 320 was officially filed by the French aviation agency (*Direction Générale de l'Aviation Civile*, or DGAC) on behalf of Airbus. In completing the application, DGAC certified that the design satisfied French airworthiness standards as well as American ones, to the extent they were the same. Actually the DGAC went further still, for it also determined, on behalf of the FAA, whether the design also satisfied FAA airworthiness standards to the extent that they exceeded or otherwise differed from French standards. In other words, the foreign authority supplies certification to the FAA not only with respect to shared or common standards, but also those peculiar to the United States.

Bilateral airworthiness agreements nevertheless leave scope for FAA technical involvement in the approval of foreign designs. The FAA must become sufficiently familiar with the general design, performance and operational characteristics of a product in order to determine whether the product would have met U.S. airworthiness standards if produced domestically, as well as to conduct any post-certification responsibilities (such as handling service problems, or approving design or flight manual changes) that may arise. (The first determination is called establishing "the normal U.S. certification basis" of the product in question.) Finally, of course, the FAA must identify any additional technical conditions, beyond those applied by the foreign authority, that compliance with FAA certification standards will require.[133]

In a fundamental way, the borrowing of design certification functions presupposes a basic familiarity on the part of the FAA with the foreign certification system and standards (and their comparability with those of the United States), as well as sufficient liaison with the foreign aviation authority to ensure that any technical or administrative questions that may affect American certification are identified and resolved. The FAA's interest and involvement in its counterpart's performance of design certification functions under a bilateral agreement normally cause it to designate a particular FAA unit (either a geographic office or technical directorate)

133. FAA additional technical conditions are those that must be satisfied above and beyond the certification standards of the exporting state in order to meet the standards necessary for FAA approval. Normally these can be determined simply be comparing the two countries' basic airworthiness standards. However, it is also possible that (1) the product had been granted an exemption from the exporting state's airworthiness standards, (2) that unusual design features will require that the FAA issue special conditions, (3) that the exporting state directed mandatory airworthiness actions on account of unsafe conditions during operations, or (4) the FAA has identified additional optional conditions that would assist an eventual U.S. operator in complying with independent U.S. operational or maintenance requirements. In these situations, too, FAA additional technical conditions may be specified. FAA ADVISORY CIRCULAR NO. AC 21-23, *supra* note 14, at 28.

having overall management of the project and to appoint an individual project manager. The foreign aviation authority will be informed of the FAA office and individual having project management responsibility. Although the foreign manufacturer is not barred from direct correspondence with the FAA on technical or policy issues that may arise, FAA policy is that the foreign authority remain fully involved:

> [B]ecause the FAA relies heavily on the [foreign civil aviation authority's] understanding of FAA's position on such issues, it is *imperative* that the [foreign authority] be included in any such meetings or correspondence. Also, FAA will normally seek the [foreign authority's] opinions before significant issues are resolved and, accordingly, may decline to meet with the applicant to discuss and resolve technical issues unless the [foreign authority] is adequately represented at the meeting.[134]

As soon as practicable, a "familiarization briefing" will be scheduled at a mutually agreeable location in order for the applicant, the foreign civil aviation authority, and the FAA to meet and discuss the design.[135] The FAA typically has its foreign counterpart arrange the meeting and considers the latter's attendance mandatory. Discussion will cover unusual design features that might necessitate the issuance of special conditions, any prior service history of the product, and comparisons between the relevant foreign and American airworthiness criteria.[136]

Cooperation between the FAA and its foreign counterpart does not end with the familiarization briefing; it continues throughout the design certification process. For example, the FAA needs to know of any unusual design features that come to light during further design development that might necessitate amendment of the U.S. type certification basis, issuance of unexpected special conditions or negotiations on acceptable means of compliance. It also needs to know of any relevant changes in the foreign authority's certification basis. Quite apart from these eventualities, the FAA may request additional technical data, or assistance in conducting inspections or test flights, and cooperation by the foreign aviation authority is obviously crucial, especially where there is a need to verify manufacturer-supplied data. Conversely, the FAA will share with the foreign authority the various technical and regulatory status reports produced in the course of final U.S. certification of the foreign design.

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134. *Id.* at 26.

135. *Id.*

136. *Id.* at 26-27.

Prior to a final certification meeting, the FAA will require formal assurance from the foreign aviation authority that the applicant has demonstrated the design's compliance with the applicable American airworthiness criteria.[137] At that meeting, it will be determined whether all items on the Type Certification Compliance Checklist drawn up for the project have been received either by the foreign authority or the FAA, as the case may be.[138] If so, FAA type certification (or, in the case of materials, parts or appliances, some other form of design approval) will follow.[139]

In the Airbus example given earlier, the FAA essentially lent credence to the DGAC's determination both with respect to Airbus' satisfaction of standards common to France and the United States, and to its satisfaction of any additional or different American requirements, though, particularly as to the latter, the FAA exercised some review of the DGAC's determination. The FAA estimates that, as a general rule, over ninety percent of the work involved in aircraft design approval of imported products is done by the aviation authority of the manufacturer's country.

Although the procedures followed by the FAA in certifying the airworthiness of imported product designs differ materially from those applicable to domestic product designs—chiefly through reliance on certification functions performed by the exporting state—the FAA's eventual issuance of a type certificate still constitutes a formal FAA finding that the relevant American airworthiness standards or their equivalent have been met.[140] The certificate has the same technical and legal significance as if issued on the basis of local inspection and evaluation, and the FAA is no less legally responsible for the accuracy of the underlying determinations than would be the case if all testing and evaluation had been performed locally by its own personnel.[141]

2. Airworthiness Certification Under the Bilateral Agreements

Thus far, my emphasis in discussion of the bilateral airworthiness agreements has been on cooperation in design certification. As indicated at the outset of this Article, however, airworthiness approval is also needed for specific products and, like the designs, these too may be imported rather than domestically produced. Once again, the international procedures developed by the FAA for these purposes seek to exploit fully the aircraft certification services that may have previously been performed on

137. *Id.* at 29.

138. *Id.*

139. *Id.*

140. FAA ADVISORY CIRCULAR NO. AC 21-23, *supra* note 14, at 22.

141. FAA ADVISORY CIRCULAR NO. AC 21-18, *supra* note 100, at 2.

the product in the place of manufacture or export. The bilateral agreements contemplate this form of cooperation as well.

In general, in order to earn FAA airworthiness approval, individual aircraft manufactured abroad must be accompanied by an export certificate of airworthiness by the civil aviation authority of the manufacturing or exporting country, with any deviation from an FAA-approved design noted thereon. United States registration of imported aircraft understandably also entails certain administrative steps—the application of new registration markings, issuance of a new identification plate, evidence of deregistration from the foreign registry, production of approved flight manual and placards in English as well as logbooks and maintenance records, recording of aircraft titles and security documents—that lie outside the scope of this study. The real interest of the process for the purposes of this Article lies in the reliance placed on export certificates of airworthiness in the issuance of U.S. airworthiness certificates for imported aeronautical products.

As was the case for design certification, legal responsibility for the U.S. airworthiness certification of individual craft remains with the FAA. Before issuing such a certificate, the FAA must find that the aircraft conforms to an FAA-approved design and that it is in a condition for safe operation.[142] However, export certificates of airworthiness by the country of export greatly facilitate airworthiness certification by the new country of registry. A bilateral airworthiness agreement, where applicable, may enable the FAA to base its airworthiness findings in whole or in part on the other country's export certification.[143] The situation is at its simplest when the imported aircraft is covered by a type certificate that itself was issued under the bilateral airworthiness agreement procedures described above. In principle, the craft will be entitled to U.S. airworthiness certification upon a simple export certification by the authorities in the country of manufacture that it conforms to an FAA-approved type design and is in a condition for safe operation.[144] Before issuing its own airworthiness certificate, the FAA will simply examine the aircraft to determine that it has not deteriorated or been modified.[145]

If an aircraft is exported to the United States from a country other than the country of manufacture—and if our bilateral agreements with both

142. FAA ADVISORY CIRCULAR NO. AC 21-23, *supra* note 14, at 44.

143. *Id.*

144. 14 C.F.R. §§ 21.183(c), .185(c) (1992). The FAA expects that the aircraft will have been fully assembled and flight tested, and the engines and propellers performance tested, before the export certificate is issued.

145. FAA ADVISORY CIRCULAR NO. AC 21-23, *supra* note 14, at 46.

the manufacturing and exporting countries contain the appropriate language—the FAA will accept export certificates of airworthiness issued by the exporting country, provided of course it furnishes the usual assurances about conformity to an FAA-approved design and safe operating condition.[146] The following remark in the FAA's relevant advisory circular reveals the complexity of the three-country situation:

> In such cases, the FAA considers it incumbent upon the [civil aviation authority] issuing the export certificate to consult with both the civil aviation authority of the country of manufacture and the FAA to assure it has adequate knowledge of the type design approved by the FAA. Configuration variations, modifications, and major repairs that are not FAA-approved should be identified, and FAA approval should be obtained before the [exporting civil aviation authority] issues its export certificate of airworthiness.[147]

Where an imported aircraft is in used condition, applicants for a U.S. airworthiness certificate have the added burden of identifying repairs and modifications that may have taken place, as well as documenting all maintenance and installation of new equipment.[148] This may entail extensive inspections by a variety of sources, including the civil aviation authority of the place of export and/or of manufacture.[149]

The situation is not fundamentally different for the certification of imported engines, propellers, or other component parts and appliances. Federal Aviation Regulations 21.500 and 21.502 provide for the airworthiness certification of foreign-manufactured parts for which a U.S. type certificate or other form of FAA design approval has previously been issued.[150] Such products are considered approved for installation on U.S.-registered aircraft when accompanied by a current export certificate of airworthiness issued by the authorities of the manufacturing state.[151] Predictably, the export certificate needs to state that the part conforms to a U.S. type certificate, passed a final operational check by the manufacturer and is in a condition for safe operation.[152] Nevertheless, the person returning to ser-

146. *Id.* at 45.

147. FAA ADVISORY CIRCULAR NO. AC 21-23, *supra* note 14, at 44. Early bilateral airworthiness agreements did not adequately cover the three-country situation. *See* FAA EXPORT/IMPORT, *supra* note 75, at 7.

148. FAA ADVISORY CIRCULAR NO. AC 21-23, *supra* note 14, at 45.

149. *Id.*

150. 14 C.F.R. §§ 21.500, .502 (1992).

151. *Id.*

152. *Id.* § 21.500.

vice the aircraft on which the component part has been installed bears legal responsibility for determining that the part: (1) has not been modified or damaged subsequent to the time of export certification; (2) complies with all applicable FAA airworthiness directives; (3) has been installed properly and is in a condition for safe operation; and (4) is accompanied by the necessary maintenance documentation.[153] Installation or replacement of parts thus obviously requires additional inspections and verifications that can be feasibly performed only on the importing side.

Plainly, the FAA places extensive reliance upon the airworthiness certification authorities of other states in the issuance of airworthiness certificates for individual imported aircraft. The extent of that reliance is shown by the fact that the FAA will simply not ordinarily issue a U.S. airworthiness certificate for a foreign-manufactured aircraft—new or used—unless accompanied by an export certification.[154] At the same time, some auxiliary FAA inspection may still be necessary, for example to ensure that no changes or modifications were made (and that no deterioration of aircraft condition occurred) since the time of export certification. Where reassembling has taken place, FAA flight testing may also be required.[155]

3. Production Certification under the Bilateral Agreements

Reference was made earlier in this Article to a third form of FAA certification, namely aircraft production certification.[156] Ordinarily, FAA approval of an American manufacturer's production and quality control system serves to facilitate the airworthiness certification of products manufactured at that facility, that is to say, the assurance that such products will conform to an approved design and be in a condition for safe operation. However, a production certificate is not a legal prerequisite for the issuance of airworthiness certificates for particular craft, even in the case of domestic manufacture. Thus, the use of bilateral airworthiness agreements for certifying foreign production processes is less critical than for certifying foreign designs and products. On the other hand, direct production quality control by the FAA of foreign manufacturing systems would simply not be technically or politically feasible.

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153. FAA ADVISORY CIRCULAR NO. AC 21-23, *supra* note 14, at 48.

154. *See id.* at 45-46.

155. *Id.* at 46.

156. Production certification, it will be recalled, is to be distinguished from design certification and the airworthiness certification of aeronautical products including complete aircraft. *See supra* subpart III.A-C.

Accordingly, the FAA does not use its bilateral agreements to certify overseas production as such. In effect, it treats a foreign country's issuance of an export certificate of airworthiness for individual craft as indirectly approving the production system, but only with respect to countries with which the United States has a bilateral airworthiness agreement. The use of such agreements for drawing inferences about the quality of overseas production only underscores the importance of carefully evaluating a foreign aeronautical industry and the airworthiness performance of the foreign country's aviation authorities before entering into a bilateral airworthiness agreement with that country.

4. General Considerations

The preceding discussion demonstrates that both the initial decision of the FAA to enter into a bilateral airworthiness agreement with a given country and the practical implementation of the agreement presupposes a considerable sharing of information between or among national civil aviation authorities. Predicating an airworthiness finding on a design's or a product's certification abroad requires familiarity with the other country's certification system, performance by the FAA of advisory services respecting the U.S. certification system, continuous monitoring of the other authorities' performance, and an awareness of equivalence or lack of equivalence in standards. These modes of cooperation also presuppose that the aviation authorities remain in close liaison and cognizant of changes in the other's technical, legal, and regulatory environment.[157] The FAA implements its bilateral airworthiness agreements through detailed export and import certification procedures set out in Part 21 of the Federal Aviation Regulations.[158]

The adequacy of the FAA's current bilateral airworthiness agreements lies outside the scope of this Article. Suffice it to say that the "bilaterals" do not address all issues, especially the emerging problems of multistate aviation products. However, over the sixty years of their existence, they have been made more modern and complete, while still allowing for dif-

157. A bilateral airworthiness agreement thus typically provides: "The aeronautical authorities of each Contracting State shall keep aeronautical authorities of the other Contracting State currently informed on all relevant laws, regulations, and requirements in their State." FAA ADVISORY CIRCULAR NO. AC 21-18, *supra* note 100, at 3.

158. There are separate FAA procedural requirements for issuance of type certificates for imported aircraft, engines, and propellers, 14 C.F.R. § 21.29 (1992); issuance of airworthiness certificates for the import of foreign-manufactured aircraft, *id.* § 21.183(c); issuance of export airworthiness approvals, *id.* subpt. L; approval of foreign-manufactured engines and propellers, *id.* § 21.500; approval of foreign-manufactured material, parts, and appliances, *id.* § 21.502; among others.

ferences in scope and coverage depending on the country in question.[159] Many have been revised and updated, and additional revisions are contemplated. According to the director of the FAA's Aircraft Certification Service, there is no documented evidence that any aircraft accident has been caused by a weakness in the aircraft certification process under a bilateral airworthiness agreement.

Plainly enough, the mutual recognition of airworthiness determinations makes no sense unless each party to a bilateral agreement is satisfied with the level of competence shown by the other's enforcement authorities. But it also makes no sense unless the basic airworthiness standards in the two countries are reasonably similar. There would simply be no point in agreeing to treat airworthiness certification performed in Canada as decisive of a design's or a craft's airworthiness in the United States unless the American airworthiness standards or type specifications, as the case may be, are ones that the Canadian authorities can recognize and administer. As already indicated, it can happen that the exporting country's standards are basically equivalent to the importing state's, but differ or fall short in one or another respect, and therefore bilateral airworthiness agreements commonly allow the importing state to prescribe additional technical conditions necessary to ensure that a covered product does indeed meet that state's required level of safety.[160] The fact remains that such agreements cannot yield much mutual recognition or "credence" absent a fundamental commonality of standards.[161]

Bilateral agreements of course do not themselves unify or harmonize national airworthiness standards. But the advantages to private enterprise and regulators alike of mutual recognition of airworthiness determinations have created an important incentive to harmonization of those standards. Reasonably common airworthiness standards in turn create an environment that favors joint national development of new aeronautical technologies and the related regulatory standards.

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159. Respects in which bilateral airworthiness agreements have been improved over the years are described in FAA EXPORT/IMPORT, *supra* note 75, at 7–8.

160. A typical clause to this effect reads:

> The aeronautical authorities of the importing State shall have the right to make acceptance of any certification by the aeronautical authorities of the exporting State dependent upon the product meeting any additional requirements which the importing State finds necessary to ensure that the product meets a level of safety equivalent to that provided by the applicable laws, regulations, and requirements which would be effective for a similar product produced in the importing State.

FAA ADVISORY CIRCULAR NO. AC 21-18, *supra* note 100, at 3.

161. *Id.* at 2.

D. *Harmonization of National Airworthiness Standards*

The preceding discussion shows that, although the network of bilateral airworthiness agreements to which the United States is a party decidedly facilitates international trade in aircraft, simplifies administrative responsibilities in airworthiness regulation, and indirectly promotes aeronautical innovation, it does not of itself produce a harmonized regulatory environment. The ICAO and GATT initiatives, discussed still earlier in this Article, though also favorable, have not substantially produced that result either.

Historically, substantial harmonization has tended to occur when the aviation authorities of one or more countries choose to adopt the standards developed by some other, presumably influential, aviation power. The Federal Aviation Administration's design, production, and airworthiness standards, as codified in Title 14 of the Code of Federal Regulations, have in fact been widely borrowed. Until recently, such borrowing took place on a strictly country-by-country basis, with the borrower free to select parts only and to introduce modifications as it saw fit. Apart from its haphazard character, this approach entails the problem that when the parent standards change, as they always do, all states that have borrowed them must follow suit if uniformity is to be maintained. From a more general perspective, too few nations may participate in the process to create an effective world-wide standard. Finally, the airworthiness standards of the state dominant in aviation circles may not necessarily be the best ones available on any given issue.

1. Development of the European Joint Aviation Authorities and Their Joint Airworthiness Requirements

For these reasons—along with the general aversion that many states feel toward copying foreign country regulations as such—a trend has recently developed in the direction of joint and collaborative standard-setting. Progressively over the past twenty years, a number of Western European nations have deliberately cooperated in the establishment of a structure called the Joint Aviation Authorities (JAA), whose central purpose has been to develop common airworthiness regulations. Current JAA participants include a majority of member states of the European Economic Community (Belgium, Denmark, France, Germany, Italy, the Netherlands, Spain, and the United Kingdom),[162] plus certain non-EEC

162. Non-JAA members of the Community are Greece, Ireland, Luxembourg, and Portugal. *See* U.S. GEN. ACCOUNTING OFFICE, PUB. RCED-92-179, AIRCRAFT CERTIFICATION: LIMITED PRO-

states (Austria, Finland, Norway, Sweden, and Switzerland).[163] To date, the JAA countries have adopted joint airworthiness requirements (or JARs) on different matters.[164] Initially, only France, the Netherlands, the United Kingdom, and the former West Germany agreed to make the JAR standard as such the national standard, the others making the JAR standard optional, so that parties subject to national certification in those states had a choice between meeting the JAR or the national standard on any given issue. More recently, all participating states have agreed to make the JAR provision, once adopted, their sole national standard on the subject.

The scale and timing of JAA cooperation was not at the outset a foregone conclusion. The founders emphasize that the joint rulemaking effort began on a purely exploratory basis, subject from the very start to the condition of technical feasibility in any given case.[165] "The task of ascertaining whether differing national views could be reconciled within an acceptable timescale was initially entrusted to aeronautical engineers having safety as their main objective; only when this appeared feasible were more formal agreements contemplated."[166] From a material point of view too, the JAA began on tentative footings. Its personnel needs and administrative expenses were covered in their entirety by the European aeronautical manufacturers association, AECMA, and by the participating national authorities, and this on a strictly informal basis.[167]

In a decidedly pragmatic spirit, the JAA Steering Committee decided that each JAR, unless dealing with entirely new matter, should be based upon one or another existing national code, the so-called "basic code" for that matter.[168] Nevertheless, the Committee intended that each JAR would reflect the airworthiness state-of-the-art, and that the basic code would therefore serve as a point of departure only, subject in every respect to review by technical study groups, composed of authority and industry representatives, with a view to identifying all desirable additions and modifications.[169]

GRESS ON DEVELOPING INTERNATIONAL DESIGN STANDARDS 40 (1992) [hereinafter GAO REPORT].

163. *Id.*

164. *See infra* text accompanying notes 170-71.

165. JOINT AIRWORTHINESS AUTHORITIES STEERING COMMITTEE, JOINT AIRWORTHINESS REQUIREMENTS: QUESTIONS AND ANSWERS 1 (1984) on file with *Law and Policy in International Business* [hereinafter JOINT AIRWORTHINESS REQUIREMENTS].

166. *Id.* at 2.

167. *See id.* at 2.

168. *Id.* at 3.

169. *Id.*

Intergovernmental work on development of the Joint Airworthiness Regulations began in 1970, with the active support of the AECMA airworthiness committee. By 1974, one joint requirement, JAR-25 (on large airplanes) had been issued.[170] Five years later, that requirement was adopted by four of the JAR countries as the sole code governing large airplanes and in another four years the first large aircraft was type-certificated in conformity with JAR-25.[171]

There currently exist a JAR-AWO (on all weather operations), a JAR-APU (on-auxiliary power units), a JAR-E (on engines), a JAR-P (on propellers), a JAR-22 (on sailplanes and powered sailplanes), and a JAR-VLA (on very light airplane design). Underway or in preparation are a JAR-TSO (on equipment), a JAR 21 (on certification procedures), JAR 23 (on light airplane and commuter design), JARS 27 and 29 (on helicopters), JAR 65 (on certifying staff qualifications), JARS 91(C), 121 (L) and 135(J) (on operations and maintenance), and JAR 145 (on repair stations). On all of these, the expectation is that national variants will be minimal or nonexistent.

2. Formalization of the JAA and a Joint Certification Process

The essential framework for JAA cooperation was first set out in writing in an "Arrangements" document dating from 1979, when the JAA had ten members.[172] The Arrangements expressed a commitment by the signatory states to enforce the airworthiness requirements that might from time to time be mutually agreed upon, and also established certain common procedures for their application to products manufactured in other signatory states.[173] In 1987, the JAA states entered into a more formal "Memorandum of Understanding" on certification procedures, and the following year the Dornier 328 became the first aircraft jointly certificated according to those procedures.

The Memorandum of Understanding formalized the members' commitment to a single airworthiness code eventually shorn of all national variations. On a more strictly procedural level, the JAA states agreed to the establishment of joint multinational certification teams. Besides distributing the costs of regulation among the member states, joint certification ensures acceptance of a certification team's findings by all participating authorities without additional national review. In order to justify this degree of confidence in the joint certification teams on the part of the various

170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*

national aviation authorities, both the composition of each team and the framework for its activities require approval by the different national authorities. In addition, a system of national coordinators promotes an adequate flow of information between the authorities and the team, once the latter is established. By 1989, joint certification teams had been created for three aircraft (the SF 340B, the MD-11, and the A 330/340) and proposed for three others (the DHC-8-300, the SAAB-2000, and the CN-235). That year Spain became the last JAA country to subscribe to the Memorandum, and an overall JAA certification director was named.

Joint certification represents an important stage in the eventual development of a single European certification process. It is now possible for type-certification of any given aeronautical product to occur virtually simultaneously in the various JAA states, with a reduction in the cost and delay normally associated with multiple design certification. The logical next step is installation of a single European aviation safety agency with Europe-wide type-certification authority.[174] For the forseeable future, however, each national authority remains responsible for the actual issuance of type certificates as well as for the performance of airworthiness certification functions with respect to individual aircraft.

Thus far, JAA efforts have accordingly focused on the joint issuance of airworthiness regulations and on collaborative type certification pursuant to those regulations. Beyond that, the JAA has begun the process of harmonizing the rules governing issuance of production certificates. This initiative is less far advanced and the gathering of needed basic data is still in process. On the other hand, the JAA has advanced considerably the sharing of airworthiness determinations for specific products. A "common release document," otherwise known as an "authorized release certificate," or simply an "airworthiness approval tag," essentially certifies that a particular component part was manufactured in compliance with the applicable regulations of the country stated in the certificate. Where the special requirements of an importing country have been notified to the country of manufacture, the latter's "tag" may certify that those regulations likewise are met. The common release document also may be adapted for used parts, in which case the certificate will state that the repair or maintenance work described was performed in accordance with the regulations of the stated country (and again, where applicable, also in accordance with the special requirements of an importing country) and further that the

174. The JAA states do not comprise the whole of Europe or even of Western Europe. In 1988, a JAA working group was established to develop the JAA's relations with the preexisting and larger, but substantially weaker, European Civil Aviation Conference (ECAC), which has a current membership of 22.

parts are "in condition for safe operation and considered ready for release to service." At the present time, each European authority has its own "tag;" harmonization of forms will facilitate their mutual recognition.[175]

3. JAA Organization

As its functions have developed, the JAA has assumed a more elaborate organizational structure. Its functions are performed by the JAA's directors-general (DG's), one per member state, though most decisions as a practical matter will be made by the Airworthiness Authorities Steering Committee (AASC), otherwise known as the JAA Committee, or management committee, likewise with one member per state. Many of the Committee's functions in turn are delegated to an Executive Board consisting of representatives of France, Germany, the Netherlands, the United Kingdom, and a fifth rotating state. A JAA Secretariat provides the Board with administrative support.

The JAA staff is divided into several divisions whose respective directors report to the JAA Committee and its Executive Board. The regulation division is responsible for fashioning JAA airworthiness standards, and to that end is assisted by technical study groups organized according to the particular regulation (JAR) in need of change or development. JAA certification activities are entrusted to a certification division organized, as seen, into teams according to aircraft type requiring certification. A project certification manager (PCM), assisted by a variable number of local and foreign specialists, heads each team. Two further JAA divisions—one for maintenance and one for operation—have been created or are under contemplation. The five-member Maintenance Committee, assisted by representatives of European manufacturers, operators and pilot groups, is responsible for developing a maintenance code based on the European regulations system, but taking the American regulatory system into account wherever possible and for identifying significant national discrepancies with that code.[176] The contemplated Operation Committee, charged with developing codes for approving and supervising commercial opera-

175. The United States has recently become involved in this cooperative effort. For years, the FAA used a Form 8130-3 tag for export of aircraft parts. Upon complaint by several JAA countries that the small size of the tag made it difficult to include all the information they deemed necessary, the FAA has met with representatives from the United Kingdom, France, Germany, the Netherlands, and Sweden to develop a mutually acceptable common document.

176. The FAA regulations that are currently being used as the JAA maintenance models are FAR 65(D & E), 14 C.F.R. pt. 65D, E (1992); 91(C), *id.* pt. 91(c); 121(L & V), *id.* pt. 121L, V; 127(I & P), *id.* pt. 127I P; 135(J), *id.* pt. 135J; and 145, *id.* pt. 145.

tors, considers the Federal Aviation Regulations (particularly FARs 121, 125, and 135) to be their point of departure.

Apart from the functional divisions just described, the JAA Committee maintains formal links, in the form of joint boards (JB's), with existing organizations of operators and manufacturers of aircraft. These Boards are in effect standing mechanisms for JAA consultation with interested groups like AECMA, AEA (the European airlines' association), and Europilote (the pilots' association). A Joint Assembly affords the JAA a forum for the widest possible discussions and consultations with representatives of manufacturers, operators and pilot organizations.

As previously suggested, airworthiness regulation is not at present a function of the European Economic Community, and its conduct takes place entirely outside the Community framework. The participating states cooperate on a strictly intergovernmental basis, and a given JAR standard, once adopted, becomes a national standard only as and when each state takes the necessary legislative or regulatory action. Eventually, it is hoped, those JAA participants that are members of the Community will share a single certification authority and those EEC states not as yet participants in JAA—Greece, Ireland, Luxembourg, and Portugal—will have joined it.

4. U.S. Attitudes Toward JAA Development

The United States is not and cannot be a member of the European Joint Aviation Authorities, but it has encouraged the organization's development and worked closely with it. Much the same may be said of Canada and Australia. These countries have several reasons for supporting and involving themselves in the European joint airworthiness effort. First, if American, Canadian, and Australian enterprises intend to produce and sell aeronautical products on the European and international markets, or operate those products, they necessarily have an interest in the adequacy and feasibility of the European standards and the cost of compliance with them. Economic realities give third countries, particularly those with an active aeronautical manufacturing industry, a strong derivative interest in the JAA process. As for American industry, approximately sixty percent of the world-wide market in aircraft lies outside the United States. It is true that the existing Federal Aviation Regulations provided the basis for many of the JARs, but neither was that a foregone conclusion nor is that invariably the case. As noted, for example, JAR 25 on large airplanes originated from the parallel FAA provision, but JAR 22 on sailplanes was based directly on the German national standard, and the JARs on engines (JAR-E) and propellers (JAR-P) on the applicable British provi-

sions. The JAR-AWO provision was newly developed, though influenced by an existing FAA advisory circular on all-weather operations.

In the second place, non-JAA governments have an independent interest in an efficient, well-functioning international regime, particularly in a field like civil aviation. Standards adopted over as large and economically important an area as Western Europe simply cannot be ignored by other countries in developing their own standards and in protecting local industries upon which prevailing airworthiness standards will have an impact. Earlier sections of this Article clearly demonstrate the difficulties that discrepancies in airworthiness standards present for the free movement of aeronautical products in international trade.[177]

American regulators cite yet a third rationale for their involvement in JAA activities. The FAA has found its European counterparts to be highly knowledgeable in technical aspects of airworthiness regulation. They are in any event necessarily in close contact with some of the world's most sophisticated aeronautical product manufacturers. Though under no duty to conform to the emerging JAR standards, American regulators believe they stand to learn a great deal from the Europeans, or at least from consultation and collaboration with them.

E. *Investigative Cooperation*

I have previously described compliance aspects of the FAA's airworthiness and operations activities as outside the scope of this study. It is nevertheless worth pointing out that FAA enforcement guidelines contemplate cooperation with foreign aviation authorities in these respects. An apparent violation of foreign aviation regulations by FAA certificate holders or U.S. citizens may come to the FAA's attention in any number of ways, including directly from foreign aviation authorities. The FAA regional office having geographic responsibility for the country filing the complaint investigates the matter and ultimately reports back to the foreign aviation authority through the FAA Office of Chief Counsel and, if need be, the U.S. foreign service post.[178] If the FAA needs to perform investigations abroad, it will seek permission from the foreign aviation authorities and coordinate its activities with the U.S. foreign service post in that country.[179]

Conversely, foreign persons may commit apparent violations of FAA regulations, though this appears to be extremely rare. Such violations

177. *See supra* Part IV.

178. COMPLIANCE AND ENFORCEMENT PROGRAM, *supra* note 25, §§ 502, 1003(b).

179. *Id.*

would be investigated and reported in the usual manner.[180] Should it need to obtain evidence through a foreign government, the FAA investigative office would consult the FAA regional office having geographic responsibility for the area and the relevant U.S. Foreign Service Post.[181] The regional office would process an enforcement report, either through counsel in the region or (where the respondent is in the service of a foreign company or air carrier) through the FAA Office of Chief Counsel.[182] Agency counsel, in consultation with the relevant FAA aviation standards office and the FAA Office of International Affairs, would determine whether enforcement action in this country is appropriate or whether the complaint should be referred to the foreign government instead.[183] If a violation should directly implicate a foreign government, the Office of Chief Counsel would call upon the Department of State to notify the foreign government and, to that end, furnish it a factual and legal summary, a copy of the investigative report, and a request to be advised of action taken by the foreign government.

VI. HARMONIZATION ACTIVITY: FAA PRACTICE IN NEGOTIATING AIRWORTHINESS STANDARDS WITH THE EUROPEAN JOINT AVIATION AUTHORITIES

The previous section of this Article described the engagement of the European Joint Aviation Authorities in development of common national certification standards and practices. For the set of reasons indicated, the FAA has determined that American participation in that process would be distinctly in the interest of the United States. The present section of the Article discusses the establishment and conduct of that relationship.

A. *The Establishment of Contacts and the Decision to Initiate Consultations*

The collaborative relationship between American and European aviation regulators has been fueled by considerations of enlightened self-interest in virtually all quarters. Although patterns of collaboration have by now become established and even institutionalized, it is still possible to reconstruct how they came to be. The Europeans themselves, looking for a common regulatory basis for joint European action and finding none among themselves that was both technically and politically acceptable,

180. *Id.* § 503.
181. *Id.*
182. *Id.*
183. *Id.* § 1003(c)(3).

provided much of the impetus. The JAA thus decided to take existing FAA regulations as their point of departure for the gradual development of European counterparts. The conscious patterning of JAA after FAA material extends even to the numbering of regulations—JAR numbers generally parallel existing FAR numbers on any given matter—and to their wording.

As might have been expected, the JAA carefully avoids any appearance of slavish imitation of American regulatory design. A convergence rather than copying of views is the JAA's stated objective. As a matter of drafting, the JAA has followed the practice, whenever designing a JAR on the basis of an existing FAR, of beginning with the FAR text, editing it as required and underlining the divergences if any for easy comparison.[184] The practice extends to the adoption of procedural regulations as well. When the JAA Regulation Committee Working Group on JAR 21 decided in 1988 to develop administrative codes for type certification of European products and for products imported from outside Europe, it initially read and reviewed the entire FAR 21 as it then stood. It then determined provisionally that certain "minimum variations" from the wording of FAR 21 would be necessary. Within eighteen months, the working group was able to circulate publicly a proposed JAR 21 that differed only slightly from the American text and whose differences from FAR 21 were clearly indicated.[185]

The FAA and JAA have now agreed to initiate discussions with one another before making any changes in airworthiness regulations that would introduce discrepancies with the standards established by the other.[186]

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184. In order to facilitate a commonality of language and format in FAA and JAA helicopter airworthiness standards, the FAA Rotorcraft Directorate furnished the JAA Helicopter Airworthiness Study Group (HASG) with IBM-PC-compatible diskettes on Word Perfect software containing the current presentation of FARs 27 and 29 (14 C.F.R. pts. 27, 29). The goal was a JAR compatible with the FARs.

185. *See* Joint Aviation Authorities, Joint Aviation Requirements JAR-21 (Sept. 1, 1992) (draft no. 4). The draft also indicates where criteria are expected to be changed on the basis of further discussions and coordination with the FAA or information supplied by the FAA. Discussions between the FAA and the JAR-21 Working Group were held in February 1989 (Gatwick, England), June 1989 (Bordeaux), and March 1990 (Atlanta).

186. *See generally* MINUTES OF THE OPEN SESSION, SIXTH FAA-JAA MEETING, BORDEAUX, FRANCE, *supra* note 1, pt. III. The General Accounting Office (GAO) studied the FAA's coordination of aircraft certification with foreign authorities and published a report on the efficiency of the process. GAO REPORT, *supra* note 162. The GAO Report focused on the effectiveness of the harmonization activities undertaken by the FAA. Specifically, it reviewed certification of designs for transport category airplanes. GAO REPORT, *supra* note 162, at 13. Programs involving smaller aircraft, engines, and rotorcraft were not studied; nor were harmonization efforts with the JAA for airplane

B. *Putting Consultation on a Regular Basis: The Framework for U.S. Participation in European Joint Aviation Regulation*

Once the JAA decided on a course of conscious regulatory parallelism with the United States as described above, a framework for continuing dialogue had to be established. At present, the FAA and JAA hold joint annual policy meetings for the discussion both of general policies and of more or less specific work programs that have been the subject of smaller and more specialized bilateral working groups meeting throughout the year. These annual sessions alternate between Europe and the United States—for example, the 1990 meeting took place in San Francisco and the 1989 meeting in Bordeaux—but the working groups meet periodically as, when, and where the circumstances suggest, with much accomplished through telecommunications.

The joint annual meetings are divided into sessions reserved to "the authorities"[187] and sessions open to industry, operators and other inter-

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production requirements, airworthiness certification, or continuing airworthiness. *Id.* Within this area, the GAO examined data from the FAA and domestic manufacturers, interviewed FAA officials, reviewed legislation, regulation, agreements, and FAA policies, and interviewed and collected data from JAA representatives and manufacturing representatives. *Id.* After the report was drafted, the GAO obtained written comments from the Department of Transportation *Id.* at 14.

After considering this information, the GAO concluded that although common international standards and interpretations would reduce costs to manufacturers and probably increase safety, the current harmonization system is inefficient. *Id.* at 4, 15. Examples of inefficiency are the duplication of certification activities, the imposition of additional requirements, and varied interpretations of similar regulations. *Id.* One reason for these problems, according to the GAO, is that "their elimination requires compromise and coordination that intrude of [the aviation authorities'] independent obligation[s] under [their] national law." *Id.*

Despite these difficulties, the GAO Report noted that FAA and JAA officials had recognized the problems and were "developing a strategic plan" in early 1992. *Id.* at 4. The Report recommended that the Secretary of Transportation ensure that this "recent momentum in the harmonization process result[ ] in the resolution of regulatory difference and avoidance of duplication." *Id.* Specifically, the GAO advised that the Secretary direct the FAA Administrator to:

> (1) monitor and report annually to the Secretary on the progress achieved relative to time frames established in the strategic plan,
> (2) develop mechanisms, such as joint certification teams, with JAA to coordinate certification activities and help prevent late design changes and duplication, and
> (3) report the achievements, problems, and impacts of the advisory committee to the Congress, when rechartering the committee.

Id. The Department of Transportation "generally agreed with GAO's recommendations" but added that the strategic plan being developed by the FAA and JAA at the time accomplished the goal of setting priorities and time frames for harmonization. *Id.* at 5.

187. These sessions are "closed" to the interested parties and the media so as to foster an uninhibited expression and exchange of opinions. MINUTES OF THE CLOSED SESSION OF THE SIXTH

ested groups including the press.[188] The former often provide the opportunity for European and American authorities to arrive at common preliminary positions that can then be presented in more or less joint fashion at the "open" sessions which are themselves jointly presided by the two sets of authorities. The annual meetings understandably also provide an opportunity for the working groups referred to earlier, which are composed both of "authorities" and private sector parties, to pursue and at intervals present their findings or recommendations. For example, at a recent annual meeting, the FAA and JAA were jointly briefed on water ingestion problems by a study group actually headed by a committee of the Aerospace Industries Association with a view to eventual changes to air traffic control weather avoidance guidelines.[189] Thus, a striking feature of the FAA/JAA relationship is its continuity. In effect, the annual meetings are only formal plenary sessions, significant less for the official decisionmaking that takes place on those occasions—actually little does—than for the opportunity to exchange views and report progress made in smaller joint industry/authorities gatherings throughout the year. Moreover, an early agenda item at each joint annual meeting is a follow-up report on actions and conclusions reached at the previous annual meeting.[190] To facilitate communications with the JAA, the FAA has appointed an individual at FAA headquarters specifically designated as "entry point" for all JAR-related issues.[191]

Among the most interesting trends over recent years is the development of a pattern of collaboration between American and European industry groups paralleling the collaboration between the FAA and JAA. The joint annual meetings offer settings at which industry on both sides of the Atlantic may effectively present its views to the regulators. This opportunity in turn provides an incentive for industry representatives from both sides to meet periodically throughout the year to discuss common problems and arrive at common positions vis-à-vis the regulators. At the June 1990 joint

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FAA-JAA MEETING, BORDEAUX, FRANCE, 6 (June 1989) (on file with *Law and Policy in International Business*).

188. *See, e.g.*, Agenda for the Open Session, Sixth FAA-JAA Meeting, Bordeaux, France (June 1989) (on file with *Law and Policy in International Business*).

189. *See* NOTES OF SEVENTH FAA-JAA MEETING, SAN FRANCISCO 21 (June 12–15, 1990) (on file with *Law and Policy In International Business*).

190. *See e.g.* Follow-Up of Actions and Conclusions of the Sixth FAA-JAA Meeting—Open Session, Bordeaux, France (June 1989) (on file with *Law and Policy in International Business, presented at* Seventh FAA-JAA Meeting, San Francisco, Califoria (June 1990). Carryover agenda items included aging aircraft, derivative aircraft, tuned gust, fatigue testing, cabin safety and a variety of specific harmonization efforts. *Id.* at 37.

191. The Aircraft Certification Service also has an office in Brussels.

annual meeting in San Francisco, for example, the Aerospace Industries Association (AIA), the General Aviation Manufacturers Association (GAMA), and their European counterpart, AECMA, themselves made a joint presentation on aviation noise issues.[192] In that presentation, these manufacturing groups strongly urged: (1) the harmonization of existing FAA (FAR 36) and JAA noise standards; (2) the adoption of ICAO Convention Annex 16 and its associated technical manual as the basis of such a harmonized standard; (3) uniform interpretation of the standard adopted and uniform application of equivalences; and (4) agreement on flight testing, noise certification and other compliance procedures and appeals.[193] At the previous annual meeting in Bordeaux, European and American industry worked jointly to eliminate differences between the FAA and JAA on flight test requirements and to that end formulated petitions for proposed rulemaking to the FAA and for parallel action by the JAA.[194] And at San Francisco, industry expressed support for the development of common standards for derivative aircraft and for the establishment of uniform maintenance record requirements.

These are not isolated examples. When it became apparent at Bordeaux that the FAA and JAA intended to harmonize their respective engine airworthiness standards, European and American industry determined to have significant input into the process. The AIA's Propulsion Committee accordingly formed a subcommittee (comprising representatives of all major American and Canadian engine manufacturers) to organize that effort by intially calling a joint meeting in Paris among the JAA, FAA, AIA, and AECMA. The AIA subcommittee then sought in cooperation with AECMA to establish a common industry position on the twenty items that the FAA and/or JAA had identified as possible additional engine conditions.[195] The AIA was thus able to present formally to the authorities in San Francisco a fully joint industry position on those matters.[196] Similarly, GAMA took that occasion to express formally to the FAA and JAA the joint industry view that the safety record of commuter airplanes

192. NOTES OF SEVENTH FAA-JAA MEETING, *supra* note 189, at 19.

193. AIA/AECMA/GAMA Presentation, Noise Issues, Seventh FAA/JAA Meeting, San Francisco, California (June 13, 1990).

194. OPEN SESSION CONCLUSIONS AND ACTIONS, SIXTH FAA-JAA MEETING, *supra* note 1, at 13.

195. NOTES OF SEVENTH FAA-JAA MEETING, *supra* note 189, at 19.

196. Paul Meyer, AIA FAR 33/JAR-E Harmonization Committee, Statement to the Joint FAA/JAA Annual Meeting, San Francisco, California (June 1990) (on file with *Law and Policy in International Business*).

did not justify adoption of more stringent airworthiness requirements for that category of aircraft.[197]

The FAA and JAA strongly support the concept of concerted industry activity on standards research and development. One can well imagine that the authorities would perceive an advantage in presenting a united regulatory front to a nationally divided industry. However, the FAA and JAA alike have stated and acted on the view that it is in the regulators' long-term interest to know the industry position, if indeed there is one, and to be able to deal with industry as a more or less unified group.

As these examples suggest, FAA/JAA collaboration (and related collaboration between American and European industry) concerns substantive technical matter, often in the form of standards to be newly adopted, modified, borrowed or harmonized. To date, most collaboration has related to aircraft certification standards, but has now extended to operations and maintenance as well.[198] No less interesting from a legal point of

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197. General Aviation Manufacturers Ass'n, Presentation, Commuter Category Airplanes: Industry Views, Seventh FAA/JAA/Industry Meeting, San Francisco, California (June 12-15, 1990).

198. Cooperation in operations and maintenance standards has become vital on account of the growth of international aircraft leasing. Through such leasing, a plan may operate out of state for long periods, making it unworkable for the state of registry to perform its regulatory functions with respect to that craft. A proposed article 83bis of the Chicago Convention would provide a legal basis for the formal transfer of maintenance and operations responsibilities to the leasing country. Until the Convention is ratified by the requisite number of countries, 98, the only way to delegate responsibility is through informal understandings. As in the certification area, those understandings can be effectively implemented only if there is a fair degree of commonality in aircraft operations and maintenance standards and procedures. *See* Remarks of Admiral James B. Busey, FAA Administrator, at seventh FAA-JAA Meeting, San Francisco, California (June 1990) [hereinafter Remarks by Admiral Busey] (on file with *Law and Policy in International Business*).

In hopes of coordinating further harmonization efforts, the FAA and JAA have developed a Harmonization Work Program, which was presented to the Ninth Annual FAA-JAA meeting in June, 1992. *See* FAA-JAA Harmonization Work Program (1st ed., June 1992) (on file with *Law and Policy in International Business*).

The strategic plan was developed and presented at the Ninth Annual Meeting in June 1992. Final Notes of Open Session, Ninth Annual FAA-JAA Meeting (June 5, 1992), at IV-3 (on file with *Law and Policy in International Business*) (hereinafter "Final Notes of Ninth Meeting"). A regular quarterly update of the harmonization plan is intended. *Id.* at VII-3. It is called the "Harmonization Work Program" and outlines the processing of a harmonization idea. *Id.* at IV-5. The document setting forth the program is "a living document . . . subject to revision as new information is obtained and decisions are made." *See* FAA-JAA Harmonization Work Program (June 5, 1992), at II-4 (on file with *Law and Policy in International Business*) (hereinafter "Harmonization Work Program"). The stated purpose of the program is to document harmonization initiatives, to provide a management tool for the authorities to "monitor the progress made by the Harmonization Working Groups," and to direct resources as necessary. *Id.* at I-I.

Under the program, a harmonization idea can come from a number of sources. These sources include the FAA and JAA, the aviation industry, academia, Congress, government agencies, and tech-

view, however, are the exchanges of view that take place between the authorities (as well as with industry) on issues of certification procedure. Among the matters treated at the Bordeaux annual meeting, and subject to follow-up reported at San Francisco, were procedures for manufacturers' appeals against adverse decisions taken in their regard by the JAA.[199] The steps eventually taken were fully discussed in draft at joint meetings of the FAA and JAA, in which industry participated.

An earlier section of this Article emphasized that regulatory cooperation between national aviation authorities has been fueled in large measure by a mutual desire to increase the opportunities for cooperation in airworthiness enforcement, in particular the sharing of design certification functions. It is not surprising, therefore, that the increase in regulatory harmonization between the FARs and JARs has been accompanied by more concerted certification efforts. A good illustration of the latter is the recent Memorandum of Agreement between the FAA and JAA on the delineation of responsibilities for certification of the McDonnell Douglas MD-11 airplane.[200] Pursuant to this agreement, whose primary objective is "to define the working procedures under the respective responsibilities and to foster a greater understanding of the MD-11 certification issues and concerns between the FAA and JAA and [thereby] strengthen relationships to minimize differences in aircraft certification standards,"[201] the FAA and JAA each assumed distinct responsibilities with respect to the MD-11 design certification process.[202] The JAA undertook to notify the FAA in writing of any JAA requirements beyond those of the FAA, to indicate for which of those the JAA would make its own inquiry, to furnish all relevant JAA regulations and interpretive material with respect to the others, and to notify the FAA of any FAA test it wished to witness.[203] For its

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nical experts, among other organizations. *Id* at II-4. *See also id.* at II-2. The idea is then submitted (in writing) to the "focal points." *Id.* at II-3. The "focal points" are various FAA and JAA officials who are assigned to one particular standard or practice. *See id.* at A-1-A-5. The focal points "obtain input from users . . . [and] develop a terms of reference sheet to track the proposal." Final Notes of Ninth Meeting, at IV-5. Next, an FAA-JAA executive review is carried out, and the idea is transmitted to a "harmonization work group." *Id.* An additional executive review is done before the idea enters the official FAA and JAA rulemaking processes. *Id.* Communication between the authorities is emphasized. *See id.*

199. *See* MINUTES OF THE OPEN SESSION, SIXTH FAA-JAA MEETING, *supra* note 1.

200. Memorandum of Agreement between the FAA Transport Airplane Directorate and JAA, March, 1990 (*effective* Apr. 9, 1990) at 1 (on file with Federal Aviation Administration, Washington, D.C.).

201. *Id.* The agreement further recites as an objective "to minimize redundant inspections, tests, demonstrations, evaluations, and approvals." *Id.* at 1-2.

202. *Id.*

203. *Id.*

part, the FAA undertook to satisfy itself and report formally to the JAA as to the craft's compliance with the FAA certification basis plus the additional JAA requirements as notified by the JAA.[204] The agreement further specifies communication routes between the FAA and JAA respecting the MD-11 certification.[205]

C. *Agency Information-Gathering About Foreign Regulatory Activity and its Domestic Impact*

It should be obvious from what has thus far been said, that the FAA does not rely on happenstance to discover the regulatory and technological developments occurring in European aviation circles. Gathering basic information of that sort is essential to the FAA's efforts to assess the impact of regulatory or technological change abroad on American regulatory and economic interests. The establishment of an information network in other regulatory domains may turn out to be more difficult in operation and less perfect in result than has been the case for civil aviation regulation. The relatively easy access to European developments enjoyed by the FAA may be explained in part by the Europeans' candid acknowledgment of our traditional preeminence in both regulatory and technological aspects of civil aviation, and their collective judgment that a full, timely, and cooperative-spirited exchange of information is decidedly in their interest. It is nevertheless likely that the same situation obtains in other regulatory sectors where systematic cooperation with foreign authorities offers promise.

In any event, a full mutuality of information seems to depend upon two circumstances in particular. The first is the development of a generally common regulatory agenda. The more or less formal and regular contacts between the FAA and JAA described earlier help ensure that at any given time both sets of authorities are addressing parallel regulatory and technical problems. The second element favoring mutual access to information on current developments is a more purely operational understanding that research, study, and recommendations generally speaking will be undertaken by joint working or study groups, on which, as has been seen, private sector interests on both sides likewise may be represented.

A particularly productive area of collaboration was in the development of a rule for rejected-take-off performance for transport aircraft. As a result of successive meetings among FAA and JAA technical staff and European and American manufacturers and pilot groups, a solution is under development that will be satisfactory to both sets of regulatory authori-

204. *Id.*
205. *Id.*

ties.[206] Implementation in the United States will require modification of FAR 25.[207]

D. *Techniques for Communicating U.S. Agency and Private Party Views to Foreign Authorities*

When matters pass from the study to the action phase, the JAA routinely notifies the FAA of all notices of proposed amendment (or NPAs), as the Europeans call their nearest equivalent to our notices of proposed rulemaking (NPRMs).[208] NPA's are formulated by the JAA Joint Steering Committee,[209] upon the advice of one or more JAA technical study groups. In all likelihood, the content of these NPA's will come as no surprise to the FAA as it will have sprung in whole or in part from prior consultations. But the notices do serve as formal reminders that JAA action in the nature of an amendment to the JARs is about to be taken and that final FAA comments are still welcome. When the JAA recently issued an NPA on the subject of tuned gust, it notified the FAA as well as industry and held meetings jointly with both. Following final comments, the NPA will be sent again to one or more JAA technical study groups for reconsideration and report to the Joint Steering Committee for eventual acceptance or rejection. On the tuned gust subject, the NPA process eventually resulted in rule changes acceptable to all parties.[210]

Among the clearest signs of the openness of channels between the FAA and JAA is the latter's practice of entertaining for adoption any amendments that the FAA actively considers introducing into the Federal Aviation Regulations. The JAA has thus shown its aversion to allowing unintended disparities between the JAR and any parallel FAR that may exist. This spirit of conscious parallelism does not necessarily ensure agreement between the FAA and JAA. However, where agreement cannot be reached, the JAA has adopted the practice of publishing an underlined version of the JAR in order to facilitate comparison with its American counterpart and the identification of differences.

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206. NOTES OF SEVENTH FAA-JAA MEETING, *supra* note 189, at 20-21.

207. *See* Remarks by Admiral Busey, *supra* note 198, at 8.

208. For a detailed comparison of differences between the JAA's and FAA's rulemaking processes, see GAO REPORT, *supra* note 162, at 33-36.

209. The Joint Steering Committee consists chiefly of representatives of the civil airworthiness authorities of the participating countries, plus representatives of the manufacturing industry, operators and pilots. *See* Joint Airworthiness Requirements, *supra* note 165, at 2.

210. NOTES OF SEVENTH FAA/JAA MEETING, *supra* note 189, app. at 1. An NPA on crashworthiness and seat configurations has also been subject to discussion in joint FAA-JAA gatherings. *Id.* at 2.

The scale of collaboration between the FAA and JAA is manifestly the result of the latter's conscious desire to build its developing airworthiness standards upon existing FAA regulations, while at the same time enlisting FAA interest in modifications that the JAA deems advisable.[211] Although the FAA has responded enthusiastically to these overtures, it understandably has not had the same incentive to conduct a reciprocally comprehensive review of European airworthiness standards. Thus, the JAA's more or less systematic examination of the Federal Aviation Regulations has not quite been matched by a parallel FAA review of all the JARs currently in effect. Such review might offer an additional opportunity to identify regulatory dissonance between the European and American authorities.

E. *American Preparation for International Airworthiness Consultation*

Although previous knowledge of a foreign regulatory system and its practices seems a perfectly obvious aid to productive collaboration with the foreign authorities, the point has received special emphasis from all participants in the process, American and foreign alike. Complete knowledge and understanding of the regulations of the other party, however, implies a heavy and long-term investment in learning a foreign language and becoming familiar with a foreign culture. Not every American regulatory agency may be prepared to make such an investment, and that investment may not be sound in the case of all agencies. Nevertheless, the relationship of that investment to results achieved by the FAA is unmistakable. For example, Craig Beard, the FAA's director of the Aircraft Certification Service in Washington, spent several years at the agency's European office and was professionally and personally acquainted with his European counterparts and their practices. That undoubtedly had something to do with his commitment to placing European and American regulatory cooperation in aviation matters on an institutionalized footing. His personal interest in expanding the scope of the FAA's international aircraft certification activities has since brought the agency into contact with authorities in Asia, South America, and Eastern Europe. On the other hand, the interest and inclination of one person alone are not sufficient to sustain a program of cooperative regulatory activity. In the case of the FAA, that

211. On certain matters still under research and development, the JAA has consciously decided to allow the FAA "to carry the ball" and to participate only marginally at the R&D stage. Such is the case, for example, with powered-lift standards for rotorcraft. NOTES OF SEVENTH FAA-JAA MEETING, *supra* note 189, at 24–25. The reasoning is that on relatively noncontroversial matters, or at early information-gathering stages, it is more economical for one set of authorities to "take the lead" in rule development.

interest and inclination came to infiltrate the agency's entire Aircraft Certification Service, with each FAA regional certification chief personally engaged in cooperation with the JAA regulatory apparatus under the leadership of that person.

F. *Caveats About Direct International Agency-to-Agency Influences*

1. Problems of Language and Meaning

The experience of the FAA Aircraft Certification Service in dealing with European counterpart agencies offers good illustrations of the difficulties that arise out of differences in language and meaning. The best way to avert or minimize these sorts of difficulties is to acquire a sensitivity to the circumstances in which they are likely to arise and to adopt specific practices designed to reduce their incidence. For instance, the FAA and JAA have found it useful to employ the same terms and the same format when inscribing agreed upon matters within their national regulations and to keep national reformulations to a minimum if not eliminate them altogether.[212]

An identity of texts does not, however, ensure an identity of interpretations. As the manufacturer of the Boeing 747 sought to comply with JARs that were based on the same language as preexisting FARs, it found that the Europeans were interpreting that language somewhat differently. Good examples of the differential meaning of shared language are the terms "new" and "derivative" aircraft. As much as anything else, industry preference for an orderly and unambiguous regulatory environment has prompted FAA and JAA efforts to reach a single understanding of shared language. Those efforts understandably involve dialogue between national authorities and a mutual willingness to seek clarity and occasionally to compromise.[213]

As for the resolution of misunderstandings that do arise, there is no single remedy. In the narrow context of the bilateral airworthiness agreements, the accepted rule, in case of ambiguity in a country's laws, regulations or requirements, is to adopt the interpretation of that country.[214]

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212. JAA documents and discussions are generally in the English language. For most of the JAA countries, however, regulations and other documents must ultimately be enacted in the jurisdiction's official language or languages.

213. Industry representatives repeatedly emphasize the importance of consistent interpretation and application by national authorities of their common standards. *See, e.g.,* MINUTES OF THE OPEN SESSION, SIXTH FAA-JAA MEETING, *supra* note 215, at 6.

214. A typical bilateral airworthiness agreement clause reads: "In the case of conflicting interpretations of the laws, regulations, or requirements pertaining to certifications or approvals under this Agreement, the interpretations of the aeronautical authorities of the Contracting State whose law,

This not only makes sense, but is central to justifying the full faith and credit that importing states under such agreements are asked to give to the findings and conclusions of exporting states. Of course, a precondition to any effective international communication in the regulatory arena is accurate and up-to-date information by each country of the other's regulatory criteria in force. Accordingly, bilateral airworthiness agreements commonly impose an obligation of mutual notification of regulatory change.[215]

2. Problems of Style

In matters as substantively complex and technical as airworthiness regulation, matters of regulatory style are bound to play a relatively minor role. Nevertheless, it is useful to point out the possibility that different national regulatory establishments also may take somewhat different regulatory approaches, and that these differences may occasionally be productive of misunderstanding.

Conversations with JAA officials suggest that the European authorities generally favor a better organized and more systematic approach to regulatory drafting, and accordingly strive for a higher degree of comprehensiveness and structure, than is common in American regulatory practice. The JAA's pronounced willingness to take the existing FARs as a regulatory point of departure has served to mask considerably the extent to which they naturally favor a more code-like methodology. In fact, some of the differences that have arisen in FAA/JAA harmonization efforts may be explained by the Europeans' preference for a complete and orderly regulatory framework. For their part, the Europeans have had to deal with a relatively unfamiliar tendency on the FAA's part to target problems on a decidedly concrete basis with an emphasis on narrow solutions to reasonably well-focused problems.

My impression is that these stylistic differences can easily be exaggerated, that they do not loom especially large in highly technical fields like airworthiness regulation, that the preeminence of the FARs has given the American approach a decided edge, and that the authorities on both sides have shown a marked capacity to bridge what are at bottom relatively inconsequential differences of style. The FAA and JAA share both a strong sense of programmatic purpose and a sensitivity to function, which

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regulation, or requirement is being interpreted shall prevail." FAA ADVISORY CIRCULAR NO. AC 21-18, *supra* note 100, app. 1, at 3.

215. Accordingly, bilateral airworthiness agreements typically provide that "[t]he competent authority of each Contracting State shall keep the competent authority of the other Contracting State currently informed on all relevant laws, regulations and requirements in its State." *Id.* at 4.

in turn lend their efforts a powerfully pragmatic flavor and better serve the public interest in promoting aviation safety.

3. Defining "Foreign" for International Regulatory Purposes

To the baseline difficulties of language and meaning in any international communication situation must be added the problem of defining terms such as "foreign," "country of production," or "place of manufacture" that recur in this regulatory setting. The latter problem is heightened by the international realities of the industry itself that is being regulated. Take again, for example, the bilateral airworthiness agreements under which certification services performed by the authorities of one country may be conclusively relied upon by the authorities of another for product import purposes. The agreements typically refer to production in one country for export to another. However, many aircraft and appliances consist of component parts or subassemblies originating in several countries. Prominent examples include the Boeing 747, McDonnell Douglas DC-10, Lockheed L-1011, Concorde, and Aerospatiale A300B Airbus. For the sake of regulatory simplicity, the FAA traditionally has considered the country of production to be the country where units of the product first come together as end units, are tested as such for certification purposes, and receive their first approval by a recognized airworthiness authority.[216] Certain segments of the manufacturing industry have complained that this practice thwarts their preference for postponing final assembly and flight testing of a product until after its export in an unassembled condition, because it requires post-testing disassembly for export and consequently retesting upon reassembly abroad.[217] Moreover, the definition of "country of production" requires that even component parts manufacturers in the importing country must ship those parts to the country of aircraft manufacture for the final assembly and flight test required for export certification.[218] The components then may well be removed for reshipment along with the disassembled aircraft for later reassembly.[219] These scenarios illustrate the problems of squaring regulatory simplicity with changes in the market realities (notably the emergence of multinational products) that the regulated industries are facing.

Problems of classification have become still more acute with the emergence of multinational joint ventures in the aeronautical manufacturing field, typified by the International Aero Engines Model V-2500 engine.

216. FAA EXPORT/IMPORT, *supra* note 75, at 24.
217. *Id.*
218. *Id.*
219. *Id.*

Where true joint ventures are concerned, the term "country of manufacture" can lose meaning altogether. In the joint venture situation, the FAA and its foreign counterparts now deliberately determine and refer to a "country of prime accountability" for the regulation of product design, production quality, and the airworthiness of completed products.[220]

G. *The Inter-Agency Dimension: Consultations with the Departments of Commerce, Defense, Labor, State, and Transportation and the Office of U.S. Trade Representative*

Because of its obvious international trade and foreign relations implications, the FAA's airworthiness certification operations may be of interest to other federal agencies. Consultation with other agencies is most obviously in order at points where the federal government enters into binding international engagements. Thus, our membership in the International Civil Aviation Organization (ICAO) came about as a result of the negotiations conducted by the State Department at the Chicago Conference of 1944.[221] The United States is represented today at ICAO meetings at all levels by officials of the Department of Transportation, including the Federal Aviation Administration.[222] However, before taking any official position on matters of importance, they will report to the Interagency Group on International Aviation (IGIA), which consists of the principally interested executive branch departments and agencies: Commerce, Defense, Labor and State, and the Office of U.S. Trade Representative.[223]

Similarly, whenever a foreign government requests the conclusion of a bilateral airworthiness agreement with the United States, or requests that an existing agreement be revised, the FAA submits the request, together with any supporting materials, to the interested federal agencies represented in the Interagency Group.[224] If the initial reaction is positive, the State Department asks the FAA to examine the requesting country's airworthiness certification system to establish the appropriateness of entering into a bilateral agreement with the country or modifying the existing agreement.[225] As noted, the FAA makes determinations about the foreign airworthiness authority's technical competence and regulatory efficacy, the adequacy and completeness of the foreign country's airworthiness laws and regulations, and the state of the foreign industry's design and manu-

220. Beard Remarks, *supra* note 6.
221. *See* MEMORANDUM ON ICAO, *supra* note 45, at 5–6.
222. *See generally* 22 U.S.C. § 5501 (1990).
223. *See* Sullivan, *supra* note 111, at 4–6.
224. *Id.*
225. *Id.* at 5.

facturing capability, in order to decide whether the country's aviation authorities and industry will be able to perform their responsibilities under a bilateral agreement.[226] The FAA also considers the country's need for an agreement enabling it to export products to the United States, since a proliferation of needless accords is rightly deemed undesirable.[227] Although these determinations rest largely on FAA shoulders, the other agencies, particularly the State Department, are consulted.[228] FAA and State Department counsel jointly negotiate and draft any agreement with their foreign country counterparts, and the State Department reserves the right of final review of any such draft.[229] Once approved, the agreement is the subject of an exchange of diplomatic notes between the State Department and its foreign counterpart.[230] Negotiation of a new bilateral agreement normally takes three to four years, and the amendment of an existing agreement takes about two years.[231]

Once this international legal framework is in place, resort by the FAA to the Interagency Group on International Aviation is unusual. Absent some discernible controversy of direct interest to one or more of those agencies, the FAA acts largely on its own. These controversies are rare. One example—the repair stations episode—surfaces later in this Article. In another, better-known example, the FAA had decided, in the wake of a major Chicago air disaster involving the DC-10, to immediately ground all such U.S.-registered aircraft pending investigation and to deny takeoff and landing rights to non-U.S. craft of that design.[232] This action, which impaired the functioning of foreign as well as domestic airlines in the United States, provoked a strong negative reaction from the major foreign aviation authorities and eventually the foreign governments themselves. The State Department understandably became involved in negotiations over the duration and continuing necessity of the grounding order. However, the grounding order was not lifted until the FAA satisfied itself that the DC-10 design had no unsafe features.

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226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* If a decision is made not to enter into a bilateral agreement, the requesting country receives a written report specifying the reasons and indicating what steps need to be taken to ready the situation. *Id.* Such a report may become the basis for a technical assistance agreement between the FAA and the foreign country in keeping with the Standards Agreement referred to above. *Supra* note 103 and accompanying text.

231. *Id.*

232. *The Big Travel Mess,* NEWSWK., June 18, 1979, at 22.

VII. The Mirror-Image Question: When and How Do Foreign Governments Participate in FAA Regulation?

Like so many other aspects of the relationship between the United States and Western Europe, influence over foreign regulatory activity no longer travels a one-way street. The FAA's involvement in European airworthiness developments has brought with it a corresponding influence of European authorities over FAA aviation safety policy. This development can best be illustrated by a concrete example involving the regulation of helicopter design.

A. *The Helicopter Regulations: A Case Study in Bilateralism*

In the wake of a series of recent mishaps, Britain, Norway and certain other North Sea perimeter countries recently decided to re-examine safety aspects of the use of helicopters for servicing oil rigs operating in the harsh North Sea environment and eventually to adopt appropriate joint airworthiness requirements for those vehicles. These countries individually advised the FAA's Aircraft Certification Service that they did not regard existing FAA airworthiness regulations governing helicopters as sufficiently protective, and that they were not prepared to adopt those regulations as their own unless the regulations were made more stringent in certain ways.

The FAA responded by notifying those countries—and indeed the JAA, of which they were members—that an update of the helicopter FARs (in particular, Parts 27 and 29) was planned, and by asking them to withhold action until the updating process could be completed.[233] The FAA understandably also sought to know in advance the respects in which the Europeans thought the American helicopter standards inadequate. There ensued a considerable exchange of information, the FAA advising the JAA of its own helicopter safety concerns and of the regulatory changes it was considering to address them. The JAA then offered detailed written commentary, based on the reactions of the various European aviation agencies, both on the existing FAA rules and their prospective reform.[234] The JAA actually formed a joint European study group on Parts 27 and 29 to coordinate this effort.[235]

Much of what the Europeans proposed—the Aircraft Certification Service estimates it at seventy percent—proved immediately persuasive to the FAA and was incorporated into a draft proposed regulation that itself

233. *See* 54 Fed. Reg. 17,936 (1989) (proposed Apr. 25, 1989) (background).

234. *See id.*

235. *Id.*

eventually became the subject of an FAA notice of proposed rulemaking.[236] The convergence of views, and prospects for still further convergence, were such that the JAA agreed to defer adoption of its own helicopter standards—which at that time still would have differed significantly from the modified American proposal—until the FAA rulemaking procedure had run its course and all opportunities for European influence had been used. During the FAA comment period, the European study group was persuaded that certain changes it had advocated were unnecessary, but still it continued to press for other changes in the proposed FAA rule that would align it more closely with European thinking. In the course of extended discussions at the FAA's Fort Worth office, the JAA countries took a hard line on what they considered the remaining essential safety features missing from the FAA's proposed helicopter rules. A final rule was adopted in September 1990,[237] incorporating some, but not all, of the recommendations of the JAA; there remained certain discrete points on which the FAA and JAA could not bridge their differences, with the Europeans generally favoring stricter standards. The FAA's position was that it would seek to distinguish among the outstanding points of difference according to the degree of consensus among the individual JAA states, their apparent priority in importance to the Europeans, and the strength of the FAA's own informed convictions.

Though not unproblematic, the scenario just described has distinctly positive attributes. It seems basically useful and appropriate that the FAA work constructively with its European counterparts on regulatory matters of common interest. In the case of civil aviation airworthiness governance, those interests are not only common but, as we have seen, highly interdependent. The willingness of the JAA in principle to build their helicopter standards, and indeed their standards on virtually all other airworthiness matters, on the current Federal Aviation Regulations was an early and enduring sign of genuine good will. However, the impression of some persons in the FAA Aircraft Certification Service is that this attitude on the part of the JAA, and related practices like regular consultation with the FAA on prospective deviations from the FARs, is in part a product of the FAA's own amenability to discussion and compromise.

The helicopter standards episode also shows how difficult it is to identify exactly who is seeking to influence whom. When the FAA persuaded the JAA that certain modifications the latter had been seeking to bring to the FARs on helicopter airworthiness were unnecessary, the FAA in effect

236. *Id.*

237. 55 Fed. Reg. 38,964 (Sept. 21, 1990) (codified at 14 C.F.R. pts. 27, 29).

influenced the JAA's own helicopter rulemaking. This is evidence that influence is truly being exerted in both directions.

The importance attached to harmonization of helicopter airworthiness standards is such that the FAA and JAA have entered into an express undertaking to pursue that goal. Their "Letter of Intent" to this effect expresses an undertaking to cooperate toward the convergence of standards and advisory materials by January 1, 1993.[238] The agreement commits the authorities to a series of early joint industry/authorities meetings on both the general design and precise wording of further changes needed for development of "a compatible mutual approach."[239] In order to facilitate their dialogue, the FAA and JAA have designated specific contact persons for each relevant subpart of the helicopter regulations to be harmonized.[240]

The pattern of reciprocal regulator-to-regulator influence had already surfaced in the JAA's first major JAR initiative, the certification standards for large transport airplanes. The development in the 1970s of new European models, exemplified by the Concorde and later the Airbus, represented an effort by European aircraft manufacturers to enter a lucrative market previously dominated by American enterprise. The American attitude toward the new technology and its regulation was understandably ambivalent. On the one hand, United States manufacturers rightly perceived a threat to their traditional dominance of the market. They also feared that certain of the standards likely to be adopted by the JAA would be tailored to suit the new European entries but not their established American rivals, and would thus operate as exclusionary and unnecessary trade barriers. On the other hand, they had to welcome the technological advances brought by this more competitive environment and to concede the necessity of regulating for their safety and for the protection of environmental values.

As in the helicopter case, the JAA commenced by borrowing the pertinent Federal Aviation Regulations, in this case Part 25. However, the JAA favored certain modifications and, at that time, was prepared to al-

238. Letter of Intent for Coordination on U.S. FARs and European Helicopter Airworthiness Codes (March 20, 1990) [hereinafter Letter of Intent for Coordination]. The agreement arose out of a special meeting in Paris among the FAA Rotorcraft Directorate, the JAA Helicopter Airworthiness Study Group (HASG), AIA and AECMA. *See* John J. Shapley & Robert T. Weaver, Trip Report: Joint Airworthiness Requirements (JAR) 27/29 Meeting in Paris, France, March 19-21 (March 30, 1990).

239. Letter of Intent for Coordination, *supra* note 238, at 1.

240. *Id.* app. D.

low national variances among the JAA countries.[241] The FARs and JARs were not then fully identical. Over the next ten years, as national variances within Europe were gradually phased out, the JAA remained in constant communication with its FAA counterparts. The agencies discussed the further regulatory modifications for large transport airplanes that technological change and heightened environmental concerns were causing European and American regulators to consider. In fact, the FAA Aircraft Certification Service was consulted by the JAA on all regulatory issues arising over the ten-year period, and the JAA participated as such in all the relevant FAA rulemakings. Ultimately, virtually every significant change made to Part 25 during this period was reproduced in the parallel JARs, and vice versa.

This process apparently replicates itself across the broad spectrum of technical issues confronting American and European civil aviation authorities. Both sides acknowledge their interdependence by conferring extensively before making changes of any moment in their airworthiness regulations. Equally important, and by way of anticipation of these changes, they have formed joint working groups to address technical and regulatory problems as they arise and to formulate common solutions. Those having perhaps the most direct interest in a common American and European response to emerging airworthiness problems—AIA, GAMA, and AECMA—have done their best to encourage the progressive harmonization of standards as they evolve. By way of a more current example, the JAR 21 group (consisting of French, German and United Kingdom authorities and AECMA representatives) began in 1988 to develop administrative codes for aeronautical products, both domestic and imported. It comprehensively reviewed FAR 21 and within eighteen months had produced a proposed JAR 21 that diverged in certain respects from the American version on such technical issues as flammability and gust requirements and collision avoidance systems. Joint deliberations are underway to determine whether some of the provisions the Europeans still would like to introduce into JAR 21 might be agreeable to the FAA and might become the subject of parallel FAA proposed rulemaking.

Although the FAA may be unusual in the extent to which it engages and attends to the opinion of foreign country regulators, it is difficult to fault the FAA for openness and responsiveness of that kind. In a field such as civil aviation, the need for international cooperation is evident and

241. At first, only five JAR countries—Britain, France, Germany, the Netherlands and Sweden—adopted JAR requirements as the national standard. The other countries basically offered manufacturers a choice between conforming to the JAR requirements or else to the existing national standards as modified.

a refusal to engage in that process will inevitably prove costly. It will do the American aviation industry little good to secure relatively relaxed safety standards from the domestic regulatory agency when, as a practical matter, its products still must pass regulatory muster with more exacting foreign authorities who ultimately decide what air safety within their jurisdictions reasonably requires.

B. *The Repair Station Episode: Drawing the Line Between Unilateralism and Bilateralism*

Notwithstanding the mostly positive record of the FAA's international certification activities, problems and misunderstandings occasionally have arisen. FAA policy on the use of foreign repair stations for the servicing of U.S.-registered planes provided one such occasion. Under a longstanding FAA regulation, absent an emergency situation, U.S.-registered craft normally could be serviced by foreign mechanics or at foreign repair stations only if the craft were predominantly used abroad.[242] Besides limiting the circumstances permitting foreign repairs to U.S. air vessels ("the scope of work restriction"), the regulation also barred the use of foreign mechanics and repair stations not previously approved by the FAA.[243] An awkward and costly system of certification of foreign mechanics and repair stations was accordingly put into place.[244] In the face of widespread disregard of these rules, the FAA's Flight Standard Service (Maintenance Division) issued a reminder to the airlines and to foreign aviation authorities both of the importance of the rules and of the FAA's intention to enforce them.

This statement of FAA policy on the use of foreign repair stations by U.S.-registered aircraft and on the certification of foreign stations and mechanics provoked a strongly negative reaction from foreign governments and from United States airlines. Both forcefully lobbied for a change in the regulations, and brought the matter to the attention of the Secretaries of Commerce and Transportation and the United States Trade Representative. As demonstrated by the involvement of the USTR, the regulations were depicted as an unjustified nontariff barrier to trade in services, as well as an affront to foreign states, particularly those with which the United States had seen fit to enter into bilateral airworthiness agreements.

The airlines and foreign governments did not particularly take issue with the claim that the FAA, bearing responsibility to third parties for the safety of U.S.-registered craft, had an interest in ensuring the adequacy of

242. *See* 55 Fed. Reg. 45,124 (proposed Nov. 24, 1987) (background).
243. *Id.*
244. *Id.*

repair services wherever performed, though the appropriateness of an FAA certification program for foreign repair stations was not conceded. The focus of complaint was the confinement of foreign repairs to craft predominantly flown abroad, and the FAA eventually sought to eliminate this restriction through FAA rulemaking.[245] In the face of vocal opposition by the International Association of Machinists to the proposed reform, Congress chose, through a rider to the FAA appropriations bill, to bar the FAA for one full year from adopting any final rule on the subject.[246] After the year had passed, in November 1988 to be precise, the FAA adopted a final rule eliminating the restriction.[247]

In some respects, this episode illustrates FAA resourcefulness and responsiveness to international aviation realities. However, the Maintenance Division's expression of policy on the use of foreign repair stations came as a jolt to the agency's counterparts abroad and generated deep dismay. This reaction was due as much to the apparent unilateralism of the FAA position as to the position itself. Moreover, although the prospect of the FAA conducting inspections of foreign repair stations was not received as unfavorably as the scope of work restriction, there is evidence that it too was greatly resented as unduly suspicious of foreign agency know-how and competence in aviation regulation. Had Maintenance Division personnel effectively communicated with their European counterparts, they might have anticipated the foreign reaction and approached the repair station problem differently from the outset. Consideration might also have been given, so far as the adequacy of foreign repairs is concerned, to a system of mutual recognition of repair station certification, a system not as yet embraced even by the bilateral airworthiness agreements with partners in whom the FAA has the highest level of confidence. Arrangements of that sort might avoid the unhappy prospect of FAA inspection and surveillance of foreign installations. Many persons in the FAA regard the repair station episode as a costly one in terms of the FAA's foreign relations and one whose damage itself has been difficult to repair.

A positive result of the foreign repair station episode is that the JAA member countries have begun work on common European standards for aircraft maintenance. Accordingly, the FAA and JAA are now in the early stages of pursuing the harmonization of their maintenance standards and practices, following the aircraft certification model.

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245. *See generally id.*

246. *See* 53 Fed. Reg. 47,362 (Nov. 22, 1988) (codified at 14 C.F.R. pts. 135, 145) (background).

247. *Id.*

C. *FAA Policy and Practice on JAA Involvement in Rulemaking*

This Article demonstrates how the involvement of the JAA in FAA rulemaking has evolved out of a shared and largely industry-supported interest of the agencies in establishing and maintaining common airworthiness standards. It also illustrates the natural linkage between the commonality of those standards and the feasibility of an international sharing of responsibility for the implementation of those standards through a system of mutual recognition of tests and certificates.

The FAA's borrowing of foreign country certifications takes place within a formal framework of well-established, treaty-based bilateral cooperation. The decision when, under what conditions, and to what extent to utilize the enforcement services of a foreign governmental agency inevitably requires the sound exercise of judgment by an agency. It also requires continuing review of the technical adequacy of those services and their degree of "fit" with the domestic regulatory operations in which they are enlisted. Provided the necessary safeguards are observed in entering into, implementing, and reviewing these administrative arrangements, they do not raise substantial issues of principle.

The involvement of foreign government authorities in the rulemaking process as such raises more delicate questions. Although, as noted, this pattern of involvement is more the product of a natural evolution than of planning, it has reached the point where a statement of FAA procedural policy is in order. The following sections of this Article describe the basic FAA practices on the solicitation and utilization of foreign regulatory views, and then examine their degree of harmony with the conventional norms of American administrative procedure.

1. FAA Solicitation of Foreign Government Views

Habits of rulemaking cooperation between the FAA and JAA have developed so far that it can now safely be said that no notice of proposed rulemaking on design, production, or airworthiness certification matters, or related issues, is likely to be issued until the JAA has first had an opportunity to examine what is about to be proposed and been invited to comment. To put the matter differently, the JAA has become de facto a privileged rulemaking participant, accustomed to being consulted by the FAA in a systematic fashion and at a distinctly pre-NPRM stage. Only recently, the FAA and JAA agreed that whenever NPRMs and NPAs on the same subject differ, each will call specific attention to the points of

difference so as to allow parties commenting on the proposed rule or amendment to take them into account.[248]

In fact, to describe JAA involvement as systematic and pre-NPRM would be to underestimate the thoroughness of FAA/JAA collaboration and the "earliness" at which it is likely to commence. The FAA does not simply submit ripe and full-blown FAR proposals to the JAA for comment. On the contrary, any significant airworthiness initiative entertained by either side will now probably emerge from a joint technical study group comprising both FAA and JAA officials, and likely industry from both sides. Exchanges of view and the search for common solutions now appear to characterize the process from its earliest stages. Recent examples of joint projects include the design of a common streamlined ETOPS approval process, the evaluation of passenger protective breathing equipment, the development of contingency ratings for engines on fixed-wing aircraft, and the protection of aircraft from high energy radiated electromagnetic fields. At San Francisco, the FAA felt constrained to share with the JAA the fact that it was entertaining the idea of oral as opposed to written export airworthiness applications, even though the idea was still in the most inchoate of forms. The FAA did not want to proceed with the idea unless the JAA was aware of its actions.

In any event, and irrespective of the extent of prior collaboration, all FAA notices of proposed rulemaking are routinely sent to the JAA, and routinely receive JAA comment. The JAA is familiar with the procedural models of American rulemaking and cognizant of the fact that the formal publication of proposed rules and the invitation to public comment from interested parties are integral components of FAA rulemaking. FAA notices of proposed rulemaking have on occasion been amended to take account of subsequent joint FAA/JAA task force recommendations.[249] From time to time, the desire to explore fully and resolve differences of view between the two sets of authorities has caused the Europeans to request an extension of the usual APA public comment period.[250] In the case of Technical Standard Orders (TSOs), that request has been granted.[251]

In some situations, discrepancies between the FARs and JARs have not been eliminated, or eliminated soon enough, and private groups have ac-

248. CLOSED SESSION—AUTHORITIES CONCLUSIONS AND ACTIONS, SIXTH FAA-JAA MEETING, BORDEAUX, FRANCE 6-7 (June 1989) on file with *Law and Policy in International Business*.

249. For example, an NPRM on reduced screen height for wet and contaminated runways was revised to incorporate a number of recommendations of the joint industry/airworthiness authorities safety enhancement task force. 52 Fed. Reg. 45,578 (Nov. 30, 1987).

250. *See* MINUTES OF THE OPEN SESSION, SIXTH FAA-JAA MEETING, *supra* note 1, at 13-16.

251. *Id.* at 14.

cordingly introduced petitions for rulemaking to that effect. As recently as July 1990, AIA and AECMA jointly petitioned the FAA and JAA to amend certain regulations on certification flight testing,[252] for the stated purpose of standardizing procedures on that subject and thereby facilitating the mutual recognition of tests.[253]

In order that the JAA remain abreast of the FAA's regulatory agenda on airworthiness, the FAA periodically sends it a version of that agenda and a detailed status report on each pending or prospective item, including proposed rulemakings. Such agenda and status reports are communicated, at a minimum, once a year in advance of the FAA/JAA annual meeting.

American industry has shown a basically supportive attitude toward FAA/JAA collaboration. This support has been conditional, however, on the FAA's satisfaction of industry concerns over: (1) the extent and timing of industry's involvement in the process, and (2) the potential competitive advantage that the process may confer on European manufacturers.

The first of these problems has already been discussed at several points in this Article. Although the AIA and other industry groups evidently believe that the FAA has done a better job over time of involving industry in its collaboration with the JAA and making joint FAA/JAA activities reasonably transparent, they nevertheless remain concerned that regulatory compromises might be struck between the authorities without an opportunity for adequate and timely industry influence.[254] They want an adequate technical explanation of all regulatory initiatives at an early stage and an ample opportunity for comment and influence.[255]

The second and more focused concern of American industry is that FAA/JAA collaboration may indirectly confer an unfair competitive advantage on European manufacturing interests. The AIA reports, for example, that because AECMA has a closer working relationship with the JAA than AIA has with the FAA, AECMA enjoys superior access to information about FAA/JAA initiatives and indeed about the FAA's own regulatory intentions. With this risk in mind, the AIA has formally requested that the FAA review and amend its procedures so as to "[k]eep all parties advised of issues at the same time" and "[p]rovide an environment in which all parties can effectively participate in the process of development of common ground between European and American airworthiness

252. The affected FAR provisions are 14 C.F.R. §§ 25.143(c), .143(f), .149, .201. 55 Fed. Reg. 29,062 (1990) (proposed July 17, 1990).

253. 55 Fed. Reg. 29,862 (July 17, 1990).

254. Letter from Don Fuqua, President, Aerospace Industries Association, to Admiral James B. Busey, FAA Administrator (Oct. 23, 1990), *reprinted in* GAO REPORT, *supra* note 162, at 44-45.

255. *Id.*

requirements, safety requirements and regulations."[256] American industry is thus concerned not only with the question of whether its European counterpart will derive unfair advantage from the substantive rules that the FAA and JAA jointly develop, but also with the question of whether the collaborative process itself tends to favor those national interests—in this case, European manufacturers'—that enjoy a closer relationship with their own national authorities.

2. FAA Utilization of Foreign Government Views

Prior sections of this Article have shown that JAA opinion influences FAA regulatory policy chiefly through one of two processes. Sometimes the JAA has communicated its reservations about existing Federal Aviation Regulations in the course of considering them for adoption as JARs, in which case an often long and uncertain process of consensus-seeking follows. A good example is the notice of proposed rulemaking of April 1989 that sought to introduce changes to the type certification requirements for normal and transport category rotorcraft in the interest both of standardization and improved aviation safety.[257] The changes were based on proposals that had been submitted to the FAA by a JAA study group,[258] and that proved attractive to the FAA in part because their adoption would in turn ensure the Europeans' adoption of the balance of the FAA's rotorcraft type certificate requirements and obviate the development of a new European standard. In other cases, new or modified airworthiness regulations have emerged from a joint program of identification and solution of air safety problems. As the following section of this Article makes clear, in neither circumstance will the virtues of international consultation relieve the FAA of its obligation to conduct rulemaking in conformity with the standard American procedural statutes.

It also can happen, however, that a particular requirement is mostly European in its origins and, in a departure from the usual pattern, the United States may become the beneficiary of a foreign regulatory initiative. An example is JAR 22, on sailplanes and powered sailplanes, which derived chiefly from existing German regulations and later likewise came to be adopted by the Canadian, Australian and Chinese civil aviation authorities. More recently, the FAA took an interest in the JAA's develop-

256. Letter from Don Fuqua, President, Aerospace Industries Association, to Hon. James S. Busey, FAA Administrator (Apr. 9, 1990) (on file with author).

257. FAA Notice of Proposed Rulemaking No. 89-10, Rotorcraft Regulatory Changes Based on European Joint Airworthiness Requirements Proposals, 54 Fed. Reg. 17,936 (1990) (proposed Apr. 25, 1989).

258. *Id.*

ment of a JAR 145 on repair stations once it became clear that the American rule needed updating and that the JAA studies and drafts in preparation of JAR 145 might be useful.[259]

Increasingly, the impetus for parallel rulemaking has come from joint European and American (as well as Canadian) industry efforts. In 1989, aviation manufacturing groups submitted four related petitions for proposed rulemaking and amendments to the FAA and JAA respectively, on flight test requirements. When rulemaking is initiated concurrently in that fashion, the likelihood that the FAA will receive and utilize JAA views on the pending matter is only further enhanced.

Whatever the precise sequence in which it comes about, an expression of JAA views will normally be sought on any significant FAA airworthiness initiative. For example, the FAA's agenda for a joint meeting with the European authorities notes that draft copies of a notice of proposed rulemaking on the measurement of stalls in flight were sent to the JAA "with a request for comments and . . . a joint dialogue on this subject." A reason for the urgency in that case was the FAA's assumption that the proposed change could affect both new Boeing and Airbus aircraft, and its desire that both products be treated equally. Although the influence of JAA views on the FAA is likely to vary from case to case, they invariably carry weight, and the question necessarily arises how much weight they deserve.

Attaching considerable significance to foreign agency views in FAA rulemaking cannot of course in itself be considered objectionable. On the other hand, absent strong congressional indications in its favor, any notion that FAA rules require prior JAA approval would be equally objectionable. One reason why the matter has never been put squarely in terms of a JAA veto is that the collaborative process tends to begin as early as it does, thus lessening the likelihood that strongly divergent views along national lines will form at a later date. For example, a joint industry/authority task force of Americans and Europeans on wet and contaminated runway operations has met periodically to develop a text that might form the basis both of an NPRM and an NPA on the subject. Similarly, a series of meetings in 1987 and 1988 of joint American and European technical panels (comprising authorities and industry alike) has produced draft criteria for transport category powered-lifts.[260] These meetings in fact were preceded by a public notice and invitation for public comment

259. *See infra* subpart VII.B.

260. NOTES OF SEVENTH FAA-JAA MEETING, *supra* note 189, at 25.

and will eventually be followed by the formal initiation of proposed rulemaking action.[261]

Although international regulatory consensus-seeking is an appropriate and desirable mode of operation, the fact is that it does not invariably produce a commonality of views. In that event, yet further efforts to seek consensus may always be made, but as previously noted there should be no compulsion to succeed at all costs. At present, the FAA, in response to a recommendation from the National Transportation Safety Board and in cooperation with the AIA, is entertaining amendments to its bird ingestion standards (FAR 33). For its part, the JAA does not believe that the current standards require change and in fact has drafted a proposal (JAR-E) that would essentially codify them as they now stand. Negotiations are still ongoing, but perfect agreement between the FAA and JAA does not appear likely. Six meetings between FAA and JAA engine and propeller standards staff have been held over a two-year period to narrow progressively the differences between American and European standards. Considerable convergence has occurred, due in part to the practice of assigning each participant a top priority item for study, comparison and formulation of a proposed solution wherever important divergences still existed, and also in part to the joint efforts of European and American manufacturers to bridge the regulatory differences. The degree of difficulty in reaching consensus on a given problem turns principally on its technical aspects, and sometimes on special economic or other interests advanced by industry or some other constituency on the American or European side. Beyond that, the moment at which cooperative efforts on a problem are initiated appears to bear some relation to the degree of difficulty encountered. In the bird ingestion case, policy thinking on the American side (prompted by the NTSB), and the formation of preliminary regulatory views, were well advanced by the time coordination with the JAA, AIA and AECMA had begun. Timing, in a way, thus may have contributed to the impasse.

One procedural obstacle to swifter harmonization mentioned with some emphasis by both the Europeans and by industry (American and European alike) is the strikingly different time frames in which FAA and JAA rulemaking tend to occur. The American rulemaking process generally requires a good deal more time than its JAA counterpart, with the result that by the time the FAA is ready to lend agreement to a given regulatory proposal the JAA may have substantially reconsidered its thinking or begun entertaining related revisions. This observation only underscores once again the importance of timing in the achievement of international regulatory consensus.

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261. Certification Issues Conference, Notice of Conference, 52 Fed. Reg. 3192 (1987).

3. Legal Problems of Integrating International Negotiation with Domestic Rulemaking

However constructive it may appear to be as agency practice, the FAA's pattern of consultation with the JAA nevertheless raises a variety of procedural problems of a legal character. The fact that the FAA may be seeking or receiving commentary from foreign governmental quarters rather than the more usual private sources should not in principle excuse it from compliance with the ordinarily applicable procedural statutes. This section of the Article deals with questions of an agency's legal entitlement to engage in international consultations and the procedural limitations it may have to observe in doing so.

a. *Agency Authority to Participate in Government-to-Government Consultations*

A threshold question worth posing is whether the FAA has statutory authority to engage in the pattern of foreign consultation traced in this Article. The FAA has proceeded on the assumption that it has that authority, an assumption amply supported by statutory language. As an arm of the Department of Transportation, the FAA is counseled to "take into consideration any applicable laws and requirements of foreign countries" and "not . . . restrict compliance by any air carrier with any obligation, duty, or liability imposed by any foreign country."[262] Given such authority, the FAA would seem to be acting on solid statutory ground when participating in discussions with foreign countries as to their prospective as well as their present aviation norms.

The FAA's authority in this regard should not, however, be thought to depend on the existence of statutory language to that precise effect. If consultation with foreign counterparts promises to yield information of use to an agency in its policymaking functions, then that behavior legitimately forms part of agency practice. In some regulatory spheres, like the FAA's, the case for internationalizing the rulemaking process is a compelling one. Although the agency's authority to engage in international consultations was not as such drawn into question, the Court of Appeals in *Pan American World Airways, Inc. v. Civil Aeronautics Board,*[263] underscored the need of the then-existing C.A.B. to consult with foreign counterparts and the special deference owed by the courts in the name of comity in the

262. 49 U.S.C. app. § 1502(a) (1988). The FAA Regulatory Handbook requires that the FAA's "Administrator shall exercise his powers and duties consistently with the international obligations of the United States . . . ." FAA REGULATORY HANDBOOK, *supra* note 6, § 1-4d.

263. 517 F.2d 734, 745-46 (2d Cir. 1975). The court cited 49 U.S.C. app. § 1502(a) (1988).

international aviation arena. "[T]here is an obvious need for cooperation, coordination and mutual agreement regarding the regulation of scheduled and charter services among the countries involved in international air transportation."[264]

In fact, international agency-to-agency consultation also would seem appropriate in spheres not as inherently "international" as civil aviation, even though the need for international consultation may not be described as compelling in such cases. Information on present or prospective foreign regulatory practice is simply that much more useful knowledge for regulators even of the most purely domestic of subjects. In fact, in a mobile society and global economy, cross-border standardization in virtually any regulatory sphere has potential value, and international consultation is accordingly a procedurally rational course of action.

Apart from the general issue of propriety just evoked, the pattern of FAA/JAA collaboration traced in this Article also raises more specific questions of conformity with otherwise applicable U.S. procedural statutes. The balance of this section deals with the rulemaking procedures of the Administrative Procedure Act, as well as with the Government in the Sunshine and Federal Advisory Committee Acts, and more particularly with the procedural mandates embodied in these enactments. It concludes with some rather more general observations regarding procedure.

b. *The Administrative Procedure Act*

The fundamental issue presented by the Administrative Procedure Act (APA)[265] for our purposes is the extent to which its procedural framework for rulemaking accommodates the extended and systematic dialogue that increasingly characterizes the FAA/JAA relationship.[266] The duration and intensity of the FAA's pre-NPRM discussions with the JAA are such that, by the time the FAA proposes a rule for public comment, its vision of that rule will have been shaped in part by, or at least in collaboration with, its European counterparts. Do any administrative law principles stated or implied in the APA place limits on the character of this pre-NPRM activity or require the observance of certain formalities when that activity takes place?

The APA in principle leaves agencies free to gather information and form provisional policy opinions prior to issuance of a notice of proposed rulemaking. Whenever confronted with the question, courts have held that

264. *Pan American World Airways v. Civil Aeronautics Bd.*, 517 F.2d at 746.

265. 5 U.S.C. §§ 551-559, 701-706.

266. The *FAA Regulatory Handbook* indicates that the APA constitutes the procedural framework for FAA regulatory activity. FAA REGULATORY HANDBOOK, *supra* note 6, § 1-3a.

agencies are entitled freely and fully to inform themselves prior to formulating a proposed rule.[267] This is so however "formative" those pre-NPRM inquiries are intended or in fact turn out to be.[268]

On occasion, litigants have argued that pre-NPRM agency conduct may practically speaking be so decisive of the outcome that it must be treated as if part of the rulemaking (i.e., post-NPRM) process and therefore itself preceded by a notice of proposed rulemaking. In *In re FTC Corporate Patterns Report Litigation,*[269] for example, the court faced a challenge to the use by the FTC in its rulemaking of records that it had required private interests to keep and make available to the agency at a pre-NPRM stage.[270] The court held that the imposition and use of record-keeping requirements do not amount to rulemaking "merely on the basis of the possible future use to which the data might be put."[271] This would indicate that there is room for the rulemaking process to begin before formal initiation of rulemaking.

Even if the conduct of international negotiations does not legally require the prior initiation of proposed rulemaking, it might be claimed that such activity nevertheless necessitates observance of all APA rulemaking requirements. But that claim too lacks substance, for essentially the same reason that formal initiation of proposed rulemaking is not required. Agencies enjoy a basic freedom in the deliberative processes that precede issuance of proposed rules. A large component of that freedom is the agency's liberty to determine when it has gathered sufficient information to formulate responsibly a proposed regulation and to open it up to public comment. No agency should be expected to embark blindly on regulatory ventures. Neither should it be expected to insulate itself from knowledge of the policies and preferences of foreign counterpart agencies, particularly in a domain as marked by regulatory interdependence as is civil aviation. The FAA would be the poorer a regulator as a result. Thus, it would seem counterproductive if not futile to pose a formal barrier to the FAA's dealings with the JAA prior to the initiation of rulemaking proceedings. Provided the FAA, having possibly been influenced by pre-comment period communications with foreign regulatory authorities, remains genuinely open to different expressions of view, it should be legally free to have those communications.

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267. BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 4.10, at 189 (3rd ed. 1991).

268. *Id.*

269. 432 F. Supp. 291, 302 (D.D.C. 1977).

270. *Id.* at 298–99.

271. *Id.* at 302.

The question that logically arises next is whether an agency, having issued a notice of proposed rulemaking, might then be limited in its international consultative activities. Is the agency required to place in the rulemaking file information about the prior consultations that led to the formulation of the proposal? Is it required to record such information about consultations that take place during the comment period?

Courts occasionally have heard the claim that background information upon which an agency relies in its proposed rule must accompany the publication of that rule or otherwise be made available for public comment.[272] Until recently, courts took a broadly negative view of that claim. In *Flying Tiger Line, Inc. v. Boyd,* for example, the court relieved the agency of the burden of producing during the rulemaking proceedings positive evidence in support of the proposed rule, and allowed that agencies might take final action largely based on information not publicly presented during the comment period as such, much less at its outset.[273] Certainly the APA does not by its terms require that an agency make public all the background information upon which it may have relied in devising its proposal or, for that matter, ultimately adopting a rule.[274]

More recently, courts have held that while an agency may not be required to provide a detailed justification of its rules in proposing them or to disclose all the information that may have had a bearing in their formulation, it must be forthcoming with some such information, particularly where it appears to be critical to the proposal. In *Lloyd Noland Hospital and Clinic v. Heckler,*[275] the plaintiff argued that the Secretary of Health and Human Services had failed in the notice of proposed rulemaking to identify adequately the specific study that formed the basis of the proposed rule, and accordingly had deprived the public of its right of effective comment.[276] While the court eventually found that any such defect in the notice was cured through timely though subsequent disclosure of the study, it also reaffirmed the principle that notices of proposed rulemaking should identify critical studies when they actually form the proposal's fundamental basis.[277] According to the court, a notice must "disclose the thinking of the agency and the data relied on," at least to the extent neces-

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272. *See generally infra* notes 328–46 and accompanying text.

273. Flying Tiger Line v. Boyd, 244 F. Supp. 889, 892 (D.D.C. 1965). According to the court, an agency "may act on the basis of data contained in its own files, on information informally gained by members of the body, on its own expertise, or on its own views or opinions." *Id.*

274. B.F. Goodrich Co. v. Dept of Transp., 541 F.2d 1178, 1184 (6th Cir. 1976); *see generally* SCHWARTZ, *supra* note 267, § 4.8, at 168 (2d ed. 1984).

275. 762 F.2d 1561 (11th Cir. 1985).

276. *Id.* at 1565.

277. *Id.* at 1565–66.

sary for reasonable and meaningful public comment on the proposal.[278] Other courts have adopted a substantially similar position.[279]

Under this general view, joint FAA/JAA technical studies forming the essential foundation of a proposed rule would appear to constitute the sort of essential background material that should be disclosed in conjunction with the notice of proposed rulemaking. Such disclosure would substantially promote intelligent public participation in rulemaking. Similarly, if the FAA were to supplement in some important way the underlying data on the basis of JAA consultations, or to revise its method of analysis during the course of rulemaking, it should notify interested persons and allow public comment. The FAA risks reversal of its rule upon judicial challenge if it does not take these precautions.[280]

The next question that arises is whether it suffices simply to disclose the underlying joint technological data, or whether disclosure of the collaboration itself is required? An agency ought not generally be required to identify in detail all its sources and all its motivations. But where the essential technical data for the proposed rule were gathered in a joint fashion, with a view toward common American and European standards, that fact may be as essential to an intelligent understanding and appraisal of the rule as the data itself. Domestic aviation interests and public interest groups may legitimately fear that the pursuit of congruence between American and European standards will compromise the FAA's ability to meet its statutory mandate.[281] They accordingly have a legitimate interest

278. *Id.* at 1565.

279. *See, e.g.*, City of Stoughton v. EPA, 858 F.2d 747, 752-53 (D.C. Cir. 1988); United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 251 (2d Cir. 1977) ("we do not believe that when the pertinent research material is readily available and the agency has no special expertise on the precise parameters involved, there is any reason to conceal the scientific data relied upon from the interested parties."); Ethyl Corp. v. EPA, 541 F.2d 1, 48-49 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). In the latter case, the District of Columbia Circuit found the EPA's failure to make public on a timely basis its test procedures and results in adopting new-source performance standards for Portland cement plants under the Clean Air Act constituted "a critical defect in the decision-making process." Portland Cement Ass'n v. Ruckelhaus, 486 F.2d. at 392. It further held that "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on . . . data that, [to a] critical degree, is known only to the agency." *Id.* at 393.

280. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, A GUIDE TO FEDERAL AGENCY RULEMAKING 179 (2d ed. 1991). The report suggests that, subject to Freedom of Information Act exemptions, agencies should make all information generated during a pre-NPRM inquiry available for comment by interested persons early in the rulemaking. *See id.* It also advises that written comments received during the comment period be placed promptly into the rulemaking file, that persons who choose to comment at a later date may make reference to them. *Id.* at 211-12.

281. 49 U.S.C. app. § 1346 (Supp. 1992).

in timely knowledge that a proposed rule springs in substantial part from considerations or processes of this sort. For this reason, when communications from other governments have fundamentally or importantly influenced the tenor of a proposed rule, it seems highly desirable that that fact be acknowledged, and that the substance of those foreign government communications be included in the rulemaking file and identified as such.

It is difficult to identify with certainty the exact materials that agencies are required under the APA to include in an informal rulemaking file. The Justice Department's Office of Legal Counsel was unable to advise the OMB precisely about agency obligations in this regard.[282] But it did suggest that agencies "generally include substantive oral or written communications in the administrative file for public comment and criticism, at least when these communications occur before the close of public comment," on the theory that the statutorily required opportunity for the public to participate in rulemaking implies the opportunity for public comment on all substantive communications from outside the agency.[283] Notwithstanding the uncertainty, it seems reasonable to suppose that when a proposed rule reflects an agency's determination to reach regulatory accord on a given matter with foreign counterpart agencies, that fact should be made known. At the least under circumstances of this kind, both the substance and the fact of an agency's international consultations would seem deserving of inclusion in the administrative file.[284] As a practical matter, since an agency cannot always confidently predict when a court will find that foreign consultation played a significant enough role in the rulemaking process to mandate disclosure, it would do well in cases of doubt to make such disclosure.

FAA policy and practice appear to reflect these precepts. As a general principle, the FAA maintains that "the public interest is best served when

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282. *See* 5 Op. Off. Legal Counsel 107, 108–13 (1981).

283. *Id.* at 112. The Office of Legal Counsel interpreted APA Section 553 as guaranteeing judicial review "on the 'whole record,'" and concluded that the latter could be said to include the substance of communications received. *Id.* at 111 (quoting 5 U.S.C. § 706).

284. Agency communications with foreign counterparts might be claimed to fall within a "deliberative process" exception to the APA's disclosure requirements. *See* United Steelworkers of America v. Marshall, 647 F.2d 1189, 1218 (D.C. Cir. 1980), *cert. denied sub. nom.* Lead Industries Ass'n v. Donovan, 453 U.S. 913 (1981). However, the Office of Legal Counsel has opined that "the deliberative process does not extend to the legal or policy views of persons outside of executive or independent agencies." *See* 5 Op. Off. Legal Counsel, *supra* note 282, at 114. Such persons, the Office concluded, "are not within the overall decision process of the rulemaking agency. . . . Their views not being protected by a deliberative process exception, the rulemaking agency would be well advised to place these views in the administrative file and the record for judicial review if the views might affect the agency's decision." *Id.*

regulatory affairs are open to the public to the fullest extent possible."[285] In fact, FAA procedures expressly address the problem of pre-NPRM comments and properly suggest the circumstances in which they should be made public:

> (a) If the substance of the contact [made before the NPRM is issued] forms one of the bases for issuing the NPRM, [the agency should] discuss the substance of the contact in the preamble. For example, if an outside group met with FAA officials to urge certain regulatory changes and the FAA proceeded to an NPRM, the meeting and interest of the outside group should be described in the preamble even if "no petition for rulemaking" was submitted. (b) If there is a legitimate reason not to discuss the contact in the preamble, [the agency should] prepare a report for the docket when the NPRM is issued.[286]

The FAA appears to observe these principles in practice. In the rotorcraft rulemaking discussed earlier, the NPRM issued by the FAA made it perfectly clear that the proposals had been influenced by the thinking of the European authorities and that they were designed to enable the Europeans to accept certification standards that in other respects would parallel the existing FAA standards on rotorcraft.[287] The NPRM itself expanded upon the JAA's role in the genesis and evolution of the proposals:

> Rotorcraft Regulatory Changes Based on European Joint Airworthiness Requirements Proposals
> SUMMARY: This notice proposes changes to the type certification requirements for both normal and transport category rotorcraft. The changes would revise airworthiness standards for systems, propulsion, and airframes, and would introduce safety improvements, clarify existing regulations, and standardize terminology. The changes are based on some of the proposals that were submitted to the FAA by the European Joint Airworthiness Requirements (JAR) 29 group. These proposals are intended to encourage the European Community's acceptance of the Federal Aviation Regulations' rotorcraft type certification requirements and to obviate the development of a new and different European

285. FAA REGULATORY HANDBOOK, *supra* note 6, § 1-6(a).
286. *Id.* at § 11-4(b)(1).
287. 54 Fed. Reg. 17,936 (1989) (codified at 14 C.F.R. pts. 27, 29).

> standard. Adoption of these changes will achieve increased commonality of airworthiness standards among the respective countries.[288]

FAA practice provides additional support for the view that significant pre-NPRM contracts with the JAA should ultimately be recorded in a rulemaking file. The agency's procedures contemplate a special rulemaking variant called an Advance Notice of Proposed Rulemaking (ANPRM), which recognizes the existence of a problem requiring rulemaking, but acknowledges the need for additional information before a notice of proposed rulemaking can be formulated.[289] An ANPRM "invites the public to respond to specific questions" or otherwise furnish information helpful to the agency in developing an NPRM or indeed in deciding that rulemaking is not necessary.[290]

The ANPRM is conducted along basically the same procedural lines as the conventional NPRM, with a rulemaking docket of information and comments available to the public. Since pre-NPRM exchanges between the FAA and JAA produce information of the general sort contemplated by an ANPRM, a functional view would suggest that such exchanges should be treated, for publicity and comment purposes, as if conducted in connection with the FAA's ANPRM procedures, including its requirements of transparency.

Assuming an agency does not at an early stage disclose, at least in general terms, the fact and substance of prior foreign consultations, there is good statutory reason to suppose that in some cases it would have to do so anyway at a later date. Section 553(c) of the APA requires agencies to incorporate in the rules they adopt "a concise general statement of [the rules'] basis and purpose."[291] This requirement is supposed to help ensure that the agency can articulate a rational basis for its rules, and, eventually, to facilitate the task of a reviewing court in examining both the agency's reasoning and its rules' rationality and conformity to statutory purpose.[292]

Determining how extensive and detailed an agency's reference to joint technical data, foreign consultations or harmonization has to be to satisfy

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288. *Id.*

289. FAA REGULATORY HANDBOOK, *supra* note 6, at § 9-2.

290. *Id.*

291. 5 U.S.C. § 553(c) (1988).

292. Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561, 1566 (11th Cir. 1985); Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968); Chemical Leaman Tank Lines, Inc. v. United States, 368 F. Supp. 925, 941 (D. Del. 1973); *see generally* PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 176 (1989).

Section 553(c) is not a simple matter. Courts have on occasion upheld published regulations containing virtually no statement of basis and purpose.[293] At other times, they have imposed a level of detail and specificity dictated by the exigencies of subsequent judicial review,[294] as well as a requirement that the statement identify and respond to the principal adverse comments received.[295] It is easy to see how a court taking the latter view might regard a statement of basis and purpose as inadequate if it failed to signal the agency's conscious desire to align its standards with those of other countries, its fundamental reliance on data jointly collected with those other countries or its conduct of international consultations, when one of these events was outcome determinative. Should these factors surface for the first time on judicial review, and be deemed sufficiently influential in the process or outcome, a court could well consider the statement of basis and purpose deficient and possibly the notice of proposed rulemaking as well.

Ultimately, disclosure of international consultations should not be predicated on Section 553(c) alone. That provision comes into play only when and if a final rule is adopted, and it presumably would require reference to the foreign consultative process or the harmonization objective only if the final rule relies on one of these as its basis or purpose. Postponing notice until that event would be inadequate from the point of view of promoting public participation in the rulemaking process itself. Outside groups have a manifestly greater opportunity to contribute to the shaping of agency policy if they have some sense of how an agency's preliminary views have been shaped by foreign government-supplied information, foreign government consultations or the conscious pursuit of internationally common criteria. Accordingly, I would recommend viewing Section 553(c) as merely a supporting reason for a requirement of disclosure of essential foreign consultations in appropriate cases, and not as the requirement's raison d'être.

Thus far, the discussion has been cast in terms of an agency's obligation to place in the rulemaking file information about prior international consultations that shaped the proposed rule. Most of the considerations I have raised in that context apply equally to consultations taking place during

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293. Alabama Ass'n of Insurance Agents v. Governors of the Federal Reserve System, 533 F.2d 224, 236 (5th Cir. 1976).

294. Amoco Oil Co. v. EPA, 501 F.2d 722, 739 (D.C. Cir. 1974). The Section 553(c) statement under this view "must be sufficiently detailed and informative to allow a searching judicial scrutiny of how and why the regulations were actually adopted." *Id.*; *see also* Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850-51 (D.C. Cir. 1972).

295. *See* Western Coal Traffic League v. United States, 677 F.2d 915, 927 (D.C. Cir. 1982), *cert. denied,* 462 U.S. 1110-11 (1983).

the comment period itself. It is difficult to imagine that discussions that would have to be mentioned as essential background if they occurred on a pre-NPRM basis should not receive mention in the rulemaking file if they occur during the comment period. FAA procedures suggest that they should.[296]

The alleged necessity of recording comment period consultations in informal rulemaking has occasionally arisen in terms of an agency's so-called ex parte contacts. The APA specifically bars contacts between agency decisionmakers and interested outside parties during formal adjudications and formal rulemaking proceedings,[297] but no such statutory bar applies to rulemaking of an informal variety.[298] Although the D.C. Circuit inferred a bar on ex parte contacts in informal rulemaking,[299] subsequent decisions have confined any such restriction to the unusual situation in which discrete private interests find themselves in competition for a specific valuable privilege.[300] Thus, ex parte contacts are ordinarily permitted in rulemaking, particularly if they can be viewed as part of the agency's information-gathering and deliberative processes.[301] Neither the standard-setting nor the design type certification activities conducted by the FAA in the airworthiness setting approaches the rare species of rulemaking that implies a bar on ex parte contacts. Interestingly, the remedy for an impermissible ex parte contact, should one occur, would ordinarily be its recording in the rulemaking file so that the occurrence becomes a matter of public record and its substance the subject of public comment. Thus, were an agency, as a matter of course, to include a record

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296. The FAA requires that for every rulemaking action a public rules docket be maintained containing summaries of all public contacts (including informal meetings and telephone calls) occurring during the comment period, and that these summaries be made available for public examination. FAA REGULATORY HANDBOOK, *supra* note 6, § 1-6(e); *see also id.* at § 11-3(b) (rulemaking docket should contain documents filed in connection with an FAA rulemaking proposal, including comments, reply comments, and correspondence).

297. 5 U.S.C. §§ 554(d), 557(d)(1)(A)-(B).

298. SCHWARTZ, *supra* note 267, at 169. The bill that eventually became the APA originally contained a similar prohibition against ex parte contacts in informal rulemaking. *See* 5 Op. Off. Legal Counsel, *supra* note 282, at 109-10.

299. Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977).

300. Action for Children's Television v. FCC, 564 F.2d 458, 477 (D.C. Cir. 1977).

301. Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981); United Steelworkers of America v. Marshall, 647 F.2d 1189, 1220 (D.C. Cir. 1980), *cert. denied sub. nom.* Lead Industries Ass'n v. Donovan, 453 U.S. 913 (1981). In this case, the court sought particularly to shield from any ban on ex parte contacts communications within agencies, as distinct from those with outside private interests. *Id.* at 1218-20. The JAA bears much functional similarity, in its relations with the FAA, to other federal agencies.

of its consultations with foreign agencies in the file pertaining to that rulemaking, it would in effect fulfil the conditions of cure for impermissible ex parte contacts.[302]

Courts have on occasion been tempted to hold that even if an agency's recordkeeping of post-NPRM communications with outside parties is not mandated by the APA or other procedural statutes, it may be mandated as a matter of procedural fairness and in the interest of effective judicial review.[303] The Supreme Court's *Vermont Yankee* opinion[304] effectively sought to put an end to the judicial imposition on agencies of procedures not as such required by general procedural enactments or by the specific enactments under which a given agency operates.[305] That opinion has left open the prospect that courts still might justify the imposition of additional procedures where and to the extent effective judicial review so requires.

The fact remains that agencies would be well advised to disclose their consultations with foreign authorities even when no judicially enforceable principle requires them to do so, provided those consultations are apt to play a significant role in the shaping of agency policy. Among those reasons certainly figures the concern for procedural fairness which, in pre-*Vermont Yankee* days, might have led a court to impose such a requirement as a matter of law. Effective participation by private groups in public rulemaking proceedings would seem unquestionably to be enhanced when those groups know not only the joint technical data that underlie a proposed rule but also the commitment to international regulatory consensus that may have caused the agency to favor one particular set of standards over another.

A word should be said about the propriety of consultation with the JAA after closure of the public comment period. Based on my observations, both the FAA and JAA appear to conduct themselves on the belief that JAA influence should be exerted, if at all, during and not after the comment period. JAA requests for an extension of the comment period, and FAA actions upon those requests, suggest that post-comment period influence should not occur. FAA policy toward ex parte contacts after the closing date for comments offers a useful if imperfect analogy. According

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302. FAA procedures in fact require agency officials to prepare promptly a report of all *ex parte* contacts made during the rulemaking comment period and to include it in the rulemaking docket. FAA REGULATORY HANDBOOK, *supra* note 6, § 11-4(b)(2).

303. *See, e.g.*, Moss v. Civil Aeronautics Bd., 430 F.2d 891, 893 (D.C. Cir. 1970).

304. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

305. *Id.* at 543, 548.

to that policy, post-comment period comments are to be discouraged[306] on the ground that other interested parties would not have reason to expect such comments or to attempt to reply to them. Should they nonetheless occur, a report should be filed promptly in the rulemaking docket.[307]

Whether or not effective judicial review requires an agency to make appropriate references in a rulemaking file to its collaboration with foreign authorities, or the agency chooses to make disclosure voluntarily, judicial review is likely to bring such collaboration to the surface. An agency may well be called upon by a court to explain why it ultimately overrode expressions of fact or opinion made by private interests during the comment period, and that alone may require reference to the joint technical data arrived at in collaboration with foreign authorities or to the agency's desire to act in standard-setting concert with counterpart agencies abroad. If there is reason to believe that a final rule would have been different but for the agency's preference for harmonized standards, the factual and policy bases of harmonization may have to appear in the record. A court might conceivably allow an agency to explain and support its rule through judicial testimony or affidavits that effectively supplement the rulemaking record,[308] but more often will remand the rule to the agency for further consideration.[309] In either event, the agency would have found itself in a stronger position upon review, both substantively and procedurally, if it could have pointed to substantial evidence in the rulemaking record of the relevant joint technical data and international considerations.

c. *The APA Foreign Affairs Function Exemption*

The discussion thus far has presupposed application of the Administrative Procedure Act to the FAA's international rulemaking activities. In fact, the question might well be raised whether those activities fall within the APA's exception for "a military or foreign affairs function of the United States,"[310] and therefore escape APA strictures. Since I conclude that recording of both pre- and post-NPRM consultations, where substantially decisive of outcome, is in any event procedurally advisable, this

306. *See* FAA REGULATORY HANDBOOK, *supra* note 6, § 11-4(b)(3)(b) (stating that such comments should be minimized).

307. *Id.* § 11-4(b)(3)(a).

308. National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 701 (2d Cir. 1975).

309. *Id.; see also* Camp v. Pitts, 411 U.S. 138, 143 (1973); Burlington Truck Lines v. United States, 371 U.S. 156, 168-70 (1962).

310. 5 U.S.C. § 553 (a)(1). For an argument in favor of the exemption's repeal, see Arthur E. Bonfield, *Military and Foreign Affairs Functions Rule-Making Under the APA*, 71 MICH. L. REV. 221, 314-15 (1972).

question could well be bypassed. But it seems of sufficient interest to warrant some discussion.

A first view of the exemption, supported by its legislative history, would consider a rulemaking exempt from APA procedures whenever the arena so affects relations with other governments that their observance "would provoke definitely undesirable international consequences."[311] In a leading case, the decision of an international trade body[312] to impose stricter textile import quotas pending consultations was thought to create an incentive for sudden and artificial short-run increases in imports; such increases, it was argued, might only exacerbate the conditions requiring agency action in the first place.[313] The court found these to be the sort of "undesirable international consequences" the APA exemption sought to avert, especially as the timing of the agency's action "may be linked intimately with the Government's overall political agenda concerning relations with another country."[314] Against the background of these and still more pointed examples of regulatory action with genuine foreign affairs implications—such as INS regulatory changes in response to the Iranian hostage crisis,[315] rulemaking about a foreign aid program[316] or strategic foreign policy formulation[317]—the FAA/JAA consultations on airworthiness standards would seem poor candidates for exemption from APA rulemaking procedures on this rationale.

At least one court has adopted a much broader, and indeed quite expansive, view of the exemption. In its view, the exemption applies to all proposed regulations that "clearly and directly" involve a foreign affairs

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311. American Ass'n of Exporters & Importers v. United States, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (citing H.R. Rep. No. 1980, 69th Cong., 2d Sess. 23 (1946)). An example cited in the legislative history of the APA, and pertinent to this case, is the issuance of a notice of proposed rulemaking during negotiation of bilateral agreements on import quotas, resulting in immediate dumping of foreign inventories onto the American market. *Id.* For criticism of the exemption's application in this domain, see William D. Araiza, *Notice-and-Comment Rights for Administrative Decisions Affecting International Trade: Heightened Need, No Response,* 99 YALE L.J. 669 (1989).

312. The body in question was the Committee for the Implementation of Textile Agreements (CITA). *American Ass'n of Exporters & Importers v. United States,* 751 F.2d at 1242.

313. *Id.* at 1249.

314. *Id.* The court emphasized that CITA's authority stemmed in part from the President's foreign affairs power and that the APA's procedural constraints would inappropriately hamper the exercise of that power. *Id.*

315. Malek-Marzban v. INS, 653 F.2d 113, 116 (4th Cir. 1981); Yassini v. Crosland, 618 F.2d 1356, 1361 (9th Cir. 1980).

316. *See* Bonfield, *supra* note 310, at 261.

317. *Id.*

function.[318] In *Mast Industries, Inc. v. Regan,* the Court of International Trade held that whether the exemption applies depends on "the function of the regulations themselves," rather than either the adverse international consequences of imposing APA procedures upon them or the source of the agency authority invoked.[319] The court concluded that regulatory action by which the President defines, modifies or possibly violates an international agreement, or directs his subordinates to do so, of necessity "clearly and directly" implicates foreign affairs.[320] Under this interpretation, an agency's consultation with foreign government counterparts, even on otherwise domestic regulatory policy, might fall outside the APA as a foreign affairs function purely on account of the fact that foreign governments have been brought into the picture. The court was careful to point out, however, that the foreign affairs exception cannot be applied to functions "merely because they have impact beyond the borders of the United States."[321]

In some instances, the international involvement will be direct and central to the regulatory purpose. Take, for example, the case of *WBEN, Inc. v. United States,*[322] which involved the FCC's consultation with its Canadian counterparts to discuss a new bilateral agreement on the allocation of pre-dawn broadcasting rights. In exempting the FCC from having to provide advance notice of the consultations or an opportunity for comment, the court emphasized the fact that the consultations in question contemplated a formal bilateral agreement on the subject with Canada and therefore had a distinctly direct and central international dimension.[323]

The FAA's collaboration in standard-setting with the JAA differs discernibly from the FCC activity at issue in the *WBEN* case. FAA/JAA consultations do not yield legally effective international instruments, such

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318. Mast Industries v. Regan, 8 Ct. Int'l Trade 214, 231 (1984) (quoting Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 191, 275 (1947) (House Report)). The court rejected any limitation of the exemption to purely "diplomatic activities," relying on legislative history. *Id.* at 229-230; *see also* Bonfield, *supra* note 310, at 259; Consumers Union of United States, Inc. v. CITA, Civ. Act. No. 74-968, J.A. 73 (D.D.C. 1975), *rev'd on other grounds,* 561 F.2d. 872 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 933 (1978) (exempting executive action in connection with the negotiation of import restriction agreements with other countries).

319. Mast Industries v. Regan, 8 Ct. Int'l Trade at 229.

320. *Id.* at 230.

321. *Id.* at 229. Legislative history likewise suggests that rulemaking should not be exempt under § 553(a) unless it "directly" or "clearly and directly" relates to the excluded subject matter. *See* Bonfield, *supra* note 310, at 236 n.46, 237 (citing legislative history). Bonfield concludes "that rulemaking only indirectly or tangentially related to the exempted functions is not to be treated as within the exemptions, and that close cases should be treated as outside the exemption." *Id.* at 237.

322. 396 F.2d 601 (2d Cir.), *cert. denied,* 393 U.S. 914 (1968).

323. *Id.* at 615-16.

as bilateral agreements on wavelength allocation, import restrictions,[324] airworthiness certification or any other subject, and are not intended to do so. Neither do they take place pursuant to a formally binding international agreement of any kind.[325] On the other hand, this Article has attempted to show that civil aviation lends itself especially well to international cooperation and that such cooperation is distinctly advantageous. Under those circumstances, only if compliance with the APA could be shown to burden severely the consultation process would an exemption be justified.

In determining whether compliance with the APA would bring a sufficiently undesirable measure of exposure to the FAA's international consultations to justify the exemption, we should not suppose that an exemption would shelter the FAA's entire rulemaking process. Presumably, in a case like the FAA's, only those steps of the rulemaking process that themselves involve international discussions would be exempt. Thus, an FAA airworthiness standard or type certification would otherwise be adopted according to usual APA rulemaking procedures. It could not sensibly be otherwise. If an agency's rulemaking, start to finish, were to fall outside the APA whenever it chose to incorporate international consultations in the process, the scope of application of the APA would be drastically curtailed. Agencies could almost always claim to see value in discussing prospective regulatory initiatives with foreign counterpart agencies, however "inherently" domestic the activity under regulation appears to be. Although it would seem generally desirable for American agencies to make pertinent international discussions a component of their regulatory process, it would not seem desirable for that practice in effect to clothe their rulemakings with immunity from the APA.[326]

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324. *See* Consumers Union v. CITA, Civ. Act. No. 74-968, J.A. 73 (D.D.C. 1975).

325. Most of the international trade cases raising the foreign affairs exemption entail proposed regulatory change affecting trade subject to bilateral trade agreements. *See, e.g.,* Mast Industries v. Regan, 8 Ct. Int'l Trade at 214, 216 (1984).

326. Bonfield appears to favor the same view:

> Since rule-making is exempted from section 553 only "to the extent that" it "clearly and directly" involves such a function . . . this exemption may apply only to agency rule-making under authority granted it specially for *foreign affairs purposes.* If that is the case, an agency would not be entitled to an exemption . . . for rule-making undertaken pursuant to some general nonforeign affairs authority, even though it in fact acted with such foreign affairs considerations in mind.

Bonfield, *supra* note 310, at 260–61. The Administrative Conference of the United States has recommended that Congress eliminate the APA's categorical foreign affairs function exemption and clarify that agencies may by rule prescribe more limited categories of rulemaking exempt from public procedures as cases in which such procedures would be "impracticable, unnecessary, or contrary to the

Even in its necessarily reduced form, the foreign affairs exemption should not, in my judgment, be applied to FAA airworthiness activities of the sort described in this Article. As noted, APA requirements for informal rulemaking will otherwise be applicable to the rulemakings in which the FAA engages and their burdensomeness will not be substantially heightened by the inclusion of JAA contacts within their ambit. More important, the requirements associated with notice and comment rulemaking, even when supplemented by appropriate references in the record to the FAA's international discussions, would not seem significantly to hobble the process of consultation or to embarrass its other participants.[327] As far as I know, the FAA does not claim that the foreign affairs function exemption shields its airworthiness rulemakings—either in their entirety or with respect to JAA communications alone—from application of the APA, and such a claim would not seem warranted. This conclusion seems all the more compelling in light of the role that JAA contacts now play in the process. Consultations with the JAA do not occur only randomly or sporadically; they tend increasingly and regularly to influence the substance of FAA regulations and are intended to.

d. *The Government in the Sunshine Act*

The openness provisions of the Government in the Sunshine Act[328] do not appear to have application to the FAA activities described in this Article. This statute, which requires agencies to give advance notice of their meetings in the Federal Register[329] and to open them to public observation[330] (or in some cases simply to record proceedings and make the records publicly available),[331] is limited to agencies "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof."[332] Thus, even without reference to its exceptions, the Sunshine Act has no bearing on the FAA, a single-headed body that is itself a component of a single-headed cabinet

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public interest" under section 553(b)(B). ACUS Recommendation No. 73-5, Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements, 1 C.F.R. § 305.73-5(b) (1992) (proposed Feb. 2, 1974).

327. *See generally* 5 U.S.C. § 553(a)-(d) (1988). Sections 553(b)(3)(B) and d(3) independently exclude from APA procedures even rulemaking non-exempt under Section 553(a) where those procedures would be contrary to the public interest.

328. 5 U.S.C. § 552b.

329. *Id.* § 552b(e)(3).

330. *Id.* § 552b(b).

331. *Id.* § 552b(f)(1)-(2).

332. *Id.* § 552b(a)(1).

agency, the Department of Transportation. Although the 1976 statute declares it to be policy that the public have the "fullest practicable information regarding the decisionmaking processes of the Federal Government,"[333] the statutory coverage is accordingly severely limited.

Even if the Sunshine Act contemplated activity by single-headed agencies, it is unclear whether it would cover the concerted rulemaking activities examined in this Article. Such activities were present in the case of *Federal Communications Commission v. ITT World Communications, Inc.*[334] There, three of the FCC's seven commissioners[335] participated in so-called "consultative process" sessions with European and Canadian counterparts for purposes of the joint planning of telecommunications facilities.[336] They constituted a quorum of the FCC's Telecommunications Committee and were authorized to act on behalf of the FCC.[337] Although for a five-year period from their inception such meetings were open to all interested parties, in 1979 private parties were excluded.[338] The Supreme Court nevertheless held the Sunshine Act inapplicable.[339]

According to the Court, the crucial issue was whether the FCC Telecommunications Committee was at the time engaged in deliberations that "determine or result in the joint conduct or disposition of official agency business."[340] The Court of Appeals for the D.C. Circuit had found that the FCC was so engaged:

> The CP [consultative process] discussions are not "chance meetings," "social gatherings," or "informal discussions" among members, but prearranged conferences held to effectuate public business of the greatest import. . . . They are . . . an integral part of the Commission's policymaking processes, and as such they constitute the "conduct . . . of official agency business."[341]

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333. *Id.* § 552b (Declaration of Policy and Statement of Purpose).

334. 466 U.S. 463 (1984).

335. *Id.* at 470.

336. *Id.* at 465.

337. *Id.* at 470.

338. ITT World Communications v. FCC, 699 F.2d 1219, 1225 (D.C. Cir. 1983), *rev'd.*, 466 U.S. 463 (1984).

339. *See* FCC v. ITT World Communications, 466 U.S. at 469.

340. *Id.* at 465–66 (quoting 5 U.S.C. § 552b(a)(2)).

341. ITT World Communications v. FCC, 699 F.2d at 1244. The court also rejected the Commission's policy-based arguments that application of the Sunshine Act to international consultations would have "adverse practical consequences." *Id.* It also concluded that the commission bore the burden of demonstrating the need for such an exemption, and that Congress does not "permit the closure of agency meetings simply because foreign representatives are present." *Id.*

The Supreme Court reversed, essentially on the ground that the Committee at the sessions in question only sought to reach informal policy understandings and did not take final action or indeed any action at all falling within the sphere of its delegated power, which in that case was limited to ruling upon applications for common carrier certification.[342] The Court's opinion cites legislative history to the effect that "informal background discussions [that] clarify issues and expose varying views"[343] should not necessarily have to be conducted in public, lest agency operations unnecessarily be impaired.[344] According to the Court, the Commissioners were engaged in preliminary discussion that did not "determine or result in . . . official agency business."[345] The Court also observed that when engaged in international consultative processes, the FCC neither convenes nor controls the conduct of the proceedings, and that the session may not even be considered an agency meeting within the meaning of the Sunshine Act.[346] Under the Supreme Court's analysis, FAA/JAA consultations, which likewise do not eventuate in final action, would not be subject to Sunshine Act constraints, even if the FAA were an agency within the meaning of that statute.

e. *The Federal Advisory Committee Act*

The Federal Advisory Committee Act of 1972 (FACA),[347] which provides for the establishment of federal advisory committees, requires that all advisory committee meetings in principle be open to the public, that notice of each meeting be published in advance in the Federal Register

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342. FCC v. ITT World Communications, 466 U.S. at 473.

343. *Id.* at 469-70 (citing S. REP. No. 354, 94th Cong., 2d Sess. 19 (1976)).

344. *Id.* at 470.

345. *Id.* at 470 n.7 (emphasis deleted). The Administrative Conference of the United States has urged that the Sunshine Act be amended, in the interest of a freer and fuller deliberative process, to provide that "agency members be permitted some opportunity to discuss the broad outlines of agency policies and priorities . . . in closed meetings, when the discussions are preliminary in nature or pertain to matters, such as budget or legislative proposals, which are to be considered in a public forum prior to final action." ACUS Recommendation No. 84-3, Improvements in the Administration of the Government in the Sunshine Act, 1 C.F.R. § 305.84-3 (1992) (proposed 1984).

346. FCC v. ITT World Communications, 466 U.S. at 473.

> The Act prescribes procedures for the agency to follow when it holds meetings and particularly when it chooses to close a meeting. These provisions presuppose that the Act applies only to meetings that the agency has the power to conduct according to those procedures. And application of the Act to meetings not under agency control would restrict the types of meetings that agency members could attend.

Id. (citations omitted).

347. 5 U.S.C. app. § 1-15 (1988).

and that interested persons be permitted, subject to reasonable regulation, to attend, appear before and file statements in connection with those meetings.[348] In addition, "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available" to the advisory committee must be made available for public inspection and copying, subject to the exemptions of the Freedom of Information Act, as must be the minutes of the advisory committee meeting itself.[349] Other requirements of the Act are dealt with below. However, FACA does not apply to any advisory committee declared by the President or relevant agency head to be concerned with matters exempt from the requirements of the Government in the Sunshine Act.[350]

The FAA has proposed the creation of an Aviation Rulemaking Advisory Committee.[351] This action, which had been recommended by the Secretary of Transportation's Task Force on FAA Reform, is described as "a means of improving communications with the public and allowing the public a better opportunity to participate in agency rulemaking."[352] According to its charter, the Committee's fifty members should reflect a fair balance of views representative of the aviation community "including air carriers, manufacturers, labor groups, environmental groups, universities, corporations, associations, consumers, and government agencies other than the FAA."[353] The agency conceived the Committee as an instrument for tapping the resources of a wide range of interested outside persons. However, the agency also views a formal advisory committee as a means of ensuring that these interests are heard and felt to be heard, particularly in a regulatory setting in which outcomes appear increasingly to be the product of joint FAA/JAA discussions.

The fact that the agency is about to establish a formal advisory committee, and that FAA/JAA collaboration appeared to strengthen the case for such a committee, does not entirely put to rest the question whether

348. *Id.* § 10(a).

349. *Id.* § 10(b).

350. *Id.* § 10(d).

351. FAA Order 1110 Establishing an Aviation Rulemaking Advisory Committee (March 14, 1990). ARAC will be integrated into the process through the FAA's rulemaking, when the idea (as a proposed rule) will be considered by an ARAC subcommittee. *See* Final Notes of Ninth Meeting, *supra* note 198, at IV-5.

352. *Id.* Remarks accompanying the Order, and constituting the Committee's charter, state that the Committee "will afford the FAA with the opportunity, which it now lacks, of obtaining direct, firsthand information and insight from the substantially affected interests with respect to proposed rules and existing rules that should be revised or eliminated; this advice will result in the development of better rules in less overall time while requiring fewer FAA resources than under the current practice." *Id.*

353. *Id.*

FACA still has application to FAA/JAA meetings as such and whether all or certain of its provisions should be observed when the FAA and JAA meet. Even after creation of an Aviation Rulemaking Advisory Committee, FACA may remain relevant to the kind of international consultations exemplified by the FAA/JAA relationship. The statute has been applied in other settings to meetings that an agency deliberately holds with outside groups in advance of the issuance of a notice of proposed rulemaking.[354] Moreover, the courts have held FACA applicable to groups that have not been formally established as advisory committees pursuant to the Act,[355] and this would allow the statute to embrace agency gatherings with representatives of foreign government regulatory authorities.

An "advisory committee," under the Act, signifies "any committee, board, commission, council, conference, panel, task force, or other similar group,"[356] whether formally established by statute, or either established or simply utilized by the agency itself, for purposes of rendering advice or recommendations.[357] In the case of the FAA, the consultations do not involve a group that can be said to have been created by statute[358] or even by deliberate action of the agency,[359] but at most a group that is utilized by the agency.

Whether an agency utilizes a body as an advisory committee within the meaning of the Act depends essentially on functional criteria. Thus, even an advisory body that predates an agency,[360] or has an existence entirely independent of the agency,[361] may be considered an advisory committee to the agency if utilized as such. GSA regulations state that a body is "utilized" as an advisory committee when it constitutes

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354. *See, e.g.*, Food Chemical News v. Davis, 378 F. Supp. 1048, 1050 (D.D.C. 1974).

355. *Id.* at 1051. The court held that failure of an agency to charter and establish a committee in accordance with FACA "cannot be employed as a subterfuge for avoiding the Act's public access requirements." *Id.*

356. 5 U.S.C. app. § 3(2) (1988).

357. *Id.*

358. In order for an advisory committee to be established by statute, Congress must have more or less directly contemplated the creation of such a committee. *See* Lombardo v. Handler, 397 F. Supp. 792, 796 (D.D.C. 1975).

359. Only committees "directly established" by an agency would fall in this category. *Id.* at 797 (citing H.R. CONF. REP. No. 1403, 92d Cong., 2d Sess. 4 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3508, 3509).

360. *Id.* at 798-99 (citing H.R. REP. No. 1017, 92d Cong., 2d Sess. 8-9 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3491, 3494).

361. *See* Center for Auto Safety v. Cox, 580 F.2d 689, 694 (D.C. Cir. 1978). The case confirms that FACA may apply to a pre-existing organization. *See id.* at 693-94.

> a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which . . . [an] agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.[362]

Other GSA regulations suggest that the Act's chief concern is an agency's recurrent use of a particular group as a preferred source of advice or recommendations.[363]

The Supreme Court has determined that the term "utilized" should not necessarily be given its plain meaning when used in the FACA context.[364] Faced with the claim that the ABA's Standing Committee on the Federal Judiciary constitutes an advisory committee when advising the President through the Justice Department on the qualifications of potential federal judicial nominees, the Court in *Public Citizen v. Department of Justice*[365] ruled that a body is not in all cases utilized as an advisory committee simply because the President or an agency seeks its advice:

> A nodding acquaintance with FACA's purposes, as manifested by its legislative history and as recited in § 2 of the Act, reveals that it cannot have been Congress' intention, for example, to require the filing of a charter, the presence of a controlling federal official, and detailed minutes any time the President seeks the views of the [NAACP] before nominating Commissioners to the Equal Employment Opportunity Commission, or asks the leaders of an American Legion Post he is visiting for the organization's opinion on some aspect of military policy.[366]

In order for an organization to constitute an advisory committee it must provide an agency with "advice or recommendations."[367] One court, declining to identify any single factor as conclusive of this question, held that

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362. 41 C.F.R. § 101-6.1003 (1992).

363. *Id.* § 101-6.1004(j).

364. *See* Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 452–55 (1988).

365. *Id.* at 440.

366. *Id.* at 452–53. The Court likewise rejected the notion that the President utilized an advisory committee when he consulted with his political party before selecting his Cabinet. *Id.* at 453.

367. 5 U.S.C app. § 3(2).

when an agency in the course of developing regulations discloses them in draft to select groups in order to obtain their advice and recommendations, it utilizes these groups as advisory committees.[368] On the other hand, the court made it plain that not all contacts between an agency and an outside group necessarily constitute utilization of an advisory committee, even if some of them do, and insisted that committees be held subject to FACA only when and to the extent they actually function as advisory committees as described above, that is, render advice or recommendations on proposed regulations.[369] Under this general analysis, the JAA conceivably constitutes an advisory committee whenever it renders "specific" advice on pending draft regulations,[370] but not when it simply exchanges information with the FAA, thus serving an informational purpose that FACA does not cover. GSA regulations implementing FACA confirm Congress' purpose to exclude bodies whose services to an agency are "for the purpose of exchanging facts or information."[371] Case law has also excluded from FACA discussions with private groups about the latter's own initiatives and proposals, even though agency comments and reactions were solicited.[372]

Although the JAA meets the functional criteria of an advisory committee when it acts in certain of the capacities observed in this Article, I am not inclined to consider the JAA an advisory committee within the meaning of the Act.

First, there remains a remarkable degree of doubt, nearly two decades after passage of the Act, whether FACA applies to bodies that are not acknowledged by the agency in establishing or utilizing them to constitute advisory committees. The case law is confused and the commentators divided,[373] and the Act's application to the JAA is correspondingly uncertain. On the one hand, FAA/JAA contacts cannot be described as the ad

368. *See* Center for Auto Safety v. Cox, 580 F.2d 689, 694 (D.C. Cir. 1978) (citing Nader v. Baroody, 396 F. Supp. 1231, 1234 (D.D.C. 1975)).

369. *See id.* at 694.

370. *See* Center for Auto Safety v. Tiemann, 414 F. Supp. 215, 224 (D.D.C. 1976).

371. 41 C.F.R. § 101-6.1004(1) (1992). Under the GSA interpretation, FACA's chief target are bodies that serve as an agency's "preferred" source of advice. *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 494 (1985).

372. *See* Consumers Union of United States v. Department of Health, Education & Welfare, 409 F. Supp. 473, 476-77 (D.D.C. 1976), *aff'd mem.*, 551 F.2d 466 (D.C. Cir. 1977).

373. *See* Michael H. Cardozo, *The Federal Advisory Committee in Operation*, 33 AD. L. REV. 1, 28 (1981). One court has suggested that, in the case of committees not actually established or organized by agencies, FACA would be satisfied by a policy of open meetings and accurate record-keeping, and little else would be needed. *See* Center for Auto Safety v. Cox, 580 F.2d 689, 694 (D.C. Cir. 1978). It is not firmly established, however, that the various requirements of FACA are legally severable.

hoc, casual and random sort—lacking in continuity and follow-up—that have been said to escape FACA;[374] they may well constitute "institutional arrangements which amount to the adoption of the group as a preferred source of advice,"[375] for they are deliberate and systematic, increasingly so, and obviously carried out at the government's instance and with public funds. Compared to the ABA judicial selection committee at issue in the *Public Citizen* case, the JAA is a much better example of the group targeted by FACA, one "organized by or closely tied to the Federal Government, and thus enjoying quasi-public status."[376] On the other hand, it does not seem quite accurate to describe the JAA as a source of "expert, technical and scholarly advice from experienced and representative individuals who are not regularly available as officers and employees of the government."[377]

The Supreme Court's *Public Citizen* decision, while not clearly demarcating the line between outside groups "utilized" and "not utilized" by

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374. *See* Nader v. Baroody, 396 F. Supp. 1231, 1233-34 (D.D.C. 1975); *see also* Consumers Union of United States v. Department of Health, Education & Welfare, 409 F. Supp. at 476-77. In *Consumers Union* the court pointed out that absent the continuity associated with advisory committees, the meetings of the Cosmetics, Toiletry and Fragrance Association would constitute "valid private meetings similar to numerous agency-industry or agency-consumer gatherings taking place daily at FDA." *Id.* at 474.

The Administrative Conference has taken the view that FACA should not be applied "to *ad hoc,* unstructured and noncontinuing" agency contacts with outside groups. ACUS Recommendation 80-3 ("Interpretation and Implementation of the Federal Advisory Committee Act"), 1 C.F.R. § 305.80-3(2)(a) (1992) [hereinafter ACUS Recommendation 80-3].

375. ACUS Recommendation 80-3, *supra* note 374, § 305.80-3(2)(b).

376. Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 461 (1988). The opinion suggests that only groups actually formed "at the behest of the Executive or by quasi-public organizations" or that "the Federal Government helped bring into being" should be considered as "utilized" by the executive. *See id.* at 462-63. In other words, the statutory language "established or utilized" by the agencies connotes groups "*established by or for such agencies.*" *Id.* (citing H.R. CONF. REP. NO. 1403, 92d Cong., 2d Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3508, 3509).

It was not obvious to the Court that the ABA judicial selection committee fell outside the scope of FACA. *See id.* at 463-65. The Court found this "a close question," though it was ultimately "fairly confident" that it was not covered. *Id.* at 465. The JAA's escape from FACA is probably not a great deal more obvious.

Three justices concurring in *Public Citizen* found that the ABA Committee fell squarely within the statutory definition of advisory committees "utilized" by the government, especially as clarified by GSA interpretive regulations. *See id.* at 469-72, 477 (Kennedy, J. concurring). The Committee consisted at least in part of persons other than full-time federal employees. *Id.* at 477. It had " 'an established existence outside of the agency seeking its advice.' " *Id.* It represented a preferred source of advice to the government. *Id.* at 477-78. Its relation to the government had become fairly institutionalized. *Id.* at 478. And its views were used by the government in much the same way as views of established advisory committees. *Id.* at 478. The JAA generally satisfies these same criteria.

377. *See* Cardozo, *supra* note 373, at 51.

agencies as advisory committees, makes it plain that FACA cannot be understood "to cover every formal and informal consultation between the President or an Executive agency and a group rendering advice."[378] And it strongly suggests that advisory committees established by the agencies as such were the Act's principal target.[379] The JAA does not comfortably meet that description.

The federal court decision in *Center for Auto Safety v. Federal Highway Administration*[380] confirms this reading of the *Public Citizen* opinion and the improbability of the meetings between the FAA and JAA constituting advisory committee meetings within the meaning of FACA. There, the FHWA had made use of a task force of the American Association of State Highway and Transportation Officials (AASHTO) (and indeed an updated version of AASHTO's Green Book on Geometric Design) in developing national standards for highway and street design.[381] Turning back plaintiff's FACA challenge to the agency's reliance on the AASHTO task force, the court emphasized that, under *Public Citizen,* a group is not "utilized" under FACA unless it is formed by the Executive Branch or by quasi-public organizations.[382] It found this not to be the case of AASHTO:

> It is evident, and conceded by both parties, that the AASHTO was not established by the FHWA. FHWA does not fund AASHTO, does not set its agenda, or appoint its members. Nor is the AASHTO an offspring of a quasi-public entity subject to FACA. In light of *Public Citizen,* these uncontested facts dictate a finding that AASHTO is not subject to FACA.[383]

To the same effect is *Food Chemical News v. Young,*[384] in which the Court of Appeals for the District of Columbia reaffirmed that FACA applies only to groups organized by or closely tied to the federal government, and thus enjoying quasi-public status.[385] It found, in keeping with the

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378. Public Citizen v. U.S. Dep't of Justice, 491 U.S. at 453.

379. "FACA's principal purpose was to enhance the public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures on them." *Id.* at 459.

380. Center for Auto Safety v. Fed. Highway Admin., No. 89-1045, 1990 U.S. Dist. LEXIS 13733 (D.D.C. Oct. 12, 1990).

381. "AASHTO is a non-profit privately incorporated association of state government transportation agencies." *Id.* at *2.

382. Public Citizen v. U.S. Dep't of Justice, 491 U.S. at 460.

383. Center for Auto Safety v. Fed. Highway Admin., 1990 U.S. Dist. LEXIS 13733 at *6.

384. 900 F.2d 328 (D.C. Cir. 1990).

385. *Id.* at 332.

Supreme Court opinion in *Public Citizen*, that the term "utilized" was not to be understood in the ordinary or literal sense of the word (as in "made use of"), but rather as denoting a group that, while not organized as such by an agency, is so closely tied to it as to be amenable to strict management by agency officials. The court declined to subject to FACA a panel of experts selected and managed by a private scientific organization pursuant to the organization's contract with the FDA to provide advice on food and cosmetics safety issues.[386]

The *Center for Auto Safety* case also raises squarely the question whether a task force that is not otherwise an advisory committee, within the meaning of FACA, becomes one on account of the fact that agency officials figure among its members. In the case, FHWA employees participated actively in the AASHTO proceedings in question. The court acknowledged that this element "does raise the specter of secret advice channels to the agency and of agency capture by an outside consultant."[387] Nevertheless, it found that the "potential abuses created by intergroup membership" were not alone enough to require a different result.[388] The court relied in part on the agency's observance of public rulemaking procedures. "[P]rocedural safeguards such as public rulemaking proceedings prior to federal adoption of AASHTO findings ensure that AASHTO findings are not simply rubberstamped."[389]

More important, FACA's legislative history suggests that Congress chiefly feared abuse by special interests of their representation on advisory committees "to promote their private concerns."[390] As the Supreme Court observed, "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals."[391] This helps explain why FACA only addresses advisory committees at least some of whose members are not full-time federal government employees,[392] and perhaps also why the Act specifically exempts

386. *Id.* at 330.

387. Center for Auto Safety v. Fed. Highway Admin., 1990 U.S. Dist. LEXIS 13733 at *6.

388. *Id.* at *7.

389. *Id.*

390. Food Chemical News v. Davis, 378 F. Supp. 1048, 1051 (D.D.C. 1974). In *Davis,* the court held FACA inapplicable to two informal meetings held by the Bureau of Alcohol, Tobacco and Firearms with consumer and distilled spirits industry representatives on ingredient labelling of distilled spirits. The Director of the Bureau scheduled those meetings to obtain the groups' comments or suggestions on proposed regulatory amendments and intended to use them. *Id.*

391. Public Citizen v. U.S. Dep't of Justice, 491 U.S. at 453.

392. *See* Cardozo, *supra* note 373, at 3. Cardozo writes that "a committee containing any number of officers of government is not covered by the Act unless its membership includes outsiders, representatives of the 'private sector.' " *Id.*

the Advisory Commission on Intergovernmental Relations from its coverage.[393] It may also help explain why the AASHTO task force at issue in *Center for Auto Safety v. Federal Highway Administration* was considered so poor a candidate for FACA treatment.[394] Admittedly, foreign government officials cannot properly be considered federal or state government employees for these or any other purposes. Nevertheless, there is virtually no evidence to suggest that the JAA approaches its dealings with the FAA with the promotion of "private concerns" or "special interests" in mind or that the JAA can be said to embody those concerns or interests.[395] The question, as one court put it, is whether outside groups consulted by the government are "self-serving."[396] The JAA gives few signs of that.

Finally, although it arises in the Sunshine Act context, the Supreme Court opinion in *FCC v. ITT World Communications*[397] counsels against considering consultations with foreign government agencies activities to which a statute such as FACA should be applied. The Court held that the

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393. *Id.* at 19.

394. Center for Auto Safety v. Fed. Highway Admin., 1990 U.S. Dist. LEXIS 13733 at *6.

395. In Center for Auto Safety v. Tiemann, 414 F. Supp. 215 (D.D.C. 1976), the agency sought to defend its noncompliance with FACA on the ground that the outside organization in question did not consist of representatives of private interests, but rather of public servants (in the event, state highway and transportation officials). The court emphasized that the organization was not as "public" as it appeared, since it represented recipients of grants under the federal-aid highway program, hence special interests within the context of the agency and program in question. "AASHTO *is* made up of public servants. But those state employees also represent the 'regulated' in the federal-aid highway program before the 'regulators,' the federal government." *Id.* at 225. The JAA would not seem to be even remotely as specially interested in the outcome of airworthiness regulations as state officials—prospective beneficiaries of federal highway aid—would be in that regulatory program.

This is not to suggest that so-called representatives of the public interest cannot be considered "special interest groups." In Food Chemical News v. Davis, 378 F. Supp. 1048, 1048-49 (1974), FACA was held applicable to agency meetings with industry and consumer groups alike, even though the latter purported to represent the public rather than any particular private interest.

396. Consumer Union of United States v. Department of Health, Education & Welfare, 409 F. Supp. 473, 475 (D.D.C. 1976), *aff'd. mem.*, 551 F.2d 466 (D.C. Cir. 1977). Cardozo identifies as the target of FACA the regular holding of closed-door meetings between government and big business "turning out reports and recommendations that were influencing government action against the interest of consumers, small business and other outsiders." Cardozo, *supra* note 373, at 48-49.

The view that FACA contemplates special interest groups in particular probably underlay another Administrative Conference recommendation, Recommendation 78-4, para. 1(e), that urged FACA's amendment to exempt technical committees and standard-setting organizations. 44 Fed. Reg. 1357 (1979). In support of this recommendation, see Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health,* 56 TEX. L. REV. 1329, 1477 (1978), arguing that application of most FACA provisions to technical committees would be "unfortunate."

397. FCC v. ITT World Communications, 466 U.S. 463 (1983).

Sunshine Act applies "only to meetings that the agency has the power to conduct according to these procedures"[398] and concluded that the FCC's consultation sessions with foreign counterpart agencies did not constitute such meetings, if only because the FCC could neither convene them nor unilaterally control their conduct.[399] Although FACA, unlike the Sunshine Act, does address meetings of bodies other than agencies—namely advisory committees—its application to consultation sessions with foreign agencies would raise similar concerns about undue inhibition of agency activity. Because FAA/JAA meetings are not wholly within the FAA's capacity to control, FACA's application, to quote the Court, "would restrict the types of meetings that agency members could attend."[400] If the Court regarded application of the Sunshine Act to the FCC's international consultations as working unduly broad restraints upon agency process,[401] particularly in the international sphere, it is difficult to imagine that it would favor inhibiting such consultations by application to them of the Federal Advisory Committee Act.

It is useful, in this last regard, to remember that FACA entails more than the advance notice, openness and recordkeeping of meetings with which it is commonly associated. A finding that a body constitutes an advisory committee under FACA brings in its wake a host of other requirements that fit poorly with the realities of the international working relations that bind the FAA and JAA. FACA was enacted in large part to stem the tide of advisory bodies specially created for the purpose of advising federal agencies,[402] and accordingly contains numerous rules limiting the creation of such bodies.[403] In theory, an agency should not establish advisory committees unless their creation is formally found by the agency head—after consultation with the director of OMB and upon publication of notice in the Federal Register—to be necessary and in the public interest. Once established, committees are subject in their operation and duration to uniform standards and procedures. They are required to have "fairly balanced" memberships "in terms of the points of view represented and the functions to be performed."[404] The agency must also protect its advisory committees against undue influence by any special interest and provide for their duration, finances, staffing, housing and reports.[405] A

398. *Id.* at 473.
399. *Id.*
400. *Id.*
401. *Id.* at 473-74.
402. 5 U.S.C. app. § 2(a)-(b) (1988).
403. *Id.* §§ 5-14.
404. *Id.* § 5(b)(2).
405. *Id.* §§ 5(b)-(c), 9(a).

committee may not act at all until it files a detailed charter with GSA, with the agency to which it reports, with the pertinent congressional committees and with the Library of Congress.[406] Its existence and activities must be known to the public.[407] Committees automatically expire after two years unless renewed or specifically exempted by the agency establishing them.[408]

FACA goes still further in regulating the internal structure and external relations of advisory committees. A federal official is required to chair or attend every committee meeting, and no meeting may be held, and no agenda followed, without the advance approval of a designated officer.[409] That official is authorized to adjourn any meeting when he or she deems its adjournment to be in the public interest.[410] Meetings must be held at reasonable times and in places (of sufficient capacity) reasonably accessible to the public, and minutes of all meetings must be kept.[411] For each committee that reports to it, an agency must appoint a Committee Management Officer responsible for monitoring the committee's performance, for maintaining its records and for making the findings needed to justify a decision to close a meeting to the public.[412] A Committee Management Secretariat, lodged in the GSA, has general oversight and recordkeeping responsibility for all established advisory committees, and authority to recommend their continuation, discontinuation or reorganization.[413] Decisions on the latter subject are ultimately made by standing committees of the House and Senate having jurisdiction over the agencies to which advisory committees report.[414]

Extension of these myriad requirements to preexisting private sector groups is obviously problematic. According to one view, they sensibly apply only to advisory committees formally and expressly established as such by Congress, the President, or the agencies, and not to independent groups whose services are simply utilized by the agencies. As to the latter, advance notice, openness and recordkeeping of meetings (perhaps along with representativeness of membership) would be the essential points. However, whether such a distinction is consistent with statutory language and

406. *Id.* § 9(c). The charter must recite a good deal of organizational, operational, and financial detail. *Id.*

407. To this end, meetings are required to be open to the public. *See id.* § 10(a)(1).

408. *Id.* § 14.

409. *Id.* §§ 10(e)-(f).

410. *Id.* § 10(e).

411. *Id.* § 10(c).

412. *Id.* § 8(b).

413. *Id.* § 7(b).

414. *Id.* § 5(a).

purpose remains an open question.[415] Application of FACA would obviously be all the more problematic in connection with bodies—such as the JAA—that have been independently created by one or more foreign governments, that consist in whole or in part of foreign government officials, and that would likely resent and reject efforts to bring them within the reach of FACA, in whole or in part.[416]

There is, in sum, scant evidence that Congress intended or would have wanted FACA to be applied to intergovernmental relationships such as have developed between the FAA and JAA. Congress, it is true, specifically exempted certain committees from coverage by FACA, and organizations composed of foreign government officials was not among them.[417] On the other hand, Congress did create an exemption for the Advisory Commission on Intergovernmental Relations, ostensibly because bodies advising public officials "on problems affecting more than one level of government" present special difficulties and have what the Act calls a "unique character."[418] Intergovernmental bodies addressing problems affecting two or more countries or groupings of countries would seem to present at least as special a situation and therefore likewise call for special treatment.

A previous Administrative Conference recommendation on the subject of FACA suggests that a degree of public access may be desirable even if an outside group is not considered to have the status of an advisory committee under the Act.[419] The FAA's relationship with the JAA, and the significance of that relationship, are such that a policy of openness and public availability is highly desirable even though FACA may not mandate it. My impression is that the FAA and JAA—short of holding all their consultations in public with advance notice—do nevertheless seek to make their conclusions and the data underlying them fully open to interested groups and to afford them reasonable opportunity for comment and influence.

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415. *See* Cardozo, *supra* note 373, at 13.

416. The Administrative Conference similarly recognized that technical standard-setting committees on which agencies rely would refuse to cooperate with the agencies if FACA were fully applied to them. *See supra* note 374 and accompanying text.

417. Among exempted committees are the Committee on Government Procurement, Committees on the Federal Reserve System and committees established to advise Congress or the courts. 5 U.S.C. app. § 4 (1988).

418. *See* Cardozo, *supra* note 373, at 19.

419. ACUS Recommendation 80-3, *supra* note 374, para. 2c ("Agencies should be sensitive to the desirability of making available to the public advice or information obtained from private or *ad hoc* groups not covered by FACA when the agency is considering action based on such advice or information.").

f. *General Procedural Concerns*

Even if the FAA/JAA consultation process passes muster under the various federal procedural enactments that plausibly bear upon it, or if all the suggested precautions are observed, lingering procedural doubts about the legitimacy of the system may persist. The very spirit of compromise and mutual consideration that gives the FAA/JAA relationship its visibly special character also raises general questions about the integrity of the rulemaking process that it affects. One way to put the question is to ask whether the Aircraft Certification Service engages in such close collaboration with its European counterparts as to risk compromising its independence of judgment. The question acquires a special reality if we suspect, as perhaps in the helicopter and other episodes, that the rules the FAA actually adopts differ in not insignificant ways from those it most likely would have adopted in the absence of JAA influence, and it accordingly has both procedural and substantive dimensions. Our procedural concern would be that once negotiations with foreign counterpart agencies yield a regulatory compromise, an agency will be hard-pressed to entertain seriously proposals from domestic quarters that would result in departures from the international understandings reached,[420] departures that might in fact be preferable in terms of the agency's statutory mandate. To put the question in more squarely substantive terms, do FAA/JAA consultations—whether pre- or post-NPRM—impermissibly predetermine the outcome of FAA airworthiness rulemakings, and do they lead aviation officials to make excessive compromises in the interest of commonality?[421]

These fears are not entirely baseless. However, even in situations where courts have acknowledged the distinct possibility that "private" arrangements may have effectively predetermined the regulatory outcome, they have neither declared those arrangements illegitimate nor forbidden the communications of which they consist. Appropriate recording of the fact and substance of the communications, and their timely exposure to public comment, have been deemed an adequate procedural solution.[422] At all

420. At their San Francisco annual meeting, the authorities agreed in closed session that they would announce to industry in open session that the FAA and JAA had each resolved to go forward with a proposed rule on "rejected takeoff safety enhancements" ("RTO"), upon which the two sets of authorities had previously reached agreement. The authorities correctly perceived that, while industry might feel that the agencies had by that time effectively taken the decision, industry also basically supported the proposal and saw considerable advantage in the existence of common standards. NOTES OF SEVENTH FAA-JAA MEETING, *supra* note 189, at 20-21.

421. The FAA Administrator has remarked that the objective of FAA/JAA collaboration is "easy" to state: "We want our regulations to mirror each other." Remarks by Admiral Busey, *supra* note 198, at 3.

422. *See* Moss v. Civil Aeronautics Bd., 430 F.2d 891 (D.C. Cir. 1970).

events, it bears remembering that the JAA and like bodies are not perfectly assimilable to private regulated interests whose *ex parte* contacts with agencies, even in a rulemaking context, have caused alarm among those who have felt themselves left outside of the process. They are themselves "public" bodies. Unless they can realistically be considered little more than conduits for influence by their domestic industries, or their objectivity can otherwise be called into question, their collaboration with American agency counterparts should not be thought to introduce a dangerous or impermissible bias. Nevertheless, an agency—whether procedurally required to do so or not—should be alert to the possibility that in being influenced by the data or policy positions advanced by counterpart agencies abroad, it may be indirectly coming under the influence of private interests with a stake in the regulatory outcome or of divergent "foreign" public interests, or otherwise be led astray from the purposes that the agency is statutorily called upon to serve. Thus, if international regulatory consensus is a legitimate agency objective, and regular international consultation a legitimate instrument to that end, steps should be taken to avert the reality or the perception that regulated or other affected interests are excluded by the process. A first remedy, alluded to throughout the immediately preceding sections of this Article, would be to ensure a reasonable degree of transparency in the FAA/JAA collaboration. This means making the fact and tenor of that collaboration reasonably conspicuous in the notice of proposed rulemaking, in the rulemaking file, and in the rule's statement of basis and purpose.

A second and distinct remedy would be to ensure that regulatory accords informally reached between the FAA and JAA are genuinely subject to reexamination and reconsideration by the agency in the course of the comment period. Agencies can legitimately be required to "consider" all expressions of view (and impliedly to enable all expressions of view to be heard).[423] Courts, on judicial review, may well demand that agencies demonstrate that they have considered and possibly even responded to all such expressions before finally adopting a rule. The genuineness of this attitude, it must readily be acknowledged, cannot ever be adequately policed. Agencies ultimately will have to be trusted to keep open minds, or at least be willing to reopen matters with their foreign government counterparts, even after informal agreement with them appears to have been reached.

Perhaps the most promising remedy for the real or perceived exclusion of private interests from intergovernmental arrangements would be the deliberate inclusion of those interests in the arrangements themselves. FAA/

423. SCHWARTZ, *supra* note 267, § 4.10, at 171.

JAA collaboration in fact has not only been made increasingly transparent to the outside, but has actually enlisted representatives of regulated interests as active participants. The information and views of manufacturers, airlines and, to a lesser extent, other affected interests are considered well before the authorities arrive at joint positions on any given issue. In a more or less systematic fashion, they are included in the study teams and working groups that help prepare those positions. Private interests understandably express less discomfort with the fact that FAA rules tend to mirror FAA/JAA understandings when they believe themselves to have been a part of the process by which the initial understandings were reached.

As the FAA moves toward a model of rulemaking in which private participation takes place at the earlier international consultation stage, as well as at the later and more conventional NPRM and comment stage, then the selection of interests becomes correspondingly important. An agency that enlists or accepts the aid of private interests in its international collaboration should first of all ensure that those interests are reasonably inclusive. In the airworthiness setting, for example, depending on the issue at hand, airlines, manufacturers, pilots, and repair stations, among others, all may have a contribution to make or an interest to protect.

A second and related concern is the representativeness of the interests that are included. To take only the most prominent examples in the FAA setting, aircraft manufacturers and operators alike are a diverse lot, as gauged by any number of indicators, and their stakes in regulatory issues may diverge accordingly. Although I have concluded that FACA does not apply to FAA/JAA consultations as such—largely because of their public and intergovernmental character—its concern that private advisory groups display balance and representativeness becomes relevant as inclusion of private interests in those consultations progresses.

More problematic is the question whether and, if so how, an agency should seek to enlist the participation in its intergovernmental efforts of interested groups *other* than the interests actually regulated, for example, various consumer, worker, or environmental interests. Ideally, those interests will be fully considered in the pre- as well as in the post-NPRM period. However, in order to be effective, FAA/JAA collaboration must be workable, and there may simply be no workable way to involve all such groups in an organized fashion in the international collaborative process. If they cannot participate systematically and integrally in the preparatory intergovernmental arrangements, then they will have to intervene at one or more junctures at the national level, for example by shaping the national positions at their very formative stages or by participating con-

ventionally in the national notice and comment procedures that separately follow the adoption of a common intergovernmental position.

It is desirable, as a general matter and within the limits of feasibility, that all affected interests—regulated and nonregulated alike—be heard in some fashion, however indirect, before joint national authorities arrive at a common proposed position. To the extent they are heard, that position has an improved chance of adoption by the competent national authorities without controversy, change or challenge at the conclusion of their respective domestic rulemaking procedures, and the goal of international regulatory harmonization will have a correspondingly greater chance of being met. Nevertheless, the feasibility of an all-inclusive international deliberative process will have its limits and cannot help but vary with the agencies involved and the subject matter at issue. The FAA's experience of including private and public interest representatives in both the meetings and study groups under the FAA/JAA umbrella, though perhaps not yielding a fully balanced and effective representation, does demonstrate, however, that it would be wrong to assume that such representatives cannot be actual participants in an agency's international regulatory cooperation efforts.

These general procedural observations would be incomplete if they did not at least raise the squarely substantive problem of regulatory compromise that attends an agency's decision to collaborate systematically with overseas counterparts. Even while following all the procedural precautions suggested in this Article, an agency must face the question of how many and how great are the concessions it should make to its counterpart agencies in the interest of commonality and cooperation. The question defies a clear or all-purpose answer. However, an agency's search for agreement certainly should not be one that holds it hostage to the views of foreign governments. Nor should it be one that regularly causes the agency to adopt standards that fall decidedly above or below those the agency independently deems appropriate or that run afoul of the mandated policy analyses. As in any venture presupposing a degree of mutual give-and-take and a readiness to compromise, there must be limits, as for example when one or the other side finds that public welfare will be severely endangered by proposed regulatory action, or that such action will impose unacceptable burdens of one sort or another. Situations will arise in which it may be preferable to tolerate regulatory discrepancies than to demand a common accord that leaves one or both sides with the conviction that a very serious regulatory mistake has been made. Finally, it would be unwise and undesirable in any event for an agency to commit itself in advance to compromise on any issue at all costs.

The concern understandably arises that when authorities of different nations cooperate in search of consensus over regulatory standards, the final product will represent the least common denominator of the interests represented and a diminution of the level of protection existing in the more protection-minded countries. Though entirely plausible, this concern does not appear to have a basis in fact in the FAA/JAA experience. This is due in part to a mutual commitment to produce what are in fact the highest practicable safety standards, and in part to the understanding that each state remains free to set its own standards if unsatisfied by those achievable through consensus. Should American agencies undertake joint rulemaking in other settings, they should be alert to this potential "least common denominator" problem.

In short, it will not do, either in reality or in appearance, for the regulatory standards an agency ultimately adopts to be the product, pure and simple, of intergovernmental negotiations. The FAA, like fellow American agencies, and like its own foreign counterparts, works under a statutory mandate which must remain its touchstone so far as the substance of regulatory action is concerned. The zone of compromise within which it may then operate in the interest of commonality with decisionmakers of other nations is necessarily uncertain but necessarily limited. Within that zone, however, harmonization has a significant, possibly even a leading, role to play.

VIII. Conclusions and Recommendations

The convergence of national airworthiness standards and borrowing of certification services is regarded in practically all quarters as a highly useful development and one to be encouraged. American aircraft manufacturers, who have traditionally dominated the international aviation market, are accustomed to meeting the requirements set by the national aviation authorities in the countries where their products are to be registered. They are understandably wary of any regulatory movement in Europe toward standards that would diverge significantly from those that the FAA imposes on the American aeronautical products market, particularly when the divergences are needless or capable of being bridged. The recent development of an energetic European aircraft industry, itself capable of serving the European market and, in fact, of invading other markets that American industry long had taken for granted, has not lessened the trend. While European manufacturers might benefit in the short run from regulatory barriers restricting American access to the European market, they have need in the long run for uninhibited access to the American and other world markets. Discrepancies between European and American air-

worthiness standards thus do not serve their interests particularly well either.

This Article has also sought to show that a commonality of standards has spillover advantages with respect to administration and enforcement. The greater the resemblance among national airworthiness standards, the wider the room for play of the bilateral airworthiness agreements that allow one state essentially to borrow conditionally the certification services performed by another. The repair station episode demonstrates that the possibilities for sharing such services are not at present being fully exploited. To the extent that such services can be responsibly and confidently shared, savings to government and the private sector alike may be anticipated.

Unless international collaboration in regulation is viewed as merely a disguised means for exportation of the American system of airworthiness certification, the undertaking implies a willingness to consider seriously the procedures and policies upon which foreign regulatory practice is based. Although it may be reasonably clear in advance that certain national participants will carry greater weight than others in international regulatory efforts, the process presupposes on all sides an attitude of cooperation and mutual benefit. It is essential that each participating authority realize and accept at the outset that its own system will be subject in the process to reexamination and comparison with others, and in the end to some measure of modification.

It is one thing to describe and in most respects applaud the program of cooperative regulation that has been put in place between the FAA and JAA, and another thing to recommend its extension to other regulatory spheres. Any judgment about the utility of this approach to a given sphere requires consideration of the extent to which nations perceive a common interest in joint regulation and are likly to pursue compatible objectives within the framework of such regulation. The case for cooperative regulation in airworthiness has been a very powerful one. As an active supporter of the FAA/JAA venture has expressed it, "the laws of physics and aerodynamics are universal."[424] The case for cooperation in other spheres may be strong but not as strong, and the intensity and regularity of cooperation therefore vary.

In order for any cooperative program to succeed, it must also enlist the political support of regulated interests. Those interests, and indeed all affected interests, must find the resulting regime to be at least as substantively and procedurally advantageous, possibly even more so, as the purely domestic regulatory regime that would otherwise apply. As in the aviation

424. SULLIVAN, *supra* note 111, at 6.

safety field, so in virtually any other regulatory domain, American regulators will not find their legal or political responsibility diminished on account of their cooperation with or reliance on the findings of counterpart agencies abroad. Before an American agency embarks on any such international program, it must therefore assure itself of having an adequate basis for recognizing foreign determinations on matters, such as design or performance, for which the agency will itself ultimately bear responsibility. It also must observe all the otherwise applicable procedural requirements of American administrative law, except to the extent that the element of intergovernmental cooperation may genuinely be said to take the procedure beyond the reach of those requirements.

As far as specific recommendations are concerned, one should begin with the obvious one that international regulatory cooperation cannot satisfactorily proceed in a climate of regulatory or technological parochialism. The point is too basic to require elaboration. Beyond attitudinal generalities, however, it is possible to identify both the features of FAA/JAA collaboration that have contributed to its apparent success and the precautions that have helped make that collaboration politically acceptable. These observations form the basis of the following recommendations:

1. International regulatory cooperation best succeeds when it has support at the highest domestic regulatory echelons of the agencies involved. It will proceed only haltingly and inconsistently unless it is considered a basically appropriate and "mainstream" approach by those most broadly in charge of the regulatory activity in question. Both process and results will vary according to whether internationalism is the disposition of regulatory leadership as a whole or simply the inclination of a handful of individuals within the regulatory apparatus. An agency's so-called "international specialist" — even an agency unit labelled "foreign liaison" or "international" — easily can remain marginal to the agency's actual mode of operation unless agency leadership shares its outlook and is reasonably committed to it. In the case of the FAA, the program of joint activity with the European authorities has had the support of a succession of FAA administrators.[425]

In determining whether international cooperation deserves genuine priority, an agency should consider the importance or value of regulatory harmonization in its field, the opportunities for international cooperation in enforcement and administration and the extent to which foreign government expertise justifies reliance on its regulatory and enforcement resources. The same considerations should determine the extent of an

425. *See, e.g.*, Remarks by Admiral Busey, *supra* note 198, at 5.

agency's international cooperation and the selection of foreign governments with which to cooperate.

2. American and European participants alike in the joint airworthiness activities described in this Article emphasize the importance of enlisting the support of the FAA's legal department. We have seen that neither the general procedural framework of American administrative regulation nor the particular legal regime governing United States aviation regulation specifically contemplated the conduct of extensive joint certification activities. It would have been entirely understandable for FAA legal counsel to regard that program as on doubtful legal footing and to seek in a variety of formal or informal ways to restrain its development. In fact, FAA lawyers in Washington have chosen to support the process and actually foster it. As a result, the process and its results have not been subjected to after-the-fact misgivings on the part of agency legal officers.

3. Important as the commitment of agency leaders and counsel to international cooperation may be to an agency's program of concerted action, it is essential to recognize that regulators do not operate in a bureaucratic vacuum. The successful conduct and implementation of concerted rulemaking and enforcement require that the regulated interests and the affected public believe that such concerted activity is in principle a useful and legitimate way for the agency to proceed and that the process has actually gone forward with adequate consultation and opportunity for private and public interest participation. It is not possible to describe completely, or in detail, how each agency should seek to ensure such participation within the framework in which it operates. However, it would seem advisable for all potentially affected public and private interests to be advised of the existence of the agency's intergovernmental cooperative arrangements, of the meetings held, working groups established and the like, and also to have an opportunity to participate in these activities to the fullest extent feasible. This will promote the transparency and representativeness of these international efforts, and thereby not only enhance them but also enhance the legitimacy of their products. The FAA experience demonstrates that one should not assume that the private sector must necessarily be excluded from intergovernmental efforts of this kind.

Agencies may need to assume more affirmative responsibilities when it comes to integrating public interest representatives in the process. Passenger, pilot and environmental groups, for example, do not have as great a presence in the joint workings of the FAA and JAA and, though there are limits on the extent to which they can feasibly be integrated, additional efforts in that direction could be made.

Depending on the regulatory sphere, other agencies will also have an interest in the nature and extent of intergovernmental consultations that

an agency conducts. The State Department always will, and the Commerce Department and U.S.T.R. almost always will as well. An interagency group should be assembled for any substantial program of intergovernmentalism contemplated by an agency.

4. One way for an internationalized regulatory process and product to win the support of regulated interests is to encourage the latter to operate in parallel fashion and to enjoy the corresponding benefits. Although they function as competitors in the aeronautical products or aviation services markets, manufacturers and operators within different countries have discovered that they face similar burdens and challenges from the national regulators in the markets they serve. Just as the FAA and JAA have found that collaboration enhances their effectiveness *qua* regulators, so similarly situated national interests have drawn strength in facing those regulators from jointly articulating their needs and presenting their views to the extent commonalities exist. The point is that possibilities for joint action by different national aeronautical products manufacturers and aviation operators — particularly when closely associated with the concerted activities of the governmental authorities — have increased their willingness to accept both the principles that drive international regulatory cooperation and the regulatory and enforcement results. That in turn has enabled national regulators to cooperate more extensively than would otherwise have been politically possible.

5. As suggested, the strength and intensity of joint rulemaking efforts that can properly occur necessarily depend on the degree of congruence among the regulatory objectives of the participating agencies. The greater the divergence of regulatory objectives, the greater the likelihood that the resulting rule will depart from a given agency's statutory mandate.

Even where the authorities of different countries share similar regulatory objectives at the general level, there is a risk of divergence on any given specific issue and agencies should be alert to that possibility. They should in any event be alert to the possibility that the positions of counterpart agencies abroad will be influenced by domestic economic interests and possibly even reflect protectionist purposes. This is especially so in the regulation of enterprises that in other countries are state-owned or state-controlled. This is not to condemn such influences, much less suggest that they never obtain in the American administrative context, but simply to urge that American agencies engaged in international regulatory cooperation recognize the risk.

6. Although the FAA/JAA experience does not raise the slightest concern on this score, agencies interested in international regulatory cooperation should as a general matter seek to ensure mutuality in the openness of agency rulemaking processes to foreign government and foreign private

sector participation. American agencies should not give foreign interests access to their rulemaking where American interests are denied parallel access to foreign government processes. Such imbalance might give an unjustified competitive advantage to foreign industry and other foreign groups, and it would diminish the incentive of foreign authorities to open up their regulatory processes to American participation and influence.

7. International consultations of the sort described in this study do not appear to necessitate any radical departure from an agency's ordinary practices in compliance with applicable procedural statutes. Except where an agency's consultations bear clearly and directly upon the nation's foreign affairs, the APA exception for such functions should not apply to shelter regulatory action simply because an agency has chosen to internationalize its horizons. Depending on the significance of a regulatory agency's reliance on those consultations, both their fact and substance should figure in the agency's notices of proposed rulemaking, rulemaking records and statements of basis and purposes under the Administrative Procedure Act, and they should be subject both in principle and in practice to meaningful public comment.

By virtue of their more focused insistence on transparency, the Government in the Sunshine and Federal Advisory Committee Acts bear more specifically on interagency consultations on the international level. However, neither of these statutes should as a general matter inhibit consultations of this sort. Even putting aside its very limited scope of application (namely, meetings of collegial agencies), the Sunshine Act only reaches agency gatherings that result in final action within the agency's scope of competence. If they are properly timed as background policy-shaping meetings, and if their conclusions are fully subject to reexamination during the comment period, an agency's prior consultation with foreign counterparts should rarely constitute a gathering subject to the Sunshine Act's advance notice, openness and recordkeeping requirements.

Although their interactions with foreign counterparts closely resemble at times the utilization of advisory committees within the meaning of the Federal Advisory Committee Act, agencies should ordinarily not be held to conform to FACA requirements when engaging in them. Apart from enduring doubts over the government's entitlement to control the structure and operations of advisory groups that it itself has not established, intergovernmental consultations will rarely present the "special" or "private interest" dangers that FACA principally addresses; at the very least the burden of establishing those dangers should fall on those claiming that foreign government agencies should be treated as advisory committees for purposes of FACA. Besides being presumptively unnecessary, efforts to bring an agency's cooperative dealings with counterparts in foreign gov-

ernments under the extensive and sometimes demanding requirements of a purely domestic statute like FACA would be resented abroad and possibly undermine the cooperative enterprise itself.

The conclusion that the Sunshine Act and FACA do not strictly apply to most agency-level intergovernmental consultations does not mean that agencies should avoid making the fact and tenor of those consultations known to interested groups and to the public in a timely fashion. In fact, their effectiveness and acceptability appear to increase dramatically as regulated interests are more directly enlisted in the authorities' joint study and consultation process itself. To the extent feasible, agencies should seek to ensure that the groups thus enlisted are inclusive of all interests affected and also reasonably representative of them.

8. It stands to reason, and has proved to be the case for the FAA, that international collaboration on any particular matter generally proceeds more satisfactorily when undertaken in the context of concrete and relatively limited problems and when commenced at the outset of that undertaking rather than after national practices have formed and national positions hardened. Modification of existing systems, particularly when originally arrived at on a strictly national basis, has proved more resistant to international consensus than consensual adoption of a common position initially. A related suggestion, therefore, is that agencies committed to an effective program of common study, deliberation or action with foreign counterparts strive at an early date to develop a common agenda that responds to the current interests of both parties, rather than merely one of them. Regulators have found that if they jointly address topics that are not at the time of concurrent mutual interest, the process will not fully engage both and may yield policies or practices that ultimately prove unsatisfactory to the party that did not initially participate fully in addressing them.

9. The FAA's experience has been that if regulatory cooperation with foreign counterpart agencies is approached in an open and respectful manner, then it produces a climate in which further cooperation can flourish.

> As the FAA works with the authorities of other countries . . . a mutual respect and understanding develops. We come to understand the nuances of each others [sic] regulations, why they differ, and the technical foundations for those differences. We learn the strengths and weaknesses of each others [sic] certification systems and what can be done to reciprocally support each other. We communicate with an increasing efficiency—a particularly important ability when either country's product encounters a serious service difficulty. Finally, each party understands the other's system, reg-

> ulations, and products well enough to stand behind them and their product when that fortunately rare catastrophic event occurs, and to seek a solution to what created that event.[426]

European participants agree that the FAA/JAA partnership has taken time and personal effort to develop. This suggests that while all agencies would do well to consider in comprehensive fashion all the respects in which international cooperation would enhance the performance of their regulatory, administrative and enforcement functions—and at the same time help produce a more orderly international regulatory environment—they should proceed to the establishment of intergovernmental mechanisms on a limited and gradual basis with an eye to what is technologically and politically feasible at any given time. Concrete success in the accomplishment of carefully targeted programs of regulatory or administrative cooperation provides a sounder basis for broader-based intergovernmentalism than an a priori commitment to intergovernmentalism on a grand and ambitious scale.

426. SULLIVAN, *supra* note 111, at 6.