Do We Need a New Chicago Convention

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Introduction

Do we need a new Chicago Convention?1 According to some of international aviation’s lawyers, government officials, industry executives, and academics, the Convention – originally drafted in 1944 and rarely amended since – has outlived its usefulness.2 This perception of the treaty’s alleged timeworn frailty varies from critic to critic, although a significant contingent of these skeptics believes, perhaps as a matter of faith more than anything else, that the Chicago Convention blocks authentic globalization of the international air transport market. The blame for the present regime of thousands of air services agreements (ASAs),3 most of them freighted with market access and investment restrictions,
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is typically assigned to Chicago despite the fact the treaty has very little to say concerning international aviation's commercial landscape. Indeed, the shift from a regime of highly restrictive ASAs, which crested in the 1977 “Bermuda II” Agreement between the United Kingdom (U.K.) and the United States (U.S.), to the substantially (though not fully) liberalized template of the U.S.-initiated “Open Skies” policy, occurred beyond the shadow of the Chicago Convention. As well, the establishment by the European Union (EU) of a common air transport market among its 27 Member States, including full intra-Union traffic and investment rights, was unimpeded by the Convention. The International Civil Aviation Organization (ICAO), an official United Nations (U.N.) organ created by the Convention, continues to promote comprehensive air transport liberalization without apparent concern that an open market order for air services will run afoul of the treaty’s terms. To be sure, some still insist that an amended or revamped Chicago Convention could do more to promote liberalization, such as abolishing the explicit right of States to reserve their domestic aviation markets for their national airlines (“cabotage”) or compelling signatories to allow their airlines to be owned and controlled by foreign nationals. These hallmarks of a truly free aviation trade environment remain flashpoints for most States’ aeropolitical relations. And there is no evidence that the world’s 194 States (190 of which are currently party to the Convention) are willing to use multilateralism to pursue such a transformation in aviation’s trade order.

Beyond economic liberalization, there are other potential reasons why critics might call for a new Chicago Convention. Com-

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5 Under this 1992 international aviation initiative, restrictions on routes, fares, and capacity have been specifically targeted for removal from all U.S. ASAs. See In the Matter of Defining “Open Skies,” Order 92-8-13, 1992 DOT Av. LEXIS 568 (Dep’t of Transp. Aug. 5, 1992).


pared to the relatively sophisticated “automatic” dispute settlement machinery of the World Trade Organization (WTO), the Chicago Convention’s adjudicative provisions, which are assigned to ICAO, appear flimsy. Further, the procedures for amending the Convention are cumbersome, which may account for why these procedures have so rarely been engaged. And despite pretensions to the contrary, ICAO does not possess the power to promulgate new international aviation law. At best, the organization can, through the tacit consent of the Chicago Convention’s State parties, update the Standards and Recommended Practices (SARPs) contained in the treaty’s annexes. But the penalties for failing to adhere to a newly promulgated SARP are, for all practical purposes, illusory. Strengthening the juridical and legislative powers of ICAO no doubt has appeal to so-called “global legalists,” committed to a robust conception of an “international rule of law” as a constraint on State behavior, but eliding sovereignty in this way has little appeal to many of the world’s

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9 See Chicago Convention, supra note 1, art. 84.


12 To amend the treaty, two-thirds of the agreement’s State parties would have to accept a proposed amendment in principle before submitting the amendment to their domestic ratification procedures. Only after two-thirds of those ratification processes prove successful will the amendment take effect and then only for those members which have ratified it. See Chicago Convention, supra note 1, art. 94. In other words, up to a third of the Convention’s State parties can reject an amendment indefinitely without incurring any consequences for doing so.


14 See Chicago Convention, supra note 1, art. 37. Any proposed SARP can be rejected if a majority of the Chicago Convention’s contracting States object within three months of the amendment’s promulgation. See id. art. 90(a).

15 Any State which cannot or does not wish to comply with a new SARP is entitled to inform ICAO of that fact without risk of forfeiting any rights conferred by the Convention. See id. art. 38.
most aeropolitically powerful nations. China and the U.S.,
though embracing quite distinct notions of international law, are
equally unenthusiastic about the kind of supranational institu-
tion-making that motivates (for example) the EU. Enhancing
ICAO's powers could jeopardize its longstanding legitimacy as a
neutral forum for States to address challenges to the "safe and
orderly" development of international aviation, including nego-
tiating treaties of common interest that have addressed, inter alia,
aircraft hijacking and airline liability rules.

While skeptical of the strong claim that the Chicago Conven-
tion is outmoded and should be dethroned, this Article advances
the more modest suggestion that the political and normative costs
of negotiating a new Chicago Convention outweigh the purported
benefits. That is to say, the Article does not defend any particular
aspects of the Convention as "optimal," nor does it assert that the
ratio of "good-to-bad" in the treaty justifies its retention. Rather,
it is suggested that the Convention, as it currently stands, is an
efficient facilitator of global aerotechnical coordination and coop-
eration among nearly all of the world's States. A replacement
Convention, or more accurately a competing Convention (not all
of the parties to the present Convention would migrate to its suc-
cessor), featuring provisions not always matched to the diffuse
interests of over 190 States, could destabilize cooperation by split-
ting the current regime into two or more inconsistent rivals. In
making this point, the Article takes its bearings from the legal-
economic principle of International Paretianism, i.e., that "all
State parties [to an agreement] must believe themselves better off
by their lights as a result of the . . . treaty." As a pragmatic
indicator of feasibility, International Paretianism casts a cold eye

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18 See Chicago Convention, supra note 1, pmbl.
on the ambitious visions of legalists. At the same time, however, it sets a more realistic understanding of the limits of international law while contributing to a fuller appreciation of why far-reaching instruments such as the Chicago Convention persist despite their criticized imperfections.

I. Background

Convened on November 1, 1944, the International Civil Aviation Conference ("Chicago Conference") brought together 54 allied and neutral States for the purposes of establishing provisional world air routes and services and to set up an interim council to collect, record, and study data concerning international aviation.\(^2\) Though some of the Chicago Conference’s participants, notably the U.S. and U.K., hoped to reach consensus on framing civil aviation’s international operating environment, irreconcilable differences about how much liberality to tolerate resulted in a text with few hard economic provisions.\(^2\) Basic movement privileges, such as flyover and landing rights for refueling purposes, were assigned to a separate treaty, the so-called "Two Freedoms Agreement."\(^2\) Commercially valuable market access privileges (i.e., traffic rights), were packaged into the so-called "Five Freedoms Agreement"\(^2\) – an accord which failed to receive more than a handful of ratifications. In response to Chi-

\(^{22}\) For a more detailed discussion of the Conference, see Brian F. Havel, Beyond Open Skies: A New Regime for International Civil Aviation 97-103 (2009).

\(^{23}\) The most salient economic provisions include the treaty’s recognition of the customary international law principle of airspace sovereignty, see Chicago Convention, \textit{supra} note 1, art. 1; the mandate that “[n]o scheduled international air services may be operated over or into the territory of a contracting state, except with the special permission or authorization of that state,” \textit{id.} art. 6; and the right of States to limit domestic (“cabotage”) routes to their home carriers, \textit{id.} art. 7. Though some analysts have argued that the Convention’s cabotage provision functions as a barrier to full liberalization, these claims appear to be based on a highly constrained reading of Article 7. See Havel, \textit{supra} note 22, at 122–26. Further, Article 7 has not stopped a handful of States from trading cabotage rights in their ASAs. See, e.g., Alan Khee-Jan Tan, Singapore’s New Air Services Agreements with the E.U. and U.K.: Implications for Liberalization in Asia, 73 J. Air L. & Com. 351, 362–64 (2008) (discussing the inclusion of cabotage rights in the Singapore/U.K. ASA).


cago’s inability to deliver a multilateral treaty regime to distribute traffic rights, States resorted to reciprocal bilateral exchanges in order to secure foreign market access for their air carriers. The result was (and is) an uneven concatenation of thousands of ASAs controlling not only traffic rights, but pricing, capacity, and flight frequency as well. In recent decades, the U.S. and EU have pursued more flexible agreements, but no multilateral instrument which could deliver comprehensive liberalization to the international air transport sector has emerged.26

While the Chicago Convention left air services trade to be worked out in piecemeal exchanges by States acting outside its orbit, the treaty’s primary utility arises from its promotion of multilateral cooperation and coordination on matters such as technical and safety standards,27 aircraft registration and markings,28 and air navigation.29 While these technical provisions, such as secure admission to foreign States’ air navigation facilities, could have been worked out on a bilateral or region-to-region basis, the Chicago Convention is a “one-stop shop” that relieves its adherents of the costs of multiple negotiations and the risks of colliding and inconsistent standards. Wherever Singapore Airlines flies in the world, for example – whether it is to the United States, Germany, or China – its pilots know the communication systems its aircraft must possess; the air traffic control, customs, and immigration procedures they must follow; and the characteristics of the airports and landing areas at all destination points.30

In a fractured system, with overlapping or disparate rules operating across individual States and regions, Singapore Airlines or

26 The closest the international community has come to such a mechanism is the WTO’s General Agreement on Trade in Services (GATS), which could, in theory, apply WTO free trade disciplines to the air transport sector. However, strong interest group pressure forced all but a handful of ancillary air services to be barred from GATS negotiations. See GATS, Annex on Air Transport Services, Marrakesh Agreement Establishing the World Trade Organization, Annex IB, Legal Instruments – Results of the Uruguay Round, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1125, 1167. For a discussion on how GATS could still deliver liberalization to international air cargo services, see Brian F. Havel, Rethinking the General Agreement on Trade in Services as a Pathway to Global Aviation Liberalisation, 45 IRISH JURIST 47 (2010).
27 See Chicago Convention, supra note 1, ch. VI.
28 See id. ch. V.
29 See id. ch. IV.
30 These terms are set out as SARPs in the annexes to the Convention. See supra notes 14–15 and accompanying text.
any other international air carrier, would be burdened with repetitious technical compliance costs. And even if the multilateral norms enshrined in the Chicago Convention and in its annexes are suboptimal, unless a critical mass of States – including the world’s largest aviation markets – defects to a new set of rules, most States are unlikely to have compelling reasons to break from the treaty’s terms; to the contrary, they would punish their air transport sectors by doing so.31

Finally, as noted in the Introduction, ICAO is endowed by the Convention with a qualified set of powers, including limited dispute settlement authority and the ability to update the SARPs contained in the Convention’s annexes. Arguably, however, these are not the Organization’s most important functions. Through its triennial Assemblies and in other official settings, ICAO also provides fora in which States share information, proclaim grievances, and sponsor new international agreements. This role goes hand-in-glove with the Convention’s promotion of international coordinating and cooperative goals, and may explain why ICAO, unlike its parent institution, the U.N., has secured high compliance with the terms of its constitutive treaty. Though the Organization has been criticized for its (in some eyes) pusillanimous response to high-profile challenges such as international aviation’s perceived role in global warming,32 it is not clear that it has either power or legitimacy to do anything more than facilitate discourse and provide guidance for State action through hortatory resolutions. Moreover, ICAO cannot allow itself to become unmoored from the interests of the Chicago Convention’s State parties. All amendments to the Convention, including new SARPs for the annexes, must meet with either the explicit or tacit acceptance of ICAO’s membership; the Organization has never had or been provided with the latitude to make adverse or nonconsensual incursions against State sovereignty. Indeed, the harshest penalty a nonconforming State party to the Convention can suffer is a loss of voting rights – a sanction which carries few, if any, practical consequences.33

32 See Havel & Sanchez, supra note 21 (discussing ICAO’s role in aviation emissions regulation).
33 See Chicago Convention, supra note 1, art. 88. Any State which loses its voting power within ICAO is still free to object to newly promulgated
Looked at in this light, it is not difficult to see why the Chicago Convention has survived for seven decades. Few (if any) States combine the aeropolitical power and global influence to unseat the Chicago regime on their own, and every State party to the Convention enjoys, at least to some measurable extent, the efficiencies of having a uniform system of technical rules and standards to steer the provision of international air services. Precisely because hard economic rights were mostly untethered from the Convention, acceptance of the treaty did not come with the cost of adopting the contentious and ideologically charged vision of free trade championed by the U.S. at the Chicago Conference. Instead, liberalization, for better or worse, unfolded incrementally as global attitudes toward service-sector protectionism softened—a development which would certainly have been stunted had the Chicago delegates coalesced around or acquiesced in a liberal economic order. Despite this, some still believe that the Convention could serve as a catalyst for accelerated liberalization, while also vesting ICAO with muscular global regulatory powers, if only the international community would come together to revisit its terms. As the next two Parts will discuss, however, bold regime change is neither politically feasible nor normatively (legally) efficient.

II. The Political (In)feasibility of a New Chicago Convention

For a new Chicago Convention to arise and supersede the current treaty, all (potentially) 190 State parties would have to believe that they are better off under the replacement. This simple but powerful insight, denoted in the international legal literature as the principle of International Paretianism, is not an ethical principle; it is a practical constraint which acknowledges that "treaties are not possible unless they have the consent of [S]tates, and [S]tates only enter treaties that serve their interests." The

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SARPs, see supra notes 14–15, or resist adopting a proposed amendment to the Convention itself, see supra note 12.

34 Posner & Weisbach, supra note 21, at 97; see also generally Havel & Sanchez, supra note 21. That States only enter into international agreements for self-interested reasons will hardly come as a shock to those who subscribe to the Realist School of international relations. See generally Hans J. Morgenthau, Politics Among Nations: The Struggle for Power and Peace (4th ed. 1967). In the last decade, however, this insight has been operationalized through the application of rational-choice theory to international law. See, e.g., Goldsmith & Posner, supra note 31; Economics of Public International Law (Eric A. Posner ed.,
costs and benefits bound up with how these interests are calculated will vary from State to State and may reflect either a wide or narrow range of considerations. State A may boost its effort to establish a military base in State B by accepting an ASA with State B that economically disadvantages State A's indigenous air carriers. On the multilateral level, the calculus of interests at stake can grow exponentially, though the most salient ones are likely to be obvious.

For example, when negotiating for a new Chicago Convention, all parties are apt to want at least the equivalent degree of coordinating and cooperative benefits they enjoy under the present regime, even if there is widespread disagreement over details. But this does not mean they will necessarily seek enhanced benefits. Economically weak States in Africa, for example, will likely seek universal technical and safety standards which approximate their present capacity for compliance so that they avoid any penalties (including reputational loss) for a continuing failure to meet internationally-mandated “minima.” On the other hand, aeropolitical powers such as the U.S. and EU, which enjoy optimized safety records, will demand standards matching their national levels of oversight in order to secure a safe international operating environment for their airlines but also to discourage third-party States from conceding a backdoor economic benefit to their own carriers by agreeing to less stringent compliance. In a “transfer” Convention, the kind of organism into which the Eurozone has mutated by default, these perspectives could be better reconciled if economically well-off States agreed to provide wealth transfers to poorer countries in order to backstop (and gradually improve) the performance of those countries’ air transport safety regimes. But in order for such compromises to be feasible, International Paretianism expects that rich States would have to be-

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37 For how this approach may be necessary for an international aviation emissions treaty, see Havel & Sanchez, supra note 21.
lieve that raising safety standards in the aggregate provides a sufficient benefit to justify a wealth transfer. If these wealthy States became concerned that the transfers would work instead as a de facto subsidy to competing foreign airlines, a transfer scheme would not be sustainable. In that scenario, the policy choice may be to agree on minimal common safety standards in order to induce accession to a new Chicago Convention or to insert “soft” penalties for non-conforming countries.\(^{38}\)

Beyond safety, any attempt to invigorate the Convention’s custody of economic issues would likely spark aeropolitical acrimony. While the U.S. now scores over 100 liberal open skies bilateral agreements, rising economic powers such as China and Russia remain leery of high-octane liberalization. Moreover, Canada has joined a number of EU Member States in pivoting toward a protectionist stance against Gulf-based airlines Emirates, Etihad, and Qatar Airways, fearing that the Middle Eastern triad will erode the competitive positions of their national airlines.\(^{39}\) Despite a steady expansion of market access freedoms for international airlines over the past two decades, it is difficult to say with any confidence that there is a settled international consensus on the appropriate level of liberalization for the global aviation sector. Key trade privileges, notably crossborder investment and cabotage, continue to be off the negotiating table for economic superpowers such as the U.S., dampening any prospect for revisiting those matters within the scope of a new Chicago Convention. Similarly, comprehensive regulatory convergence, a hallmark of the EU’s external aviation trade policy, remains unpalatable to the U.S.\(^{40}\) Other States, too, are likely to resist sacrificing their autonomy over regulatory matters, particularly in areas such as competition law.\(^{41}\) It is doubtful that a new Chi-

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\(^{38}\) Arguably, this is what the present Chicago Convention already does with respect to SARPs. See supra note 15. In order to compensate for this apparent enforcement defect, the U.S. and EU have developed their own mechanisms to sanction airlines and States which fail to adhere to the Convention’s technical and safety standards. See generally Andreas Korr, Will “Blacklists” Enhance Airline Safety? (FOV Discussion Papers No. 32, 2006).

\(^{39}\) See, e.g., Robert Wall, Qatar Airways Executive Lashes Out Against European Airlines Group, AVIATION DAILY, Feb. 11, 2011, at 1.


chicago Convention would be allowed to claim any more trade or economic issues than the few it already possesses.\textsuperscript{42}

Just as unconvincing are suggestions to use a new Chicago Convention to upgrade ICAO’s oversight and enforcement authority. As already noted, the world’s three leading aeropowers – the U.S., EU, and China – profess substantially divergent views of international law and of the permissible jurisdictional reach of international legal institutions.\textsuperscript{43} Additionally, any proposal to bolster ICAO’s powers is likely to encounter substantial disagreement concerning which States ought to hold the reins. The “one State, one vote” mantra still has normative resonance for those who subscribe to the ideal of sovereign equality, but few contemporary international institutions actually defer to each State’s vote (and potential veto).\textsuperscript{44} The U.N. Security Council, for example, is beholden to the interests of its permanent members, and the WTO, which is superficially compliant with the notion of sovereign equality, still compels States to settle their disputes bilaterally. In reality, only the most powerful members of an international organization are likely to have the capability of taking strong retaliatory measures against defectors.\textsuperscript{45} ICAO, though adjudicatively weak, has rarely had reason to exercise its dispute settlement powers during the lifespan of the Chicago Convention, probably reflecting the fact that the parties have seen little wisdom in defection from the treaty’s terms.\textsuperscript{46} Given that long record of stability, it is unclear why ICAO requires greater dispute settlement powers than those it already possesses. If anything, an attempt to turbo-charge ICAO’s judicial competence would heighten fractiousness among a new Chicago Convention’s negotiating parties, at best resulting in a return to the status quo ante. Moreover, any ambitious hopes to endow ICAO with binding leg-

\textsuperscript{42} See supra note 23.

\textsuperscript{43} See generally Bradford & Posner, supra note 17.

\textsuperscript{44} And even if they did, there is an obvious democratic deficit when all States vote in technical equality. There is considerable scholarly discussion of the undemocratic implications of (for example) China and Trinidad and Tobago having an exactly equal voice in the voting conclaves of international institutions. See generally, e.g., Elizabeth McIntyre, Weighted Voting in International Organizations, 8 INT’L ORG. 484 (1954); cf also Athena Debbie Efraim, Sovereign (In) Equality in International Organizations (1999).

\textsuperscript{45} See generally Goldsmith & Posner, supra note 31, 150–62.

\textsuperscript{46} For further discussion of this possibility, see Sanchez, supra note 11.
islative powers would be quickly tempered by the reality that no international legal organization (outside the special circumstance of the EU institutions) holds such far-reaching authority. Although ICAO has arguably been more successful than other international institutions in inducing global cooperation that conforms to the terms of its constitutive treaty, that fact does not by itself legitimize a further accretion of powers. ICAO’s relative success, as suggested earlier, can be attributed to its function as a neutral forum where bottom-up State interests rather than top-down mandates promote cooperative outcomes.

With this sketch of contentious issues in mind, it appears doubtful that a new Chicago Convention, particularly one which boasts additional provisions covering air services trade and more powers for ICAO, can satisfy the International Paretian principle. Even if it is true that some of the current Convention’s terms are suboptimal and in need of overhaul, piecemeal adjustments would be better handled through the comparatively less onerous amendment process set forth in the treaty.47

III. The Normative (In)efficiency of a New Chicago Convention

Still, assuming that the foregoing evaluation is correct and that a new Chicago Convention encompassing all 190 of the current treaty’s State parties is infeasible, some might contend that a smaller number of likeminded States could forge a new multilateral agreement which, in time, would displace the old. After all, the shift in international aviation’s liability regime from the airline-friendly terms dictated by the 1929 Warsaw Convention (and its amending instruments) to the plaintiff-friendly Montreal Convention of 1999 has been incremental; to avoid jurisdictional black holes, many countries remain parties to both treaties.48 While the compliance costs of being part of both the Warsaw and Montreal regimes are negligible, adherence to two different “Chicago” systems would not be so easy.

Consider, for example, a scenario where each treaty system customizes its own air traffic management (ATM) procedures and

47 Stress should be placed on the word “comparatively” since, as discussed in supra note 12, the Chicago Convention’s amendment process is quite cumbersome.
required specifications for onboard communications equipment. Airlines performing services to countries which are parties to different regimes would confront not only much higher compliance costs but also potentially dangerous confusion over which rules and standards to apply across borders. Air services trade would suffer as States which adhere to one regime may curtail or even decline access rights to airlines from States adhering to the rival Convention system. Most air services agreements, including the U.S. Open Skies agreements, presuppose that both parties are members of the Chicago Convention (and of ICAO) and are therefore in full compliance with the treaty's terms and with its technical acquis.49 In an imagined environment where two regimes coexist, either these formerly “background” terms would have to be standardized within bilateral air services arrangements (a process which would add substantial complexity and confusion) or, as noted, States would simply dispense with providing market access to adherents of the other regime.

The parallel existence of two Chicago-style regimes would exacerbate the perceived problem of fragmentation in international law, which notoriously results in conflicting international norms and legal uncertainty.50 This possibility would likely not align with the theoretical models of global legalists, certainly, but it would also create immediate challenges for States (and their airlines) which must navigate the dictates of two potentially conflicting bodies of law. Under internationally recognized rules of treaty interpretation, States which subscribe to a new “Chicago” Convention would still be bound to the terms of the original treaty with respect to all States which refuse to adhere to the new regime.51 In other words, defection to the new ordos would not


override a State's obligations to the old unless, of course, it denounced the original treaty (and thus sacrificed its benefits as well). States which refused to adopt the new Chicago Convention would simply retain the rights and obligations of the original regime. This messy legal reality could have a powerful dissuasive effect on States contemplating participation in both regimes. If the path of least resistance (and complexity) remains fidelity only to the original Chicago Convention, the new regime and the fractured environment it would bring into being would have to yield significant countervailing benefits in order to generate adherence. For the reasons discussed in the previous Part, it is doubtful that such benefits are likely to be included in a new Chicago Convention in the first place, regardless of the particular constellation of founding parties. And even if some of these new ideas for economic liberalization or enhanced institutional powers were stitched into the new agreement, they would be unlikely to deliver fully on their promise without the universalism reflected in the current Convention.

Finally, it is important to recognize that a replacement Chicago Convention, even if it were to win widespread acceptance, would almost certainly lack the structural pliability that its predecessor has exhibited (if partly by historical accident). States have used ICAO as an efficient conduit to develop subject-specific responses to issues as diverse as air carrier liability, air crimes and, more recently, global ATM modernization. In the realm of air services trade, the fact that the original Convention had very little to

though the Vienna Convention has not received universal ratification, its terms are recognized as a codification of the customary international law governing treaty interpretation. See Restatement (Third) of Foreign Relations Law of the United States pt. III, Introductory Note. See Vienna Convention, supra note 51, art. 60. For example, assuming that a new Chicago Convention eradicated the traffic rights artifice and mandated unrestricted market access among its State parties, this benefit would lose its savor if major air transport markets such as the U.S. and EU refused to go along. Similarly, an unrestricted crossborder investment regime for aviation, if included in a new Chicago Convention, could be effectively stymied if the aforementioned markets threatened to invoke the nationality clauses in their respective ASAs to lock out foreign air carriers owned by third-party nationals. For further discussion of the nationality rule's chilling effect on international airline investment, see Havel & Sanchez, supra note 3, at 648–53. See supreme notes 22–33 and accompanying text. See supreme notes 19–20 and accompanying text. See Brian F. Havel, A U.S. Point of View on European ATM Developments, in Achieving the Single European Sky (SES): Goals and
say on the matter allowed latitude to likeminded States to evolve liberalized air services agreements. States would be wise to remain circumspect about the coverage "bandwidth" of any one instrument, especially given the negotiating costs associated with modifying or abandoning outmoded provisions. One of the most enlightened features of the existing Chicago Convention is ICAO's ability continually to devise and update SARPs, thereby keeping the treaty, within certain constraints, reflective of best practices in technical and safety matters. And even though States may evade SARP compliance and incur no direct penalties, defections attract secondary sanctions such as reputational loss and damage to aeropolitical relations. Experience offers no reason to believe that a more invasive dispute settlement and enforcement system will yield superior results.57

Conclusion

Though imperfect, the Chicago Convention is a fixed compass within international law because of its demonstrated cooperative benefits. Calls for a replacement Convention, this Article argues, fail on grounds of political feasibility and normative efficiency. While they may be provoked by dissatisfaction with international aviation's current regulatory landscape, a new Convention might not easily replicate the cooperative ethos embedded in Chicago. None of this is to argue, however, that the present Convention system is optimal or that efforts to amend the treaty are somehow spurious. New issues and challenges will demand fresh intellectual energy and some degree of continuing reform will probably be necessary. Aviation's role in climate change, for example, has put the Convention and ICAO directly in the crosshairs of a huge international controversy. While the Paretian principle suggests

57 What if, for instance, a new Chicago Convention required all State parties to immediately withdraw market access rights from the airlines of a scofflaw State? This seemingly powerful sanction would be largely nullified by the harsh fact that multilateral enforcement of international agreements is difficult to coordinate and monitor. Every potential enforcer has an incentive to "cheat" and to rely on the agreement's other parties to bear any costs associated with the punishment.
that any consequent treaty reform is likely to be modest,\textsuperscript{58} past evidence also indicates that ICAO is well-suited to broker conflicting State perspectives.\textsuperscript{59} In the sphere of economic liberalization, too, ICAO is acting through its Legal Committee to evaluate a joint U.S./EU proposal (referred to it by U.S. Department of State officials) for a multilateral waiver of the nationality provision in States’ air services agreements.\textsuperscript{60} The Chicago Convention will continue to be a “steady state” system that changes only incrementally. For those in search of more ambitious experiments, especially in economic regulation, the busiest laboratories will likely be regional and cross-regional rather than multilateral.

\textsuperscript{58} For a comprehensive discussion of the international political hurdles confronting strong measures to combat climate change, see Posner & Weisbach, supra note 21.

\textsuperscript{59} For a survey of ICAO’s success in fostering a series of anti-air crime treaties, see Michael Milde, International Air Law and ICAO ch. 8 (2008).