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**Responsibilities of the State and Aircraft Manufacturer on Lion Air JT610 and Ethiopian Airlines ET302 Accidents under International Law**

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**Abstract**

*Lion Air JT610 and Ethiopian Airlines ET302 crashes occurred on October 2018 and March 2019 respectively. The main cause of the accident on both flights, which used Boeing 737 MAX 8 aircraft, is the defect on the Maneuvering Characteristics Augmentation System (MCAS), a new anti-stall system of this aircraft model. Boeing 737 MAX 8 is produced by Boeing Company which resides in the United States. However, passengers on both accidents could not claim compensation from Boeing Company because there is no international law that regulates aircraft manufacturer responsibilities. This research tries to analyze whether passengers can request for compensation to the United States and whether national court rulings or judgments can fill the gap in international law regarding aircraft manufacturer. The research uses the normative juridical approach with analytical descriptive method. The research uses the library research method, focusing mainly on primary, secondary, and tertiary legal resources. This research found that the current international law could not accommodate the interests of plaintiffs to hold the United States accountable. The usage of forum non conveniens principle at the national courts made it difficult for the plaintiffs to obtain the compensation they are entitled to. Subsequently, the national law applied in each case is different which created a distinction on the compensation received by each plaintiff for the loss they suffered. Author comes into the conclusion that there is a need for the establishment of regulations in international law concerning the responsibilities of aircraft manufacturer.*

*Keywords: Aircraft Manufacturer, Forum Non Conveniens, State Responsibility*

**Tanggung Jawab Negara dan Manufaktur Pesawat Terbang dalam Kecelakaan Pesawat Terbang Lion Air JT610 dan Ethiopian Airlines ET302 Berdasarkan Hukum Internasional**

**Abstrak**

Kecelakaan pesawat terbang Lion Air JT610 dan Ethiopian Airlines ET302 terjadi pada bulan Oktober 2018 dan Maret 2019 secara berturut-turut. Penyebab utama kecelakaan kedua penerbangan yang menggunakan pesawat terbang Boeing 737 MAX 8 ialah kerusakan sistem Maneuvering Characteristics Augmentation System (MCAS), sebuah sistem anti-stall terbaru untuk model pesawat terbang ini. Boeing 737 MAX 8 diproduksi oleh Boeing Company yang berkedudukan di Amerika Serikat. Penumpang pada kedua kecelakaan tidak dapat meminta ganti rugi pada Boeing Company karena belum adanya hukum yang dapat mewadahi penggantian rugi serta tanggung jawab manufaktur pesawat terbang dalam hukum internasional. Penelitian ini akan menganalisis apakah penumpang dapat memintakan ganti rugi kepada Amerika Serikat sebagai negara dan apakah putusan pengadilan nasional dapat mengisi kekosongan

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hukum internasional terkait manufaktur pesawat terbang. Penelitian dilakukan menggunakan metode pendekatan yuridis normatif dengan spesifikasi penulisan deskriptif analitis. Tahap penulisan dalam penelitian ini dilakukan menggunakan metode studi kepustakaan bahan hukum primer, sekunder, dan tersier. Hasil penelitian ini menemukan bahwa hukum internasional yang ada saat ini pun belum dapat mewadahi kepentingan penumpang sebagai penggugat untuk dapat meminta pertanggungjawaban kepada Amerika Serikat atas kesalahan manufaktur pesawat terbang. Selain itu, munculnya prinsip forum non conveniens pada level nasional mempersulit penggugat untuk mendapatkan ganti rugi pada pengadilan nasional. Hukum nasional yang diterapkan pada tiap kasus pun berbeda sehingga muncul kesenjangan mengenai ganti rugi yang diperoleh penggugat atas kerugian yang diderita. Melihat situasi ini, peneliti berkesimpulan perlunya pembentukan pengaturan dalam hukum internasional mengenai tanggung jawab manufaktur pesawat terbang.

Kata Kunci: Forum Non Conveniens, Manufaktur Pesawat Terbang, Tanggung Jawab Negara

## A. INTRODUCTION

The world of aviation is faced with tragedies that occurred on October 2018 and March 2019. On October 2018, Lion Air Flight JT610 fell and plunged in the Indonesian waters, which caused fatalities of 187 passengers. This plane crashed in Jakarta Bay, Karawang, 5 minutes after it took off from Soekarno-Hatta International Airport, Tangerang. Lion Air claimed that Boeing 737 MAX 8 aircraft used in the flight was less than 1 year old and it was lastly used on August 15<sup>th</sup> 2018 before the crash. Based on the ongoing investigations, the accident was caused by the Maneuvering Characteristics Augmentation System (MCAS), which used as a system to avoid stall situation (anti-stall). This system is the newest technology that Boeing Company used for Boeing 737 MAX 8.<sup>1</sup>

In March 2019, a Boeing 737 MAX 8 crash occurred for the second time. The airplane crashed about 5 minutes after departing from Addis Ababa, Ethiopia to Nairobi, Kenya and caused fatalities of 157 passengers. Ethiopian Airlines Flight ET320 crash was claimed to be similar to Lion Air JT610 crash. This crash was also triggered by MCAS errors in reading and analyzing the situation, where the pilot raised the airplane to reach an altitude, but MCAS

read it wrongly that the height could cause a stall so that it automatically lowered the angle of the aircraft.<sup>2</sup> As far as the investigations were carried out, the investigators of two accidents confirmed that there was an error in data input regarding the angle of attack (AOA) by MCAS so that MCAS became active automatically and dropped the plane. Before the investigation facts came out, the family of Lion Air passengers sued the airline for this accident. However, when the following accident happened to the same type of aircraft, the families of the passengers filed a lawsuit against Boeing Company in the United States for compensation.

In fact, the states on both of these accidents were involved in certifying an aircraft airworthiness certificate, which was validated by their respective domestic authorities. The United States Federal Aviation Administration (FAA) has issued an airworthiness certificate for Boeing 737 MAX 8 in March 2017. In addition, the Acting Director General of Air Transportation of the Ministry of Transportation of the Republic of Indonesia (Kemenhub RI) had stated that Boeing 737 MAX 8 was airworthy to operate because it had met standards of airworthiness. Not only that, Ethiopia had also certified Boeing

<sup>1</sup> Kompas, "Kronologi dan Fakta Kecelakaan 737 MAX 8 Lion Air JT610", <https://nasional.kompas.com/jeo/kronologi-dan-fakta-kecelakaan-boeing-737-max-8-lion-air-jt-610>, accessed on 7<sup>th</sup> of April 2019.

<sup>2</sup> BBC News, "Ethiopian Airlines Boeing 737 Pilots 'could not stop nosedive'", <https://www.bbc.com/news/business-47812225>, accessed on 7<sup>th</sup> April 2019.

737 MAX 8 airworthiness before Ethiopian Airlines ET302 crash took place.<sup>3</sup>

Various similar cases have previously been resolved by applicable national law and international law. In the international airspace regime, the 1944 Chicago Convention has been recognized, in which this set of convention regulates about state sovereignty over air space above its territory. Additionally, the 1944 Chicago Convention limits its scope to civil aircraft thus national aircraft belongs to the state are not covered by the provisions of this Convention.<sup>4</sup> The 1944 Chicago Convention is also the legal basis for the formation of the International Civil Aviation Organization (ICAO)<sup>5</sup>, which has the authority to establish aviation regulations under the 1944 Chicago Convention on technical and non-technical matters. These regulations are known as International Standards and Recommended Practices (SARPs).<sup>6</sup> SARPs were later adopted into Annexes or additional regulations that became an integral part of the 1944 Chicago Convention.

Moreover, for cases involving international air transportation, there are two conventions that have governed international air carriage law in general, which are the 1929 Warsaw Convention and the 1999 Montreal Convention. These two conventions regulate the rights and obligations of air carriers and consumers, including the settlement of cases and the amount of compensation. The scope of consumers in this convention is defined as users of air transportation services so consumers are not only defined as passengers, but also consumers who use aviation transportation services for delivery of goods in the form of cargo.<sup>7</sup>

Aircraft manufacturer involvement on airplane crash previously had been researched by Alan H. Collier and Stephanie N. Brie in a scientific article, "The Battle Over Air France: Does the Montreal Convention Apply to Manufacturer Claims for Carrier Indemnity?". This scientific article raises the Air France crash which was sued with a contribution counterclaim liability by aircraft manufacturers under the 1999 Montreal Convention. This scientific article provides two views which can be taken as arguments for aircraft manufacturer and air carrier.

The article stated that the 1999 Montreal Convention is deemed to have shifted away from its primary purpose of protecting air carriers. If the 1999 Montreal Convention applies to a claiming third party, aircraft manufacturers must face the weakness of seeking the contribution of air carriers in foreign jurisdictions. However in this context, aircraft manufacturers would benefit for bringing *forum non conveniens* principle as their argument, given the lack of jurisdiction of the United States courts on them. If the 1999 Montreal Convention does not apply to a claiming third party, the aircraft manufacturer has a huge advantage in sharing the liability for losses with the air carrier, but the *forum non conveniens* argument is weakened by the emergence of recognized jurisdiction of US courts over foreign carriers.<sup>8</sup>

Although the legal subjects discussed are broadly similar, the scope of discussion in this writing will be much different from the abovementioned scientific article. The first issue that will be raised in this research is the airworthiness certification of Boeing 737 MAX 8 which was issued by the United

<sup>3</sup> Komite Nasional Keselamatan Transportasi Republic of Indonesia, *Aircraft Accident Investigation Report: Preliminary KNKT. 18.10.35.04*, 2018, p. 6; Ministry of Transport of Federal Democratic Republic of Ethiopia, *Aircraft Accident Investigation Preliminary Report Issue AI-01/19*, 2019, p. 25.

<sup>4</sup> Article 1 and 3 Convention on International Civil Aviation (Chicago Convention) 1944.

<sup>5</sup> *Ibid.*, Part II.

<sup>6</sup> *Ibid.*, Article 37.

<sup>7</sup> Article 1 Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) 1999.

<sup>8</sup> Alan H. Collier and Stephanie N. Brie, "The Battle Over Air France: Does the Montreal Convention Apply to Manufacturer Claims for Carrier Indemnity?", <https://www.fitzhunt.com/sites/default/files/news/The%20Battle%20Over%20Air%20France%20Does%20the%20Montreal%20Convention%20Apply%20to%20Manufacturer%20Claims%20for%20Carrier%20Indemnity-Collier-Brie.pdf>, accessed on 15<sup>th</sup> of May 2019.

States, as the country where Boeing Company is located. Before the emergence of aircraft manufacturers' responsibilities, one should underline that the United States, Indonesia, and Ethiopia have the authorities to declare the airworthiness of an aircraft to fly within the territory of their countries, including Boeing 737 MAX 8. According to author's view, it is necessary to first investigate whether the passengers who were victims of Lion Air JT610 and Ethiopian Airlines ET302 crashes can hold the United States accountable as a country before examining aircraft manufacturers.

Another problem that arises is regarding the application of court's decisions within the scope of national courts regarding aircraft manufacturer. In international air carriage law, the scope of the 1929 Warsaw Convention and the 1999 Montreal Convention only cover the rights and obligations of air carriers with consumers, both passengers and air cargo service users. Aircraft manufacturer is not regulated by these two conventions, hence the settlements of similar cases, which have occurred before, are settled by certain national laws.

The passengers on various cases, who are foreigners, had filed their claims to United States courts because these cases involved aircraft manufacturers which were domiciled in the United States. In these cases, the court judges had decided the cases based on the *forum non conveniens* principle. *Forum non conveniens* has the meaning of a court's discretionary power to reject its jurisdiction of a case based on the grounds that the court is not the right court to settle the case.<sup>9</sup> This commonly used doctrine in countries adhering to the Anglo Saxon legal system gives the court the power to decide that a case should be resolved in an appropriate court based on

certain reasons, especially on the grounds that the plaintiff is not a citizen of the United States.<sup>10</sup> The use of *forum non conveniens* raises the problem that whether the decisions of state courts in various countries can fill the gap on law at the international level.

The case of Boeing 737 MAX 8 aircraft shows that there is a big role for the state in determining the airworthiness of an aircraft and the role of aircraft manufacturers in the world of air carriage. International regulations on state responsibility in issuing airworthiness certificates and aircraft manufacturer responsibilities are the main focuses of this research.

## B. UNITED STATES AS THE STATE UNDER INTERNATIONAL LAW FRAMEWORK

The cause of this accident was the replacement of the anti-stall system from the old system to the MCAS software installed on the aircraft. In general, this system is made to avoid a stall that occurs on an airplane because it can cause the airplane to be stationary and unable to move or fly. When an airplane flies in a take-off state, MCAS reads this situation as a stall situation, thus this system automatically becomes active and lowers angle of the aircraft. In a preliminary report prepared by the Ethiopian Ministry of Transportation's Aircraft Accident Investigation Bureau and the National Transportation Safety Committee (KNKT) of the Republic of Indonesia, pilots of Lion Air JT610 and Ethiopian Airlines ET302 had tried to control the active MCAS but repeatedly failed and caused accidents.<sup>11</sup>

Investigators discovered the fact that Boeing 737 MAX 8 had a valid airworthiness certificate given by FAA at the time the plane crashed.<sup>12</sup> From the final report

<sup>9</sup> Karl Hennessee dan David J. Weiner, "International Litigation and forum non conveniens: Strategies and lessons from the aviation context", *International In-house Counsel Journal*, Vol. 2, Issue 7, 2009, p. 1013.

<sup>10</sup> F. M. Manolis (et al.), "The Doctrine of Forum Non Conveniens: Canada and the United States Compared", *FDCC quarterly*, 2009, p. 3 dan 33; Steven R. Pounian

and Justin T. Green, "Using the Forum Non Conveniens Doctrine With Foreign Victims", *New York Law Journal*, 2011, p. 1.

<sup>11</sup> Komite Nasional Keselamatan Transportasi Republic of Indonesia, *Aircraft Accident Investigation Report: Final KNKT. 18.10.35.04*, 2019, pp. 19-27.

<sup>12</sup> *Ibid*, p. 32.

released by KNKT and the report from Joint Authorities Technical Review (JATR) Team, there were several errors that cumulatively occurred and caused Lion Air JT610 accident. United States law gives FAA the authority to delegate its functions so that FAA acts as a supervisor, whose authority is exercised by FAA's Boeing Aviation Safety Oversight Office (BASOO). FAA's BASOO is responsible for overseeing Boeing 737 MAX 8 certification and approval process.<sup>13</sup> The body which concludes that airworthiness standards are met is Boeing ODA.<sup>14</sup> It can be concluded from the delegation from FAA to FAA's BASOO and Boeing ODA that FAA is unable to independently assess and evaluate MCAS. This was also shown by lack of information regarding MCAS known to FAA.<sup>15</sup>

FAA has a three-process safety assessment system consisting of several gradual assessments, namely FHA, FMEA, and FTA, which are carried out on certain hazard categories. Generally, FHA is carried out to identify hazards before FMEA and FTA are carried out. However, FMEA and FTA assessments are only carried out for hazards that are categorized as hazardous and catastrophic. In this case, MCAS which is categorized as a major hazard does not require FMEA and FTA assessments. Investigators assessed that both assessments could in fact identify failures that the FHA could not read.<sup>16</sup>

Another factor that caused the accident was Boeing Company did not submit the proper documentation required by FAA. This was deemed to be a fatal mistake and made FAA not aware of or know about the latest developments or changes to the MCAS system. Not only that, FAA did not properly supervise Boeing ODA.<sup>17</sup> Boeing

Company also assumed that flight crews had understood the systems on the Model 737 and were able to take appropriate action when a failure occurred. This assumption is one of the reasons Boeing Company did not provide additional information and training regarding the whole MCAS system.<sup>18</sup> The factor that worsened the situation was the unrecorded aircraft damage on the previous flight on the Aircraft Flight Maintenance Log (AFML) so the previous error was not known by maintenance personnel and could not be repaired.<sup>19</sup>

The JATR team also assessed that FAA rules and guidelines on changed product rule were deemed to be incompatible with developments.<sup>20</sup> Boeing Company did not provide a complete Flight Crew Operating Manual (FCOM) or Flight Crew Training Manual (FCTM), thus pilots or flight crews were unable to mitigate or resolve problems appropriately when the failure occurred due to MCAS.<sup>21</sup> Of all the factors that caused Lion Air JT610 accident, there are two legal subjects involved, FAA and Boeing Company.

From the cumulative errors above, it can be concluded that there are two subjects with their respective mistakes and are related to one another. Boeing Company had done three main actions: (1) did not provide the required documentation regarding the latest MCAS analysis to FAA; (2) did not further evaluate MCAS using FMEA and FTA; and (3) did not provide MCAS information on flight crew manuals and training for flight crews. On the other hand, FAA itself: (1) had lack of knowledge of MCAS; (2) did not properly supervise Boeing ODA; and (3) had incompatible regulations with existing

<sup>13</sup> *Ibid*, p. 147.

<sup>14</sup> *Ibid*, p. 50.

<sup>15</sup> *Ibid*, p. 207; JATR Team, *Joint Authorities Technical Review on Boeing 737 MAX Flight Control System: Observations, Findings, and Recommendations*, 2019, p. VII.

<sup>16</sup> Komite Nasional Keselamatan Transportasi Republic of Indonesia, *Aircraft Accident Investigation Report: Final KNKT. 18.10.35.04*, *Ibid*, pp. 189-191.

<sup>17</sup> *Ibid*, p. 207.

<sup>18</sup> *Ibid*, p. 207 and p. 213.

<sup>19</sup> *Ibid*, p. 61.

<sup>20</sup> JATR Team, *Op. Cit.*, p. III-IV.

<sup>21</sup> Komite Nasional Keselamatan Transportasi Republic of Indonesia, *Aircraft Accident Investigation Report: Final KNKT. 18.10.35.04*, *Op. Cit.*, pp. 199-200.

developments. The next question is whether the actions of these two agencies can be said to be the actions of the United States and hold the United States responsible.

International law recognizes the concept of internationally wrongful acts, where an act of the state which violates the obligations of the state results in international responsibility and this concept has been accepted as a general principle in international law.<sup>22</sup> The concept of responsibility for an action is stated and regulated in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), which is considered a known principle in international law, in the concept of law in general, and accepted as a source of customary international law.<sup>23</sup> ARSIWA regulates that,

*"There is an internationally wrongful act of a State when conduct, consisting of an action or omission:*

- a. is attributable to the State under international law; and*
- b. constitutes a breach of an international obligation of the State."*<sup>24</sup>

From this article, it can be concluded that the actions of a state must fulfill these two conditions in order to be considered as violation of international obligations: first, that such action attributable to the state within the scope of international law and second, such action constitutes a breach of an international obligations of the state.<sup>25</sup>

In general, proof that there is an act of violation by a state against other subjects of international based on ARSIWA needs to be proven by the international law subject who is the victim. In the case of an airplane crash involving Boeing Company, Lion Air, and Ethiopian Airlines, the burden of proof lies within the victims who can be represented by the citizenship's countries, Indonesia and Ethiopia, to file a lawsuit against the United States.<sup>26</sup> Two conditions for determining whether an act constitutes an internationally wrongful act must be met cumulatively. The first condition that needs to be fulfilled is whether the actions of FAA and Boeing Company in the case of Lion Air JT610 and Ethiopian Airlines ET302 can be considered as state action in international law.

ARSIWA regulates that the actions of state organs or individuals or entities that are authorized by national law can be categorized as actions taken by the state in international law.<sup>27</sup> State organs in this article include all individuals or entities that are in the organization of a state and act on behalf of the state and are not limited to the central organs of a country, but also include regional organs acting on behalf of the central organs.<sup>28</sup> This article does not have certain limits and does not have a specific category to define state organs. It can be concluded that state organs at any level or with any function can be said to have committed internationally wrongful act on behalf of that state.<sup>29</sup>

<sup>22</sup> Article 1 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) 2001; Malcolm Shaw, *International Law (6<sup>th</sup> Edition)*, New York: Cambridge University Press, 2008, p. 778; Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, New York: Taylor & Francis e-Library, 2002, p. 254; James R. Crawford, *Brownlie's Principles of Public International Law (8<sup>th</sup> Edition)*, Oxford: Oxford University Press, 2012, pp. 539-540.

<sup>23</sup> *Chorzow Factory case*, 1928, on Malcolm Shaw, *Op. Cit.*, p. 781; *Noble Ventures, Inc. v. Romania*, 2005, on Michael Feit, "Responsibility of the State Under International law for the Breach of Contract Committed by a State-Owned Entity", *Berkeley Journal of International Law*, Vol. 28, Issue 1, 2010, pp. 145-146.

<sup>24</sup> Article 2 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) 2001.

<sup>25</sup> *Ibid.*

<sup>26</sup> *La Grand Case (Germany v. USA)*, 2001 and *Avena and Other Mexican Nationals (Mexico v. USA)*, 2004, which implemented that the state can represent its citizens.

<sup>27</sup> Article 4 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) 2001.

<sup>28</sup> International Law Commission, *Commentaries to the draft articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10)chp.IV.E.1, <https://www.refworld.org/docid/3ddb8f804.html>, accessed on 10<sup>th</sup> of December 2019.

<sup>29</sup> *Ibid.*, pp. 85-86.

In this case, FAA as an agency or governmental body that acts on all aviation administration in the United States is one of the state organs. FAA operates under the United States Department of Transportation with the authority to regulate and to run administration on aviation within the United States, including determining aircraft airworthiness and issuing airworthiness certificates for eligible aircraft. The authority of FAA is clearly regulated in the Federal Aviation Act which was issued on 1958. Therefore, it can be concluded that FAA is a state organ and its actions are attributable to the state.

Private companies such as Boeing Company are included in the scope of non-state organs, which are regulated in Articles 5, 7, 8, 9, 10, and 11 of ARSIWA. Before ARSIWA was made and entered into force, the involvement of private companies in a case which was then represented by the state and resolved in an international forum had emerged long before this case appeared. In *Barcelona Traction*, the Belgian government asked Spain for compensation for a Canadian-owned company located in Spain, where Belgium was involved in this case because its citizens became shareholders in the company which later went bankrupt. Belgium sued Spain that Spain was responsible for violations of international law which inflicted losses on the Canadian company and its Belgian shareholders. The questions raised to the International Court of Justice were whether Belgium had *jus standi* to exercise diplomatic protection over the shareholders of Canadian company and whether Belgium had the right and jurisdiction to sue Spain in court for acts committed by Canadian companies.<sup>30</sup>

International law provides that when there is an illegal act involving foreign capital, a lawsuit can only be filed by the company's nationality. The International

Court of Justice rejected the lawsuit filed by Belgium because Belgium did not have the legal standing to seek diplomatic protection for shareholders and citizens on Canadian company in Spain. The Court emphasized that when the theory of diplomatic protection of shareholders was adopted and applied in this case, it would raise competing claims from different countries and create an unfavorable atmosphere in international economic relations between states.<sup>31</sup> This case is one example where the international court forum discusses the involvement of private subjects, where the state can represent private companies and even individuals. However, it must be examined to what extent and in what realm the state can represent private subjects or its citizens in international forums.

Furthermore, ARSIWA recognizes that an action carried out by an entity or an agency other than a state organ is an act of the state when the action is protected by national law and is considered as duties that have to be carried out as or in the capacity of a governmental authority.<sup>32</sup> The entities referred to in this article include public companies, public agencies, as well as private companies as long as these entities are authorized by the national law of the state to act as governmental authority. Generally, these actions are performed by state organs but the state is the one which delegates the tasks to these entities.

This article emphasizes several things, one of which is regarding the implementation of elements of governmental authority. There are no boundaries regarding governmental authority and generally, in order to define the boundaries of governmental authority, it is necessary to relate to the context of society, its history, and its traditions. Important questions that must be further investigated are not only regarding the substance of this authority or authority, but

<sup>30</sup> *Barcelona Traction (Belgium v. Spain), Judgment, I.C.J. Reports, 1970.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Article 5 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) 2001.

also how it is assigned to other entities, for what purposes this authority is exercised, and to what extent this entity is responsible to the government for its implementation.<sup>33</sup>

In connection with the current case, Boeing Company which carries out an action to apply for MCAS certification and technology update is seen as a private legal subject that does not carry out governmental authority or the action is not protected by the national laws of the United States. Applications for MCAS certification and technology updates are made by Boeing Company for commercial purposes. The national laws of the United States have no bearing on or connection with the actions of Boeing Company other than requiring Boeing Company to obtain MCAS certification that MCAS is eligible for use.

Article 7 of the ARSIWA regulates that when a state organ or entity acts outside or exceeds the limits of the governmental authority that has been given by the state to that organ or entity, that action is still said to be an act of the state. This article emphasizes the ultra vires principle which has the concept that an entity can be allowed to take action outside of its capacity or authority given to it.<sup>34</sup> In this case, it can be seen that Boeing Company continues to carry out its duties in accordance with the guidance provided by FAA, which is further acknowledged by the report produced by JATR. Furthermore, Boeing Company did not take any action by the governmental authorities in this case so that this article cannot be used to say that the actions of Boeing Company were acts of the state.

Furthermore, ARSIWA regulates that the actions of a person or group can be said to be state actions in international law if those actions are indeed carried out under the direction or order or control of the state that is supposed to carry out the action.<sup>35</sup> The thing that is emphasized in this article is

the existence of effective control by the state on this group. In this case, there was no effective control exercised by the United States over Boeing Company so this section also cannot be used to hold the United States accountable.

Then, ARSIWA also regulates that an action taken by an individual or a group of people is said to be a state action if the action is considered to be carrying out a governing authority even though the action is not carried out by the competent authority.<sup>36</sup> To use this article in a case, three things are need to be proven: (1) the act was an act of a government authority; (2) acts carried out by entities or individuals outside the official authority of that country; and (3) the existing circumstances necessitated the exercise of that element of authority.<sup>37</sup> In this case, Boeing Company action did not become the act of a governmental authority or exercised the authority of a particular United States government agency regarding MCAS, hence this article cannot be used.

Article 10 ARSIWA regulates that the actions of a rebellion movement that will become the new government of a state are said to be the actions of that state in international law. This article certainly cannot be applied to the case that the author brought in this study because there was no rebellious movement, thus Article 10 of ARSIWA is not appropriate to be used in this case. In the last article regarding the attribution of a state is Article 11 of ARSIWA. This article provides that when the state has recognized and adopted the action into its actions, then the action is said to be the state's action under international law regardless of the fact that the action cannot be attributed in accordance with the previous articles in ARSIWA.

In this case, no statement was issued by the United States acknowledging that Boeing Company's actions against

<sup>33</sup> International Law Commission, *Op. Cit.*, p. 43.

<sup>34</sup> International Law Commission, *Op. Cit.*, p. 45.

<sup>35</sup> Article 8 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) 2001.

<sup>36</sup> Article 9 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) 2001.

<sup>37</sup> International Law Commission, *Op. Cit.*, p. 49

airworthiness applications or the development of anti-stall technology were state actions. This article also cannot be used that the actions of Boeing Company are attributable to the state. From the discussion above, it can be concluded that the conditions for action of a state within the scope of international law are not fulfilled because the actions of Boeing Company cannot be considered as actions of the state in the framework of ARSIWA.

Furthermore, in the second condition of the existence of internationally wrongful acts, it is necessary to prove that the actions taken by the subject constitute a breach of international obligations. In this case, FAA which can be said to be a state is governed by the 1944 Chicago Convention and its annex as its derivative regulations. The author argues that there are no regulations in the 1944 Chicago Convention or annex, especially Annex 8 that are violated by FAA. The author views that FAA's technical actions do not violate the rules in Annex 8 concerning Aircraft Airworthiness.

Furthermore, when there are no rules violated by FAA within the scope of the 1944 Chicago Convention, it is necessary to further investigate *lex specialis* in air carriage law, the 1929 Warsaw Convention and the 1999 Montreal Convention. However, the scope regulated by the two conventions only covers the rights and obligations of air carriers and consumers. The legal subjects which are state and aircraft manufacturer are not regulated by these conventions. The author concludes that there is no breach of international obligations committed by FAA and Boeing Company.

If FAA in fact can be sued in front of the international tribunal forum because it has done an internationally wrongful act, this will cause injustice to FAA because Boeing Company cannot be sued in front of the international tribunal forum, thus the lawsuit against Boeing Company will be settled on national court. The compensation that will be charged to both parties will certainly be different, where

FAA's mistake will be seen as the fault of a state and resulted in compensation of state's portion, while Boeing Company's mistake will be seen as the fault of a private subject, hence the compensation that must be given will not be greater than the state's share of compensation.

The difficulty of suing Boeing Company within the scope of international law is supported by the absence of regulations regarding aircraft manufacturer. There is no compensation standard that can be used as a claim to aircraft manufacturer. Other than that, when the plaintiff wants to file a lawsuit that there is an error from FAA regulations that are deemed insufficient to evaluate MCAS, it is necessary to have standard regulations that can be FAA benchmark. However, MCAS which is classified as the newest technology in the world of aviation certainly does not have a standard regulation to evaluate this technology, so it will be difficult to find a strong legal basis to state that FAA regulations are lacking.

Until now, cases that have been resolved in the International Court of Justice and the decisions of the International Court of Justice have not recognized corporations as subjects of international law. In addition, proceeding with the International Court of Justice has its advantages and disadvantages. Both parties must estimate several things, such as time and cost efficiency. Several cases in the International Court of Justice take long time to settle so that the settlement in the International Court of Justice is not effective and efficient for these cases.

Another solution that can be taken from this case is to look at the laws that apply to international air carriage. The international air carriage law framework recognizes equal compensation based on the principle of

restitution<sup>38</sup> that a plaintiff can use to claim damages against a defendant. However, the conventions that apply in this regime still limit its regulations to two legal subjects, which are airlines and passengers, so this convention cannot be a strong basis for holding Boeing Company, FAA, or the United States accountable. Based on the above considerations, aviation accident disputes involving aircraft manufacturer are then settled in national courts.

The number of cases that exist and are recognized in the national law of the United States regarding the acceptance of aviation accident cases in the national courts of the United States is another supporting value that passengers as victims can file a lawsuit in the national court. This was also supported by the 1929 Warsaw Convention and the 1999 Montreal Convention, as two conventions recognized in the international air carriage law regime, that victims must determine the jurisdiction they use to settle the cases.

The plaintiff has the authority to choose one of the four forums to file the case: (1) before the court having jurisdiction where the carrier is ordinarily resident; (2) the country where the carrier has his principal place of business; (3) the country has an establishment by which the contract has been made; or (4) before the court having jurisdiction at the place of destination.<sup>39</sup> In contrast to the 1999 Montreal Convention, plaintiffs can submit their case to the four pre-arranged forums and the fifth additional forum, the country in the territory of a state party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft,

or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.<sup>40</sup>

### C. THE ROLE OF COURT'S DECISIONS IN FILLING THE GAP OF INTERNATIONAL AIR CARRIAGE LAW REGARDING AIRCRAFT MANUFACTURER

In the previous discussion, international air transportation law has not specifically recognized the legal subject of aircraft manufacturer so that there is a gap in the law. This gap is one of the reasons why the plaintiffs filed their lawsuit in the national court. From the various lawsuits filed by passengers against aircraft manufacturers, author takes several aircraft crash cases that were resolved in national courts, especially the national courts of the United States.

In settlement of cases brought by author, these cases applied the principle of *forum non conveniens* or the principle that gives the court the authority to transfer a case because there is a court or forum that is more appropriate to settle the case. Generally, the principle of *forum non conveniens* is put forward by the defendant as an objection to the lawsuit filed by the plaintiff. Is the principle of *forum non conveniens* granted by the court and how does the principle of *forum non conveniens* affect the plaintiffs? Does this principle give the plaintiff access to justice or appropriate court access or reduce the rights of the plaintiff?

The first case that the author brings up in this paper is a case involving Piper Aircraft and Reyno.<sup>41</sup> Reyno is a foreign plaintiff who

<sup>38</sup> Preamble of Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) 1999.

<sup>39</sup> Article 28 Convention For The Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) 1929.

<sup>40</sup> Article 33 Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) 1999.

<sup>41</sup> *Piper Aircraft v. Reyno*, United States Supreme Court, 1981, <https://caselaw.findlaw.com/us-supreme-court/454/235.html>, accessed on 19<sup>th</sup> of December 2019.

filed a lawsuit against an aircraft manufacturer domiciled in the United States. The basic reason Reyno chose the United States court over the Scottish court was to sue Piper Aircraft with strict liability so that Reyno could get a bigger amount of compensation. The plaintiff admitted that he chose the United States court because the law was favorable to the plaintiff, especially in laws regarding compensation, capacity to challenge, and liability. In addition, Scotland's national law does not yet recognize strict liability, so victims can only claim that there is negligence and legal capacity to sue in Scotland are seen as more restricted.<sup>42</sup>

The judge decided this case based on public interest and private interest between the two forums proposed by the plaintiff and the defendant<sup>43</sup> and the judge was of the opinion that the public interest and private interest in this case were directed towards Scotland. The judge argued that the plaintiff's argument which stated that the substantive law of the forum he chose was in his favor can be justified. Even changes in substantive law should not be a consideration in *forum non conveniens* discussions.<sup>44</sup> The Supreme Court of the United States also supports the statement of the trial court judge that the plaintiff's choice to settle the case in a foreign forum is considered no more convenient for the plaintiff than the forum in the state he is from. The Supreme Court views that the decision regarding *forum non conveniens* can only be rejected when the trial court is proven to have abused discretion, in which

case, the District Court is deemed not to have done this.<sup>45</sup>

The principle of *forum non conveniens* was also granted by the judge in cases involving an Indonesian national plaintiff. Adam Air Flight 574 accident which crashed in Makassar Strait, Sulawesi, killed more than 100 victims. The victims filed a lawsuit in a United States court and sued the aircraft manufacturer and the manufacture of its components, which encountered *forum non conveniens* objection that Indonesian law provides adequate compensation. However, the plaintiff replied to this argument with the news that the Indonesian courts had frequently committed corruption.<sup>46</sup>

This lawsuit was granted by the court judge because Indonesia's public and private interests were considered to be heavier than the public and private interests of the United States in this case. The judge focused on witnesses who were domiciled in Indonesia, as well as the ease of obtaining evidence. In addition, the judge considered that this accident involved transporters and passengers who were Indonesian citizens, so the possibility of Indonesia's interests being considered far greater than those of the United States.<sup>47</sup>

Not only in these two cases, the principle of *forum non conveniens* was accepted as an objection to the Helios Airways Flight 522 case between passengers as victims against Boeing Company.<sup>48</sup> In this case, the investigator found that there was an error from the carrier, Helios Airways, and the aircraft

<sup>42</sup> *Ibid.*

<sup>43</sup> Public and private interests became the basis for judges to decide the cases with *forum non conveniens* for the first time on *Gulf Oil Corporation v. Gilbert*, 1947. This basis is then used by judges as the main basis to settle other cases involving *forum non conveniens*.

<sup>44</sup> Maria A. Mazzola, "Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of Reyno", *Fordham International Law Journal*, Vol. 6, Issue 3, 1982, pp. 580-581; Anita J. Zigman, "Piper Aircraft v. Reyno", *NYLS Journal of International and Comparative Law*, Vol. 4, Issue 3, 1983, p. 652.

<sup>45</sup> *Piper Aircraft v. Reyno*, United States Supreme Court, 1981, *Op. Cit.*

<sup>46</sup> *In re Air Crash Disaster Over Makassar Strait*, United States District Court, N.D. Illinois, Eastern Division, 2011, <https://casetext.com/case/in-re-air-crash-disaster-over-makassar-strait>, accessed on 19<sup>th</sup> of December 2019; William V. O'Connor dan William C. Dalton, "Recent Developments in Aviation Law: General", *Journal of Air Law and Commerce*, Vol. 76, Issue 1, 2011, pp. 154-155.

<sup>47</sup> *Ibid.*

<sup>48</sup> *In re Air Crash Near Athens, Greece*, United States District Court, N. D. Illinois, 2007, <https://casetext.com/case/in-re-air-crash-near-athens-2>, accessed on 19<sup>th</sup> of December 2019.

manufacturer, Boeing Company, thus the sources to gather the evidence are important for both the plaintiff and the defendant. All evidences and witnesses involved are domiciled in the United States, but the defendant agrees that all witnesses and evidences available to him will be brought to an alternative forum. The judge saw that the majority of the victims were citizens or were domiciled in Cyprus or Greece so that private interests were considered heavy on the Cypriot or Greek side. The public interest which burdens the Cypriot or Greek forum is the interest of Cypriot or Greek citizens in the outcome of the settlement of cases.<sup>49</sup>

The judge decided that Cyprus was the most suitable forum for settling cases compared to the national court forum in the United States. The public interest and private interest on the side of the United States were lower than Cyprus. The judge in this case accepted the defendant's objection and transferred the case to the court in Cyprus, but he added that the defendants had to do a number of conditions in order for to settle the case in Cyprus.<sup>50</sup>

Another case that the author took in this study was the *In re West Caribbean Airways* case, where the passengers as victims filed a lawsuit against Newvac Corporation and West Carribean Airways. In this case, Newvac Corporation served as the company that formed the charter contract with West Caribbean Airways for the tour package but the aircraft that was used faced an accident. The lawsuit was filed in Miami Federal Court which the defendant rejected on the principle of *forum non conveniens*. This objection was also granted by the court judge by further stating that the Martinique

Court was more suitable to settle the case. Some of the passengers forwarded their lawsuit to the Martinique Court, but the lawsuit that was brought was regarding the settlement of cases that had to be resolved in the United States.<sup>51</sup>

Martinique district court approved the decision of the United States court and the Martinique appellate court decision also supported the previous decision. The plaintiff also filed an appeal to France *Cour de Cassation* and the judge issued a different decision. The judge stated that the lack of connection with the French forum on this case was the reason that the settlement had to be carried out in the United States. This decision became the basis for the victims to file a lawsuit back in the national court of the United States, but the judge still refused to settle the case because if the settlement was still resolved in the United States, the decision of this case would weaken the position of the United States and the United States court forum would become open for foreign plaintiffs.<sup>52</sup> From this case, the principle of *forum non conveniens* can cause a case to be deadlocked or even without a resolution due to differences of opinion between two courts of two different countries.

In contrast to previous court decisions, the principle of *forum non conveniens* was rejected as objection by US court judges in several cases. In *McCafferty v. Raytheon Inc.*, a lawsuit for an accident that occurred in Indonesia was filed on a court in Philadelphia regarding negligence in the context of product liability. The plaintiff claims that the defendant was involved in production or manufacturing activities as well as the sale of defective aircraft and machines, and the plaintiff made a claim

<sup>49</sup> *Ibid.*

<sup>50</sup> Paul S. Dempsey, "All Along The Watchtower: Forum Non Conveniens in International Aviation", 2015, p. 8 and pp. 17-18, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2692669](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692669), downloaded on 23<sup>rd</sup> of August 2019; Don G. Rushing dan Ellen Nudelman Alder, "Some Inconvenient Truths about Forum Non Conveniens Law in

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<sup>51</sup> *In re West Carribean Airways, S.A., et.al.*, United States District Court, S.D. Florida, 2013, <https://www.leagle.com/decision/20071918619bxfsu pp2d129911843>, accessed on 19<sup>th</sup> of December 2019.

<sup>52</sup> Steven R. Pounian and Justin T. Green, "Using the Forum Non Conveniens Doctrine With Foreign Victims", *New York Law Journal*, 2011, pp. 1-2.

regarding product liability. The judge considered that the activities of the production of aircraft and machines actually occurred in the United States, hence the objections based on *forum non conveniens* were rejected by the judge and the case was still resolved in the United States.<sup>53</sup>

A similar situation was experienced by *Vivas v. Boeing Company*, where a US court judge rejected the defendant's objection based on *forum non conveniens*. The judge considered that Peru's private and public interests did not support the settlement of cases in Peruvian courts. In addition, the appellate court judge also approved the decision by the United States district court because this case is a product liability case so that all relevant evidence regarding aircraft design and manufacture is in the United States. With this, the private interests of the United States are higher than that of Peru. This private interest is also supported by the public interest which states that Illinois residents have an interest in resolving product liability disputes against local companies.<sup>54</sup>

This principle was also rejected by the judge on *Ellis v. AAR Parts Trading*.<sup>55</sup> A case involving a Filipino citizen as a plaintiff was filed in Illinois, United States, against two corporations based in Illinois. The objection based on *forum non conveniens* submitted by the defendant was rejected by the judge on the grounds that the defendant's refusal on the inadequacy of the court settlement forum in the defendant's forum was considered odd. The judge also considered it odd that the defendant ignored the claim for compensation made to him regarding the defective condition of the aircraft before the aircraft was given to Air Philippines. The defendants in this case did not argue that the source of the evidence was outside Illinois. The judge then

considered that the private interest was heavier towards the two forums proposed by the defendant and the plaintiff, but the public interest was seen as burdening the defendant's forum so that the judge rejected *forum non conveniens* and settled the case in Illinois.<sup>56</sup>

The judge also rejected the case filed by the plaintiffs brought to the Cessna Caravan 208B case, which was filed by representatives of the pilots who were victims against Cessna Aircraft and Goodrich Corporation. The judge considered that the public interest was heavier towards the side of the United States because the resolution of this case would affect the regulations in force in the United States regarding aircraft manufacturer. The judge assessed that the private interest related to witnesses and evidence could be brought to a court in Kansas so that the settlement was continued in the court forum submitted by the plaintiff.<sup>57</sup>

In the cases that have been examined and discussed, all decisions involving *forum non conveniens* as the basis for the objections are brought by the defendant to transfer the case to a more appropriate forum. The author views that there are two possibilities when *forum non conveniens* based objections are raised, objections are accepted or objections are rejected. Both of them can provide disadvantages and advantages for both parties because legal differences in the two forums have become a debate and have led to forum shopping. In the view of the defendant, submitting *forum non conveniens* as an objection is a way to avoid forum shopping by the plaintiff to obtain huge amounts of compensation. The objection to *forum non conveniens* was motivated by the assumption that the defendant wanted a smaller amount of

<sup>53</sup> Paul S. Dempsey, *Op. Cit.*, p. 21.

<sup>54</sup> *Ibid*, p. 20-21.

<sup>55</sup> *Ellis v. AAR Parts Trading, Inc., LLC*, Appellate Court of Illinois, First District, Fifth Division, 2005, <https://casetext.com/case/ellis-v-aar-parts-trading-inc-1-02-3744-illapp-2-4-2005> and

<https://caselaw.findlaw.com/il-court-of-appeals/1266488.html>, accessed on 19<sup>th</sup> of December 2019.

<sup>56</sup> *Ibid*; Paul S. Dempsey, *Op. Cit.*, pp. 19-20.

<sup>57</sup> Don G. Rushing dan Ellen Nudelman Alder, *Op. Cit.*, pp. 422-423.

compensation than the law proposed by the plaintiff.

In the case of *In re Air Crash Near Athens, Greece*, and in the case of *In re Air Crash Disaster Over Makassar Strait*, judges in both cases rejected cases based on private interests and public interests which weighed on the defendant's choice of forum. In the case of *In re West Caribbean Airways*, there was a collision between two different court forum decisions which resulted in the case not being resolved. In the case of *Piper Aircraft v. Reyno* also has differences in law between Scotland and the United States, where the plaintiff can base his lawsuit on strict liability and negligence in the United States, but can only sue negligence in Scotland.

Private and public interests were also considered in the *McCafferty v. Case. Raytheon*, however, the judge stressed the suit over design flaws filed by the plaintiffs and weighed on the plaintiffs' choice of forums.<sup>58</sup> The lawsuit over design flaws became the basis for the judge's decision in the *Ellis v. AAR Parts Trading and Vivas v. Boeing Company*<sup>59</sup> and the *Cessna Caravan 208B*<sup>60</sup> case which raise the view that the United States has a high public interest because the decision will have an impact on the prevailing regulations in the United States.

Seeing this situation, it can be concluded that the absence of uniformity regarding the responsibility of aircraft manufacturer for victims is the main problem why *forum non conveniens* are still often used and even become the cause for dispute in a case that cannot be settled. In this discussion, the author concludes that court decisions and national laws can fill the gap in law regarding aircraft manufacturer responsibilities, but differences in the laws used result in gaps between the settlement

of one case and another. To keep in mind that the objective of forming the incorporation of laws into an international code is to achieve harmonization and unification of air transport law. It also returns to the principles of international air carriage law that the importance of protecting the interests of consumers in air carriage and the need for equal compensation based on the principle of restitution. From this explanation, it can be concluded that the absence of uniformity regarding the responsibility for aircraft manufacturer is not in line with the principles in international air carriage law. Hence, it is necessary to establish a law regarding the responsibility of aircraft manufacturer to passengers in the international law framework.

#### D. CONCLUSION

Passengers who are victims of Lion Air JT610 and Ethiopian Airlines ET302 accidents cannot hold the United States accountable as a state. This is based on the argument that ARSIWA cannot be the legal basis for the plaintiff to file a claim against Boeing Company because Boeing Company's actions cannot be attributed as the United States' act. In this argument, it is not only the actions of Boeing Company that cannot be attributed as the actions of the state, but the elements of internationally wrongful act are not fulfilled. Boeing Company's failure to fulfill its responsibilities to passengers under international law does not prevent Boeing Company from being liable under national law.

The filing of a lawsuit in United States courts by foreign plaintiffs is

<sup>58</sup> *McCafferty v. Raytheon, Inc.*, United States District Court, E.D. Pennsylvania, 2004, <https://casetext.com/case/mccafferty-v-raytheon-inc>, accessed on 19<sup>th</sup> of December 2019.

<sup>59</sup> *Vivas v. Boeing Company*, Appellate Court of Illinois, First District, First Division, 2009,

<https://caselaw.findlaw.com/il-court-of-appeals/1403649.html>, accessed on 19<sup>th</sup> of December 2019.

<sup>60</sup> Paul S. Dempsey, *Op. Cit.*, p. 21.

allowed by the 1929 Warsaw Convention and the 1999 Montreal Convention. However, this lawsuit was not automatically granted by the court judge because of the principle of forum non conveniens, which is used as the basis for the arguments for the defendant's objection to submitting the case to other forum. The assumptions regarding the plaintiffs doing forum shopping and the defendants who wanted to reduce their responsibilities also emerged. Various court decisions on these cases can be classified into two categories; forum non conveniens can be rejected or accepted. Although national law can fill the gap of international law regarding the responsibilities borne by aircraft manufacturers, these two possibilities create other gaps because the national laws used in each decision are different and it gives impacts on their compensation.

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