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## **The Missing Link in the Global Aviation Safety and Security Network: *the Case of Taiwan***

by

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# THE MISSING LINK IN THE GLOBAL AVIATION SAFETY AND SECURITY NETWORK: *THE CASE OF TAIWAN*

by

Ram S. Jakhu\* and Kuan-Wei Chen<sup>+</sup>

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## I. INTRODUCTION

Flying is safer than ever before in the history of civil aviation,<sup>1</sup> thanks in large part to the International Civil Aviation Organization (ICAO), which for the past seven decades has served as the *global* forum for international civil aviation.<sup>2</sup>

Recent terrorist attacks in Brussels and Istanbul,<sup>3</sup> coupled with a series of serious, and at times unexplained,<sup>4</sup> aviation accidents over the past few years, have underlined the importance of a global approach to guarantee a safe and secure global air transportation network. Without a doubt, issues of aviation security and safety<sup>5</sup> are matters that, due to the cross-boundary and integral nature of this industry to the world's connectivity and economy, concern all. The uniformity of standards and coordination of

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<sup>1</sup> The number of fatal accidents are at an all-time low. Since the late 1970s, when the peak was reached, the number of fatal accidents per year has steadily declined. See "Statistics", online: Planecrashinfo.com <[www.planecrashinfo.com/cause.htm](http://www.planecrashinfo.com/cause.htm)>; see also "Statistics", online: Aviation Safety Network <[aviation-safety.net/statistics/](http://aviation-safety.net/statistics/)>; and Nick Evershed, "Aircraft accident rates at a historic low despite high-profile plane crashes", *The Guardian* (24 March 2015), online: The Guardian <[www.theguardian.com/world/datablog/2014/dec/29/aircraft-accident-rates-at-historic-low-despite-high-profile-plane-crashes](http://www.theguardian.com/world/datablog/2014/dec/29/aircraft-accident-rates-at-historic-low-despite-high-profile-plane-crashes)>.

<sup>2</sup> ICAO, "Vision and Mission", online: ICAO <[www.icao.int/about-icao/Pages/vision-and-mission.aspx](http://www.icao.int/about-icao/Pages/vision-and-mission.aspx)>.

<sup>3</sup> See "Brussels: Islamic State launches attacks on airport and station – as it happened", *The Guardian* (23 March 2016), online: The Guardian <[www.theguardian.com/world/live/2016/mar/22/brussels-airport-explosions-live-updates](http://www.theguardian.com/world/live/2016/mar/22/brussels-airport-explosions-live-updates)>; and "Istanbul Ataturk airport attack: 41 dead and more than 230 hurt", *BBC News* (29 June 2016), online: BBC News <[www.bbc.com/news/world-europe-36658187](http://www.bbc.com/news/world-europe-36658187)>.

<sup>4</sup> Malaysia Airlines Flight 370 disappeared while *en route* from Kuala Lumpur, Malaysia, to Beijing, China, in March 2014. To date, it is still unclear what transpired onboard the fateful aircraft before its disappearance and where the plane is located.

<sup>5</sup> Safety denotes "technical and operational safety of flight" whereas aviation security relates to "safeguarding civil aviation against acts of unlawful interference". Ludwig Weber, "The Chicago Convention" in Paul S Dempsey & Ram Jakhu, eds, *Routledge Handbook of Public Aviation Law* (New York: Routledge, 2016), 9 at 16.

operational procedures and technical lingo are indispensable to ensure the safe, efficient and economic operation of millions of flights connecting hubs of population and production around the world. No part of this intricate network of airports, tightly woven web of passenger and cargo screening, and interconnected regions of airspace and air traffic control systems that the globe has been demarcated into, is dispensable. In the effort to safeguard the global governance of aviation, no part of this air transportation network can be isolated or excluded. Indeed, ICAO recently launched the “No Country Left Behind” (NCLB) campaign<sup>6</sup> with the laudable objective of ensuring that *all* States are able to achieve the minimum standards and practices safety and security of promulgated by the United Nations’ specialised agency dedicated to civil aviation.

However, despite having near-universal membership<sup>7</sup> and enjoying the participation of 191 Contracting States to the Chicago Convention,<sup>8</sup> there is one missing link to the otherwise truly global effort and involvement in addressing aviation matters that concern all. The continued exclusion of Taiwan is a constant reminder that in concerted efforts to address global challenges and achieve common objectives, some are unfortunately left behind.

## II. ICAO STANDARDS AND RECOMMENDED PRACTICES

In order to ensure every part of the world can enjoy the socio-economic benefits derived from “safer and more reliable commercial air transportation”,<sup>9</sup> a continuously developed and updated set of technical Standards and Recommended Practices (SARPs)<sup>10</sup> is in place to cover every conceivable aspect of civil aviation. From the licensing of aircraft personnel<sup>11</sup> to the fundamental rules of the air,<sup>12</sup> from the conditions of aircraft airworthiness<sup>13</sup> to how aircraft accidents and incidents are investigated<sup>14</sup> to global

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<sup>6</sup> See ICAO, “No Country Left Behind”, online: ICAO <[www.icao.int/about-icao/NCLB/Pages/default.aspx](http://www.icao.int/about-icao/NCLB/Pages/default.aspx)>.

<sup>7</sup> Paul S Dempsey, *Public International Air Law*, 1st ed (Montreal: Centre for Research in Air and Space Law, 2008) at 8.

<sup>8</sup> ICAO, “Member States”, online: ICAO <[www.icao.int/MemberStates/Member%20States.Multilingual.pdf](http://www.icao.int/MemberStates/Member%20States.Multilingual.pdf)>.

<sup>9</sup> See ICAO, “No Country Left Behind”, online: ICAO <[www.icao.int/about-icao/NCLB/Pages/default.aspx](http://www.icao.int/about-icao/NCLB/Pages/default.aspx)>.

<sup>10</sup> *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, ICAO Doc 7300/6 [*Chicago Convention*], art 37. See also Article 54(l). An “international standard” is any specification which States must conform to, while a “recommended practice” is any specification which States “will endeavor to conform” to: see ICAO, *Consolidated statement of continuing ICAO policies and associated practices related specifically to air navigation*, ICAO Doc A36-13, Appendix A.

<sup>11</sup> *Chicago Convention*, *supra* note 10, art 37(d); and ICAO, *Annex 1 to the Convention on International Civil Aviation: Personnel Licensing*, 11th ed (July 2011).

<sup>12</sup> *Chicago Convention*, *supra* note 10, art 37(c); and ICAO, *Annex 2 to the Convention on International Civil Aviation: Rules of the Air*, 10th ed (July 2005).

<sup>13</sup> *Chicago Convention*, *supra* note 10, art 37(e); and ICAO, *Annex 8 to the Convention on International Civil Aviation: Airworthiness of Aircraft*, 11th ed (July 2008).

<sup>14</sup> *Chicago Convention*, *supra* note 10, art 37(k); and ICAO, *Annex 13 to the Convention on International Civil Aviation: Aircraft Accident and Incident Investigation*, 10th ed (July 2010).

standards for noise and engine emissions,<sup>15</sup> ICAO truly is the *global* forum for international civil aviation.

The very safety and wellbeing of the international travelling public demands aviation standards and practices be uniform across international boundaries. ICAO is charged with the mandate to ensure that international civil aviation develops in “a safe and orderly manner”, and that international air transport services “be established on the basis of equality of opportunity and operated soundly and economically”.<sup>16</sup> The Chicago Convention, under Article 44, provides the aims and objectives of ICAO are to, among other things, “develop principles and techniques of international air navigation”.<sup>17</sup> In more recent years, and certainly a major issue at the upcoming session of the ICAO Assembly,<sup>18</sup> the matter of fostering the sustainable development of international aviation has been added to portfolio of aviation-related matters ICAO must oversee and regulate.<sup>19</sup>

### III. A VITAL MISSING LINK IN GLOBAL AVIATION

Located at the crossroads of North Asia and South-East Asia and adjacent to the eastern seaboard of the China, the island of Taiwan has a population of over 23 million. Though small in size, the country is the world’s 22<sup>nd</sup> largest economy and the 18<sup>th</sup> largest exporting nation.<sup>20</sup> Linked to 135 cities globally through 301 scheduled passenger and cargo routes,<sup>21</sup> in 2015, the 17 airports that dot the island processed over 58 million

<sup>15</sup> ICAO, *Annex 16 to the Convention on International Civil Aviation: Environmental Protection – Vol I: Aircraft Noise*, 7th ed (July 2014) and *Vol II: Aircraft Engine Emissions*, 3rd ed (July 2008).

<sup>16</sup> *Chicago Convention*, *supra* note 10, preambular text.

<sup>17</sup> According to Weber these objectives underline the “predominantly technical nature” of the organization. Ludwig Weber, *International Civil Aviation Organization: ICAO* (Alphen aan den Rijn: Kluwer Law International, 2012) at 9.

<sup>18</sup> See ICAO, *Consolidated statement of continuing ICAO policies and practices related to environmental protection – Climate change*, ICAO Res A38-18. The 39th Assembly is long anticipated to adopt a global measure to arrest gaseous emissions from international civil aviation. Further, the upcoming Assembly session is slated to discuss and adopt the Global Aviation Safety Plan and Global Air Navigation Plan: respectively ICAO, *2017-2019 Global Aviation Safety Plan*, 2nd ed (2016), ICAO Doc 10004, online: ICAO <[www.icao.int/Meetings/a39/Documents/GASP.pdf](http://www.icao.int/Meetings/a39/Documents/GASP.pdf)>; and *Draft 2016-2030 Global Air Navigation Plan* (2016), ICAO Doc 9750-AN/963, online: ICAO <[www.icao.int/Meetings/a39/Documents/GANP\\_en.pdf](http://www.icao.int/Meetings/a39/Documents/GANP_en.pdf)>.

<sup>19</sup> The Kyoto Protocol gave ICAO the clear mandate to deal with issues of emissions arising from aviation: *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005), art 2(2).

The McGill Centre for Research in Air and Space Law and the Centre for International Sustainable Development Law have together published a series on the very topic of sustainable international civil aviation. These papers, written by scholars and practitioners from around the world, explore the issue of how to mitigate the environmental impact of aviation without constraining aviation growth and development. See *Occasional Paper Series: Sustainable International Civil Aviation*, online: McGill University <[www.mcgill.ca/iasl/publications/occasional/sustainable-aviation](http://www.mcgill.ca/iasl/publications/occasional/sustainable-aviation)>.

<sup>20</sup> Central Intelligence Agency, “Taiwan” in *World Factbook 2016*, online: CIA <[www.cia.gov/library/publications/the-world-factbook/geos/tw.html](http://www.cia.gov/library/publications/the-world-factbook/geos/tw.html)>. See also Shelley Rigger, *Why Taiwan Matters: Small Island, Global Powerhouse* (Lanham, MD: Rowman & Littlefield Publishers, 2011).

<sup>21</sup> See Taiwan Civil Aeronautics Administration (CAA), *Annual Report 2015* at 12-13, online: CAA <[www.caa.gov.tw/APfile/en/download/pliad/1371635616050.pdf](http://www.caa.gov.tw/APfile/en/download/pliad/1371635616050.pdf)>.

THE MISSING LINK IN THE GLOBAL AVIATION SAFETY AND SECURITY NETWORK:  
THE CASE OF TAIWAN

passengers, of which a staggering 80% were international, cross-Straits or transit passengers.<sup>22</sup> The country's main international portal, Taoyuan International Airport, was the 11th busiest airport by international passenger traffic in 2015<sup>23</sup> and the 15th busiest air freight hub in the world in 2013.<sup>24</sup>

Taiwan's aviation authorities exclusively controls and provides air navigation and air traffic control services in the Taipei Flight Information Region (FIR),<sup>25</sup> which spans an airspace of some 180,000 square nautical miles<sup>26</sup> and overlaps with one of the densest and fastest-growing air traffic corridors in the world. In 2015 alone, the Taipei FIR provided air traffic control, aircraft communications, and meteorology services for over 1.5 million flights traversing the airspace.<sup>27</sup> Some 14 international airways and 4 domestic airways crisscross the Taipei FIR, and over seventy airlines must traverse the airspace over and around Taiwan in order to access some of the busiest flight routes in the world bridging North and South-East Asia with destinations in North America and Europe.<sup>28</sup> Further, the traffic between China and Taiwan numbering up to 890 flights a week, there is undeniable potential for economic ties and transportation links across the Taiwan Straits.<sup>29</sup> These facts and figures clearly underline how Taiwan's engagement and participation in international air transport can neither be ignored nor sidelined.

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<sup>22</sup> See Taiwan, Ministry of Transportation and Communications, "Air Transport", online: MOTC <[www.motc.gov.tw/en/home.jsp?id=258&parentpath=0,150,250](http://www.motc.gov.tw/en/home.jsp?id=258&parentpath=0,150,250)>.

<sup>23</sup> Airports Council International, "International Passenger Traffic for past 12 months", online: ACI <[www.aci.aero/Data-Centre/Monthly-Traffic-Data/International-Passenger-Rankings/12-months](http://www.aci.aero/Data-Centre/Monthly-Traffic-Data/International-Passenger-Rankings/12-months)>.

<sup>24</sup> Airports Council International, "Cargo Traffic 2013 FINAL (Annual)", online: ACI <[www.aci.aero/Data-Centre/Annual-Traffic-Data/Cargo/2013-final](http://www.aci.aero/Data-Centre/Annual-Traffic-Data/Cargo/2013-final)>.

<sup>25</sup> This FIR was already demarcated by ICAO back in 1953. See Ruwantissa Abeyratne, "ICAO admits Taiwan to its premises at its 38th Assembly" (2014) Ann Air & Sp L 647 at 657.

<sup>26</sup> The Taipei FIR borders the FIRs of Fukuoka, Japan; Shanghai and Guangzhou in China; Hong Kong; and Manila in the Philippines: online: Shelley Shan, "Unidentified flights aviation risk", *Taipei Times* (1 August 2015), online: Taipei Times <[www.taipeitimes.com/News/taiwan/archives/2015/08/01/2003624398](http://www.taipeitimes.com/News/taiwan/archives/2015/08/01/2003624398)>.

<sup>27</sup> See Air Navigation and Weather Services, Civil Aeronautics Administration, Ministry of Transportation and Communications, "Operational Performance – Air Traffic Control", online: ANWS <[www.anws.gov.tw/eng/index.php?act=service\\_report&code=engchart1](http://www.anws.gov.tw/eng/index.php?act=service_report&code=engchart1)>. See also *Air Navigation and Weather Services 2015 Annual Report*, online: ANWS <[www.anws.gov.tw/upload/eng/attachment/3aad810f8162d7a67b355559706795b7.pdf](http://www.anws.gov.tw/upload/eng/attachment/3aad810f8162d7a67b355559706795b7.pdf)>.

<sup>28</sup> Air Navigation and Weather Services, "About Us", online: ANWS <[www.anws.gov.tw/cht/index.php?code=list&ids=17](http://www.anws.gov.tw/cht/index.php?code=list&ids=17)> (in Chinese). For a visualisation of the complex international airways that crisscross the Taipei FIR, see "Asia Upper ATS Route Chart", online: Worldairrops.com <[www.worldairrops.com/ASI/docs/ASI\\_MAP\\_ATSRoutesUpper\\_atWorldAirOps.com.pdf](http://www.worldairrops.com/ASI/docs/ASI_MAP_ATSRoutesUpper_atWorldAirOps.com.pdf)>; and ANWS, "Taipei FIR en route Chart", online: ANWS <[eaip.caa.gov.tw/eaip/history/2015-10-29/graphics/135435.pdf](http://eaip.caa.gov.tw/eaip/history/2015-10-29/graphics/135435.pdf)>.

<sup>29</sup> "Fact Sheet 2015" (29 June 2016). On file with authors.



## IV. EXCLUSION TO THE DETRIMENT OF GLOBAL AVIATION SAFETY AND SECURITY

Due to several legal reasons precluding Taiwan from becoming a Contracting State of the Chicago Convention and Member State of ICAO,<sup>30</sup> for more than four decades<sup>31</sup> Taiwan has not been able to participate in ICAO international and regional meetings and conferences. In the words of the country's Civil Aeronautics Administration, Taiwan

faces an inherent difficulty that is associated with being neither a member state of, nor an observer at, ICAO activities. Most ICAO documents can be obtained, although not directly, in a fairly timely manner but there is no opportunity to take part in the deliberations that result in new standards and recommended practices. Being excluded from ICAO, there is not the good notice of developing standards that permits the planning for their implementation and there is no forum for [Taiwan] to bring its unique requirements to the international civil aviation community.<sup>32</sup>

Due to arcane motivations that simply pale in light of securing global safety and security, there is radio silence between ICAO and Taiwan. As a result, vital international technical and operational standards and information related to air navigation are unavailable to Taiwan and must be obtained or purchased through unofficial channels—often with significant delay and lacking in the necessary technical details and knowhow to ensure their effective implementation.<sup>33</sup> Thus, aircraft flying through Taiwan-controlled

<sup>30</sup> Article 92 of the Chicago Convention provides the Convention is open for adherence by members of the United Nations, which Taiwan is not. Article 93 of the Convention provides States be admitted to ICAO with the approval of four-fifths vote of the Assembly. See also Weber, *supra* note 5 at 29.

<sup>31</sup> The Republic of China (ROC), Taiwan's official name, was one of the first signatories of the Chicago Convention: see United Nations Treaty Collection, online: UN < treaties.un.org />. See also Stefan Talmon, "The Recognition of the Chinese Government and the Convention on International Civil Aviation" (2009) 8 Chinese J Int'l L 135 at 137. The ROC was a member of ICAO until 1971, when the People's Republic of China was recognised and admitted into the United Nations (UN) simultaneously with the expulsion of the representatives the ROC "from the place which they unlawfully occupy at the United Nations and in all the organizations related to it": See *Restoration of the lawful rights of the People's Republic of China in the United Nations*, UN Doc A/RES/2758 (XXVI) (1971).

According to Article 93bis (a)(2) of the Chicago Convention:

A State which has been expelled from membership in the United Nations shall automatically cease to be a member of the International Civil Aviation Organization unless the General Assembly of the United Nations attaches to its act of expulsion a recommendation to the contrary.

See also ICAO, *Representation of China in ICAO*, ICAO Doc 8987-C/1004, 47-49 (8 July 1971); and David MacKenzie, *ICAO: A History of the International Civil Aviation Organization* (Toronto: University of Toronto Press, 2010) at 278.

<sup>32</sup> Aviation Safety Council, *Crashed on a Partially Closed Runway during Takeoff, Singapore Airlines Flight 006, Boeing 747-400, 9V-SPK, CKS Airport, Taoyuan, Taiwan, October 31, 2000* [Aviation Safety Council Report], Appendix 7.5, "Representations on the draft final report by the Civil Aeronautics Administration, Republic of China" at 7-144 [emphasis added]. Similarly, see Bonnie S Glaser, *Taiwan's Quest for Greater Participation in the International Community*, (Washington DC: Centre for Strategic & International Studies, 2013) at 19.

<sup>33</sup> See remarks of Taiwan CAA Director-General Jean Shen: Jim Hwang, "Towards a Seamless Sky", *Taiwan Review* (1 September 2013), online: Taiwan Review < taiwanreview.nat.gov.tw / ct.asp? xItem=208453 & ctNode=1446 >. The fact that Taiwan is not part of the "information loop" and must wait for ICAO to publicly disseminate information vital to

THE MISSING LINK IN THE GLOBAL AVIATION SAFETY AND SECURITY NETWORK:  
*THE CASE OF TAIWAN*

airspace may be subject to differing degrees standards and practices as neighbouring flight information regions—the notice of differences of which cannot be officially furnished to ICAO for all States to heed. There simply is no official channel for the Taiwanese aviation authorities to provide ICAO with information and data about the intricacies and practicalities of navigation through the airspace under its exclusive control.

Exclusion from ICAO, in effect, “has created a gap in the global aviation network, adversely affecting the aviation safety and convenience of all passengers”.<sup>34</sup> “Remaining in the dark” with regard to the rationale and detailed method of implementation has conceivably adverse impact on the “efficacy and competitiveness of Taiwan's civil aviation industry” and results in “potentially dangerous consequences”<sup>35</sup> for the security and safety of international aviation and the travelling public—the very matters ICAO was established to ensure uniformity of global aviation governance.

Following the September 11 attacks, ICAO declared that:

a uniform approach in a *global* system is essential to ensure aviation security throughout the world and *that deficiencies in any part of the system constitute a threat to the entire global system*.<sup>36</sup>

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air navigation and safety means that “Taiwan’s operations are between six months to a year behind the international norm, which hinders its ability to provide safe and efficient air transport services”: see Taiwan, Ministry of Foreign Affairs, “Taiwan’s quest for meaningful participation in the International Civil Aviation Organization (ICAO)” (April 2011) [“Taiwan’s quest for meaningful participation” (2011)], online: MOFA <[www.mofa.gov.tw/Upload/RelFile/1061/1940/8d6243ff-e966-4d1a-ba01-8afcc115f7d2.pdf](http://www.mofa.gov.tw/Upload/RelFile/1061/1940/8d6243ff-e966-4d1a-ba01-8afcc115f7d2.pdf)>.

A saving grace, and a means by which Taiwan’s provision of air navigation services can be more uniform with international norms and practices, is the fact that Taiwan is a member of Civil Air Navigation Services Organisation (CANSO), the air navigation service providers organization which represent over 85% of the world's air traffic: see Shelley Shan, “Taiwan joins CANSO aviation organization”, *Taipei Times* (15 January 2011), online: Taipei Times <[www.taipetitimes.com/News/taiwan/archives/2011/01/15/2003493568](http://www.taipetitimes.com/News/taiwan/archives/2011/01/15/2003493568)>.

<sup>34</sup> “Taiwan's Quest for Meaningful Participation in the International Civil Aviation Organization (ICAO)” (2010) 28 Chinese (Taiwan) Y B Int'l L & Aff 281 at 284 [“Taiwan's Quest for Meaningful Participation” (2010)]. Glaser writes:

As a member of the international community in an increasingly interconnected world, Taiwan faces numerous challenges that cannot be addressed unilaterally. [...] The exclusion of Taiwan from global networks also carries a cost for international society. Taiwan is a significant provider of official development assistance (ODA), but because it is not a member of the major international donor organizations it has to employ innovative ways of delivering aid through or with nongovernmental organizations (NGOs) and multilateral institutions.

Glaser, *supra* note 32 at 2.

<sup>35</sup> “Taiwan's Quest for Meaningful Participation” (2010), *supra* 34, at 284-285.

<sup>36</sup> See High-Level Conference on Aviation Security (HLCAS), Montreal, 12-14 September 2012, “Principles governing International Aviation Security Cooperation”, ICAO Doc HLCAS-WP/31 (20 July 2012), Appe B, “Declaration of the High-Level, Ministerial Conference on Aviation Security (19-20 February 2002, Montreal)”, Preamble [emphasis added], online: ICAO

<[www.icao.int/Meetings/avseconf/Documents/WP%2031/PRINCIPLES%20GOVERNING%20INTERNATIONAL%20AVIATION%20SECURITY%20CO-OPERATION.en.pdf](http://www.icao.int/Meetings/avseconf/Documents/WP%2031/PRINCIPLES%20GOVERNING%20INTERNATIONAL%20AVIATION%20SECURITY%20CO-OPERATION.en.pdf)>. See also ICAO, “Address by the Director of the Air Transport Bureau of the International Civil Aviation Organization (ICAO) Mr. Mohamed Elamiri to the International Conference on Arab Aviation Security”, Abu Dhabi, UAE, 7 February 2006, online: ICAO <[www.icao.int/secretariat/air-transport/Documents/ACAC-SecConf-2006/IcaoElamiriAddress\\_En.pdf](http://www.icao.int/secretariat/air-transport/Documents/ACAC-SecConf-2006/IcaoElamiriAddress_En.pdf)>.

The Universal Security Audit Programme (USAP)<sup>37</sup> was set up with the noble aim of reducing unlawful interference with aircraft and restoring public confidence in civil air transport by auditing the security oversight systems of States around the world.<sup>38</sup> Despite the programme's recognition of the importance of the universality and standardisation of security audits across the world, Taiwan's exclusion from the audit system means that aviation security on the whole will never be entirely airtight. No doubt, identifying and targeting a location where security and screening efforts differ from the global norm can be an easy ploy for potential terrorists to wreak havoc on the global aviation system.<sup>39</sup> In a similar vein, the exclusion of Taiwan from ICAO's Universal Safety Oversight Audit Programme (USOAP), which has as its objective the promotion of aviation safety through the identification of shortcomings and inconsistencies with international SARPs and procedures,<sup>40</sup> simply cannot be justified if truly global safety practices are to be realised.<sup>41</sup>

Another example of the potentially dangerous consequences of Taiwan's exclusion relates to the renaming and reclassification of air routes that traverse or affect the Taipei FIR. Thus, in 2011 ICAO's Southeast Asia Route Review Task Force decided to rename and reclassify an air route going to Taipei without even consulting or informing the proper authorities that are exclusively in charge of the Taipei FIR. As a result, the automated air control system could not accept aircraft travelling on the route with the new international designation, meaning Taiwanese air traffic controllers needed to manually handle each flight, which resulted "a lot of extra work and some safety concerns".<sup>42</sup> Similarly, 2015 saw a situation involving the unilateral adjustment of an air route which would have greatly impacted on the safety of navigation in the Taiwan-controlled airspace. Though adjustments of routes must be notified at the international

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<sup>37</sup> USAP's scope covers the standards contained in Annex 17, as well as other security-related provisions in Annex 9: respectively, ICAO, *Annex 17 to the Convention on International Civil Aviation: Security*, 9th ed (March 2011) [Annex 17] and ICAO, *Annex 9 to the Convention on International Civil Aviation: Facilitation*, 13th ed (July 2011).

<sup>38</sup> ICAO, "Background and Evolution", online: ICAO <[www.icao.int/Security/USAP/Pages/Background-and-Evolution.aspx](http://www.icao.int/Security/USAP/Pages/Background-and-Evolution.aspx)>.

<sup>39</sup> "Taiwan's Quest for Meaningful Participation" (2010), *supra* note 34 at 286. As a member of the US House of Representatives Committee on Foreign Affairs notes, the exclusion of Taiwan not only "hurts Taiwan" but also puts "the entire international aviation system at risk" and prevents ICAO "from developing a truly global strategy to address security threats": "Concerning the Participation of Taiwan in the International Civil Aviation Organization", 113th Congress, 1st Session, 159 Congressional Record H3705, at H3707, online: US Congress <[beta.congress.gov/congressional-record/2013/06/18/house-section/article/H3705-1](http://beta.congress.gov/congressional-record/2013/06/18/house-section/article/H3705-1)>. See also "Al Qaeda had its sights on Taiwan", *Taipei Times* (6 January 2004), online: Taipei Times <[www.taipetimes.com/News/taiwan/archives/2004/01/06/2003086534](http://www.taipetimes.com/News/taiwan/archives/2004/01/06/2003086534)>.

<sup>40</sup> ICAO, "USAOP Continuous Monitoring Approach", online: ICAO <[www.icao.int/safety/CMAForum/Pages/default.aspx](http://www.icao.int/safety/CMAForum/Pages/default.aspx)>.

<sup>41</sup> For more on ICAO's USAP and USOAP, see Weber, *supra* note 17 at 101-104.

<sup>42</sup> See Steven D Jaffe, *Airspace Closure and Civil Aviation: A Strategic Resource for Airline Managers* (New York: Ashgate Publishing, 2015) at 164. See also Jim Hwang, "Towards a Seamless Sky", *Taiwan Review* (1 September 2013), online: Taiwan Review <[taiwanreview.nat.gov.tw/ct.asp?xItem=208453&ctNode=1446](http://taiwanreview.nat.gov.tw/ct.asp?xItem=208453&ctNode=1446)>. In 2000, as yet another example of ICAO drew a flight route from Manila to Shanghai which passed through Taiwan, via airspace designated by the government of Taiwan for military exercises: see "Taiwan finally wins 'guest' status at ICAO Assembly", *Taiwan Insights* (16 September 2013), online: Taiwan Insights <[www.taiwaninsights.com/2013/09/16/taiwan-finally-wins-guest-status-at-icao-assembly](http://www.taiwaninsights.com/2013/09/16/taiwan-finally-wins-guest-status-at-icao-assembly)>.



level and all stakeholders and States should have the right to be consulted, exclusion from ICAO naturally excluded the country's ability to provide its input and or have its views solicited. Fortunately, this instance was resolved as a result of extensive exchanges and discussions between the relevant authorities in China and Taiwan.<sup>43</sup> The above examples highlight valid concerns – not only for safety and wellbeing of millions of passengers and even populations on the ground, but particularly for aircrew and air carriers, for which uniform and standardised air navigation information is much desired as a matter of route efficiency but also as being “essential to maintain a high level of safety”.<sup>44</sup>

## V. TAIWAN'S EFFORTS AT VOLUNTARY COMPLIANCE AND OVERCOMING EXCLUSION

Despite being excluded from the forum for engaging in and contributing to global aviation governance, Taiwan appears to subscribe to international standards and to comply with international norms.

Long-term exclusion from direct access to ICAO debates and documents, and the global auditing process has not impeded the achievement of a certifiably good aviation safety record.<sup>45</sup> Indeed, Taiwan's award-winning airline EVA Air has consistently been

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<sup>43</sup> See *Preliminary conclusion reached between Taiwan and mainland China on the latter's establishment of new flight routes in the Shanghai FIR, including M503*, Press Release, Civil Aeronautics Administration, Ministry of Transportation and Communications (2 March 2015) (English translation). On file with authors.

<sup>44</sup> A pilot voiced concerns that when flying into an airport, pilots should not have to worry about safety risks. As the pilot vividly describes, Taiwan's exclusion from ICAO is a major concern:

Imagine there is a huge highway that crosses different countries. When you enter Taiwan, the name of this highway is, let's say, Highway 41. But if someone suddenly changes the name of Highway 41 to Highway 52, then there is a huge problem because the flight plan may be rejected and the aircraft barred from entering the Taipei FIR. The pilot may have to take a detour, not having enough fuel for the detour or to declare an emergency. If the delays were to affect the safety and efficiency of Taiwan's airports and the Taipei FIR, we will regret not having Taiwan as a member of ICAO. From a pilot's point of view, information is essential to maintain a high level of safety.

Fred Tan, “Taiwan seeks observer status in aviation body”, *New Straits Times* (22 September 2013), online: New Straits Times

<[www.nst.com.my/mobile/nation/general/taiwan-seeks-observer-status-in-aviation-body-1.360795](http://www.nst.com.my/mobile/nation/general/taiwan-seeks-observer-status-in-aviation-body-1.360795)>. See also Yeh-Chung Lu, “Safer Skies, Better Global Cooperation: Why Taiwan's Inclusion in ICAO is Necessary” *Georgetown Journal of International Affairs* (4 September 2013), online: Georgetown University <[journal.georgetown.edu/safer-skies-better-global-cooperation-why-taiwans-inclusion-in-icao-is-necessary-by-yeh-chung-lu](http://journal.georgetown.edu/safer-skies-better-global-cooperation-why-taiwans-inclusion-in-icao-is-necessary-by-yeh-chung-lu)>.

<sup>45</sup> The US Federal Aviation Administration's International Aviation Safety Assessments (IASA) was established to assess a country's ability to adhere to ICAO's international standards and recommended practices for aircraft operations and maintenance. Taiwan falls under Category 1, a country which is compliant with ICAO standards of safety, see FAA, “FAA Flight Standards Service”, online: FAA <[www.faa.gov/about/initiatives/iasa/media/IASAWS.xlsx](http://www.faa.gov/about/initiatives/iasa/media/IASAWS.xlsx)>. According to the US State Department:

The US Federal Aviation Administration (FAA) has assessed Taiwan's Civil Aeronautics Administration (CAA) as being in compliance with International Civil Aviation Organization (ICAO) aviation safety standards for oversight of Taiwan's air carrier operations.

See US State Department, “International Travel Information: Taiwan”, online: State Department <[travel.state.gov/content/passports/en/country/taiwan.html](http://travel.state.gov/content/passports/en/country/taiwan.html)>.

ranked one of the safest air carriers in the world.<sup>46</sup> The Taiwan's own national air laws are geared to establishing and maintaining a safe and sound civil aviation system which is compliant with "international civil aviation standards".<sup>47</sup> Much of Taiwan's body of aviation-related regulations and rules are in fact based on regulations and standards promulgated by aviation authorities in the US and the European Union.<sup>48</sup> **Indeed, it is largely due to the unofficial technical assistance and auditing initiatives from foreign aviation authorities that permits Taiwan to keep up with international aviation standards.**<sup>49</sup> However, being denied direct access to ICAO documents and from partaking directly in the discussion and implementation of ICAO standards and practices, Taiwan's aviation regulations are consequently piecemeal, and at times outdated<sup>50</sup> and conflicting in nature.<sup>51</sup>

<sup>46</sup> See Jet Airliner Crash Data Evaluation Centre, "JACDEC Airline Safety Ranking 2016", online: JACDEC <[www.jacdec.de/airline-safety-ranking-2016/](http://www.jacdec.de/airline-safety-ranking-2016/)>. According to Skytrax, a global survey of air passenger reviews, EVA Air is one of the "World's Top-10 Best Airlines", the "Best Trans-Pacific Airline", and one of only eight air carriers worldwide to earn the prestige of being a "5-Star Airline": see "EVA Revealed to Be World's 3rd Most Loved Airline SKYTRAX scored carriers on total of global traveler ratings", online: EVA Air <[www.evaair.com/en-global/news-releases/2016/2016-08-29-the-most-loved-airlines-on-skytrax.html?filter=>](http://www.evaair.com/en-global/news-releases/2016/2016-08-29-the-most-loved-airlines-on-skytrax.html?filter=>)>.

<sup>47</sup> Taiwan, *Civil Aviation Act*, art 1, online: CAA <[www.caa.gov.tw/APfile/en/download/pliad/1355122508112.pdf](http://www.caa.gov.tw/APfile/en/download/pliad/1355122508112.pdf)>. Several provisions of the Civil Aviation Act reflect international practices and/or are reflections of provisions of the Chicago Convention. For example, on the issue of airworthiness standards, Article 23 of the Act provides "the airworthiness standards, which are generally used in international aviation practices" can be adopted. Article 121 of the Civil Aviation Act provides Taiwan's Civil Aeronautics Administration:

may, making reference to the *standards, recommendations, measures or procedures outlined in relevant international conventions and annexes thereto*, propose [the] adoption of provisions involving international affairs not covered in this Act, for their promulgation and implementation [emphasis added].

On the issue of compensation for damage caused to passengers onboard an aircraft, despite the fact Taiwan is not (able to be) a party to the private international air law conventions governing air carrier liability, Article 93 of the Civil Aviation Act provides the compensation rules will be adopted "reference to international standards for liability". Taiwanese air carriers voluntarily accept the liability rules of any convention and amendment "from the 1929 Warsaw Convention to the 1999 Montreal Convention" that may be applicable. See EVA Air, "Conditions of Carriage", art 15.1.1, online: Eva Air <[www.evaair.com/en-us/conditions-of-carriage/](http://www.evaair.com/en-us/conditions-of-carriage/)>.

Even so, Taiwan's Aviation Safety Council recognised, in light of an air crash at the nation's main international airport, there is a lack of qualified legal personnel in Taiwan's CAA to draft and update regulations relating to aviation in accordance with international norms, as a result of which rules and regulations are "inadequately written": see *Aviation Safety Council Report*, *supra* note 32 at 182.

<sup>48</sup> *Ibid* at 128-129. See also François Shalom, "Taiwan pushes for place at ICAO table", *Montreal Gazette* (25 September 2013); and Glaser, *supra* note 32 at 19.

<sup>49</sup> Abeyratne, *supra* note 25 at 661-662. As Glaser writes:

Taiwan's exclusion from ICAO has prevented its civil aviation authorities from obtaining timely information regarding ICAO standards and recommended practices (SARPs), which has impeded Taiwan's efforts to maintain civil aviation practices that comport with evolving international standards.

Glaser, *supra* note 32 at 19. See also François Shalom, "Taiwan pushes for place at ICAO table", *Montreal Gazette* (25 September 2013).

<sup>50</sup> See Glaser, *supra* note 32 at 19. By way of example of how Taiwan lags behind in adopting standards that are in line with international standards, in October 2006, ICAO and Member States formulated a policy prohibiting liquids, aerosols and gels over 100ml in carry-on luggage. The policy, deliberated and formulated behind closed doors, was set to be implemented from March 2007. Only in December 2006 did aviation authorities in Taiwan receive information relating to the latest security measures through third party sources, prompting the country's CAA to quickly adopt measures that conform to the international standard. See Jim Hwang, "Toward a Seamless Sky", *Taiwan Review* (1 September 2013), online: Taiwan Review <[www.taiwantoday.tw/ct.asp?xItem=208453&ctNode=2190](http://www.taiwantoday.tw/ct.asp?xItem=208453&ctNode=2190)>.

<sup>51</sup> In an accident report following the crash of an airliner at the (then) Chiang-Kai Shek International Airport in 2000,

THE MISSING LINK IN THE GLOBAL AVIATION SAFETY AND SECURITY NETWORK:  
THE CASE OF TAIWAN

The Chicago Convention obliges States to facilitate international air navigation by providing “airports, radio services, meteorological services and other air navigation facilities” in its territory.<sup>52</sup> Annex 15 to the Chicago Convention elaborates how States must gather, manage and communicate vital aeronautical information to ensure “uniformity and consistency” in the information that pilots and air traffic controllers all over the world receive and send.<sup>53</sup> Despite not being a Contracting State of the Chicago Convention, and therefore not bound by obligations flowing from the Convention,<sup>54</sup> Taiwan's CAA maintains a comprehensive electronic Aeronautical Information Publication (eAIP) system that is publicly available and accessible.<sup>55</sup> Though not a Contracting Member, and lacking direct access to the latest ICAO with standards and procedures established for international use, Taiwan regularly publishes and disseminates documents which list the ways that rules and regulations in the Taipei FIR differ from ICAO SARPs and procedures.<sup>56</sup> As Taiwan is practically unable to furnish ICAO with vital data that have major implications for the safe navigation and operation of the thousands of flights traversing the Taipei FIR, much data and information is made publicly available online.<sup>57</sup>

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Taiwan's Aviation Safety Council, the body responsible for investigating air accidents noted:

CAA's knowledge of most updated civil aviation related laws and regulations were impaired by its absence from participation in major international organizations, including ICAO. Limited access to certain civil aviation resources also causes some problems. Regulations originating from the USA's FAA, enacted by one division, may conflict with regulations derives from the JAA of EU, enacted by the other division. In some cases, the shortage of resources leads to difficulty in implementation of some rules and regulations in a timely fashion.

*Aviation Safety Council Report*, *supra* note 32 at 128-129, online: Aviation Safety Council <[www.asc.gov.tw/upload/acd\\_att/e2e5348e-a4b8-4705-8495--4ffd35e99483.pdf](http://www.asc.gov.tw/upload/acd_att/e2e5348e-a4b8-4705-8495--4ffd35e99483.pdf)>.

<sup>52</sup> *Chicago Convention*, *supra* note 10, art 28(a).

<sup>53</sup> As the Annex notes “[c]orrupt or erroneous aeronautical information/data can potentially affect the safety of air navigation”, and States must “as far as practicable, avoid standards and procedures other than those established for international use”: ICAO, *Annex 15 to the Convention on International Civil Aviation: Aeronautical Information Services*, 12th ed (2004) at 1-1. See also ICAO has also called upon States to establish Performance Based Navigation (PBN) implementation plans to improve the performance, safety and efficiency of global air navigation system: ICAO, *Performance-based navigation global goals*, ICAO Res A36-23. Taiwan has done so largely through the implementation of satellite-based navigation systems.

<sup>54</sup> Article 38 of the Chicago Convention obliges all Contracting States that finds it “impracticable to comply in all respects with any such international standard or procedure” to give “immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard”. It is practically impossible for Taiwan to do so as the country is not a Contracting State.

<sup>55</sup> See Taiwan CAA, “eAIP”, online, CAA <[eaip.caa.gov.tw/eaip](http://eaip.caa.gov.tw/eaip)>. Even in the air transport agreement between Taiwan and Mainland China, both sides agreed to maintain procedures on air traffic control registered in “flight path rules manuals (AIP, Aeronautical Information Publication) that are in common use internationally”. See Mainland Affairs Council, *Cross-Strait Air Transport Agreement*, 4 November 2008, online: MAC <[www.mac.gov.tw/public/Data/96301072771.pdf](http://www.mac.gov.tw/public/Data/96301072771.pdf)>; and Mainland Affairs Council, *Explanation concerning the Cross-Strait Air Transport Agreement*, 4 November 2008, s IV, para 3, online: MAC <[www.mac.gov.tw/public/Data/962917501071.pdf](http://www.mac.gov.tw/public/Data/962917501071.pdf)>.

<sup>56</sup> See e.g. *Gen 1.7 Differences from ICAO Standards, Recommended Practices and Procedures of Annex 3 Meteorological Service for International Air Navigation*, online: CAA <[eaip.caa.gov.tw/eaip/history/2015-03-19/pdf/RC-amdt-en-TW.pdf](http://eaip.caa.gov.tw/eaip/history/2015-03-19/pdf/RC-amdt-en-TW.pdf)>.

<sup>57</sup> Hsiu-chuan Shih, “Taiwan only ‘guest’ due to China: ICAO”, *Taipei Times* (26 September 2013), online: *Taipei Times* <<http://www.taipeitimes.com/News/front/archives/2013/09/26/2003573020/2>>. The article refutes the suggestions that Taiwan's aviation data be sent to ICAO via China or that China does receive any information from Taiwan.

Though not permitted to formally ratify the Chicago Convention, the desire to “ensure the highest degree of safety and security in international air transport”<sup>58</sup> is reflected in air transport agreements Taiwan concludes with other States. The Open Skies agreement between Taiwan and the US, for instance, commit both parties to adhere to the minimum safety standards required by the Chicago Convention and its Annexes.<sup>59</sup> In terms of security, though Taiwan as a non-member is unable to ratify ICAO-promulgated conventions related to aviation security, both sides committed themselves to adhere to ICAO standards and norms.<sup>60</sup>

In terms of airport safety management, the compliance of the largest international aviation gateway, Taiwan Taoyuan International Airport, with ICAO’s standards has been hailed as “impressive”, particularly considering Taiwan’s aviation authorities have been unable to partake in committees and technical sessions formulating the security and safety considerations in the design and operation of airports.<sup>61</sup> When ICAO called for the implementation of a global and seamless system of air navigation services with the aid of satellite applications,<sup>62</sup> Taiwan became the first country in Asia to introduce and

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<sup>58</sup> *Air Transport Agreement between Taipei Economic and Cultural Representative Office and the American Institute in Taiwan*, 18 March 1998, Preamble, online: [Airlineinfo.com <airlineinfo.com/openskies/taiwan.pdf>](http://airlineinfo.com/openskies/taiwan.pdf). The Taipei Economic and Cultural Representative Office and the American Institute in Taiwan are the *de facto* embassies in each respective countries which, due to the lack of official diplomatic relations, are responsible for signing bilateral agreements on behalf Taiwan and the US.

<sup>59</sup> *Ibid*, art 6.

<sup>60</sup> *Ibid*, art 7. These conventions include: the *Convention on Offenses and Certain Other Acts Committed On Board Aircraft*, 14 September 1963, 20 UST 2941, TIAS No 6768, 704 UNTS 219, 58 Am J Int’l L 566 (1959) (entered into force 4 December 1969) [Tokyo Convention]; the *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 860 UNTS 105, [1972] ATS 16, 10 ILM 133 (1971) (entered into force 14 October 1971) [Hague Convention]; the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, 974 UNTS 177, [1973] ATS 24, 10 ILM 1151 (1971) (entered into force on 26 January 1973) [Montreal Convention 1971]; and the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 24 February 1988, ICAO Doc 951, 1589 UNTS 474, [1990] ATS 37, 27 ILM 628 (1988) (entered into force 6 August 1989) [Montreal Protocol 1988].

<sup>61</sup> See Steven Leib & Chien-tsung Lu, “A Gap Analysis of Airport Safety Using ICAO SMS Perspectives: A Field Study of Taiwan” (2013) 2 *Journal of Aviation Technology and Engineering* 63. As the authors note, at 70:

As Taiwan is not a member of ICAO, its largest airport’s level of compliance with the SMM is impressive. Overall, the airport addresses key components of safety hazard reporting, safety risk management, safety assurance, and safety promotion in ways that are consistent with the ICAO SMM.

See also Chien-tsung Lu, John Young & Stewart Schreckengast “Safety Culture: the Perception of Taiwan’s Aviation Leaders” (2011) 11 *International Journal of Applied Aviation Studies* 27. This should be contrasted with the conclusions of a report in the aftermath of a crash at TPE in 2000: see “Accident Report Provides Lessons Learned about Preventing Takeoff on a Closed Runway” (July 2002) 59(7) *Accident Prevention* 1 at 7, online: [Flight Safety Foundation <flightsafety.org/ap/ap\\_jul02.pdf>](http://flightsafety.org/ap/ap_jul02.pdf). There were even concerns Taiwan’s own safety records were glossed over and that the deficiencies of the airport were “downgraded” in the crash investigation: see Tom Ballantyne, “Peers Support sieged pilots”, *Orient Aviation* (1 May 2002), online: [Orient Aviation <www.lite.orientaviation.com/orient-aviation-magazine/airlines/peers-support-sieged-pilots>](http://www.lite.orientaviation.com/orient-aviation-magazine/airlines/peers-support-sieged-pilots). There are also claims that Taiwan’s conduct of aircraft accident investigation is at odds with ICAO standards, the sole objective of which is “the prevention of accidents and incidents” and not “to apportion blame or liability”: ICAO, *Annex 13 to the Convention on International Civil Aviation: Aircraft Accident and Incident Investigation*, 10th ed (July 2010), ch 3.1.

<sup>62</sup> See ICAO, *Global Air Navigation Plan for CNS/ATM Systems*, ICAO Doc 9750, AN/963 (2002). The vision according to ICAO is:

To foster implementation of a seamless, global air traffic management system that will enable aircraft operators

successfully implement the communications, navigation and surveillance/air traffic management (CNS/ATM) system.<sup>63</sup> The know-how and experience from the implementation and use of advanced space-based technology to improve aviation safety and efficiency can be readily shared with other States which are not yet so experienced in this development.<sup>64</sup> In terms of passport security, in 1995 the island was among the first countries in the world to issue ICAO-compliant machine-readable passports; in 2008 Taiwan began issuing the “e-passport”, which is compliant with ICAO's security and technical standards.<sup>65</sup>

As illustrated, continuing exclusion from the global aviation security and safety network has not deterred Taiwan from complying with international standards and practices. On the contrary, the country attempts in all possible manners to comply with international standards governing aviation safety and security as best as it possibly can. However, being permanently excluded from ICAO's various committees and technical sessions that discuss, develop and update standards and practices means that often Taiwan “remains in the dark as to the background and context of any new policies or decisions”.<sup>66</sup>

## VI. PATHWAYS TO MEANINGFUL PARTICIPATION AND CONTRIBUTION

There have been concerted diplomatic efforts and support to take Taiwan out of the dark and into the international limelight as far as the matter of Taiwan's exclusion from ICAO is concerned. These efforts and shows of support resulted in appearance of representatives from Taiwan at the 38<sup>th</sup> ICAO Assembly in 2013 as “guests” of the

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to meet their planned times of departure and arrival and adhere to their preferred flight profiles with minimum constraints and without compromising agreed levels of safety.

See also ICAO, *Amendment No. 1 to the Procedures for Air Navigation Services – Air Traffic Management*, ICAO Doc 4444-ATM/501.

<sup>63</sup> Meg Chang, “Taiwan Launches Asia's First CNS/ATM System”, *Taiwan Today* (6 October 2011), online: Taiwan Today <[taiwantoday.tw/ct.asp?xitem=177482&ctnode=1743](http://taiwantoday.tw/ct.asp?xitem=177482&ctnode=1743)>.

<sup>64</sup> See Kuang-shih Yeh, “Taiwan Seeks Meaningful Participation in the International Civil Aviation Organization”, online: MOFA <[http://www.mofa.gov.tw/enigo/News\\_Content.aspx?n=F9C9A875D719DB70&sms=DE4C0FE1DE37E6E0&s=F508CA8B5B203ACF](http://www.mofa.gov.tw/enigo/News_Content.aspx?n=F9C9A875D719DB70&sms=DE4C0FE1DE37E6E0&s=F508CA8B5B203ACF)>. Taiwan has expertise in aviation training, air traffic control system upgrades and safety surveillance data acquisition

<sup>65</sup> Bureau of Consular Affairs, “Taiwan migrates from MRP to e-passport” (2009) 29 Keesing Journal of Documents & Identity 11, online: BOCA <[www.boca.gov.tw/public/Attachment/98241264371.pdf](http://www.boca.gov.tw/public/Attachment/98241264371.pdf)>. For the ICAO standards on machine readable passports, see ICAO, *Machine Readable Travel Documents*, ICAO Doc 9303.

<sup>66</sup> “Taiwan's quest for meaningful participation” (2011), *supra* note 33. In a statement by the Minister of Transportation and Communications:

For over four decades, due to the lack of direct contact with ICAO, Taiwan's aviation authority, the Civil Aeronautics Administration (CAA), has had to make extra efforts to keep abreast of constant updates of flight safety and security standards set by ICAO. Although we have an excellent record in keeping our systems up-to-date, obtaining the latest ICAO standards has often been a costly and drawn-out process.

Yeh, “Taiwan Seeks Meaningful Participation in the International Civil Aviation Organization”, *supra* note 64.

President of the ICAO Council.<sup>67</sup> Though welcomed as a breakthrough and “an important step forward in [Taiwan’s] bid for meaningful participation in ICAO”,<sup>68</sup> the first time in over four decades representatives from Taiwan’s CAA were able to step into ICAO Headquarters appears to be a one-off invitation predicated on the goodwill of ICAO President and third parties.<sup>69</sup> This falls short of calls by European Union,<sup>70</sup> the US,<sup>71</sup> Canada and elsewhere<sup>72</sup> that Taiwan have more “meaningful participation” and more active engagement at ICAO as an observer. Efforts are continuously made to raise awareness of the alarming fact that the safety of millions of aircraft and passengers flying through a heavily-used airspace corridor is neglected due to “diplomatic and political wrangling”.<sup>73</sup> This year the request to gain admission to the 39th ICAO Assembly has, as of press time, met with a deafening silence.<sup>74</sup>

<sup>67</sup> Hsiu-chuan Shih, “Taiwan only ‘guest’ due to China: ICAO”, Taipei Times (23 September 2013), online: Taipei Times <[www.taipeitimes.com/News/front/archives/2013/09/26/2003573020](http://www.taipeitimes.com/News/front/archives/2013/09/26/2003573020)>.

<sup>68</sup> Chi Shen, “ICAO invites the Republic of China (Taiwan) to attend the 38th Session of the ICAO Assembly”, (2013) 31 Chinese (Taiwan) Yearbook of International Law and Affairs 274 at 275.

<sup>69</sup> The ability of representatives from Taiwan to take part in the 38th ICAO Assembly rested largely due to the approval China. See Steven D Jaffe, *Airspace Closure and Civil Aviation: A Strategic Resource for Airline Managers* (New York: Ashgate Publishing, 2015) at 164. See also Shih, “Taiwan only ‘guest’ due to China: ICAO”, *supra* note 67.

<sup>70</sup> See EU, *Annual report from the Council to the European Parliament on the Common Foreign and Security Policy (CFSP) in 2012*, EU Doc P7\_TA(2013)0453 (24 October 2013) (in German), para 82. See also EU, “Statement by the Spokesperson of EU High Representative Catherine Ashton on the occasion of the participation of Taiwan in the 38th Assembly of the International Civil Aviation Organisation”, EU Doc 130923/01 (23 September 2013), online: European External Action Service

<[eeas.europa.eu/statements/docs/2013/130923\\_01\\_en.pdf](http://eeas.europa.eu/statements/docs/2013/130923_01_en.pdf)>. See also EPP Group, “Taiwan should be granted Observer Status in the ICAO”, online: EPP Group <[www.eppgroup.eu/press-release/Taiwan-should-be-granted-Observer-Status-in-the-ICAO](http://www.eppgroup.eu/press-release/Taiwan-should-be-granted-Observer-Status-in-the-ICAO)>.

<sup>71</sup> See Public Law No 113-17, *An Act to direct the Secretary of State to develop a Strategy to obtain Observer Status for Taiwan at the triennial International Civil Aviation Organization Assembly, and for other purposes*, 12 July 2013. See also American Legislative Exchange Council, “Resolution Supporting Taiwan’s Meaningful Participation in the International Civil Aviation Organization (ICAO)”, online: ALEC <[www.alec.org/model-legislation/resolution-supporting-taiwans-meaningful-participation-in-the-international-civil-aviation-organization-icao/](http://www.alec.org/model-legislation/resolution-supporting-taiwans-meaningful-participation-in-the-international-civil-aviation-organization-icao/)>; and National Association of Secretaries of State, *NASS Resolution In Support of Taiwan’s Participation as an Observer in the International Civil Aviation Organization*, 21 July 2013, online: NASS <[www.nass.org](http://www.nass.org)>.

<sup>72</sup> “Taiwan’s ICAO observer-bid garners European and global support”, *European Business Review* (20 August 2013), online: European Business Review <[www.europeanbusinessreview.eu/page.asp?pid=1083](http://www.europeanbusinessreview.eu/page.asp?pid=1083)>. See also John Scott Marchant, “Flexible diplomacy gives new impetus to Taiwan-Canada ties”, *Taiwan Review* (17 September 2010), online: Taiwan Review <[taiwanreview.nat.gov.tw/fp.asp?xItem=118156&ctNode=205](http://taiwanreview.nat.gov.tw/fp.asp?xItem=118156&ctNode=205)>.

<sup>73</sup> Abeyratne, *supra* note 25 at 661.

<sup>74</sup> Again, attempts to attend the 39th Assembly later this month depends much on the goodwill of ICAO members as well as China. See Mainland Affairs Council Press Release No. 51 (4 August 2016):

The CAA applied to participate in this year’s ICAO Assembly as the authority in charge of international aviation safety and safety of cross-strait travel. The administration submitted the application under “a proper name” and is willing to follow the relevant rules for participation in ICAO meetings. The government will seek support from the ICAO members and believes that this issue could be resolved through cross-strait negotiations and hopes that mainland China could show goodwill to the people of Taiwan.

[Emphasis added]



THE MISSING LINK IN THE GLOBAL AVIATION SAFETY AND SECURITY NETWORK:  
THE CASE OF TAIWAN

There are many examples, particularly on the economic and humanitarian front, whereby Taiwan has demonstrated its ability and willingness to play the role of being vital and responsible a member of the international community.<sup>75</sup> As mentioned previously, it is practically impossible for Taiwan to adhere to the Chicago Convention, let alone become an ICAO Member State.<sup>76</sup> However, already in 1947, with the desire to securing the organisation's stated aims and objectives of safe and orderly global air transportation, the ICAO Council adopted a resolution aimed at securing the participation of Non-Contracting States.<sup>77</sup>

Under ICAO Assembly's rules, Non-Contracting States may be invited by the Council or the Assembly to be present at ICAO as observers.<sup>78</sup> Observers have no voting rights but are permitted to participate in deliberations of the Assembly and its commissions and sub-commissions.<sup>79</sup> On invitation by the body concerned, observers are also able "to attend and be heard" in private meetings.<sup>80</sup> To ensure the input and feedback of stakeholders and parties with a vested interest in aviation, both the International Air Transport Association (IATA) and the European Union are strongly involved at ICAO as observers.<sup>81</sup> Taiwan, or perhaps its civil aviation authority, can be represented as an observer. This is a pragmatic way, in accordance with ICAO's own rules, to ensure universal involvement of all aviation stakeholder, to sideline the divisive topic of statehood and recognition, which has no place at a global forum dedicated solely to foster the safe and orderly governance of global aviation. There is indeed precedence for Taiwan's participation as an observer at a UN body; since 2009, the country has been actively involved and contributing as an observer in the Assembly of the World Health Organization.<sup>82</sup>

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<sup>75</sup> These organisations include the World Trade Organization (WTO), the Asia-Pacific Economic Cooperation (APEC), the Asian Development Bank and the International Olympic Committee. Participation is however, according to one commentator, "at the cost of indignities of nomenclature ("Chinese Taipei" and so on) and other affronts". Jacques De Lisle, *Taiwan: Sovereignty and Participation in International Organizations*, Foreign Policy Research Institute (2011), online: FPRI

<[www.fpri.org/docs/media/201107.delisle.taiwan.pdf](http://www.fpri.org/docs/media/201107.delisle.taiwan.pdf)>.

<sup>76</sup> See *supra* note 30. As Weber notes, this provision is nowadays outdated as it was drafted with "enemy States" of the Second World War in mind: see *supra* note 17, at 26.

<sup>77</sup> ICAO, *Proceedings of the Council*, 2nd Session, 1947, ICAO Doc 7248-C/839 at 62-63. The Resolution is contained in ICAO Doc 4595-C/564. See also Abeyratne, *supra* note 25 at 654-655. Glaser cites the example of the Cook Islands, which was not a member of the UN, but joined ICAO as a full member. Glaser, *supra* note 32 at 20.

<sup>78</sup> ICAO, *Standing Rules of Procedure of the Assembly of the International Civil Aviation Organization*, ICAO Doc 7600/7 (2012), rule 5.

<sup>79</sup> *Ibid*, rule 25 and 43(c). For meetings of bodies with limited membership, observers may, on the invitation by that body or the body's officers, be able to attend and participate in the meetings without the right to vote. See also Glaser, *supra* note 32 at 21-22.

<sup>80</sup> *Ibid*.

<sup>81</sup> The EU is an observer at ICAO represented by the European Commission, see: "The European Union at ICAO", online: European Commission

<[ec.europa.eu/transport/modes/air/international\\_aviation/european\\_community\\_icao/](http://ec.europa.eu/transport/modes/air/international_aviation/european_community_icao/)>. Even the Palestine Liberation Organization (PLO) took part in ICAO as an observer: "PLO Gets Observer Status in the ICAO", JTA (5 October 1975) online: JTA <[www.jta.org/1977/10/05/archive/plo-gets-observer-status-in-the-icao](http://www.jta.org/1977/10/05/archive/plo-gets-observer-status-in-the-icao)>.

<sup>82</sup> See Che-Ming Yang, "The Road to Observer Status in the World Health Assembly: Lessons from Taiwan's Long

Alternatively, representatives from Taiwan's civil aviation authorities can take part in ICAO working groups and projects which permit specialists to be engaged in and contribute to developing aviation standards.<sup>83</sup> Involvement in the works and deliberations of ICAO's regional office in the Asia-Pacific is also a potential way for Taiwan to gain access and insight into international standards, as well as for Taiwan to inform the international community of its challenges and efforts in securing compliance.<sup>84</sup>

## VII. CONCLUSION

Situated in one of the world's most used and congested air, Taiwan's exclusion from ICAO threatens the safety and security of international and cross-Straits air transportation, as well as the wellbeing of the general traveling public. The island is an economic powerhouse with a burgeoning aviation industry, and it occupies a vital geographic position in the Far East where dozens of international airways crisscross. Taiwan is, therefore, a major node and an unmissable link in the global aviation network.

As information regarding latest international aviation standards and practices are received piecemeal or with long delays, Taiwan's practices are often lagging behind or out of sync with the rest of the world. Even when the civil aviation authorities of Taiwan gains access to ICAO documents, there is a difficult process of second-guessing the rationale behind the annexes and resolutions and how the standards and practices prescribed therein can be implemented to ensure air traffic, communications, safety and security protocols conform to the global norm. This sordid state of affairs is unjustifiable – particularly considering the wellbeing and lives of millions of passengers and immeasurable amounts of high value air freight originating from, destined for, or transiting through a strategic aviation hub in the Asia-Pacific.

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Journey" (2010) 5 Asian J WTO & Int'l Health L & Pol'y 331. See also deLisle, who notes Taiwan's participation as an observer was an example of the "delicate and intricate dance" to compromise partial inclusion and involvement with its statehood. DeLisle, *Taiwan: Sovereignty and Participation in International Organizations*, *supra* note 75.

<sup>83</sup> Glaser, *supra* note 32 at 22. The Committee on Aviation Environmental Protection (CAEP) is an example, as it allows observers from "States, intergovernmental and non-governmental organizations, including airlines, aircraft and engine manufacturers, environmental NGOs and UN bodies" to take part in its work. See e.g. ICAO, "ICAO Environmental Protection Committee delivers progress on Aircraft CO<sub>2</sub> and Noise Standards", Press Release, COM 4/13, online: ICAO <[www.icao.int/Newsroom/News%20Doc%202013/COM.4.13.EN.pdf](http://www.icao.int/Newsroom/News%20Doc%202013/COM.4.13.EN.pdf)>. See also ICAO, "Committee on Aviation Environmental Protection (CAEP)", online: ICAO <[www.icao.int/environmental-protection/Pages/Caep.aspx#Members](http://www.icao.int/environmental-protection/Pages/Caep.aspx#Members)>.

<sup>84</sup> Glaser, *supra* note 32 at 22-23. The author cites involvement in the Collaborative Arrangement for the Prevention and Management of Public Health Events in Civil Aviation (CAPSCA) as a feasible way forward, as the framework is a means for stakeholders to be involved in the preventing and managing the spread of diseases through air transportation.

As DeLisle put it rightly, Taiwan is an important player in several fields of activity that requires coordinated efforts and transparency of information and exchange. These include:

international organs that regulate financial institutions and other economic behavior, shipping, fishing, *civil aviation*, nuclear energy, potential dual-use technology – all areas in which Taiwan is a significant actor whose actions have substantial international consequences.

See *Taiwan: Sovereignty and Participation in International Organizations*, *supra* note 75 [emphasis added].

Independent of the controversial matters of statehood and recognition, there is no doubt in practice the authorities of Taiwan exercise “complete and exclusive sovereignty over the airspace above its territory”.<sup>85</sup> Taiwan should therefore have the equal opportunity as all other air-faring nations to participate in and contribute to the governance of civil aviation.<sup>86</sup> As Dr. Abeyratne has succinctly argued, “meaningful participation” of Taiwan in ICAO must be:

based on the implicit but compelling requirement that the very notion of international civil aviation requires, for its safety and sustenance, international participation and cooperation without fragmentation or isolation of segments of the world's populations or nations.<sup>87</sup>

To meaningfully participate in as well as contribute to enhancing global aviation safety and security, Taiwan would need more than the opportunity to attend a triennial meetings of the ICAO Assembly.<sup>88</sup> Its aviation authorities and technical experts need to have the ability to be present at technical meetings and various committees to receive “real time” updates on various aspects of aviation safety and security. Taiwan’s aviation sector, from the airports to air navigation, from passenger security checks to cargo security, stand to benefit greatly from technical assistance as well as regular audits to ensure that standards are uniform with global standards. In return, the aviation authorities would be able to provide valuable information and updates on the management of air traffic and navigation in the heavily-utilised Taipei FIR. This is not just for the sake of the country’s 23 million inhabitants, but also for the sake of millions of international passengers and crew traveling to and from and traversing the airspace under the country’s exclusive control.

As the “global forum” for the “world aviation community”, ICAO has committed itself to the “safe and orderly development of international civil aviation”.<sup>89</sup> From the standard routine for the screening cargo and passengers to the planning of airports and procedures for taxing on the tarmac; from the avoidance of airspace over conflict zones to the operational protocols of flight in incremental weather conditions; from the

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<sup>85</sup> *Chicago Convention*, *supra* note 10, art 1. As Talmon underlines, the People’s Republic of China may claim to exercise sovereignty over Taiwan, “rights derived from the Convention that require control over territory are suspended with regard to Taiwan”: Talmon, *supra* note 31 at 159.

<sup>86</sup> Glaser, *supra* note 32 at 2.

<sup>87</sup> Abeyratne, *supra* note 25 at 650. Dr. Abeyratne succinctly notes “Taiwan must have continued and sustained involvement in ICAO and not just attendance at an ICAO meeting where ICAO would pay lip service to international pressure and influence” and suggested ICAO “shed political considerations in favour of safety in air transport”. *Ibid* at 661-662.

<sup>88</sup> As suspected by Glaser, Taiwan’s attendance at the 38th Assembly “will not by itself guarantee involvement in ICAO Council and technical meetings, and did not mean full access to ICAO SARPs and the deliberations involved in formulating these international norms. Glaser, *supra* note 32 at 19-20.

<sup>89</sup> ICAO, “ICAO Strategic Objectives 2014-2016”, online: ICAO <[www.icao.int/about-icao/Pages/Strategic-Objectives.aspx](http://www.icao.int/about-icao/Pages/Strategic-Objectives.aspx)>.

licensing of in-flight personnel to auditing standards and practices and to the regulation of unmanned aerial vehicles, ICAO has by and large secured uniformity across a swathe of aviation-related affairs and ensured flying is safer and more secure than ever before. Even with the passage of seven decades, the organisation's role and importance persists to this day. With new challenges and developments, the organisation will surely retain its role and importance far into the future, as demonstrated in the Strategic Objectives for the years 2014-2016, which include:

- enhancing *global* civil aviation safety, under the Global Aviation Safety Plan;
- improving air navigation capacity and efficiency by increasing the capacity and improving the efficiency of the *global* civil aviation system;
- Enhancing *global* civil aviation security and facilitation;
- Fostering the development of a sound and economically-viable aviation system; and
- Minimising the adverse environmental effects of civil aviation activities.<sup>90</sup>

No doubt, these truly noble objectives will continue to guide and be enshrined in the vision and actions of one of the most successful specialised agencies of the international community.

However, how can global efforts to bolster aviation safety and to streamline the provision of seamless air navigation services by using space-based technologies and tapping into local resources and knowhow not involve a member of the aviation community that has demonstrated willingness to voluntarily align itself with international norms and standards? How can global attempts to identify and neutralise threats to aviation security and to curb the detrimental impact international aviation has on the environment possibly exclude any one region of airspace? These fundamental questions ought to be addressed urgently by the international community, particularly at the 39<sup>th</sup> Assembly of ICAO.

The time has come for ICAO, as the world's foremost forum charged with the vital role of facilitating and overseeing the orderly global governance of aviation, to take a pragmatic approach in order to ensure that there is no missing link in the safety and security aspects of the truly global industry that is international civil aviation.

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<sup>90</sup> *Ibid* [emphasis added].

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