

Ruwantissa Abeyratne

Regulation of Air Transport

The Slumbering Sentinels

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Preface

The airline and airport industry combined employs 4.3 million people. Additionally, engine and airframe component manufacturers employ 73,000. These industries indirectly provide employment for 5.8 million people, mostly within the supply chain that services these industries. In 2010, 2.6 million flights were operated every month providing 317 million seats. Aircraft departures are forecast to grow from 30 million in early 2013 to 60 million by 2030. Figures of the International Air Transport Association (IATA) for 2010 indicate that there were 1,568 commercial airlines; 23,844 aircraft in commercial service (19,203 jets and 4,641 turboprops); 3,846 airports servicing these aircraft which operated 26.7 million commercial aircraft movements. Airports Council International (ACI) has reported that at these airports, in 2011, worldwide traffic reached 5.4 billion passengers. Furthermore, during the first half of 2012, traffic managed to grow by a respectable 5 % in spite of global uncertainty. Regionally, strong passenger traffic growth continues in the Middle East, Latin America, Africa, and Asia, while the mature markets of North America and Western Europe growth are somewhat stalled. Airports worldwide are forecast to handle over 10 billion passengers by 2030.

At the time this book was being written, *Airbus Industrie* had reported that it had delivered 588 aircraft in 2012. It was going ahead with the A 350—Airbus's answer to the Boeing 787 Dreamliner—which was being questioned for defects. *Airbus Industrie*, it was reported, had made a profit of 1.5 billion US dollars in 2012. Over the past decade, airlines carried 70 % more people than were carried in the previous decade, and this figure is expected to double by 2030. At its 12th Air Navigation Conference held in November 2012, the International Civil Aviation Organization (ICAO) released its new Global Air Navigation Plan, which would cope with the congestion in the skies brought about by the exponential traffic growth. Yet, not much progress had been made in the past 10 years to provide a sense of purpose and direction to the economic regulation of air transport.

Although, like many other businesses, the air transport business is sometimes beset by surprises such as unexpected economic crashes, wide-scale terrorist activity, pandemics, and natural disasters, those in the business know or ought to

know the nature of the business and have the know-how to adapt to the vicissitudes of cyclical business patterns that apply. However, they are precluded from doing so by the very nature of the air transport industry, which is driven by government policy, competition, and a race to the finish line ahead of others. Airlines are attracted by the claims of manufacturers who sport new aircraft that are more efficient, emit less greenhouse gases, and cause less noise than their competitors' aircraft. They order aircraft that, when ultimately delivered, are unable to cope with economic factors that have overtaken the circumstances prevailing when they were ordered.

Once every 10 years ICAO holds a worldwide air transport conference. The most recent of such events—the 6th Worldwide Air Transport Conference (ATConf/6)—was held in Montreal from 18 to 22 March 2013. At this conference, delegates mulled over “achievements” since the 5th Worldwide Air Transport Conference (ATConf/5), held 10 years earlier in Montreal from 24 to 29 March 2003. They noted that ATConf/5 had adopted a Declaration on Global Principles for the Liberalization of International Air Transport, 14 Conclusions and 2 Recommendations, i.e., one on the liberalization of air carrier ownership and control and the other on the future role of ICAO, including its relations with the World Trade Organization (WTO-OMC), and seven model clauses for use at States' discretion in air services agreements.

In addition, ATConf/5 adopted 67 Conclusions for inclusion in its report, which covered the full spectrum of topics and issues on the agenda. Among the Conclusions was the conference's approval for the concept and content of the Template Air Services Agreements (TASAs), one for bilateral and the other for regional situations, for use in air transport relationships. Throughout the Declaration, Recommendations, and Conclusions are numerous references to actions to be taken by States and by ICAO.

Based on these (the Declaration, Conclusions, and Recommendations), ATConf/6 decided, as further action to “meet the needs of the people of the world for safe, regular, economical and efficient air transport” (as prescribed in the Convention on International Civil Aviation), to continue to assist States in their liberalization efforts by enhancing the “market place” facility offered to States; continue to update the TASAs to keep pace with regulatory evolution; undertake and promote the development of additional training courses, regional seminars, or similar activities for the benefit of States, in accordance with available resources; continue to monitor regulatory developments, conduct studies on major issues of global importance, and provide policy guidance and assistance to States; and continue to develop relevant databases such as the Database of the World's Air Services Agreements, as well as case studies of liberalization experiences.

The questions posed by this book are as follows: Are these “clerical and administrative tasks” for ICAO that were decided on by ATConf/6 (and other such preceding conferences) sufficient to meet the needs of the people of the world for safe, regular, economical, and efficient air transport? Should ICAO not think out of its 67-year-old box and be a beacon to air transport regulators? In other words, shouldn't the bottom line of ICAO's meaning and purpose in the field of air

transport be to analyze trends and guide the air transport industry instead of continuing to act as merely a forum for global practitioners to gather and update information on their respective countries' policies for air transport? Shouldn't ICAO provide direction as do other agencies of the United Nations?

These questions are easily answered by a sensible response to the question "what are the needs of the people in this regard?" For instance, the World Bank assembles record funding to reduce poverty. The World Health Organization (WHO) is the directing and coordinating authority for health within the United Nations system. It is responsible for providing leadership on global health matters, shaping the health research agenda, setting norms and standards, articulating evidence-based policy options, providing technical support to countries, and monitoring and assessing health trends. The International Labour Organization (ILO) is the international organization responsible for drawing up and overseeing international labour standards. The International Maritime Organization (IMO) is the United Nations specialized agency with responsibility for the safety and security of shipping and the prevention of marine pollution by ships.

The word "responsibility" does not occur anywhere in ICAO's mission in air transport, as it does in other specialized agencies of the United Nations. In its web page, ICAO identifies itself as a specialized agency of the United Nations that *promotes* the safe and orderly development of international civil aviation throughout the world. It sets standards and regulations necessary for aviation safety, security, efficiency, and regularity, as well as for aviation environmental protection. Its mission is to be the global forum for civil aviation—in other words, a meeting place. Its only task is to achieve safe, secure, and sustainable development of civil aviation through the cooperation of its Member States. Again, in other words, ICAO is but an interlocutor (someone who takes part in a conversation) in global air transport, and if States do not cooperate in a particular issue, ICAO is destitute of the ability to show direction and persuade its members to follow it.

This book addresses ICAO's inability, unlike most other specialized agencies in their missions, to make a tangible difference to air transport development, through a discussion of key issues affecting the air transport industry. It will also inquire into the future of air transport regulation.

Montreal, QC, Canada
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Ruwantissa Abeyratne

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Chapter 1

The Nature and Role of ICAO

1.1 The Problem

ICAO¹ has its genesis in Article 57 of the Charter of the United Nations which states:

The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.²

Clearly, this provision gives ICAO “wide international responsibilities, as defined in their basic instruments. . .” In all fairness to ICAO, the basic instrument in this context—the Convention on International Civil Aviation (hereafter referred to as the Chicago Convention)—defines the aims and objectives (not mandate or responsibility) of the Organization:

The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport.³

¹ ICAO is the specialized agency of the United Nations handling issues of international civil aviation. ICAO was established by the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (Chicago Convention). One of the overarching objectives of ICAO, as contained in Article 43 of the Convention is to foster the planning and development of international air transport so as to meet the needs of the peoples for safe, regular, efficient and economical air transport. ICAO has 191 member States, who become members of ICAO by ratifying or otherwise issuing notice of adherence to the Chicago Convention. See ICAO Doc 7300/9 Ninth Edition 2008.

² Charter of the United Nations and Statute of the International Court of Justice, United Nations: New York, DPI/511-40108 (3-90) 100M, Article 57.1 and 57.2.

³ Chicago Convention, *supra*, note 1, Article 44.

In terms of economic regulation of air transport, ICAO can only “foster the planning and development of air transport”. One definition of “foster” is “to encourage or promote the development of something (typically something regarded as good)”. Another is “to nurture”. None of these definitions has even a hint of leadership, direction or responsibility ascribed to ICAO. At the International Civil Aviation Conference held in Chicago from November 1 to December 7, which gave rise to the Chicago Convention, some delegations suggested a Resolution which stated *inter alia*:

We the nations and authorities represented at this international civil aviation conference, being determined that the fullest measure of cooperation should be secured in the development of air transport services between the nations of the world, believing that the unregulated development of air transport can only lead to misunderstanding and rivalries between nations...agree that these objectives can best be achieved by the establishment of an international air transport authority which would be responsible for the operation of air services on prescribed international trunk routes. . .

This resolution did not see the light of day.⁴ As a result, after nearly 70 years we have a somewhat powerless Organization grappling with economic issues without the responsibility to lead its member States. This is indeed unfortunate, as a leading political scientist said:

The primary aim of inter-governmental institutions is to produce some predictability about the behaviour of its members.⁵

The key to inducing such predictability is the promulgation of Standards for the conduct of member States, an ability not bestowed upon ICAO by its authorizing instrument. However, all is not lost, due to the ingenuity of the Council of ICAO. The Council, at the 8th meeting of its 196th Session in June 2012, approved ICAO’s revised Vision and Mission Statements, as well as the new set of five Strategic

⁴ Early in the discussions during the Chicago Conference of 1944 which led to the adoption of the Chicago Convention, the Committee on Multilateral Aviation Convention and International Aeronautical Body rejected the joint proposal from the New Zealand and Australian Delegations for international ownership and operation of civil air services on world trunk routes. The rejection of that proposal indicated the tendency of the Conference away from extensive international control of air services. Of the three other plans which remained before the Committee, the United States plan called for an international aviation authority with powers limited to the technical and consultative fields; the Canadian plan aimed to set up international authority with power to allocate routes, review rates, and determine frequencies of operation, but with that power curbed by specific formulae under which the authority would operate; and the United Kingdom plan proposed more discretionary power to the international authority in allocating routes, fixing rates, and determining frequencies. It was soon obvious that none of the three plans would emerge intact from the discussions and that the final Conference proposal, if agreement were reached, would be a composite of all plans. See *Proceedings of the International Civil Aviation Conference*, Chicago, Illinois, November 1 to December 7, Vol. I, The Department of State, United States Government Printing Office, Washington:1948, at 539–540.

⁵ Gordenker (1991), p. 71.

Objectives of the Organization for 2014–2016.⁶ Accordingly, ICAO's new vision statement is "Achieve the sustainable growth of the global civil aviation system". Its Mission Statement is "The International Civil Aviation Organization is the global forum of States for international civil aviation. ICAO develops policies, standards, undertakes compliance audits, performs studies and analyses, provides assistance and builds aviation capacity through the cooperation of Member States and stakeholders". Under these two statements come ICAO's new Strategic Objectives:

- A. Safety: Enhance global civil aviation safety
- B. Air Navigation Capacity and Efficiency: Increase capacity and improve efficiency of the global civil aviation system
- C. Security and Facilitation: Enhance global civil aviation security and facilitation
- D. Economic Development of Air Transport: Foster the development of a sound and economically-viable civil aviation system
- E. Environmental Protection: Minimize the adverse environmental effects of civil aviation activities.

When one meshes the Mission Statement which states *inter alia* that ICAO develops policies, with Strategic Objective D (Economic Development of Air Transport) ICAO has legal justification to interpret the original aim in Article 44 of the Chicago Convention in a manner that justifies more responsibility and leadership in economic regulation. However, the spoiler remains the explanation of Strategic Objective D: "Foster the development of a sound and economically-viable civil aviation system". The Council has ineptly reverted back to "fostering" and that too, something called "a sound and viable civil aviation system". Apart from the ambivalence that resonates through words such as "sound" and "viable", one is bemused by the term "civil aviation system". The author has not seen any definition of this term. However, if civil aviation is considered in a systemic way, it should include all aspects of civil aviation including the aircraft involved and their manufacture and that of their components, the service providers such as ground handlers. ICAO has nothing to do with these elements.

In terms of ICAO's role in facilitating cooperation among States, the Organization is consistent with the overall role to be played by the United Nations specialized agencies as was recognized in 1945:

The international institutions of the post war period continue to be primarily instruments for the organization of cooperation between States.⁷

However, we are in the twenty-first century and the role of a United Nations agency calls for a more proactive role. This proactive role has been epitomized in the context of responses of the United Nations specialized agency thus:

⁶ Earlier, ICAO had four Strategic Objectives. They were: Safety—Enhance global civil aviation safety; Security—Enhance global civil aviation security; Environmental Protection—Minimize the adverse effect of global civil aviation on the environment; and Sustainable Development of Air Transport.

⁷ Jenks (1945), pp. 11, 19.