

Safety Investigations with Foreign Partners



Mishap Investigations Directorate
Naval Safety Command



This paper discusses the instructions, differences and challenges for conducting an investigation in a foreign country, including North Atlantic Treaty Organization (NATO) allies and non-NATO allies. We will also discuss the overall International Civil Aviation Organization (ICAO) governing instruction, the NATO Standardization Agreements (STANAG) and past experiences from Naval Safety Command (NAVSAFECOM) investigations involving foreign partners.

Problem statement: Naval instructions govern naval aviation mishap investigations inside the United States. When involving multiple services, the Department of Defense (DoD) adjudicates any disagreements between services. However, a different set of rules and regulations may apply when a mishap occurs over or in a foreign country.

ICAO Annex 13 provides standards and recommendations on conducting aircraft accidents and incident investigations to the 193 signatory countries, along with guidance on what to do when an incident occurs in a non-signatory country or international waters. This document only guides the countries involved and does not mandate a specific way to conduct the investigation. However, it does specify standard definitions of terms, expected responsibilities, set rights of defined parties and what is considered privileged information. The established parties are defined as the following:

State of Occurrence - The State in the territory of which an accident or incident occurs.

State of Registry - The State on whose register the aircraft is entered.

State of Operator - The State where the operator's principal place of business is located or, if there is no such place of business, the operator's permanent residence.

State of Design - The State having jurisdiction over the organization responsible for the type of design.

State of Manufacturer - The State having jurisdiction over the organization responsible for the final assembly of the aircraft, engine or propeller.

The State of Occurrence is primarily responsible for notifying the other parties and conducting the investigation. The State of Occurrence can delegate that investigation to another party but is not obligated to. The other parties are entitled to provide representatives, observers and subject matter experts to the investigation. However, Annex 13 does not explicitly give the right to independent investigations. Annex 13 also does not provide a structure or higher organization to mediate when state actors disagree.

Annex 13, Chapter 3 states the investigation's sole objective shall be to prevent accidents and incidents and not to apportion blame or liability. Additionally, it also directs that the investigating state shall establish an accident investigation authority independent from State aviation authorities and other entities that could interfere with the conduct or objectivity of an investigation. Protected information is discussed in Chapter 5 paragraph 5.12 and is quoted below.

“The State conducting the investigation of an accident or incident shall not make the following records available for purposes other than accident or incident investigation, unless the competent authority designated by that State determines, in accordance with national laws and subject to Appendix 2 and 5.12.5, that their disclosure or use outweighs the likely adverse domestic and international impact such action may have on that or any future investigations:

- a) cockpit voice recordings and airborne image recordings and any transcripts from such recordings; and
- b) records in the custody or control of the accident investigation authority being:
 - 1) all statements taken from persons by the accident investigation authority in the course of their investigation;
 - 2) all communications between persons having been involved in the operation of the aircraft;
 - 3) medical or private information regarding persons involved in the accident or incident;
 - 4) recordings and transcripts of recordings from air traffic control units;
 - 5) analysis of and opinions about information, including flight recorder information, made by the accident investigation authority and accredited representatives in relation to the accident or incident; and
 - 6) the draft final report of an accident or incident investigation.”

When there is a question on what needs to be released, the manual discusses a “balancing test” which is defined as “the determination by the competent authority, in accordance with paragraph 5.12, of the impact the disclosure or use of accident and incident investigation records may have on current or future investigations.” Appendix 2 further highlights the risks of disclosure with the following note:

“The disclosure or use of records listed in Chapter 5, 5.12, in criminal, civil, administrative or disciplinary proceedings, or their public disclosure, can have adverse consequences for persons or organizations involved in accidents and incidents, likely causing them or others to be reluctant to cooperate with accident investigation authorities in the future. The determination on disclosure or use required by 5.12 is designed to take account of these matters.”

Safety Investigations with Foreign Partners

In keeping with the above note, Appendix 2 walks the parties through how to conduct this balancing test.

Annex 13 provides the overarching policy and direction for aircraft incident and accident investigations but does not provide step-by-step guidance. There are 10 follow-on ICAO manuals that provide investigators with information on how to conduct investigations should they not have a process already in place.

NATO STANAGs:

NATO STANAGs are very similar to ICAO Annex 13, providing standard definitions of terms, expected responsibilities, specified rights of defined parties and discussion about protected information while providing amplification in two areas not covered in Annex 13. NATO STANAG 3531 is an adoption of the AIR STANDARD ACS 4086, an agreement amongst the United States, Canada, Australia, United Kingdom and New Zealand. The NATO STANAG 3531 specifically gives the right to independent investigations when requested. This specified right allows the U. S. DoD to conduct independent investigations of military aircraft mishaps. This right is essential because the Office of the Secretary of Defense guidance states we will not share privileged information with foreign countries unless very stringent agreements have been made. The other amplification to Annex 13 is the formation of the Coordination Committee. This group comprises the designated senior member of each involved nation's military safety investigation body/department. The committee is not part of the Safety Investigation Board and aims to facilitate the liaison/communication between all involved nations. This structure provides a framework to rectify and adjudicate disagreements during the investigation. Though the STANAGs amplify Annex 13, it is still considered a recommendation and a starting point versus a mandatory procedure.

COMNAVSAFECOM Past Experiences:

- **March 2015, MH-1Y, Nepal** – Nepalese Armed Forces (NAF) provided initial response and site security as Host Nation representative. They did not disturb the wreckage or evidence and established a base camp on the summit. The NAF established and led a joint mishap investigation board and, though not a signatory to the NATO-STANAG 3531, used it and followed the format, developing a well-managed board free of disagreement or strife. The NAF provided logistical support, including transportation, food, shelter, medical assistance and equipment.
- **March 2022, MV-22B, Norway** – The Norwegian Safety Investigation Authority (NSIA) was designated by the Norwegians to conduct the investigation. At first, the NSIA did not release the investigation to the Aviation Mishap Board (AMB), even after the AMB cited STANAG 3531. The NSIA cited that the STANAG was more of a “suggestion” versus a mandate. Due to this disagreement, the NSIA initially did not allow the AMB access to the crash site, the crash survivable flight incident recorder (CSFIR) or the mishap crew’s Go-Pro camera. During this custody and access dispute, the NSIA corrupted some of the Go-Pro footage when they accidentally recorded over it during viewing. In addition, the NSIA wanted to conduct autopsies before the Armed Forces Medical Examiner System (AFMES) arrival. However, after great effort, the AMB successfully delayed this initiative. The remains, however, were transported to the United States without coordinating with NAVSAFECOM Investigations Branch or the AFMES, potentially causing some evidence to be discarded or missed. Contrary to U.S. AMB practices, another friction point with the Norwegians is they were very interested in sharing as much data with the local media as possible. Over time, as relationships developed, the AMB eventually gained access to the crash site and the CSFIR. After initial friction points, the Norwegian locals, the Red Cross and military forces were very accommodating and proved to be great hosts to the AMB, to the point they allowed the wreckage to stay in place until springtime, when it was safer to move.
- **August 2023, MV-22B, Australia** – During the August U.S. Marine Corps MV-22B investigation, the local coroner took jurisdiction and did not allow the AMB to be onsite until all remains could be uncovered and the investigation complete. Additionally, via statutory obligation, the local coroner requested interviews of U.S. personnel without command knowledge and called the next of kin, providing information to them and asking questions. Under the Australian nationally passed crime bill, the coroner would typically have jurisdiction over the site when there are fatalities. The local coroner, under Australian law, is more aligned to a District Attorney in the United States, and because of this role, generally refers to any crash site as a crime scene while initiating a coronial investigation. Due to this bill, an Australian coronial investigation is a combined safety and criminal inquiry conducted to assess safety issues and potential charges. In this investigation, the local coroner was unaware of the status of forces agreement and stated only the Federal Attorney General in Canberra could waive or direct her to deviate from her statutory obligations. After several days of delay, the Australian Federal Government stepped in. It informed the local coroner of the DEFENCE (VISITING FORCES) ACT of 1963 - SECT 14. At that time, the coroner ultimately released jurisdiction to the visiting defense force and relinquished her control of the scene. Once done, the Australian military, citing the same DEFENCE ACT, allowed the AMB to conduct the investigation independently while providing support.

Of note, Section 14 of the DEFENCE ACT of 1963 specifically talks about coronial affairs. When NAVSAFECOM Investigations Directorate asked the Australian liaison officer (LNO), if no one died, what document would give the

Safety Investigations with Foreign Partners

U.S. military jurisdiction of the investigation, the answer became murky. For Australia, the governing instruction for mishap investigations is Joint Directive 21/2021, The Defence Aviation Safety Framework, which only specifies Australian military mishaps. However, the Defence Aviation Safety Manual states the responsibility for foreign military occurrences generally lies with the visiting force but provides no direction, meaning it is up to the Australian military on how to proceed. The LNO acknowledged the lack of direction and informed us that this document is currently being updated, adding more guidance and direction while aligning closer to the NATO STANAG and other agreements already in place. Since these discussions, NAVSAFECOM Investigations Directorate discovered AIR STANDARD ACS 4086. Though this agreement should have covered the investigation, it is clear that some are not aware it exists.

Summary and Recommendations

Though standards, agreements and recommendations are published for aviation mishap investigations, no mandate requires a country to follow these agreements. As noted in the Australia and Norway examples, the cited documents are considered as suggestions versus legal mandates. Though there is a benefit to these documents providing a common framework and definition, there is no standardized practice for conducting an investigation. For maritime and ground mishap investigations, there is even less guidance and recommendations for nations to follow, further requiring relationship building.

In all the examples above, the investigations occurred only after relationships were formed. During this time of building relationships, there were delays in access to the crash site, compromised evidence and follow-on delays with completing the investigation.

To mitigate these issues, the U.S. military operational commands, before any exercise, should preemptively include detailed planning and policy guidance for a major mishap in their Concept of Operations and follow-on investigations. This Concept of Operations should consist of host-nation military and embassy inputs and identifying visiting forces agreements that were previously unknown. Because safety investigations are generally run by civilian organizations in the State of Occurrence, it is imperative for convening authorities, with NAVSAFECOM assistance, to contact the Military Attaché as soon as possible post mishap, requesting diplomatic coordination with the Department of State. This diplomatic coordination, along with early military communication with the involved foreign partner nation, will smooth out initial friction points. Finally, understanding the specific foreign policies prior to travel will also better prepare the investigation team, setting up for proper expectations upon arrival.

See the FAO checklist on pg. 5 for more information.

Contact:

navsafecom_code90_Mishap_Investigations@navy.mil



Cover: An MH-60S that crashed into the North Pacific Ocean in January 2020 clears the surface after a nine-hour ascent from record depth. The sea-dye marker from the aircraft's water-logged Search and Recovery (SAR) bags flush to the sea during a recovery operation March 19, 2021. Marine dye markers are a safe, effective alternative to flares and smoke for SAR operations. The recovery operation, coordinated by then-Naval Safety Center aviation mishap investigators and Supervisor of Salvage and Diving, provides an opportunity for investigators to examine critical evidence needed to determine why the aircraft went down. (U.S. Navy photo by David Clark)

Safety Investigations with Foreign Partners

Foreign Area Officer (FAO) Aviation Mishap Checklist

Before a Mishap Occurs:

1. Develop/Update a pre-mishap plan to include a phone tree of important numbers to call after mishap occurs. Establishing diplomatic support within the first few hours of a mishap will greatly assist the safety investigation.
2. Study and know the U.S. and Host Nation (HN) agreements. At a minimum, this will be the ICAO Annex 13; however, there are standing agreements with FVEY, NATO allies and other individual countries.
3. Establish relationships with HN counterparts and HN safety investigation organizations (e.g., NTSB) discussing what will occur upon a mishap with regards to the agreements reviewed in step 2. Discuss with your HN counterpart the agreements already signed along with potential roadblocks with civilian organizations and how your counterpart could assist in clearing those issues when a mishap occurs. (Past experience has shown that some HN individuals are not aware of these agreements and walking them through the documents prior to a mishap will greatly assist the effort.)
4. Identify upcoming U.S. military exercises or detachments occurring in your country. Support their planning efforts in discussing what agreements are already established for mishap investigations. Chances are that the Operational Command conducting the events are not thinking or planning for this. They most likely will not know to even go to you for assistance. At a minimum, reach out to the command, provide them information on the HN agreements, along with your contact information should a mishap occur.

Mishap Occurs:

1. Call the Naval Safety Command (NAVSAFECOM) SDO: 757-353-7937, DSN 564-7937 and ask to be connected to a mishap investigator from the Mishap Investigations Directorate, Code 90. The investigator will be your connection to the mishap. Provide embassy POC to the NAVSAFECOM investigator in case of emergency assistance needed during travel.
2. Review the HN Agreement and contact your counterpart to establish communications.
3. Be prepared to assist with country clearance and visa approvals for investigators and SMEs traveling from CONUS in support of the investigation. They will be traveling within 24 hours of mishap and will need priority assistance. You can expect a NAVSAFECOM Code 90 mishap investigator, SYSCOM engineers and a senior member from the mishap squadron at a minimum.
4. Provide the NAVSAFECOM investigator your information or point of contact to be available should diplomatic assistance be required.

Important Note: Your responsibility is diplomatic support. Safety mishap investigations are protected as Privileged Safety Information (PSI). PSI is not to be released to any other activity or organization or used for any purpose other than safety without the written permission of commander, Naval Safety Command. See SECNAVINST 5211.5 series, SECNAVINST 5720.42 series, OPNAVINST 3750.6 series and OPNAVINST 5102.1 series.