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MOVING OUT TO SEA

INTERNATIONAL LEGAL IMPLICATIONS OF BUILDING AN OFFSHORE AIRPORT OUTSIDE TERRITORIAL WATERS

by

D. Hulsewé

A thesis submitted to the Faculty of Graduate Studies
and Research in partial fulfillment of the requirements
for the degree of **Master of Laws (LL.M.)**.

Institute of Air and Space Law
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Montreal, Canada
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To my parents

who made all of this possible

ABSTRACT

This thesis deals with the plan of the Dutch government to build an offshore airport outside its territorial waters. Because the airport will be outside territorial waters several problems may arise. Under the Law of the Sea the question is whether such an airport can lawfully be built and what the different conditions are under which it is possible. The Convention on International Civil Aviation is older then the new Law of the Sea Convention and therefore not up to date with the new zones in the sea that have emerged. Air law therefore needs to be interpreted in the light of those new developments.

The first chapter deals with the reasons behind the plan to build such an airport. Thereafter, subsequent chapters discuss the law of the sea, air law, European law and the law of other organizations, which will have an influence on an offshore airport outside the territorial sea. The final chapter deals with plans and examples of other uses of artificial islands, including offshore airports.

RESUMÉ

Ce mémoire porte sur le projet du gouvernement hollandais d'établir un aéroport offshore à l'extérieur de ses eaux territoriales. Cette situation pourrait en effet causer plusieurs problèmes. Selon le droit de la mer, notamment, on peut se demander si un tel aéroport peur légalement être construit et, le cas échéant, sous quelles conditions. La Convention sur l'aviation civile internationale étant antérieure à la nouvelle Convention sur le droit de la mer, elle n'est pas à jour en ce qui a trait aux nouvelles zones maritimes. Le droit aérien doit donc être interprété à la lumière des nouveaux développements.

Le premier chapitre traite des motifs qui sous-tendent la construction d'un aéroport offshore. Les chapitres qui suivent discutent du droits de la mer, du droit aérien, du droit européen et du droit d'autres organisations qui sont susceptibles d'avoir une incidence sur la construction d'un aéroport offshore à l'extérieur des eaux territoriales. Le chapitre final traite de projets et d'autre examples d'utilisation d'îles artificielles, dont les aéroports offshore.

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ABBREVIATIONS

AAS	Amsterdam Airport Schiphol
ADIZ	Air Defense Identification Zone
A.F.L.	Air Force Law Review
A.J.I.L.	American Journal of International Law
Alta. L. Rev.	Alberta Law Review
Ann. Air & Sp. L.	Annals of Air and Space Law
ATM	Air Traffic Management
CADIZ	Canadian Air Defense Identification Zone
Can. Bar Rev.	Canadian Bar Review
CATE	Coordination of Air Transport
CC	Convention on International Civil Aviation of 1944
CRS	Computer Reservation System
CS	Continental Shelf
CZ	Contiguous Zone
EASA	European Aviation Safety Authority
EC	European Communities
ECAC	European Civil Aviation Conference
ECJ	European Court of Justice
E.C.R.	European Court Reports
ECSC	European Coal and Steel Community
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EU	European Union
EURATOM	European Atomic Energy Community
FAA	Federal Aviation Administration
F.I.R.	Flight Information Region
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IATA	International Air Transport Association

ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
I.C.L.Q.	International and Comparative Law Quarterly
I.L.M.	International Legal Materials
IMO	International Maritime Organization
ITO	International Trade Organization
IW	Internal Waters
JAA	Joint Aviation Authorities
J. Marit. L. & Com.	Journal of Maritime Law and Commerce
J. of Air L.	Journal of Air Law and Commerce
KLM	Koninklijke Luchtvaart Maatschappij (Royal Dutch Airlines)
LOOP	Louisiana Offshore Oil Port, Inc.
LOSC	(United Nations) Law of the Sea Convention of 1982
L.N.T.S.	League of Nations Treaty Series
MATSE	Meeting on Air Traffic System in Europe
METRO	Maastricht Maastrichts Europees Instituut voor Transnationaal Rechtswetenschapplijk Onderzoek (Maastrichts European Institute for Transnational Judicial Research)
Ocean Dev. & Int'l L.	Ocean Development and International Law
OSPAR	Convention for the Protection of the Marine Environment of the North East Atlantic
San Diego L. Rev.	San Diego Law Review
SEA	Single European Act
TEU	Treaty on the European Union
TNLI	Toekomstige Nederlandse Luchtvaart Infrastructuur (Future Dutch Air transport Infrastructure)
TRIPs	General Agreement on Trade-Related Aspects of Intellectual Property Rights
TS	Territorial Sea

TSC	Convention on the Territorial Sea and the Contiguous Zone (Geneva, 1958)
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNLOSC	United Nations Law of the Sea Convention 1982
U.N.T.S.	United Nations Treaty Series
US	United States
Va. J. Int'l. L.	Virginia Journal of International Law
WTO	World Trade Organization
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
Z.L.W.	Zeitschrift für Luft- und Weltraumrecht

INTRODUCTION

In the last couple of years, the problem of noise pollution has become more acute. This is especially true at many airports around the world, and Amsterdam Airport Schiphol (AAS or Schiphol) is no exception. The number of complaints lodged by environmental lobbying groups has increased as the population has moved closer to Schiphol.

To deal with these complaints, the Netherlands imposed strict noise limits around Schiphol that has forced the airport to close runways, cancel flights and implement a nighttime regime that prevents all Chapter 2 aircraft and delayed flights from landing or taking off.

But noise limits are not a solution – they merely serve to shift the problem into someone else's hands. Preventing noisy aircraft from landing at Schiphol means they must land somewhere else, this usually being a regional airport or an airport in a neighboring country; many flights have been diverted to Zaventem Brussels Airport (Belgium), Paris Charles de Gaulle (France), or Frankfurt Main Airport (Germany).

Furthermore, short-term solutions like closing runways and restricting access of noisy aircraft have economic implications. For instance, diverted flights cost more for the airlines involved.

Thus, a balance between environmental and economic growth needs to be achieved. Sparing both the environment and economic development is not possible in the long-term as both will suffer, and so a choice has to be made as to which should take priority.

The Dutch government, although recognizing this critical balance, has decided that it wants to foster air transport growth, and many ideas regarding how to achieve this without effecting too much environmental damage have been put forward. In compliance with Dutch history as regards the sea, the idea of an offshore airport has been recognized as one option.

In fact, such an idea is not new. The Netherlands has harbored such ideas before, as have many other countries. Two offshore airports already exist, namely Kansai International Airport in Osaka, Japan and Chek Lap Kok in Hong Kong. Others have been contemplated, like one in Sydney harbor.

Since a large part of the Dutch territory is below sea level, the Dutch have a lot of experience with water management and protecting its land from the sea. In fact, Dutch companies have been involved in many water projects around the world, including the construction of Chep Lap Kok Airport and the creation of an artificial island as part of the Öresund link between Copenhagen, Denmark and Malmö, Sweden. The idea of a Dutch offshore airport is, therefore, within the tradition of Dutch history.

The current plan of the Netherlands, however, is more innovative. The possibility currently being studied is an offshore airport that would be located just beyond the Dutch territorial sea. There, it could operate 24 hours a day, without hindering people attempting to enjoy the Dutch seaside. In addition, the size of the island would also allow for future expansion of the airport and its related services.

The idea of an offshore airport outside territorial waters is not entirely new either. Although other offshore airports contemplated by the Dutch government were to be located within Dutch territorial waters, some countries and international legal theorists have weighed the idea of whole offshore cities, including airports, on the high seas. In the early 1930s, the US Naval War College had contemplated the status of offshore airports under international law in times of peace and of war. In the early 1970s, the possibility of offshore airports off the coast of San Diego and New York were examined. Locations included sites outside the US territorial sea.

Since then, certain changes have affected the applicable legal framework. With the entry into force of the 1982 United Nations Law of the Sea Convention, the territorial sea has been extended and new maritime zones have been created and codified. Although not regulated specifically, sufficient latitude in the Convention allows for artificial islands for different purposes under the new law of the sea, including an offshore airport.

In the air transport sector, several changes have also taken place, but not so much as regards the legal framework as in economic terms. With the deregulation and liberalization of air transport around the world and the globalization of air transport, new trends have emerged that might indeed be considered economic, but which will have a definitive impact on the legal framework as it now stands. This framework will have to be interpreted in this light or maybe even "modernized" into a new framework.

This thesis has a legal topic, namely the international legal implications of an offshore airport outside territorial waters. However, economic considerations cannot be excluded. The impact of deregulation and liberalization, especially in the form of global alliances, have to be considered, not only due to their impact on the necessity of such an investment but also because of their influence on the existing legal regime. In the wake of the new global alliances, airlines have pressed for more freedom to invest and to fly without limitations, thereby putting pressure on the current bilateral regime, its notion of nationality and even that of State sovereignty itself.

This is what makes this subject so interesting. It is new, innovative and still very much subject to a changing environment. Due to the limited length of this thesis, we concentrate mainly on the idea of offshore airport outside territorial waters. The legal regime discussed is limited to the international legal regime, especially that of the 1982 United Nations Law of the Sea Convention and the Chicago Convention on International Civil Aviation. These will be discussed separately. A briefer outline is given of certain regional legal frameworks, like those established by the European Union and Eurocontrol. Separate chapters are devoted to the notions of sovereignty and jurisdiction and the economic implications of the airport. In each of the chapters, an outline of the legal framework and the problems and possibilities it creates for an offshore airport is provided. Some practical solutions regarding ways to overcome these problems are supplied, including examples of State practice in related issues.

The conclusion summarizes the different problems analyzed in this thesis and presents some ideas about how to solve them. An assessment as to the attainability of these solutions and a suggestion as to the way in which such a solution can be reached are given. Finally, this thesis presents a conclusion as to whether the building of an offshore airport outside territorial waters and the operation thereof is feasible.

CHAPTER 1

ECONOMY V. ENVIRONMENT; HISTORY OF AN AIRPORT

Since the liberalization of air transport, first in the United States and later in the European Union, rapid growth has occurred in the air transport sector. Privatization and heightened competition resulting from liberalization have forced airlines to become more efficient by creating hub-and-spoke systems[1] on the one hand and closer cooperation with other airlines on the other, and have prompted them to fly more frequently, to more destinations, for lower fares. With this expansion has come congestion of both the airways and the airports.

Schiphol Airport is one of the airports experiencing increases in flight movements, and cargo transport and the number of passengers handled have grown accordingly. Complaints about aircraft noise from surrounding areas have increased as well. Like many governments around the world, the Dutch government has had to find a solution to sustain the economic benefits derived from the airport, while attempting at the same time to spare the environment. The compromise reached by the Dutch government has been to allow more flight movements and, thus, more passengers, but within strict environmental limits, especially as relates to noise.

Since Schiphol is located in a densely populated area, the environmental limits established, specifically those applying to noise, were very strict. However, the airport has been unable to stay within those limits since the moment they were implemented. This has in part been due to the way in which the noise was measured, and, therefore, a new measurement system was devised. The Dutch government still embraces growth in this sector and has decided that alternate sites for a subsidiary or a completely new airport should be examined. First and foremost, a new site must be able to accommodate future air transport growth without inflicting adverse effects on its surroundings.

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[1] A hub-and-spoke system is a system in which the home carrier (*e.g.*, the KLM group) carries passengers to its homebase (*i.e.*, Schiphol) and then flies them to other destinations from there, thereby, *inter alia*, achieving higher load factors.

This chapter outlines the history of Amsterdam Airport Schiphol and the decision-making process of the Dutch government in relation to the airport. Thereafter, it relates and analyzes the alternatives proposed for the expansion of the Airport.

1. History of Amsterdam Airport Schiphol

Amsterdam Airport Schiphol (Schiphol) started as a military airport on 19 September 1916,[2] and in 1920 it was opened to civil aviation, especially to accommodate KLM. Management of the airport was handed over from the government to the municipality of Amsterdam in 1926. During World War II, Schiphol was destroyed and had to be rebuilt, which took until 1958, after which the airport was managed by Luchthaven Schiphol NV, a corporation in which the State held 75.8%, the municipality of Amsterdam 21.8% and the municipality of Rotterdam 2.4%.[3] In 1967, the airport moved to its current location, which is just south of Amsterdam.[4]

Schiphol now has four runways and covers 1720 hectares, excluding the different zones.[5] It now ranks fourth on the top-ten list of West-European airports, based on flight movements just behind London, Paris[6] and Frankfurt.[7] Having had a direct connection to the railway since 1981, the airport is now linked by road, rail and air and has become a multimodal hub. Under Master Plan 2015,[8] certain piers will be extended, new ones will be added and, if all goes according to plan,[9] a fifth runway will be operational in 2003.

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[2] See *Geschiedenis van de luchthaven* (History of an Airport), online: De Volkskrant Dossier Schiphol2 <http://www.volkskrant.nl/leeg/215002419.html> (date accessed: 19 March 1999) [translated by author] and *Tachtig jaar Schiphol* (Eighty Years of Schiphol), Schipholkrant, (1996/1997), 2 [translated by author]

[3] Although the State announced in June 1997 that it was in favor of selling off its shares, it has not yet done so. See Amsterdam Airport Schiphol, *Annual Report Amsterdam Airport Schiphol 1997* (Amsterdam: Amsterdam Airport Schiphol Corporate Communications, 1998) at 11.

[4] See *Gedaanteverwisseling 'oude' Schiphol* (Transformation "former" Schiphol), Schipholland 9 (15 September 1998) at 4-5 [translated by author].

[5] See Provincie Noord-Holland, *Strategische Luchtvaartontwikkeling; De luchthavens in Osaka en Hong Kong; Verslag van de oriëntatiereis van de provincie Noord-Holland* (Strategic air transport development; The airports in Osaka and Hong Kong; Report of the orienteering trip of the Province of Noord-Holand) (7 October 1997) at 13 [translated by author].

[6] Paris has both Orly and Charles de Gaulle airports and London has Heathrow, Gatwick and Stansted airports.

[7] See Amsterdam Airport Schiphol, *Schiphol Group AnnualReport 1998* (Amsterdam: 1998) at 78.

[8] See A. van der Sar, "Master Plan 2015" *Holland Herald* 34:1 (January 1999) 44-45.

[9] Due to fierce opposition from environmental groups, there has been a significant delay and building has not yet started.

This growth has not gone unchallenged. Schiphol is located in a densely populated area in which urbanization is ongoing. Both occupant and environmental organizations have challenged the airport on many occasions, and the Dutch government and parliament have been forced to take action, attempting to strike a balance between economic growth and protection of the environment.

2. The 1995 Government White Paper for Schiphol and Surroundings

In 1990 the Dutch parliament passed the *Vierde Nota op de Ruimtelijke Ordening*,[10] in which both Schiphol and the seaport of Rotterdam were designated to become a mainport.[11] The idea behind a mainport is for the designated port to become a central point in infrastructure, promoting the economy and trade by providing an intermodal, international hub for more than one means of transport.[12] Schiphol will be accessible by high-speed trains from France and Germany and highways serving the Netherlands and the rest of Europe. The main forces behind this goal are the *Luchthaven Schiphol NV*, the *Koninklijke Luchtvaart Maatschappij NV*, the municipalities of Amsterdam and Haarlemmermeer, the province Noord-Holland and the ministries of Economic Affairs, Transport and Environmental Affairs.

On 17 June 1995, the Dutch parliament passed the Government White Paper for Schiphol and Surroundings.[13] This decree has two major goals: (1) to promote economic growth, and (2) to protect the environment. In order to serve the economy, the paper allows Schiphol to become a mainport and defines that status.[14] According to the paper, this status will be accorded when the airport serves a minimum of 38.6 million passengers, 2.8 million tons of cargo and 420,000 landings and take-offs a year.

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[10] Roughly translated, this is the "Fourth amendment to the white paper on public works".

[11] See A. Drogendijk & T. Klein, "De groeistuipen van mainport Schiphol (Growing pains of mainport Schiphol)" in E. van Thijn, *et al.*, *De Sorry-democratie; Recente politieke affaires en de ministeriële verantwoordelijkeheid* (Amsterdam: Van Gennep BV, 1998) 133 at 135-137 [translated by author].

[12] See R. den Besten, "An airport view" in P. Mendes de Leon, ed., *Air Ttransport Law and Policy in the 1990's: Controlling the Boom* (Dordrecht: Martinus Nijhoff, 1991) 47 at 48-49.

[13] The Dutch name is "*Planologische Kernbeslissing Schiphol en Omgeving*" (deel 4, February 1995), which is nearly as far-reaching as a law. See also Drogendijk & Klein, *supra* note 11 at 136-137 [translated by author].

According to the statistics provided in the decree, this status would not be reached until 2015. In order to protect the environment, the paper defined very strict limits for the growth of the airport. These not only included environmental limits for noise and pollution but also one for the amount of passengers the airport could serve, namely 44 million passengers a year. The predictions of air transport growth, however, proved to be too conservative.

3. A higher rate of growth than expected

New calculations in 1996 showed that the airport was growing much faster than expected. In fact, the limit of 44 million passengers a year would be reached by 2005, rather than in 2015. The government was not too worried about this because, as of 1 January 1997, noise limits would be introduced around the airport to measure the amount of noise produced.[15] Noise is now measured at 12,000 points around the flight-paths to and from the airport. Points with the same amount of noise are joined to establish a contour, and the noise within the contour is more than at the contour itself; the area within the contour is a noise zone. Schiphol has two noise zones: one for the night and one for the whole year.[16] Limits have been set as to the maximum noise allowed within each zone.[17]

Since that same time, the airport has been required to submit an operations plan twice a year, outlining the growth expected for the coming season and the measures that will be implemented to stay within the noise limits. The plan must include an estimate of

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[14] Mainports are central points in (air) transportation and have very important economic functions. They generate spillover effects to other industries and service providers. Europe already has three mainports, namely Heathrow London Airport, Charles de Gaulle Paris Airport and Frankfurt Airport.

[15] The Netherlands, *Aanwijzing Luchtvaartterrein Schiphol* (1996), roughly translated as "Decision Airport grounds Schiphol", which is a licence granted to operate an airport in that particular area, based on the Dutch decree on air law (*Luchtvaartwet*).

[16] See *Meest gestelde vragen over geluidszones rond vliegvelden* (Frequently asked questions on noise zones around airports) (The Netherlands: Rijksluchtvaartdienst, 1998), online: Rijksluchtvaartdienst <http://www.minvenw.nl/rld/milieu/geluid/htm/mgv.htm> (date accessed: 8 February 1999) [translated by author]; Amsterdam Airport Schiphol, *Environmental Report Amsterdam Airport Schiphol 1997*, (Amsterdam: Amsterdam Airport Schiphol Corporate Communications, 1998) at 14.

[17] See *ibid.* The way in which noise, and specifically aircraft noise, is measured differs from country to country. In the Netherlands, aircraft noise is measured in Kosten units (in Dutch Kosteneenheid or Ke). This unit was developed by Prof. Kosten in the sixties. The unit is the average of certain amounts of noise during one year; noise during the night and the weekend is weighted more heavily. Surrounding Schiphol are four noise zones: 35 Ke, in which no new houses can be built, 40 Ke, in which existing houses are isolated, 55 Ke and 65 Ke in which case the house is demolished when the current owner sells the house.

the number of households that will suffer from the noise before being submitted for the approval of the Department of Transport. The government believed that with the noise limits in place and the requirement of a biannual operations plan, Schiphol would be able to stay within the established environmental limits. This assumption proved to be false, and additional steps became necessary.

Already in May 1997 it became apparent that the noise limits would be breached if additional measures were not adopted. A national debate was convened to discuss the future of air transport in general and that of Schiphol in particular. Participants included Schiphol, employer and employee organizations, environmental and occupant organizations, the Department of Transport, the Department of Environmental Affairs and the Department of Economic Affairs. The debate ended in conflict between the corporate sector on the one hand and the environmental organizations on the other. As a result, a final decision was postponed,[18] and Schiphol was forced to take action on its own to stay within the noise limits.

On 5 July 1997 Schiphol announced that as of 1 August 1997 it would impose a take-off prohibition for so-called Chapter 2 wide-body airplanes between 23:00 and 6:00 hours.[19] On the basis of Annex 16 of the ICAO Convention, aircraft are divided in categories as to the amount of noise they produce. Chapter 2 aircraft are noisy, while Chapter 3 aircraft are relatively quiet. Schiphol tries to discourage the use of Chapter 2 aircraft. Since KLM has no Chapter 2 aircraft in its fleet, it would not be affected.[20] Schiphol planned to apply a more lenient regime to the Dutch charter companies.

Apart from the foregoing measures, Schiphol also requested that the Dutch government grant it the status of a slot-coordinated airport so that it would be able to refuse new flights. The airport reasoned that if it became a slot-coordinated airport within the meaning of EU Regulation 95/93, it would be able to refuse slots (*i.e.*, a frame of time

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[18] See *Schiphol-debat eindigt met harde botsing* (Schiphol-debate ends with significant clash), De Volkskrant (3 July 1997), (The Netherlands: De Volkskrant BV, 1999), online: De Volkskrant <http://www.volkskrant.nl/indruk/fr...1/i155004987/i155004210/i155001652> (date accessed: 8 February 1999) [translated by author].

[19] See *Schiphol neemt maatregelen tegen geluidhinder* (Schiphol takes measures against noise nuisance), De Volkskrant, (5 August 1997), (The Netherlands: De Volkskrant BV, 1998), online: De Volkskrant <http://www.volkskrant.nl/indruk/fr...8/i155005071/i155004987/i155004210> (date accessed: 8 February 1999) [translated by author].

[20] See Koninklijke Luchtvaart Maatschappij nv, *Koninklijke Luchtvaart Maatschappij nv Milieujaarverslag 1997/98*, (Amstelveen: Koninklijk Luchtvaart Maatschappij nv, 1998) at 23.

in which a plane can land or take-off) to new airlines. The decision to refuse to grant a slot is made by an independent slot coordinator appointed by the Dutch Ministry of Transport, and the allocation of available slots takes place twice a year at the IATA Slot Coordination Meetings.[21] Hence, Schiphol assumed it would be able to restrain its growth and thus its noise production.

The nighttime take-off ban was insufficient, according to the Minister of Transport, who on 5 August 1997 threatened to close the entire airport if additional measures were not implemented.[22] The airport issued a statement that same day, announcing an absolute nighttime take-off ban between 23:00 and 6:00 hours for all Chapter 2 wide-body aircraft and all delayed aircraft wanting to leave after 23:00 hours. It also announced that no permission would be granted for new nighttime flights. The measures would be effective as of 16 August 1997.

These measures were especially hard on cargo and charter airlines - the former because they use older, noisier planes, the latter because they usually land and/or take-off at night and regularly have delays. A few of the affected airlines instituted summary proceedings on 7 August 1997, demanding a court order that would disallow the announced measures.[23] The decision was rendered on 15 August 1997, and the judge indeed decided to disallow the measures.[24] He pointed out that only the Minister of Transport had the authority to impose such measures, on the basis of the Dutch Air

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[21] See *Meest gestelde vragen over slotallocatie* (Frequently asked questions on slot allocation), (The Netherlands: Rijksluchtvaartdienst, 1998), online: Rijksluchtvaartdienst <http://www.minvenw.nl/rld/milieu/geluid/htm/slotall.htm> (date accessed: 8 February 1999) [translated by author]; Amsterdam Airport Schiphol, *Annual Report Amsterdam Airport Schiphol 1997*, (Amsterdam: Amsterdam Airport Schiphol Corporate Communications, 1998) at 30.

[22] See *Schiphol zet mes in aantal nachtvluchten* (Schiphol cuts down amount of night flights), De Volkskrant, (5 August 1997), (The Netherlands: De Volkskrant BV, 1998), online: De Volkskrant: <http://www.volkskrant.nl/indruk/fr...=/i155005552/i155005078/i155005071> (date accessed: 8 February 1999) [translated by author].

[23] See *Martinair eist in geding opheffing verbod Schiphol op nachtvluchten* (Martinair demands lift of ban on night flights on Schiphol in summary proceedings), De Volkskrant, (7 August 1997), (The Netherlands: De Volkskrant BV, 1998), online: De Volkskrant <http://www.volkskrant.nl/indruk/frame/155005078.html?history=/i155005552> (date accessed: 8 February 1999) [translated by author].

[24] See *Minister treedt op tegen vlieglawaai* (Minister takes a stand against aircraft noise), De Volkskrant (16 August 1997), (The Netherlands: De Volkskrant BV, 1998), online: De Volkskrant <http://www.volkskrant.nl/indruk/frame/155005552.html> (date accessed: 8 February 1999) [translated by author].

Transport Statute,[25] and that the Ministry was the sole body to exercise this authority. He further suggested Schiphol should become a fully coordinated airport, as all parties considered this the best solution.

The Minister granted Schiphol the status of fully coordinated airport on 1 November 1997, to be fully effective as of 1 April 1998, when the new summer schedule of the airlines would begin. Schiphol was the first airport to become a fully coordinated airport for environmental considerations, the reason being that capacity is usually limited due to limits in the infrastructure. In the meantime, the take-off ban was extended to Chapter 3 aircraft and a new nighttime landing ban was imposed for Chapter 2 aircraft, effective as of 1 October 1997.[26]

It was clear, however, that despite the measures taken, the noise limits would be exceeded unless the airport was completely shut down during the final months of 1997. Although some members of the opposition toyed with this idea, most agreed this was not actually an option.[27] On 3 October 1997 the government, therefore, decided that it would allow Schiphol to exceed the noise limits.[28] To limit the excess as much as possible, the nighttime regime was advanced from 23:00 to 21:00 hours for the two runways producing most of the noise. It was also agreed that the limits could not be broken after 31 December 1997. A new discussion regarding the future of Schiphol commenced, and the government decided to allow further growth, but under strict conditions.[29]

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[25] See *Luchtvaartwet*, reproduced in E. Soetendal & C.A.L.C. Ditvoorst, *Zicht op de luchtvaartwetgeving, 1998-1999* (The Hague: Sdu Uitgevers, 1998) at 150.

[26] See *Schiphol's nachts gesloten voor lawaaivliegtuigen* (Schiphol closed at night for noisy aircraft), De Volkskrant (23 August 1997), (The Netherlands: De Volkskrant BV, 1999), online: De Volkskrant <http://www.volkskrant.nl/indruk/frame/155006052.html> (date accessed: 8 February 1999) [translated by author].

[27] See *Regels tegen lawaai Schiphol onvoldoende* (Rules against aircraft noise insufficient), De Volkskrant (27 August 1997), (The Netherlands: De Volkskrant BV, 1999), online: De Volkskrant <http://www.volkskrant.nl/indruk/frame/155010627.html> (date accessed: 8 February 1999) [translated by author].

[28] See *Kabinet zal herrie van Schiphol dit jaar gedogen* (Government will allow for noise Schiphol this year), De Volkskrant (3 October 1997), (The Netherlands: De Volkskrant BV, 1999), online: De Volkskrant <http://www.volkskrant.nl/indruk/frame/165002071.html> (date accessed: 8 February 1999) [translated by author].

[29] See *Schiphol kan groeien, maar onder harde voorwaarden* (Schiphol can grow, but under strict conditions), De Volkskrant (23 August 1997), (The Netherlands: De Volkskrant BV, 1999), online: De Volkskrant <http://www.volkskrant.nl/indruk/frame/155006053.html> (date accessed: 8 February 1999) [translated by author].

New studies at the end of 1997 showed that with, *inter alia*, different landing methods, more efficient use of the runways, and technological improvements of aircraft engines, Schiphol would be able to serve more than 44 million passengers a year without surpassing the noise limits. Basing its decision on these reports, the government lifted the limit of 44 million passengers.[30] On the basis of the same reports, Schiphol submitted a supplemental operations plan for more flights,[31] requesting an additional 40,000 flight movements, for a total of 400,000 flight movements rather than the original 360,000 requested.[32] In March, the government allowed the airport a total of 380,000 flights during 1998 and an additional 20,000 flights a year until 2002, after which the fifth runway was expected to be operational, allowing for further growth, with less noise for the surrounding areas. The increase was allowed on the condition that no more than 12,000 households would suffer from the noise. In April 1998, Schiphol submitted the operations plan for the fall of 1998 on the basis of this decision.[33]

In September 1998 it became evident that the statistics used by the government in its decision by Schiphol for its subsequent operational plan were erroneous and that Schiphol would again breach the noise limits in certain areas.[34] The Minister decided to allow the breach because many of the points at which the noise was measured and where the noise level would exceed the limit set were located in uninhabited areas, such as long-term parking lots and meadows. The environmental organizations did not agree with the decision and instituted summary proceedings against the Dutch Minister of Transport and Schiphol, requesting that the court hold Schiphol to the noise limits. The judge upheld the decision of the Minister and allowed the breach. However, he did stipulate that the

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[30] See *Kabinet staat verdere groei luchtvaart toe* (Government allows for further growth of air transport), De Volkskrant (29 November 1997), (The Netherlands: De Volkskrant BV, 1999), online: De Volkskrant <http://www.volkskrant.nl/indruk/frame/190005818.html> (date accessed: 8 February 1999) [translated by author].

[31] See Amsterdam Airport Schiphol, *Environmental Report Amsterdam Airport Schiphol 1997* (Amsterdam: Amsterdam Airport Schiphol Corporate Communications, 1998) at 18.

[32] See *Schiphol wil door naar 400 duizend vliegbewegingen* (Schiphol wants to grow to 400.000 flight movemnts), De Volkskrant (7 January 1998), (The Netherlands: De Volkskrant BV, 1999), online: De Volkskrant <http://www.volkskrant.nl/dossiers/frame/215002413.html> (date accessed: 8 February 1999) [translated by author].

[33] See Amsterdam Airport Schiphol *1998 half-year report*, online: <http://www.schiphol.com/figures/hj98p01.htm> (date accessed: 8 February 1999).

[34] *Besluit Schiphol op basis foute cijfers; Kamer verlangt opheldering kabinet* (Decision Schiphol based on faulty calculations; Parliament requires explanation of government), NRC Handelsblad (26 September

interests of Schiphol and the air transport sector did not outweigh those of the neighboring people.[35] The tolerance order would therefore only be legal if the noise nuisance to these people did not increase.

On 29 October 1998, the Minister accepted 1999 operations plan of Schiphol,[36] which included measures to stay within the limit of 12,000 houses to suffer from the noise nuisance. Unfortunately, even the wider noise limits in the tolerance order were in danger of being breached and, in November 1998, one of the runways had to be closed at night.[37] During the same month it was decided that newer and wider noise limits would be established and that Schiphol would be allowed to expand its operations as long as it conformed to those new noise limits.[38]

However, the airport will again exceed the noise limits in 1999 and is likely to do so until 2003, when the new runway will be ready and the airport obtains a new environmental permit.[39]

4. The alternatives

In 1995, the Dutch government initiated the Project Future Dutch Air Transport Infrastructure to obtain more information regarding the future growth of air transport and

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1998), (The Netherlands: NRC Handelsblad, 1998), online: NRC Handelsblad <http://www.nrc.nl/W2/Evj/98/42p.html> (date accessed: 28 November 1998) [translated by author].

[35] See *Rechter versmalt marges geluidsoverlast Schiphol* (Judge narrows margins for noise pollution Schiphol), NRC Handelsblad, (2 October 1998), (The Netherlands: NRC Handelsblad, 1998), online: NRC Handelsblad <http://www.nrc.nl/W2/Evj/98/42b.html> (date accessed: 28 November 1998) [translated by author].

[36] See *Schiphol mag lawaaigrens overschrijden; Gebruiksplan krijgt fiat* (Schiphol can breach noise limit; government approves operations plan), NRC Handelsblad, (29 October 1998), (The Netherlands: NRC Handelsblad, 1998), online: NRC Handelsblad <http://www.nrc.nl/W2/Evj/98/42k.html> (date accessed: 28 November 1998) [translated by author].

[37] See *Netelenbos: Schiphol moet's nachts dicht; bij harde westenwind* (Netelenbos [Dutch minister of transport]: Schiphol must close during the night in case of strong westerly winds), NRC Handelsblad, (11 November 1998), (The Netherlands: NRC Handelsblad, 1998), online: NRC Handelsblad <http://www.nrc.nl/W2/Evj/98/42g.html> (date accessed: 28 November 1998) [translated by author].

[38] See *Schiphol krijgt fors meer ruimte; Extra kabinetsberaad luchtvaart:* (Schiphol gets more space; Additional government meeting on air transport), NRC Handelsblad, (17 November 1998), (The Netherlands: NRC Handelsblad, 1998), online: NRC Handelsblad <http://www.nrc.nl/W2/Evj/98/42c.html> (date accessed: 28 November 1998) [translated by author].

[39] See *Schiphol blijft geluidsgrens overschrijden* (Schiphol keeps breaching noise limit), De Volkskrant, (25 June 1999), (The Netherlands: De Volkskrant BV, 1999) online: De Volkskrant <http://www.volkskrant.nl/indruk/frame/305021229.html?history=/i305021312> (date accessed: 28 June 1999) [translated by author].

its effects on the existing air transport infrastructure,[40] in the short, middle and long terms.[41] The purpose of the investigation was to provide the government with sufficient information to make an informed decision.

Due to the two conditions of the Government White Paper for Schiphol and surroundings, namely Schiphol becoming a mainport and protection of the environment, it became apparent that the expansion of Schiphol might not be sufficient to accommodate increased air transport, while staying within the established environmental limits. Alternative locations were designated and investigated as to their suitability under the conditions set out in the White Paper. Out of eight areas, three were targeted for further investigation, in addition to the expansion of Schiphol itself. The three areas investigated were:

- Flevoland, a *polder*[42] in the IJsselmeer, located relatively close to Amsterdam and less populated;
- the Tweede (second) Maasvlakte, which would entail the reclamation of more land near the port of Rotterdam; and,
- the North Sea, where an airport could be constructed on an artificial island.

The different sites were examined to determine whether they could accommodate a small subsidiary airport (*i.e.*, two runways) or a bigger subsidiary airport (*i.e.*, more than two runways in different directions), with Schiphol becoming the smaller of the two. Air traffic would than be split up in hub traffic[43] on the one hand and charter[44] and all cargo

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[40] The Dutch term is "*Project Toekomstige Nederlandse LuchtvaartInfrastructuur*" (TNLI).

[41] For a summary of all investigations in this project, see TNLI, *Luchtvaart-infrastructuur in de toekomst; Samenvattende onderzoeksrapportage; Waar ligt de toekomst van de luchtvaart in Nederland?* (The Hague: December 1998) [translated by author].

[42] A *polder* is land reclaimed from the sea by surrounding an area of water with dykes and then removing the water.

[43] Hub traffic is scheduled air traffic within a network, using a hub to transfer its passengers to other destinations.

[44] ICAO, *International Civil Aviation Vocabulary*, 1st ed., ICAO Doc. 9713, gives the following definitions:

> "cargo air service" (...) an air service provided for the public transport of freight and mail (...)
> "charter carrier" (...) a non-scheduled carrier, which operates only charter flights (...)
> "charter flight" (...) a non-scheduled operation using a chartered aircraft (...)

traffic[45] on the other, divided between the two airports. The project also investigated under what conditions Schiphol would be able to accommodate the increase in air traffic on its own or whether either a subsidiary airport or a completely new airport should be built in the North Sea.

4.1 Growth at Schiphol or a subsidiary airport at Flevoland or on the Tweede Maasvlakte

At Schiphol, the construction of a fifth runway is already planned, and when built and operational, it will accommodate an increase in air transport for the time being. With a complete redesign of the runway system, it will be able to accommodate even more traffic without increasing the amount of noise generated. Technological progress in landing systems, quiter engines, and similar improvements will allow for even more flight movements. Being located in a densely populated area, the accommodation of air traffic can only continue for so long, and thereafter other solutions must be found. If, however, air transport were to grow less than expected, this alternative might be sufficient to accommodate that growth. Expansion of Schiphol itself could be a temporary solution while the capacity is increased at another location.

The relatively uninhabited *polder* of Flevoland already has railway and road connections to Amsterdam and Schiphol. Of the different locations under consideration there, only one could support runways in different directions. As Flevoland has wildlife parks and many migrating birds, the added advantage of alleviating the problems of Schiphol would be offset by the environmental impact of such an airport on Flevoland.

> "scheduled air service" (...) an air service open to use by the general public and operated according to a published timetable or with such regular frequency that it constitutes an easily recognizable systematic series of flights (...)
> "scheduled international air service" (...) a series of flights that (...) possesses the following characteristics: it passes through the airspace over the territory of more than one State; it is performed by aircraft for the transport of passenger, mail or cargo for remuneration or hire, in such a manner that each flight is open to use by members of the public (...); it is operated so as to serve traffic between the same two or more points, either according to a published timetable, or with flights so regular or frequent that they constitute a recognizable systematic series.

[45] All cargo traffic is air traffic that moves on all cargo aircraft as opposed to combi-aircraft. Most major airlines, however, have some combination aircraft that carry both cargo and passengers.

Since the disadvantages of an airport would be spread over two locations, the Dutch government decided to drop this site as an alternative.[46]

The Tweede Maasvlakte is located in the estuary of the river Maas. It would be the second project of land reclamation in that area, extending the shoreline further into the North Sea. The Rotterdam harbor and large industries, such as chemical plants, are located on or near the Maasvlakte, which was the first reclamation project. Two locations were targeted for an airport. One would be connected to the land as part of the extended harbor works, while the other would be an island close to the coast. The problem with both these sites was that they were difficult to connect to the existing infrastructure at Schiphol. There was also a greater risk of aircraft crashes on chemical plants, and bird-aircraft collisions, due to an abundance of birds close to the coast.[47] Furthermore, the size of certain ships destined to or coming from Rotterdam harbor would force aircraft to execute a steeper rate of descent when landing or a steeper rate of ascent when taking off, to avoid a collision. With the added preference of the Dutch government to concentrate the disadvantages of an airport, this site was also dropped as an option.

Because of the preference for one location, and with the possible development of Schiphol being limited, only one alternative remained. As the Dutch have done for centuries, they turned to the sea. Studies are being conducted as to the possibilities of an offshore airport.

4.2 An offshore airport

The idea of building an offshore airport has been met with enthusiasm from various sides because it can solve all future problems of increased air traffic. Such an airport would be able to operate 24 hours a day, and if the island were big enough, the airport could even be extended to accommodate even more flight movements. Different ideas have been voiced as to size, which runs from just runways to a complete airport, and as to location, which have ranged from a spot near the coast to one outside the territorial sea. Although

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[46] See TNLI, *Strategische beleidskeuze toekomst luchtvaart; Waar ligt de toekomst van de luchtvaart in Nederland?* (Strategic policy choice of future air transport; What will be the future of air transport in the Netherlands?), (The Hague: December 1998) at 19 [translated by author].
[47] See *ibid.* at 18-19.

no final decision has yet been made, a location outside territorial waters is favored because an airport that far out to sea would generate less noise for the coastal area. This location would also limit the danger of bird-aircraft collisions and would prevent damage to the coast resulting from changing currents. Although the size of the airport has also not yet been determined, it is likely that it would be a complete airport, moving Schiphol as a whole to an offshore island.[48] A connection with the mainland would be provided by a high speed underground train traveling through a tunnel. It would take approximately 20 minutes to reach the mainland and 45 minutes to reach Schiphol Airport at its current location, where the infrastructural hub of rail and road would be located.

The construction of such an airport is technically feasible. Various ideas have been voiced, ranging from a solid island composed of sand within dykes, to a floating and even turning island. A decision regarding the sort of island would depend on whether a complete airport or only runways, as suggested earlier, would be built. The Dutch government has now decided that if an offshore airport is to be built, it will have to accommodate all air traffic, with the "old" Schiphol serving only as a connection point for transport by rail and road to and from the offshore airport.[49] This is also the only option accepted by the Dutch air transport sector,[50] which has agreed to contribute financially.[51]

5. Conclusion

The Dutch government has decided to investigate two options further: the expansion of Schiphol and the building of an offshore airport. Although a final decision has not yet been made, one is expected by the end of 1999.[52] In the meantime, further studies are being conducted.

The idea of an offshore airport has created interesting problems. One of those is financing such a project. Part of the cost will have to be born by the Dutch commerce,

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[48] See *ibid.* at 21-22.
[49] See *ibid.*
[50] The Dutch air transport sector consists of Amsterdam Airport Schiphol, Martin Air Holland, Air Holland, KLM, Transavia Airlines and Luchtverkeersleiding (ATC) Netherlands.
[51] See *Standpunt luchtvaartsector over uitbreiding vliegveldcapaciteit* (Position air transport sector on increase of airport capacity), (Amsterdam: 12 November 1998).

including but not restricted to the Dutch air transport sector, and the other part will have to be provided by the Dutch government. This can in part be financed by the sale of land of the current airport for housing projects. It is also likely that funds may be requested and probably acquired from the European Union.

Another problem regarding an offshore airport has to do with international law. Since the island will be outside territorial waters, it has to be ascertained whether such an airport can be built under the United Nations Law of the Sea Convention (UNLOSC) and whether it can be operated under the International Civil Aviation Convention (Chicago Convention). Other regional international law is likely to be applicable, like EU law, and the rules and regulations of Eurocontrol.

In the following chapters the applicable international law for an offshore airport will be discussed and analyzed. Some domestic law of both the Netherlands and some other countries will also be discussed in order to anticipate potential objections of other countries. The final chapter gives an overview of the economic considerations relevant to the decision whether or not to construct such an offshore airport. The next chapter, however, first discusses how different artificial islands contemplated and already in use can help define the legal framework applicable to a future Dutch offshore airport.

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[52] See *supra* note 46 at 27.

CHAPTER 2

FORMER AND FUTURE USES OF ARTIFICIAL ISLANDS

Artificial islands have for some time been contemplated for a variety of reasons, by many countries. With the increase of their populations, States have cast an eye to the sea to gain more space. In some cases, land adjacent to the territory can be reclaimed from the sea, thus extending the coastline seaward. In other cases, some distance between the territory and the island might be necessary and a link to the mainland must be provided.

The purposes of an artificial island can vary; the island might even be used for more than one purpose. Artificial islands can accommodate cities, airports and mining installations, and can be used for research and defense purposes. The size of such an artificial island, as well as its distance from the mainland, will vary, depending on its use.

The Netherlands has regularly regained land from the sea, one of the most notable examples being the extension of Rotterdam harbor into the sea near Hoek van Holland, the so-called Maasvlakte. The country has also closed off a sea, turning it into a lake, and regained land from that lake, the so-called Zuiderzeeproject.[53]

Plans by the Netherlands for an offshore airport in the North Sea date as far back as the early 1970s. This airport was to be located near the islands of the province of Zeeland, within the territorial sea. The plan was abandoned, but now the Netherlands is considering a new offshore airport outside the territorial sea Scheveningen and Noordwijk.

This chapter discusses the plans of different artificial islands and examines in more detail the projects that have already been completed, comparing their status and consequences under international law to those that will be generated by an offshore airport outside territorial waters. First, however, a definition of an artificial island is provided.

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[53] The "Zuiderzeeproject" was a big project in which the Waddenzee was in part turned into a large lake by connecting the western and eastern part of the north of Holland, *i.e.*, the provinces of Noord-Holland and Friesland, with a long dyke. Part of the lake, now called IJsselmeer, was than made into *polders* to create more land. Sluices prevent the lake from overflowing, and locks allow ships access to and from the Waddenzee and the North Sea.

1. Definition of an artificial island

The importance of defining an artificial island is directly linked to its status under international law. More specifically, it is related to whether an artificial island generates its own maritime zones or not.

Already in the early 1930s, it was commonly accepted that an island had its own territorial sea. However, the term "island" had to be defined. The issue was subsequently discussed during the League of Nations Conference for the Codification of International Law. At the Conference, the United Kingdom proposed that an island should be defined as "a piece of territory surrounded by water and in normal circumstances permanently above high water. It does not include a piece of territory not capable of effective occupation and use."[54] Germany considered an island to be "any land which emerges from the sea and is dry".[55] An artificial island that has been joined to a natural island would also be considered as an island.[56] The Dutch, however, suggested that an island be defined as "any natural or artificial elevation of the sea bottom above the surface of the sea at low tide".[57] The final conclusion of the Conference was that "[e]very island has its own territorial sea. An island is an area of land surrounded by water, which is permanently above high-water mark."[58] An artificial island could fall under this definition.

Under the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone,[59] the matter was settled, and a natural island was defined as "a naturally-formed area of land, surrounded by water, which is above water at high-tide".[60] Such an island has a territorial sea.[61] In order to clarify that artificial islands do not have a territorial sea, the 1958 Geneva Convention on the Continental Shelf[62] provides that

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[54] "Conference for the Codification of International Law", League of Nations, C. 47 M. 39, 1929, V., vol. II, at 53, as cited in Naval War College, *International Law Situations with Solutions and Notes 1932* (Washington: United States Government Printing Office, 1934) at 62.
[55] *Ibid.* at 63.
[56] See *ibid.*
[57] *Ibid.*
[58] *Ibid.* at 64.
[59] See *Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 516 U.N.T.S. 205. [hereinafter *TSC*].
[60] *Ibid.* at 212, art. 10(1).
[61] See *ibid.* at 212, art. 10(2).
[62] See *Convention on the Continental Shelf*, 29 April 1958, 499 U.N.T.S. 311.

> [s]uch installations and devices [installations and devices for the exploration and exploitation of the natural resources of the continental shelf], though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.[63]

The new 1982 United Nations Law of the Sea Convention[64] has incorporated the definitions provided under both these Geneva Conventions.[65] An artificial island is, therefore, any non-naturally formed island not possessing maritime zones of its own. It seems likely that an island that has been artificially enlarged will have at least have its own territorial sea and if it can sustain human habitation or economic life of its own, it will also have a exclusive economic zone and continental shelf.[66]

2. Uses for artificial islands

As far back as 1967, Japan had plans to build a coal mining facility on an artificial island, including all the necessary amenities needed by the inhabitants of the island. Even before that, small villages, which were for the most part inhabited by pirates, were erected on piles in the seas of South-East Asia, especially near Indonesia.[67] In the early thirties, plans were also made for artificial airports in the high seas, so aircraft could land and refuel.[68] Technology has overtaken such needs, but the idea for an offshore airport has resurfaced repeatedly.

Apart from cities and offshore airports, artificial islands could be used to accommodate ships that cannot navigate near the coast when fully loaded, complete

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[63] *Ibid.* at 314, art. 5(2). The terms "installations and devices" include artificial islands. This interpretation is reinforced by the new Law of the Sea Convention, art. 60(8) and 80, *infra* note 64. The same interpretation is made by R.R. Churchill and A.V. Lowe, in R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 2nd ed., (Manchester: Manchester University Press, 1988) at 42-43.

[64] See *United Nations Law of the Sea Convention*, 10 December 1982, 21 ILM 1261 at 1272. [hereinafter *LOSC*].

[65] See *ibid.* at 1291, art. 121(1) & at 1281, art. 60(8).

[66] *Ibid.* at 1291, art. 121(3).

[67] See "Regime of the Territorial Sea" (UN DOC. A/CN.4/61) in *Yearbook of the International Law Commission 1954*, UNDOC.A/CN.4/SER.A/1954, vol. 1 (New York: UN, 1959) at 91-94.

[68] See Naval War College, *supra* note 54 at 78.

States, recreational facilities, defense installations, etc.[69] The most common artificial islands are those used for the drilling of gas and oil. Gas and oil generates a lot of money and is, therefore, worth the investment. As deep draft harbors mostly cater to oil and gas tankers, they too are worth the investment. Both types of islands have been built all over the world.

The creation of a State on an artificial island outside territorial waters has so far been less than successful. Created to avoid the laws of a country, particularly its tax laws, and usually having a very small population, they have yet to be recognized as States,[70] but they do exist and people do live there. Examples are New Atlantis, off the coast of Jamaica, which was destroyed by a storm; Isola Delle Rose, which was built just outside Italian territorial waters; and the Duchy of Sealand, created on an old defense island from WW II, off the coast of England.[71]

3. Offshore airports

Offshore airports were discussed as early on as 1930 in the "Neuvième Congrès International de Législation Aérienne", which even adopted a text on the subject of airports on the high seas.[72] The ninth meeting of the "Comité Juridique International de

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[69] See N. Papdakis, *The International legal regime of artificial islands* (Leiden: A.W. Sijthoff International Publishing Company B.V., 1977) at 16, 25, 32 & 33.

[70] See M. Leich, "Judicial Decisions" (1983) 77 A.J.I.L. 144 at 160-166.

[71] See S.P. Menefee, ""Republics of the Reefs:" Nation-Building on the Continental Shelf and in the World's Oceans" (1994) 25 Cal. W. Int'l L.J. 81 at 104-110.

[72] See 9 Congrès Internationale de Législation Aérienne at 233, as cited in Naval War College, *supra* note 54 at 59. The adopted text is as follows:

> Aéroports de Haute Mer
> Article premier- Aucun aéroport de haute mer, créé pour les besoins de la navigation aérienne, qu'il soit la propriété d'un particulier ou d'un Etat, ne peut être établi en haute mer autrement que sous l'autorité et la reponsabilité d'un Etat, que ce dernier ait un littoral maritime ou non.
> Art. 2- L'Etat sous l'autorité duquel se trouve place cet aéroport de haute mer en règle les conditions d'accès et d'exploitation.
> Si l'aéroport de haute mer est ouvert à l'usage public, aucune discrimination ne peut être faite, au point de vue de l'accès, sur la base de la nationalité.
> Art. 3- Les Etats doivent porter réciproquement à leur connaisance leurs projects de création d'aéroports de haute mer.
> Au cas où dans un délai à determiner quelque Etat s'y opposait le différend serait porté devant la Société des Nations et tranché par elle.

L'Aviation" at Budapest also adopted a resolution on an airport in the high seas, in this case, a floating airport.[73] A decree of Portugal of that same year defined "aerodrome" as "any land or water surface set apart for the taking off or arrival of aircraft".[74]

From 29 April to 2 May 1973, a Conference, sponsored by the New York section of the American Institute of Aeronautics and Astronautics, the Federal Aviation Administration and the International Water Resources Association, was held on the subject of offshore airport technology, in Bethesda, Maryland.[75] During this Conference, many different countries presented plans for offshore airports, including the United States, Japan, Australia, Israel, The Netherlands, the United Kingdom and Canada.

To date, only two have indeed been built and are open for operation: Kansai International Airport in Japan and Chep Lap Kok in Hong Kong. A third offshore airport, called Inchon International Airport, is being built in Korea, in Kyung-Gi Bay, approximately 15 miles from the port city of Inchon.[76] Construction of a fourth offshore airport near Nagoya, in Japan, will start this year and should be operational in 2005.[77]

The offshore airports of Japan and Hong Kong have been built within their respective territorial seas. Kansai International Airport is located in Osaka Bay, 30 miles west of the Port of Osaka, but less than 4 kilometers off the coast.[78] Studies were commenced in 1968, and construction of the airport began in 1987.[79] This included building a link with the mainland, in the case of Kansai International Airport, a bridge with road and rail connections.[80] Chek Lap Kok Airport was built partly on the existing

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> Si pour une raison quelconque la Société des Nations ne pouvait être utilement saisi – ou si elle ne parvenait pas à regler le différend – les parties seront tenues de recourir à la procedure de l'arbitrage obligatoire.

[73] See XV Droit Aérien, at 24, as cited in Naval War College, *ibid.* at 60. The text adopted is nearly equal to the text adopted at the Congrès Internationale de Législation Aérienne.

[74] Naval War College, *ibid.* at 72.

[75] See J. Grey, ed., *First International Conference on Offshore Airport Technology* (New York: American Institute of Aeronautics and Astronautics, 1973).

[76] See R. Rowe, "Seoul Mates" *Airports International* 30:4 (May 1997) 26.

[77] See "New Japanese Offshore Airport On Track at Nagoya, Lower Costs Envisioned" *Airports* 16:17 (27 April 1999) at 180.

[78] Psee rovincie Noord-Holland, *Strategische Luchtvaartontwikkeling; De luchthavens in Osaka en Hong Kong; Verslag van de oriëntatiereis van de provincie Noord-Holland* (Strategic airtransport development; The airports in Osaka and Hong Kong; Report of the orienteering trip of the Province of Noord-Holland) (7-12 October 1997) at 9 & 11. [translated by author].

[79] See *ibid.* at 10.

[80] See *ibid.* at 10 & 11.

island of Chep Lap Kok, just north of Lantau island.[81] This island was enlarged to accommodate the airport. A tunnel, bridge, railroad and highway have been built to connect the airport with Hong Kong island, a distance of approximately 34 kilometers, and the other islands.[82]

Inchon International Airport is scheduled to be operational in 2001.[83] Reclamation of land for the enormous airport, which is even bigger than Chep Lak Kok and Kansai International Airport,[84] started in 1992.[85] The airport hopes to open with two runways, after which two more can be built.[86] During that time, the old Seoul Kimpo Airport will remain open, probably for regional and domestic flights.[87]

Chubu International Airport, near Nagoya, will be the second offshore airport and third airport open twenty-four hours a day in Japan. The airport will be built in the same manner as Kansai International Airport but has the space necessary for an additional runway in the future.[88] The airport will also be located in the territorial sea, with part of the coastal area expanded by reclaiming land.

Proposals for offshore airports, which would be located within territorial waters of the United Kingdom and Australia, have been put forward by proponents of the idea. In the United Kingdom, plans have been put forward for an airport on the Goodwin Sands. These sandbanks, which are located 4 miles off the eastern coast of Kent, would support both an airport and a seaport. Because of the size of the sandbanks, the runways would be situated approximately 6 miles off the coast and the airport would be open 24 hours a day. The plan, called the European Transport Interchange, also provides for an additional railway tunnel to France.[89] However, the airport is not likely to be built because there is a strong environmental lobbying group protesting against it.

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[81] See *ibid.* at 16 & 19.
[82] See *ibid.* at 17 & 18.
[83] See Rowe, *supra* note 76 at 27.
[84] Inchon International Airport will be 5.516 hectares, whereas Chep Lap Kok and Kansai International Airport are 1,248 and 1,300 hectares respectively. See *ibid.* at 26.
[85] See *ibid.*
[86] See *ibid.*
[87] See *ibid.* at 28.
[88] See *supra* note 77; *Project Plan*, online: Central Japan International Airport Company <http://www.cjiac.co.jp/eng/ejigyou/ejigyou02.html> (date accessed: 1 August 1999).
[89] Information courtesy of G.J. Keur, during interview (7 May 1999).

"Sydney Offshore" is a plan put forward in Australia to build an offshore airport just north of Botany Bay, approximately 500 meters from the coast. This airport would be able to operate 24 hours a day.[90] Sydney's Kingsford Smith Airport is already becoming congested, despite the opening of a third runway in 1991, and complaints from the community regarding noise levels have increased.[91] Proposals for a second airport have been put forward since the seventies. The Australian government has been considering sites on land for a second airport, and it is now awaiting an assessment of the different environmental impact studies. At this time, an offshore airport is considered to be a rather expensive proposition since land in Australia is cheap.[92]

Older plans for offshore airports included those of New York and San Diego in the United States. These airports would have been situated outside the territorial sea, as at that time the breadth of the US territorial sea was 3 miles.[93]

The New York Offshore Airport Feasibility Study started in 1971, sponsored by the Federal Aviation Administration (FAA). The study concentrated on the rationality of building an offshore airport approximately 3.5 miles off the coast, south of the barrier beaches of Long Island.[94] The island would have served as an airport with 12 runways, a deep water port and an electrical power plant. The San Diego Offshore airport study investigated seven possible sites for an offshore airport, some of which were located 3 miles off the California coast.[95] Neither of the offshore airports was built.

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[90] See "A Bold New Plan for Sydney's Airport Woes" *Engineers Australia Magazine* (March 1997), online: Pacific Airport Group <http://www.tierney.com.au/pag/media/03airpoz.html> (date accessed: 22 July 1999).

[91] See *ibid.*

[92] See V. Pavlovic, "Plans Mooted for an Offshore Sydney Airport at Malabar" *Business Online Sydney* (16 June 1997), online: Business Online Sydney <http://www.businesssydney.com.au/jun16.htm> (date accessed: 22 July 1999).

[93] The U.S. extended its territorial sea to 12 miles in 1988. See Presidential Proclamation 5928 of 27 December 1988, cited in J. Astley III and M.N. Schmitt, "The Law of the Sea and Naval Operations" (1997) 42 A.F.L. 119 at 130.

[94] See L. Lerner & M. Graham, "New York Offshore Airport Feasibility Study" (executive brief) (1973), cited in W.H. Lawrence, "Superports, Airports and Other Fixed Installations on the High Seas" (1975) 6 J. Marit. L. & Com. 575 at 578. See also L. Lerner, "Current Conditions of the New York Offshore Airport Study (As taped on a briefing to the FAA on March 2 1973)" in *First International Conference on Offshore Airport Technology, Bethesda, Maryland, 29 April-2 May 1973* (New York: American Institute of Aeronautics and Astronautics, 1973) 120 at 122 & 124. [hereinafter *Offshore Airport Conference*]

[95] See C.J. Lord, "San Diego Offshore Airport Study" in *Offshore Airport Conference, ibid.* at 133-134 & 139-141. See also *Floatport*, online: Float Incorporated <http://www.floatinc.com/WhatItIs.html> (date accessed: 22 July 1999).

4. Current projects which can serve as an example

4.1 Denmark

Denmark consists of a peninsula and several islands. To connect the different islands to the mainland, Denmark has started to construct tunnels and bridges. However, the Danish islands effectively divide the sea into lanes to and from the Kattegat and the North Sea on one side and the Baltic Sea on the other side. The bridges, therefore, span the sea-lanes, which are important for maritime traffic, especially from Finland, Poland and the Baltic States. The biggest parts of the Danish infrastructural project are the bridge that spans the Store Baelt or Great Belt, connecting the islands of Funen and Sealand, and the bridge and tunnel that will connect Copenhagen in Denmark with Malmö in Sweden.

Plans for the bridge over the Great Belt were already put forward in the early 1970s, and the foreign embassies were informed of them in 1977.[96] A law to construct the bridge was passed on 10 June 1987, followed by another notification to the foreign embassies on 30 June 1987. In 1989, the Danish authorities adopted the final version of the plan, which included a bridge, 6.6 kilometers in length. At the point where the bridge would cross the deep water navigational channel from the Kattegat to the Baltic Sea, the bridge was to be 65 meters high.[97]

In the summer of 1989, a Finnish company, which among other things built drilling rigs, notified the Finnish government that some of their mobile offshore drilling units were 150 meters high and would, therefore, be unable to pass under the new bridge. When addressed, the Danish government pointed to an alternative passage, namely that through the Øresund, which according to the Finnish government would be too shallow.[98] The case was brought before the International Court of Justice (ICJ) by the Finnish

[96] See M. Koskenniemi, "Case Concerning Passage through the Great Belt" (1996) 27 Ocean Dev. & Int'l L. 255 at 259.
[97] See *ibid.* at 257.
[98] See *ibid.* at 257-258.

government on 17 May 1991.[99] A settlement was reached between the two countries on 3 September 1993, before the case went before the court.[100]

Although the case, which deals with passage through territorial waters, was settled before it could reach the court, it is still interesting to analyze the arguments of the two countries because they deal with the ability and permissibility of a coastal State to infringe upon the rights of third States. At that time the LOSC had not yet entered into force and the two countries used the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. As the case was settled, the court did not render an opinion as to the applicability of the LOSC, but it is likely that it would have had at least some impact, including the requirement of the LOSC to consider the interests of the coastal State.

The two countries agreed that the dispute centered around a strait used for international navigation, as defined by the ICJ in the *Corfu Channel* case.[101] A special treaty on the passage through the Danish straits[102] was also applicable, as was the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. Finland claimed that the right of transit passage under the LOSC had evolved into customary international law and that the LOSC regime would, therefore, be applicable.[103]

The reason Finland accepted the settlement was two-fold.[104] First, it was not very likely that the ICJ would order the plans of the bridge be changed, considering the amount of development that had already taken place. Secondly, the ICJ might have applied its ruling in the *North Sea Continental Shelf* case on equitable principles,[105] meaning that Finland would be required to pay part of the costs for the necessary modifications.

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[99] See *ibid.* at 260.

[100] To settle the case, Denmark agreed to pay Finland 90 million Danish Kroner, for which Finland in return, withdrew the case. See *ibid.* at 255.

[101] See *Corfu Channel Case (U.K.* v. *Albania)* [1949] I.C.J. Rep. 15 at 28.

[102] See *Traité entre le Danemark, d'une part, et l'Autriche, La Belgique, La France, La Grande-Bretagne, Le Hanovre, le Grand-Duché de Meckelenbourg-Schwerin, Le Grand-Duché d'Oldenburg, Les Pays-Bas, La Prusse, La Russie, La Suède et La Norwège et les Villes Anséatiques, d'autre part, relatif au rachat des droit du Sund*, 14 March 1857, reproduced in G.F. Martens, *Nouveau recueil général de traités et des autres actes relatifs aux rapports de droit international*, 16 part II at 345, cited in Koskenniemi, *supra* note 96 at 261.

[103] See *ibid.* at 261.

[104] See *ibid.* at 278.

[105] See *North Sea Continental Shelf Case (Federal Republic of Germany* v. *Denmark and Federal Republic of Germany* v. *the Netherlands)* [1969] I.C.J. Rep. 1 at 46-47.

Denmark is now working to connect Copenhagen in Denmark and Malmö in Sweden. This link, which will be 16 kilometers in length, will consist of a tunnel, an artificial island and a bridge. The artificial island will be four kilometers in length, while the bridge will be nearly eight kilometers in length, with one kilometer of it being elevated to a navigational height of 57 meters, to accommodate the new Flinte Navigation Channel. The tunnel on the other side of the artificial island will allow for navigation between the islands of Salthom and Sealand, through the Drogden Navigation Channel.[106] However, both these navigation channels are shallower than that of the Great Belt.[107]

Denmark has acknowledged the rights of other States, including rights of passage through an international channel, in planning and building these structures. Nevertheless, the rights of passage of third countries will be violated by these projects, as has been shown by the case with Finland. Even though there has been some friction between the two countries, the case has been brought to a satisfactory conclusion. However, the fact that Finland had been notified but reacted very late had a significant effect on the outcome of this case. There is a lesson to be learned from this case by other countries facing similar situations in the future.

4.2 LOOP and other deep draft ports

The Louisiana Offshore Oil Port, Inc. (LOOP) is a marine terminal with three floating single point moorings, located twenty miles off the coast of Louisiana. Very large and ultra large crude carriers, *i.e.*, mammoth tankers, dock at the mooring points to unload their cargo of crude oil. These tankers are too big to enter the harbor, and without LOOP, smaller tankers would have had to be used, adding to the congestion of the harbors and resulting in a decreased level of safety. The plan for an offshore super-port to accommodate such tankers was launched in the late sixties and early seventies. Although more sites were proposed, LOOP was the only port built in the United States. Construction of the port began in 1978, and it opened for operation in May 1981.

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[106] See Öresund Marine Joint Venture, *The Øresund Link, Contract No. 2, Dredging & Reclamation* (August 1997) at 4-5 & 12-13.

[107] The navigation channels in the Öresund are 7.7 meters deep, whereas the navigation channel through the Great Belt is 15 meters deep. See Koskenniemi, *supra* note 96 at 272.

LOOP is located 20 miles from the coast and is, thus, outside the US territorial waters. Nevertheless, the United States has jurisdiction over this installation and the surrounding area, under the Deep Water Port Act 1974, as subsequently amended.[108] That area is obviously larger than the 500-meter safety zone allowed for under Article 60 LOSC, and Article 5 of the 1958 Continental Shelf Convention, to which the United States is a party.[109] The Secretary of Transportation designates a zone of appropriate size around the deepwater port, with the relevant international regulations in mind.[110]

Another artificial island harbor is I'll du Parfond, located 17 miles off the coast of Le Havre and as such outside French territorial waters.[111] This deep draft harbor also caters to very large and ultra-large crude carriers.

4.3 Sea Launch

Sea Launch is a project that has sometimes been employed to illustrate the use of the high seas, which limits the freedoms of other States. Three consortia of the United States, Norway and the Ukraine, respectively, developed Sea Launch.[112] The project consists of a ship, Sea Launch Commander, and an oil platform that has been rebuilt to accommodate a launch platform. Sea Launch Commander will tow the platform from its harbor at the British Christmas Islands to the Equator, from where the launch will be executed. Both the launch rocket and the payload will be carried onboard the ship to the

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[108] To this end, the Secretary of Transport issues licenses for the ownership, construction and use of a deepwater port (s. 4 as amended). A deepwater port is defined as meaning (s. 3(10) as amended):

> any fixed or floating manmade structures other than a vessel, or any group of structures, located beyond the territorial sea and off the coast of the United States and which are used or intended for use such as a port or terminal for the transportation, storage, and further handling of oil for transportation to any State, except as otherwise provided in section 23, and for other uses not inconsistent with the purposes of this title, including transportation of oil from the United States outer continental shelf.

See: *Deepwater Port Act 1974*, reproduced in 14 I.L.M.153, as amended by the *Deepwater Port Modernization Act, Title V of the Coast Guard Authorization Act* Public Law 104-324 (1996), online: LEXIS (Genref, PUBLAW).

[109] See Astley III & Scmitt, *supra* note 93 at 121.

[110] See *supra* note 108, s. 10(d) as amended.

[111] See N. Papadakis, *The International Legal Regime of Artificial Islands* (Leiden: A.W. Sijthoff Publishing Company B.V., 1977) at 26.

[112] The companies are Boeing, Kvaerner Maritime and RCS Energia and KB Yuzhnoye/PO Yuzhmash, respectively. See B.A. Smith, "Sea Launch Prepares for Demonstration Mission" *Aviation Week & Space Technology* 149:22 (30 November 1998) 56.

Christmas Islands, where both will be transferred to the launch platform.[113] The theory behind the project is that a launch from the Equator will shorten the trajectory to the geostationary orbit, hence requiring less fuel. As a result, the launch will be less expensive.[114]

As would be the case with an offshore airport, during the launch, air traffic and navigation in the immediate vicinity of the launch platform would be either severely limited or suspended. However, this limitation of the freedoms of third countries would be only temporary. If the platform were to remain in place at its location on the Equator, the situation would be different. Under such circumstances, a permanent part of the high seas would be occupied. However, at this time this is not a concern and will only become one if the company gets so many contracts that it can no longer return to its base and still perform the launch on time. If that happens, extra investment will be required to create the necessary infrastructure at the location on the Equator.[115]

4.4 EuroAirport Basel-Mulhausen

EuroAirport Basel-Mulhausen is the only bi-national airport in the world and is regulated under a treaty.[116] Its legal status is based on a bilateral treaty between Switzerland and France of 4 July 1949.[117] The airport is located three kilometers from the Swiss border in French territory. It functions as a French airport, a Swiss airport, and a joint international airport for the common interests of both countries. The French supplied the land and granted Switzerland the same traffic rights as if the airport were located on Swiss territory. In return, the Swiss pay the costs of any investment.

As it is also located near the German border, the airport attracts many Germans, and there have been talks of making the airport tri-national. In fact, some Germans are now members of the consultative committee, although they are ineligible to vote. So far,

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[113] See *ibid.*
[114] See *ibid.*
[115] See *ibid.*
[116] See J. Bentzien, "Die völkerrechtliche Sonderstellung des Flughavens Basel-Mülhausen" (1993) 42 Z.L.W. 401 at 401-402; R. Rowe, "Border Country" *Airports International* 31:3 (April 1998) 16. Geneva Airport is also bi-national (French and Swiss), but this is not regulated under a treaty.

Germany has not become a full member and will probably not become one in the immediate future.[118]

The existence of this airport proves that an airport can be run on a bilateral or even on a regional level. The bi-national airport functions like an international airport and can be operated under international law. Such a solution might also be interesting for an offshore airport. Since especially the airports around London are becoming increasingly congested, the investment of an offshore airport and its operation could be shared with one State, like the United Kingdom, or with other European countries. The existence of EuroAirport Basel-Mulhausen illustrates that even if international law does not provide for such a problem, it is not insurmountable. In this case, the situation was further complicated by the fact that France is a Member State of the European Union and Switzerland is not.

5. Conclusion

Offshore airports outside the territorial waters of a coastal State have yet to be built. However, other projects outside territorial waters have already been established, as have their regulatory frameworks under both domestic and international law. Those projects provide insights concerning likely problems and solutions of an offshore airport. They also give some idea as to the reactions of other States to such projects, and possible reactions to an offshore airport.

The legal framework dealing with artificial islands has not been completely determined and is, therefore, not always clear. Thus, States usually create a regulatory framework based on an interpretation of the existing law that is the most favorable for the State. The foregoing examples have outlined some possible interpretations. They also show that the international legal framework is established after construction has been completed.

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[117] See *Convention Franco-Suisse relative à l'exploitation de l'aéroport de Bâle-Mulhause, àBlotzheim*, 4 July 1949, R.O. 1950, 1360. See also G. Ladet, *Le statut de l'aeroport de Bale-Mulhausen* (Paris: Pedone, 1984).

[118] See Bentzien, *supra* note 116 at 401 & 414-417. See also Rowe, *supra* note 116 at 17.

The different examples of offshore airports point out that they have both been thought of and built as well. Those already constructed or in the last stages of planning are all located within territorial seas. This has some advantages: easier access to and from the island, more rights for the coastal State and sometimes lower construction costs. But there are disadvantages as well: a lot of noise, limited use of the coastal area and lack of opportunity to use the island for more than one purpose because of its location close to the coast. The government involved must weigh the advantages and disadvantages, taking into account the experiences of other countries.

The Danish infrastructural project proves that a project that infringes on the freedoms of other States can still be built. The rights of third States must be considered, but they do not necessarily outweigh the interests and rights of the coastal State. The ideal situation would be for the two to be one and the same, *i.e.*, that the coastal State, in exercising its rights, would benefit third countries. With an offshore airport outside territorial waters such a situation can be achieved in two ways. The offshore airport could become a truly international airport by sharing its costs and benefits with other countries, as is the case with EuroAirport Basel-Mulhausen. Second, the offshore airport outside territorial waters could be used as a precedent by other countries dealing with environmental and congestion problems similar to those of the Netherlands, concerning their land located airports. Either option would provide a more sympathetic stance of third countries to such an airport.

CHAPTER 3

THE LAW OF THE SEA CONVENTION

When considering whether to build an offshore airport, the first legal framework available to regulate part of the issue is the law of the sea. The law of the sea, which has evolved through State practice to customary international law, was codified [119] in the four 1958 Geneva Conventions on the Law of the Sea.[120] Not all the issues were solved, and a second Conference on the law of the sea in 1960 failed to produce an agreement. In 1973 negotiations started again at a third conference on the law of the sea. After nine years of intermittent negotiations, the 1982 United Nations Law of the Sea Convention (LOSC)[121] was agreed upon. The Convention entered into force on 16 November 1994.

The LOSC regulates many of the issues left unsettled by the 1958 Geneva Conventions. It also codified and clarified existing State practice and customary international law, and created entirely new law. The Convention divides the sea into different maritime zones, providing for their breadth and the legal framework regulating the zones. Apart from this, the Convention provides a dispute settlement regime, having created an international tribunal for the law of the sea, but leaves States free to choose the way in which they will settle their disputes.

This chapter discusses the different maritime zones and their legal framework, which are relevant to the construction and operation of an offshore airport. It analyzes

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[119] The law of the sea has developed through customary law and treaties. One of the first authors to write about it was Hugo Grotius in "*Mare Liberum*", the famous chapter of his book "*De jure praedae commentarius*". It claimed the freedom of the sea and provided the Dutch East India Company with the legal arguments to end Portugal's monopoly over trade and shipping with the East Indies. As technology developed, States started to claim more jurisdiction. Overall, however, a 3-mile territorial sea with somewhat of a contiguous zone for the purpose of applying taxation laws was accepted. When the potential of the continental shelf became evident, States started to claim the continental shelf for their exclusive use. The 1958 Geneva Conventions, while codifying many issues, did not reach a conclusion concerning the breadth of the territorial sea, among other issues. A conference on the Law of the Sea in 1960 (UNCLOS II) also failed to provide answers. Dissatisfaction with the 1958 Geneva Conventions in the light of new developments supported a third conference on the Law of the Sea, UNCLOS III, which started in 1973 and ended in 1982 with the adoption of the 1982 LOSC.

[120] The four 1958 Geneva Conventions are:

- *Convention on the Territorial Sea and the Contiguous Zone, supra* note 59;
- *Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 82;
- *Convention on the Continental Shelf, supra* note 62;
- *Convention on Fishing and Conservation of the Living Resources of the High Seas*, 29 April 1958, 559 U.N.T.S. 285.

the potential problems and suggests likely solutions. First, however, a brief introduction is given on all the maritime zones under the LOSC.

1. The different zones under the LOSC

Under the LOSC, the following zones exist: the internal waters, the territorial sea, the contiguous zone (CZ), the exclusive economic zone (EEZ) and the continental shelf. All zones are measured from the baseline, which is ordinarily the low tide line, unless the coastal State has a special coastline, as determined by the LOSC.[122] The internal waters are the waters on the landward side of the baseline; all other zones are on the outward side of the baseline.

The territorial sea measures a maximum of 12 nautical miles[123] from the baseline.[124] The CZ measures at most 24 miles from the baseline, but is also contiguous to the territorial sea.[125] The EEZ is beyond and adjacent to the territorial sea and cannot extend beyond 200 miles from the baseline.[126] The EEZ and the CZ, therefore, overlap in an area of 12 miles adjacent to the territorial sea. Beneath these zones is the continental shelf, which has a minimum breadth of 200 miles, measured from the baseline, or a maximum breadth of 350 miles if the continental shelf of the coastal State stretches that far.[127] Beyond these zones are the high seas, where the freedoms of the high seas apply.[128]

The Netherlands ratified the LOSC in 1996. Under the LOSC all zones must be declared, except for the territorial sea and the internal waters. A Dutch decree to declare the EEZ will soon be approved.[129] However, the Netherlands has not yet declared a CZ.[130]

When constructing an offshore airport outside the territorial sea, the establishment of a CZ might be helpful. Of the other States bordering the North Sea, Belgium has a 12-

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[121] *United Nations Law of the Sea Convention, supra* note 64.
[122] See *ibid.* at 127, arts. 5-7.
[123] When miles are mentioned in this chapter, nautical miles are meant. One nautical mile is 1.852 kilometers.
[124] See *LOSC, supra* note 64 at 1272, arts. 3 & 4.
[125] See *ibid.* at 1276, art. 33.
[126] See *ibid.* at 1279, arts. 55 & 57.
[127] See *ibid.* at 1285, art. 76.
[128] See *ibid.* at 1286, art. 87.
[129] Interview with E. Soetendal (28 April 1999).
[130] See T. Treves, ed., *The Law of the Sea; The European Union and its Member States* (The Hague: Martinus Nijhoff Publishers, 1997) at 375.

mile territorial sea, and a 200-mile fishery zone, but has not yet enacted an EEZ or a CZ under the LOSC.[131] The United Kingdom has a 12-mile territorial sea, has not claimed a CZ, and has only a 200-mile fishery zone, which is the predecessor of the EEZ.[132] Finally, Denmark has only a 3-mile territorial sea, due to its location. It has, however, also enacted a 4-mile customs zone and a 24-mile nature conservation zone, which are in fact a combination of the CZ and the EEZ. Like the United Kingdom, Denmark also has a 200-mile fishery zone.[133]

2. History and context of the relevant zones

2.1 Territorial sea

Although the Dutch government has not yet decided on a location for the offshore airport, studies have been limited to locations outside or partly outside the territorial sea.[134] Nevertheless, it is important to realize the extent of the rights and obligations under the regime of the territorial sea as opposed to those of other zones.

The breadth of the territorial sea was ambiguous before the entry into force of the LOSC. Most countries had and accepted a 3-mile limit as a minimum. Some countries claimed much more, even up to 200 miles. Such claims were, however, strongly opposed by other (seafaring) nations.[135] The LOSC settled this matter by limiting the territorial sea to 12 miles, measured from the baseline. This ambiguity stemmed from the fact that States with a seafaring and trade oriented practice favored as much freedom of the high seas as possible and, therefore, a narrow territorial sea. Other nations preferred a large territorial sea because of the associated sovereign rights, mostly for reasons of national security.

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[131] See *ibid.* at 41,50, 54 & 57.
[132] See *ibid.* at 525, 532 & 534.
[133] See *ibid.* at 99.
[134] Locations considered are between 10 and 30 km from the coast. An island further than 20 km out to sea is likely, due to the delicate nature of the dunes, the number of birds near the coast and migrating along the coast and the amount of noise generated due the reflections from the water. See Toekomstige Nederlandse Luchtvaart Infrastructuur Project (TNLI), *Strategische beleidskeuze toekomst luchtvaart; Waar ligt de toekomst van luchtvaart in Nederland?* (Strategic policy choice future air transport; What will be the future of air transport in the Netherlands?)" (December 1998) [translated by author].

The sovereignty of the coastal State over its territorial sea extends to the airspace above those waters and the deep sea bed and subsoil beneath.[136] The rights of the coastal State are, therefore, very broad, with the exception of the right of innocent passage.[137] The right of innocent passage is clearly defined by the LOSC as passage that "is not prejudicial to the peace, good order and security of the coastal State."[138] Thereafter, the Convention provides examples of activities that are not considered to be innocent. The right of innocent passage for third countries is, therefore, quite limited, especially regarding the passage of warships and submarines. This right does not extend to the airspace; airplanes do not have such a right.[139] Only international law, especially the LOSC, limits the rights of the coastal State in its territorial waters.[140] In its internal waters, however, the coastal State has even more rights, as no right of innocent passage exists there for third countries. Outside the territorial sea, the rights of the coastal State diminish in favor of more freedoms for other States and their vessels.

2.2 Contiguous zone

As with the territorial sea, the CZ already existed before the 1958 Geneva Conventions. In this belt of sea adjacent to the territorial sea, States exercised jurisdiction and control, mostly with regard to customs and fiscal regulations. Such zones were specifically created to combat smuggling. One of the first countries to have such a regulation for revenue purposes was the United Kingdom, in 1718.[141] Other countries followed suit and although the regulations in question were domestic, it became part of customary international law, allowing certain powers to be exercised beyond the territorial sea. As of 1935 almost every country in the world had a special customs zone.[142]

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[135] See Naval War College, J.A. Roach & R.W. Smith, *International Law Studies 1994 Excessive Maritime claims*, vol. 66 (Newport: Naval War College, 1994), for examples of claims protested against by the U.S.
[136] See *LOSC*, *supra* note 64 at 1272, art. 2.
[137] See *ibid.* at 1273-127, arts. 17-32.
[138] *Ibid.* at 1274, art. 18.
[139] This is because of the regime of civil aviation. See chapter 4 *infra*.
[140] See *LOSC*, *supra* note 64 at 1272, art. 2(3).
[141] See Naval War College, *International Law Situations with solutions and notes*, (Washington: United States Government Printing Office, 1940) at 63.
[142] See *ibid.* at 64.

In 1958 the concept of the CZ was codified in the Geneva Convention on the Territorial Sea and the Contiguous Zone and was almost *verbatim* copied in the LOSC.[143] Under the LOSC, however, the maximum breadth of the zone was extended from 12 miles to 24 miles.[144] The framework of the CZ gives States the power to "(a) prevent infringement of its customs, fiscal, immigration and sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea."[145]

This provision gives States extra control regarding vessels infringing national laws of a country just outside the territorial sea. This rule could be used in relation to an offshore airport, thereby assuring compliance with national regulations. A State may choose to claim this zone even though many States, including the Netherlands, have not yet done so.

2.3 Exclusive Economic Zone

The EEZ is subject to a specific and new legal regime *sui generis*. This regime is laid down in Part V of the LOSC. A zone claimed for economic considerations, however, is not entirely new. Such zones existed already in a more restricted form before the Geneva Conventions of 1958 and were usually connected with the resources of the continental shelf and/or fisheries.

In 1945, US President Truman was the first to make such a claim in the two so-called Truman Proclamations.[146] In the Proclamation with Respect to the Natural Resources of the Subsoil and Sea-bed of the Continental Shelf, the United States claimed jurisdiction and control over the mineral resources of the continental shelf up to a depth of approximately 200 meters. The Proclamation with Respect to Coastal Fisheries in Certain Areas of the High Seas claimed certain fishery conservation zones beyond the US territorial sea, where only US nationals were permitted to fish. Other nations soon

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[143] See *LOSC, supra* note 64 at 1276, art. 33.
[144] See *TCS, supra* note 59 at 220-222, art. 24.
[145] *LOSC, supra* note 64 at 127, art. 33.
[146] See D.J. Attard, *The Exclusive Economic Zone in International Law* (Oxford: Clarendon Press, 1987) at 1-3; R.W. Smith, *Exclusive Economic Zone Claims; An Analysis and Primary Documents* (Dordrecht: Martinus Nijhoff Publishers, 1986) at 25-26.

followed this example and staked their own claims. States like Argentina, Chili, Peru and Panama took it one step further and claimed sovereignty over the continental shelf and the waters above, with a minimum limit of 200 miles.[147]

In 1972 a Conference of Caribbean States on problems of the sea ended in the adoption of the Santo Domingo Declaration.[148] The States claimed a 12-mile territorial sea and the exercise of exclusive economic jurisdiction beyond that, up to a limit of 200 miles. Through the Declaration they tried to reconcile the differences between States claiming a 12-mile territorial sea and those claiming a 200-mile territorial sea. This was made easier by the fact that the States claiming a 200-mile territorial sea already had a somewhat different regime beyond 12 miles, *i.e.*, the accepted breadth of the territorial sea. The African States followed suit and claimed a 200-mile EEZ, which was endorsed by the Organization of African Unity and brought up during the conference negotiations of the law of the sea.[149]

The EEZ, as regulated under the LOSC, gives the coastal State many rights in connection with the economic uses of the sea. Article 56 LOSC describes them as follows:

> 1. In the exclusive economic zone, the coastal State has:
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
> (b) jurisdiction as provided for in the relevant articles of this Convention with regard to:
> (i) the establishment and use of artificial islands, installations and structures;
> (ii) marine scientific research;
> (iii) the protection and preservation of the marine environment

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[147] See W.C. Extavour, *The Exclusive Economic Zone; A Study of the Evolution and Progressive Development of the International Law of the Sea* (Geneva: Institut Universitaire de Hautes Etudes Internationales, 1978) at 74.

[148] See *Declaration of Santo Domingo*, 27 U.N. GAOR, Supp. 21 at 70, as cited in D.E. Pollard, "The Exclusive Economic Zone- The Elusive Consensus" (1975) 12 San Diego L. Rev. 600 at 605-606. See also Extavour, *ibid.* at 149-150. States attending the conference were: Barbados, Colombia, Costa Rica, Dominican Republic, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Trinidad and Tobago and Venezuela. El Salvador and Guyana had observer status because of their close ties with some of the attending States.

[149] See Pollard, *ibid.* at 606-607.

> (c) other rights and duties provided for in this Convention
> 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
> 3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.[150]

The coastal State has, therefore, many rights relating to the EEZ. Rights of other States in the EEZ are those of the high seas under Article 87 LOSC, applied *mutatis mutandis* to the EEZ in Article 58 LOSC. These rights are listed in Article 58 LOSC as:

> the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this convention.[151]

Since the rights of third States restrict those of the coastal State, they must be considered by the coastal State when planning the construction and the operation of an offshore airport.

2.4 The dispute settlement regime

The new Tribunal on the Law of the Sea, which is situated in Hamburg, Germany, was created and is regulated under Annex XI to the LOSC.[152] With the signing or ratification of the LOSC, or accession to the LOSC, States can choose which procedure they want to follow in case of a dispute.[153] They can also make this choice at any other time. The

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[150] Part VI LOSC is the regulation of the continental shelf. See *LOSC*, *supra* note 64 at 127, art. 56.
[151] *Ibid.* at 1279, art. 58.
[152] See *Annex VI Statute of the International Tribunal for the Law of the Sea*, *supra* note 64 at 1345.
[153] *LOSC*, *supra* note 64 at 1322-1323, art. 287(1), states:

> 1. When signing , ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
> (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
> (b) the International Court of Justice;
> (c) an arbitral tribunal constituted in accordance with Annex VII;

dispute settlement regime only concerns the interpretation and application of this Convention. Hence, if an offshore airport outside territorial waters is opposed on the basis of the LOSC, the chosen dispute settlement regime will be applicable. The Netherlands has selected the ICJ for dispute settlement.[154] Of the other States surrounding the North Sea, Belgium has picked both the ICJ and the International Tribunal for the Law of the Sea.[155] The United Kingdom and Norway have opted solely for the ICJ and Germany has chosen the International Tribunal for the Law of the Sea, the Arbitral Tribunal under Annex VII of the Convention and the ICJ, in that order of priority.[156] Denmark has not yet made a decision.[157]

The legal status of the EEZ is not entirely evident, and as a result the interpretations vary. Some States see the EEZ as an extension of the territorial sea, with some rights for other States.[158] Others view the EEZ as part of the high seas with certain economic rights belonging to the coastal State.[159] A third group considers the EEZ a special area, with its own legal regime, independent of the territorial sea and the high seas.[160] To accommodate all these views, Article 59 LOSC was drafted. This so-called "Castañada formula" is named after Ambassador Casteñada of Mexico, who created this compromise.[161] It states:

> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community a whole.[162]

(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories specified herein.

[154] The Netherlands made a declaration in accordance with *LOSC*, *supra* note 64 at 1327 art. 310, stating that it chooses the International Court of Justice. See *Settlement of Disputes Mechanism*, online: United Nations <http://www.un.org/Depts/los/los_sdm1.htm> (date accessed: 17 February 1999).

[155] See *ibid.*

[156] See *ibid.*

[157] See *ibid.*

[158] See Attard, *supra* note 146 at 61.

[159] See *ibid.*

[160] See *ibid.* at 62

[161] See *ibid.*

[162] *LOSC*, *supra* note 64 at 1280, art. 59.

Although rather vague, the Article acknowledges the existence of residual rights not covered by the LOSC. The Convention is, therefore, not static and can accommodate rights not directly regulated by the Convention like an offshore airport.[163]

3. Excessive claims

Several States have made excessive claims regarding different zones. This was not always been done on purpose, as many countries adapted their domestic legislation during the LOSC negotiations, after which the expected result was altered, while the domestic legislation was not. The United States, especially, has diligently published such claims and their arguments against them, while at the same time asserting their own claims by exercising their freedoms. Excessive claims can be classified as those concerning territorial seas, those concerning CZs and those concerning EEZs. Such claims can be excessive in relation to their breadth as well as the rights asserted therein.

Already during the negotiations of the LOSC, some States previously having excessive claims changed their laws to comply with the emerging legal framework and adjusted their zones accordingly. In some cases, this required that the territorial sea be reduced from 200 miles to 12 miles.[164] However, despite the signing and entry into force of the LOSC, some States still claim more than 12 miles as a territorial sea and assert the concurrent rights, including denial of overflight of military aircraft.[165]

Among those States claiming a CZ, many have done so for the purposes listed in Article 33 LOSC, and some of these have also established a CZ for security purposes, restricting or excluding the use of warships and military aircraft as a direct consequence.[166] The United States, especially, has ardently contested these restrictions, claiming application of the freedoms of the high seas within the CZ, especially the freedoms of navigation and overflight.[167]

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[163] For the same reasoning, see B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Dordrecht: Martinus Nijhoff Publishers, 1989) at 228; K. Hailbronner, "Freedom of the Air and the Convention on the Law of the Sea" (1983) 77 A.J.I.L. 490 at 505.
[164] See Naval War College, Roach & Smith, *supra* note 135 at 96.
[165] See *ibid* at 97 & 231-234.
[166] See R.R. Churchill & A.V. Lowe, *supra* note 63 at 117.
[167] See *LOSC*, *supra* note 64 at 1279, art. 56.

The excessive claims within the EEZ are a result of States asserting more rights than those granted by the LOSC.[168] These States apply domestic law to the EEZ, allowing for the broad authority of the coastal State. The United States, for instance, has protested against the litigation of Burma. The domestic law of Burma claims "exclusive rights and jurisdiction for the construction, maintenance or operation of artificial islands, offshore terminals, installations and other structures and devices necessary for the exploration of its natural resources, both living and non-living, or for the convenience of shipping or any other purposes."[169] According to the United States, the terms "exclusive rights and jurisdiction" are too broadly defined and, therefore, infringe on the freedoms of the high seas, and, thus, the act is considered as contrary to the LOSC. The United States has protested against similar claims of other States.[170]

However, it should be noted that whereas a territorial sea claim of 200 miles is a clear violation of the LOSC, the assertion of certain rights in the relevant zones is not always so clear. The LOSC is relatively new and since international tribunals and courts have not yet had the opportunity to make many decisions on its basis, it still needs time to become fully established. Rights protested against now might be regarded as normal and legal under the LOSC in the future. In addition, the assertion of a right by a State is *per definition* an infringement on the right of another State, be it temporary or permanent. Excessive claims, however, that are clearly against the letter and/or spirit of the LOSC will be illegal under international law and cannot be legalized through the use of the residual rights of Article 59 LOSC, as they have not been accepted by other States. In the end, therefore, it will be State practice and decisions by international tribunals and courts that will determine whether a right claimed is acceptable under international law or not.

[168] See *supra* note 63 at 115-117.
[169] *Ibid.* at 115.
[170] See *ibid.* at 116.

4. The status of artificial islands under the LOSC

4.1 Rights over artificial islands and their status

The status of artificial islands under the LOSC is for the most part regulated within the framework of the EEZ, the continental shelf and the high seas. The regime of artificial islands in the EEZ applies *mutatis mutandis* to artificial islands on the continental shelf and on the high seas.[171] Under the territorial sea regime no provision for artificial islands has been established, but as the territorial sea is under the exclusive sovereignty of the coastal State, the coastal State has full and exclusive sovereignty to construct and to regulate artificial islands in the territorial sea.

Regarding the status of artificial islands, Article 60 (8) LOSC provides "artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf."[172] An artificial island, therefore, does not generate zones, meaning that even if the artificial island is built in the territorial sea, this would neither affect the delimitation of the territorial sea nor the status of the artificial island.

The regime of artificial islands was created with the oil and gas industry in mind. This, however, does not mean that other uses of artificial islands are excluded. On the contrary, Article 60 LOSC mentions the uses contained Article 56 and "other economic uses", stating:

> 1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the use of:
> (a) artificial islands;
> (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
> (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the Zone
> 2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction

[171] Regarding the continental shelf, see *ibid.*, art. 80, and regarding the high seas see ibid., art. 87(d).
[172] *Ibid.* at 1281, art. 60(8).

> with regard to customs, fiscal, health, safety and immigration laws and regulations.[173]

Artificial islands used for other purposes are, therefore, permissible under the LOSC, and, in fact, such ideas were already expressed before the 1958 Geneva Conventions.[174] As the coastal State has full and exclusive jurisdiction over the structure, the Netherlands will be able to apply part or all of its domestic law to an offshore airport. This is already the case for drilling rigs on the continental shelf, for which the Netherlands has enacted special legislation, providing for the applicability of certain Dutch laws.[175]

4.2 Safety zones around artificial islands

To protect artificial islands, safety zones may be established. Article 60 LOSC provides the following for the establishment of such zones:

> 4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and the of the artificial islands, installations and structures.
> 5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be determined to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 meters around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extend of safety zones.
> 6. All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.[176]

It has been argued that safety zones do not extend to the air above the artificial island,[177] but this is too restrictive an interpretation of the relevant clauses. A broader

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[173] *Ibid.* at 1279, art 60.
[174] See Naval War College, *supra* note 54 at 57-59.
[175] Due to the specific nature of drilling rigs, the Dutch government did not want to declare all Dutch legislation applicable. Interview with H. Dottinga (4 May 1999).
[176] *LOSC*, *supra* note 64 at 1281, art. 60(4)-(6).
[177] Interview with P. Mendes de Leon & F. von der Dunk (21 December 1998).

interpretation has, in fact, already been accorded to this clause in relation to drilling rigs. Such artificial islands have special regulations regarding the approach and landing of helicopters and, therefore, the safety zone also applies to the air.[178]

Obviously, a breadth of 500 meters for a safety zone is too small for an offshore airport or even a deepwater port.[179] The LOSC, however, has taken this into account and provides for larger safety zones, as long as they are "authorized by generally accepted international standards or as recommended by the competent international organization", which in this case would be the International Maritime Organization (IMO).[180]

IMO has already adopted a resolution on safety zones and the navigation around them.[181] It stipulates that vessels, other than those rendering services, should remain outside the safety zone, unless they enter or remain in the safety zone "when in distress; for the purpose of saving or attempting to save life or property; or in cases of force majeur."[182] IMO also recommends that governments:

> (a) study the pattern of shipping traffic through offshore resource exploration areas at an early stage so as to be able to assess potential interference with marine traffic passing close to or through such areas at all stages of exploitation;
> (b) ensure that the exploitation of natural resources on the continental shelf and in the exclusive economic zone does not seriously obstruct sea approaches and shipping routes; (...)[183]

Although the Resolution speaks of "exploitation of natural resources" and has obviously been written with the gas and oil offshore industry in mind, it can be applied *mutatis mutandis* to an offshore airport, as it concerns general principles for safety zones and adherence thereto by others.

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[178] Helicopters can interfere with certain operation on or around the drilling rig and must, therefore, be diverted to another approach or even denied right of overflight. This, however, is only true when low altitudes are concerned.
[179] See N. Papadakis, *The international Legal Regime of Artificial Islands* (Leiden: A.W. Sijthoff International Publishing Company, 1977) at 109.
[180] *LOSC*, *supra* note 64 at 128, art. 60(5).
[181] See *Safety Zones and Safety of Navigation around Offshore Installations and Structures*, IMO Res. A16/Res. 671, 16th Sess., 19 October 1989, 1 [hereinafter *IMO Res.*].
[182] *Ibid.* at 4, art. 1(e).
[183] *Ibid.* at 3-4, art 1(a)-(b).

4.3 Location of an artificial island

Article 60(3) LOSC stipulates that due notice must be given for the construction of an artificial island and that a warning as to its presence should be maintained after the airport has been constructed. Before that time, however, the Dutch government must determine the location of the offshore airport. When it makes this decision, it needs to consider Article 60(7) LOSC, which provides that "artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation."[184] Because the Netherlands is a seafaring nation with one of the largest ports in the world, this will undoubtedly be taken into account since it would not make sense to have one economic sector grow at the expense of another.

The final decision on the location should be made on the basis of the rights of other States, as provided in Article 58 LOSC, namely the freedoms of the high seas. An offshore airport will undoubtedly curtail the uses of the sea by other countries. Leaving the question of overflight aside for the time being,[185] navigation will obviously be restricted near the island due to the operation of the airport. This is equally applicable to the laying of submarine cables and pipelines. Some solutions might be found through international consultations, for instance through IMO or OSPAR.[186]

Under Article 62 LOSC, the coastal State shall grant other States the right to fish in its EEZ if the coastal State is not able to harvest its entire allowable catch. As fishing is within the exclusive competence of the European Union, this problem will be dealt with in the chapter on the European Union. It is apparent, however, that fishing and environmental protection should be thought of as well when deciding on a location for an offshore airport. Environmental protection is a duty imposed on States under Part XII of the LOSC and specifically under Article 192 LOSC, which obligates States to protect and preserve the marine environment.

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[184] *LOSC, supra* note 64 at 1281, art. 60(3).
[185] See chapter 5 *infra*.
[186] The OSPAR Convention merges and modernizes the Oslo Convention of 1972 on the prevention of Marine pollution by dumping from ships and aircraft and the 1974 Paris Convention for the prevention of marine pollution from land-based sources. See chapter 7 *infra*.

5. Conclusion

Building an offshore airport under the LOSC is possible. The regime of the EEZ gives the coastal State the jurisdiction "to establish artificial islands"[187] and the "exclusive right to construct and to authorize and regulate the construction, operation and use"[188] of such an artificial island and the "exclusive jurisdiction"[189] over such an island. Under the regimes of the CZ[190] and the EEZ, the coastal State has "jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations".[191] Since Article 60(2) LOSC mentions "including",[192] the list is not exhaustive and other issues fall within the jurisdiction of the coastal State.

However, the LOSC does not grant the coastal State sovereignty over such an island. But with the powers granted the Netherlands is given sufficient latitude, by the law of the sea, to build and operate an offshore airport outside territorial waters. Nevertheless, other States should be consulted, as this is an enterprise involving a new concept that might serve as an example for others to follow.

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[187] *LOSC*, *supra* note 64 at 1280, art. 56(b)(i).
[188] *Ibid.* at 1280-1281, art. 60(1)(a).
[189] *Ibid.* at 1281, art. 60(2).
[190] See *ibid.* at 1276, art. 33.
[191] *Ibid.* at 1281, art. 60(2).
[192] *Ibid.*

CHAPTER 4

PUBLIC INTERNATIONAL AIR LAW

The Convention on International Civil Aviation (Chicago Convention) was concluded in 1944,[193] before the end of World War II and the establishment of the United Nations. Hence, the Convention has characteristics indicative of that particular period must be interpreted, including State practice, which has emerged from it, with that in mind.

It is the successor to the Paris, Madrid and Havana Conventions on international civil aviation. Like the Paris Convention, the Chicago Convention stresses the sovereignty of States over the airspace above its territory. Two separate agreements were negotiated alongside the Chicago Convention so that traffic rights could be exchanged on a multilateral basis. Due to the commercial interests involved, only one was ratified fairly well, as States wanted to keep an influence on the exchange of economic rights. As a result, a regime of bilateral agreements granting traffic rights emerged.

With the maturing of the aviation industry, changes have become visible in the attitude of States towards the aviation industry. A tendency towards liberalization, deregulation and more liberal bilateral agreements has emerged. Airlines are now pressing for more freedom and fewer national restrictions in order to cope with heightened competition. If this trend continues, a whole new system of freedom of the air as was originally intended in the 1944 Chicago Convention might emerge.

This chapter provides a brief history of public international air law, before analyzing articles of the Chicago Convention relevant to the operation of an offshore airport outside the territorial sea. Finally, it examines the possibility of liberalization culminating in the abandonment of the bilateral system and the effects that would have on an offshore airport.

1. History of public international air law

1.1 Before the Chicago Convention

After man began to fly, regulation was not far behind. Already in 1784, one year after the first flight of a balloon invented by the Montgolfier brothers, the Paris police required that balloonists possess a license.[194]

Aircraft first showed their potential during World War I, after which it was obvious that flights of such craft should be regulated internationally. With the start of a scheduled air service between Paris and London in 1919,[195] this became a necessity. Therefore, the French government convened an international conference during that same year in Paris, as part of the Versailles Peace Conference, which ended the War.

The resulting Paris Convention of 1919,[196] signed by 32 States, granted States complete and exclusive sovereignty over the airspace above their territory. Territory was defined in this Convention to include the territorial waters, the colonies and protectorates and their respective territorial waters.[197] The Spanish-speaking countries held their own conference in Madrid in 1926, which resulted in the Ibero-American Convention.[198] While its provisions were similar to those of the Paris Convention, the Convention never entered into force due to lack of ratifications.[199]

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[193] See *Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295 [hereinafter *Chicago Convention*].

[194] See N.M. Matte, *Treatise on Air-aeronautical Law* (Montreal: Institute and Center of Air and Space Law, McGill University, 1981) at 21.

[195] See I.H.Ph. Diederiks-Verschoor, *An Introduction to Air Law*, 5th ed. (Deventer: Kluwer Law and Taxation Publishers, 1993) at 2.

[196] See *Convention Relating to the Regulation of Aerial Navigation*, 13 October 1919, 11 L.N.T.S. 173 [hereinafter *Paris Convention*].

[197] *Ibid.* at 190, art. 1 states:

> The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory. For the purpose of the present Convention, the territory of a State shall be understood as including the national territory, both that of the mother country and the colonies, and the territorial waters adjacent thereto.

[198] See *Spanish American Convention on Aerial Navigation*, 1 November 1926, 3 Hudson International Legislation 2019 [hereinafter *Ibero-American Convention*].

[199] *Ibid.* at 2019, art. 1 states:

> Les Hautes Parties Contractantes reconnaissent que chaque Puissance a la souveraineté complète et exclucsive sur l'espace atmosphérique au-desus de son territoire. Au sens de la présente Convention, le territoire d'un Etat sera entendu

The US-initiated Pan-American Convention[200] was the result of a conference held in 1927 in Havana. It did enter into force and was largely similar to the Paris Convention of 1919, especially in relation to its stance on sovereignty of the airspace.[201]

1.2 The Chicago Convention

In 1944, the Chicago Convention replaced both the Paris and Havana Conventions.[202] This Convention was the result of a conference of the allied powers in Chicago in 1944, on the invitation of US President Roosevelt. There were three stances towards air transport held by the different States attending this meeting. The first group, led by the United States, held to the idea of complete freedom of competition in air transport. The second group, led by the British, preferred to completely regulate international air transport. The third and last group consisted of Australia and New Zealand, who wanted to create only a few international airlines regulated by an international organization.

The reasons for these stances towards air transport were directly related to the development of aviation during World War II. The United States held a virtual monopoly on the production of big planes and would, therefore, be able to reap huge benefits from international air transport. The United Kingdom, on the other hand, had built mostly small fighter planes and would not be able to compete with the United States.[203] These and other considerations dictated the outcome of the Chicago Convention.

Alongside the Chicago Convention, two other agreements, the Transit Agreement[204] and the Transport Agreement,[205] were negotiated separately, when it became clear that the Chicago Convention would grant States full sovereignty over their

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comme comprenant le territoire national métropolitain et colonial, ainsi que les eaux territoriales adjacentes au dit territoire.

[200] See *Convention on commercial aviation*, 20 February 1928, 129 L.N.T.S. 225 [hereinafter *Havana Convention*].

[201] *Ibid.* at 227, art. 1, states that "[t]he high contracting parties recognize that every state has complete and exclusive sovereignty over the air space above its territory and territorial waters."

[202] See *Chicago Convention*, *supra* note 193 at 350, art. 80.

[203] See J.C. Cooper, *The Right to Fly* (New York: Henry Holt and Company, 1947) at 171.

[204] See *International Air Services Transit Agreement*, 7 December 1944, 84 U.N.T.S. 389 [hereinafter *Transit Agreement*].

[205] See *International Air Transport Agreement*, 7 December 1944, 171 U.N.T.S. 387 [hereinafter *Transport Agreement*].

airspace. The idea was for them to grant the different freedoms of the air[206] on a multilateral basis, thereby avoiding the need for separate bilateral negotiations of agreements on, *inter alia*, traffic rights.

The Transit Agreement contains technical freedoms or transit rights, namely the freedom of overflight and the freedom to make a technical stop.[207] This agreement has been reasonably ratified and has, thus, entered into force. Some very large countries, like the former USSR, have refrained from ratification and now charge for the right of overflight and technical stops. Although this is contrary to the Chicago Convention,[208] it still occurs.[209] The Transport Agreement provides for five freedoms, two technical freedoms and three so-called commercial freedoms or traffic rights.[210] Because the commercial freedoms were perceived as a potential source of income, most States did not want to grant these rights up front. This agreement was, therefore, very poorly ratified and later even denounced by some States. The Netherlands is party to both agreements but still negotiates bilateral agreements with other countries.

The effect of the Chicago regime and the consequent bilateral system is that it might create a problem regarding the granting of traffic rights, or freedoms of the air, in the case of an airport outside the territorial sea.

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[206] See section 2.2 *infra* for an explanation of the different freedoms.

[207] See *Transit Agreement*, *supra* note 204 at 390, art. 1. See also B. Cheng, *The Law of International Air Transport* (London: Stevens & Sons Limited, 1962) at 10.

[208] *Chicago Convention*, supra note 193, art. 15, last sentence states that "[n]o fees dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon." *Chicago Convention*, *supra* note 193 at 306, art. 15.

[209] According to Cooper, *supra* note 203 at 174, this is because

> [a]ny nation, except during the time that it is committed otherwise by the Transit or Transport or other special Agreement [*i.e.*, bilateral agreements], is still fully authorized to take advantage of its own political position and bargaining power, as well as fortunate geographical position of its homeland and outlying possessions, and unilaterally determine (for economic or security reasons) what foreign aircraft will be permitted to enter or be excluded from its airspace, as well as the extent to which such airspace may be used as part of world air trade routes.

2. The relevant articles of the Chicago Convention for the bilateral system

2.1 Sovereignty and territory

Article 1 Chicago Convention states: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."[211] The term "territory" in Article 1 is defined in Article 2 of the Convention as follows: "For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such a State."[212]

When the Chicago Convention was drafted, the LOSC was obviously not yet in place, which is why legal fiction is required. The territorial sea had, however, been part of customary international law for a long time already and its legal framework was codified in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.[213] No consensus could be reached on the breadth of the territorial sea. At that time its size ranged from between 3 and 200 miles; 3, 6 and 12 miles were the most accepted sizes. In the LOSC the issue was settled and the breadth of the territorial sea was determined to be 12 miles, measured from the baseline.[214] According to the Legal Bureau of ICAO, [215] the terms "territorial sea" and "territorial waters" are equivalent.[216]

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[210] See *Transport Agreement*, *supra* note 205 at 388-390, art. 1. See also Cheng, *supra* note 207 at 11.
[211] *Chicago Convention*, *supra* note 193 at 296, art. 1.
[212] *Ibid.* at 298, art. 2.
[213] See *Convention on the Territorial Sea and the Contiguous Zone*, *supra* note 59.
[214] See *United Nations Law of Sea Convention*, *supra* note 64 at 1272, arts. 2 & 3 [hereinafter *LOSC*].
[215] The International Civil Aviation Organization was established under See *Chicago Convention*, *supra* note 193 at 324, art. 43 and was based on Chicago Convention, *supra* note 193, at 326, art. 44. Its objectives are:
(...) to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:
(a) Insure the safe and orderly growth of international civil aviation throughout the world;
(b) Encourage the arts of aircraft design and operation for peaceful purposes;
(c) Encourage the development of airways, airports and air navigation facilities for international civil aviation;
(d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;
(e) Prevent economic waste caused by unreasonable competition;
(f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
(g) Avoid discrimination among contacting States;
(h) Promote safety of flight in international air navigation
(i) Promote generally the development of all aspects of international civil aeronautics.

2.2 The freedoms of the air

The different rights of flying into different States are the freedoms of the air, and they are:

- First freedom: the right to fly across the territory of another State without landing.
- Second freedom: the right to land in another State for non-commercial purposes.
- Third freedom: the right to transport passengers, baggage, mail and cargo from your country to the other country and to unload them there.
- Fourth freedom: the right to take aboard passengers, baggage, mail and cargo in the other country and bring them to your own country.
- Fifth freedom: the right to transport passengers, baggage, mail and cargo from a third country via your own country to the other country.

The above five freedoms are derived from the negotiations of the Chicago Conference. However, practice has created some more freedoms, although the eighth freedom, cabotage, is also regulated under Article 7 Chicago Convention.[217] The other four freedoms are:

- Sixth freedom: the right to transport passengers, baggage, mail and cargo from a third country via your own country to another country and *vice versa*. It is a combination of third and fourth freedom rights.
- Seventh freedom: the right to take passengers, baggage, mail and cargo from a third county to another country, without going through your own country.
- Eight freedom: the right to take passengers, baggage, mail and cargo from one airport in a country to another airport in the same country, which is not your own (cabotage).
- Ninth freedom: the right to fly, land and transport passengers, baggage, mail and cargo in your own country (domestic flights).[218]

To this end ICAO adopts international standards and recommended practices, under art. 37. Although these are officially not binding law, many States will abide by them out of self-interest. The standards and recommended practices are adopted in the different annexes; annex 2 being the one on rules of the air.

[216] ICAO, *Report of the Rapporteur to the ICAO Legal Committee on "United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments"*, LC/29-WP/8-3 (1994) at 2.

[217] See *Chicago Convention, supra* note 193 at 300, art. 7.

[218] See, *e.g.*, B.F.Havel, *In Search of Open Skies* (The Hague: Kluwer Law International, 1997) at 35-39.

The first two freedoms are technical freedoms, while the others are commercial freedoms. The freedoms granted under a bilateral agreement are specifically provided for in the bilateral agreement itself.

2.3 Flight over or into other countries

The legal framework for flights over or into other countries is different for scheduled and non-scheduled air services. The term scheduled air service is defined by ICAO as:

> [A] series of flights that possess all the following characteristics:
> (a) it passes through the airspace over the territory of more than one State;
> (b) it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public;
> (c) it is operated, so as to serve traffic between the same, two or more points, either
> (i) according to a published time-table, or
> (ii) with flights so regular or frequent that they constitute a recognizable systematic series.[219]

The distinction is important, as Article 5 Chicago Convention allows for a more lenient regime for non-scheduled international air services, even though the last sentence gives States the opportunity to create many limitations.[220] Article 5 Chicago Convention words the regime for non-scheduled services for flights into and over other countries as follows:

> Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.
> Such aircraft, if engaged in the carriage of passengers, cargo or mail for remuneration or hire on other than scheduled international air

[219] ICAO, *Definition of a Scheduled International Air Service*, ICAO Doc. 7278-C/841 (10 May 1952) at 3-6, cited in Cheng, *supra* note 207 at 174-177.
[220] See Cooper, *supra* note 203 at 173.

> services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.[221]

For scheduled air services, Article 6 Chicago Convention provides "no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."[222]

Since the majority of air transport nowadays is scheduled, the regime of Article 6 Chicago Convention has become the most important one, as it requires that treaties be negotiated on a bilateral basis.

3. The bilateral system

3.1 History of the bilateral system

The bilateral system emerged because States have complete and exclusive sovereignty over the airspace above their territory. In order for scheduled air services (and usually even for non-scheduled air services) to fly to other countries, prior permission is needed. This is especially true if passengers, baggage and cargo are taken on board or brought to that country, or in other words, if commercial interests are at stake. Such permission can be obtained in two ways: either by the airline getting direct permission of the State in question or through the negotiation of bilateral agreements between the two governments of the States concerned. The first way is usually only for short period of time (*i.e.*, one season) and as such is not very dependable for the airline. The second is much more dependable, because although all bilaterals have a denunciation clause, this only takes effect one year after the agreement is denunciated. Therefore, the negotiation of bilaterals is far more common.

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[221] *Chicago Convention*, *supra* note 193 at 298, art. 5.
[222] *Ibid.* at 300, art. 6.

Negotiations of bilateral agreements have always been on a *quid pro quo* basis. If a State were to grant an airline from another State access, it would want to have the same or comparable access in return. One of the first bilateral agreements to be concluded was between the United States and the United Kingdom in 1946.[223] This so-called Bermuda I Agreement[224] was used as a model for many other bilateral agreements. The agreement was reasonably liberal in its granting of access, much more so than some of the later agreements, such as the Bermuda II Agreement.[225]

The Bermuda I Agreement consists of the agreement itself, an annex thereto and a final act. The agreement itself consists of mostly general principles, whereas the annex is much more specific. The annex has detailed articles on such subjects as rates to be charged[226] and routes to be served.[227] In the Final Act[228] certain specific commercial conditions are imposed, namely "that the air transport facilities available to the travelling public should bear a close relationship to the requirements of the public for such transport",[229] thus preventing airlines from increasing their capacity without prior consultation. It also requires:

> that there shall be fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories (as defined in the Agreement) covered by the Agreement and the Annex[230]

and

> that, in the operation by the air carriers of either Government of the trunk services described in the Annex to the Agreement, the interest of the air carriers of the other Government shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes.[231]

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[223] See *Agreement between the government of the United States of America and the Government of the United Kingdom relating to Air Services between their Respective Territories*, 11 February 1946, 3 U.N.T.S. 253 [hereinafter *Bermuda I Agreement*].

[224] The Agreement was renamed Bermuda I Agreement after a new air services agreement was negotiated between the US and the UK in 1977, which was also signed in Bermuda.

[225] See *Agreement between the government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland concerning Air Services*, 23 July 1977, 28 U.S.T. 5367 [hereinafter *Bermuda II Agreement*].

[226] See Annex II, *supra* note 223 at 264-268.

[227] See Annex III, *ibid.* at 270-276.

[228] See *Final Act of the Civil Aviation Conference*, 11 February 1946, 3 U.N.T.S. 278 [hereinafter *Final Act*].

[229] *Ibid.* at 288, para. 3.

[230] *Ibid.* at para. 4.

Under these terms both governments are, therefore, able to protect their airlines to a certain extent.

In relation to the freedoms granted, Paragraph 6 of the Final Act clarifies that the primary objective of the airlines should be third and fourth freedom traffic and that the capacity should be adequate to achieve this. Fifth freedom traffic is regarded as secondary and capacity cannot be increased for that purpose.[232] Where the agreement itself seems somewhat liberal, this is to some extent offset by the Final Act. Other bilateral agreements have followed the Bermuda I Agreement as regards its content.[233]

The so-called predetermination agreements are even more restrictive. Such bilateral agreements include very specific rules regarding a fifty-fifty capacity split for designated routes.[234] Bermuda II was also more restrictive than Bermuda I. Contrary to Bermuda I, many of the specific conditions are now part of the agreement itself. The annex still includes a route schedule,[235] like under the annex of the Bermuda I Agreement, but under Bermuda II it is much more precise, and even has caps on certain routes.[236]

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[231] *Ibid.* at para. 5.

[232] *Ibid.* at para. 6, which states:

> That it is the understanding of both Governments that services provided by a designated air carrier under the Agreement and its Annex shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in the Annex to the Agreement shall be applied in accordance with the general principles of orderly development to which both Governments subscribe and shall be subject to the general principle that capacity should be related:
> (a) to traffic requirements between the country of origin and the countries of destination
> (b) to the requirements of through airline operation; and
> (c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services.

[233] See Havel, *supra* note 218 at 42. Apart from the Agreement, the Annex and the Final Act, States would and will also regularly have an exchange of letters, in which additional agreements are put down. These are usually secret and, under Article 83 of the Chicago Convention, do not have to be deposited with ICAO, thus avoiding publicity.

[234] This was very strictly interpreted, sometimes even requiring airlines to literally seal off seats to make sure that the capacity was equal. See lecture by P. van Fenema (9 March 1999).

[235] See *Annex I to the Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland concerning Air Services*, 23 July 1977, 28 U.S.T. 5368 at 5386-5415.

[236] See *ibid.* at 5386-5418, Annex I & II.

Both the Bermuda I and II Agreements include provisions on substantial ownership and effective control, allowing the other State to withhold or revoke rights granted under them.[237] This terminology comes from the Transit and the Transport Agreements[238] and was put there to avoid "enemy States" from benefiting of the granted rights.[239]

These very restrictive bilateral agreements like Bermuda II and predetermination agreements, and even Bermuda I-type agreements to some extent may now have become a thing of the past. Under the pressure of liberalization, deregulation and globalization, airlines have to start fending for themselves. Governments are less keen nowadays to keep funding failing airlines and have started to liberalize them. Some States have even liberalized airports[240] and air traffic control.[241]

3.2 The current bilateral system and future trends

Because of the trend for liberalization and deregulation, and the resulting increase in competition in the air transport world, bilateral agreements were adapted accordingly. Deregulation started in the seventies in the United States and was followed by liberalization of the air transport market in the European Union in the eighties. Because the United States always wanted more liberal agreements, it offered more liberal "open-skies" agreements. It is only fitting that the Netherlands, which also favors liberal agreements, was the first to negotiate such an agreement with the United States.[242]

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[237] See *Bermuda I Agreement*, *supra* note 223 at 258, art. 6; *Bermuda II Agreement*, *supra* note 225 at 5373, art. 5.

[238] See *Transit Agreement*, *supra* note 204 at 394, art. 1(5); *Transport Agreement*, *supra* note 205 at 394 art. 1(6), each have the same wording, stating:

> Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State, or in case of failure of such air transport enterprise, to comply with the laws of the State over which it operates, or to perform its obligations under this Agreement.

[239] See Havel, *supra* note 218 at 62-63.

[240] One example of privatization of airports is that of the United Kingdom, where the British Aviation Authorities are now a private company.

[241] Examples of this can be found in New Zealand and Canada.

[242] For a commercially aggressive airline like KLM, access to a big market, like the United States, that is under as few constraints as possible is very attractive, especially since the airline is very dependent on sixth freedom traffic. The advantage for the United States was that it obtained a foothold in Europe, allowing it

Under an open skies agreement, the United States grants full access to all international airports in the United States, under the condition of full reciprocity. Fifth freedom is also allowed, without restrictions on capacity, again on a reciprocal basis. In fact, all capacity determination is free. It does, however, include the nationality principle, included the Transit and Transport Agreements, which can be used to prevent larger capital investment or even outright takeovers by foreign airlines and can be a reason to denounce the agreement.[243]

Due to deregulation and liberalization, airlines have started to adapt to a new commercial environment. Cooperation between airlines is becoming more and more frequent and increasingly close. This has culminated in alliances between airlines worldwide. Because of the restrictions due to the nationality principle, alliances are under constant scrutiny regarding the investments made. Within the European Union, under the so-called third package,[244] the air transport sector is now completely liberalized, and all airlines registered in an EU Member State are now "common carriers". As a result, the nationality principle is no longer applicable in the European Union, and within the European Union complete takeovers can occur,[245] as long as the new airline stays within the European Union.

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to pressure other (more attractive) countries into a "open skies" agreement. This tactic worked, especially after the United States had negotiated more open skies agreements with other small European countries. See *Agreement between the United States of America and the Netherlands, amending the Agreement of April 3 1957, as amended, and the Protocol of March 31, 1978, as amended*, 14 October 1992, T.I.A.S. No. 11976 [hereinafter *US-NL Open Skies Agreement*].

[243] See *supra* note 238.

[244] Liberalization of air transport in the EU was done gradually with three different packages of measures taken. For more information, see chapter 6 *infra*. The third package consisted of:

- EC, *Council Regulation 2407/92 of 23 July 1992 on Licensing of Air Carriers* [1992] O.J.L. 240/1, [hereinafter *Council Regulation 2407/92*];
- EC, *Council Regulation 2408/92 of 23 July 1992 on access for Community Air Carriers to Intra-Community Air Routes* [1992] O.J.L. 240/8, [hereinafter *Council Regulation 2408/92*]; and
- EC, *Council Regulation 2409/92 of 23 July 1992 on Fares and Rates for Air Services*, [1992] O.J.L. 240/15, [hereinafter *Council Regulation 2409/92*].

[245] *Council Regulation 2409/92, ibid.* art. 4 states:

> 1. No undertaking shall be granted an operating license by a Member State unless:
> (a) its principal place of business and, if any, its registered office are located in that Member State; and
> (b) its main occupation is air transport in isolation or combined with any other commercial operation of aircraft or repair and maintenance of aircraft.

The term "effective control" is defined in *Council Regulation 2407/92, ibid.*, art. 2, as:

> effective control means a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of

The interpretation of "substantive ownership and effective control" also differs between countries. Whereas, for example, the United States is very strict and demands a minimum of 75% of the shares in the hands of an American citizen, apart from certain voting rights and the appointments on the board of directors, the European Union considers a 51% share sufficient.[246]

Under pressure to be competitive in a highly competitive market, airlines are now pushing for fewer restrictions regarding nationality clauses and bilateral agreements as a whole.[247] Airlines now want to run themselves like companies, without restrictions that will hinder their growth or will interfere with their operations. However, such a trend would be hazardous for airports if airlines were truly free to choose, especially in regions like Europe, where distances are relatively small. In order to be competitive as well, airports should have the freedom to become a commercially run operation and to act as a competitive company, thereby being able to attract as many airlines as possible.

This whole system of bilateral agreements and airline alliances will have influence on an offshore airport outside territorial waters. This system manifests its influence not only in the form of the direct economic consequences of the system for the airport, but also through the roots of this system, namely the basis of State sovereignty over its territory. It is this principle that is at the heart of the possibility of an offshore airport outside territorial waters, under public international air law. Will the Netherlands be able to grant traffic rights? Can the bilateral system still function outside State territory? Chapter 5 explains how this would be possible.

4. Conclusion

Under the Chicago Convention, a State has sovereignty over the airspace above its territory, including its territorial waters. Under the LOSC the State has exclusive

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fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by:
(a) the right to use all or part of the assets of an undertaking
(b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.

[246] Lecture by R. Janda (14 April 1999).

jurisdiction, exclusive rights and jurisdiction for the use and operation of an artificial island in its EEZ. Both the LOSC and the Chicago Convention are silent as to the judicial status of the airspace above the EEZ. The Chicago Convention mentions only territorial waters and the high seas, whereas the LOSC only mentions the freedom of overflight in the EEZ for other States.

The LOSC therefore grants a State the right to construct an offshore airport in its EEZ or to authorize such constructions. It also can regulate this construction and regulate the use and operation thereof.

[247] See, *e.g.*, J. Ott, "Pressures Build for New Slant on Aviation Agreements" *Av. Wk & Sp. Tech.* 149:19 (9 November 1998) 65.

CHAPTER 5

SOVEREIGNTY, JURISDICTION AND TERRITORY

The most interesting questions regarding the international possibilities for an offshore airport are related to the terms "sovereignty", "jurisdiction" and "territory". The location of the Dutch offshore airport is likely to be outside territorial waters. Yet, under the Chicago Convention, a State only has sovereignty over the airspace above its territory and territorial waters. All other airspace is located above the high seas, according to the Chicago Convention.

Since the entry into force of the Chicago Convention, however, the law of the sea has changed. While at one time only territorial seas and high seas existed, the LOSC has codified additional zones, each of which limits the freedoms of the high seas.

But apart from the foregoing distinctions, the terms sovereignty, jurisdiction and control are used by both conventions, necessitating a definition for all three. This chapter, therefore, starts by defining these terms. It then outlines the regulatory framework of the airspace under the LOSC and the Chicago Convention. Finally, it ends with the legal regime in the airspace above and around an offshore airport in the EEZ and provides a conclusion.

1. The definitions of sovereignty, jurisdiction, control and territory

The Chicago Convention grants a State full sovereignty over the airspace above the territory of the State, which includes its territorial waters. Sovereignty can be defined as:

> The supreme, absolute, and uncontrollable power by which any independent State is governed; supreme political authority; the supreme will; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a State combined with the right and power of regulating its internal affairs without foreign dictation; (...)[248]

[248] *Black's Law Dictionary*, 6th ed., *s.v.* "sovereignty".

Being a sovereign State has the following consequences:

> (a) a Sovereign State is bound only by ICL [international customary law] and the provisions of treaties to which it is a party and no additional obligations can be imposed on it without its consent;
> (b) subject to the above, its jurisdiction *within* its territory is unrestricted and no other subject of IL [international law] may lawfully intervene in it; *outside* its territory it may exercise its jurisdiction only with the consent of the other State concerned;
> (c) it participates directly in inter-State relations by maintaining diplomatic relations with other subjects of IL [international law] and concluding treaties with them.[249]

Therefore, a State can theoretically do as it pleases as long as it stays within the limits of the treaties to which it is a party and those rules established by customary international law.[250]

Under the LOSC, the coastal State has jurisdiction and control over the operation of an artificial island.[251] Jurisdiction can be defined as "a term of comprehensive import embracing every kind of judicial action"[252] or the "power of the State to submit persons and things to the rulings of its courts, i.e. to do justice".[253] Such power can be considered the "manifestation of the sovereignty of the State".[254] Control can be defined as "to exercise restraining or directing influence over. To regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern".[255] Finally, territory can be defined as a "geographical area under the jurisdiction of [another] country or sovereign power".[256]

Yet, according to P. Mendes de Leon, "[t]he definition of territory is given by law. The extent of the definition depends on the purpose for which the law, whether national or international, has been enacted. Therefore there is no uniform definition of

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[249] I. Paenson, *English-French-Spanish-Russian Manual of the Terminology of Public International Law (peace) and International Organizations* (Brussels: Bruylant, 1983) at § 42.
[250] A State is bound to customary international law unless it persistently objected to the emerging rule of law.
[251] The coastal State has jurisdiction under *LOSC*, *supra* note 64 at 1280, art. 56(1)b(i) & at 1281, art. 60(2), control under *LOSC*, *supra* note 64, at 1276, art. 33, and an exclusive right under *LOSC*, *supra* note 64 at 1280-1281, art. 60(1).
[252] *Supra* note 248, *s.v.* "jurisdiction".
[253] *Supra* note 249, § 114.
[254] *Ibid.*
[255] *Supra* note 248, *s.v.* "control".
[256] *Ibid.*, *s.v.* "territory".

territory."[257] However, in order to apply international law, other States must accept the definition of territory provided.[258]

2. Rights over the airspace under the LOSC

2.1 The territorial sea

Regarding the status of the airspace above the territorial sea, Article 2(1) LOSC provides specifically for the full sovereignty of the coastal State. This is also the case for the Chicago Convention,[259] as was outlined in Chapter Four. Since the breadth of the territorial sea is now clearly stipulated in the LOSC, the same can be said for the airspace above the territorial sea.

In the territorial sea, a right of innocent passage has been granted to ships, but the "launching, landing or taking on board of any aircraft" is not considered to be innocent.[260] Since the term "any aircraft" is used, it can be presumed that both civil and state aircraft are included,[261] although so far only military state aircraft have been launched from aircraft carriers. Irrespective of the type of aircraft, however, they are not allowed to take off or land on the aircraft carrier when it is navigating through the territorial waters of another State.

As mentioned before, no rights of innocent passage exist for aircraft. The Chicago Convention,[262] and the consequent regime of bilateral treaties, which was outlined in Chapter Four, regulates entry into another State and overflight of a State by aircraft. This concerns both the airspace above the territory of a State and the airspace above its territorial waters. The LOSC, however, has added other maritime zones to the sea, and each has its own legal framework. It can, therefore, be argued that the airspace there above has a similar framework, as the former reality of high seas beyond the territorial

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[257] P. Mendes de Leon, *Cabotage in Air Transport Regulation* (Dordrecht: Martinus Nijhoff Publishers, 1992) at 26 [footnotes omitted].
[258] See *ibid.* at 29.
[259] See *Chicago Convention*, *supra* note 193.
[260] *LOSC*, *supra* note 64, at 1274, art. 19(2)(e).
[261] See P. Iswandi, *The Rights and Duties in the Airspace Adjacent to their Coasts: Reflections on the UN Convention on the Law of the Sea* (Montreal: Institute of Air and Space Law, McGill University, 1985) at 172.

sea is no longer there. The territorial sea is now adjacent to the CZ and the EEZ, and each has its own rules under the LOSC. These new zones will affect the airspace there above and although not granting the coastal State full sovereignty over that airspace, will still provide it with a form of authority.

2.2 The contiguous zone

The status of the airspace above the CZ is not referred to in Article 33 LOSC. As result, some authors consider the CZ as part of the high seas with, *inter alia*, the associated freedom of overflight.[263] It would seem, however, that a somewhat equivalent zone has been established above coastal waters by State practice.

Certain States have established identification zones in the airspace above the waters adjacent to their coasts, stretching out for 200 miles or more in some places. When entering these zones, aircraft are obliged to identify themselves. In some cases only flights into the country are required to give prior notification, while in other cases aircraft passing through the zones, even if not destined for that particular country, must identify themselves. Both requirements restrict the freedom of overflight over the high seas.

The most notable examples of such zones are ADIZ and CADIZ of the United States and Canada, respectively,[264] which were established in 1950 and 1951 for security purposes. For ADIZ, identification is only required for air traffic destined for the United States. CADIZ, however, also requires flights through the zone, even if not destined for Canada, to identify themselves. Both States, therefore, impose a form of jurisdiction and control that does not allow the complete freedom of flight permitted over the high seas. The airspace seems, therefore, to share the jurisdiction of the underlying territory.[265]

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[262] See *Chicago Convention*, *supra* note 193.

[263] See J. Bentzien, "Die Zuständigkeit des Internationalen Seegerichtshofes für Streitigkeiten der internationalen Luftfahrt" (1996) 2 Z.L.W. 145 at 149 [translated by author].

[264] The Air Defense Information Zone (ADIZ) and the Canadian Air Defense Information Zone (CADIZ), both of which extend up to 200 miles from the coast in certain areas and cover both the east and west coasts of North America, some arctic regions and Alaska. Besides ADIZ and CADIZ, there are more identification zones around the world, but these were the first to be established. See Hailbronner, *supra* note 163, at 515-516, I.L. Head, "ADIZ, International Law and Contiguous Airspace" (1964) 3 Alta. L. Rev. 182 at 186; R.D. Hayton, "Jurisdiction of the Littoral State in the 'Air Frontier'" (1964) 3 Philippine Int. L.J. 369 at 384 & 388.

[265] For arguments to the same effect, see J.A. Martial, "State Control over the Air Space over the Territorial Sea and the Contiguous Zone" (1952) 30 Can.Bar Rev. 245 at 251.

The Chicago Convention has not followed this reasoning in establishing its rules regarding the airspace above the sea. It, in fact, only deals with territorial waters and high seas.[266] The legal regime dealing with air traffic control in that airspace is, therefore, divided between areas above the territory of a State and areas above the high seas.[267] In the airspace above its territory and territorial sea, a State may divert from the standard rules of the air as established by ICAO, although notification has to be given. Above the high seas, the standard rules of the air apply as they are.[268] Since the CZ now overlaps with the EEZ, this will be dealt with under the discussion of the EEZ.

2.3 The exclusive economic zone

The regime of the EEZ mentions the status of the airspace in Article 58 LOSC, which refers to Article 87 LOSC, providing for, *inter alia*, the freedom of overflight. Since the EEZ overlaps with the CZ, the same creeping extension of jurisdiction of the coastal State over this airspace is noticeable in the form of the security zones ADIZ and CADIZ. Some authors do not agree with this form of jurisdiction, considering it contrary to international law because of its infringement on the freedom of the high seas.[269] However, others think that it can be allowed by applying the principle of the CZ to the airspace and by stressing the principle of interests of the State.[270] Irrespective of these arguments, the zones should be considered part of customary international law since no other States have protested against them.[271]

Under the Chicago Convention, rules of the air are applicable to both the high seas and the territory of a State. Article 12 provides the following:

> Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the

[266] See *Chicago Convention*, *supra* note 193 at 298 & 304, arts. 2 & 12.
[267] This is possible under *Chicago Convention*, *ibid.* at 322, art. 38.
[268] The sentence before the last states: "Over the high seas, the rules in force shall be those established under this convention."
[269] See Hailbronner, *supra* note 163 at 517-518; Head, *supra* note 264 at 182-183.
[270] See J.T. Murchinson, *The Contiguous Air Space Zone in International Law* (Ottawa: Queens Printer and Controller of Stationary, 1957) at 77; C.Q. Christol, "Unilateral Claims for the Use of Ocean Airspace" in J.K. Gamble, ed., *Law of the Sea: Neglected Issues* (Honolulu: Law of the Sea Institute, 1979) 122, at 133.
[271] See Head, *supra* note 264 at 182.

> flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established form time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure prosecution of all persons violating the regulations applicable.

Over their own territory and their respective territorial waters, States can divert from these rules under Article 38.[272] It must, however, notify ICAO of such differences on the basis of the same Article. On the high seas, however, even though States provide air traffic control there, the rules of the air stipulated in the Chicago Convention apply in their unabridged form to the waters beyond the territorial sea.

The Chicago Convention, therefore, does not make a distinction between the CZ and the EEZ. Since such a distinction is now part of international law, this difference should be made and allowed for under the Chicago Convention. This could even be done in practice, without changing the Convention.

3. The practical applicability of sovereignty and jurisdiction

In their practical applicability, jurisdiction and sovereignty do not differ much.[273] Jurisdiction is an exercise of sovereignty. In the Chicago Convention, State sovereignty over the air is limited to that above the territory of the State and its territorial waters. But this Convention was drafted in 1944, when sovereignty, and jurisdiction for that matter, could not extend that far. Freedom of the (high) seas rather than the air was paramount.

As demonstrated above, this has changed. For both economic and security reasons, State jurisdiction has been extended over the air and the sea. ADIZ and CADIZ and other identification zones were motivated by security considerations.[274] The CZ was

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[272] See *Chicago Convention*, *supra* note 193 at 322.

[273] A.L. Morgan uses the term sovereign jurisdiction, which he defines as "the device through which constitutionally independent states assert control over territory". He adds that "[t]o a more limited extent, that jurisdiction also extends over other sea zones as recognized under international law." He, therefore, uses the same term for the two kinds of jurisdiction or sovereignty. See A.L. Morgan, "The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action" (1996) 27 Ocean Dev. & Int'l L. 5 at 6.

[274] See *supra* note 264 and accompanying text.

motivated by a combination of economic and security interests.[275] Finally, the continental shelf regime and the subsequent EEZ regime were motivated by economic considerations.[276] Due to technological progress, States have increased their jurisdiction to protect their country against, *inter alia*, faster planes and to exploit newly discovered resources of the sea.

Now an initiative is being made for another commodity of the sea, namely space. With the continuous growth of the global population, the need for space increases daily. Building cities, airports, waste disposal plants, nuclear energy plants, etc. on islands in the sea will create more space on land. This is especially true for projects needing a lot of space due to environmental factors, namely airports (noise), nuclear plants (safety) and waste disposal plants (smell and safety).[277]

The Chicago Convention does not take this trend explicitly into account. However, action has been undertaken before, without a specific basis in the Chicago Convention.[278] So what it comes down to is whether a State needs sovereignty to exercise jurisdiction over part or the whole of its EEZ. It does not. Under the current legal framework very little needs to be changed to allow a State to exercise its rules of the air over its EEZ.

As was pointed above, the difference between the rules of the air as established by a State and those established by ICAO is that under the Chicago Convention, the State

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[275] See *ibid.*

[276] See, *e.g.*, the Truman declarations of 1945. It can be deduced from the actions of States (nearly) capable of exploiting newly discovered resources that a treaty will not be ratified if it does not give the State sufficient jurisdiction and sovereignty over such resources. This happened with the LOSC over part XI, according to which the deep sea bed or area is to be considered the common heritage of mankind. It included an entire regime dealing with how the benefits of the harvested resources were to be shared with the rest of the world. This has now been changed under the new *Agreement relating to Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, 28 July 1994, 33 I.L.M. 1309. Another example is the *Agreement Governing the Activities of States on the Moon and other Celestial Bodies*, 5 December 1979, 1363 U.N.T.S. 3 [hereinafter *Moon Agreement*]. Here, the idea of potential resources prevented States from signing the treaty. Under Moon Agreement, *ibid.*, art. 11, the moon and its resources are considered as the common heritage of mankind, and an international regime will regulate the exploitation of the resources, including an "equitable sharing by all States Parties in the benefits derived from those resources". As a result, many industrialized countries did not ratify the agreement.

[277] See C.W. Walker, "Jurisdictional Problems created by Artificial Islands" (1973) San Diego L. Rev. 638 at 638-640; W.H. Lawrence, "Superports, Airports and Other Fixed Installations on the High Seas" (1975) 6 J. Marit. L. & Com. 575 at 575-578; A.H.A. Soons, *Artificial Islands and Installations in International Law* (Occasional Paper no 22, Law of the Sea Institute, University of Rhode Island, 1974) at 1.

[278] Although not regulated under the Chicago Convention, ICAO has teams that assist Member States in the technical implementation of the rules of the Annexes. This is assistance is both technical and financial.

can file differences for the former, but not the latter. However, since the standards and recommended practices of ICAO are minimum standards, a State should be permitted to file differences in case of higher standards as long as such rules are not discriminatory.[279]

Another issue to consider is whether the rules of the air of the coastal State should extend over the whole of its EEZ, even if this is not necessary. This question can be addressed from two different perspectives, namely from a geographic perspective and from a functional perspective.

From a geographic angle, a decision must be made as to whether the whole of the EEZ should become part of the airspace regulated by a State with its own rules of the air. If this were indeed to happen, it would be advisable to provide for the right of overflight, considering the size of the EEZ and, thus, not charge third countries for overflying the EEZ. It would also still be possible for third countries to have military exercises in such areas.[280] The extent of the controlled airspace of the coastal State would also be dependent on the size of its EEZ. In a semi-enclosed sea like the North Sea, the EEZ will have to be delimited with the neighboring countries. The same would apply for the rules regarding the airspace above.

Referring to the functional angle, the question is more about whether every coastal State would have such jurisdiction over its EEZ, or only those coastal States needing it, because of *i.e.*, an offshore airport in its EEZ. If a choice is made for the former possibility, protests are likely to arise from States strongly supporting the freedom of overflight. If a choice is made for the latter, some States might argue that they have less power than others do. Of course, extra jurisdiction would also mean extra responsibility and higher costs when extending the jurisdiction of the coastal State to the air above the EEZ.[281]

Another solution would be to grant jurisdiction over the air only for that part of the EEZ that is needed, namely only so much for the coastal State so it can operate its

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[279] Rules as to pollution, noise, etc., fall under the operation of the island and the Dutch government will be free to decide the extent in to which to apply such rules.

[280] Military planes do not fall under the Chicago Convention, similar to other State aircraft. Under *Chicago Convention*, *supra* note 193 at 298, art. 3(d), States are obliged to have "due regard for the safety of navigation of civil aircraft", when issuing regulations for their state aircraft. In practice, however, State aircraft are separated from civil aircraft. Special airspace is reserved for the military. Although, these spaces might have to be moved and might even decrease, they can still be there.

[281] Such responsibilities would include, *inter alia*, air traffic control (ATC) and the accompanying services.

offshore airport. This might be difficult to determine, but it would prevent excessive claims and answer the functional question. Considering the stance of certain States to the right of overflight, this might be a more realistically achievable solution than granting every State jurisdiction over its entire EEZ.

In either case, sovereignty is not needed. The jurisdiction granted under the LOSC and applied to the airspace above the corresponding maritime zone will provide the coastal State with sufficient powers to operate an offshore airport outside territorial waters under both the LOSC and the Chicago Convention. Interpretation of the Chicago Convention in light of the LOSC allows such coastal State authority. This, however, still leaves the question of the granting of traffic rights.

4. The Chicago Convention and an offshore airport outside the territorial sea

4.1 The granting of traffic rights

As highlighted in Chapter Four, the granting of traffic rights is completely regulated by States on a bilateral basis. The obvious problem encountered is whether traffic rights can still be granted in case of an offshore airport outside territorial waters, which does not fall within State sovereignty. This raises the question whether a State needs sovereignty over an artificial island, on which it builds and operates an airport in order to grant traffic rights to that airport. Another issue is whether the bilateral agreements need to be renegotiated because of a change in airport. In the case of the Netherlands, this could mean that KLM would end up in a worse position than before the renegotiations.[282]

Before answering these questions, it should be pointed out that within the European Union traffic rights need no longer be granted on intra-European Union flights, which will be explained in Chapter Six. This issue is, therefore, only important for flights to and from States outside the European Union.

Traffic rights are based on the Chicago Convention and its notions of territory and sovereignty. The issue is whether the island can be deemed Dutch territory for this

[282] This would be so, because KLM and the Dutch government would then have to negotiate from a lower position, which could be used by other airlines and their governments to get concessions they would otherwise not have gotten without giving something more substantial in return.

purpose and whether there is indeed such a need. The powers granted under the LOSC might be sufficient to include the granting of traffic rights. However, it is interesting to study all possible solutions.

To be able to consider an artificial island outside territorial waters as the territory of a coastal State, it is necessary to determine what constitutes territory. Under Article 2 of the Chicago Convention, "territory" is defined as "the land areas and territorial waters thereto under the sovereignty, suzerainty, protection or mandate of such State".[283] So if the artificial island can be construed as a land area under the sovereignty, suzerainty, protection or mandate of the coastal State, the island could be considered as territory of the coastal State.

Land area or land "signifies everything which may be holden; and the term is defined as comprehending all things of a permanent and substantial nature, and even an unsubstantial, provided they be permanent."[284] An artificial island can, therefore, be considered as land. To be territory of a State, the land should be under the sovereignty, suzerainty, protection or mandate of the coastal State according to the Chicago Convention. The terms suzerainty, protection and mandate date back to the years before decolonization and are relationships between two States.[285] They cannot, therefore, be used by analogy to consider an artificial island territory. The definition of territory under Article 2 Chicago Convention is outdated and can, therefore, not be used for an offshore airport outside territorial waters.

P. Mendes de Leon came up with a new definition for the same reason, suggesting that "[t]he scope of this convention extends to the entire territory over which a contracting state has jurisdiction and control for the purpose of application of the provisions of the present convention."[286] Under such a definition, the offshore airport would be Dutch

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[283] *Chicago Convention*, *supra* note 193 at 298, art. 2.
[284] *Supra* note 248, *s.v.* "land"
[285] Suzerainty is the "quasi-sovereign status of certain territories where the local sovereign is a subject (vassal) of another sovereign, and yet exercises most of the powers of the government internally". A State under the protection of another or a protectorate is "a relationship of dependency [which] is created when one state places itself by treaty under the protection of another more powerful state." Finally, a mandate or mandate territory is a "territory separated from the former central powers after World War I, in accordance with Art. 22 of the CONVENANT OF THE LEAGUE OF NATIONS, placed under a tutelary regime." See J.R. Fox, *Dictionary of International and Comparative Law*, 2nd ed. (Dobbs Ferry, New York: Oceana Publications, 1997), *s.v.* « suzerainty », « protectorate » and « mandate territory ».
[286] *Supra* note 257 at 29.

territory, as the LOSC grants jurisdiction and control over such an artificial island, but this would require amendment of the Chicago Convention.[287]

A State can also acquire territory through acquisitive prescription, conquest, occupation, accretion and cession.[288] Article 89 LOSC, however, states that "[n]o States may validly purport to subject any part of the high seas to its sovereignty."[289] The Article applies *mutatis mutandis* to the EEZ, through Article 58(2) LOSC.[290] The Netherlands is, therefore, not even allowed to assert sovereignty over the island. In practice that is, however, exactly what happens. A piece of ocean space will be permanently under the control of the coastal State and, thus, becomes part of its territory.[291] However, the coastal State will not have sovereignty over the island or the airport under international law. It will only have jurisdiction and control.

The question whether sovereignty is needed for the State to be able to grant traffic rights can now be answered. It is not, for three reasons. First, the LOSC grants the coastal State jurisdiction for the use and operation of an artificial island. This, therefore, includes jurisdiction in relation to the granting of traffic rights as these are essential for the operation of an offshore airport. Secondly, the EEZ regime was created so coastal States can reap the economic benefits of that zone. To this end, the LOSC grants the coastal State sovereign rights under Article 56(1)(a) LOSC.[292] By building a offshore airport on an artificial island, the coastal State uses one of the most valuable resources of the EEZ – space - for an economic purpose: air transport. Granting traffic rights to land at that airport is part of that use and is, thus, a sovereign right of the coastal State. Thirdly, the airport is an extension of the Netherlands. As it will be the only international airport of

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[287] P. Mendes de Leon implies the same thing. See *ibid*, at 30-31.
[288] See *supra* note 249 at § 156.
[289] *LOSC*, *supra* note 64 at 1287, art. 89.
[290] *Ibid.* at 1280, art. 58(2).
[291] A similar remark is made by Walker, *supra* note 277 at 651. An analogy can also be drawn to the status of Outer Space and the celestial bodies under international law and the status of Antarctica. Fir more information on this subject, see J.Kish, *The Law of International Spaces* (Leiden: A.W. Sijthoff International Publishing Company, 1973) and M.S. McDougal, H.D. Lasswell and I.A. Vlasic, *Law and Public Order in Space* (London: Yale University Press, 1963).
[292] *LOSC*, *supra* note 64 at 1280, art. 56(1)(a), states that "[i]n the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of (...) and with regard to any other activities for the economic exploitation and exploration of the zone (...)". These terms can, therefore, also apply to an offshore airport.

the Netherlands,[293] traffic rights can only be granted for that particular airport for which it has the jurisdiction and, thus, the right to do so.

Finally, the status of the new airport under the old bilateral treaties must be addressed. Under all Dutch bilateral treaties, the determined place of landing is Amsterdam.[294] Because the new airport will replace the old one, the same airport designator code could be applied.[295] As a result, nothing will have to be changed in the bilateral agreements and none will have to be renegotiated. Therefore, route-schedules and annexes of bilateral agreements with non EU-member States need not be changed.

5. Flying activities and artificial islands

When an offshore airport has been built, the question of which law will be applicable to flying activities arises. Such activities can be divided into four different groups: flights to and from the island from elsewhere, flights to and from the island from the coastal State, flights to other artificial islands in the same EEZ, and flights over the island.

For the efficiency of flights and flight movements, the legal regime should be the same for all four groups. There are three ways to solve this dilemma. Firstly, one can consider the EEZ as part of the high seas and, thus, apply the rules of the air of the Chicago Convention without any distinctions. Secondly, one can consider the EEZ as part of the jurisdiction of the coastal State and, thus, be able to file differences. Finally, a whole new system could be developed specifically for the EEZ.[296] Since air traffic benefits from continuity, the third solution should not be considered as it could result in the application of three different legal regimes.

In practice, most of the world is already divided into flight information regions (FIRs),[297] in which information and advice for the flight is given and the appropriate

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[293] If an offshore airport is built, Amsterdam Airport Schiphol will be closed and all international flights will be handled by the new offshore airport. See chapter 1 *supra*.
[294] Interview with H. de Jong (28 April 1999).
[295] See H. Bouwmans, "Op weg naar zee (8) De Juristen, Kans op claims is levensgroot" *Het Parool* (15 December 1998).
[296] Something similar is proposed by P.P. Heller, "Airspace over Extended Jurisdictional Zones" in Gamble, *supra* note 270, 135 at 146-147.
[297] Under Annex 11 to the Chicago Convention on air traffic services, flight information regions are dealt with. It recommends a delineation of the airspace, which does not necessarily coincide with the borders of

organizations are alerted in case of distress of an aircraft. Amsterdam has its own FIR, which extends far beyond the territorial sea. Even if an offshore airport were located 30 km from the coast, it would still fall within the Amsterdam FIR.[298]

The waters beyond the territorial sea are considered by ICAO as high seas and, thus, fall under the application of Article 12 Chicago Convention.[299] In the case of an offshore airport, however, this should be different because the coastal State needs to be able to apply its jurisdiction and control to the island. The extension of State jurisdiction over the airspace above the waters beyond the territorial sea has already been accepted by other States and has been advocated by many authors.[300]

In order to promote the efficient use of the airspace and a continuing flow of air traffic, the coastal State should be able to exercise its own jurisdiction over the EEZ, or as P.P. Heller puts it:

> Primarily in the interest of safety of air traffic, the Rules of the Air, and the rules applying to operation and navigation of the coastal state, should be the same as those applying in the airspace over the territory of the coastal state; for inward flights from the moment an aircraft crosses the boundary between the high seas and the coastal state's EEZ, and for outward flights until the aircraft crosses the boundary between the coastal state's EEZ and the high seas.[301]

Not everybody agrees with this. Some authors believe that such an extension of coastal State jurisdiction is contrary to the spirit of the high seas and should not be allowed.[302] It is a fact, however, that certain extensions of coastal State jurisdiction have been accepted by the international community. ADIZ, CADIZ and other identification zones are examples of this creeping jurisdiction and its acceptance. Older examples are those of the CZ and the continental shelf. Both were increases in coastal state jurisdiction and both were accepted as customary international law and later codified.

Whether an increase in jurisdiction will be accepted will depend first and foremost on the reasonableness and view of the international community. In the case of an offshore

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States. For more information on F.I.R.'s, see B. Correia e Silva, *Some Legal Aspects of Flight Information Regions* (LL.M. Thesis, Montreal: Institute of Air and Space Law, McGill University, 1990) [unpublished].

[298] ICAO, *Regional Air Navigation Plan – Europe*, ICAO Doc. 7754.

[299] Interview with C.R. Boquist (8 February 1999)..

[300] See Martial, *supra* note 265 at 263; Hayton, *supra* note 264 at 394; Christol, *supra* note 270; Murchinson, *supra* note 270.

[301] Heller, *supra* note 296 at 148.

airport, jurisdiction for the flight movements surrounding it can be based in large part on the regime of the EEZ. A State has jurisdiction and control over the operation of the island. For an offshore airport to operate, jurisdiction and control over the airspace needs to be held by the coastal State. Some authors have pointed to the reactions of States during the Law of the Sea Conference, especially those claiming that the EEZ is still part of the high seas.[303] The United States was one of those States, but the United States established ADIZ and accepts CADIZ and others that infringe on the freedoms of the high seas. Past experience, therefore, shows that the international community is likely to accept such an extension of jurisdiction.

6. Conclusion

Regarding the right of overflight, some alternatives have been provided here. In order to be able to operate an offshore airport, a coastal State needs jurisdiction and control over flight maneuvers near the airport. Such jurisdiction can be based on the subsidiarity[304] principle, on the customary international law of identification zones and on the principle of necessity to have such powers.

The coastal State has exclusive jurisdiction over such an island, so it can apply the laws and international treaties to which it is a party to that island. Freedom of overflight is granted to other States that, therefore, do not need permission to fly over that territory. However, they will have to comply with the air traffic control in the respective flight information regions.

The LOSC also provides for situations in which no rights are granted by the Convention to either the coastal State or other States. This is the case with the status of the airspace above the EEZ. According to the LOSC, in case of a conflict between the coastal State and any other State or States, "the conflict should be resolved on the basis of equity and in the light of all relevant circumstances, taking into account the respective

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[302] See *supra* note 269.
[303] See Hailbronner, *supra* note 163 at 504.
[304] According to this principle, a State is granted the powers it needs to be able to abide by the Convention.

importance of the interests involved to the parties as well as to the international community as a whole".[305]

Waiting for such a conflict to arise before solving it is not a preferred option. Considering the importance and financial investment of an offshore airport, solutions need to be found beforehand. Either the coastal State has jurisdiction over the airspace over the EEZ or it does not. Since it has jurisdiction to operate and use an offshore airport on an artificial island, it also has jurisdiction over the airspace of the EEZ since this is an inherent right to the operation of an offshore airport.

Regulating this on a multilateral basis, *i.e.*, by redrafting the Chicago Convention, would be a better solution. However, as R.D. Hayton puts it:

> But pending the realization of such a felicitous and, at the moment, unlikely result, the States will continue to form the law out of reciprocal demands and expectations, which may, as in the past, 'ripen' into usage, and then into binding custom. Whether or not regarded as *sui generis* by the decision makers, these solutions, worked out as we go along, shaping the rules and principles of the emergent international air law, will have an impact certain to be felt in more than one field of legal doctrine.[306]

[305] *LOSC*, *supra* note 64 at 1280, art. 59.
[306] R.D. Hayton, "Jurisdiction of the Littoral State in the 'Air Frontier'" (1964) 3 Philippine Int. L.J. 369 at 398.

CHAPTER 6

EUROPEAN UNION LAW

Since the establishment of the European Coal and Steel Community (ECSC) in 1952, EU law has developed considerably. In 1957 the Treaties of Rome added the European Economic Community and EURATOM to the existing ECSC, resulting in three Communities. In the ensuing period, the Communities increased their memberships and became more powerful and influential. The three Communities are now part of the legal framework of the European Union.

Even though EU air law was at first slow to develop, in the late 1980s and early 1990s it hit its stride, resulting in full liberalization of the internal market. The EU Commission, which was the driving force behind the liberalization, is now trying to enhance its prerogative so it will be able, at a minimum, to influence air transport relations with third countries as well.

Community air law will not be the only EU legislation to affect an offshore airport. As the Netherlands is a Member State of the European Union, other issues of EU law will be applicable to an airport outside the Dutch territorial waters, either directly or through the Dutch implementation of that law. This includes areas in which the European Union has exclusive competence, like fisheries, and those in which the European Union has shared responsibilities with its Member States, as is the case with environmental matters. However, due to the limited length of this thesis, these non-air law issues will only be addressed briefly.

This chapter begins with a short introduction to the history and workings of the European Union. It then traces the steps of the liberalization of the European air transport sector, after which it discusses the most salient elements of EU air law to the operation of an offshore airport. Finally, it outlines future scenarios in which the EU Commission might receive more external competence to regulate air transport relations with third countries.

1. Introduction

1.1 History

After the Second World War, the ECSC[307] was established on a French initiative, between France, Germany, the Netherlands, Belgium, Luxembourg, and Italy. A supranational organ, the Assembly regulated the production of coal and steel, and, thus, the most essential elements for the creation of weapons were outside the realm of State sovereignty. This allowed the Germans to mine coal and produce steel without posing any further threat to the other European countries.

Since this effort was such a success, the Member States decided to attempt further integration and, after some disappointments, managed to establish both the European Economic Community (EEC) and EURATOM in 1957.[308] All three Communities had similar institutional structures, and they each benefited from a supranational body charged with regulating issues within its mandate, thus decreasing the involvement of the Member States themselves.

More issues began to fall within the competence of the three Communities. Subsequent amendments by the Merger Treaty[309] and the Single European Act[310] paved the way to the establishment of the European Union by the Treaty on the European Union of 7 February 1992, the so-called Maastricht Treaty.[311] This Treaty created a three-pillared structure: The "roof" of the structure is comprised of the common provisions and

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[307] See *Treaty establishing the European Coal and Steel Community*, 18 April 1951, G.B.T.S. 1973 No. 2 [hereinafter ECSC].

[308] See *Treaty (with annexes and Protocol) establishing the European Atomic Energy Community (EURATOM)*, 25 March 1957, 298 U.N.T.S. 167 [hereinafter *EURATOM*] and *Treaty establishing the European Economic Community (with annexes and Protocols)*, 25 March 1957, 298 U.N.T.S. 3 [hereinafter *EC*].

[309] See *Treaty establishing a Single Council and a Single Commission of the European Communities*, 8 April 1965, 4 I.L.M. 776 [hereinafter *Merger Treaty*]. This Treaty renamed and merged the special Council of Ministers of the ECSC, the Council of the European Economic Community (EEC) and the Council of EURATOM into the Council of the European Communities. It also merged and renamed the High Authority of the ECSC, the Commission of the EEC and the Commission of EURATOM into the Commission of the European Communities.

[310] See *Final Act of the Conference of Representatives of the European Communities' Member States with Treaty Modifications concerning Community Institutions, Monetary Cooperation, Research and Technology, Environmental Protection, Social Policy and Foreign Policy Coordination*, 17 & 28 February 1986, 25 I.L.M. 503 [hereinafter *Single European Act* or *SEA*].

[311] See *Treaty on European Union and Final Act*, 7 February 1992, 31 I.L.M. 247 [hereinafter *TEU*].

final provisions of the EU Treaty. The three communities, the common foreign and security policy, and the provisions on cooperation in the fields of justice and home affairs form the three different pillars. The last two pillars are intergovernmental, while the first is supranational. It is under the first pillar, and specifically under the EEC Treaty (renamed EC Treaty), that liberalization of the air transport sector took place. The Treaty of Amsterdam[312] has consolidated the Treaty of the European Union and the Treaty of the European Communities.[313]

1.2 Legislation and the institutional structure

The institutional structure of the European Union has become more elaborate under the different amendments. The European Council presides at the top of the hierarchy. In this Council the heads of the governments meet in order to set the general framework and deal with politically sensitive issues.[314] Beneath this Council resides the Council of the European Union.[315] This Council consists of the ministers whose issue is under consideration, *i.e.*, the ministers of transport if transport is under discussion.

The Commission of the European Communities[316] and the European Parliament[317] are more or less equal in hierarchy. The Commission is a supranational structure, consisting of twenty members chosen on basis of merit rather than the States they represent.[318] Its task is threefold: it has the power of initiative, making proposals for new legislation; it ensures that Member States do not infringe on EU law; and it implements the policies established by the Council.[319]

The European Parliament represents the people of the European Union, who have had an active and passive right to vote since 1979. Its influence on the decision-making process in the European Union has spread over the years, and it now has a "veto" over

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[312] See *Consolidated Version of the Treaty of the European Union and Consolidated Version of the Treaty establishing the European Community*, 2 October 1997, 37 I.L.M. 56 [hereinafter *Treaty of Amsterdam*]. This treaty also renumbered the Articles, and these new numbers will be used here.
[313] See *ibid.* at 69, art. 8.
[314] See *ibid.* at art. 4.
[315] See *ibid.* at 121-122, art. 202-210.
[316] See *ibid.* at 122-124, art. 211-219.
[317] See *ibid.* at 119-121, art. 189-201.
[318] See *ibid.* at 123, art. 213.
[319] See J. Steiner & L. Woods, *Textbook on EC Law*, 5th ed. (London: Blackstone Press ltd, 1997) at 23-24.

certain decisions.[320] It has also gained the power of initiative, allowing it to submit proposals to the Commission if acting on a majority of its members.[321] Moreover, it has become part of the co-decision procedure implemented by the Treaty of Amsterdam.[322]

The Court of First Instance[323] has been added to the institutional structure to aid the European Court of Justice (ECJ).[324] Although the Court of First Instance has a more restricted mandate than the ECJ, its decisions in competition cases have been significant. Still, cases can be appealed to the ECJ.[325] The task of the ECJ is to assure that "in the interpretation and application of the Treaty the law is observed."[326] To ensure that the interpretation of Community legislation is uniform throughout the European Union, a system of obligatory preliminary questions was put in place. Article 234 EC requires that if an issue of Community law is brought before a court in a Member State and this is a court of last instance, the ECJ shall be requested to interpret the issue.[327] Lower courts, which are not a court of last instance, may ask preliminary questions, but are not obliged to do so.

EU legislation has three forms, which differ somewhat in their application.[328] A regulation has a general application and is directly binding in its entirety in all Member States. A directive is only binding as to the result to be achieved and can be implemented by the Member State to which it is addressed, in whatever form and by whatever State authority the Member State so chooses. Finally, a decision is binding in its entirety to the

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[320] See *Treaty of Amsterdam*, *supra* note 312 at 129, art. 251.
[321] See *ibid.* at 120, art. 192.
[322] See *ibid.* at 129, art. 251.
[323] See *ibid.* at 124-125, art. 225.
[324] See *ibid.* at 124-127, art. 220-245.
[325] See *ibid.*
[326] *Ibid.* at 124, art. 220.
[327] *Ibid.* at 126, art. 234, sets out the jurisdiction of the ECJ in preliminary rulings:

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
> (a) the interpretation of this Treaty;
> (b) the validity and interpretation of acts of the institutions of the Community and of the ECB [European Central Bank];
> (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.
>
> Where any such is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

[328] See *ibid.* at 128, art. 249.

addressee, which can be a natural person. The Council has used all three forms of legislation for the liberalization of air transport.

2. The Liberalization process

2.1 The internal air transport market

Air transport is "regulated" by Article 80(2) EC, which provides that "[t]he Council may, acting by qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport."[329] Member States at first interpreted this to mean that EC law was not applicable to air transport at all, including articles on competition,[330] because they wanted to protect their airlines from all competition. However, in 1974 the ECJ settled the issue in the *French Seaman* decision.[331] The court stated that the then Article 84(2) EC prevented the application of the common transport policy to air and sea transport, unless the Council would decide otherwise, but that all general rules of the Treaty did apply to air and sea transport.[332] Consequently, the Commission started making proposals to implement a common air transport policy.

On 4 July 1979, the Commission issued its first memorandum,[333] outlining ideas for a common air transport policy and giving specific suggestions concerning its legislation. The Council did indeed adopt some new laws,[334] which included a resolution for setting up consultations between Member States and third countries to discuss air transport issues and between the Member States and international organizations in air

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[329] *Ibid.* at 70, art. 80(2).
[330] The two main Articles on competition are Articles 81 and 82. Article 81 EC prohibits agreements that are anti-competitive and concerted practices, and Article 82 EC deals with abuse of a dominant position. See *ibid.* at 93-94, arts. 81 & 82.
[331] See *Commission v. French Republic*, C-167/73 [1974] E.C.R. I-359.
[332] See *ibid.* at I-371.
[333] See *Contributions of the European Communities to the Development of Aviation-Memorandum of the Commission*, Document COM (79) 311 final, in Bulletin of the European Communities, app. 5/79.
[334] For a complete list, see E. Giemulla & R. Schmid, *European Air Law; Texts and Documents*, looseleaf (The Hague: Kluwer Law International, 1998) at 20.

transport.[335] The Commission issued a second memorandum on 15 March 1984, defining the specific issues in the air transport system that were anti-competitive.[336] This memorandum was followed by another judgement of the ECJ in the *Nouvelles Frontières* case, which specifically stated competition law was applicable to air transport.[337] Shortly after this judgement, on 7 July 1987, the Single European Act came into force.[338] The main purpose of the Act was to break down the remaining barriers and realize a single internal market as of 31 December 1992. This included air transport, and in order to achieve this goal, measures regarding air transport were adopted in three stages, the so-called "packages".

The first package, adopted on 14 December 1987, commenced the liberalization of air transport within the Community. The package contained rules relating to the applicability of EC competition rules and some exception thereupon, as well as rules on fares, and access and capacity.[339] Due to the *Nouvelles Frontières* case, and Regulation 3975/87, competition law now became applicable to air transport. Under Regulation 3975/87, however, the Commission could grant block exemptions for certain types of agreements.[340] Directive 87/601 allowed airlines some flexibility, as opposed to previous governmental restrictions, by allowing them to discount fares, which Member States were required to approve so long as the prices remained within specified "zones of

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[335] See EC, *Council Resolution 80/50/EEC of 20 December 1979, Setting up a Consultation Procedure for the Relations between Member States and Third Countries in the Field of Air Transport and on Action relating to such Matters within International Organizations*, [1980] O.J.L. 48/24.

[336] See *Commission of the European Communities, Civil Aviation Memorandum No. 2: Progress on the Way towards a Common Aviation Policy*, Document COM (84) 72 final.

[337] See *Ministère public v. Lucas Asjes, Andrew Gray and Others, Andrew Gray and Others, Jaques Maillot and Others and Léo Ludwig and Others*, C-209 to 213/84, [1986] E.C.R. I-1425 at 1466 [also known as the *Nouvelles Frontières* case].

[338] See *supra* note 310.

[339] The following legislation was adopted:

- EC, *Council Regulation 3975/87 of 14 December 1987 Laying Down the Procedure for the Application of the Rules on Competition to Undertakings in the Air Transport Sector*, [1987] O.J.L. 374/1;
- EC, *Council Regulation 3976/87 of 14 December 1987 on the Application of Article 85 (3) of the Treaty to Certain Categories of Agreements and Concerted Practices in the Air Transport Sector*, [1987] O.J.L. 374/9;
- EC, *Council Directive 87/601 of 14 December 1987 on fares for scheduled air services between Member States*, [1987] O.J.L. 374/12;
- EC, *Council Decision 87/602 of 14 December 1987 on the Sharing of Passenger Capacity between Air Carriers and Scheduled Air Services between Member States and on Access for Air Carriers to Scheduled Air Service Routes between Member States*, [1987] O.J.L. 374/19.

flexibility".[341] Finally, Decision 87/601 took the initial steps towards third, fourth and fifth freedom traffic between the Member States but included certain exceptions.[342]

Before the adoption of the second package, the ECJ decided, in the *Ahmed Saeed* case,[343] that competition rules would apply to both international air transport between Member States and their domestic air transport. The judgement was influenced by the adoption of the first package, and the Treaty provisions were interpreted in light of this new legislation.[344]

The second package was adopted on 18 and 19 June 1990.[345] It contained Regulation 2342/90, which extended the "zones of flexibility" for discount prices and introduced a double disapproval system for certain fares.[346] At the same time, Regulation 2343/90 provided for the complete liberalization of third and fourth freedom traffic and some liberalization of fifth freedom traffic.[347] It also allowed Member States to increase capacity on a reciprocal basis.[348] Finally, Regulation 2344/90 extended the exceptions made under the then Article 84(3) EC for another year.

The Council adopted the third and final package on 22 June 1992. It contained the final steps in the legal framework to attain an internal market for air transport.[349] Under

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[340] See Giemulla & Schmid, *supra* note 334 at 28; J. Balfour, *European Community Air Law* (London: Butterworths, 1995) at 158.

[341] Giemulla & Schmid, *ibid.* at 28; Balfour, *ibid.* at 79.

[342] Giemulla & Schmid, *ibid.*; Balfour, *ibid.* at 55-57.

[343] See *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH* v. *Zentrale Bekämpfung unlauteren Wettbewerbs e.V.*, C-66/86, [1989] E.C.R. I-803.

[344] See *ibid.* at 842-844.

[345] The second package contained the following legislation:

- EC, *Council Regulation 2342/90 of 24 July 1990 on Fares for Scheduled Air Services*, [1990] O.J.L. 217/1;
- EC, *Council Regulation 2343/90 of 24 July 1990 on Access for Carriers to Scheduled Intra-Community Air Service Routes and on the Sharing of Passenger Capacity between Air Carriers on Scheduled Air Services between Member States*, [1990] O.J.L. 217/8;
- EC, *Council Regulation 2344/90 of 24 July 1990 amending Regulation (EEC) No 3976/87 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices in the Air Transport Sector*, [1990] O.J.L. 217/15.

[346] See Giemulla & Schmid, *supra* note 334 at 40-44; Balfour, *supra* note 340 at 80.

[347] See Giemulla & Schmid, *ibid.* at 46; Balfour, *ibid.* at 56.

[348] See Giemulla & Schmid, *ibid.* at 48-50; Balfour, *ibid.* at 55.

[349] The third package contained the following legislation:

- EC, *Council Regulation 2407/92 of 23 July 1992 on Licensing of Air Carriers*, [1992] O.J.L. 240/1;
- EC, *Council Regulation 2408/92 of 23 July 1992 on Access for Community Air Carriers to Intra-Community Air Rroutes*, [1992] O.J.L. 240/8;
- EC, *Council Regulation 2409/92 of 23 July 1992 on Fares and Rates for Air Services*, [1992] O.J.L. 240/15;

this package, licensing criteria became standardized throughout the Community, allowing an airline to operate out of any Member State, irrespective of its European nationality. The package further created a single air transport market by eliminating all restrictions on access and capacity from 1 January 1993 onwards, with the exception of the right of cabotage, which was liberalized as of 1 April 1997.[350] An airline could now set its own fares, required only to notify the government 24 hours in advance. The government could intervene if it considered the fare too high or too low, but had the burden of proof that such was the case, taking into account, *inter alia*, fares on the same route and the competition on that route. [351] Finally, the regulations on competition codified the ECJ judgement of the *Ahmed Saeed* case, extending the application of competition rules to domestic air transport and narrowing the exemptions under the then Article 84(3) EC. It placed a limit on the duration of the exemptions and deleted certain categories and various requirements.[352]

2.2 External relations

After the internal air transport market became a reality, the Commission turned to external air transport relations. It wanted to control negotiations of bilateral agreements because it claimed that the external relations of the Member States undermined the existing internal market.[353] The Commission especially targeted "open skies" agreements because, according to the Commission, the United States would gain access to the European Union, and its common carriers would be unable to handle the competition.[354] The Member States, and with them the Council, were unwilling to hand over such

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- EC, *Council Regulation 2410/92 of 23 July 1992 on amending Regulation (EEC) No. 3975/87 Laying Down the Procedure for the Application of the Rules on Competition to Undertakings in the Air Transport Sector*, [1992] O.J.L. 240/18;
- EC, *Council Regulation 2411/92 of 23 July 1992 on amending Regulation (EEC) No. 3976/87 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices in the Air Transport Sector*, [1992] O.J.L. 240/18.

[350] See Giemulla & Schmid, *supra* note 334 at 65-67; Balfour, *supra* note 340 at 57-58.
[351] See Giemulla & Schmid, *ibid.* at 61-64; Balfour, *ibid.* at 81-86.
[352] See Balfour, *ibid.* at 23.
[353] See Giemulla & Schmid, *supra* note 334 at 120.
[354] See "EU-Commissie tegen bilaterale open-sky-akkoorden (EU-Commission against bilataral open-sky-agreements)" *Staatscourant* (2 March 1998) at 53 [translated by author], "EU/Air Transport: Commission

prerogatives. As a result, the powers given have been sparing and for very specific purposes.

The Commission was granted authority to negotiate the EEC-Norway-Sweden Air Transport Agreement under Decision 92/384,[355] as amended by Decision 93/453.[356] The Agreement has now expired due to the subsequent EU membership of Sweden and the entry into force of the European Economic Area Agreement.[357] The Commission then received permission to negotiate a bilateral air services agreement with Switzerland. This is now included in a general European Union-Switzerland Association Agreement to come into force progressively. The Commission has also been negotiating air transport agreements as part of the negotiation of the association agreements between the European Union and the Member States on the one hand and Hungary, Poland, the Czech and Slovak Republics, Romania and Bulgaria on the other.[358] Finally, the Commission received a mandate to negotiate air transport matters with the United States, but it specifically excluded air traffic rights. A general Agreement between the United States and the European Union has now been established on the application of competition laws.[359] The Commission has been pressing for a broader mandate so that it will no longer be dependent on the Council. The Member States, however, are not yet ready to surrender this power.

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reopens Infringement Proceedings Against Member States that have Concluded Open Skies Agreements with the United States" *Europe* (12 March 1998) at 7; Guest Lecture of P. van Fenema (10 March 1999).

[355] See EC, *Council Decision 92/384 of 22 June 1992 concerning the conclusion of an Agreement Between the European Economic Community, the Kingdom of Norway and the Kingdom of Sweden on Civil Aviation*, [1992] O.J.L. 200/21.

[356] See EC, *Council Decision 93/453 of 24 July 1993 concerning the Amendment of the Agreement between the European Economic Community, the Kingdom of Norway and the Kingdom of Sweden on Civil Aviation*, [1993] O.J.L. 212/17.

[357] See EC, *Decision of the Council and the Commission 94/1 of 13 December 1993 on the Conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland*, [1994] O.J.L. 1/2, amended by EC, *Decision of the Council and the Commission 94/2 of 13 December on the Conclusion of the Protocol Adjusting the Agreement on the European Economic Area between the European Communities, their Member States and Austria, Finland, Iceland, Liechtenstein, Norway and Sweden*, [1994] O.J.L. 1/571. This agreement includes provisions on air transport.

[358] See A.A. Mencik von Zebinsky, *European Union External Competence and External Relations in Air Transport* (The Hague: Kluwer Law International, 1996) at 94-95.

[359] See *Agreement between the Government of the United States and the Commission of the European Communities regarding the Application of their Competition Laws*, 23 September 1991, reproduced in Giemulla & Schmid, *supra* note 334 at A II (2.0).

3 EU aviation law and an offshore airport

The above outlined legal regime for air transport, as currently in force, refers to air transport within the European Union and is thus applicable to the airports in the Member States. Apart from legislation on air transport, legislation was also issued relating to the operation of an airport. These include a Regulation on the allocation of slots,[360] a Directive regarding access to the groundhandling market[361] and a Regulation on the application of competition law to slot allocation.[362] It also includes Directives on the limitation of noise,[363] on the limitation of Chapter 2 aircraft[364] and on the specifications for procurement of air-traffic-management equipment and systems,[365] and a Regulation on the harmonization of technical requirements and administrative procedures.[366]

Regulation 2408/92 on access defines an airport as "any area in a Member State which is open for commercial air transport operations."[367] Regulation 3975/87 on the application of competition rules applies to air transport between Community airports.[368] While it does not define the term Community airport, it is likely to be the same as in Regulation 2408/92.[369] The same is true for the Regulation on slots, which does not define a Community airport either. Directive 96/67 on groundhandling provides a

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[360] See EC, *Council Regulation 95/93 of 18 January 1993 on Common Rules for the Allocation of Slots of Community Airports*, [1993] O.J.L. 14/1.

[361] See EC, *Council Directive 96/67 of 15 October 1996 on Access to the Groundhandling Market at Community Airports*, [1996] O.J.L. 272/36.

[362] See EC, *Commission Regulation 1523/96 of 24 July 1996 amending Regulation (EEC) No. 1617/93 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices concerning Joint Planning and Coordination of Schedules, Joint Operations, Consultations on Passenger and Cargo Tariffs on Scheduled Air Services and Slot Allocation at Airports*, [1996] O.J.L. 190/11.

[363] See EC, *Council Directive 83/206 of 21 April 1983 amending Directive 80/51/EEC on the Limitation of Noise Emissions from Subsonic Aircraft*, [1983] O.J.L. 117/15; EC, *Council Directive 89/629 of 4 December 1989 on the Limitation of Noise Emission from Civil Subsonic Jet Aeroplanes*, [1989] O.J.L. 363/27.

[364] See EC, *Council Directive 98/20 of 30 March 1998 amending Directive 92/14/EEC on the Limitation of the Operation of Aeroplanes covered by Part II, Chapter 2, Volume 1 of Annex 16 to the Convention on International Civil Aviation, 2nd ed. (1988)*, [1998] O.J.L. 107/4.

[365] See EC, *Council Directive 93/65 of 19 July 1993 on the Definition and Use of Compatible Technical Specifications for the Procurement of Air-Traffic-Management Equipment and Systems*, [1993] O.J.L. 187/52.

[366] See EC, *Council Regulation 3922/91 of 16 December 1991 on the Harmonization of Technical Requirements and Administrative Procedures in the Field of Civil Aviation*, [1991] O.J.L. 373/4.

[367] *Regulation 2408/92, supra* note 349, art. 2(k).

[368] See Regulation 3975/87, art. 1(2) as amended by Council Regulation (EEC) No. 1284/91 of 14 May 1991 and as amended by Council Regulation (EEC) No. 2410/92 of 23 July 1992, *supra* notes 339, 345 & 349.

different definition of airport, namely "any area of land especially adapted for the landing, taking-off and manoeuvres of aircraft, including ancillary installations which these operations may involve for the requirements of aircraft traffic and services including the installations needed to assist commercial air services."[370] This definition seems much broader as it does not include the term "Member State" and could include an airport whose status under Community law is unclear, like that of an offshore airport.[371]

The Directives on noise apply to aircraft registered in the territory of a Member State; noisy aircraft are not allowed to operate in the territory of another Member State.[372] Directive 89/629 on noise emissions from civil subsonic jet aeroplanes completely phases out the use of Chapter 2 aircraft within the European Union, and they may no longer be operated in either the Member State of registration or any other Member State unless specifically exempted.[373]

The issue, therefore, is whether EU legislation would apply to an airport outside the territorial waters of a Member State. In fact, the same reasoning applies as under both the LOSC and the Chicago Convention. The coastal State has exclusive jurisdiction over the operation and use of the island and can, therefore, apply its internal law as if it were its own territory. This law includes EU law, which is part of that internal law. In fact, the European Union will be able to extend its law directly to this airport as it falls under the jurisdiction of one of its Member States. This would not be the case had the Netherlands made a specific reservation as to the application of EU law to this airport, which it did not. The ECJ stated this already in relation to fishing rights on the high seas, stating "that the rule-making authority of the Community *ratione materiae* also extends -in so far as the Member States have similar authority under public international law- to fishing on the high seas."[374] As the Netherlands has certain authority over the offshore airport, EU law will be part of that authority, so long as the European Union does not acquire exclusive competence over such matters.

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[369] J. Balfour comes to the same conclusion. See Balfour, *supra* note 340 at 167-168.
[370] *Directive 96/67*, *supra* note 361 at art. 2(a).
[371] See Balfour, *supra* note 340 at 167.
[372] See *Directive 83/206*, *supra* note 363 at art. 1.
[373] See *Directive 89/629*, *supra* note 363 at art. 2.

4. Other EU law relevant to an offshore airport

Apart from air law, other issues regulated by EU legislation will be relevant to the building, use and operation of an offshore airport. Although they are actually outside the scope of this thesis, a short outline of the issues is given. One such issue that falls within the exclusive competence of the European Union is fisheries. Since it is within the common agricultural policy, the European Union has complete and exclusive competence over fisheries. Because the offshore airport will undoubtedly influence the local fish population and the subsequent fishing thereof, the European Union will be involved in some respect. As of 1 January 1977, the European Community extended the European fishery zones to 200 miles, following the example of other countries.[375] The European Union also has exclusive competence over the conservation of the fish stocks and the division of the allowable catching quota between Member States.[376] This includes the authority to protect certain areas that are important for the fish stock and the ability to prevent certain practices harmful to the fish.[377] Research by the Netherlands as to the adverse effects of an offshore airport to fish is in progress.[378]

Issues for which the European Union shares its competence with Member States are the protection of the habitat and natural environment of animals and plants, environmental protection, and sea transport. The protection of habitat and natural environment includes the protection of sea animals and birds. Since the presence of an offshore airport will have an effect on such environments, the Netherlands has to ensure that protected areas or highly sensitive areas are not adversely affected. Since all EU

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[374] *Cornelis Kramer and others (preliminary ruling requested by the Arondisementsrechtbanken of Zwolle and Alkmaar)*, C-3, 4 and 6/76, [1976] E.C.R. I-1279, at I-1309.

[375] See P.J.G. Kapteyn & P. Verloren van Themaat, *Introduction to the Law of the European Communities*, 2nd ed. by L.W. Gormley (Deventer: Kluwer Law and Taxation Publishers, 1989) at 701.

[376] See *ibid.*

[377] See M. Hertoghs, "Luchthaven in of aan zee. Een onderzoek naar de bestuurlijke en juridische mogelijkheden, knelpunten en oplossingsrichtingen bij vestiging van een luchthaventerrein op een kunstmatig eiland in zee (Airport in or bordering the sea. An investigation into the administrative and legal possibillities, problems and possible solutions when constructing an airport on an artificial island in sea)", Report for TNLI (Maastrichts Europees Instituut voor Transnationaal Rechtswetenschappelijk Onderzoek, Faculteit der Rechtsgeleerdheid, Universiteit Maastricht, October 1998) [unpublished, available at Universiteit Maastricht] [translated by author] [hereinafter METRO report] at 10.

[378] See TNLI, *Luchtvaart-infrastructuur in de toekomst, Samenvattende onderzoeksrapportage; Waar ligt de toekomst van de luchtvaart in Nederland?* (Air transport infrastructure in the future, Summarizing

Member States, including the Netherlands, and the European Union itself are party to the Treaty of Rio on biological diversity,[379] this has already been taken into consideration and studies are being conducted.[380]

The level of environmental protection is high within the European Union, and even higher in some Member States, like in the Netherlands. Where cooperation overlaps with an issue under EU law, the two need to be integrated, and to this end the Commission usually has observer status when it is not a full member. Environmental protection of the North Sea, in particular, is for the most part coordinated within the OSPAR Commission and the North Sea Ministers Conference, with the other States bordering the North Sea.[381] Under EU environmental law, an environmental impact report is obligatory, and the Dutch government already anticipates one for the offshore airport.[382]

Maritime transport has been excluded under Article 80(2) EC from the applicability of the common transport policy rules. As in air transport a common sea transport policy is anticipated and the first steps towards its formulation have been taken.[383] In 1984 the Council adopted four regulations to start liberalizing maritime transport. These included measures regarding the applicability of competition rules to maritime transport[384] and the application of the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries.[385] A common sea transport policy must, however, be taken into account because of the effect of an offshore airport on navigation.

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investigation report; What will be the future of air transport in the Netherlands?), (The Hague: December, 1998) at 169-170 [translated by author].

[379] See *Convention on biological diversity*, 5 June 1992, 31 I.L.M. 818.

[380] See *ibid.* at 155.

[381] See *Convention for the Protection of the Marine Environment of the North-East Atlantic*, 22 September 1992, 32 I.L.M. 1069 [hereinafter *OSPAR Convention*]. See chapter 7 *infra*.

[382] See EC, *Council Directive 97/11 of 14 March 1997 amending Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment as Amended by Council Directive 97/11 of 3 March 1997*, [1997] O.J.L. 73/5 [hereinafter *Environmental Assessment Directive*].

[383] See *METRO Report*, *supra* note 377 at 14.

[384] See EC, *Council Regulation 4056/86 of 31 December 1986 on the Application of Articles 85 and 86 of the Treaty to Maritime Transport*, [1986] O.J.L. 378/1.

5. In case of EU external competence

External competence, *i.e.*, the authority of the Commission to deal with third countries on behalf of the Member States, is based on the provisions of, *inter alia*, the EC Treaty. This competence can be separated in two categories: relations with international organizations and relations with third countries. The Community has a legal personality[386] and, therefore, has both a passive and an active right of delegation, *i.e.*, it can receive ambassadors and it can send them. It can also become member of an international organization and has exclusive competence in external relations for those issues in which it has exclusive internal competence. For other issues the competence is either shared with the EU Member States, or rests solely with the Member States.[387]

The external competence of the Commission can be directly based on provisions of the EC or EU Treaty. In the case of air transport this basis is established by Article 80(2) EC in conjunction with Article 300 EC.[388] Under these two provisions, the Commission needs a mandate from the Council to exercise external competence in the field of air transport. It can, however, also gain the competence indirectly, through the establishment of internal rules. This was decided by the ECJ in the so-called *AETR* case.[389] The ECJ stated that:

> In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.
> As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.[390]

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[385] See EC, *Council Regulation 4055/86 of 31 December 1986 on the Application of the Principle of Freedom to Provide Services to Sea Transport*, [1986] O.J.L. 378/4.
[386] See *supra* note 312 at 86, art. 281.
[387] See *Opinion Pursuant to Article 228(6) of the EC Treaty*, Opinion 1/94, [1994] E.C.R. I-5267 at I-5411.
[388] See *EC*, *supra* note 312 at 47, art. 80(2); *EC*, *supra* note 312 at 138-139, art. 300.
[389] See *Commission of the European Communities v. Council of the European Communities*, C-22/70, [1971] E.C.R. 263.
[390] *Ibid.* at 274.

In *Opinion 1/94* the ECJ reiterated this stance, adding that not all transport matters are covered by common rules.[391] As a result, the Commission is still dependent on the Council for a mandate.

Relations with several international organizations have been established. The European Community is now party to the World Trade Organization (WTO) and to Eurocontrol and has observer status at ICAO. In all three organizations, the Community shares its competence with EU Member States.

The ability of the Community to deal with external air transport relations has slowly expanded. However, Member States are hesitant to hand over all authority to the Commission as they are unsure of the consequences. The Commission has been pushing for more competence, asserting that bilateral agreements infringe on the current EU legislation on air transport in three different respects. The first is ownership and control clauses in bilateral agreements. According to the Commission, these clauses are contrary to the freedom of establishment, and it has already requested that all Member States eliminate them from their bilateral treaties.[392] None of the Member States have yet complied because third countries are unlikely to accept this omission as it would mean that all European carriers could benefit from the rights granted, unless the bilateral was very specific in naming the carrier. Even if they did accept it, they would want something in return, *i.e.*, more traffic rights, etc., which could be very disadvantageous to European carriers.

Another threat to EU law, according to the Commission, is the granting of traffic rights under bilateral agreements. According to the Commission third countries will be able to benefit from the internal market without reciprocating. Third countries would also be able to play Member States against each other.[393] Regarding the profiting of traffic rights, the internal market applies to Community carriers and not to third country carriers. Third country carriers can, therefore, only benefit if they establish themselves in a EU Member State, in which case they can only fly within the European Union, as a result of the ownership and control clauses. An alliance will be more efficient and less expensive in such a case. Regarding the matter of third countries playing Member States against

[391] See *supra* note 387 at I-5411.
[392] See COM (90) 17, para 14, cited in Balfour, *supra* note 340 at 281.
[393] See COM (92) 434, para. 43-49, cited in Balfour, *ibid.*.

each other, this has already happened.[394] A Community stance might prove beneficial in some cases, *i.e.*, in the case of air transport relations with the United States, but not in all instances. Trouble is very likely to arise if the Commission, negotiating traffic rights with a third country, only gets a certain amount of rights and then has to decide which Community carrier would be designated. The debate on this issue is likely to continue in the years to come, but the outcome will have an effect on the European air transport market, and thus on a Dutch offshore airport.

6. Conclusion

The EU has grown steadily over the years and so has the amount of legislation originating from it. As a Member State of the European Union, the Netherlands will have to apply EU law to an offshore airport as part of its internal law. In areas in which the European Union has exclusive competence, it will apply automatically. These areas are slowly expanding and this trend must be taken into account if the airport is to be constructed. It will be a long term project and the European Union will continue to widen, *i.e.*, more Member States, and deepen, *i.e.*, a larger mandate, and both factors will influence European air transport and, thus, an offshore airport.

Member States have been hesitant to hand over external competence regarding air transport because the Commission would not take into account the needs of "their" airline but would serve the needs of the Community as a whole. Depending on the country and the strength of the airline this could result in either a protectionist attitude towards weaker airlines or support for the larger and stronger airlines. Since air transport is still a sensitive political issue, Member States are not keen on handing the Commission a broader mandate. Neither are some of the airlines. The Commission will need to prove itself first.

With the increasing integration and interdependence of air transport, the world outside the European Union is changing as well. Pressure from both airlines and States on the current system will have an effect. The European Union has an internal aviation market, which can be extended to Eastern Europe and beyond. Regional agreements

[394] See Chapter 4 *supra*.

between the European Union and South America's MERCOSUR are being considered. If the ownership and control clause is eliminated, further integration with third country carriers will take place. At such a time, the conclusion of regional agreements will become beneficial for small countries like the Netherlands. If, however, the whole bilateral system is eliminated, either worldwide or between the European Union and the United States or other regions, air transport will flourish, and a new airport that can operate 24 hours a day will profit. Other States may be likely to follow the example.

CHAPTER 7

THE LAW OF OTHER ORGANIZATIONS

In addition to being a Member State of the European Union, the Netherlands is a member of various international organizations, and a party to many treaties, and some of these will have an influence on an offshore airport. The extent of this influence may be direct and immediate or indirect and limited. Nevertheless, all are important since, under Dutch law, treaties have direct bearing in the Dutch society, where a monopolistic system prevails.

The subjects covered by these different international organizations and treaties are extensive, ranging from environmental law through maritime law to aviation law. Therefore, choices need to be made as to the issues that should be addressed, and, thus, this chapter limits its analysis to treaties and international organizations dealing with aviation law and regional cooperation regarding the North Sea. With the exception of the World Trade Organization (WTO), all are regional in nature.

1. Eurocontrol

The Eurocontrol Convention[395] created the European Organization for the Safety of Air Navigation, or Eurocontrol, in 1960. As European countries are relatively small and new technology had enabled civil aircraft to reach the upper airspace,[396] its establishment was considered as a necessity. A joint European air navigation system was, therefore, decided upon for the upper airspace of the Member States.[397] Article 1 of the Convention, its main objective, provided that "[t]he Contracting Parties agree to strengthen their cooperation in matters of air navigation and in particular to provide for the common organisation of the

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[395] See *"Eurocontrol" International Convention Relating to Co-operation for the Safety of Air Navigation (with Annexes and Protocol of Signature)*, 13 December 1960, 523 U.N.T.S. 117 [hereinafter *Eurocontrol Convention*].

[396] See *ibid.* at 119-121, preamble.

[397] The establishing Member States were Belgium, France, the Federal Republic of Germany, Luxembourg, the Netherlands and the U.K. It now has 28 Member States. Austria, Bulgaria, Cyprus, Croatia, Denmark, Spain, Greece, Hungary, Ireland, Italy, the Former Yugoslav Republic of Macedonia, Malta, Monaco, Norway, Portugal, Slovak Republic, Czech Republic, Romania, Slovania, Sweden, Switzerland and Turkey

air traffic services in the upper airspace."[398] "Air traffic" was defined as comprising "civil aircraft and those military, customs and police aircraft which conform to the procedures of the International Civil Aviation Organization (I.C.A.O.)."[399]

To this end, two institutional organs were established: a permanent Commission for the safety of air navigation, called Commission, and an air traffic services agency, named Agency.[400] The Commission consisted of two representatives of each Member State, each having only one vote.[401] A Committee of Management, named Committee, and a Director administered the Agency.[402] The Committee consisted of two representatives of each Member State, and only the highest placed official of the air traffic navigation system of that country had the power to vote.[403] The Convention had a 20-year lifespan after its entry into force, with an automatic extension of five years if no further notice was given.[404]

Due in part to the expiry date, a Protocol to amend the Eurocontrol Convention was signed on 12 February 1981.[405] It replaced the old regime on 1 January 1986 and extended the life of the Convention by another 20 years. It also increased the mandate of the organization and, more specifically, the mandate of its institutions.[406] On 27 June 1997 another Protocol was signed to amend the then existing Convention as amended by the 1981 Protocol.[407] Even though the amended Convention needs to be ratified by all Member States, the Commission decided to implement certain important elements on a

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joined later. See *Welcome to Eurocontrol* online: Eurocontrol <http://www.eurocontrol.be/dgs/organisation/main.html> (date accessed: 9 April 1999).

[398] *Eurocontrol Convention*, *supra* note 395 at 121, art. 1(1).

[399] *Ibid.* at 123, art. 3.

[400] See *ibid.* at 121, art. 1(2).

[401] See *ibid.* at 123, art. 5.

[402] See *Annex I to the Eurocontrol Convention*, *supra* note 395 at 185, art. 4.

[403] See *ibid.*

[404] See *ibid.* at 147, art. 39 (1).

[405] See *Protocol to Amend the Eurocontrol International Convention Relating to Co-operation for the Safety of Air Navigation of 13 December 1960*, 12 February 1981, reproduced in Shawcross and Beaumont, *Air Law*, vol. 2 (London: Butterworths, 1982) at A-283.

[406] For a discussion on the various changes, see J. Moussé, "EUROCONTROL: The changes effected in the International Organisation by the instruments signed on 12 February 1981" (1982) 6 Air L. 22.

[407] See *Protocol Consolidating the Eurocontrol International Convention Relating to Cooperation for the Safety of Air Navigation of 13 December 1960 as variously amended*, 27 June 1997, published in Eurocontrol, *Eurocontrol Revised Convention*, (Brussels: DGS Logistics and Support Services, Printshop, 1997), [hereinafter *Amended Convention*]. Publication courtesy of R. van Dam.

provisional basis.[408] The amended Convention will change Eurocontrol extensively, increasing its mandate, the number and tasks of its institutions and, hence, its power over the Member States. As the amended Convention is likely to be in force by the time the Dutch offshore airport is constructed and operational, the amended Convention of 1997 is used here to determine the potential effect of Eurocontrol over a Dutch offshore airport.

Under the amended Convention, the Commission will be changed to a General Assembly in which the Ministers of Transport and Defense meet to define the general policy of Eurocontrol.[409] A Council will be added to the structure, which will adopt objectives, resolve conflicts, list priorities and supervise the Agency.[410] Each member of the Council must be of the same level as a Director General of Civil Aviation.[411] To these institutions, advisory committees have been added, which include a safety review commission, a performance review commission and a civil and military interface standing committee.[412]

The mandate of Eurocontrol has been broadened to take account of the increase in air traffic over Europe. This includes the new gate-to-gate concept, under which an airplane is under the control of Eurocontrol from the moment it leaves the gate of an airport in a Member State, until it turns off its engines at the gate of an airport in another Member State.[413] Under this concept, Eurocontrol will not only be responsible for en route traffic, but for each step of the journey, *i.e.*, from the planning stage, to the departure and arrival to and from airports, to the collection of the charges afterwards.[414] This concept was developed as part of the ATM 2000+ Strategy entrusted to Eurocontrol

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[408] See Commission, *Decision No. 71 on Early Implementation of Certain Provisions in the Revised Convention, in Particular in Respect of the Role of the Organisation*, 9 December 1997, PU337702.DOC; Commission, *Decision No. 72 on Early Implementation of Certain Provisions in the Revised Convention, in Particular on the Establishment of a Provisional Council*, 9 December 1997, PU337702.DOC; Commission, *Decision No. 73 Approving Modifications to Annex I to the Amended Convention, Relating to the Statute of the Agency*, 9 December 1997, PU337702.DOC.

[409] See *Welcome to Eurocontrol*, Institutional structure, online: Eurocontrol <http://www.eurocontrol.be/dgs/organisation/institutional_struct.html> (date accessed: 9 April 1999).

[410] See *ibid.*

[411] See *ibid.*

[412] See *ibid.*

[413] This concept is retained in the ECAC Institutional Strategy and defined as follows: ""Gate-to-Gate" starts at the moment the user first interacts with ATM [air traffic management] and ends with the switch off of the engines. It includes the processes for charging airspace users for ATM services. It covers airport/air traffic interface." Reproduced in *Eurocontrol Revised Convention*, *supra* note 407 at 7.

at the meeting of Ministers of Transport of European Civil Aviation Conference (ECAC) Member States on the Air Traffic System in Europe (MATSE) in February 1997.[415]

The eventual goal of Eurocontrol is to develop a uniform European air traffic management system. In order to accomplish this goal, membership needs to be extended to all ECAC Member States. The EU Commission is now a Member of Eurocontrol, under Article 40 of the amended Convention, as it is an important actor in the European aviation scene.[416] Apart from gaining direct control of ATM surrounding an offshore airport, Eurocontrol will also become more involved with military flights in European airspace.

To this end, a Civil and Military Interface Standing Committee has been established, under Article 7 of the amended Convention, as an advisory body to the Council to answer questions about civil/military interface.[417] The Agency also "supports the improvement of efficiency and flexibility in the use of airspace between civil and military uses"[418] and will "develop proposals concerning the strategic planning and design of routes and supporting airspace structures, in coordination with civil and military experts appointed by the States".[419] To that end, the Agency will work closely with both user organizations of civil aviation and military authorities as regards military aviation.[420] Such cooperation could be beneficial to accommodate both the freedom of overflight and the operation of an airport in the EEZ.

This closer cooperation between military and civilian users of the airspace is essential since the airspace used by civil aircraft is becoming increasingly congested. Military personnel do not use "their" space continually. Nevertheless, large portions of the airspace have been set aside for military use. Through closer cooperation, civilian aircraft might be able to use all or part of the airspace normally used by the military.

The airspace above the EEZ is divided between military and civilian users. With an offshore airport in the EEZ, this division will have to change, leaving more room for

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[414] See *Eurocontrol Annual Report*, Eurocontrol Overview, online: Eurocontrol, Development of Policies and Tasks <http://www.eurocontrol.be/dgs/publications/annual/1997/p6.html> (date accessed: 9 April 1999).
[415] See *ibid.*
[416] See *Amended Convention, supra* note 407 at 60, art. 40.
[417] See *ibid.* at 24, art. 7
[418] *Annex I, Amended Convention, supra* note 407 at 3, art. 1(5)(e).
[419] *Ibid.* at 2, art. 1(5)(d).

civil aircraft in the vicinity of the offshore airport. Cooperation between the two users is, therefore, essential.

2. ECAC

Europe is not one entity. It consists of many different States, each with its own laws and regulations. Consultation between European States has taken place, *inter alia*, within the Council of Europe[421] since World War II. Considering the fact that many European States had their own scheduled airlines, with many different rules applying to them, the subject of aviation was also raised. The need for coordination and preferably some form of unity was therefore great. A number of proposals were put forward by the Parliament of the Council of Europe.[422]

In following up on these proposals, the Committee of Ministers of the Council of Europe decided to mandate ICAO to convene a European conference to improve technical and commercial cooperation between the attending States and airlines. It was also asked to try to secure closer cooperation between the European States regarding the exchange of traffic rights. The Council of ICAO established the Conference on Co-ordination of Air Transport in Europe (CATE) through a resolution on 15 December 1953.[423] In order to continue the work of this Conference, a proposal was made to

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[420] See *ibid.* at 5, art. 1(7).

[421] See *Statute of the Council of Europe*, 5 May 1949, 87 U.N.T.S. 103. The Council of Europe was established to further cooperation between the Member States. The United States pressed for some form of coordination within the Marshall Plan, *i.e.*, help to rebuild Europe so it would have one organization to deal with, rather than several separate countries. Founding members of the Council are Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

[422] See I.H.Ph. Diederiks-Verschoor, *supra*, note 195 at 44; N.M. Matte, *supra* note 194 at 267. The proposals were the following:

- A plan by the Italian Minister of Foreign Affairs, submitted in 1950, to create a single European airspace, legislated by a supranational organization;
- A plan by the French delegate Bonnefous, also submitted in 1950, to create a single European Transport Authority, which would include all modes of transport, and which was similar in its structure to the plans for the European Coal and Steel Community; and
- A plan by the Dutch Cabinet Minister van der Kieft, to create an organization in which air transport matters could be discussed and coordinated, thereby achieving greater unity.

[423] See *History: The Birth of ECAC*, online: The European Civil Aviation Conference <http://www.ecac-ceac.org/uk/ecac/ecac-history.htm> (date accessed: 19 July 1999).

establish a permanent organization in which European aeronautical authorities would cooperate. As a result, ECAC was established in 1955.[424]

Although it started out with only nineteen Member States,[425] it now counts 37 Member States[426] and covers most of Europe. The objectives of ECAC are to provide a forum in which to coordinate intra-European air transport, to promote unification and to deal with special issues that might arise.[427] The Convention establishing ECAC was modified in 1968 and 1976 to deal with new challenges. In 1968 the institutional structure was changed and the Conference now consists of a General Assembly, which meets three times a year, a Coordinating Committee for Administration and Budgeting, and four standing committees.[428] In 1976 a permanent body, consisting of the Director Generals of Civil Aviation, was added to the institutional structure.[429]

ECAC has formulated a number of Agreements.[430] It also makes policy recommendations and interacts with the European Union, Eurocontrol and ICAO. On 16 April 1999 the first ECAC-EU dialogue was held with the European air transport industry

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[424] See *Constitution of the European Civil Aviation Conference (ECAC) as amended*, 22 April 1993, ECAC-CEAC Doc. No. 20, 4th ed. [hereinafter *ECAC Constitution*].

[425] The founding members were Austria, Belgium, Denmark, Finland, German Federal Republic, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

[426] The current Member States are Albania, Armenia, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Monaco, The Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey and the U.K. See *Eurocontrol- The Member States, The ECAC Member States*, online: Eurocontrol <http://www.eurocontrol.be/dgs/organisation/member_states.html> (date accessed: 9 April 1999).

[427] See *ECAC Constitution*, *supra* note 424 at 1, art. 1. See also I.H.Ph. Diederiks-Verschoor, *supra* note 195 at 45.

[428] See I.H.Ph. Diederiks-Verschoor, *ibid.*; N.M. Matte, *supra* note 194 at 269. The four standing committees are:

- ECO-I, the committee for tariffs and conditions;
- ECO-II, the committee for regulatory framework of air transport;
- TECH, the technical committee for the coordination and harmonization of navigation and communication equipment; and
- FAL, the committee that applies the principles and direction of Annex 9 Chicago Convention (on facilitation), for the safety of air transport.

See also *ECAC Constitution*, *ibid.* at 2, art. 4.

[429] See I.H.Ph. Diederiks-Verschoor, *ibid.*; N.M. Matte, *ibid.*.

[430] These agreements include:

- *Multilateral Agreement on Commercial Rights of Non-scheduled Air Services in Europe*, 30 April 1955, 310 U.N.T.S. 229.
- *Multilateral Agreement Relating to Certificates of Airworthiness for Imported Aircraft*, 22 April 1960, 418 U.N.T.S. 211.

on airport capacity.[431] This included the issue of new airports and land use planning. As a result, its influence on the offshore airport will be direct in the sense that it will affect the operation of the airport. It cannot affect the status of the island and the air there above, as this is decided under the LOSC and the Chicago Convention. It can, however, be used as a consultative organization on the building of such an airport.

3. JAA and EASA

The Joint Aviation Authorities (JAA) are, in fact, an associated body of ECAC. The civil aviation authorities of the Member States cooperate in this organization to develop and implement common safety and regulatory standards and procedures.[432] The JAA was originally created, under the name of Joint Airworthiness Authorities, to develop common certification systems for large airplanes and engines.[433] This was especially beneficial to Airbus, in which four companies from different countries cooperate.[434] In 1987 the work of the JAA was extended to all types of aircraft and included not only the certification of those airplanes and engines, but also the setting of standards for maintenance, operations, licensing, certification and design standards.[435]

In 1990, a "JAA Arrangements" document was drawn up by the then Member States.[436] Countries wanting to become a Member State must now sign the JAA Arrangements, which list the different objectives and functions of the JAA.[437] To achieve

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- *International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services*, 10 July 1967, 696 U.N.T.S. 31.

[431] See *Press Releases*, No. 160 E 16/04/99, online: The European Civil Aviation Conference <http://www.ecac.ceac.org/uk/whatsnew/w-pressreleases.htm> (date accessed: 19 July 1999).

[432] See *What is JAA?*, online: JAA <http://www.jaa.nl/WHATISTHEJAA/JAAINFO.HTML> (updated: August 1998) (date accessed: 19 July 1999)

[433] See *ibid.*

[434] The four companies come from Germany, the United Kingdom, France and Italy.

[435] See *supra* note 432.

[436] See *ibid.*

[437] See *ibid.*; Giemulla & Schmid, *supra* note 324 at 222.

[T]he JAA's objectives and functions may be summarized as follows:

Objectives:

- To ensure, through co-operation on regulation, common high levels of aviation safety within the Member States.
- To achieve a cost effective safety system so as to contribute to an efficient aviation industry.
- To contribute, through the uniform applications of common standards, to fair and equal competition within the Member States.

these objectives, the JAA adopts Joint Aviation Requirements (JARs). Since 1992 these JARs have been adopted by the European Union as part of the EC Regulation on Harmonized Technical Standards[438] and, therefore, have force of law in all EU Member States.[439] The membership of the JAA has increased to 29 Member States,[440] including candidate Member States.[441]

Based on a proposal of the Commission, the Council of the EU agreed on a general concept for a European Aviation Safety Authority (EASA) in June 1998. EASA is to take over the role of the JAA and will strengthen the legal basis of the JARs. The Commission is currently negotiating with third countries to establish EASA with them.

The influence of the JAA or the future EASA on an offshore airport is indirect. Its influence will be that the Netherlands as a Member State must apply the JARs in its

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- To promote, through international co-operation, the JAA standards and system to improve the safety of aviation worldwide.

Functions:

- To develop and adopt Joint Aviation Requirements (JARs) in the fields of aircraft design and manufacturing, aircraft operations and maintenance, and the licensing of aviation personnel.
- To develop administrative and technical procedures for the implementation of JARs.
- To implement JARs and the related administrative and technical procedures in a coordinated and uniform manner.
- To adopt measures to ensure, whenever possible, that pursuance of the JAA safety objective does not unreasonably distort competition between the aviation industries of Member States or place companies of Member States at a competitive disadvantage with companies of non-Member States.
- To provide the principal centre of professional expertise in Europe on the harmonization of aviation safety regulation.
- To establish procedures for joint certification of products and services and where it is considered appropriate to perform joint certification.
- To cooperate on the harmonization of requirements and procedures with other safety regulatory authorities, especially the Federal Aviation Administration (FAA).
- Where feasible, to co-operate with foreign safety regulatory authorities especially the FAA, on the certification of products and services.

[438] See *Council Regulation 3922/91 of 16 December 1991 on the Harmonization of Technical Requirements and Administrative Procedures in the Field of Civil Aviation*, [1991] O.J.L. 373/4.

[439] See *ibid.* See also Giemulla & Schmid, *supra* note 324 at 151.

[440] See *ibid.* The Member States are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Monaco, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the U.K. Candidate Member States are: Latvia, Poland, Cyprus, Czech Republic, Hungary, Malta, Romania, Slovak Republic, Slovenia, and Turkey.

[441] See *ibid.* Membership of the JAA is open to all Member States of ECAC. There are two phases to becoming a Member. First, the civil aviation authority of the State is interviewed. If the results are positive, a report to this effect is submitted to the JAA Committee and the State can formally apply for membership. The Committee than submits a report to the JAA Board, which needs a two-third majority vote for the State to become a "candidate member" and sign the Arrangements. After the signature, in the second phase, the country is visited and investigated as to its compliance with the standards and regulations of the JAA. This can take a long time, but if considered satisfactory, a report to that effect will be sent to the JAA Board recommending a date for full membership.

territory. Even though the offshore airport will not be on Dutch territory, the Netherlands has jurisdiction over the airport and must, therefore, apply the JARs.

4. WTO

The WTO was established through the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).[442] The GATT, a multilateral treaty to which many countries are parties, was formulated in 1947[443] with the idea of establishing the International Trade Organization (ITO) to apply the Agreement. The ITO never came into being, as US Congress refused to ratify the whole Agreement. Thus, the GATT began a life of its own.[444] The purpose of the GATT was to liberalize international trade by reducing and eventually eliminating barriers to trade in whatever form and to ensure that States did not discriminate against each other in international trade.[445] To this end, States would meet in so-called trade rounds to discuss the lowering of trade barriers.

In order to facilitate the liberalization of trade, the GATT contains a number of principles. One of the most important is the most favored nation principle,[446] which requires that if a GATT Member State grants a concession to one Member State it should grant the same concession to all other GATT Member States. This clause, however, has certain exceptions. Another important principle of the GATT is that of national treatment.[447] Under this principle foreign goods which have entered into the country must be treated in the same way as "like" domestic goods.

Under the Uruguay Round, the scope of traditional GATT issues grew, *i.e.*, more market access, the addition of new issues and the establishment of an institutional framework, including a permanent organization. The traditional principles of the GATT have now been introduced to the new areas, unless they have been specifically exempted in an Annex dealing with the issue.

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[442] See *General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round): Agreement Rstablishing the Multilateral Trade Organization [World Trade Organization]*, 15 December 1993, 33 I.L.M. 13 [hereinafter *WTO*].
[443] See *General Agreement on Tariffs and Trade*, 30 October 1947, 188 U.N.T.S. 188 [hereinafter *GATT*].
[444] See P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (London: Routledge, 1997) at 228.
[445] See *ibid.*
[446] See *GATT*, *supra* note 443 at 196-200, art. I.

One of several annexes to have been added to the WTO[448] is the General Agreement on Trade in Services (GATS).[449] The GATS has three basic principles: it applies to all services, except those provided by a governmental authority; it applies the national treatment principle; and it applies the most favored nation principle.[450] The GATS itself, however, provides for some major exceptions. States can decide to which services the principles of market access and national treatment apply, and they can limit the degree to which they apply these principles. States can even make exceptions to the most favored nation principle, but only for a maximum of ten years.

The GATS includes an Annex on air transport services.[451] This Annex so far only applies to aircraft and maintenance services, the selling and marketing of air transport services and computer reservation services, the so-called soft rights.[452] In the near future, however, it is likely that this Annex will be extended to so-called hard rights. In that case, traffic rights, however granted, and services directly related to the exercise of traffic

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[447] See *ibid.* at 204-208, art. III.

[448] These annexes are:
Annex 1, which consists of Annex 1A, the substantive trade agreements on trade in goods; Annex 1B, the Agreement on Trade in Services; and Annex 1C, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Annex 2 consists of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Annex 3 contains the Trade Policy Review Mechanism. These Annexes are an integral part of the WTO Agreement. Annex 4 contains Plurilateral Trade Agreements, which are only binding to States that are party to that specific agreement. See A. Porges, *Introductory Note*, 33 I.L.M. 1 (1994).

[449] See *General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round): General Agreement on Trade in Services*, 15 December 1993, 33 I.L.M. 44.

[450] See *WTO, supra* note 442 at 48-49, art. I, at 49, art. II & at 60-61, art. XVII. See also *General Agreement on Trade in Services*, online: WTO <http://www.wto.org/wto/services/services.htm> (last updated: 14 July 1999) (date accessed: 20 July 1999).

[451] See *Annex on Air Transport Services*, 15 December 1993, 33 I.L.M. 76 [hereinafter *Air Transport Services*].

[452] *Air Transport Services, ibid.* at 77, art. 33; *Air Transport Services, ibid.* at 77, art. 6 defines the terms as follows:

> (a) "*aircraft repair and maintenance services*" mean such activities when undertaken on an aircraft or part thereof while it is withdrawn from service and do not include so-called line maintenance.
>
> (b) "*selling and marketing of air transport services*" mean opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions.
>
> (c) "*computer reservation system (CRS) services*" mean services provided by computerized systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.

rights will be liberalized as well.[453] This is likely to start in the sector of air cargo, but is thereafter likely to find its way to scheduled and non-scheduled air services.

Liberalization within the GATS framework would mean that these basic principles would apply to all aspects of air transport, as the different aspects are hard to divide. The most difficult problem would be to apply the most favored nation principle to the bilateral system. Two interpretations have been suggested. First, to interpret the clause in such a way that after granting a bilateral treaty to one WTO Member State, all other WTO Member States should be able to enjoy the same rights. The second way would be that if certain rights are offered under a bilateral agreement, similar rights under similar conditions (*i.e.*, reciprocity) should be offered to other WTO Member States.[454] For now, however, bilateral agreements are outside the scope of the GATS, although the subject is on the agenda of the ministerial conference in Seattle, from 30 November-3 December 1999. The influence of the WTO on air transport will grow and this will directly effect the operation of the airport.

5. North Sea cooperation

The North Sea is a semi-enclosed sea under Article 122 LOSC.[455] Cooperation between the coastal States adjacent to such a sea is obligatory under Article 123 LOSC[456] so as to

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[453] These issues are now excluded from the GATS, under *Air Transport Services*, *ibid.* at 77, art. 2. Article 6 Air Transport Services defines traffic rights as follows:

> (d) "*traffic rights*" mean the right for scheduled and non-scheduled services to operate and/or carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership and control.

[454] See R. Janda, "Passing the Torch: Why ICAO Should Leave Economic Regulation of International Air Transport to the WTO" (1995) 22 Ann. Air & Sp. L. 409 at 423-424.

[455] *LOSC*, *supra* note 64 at 1291, art 122, gives the following definition: "For the purposes of this Convention, "enclosed or semi-enclosed" means a gulf, basin or sea surrounded by two or more States and connected to another sea and ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States."

[456] *Ibid.* at 1291, art. 123, states:

> States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:
>
> (a) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea;

protect the living resources of the sea, to preserve the marine environment and to conduct scientific research. Although not directly related to air law, it must be taken into account when constructing and operating an airport in the North Sea.

The North Seas is surrounded by densely populated areas and is used for, *inter alia*, waste disposal of both towns and industries. It also provides for an active oil and gas industry, has fish catches that are among the highest in the world and contains some of the busiest shipping routes in the world.[457] Apart from this, the North Sea coast is used intensively for recreation. Coordination to protect the North Sea takes place in three different fora: the North Sea Ministers Conference, the European Union and OSPAR.

The North Sea Ministers Conference deals with protection of the North Sea. The first Conference was held in 1984 in Bremen, and Belgium, Denmark, France, Germany, the Netherlands, Norway, Sweden, the United Kingdom and the European Commission participated. Regular conferences followed and commitments have been made for the protection and the enhancement of the North Sea. In 1990, at the third Conference, Switzerland became a participant due to the influence of the Rhine on the North Sea.[458]

The Conferences are on a ministerial level and can, therefore, address any issue relating to the protection of the North Sea. These issues include the protection of "species and habitats, fisheries, hazardous substances, nutrient inputs and eutrophication [promoting nutrition], pollution from ships, pollution from offshore installations, radioactive substances, the dumping of waste at sea and the incineration of industrial waste at sea".[459]

Within the European Union the North Sea is part of its exclusive competence as regards fisheries, which comprise part of the common agricultural policy. Protection of the fish stocks and the allocation of the total allowable catch are included in the exclusive

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(b) to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
(c) to co-ordinate their scientific research policies and undertake where appropriate joint programs of scientific research in the area;
(d) to invite, as appropriate, other interested States or international organizations to co-operate with them in the furtherance of the provisions of this article.

[457] See *Background*, online: Fifth International Conference on the Protection of the North Sea <http://odin.dep.no/nsc/ecosyst/background.html> (date accessed: 21 July 1999).

[458] See *Background of the North Sea Conferences*, online: Odin <http://odin.dep.no/nsc/background/background.html> (date accessed: 21 July 1999).

[459] *Initiatives by the North Sea Conferences*, online: Fifth International Conference on the Protection of the North Sea <http://odin.dep.no/nsc/ecosyt/initiatives.html>

competence of the European Union. Any influence of the offshore airport on fish stocks and the catching of fish will fall within the prerogative of the European Union.

Protection of habitat and environment are areas in which the European Union shares its competence with the Member States. Under the habitat Directive[460] certain areas are protected, and projects which might adversely affect such areas can only be built there in exceptional circumstances. Some of these are near the Dutch coast.[461] In the case of certain private or public projects, States are obliged to assess the effects of that project on the environment on the basis of the environmental assessment Directive.[462] The Dutch government already anticipates such an assessment report for an offshore airport.

The OSPAR Convention,[463] which replaced both the Oslo Convention[464] and the Paris Convention,[465] deals with protection of the marine environment. It was opened for signature in 1992 and entered into force 1998. The Convention also applies to offshore installations but defines those as being specifically "for the purposes of the exploration, appraisal or exploitation of liquid and gaseous hydrocarbons,"[466] and, thus, only applies to oil and gas rigs. However, the definition of vessels and aircraft includes "other man-made structures in the maritime area and their equipment".[467] As no mention is made of movement stationary structures, like an offshore airport, could fall under this definition. As the purpose of the Convention is to protect the marine environment, such an interpretation would prevent circumvention of the rules laid down in the Convention by giving the artificial island another purpose. In any case, the OSPAR Convention will at least have some influence on protection of the marine environment.

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[460] See EC, *Council Directive 92/43 of 21 May 1992 on the preservation of natural habitats and wild flora and fauna*, [1992] O.J.L. 206/7 [hereinafter *Habitat Directive*].
[461] See *METRO Report*, *supra* note 377 at 12.
[462] See EC, *Council Directive 85/337 of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment as Amended by Council Directive 97/11 of 3 March 1997*, [1997] O.J.L. 73/5 [hereinafter *Environmental Assessment Directive*].
[463] See *Convention for the Protection of the Marine Environment of the North-East Atlantic*, 22 September 1992, 32 I.L.M. 1069 [hereinafter *OSPAR Convention*].
[464] See *Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft*, 15 February 1972, 11 I.L.M. 262 [hereinafter *Oslo Convention*].
[465] See *Convention for the Prevention of Marine Pollution from Land-Based Sources*, 4 June 1974, 13 I.L.M. 352 [hereinafter *Paris Convention*].
[466] *OSPAR Convention*, *supra* note 463 at 1075, art. 1(l) & (j).
[467] *Ibid.* at 1075, art. 1(n).

Although the above does not directly deal with an offshore airport, it does deal with the effects of both the building and the operation of such an island in the North Sea. The Dutch government has already taken this into account and different studies are in progress.[468]

6. Conclusion

The above organizations will not directly affect the legal status of an offshore island outside territorial waters. On the contrary, the legislation coming from these organizations derives its effect from the status of the island under other international treaties: the LOSC and the Chicago Convention. But that does not make them less important.

Eurocontrol has been given a broader mandate. Thus, by the time the airport is open for operation, it will be Eurocontrol that will regulate air traffic services to, from, over and around the island. It will also be Eurocontrol that will collect the different fees, including landing charges.

ECAC is mostly a coordinating body and, as such, will be useful during consultations with other States regarding the offshore airport. As some of the ECAC Member States are not EU Member States, this is also important with regard to bilateral agreements. Although such agreements should be able to remain the same, other States might not agree with such an interpretation.

The JAA will be more influential when it becomes EASA. In that case the different JARs will gain a more formal status and might even become binding on (some) third countries. As the JARs will be implemented and applied by the Member States, the Dutch government will have to apply them to an offshore airport outside territorial waters.

Developments within the WTO could also influence the offshore airport. This, however, will happen in an indirect manner. If air transport services do indeed become more liberalized, the airport should be able to benefit from this. Another issue of this

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[468] See TNLI, *Luchtvaart-infrastructuur in de toekomst, Samenvattende onderzoeksrapportage; Waar ligt de toekomst van de luchtvaart in Nederland?*, *supra* note 378 at 169-170.

liberalization movement might be that airports need to be liberalized themselves, *i.e.*, commercialized or even privatized. In that case, the airport will absolutely have to be efficient so that it can attract as much traffic as possible without pricing itself out of the market through user fees that are too high.

Cooperation with other countries on the subject of the North Sea deals mostly with environmental issues. These should be and are taken into account. Many measures will have to be taken to safeguard the environment, not only as to the location and construction of the island, but also regarding its operation.

CHAPTER 8

THE ECONOMIC SIDE

An analysis of the existing international legal framework is essential when considering the construction of an offshore airport outside territorial waters. However, such an airport is an expensive proposition and must, therefore, be worth its while. Air transport growth must be sufficient to justify the expense, and the enormous investment must be born out by the expected profits.

There are numerous advantages associated with an offshore airport. It will be able to operate 24 hours a day, will have no need for slot allocation, and will provide sufficient space for future expansion. By moving Schiphol as a whole to the new location, space will be freed up for housing, providing a sizeable down payment for the new airport. The problem, however, is that the money will not be available until after the new airport is built and the old one has moved to the new location, meaning that it has to come from somewhere else in the meantime.

This chapter discusses the economic trends in air transport and the expectations. It also looks at the operation of airports, especially in terms of privatization and cooperation agreements between airports. It then turns its attention to potential sources of funding before concluding whether there is a need for a new airport and whether there is a possibility of financing it.

1. Growth in air transport

Since the deregulation of air transport in the United States and the subsequent liberalization of air transport in the European Union, air transport has grown enormously in terms of flight movements, passengers carried and cargo transported. Under the consequent pressures of competition and globalization, airlines and airports alike are starting to press might press for more freedom regarding their operations.[469] A consequence of which can be that a new regime emerges in which traffic rights are no

longer granted and airlines will be able to fly to any airport in any country as long as they pay for the services rendered, irrespective of what country they are coming from.[470]

This scenario might not be as far-fetched as it seems. In fact, such an idea has already been put forward in the United States.[471] States must respect their tightening budgets and having their own airline is an expensive proposition, as is the building and running of an airport.[472] As a result, both airlines and airports are being commercialized and even privatized,[473] and both airlines and airports need as much business as they can get and will aggressively pursue this goal. This, of course, will attract to the aviation scene new entrepreneurs who are trying to imitate successful formulas.[474]

However, the State wants to keep at least some control for economic and security reasons: economy-wise so it will not end up without any airline serving the State, and security-wise so it may not be dependent on a foreign airline, which might turn out to be of an enemy State. A difference in views, however, can be seen between the industrialized countries and developing countries. Whereas the industrialized countries tend to let their airlines fend for themselves to a large extent, developing countries try to shield their airlines from (too much) competition.[475]

The trend is toward a more liberal regime. Under the WTO some steps have already been taken to free certain accessory parts to air transport, like CRS. Although the WTO is a forum that has already achieved much progress in the liberalization of trade, trade in services and especially that in air transport services is still a very difficult subject for many States. This is certainly the case for developing countries and newly emerging

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[469] See C.A. Shifrin, "Airport Execs Promote Airline Competition" *Av. Wk & Sp. Tech.* 149:22 (30 November 1998) 52; M.A. Taverna, "Lufthansa Hastens Airport Privatization" *Av. Wk & Sp. Tech.* 149:14 (5 October 1998) 96.

[470] See T. Hayes, "Why Not Open U.S. Skies To Foreign Carriers?" *Av. Wk & Sp. Tech.* 149:24 (14 December 1998) 70.

[471] See J. Ott, "Pressures Build for New Slant On Aviation Agreements" *Av. Wk & Sp. Tech.* 149:19 (9 November 1998) 65.

[472] See "Global Airports Seek Gains From New Kinds of Ownership" *Av. Wk & Sp. Tech.* 149:24 (14 December 1998) 53.

[473] In case of privatization, the stakes in an airport or airline are sold completely or in part to the private sector. In case of commercialization, the airline or airport remains owned by the government, but it must become commercial, *i.e.*, it must operate so it can make a profit. See P.P.C. Haanappel, "The Transformation of Sovereignty in the Air" (1995) 20 Air & Sp. L. 311 at 312.

[474] See J.D. Morrocco, "Low-cost Carriers Expand into Europe" *Av. Wk & Sp. Tech.* 149:19 (9 November 1998) 58.

States. These States consider an airline as a status symbol that they must have, even if it is not profitable. As a result these airlines are shielded from competition as much as possible.

The trend for more liberal bilateral agreements and for lessening the ownership and control restrictions on an individual State basis is still there and will continue to exist. Whether the granting of air traffic rights will completely disappear is doubtful. What is likely, however, is that such rights will be granted on a regional scale, *i.e.*, between the European Union and North America.[476]

Airlines have triggered a more economic trend by becoming more global, through alliances.[477] Alliances enable airlines to access more points around the world by either serving such points themselves or having a partner serve them. Unfortunately, airlines still have trouble forming such alliances because of restrictive ownership and control clauses.[478] As a result airlines are unable to invest as much as they want in the partner airline, which might have been saved by such an action.

However, when alliances are established between two or more airlines, they can screen flights to a certain airport. The partner can take the passengers to that destination, and they do not both need to fly there. It is this phenomenon that needs to be considered when deciding on the construction of an offshore island. If ownership and control restrictions are indeed lifted in whole or in part and more alliances result, the problem of congestion might be able to solve itself. However, alliances also have a tendency to use

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[475] See H. Wassenbergh, "The Future of Global Economic Air Transport Regulation" in C.-J. Cheng, *The Use of Air and Outer Space, Cooperation and Competition* (The Hague: Kluwer Law International, 1998) 411 at 412.

[476] See H. Wassenbergh, "Commercial Aviation Law 1998, Multilateralism versus Bilateralism" (1998) 23 Air & Sp. L. 22 at 29-30.

[477] At the moment there are two global alliance groupings, namely "Oneworld", which consists of American Airlines, British Airways, Canadian Airlines International, Cathay Pacific Airways and Qantas Airways, and "Star Alliance", which consists of United Airlines, Lufthansa German Airlines, SAS, Air Canada, Varig and Thai Airways. See J.D. Morrocco, G. Thomas & B. Dorminey, "'Oneworld' Alliance to Expand Quickly" *Av. Wk & Sp. Tech.* 149:13 (28 September 1998) 32. Airlines have also made even closer alliances with only two partners, like KLM and Northwest. For the different alliances and their ways of cooperating, see R. Miller, "International Airline Alliances, A Review of Competition Law Aspects" (1998) 23 Air & Sp. L. 125.

[478] American Airlines and British Airways have wanted to form an alliance for some time now but permission for the alliance or, to be more precise anti-trust immunity for the alliance, is linked to the ability of the United States and United Kingdom government respectively, to negotiate an open-skies agreement. See for instance: "U.S.-U.K. Talks Still Stalled", *Av. Wk & Sp. Tech.* 150:9 (1 March 1999) 42, "U.K., U.S. Deadlocked In Open Skies Talks" *Av. Wk & Sp. Tech.* 149:15 (12 October 1998) 42; J.D. Morrocco,

an airport as a hub, resulting in a lot of traffic for the airport and increasing income.[479] The construction of the island will take at least ten years to complete, and it needs to be determined whether a new airport will still be required.[480]

2. Operating an airport

Schiphol Airport has been pressing for privatization but has yet to achieve this goal. However, the trend has been started and airports all over the world are being either commercialized or privatized as the next step in deregulation or liberalization of air transport. In Germany, Lufthansa has hastened this trend of privatization by investing in Munich Airport. More airlines are likely to follow this example as it will ensure them an influence on the operation of the airport, on which they are very dependent.

While waiting for the governments to follow this trend of commercialization and privatization, airports have started to become more efficient by creating cooperative agreements with other airports and diversifying their modes of income. Airports are also copying the airlines and have started to form alliances as well.[481] Schiphol Airport is part of this development. In fact, the company has reorganized itself into the Schiphol Group, with the name Amsterdam Airport Schiphol applying solely to the airport.[482] The group now further consists of Schiphol Real Estate, Schiphol Project Consult, and Schiphol International and Regional Airports.[483]

Under Schiphol International, the Schiphol Group is involved in replacing Terminal 4 at John F. Kennedy Airport in New York. It is also involved in the operation of Brisbane Airport, Australia for fifty years, with an option to renew for another forty-

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"Brussels, London Clash Over BA-AA Slots Sale" *Av. Wk & Sp. Tech.* 149:7 (17 August 1998) 36; C.A. Shifrin, "U.S., U.K., To Resume Open Skies Talks" *Av. Wk & Sp. Tech.* 149:6 (10 August 1998) 38.

[479] See J. Sarazin, "Alliances: Big Est-il Beautiful? *Aéroports Magazine* 293 (November 1998) 12 at 14-15.

[480] Interview with J. de Wit (11 May 1999).

[481] Metropolitan Washington Airports Authority and Chateauroux Airport in France have concluded a cargo airport alliance. See P. Sparaco, "U.S., France Conclude Cargo 'Airport Alliance'" *Av. Wk & Sp. Tech.* 150:11 (15 March 1999) 39.

[482] See Schiphol Group, *Annual Report 1998* (1998) at 5.

[483] See *ibid.* at 13.

nine years.[484] Furthermore, the Group also has a large stake in the Dutch regional airports.[485]

The airport is also trying to become more efficient in other ways. During the summer, when travel is at its peak, delays are frequent, in part due to delays at immigration and customs. The airport has, therefore, suggested introducing electronic controls for frequent travelers, such as business travelers.[486] This is technically possible, but it will have certain consequences under the privacy legislation.[487] An offshore airport will provide better opportunities, as passengers will only go through immigration and customs when coming into the Netherlands itself, and immigration and customs need, therefore, not be located in the airport itself. This can save the airport a lot of money.[488]

Another fact to be taken into account when operating an offshore airport is that of human psychology. The airport will be connected with the mainland through an underground tunnel having a high-speed train: the Channel tunnel that connects Calais and Dover is a good example of this. There will always be people who do not like this idea, and studies need to be done.[489] An alternative would be to build a bridge, but this would create a lot of controversy, as it would have to go through the dunes, an ecologically vulnerable area. A tunnel can be made with much less impact on the dunes than a bridge.[490] A compromise between the two would be a bridge to an island halfway and then a tunnel from that island to the mainland.[491] Whatever the choice is made,

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[484] See *ibid.* at 31.

[485] See *ibid.* at 35.

[486] See *Schiphol wil afrekenen met pascontrole* (Schiphol wants to get rid off passport check), De Volkskrant, (3 August 1999), (The Netherlands: De Volkskrant BV, 1999), online: De Volkskrant <http://www.volkskrant.nl/indruk/315021081.html?history=/i315021541> [translated by author] [date accessed: 4 August 1999).

[487] See *Eén duimafdruk en nooit meer in de rij op Schiphol* (One thumb print and never again in a lineup at Schiphol) De Volkskrant, (4 August 1999), (The Netherlands: De Volkskrant BV, 1999), online: De Volkskrant <http://www.volkskrant.nl/indruk/315021542.html?history=/i315021616> [translated by author] (date accessed: 4 August 1999).

[488] Interview with G.J. Keur (7 May 1999).

[489] See *ibid.*

[490] In the 1980s the Nederlandse Aardolie Maatschappij (NAM, Dutch Oil Company) made a "dune-crossing" at Schoorl in the province of Noord-Holland. To preserve the dune habitat, the dunes and the ground below were removed in layers and put aside separately, so that they could be put back again in the same sequence as they were before. Something similar could be done with a tunnel, although new technology also enables the digging of a tunnel without the removing of the top area, as would be necessary in the sea anyway.

[491] This combination was used in Denmark for the Öresund link. Such an island could then, for instance, host immigration and customs and recreational facilities.

human reactions need to be studied, as the traveler is still the most important part of air transport.

3. Funding

The construction of an offshore airport outside the territorial waters will be expensive. Part of that money can come from the sale of the land at the current location of Schiphol Airport. However, as the offshore airport will need to be built and operational before the "old" Schiphol can be closed, this money will not be available until after the new airport has been constructed, and funds will, therefore, be needed beforehand.

Such funds could in part be obtained from the financial community, but that will raise the cost. The Dutch government has already indicated that it is prepared to pay part of the amount but that it requires a substantial contribution from the Dutch air transport sector. Under the trans-European networks, the European Union helps fund large infrastructural projects. The Dutch government could ask for such funds. Investors will also need to be found and it would be advisable to promote investment by both foreign airlines and foreign airports, thus ensuring a more lenient view to the endeavor by their respective governments. It will also provide the airports with an opportunity to earn money from a project that will be in competition with them. Airlines investing in the airport will be flying to and are, therefore, essential to its livelihood.

By providing more services on the island, *i.e.*, recreational facilities, conference centers, etc., the island will be less dependent on air transport alone, increasing its sources of income and creating a larger market for air transport. The airport can also become a tourist attraction, catering to both transit passengers and other passengers and visitors. The possibilities are endless and should be considered as they will not only generate more income but will also attract different investors.

4. Other economic issues

Two other economic issues should be mentioned here. First, the Dutch government has considered leaving the connecting rail and roadways at their current location. This,

however, might not be realistic as it will increase travel time from the airport by an additional 45 minutes. Companies now located at the current location of the airport might move towards the coast, thereby endangering the fragile dune landscape. This should be kept in mind, and solutions need to be sought.

Secondly, companies who have established themselves near the airport will not be happy with the move of the airport to an offshore location, unless satisfactory solutions can be found for logistical problems. In the meantime, however, companies will hesitate to make further investments, as they are not sure what the future will bring. The Dutch government has said that it will make a decision for further studies in December 1999. It should try to present companies with more certainty, alleviating their concerns by either give a reasonable solution as regards logistics and an artificial island, or by making it clear that this will be provided for when such an airport is indeed built and giving guarantees to this effect.

5. Conclusion

The economic influence on an offshore airport is two-fold: (1) it concerns the need to built such an airport, *i.e.*, will there be sufficient growth in air transport to justify the expense; and (2) will the airport be able to generate a profit or at least break even, *i.e.*, will it attract sufficient traffic. Regarding the need for an airport, the trend of air transport should be studied. This trend is towards a continuing liberalization of air transport, allowing airlines to develop to their full potential. Alliances allow airlines to become more effective and to increase the number of packages they offer.

On the issue of the profitability of such an airport, an assessment must be made as to sources and amounts of income. Realistically the airport cannot be expected to turn an immediate profit. It must be allowed sufficient time to repay its investment. Attempts to shorten this period by increasing airport charges will backfire as airlines divert their operation to other airports. Chep Lap Kok Airport, in Hong Kong can serve as an example of the reaction of airlines to high airport charges. Apart from direct sources of income arising from air transport, other sources should be sought or created to spread the sources of income and decrease dependency.

The issue of logistics and the location of companies around Schiphol also needs to be solved. This issue should not be underestimated and should be dealt with soon, as otherwise those companies and others will no longer be willing to invest in Schiphol. That could lead to a decrease of the airport now, and a disincentive for investments later when an offshore airport is built and operational.

CONCLUSION

There are several legal implications regarding the construction of an airport outside territorial waters, and these revolve around many issues. But aside from the legal implications, there are also economic ones since such an island is very expensive to build. Thus, an analysis of the economic trends in future air transport is essential. Moreover, a study of the reasons and decisions leading to the contemplation of an offshore airport provides insight as to whether such an airport is likely to be built.

The history of Schiphol Airport and its current problems have been outlined in the first chapter. The Dutch government chose two goals for the airport, namely to become a mainport and to protect the environment. To strike a balance between its goals, the government introduced noise zones and set limits as to the allowable amount of noise generated on the one hand, and gave permission for a certain increase in flight movements and passengers handled per year on the other. Unfortunately, staying within the noise limits proved to be impossible, and a choice had to be made. The Dutch government chose economic growth and is now studying how such growth can be accommodated in the long term, without harming the environment, and specifically without disturbing the population. One possibility currently being studied is an offshore airport outside territorial waters.

The current international legal framework does not explicitly address offshore airports. However, the new LOSC provides certain rules for the CZ and for the construction and operation of an offshore airport outside the territorial sea. Under the two regimes, which overlap at the likely location of the airport, the coastal State has exclusive rights, jurisdiction and control to construct and operate such an airport. It also gives the coastal State the right to surround the island with safety zones, which could be extended beyond the limit of the Convention by the appropriate organization, in this case IMO.

The Chicago Convention has established the legal framework applicable to air transport. However, the Convention was drafted nearly 40 years before the LOSC and does not take account of the new developments under the law of the sea. It must, therefore, be interpreted with those developments and former State practice in mind. State practice has already shown a certain similarity between the legal regime applicable to the

sea and that applicable to the air above. Another framework for the airspace above the EEZ, similar to that contained in the LOSC, can be envisioned. The Chicago Convention provides a definition of territory that limits the sovereignty of the State to the airspace above its territory and territorial waters. Again State practice has already shown, through identification zones, that such limitations are not always adhered to.

In analyzing both the LOSC and the Chicago Convention, an interpretation of the latter in the light of the former provides an insight as to the legal possibilities of an offshore airport outside territorial waters. As indicated in Chapter Five, an offshore airport can be constructed and operated, including the essential granting of traffic rights. The application of the rules of other international organizations and treaties can, therefore, be derived from this interpretation.

As the Netherlands is a Member State of the European Union, it will have to apply the European rules, together with its own, to such an offshore airport. This includes European aviation law, which contains rules on various topics dealing with air law. It will also include rules regarding the environment, sea transport and fishing. As an offshore airport has an effect on all three, all need to be taken into account. In anticipation of this the Dutch government has already commenced studies to evaluate possible effects.

The Netherlands also needs to take account of the rules and regulations of the various regional organizations. These include the rules of Eurocontrol, whose mandate has now expanded considerably and who is likely to provide the air traffic control of the future offshore airport. Other organizations influencing air law in Europe are ECAC and the JAA. As the European Union is involved to some degree in all three, legislation generated by these organizations will also affect Dutch law through EU law. All will be applicable to the offshore airport.

Cooperation with other States to protect the North Sea is required under the LOSC. In the case of the Netherlands, this cooperation takes place in the North Sea Ministers Conference, OSPAR and the European Union. Again, legislation of all three will have to be taken into account. The Dutch government has, therefore, already contemplated and begun an assessment of the effects of an offshore airport on the North Sea, which includes, *inter alia*, effects on currents, on fish stocks and on birds.

The WTO, of which the Netherlands is a Member State, has recently started to apply its principles to air transport issues. So far these issues do not include so-called hard rights, but this is likely to change. Considering the amount of time it will take to construct the airport, these issues must be anticipated since they will influence the growth of air transport and, thus, the number of airlines flying to such an offshore airport. Economic factors should, therefore, not be overlooked.

Although offshore airports have been contemplated before, none have yet been built, and the legal framework that would once have applied has changed substantially. When the study of an offshore airport near New York was undertaken, no breadth for the territorial sea was agreed upon, although 3, 6 and 12 miles prevailed. As the United States had only 3 miles at that time, extension of the territorial sea was a distinct possibility. However, such is not possible in this case.

Another option put forward by the New York Offshore Airport Feasibility Study was to include a harbor in the design of the offshore airport. This would have constituted an "outermost permanent harbor work, which forms an integral part of the harbor system" under the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, thus allowing the coastal State to regard the offshore airport as part of the coast. Such an interpretation, however, was not valid then and is not valid now. An artificial island located so many miles from the coast does not form an integral part of that coast, no matter what its purpose.

The final option that was suggested in the study was to negotiate a treaty dealing with offshore airports outside the territorial sea. This is indeed a valid option, but it would take a lot of time. For now the current framework will suffice, and it might even be easier to change the current framework to allow for such airports than to negotiate an entirely new treaty.

In conclusion, it can be said that the Dutch government can construct an offshore airport off its coast outside its territorial waters. It will need to take account of the rights and freedoms of third countries, but these can be accommodated. It can also apply its legislation to that airport and grant traffic rights for that airport as it has jurisdiction over that airport. Finally, it will able to apply to apply its own rules of the air to the airspace around that airport. This will be possible because the airport will be located within the

Amsterdam F.I.R. and because the regime of the EEZ can be interpreted to include the airspace above, as has been the case for the CZ in State practice. Nevertheless, coordination with other States will be essential.

Whether such an airport is economically feasible will depend on the growth of air transport, on the funds available and on the willingness of airlines to fly to such an island. Although growth is hard to predict, all indicators point to a steady growth of air transport. Funds will need to be raised from different places, including the treasury, the air transport community, the financial community and the European Union. Participation of foreign airports should be encouraged since it will eliminate some of the negative feelings held by other countries. Finally, in order to attract airlines, the airport should have reasonable airport charges, operate 24 hours a day and provide high safety and service standards.

Studying the international legal implications is fascinating, considering the amount of international legislation involved. What is provided in this thesis, however, is only a small part of the picture, mainly focusing on the law of the sea and air law. Whether the airport will eventually be built depends on the Dutch government. Chances are, however, that it will happen. If not now, then at a future date, and if not in the Netherlands, then in another State.

BIBLIOGRAPHY

Books:

- Attard, D.J., *The Exclusive Economic Zone in International Law*, (Oxford: Clarendon Press, 1987).
- Balfour, J., *European Community Air Law*, (London: Butterworths, 1995).
- R. den Besten, "An airport view", in P. Mendes de Leon, (ed.), *Air Transport Law and Policy in the 1990s: Controlling the Boom*, (Dordrecht: Martinus Nijhoff Publishers, 1991).
- Braven den, K, "The Role of Government in International Aviation Relations", in C.-J. Cheng, ed., *The Use of Air and Outer Space Cooperation and Competition*, (The Hague: Kluwer Law International 1998).
- Cheng, B., *The Law of International Air Transport*, (London: Stevens & Sons Limited, 1962).
- Christol, C.Q., "Unilateral claims for the use of ocean airspace", in J.K. Gamble, ed., *Law of the Sea: Neglected issues*, (Honolulu: Law of the Sea Institute, 1979).
- Churchill, R.R. and Lowe, A.V., *The Law of the Sea*, 2nd ed. (Manchester: Manchester University Press, 1988).
- Cooper, J.C., *The right to fly*, (New York: Henry Holt and Company, 1947).
- Diederiks-Verschoor, I.H.Ph., *An introduction to Air Law*, 6th ed. (Deventer: Kluwer Law and Taxation Publishers, 1997).
- Dierikx, M. and Brouwens, B., *Building castles of the air; Schiphol Amsterdam Airport and the development of airport infrastructure in Europe, 1916-1996*, (The Hague: Sdu Publishers, 1997).
- Drogendijk A. and T. Klein, "De groeistuipen van mainport Schiphol", in E. van Thijn et al, *De Sorry-democratie; recente politieke affaires en de ministriële verantwoordelijkheid*, (Amsterdam: Van Gennep BV, 1998).
- Extavour, W.C., *The Exclusive Economic Zone; A Study of the Evolution and Progressive Development of the International Law of the Sea*, (Geneva, Institut Universitaire de Hautes Etudes Internationales 1978).

- Giemulla, E.& Schmid, S., *European Air Law, Texts and Documents*, The Hague: Kluwer Law and Taxation publishers, 1997).
- Grief, N., *Public International Law in the Airspace of the High Seas*, (Dordrecht: Martinus Nijhoff Publishers, 1994).
- Grey, J. ed., *Offshore Airport Center Planning Confernce, Ardenhouse, 10-13 October 1971, Conference Proceedings*, (New York: American Institute of Aeronautics and Astronautics, 1971).
- Grey, J. ed., *First International Conference on Offshore Airport Technology, Bethesda Maryland, 29 April-2 May 1973, Proceedings*, (New York: American Institute of Aeronautics and Astronautics, 1973).
- Grotius, H., *De iure praerae commentarius*, trans. G.L. Williams & W.H. Zeydel (Oxford: Clarendon Press, 1950).
- Hailbronner, K., "Commentary", in J.K. Gamble, ed., *Law of the Sea: Neglected issues*, (Honolulu: Law of the Sea Institute, 1979).
- Hardaway, R.M., *Airport Regulation, Law and Public Policy*, (New York: Quorum Books, 1991).
- Havel, B.F., *In Search of Open Skies: Law and Policy for a New Era in International Aviation*, (The Hague: Kluwer Law International, 1997).
- Heller, P.P., "Air space over extended jurisdictional zones", in J.K. Gamble, ed., *Law of the Sea: Neglected issues*, (Honolulu: Law of the Sea Institute, 1979).
- Institute of Air and Space Law, *Annals of Air and Space Law*, vol. XVIII-II, (Montreal: Institute and Centre of Air and Space Law, 1993).
- Jayewardene, H.W., *The Regime of Islands in International Law*, (Dordrecht: Martinus Nijhoff Publishers, 1990).
- Kapteyn, P.J.G. & Verloren van Themaat, P., *Introduction to the Law of the European Communities*, 2nd ed. by L.W. Gormley (Deventer: Kluwer Law and Taxation Publishers, 1989).
- Kish, J., *The Law of International Spaces*, (Leiden: A.W. Sijthoff International Publishing Company, 1973).

- Knight, G. and Chiu, H., *The International Law of the sea: cases, documents, and readings*, (London: Elsevier Science Publishers LTD and UNIFO Publishers Inc, 1991).
- Kwiatkowska, B., *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, (Dordrecht: Martinus Nijhoff Publishers, 1989).
- Ladet, G., *Le statut de l'aeroport Bale-Mulhouse*, (Paris: Pedone, 1984).
- Levine, M.E., "Governement policy and commercial strategy in the 21st century", in C.-J. Cheng, ed., *The Use of Air and Outer Space Cooperation and Competition*, (The Hague: Kluwer Law International, 1998).
- Majid, A.A., *Legal status of International Institutions; SITA, INMARSAT and Eurocontrol Examined*, (Brookfield: Dartmouth Publishing Company Limited, 1996).
- Malanczuk, P., *Akehurst's Modern Introduction to International Law*, (New York: Routledge, 1997).
- Matte, Mateesco, N., *Treatise on Air- Aeronautical law*, (Montreal: Institute and Centre of Air and Space Law, 1981).
- Matte, Mateesco, N., *Deux frontières invisibles: De la Mer Territoriale a l'air "Territoriale"*, (Paris: Editions A. Pedone, 1965).
- McDougal, M.S., Lasswell, H.D., Vlasic, I.A., *Law and Public Order in Space*, (London: Yale University Press, 1963).
- Mencik von Zebinsky, A.A., *European Union external competence and external relations in air transport*, (The Hague: Kluwer Law International 1996).
- Mendes de Leon, P., *Cabotage in Air Transport Regulation*, (Dordrecht: Martinus Nijhoff Publishers, 1992).
- Murchinson, J.T., *The Contiguous Air Space Zone in International Law*, (Ottawa: Queens Printer and Controller of Stationary, 1957).
- Naveau, J., *International Air Transport in a Changing World*, (Dordrecht: Martinus Nijhoff Publishers, 1989).
- Oxman, B.H., "An analysis of the exclusive economic zone as formulated in the informal composite negotiating text", in T.A. Clingan Jr., ed., *Law of the Sea: State practice in zones of special jurisdiction*, (Honolulu: Law of the Sea Institute, 1982).

- Papadakis, N., *The International Legal Regime of Artificial Islands*, (Leiden: A.W. Sijthoff International Publishing Company, 1977).
- Rogalla, D. & Schweren, K., *Der Luftverkehr in der Europäischen Union*, (Baden-Baden: Nomos Verlagsgesellschaft, 1994).
- Rudden, B. & Wyatt, D., *Basic Community Laws*, (Oxford: Clarendon Press, 1996).
- Rossing, A.G.H., *Luchtvaart-terminologie 1999; Begrippen en afkortingen uit de nationale en internationale luchtvaartwetgeving*, (The Hague: Sdu Uitgevers, 1998).
- Sakamoto, T., "The globalization of the international air transport system", in C.-J. Cheng, ed., *The Use of Air and Outer Space Cooperation and Competition*, (The Hague: Kluwer Law International 1998).
- Shawcross & Beaumont, *Air Law*, (London: Butterworths, 1977).
- Smith, R. W., *Exclusive Economic Zone Claims; An Analysis and Primary Documents*, (Dordrecht: Martinus Nijhoff Publishers, 1986).
- Soetendal, E & Ditvoorst, C.A.L.C., *Zicht op de luchtvaartwetgeving, 1998-1999*, (The Hague: Sdu Uitgevers, 1998).
- Steiner, J. & Woods, L., *Textbook on EC Law*, 5th ed. (London: Blackstone Press Limited 1997).
- Treves, T. (ed.), *The Law of the Sea: The European Union and its Member States*, (The Hague: Martinus Nijhoff Publishers, 1997).
- United Nations, *The Law of the sea; Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index*, (New York: United Nations, 1983).
- U.S. Naval War College, *International Law Situations with solutions and notes*, V32 (Washington: United States Government Printing Office, 1934).
- U.S. Naval War College, *International Law Situations*, V39, (Washington: United States Government Printing Office, 1940).
- U.S. Naval War College, *International Law Studies 1959-1960*, V53, (Washington: United States Printing Office, 1961).
- U.S. Naval War College, Lillich, R.B. and Moore, J.N., eds., *International Law Studies, Readings in International Law from the Naval War College Review 1947-1977, Volume I*, V61, (Newport: Naval War College Press, 1980).

- U.S. Naval War College, Roach, J.A.& Smith, R.W., *Excessive Maritime Claims*, V66, (Newport: Naval War College Press, 1994).
- Wassenbergh, H., *Principles and Practices in Air Transport Regulation*, (Paris: Les Presses de l'Institut du Transport Aérien, 1993).
- Wassenbergh, H., "Open Skies/Open Markets": The Limits to Competition", in C.-J. Cheng, ed., *The Use of Air and Outer Space for all Mankind in the 21st Century*, (The Hague: Kluwer Law International, 1995).
- Wassenbergh, H., "The future of Global Economic Air Transport Regulation", in C.-J. Cheng, ed., *The Use of Air and Outer Space Cooperation and Competition*, (The Hague: Kluwer Law International, 1998).
- Woerz, C., *Dereguleirungsfolgen im Luftverkehr; Handlungsempfehlungen für Marktordnung und Umweltpolitik*, (Heidelberg: R. V. Deckers's Verlag, 1996).

Treaties:

- *Convention relating to the regulation of aerial navigation*, 13 October 1919, 11 L.N.T.S. 173.
- *Spanish American Convention on Aerial Navigation*, 1 November 1926, 3 Hudson International Legislation 2019.
- *Convention on commercial aviation*, 20 February 1928, 129 L.N.T.S. 225.
- *Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295.
- *International Air Services Transit Agreement*, 7 December 1944, 84 U.N.T.S. 389.
- *International Air Transport Agreement*, 7 December 1944, 171 U.N.T.S. 387.
- *Agreement between the government of the United States of America and the government of the United Kingdom relating to air services between their respective territories*, 11 February 1946, 3 U.N.T.S. 253.
- *Treaty establishing the European Coal and Steel Community*, 18 April 1951, G.B.T.S. 1973 No.2.
- *Treaty (with annexes and protocol) establishing the European Atomic Energy Community (EURATOM)*, 25 March 1957, 298 U.N.T.S. 167.
- *Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 516 U.N.T.S. 205.

- *Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 82
- *Convention on the Continental Shelf*, 29 April 1958, 499 U.N.T.S. 311.
- *Convention on Fishing and Conservation of the Legal Resources of the High Seas*, 29 April 1958, 559 U.N.T.S. 285.
- *Treaty establishing a single Council and a single Commission of the European Communities*, 8 April 1965, 4 I.L.M. 776.
- *Agreement between the government of the United States of America and the government of the United Kingdom concerning air services*, 23 July 1977, 28 U.S.T. 5367.
- *United Nations Law of the Sea Convention*, 10 December 1982, 21 I.L.M. 1261.
- *Final Act of the Conference of Representatives of the European Communities' Member States with Treaty Modifications concerning Community Institutions, Monetary Cooperation, Research and Technology, Environmental Protection, Social Policy and Foreign Policy Coordination*, 17 and 28 February 1986, 25 I.L.M. 503.
- *Treaty on the European Union and Final Act*, 7 February 1992, 31 I.L.M. 247.
- *Agreement between the United States of America and the Netherlands, amending the agreement of 3 April 1957, as amended and the Protocol of 31 March 1978, as amended*, 14 October 1992, T.I.A.S. No. 11976.
- *Convention on biological diversity*, 5 June 1992, 31 I.L.M. 818.

Governmental documents:

- Ministerie van Verkeer en Waterstaat, *Bestuursdwangbesluit Schiphol*, 1998.
- Ministerie van Verkeer en Waterstaat, *Selectiviteitsbeleid*, 1998.
- Ministerie van Verkeer en Waterstaat, *Rapportage planbureaus over Schiphol*, 1998.
- Toekomstige Nederlandse Luchtvaart Infrastructuur project, *Stategische beleidskeuze toekomst luchtvaart, Waar ligt de toekomst van luchtvaart in Nederland?*, December 1998.
- Toekomstige Nederlandse Luchtvaart Infrastructuur projekt, *Luchtvaart-infrastructuur in de toekomst, Samenvattende onderzoeksrapportage*, December 1998.

ICAO documents:

- Legal Committee, *Secretariat Study, United Nations Convention on the Law of the Sea- implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments*, Montreal, 1994.
- Legal Committee, *Secretariat Study, United Nations Convention on the Law of the Sea- implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments*, Montreal, 1994.

European Union Cases and Documents:

Cases:

- *Opinion pursuant to Article 228(6) of the EC Treaty*, Opinion 1/94, [1994] E.C.R. I-5267.
- *Ahmed Saeed Flugreisen and Silver Line Reise büro GmbH v. Zentrale Bekämpfung unlauteren Wettbewerbs e.V.*, C-66/86, [1989] E.C.R. I-803.
- *Ministère public v. Lucas Asjes, Andrew Gray and Others, Jaques Maillot and Others and Léo Ludwig and Others*, C-209 to 213/84, [1986] E.C.R. I-1425.
- *Cornelis Kramer and other (preliminary ruling requested by the Arrondissementsrechtbanken of Zwolle and Alkmaar)* C-3, 4 and 6/76, [1976] E.C.R. I-1279.
- *Commission v. French Republic*, C-167/73 [1974] E.C.R. I-359.
- *Commission of the European Communities v. Council of the European Communities* C-22/70, [1971] E.C.R.263.

Directives:

- EC, *Council Directive 83/206 of 21 April 1983 amending Directive 80/51/EEC on the limitation of noise emissions from subsonic aircraft*, [1983] O.J.L. 117/15 and EC, *Council Directive 89/629 of 4 December 1989 on the limitation of noise emission from civil subsonic jet aeroplanes*, [1989] O.J.L. 363/27.
- EC, *Council Directive 87/601 of 14 December 1987 on fares for scheduled air services between Member States*, [1987] O.J.L. 374/12.

- EC, *Council Directive 93/65 of 19 July 1993 on the definition and use of compatible technical specifications for the procurement of air-traffic-management equipment and systems*, [1993] O.J.L. 187/52.
- EC, *Council Directive 96/67 of 15 October 1996 on access to the groundhandling market at Community airports*, [1996] O.J.L. 272/36.
- EC, *Council Directive 97/11 of 14 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment as amended by Council Directive 97/11 of 3 March 1997*, [1997] O.J.L. 73/5.
- EC, *Council Directive 98/20 of 30 March 1998 amending Directive 92/14/EEC on the limitation of the operation of aeroplanes covered by Part II, Chapter 2, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988)*, [1998] O.J.L. 107/4.

Regulations:

- EC, *Council Regulation 4056/86 of 31 December 1986on the application of articles 85 and 86 of the Treaty to maritime transport*, [1986] O.J.L. 378/1.
- EC, *Council Regulation 4055/86 of 31 December 1986 on the application of the principle of freedom to provide services to sea transport*, [1986] O.J.L. 378/4.
- EC, *Council Regulation 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector*, [1987] O.J.L. 374/1
- EC, *Council Regulation 3976/87 of 14 December 1987 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector*, [1987] O.J.L. 374/9.
- EC, *Council Regulation 2342/90 of 24 July 1990 on fares for scheduled air services*, [1990] O.J.L. 217/1.
- EC, *Council Regulation 2343/90 of 24 July 1990 on access for carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States*, [1990] O.J.L. 217/8.

- EC, *Council Regulation 2344/90 of 24 July 1990 amending Regulation (EEC) No 3976/87 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector*, [1990] O.J.L. 217/15.
- EC, *Council Regulation 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation*, [1991] O.J.L. 373/4.
- EC, *Council Regulation 2407/92 of 23 July 1992 on licensing of air carriers*, [1992] O.J.L. 240/1.
- EC, *Council Regulation 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes*, [1992] O.J.L. 240/8.
- EC, *Council Regulation 2409/92 of 23 July 1992 on fares and rates for air services*, [1992] O.J.L. 240/15.
- EC, *Council Regulation 2410/92 of 23 July 1992 on amending Regulation (EEC) No. 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector*, [1992] O.J.L. 240/18.
- EC, *Council Regulation 2411/92 of 23 July 1992 on amending Regulation (EEC) No. 3976/87 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector*, [1992] O.J.L. 240/18.
- EC, *Council Regulation 95/93 of 18 January 1993 on common rules for the allocation of slots of Community airports*, [1993] O.J.L. 14/1.
- EC, *Commission Regulation 1523/96 of 24 July 1996 amending Regulation (EEC) No. 1617/93 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports*, [1996] O.J.L. 190/11.

Decisions:

- EC, *Council Resolution 80/50/EEC of 20 December 1979, setting up a consultation procedure for the relations between Member States and third countries in the field of air transport and on action relating to such matters within international organizations*, [1980] O.J.L. 48/24.

- EC, *Council Decision 87/602 of 14 December 1987 on the sharing of passenger capacity between air carriers and scheduled air services between Member States and on access for air carriers to scheduled air service routes between Member States*, [1987] O.J.L. 374/19.
- EC, *Council Decision 92/384 of 22 June 1992 concerning the conclusion of an Agreement Between the European Economic Community, the Kingdom of Norway and the Kingdom of Sweden on Civil Aviation*, [1992] O.J.L. 200/21.
- EC, *Council Decision 93/453 of 24 July 1993 concerning the amendment of the Agreement between the European Economic Community, the Kingdom of Norway and the Kingdom of Sweden on civil aviation*, [1993] O.J.L. 212/17.
- EC, *Decision of the Council and the Commission 94/1 of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland*, [1994] O.J.L. 1/2, as amended by EC, *Decision of the Council and the Commission 94/2 of 13 December on the conclusion of the Protocol adjusting the Agreement on the European Economic Area between the European Communities, their Member States and Austria, Finland, Iceland, Liechtenstein, Norway and Sweden*, [1994] O.J.L. 1/571.

Others:

- *Contributions of the European Communities to the development of aviation- Memorandum of the Commission*, Document COM (79) 311 final, in Bulletin of the European Communities, Appendix 5/79.
- EC, *Council Resolution 80/50/EEC of 20 December 1979, setting up a consultation procedure for the relations between Member States and third countries in the field of air transport and on action relating to such matters within international organizations*, [1980] O.J.L. 48/24.
- *Commission of the European Communities, Civil Aviation Memorandum No. 2: Progress on the way towards a common Aviation Policy*, Document COM (84) 72 final.

Law journals:

- Allott, P., "Mare Nostrum: A New Intrernational Law of the Sea", (1992) 86 A.J.I.L. 764.
- Arrigoni, N., "Joint Aviation Authorities, Development of an International Standard for Safety Regulation: The First Steps are being taken by the JAA", (1992) 17 Air & Space Law 130.
- Astley III, J. and Schmitt, M.N., "The Law of the Sea and Naval Operations", (1997) 42 A.F.L. 119.
- Balfour, J., "European Community External Aviation Relations – The Question of Competence", (1996) 21 Air & Space Law 2.
- Bentzien, J., "Die Zuständigkeit des Internationalen Seegerichtshofes für Streitgkeiten der internationalen Luftfahrt", (1996) 45 Z.L.W. 145.
- Bentzien, J., "Die völkerrechtliche Sonderstellung des Flughavens Basel-Mülhausen", (1993), 42 Z.L.W. 401.
- Brown, E.D., "The Significance of a Possible EC EEZ for the Law Relating to Artificial Islands, Installations, and Structures, and to Cables and Pipelines, in the Exclusive Economic Zone", (1992) 23 Ocean Dev. & Int'l L. 115.
- Carroz. J., "International Legislation on Air Navigation over the High Seas", (1959) 26 J. of Air L.1959.
- Charney, J.I., "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea", (1996) 90 A.J.I.L. 69.
- Clingan, T.A., "Emerging Law of the Sea: The Economic Zone Dilemma", (1977), 14 San Diego L. Rev. 530.
- Crans, B.J.H., "Liberalization of Airports", (1996) 21 Air & Space Law 10.
- Doganis, R., "Relaxing Airline Ownership and Investment Rules", (1996), 21 Air & Space Law 267.
- Donahue, B.E., "Attacks on Foreign Civil Aircraft Trespassing in National Airspace", (1989), 30 A.F.L. 49.
- Fenema, van, H.P., "Ownership Restrictions: Consequences and Steps to be Taken", (1998), 23 Air and Space Law 63.

- Fleisher, C.A., "The Right to a 200-Mile Exclusive Economic Zone or a Special Fishery Zone", 14 Va. J. Int'l L. 548.
- Geraci, T.A., "Overflight, Landing Rights, Customs, and Clearances", (1994) 37 A.F.L. 155.
- Galdorisi, G., "The United Nations Convention on the Law of the Sea: A National Security Perspective", (1995) 89 A.J.I.L. 208.
- Galdorisi, G., "The United States Freedom of Navigation Program: A Bridge for the International Compliance with the 1982 United Nations Convention on the Law of the Sea", (1996) 27 Ocean Dev. & Int'l l. 399.
- Georgiades, E., "Du nationalisme aérien à l'internationalisme spatial ou le mythe de la souveraineté aérienne", (1962) 16 Revue Franç. de Droit Aérien 129.
- Haanappel, P.P.C., "The future relations between EEC institutions and international organizations working in the field of civil aviation", (1990) 15 Air & Space Law, 317.
- Haanappel, P.P.C., "The Transformation of Sovereignty in the Air", (1995) 20 Air & Space Law, 311.
- Hailbronner, K., "Freedom of the Air and the Convention on the Law of the Sea", (1983), 77 A.J.I.L. 490.
- Hailbronner, K. "The legal regime of the Air Space above the Exclusive Economic Zone", (1983), 8 Air Law 30.
- Hayton, R.D., "Jurisdiction of the littoral state in the 'Air Frontier'", (1964) 3 Philippine Int. Law Journal 369.
- Head, I.A., "ADIZ, international law, and contiguous airspace", (1964) 3 Alta. L. Rev. 182.
- Heere, W.P., "Problems of jurisdiction in air and outer space", (1999) 24 Air & Space Law, 70.
- Heller, P.P., "Flying over the Exclusive Economic Zone", (1978) 27 Z.L.W. 15.
- Koskenniemi, M., "Case Concerning Passage Trough the Great Belt", (1996) 27 Ocean Dev. & Int'l L. 256.
- Knight, H.G., "International Legal Aspects of Deep Draft Harbor Facilities", (1973) 4 J. Marit. L. & Com. 367

- Lawrence, W.H., "Superports, Airports and Other Fixed Installations on the High Seas", 6 J. Marit. L. & Com. 575.
- Martial, J.A., "State control of the Air Space over the Territorial Sea and the Contiguous Zone", (1952) 30 Can. Bar Rev. 245.
- Morgan, A.L., "The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action", (1996) 27 Ocean Dev. &Int'l L. 5.
- Moussé, J., "EUROCONTROL: The changes effected in the International Organisation by the instruments signed on 12 February 1981", (1982), 6 Air Law 22.
- Münch, F., "Les îles artificielles et les installations en mer", (1978), 38 ZaöRV 933.
- Oda, S., "The Concept of the Contiguous Zone", (1962) 11 I.C.L.Q. 131.
- Pollard, D.E., "The Exclusive Economic Zone- The Elusive Consensus", (1975) 12 San Diego L. Rev. 600.
- Rosenne, S., "Establishing the International Tribunal for the Law of the Sea", (1995) 89 A.J.I.L., 806.
- Schwenk, W., "Die Anwnedung luftrechtlicher Vorschriften bei Flügen von und nach Schiffen und Bohrinseln", (1976), 25 Z.L.W. 234.
- Stevenson, J.R. and Oxman, B.H., "The future of the United Nations Convention on the Law of the Sea", (1994) 88 A.J.I.L. 488.
- Treves, T., "Military Installations, Structures, and Devices on the Seabed", (1980) 74 A.J.I.L. 808.
- Tsamenyi, M. and Herriman, M., "The 1997 Australia-Indonesia Maritime Boundary Treaty: A Secure Legal Regime for Offshore Resource Development?", (1998) 29 Ocean Dev. & Int'l L. 361.
- Tsamenyi, M. and Herriman, M., "Ocean energy and the New Law of the Sea: The need for a Protocol", (1998) 29 Ocean Dev. & Int'l L. 3.
- Walker, C.W., "Jurisdictional problems created by artificial islands", 10 San Diego L. Rev. 638.
- Wassenbergh, H.A., "Parallels and Differences in the Development of Air, Sea and Space Law in the Light of Grotius' Heritage", (1984) 9 Ann. Air & Sp.L. 163.
- Wassenbergh, H.A., "De-regulation of Competition in International Air Transport", (1996), 21 Air & Space Law 80.

- Wassenbergh, H.A., "Future Regulation to allow Multi-national Arrangements between Air Carriers (Cross-border Alliances), putting an End to Air Carrier Nationalism", (1995) 20 Air & Space Law 164.

Theses, dissertations and papers:

- Correia e Silva, B., *Some Legal Aspects of Flight Information Regions*, (LL.M. Thesis, Institute for Air and Space Law, McGill University, 1990) [unpublished]
- Iswandi, P., *The rights and duties of states in the airspace adjacent to their coasts: Reflections on the Law of the Sea Convention*, (LL.M. Thesis, Institute for Air and Space Law, McGill University, 1985) [unpublished]
- Romero-Royo, M., *The new convention on the Law of the Sea and its implications for Civil Aviation and the Chicago Convention*, (LL.M. Thesis, Institute for Air and Space Law, McGill University, 1989) [unpublished]
- Soons, A.H.A., *Artificial Islands and Installation in International Law*, (Occasional Paper no. 22, The Law of the Sea institute, University of Rhode Island, 1974)
- Stinson, S.A., *International Air Space with emphasis on the Polar Regions* (LL.M. Thesis, Institute for Air and Space Law, 1982) [unpublished]
- Tsidji, K., *Le nouvveau droit de la mer et le transportaerien: la liberte de survol au desus de la zone economique exclusive*, (LL.M. Thesis, Institute for Air and Space Law, McGill University, 1982) [unpublished]
- Turmen, R., *Freedom of Flight in the Airspace over the High Seas and its Practical Aspects*, (LL.M. Thesis, Institute for Air and Space Law, McGill University, 1981) [unpublished]

Magazines and Newspapers: (with authors)

Aéroports Magazine:

- Brosselin, S., "ATM 2000+: le «big brother» d'Eurocontrol prend forme" *Aéroports Magazine* 297 (April 1999) 26.
- Howe, J., "Les aéroports, des partenaires à part entière" *Aéroports Magazine* 285 (January-February 1998) 26.

- Rivière, B., "Un nouveau terminal pour l'EuroAirport" *Aéroports Magazine* 295 (January-February 1999) 12.
- Nanna, J.P. and Rivière, B., "Transport aérien: poursuite de la hausse" *Aéroports Magazine* 285 (January-February 1998) 15.
- Sarazin, J., "La libéralisation entre ciel blue et nuages" *Aéroports Magazine* 285 (January-February 1998) 20.
- Sarazin, J., "Alliances: big est-il beautiful?" *Aéroports Magazine* 293 (November 1998) 12.

Airports International:

- Rowe, R., "Border Country", *Airports International* 31:3 (April 1998) 16.

Algemeen Dagblad:

- Bos, W., "Schiphol is uit de brand met twee filialen" *Algemeen Dagblad* (4 July 1998) 9.
- Huisjes, B., "Plan voor drijvend vliegveld op mega-ponton" *Algemeen Dagblad* (30 October 1998) 6.
- Klein, P., and Koole, S., "Schiphol kan niet groeien; Uitbreiding luchtvaart alleen na aanleg nieuw vliegveld" *Algemeen Dagblad* (27 February 1998) 1.
- Koole, S., "Snelle wet haalt vliegveld dichterbij" *Algemeen Dagblad* (3 November 1998) 6.
- Tielrooij, F., "Ruim baan voor Schiphol; Starten en landen in de toekomst op een eiland in zee" *Algemeen Dagblad* (4 February 1998) 11.
- Vermeulen, R., "Nederlands succes in Hong Kong" *Algemeen Dagblad* (11 April 1998) 19.
- Wenstedt, J., "Maatwerk met drijvend eiland" *Algemeen Dagblad* (29 August 1998) 8.
- Wijgaart, van den, J., "Verkeer en Waterstaat; Tussen droom en daad op Verkeer en Waterstaat" *Algemeen Dagblad* (16 September 1998) 26.

Aviation Week & Space Technology:

- Mann, P., "Complex economic puzzle confronts world airlines" *Aviation Week & Space Technology* 149:16 (19 October 1998) 30.
- McKenna, J.T., "Airport aid funded in last-minute bill" *Aviation Week & Space Technology* 149:17 (26 October 1998) 34.
- McKenna, J.T., "House threatens ban on Concorde flights" *Aviation Week & Space Technology* 150:10 (8 March 1999) 46.
- Mecham, M., "New IATA forecast reflects Asian turmoil" *Aviation Week & Space Technology* 150:5 (1 February 1999) 70.
- Morrocco, J.D., Thomas, G. and Dorminey, B., "'Oneworld' Alliance to expand quickly" *Aviation Week & Space Technology* 149:13 (28 September 1998) 32.
- Morrocco, J.D., "Low-cost carriers expand into Europe" *Aviation Week & Space Technology* 149:19 (9 November 1998) 58.
- Nordwall, B.D., "Procedural improvements needed to increase airspace capacity" *Aviation Week & Space Technology* 149:19 (9 November 1998) 75.
- Ott, J., "Pressures build for new slant on aviation agreements" *Aviation Week & Space Technology* 149:19 (9 November 1998) 65.
- Ott, J., "Air Canada balks at Pearson charges" *Aviation Week & Space Technology* 149:24 (14 December 1998) 49.
- Ott, J., "Indianapolis serves as privatization testbed" *Aviation Week & Space Technology* 149:24 (14 December 1998) 52.
- Ott, J., "Alliances encounter government scrutiny" *Aviation Week & Space Technology* 150:6 (8 February 1999) 76.
- Ott, J., "Consolidation divides airlines, consumers" *Aviation Week & Space Technology* 150:10 (8 March 1999) 45.
- Shifrin, C.A., "Further liberalization under consideration" *Aviation Week & Space Technology* 149:13 (28 September 1998) 58.
- Shifrin, C.A., "Tough policy question a deregulation legacy" *Aviation Week & Space Technology* 149:19 (9 November 1998) 50.
- Shifrin, C.A., "Airport execs promote airline competition" *Aviation Week & Space Technology* 149:22 (30 November 1998) 52.

- Smith, B.A., "Sea Launch prepares for demonstration in March" *Aviation Week & Space Technology* 149:15 (12 October 1998) 27.
- Smith, B.A., "Sea Launch prepares for demonstration mission" *Aviation Week & Space Technology* 149:22 (30 November 1998) 56.
- Smith, B.A., "Sea Launch mission to demonstrate system" *Aviation Week & Space Technology* 150:12 (22 March 1999) 74.
- Sparaco, P., "Northern Italy's new hub seeks international role" *Aviation Week & Space Technology* 149:16 (19 October 1998) 39.
- Sparaco, P., "European deregulation still lacks substance" *Aviation Week & Space Technology* 149:19 (9 November 1998) 53.
- Sparaco, P., "Alitalia, KLM implement strategic partnership" *Aviation Week & Space Technology* 149:23 (7 December 1998) 38.
- Sparaco, P., "European travelers criticize Alliances" *Aviation Week & Space Technology* 149: 23 (7 December 1998) 41.
- Sparaco, P., "Europeans foresee gradual downturn" *Aviation Week & Space Technology* 150:5 (1 February 1999) 70.
- Sparaco, P., "Swissair strengthens EU partnership" *Aviation Week & Space Technology* 150:6 (8 February 1999) 73.
- Sparaco, P. and Mann, P., "Europe, U.S. clash over hushkit rules" *Aviation Week & Space Technology* 150:7 (15 February 1999) 47.
- Sparaco, P., "U.S. , France conclude cargo 'airport alliance'" *Aviation Week & Space Technology* 150:11 (15 March 1999) 39.
- Sparaco, P., "European Commission ponders broader aviation role" *Aviation Week & Space Technology* 150:16 (19 April 1999) 48.
- Sparaco, P., "Paris Airports Authority tackles congestion" *Aviation Week & Space Technology* 150:16 (19 April 1999) 50.
- Taverna, M.A., "Lufthansa hastens airport privatization" *Aviation Week & Space Technology* 149:14 (5 October 1998) 96.
- Thomas, G., "Asian turbulence may dictate radical ownership shifts" *Aviation Week & Space Technology* 149:19 (9 November 1998) 62.

- Thomas, G., "SIA set to join Star Alliance in March" *Aviation Week & Space Technology* 149:30 (7 December 1998) 32.
- Thomas, G., "Australia opens market to SIA" *Aviation Week & Space Technology* 150:13 (29 March 1999) 42.
- Thomas, G., "Star Alliance founders say membership means profits" *Aviation Week & Space Technology* 150:20 (17 May 1999) 64.

De Telegraaf:

- Burlage, A., "Estonian air verlaat als zoveelste in rij Schiphol" *De Telegraaf* (7 April 1999) T27.
- Burlage, A., "Ook US Air stopt nu met vluchten naar Schiphol" *De Telegraaf* (15 April 1999), T39.
- Burlage, A., "Ambtelijke molens rem in samenwerking luchtvaart" *De Telegraaf* (19 April 1999) T13.
- Burlage, A., "KLM wil zeggenschap over concurrenten buiten EU" *De Telegraaf* (6 May 1999) T8.
- Hussaarts, D., "Vliegveld in zee dreiging voor Britse concurrenten" *De Telegraaf* (23 June 1999) T27.

Elsevier:

- Fortuyn, P., "Schiphol", *Elsevier* (26 September 1998) 25.
- Vrijsen, E., "Glibberig pad", *Elsevier* (3 October 1998) 10.
- Vrijsen, E., "Tineke hield Kok erbuiten" (17 October 1998) 18.

Intermediar:

- Boxmeer, A., "Afgedwongen stilte rond Schiphol" *Intermediar* (1 July 1999) 41.

Trouw:

- Abels, R., "Minister de Boer: Tweede vliegveld op de Maasvlakte" *Trouw* (20 April 1998) 1.

- Boscher, D., "Weelde op futuristisch vliegveld Hong Kong; Veel Nederlandse bedrijven bouwden mee" *Trouw* (2 July 1998) 7.
- Dekker, V., "Tunnel HSL ook door nood Schiphol overbodig" *Trouw* (20 March 1998) 6.
- Dijs, F., "Nu de Noordzee nog; 200 jaar Rijkswaterstaat" *Trouw* (27 May 1998) 15.
- Hos, D., "Schiphol inzet formatie; Besluit over nieuwe luchthaven of groei op huidige plek moet snel vallen" *Trouw* (28 May 1998) 1.
- Houten, van M., "De VVD blij: luchtvaart mag in elk geval blijven groeien" *Trouw* (25 June 1998) 8.
- Houten, van M., "Stapel studies nu hoog genoeg" *Trouw* (4 September 1998) 9.
- Houten, van M., "Pronk en Netelenbos vliegen elkaar meteen in de haren, over Schiphol" *Trouw* (10 September 1998) 1.
- Houten, van M., "Melkert wil nu geen ruzie over Schiphol" *Trouw* (17 September 1998) 4.
- Houten, van M., "Hou op met doormodderscenario Schiphol, kies voor de zee" *Trouw* (24 September 1998) 4.
- Molenaar, E.J., "De juridische mitsen en maren van Schiphol in zee" *Trouw* (19 September 1998) 11.
- Oost, L. and Leopold, M., "Een luchthaven bouwen in zee hoeft niet bij voorbaat taboe te zijn" *Trouw* (4 September 1998) 11.
- Petri, J.P.L., "Vogels kunnen toch wijken voor een luchthaven?" *Trouw* (29 October 1998) 11.

Magazines and newspapers: (without authors)

Airports:

- "The Netherlands considers second national airport, Year 2000 preparations" *Airports* 15:5 (3 February 1998) 36.
- "Amsterdam Airport Schiphol" *Airports* 15:19 (12 May 1998) 188.
- "Belgian Greens fear shift of Schiphol noise to Brussels" *Airports* 15:37 (15 September 1998) 374.

- "Schiphol's fifth runway threatened by disclosure on growth plans" *Airports* 15:39 (29 September 1998) 394.
- "Amsterdam growth options include offshore airport as Schiphol alternative" *Airports* 15:39 (29 September 1998) 395.
- "Restrictions at Amsterdam Schiphol said to threaten Northwest-KLM" *Airports* 15:41 (13 October 1998) 413.
- "Dutch to focus on Schiphol for medium-term transportation development" *Airports* 16:2 (12 January 1999) 14.

Airport World:

- "Schiphol streaks ahead", *Airport World* 2:6 (December 1997-January 1998) 36.
- "What keeps Schiphol in front?", *Airport World* 1:1 (Winter 1996) 40.

Algemeen Dagblad:

- "Worsteling-1" *Algemeen Dagblad* (3 November 1998) 6.
- "PvdA-plan voor Schiphol onhaalbaar" *Algemeen Dagblad* (29 October 1998) 5.
- "Schiphol kan naar 60 miljoen; 'Milieuwetten hoeven reizigersgroei niet te beperken'" *Algemeen Dagblad* (4 September 1998) 13.
- "Vogels maken keuze moeilijk" *Algemeen Dagblad* (4 September 1998) 13.
- "Verkeer" *Algemeen Dagblad* (17 July 1998) 7.
- "Lelystad favoriet tweede vliegveld; Maasvlakte, Markerwaard en Noordzee vallen af voor overloop Schiphol" *Algemeen Dagblad* (11 July 1998) 5.
- "Luchthaven niet in de Noordzee" *Algemeen Dagblad* (16 March 1998) 11.

Aviation Week & Space Technology:

- "Star Alliance Board formed" *Aviation Week & Space Technology* 149:24 (14 December 1998) 47.
- "Global airports seek gains from new kinds of ownership" *Aviation Week & Space Technology* 149:24 (14 December 1999) 53.
- "Final preparations underway for first Sea Launch mission" *Aviation Week & Space Technology* 150:7 (15 February 1999) 26.

- "British Airways to gain 9% of privatized Iberia", *Aviation Week & Space Technology* 150:8 (22 February 1999) 62.
- "The European Union will ban hushkitted stage 2" *Aviation Week & Space Technology* 150:18 (3 May 1999) 18.
- "Indian government backs airline's privatization" *Aviation Week & Space Technology* 150:22 (31 May 1999) 37.
- "Narita to get new runway" *Aviation Week & Space Technology* 150:22 (31 May 1999) 38.

The Economist:

- "Airline alliances; Mergers in mind" *The Economist* 348:8078 (26 September 1998) 68.

De Telegraaf:

- "KLM en Malysian kiezen Duitse Hahn" *De Telegraaf* (8 March 1999) T5.
- "Badplaatsen in het geweer tegen vliegveld in zee" *De Telegraaf* (26 March 1999) T9.
- "Vliegverkeer op Schiphol minder" *De Telegraaf* (26 March 1999) T31.
- "Privatisering Schiphol op de lange baan geschoven" *De Telegraaf* (29 April 1999) T37.
- "Luchtverkeer London chaotisch" *De Telegraaf* (5 July 1999) T8.

Trouw:

- "Jorritsma vind vliegveld in zee weggegooid geld" *Trouw* (16 March 1998) 4.
- "Jorritsma kiest voor groei Schiphol" *Trouw* (21 April 1998) 9.
- "Schiphol zint op heffing vliegtickets; Poging om peperduur vliegveld in zee deels zelf te financieren" *Trouw* (1 May 1998) 7.
- "Vliegveld in zee moet ver van de kust" *Trouw* (27 June 1998) 8.
- "Schiphol gevaarlijk; Kabinet laat nieuw onderzoek doen na 'schokkend' RIVM-rapport" *Trouw* (9 September 1998) 1.
- "CDA kiest voor luchthaven in zee" *Trouw* (117 September 1998) 1.

- "Kok ontkent woordbreuk; Aantijging over Schipholbeleid valt verkeerd bij premier" *Trouw* (18 September 1998) 4.
- "De paarse partijen zijn er nog niet aan toe" *Trouw* (24 September 1998) 4.
- "PvdA: heropen discussie vijfde baan; Milieubeweging bereid onder voorwaarden mee te spreken" *Trouw* (2 November 1998) 1.
- "Advies: luchthaven in de Noordzee" *Trouw* (7 November 1998) 3.

Company publications:

- Annual Report, *Koninklijke Luchtvaart Maatschappij NV*, (1997/98)
- Environmental Annual Report, *Koninklijke Luchtvaart Maatschappij NV*, (1997/98)
- Annual Report, *KLM Royal Dutch Airlines*, (1998/99)
- Environmental Annual Report, *KLM Royal Dutch Airlines*, (1998/99)
- Annual Report, *Amsterdam Airport Schiphol*, (1997)
- Environmental Annual Report, *Amsterdam Airport Schiphol*, (1997)
- Annual Report, *Schiphol Group*, (1998)
- Environmental Report, *Schiphol Group*, (1998)
- Ballast Nedam, *Review*, (1/1995)
- Ballast Nedam, *Öresund Marine Joint Venture*, (August, 1997)

Studies:

- Grontmij Groep, *Locatiestudie Luchthaven Noordzee*, (De Bilt/Delft, 1998)
- RIVM rapport, *Schiphol binnen Milieugrenzen*, (Bilthoven, 1998)
- METRO rapport, *Luchthaven in of aan zee; Een onderzoek naar de bestuurlijke en juridische mogelijkheden, knelpunten en oplossingsrichtingen bij vestiging van een luchtvaartterrein op een kunstmatig eiland in zee*, (Maastricht, 1998)

Internet adresses:

http://www.ecac-ceac.org

http://www.eurocontrol.be

http://www.floatinc.com

http://www.ICAO.org

http://www.jaa.nl

http://www.klm.nl

http://www.minvenw.nl/rld

http://www.nrc.nl

http://www.parool.nl

http://www.schiphol.com

http://www.un.org

http://www.volkskrant.nl/dossiers

http://www.wto.org