Flexing the slot regime: airport slot coordination in light of evolving market realities: a regulatory perspective

Houten, L.M. van

3 CHAPTER THREE

The global regime for access to airports

3.1 The Chicago Convention on International Civil Aviation of 1944 as the Magna Carta of international air transport

3.1.1 Preliminary remarks on the Chicago Convention of 1944

The Convention on International Civil Aviation of 1944[304] [hereinafter: the Convention] is widely regarded as the principal legal instrument governing international aviation,[305] with 193 contracting States at the date of writing.[306] To date, its provisions are the fundamental source of law in the field of international civil aviation.[307] The Convention was signed at Chicago on 7 November 1944 and entered into force in 1947. It also includes the constitution of the International Civil Aviation Organization [hereinafter: ICAO].[308]

On 4 April 1947, parallel to the entry into force of the Convention, ICAO came into being as a specialized agency of the United Nations [hereinafter: UN] and was tasked with the coordination and regulation of the development of international aviation.[309] Regional organizations are increasingly carrying out tasks which are also exercised by ICAO, particularly in Europe.[310] The challenge is to harmonize the international legal framework which covers the activities of the various actors involved in air transport, including States and industry stakeholders, for the purposes of fostering the development of air transport.

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[304] Convention on International Civil Aviation, *supra* note 4.

[305] *See* Milligan, *supra* note 14, at 2.2.1.

[306] *See* ICAO, Member States List, *available at* https://www.icao.int/MemberStates/Member%20States.English.pdf (last visited November 10, 2021).

[307] *See* Michael Milde, *International Air Law and ICAO* (2016), at 50.

[308] *See* Truxal, *supra* note 16, Preface.

[309] Article 43 of the Convention provides that ICAO is formed by the Convention. Membership of ICAO is open to all States who are members of the UN, as to which *see* Articles 92(a), 93 and 93bis of the Convention. ICAO is made up of two governing bodies: the General Assembly and the Council. Though not mentioned by the Convention, a third body is the Secretariat headed by ICAO's Secretary General. The 'tripartite' structure of ICAO's bodies has evolved to be the standard organizational chart of all intergovernmental organizations since the 19th century. *See* Paul Stephen Dempsey, *The Role of the International Civil Aviation Organization on Deregulation, Discrimination and Dispute Resolution*, 52 Journal of Air Law and Commerce 3 (1987), at 530; Michael Milde, *The Chicago Convention – Necessary or Desirable 50 Years Later*, 19 Annals of Air and Space Law (1994), at 479; Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary* (2013), at 474-524 and Milde, *supra* note 307, at 129-198 for further details on the establishment, composition, status and functions of ICAO.

[310] Since the late 1980s, with the establishment of the internal air transport market, the European Union [hereinafter: EU] has considerably strengthened its role in international air transport matters. Although the EU has explored ways to become a member of ICAO, the Organization's membership is only open to States under the terms of Articles 91-93bis of the Convention. All EU Member States are, however, also contracting States to the Convention and ties between the EU and ICAO also exist in the form of the Memorandum of Cooperation between the EU and ICAO. *See infra* Chapter 4, section 4.3.5 (addressing the supranational nature of the EU).

The following sections will analyze ICAO's aims and objectives, explain the legal instruments which are attached to or made under the Convention, creating the 'Chicago Convention' regime. In addition, the basic concepts of this Convention which are relevant for the analysis carried out in this dissertation will be studied from the perspective of access to airports in terms of traffic rights and, more specifically, airport slots.

3.1.2 ICAO's Aims and Objectives

ICAO's purpose is derived from the Preamble to the Convention, which states that the Organization's contracting States have agreed on "certain principles and arrangements" in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services should be established "on the basis of equality of opportunity" between airlines.[311] To this end, Article 44 of the Convention lays down ICAO's aims and objectives as follows:

> "The aims and objectives of the Organization are to *develop the principles and techniques* of international air navigation to *foster* the planning and development of international air transport so as to: (a) ensure the safe and orderly growth of international civil aviation throughout the world . . ., (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 between contracting States . . ." [italics added][312]

These objectives are multiple, and embrace several categories of competences and functions, including technical, administrative, supervisory, legislative and juridical functions.[313]

Among others through the adoption of Annexes to the Convention, ICAO can *develop principles and techniques* of air transport to safeguard a host of aims and objectives, which are reflected in the citation of Article 44 of the Convention above. However, it can only *foster* the development of air transport via the issuance of guidelines on air transport economics.[314] As such, the intention of the drafters of the Convention not to delegate regulatory powers to ICAO in the economic area is reflected in the wording of Article 44 of the Convention. When it comes to the "planning and development of international air transport", ICAO's aims and objectives are merely to foster this planning and development instead of effectively taking the reins themselves.[315] This dichotomy of functions, split between developing principles and techniques and fostering planning and development, implicitly reflects the agreement of contracting States to the Convention that ICAO could adopt Standards and Recommended Practices [hereinafter: SARPs] in the technical field of air navigation and could only draft guidelines in the economic field as addressed in section 3.1.3 below.

According to Milde (2016), the Convention was drafted with foresight and flexibility that commands full respect and endured for over seventy years without substantive amendments.[316] The basic principles of the Convention, as discussed in section 3.1.4, have remained unchanged following the Convention's entry into force in 1947. Since then, international air transport has seen far-reaching technical, political and structural developments which have had a profound impact on modern-day transportation and society in

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[311] Convention on International Civil Aviation, *supra* note 4, Preamble.
[312] *Id.,* Article 44.
[313] *See* Abeyratne, *supra* note 309, at 477.
[314] *Id.,* at 515.
[315] *See* Lykotrafiti, *supra* note 10, at 90.
[316] *See* Milde, *supra* note 307, at 210.

general, with elements of liberalization unimaginable at the time the Convention was drafted. Hence, 21st century international air transport bears little resemblance to what it was during World War I and World War II, and so it is questionable if the Convention responds to the needs of contemporary air transport.[317]

A little over seventy-five years after the signing of the Convention, a very different geopolitical, social and economic landscape with different angles on the development of air transport has appeared.[318] As shown in Chapter 2 of this dissertation, market realities have evolved, including growing capacity scarcity and related market access issues, as well as growing concerns related to the environment and public health.[319]

3.1.3 Principal components of the 'Chicago Convention' regime

The Convention and its Annexes, hereinafter referred to as the 'Chicago Convention regime', can be viewed as a multilateral regime between States, creating rights and obligations for States under public international law.[320] It has 'dual personality', that is to say two functions. In the *first* place, the Convention is a comprehensive unification of public international air law. In the *second* place, it is a constitutional instrument of an international intergovernmental organization of universal character.[321] Where most constitutional instruments of other specialized agencies of the UN, including the Charter of the UN[322] itself, stipulate general principles governing the work of the organization, the Convention contains a detailed and self-contained "*corpus* of public international air law".[323]

The Convention was adopted during the final year of World War II, as a result of the International Civil Aviation Conference, held in Chicago from 1 November until 7 December 1944.[324] It is the product of a multilateral consensus reached by 52 States, composed of the "war-time allies" calling themselves "the United Nations", by States associated with them and by invited States that remained neutral during the war".[325] Although the Convention was signed on behalf of 52 States, it entered into force by the ratification of 26 signatory States pursuant to Article 91(b) of the Convention.[326]

The Convention's functions in the technical field are straightforward and clear.[327] Unlike their solidity with regard to uniform technical and safety standards, the 52 States participating in the International Civil Aviation Conference appeared to be far from capable of adopting provisions regulating the economic side of air transport. As such, the drafters could not agree on standards for the operation of international air services, apart from establishing the legal basis for States to negotiate such standards provided by Articles 5 and 6 of the Convention.[328]

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[317] *See* Ludwig Weber, *International Civil Aviation Organization* (2012), at 279; Milde, *supra* note 307, at 107.
[318] *See*, among others, Pablo Mendes de Leon and Niall Buissing, *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty* (2019).
[319] *See* ICAO, *supra* note 78, paragraph 4.4.
[320] *See* Weber, *supra* note 317, at 310.
[321] *See* Truxal, *supra* note 16, Preface.
[322] Charter of the United Nations (San Francisco, 26 Jun. 1945), 1 U.N.T.S. 16.
[323] *See* Milde, *supra* note 307, at 403.
[324] *See* ICAO, Proceedings of the International Civil Aviation Conference, *available at* https://www.icao.int/ChicagoConference/Pages/proceed.aspx (last visited May 25, 2021).
[325] *See* David Grant, Regulation of Air Transport Economic Rationale and Impact, UK ESSAYS (2017), https://www.ukessays.com/essays/economics/regulation-air-transport-economic-rationale-2023.php?vref=1 (last visited February 19, 2021; Milde, *supra* note 307, at 31.
[326] *See* Milde, *supra* note 307, at 31.
[327] *See* Abeyratne, *supra* note 309, at 517.
[328] The drafters had hoped to reach agreement on both economic regulation and technical and operational aspects but were only successful as to the latter. While World War II had emphasized the military importance of aviation, it had equally demonstrated the potential for civil aviation for economic and political purposes. Different positions

Although the Convention is a product of balancing the conflicting interests of its drafters, it is one of the most generally accepted multilateral law-making instruments, with 193 contracting States at the date of writing of this dissertation as mentioned in section 3.1.1 above. Like all international conventions, it embodies the 'common denominator' of political wills of the negotiating States at the time of its drafting.[329]

Apart from the establishment of airport charges, the drafters of the Convention decided that the economic regulation of international civil aviation was left to the discretion of States. Separate regulatory instruments for economic regulation emerged accordingly,[330] to wit the International Air Services Transit Agreement[331] [hereinafter: IASTA] and the International Air Transport Agreement,[332] as well as a host of bilateral air services agreements [hereinafter: ASAs], which are subject to discussion in section 3.2.

Article 37 of the Convention provides that ICAO shall adopt and amend from time to time, as may be necessary, international SARPs and Procedures for Air Navigation Services[333] [hereinafter: PANS] designed to implement the articles of the Convention.[334] Standards are any specifications of which the uniform application is recognized as necessary for the safety or regularity of international air navigation and have been attributed legal force. Normally, compliance with standards is a prerequisite for the exercise of traffic rights by an air carrier under a bilateral or plurilateral ASA between States.[335] Recommended practices are not of a mandatory nature but are considered as desirable.[336] For approval by the ICAO Council, ICAO's Air Navigation Commission[337] considers and recommends SARPs and PANS for the safety and

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were taken in preparation of the Convention. In particular, the views of the US and UK delegations were diametrically opposed as to the economic regulation of air transport, although both delegations insisted on maintaining the sovereignty of airspace. The US, however, advocated minimum restrictions on the economic operation of air services, whereas the UK, which was severely weakened by World War II and faced the collapse of its colonial empire, was strongly committed to regulation in the technical ánd economic field in order for each State to have a share in international civil aviation. It is against that backdrop that the Convention was established. As a result, ICAO has mainly operated as a technical standard-setting body. The Convention's scope is curtailed to solve technical coordination problems relating to, inter alia, aircraft registry, air traffic management, cross-border recognition of licensing certificates, and taxes and charges that are imposed on international air services. *See* Stephan Hobe, *Sovereignty as a Basic Concept of International Law and a Core Principle of Air Law*, in Pablo Mendes de Leon and Niall Buissing (eds), *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty* (2019); José Ignacio García-Arboleda, *Bilateralism and Equality of Opportunity under Scheduled Services: Are Air Services Agreements the Sole and Absolute Source for Traffic Rights?*, in Pablo Mendes de Leon and Niall Buissing (eds), *Behind and Beyond the Chicago Convention* (2019); Alain Lumbroso, *Aviation liberalization: What headwinds do we still face?*, 74 Journal of Air Transport Management (2019), at 23; Milde, *supra* note 307, at 13-16; Von den Steinen, *supra* note 12, at 10; Havel and Sanchez, *supra* note 233, at 28; Milde, *supra* note 307, at 13-16; Dempsey, *supra* note 309, at 533.

[329] *See* Milde, *supra* note 307, at 19.

[330] *See* NERA Economic Consulting, *supra* note 5, at 11.

[331] International Air Services Transit Agreement (Chicago, 7 Dec. 1944), 59 Stat. 1693, 84 U.N.T.S. 389.

[332] International Air Transport Agreement (Chicago, 7 Dec. 1944), 59 Stat. 1701, 171 U.N.T.S. 387.

[333] PANS are documents approved by the ICAO Council and recommended to States for worldwide applications. As such, they attempt to make air navigation services uniform across the world.

[334] Convention on International Civil Aviation, *supra* note 4, Article 37.

[335] *See infra* section 3.2 for a discussion on the exchange of traffic rights under ASAs between States.

[336] The uniform application of Standards is recognized as necessary, whereas the uniform application of Recommended Practices is recognized as merely desirable. *See* ICAO, Doc 9902: Assembly Resolutions in Force (as of 28 September 2007), Resolution A36-13: Consolidated statement of continuing ICAO policies and associated practices related specifically to air navigation, Appendix A. In the words of Truxal, *supra* note 16, at 27, "SARPS are in effect legislation on one hand and guidelines on the other".

[337] The Air Navigation Commission is established by the ICAO Council pursuant to Article 54 of the Convention. The Commission assists the Council with regard to the development of SARPs and PANS and advises the Council on all matters which may help to advance air navigation.

efficiency of international air services.[338] At present, there are around 12,000 SARPs contained in the form of Annexes to the Convention, with which contracting States must comply.[339] Currently, the Convention hosts 19 Annexes,[340] of which 17 deal with aviation safety.[341]

The mandatory nature of the Convention is underlined by Article 82, which reads that contracting States committed themselves to not act in breach of any of the Convention's provisions.[342] Should a contracting State deem it necessary to adopt national standards different from those prescribed by the Convention, it shall immediately notify ICAO of its intention.[343] When a contracting State has not registered its disapproval with ICAO, the standard is regarded as binding upon that contracting State by virtue of Article 90 of the Convention.[344] Moreover, Article 31 of the Vienna Convention on the Law of Treaties[345] and Article 2(2) of the Charter of the UN[346] hold the principle of good faith, *id est* the principle that States must fulfil in good faith their international legal principles.[347]

Article 47 of the Convention provides that ICAO "shall enjoy in the territory of each contracting State such legal capacity as may be necessary for the performance of its functions" and that "[f]ull juridical personality shall be granted to the Organization wherever compatible with the constitution of the laws of the State concerned". ICAO needs legal personality to, *inter alia*, perform its functions and to conclude agreements with States or other organizations.[348] The legal personality of intergovernmental organizations needs to be different from that of its Member States in order to avoid confusion with the parallel function of governments.

While ICAO serves as a forum for the Convention's contracting States to negotiate and adopt treaties relating to civil aviation, States are the ultimate decision-makers to adopt said treaties and to accept them as binding.[349] Hence, ICAO has limited enforcement powers, as these are left to the contracting States of the Convention.[350]

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[338] *See* Abeyratne, *supra* note 309, at 477.
[339] *See* Jiefang Huang and Mathieu Vaugeois, *The Impact of Sovereignty on the Administration of International Civil Aviation Through International and Regional Organizations: The Role of ICAO*, in Pablo Mendes de Leon and Niall Buissing (eds), *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty* (2019), at 58.
[340] The Convention's 19 Annexes are as follows: Annex 1 (Personnel Licensing), Annex 2 (Rules of the Air), Annex 3 (Meteorological Service for International Air Navigation), Annex 4 (Aeronautical Charts), Annex 5 (Units of Measurement to be Used in Air and Ground Operations), Annex 6 (Operation of Aircraft), Annex 7 (Aircraft Nationality and Registration Marks), Annex 8 (Airworthiness of Aircraft), Annex 9 (Facilitation), Annex 10 (Aeronautical Telecommunications), Annex 11 (Air Traffic Services), Annex 12 (Search and Rescue), Annex 13 (Aircraft Accident and Incident Investigation), Annex 14 (Aerodromes), Annex 15 (Aeronautical Information Services), Annex 16 (Environmental Protection), Annex 17 (Security), Annex 18 (The Safe Transport of Dangerous Goods by Air) and Annex 19 (Safety Management).
[341] *See* Peter Paul Fitzgerald, *A Level Playing Field for "Open Skies": The Need for Consistent Aviation Regulation* (2016), at 17.
[342] Article 82 of the Convention reads as follows: "The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understanding . . .".
[343] Convention on International Civil Aviation, *supra* note 4, Article 38.
[344] *See* Weber, *supra* note 317, at 297.
[345] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), 1155 U.N.T.S. 331.
[346] Charter of the UN, *supra* note 322.
[347] Article 31 of the Vienna Convention on the Law of Treaties, *supra* note 345, states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith . . .".
[348] *See* Milde, *supra* note 307, at 136.
[349] *See* Jiefang Huang, Aviation Safety and ICAO (2009), at 181.
[350] According to Paul Stephen Dempsey, *Compliance & Enforcement in International Law: Achieving Global Uniformity in Aviation Safety*, 30 North Carolina Journal of International Law 1 (2004), the sovereign State has ". . . corpse of police, jails, courts, and prisons to coerce and punish those who violate his or her edicts. But in international law, no equivalent institutions exist. Outside of the powers held by the UN Security Council to exert force against States that violate international law, no UN agency has unrestricted power to punish an errant State. Global governance

Hence, the above-mentioned instruments together constitute the 'Chicago Convention regime', including the Convention and its 19 Annexes, the IASTA and the International Air Transport Agreement. Besides SARPs and PANS, ICAO has also developed other forms of regulatory material, including but not limited to Assembly Resolutions, Supplementary Procedures, regional air navigation plans, model clauses and other guidance materials.[351] The next section sheds light on the basic concepts of the 'Chicago Convention' regime.

3.1.4 Basic concepts of the 'Chicago Convention' regime relevant to slot coordination

3.1.4.1 *Safety as a primary goal of the Chicago Convention regime*

Since the drafters of the Convention were primarily concerned with questions related to safety and technical aspects of aviation, as discussed in section 3.1.3, the Convention failed to provide a global framework for the economic regulation of air transport, including airport access via slots, with the exception of the regulation of airport charges. It is for that reason that the Convention and its 19 Annexes do not include provisions on slot coordination.[352]

Moreover, at the time when the Convention was drafted, the problem of airport congestion did not exist. Thus, the drafters of the Convention may not have felt the need to address this issue.[353] The Convention does, however, include basic concepts regarding access to airports that may be linked to slot coordination.[354] The principal provisions of the Convention relevant to slot coordination discussed in this section are Article 1, 2, 5, 6, 11, 15 and 68 of the Convention. Article 44 of the Convention on ICAO's aims and objectives has been discussed in section 3.1.2. ICAO policy guidance in the field of slot coordination is presented in section 3.1.7.

3.1.4.2 *The principles of complete and exclusive aerial sovereignty and jurisdiction*

Like its predecessor, the 1919 Paris Convention[355], the Chicago Convention upholds the principle of *complete and exclusive sovereignty*. According to Article 1 of the Convention, "the contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." 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 State," pursuant to Article 2 of the Convention.[356]

Article 1 addresses the legal status of the airspace above the territory of any State, not only of that of the contracting States.[357] Thus, every State is sovereign in its own territory in the sense that it has the supreme power, including the jurisdiction, to deal with its internal and external affairs in an independent manner.[358] All States are deemed to be equally sovereign.[359]

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instead works in a system of compliance, rather than enforcement". *See* also Mendes de Leon, *supra* note 48, at 559; Truxal, *supra* note 16, at 57.

[351] *See* Huang, *supra* note 349, at 182.

[352] *See* Hobe, *supra* note 328, at 38.

[353] *See* NERA Economic Consulting, *supra* note 5, at 225.

[354] *Id.,* at 226.

[355] Convention relating to the Regulation of Aerial Navigation (Paris, 13 Oct. 1919), 11 L.N.T.S. 173.

[356] The principle of sovereignty in international air transport emerged in the 20th century, after the Wright brothers carried out the first heavier-than-air manned flight on 17 December 1903 in North Carolina, US. However, the awareness of the link between national security and the control over the national airspace of States became more widespread with the development of aircraft manufacturing and related technologies during World War I and World War II. Thus, the proclamation of sovereignty has, at least in part, a military background. *See* Hobe, *supra* note 328, at 37; Haanappel, *supra* note 10, at 311-317; Peter Haanappel, *The Law and Policy of Air Space and Outer Space: A Comparative Approach* (2003), at 1-3.

[357] *See* Milde, *supra* note 309, at 416.

[358] *See* Varsamos, *supra* note 16, at 13; Huang and Vaugeois, *supra* note 339, at 56.

[359] *See* Varsamos, *supra* note 16, at 13.

As opposed to the Paris Convention, the Chicago Convention applies only to civil aviation with an attempt to legally separate civil aircraft from State aircraft in Article 3.[360] The Convention does not create a global commercial airspace analog to the freedom of the high seas, also known as the *mare liberum*.[361]

Sovereignty and jurisdiction are related concepts, because *jurisdiction* ought to be seen as an essential element of sovereignty.[362] The concept of complete and exclusive sovereignty comes down to a State possessing the ultimate legal authority within its territory. It refers in the first place to the exclusive jurisdiction of the State concerned to adopt laws and regulations for the users of its airspace, and to implement such laws and regulations by administrative decisions and sanctions, all to the exclusion of any other State's jurisdiction.[363] In other words, where sovereignty comes down to a State possessing the ultimate legal authority within its territory, jurisdiction is the authority to exercise legal power.[364] Since slot coordination takes place within the territory of States, oftentimes with the intervention of an independent coordinator, slot coordination is subject to Articles 1 and 2 of the Convention as implemented in other provisions of international law as explained below.

The Convention does not in itself create the principle of sovereignty, it rather recognizes it as a rule that is generally applicable for all States. ICAO is by no means sovereign in its own right.[365] The drafters of the Convention considered the principle of sovereignty to be rooted in customary international law,[366] that was only to be formally recognized by a codified instrument.[367]

The principle of sovereignty is to be interpreted and applied in the spirit of the Convention's Preamble,[368] which stresses the preservation of friendship and understanding

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[360] The Paris Convention applied to all aerial navigation. *See* Peter Haanappel, Aerial Sovereignty: From Paris 1919, Through Chicago 1944, to Today' in Pablo Mendes de Leon and Niall Buissing (eds), *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty* (2019), at 26.

[361] Under Grotius' idea of *mare liberum*, it is viewed that the sea cannot be occupied, and therefore cannot be possessed. It is common property to be used by all. An analogy with the concept of airspace can be made, arguing that it is impossible to occupy and thus possess an enormous portion of airspace, even if it is located directly above land over which a State exerts territorial control. However, because of safety and security concerns, a comparison with *mare liberum* may fall out of favor as aircraft flying above populated land may present certain risks and dangers to those below the aircraft, including military installations, that are not present at the high seas. Therefore, a State's sovereign authority over land extends upward to the airspace above the territory controlled by the State. *See,* for instance, Havel and Sanchez, *supra* note 233, at 38. Moreover, unlike maritime law, international air law does not recognize the rule of 'innocent passage'. A special permission or other authorization is required for both the operation of international air services to or from points in a foreign State pursuant to Article 6 of the Convention, but also for the mere overflight of that State, *see* Haanappel, *supra* note 10, at 315.

[362] *See* Regula Dettling-Ott, *Sovereignty in the Context of European Law and Policy*, in Pablo Mendes de Leon and Niall Buissing (eds), *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty* (2019), at 223.

[363] *See* Varsamos, *supra* note 16, at 13; Milde, *supra* note 307, at 11.

[364] *See* various book sections included in Mendes de Leon and Buissing, *supra* note 318, for further explanations on the concepts of sovereignty and jurisdiction, including Dettling-Ott, *supra* note 356 at 223. *See* also James Crawford, *Brownlie's Principles of Public International Law* (2019), Part III; Truxal, *supra* note 16, at 33-35.

[365] *See* Abeyratne, *supra* note 309, at 480.

[366] The principle of airspace sovereignty is a presumptive extension of the customary international law doctrine of State sovereignty. In Roman times, the principle of airspace sovereignty has been expressed through the Latin maxim *cuius est solum, eius est usque ad coelum et ad inferos* ("for whomever owns the soil, it is theirs up to Heaven and down to Hell"). The Statute of the International Court of Justice (San Francisco, 26 Jun. 1945), 33 U.N.T.S. 993, Article 38(d), defines international custom as "evidence of a general practice accepted as law". For an historical overview of the background of custom in air law, *see* Haanappel, *supra* note 360, at 26.

[367] *See* Milde, *supra* note 307, at 11.

[368] According to Article 26 of the Vienna Convention on the Law of Treaties, *supra* note 345, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*" [italics added]. The context of a treaty is given, among others, by

among the nations and peoples of the world as a function of the future development of international civil aviation. States are urged to "avoid friction and to promote the cooperation between nations and peoples upon which the peace of the world depends".[369] Given the wider framework of the Convention's Preamble, Milde (2016) has rightfully concluded that States should interpret the principle of complete and exclusive sovereignty as a right for mutual international benefit and cooperation, instead of as a self-centered entitlement.[370]

A prime corollary of the principle of sovereignty is expressed in Article 6 of the Convention, which subjects the operation of international air services to the discretionary permission of States. Each State is free to use its jurisdictional powers and impose limitations as it deems fit on the aircraft of a foreign State, as evidenced by bilateral or plurilateral ASAs. Accordingly, national airspace is *de iure* closed for foreign aircraft and their operators, unless a State decided to open it for civil aviation activities.[371] Article 5 of the Convention furthermore establishes that States may impose "regulations, conditions or limitations" as it may consider desirable for aircraft not engaged in scheduled international air services. In other words, the principle of sovereignty only applies insofar as States have not made other arrangements.[372] The application and practice of Articles 5 and 6 of the Convention is studied in section 3.2.1.

By way of international agreement between States, the concept of sovereignty may also be made subject to specified conditions and limitations.[373] For instance, Article 15 of the Convention in particular limits jurisdiction by obligating States to make available the airports in their territory under uniform conditions to the aircraft of all contracting States subject to Article 6 of the Convention. Another limitation is found in Article 68, according to which States may designate within its territory the routes to be followed by any international air services, as well as the airports which may be used.

3.1.4.3 *National treatment and non-discrimination*

Another fundamental principle underlying the Convention, which is relevant to this dissertation, is the principle of *equality of opportunity*, or *fair and equal opportunity,* entailing that all contracting States should be able to participate in air transport on the basis of equality of opportunity. It is designed to maintain a level playing field for the designated carriers under an ASA and for carriers engaged in non-scheduled services.[374] The Convention's Preamble refers to the good faith of States in establishing international air transport services, be it scheduled or non-scheduled, with regard for equal opportunity and participation.

Over the years, an increasing number of States have applied the principle of equality of opportunity to promote effective competition for the benefit of national economies and consumers, as opposed to interpreting the principle of equality of opportunity narrowly to

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its Preamble. The Preamble to a treaty determines the way the rest of the treaty is interpreted, *see* also Article 31 of the Vienna Convention on the Law of Treaties.

[369] Convention on International Civil Aviation, *supra* note 4, Preamble.

[370] *See* Milde, *supra* note 307, at 36.

[371] *See* Pablo Mendes de Leon, *Introduction to Air Law* (2017), at 45.

[372] In the words of Wassenbergh (1962): ". . . the provision of Article 1 applies only insofar as it is not expressly restricted by other provisions of the Convention or by engagements entered into elsewhere". *See* Henri Wassenbergh, *Post-War International Civil Aviation Policy and the Law of the Air* (1962), at 100; Pablo Mendes de Leon, Cabotage in Air Transport Regulation (1992).

[373] *See* García-Arboleda, supra note 328, at 267.

[374] The principle of equality of opportunity is interpreted differently by different States. Some are of the opinion that it entails equal access to the market, and/or non-discrimination in all respects. Others may interpret 'equality of opportunity' as 'equality of advantage' or 'balance of benefit' in a sense that neither party to a bilateral or plurilateral ASA draws a bigger benefit from the agreed international air services. For further explanations, *see* Mendes de Leon, *supra* note 48, at 566; Milde, *supra* note 307, at 116.

achieve "equality of benefits".[375] In addition to ensuring the principle of equality of opportunity is adhered to, States cannot discriminate as to the nationality of any aircraft, implying that national aircraft must be treated in the same way as foreign aircraft.[376]

To give substance to the principle of equality of opportunity, Article 11 of the Convention sets out the *national treatment* principle:

> "Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State."[377]

It could be argued that rules and procedures on slot coordination can be regarded as "laws and regulations of a contracting State", even though this may not have been envisaged at the time the Convention was drafted as previously mentioned in section 3.1.4.1. Henceforth, slot coordination rules must be applied "to the aircraft of *all* contracting States without distinction as to nationality" [italics added].[378]

Subsequently, Article 15 of the Convention relates to the establishment of airport charges. Slot coordination may not be regulated directly under the Convention, but access to airports is.[379] The first sentence of Article 15 contains a relevant provision that may lend itself for an extension to the slot rules:

> "Every airport in a contracting State which is open to public use by its national aircraft shall likewise . . . be open *under uniform conditions* to the aircraft of all the other contracting States. . ." [italics added][380]

Accordingly, when traffic rights are secured or when the regulations, conditions or limitations for non-scheduled flights have been complied with, contracting States to the Convention must adhere to the non-discrimination principle with respect to access to airports located in their territory. The *non-discrimination* principle entails that all foreign aircraft must be treated in the same way when flying into or departing from an airport located in the territory of a contracting State. It embodies the potential to successfully operate on a certain market on equal terms. It is imperative that access to airports does not only guarantee equal treatment *de iure*, but also *de facto*.[381] Thus, Article 15 also encompasses the *national treatment* principle.

The next section applies the principles of national treatment and non-discrimination to the coordination of slots, during which the difference between national treatment and non-discrimination also comes to light.

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[375] *See* ICAO, *ATConf/6-WP/4: Fair Competition in International Air Transport* (2013), paragraph 3.1.
[376] *See* NERA Economic Consulting, *supra* note 5, at 227.
[377] Convention on International Civil Aviation, *supra* note 4, Article 11.
[378] The national treatment principle holds that national and foreign airlines should be treated equally. Therefore, States party to the Convention are required to apply the same conditions regarding access to airports to both national and foreign airlines. *See* Mendes de Leon, *supra* note 48, at 558.
[379] *See* Mendes de Leon, *supra* note 48, at 559.
[380] Convention on International Civil Aviation, *supra* note 4, Article 15.
[381] *See* NERA Economic Consulting, *supra* note 5, at 226; José Ignacio García-Arboleda, *Airport Slot Regulation in Latin America: Between Building the Fortress and Protecting the Newcomers*, 12 Aviation Law and Policy (2013), at 583.

3.1.5 An application of the national treatment and non-discrimination principle to slot coordination

Access to airport infrastructure is an essential condition of engaging in air transport activity.[382] Per Articles 15, 28 and 68 of the Convention, States are obliged to provide the infrastructure needed for the safe operation of air services. This obligation includes access to airport infrastructure and all related facilities, such as runways, platforms, air navigation services, et cetera. Article 15 of the Convention on airport access requires all contracting States to keep their airports open to international air transport and apply uniform conditions as to the use of the airports, including air navigation facilities and services.[383]

A main competitive issue at stake with regard to airport access is the application of discriminatory practices between airport users in the granting or refusal of airport access through traffic rights, slots, and airport charges. These issues are getting more serious with the increasing capacity crunch.[384] Article 15 of the Convention deals with the use of airports, which is generally interpreted as encompassing the use of slots.[385] It follows that slot coordination can be considered part of the process concerning access to airports, thus it must be performed in a non-discriminatory manner and subject to the national treatment principle.[386]

Since the non-discrimination principle appears to merely forbid discrimination *as between foreign carriers* by requiring the application of "uniform conditions to the aircraft of all the other contracting States",[387] granting national carriers a better treatment in respect of slot coordination may be allowed under the non-discrimination principle. It may, however, not be allowed under the national treatment principle, which is designed to give all carriers of all contracting States to the Convention, whether national or foreign, the same treatment, save for the option of positive discrimination.[388] Since Article 15 also encompasses the national treatment principle as concluded in the above section, States are required to apply the same conditions in respect to slot coordination to both national and foreign carriers.[389]

In line with the national treatment principle, slot coordination rules must be applied "to the aircraft of *all* contracting States without distinction as to nationality" [italics added], since rules and procedures on slot coordination can be regarded as "laws and regulations of a contracting State" referred to in Article 11 of the Convention.[390] Although States may apply and enforce slot coordination rules against all foreign and national aircraft in their territories, States are not allowed to discriminate as to the nationality of any airline. Consequently, local airlines[391] must be treated in the same way as non-local airlines when local, national and regional slot coordination rules are applied and enforced.[392]

Provided that any criteria used to accord allocation priority or in the management of slots in a general sense are equally applicable to the aircraft of all contracting States, it appears that the national treatment principle is not breached. Regulators must thus be cautious not to give preferential treatment to national (hub) carriers, for instance, that may result in a

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[382] *See* Milligan, *supra* note 14, at 105.
[383] *See* Varsamos, *supra* note 16, at 13.
[384] *See* Milligan, *supra* note 14, at 105.
[385] *See* Haanappel, *supra* note 151, at 204. *See infra* section 3.3 (providing further analysis on the link between slots and traffic rights as prerequisites for airport access).
[386] *See* Mendes de Leon, *supra* note 48, at 558.
[387] Convention on International Civil Aviation, *supra* note 4, Article 15.
[388] *See* NERA Economic Consulting, *supra* note 5, at 234; Mendes de Leon, *supra* note 48, at 562; García-Arboleda, supra note 381, at 581-582.
[389] *See* Mendes de Leon, *supra* note 48, at 559.
[390] Convention on International Civil Aviation, *supra* note 4, Article 11.
[391] Airlines licensed by the State in which the airport is located are referred to as 'local airlines' in this dissertation.
[392] *See* NERA Economic Consulting, *supra* note 5, at 227.

distinction as to nationality. Differential treatment can only be supported on the equation 'giving equal treatment to equal situations' using relevant and objective criteria, or put differently, where it concerns 'unequal situations' and provided these differences in situations can be adequately proportioned.[393] Where this is not the case, the slot coordination scheme is liable to non-compliance with Article 15 of the Convention, and very likely also with the relevant provisions of the applicable ASA, more specifically the principle of equality of opportunity.[394] Sections 3.2.3 and 3.2.4 respectively discuss ICAO's model clause on slots for States to use in ASAs and slot provisions used in specific ASAs in relation to the principle of equality of opportunity.

With regard to the principle of non-discrimination, it is also relevant that the Worldwide Airport Slot Guidelines [hereinafter: WASG] describe a non-discriminatory slot coordination process by an independent slot coordinator as one of the objectives of slot coordination, as to which *see* Chapter 2, section 2.1.3.[395] In States where the WASG guidelines are applied, non-discriminatory access to slots appears to be upheld, either through an implementation of WASG guidelines in national law or because a State has appointed an independent slot coordinator which observes the WASG guidelines in a non-discriminatory manner.[396] In the absence of internationally binding rules on slot coordination,[397] however, States do not necessarily abide by non-discriminatory slot coordination. In China, for instance, slot coordination falls within the control of the central government, and Chinese hub carriers often receive preferential treatment.[398] The reverse situation occurs in the United States [hereinafter: the US] where international flights are excluded from the so-called 'High-Density Rule' and are placed in a separate slot pool to safeguard airport access for international flights. Comments on the process for slot coordination as practiced in China and the US are found in Chapter 4, sections 4.5 and 4.6.3 of this dissertation.

Also relevant for slot coordination is that each contracting State may designate airports within its territory that are open for use by international air services pursuant to Article 68 of the Convention. A contracting State may have congested airports in its territory designated as Level 3 and may opt to refer international air services to less-congested airports, if available. This allows States certain room to maneuver in the distribution of traffic within their territories and partly mirrors the intention behind the European Union [hereinafter: EU] legislation on Traffic Distribution Rules at EU airports, which is addressed in Chapter 4, sections 4.4.2 and 4.4.3 of this dissertation.

The next section assesses briefly the national treatment principle in light of the framework offered by the World Trade Organization [hereinafter: WTO], more specifically the so-called 'Most Favored Nation' clause, in the context of slot coordination.

3.1.6 The national treatment principle vis-à-vis the WTO's Most Favored Nation clause

In light of States' complete and exclusive sovereignty over their airspace as discussed in section 3.1.4.2 above, States have not transferred most of their competencies in the economic field of

[393] *See* García-Arboleda, supra note 381, at 584.
[394] *Id.,* at 584.
[395] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 1.2.1(c), 1.7.2(i), 5.2.3 and 5.5.1(a).
[396] In the EU, for instance, the principle of non-discrimination is explicitly upheld in law. EU Regulation 95/93, *supra* note 47, echoes the non-discrimination principle in its Preamble and the main text.
[397] Although the WASG are widely applied by coordinators, they have the legal status of mere guidelines. *See infra* sections 3.4.1 and 3.4.2 (analyzing the application, legal status and governance of the WASG).
[398] *See* Xiaowen Fu and Tae Hoon Oum, *Dominant Carrier Performance and International Liberalisation: The case of North East Asia* (2015), at 9-11.

air transport to the WTO, a global intergovernmental organization which deals with the global rules of trade between nations,[399] Unlike the economic regulation for air transport, international trade regulation increasingly tends to develop multilaterally, for example through institutions such as the WTO.[400]

The WTO embodies post-war efforts to liberalize international trade in a broad sense in the 1995 General Agreement on Tariffs and Trade[401] [hereinafter: GATT].[402] The central aim of the GATT is to reduce customs barriers to international trade in a non-discriminatory manner through the 'Most-Favored Nation' [hereinafter: MFN] clause. The MFN clause holds that the best commercial treatment offered to one State must equally be extended to all other commercial partners.[403] In other words, State A has the obligation to grant to State B the minimum favorable conditions it has granted to State C.[404]

Hence, where the national treatment principle embodied in Article 11 of the Convention merely forbids a State to discriminate between national and foreign carriers in slot coordination decisions, the MFN clause appears to have a broader definition. It implies that if one State were to accord, for instance, slot allocation priority to the designated carriers of another State, the grantor State must accord the same allocation priority to the aircraft of all other States.

However, save for limited 'soft' traffic rights, including aircraft repair and maintenance services, the selling and marketing of air transport services and computer reservation system services, the bilateral regime set forth by the Convention remains untouched by the General Agreement on Trade in Services[405], which is included as Annex 1B to the GATT and is relevant for air transport.[406] Therefore, the MFN clause and the settlement of differences under WTO procedures, for instance, are not available for application to inter-State disagreements on the relationship between slots and traffic rights as discussed in section 3.3.4, or slot coordination decisions in general.

The inapplicability of the MFN clause means that State A may discriminate between its trading partners in air transport, and is under no obligation to grant to State B the same favorable slot coordination conditions it has granted to State C.[407] It is, however, imperative that the national treatment principle set forth by the Convention is complied with.

The next section addresses to what extent the policy guidance on slot coordination, as developed by ICAO, can alleviate the concerns brought along by capacity scarcity and air transport's negative externalities.

3.1.7 Policy guidance on slot coordination, as developed by ICAO

Traditionally, and as highlighted in section 3.1.3 of this chapter, ICAO has focused on technical and navigation issues rather than the economic regulation of international civil aviation. ICAO has not yet adopted SARPs in the field of slots, and there are no binding rules from ICAO on

[399] *See* World Trade Organization (WTO), Who we are, *available at* https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (last visited February 5, 2021).
[400] *See* Von den Steinen, *supra* note 12, at 31.
[401] General Agreement on Tariffs and Trade (Geneva, 30 Oct. 1947), 55 U.N.T.S. 194, 61 Stat. A-11.
[402] *See* Milde, *supra* note 307, at 125.
[403] *Id.,* at 125.
[404] *See* García-Arboleda, supra note 328, at 263.
[405] General Agreement on Trade in Services (Marrakesh, 15 Apr. 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167, Annex on Air Transport Services.
[406] *Id.,* recital 2.
[407] *See* García-Arboleda, supra note 328, at 263.

slot coordination. However, while ICAO may not be directly involved in slot coordination, it was directed to ensure that the impact on airport capacity is taken into account when SARPs and PANS are developed.[408]

At the 27th Session of the ICAO Assembly in 1989, for instance, ICAO already took note of the forthcoming airport capacity crunch. ICAO adopted Resolution A27-11 which urged States "to take measures that have positive effects on airport and airspace capacity" and "to take into account the effects on other States of their airport and airspace congestion problems and the implications of actions taken to deal with those problems".[409] A meeting of ICAO's Economic Commission in 2016 again acknowledged "the need to optimize the use of scarce capacity, particularly at capacity-constrained airports".[410]

Annex 9 to the Convention, pertaining to the facilitation of air services, relates indirectly to the coordination of slots. Standard 6.1.4 of Annex 9 requires that "each Contracting State, in consultation with airport operators, shall ensure that facilities and services provided at international airports are, where possible, flexible and capable of expansion to meet traffic growth . . .".[411] Similar to the objectives mentioned in the WASG,[412] this provision seems to mean that slot coordination is a measure that should only be taken as a last resort to deal with airport congestion.[413] Evidently, investing in long-term infrastructure development is the best solution to relieve capacity constraints at (super-)congested airports. However, given the growing number of airports where environmental or physical constraints are prevalent, the expansion solution is not always feasible as discussed in Chapter 2, sections 2.3 and 2.4.

ICAO is also active in providing *guidance* to States in areas of economic policy, airports and air navigation services economics, including slot coordination. Already twenty years ago, in its 2001 ICAO Circular 283-AT/119 on *Regulatory Implications of the Allocation of Flight Departure and Arrival Slots at International Airports*[414], ICAO noted that the increase in commercial air services had continued to outstrip available capacity at an increasing number of airports in and outside Europe from 1991 on. Despite the relatively oblivious wording used in Annex 9 to the Convention, ICAO acknowledges that it is insuperable that more States and coordinators will be confronted with excess demand for slots and will have to make trade-offs in coordination decisions as a result.[415] Because air transport is an international, inter-connected activity, capacity constraints at one airport impact the capacity situation at other airports within the international air transport system. Constraints on increasing the capacity of an airport, whether they are environmentally, economically, politically or physically driven, have exacerbated this problem, as to which *see* Chapter 2.[416]

ICAO's Manual on the Regulation of International Air Transport, henceforth referred to as 'the Manual', encompasses multiple regulatory topics, including slot coordination. ICAO acknowledges that economic regulation is not inseparable of the technical aspects of

[408] *See* García-Arboleda, supra note 381, at 585.
[409] *See* ICAO, Doc 9790: *Assembly Resolutions in Force (as of 5 October 2001),* Resolution A27-11: Airport and airspace congestion, at II-23.
[410] *See* ICAO, *supra* note 204, paragraph 39.30.
[411] Convention on International Civil Aviation, *supra* note 4, Annex 9, Standard 6.1.4.
[412] As discussed in Chapter 2, section 2.3.2 of this dissertation, paragraph 1.1.2 of the WASG explicates that slot coordination is not a solution to the fundamental problem of a lack of airport capacity, and that it should be seen as an interim solution to manage congested infrastructure until the longer-term solution of expanding airport capacity is implemented.
[413] *See* García-Arboleda, supra note 381, at 586.
[414] *See* ICAO, *supra* note 256.
[415] *Id.*
[416] *Id.*

international air transport laid down in the Convention and its Annexes, for instance in matters like airport access.[417] The Manual merely provides an overview of the process of slot coordination[418] and refers to 2001 ICAO Circular 283-AT/119, as discussed above, for additional information on the matter, as well as to ICAO's model clause on airport slot coordination for optional use by States in their ASAs, as to which *see* section 3.2.3 below. In addition to content-related aspects, the Manual acknowledges that the increase in commercial air services has continued to outstrip available capacity at more and more airports. It also briefly mentions the existence of broader policy questions in the coordination of slots at capacity-constrained airports, such as the compatibility of broad market access with capacity-constrained airports.[419]

Furthermore, the Airport Economics Manual is focused primarily on Article 15 of the Convention in relation to airport charges and provides States and airports with practical guidance for the efficient management of airports and in implementing *ICAO's Policies and Charges for Airports and Air Navigation Services*, as laid down in ICAO Doc 9082.[420]

A 2008 ICAO report mentions the report of the Fifth Worldwide Air Transport Conference [hereinafter: ATConf/5] of 2003 as practical guidance document on slot coordination for States.[421] Though nowhere explicitly mentioned by ICAO, it appears likely that the 2013 report of the Sixth Worldwide Air Transport Conference [hereinafter: ATConf/6] has replaced its 2003 predecessor as ICAO guidance document on slot coordination. Although the report to ATConf/5 still proceeds from the notion that "airport congestion has not thus far been a significant constraint on the conclusion by States of liberalized ASAs", in the report to ATConf/6 ICAO expressed its concern that the lack of available slots at capacity-constrained airports affects the ability of airlines to exercise market access rights granted under ASAs in a fundamental way.[422] Much water has flown under the bridge since ICAO's 2003 ATConf/5 report, which is illustrated through ICAO's different stance on airport congestion *vis-à-vis* the inability of air carriers to exercise their entitled traffic rights at ATConf/6 in 2013.

The report to ATConf/6 furthermore clarifies that a key driver of ICAO guidance in the field of slot coordination is that any future coordination system should be fair, non-discriminatory and transparent, although ICAO recognizes that the situation at each capacity-constrained airport is different.[423] Given the cross-border nature of international aviation, the principles in place for slot coordination should be globally compatible, practicable, economically sustainable and take into account the interests of all stakeholders. Consideration should be given to capacity constraints and long-term infrastructure needs in particular. ICAO's contracting States must adhere to the legal framework for slot coordination, comprising of the Convention, obligations under ASAs as discussed below in section 3.2, as well as regional and national rules for the coordination of slots, including the WASG.[424] Moreover, States should give due consideration to the results of ICAO's studies and relevant guidance on slot coordination at their discretion

[417] *See* ICAO, *supra* note 212, at (v).
[418] For the purposes of this dissertation, the slot allocation process as the demand-side of slot coordination is described in Chapter 2, section 2.2.3.
[419] *See* ICAO, *supra* note 212, section IV-11-2. I
[420] *See* ICAO, Doc 9562: *Airport Economics Manual* (2020).
[421] *See* ICAO, Report of the Conference on the Economics of Airports and Air Navigation Services (CEANS) of 15 to 20 September 2008, ICAO Headquarters, Montréal, Canada (2008), paragraph 2.4.4
[422] *See* ICAO, supra note 78, paragraph 2.4.
[423] *Id.,* paragraph 3.2.
[424] *Id.,* paragraph 3.2.

and in a flexible manner with the aim of harmonizing slot coordination practices around the world to the greatest extent.[425]

3.1.8 Concluding remarks

Illustrative to the political sensitivity of air transport is the Convention's drafters' inability to create an international multilateral structure for the distribution of economic rights and privileges, including traffic rights and slots. Apart from the fact that the Convention has been successful in creating a legal basis for airport access issues to be arranged by States via ASAs or on the basis of other arrangements, it appears to have been a bridge too far at the time to expect the drafters to have created multilateral solutions for airport access given the multitude of interests involved.

Also, at the time the Convention was drafted, the problem of airport congestion did not exist, and the drafters were primarily concerned with questions related to safety and technical aspects of air transport. As such, the Convention – dare I say, understandably – fails to provide a global framework for the economic regulation of air transport, including airport access, which is generally interpreted as encompassing the use of slots.[426] Thus, the Convention does not explicitly regulate slot coordination. The Convention does, however, contain principles that may be linked to slot coordination, including the *national treatment* and *non-discrimination* principles vested in Article 11 and Article 15 of the Convention respectively.[427] Consequently, States must adhere to these principles in their rules and procedures on slot coordination.

ICAO does provide guidance to States in the field of slot coordination. Policy guidance relevant to slot coordination developed by ICAO includes 2001 ICAO Circular 283-AT/119 on Regulatory Implications of the Allocation of Flight Departure and Arrival Slots at International Airports, a Manual on the Regulation of International Air Transport, the reports to ATConf/5 and ATConf/6, and the ICAO model clause for optional use by States in their ASAs, as to which *see* section 3.2.3 below. The aforementioned documents merely provide an overview of the process of slot coordination. They also acknowledge the increasing gap between the demand for and the supply of airport capacity, but neither document lays down uniform rules or procedures for States and industry stakeholders to use to combat the issues identified in Chapter 2.

An important task appears to be waiting for the upcoming 2023 Seventh Worldwide Air Transport Conference [hereinafter: ATConf/7] to create order and provide clarity to both States and industry stakeholders involved in relation to the aims, objectives and key principles for slot coordination from 2023 onwards, given that market realities have changed since the key principles for slot coordination in use to date have been developed. I shall revert to these expectations in Chapter 6.

In interplay with the more general global regime for access to airports offered by the Convention, the coordination of slots is also an increasingly relevant matter under the more specific regime offered by ASAs concluded between States, as to which *see* section 3.2 below.

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[425] *See* ICAO, *supra* note 421, Recommendation 8.
[426] *See* Mendes de Leon, *supra* note 48, at 559; Hobe, *supra* note 328, at 38.
[427] *See* NERA Economic Consulting, *supra* note 5, at 225.

3.2 Traffic rights at the heart of the bilateral regime

3.2.1 Application and practice of Articles 5 and 6 of the Convention

Based on the principle of sovereignty, national airspace is *de iure* closed for foreign aircraft and the international airlines operating these aircraft. Exempted are air carriers that have been given a "special permission or other authorization" under an ASA to perform scheduled air services to and from the territory of said State pursuant to Article 6 of the Convention,[428] or based on other arrangements such as the multilateral regime laid down in Article 5 of the Convention pertaining to the operation of non-scheduled international services.

The authorization for access to foreign airspace may be granted in different forms. As stated above, traffic rights are often exchanged under ASAs and operated by carriers which are designated under the ASA at airports specified or indicated in the ASA.[429] Pursuant to the mentioned Article 5 of the Convention, aircraft not engaged in scheduled air services may also be made subject to regulations, conditions or limitations imposed by States. Moreover, Article 6 of the Convention leaves room for States to allow traffic unilaterally, without an underlying ASA. Hence, the jurisdiction of States as per Articles 1 and 2 of the Convention has been implemented with respect to the operation of non-scheduled and scheduled international air services through the multilateral provision of Article 5 of the Convention, ASAs concluded between States pursuant to Article 6 of the Convention, and/or on the basis of unilateral concessions.

Traditionally, ASAs allowed only a limited number of 'flag carriers' owned and controlled by the State and/or its nationals to operate air services between the two signatory States.[430] Traffic rights were often granted on a reciprocal basis with the aim of protecting the national airline against foreign competitors, which used to result in a duopoly on the routes in question.[431]

The choice for limitations in terms of designation of air carriers and their operation of traffic rights flows from the concept of 'complete and exclusive sovereignty over national airspace', as discussed in section 3.1.4.2 above. As a corollary, States are entitled to decide for a liberal or protectionist approach towards the operation of international air services, especially with respect to the operation of scheduled international air services by their designated air carriers.[432]

States are, however, under no obligation to treat all other States equally upon the conclusion of ASAs.[433] The bilateral regime, based on the principle of complete and exclusive sovereignty vested in Article 1 in conjunction with Article 6 of the Convention, yields that States

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[428] Convention on International Civil Aviation, *supra* note 4, Article 6.

[429] A fundamental dialogue through airline dependence on governments to negotiate traffic rights on their behalf thus exists through ASAs, *see* Truxal, *supra* note 10, at 9.

[430] *See* European Commission and United States Department of Transportation, *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches* (2010), at 10.

[431] *See* Milligan, *supra* note 14, at 19.

[432] A common aspect of ASAs is that, irrespective of providing for single, multiple or unlimited designation, the authorization to operate into foreign markets is reserved to carriers "substantially owned and effectively controlled" by nationals of the signatory States, commonly known as the 'O&C clause'. Article I(5) of IASTA, *supra* note 331, and Article I(6) of the International Air Transport Agreement, *supra* note 332, also lay down this requirement. Substantial ownership is complied with when 50% plus one share of the designated airline is owned by that State or its nationals. Effective control is assured when the State or its nationals have decisive influence on the management of the designated airline. More information on ownership and control of airlines is provided in ICAO's Manual on the Regulation of International Air Transport, *supra* note 212, paragraph 4.4.

[433] *See* García-Arboleda, supra note 328, at 263.

may discriminate between the airlines designated by its trading partners.[434] It follows that States may grant more attractive traffic rights on more favorable conditions to airlines which are designated by the one State, whereas they may grant traffic rights and related conditions in a less favorable manner to airlines which are designated by another State.[435]

Negotiations for bilateral ASAs used to be modelled on the 1946 Bermuda Agreement[436] concluded between the US and the United Kingdom [hereinafter: UK], henceforth also referred to as the 'Bermuda I Agreement'. Because of the diverging views between the US and the UK, the wording of the agreement's provisions was kept rather vague. The drafters' choice of ambiguous wording may serve as an explanation why a majority of States were receptive of the Agreement. After all, States held different views on how restrictive or liberal the air transport market should be, and the Bermuda I Agreement could function as a compromise to bridge diverging philosophies.[437]

Under the compromise agreement of Bermuda I, tariffs were to be established by the airlines within the framework of the International Air Transport Association [hereinafter: IATA] and were subject to the prior approval from the civil aviation authorities of both States to ensure that fares were not set unreasonably low and could negatively impact the profitability of both airlines.[438] The airlines determined capacity between themselves subject to certain agreed principles, for instance that the capacity was to be used for passenger flights between the two respective States.

The Bermuda I Agreement became the vehicle for the operation of scheduled international air services and set forth an international regulatory framework for international air transport that was essentially protectionist in nature with government intervention in the management of airlines.[439] It leaves the decision of how air carriers should conduct business in the hands of each individual State, as opposed to in the hands of the market, and enables States to impose restrictions on flights operated by foreign carriers of their choice.[440]

In 1977, the US and the UK replaced the Bermuda I Agreement by the more restrictive Bermuda II Agreement[441], due to UK concerns that the market share enjoyed by US airlines on routes between the US and the UK doubled those of the UK airlines. The Bermuda II Agreement introduced elaborate controls on capacity on routes between the two States in an attempt to stimulate competition on more equal terms.[442]

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[434] *Id.,* at 263; Crawford, supra note 364, at 289-292.
[435] *See* García-Arboleda, supra note 328, at 265.
[436] Air Services Agreement between the United States of America and the United Kingdom (Bermuda, 11 Feb. 1946), 60 Stat. 1499, T.I.A.S. No. 1507.
[437] Since the Bermuda I Agreement was drafted only two years after the Convention, the diverging views of the US on the one hand, and the UK on the other hand largely resemble the diverging views between the same two States when the Convention was drafted. The US strongly favored a liberal approach to the economic conditions under which air services should be exchanged, whereas the UK had an equally strong desire for the protection of national civil aviation interests in a more regulated environment. *See* Barry R. Diamond, *The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements*, 41 Journal of Air Law and Commerce (1975).
[438] *See* Mike Tretheway and Robert Andriulaitis, *What do we mean by a level playing field in international aviation?* (2015), at 6.
[439] *See* Haanappel, *supra* note 10, at 313.
[440] *See* García-Arboleda, supra note 328, at 259.
[441] Air Services Agreement between the United States of America and the United Kingdom (Bermuda, 23 Jul. 1977), 28 Stat. 5367, U.K.T.S. 1977 No 76, T.I.A.S. 8641.
[442] *See* Fitzgerald, *supra* note 341, at 76; Pablo Mendes de Leon, *Before and After the Tenth Anniversary of the Open Skies Agreement Netherlands-US of 1992*, 28 Air and Space Law 4/5 (2002), at 281.

To date, ASAs range from restrictive agreements whereby only one carrier from each State is allowed to operate the route (single designation) to plurilateral 'Open Skies' agreements offering unlimited designation and frequencies, as discussed in the section below.[443]

3.2.2 The shift from bilateralism to liberal and plurilateral 'Open Skies' agreements

The restrictive regulatory framework for market access in air transport set forth by the Bermuda I and II Agreements remained intact for around 30 years. In certain areas of the world, these agreements are still used as a model for ASAs. The first serious cracks were observed in the wake of US air transport deregulation initiatives in the mid-70's, when the Airline Deregulation Act of 1978[444] took effect.[445]

The US deregulation process set the course for major structural changes in the operation of air services and a wave of deregulation and liberalization initiatives would soon spread to other parts of the world, most notably the EU.[446] Although liberalization in the EU followed a more gradual approach than the US, among others, due to its composition of independent States with sovereign rights over their airspace, liberalization found its way to Europe ten years later.[447]

Increasingly so, traffic rights and market access conditions in a general sense were laid down in liberalized, regional, and plurilateral ASAs, which reduce many of the regulatory barriers of the more restrictive ASAs. Hence, traffic rights may also be obtained outside the bilateral regime as explained above.[448] The principal instrument to give substance to the liberalization of international air transport services was the conclusion of liberal and plurilateral agreements, more commonly known as 'Open Skies' agreements. This type of agreement is much less restrictive on, *inter alia*, the number of flights and the routes served, and typically allows carriers to operate between any point in the signatory States to the agreement.[449]

A key feature of 'Open Skies' agreements is that States allow the free exercise of the agreed traffic rights,[450] while leaving the exercise of the commercial modalities thereof – such as pricing and capacity setting – largely to the management of the designated air carriers. As such, government intervention is much more limited in comparison with ASAs modeled on the Bermuda I Agreement, as discussed in section 3.2.1. Under the most liberalized agreements, for instance UK-Singapore,[451] the operation of international air services may be turned into a market within which the regulation of competition forms the core element. In the well-founded

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[443] *See* Case M.3770 – Lufthansa/Swiss, *supra* note 274, paragraph 38.
[444] United States Airline Deregulation Act (24 Oct. 1978), P.L. 95-204, 92 Stat. 1705.
[445] The US Airline Deregulation Act of 1978, *see id.,* was adopted by the US Congress, followed by the United States International Air Transportation Competition Act 1979, 94 Stat. 35, P.L. 96-192, which sought to open up the international market to US carriers by promoting liberalized ASAs. *See* Milligan, *supra* note 14, at 2.5.1.
[446] *See* Truxal, *supra* note 10, at 159; Wassenbergh, supra note 372, at 68; European Commission and United States Department of Transportation, supra note 430, at 2; Von den Steinen, *supra* note 12, at 28; Lykotrafiti, *supra* note 10, at 86. The concepts of deregulation and liberalization, as well as the differences between them, are briefly explained in Chapter 1, n.10.
[447] *See* Milligan, *supra* note 14, at 2.5.1.
[448] *See* UK Competition and Markets Authority, *Aviation 2050: Response from the Competition and Markets Authority* (2019), at 6.
[449] *Id.,* at 7.
[450] Liberal and plurilateral, or 'Open Skies' agreements primarily cover the first five freedoms listed in n.463 below. The other freedoms are not always exchanged – the exchange of 8th and 9th freedom rights (cabotage) is especially rare.
[451] Air Services Agreement between the United Kingdom and the Republic of Singapore (21 Nov. 2007), Treaty Series No. 4 (2008), Cm 7362.

words of Haanappel (1995), 'Open Skies' agreements do not hamper the notion of 'complete and exclusive' sovereignty. Instead, they liberalize its exercise.[452]

Liberal and plurilateral agreements are not exclusive to the EU and the US.[453] Most developed nations, including all 35 Organisation for Economic Co-operation and Development [hereinafter: OECD] States, have liberalized their domestic market based on the conduct of domestic Open Skies policies.[454] Examples of liberalization efforts include the 2007 US-EU Agreement on Air Transport,[455] as amended in 2010, the Multilateral Agreement on Commercial Rights of Non-scheduled Air Services among the Association of Southeast Asian Nations, the 1999 Yamoussoukro Declaration on a New African Air Transport Policy[456] in Africa, the Fortaleza Agreement[457] in Latin America, the Single Aviation Market arrangements between Australia and New Zealand and the liberalization of air services between members of the Arab Civil Aviation Commission.[458]

Moreover, at the 2008 Conference on the Economics of Airports and Air Navigation Services [hereinafter: CEANS], 53 African States highlighted the difficulties their carriers were facing in securing slots at several airports outside Africa. According to the African States, such difficulties have negatively impacted the operation of international air services of African carriers. They seem to hold an opinion similar to the US, expressing that the States in which the capacity-constrained airports in question were located should apply the principle of reciprocity and equity as embodied in the ASA signed between them to the slot issues experienced. At CEANS, African States urged ICAO to take further action to address the issue of slot coordination.

Some opening-up efforts of the Chinese air transport market were observed in 2007 as the bilateral ASA between China and the US allowed for more frequencies between destinations in the signatory States.[459] Moreover, a liberal and plurilateral agreement took effect between the Republic of Korea and the Shandong province in China in 2006, followed by an agreement between the Republic of Korea and Japan in 2007.[460] In 2002, as a corollary of the '*Open Skies*-judgments' of the Court of Justice of the EU [hereinafter: CJEU],[461] the EU Member States, in close cooperation with the European Commission [hereinafter: the Commission], have drawn

[452] *See* Haanappel, *supra* note 10, at 314.
[453] *See* Truxal, *supra* note 10, at 9.
[454] *See* Lumbroso, *supra* note 328, at 24.
[455] Air Transport Agreement between the European Union and the United States of America (30 Apr. 2007), 46 I.L.M. 470, *entered into force* 30 Mar. 2008. Pursuant to this Agreement, any airline registered in an EU Member State or in the US may now fly to any airport within the other States' borders, subject to the availability of airport slots at both ends of the route, as to which *see infra* section 3.3.2.
[456] United Nations Economic and Social Council, Decision adopted at the Conference of African Ministers Responsible for Civil Aviation, held in Yamoussoukro, Côte d'Ivoire, 13-14 Nov. 1999.
[457] Decision No 07/96 (XI CMC – Fortaleza, 17/96). The Fortaleza Agreement liberalized intra-regional air services among the four MERCOSUR States in 1996, that is to say Argentina, Brazil, Paraguay and Uruguay.
[458] *See* ICAO, *supra* note 212, Chapter 3.2.
[459] *See* Fu and Oum, *supra* note 398, at 5.
[460] *Id.*, at 4. Japanese airports that suffer from capacity constraints were exempted in the 2007 ASA concluded between Korea and Japan. An agreement to liberalize the services between Tokyo Narita International Airport and Incheon International Airport was subsequently reached in 2010, after the airport capacity was expanded in Tokyo. *See infra* section 3.3 for a discussion of growing airport capacity constraints in relation to the exercise of traffic rights under ASAs.
[461] Joined Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, *Commission v. United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany* [2002], *inter alia,* ECLI:EU:C:2002:624.

up an external aviation policy pursuant to which the EU may also conclude so-called 'vertical' and 'horizontal' agreements on air transport with third States.[462]

All these agreements *liberalize* air transport and turn at least the first five 'Non-Freedoms of the Air' into 'Freedoms of the Air'[463] so to say. Significant economic regulation remains in place in these liberal agreements, including antitrust and competition law, restrictions on foreign ownership of airlines and the related cross-border consolidation of airlines, restrictions on foreign airlines providing domestic services and the tax-free status of aviation fuel.[464] At present, a fragmented network of over 7,000 bilateral ASAs regulating the operation of international air services under the umbrella of the Convention still exists in 2021.[465] Clearly, WTO multilateralism, as discussed in section 3.1.6 below, has not been extended to air transport to replace the fragmented network of bilateral and plurilateral ASAs by open competition at a global level.[466]

Mendes de Leon (1992) rightfully concluded that the transition from bilateralism to multilateralism requires States to "cease regarding international air traffic as national property, regarding it instead as international property".[467] Since States continue to have an interest in the promotion of national policy objectives related to air transport, it is the author's expectation that the economic side of air transport, including slot coordination, will continue to be regulated by ASAs for the time being.

3.2.3 ICAO's model clause on slots from the perspective of equality of opportunity

Traffic rights may lose their value when carved out by airport capacity constraints in terms of a lack of slots, especially if the applicable limitations are not mentioned in the ASA. Particularly the lack of available slots at super-congested airports affects the ability of airlines to exercise market access traffic rights granted under ASAs in a fundamental way.[468]

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[462] *See* NERA Economic Consulting, *supra* note 5, at 14; European Commission and United States Department of Transportation, supra note 430, at 11.

[463] The 'Freedoms of the Air' are a combined set of 9 traffic rights, granting the designated airlines of a State under an ASA the privilege to access another State's airspace and/or airports. The 9 'Freedoms' are as follows:

- 1st Freedom: to overfly one country *en route* to another
- 2nd Freedom: to make a technical stop in another country
- 3rd Freedom: the carriage of traffic, that is, passengers and cargo, from the home country of the airline to another country
- 4th Freedom: the carriage of traffic to the home country of the airline from another country
- 5th Freedom: the carriage of traffic between two foreign countries by an airline of a third country, which carriage is linked with third and fourth Freedom traffic rights of the airline
- 6th Freedom: the carriage of fifth Freedom traffic between two foreign countries via the home country of the airline
- 7th Freedom: the carriage of traffic between two foreign countries by an airline of a third country, which carriage is not linked with third and fourth Freedom traffic rights of the airline
- 8th Freedom: the carriage of passengers and cargo between two points in a foreign country on a route with origin and/or destination in the home country of the airline
- 9th Freedom: the carriage of passengers and cargo between two points in a foreign country on a route, which is unrelated to the home country of the airline.

[464] *See* Grant, *supra* note 325.

[465] *See* Lumbroso, *supra* note 328, at 23; Severin Borenstein and Nancy L. Rose, 'How Airline Markets Work… or Do They? Regulatory Reform in the Airline Industry' in Nancy Rose (ed), *Economic Regulation and Its Reform: What Have We Learned?* (2014), at 31; Case M.3770 – Lufthansa/Swiss, *supra* note 274, paragraph 38.

[466] Unlike the economic regulation for air transport, international trade regulation increasingly tends to develop multilaterally, for example through institutions such as the WTO, a global intergovernmental organization which deals with the global rules of trade between nations. *See* WTO, *supra* note 399.

[467] *See* Mendes de Leon, *supra* note 371, at 101.

[468] *See* ICAO, *supra* note 78, paragraph 2.4.

On the one hand, the granting of traffic rights between States may provide relief in the form of flexibility to use alternative airports with spare capacity available in the same country or region, depending on the terms agreed upon in the ASA.[469] On the other hand, however, airport congestion paired with the inadequate coordination of slots at an airport, in particular at airports where no substitute airports serving the same market are available, may render it practically impossible for an airline to access that airport.

If the slots are refused because there are not any available, several cases have shown that the affected State may take recourse to the bilateral – or plurilateral, for that matter – relationship between the two States governing international air services, as materialized through the ASA. These cases, including their legal validity, are analyzed in section 3.3.4. In particular, the affected State may invoke the equality of opportunity, or the 'fair and equal opportunity to compete' clause, which is included in most ASAs, arguing that its designated carriers do not have a fair and equal opportunity to compete with the designated carriers of the other State in the matter of access to airports.[470]

To avoid conflicts in inter-State relations, ICAO recommended to only negotiate new or expanded traffic rights when they can also be accommodated at the airports in the grantor States.[471] Furthermore, to prevent divergence in textual interpretations included in national regulations and/or ASAs on the link between traffic rights and slots, which is subject to extensive discussion in section 3.3 below, the ICAO Secretariat developed three options of bilateral model clauses that include a reference to the availability of slots, in consultation with ICAO's Air Transport Regulation Panel. This has resulted in a model clause that has been included in the ICAO Template ASA for optional use by States upon the conclusion of an agreement.[472] The article reads as follows:

> "Each Party shall ensure that its procedures, guidelines and regulations to manage slots applicable to airports in its territory are applied in a fair, transparent, effective and non-discriminatory manner."[473]

It seems that ICAO seeks to prevent discussions on the relationship between slot coordination and traffic rights *a priori* by introducing a model clause that subjects traffic rights to the availability of slots. The next section dives into slot provisions incorporated in specific ASAs, followed by an analysis of the various regulatory approaches taken by States on the relationship between traffic rights and slots in section 3.3.

3.2.4 Slot provisions in specific ASAs

Before the model clause discussed in the above section was adopted by ICAO, ASAs already held similar provisions, although slots were never mentioned explicitly. For example, the 2000 ASA between the US and Germany held the following provision in Article 8:

> "(1) Each contracting party shall allow a *fair and equal opportunity* for the designated airlines of both parties to compete in the international air transportation covered by the Agreement; (2) Each contracting party shall allow each designated airline to determine the frequency and capacity of the international air transportation it offers, based upon commercial considerations in the marketplace. Consistent with this right, neither contracting party shall unilaterally limit

[469] *See* ICAO, *supra* note 256.
[470] *See* NERA Economic Consulting, *supra* note 5, at 229; Mendes de Leon, *supra* note 48, at 566; García-Arboleda, supra note 381, at 581-582.
[471] *See* ICAO, *supra* note 256, at 15.
[472] *See* ICAO, *supra* note 78, paragraph 3.4.
[473] *Id.,* Appendix A.

> the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated airlines of the other contracting party, except as may be required for customs, technical, *operational,* or environmental reasons under uniform conditions consistent with Article 15 of the Convention." [italics added][474]

Consequently, the US and Germany had to allow the carriers designated by them a "fair and equal opportunity" to compete. US carriers were free to access German airspace and airports and *vice versa* under the condition that applicable operational restrictions allowed for it. In the 'Open Skies-judgments' of 2002,[475] the Commission argued that the term "operational restrictions" also includes slot coordination. Therefore, by subjecting the 'fair and equal opportunity' clause to slot coordination, a State party to the agreement could not use this provision to argue that its designated carriers did not have a fair and equal opportunity to compete for air services with carriers of the other State should slots be refused. However, Advocate General Tizzano of the 'Open Skies-judgments' was of the opinion that the Commission had not supplied sufficient evidence for its claim that "operational restrictions" also includes the coordination of slots, particularly as Member States, for their part, also argued that such clauses do not refer to the coordination of slots.[476] The CJEU remained silent on the argument brought forward by the Commission.[477]

The US-EU Air Transport Agreement of 2007 and its amended version of 2010 do not contain provisions on slots, nor do they subject international air transport to the "operational restrictions" mentioned above. However, both the availability and the coordination of slots is governed by the applicable international, regional and rules on slots.[478] It follows that although US airlines, for instance, in theory have unlimited rights to operate air services from London Heathrow, they will only be able to do so in practice if they can acquire slots through the regular allocation process or via secondary slot trading.[479] In the EU, this dichotomous relationship between traffic rights and slots is known as the 'operational link', subject to discussion in section 3.3.2 below.

The availability of slots at super-congested Japanese airports, such as Tokyo Narita International Airport, is also an issue that needs to be dealt with separately from the negotiation of traffic rights. When airlines want to service Tokyo Narita, the airline may acquire the necessary traffic rights via the ASA between the two States, but the airline may be referred to the Narita airport authorities in order to obtain slots, which is a virtually impossible task. In those situations, traffic rights cannot be exercised and become obsolete.[480] To alleviate US concerns, which had concluded a liberal and plurilateral agreement with Japan in 2010, in the

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[474] The 2002 EU-US 'Open Skies' agreement includes similar language: "Each Party shall allow each airline to determine the frequency and capacity of the international air transportation it offers based upon commercial considerations in the marketplace. Consistent with this right, neither party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the airlines of the other Party, nor shall it require the filing of schedules, programs for charter flights, or operational plans by airlines of the other Party, except as may be required for customs, technical, *operational*, or environmental reasons under uniform conditions consistent with Article 15 of the Convention." [italics added] *See* US-EU Air Transport Agreement, *supra* note 455, Article 3(4).

[475] Joined Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, *Commission v. United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany* [2002], *supra* note 461.

[476] Case C-466/98, Joined opinion of Mr Advocate General Tizzano delivered on 31 January 2002 in *Commission v. United Kingdom* [2002] ECLI:EU:C:2002:63, paragraph 105-107.

[477] *See* NERA Economic Consulting, *supra* note 5, at 233.

[478] *See* section 3.1 above for globally binding rules applicable to the coordination of slots. *See infra* Chapter 4 (discussing regional and national rules on slots).

[479] *See* Mendes de Leon, *supra* note 371, at 101.

[480] *See* NERA Economic Consulting, *supra* note 5, at 229; Mendes de Leon, *supra* note 48, at 559.

matter of access to Tokyo Narita, the 2010 liberal and plurilateral ASA between the US and Japan saw the Japanese government agreeing to increase the number of slots available at Tokyo Narita International Airport.[481]

The exact wording of the ICAO model clause discussed above is used in, *inter alia,* Article 11 of the 2009 EU-Canada Air Transport Agreement[482], the draft EU-Brazil Air Transport Agreement[483] initialed in 2011, and Article 8(11) of the 2013 Euro-Mediterranean Aviation Agreement between the EU and Israel.[484] A 2020 example of application of ICAO's model clause is provided by Article AIRTRN.13(4) of the post-Brexit EU-UK Trade and Cooperation Agreement:

> "As regards the allocation of slots at airports, each Party shall ensure that its regulations, guidelines and procedures for allocation of slots at the airports in its territory are applied in a transparent, effective, non-discriminatory and timely manner."[485]

3.2.5 Concluding remarks

The previous sections have shown that 20th century international air transport saw air services forbidden by default unless arrangements were made in the bilateral sphere, which contributed to the proliferation of a 'labyrinth' of ASAs signed between contracting States.[486]

Bilateral – and increasingly so, also plurilateral – 'Open Skies' agreements in particular indicate a shift from the traditional exchange of traffic rights under bilateral ASAs towards a more liberalized air transport system. States are, however, still free to conclude ASAs between them to varying degrees of protectionism or liberalism. Moreover, and especially relevant for this dissertation, the impact of liberalization is increasingly moderated by continuing airport capacity constraints that limit or preclude entry at the airport level, as discussed in Chapter 2 of this dissertation.[487]

As the overarching UN specialized agency tasked with fostering the planning and development of international air transport pursuant to Article 44 of the Convention, ICAO appears to be the most appropriate body to issue a more distinct interpretation that the exercise of traffic rights is indeed subject to the availability of slots to provide clarity for all parties involved. Yet, the question is whether ICAO's model clause will bring more clarity into the debate. After all, the clause only requires States to ensure that its procedures, guidelines and regulations to manage slots are applied in a "fair, transparent, effective and non-discriminatory manner", qualifications that are already in place in a large number of States around the world through the WASG guidelines or national or regional rules.[488]

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[481] *See* Intervistas, *supra* note 14, at 42.
[482] Agreement on Air Transport between Canada and the European Community and its Member States (Brussels, 17 Dec. 2009 and Ottawa, 18 Dec. 2009), OJ L 207.
[483] *See* European Commission, *Proposal for a Council Decision on the signature of the Agreement on Air Transport between the European Union and its Member States, of the one part, and the Federative Republic of Brazil, of the other part*, COM(2011) 253 final, at 1.
[484] Euro-Mediterranean Aviation Agreement between the European Union and its Member States, of the one part and the government of the State of Israel, of the other part (Luxembourg, 10 Jun. 2013), OJ L 208.
[485] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (Brussels and London, 30 Dec. 2020), OJ L 444, at 235.
[486] *See* Lumbroso, *supra* note 328, at 23.
[487] *See* Borenstein and Rose, *supra* note 465, at 30.
[488] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 5.5.1(a).

Furthermore, in the EU, where the largest number of Level 3 airports of the world are located and where difficulties to access to congested airports are among the most prevalent around the world,[489] the legally binding Slot Regulation already prescribes that slots are managed in a fair, transparent, effective and non-discriminatory manner at congested airports by the appointment of an independent slot coordinator, as mentioned briefly in Chapter 2 and extensively elaborated upon in Chapter 5, section 5.4.

Hence, ICAO's model clause seems to fall short of providing a solution to the problem at hand, since it does not actually address the relationship between traffic rights and slots, nor does it bring forward any amendments to prevent future inter-State disputes centered around the relationship between slot coordination and traffic rights, some of which are illustrated in section 3.3.4 below.

3.3 Slots and traffic rights: an intertwined concept?

3.3.1 The formulation and practice of Article 15 of the Convention

International access to airports is governed by Article 15 of the Convention which requires that "[e]very airport in a contracting State which is open to public use by its national aircraft shall likewise . . . be open *under uniform conditions* to the aircraft of all the other contracting States" [italics added].[490] Thus, based on the combined effect of the phrasing "likewise" and "under uniform conditions", this provision seems to require national treatment, indicating that States are required to apply the same conditions on access to airports to both national carriers and foreign carriers as discussed in sections 3.1.4.3 and 3.1.5.

However, before an airline can make use of an airport for the operation of international scheduled air services, it must first ensure that it acquired two constituents: traffic rights and airport slots. Traffic rights are generally traded under bilateral or plurilateral ASAs as discussed in section 3.2.1, of which they form the central piece.[491] In practice, flights can only be operated when the airline operating on the basis of these traffic rights also has access to the airport located in the territory of the grantor State it wants to fly into in the form of airport slots if it concerns a slot coordinated airport, as evidenced by slot provisions in specific ASAs discussed in section 3.2.4 above.[492]

In relation to traffic rights, slots are a technical modality to be allocated by the coordinator following the exchange of traffic rights in ASAs. An airline holding traffic rights is not guaranteed the necessary airport slots, because slots are allocated separately, that is, under a different legal regime and at a later stage.[493] This holds especially true for super-congested airports with excess demand in particular, as will become clear throughout this chapter. Airlines operating non-scheduled air services may also gain access to airports via Article 5 of the Convention or on the basis of unilateral concessions as mentioned in section 3.2.1.

Although the policy issues related to the concepts of slots and traffic rights are global in nature, and not limited to the EU or the US alone, the next sections specifically address the EU and the US approach to slots in relation to traffic rights in sections 3.3.2 and 3.3.3 respectively.

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[489] *See* Odoni, *supra* note 61, at 8. *See* also Chapter 2 sections on increasing airport congestion.
[490] Convention on International Civil Aviation, *supra* note 4, Article 15.
[491] *See* Katja Brecke, *Airport Slot Allocation: Quo Vadis, EU?,* 36 Air and Space Law 3 (2011), at 199.
[492] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 1.7.2(j).
[493] *See* Haanappel, *supra* note 151, at 203.

3.3.2 The operational link between traffic rights and slots in the EU

The relation between airport slots and traffic rights shows that there is an operational link between traffic rights and airport slots, meaning that the grant of traffic rights does not necessarily imply free access to slot coordinated airports.[494] The operational link between traffic rights and slots yields that an airline must have acquired the necessary slots at a coordinated airport before it can materialize the traffic rights negotiated under the ASA between the two States involved.

In the EU, the operational link between traffic rights and slots is confirmed in Article 19(1) of EU Regulation 1008/2008[495], which states the following: "The exercise of traffic rights shall be subject to published Community, national regional and local operational rules relating to . . . *the allocation of slots*" [italics added]. Therefore, the process of slot coordination in the EU can be considered to be separate from acquired traffic rights, as reflected by it being governed by a different regulation.[496]

In *VIVA Air*, the Commission confirmed that it considered slot coordination "legally distinct from the question of granting traffic rights".[497] It follows that an airline's application for traffic rights may not be refused for the reason that the airline does not have the necessary slots to be able to provide the service. Similarly, the Commission argues that an airline that is able to obtain the slots the airline needs to operate a given service may not assume that this authorizes the airline to exercise traffic rights in respect of the service.[498]

Nevertheless, if a State did not subject access to its airports to slot restrictions evidenced by national regulations, and the ASA provides an unrestricted operation of international air services by the designated carriers under the agreement, States may opine that traffic rights ought to be exercised without being hampered by slot restrictions, as to which *see* section 3.3.4.[499]

3.3.3 The US approach to slots in relation to traffic rights

The US has adopted an approach on the enactment of traffic rights in national law which is different from the EU. Pursuant to the International Air Transportation Fair Competitive Practices Act of 1974,[500] the US may hold foreign States responsible in situations where slots are not distributed properly at airports located in their territories, invoking the 'equality of opportunity' clause. This view was also expressed by the US Court of Appeals in the *Laker*-case of 1999.[501] The provision, codified in the US Code of Federal Regulations, Title 49 Transportation, § 41310, under (a) on discriminatory practices, states that "an air carrier or foreign air carrier may not subject a person, place, port, or type of traffic in foreign air transportation to unreasonable discrimination."[502] Hence, not only have the US not recognized

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[494] *See* NERA Economic Consulting, *supra* note 5, at 228-29; Mendes de Leon, *supra* note 48, at 559.
[495] EU Regulation 1008/2008, *supra* note 39. *See infra* Chapter 4, section 4.4 (analyzing the application of EU Regulation 1008/2008 and its key components).
[496] European Commission, Commission Decision of 28 May 1993 on a procedure relating to the application of Regulation (EEC) No 2408/92 (Case VII/AMA/I/93 – *Viva Air*), OJ L 140, paragraphs 51 and 55.
[497] *Id.,* under VI.
[498] *Id.,* under VI.
[499] *See* Mendes de Leon, *supra* note 48, at 561.
[500] United States Code of Federal Regulations, Title 49 Transportation, § 41310 ('International Air Transportation Fair Competitive Practices Act of 1974').
[501] Court of Appeals, *Laker Airways Inc. v. British Airways PLC*, 182 F.3d 843 (11th Circuit 1999).
[502] The provision was formerly codified in § 2(b) of the US Code of Federal Regulations, Title 49 Transportation, § 41310, as amended before the Department of Transportation Office of the Secretary in Washington D.C. on January 29, 2019.

the operational link between traffic rights and slots in legislation, the US even has a complaints procedure in place for what the US refers to as "discriminatory practices".[503]

Should the US Secretary of Transportation decide that a situation is discriminatory, the US Secretaries of State and Transportation shall commence negotiations with the State in question to end the alleged discriminatory practice. An example of such a practice could be the unavailability of slots as evidenced by the *Kalitta*-case discussed in section 3.3.4, which may be considered by the US to be "an unjustifiable or unreasonable restriction on access of an air carrier to a foreign market."[504] The US Secretary of Transportation may also take actions against the alleged discriminatory practice so as to eliminate an activity of a foreign State or another foreign entity, including a foreign air carrier, if the Secretary considers this to be in the public interest. Such actions may include the suspension of traffic rights as negotiated under the ASA between involved States.[505]

Neither the principle of national treatment nor the principle of non-discrimination hampers contracting States to the Convention from engaging into 'positive discrimination', *id est* granting foreign carriers a more favorable treatment than national carriers, as discussed in section 3.1.5.[506] An example can be found in the preferential treatment foreign carriers enjoyed in the US, where a separate slot pool guaranteeing slots for international air services has been applied in the past to ensure compliance with the obligations of the US government under the ASAs it concluded with other States. This arrangement held that these slots were excluded from the slot trading system under the so-called 'High-Density Rule' in the US, together with slots for 'essential' air services and slots for new entrants.[507] The US regime for slot coordination is subject to further discussion in Chapter 4, section 4.5.

3.3.4 Inter-State disagreements on the matter of slots and traffic rights

3.3.4.1 On access to the airports of London Heathrow and Amsterdam

To date, London Heathrow and Amsterdam Airport Schiphol are still prime examples of super-congested airports where issues over slot scarcity may arise in the bilateral sphere. Amsterdam Airport Schiphol reached its annual capacity limit of 500,000 aircraft movements in 2017. As of then, slot scarcity at Amsterdam Airport Schiphol has been resemblant of the situation at London Heathrow. All available slots are taken up by historic rights, leaving no slots left for allocation and market access hampered.

This section discusses disagreements between States, and their designated airlines, on the relationship between traffic rights and the coordination of slots. The first of these disagreements occurred in 1997, when the interplay between slots and traffic rights came to light between the US and the UK, and between the US and The Netherlands.

3.3.4.2 Between the US and the UK in the context of the Bermuda II Agreement

At that time (1997), the Bermuda II Agreement, the successor of the Bermuda I Agreement discussed in section 3.2.1, governed passenger flights between the US and the UK. Per the terms of the Bermuda II agreement, non-stop services to London were permitted from 26 gateway cities in the US. Access to London Heathrow was restricted to two US carriers, to wit American Airlines and United Airlines. The demand for slots at the super-congested airport of London

[503] The complaints procedure is set out in the US Code of Federal Regulations, Title 49 Transportation, § 41310, under (d)(1) and (d)(2).
[504] US Code of Federal Regulations, Title 49 Transportation, § 41310, under (c)(1).
[505] *Id.*
[506] *See* Mendes de Leon, *supra* note 48, at 562.
[507] *See* NERA Economic Consulting, *supra* note 5, at 234 and 271.

Heathrow by US carriers wishing to expand or enter service, however, by far exceeded supply.[508]

The US held that the Bermuda II Agreement placed substantial limits on competition which disproportionately impacted US airlines, most of whom are not allowed to serve London Heathrow.[509] Conversely, British Airways had obtained extensive access to the US market. According to a testimony of the US General Accounting Office before the US Senate Subcommittee on Aviation, the US Department of Transportation [hereinafter: US DoT] has not been successful in securing increased access for US airlines to London Heathrow. The testimony also included the opinion that the slot scarcity at Heathrow prevents US airlines from having adequate access to that airport, and action should be taken to address these barriers if a liberal and plurilateral, or 'Open Skies' agreement between the US and the UK were to result in increased competition.[510] Such barriers to entry did not exist in other States the US had previously signed 'Open Skies' agreements with.[511]

London Heathrow airport officials noted that US airlines wishing to enter services at London Heathrow under an 'Open Skies' agreement would be allocated priority slots if new slots became available. Because the airport was operating at its maximum capacity, it would likely take several years before additional capacity was created and slots would become available for additional US airlines. The airlines would likely need to have slots transferred to them from other airlines.[512] Because a forthcoming alliance between American Airlines and British Airways – the two largest carriers in the US-UK market, together accounting for 60% of the scheduled passenger traffic at the time – raised competition concerns, the two airlines indicated they were willing to release a portion of the slots they held to other US airlines, provided they were paid fair market value for those slots.[513]

3.3.4.3 The US – Netherlands Memorandum of Understanding of 1992

Also in 1997, slot scarcity placed restrictions on the exercise of traffic rights between the US and The Netherlands.[514] A Memorandum of Understanding of 1992 created an open market between the US and The Netherlands and allowed each States' designated carriers access to point(s) in the other State and beyond, without limitations.[515] Although the Dutch delegation had indicated to the US delegation that it did not expect slot scarcity issues at Amsterdam Airport Schiphol, the airport became subject to slot coordination in 1997, and US carriers were suddenly confronted with a coordination mechanism through which they had to acquire slots.[516] According to Mendes de Leon (2002), however, KLM and the operator of Amsterdam Airport Schiphol "handled this problem in a pragmatic manner".[517]

3.3.4.4 Involving AirBridgeCargo and Kalitta Air over slot scarcity at Amsterdam Airport Schiphol

Following the increased slot shortage, Russian-registered all-cargo carrier AirBridgeCargo was not allocated all of the slots it held before the 500,000 aircraft movement limit was reached.

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[508] District Court for the Southern District of New York, US Airways Group Inc. v. British Airways PLC, 989 F. Supp. 482 (S.D.N.Y. 1997).
[509] *See* United States General Accounting Office, *International Aviation: Competition Issues in the U.S.-U.K. Market. Statement of John H. Anderson, Jr.* (1997), at 1.
[510] An 'Open Skies' agreement between the US and the UK would eventually take effect in 2008.
[511] *See* US General Accounting Office, *supra* note 509, at 13.
[512] *Id.,* at 13.
[513] *Id.,* at 14.
[514] *See* Mendes de Leon, *supra* note 442, at 287.
[515] *Id.*, at 289.
[516] NorthWest Airlines had commercially partnered up with KLM Royal Dutch Airlines, which already had an established presence at Amsterdam Airport Schiphol. *See* also Mendes de Leon, *supra* note 442, at 292.
[517] *Id.*, at 292.

As part of the commitments in the air services agreement between The Netherlands and Russia, Russia invoked the principle of a fair and equal opportunity to compete as provided for in the agreement. It threatened to close Russian airspace to Dutch aircraft, including those for Dutch home carrier KLM, if AirBridgeCargo was refused more slots at Amsterdam Airport Schiphol.[518]

After several rounds of negotiations, AirBridgeCargo and KLM came to an agreement, which allowed AirBridgeCargo to fully re-establish its operations at Schiphol instead of moving to Liège airport in Belgium. The agreement was described as a codeshare agreement, through which KLM could lease slots to AirBridgeCargo.[519] The then Managing Director of Airport Coordination Netherlands [hereinafter: ACNL], the independent entity responsible for slot allocation at Dutch coordinated airports, stated in Dutch newspaper NRC that the government of The Netherlands "could set a dangerous precedent by giving in to the threats over Russia's airspace, as other carriers may try to gain space at European airports in the same way".[520]

A similar dispute to that of AirBridgeCargo occurred in 2018, when US cargo carrier Kalitta Air filed a complaint with the US Secretary of Transportation under the US Code of Federal Regulations, Title 49 Transportation, § 41310, arguing that its slots at the super-congested Amsterdam Airport Schiphol were "wrongfully withheld" by the Netherlands, ACNL and the airport managing body of Amsterdam Airport Schiphol. Because the carrier's on-time performance is largely dictated by its customer – the US Department of Defense books Kalitta Air for military charters to the Middle East via Amsterdam – Kalitta has "no control over when its flights will be allowed to land or depart". Consequently, it failed to comply with the use-it-or-lose-it rule and therefore it was not allocated all of the slots it previously held.[521]

Consequently, Kalitta Air claimed "unjustifiably and unreasonably discriminatory" actions to restrict the carrier's access to its Amsterdam-New York route guaranteed under the US-EU 'Open Skies' Agreement. The all-cargo carrier urged the US DoT to restrict or suspend the cargo operations of Dutch home carrier KLM to and from the US. In response, The Netherlands held that there is no correlation between traffic rights and the right to slots at Amsterdam Airport Schiphol, given the existence of an operational link between traffic rights and slots in the EU as explained in section 3.3.2. In May 2019, the US DoT dismissed Kalitta's complaint and referred to a recently agreed local rule governing slot allocation procedures for all-cargo carriers at Amsterdam Airport Schiphol, stating this local rule could function as a potential remedy to resolving Kalitta's problems.[522] Interestingly, the US DoT didn't touch upon the link between traffic rights and airport slots in its dismissal of the complaint at hand.

3.3.4.5 The solution of disagreements under ASAs and the Chicago Convention

The above cases illustrate that the 'equality of opportunity' principle, which is a standard provision in many ASAs, has been and is increasingly applied to the process of slot

[518] *See* NRC Handelsblad, Boodschap is dat chantage loont *(in Dutch)* (November 2, 2017), *available at* https://www.nrc.nl/nieuws/2017/11/02/boodschap-is-dat-chantage-loont-13815483-a1579681 (last visited November 10, 2021)

[519] EU Regulation 95/93, as amended, *supra* note 47, Article 10(8) enables slot swaps between carriers that entered into shared operations with one another: ". . . Slots allocated to one carrier may be used by (an)other air carrier(s) participating in a joint operation, provided that the designator code of the air carrier to whom the slots are allocated remains on the shared flight for allocation and monitoring purposes. Upon discontinuation of such operations, the slots so used will remain with the air carrier to whom they were initially allocated . . .".

[520] *See* NRC Handelsblad, *supra* note 518.

[521] Complaint of Kalitta Air, LLC against the Kingdom of the Netherlands, Amsterdam Airport Schiphol and *Stichting* Airport Coordination Netherlands of 29 January 2019 under 49 U.S. Code § 41310. *See* also Chapter 2 of this dissertation for a detailed explanation of the current slot rules, including the application and practice of the use-it-or-lose-it rule.

[522] *Id.*

coordination.[523] Where the grantor State imposes conditions on the coordination of slots to airlines flying under ASAs containing the 'equality of opportunity' clause, the airlines or the States designating them could – regardless of the legal validity, which is subject to discussion below – thus claim that the slot restrictions and/or conditions affect the balance of benefits as agreed upon in the agreement and raise the claim that the ASA fails to proceed from free and unrestricted trade of international air services because no airport access is granted.[524] For instance, States party to a liberal and plurilateral agreement may use the provision to demand access to airports in the opposite State for the benefit of its designated carriers.[525] In case the States fail to find a solution between them, the affected State may adopt retaliatory measures.[526]

Article 15 of the Convention does not prevent retaliatory action if problems with regard to the use of airports arise in the bilateral sphere between ICAO Member States and their respective designated carriers.[527] So far, however, it has not been made entirely clear whether the 'equality of opportunity' clause is also liable to impose any obligation on the States party to a particular agreement to ensure that the slots needed to operate the agreed air services are made available, as the clause has never been made subject to court proceedings. This uncertainty exists in spite of the fact that there is a clear separation between the concepts of traffic rights and slots and the steps that need to be taken to acquire both concepts, and also bearing in mind that States are free to introduce rules and procedures on slot coordination under Article 1 of the Convention.[528]

3.3.5 Concluding remarks

In terms of airport access, the assignment of traffic rights is 'only' the first step for an airline to be able to operate air services to and from a foreign airport. The second step involves acquiring increasingly scarce airport slots. Despite the separation between slots and traffic rights, however, experience has shown that the 'equality of opportunity' clause in ASAs has been applied to the process of slot allocation in an attempt to gain access to super-congested airports where no slots are available through the regular slot allocation process.

States tend to hold diverging views when it comes to the exercise of traffic rights and slot availability. States home to airports with limited to no slot availability may be accused of failure to abide by the terms of the ASA concluded, or to the adoption of retaliatory measures by the opposite State for non-compliance, more specifically in light of the 'equality of opportunity' clause. García-Arboleda (2013) describes the ellipsis as "evidence of a short-circuit that exists . . . between airport slots and international air traffic rights".[529] With capacity constraints increasing, the relationship between traffic rights and slots becomes increasingly prominent in the policy sphere between States and may thus result in interpretative differences between States all the more often.[530]

The situation pursuant to which the acquisition of traffic rights under ASAs would guarantee airlines any slots at coordinated airports would be undesirable from an international aviation law and policy perspective. It would complicate the conclusion of liberal and

[523] *See* NERA Economic Consulting, *supra* note 5, at 233.
[524] *See* Mendes de Leon, *supra* note 48, at 566; Balfour, *supra* note 92; García-Arboleda, supra note 381, at 580.
[525] *See* Mendes de Leon, *supra* note 48, at 566.
[526] *See* García-Arboleda, supra note 381, at 591.
[527] *See* NERA Economic Consulting, *supra* note 5, at 204.
[528] *See* Steer Davies Gleave, *supra* note 69, at 143.
[529] *See* García-Arboleda, supra note 381, at 591.
[530] *See* Mendes de Leon, *supra* note 48, at 566; Organisation for Economic Cooperation and Development (OECD), *Latin American Competition Forum, Session IV: Competition Issues in the Air Transport Sector*, paragraph 18.

plurilateral agreements with States home to one or multiple super-congested airports, since these agreements proceed from unrestricted market access within the territories of the States party to the agreement. Having to guarantee slot availability in order to exercise unlimited traffic rights is also deemed unrealistic given the market developments mentioned in Chapter 2.

The separation between slots and traffic rights could potentially be solved via the structural adoption of slot provisions in ASAs, prescribing that traffic rights may only be exercised if the airlines involved can get their hands on the airport slots needed to operate an air service.[531]

3.4 WASG as *de facto* and *de iure* reference document for slot coordination

3.4.1 The legal status and global influence of the Worldwide Airport Slot Guidelines

Having established that slots are not allocated to airlines under the Convention, nor are they allocated on the basis of ASAs, this section seeks to clarify the allocation of slots under the WASG, which prescribes that slots are allocated to airlines by an independent coordinator.[532] Moreover, the WASG reads that "[t]he allocation of slots is independent from the assignment of traffic rights under bilateral air services agreements".[533] Chapter 2 of this dissertation analyzed the concept, functions and basic notions of the slot coordination process. This section does not intend to repeat or analyze what has already been discussed.

Although not legally binding *per se*, the WASG is published in order to provide the global air transport community with a single set of standards as a best practice guide for the management of airport slots at coordinated airports.[534] It follows that the current slot coordination process is largely based on the guiding principles set out in the WASG. The WASG guidelines attempt to mitigate concerns over national treatment and non-discrimination by requiring the coordinator to allocate slots to airlines in a "neutral, transparent and non-discriminatory way".[535]

States that have adopted domestic regulations on slots often draw on the guidelines enshrined in the WASG, making the global air transport industry largely subject to the same regulations.[536] In some instances, WASG principles have been incorporated into national or regional (EU) law,[537] making the provisions directly enforceable by the State concerned.

Given that air transport is global in nature, harmonized slot coordination standards at both the origin and destination airports is needed to maximize an airport's efficient use of resources.[538] However, since air transport may also be subject to local regulations depending on local circumstances that are different from and/or additional to the principles incorporated in the WASG, slot coordination may work differently to varying extents in different parts of the world.[539]

The changes in the governance structure of the WASG are addressed in section 3.4.2, followed by the roles and functions of IATA, Airports Council International [hereinafter: ACI] and the

[531] *See* Mendes de Leon, *supra* note 48, at 560.
[532] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 1.7.2(i).
[533] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 8.1.1(j).
[534] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, Preface.
[535] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 5.5.1(a).
[536] *See* ICAO, *supra* note 78, paragraph 4.1.
[537] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, Preface.
[538] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 2.1.6.
[539] *See* European Commission, *supra* note 26, at 2.

World Wide Airport Coordinators Group [hereinafter: WWACG] as the three non-governmental organizations jointly responsible for administering any amendments to the WASG in section 3.4.3.

3.4.2 The governance structure of the WASG pre- and post-2020

Various non-governmental organizations have established guidelines on slot coordination. Before 2020, the guiding principles of the – now – WASG were published by IATA alone, as a result of consultations between an equal number of IATA member airlines and airport coordinators and facilitators in the IATA Joint Slot Advisory Group.[540] IATA first issued its guidelines under the title Scheduling Procedures Guide, followed by Worldwide Scheduling Guidelines from 2000 until 2010 respectively Worldwide Slot Guidelines from 2010 until 2020.[541]

For the first time ever and starting in 2016, airport representatives participated in the consultation process that led to the 1st joint edition of the WASG in 2020.[542] This development was preceded by a meeting of the Economic Commission of ICAO as part of ICAO's 39th Assembly in Fall 2016, during which "the need to optimize the use of scarce capacity, particularly at capacity-constrained airports" was noted.[543] In response, IATA, ACI and the WWACG joined forces and agreed to collectively review the – then – Worldwide Slot Guidelines.[544] The so-called 'Worldwide Slot Guidelines Strategic Review' has been concluded in 2019, leading up to the first edition of the renamed Worldwide *Airport* Slot Guidelines in June 2020. The results of the Strategic Review have been presented at ICAO's 40th Assembly in Fall 2019.[545]

The wording of the document was changed to include 'Airport', hence the change in abbreviation from WSG to WASG. In order to remain up to date with industry and regulatory changes, the WASG are reviewed and revised on a regular basis by IATA, ACI and WWACG.[546] The revision process of the WASG takes place in the Worldwide Airport Slot Board [hereinafter: WASB], a forum where an equal number of appointed airline, airport and coordinator representatives can meet to discuss issues and future trends of common interest. The WASB is furthermore responsible for addressing the development of amendments to the WASG and to provide guidance on slot-related matters.[547] All changes to the WASG are agreed by the WASB, ensuring that any amendments cannot be adopted unilaterally by any industry group.[548]

3.4.3 The roles and functions of IATA, ACI and WWACG

Unlike ICAO, IATA, ACI and the WWACG are not intergovernmental bodies, but private organizations with a representative function of airlines, airports and coordinators and facilitators. With their wide range of members from numerous States around the world, they

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[540] IATA, *Worldwide Slot Guidelines (WSG) Edition 10* (2019), at 2.1.3.
[541] The 1st edition of the 2011 Worldwide *Slot* Guidelines supersedes the 21st edition of the Worldwide *Scheduling* Guidelines, *see* International Air Transport Association (IATA), *Worldwide Slot Guidelines (WSG) Edition 10* (2019), *supra* note 8.
[542] *See* Odoni, *supra* note 61, at 19.
[543] *See* ICAO, *supra* note 204, paragraph 39.30.
[544] *See* Ribeiro et al., *supra* note 133, at 33.
[545] *See* ICAO, A40-WP/275, *Agenda item 32: Progress report on airport slot allocation* (2019).
[546] *See* ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, Preface.
[547] *See* Worldwide Airport Slot Board (WASB), Terms of Reference I.1 (March 2020), *available at* https://www.iata.org/contentassets/c1d7626d7175462ab0fc527c9e2937ce/wasb-tor-2020.pdf (last visited November 10, 2021).
[548] *See* International Air Transport Association (IATA), Annex 12.1 – Overview of Amendments to WSG Edition 10, *available at* https://www.iata.org/contentassets/4ede2aabfcc14a55919e468054d714fe/wasg-annex-12.1.pdf (last visited November 11, 2021).

occupy an important place in the world of international air transport. IATA currently represents 290 airlines from 120 States,[549] ACI serves 701 members operating 1,933 airports in 183 States,[550] and the WWACG represents 103 coordinators responsible for a total of 385 airports.[551] Like ICAO, IATA, ACI and the WWACG are all non-governmental and non-profit organizations headquartered in Montreal with a number of regional offices throughout the world.[552]

IATA is by far the oldest organization of the three. It was established in April 1945 to provide technical support to ICAO and to adopt industry standards in the field of commercial and economic regulation where the Convention had failed to do so.[553] Given that the Convention did and still does not regulate slot coordination directly, as to which *see* section 3.1.4.3, IATA seems to have bridged the gap at the time by formulating the key provisions for slot coordination in the – then – Scheduling Procedures Guide, as to which *see* section 3.4.2. Through IATA's Scheduling Procedures Guide, the industry agreed that airlines should be required to have a slot for each flight to or from a congested airport and developed worldwide guidelines.[554]

From 1945 to the late 1980s, IATA's centerpiece of activities concerned the organization of the IATA Traffic Conferences.[555] At these conferences, IATA recommended international air fares and rates for scheduled international air services to governments and regulators. It follows that IATA dealt directly with one important commercial aspect of international air services in which the Convention had failed, to wit airline pricing.[556] At the time, IATA has been perceived as quasi-governmental due to many of its members being fully or partially State-owned, and because its Traffic Conference functions were largely performed pursuant to delegation by States through their bilateral ASAs. It follows that IATA maintained close ties with the government authorities of Member States.[557]

The significance of the Traffic Conferences started to decline when air transport deregulation and liberalization came around in the late 1970s and 1980s. Moreover, with the privatization of airlines, fewer members were State-owned, and IATA had become more private and more commercial in nature. IATA commenced to develop commercial products and services in addition to its traditional trade association activities. Nonetheless, IATA's recommendations to governments, ICAO and other international organizations are always received with due respect and consideration.[558] Moreover, the IATA Slot Policy Working Group is established to provide guidance to IATA in the implementation of WASB proposals to amend the WASG, and

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[549] *See* International Air Transport Association (IATA), Fact Sheet (October 2021), *available at* https://www.iata.org/en/iata-repository/pressroom/fact-sheets/fact-sheet---iata/ (last visited November 10, 2021).
[550] *See* Airports Council International (ACI) World, About ACI, *available at* https://aci.aero/about-aci/ (last visited November 10, 2021).
[551] *See* World Wide Airport Coordinators Group (WWACG), WWACG Members & Associate Members across the world, *available at* http://www.wwacg.org/FMapSearch.aspx (last visited November 11, 2021).
[552] *See* Haanappel, *supra* note 356, at 30.
[553] *See* Milligan, *supra* note 14, at 2.2.1.
[554] *See* Mott MacDonald, *supra* note 63, at 2-1.
[555] At IATA's first Annual General Meeting of airlines held in Montreal in October 1945, the organization adopted Provisions for the Regulation and Conduct of the IATA Traffic Conferences, currently known as the Provisions for the Conduct of the IATA Traffic Conferences. *See* Haanappel, *supra* note 356, at 33.
[556] *Id.,* at 31.
[557] *Id.,* at 34.
[558] In Council of State, *KLM v. Airport Coordination Netherlands* [2019] ECLI:NL:RVS:2019:1368, KLM used a clarification of the IATA Slot Policy Working Group [hereinafter: SPWG] dated 30 January 2018 in its appeal to the Dutch Council of State. In part because of the clarification issued by the SPWG, the Council ruled KLM's appeal to be successful. *See infra* Chapter 5, section 5.3.2 (providing more information on the specific case between KLM and Airport Coordination Netherlands).

to provide guidance on industry scheduling and slot matters to the office of the IATA Director General.[559]

Although ACI and WWACG do not have a history in supporting commercial and economic regulation equal to that of IATA,[560] both organizations have established themselves as strong, reliable and cooperative representative platforms to their members, intergovernmental organizations such as ICAO and the EU, as well as to governments and regulators. This is illustrated by their participation in the publication of the WASG as of 2020,[561] in which IATA, ACI and the WWACG all have an equal role and equal voice.[562]

Like IATA, ACI regularly provides policy briefs and best practices in various areas linked to their objectives,[563] including but not limited to policy changes on airport slots, charges and regulation and safety, security and the environment to its members and intergovernmental organizations, such as ICAO and the EU.[564] The ACI World Expert Group on Slots consist of representatives from all world regions, including representatives who are also on the WASB, and provides strategic and technical guidance to ACI World on the development of policies on slot coordination.[565] The WWACG acts along the same lines and publishes best practices and other relevant information to coordinators around the world, including their regional offices.[566]

3.4.4 Concluding remarks

Although the joint oversight of the WASG by ACI, IATA and WWACG marks a step in the right direction to reflect the global and intertwined nature of international air transport with various actors involved, the fundamental WASG cornerstones and guidelines currently in use date back to well before 2000 when the guidelines were still administered by IATA alone, and when coordinators were still closely affiliated with airlines and governments. Although a Strategic Review of the guidelines contained in the WASG has taken place in parallel to a revision of the governance structure between 2016 and 2019, it only brought marginal, *id est* merely textual, changes, as well as a change in objectives.[567]

The key target of widespread criticism from leading academics, competition authorities and industry professionals on the slot regime to date, to wit the principle of historic precedence, which is said to function as a significant barrier to airport access,[568] is still upheld. Maintaining the *status quo* appears to fit IATA's position going into the Strategic Review, describing it as

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[559] *See* International Air Transport Association (IATA), Slot Policy Working Group (SPWG) Terms of Reference, *available at* https://www.iata.org/contentassets/c1d7626d7175462ab0fc527c9e2937ce/spwg-tor-2019.pdf (last visited January 6, 2021).

[560] ACI was created in 1991 in the wake of air transport deregulation and liberalization as the first worldwide association to represent the common interests of airports and to foster cooperation with partners throughout the air transport industry, followed by the WWACG in 2004. *See* Airports Council International (ACI), Overview, *available at* https://aci.aero/about-aci/overview/ (last visited November 11, 2021).

[561] Until 2019, the WASG was published by IATA alone, *see* section 3.4.2.

[562] *See* WASB, *supra* note 547.

[563] A main objective of ACI is to maximize the contributions of airports to maintaining and developing a safe, secure, environmentally compatible and efficient air transport system, *see* ACI World, *supra* note 550.

[564] *See* ACI World, *supra* note 560.

[565] *See* Airports Council International (ACI) World, Terms of Reference of the Expert Group on Slots, *available at* https://aci.aero/wp-content/uploads/2021/09/EGS-ToR.pdf (last visited November 11, 2021).

[566] *See* World Wide Airport Coordinators Group (WWACG), The officially registered purpose of WWACG, *available at* http://www.wwacg.org/FPage.aspx?id=22 (last visited November 11, 2021) and World Wide Airport Coordinators Group (WWACG), How is the WWACG organized?, *available at* http://www.wwacg.org/FPage.aspx?id=6 (last visited November 11, 2021).

[567] For a list of changes to the WSG, *see* IATA, supra note 548. For an analysis of the change in objectives, *see* Chapter 2, section 2.1.3.

[568] *See* Chapter 2, section 2.1.4 for an overview of authors expressing criticism.

> ". . . the ongoing process of enhancing the existing WSG, not rewriting from scratch, to ensure it remains the global, single slot standard for years to come – a major undertaking for 2017/18."[569]

IATA does not specify why the document would not be able to function as global, single slot standard if a review from scratch would have been undertaken. Despite widespread criticism, however, the WASG does describe quite clearly the details and rules of how the slot coordination process should work, allowing for a more or less universal approach by slot coordinators around the world. The existence of grandfather rights also acknowledges the investments made by airlines in the development of their fleet and networks and ensures the stability and continuity of international air transport services.

Given the changing market realities air transport has had to cope with since the key principles in the current WASG were first introduced, it may in fact be more logical to identify time-conscious objectives and conduct a wholesale review feeding into the newly identified objectives of the WASG. At the time, international air traffic was still heavily regulated and dominated by the so-called 'flag carriers', often owned by their respective States. As illustrated in Chapter 2 of this dissertation, this structure has undergone drastic changes, which renders it questionable whether the key principles of the WASG are fit for the newly identified objectives they are designed to serve, including the facilitation of consumer choice, improving connectivity, the protection of the environment, and balancing airport access for existing and new airlines.[570]

3.5 Concluding remarks

At the time the Convention was drafted, the problem of airport congestion did not exist, and the drafters were primarily concerned with questions related to safety and technical aspects of air transport.[571] As such, the Convention and its 19 Annexes fail to provide a binding global framework for the economic regulation of air transport, including airport access and henceforth slot coordination.[572] Although ICAO has produced guidance documents on slot coordination, often with reference to the WASG, these do not equate to binding and uniform rules or procedures on slot coordination for States and industry stakeholders to use.

Provisions of the Convention, however, affect slot coordination via Article 1 in conjunction with Articles 2, 5, 6, 11, 15 and 68 of the Convention,[573] all of which are attributed legal force because of their status as treaty law. Slot coordination is part of a broader capacity allocation process and is inextricably linked to other parts of the process, including airport charges pursuant to Article 15 of the Convention and the exchange of traffic rights on the basis of Article 6 of the Convention.[574] Also, the *equality of opportunity, national treatment* and *non-discrimination* principles vested in the Preamble and Article 11 respectively Article 15 of the Convention are relevant for slot coordination.

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[569] *See* Ribeiro et al., *supra* note 133, at 33. The IATA paper in which this statement was made is no longer available online.
[570] *See* Chapter 2, section 2.1.3 of this dissertation for a discussion on the general and specific objectives of slot coordination, some of which have only recently been added into the first edition of the WASG without an accompanying wholesale reform of the documents' key principles.
[571] *See* NERA Economic Consulting, *supra* note 5, at 225.
[572] *See* Hobe, *supra* note 328, at 38.
[573] *See* García-Arboleda, supra note 381, at 573.
[574] *See* Forsyth and Niemeier, *supra* note 273, at 128.

There appears to be a complex and delicate relationship between a State's jurisdictional powers resulting from the principle of complete and exclusive sovereignty on the one hand, and the national treatment and non-discrimination principle on the other hand. The Convention upholds all three principles in Articles 1, 11 and 15, yet States may still invoke their sovereign rights when granting traffic rights to State A on less favorable conditions compared to the conditions it has granted to State B, thus differentiation is allowed under Article 11. Therefore, a State or a regional authority may not treat the national airline in the same way as it treats foreign airlines across the range of all ASAs a State has concluded.[575]

In slot coordination, a similar relationship can be observed. Since Article 15 of the Convention may be applied to the process of slot coordination, States that have ratified the Convention are obliged to ensure that coordination decisions are made in a non-discriminatory manner and irrespective of nationality. Consequently, States must adhere to the principles of national treatment and non-discrimination in their rules and procedures on slot coordination.

In the absence of ICAO rules on the matter, the WASG provides the global air transport community with a single set of standards as a best practice guide for the management of airport slots at coordinated airports,[576] although again not legally binding *per se*. States or regional authorities that have adopted their own regulations on slots, such as the EU Slot Regulation, often draw on the principles of the WASG, making the global air transport industry largely subject to the same regulations.[577] ICAO emphasizes that its contracting States should adhere to the legal framework for slot coordination, comprising of the Convention, obligations under ASAs as well as regional and national rules for the coordination of slots.[578]

Much water has flown under the bridge since the Convention was drafted in 1944 and since the inception of the key principles governing slot coordination.[579] As capacity falls short of demand at more and more airports, the principles of the Convention and the WASG have more impact than they did at the time they were conceived. The lack of slots experienced to date is increasingly pressurizing inter-State relations.[580]

After all, the way in which slots are coordinated relates to the reciprocal concession of rights by States to allow their designated carriers to operate international scheduled air services under Article 6 of the Convention, or based on other arrangements. The impossibility for an airline to be allocated slots, even though it possesses the required traffic rights, may frustrate bilateral relations under ASAs as to which *see* section 3.3.4 above.[581] ASAs generally do not contain explicit references to slots. ICAO has drafted a model clause, but it appears to fall short of providing a constructive solution to the problem at hand for the reasons mentioned in section 3.2.5.

Although the slot regime set forth by the WASG very much welcomes competitive entry in spirit,[582] in practice competitors are regularly not able to enter a market due to the inability

[575] *See* Garcia-Arboleda, *supra* note 328, at 259-261.
[576] Paired with the changed governance structure in 2020, the WASG came under joint supervision of airports, airlines and coordinators with an equal voice for all industry groups. As addressed in section 3.4.2, the WASG were administered by IATA alone until 2020.
[577] *See* ICAO, *supra* note 78, paragraph 4.1. Notable exceptions are the US and China, as to which *see infra* Chapter 4, sections 4.5 and 4.6.3.
[578] *Id.,* paragraph 3.2.
[579] *See* Abeyratne, *supra* note 309, at 481; Garcia-Arboleda, *supra* note 328, at 260.
[580] *See* García-Arboleda, supra note 381, at 573.
[581] *Id.,* at 574.
[582] The specific objectives of the WASG list, for example, the enhancement of competition at congested airports and the balancing of airport access opportunities for existing and new airlines, *see* also Chapter 2, section 2.1.3.

to acquire airport slots.[583] The shift to liberalized 'Open Skies' agreements imply that in many markets, it is now the slot availability and not the traffic rights that have the greatest potential for causing inefficiencies.[584] Von den Steinen (2006) stressed that we need to understand that "[O]pen [S]kies will not remain open if the ground is closed".[585]

Chapter 4 turns attention to the process of slot coordination in selected jurisdictions, and how the binding principles set forth by the Convention, including the principles of equality of opportunity, national treatment and non-discrimination, are reflected in these specific legal regimes for slot coordination. The EU rules on slot coordination will be the primary object of analysis, along with several other jurisdictions such as the US, Australia, China and jurisdictions in Latin America, albeit these will be considered to a lesser extent. Chapter 4 also considers if and to what extent these specific legal regimes alleviate the issues identified in Chapter 2.

[583] *See* García-Arboleda, supra note 381, at 577.
[584] *See* NERA Economic Consulting, *supra* note 5, at 52.
[585] *See* Von den Steinen*, supra* note 12, at 172.