# Still a Mile too Far? International Law Implications of the Location of an Airport in the Sea

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**Keywords:** air law; artificial islands; exclusive economic zone; law of the sea; the Netherlands.

**Abstract.** This essay discusses international law aspects of an airport in the Exclusive Economic Zone (EEZ), concentrating on the law of the sea and air law. The law of the sea gives a more positive answer to the question regarding the feasibility of the operation of an airport in the EEZ than air law. At the same time, the evolution of regimes, including also EC law and policy, may facilitate acceptance of international operations at a national airport in the EEZ. Finally, the prevailing circumstances, such as economic, financial and environmental considerations, will be liable to affect the acceptability of an airport in the sea, more particularly in the EEZ.

## 1. A Unique Initiative

In 1998 plans were made public by the government of the Netherlands to build an airport in the sea, as a substitute for the present premises of Amsterdam Airport *Schiphol*. A few alternatives were presented. Among them were different locations in the North Sea. These were either within the limits of the territorial sea and outside such limits, but not beyond the outer limits of the Netherlands continental shelf and the recently established Exclusive Economic Zone (EEZ). The present essay concentrates on a location outside the territorial sea but within the continental shelf/EEZ. As becomes clear, this choice is made because of the interplay with international air law and policy.

The ideas for the construction of an artificial island in the sea for the purpose of exploiting such an island for the benefit of international air commerce raises interesting questions pertaining to international law. The branches of international law which are most involved and discussed below concern the law of the sea and air law, as well as EC law. To assess the impact of each field of law on the present subject is not an easy task, as the impact depends, *inter alia*, on both the location of the airport in the sea and the time at which the airport is designed to become operational. When referring to the location, the impact of the law of the sea on the one hand, and air law on the other, is relevant. The impact of EC law and

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policy on international air transport matters, including infrastructure, will gain growing importance in the twenty-first century. This point has to be taken into account since the preparation and construction of an airport in the sea is far from being an 'overnight event.'

At the time of writing (October 2000) the Netherlands government had already decided not to pursue the option of an airport in the sea, at least not for the time being. However, it is certainly not ruled out that this option may again be attractive in the near future, for example due to increased air traffic and heightened environmental and safety concerns on land.

This essay will focus on the main, and, it is emphasized, no more than those, provisions of the law of the sea[1] and air law which apply directly to this subject. Another important branch of international law, namely, environmental law, including EC environmental law, will not be addressed here. A brief reference, however, will be made to EC air transport law.

## 2. The Choice of the Location of an Airport

The choice of the most appropriate location for an airport is critical. On the one hand, environmental concerns are gaining importance. On the other hand, legal, financial, economic and commercial interests also affect such a choice. The growing effect of international airline alliances on the choice of the location of an airport will also be addressed. The challenge is to reconcile these interests which are often pointing in different directions.

To opt for locations outside urban centers is not new. In the late 1980s, plans were launched for so-called "way-ports," that is, airports in the middle of nowhere, for instance, in rural areas, where airlines would be free to fly in and fly out, and which could serve as transit ports. Not surprisingly, the concept of way-ports could not be applied to the Netherlands where it is hard to find a 'nowhere.' From that point of view, an airport located in the sea could be seen as an application of the concept of way-ports.

The construction and exploitation of airports in the sea is not new either. In fact, there are already a few examples, namely, Kansai airport of Osaka, Chep Lap Kok airport of Hong Kong, the new airport of Macao, and, within a few years, the new airport of Seoul. Those airports are all located in coastal areas, that is, within the territorial sea of the respective states. International air law does not affect such a choice, as it treats "territory" and "territorial sea" on a same footing. The plans of the Netherlands were special, however, as one of the possible locations was outside the limits of the territorial sea of the Netherlands. The law of the sea currently allows a state to establish a territorial sea with a maximum breadth of 12 nautical

1. For a more comprehensive discussion of the law of the sea aspects, *see* E.J. Molenaar, *Airports at Sea: International Legal Implications*, 14 International Journal of Marine and Coastal Law 371–386 (1999).

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miles (nm). The Netherlands claims a 12 nm territorial sea since 1985.[2] With 1,852 meters per nm, this amounts to a little more than 22 kilometers.

The prospect of an airport beyond a state's territorial sea is not as unique as it may seem. As early as 1930, plans for "seadromes" were introduced. Seadromes were intended to be sites in the ocean, in particular the Atlantic Ocean, to be used as reference points and sites for technical landings in the early days of trans-Atlantic flying. At the time, aircraft engines were not yet equipped to cross the Atlantic Ocean without landing. Thus, the status of these seadromes was considered in the same fashion as beacons and lighthouses, that is, instruments to bridge distances and to facilitate air navigation.

Even then, some thought was given to the status of seadromes under international law. The majority of the people who were involved with the subject was of the opinion that a seadrome should come under the jurisdiction of the state to which the seadrome belonged, or of the state whose national(s) constructed it. At the same time, the right to build a seadrome should be subjected to international control, for instance, under the League of Nations or an international organization set up for that purpose. These proposals have not materialized. Firstly, the World War II prevented the further development of Trans-Atlantic flying for civil purposes. Secondly, technical developments in the fourth and fifth decades of the twentieth century made it possible that civil aircraft crossed larger distances without the necessity of a technical stop, so that places like Shannon in West Ireland, Prestwick in North Scotland and several locations in Newfoundland functioned as beacons in Trans-Atlantic flying.[3]

A more modern application concerns the launching of commercial satellites into orbit from a platform at sea. This is in fact already taking place. On 27 March 1999 an international consortium led by Boeing Co. blasted a rocket into space from a floating platform in the Pacific Ocean. It has been argued that the launching of a spacecraft from a ship, which is at the time of the launch located in the EEZ of another state, should be tolerated because of the freedom of the high seas, in particular the freedoms of navigation and overflight and other internationally lawful uses of the sea related to these freedoms.[4]

The plans of the Netherlands differ with respect to the use of an airport in the sea: it would not only be constructed for safety and technical purposes (including, for instance, refueling of aircraft), but also for envi-

2. Art. 1(1), *Wet grenzen Nederlandse territoriale zee* (Netherlands Territorial Sea Demarcation Act), 9 January 1985, Staatsblad 129 (1985).
3. *See* National War College, International Law Situations 82–83 (1934), with solutions and notes.
4. All states enjoy these freedoms in another state's EEZ by virtue of Art. 58(1) of the LOS Convention, note 5, *infra*. *See also* A. Kerrest, *The Launch of Spacecraft from the Sea*, *in* G. Lafferanderie & D. Crowther (Eds.), Outlook on Space Law over the Next 30 Years 217–233, at 220 (1997).

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ronmental reasons as well as for economic and commercial objectives. Those objectives are thus predominantly linked to national policy objectives rather than serving international air navigation. Consequently, the attitude of other states whose airlines operate to, via and from the Netherlands, when confronted with plans for such an airport, will be of crucial influence.

## 3. The Application of the Law of the Sea

### 3.1. The Netherlands and the law of the sea

The United Nations Convention on the Law of the Sea (hereinafter: the LOS Convention),[5] is a framework convention which seeks to accommodate conflicting interests of states with respect to the seas and oceans. The nine years that it took to negotiate have resulted in a carving-up of the seas and oceans in maritime zones where states have exclusive or co-existing rights as well as obligations. In addition to a 12 nm territorial sea, coastal states have the right to establish an EEZ with a maximum width of 200 nm, and are entitled to a part of the (legal) continental shelf that extends potentially far beyond 200 nm.[6]

States can also establish a contiguous zone with a maximum breadth of 24 nm. However, the jurisdiction that can be exercised therein is not relevant in our case, if only because of the much more extensive rights and jurisdiction within/on the much larger EEZ/continental shelf.[7] At any event, the Netherlands has not deemed it necessary to establish a contiguous zone. Furthermore, Part IV of the LOS Convention introduces the novel concept of archipelagic waters. The Netherlands cannot claim this maritime zone but for states that can, the issues concerning an airport in the sea would be largely similar to the territorial sea.

Whereas the rights of a state over its continental shelf exist *ab initio*, in the sense that it requires no proclamation, an EEZ needs to be officially established. The Netherlands did this by Act on 27 May 1999,[8] while the outer limits of the EEZ were established by Decree on 13 March

5. United Nations Convention on the Law of the Sea, 21 ILM 1245 (1982); adopted at Montego Bay on 10 December 1982; entered into force on 16 November 1994. As of 24 January 2001, 134 States and the European Community (EC) were Parties to the LOS Convention. The Netherlands became a Party on 28 June 1996.
6. Arts. 57 and 76 LOS Convention. All distances are measured from the baselines for the measurement of the territorial sea, which is in normal cases the low-water line along the coast. *See* Section 2, Part II of the LOS Convention.
7. *See* Art. 33 LOS Convention.
8. *Rijkswet instelling exclusieve economische zone* (Act establishing an EEZ, of 27 May 1999), Staatsblad 281 (1999). *See* 17 NILOS Newsletter 2 (1999), available at http://www.law.ruu.nl/english/isep/framenilos.asp.

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2000.[9] As the North Sea is a relatively small (semi-)enclosed sea, the Netherlands is not in a position to claim a 'full' EEZ, let alone a 'full' continental shelf. At the negotiations on the LOS Convention, the Netherlands was in fact one of the "geographically disadvantaged and land-locked states." Agreements have therefore been concluded with Belgium for the delimitation of all maritime zones and with Denmark, Germany, and the United Kingdom for the delimitation of the continental shelf.[10] The boundaries of the EEZ coincide with those of the continental shelf.[11] The Netherlands' EEZ/continental shelf is at any rate large enough to enable the construction of an artificial island that is used as an airport.

### 3.2. Coastal state jurisdiction over artificial islands

The main feature of the EEZ is that it entitles a state to sovereign rights over the living and non-living resources of the seabed and the water-column. In addition to these rights, a coastal state has jurisdiction with regard to, *inter alia*, "the establishment and use of artificial islands, installations and structures."[12] As the Netherlands is not able to claim a legal continental shelf which extends beyond the EEZ, further discussion can merely focus on the legal regime of the EEZ. But even if the Netherlands would have been able to do this, the applicable rules to airports in the sea are essential identical for both maritime zones.[13]

Article 60 of the LOS Convention recognizes the coastal state's "exclusive right to construct and to authorize and regulate the construction, operation, and use of," and "exclusive jurisdiction over," artificial islands. This is clearly meant to establish comprehensive regulatory authority and would thus in principle include the construction, operation, and use of, and jurisdiction over, an airport on an artificial island.[14] *Prima facie*, this may therefore even include the privilege to grant landing rights and traffic rights from, to, and via such an artificial island to foreign states and their airlines. While this authority is in itself not really disputed, the

9. *Besluit grenzen Nederlandse exclusieve economische zone* (Decree on the Limits of the Netherlands Exclusive Economic Zone), 13 March 2000, Staatsblad 167 (2000).
10. *See* H. Dotinga & A. Soons, *The Netherlands and the Law of the Sea*, *in* T. Treves & L. Pineschi (Eds.), The Law of the Sea: The European Union and its Member States 365, at 400–403 (1997). For the maritime delimitation agreements concluded between Belgium and the Netherlands in 1996, *see* 14 Tractatenblad (1997) and 15 Tractatenblad (1997); *see also* 14 NILOS Newsletter 4 (1997), *supra* note 8.
11. *See* Decree on the Limits of the Netherlands Exclusive Economic Zone, *supra* note 9.
12. Art. 56(1)(b)(i) LOS Convention.
13. Art. 80 LOS Convention makes Art. *60 mutatis mutandis* applicable to artificial islands.
14. *Cf.* K. Hailbronner, *Freedom of the Air and the Convention on the Law of the Sea*, 77 AJIL 490, at 509–510 (1983), who also refers to existing state practice on the exercise of such jurisdiction over offshore installations. Under the 1958 Convention on the Continental Shelf a coastal state would merely have certain rights and jurisdiction with respect to "installations and other devices necessary for its exploration and the exploitation of its natural resources." *See* Art. 5(2) of the Convention on the Continental Shelf, 499 UNTS 311 (1958); adopted in Geneva on 29 April 1958; entered into force on 10 June 1964.

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coastal state remains bound to other relevant rules or international law and must ensure that rights of other states are not compromised.

Among other things, coastal states must act consistent with 'due diligence' obligations under customary law and the general and specific duties incorporated in a large number of international instruments that foster environmental protection. An extensive environmental impact assessment (EIA) should investigate all possible impacts of the construction and use of 'Schiphol at Sea.' The immediately affected rights of other states in a coastal state's EEZ are the freedoms of navigation and the laying of submarine cables and pipelines.[15] The choice of location should obviously take account of "recognized sea lanes essential to international navigation."[16] Whereas there is no need to seek approval by the International Maritime Organization (IMO), it would be a sign of good governance to conduct consultations on the construction plans in IMO's Subcommittee on Safety of Navigation. Account should also be taken of possible conflicts with fishing and off-shore activities, even though these may not necessarily relate to the rights of other states, but rather to a coastal state's own nationals and industries.

At this point, however, it should be reminded that the particularities of this case are not exclusively governed by the law of the sea. While a coastal state may have the right to build an artificial island for the purpose of international air commerce, is it also able to exploit such an island for the said purpose? In particular, would this be consistent with the freedom of overflight, as recognized in Article 58(1) of the LOS Convention? At that point, international air law may provide more guidance.

## 4. The Application of Air Law and Air Regulations

### 4.1. The Convention on international civil aviation of 1944

The Convention on international civil aviation of 1944 (hereinafter: the Chicago Convention),[17] is the constitution of international civil aviation. About 187 states are party to this Convention;[18] it has therefore worldwide application. The Chicago Convention defines "territory" as "[…] the land areas and the territorial waters adjacent thereto […] under the sovereignty of a contracting state." The width of the territorial sea is not specified in the Chicago Convention as it was recognized that this should be left to general international law, or the law of the sea. Not surprisingly, the Chicago Convention makes no reference to the EEZ, nor to the

15. Art. 58(1) LOS Convention.
16. Art. 60(7) LOS Convention.
17. Convention on International Civil Aviation, 15 UNTS 295 (1948); adopted at Chicago on 7 December 1944; entered into force on 4 April 1947.
18. Status per March 2001.

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continental shelf. According to what can be termed as the 'Chicago regime',[19] sea areas can be either territorial seas or high seas.

Obviously, the definition of territory under the Chicago Convention dates back till 1944, and is in more than in one respect somewhat archaic. The International Civil Aviation Organization (ICAO), which was set up under the Chicago Convention, has the same world-wide membership as the Convention, including the Netherlands. In the light of this world-wide membership, as well as sensitive sovereignty-related arguments, it is unrealistic to anticipate that the territorial definition of the Chicago Convention will be adapted to developments in the field of law of the sea in the near future.

### 4.2. Regulation of safety in relation to civil air transport

The Chicago Convention forms the global framework for regulating air safety world-wide. ICAO sets Safety Standards and Recommended Practices (SARPs)[20] applying to the high seas which must be deemed to include the EEZ.[21] Such Standards therefore govern traffic to, via and from an artificial island in the EEZ, because it follows from the above definition given by the Convention that all seas outside the territorial seas are qualified as "high seas."

This has not prevented certain states, especially the United States and Canada,[22] from proclaiming so-called "identification zones." Identification zones are zones in which operators of aircraft must identify themselves. Where they extend further seaward than the outer limit of the territorial sea, they are liable to contravene the freedom of overflight granted under both the LOS Convention and the Chicago Convention.

Identification zones are established for *security* rather than for *safety* reasons. It could therefore be held that they are permissible as an exercise of sovereign powers with respect to national defense, which is an area falling outside the scope of the Chicago Convention. If there were a body dealing with national security and military affairs outside the national administration, this would be the UN or NATO rather than ICAO.

Moreover, ICAO draws up so-called Air Navigation Plans (ANPs) covering technical aspects of air transport, including but not limited to airport operations, the management of air traffic, communications between

19. The term includes the Chicago Convention and bilateral air services agreements, which usually refer to this Convention for the purpose of defining the term "territory."
20. Art. 38 of the Chicago Convention.
21. *See also* the third sentence of Art. 12 of the Chigago Convention: "Over the high seas, the rules in force shall be those established under this Convention." *See also*, H. Wassenbergh, *The Status and Use of an Airport on an Artificial Island*, XXIV Air and Space Law 178 (1999).
22. The United States calls its identification zone "Air Defense Information Zone" (ADIZ), and Canada "Canadian Air Defense Information Zone" (CADIZ).

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aircraft commander and air traffic control centers, and meteorology. ANPs apply on a regional basis, that is, without regard to national boundaries.[23]

### 4.3. The grant of traffic rights

Airlines cannot commercially operate to a point in a foreign state unless they have traffic rights there. Those rights are granted either under bilateral air services agreements, concluded between states, or, in the special case of the European Community (EC), under an EC Regulation.[24] The latter regulation only applies to Community air carriers flying *intra*-Community routes.

Traffic rights are contracted internationally by the Netherlands with reference to a point in the territory of the Netherlands, sometimes specified as 'Amsterdam Airport Schiphol,' plus and including in exceptional cases Rotterdam Airport, and Maastricht/Aachen airport. To change these points and corresponding international routes is a matter of negotiation. States accept a point within the territory of the Netherlands under a "trade of traffic rights," laid down in the said bilateral air services agreements. Changes may be made without any conditions, with conditions and subject to these states' approval. In a worst case scenario, the result may be the cancellation of the bilateral agreement. The reaction of foreign states to a unilaterally imposed change of the point or points that may be served will depend on several factors. Crucial is the extent to which the alternative is convenient for their airlines.

Foreign states, acting on behalf of their designated airlines, may therefore not object if the Netherlands government designates a location in the Netherlands EEZ as a point in the Netherlands under bilateral air agreements – but they may also decide not do to so on legal grounds. The argument, which can be put forward here is that those bilateral agreements take their restricted definition of "territory" from the Chicago Convention.

The mutual grant of traffic rights is based on the predominant principle prevailing in international air transport, that is, *reciprocity*. To adopt a formal approach towards the status of an artificial island in the EEZ by interpreting it as a point located outside the jurisdiction of the Netherlands would deny the value of this principle. When one applies the combination of these two arguments, namely, the principle of reciprocity, reflected by the establishment of a 'balance of benefits' for both parties to the agreement, and the principle of adherence to the global legal framework

23. *See* Section 2.1.2 of Annex 11, *Air Traffic Services*, to the Chicago Convention: "Those portions over the high seas or in airspace of undetermined sovereignty where air traffic services will be provided shall be determined on the basis of regional air navigation agreements. A Contracting State having accepted the responsibility to provide air traffic services in such portions of airspace shall thereafter arrange for the services to be established and provided in accordance with the provisions of this Annex."
24. *See* Regulation 2408/92 on market access, OJ L 240, at 8–14 (1992).

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provided by the 'Chicago regime' to the bilateral exchange of traffic rights in relation to a point in the EEZ, the following picture can be drawn.

A state, representing its airline or airlines being invited by the Netherlands government to fly to a point in the EEZ rather than to Amsterdam Airport Schiphol, will look at the practical advantages which such a change produces for those airlines. If the removal is convenient it may accept the change, with or without asking for concessions from the Netherlands government in terms of compensation for damages, or extra traffic rights for the benefit of its airline(s). If the removal is not convenient, the foreign state may be tempted to ask for more concessions, in order to restore the 'balance of benefits' referred to in the previous paragraph. The quest for concessions may be based on legal grounds related the limited rights which the Netherlands government has in the EEZ, at least under the 'Chicago regime,' that must be deemed to govern aviation relations between states.

From a legal perspective the Netherlands government may very well claim that it has sovereign aviation rights in the EEZ, or at least that it has the necessary rights to grant traffic rights to, via and from a point in the EEZ, including the full power to control safety in the airspace above the EEZ. Realistically, but, also, legally speaking, such a unilateral claim must be recognized by other states; this question will be examined in the next section. At the multilateral level, ICAO did not seem to be in favor of such an extension of aviation competencies of the coastal state in its EEZ.[25] However, it appears that ICAO has come to a conclusion on the subject.[26]

The arguments on which such a claim should be based must obviously be related to the LOS Convention and a modern, that is, liberal approach towards the competencies of the coastal state in the EEZ. Not surprisingly, this approach is favored in maritime circles, and by some aviation law authors.[27] However, their views focussed on the extension of powers related to the application of safety regulations as embodied in, *inter alia*, the above mentioned SARPs and ANPs, rather than on the economic and commercial side, including but not limited to the grant of traffic rights. There seems to be agreement among those authors, that, with respect to the exercise of the necessary aviation powers,[28] there is no alternative but to extend by unilateral legislative action their civil aviation jurisdiction beyond the outward boundary of the territorial sea to be exercised as

25. *See* notes 31 and 32, *infra*.
26. *See* Section 4.4, *infra*.
27. *See*, *e.g.*, K. Hailbronner, *The Legal Regime of the Airspace Above the Exclusive Economic Zone*, VIII(1) Air Law 30–44 (1983); P. Heller, *Airspace over Extended Jurisdictional Zones*, *in* J. Gamble (Ed.), Law of the Sea: Neglected Issues 150 (1979); W. Lawrence, *Superports, Airports, and Other Fixed Installations on the High Seas*, 6 Journal of Maritime Law and Commerce 575–591 (1975).
28. Whereby, as stated before, the distinction between aviation safety powers and powers related to air commerce, including the grant of traffic rights, was not clearly specified.

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regards aviation operations to, from, and on artificial islands and structures in the EEZ.[29]

In case of doubt regarding the jurisdictional powers of the coastal state in the EEZ, the LOS Convention provides a solution. "Conflicts" regarding jurisdictional powers of coastal states on the EEZ must be resolved "on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."[30] This provision does not help us further, as its wording is too abstract for the present situation.

### 4.4. The views of ICAO

The Secretariat of ICAO has conducted several studies questioning whether the LOS Convention affected the 'Chicago regime.' The answer was negative. For instance, an ICAO study of 1987 states:

> For all practical and legal purposes, the status of the airspace above the EEZ and the regime over the EEZ is the same as over the high seas and *the coastal States are not granted any precedence or priority*. Consequently, for the purposes of the Chicago Convention, its Annexes and other air law instruments, the EEZ should be deemed to have the same legal status as the high seas and any reference in these instruments to the high seas should be deemed to encompass the EEZ.[31]

A similar conclusion was reached in 1994: a coastal state cannot impose its aeronautical laws and regulations in the EEZ.[32] One state, namely Brazil, suggested in 1994 that "an effort should be made in the context of the Chicago system to give the EEZ the same conditions as those applicable to land territory and territorial waters with respect to over-flight, as provided for Article 5 of the Chicago Convention (and in IASTA)."[33] The legal Rapporteur of ICAO comments on this suggestion that

29. *See* Heller, *supra* note 28, at 150, and the other authors (Knight, Lawrence, Koers and Walkers) cited by Heller, sharing these views regarding unilateral extension of competencies of coastal states in the EEZ.
30. Art. 59 LOS Convention.
31. *See* ICAO Secretariat Study, Consideration of the Report of the Rapporteur on United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes, and other air law instruments, LC/26-WP/5-1 of 4 February 1987, at 20 (emphasis added by the Secretariat).
32. *See* ICAO Secretariat Study, United Nations Convention on the Law of the Sea, Implications, if any, for the application of the Chicago Convention, its Annexes, and other air law instruments, LC/29-WP/8-1 of 10 March 1994, at 22.
33. Article 5 of the Chicago Convention gives (the operators of) aircraft engaged in non-scheduled services the right of free overflight over the territory of other contracting states. IASTA refers to the International Air Services Transit Agreement, 84 UNTS 389, which confirms the said privilege. *See* ICAO Working Paper LC/29-WP8-3 of 10 March 1994, at 9.

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"[s]uch a suggestion would […] require an amendment of [the LOS Convention]."[34]

In 1998 ICAO reported that a "Contracting State requested the Secretariat to provide its legal views on the implications of building an airport on an artificial island which would be constructed in the Exclusive Economic Zone (EEZ) outside the territorial sea of the Contracting State."[35] Not surprisingly, the "Contracting State" referred to in the last citation is the Netherlands. ICAO presented its findings on 23 June 2000.

The Legal Committee starts by stating the applicable provisions of the LOS Convention, and refers back to its earlier studies on the subject. It then suggests a pragmatic solution, which is inspired by ICAO jurisdiction in the EEZ. ICAO jurisdiction in the EEZ is based on the above-mentioned Article 12 of the Chicago Convention;[36] in practice, it develops ANPs for such, and other areas, which haven been briefly discussed above.

The conclusion is the same as the conclusions drawn in previous studies carried out by ICAO. The coastal state does not have "sovereignty or jurisdiction over the airspace above that airport located on an artificial island, and over the airspace in the approach and take-off corridors […]." Consequently,

> […] the coastal State must negotiate the exclusive use of these portions of the airspace with the other user States in the framework of the Air Navigation Plan (ANP), which will then be subject to the approval of the Council of ICAO in accordance with the applicable amendment procedure. Thus, the value of a traffic right given by a coastal State with respect to an artificial island can be similar to that of a normal traffic right, provided that the exclusive use of the airspace above and around the airport can be successfully negotiated with the other States.[37]

Once approval has been granted by ICAO, the applicable ANP can be changed.

This having been stated, ICAO concludes that, *if* a coastal state has successfully negotiated its arrangements with the concerned states, and *if* approval for such modified arrangements has been given by ICAO, the legal status which has then been created for the benefit of the coastal state does "not result in granting of sovereignty or any exclusive jurisdiction, and would not be permanent or irrevocable."[38]

The solution, which is suggested by ICAO, is both a pragmatic one, and has a legal/technical nature. This is not surprising as ICAO's tasks focus on safety regulation, which has similar characteristics. The report made

34. *Id.*
35. ICAO Legal Committee, United Nations Convention on the Law of the Sea, Implications, if any, for the application of the Chicago Convention, its Annexes and other air law instruments, LC/31-WP/4-4 of 23 June 2000, at 3.
36. *See* Chicago Convention, *supra* note 17.
37. *Supra* note 31, at 4.
38. *Id.*

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by ICAO does not go into the following questions: whether the concerned contracting state is likely to be successful in its negotiations with other states; and to what extent the ICAO Council will be prepared to sanction such modified arrangements.

As to the first question, that is, successful negotiations with other states, the bilateral relationships between the coastal state and its partners will have to be evaluated. ICAO does not touch this subject, which is governed by the regime governing the air policy and economics of air transport. ICAO has no say in these fields.

As to the second point, that is, approval of the modified ANPs, it must be borne in mind that ICAO now has jurisdiction in the EEZ, which, for ICAO, coincides with the "high seas."[39] Obviously, ICAO does not want its own jurisdiction to be affected by granting its contracting states more jurisdiction than they have at present in those areas as a consequence of the presence of airports in the EEZ.

Conflicts pertaining to jurisdiction can also arise under a regime, which takes into account future developments, especially those, which are changing the picture of the EC regime applying to air transport. After all, the contracting state of ICAO applying for ICAO's opinion on this subject matter is an EC member state. That is why the last section of this essay will look into the future, that is, by taking into account EC competencies with respect to air transport.

## 5. Anticipating Future Regimes, with Special Reference to the EC

The above regime, which is based on an interpretation of the *lex lata* in the field of maritime and aviation activities, is valid now, that is, at the turn of the century. If there is to be an airport in the EEZ, it will not be finished before 2015. At that point, the regime may have evolved into a yet unknown *lex ferenda*. Also, the manner in which the said *lex lata* is to be interpreted may have evolved. A crucial factor to be taken into account at that time is the jurisdiction of the EC not only over *intra*-EC relations but also over external relations.

The questions are then, firstly, is the Community prepared to accept that its jurisdiction extends to an airport in the EEZ of one of its member states, secondly, is the Council of transport ministers prepared to accept and to present an airport in the EEZ as a Community airport, and, thirdly, will non-EC states be prepared to accept this airport as a Community airport?

The first question is not only a legal but perhaps even more a policy question. The second question will have to be discussed with the EC Commission, which must prepare a Community stance on the subject; obviously, a reply to this question follows from the reply given to the

39. *See* Section 4.1., *supra*.

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first question. The third question can be dealt with in a formal way, taking into account arguments derived from law of the sea and/or air law, or in a pragmatic way. It is submitted that the EC negotiators, with their more market oriented approach, would probably opt for the more pragmatic approach: what does such an airport add in the 'package' of about 40 airports, next to Munich, Naples, and at that time also Warsaw, to the Community position?

The argument based on convenience will probably also dominate international relations for which the EC has no or not yet external powers. Realism dictates, however, that the air law arguments will not be left untouched in such discussions. It is one step to claim jurisdiction – on arguments derived from law of the sea – but it is another step to have that jurisdiction recognized by other states. Those other states could argue that the matter of traffic rights is not governed by law of the sea but by air law, since traffic rights fall under the heading of aviation relations. To asses the scope of a pragmatic solution, including demand for concessions or even compensation for damages by the aviation partners of the Netherlands, is unpredictable as it depends upon prevailing political and policy circumstances.

From the perspective of public international law, it would be a fascinating challenge to examine all the arguments, which are based on international treaties, some of which have been mentioned above. Furthermore, an examination of, for instance, the Vienna Convention on the Law of the Treaties, the jurisprudence of the International Court of Justice, as well as other sources of international law, could be taken into account in that exercise.

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