KU LEUVEN

FACULTY OF LAW

Academic Year 2018 - 2019

The ambiguous relationship between air transport services and the WTO

Is there a place for air transport in the WTO?

SUPERVISING PROFESSOR:
PROF. DR. G. VAN CALSTER

PAPER SUBMITTED BY
JULIE VAN COILLIE

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SUMMARY

This master thesis focusses on the relationship between air transport services and the WTO. First, the the ambiguous relationship will be examined. Secondly, the question whether there is a place for air transport services in the WTO will be discussed.

Under the WTO, air transport services are governed by a specific annex of the General Agreement on Trade in Services (GATS). Traffic rights and services directly related to the exercise of traffic rights are excluded from the Annex on Air Transport Services (ATS). Only three services are covered and are considered as an exception on the exemption of "*services directly related to the exercise of traffic rights"*. The lack of a definition of *"services directly related to traffic rights"* brought uncertainty to the exact coverage of the Annex ATS. As a consequence, some WTO Members have taken commitments outside the scope of these three covered services. The lack of a common understanding of the interpretation of *"services directly related to the exercise of traffic rights"* results in an ambiguity about the exact coverage of the Annex ATS.

Paragraph 5 Annex ATS gives the WTO members the opportunity and the flexibility to further elaborate the Annex ATS. The purpose of the periodic reviews of the Annex ATS is to further liberalise the air transport services on a multilateral level. However, the question is whether there is a place for air transport services in the WTO. The general principles underlying the WTO framework, mainly the MFN principle, are considered to be irreconcilable with the general principle of 'national sovereignty over air space'.

Despite the irreconcilability, the GATS framework can be an adequate framework to liberalise air transport services. It allows the WTO members to make exemptions on the applicability of the MFN principle. It also offers the WTO members the possibility to decide their own path and pace of liberalisation. The degree of liberalisation depends on the willingness of WTO Members to make commitments regarding the applicability of the NT principle and market access.

Despite the fact that the GATS can provide an adequate framework for liberalizing air transport services, political disagreement between to WTO Members makes it impossible to reach a consensus regarding the implementation of air transport services. So, a full adoption of air transport services, including the traffic rights, within the GATS framework will, in my opinion, not occur in the near future.

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Solo chi sogna può volare

Julie Van Coillie
2 mei 2019

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INTRODUCTION

1. **LIBERALISATION –** Air transport services have played an important role in achieving economic growth and development in the last few decades.[1] The regulation of air transport services consists of a complex structure of bilateral agreements negotiated between states under the Chicago Convention.[2] One of the main principles under the Chicago Convention is the principle of 'national sovereignty over airspace.'[3] The principle of 'national sovereignty over airspace' is often applied to preclude liberalisation.[4] Yet, the air transport industry has expanded tremendously in the last few decades. As a consequence of the expansion of the air transport industry, new trends favouring liberalisation of air transport services are emerging.[5] Liberalisation refers to *"international trade rules which govern how tariff and non-tariff barriers will be reduced or removed between, or among a group of states."* [6]

   Air transport services have mostly been liberalised through bilateral negotiations between states, under the Chicago Convention.[7] The bilateral negotiations, however, do not encourage liberalisation. They are considered restrictive and have led to significant losses of economic efficiency.[8] The question that arises is whether it would be better to fully implement air transport services within the World Trade Organization (WTO). However, air transport services are mostly excluded from the scope of application of the General Agreement on Trade in Services (GATS).[9]

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[1] K. BUTTON and T. SAMANTHA, "International Air Transportation and Economic Development", *Journal of Air Transport Management*, 2000, (209) 209; L. XING, *Air Transport Services in the GATS,* unpublished LL.M thesis, University of Ghent, 2013-2014, p. 1; X., *Air Transport,* The World Bank, *http://www.worldbank.org/en/topic/transport/brief/airtransport* consulted 3 December 2018.

[2] Article 43 Convention on International Civil Aviation, 7 December 1944, 15 UNTS 295, ICAO Doc 7300/6. (later referred as: Chicago Convention); C. FINDLAY and D.K. ROUND, "The 'three pillars of stagnation: challenges for air transport reform", *World T.R.,* 2006*,* (251) 252.

[3] Article 1 Chicago Convention.

[4] Y. ZHAO, "Air Transport Services and WTO in the New Epoch", *ZI.W. 50*, Rotterdam, 2001, (48) 48.

[5] Y. ZHAO, "Liberalisation of Air Transport Services under the Framework of the WTO: Confronting the Challenge of the Twenty-First Century*", Asian Y.B. Int'l L,* 1998, (3) 8.

[6] C.G DECURTINS, *The air transport review at the WTO: Bilateralism versus Multilateralism*, unpublished PhD thesis International relations, University of Genève, 2007, p. 2.

[7] Article 43 Chicago Convention; C.G. DECURTINS, *The air transport review at the WTO: Bilateralism versus Multilateralism*, unpublished PhD thesis International relations, University of Genève, 2007, p. 2.

[8] R. TIROUAL, "Competition and Subsidies in Air Transport Liberalisation – The UAE – North America Dispute", *Journal of Air Law and Commerce*, 2017, (345) 346.

[9] C.G DECURTINS, *The air transport review at the WTO: Bilateralism versus Multilateralism*, unpublished PhD thesis International relations, University of Genève, 2007, p. 4; C. FINDLAY and D.K. ROUND, "The 'three pillars of stagnation: challenges for air transport reform", *World T.R,* 2006*,* (251) 251; J.A. MARCHETTI and M.ROY, "Summary and overview", in J.A. MARCHETTI and M.ROY (eds.), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, (1) 6.

2. **AMBIGUOUS RELATIONSHIP** – This master thesis focusses on the relationship between air transport services and the WTO. First, the ambiguous relationship between air transport services and the WTO will be examined. Under the WTO, air transport services are governed by a specific annex of the GATS. The Annex on Air Transport Services (Annex ATS). This unique sectorial exclusion is the result of the positions that the WTO members have taken on the topic of multilateral liberalisation of air transport services. The fear of the members to transfer part of their sovereignty to a multilateral agreement was one of the reasons to exclude the largest part of the air transport services from the scope of application of the GATS.[10]

3. **FULL INCLUSION?** – Paragraph 5 Annex ATS gives the WTO members the opportunity and the flexibility to further elaborate the Annex ATS. The intention of the periodic reviews of the Annex ATS is to further liberalize the air transport services on a multilateral level.[11] However, the question is whether there is a place for air transport services in the WTO. In order to give an answer to the second research question, two sub questions will be answered. Firstly, is the GATS an adequate framework for liberalising air transport services? Secondly, is a full inclusion of air transport services likely to occur in the near future?

[10] F. DEVOS, *De vervoerdiensten en het WTO GATS*, unpublised masterthesis Law and Economics, University Ghent/Antwerp, 2010-2011, p. 51; WTO Secretariat, *Guide to the GATS: an overview of issues for further liberalization of Trade in Services,* London, Kluwer International Law, 2001, p. 51.

[11] P.P.C. HAANAPPEL, *The Law and Policy of Air Space and Outer Space. A comparative approach,* Kluwer Law International, 2003, p 151–152; P.P.C. HAANAPPEL, "Regulatory Developments at the European Union and World Trade Organization Levels"*, Air & Space Law*, 2015, (65) 68.

CHAPTER 1. RESEARCH METHOD

4. **FRAMEWORK OF AIR TRANSPORT SERVICES –** In order to understand the ambiguous relationship between air transport services and the WTO, it is relevant to set out the international regulatory framework of air transport services. Chapter 2 will offer a brief overview of the structure of the current regulatory framework of the air transport services. It must be pointed out that it is not an entire outset of the regulatory framework of air transport services. Only relevant parts concerning this paper will be discussed.

First, the Chicago Convention will be discussed in Section I. This multilateral agreement governs the rights and obligations of states with respect to international aviation.[12] One of the main principles under the Chicago Convention is the principle of 'national sovereignty over airspace.'[13] The principle of 'national sovereignty over airspace' also has consequences in the economic field. In particular in the context of market access.[14]

The economic regulation of international air transport services will be discussed in Section II. During the Chicago Conference, no agreement could be reached between the participating states on how to regulate the economic aspects of international air transport services.[15] As a consequence, the economic part of the air transport services are mostly regulated by bilateral air services agreements (ASA).[16] The bilateral ASAs regulate different aspects such as traffic rights; capacity; designation, ownership and control; tariffs and many more.[17] In this paper, the main focus will be on the exchange of traffic rights. A traffic right is a market access right allowing air transport services into the national territory of a state.[18]

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[12] L.WEBER, "The Chicago Convention" in P. S. DEMPSEY and R.S. JAKHU (eds.), *Handbook of Public Aviation Law*, Routledge, London, 2017, (9) 9.
[13] Article 1 Chicago Convention.
[14] A. LYKOTRAFITI, *Liberalisation of International Civil Aviation*, OECD Discussion Paper, 2015, p. 8; P.M DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 45.
[15] J.C. SALAZAR and P. VAN FENEMA, "International air transport agreements" in P.S. DEMPSEY and R.S. JAKHU (eds.), *Handbook of Public Aviation Law,* Routledge, London, 2017, (252) 253.
[16] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 34.
[17] X., *The Bilateral System – how international air services work,* Australian Government: Department of Infrastructure, Regional Development and Cities, *https://infrastructure.gov.au/aviation/international/bilateral_system.aspx* consulted 11 April 2019.
[18] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 57; *ICAO Doc., 9626,* (2016), 222 [manual on the regulation of international air transport].

The gradual development from restrictive bilateral agreements between states to more liberal 'Open Skies' agreements brings us to the question whether the bilateral system is outdated and new multilateral solutions should be pursued. This will be examined in Section III.[19]

5. **WTO AND AIR TRANSPORT SERVICES –** In Chapter 3, the relationship between air transport services and the WTO will be examined. The aim of the WTO will briefly be discussed in the first section. This is a necessary step to take in order to fully understand the following sections. Section II concerns the GATS. But before analysing the legal structure of the GATS. It is relevant to look back at the negotiations during the Uruguay Round. The Uruguay Round negotiations led to the official launching of the GATS. Therefore, examining the negotiations under the Uruguay Round allows us to better understand the current framework of the GATS. After the Uruguay negotiations, the GATS legal structure will be discussed. What is the main purpose of the GATS? What are the basic obligations under the GATS? Are these obligations applicable to the specific annex on air transport services?

Section III will focus on the Annex Air Transport Services (later referred as: Annex ATS). By examining the general carve-out and the scope, a broader understanding about the ambiguity between air transport services and the WTO can be provided. Currently, most part of the air transport services are excluded from the scope of the Annex. However, paragraph 5 of the Annex ATS creates a possibility for change towards a multilateral framework under the GATS.[20] Since the adoption of the Annex ATS, only two reviews have taken place. Analysing the Air Transport Reviews will give an attempt to answering the question whether or not there is a place for air transport services in the WTO.

In order to give an answer to the second research question, two sub questions will be answered. Firstly, is the GATS an adequate framework for liberalising air transport services? Secondly, is a full inclusion of air transport services likely to occur in the near future?

[19] J., TORTICE, *Air Transport Services: International Regulation and Future Prospects for Liberalization*, Industry, Trade and Technology Review*,* 1999, p. 1, *https://www.usitc.gov/publications/ittr/pub3271.pdf* consulted 15 April 2019.
[20] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, 2017, p. 87.

6. **LIBERALISATION OF AIR TRANSPORT SERVICES –** Chapter 4 talks about the liberalisation of air transport services. The economic benefits of liberalisation will briefly be discussed in Section I. Although the economic benefits of liberalisation have long been recognized by a large majority of states, finding consensus on how to liberalise air transport services remains a huge challenge.[21] Section II will briefly mention the main difficulties regarding liberalising air transport services. Keeping the main difficulties in mind, the question whether the GATS can provide in an adequate framework for liberalising air transport services will be answered in Section III. In conclusion, the question whether or not a full inclusion of air transport services is likely to occur in the near future will be answered.

[21] X. FU, T. HOON and A. ZHANG, "Air Transport Liberalization and Its impacts on Airline Competition and Air Passenger Traffic", *Transportation Journal,* 2010, (24) 37; InterVISTAS-EU Consulting Inc., *The Impact of International Air Service Liberalization on Chile,* 2009, p. 5, *https://www.iata.org/publications/economics/reports/chile-report.pdf* consulted 15 April 2019.

CHAPTER 2. REGULATORY FRAMEWORK OF INTERNATIONAL AIR TRANSPORT

7. **INTRODUCTION –** In order to understand the ambiguous relationship between air transport services and the WTO, it is relevant to set out the international regulatory framework of air transport services. Chapter 2 will offer a brief overview of the structure of the current regulatory framework of the air transport services. It must be pointed out that it is not an entire outset of the regulatory framework of air transport services. Only relevant parts concerning this paper will be discussed. First, the Chicago Convention will be discussed in Section I.

I. THE CHICAGO CONVENTION

8. **DURING THE CLOSING STAGES OF WWII –** In 1944, 54 countries came together to discuss the future of international aviation. The conference resulted in the signing of the Chicago Convention. The Chicago Convention entered into force on 4 April 1947. Today, with its 192 members, the Chicago Convention still is the basis for the organisation of global air transport services. It governs the rights and obligations of states with respect to international aviation.[22] This multilateral agreement is considered the "Magna Carta" of Air law.[23] One of the main principles under the Chicago Convention is the principle of 'national sovereignty over airspace.'[24]

[22] L.WEBER, "The Chicago Convention" in P. S. DEMPSEY and R.S. JAKHU, *Handbook of Public Aviation Law*, Routledge, London, 2017, (9) 9.
[23] L.WEBER, "The Chicago Convention" in P. S. DEMPSEY and R.S. JAKHU, *Handbook of Public Aviation Law*, Routledge, London, 2017, (9) 9; P.S DEMPSEY, *Public International Air Law,* Institute and Centre of Air & Space Law, McGill University, 2017, p. 964; L. XING, Air Transport Services in the GATS, unpublished LL.M thesis, University of Ghent, 2013 – 2014, p 3.
[24] Article 1 Chicago Convention.

§1. Basic principles

9. **THE PRINCIPLE OF 'NATIONAL SOVEREIGNTY OVER AIRSPACE' –** Article 1 of the Chicago Convention states that *"each state has complete and exclusive sovereignty over the air space above its territory".*[25] As a result of the principle of 'national sovereignty over airspace', not a single foreign aircraft can fly over or into the national territory of a state without breaching the national sovereignty of that state.[26] The principle of 'national sovereignty over airspace' also has consequences in the economic field. In particular in the context of market access.[27] (*infra* nr. 53)

10. **THE PRINCIPLE OF 'ECONOMIC SOVEREIGNTY OVER AIRSPACE' –** Article 6 of the Chicago Convention, also called the principle of 'economic sovereignty over airspace', states that "*no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other organization of that State, and in accordance with the terms of such permission or authorization."*[28] The exchange of commercial rights for scheduled international air transport services must be granted by a "*special permission",* traditionally given by bilateral air services agreements (ASAs) *(infra* nr. 18).[29]

[25] Article 1 Chicago Convention.
[26] H. A. FAYED and J.W. ESTLAKE, "Globalization of air transport: the challenges of the GATS", *Tourism Economics,* 2002, (431) 437.
[27] A. LYKOTRAFITI, *Liberalisation of International Civil Aviation*, OECD Discussion Paper, 2015, p. 8; P.M DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 45.
[28] Article 6 Chicago Convention; A. LYKOTRAFITI, *Liberalisation of International Civil Aviation,* OECD Discussion Paper, 2015, p. 8.
[29] P.M DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 45.

§2. International Civil Aviation Organization (ICAO)

11. **ICAO –** The ICAO is a UN specialized agency, established by the Chicago Convention.[30] Article 44 of the Chicago Convention lays down the objectives of the ICAO. The development of international air transport is ICAO's main responsibility.[31] The ICAO does not draft or conclude treaties but only provides a framework for states to safely operate international air transport services. [32]

12. **THE ECONOMIC FIELD –** However, the authority of ICAO in the economic field is limited. The only objectives having a link with the economic field are found in article 44 (d), (e) and (f) of the Chicago Convention,[33] which contains the following: "*meet the needs of the peoples of the world for safe, regular, efficient and economical air transport"*[34]*;* "*prevent economic waste caused by unreasonable competition"*[35]*; insure … that every contracting State has a fair opportunity to operate international airlines."*[36] Nevertheless, these principles are not specified in by ICAO in binding standards.[37]

[30] Article 43 – 66 Chicago Convention; X., *About ICAO,* ICAO Uniting Aviation, *https://www.icao.int/about-icao/Pages/default.aspx* consulted 28 April 2019.
[31] Article 44 Chicago Convention; X, *The Bilateral System – how international air services work,* Australian Government: Department of Infrastructure, Regional Development and Cities, *https://infrastructure.gov.au/aviation/international/bilateral_system.aspx* consulted 11 April 2019.
[32] International Transport Forum, *Air Service Agreement Liberalisation and Airline Alliances*, OECD Discussion Paper, 2014, p. 13, *https://www.itfoecd.org/sites/default/files/docs/14airserviceagreements.pdf*, consulted 12 April 2019.
[33] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 34
[34] Article 44 (d) Chicago Convention.
[35] Article 44 (e) Chicago Convention.
[36] Article 44 (f) Chicago Convention.
[37] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 34.

§3. Membership

13. **ONLY SOVEREIGN STATES –** The conditions to become a member of the Chicago Convention and the ICAO are found in the articles 92 and 93 of the Chicago Convention.[38] It therefore follows that no other parties than sovereign states can enjoy full membership. International organizations can only obtain an observer status in the bodies of the ICAO. Only by amending Chicago Convention, full membership for international organizations could be obtained. [39] But "*any proposed amendment to this Convention must be approved by a two-thirds vote of the Assembly, meaning all the members.*"[40]

[38] L. WEBER, "The Chicago Convention" in P. S. DEMPSEY and R.S. JAKHU, *Handbook of Public Aviation Law*, Routledge, London, 2017, (9) 30.
[39] Article 94 Chicago Convention; L. WEBER, "The Chicago Convention" in P. S. DEMPSEY and R.S. JAKHU (eds.), *Handbook of Public Aviation Law*, Routledge, London, 2017, (9) 30.
[40] Article 94 Chicago Convention; L. WEBER, "The Chicago Convention" in P. S. DEMPSEY and R.S. JAKHU (eds.), *Handbook of Public Aviation Law*, Routledge, London, 2017, (9) 30.

II. ECONOMIC REGULATION OF INTERNATIONAL AIR TRANSPORT SERVICES

14. **INTRODUCTION –** The economic regulation of international air transport services will be discussed in Section II. During the Chicago Conference, no agreement could be reached between the participating states on how to regulate the economic aspects of international air transport services.[41] As a consequence, the economic part of the air transport services are mostly regulated by bilateral air services agreements (ASA).[42] The bilateral ASAs regulate different aspects such as traffic rights; capacity; designation, ownership and control; tariffs and many more.[43] In this paper, the main focus will be on the exchange of traffic rights.

§1. Traffic rights

15. **MARKET ACCESS RIGHT –** The principle of 'economic sovereignty over airspace' [44] requires a "*special permission*" of a state before a foreign airline can have market access into a state's national territory.[45] The rights granted by states and exchanged under bilateral ASAs, are known as 'traffic rights'.[46] A traffic right is a market access right allowing air transport services into the national territory of a state.[47] The traffic rights are translated into the so called 'Freedom of the Air' developed by the ICAO in order to facilitate the negotiations between states. [48]

[41] J.C. SALAZAR and P. VAN FENEMA, "International air transport agreements" in P.S. DEMPSEY and R.S. JAKHU (eds.), *Handbook of Public Aviation Law,* Routledge, London, 2017, (252) 253.
[42] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 34.
[43] X., *The Bilateral System – how international air services work,* Australian Government: Department of Infrastructure, Regional Development and Cities, *https://infrastructure.gov.au/aviation/international/bilateral_system.aspx* consulted 11 April 2019.
[44] Article 6 Chicago Convention.
[45] J.C. SALAZAR and P. VAN FENEMA, "International air transport agreements" in P.S. DEMPSEY and R.S. JAKHU (eds.), *Handbook of Public Aviation Law,* Routledge, London, 2017, (252) 253.
[46] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 57; *ICAO Doc., 9626,* Manual on the regulation of international air transport, 2016, 222 p., *https://www.icao.int/Meetings/a39/Documents/Provisional_Doc_9626.pdf* consulted 25 April 2019.
[47] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 57; *ICAO Doc., 9626,* Manual on the regulation of international air transport, 2016, 222 p., *https://www.icao.int/Meetings/a39/Documents/Provisional_Doc_9626.pdf* consulted 25 April 2019.
[48] X., *Freedoms of the Air explained – Can an airline fly anywhere?,* The Aviation Blog, 2017, *https://pilotstories.net/freedoms-of-the-air-explained/* consulted 26 April 2019; X., *International Trade in Air Transport: Recent Developments and Policy Issues,* World Trade Organization, 2005, p. 230, *https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr05-3b_e.pdf* consulted 24 April 2019.

16. **THE FREEDOMS OF THE AIR –** Altogether, the ICAO developed nine 'freedoms of the air'. However, only the third and fourth 'freedoms of the air' are dealing with traffic rights. The third freedom grants "*the right to carry passengers from the territory of the State whose nationality the airlines possess or where the airline is established, into a foreign territory."* And the fourth freedom grants "*the right to carry passengers from the territory into the territory of the State whose nationality the airlines possesses or where the airline is established."*[49]

17. **SCHEDULED INTERNATIONAL AIR SERVICE –** Important to note is that traffic rights are only negotiated for scheduled international air service.[50] A scheduled international air service is *"an air service open to use by the general public and operated according to a published timetable or with such a regular frequency that it constitutes an easily recognizable systematic series of flights."*[51] The exchange of traffic rights are traditionally given by bilateral air services agreements (ASAs). Currently, More than 4000 bilateral ASAs currently have been concluded between states.[52]

[49] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 45, p. 61; X., *Freedoms of the Air explained – Can an airline fly anywhere?,* The Aviation Blog, 2017, *https://pilotstories.net/freedoms-of-the-air-explained/* consulted 26 April 2019.
[50] P.M DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 45.
[51] *ICAO Doc., 9626,* (2016), 194 [manual on the regulation of international air transport]; P.M DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 45.
[52] P.M DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 45.

§2. Bilateral ASA's

18. **RECIPROCITY –** The objective of the bilateral ASA's is to both open up each other's national airspace and to negotiate the conditions on market access for the operation of international air transport services, based on the principle of reciprocity.[53] The principle of reciprocity allows states to conclude whatever they want; with whomever they want. As a consequence, the rights given to one state are often significantly different from the rights given to another state.[54]

19. **THE BERMUDA AGREEMENTS –** The 'Bermuda Agreements'[55], two bilateral ASAs negotiated between the US and the UK, became a model followed by other states.[56] A typical Bermuda Agreement is "*characterized by a high level of government intervention and control in respect of capacity, fares, frequency, routes and type of planes."*[57] Since the 'Bermuda Agreements' are functioning as a model for further negotiations, the exact content remains under the full competence of the negotiating states.[58] The bilateral ASAs, however, do not encourage liberalisation. They are considered restrictive and have led to significant losses of economic efficiency.[59] As a result of these restrictive agreements, states have limited choice and there is barely an opportunity for competition. The restriction to the continued growth of air traffic have led to the adoption of a more liberal agreement, also known as the 'Open Skies'.[60]

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[53] C.G. DECURTINS, *The air transport review at the WTO: Bilateralism versus Multilateralism*, unpublished PhD thesis International relations, University of Genève, 2007, p. 64; P.M DE LEON, *Introduction to Air Law,* tenth edition, Wolters Kluwer, 2017, 45.

[54] L. ZHANG, "The Role of Dispute Settlement Body in the World Trade Organization in the Aviation Industry – in the Time of Bombardier Case"*, Air and Space Law*, 2018, (1) 8.

[55] Bermuda I (1946) and Bermuda II (1977).

[56] R. WOLFRUM, P.-T. STOLL and C. FEINAUGLE, *WTO – Trade in Services,* Martinues Nijhoff Publishers, Leiden – Boston, 2008, p. 603.

[57] R. WOLFRUM, P.-T. STOLL and C. FEINAUGLE, *WTO – Trade in Services,* Martinues Nijhoff Publishers, Leiden – Boston, p. 603.

[58] R. WOLFRUM, P.-T. STOLL and C. FEINAUGLE, *WTO – Trade in Services,* Martinues Nijhoff Publishers, Leiden – Boston, p. 603.

[59] R. TIROUAL, "Competition and Subsidies in Air Transport Liberalization – The UAE – North America Dispute", *Journal of Air Law and Commerce 82*, 2017, (345) 346.

[60] Uniting Aviation, *Creating Opportunities Through Open Skies Agreements,* 2018, *https://www.unitingaviation.com/strategic-objective/economic-development/creating-opportunities-through-open-skies-agreements/* consulted 12 April 2019.

§3. From 'Bermuda Agreements' to 'Open Skies'

20. **TOWARDS A MORE LIBERAL APPROACH –** In the early '90's the United States and the Netherlands entered into a new agreement. It was a less restrictive agreement than the previous bilateral agreements based on the 'Bermuda Agreements'.[61] The 'Open Skies' agreement between the US and the Netherlands was a new kind of bilateral agreement and replaced the 'Bermuda Agreements' as model followed by other states.[62] Whereas the restrictive 'Bermuda Agreements' only exchange rights to enter into each other's national airspace and market, the 'Open Skies' agreements are a system whose core element is the regulation of competition between air transport services.[63] Contrary to the bilateral ASA, the Open Skies agreements allow the free market to establish the prices.[64] Due to this liberal approach, it was a whole lot easier for the air transport industry to expand new markets.[65]

21. **PREMINATELY BILATERAL –** This type of agreements indicates a shift toward the direction of enhanced flexibility and liberalisation.[66] The 'Open Skies' agreements enable full market access without restrictions on the traffic rights regulated in the third and fourth 'freedom of the air'.[67] Despite the fact that the 'Open Skies' provides in full market access to the traffic rights, it would not be appropriate to talk about liberalisation *sensu stricto.* Liberalisation *sensu stricto* creates a 'level-playing field' meaning that all trading conditions in all parts of the world are the same. Therefore, no market access restrictions to any destination. Yet, with the 'Open Skies' agreements, the 'level-playing field' is not achieved because they are still predominately bilateral.[68]

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[61] R. WOLFRUM, P.-T. STOLL and C. FEINAUGLE, *WTO – Trade in Services,* Martinues Nijhoff Publishers, Leiden – Boston, p. 603.
[62] H.A FAYED, and J.W. ESTLAKE, "Globalization of air transport: the challenges of the GATS", *Tourism Economics,* 2002, (431) 437.
[63] C.G. DECURTINS, *The air transport review at the WTO: Bilateralism versus Multilateralism*, unpublished PhD thesis International relations, University of Genève, 2007, p. 64; P.M DE LEON, *Introduction to Air Law,* tenth edition, Wolters Kluwer, 2017, pp. 45 and 72.
[64] International Transport Forum, *Air Service Agreement Liberalisation and Airline Alliances*, OECD Discussion Paper, 2014, p. 13, *https://www.itfoecd.org/sites/default/files/docs/14airserviceagreements.pdf*, consulted 12 April 2019.
[65] Uniting Aviation, *Creating Opportunities Through Open Skies Agreements,* 2018, *https://www.unitingaviation.com/strategic-objective/economic-development/creating-opportunities-through-open-skies-agreements/* consulted 12 April 2019.
[66] H. ANAA FAYED, and J.W. ESTLAKE, "Globalization of air transport: the challenges of the GATS", *Tourism Economics,* 2002, (431) 437.
[67] Uniting Aviation, *Creating Opportunities Through Open Skies Agreements,* 2018, *https://www.unitingaviation.com/strategic-objective/economic-development/creating-opportunities-through-open-skies-agreements/* consulted 26 April 2019.
[68] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, 2017, p. 73; P. LATRILLE, "Air transport liberalisation: a world apart" in J.A. MARCHETTI and M.ROY (eds.), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, (264) 264; H. WASSENBERG, "Commercial Aviation Law 1998, Multilateralism versus Bilateralism", *Air & Space Law,* 1998, (22) 23.

III. TOWARD A MULTILATERAL FRAMEWORK?

22. **INTRODUCTION –**Increasingly, states recognised the benefits of liberalisation.[69] This led to the gradual development from restrictive bilateral agreements between states to more liberal 'Open Skies' agreements.[70] This was discussed in the previous section. Now, the question arises whether the bilateral system is outdated and new multilateral solutions should be pursued.[71] In the context of this paper, more specifically whether the multilateral framework of the WTO should be pursued.

§1. WTO as a multilateral framework?

23. **MULTILATERAL LIBERALISATION –** A large majority states, such as Australia, New-Zeeland and the European Union, recognised the benefits of liberalisation and want to pursue this on a multilateral level.[72] At this stage, it can be stated that the ICAO does not provide in an adequate framework to encourage liberalisation of air transport services.[73] *(supra* nr. 13) Perhaps the framework of the WTO can be a valid alternative for liberalising air transport services on a multilateral level?

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[69] InterVISTAS-EU Consulting Inc., *The Impact of International Air Service Liberalization on Chile,* 2009, p. 5, *https://www.iata.org/publications/economics/reports/chile-report.pdf* consulted 26 April 2019*;* X., *What is the WTO?,* World Trade Organization, *https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm*, consulted 26 April 2019.

[70] J., TORTICE, *Air Transport Services: International Regulation and Future Prospects for Liberalization*, Industry, Trade and Technology Review*,* 1999, p. 1 , *https://www.usitc.gov/publications/ittr/pub3271.pdf* consulted 15 April 2019.

[71] H. A. FAYED and J.W. ESTLAKE, "Globalization of air transport: the challenges of the GATS", *Tourism Economics,* 2002, (431) 446.

[72] *WTO Doc.,* S/C/M/84, (2006), § 5, § 10, § 13 [report of the First session of the Review mandated under Paragraph 5 of the Annex on Air Transport Services held on 12 September 2006]; InterVISTAS-EU Consulting Inc., *The Impact of International Air Service Liberalization on Chile,* 2009, p. 5, *https://www.iata.org/publications/economics/reports/chile-report.pdf* consulted 26 April 2019*;* X., *What is the WTO?,* World Trade Organization, *https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm*, consulted 26 April 2019.

[73] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 34.

The WTO is the only global international organization dealing with the rules of trade between nations.[74] It offers a framework to encourage liberalisation of trade in services.[75] Specific articles concerning liberalisation for trade in services can be found in part IV of the GATS.[76] However, a problem remains with regard to air transport services as they are mostly excluded from the scope of application of the GATS.[77]

24. **SECTOR SPECIFIC ANNEX –** The rationale for agreeing to an exclusion of most part of air transport services is to be found in the deeply rooted reciprocal bilateral agreements that have characterized the regulation of air transport services worldwide since the Chicago Convention of 1944.[78] Therefore, air transport services are regulated in a specific annex within the GATS.[79]

Despite the fact that the economic side of air transport services is still regulated by bilateral international agreements concluded between states, paragraph 5 of the Annex ATS creates a possibility for change towards a multilateral framework under the GATS.[80] But is there a place for air transport services in the WTO? This will be examined in the following chapter.

[74] *The WTO,* World Trade Organization, *https://www.wto.org/english/thewto_e/thewto_e.htm* consulted 12 April 2019.
[75] A.R. AMANA, "The liberalization of air services: prospects and challenges for the Indian economy", *Journal of International Trade Law and Policy,* 2015, (49) 49.
[76] Article XIX – XXI General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, *1869 UNTS 183,* 33 ILM 1167. (later referred as GATS)
[77] C.G DECURTINS, *The air transport review at the WTO: Bilateralism versus Multilateralism*, unpublished PhD thesis International relations, University of Genève, 2007, p. 4; C. FINDLAY and D.K. ROUND, "The 'three pillars of stagnation: challenges for air transport reform", *World T.R,* 2006*,* (251) 251; J.A. MARCHETTI and M.ROY, "Summary and overview", in J.A. MARCHETTI and M.ROY, *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, (1) 6.
[78] P. LATRILLE, "Air transport liberalisation: a world apart" in J.A. MARCHETTI and M.ROY, *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, (264) 273.
[79] Annex on Air Transport Services.
[80] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, 2017, p. 87.

CHAPTER 3. WTO AND AIR TRANSPORT SERVICES

25. **INTRODUCTION –** In Chapter 3, the relationship between air transport services and the WTO will be examined. The aim of the WTO will briefly be discussed in the first section. This is a necessary step to take in order to fully understand the following sections.

I. THE AIM OF WTO

§1. Philosophy

26. **ORIGIN –** The WTO, a fully-fledged international organization, came into being in 1995. It is a sequel of the older GATT's system of 1948.[81] As a member-driven international organization, it is a forum for negotiation where states have a far-going integrated role and a place to settle trade disputes.[82] With the underlying philosophy that *"open markets and non-discrimination are favourable to the national welfare of all countries"*[83] the WTO has adopted some general principles to accomplish this philosophy.[84]

[81] M. EHRENBECK, "GATS Annex on Air Transport Services and the Aviation Industry's Response", *S. Afr. Y.B., Int'l L*, 2004, (217) 218.
[82] X, *what is the World Trade Organization*, World Trade Organization, < http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm> accessed 7 November 2018.
[83] B.M. HOEKMAN and P.C. MAVROIDIS, *The World Trade Organization: Law, economics and politics,* Second edition, Global Institutions, Routledge, London, New York, 2016, p 1.
[84] B.M. HOEKMAN and P.C. MAVROIDIS, *The World Trade Organization: Law, economics and politics,* Second edition, Global Institutions, Routledge, London, New York, 2016, p 1.

27. **UNDERLYING PRINCIPLES –** The most favoured nation (MFN) principle, the national treatment (NT) principle and the market access clause are the general principles underlying the entire WTO trading system.[85] These general principles will be discussed within the applicable WTO agreement. Since air transport services are considered to be a service, the applicable agreement for air transport under the WTO is the GATS.[86] However, air transport services are mostly excluded from the scope of application of GATS.[87] Air transport services are regulated in a specific annex attached to GATS.[88] The Annex ATS will be discussed in section III of this chapter.

Briefly, within the GATS agreement, the MFN principle *"prohibits a country from discriminating between and among other countries."* [89] The NT principle *"prohibits a country from negatively discriminating against foreign countries."*[90] At last, the market access clause ensures that *"each member country shall grant services and service suppliers of any other member country treatment no less favourable than provided for under the terms, limitations and conditions agreed and specified in its Schedule."*[91]

[85] M. EHRENBECK, *G*ATS Annex on Air Transport Services and the Aviation Industry's Response*, S. Afr. Y.B., Int'l L*, 2004, (217) 217.
[86] Article I (1) GATS.
[87] C.G DECURTINS, *The air transport review at the WTO: Bilateralism versus Multilateralism*, unpublished PhD thesis International relations, University of Genève, 2007, p. 4; C. FINDLAY and D.K. ROUND, "The 'three pillars of stagnation: challenges for air transport reform", *World T.R,* 2006*,* (251) 251; J.A. MARCHETTI and M.ROY, "Summary and overview", in J.A. MARCHETTI and M.ROY, *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, (1) 6.
[88] Annex on Air Transport Services
[89] Article II (1) GATS; P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 306.
[90] Article XVII GATS; P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 306.
[91] Article XVI (1) GATS.

§2. Membership

28. **MEMBERSHIP –** *"Any State or separate customs territory possessing the full autonomy in the conduct of its external commercial relations… may accede this Agreement."*[92] It therefore follows that state sovereignty is not a condition for membership, so the European Union is a member of WTO.[93] The European Union can, on behalf of the member states, negotiate and conclude agreements concerning services.[94] Compared with the conditions to obtain membership of the Chicago Convention and the ICAO *(supra* nr.13), where no other parties than sovereign states can enjoy full membership. [95]

§3. Institutional structure

29. **OVERVIEW –** The institutional structure is set out in Article IV of the WTO Agreement. At the highest level, there is the Ministerial Conference. All members of the WTO are represented in the Ministerial Conference.[96] At the second level, a General Council is established. The General Council functions both as Dispute Settlement Body and as Trade Policy Review Body.[97] At the level below the General Council, specialised councils are established.[98] In this paper, the examination of the specialised councils is limited to the Council of Trade in Services.

[92] Article XII Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, *1867 UNTS 154,* 33 ILM 144. (after referred as: WTO Agreement)
[93] J. JACKSON, *The World Trade Organization. Constitution and Jurisprudence,* Routledge, London, 1998, p. 48; J. WOUTERS and B. DE MEESTER, *The World Trade Organization: A Legal and Institutional Analysis,* Intersentia, 2007, p. 168.
[94] Article 207 Treaty on the Functioning of the European Union (consoled version), 13 December 2007, *OJ C 326,* 26 October 2012; J. WOUTERS and B. DE MEESTER, *The World Trade Organization: A Legal and Institutional Analysis,* Intersentia, 2007, p. 169.
[95] Article 94 Chicago Convention; L. WEBER, "The Chicago Convention" in P. S. DEMPSEY and R.S. JAKHU, *Handbook of Public Aviation Law*, Routledge, London, 2017, (9) 30.
[96] Article IV (1) WTO Agreement; P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 128 - 129.
[97] Article IV (2) (3) (4) WTO Agreement; P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 129.
[98] Article IV (5) WTO Agreement; P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 134.

30. **COUNCIL OF TRADE IN SERVICES –** The establishment of the Council of Trade in Services is provided in Article IV (5) of the WTO Agreement. The Council of Trade in Services is a specialised council that operates under the general guidance of the General Council. [99] It is responsible for facilitating the operation of the GATS. Fulfilling this task by overseeing the implementation of the GATS and reporting information to the General Council. The Council of Trade in Services is also responsible for the periodic review of the Annex on Air Transport Services. [100] (*infra* nr. 60)

§4. Decision-making in the WTO

31. **CONSENSUS –** Article IX (1) of the WTO Agreement states that *"the WTO shall continue the practice of decision-making by consensus."*[101] However, if no consensus can be reached, the WTO agreement also provides that the matter at issue should than be decided by voting. [102] Although the WTO agreement includes this possibility, it is very unlikely for bodies to take decisions by voting. In practice, WTO decisions are taken by consensus.[103] The consensus principle considered the heart of WTO trading system, ensuring the participation of all WTO Members.[104] However, decision-making by consensus on sensitive aspects can work paralyzing.[105]

[99] P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 134.
[100] P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 134; X., *Council for Trade in Services,* Office of the United States Trade Representative, *https://ustr.gov/trade-agreements/wto-multilateral-affairs/-world-trade-organization/council-trade-services* consulted 28 April 2019; X., *The Services Council, its Committees and other subsidiary bodies,* World Trade Organization, *https://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm* consulted 28 April 2019.
[101] Article XI (1) WTO Agreement.
[102] Article XI (1) WTO Agreement; P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 146.
[103] P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 151.
[104] P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 151.
[105] P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 162.

II. GATS

32. **INTRODUCTION –** Section II concerns the GATS. But before analysing the legal structure of the GATS. It is relevant to look back at the negotiations during the Uruguay Round. The Uruguay Round negotiations led to the official launching of the GATS. Therefore, examining the negotiations under the Uruguay Round allows us to better understand the current framework of the GATS. After the Uruguay negotiations, the GATS legal structure will be discussed. What is the main purpose of the GATS? What are the basic obligations under the GATS? Are these obligations applicable to the specific annex on air transport services?

§1. Philosophy

33. **1 JANUARY 1995 –** The contribution of international trade in services to economic growth and development increased tremendously over the years.[106] However, a multilateral agreement governing trade in services did not exist until 1 January 1995. From that moment, the GATS entered into force. The GATS was *"the first, and only, multilateral agreement aimed at the liberalisation of international trade in services."*[107] This multilateral agreement is one of the three main pillars of the WTO system,[108] and implements the general principles of the WTO system to trade in services. The GATS is applicable for all WTO member states.[109]

34. **PURPOSE –** The ideal goals of the GATS are *"to create a credible and reliable system of international trade rules, to ensure fair and equitable treatment of all participants and to promote trade and development through liberalisation."*[110] Beside the important achievement of providing a conceptual innovation, the GATS in addition, established a novel framework facilitating negotiations on trade in services.[111]

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[106] N. F. DIEBOLD, *Non-discrimination in International Trade in Services*, Cambridge, 2010, p. 1.
[107] N. F. DIEBOLD, *Non-discrimination in International Trade in Services*, Cambridge, 2010, p. 1.
[108] GATT (goods), GATS (services), TRIPS (intellectual property).
[109] B.M. HOEKMAN and P.C. MAVROIDIS, *The World Trade Organization: Law, economics and politics,* second edition, Global Institutions, Routledge, London, New York, 2016, p 68; J.A. MARCHETTI and P.C. MAVROIDIS, "What are the main challenges for the GATS framework? Don't talk about revolution", *E.B.O.R.* 2004, (511) 512; X., *Liberalisation of Air Transport and the GATS,* IATA Discussion Paper, 1999, p. 1, *https://www.wto.org/english/tratop_e/serv_e/iacposit41.pdf* consulted 30 November 2018.
[110] X, *The General Agreement on Trade in Services: objectives, coverage and disciplines,* World Trade Organization, *https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm* consulted 4 April 2019.
[111] J.A. MARCHETTI and M.ROY, "Services liberalisation in the WTO and in PTAs" in J.A. MARCHETTI and M.ROY, *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, (61) 62-63.

35. **URUGUAY ROUND NEGOTIATIONS –** The creation of the GATS did not come out of the blue. It is a result of long-standing negotiations completed under the Uruguay Round. The Uruguay Round negotiations (1986 – 1994) were the 8th round of Multilateral Trade negotiations undertaken within the framework of the GATT 1948.[112] These negotiations are seen as one of the longest and most difficult economic negotiations to ever occur.[113] Next to the adoption of the GATS, the Uruguay Round negotiations led to the creation of the WTO as a fully-fledged international organization.[114] However, in this paper, our main focus will be on the negotiations that led to the adoption of the GATS.

§2. The Uruguay Round

36. **PURPOSE –** Since the contribution of international trade in services to the economic growth and development increased tremendously over the years, the contracting parties felt the urge to negotiate trade in services on a multilateral level.[115] The contracting parties of the Uruguay Round negotiations wanted to diminish or eliminate barriers and disruptions in trade in services. Similar to what was done with trade in goods.[116] The priority was to *"create a multilateral regulatory framework defining common objectives and mutually agreed disciplines, on the basis of which the process of progressive liberalisation can be carried out."*[117] However, the opposite positions of the contracting parties made it difficult to agree on the scope of the new multilateral agreement.[118] There were three fundamental issues where contracting parties had diametrical opposite views.[119]

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[112] G. AVERSA, *Uruguay Round,* Bankpedia *http://www.bankpedia.org/index.php/en/130-english/u/23844-uruguay-round* consulted 28 March 2019.
[113] THE WTO SECRETARIAT, *Guide to the Uruguay Round Agreements,* Kluwer Law International, 1999, v.
[114] G. AVERSA, *Uruguay Round,* Bankpedia *http://www.bankpedia.org/index.php/en/130-english/u/23844-uruguay-round* consulted 28 March 2019.
[115] N. F. DIEBOLD, *Non-discrimination in International Trade in Services*, Cambridge, 2010, p. 1.
[116] T. P. STEWART, *The GATT Uruguay Round: A negotiating history (1986 – 1992). Volume II: Commentary*, Kluwer Law and Taxation Publishers, Boston, 1993, p. 2342.
[117] R.J. KROMMENACKER, "Multilateral Services Negotiations: From Interest-Lateralism to Reasoned Multilateralism in the Context of the Servicization of the Economy" in E-U. PETERSMANN and M. HILF, *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems,* Kluwer Law and Taxation Publishers, Boston, 1988, (455) 459.
[118] J.A. MARCHETTI and P.C. MAVROIDIS, "The Genesis of the GATS", *EJIL* 22, 2011, (689) 719.
[119] T. P. STEWART, *The GATT Uruguay Round: A negotiating history (1986 – 1992). Volume II: Commentary*, Kluwer Law and Taxation Publishers, Boston, 1993, p. 2360.

37. **THREE FUNDEMENTAL ISSUES –** The first issue was about the "*scope of the framework agreement"*. Whether it should be an agreement that covers all services sectors or not.[120] There was a divergence between the 'universal approach' and the 'sectoral approach'. The 'universal approach' as the word suggest, means that all services sectors should be covered by the GATS. The 'sectoral approach' means that certain services should be excluded.[121] Eventually, it was the 'universal approach' that gained most support. The GATS, therefore, covers all services "*except services supplied in the exercise of governmental authority."*[122]

The second issue was about "*the structure of the agreement"*. In particular, whether the general principles underlying the WTO framework should be included.[123] (*supra* nr. 27) Some contracting parties did not want the above-mentioned general principles to apply to trade in services. While other contracting parties found it important to apply the general principles to trade in services.[124] Eventually, the general principles underlying the WTO framework have been transferred into the GATS agreement. (*infra* nr. 49, 55 – 56)

Thirdly, a deal was needed on "*the instrumental issues."* Most importantly, the question how to define 'services'. During the negotiations, it was very difficult to conclude an adequate definition that every contracting party could agree too.[125]

38. **COMPROMISE –** It took the contracting states seven and a half years of negotiations before they could reach a compromise. The GATS has not led to substantial liberalisation of trade in services.[126] But the fact that the contracting parties wanted to include trade in services in the Uruguay Round, shows us that there is a will to liberalize trade in services on a multilateral level.[127]

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[120] T. P. STEWART, *The GATT Uruguay Round: A negotiating history (1986 – 1992). Volume II: Commentary*, Kluwer Law and Taxation Publishers, Boston, 1993, p. 2360.
[121] T. P. STEWART, *The GATT Uruguay Round: A negotiating history (1986 – 1992). Volume II: Commentary*, Kluwer Law and Taxation Publishers, Boston, 1993, p. 2364.
[122] Article I (3) (b) GATS; X, *GATS: Facts and fiction. The Structure of the GATS,* World Trade Organization, *https://www.wto.org/english/tratoP_e/serv_e/gats_factfiction4_e.htm* consulted 16 April 2018.
[123] W. VON DEWITZ, "Services and the Uruguay Round: Issues Raised in Connection with Multilateral Action on Services: A Comment", E-U. PETERSMANN and M. HILF, *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems,* Kluwer Law and Taxation Publishers, Boston, 1988, (475) 477.
[124] C.G. DECURTINS, *The air transport review at the WTO: Bilateralism versus Multilateralism*, unpublished PhD thesis International relations, University of Genève, 2007, p. 67.
[125] R. ADLUNG, A. MATTOO, "The GATS" in A. MATTOO, R. STERN and G. ZANINI (eds.), *A handbook of International Trade in Services,* Oxford University Press, Oxford, 2008, (48) 49.
[126] J.A. MARCHETTI and M.ROY, "Services liberalisation in the WTO and in PTAs" in J.A. MARCHETTI and M.ROY, *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, (61) 62-63.
[127] C.G. DECURTINS, *The air transport review at the WTO: Bilateralism versus Multilateralism*, unpublished PhD thesis International relations, University of Genève, 2007, p. 64.

§3. The Uruguay Round and Air Transport Services

39. **NO WILLINGNESS –** The development from restrictive bilateral agreements between states to more liberal 'Open Skies' agreements is an indication that the air transport services sector is gradually evolving towards a liberalised framework.[128] The Uruguay Round negotiations could have been an opportunity to liberalise international air transport services on a multilateral level.[129] Yet, the WTO members did not want to undertake significant changes regarding air transport. They wanted to stick to the bilateral agreements, governed by arrangements negotiated under the ICAO framework.[130]

One argument was that the ICAO framework has far more reliability and expertise regarding air transport services than the WTO.[131] And why, include international air transport services under the scope of the GATS, when there is already a framework regulating air transport services.[132] However, in the economic field, the competences of ICAO in the are limited.[133] Thus, some contracting parties saw an opportunity to maximize the economic benefits of air transport services through a multilateral liberalisation under the framework of the GATS.[134]

40. **SECTOR SPECIFIC ANNEX –** The opposite views of the contracting parties resulted in the adoption of the Annex on Air Transport Services within the GATS. The Annex ATS was a compromise between those who were sceptic about the application of the GATS to air transport services and those who saw it as an opportunity to encourage liberalisation of air transport services on a multilateral level. [135] The Annex ATS will be discussed in Section III.

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[128] J., TORTICE, *Air Transport Services: International Regulation and Future Prospects for Liberalization*, Industry, Trade and Technology Review, 1999, p. 1, *https://www.usitc.gov/publications/ittr/pub3271.pdf* consulted 15 April 2019; InterVISTAS-EU Consulting Inc., *The Impact of International Air Service Liberalization on Chile,* 2009, p. i, *https://www.iata.org/publications/economics/reports/chile-report.pdf* consulted 15 April 2019.
[129] W. HUBNER and P. SAUVE, "Liberalization scenarios for International Air Transport", *JWT,* 2001*,* (973) 975.
[130] F. DEVOS, *De vervoerdiensten en het WTO GATS*, unpublised masterthesis Law and Economics, University Ghent/Antwerp, 2010-2011, p. 56.
[131] X, *Assessment by the International Transport Workers' Federation (ITF) Civil Aviation Section on the TISA Annex on Air Transport Services*, year unknown, p. 1-2, *https://wikileaks.org/tisa/air-transport/analysis/Analysis-TiSA-Air-Transport-Services-Annex.pdf*, consulted 15 April 2019.
[132] H. A. FAYED and J.W. ESTLAKE, "Globalization of air transport: the challenges of the GATS", *Tourism Economics,* 2002, (431) 446.
[133] Article 44 (d), (e) and (f) of the Chicago Convention; P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 34
[134] W. HUBNER and P. SAUVE, "Liberalisation scenarios for International Air Transport", *JWT,* 2001*,* (973) 974 – 975.
[135] H. A., FAYED, J. W. ESTLAKE, "Globalization of air transport: the challenges of the GATS" *Tourism Economics,* 2002, (431) 446; W. HUBNER and P. SAUVE, "Liberalisation scenarios for International Air Transport", *JWT,* 2001*,* (973) 975.

§4. GATS Legal Structure

41. **TRADE IN SERVICES –** The GATS established a novel framework facilitating negotiations on trade in services.[136] Different from trade in goods, trade in services are rather about negotiation on regulation instead of negotiation on tariffs. So, negotiating about opening markets is, in fact, talking about removing regulations. With the consequence that opening up trade in services is very sensitive because these regulations are meant to ensure the quality of the service. Therefore, the right to regulate is explicitly mentioned in the preamble of the GATS.[137]

42. **COMPOSITION –** The GATS consist of a framework agreement, several annexes on liberalisation, such as the Annex on Article II exemptions and the Schedules of Specific Commitments.[138] And also has some sector-specific annexes, including the Annex on Air Transport Services." [139] It is a 'standstill agreement' that gives flexibility to the WTO members.[140] It allows WTO members to determine themselves how much they open their markets and which obligations will apply in the specific service industry.[141] Therefore, the GATS is only a framework agreement with a few general obligations which apply to every WTO member and a lot of specific obligations depending on the willingness of the WTO members.[142] If the WTO members decide to make a commitment, the only obligation is then not to impose new or more restrictive trade measures in the sector listed in the respective Schedules of Specific Commitments. [143]

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[136] J.A. MARCHETTI and M.ROY, "Services liberalisation in the WTO and in PTAs" in J.A. MARCHETTI and M.ROY, *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, (61) 62-63.
[137] Preamble § 4 GATS.
[138] A.R. AMANA, "The liberalisation of air services: prospects and challenges for the Indian economy", *Journal of International Trade Law and Policy,* Vol.14 (2015), (49) 53-54; R. EBDON, "A Consideration of GATS and of its Compatibility with the Existing Regime for Air Transport" *In* Air and Space Law, Volume XX (2) 1995 (71 - 75) 72.
[139] R. EBDON, "A Consideration of GATS and of its Compatibility with the Existing Regime for Air Transport" *Air and Space Law*, Volume XX (2) 1995, (71) 72.
[140] *WTO Doc.,* S/C/W/179, (2000), § 6 [communication from Australia. The GATS Review: An Opportunity for Phased Reform of Air Transport Services].
[141] X., *WTO in brief,* World Trade Organization, *https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm*, consulted 16 April 2019.
[142] K. ALEXANDER and M. ANDENAS, *The World Trade Organization and Trade in Services,* Martinus Nijhoff Publishers, Boston/Leiden, 2008, p. 383.
[143] *WTO Doc.,* S/C/W/179, (2000), § 6 [communication from Australia. The GATS Review: An Opportunity for Phased Reform of Air Transport Services].

A. Scope of the GATS

43. **SCOPE –** Article I (1) of the GATS states that *"this agreement applies to measures by Members affecting trade in services."* Three elements must be examined. First of all, what measures are covered by the GATS? Secondly, what is a service? Thirdly, how does the measure affect trade in services.

44. **MEASURES –** *"Measures by members"* is defined very broadly in the GATS. It says that it applies to *"measures adopted by central, regional or local governments and authorities; and non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities."*[144] It is also any type of measure, whether *"a law, regulation, rule, procedure, decision, administrative action or any other form."*[145] So even a judgement by a court could be a measure challenged as a measure under the GATS.

45. **SERVICE –** The GATS covers all services "*except services supplied in the exercise of governmental authority."*[146] There is no real definition of 'services' under the GATS. During the negotiations, it was very difficult to determine an adequate definition which every contracting party could agree with. It was therefore decided to take a very broad view of trade in services.[147]

Article I (2) GATS states that *"trade in services are defined as the supply of a service:*

(a) *From the territory of one Member into the territory of any other Member (cross-border trade);*

(b) *In the territory of one Member to the service consumer of any other Member (consumption abroad);*

(c) *By a service supplier of one Member, through commercial presence in the territory of any other member (commercial presence);*

(d) *By a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (presence of natural persons).* [148]

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[144] Article I (3) (a) GATS.
[145] Article XXVIII (a) GATS.
[146] Article I (3) (b) GATS; X, *GATS: Facts and fiction. The Structure of the GATS,* World Trade Organization, *https://www.wto.org/english/tratoP_e/serv_e/gats_factfiction4_e.htm* consulted 16 April 2018.
[147] R. ADLUNG, A. MATTOO, "The GATS" in A. MATTOO, R. STERN and G. ZANINI (eds.), *A handbook of International Trade in Services,* Oxford University Press, Oxford, 2008, (48) 49.
[148] Article I (2) GATS.

The GATS determine four modes of supply. WTO members can modulate and modify their obligations depending on the mode of supply that is at stake. The GATS applies to the treatment of both services and services suppliers.[149] *"Supply of a service"* is defined in the GATS, as amongst others as *"supply of a service includes the production, distribution, marketing, sale and delivery of a service."*[150] And *"service supplier"* is defined as *"any person that supplies a service."*[151]

46. **AFFECTING –** Thirdly, the measure at stake must affect trade in services. A link between them is required. In EC – BANANAS (AB) the Panel found that: *"no measures are excluded a priori from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service of whether it regulates other matters but nevertheless affects trade in services."*[152] Thus, both direct and indirect affecting trade in services is accepted.

[149] R. ADLUNG, A. MATTOO, "The GATS" in A. MATTOO, R. STERN and G. ZANINI (eds.), *A handbook of International Trade in Services,* Oxford University Press, Oxford, 2008, (48) 50.
[150] Article XXVIII (b) GATS.
[151] Article XXVIII (g) GATS.
[152] Paragraph 217, Appellate Body Report, *European Communities – Regime for the Importation, Distribution and Sale of Bananas,* WT/DS27/AB/R, adopted on 25 September 1997.

B. Obligations and commitments

47. **INTRODUCTION –** The obligations under the GATS can be divided into general obligations and specific obligations.[153] Specific obligations because they are subject to Specific Commitments set out in a Member's nationals schedule. These obligations only apply as far as WTO members made specific special commitments regarding these obligations. This is found in Part III of the GATS.[154] The general obligations can be found in Part II of the GATS and apply immediately, unless WTO Members adopted an exception to the MFN principle, set out in the Annex on Article II Exemptions.[155]

1. General obligations

48. **TRANSPARENCY –** The general obligations are the following: the MFN principle[156] and transparency.[157] Transparency is considered as one of the major obstacles for trade in services. Because of the lack of knowledge about the regulations applied to the services sector, WTO members are obliged to notify new measures to the WTO.[158]

49. **NON – DISCRIMINATION PRINCIPLE –** The MFN principle, together with the NT principle, are the non-discrimination principles under the trading system of the WTO.[159] The importance of eliminating discrimination is highlighted in the Preamble of the WTO agreement, ensuring an *"elimination of discriminatory treatment in international trade relations".*[160]

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[153] B.M. HOEKMAN and P.C. MAVROIDIS, *The World Trade Organization: Law, economics and politics,* Second edition, Global Institutions, Routledge, London, New York, 2016, p 67.
[154] R. ADLUNG, A. MATTOO, "The GATS" in A. MATTOO, R. STERN and G. ZANINI (eds.), *A handbook of International Trade in Services,* Oxford University Press, Oxford, 2008, (48) 54; P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 413.
[155] Article II (2) GATS.
[156] Article II GATS.
[157] Article III GATS.
[158] X, *The General Agreement on Trade in Services (GATS): objective, coverage and disciplines,* World Trade Organization, *https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm* consulted 16 April 2019.
[159] X, *Principles of the trading system*, World Trade Organization, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm
consulted 29 April 2018; L. ZHANG, "The Role of Dispute Settlement Body in the World Trade Organization in the Aviation Industry – in the Time of Bombardier Case*", Air and Space Law*, 2018, (1) 8.
[160] Paragraph 3 preamble WTO Agreement; P. VAN DEN BOSSCHE, W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 88.

50. **MFN PRINCIPLE –** The MFN principle is the core principle underlying the multilateral trading system.[161] Under the GATS framework, the MFN principle states the following: *"each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."*[162] As a consequence of the MFN principle no country can discriminate between and among other countries.[163]

The contracting parties to the Uruguay Round negotiations were on the same page regarding the non – applicability of the MFN principle to air transport services.[164] The MFN principle does not allow any discrimination between and among countries. As a consequence, this principle would imply that, the traffic rights granted in a bilateral agreement to one state, should be conferred to all States that have ratified the GATS agreement.[165] Implementing the MFN principle, thus, is in direct contrast with the current regulatory framework of air transport services.[166] The bilateral system regulating air transport services, is based on the notion of reciprocity. The rights given to one are often significantly different from the rights offered to another. It allows states to conclude whatever they want; with whomever they want.[167] Applying the MFN principle to traffic rights is still a complex and difficult issue. [168]

51. **EXCEPTIONS –** However the application of MFN principle under the GATS is not absolute. The WTO Members have the opportunity to adopt exceptions to the MFN principle. Exceptions on the applicability of the MFN principle to certain measures must be set out in the Annex on Article II Exemptions.[169]

[161] *WTO Doc.,* S/C/W/179, (2000), § 14 [communication from Australia. The GATS Review: An Opportunity for Phased Reform of Air Transport Services].
[162] Article II GATS.
[163] Article II (1) GATS; P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 306.
[164] J.A. MARCHETTI and P.C. MAVROIDIS, "The Genesis of the GATS", *EJIL*, 2011, (689) 719.
[165] Article II (1) GATS; V.R. SERRANO, "Trade in Air Transport Services: Liberalizing Hard Rights, *Air & Space Law,* 1999, (199) 201.
[166] P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 306.
[167] L. ZHANG, "The Role of Dispute Settlement Body in the World Trade Organization in the Aviation Industry – in the Time of Bombardier Case", *Air and Space Law*, 2018, (1) 8.
[168] *ICAO Doc., 9626,* (2016), 74 [manual on the regulation of international air transport].
[169] Article II (2) GATS.

2. Specific commitments

52. **SPECIFIC COMMITMENTS –** The NT principle and the market access clause are specific obligations under the GATS. Because they only apply as far as WTO members made specific commitments regarding these obligations. The specific commitments made by the WTO members are set out in its respective national schedule.[170] The WTO members are free to decide whether or not to apply these principles regarding specific services and thus allows flexibility.[171] In practice, in order to conclude whether there is a violation of a specific obligation, the Specific Schedules of Commitments must be looked at.[172]

53. **MARKET ACCESS –** The market access clause ensures that *"each member shall accord services and service suppliers of any other member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.*[173] The various types of limitations are listed in Article XVI (2) of the GATS. The limitations require the WTO members to not restrict their access to the services market through quantitative restrictions.[174] For decades, market access has been negotiated on the basis of reciprocity.[175] The principle of 'economic sovereignty in the air'[176] requires a "*special permission*" of a state before a foreign airline can have market access.[177] Resulting in a chaotic network of more than 4000 bilateral ASAs.[178] This approach is very different from the complete market access without restrictions provided under the GATS.[179]

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[170] R. ADLUNG, A. MATTOO, "The GATS" in A. MATTOO, R. STERN and G. ZANINI (eds.), *A handbook of International Trade in Services,* Oxford University Press, Oxford, 2008, (48) 54; P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 413.

[171] X., *GATS: Facts and fiction. The Structure of the GATS,* World Trade Organization, *https://www.wto.org/english/tratoP_e/serv_e/gats_factfiction4_e.htm* consulted 16 April 2018.

[172] X., *Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions, https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm*, consulted 20 April 2019.

[173] Article XVI GATS.

[174] X., *The General Agreement on Trade in Services (GATS): objective, coverage and disciplines,* World Trade Organization, *https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm* consulted 16 April 2019.

[175] J.A. MARCHETTI and P.C. MAVROIDIS, "The Genesis of the GATS", *EJIL*, 2011, (689) 719.

[176] Article 6 Chicago Convention.

[177] J.C. SALAZAR and P. VAN FENEMA, "International air transport agreements" in P.S. DEMPSEY and R.S. JAKHU (eds.), *Handbook of Public Aviation Law,* Routledge, London, 2017, (252) 253.

[178] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 45; M. MILDE, *International Air Law and ICAO,* Eleven International Publishing, The Netherlands, 2008, p. 116.

[179] R. WOLFRUM, P.-T. STOLL and C. FEINAUGLE, *WTO – Trade in Services,* Martinues Nijhoff Publishers, Leiden – Boston, 2008, p. 603.

54. **NATIONAL TREATMENT PRINCIPLE –** The second specific obligation under the GATS is the NT principle. Article XVII of the GATS, states that *"in the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.*[180] As a consequence, it is prohibited that a country negatively discriminate against other countries.[181] The NT principle only applies once the service has entered the local market.[182]

[180] Article XVII (1) GATS.
[181] Article XVII GATS; P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 306.
[182] M. EHRENBECK, "GATS Annex on Air Transport Services and the Aviation Industry's Response", *S. Afr. Y.B., Int'l L*, 2004, (217) 218; M. MATSUSHITA, T.J. SCHOENBAUM, P.C. MAVROIDIS, and M. HAHN, *The World Trade Organization: Law, Practice and Policy,* Oxford University Press, Oxford, 2015, p. 180.

III. ANNEX ON AIR TRANSPORT SERVICES

55. **INTRODUCTION –** Section III will focus on the Annex ATS. By examining the general carve-out and the scope, a broader understanding about the ambiguity between air transport services and the WTO can be provided. Currently, most parts of the air transport services are excluded from the scope of the Annex. However, paragraph 5 of the Annex ATS creates a possibility for change towards a multilateral framework under the GATS.[183] Since the adoption of the Annex ATS, only two reviews have taken place. Analysing the Air Transport Reviews will give an attempt to answering the question whether or not there is a place for air transport services in the WTO.

§1. Scope

56. **FIRST PARAGRAPH –** According to paragraph 1, sentence 1 of the Annex ATS, *"the Annex applies to measures affecting trade in air transport services, whether scheduled or non-scheduled, and ancillary services."*[184] The lack of definition of 'trade in air transport services' and 'ancillary services' in the Annex ATS gives the WTO members a broad scope of application.[185] This broad scope of application, however, only with regard to the three covered services included in the Annex ATS.[186] The three covered services included in the Annex ATS will be discussed in § 2.

[183] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, 2017, p. 87.
[184] Paragraph 1 Annex ATS.
[185] R. WOLFRUM, P.-T. STOLL and C. FEINAUGLE, *WTO – Trade in Services,* Martinues Nijhoff Publishers, Leiden – Boston, 2008, p. 611
[186] Paragraph 3 Annex ATS; A.R. AMANA, "The liberalization of air services: prospects and challenges for the Indian economy", *Journal of International Trade Law and Policy,* Vol.14*,* 2015, (49) 56.

§2. General Carve-out

57. **COVERED SERVICES –** The Annex ATS attached to the GATS is only applicable *"to measures affecting aircraft repair and maintenance services, computer reservations system services and the selling and marketing of air transport services."*[187]

'Aircraft repair and maintenance activities' are defined in paragraph 6 (a) Annex ATS. As meaning *"such activities when undertaken on an aircraft or a part thereof, while it is withdrawn from service and do not include the so-called line maintenance"*[188]

According to paragraph 6 (c) Annex ATS, 'computer reservation services' are *"services provided by computerized systems that contain information about carriers' schedules, availability, fares and fare rules, for which reservations can be made or tickets may be issued."*[189]

Paragraph 6 (b) of the Annex ATS defines 'selling and marketing of air transport services' as *"opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions."*[190]

58. **EXCLUDED SERVICES –** The contracting parties of the Uruguay Round negotiations did not want to include *"traffic rights and services directly related to the exercise of traffic rights"*[191] The definition of 'traffic rights' can be found in paragraph 6 (d) of the Annex ATS.

"Traffic rights mean the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to provide, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership and control.[192]

[187] Paragraph 3 Annex ATS.
[188] Paragraph 6 (a) Annex ATS.
[189] Paragraph 6 (c) Annex ATS.
[190] Paragraph 6 (b) Annex ATS.
[191] Paragraph 2 Annex ATS.
[192] Paragraph 6 (d) Annex ATS.

59. **AMBIGUITY –** *"Services directly related to…"* is not defined in the Annex ATS. The lack of definition resulted in an ambiguity regarding the coverage of the Annex ATS.[193] The WTO Secretariat tried to clarify the ambiguity by saying that *"the fact that paragraph 3 is presented as an exception to the exclusion in paragraph 2, implies that the three covered services are regarded as directly related.*[194]

However, not every WTO member could agree with the explanation given by the WTO Secretariat. In fact, some WTO members gave a very restrictive interpretation to *"services directly related to the exercise of traffic rights"* and stated that all those services *"not directly related"* would then fall within the scope of the GATS. [195] As a consequence of this interpretation, more services would be included within the Annex ATS.

The lack of a common understanding of the exact coverage of the Annex ATS results in an ambiguity. Some WTO Members have taken, for example, commitments outside the scope of the three covered services.[196] Nicaragua and Gambia have taken commitments regarding rental of aircraft with crew.[197]

Regardless the different interpretations, traffic rights still make a great part of the air transport services industry. Excluding them is the same as excluding air transport services almost entirely from the scope of application of the GATS.[198] These traffic rights, also known as 'hard rights', are governed by bilateral air services agreements.[199] The main reason for exclusion was the existence of the complex structure of bilateral agreements on air services, which the contracting parties wanted to retain.[200]

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[193] D. KREYMBORG, "Developments Relevant to International Air Transport in the WTO", *Air & Space Law,* 2003, (471) 478.
[194] *WTO Doc.,* S/C/W/59, (1998), § 4 [background Note by the Secretariat. Air Transport Services].
[195] P. LATRILLE, "Air transport liberalization: a world apart" in J.A. MARCHETTI and M.ROY, *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, (264) 275.
[196] *WTO Doc.,* S/C/M/50, (2001), § 6 [report of the Second session of the Review mandated under paragraph 5 of the Air Transport Annex held on 4 December 2000].
[197]GATS Commitments – The Gambia – 11 Transport Services *http://i-tip.wto.org/services/GATS_Detail.aspx/?id=The%20Gambia&sector_path=TRANSPORT%20SERVICES&rta_path=0000* consulted 22 April 2019; GATS Commitments – Nicaragua – 11 Transport Services, *http://itip.wto.org/services/GATS_Detail.aspx/?id=Nicaragua&sector_path=TRANSPORT%20SERVICES&rta_path=0000* consulted 22 April 2019.
[198] R. WOLFRUM, P.-T. STOLL and C. FEINAUGLE, *WTO – Trade in Services,* Martinues Nijhoff Publishers, Leiden – Boston, 2008, p. 611.
[199] P.M DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 45; S. NARENDRA, "General Agreement on Trade in Services and Aviation Ground Handling Services – A Theoretical Perspective", *IOSR Journal of Business and Management*, 2014, (36) 37.
[200] *WTO Doc.,* S/C/M/50, (2001), § 5 [report of the Second session of the Review mandated under paragraph 5 of the Air Transport Annex held on 4 December 2000].

§3. Commitments and exemptions

60. **NOT NUMEROUS –** As expected, the commitments undertaken by WTO Members are not numerous.[201] (*supra* nr. 37) Indeed, many States have made no commitments at all in the field of air transport. Many States have obtained exemption under the GATS even from the limited coverage of the Annex ATS.[202] Currently, only forty-six members have listed commitments on "computer reservation services"[203], whereas nineteen members have listed MFN exemptions.[204] Regarding "selling and marketing of air transport services", forty-three members have listed commitments in their national schedule.[205] Twenty-two members have listed MFN exemptions.[206] Only three members have listed MFN exemptions on "maintenance and repair of aircrafts",[207] and sixty-two members have undertaken commitments on "maintenance and repair of aircrafts"[208]

[201] H. A., FAYED, J. W. ESTLAKE, "Globalization of air transport: the challenges of the GATS" *Tourism Economics,* 2002, 8 (4), (431) 446; W. HUBNER and P. SAUVE, "Liberalization scenarios for International Air Transport", *JWT,* 2001*,* (973) 975; P. LATRILLE, "Air transport liberalisation: a world apart" in J.A. MARCHETTI and M.ROY, *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, (264) 264.

[202] R. EBDON, "A Consideration of GATS and of its Compatibility with the Existing Regime for Air Transport" in *Air and Space Law*, Volume XX (2) 1995 (71) 73.

[203] Afghanistan, Australia, Austria, Cambodia, Canada, Chile, China, Costa Rica, Croatia, Cuba, Ecuador, Europe, Finland, Guatemala, Guyana, Honduras, Hungary, Iceland, japan, Jordan, Kazakhstan, Kenya, Korea, Lao People's Democratic Republic, Moldova, Montenegro, Morocco, Nepal, New Zeeland, Vietnam, Ukraine, Turkey, Tonga, Tajikistan, Chinese Taipei, Sweden, Suriname, Slovenia, Saudi Arabia, Samoa, Russian Federation, Romania, Oman, Norway, North Macedonia; source: Reports – Commitments – Member x Sector (GATS) *http://i-tip.wto.org/services/ReportResults.aspx* consulted 22 April 2019.

[204] Latvia, Korea, Poland, Norway, North Macedonia, Lithuania, Albania, Austria, Europe, Finland, Iceland, the United States, Switzerland, Ukraine, Chinese Taipei, Slovenia, Singapore, Lichtenstein and Kuwait; Source: Reports – MFN Exemptions – Member x Sector (GATS) *http://i-tip.wto.org/services/ReportResults.aspx* consulted 22 April 2019.

[205] Afghanistan, Armenia, Austria, Bulgaria, Cambodia, Croatia, Cuba, Czech Republic, Estonia, Europe, Finland, Guatemala, Honduras, Iceland, Japan, Jordan, Kazakhstan, Kenya, Lao People's Democratic Republic, Moldova, Montenegro, Morocco, New Zeeland, Vietnam, Vanuatu, Ukraine, Turkey, Thailand, Tajikistan, Chinese Taipei, Sweden, Suriname, Slovenia, Slovak Republic, Samoa, Russian Federation, Romania, Oman, Norway, North Macedonia, New Zeeland; source: Reports – Commitments – Member x Sector (GATS) *http://i-tip.wto.org/services/ReportResults.aspx* consulted 22 April 2019.

[206] Albania, Austria, Bulgaria, Canada, Europe, Finland, Iceland, Kazakhstan, the United States, Switzerland, Thailand, Chinese Taipei, Russian Federation, Romania, Poland, Norway, North Macedonia, Moldavia, Lithuania, Lichtenstein, Latvia, Kuwait; Source: Reports – MFN Exemptions – Member x Sector (GATS) *http://i-tip.wto.org/services/ReportResults.aspx* consulted 22 April 2019.

[207] Thailand, Canada and Kuwait; Source: Reports – MFN Exemptions – Member x Sector (GATS) *http://i-tip.wto.org/services/ReportResults.aspx* consulted 22 April 2019.

[208] Afghanistan, Albania, Armenia, Australia, Austria, Bulgaria, Cambodia, Canada, Chile, China, Croatia, Cuba, Czech Republic, Ecuador, El Salvador, Estonia, Europe, Finland, The Gambia, Georgia, Guatemala, Guyana, Honduras, Hungary, Iceland, Japan, Jordan, Kazakhstan, Kenya, Korea, Kyrgyz Republic, Lao People's Democratic Republic, Latvia, Lithuania, Moldova, Montenegro, Thailand, Tonga, Ukraine, the United States, Morocco, Nepal, Vietnam, Vanuatu, Tajikistan, Chinese Taipei, Switzerland, Sweden, Suriname, Slovenia, Slovak Republic, Saudi Arabia, Samoa, Russian Federation, Romania, Poland, Philippines, Panama, Oman, Norway, North Macedonia, Nicaragua; source: Reports – Commitments – Member x Sector (GATS) *http://i-tip.wto.org/services/ReportResults.aspx* consulted 22 April 2019.

§4. Review Annex ATS

61. **PERIODICAL REVIEW –** Paragraph 5 of the Annex ATS provides that *"the Council of Trade in Services shall review periodically, and at least every five years, developments in the air transport sector and the operation of this Annex with a view to considering the possible further application of the Agreement in this sector."*[209] Paragraph 5 gives the WTO members the opportunity and the flexibility to further elaborate the Annex ATS.[210] The main objective of the periodic reviews of the Annex ATS, is to further liberalise the air transport services on a multilateral level.[211]

Since the adoption of the Annex ATS, only two reviews have taken place. Analysing the Air Transport Reviews will give provide an attempt for further answering the question whether there is a place for air transport services in the WTO.

A. First Review

62. **2000 - 2003 –** The first review started in 2000 and ended in 2003.[212] The review had two purposes. The first purpose was to clarify the exact coverage of the Annex ATS to resolve the ambiguity. The second purpose was to clarify the question whether the WTO Members wanted to continue the current exclusion of *"traffic rights and services directly related to the exercise of traffic rights"* or not.[213]

[209] Paragraph 5 Annex ATS.
[210] The WTO Secretariat, *Guide to the Uruguay Round Agreements,* Kluwer Law International, 1999, 175; L. XING, *Air Transport Services in the GATS,* unpublished LL.M thesis, University of Ghent, 2013-2014, p. 10.
[211] P.P.C. HAANAPPEL, *The Law and Policy of Air Space and Outer Space. A comparative approach,* Kluwer Law International, 2003, p 151–152; P.P.C. HAANAPPEL, "Regulatory Developments at the European Union and World Trade Organization Levels"*, Air & Space Law 40*, 2015, (65) 68.
[212] P.P.C. HAANAPPEL, *The Law and Policy of Air Space and Outer Space. A comparative approach,* Kluwer Law International, 2003, p 151; X., *Air transport services, https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_air_e.htm,* consulted 25 March 2018.
[213] *WTO Doc.,* S/C/M/50, (2001), § 8 [report of the Second session of the Review mandated under paragraph 5 of the Air Transport Annex held on 4 December 2000]; P.P.C. HAANAPPEL, *The Law and Policy of Air Space and Outer Space. A comparative approach,* Kluwer Law International, 2003, p 151.

1. Coverage of the Annex ATS

63. **COVERAGE OF THE ANNEX ATS –** The sectorial note by the Secretariat stated, that the clarification of the WTO Secretariat (*supra* nr. 56) was not sufficiently conclusive to take the ambiguity away.[214] The notion *"services directly related to the exercise of traffic rights"* still resulted in interpretation problems.[215] (*supra* nr. 56) The first purpose of this review was to clarify the exact coverage of the Annex ATS to resolve the ambiguity.[216] Despite the fact that all WTO members had the same intention, no consensus could be reached on the interpretation of the notion *"services directly related to the exercise of traffic rights."*[217] After the first review, the situation was not altered and the ambiguity about the coverage of the Annex ATS still remained.

2. Inclusion of traffic rights?

64. **DIFFERENT PERSPECTIVES –** The second purpose of the review was to clarify the question whether the WTO Members wanted to continue with the current exclusion of *"traffic rights and services directly related to the exercise of traffic rights"* or not.[218] The WTO Members had the possibility to set out their different perspectives regarding the further development of the Annex ATS.[219] In this paper, the focus will be on the the different perspectives of Australia, Japan and the United States.

[214] *WTO Doc.,* S/C/W/59, (1998), §4 [background Note by the Secretariat. Air Transport Services].
[215] D. KREYMBORG, "Developments Relevant to International Air Transport in the WTO", *Air & Space Law,* 2003, (471) 478.
[216] *WTO Doc.,* S/C/M/50, (2001), § 8 [report of the Second session of the Review mandated under paragraph 5 of the Air Transport Annex held on 4 December 2000]; P.P.C. HAANAPPEL, *The Law and Policy of Air Space and Outer Space. A comparative approach,* Kluwer Law International, 2003, p 151.
[217] P. LATRILLE and L. JUNEYOUNG, "Services rules in regional trade agreements: how diverse and how creative as compared to the GATS multilateral rules?" *WTO Staff Working Paper, NO. ERSD-2012-19*, 2012, p. 12.
[218] *WTO Doc.,* S/C/M/50, (2001), § 8 [report of the Second session of the Review mandated under paragraph 5 of the Air Transport Annex held on 4 December 2000]; P.P.C. HAANAPPEL, *The Law and Policy of Air Space and Outer Space. A comparative approach,* Kluwer Law International, 2003, p 151.
[219] L. XING, *Air Transport Services in the GATS,* unpublished LL.M thesis, University of Ghent, 2013-2014, p. 26.

65. **AUSTRALIA –** Australia was one of the states who wanted to extend the coverage of the GATS to a broader range of air transport services. A gradual extension of the coverage of the Annex ATS, aiming to replace the bilateral agreements over the long term.[220] The primary reason why the bilateral system remains successful is, according to Australia, because the governments are able to control the liberalization process.[221]

Yet, Australia is convinced that the GATS offers an adequate framework for the liberalisation of air transport services.[222] According to Australia, the GATS gives the WTO Members "*an opportunity to adopt a phased approach to international aviation forum, which respects Members' different development levels."* [223] A further extension of the Annex ATS is, in the opinion of Australia, therefore, not an obligation for the WTO member to liberalize, nor does it mean that the WTO members have to deregulate the air transport service sector. The GATS agreement, however, allows the governments to control the liberalisation process. [224]

66. **JAPAN** – Also Japan wanted to broaden the scope of the Annex ATS. However, it did not plead for an inclusion of the traffic rights.[225] The main reason for the exclusion of the traffic rights in the Annex ATS, was that Japan did not want the applicability of the MFN principle and the NT principle regarding traffic rights.[226]

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[220] D. KREYMBORG, "Developments Relevant to International Air Transport in the WTO", *Air & Space Law,* 2003, (471) 484.
[221] *WTO Doc.,* S/C/W/179, (2000), § 3 [communication from Australia. The GATS Review: An Opportunity for Phased Reform of Air Transport Services].
[222] *WTO Doc.,* S/C/W/179, (2000), [communication from Australia. The GATS Review: An Opportunity for Phased Reform of Air Transport Services].§ 8.
[223] *WTO Doc.,* S/C/W/179, (2000), § 9 [communication from Australia. The GATS Review: An Opportunity for Phased Reform of Air Transport Services].
[224] *WTO Doc.,* S/C/W/179, (2000), § 8 [communication from Australia. The GATS Review: An Opportunity for Phased Reform of Air Transport Services].
[225] *WTO Doc.,* S/C/W/134, (2000) § 3 [communication from Australia. The GATS Review: An Opportunity for Phased Reform of Air Transport Services]; D. KREYMBORG, "Developments Relevant to International Air Transport in the WTO", *Air & Space Law,* 2003, (471) 487.
[226] *WTO Doc.,* S/C/W/134, (2000), § 3 [communication from Australia. The GATS Review: An Opportunity for Phased Reform of Air Transport Services].

67. **THE UNITED STATES –** The United States was one of the states who were strongly against any further inclusion of air transport services under the Annex ATS.[227] The United States strongly support liberalising air transport services. However, in the opinion of the United States, liberalisation of air transport services should occur through the existing regulating system, and not through the WTO framework.[228]

According to the United States, *"all of the foregoing developments in the air transport sector have take place and are continuing the evolve under the established system, outside the auspices of the WTO. There is little to suggest that comparable liberalisation would have occurred had the GATS applied to air transport services, and there therefore is no reason to believe that future liberalization could best occur under GATS auspices."*[229] This reasoning is based on the fact that, in the view of the United States, the commitments made regarding the covered services under the GATS has not led to any further liberalisation.[230]

3. The outcome of the first Review

68. **DISSAPOINTING –** The result of the first review was disappointing. Due to a lack of understanding between the WTO members, no major turning point occurred in the treatment of air transport services under the GATS.[231] Yet, it must be pointed out that the review negotiations are not useless. The review gives us the opportunity to gain knowledge about the different perspectives of the WTO members. [232] The ICAO (*supra* nr. 11) has shown considerable interest in the development of trade in services negotiations.[233]

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[227] *WTO Doc.,* S/C/W/198, (2001), § 6 [communication from the United States: Review of the GATS Annex on Air Transport Services]; P.P.C. HAANAPPEL, *The Law and Policy of Air Space and Outer Space. A comparative approach,* Kluwer Law International, 2003, p 15; D. KREYMBORG, "Developments Relevant to International Air Transport in the WTO", *Air & Space Law,* 2003, (471) 490.
[228] *WTO Doc.,* S/C/W/198, (2001), §38 - §39 [communication from the United States: Review of the GATS Annex on Air Transport Services].
[229] *WTO Doc.,* S/C/W/198, (2001), § 23 [communication from the United States: Review of the GATS Annex on Air Transport Services].
[230] *WTO Doc.,* S/C/W/198, (2001), § 26 [communication from the United States: Review of the GATS Annex on Air Transport Services].
[231] P.P.C. HAANAPPEL, *The Law and Policy of Air Space and Outer Space. A comparative approach,* Kluwer Law International, 2003, p 151; D. KREYMBORG, "Developments Relevant to International Air Transport in the WTO", *Air & Space Law,* 2003, (471) 473.
[232] L. XING, *Air Transport Services in the GATS,* unpublished LL.M thesis, University of Ghent, 2013-2014, p. 26.
[233] X., *Trade in Services,* ICAO Economic Development, *https://www.icao.int/sustainability/Pages/eap-ep-trade-services.aspx* consulted 28 April 2019.

B. Second Review

69. **PRIOR TO THE SECOND REVIEW –** In preparation of the Second review, the Secretariat provided a detailed background paper on *"Developments in the Air Transport Sector since the Last Review"* laid down in document S/C/W/270.[234] This background paper tries to include all aspects of air transport and air transport-related services.[235] It also gives the WTO Members information about the significant changes that have taken place in ancillary services since the previous Review.[236]

One aspect of this background paper was the creation of the Quantitative Air Services Agreement Review (QUASAR) database. The QUASAR database has been developed by the WTO Secretariat in order to gain more information about the degree of liberalization of air transport services.[237] Another development, directly related to QUASAR database, was the Air Services Agreements Projector (ASAP). This tool allows for the visualisation of the currently existing agreements liberalizing air transport services, incorporated in the QUASAR database.[238]

70. **SECOND REVIEW –** The second review started in 2005 and is still on-going.[239] The last review session was held on 2 October 2007.[240] Again, the WTO members had the possibility to set out their different views regarding the Annex ATS.[241] The WTO members were still willing to participate the negotiations. However, the positions of the WTO members did not change significantly. Australia still wanted an entire inclusion of air transport services within the Annex ATS, while the United States still were against the liberalisation of air transport services through the GATS framework.[242]

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[234] *WTO Doc.,* S/C/M/84, (2006), § 1 [report of the First session of the Review mandated under Paragraph 5 of the Annex on Air Transport Services held on 12 September 2006].
[235] X., *Air Transport Services: Second Review*, World Trade Organization, *https://www.wto.org/english/tratop_e/serv_e/transport_e/review2_e.htm* consulted 22 April 2019.
[236] *WTO Doc.,* S/C/M/84, (2006), § 7 [report of the First session of the Review mandated under Paragraph 5 of the Annex on Air Transport Services held on 12 September 2006].
[237] *WTO Doc.,* S/C/W/270/Add.1, (2006), volume I, p.10 [note by the Secretariat. Second Review of the Air Transport Annex: developments in the Air Transport Sector (Part Two). Quantitative Air Services Agreements Review].
[238] X., *Services: sector by sector: Air transport services*, World Trade Organizations, *https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_air_e.htm, consulted* 17 March 2018.
[239] X., *Air transport services, https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_air_e.htm,* consulted 25 March 2018.
[240] *WTO Doc.,* S/C/M/89, (2007), § 1 [note by the Secretariat: Report of the Second session of the review mandated under Paragraph 5 of the Annex on Air Transport Services held on 2 October 2007].
[241] *WTO Doc.,* S/C/M/84, (2006), § 5 - § 9 and § 21 - § 27 [report of the First session of the Review mandated under Paragraph 5 of the Annex on Air Transport Services held on 12 September 2006].
[242] *WTO Doc.,* S/C/M/84, (2006), § 5 - § 9 and § 21 - § 27 [report of the First session of the Review mandated under Paragraph 5 of the Annex on Air Transport Services held on 12 September 2006].

Concerning the First review, one can state that no major turning points occurred in the treatment of air transport services under the GATS.[243] As a consequence, the same issues were at stake in the Second review. Again, the review had to serve two purposes. The first purpose of this review was to clarify the exact coverage of the Annex ATS to resolve the ambiguity. The second purpose was to clarify the question whether WTO Members wanted to continue with the current exclusion of *"traffic rights and services directly related to the exercise of traffic rights"* or not.[244] The main goal was to achieve concrete outcomes and opportunities for the WTO members, but so far no consensus has been reached.[245]

71. **DEADLOCK –** Almost twelve years after the last review session (*supra* nr. 67), no concrete proposals have been made. Even though the Second review is still formally on-going, in my view, it is appropriate to say that the second review is in a deadlock. Despite the fact that some WTO members are willing to fully incorporate the air transport services within the GATS agreement, there are still several WTO Members strongly against the incorporation. Even twenty-five years after the adoption of the Annex ATS, no significant changes have occurred. Mainly because of political disagreement that no consensus can be reached about whether or not air transport services should be fully included within the GATS agreement. [246]

Now regarding the traffic rights, these are totally excluded from the coverage of the GATS.[247] The implementation of the 'traffic rights' into the Annex ATS would prove an opportunity to replace the chaotic network of restrictive bilateral agreements by open competition.[248] An implementation of traffic rights within the annex, however, will not occur in the near future, in my opinion. Firstly, the unwillingness of the WTO members to transfer their national sovereignty over airspace into the WTO framework troubles implementation possibilities. Another obstacle is the irreconcilability of the principle of 'national sovereignty over airspace' with the basic principles underlying the WTO framework. (*supra* nr. 47, 50 – 51)

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[243] P.P.C. HAANAPPEL, *The Law and Policy of Air Space and Outer Space. A comparative approach,* Kluwer Law International, 2003, p 151; D. KREYMBORG, "Developments Relevant to International Air Transport in the WTO", *Air & Space Law,* 2003, (471) 473.
[244] *WTO Doc.,* S/C/M/84, (2006), § 1 [report of the First session of the Review mandated under Paragraph 5 of the Annex on Air Transport Services held on 12 September 2006]; P.P.C. HAANAPPEL, *The Law and Policy of Air Space and Outer Space. A comparative approach,* Kluwer Law International, 2003, p 151.
[245] *WTO Doc.,* S/C/M/89, (2007), § 1 [note by the Secretariat: Report of the Second session of the review mandated under Paragraph 5 of the Annex on Air Transport Services held on 2 October 2007].
[246] F. DEVOS, *De vervoerdiensten en het WTO GATS*, unpublished master thesis Law and Economics, University Ghent/Antwerp, 2010-2011, p. 60.
[247] Paragraph 2 Annex ATS.
[248] M. MILDE, *International Air Law and ICAO,* Eleven International Publishing, The Netherlands, 2008, p. 116.

CHAPTER 4. LIBERALISATION OF AIR TRANSPORT SERVICES

72. **INTRODUCTION –** Chapter 4 describes the liberalisation of air transport services. The economic benefits of liberalisation will briefly be discussed in Section I. Although the economic benefits of liberalisation have long been recognized by a large majority of states, finding consensus on how to liberalise air transport services remains a huge challenge.[249] Section II will briefly mention the main difficulties regarding liberalising air transport services. With these main difficulties kept in mind, the question whether the GATS can provide an adequate framework for liberalising air transport services will be answered in Section III. In conclusion, the question whether or not a full inclusion of air transport services is likely to occur in the near future will be answered.

I. THE ECONOMIC BENEFITS OF AIR TRANSPORT LIBERALISATION

73. **INCREASED COMPTETITION –** The economic impact of air transport liberalisation should not be underestimated. Liberalisation refers to *"international trade rules which govern how tariff and non-tariff barriers will be reduced or removed between, or among a group of states."* [250] Liberalisation governs access to the market which results in a strong competition on international level.[251] This has brought substantial welfare gains and economic growth worldwide.[252] In order to prove that statement, two different countries which already liberalised the air transport services market, will briefly be discussed.

[249] X. FU, T. HOON and A. ZHANG, "Air Transport Liberalization and Its impacts on Airline Competition and Air Passenger Traffic", *Transportation Journal,* 2010, (24) 37; InterVISTAS-EU Consulting Inc., *The Impact of International Air Service Liberalization on Chile,* 2009, p. 5, *https://www.iata.org/publications/economics/reports/chile-report.pdf* consulted 15 April 2019.
[250] C.G DECURTINS, *The air transport review at the WTO: Bilateralism versus Multilateralism*, unpublished PhD thesis International relations, University of Genève, 2007, p. 2.
[251] S. HUNDEREK-GLAPSKA, "Economic Benefits of Market Liberalization. Evidence from Air Transport in Poland", *Journal of International Studies,* 2010, (49) 49.
[252] X. FU, T. HOON and A. ZHANG, "Air Transport Liberalization and Its impacts on Airline Competition and Air Passenger Traffic", *Transportation Journal,* 2010, (24) 26.

74. **NEW ZEELAND –** New Zeeland, for example, has been liberalising the commercial air transport services since the mid-1980s. New-Zeeland's approach to liberalising air transport services was through renegotiating the existing bilateral ASAs and concluding new bilateral "open skies" ASAs with the aim to reduce or remove barriers between the negotiating states. Liberalisation resulted in proliferation of international travel volumes to and from New Zeeland and more affordable prices for international travel, notwithstanding the increased fuel costs.[253]

75. **POLAND –** Also Poland witnessed the importance of the competitive and international air market. Ever since Poland's accession to the European Union in 2004, the volume of air traffic has doubled and consumers benefit from lower prices and wider choice. [254] In both countries, liberalisation led to an increase of air service levels and lower prices, which in its turn led to more traffic and consequently, an economic growth. The economic growth resulted then resulted in more job opportunities. [255]

76. **COUNTERARGUMENT –** However, not everybody shares this view. A significant example proves that it is not guaranteed that the liberalisation of air transport services automatically leads to an increase of air service levels and lower prices, more traffic, economic growth and more job opportunities. [256] The delegation of a small African country reported that: *"Our country has fully liberalised our market and the regulatory framework for civil aviation. We are thus prepared to welcome any interested party."*[257] Despite the willingness of this country to welcome foreign airlines or investors, there was not any foreign interest. [258]

[253] A. SCHIFF and J. SMALL, *Economic Effects of Air Services Liberalisation in New Zeeland. Prepared for Ministry of Transport,* 2013, p. 1.
[254] S. HUNDEREK-GLAPSKA, "Economic Benefits of Market Liberalisation. Evidence from Air Transport in Poland", *Journal of International Studies,* 2010, (49) 57.
[255] InterVISTAS-EU Consulting Inc., *The Impact of International Air Service Liberalization on Panama,* 2010, p. 11, *https://www.iata.org/publications/economics/Reports/panama-report.pdf* consulted 23 April 2019; *ICAO Doc.,* A39-WP/189, 4 [air transport liberalization and the economic development of the countries].
[256] M. KOESTER, "ICAO and the Economic Environment of Civil Aviation – The Impact of the Fifth Worldwide Air Transport Conference of 2003 on Challenges and Opportunities of Liberalisation, *ZLW,* 2003, (322) 326; InterVISTAS-EU Consulting Inc., *The Impact of International Air Service Liberalization on Panama,* 2010, p. 11, *https://www.iata.org/publications/economics/Reports/panama-report.pdf* consulted 23 April 2019.
[257] M. KOESTER, "ICAO and the Economic Environment of Civil Aviation – The Impact of the Fifth Worldwide Air Transport Conference of 2003 on Challenges and Opportunities of Liberalisation, *ZLW,* 2003, (322) 326.
[258] M. KOESTER, "ICAO and the Economic Environment of Civil Aviation – The Impact of the Fifth Worldwide Air Transport Conference of 2003 on Challenges and Opportunities of Liberalisation, *ZLW,* 2003, (322) 326.

77. **ECONOMIC BENEFITS –** Despite the mentioned counterargument, it is, in my view, appropriate to state that the increased competition - as a consequence of liberalisation - results in a range of economic benefits.[259] Therefore, it is desirable to further liberalise air transport services, in my opinion.[260] The question currently at stake is how to achieve this.[261] Liberalisation of air transport services remains a huge challenge mainly because it is difficult to reach consensus on how to liberalise air transport services.[262]

[259] S. HUNDEREK-GLAPSKA, "Economic Benefits of Market Liberalisation. Evidence from Air Transport in Poland", *Journal of International Studies,* 2010, (49) 49.
[260] InterVISTAS-EU Consulting Inc., *The Impact of International Air Service Liberalisation on Panama,* 2010, p. 1, *https://www.iata.org/publications/economics/Reports/panama-report.pdf* consulted 23 April 2019.
[261] M. KOESTER, "ICAO and the Economic Environment of Civil Aviation – The Impact of the Fifth Worldwide Air Transport Conference of 2003 on Challenges and Opportunities of Liberalisation, *ZLW,* 2003, (322) 324.
[262] X. FU, T. HOON and A. ZHANG, "Air Transport Liberalisation and Its impacts on Airline Competition and Air Passenger Traffic", *Transportation Journal,* 2010, (24) 37; InterVISTAS-EU Consulting Inc., *The Impact of International Air Service Liberalisation on Chile,* 2009, p. 5, *https://www.iata.org/publications/economics/reports/chile-report.pdf* consulted 15 April 2019.

II. OBSTACLES OF LIBERALISING AIR TRANSPORT SERVICES

78. **INTRODUCTION –** A large majority of states recognize the benefits achieved through liberalisation. However, up until now, no consensus could be reached about how to liberalise air traffic rights.[263] Why is it so difficult to find a common understanding? This section will briefly mention two difficulties regarding liberalizing air transport services.

§1. The principle of 'national sovereignty over airspace'

79. **RECIPROCITY** – During the Chicago Conference, no agreement could be reached between the participating states on how to regulate the economic aspects of air transport services.[264] The only aspect that was loud and clear was that a "*special permission*" of a state is required before a foreign airline can have market access in its respective territory.[265] As a consequence of the lack of agreement, the exchange of traffic rights are, up until now, for most part negotiated through bilateral agreements based on the notion of reciprocity.[266] A large majority of states are not willing to submit their absolute sovereignty over airspace to a multilateral organization. The principle of 'economic sovereignty over airspace' seems to dominate any possibly following changes of liberalising air transport services.[267] In addition, states also want to guard their own path and pace of liberalisation. (*supra* nr. 77)

[263] X. FU, T. HOON and A. ZHANG, "Air Transport Liberalisation and Its impacts on Airline Competition and Air Passenger Traffic", *Transportation Journal,* 2010, (24) 37; InterVISTAS-EU Consulting Inc., *The Impact of International Air Service Liberalization on Chile,* 2009, p. 5, *https://www.iata.org/publications/economics/reports/chile-report.pdf* consulted 15 April 2019.
[264] ICC Policy Statement, "The need for greater liberalisation of international air transport. Prepared by the Committee on Air Transport", International Chamber of Commerce, p. 1, *https://iccwbo.org/content/uploads/sites/3/2016/10/The-need-for-greater-liberalization-of-international-air-transport.pdf* consulted 24 April 2019.
[265] Article 6 Chicago Convention; J.C. SALAZAR and P. VAN FENEMA, "International air transport agreements" in P.S. DEMPSEY and R.S. JAKHU (eds.), *Handbook of Public Aviation Law,* Routledge, London, 2017, (252) 253.
[266] C.G. DECURTINS, *The air transport review at the WTO: Bilateralism versus Multilateralism*, unpublished PhD thesis International relations, University of Genève, 2007, p. 64; P.M DE LEON, *Introduction to Air Law,* tenth edition, Wolters Kluwer, 2017, 45; J.A. MARCHETTI and P.C. MAVROIDIS, "The Genesis of the GATS", *EJIL* 22, 2011, (689) 719.
[267] A. KUSUMANINGRUM, "The challenges of International Air Law Principles in Globalization Era", *Brawijaya Law Journal,* 2017, (255) 256; S.M. SHREWSBURY, "September 11th and The Single European Sky: Developing Concepts of Airspace Sovereignty", *Journal of Air Law and Commerce,* 2003, (115) 115.

§2. Own pace and path

80. **MAINTAIN CONTROL –** The air transport sector is a sensitive sector regarding policies. Each member state wants to safeguard their own pace and path in the liberalization process.[268] This is also confirmed by VICTORIA NGUYEN, MANAGER AIR TRAFFIC RIGHTS AND GOVERNMENT AFFAIRS – LUFTHNSA GROUP. As a specialist in the business, MRS. NGUYEN pointed out that bilateral agreements are not out of fashion. Despite the general acceptance of further liberalising air transport services, the majority of states still prefer negotiation bilateral ASAs because they facilitate reaching an agreement and they are much more specific.

[268] M. KOESTER, "ICAO and the Economic Environment of Civil Aviation – The Impact of the Fifth Worldwide Air Transport Conference of 2003 on Challenges and Opportunities of Liberalisation, *ZLW,* 2003, (322) 325.

III. LIBERALISATION UNDER THE GATS FRAMEWORK?

81. **INTRODUCTION –** With these two main obstacles kept in mind, the question arises whether the GATS can provide an adequate framework for the liberalisation of air transport services, more specifically, the traffic rights. Is the GATS framework, when we keep in mind the underlying principle, reconcilable with the principle of 'reciprocity'? Secondly, does the GATS allow the WTO Members to safeguard their own path and pace regarding the liberalisation of air transport services? These questions will be examined in this section.

§1. Adequate framework?

82. **MFN PRINCIPLE AND RECIPROCITY –** First, the question whether the GATS framework is reconcilable with the principle of 'reciprocity' will be answered. The principle of reciprocity seems to clash with the MFN principle. The MFN principle is a very effective tool to promote liberalization.[269] This principle, however, does not allow any discrimination between and among countries. The implementation of the MFN principle in air transport services would mean that, the traffic rights granted in a bilateral agreement with one state, should be conferred to all States that have ratified the GATS agreement.[270] This is an inherent problem in any multilateral agreement. Implementing the MFN principle, thus stands in direct contrast with the current regulatory framework of air transport services.[271] Despite the irreconcilability, the GATS framework can serve as an adequate framework for liberalization. It allows the WTO members to make exemptions on the applicability of the MFN principle.[272] (*supra* nr. 48)

[269] W. VON DEWITZ, "Services and the Uruguay Round: Issues Raised in Connection with Multilateral Action on Services: A Comment", E-U. PETERSMANN and M. HILF, *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems,* Kluwer Law and Taxation Publishers, Boston, 1988, (475) 477.
[270] Article II (1) GATS; V.R. SERRANO, "Trade in Air Transport Services: Liberalizing Hard Rights, *Air & Space Law,* 1999, (199) 201.
[271] R. EBDON, "A Consideration of GATS and of its Compatibility with the Existing Regime for Air Transport" in *Air and Space Law*, 1995, (71) 73; P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 306.
[272] Article II (2) GATS.

83. **OWN PATH AND PACE –** Secondly, the question is whether the GATS allows the WTO Members to safeguard their own path and pace regarding the liberalisation of air transport services. In my view, the GATS framework offers the WTO Members the to possibility to secure their own path and pace of liberalisation.[273] The advantage of the GATS framework is that it is not a 'take it or leave it' agreement.[274] The degree of liberalization depends on the willingness of WTO Members to make commitments and to not make exemptions.[275] So the coverage of the GATS does not guarantee that the air transport sector being liberalised.[276] A multilateral approach through the GATS does not correlate with the degree of liberalization of the air transport services.

§2. Full inclusion?

84. **NOT IN THE NEAR FUTURE –** Despite the fact that the GATS can offer an adequate agreement for the liberalisation of air transport services, a full inclusion of air transport services will, in my opinion, not occur in the near future. The WTO is a member-driven international organization, and its decision making process is based on the principle of consensus.[277]

When examining the air transport reviews, one can conclude that some WTO members are willing to completely incorporate the air transport services within the GATS agreement. At the same time, there are still several WTO Members fully against the incorporation. It is mainly because of political disagreement that no consensus can be reached about whether or not air transport services should be fully included within the GATS agreement. Regardless the fact that the GATS is able to offer an adequate framework, the choice of framework for liberalising air transport services, will ultimately be a political choice.[278]

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[273] *WTO Doc.,* S/C/M/50, (2001), § 9 [report of the Second session of the Review mandated under paragraph 5 of the Air Transport Annex held on 4 December 2000]; J., TORTICE, *Air Transport Services: International Regulation and Future Prospects for Liberalization*, Industry, Trade and Technology Review, 1999, p. 18 , *https://www.usitc.gov/publications/ittr/pub3271.pdf* consulted 15 April 2019.

[274] *WTO Doc.,* S/C/M/50, (2001), § 9 [report of the Second session of the Review mandated under paragraph 5 of the Air Transport Annex held on 4 December 2000]; J., TORTICE, *Air Transport Services: International Regulation and Future Prospects for Liberalization*, Industry, Trade and Technology Review, 1999, p. 18 , *https://www.usitc.gov/publications/ittr/pub3271.pdf* consulted 15 April 2019.

[275] *WTO Doc.,* S/C/M/50, (2001), § 9 [report of the Second session of the Review mandated under paragraph 5 of the Air Transport Annex held on 4 December 2000].

[276] B.F. HAVEL, "Rethinking the GATS as a pathway to global aviation liberalisation", *Iris Juris,* 2009, (47) 49.

[277] X, *what is the World Trade Organization*, World Trade Organization, < http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm> accessed 7 November 2018.

[278] B.F. HAVEL, "Rethinking the GATS as a pathway to global aviation liberalisation", *Iris Juris,* 2009, (47) 61.

CONCLUSION

This master thesis focusses on the relationship between air transport services and the WTO. First, the ambiguous relationship between air transport services and the WTO was examined.

Air transport services might look like a typical international 'trade in service' under the framework of the GATS.[279] Air transport services are, however, to a large extent excluded from the application purposes of the GATS.[280] Under the WTO, air transport services are governed by a specific annex attached to the GATS.[281] Traffic rights and services directly related to traffic rights are excluded from the Annex ATS. A traffic right is a market access right allowing air transport services into the national territory of a state.[282]

Only three services are included into the coverage of the Annex ATS. According to the WTO Secretariat, the three covered services are an exception on the exemption of "*traffic rights and services directly related to the exercise of traffic rights"*. However, not every WTO member could agree with the explanation given by the WTO Secretariat. In fact, some WTO members gave a very restrictive interpretation to *"services directly related to the exercise of traffic rights"* and stated that all those services *"not directly related"* would then fall within the scope of the GATS.[283] As a result; some WTO Members have undertaken commitments outside the scope of the three covered services.[284] The lack of a common understanding of the interpretation of *"services directly related to the exercise of traffic rights"* results in an ambiguity about the exact coverage of the Annex ATS.

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[279] M. MILDE, *International Air Law and ICAO,* Eleven International Publishing, The Netherlands, 2008, p. 116.
[280] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, 2017, p. 88; J.A. MARCHETTI and M.ROY, "Summery and overview", in J.A. MARCHETTI and M.ROY, *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, (1) 6; P.S. MORRIS, "Competition in Air Transport in Europe under a World Trade Organization Umbrella", *Annals Air & Space Law,* 2007, (529) 536 X., *Air transport services, https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_air_e.htm,* consulted 25 March 2018.
[281] F. DEVOS, *De vervoerdiensten en het WTO GATS*, unpublised masterthesis Law and Economics, University Ghent/Antwerp, 2010-2011, p. 51; WTO Secretariat, *Guide to the GATS: an overview of issues for further liberalization of Trade in Services,* London, Kluwer International Law, 2001, p. 51.
[282] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, p. 57; *ICAO Doc., 9626,* 222 [manual on the regulation of international air transport].
[283] P. LATRILLE, "Air transport liberalization: a world apart" in J.A. MARCHETTI and M.ROY, *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, (264) 275.
[284] *WTO Doc.,* S/C/M/50, (2001), § 6 [report of the Second session of the Review mandated under paragraph 5 of the Air Transport Annex held on 4 December 2000].

The second research question was whether there is a place for air transport services in the WTO. Before giving the final answer to the second research question, two sub questions were answered throughout this master paper. Firstly, is the GATS an adequate framework for liberalising air transport services? Secondly, is a full inclusion of air transport services likely to occur in the near future?

Air transport services are to a large extent excluded from the application of the GATS.[285] However, paragraph 5 Annex ATS gives the WTO members the opportunity and the flexibility to further elaborate the Annex ATS. The purpose of the periodic reviews of the Annex ATS is to further liberalise the air transport services on a multilateral level.[286] A large majority of states recognize the benefits achieved through liberalisation. However, up until now, no consensus could be reached about the way to liberalise air traffic rights.[287]

With the MFN principle, the NT principle and the market access clause, which are very effective principles to promote liberalization, the GATS can, in principle, serve as an adequate framework for liberalising air transport services.[288] Nonetheless, the general principle of 'national sovereignty over air space' underlying the air transport services, is considered to be irreconcilable with the mentioned principles underlying the WTO framework.

[285] P.M. DE LEON, *Introduction to Air Law,* Wolters Kluwer, 2017, p. 88; J.A. MARCHETTI and M.ROY, "Summery and overview", in J.A. MARCHETTI and M.ROY, *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, (1) 6; P.S. MORRIS, "Competition in Air Transport in Europe under a World Trade Organization Umbrella", *Annals Air & Space Law,* 2007, (529) 536 X., *Air transport services, https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_air_e.htm,* consulted 25 March 2018.

[286] P.P.C. HAANAPPEL, *The Law and Policy of Air Space and Outer Space. A comparative approach,* Kluwer Law International, 2003, p 151–152; P.P.C. HAANAPPEL, "Regulatory Developments at the European Union and World Trade Organization Levels"*, Air & Space Law 40*, 2015, (65) 68.

[287] X. FU, T. HOON and A. ZHANG, "Air Transport Liberalization and Its impacts on Airline Competition and Air Passenger Traffic", *Transportation Journal,* 2010, (24) 37; InterVISTAS-EU Consulting Inc., *The Impact of International Air Service Liberalization on Chile,* 2009, p. 5, *https://www.iata.org/publications/economics/reports/chile-report.pdf* consulted 15 April 2019.

[288] W. VON DEWITZ, "Services and the Uruguay Round: Issues Raised in Connection with Multilateral Action on Services: A Comment", E-U. PETERSMANN and M. HILF, *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems,* Kluwer Law and Taxation Publishers, Boston, 1988, (475) 477.

Firstly, the principle of 'national sovereignty over airspace' seems to clash with the MFN principle. The MFN principle does not allow any discrimination between and among countries. The implementation of the MFN principle in air transport services would mean that, the traffic rights granted in a bilateral agreement with one state, should be conferred to all States that have ratified the GATS agreement.[289] Implementing the MFN principle thus stands in direct contrast to the current regulatory framework of air transport services.[290] However, the GATS allows the WTO members to make exemptions on the applicability of the MFN principle.[291]

The NT principle and the market access clause are very effective principles to promote liberalisation.[292] Some WTO Members, however, are not willing to fully include air transport services within the GATS. Mainly because they are afraid to lose their own path and pace of liberalization. [293] Yet, the WTO members are free to decide whether or not to apply these principles.[294] They are only applied as far as WTO members made specific commitments regarding these obligations.[295] The degree of liberalization depends on the willingness of WTO Members to make commitments and to not make exemptions.[296]

In my opinion, one can conclude that the GATS can provide an adequate framework for liberalising the air transport services. However, in order to answer adequately the second research question, another sub question was answered in this master thesis. Namely, is a full inclusion of air transport services likely to occur in the near future?

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[289] Article II (1) GATS; V.R. SERRANO, "Trade in Air Transport Services: Liberalizing Hard Rights, *Air & Space Law,* 1999, (199) 201.
[290] P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 306.
[291] Article II (2) GATS.
[292] W. VON DEWITZ, "Services and the Uruguay Round: Issues Raised in Connection with Multilateral Action on Services: A Comment", E-U. PETERSMANN and M. HILF, *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems,* Kluwer Law and Taxation Publishers, Boston, 1988, (475) 477.
[293] *WTO Doc.,* S/C/M/50, (2001), § 9 [report of the Second session of the Review mandated under paragraph 5 of the Air Transport Annex held on 4 December 2000]; J., TORTICE, *Air Transport Services: International Regulation and Future Prospects for Liberalization*, Industry, Trade and Technology Review, 1999, p. 18 , *https://www.usitc.gov/publications/ittr/pub3271.pdf* consulted 15 April 2019.
[294] X., *GATS: Facts and fiction. The Structure of the GATS,* World Trade Organization, *https://www.wto.org/english/tratoP_e/serv_e/gats_factfiction4_e.htm* consulted 16 April 2018.
[295] R. ADLUNG, A. MATTOO, "The GATS" in A. MATTOO, R. STERN and G. ZANINI (eds.), *A handbook of International Trade in Services,* Oxford University Press, Oxford, 2008, (48) 54; P. VAN DEN BOSSCHE and W. ZDOUC, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, p. 413.
[296] *WTO Doc.,* S/C/M/50, (2001), § 9 [report of the Second session of the Review mandated under paragraph 5 of the Air Transport Annex held on 4 December 2000].

When examining the air transport reviews, one can conclude that some WTO members are willing to fully incorporate the air transport services within the GATS agreement. At the same time, there are still several WTO Members completely against the incorporation. The opposition of views regarding the full implementation of air transport services makes it very difficult to reach a consensus. And since the WTO is a member-driven international organization, based on the principle of consensus, there is still no progress regarding the implementation of air transport services within the GATS framework.[297]

Despite the fact that the GATS can provide an adequate framework for liberalizing air transport services, political disagreement between to WTO Members makes it impossible to reach a consensus regarding the implementation of air transport services. Consequently, a full adoption of air transport services, including the traffic rights, within the GATS framework will, in my opinion, not occur in the near future.

[297] X, *what is the World Trade Organization*, World Trade Organization, < http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm> accessed 7 November 2018.

BIBLIOGRAPHY

I. LEGISLATION

Annex on Air Transport Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, *1869 UNTS 183,* 33 ILM 1167.

Convention on International Civil Aviation, 7 December 1944, *15 UNTS 295*, ICAO Doc 7300/6

General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, *1869 UNTS 183,* 33 ILM 1167.

Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, *1867 UNTS 154,* 33 ILM 144.

Treaty on the Functioning of the European Union (consoled version), 13 December 2007, *OJ C 326,* 26 October 2012, 13 – 390.

ICAO Doc., A39-WP/189, (2016), 4, [air transport liberalization and the economic development of the countries].

ICAO Doc., 9626*,* (2016), 222 [manual on the regulation of international air transport].

WTO Doc., S/C/W/59, (1998), 55 [background Note by the Secretariat. Air Transport Services].

WTO Doc., S/C/W/179, (2000), 3 [communication from Australia. The GATS Review: An Opportunity for Phased Reform of Air Transport Services].

WTO Doc., S/C/W/134, (2000), 3 [communication from Japan. Work Programme on Review of Air Transport Services].

WTO Doc., S/C/W/198, (2001), 7 [communication from the United States. Review of the GATS Annex on Air Transport Services].

WTO Doc., S/C/M/50, (2001), 19 [note by the Secretariat: Report of the Second session of the Review mandated under paragraph 5 of the Air Transport Annex held on 4 December 2000].

WTO Doc., S/C/M/84, (2006), 13 [note by the Secretariat: Report of the First session of the Review mandated under Paragraph 5 of the Annex on Air Transport Services held on 12 September 2006].

WTO Doc., S/C/W/270/Add.1, (2006), 90 [Note by the Secretariat. Second Review of the Air Transport Annex: developments in the Air Transport Sector (Part Two). Quantitative Air Services Agreements Review", Volume I].

WTO Doc., S/C/M/89, (2007), 23 [Note by the Secretariat: Report of the Second session of the review mandated under Paragraph 5 of the Annex on Air Transport Services held on 2 October 2007].

II. JURISPRUDENCE

Appellate Body Report, European Communities – Regime for the Importation, Distribution and Sale of Bananas, WT/DS27/AB/R, adopted on 25 September 1997.

III. DOCTRINE

§1. Books

ADLUNG, R., MATTOO, A., "The GATS" in MATTOO, A., STERN, R., and ZANINI, G. (eds.), *A handbook of International Trade in Services,* Oxford University Press, 2008, 48 – 83.

ALEXANDER, K., and ANDENAS, M., *The World Trade Organization and Trade in Services,* Martinus Nijhoff Publishers, Boston/Leiden, 2008, 1024 p.

DECURTINS, C.G., *The air transport review at the WTO: Bilateralism versus Multilateralism*, unpublished PhD thesis International relations, University of Genève, 2007, 228 p.

DEMPSEY, P.S., *Public International Air Law,* Institute and Centre of Air & Space Law, McGill University, Canada, 2017, 1025 p.

DEVOS, F., *De vervoerdiensten en het WTO GATS,* unpublised masterthesis Law and Economics, University Ghent/Antwerp, 2010-2011, 92 p.

DIEBOLD, N.F., *Non-discrimination in International Trade in Services: 'Likeness in WTO/GATS*, Cambridge, 2010, 432 p.

DIEDERIKS – VERSCHOOR, I.H. Ph. *An introduction to Air Law,* 2012, Wolters Kluwer, The Netherlands, 429 p.

DE LEON, P.M., *Introduction to Air Law,* Wolters Kluwer, the Netherlands, 2017, 545 p.

HAANAPPEL, P.P.C., *The Law and Policy of Air Space and Outer Space. A comparative approach,* Kluwer Law International, 2003, 311 p.

HOEKMAN, B.M., and MAVROIDIS, P.C., *The World Trade Organization: Law, economics and politics,* Second edition, Global Institutions, Routledge, London, New York, 2016, 160 p.

JACKSON, J.H., *The World Trade Organization. Constitution and Jurisprudence,* Routledge, London, 1998, 128 p.

KROMMENACKER, R.J., "Multilateral Services Negotiations: From Interest-Lateralism to Reasoned Multilateralism in the Context of the Servicization of the Economy" in PETERSMANN, E-U., and HILF, M. (eds.), *The New GATT Round of Multilateral Trade*

Negotiations: Legal and Economic Problems, Kluwer Law and Taxation Publishers, Boston, 1988, 455 – 474.

LATRILLE, P., "Air transport liberalization: a world apart" in MARCHETTI, J.A., and ROY, M. (eds.), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, 264 – 299.

LATRILLE, P., and JUNEYOUNG, L., "Services rules in regional trade agreements: how diverse and how creative as compared to the GATS multilateral rules?" *WTO Staff Working Paper, NO. ERSD-2012-19*, 2012, 43 p.

LYKOTRAFITI, A., *Liberalisation of International Civil Aviation*, OECD Discussion Paper, 2015, 22 p.

MARCHETTI, J.A., and ROY, M., "Summary and overview", in MARCHETTI, J.A., and ROY, M. (eds.), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, 1 – 18.

MARCHETTI, J.A., and ROY, M., "Services liberalisation in the WTO and in PTAs" in MARCHETTI, J.A., and ROY, M. (eds.), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations,* Cambridge University Press, 2008, 61 – 112.

MATSUSHITA, M., SCHOENBAUM, T.J., MAVROIDIS, P.C., and HAHN, M., *The World Trade Organization: Law, Practice and Policy,* Oxford University Press, Oxford, 2015, 1000 p.

MILDE, M., *International Air Law and ICAO,* Eleven International Publishing, The Netherlands, 2008, 351 p.

SALAZAR, J.C., and VAN FENEMA, P., "International air transport agreements" in P.S. DEMPSEY, P.S., and JAKHU, R.S. (eds.), *Handbook of Public Aviation Law,* Routledge, London, 2017, 252 – 294.

SAUVANT, K.P., "The Tradability of Services", in MESSERLIN, P., and SAUVANT, K.P. (eds.), *The Uruguay Round: Services in the World Economy,* Washington, New York: The World Bank and UNCTC, 1990, 114 – 122.

SCHIFF, A., and SMALL, J., *Economic Effects of Air Services Liberalisation in New Zeeland. Prepared for Ministry of Transport,* 2013, 48 p.

STEWART, T.P., *The GATT Uruguay Round: A negotiating history (1986 – 1992). Volume II: Commentary*, Kluwer Law and Taxation Publishers, Boston, 1993 2921 p.

THE WTO SECRETARIAT, *Guide to the Uruguay Round Agreements,* Kluwer Law International, 1999, 285 p.

VAN DEN BOSSCHE, P., and ZDOUC, W., *The Law and Policy of the World Trade Organization,* Cambridge University Press, 2017, 1077 p.

VON DEWITZ, W., "Services and the Uruguay Round: Issues Raised in Connection with Multilateral Action on Services: A Comment", PETERSMANN, E-U., and HILF, M. (eds.), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems,* Kluwer Law and Taxation Publishers, Boston, 1988, 475 – 479.

WEBER, L., "The Chicago Convention" in DEMPSEY, P.S. and JAKHU, R.S. (eds.), *Handbook of Public Aviation Law*, Routledge, London, 2017, 9 – 32.

WOUTERS, J., and DE MEESTER, B., *The World Trade Organization: A Legal and Institutional Analysis,* Intersentia, 2007, 301 p.

WOLFRUM, R., STOLL P.-T., and FEINAUGLE C., *WTO – Trade in Services,* Martinues Nijhoff Publishers, Leiden – Boston, 2008, 784 p.

WTO Secretariat, *Guide to the GATS: an overview of issues for further liberalization of Trade in Services,* London, Kluwer International Law, 2001, 704 p.

XING, L., *Air Transport Services in the GATS,* unpublished LL.M thesis, University of Ghent, 2013-2014, 44 p.

§2. Journals

AMANA, A.R., "The liberalization of air services: prospects and challenges for the Indian economy", *Journal of International Trade Law and Policy,* 2015, 49 – 66.

BUTTON, K., and SAMANTHA, T., "International Air Transportation and Economic Development", *Journal of Air Transport Management*, 2000, 209 – 222.

EBDON, R., "A Consideration of GATS and of its Compatibility with the Existing Regime for Air Transport" *Air and Space Law*, 1995, 71 – 75.

EHRENBECK, M., "GATS Annex on Air Transport Services and the Aviation Industry's Response", *S. Afr. Y.B., Int'l L*, 2004, 217 – 228.

FAYED, H.A., and ESTLAKE J.W., "Globalization of air transport: the challenges of the GATS", *Tourism Economics,* 2002, 431 – 451.

FINDLAY, C., and D.K. ROUND, D.K., "The 'three pillars of stagnation: challenges for air transport reform", *World T.R.,* 2006*,* 251 – 270.

FU, X., HOON, T., and ZHANG, A., "Air Transport Liberalization and Its impacts on Airline Competition and Air Passenger Traffic", *Transportation Journal,* 2010, 24 – 41.

HAANAPPEL, P.P.C., "Regulatory Developments at the European Union and World Trade Organization Levels"*, Air & Space Law 40*, 2015, 65 – 69.

HAVEL, B.F., "Rethinking the GATS as a pathway to global aviation liberalisation", *Irish Jurist,* 2009*,* 47 – 94.

HUBNER, W., and SAUVE, P., "Liberalization scenarios for International Air Transport", *JWT,* 2001*,* 973 – 987.

HUNDEREK-GLAPSKA, S., "Economic Benefits of Market Liberalization. Evidence from Air Transport in Poland", *Journal of International Studies,* 2010, 49 – 58.

KOESTER, M., "ICAO and the Economic Environment of Civil Aviation – The Impact of the Fifth Worldwide Air Transport Conference of 2003 on Challenges and Opportunities of Liberalisation, *ZLW,* 2003, 322 – 331.

KREYMBORG, D., "Developments Relevant to International Air Transport in the WTO", *Air & Space Law,* 2003, 471 – 498.

KUSUMANINGRUM, A., "The challenges of International Air Law Principles in Globalization Era", *Brawijaya Law Journal,* 2017, 255 – 268.

MARCHETTI, J.A. and MAVROIDIS, P.C., "What are the main challenges for the GATS framework? Don't talk about revolution"*, EBOR,* 2004, 511 – 562.

MARCHETTI, J.A., and MAVROIDIS, P.C., "The Genesis of the GATS", *EJIL*, 2011, 689 – 721.

MATTOO, A., and WUNSCH-VINCENT, S., "Pre-Empting Protectionism in Services: The GATS and Outsourcing", *Journal of International Economic Law,* 2004, 765 – 800.

MORRIS, P.S., "Competition in Air Transport in Europe under a World Trade Organization Umbrella", *Air & Space Law.,* 2007, 529 – 558.

NARENDRA, S., "General Agreement on Trade in Services and Aviation Ground Handling Services – A Theoretical Perspective", *IOSR Journal of Business and Management*, 2014, 36 – 46.

PIERMARTINI, R., and ROUSOVA, L., "The Sky is not flat: how discriminatory is the access to international air services?" *American Economic Journal: Economic Policy,* 2013, 287 – 319.

SERRANO, V.R., "Trade in Air Transport Services: Liberalizing Hard Rights, *Air & Space Law,* 1999, 199 – 215.

SHREWSBURY, S.M., "September 11th and The Single European Sky: Developing Concepts of Airspace Sovereignty", *Journal of Air Law and Commerce,* 2003, 115 – 160.

TIROUAL, R., "Competition and Subsidies in Air Transport Liberalization – The UAE – North America Dispute", *Journal of Air Law and Commerce*, 2017, 345 – 395.

WASSENBERG, H., "Commercial Aviation Law 1998, Multilateralism versus Bilateralism, *Air & Space Law,* 1998, 22 – 30.

ZHANG, L., "The Role of Dispute Settlement Body in the World Trade Organization in the Aviation Industry – in the Time of Bombardier Case*", Air and Space Law*, 2018, 1 – 16.

ZHAO, Y. “Air Transport Services and WTO in the New Epoch”, *ZI.W. 50*, Rotterdam, 2001, 48 – 67.

ZHAO, Y., “Liberalization of Air Transport Services under the Framework of the WTO: Confronting the Challenge of the Twenty-First Century*”, Asian Y.B. Int’l L,* 1998, 3 – 36.

§3. Internet Sources

AVERSA, G., *Uruguay Round,* Bankpedia *http://www.bankpedia.org/index.php/en/130-english/u/23844-uruguay-round* consulted 28 March 2019.

ICC Policy Statement, "The need for greater liberalization of international air transport. Prepared by the Committee on Air Transport", International Chamber of Commerce, 7 p., *https://iccwbo.org/content/uploads/sites/3/2016/10/The-need-for-greater-liberalization-of-international-air-transport.pdf* consulted 24 April 2019.

International Transport Forum, *Air Service Agreement Liberalisation and Airline Alliances*, OECD Discussion Paper, 2014, 13 p., *https://www.itfoecd.org/sites/default/files/docs/14airserviceagreements.pdf*, consulted 12 April 2019.

InterVISTAS-EU Consulting Inc., *The Impact of International Air Service Liberalisation on Chile,* 2009, 41 p., *https://www.iata.org/publications/economics/reports/chile-report.pdf* consulted 12 April 2019.

InterVISTAS-EU Consulting Inc., *The Impact of International Air Service Liberalization on Panama,* 2010, 41 p., *https://www.iata.org/publications/economics/Reports/panama-report.pdf* consulted 23 April 2019.

Reports – Commitments – Member x Sector (GATS) *http://i-tip.wto.org/services/ReportResults.aspx* consulted 22 April 2019.

Reports – MFN Exemptions – Member x Sector (GATS) *http://i-tip.wto.org/services/ReportResults.aspx* consulted 22 April 2019.

Reports – GATS commitments – Nicaragua – 11 Transport Services; *http://itip.wto.org/services/GATS_Detail.aspx/?id=Nicaragua&sector_path=TRANSPORT%20SERVICES&rta_path=0000* consulted 22 April 2019.

TORTICE, J., *Air Transport Services: International Regulation and Future Prospects for Liberalization*, Industry, Trade and Technology Review, 1999, 31 p., *https://www.usitc.gov/publications/ittr/pub3271.pdf* consulted 15 April 2019.

Uniting Aviation, *Creating Opportunities Through Open Skies Agreements,* 2018, *https://www.unitingaviation.com/strategic-objective/economic-development/creating-opportunities-through-open-skies-agreements/* consulted 12 April 2019.

X., *About ICAO,* ICAO Uniting Aviation, *https://www.icao.int/about-icao/Pages/default.aspx* consulted 28 April 2019.

X., *Air Transport,* The World Bank, *http://www.worldbank.org/en/topic/transport/brief/airtransport* consulted 3 December 2018.

X., *Air transport services, https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_air_e.htm,* consulted 25 March 2018.

X., *Air Transport Services: Second Review*, World Trade Organization, 31 p., *https://www.wto.org/english/tratop_e/serv_e/transport_e/review2_e.htm* consulted 22 April 2019.

X., *Assessment by the International Transport Workers' Federation (ITF) Civil Aviation Section on the TISA Annex on Air Transport Services*, 3 p., *https://wikileaks.org/tisa/air-transport/analysis/Analysis-TiSA-Air-Transport-Services-Annex.pdf*, consulted 15 April 2019.

X., *Comparative Advantage,* Wikipedia, *https://en.wikipedia.org/wiki/Comparative_advantage* consulted 16 April 2019.

X., *Council for Trade in Services,* Office of the United States Trade Representative, *https://ustr.gov/trade-agreements/wto-multilateral-affairs/-world-trade-organization/council-trade-services* consulted 28 April 2019.

X., *Freedoms of the Air explained – Can an airline fly anywhere?,* The Aviation Blog, 2017, *https://pilotstories.net/freedoms-of-the-air-explained/* consulted 26 April 2019.

X., *GATS: Facts and fiction. The Structure of the GATS,* World Trade Organization, *https://www.wto.org/english/tratoP_e/serv_e/gats_factfiction4_e.htm* consulted 16 April 2018.

X., *Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions, https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm*, consulted 20 April 2019.

X., *International Trade in Air Transport: Recent Developments and Policy Issues,* World Trade Organization, 2005, p. 230, *https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr05-3b_e.pdf* consulted 24 April 2019.

X., *Liberalisation of Air Transport and the GATS,* IATA Discussion Paper, 1999, 15 p. , *https://www.wto.org/english/tratop_e/serv_e/iacposit41.pdf* consulted 30 November 2018.

X., *Principles of the trading system*, World Trade Organization, *https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm* consulted 29 April 2018.

X., *Services: sector by sector: Air transport services*, World Trade Organizations, *https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_air_e.htm, consulted* 17 March 2018

X., *The Bilateral System – how international air services work,* Australian Government: Department of Infrastructure, Regional Development and Cities, *https://infrastructure.gov.au/aviation/international/bilateral_system.aspx* consulted 11 April 2019.

X., *The General Agreement on Trade in Services (GATS): objective, coverage and disciplines,* World Trade Organization, *https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm* consulted 16 April 2019.

X., *The Services Council, its Committees and other subsidiary bodies,* World Trade Organization, *https://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm* consulted 28 April 2019.

X., *Trade in Services,* ICAO Economic Development, *https://www.icao.int/sustainability/Pages/eap-ep-trade-services.aspx* consulted 28 April 2019.

X., *What is the WTO?,* World Trade Organization, *https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm*, consulted 26 April 2019.