Legal implications of access to Zurich airport through South Germany's airspace

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Executive Summary

The present study concerns an examination of the legal implications of access to Zurich airport through South Germany's airspace. It outlines the Swiss and German's positions under public international air law, and, anticipating the entry into force of the EC-Switzerland agreement (1999), under EC air law, taking into account the provisional results of the (draft) Berlin agreement. This agreement is designed to reduce, inter alia, the number of flights using the contested portion of South Germany's airspace, both in terms of frequencies, time periods and type of aircraft. The impact of environmental law is limited. We have not examined the legality of the (draft) Berlin agreement under national (constitutional) law.

Our overall conclusion is that the (draft) Berlin agreement is favourable for Switzerland, especially under public international air law. However, this agreement could be challenged by Germany's partners in bilateral air agreements, and under EC air law, in so far as this agreement would restrict the rights of airlines to fly to and from Zurich airport, and the operation of the airport. This does not seem to be the case.

It seems to us that Germany has more rights to regulate air traffic in the contested portion of its Southern airspace under public international air law than under EC air law. Subject to a number of legal principles, especially the non-discrimination principle, Germany can organise traffic in that portion of airspace as it sees fit. We have seen no evidence that the proposed German measures discriminate against Switzerland, its carriers other carriers and/or Zurich airport. This conclusion is based on the opinion that the passage of flights approaching or departing from Zurich airport through South Germany's airspace is not covered by the transit freedom secured by international air agreements.

Whereas public international air law proceeds from the state's powers in its airspace, EC air law adopts a market-oriented approach, and may challenge a state's competencies in air transport matters. Switzerland might be in a stronger position from the perspective that the German measures may affect the freedom of market access. However, EC legal bodies may question the Swiss claims to use the contested portion of Germany's airspace as Switzerland is in a position to offer alternative routes for use of Zurich airport via its own airspace. The Swiss position may be examined under the proportionality principle, as may the necessity of the German environmental measures so as to establish the proportionality between the proposed restrictions and the stated protection of the environment. Also, a decision of the EC Commission as an alternative for an inter-state agreement could be an option under EC procedural law.

We would advise the Swiss government to proceed with the preparations of the conclusion of the Berlin agreement, and not to engage into legal proceedings, to begin with, under public international air law.

APPLICABLE LAW AND ABBREVIATIONS

Public international air law

Public international law includes public international air law. The present question is related to passage of aircraft through foreign airspace so that the privilege or right granting the Transit Freedom may be applicable. Therefore, we apply the rule *lex specialis derogat legi generali*, and will deal with the application of public international air law, to begin with.

For the purpose of examining the present case, the following instruments of public international air law are applicable:

- the Chicago Convention on international civil aviation of 1944, henceforth also referred to as: the Chicago Convention;
- the International Air Services Transit agreement of 1944, henceforth also referred to as: the Transit Agreement;
- the bilateral agreement concluded between Switzerland and Germany on 2 May 1956, as amended, lastly on 18 July 1991, henceforth also referred to as: the Swiss-German bilateral agreement;
- ICAO Annex 11 "Rules of the Air", henceforth also referred to as: ICAO Annex 11.

Public international law

Reference will be made to:

- the Vienna Convention on the Law of the Treaties (1969), henceforth also referred to as: the Vienna Convention (1969) and:
- cases decided upon by the International Court of Justice, henceforth also referred to as: ICJ.

EC law

The Agreement between the European Community (EC) and the Swiss Confederation on Air Transport dated 21 June 1999, henceforth: the EC-Switzerland Agreement (1999). We presume that this agreement will enter into force in 2002 at the latest. That is why we anticipate the application of the main principles and provisions below. This expectation is subject to the condition that EC law cannot be applied retroactively to the present case.

Applicable instruments are:

- The EC-Switzerland Agreement (1999)
- provisions of the EC Treaty;
- the Regulation on market access (2408/92), henceforth also referred to as: the market access Regulation;
- cases decided upon by the European Court of justice, henceforth also referred to as: ECJ.

Other applicable international law

The impact of other branches of international law on the analysis of the present case, including environmental law and the law of neighbourliness, is limited. Obviously, we will mention these branches of international law where appropriate.

National law

As to the application of national law, we quote Article 27 of the Vienna Convention (1969) stating that a state "may not invoke the provisions of its internal law as a justification for its failure to perform a treaty." Consequently, national law must comply with, and may not infringe, rules of international law, confirming the primacy of international law.

The ECJ established the primacy of EC law in relation to the national laws of the E(E)C Member States. This court ruled that the E(E)C Treaty constitutes the basis "for a new legal order of international law for the benefit of which the states have limited their sovereign rights …".[1] In a later decision,[2] the words "of international law" were no longer mentioned, so as to emphasise the special nature of Community law. The last words, referring to the legal personality of the Community, both at the internal and the international level, implies that the Community is vested with real powers arising from a limitation of competencies or a delegation of powers from the Member States to the Community.[3] That is why we adopted a methodology, proceeding from the primacy of international law and EC law (if applicable).

This having been stated, Article 11 of the Chicago Convention gives a role to national law. We will revert to this in the replies givens to the questions asked by the Swiss authorities.

On the EC side, it will be noted that EC law does not govern all subject matters pertaining to the analysis of this case, for instance, standards pertaining to approach and landing movements in relation to airports, and noise zoning around airports. In such instances, national laws continue to play a role. However, those

[1] Case 26/62 *Van Gend en Loos*, ECR 1963 at 12
[2] Cases 90 and 91/63 *Commission* v. *Luxembourg and Belgium*, European Court Reports 631 (1964)

national laws must comply with certain principles of the Community and the EC treaty, including but not limited to the freedom to provide services in the Community, prohibition of discrimination and of distortion of competition, and the proportionality principle (*see*, below).

On the basis of the above remarks, we decided to concentrate our evaluation of the above case on the basis of international law and EC law.

EXAMINATION OF THE MAIN PRINCIPLES

Throughout the report, we will refer to a number of principles. A brief discussion of the main principles is given below. We add that this discussion is made at an abstract level; that is to say, a principle receives a meaning through application to a certain case, taking into account all the concrete circumstances of that case. In the final analysis, judicial institutions decide whether, and how, these principles apply to the case.

- *The non-discrimination principle under public international air law*

  Contracting states to the Chicago Convention may not discriminate between aircraft registered in those contracting states, and to their operators, that is, the airlines. Consequently, we will consider the non-discrimination principle as having the same meaning as national treatment. Certain provisions provide that no distinction may be made between operators of scheduled and non-scheduled services; see, Article 15 of the Chicago Convention on airport charges.

- *The non-discrimination principle under EC law*

  This principle is firmly enshrined in Community law. Its meaning depends on the context in which it is used. For the purpose of the present analysis, non-discrimination amounts to *national treatment*. For example, Community law gives EC Member States, under specified conditions, the right to regulate traffic to and from airports on their territories depending on operational and environmental circumstances and on the availability of slots. If this right to regulate traffic under the said conditions is made use of, the principle of non-discrimination in terms of nationality and identity of the air carrier, whether a Community air carrier or not, must be observed.

[3] Case 6/64 *Costa* v. *Enel*, European Court Reports 593 (1964)

- *The proportionality principle under environmental law*

  In the present context, it is applied to the relationship between trade, including the freedom to provide services, on the one hand, and the imposition of environmental restrictions to international trade, on the other hand. One of the meanings of "proportionality" is that there should be proportionality of environmental measures, to trade restrictions. Moreover, Principle 12 of the *Rio Declaration on Environment and Development* (*see below*, under 4) states that trade policy measures for environmental purposes should not constitute a disguised restriction on international trade.

- *The proportionality principle under EC law*

The *proportionality principle* as applied in EC law means that certain measures, for instance, environmental restrictions, may be unacceptable if:

- they are not warranted by mandatory requirements in the public interest; *or*
- the same result can be achieved by less restrictive rules,

even if the measures under discussion apply without distinction as to nationality to all EC air carriers, and thus do not infringe the principle of non-discrimination.[4]

- *Transit Freedom*

One of the most essential aspects of the present case concerns the application of the Transit Freedom which states granted each other under either the Transit Agreement or in bilateral air agreements or both. For the purpose of defying the term "Transit Freedom" we will proceed from the formulation, which is laid down in Article I, section I of the Transit Agreement. Transit Freedom means the privilege to fly across the territory of another state, party to one or more of the mentioned agreements, without landing.

Since the Transit Freedom embodies one of the "Freedoms of the Air", an overview of the "Freedoms of the Air" is attached in the Annex to this report (see, Annex I at page 44).

Application of the above principles

The above principles will be applied bearing in mind the legal adagio: *ex re sed no ex nomine*. The facts of the case rather than the formulation of the rule determine whether or not the principles on non-discrimination and proportionality have been infringed.

[4] See, EC Commission, *Access to Karlstad airport*, decision of 22 July 1998; case 98/523/EC, consideration 24.

TWO DIFFERENT APPROACHES: PUBLIC INTERNATIONAL AIR LAW AND EC AIR LAW

Public international air relations are part of trade relations between states, where policy arguments may play a greater role in the legal interpretation of the case. This point of departure is legally translated into the application of the "complete and exclusive sovereignty" which states have over the airspace had above their territory (see, Article 1 of the Chicago Convention).

The rules with respect to the use of Germany's airspace are more detailed and subject to stricter judicial control under EC air Law than under public international air law.
EC air relations are related to the formation of a single market for economic activities governed by EC institutions, rules and legal remedies.

In summary, whereas the public international air law approach is dominated by the competencies of the national state in relation to air transport activities, the Community approach is marked by a market oriented approach towards the operation of intra-Community air services.

1 Questions pertaining to the Transit Freedom and Market Access

1.1 *Does the privilege to fly across the territory of a contracting party without landing as defined in the Transit Agreement of 1944 include approaches, departures and holding patterns as well*?

The short answer to this question is: no. However, we immediately add that this positive answer is subject to the acceptance of the interpretation given to the words "flying across" and "without landing".

The relevance of this question is dictated by the following facts. Some 68 % of all flights landing in and departing from ZRH airport is coming from or destined for a point which is located South, South East, or South West from Switzerland. For instance, the question is whether a flight coming from Johannesburg, operated by South African Airways (SAA), using South Germany's airspace for an approach movement towards ZRH airport, is protected by, and falls under the terms of, the "Transit Agreement". The most direct airways for those services from and to ZRH airport do not pass via the airspace of Southern Germany, so that the operators of the concerned flights could avoid flying through this airspace. Said operators use the airspace of Germany merely for approaches and departure movements.

It seems to us that approaches, departure and holding patterns are not governed by the "Transit Freedom" given by the above Agreement of 1944. We arrive at this conclusion by an interpretation, which is given "in good faith" and in accordance "with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." (see, Article 31(1) of the *Vienna Convention* of 1969, applying as a rule of law between Switzerland and Germany).

The combination of the terms "flying across" and "without landing" justifies the conclusion that the term "transit freedom" refers to flying at a cruising level across the territory of another country.

The Transit Freedom as formulated in the Transit Agreement is related to *a privilege* to fly across another country without landing. "To grant someone a privilege," means "to invest someone with a special advantage or benefit," with a peculiar right or prerogative.[5] It follows therefore that the word "privilege" means a "special right". In the light of the basic principles of the Chicago Convention, proceeding from "closed airspaces", the grant of any transit right must therefore be viewed as a *privilege*.

[5] Cf. Mozley and Whiteley's *Law Dictionary* 358 (1988), giving a definition of privilege: "That which is granted or allowed to any person, or to any class of persons, either *against* or *beyond* the course of ordinary law." (italics supplied)

However, we add that not all air agreements consider the Transit Freedom as a "privilege". Clauses in bilateral air agreements may also refer to "the right" to fly across the territory of the other party. The Swiss-German bilateral agreement speaks of "*Das Recht des Überfluges*".

The terms "transit freedom" or "the right to fly across [foreign] territory without landing" have never been interpreted in (international) legal proceedings.

When saying this, we do not exclude that other interpretations can be defended. For instance, it could be argued that "landing" refers to the moment the aircraft touches the ground, or the "land" (see also, the French word "*atterrissage*"). This interpretation is supported by the definition which Art. 96(d) of the Chicago Convention gives for "stop for non-traffic purposes", meaning "a landing for any purpose other than taking on or discharging passengers, cargo or mail". A stop is seen as a landing - which does not necessarily mean that any landing is a stop.

"Landing" can also be seen from an operational side: an aircraft is in the process of landing the moment the landing gears are released. When aircraft approaching ZRH airport releases landing gears above German territory, it can said that the aircraft is "landing". This approach does not bring us much further as landing gears are released some 12 to 15 kilometres before touching the ground. The German border is located at some 14 kilometres from the runway 16 of ZRH airport.

Other criteria for landing and departure can be found in the *Procedures for Air Navigation Services, Aircraft Operations*, established by ICAO.[6]

Chapter 2.2 defines the end of the departure procedure as follows:

> "The departure procedure ends at the point where the slope, achieved by adding 0.8 per cent to the 2.5 per cent gradient of the obstacle identification surface (OIS) or to the gradient determined by the significant obstacles infringing this OIS, measured along the nominal flight track reaches the minimum altitude/height authorised for the next phase of flight."

The said Procedures do not refer to "landing" but to *approach*. For instance, Chapter 4.1 states that the initial approach segment commences at the initial approach fix.

One could also question whether the freedom granted under the "Transit Agreement" includes "innocent passage". We feel that this question has to be replied in a positive fashion, referring to the proceedings of the Chicago Convention: "The first of these documents is the agreement of the two freedoms - the freedom of peaceful transit …".[7] Furthermore, we rely on the views expressed by the advisor to the

[6] ICAO Doc 8168
[7] See, *Proceedings of International Civil Aviation Conference*, Chicago, at 110 (1944)).

German government in this respect (*On the transit flights over the territory of Germany to/from Zurich airport*, 2001). Therefore, *even if* the passage movements, that is, approaches to and departures from, as well as holding patterns with respect to ZRH airport, of non-German, especially non-EC (see on this, below) airlines are covered by the above Transit Agreement, they may not cause harm to the overflown country and its inhabitants.

Germany can be said to accept the interpretation that "transit flights" must be "innocent passage" in that it imposes restrictions based on safety and environmental considerations on flights in transit. Obviously, Germany is entitled to do so in the light of Article 11 of the Chicago Convention.[8]

In our view, the passage of the SAA aircraft through South Germany's airspace referred to above is not protected by the Transit Freedom laid down in the Transit Agreement. The provisions of the bilateral air agreement between South Africa and Germany probably also do not protect said passage. However, in order to have an accurate picture of the rights exchanged between - in this case Germany and South Africa - the applicable bilateral air agreement between the two countries should be examined.

The question of Iberia, as a Community air carrier, flying from Madrid through Germany's airspace to ZRH airport, must be examined under applicable EC air law, that is, to begin with, EEC Regulation 2408/92, in particular Article 8(2) thereof. This question is a matter of market access. We refer to the examination under 1.4. Also, regard must be had to the freedom to provide services in the Community, as well as conditions related to non-discrimination and the “proportionality” (see on this,1.4) of the German environmental measures.

Proceeding from the inapplicability of the *Transit Agreement* and the questionable applicability of the "transit provisions" in bilateral air agreements, the question arises - although this question has not been asked - by what rights the above passage of non-German airlines through South German airspace are protected. Apart from the special EC regime, Germany must base access to German airspace on a positive grant, either in a multilateral agreement, or in a bilateral agreement. We find that, if we proceed from the inapplicability of the – unspecified - transit freedom under the Transit Agreement, the same reasoning should apply to the – unspecified - transit freedom under Article 5 of the Chicago Convention on non-scheduled services. In other words, Article 5 of the Chicago Convention does not cover operations of non-scheduled airlines, similar to those of SAA and IB, above, passing through South Germany's airspace for the purpose of landing at ZRH airport.

[8] See, K.H. Böckstiegel/J. Reifarth, *Die Luftaussicht im südwestdeutschen Raum, Zeitschrift für Luft- und Weltraumrecht* 204 (1993), and N. Lübben/R. Wolfrum (Wilmer Cutler & Pickering), *Rechtliche Einschätzung der Zulässigkeit von Einschränkungen des An- und Abflugs vom/zum Flughafen Zürich über Deutschland*, 28. November 2000 at 12 (*not published*).

Thought could be given to the following legal arguments:

- said passage, that is, approach and departure movements, have so far been considered by Germany as "transit rights", giving a broad interpretation to this term under the applicable agreements (*see*, above);
- said passage movements have so far been tolerated by Germany on the basis of "neighbour law" dictating comity and co-operation in international relations (*see also*, under 4);
- said passage movements can be considered as an "international servitude" which has been established by the operation of said flights through South Germany's airspace.

Obviously, Germany's positive attitude until the beginning of the 1980s vis a vis the situation prevailing in its Southern airspace can be based on a mix of the above legal arguments. This positive attitude was backed by political good will of the German government vis a vis other states.

Thus, we agree in principal with the opinions expressed by Professor Böckstiegel,[9] and with the views expressed by the advisor to the German government (*On the transit flights over the territory of Germany to/from Zurich airport*, 2001). We disagree with the opinions expressed by Mme R. Dettling-Ott of 22 August 2000, and of Wilmer, Cutler and Pickering (WCP) of 28 November 2000.

The Transit Agreement, as well as most bilateral air agreements, apply to scheduled international air services only. For the regime governing the operation of non-scheduled international air services, reference is made to question 1.3, below.

1.2 (a) *Can Switzerland based on the Transit Agreement of 1944 claim the right of transit for Swiss aircraft only (registered in Switzerland) or also for foreign aircraft flying to and from Switzerland*?

(b) *Could Switzerland based on the same agreement claim such rights also for the Operation of an airport*?

(a) Switzerland can claim and enforce the said rights - if applicable, *see*, under 1.1 - for Swiss aircraft and Swiss airlines only. Germany has granted those transit rights - again, if applicable - to operators of non-Swiss aircraft. The states designating those non-Swiss airlines may enforce claims vis a vis the German government on the basis of the prevailing bilateral air agreements and the Transit Agreement. The EC regime is different (*see*, inter alia, 1.4, below).

[9] *Die Luftaussicht im Süddeutschen Raum*, Zeitschrift für Luft- en Weltramurecht at 204 (1983)

(b) No; since we arrived at the conclusion that the approach and departure movements do not fall under the Transit Agreement, this agreement is inapplicable with respect to the operation of ZRH airport. The - international - law governing access to airports is Article 15 of the Chicago Convention.

1.3 (a) *Can Switzerland claim a right* (*based on public international law and/or EC-law*) *to use German airspace for flights engaged in the transit phase to and from Zurich*?

(b) *Can Switzerland claim a right* (*based on public international law and/or EC-law*) *to use German airspace for approaches, departures and holding patterns, as envisaged under 1.1*?

(a) The short answer is yes, that is, under public international air law for Swiss registered aircraft and Swiss airlines. Swiss claims may be broader under EC law.

Public international (air) law

Since the problem, which is at present under discussion, relates to passage of aircraft through the airspace of Southern Germany, we shall focus on the grant of privileges and rights granting Transit Freedom. The commercial Freedoms of the Air are not relevant in the present context.

A distinction has to be made between the use of airspace for the operation of *scheduled* international air services, on the one hand, and the operation of *non-scheduled* international air services, on the other hand, as the legal regimes governing the two sets of services are different.

- For the operation of *scheduled* international air services (to which Article 6 of the Chicago Convention applies):

Switzerland can claim the use of Germany's airspace for the operation of "transit" rights ("*Das Recht des Überfluges*") for scheduled designated air carriers it designated under Article 2 of the Swiss-German bilateral air services agreement of 2 May 1956, as amended, lastly on 18 July 1991. The same claim can be made by Switzerland, based on Article I, section 1 of the International Air Services Transit Agreement of 1944. Both Germany and Switzerland are a party to this Agreement.

- For the operation of *non-scheduled* international air services (to which Article 5 of the Chicago Convention applies):

Switzerland can claim the use of Germany's airspace for the operation of "transit" rights for non-scheduled flights by aircraft registered in the Swiss national aircraft register on the basis of Article 5 of the Chicago Convention of 1944. Both Switzerland and Germany are a party to this convention.
These claim are based upon, and subject to, the terms of the Chicago Convention and the International Air Services Transit agreement of 1944, as well as on the bilateral air agreement between Switzerland and Germany of 1956, as amended.

For restrictions with respect to these claims, *see*, 1.4, below.

EC law

Under the EC regime, the claim of Switzerland should not be based on its proclaimed entitlement of the use of Germany's airspace, but on Switzerland's entitlement to participate to the EC air transport market, unhampered by national - that is, German - measures, isolating its nationals (Zurich airport, Swissair) from such participation. Switzerland's claim is based upon the ratification of the EC-Switzerland agreement of 1999, the entry into force of this agreement, and subject to the terms of this agreement.

(b) *Can Switzerland claim a right* (*based on public international law and/or EC-law*) *to use German airspace for approaches, departures and holding patterns, as envisaged under 1.1*?

The application if public international air law

The operation of scheduled international air services

It follows from the examination made under 1.1 that Switzerland cannot claim such a right, at least as a privilege under the Transit Agreement. Under 1.1, we arrived at the conclusion that the above movements, that is, approaches, departures and holding patterns, are not covered by the privilege relating to the Transit freedom granted by Germany to Switzerland under the Transit Agreement.
Under the Swiss-German bilateral Agreement of 1956, as amended, reference is made to "*Das Recht des Überfluges*". This right, which is not a privilege (see, above under 1.1) gives "more right" to Switzerland and its designated carriers to use German airspace.

This is so because:

- the *privilege* has become a *right*;
- the words "without landing" have been omitted in the Swiss-German bilateral agreement.

However, we doubt whether the intention of the parties, especially Germany, under the mentioned bilateral agreement, was to give Switzerland and its designated carriers broader rights under this agreement than under the Transit Agreement. The practice following the entry into force of the Switzerland-Germany air agreement, including protests made by Germany or its nationals against landing and departure movements made by Swiss aircraft in the contested German airspace, support the argument that the scope of the "privileges" which Germany and Switzerland and exchanged under the Transit Agreement, were *not* broadened by the terms of the said bilateral agreement.[10]

Consequently, we maintain our conclusion that approach and departure movements made by Swiss carriers in relation to ZRH airport passing through German airspace are neither protected by the Transit Agreement nor by the Swiss-German agreement of 1956. We add that this is a matter of appreciation of arguments and terms, so that other interpretations may be justified.

The operation of non-scheduled rights

As to the operation of *non-scheduled flights* in the contested South German airspace, we arrive at a similar conclusion. The words used in Article 5 of the Chicago Convention are slightly different from the language which is used by the Transit Agreement. Said Article 5 refers to the grant of the right to make flights in transit non-stop across the territory of another state, but it seems not reasonable to give these words another interpretation than the terms which are used under the Transit Agreement. Landing- and departure movements made by Swiss aircraft engaged in non-scheduled services are, in our view, therefore not protected by the Transit freedom granted by Article 5 of the Chicago Convention.

<u>The application of the EC regime</u>

We proceed from the point of view, that:

- EC air law is applicable - that is, the EC-Swiss agreement of 1999 has entered into force, and
- there is no retro-activity with respect to its application to its application, and
- the Regulation *on market access* (2408/92) grants Community air carriers not only traffic, or commercial, rights but also transit rights (*see*, under 1.4),

so that the above arguments which are raised in the context of public international law are set aside.

If the last mentioned assumption is not right - that is, that the grant of intra-EC traffic rights under EC law do not encompass transit rights - the operations of the Community carriers while carrying out intra-EC transit flights are still covered by the above bilateral and multilateral transit regimes. The agreement EC-Switzerland of 1999 (Article 16) confirms that "existing traffic rights which originate from these bilateral arrangements [and which are not covered by Article 15] can continue to be exercised, provided that there is no discrimination on the grounds of nationality and competition is not distorted."

Generally speaking, EC air law *only* replaces public international air law with respect to matters that are covered by EC air law. Bilateral air agreements between EC Member states are still in place, for instance for security matters. The Commission has a different view: it states that Community air law governs all matters pertaining to the operation of air transport services, and bases its internal and external competencies on this point of view (see, the current “Open Skies” cases between the Commission and Member states before the European Court of Justice).

If the above points of departure are right, the Swiss claims should be based on the argument that Germany hampers market access to ZRH airport. Germany, on its part, may invoke environmental justifications for its actions. In such a case, the principle of market access must be weighed against the objective of protecting the environment under the proportionality principle, which will be discussed below, under 1.4.

One of the factors, which play a role when determining whether or not the principle of market access is complied with, concerns the question whether or not Switzerland can offer alternatives for approach and departure movements in relation to ZRH airport via its own territory. It appears that this question can be answered positively. This factor will play an important role in a judgement concerning the compatibility of the freedom to provide services, which is implemented for air transport in the above Regulation on market access, with the objective of protecting the environment. The fact that there are, or may be, alternatives for the contested approach and departure movements through German airspace will affect the position of Switzerland under the proportionality principle.

For the sake of completion, we add that the Regulation on market access mentioned before does not make a distinction scheduled and non-scheduled services. The Regulation applies to both, provided they are carried out between points in the Community.

[10] See, Article 31(1) of the *Vienna Convention on the Law of Treaties* (1969): "A treaty shall be applied in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the lights of its object and purpose."

1.4 *Supposing that the answer to question 1.3 is yes, do public international law and/or EC-law set any conditions or limits to this right, which have to be respected*? *If yes, which ones*?

The short answer to this question is: yes, conditions based on national law and regulations, the principle of non-discrimination, and, as to EC law, also the principle of proportionality.

Restrictions on the Swiss claims imposed by public international air law

The claims of Switzerland in this respect are subject to public international air law giving Germany the power to:

- apply national laws and regulations to the operation of the above transit rights (pursuant to Article 11 of the Chicago Convention);
- require landing of aircraft engaged in non-scheduled services while in transit through its airspace (pursuant to Article 5 of Chicago Convention);
- designate routes to be followed by Swiss airlines while in transit through its airspace (see, Article 68 of the Chicago Convention);
- establish "prohibited" and "restricted" areas in its territory on the basis of Article 9 of the Chicago Convention, restricting or prohibiting the operation of scheduled air services in those areas under specified conditions.

Applying this to the case concerning access to Zurich airport, we conclude that Germany has a right to regulate the use of its airspace as it sees fit under public international law. Germany's powers to adopt the above measures are subject to the *non-discrimination* principle. Germany must apply said measures in the same manner to Swiss airlines as to airlines - or aircraft - of all states party to the Chicago Convention, including German airlines – or aircraft. In the latter case, the national measures must meet the *national treatment* standard, which, in our view, is the most correct interpretation of Article 11 of the Chicago Convention. We emphasise that national measures may have *the appearance* of non-discrimination, but may *in practice* produce discriminatory results vis à vis a certain category of aircraft, the nationals, including the national airlines of a certain country, etc. The adoption of such measures must be considered against the effects, which they produce, following the adagio: *ex re sed non ex nomine*.

While imposing environmental restrictions on access to ZRH airport, there is no evidence that Germany discriminates against Swiss airlines. It may be so that Swiss airlines are most affected by the German measures, but that does not necessarily imply that the German authorities discriminate against them.

Restrictions on the Swiss claims imposed by EC law

Again, any Swiss claim to use German airspace is subject to the entry into force of the EC-Switzerland agreement (1999). This agreement restricts the grant of traffic rights to third and fourth Freedom traffic rights during the first two years of the implementation of this agreement (see, Article 15). After this period of two years, the agreement gradually grants the other Freedoms of the Air.

We have stated above that the EEC Regulation on *market access* (2408/92) does not refer to the term "transit rights". However, Community air carriers are permitted to exercise *traffic* rights on routes within the Community. Those rights include the operation of transit rights, since Community air carriers cannot operate the third to ninth Freedom of the Air (*see*, Annex 1, at page 44) without having transit rights.

The agreement EC-Switzerland (1999) restricts the grant of traffic rights to *third* and *fourth* Freedom traffic rights during the first two years of the implementation of this agreement.[11] After this period of two years, the agreement gradually grants the other Freedoms of the Air. The reasoning which has been applied to Community air carriers can also be applied to Swiss carriers: Swiss carriers cannot fly on a third Freedom basis from Geneva to London unless they have transit rights over French territory.

Absent an *explicit* grant of transit rights under Community law, we are inclined to consider the bilateral/multilateral "Chicago" based regime concerning transit rights as a legal safety net rather than the principal regime governing intra-Community traffic rights.

Under EC law, Germany should avoid any discrimination, including appearance thereof, against Swissair and Zurich airport, it may not violate the freedom to provide services in the Community, and not cause any distortion of competition.

The non-discrimination principle is applied in another fashion than under public international law. Non-discrimination does not only refer to the treatment of airlines of other countries as such. EC law adds another element to this condition. Even if national rules, for instance, the German measures designed to contain environmental problems in South Germany, do not discriminate between Community air carriers, and do not discriminate against Swiss carriers - which is then supposed to be a Community air carrier - those measures must satisfy an "objective justification" test.

Proceeding from the general Community law[12] to the specific Community law, Community air law comes into play. Under EC Regulation 2408/92, the exercise of intra-Community traffic rights by Community

[11] See, Article 15
[12] See, Annex 2 on the *Freedom to provide goods and services in the Community*, at page 45.

air carriers is subject to: "published Community, national, regional or local operational rules relating to safety, *the protection of the environment* and the allocation of slots." (*italics added*)

Germany may therefore draw up operational restrictions with a view to protecting the environment, but it must respect:

- the non-discrimination principle, as well as:
- the principle concerning the freedom to provide services and
- the prohibition to distort competition.

Germany must justify its national or regional measures, preventing not only Swiss but also other Community nationals - for instance, SAS on a flight from Stockholm into Zurich airport - from enjoying the benefits of the EC air transport market, as not being discriminatory and not causing distortion of competition within the internal market. Again, we note that there is no evidence that Germany discriminates against Swiss carriers while drawing up its environmental regulations.

However, we add that the positions of Switzerland and Germany must be further examined in order to establish a balance of interests between the two. Such a balance is based on a conciliation between the objective of enhancing market access for Community air carriers on intra-Community routes, on the one hand, and the objective of protecting the environment for the benefit of Community nationals.

Reference is made to consideration 32 made by the EC Commission in the case concerning *access to Karlstad airport*.[13] The Commission found that a certain Directive 92/14/EEC, restricting the use of Chapter 2 aircraft "… also ensures that a Member state does not 'export' any possible noise problems around its airports to other Member States…"

Directive (92/14/EEC) is not applicable here. Moreover, the case concerning *access to Karlstad airport* did not create cross border or trans-frontier repercussions, as it was an intra-Swedish question. However, the following point could be made. Member States are not allowed to 'export' noise problems to other Member States by the establishment of national measures. In the present case, Switzerland would not be allowed to protect its own citizens by designating airways avoiding Swiss territory so that noise problems would be exported to Germany, while maintaining or even enhancing economic benefits ensuing from unrestricted access to ZRH airport.

It seems to us that the above condition - pertaining to the prohibition of 'exporting' noise problems to another country - may also be judged in the light of the fact that Switzerland is in a position to offer alternatives. It appears that Switzerland can accommodate a number of flights which are now passing

[13] Case 98/523/EC; OJ L 233/25-31 (1998)

through Southern Germany in order to land on or to depart from ZRH airport in its own airspace, so that one can wonder whether Switzerland complies with, for instance, the above "objective justification" test.

On the other side, pleading in favour of Switzerland and turning against Germany, it must be noted that the EC Commission, in its decision *on access to Karlstad airport*, decided in favour of market access, by arguing that the imposed environmental measures did not meet the principle of proportionality. This is not the only instance a balance had to be found between market access and environmental measures. In the "*Brenner Toll*" case decision of the European Court of Justice of 26 September 2000, the court did not agree with Austria's claims that environmental concerns or those linked to national transport policy could be invoked, under EC law, to justify discriminatory toll rates for traffic transiting Austrian high-ways.

At the abstract level, it can be concluded that the European Court of Justice and EC Commission are setting limits to the imposition of environmental restrictions affecting market access and transit rights.

Lege ferenda *of the Community on airport matters in relation to environmental protection*

The Commission is in the process of drawing up a Community framework on noise classification of aircraft with a view to establishing an objective basis for the computation of noise exposure for calculation of local and national airport charges, operational restrictions and slot allocation. A future EC-based framework for noise measurement and land use rules is designed to include:

- a standard noise exposure index;
- a standard calculation of noise exposure levels;
- noise monitoring, noise zoning and land use rules around airports.[14]

Community regulations designed to harmonise environmental operating restrictions at noise sensitive Community airports could not only question the non-discriminatory and anti-competitive nature of the present German noise measures, but also the "objectivity" of the present Swiss operational rules, giving way to the export of noise quota into Southern German airspace. The EC is increasingly taking into account, and legalising, environmental concerns in relation to the freedom of market access. However, so far, the decisions, which have been rendered by EC institutions, that is, the ECJ and the Commission, have favoured the "market" approach over the "environmental" approach. To find a balance between market access, on the one hand, and the necessity of imposing environmental restrictions, on the other hand, could be relevant if the implementation of the (draft) Berlin agreement affects market access. However, since Switzerland is in a position tom offer alternatives for flights which are now passing

[14] *See*, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *Air Transport and the Environment - Towards meeting the challenges of Sustainable Development*, dated 30 November 1999, at 19-24.

through South Germany's airspace, the implementation of the said agreement does not result into restrictions on market access, and the question of finding the mentioned balance does not come into play.

Evaluation

For the time being, we note that the application of a "Chicago based" regime, proceeding from sovereignty in the air, and the EC regime, proceeding from a market oriented approach towards air services, may produce different results in the case on access to Zurich airport.
Whereas, under the "Chicago based" regime, Germany is, subject to the above conditions, entitled to exercise its sovereign powers. However, the actual exercise of those powers - by the adoption of certain national or regional environmental measures - is liable to yield anti-competitive results, and may infringe the basic EC freedom to provide services within the Community. At the same time Switzerland is in a position to offer alternatives, so that the freedom to provide services in the Community - presuming the EC law can be made applicable to this case(*see*, above) - is not affected by the (draft) Berlin agreement.

Subject to a number of factors, including the justification of the German measures in the light of environmental necessity and their non-discriminatory effects on Swiss nationals (Zurich airport; Swissair), as well as the application of the proportionality principle it seems to us that Switzerland's position may better served by the EC – market oriented - regime than by the "Chicago" -regime, departing from the "complete and exclusive sovereignty " of states.

When applying the above results to the draft Berlin agreement, we believe that public international air law helps Germany to a greater extent than Switzerland, so that we see this agreement as favourable to Switzerland. However, we find the position of Switzerland and Germany more balanced when the draft Berlin agreement is examined under EC law. This conclusion is the more justified as Switzerland can offer measures designed to take away concerns related to EC law and policy with respect to the restrictions on market access and the freedom to provide services in the Community (*see*, 1.6, below).

1.5 *If the answer to question 1.4 is yes and if Switzerland can claim a right to use German airspace, does this right include the right to define the approach- and departure procedures, applicable altitudes as well as the intensity in which they are used*?

We will again examine this question under public international air law and EC air law.

Public international air law

In principal, the short answer is no.

Under Article 11 of the Chicago Convention, Germany is entitled to draw up operational rules applying to admission to and departure of aircraft from its territory, including its national airspace. Those operational rules are deemed to include a definition of approach and departure procedures and applicable altitudes.
However, since said operational rules concern access to a foreign airport, that is ZRH airport, it would seem to us that German operational rules are subject not only to the above (under 1.4) mentioned restrictions pertaining to non-discrimination, but also to a duty to co-operate with respect to the establishment of these operational rules with the competent Swiss authorities.
We shall revert to this point under 4, below.

We proceed from the point of view, that the words "intensity in which they are used", mean a reduction of number of flights as foreseen by Germany. In such a case, it seems to us that this reduction can be challenged by Switzerland and other states whose airlines are affected by such a measure, *unless* Switzerland is capable of accommodating this reduction by offering use of its own airspace for the number of reduced flights. The present number of flights using German airspace for access to ZRH airport amounts to approximately 160,000 per year. The number of flights, to be agreed upon in the draft Berlin agreement, is 100,000 per year.

If Switzerland does not offer the above use of its airspace, and in the unlikely scenario that this reduction of 60,000 flights per year through South German airspace is accommodated by SR and other Swiss airlines only, the reduction is a matter between Germany and Switzerland, falling under the terms of the bilateral agreement between Germany and Switzerland. If non-Swiss airlines are affected by the mentioned reduction, their states (designating the airlines) will challenge Germany's refusal to allow their airlines to operate transit, approach or departure movements (*see*, 1.1, above) through this part of German airspace under the bilateral agreements between these third states and Germany. Since Germany is denying the rights to those airlines, their states may challenge such a refusal based on commitments into which Germany entered into with them under:

- the Chicago Convention (*see*, Article 5);
- the International Air Services Transit Agreement (*see also* below, under 1.1);
- applicable bilateral air agreements between Germany and those third states;
- in so far as those non-Swiss airlines qualify as Community air carriers, under EEC Regulation 2408/92 (Article 3 *juncto* Article 8(2) - *see*, above).

Typically, multilateral and bilateral agreements, including applicable EC air law, do not include quota restrictions on transit flights.[15] Germany will therefore have to seek other legal arguments for its proposed actions designed to reduce the number of movements through Southern German airspace.

In this context, Germany might be tempted to establish the contested portion of airspace located in South Germany as a "restricted" or even "prohibited" area under Article 9 of the Chicago Convention. We wonder whether such a measure, which must be justified by "reasons of … public safety" can be used so as to encompass " reasons of environmental concerns", for environmental reasons. Moreover, we share the point of view put forward by the advisor of the German government (*see*, legal opinion *on the transit flights over the territory of Germany to/from Zurich airport*; not dated) that the establishment of "prohibited areas" may provoke challenges on the legal and policy side.

Also, it seems to us that such a measure does not fit into the framework which is being shaped by the EC, and in which Germany and Switzerland are working together to achieve common objectives, inter alia, in the field of air transport. More importantly, Germany is a strong supporter of the "Single Sky" policy of the EC (see, below). The Single Sky policy aims at *freeing* European airspace from areas where civil flights cannot be operated as a consequence of national policy objectives, including military considerations. From this EC policy point of view, Germany can hardly afford to establish a "restricted area" under Article 9 of the Chicago Convention.

In conclusion: yes, Germany is in principal entitled to take a number of measures in the operational field, but it must, again, take away any appearance of discrimination. Moreover, it may not distort intra-EC competition and not frustrate the freedom to provide services in the Community.

Although the imposition of quota restrictions is liable to meet certain legal standards, they may be justified as a national measure under Article 11 of the Chicago Convention. Moreover, the conduct of a balanced policy between the two countries, resolving their disagreement through co-operation, may imply that the conclusion of an agreement on this matter requires the imposition of quota restrictions. The draft Berlin agreement, including the conditions on quota restrictions, can be seen in the light of the objective of the two countries to resolve their disagreement by way of co-operation.

[15] Quota and capacity restrictions may be imposed on third, fourth and fifth Freedom flights.

1.6 *How does the expert consider the statement*: "*The German claims are discriminatory because they impose bigger restrictions on the operation of the airport of Zurich than the ones applicable to the German airports*?"
Upon which legal bases could this discrimination be challenged, respectively based on which rule of international law could Switzerland claim an equal treatment?

Again, this question must be addressed from a public international law and from an EC law point of view.

Public international air law

The short answer from a public international air law point of view is: under public international air law Germany can set the rules as it sees fits, as long as the rules apply in a non-discriminatory fashion to all aircraft flying through the airspace covered by the German rules.

There is no supra-national organisation, which is entitled to intervene because of alleged discrimination; this is a bilateral matter between Germany and Switzerland. We confirm that the examination of the German rules containing restrictions on access to ZRH airport must be assessed with due regard for the legal principle: *ex re sed non ex nomine* (*see also*, above). There is no evidence that, in practice, the German environmental restrictions discriminate against Swiss and other foreign carriers (*see also*, above).

If the German rules are examined under this legal principle, the conclusion could be that, at first sight, they do not discriminate against, for instance, Swissair (SR) (see also, above), but they have the *effect* to discriminate against SR. A case which could be used for the purpose of further clarifying this point is the *Heathrow Arbitration Case* (1992), in which US carriers were more severely affected by the imposition of peak charges at Heathrow Airport than their UK counterparts. The rules containing the peak charges were not formulated in a discriminatory fashion, but they produced discriminatory effects *in practice*.

A further examination of the question, where or not Germany engages in this case into discriminatory practices vis a vis Switzerland, may be warranted. In this context, the *Recommendation on Principles Governing Transfrontier Pollution*, adopted by the OECD Council in 1971, could be used.
Title C of this Declaration, entitled *non-discrimination*, states:

"Countries should initially base their action on the principle of non-discrimination, whereby:
(a) polluters causing transfrontier pollution should be subject to legal or statutory provisions no less severe than those which would apply occurring within their own country, under comparable condition and in comparable zones, taking into account, when appropriate, the special nature and environmental needs of the zone affected;
(b) in particular, without prejudice to quality objectives or standards applying to transfrontier pollution mutually agreed upon by the countries concerned, the levels of transfrontier pollution entering into the zones liable to be affected by such pollution should not exceed those considered

acceptable under comparable conditions and in comparable zones inside the country in which it originates, taking into account, when appropriate, the special state of the environment in the affected country;

(c) …

(d) persons affected by transfrontier pollution should be granted no less favourable treatment than persons affected by a similar pollution in the country from which such transfrontier pollution originates."

Both Germany and Switzerland are OECD Members. This recommendation does not have binding legal force. Moreover, the above principles are related to pollution caused by substances or energy rather than by noise. However, we find it useful to keep the above line of reasoning in mind, because it could be applied, *mutatis mutandis*, and taking into account the mentioned reservations, to the present situation.

In order to assess, whether or not the German environmental rules produce discriminatory effects against Swiss carriers, they – the said rules - must therefore be placed in their national – German - context. Such a comparative analysis, comparing environmental rules governing access to German airports with comparable parameters, that is, size, location etc., might lead to the conclusion that the environmental measures which are or will be applied in South Germany's airspace discriminate against the main users of ZRH airport, in particular SR. If such a conclusion would be justified, the German environmental rules could indeed be said to infringe Article 11 of the Chicago Convention, as well as Article 9(1) and (2) of the German Swiss bilateral air agreement of 1956 (as amended), speaking of "fair and equal opportunity to compete". The mentioned analysis could be conducted on the basis of, inter alia, the study made by Mme Rita Bidinger, *Planung und Nutzung von Verkehrsflughafen unter besondere Berücksichtigung von Kapazitätsbeschränkungen* 18-43 (1996). Mme Bidinger analyses rules and environmental restrictions of some Germany's airports, including Stuttgart, Munich, Frankfort, Bonn-Cologne, and Düsseldorf.

The EC regime

The EC regime is different: a supra-national organisation can assess whether or not market access is hampered by discriminatory rules, or environmental restrictions, which place a disproportionate burden on market access, and take enforcement measures against Germany.

After the entry into force of the EC-Switzerland agreement of 1999, the EC regime will apply, subject to retro-active provisions (see, above under 1.3). The application of the EC regime adds a substantive and a procedural element to the above situation.

The substantial element

For the time being, the above situation, under which German environmental measures impose burdens on access to ZRH airport, and resulting in potentially discriminatory treatment of ZRH airport – and, consequently, SR as one of its main users – must be examined under Article 8(2) of EEC Regulation 2408/92 (*see also*, above, under 1.4). We add the words "for the time being" as the Community is preparing a common policy designed to create a level playing field for Community airports (see above, under 2.1). Once such a regime has been drawn up, the above situation may also be tested against the law and policy, which will prevail under this new – Community airport - regime.

Under EC law, the German environmental restrictions will not only be tested against the non-discrimination principle, but also under the *proportionality principle* (*see also above*, under 1.4).

Under the proportionality principle, it must be determined whether:

(a) the German measures are necessary in the public interest, and
(b) the same result cannot be achieved by other means.

Absent EC law harmonising conditions pertaining to noise zones around airports, it seems to us that the question mentioned under (a) should be examined in the light of the factual situation, taking into account the level at which arriving and departing aircraft are flying, the density of the population suffering from noise produced by overflying aircraft etc., as well as the results of the comparative analysis with respect to environmental regulations governing access to German airports.

As to question (b), it could be argued that the Commission, on the basis of the local conditions and the establishment of approach and departure routes via runways 16 and 14 of ZRH airport, arrives at the conclusion that Switzerland is "exporting" its noise quota into Germany (*see also*, the above *Karlstad* decision, consideration 32). Consequently, the Commission might argue that Switzerland must organise approach to and departure from ZRH airport in such a way that "the same result" – that is, environmental friendly access to ZRH airport – can be achieved by other means, that is, by using other airways, that is, preferably, airways for approach and departure passing through Switzerland only.

The procedural element, including enforcement

Upon the entry into force of the EC-Switzerland agreement of 1999, the Commission, and/or the Joint Committee (*see also*, under 3, below) have competence to make a binding decision in this matter. The law and policy of the Community in the field of air traffic management is not yet firmly established (*see, above*, under 1.5, dealing with the "Single Sky" policy), so that Eurocontrol could be invited to attend such a meeting and perhaps take part in the decision making process.

1.7 *In view of the fact that the German claims pertaining to a reduction of the present number of flights to 80.000 per year do not restrict the operation of the airport to the extent that there are alternatives on the Swiss side, does the expert consider the German claims as discriminatory against airlines flying to Zurich and especially against those operating from Zurich*? *If yes, based on which rule of international law*?

We feel that this question has been answered above, especially under 1.7. We repeat the main findings.

Public international air law

Pursuant to Article 11 of the Chicago Convention, and subject to the compatibility of the reduction of number of movements with multilateral and bilateral air agreements, Germany can put the above claims pertaining to a reduction of flights. In stating this, we assume that Germany complies with the non-discrimination principle, which has been examined above.

The EC regime

Again, Switzerland, the EC Commission and any other Member State - or even interested parties such as airlines - might argue that the said reduction infringes the principle on market access, and that it is not justified under Article 8(2) of the Regulation on market access and/or the proportionality principles. However, we feel that the German position is stronger when Switzerland has real alternatives for the reduction of flights as suggested by Germany, inter alia, because the same result - access to ZRH airport - can be achieved by less restrictive conditions than those imposed by Germany.

2 Questions pertaining to the provision of air traffic control

2.1 *Can Switzerland claim a right to provide air traffic control service in this very portion of German airspace*?

The short answer to this question is: no, unless there is an agreement between the two countries, and, obviously, subject to the terms of such an agreement.

The Swiss ATS (Air Traffic Service) provider Skyguide delivers air traffic services in the concerned portion of South Germany's airspace, and assures the safe and efficient passage of aircraft from and to ZRH airport through this portion of airspace. Said service provision is based on a private agreement between the Skyguide, and *Deutsche Flugsicherung* being the German ATS provider.

Here again, the point of departure is Germany's sovereignty in its national airspace, including the freedom to provide there air traffic control (*see*, Articles 1 and 28 of the Chicago Convention). Standard 2.1.1 of ICAO Annex 11 confirms the right of ICAO Member States to conclude agreements under which *a state* delegate to *another state* the responsibility for providing air traffic services areas extending over the territory of the former. States can make such arrangements in the exercise of their sovereignty, which is untouched by the conclusion of the agreement.

This reasoning also applies to the above situation, according to which a state, for instance, Germany, grants transit or traffic rights to Switzerland, pursuant to an agreement concluded between the two countries in the exercise of their sovereign powers. It seems to us that the above private agreement does not affect state responsibility, as laid down in, for instance, Article 28 of the Chicago Convention, and as further elaborated in ICAO Annex 11.

Switzerland can obtain a right to provide air traffic control services in Germany's airspace, if and as long as the two countries have concluded an agreement to this effect, and they stick to the provisions of such an agreement. Switzerland's rights end when one of the parties decides to terminate the agreement.

The note to ICAO Standard 2.1.1 (Annex 11) further stipulates that:

- Switzerland's responsibility (as the "providing state") is limited to technical and operational considerations, and does not extend beyond those pertaining to the safety and expedition of aircraft using the concerned airspace which comes under the sovereignty of Germany ("delegating state").

- Switzerland in providing air traffic services in a certain portion of South Germany's airspace must do so in accordance with the requirements of Germany which is expected to establish such facilities and services for the use of Switzerland as the two states agreed to be necessary.
- Germany may not withdraw or modify the ATC facilities and services without prior consultation with Switzerland.

The legal force of the above stipulations is not as strong as that of a Standard, and certainly not as strong as a treaty provision.

The European Community is attempting to facilitate the cross border provision of air traffic services. In November 2000, the "High Level Group" set up by the EC Council of Transport Ministers launched the "Single European Sky" initiative. The objective of this initiative is to establish a 'European' airspace as a single continuum, managed for overall system efficiency. Providers of air traffic services must be able to offer their services without regard of national boundaries, complying with the basic freedom to provide services in the Community. This initiative is being discussed; it is too early to draw firm conclusions from the present policy statements and studies which have been carried out in the context of this initiative.

(During the meeting in Bern on 17 July 2001, the following additional questions were asked):

2.2 *In case no agreement will be reached between Switzerland and Germany concerning the use of the contested portion of Germany's airspace, can Switzerland prevent* Deutsche Flugsichering (*DFS*) *from denouncing its agreement with Skyguide on the provision of air traffic services by Skyguide in the concerned portion of airspace in Southern Germany*?

We have not examined the provisions of the agreement between DFS and Skyguide. Subject to this reservation, we note that this is a private agreement, containing a clause for cancellation of the agreement of six months. If the right to cancel the agreement is not made subject to the completion of further conditions, we do not see how DFS can be prevented from terminating its agreement with Skyguide.

2.3 *If the answer to question 2.2, above, is negative, can Switzerland require from Germany that Germany provide air traffic control services in such a fashion that unhampered access to ZRH airport is assured*?

Switzerland may put forward the following arguments:

Under Article 28 of the Chicago Convention, Germany is obliged to provide air traffic services in its airspace so as "to facilitate international air navigation," in accordance with ICAO standards. If Germany would stop with the provision of air traffic services in Southern Germany, so that access to ZRH airport in endangered, Switzerland could claim that Germany infringes its obligations under Article 28 of the Chicago Convention in that it does infringe its obligation "to facilitate international air navigation".

Moreover, pursuant to the above-mentioned note to Standard 2.1.1 of the above Annex 11, Germany may not withdraw or modify the ATC facilities and services without prior consultation with Switzerland. Finally, Germany must comply with the conditions agreed upon by it and other ICAO States, including Switzerland, under ICAO's Regional Navigation Plan.

Germany may put forward the following arguments:

Germany may want to invoke Article 68 of the Chicago Convention, under which it has the right "to designate the route to be followed by any international air service…".

Germany can claim that it has full rights to establish laws and regulations "relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation of such aircraft while within its territory", subject to the application of the non-discrimination principle.[16]

[16] Pursuant to Article 11 of the Chicago Convention; see also, above.

Examination of the above arguments

Again, the balance of the above arguments will not be determined by their legal strength, but by the time when they are made, by the prevailing circumstances, by the people who put these arguments forward and by the (political or legal) bodies who have to judge them.

At present, there are two many questions which are unanswered:

- will there be a "Berlin" agreement?
- if no, why and under what conditions have the negotiations been terminated?
- has Switzerland become a member of the European Community?
- if the questions are submitted to a third party, what is the nature of this third party (political, such as the ICAO Council, or legal, such as an arbitration tribunal; the EC Commission; see, below)?
- to what extent can Switzerland prepared offer alternatives for flights, which are now passing through Southern Germany when approaching or departing from ZRH airport?

3 Questions pertaining to judicial procedures and enforcement

3.1 *Supposing that Switzerland would follow the legal position of Swissair and/or Unique, according to which Switzerland would have the right to use German airspace in a much larger amount than Germany wants to concede, what kind of legal procedures could Switzerland introduce in order to assess its right and, if there are any such legal procedures, how does the expert estimate the chances to win such a procedure*?

If Switzerland wants to enforce certain claims (or rights), such claims must have a legal basis. The legal basis is an international agreement or treaty, or customary law. The agreement or treaty or custom determines the enforcement procedure.

Apart from the possibility to provide air traffic control services in Germany, Swiss claims may be based on asserted rights for the purpose of operating transit rights through German airspace. Switzerland can claim and enforce such rights for the benefit of Swiss carriers, *if* the flights for which Switzerland claims these rights are covered by the Transit Agreement (see on this, 1.1 above).

We concluded that it is very doubtful that approach and departure movements can be qualified as flights covered by the Transit Agreement. Consequently, if this is not the case, Switzerland cannot claim, and therefore not enforce, rights on the basis of this agreement. We also noted that, although Swiss rights with respect to the said approach and departure flights may be broader under bilateral air agreements, it would be unreasonable to arrive at a different conclusion. In other words, even under bilateral air agreements we doubt whether Switzerland can claim, en thereof enforce, rights with respect to the passage of its carriers from and to ZRH airport through the contested portion of South Germany's airspace.

This brings us to the following.
If the claim can still be based on the operation of transit rights for operation of scheduled international air services - to be performed by carriers designated by the Swiss government under the Swiss-German bilateral air agreement - the procedure is laid down in the agreement, providing for such rights:

- Switzerland and Germany may chose to enter into *consultations* on the above question - that is, the interpretation of the term "transit rights" and the application thereof in the above context - using Article 16 of the bilateral agreement of 1956 between the two countries, as amended. If the

consultations do not yield the desired result, the questions should be submitted to an *ad hoc* tribunal, which shall render a binding decision.

- If only the *International Air Services Transit Agreement* of 1944 applies: examination by the ICAO Council (because Germany is "causing injustice or hardship" to Switzerland; *see*, Article II, section 1), upon which the ICAO Council may make recommendations to the ICAO Assembly, which may initiate corrective actions against a state.
- If the claim made by Switzerland concerns the interpretation of "transit rights", Switzerland and/or Germany may submit their question to the ICAO Council following Chapter XVIII of the Chicago Convention. Appeal from that decision may be brought either to an *ad hoc* arbitral tribunal or to the International Court of Justice. (Pursuant to this chapter of the Chicago Convention, Sweden submitted in 1966 a request for deletion of the second sentence of Article 7 of the Chicago Convention on cabotage).
- The same procedure applies for the question on the interpretation of the term "flights ... in transit non-stop" across the territory of another state party to the Chicago Convention as formulated in Article 5 of the Chicago Convention on the *Right of non-scheduled flights*.
- If EC law applies, the procedure envisaged under EEC Regulation 2408/92 can be addressed. At the request of *any* Member State, or the Commission at its own initiative, or an interested part/carrier, the Commission may examine the question, whether the imposition of the German environmental matters is in accordance with or infringes the principle of market access laid down in this regulation. Any Member state may refer the Commission's decision to the EC Council, which may "in exceptional circumstances" take a different decision (*see*, Article 8(3) of this regulation).
- Alternatively, Switzerland may appeal to the "Joint Committee" which has been established under the EC-Switzerland agreement of 21 June 1999, again, upon the condition that this agreement has entered into force.

Since we doubt whether approach and departure movements operated by carriers using ZRH airport are protected by the transit rights (including *"Das Recht des Überfluges*") laid down in the above air agreements, we are inclined to question the chances of success for Switzerland in the above procedures.

The EC institutions, once they are mandated to do so, have a different approach towards the above questions, that is, they will look at them from the point of view of hampering market access on the part of Germany. On the other side, the EC institutions could invoke the proportionality principle, in which an examination of the possibility of alternative routes through Switzerland may be examined.

Absent a thorough analysis of all the facts concerning the present situation, and of the case law on the above EC principles on market access, proportionality, freedom to provide services, prohibition of distortion of intra Community competition, the outcome of procedures under EC law is not predictable.

3.2 *Supposing that Switzerland would pretend that public international law and/or EC-law grant a right to use the German airspace in a larger amount than Germany concedes and supposing that Switzerland would decide not to conclude an agreement with Germany, based on the German conditions, would Germany have the right to take unilateral measures to prevent Switzerland from using German airspace. In other words: Would Germany have the right to establish operational rules prohibiting the approaches or the departures to and from Zurich through its airspace* (*for example by installing prohibited- or restricted areas, introducing separation-prescriptions, restricting the times of operation, requiring altitude limitations or by withdrawing the competence of Skyguide to provide air traffic service*) *and therewith to limit Switzerland's right to use German airspace*?

Again, we shall give a reply to this question on the basis of public international air law, and EC law. Also, we find it useful to make a distinction between unilateral measures designed to reduce the number of flights which Swiss carriers may operate through, into and from German airspace, and operational measures, including but not limited to the establishment of prohibited and restricted areas, introduction of separation prescriptions etc. (*see above*, under 3.2).

Germany presents the reduction of number of flights as an operational or environmental measure, but this measure may, but not necessarily has to, affect provisions on capacity laid down in the bilateral agreement Germany-Switzerland of 1956, as amended. The restrictions in terms of number of flights will *not* affect capacity if Switzerland is in a position to accommodate the reductions imposed by Germany.

<u>Public international air law</u>

Unilateral measures designed to reduce the number of flights

If the flights concern the operation of *scheduled* international air services, the adoption of such a measure would fall under the terms of the bilateral air agreement Switzerland-Germany of 1956. This agreement subjects the operation of Swiss carriers to national laws and regulations. Consequently, if Germany would reduce that number of flights through the airspace of South Germany, and Switzerland would be in a position to accommodate the said reductions by offering alternative flights from and into ZRH airport via the South, the said agreement would not be violated, unless Germany discriminates against Swiss carriers. As to this last point, we confirm that there no evidence of discriminatory practices on Germany's side.

If the flights reduction would affect flights operated by non-EC carriers, *and* Switzerland would not be in a position to accommodate the said reductions, Germany would have to deal with those flight reductions with the concerned non-EC states whose carriers are affected by its (Germany's) unilateral measures under the terms of the applicable bilateral air agreement (Germany-non-EC state). Depending on whether the approach and departure movements operated by non-EC carriers through South Germany's airspace are considered as transit or as mere passage rights (*see on this*, 1.1, below), Germany and the non-EC state can or cannot rely on the provisions of the International Air Services Transit Agreement of 1944.

If the flights concern the operation of non-scheduled international air services, the adoption of such a measure would fall under the terms of Article 5 of the Chicago Convention. Subject to a justification by Germany under Article 11 of the Chicago Convention, and subject to Switzerland's inability to accommodate the reduction of non-scheduled flights, such a reduction of flights might infringe Article 5 of the Chicago Convention.

Unilateral operational measures

In principle (based on sovereignty related considerations), Germany is entitled to establish restricted or prohibited areas pursuant to Article 9 of the Chicago Convention (*see above*, under 1.5). However, we noted there that Germany would face legal and policy obstacles when it would take such unilateral measures. Those obstacles are related to public international as well as EC law and policy.
Otherwise, Germany is free to take unilateral operational measures pursuant to Article 11 of the Chicago Convention, provided that it respects the non-discrimination principle (*see*, 1.4, above).

EC Law

Unilateral measures designed to reduce the number of flights

EC law does not allow the imposition of capacity restrictions upon intra-Community flights operated by Community carriers. However, Germany is entitled to limit the exercise of intra-Community traffic rights by Community air carriers because of environmental considerations. Such environmental operational restrictions must be published (*see*, Article 8(2) of EEC Regulation 2408/92). Germany's unilateral measures, restricting market access to Community air carriers, must be justified by environmental concerns. This justification can be examined by the Commission, and, in the last resort, the European Court of Justice. On the other side, Switzerland will be challenged by the EC Commission and other EC institutions to offer alternative routes, avoiding an unjustified use of South Germany's airspace for flights approaching or departing from ZRH airport. Reference is made to the discussion on the decision *on access to Karlstad airport*, and the Brenner Toll judgement (*see above*, under 2.1).

Unilateral operational measures

So far, the Community has followed the "ICAO pattern, based on the "Chicago regime" in the area of operational measures; see, Council Directive 92/14 concerning the operation of Chapter 2 aircraft for the EC, on the basis of ICAO standards (Annex 16). Council Regulation 925/1999 (designed to eliminate the operation of Chapter 2 aircraft after 1 April 2002) has the same objective, but has been challenged by the US because the US claims that its conditions go beyond those agreed upon within ICAO.

Otherwise, operational rules in EC Member States are:
- national rules established in accordance with Article 11 of the Chicago Convention;
- Eurocontrol standards, which have no supra-national status;

In the future perhaps, measures taken under the Community's "Single Sky" initiative (*see also above*, under 1.5).

3.3 *In case Switzerland would bring the case to court and this court would grant to Switzerland the right to use the German airspace, could Germany despite this legally binding decision take the unilateral measures described in 3.2*?

The answer to this question is subject to Germany's acceptance of the jurisdiction of the court or body to which Switzerland submitted the above case. Before initiating legal proceedings, Switzerland and Germany must hold consultations on their disagreement. The disagreement must result into a “dispute” under public international law.
We have discussed the various instances, which may be called upon under public international law.

(1) Under the bilateral air agreement Switzerland-Germany, upon failure to reach a settlement by consultations, *either* Switzerland *or* Germany, may request for decision of the dispute by an *ad hoc* tribunal. This method falls under the heading of *arbitration*. Both parties have a right to appoint an arbitrator. The two arbitrators appointed by each of the two countries shall appoint a third arbitrator. The text of the bilateral agreement Switzerland-Germany does not say that both parties must accept the jurisdiction of the *ad hoc* tribunal. However, for all practical purposes, it seems fair to presume that both parties must agree upon settlement of the dispute by an *ad hoc* tribunal. The mechanism for dispute settlement under bilateral air agreements has hardly been used. One of the reasons is that the disagreement or dispute is brought at the - sometimes undesirable - political level. On the other hand,

to reach agreement at the political level may, in other instances, be both effective and efficient. Consultations, and, in some cases, cancellation of the agreement, are means of terminating a disagreement or dispute which are more frequently used.

(2) Upon the application of *one* of the two - or more- states concerned in the disagreement, the disagreement may be brought to the attention of the ICAO Council. Pursuant to Chapter XVIII of the Chicago Convention,[17] the ICAO Council is empowered to take a decision pertaining to the disagreement. However, the ICAO Council is a political body, so that we wonder whether we can recommend this procedure from a legal perspective, because this political body would assume a *quasi*-judicial adjudicatory role. Moreover, it is not clear how the ICAO Council would proceed: mediation, assignment of an expert, or even a full trial are some of the options available. The *Rules for the Settlement of Differences*[18] focus strongly on *negotiation* and contain an option for what is termed as an "expert opinion". There is little experience with this procedure. The sanction power of ICAO, if it were ever applied, is a stiff one: airlines of the recalcitrant state may be denied operation through the airspace of the other contracting states. However, the full reach of these provisions has never been brought into effect. Otherwise, we refer to the remarks, which were made by the advisor to the German government in this respect (*On the transit flights over the territory of Germany to/from Zurich airport*, 2001).

(3) *Any* contracting state may appeal from the decision made by the ICAO Council either to an *ad hoc* tribunal, agreed upon with the other parties of the dispute, or to the International Court of Justice. Consequently, arbitration is one of the two available "appellate" options. In this rather unorthodox procedure, arbitration only becomes an option *after* the ICAO Council has rendered its verdict. A special arbitration tribunal could be convened *even* if the parties failed to agree on the appellate arbitration tribunal or one of the parties has not accepted the compulsory jurisdiction of the International Court of Justice.[19] During the last fifty years, twelve cases involving air law have been submitted to the International Court of Justice. Most of these cases involved either air accidents between military aircraft or accidents involving civil aircraft. In a number of cases, the defendant state did not accept the jurisdiction of this court, or raised preliminary objections. In some other cases, an amicable settlement was reached, so that the case could be withdrawn. Three cases remain pending before the court: one brought by Pakistan against India, relating to the shooting down of a military aircraft by India's air forces on 10 August 1999, and two relating to the Lockerbie disaster.[20]

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[17] Article II of the *International Air Services Transit Agreement* of 1944 and Chapter XVIII of the Chicago Convention also refers to this procedure.
[18] ICAO Doc 7782
[19] See also, Article 85 of the Chicago Convention
[20] For an examination of these cases, see, G. Guillaume, *Les affaires touchant au droit aérien devant la Cour internationale de justice*, M. Benkö/W. Kröll (Editors), *Air and Space Law in the 21st Century, Liber Amicorum Karl-Heinz Böckstiegel* 75-87 (2001).

The above is designed to present an overview of the options for remedies under public international air law in case a disagreement cannot be achieved by consultations. Switzerland and Germany are presently attempting to do this, with the undertaking that they formalise their consultations by way of inter-state agreement, that is, the (draft) Berlin Agreement of 2001.

As a member of the European Community, Germany accepts the jurisdiction of the Commission in cases covered by Article 8 and 9 of Regulation 2408/92, and of the European Court of Justice for appeal procedures. The decisions of the said bodies are binding upon Germany, so that it is prevented from taking unilateral measures infringing the decisions given by these EC institutions. If Switzerland becomes a member of the European Community, it will also be submitted to the jurisdiction of the Commission under Regulation 2408/92 and the European Court of Justice. The jurisdictional powers of Community institutions are frequently used. In many cases, the European Commission functions as a *mediator* between the parties, whether Member States or private parties, without reaching a formal decision.

3.4 *In case Switzerland would bring the case to court, could Switzerland continue to use German airspace during the procedure*?

If the (draft) Berlin Agreement will be concluded between Switzerland and Germany, ratified and enter into force, the terms and provisions governing the use of the concerned portion of German airspace will regulate the use by Switzerland of this portion of Germany's airspace.
Therefore, we proceed from the situation that the (draft) Berlin agreement will not be concluded.

Following the failure to reach agreement on the use of Germany's airspace, Germany might take unilateral measures, designed to reduce use by Swiss and other airlines of the contested airspace for the purposes envisaged under 1.1, above. In such a scenario, Switzerland might consider to bring the case to court, challenging the imposition of the German unilateral measures. The question then becomes, whether "might" in the fits sentence of this paragraph, can be substitute by "is entitled to": is Germany entitled to take unilateral measures, preventing Swiss and other airlines from flying through the contested airspace for the purposes envisaged under 1.1, above?

The two following options must be considered, depending on the status of the services performed by airlines through the contest portion of Germany's airspace.

(1) We proceed from the point of view, that the passage of Swiss and other airlines through the contested portion of Germany's airspace is not protected by the Transit Freedom (*see above*, under 1.1). Germany may be entitled to take the said unilateral measures (*see*, above), and will argue that the imposition of the unilateral environmental measures is not against the (international) law. Switzerland must claim before the seized court that, taking into account all relevant factors, such as:
   - good faith, including tolerance of the flights by Germany during a rather long period,
   - Switzerland's efforts to settle the disagreement through negotiations and the conclusion of an agreement,
   - the objective of continuing international air services, and
   - the disproportional effects of the German measures in relation to the stated objective, that is, economic harm caused to international air transport in relation to noise problems suffered by its inhabitants, and principles of co-operation and neighbourliness law.

   Switzerland must request the court, body or arbitration tribunal to which it has submitted the case to take interim or provisional measures. It depends on the rules of procedure of the court, body or tribunal to which the case has been submitted if and under what conditions such interim or provisional measures can be taken. Those measures must be designed to assure the use by airlines of the contest portion of airspace in Southern Germany.

   Since this option presumes that the substantive law - that is, the law governing the substance of the question pertaining to the status, or lack thereof, of the contested flights through Germany's airspace - is on Germany's side, we are not certain whether Switzerland will be successful in its claim for the imposition of interim or provisional measures.

(2) If the passage of Swiss and other airlines through the contested portion of Germany's airspace is protected by the Transit Freedom, and if Germany would deny airlines to continue to enjoy transit rights through this portion of airspace, Germany would be in breach of its bilateral air agreement with Switzerland, the Transit agreement and Article 5 of the Chicago Convention. Switzerland will have more success in obtaining a positive answer to its request for the imposition of the above interim or provisional measures. Again, it will depend on the rules of procedure of the court, body or tribunal to which Switzerland has submitted the case if and under what conditions the imposition of such interim or provisional measures will be approved by the seized court.

(3) If Switzerland is a Member of the European Community, both substantive and procedural EC air law will apply. Under EC law, both substantive criteria and procedures are different from those prevailing under public international air law. Germany's unilateral measures may be brought under Germany's right to "impose conditions on, limit or refuse the exercise of traffic rights" because it considers that there are " serious … environmental problems" - as formulated in Article 9 of EEC Regulation 2408/92 - in the contested portion of airspace. Germany will have to justify its action - the imposition of unilateral measures - inter alia by arguing that those measures "are not … more restrictive than necessarily in order to relive the problems." These conditions can be seen as an application of the proportionality principle. Moreover, Germany must meet the other conditions listed under said Article 9, which have been referred to above, that is, conditions pertaining to:

- the non-discrimination principle;
- the limitation of period of validity;
- compliance with the principles n market access;
- the prohibition of unduly distortion of competition.

Moreover, Germany must inform the other EC Member States and the Commission, "providing adequate justification" for its measures. A Member State, for instance, Switzerland, and/or the Commission, may challenge Germany's actions, upon which the Commission is entitled to examine the situation and the measures envisaged by Germany. Pending such final decision, the Commission "may decide on interim measures including the suspension, in whole or in part, of the action, taking into account in particular the possibility of irreversible effects."

The above procedure has hardly been used, if it has been used at all.

It seems to us that the status of Switzerland under EC air law, both from a substance and a procedural point of view, is firmer than under public international air law. We refer to the above discussions.

3.5 *Does the expert consider the solution adopted by the ministers of the two countries as appropriate in view of public international law and/or EC-law*?

The solution sought by the governments of Switzerland and Germany is a political solution. Taking into account all the legal arguments which have been discussed above and which will be discussed bellow, and all geographical, physical and environmental conditions, we consider the draft "Berlin" agreement Switzerland-Germany as favourable for Switzerland. This opinion is also based on what will be said under 1.1, below (but see the reservations made there with respect to the interpretation of "landing").
However, we are of the opinion that this agreement, once it has been concluded, is open to challenge by a number of parties on different legal arguments. We have briefly referred to a number of those arguments above, which are related to public international law and policy, and EC law and policy. We have not discussed national law, including constitutional law, which may also set conditions for the validity of the draft agreement. Finally, we note that the (draft) Berlin agreement does not seem to affect the rights of third states and their carriers since Switzerland can organise alternative routes for the flights which are affected by the reduction following from the implementation of this agreement.

4 Questions pertaining to the application of environmental law and the international law of neighbourliness

4.1 *How is the situation to be considered with respect to international environmental law and international law of neighbourliness*?

Under A.1, we stated the present situation governing access to ZRH airport through South Germany's airspace must primarily dealt with under international air law, including EC air law. Germany's environmental restrictions must comply with, and may not infringe, rules of international law. See, for instance Article 27 of the *Vienna Convention on the Law of Treaties* (1969) stating that a state "may not invoke the provisions of its internal law as a justification for its failure to perform a treaty."
The primacy of EC law over national law has been confirmed in various decisions of the European Court of Justice. The E(E)C Treaty constitutes the basis "for a new legal order of international law for the benefit of which the states have limited their sovereign rights …" (Case 26/62, *Van Gend en Loos*, ECR 1963 at 12). That is why adopted a methodology answering these questions, proceeding from the primacy of international law and EC law.

Environmental law

Public international air law and EC air law also contain rules for the protection of the environment. We referred to: ICAO Annex 16 on the environment (see above, under A.3.2) and Directive 92/14 of the EEC (see, above A.2.1). A discussion on the relationship between the freedom of market access and the environment is given above, under A.2.1, and below, under B.5.1. This relationship is affected by the application of the principles of non-discrimination, prohibition of distortion of competition and proportionality.

Other principles and rules belonging to the field of environmental law are:

Principle 12 of the *Rio Declaration on Environment and Development* of 1992. This Declaration has no legally binding force, but contains an "authoritative statement of principles fro a global consensus …"

Principle 12 states that:

> "States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.
> Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental measures should, as far as possible, be based on international consensus."

This principle is in essence applied in the EC context, where reference is made to not only the application of the non-discrimination principle, but also the principle of proportionality. Within the *internal* EC context, air transport is seen as an economic activity, which is subject to the fundamental EC principle of Freedom of Services. However, this point of view is not necessarily shared at the global level, so that we have some hesitation to apply the above principle to the operation of international air services, which is not (yet) seen as a "trade in services."

Otherwise, we refer to the last sentence of the above Principle 12, encouraging states to solve cross border environmental problems "on the basis of international consensus". The attempt made by the Swiss and German governments to draft an international agreement designed to solve their trans-boundary environmental problem can be considered as an implementation of this provision. The above *Rio Declaration* contains other Principles stimulating states to "effectively cooperate" in the field of trade and environment. Those principles are in line with principles of the international law of neighbourliness.

For the sake of completion, we make a brief reference to the *Convention on Long-Range Transboundary Air Pollution* of 1979, addressing cross border air pollution. Both Germany and Switzerland are a party to this convention. Contracting states are required to cooperate in order to reduce cross border air pollution, to exchange information and to hold consultations on this matter. The present problem is noise related rather than emission related. Moreover, for the operation of international air transport, the question of emissions is dealt with by ICAO (assisted by CAEP), which publishes from time to time standards on aircraft emissions in Annex 16.

In 1971, the OECD adopted the *Recommendation on Principles Governing Transfrontier Pollution*, adopted by the OECD Council in 1971, could be used. We referred above, under 1.6 to Title C of this Declaration, entitled *non-discrimination*, encouraging states to apply the *national treatment* principle both to the people living on the other side of the border, and to companies, established on one side of the border but casing environmental damage on the other of the border.

International law of neighbourliness

The Chicago Convention says little about cooperation between adjacent states. The drafters of the Chicago Convention considered the operation of international air transport services as a global effort. The standard of international co-operation is confirmed by the Preamble of the Chicago Convention - "it is desirable to avoid friction and to promote … co-operation between nations …" - and the establishment of ICAO and other, regional air transport organisations.

Arrangements between adjacent states, and regional arrangements, were seen as a potential violation of the above principle – that international air transport is global effort – because such arrangements were liable to provoke exclusive deals between the participating states. Closest to cooperative arrangements on a regional basis are laid down in Chapter XVI of the Chicago Convention on *joint operation organizations and pooled services*, referring to cooperation in a regional context, but it seems to us that Switzerland and Germany do not envisage to set up a "Joint operating organization" or a "Joint operating agency" for the purpose of organising cross-border air traffic management problems.

The *International Air Transport Agreement* of 1944, which also includes the "transit freedom" being under discussion here, contains a provision which obliges each contracting state to undertake:

> "… that in the establishment and operation of through services due consideration shall be given to the interest of the other contracting States so as not to interfere unduly with their regional services or to hamper the development of their through services."

Since neither Germany nor Switzerland ratified this agreement, the said provision is inapplicable to the present case, and we will not further analyse it.

Otherwise, the international law of neighbourliness can be seen as a corollary of the international law duty of cooperation, which is laid down, inter alia, in the UN General Assembly's Resolution 2625 (XXV) adopted on 24 October 1970, containing the *Declaration of principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations.* States have a duty to cooperate, inter alia, in the conduct of their international relations in the economic and trade fields, in accordance with the principles of equality and non-intervention. The doctrine of international cooperation produced, inter alia, attention for abuse of rights (*abus de droit*; *Rechstmisbrauch*) of sovereign powers – a concept that was, until the inter-War period in the twentieth century, not applied to inter-sate relations. Those relations were based upon a wide interpretation of "sovereignty" which did not allow for limitation on the power of states.

Obviously, the second half of the twentieth century inter-state co-operation replaced a strict adherence to national sovereignty. Civil law concepts, including abuse of rights, that is, in inter-state relations, abuse of sovereign rights, are lifted at the level of international relations, and applied in the context of public international law. The doctrine of "piercing the corporate veil" in (private) company law is becoming "piercing the sovereign veil" in international relations. States cannot rely on "absolute and exclusive sovereignty" as a justification of their actions. The trend demonstrates that states are becoming accountable, just like any other actors, for their actions, *including* the justifications thereof (see for instance, the '*Cassis de Dijon*' ruling, quoted in Annex 2, below), without being protected by a "sovereign veil". The prime example of this is formed by the states working together in the European Community. In another field of law, that is, criminal law, we may point at the extradition of Mr Milosevic to an international crimes tribunal.

On the basis of the above legal and political developments, it could be put forward that Germany is abusing its sovereign rights – based on Article 1 of the Chicago Convention – by denying passage movements of aircraft approach towards or departing from ZRH airport. Judicial institutions, both at the EC level and at the international level, may test such an abuse. However, the same can be said of Switzerland: its conduct – that is, the "export of noise problems to Germany" causing harm to that country, can be tested against a private law – concept of "intentional" behaviour, the mores since Switzerland is in a position to offer alternative routes for those flights. [21]

In addition to this, well respected authors, including the Yugoslav jurist Andrassy and the Swiss jurist Hans Thalmann, created special categories of rules regulating the relations between neighbouring states which were emerging. Andrassy based those rules on what is *justice* and *equity*; Thalmann conceded a role for more *informal modes* of creation of legal norms, including the other state's tolerance of certain acts committed by its neighbour, or at least failure to act on such acts. Thalmann offered, inter alia, a category of neighbourliness norms relating to jurisdictional intrusions, defined by way of extensity as including aerial overflights across frontiers.

However interesting a further analysis of the above doctrine, concepts and legal norms would be, we feel that the above case is governed by *special* rules of law, that is, primarily, of public international air law and EC air law. The impact from the law of neighbourliness is that Germany and Switzerland:

- must cooperate in the area of their air transport relations;
- must regulate their conduct taking into account justice and equity, and a certain tolerance with respect to each other's acts or omissions.

[21] See also, the above consideration 32 in the decision on access to Karlstad airport, made by the EC Commission (quoted under A.2.1).

The above refers to *positive* action taken and to be taken by neighbouring state.

On the *negative* side, it can be concluded from the *Trial Smelter* case, between Canada and the United States, that a state must refrain from causing environmental injury to another, neighbouring state. In the last mentioned case, the following principle was laid down:

> "… under the principles of international law, as well as the law of the United States, no State has the right to use or permit to use of its territory in such a manner as to cause injury by fumes in or to the other territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".[22]

The judgement held Canada responsible for the cross-boundary pollution by the Trial Smelter. Canada was required to take measures to stop the air pollution in the State of Washington. Also, the both governments had to create a method whereby people affected by the air pollution could claim damages.

It seems to us that the above norms are rather general, but they can be, and have been applied to the present case. Its outcome depends, however, on more detailed rules, which can, as said above, be found in other bodies of law.

[22] Judgement of 11 March 1941, *Trial Smelter Case; United States* v. *Canada*, III United Nations Reports of Arbitral Awards 1907-1981 (1941).

ANNEX 1

THE FREEDOMS OF THE AIR

FIRST FREEDOM

To overfly one country en-route to another

Ex.: South African Airways flies from Johannesburg over Germany to Switzerland

SECOND FREEDOM

To make a technical stop in another country

Ex.: South African Airways makes a stop for fuelling purposes in Rome on a flight between Durban and Zurich

THIRD FREEDOM

The carriage of passengers and cargo from the home country to another country

Ex.: Swissair carries traffic from Zurich to Cairo

FOURTH FREEDOM

The carriage of passengers and cargo to the home country from another country

Ex.: Swissair carries traffic from New York to Zurich

FIFTH FREEDOM

The carriage of passengers and cargo between two countries by an airline of a third country on route with origin and/or destination in its home country

Ex.: Swissair flies and carries traffic from Zurich to Rome and then on to Cairo, picking up traffic in Rome with destination Cairo

SIXTH FREEDOM

The carriage of passengers and cargo between two countries via the home country of the airline

Ex.: Swissair flies from Johannesburg via Zurich to Copenhagen, with traffic rights between Johannesburg and Zurich, and between Zurich and Copenhagen

SEVENTH FREEDOM

The carriage of passengers and cargo between two countries by an airline of a third country on a route with no connection with its home country

Ex.: Swissair carries traffic between London and Mexico City, without connection of that flight with a point in Switzerland

EIGHTH FREEDOM

The carriage of passengers cargo between two points in a foreign country on a route with origin and/or destination in the home country of the airline

Ex.: Swissair carries traffic between Munich and Hamburg, on a flight Zurich-Munich-Hamburg

NINTH FREEDOM

The carriage of passengers and cargo between two points in a foreign country with no connection with the home country of the airline

Ex.: Swissair carries traffic between Moscow and St. Petersburg, which service is unrelated to a service between those point and a point in Switzerland.

ANNEX 2

The freedom to provide goods and services in the Community

The *landmark* concerns the decisions of the European Court of Justice given in *Cassis de Dijon.*[23] The following paragraph (8) is quoted from that decision:

> "In the absence of common rules relating to the production and marketing of alcohol … it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory. Obstacles to movement within the Community resulting from disparities between national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."

The above case concerned the Free movement of goods rather than of services in the Community. However, the *Cassis de Dijon* ruling has become such a basic doctrine of EC law that it can also be applied to the Free movement of services.
In the case of *Säger* v. *Dennemayer*, Advocate General Jacobs considered the following:

> "… it may be thought that services should rather be treated by analogy with goods, and that non-discriminatory restrictions on the free movement of services should be approached in the same way as non-discriminatory restrictions f goods under the 'Cassis de Dijon' line of case law." [24]

In *Cassis de Dijon*, the European Court of Justice begins by affirming the rights of EC Member States to regulate all matters, which have not yet been the subject of Community legislation. This is clearly the case with the environmental rules established by Germany. Moreover, Germany has this right on the basis of Article 11 of the Chicago Convention. However, Community law as it stands law examines the justification of national regulations: states are not entirely sovereign to regulate as they which - which is, by the way, neither permitted under the Chicago Convention. Contracting states to this convention are subject to the application of the application of the non-discrimination principle. However, Community law goes on or perhaps a few, steps further, infringing the sovereign powers of the state.

National regulation of areas which are not covered by Community law - as is the case here - must be accepted together with any obstacles to trade which may follow from disparities in national regulations, *but only* in so far as these trade rules can be justified by one of the mandatory requirements listed in the above quotation. Public health would come closest to a possible justification of the present German environmental measures, affecting intra-Community trade.

[23] Case 120/78; European Court Reports 649 (1979)
[24] European Court Reports 4234-35 (1991)