

## International Air Passenger Adaptation Levy under international law\*

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### 1. Introduction and background

In 2008, the Maldives, on behalf of the Group of Least Developed Countries (LDCs), submitted a proposal to the Conference of the Parties (COP) of the United Nations Framework Convention on Climate Change (UNFCCC) for an International Air Passenger Adaptation Levy (IAPAL). The suggested IAPAL is a tax on the purchase of international airfares differentiated by travel class - USD 6 per passenger in economy class, USD 62 per passenger in business or first class. Its proceeds (possibly between USD 8-10 billion per year) would be invested in climate change adaptation in developing countries.<sup>1</sup> This briefing paper provides a basic analysis of the IAPAL model under public international law. It reviews the consistency of the concept with the existing international legal framework - in particular the UNFCCC, the Convention on International Civil Aviation<sup>2</sup> (Chicago Convention), and the World Trade Organization's (WTO's) General Agreement on Trade in Services (GATS).

### 2. UN Framework Convention on Climate Change

The initial IAPAL proposal put forward by the Maldives envisaged that the IAPAL should be applied to international (not domestic) flights on any airline and on any route. It did not distinguish between flights, airlines or passengers en route to and from either developed or developing countries. The UNFCCC, however, provides that in the implementation of the Convention its parties should be guided by the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC). Art.3.1 states: *"The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof."*

Public international law is based on the formal equality of states. Thus, the principle of CBDRRC establishes the common responsibility of states for the protection of the global environment. But it also lays down different standards of conduct for developed and developing nations. It encapsulates the idea that any actions taken to address climate change must, to some extent, take account of the

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\* Elizabeth Sheargold and Stéphanie Chuffart of the Columbia Centre for Climate Change Law in collaboration with Christoph Schwarte of the Legal Response Initiative (LRI).

<sup>1</sup> Momodou Njie and Benito Müller, Climate Finance for Developing Countries: A post-Copenhagen Synopsis, European Capacity Building Initiative, 2010 available at <http://pubs.iied.org/pdfs/G03020.pdf>; 6 Baker, A.C., How can air travel contribute to the costs of adapting to climate change? The feasibility of the International Air Passenger Adaptation Levy (IAPAL) as a market governance mechanism. International Institute for Environment and Development (IIED), London, 2011.

<sup>2</sup> Convention on International Aviation, Dec. 7, 1944, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

relative responsibility of each country for contributing to the problem, and the capacity of each country to contribute to tackling the problem. However, Article 3 of the UNFCCC and related provisions contain limited guidance on the how the principle of CDDRRC is implemented. Its legal status, precise scope and ability to guide the design of a future climate regime have therefore been subject to significant academic and political debate.

Recent developments in the climate negotiations appear to indicate a broad move towards more symmetry and parallelism. Developing and developed country mitigation actions were included in the Bali Action Plan (2007), the Copenhagen Accord (2009), and the Cancun Agreements (2010). But there also remain significant differences. Developed country mitigation often refers to quantified emission reduction commitments or targets. Developing country mitigation does not refer to commitments, and is set in the context of sustainable development, supported and enabled by technology, financing, and capacity building from developed countries. Special consideration is given to particularly vulnerable groups of developing countries such as Small Island Developing States (SIDS) and LDCs. Hence, while disputes over the nature and extent of CDDRRC will continue, some form of differential treatment between developed and developing country parties to the UNFCCC, in particular the most vulnerable, remains a core legal principle under the Convention.<sup>3</sup>

Although the IAPAL would be levied on an individual basis it nevertheless creates an additional financial burden on national economies. For example: airlines would pass the costs on to consumers. In turn, this levy, while small, may discourage people from travelling internationally and harm the economic development of some developing countries that are heavily dependent on tourism. The interpretation, initially put forward by the Maldives, that the levy inherently embodies the principle of CDDRRC at a personal level because it imposes the levy on passengers based on their personal (or corporate) responsibility for emissions and their capability to afford international air travel, may be morally compelling. To date, however, CDDRRC is predominately perceived as a concept which applies when determining the rights and obligations of states, rather than the responsibilities of citizens, corporations or other sub-state actors.

The UN High-Level Advisory Group on Climate Finance (AGF), convened by the UN Secretary General in 2010 took the view that any measures applied to international aviation should have no net incidence on developing countries.<sup>4</sup> 'Incidence' refers to potential direct burdens imposed on developing countries in connection with a source of finance.<sup>5</sup> Consequently, the AGF's calculations only included potential revenues generated by contributions from developed countries.<sup>6</sup> Estimates of revenues from taxes on international aviation, for example, excluded flights between developing countries and one half of flights between developed and developing country countries "*in order to ensure no incidence of the tax on developing countries*".<sup>7</sup> In this way, the 'no incidence' concept reflects the principle of CDDRRC (and Article 4.7 UNFCCC).<sup>8</sup> So if a country or countries choose to impose IAPAL without including any form of differential treatment in how the levy applies to international flights or airlines from developed and developing countries, it is likely to conflict with the principles and provisions of the UNFCCC.

A less formal approach in connection with the proposed IAPAL may also consider the principle of CDDRRC sufficiently upheld through the actual impact of the new levy. With the exception of China,

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<sup>3</sup> Lavanya Rajamani, The changing fortunes of differential treatment in the evolution of international environmental law, *International Affairs* 88, 3, pp. 605–623.

<sup>4</sup> Report, paras.31, 33, 34, 42.

<sup>5</sup> Report, paras.70 and 71.

<sup>6</sup> Report, para.67.

<sup>7</sup> Annex II, Detailed methodology, to the report.

<sup>8</sup> At COP 17 in Durban, the AWG-LCA considered draft text (under financing) that mentioned the "no net incidence" concept in connection with money raised by the IMO under a market-based measure to fund the Green Climate Fund. The agreed AWG-LCA text, however, is rather vague and does not refer to the concept.

developing countries, in particular LDCs, are responsible for a relatively small share of international air traffic only.<sup>9</sup> As a result of their higher market share on international routes, airline operators (and their customers) from northern industrialised countries would bear a large proportion of the revenue generated through IAPAL. The economic impact of IAPAL on developing countries, and in particular LDCs, in comparison to developed countries is anticipated to be modest, as the consequences for flight demand and tourism are generally considered moderate. However, a more detailed economic analysis is needed to review these assumptions and determine the sustainability of trends and predictions for the future.

### 3. Chicago Convention

#### 3.1 Imposition of “charges”

The Chicago Convention provides the legal framework for international civil aviation. Article 15 of the Convention addresses airport and similar charges. It has three main elements: first, a non-discrimination provision requiring that uniform conditions for airport use are imposed on all airlines; second, a national-treatment obligation, requiring that any charges for the use of airports or air navigation facilities are not higher than those charged for national airlines;<sup>10</sup> and finally it stipulates that “[n]o fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon”.<sup>11</sup>

The proposed IAPAL is a charge on air travel from and to another country for the purpose of raising revenue to fund adaptation measures – rather than an express condition or charge for the use of an airport or navigation facility. If it fell within the category of “fees, dues or other charges” (under Article 15) its introduction may be prohibited. While none of these terms is defined in the Chicago Convention, the ICAO’s Council Resolution on Taxation of International Air Transport draws a distinction between charges and taxes. It defines charges as “levies to defray the costs of providing facilities and services”. Taxes are “levies to raise general national and local government revenues that are applied for non-aviation purposes”.<sup>12</sup> Based on these definitions, IAPAL would fall within the category of taxes (not charges). Its introduction should not conflict with (the third element of) Article 15.

There are, however, four authenticated language texts of the Chicago Convention – English, French, Spanish and Russian. Under international rules on treaty interpretation, each of these four texts would be of equal weight.<sup>13</sup> The French, Spanish and Russian texts of Article 15 use words (“droits, taxes ou autres redevances”, “derechos, impuestos u otros gravámenes” and “пошлин, налогов или других сборов” respectively) which could translate as taxes in English, creating some ambiguity as to whether the article distinguishes between charges and taxes.<sup>14</sup>

In considering the consistency of passenger levies with Article 15 of the Chicago Convention, domestic courts have reached conflicting decisions. In the case of *B.A.R. Belgium v. The Belgian State*,<sup>15</sup> the Belgian Council of State held that an annual tax on aircraft operations, levied by a municipality and calculated based on the number of passengers on flights departing the local airport

<sup>9</sup> Some statistic data and forecasts are publicly available through the websites of IATA e.g.

<http://www.iata.org/publications/Pages/airline-industry-forecast.aspx> and ICAO e.g.

<http://www.icaoodata.com/Trial/WhatIsICAO.aspx> and <http://www.icao.int/sustainability/Pages/default.aspx>.

<sup>10</sup> Chicago Convention, Art.15 subparagraph 2 a) and b).

<sup>11</sup> Chicago Convention, Art.15 last sub-paragraph.

<sup>12</sup> ICAO, ICAO’s Policies on Taxation in the Field of International Air Transport, Third Ed., 2000, Doc. 8632.

<sup>13</sup> Vienna Convention on the Law of Treaties, 1969, Art.33.

<sup>14</sup> This is discussed in R (on the application of the Federation of Tour Operators and others) v. Her Majesty’s Treasury [2007] EWHC 2062, at [52].

<sup>15</sup> Decision 144.081, the Belgian Council of State, Twelfth Chamber. ,May 3, 2005, ILDC 1143 (BE 2005).

violated Article 15 of the Chicago Convention. While the tax was not levied for each entry or exit from the municipality, the Court held that in substance the tax was for flying in or out of the district. As such, it was held that the tax was inconsistent with the last sub-paragraph of Article 15.

The opposite conclusion was reached in the UK High Court, which found that the UK Air Passenger Duty (APD) - a tax imposed on air passengers departing from UK airports - was not prohibited by Article 15 of the Chicago Convention.<sup>16</sup> The APD applies to flights departing from UK airports, regardless of whether they are domestic or international (although exceptions are made for flights which merely stopover or transit in an airport). Since the duty was equally payable if the flight did not leave the UK, the court (in the Federation of Tour Operators case) held that it was not imposed “solely” for the right to exit territory.<sup>17</sup> The Supreme Court of the Netherlands held that an air passenger tax was not manifestly incompatible with the Chicago Convention as “charges” in Article 15 (subparagraph 3) referred to fees that were levied in return for certain consideration.<sup>18</sup> It did not encompass consumption taxes imposed without any services being provided in exchange.<sup>19</sup>

Other states that have unilaterally imposed air passengers levies include Germany (German Air Travel Tax), Austria (Austrian Flight Charge)<sup>20</sup>, Ireland (Irish Air Travel Tax on departures from airports in Ireland)<sup>21</sup>, Australia, Barbados, Hong Kong, Peru, India and Pakistan<sup>22</sup>. The most relevant comparator for the proposed IAPAL may be the French “Solidarity Levy”. It applies to both domestic and international flights and provides revenue for the Global Fund to Fight AIDS, Tuberculosis and Malaria (UNITAID) in developing countries. Several other countries (Cameroon, Chile, Congo, Madagascar, Mali, Mauritius, Niger, Republic of Korea and Norway) have subsequently joined the scheme.<sup>23</sup> Chile has imposed a levy of USD 2 on all international flights, while Niger applies differential rates for domestic and West African flights (USD 1.20 for economy or USD 6 for business and first class) and other international flights (USD 4.70 for economy or USD 24 for business/first class). In all of these countries the solidarity levy is imposed on flights of all airlines, although in some cases with differentiation being based on the destination of a flight.

Levies similar to the proposed IAPAL have been imposed by several countries. In most cases these taxes have not been challenged as a breach of Article 15 of the Chicago Convention. This appears to indicate an interpretation of the Chicago Convention by its parties that allows countries to tax air passengers for general revenue raising or non-aviation related purposes.<sup>24</sup> Thus, the parties’ subsequent practice suggests that the term “fees, dues or other charges” does not cover levies to raise general government revenues for non-aviation purposes. Consequently, the most likely

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<sup>16</sup> UK Government, HM Revenue and Customs, “Air Passenger Duty – Introduction”, available from [http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageExcise\\_InfoGuides&id=HMCE\\_CL\\_001170&propertyType=document](http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageExcise_InfoGuides&id=HMCE_CL_001170&propertyType=document).

<sup>17</sup> Id., at [56].

<sup>18</sup> Board of Airline Representatives in the Netherlands v. the State of the Netherlands and the Minister of Finance, Supreme Court, 10 July 2009, LJN No. BI 3450, RvdW (2009) No. 848, NJ (2009) No. 563. For discussion of the case, see: Brian F. Havel and Niels van Antwerpen, ‘The Dutch Ticket Tax and Article 15 of the Chicago Convention,’ 34 Air and Space Law 141-146 (2009) and Brian F. Havel and Niels van Antwerpen, ‘Dutch Ticket Tax and Article 15 of the Chicago Convention (Continued),’ 34 Air and Space Law 447-451 (2009).

<sup>19</sup> An English translation of the decisions is available in: L. A. N. M. Barnhoorn, ‘Netherlands Judicial Decisions Involving Questions of Public International Law, 2008–2009,’ 41 Netherlands Yearbook of International Law 379, 432-436 (2010).

<sup>20</sup> They apply to domestic and international flights from German and Austrian. Ulrich Steppeler, “German Air Travel Tax and Other Duties: A New European Trend?”, The Air and Space Lawyer, Vol. 24, No. 1, 2011.

<sup>21</sup> Irish Tax and Customs, “Air Travel Tax Guide”, available from <http://www.revenue.ie/en/tax/excise/leaflets/air-travel-tax.html>.

<sup>22</sup> R (on the application of the Federation of Tour Operators and others) v. Her Majesty’s Treasury [2007] EWHC 2062, at [62].

<sup>23</sup> UNITAID, “How Innovative Financing Works”, available at <http://www.unitaid.eu/how/innovative-financing?id=163>.

<sup>24</sup> Vienna Convention on the Law of Treaties, 1969, Art.31 para.3(b).

interpretation is that there are no absolute barriers to the introduction of the proposed IAPAL under Article 15 of the Chicago Convention.

### **3.2 Non-discrimination**

In order to reflect the principle of CDDRRC under the UNFCCC in the design and implementation of an IAPAL scheme it has been suggested to couple the introduction of the tax with a form of differentiation between developed and developing countries. For example: certain routes to and from developing countries or airlines registered in developing countries could be exempt from the levy. As a result, there could be a difference in treatment of passengers on aircraft from different states. This may infringe Article 11 of the Chicago Convention which states: *“Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.”*

Article 11 is a non-discrimination provision. It requires that laws or regulations relating to the admission and departure of international air services, or relating to the operation or navigation of aircraft, are imposed without any distinction as to the nationality of the carrier. The article does not refer specifically to passenger taxes or levies. But the exemption of airlines from the levy based on their affiliation with a developing country appears, *prima facie*, to be incompatible with Article 11 of the Chicago Convention.

In the past the ICAO has also allowed for a certain degree of flexibility in the equal treatment of States. In defining the phasing-out of noisier aircraft, for example, States were requested to *“take into account the problems of operators of developing countries with regard to... aircraft presently on their register”*.<sup>25</sup> While the Chicago Convention prohibits unequal treatment on grounds of nationality, it does not explicitly ban the differential treatment of operators that are flying different routes. Hence, a purely route based approach - excluding, for example, all flights to or from LDCs from the levy - may be consistent with the Chicago Convention.<sup>26</sup>

However, the practical outcome of a route based scheme is likely to be that certain national airlines will benefit from exemptions while others (because they service the non-exempt routes) effectively carry the brunt of the proposed IAPAL's burden on airlines. Jurisprudence and subsequent interpretation related to comparable equal treatment and non-discrimination provisions in other regimes – such as European Union law or WTO rules (see below) – increasingly focus on the actual impact of measures (regardless of form and objectives) to determine cases of non-compliance.

#### European emission trading scheme<sup>27</sup>

Since the start of 2012, emissions from international aviation are included in the EU Emissions Trading System. For commercial airlines, the system covers CO<sub>2</sub> emissions from flights within and between countries participating in the EU ETS (except Croatia until 2014). International flights to and from non-ETS countries are also covered. Operators will have to report on their annual emissions and surrender an equivalent number of allowances. Incoming flights can be exempted from the EU ETS if

<sup>25</sup> Chris Lyle, *Kyoto v. Chicago: ICAO debates how to apply the principle of Common but Differentiated Responsibilities to aviation*, <http://www.greenaironline.com/news.php?viewStory=450>.

<sup>26</sup> Joanne Scott and Lavanya Rajamani, *EU Climate Change Unilateralism*, *The European Journal of International Law*, Vol. 23, 2012, no. 2.

<sup>27</sup> Largely based on information available through the European Commission website [www.ec.europa.eu](http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm) For example: [http://ec.europa.eu/clima/policies/transport/aviation/index\\_en.htm](http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm).

the EU recognises that the country of origin is taking measures to limit aviation emissions from departing flights.

The inclusion of aviation in the EU ETS has been challenged by US airlines and their trade association. On 21 December 2011, the European Court of Justice found that the scheme was compatible with international law. It concluded that the uniform application of the EU ETS to all flights which depart or arrive from the EU is consistent with provisions designed to prohibit discriminatory treatment between aircraft operators on grounds of nationality. The Court also stated that the EU ETS does not constitute a tax, fee or charge on fuel, which could be in breach of the EU-US Air Transport Agreement.

In order to facilitate an amicable international solution, the European Commission has deferred the scheme's application to flights into and out of Europe until after the ICAO General Assembly in autumn 2013. However, if the 2013 ICAO General Assembly fails to make the necessary progress towards a global scheme, the EU ETS legislation will be applied in full to all flights to and from non-European countries. For the EU, an agreement in ICAO on market-based measures must at least deliver aviation emission reductions as big as the EU ETS is doing; be non-discriminatory for all airlines; and contain targets and measures for ICAO member countries.

In order to avoid a degree of legal uncertainty associated with a route based approach, an IAPAL scheme could be designed to apply the levy equally to all airlines but reflect the notion of CBDRRC in connection with the distribution of revenues. The levy collected in developing countries may be used in the country of collection for domestic adaptation purposes only, while the revenues generated in developed countries would be distributed to developing countries through a fund, in accordance with agreed funding criteria. Alternatively, based on the model proposed in the International Maritime Organisation, all airlines could also collect the tax while each developing country subsequently receives a rebate in accordance with the incidence, or economic burden, of the levy on their economies.<sup>28</sup> The remainder of revenues would be disbursed to developing countries for adaptation purposes. A developing country could voluntarily forego its rebate.

#### 4. WTO Trade Rules

Under WTO trade rules, the General Agreement on Tariffs and Trade (GATT) applies to trade in goods, while the General Agreement on Trade in Services (GATS) applies to services. This could potentially include the transport of air passengers and the provision of domestic tourism services to passengers who arrive by airplane. However, a specific annex to the GATS excludes the majority of regulations affecting air travel from the application of GATS. The GATS "*shall not apply to measures affecting: (a) traffic rights, however granted; or (b) services directly related to the exercise of traffic rights...*"<sup>29</sup> But the annex also states that GATS shall apply, *inter alia*, to measures affecting "*the selling and marketing of air transport services*" and "*computer reservation system (CRS) services*".<sup>30</sup>

These terms are further defined in the annex. Selling and marketing of air transport services refers to the opportunity for air carriers to sell and market their services freely, including market research, advertising and distribution but does not include "*the pricing of air transport services nor the applicable conditions*". CRS services is defined as "*services provided by computerised systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued*". "*Traffic rights*" refers to the so-called 'freedoms of the air', which relate to rights of transit through and access to a country's airspace (and the extent

<sup>28</sup> Proposed by IUCN in the IMO's Marine Environment Protection Committee (MEPC), documents MEPC 60/4/55 and MEPC 61/5/33.

<sup>29</sup> Paragraph 2 of the Annex on Air Transport Services (AATS).

<sup>30</sup> Paragraph 3 of the AATS.

to which those rights may be regulated by a state). The annex's definition of traffic rights covers the right for scheduled and non-scheduled services to operate and carry passengers for remuneration or hire, "*including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control*".

There are different possible interpretations of this definition of "*traffic rights*". On its face, it appears that measures affecting the pricing of tickets by the aviation industry relate to traffic rights, as they are "*tariffs to be charged*". Following this literal interpretation of the provision, any measures affecting the price charged for air services, including government taxes, are therefore covered by the application of the annex and not subject to GATS.<sup>31</sup> Some commentators suggest that any impacts of the measure in sectors outside of the aviation industry may still be subject to the provisions of the GATS. Under this view, any harm caused by an IAPAL to the aviation industry could not be subject to a claim under the GATS - but rather impacts in other services sectors such as tourism.<sup>32</sup>

The alternative interpretation is that the phrase "*tariffs to be charged and their conditions*" (in its historic context), is a reference to the air service pricing negotiated by states (to ensure their nationals could access the freedoms of the air).<sup>33</sup> On that basis, the introduction of a new tax for adaptation purposes may not be a "*tariff to be charged*", and instead be considered to primarily affect airlines' opportunities to sell and market their services freely (rather than their traditional traffic rights). A contemporary interpretation, to include internet based booking systems, could also be applied to the term "*computer reservation systems*". Thus, there are also possible lines of argument that GATS would apply to an IAPAL.<sup>34</sup>

If the proposed IAPAL was not considered a measure affecting traffic rights or directly related services as defined by the annex it would have to comply with non-discrimination requirements imposed by GATS. One of the main requirements under GATS is the Most-Favoured-Nation (MFN) treatment obligation contained in Article II.1 which states: "*With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.*"

This is a basic non-discrimination obligation. It requires that service suppliers and services from a WTO member receive equal (or better) treatment than the same services or service supplier from any other country. If the MFN obligation under GATS applied, any differential treatment in the application of the proposed IAPAL based on the nationality of a carrier would conflict with that obligation. If the levy was, for example, payable by passengers on flights on airlines based in developed countries, but not on flights on the same routes operated by airlines from LDCs, this would constitute a less favourable treatment of like services in the sense of Article II.1 GATS. Jurisprudence in both the GATT and WTO eras has clarified that these rules cover both *de jure* and *de facto* discrimination.<sup>35</sup> Thus, even if the differential treatment was not explicitly based on the nationality of a carrier, but it *de facto* affected airlines from some WTO members more than others, this would constitute a breach of the MFN obligation.<sup>36</sup>

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<sup>31</sup> Lorand Bartels, *The Inclusion of Aviation in the EU ETS: WTO Law Considerations*, ICTSD Programme on Trade and Environment, April 2012, at 47, footnote 172.

<sup>32</sup> Bartels, at 47, footnote 172.

<sup>33</sup> Bartels, at 23.

<sup>34</sup> Joshua Meltzer, "Climate Change and Trade – The EU Aviation Directive and the WTO", 15 *Journal of International Economic Law* 1 (2012):111-156, at 147-150, who based on the European Court of Justice decision holds that the Aviation Directive does not deal with traffic rights as defined in the AATS and is subject to GATS.

<sup>35</sup> Appellate Body, *Canada - Certain Measures affecting the automotive industries*, Report, WT/DS139/AB/R & WT/DS142/AB/R, 2000, para.78.

<sup>36</sup> See also above on differential treatment under the Chicago Convention.

In addition to the MFN treatment obligation, GATS also contains a national treatment obligation in Article XVII, which requires that services provided by other WTO Members must be accorded treatment no less favourable than that accorded to domestic suppliers of those services. However, the national treatment obligation in the GATS is limited to specific sectors identified in the schedules of commitments made by each WTO Member. Thus, whether or not the national treatment obligation was relevant to the proposed IAPAL would depend on whether the State imposing the levy included potentially relevant sectors – for example tourism – to which the national treatment obligation applied in its schedule of commitments.

Most states have included the uptake of tourism services by its citizens abroad (known as a “Mode 2” supply of services) within their schedule of commitments. In this case a WTO member must accord services and service suppliers in any other member state “*treatment no less favourable than that it accords to its own like services and service suppliers*”.<sup>37</sup> An air passenger levy on international but not domestic flights may benefit the domestic tourism industry at the expense of similar service providers based in other WTO member states. The country allegedly harmed by the introduction of the measure would need to demonstrate that the levy modified the conditions of competition between domestic and foreign tourism services.

## 5. Permissibility of discrimination

There is no hierarchy between the rules of the UNFCCC, the WTO and the Chicago Convention. If states are bound by conflicting treaty obligations the general principles of *lex posterior derogat priori* (a later rule repeals an earlier one) and *lex specialis* (a specialized rule takes precedence over a general rule) apply.<sup>38</sup> A very broad legal contention could be that in the area of climate action parties to the 1992 UNFCCC have amended any existing obligations to equal treatment, as the treaty states that “*measures taken to combat climate change may affect the parties differently, unless they constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade*”.<sup>39</sup> But while the Chicago Convention was adopted and entered in force in 1944 and 1947, respectively, the GATS was negotiated in 1994. Applying the rule of *lex posterior*, the provisions of the GATS would take precedence over the UNFCCC, to the extent of any inconsistency. Moreover, a WTO dispute settlement panel is unlikely to consider an argument that WTO rules were overridden by another international treaty.

If the imposition of an IAPAL were held to be discriminatory according to GATS rules, then it might be saved from invalidity by the exceptions allowed for within WTO law. Article XIV of the GATS provides general exceptions to rules on discrimination. It states that “[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: ... (b) necessary to protect human, animal or plant life or health”.

In the WTO jurisprudence, safeguarding human health, including through environmental protections, is considered among the most important policy measures which a government can pursue. To determine whether a measure is necessary the WTO Appellate Body jurisprudence weighs and balances several factors, including: the importance of the policy objective, the contribution of the measure to this objective and the restrictive impact of the measure on international commerce. It

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<sup>37</sup> GATS, Article XVII para.1.

<sup>38</sup> Vienna Convention Art.30.

<sup>39</sup> UNFCCC, Art.3 para.5, second sentence.



also examines if less trade restrictive alternatives are reasonably available.<sup>40</sup> In relation to a complex public health or environmental problem such as climate change, a policy which would make a partial but “material contribution” to safeguarding human, plant or animal life and health *may* be justified.<sup>41</sup>

However, IAPAL is not intended to reduce the number of flights. It may potentially slow down the overall increase in international air traffic, but its policy objective is the generation of funds for adaptation purposes. Whilst this also aims to protect human lives it will not significantly impact on greenhouse gas emissions and help to prevent dangerous anthropogenic interference with the climate system.

But even if the proposed IAPAL was held to be protected by Article XIV, it would also need to be consistent with the chapeau of the article. The chapeau, *inter alia*, requires that the measure must not be applied in a manner which constitutes “*arbitrary or unjustifiable discrimination*”. The Appellate Body has held that any discrimination in the application of a measure must be justified in relation to the objective of the measure.<sup>42</sup> While discrimination in the application of an IAPAL reflects the special situation of developing countries, this may still be arbitrary and unjustified within the meaning of the chapeau as an IAPAL that applied to all flights would generate more money for adaptation purposes and be less trade restrictive.

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<sup>40</sup> EC - Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/AB/R, 2001, paras.171-172. While Article XIV of GATS has not been subject to consideration in many disputes, the Appellate Body has held that the GATT jurisprudence on equivalent exceptions is relevant to interpreting exceptions to the GATS, United States – Measures affecting the cross-border supply of gambling and betting services, WT/DS285/AB/R, 2005, para.291.

<sup>41</sup> Appellate Body Report, Brazil - Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, 2007, para.151.

<sup>42</sup> Appellate Body Report, Brazil - Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, 2007, para.232.