# Functional Airspace Block Agreements: European Instruments or International Treaties?

by Delphine Defossez*

## 1. *Introduction*

Air transport is growing exponentially. The traffic flow within Europe will double by 2030, but the actual system is not able to satisfy such demand.[1] European airspace is poorly managed and dramatically fragmented. The European Commission is trying to prevent a capacity shortage and is making efforts to triple the capacity of the airspace.[2] The Commission aims to remedy this emerging problem while leaving a margin of error in case the growth predictions are incorrect. This also leaves more time for the Commission to develop a new action plan for any additional increases in European flight capacity. The way forward is called the Single European Sky (SES).

The SES aims to decrease the number of sectors by reducing the number of control centers, which is one of the causes of inefficiency.[3] These changes should bring Europe closer to the American model.[4] The main tool to enhance efficiency, and satisfy the growing capacity requirements, is the establishment of Functional Airspace Blocks (FABs). These FABs group various countries, including non-European countries, and require them to closely cooperate in order to manage the airspace over the delimited territory in the best possible way. To implement all the changes, the Commission requires Member States within the same FAB to enter into agreements with one another.

The structure and layout of the agreements are close to the requirements of international treaties. Even their names – Agreements Establishing the Functional Airspace Block – cast doubt as to their real nature, and even more so when international reality evolves with time and leads to the evolution of international law to follow this reality. As Judge Jessup rightly said, "The notion that there is a clear and ordinary meaning of the word "treaty" is a mirage."[5]

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* LL.B., Maastricht University; LL.M., European University Institute; LL.M., Swansea University; Ph.D. candidate, Universidade de Brasília.

1 "Selon les prévisions, le trafic aérien devrait doubler d'ici à 2030. La plus grande difficulté consiste à faire en sorte que l'espace aérien européen puisse faire face à la croissance du trafic, tout en réduisant les coûts et en améliorant les performances." *See L'aviation Civile*, at 1, BANQUE EUROPÉENNE D'INVESTISSEMENT (Apr. 2013), http://www.eib.org/attachments/thematic/civil_aviation_fr.pdf.

2 IATA, A BLUEPRINT FOR THE SINGLE EUROPEAN SKY: DELIVERING ON SAFETY, ENVIRONMENT, CAPACITY AND COST-EFFECTIVENESS 2 (2011); *Air Traffic Management – Freeing Europe's Airspace*, COM (96) 57 final (Mar. 6, 1996); *Le "Ciel Unique Européen," Qu'est-ce que c'est?*, NOUVELOBS.COM (June 11, 2013, 2:16 PM), http://tempsreel.nouvelobs.com/social/20130611.OBS2746/le-ciel-unique-europeen-qu-est-ce-que-c-est.html; *Europe to Take a Third Attempt at Sorting Out the Single European Sky*, CAPA (Oct. 26, 2012, 2:20 AM), http://centreforaviation.com/analysis/europe-to-take-a-third-attempt-at-sorting-out-the-single-european-sky-86383.

3 Julian Moxon, *Single European Sky Still Fragmented*, AINONLINE.COM (June 17, 2013, 3:50 AM), http://www.ainonline.com/aviation-news/paris-air-show/2013-06-17/single-european-sky-still-fragmented.

4 Press Release, Eur. Comm'n, Single Sky: Commission Acts to Unblock Congestion in Europe's Airspace, IP/13/523 (June 11, 2013), http://europa.eu/rapid/press-release_IP-13-523_en.htm.

5 South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1962 I.C.J. Rep. 387, 402 (Dec. 21) (separate opinion of Judge Jessup).

The efforts made by the European Commission to remedy the fragmentation of Europe's airspace have also generated new problems. One of the current problems is to define the nature of the FAB agreements. These agreements, when involving non-European States, can be confused with international treaties – especially when no such instruments have ever been recorded at the European Union level and when ICAO was notified of each FAB agreement.

If the FAB treaties are international agreements, then the repercussions would be enormous. Indeed, it would mean that the Union has the power to require its Member States to enter international treaties. With the entry into force of the agreements establishing the Functional Airspace Blocks, European law will give rise to international treaties within the Union. This will result in a new kind of EU lawmaking with everything it entails, such as a wider control of the EU over Member States' decisions. It would push European integration to a whole new level, not even envisioned by the Member States themselves, and would make EU law applicable to non-EU countries which are part of the SES project.

This article seeks to define the nature of these agreements and is based on the hypothesis that the agreements which include non-European countries could be international treaties. At the very least, the nature of these agreements is more than vague. This, of course, is only relevant in case a dispute arises. Initially, a brief definition of the term "treaty" will be provided, followed by a look at the requirements under the Vienna Convention on the Law of Treaties of 1969. Then the European system is analyzed, before moving to the application of these definitions to the FAB agreements.

## 2. *Definition of the Term "Treaty"*

Treaties have existed since antiquity and started taking their current shape after 1815.[6] Treaties are based on the idea embodied in the maxim *pacta sunt servanda*, which is one of the general principles of law according to Article 38(1) of the Statute of the International Court of Justice.[7] However, no jurisdiction upholds all agreements. As a result, the idea that one uniform and clear definition exists is fiction.[8]

The term "treaty" can have various senses. It encompasses both the act and the norm.[9] The narrow definition goes as follows: "a formal agreement recording and constituting an international agreement."[10] However, with the passage of time, the term has come to have a wider definition, encompassing any binding international agreements.[11] Earlier, a distinction was made between contractual treaties and law-making treaties, but this distinction has lost its meaning.[12]

There is no specific fixed term: a treaty can also be called an agreement or convention or protocol.[13] The difficulty is whether a particular instrument falls within the definition of a treaty

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6 PAUL REUTER, INTRODUCTION AU DROIT DES TRAITES 9–10 (1st ed. 1972).

7 June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

8 Julio A. Barberis, *Le Concept de "Traité International" et ses Limites*, 30 ANNUAIRE FRANÇAIS DE DROIT INT'L 239, 247 (1984); Kelvin Widdows, *What Is an Agreement in International Law?*, 50 BRIT. Y.B. INT'L L. 117, 117 (1979).

9 REUTER, *supra* note 6, at 33.

10 Widdows, *supra* note 8, at 117.

11 Barberis, *supra* note 8, at 240; Widdows, *supra* note 8, at 117.

12 PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 35 (3d ed. 1995).

13 Barberis, *supra* note 8, at 240; REUTER, *supra* note 6, at 39.

and not the definition of the treaty itself. This certainly holds true with treaty law being flexible and able to accommodate departure from its norms. Nevertheless, most treaties follow the standard forms.[14] However, with new forms of interstate relationships and cooperation – such as the EU or the ASEAN – it is increasingly difficult to establish with certainty if an instrument is a treaty or simply a non-binding soft law agreement.[15] Deciding whether or not an agreement is a treaty has important practical consequences.[16]

The Vienna Convention on the Law of Treaties[17] of 1969 (VCLT) is the main instrument regulating treaties. The VCLT defines the term "treaty" and regulates the creation, amendment procedure, and interpretation, as well as termination, of a treaty. The VCLT can be regarded as a treaty about treaties, as it governs treaties irrespective of their subject matter or objectives. Its purpose is not to create specific substantive rights or obligations for parties; rather, it creates certain obligations for States not to invoke national law as a legal barrier to avoid compliance with international treaties.[18]

### 3. *The Requirements of a Treaty According to the VCLT*

Significantly, the qualification of an agreement as an international treaty changes the practical consequences.[19] Treaties are one of the sources that give rise to international legal obligations.[20] "International legal obligations may be established by a customary rule of international law, by a treaty or by general principles applicable within the international order."[21] Finally, a treaty is binding between States or States and international organizations.[22]

Article 2, paragraph 1(a) of the VCLT defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." The elements of this definition are also part of customary international law.[23] "But with respect to the substantive issue of which among the 'agreements' that meet the

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14 ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 16 (2d ed. 2007).

15 MALGOSIA FITZMAURICE & OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 2 (2005). *See id.* at 6 (defining "soft law" instruments).

16 EDUARDO JIMÉNEZ DE ARÉCHAGA SIENRA, INTERNATIONAL LAW IN THE PAST THIRD OF A CENTURY 35 (Collected Courses of The Hague Acad. of Int'l Law No. 159, 1978).

17 *Opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter VCLT]. The Vienna Convention on the Law of Treaties is considered customary international law, which means that it is binding even on States that are, in fact, not parties to it, such as the United States. *See* Malgosia Fitzmaurice, *The Identification and Character of Treaties and Treaty Obligations between States in International Law*, 73 BRIT. Y.B. INT'L L. 141, 143 (2002).

18 This is the role of the Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964), which creates rights and obligations for States in their diplomatic relations.

19 JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 1 (1996).

20 Fitzmaurice, *supra* note 17, at 143.

21 REP. OF THE INT'L L. COMM'N, 53RD SESS. 126 (Apr. 23, 2001) ("State Responsibility").

22 Article 3 of the VCLT states, "[t]he present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization." *See* REUTER, *supra* note 6, at 33.

23 AUST, *supra* note 14, at 16.

positive formal requirements set out in the VCLT are to be upheld by international law and which are not, the VCLT is essentially silent."[24]

According to the definition in Article 2(1)(a), a treaty consists of at least three components: agreement between States, in writing, and governed by international law. At first sight, the definition sounds simple. However, looking at the jurisprudence of the International Court of Justice (ICJ), this first impression is quickly dismissed. Indeed, the Court has often been required to give its opinion and decide whether or not a specific agreement constituted a treaty.[25]

The first component of a treaty is the agreement between States. This component includes different parts: first, it must be an agreement between two or more subjects; second, it must be an act between subjects of international public law; and finally, it must produce legal consequences.

The first part is straightforward; an agreement cannot be regarded as a treaty if there are not at least two parties involved.[26]

Second, if the act is between States, it fulfills the second part of the component. However, if the agreement has been concluded by a decentralized State service or a public body linked to the State, then it first must be determined if the State is involved (i.e., whether this body has the power to commit its State or not). If the answer is yes, then the agreement is one step closer to being a treaty. If not, then the agreement can be an international agreement having a special form.[27]

Finally, there must be an intention to produce legal effects. If the agreement only possesses programmatic obligations, then the agreement will not be considered a treaty. A treaty needs to create norms in a defined field.[28] However, this approach is problematic for a simple reason: even if a treaty concluded in the name of a State does not create obligations, if it is breached the State can still be held responsible under international law or international customary law.[29] For instance, the Chicago Convention[30] is an international treaty, but it does not obligate the contracting States to provide an air navigation service provider (ANSP). However, the States are held responsible if, due to a fault of their ANSPs, damages occur.[31]

The second condition is the written form, meaning something that is permanent and readable.[32] This requirement exists to show the wish of the parties to be bound. Due to the complexity in determining other types of agreements, mostly oral, the drafters of the Vienna Convention decided to focus only on written treaties.[33] However, this does not mean that

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24 Fitzmaurice, *supra* note 17, at 146.
25 *Id.* at 141.
26 REUTER, *supra* note 6, at 42.
27 A treaty may be concluded by heads of state, governments, ministries, state organs, or agencies. *See* AUST, *supra* note 14, at 19; REUTER, *supra* note 6, at 43.
28 Barberis, *supra* note 8, at 251.
29 REUTER, *supra* note 6, at 44.
30 Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force Apr. 4, 1947) [hereinafter Chicago Convention].
31 *See* Niels van Antwerpen, *Single European Sky*, 27 AIR & SPACE L. 3 (2003).
32 For instance, section 5(6) of the Arbitration Act 1996 in the U.K. provides similar reasoning.
33 REUTER, *supra* note 6, at 40–41.

unwritten agreements are not formally binding, but simply that they do not fall under the VCLT. Nothing excludes the text of a treaty to be embodied in, for instance, an email, even though it is normally typed and printed.[34] A treaty can be embodied in a single instrument or more.[35] The consent of the States to be bound should be expressed in one of the forms enumerated in Article 11 of the VCLT.

The third condition is to be governed by public international law. If the agreement is governed by national law, then it will be regarded as a contract.[36] The VCLT only applies to treaties concluded between States that are parties to the Convention, and for treaties entered into force after the Convention itself gained enough signatures to enter into force.[37] The FAB agreements were enacted long after the VCLT entered into force.[38] In addition to this formal requirement, the parties need to have the intention to create obligations under international law, which differentiates from agreements governed by national law.[39] This is the most problematic condition of this definition. However, there are borderline cases. To determine whether an agreement is a contract, the object and the circumstance of the conclusion of the agreement are important, as was shown in an arbitral decision between the United Kingdom and Greece.[40] Furthermore, nothing in international law prohibits States from subjecting their agreements to a different law as long as it is not against *ius cogens*.[41]

The given name of the agreement is not important, as suggested by the clause, "whatever its particular designation." The VCLT governs both formal agreements and informal agreements. The character of the instrument is not determined by the name of the treaty.[42] The fact that an instrument is named in a certain way, in itself, does not deny its status under Article 2(1)(a). VCLT, the particular circumstance, and the terms of the agreement play the major role in deciding.[43] In the minutes of the 655th meeting of the International Law Commission, which led to the adoption of the VCLT, Article 1 was formulated as follows:

> 1 *(a)*. Treaty means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), which is

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[34] The absence of signed copies is not a great issue, as long as the signature can be authenticated. Different instruments deal with electronic signature, i.e UNCITRAL Model Law on Electronic Signatures (2001) and Council Directive 1999/93, Community Framework for Electronic Signatures, 2000 O.J. (L 13) 12–20. *See* AUST, *supra* note 14, at 19.

[35] AUST, *supra* note 14, at 22.

[36] *See* Anglo-Iranian Oil Co. Case (U.K. v. Iran), Judgment, 1952 I.C.J. Rep. 93 (Jul. 22); REUTER, *supra* note 6, at 45; F.A. Mann, *Another Agreement between States under National Law?*, 68 AM. J. INT'L L. 490 (1974).

[37] VCLT, *supra* note 17, art. 4.

[38] The Convention came into force in 1980; the first FAB agreement was established in early 2000.

[39] AUST, *supra* note 14, at 20.

[40] The Diverted Cargoes Case (Greece, U.K.), 12 R.I.A.A. 53 (1955).

[41] Barberis, *supra* note 8, at 257.

[42] AUST, *supra* note 14, at 23.

[43] *See, e.g.*, the Court's reasoning in the Case Concerning Maritime Delimitation and Territorial Question between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, 1994 I.C.J. 112 (July 1).

governed by international law and is concluded between two or more states or other subjects of international law.[44]

Thus, even under the wording of the 655th meeting and its enumeration of names, the FAB agreements would fall under the treaty category.

In addition to these three components, other secondary elements might indicate that a specific agreement is intended to be a treaty. For instance, there are terms indicating that an agreement is a treaty, such as "enter into force," "shall," "agree," "obligations," "undertake," and "rights."[45] All of the FAB agreements have in their final clauses the conditions and the date the agreements are to enter into force.[46] The parties designated at the beginning of the documents are either the States themselves or their governments. In Article 7(1) VCLT, the magic word "agree" is used. However, in the preamble, the words "undertake" or "shall" have been avoided, which is what happens with Memoranda of Understanding. At the same time in MOUs, "enter into force" is not used and the normal final provisions in treaties are omitted or simplified, which is not the case with the FAB agreements.[47] The preambles of the agreements mostly use the word "considering," which is not a usual word for Regulations, which mostly use the term "having regard."[48] One may argue that, in the EU context, these factors are not particularly relevant, as in each Regulation or Directive adopted by the Union, the parties are cited at the beginning, and the final clauses state when the legal act will enter into force. However, Regulations and Directives are not signed, while each of the agreements is signed and names a depository country. It is not because an agreement is using treaty terminology that it is a treaty *per se*.[49]

Surprisingly enough, the definition in the Convention does not mention signature; in fact, Articles 12 and 13 make it clear that signature is not necessary.[50] In the *Aegean Sea Continental Shelf* case, one of the arguments of Turkey was that the agreement was not signed.[51] The Court through its procedure has shown numerous times that to define an agreement as a treaty it was necessary to analyze the actual terms and the circumstances in which the document was drafted.[52] It is worth mentioning that all the FAB agreements are signed. MOUs can also be signed by ministers or officials.[53]

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[44] 1 Y.B. Int'l L. Comm'n 180, U.N. Doc. A/C.N.4/Ser.A/1962, http://legal.un.org/ilc/publications/yearbooks/english/ilc_1962_v1.pdf.

[45] AUST, *supra* note 14, at 33; REUTER, *supra* note 6, at 33.

[46] Some enter into force upon signature, but others state that the agreement will be enforceable 30 days after the deposit of the last instrument of ratification. *See, e.g.*, BLUE MED FAB State Level Agreement art. 38, Mar. 29, 2010 (entered into force Aug. 22, 2014).

[47] AUST, *supra* note 14, at 33.

[48] All of the SES Regulations use this wording.

[49] AUST, *supra* note 14, at 33.

[50] For instance, the Maastricht Treaty is not in a customary form but still is considered as a treaty by the Member States. *See* AUST, *supra* note 14, at 22.

[51] For more information, see Leo Gross, *The Dispute between Greece and Turkey Concerning the Continental Shelf in the Aegean*, 71 AM. J. INT'L L. 31, 39 (1977).

[52] *See, e.g.*, *Qatar v. Bahrain*, *supra* note 43.

[53] AUST, *supra* note 14, at 45.

Treaties do not give rights to third parties.[54] The status of a treaty is not affected by the amount of substance or obligations or enforcement mechanisms included in it.[55] Unlike the normal requirements for agreements, reciprocity or consideration is not necessary for an agreement to become legally binding.[56] To be considered a treaty, the agreement needs to create rights and obligations for the States that are enforceable under international law.

#### 4. *The Difference Between Memoranda of Understanding (MOUs) and Treaties*

These two instruments are sometimes confused, as some treaties are called Memoranda of Understanding. MOUs record international "commitments." However, the main difference is that MOUs are concluded between States but are not intended to be governed by international law and are not binding.[57] MOUs are preferred when the States want to avoid the formalities of a treaty.[58] In addition, to avoid formalities, the MOUs are perfect instruments when a provision needs to be frequently amended. MOUs are preferred when the matter is essentially of a technical or administrative nature. As with treaties, MOUs can be named in various ways.

The differences between treaties and MOUs are numerous. Treaties have articles, while Memoranda of Understanding have paragraphs. Treaties have preambles, whereas MOUs have introductions. Treaties are mutually agreed; MOUs are jointly decided. MOUs avoid the word "agree."[59] Treaties do not. Treaties talk about rights and obligations; MOUs talk about benefits and commitments. MOUs do not need to be published, which is an advantage with regard to confidentiality.[60]

Most MOUs have a dispute resolution provision, namely that the dispute is to be resolved by negotiation, and do not mention any court or tribunal.[61] Only some FAB agreements have a dispute resolution provision, but there is a reference to the "Permanent Court of Arbitration optional rules for arbitrating disputes between two States."

#### 5. *European Legal Instruments*

##### a. *General*

The European Union has its own legal order, separated from international law, and which forms an integral part of the legal systems of the Member States. Concepts such as legal instrument, hierarchy of norms, or competencies are part of this legal order. Legal instruments in European law encompass both binding and non-binding measures. The system is composed of

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54 REUTER, *supra* note 6, at 31.
55 Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).
56 *See, e.g.*, Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the question of Hong Kong, 1399 U.N.T.S. 33, 23 I.L.M. 1366 (1984); Nuclear Tests Case (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).
57 Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499 (1999); AUST, *supra* note 14, at 21.
58 RUWANTISSA ABEYRATNE, AVIATION AND CLIMATE CHANGE: IN SEARCH OF A GLOBAL MARKET BASED MEASURE 12 (2014).
59 AUST, *supra* note 14, at 30. *See also Difference between Treaty and MOU*, EUCLIDTREATY.ORG, http://www.euclidtreaty.org/difference-between-treaty-and-mou/ (last visited Apr. 2, 2018).
60 AUST, *supra* note 14, at 43.
61 *Id.* at 46.

primary law and complementary law, such as agreements of international law concluded between the Member States.[62] A hierarchy was established as follows:

1) Primary legislation embodied in the Treaties (Treaty on European Union (TEU),[63] Treaty on the Functioning of the European Union (TFEU),[64] Charter of Fundamental Rights of the European Union[65]), and general legal principles;

2) International agreements concluded by the Union;

3) Secondary legislation, which is based on the Treaties, such as Regulations, Directives, and Decisions.

Article 288 TFEU lists the legal acts of the Union, i.e. regulations, directives, decisions, recommendations, and opinions. Any of these types of acts are legal instruments so long as the Union is empowered by the Treaties to adopt such act. The principles of conferral, subsidiarity, and proportionality, enshrined in Article 5(1) TEU, limit the Union competencies.

Since the Treaty of Lisbon[66] entered into force, institutions only adopt the legal instruments listed in Article 288 TFEU, except the common foreign, security, and defense policies to which intergovernmental methods are still applied.

> There are, in addition, various forms of action, such as recommendations, communications and acts on the organisation and running of the institutions (including interinstitutional agreements), the designation, structure and legal effects of which stem from various provisions in the Treaties or the rules adopted pursuant to the Treaties. White papers, green papers and action programmes are also important, given that the Commission uses these documents to agree [upon] long-term objectives.[67]

A second hierarchy was introduced among secondary legislation. A clear distinction is drawn between legislative acts (Article 288-289 TFEU), delegated acts (Article 290 TFEU), and implementing acts (Article 291 TFEU). A delegated act is a non-legislative act of general application which supplements or amends non-essential elements of a legislative act. Often, the legislative act contains the conditions to which the delegation is subject, as well as the objective, content, and scope of the delegation. Implementing acts are generally adopted by the Commission and lay conditions for implementing legally binding acts.

Finally, the Union can conclude international agreements with third countries or international organizations, but they need to be within its sphere of competence.[68] Once such an

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[62] E.g., decisions or agreements of the "Representatives of the Member States meeting in Council."
[63] Consolidated Version of the Treaty on European Union, Feb. 7, 1992, 2002 O.J. (C 325) 5 [hereinafter TEU].
[64] Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].
[65] 2000 O.J. (C 364) 1. After the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights acquired the same value as the Treaties.
[66] 2007 O.J. (C 306) 1 (entered into force Dec. 1, 2009).
[67] European Parliament, Main Characteristics of the European Union's Legal System, http://www.europarl.europa.eu/unitedkingdom/en/education/teachingresources/howeuworks/legalsystem.html (last visited Apr. 4, 2018); European Parliament, Sources and Scope of European Union Law, at 2, http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf (last visited Apr. 4, 2018).
[68] Article 216(1) TFEU.

agreement is passed, it is binding on both the Union and the Member States, forming an integral part of the Union law.

### b. *European Legislation Specific to Aviation*

The Union has competencies over the area of transport; however, before 1987 and the ruling of the CJEU in the case *Nouvelles Frontières*,[69] the airspace market was protected and considered taboo by both national and supranational authorities.[70] As the result of some pressures and the willingness of the Commission to reform the air transport market since 1979,[71] the Single European Act made the creation of a legal framework for aviation possible.[72]

Three packages of liberalization regulations were promulgated between 1987 and 1992.[73] However, soon after the liberalization of the market, it became obvious that the airspace was not managed efficiently. In order to remedy the fragmentation of the airspace, the Commission launched the Single European Sky (SES) initiative in 1999.[74] In so doing, the Commission relied on Eurocontrol, one of its most important allies.[75] The SES is meant to address the dramatic growth in air travel by creating a legislative framework for EU aviation.[76] One of the main goals of the SES is to increase coordination among air navigation services within the Union.

The SES reorganized European airspace. To meet the objectives of the SES, the Member States are required to establish FABs, the crux of the SES,[77] as stipulated in Article 5 of the SES Airspace Regulation.[78] However, it is only with the entry into force of Regulation 1070/2009

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69 Joined Cases 209 to 213/84, Ministère Public v. Lucas Asjes and Others, Andrew Gray and Others, Jacques Maillot and Others and Léo Ludwig and Others, 1986 E.C.R. 1425.

70 ANDREAS LOEWENSTEIN, EUROPEAN AIR LAW: TOWARDS A NEW SYSTEM OF INTERNATIONAL AIR TRANSPORT REGULATION 47 (1991); Alfonso Arroyo, Single European Sky and Functional Airspace Blocks, slide 3, Directorate-General for Energy and Transport/Air Transport Directorate (2008), http://legacy.icao.int/NetCentric/pres/A.Arroyo.pdf.

71 *Contributions of the European Communities to the Development of Air Transport Service: Memorandum of the Commission*, COM (1979) 311 final (Jul. 6, 1979).

72 PAUL STEPHEN DEMPSEY, EUROPEAN AVIATION LAW 23 (2004); LOEWENSTEIN, *supra* note 70, at 48; Stacy K. Weinberg, *Liberalization of Air Transport: Time for the EEC to Unfasten its Seatbelt*, 12 U. PA. J. INT'L L. 433, 439 (1991).

73 Seth M. Warner, *Liberalize Open Skies: Foreign Investment and Cabotage Restrictions Keep Noncitizens in Second Class*, 43 AM. U. L. REV. 277, 295 (1993); LOEWENSTEIN, *supra* note 70, at 48; MAGNUS SCHMAUCH, EU LAW ON STATE AID TO AIRLINES: LAW, ECONOMICS AND POLICY 18 (2012); EUR. COMM'N & U.S. DEP'T OF TRANSP., TRANSATLANTIC AIRLINE ALLIANCES: COMPETITIVE ISSUES AND REGULATORY APPROACHES 4 (2010), http://ec.europa.eu/competition/sectors/transport/reports/joint_alliance_report.pdf.

74 Arroyo, *supra* note 70, slide 3.

75 Eurocontrol's role as a central player in aviation grew in the 1990s. *See Single European Sky: Eurocontrol, History*, EUROCONTROL, http://web.archive.org/web/20140704092311/http://www.eurocontrol.int/articles/history.

76 *Single European Sky II: Towards More Sustainable and Better Performing Aviation*, at 2, COM (2008) 389 final (June 25, 2008).

77 Kenneth Button & Rui Neiva, *Single European Sky and the Functional Airspace Blocks: Will They Improve Economic Efficiency?*, 33 J. AIR TRANSP. MGMT. 73, 74 (2013).

78 Council Regulation 551/2004 of Mar. 31, 2004, Organisation and Use of the Airspace in the Single European Sky, 2004 O.J. (L 96) 20, 24. However, in the consolidated version, this article has been deleted and replaced by Article 9a, which adopts a similar wording. The revised article reads as follows: "[w]ith a view to achieving maximum capacity and efficiency of the air traffic management network within the single European sky, and with a view to maintaining a high level of safety, the upper airspace shall be reconfigured into functional airspace blocks." *Id.* at 22. *See SES I and II Consolidated: The 4 Regulations Creating the Single European Sky* (Eur. Comm'n Internal

and Article 9a that a definition of, and article dedicated to, the FABs were introduced, respectively.[79] Even in the consolidated version, which was introduced after Regulation 1070/2009 entered into force, the only definition of FABs is in Article 2(25) of the SES Framework Regulation,[80] which defines the FABs as an "airspace block based on operational requirements, reflecting the need to ensure more integrated management of the airspace regardless of existing boundaries."[81]

Currently, the SES framework is composed of five Regulations. The first package of four was adopted in 2004. After having reviewed the progress of the SES in 2007, the Commission realized that some further actions were needed, resulting in the publication of a revised version in November 2009. To this revised version, a fifth Regulation was added.[82] The volcanic eruption in Iceland of 2010 clearly pinpointed the deficiencies of the system and boosted the debate about the proposal, as it was imperative to find solutions.[83]

### 6. *The Agreements Establishing the FABs*

The main aim of the FABs is to satisfy the growing capacity requirements of all airspace users with minimum delay by managing air traffic more dynamically, which will produce as immediate consequences an increase in efficiency.[84] FABs should become the driving force for performance and will bring changes to the landscape of Air Traffic Management Service provisions.[85] Nevertheless, their creation has not been without obstacles, both economic and political.[86]

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Working Document, 2010), https://ec.europa.eu/transport/sites/transport/files/modes/air/sesar/doc/vol_1._ses_consolidation._feb_2010.pdf.

[79] Before, the only references to the FAB were in point 12 of the preamble and Article 5 of Regulation 551/2004. The original version of Article 5 introduced the idea of FABs but did not mention all the requirements, such as ecofriendliness.

[80] Council Regulation 549/2004 of Mar. 31, 2004, Laying Down the Framework for the Creation of the Single European Sky, 2004 O.J. (L 96) 1.

[81] *Id.* at 5.

[82] The coming into existence of the SES cannot be discussed in detail here. There is a large range of articles and books dedicated to the description of the lengthy process that led to the drafting of the five regulations. *See, e.g.*, Niels van Antwerpen, *supra* note 31; Daniel Calleja Crespo & Timothy Fenoulhet, *The Single European Sky (SES): 'Building Europe in the Sky'*, *in* ACHIEVING THE SINGLE EUROPEAN SKY: GOALS AND CHALLENGES (Daniel Calleja Crespo & Pablo Mendes de Leon eds., 2011); Francis Schubert, *The Single European Sky – Controversial Aspects of Cross-Border Service Provision*, 28 AIR & SPACE L. 32 (2008).

[83] ALBERTO ALEMANNO, GOVERNING DISASTERS: THE CHALLENGES OF EMERGENCY RISK REGULATION 239 (2011).

[84] Christopher Lawless, *Bounding the Vision of a Single European Sky*, 180 GEOGRAPHICAL J. 76, 76 (2014); EUROCONTROL PERFORMANCE REV. COMM'N, EVALUATION OF FUNCTIONAL AIRSPACE BLOCK (FAB) INITIATIVES AND THEIR CONTRIBUTION TO PERFORMANCE IMPROVEMENT (2008), http://ec.europa.eu/transport/modes/air/studies/doc/traffic_management/evaluation_of_fabs_final_report.pdf; Button & Neiva, *supra* note 77, at 74; *Background Info on FABs: The Functional Airspace Blocks in the Single European Sky* 2, BELGOCONTROL, http://www.belgocontrol.be/belgoweb/publishing.nsf/AttachmentsByTitle/Background_on_FABs.pdf/$FILE/Background_on_FABs.pdf (last visited Jan. 29, 2018).

[85] *Functional Airspace Blocks (FABs)*, EUROPEAN COMM'N MOBILITY AND TRANSP., https://ec.europa.eu/transport/modes/air/single-european-sky/functional-airspace-blocks-fabs_en (last visited Jan. 29, 2018).

[86] Due to the fact that Air Traffic Control falls under the heading of State sovereignty, some Member States used it as an excuse to block cross-border integration. *Single European Sky II*, *supra* note 76, at 3.

To achieve this goal, the airspace will no longer be divided according to national borders but rather according to traffic flow and efficiency-based criteria.[87] The route-by-route, as opposed to State-by-State, strategy more accurately reflects the reality of the airspace system.[88] Consequently, the airspace will be managed more rationally.[89] Thus, the FABs would contribute to meeting the capacity requirements of airspace users by reducing minimum delays and enabling more dynamic management of air traffic, increasing efficiency. Furthermore, the FABs are also regarded as the best solution for achieving the highest level of integration possible by maximizing cooperation.[90]

The division is as follows:

(1) Danish-Swedish FAB
(2) UK-Ireland
(3) FABEC (Belgium, France, Germany, Luxembourg, the Netherlands and Switzerland)
(4) South West FAB (Portugal, Spain)
(5) BLUE MED FAB (Cyprus, Greece, Italy and Malta)
(6) Baltic FAB (Lithuania, Poland)
(7) FAB CE (Austria, Bosnia & Herzegovina, Croatia, Czech Republic, Hungary, Slovak Republic, Slovenia)
(8) Danube FAB (Bulgaria, Romania)
(9) North European FAB (Estonia, Finland, Latvia, and Norway[91]).[92]

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87 Lawless, *supra* note 84, at 76; Mark Franklin, *Sovereignty and Functional Airspace Blocks*, 32 AIR & SPACE L. 425, 425 (2007).

88 ALEMANNO, *supra* note 83, at 239.

89 *Functional Airspace Blocks (FABs)*, *supra* note 85.

90 Button & Neiva, *supra* note 77, at 75.

91 Originally, Sweden, Denmark, and Iceland should have been part of the North European FAB (NEFAB). Nevertheless, the Swedish and Danish governments preferred to establish cooperation only between their two States and create their own FAB. *See What is NEFAB?*, NEFAB, http://archive.is/le67N (last visited Jan. 29, 2018).

92 EUROCONTROL PERFORMANCE REV. COMM'N, *supra* note 84; Button & Neiva, *supra* note 77, at 75; BELGOCONTROL, *supra* note 84. The agreements are, respectively, the State Agreement between the Government of the Kingdom of Sweden and the Government of the Kingdom of Denmark, establishing a common Danish and Swedish Airspace, Dec. 17, 2009 (entered into force July 1, 2010) [Danish-Swedish FAB Agreement]; the Memorandum of Understanding in relation to the establishment of the Functional Airspace Block between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, June 12, 2008 (entered in force July 14, 2008) [UK-Ireland FAB Agreement]; Treaty Relating to the Establishment of the Functional Airspace Block "Europe Central" Between the Federal Republic of Germany, the Kingdom of Belgium, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Swiss Confederation, Dec. 2, 2010 (entered into force June 1, 2013) [FABEC Agreement]; the Agreement on the Establishment of the South West Functional Airspace Block (SW FAB) between the Republic of Portugal and the Kingdom of Spain, June 19, 2012 (entered into force Apr. 18, 2014) [South West FAB Agreement]; the BLUE MED FAB State Level Agreement, *supra* note 46; the Agreement on the Establishment of the Baltic Functional Airspace Block between the Republic of Poland and the Republic of Lithuania, July 17, 2012 [Baltic FAB Agreement]; the Agreement on the Establishment of Functional Airspace Block Central Europe, May 5, 2011 (entered into force Mar. 20, 2012) [FAB CE Agreement]; the Agreement on the Establishment of Functional Airspace Block DANUBE between the Republic of Romania and the Republic of Bulgaria, Dec. 12, 2011 (entered into force Nov. 16, 2012) [DANUBE FAB Agreement]; and the Agreement on the Establishment of the North European Functional Airspace Block between the Republic of Estonia, the Republic of Finland, the Republic of Latvia and the Kingdom of Norway, June 4, 2012 (entered into force Dec. 23, 2012) [NEFAB Agreement].

Some of the FABs encompass non-EU countries, such as the FAB CE, FABEC, or the NEFAB. Regarding these FABs, the question of the nature of the agreement is of crucial importance.

The FAB agreements have all been submitted to the European Commission. Additionally, ICAO has been informed of their content. Indeed, the agreements have been registered with ICAO, as required by Article 83 of the Chicago Convention.[93] Article 83 states that the contracting States can enter into arrangements so long as they do not conflict with the provisions of the Convention. With regard to the airspace situated above the High Seas, the agreements need to be consistent with provisions of the UN Convention on the Law of the Sea (UNCLOS III).[94]

**a.** ***FAB Agreements: A New European Law Instrument?***

Even though based on Regulations, the agreements are not reflective of any known form of European law; the agreements can be regarded as instruments implementing European law. Normally, these kinds of instruments are implemented at the national level but never involve several States.

In the same way as any secondary European legislation, the Commission has scrutiny over the FAB agreements. This power was exercised by the Commission when it launched infringement procedures against 25 out of 27 Member States after the deadline for the implementation of the SES, due on December 4, 2012, had passed.[95] The infringement procedures were pursued against Member States that had made little or no progress toward reforms.[96] The infringement procedure is a two-stage process, starting with informal proceedings in which the Union requires the Member State to rectify its errors or to justify why the legislation has not yet been implemented. The second stage, the formal stage, leads to the involvement of the Court of Justice of the European Union, and State fines are imposed.[97] In April 2014, letters of formal notice were sent to the members of the FABEC. After consideration, the Commission sent formal letters to the members of six more FABs, namely the Baltic, Danube, BLUEMED, FAB CE, Southwest, and UK-Ireland FABs.[98] To date, formal

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93 Article 34 of the NEFAB agreement, Article 39 SW FAB, and Article 37 of the FABEC agreement add "in accordance with the provisions of Article 83 of the Chicago Convention;" FABEC, *supra* note 92, art. 26.

94 Dec. 10, 1982, 1833 U.N.T.S. 396. *See* Luis Fonseca de Almeida, *ICAO and the Pan-European Dimension: The Single European Sky from a Global Perspective*, *in* ACHIEVING THE SINGLE EUROPEAN SKY: GOALS AND CHALLENGES 88 (Daniel Calleja Crespo & Pablo Mendes de Leon eds., 2011).

95 For more information, see *Infringement Proceedings in the Field of Air Transport*, EUROPEAN COMM'N MOBILITY & TRANSP., http://web.archive.org/web/20151106151443/http://ec.europa.eu/transport/media/infringements/proceedings/air_en.htm (last visited Aug. 20, 2017); Single European Sky: *EU Urges Action on Joint Airspace*, BBC.COM (Oct. 12, 2012), http://www.bbc.com/news/world-europe-19921805.

96 Press Release, Eur. Comm'n, *supra* note 4.

97 *See* TFEU, *supra* note 64, art. 258.

98 Press Release, Eur. Comm'n, Single European Sky: Commission Urges Germany, Belgium, France, the Netherlands, and Luxembourg to Make a Decisive Move Towards a Common Airspace, IP/14/446 (Apr. 16, 2014), http://europa.eu/rapid/press-release_IP-14-446_en.htm.

proceedings have begun for 18 countries.[99] A reasoned opinion was sent to Bulgaria for the implementation of the regulation.[100]

The EU's ambitions do not seem to match with the decisions of the Member States, many of which seem unwilling to move ahead with the implementation of the FABs. The SES project seems to have encountered a lack of Member State political commitment and may not in fact ever come to fruition. The latest package, the SES 2+,[101] introduced in 2013, did not result in more compliance by the Member States. As the European Commission reported in late 2015, "The lack of progress on FABs is holding back the full implementation of the project . . . ."[102]

Although it is possible that the FAB treaties are instruments implementing European law, there are no records of any such legislation before, suggesting a new kind of EU lawmaking. In addition, they are dangerously close to fulfilling all the requirements of a "traditional" treaty as understood in the international law context.

**b. *Are They International Treaties?***

Member States are under obligation to establish FABs, as required by the Regulations. These FABs are subject to the rights and obligations under the Chicago Convention as stipulated in Point 4 of the Preamble of the Framework Regulation. Indeed, this point states that, "[t]he single European sky initiative should be developed in line with the obligations stemming from the membership of the Community and its Member States of Eurocontrol, and in line with the principles laid down by the 1944 Chicago Convention on International Civil Aviation."[103] The Member States are ultimately responsible for the service provided within their airspace, according to Article 28.[104] This responsibility also covers the regulatory and supervisory functions of a State. As a result, a Member State providing services over non-territorial airspace faces responsibilities in case a wrong is committed.

The problem lies in the fact that the FAB treaties are not governed by international law, but by EU law. However, the SES Regulations embody international law principles and acknowledge that international law prevails. The definition of a treaty mentions that the agreement needs to be "governed by international law." This excludes agreements which are not governed by international law but by other legal systems. On the one hand, the FAB agreements are instruments applying European law, but some of the FABs encompass third-party countries

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[99] Press Release, Eur. Comm'n, Single European Sky: Commission Urges Eighteen Member States to Make a Decisive Move Towards Common Airspace Management, IP/14/818 (Jul. 10, 2014), http://europa.eu/rapid/press-release_IP-14-818_en.htm.

[100] Press Release, Eur. Comm'n, November Infringements Package: Main Decisions, MEMO/14/2130 (Nov. 26, 2014), http://europa.eu/rapid/press-release_MEMO-14-2130_en.htm. *See* Sarah Jane Fox, *Single European Skies: Functional Airspace Blocks – Delays and Responses*, 41 AIR & SPACE L. 201 (2016), http://eprints.mdx.ac.uk/23065/1/S.%20J.%20Fox_SingleEuropeanSkies_FINAL_R_15-MARCH_2016.pdf.

[101] *Single European Sky 2+*, EUROPEAN COMM'N MOBILITY & TRANSP., https://ec.europa.eu/transport/modes/air/single_european_sky/ses2plus_en (last visited Apr. 2, 2018).

[102] Commission Staff Working Document Accompanying the Document, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: An Aviation Strategy for Europe*, SWD (2015) 261 final (Dec. 7, 2015), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015SC0261&from=DE.

[103] Council Regulation 549/2004, *supra* note 80, at 1.

[104] Delphine Defossez, *The Single European Sky: What about the Liability Aspect?*, 40 AIR & SPACE L. 209, 212 (2015).

and the application of European law to these countries is uncertain. On the other hand, in the first articles of each agreement, it is stated that the FAB treaty is "without prejudice to the Chicago Convention." For instance, the provisions concerning liability clearly stipulate their accordance with the Chicago Convention.[105] This tends to indicate that international law prevails on the FAB treaties – and certainly when the sovereignty principle in Article 1 of the Chicago Convention is not affected by the arrangement between contracting States. Moreover, the wording of most of the treaties is directly inspired by the international conventions dealing with airspace law matters. Lastly, all the sets of rules available at the EU level are heavily based on international conventions.[106]

This confusion is further fed by the fact that ICAO, an international organization, has been notified of the FAB Treaties.[107] The registration of a treaty is not a formal requirement in the definition, but it might help to decide whether the agreement is or not.[108] Few MOUs have been registered with ICAO.[109]

This situation is relatively similar to the *Cameroon v. Nigeria*[110] case, where the ICJ found that the Declaration was a binding international legal agreement. In this case, the delimitation of the Akwayafe River was embodied in two documents: the 1975 Maroua Declaration and the 1971 Yaounde II Declaration. In Cameroon's opinion, the adoption of the 1975 Maroua Declaration only confirmed the binding nature, as an international agreement, of the Yaounde II Declaration. Furthermore, the end of the 1975 Maroua Declaration stipulates that "the signatories reached full agreement on the exact course of the maritime boundary." For Cameroon, this last sentence showed the consent of the involved States to be bound by the agreements without conditions. Additionally, the Maroua Declaration was notified to the Secretariat of the United Nations. The Court agreed with Cameroon and decided that the Maroua Declaration "constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties . . . and which in any case reflects customary international law in this respect."[111] One interesting argument made by Cameroon, which was taken into consideration by the Court, was that international law "is in favour of the stability and permanence of boundary agreements, whether land or maritime."[112] The FAB agreements address existing borders and provide a framework to manage more efficiently the area within the FABs.

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[105] Not all FAB agreements include a specific article for liability.

[106] For instance, Regulation 2027/97, which aims at defining and harmonizing the duties of European air carriers under European law with respect to their liability, is heavily based on the Warsaw Convention. But in practice, apparently, the Regulation is not really used as there are inconsistencies with the Warsaw Convention. Also, Regulation 889/2002 attempts to bring European law in line with the Montreal Convention.

[107] For instance, Article 22 of the Danish-Swedish agreement stated that the agreement is registered with ICAO. Article 36 of the Blue Med agreement has a similar wording. Furthermore, a depository state is always designated. For instance in the Blue Med FAB, Italy is the depository state.

[108] The Tribunal held that the U.K.-U.S. Heathrow User Charges Arbitration 1988-1992 was a MOU as it was not binding and had neither been published nor registered with ICAO. *See* AUST, *supra* note 14, at 36.

[109] *Id.* at 43.

[110] Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria, (Cameroon v. Nigeria), Judgment, 2002 I.C.J. 303 (Oct. 10), http://www.icj-cij.org/files/case-related/94/094-20021010-JUD-01-00-EN.pdf.

[111] *Id.* par. 263.

[112] *Id.* par. 253.

In the *Bahrain* case, the Court ruled that the agreements "enumerate the commitments to which Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement." In the case of the FAB agreements, it is obvious that they enumerate the commitments to which Parties have consented. Furthermore, the FABs create rights and obligations, mostly stemming from international law, however embodied in European legislation.

> A second factor operating at the international level is the use made, in the absence of any international legislative body, of agreements to achieve objectives, which at the national level, would generally be achieved through legislation. This has given rise, among other things, to the growing importance of international instruments that are negotiated and drafted in ways virtually indistinguishable from binding treaty instruments, but which are not intended to be, and are not, legally binding. They may eventually become binding, either through their influence on the formation of customary international law or through their eventual incorporation into a binding treaty; and they are often intended to do so. These are often, and perhaps confusingly, called 'soft-law' instruments . . . .[113]

The FAB agreements do not fall under this comment. They have been enacted with the view of being binding and to establish a new framework within the European airspace.

The agreement giving power over the Maastricht Upper Area Control Center (MUAC) to Eurocontrol is framed in similar terms as the FAB agreements, and is an international treaty. The only difference is that the Eurocontrol Agreement is not based on European law but international law. This, at least, proves that the agreements can be regarded as international agreements if they are not based on European law.

Treaties generally do not give rights to third parties; the FAB agreements follow the same rule. This principle implicitly excludes State liability to individual claimants, similar to the Chicago Convention, which only allows States to claim damages under the Convention. This exclusion could even be extended, by the FAB treaties, to claims of States in other FABs. The fact that the FAB agreements can be treaties can affect the responsibility of the States, especially because some of the agreements do not provide a clear framework of liability. In the agreements that contain a provision on liability, the primary liability remains with the State, meaning that the agreements do not affect the international responsibility of the State.[114]

### 7. *Conclusion*

The FAB agreements are a new form of European law, dangerously close to an international treaty. The FAB agreements are not governed by international law even though they regulate a matter with an international character. The agreements have been enacted with the view of establishing a new framework within the European airspace.

These agreements are certainly a new genre of instruments. Indeed, they cannot be regarded as domestic laws, as nothing similar exists at the European level and non-European

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[113] FITZMAURICE & ELIAS, *supra* note 15, at 6.

[114] FABEC Agreement, *supra* note 92, art. 30.1; South West FAB Agreement, *supra* note 92, art. 27.1; BLUE MED FAB Agreement, *supra* note 92, art. 25; Baltic FAB Agreement, *supra* note 92, art. 28; NEFAB Agreement, *supra* note 92, art. 27.

countries are bound by these agreements. Some of the case law of the ICJ deals with similar problems but never with a European dimension. The approach adopted by the States in establishing agreements that are not yet international treaties, but are very close, has the advantage of being an intermediate one, meaning that on the one hand the Union would further harmonize its legislation, and on the other hand, States will still have some room to maneuver.

Without this European dimension, these agreements would certainly be treaties, as they would be solely based on international law. This is based on the wording used in all of the agreements as well as on their structure, which is similar to that of formal treaties. One aspect that is relatively strange is that all these agreements have been registered with ICAO, an international organization.

This paper was not concerned with the possible consequences that such instruments could have, but rather attempted to identify the nature of these instruments. Whether or not such instruments are in fact treaties is subject to interpretation, but those agreements are, at a minimum, a "new genre" of instruments that can have effect within and beyond the EU. The effect of such instruments should be further researched.

The SES is one of the Union's greatest ideas. It will extend the internal market concept to the sky, reducing delays and increasing efficiency. In the current situation, the SES is the most suitable instrument to increase efficiency. The SES can bring the necessary changes the European airspace craves. At the same time, it creates new legal challenges, such as determining the nature of the agreements.