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TO THE PRESIDENT AND THE MEMBERS OF THE COURT OF JUSTICE

Case C-366/10

OBSERVATIONS

submitted pursuant to Article 20 of the statute of the Court of Justice of the European Union by the EUROPEAN COMMISSION, represented by Eric WHITE, Legal Adviser, and Knut SIMONSSON, Sonja BOELAERT, and Ken MIFSUD-BONNICI, Members of its Legal Service, acting as its Agents, with an address for service in Luxembourg at the office of Mr. Antonio ARESU, a Member of its Legal Service, Bâtiment BECH, 5 rue A. Weicker, L-2721 Luxembourg in

Case C-366/10

The Air Transport Association of America Inc. and others

- Claimants

v

The Secretary of State for Energy and Climate Change

- Defendant

in which the High Court of Justice has requested a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union.

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1. INTRODUCTION

1. The present request for a preliminary ruling arises out of an attempt by four US corporations – the Air Transport Association of America and three US airlines – to impugn before the UK High Court of Justice the validity of EU legislation extending the scope of the EU Emission Trading System (the "EU ETS")[1] to cover greenhouse gas emissions from air transport.

2. The High Court of Justice, in its reference for a preliminary ruling, calls, first, for a ruling on whether certain asserted rules of international law may be invoked in this case against the validity of the EU legislation and, second, whether the EU legislation is consistent with those rules.

3. The European Commission will first set out the factual and legal background relevant to a consideration of this case, and in doing so will concentrate on providing an explanation of how the EU legislation at issue relates to international law in the field, how it fits in with other EU legislation concerning efforts to combat climate change, and how it is being implemented (Section 2). The Commission will then make some general observations on the legal issues raised in this case (Section 3) and address the questions of the High Court (Sections 4, 5, 6 and 7).

2. LEGAL AND FACTUAL BACKGROUND

2.1. The EU ETS and its role in the implementation of the Kyoto Protocol

4. Global warming, and its consequential impacts on the climate system, is one of the greatest environmental, social and economic threats facing the planet. Human activities that contribute to climate change include, in particular, the burning of fossil fuels from energy production, industry and transport, agriculture, and land-use changes such as deforestation. These cause net emissions of carbon dioxide (CO2), the main greenhouse gas ("GHG") responsible for climate change.

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[1] The European Commission uses wherever possible the same abbreviations as the High Court in its Order for Reference.

5. Recognition of this threat led first to the adoption, in 1992, of the United Nations Framework Convention on Climate Change (the "UNFCCC"),[2] which entered into force on 21 March 1994 and has 194 parties, including the European Union[3] and the United States. The UNFCCC has the objective of stabilising greenhouse gas concentrations at a safe level within an acceptable time frame.[4] It contains a series of commitments requiring all Parties to develop national inventories of GHG emissions, to formulate national programmes to mitigate climate change and to promote technologies, practices and processes that control, reduce or prevent emissions in all relevant sectors, including transport.[5] The most concrete action that has been taken so far under the UNFCCC is the 1997 adoption of the Kyoto Protocol,[6] containing quantified emission limitation reduction commitments for 39 Parties (Annex I countries) as compared to 1990 emission levels. The Kyoto Protocol entered into force on 16 February 2005 and currently has 192 parties, including the European Union.[7] The United States signed the Kyoto Protocol but has not ratified it.

6. One of the main innovations of the Kyoto Protocol was to accompany the introduction of quantified emission limits with flexibility mechanisms, whereby emissions in one area can be offset by reductions elsewhere. This, together with experience in the US of emissions trading for other pollutants, influenced the design of the EU ETS, which seeks to ensure that emission reductions take place in the most economically efficient way by allowing the purchase and sale of emission allowances, and thus creating an incentive for the reduction of emissions where it would be economically cheapest to do so.

7. The EU ETS was established by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 (the "ETS Directive")[8] as a cost-effective measure to

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2 Available at http://unfccc.int/resource/docs/convkp/conveng.pdf.

3 Council Decision 94/69/EC, OJ Series L 33 on 7.02.1994.

4 Article 2 of the UNFCCC.

5 All Parties to the UNFCCC, should "*promote... application ... of practices and processes that control, prevent or reduce anthropogenic emissions of greenhouse gases ... including the energy, transport, industry, agriculture, forestry and waste management sectors*" – Article 4 (1) of the UNFCCC.

6 Available at http://unfccc.int/resource/docs/convkp/kpeng.pdf.

7 Council Decision 2002/358/EC of 25 April 2002, OJ L 130 of 15.05.2002.

8 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275 of 25.10.2003 pp. 32-46. This Directive has been amended a number of times since 2003, including subsequently to its extension to aviation activities. The current consolidated version is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2003L0087:20090625:EN:PDF. The European

reduce greenhouse gas emissions independent of the Kyoto Protocol, whose entry into force was not clear at that time. It began operation on 1 January 2005 and initially focused on GHGes emitted from more than 10,000 large stationary installations across the EU (amounting to around 45 percent of all GHG emissions in the EU).[9] The EU ETS sets a mandatory cap on the total emissions from the covered sectors. Emission allowances are created in numbers corresponding to the cap. Each emission allowance gives the right to an installation participating in the system to emit one tonne of CO2, or an equivalent quantity of another GHG. The emissions of participating installations are monitored, reported and verified every year. Operators must surrender allowances to cover their emissions by 30 April of the following year. Surrendered allowances are cancelled and serve as a means of accounting for emission reductions and establishing compliance with the cap and, ultimately, with the international obligations of the EU.[10] Initially, installations were allocated allowances in advance on the basis of a range of criteria[11], while the overall cap ensures that allowances are in overall scarcity on the market. If an installation emits more GHG than it has allowances, it must acquire the additional allowances in order to be able to surrender them. Installations that keep their emissions below the level of their allowances are able to sell their excess allowances at a price determined by the EU-wide "carbon market". Allowances may also be generated by reductions taking place elsewhere under the international Clean Development Mechanism and Joint Implementation mechanisms established by the Kyoto Protocol.

2.2. The recognised need for aircraft emissions to be covered

8. Aviation activities also have an impact on the global climate.[12] Article 4 of the UNFCCC, and a subsequent Decision adopted at the third Conference of the Parties

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Commission does not use the term "Amended Directive" as defined by the High Court to refer to the 2003 Directive as extended in 2008 to cover aviation activities. Because of the various amendments that have been made this term may be ambiguous and not refer to the Directive as it exists now and when the order for Reference was made. The European Commission prefers to use a dynamic reference to the "ETS Directive". It uses the terms "2003 Directive" and "2008 Directive" to refer to the original Directive and Directive 2008/101/EC respectively when necessary, for example when referring to recitals.

9 GHG emission reductions in other sectors where it is judged that emissions trading cannot be efficiently implemented are secured through Decision 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 ("the Effort Sharing Decision"). OJ L 140 of 5 June 2009, p. 136.

10 Surrender and cancellation of allowances is provided for in Article 12 of the ETS Directive.

11 Annex III to Directive 2003/87/EC.

12 See Recital 19, Directive 2008/101/EC.

(Decision 2/CP.3), urges the UNFCCC's subsidiary bodies to "further elaborate on the inclusion of these emissions [from international flights] in the overall greenhouse gas emission inventories of Parties to the UNFCCC."[13] This has never led to a formal decision under the UNFCCC. This results in quantified emissions limitations under the Kyoto Protocol only applying to flights within individual EU Member States (i.e. not even flights between Member States are captured), which only represent a small proportion of the total aviation activities related to the European Union.[14]

9. The exclusion of aviation emissions from the EU ETS meant that the growth in emissions from flights to and from EU airports would by 2012 cancel out more than a quarter of the 8% emission reduction required to achieve the EU Kyoto Protocol target. Aviation emissions were forecast to more than double from 2005 to 2020.[15] However, the Union legislators and the European Council have expressed the view that all sectors of the economy should contribute to emission reductions.[16] The Court of Justice has recognised that the legislature can lawfully make use of a step-by-step approach for the introduction of the allowance trading scheme[17]. The EU legislator has, in Directive 2008/101/EC, only addressed a proportion of the overall climate change impacts from aviation.[18]

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[13] See Decision 2/CP 3 of the Conference of the Parties to the UNFCCC contained on p. 31 of the Report of the COP 3 avaialble at http://unfccc.int/resource/docs/cop3/07a01.pdf.

[14] See *Summary of the Impact Assessment: inclusion of aviation in the EU Greenhouse gas Emission trading Scheme*, COM (2006) 818 final.

[15] See Commission Communication: *Reducing the Climate change impact of aviation,* COM (2005)27/09/2005.

[16] See Recital 11 of Directive 2008/101/EC, recital 3 of Directive 2009/29/EC, Recital 2 of Decision No 2009/406/EC, paragraph 18 of the March 2008 European Council Conclusions at http://www.eu2008.si/en/News_and_Documents/Council_Conclusions/March/0314ECpresidency_conclusions.pdf, and paragraph 16 of the October 2008 European Council Conclusions at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/103441.pdf.

[17] Case C-127/07 Arcelor, paragraph 62 "*It should be observed here that, while the legislature could lawfully make use of such a step-by-step approach for the introduction of the allowance trading scheme, it is obliged, in particular in view of the objectives of Directive 2003/87 and of Community policy in the field of the environment, to review the measures adopted, inter alia as regards the sectors covered by Directive 2003/87, at reasonable intervals, as is moreover provided for in Article 30 of the directive.*"

[18] See, in particular, Recital 18 of Directive 2008/101/EC: "*Aviation has an impact on the global climate through releases of carbon dioxide, nitrogen oxides, water vapour and sulphate and soot particles. The IPCC has estimated that the total climate impact of aviation is currently two to four times higher than the effect of its past carbon dioxide emissions alone. Recent Community research indicates that the total climate impact of aviation could be around two times higher than the impact of carbon dioxide alone. However, none of these estimates takes into account the highly uncertain cirrus cloud effects. In accordance with Article 174(2) of the Treaty, Community environment policy is to be based on the precautionary principle. Pending scientific progress, all impacts of aviation should be addressed to the extent possible. Emissions of nitrogen oxides will be addressed in other legislation to be proposed by the Commission in 2008. Research*

10. The Commission conducted stakeholder consultations[19] and commissioned a feasibility study on the possibility of including aviation in the EU ETS (also called the "Delft Report") which was published in July 2005.[20] This was followed by a detailed impact assessment,[21] leading to the adoption of Directive 2008/101/EC (discussed further below).

11. Other countries have also been pursuing efforts to control GHG emissions from aviation. For example, in the United States, the Kerry/Lieberman bill (issued on 12 May 2010 but not voted in Senate),[22] covered international aviation and contained specific provisions on the treatment of international aviation to compensate airlines with foreign flights covered by a system in another country or an international system, or where offsets have been surrendered to cover the emissions. Similarly, the Waxman/Markey bill (which was voted through by the US House of Representatives) would bring fuel suppliers under the cap and have them trade allowances like other regulated sectors. They would then pass on the costs of this to fuel users, including in the aviation sector (the bill does not exclude them).[23]

2.3. Discussions within ICAO

12. The importance of including aircraft emissions within efforts to reduce GHG emissions is also recognised in the Kyoto Protocol, and in Article 4 and Decision 2/CP.3 of the UNFCCC. Article 2(2) of the Kyoto Protocol requires certain parties to "pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal

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on the formation of contrails and cirrus clouds and effective mitigation measures, including operational and technical measures, should be promoted."

19 See http://ec.europa.eu/environment/climat/pdf/report_publ_cons_aviation_07_05.pdf.

20 *Giving wings to emission trading: Inclusion of aviation under the European emission trading system (ETS): design and impacts.* Available at http://ec.europa.eu/environment/climat/pdf/aviation_et_study.pdf.

21 Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community {SEC(2006) 1684} {SEC(2006) 1685}.

22 Kerry/Lieberman bill, Section 729, p. 36. Under Kerry/Lieberman, aviation would be under the cap, through fuel providers. Transport, including international aviation but not international maritime transport, would be covered from 2013, with upstream fuel suppliers required to buy allowances set aside from the overall cap, at a fixed price determined by the price of allowances in the previous 3 months. The bill also has a sense of Congress provision calling for an international agreement and provides for compensation for international flights covered by another system outside the US or using offsets, to avoid double regulation.- see (g) starting p. 319.

23 See also Waxman/Markey - HR 2454 (passed by the House) where aviation is covered through coverage of fuels (under section 722, see p 735. There is also a sense of congress section outside the cap and trade part - section 276 which calls on congress to work with other countries and under ICAO to avoid duplication.

Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively."

13. The European Union is neither a member of the International Civil Aviation Organization ("ICAO") nor a party to its founding treaty, the Chicago Convention, although its Member States are. The European Union has observer status at ICAO and, with its Member States, has been actively participating in the discussions at ICAO concerning options for responding to this challenge since 1997. No binding rules concerning GHG emissions from aircraft have ever been adopted within ICAO. However, there have been a number of non-binding resolutions and opinions. In 2004, the ICAO Council's Committee on Aviation Environmental Protection (CAEP) endorsed the idea of using emissions trading for international aviation emissions, and considered that "*the idea of an aviation-specific emissions trading system based on a new legal instrument under ICAO was sufficiently unattractive that it should not be pursued further*".[24] The 35th ICAO Assembly, held in 2004, agreed Resolution A35-5 that supported the development of an open emissions trading system for international aviation either through voluntary emissions trading or through the incorporation of international aviation into States' existing emissions trading schemes, the approach that the European Union has implemented. This ICAO Resolution was superseded at the 36th ICAO Assembly in 2007 by Resolution A36-22, This was in turn superseded at the 37th ICAO Assembly in 2010 by Resolution A37-19, which confirmed again the important role of market-based measures, such as emissions trading, and agreed to a range of guiding principles to be applied by States designing and implementing them. The EU ETS is consistent with all 15 of these principles.[25] In their reservation to Resolution A37-19, 44 European states welcome the adoption of this Resolution (which was then numbered

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[24] See Recital 9 of Directive 2008/101/EC concerning the sixth meeting of the ICAO Committee on Aviation Environmental Protection in 2004 and the Resolution adopted at the 35th ICAO Assembly (A35-5 Appendix I).

[25] The language of the ICAO Assembly Resolution A36-22 relating to the implementation of an emissions trading system provoked a formal reservation by the European Union, its 27 Member States and the then 15 other European States which were Members of the European Civil Aviation Conference (ECAC). It has been replaced by Assembly Resolution A37-19, from 8th October 2010, containing a new provision (paragraph 14) which urges States to respect a number of (acceptable) guiding principles when designing new and implementing existing MBMs [market based measures], and to engage in constructive bilateral and/or multilateral consultations and negotiations with other States to reach an agreement. In order to clarify their position in relation to this paragraph, European States have entered a formal reservation. See press release at http://ec.europa.eu/avservices/index.cfm?sitelang=en.

A37-17/2[26]) as a step forward from Resolution A36-22, which it supersedes and replaces. They note that there were also a number of key aspects where no consensus was reached. Furthermore, a large number of States indicated their intention to place reservations on parts of the Resolution. This highlights the challenges of taking discussions limiting the climate impacts of aviation forward at a global level. The European states believe that the Resolution's collective "aspirational" goal, which is formulated to apply from 2020, is insufficiently stringent, because by 2020, global international aviation emissions are projected to be around 70% higher than 2005 levels, even with the 2% per year fuel efficiency improvement foreseen in the Resolution. They welcome the Resolution's recognition that some States may take more ambitious actions prior to 2020. The US is one of the other countries that submitted a reservation in respect of this ICAO Resolution.

2.4. The extension of the EU ETS to aviation

14. The extension of the EU ETS to aviation was achieved through the adoption of Directive 2008/101/EC (the "2008 Directive").[27] It amends the ETS Directive so that, from 1 January 2012, all flights that depart from or arrive in an aerodrome situated in a Member State to which the Treaty applies[28] will be covered under the EU ETS (unless these activities are included in the limited number of categories exempted under Annex I of the ETS Directive). The ETS Directive covers aviation operators without discriminating on the basis of nationality. All EU and non-EU carriers flying to and from the European Union are subject to the same obligations.

15. The EU ETS applies to aviation in a similar way as it does to "stationary installations," though with certain adaptations to take account of the specificity of the sector. Accordingly, a specific cap for total CO2 emissions from all covered operators is fixed, based on historic aviation emissions in the years 2004 to 2006.[29] The cap represents the

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[26] The ICAO Secretariat informed the Commission that the Resolution will be referred to as Resolution A37-19 (Consolidated statement of continuing ICAO policies and practices related to environmental protection - Climate Change), and that its provisional reference A-37-17/2 would no longer be used. The Commission will in the following refer to Resolution A37-19.

[27] Directive 2008/101/EC of the European Parliament and of the Council, OJ L 8 of 13 January 2009, p. 3.

[28] See Article 2 and Annex I to the ETS Directive. Some categories and types of flights (e.g. military flights, flights for emergency purposes, together with some airlines with very limited operations) are excluded from the scope of the ETS Directive by detailed rules set under Annex I of the Directive. See also Commission Decision 2009/450/EC of 8 June 2009 on the detailed interpretation of the aviation activities listed in Annex I to Directive 2003/87/EC of the European Parliament and of the Council, OJ L 149 of 12 June 2009, p. 69.

[29] See Article 3c of the ETS Directive.

total number of allowances that will be distributed (either for free or through auctioning) to aircraft operators.[30] The majority of allowances will be allocated free of charge to operators, based on their aviation activity (measured in tonne kilometres) performed in 2010. 15% of the allowances will be auctioned by Member States in an open process. The ETS Directive indicates that all the revenues raised from auctions should be used to tackle climate change in the EU and third countries, including for actions in the transport sector.[31]

16. As with other sectors covered by the EU ETS, aircraft operators having performed aviation activities covered by the ETS Directive must surrender for cancellation a number of allowances equal to their total emissions in that year. Non-EU aircraft operators flying from and to EU airports are treated exactly like their EU counterparts. Emissions will be calculated for the entire flight (on the basis of two basic parameters: actual or estimated fuel consumption and emission factors). The calculation of allowances is altogether independent of whether the fuel is consumed over the EU territory or not. The number of allowances is also a function of CO2 emitted, rather than fuel consumed, because an "emissions factor" is used. Emissions are to be calculated and verified, and later reported, according to the criteria established in Annex IV part B of the Directive and the implementing Decision on monitoring and reporting for aviation activities.[32] Article 14 of the ETS Directive requires that this decision include different emission factors by reference to IPPC guidelines that distinguish different types of aviation fuel (Jet A, Jet B and Av Gas).[33] These different emission factors reflect the fact that the different fuels have different carbon content, and ensure that emissions of all aircraft operators are calculated on a non-discriminatory manner and on the basis of internationally agreed emission factors. It should be mentioned also that, further to the ETS Directive, the emission factor for biofuel shall be zero.[34]

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30 For 2012, the cap for all GHG emissions from covered flights will be set at 97 percent of the "historical aviation emissions"; for the trading period starting in 2013, the cap for all carbon dioxide emissions from covered flights will be set at 95 percent of the historical aviation emissions.

31 See recital 22 of Directive 2008/101/EC relating to Article 3d(4) of the ETS Directive.

32 Commission Decision of 16 April 2009 amending Decision 2007/589/EC as regards the inclusion of monitoring and reporting guidelines for emissions and tonne-kilometre data from aviation activities OJ Serie L 103/10 on 23.4.2009.

33 See section 13 on p. 18 of the Commission decision mentioned under footnote 26.

34 See Article 14 and Annex IV.B of the ETS Directive.

17. Also, in line with the rest of the EU ETS, aircraft operators that keep their emissions below the level of their allocation are able to sell their excess allowances at a price determined by the market. Operators can also use certain credits from emission-reduction projects under the Kyoto Protocol's Joint Implementation (JI) and Clean Development Mechanism (CDM) to cover their emissions. In addition, aviation operators can use an unlimited amount of allowances from other sectors.

18. By establishing the application of the EU ETS to aviation activities on a non-discriminatory basis, as explained above, the ETS Directive provides for an economically-efficient instrument to tackle global greenhouse emissions. This avoids distortions in the market and allows operators to choose the most cost-effective method for tackling their emissions (investing in lower emissions or purchasing allowances).

19. Furthermore it should be noted that the ETS Directive provides a means of avoiding "double regulation" of international flights by providing a mechanism for the EU to exempt incoming flights from countries having established measures of their own to reduce emissions from such flights, and to make other necessary changes to the EU ETS.[35] The presence of these provisions on avoiding overlap and their foreseen interaction with US legislative proposals is noted in a report to the US Congress.[36]

2.5. Progress made in implementation

20. The implementation of the 2008 Directive is proceeding smoothly. At the beginning of 2010, Member States have informed the European Commission that all the major commercial airlines, emitting around 98% of CO2, had submitted their monitoring plans to the Competent Authorities on time, and that the majority of these plans had been approved by the Competent Authorities in a timely manner.

21. Although aircraft operators' obligations to surrender allowances will only arise in relation to activities carried out from 1 January 2012, a large majority of aircraft operators have already started fulfilling the requirements of the ETS Directive in 2009 by submitting their emissions and tonne-km data monitoring plans to the Competent Authorities. The

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[35] See Article 25a of Directive 2008/101/EC.

[36] See p. 57 and footnote 14 of the June 2009 US Government Accountability Office report on Aviation and Climate Change, at http://www.gao.gov/new.items/d09554.pdf .

emissions and tonne-kilometre data are already being monitored by aircraft operators in 2010.

3. PRELIMINARY OBSERVATIONS

22. The Commission considers that the questions of the High Court call for a number of preliminary observations that help to clarify the issues to be addressed.

23. The first preliminary observation relates to the nature of the claims brought. The Claimants seek to impugn the validity of a directive on the grounds that it is inconsistent with alleged rules of international law deriving from custom and treaties. They do not make any allegation of inconsistency with any provision of Union law. These alleged inconsistencies with international law are not raised merely incidentally in connection with a claim based on another asserted legal right of the Claimants; instead the Claimants seek a ruling that Union law is invalid based directly on these alleged rules of international law.

24. The second preliminary observation relates to certain assumptions that are made by the Claimants as to the nature and operation of the EU ETS as it relates to air transport. The Claimants present the obligations imposed on aircraft landing at and taking off from airports in the European Union as a tax or charge that applies, in some cases to activities conducted outside the European Union. Both assertions are misleading.

25. The Claimants do not explain exactly why they consider the EU ETS to involve the imposition of a tax or charge. Allowances are mostly allocated to operators free of charge. The obligation to surrender allowances corresponding to emissions of GHGes caused by flights arriving at or departing from an airport in the European Union is not a tax or charge, also because allowances are cancelled on surrender and constitute no transfer of value to the State. They are simply a means of accounting for emission reductions and establishing compliance with the cap.

26. Nor does the fact that a certain number of allowances are auctioned by the Member States make the EU ETS a tax or charge. An emission allowance in an asset (the price of which fluctuates on the basis of supply and demand) that confers an economically valuable right to utilise a scarce and limited public resource. The auctioning of allowances results in the sale and voluntary purchase of assets. This does not make the

EU ETS a tax or charge any more than the sale of other state-generated assets (such as land reclaimed from the sea or rights to extract ground water) results in a tax or charge.

27. Nor, finally, does the need for undertakings to acquire allowances to surrender turn the EU ETS into a tax or charge. First, a decision by the legislator to only allow persons to utilise a limited public resource once they have acquired the right to do so constitutes, in its very essence, a regulatory choice to set up a system of property ownership and property rights in respect of that resource. In the context of the EU ETS, this reflects the will to disallow the continued free-for-all exploitation of that resource in a context where, because of the inexistence of a system of property ownership in respect of that resource, the price of that resource (zero) does not reflect its scarcity or cost. Legislation that requires persons to acquire a right to extract groundwater before doing so does not alter the fact that the groundwater extracted is economically valuable. The fact that groundwater may have a price after the legislation results from the scarcity and economic value of the groundwater, and not from the measure establishing property rights. This holds equally true in respect of the EU ETS, given that the acceptable GHG absorption capacity of the atmosphere is limited, and the right to utilise some of that capacity is valuable. Second, while allowances are tradable and will normally have a value, operators are able to obtain them for free whether based on their reported activity or as a result of certain activities that reduce emissions. Whether an operator needs to acquire additional allowances will depend on its behaviour. An operator may instead make a profit from selling its freely allocated allowances where it reduces its emissions sufficiently. In this respect, the situation is similar to that which arises as a result of many other purely regulatory systems or requirements. The cost to an operator of, for example, an obligation to keep aircraft in good repair (which may vary depending on whether the flight is international or not) will also depend on its behaviour.

28. The Claimants are also entirely misguided when they assert that the EU ETS relates to or seeks to restrict activities outside the territory of the European Union. The obligation to surrender allowances depends on the emissions of CO2 resulting from flights taking off or landing at an airport in the European Union. It is up to the operator to decide where it flies, and whether or to what extent it flies over the high seas or the territory of third states. In any case, the EU ETS does not take account of such latter circumstances in any way.

4. FIRST QUESTION – INVOCABILITY

29. With its first question, the High Court wishes to know to what extent any or all of the seven asserted rules of international law, set out under (a) to (g) of the question, are capable of being relied on by the Claimants to challenge the validity of the ETS Directive as it applies to aviation activities within the EU ETS. The first four asserted rules ((a) to (d)) are alleged by the Claimants to constitute principles of customary international law, whereas (e) to (g) are provisions set out in international treaties.

4.1. General consideration of the issues

30. The Commission would first of all observe that this question involves a number of sub-issues that it is useful to distinguish. It is clear that the EU "must respect international law in the exercise of its powers," and that consequently EU law must be interpreted and its scope limited by international law.[37] However, as will be explained in more detail below, this principle can only apply to international law that is applicable to and binding on the EU and this requires a consideration of the source of the rule (treaty or custom) and a precise identification of the rule. Furthermore, there are limits to the invocability of rules of international law by private parties.

4.1.1. Determining which rules of international law are applicable to and binding on the EU

31. While the EU is generally bound to respect international law, it is not bound by treaties to which it is not a party. This derives first from the principle of customary international law recognised in Article 34 of the 1969 Vienna Convention on the Law of Treaties, which provides that: "A treaty does not create either obligations or rights for a third State without its consent".[38] It has also been expressly recognised by the Court of Justice, for example in its *Intertanko* judgment.[39]

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[37] Judgment of 24 November 1992 in Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 9. See also the judgment of 3 June 2008 in Case C-308/06, *The Queen on the application of: International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union, v Secretary of State for Transport,* [2008] ECR I-4057, paragraph 51.

[38] See too: Article 34 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations: " A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization".

[39] Case C-308/06, cited *supra,* at paragraph 47 *et seq.*

32. Even where the EU is a party to a treaty, it might not be bound by that treaty in its relations with states that have not consented to be bound by the treaty, and the treaty might consequently not be applicable.

33. The Commission notes that some of the alleged principles invoked by the Claimants may bind the EU not only on the grounds of customary law, but also because they are set out in international treaties that bind the EU.[40] This raises the question of which standards the Court of Justice should apply to determine the question of invocability of the principles concerned.

34. International treaties and international custom are unquestionably the most important sources of international law.[41] There is no formally recognised hierarchy among sources of international law. Treaty sources are mentioned first in the Statute of the International Court of Justice (ICJ) because they refer to mutual obligations of State parties.[42] Where a treaty rule comes into being covering the same ground as a customary rule, the latter will maintain its separate existence.[43] Importantly, a dual source (treaty and custom) for the existence of a rule of international law may well suggest that the two versions of the rule are not identical.[44] This means that two rules with the same content may be subject to different principles with regard to their interpretation and application.

35. In the light of the foregoing, the Commission submits that when the EU, as a subject of international law, has become a party to a treaty that includes principles that may also reflect customary international law, the treaty is the most important source of law that the

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[40] This is also what Claimants in the national proceedings maintain.

[41] Article 38 of the Statute of the International Court of Justice (ICJ) is widely recognised as the most authoritative statement as to the sources of international law. It states as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[42] I. Brownlie, *Principles of Public International Law*, 2003, p. 5.

[43] ICJ Nicaragua Case, Judgment of 27 June 1986, ICJ Reports, 1986, p. 14, 94-5, at http://www.icj-cij.org/docket/files/70/6503.pdf.

[44] See ICJ Nicaragua Case, paragraph 175, p. 74: "*On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content*": See too: M. Shaw, *International Law*, *International Law*, 4th. Ed pp. 76-77.

Court of Justice should examine in the context of preliminary reference proceedings. However, where the treaty is not applicable, either because the EU is not a party to that treaty or because a state in relation to which it is being invoked is not a party to it, the customary rule may be applicable.

4.1.2. Establishing the existence of customary international law

36. Article 38 (1) (b) of the ICJ Statute provides that international custom, as 'evidence of a general practice accepted as law,' is a source of international law. The notion of custom encompasses a number of elements, including: (a) a time element (duration), (b) uniformity and consistency of the practice, (c) generality of practice, and (d) that the practice is accepted as law (*opinio juris sive necessitatis).*[45] The material sources of custom are numerous and include diplomatic correspondence, policy statements, opinions of official legal advisers, official manuals on legal questions, drafts produced by the International Law Commission, state legislation, international and judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions of the UN General Assembly. However, the value of these sources may vary and depends on the circumstances.[46]

37. Even where a principle has achieved the status of customary international law, a state may nevertheless be considered as having 'contracted out' of the international rule provided it has the status of 'persistent objector' to the rule: this requires that the state concerned objected to being bound by the rule during the process of its formation as customary international law.[47] A state claiming not to be bound by international custom needs to prove that it was a 'persistent objector'. Such a state would have to rebut the presumption that it is bound by the customary law rule.

4.1.3. The invocability of rules of international law by private parties

38. It does not follow from the fact that the EU is bound to respect certain rules of international law that they may be invoked by any person for any purpose in litigation.

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[45] I. Brownlie, *Principles of Public International Law*, 2003, pp. 7-10.

[46] *Ibid*, p. 6.

[47] *Ibid.* p. 11; M. Shaw, International Law, 2008, p. 90; ICJ Anglo-Norwegian Fisheries Case, Judgment of 18 December 1951, ICJ Reports, 1951, p. 131, http://www.icj-cij.org/docket/files/5/1809.pdf.

39. As the Court of Justice recalled in its 2008 *Intertanko* judgment, in order to invoke international (treaty) law directly, private litigants need to prove not only that the EU is bound by the treaty concerned but, in addition, that the nature and broad logic of the treaty does not preclude the Court of Justice from examining the validity of EU legislation and that the treaty's provisions must appear, as regards their content, to be unconditional and sufficiently precise.[48] Although the Court of Justice was referring here to treaty law, the Commission considers that similar principles must apply to customary international law, so that customary international law that is not apt to protect the interests of private parties may not be invoked by them directly to attack the validity of legislation.

40. In *International Fruit*[49] and *Racke,*[50] the Court held that its jurisdiction to give preliminary rulings concerning the validity of Union acts is not limited by the grounds on which the validity of those measures may be contested, and that consequently EU law must be interpreted and its scope limited by international law.

41. However, the Court's judgment in *Racke* makes clear that the possibility for private litigants to challenge the validity of EU legislation on the basis of international law rules derived from custom is very limited. In *Racke,* the Court stressed that the plaintiff was only incidentally challenging the validity of a Community Regulation under fundamental rules[51] of customary international law in order to rely on rights which he sought to derive directly from an agreement of the Community with a non-member country, which was clearly capable of having direct effect. Importantly, *Racke* did not concern the direct effect of the customary international law rules concerned.[52]

42. In addition, in *Racke,* the Court allowed only for a limited review of the particular "fundamental" customary international law rules concerned (*in casu*, rules of the Vienna Convention on the Law of Treaties concerning termination and suspension of treaties). In view of the complexity of the particular rules at issue and the imprecision of some of

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48 Case C-308/06, *Intertanko*, paragraphs 44 and 45.

49 Joined Cases 21/72 to 24/72 *International Fruit Company v Produktschap voor Groenten en Fruit* [1972] ECR 1219, paragraph 5.

50 Case C-162/96, *Racke / Hauptzollamt Mainz*, Judgment of 16 June 1998, ECR [1998] p. I-3655), paragraphs 25-28.

51 *Ibid.*, paragraphs 48-49.

52 *Ibid.*, paragraphs 47 and 51.

the concepts to which they refer, the Court limited its judicial review to whether the EU's institutions had made a "manifest error of assessment concerning the conditions for applying those rules."[53]

43. To summarise, in *Racke,* the Court has held that non-privileged litigants are not allowed to rely directly on an alleged fundamental principle of customary international law to challenge the validity of an EU act. Even where they seek to rely on customary international law only indirectly, the Court will exercise limited review, in that it will examine only whether the EU's institutions committed a "manifest error of assessment concerning the conditions for application" of the customary international law principles involved.

4.2. The invocability of the asserted customary law principles ((a) to (d))

44. The jurisdictional rules described in points (a) to (d) of the question shows that they are not intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon by states.[54]

45. This is particularly clear from the jurisdictional nature of these rules. The jurisdiction of states inevitably overlaps and jurisdictional rules are, and need to be, applied flexibly. states often adopt regulations that affect the interests of other states. This is indeed very often the case of the United States, the jurisdiction in which all the Claimants are incorporated. The lack of protest from other states to an arguably excessive exercise of jurisdiction often indicates agreement with the policy objectives that are being pursued and consent to the application of these rules. It is therefore particularly inappropriate for such rules to be the subject of enforcement by private parties.

46. Further, it must be recalled that the Claimants rely on the purported customary international law principles directly to support their claims. This means that the criterion for incidental invocation set out by the Court of Justice in the *Racke* case is not fulfilled.

47. Hence, based on this jurisprudence, the Claimants are not entitled to rely on purported customary law principle (a) to (d) to challenge the validity of the ETS Directive.

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[53] *Ibid.*, paragraph 51.

[54] Case C-308/06, *Intertanko,* paragraphs 45, 53-56.

48. The same conclusion applies even when one considers that the purported principles of customary international law are also reflected in treaties. Principle (a) is reflected in Article 1 of the Chicago Convention (to which the EU is not a party and which is therefore in any event not binding on the EU). Principles (b) and (c) are also contained in the United Nations Convention on the Law of the Seas (UNCLOS)[55] to which the EU is a party although the country in which all the claimants are incorporated (the United States) is not. Article 89 of UNCLOS, entitled "Invalidity of claims of sovereignty over the high seas" states that "[N]o State may validly purport to subject any part of the high seas to its sovereignty". This corresponds to customary law principle (b). Article 87 (b) of UNCLOS sets out the principles of the "Freedom of the high seas", including expressly the "freedom of overflight" both for coastal and land-locked States. This corresponds to customary principle (c). In other words, principles (b) and (c) have a dual source: treaty and custom.[56]

49. However, in the *Intertanko* case the Court of Justice examined UNCLOS and held that private litigants are not entitled to rely on its provisions to challenge the validity of EU legislation. The Court of Justice held that the nature and the broad logic of UNCLOS shows that this convention is not intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied by states.[57] The Court of Justice, looking at the overall structure and purpose of UNCLOS, decided that this UN convention was primarily intended to lay down rights and duties between states as to the various uses of the seas, within different maritime zones agreed in the convention. Even insofar as these provisions may seem to grant rights to ships, in the view of the Court of Justice, such rights are primarily derived from states who grant their flag to ships and thus have assumed an obligation to supervise these ships and their crew and to ensure the application and enforcement of certain (agreed) rules on board the vessels flying their flag.[58]

50. Consequently, the *Intertanko* judgment excludes direct effect for UNCLOS as a whole. Clearly this must also apply to Articles 89 and 87(b) of UNCLOS, provisions that are, it

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[55] United Nations Convention on the Law of the Sea (UNCLOS), signed at Montego Bay on 10 December 1982, which entered into force on 16 November 1994 and was approved by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1).

[56] The Claimants agree. See Order for Reference, paragraph 28.

[57] Case C-308/06, *Intertanko,* paragraphs 45, 53-56.

[58] Case C-308/06 *Intertanko*, point 61.

should be noted, *expressis verbis* directed to States only. Consequently, the Court of Justice cannot assess the validity of the ETS Directive in the light of these provisions of UNCLOS. These principles may not be invoked directly to impugn EU legislation. Otherwise, the Claimants would be able to circumvent the strict conditions set out in the Court of Justice's case-law for provisions of international conventions to which the EU is a party.

51. In sum, the Commission considers that none of the four principles of customary international law, nor the treaty reformulations of these principles, may be invoked by the Claimants to impugn the validity of the extension of the EU ETS to aviation activities.

4.3. Additional considerations concerning asserted customary law principle (d)

52. In addition to arguing that asserted principle (d) may not be invoked by the Claimants, the Commission would also express its agreement with the United Kingdom in contesting the existence of this alleged customary law principle (i.e., that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by international treaty). In support the Claimants refer to Article 92 (1) of UNCLOS, entitled "status of ships", which reads as follows:

> "*Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.*"

53. This UNCLOS provision only refers to ships and not to aircraft. Whilst UNCLOS contains a number of provisions that may apply to ships and to aircraft alike, not all provisions of UNCLOS can be applied to aircraft; an explicit reference to aircraft is required. For example, unlike ships, which enjoy the right of innocent passage in the territorial seas of coastal states[59], there is no right of 'innocent overflight' by aircraft over the territorial seas of coastal states. This is also apparent from Article 1 of the 1944 Chicago Convention, which confirms that there is no right of overflight by aircraft of

[59] UNCLOS, Article 17.

third states over land territory or maritime territory of coastal states. However, because UNCLOS led to the right of coastal states to extend the limits of their territorial seas from 3 to 12 NM, the Convention introduced for the first time the right of overflight over straits used for international navigation ('transit passage')[60] and over archipelagic sea lanes ('the right of archipelagic sea lanes passage').[61] It should be noted that each of these provisions refers to aircraft or the right of overflight *expressis verbis*. Therefore, Article 92(1) UNCLOS cannot be applied by analogy to aircraft and cannot be accepted as evidence of the principle invoked by the Claimants.

54. Further, the plaintiff's reference to *Oppenheim's International Law*[62]does not assist their claim, since that reference only deals with ships. As for the reference to the decision of the New Zealand High Court of Appeal, *Sellers v Maritime Safety Inspector (1999),* this decision also only deals with ships, not aircraft. Moreover, this is a national judicial decision that could only be regarded as a subsidiary source of international law.[63] Furthermore, the outcome of the case has been criticized in international academic literature for its outdated view with regard to the ability of coastal states to enact port state measures.[64]

55. The Commission would also point to the existence of a widely ratified multilateral convention, the 1963 Tokyo Convention on Offences and Certain Other Acts Committed On Board Aircraft, administered by ICAO,[65] which contains a chapter on jurisdiction (Chapter II) that contains only two provisions (Articles 3 and 4). Article 3 provides that the State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.[66] However, Article 4 then sets out the conditions under

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60 UNCLOS, Article 38 (1) and (2).

61 UNCLOS, Article 53.

62 9th ed., 1996, p. 731.

63 See Article 38(1) (d) of the Statute of the International Court of Justice.

64 See Henrik Ringbom, The EU Maritime Safety Policy and International Law, Martinus Nijhoff, Publications on Ocean Development, 2008, at p. 339: " The judgement is unlikely to reflect adequately international law, however, as the analysis (...) fails to distinguish properly between coastal and port State jurisdiction, between port State control procedures and the extent of regulatory jurisdiction, between CDEM and other types of rules or between pleasure craft and other types of ships." Available via Google books, http://tiny.cc/0vhppbpkbr, last accessed on 4 November 2010.

65 The Tokyo Convention entered into force on December 4, 1969, and has been ratified by 185 parties. See http://www.icao.int/icao/en/leb/Tokyo.pdf.

66 Tokyo Convention, Chapter II, Article 3:

1. The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.

which a State that is not the State of registration may interfere with an aircraft in flight to exercise criminal jurisdiction over offences committed on board.[67] The 1963 Tokyo Convention currently has 185 state parties, which is more than UNCLOS (160) and only 5 parties less than the Chicago Convention (190). Therefore, the rules on jurisdiction over aircraft in flight set out in the Tokyo convention are incontestably widely recognized by states. This casts serious doubt on the customary law character of the alleged principle (d), which the Claimants seek to invoke. That there is probably no clear rule in international law on which state is competent to exercise jurisdiction over aircraft in flight is furthermore explicitly confirmed by the same author who the Claimants seek to rely on: *Oppenheim's International Law* writes on the jurisdiction of the state of registration:

> *(...) there has not (...) however, developed a clear rule that the law of that state (i.e., the state in which the aircraft is registered) applies on board the aircraft in the same way as the law of the flag state applies on board ships (...)....several states have concurrent claims to jurisdiction (...)* [68]

56. In conclusion, the Commission submits that the claimants have not demonstrated that the principle referred to under (d) [aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by an international treaty] forms part of customary international law.

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2. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

67 Tokyo Convention, Chapter II, Article 4:

A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:

(a) the offence has effect on the territory of such State;

(b) the offence has been committed by or against a national or permanent resident of such State;

(c) the offence is against the security of such State;

(d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;

(e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.

68 9th ed., Longman, 9th Ed., 1996, p. 480.

4.4. Invocability of rules (e) to (g)

57. The Claimants in the national proceedings claim that in extending the EU ETS to aviation activities the EU breached various rules of treaty law, in particular:

— the Chicago Convention (in particular, Articles 1, 11, 12, 15 and 24);
— the Open Skies Agreement (in particular, Articles 7, 11(2) (c) and 15(3));
— the Kyoto Protocol (in particular, Article 2(2)).

58. With its first question the High Court wishes to know to what extent private litigants can rely on these treaty provisions to challenge the validity of the ETS Directive.

4.4.1. General Discussion

59. As mentioned above, the Court of Justice's case-law makes clear that invalidity of EU legislation on the grounds of inconsistency with international treaty law may be pleaded before a national court and reviewed by the Court of Justice pursuant to Article 267 TFEU subject to two conditions:

— First, the EU must be bound by those rules; and

— Second, the Court of Justice can examine the validity of EU legislation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise;

60. Where the EU is not a party to a particular international treaty the first condition is not fulfilled unless it is established that the EU has assumed, under the Treaties, the powers previously exercised by the Member States in the field to which the international convention applies so that consequently, its provisions have the effect of binding the Union.[69]

61. For the EU to be bound by the provisions of a treaty to which it is not a party it is not sufficient to show that an EU directive has the objective of incorporating certain rules set out in that treaty.

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[69] See *International Fruit* at paras 10 to 18 and *Intertanko* at para 48 (both cited *supra)*.

62. Likewise, for the EU to be bound by the provisions of a treaty to which it is not a party it is not sufficient to show that all EU Member States are a party to that treaty.[70] However, the latter fact is liable to have consequences. In view of the customary law principle of good faith and the duty of sincere cooperation (Art. 4(3) TEU), it is incumbent on the Court of Justice to interpret the provisions of the contested EU legislation taking account provisions of treaties that bind all EU Member States.

63. With the above general principles in mind, the Commission will now turn to whether the Claimants in the national proceedings can rely on any of the treaty provisions set out under (e) to (g) of the High Court's first question.

4.4.2. The Chicago Convention (in particular, Articles 1, 11, 12, 15 and 24);

64. As noted above, the EU is not a party to this convention, even if all its Member States are. The claimants have not established that the EU would have assumed the powers previously exercised by EU Member States in the field to which this international convention applies.

65. In *International Fruit,* the Court of Justice held that the European Community had assumed the powers of the Member States under the General Agreement on Tariffs and Trade (GATT) on the basis of a set of significant legal and factual elements. The Court of Justice noted that Article 110 EEC, which seeks adherence of the Community to the same aims as sought by the GATT, and Article 234 EEC provided that agreements concluded by Member States before the entry into force of the EEC Treaty are not affected by the provisions of the latter. More importantly, the Court of Justice also noted that the Community had assumed the functions inherent in the tariff and trade policy, progressively during the transitional period and in their entirety on the expiration of that period and that since the entry into force of the EEC and more particularly since the setting up of the common external tariff, the transfer of powers which has occurred in relations between Member States and the Community has been put into concrete form in different ways within the framework of the GATT and had been recognised by the other contracting parties. The Court of Justice noted in particular that the Community, acting through its own institutions, had appeared as a partner in the tariff negotiations and as a party to the agreements of all types concluded within the framework of the GATT, in

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[70] See *Intertanko* at para 52.

accordance with Article 114 of the EEC Treaty, which provided that tariff and trade agreements 'shall be concluded...on behalf of the Community'. All these factors led the Court of Justice to conclude that, insofar as under the EEC Treaty, the Community has assumed the powers previously exercised by the GATT, the provisions of that agreement have the effect of binding the Community.[71]

66. The Union incontestably has the competence to conclude air transport agreements with non-Member States (see Article 100(2) and 216 (1) TFEU), even if many of these agreements have been concluded as 'mixed agreements' on the EU side. Furthermore, Article 351 TFEU contains the same rule as set out previously in Article 234 EEC and 307 TEC.

67. However, none of the other factors cited by the Court of Justice in *International Fruit* are present in the case of ICAO.

68. In this regard, the Commission refers to the Court of Justice's judgment in Case C-301/08 *Bogiatzi v Deutscher Luftpool et al.,* which concerns the question of whether the Community was bound by the provisions of the 1955 Warsaw Convention on the Unification of Certain Rules Relating to International Carriage by Air, to which the 15 EU Member States had acceded (but not the Community). Even if the Community had adopted, on the basis of then Article 80(2) TEC, three regulations in the field in which the Warsaw Convention applies, the Court of Justice held that the Community had not assumed all the powers previously exercised in the field in which the Convention applies.[72]

69. Nor is there any indication that the objective of the ETS Directive was to transpose or incorporate rules set out in the Chicago Convention. On the contrary, it was precisely because the EU was dissatisfied with the direction taken and the lack of progress within ICAO regarding the development of measures – including market-based instruments – to address the climate change impacts of aviation that the EU extended the EU ETS to aviation activities.[73]

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[71] Joined Cases 21/72 to 24/72 *International Fruit Company v Produktschap voor Groenten en Fruit* [1972] ECR 1219, paragraphs 12-18.

[72] Case C-301/8 *Bogiatzi v Deutscher Luftpool et al.*, Judgment of 22 October 2009, paragraphs 16-34.

[73] As reflected, inter alia, in recital 9 of the 2008 Directive.

70. In sum, the Commission submits that all that can be said in relation to the Chicago Convention is that, because it is binding on all EU Member States, in line with the Court of Justice's judgment in *Intertanko,* it is incumbent on the Court of Justice to interpret, where relevant, the provisions of the ETS Directive in a manner that takes account of the provisions of the Chicago Convention.[74] The Claimants are not entitled to invoke the provisions of this Convention to challenge the validity of the ETS Directive.

4.4.3. The Open Skies Agreement (in particular, Articles 7, 11(2)(c) and 15(3))

71. The EU and the US are party to this bilateral agreement, which is currently applied provisionally following its signature by both parties. The Claimants, which are all US corporations, are entitled to invoke the provisions of this agreement provided that "*the nature and the broad logic*" of this agreement does not preclude this, and in addition that the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise.

72. This Court has consistently held that a provision in an agreement concluded by the EU with non-member countries must be regarded as being directly applicable when, having regard to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[75]

73. The Commission does not contest that in light of these criteria, Articles 7, 11(2) and 15(3) of the 'Open Skies' Agreement are capable of being relied on by the Claimants to challenge the validity of the ETS Directive.

4.4.4. The Kyoto Protocol (in particular, Article 2(2))

74. The Kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997 in order to further the objectives of the UNFCCC (see section 2 above). It entered into force on 16 February 2005.

75. Before dealing with the criteria set out by the Court of Justice in the *Intertanko* case the Commission wishes to raise the question of whether the Claimants, which are all US corporations, should be entitled to invoke the provisions of this agreement at all. The

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[74] See *Intertanko* at para 52.

[75] See, for example, Case C-262/96 *Sürül* v *Bundesanstalt für Arbeit* [1999] ECR I-2685, paragraph 60).

Kyoto Protocol is a multilateral convention. The EU is a contracting party[76] but the US has not ratified it.[77]

76. This means that under international (treaty) law the US is not bound by the provisions of the protocol; under international law, unless a treaty is provisionally applied following signature, a state that has signed a treaty but not ratified is not bound by the provisions contained in the treaty.

77. The Commission submits that the multilateral nature of an agreement is not sufficient to exclude the reciprocal nature of that agreement where it was negotiated solely on the basis of mutual concession. The Kyoto Protocol is a multilateral agreement based on reciprocal obligations between the Contracting parties.[78]

78. The Commission submits that the Claimants, which are all US corporations, should consequently not be entitled to invoke the provisions of this international agreement to challenge the validity of the ETS Directive. If the Kyoto protocol were a pure bilateral agreement between the EU and country X, Claimants incorporated in another third country (Y) would not be entitled to invoke its provisions before EU courts. The conclusion should not be any different with regard to multilateral agreements, for there is no compelling legal reason to distinguish between bilateral and multilateral agreements on the question of invocability. The opposite view would impose upon states obligations towards foreign subjects that these states have not specifically or even tacitly consented to undertake. This runs contrary to the jurisprudence of the Permanent Court of International Justice, which stated that "[r]estrictions upon the independence of states cannot therefore be presumed."[79] The only generally accepted exceptions to this rule

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[76] The EU has approved the protocol on 31 May 2002 and became bound upon its entry into force for the EU on 16 February 2005.

[77] The US signed the Kyoto Protocol on November 12, 1998. However, the Clinton Administration did not submit the Protocol to the Senate for advice and consent. In late March 2001, the Bush Administration rejected the Kyoto Protocol. There are no indications that the current US administration will propose to the US congress to ratify the Kyoto Protocol.

[78] The Commission accepts that there are multilateral agreements of a general nature that are not based on a system of mutual concessions, but that instead seek to set up international standards of conduct (for example, international conventions on human rights). The question relating to whether private litigants having the nationality of a state that has not signed up to human rights agreements would be entitled to invoke these before EU courts does not have to be answered here

[79] PCIJ *The Lotus Case,* Judgment of 7 September 1927, Series A, No. 10, p. 18 at http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf.

pertain to customary law, which the Kyoto Protocol neither reflects nor crystallises. The opposite view would also run contrary to the rule of reciprocity in international law.

79. Hence, the Commission submits that Claimants should not be entitled to rely on provisions of the Kyoto Protocol on the grounds that the provisions of this international treaty do not bind the state in which they are incorporated.

80. In addition, the Commission submits that the nature and the broad logic of the Kyoto Protocol also preclude reliance by private parties on its provisions to impugn Union law. The treaty is addressed to states and international organizations only. It requires states to set up monitoring, reporting and verification systems and for some of them to establish systems to reduce GHG emissions. These obligations all require implementation and so none of them are susceptible to being invoked by private parties.

81. In particular, Article 2(2) does not appear, as regards its content, to be unconditional and sufficiently precise. It provides that:

> "*The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively.* "

82. In the Commission's view, there are no sufficiently precise obligations that private parties could seek to derive from this provision, as states and international organisations that are set out Annex I, according to the terms of the provision, have the duty to 'pursue' and 'work through'. These obligations are therefore subject, in their implementation or effects, to the adoption of subsequent measures, and consequently have no direct effect.

4.5. Conclusion on the first question

83. For the reasons set out above, the Commission's response to High Court's first question is that the validity of the ETS Directive cannot be assessed in the light of the alleged customary law principles (a) to (d) invoked by the Claimants. Furthermore, the Commission submits that the validity of the ETS Directive cannot be assessed in light of the provisions of the Chicago convention (rule (e)) nor in the light of the Kyoto Protocol (rule g).

84. The Commission accepts that the validity of the ETS Directive can be assessed in the light of the provisions of the Open Skies agreement.

5. SECOND QUESTION – CONSISTENCY OF THE EU ETS WITH THE ASSERTED PRINCIPLES OF CUSTOMARY INTERNATIONAL LAW

5.1. General discussion

85. With its second question, the High Court wishes to know whether the ETS Directive, insofar as it applies to parts of flights (either generally or by aircraft registered in third countries) that take place outside the airspace of the EU Member States, contravenes one or more of the alleged customary law principles (a) to (d) invoked by the Claimants. As will be set out below, the Commission submits that the second question of the High Court need only be addressed if the Court of Justice finds that these principles can be relied on by the Claimants in these proceedings.

86. In light of the response that the Commission submits to the High Court's first question, there would be no need for this Court to address the High Court's second question insofar as alleged customary law principles are concerned. However, should the Court of Justice wish to leave the question of invocability of the customary law principles invoked aside, the Commission submits that for the reasons set out below, the Claimants' arguments that the EU legislator breached these alleged principles of international customary are unfounded.

87. The Claimants' reliance on the alleged customary law principles (a) to (d) all result in essence from the same contention: that because the system for the aviation sector introduced by the ETS Directive, is calculated partly to include portions of flights that take place outside the national airspace of EU Member States, the ETS Directive violates general international (customary) rules, which place limits on the exercise of jurisdiction by the EU over various airspace zones. The two airspace zones that the Claimants allege the EU Directive violates are: the national airspace of third countries (which covers the airspace over third States' land territory as well as above their territorial seas) and the international airspace above the high seas.

88. The reality is that the ETS Directive is a regulatory instrument that seeks to ensure that operators subject to its rules internalise, that is to say take into account in their cost structure, certain environmental costs of activities they conduct in the European Union.

This policy and economic rationale for the measure confirms its regulatory nature: it is a basic notion amongst regulatory economists that so-called externalities (including social costs that are not internalised within the economic costs of a product) constitute a form of market failure, in that the resulting price signal does not incentivise the efficient use of the underlying resource.[80] The extension of the ETS to aviation activities is designed specifically to ensure that the adverse impact of flights departing from and arriving at aerodromes in the European Union is economically accounted for in the same way as for other activities covered by the ETS.[81] As explained in Section 2 above, the EU ETS operates by imposing an obligation to surrender allowances corresponding to emissions of GHGes caused by flights arriving or departing from an airport in the European Union. This obligation does not relate to or seek to restrict activities outside the territory of the European Union. The obligation to surrender allowances depends on the emissions of GHGes resulting from flights departing from and arriving at aerodromes in the European Union. The operator is free to decide where it flies, and whether – or to what extent – it flies over the high seas or the territory of third states. The EU ETS does not take such circumstances into account in any way, but only whether the flight lands in or departs from an EU aerodrome. Thus, if an aircraft operator wishes to fly from New York to Casablanca, or from Helsinki to Athens, it may freely choose to fly over the territory of Members States of the European Union, or, at least in part, over the territory of third states or over the high seas. This is not relevant. It will only be submitted to obligations arising from the EU ETS if it lands or departs from an EU aerodrome. In case it does so, the number of allowances that it will need to surrender will depend on the emissions characteristics of the aeroplane that it operates, on the (emissions of the) fuel that it uses and on the distance flown. There is no obligation relating to aviation activities conducted outside the European Union.

89. Accordingly, there is no exercise of 'extra-territorial' jurisdiction by the EU that is contrary to the four alleged customary rules of international law referred to in the Order for Reference. Still less is there an impermissible exercise of such jurisdiction.

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[80] Such "externalities" are often the result of the absence of defined property rights, and as such frequently affect resources considered of common ownership (*res communis*) or unownable (*res nullius*).

[81] It should be noted that the EU ETS provides for the free allocation of allowances to be progressively replaced by the auctioning of allowances, thus progressively "internalising the cost of carbon."

90. Under international law, sovereignty and jurisdiction are closely related concepts. The principal corollaries of the sovereignty, independence and equality of States are: (1) the principle that a State has *prima facie* exclusive jurisdiction over its territory and the permanent population living there, (2) a duty of non-intervention in the area of exclusive jurisdiction of other States,[82] and (3) the principle that States need to consent to rules before being bound by them.[83]

91. Jurisdiction is an essential aspect of State sovereignty. It refers to judicial, legislative and administrative competence. A distinction is made in the literature between prescriptive or legislative jurisdiction (i.e., the power to make decisions or rules) and the power to take executive action in pursuance of or consequent on the making of decisions or rules (i.e. enforcement or prerogative jurisdiction).[84] Legislative jurisdiction refers to the supremacy of the constitutionally recognised organs of a State to make binding laws within its territory.[85]

92. Therefore, the starting point in international law is that jurisdiction is territorial.[86] Territory is the most important basis for jurisdiction.[87] Within this context, a distinction is made between jurisdiction in civil and in criminal matters. Criminal jurisdiction can be exercised on the grounds of the following principles: the territorial principle, the nationality principle, the passive personality principle, the protective or security principle, the universality principle, and crimes under international law. Civil jurisdiction is ultimately reinforced by procedures of enforcement involving criminal sanctions, there is in principle no great difference between the problems created by assertion of civil and criminal jurisdiction over foreigners.[88]

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82 M. Shaw, *International Law*, 6th. Ed. 2008, p. 647.

83 PCIJ The Lotus Case, Judgment of 7 September 1927, Series A, No. 10, p. 18, http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf.

84 *Ibid.* pp. 645-646; D. Harris, *Cases and Materials on International Law*, Seventh Edition, 2010, p. 227.; See too: Opinion of AG Darmon, 25 May 1988, Joined Cases 89, 104, 11", 11§, 117 and 129/85, *A. Ahström Osakeyhtiö and others v Commission*, paragraphs 19-31.

85 *Ibid.* p. 649.

86 I. Brownlie, *Principles of Public International Law*, 6th ed., 2003, p. 297.

87 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian* Territory, Advisory Opinion -, 2004 ICJ Rep. 136, paragraph 9 (July 9): "The jurisdiction of States is primarily territorial...".

88 M. Shaw, *International Law*, 6th. Ed. 2003, pp. 651-673; I. Brownlie, *Principles of Public International Law*, 6th ed., 2003, pp. 297-306.

93. With these principles in mind, the Commission submits that there is no substance to the Claimants' allegation that the ETS Directive violates general (customary) principles of international law on sovereignty and jurisdiction. The ETS Directive does not amount to the exercise of either prescriptive (legislative) or enforcement jurisdiction over the national airspace of third countries or over the 'international' airspace above the high seas. In particular, the EU does not, with the ETS scheme, 'prescribe' or 'enforce' its legislation in the airspace above the national territories of third countries, or over the international airspace above the high seas. The extension of the EU ETS is not a case of the EU seeking to apply its rules outside EU territory.

94. The rules concerned apply (both from a legislative and enforcement perspective) only in the national airspace/national territories of EU Member States, more in particular in the aerodromes of EU Member States, which incontestably fall within the limits of the EU's jurisdiction. It is perfectly lawful under general international law for the EU to seek to prescribe and enforce rules that apply to its territory, and to apply these regardless of the nationality of the natural or legal persons that reside on its territory or enter its territory.

95. Put differently, the ETS Directive is completely in line with the EU's power to prescribe and enforce laws on the basis of the one important jurisdictional principle – the territorial principle – that is the "indispensable foundation for the application of the series of legal rights"[89] that states possess under international law. As a subject of international law, the EU is perfectly entitled to make binding laws within its territory, and under general international law the EU does not need the consent of third states to subject natural or legal persons that enter its territory to its rules. EU ETS obligations are not imposed solely in respect of entry into or exit of the territory of the EU, they apply also to EU domestic flights. Furthermore, third states' aircraft can avoid becoming subject to the rules by not landing in, or taking off from, EU Member States' aerodromes.

96. It is not considered that there would be a breach of the jurisdictional principles invoked were a state to require that all aircraft landing at or departing from its territory must comply with certain safety or other standards. Neither is there a breach where personal details of passengers must be collected from passengers before departure to a regulating state, and communicated to the authorities of that regulating state, before an aircraft may depart from a third state for the regulating state. Consequently, nor can there be any

breach when a jurisdiction seeks to ensure that aircraft operators arriving in or taking off from aerodromes on its territory account for the impact of their flights on the climate system.

5.2. Conclusion on the second question

97. In sum, the Commission submits that the Claimants have not demonstrated that the ETS Directive violates general (customary) principles of international law on state sovereignty and exercise of jurisdiction over various airspace zones.

6. THIRD AND FOURTH QUESTIONS – ALLEGED VIOLATION OF CERTAIN TREATY RULES

6.1. General discussion

98. For the event that the Court finds that the Claimants can rely on the Open Skies Agreement or the Kyoto Protocol, the Commission will address in this section the High Court's third and fourth questions insofar as they relate to these instruments.

99. The Commission would first make one initial but important remark regarding the Open Skies Agreement that is relevant for both the third and the fourth questions. In the Memorandum of Consultations accompanying the Agreement, and in the Memorandum accompanying the Protocol amending it, the EU and the US delegations emphasised that nothing in the Agreement affects in any way their respective legal and policy positions on various aviation-related environmental issues[90]. This statement reflects the fact that the Parties did not intend to address, let alone resolve, any differences of opinion regarding the EU ETS in the Agreement.

6.2. Third question in so far as it relates to the Open Skies Agreement

100. In this question, the referring Court asks if the ETS Directive is invalid, as contravening Article 7 of the Open Skies Agreement, if and insofar as it applies the EU ETS to those parts of flights (either generally or by aircraft registered in third countries) that take place outside the airspace of EU Member States.

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89 M. Shaw, *International Law*, 6th. Ed. 2003, pp.652-653.

90 See paragraph 54 of the Memorandum of Consultations regarding the Agreement and paragraph 11 of the Memorandum regarding the Protocol, respectively.

101. Article 7 of the Agreement provides, insofar as is relevant for the High Court's question, that:

> *"The laws and regulations of a Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory shall be applied to the aircraft utilised by the airlines of the other Party, and shall be complied with by such aircraft upon entering or departing from or while within the territory of the first Party."*

102. It appears from the Order for Reference that the Claimants submit that the ETS Directive is contrary to Article 7 of the Agreement insofar as it applies to those parts of flights that take place outside the airspace of EU Member States. While Article 7 confers power on a Party to develop its own departure and admission rules, the obligation to comply with those rules applies only upon entering or departing from or while in the territory of that Party. According to the Claimants, that language does not permit the EU to apply a scheme in respect of the activities of aircraft taking place outside its airspace.

103. In this respect, the Commission submits that, whilst it does not accept that the EU ETS implies regulation of or in the airspace of third countries, Article 7 of the Agreement does not provide that the only regulations that can apply in relation to a Party's airspace are those made by the Party in question. Article 7 simply provides that the laws and regulations of a Party that relate to the admission to, departure from, and operation and navigation within its territory shall be applied to aircraft of the other Party and shall be complied with by those aircraft. Hence, Article 7 of the Open Skies Agreement does not preclude the EU ETS.

6.3. Fourth Question in so far as it relates to the Open Skies Agreement or the Kyoto Protocol

104. By the fourth question, the High Court asks if the ETS Directive is invalid insofar as it applies the ETS to aviation activities:

— as contravening Article 2.2 of the Kyoto Protocol and Article 15(3) of the Open Skies Agreement;

— as contravening Article 15 of the Chicago Convention, on its own or in conjunction with Articles 3(4) and 15(3) of the Open Skies Agreement;

— as contravening Article 24 of the Chicago Convention on its own or in conjunction with Article 11(2)(c) of the Open Skies Agreement.

6.4. The Open Skies Agreement (in particular Articles 3(4), 11(2)(c) and 15(3))

6.4.1. Question 4 a

105. As regards the first part of the High Court's question, it appears from the Order for Reference that the Claimants contend that, by extending the EU ETS to aviation activities, the EU has infringed an obligation under Article 15(3) of the Open Skies Agreement to address aircraft emissions through ICAO.

106. Article 15(3) provides:

> *"When environmental measures are established, the aviation environmental standards adopted by the International Civil Aviation Organisation in Annexes to the Convention shall be followed except where differences have been filed. The Parties shall apply any environmental measures affecting air services under this Agreement in accordance with Articles 2 and 3(4) of this Agreement."*

107. In support of their contention, the Claimants argue that the Parties to the Open Skies Agreement recognised the need to pursue agreement on the issue of emissions trading within the framework of ICAO. This commitment was reflected in the language of Article 15(3), as it provides that, when either Party applies any environmental measures affecting air services, it must do so in accordance with Article 3(4) and therefore, by reference, in accordance with Article 15 of the Chicago Convention. The Claimants contend that the EU has breached these obligations because it has extended the EU ETS to aviation activities outside the framework of ICAO, contrary to Resolution A36-22 and/or to Articles 1, 11, 12, 15 and/or 24 of the Chicago Convention. Although the Member States entered a reservation in relation to Resolution A36-22, the reservation was, according to the Claimants, unlawful and therefore ineffective because states party to a Treaty, in this case the Chicago Convention, may not unilaterally excuse themselves from compliance with that Treaty.

108. In this respect, the Commission notes, first, that the references to ICAO and the Chicago Convention in Articles 15(3) and 3(4) of the Open Skies Agreement do not have the effect of incorporating Articles 1, 11, 12, 15 and 24 of the Convention into the EU legal

order, hence creating grounds under which the validity of the ETS Directive could be assessed.

109. Article 15(3) of the Open Skies Agreement requires that when a Party establishes environmental measures, such as the EU ETS, the aviation environmental standards adopted by ICAO in Annexes to the Chicago Convention shall be followed, except where differences have been filed. This corresponds in fact to Article 37 of the Chicago Convention, which renders such standards legally binding unless differences have been filed in accordance with Article 38. However, Article 37 of the Chicago Convention does not require Parties to refrain from adopting environmental measures except where they implement such standards. It also does not prohibit the adoption of environmental measures except as authorised by ICAO and so nor does Article 15(3) of the Open Skies Agreement, as the Claimants argue. Since, as a matter of fact, no such standards currently exist with respect to CO2 emissions, Article 15(3) of the Open Skies Agreement does not mean that the Parties are required to address aircraft emissions exclusively through ICAO.

110. As regards the Claimants reference to Resolution A36-22, the Commission must point out that the Resolution not an environmental standard and is not otherwise binding. In addition, the Member States entered a reservation in relation to the Resolution, in which they reserved the right under the Chicago Convention to enact and apply marked-based measures on a non-discriminatory basis to all aircraft operators of all States providing services to, from and within their territory.[91]

111. Moreover, Resolution A36-22 has been superseded by Resolution A37-19, which confirms the important role of market-based measures – such as emissions trading – and sets out a range of guiding principles to be applied by States designing and implementing them, all of which are consistent with the EU ETS.[92]

112. The Claimants' contentions suggest that the EU has not pursued agreement on the issue of emissions trading within the framework of ICAO. This is, in fact, not true. As discussed in paragraph 13 above, the EU and its Member States have participated

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[91] See Recital 19 of the 2008 Directive.

[92] See paragraph 13 above.

actively in the discussions on aviation emissions at ICAO since 1997, and they continue to actively do so.

113. Finally, the Claimants seem to contend that the reference in Article 15(3) of the Open Skies Agreement to Article 3(4) of the Agreement would mean that an environmental measure, such as the EU ETS, is to be applied consistently with the last sentence of Article 15 of the Chicago Convention. Here, it is sufficient to note that the EU ETS is not a charge solely in respect of the right of transfer over, entry into, or exit from EU territory in the sense of that provision. The Commission will return to this issue when dealing with the second part of the High Court's question.

114. In the light of these considerations, the Commission cannot see how the ETS Directive would contravene Article 15(3) of the Open Skies Agreement.

6.4.2. Question 4 b

115. As regards the second part of the High Court's question, the Commission recalls first that, as amply discussed above, the Claimants cannot invoke Article 15 of the Chicago Convention on its own to challenge the validity of the ETS Directive.

116. Nevertheless, as noted above, the Claimants seem to contend that the reference in Article 15(3) of the Open Skies Agreement to Article 3(4) of the Agreement would mean that an environmental measure, such as the EU ETS, is to be applied consistently with the last sentence of Article 15 of the Chicago Convention.

117. Article 3(4) of the Agreement states:

> *"Each Party shall allow each airline to determine the frequency and capacity of the international air transportation it offers based upon commercial considerations in the market place. Consistent with this right, neither Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the airlines of the other Party, nor shall it require the filing of schedules, programs for charter flights, or operational plans by airlines of the other Party, except as may be required for customs, technical, operational, or environmental (consistent with Article 15) reasons under uniform conditions consistent with Article 15 of the Convention."*

118. The last sentence of Article 15 of the Convention reads:

> *"No 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."*

119. The Commission submits that, insofar as the reference in Article 15(3) of the Agreement to Article 3(4) would mean that an environmental measure such as the EU ETS shall be applied consistently with the last sentence of Article 15 of the Convention, the EU ETS is not a charge in respect solely of the right of transfer over, entry into or exit from EU territory within the meaning of that provision.

120. In this respect, the Commission notes first that ICAO has referred to a charge in the context of Article 15 as a levy that is designed and applied specifically to recover the costs of providing facilities and services for civil aviation.[93]

121. The EU ETS is of a wholly different nature. It is clear from the Commission's observations in paragraphs 25-7 above that the system is not a charge, let alone a charge imposed in respect solely of the right of transfer over, entry into or exit from EU territory, within the meaning of Article 15.

122. Consequently, the Commission submits that the ETS Directive does not contravene Article 15 of the Chicago Convention, whether on its own or in conjunction with Articles 3(4) and 15(3) of the Open Skies Agreement.

6.4.3. Question 4 c

123. In connection with the last part of the High Court's question, it appears from the Order for Reference that the Claimants contend that the ETS Directive infringes the prohibition on fuel taxes on international aviation, contrary to Article 24 of the Chicago Convention and Article 11(2)(c) of the Open Skies Agreement.

124. In this respect, the Commission recalls once again that the Claimants cannot invoke the provisions of the Chicago Convention to challenge the validity of the Directive.

125. Article 11(2)(c) of the Open Skies Agreement exempts from taxes fuel introduced into or supplied in the territory of a Party for use in an aircraft of an airline of the other Party engaged in international air transportation, even when these supplies are to be used on a

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[93] See ICAO's Policies on Charges for Airports and Air Navigation Services, Doc. 9082/7, paragraphs 2 and 3 (2004). The document is enclosed with the Order for Reference as Annex 38.

part of the journey performed over the territory of the Party in which they are taken on board.

126. ICAO, for the purpose of its policy objectives, has defined taxes as levies to raise general national and local government revenues that are applied for non-aviation purposes.[94]

127. Again, it follows from the Commission's analysis in paragraphs 25-7 above that the EU ETS is not a tax within the meaning of Article 11(2)(c) of the Open Skies Agreement.

128. Consequently, in the Commission's view also the third part of the High Court's fourth question must be answered in the negative.

6.5. The Kyoto Protocol (in particular, Article 2(2))

129. Apart from the fact that the Claimants may not rely on Article 2(2) of the Kyoto Protocol, it is also abundantly clear that they misconstrue its meaning. Article 2(2) provides that:

> *"The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively."*

130. This provision contains an obligation to cooperate in a given forum in order to try to achieve a result there. It does not prohibit anything. It certainly does not provide an exclusive avenue for addressing the problem of emissions from aviation, nor does it provide that parties may not take action themselves to this end. Any such obligation would indeed be contrary to the very objective of the UNFCCC and the Kyoto Protocol, which is to combat climate change as a matter of urgency.

131. For this provision to have the implication that the Claimants contend it has, this would at the least have to be stated explicitly. It may be noted that Article 2(2) does not contain any time limit, so if "working through the International Civil Aviation Organization" were to be considered an exclusive avenue, this would obstruct the overall goal of the

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[94] See Council Resolution on Taxation of International Air Transport, included in ICAO's Policies on Taxation in the field of International Air Transport, Doc. 8632 (2000). The document is enclosed with the Order for Reference as Annex 35.

treaty as regards emissions from aviation until consensus could be achieved to modify it. This is hardly a credible interpretation of the intention of the parties.

7. CONCLUSION

132. In view of the above, the following reply to the questions of the UK High Court of Justice is proposed:

Answer to Question 1:

Of the rules or asserted principles of international law (a) to (g) referred to by the High Court, only the rules in (f), included in the Open Skies Agreement, are capable of being relied on by the Claimants to challenge the validity of the ETS Directive.

Answer to Questions 2 - 4:

Examination of the questions referred to the Court of Justice reveals no grounds to conclude that the ETS Directive, or its application of the EU Emission Trading System, contravenes any of the rules or asserted principles of international law referred to.

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