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CLIENT MATTER NO. 107624-0002

Registry
Court of Justice of the European Union
Rue du Fort Niedergrünewald
L-2925 Luxembourg

By post, fax and e-mail

16 November 2010

Dear Sir or Madam

Case C-366/10 *R (on the application of the Air Transport Association of America, Inc. and others) v The Secretary of State for Energy and Climate Change*

Please find enclosed by way of service the original signed Written Observations of the Claimants in these proceedings, made pursuant to Article 23 of the Protocol on the Statute of the Court of Justice of the European Union. Also enclosed are six certified copies of the same (the certified copies are not attached to the copies of this letter sent by fax and email). Further to discussion with the Registry by telephone on 15 November 2010, I also enclose two sets of the bundle of additional documents cited in the Written Observations of the Claimants. The additional documents in this bundle have also been transmitted to the Registry electronically as numbered PDF files.

I should be grateful if you would contact me immediately on +44 207 427 3574 if you have any concerns as to the extent to which these documents comply with the necessary formalities.

Yours faithfully

Deba Das, Freshfields Bruckhaus Deringer LLP

IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

CASE C-366/10

THE QUEEN

on the application of

(1) THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

(2) AMERICAN AIRLINES, INC.

(3) CONTINENTAL AIRLINES, INC.

(4) UNITED AIR LINES, INC.

Claimants

-and-

(1) THE INTERNATIONAL AIR TRANSPORT ASSOCIATION

(2) THE NATIONAL AIRLINES COUNCIL OF CANADA

Interveners

- V –

THE SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE

Defendant

-and-

(1) THE AVIATION ENVIRONMENT FEDERATION

(2) WWF-UK

(3) THE EUROPEAN FEDERATION FOR TRANSPORT AND ENVIRONMENT

(4) THE ENVIRONMENTAL DEFENSE FUND

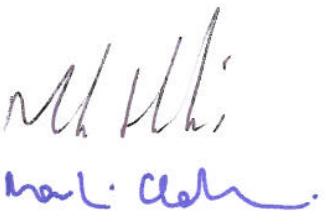
(5) EARTHJUSTICE

Interveners

WRITTEN OBSERVATIONS OF THE CLAIMANTS

The Claimants are represented by Mark Hoskins Q.C. and Martin Chamberlain, barrister, instructed by Freshfields Bruckhaus Deringer LLP.

Submitted by:



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Martin Chamberlain
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15 November 2010

(1) INTRODUCTION

1. These are the written observations of the claimants on the questions referred for a preliminary ruling under Article 267 TFEU by the High Court of Justice of England and Wales (Queen's Bench Division, Administrative Court) (the ***Referring Court***) in its Order and Schedule (the ***Schedule***) dated 8 July 2010 (collectively the ***Order for Reference***). (References to documents in the bundle provided by the Referring Court are in the form [***RC/Tab***]. References to the additional documents annexed to these written observations are in the form [***AD/Tab, page number(s) in bundle***].)

2. The Referring Court seeks a preliminary ruling from the Court of Justice on four questions concerning the validity of Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community[1] (the ***2003 Directive***), as amended by Directive 2008/101/EC[2] (the ***2008 Directive***) so as to include aviation activities (together referred to as the ***Amended Directive***). A consolidated version of the Amended Directive has been published [RC/9]. Its main provisions have been set out at paragraphs 9 – 20 of the Schedule.

3. The 2003 Directive established an EU emissions trading scheme for greenhouse gases (the ***EU ETS***). The 2008 Directive extended the application of the EU ETS to aviation activities.

4. In outline, the principal submissions of the claimants are as follows.

5. First, the Amended Directive states that the purpose of the EU ETS is "to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner." To achieve this purpose, the EU ETS originally imposed a cap on greenhouse gas emissions allowances from installations in the EU. The Amended Directive extended the application of the EU ETS to aviation activities.

6. In relation to aviation activities, the scheme is not restricted to emissions in the EU, but instead places a cap on the total quantity of emissions allowances for flights that "depart from or arrive in an aerodrome situated in a Member State". Further, the EU

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1 2003 OJ L 275, p.32.
2 2009 OJ L 8, p.3.

ETS requires aircraft operators to obtain and surrender allowances equal to their emissions during the preceding calendar year. The relevant cap and the requirement to obtain and surrender allowances are based on the entirety of flights that depart from or arrive in the EU, regardless of the extent to which such flights take place inside or outside of EU airspace.

7. The EU ETS therefore seeks to achieve reductions of greenhouse gas emissions not just in EU airspace, but in third countries and over the high seas. In applying its environmental legislation to aviation activities in third countries' airspace and over the high seas, the EU has violated fundamental and well-established principles of customary international law. It has also violated the Chicago Convention, which, not surprisingly, recognises and gives further effect to these principles of customary international law.

8. Second, in unilaterally adopting legislation concerning aviation activities which applies to such activities outside its own territory, the EU has breached international obligations which require such matters to be regulated by consensus reached within the framework of the International Civil Aviation Organisation (***ICAO***), a body recognised by the United Nations.

9. Third, the application of the EU ETS to aviation activities breaches various provisions of the Chicago Convention and EC-US Open Skies Agreement relating to financial charges. Whilst the majority of emission allowances are presently distributed free of charge, the remainder must be obtained by payment through an auction held by EU Member States. Therefore, an aircraft operator who wishes to carry out aviation activities in excess of his free allocation must purchase sufficient allowances to do so. Such activities are therefore subject to a "charge". The fact that such a charge is incurred as part of the application of a scheme with other aspects is irrelevant; it is still a charge which must comply with the provisions of the Chicago Convention. The EU ETS does not do so.

(2) THE MEASURE CHALLENGED

10. As indicated above, the 2008 Directive extended the application of the EU ETS to "aviation activities".

11. Pursuant to Article 3a of the Amended Directive, aviation activities are defined in Annex I of the Amended Directive as covering:

> "Flights which depart from or arrive in an aerodrome situated in the territory of a Member State to which the Treaty applies."

12. There are three particular aspects of the Amended Directive which are of particular importance in the present case: the imposition of a cap on the total quantity of aviation emissions, the requirement on aircraft operators to surrender emissions allowances for the entirety of flights departing from or arriving in the EU and the requirement to pay for allowances in certain circumstances.

13. From 2012, the total quantity of emissions allowances available will be capped; initially at 97% of historical aviation emissions levels (Article 3c(1) of the Amended Directive). From 2013 onwards, the cap will be set at 95% of historical aviation emissions levels (Article 3c(2) of the Amended Directive). "Historical aviation emissions" are defined in Article 3(s) of the Amended Directive as the average of the annual aviation emissions from the entirety of flights that arrived in or departed from an airport in an EU Member State in the calendar years 2004, 2005 and 2006.

14. Initially, 15% of allowances will be auctioned. This percentage may subsequently be increased (Article 3d(1) & (2) of the Amended Directive).

15. A certain number of allowances will be available for allocation to operators free of charge (Article 3e(1) & (3) of the Amended Directive). The allocation to aircraft operators is made on the basis of verified tonne-kilometre data for the "aviation activities" performed by that aircraft operator for the relevant monitoring year. The relevant formula for calculating tonne-kilometres is set out in Annex IV, Part B of the Amended Directive. It takes accounts of the distance between the airport of arrival and departure, not just distance travelled in EU airspace.

16. The cap on the total quantity of emissions allowances is therefore not limited to emissions in EU airspace, but also applies to emissions outside EU airspace in respect of flights departing from or arriving in an EU Member State.

17. An aircraft operator which wishes to carry out aviation activities in excess of its free allocation will be required to purchase sufficient allowances to do so. Furthermore, the practical effect of the imposition of the cap and the method of allocation is that an aircraft operator which wishes to maintain even its historic level of aviation activities will be required to purchase sufficient allowances at auction.

18. An article in ENDS Europe suggests that:

> "Given that the aviation sector's 2012 emissions are expected to be about 130% of 2005 levels, only about 60% of the allowances the sector needs will be issued for free in 2012. If the traded carbon price doubles to an expected €30 per tonne, airlines will contribute a collective €3.5bn annually to EU coffers by buying extra allowances at auction."[3]

19. By 30 April each year (starting in 2013) aircraft operators must surrender a number of emissions allowances equal to their total emissions during the preceding calendar year from aviation activities (Article 12(2a) of the Amended Directive).

20. Article 14(3) of the Amended Directive provides that an aircraft operator must monitor and make an annual report of the emissions from the aircraft which it operates. The monitoring and reporting of the emissions must be based on the principles set out in Annex IV, Part B of the Amended Directive (see Article 14(1) of the Amended Directive), which provides, *inter alia*:

> "Emissions shall be monitored by calculation. Emissions shall be calculated using the formula:
>
> **Fuel consumption x emission factor**
>
> Fuel consumption shall include fuel consumed by the auxiliary power unit. Actual fuel consumption for each flight shall be used whenever possible and shall be calculated using the formula:

[3] ENDS Europe, "Aviation's entry into the EU ETS off to a shaky start", 7 September 2009 [AD/22, p. 308-310]. ENDS (Environmental Data Services) is a leading provider of environmental and carbon intelligence for business in Britain and across Europe (http://www.ends.co.uk/about.htm).

> Amount of fuel contained in aircraft tanks once fuel uplift for the flight is complete – amount of fuel contained in aircraft tanks once fuel uplift for subsequent flight is complete + fuel uplift for the subsequent flight."

21. This formula is not limited to fuel used in respect of flight over EU airspace. It covers the total fuel used during the entire flight, including time spent on the ground at the airports of departure and arrival.

22. Pursuant to the Amended Directive, when an aircraft departs or arrives from an EU Member State, the EU ETS therefore applies not just to flight over the airspace of EU Member States but also any part of the flight conducted over the high seas and over the territory of third countries. It also applies to time spent on the ground at an airport in a third country at the beginning or end of a flight.

23. Furthermore, the EU ETS applies to aircraft registered in third countries, even in the absence of any mutual agreement between the EU and the relevant third country as to the application of the EU ETS.

24. Aircraft operators that do not surrender sufficient allowances will be held liable for an excess penalty of 100 Euros per tonne of carbon dioxide, in addition to the obligation to surrender allowances (Article 16(3) of the Amended Directive). In the event an aircraft operator fails to comply with the requirements of the Amended Directive and where other enforcement measures have failed, the administering EU Member State may request the Commission to decide on the imposition of an EU-wide operating ban on the aircraft operator concerned (Article 16(5) of the Amended Directive).

25. The manner in which the EU has chosen to extend the EU ETS to aviation activities is unlawful for the reasons set out in the submissions which follow. These will be divided into two main parts: first, compatibility with customary international law; and second, compatibility with international treaties.

(3) LEGAL AND FACTUAL BACKGROUND

A: ESTABLISHMENT OF THE CHICAGO CONVENTION AND ICAO

26. The Chicago Convention [RC/11] was signed as a multilateral treaty in 1944 and has provided the basis for the regulation of international civil aviation for more than 60 years. All EU Member States are parties to it, although the EU is not.

27. As indicated in the third recital in its preamble, the Chicago Convention is intended to establish:

> "certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically."

28. The Chicago Convention establishes a number of such principles. One of the most significant, as recognised by its position in Article 1 of the Convention, is that of sovereignty:

> "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."

29. The other provisions of the Chicago Convention of particular relevance to these proceedings are Article 11 (Applicability of air regulations), Article 12 (Rules of the air), Article 15 (Airport and similar charges) and Article 24 (Customs duties). These are set out at paragraph 36 of the Schedule.

30. ICAO was formed pursuant to Article 43 of the Convention. Article 44 states that:

> "The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport...".

31. Under Article 37 of the Convention, each contracting State undertakes:

> "to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures and organization in relation to aircraft,...***in all matters*** in which such uniformity will facilitate and improve air navigation." (Emphasis added.)

32. To this end, Article 37 requires the ICAO Council to adopt "international standards and recommended practices and procedures". Such international standards form part of the hierarchy of norms envisaged by the Chicago Convention framework.

33. Whilst Article 38 provides a mechanism for departure from international standards and procedures adopted by ICAO pursuant to Article 37, there is no provision for departure from the substantive principles laid down in the Convention itself. These are absolute and must be respected by the contracting States.

B: RECOGNITION OF THE CENTRAL ROLE OF THE CHICAGO CONVENTION AND ICAO IN INTERNATIONAL AVIATION MATTERS

34. The central role played by the Chicago Convention and ICAO in international aviation, including in relation to the specific issue of greenhouse gas emissions, has been recognised by the international community, including the EU itself.

(a) United Nations

35. Having been established in 1944, ICAO became a UN "specialised agency" in 1947, pursuant to Articles 57-64 of the UN Charter [AD/1, p. 1-3].

36. The UN Charter (see, in particular, Article 63) authorises the UN, acting through its Economic and Social Council, with the approval of the General Assembly, to enter into agreements with certain inter-governmental organisations. Having entered into such an agreement, the Economic and Social Council may coordinate the activities of a specialised agency through consultation with, and recommendations to, such agencies and through recommendations to the General Assembly and to the Members of the UN.

37. Following approval by the General Assembly and ICAO's Assembly, the UN-ICAO Agreement came into force on 13 May 1947 [AD/2, p. 4-18].[4] Article 1 of the UN-ICAO Agreement states:

> "The United Nations recognizes the International Civil Aviation Organization as the specialized agency responsible for taking such action as may be appropriate

[4] UN-ICAO Protocol concerning the entry into force of the Agreement between the UN and ICAO, (1947) 8 UNTS 316, annexing the Agreement between the UN and ICAO regarding the specialized agency status of ICAO, at p. 324 [AD/2, p. 9].

> under its basic instrument for the accomplishment of the purposes set fort therein."
>
> (The basic instrument of ICAO is the Chicago Convention.)

38. The establishment of ICAO as a specialised agency indicates that the UN considers that there is a need for a common global policy on international civil aviation, that it is desirable for this common global policy to be coordinated and that ICAO is best placed to undertake this coordination. As recognised on the UN website, ICAO "serves as the coordinator for international cooperation in all areas of civil aviation."[5]

39. The status and importance of UN specialised agencies is recognised in Article 220 TFEU, which requires the Union "to establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies...".

(b) The Kyoto Protocol

40. The principal international treaty concerning greenhouse gas emissions (***GHG***) is the United Nations Framework Convention on Climate Change (***UNFCCC***), which was adopted on 9 May 1992 and entered into force on 21 March 1994 [AD/6, p. 41-65]. Article 4(2)(a) of the UNFCCC states:

> "Each of these Parties shall adopt ***national***[6] policies and take corresponding measures on the mitigation of climate change, by limiting *its* anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs." (Emphasis added.)

41. The Kyoto Protocol to the UNFCCC was adopted on 11 December 1997 and entered into force on 16 February 2005 [RC/15]. As of 6 November 2009, there were 189 parties to the Kyoto Protocol, including the European Community.

42. Parties with commitments under the Kyoto Protocol have accepted ***national*** targets for limiting or reducing GHG emissions (Article 2). Each party with obligations receives a limited number of "assigned amounts" for its GHG emissions for the period

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5 See http://www.un.org/Overview/uninbrief/institutions.shtml

6 According to a footnote to Article 4(2)(a) UNFCCC, this includes policies and measures adopted by regional economic integration organisations.

2008 – 2012 (Article 3). By definition, ***international*** aviation emissions are not included in ***national*** targets under the Kyoto Protocol.[7]

43. The Parties to the Kyoto Protocol expressly recognised ICAO as the appropriate United Nations body to address greenhouse gas emissions from international aviation. Article 2(2) of the Kyoto Protocol states:

> "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 ICAO*** and the International Maritime Organization, respectively." (emphasis added)

44. ICAO's authority to deal with this matter does not, however, derive from the Kyoto Protocol. It derives from the Chicago Convention.

(c) Open Skies Agreement

45. The EU also recognised the central role of the Chicago Convention in relation to environmental issues *inter alia* in the bilateral air service agreement with the United States entered into in April 2007 (the ***Open Skies Agreement***) [RC/17].

46. Articles 15(3) and 3(4) of the Open Skies Agreement reflect and give effect to the central role of the Chicago Convention and ICAO in the regulation of environmental issues for international aviation.

47. Furthermore, the intended effect of the Open Skies Agreement can be seen from the Memorandum of Consultations, which was published with the draft Agreement in the Official Journal[8] [RC/18].

a. Paragraph 35 of the Memorandum states that, with respect to Article 15 of the Agreement ("Environment"),

> "the delegations noted the importance of international consensus in aviation environmental matters within the framework of the International Civil Aviation Organisation (ICAO). ..."

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[7] Countries may report emissions from international aviation on a voluntary basis as a separate memo item. For example, the UK reports cruise emissions from international flights for aircraft *departures* (but not arrivals) from UK airports. According to the UK National Inventory Report, "[t]his procedure prevents double counting of emissions allocated to international aviation." UK National Inventory Report, Annex 3, p. 385 (http://www.airquality.co.uk/reports/cat07/1004301344_ukghgi-90-08_Annexes_Issue3_Final.pdf). [AD/23, p. 313]

[8] OJ 2007 L 134, p.1 at p.33.

b. Paragraph 36 of the Memorandum states that:

> "Having regard to their respective positions on the issue of emissions trading for international aviation, the two delegations noted that the United States and the European Union intend to work within the framework of the International Civil Aviation Organisation."

C: ICAO ACTION IN RELATION TO GREENHOUSE GAS EMISSIONS

48. The regulation of greenhouse gas emissions has been, and continues to be, actively addressed within ICAO in accordance with the multilateral framework established by the Chicago Convention.

(a) ICAO's 35th Session

49. The issue of aviation greenhouse gas emissions was specifically considered at ICAO's 35th Session, as reflected and recorded in ICAO Resolution A35-5 of 8 October 2004 [RC/31].

50. Paragraph 1 of Appendix A to Resolution A35-5 included a declaration that, in carrying out its responsibilities, ICAO would strive to limit or reduce the impact of aviation greenhouse gas emissions on the global climate. Paragraph 8 of Appendix A urged States "to refrain from unilateral environmental measures that would adversely affect the orderly development of international civil aviation."

51. More detailed consideration of these specific issues is reflected in Appendices H and I to Resolution A35-5. Paragraph 2(c)(2) of Appendix I made a specific request to the ICAO Council to undertake further work in relation to emissions trading.

(b) ICAO's 36th Session

52. The issue of emissions trading was considered again at ICAO's 36th Session in September 2007, as reflected in Appendix L of ICAO Resolution A36-22 [RC/32].

53. The fourth recital in the preamble to Appendix L states:

> "that the majority of the Contracting States endorses the application of emissions trading for international aviation only on the basis of mutual agreement between States, and that other Contracting States consider that any open emissions trading system should be established in accordance with the principle of non-discrimination".

54. Paragraph 1 requested the ICAO Council to undertake further work in relation to emissions trading. Paragraph 1(b)(1) of Resolution A36-22 urged:

> "Contracting States not to implement an emissions trading system on other Contracting State's aircraft operators except on the basis of mutual agreement between those States;...".

55. In spite of the majority view of ICAO members, the EU Member States and 15 other European States entered a Reservation to Resolution A36-22. They "reserved the right under the Chicago Convention to enact and apply market-based measures on a non-discriminatory basis to all aircraft operators of all States providing services to, from or within their territory".[9]

56. As explained above, whilst Article 38 of the Chicago Convention provides a mechanism for departure from international standards and procedures adopted by ICAO pursuant to Article 37, there is no provision for departure from the substantive principles laid down in the Convention itself. These are absolute and must be respected by the contracting States.

(c) ICAO Guidance on Emissions Trading

57. Following the 36th Assembly, ICAO published Guidance on Emissions Trading for Aviation [AD/16, p. 209-253].[10]

58. The Guidance recalls, at paragraph 11.7, that Assembly Resolution A36-22 "urges States not to implement an emissions trading system except on the basis of mutual agreement with other States" and makes clear, at paragraph 3.2.35, that "States that wish to incorporate emissions from international aviation into their emissions trading schemes consistent with ICAO A36-22 (Appendix L) should not implement an emissions trading system on other Contracting States' aircraft operators except on the basis of mutual agreement between those States."

59. In addition, the Guidance states, at paragraph 3.2.23, that, even on the basis of mutual agreement, "State(s) would need to decide whether to include in the scheme emissions from flights arriving *or* departing on predetermined routes. …" (Emphasis added).

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9 The Reservation is referred to in the 9th Recital to the 2008 Directive, and set out in Extracts of the Minutes of the Ninth Plenary Meeting of the ICAO Assembly.

10 ICAO Doc 9885, Guidance on the Use of Emissions Trading for Aviation, 2008, [AD/16, p. 209-253].

The Amended Directive applies to flights arriving *and* departing in the EU. Even if there were mutual agreement with third parties regarding the Amended Directive (which there is not), the provisions of the EU ETS exceed the limits contained in the Guidance.

(d) Adoption of the Amended Directive

60. In spite of the clear international opposition within ICAO, the European Community adopted the 2008 Directive extending the application of the EU ETS to aviation activities on 19 November 2008.

61. As indicated at paragraph 58 of the Schedule (see also the documents at [RC/44, 45, 47 and 48]), the EU's unilateral action has provoked strong international criticism from *inter alia* the governments of Australia, Korea, China, Canada, Japan and the United States of America.

(e) ICAO's 37th Session

62. At the 37th Session of the Assembly of ICAO in October 2010, further progress was made in relation to emissions. Conditional agreement on a new ICAO Assembly Resolution was reached. The reason why the agreement was conditional was because some States expressed reservations and called upon the ICAO Council to continue its work on specific aspects of the agreement (see ICAO News Release dated 8 October 2010 [AD/17, p. 254-256]).

63. Details of the results of the 37th Session are set out in the relevant Report of the Executive Committee [AD/18, p. 257-274]. There was agreement to commit to a number of measures including development of a framework for market-based measures (***MBMs***) in international aviation. Canada, Mexico and the United States emphasised that it was important that States seeking to apply emissions trading to international aviation should engage other states whose carriers would be affected, with a view to seeking a mutually agreeable way forward (see para 17.3.22 and 17.3.24 of the Executive Committee Report, [AD/18, p. 261]). Article 14 of the draft Resolution urged States, "when designing new and implementing existing MBMs for international aviation…to engage in constructive bilateral and/or multilateral consultations and negotiations with other States to reach an agreement". Belgium, on

behalf of the EU and its Member States entered a reservation in relation to Article 14.[11] Whilst the EU's interpretation of this (conditional) Resolution differs from the interpretation of other parties, it is clear that it does not amend the Chicago Convention or the principles of customary international law relied on by the claimants (nor could it).

(f) Position of the aviation industry

64. The settled view of the principal stakeholders in the international aviation industry is that international aviation emissions should be subject to regulation agreed through the applicable ICAO procedures. They have actively participated in the ICAO process to achieve such a result. The first claimant's publicly expressed view is that:

> "…Policy measures must be developed at a global level to avoid the unilateral imposition of targets and measures and to avert creating a patchwork of conflicting and potentially overlapping national, regional and local policies."[12]

(g) Summary

65. In conclusion, the Chicago Convention/ICAO is internationally recognised as the forum through which international aviation issues, including greenhouse gas emissions, should be regulated. ICAO has specifically addressed, and adopted measures, in relation to greenhouse gas emissions and continues to do so. The EU itself has recognised this and originally engaged with ICAO in relation to greenhouse gas emissions. However, when it became dissatisfied with the multilateral process of ICAO, the EU decided, contrary to the clear wishes of the majority of Chicago Convention contracting States, to adopt a unilateral emissions trading system extending to other sovereign territories and the high seas, introduced without mutual agreement. For the reasons set out below, such behaviour is contrary to international law and to international agreements by which the EU is bound.

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[11] The suggestion at para 42 of the Environmental Interveners' written observations that ICAO recognises the legitimacy of "regional" MBMs is correct. However, it is also clear that ICAO does not recognise the legitimacy of regional MBMs with extra-territorial effect.

[12] http://www.airlines.org/Environment/ClimateChange/Pages/TheAirTransportAssociationClimateChangeCommitment-AGlobal,SectoralApproach.aspx. [AD/24, p. 315-317]

(4) RULES OF CUSTOMARY INTERNATIONAL LAW

A: ISSUES RAISED BY THE QUESTIONS REFERRED

66. The first reason why the application of the EU ETS to aviation activities is unlawful is because it is contrary to certain principles of customary international law. This is the subject of questions 1(a)-(d) and 2 of the Referring Court, which raise the following issues:

    (i) Does customary international law constitute a ground of review of the legality of EU legislation?

    (ii) Which of the principles referred to in the questions referred are principles of customary international law?

    (iii) Does the manner in which the EU ETS has been applied to aviation activities contravene any such principles of customary international law?

B: CUSTOMARY INTERNATIONAL LAW AS A GROUND OF REVIEW

67. It is well established by consistent case law that the validity of an EU measure can be reviewed for compatibility with customary international law e.g. see Case C-286/90 *Poulsen and Diva Navigation Corp* [1992] ECR I-6019 paras 9-10; Case C-162/96 *A. Racke GmbH* [1998] ECR I-3655 para 45; Case C-386/08 *Brita GmbH*, judgment of 25 February 2010, para 42. This was common ground before the Referring Court (Schedule para 68).

C: SOVEREIGNTY

(a) Sovereignty is a principle of customary international law

68. The principle of sovereignty, or territoriality, is a universally recognised principle of customary international law; see Joined Cases 89 etc/85 *Ahlström v Commission* [1988] ECR 5193 para 18. It is recognised in *inter alia* Article 2(1) of the Charter of the United Nations.

69. The application of the principle of sovereignty to aviation activities is confirmed and codified by Article 1 of the Chicago Convention, entitled, "Sovereignty", which provides:

> "The contracting States recognise that every state has complete and exclusive sovereignty over the airspace above its territory."

70. In *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America*),[13] the International Court of Justice held:

> "The Court should now mention the principle of respect for State sovereignty, which in international law is of course closely linked with the principles of the prohibition of the use of force and of non-intervention. The basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. As to superjacent air space, the 1944 Chicago Convention on International Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory. That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. ***The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law.***" (Emphasis added.)

71. Not surprisingly, the existence of the customary international law principle that each State has complete and exclusive sovereignty over the airspace above its territory was common ground in the proceedings before the Referring Court; see Schedule para 26.

(b) Content of the principle of sovereignty

(i) Nature of sovereignty/power to legislate

72. The principle of sovereignty both defines and limits a State's power. In the *Island of Palmas case (Netherlands/USA)*[14], the Arbitrator made the following general remarks on sovereignty in its relation to territory:

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, ***to the exclusion of any other State***, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the ***exclusive***

[13] Judgment of 27 June 1986, ICJ Reports 1986, para 212 [RC/27].
[14] 4 April 1928, Reports of International Arbitral Awards, Volume II pp.829-871 [AD/13, p. 123-165].

> ***competence of the State in regard to its own territory*** in such a way as to make it the point of departure in settling most questions that concern international relations." (Emphasis added.)

73. It is well-established that the principle of sovereignty includes the exclusive competence of a State to ***adopt*** legislation to regulate conduct which occurs on its own territory; not just the enforcement of such legislation. Professor Vaughan Lowe QC[15] has explained the position as follows:[16]

> (i) "Each State has the right to regulate its own public order, and to that end it is entitled to legislate for everyone within its territory".
>
> (ii) ""Jurisdiction" is the term that describes the limits of the legal competence of a State or other regulatory authority (such as the European Community) to make, apply, and enforce rules of conduct upon persons."

74. Similarly, Jennings and Watts, *Oppenheim's International Law* (9th ed, Longman) states (at p.456, [AD/27, p. 332]):

> "State jurisdiction concerns essentially the extent of each state's right ***to regulate*** conduct or the consequences of events. In practice jurisdiction is not a single concept. ***A state's jurisdiction may take various forms. Thus a state may regulate conduct by legislation***; or it may, through its courts, regulate those differences which come before them, whether arising out of the civil or criminal law; or it may regulate conduct by taking executive or administrative action which impinges more directly on the course of events, as by enforcing its laws or the decisions of its courts. The extent of a state's jurisdiction may differ in each of these contexts...". (Emphasis added.)

75. It is also well-established that a State may accept limitations on the right to exercise its sovereign power within its own territory by adherence to an international treaty.[17] When exercising its sovereign power within its territory, a State is required to respect the substantive provisions of international treaties by which it is bound, such as the Chicago Convention.

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15 Chichele Professor of Public International Law and Fellow of All Souls College in the University of Oxford.

16 At page 335 of Chapter 11 "Jurisdiction" in *International Law* (2nd ed, 2006, Oxford), edited by Professor Malcolm Evans [AD/25, p. 319].

17 Brownlie, *Principles of Public International Law*, (7th ed.), pp. 311-312 [RC/50] and the *Nicaragua Case* para 135 [RC/27].

(ii) Competence to act extra-territorially

76. International law does recognise that States may act extra-territorially under certain limited circumstances. The current state of the law is as described by Professor Vaughan Lowe:[18]

> "The sovereign equality of States is equally a fundamental principle of international law. Claims by one State to prescribe rules for persons in another State encroach upon the right of the State where those persons are based itself to exercise jurisdiction over those persons within its territory. There are two States – two 'co-existing independent communities' – involved, and there plainly can be no presumption that the one asserting extraterritorial jurisdiction is entitled to prevail in the extent of a conflict, and to impose its laws on persons within the territory of another State.
>
> The best view is that it is necessary for there to be some clear connecting factor, ***of a kind whose use is approved by international law***, between the legislating State and the conduct that it seeks to regulate. This notion of the need for a linking point, which has been adopted by some prominent jurists, accords closely with the actual practice of States. If there exists such a linking point, one may presume that the State is entitled to legislate; if there does not, the State must show why it is entitled to legislate for anyone other than persons in its territory and for its nationals abroad (who are covered by the territorial and the nationality principles respectively).
>
> There are two of these linking points, or "Bases of Jurisdiction", or "principles of jurisdiction" (the terms mean the same thing) that are firmly established in international law: territoriality, and nationality."[19] (Emphasis added.)

77. Some academic authors, recognising that extra-territorial acts may be justified in certain exceptional circumstances, have sought to identify a common principle underlying those exceptions, e.g. see Brownlie, *Principles of Public International Law,* (7th ed.), pp. 311-312 [RC/50]. However, these academic attempts to identify a common thread underpinning the existing limited categories of exceptions permitting the exercise of extra-territorial jurisdiction (generally in criminal matters; see Brownlie at pp. 300-307) are not intended to suggest that there is a generally accepted "rule of reason" permitting the exercise of extra-territorial jurisdiction in international law. This is reflected in the position adopted by the defendant before the Referring Court, namely that the academic analysis set out by Brownlie has no application in the

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[18] At pages 341-342 of Chapter 11 "Jurisdiction" in *International Law* (2nd ed, 2006, Oxford), edited by Professor Malcolm Evans [AD/25, p. 321-322].

[19] The territoriality and nationality principles are described by Professor Vaughan Lowe at pp.342-347 [AD/25, p. 322-327].

present case (see Schedule para 85). The defendant was clearly right to adopt this position.[20]

78. State practice is consistently based upon the premise that it is for the State asserting some novel extra-territorial jurisdiction to prove that it is entitled to do so.[21] It is therefore for the EU to identify an established principle of customary international law to justify its adoption of extra-territorial legislation. In order to establish such a principle, the EU would have to satisfy the following requirement, as enunciated in the *Asylum case (Columbia v Peru)* [1950] ICJ Reports 266 at 276-277 [AD/29, p. 366-367]:

> "The party which relies on custom…must prove that this custom is established in such a manner that it has become binding on the other party…that the rule invoked…is in accordance with a constant and uniform usage practised by the States in question,…".

(iii) Extra-territoriality and the environment

79. It is clear that, in respect of environmental legislation, there is no justification or connecting factor of a kind whose use is approved by international law for extra-territorial measures. Indeed, the opposite is the case. In this area, it has long been established that States are required to respect each others' sovereignty. This is confirmed by the position adopted in various international agreements.

80. First, the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972 [AD/3, p. 21-22] states:

(i) Principle 21:"States have, in accordance with the Charter of the United Nations and the principles of international law, the ***sovereign right to exploit their own resources pursuant to their environmental policies***, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (Emphasis added.)

(ii) Principle 24: "International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing.

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[20] The purported reliance on *The Lotus Case (France v Turkey)*, PCIJ, Ser. A., No. 10 1927 [RC/25] at para 35 of the Environmental Interveners' written observations is misplaced. See Vaughan Lowe, above, at p.340-341 [AD/25, p. 320-321], who describes the interpretation of *The Lotus* relied upon by the Environmental Interveners as "a tiresome and oddly persistent fallacy".

[21] See page 341 of Chapter 11 "Jurisdiction" in *International Law* (2nd ed, 2002, Oxford), edited by Professor Malcolm Evans [AD/25, p. 321].

Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, ***in such a way that due account is taken of the sovereignty and interests of all States***." (Emphasis added.)

(iii) Principle 25: "States shall ensure that international organizations play a coordinated, efficient and dynamic role for the protection and improvement of the environment."

81. Second, the Rio Declaration on Environment and Development adopted at the UN Conference in June 1992 [AD/4, p. 23-25] "reaffirmed" and "built upon" the Stockholm Declaration[22] as follows:

(i) Principle 2: "States have, in accordance with the Charter of the United Nations and the principles of international law, ***the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies***, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

(ii) Principle 12: "States should co-operate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. ***Unilateral action to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.***" (Emphasis added.)

82. Third, the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982 (***UNCLOS***)[23] [RC/14], to which the EC is a signatory, provides:

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22 See the first recital in the Preamble to the Rio Declaration.

23 Although the ECJ has held that the specific provisions of UNCLOS do not have direct effect in the Community legal order, it has also held that the powers of the Community must be exercised in observance of international law, including provisions of international agreements in so far as they codify customary rules of general international law; and the main objective of UNCLOS is to codify, clarify and develop the rules of general international law relating to the sea. (See Case C-308/06 *Intertanko* [2008] ECR I-4057 paras 51, 53, 55 and 64). UNCLOS is therefore relevant insofar as it identifies and codifies customary rules of general international law and also insofar as it indicates the scope and content of such rules.

(i) Article 212:

> "1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or though the atmosphere, ***applicable to air space under their sovereignty and to*** vessels flying their flag or vessels or ***aircraft of their registry***, taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation.
>
> …
>
> (3) States, ***acting especially through competent international organizations or diplomatic conference***, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control such pollution." (Emphasis added.)

(ii) Article 222:

> "States shall enforce, ***within the air space under their sovereignty or with regard to*** vessels flying their flag or vessels or aircraft of their registry, their laws and regulations adopted in accordance with article 212, paragraph 1, and with other provisions of this Convention and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards ***established through competent international organizations or diplomatic conference*** to prevent, reduce and control pollution of the marine environment from or through the atmosphere, in conformity with all relevant international rules and standards concerning the safety of air navigation." (Emphasis added.)

83. Articles 212(1) and 222 make it clear that, as a matter of public international law, a State has power to adopt environmental legislation in relation to atmospheric pollution only in respect of air space under its sovereignty or aircraft of its registry.

84. Fourth, the third and fourth recitals to the UN Rio Convention on Biological Diversity, which was approved by the EC (OJ 1993 L 309, p.1) [AD/5, p. 28], having affirmed "that the conservation of biological diversity is a common concern of humankind", reaffirms "that States have sovereign rights over their own biological resources".

85. Finally, the ninth recital in the preamble to the UNFCCC [AD/6, p. 42], to which the EU is a party, "reaffirms":

> "…the principle of sovereignty of States in international cooperation to address climate change."

86. The requirement of international cooperation is reflected in Article 2(2) of the Kyoto Protocol to the UNFCCC [RC/15] which states:

> "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". (Emphasis added.)

87. It is therefore clear that, in international law, the common interest in protection of the environment does not justify the adoption of unilateral extra-territorial measures by individual States. Instead, international law emphasises the importance of each State's sovereignty in relation to the environment and the need to act through international cooperation in order to address common concerns. The reason for this is obvious. Unilateral action, such as that adopted by the EU in this case, which seeks to impose one State's preferred solution to environmental problems on other States, is a recipe for confusion and conflict. Such an approach is the antithesis of the objectives of international law.

88. Finally, for the avoidance of doubt, there is no scope for the application of an "effects" principle to justify the adoption of environmental legislation with extra-territorial scope. The justification for assertion of jurisdiction on the basis of an alleged "effects" principle of jurisdiction has not been generally accepted, and the matter is still one of controversy; see P. Sands,[24] *Principles of International Environmental Law* (2nd ed, 2003, Cambridge University Press) at p.240 [AD/26, p. 329]; O*ppenheim* at p.472-476 [AD/27, p. 333-337] and *Vaughan Lowe* at pp. 344-345 [AD/25, p. 324-325]. The recognition of an "effects" principle to justify the adoption of extra-territorial legislation would be particularly inappropriate in relation to global environmental measures. For example, it could be invoked to give the EU a right to adopt legislation in respect of the use of aerosols in Australia or coal-burning power stations in China. As indicated above, it is precisely because of the specific nature of transborder environmental issues that international law places particular emphasis on the need to respect sovereignty in relation to the environment, and in the aviation context in particular, to adopt rules working through the UN-recognised body, ICAO.

[24] Philippe Sands QC, Professor at University College London.

89. In summary, the claimants submit that:

(i) There is a principle of customary international law that a State has exclusive competence to regulate by legislation conduct which occurs on its own territory (including the airspace above that territory).

(ii) International law does not recognise any exception which could justify the extra-territorial application of jurisdiction in respect of third country aircraft in a case such as the present. In any event, the burden of proof is on the EU to establish the existence of any such principle.

(c) Breach of the principle of sovereignty

90. There are two principal reasons why the EU ETS is in breach of the customary international law principle of sovereignty. These are: (i) the extra-territorial aspect of the imposition of a cap on total aviation emissions; and (ii) the extra-territorial aspect of the requirement on aircraft operators to surrender emissions allowances.

91. First, as explained above at paragraphs 13-17, the EU ETS imposes a cap on the total quantity of emissions allowances for aviation activities which is not limited to emissions in EU airspace, but also applies to emissions outside EU airspace in respect of flights departing from or arriving in an EU Member State.

92. Secondly, as explained above at paragraphs 19-24, the EU ETS requires the surrender of allowances relating not just to flight over EU airspace, but also to parts of a flight conducted over the high seas and over the territory of third countries. It also applies to time spent on the ground at an airport in a third country at the beginning or end of a flight.

93. The so-called "Delft Report" prepared on behalf of DG Environment as part of the process leading to the adoption of the Amended Directive suggested that the EU ETS would be consistent with the principle of sovereignty because "The amount of emissions of greenhouse gases caused by a flight would…constitute only a calculation parameter to quantify the amount of allowances to be surrendered" and that, therefore,

"the requirement to surrender allowances would purely constitute an obligation related to the admission to and/or departure from EU airports."[25]

94. However, this suggested analysis is a hollow attempt to seek to allow form to triumph over substance. According to Article 1 of the Amended Directive, the purpose of the EU ETS is "to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner". The EU ETS seeks to achieve this purpose *inter alia* in third countries' airspace by imposing a cap on the total quantity of emissions allowances available and by requiring the surrender of allowances. Both these elements of the EU ETS are not limited to aviation activities in EU airspace, but also those parts of flights in third countries' airspace and territory. It is therefore wholly artificial to suggest that the scope and effect of the EU ETS is restricted to EU airspace. Given the scope and manner of application of the EU ETS to aviation activities, it is clear that it seeks to achieve its objective not just for emissions from flights over EU airspace, but also flights over third countries' airspace and emissions on the ground at third country airports.

95. The unlawful, extra-territorial nature of the application of the EU ETS to aviation activities can be demonstrated as follows:

(i) If the EU sought to cap the total emissions or require the surrender of allowances in respect of purely domestic US flights, it could not be seriously argued that this would be compatible with the principle of sovereignty (regardless of any difficulties of enforcement). The US has exclusive competence to regulate flights over its own airspace.

(ii) Equally, if the EU sought to cap the total emissions or require the surrender of allowances in respect of all international flights over US airspace, including those which did not depart from or arrive in an EU Member State, such a regime would also clearly conflict with the principle of sovereignty.

(iii) The extra-territorial nature of the cap on total emissions and the requirement to surrender allowances in respect of flights over US

[25] [RC/43] at p.174. The same point is put forward by the Environmental Interveners at paras 10-11 and 31-36 of their written observations.

airspace is not altered by the fact that its application is restricted to flights which depart from or arrive in an EU Member State. The EU ETS seeks to reduce greenhouse gas emissions caused by the entirety of such flights, including those parts over third country airspace. It imposes legal obligations, creates financial costs and threatens penal action in respect of activities taking place outside the EU, and indeed, within the territory of third countries. It is therefore contrary to the principle of sovereignty.

(d) No lawful justification in any event

96. Alternatively, even if, contrary to the above, the EU were to identify a possible justification of a kind whose use is approved by international law for the extra-territorial scope of the application of the EU ETS to aviation activities, the application of the EU ETS to third country airspace would still be unlawful.

97. Even if the possibility of such a justification did exist, the extra-territorial application of the EU ETS could only be lawful if:

(i) there existed a substantial and *bona fide* connection between the subject-matter of the contested legislation and the source of the jurisdiction;

(ii) the principle of non-intervention in the territorial jurisdiction was observed; and

(iii) the intervention was proportionate. (See Brownlie at pp. 311-312 [RC/50] and Schedule para 85)

98. The EU has purported to regulate aviation emissions outside EU airspace. The source of the supposed jurisdiction is the fact that a flight departs from or arrives at an airport in the EU. However, this connecting factor cannot justify the purported exercise of extra-territorial jurisdiction by the EU on a world-wide basis.

(i) First, the fact that a flight between an EU Member State and a third country departs from or arrives in the EU provides no stronger connection with the EU than it does with the third country. Each of

those flights also necessarily arrives from or departs in a third country. The connecting factor relied on by the EU therefore cannot override a third country's right to regulate its own airspace.

(ii) Second, as indicated above, it would be unjustified and disproportionate for the EU to seek to apply the EU ETS to purely domestic flights in the US. That conclusion remains unaltered in respect of the attempt to impose the EU ETS on the part of a flight from the US to the EU over US airspace.

(iii) Third, the application of the EU ETS is illogical and disproportionate. By way of example, in relation to a flight from Texas to London, a far greater proportion of the flight takes place over US airspace. There is no rational justification for the EU seeking to apply the EU ETS to the totality of the flight, including the part over US airspace. Equally, on a flight from Tokyo to Helsinki, the distance covered by the flight over Russian airspace is far greater than over Finnish airspace. Again, there is no rational justification for the application of the EU ETS to the totality of that flight.

99. The mere fact that a flight departs from or arrives at an EU airport therefore does not provide a sufficiently strong connection to justify the EU applying the EU ETS on a worldwide basis.

100. Further or alternatively, the EU ETS contravenes the principle of sovereignty because it does not respect the principle of non-intervention in the territorial jurisdiction of other states.

101. If the US wished to adopt its own emissions trading scheme in respect of its own airspace, its ability to do so on the terms that it considered appropriate would be impeded by the extra-territorial application of the EU ETS. In deciding what form of scheme was appropriate, the US would inevitably have to take account of the existing effects of the EU ETS on flights within US airspace in order to avoid imposing an inappropriate or inequitable burden on such flights.

102. The fact that the scope of the EU ETS is a form of regulation which impacts on third countries' rights to regulate their own airspace is expressly recognised by recital 17 in the preamble to the Amended Directive, which states:

> "Bilateral arrangements on linking the Community scheme with other trading schemes to form a common scheme or taking account of equivalent measures ***to avoid double regulation*** could constitute a step towards global agreement. Where such bilateral arrangements are made, the Commission may amend the types of aviation activities included in the Community scheme, including consequential adjustments to the total quantity of allowances to be issued to aircraft operators." (Emphasis added)

103. Furthermore, the fact that Article 25a of the Amended Directive provides for a mechanism to take account of third countries' climate change legislation relating to air transport does not cure the breach of sovereignty by the EU ETS.

104. Article 25a provides

> "Where a third country adopts measures for reducing the climate change impact of flights departing from that country which land in the Community, the Commission, after consulting with that third country, and with Members States within the Committee referred to in Article 23(1), shall consider options available in order to provide for optimal interaction between the Community Scheme and that country's measures.
>
> Where necessary, the Commission may adopt amendments to provide for flights arriving from the third country concerned to be excluded from the aviation activities listed in Annex I or to provide for any other amendments to the aviation activities listed in Annex I which are required by an agreement pursuant to the fourth subparagraph."

105. The reason why Article 25a does not prevent a breach of the principle of sovereignty is that any accommodation to take account of measures adopted by a third country is dependent on the *ex post* discretionary assessment of the Commission. When it adopts its own legislation, a third country cannot be sure that the Commission will amend the application of the EU ETS at all or, if so, in what way. Under the principle of sovereignty, a third country's exclusive competence to regulate activities in its own airspace cannot be subjected to the discretion of the EU Commission.

D: CUSTOMARY INTERNATIONAL LAW PRINCIPLES APPLICABLE TO THE HIGH SEAS

(a) Customary international law principles applicable to the high seas

106. The high seas are subject to specific principles of customary international law.

107. It is well-established that:

(i) The high seas are open to all States and the freedom of the high seas comprises the freedom of overflight; and

(ii) No State may validly purport or subject any part of the high seas to its sovereignty.

108. The existence of these principles is established *inter alia* by: articles 87 and 89 of UNCLOS; article 2 of the UN Convention on the High Seas, done at Geneva on 29 April 1958 (which treaty, as its preamble records, was intended as "generally declaratory of established principles of international law); *Fisheries Jurisdiction Case (United Kingdom v Iceland*) ICJ Reports, 1974 [RC/26], para 50 at p.22; Lowe and Churchill *The Law of the Sea* (3rd ed, 1999) [RC/53] at p.204; and *Oppenheim* [RC/54] para 284 at pp. 726-728.

109. In the proceedings before the national court, the defendant accepted the existence of these principles (see Schedule para 68).

110. Brownlie's suggested analysis of the basis of existing exceptions to the principle of sovereignty based on a substantial connection does not apply to the high seas. This is expressly stated at Brownlie [RC/50] p. 312 at (e) and was accepted by the defendant in the national proceedings (see Schedule para 85).

111. There is a further relevant principle of customary international law (which is not accepted by the defendant) that the State of registration of an aircraft has exclusive jurisdiction over an aircraft when it is over the high seas. The existence of this principle is established *inter alia* by Case C-286/90 *Poulsen* [1992] ECR I-6019 paras 21-22; the judgment of the Court of Appeal, Wellington, in *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 [RC/29] at 46-47; articles 92, 212 and 222 of UNCLOS [RC/14]; article 6 of the UN Convention on the High Seas [RC/12]; Lowe and

Churchill *The Law of the Sea* (3rd ed, 1999) [RC/53], at p.208; and *Oppenheim* [RC/55] para 287 at pp. 731. The suggestion made by the Environmental Interveners at paras 15-20 of their written observations that a distinction has to be drawn between ships and aircraft in this regard is unfounded – the principle is the same in relation to both; e.g. see the extract cited from *Oppenheim* and the common treatment of ships and aircraft in Articles 212 and 222 of UNCLOS.

112. However, even if the Court were to find that this principle does not constitute a principle of international law, this would not render the application of the EU ETS to the high seas lawful. Regardless of the existence of such a principle, it would still be contrary to the freedom of overflight and the prohibition on the exercise of national sovereignty over the high seas to apply the EU ETS to aircraft registered in third countries in respect of flights over the high seas.

(b) Breach of the customary international law principles applicable to the high seas

113. The reasons why the application of the EU ETS to the high seas is contrary to the relevant principles of customary international law identified above are similar to the reasons why it is contrary to the principle of sovereignty.

114. The EU ETS applies the EU emission trading rules to flights over the high seas as it applies to the entirety of flights which arrive at or depart from an aerodrome situated within the territory of an EU Member State (see Annex I para 6 of the Amended Directive). As explained above, in respect of such flights, both the cap imposed on the total quantity of emissions allowances for aviation activities and the requirement to surrender allowances are not limited to those parts of the flights in EU airspace but also apply to the parts outside EU airspace.

115. As is clear from Article 1 of the Amended Directive, the objective of the EU ETS is to promote reductions of greenhouse gas emissions. It is clear from the scope and manner of application of the Amended Directive that this includes the reduction of such emissions from flights over the high seas. In relation to fights departing from or arriving in an EU Member State, the cap placed on the total quantity of available emissions allowances covers emissions over the high seas and the requirement on aircraft operators to surrender allowances applies in respect of those parts of flights

over the high seas. The adoption of such legislation is therefore contrary to the principles of customary international law identified above.

116. As already explained in relation to the principle of sovereignty, the principle of freedom of the high seas is not limited to enforcement acts taken on the high seas, it also applies to the adoption of legislation purporting to apply to conduct on the high seas. *Oppenheim* [RC/54] describes the effect of the principle of freedom of the high seas, and the resultant principle that no State may therefore purport to subject any part of the them to its territorial sovereignty in the following terms (at para 284, p.726):

> "Since, therefore, the open sea is not the territory of any State, no State has as a rule a right to exercise its legislation, administration, jurisdiction, or police over parts of the high seas."

117. The customary international law principle prohibiting the unilateral adoption of legislation concerning the high seas is reflected *inter alia* in Articles 212 and 222 of UNCLOS (set out above) which expressly distinguish between the adoption of legislation and its enforcement. Article 212 concerns the adoption of legislation; Article 222 concerns its enforcement. In relation to the adoption of legislation, Article 212(1) of UNCLOS, consistent with the principle of the freedom of the high seas as described in Articles 87 and 89, provides that States may only "adopt" laws relating to atmospheric pollution which are "applicable to the air space under their sovereignty…and to aircraft of their registry." This is consistent with the fact that the adoption of legislation applicable to the high seas is contrary to the customary international law principle of the freedom of the high seas. That principle, and the prohibition on the exercise of sovereignty which forms part of it, preclude the adoption of legislation applicable to the high seas, not just the enforcement of such legislation.

118. Once again, the correctness of this legal analysis can be confirmed by reference to a hypothetical example. If the EU purported to cap the total emissions, or require the surrender of allowances, in relation to flights over the Pacific Ocean which did not depart from or arrive at an airport in the EU, such measures would be clearly unacceptable under customary international law principles. The fact that the EU ETS imposes a cap on total emissions allowances and requires the surrender of allowances in a manner which applies to flights over the Pacific Ocean does not become

acceptable merely because those measures are limited to flights departing from or arriving at an airport in the EU. The inescapable truth is that the EU has sought to arrogate to itself jurisdiction to regulate activities on the high seas by adopting environmental legislation that applies to activities over the high seas. This is a clear contravention of basic principles of customary international law.

119. As recognised in the various international declarations and agreements concerning the environment identified above, regulation of transboundary or global environmental problems, including those concerning the high seas, can only legitimately be brought about by international cooperation and agreement, not by unilateral imposition.

(5) INCOMPATIBILITY WITH INTERNATIONAL TREATIES

A: RELIANCE ON INTERNATIONAL AGREEMENTS TO CHALLENGE THE VALIDITY OF EU SECONDARY LEGISLATION

(a) Applicable legal principles

120. According to consistent law (see Case C-308/06 *Intertanko* [2008] ECR I-4057 paras 42-49), the validity of EU secondary legislation may be challenged on the basis of its alleged incompatibility with an international treaty where:

(i) the EU is bound by the international treaty because:

i. the EU itself is a party to the international treaty (Article 216(2) TFEU); or

ii. where the Member States are parties, but the EU itself is not, the EU has assumed the powers previously exercised by the Member States in the field to which the international treaty applies;

(ii) the nature and broad logic of the relevant provisions of the international treaty do not preclude examination of the validity of EU measures in light of those provisions; and

(iii) the relevant provisions of the treaty are, as regards their content, unconditional and sufficiently precise.

(b) Chicago Convention

121. Question 1(e) of the questions referred asks whether the Chicago Convention [RC/11] may be relied upon to challenge the validity of an EU measure.

(i) The EU is bound by the Chicago Convention

122. The EU is not a signatory to the Chicago Convention. However, all of the EU Member States are and the claimants submit that the EU is bound by the Chicago Convention by virtue of the "succession principle" established by the Court in Joined Cases 21-24/72 *International Fruit* [1972] ECR 1219 paras 10-18 because the EU has

assumed the powers previously exercised by the EU Member States in the field to which the Chicago Convention applies.

123. In Case 22/70 *Commission v Council ("AETR")* [1971] ECR 263 paras 17-19, the Court held that, as and when the Community adopts internal provisions laying down common rules implementing a common policy envisaged by the Treaty, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.

124. In relation to air transport, the Commission has asserted that the EU enjoys "extensive powers and responsibilities in the field of air transport, notably in virtually all areas within ICAO's remit."[26] Further, the Commission has stated[27] that the EU's involvement with matters dealt with at ICAO (including protection of the environment, market access, computer reservation systems, air traffic management, satellite navigation, air transport safety and security) and the adoption of a number of specific EU legislative instruments[28] in these areas has brought the relevant subjects within the EU's competence, specifically invoking the Court's judgment in the *AETR* case. In addition, the Council has acknowledged that "the Community has gradually introduced a common air transport policy".[29]

125. Further, in December 2009 the Council granted the Commission a mandate to negotiate on behalf of the Community a framework for enhanced cooperation with ICAO. Pursuant to this mandate, on 27 September 2010, the EU entered into a Memorandum of Cooperation with ICAO regarding the matters governed by the Chicago Convention, specifically aviation safety, aviation security, air transport management and environmental protection.[30] The Commission described this

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26 Website of the Commission's Representation to ICAO, concerning the status of the EC (now EU) at ICAO, available at: http://ec.europa.eu/transport/air/international_aviation/european_community_icao/european_community_icao_en.htm [AD/9, p. 89].

27 Recommendation from the Commission to the Council in order to authorise the Commission to open and conduct negotiations with the International Civil Aviation Organization on the conditions and arrangements for accession by the European Community (SEC (2002)381 final) (the ***Recommendation***) Section 2 [AD/7, p. 72].

28 Annex I to the Recommendation lists over 20 such instruments, covering the fields of market operation, air traffic management, environment, air safety, air carrier liability and working conditions [AD/8, p. 84-87].

29 See, for example, the first preambular paragraph to Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports [AD/10, p. 92].

30 Memorandum of Cooperation between the EU and ICAO providing for an enhanced framework for cooperation, initialled at Montreal on 27 September 2010 [AD/11, p. 103-116].

Memorandum of Cooperation as an "acknowledgement by ICAO of the EU's extensive competence in air transport."[31]

126. The claimants submit that, given the extensive nature of the EU's internal legislation concerning aviation identified by the Commission and the EU's role within ICAO, the *AETR* principle applies and the EU is now bound by the Chicago Convention.

127. Further or alternatively, it cannot be the case that, for the EU to be bound by the Chicago Convention, it must have succeeded to the powers of the EU Member States in relation to ***every*** aspect conceivably covered by every provision of the Convention. This would create an unacceptable lacuna as a matter of both international and EU law whereby the EU would have exclusive competence in relation to certain matters covered by the Chicago Convention but would not be bound by the Chicago Convention in those regards. It is inherent in the logic of the "succession principle" established in *International Fruit*, that the EU must be bound by those aspects of an international agreement in relation to which it has assumed exclusive competence at EU level.

128. In relation to the regulation of emissions from aviation activities, the EU has of course adopted specific legislation, namely the Amended Directive. Insofar as the EU has exercised its internal competence relating to the regulation of emissions from aviation activities, the EU has therefore assumed the powers previously exercised by the EU Member States in relation to those matters as covered by the Chicago Convention and the EU is therefore now bound by the Chicago Convention in relation to those matters.

(ii) Position if the EU is not bound by the Chicago Convention

129. If, contrary to the above, the Court finds that the Chicago Convention is not binding on the EU, it should not go on to consider any of the further questions relating to the nature, effect and interpretation of that Convention. In this scenario, these questions will be matters for the national court to determine when considering the application of

[31] Information Note of 13 October 2010 from the Commission to the Council regarding the 37th ICAO General Assembly (Montreal, 28 September to 8 October 2010) at para 3.1 [AD/12, p. 119].

Article 351 TFEU: see Case 812/79 *Attorney General v Burgoa* [1980] ECR 2787 paras 6-11 and Case C-158/91 *Levy* [1993] ECR I-4287 paras 22-23.[32]

(iii) Nature and broad logic of the Chicago Convention

130. The claimants submit that the nature and broad logic of the Chicago Convention does not preclude examination of the validity of EU measures in light of its provisions. The status of international law in the EU legal order has been recently affirmed by Articles 3(5) and 21(1) TFEU. In particular, Article 3(5) requires the Union to contribute to "the strict observance and the development of international law". The Court should therefore strive to give the utmost effect to international treaties, including by recognising, wherever possible, the ability of private parties to rely on international treaties to challenge the validity of EU measures. Such recognition will serve to ensure the "strict observance" of international law by EU measures. Even before the adoption of the TFEU, the Court only very rarely held that the broad nature and logic of an international treaty was such as to preclude examination of the validity of Community measures in light of it.

131. The purpose of the Chicago Convention is to establish practical principles to permit the operation and development of international civil aviation. This is reflected in the third paragraph to its preamble which states:

> "Therefore, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be ***established*** on the basis of ***equality of opportunity*** and ***operated*** soundly and economically". (Emphasis added.)

132. As is clear from the Court's case law, the right of equal treatment is *par excellence* the sort of right which can be invoked by individuals. Furthermore, the similarity between rights which permit international air transport services to be "established" and "operated" and the rights of freedom of establishment and to provide services under the TFEU is self-evident. Given that such rights are capable of being invoked by individuals when arising under EU law, they must equally be capable of being invoked by individuals when arising under the Chicago Convention.

[32] This is without prejudice to the argument at para 176 below that the EU is bound in any event by Article 15 of the Chicago Convention by virtue of Articles 3(4) and 15(3) of the Open Skies Agreement.

133. Before the Referring Court, the defendant sought to rely on the finding in Case C-308/06 *Intertanko* [2008] ECR I-4057 paras 53-65 that the nature and broad logic of UNCLOS precluded its use to impugn the validity of EU measures. However, the Court's reasoning in that case cannot be applied to the Chicago Convention. First, since the judgment in *Intertanko*, Articles 3(5) and 21(1) TFEU have been adopted and come into effect. Second, as, recognised at para 55 of *Intertanko*, the main objective of UNCLOS is limited to the codification, clarification and development of the rules of general international law relating to the law of the sea. This is reflected, in particular, in the first recital in the preamble to UNCLOS, which indicates that it was prompted "by the desire to settle…all issues relating to the law of the sea". In contrast, as indicated above, the purpose of the Chicago Convention is to establish practical principles to permit the operation and development of international civil aviation.

134. The fact that the application of the Chicago Convention is not limited to its contracting States is further confirmed by, for example:

(i) Article 15, which imposes obligations relating to airports. Airports are often owned and operated by private parties, not by the State;

(ii) Article 39(b), which exposes individual licence-holders to endorsement or attachment of their licences in respect of any failure to satisfy international standards of airworthiness or performance; and

(iii) Article 40, which prohibits aircraft or private parties with certificates or licences so endorsed from participating in international aviation, save with State permission.

135. The Chicago Convention, by its nature and specific provisions, therefore seeks to establish rights capable of being invoked by individuals. Again, this is different from UNCLOS which, as stated at para 58 of *Intertanko*, "seeks to strike a fair balance between the interests of States".

136. Finally, whilst the approach adopted in other signatory states to the enforceability of the Chicago Convention cannot be determinative of its status in EU law, the Court has recognised the need to take account of reciprocity when considering the nature of

international agreements (see Case C-149/96 *Portugal v Council* [1999] ECR I-8395 paras 42-45). Significantly, given the nationality of the claimants, the US Courts have long recognised that the Chicago Convention may be relied upon by private parties in domestic legal proceedings; see *Aerovias Interamericanas de Panama v Board of County Commissioners* 197 F. Supp. 230 (S.D. Fla. 1961) [AD/14, p. 166-192] and *British Caledonian Airways, Ltd. v. Bond*, 665 F.2d 1153, 1160 (D.C. Cir. 1981) [AD/15, p. 193-208].

(iv) Relevant provisions of the Chicago Convention are unconditional and sufficiently precise

137. Articles 1, 11, 12, 15 and 24 of the Chicago Convention are all unconditional and sufficiently precise. They establish clearly defined obligations which are not dependent upon the adoption of any further measures by ICAO or the contracting parties.

(v) Ground of review in any event

138. Even if (contrary to the above) the provisions of the Chicago Convention did not have direct effect, that would not preclude review by the Court of the legality of the Amended Directive, insofar as it imposes an obligation on the EU Member States to breach their obligations under the Chicago Convention (see Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079 paras 50-55).

(c) Open Skies Agreement

139. Question 1(e) of the questions referred asks whether the Open Skies Agreement may be relied upon to challenge the validity of an EU measure.

(i) The EU is bound by the Open Skies Agreement

140. The EU is a party to the Open Skies Agreement and is therefore bound by it pursuant to Article 216(2) TFEU.

(ii) Nature and broad logic of the Open Skies Agreement

141. The claimants submit that, in accordance with Article 3(5) TFEU, the Court should recognise that the nature and broad logic of the Open Skies Agreement [RC/17] does not preclude examination of the validity of EU measures in light of its provisions.

142. First, it is clear from the recitals in the preamble to the Open Skies Agreement that it is intended to create practical economic rights exercisable by legal individuals such as airlines. For example:

(i) The first recital states:

> "Desiring to promote an international aviation system based on competition among airlines in the marketplace with minimum government interference and regulation";

(ii) The third recital states:

> "Desiring to make it possible for airlines to offer the travelling and shipping public competitive prices and services in open markets"; and

(iii) The fourth recital states:

> "Desiring to have all sectors of the air transport industry, including airline workers, benefit in a liberalised agreement".

143. Second, the nature of the agreement is also clear from its substantive provisions, many of which establish express rights for airlines; e.g. see Articles 2, 3(2)&(4), 4, 10 and 12.

144. The Court has consistently accepted that bilateral international agreements entered into by the EU are capable of being invoked by private parties, e.g. association agreements,[33] free-trade agreements,[34] partnership and cooperation agreements,[35] and sectoral agreements.[36] This willingness to apply international agreements concluded by the EC (now EU) is inspired by the principle that the EU legal order is

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33 E.g. the association agreement with Turkey, see e.g. Case C-192/89 *Sevince* [1990] ECR I-3461.

34 E.g. the free-trade agreement with Portugal (prior to its accession), Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641.

35 E.g. the partnership and cooperation agreement with Russia, Case C-265/03 *Igor Simutenkov v. Ministerio Educación y Cultura and Real Federación Española de Fútbol* [2005] ECR I-2579.

36 E.g. the agreement with Switzerland on free movement of persons, Case C-13/08 *Stamm und Hauser* [2008] ECR I-11087.

characterized by a fundamental openness towards international law.[37] The nature and broad logic of the Open Skies Agreement should be similarly interpreted in the present case.

(iii) Relevant provisions of the Open Skies Agreement are unconditional and sufficiently precise

145. Articles 7, 11(2)(c) and the second sentence of 15(3) of the Open Skies Agreement are unconditional and sufficiently precise. They establish clearly defined obligations which are not dependent upon the adoption of any further measures by the contracting Parties.

(iv) Ground of review in any event

146. Even if (contrary to the above) the provisions of the Open Skies Agreement did not have direct effect, that would not preclude review by the Court of compliance with the obligations incumbent on the EU as a party to the Agreement (see Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079 paras 52-54).

(d) Kyoto Protocol

147. Question 1(f) of the questions referred asks whether the Kyoto Protocol [RC/15], in particular Article 2(2), may be relied upon to challenge the validity of an EU measure.

(i) The EU is bound by the Kyoto Protocol

148. The EU is a signatory to the Kyoto Protocol and is therefore bound by it pursuant to Article 216(2) TFEU.

(ii) Nature and broad logic of the Kyoto Protocol

149. Regardless of whether the provisions of the Kyoto Protocol have direct effect, that does not preclude review by the Court of compliance with the obligations incumbent on the EU as a party to the Protocol (see Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079 paras 52-54).

[37] See A. Rosas, "The European Court of Justice and Public International Law", in J. Wouters, A.Nollkaemper and E. de

(iii) Article 2(2) of the Kyoto Protocol is unconditional and sufficiently precise

150. In any event Article 2(2) of the Kyoto Protocol is unconditional and sufficiently precise. It establishes a clearly defined obligation which is not dependent upon the adoption of any further measures by the contracting Parties.

B: APPLICATION OF THE EU ETS TO FLIGHTS OUTSIDE THE AIRSPACE OF EU MEMBER STATES

151. The third question referred asks:

> "Is the Amended Directive invalid, if and insofar as it applies the Emissions Trading Scheme to those parts of flights (either generally or by aircraft registered in third countries) which take place outside the airspace of EU Member States:
>
> a. as contravening Articles 1, 11 and/or 12 of the Chicago Convention;
>
> b. as contravening Article 7 of the Open Skies Agreement?"

152. Article 1 of the Chicago Convention, entitled "Sovereignty" provides:

> "The contracting States recognise that every state has complete and exclusive sovereignty over the airspace above its territory."

153. Article 11 of the Chicago Convention, entitled "Applicability of air regulations", provides:

> "***Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation***, or to the operation and navigation of aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and ***shall be complied with by such aircraft upon entering or departing from or while within the territory of that State***."

154. Article 12 of the Chicago Convention, entitled "Rules of the air" provides:

> "Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those

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Wet (eds), *The Europeanisation of International Law* (TMC Asser Press 2008), at p.84 [AD/28, p. 338-353].

> established from time to time under this Convention. ***Over the high seas, the rules in force shall be those established under this Convention***. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable."

155. Article 7 of the EC-US Open Skies Agreement, headed "Application of laws", states:

> "1. 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.
>
> 2. While entering, within, or leaving the territory of one Party, the laws and regulations applicable within that territory relating to the admission to or departure from its territory of passengers, crew or cargo on aircraft (including regulations relating to entry, clearance, immigration, passports, customs and quarantine or, in the case of mail, postal regulations) shall be complied with by, or on behalf of, such passengers, crew or cargo of the other Party's airlines."

156. The legislative scheme of the Chicago Convention and the Open Skies Agreement, as one would expect, respect the requirements of international law and establish a coherent framework under which:

(i) Each contracting State has complete and exclusive sovereignty to adopt legislation applicable to the airspace above its territory;

(ii) Each contracting State may adopt legislation relating to the admission to or departure from its airspace of aircraft, but may apply them to aircraft only "upon entering or departing from or while within that territory" and only in a manner consistent with the Chicago Convention; and

(iii) No individual contracting State is entitled to adopt legislation relating to flight over the high seas. Flight over the high seas may only be regulated by rules established under the Chicago Convention.

157. The nature and scope of Articles 1, 11 and 12 are confirmed by their previous interpretation and application by ICAO institutions. An analysis by the ICAO Secretariat of the legal framework and policy issues related to the use of emission-related levies, as a market-based measure, considered that, in light of Articles 1, 11 and 12 of the Chicago Convention, contracting States:

(i) "…have no jurisdiction for mitigating the environmental impact on areas outside their national territories. Therefore, a priori, it would not be legitimate for States to individually establish a charge including environmental costs related to territories they have no sovereignty over."[38]

(ii) "…under Article 12, third sentence, of the Convention, it is ICAO which has jurisdiction for rules in force over the high seas."[39]

158. As explained above, the EU ETS applies the EU emissions trading rules to flights over the airspace of third countries and the high seas, because it applies to the entirety of flights which arrive at or depart from an aerodrome situated within the territory of an EU Member State (see Annex I, para 6 of the Amended Directive) and aircraft operators are required to surrender allowances which are calculated on the basis of the total fuel consumed on such flights (see Article 12(2a) and Appendix IV, Part B of the Amended Directive).

159. The application of the EU ETS to aviation activities is contrary to the Chicago Convention and the Open Skies Agreement in a number of ways.

160. First, for the reasons set out above, insofar as it applies to flight in the airspace over third countries, the EU ETS is contrary to the principle of sovereignty recognised in Article 1 of the Chicago Convention.

161. Second, the application of the EU ETS is contrary to Article 11 of the Chicago Convention because aircraft operators are expected to comply with it in respect of the entirety of the flight, not just "upon entering or departing from or while within the territory" of the EU.

162. This aspect is also contrary to Article 7 of the Open Skies Agreement, which confers power on each Party to develop its own departure and admission rules, but again permits such rules to be applied to aircraft only "upon entering or departing from or while within the territory of" that Party.

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38 ICAO Secretariat, "Legal Framework and Policy Issues Related to the Use of Emission-Related Levies," CAEP/6-WP24, paragraph 3.6.5 [RC/36].

39 *Ibid*., at paragraph 3.6.6.

163. Finally, insofar as it applies to flight over the high seas, the EU ETS is contrary to the principle in Article 12 of the Chicago Convention that, over the high seas, the rules in force shall be those established under the Convention.

164. Before the national court, the defendant suggested that Article 12 of the Chicago Convention did not apply to environmental legislation regarding emissions trading (see Schedule para 95(d)). This is incorrect. In relation to Article 12, ICAO's authority to establish "flight and manoeuvre" rules in respect of the airspace above the high seas permits it to regulate a broad range of activities.[40] For example, under Article 12, ICAO has regulated such activities as dropping and spraying from aircraft.[41] Just as ICAO can regulate what an aircraft may drop or spray from its hold under Article 12, so ICAO may also regulate emissions from an aircraft's engines. Just as measures to regulate the former fall within the authority conferred by Article 12, so do measures to regulate the latter. Indeed, the broad scope of Article 12 is confirmed in its title, "Rules of the air".

C: FAILURE TO ACT THROUGH ICAO

165. Question 4(a) of the questions referred asks:

> "Is the Amended Directive invalid, insofar as it applies the Emissions Trading Scheme to aviation activities as contravening Article 2(2) of the Kyoto Protocol and Article 15(3) of the Open Skies Agreement?"

166. Article 2(2) of the Kyoto Protocol states:

> "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 ICAO and the International Maritime Organization, respectively." (Emphasis added.)

167. This provision therefore reflects the consistently stated position in international law (set out above) that unilateral action to deal with environmental problems outside the jurisdiction of a State must be avoided and environmental measures addressing transboundary or global environmental problems must be achieved through international consensus.

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40 See I.H. Diederiks-Verschoor, *An Introduction to Air Law* (2008), p. 38 [RC/51].
41 See Annex 2 to the Chicago Convention (Rules of the Air), section 3.1.4 [RC/11].

168. The obligation imposed by Article 2(2) of the Kyoto Protocol is in mandatory terms and is not subject to any exceptions. The EU has failed to comply with this obligation because it has unilaterally adopted environmental legislation with extra-territorial effect rather than pursuing a negotiated agreement through ICAO.

169. This analysis is confirmed by the drafting history of Article 2(2) of the Kyoto Protocol – in particular the use of the word "shall" and the moving of this provision from a list of optional measures to a stand-alone provision.[42]

D: IMPOSITION OF UNLAWFUL CHARGES

(a) Financial burden on aircraft operators

170. An aircraft operator may be required to make a payment in order to comply with the EU ETS. As explained above, the EU ETS imposes a cap on the total quantity of emissions allowances. This cap is set at a level which is lower than historical aviation emissions. Whilst Article 3e(1) of the Amended Directive expressly provides that the majority of the total annual allowances are to be distributed "free of charge", a material percentage are only available by auction under Article 3d of the Amended Directive. The language of Article 3e(1) reflects the reality of the situation; whilst some allowances are distributed "free of charge", the remainder may only be purchased upon payment of a charge. If an aircraft operator wishes to carry out aviation activities at a level in excess of his free allocation, he may do so only in return for payment.

171. The defendant and the Environmental Interveners have submitted that a payment made pursuant to the EU ETS cannot be described as a charge because the EU ETS is a "market-based measure".[43] However, this reveals a fundamental misunderstanding. According to ICAO:

> "Market-based measures include: emissions trading, emission related levies - charges and taxes, and emissions offsetting; all of which aim to contribute to the achievement of specific environmental goals, at a lower cost, and in a

[42] Depledge, *Tracing the Origins of the Kyoto Protocol: An Article-By-Article Textual History*, UNFCCC, 2000, FCCC/TP/2000/2, paragraphs 113 – 114. The EU appeared to concede the primacy of ICAO in this regard in proposing a draft Article 2(2) in similar terms.

[43] See Schedule paras 124-125 and Written Observations of the Environmental Interveners para 73.

> more flexible manner, than traditional command and control regulatory measures."[44]

172. Therefore, market-based measures can be designed as environmental "levies" or as emission trading schemes or – as in the present case – a combination. The fact that a requirement to make a payment is incorporated into an emissions trading scheme, as in the present case, cannot alter the fact that it is a "levy".

173. Whatever label is attached, the fact that a payment may have to be made pursuant to the EU ETS in order to obtain sufficient allowances is undeniable. Such a payment cannot escape from both Article 24 and Article 15 of the Chicago Convention on the basis that it is not a "duty", a "tax", a "fee", a "due" or an "other charge". It is not possible for a payment made under the EU ETS to evade such a comprehensive definitional framework.

(b) Charge in respect of the right of transit over or entry into or exit from EU territory

(i) Question referred

174. Question 4(b) of the questions referred asks:

> "Is the Amended Directive invalid, insofar as it applies the Emissions Trading Scheme to aviation activities 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?"

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[44] http://www.icao.int/icao/en/Env2010/MarketBasedMeasures.htm [AD/19, p. 275]. See also ICAO Resolution A36-22 [RC/32] ("market-based measures, *including* the use of emissions trading, are policy tools that are designed to achieve environmental goals at a lower cost and in a more flexible manner than traditional regulatory measures"). Resolution A36-22 explicitly refers to ICAO Resolution of 9 December 1996 on Emission-related Charges and Taxes [AD/20, p. 277] as well as ICAO's Policies on Taxation in the Field of International Air Transport (Doc 8632) [RC/35]. Contrary to the contentions of the Environmental Interveners, ICAO has not found that environmental levies are to be contrasted with "market-based measures". Assembly Resolution A36-22 distinguishes market-based measures (e.g. environmental levies and emissions trading schemes) from "traditional regulatory measures" seeking, for example, to "develop medium- and long-term technology goals for aircraft fuel-burn", "implement an emphasis on increasing fuel efficiency in all aspects of ICAO's Global Air Navigation Plan" and "promote the use of new procedures and technologies that have a potential to provide environmental benefits on the operation of aircraft".

(ii) Application of Article 15 of the Chicago Convention

175. The claimants' primary submission, as set out above, is that they are entitled to rely directly on Article 15 of the Chicago Convention to challenge the validity of an EU measure.

176. Alternatively, even if the Court were to find that the Chicago Convention was not binding on the EU, the EU has nonetheless accepted an obligation to be bound by Article 15 of the Chicago Convention by virtue of Articles 3(4) and 15(3) of the EC-US Open Skies Agreement, to which the EC is a party and is therefore bound. Articles 3(4) and 15(3) of the EC-US Open Skies Agreement expressly require the Parties to act consistently with Article 15 of the Chicago Convention when applying any environmental measures affecting air services.

(iii) Breach of Article 15 of the Chicago Convention

177. The last sentence of Article 15 of the Chicago Convention provides:

> "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."

178. The EU ETS is in breach of this provision insofar as an aircraft operator may be obliged to pay for emissions allowances in order to operate flights into or out of the EU. Such payments constitute "fees, dues or other charges". They are payments made "in respect solely of the right of transit over or entry into or exit from EU" because the requirement to make them applies in respect of all "flights which depart from or arrive in an aerodrome situated in the territory of a Member State to which the Treaty applies" (Amended Directive, Article 3a and Annex I). The obligation imposed on an aircraft operator to surrender a sufficient number of allowances is therefore triggered by entry into or exit from EU territory.[45]

179. Further or alternatively, as interpreted by ICAO, the final sentence of Article 15 prohibits all charges linked to the departure or arrival of international flights, unless such charges are "cost-based and related to the provision of facilities and services for

[45] The fact that the obligation to surrender sufficient allowances is triggered by entry into or exit from EU territory does not prevent the EU ETS from being extra-territorial in nature, as explained above at paras 94 and 95.

civil aviation".[46] However, payments by aircraft operators for emissions allowances under the EU ETS are not cost-based and do not have to be used specifically to address the impact of aviation emissions (see Article 3d(4) of the Amended Directive). The EU ETS is therefore contrary to the final sentence of Article 15 of the Chicago Convention.

180. A number of arguments have been put forward as to why the EU ETS does not breach Article 15 of the Chicago Convention. First, the authors of the Delft Report argued ([RC/43] at section 7.4.1, p.175) that Article 15 of the Chicago Convention deals specifically with charges for the use of airports and air navigation facilities and should not be read as prohibiting charges imposed for other purposes. However, this interpretation ignores the distinction between the second paragraph of Article 15, which refers to charges imposed for the use of airports and air navigation facilities, and the final sentence of Article 15, which refers to "fees, dues or other charges... imposed... 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". It is plain from its wording that the final sentence is intended to cover a broader category of charges than just those for the use of airports and air navigation.

181. Second, before the Referring Court, the defendant further suggested that any charge is not imposed in respect "solely" of the right of transit over or entry into or exit from EU territory (see Schedule paras 126-127). In this regard, it sought to rely upon the judgment of the English High Court in *R (on the application of Federation of Tour Operators) v HM Treasury*[47], in which the Judge held that Article 15 is "essentially an anti-discrimination provision…precluding a State from favouring its national airline or airlines when imposing charges". However, whilst the second paragraph of Article 15 does indeed impose an obligation not to discriminate as between foreign and national registered aircraft, the final sentence in the third paragraph of Article 15 goes

[46] ICAO's Policies on Charges for Airports and Air Navigation Services (Doc 9082/7) [RC/38]*;* also ICAO Council Resolution on Environmental Charges and Taxes adopted on 9 December 1996 (149/16) [AD/20, p. 277]. Consistent with the December 1996 Council Resolution on Environmental Charges and Taxes, ICAO guidance specific to such charges makes clear a cost-basis between the emissions, the charges and the specific emissions mitigation measures must be established, and the funds collected must go to mitigating the specific environmental impact. See ICAO, Guidance on Aircraft Emissions Charges Related to Local Air Quality (Doc 9884) [AD/21, p 278-306].

[47] [2007] EWHC 2062 (Admin) [RC/30].

further. It imposes an independent obligation not to impose certain types of fees, duties or other charges.

(c) Charge on fuel

182. Question 4(c) of the questions referred asks:

> "Is the Amended Directive invalid, insofar as it applies the Emissions Trading Scheme to aviation activities as contravening Article 24 of the Chicago Convention, on its own or in conjunction with Article 11(2)(c) of the Open Skies Agreement?"

183. Article 24 of the Chicago Convention states:

> "Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges."

184. Article 24 of the Chicago Convention is reflected in Article 11(2) of the Open Skies Agreement, which states:

> "There shall also be exempt, on the basis of reciprocity, from the taxes, levies, duties, fees and charges referred to in paragraph 1 of this Article, with the exception of charges based on the cost of the service provided:
>
> …
>
> (c) fuel, lubricants and consumable technical supplies 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 part of the journey performed over the territory of the Party in which they are taken on board."

185. Article 11(2) of the Open Skies Agreement should be interpreted so as to be consistent with Article 24 of the Chicago Convention.

186. In its Policies on Taxation in the Field of International Air Transport [RC/35] , the ICAO Council has resolved (see resolving clause 1(d)) that:

(i) "the expression 'customs and other duties' shall include import, export, excise, sales, consumption and internal duties and taxes of all kinds levied upon [the] fuel, lubricants and other consumable technical supplies"; and

(ii) Article 24 should apply not only to fuel on board an aircraft but also to *uplifted fuel*, i.e. where:

> "the fuel etc. is taken on board for consumption during the flight when the aircraft departs from an international airport of that other State…for the territory of any other State, provided that the aircraft has complied, before its departure from the customs territory concerned, with all customs and other clearance regulations in force in that territory".

187. Furthermore, in line with this resolution, Article 24 of the Chicago Convention has been broadly interpreted by ICAO as "exempting from taxation aviation fuel used in international air transport".[48]

188. As explained above, the EU ETS imposes an obligation on an aircraft operator to surrender allowances in respect of emissions calculated on the basis of fuel consumption (see Articles 12(2a) and Appendix IV, Part B of the Amended Directive). Therefore, insofar as an aircraft operator is required to pay for allowances in respect of a flight departing from an EU Member State on the basis of the consumption of fuel which was on the aircraft when it arrived in the Member State and/or was uplifted there, the EU ETS contravenes Article 24 because it constitutes a levy or charge on fuel.

189. The suggestion, advanced by the defendant in the national proceedings, that the EU ETS can escape the operation of Article 24 because it is not properly characterised as a levy or charge is an exercise in linguistic evasion. As the ICAO Commentary on the Resolution on Taxation of International Air Transport explains at p. 5, paragraph 9:

> "Resolving Clause 1(d) makes it clear that fuel, lubricants, etc., should be exempt from any kind of duties and taxes ***regardless of the names attached to such levies in different countries***" (emphasis added).

190. There is an analogy here with Case C-346/97 *Braathens Sverige AB v Riksskatteverket* [1999] ECR I-3419, in which the Court considered the proper classification of a Swedish environmental tax designed to limit pollution caused by air traffic. The Court found that the EC harmonised system of excise duties on mineral oils precluded

[48] Committee on Aviation Environmental Protection, Montreal 2-12 February 2004, CAEP/6-WP/24, paragraph 2.1 [RC/36].

an environmental protection tax on domestic commercial aviation that was calculated by reference to fuel consumption and emissions of hydrocarbons and nitric oxide. It reached that view because:

> "there is a direct and inseverable link between fuel consumption and the polluting substances in the [Swedish law] which are emitted in the course of such consumption, so that the tax at issue, as regards both the part calculated by reference to the emissions of hydrocarbons and nitric oxide and the part determined by reference to fuel consumption, which relates to carbon dioxide emissions, must be regarded as levied on consumption of the fuel itself".[49]

191. For these reasons, the EU ETS is contrary to both Article 24 of the Chicago Convention and Article 11(2) of the Open Skies Agreement.

[49] See para 23 of the judgment.