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BETWEEN SPLENDID ISOLATION AND TENTATIVE IMPERIALISM: THE EU'S EXTENSION OF ITS EMISSION TRADING SCHEME TO INTERNATIONAL AVIATION AND THE ECJ'S JUDGMENT IN THE ATA CASE

A. Introduction

For the last 15 years the European Union (EU) has been particularly active, both internally and internationally, in the fight against global warming, and it is determined to continue to play a global leadership role in this strategic issue. Among the various market-based measures decided upon, the Emission Trading Scheme (ETS) for energy-intensive industrial sectors has been rightly described as the 'flagship of the EU climate policy'.[1] Even before proceeding to a general overhauling of Directive 2003/87 in the framework of the 2009 Climate and Energy package, the EU had decided to modify the Directive by including aviation activities in the ETS. Directive 2008/101[2] provides that all flights from whichever aircraft operator taking off from or landing in the EU territory will be subjected to the ETS from 1 January 2012. For the year 2012 97 per cent of all emissions allowances will be freely assigned, from 2013 the amount will decrease to 95 per cent, whereas 15 per cent of all allowances will be auctioned. In reality the percentage of free allowances is much lower, about 60 per cent, because it takes as parameter the historical aviation emissions of the years 2004–06, when the air traffic was 40 per cent lower than it is now. The idea underlying the Directive is that aircraft operators will either purchase the necessary allowances in the market or will try to reduce their emissions by using bio-fuels (or else reducing the number of flights), with the second option becoming more economically attractive over time.

From April 2013 onwards aircraft operators exceeding their allotted emissions allowances will have to pay an excess emissions penalty of 100 euros per CO_2 tonne, which will be collected by the administering EU Member State specified in a subsequent EC Regulation of August 2009. What is not clear is the final destination of the auctions and sanctions revenues. Article 3(d)(4) of Directive 2003/87, to which Directive 2008/101 refers, states in very general terms that 'revenues should be used to tackle climate change in the EU and in third countries', leaving each administering

[1] See K Kulovesi, E Morgera and M Munoz, 'Environmental Integration and Multi-Faceted International Dimensions of EU Law: Unpacking the EU's 2009 Climate and Energy Package' (2011) 61 CMLRev 845. On the EU ETS see in general D Freestone and C Streck (eds), *Legal Aspects of Carbon Trading* (OUP 2009); See also A Ellerman, F Convery and C de Perthuis (eds), *Pricing Carbon: The European Union Emissions Trading Scheme* (CUP 2010).

[2] Directive 2008/101 of 19 November 2008 amending Directive 2003/87 so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ 2009, L 8/3.

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Member State a wide margin of discretion. Another curious feature of the sanctions mechanism, to which we will come back at the end of this note, is that provided for in Article 16 of the Amended Directive. In the event that an aircraft operator fails to comply with the requirements of the Directive and where other enforcement measures have failed to ensure compliance, the administering Member State may request the Commission to adopt a decision to impose an operating ban on the aircraft operator concerned.

Whereas European airlines did not have any other choice but to comply, extra-European airlines operators, particularly the US ones have tried to actively oppose the EU decision. In particular, the US umbrella civil aviation association, the Air Transport Association of America, together with three US airlines companies brought a claim before British courts against the Secretary of State for Energy and Climate Change to challenge the transposition of the Directive in the United Kingdom. In July 2010 the British High Court of Justice suspended the proceedings and referred the case to the ECJ for a preliminary ruling. In October 2011 Advocate General Kokott released her opinion, holding the validity of the Directive. With unprecedented speed, surely due to the urgency of the issue but which also smacks of political pressure, on December 21 2011 the European Court of Justice (the Court) delivered its judgment.[3] Not unexpectedly, the ECJ did not see any ground upon which to invalidate Directive 2008/101.

B. Alleged Irrelevance of Customary International Law as a Parameter of Validity of EU Secondary Legislation

The questions posed by the High Court of Justice were the following. The first question concerned the existence of rules of international law capable of being relied upon by an individual to challenge the validity of the Directive. The High Court distinguished between rules of customary international law (CIL) and rules of treaty law. With regard to the first, the High Court detected four such rules: (a) the principle that each state has complete and exclusive sovereignty over its air space; (b) the principle that no state may validly purport to subject any part of the high seas to its sovereignty; (c) the principle of the freedom to fly over the high seas; and (d) the principle that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by an international treaty. With regard to treaty law, the High Court mentioned some articles of the 1944 ICAO Chicago Convention, articles of the US/EU Open Skies Agreement of 2007, and one article of the 1997 Kyoto Protocol.

To the extent that question one might be answered in the affirmative, the referring Court asked whether the Amended Directive was invalid in so far as it applies the ETS to parts of the flights which take place outside the EU airspace and are contrary to any article of the previously mentioned conventions.

One omission in the list of these conventions catches the eye: why not the United Nations Convention on the Law of the Seas of 1982? The answer is quite obvious, after the Court's *Intertanko* decision of 2008, a preliminary ruling referred to by the same High Court of Justice. It will be recalled that in that unfortunate decision, the Court had stated that UNCLOS's 'nature and broad logic'—whatever

[3] For a critical assessment of the judgment, see B Havel and J Mulligan, 'The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme' (2012) 37 *Air and Space Law* 1.

it means[4]—barred the Court from recognizing direct effect to any norm contained in it.[5] Be as it may with the coherence of the *Intertanko* decision, on which we will shortly come back, the Court adopted a similar approach in the present case, when dealing with the fundamental question to what extent may a CIL rule be relied upon by an individual to challenge the validity of an EU secondary norm. The Court set three requisites: the rule must form part of customary international law; it must be able to call into question the competence of the EU institutions to adopt such an act; and finally, the act in question must be liable to affect individual rights.

The Court found that some of the CIL rules referred to by the High Court indeed satisfied the three requisites. This could be seen as a major statement by the Court, one which will surely be remembered in the history of EU law as a significant testimony of the 'monistic' outlook and openness of the ECJ towards international law. It will be recalled that in the *Racke* judgment of 1998 the Court had already had the opportunity to answer in the affirmative whether an individual could rely on CIL rules. However, in that case it had specified that its ruling did not concern the direct effect of those rules, since they were relied upon only 'incidentally', in order to challenge the validity of a Regulation which had suspended the application of a treaty provided of direct effect.[6] The present judgment now accomplishes that further step, but it shares the character of quite a few of other ECJ's leading cases, of being 'grandiose on principle without being of much help for the individual concerned'.[7] The Court aptly takes advantage of the alleged imprecision of the CIL rules at issue, to repeat what it had already stated in the *Racke* case, ie that judicial review must 'necessarily be limited to the question whether . . . the Council made manifest error of assessment'.[8]

With this caveat in mind, the subsequent enquiry of the Court to assess the existence and content of the four CIL rules previously mentioned resembles little more than an academic exercise. As regards the first three principles referred to, the Court has no difficulty in seeing them well anchored in CIL, and with regard to the first—state's exclusive sovereignty over its own air space—the Court ventures to quote the *Nicaragua* judgment of the International Court of Justice. It is noteworthy that in order to assess the CIL quality of these rules, the Court does not shy back from referring to UNCLOS as evidence, as it had actually already done in the *Poulsen and Diva*

[4] It will be recalled that the separate requirement of the 'spirit and structure' of the international treaty in order to produce direct effects had been introduced by the Court in the *Bresciani* case of 1976, but that the subsequent jurisprudence seemed to have dropped it or made it redundant. It was resuscitated in the even vaguer notion of 'nature and broad logic' in the *IATA* case of 2006. In that case the 1999 Montreal Convention on the Unification of Certain Rules for International Carriage by Air was considered as a basis for reviewing an EC Regulation, but the ECJ eventually found no breach. See Case C-344/04, *The Queen on the Application of International Air Transport Association, European Low Fares Airlines Association v Department for Transport* [2006] ECR I-403, para 39.

[5] Case C-308/06, *The Queen on the Application of International Association of Independent Tankers Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-4057, para 64. For an overall sympathetic assessment see the case note by P Eeckhout (2009) 46 CMLRev 2041, for whom 'whilst the nature of the analysis can be applauded, its actual performance is much less persuasive'.

[6] See Case C-162/96, *Racke v Hauptzollamt Mainz* [1998] ECR I-3655, para 47.

[7] I borrow this remark from B. Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 294 in footnote.

[8] *ATA* Judgment, para 110, referring to *Racke*, para 52.

Navigation case of 1992.[9] It was exactly the *Poulsen* precedent, which had led the Advocate General in her conclusions in the *Intertanko* case to argue for the capability of UNCLOS to produce direct effects.[10] The Court is apparently unaware of the methodological contradiction in which it manoeuvres itself. Given the fact that UNCLOS was discarded as a whole as a parameter of legitimacy of a Directive four years ago, how is it possible that an analogical application of the same UNCLOS may now serve as a mould for the existence of an international customary norm to that same effect? Furthermore, it will be recalled that the reason why the Court had denied direct effect to UNCLOS, was that the rights therein inscribed do not directly accrue to individuals, but are those of registered ships, depending in last resort on the rights of the flag state. Now it is not at all clear why the Court did not draw the same conclusion with regard to aircraft, as the Advocate General had suggested in her conclusions,[11] unless one regards the *ATA* decision as an implied reversal of the *Intertanko* precedent.

However, it is with regard to the fourth CIL norm, the principled exclusive jurisdiction of the flag state over aircraft flying over the high sea that the Court decided to break the parallelism between the UNCLOS and CIL. As is known, Article 92(1) UNCLOS codifies the rule that vessels on the high sea are subject to the exclusive jurisdiction of the flag state, but for the Court there is no evidence that such a rule analogically applies to aircraft. This is allegedly not the case in the framework of the UNCLOS, and even less so in CIL. One may wonder whether the Court did really investigate the matter or was rather too ready in endorsing the negative opinion expressed by the Advocate General,[12] as well as by the British and, 'to a certain extent' by the German government, which the Court expressly refers to.[13]

Having conveniently disposed of the fourth, annoying customary international principle, the Court proceeds to investigate how the remaining three may affect the EU competence to legislate. Here the Court's reasoning assumes ubuesque features in order to deny any extraterritorial effect of the Directive. The first principle, territorial state's exclusive jurisdiction, is not violated—says the Court—because the aircraft are subjected to the allowance emission trading only when voluntarily present in the territory of an EU Member State, hence subjected to the 'unlimited' territorial jurisdiction of the latter.[14] The second principle, absence of sovereignty over the high seas, is not violated because the EU does not impose its normative will on foreign aircraft just for the fact of overflying the high sea, but for the fact of their presence in the territory of EU Member States at a certain moment. The third principle, freedom of

[9] Case C-286/90, *Poulsen and Diva Navigation* [1992] ECR I-6019.

[10] See *Intertanko* Opinion of Advocate General Kokott, 20 November 2007, para 50.

[11] *ATA* Opinion of Advocate General Kokott, 6 October 2011, para 136.

[12] See *ATA* Opinion of AG Kokott, 6 October 2011, para 132. For the opposite view see N Grief, *Public International Law in the Airspace of the High Seas* (Nijhoff 1994) 78. The probative value of the Advocate General's two main arguments is far from being decisive. With regard to the first, while it is true that art 92 UNCLOS does not mention aircraft alongside ships, contrary to some other articles, it must be recalled that the specific purpose of that article is to regulate the status of ships. In regard to the second, while it is true that art 4 of the 1963 Tokyo Convention on offences and certain other acts committed on board aircraft enables States other than the State of registration to exercise criminal jurisdiction in certain circumstances, it can be easily maintained that this is a treaty exception to the general rule of the jurisdiction of the State of registration embodied in art 3, para 1 of the same Convention.

[13] *ATA* Judgment, para 106.

[14] ibid para 125.

overfly, is not violated to the extent that the mere fact of high seas overfly, as such, does not make the aircraft subject to the allowances trading system.

The Court's strenuous attempt to be faithful to its previous jurisprudence hostile to extraterritorial legislative jurisdiction is remarkable for its ingenuity,[15] but fails to convince. The Court quotes two precedent cases, the *Ahlström Osakeyhtiö* (better known as Wood Pulp) case of 1988 and the *Commune de Mesquer* case of 2008, in order to demonstrate that the territorial principle is not put into question by the fact that 'certain matters [...] originate in an event which occurs partly outside the territory'.[16] Unfortunately, they both do not support the Court's thesis. In the celebrated Wood Pulp case, the Court had said that 'the decisive factor' was the place where the anti-competitive agreement was 'implemented',[17] meaning the place where the agreement was intended to display its effects. The case at hand is completely different: the fact that a flight lands or takes off from a certain aerodrome is an inevitable technical necessity in order to transport passengers or goods from point A to point B of the earth, but this does not mean that an intercontinental flight is 'implemented' in Europe. In the *Commune de Mesquer* case, which dealt with coastal pollution having had its origin in an oil spill in the exclusive economic zone of a Member State, the Court even expressly said that it had not to judge on the applicability of the Directive 'at the place where the ship sank', since 'the hydrocarbons thus accidentally spilled drifted along the coast until they were washed up on it, so being discharged on the member State's land territory'.[18] In this case too, the relevant facts, ie the actual pollution, entirely occurred on the territory of a Member State.

Albeit in the different context of the EU's competence to adopt the Directive, the Court refers also to the *Mondiet* case of 1993.[19] This is a very interesting, and very telling, reference. What was at issue in that case was to decide whether the Community had competence, alongside the Member States, to adopt technical measures for the conservation of fishery resources in maritime waters that were not under the sovereignty or jurisdiction of the Member States, and the Court rightly affirmed such competence. In that context the Court affirmed that 'the Community has the same rule-making authority in matters within its jurisdiction as that conferred under international law on the State whose flag the vessel is flying or in which it is registered'.[20]

To mention the *Mondiet* precedent in the present case amounts to an implied confession of sin. Undoubtedly international law confers wide-ranging powers to the flag state, but does international law confer similar powers to the port state as well? It is remarkable that neither the Advocate General nor the Court (but for that matter, nor the High Court itself) thought to draw the most obvious analogy between Directive 2008/101 and the port state control theory.

As is well known, Article 218 UNCLOS introduced an innovative rule, when it extended some of the customary powers of the flag state to the port state as well. Under Article 217 UNCLOS the flag state shall ensure the compliance of the ships flying its

[15] Havel and Mulligan (n 3) speak of 'semantic manipulation', at 18.
[16] *ATA* Judgment, para 129.
[17] Case C-89/85 *Ahlström Osakeyhtiö and Others v Commission* (Wood Pulp) [1988] ECR 5193, para 15.
[18] Case C-188/07 *Commune de Mesquer v Total France and Total International Ltd* [2008] ECR I-4501, para 61.
[19] *ATA* Judgment, para 107.
[20] Case C-405/92, *Mondiet* [1993] ECR I-6133, para 12.

flag not only with international rules and standards but also with its own laws and regulations adopted in conformity with the Convention, and 'shall provide for an effective enforcement of such rules, standards, laws and regulations irrespective of where the violation occurs'. Differently from the enforcement powers of the flag state, Article 218(1) makes clear that the port state may institute proceedings with regard to any discharge from a vessel outside its internal waters, territorial sea or exclusive economic zone, but only when it occurred 'in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference'. Furthermore, Article 218(2) specifies that no proceedings pursuant to paragraph 1 may be instituted by the port state in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another State unless requested by that State or by the flag State, or 'unless the violation has caused or is likely to cause pollution' in the internal waters, territorial sea or exclusive economic zone of the port State. It is generally understood that the international standards referred to are those set forth in the IMO Convention for the prevention of pollution from ships (Marpol Convention) of 1973/78.[21]

This helps to understand the Advocate General and the Court's strategy. In the *Intertanko* decision the Court had already excluded that the EU, which is not a party to Marpol, is bound by its rules. For its part, the EU had already showed its preparedness to act unilaterally in defiance of Marpol Rules, when, after the disaster of the Prestige oil tanker's massive pollution of the coast of Galicia in October 2002, it decided to permit transport of heavy grade oil only by double-hull oil tankers.[22] In that case the EU's muscle flexing was successful, because a few months after the adoption of Regulation 1726/2003, the Assembly of the Parties decided to amend the Rules of Annex I to Marpol, in order to impose a worldwide ban of single hull oil tankers from 2005.

But, even if it is understandable that in the present case the Court preferred not to tread the impervious terrain of the port state control theory, also in order to avoid the risk of being perceived as a complicit in the art of political brinkmanship, it is striking that the Court did not use any other of the arguments either, which the Advocate General had advanced in order to buttress the credibility of the 'territoriality approach'.

The Advocate General tried indeed to anchor the Directive's choice on the apparently more solid legal ground of general principles, but her attempt is not convincing. She argued that 'taking account of the whole length of the flight is ultimately an expression of the principle of proportionality and reflects the "polluter pays" principle of environmental law'.[23] One can concede that the fact to hold an aircraft operator liable for the whole of the emissions of the entire flight corresponds to the principle of proportionality, in abstract terms, as well as to the principle of 'polluter pays'. The mention of 'proportionality' in this context, however, can be understood only if one

[21] See D Bodansky, 'Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS IIII and Beyond', (1991) 18 *Ecology Law Quarterly* 760; N Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 69. For the contrary view of a residual, in principle unfettered right of the port state see E Molenaar, 'Port State Jurisdictions: Towards Mandatory and Comprehensive Use' in D Freestone, R Barnes and D Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP 2006) 198, even if the same author concedes that Section 15(1) of Annex I to Marpol puts more constraints on the port State's right to prescribe.

[22] Regulation EC 1726/2003 amending Reg 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, OJ 2003, L 249/1.

[23] *ATA* AG Opinion, para 153.

posits himself on a universal plane, in a supposed *civitas mundi*, but then the question inevitably pops up of why should the EU assume the role of legislator, fee collector, and lastly exclusive beneficiary of the revenues, for the sake of the entire world. A common-sense understanding of proportionality would rather demand that the EU imposes its ETS only to the percentage of emissions, which are actually discharged in the European airspace, not on the high seas, and even less in the airspace of other states. The Advocate General's arguments seem to implicitly endorse a new doctrinal trend, which aims at redefining the extraterritoriality issue in terms of a rational allocation of 'international public authority'. The purpose of this doctrine is to shift the focus from a formalist approach based on territorial factors to a 'cosmopolitan pluralist' theory of jurisdiction based on new forms of community affiliation with a focus on the elaboration of adequate standards such as transparency, participation, reasoned decision-making, accountability and effective review mechanisms.[24] However, even some sympathetic observers have warned against a too ready enthusiasm in finding operational solutions.[25]

The Advocate General's main thrust is condensed in the following statement: 'Such an approach reflects the nature as well as the spirit and purpose of environmental protection and climate change measures'.[26] This is self-explanatory, as well as it is self-absolutory, but it is lastly also self-defeating. The legal crux of the issue resides in the difficulty to demonstrate that international law has progressed so far as to impose on each and all an obligation to abate Greenhouse Gases (GHG) emissions. The only conceptual tool would be to raise the environmental 'common interest of mankind' to an *erga omnes* obligation,[27] but it is understandable that the Advocate General shies away from spelling out or even hinting at such a daring idea.

From its very silence it can be inferred that the Court did not share the Advocate General's commitment and universalistic common-good approach. But, without that strong political underpinning, the legal arguments of the Court look scant and shaky. It is interesting to see how the Court skips the major hurdle of the proportionality issue. For the Court 'the goal of ensuring a high level of protection of the environment', inscribed in Article 191(2) TFEU, coupled with the alleged lack of legal relevance of the fact that parts of the events take place outside the EU territory, are sufficient arguments to state 'the full applicability of EU law in that territory'.[28] The Court's approach is even more tautological that the Advocate General's efforts to found the Directive's

[24] For an exemplary presentation of this theory see P Berman, 'Globalization of Jurisdiction' (2002) 151 UPaLRev 311. The new approach has been endorsed by both the Global Administrative Law and International Public Authority scholars, see a recent overview by J Ellis, 'Extraterritorial Exercise of Jurisdiction for Environmental Protection: Addressing Fairness Concerns' (2012) 25 LJIL 397. For a well-balanced, sensible approach on the whole issue, binding old and new scholarship's strands and comparing US and European jurisprudence see H Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57 AmJCompL 631.

[25] See N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 EJIL 247, who reaches the not too original conclusion that the issues at stake are 'often of a political rather than legal nature' and that 'stability is thus created . . . through processes of negotiation and compromise as well as challenge and concession between the different constituencies involved' (at 279).

[26] *ATA* AG Opinion, para 154.

[27] The attempt to frame 'common interests' as legal obligations in international law, under the heading of *erga omnes* obligations and even *jus cogens* was made almost 25 years ago by J Brunnée, ''Common Interest''—Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law' (1989) 49 *ZaöRV* 800.

[28] *ATA* Judgment, paras 128–129.

validity on general principles, and lays on the presupposition of a supremacy of EU environmental law in comparison with any other legal source.

If it is only understandable that the Court shies away from such a radical statement, it is true that the time should by now be ripe for the Court to embrace more openly the extraterritorial ambition of EU law. It is a commonly held wisdom that only powerful and self-assured states, such as the US, do not hesitate to assume the extraterritorial scope of their legislation or adjudicatory powers, whenever they think that this is necessary to hold their ground, and possibly globally impose their views.[29] European tradition is obviously a different one, but one can question how much this depended on a legal perspective rather than on a strategically political choice. The Court is not even prepared to acknowledge its jurisprudence on the territorial reach of the EU's competition rules as an application of the so-called 'effects doctrine', which could still be disguised as a variation of objective territorial jurisdiction. It is therefore more than doubtful whether the Court, without a major cultural change on its bench, would now be prepared to assume the effects doctrine, if reframed as an expression of the protective principle, ie the principle permitting a state to protect itself against serious detrimental repercussions from abroad.[30] Obviously a problem would arise about how to circumscribe interests of states worth to be protected, and this consideration would not hinder such jurisdiction from still being labelled extraterritorial anyway.[31] Yet the EU's determination in 'combating climate change' is now inscribed in Article 191(1) TFEU, and the global dimension of climate warming lends a universalistic clout to the EU concerns. If in the present case the Court had openly supported this perspective, instead of hopelessly clinging to traditional but misplaced legal concepts, it would have rendered the EU and its environmental policy a better service.

By the way, the Advocate General's enthusiasm in embracing a 'one common planet, one common responsibility' philosophy makes place for some very pragmatic, down-to-earth considerations. At a later point, dealing with some aspects of the Open Skies Agreement, the Advocate General candidly stated what she could as well have uttered at an earlier point, namely that '[i]f the EU legislature had excluded airlines holding the nationality of a third country from the EU emissions trading scheme, those airlines would have obtained an unjustified competitive advantage over their European competitors'.[32] Once again, but here not unjustified, the Court decided to ignore the suggestion.[33]

[29] For an unabashed pleading of unilateralism in environmental issues see D Bodansky, 'What's So Bad about Unilateral Action to Protect the Environment?' (2000) 11 EJIL 339, for whom 'a less pejorative term for unilateralism is *leadership*' (at 340). For a far more balanced approach see L Boisson de Chazournes, 'Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues' ibid, 315.

[30] See B Simma and A Müller, 'Exercise and Limits of Jurisdiction' in J Crawford and M Koskenniemi (eds), *Cambridge Companion to International Law* (CUP 2012) 141.

[31] ibid 143.

[32] *ATA* AG Opinion, para 199.

[33] Paradoxically, the issue is on one side very similar, but on the other side quite the reversal from that which had been decided upon by the Court some weeks earlier in the *Systeme Helmholz* case (C-79/10 [2011] ECR I-0000, nyr). In that case the Court had to interpret Directive 2003/96 of October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003, L 283/51), whose art 14(1)(b) lays down a general tax exemption for energy products supplied for use as fuel for the purpose of air navigation other than in private pleasure-flying. The Court openly acknowledged that 'the imposition of duty on the aviation fuel used by European airlines for intra-Community or international flights significantly reduces the

C. Alleged irrelevance of international treaty law as a parameter of the validity of EU secondary legislation

If the part of the judgment dealing with questions of international customary law leaves the international law scholar with an alternate sense of incredulity and irritation, the part dealing with treaty law is better engineered but not more convincing.

The first treaty to deal with is the ICAO Chicago Convention. The obstacle would seem weighty, if one considers that it is in the ICAO framework that for the last 65 years all legal policies regarding international civil air traffic have been discussed, negotiated and decided upon. The point is that, whereas all Member States are parties, the EU is not. Both the Advocate General and the Court swiftly dismiss the applicability of the Convention, with the argument that there has not been any functional succession. As for the hurdle of Article 351 TFEU, it has by now become routine to circumvent it with the formalistic argument that the respect due to former treaties of EU members does not mean that the EU is bound by them. Therefore the Court can ignore Article 12 of the Chicago Convention (Rules of the Air), which foresees that 'over the high seas, the rules in force shall be those established under this Convention'.

The Court is not any more impressed by Article 2(2) of the Kyoto Protocol, to which the EU is a Party alongside its Member States, and which imposes on the Parties included in Annex I to pursue limitation or reduction of GHG emissions from aviation and marine bunker fuels, and not controlled by the Montreal Protocol, 'working through the International Civil Aviation Organization and the International Maritime Organization, respectively'. Here the Court does not follow the path of a restrictive interpretation suggested by the Advocate General, and resorts to the well-tried and true argument of the (alleged) lack of direct effect of the Protocol.[34]

By these partly rhetorical devices the Court hopes to have warded off the spectre of an international organization intruding into the realm of EU law. As we will later see, most probably this will not be the case. Article 84 of the Chicago Convention offers a dispute solution mechanism, which although not judicial, is far from being ineffective, as the EU itself experienced 13 years ago in the so-called 'noise war' dispute with the US.[35] That dispute had striking similarities with the present one. In the late 1990s, the issue of aircraft noise was actively dealt with in the ICAO's Committee on Aviation Environmental Protection. However, the EU, impatient with the slow pace of negotiations, adopted engine noise standards stricter than those specified in Annex 16 of the ICAO Convention. Most US airlines thought to comply with the stricter standards by retrofitting aircraft engines with 'hush-kits', instead of purchasing new aircraft. The EU Commission, dissatisfied with this perspective, submitted a proposal to the EU Council to adopt a new regulation, in which the parameter of engine performance would

competitiveness of those companies in relation to the air transport companies of third countries' (para 26). The Court's outspokenness was however facilitated by the same Recital 23 to Directive 2003/96, which expressly recognizes that the aim of granting that exemption for commercial aviation in general is not only to comply with 'existing international obligations' but also to maintain the 'competitive position of Community companies'.

[34] *ATA* Judgment, para 77, as compared to lengthy observations in the AG Opinion, paras 175–184.

[35] See P Dempsey, 'Flights of Fancy and Flights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation' (2004) 32 GaJIntl&CompL 277.

substitute that of decibel level. Regulation 925/1999[36] was adopted, but its implementation was delayed one year pending negotiations with the US. US airline companies, which had already invested considerable sums in hush-kitting their airplanes, filed a complaint with the US Department of Transportation against the then 15 EU Member States, and the US Government brought the dispute to the ICAO Council under Article 84 of the ICAO Convention. The EU tried unsuccessfully to raise preliminary objections against the ICAO's Council competence, and the Member States had no other choice than to look for a consensual settlement within the ICAO. In June 2001 the ICAO Council adopted new noise standards, adhering in substance to the US position, and in October 2001 the parties reached an agreement by which the US would withdraw the complaint and the EU would repeal the engine parameter noise regulation. And so it was done: in March 2002 Regulation 925/1999 was repealed and substituted by Directive 30/2002 'on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports'.[37]

Even more than the Chicago Convention, the real challenge for the Court was the 2007 US–EU Open Skies Agreement (OSA). Here we have a recent treaty, directly negotiated by the EU, with the main purpose to liberalize air traffic between the US and the EU. Its very essence relies on the mantras of growth, liberalization, deregulation and it is *prima facie* at odds with the regulatory twist displayed by the Directive. The Court was faced with a daunting task to overcome the hurdle. After the burning defeat of *Intertanko*, where she had unsuccessfully tried to defend the direct effect of some UNCLOS norms, the Advocate General thought to interpret the Court's mind by suggesting it to make the amplest use of its cherished lethal weapon of a purported lack of direct effect of annoying treaties. But here again she did not touch the right chord. There is a consistent pattern in the Court's jurisprudence in recognizing direct effect to treaties, which were directly concluded by the EC/EU, viewing them as 'an integral part of Community law'.[38] The ATA Judgment, insofar as it concerns the OSA, is no exception. In order to fully appreciate the Byzantine sophistication, which the direct effect jurisprudence of the Court has reached over time,[39] it is interesting to notice the subtle degrees of agreement and disagreement between the Advocate General and the Court on the issue.

Not surprisingly the Advocate General and the Court were in agreement in recognizing direct effect to the rules of the OSA, which would not be determinative to the outcome of the case. This is true, for instance, for Article 7, which provides that 'aircraft engaged in international transport are subjected to the laws and regulations of the contracting party regarding admission, departure, operation and navigation, when they enter, depart from or are within its territory'.

[36] OJ 1999, L 115.

[37] OJ 2002, L85/40.

[38] The quotation is from the *Haegeman* case, see ECJ, C-181/73, *Haegeman v Belgium* [1974] ECR 449, para 5. On the point see M Mendez, 'The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques' (2010) 21 EJIL 83. For an overview of recent ECJ's jurisprudence on direct effects of international treaties concerning environmental issues see S Marsden, 'Invoking Direct Application and Effect of International Treaties by the European Court of Justice: Implications for International Environmental Law in the European Union' (2011) 60 ICLQ 737.

[39] On the issue see K Lenaerts and T Corthaut, 'Towards an Internally Consistent Doctrine on Invoking Norms of EU Law' in S Prechal and B van Roermund (eds), *The Coherence of EU Law* (OUP 2008) 495–7.

To the contrary, it is noteworthy that the Court was willing to confer direct effect to some norms, which could well endanger the position of the EU institutions. In this regard one of the most worrying provisions of the OSA is Article 11, whose paragraphs 1 and 2 provide that fuel introduced into or supplied in the territory of the EU for use in aircraft of an airline established in the US and engaged in international air transportation will be exempted from taxes, duties fees and charges 'on the base of reciprocity'. The Advocate General had thought to get rid of the provision, by maintaining that the express mention of reciprocity in the text of the treaty would exclude direct effect, as it can be inferred from the ECJ's jurisprudence on the WTO rules.[40] The Court did not follow her advice, and did not hold the condition of reciprocity as an obstacle to direct effect. The Court, however, was attentive to specify that this was 'in particular' true in circumstances such as those of the present case, in which the condition of reciprocity had been so far satisfied.[41] Once again the Court is not unequivocal in telling us whether it considers the element of reciprocity relevant or not for the purpose of recognizing direct effect to international treaties, revealing, if need be, its difficulty to openly endorse political considerations in its legal assessment of the thorny issue of direct effect.[42]

As for the merit of the argument drawn from Article 11 OSA, the claimant had an apparently fair chance to demonstrate the nature of 'charge' of the ETS, recalling the Court's precedent of the 1999 *Braathens* case. As it will be recalled, in that case the Court had reached the conclusion that a Swedish statute from 1988, which imposed the levy of duties and other indirect taxes on the consumption of fuel for the purpose of civil aviation was incompatible with Directive 92/81 on the harmonization of the structures of excise duties on mineral oils, which excluded any such charges in the EC single market.[43]

Although with some uneasiness the Court was eventually able to distinguish the precedent and to deprive the norm of any relevance in the present case. The Court held that in contrast to the defining feature of obligatory levies on the possession and consumption of fuel, which constituted the subject matter of that previous case, in the present case there is 'no direct and inseverable link' between the quantity of fuel held or consumed by an aircraft and the pecuniary burden on the aircraft's operator in the context of the allowance trading scheme's operation.[44] This is so, because the actual cost for the operator will not entirely depend on fuel consumption, but also on other

[40] *ATA* AG Opinion, para 104.

[41] *ATA* Judgment, para 93.

[42] In C-104/81, *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641, para 18, the Court had expressly stated that the fact that the courts of a contracting Party do not recognize a direct effect to some provisions of a treaty, while the courts of another contracting Party do, does not in itself mean a lack of reciprocity in the implementation of the treaty. When dealing with the GATT/WTO rules, the Court's jurisprudence seems much less firm; compare Joined Cases C-21-24/72 *International Fruit Company NV v Produktschap voor Groenten en Fruit* [1972] ECR-1220, in which the Court did not mention reciprocity as a precondition for recognizing direct effect to art XI GATT, which was denied on other grounds, with *Portugal v Council* (C-149/96 [1999] ECR I-8425, para 45) in which, probably under the influence of the preamble of the Council's Decision 94/800 implementing the WTO Agreements, the Court denied direct effect also on this basis, by noting the risk of a 'disuniform application'. The ECJ tried to distinguish the *Kupferberg* precedent, by noting that agreements, such as that which it had been called to interpret in that former case, are based on 'certain asymmetry of obligations, or create special relations of integration with the Community' (ibid, para 43).

[43] C-346/97, *Braathens* [1999] ECR I-3419, para 23.

[44] *ATA* Judgment, para 142.

variables, such as 'the number of allowances initially allocated to the operator and their market price when the purchase of additional allowances proves necessary in order to cover the operator's emissions'. The Court even ventured to say that an aircraft operator, despite its fuel consumption, could 'even make a profit by assigning its surplus allowances for consideration'.

Here the reasoning of the Court reaches a sublime degree of surrealism.[45] Either the ETS is intended to make polluters pay or it is a big joke. Undoubtedly operators are granted a start bonus, by receiving a very large amount of free allowances, but if the reduction target must have any credibility, it is unthinkable that the subsequent scarcer amount of free allowances and the subsequent rising market prices for the purchase of additional allowances would not come at a cost. The precedent of the US emission trading scheme for dioxide sulfates emissions in the 1990s, which is often presented as a success, and as a model for the European ETS, is ambivalent. In that case many factors, such as the generosity of free allowances, trading mechanisms such as banking and netting, as well as the agreed strategies of the most important industries to desert the allowances auctions in order to bring the prices down, make it difficult to assess the impact that the US ETS had on actual industrial behaviour. Doubts are voiced from time to time as to the effectiveness of the current EU ETS as well.[46] At any rate, the Court's considerations do not help in making the ETS look any more effective.

Another norm which the Advocate General tried to strip off of direct effect was Article 15(3), first sentence, which provides the obligation to follow the aviation environmental standards set out in annexes to the Chicago Convention, 'except where differences have been filed'. For the Advocate General this last sentence meant that the individuals could never rely upon certain environmental standards, the power of the EU to file different standards being always unfettered.[47] Here again the Court made a display of magnanimity and held that the mere possibility of a future derogation is not 'an element defining the obligation' and does not deprive it of its present efficacy. Nevertheless, in the event the Court dismissed the relevance of the norm, by relying on ICAO Res. 37A-19, adopted by the ICAO Assembly of the Parties in October 2010. An Annex of that Resolution had indeed laid down a set of guiding principles for the design and implementation of market-based measures, but the Court aptly forgot to quote the entire paragraph 14 of the Resolution, in which the Assembly urged State Parties 'to engage in constructive bilateral and multilateral consultations and negotiations with other States to reach an agreement', or paragraph 19, in which the Assembly had indeed recognized that 'in the short term voluntary carbon offsetting schemes constitute a practical way to offset CO2 emissions'.

[45] Havel and Mulligan (n 3) speak of 'semantic dodge', at 30.

[46] See in particular the reports published by the carbon emission 'watchdog' non-profit organization Sandbag, 'Cap or trap? How the EU ETS risks locking-in carbon emissions' <www.sandbag.org.uk/site_media/pdfs/reports/caportrap.pdf> (Sept 2010). As it will be recalled, during the first experimental trading period running from 2005 to 2007, 95 per cent of allowances were allocated free of charge. In the current second trading period 2008–12, emissions in the ETS sectors have been capped at around 6.5 per cent below their levels in 2005, but the economic recession in some EU countries is such that the overall emissions could continue to grow with no further need for abatement for almost the entire third period from 2013 to 2020, in which the EU emissions should decrease by 1.74 per cent per year. For a critical assessment see also G Winter, 'The Climate is No Commodity: Taking Stock of the Emission Trading System' (2010) 22 JEL 1.

[47] *ATA* AG Opinion, para 105.

On the extremely frail basis of that Resolution[48] the Court felt assured to uphold the international legality of the European ETS as against the ICAO legal framework. The Court's move is particularly daring. Taken its good faith for granted, it is still very amazing that the Court's interpretation of a single non-binding statement, extrapolated from its context, should so openly run counter to what the same ICAO Parties actually intended to say, and made it later abundantly clear. The key elements of the Resolution were clearly enunciated in the following terms: (1) to work through ICAO to achieve a global annual average fuel efficiency improvement of 2 per cent until 2020; (2) to work through ICAO to achieve an aspirational global fuel efficiency improvement rate of 2 per cent per annum from 2021 to 2050; (3) to favour state cooperation in reaching the aspirational goal of keeping the global net carbon emissions from international aviation from 2020 at the same level; and (4) to explore the feasibility of a global market-based scheme. As it is easy to see, each of these points stresses the importance of cooperation and consent, and leaves no place for unilateral measures.

D. Out There in the Cold: International Law Strikes Back

The perspective of a dispute with non-European countries is looming. All non-EU members of the ICAO Council, with the exception of Australia, tabled in 2011 a Draft Resolution condemning the EU's unilateral move.[49] In particular the Governments of the US, China and India have strongly criticized the EU decision. The two latter governments have even prohibited national air companies operating in Europe to submit by 31 March 2012 to the EU Commission the detailed statistics of their 2011 emissions. US airlines have so far complied with this preliminary requirement, in order not to be excluded from the distribution of free allowances, but are vociferous in asking the support of the US Government to take all necessary steps to convince the EU to repeal or radically modify the Directive. The US House of Representatives has already passed a bill prohibiting air carriers from complying with the EU ETS, which is now pending at the Senate.[50]

The ways to bring the dispute before an arbitral tribunal are various, but each may present some pitfalls. To start with the US, it could activate the Joint Committee provided for in Article 15 of the OSA, and eventually submit the dispute to the arbitration procedure provided for in Article 19. The probability that an arbitration panel would interpret OSA Articles 7, 11, 15 differently than the Court has is fairly high. However, if this were ultimately not the case, the US would lose the leverage and the comparative advantages, which a multilateral forum such as the ICAO offers. Choosing ICAO for the settlement of the dispute could present a risk as well, given the fact that the EU is not a Party to it. The spectre of a non-cooperating EU would drag the dispute for a long time without any prospect of a reasonably quick, clear-cut solution. Finally, there is the possibility that third states bring the dispute to the negotiations and arbitration mechanisms provided for in their bilateral air service agreements with individual EU Member States, by considering that the ETS enforcement

[48] For a critical assessment see M Adam, 'ICAO Assembly's Resolution on Climate Change: A ''Historic'' Agreement?' (2011) 37 Air and Space Law 23.

[49] See ICAO Council, 94th Session, C-WP/13790 17 October 2011.

[50] See *EU ETS Prohibition Act of 2011*, H.R. 2594, 112th Congress 2011, cited in Havel and Mulligan (n 3) at 7, fn 17.

affects the operation of international scheduled air services bilaterally agreed upon.[51] Given the absence of any coordination among the different plaintiffs and between the different arbitration tribunals, this would be the worst scenario, both in terms of an overall clarity of the applicable legal standards, and of the enforceability of each judicial solution.

It is in this light that Article 16 of the Amended Directive displays its entire meaning. By assuming the competence to order flight bans in case of non-compliance with the Directive, the EU Commission seems to have already taken into account the high probability of this scenario. In case of an arbitration between the third state and a Member State, or for that matter in case of an arbitration in the framework of the ICAO, the Member State would advance the defence of the non-attribution of the alleged illegal act, and the arbitral tribunal would have to tackle the irksome question of the responsibility of Member States for an act of an international organization in the case of circumvention of their own obligations.[52] Even in the event of a favourable award for the third state, this could not affect the effectiveness of EU sanctions. The possibility for the air company to directly challenge the Commission's ban decision on the basis of the bilateral air service agreement does not seem to augur a better result. If it is true that in the 1980 *Burgoa* decision[53] the Court held that the then Article 234 TEC, now Article 351 TFEU obliges the EU institutions to respect the rights directly conferred to third states individuals by previous treaties concluded by Member States, it is more than doubtful than the Court, applying the *Intertanko* reasoning, would detect any such individual rights in any bilateral air service agreement.

Of course, one could think that the EU Commission had strategically decided to push through Directive 2008/10 as a bargaining tool in the ICAO negotiations towards a global market-based mechanism for aviation emissions reduction, which would rendered moot any such bilateral dispute.[54] The comparison with the EU's bargaining position at the IMO is instructive. After extensive negotiations, in July 2011 the IMO amended Annex VI of the Marpol, concerning prevention of air pollution from ships, by adding a new chapter, which imposes energy efficiency measures for all ships of 400 gross tonnage and above. It remains to be seen whether the EU will be as successful at the ICAO. On the one hand, the substantial debacle of the hush-kits dispute does not forebode well for such strategy. On the other hand, even a cooperative posture by the EU Commission through the action of Member States in the ICAO framework would not necessarily guarantee a positive outcome, if the other EU institutions were not obliging as well. If called upon by the European Parliament[55] the

[51] See P Mendes de Léon, 'The Enforcement of EU ETS: the EU's Convulsive Efforts to Export its Environmental Values' (2012) 37 *Air and Space Law* 365–84.

[52] See art 61 of the ILC 2011 Draft Articles on the Responsibility of International Organizations, which requires the proof that the member state circumvents its obligation 'by causing the Organization to commit an act that, if committed by the State, would have constituted a breach of that obligation'. The Advocate General was perhaps aware of this risk, which she tried to preventively counteract, by analysing the compatibility of the Directive with the ICAO Convention 'as a matter of good faith', AG Opinion, para 66. On this aspect see Havel and Mulligan (n 3) 16.

[53] C-812/79, *Burgoa* [1980] ECR 2787, para 10.

[54] See art 25a of the Directive, which signals the EU's readiness to amend the Directive as soon as a third country adopts measures for reducing the climate change impact of international aviation.

[55] Under art 294 TFEU all legislative measures in the environmental field are to be taken by the ordinary legislative procedure, ie with the full participation of the EP, which was already the main

Court could be tempted to repeat, *mutatis mutandis*, what it had said in the *Mox Plant* litigation, namely the prohibition to submit instruments of EU law to an Arbitral Tribunal to which the EU is not a party for purposes of their interpretation and application.[56] The stalemate would then be complete.

E. Conclusion

The EU may well be proud of its leadership in carbon emission abating policy. Some facts should however not be forgotten. Civil aviation still accounts for only 2 per cent of all carbon emissions worldwide, even if the percentage is rapidly increasing. For the sake of comparison, the light-duty vehicles and the high-duty vehicles sectors are responsible for respectively 8 per cent and 6 per cent of all European carbon emissions, but here the EU Commission has just started to consider a comprehensive strategy on how to tackle the issue.[57] The Commission's slow pace does not come as a surprise, given the traditional extraordinary effectual lobbying power of this strategically important economic sector in the EU.

The suspicion inexorably arises that through Directive 2008/101the EU Commission just wanted to set an example selecting the transport sector, in which the publicity effect of such measures and the favourable reaction of domestic constituencies would be maximized as compared to the costs to the European economy. The increased costs sustained by the aircraft operators will most probably be passed over to the passengers anyway, meaning an average increase of flight tickets from 2 to 10 euros depending on the distance of the flight. If that will prove a severe enough incentive to meaningfully abate emissions in a foreseeable future is more than doubtful.

By obediently endorsing the validity of Directive 2008/101, the Court might have thought to both contribute to the noble cause of climate change mitigation and to reaffirm the supremacy of EU law. Possibly, it will not reach either of the two goals.

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COMPETITION LAW

The period under review (January 2010 – June 2012) has been a time of consolidation (or exhaustion) for the Union generally, as the *Lisbon* changes are allowed to bed in.

thriving force in rendering Directive 2008/101 as strict as possible with regard to extra-European aircraft operators; see Havel and Mulligan (n 3) 6.

[56] Case C-459/03, *Commission of the European Communities v Ireland* [2006] ECR I-4635, paras 151–152.

[57] Succinct, but none the less telling information available online at <http://ec.europa.eu/clima/policies/transport/vehicles/heavy/index_en.htm>.

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