the Court did cite two of its cases, *Kenneth Good* and *World Organization Against Torture v. Rwanda*.[27] It did not necessarily follow, however, that the Court should make use of the jurisprudence of other regional bodies, such as the Inter-American Court of Human Rights and the European Court of Human Rights.[28] But, in fact, the Court took the opposite approach and found additional support in the case law of both the Inter-American and European Courts, which was "consistent" with the Court's own findings.[29]

In this way the 2012 judgment on compensation has further developed the use of judgments by other international courts and tribunals. Judge Greenwood noted this expansion with approval in his separate declaration:

> International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions. (Dec., Greenwood, J., para. 8)

This is not the place to formulate a thesis, but the multiplicity of sources relied on by the Court in *Diallo* reflects the nature of public international law as an open system. By engaging the different regimes of international law, and by explicitly citing its sources, the Court has asserted its role as the principal judicial body of the United Nations, a genuine world court, and the ultimate arbiter of general international law. The three judgments in the *Diallo* case are important expressions of the changing paradigm of the Court, as it moves away from an arbitral model in contentious cases and further develops its jurisprudence on jurisdiction, procedure, remedies, method, sources, and substantive law.

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European Union law—relationship with international law—climate change—greenhouse gases—regulation of international aviation—Open Skies Agreement—Chicago Convention—Kyoto Protocol

AIR TRANSPORT ASSOCIATION OF AMERICA v. SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE. Case No. C-366/10. *At* http://curia.europa.eu.

Court of Justice of the European Union (Grand Chamber), December 21, 2011.

In a landmark decision, on December 21, 2011, the Court of Justice upheld the extension to international aviation activities of the greenhouse gas emissions trading scheme (ETS) of the

[27] *Id.,* para. 67 (citing Good v. Rep. of Botswana, Communication No. 313/05, para. 204, Afr. Comm'n on Human & Peoples' Rights, 28th Annual Activity Rep. 66 (2010); World Organization Against Torture v. Rwanda, Communication Nos. 27/89, 46/91, 49/91, 99/93 (joined), *id.*, 10th Annual Activity Rep. 49 (1996)).

[28] *See* James Crawford & Penelope Nevill, *Relations Between International Courts and Tribunals: The 'Regime Problem,' in* REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 235 (Margaret A. Young ed., 2012); Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 5, 19–20 (2011) (stating that the International Court of Justice "always abstained itself from the smallest reference to the rationales employed by the regional jurisdictions"). Previously, the Court's registrar would informally advise judges that the Court does not cite regional courts in its judgments, as discussed by Mads Andenas, International Court of Justice, Case Concerning Ahmadou Sadio Diallo, 60 INT'L & COMP. L.Q. 810, 817 n.26 (2011). In the secretariats of the different UN human rights bodies different views have been taken on this, which is reflected in their decisions and general comments. But here, too, the system of citations is opening up. *See* Yevdokimov v. Russia, Communication No. 1410/2005, [2011–12] 1 Report of the Human Rights Committee 127, UN Doc. A/67/40 (Vol. I) (dissenting views clarifying the breach with established practice that the majority's reliance on the European Court of Human Rights represented).

[29] Merits Judgment, para. 68.

European Union (Union or EU) against a challenge that it violates several treaties and principles of customary international law.[1] In addition to its broader significance in the context of global versus unilateral approaches to tackling climate change, and its related role in fueling a major international trade dispute, the ruling pronounces on important aspects of international aviation law and clarifies the principles governing conformity of EU internal legislation with international law.

The ETS, the preeminent element of the Union's climate change policy since 2005, is a "cap and trade" system designed to induce cost-effective reductions in emissions of certain industrial greenhouse gases. Within a specified overall limit on the amount of such gases that can be emitted annually by covered entities, companies are granted—or purchase by auction—tradable emission allowances, each giving a right to emit one metric ton (or 2204.6 pounds) of carbon dioxide (CO_2) equivalent per year. They are obliged annually to redeem allowances commensurate with the volume of their recorded emissions or pay a penalty price. Directive 2008/101/EC (Directive) extended the ETS, as of January 1, 2012, to airlines (including those headquartered in non-EU countries) that operate flights departing from or arriving at airports in thirty European countries.[2] It is applied to each of those flights regardless of its point of origin or destination (whether within the Union or outside it) and with respect to CO_2 emissions calculated on the basis of the entire length of the flight (plus an emission factor).[3]

In 2009, three major U.S. operators of transatlantic air services, together with the then Air Transport Association of America, brought a proceeding before the High Court of Justice of England and Wales seeking to quash regulations that implemented the Directive in the United Kingdom (the member state responsible under the Directive for most United States airlines).[4] The challengers contended that, in adopting the Directive, the Union had violated the provisions of the Chicago Convention, the Kyoto Protocol, the EU-U.S. "Open Skies" Agreement,[5] and several principles of customary international law. It had done so, they claimed, most particularly by purporting to extend jurisdiction and control over flight emissions occurring beyond the Union's borders, including over the high seas and the territory of non-EU states.[6] The defendant argued that the Directive did no such thing, as jurisdiction was exercised only in relation to aircraft on the ground at Union airports.

Because the validity of an EU directive was being challenged, the English court referred the case for a preliminary ruling to the Court of Justice in Luxembourg, which alone has

[1] Case C-366/10, Air Transp. Ass'n of Am. v. Sec'y of State for Energy & Climate Change (Eur. Ct. Justice Dec. 21, 2011), *at* http://curia.europa.eu [hereinafter Judgment].

[2] The twenty-seven EU and three European Economic Area member states.

[3] Parliament and Council Directive 2008/101/EC Amending Directive 2003/87/EC so as to Include Aviation Activities in the Scheme for Greenhouse Gas Emission Allowance Trading Within the Community, 2009 O.J. (L 8) 3, *available at* http://eur-lex.europa.eu [hereinafter Directive].

[4] R on the Application of Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change, [2010] EWHC 1554 (Admin), *at* http://www.casetrack.com (by subscription).

[5] Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 UNTS 295, *as amended*, ICAO Doc. 7300/9 (2006), *available at* http://www.icao.int [hereinafter Chicago Convention]; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 UNTS 148, 37 ILM 22 (1998); Air Transport Agreement, EU-U.S., Apr. 30, 2007, 2007 O.J. (L 134) 4, 46 ILM 470 (2007), *as amended* Mar. 25, 2010, 28 UST 5367, *available at* http://ec.europa.eu/transport/modes/air/international_aviation/country_index/united_states_en.htm [hereinafter Open Skies Agreement].

[6] Noncompliant operators incur various penalties in the responsible member state and risk, in the event of persistent failure to comply, being banned at the Community level from operating to and from EU airports.

competence to rule on the validity of an EU legislative act. It posed four questions in its referral (Questions (1)–(4)):

> (1) Were the claimant corporations entitled to rely on any or all of (a) the four customary norms, or (b) the provisions of the Chicago Convention, the Kyoto Protocol, or the Open Skies Agreement[7] as benchmarks against which to judge the Directive's validity?
>
> (2) Was the Directive invalid for contravening one or more of those customary norms "if and in so far as it applies the [ETS] to those parts of flights . . . which take place outside [Union] airspace"?
>
> (3) Was the Directive invalid for contravening one or more of the treaty provisions "if and in so far as it applies the [ETS] to those parts of flights . . . which take place outside [Union] airspace"?[8] and
>
> (4) Did the Directive contravene any treaty norms by unilaterally applying the ETS to international aviation activities generally governed by the standards found in global conventions or promulgated by the International Civil Aviation Organization (ICAO)?[9] (Para. 45)

The proceedings attracted considerable international attention. Twelve governments intervened at the written proceedings stage and seven at the oral hearing.[10] The EU Council, Commission, and Parliament also intervened.[11]

The Court of Justice upheld the Directive. It first held, in answer to Question (1), that the claimant corporations were entitled to rely on only some of the treaty and customary norms. On the issue whether or not the Directive satisfied the applicable principles and rules contained in the norms that it found could be relied on (Questions (2)–(4)), it found "no factor of such a kind as to affect its validity" (para. 157).

In answering Question (1), the Court dealt first with treaty law. It reiterated that "by virtue of Article 216(2) [of the Treaty on the Functioning of the European Union (TFEU)[12]], where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union" (para. 50). In principle, therefore, "the validity of an act of the European Union may be affected by the fact that it is incompatible with such rules of international law" (para. 51). A claimant corporation could, however, rely on rules of international law to defeat an EU act only when the Union was bound by those rules; the "nature and the broad logic" of the treaty in question did not preclude

[7] In particular, Chicago Convention, *supra* note 5, Arts. 1, 11, 12, 15, 24; Kyoto Protocol, *supra* note 5, Art. 2(2); Open Skies Agreement, *supra* note 5, Arts. 7, 11(2)(c), 15(3).

[8] In particular, Chicago Convention, Arts. 1, 11, and/or 12; Open Skies Agreement, Art. 7.

[9] In particular, Kyoto Protocol, Art. 2(2); Open Skies Agreement, Art. 15(3); Chicago Convention, Arts. 15, 24 (on their own or as read with provisions of the Open Skies Agreement).

[10] Austria, Belgium, France, Germany, Iceland, Italy, Netherlands, Norway, Poland, Spain, Sweden, and the United Kingdom (written proceedings); and Denmark, France, Norway, Poland, Spain, Sweden, and the United Kingdom (oral hearing).

[11] The International Air Transport Association and the National Airlines Council of Canada had already been admitted as "Claimant Interveners" and a transatlantic coalition of five environmental organizations as "Defendant Interveners" by the referring court.

[12] Consolidated Version of the Treaty on the Functioning of the European Union, Art. 216(2), Sept. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

it; and the provisions of the treaty "appear, as regards their content, to be unconditional and sufficiently precise" (paras. 52–55).

With respect to the Chicago Convention, the Court noted that, while all twenty-seven member states are party to it, the Union itself is not, and so is not bound by it. This status is not affected by the Union's implied duty, under TFEU Article 351,[13] not to impede member states' performance of duties under prior agreements, as that article's purpose is to permit such performance, and not to bind the Union itself as regards third state parties. Moreover, the Union could be treated as having "functionally succeeded" to the Convention only if it had assumed *all* the duties of its member states under it (paras. 60–71). The Court therefore concluded that it could not examine the validity of the Directive in light of the Chicago Convention "as such" (para. 72).

Although the Union *is* party to the Kyoto Protocol, and although that protocol mandates quantified greenhouse gas reductions, flexibilities in its provisions persuaded the Court that it "cannot . . . be considered to be unconditional and sufficiently precise so as to confer on individuals the right to rely on it in legal proceedings in order to contest the validity of [the Directive]" (para. 77).

Since, in contrast, the Open Skies Agreement, by which the Union is also bound, "establishes certain rules designed to apply directly . . . to airlines and thereby to confer upon them rights . . . . capable of being relied upon against the parties," and since "the nature and broad logic of the agreement do not so preclude," the Court concluded that it could assess the Directive's validity in light of its provisions, notably Articles 7, 11, and 15 (paras. 84, 86–100). These articles are in similar form to, or incorporate by reference, Chicago Convention/ICAO standards.

The Court then found that the principles of customary international law recognizing (1) the sovereignty of states over their airspace, (2) the illegitimacy of claims to sovereignty over the high seas, and (3) the freedom to fly over the high seas had been codified by the Chicago Convention, and that no state had objected to their application, so that they could be relied upon to test the Directive's validity. It applied a judicial review test to them that was less onerous than its three-part "direct effect" test for treaties: whether, in adopting the Directive, Union institutions had made "manifest errors of assessment concerning the conditions for applying those [norms]" (para. 110). It found insufficient evidence, however, for the existence of the fourth claimed principle, that states of registration exercised exclusive jurisdiction regarding aircraft flying over the high seas.

The Court then proceeded to examine Questions (2) to (4), concerning the substantive compatibility of the Directive with the relevant principles and rules. Determining first the Directive's "scope *ratione loci*," the Court observed that it was not intended to apply as such to aircraft flying over the territories of Union member states or third states, but only to flights as they are on the ground during arrivals at or departures from an EU airport, whereupon their operator incurs an obligation to report the emissions relevant to each entire flight (paras. 114–20).

[13] The first sentence of TFEU Article 351 provides: "The rights and obligations arising from agreements concluded before 1 January 1958 [when the EEC came into being] . . . between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the [EU] Treaties."

Noting, second, that the three customary law principles "are, to a large extent, connected with the territorial scope of [the ETS]" (para. 121), the Court reasoned that, to fulfill the EU duty to respect international law, the Directive must "be interpreted, and its scope delimited, in the light of the relevant rules of the international law of the sea and . . . of the air" (para. 123). In so construing the Directive, it applied a presumption against the Directive's extraterritorial (and in favor of its territorial) application in two propositions: EU law "cannot render [the ETS] applicable as such to aircraft registered in third States that are flying over third States or the high seas" (para. 122); but EU legislation "*may* be applied to an aircraft operator when its aircraft is in the territory of one of the Member States . . . since, in such a case, that aircraft is subject to the unlimited jurisdiction of that Member State and the European Union" (para. 124 (emphasis added)). As the application of the Directive is founded on the physical presence in the Union of aircraft, it followed that it could be said to infringe neither the principle of territoriality nor the sovereignty of third states (para. 125).[14]

To this basis of territorial jurisdiction, the Court added the operator's *choice* to operate a commercial air service to and from the European Union, reasoning that the Union may permit a commercial activity on EU territory only on the condition that operators comply with its environmental protection objectives, especially as these are set high[15] and particularly where they arise from an international agreement to which the Union is party (here the Kyoto Protocol). In this regard, it makes no difference if the relevant events occur partly outside EU territory (paras. 127–29).[16]

The Court sought to distinguish the ETS from a tax or charge on aircraft fuel (which is prohibited by Article 11 of the Open Skies Agreement) along the following lines: (1) this cap-and-trade scheme is a means to encourage the lowest-cost achievement of environmental benefits delimited by the stringency of its cap; (2) as it uses an allowance calculation formula relating to both fuel consumption and an emission factor, there is no direct or inseverable link between fuel held or consumed on board and the amount the operator must pay; (3) that amount depends on the market price of any additional allowances the operator must buy to cover its emissions; (4) this cost is unpredictable and might be nil or less than nil; and (5) the ETS is not intended to be a source of public revenue (paras. 136–47). The Court distinguished, as "fundamentally different," *Braathens Sverige AB v. Riksskatteverket*[17] (member state domestic aviation emissions tax a tax on fuel consumption).

Finally, the Court held that the Directive was not invalid in the light of Article 15(3) of the Open Skies Agreement. It found no evidence of any breach of the environmental standards of the ICAO or the Chicago Convention, which the first sentence of Article 15(3) requires the parties' unilateral environmental measures to follow ("unless differences have been filed"), and no indication that the ETS would be contrary to the latest guiding principles for the design and implementation of environmental market-based measures (MBMs) set out in the annex to

[14] *See also* Judgment, paras. 131–35 (concerning Open Skies Agreement, *supra* note 5, Art. 7(1)).

[15] TFEU, *supra* note 12, Art. 191(2).

[16] On this point the Court cited its judgments in *Ahlström Osakeyhtiö v. Commission,* Joined Cases C-89/85, C-104/85, C-114/85, C-116/85–117/85, C-125/85–129/85, 1994 ECR I-99, paras. 15–18, and *Commune de Mesquer v. Total France SA*, Case C-188/07, 2008 ECR I-4501, paras. 60–62.

[17] Case C-346/97, Braathens Sverige AB v. Riksskatteverke, 1999 ECR I-3419.

ICAO Assembly Resolution A37-19 (paras. 148–51).[18] The Court interpreted the second sentence of Article 15(3) to permit the Union to adopt environmental measures in the form of airport charges that have the effect of limiting the volume of traffic or the frequency or regularity of transatlantic air services as long as they are applied in a nondiscriminatory manner, but added that the ETS does not *in fact* set limits on emissions, or on frequency or regularity of service, nor indeed does it impose an airport charge (paras. 152–56).[19]

* * * *

The judgment concerns a well-intentioned regional effort to deal with the serious and growing threat of global climate change: international aviation has the fastest annual growth rate in greenhouse gas emissions of any industrial sector.[20] After years of fruitless ICAO negotiations, the unilateral European Union effort to fill the regulatory gap is perhaps understandable—even, from an environmentalist perspective, laudable: extending the Directive's application beyond intra-EU flights might well minimize carbon leakage and maximize environmental benefits.

The action of the Union, however, exposed it to various political and potential legal challenges at the interstate level. It raised serious issues of sovereignty and jurisdiction, as well as trade relations, including with respect to taxation and unilateral environmental regulation of foreign corporations offering services in EU territory. This proceeding was anything but frivolous and offered a serious challenge on its own merits. The claimant airlines hoped that their action would encourage the United States to bring an interstate action,[21] but despite widespread state opposition and some retaliatory measures, no state legal action has yet been brought.

Before the European Court of Justice, the claimant corporations were "on the other side's home field" and limited to arguing *states'* rights and duties that applied to them only indirectly, and of these only those capable of being relied on by corporations. The result was arguably a case argued by the "wrong" parties in the "wrong" forum on "too limited" a subject matter in a court more expert in EU than international law and mandated to decide it on the basis of EU law, considering international law only indirectly and relying mainly on its own case law and the practice, *opinio juris*, and treaty interpretations solely of Union member states.

For EU law purposes, the judgment is unquestionably important in clarifying when individuals and corporations can rely on international law to defeat EU legislation. Of concern, however, is the failure of the Court to address the logical consequences for Union member states of its restrictive interpretation of TFEU Article 351. Member states could conceivably

[18] Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection—Climate Change, ICAO Res. A37-19, annex (Sept./Oct. 2010), *at* http://legacy.icao.int/Assembly37/docs/DOCS_REF.html.

[19] The second sentence of Article 15(3) provides: "The Parties shall apply any environmental measures affecting air services under this Agreement in accordance with Articles 2 and 3(4)." Article 2 provides for a fair and equal opportunity for the airlines of both parties to compete. Article 3(4) permits by reference certain exceptions based on standards in Chicago Convention Article 15.

[20] The rate is 3–4 percent. International aviation already accounts for 2–3 percent of global emissions. Joshua Meltzer, *Regulating CO_2 Emissions from Aviation in the EU*, ASIL INSIGHTS, Aug. 31, 2012.

[21] Such an action could be brought, for example, before the ICAO Council (under the Chicago Convention, *supra* note 5, Art. 84), the U.S.-EU Joint Committee (under the Open Skies Agreement, *supra* note 5, Art. 18), or WTO/GATT or GATS dispute settlement mechanisms.

be held responsible under the Chicago Convention for infractions by Union institutions and thereby obliged either to persuade (they have no power to require) those institutions to amend the Directive to bring it into line with the Convention or, in default, to denounce it, the very framework convention on international aviation.

The Court relies, moreover, on a single phrase from an earlier judgment (that Article 351 "does not bind the Community as regards the non-member country in question") read in isolation when it would have been better viewed in the context of the entire paragraph.[22] The Court does *not* rely, as might have been expected, on its famous *Kadi* judgment[23] to hold that Article 351 cannot be invoked to place Chicago Convention obligations above basic fundamental rights forming a foundational part of the Union's constitutional order.

As for the Court's treatment of "functional succession" to the Chicago Convention, it seems odd that a regional integration organization that has assumed exclusive competence vis-à-vis its member states in an extensive range of air transport matters (including, indeed, the aviation emissions that are the subject matter of the challenge in this case) is able to "hide behind" its member states' status as parties to this fundamentally important treaty so as not itself to be bound *in any respect* as long as they retain for themselves a few rights (some of which they will *never* surrender to the Union short of a full defense or political union).[24]

The Court took a particularly narrow *spatial* view of the ETS's extension to international aviation, and failed to mention that the cap (in addition to the obligation to surrender allowances) appears to have extraterritorial scope. This is controversial, as is the Court's avoidance of language going to the *temporal* scope of the Directive: one seems to be expected to believe that an emissions control directive in force applies to facts arising when an aircraft is on the ground, and perhaps not emitting, but *not* when it is in the air and certainly emitting.

The Court is controversial, too, in asserting that territorial jurisdiction over visiting non-EU aircraft and their operators is *unlimited*. In so doing, it failed to examine customary norms applying special jurisdictional rules to visits to a foreign country of civil aircraft (and, by way of carefully drawn analogy, ships), where concurrent criminal and quasi-criminal jurisdiction exists in principle in both the territorial state and the state of registry (or flag). Absent contrary treaty provisions, the territorial state is generally entitled to impose conditions of its choice on arrival or departure, and its jurisdiction will normally prevail over criminal or quasi-criminal matters arising outside the aircraft's doors (or ship's rail).[25] Nevertheless, certain limits on this entitlement are suggested by a number of European and U.S. domestic cases and analogous instances of practice concerning visiting aircraft (and ships).[26]

[22] *Attorney General v. Burgoa*, Case 812/79, 1980 ECR 2787, para. 9, also states, inter alia, that Article 351 (then Treaty of Rome Article 234) "would not achieve its purpose if it did not imply a duty [of the Union institutions to permit a] Member State . . . to perform its obligations under [a] prior agreement."

[23] Joined Cases C-402/05 P, 415/05 P, Kadi v. Council, 2008 ECR I-6351.

[24] For example, the right to maintain prohibited areas as a precaution against aerial attack.

[25] Lauritzen v. Larsen, 345 U.S. 571, 585 (1953). Matters concerning the "internal economy" of the ship will normally be left to flag state control, as a matter of comity (or of law in many non–common law countries), but few, if any, of the cases listed below by the reviewer can be explained as "mere" comity cases.

[26] For practice and citations regarding aircraft, see Written Observations of the International Air Transport Association and the National Airlines Council of Canada, paras. 24, 151, 161–62 (Oct. 20, 2010), *at* http://airlinecouncil.ca/en/document-library.html [hereinafter IATA Observations]; Edmund Dell, *Interdependence and the Judges: Civil Aviation and Anti-Trust*, 61 INT'L AFF. 355, 366–67, 370–72 (1985). *Non-U.S.* cases regarding ships include *SS St Marcos*, 77 ILR 413 (Civ. Brussels 1977); *State v. Jannopoulos*, 77 ILR 559 (Cass. It. 1974); *Sellars v. Mar. Safety Inspector*, [1999] 2 NZLR 44 (CA), 120 ILR 585.

These cases and instances of practice have in common a concern with balancing the policy interests of the territorial state in exercising criminal or quasi-criminal jurisdiction over a state of affairs arising during a foreign craft's visit with the danger of interfering with conflicting policy interests of the state of registry (or flag). Of special note is that European governments have frequently intervened to object to U.S. exercises of criminal or quasi-criminal jurisdiction over visiting craft as contrary to international law (or comity), above all where they involve requirements that, *to fulfill in the United States, they would have to fulfill during the inward and outward journeys, and in many instances everywhere*.[27]

At least one of the "ship visit" cases and one instance of practice were pleaded before the European Court in this case.[28] At least three others are identifiable as ship visit cases by a cursory consultation of *Oppenheim's International Law*.[29] The Court, however, cited only two of its own cases,[30] neither one on point or convincing, and even failed to cite in this context *Poulsen and Diva Navigation,* its main ship visit case, which correctly qualifies the "unlimited" nature of territorial jurisdiction over visiting foreign craft with the phrase "generally subject to."[31]

More broadly, the Court should have considered whether the Union's policy interest in applying the ETS to visiting U.S. aircraft outweighed conflicting U.S. policy interests (while restraining self-referential remarks on high EU environmental policy standards), whether the ETS imposed a requirement that bound U.S. aircraft *during their inward and outward journeys* (or even wherever they went), and what degree of influence inconsistent European state practice should have on its decision. Indeed, even more broadly, the Court might have considered whether Union territorial jurisdiction should give way to the territorial jurisdiction of a non-EU state of origin or destination with a greater interest; the United States appears, for example, to have the greater interest in regulating emissions of aircraft flying from its western states to Europe and back, since they spend more time in and over its territory than in and over EU territory.

The broad wording of Article 11 of the Open Skies Agreement appears aimed at prohibiting all unilateral financial impositions on aircraft fuel, besides payment for services rendered, of whatever kind, including MBMs like the ETS. In any event, the ETS might in truth not be

[27] These protests include sixteen in visiting aircraft cases against U.S. application of smoking and gambling laws, IATA Observations, *supra* note 26, para. 162. In visiting ship cases, see, for example, *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923); twelve protests against section 2 of Senate bill S. 2074 (shipboard environmental standards exceeding those in globally agreed safety conventions), State Department letters dated Sept. 23 & Nov. 1, 1971, *reprinted in* 1972 U.S.C.C.A.N. 2799, 2804; and twelve against the federal Oil Pollution Act of 1990 and a multiplicity of state laws that departed in varying degrees from globally agreed double-hull tanker standards, Int'l Ass'n of Indep. Tanker Owners (Intertanko) v. Lowry, 947 F.Supp. 1484 (W.D. Wa. 1996), *aff'd in part sub nom.* Int'l Ass'n of Indep. Tanker Owners (Intertanko) v. Locke, 148 F.3d 1053 (9th Cir. 1998), *rev'd sub nom.* United States v. Locke, 529 U.S. 89 (2000).

[28] The instance of practice appears at IATA Observations, *supra* note 26, para. 151. The case was *Sellars*, *supra* note 26. Written Observations of the Claimants, para. 111 (Nov. 15, 2010), *at* http://www.airlines.org/Pages/Public_Policy_Filings_Court.aspx.

[29] 1 OPPENHEIM'S INTERNATIONAL LAW §203, at 623–24 & nn.9, 11 (R. Y. Jennings & Arthur Watts eds., 9th ed. 1992) (citing the *SS St Marcos* and *Jannopoulos* cases, *supra* note 26, and *Incres S.S. Co. v. Int'l Mar. Workers Union*, 10 N.Y.2d 218, 176 N.E.2d 719 (1961) (U.S. labor laws applicable to visiting ships, later vacated by the Supreme Court). This reviewer drew the relevant European Commission officials' attention to the cases around the time the Directive was being finalized, in 2008, so the Commission should perhaps have had them in mind and mentioned them during its intervention before the Court.

[30] *Ahlström Osakeyhtiö, supra* note 16; *Commune de Mesquer*, *supra* note 16.

[31] Case C-286/90, Anklagemyndigheden v. Poulsen, 1992 ECR I-6019, para. 28. This is odd, as it cites it in another context.

"fundamentally different" from a *Braathens*-style fuel tax,[32] especially as an increasing proportion of aviation allowances will need to be obtained by auction under a progressively lowered cap and most member states use ETS revenues as a source of public revenue despite being encouraged by the Directive to hypothecate them to environmental purposes.

Moreover, in interpreting Article 15(3) of the Open Skies Agreement, the Court failed to note that the ICAO resolution it cited in support of the Union's unilateral regulatory approach was the object of sixty-three reservations. It also seemed to follow the spirit of the EU reservation more than the resolution's text, and ignored the U.S. reservation, which called the resolution a "package" that needed more work to become balanced and effective. Nor did it refer to earlier, more generally accepted ICAO environmental standards less favorable to the defendant. Doubts arise as to whether full respect is given either to Article 15 of this bilateral treaty or to Chicago Convention Article 15 (in which the prohibition against fees, dues, and charges solely respecting entry to or exit from territory is virtually *absolute* in its phrasing).

Finally, the Court of Justice operates no formal system of deference to the executive, but the Commission exercises considerable influence over it through its exclusive power of legislative initiative, supervision of implementation processes, and interventions as of right in all written and oral proceedings before the Court. The Court, like the member state governments and other EU institutions before it,[33] might well have started from the presumption that the Commission would have acted upon full and sound legal advice. If so, there might be cause for concern in this case. The euro crisis has highlighted claims of dogmatism and arrogance in EU institutions. Power comes with responsibility, including toward European citizens and taxpayers, commercial enterprises operating in the Union (including U.S. airlines), and, indeed, the Court of Justice and its reputation. This author was surprised that his warnings to Commission staff that the Directive was likely to incur major political and legal challenges were dismissed.[34] He was even more surprised when the contractor leading the pre-Directive study for the Commission alleged that Commission staff had pressed for changes to the legal sections,[35] changes that might ultimately have influenced the Court in a wrong direction.

The implications of this decision in the context of trade relations are still evolving. Since 2011, the United States and some thirty other states, most notably China, India, and Russia, have put intense pressure on the European Union to rescind the Directive, while simultaneously speeding up the pursuit of a *global* solution in the ICAO. On November 12, 2012, the EU commissioner for climate action, Connie Hedegaard, recommended, in order to "create a positive atmosphere around these [ICAO] negotiations, . . . that the EU 'stops the clock' when it comes to enforcement of the inclusion of aviation in the EU ETS to and from non-European countries until after the ICAO General Assembly next autumn."[36] If her formal

[32] Braathens Sverige AB v. Riksskatteverke, *supra* note 17.

[33] Since the Directive was adopted under the co-decision procedure, in pursuance of which the member state–appointed Council and the directly elected European Parliament must endeavor to reach a consensus, the Parliament (and its powerful environment committee) effectively wielded a veto, and so has had a good deal of influence over the nature and manner of implementation of the Directive.

[34] Conversation with Stefan Moser and Mark Major (Oct. 15, 2008) (note on file with author).

[35] Telephone conversation with Jasper Faber of the contractor, CE Delft (Nov. 5, 2008) (note on file with author).

[36] Europa Press Release MEMO/12/854, Stopping the Clock of ETS and Aviation Emissions Following Last Week's International Civil Aviation Organisation (ICAO) Council (Nov. 12, 2012), *at* http://europa.eu/rapid/press-release_MEMO-12-854_en.htm.

proposal of November 20, 2012, to the Parliament and Council is adopted as expected early in 2013, U.S. airlines will not be required by EU law to comply with the ETS with respect to those 2012 flights, other than intra-EU flights, in relation to which they return any free allowances already received. The Commission intends that this standstill will continue until the triennial ICAO Assembly agrees, in September or October 2013, on a global MBM with a realistic timetable for further development and implementation (together with an interim framework to facilitate regional and domestic MBMs pending the global MBM agreement's entry into force). If this occurs, the Commission will seek to replace or amend as appropriate the Directive. If it does not occur, the Commission's view is that enforcement powers under the Directive will automatically be reinstated in full. This approach mirrors the unilateral nature of the demand in Directive Article 25a for non-EU states seeking exemption from the ETS to produce equivalent measures *to the Union's satisfaction*.

Notwithstanding the announcement of the standstill, U.S. political opposition to the Directive had such (unusual) bipartisan traction that, less than forty-eight hours later, the House of Representatives passed a bill previously passed by the Senate (S. 1956), and within a fortnight, on November 27, 2012, President Obama signed it into law. The new Act requires the secretary of transportation to prohibit U.S. carriers from participating in the ETS where the secretary determines this ban to be in the public interest; to conduct (with other officials) international negotiations toward a global solution; and to take, in the public interest, other lawful actions necessary to hold U.S. carriers harmless from the ETS, short of the payment from U.S. public funds of any tax or penalty imposed under the ETS.[37]

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World Trade Organization—Agreement on Technical Barriers to Trade—barriers to trade—discrimination—environmental and animal health objectives

UNITED STATES—MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS. WT/DS381/AB/R. *At* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.
World Trade Organization Appellate Body, May 16, 2012 (adopted June 13, 2012).

In a Mexican challenge against U.S. criteria for labeling tuna products as "dolphin-safe," the Appellate Body of the World Trade Organization (WTO), on May 16, 2012, held against the United States while reversing various findings of the panel.[1] The case was one of three WTO Appellate Body decisions issued in 2012 that interpreted and applied the key substantive provisions of the Agreement on Technical Barriers to Trade (TBT Agreement or TBT) for the

[37] European Union Emissions Trading Scheme Prohibition Act of 2011, Pub. L. No. 112-200, 126 Stat. 1477 (2012) (to be codified at 49 U.S.C. §40101 note), *available at* http://www.gpo.gov/fdsys/.

[1] Panel Report, United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/R (Sept. 15, 2011) [hereinafter Panel Report]; Appellate Body Report, United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R (May 16, 2012) (*adopted* June 13, 2012) [hereinafter AB Report]. WTO dispute settlement reports and other WTO documents cited herein are available online at http://www.wto.org.