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ARTICLE

Sovereignty as Decisional Independence over Domestic Affairs: The Dispute over Aviation in the EU Emissions Trading System

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Abstract
A crucial question for international law is how to allocate regulatory jurisdiction over transboundary problems between sovereign states. Insufficient clarity can trigger disputes such as that regarding the legality of the EU Directive that extends its ETS to all flights taking off from or landing at an EU airport, including those by non-EU carriers. This article uses this dispute as the vehicle to examine sovereignty in an increasingly interdependent world. It argues that a state's decisional inviolability is central to sovereignty. Decisional sovereignty allows a state to regulate actors or activities with a link to its territory when these affect the state's domestic affairs, rather than leaving the state at the mercy of an actor's home state or of other states from the territory of which the problem emerges. Moreover, allocation of regulatory jurisdiction in conformity with decisional sovereignty reduces the incentives to free-ride on other states' regulatory efforts and incentivizes international cooperation.

Keywords: State Sovereignty, Regulatory Jurisdiction, Unilateralism, Climate Change, Emissions Trading, Aviation

1. INTRODUCTION

This article addresses the challenge that multi-territorial activities pose to the concept of territorial sovereignty. The term 'multi-territorial activities' is used throughout this article to refer to activities that can be linked to the territory of more than one state. A clear example of such an activity is international transport where passengers or cargo leave from State A, arrive in State B, and possibly also cross the territory, territorial waters or airspace of third states, or the high seas and airspace above it. Other examples

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of multi-territorial activities can be found in the international services sector, such as international financial transactions and telecommunications, where clients and service providers are often located in different jurisdictions, or in relation to the international environment for regulation in the protection of migratory species.

The focus of this article is on the dispute regarding the inclusion of international aviation in the European Union's (EU) Emissions Trading Scheme (ETS), which covers almost 60 per cent of international aviation emissions.[1] As will be discussed in Part 2, the inclusion applies to all flights to or from an airport in a Member State of the EU or the European Economic Area (EEA),[2] regardless of the nationality of the carrier.

The legality of the inclusion of aviation into the ETS under international agreements and customary international law has been the subject of a number of academic articles.[3] This article does not systematically analyze which international law provisions apply and whether they have been violated by the inclusion of aviation in the EU ETS. Instead, it adopts an approach that focuses on the concept of state sovereignty and on the allocation of regulatory jurisdiction with respect to multi-territorial activities such as international aviation. It will be argued that, when we investigate the essence of state sovereignty – that is, the capacity to decide over domestic affairs – the EU should be allowed to include international aviation in its ETS.

Regulatory decisions regarding multi-territorial activities will inevitably have an impact on other states. In the case of the EU ETS, the decision to include international aviation affects non-EU carriers that fly to and from the EU because of the regulatory compliance cost. Conversely – and this is often overlooked in the debate – the decision of the EU's opponents not to regulate aviation greenhouse gas (GHG) emissions also affects other states because of the long-term negative impact of insufficient climate change mitigation and the impact on the competitiveness of carriers whose emissions are regulated relative to their unregulated competitors.

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1 Energy and Climate Change Committee, 'Oral Evidence Taken before the Energy and Climate Change Committee: The EU Emissions Trading System', HC 2010-12 1476-II, answer to Q74, available at: http://www.publications.parliament.uk/pa/cm201012/cmselect/cmenergy/c1476-ii/c147601.htm.

2 The EEA States were included in the EU ETS through the Decision of the EEA Joint Committee 6/2011 of 1 Apr. 2011 amending Annex XX (Environment) to the EEA Agreement [2011] OJ L93/35. To avoid over-complicating the discussion below, this article will refer only to the EU and the EU ETS.

3 L. Bartels, 'The Inclusion of Aviation in the EU ETS: WTO Law Considerations' (2012) 23(2) *European Journal of International Law*, pp. 429–67; S. Bogojević, 'Legalising Environmental Leadership: A Comment on the CJEU's Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme' (2012) 24(2) *Journal of Environmental Law*, pp. 345–56; B. Mayer, 'Case C-366/10, *Air Transport Association of America and Others* v. *Secretary of State for Energy and Climate Change*, Judgment of the Court of Justice (Grand Chamber) of 21 December 2011' (2012) 49(3) *Common Market Law Review*, pp. 1113–40; J. Meltzer, 'Climate Change and Trade: The EU Aviation Directive and the WTO' (2012) 15(1) *Journal of International Economic Law*, pp. 111–56; E. Pache, 'On the Compatibility with International Legal Provisions of Including Greenhouse Gas Emissions from International Aviation in the EU Emission Allowance Trading Scheme as a Result of the Proposed Changes to the EU Emission Allowance Trading Directive', Legal Opinion Commissioned by the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, 15 Apr. 2008, available at: http://www.bmu.de/files/pdfs/allgemein/application/pdf/aviation_emission_trading.pdf; M. Petersen, 'The Legality of the EU's Stand-Alone Approach to the Climate Impact of Aviation: The Express Role Given to the ICAO by the Kyoto Protocol' (2008) 17(2) *Review of European Community and International Environmental Law*, pp. 196–204; J. Scott & L. Rajamani, 'EU Climate Change Unilateralism: International Aviation in the European Emissions Trading Scheme' (2012) 23(2) *European Journal of International Law*, at pp. 469–94.

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In an ideal world, multi-territorial problems would be solved multilaterally between the states involved. In the case of the EU ETS, the EU's opponents have argued that any restrictions on GHG emissions of international aviation need to be based on the mutual agreement of states.[4] The EU and its Member States do not disagree that international cooperation is the best way forward.[5] However, as will be discussed in Part 2 of this article, the EU and its Member States felt compelled to take unilateral action because of the lack of progress made within the International Civil Aviation Organization (ICAO).

The problem is that the consent required in international law for the conclusion of an international agreement is difficult to obtain when dealing with collective action problems. Such problems arise wherever the cooperation of multiple actors is required to reach a positive outcome for everyone involved, but the required actions are not individually rational for the actors that need to perform them.[6] In the case of climate change mitigation, there is a strong incentive to free-ride on the efforts of other states because successful climate change mitigation is a 'global public good',[7] meaning that its benefits are non-excludable and non-rivalrous.[8]

If international regulation of a multi-territorial activity does not emerge, as is the case with aviation GHG emissions, this article argues that we should analyze at what point the effects of one state's regulation infringe another state's sovereignty.

To this end, this article first examines the principles for allocating jurisdiction in customary international law. After demonstrating that these are unable to exclude double regulation, the article will reflect on what sovereignty protects, and how this plays out in the context of multi-territorial activities. It will be argued that a state's freedom to decide over its domestic affairs, or its 'decisional sovereignty', should be central to our understanding of sovereignty.

A state's domestic affairs include the decision on how much environmental degradation it is willing to tolerate within its territory, as long as areas beyond its jurisdiction are not harmed.[9] Hence, if the EU and its Member States consider that aviation GHG emissions from flights to or from their airports pose a threat to their environmental integrity, they should be able to regulate these emissions. In contrast, it should not be up to airlines' home states to decide on the appropriate level of environmental regulation of

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4 ICAO Council, 'Council – 194th Session Summary Minutes of the Second Meeting (Draft)', at paras. 9, 30, 47, 68, 70, 80, 82, 84, 86–8, 100, and Appendix, clause 7, available at: http://ec.europa.eu/clima/policies/transport/aviation/docs/minutes_20111102_en.pdf.

5 Ibid., paras. 21, 29, 39, 43, 53, 91, 96, and 108; 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] OJ L8/3, Preamble, at para. 25.

6 T. Sandler, *Global Collective Action* (Cambridge University Press, 2004), at pp. 17, 19.

7 Ibid., at p. 47.

8 S. Barrett, *Why Cooperate?: The Incentive to Supply Global Public Goods* (Oxford University Press, 2007), at p. 1.

9 Stockholm Declaration of the United Nations Conference on the Human Environment, UN Doc A/CONF.48/14/REV.1, 16 June 1972, Principle 21, available at: http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503; Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (Vol. I), 14 June 1992, Principle 2, available at: http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163.

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all GHG emissions of their airlines, because the environmental effects thereof are not necessarily limited to the home state's territory.

Decisional sovereignty over domestic affairs does not imply that states have unrestricted authority to regulate any activity that affects their domestic affairs. It needs to be remembered that the argument is about multi-territorial activities, which therefore assumes the existence of a link between the regulated activity and the regulating state's territory. Moreover, decisional sovereignty is a relative concept that requires respect for the equal sovereignty of other states. The article will argue that the concept of 'contingent unilateralism' advanced by Scott and Rajamani (that is, unilateralism that is contingent upon the absence of domestic regulation or multilateral cooperation in other states),[10] is essential to protect the decisional sovereignty of other states.

An advantage of decisional sovereignty is that it could, in theory, tip the balance of states' incentives in favour of cooperation. This makes decisional sovereignty desirable not only to protect states' sovereignty over their domestic affairs, but also from the perspective of providing solutions to global or transnational problems.

The article is structured as follows: Part 2 briefly introduces the EU Directive. Part 3 describes the strong reactions to the Directive by non-EU airlines, their home states and the ICAO. Part 4 frames this dispute as one involving the boundaries of state sovereignty in increasing interdependence. It introduces 'decisional sovereignty' as a different way of approaching questions of sovereignty and jurisdiction. Part 5 then discusses how approaching sovereignty as decisional sovereignty can stimulate the development of international agreements. Part 6 concludes.

2. OVERVIEW OF THE DIRECTIVE AND ITS BACKGROUND

In 2008, the European Parliament and the Council of the EU issued Directive 2008/101/EC[11] which included civil aviation in the EU ETS, itself established by Directive 2003/87/EC[12] and in force since 2005. In 2011, the scope of application of Directive 2008/101/EC was extended to Iceland, Liechtenstein and Norway.[13]

The inclusion of aviation in the EU ETS was considered to be essential to achieve the EU's goals to reduce GHG emissions by at least 20 per cent below 1990 levels by 2020,[14] in a cost-effective and economically efficient way.[15] Without this inclusion, aviation emissions were projected to undermine the efforts of other sectors.[16] As shown in

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10 Scott & Rajamani, n. 3 above, at pp. 469, 472–3.

11 Directive 2008/101/EC, n. 5 above. For a discussion of the legislative history, see B. Mayer, n. 3 above, at pp. 1115–9.

12 Directive 2003/87/EC establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community and Amending Directive 96/61/EC [2003] OJ L275/32.

13 Decision 6/2001, n. 2 above.

14 Directive 2008/101/EC, n. 5 above, Preamble, at para. 4.

15 Ibid., para. 1.

16 Ibid., para. 11. Emissions from maritime bunker fuels are still excluded from the ETS, but given the International Maritime Organization's failure to adopt measures, the EU is considering including maritime transport as well: see International Centre for Trade and Sustainable Development (ICTSD), 'Shipping Emissions Next Target for EU Carbon Scheme?' (2012) 12(4) *Bridges Trade BioRes*, available at: http://ictsd.org/i/news/biores/127370.

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a presentation by the European Commission to the ICAO Council in September 2011, GHG emissions from international aviation in the 27 EU Member States have nearly doubled since 1990, whereas total emissions declined by 3 per cent.[17]

A further reason for including aviation in the EU ETS was the lack of an international response to calls to reduce aviation GHG emissions.[18] Despite a mandate in the Kyoto Protocol to regulate aviation emissions,[19] the ICAO has not yet achieved an agreement on how to do so. In 2004, the ICAO Assembly endorsed 'the further development of an open emissions trading system for international aviation'.[20] The incorporation of international aviation into domestic emissions trading schemes was explicitly proposed as an option.[21] The tide turned at the Assembly's next meeting in 2007, when it passed a resolution urging its members 'not to implement an emissions trading system on other Contracting States' aircraft operators except on the basis of mutual agreement between those States'.[22] One year later, the ICAO Secretary-General issued a guidance document discussing options to design the geographical scope of an ETS with respect to international aviation.[23] Using routes, as the EU and its Member States have done, is explicitly mentioned.[24] Moreover, the document describes schemes limited to emissions within a state's national airspace as 'impracticable' and as ineffective because of the exclusion of emissions over the high seas.[25] In 2010, a new ICAO Assembly Resolution superseded the 2007 resolution.[26] Attached to this new Resolution are 'guiding principles for the design and implementation of market-based measures'. These principles mention only that domestic market-based measures

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17 A. Runge-Metzger, 'Aviation and Emissions Trading', ICAO Council Briefing, 29 Sept. 2011, available at: http://ec.europa.eu/clima/policies/transport/aviation/docs/presentation_icao_en.pdf.

18 ICAO Council, n. 4 above, at para. 24; S. Bogojević, n. 3 above, at p. 348.

19 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto (Japan), 10 Dec. 1997, in force 16 Feb. 2005, Art. 2(2), available at: http://unfccc.int/kyoto_protocol/items/2830.php.

20 ICAO Assembly, 'Resolution 35-5: Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection', in *Assembly Resolutions in Force (as of 8 October 2004)*, Appendix I, operative clause 2(c)(1), available at: http://legacy.icao.int/icaonet/dcs/9848/9848_en.pdf. An open system is one in which emissions allowances can be traded across sectors: see Runge-Metzger, n. 17 above, slide 18.

21 ICAO Assembly, ibid., Appendix I, operative clause 2(c)(2). The Directive's preamble explicitly refers to this endorsement as a motivation: Directive 2008/101/EC, n. 5 above, Preamble, at para. 9.

22 ICAO Assembly, 'A36-22: Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection' in *Assembly Resolutions in Force (as of 28 September 2007)*, Appendix L, operative clause 1(b)(1) available at: http://www.icao.int/icaonet/dcs/9902/9902_en.pdf. The EU ICAO members and the members of the European Civil Aviation Conference registered a formal reservation to this particular part of the resolution: see European Community and European Civil Aviation Conference, 'MEMO/07/391 – Written Statement of Reservation on behalf of the Member States of the European Community (EC) and the Other States Members of the European Civil Aviation (ECAC) [made at the 36th Assembly of the International Civil Aviation Organization in Montreal, 18–28 September 2007]', available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/391&format=PDF&aged=1&language=EN&guiLanguage=fr.

23 ICAO Secretary-General, 'Doc. 9985, Guidance on the Use of Emissions Trading for Aviation', available at: http://ec.europa.eu/clima/policies/transport/aviation/docs/icao_guidance_2008_en.pdf.

24 Ibid., para. 3.2.20.

25 Ibid., paras. 3.2.33–34.

26 ICAO Assembly, 'Resolution A37-19: Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection–Climate Change', at para. 1, available at: http://www.icao.int/icao/en/env2010/A37_Res19_en.pdf.

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'should not be duplicative and international aviation CO_2 emission should be accounted for only once'.[27] Thus, unilateral measures are not excluded, as long as overlaps between different unilateral measures are avoided. These guidelines are the most concrete initiative to have come out of the ICAO with respect to market-based measures such as an ETS.

In light of the international inaction and the need to spread the burden of emissions reductions across economic sectors, Directive 2008/101/EC requires, from 1 January 2012 onwards, that all aircraft (regardless of their nationality) cap emissions of their flights to or from the EU at a percentage of average annual emissions in 2004, 2005 and 2006.[28] In 2013, total GHG emission allowances are set at 97 per cent. Barring an amendment, the ceiling is lowered to 95 per cent in the following years.[29] Of the available emission allowances, 15 per cent are auctioned and the remainder is allocated for free.[30] From 2013, 3 per cent of the free allowances will be reserved for new entrants to the market or for airlines that engage in additional activities.[31]

The financial impact of the Directive on individual airlines not benefiting from an exemption[32] will depend on their initial allocation of free allowances and their success in reducing their GHG emissions. If an airline reduces emissions by more than that required, it can sell its excess allowances to other airlines.[33] However, if it fails sufficiently to reduce its emissions, it will have to purchase excess allowances from other airlines or other sectors included in the ETS.

To apply the Directive in practice, each aircraft operator is assigned to a Member State based on where it has received its operating licence or where it is estimated to emit the most.[34] The administering Member State deals with applications for free emission allowances,[35]

27 Ibid., Annex, at para. f.

28 Directive 2008/101/EC, n. 5 above, Art. 1(3). A list of implementing legislation is available at: http://ec.europa.eu/clima/policies/transport/aviation/documentation_en.htm.

29 Directive 2003/87/EC, n. 12 above, Art. 3c.

30 Ibid., Art. 3d.

31 Ibid., Art. 3f.

32 Certain types of flight are exempt, e.g., search and rescue flights, and operators with total flights or emissions below a minimum threshold: see Directive 2003/87/EC, n. 12 above, Annex I. The interpretation of the existing exemptions is clarified in Commission Decision 2009/450/EC on the Detailed Interpretation of the Aviation Activities Listed in Annex I to Directive 2003/87/EC [2009] OJ L149/69. Following the Directive's review by 1 Dec. 2014, differential treatment could be introduced for airlines from states that are structurally dependent on air transport: see Directive 2003/87/EC, n. 12 above, Art. 30(4) (f) and (h).

33 Although airlines can purchase excess allowances from ETS participants in other sectors, such as steel production, they cannot sell their own excess allowances to participants in other sectors: see Directive 2008/101/EC, n. 5 above, Preamble, at paras. 27 and 29.

34 Directive 2003/87/EC, n. 12 above, Art. 18a. Every year, the European Commission publishes a list of all aircraft operators and their administering Member State. The latest compilation is attached to Commission Regulation (EU) No. 100/2012 Amending Regulation (EC) No. 748/2009 on the List of Aircraft Operators that Performed an Aviation Activity Listed in Annex I to Directive 2003/87/EC on or after 1 January 2006 Specifying the Administering Member State for Each Aircraft Operator also Taking into Consideration the Expansion of the Union Emission Trading Scheme to EEA-EFTA Countries [2012] OJ L39/1.

35 Directive 2003/87/EC, n. 12 above, Art. 3e(1) and 3f(2) for allowances from the special reserve.

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calculates free allowances using a benchmark provided by the Commission,[36] allocates allowances,[37] approves monitoring and reporting plans of airlines under its responsibility,[38] ensures that the required amount of allowances is surrendered by 30 April of the following year,[39] and deals with non-compliance.[40]

The Directive specifies that non-compliance results in a fine of €100 for each tonne of carbon dioxide equivalent emitted,[41] as well as the addition of the shortfall to the amount of allowances to be surrendered in the next year.[42] The administering Member State can decide on further enforcement measures to ensure compliance[43] and, should these measures fail, the Member State can request the European Commission to impose an operating ban on the airline concerned.[44]

Most important for the purpose of this article is the application of the Directive to all flights landing at or taking off from an EU airport, regardless of the nationality of the carrier.[45] This extension is motivated by the need to avoid leakage and to avoid reducing the competitiveness of EU carriers when their foreign competitors flying the same routes are not required to reduce their GHG emissions.[46]

Should a third state take regulatory steps to address aviation GHG emissions, the Directive provides ways of taking these into account. A first option is for the Commission and the Member States to consult with the third state on how to ensure optimal interaction between different regimes.[47] When necessary, the Commission has been delegated the authority to amend Annex I of the Directive to exempt flights arriving from a third state that has adopted measures to deal with aviation GHG emissions from the EU ETS.[48] Any other amendments are not within the Commission's competence, but need to be made by the European Parliament and the Council themselves.[49] The Commission can also recommend to the Council to open negotiations with the third country involved.[50] At this stage, it is unclear what the conditions would be for an exemption from Annex I, for another type of exemption, or to open up

36 Ibid., Art. 3e(4) and 3f(7) for allowances from the special reserve.

37 Ibid., Art. 3e(5).

38 Ibid., Art. 3g.

39 Ibid., Art. 12(2a).

40 Ibid., Art. 16.

41 For allowances issued from 1 Jan. 2013 onwards, this amount will be increased in line with the European index of consumer prices: Directive 2003/87/EC, n. 12 above, Art. 16(4).

42 Ibid., Art. 16(3).

43 Ibid., Art. 16(1); Directive 2008/101/EC, n. 5 above, Preamble, para. 26.

44 Directive 2003/87/EC, n. 12 above, Art. 16(5), as amended.

45 Directive 2008/101/EC, n. 5 above, Preamble, para. 16. Whether or not leakage will occur is debated: see T. Barker et al., 'Mitigation from a Cross-Sectoral Perspective', in B. Metz et al. (eds), *Climate Change 2007: Mitigation Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007), at pp. 665–6. In the specific case of the EU ETS, the threat of leakage is reduced because 85% of the allowances are allocated for free.

46 Directive 2008/101/EC, n. 5 above, Preamble, para. 16.

47 Directive 2003/87/EC, n. 12 above, Art. 25a(1), 1st subpara.

48 Ibid., 2nd subpara.

49 Ibid., 3rd subpara.

50 Ibid., 4th subpara.

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negotiations with the third state. While this hardly creates a good foundation on which to build confidence between states, the lack of clarity is understandable given that other states have yet to regulate aviation emissions.[51]

The inclusion of non-EU airlines has proved to be the most controversial aspect of Directive 2008/101/EC. Part 3 gives an overview of the dispute.

3. OVERVIEW OF THE DISPUTE

In their fight against the application of Directive 2008/101/EC to non-EU airlines for flights to or from the EU, the EU's opponents have pursued various avenues.

Firstly, in December 2009, American Airlines, Continental Airlines, United Airlines and the Air Transport Association of America[52] challenged the legality of the United Kingdom's (UK) implementation of Directive 2008/101/EC in the High Court of Justice of England and Wales.[53] In the course of these proceedings, the High Court made a request for a preliminary ruling to the Court of Justice of the European Union (CJEU) to determine whether a range of international agreements and rules of customary international law could be invoked to challenge the legality of the Directive and, if so, whether these international provisions could invalidate the Directive.[54] On 6 October 2011, Advocate-General (A-G) Kokott issued an Opinion which argued that most of the provisions on which the claimants relied could not be invoked as a benchmark for the legality of the Directive and, even if they could, they would not invalidate the Directive.[55] The CJEU's judgment of 21 December 2011[56] largely followed the A-G's Opinion, and the lawsuit was subsequently dropped.[57] Chinese airlines are reportedly considering

[51] The EU's delegation in Beijing is reportedly studying Chinese proposals to allot a portion of the revenue generated by passenger taxes to curb aviation emissions: see B. Lewis, 'EU Climate Boss: Studying China's Airline CO_2 Plan', *Reuters*, 19 Apr. 2012, available at: http://www.reuters.com/article/2012/04/19/uk-eu-china-airlines-idUSLNE83I00S20120419.

[52] The Air Transport Association of America is now known as 'Airlines for America' or 'A4A': see http://www.airlines.org.

[53] The UK was chosen as the forum because of its role as the administering Member State for these three airlines: see Commission Regulation (EC) No. 748/2009 on the List of Aircraft Operators which Performed an Aviation Activity Listed in Annex I to Directive 2003/87/EC on or after 1 January 2006 Specifying the Administering Member State for Each Aircraft Operator [2009] OJ L219/1, now superseded by Commission Regulation (EU) No. 100/2012, above n. 34, Annex.

[54] Case C-366/10, *Air Transport Association of America, American Airlines, Inc., Continental Airlines, Inc., United Airlines, Inc.* v. *Secretary of State for Energy and Climate Change*, Reference for a Preliminary Ruling from High Court of Justice Queen's Bench Division (Administrative Court) (UK) made on 22 July 2010 [2010] OJ C260/9.

[55] Case C-366/10, *Air Transport Association of America and Others* v. *Secretary of State for Energy and Climate Change*, Opinion of A-G Kokott (not yet published). For a detailed discussion of the Opinion, see K. Kulovesi, 'Make Your Own Special Song, Even if Nobody Else Sings Along: International Aviation Emissions and the EU Emissions Trading Scheme' (2011) 2(4) *Climate Law*, pp. 535–58, at 545–51.

[56] Case C-366/10, *Air Transport Association of America and Others* v. *Secretary of State for Energy and Climate Change* (not yet reported).

[57] Airlines for America, 'A4A Lawsuit Defines Clear Path for Government Action', 27 Mar. 2012, available at: http://www.airlines.org/Pages/news_3-27-2012.aspx.

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further legal challenges against the Directive, although they are waiting for the most appropriate time to file, which presumably is after their administering Member State has imposed penalties for non-compliance.[58]

Secondly, some states have chosen the route of unilateral legal responses. For example, on 24 October 2011, the House of Representatives of the United States (US) passed the European Union Emission Trading Prohibition Act of 2011.[59] If passed by the Senate,[60] and unless vetoed by President Obama, this Act would make it illegal for American companies to comply with the EU ETS. China and India have similarly banned their carriers from complying with the EU ETS.[61]

Thirdly, opponents are using political and economic pressure on the EU to withdraw Directive 2008/101/EC. China has allegedly blocked Hong Kong Airlines' order of ten A380 aircraft from Airbus.[62] The Chinese government has also threatened to use unspecified measures to defend its carriers against the EU ETS.[63] In the US, the State and Transportation Departments are looking into avenues for retaliation.[64] India has threatened that the inclusion will affect climate change negotiations.[65]

Fourthly, this unilateral pressure is backed up by multilateral initiatives. India has taken the initiative of coordinating the responses of what its officials have dubbed 'the Coalition of the Unwilling'.[66] At the end of September 2011, representatives of 21 states

58 ICTSD, 'EU Aviation Emissions Levy Ruled Lawful by European Court as Measure Enters into Force' (2012) 16(1) *Bridges Weekly Trade News Digest*, available at: http://ictsd.org/i/news/bridgesweekly/123063/; 'China Aviation Body Urges Members not to Cooperate with EU CO_2 Scheme', *Reuters*, 15 Dec. 2011, available at: http://www.reuters.com/article/2011/12/15/uk-china-aviation-carbon-idUSLNE7BE01D20111215.

59 H.R. 2594, An Act to Prohibit Operators of Civil Aircraft of the United States from Participating in the European Union's Emissions Trading Scheme, and for Other Purposes, available at: http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR02594:.

60 The Bill was introduced in the Senate on 7 Dec. 2011, where it was referred to the Committee on Commerce, Science and Transportation: see http://thomas.loc.gov/cgi-bin/bdquery/z?d112:S.1956:.

61 Aviation Law Prof Blog, 'India Encouraging Carriers not to Comply with EU ETS', 11 Jan. 2012, available at: http://lawprofessors.typepad.com/aviation/2012/01/india-encouraging-carriers-not-to-comply-with-eu-ets.html; 'China Bans Airlines from Joining EU Carbon Levies System', *Bloomberg News*, 6 Feb. 2012, available at: http://www.bloomberg.com/news/2012-02-06/china-bans-airlines-from-joining-european-union-s-carbon-emissions-system.html. The China Air Transport Association had already instructed its members not to participate in the EU ETS, see Reuters, n. 58 above.

62 P. Clark, 'China Blocks Billion-Dollar Airbus Order', *The Financial Times*, 24 June 2011, available at: http://www.ft.com/intl/cms/s/0/c4ce5aa0-9e4b-11e0-8e61-00144feabdc0.html#axzz1eNoGmzej.

63 'China Says to Defend against EU Emissions Plan', *Reuters*, 7 Feb. 2012, available at: http://www.reuters.com/article/2012/02/07/us-china-eu-airlines-idUSTRE8160QF20120207.

64 J. Crawley & A. Quinn, 'Analysis: U.S. Weighs Retaliation over Europe Aviation Law', *Reuters*, 6 Jan. 2012, available at: http://www.reuters.com/article/2012/01/06/us-usa-eu-airlines-idUSTRE8051YU20120106; ICTSD, 'Washington-Brussels Tension Grows over Aviation Emissions Levy' (2012) 16(2) *Bridges Weekly Trade News Digest*, available at: http://ictsd.org/i/news/bridgesweekly/123211.

65 K. Mukherjee, 'EU CO_2 Law Could Scupper Global Climate Talks', *Reuters*, 11 Apr. 2012, available at: http://www.reuters.com/article/2012/04/11/uk-india-eu-climate-idUSLNE83A02020120411.

66 See, e.g., C. Buckley, 'China Bans Airlines from Joining EU Emissions Scheme', *Reuters*, 6 Feb. 2012, available at: http://www.reuters.com/article/2012/02/06/us-china-eu-emissions-idUSTRE81500V20120206.

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met in New Delhi (India) to formulate a unified position.[67] This Declaration was presented as a non-negotiable proposal to the ICAO Council at its 194th session in early November 2011, together with a working paper drafted by India's representative on the Council, where it received the endorsement of 26 ICAO Members.[68] Since the ICAO Council is not competent to take legally binding decisions, the endorsement of the working paper is a political statement only.[69] Nevertheless, the EU submitted a reservation to it.[70] The opponents met again in Moscow (Russia) on 21 and 22 February 2012 where 23 states[71] decided on a list of possible retaliation measures.[72] Some of these measures involve multilateral action, such as dispute settlement under Article 84 of the Chicago Convention[73] or a review of the legality under the World Trade Organization (WTO) Agreement.[74] Most of the options, however, involve denying privileges to EU airlines and economic retaliation against them, presumably in the hope that they will lobby their governments and the European Commission to change stance. The threat of countermeasures has not gone unnoticed, with France asking the European Commission to seek a compromise with other states.[75]

4. SOVEREIGNTY OVER MULTI-TERRITORIAL ACTIVITIES

The dispute over the inclusion of international aviation in the EU ETS reveals conflicting claims of sovereignty over multi-territorial activities. On the one hand, the EU Member States, acting through the EU, consider the inclusion of aviation a legitimate exercise of their own sovereignty.[76] On the other hand, the EU's opponents argue that the inclusion

67 The 21 states involved were Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Japan, South Korea, Malaysia, Mexico, Nigeria, Paraguay, Qatar, Russian Federation, Saudi Arabia, Singapore, South Africa, the US, and the United Arab Emirates: see Press Information Bureau, Government of India, Ministry of Civil Aviation, 'Inclusion of International Civil Aviation in European Union-Emission Trading Scheme (EU-ETS) and its Impact – Press Note', available at: http:// pib.nic.in/newsite/PrintRelease.aspx?relid=77104.

68 ICAO Council, n. 4 above. The 26 states endorsing the New Delhi Declaration in the ICAO Council are Argentina, Brazil, Burkina Faso, Cameroon, China, Colombia, Cuba, Egypt, Guatemala, India, Japan, Malaysia, Mexico, Morocco, Nigeria, Paraguay, Peru, South Korea, Russian Federation, Saudi Arabia, Singapore, South Africa, Swaziland, Uganda, the United Arab Emirates and the US.

69 ICAO Council, ibid., para. 6.

70 European Commission, 'EU Reservation to Council Decision on Joint Declaration', 12 Jan. 2012, available at: http://ec.europa.eu/clima/policies/transport/aviation/docs/reservations_20120112_en.pdf.

71 In Moscow, the opponents that signed the Declaration were Armenia, Argentina, Belarus, Brazil, Cameroon, Chile, China, Cuba, Guatemala, India, Japan, South Korea, Mexico, Nigeria, Paraguay, Russian Federation, Saudi Arabia, Seychelles, Singapore, South Africa, Thailand, Uganda and the US.

72 'Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU-ETS', available at: http://www.ruaviation.com/docs/1/2012/2/22/50; ICTSD, 'Opponents of EU Aviation Carbon Law Agree on Possible Countermeasures' (2012) 16(7) *Bridges Weekly Trade Digest*, available at: http://ictsd.org/i/news/bridgesweekly/126278/.

73 Convention on International Civil Aviation, Chicago, IL (US), 7 Dec. 1944, in force 4 Apr. 1947, available at: http://www.icao.int/publications/pages/doc7300.aspx.

74 Marrakesh Agreement Establishing the World Trade Organization, Marrakesh (Morocco), 15 Apr. 1994, in force 1 Jan. 1995, available at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

75 ICTSD, 'France Wavers on EU Aviation Emissions Rule' (2012) 16(14) *Bridges Weekly Trade Digest*, available at: http://ictsd.org/i/news/bridgesweekly/130794.

76 ICAO Council, n. 4 above, para. 26.

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of flights of non-EU airlines landing at or taking off from an EU airport amounts to an extra-territorial exercise of jurisdiction.[77]

To examine which claim to exercise sovereignty over the multi-territorial activity of aviation is compatible with international law, the following sections analyze the limits of traditional approaches to sovereignty and jurisdiction and argue that, in the context of multi-territorial activities, the focus of sovereignty should be on the ability of states to make decisions over their domestic affairs.

4.1. *The Limits of Traditional Approaches to Sovereignty and Jurisdiction*

Sovereignty can be defined as the ultimate legal authority to decide to the exclusion of others.[78] In international law, states exercise this sovereignty over their 'domestic affairs'. Often, the term is used interchangeably with 'reserved domain'[79] or 'domestic jurisdiction'.[80]

Traditionally, the concept of state sovereignty is closely linked to a state's territory. State sovereignty is considered as a 'title to territory'[81] that allows states to take independent decisions within their territory and bans them from acting in another state's territory without the latter's consent.[82] As articulated by Huber in the *Island of Palmas* arbitration, '[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State'.[83] As a result, under international law, sovereignty is traditionally considered 'territorial sovereignty'.[84]

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77 Ibid., paras. 10, 13, 47, 56, 81, 83, 103; Pache, n. 3 above, at p. 3.

78 *Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925 between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas (or Miangas)* RIAA 829, at p. 838; R.H. Jackson, *Sovereignty: Evolution of an Idea* (Polity, 2007), at pp. 10–11; D.A. Lake, 'The State and International Relations', in Ch. Reus-Smit and D. Snidal (eds.), *The Oxford Handbook of International Relations* (Oxford University Press, 2008), pp. 41–61, at 43; D. Sarooshi, 'The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government' (2003–4) 25 *Michigan Journal of International Law*, pp. 1107–39, at 1108.

79 I. Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press, 2003), at p. 291; K.S. Ziegler, 'Domaine Réservé', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2008), available at: http://www.mpepil.com.

80 UN GA Resolution 2625 (XXV), of 24 Oct. 1970, on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, available at: http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/2625(XXV)&Lang=E&Area=RESOLUTION. For a discussion, see A. D'Amato, 'Domestic Jurisdiction', in R. Bernhardt (ed.), *Encyclopedia of Public International Law, Vol. 1* (Elsevier, 1992), pp. 1090–6, at 1090.

81 E. Lauterpacht, 'Sovereignty – Myth or Reality?' (1997) 73(1) *International Affairs*, pp. 137–50, at 139–40.

82 P. Malanczuk and M.B. Akehurst, *Akehurst's Modern Introduction to International Law* (7th revd. edn, Routledge, 1997), at p. 109.

83 *Island of Palmas* case, n. 78 above, at p. 838.

84 See, e.g., Brownlie, n. 79 above, who devotes a whole Part to the discussion of territorial sovereignty.

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Yet, not all actors or activities within a state's territory are automatically within its domestic affairs. The 1923 *Nationality Decrees* Advisory Opinion[85] of the Permanent Court of International Justice (PCIJ), still regarded as the authoritative interpretation of 'domestic jurisdiction', 'reserved domain' or 'domestic affairs',[86] indicates that the evolution of international law and international relations can restrict the scope of a state's domestic affairs.

The Opinion originated in a dispute between the UK and France about the impact on British citizens of the nationality decrees issued by France in Tunis – at the time a French protectorate – and in Morocco's French Zone. The Council of the League of Nations asked the PCIJ whether the dispute related to a matter which, by international law, was solely within France's domestic jurisdiction.[87] The PCIJ held that:

> [t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. ... [I]t may well happen that, in a matter which . . . is not, in principle regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States.[88]

Given its dependence on the evolution of international relations, the scope of a state's domestic affairs is thus inherently in flux and can only be determined for each state individually, depending on its specific obligations under international law.[89]

Applying the PCIJ's formula to the EU ETS, one finds that there is no specific international agreement that governs GHG emissions of international aviation or allocates the regulation thereof to the state of departure, arrival or registration of the aircraft.[90] There is thus no indication that the regulation of international flights landing at or departing from an EU airport is not part of the domestic affairs of the EU Member States, nor that it is excluded from those of the EU's opponents.

The principles allocating jurisdiction under customary international law similarly do not restrict either side's discretion to regulate GHG emissions from international aviation. International law traditionally requires a sufficient nexus between a regulating state and the object of regulation for the exercise of regulatory jurisdiction to be

85 *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921*, Advisory Opinion, 7 Feb. 1923, (1923) PCIJ Series B 5.

86 Brownlie, n. 79 above, at p. 291; G. Nolte, 'Article 2(7)', in B. Simma (ed.), *The Charter of the United Nations: A Commentary, Vol. 1* (Oxford University Press, 2002), pp. 148–71, at 157.

87 This question was important because Art. 15(8) of the Covenant of the League of Nations precluded the Council from making recommendations about the settlement of a dispute arising 'out of a matter which by international law is solely within the domestic jurisdiction of that party'.

88 *Nationality Decrees* Advisory Opinion, n. 85 above, at p. 24.

89 G. Abi-Saab, 'Some Thoughts on the Principle of Non-Intervention', in E. Suy & K. Wellens (eds), *International Law: Theory and Practice* (M. Nijhoff, 1998), pp. 225–35, at 230; Brownlie, n. 79 above, at p. 291; Nolte, n. 86 above, at p. 157; L. Preuss, 'Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction' (1949) 74 *Recueil de Cours*, pp. 553–652, at 568; M.S. Rajan, *The Expanding Jurisdiction of the United Nations* (Oceana Publications, 1982), at p. 232.

90 Scott & Rajamani, n. 3 above, at p. 476.

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presumed valid.[91] Of the principles that assist with the identification of such a nexus, the most important in the context of the EU ETS dispute are the territoriality and the personality principles.

Based on the personality principle, each state's exercise of jurisdiction over its own carriers, even for the GHG emissions over the high seas and in another state's airspace, would be presumed to be legal under international law. Some statements of the EU's opponents reveal that they favour the personality principle as a basis for the exercise of jurisdiction. For example, according to press reports, a spokesperson for the US State Department argued that the 'EU needs to cease application of this scheme to *foreign* airlines'.[92] Jurisdiction over international aviation is, however, not solely determined on the basis of the personality principle. For example, the obligations under the Schengen Agreement[93] and its Implementing Convention,[94] to ensure that passengers have the necessary documents to enter the territory of an EU Member State, apply to all carriers flying to the EU.[95]

The territoriality principle is at least equally important in an international legal order based on territorial sovereignty.[96] It bans states from regulating acts that are wholly internal to another state, except when jurisdiction can be based on another principle. However, this does not imply that states can exercise jurisdiction only over acts that are wholly internal to their own territory. The territoriality principle requires only a nexus, rather than a complete match, between the regulated activity and the territory of the regulating state.[97]

Given that international aviation is a multi-territorial activity, both the EU Member States and their opponents could claim jurisdiction. This author thus disagrees with the position of the EU's opponents that the inclusion of international aviation in the EU ETS is extra-territorial because allowances have to be submitted for the portion of a flight that takes place outside the airspace of an EU Member State.[98] Such an interpretation of the territoriality principle limits the valid exercise of territorial jurisdiction to events that fall entirely within a single state's territory.

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91 It should be noted that these principles confer only a presumption of legality, and that there may be reasons why an exercise of jurisdiction based on one of these principles is nevertheless unacceptable under international law: M.T. Kamminga, 'Extraterritoriality', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2009), at para. 10, available at: www.mpepil.com.

92 J. Rankin, 'Foes of EU Airline CO_2 Rules Agree on Tactics', *Reuters*, 22 Feb. 2012, available at: http://www.reuters.com/article/2012/02/22/eu-airlines-idUSL5E8DM3YD20120222. (emphasis added)

93 Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 14 Jun. 1985, Schengen (Luxemburg) [2000] OJ L239/13.

94 Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/19, at Art. 26.

95 Mayer, n. 3 above, at p. 1129.

96 C. Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2008), at p. 42.

97 *Case of the S.S. 'Lotus'*, Judgment, 7 Sept. 1927, PCIJ Series A, at pp. 18–19; Brownlie, n. 79 above, at p. 297; Ryngaert, ibid., at pp. 17, 134.

98 See n. 77 above.

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There are many examples under international law where states exercise jurisdiction over actors or activities that have only a nexus with the regulating state's territory. States, for example, have jurisdiction to regulate both services supplied from the territory of another state into their territory and the suppliers of these services.[99] Such regulation will affect foreign-service suppliers that want to export their service to the regulating state. Similarly, states often base antitrust jurisdiction, albeit controversially, on the effects of foreign actions within their territory.[100] Finally, at least one EU opponent applies its taxation laws to the worldwide income of 'resident aliens'.[101] Since these 'resident aliens' are not citizens, jurisdiction can only be based on the territoriality principle. The situation of these 'resident aliens' is comparable to that of non-EU airlines in the EU ETS: because of a territorial connection with the regulating state, some of their activities elsewhere are taken into account for the purposes of the regulation. Arguably, the application of US tax law to resident aliens reaches even further into another state's territory than the inclusion of airlines in the EU ETS because, once the territorial connection is established, all worldwide income is taken into account.[102] This would be comparable to the position where the EU requires all carriers that regularly[103] land at an EU airport to submit allowances for all their flights, even those between two non-EU airports.

The principles that allocate jurisdiction under customary international law thus do not place international aviation outside the domestic affairs of one of the sides involved. Instead, they can lead to double regulation. Traditionally, double regulation is avoided either through an international agreement allocating jurisdiction to one state or another, or through the creation of an international organization with regulatory authority. In an international legal system of sovereign states, international agreements require a state's consent before they can become binding. However, consent to cooperation has so far failed to materialize in the case of GHG emissions from international aviation. The legality of the EU's decision to include foreign air carriers in the EU ETS cannot, therefore, be determined with reference to an international consensus, but stands or falls depending on whether it is considered to be a legitimate exercise of state sovereignty. The following sections will argue that, if we understand sovereignty as decisional sovereignty over domestic affairs, as is appropriate in today's interdependent world characterized by multi-territorial activities, the inclusion of aviation in the EU ETS is a legal and legitimate exercise of EU sovereignty.

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99 WTO Members will have to comply with the provisions of domestic regulation in the General Agreement on Trade in Services, Marrakesh (Morocco), 15 Apr. 1994, in force 1 Jan. 1995, available at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm. In this author's opinion, this is, however, a matter of application rather than of jurisdiction itself.

100 Opinion of A-G Kokott, n. 55 above, at paras. 143–8. This is known as the 'objective territoriality principle' or the 'effects doctrine': see C. Ryngaert, *Jurisdiction over Antitrust Violations in International Law* (Intersentia, 2008).

101 26 U.S.C 862(b), 911.

102 Double taxation agreements can limit the reach of tax law for resident aliens.

103 In this hypothetical example, 'regular' arrivals or departures would be based on a quantitative threshold, similar to the calculation of the 'substantial presence' test in 26 U.S.C 7701(b), which is based on the number of days spent within the US.

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4.2. *Reviving the Decisional Aspect of State Sovereignty*

As discussed above, sovereignty is the ultimate legal authority to decide to the exclusion of others,[104] which under international law is exercised by states over their domestic affairs. By focusing on the decisional aspect of sovereignty, the emphasis is on the legal ability of states to make decisions over their domestic affairs.

'Decisional sovereignty' was first invoked by Australia in its pleadings before the International Court of Justice (ICJ) in the *Nuclear Tests* case.[105] Australia argued that sovereignty does not only entitle states to territorial inviolability, but also to decisional inviolability. Each state, Australia argued, has an 'independent right to determine what acts shall take place within its territory'.[106] Therefore, 'decisional sovereignty is violated by such an intrusion as impairs or destroys the unfettered capacity to decide'.[107] Although the concept of decisional sovereignty was not analyzed by the ICJ[108] and is only mentioned in passing in legal literature,[109] it is a useful concept that merits further exploration, particularly given the increased likelihood of jurisdictional conflicts as states become more interdependent.

Since the scope of a state's domestic affairs is still heavily influenced by its territorial boundaries, decisional sovereignty remains tethered to a state's territory. Thus, decisional sovereignty is not all that different from more traditional territorial sovereignty. With respect to activities that are contained within one territory, decisional and territorial sovereignty coincide. It is only when confronted with multi-territorial activities that we are forced to reflect on why a state is allocated jurisdiction. Is it because the activity takes place in its territory or because the activity has negative effects on the state or its inhabitants? This article argues that the ability of a state to regulate in order to avoid negative effects should be recognized. In response to 'multi-territorial' activities, the territoriality of the activity combined with the activity's effects are at least as important to legitimize the exercise of jurisdiction as the territoriality of the activity combined with the nationality of the actor.

Decisional sovereignty, however, should not be mistaken for the effects doctrine – the exercise of jurisdiction based solely on the effects of activities. While decisional sovereignty may strengthen support for the effects doctrine, the legality of jurisdiction exercised under the effects doctrine will always need to be measured against the impact of the equal decisional sovereignty of other states. As with the less controversial

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104 See text accompanying n. 78 above.

105 *Nuclear Tests Cases* (*Australia* v. *France*), Judgment, 20 Dec. 1974 [1974] ICJ Rep 253.

106 *Nuclear Tests Cases* (*Australia* v. *France*), Memorial on Jurisdiction and Admissibility submitted by the Government of Australia, at p. 336, para. 454, available at: http://www.icj-cij.org/docket/files/58/9443.pdf.

107 *Nuclear Tests Cases (Australia* v. *France)*, Oral Arguments on Jurisdiction and Admissibility – Minutes of the Public Sittings held at the Peace Palace, The Hague (the Netherlands), on 4, 5, 6, 8, 9 and 11 July and 20 December 1974, at p. 496, available at: http://www.icj-cij.org/docket/files/58/11829.pdf.

108 Judge Barwick discusses it briefly in his dissenting opinion, where he mentions though that, despite initial impressions, decisional sovereignty was not a major basis of Australia's claim: see *Nuclear Test Cases* (*Australia* v. *France*), n. 105 above, Dissenting Opinion of Sir Garfield Barwick, at p. 428.

109 See, e.g., I. Brownlie, *State Responsibility* (Oxford University Press, 1983), at pp. 68–9, who states that 'it is not unreasonable to propose the concept of "decisional sovereignty"', but does not analyze it; or N. Giref, 'Legal Aspects of Nuclear Testing' (1991) 23 *Bracton Law Journal*, pp. 25–40, at 34.

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principles allocating jurisdiction, the effects doctrine confers only a presumption of legality and is not an automatic legitimation of a state's exercise of jurisdiction beyond its own territory as it pleases.[110]

At the same time, however, the presence of an actor or an activity in a state's territory is not in itself a sufficient basis to exercise sovereignty. Not every actor or activity within a state's territory is necessarily also within its domestic affairs, particularly not when the actor or the activity reduces another state's capacity to decide.

This argument is not as radical as it may seem. In the *Nationality Decrees* Advisory Opinion, the PCIJ held that the evolution of international law can limit the scope of a state's domestic affairs.[111] International law recognizes that inherent limits on state sovereignty are necessary for any system based on the equality of sovereign states.[112]

Crucial to decisional sovereignty is the freedom from intrusion in the capacity of a state to decide over its domestic affairs.[113] This illustrates that the freedom that comes with state sovereignty is not just a freedom *to* act (or not to act), but also a freedom *from* external interference.[114] In a context of increasing interdependence, protecting the 'freedom from' dimension becomes more important because the consequences of states' actions or omissions are more likely to affect other states without the citizens of the latter state being able to voice their concerns to the authorities of the former.

At first glance, this distinction between 'freedom to' and 'freedom from' may not seem to clarify matters because the EU and its opponents could each invoke both, depending on one's perspective. On the one hand, the EU could claim *freedom to* regulate international aviation emissions and *freedom from* the negative effects of climate change triggered by the inaction of other states as well as from the negative effects of lost competitiveness. On the other hand, the EU's opponents could invoke *freedom to* regulate international aviation emissions and *freedom from* the EU's regulation.

To weigh up the different 'freedoms to' and 'freedoms from' involved and determine which should prevail to safeguard decisional sovereignty, this article proposes a comparison of the negative effects caused by the EU's action with those caused by its opponents' inaction, in order to determine which of the negative effects are compatible with sovereignty, namely, with the state's capacity to decide over its domestic affairs. It is this comparison of the negative effects that provides a tool to avoid overlapping claims of sovereignty and jurisdiction. The following paragraphs discuss how this plays out in favour of the inclusion of international aviation in the EU ETS.

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110 A.V. Lowe, 'Jurisdiction', in M.D. Evans (ed.), *International Law* (Oxford University Press, 2006), pp. 335–60, at 342.

111 See text accompanying nn. 85–89 above.

112 *Island of Palmas* case, n. 78 above, at p. 839; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996 [1996] ICJ Rep 226, Dissenting Opinion of Judge Shahabuddeen, at 393–4; G. Abi-Saab, 'Whither the International Community?' (1998) 9(2) *European Journal of International Law*, pp. 248–65, at 254.

113 See the description by Australia in text accompanying nn. 106–107 above.

114 Cf. I. Berlin, *Liberty: Incorporating 'Four Essays on Liberty'* (Henry Hardy (ed.), Oxford University Press, 2002).

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On the one hand, the lack of regulation by the EU's opponents of international aviation emissions causes negative effects for other states, such as the EU Member States. Firstly, there are the negative environmental effects of unrestricted growth in GHG emissions. Because of the transboundary character of climate change, these effects are not limited to the states that opt not to restrict emissions, but extend to other states. These effects are incompatible with international law, which has long recognized that sovereignty should not be exercised in a way that causes a negative impact on the environment of another state.[115] Secondly, further negative effects follow from the artificial competitive advantage for internationally active businesses when their home state does not regulate, or does not regulate to the same extent as their competitors' home states. Admittedly, by itself, the lack of regulation in one state does not reduce another state's legal capacity to decide. However, combined with a strict approach to territoriality that would preclude regulation of internationally active businesses by states other than their home states, the political reality is different. States will find it difficult to regulate their internationally active businesses unless the home states of the competitors of these businesses adopt similar regulation. It takes significant political courage to persuade voters that the long-term positive impacts of regulation outweigh the short-term negative impacts on competitiveness and jobs, particularly in times of economic uncertainty. Both of the negative effects discussed – higher exposure to unmitigated climate change and the impact on the competitive advantage – interfere with the capacity of the EU and its Member States to decide, which is central to decisional sovereignty. As Meltzer argues, restrictions on the ability of states to effectively regulate access to their territory leads 'to a complete collapse of the very notion of sovereignty that [the EU's opponents] are claiming to defend'.[116]

On the other hand, the EU's opponents claim negative effects as a result of the EU Directive and the domestic implementation thereof by its Member States. A first negative effect is the higher cost of regulatory compliance. However, in contrast with the negative environmental effects that interfere with the decisional capacity of the EU Member States, the 'no harm' principle does not extend to the impact of economic regulation, as evidenced by the International Law Commission's discussions on its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities[117] and its Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities.[118] During these discussions, the state representatives on the United Nations (UN) General Assembly's Sixth Committee made it clear that 'the wholesale transfer of pioneering experience in the field of the physical uses of territory to

[115] *Trail Smelter Case* (*United States* v. *Canada*), 16 Apr. 1938 and 11 Mar. 1941, RIAA, Vol. III, p. 1905, at 1965; Stockholm Declaration, n. 9 above, at Principle 21; Rio Declaration, n. 9 above, at Principle 2; International Law Commission, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries' (2001 Draft Articles on Prevention), UN Doc A/56/10, pp. 144–70, at Art. 3; Ryngaert, n. 100 above, at pp. 31–2.

[116] Meltzer, n. 3 above, at p. 153.

[117] 2001 Draft Articles on Prevention, n. 115 above, at p. 151, para. 17.

[118] International Law Commission, 'Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities with Commentaries', UN Doc A/61/10, pp. 101–82, at 117–8.

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the even less developed field on economic regulation' was a line that should not be crossed.[119]

A second negative effect is the impact of the Directive on the ability of non-EU states to regulate. In this respect, it could be argued that the EU benefits from a first-mover advantage.[120] This could make it harder for other states to regulate, because their regulation would add another layer of costs on flights to or from their territory. Yet, the EU has expressed its willingness to accept the equivalent regulation of other states should they decide to regulate.[121] This abates the risk of double counting of emissions for flights between the EU and another regulating state, in line with the 2010 ICAO resolution.[122]

The commitment to credit domestic regulation through an exemption from the EU ETS reduces the negative effects of the EU Directive on the ability of other states to regulate. This regulatory technique, which Scott and Rajamani have described as 'contingent unilateralism',[123] is essential for the protection of decisional sovereignty. It expresses the idea of relative sovereignty, according to which state sovereignty is limited by the equal sovereignty of other states. Contingent unilateralism ensures that states that currently do not regulate in response to a specific problem retain not only the legal but also the political capacity to regulate later without fear of adding to the regulatory compliance costs of companies that already fall within the scope of another state's regulation.

Whether the decisional sovereignty of other states to regulate GHG emissions from aviation will be protected in practice will depend on how the EU will evaluate the equivalence of another state's regulation. As contingent unilateralism is not currently required under general international law, there are no criteria available to limit the EU's discretion in the determination of equivalence. However, contingent unilateralism is not unknown in international economic law, and we can draw guidance from the limits developed in that context.[124] In the *Shrimp/Turtle* decision,[125] the WTO Appellate Body clarified that it prefers states to reach a bilateral or multilateral solution for trade-related issues such as environmental protection. Nonetheless, trade restrictive unilateral regulation can still benefit from one of the exemptions in Article XX GATT[126] if good faith attempts to negotiate a bilateral or multilateral agreement have been undertaken.

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119 R.Q. Quentin-Baxter, 'Fourth Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law', International Law Commission, UN Doc A/CN.4/373 (1983), at para. 212.

120 Directive 2008/101/EC, n. 5 above, Preamble, para. 17, recognizes that the 'Community scheme may serve as a model for the use of emissions trading worldwide'.

121 Directive 2003/87/EC, n. 12 above, Art. 25a, as discussed in the text accompanying nn. 47–50. See also J. Kanter, 'Airline Emissions Restraints may be Relaxed in Europe', *The New York Times*, 7 Feb. 2012, available at: http://www.nytimes.com/2012/02/08/business/global/european-union-shows-flexibility-on-airline-emissions-law.html?_r=2&ref=business.

122 ICAO Assembly, n. 26 above.

123 Scott & Rajamani, n. 3 above, at pp. 469, 472–3.

124 Kulovesi, n. 55 above, at p. 556.

125 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 Nov. 1998, para. 166.

126 General Agreement on Tariffs and Trade 1994, Marrakesh (Morocco), 15 Apr. 1994, in force 1 Jan. 1995, Art. XX, available at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

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Should these attempts fail, WTO Members are allowed to regulate unilaterally, as long as they make allowances for domestic regulation in other states. When deciding on these allowances, different conditions prevailing in exporting states must be taken into consideration to evaluate whether the regulatory programme of the exporting state is appropriate for those conditions.[127] It should not be required that trading partners adopt a domestic regulatory regime that is 'essentially the same' as that of the importing state.[128] The example from WTO law provides guidance on the allocation of jurisdiction in other areas of increasing interdependence, such as international aviation, where the primary goal of an international agreement needs to be balanced against related goals, such as environmental protection.

5. DECISIONAL SOVEREIGNTY AND THE PROVISION OF GLOBAL PUBLIC GOODS

In Part 4 it was argued that our understanding of state sovereignty should emphasize the state's capacity to decide. It also argued that decisional sovereignty justifies unilateral action with respect to multi-territorial activities, such as the inclusion in the EU ETS of all flights landing at or departing from an EU airport, regardless of the nationality of the carrier.

This argument, however, should not be mistaken as one against multilateral regulation. On the contrary, this author prefers multilateral responses to global threats such as climate change. Unfortunately, effective multilateral cooperation relies on state consent. As the Kyoto Protocol and the lack of initiatives at the ICAO illustrate, this is notoriously difficult to achieve with respect to climate change. The difficulties stem from the global public good characteristics of successful climate change mitigation.[129] The incentives for states to free-ride on the efforts of other states are further strengthened by the asymmetry between the responsibility for GHG emissions and the vulnerability to their negative impact, which leads to insufficient internationalization of the full environmental costs of emissions.

International law ought to ban the 'beggar-thy-neighbour' behaviour of free-riding and causing negative externalities. However, when regulating states are barred under international law from adopting any regulations that could affect a non-regulating state – as per the allocation of jurisdiction favoured by the EU's opponents – international law reinforces the incentives to free-ride. A state that is not currently inclined to regulate in response to a global problem such as climate change will have every reason not to change its stance, because that would require sacrificing its exporters' competitive advantage in the markets of states that have regulated. Even regulation based on multilateral cooperation is less attractive than no action, as international obligations are costly to negotiate and implement.[130]

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127 *Shrimp/Turtle* , n. 125 above, para. 165.

128 Ibid., paras. 163–4.

129 See text accompanying n. 7 above.

130 H.F. Chang, 'An Economic Analysis of Trade Measures to Protect the Global Environment' (1994–5) 83 *Georgetown Law Journal*, pp. 2131–213, at 2151.

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Approaching state sovereignty as decisional sovereignty can reduce these obstacles towards international cooperation. The allocation of jurisdiction on the basis of decisional sovereignty has two effects. Firstly, states that want to take the lead on regulation can do so without putting their competitiveness at risk, because there is no legal objection to the inclusion of all actors with activities in their territory, regardless of nationality. Secondly, such unilateral regulation removes the competitive advantage that would befall non-regulating states by simply doing nothing. Moreover, if the non-regulating state values market access for its economic actors to the regulating state, there will be an incentive either to engage in multilateral regulation[131] or, at the very least, to adopt equivalent regulation, which the originally regulating state will then have to accept pursuant to the idea of contingent unilateralism.

Any resulting regulatory differences create incentives for foreign companies to lobby their own government to impose equivalent regulation or to negotiate global regulation. Scott attributes the adoption of the ICAO's guiding principles on market-based mechanisms in 2010[132] to the pending inclusion of international aviation in the EU ETS.[133] The ICAO Secretary-General has indeed cited the pressure stemming from the inclusion of international aviation in the EU ETS as a reason behind intensified efforts to develop a draft global instrument on market mechanisms by the end of 2012.[134] Although this deadline has been postponed to spring 2013, the intention is still to complete the work in time for the 2013 ICAO Assembly.[135] At a meeting in June 2012, the number of options presented to the ICAO Council Members was reduced to three.[136] These recent steps indicate that unilateral action by affected states can kick into gear laggard international efforts to deal with a transboundary issue.

6. CONCLUSION

Traditionally, sovereignty was conceived of as territorial sovereignty. This article, however, argues that the territorial boundaries of a state do not exhaustively define the essence of state sovereignty. After all, these boundaries can be artificial in the face of transboundary problems or multi-territorial activities. Instead, the approach

131 Ibid., at pp. 2148–9.

132 ICAO Assembly, n. 26 above, Annex.

133 J. Scott, 'The Multi-Level Governance of Climate Change' (2011) 5(1) *Carbon & Climate Law Review*, pp. 25–33, at 32.

134 ICAO, 'Towards the Sustainable Development of Aviation', Submission to the 36th Session of the UNFCCC Subsidiary Body for Scientific and Technological Advice (SBSTA36), May 2012, available at: http://unfccc.int/resource/docs/2011/smsn/igo/127.pdf. See also A. Vitelli & M. Carr, 'UN Aviation Regulator Seeks 2012 CO_2 Deal, May Enlist World Bank', *Bloomberg News*, 30 Nov. 2011, available at: http://www.bloomberg.com/news/2011-11-30/un-aviation-regulator-seeks-2012-co2-deal-may-enlist-world-bank.html. Other examples of unilateral action triggering negotiations on international agreements in the context of international environmental law can be found in D. Bodansky & G. Shaffer, 'Transnationalism, Unilateralism and International Law' (2012) 1(1) *Transnational Environmental Law*, pp. 31–41, at 34–5.

135 A. Martel, 'U.N. Aviation Body Says Will Have Emissions Plan by March', *Reuters*, 18 June 2012, available at http://www.reuters.com/article/2012/06/18/us-airlines-emissions-idUSBRE85H1M920120618.

136 European Commission, 'Connie Hedegaard: "ICAO is making some progress towards the long-awaited global deal to curb aviation emissions"', 28 June 2012, available at: http://ec.europa.eu/commission_2010-2014/hedegaard/headlines/news/2012-06-28_01_en.htm.

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suggested is to focus on the state's capacity to make decisions over its domestic affairs. When it comes to the regulation of multi-territorial activities, such as international aviation in the dispute studied, decisional sovereignty allows states to regulate actors or activities that have a nexus to their territory and that negatively affect them, despite the fact that these actors are foreign nationals or that these activities partly take place abroad.

The main advantage of approaching state sovereignty as decisional sovereignty is that it creates space for a state to regulate unilaterally when multi-territorial activities affect its domestic affairs, even if the regulation applies to economic actors from other states that are active within the regulating state's territory. Otherwise, the state would either be exposed to the negative effect of non-regulation or to a lack of competitiveness as a result of more lenient regulation by its trading partners. A technique such as 'contingent unilateralism' serves as a tool to avoid unilateral regulation unduly restricting other states' decisional sovereignty.

Unilateral regulation may not be the preferred option of many international lawyers, who are committed to multilaterally agreed solutions.[137] However, we need to question whether, while we pursue the holy grail of an effective and binding multilateral agreement, we prefer no regulation or unilateral regulation. This article argues in favour of the latter, all the more because unilateral action can provide an impetus for future cooperation. The regulatory differences, feared by some as increasing fragmentation,[138] create incentives for states to harmonize their domestic regulation or negotiate international regulation. Recognition that unilateral regulation is legal under international law would also send a clear message to industry lobby groups that the real question is not whether there will be regulation or not, but rather which regulation they will be subject to. Rather than lobbying their government to fight the very existence of regulation, they could (and should) focus their energy on developing a global response.[139]

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137 J. Alvarez, 'Multilateralism and Its Discontents' (2000) 11(2) *European Journal of International Law*, pp. 393–411, at 394.

138 Kulovesi, n. 55 above, at pp. 537, 558.

139 D. Bodansky, 'Multilateral Climate Efforts beyond the UNFCCC', 25 Nov. 2011, at p. 11, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1963928.

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