EUROPEAN FOREIGN AFFAIRS REVIEW

Published by:
Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
USA

In all other countries sold and distributed by:
Turpin Distribution Services
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 1384-6299

Print subscription prices, including postage (2013): EUR 419/USD 559/GBP 308.
Online subscription prices (2013): EUR 389/USD 518/GBP 285 (covers two concurrent users).

(2013) 18 EFA Rev. should be used to cite this volume.

This journal is available online at www.kluwerlaw.com.
Sample copies and other information are available at www.kluwerlaw.com.
For further information, please contact our sales department at +31 (0) 172 641562
or at sales@kluwerlaw.com.

For Marketing Opportunities please contact marketing@kluwerlaw.com.

The ECJ's Judgment in *Air Transport Association of America* and the International Legal Context of the EU's Climate Change Policy

Geert De Baere & Cedric Ryngaert*

The present article discusses the international legal context of the EU's emissions trading scheme in the light of the judgment of the Court of Justice of the EU in Air Transport Association of America. After ascertaining the effect in the EU legal order of the relevant international norms invoked in that case, the focus of the present article lies on the discussion of the substantive issues that arise when reviewing the scope of Directive 2008/101 in light of the applicable norms. The article assesses the legality under customary international law of the jurisdictional assertions of the EU as upheld by the Court of Justice, reviews the EU measures in light of the law of the World Trade Organization, and compares those measures with similar EU environmental measures in the field of fisheries regulation and maritime transport.

1 INTRODUCTION

Climate change has been described as a classic 'tragedy of the commons':[1] the climate is an overexploited common resource the users of which are unable to address its overexploitation. Against that background, the European Union (EU) has set itself as a goal to lead the way with respect to measures to address climate change and, at the same, to establish itself as the world leader in climate change abatement technology.[2] Since the Treaty of Lisbon, that goal is reflected in the fourth indent of Article 191(1) TFEU, which provides for Union policy on the environment to contribute to promoting measures at international level to deal with 'regional or worldwide environmental problems, and in particular combating climate change'. In 2003, the EU decided to set up a scheme for greenhouse gas emission allowance trading as a central element of European policy to combat

* The first author is Assistant Professor of EU Law and International Law at the Faculty of Law and Senior Member at the Leuven Centre for Global Governance Studies, University of Leuven. The second author is Associate Professor of International Law at the Faculty of Law and Senior Member at the Leuven Centre for Global Governance Studies, University of Leuven; Associate Professor of International Law, Utrecht University.

1 The term originates from G. Hardin, *The Tragedy of the Commons*, 162 Science, 1243–1248 (1968).

2 H. Vedder, *Diplomacy by Directive? An Analysis of the International Context of the Emissions Trading Scheme Directive*, in *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* 105–106 (M. Evans & P. Koutrakos eds., Hart Publg. 2011).

De Baere, Geert & Ryngaert, Cedric. 'The ECJ's Judgment in *Air Transport Association of America* and the International Legal Context of the EU's Climate Change Policy'. *European Foreign Affairs Review* 18, no. 3 (2013): 389–410.

climate change,[3] and at the same time unapologetically intended as a model for third countries.[4]

Aircraft form an important source of greenhouse gas emissions. They perturb the atmosphere by changing background levels of trace gases and particles and by forming condensation trails (contrails). Aircraft emissions include greenhouse gases such as carbon dioxide and water vapour that trap terrestrial radiation and chemically active gases that alter natural greenhouse gases, such as ozone and methane.[5] Nevertheless, initially, the EU emissions trading scheme (ETS) did not cover greenhouse gas emissions from air transport. However, Directive 2008/101 provides, in the face of strong international opposition,[6] for aviation activities to be included in that scheme from 1 January 2012. Accordingly, from that date all airlines – including those of third countries – have to acquire and surrender emission allowances for their flights that depart from and arrive at European airports.[7] The EU's decision to 'go it alone' in this regard must be understood against the background of its frustration with the lethargic pace at which international negotiations on the reduction of emissions from international aviation proceed, but inevitably raises questions on the effect of the applicable international norms in the EU legal order and on the international legality of the EU's action.[8]

The Air Transport Association of America (ATA), American Airlines (AA), Continental Airlines (Continental) and United Air Lines (UAL),[9] all of whose headquarters are in the USA, contested the measures transposing Directive 2008/101 in the UK, the administering Member State responsible for them for the

---

3 *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC*, OJEU L 275/32 (2003).

4 *Recital 17 in the preamble to Directive 2008/101/EC of the European Parliament and of the Council of 19 Nov. 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community,* OJEU L 8/3 (2009).

5 D.H. Lister, D.J. Griggs, D.J. Dokken & M McFarland eds., *Aviation and the Global Atmosphere* sec. 6.1 (Intergovernmental Panel on Climate Change, Cambridge U. Press 1999).

6 See Declaration Adopted by the Council of the International Civil Aviation Organization (ICAO) at the Second Meeting of the 194th Session on 2 Nov. 2011, C-DEC 194/2.

7 See for the list of operators (including foreign operators) covered by the Directive: Commission Regulation (EU) No 100/2012 of 3 Feb. 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 of the European Parliament and of the Council on or after 1 Jan. 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, OJEU, L 39/1 (2010).

8 See K. Kulovesi, *Climate Change in EU External Relations: Please follow my Example (or I might force you to)*, in *The External Environmental Policy of the European Union. EU and International Perspectives* 144 (E. Morgera ed., Cambridge U. Press 2012).

9 ATA, which has been rebaptised 'Airlines for America (A4A)', is a non-profit trade and service association of airlines in the USA. AA, Continental and UAL are airlines whose headquarters are in the USA and which operate worldwide, also serving destinations within the EU.

purposes of the ETS. According to them, the directive infringes, first, the Chicago Convention,[10] the Kyoto Protocol,[11] and the Open Skies Agreement,[12] in particular because it imposes a form of tax on fuel consumption, and second, certain principles of customary international law in that it seeks to apply the allowance trading scheme beyond the EU's territorial jurisdiction. The High Court of Justice of England and Wales (Queen's Bench Division, Administrative Court) referred a number of questions to the Court of Justice of the European Union (ECJ) for a preliminary ruling under Article 267 TFEU on whether the directive is valid in the light of those rules of international law.

That gave the ECJ the opportunity to deliver a densely reasoned judgment that is, while upholding the validity of Directive 2008/101, of crucial importance for the EU's climate change policy and its relationship to international law,[13] as predicted by Advocate General Kokott.[14] While, as the *New York Times* reported, the judgment possibly 'sets the stage for a potentially costly trade war with the United States, China and other countries',[15] it also offers a prime example of why, as Judge Rosalyn Higgins wrote in 2003, it is 'extremely interesting to see how important courts, dealing with specialized legal issues of the first rank of significance, see the importance nonetheless of locating themselves within the embrace of general international law.'[16]

On 12 November 2012 the EU announced that it will not require allowances to be surrendered for emissions from international flights during 2012 in order to create space for political negotiations within the International Civil Aviation Organization (ICAO) regarding a global solution to address emissions from aviation.[17] However, the 'stopping the clock' by the EU is only conditional. It depends on a successful result to be reached within the ICAO by September 2013,

---

10 *Convention on International Civil Aviation*, concluded on 7 Dec. 1944, 61 Stat. 1180; 15 UNTS 295.

11 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, of 11 Dec. 1997, OJEU, L 130/4 (2002).

12 *Air Transport Agreement between the United States of America, of the one part, and the European Community and its Member States, of the other part, concluded on 25 and 30 April 2007*, OJEU, L 134/4 (2007).

13 Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change (ATA)* (Judgment of 21 Dec. 2011, OJ C 49/7, 18 Feb. 2012).

14 Opinion in *ATA*, Case C-366/10, delivered on 6 Oct. 2011, point 4.

15 N. Clark, *Carbon Emission Fees for Flights Upheld*, The N.Y. Times (21 Dec. 2011). Nevertheless, the joint Statement from United States President Barack Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso of 13 Feb. 2013 (EUCO 39/13) seems to indicate that, rather than a trade war, the US and the EU appear to be heading towards a 'Transatlantic Trade and Investment Partnership'. 'On 14 June 2013, the EU Member States gave the Commission the green light to start trade and investment talks with the US. See Commission Press Release **IP/13/548**.'

16 R. Higgins, *The ICJ, the ECJ, and the Integrity of International Law*, 52 Intl. & Comp. L. Q., 9–10 (2003).

17 European Commission, *MEMO/12/854* (12 Nov. 2012) (Stopping the clock of ETS and aviation emissions following last week's International Civil Aviation Organisation (ICAO) Council). See also European Commission, ICAO, COM 20/12 (15 Nov. 2012).

failing which the EU Directive will apply in full force from 2013 onwards. Given the difficulty of reaching a compromise among all ICAO member States that would satisfy the EU requirement of 'equivalent protection' (see below), such a result is hardly certain. An analysis of the impact of the *ATA* judgment on the EU's position in international law therefore remains highly relevant. The focus of the present article lies on the discussion of the substantive issues that arise when reviewing the scope of Directive 2008/101 in light of the applicable norms. That analysis will be limited to a customary law review, and will not address the legality of the Directive in light of the Open Skies Agreement between the EU and the US, because that analysis would necessarily be restricted to the impact of the Directive on *US aircraft operators*.[18] We rather intend to examine whether general international law allows a State or an international organization such as the EU to impose its own environmental (climate-change) legislation on persons – including, but not limited per se to aircraft operators – registered outside the EU, whatever their nationality. In the absence of applicable treaties, this question is governed by customary international law.

Following a discussion of the effect of the international norms at issue in the EU legal order in section 2, the jurisdictional assertions of the EU, as upheld by the ECJ, are presented in section 3, and evaluated, under customary international law, and – briefly – in light of the law of the World Trade Organization (WTO), in section 4. Section 5 compares those measures with similar EU environmental measures in the field of fisheries regulation and maritime transport.

2 INTERNATIONAL LAW AS PART OF THE EU LEGAL ORDER

In contrast with other more sparsely reasoned judgments on the effect of international law in the EU legal order,[19] the ECJ's judgment in *ATA* offers something of a treatise on the topic. Nevertheless, the following will mainly focus on an analysis of what the judgment provides regarding the effect of general or customary international law in the EU legal order as compared to the effect of international agreements.

Pursuant to Article 3(5) TEU, the Union is to contribute to the strict observance and the development of international law. The Court derived from that provision the obligation for the EU to observe international law in its entirety when it adopts an act, including customary international law, which is binding

[18] The Court did address this question, however, and concluded that the Directive is not incompatible with the provisions of the Open Skies Agreement: *ATA*, *supra* n. 13, paras 131–157.

[19] E.g. Case C-364/10, *Hungary v. Slovakia* (Judgment of 16 Oct. 2012, Application OJ C 301/5, 06 Nov. 2010).

upon the EU institutions.[20] The ECJ then proposed to perform a two-stage analysis: first, do the principles mentioned by the referring court actually form part of international law?; and second, can they be relied upon by individuals to call into question the validity of Directive 2008/101?

The ECJ relied on the case law of the International Court of Justice (ICJ) and the Permanent Court of International Justice (PCIJ), as well as on a number of international agreements, as a basis for determining the status in international law of the principles at issue. Such reliance has become habitual, and is a notable example of deference towards the ICJ and towards international law more broadly,[21] as well as arguably a technique to mitigate the risk of conflicting interpretations threatening the consistency of international law.[22] The ECJ regarded the principles that each State has complete and exclusive sovereignty over its airspace, that no State may validly purport to subject any part of the high seas to its sovereignty, and the freedom to fly over the high seas, as 'embodying the current state of customary international maritime and air law'. Moreover, it noted that they had been respectively codified in Article 1 of the Chicago Convention,[23] in Article 2 of the Geneva Convention of 29 April 1958 on the High Seas,[24] and in the third sentence of Article 87(1) of the United Nations Convention on the Law of the Sea (UNCLOS).[25] By contrast, as regards the principle that aircraft overflying the high seas are subject to the exclusive jurisdiction of the State in which they are registered, the ECJ held there to exist insufficient evidence to establish that the principle of customary international law, recognized as such, that a vessel on the high seas is in principle governed only by the law of its flag, to which the Court had referred in *Poulsen and Diva Navigation*,[26] would apply by analogy to aircraft overflying the high seas.[27]

The ECJ further held that principles of customary international law it had recognized as such could be relied upon by an individual for the purpose of the Court's examination of the validity of an EU act subject to two conditions: first, in

---

20 *ATA*, *supra* n. 13, para. 101.

21 See also P.J. Kuijper, *Customary International Law, Decisions of International Organisations and Other Techniques for Ensuring Respect for International Legal Rules in European Community Law*, in *The Europeanisation of International Law* 95 (J. Wouters, A. Nollkaemper & E. de Wet, eds., TMC Asser Press 2008).

22 J. Pauwelyn, *Europe, America and the 'Unity' of International Law*, in *The Europeanisation of International Law*, Wouters, Nollkaemper & de Wet, *supra* n. 21, at 212.

23 Referring to the judgment of the ICJ of 27 Jun. 1986 in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports 1986*, 392, para. 212.

24 UNTS, vol. 450, 11. The ECJ also referred to the judgment of the PCIJ of 7 Sep. 1927 in the *Case of the S.S 'Lotus', PCIJ 1927, Series A, No 10*, 25.

25 Signed in Montego Bay on 10 Dec. 1982, entered into force on 16 Nov. 1994, concluded and approved on behalf of the European Community by Council Decision 98/392/EC of 23 Mar. 1998, OJEU, L 179/1 (1998).

26 Case C -286/90, *Poulsen and Diva Navigation* [1992] ECR I 6019, para. 22.

27 *ATA*, *supra* n. 13, paras 103–106.

so far as those principles are capable of calling into question the competence of the EU to adopt that act;[28] and second, in so far as the act in question is liable to affect rights which the individual derives from EU law or to create obligations under EU law in his regard.[29]

It is important to note that these conditions differ from those applicable to international agreements. As outlined by the ECJ in *ATA*, these conditions are:[30] First, the EU must be bound by the rules of international law relied upon;[31] second, the nature and the broad logic of the international treaty in question must not preclude the ECJ from examining the validity of an EU act in the light of its provisions;[32] third, the treaty provisions relied upon for the purpose of examining the validity of the EU act in question appear, as regards their content, to be unconditional and sufficiently precise,[33] i.e., they contain a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[34]

With that overview, the ECJ reaffirmed its approach in *Intertanko*[35] and, while shying away from explicitly using the term 'direct effect', appears nevertheless to confirm its move away from earlier case law such as the *Biotechnological Inventions* judgment.[36] There, the Court appeared to dissociate direct effect from the possibility for the Court to review compliance by the Union with international agreements that are binding upon it.[37] In *IATA and ELFAA*, the ECJ had arguably gone even further by simply confirming that certain provisions of the Montreal Convention [38] 'are among the rules in the light of which the Court reviews the legality of acts of the Community institutions since, first, neither the nature nor the broad logic of the Convention precludes this and, second, [the provisions in question] appear, as regards their content, to be unconditional and sufficiently precise'.[39] That holding has been interpreted as demonstrating that the question

---

28 Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 & 125/85 to 129/85, *Ahlström Osakeyhtiö and Others v. Commission (Wood Pulp)* [1988] ECR 5193, paras 14–18, and Case C 405/92, *Mondiet* [1993] ECR I 6133, paras 11–16

29 *ATA*, *supra* n. 13, para. 107.

30 *Ibid*., paras 52–55.

31 See Joined Cases 21/72 to 24/72, *International Fruit Company and Others (International Fruit Company)* [1972] ECR 1219, para. 7.

32 See Joined Cases C 120/06 P and C 121/06 P, *FIAMM and Others v. Council and Commission* [2008] ECR I 6513, para. 110.

33 Case C 344/04, *IATA and ELFAA* [2006] ECR I 403, para. 39.

34 See Case 12/86, *Demirel* [1987] ECR 3719, para. 14.

35 Case C 308/06, *Intertanko and Others* [2008] ECR I 4057.

36 Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079, para. 54.

37 M. Mendez, *The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, 21 European J. Intl. L., 98 (2010).

38 The Convention for the Unification of Certain Rules for International Carriage by Air ('the Montreal Convention'), approved by decision of the Council of 5 Apr. 2001, OJEU, L 194/38 (2001).

39 *IATA and ELFAA*, *supra* n. 33, para. 39

whether an international agreement confers rights on individuals is 'simply not at issue when assessing whether its relevant provisions are among the rules in the light of which the Court reviews the legality of acts of the Community institutions',[40] or even as creating a 'presumption of invocability'.[41] However, read in the light of *Intertanko*, *ATA* appears to indicate that the ECJ's approach remains essentially casuistic. Of the three international agreements relied upon by the applicants, only the Open Skies Agreement passed the test, while the EU was held not to be bound by the Chicago Convention, and the provisions of the Kyoto Protocol were not deemed to meet the standard of being 'unconditional and sufficiently precise', which implied that they could not be relied on in order to contest the legality of an act of EU law.

It is worth pausing for a moment at why the EU was held not to be bound by the Chicago Convention. Given that the Union is not a party to the Convention,[42] that the EU or FEU Treaties do not provide for the Union to exercise its competences in accordance with the convention,[43] and that the Convention (except for its Article 1) has not become as such part of general or customary international law,[44] the only manner in which the Union could be bound by that convention as such appears to be through 'functional succession'.[45] However, as the Court made clear in *Intertanko*, the standard for that to happen is rather high: the EU must have assumed, and thus have transferred to it, all the powers previously exercised by the Member States that fall within the convention.[46] The ECJ held that the EU did not have 'exclusive competence in the entire field of international civil aviation as covered by' the Chicago Convention, and concluded on that basis that the powers previously exercised by the Member States in the field of application of the Chicago Convention have not

---

40 K. Lenaerts & T. Corthaut, *Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law*, 31 European L. Rev., 299, fn. 84 (2006).

41 Mendez, *supra* n. 37, at 99.

42 See Art. 216(2) TFEU.

43 See e.g. with respect to the Geneva Convention of 28 Jul. 1951, 189 UNTS 150, and the Protocol of 31 Jan. 1967 relating to the status of refugees, 606 UNTS 267: Art. 78(1) TFEU and Case C-364/11, *Abed El Karem El Kott and Others* (Judgment of 19 Dec. 2012, Application OJEU, C 347/7, 26 Nov. 2011), para. 43.

44 See e.g. with respect to the Vienna Convention on the Law of Treaties, 23 May 1969, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969): Case C-410/11, *Espada Sánchez and Others* (Judgment of 22 Nov. 2012, Application OJEU, C 290/7, 01 Oct. 2011), para. 21.

45 Note, however, that as the Chicago Convention dates from 1944, it falls within the ambit of Art. 351 TFEU, which allows a Member State not to apply a Union provision 'in order to respect the rights of third countries deriving from a prior agreement and to perform its obligations thereunder', while at the same time allowing them to choose the 'appropriate means' of rendering the agreement concerned compatible with Union law (*ATA*, paras 49-50). Clearly, denouncement or renegotiation are not always 'appropriate' for agreements such as the Chicago Convention, which create 'multilateral obligations between all the parties to it, so that States that are parties to the Convention but are not Members of the Community have a right to the observation of the provisions of the Convention' (Opinion of Advocate General Warner in Case 34/79, *Henn and Darby* [1979] ECR 3795, 3833).

46 *Intertanko*, *supra* n. 35, paras 49–50.

to date been assumed in their entirety by the Union. The EU is therefore not bound by the Chicago Convention, and the ECJ could not examine the validity of Directive 2008/101 in the light of the Convention as such.[47] In other words, while it was clear from *Intertanko* that the threshold for such a functional succession to happen was 'a full transfer of the powers previously exercised by the Member States' to the Union,[48] *ATA* has now confirmed that what is needed is not just for the EU to have effectively taken over the place of the Member States in the international agreement in question, but also for that to have happened on the basis of *exclusive* competence. Functional succession at the international level is therefore crucially linked to exclusive competence at the EU level. The ECJ thereby follows the model of the only undisputable example of functional succession viz. the EU's position in the General Agreement on Tariffs and Trade (GATT),[49] which corresponds to its exclusive competence regarding the common commercial policy as per Article 3(1) (e) TFEU.

The question that remains is whether the ECJ would limit the possibility for functional succession strictly to EU adherence to international agreements on the basis of the a priori exclusive competences [50] listed in Article 3(1) TFEU, or whether shared competences that have become exclusive through the operation of Articles 2(2) and 3(2) TFEU would also qualify. In her Opinion in *Intertanko*, Advocate General Kokott expressed doubts in that regard, referring *inter alia* to the Court's denial of binding effect for Marpol [51] on the basis that it did not appear that the Community had assumed 'under the EEC Treaty, the powers previously exercised by the Member States in the field to which that convention applies'.[52] However, the phrase 'under the EEC Treaty' (in French '*en vertu du traité CEE*')[53] does not appear to be conclusive either way, as the mechanism through which shared competences can become exclusive is surely likewise 'under' what is now the FEU Treaty, in particular Articles 2(2) and 3(2). Given that environmental policy is a shared competence,[54] the answer to that question could become crucial for the EU's international action as regards climate change.

Nevertheless, the fact that the Member States are parties to the Chicago Convention is liable to have consequences for its interpretation. In light of the customary principle of good faith, which forms part of general international law,

---

47 *ATA*, *supra* n. 13, paras 71–72.
48 *Intertanko*, *supra* n. 35, para. 49.
49 *International Fruit Company*, *supra* n. 31, paras 14–18.
50 G. De Baere, *Constitutional Principles of EU External Relations*, 39–43 and 68 (Oxford U. Press 2008).
51 *The International Convention for the Prevention of Pollution from Ships*, signed in London on 2 Nov. 1973, 12 ILM 1319 (1973); TIAS No. 10,561; 34 UST 3407;1340 UNTS 184.
52 Opinion in *Intertanko*, Case C-308/06, delivered on 20 Nov. 2007, point 43.
53 Case C 379/92, *Peralta* [1994] ECR I 3453, para. 16.
54 Article 4(2)(e) TFEU.

and of Article 4(3) TEU, its specific expression in the EU legal order, the ECJ must interpret Directive 2008/101 taking account of the Chicago Convention,[55] a point that was made by the Advocate General,[56] but not included in the judgment. That said, neither the Advocate General nor the ECJ in previous case law has provided clear guidance on what such an interpretation in conformity with international law would entail.

Be that as it may, with all the international agreements relied upon (except for the Open Skies Agreement) failing to pass the test, the international legality of the Union's action could only be assessed in the light of customary international law. Advocate General Kokott proposed that principles of customary international law ought to be subject to the same conditions as provisions of international agreements in order for them to be relied upon and ruled out that possibility in *ATA*.[57] By contrast, the ECJ held that even though the principles at issue appeared only to have the effect of creating obligations between States, it was nevertheless possible for the claimants in the main proceedings to rely on them and for the Court to examine the validity of Directive 2008/101 in their light, given that Directive 2008/101 was liable to create obligations under EU law as regards those claimants. In other words, contrary to what some had feared after the judgment in *Intertanko*, the ECJ did not impose the same strict conditions on principles of customary international law as it does on provisions of international agreements in order for them to be capable of being relied upon. However, the Court immediately toned down the impact of its principled stance by adding that since a principle of customary international law does not have the same degree of precision as a provision of an international agreement, judicial review must necessarily be limited to the question whether, in adopting the act in question, the EU institutions made manifest errors of assessment concerning the conditions for applying those principles,[58] citing its judgment in *Racke* to that effect.[59]

In other words, the reason why the ECJ did not apply the same conditions to principles of customary international law as it does to international agreements appears to be that it believes that those conditions can *never* be met by those principles. One wonders why a middle position between the ECJ and the Advocate General would not be preferable: if principles of customary international law appear, as regards their content, to be unconditional and sufficiently precise, individuals should be able to rely on them in the same way as with respect to international agreements and a full review should take place. If it is found that such

---

55 *Intertanko*, *supra* n. 35, para. 52.
56 Opinion in *ATA*, *supra* n. 14, point 66.
57 *Ibid.,* points 134–138.
58 *ATA*, *supra* n. 13, paras 109–110.
59 Case C 162/96, *Racke* [1998] ECR I 3655, para. 52.

principles miss the necessary degree of precision, they could be relied on for the marginal review suggested by the ECJ. However, that view was clearly not adopted by the Court. The Court simply ruled that in the circumstances of the case before the referring court, Directive 2008/101 was liable to create obligations under EU law as regards the claimants in the main proceedings and, accordingly, that the latter may rely on those principles and the Court 'may thus examine the validity of Directive 2008/101 in the light of such principles'.[60]

As far as the review of EU law specifically in light of customary law principles of *jurisdiction* is concerned, this is not entirely surprising, as in the past the EU Courts had already determined the scope *ratione loci* of competition law provisions in the EC Treaty on the basis of such principles.[61] Nevertheless, as Advocate General Kokott noted, they had not had the occasion to review the *validity* of EU legislation in the light of those principles.[62]

However, from the affected individual's point of view, the question arises why a distinction should be made between *validity* and *scope*, as the effect of an assertion of excessive jurisdiction on an individual does not depend on the type of case in which the issue is raised. Indeed, almost all assertions of jurisdiction by States or by the EU typically subject individuals to the writ of State/EU law and potentially severely affect their legal position. In fact, individuals should arguably be allowed to invoke *all* rules of jurisdiction under customary law in domestic/EU proceedings.[63]

3 THE EU'S AND THE ECJ'S JURISDICTIONAL ASSERTIONS

Does customary international law allow the EU to extend, on the basis of Directive 2008/101, the allowance-trading scheme laid down by Directive 2003/87 to flights that arrive at or depart from an aerodrome situated in the territory of a Member State, including flights by aircraft registered in third States? Although the ECJ did not specifically refer to the concept of jurisdiction, the question was essentially whether the EU had jurisdiction under customary international law to impose its environmental legislation on non-EU registered aircraft, also in respect of their carbon emissions which occurred outside EU airspace.

When assessing the legality of such partly extraterritorial legislation, it is appropriate to recall its policy rationale, given that, arguably, the reach of every law

---

60 *ATA*, *supra* n. 13, para. 109.

61 See *Wood Pulp*, *supra* n. 28; Case T-102/96, *Gencor Ltd v. Commission* [1999] ECR II-753.

62 Opinion in *ATA*, *supra* n. 14, point 109.

63 See P.J. Kuijper, *From Dyestuff s to Kosovo Wine: From Avoidance to Acceptance by the European Community Courts of Customary International Law as Limit to Community Action*, in *On the Foundations and Sources of International Law* 169 (I.F. Dekker & H.G. Post eds., TMC Asser Press 2003).

is a function of the protective substantive content of that law.[64] The rationale of the extraterritorial effect of Directive 2008/101 is articulated in recital 25 in the preamble, which recalls that:

> the European Council meeting in Brussels on 13 and 14 March 2008 recognized that in a global context of competitive markets the risk of carbon leakage is a concern that needs to be analysed and addressed urgently in the new Emissions Trading System Directive, so that if international negotiations fail appropriate measures can be taken.

Carbon leakage is defined by the Intergovernmental Panel on Climate Change (IPCC) as 'the increase in CO_2 emissions outside the countries taking domestic mitigation action divided by the reduction in the emissions of these countries'.[65] If the EU were to adopt mitigation policies in respect of the aviation industry that were restricted to EU-registered aircraft, their foreign competitors would be accorded an undue competitive advantage. This would harm European business interests, and encourage EU airlines to flag out to regions with less stringent mitigation policies, thus contributing to higher carbon emissions. Similarly, if EU mitigation policies only applied to carbon emitted in EU airspace, airlines may tend to limit flight stretches through EU airspace, which may result in longer flights and, again, higher carbon emissions. Accordingly, to achieve the goal of reducing carbon, the playing field had to be levelled. This implied requiring *all* aircraft operators whose flights depart from or arrive in an aerodrome situated in the territory of a Member States to surrender carbon emissions allowances.[66]

It was precisely this territorial link which the ECJ believed to be sufficient to justify the exercise of jurisdiction by the EU. The Court held that it is only if the operators of such aircraft choose to operate a commercial air route arriving at or departing from an airport situated in the EU that they are subject to the ETS.[67] In this context, according to the Court, application of the ETS to aircraft operators infringes neither the principle of territoriality nor the sovereignty of third States, since the scheme is applicable to the operators only when their aircraft are physically in the territory of one of the Member States of the EU and are thus subject to the unlimited jurisdiction of the EU.[68]

Directive 2008/101 does indeed not claim 'universal' jurisdiction by applying as such to aircraft registered in third States and flying over third States or the high seas.[69] Aircraft operators still have the choice *not* to make use of a European

---

[64] C. Ryngaert, *Jurisdiction in International Law* 211–212 (Oxford U. Press 2008), relying on the German *Schutz-* or *Regelungszweck* doctrine of 'reasonable' jurisdiction.

[65] IPCC Fourth Assessment Report: Climate Change 2007, Working Group III: Mitigation of Climate Change, Section 11.7.2.

[66] See Annex 1 of Directive 2003/87 as amended by Directive 2008/101.

[67] *ATA*, *supra* n. 13, para. 127.

[68] *Ibid.*, para. 125.

[69] *Ibid.*, para. 122.

aerodrome, and in so doing avoid the application of the 'territorial' European ETS. However, the Directive does have certain extraterritorial effects in that it takes into account the carbon emitted by aircraft operators subject to the Directive (whose aircraft arrive or depart from an aerodrome situated in the territory of a Member State) *outside* EU airspace. Especially for long-distance flights, the allowances are in large part based on extraterritorial mileage. However, the ECJ pointed out that the territoriality principle does not require that the event that is the subject of regulation occurs *entirely* on EU territory; in the Court's view, it would suffice that such an event occurred at least *in part* on EU territory.[70]

4 ASSESSING THE EU'S AND THE ECJ'S JURISDICTIONAL ASSERTIONS

It seems hard to contest that aircraft arriving at or departing from EU territory do emit greenhouse gases *in the EU*, and that the EU can set environmental standards for such activities, all the more so if international agreements oblige the EU to take environmental action.[71] But is it really appropriate for the ECJ to rely on the jurisdictional theory of 'ubiquity', pursuant to which any territorial connection of the wrongful conduct or effect suffices for territorial jurisdiction to obtain? It should be borne in mind that the territoriality principle and the theory of ubiquity were initially designed for application in the field of criminal law.[72] They have gradually found their way to the field of antitrust law which, as far as concerns its enforcement, bears striking similarities to criminal law.[73] Typically, the effects of violations of criminal or antitrust law are clearly territorially discernible: a man is fatally hit by a bullet, or foreign consumers are adversely affected by an export price-fixing cartel. This explains why in the seminal competition law cases of *Wood Pulp* and *Gencor*, the ECJ and the General Court, respectively, could cite the territorial implementation or effect of a (potentially) restrictive business practice (a cartel and a merger, respectively) as an acceptable nexus for the exercise of jurisdiction.[74]

In environmental law, however, effects *may* be territorially discernible, but need not be. They may be so when upon the sinking of a ship, hydrocarbons are accidentally spilled in the exclusive economic zone and drift along the coast on which they are washed up. In such a case, the EU may justifiably exercise

---

70 *Ibid*., para. 129.
71 *Ibid*., para. 128.
72 C. Ryngaert, *Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law*, 9 Intl. Crim. L. Rev., 187–209 (2009).
73 See on justifying effects-based antitrust jurisdiction, C. Ryngaert, *Jurisdiction over Antitrust Violations under International Law* 15–24 (Intersentia 2008).
74 *Wood Pulp, supra* n. 28, paras 17–18; *Gencor*, *supra* n. 61,para. 90.

territorial jurisdiction pursuant to the Waste Directive,[75] as the ECJ confirmed in *Commune de Mesquer*.[76] However, in the environmental law subfield of climate law, effects are typically *not* territorially discernible or limited. Indeed, it is difficult to maintain from a scientific perspective that aviation emissions have proximately caused changes in climate and weather patterns in the EU.[77] In fact, one can even argue that emissions from aircraft having no link whatsoever to the EU may contribute in equal measure to global warming, with equally adverse consequences for the EU, as all emissions are released in an atmosphere that knows no boundaries. Therefore, arguably, the EU could set standards regulating emissions by *any* aircraft, not only aircraft that are departing from or arriving on an EU aerodrome.[78] Ultimately, such regulation too would be covered by the 'effects based' territoriality principle. Needless to say, this would stretch application of the principle of territoriality to such limits that it may justify almost any jurisdictional assertion, thus becoming a normatively empty concept.[79]

In light of the foregoing, the ECJ's reliance in *ATA* on the principle of territoriality as applied in *Wood Pulp* and *Commune de Mesquer* with a view to justifying the legality of Directive 2008/101 under public international law is not fully convincing. A more convincing justification for the exercise of unilateral jurisdiction can be found in what is arguably a novel ground of jurisdiction that aims at the protection of global public goods that are insufficiently protected by international solutions. Such a principle of jurisdiction could be conceived of as a hybrid of the protective principle and the universality principle. Arguably, when international agreements are not forthcoming, because some nations drag their feet, for example with respect to curbing greenhouse gas emissions, individual States or regional groupings such as the EU should be allowed to 'go it alone', provided that the global public goods which they protect are laid down in international instruments with a global reach (whether or not they are binding, such as the Kyoto Protocol), and provided that a territorial link with the regulator can be discerned (e.g., leaving or arriving from an EU aerodrome). This requirement of a territorial link is in fact not alien to the exercise of extraterritorial jurisdiction: many jurisdictional assertions under the universality principle are based on the principle of *aut dedere aut judicare*, which logically requires that the presumed perpetrator be present on the forum State's territory for universal jurisdiction to be lawfully exercised; the presence of the perpetrator is

---

75 *Council Directive 75/442/EEC of 15 July 1975 on waste*, OJEU, L 194/39 (1975).

76 Case C-188/07, *Commune de Mesquer* [2008] ECR I-4501, paras 60–62.

77 Compare H. Ringbom, *Global Problem—Regional Solution? International Law Reflections on an EU CO^2 Emissions Trading Scheme for Ships*, 26 Intl. J. Marine & Coastal L., 613–630 (2011).

78 See also L. Bartels, *The WTO Legality of the Application of the EU's Emission Trading System to Aviation,* 23 European J. Intl. L., 429–459 (2012).

79 See further Ryngaert, *supra* n. 64, at 83–84.

also required by most national penal codes.[80] Accordingly, it is perhaps no exaggeration to say that, just as in the case of international crimes, the territorial connection between the object of regulation/repression (here, carbon emissions) and the regulating State/organization (here, the EU) is not *constitutive* for the *existence* of jurisdiction, but merely *conditions* its *exercise*. What may be constitutive is the global harmful effect of the activity, irrespective of whether this activity took place inside or outside the EU.

However, the reach of the EU Directive is, unlike universal jurisdiction legislation, not only informed by the protection of global values, but also by the desire to protect the competitiveness of EU-based airline operators. Therefore, the jurisdictional ground appears to be a hybrid, partly based on the protection of a global values, and partly on the protection of domestic trade interests, nuanced by the principle of territoriality. In the antitrust context, the use of extraterritorial jurisdiction to protect the domestic industry's trade interests has been considered unlawful where such jurisdiction over foreign corporations would be used to obtain access for domestic companies on foreign monopolized markets.[81] In an environmental context, by contrast, the EU exercises 'extraterritorial' jurisdiction to *offset* the economic harm caused to the competitiveness of its own industry as a result of an EU measure to further global values that are internationally recognized, but insufficiently protected by other States or the international community at large. It is the international consensus on the necessity to combat climate change that may confer legitimacy and legality on the 'extraterritorial' dimension of the EU Directive, a consensus that, as far as foreign monopolistic behaviour is concerned, may remain elusive.

Whatever the exact jurisdictional basis on which the EU may rely to justify the reach of Directive 2008/101 (territoriality, global values, protection of domestic competitiveness, or all of the above), it remains to be seen whether this basis is also accepted by other states. Ultimately, the legality under customary international law of a jurisdictional assertion, especially a novel one, is a function of the amount of foreign protest (i.e., state practice) levelled against it, provided that such protest is informed by concerns over overreach under the international law of jurisdiction (*opinio juris*).

There is no shortage of vigorous foreign reactions. Shortly after the ECJ rendered its decision, 23 States issued a joint declaration condemning the EU measure, threatening legal action, and anticipating the adoption of 'blocking

---

[80] See for an overview of States' relevant laws, Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation around the World* (Amnesty Intl. 2011).

[81] F. Wagner-Von Papp, *Competition Law, Extraterritoriality & Bilateral Agreements*, in *Research Handbook on International Competition Law* 21 (A. Ezrachi ed., Edward Elgar 2012).

legislation' prohibiting airlines from complying with the EU Directive.[82] In what is probably the most significant foreign reaction, at least in legal terms, US President Barack Obama, shortly after being re-elected in November 2012, signed into law the 'European Union Emissions Trading Scheme Prohibition Act'.[83] Pursuant to this Act, '[t]he Secretary of Transportation shall prohibit an operator of a civil aircraft of the United States from participating in the [EU emissions trading scheme], in any case in which the Secretary determines the prohibition to be, and in a manner that is, in the public interest.'[84]

It is unclear, however, whether these reactions are based on considerations of jurisdictional overreach under international law, or rather on the perceived illegality of the EU's scheme under specific legal regimes (WTO, ICAO), or simply on concerns over thwarted business opportunities. On a comparative note, it should be observed that one of the leading statutes blocking foreign extraterritorial legislation, the British Protection of Trading Interests Act 1980, designed to counter the reach of U.S. antitrust law (and discovery orders in particular), was premised on the damage done to UK trading interests rather than on the perceived unlawfulness of the jurisdictional assertion.[85] Vaughan Lowe wrote at the time that this Act marked 'a shift towards the analysis of the problem in terms of competing sovereignties, rather than competing jurisdictions',[86] implying that the UK protested the U.S. jurisdictional assertions on *political* rather than *legal* grounds.[87]

Even if the geographical reach of the EU Directive were prima facie lawful in light of the principles of the law of jurisdiction, the question would subsequently arise whether the EU, when regulating events that are partly extraterritorial, should take into account, under a principle of comity or reasonableness, other

---

82 Joint declaration of the Moscow meeting on inclusion of international civil aviation in the EU-ETS, adopted on the 21st and 22nd Feb. 2012. The text of the declaration is available on the website of Russian Aviation: http://www.ruaviation.com/docs/1/2012/2/22/50/ (last visited 27 Jan. 2013).

83 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, a.k.a. European Union Emissions Trading Scheme Prohibition Act 2011 (112th Congress, S. 1956).

84 Section 2 of the Act, which adds that in this determination the Secretary shall take into account: '(1) the impacts on U.S. consumers, U.S. carriers, and U.S. operators; (2) the impacts on the economic, energy, and environmental security of the United States; and (3) the impacts on U.S. foreign relations, including existing international commitments.'

85 Section 1.1 of the British Protection of Trading Interests Act 1980, citing, indeed, the damage done to *trading interests*.

86 A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act 1980*, 75 Am. J. Intl. L., 257, 274 (1981).

87 See also Ryngaert, *supra* n. 64, at 189–190.

States' or organizations' regulatory initiatives when it comes to calculating fines or emissions allowances.[88]

Recall that in *Graphite Electrodes*, the ECJ held that the prohibition of double jeopardy is not a principle of public international law; hence the Commission is not required, as a matter of law, to take into account fines imposed by foreign regulators when calculating the amount of a fine imposed for infringements of EU competition law.[89] In *ATA*, the ECJ remained silent about the possibility of a double inclusion of a single flight in two different emissions trading schemes, but Advocate General Kokott argued, as the ECJ had held in *Graphite Electrodes*, that 'customary international law does not impose any such obligation'.[90] Nevertheless, in Regulation 2008/101 the EU has duly pledged to take into account 'equivalent measures to avoid double regulation', and subsequently to 'amend the types of aviation activities included in the Community scheme, including consequential adjustments to the total quantity of allowances to be issued to aircraft operators'.[91]

EU deference towards other nations' measures need not necessarily be seen as an *ex gratia* commitment. In fact, it may be required under the law of the World Trade Organization (WTO).[92] It is indeed arguable that the EU aviation emissions cap-and-trade system falls within the scope of WTO law, as it may potentially restrict the trade in goods and/or services through the requirement that corporations (including foreign corporations) surrender emission allowances annually.[93] As far as the GATT is concerned, it is not excluded that the EU's measures may run afoul of the principles of national treatment and most-favoured nation.[94] Under Article XX of GATT, however, these trade restrictions may be allowed if they relate to the conservation of exhaustible natural resources.[95] But even then, Article XX requires that such measures not be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination

---

88 Note that, from a jurisdictional point of view, such initiatives need not be based on the territoriality principle as propounded by the EU and the ECJ. They could as well be based on nationality or overflight. See also Bartels, *supra* n. 78, at 457. This multitude of jurisdictional assertions may obviously complicate the EU's calculations.

89 Case C-289/04 *Showa Denko KK v. Commission (Graphite Electrodes)* [2006] ECR I-5884, para. 58.

90 Opinion in *ATA*, *supra* n. 14, point 159.

91 Recital 17 in the preamble to Directive 2008/101 and Art. 25a of Directive 2003/87 as amended by Directive 2008/101. Scott and Rajamani have characterized this approach as 'contingent unilateralism', see J. Scott & L. Rajamani, *EU Climate Change Unilateralism*, 23 European J. Intl. L., 469-470 (2012).

92 See also Bartels, *supra* n. 78, at 457.

93 See for a general first exploration of the compatibility of emissions cap-and-trade systems with WTO law, C. Voigt, *WTO Law and International Emission Trading: Is there Potential for Conflict?*, 1 Carbon & Climate L. Rev., 52–64 (2008).

94 J. Meltzer, *Climate Change and Trade – the EU Aviation Directive and the WTO*, 15 J. Intl. Econ. L., 111, 123–140 (2012).

95 See Bartels, *supra* n. 78, at 466.

between countries where the same conditions prevail, or a disguised restriction on international trade'. It is precisely to meet this requirement that the EU may have to recognize other countries' regulatory schemes that provide equivalent protection,[96] and exempt operators subject to such schemes, at least in part, from its own cap-and-trade system under Directive 2008/101. In doing so, in light of the principle of common but differentiated responsibilities informing the Kyoto-based fight against climate change, as well as the above cited reference in GATT to 'countries where the same conditions prevail', the EU may want to take into account the different economic conditions in which developing countries and countries in transition find themselves when designing their own schemes to reduce carbon emissions.[97] Notably, Scott and Rajamani have convincingly argued in this respect that Directive 2008/101 should be interpreted, applied and where necessary adjusted in light of the principle of common but differentiated responsibilities.[98]

How precisely the EU will determine equivalence, or commensurability for that matter, remains to be seen. It is clear, however, that the EU has also *in concreto* expressed its willingness to grant exemptions to aircraft operators covered by an effective foreign scheme: after China confirmed in April 2012 that it would use revenue from a passenger tax on international flights to cut carbon emissions in the aviation sector, the EU Climate Commissioner instructed EU officials to review this proposal in light of the principle of equivalence.[99]

5 EU ENVIRONMENTAL BENCHMARKING: FROM FISHERIES VIA AVIATION TO MARITIME TRANSPORT

As noted above, like much extraterritorial regulation, Directive 2008/101 too has a benchmarking aim. Recital 17 in the preamble explicitly states that the EU scheme 'may serve as a model for the use of emissions trading worldwide'. The idea is clearly for the EU to be a first mover that puts pressure on other countries through rather stringent regulation with extraterritorial impact.[100] This is not unlike the United States which, through legislation with extraterritorial effect,

---

96 J. Meltzer, *The European Union's Regulation of CO^2 Emissions from Aviation and the Implications for International Trade* (Brookings Inst. 23 Jan. 2012).

97 *Ibid.*, 155.

98 Scott & Rajamani, *supra* n. 91, 479–493.

99 *EU climate chief: looking at China's airline carbon plan*, Reuters, 19 Apr. 2012.

100 See Ryngaert, *supra* n. 64, 202–203.

attempted to benchmark the fields of antitrust law,[101] securities law,[102] and corporate governance.[103]

In spite of its seminal importance for the development of the law of jurisdiction, Directive 2008/101 does not mark the first time that the EU has unilaterally asserted its jurisdiction to protect global rather than national or regional interests, and to benchmark regulatory measures. Indeed, the EU (the EEC at the time) exercised its jurisdiction in a similar manner in the field of marine conservation law as early as 1986 in Regulation 3094/86,[104] at issue in *Poulsen and Diva Navigation*. Article 6(1) of that regulation provides, with regard to salmon and sea trout, that, even where those fish have been caught outside waters under the sovereignty or jurisdiction of the Member States in certain regions, they may not be retained on board, transshipped, landed, transported, stored, sold, displayed or offered for sale, but must be returned immediately to the sea. This provision had an extraterritorial aspect in that it regulated fishing on the high seas, outside member States' functional jurisdiction over their maritime zones. As in *ATA*, the object of regulation was a global public good (conservations of threatened fish stocks) which found its legal basis in an international convention (the Convention for the Conservation of Salmon in the North Atlantic Ocean),[105] to which the Community was a party. In *Poulsen and Diva Navigation*, the ECJ upheld the Regulation by drawing attention to the Community's territorial *enforcement* jurisdiction, which is indeed hardly contested.[106] However, the fact remains that the Community's *legislative* jurisdiction over the relevant events (fishing) extended to areas beyond national or Community jurisdiction, i.e., parts of the high seas.[107] Similar to *ATA*, the judgment did not fully justify this exercise of extraterritorial jurisdiction. Nevertheless, arguably, the justification here too lies in the protection of the global commons.

Where *Poulsen and Diva Navigation* laid the legal groundwork for the 'extraterritorial' ambitions of 2008/101 as regards an aviation cap-and-trade emissions system, the ECJ's upholding of these ambitions in *ATA* may well encourage the Commission to come up with proposals containing assertions of

---

101 *United States v. Aluminium Corp. of America*, 148 F.2d 416 (2d Cir. 1945) (Alcoa); *Hartford Fire Insurance v. California*, 509 US 764 (1993). The extraterritorial ambitions of the US in the field of antitrust law have been somewhat mitigated in *F. Hoffman-La Roche Ltd. et al. v. Empagran S.A. et al.,* 124 S. Ct. 2359 (2004).

102 The US Supreme Court has, however, put a halt to giving U.S. securities legislation a wide territorial scope. See *Morrison v. National Australia Bank*, 130 S.Ct. 2869 (2010).

103 Sarbanes–Oxley Act of 2002 (Pub.L. 107–204, 116 Stat. 745, enacted 29 Jul. 2002).

104 *Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources*, OJEU, L 288/1 (1986).

105 OJEU, L 378/25 (1982).

106 *Poulsen and Diva Navigation*, *supra* n. 26, paras 28–29 & 34.

107 Ringbom, *supra* n. 77, at 626.

unilateral jurisdiction in the field of climate change mitigation. In addition, it might embolden the EU and other regional groupings or States, as regards assertions of unilateral jurisdiction in sectors of the economy other than aviation.[108] The EU has already hinted in Directive 2009/29/EC [109] that it may subject the shipping industry to a cap-and-trade system that is perhaps not very different from the system it applies to the aviation industry. Just as the ICAO has not made much progress regarding the reduction of aviation emissions, the International Maritime Organization (IMO) has not been particularly successful in reducing maritime emissions.[110] Accordingly, under Directive 2009/29/EC, the Commission is under an obligation to develop an EU maritime emissions trading system, which – in light of the reference to the minimization of any negative impact on the Community's competitiveness and the stated desire to reduce global emissions – presumably also includes maritime emissions occurring outside the EU, provided that the ships in question enter EU ports.[111] Such a regulatory choice not only raises issues of jurisdiction under general international law and of WTO law, like in the case of an aviation cap-and-trade system, but also issues under the law of the sea.

As the EU is a party to UNCLOS,[112] its provisions are binding upon EU institutions and Member States [113] and prevail over EU acts.[114] In other words, whether or not UNCLOS as such [115] or customary law of the sea can be invoked before EU courts, the EU *is* required to abide by the Convention both under international law and EU law. In light of UNCLOS, a requirement that ship operators surrender emission allowances for any voyage to or from EU ports may well be reasonable, especially as there is a clear link between this requirement and the port State, as is the case with respect to Directive 2008/101. After all, the ship

---

108 Compare Meltzer, *supra* n. 94, at 156.

109 Recital 3 in the preamble to Directive 2009/29/EC of the European Parliament and of the Council of 23 Apr. 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJEU, L 140/63 (2009).

110 Ringbom, *supra* n. 77, at 614.

111 *Ibid*., 619.

112 *Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof*, OJEU, L 179/1 (1998).

113 Article 216(2) TFEU.

114 *ATA*, *supra* n. 13, para. 50.

115 In *Intertanko*, paras 64–65, the ECJ held that 'UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States', and that it 'follows that the nature and the broad logic of UNCLOS prevent the Court from being able to assess the validity of a Community measure in the light of that Convention'. That position is undoubtedly problematic from an international law point of view. See e.g. P. Eeckhout, *Case C-308/06, The Queen on the application of Intertanko and Others v. Secretary of State for Transport, judgment of the Court of Justice (Grand Chamber) of 3 June 2008*, 46 Com. Mkt. L. Rev., 2055 (2009).

operators have to surrender the necessary quantity of allowances *in the port*,[116] which is indisputably subject to the State's territorial sovereignty under UNCLOS.[117] Just as in the case of the aviation scheme, this wide view of territoriality may be supported by the sheer necessity of subjecting carbon emissions occurring beyond EU territorial waters to a territorial carbon emission system. These may be exactly the same considerations that have informed the EU's choice to introduce an aviation cap-and-trade system that applies to all aircraft departing from or arriving at an EU aerodrome. On the basis of *ATA*, if the validity of a future EU maritime emissions trading scheme is ever challenged before the ECJ, it is likely to pass muster. Furthermore, as argued above, provided that this scheme takes into account the conditions in other countries, and defers to foreign schemes providing equivalent protection, it is also likely to withstand a WTO compatibility test.

6 CONCLUSION

Has the ECJ moved away from what has been described as an 'ad hoc, instrumentalist engagement with international law of which the USA is often accused, and which the EU had long professed to set itself against'?[118] Put differently, has it lived up to the promise of Article 3(5) TEU and contributed to the 'strict observance and development of international law'? The answer to that question is not at all straightforward, not in the least because 'the strict observance and development of international law' is liable often to raise systemic issues that are not necessarily suitable to judicial settlement.[119] At least the 'development of international law' would chiefly appear to be a policy-oriented task probably more appropriately entrusted to the political branches of the Union.[120] Nevertheless, the assessment of the EU's 'strict observance' of international law is to an important extent entrusted to the ECJ, bearing in mind that, as the ICJ held, all international organizations, including the EU, 'are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'.[121]

---

116 Ringbom, *supra* n. 77, at 628.

117 See Art. 25(2) UNCLOS.

118 G. de Búrca, *The ECJ and the International Legal Order: A Re-evaluation*, in *The Worlds of European Constitutionalism* 148–149 (G. de Búrca & J.H.H. Weiler eds., Cambridge U. Press 2012).

119 See A.V. Lowe, *The Function of Litigation in International Society*, 61 Intl. & Comp. L. Q., 216–219 (2012).

120 See A. Rosas, *The European Court of Justice and Public International Law*, in *The Europeanisation of International* Law, Wouters, Nollkaemper & de Wet eds., *supra* n. 21, at 85.

121 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion,* I.C.J. Reports, 73, 89–90 (1980).

While one may agree or disagree with how the ECJ interpreted the international norms at issue, it is difficult to disagree with the fact that the Court appears to have taken international law seriously. That may be because it is well aware that the Union is part of an international avant-garde as regards its emissions trading system, and by showing its attachment to both the international legal framework for fighting climate change and the (admittedly broadly construed) customary principles of prescriptive jurisdiction, it may be tacitly encouraging the Union's international partners to do the same and to get on board of the EU's ambitious climate change policy.[122] At the same time, the ECJ in *ATA* takes care to protect the autonomous possibility for the Union to develop such a policy. Arguably, the structure of international law, based as it is on 'polyphony, not plainsong',[123] ought to allow such diversity, to the extent that the Union acts reasonably and similarly respects the autonomy of its international partners. Whether the Union's strategy of 'leading by example' has been successful is another issue entirely, though the post-Kyoto practice appears to indicate that progress has been painstakingly slow.[124] Furthermore, as is clear *inter alia* from the Moscow Meeting Joint Declaration and the US 'European Union Emissions Trading Scheme Prohibition Act' mentioned above, opposition against the EU scheme remains firm. Nevertheless, the EU's climate initiative has also received support from within the USA, notably in a 14 March 2012 letter to President Obama signed *inter alia* by five Nobel Prize economists, imploring the President 'to support the European Union's innovative efforts to place a price on carbon from aviation through the emissions trading system (EU ETS), or, at the very least, to stop actively opposing these efforts'.[125] While the Union's ETS may be a classic example of Europe speaking, as appears to be its wont, 'the language of universal international law, perhaps uncertain about who will listen',[126] efforts such as the ETS arguably act as regulatory safety nets if higher-level negotiations fail, as Maslin and Scott have argued, and can help shape the dynamics of international negotiations.[127] If nothing else, the judgment in *ATA* upholds the legal framework for the Union to continue that endeavour.

---

122 See more in general Pauwelyn, *supra* n. 22, at 222.
123 Lowe, *supra* n. 119, at 221.
124 See Vedder, *supra* n. 2, at 122–124.
125 Available at: http://assets.wwf.org.uk/downloads/eu_ets_letter_from_economists_to_obama.pdf.
126 M. Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 European J Intl. L., 117 (2005).
127 M. Maslin & J. Scott, *Carbon Trading Needs a Multi-level Approach*, 475 Nature, 445–446 (2011).

Author Guide

[A] Aim of the Journal

The aim of *European Foreign Affairs* Review is to consider the external posture of the European Union in its relations with the rest of the world. Therefore the journal focuses on the political, legal and economic aspects of the Union's external relations. It functions as an interdisciplinary medium for the understanding and analysis of foreign affairs issues which are of relevance to the European Union and its Member States on the one hand and its international partners on the other.

The journal aims at meeting the needs of both the academic and the practitioner. In doing so it provides a public forum for the discussion and development of European external policy interests and strategies, addressing issues from the points of view of political science and policy-making, law or economics. These issues are discussed by authors drawn from around the world while maintaining a European focus.

Authors should ensure that their contributions will be apparent also to readers outside their specific expertise. Articles may deal with general policy questions as well as with more specialized topics.

[B] Contact Details

Manuscripts should be submitted to the Deputy Editor, Dr. Saïd Hammamoun.
E-mail address EFAR@kluwerlaw.com or said.hammamoun@gmail.com

[C] Submission Guidelines

[1] Manuscripts should be submitted electronically, in Word format, via e-mail.
[2] Submitted manuscripts are understood to be final versions. They must not have been published or submitted for publication elsewhere.
[3] Manuscripts should be between 6,000 and 8,000 words.
[4] Only articles in English will be considered for publication. Manuscripts should be written in standard English, while using 'ize' and 'ization' instead of 'ise' and 'isation'. Preferred reference source is the Oxford English Dictionary. However, in case of quotations the original spelling should be maintained. In case the complete article is written by an American author, US spelling may also be used.
[5] The article should contain an abstract, a short summary of about 200 words. This abstract will also be added to the free search zone of the Kluwer Online database.
[6] A brief biographical note, including both the current affiliation as well as the e-mail address of the author(s), should be provided in the first footnote of the manuscript.
[7] An article title should be concise, with a maximum of 70 characters. Short titles are invited for use as running heads.
[8] Special attention should be paid to quotations, footnotes, and references. All citations and quotations must be verified before submission of the manuscript. The accuracy of the contribution is the responsibility of the author. The journal has adopted the Association of Legal Writing Directors (ALWD) legal citation style to ensure uniformity. Citations should not appear in the text but in the footnotes. Footnotes should be numbered consecutively, using the footnote function in Word so that if any footnotes are added or deleted the others are automatically renumbered.
[9] This journal should be cited as follows: (2013) 18 EFA Rev.
[10] Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Tables should be numbered and should include concise titles.
[11] Heading levels should be clearly indicated.

For further information on style, see the House Style Guide on the website: www.kluwerlaw.com/ContactUs/

[D] Review Process

[1] Articles will be subjected to a review procedure, intended to establish and maintain a high standard in order to attain international recognition. Before submission to the publisher, manuscripts will be reviewed by the Board of Editors and may be returned to the author for revision.
[2] The journal's policy is to provide an initial assessment of the submission within thirty days of receiving the posted submission. In cases where the article is externally referred for review, this period may be extended.
[3] The editors reserve the right to make alterations as to style, punctuation, grammar etc.
[4] In general the author will not receive proofs of the article. Proofreading will be taken care of by the Board of Editors.

[E] Copyright

[1] Publication in the journal is subject to authors signing a 'Consent to Publish and Transfer of Copyright' form.
[2] The following rights remain reserved to the author: the right to make copies and distribute copies (including via e-mail) of the contribution for own personal use, including for own classroom teaching use and to research colleagues, for personal use by such colleagues, and the right to present the contribution at meetings or conferences and to distribute copies of the contribution to the delegates attending the meeting; the right to post the contribution on the author's personal or institutional web site or server, provided acknowledgement is given to the original source of publication; for the author's employer, if the contribution is a 'work for hire', made within the scope of the author's employment, the right to use all or part of the contribution for other intra-company use (e.g. training), including by posting the contribution on secure, internal corporate intranets; and the right to use the contribution for his/her further career by including the contribution in other publications such as a dissertation and/or a collection of articles provided acknowledgement is given to the original source of publication.
[3] The author shall receive for the rights granted a free copy of the issue of the journal in which the article is published, plus a PDF file of his/her article.