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CASE LAW

A. Court of Justice

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, nyr.

1. Introduction

Many international air carriers protested against the extension of the EU Emission Trading Scheme (ETS) to aviation activities that took effect on 1 January 2012. After some of them challenged the validity of national execution measures taken to implement Directive 2008/101,[1] the High Court of Justice for England and Wales made a reference for a preliminary ruling to the European Court of Justice. Following the Opinion of Advocate General Kokott,[2] the present judgment upholds the extension of the EU ETS to aviation activities.

The case featured strong, opposing economic and political interests. Before the Court, the Air Transport Association of America and American, Continental and United Airlines (hereafter referred to collectively as ATA) were supported by the intervention of the powerful International Air Transport Association (IATA), along with the National Airlines Council of Canada. On the other side, thirteen governments submitted observations supporting the EU institutions. Outside the courtroom, the case raised transatlantic tensions reminiscent of those in winter 2004, when several continental European States opposed a US-led coalition to attack Iraq. In April 2007, when Directive 2008/101 was still a project, a US-led diplomatic coalition in Brussels, comprising senior diplomats from Australia, Canada, China, Japan and South Korea, wrote to the representatives of the 27 Member States to the EU. They "urge[d]" the EU to "exclude operations of non-European aircraft" from the scope of the EU ETS and "to reconsider the Commission's unilateral

1. 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, O.J. 2009, L 8/3.

2. Opinion of A.G. Kokott of 6 Oct. 2011.

proposal".[3] While the Court was still deliberating, the diplomacies of 28 countries, including Brazil, South Africa, India and China, denounced what they called EU's "unilateralism,"[4] and they led the Council of the International Civil Aviation Organization (ICAO) to declare its opposition to the EU plan.[5] Threats of retaliation were put forward by Chinese and American lobbyists.[6] Five days before the release of the Court's judgment, a letter by US Secretary of State Clinton and Secretary of transportation LaHood, transmitted to the *International Herald Tribune*, reaffirmed that the United States would be "compelled to take appropriate action" if the EU followed its plans.[7] After the judgment, the US House of Representatives supported a bill to prevent American air carriers from participating in the European scheme;[8] the four main Chinese airlines announced that they would not pay any carbon charge;[9] Russia threatened to retaliate in restricting trans-Siberia flights for European airlines;[10] and the African Airline Association expressed its hostility to the scheme.[11]

On a legal rather than political perspective, the case is rooted in the love-hate relationship between EU and international law. International law has long promoted what could be called progressive standards regarding, for instance, the protection of human rights or the mitigation of climate change. These standards aimed at protecting the most vulnerable individuals and seeking a form of international justice through international cooperation. The underlying idea was that, through the progressive recognition of "universal" standards, the international community would progress toward a more just, thus more peaceful world. Most local jurisdictions – including the ECJ – have recognized, more or less directly, a certain prevalence of these progressive standards over local law, and a form of judicial review to enforce this prevalence.[12] Yet the ECJ has taken a different position when international norms put forward to challenge European law were not, indeed, progressive.

3. Cited in Corporate Europe Observatory, "Climate crash in Strasbourg: An industry in denial" (Dec. 2008), 3.

4. Mathews, "EU-CTS dangers of unilateralism", *Aerospace Diary*, <aerospacediary.blogspot.com/2011/09/exclusive-eu-ets-dangers-of.html> (13 Sept. 2011).

5. Declaration of the ICAO Council, C-DEC 194/2, 2 Nov. 2011, para 5.

6. Corporate Europe Observatory, op. cit. *supra* note 3, 10.

7. Clark, "Carbon emission fees for flight upheld", *New York Times* (21 Dec. 2011).

8. Ibid.

9. Watts, "Chinese airlines refuse to pay EU carbon tax", *Guardian* (4 Jan. 2012).

10. "29 countries oppose EU carbon tax", *CNN* (23 Feb. 2012), <www.cncworld.tv/news/v_show/22288_29_countries_oppose_EU_carbon_tax.shtml>.

11. Obura, "African airlines oppose EU emissions trading scheme", *Standard* (15 Jan. 2012), <www.standardmedia.co.ke/InsidePage.php?id=2000050064&cid=14&j=&m=&d=>.

12. See, most recently, C-329/11, *Achughbabian* v. *Préfet de la Marne*, judgment of 6 Dec. 2011, nyr, para 49 (on the European Convention on Human Rights).

Such was the case in *Kadi*, where EU measures taken to implement UN sanctions conflicted with European (and probably international) norms on the protection of fundamental rights. In *Kadi*, the Court decided in favour of fundamental rights, at the expense of international norms embedded in the UN Charter. The present case, although justified on very different grounds, is reminiscent of *Kadi*. International rules put forward promoting international civil aviation do not aim at establishing progressive standards. They do not seek any form of global justice.[13] International civil aviation benefits only a tiny group of the world's privileged. On the other hand, it results in significant environmental impact that affects the world's most vulnerable. In the present case, like in *Kadi*, the Court decides that progressive European standards should prevail over conservative international norms. Yet, the Court's justification is regrettably much less straightforward in the present case than it was in *Kadi*. Here, possibly for reasons of political prudence, the Court grounded its decision on shaky legal arguments, and avoided addressing the challanges brought by ATA, rather than invoking *Kadi*-like reasons.

2. Factual and legal background

2.1. *Directive 2003/87: The EU emission trading scheme and its necessary extension*

The EU has often taken the lead in global efforts to mitigate climate change. Directive 2003/87 established a "scheme for greenhouse gas emission allowance trading within the Community".[14] This Emission Trading Scheme (ETS) took effect on 1 January 2005, one and a half months before the Kyoto Protocol to the United Nations Framework Convention on Climate Change entered into force.

However, while implementing a brand new type of legislation, European institutions were cautious to avoid some technical issues. The initial EU ETS applied only to a limited number of activities, representing about half of the greenhouse gases (hereafter: GHG) emitted within the EU.[15] Yet the language of Directive 2003/87 clearly mentioned the goal of a more comprehensive

13. Reference can for instance be made to John Rawls's *A Theory of Justice* (1999). Thus, "progressive" standards and "justice" may refer to norms that seek equal rights to basic liberty, or norms that are of the greatest benefit to the least-advantaged individuals.

14. O.J. 2003, L 275/32.

15. See Ellerman and Buchner, "The European Union emissions trading scheme: Origins, allocation, and early results", 1 *Review of Environmental Economics & Policy* (2007), 66.

scheme and it encouraged the Commission to report on possible extensions, in particular to the transport sector.[16]

In fact, the incomplete scope of Directive 2003/87 was in tension with the general principle of equal treatment, as it treated comparable situations differently. Thus, in 2007, in a reference for a preliminary ruling, the French *Conseil d'État* asked the Court if Directive 2003/87 was "valid in the light of the principle of equal treatment, in so far as that Directive makes the greenhouse gas emission allowance trading scheme applicable to installations in the steel sector without including in its scope the aluminium and plastic industries".[17] In its judgment in the case, the Court recognized an infringement of the principle of equal treatment, as the "different sources of greenhouse gas emissions relating to economic activities are in principle in a comparable situation".[18] However, the Court also acknowledged "the novelty and complexity of the scheme," whose implementation "could have been disturbed by the involvement of too great a number of participants".[19] In the words of Advocate General Maduro, "[i]t is . . . in the very nature of legislative experimentation that tension with the principle of equal treatment should arise. . . . The experimental measures must first of all be transitory".[20] Accordingly, the Court considered the infringement of the principle of equal treatment justified on the basis of "the Community legislature's discretion as regards a step-by-step approach".[21] In other words, the discriminatory nature of Directive 2003/87 was justified, but only provided that it was temporary: the EU was bound to move either back (withdrawing Directive 2003/87) or forward (extending it to other sectors).

2.2. *Directive 2008/101: Extending the EU ETS to aviation activities*

A growing European awareness of climate change militated in favour of going further, or at least opposed any withdrawal of the existing scheme. After extensive public consultation,[22] the Commission initiated two proposals for Directives in 2006 and in 2008, extending the EU ETS respectively to aviation activities and to several industrial sectors (including aluminium).[23] Both proposals were adopted by the European Parliament and

16. Recital 25 and Art. 30 of Directive 2003/87.
17. Case C-127/07, *Arcelor* v. *Premier Ministre*, [2008] ECR I-9895, para 22.
18. Ibid., para 34.
19. Ibid., paras. 61, 60.
20. Opinion, in *Arcelor,* ibid., paras 46, 47.
21. *Arcelor*, cited *supra* note 17, para 63.
22. See: Dempsey, *Public International Air Law* (McGill, 2008), p. 472.
23. Proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas

the Council. The present case concerned the validity of the first one: "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".[24]

The extension of the EU ETS to aviation activities was not a surprise. As recalled, the transport sector was already mentioned in Directive 2003/87 as an objective for future extension.[25] Although aviation, taken alone, is responsible for only a tiny share of global GHG, it is also a quickly developing sector, with an average annual growth of 3.8 percent between 2001 and 2005.[26] In 2007, the aviation GHG emissions in the EU rose by 3.7 MtCO2, roughly half of the EU net annual carbon sequestration through domestic afforestation and reforestation activities.[27] Thus, Directive 2008/101 is justified on the fact that, "[i]f the climate change impact of the aviation sector continues to grow at the current rate, it would significantly undermine reductions made by other sectors to combat climate change".[28]

As provided for by Directive 2008/101, the extension of the EU ETS to civil aviation has entered into force on 1 January 2012. From this date on, all airlines operating to and from European airports must have allowances for their GHG emissions. While a substantive part of these allowances are allocated free of charge to existing air carriers on the basis of their historical activity and to new entrants, the remaining allowances (15% of the total in 2012) are auctioned. The total quantity of the allowances is progressively reduced (in 2012, 97% of the 2004–2006 average).[29] Thus, the price of the allowances is determined by the interaction of supply and demand. States are in charge of most of the implementation of the Directive, including the issuance and auctioning of allowances. The revenues generated from the auctioning of allowances must be directed to climate change related efforts:

emission allowance trading within the Community of 20 Dec. 2006, COM(2006)818 final; proposal for a directive of the European Parliament and of the Council amending Directive 2003/87 so as to improve and extend the greenhouse gas emission allowance trading system of the Community of 23 Jan. 2008, COM(2008)16 final.

24. See *supra* note 1. The other proposal led to Directive 2009/29/EC of the European Parliament and of the Council amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, O.J. 2009, L 140/63.

25. See *supra* note 16.

26. Ribeiro and Kobayashi, "Transport and its infrastructure", in Metz et al. (Eds.), *Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007), p. 334.

27. Report from the Commission to the European Parliament and the Council, *Progress Towards Achieving the Kyoto Objectives*, COM(2009)630 final, 8, 16.

28. 11th Recital of Directive 2008/101.

29. Art. 3c–3e and 3(s) of Directive 2003/87 as amended by Directive 2008/101.

> "Those revenues should be used to tackle climate change in the EU and third countries, inter alia, to reduce greenhouse gas emissions, to adapt to the impacts of climate change in the EU and third countries, especially developing countries, to fund research and development for mitigation and adaptation, including in particular in the fields of aeronautics and air transport, to reduce emissions through low-emission transport and to cover the cost of administering the Community scheme. The proceeds of auctioning should also be used to fund contributions to the Global Energy Efficiency and Renewable Energy Fund, and measures to avoid deforestation".[30]

In the context of a growing demand for air transportation, the efficiency of Directive 2008/101 depends on the capacity of air carriers to reduce their GHG emissions. According to the IPCC Fourth Assessment Report, "[m]arket pressures . . . determine fuel efficiency and CO2 emissions".[31] Therefore, "[c]arbon pricing could effect further emissions reductions if the aviation industry introduces further technology measures in response".[32] As no revolutionary alternative technology to kerosene is available yet, diminishing GHG emissions while accommodating more passengers "drives a continuing trend of fuel efficiency improvement through aerodynamic improvements".[33] Annual fuel efficiency improvements generally observed range between 1–1.5 percent[34] – much less that the sector's growth rate. Air carriers already have a strong incentive to reduce their consumption of fuel, which represents one fifth of an air carrier's expenses.[35] As a consequence, the extension of the EU ETS to aviation activities is unlikely to significantly impact the cost structure incurred by air carriers. Thus, despite Directive 2008/101, the GHG emissions of aviation activities will continue to grow, although at a slightly lower rate. According to an economic survey by Vespermann and Wald, "compared to an unrestricted growth scenario, the annual growth rate for CO2 emissions within air transportation is expected to be about 1% lower under the [ETS] system".[36] This also means that air carriers will need to buy carbon allowances from stationary industries, which would further reduce their own emissions. Lastly, a regional ETS cannot avoid certain risks of carbon leakage:

30. Ibid. Art. 3d(4).
31. Ribeiro and Kobayashi, op. cit. *supra* note 26, 352.
32. Ibid., 364.
33. Ibid., 353.
34. Anger et al., *Air Transport in the European Union Emissions Trading Scheme* (2008), <www.omega.mmu.ac.uk/Events/OmegaStudy_17_finalreport_AAPMA_2-1__240209.pdf>, 19.
35. Ibid., 352.
36. Vespermann and Wald, "Much ado about nothing? An analysis of economic impacts and ecologic effects of the EU-emission trading scheme in the aviation industry", 45 *Transportation Research Part A* (2011), 1075.

international air carriers could be tempted to dispatch their fleet so as to use their most fuel efficient airplanes on European routes, without decreasing (and through a less rational dispatching, possibly even increasing) their global GHG emissions.[37] Here again, however, it is unsure whether the relatively limited cost of the EU ETS will really have such an impact.[38]

2.3. *The reference for a preliminary ruling*

In the present case, the reference for a preliminary ruling may be synthesized in two broad questions. On the one hand, the Court was asked to determine which rules of international law are "capable of being relied upon . . . to challenge the validity" of Directive 2008/101. ATA invoked provisions of the 1944 Convention on International Civil Aviation (the Chicago Convention), a transatlantic Air Transport Agreement (the Open Skies Agreement),[39] a provision of the Kyoto Protocol, and four principles of customary international law on State sovereignty: the principles of a State's complete and exclusive sovereignty over its airspace, the invalidity of claims of sovereignty over the high seas, the freedom to fly over the high seas and the principle (contested) that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered.

On the other hand, in the light of the rules applicable, the Court was asked to assess the validity of the Directive, both as a whole and "in so far as it applies the [EU ETS] to those parts of flights (either generally or by aircraft registered in third countries) which take place outside the airspace of EU Member States". Three main arguments were developed to challenge the validity of the Directive: (i) a jurisdictional argument, according to which the EU went beyond the limits of its jurisdiction as defined by international law because Directive 2008/101 took into account the parts of the flights taking place over the airspace of third States or the high seas; (ii) a capacity argument, according to which the EU did not have the capacity to unilaterally extend the EU ETS to aviation activities (the ICAO would be the only legitimate forum); (iii) a free trade argument, according to which the EU ETS amounted to a tax or charge prohibited by treaties.

37. Scheelhaase, Grimme and Schaefer, "The inclusion of aviation into the EU emission trading scheme: Impacts on competition between European and non-European network airlines", 15 *Transportation Research Part D: Transport and Environment* (2010), 23.

38. Albers, Bühne and Peters, "Will the EU-ETS instigate airline network reconfigurations?", 15 *Journal of Air Transport Management* (2009), 1.

39. Air transport agreement between the European Community and the United States, O.J. 2007, L. 134/1, as amended by its protocol, O.J. 2010, L. 223/1.

3. Opinion of Advocate General Kokott

Advocate General Kokott recalled the very restrictive case law of the Court relating to the rules of international law capable of challenging the validity of EU acts. Accordingly, legal and natural persons could only rely upon international agreements under two cumulative conditions: "the European Union must be bound by the agreement concerned"; "the nature and the broad logic of the agreement concerned must not preclude such a review of validity and, in addition, its provisions must appear, as regards their content, to be unconditional and sufficiently precise".[40]

All 27 Member States are party to the Chicago Convention, but the EU is not. Consequently, Advocate General Kokott considered that ATA could not rely on the Chicago Convention to challenge Directive 2008/101.[41] Moreover, although the EU is bound by the Kyoto Protocol and by the Open Skies Agreement, the Advocate General considered that most provisions invoked by ATA are either conditional, or not sufficiently precise to be relied upon. As for principles of customary international law, Advocate General Kokott proposed to apply the same conditions as for treaties. Here again, she considered that these principles are, "by their very nature and broad logic, by no means capable of having an effect on the legal status of individuals". Therefore, she concluded that only two provisions of the Open Skies Agreement could be relied upon to assess the validity of Directive 2008/101.

Nevertheless, "for the sake of completeness,"[42] Advocate General Kokott examined the validity of Directive 2008/101 in the light of all the rules invoked by ATA. The jurisdictional argument was based on customary principles of international law and certain provisions of the Chicago Convention and the Open Skies Agreement. The Advocate General affirmed that the EU ETS "does not contain any extraterritorial provisions" as it "is concerned solely with aircraft arrivals at and departures from aerodromes in the European Union".[43] She recalled that State legislations often "take into account in the exercise of its sovereignty circumstances that occur or have occurred outside its territorial jurisdiction," for instance regarding taxes, competition or fishing.[44] For such legislation to conform with international law on State jurisdiction, what matters is thus the "existence of an adequate territorial link" and the "absence of any adverse effect on the sovereignty of

40. Opinion, para 49.
41. Ibid., para 101.
42. Ibid., para 139.
43. Ibid., paras. 145, 146.
44. Ibid., para 148.

third countries".[45] In Advocate General Kokott's opinion, the "nature as well as the spirit and purpose of environmental protection and climate change measures" may call for norms to take into account events occurring outside of a State territory: even if emitted abroad, GHG "can have effects on the environment and climate in every State and association of States".

As for the capacity argument, Advocate General Kokott briefly showed that, if Article 2(2) of the Kyoto protocol call its parties to undertake negotiations within the ICAO, this is in no case exclusive of other actions.[46] She highlighted that article 15(3) of the Open Skies Agreement does not prohibit unilateral environmental measures when the ICAO has not adopted environmental standards, provided that such measures are not discriminatory. She recalled that, in fact, "[i]f the EU legislature had excluded airlines holding the nationality of a third country from the EU emissions trading scheme, those airlines would have obtained an unjustified competitive advantage over their European competitors".[47]

Lastly, the free trade argument is based on certain provisions of the Chicago convention and the Open Skies Agreement that prohibit "taxes" and "charges" on fuel, or any kind of "dues" on arrival or departure of the aircraft. Yet, Advocate General Kokott argued, the EU ETS does not levy a "charge" or a "tax": the EU scheme is a "market-based measure," and the price of auctioned allowances is "governed solely by supply and demand".[48] Therefore, Advocate General Kokott proposed rejecting all challenges and upholding Directive 2008/101.

4. Judgment of the Court

Throughout the judgment, the Grand Chamber generally followed the reasoning of Advocate General Kokott, although it made some concessions to ATA where the Advocate General opposed formalist reasons. On the one hand, regarding the sources of law applicable, the judgment recognized a wider set of relevant norms of international law than the Opinion. For instance, the Court ruled that the condition of reciprocity in Article 11 of the Open Skies Agreement, which is clearly met, does not prevent the parties from invoking it.[49] Moreover, the Court considered that principles of customary international law can be relied upon even if they do not directly affect the legal status of the parties, at least (given the lack of precision of

45. Ibid., paras. 150–159.
46. Ibid., paras. 175–188.
47. Ibid., para 199.
48. Ibid., para 215.
49. Judgment, para 93.

these principles) in case of "manifest errors of assessment".[50] Ultimately, however, the Court did not recognize the Chicago Convention, which air lawyers view as the backbone of their legal field, as capable of being relied upon by private persons to challenge EU acts, although all EU Member States have ratified it. Similarly, the Court rejected a ground based on the Kyoto Protocol, considering that the obligation of the EU to negotiate within the ICAO is not sufficiently direct and precise to be relied upon by ATA.[51]

On the validity of the Directive, the Court shared Advocate General Kokott's Opinion and rejected all three arguments, although it sometimes followed a slightly different reasoning. Firstly, on the jurisdictional challenge to Directive 2008/101, the Court insisted that "[t]he European Union must respect international law in the exercise of its powers".[52] It recognized that, in a hypothetical case, European legislation could not apply to "aircraft registered in third States that are flying over third States or the high seas".[53] In contrast, in the case at issue, the Court affirmed that "European Union legislation may be applied to an aircraft operator when its aircraft is in the territory of one of the Member States and, more specifically, on an aerodrome situated in such territory, since, in such a case, that aircraft is subject to the unlimited jurisdiction of that Member State and the European Union".[54]

Generally speaking, the Court interpreted customary international law as providing that a State "may in principle choose to permit a commercial activity . . . to be carried out in the territory of the European Union only on condition that operators comply with [established] criteria".[55] Just as the Advocate General submitted that environmental protection calls for measures that take extraterritorial events into account, the Court highlighted: "the fact that . . . certain matters contributing to the pollution of the . . . territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question . . . the full applicability of European Union law in that territory".[56]

Secondly, on the capacity argument, the Court shared Advocate General Kokott's interpretation of the Open Skies Agreement as allowing unilateral, non-discriminatory measures in the absence of ICAO standards.

Thirdly, on the free trade argument, the Court once again agreed with the Advocate General and distinguished the EU ETS from a "charge" prohibited

50. Ibid., para 110.
51. Ibid., paras. 72, 78.
52. Ibid., para 123.
53. Ibid., para 122.
54. Ibid., para 124.
55. Ibid., para 128.
56. Ibid., para 129.

by the Open Skies Agreement. The distinction must be made not only because the EU ETS is a market-based mechanism, but also because it may even be that an air carrier, achieving substantial reduction of its emissions, "will make a profit by assigning its surplus allowances for consideration". Unlike an "environmental protection tax paid fully to the State," the Court argues that the ETS is not an "obligatory levy in favour of the public authorities" that would fall within the scope of the prohibition.[57] Consequently, the Court upheld Directive 2008/101.

5. Comment

Although critical of the reasoning in both the Opinion and the judgment, this comment generally supports their final conclusion on the conformity of Directive 2008/101 with international law. The first section deals with the determination of the rules of international law that, in the present case, can be relied on to challenge the Directive. In particular, it discusses the rejection of the Chicago Convention from the international norms relevant to the present case. The second section focuses on the three substantial challenges to Directive 2008/101: the "jurisdiction," "capacity" and "free trade" grounds. The third section explores alternative ways to justify Directive 2008/101 as an exception to international norms.

5.1. *Invoking international norms before the ECJ: The case of the Chicago Convention*

5.1.1. *Framing the issue: EU and international law*

Both the Advocate General and the Court rejected the claims based on the Chicago Convention, as a treaty which is not ratified by the EU, although it binds each of the 27 Member States. This has infuriated air lawyers, who do not feel that the Court takes their legal field as seriously as it should. Their wariness was already fuelled by a series of previous regulations and cases.[58]

At least symbolically,[59] the exclusion of the Chicago Convention illustrates the growing isolationism of the Court's case law. For international lawyers, the

57. Ibid., paras. 142, 144, 145.

58. See Case C-344/04, *IATA* v. *Department for Transport*, [2006] ECR I-403; Case C-173/07, *Emirates Airlines*, [2008] ECR I-5237; Case C-549/07, *Wallentin-Hermann* v. *Alitalia* [2008] ECR I-1061; Joined Cases C-402/07 & 432/07, *Sturgeon* v. *Condor Flugdienst* and *Böck* v. *Air France*, [2009] ECR I-10923. See also Dempsey and Johansson, "Montreal v. Brussels: The conflict of laws on the issue of delay in international air carriage", 35 *Air & Space Law* (2010), 207.

59. See *infra*, introduction to section 5.2.

primacy of international rules (in international law, at least), the famous *pacta sunt servanda*, stems from a simple notion: that, if international law is to be law, its subjects ought to respect it. Yet, for the advocates of the domestic or regional legal systems, values should matter, and fundamental values should prevail over contradictory international norms. Of course, the monist/dualist issue gets all the more sensitive when international rules prove less "progressive" than domestic or regional ones. Under such circumstances, Europe and the world appear to be on two diverging tracks, rather than simply on different positions on the same path: reconciling them becomes all the more difficult. If European States decide to renounce illiberal projects or rules when these are condemned as contrary to international standards, they may legitimately be wary of abandoning more progressive regional policies to conform to international rules. The Court's decision in *Kadi I* has come to symbolize the resistance the Court may oppose to sanctions adopted by the Security Council Sanctions Committee with insufficient procedural guarantees.[60] Just as the decisions of the Sanction Committee interfered with Kadi's rights, the parties in the present case claimed that international rules prevented European measures intended to mitigate climate change. In both cases, the international rules are fundamentally irreconcilable with EU norms, not only because EU and international law are contradictory, but because international rules are (from a European perspective at least) perceived as somewhere "behind" the EU.

5.1.2. *Flawed isolationism*

Three theoretical models can conceptualize the relation between the EU legal regime and the international obligations of its Member States. In the present case, the Court adopts an isolationist model. Certainly, the Court recalls, "where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union".[61] However, according to the Court, this applies only to treaties agreed upon by the EU; the EU is not concerned by treaties agreed upon by some or all of its Member States. Thus, the EU's legal regime is not part of the unique normative pyramid imagined by Kelsen, but rather it forms another, distinct pyramid. In this model, both regimes, equal in a sense because isolated, co-exist largely in ignoring each other. Since the EU is not a party to the Chicago Convention, it is not bound by it, just like the ICAO is not bound by EU law. Thus, the possible inconsistencies between international (air) law and EU law is of concern only to States which are at the basis of both pyramids (i.e., as happens to be

60. Joined Cases C-402/05 & 415/05, *Kadi* v. *Council & Commission*, [2008] ECR I-6351.
61. Judgment, para 50.

the case, all 27 Member States).[62] In fact, this model reveals a failure of the project of law: its incapacity to provide a unique and consistent set of rules.

However, this isolationist posture of the Court is in tension with EU primary law. Article 351 TFEU provides that: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties". The Chicago Convention fits within the conditions of Article 351 TFEU: all EU Member States joined the Chicago Convention before joining the European integration project. Yet, to interpret Article 351 TFEU, the Court relies on an ambiguous extract of its 1980 judgment in *Burgoa*. This extract states that Article 234 EEC (now 351 TFEU) "does not bind the Community as regards the non-member country".[63] On this fragile ground, the Court rejects the claim that Directive 2008/101 imposes on Member States obligations incompatible with their international obligations under the Chicago Convention. This is, however, inconsistent with the Court's judgment in *Burgoa*.

Mr Burgoa proposed a second theoretical model of the relation between the EU legal regime and the international obligations of its Member States – a model that the Court in *Burgoa* rejected. According to Mr Burgoa, the EU was responsible for ensuring that its Member States comply with their own international obligations (at least those fitting within the conditions of Art. 234 EEC). This Spanish fisherman had been tried before an Irish court for illegal fishing 20 miles off the Irish coast, in contravention of Irish law. While Irish law regulated fishing up to 200 miles off the coast, Mr Burgoa argued that the 1964 London Fisheries Convention (which Ireland ratified before joining the EEC) limited State jurisdiction to 12 miles off the coast, therefore Irish law was incompatible with the international obligations of Ireland. Yet, the intricacies of Irish procedural law did not allow Mr Burgoa to invoke the 1964 London Fisheries Convention before a domestic judge, while nonetheless allowing him to invoke the Treaty of Rome. Therefore, Mr Burgoa tried to use Article 234 EEC as a vehicle – a Trojan horse of international law if you will – to bring the 1964 London Fisheries Convention before an Irish court. He argued that Article 234 EEC confirmed and upheld his right under the 1964 treaty. The Irish court asked the ECJ whether Article 234 EEC created rights and obligations for the institutions or for the Member States of the European Communities.

62. See also Havel and Mulligan, "The triumph of politics: Reflections on the judgment of the Court of Justice of the European Union validating the inclusion of non-EU airlines in the emissions trading scheme", 37 *Air and Space Law* 3 (2012), 12–13.

63. Case C-812/79, *Burgoa*, [1980] ECR 2787, para 9.

And the answer was negative, of course: Article 234 EEC quite clearly did not itself oblige Member States to respect their prior international obligations, even less did it create an obligation for the EU to ensure that States obey their international obligations. Article 234 EEC only demands that European institutions do not "affect" such obligations through incompatible obligations. In the words of Advocate General Capotorti, "[t]here can . . . be no question whatever . . . of any confirmation or novation of, and far less of any protection or Community guarantee for, the said obligations and rights of Member States towards non-member countries".[64] Article 234 EEC reserves the "right" of Member States to comply with their pre-existing international obligations, but it does not create a "duty" of compliance.[65] And this is exactly what the extract on non-member countries paraphrased in the present case meant when read in its original context:

> "Although the first paragraph of Article 234 makes mention only of the obligations of the Member States, it would not achieve its purpose if it did not imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from a prior agreement. However, that duty of the Community institutions is directed only to permitting the Member State concerned to perform its obligations under the prior agreement and does not bind the Community as regards the non-member country in question".[66]

In effect, the Court's judgment in *Burgoa*, consistently with Article 234 EEC, suggested a third theoretical model to conceptualize the relation between the EU legal regime and the international legal order. Unlike Mr Burgoa's argument, the Court did not consider that the Article 234 EEC could transform the EU legal regime into a Trojan horse or a guardian of Member States' compliance with international law. In a later case, the Court would consider that Article 234 EEC could not create a direct effect that GATT 1994 otherwise did not have.[67] Yet, contrary to its erroneous interpretation in the present *ATA* case, *Burgoa* did not isolate EU law from the international obligation of its Member States (which would have nullified the effect of Art. 234 EEC). According to the Court in *Burgoa*, although the EU is not responsible for implementing the international obligations of its Member States, it must abstain from interfering in the right of its Member States to comply with these obligations. Rather than complete surrender or mutual ignorance, the rule in *Burgoa* is one of mutual respect. When EU law is built

64. Opinion of A.G. Capotorti in *Burgoa*,cited *supra* note 63, 10 July 1980, para 2.

65. In this sense, see annotation by Akehurst, 52 *British Yearbook of International Law* (1982), 354. *Contra*: annotation by Leigh, 76 AJIL (1982), 396.

66. *Burgoa*, cited *supra* note 63, para 9.

67. Case C-307/99, *Fruchthandelsgesellschaft*, [2001] ECR I-3159, paras. 29–30.

upon pre-existing international treaties, then it is up to the EU not to affect these regimes.

Indeed, all later decisions of the Court followed this third model when interpreting Article 234 EEC (later 307 EC, now 351 TFEU).[68] The rule is construed as reflecting the fact that, "by concluding a treaty between them [Member States] could not withdraw from their obligations to third countries".[69] In at least two cases, the Court concluded that States could be exempted from the obligations resulting from a directive conflicting with an international treaty falling within the scope of Article 351 TFEU.[70] In these cases, the Court (fairly) assumes that States are willing to exercise their right under EU primary law to comply with their international legal obligations. In the present case, according to the Court's case law, the EU certainly does not have an obligation to incorporate the whole Chicago Convention into Directives, or to ensure that Member States comply with this convention. However, according to the same case law, Directive 2008/101 could not impose obligations upon Member States which would prevent them from complying with the Chicago Convention.

In the present judgment, however, the Court utilizes the ambiguity of a truncated sentence and nullifies the effect of Article 351 TFEU. Considering that the EU is not bound by the Chicago Convention and that Article 351 TFEU does not impose any obligation on the EU – contradicting both the letter of this provision and its well-settled case law – it rejects arbitrarily the backbone of international air law.[71]

5.2. *Alleged grounds of invalidity*

The Court thus excluded the Chicago Convention from the sources able to challenge the validity of Directive 2008/101. Yet, although unfortunate, the formalist perspective of the Court on the Chicago Convention should normally not have been of great legal consequence in the present case. Indeed, the Court reviews the validity of Directive 2008/101 in the light of

68. Case C-264/09, *Commission* v. *Slovakia*, 15 Sept. 2011, nyr, paras. 41–42; *Fruchthandelsgesellschaft*, previous note.; Case C-324/93, *Evans Medical and Macfarlan Smith*, [1995] ECR I-563, para 27; Case C-158/91, *Levy*, [1993] ECR I-4287, paras. 11–12; Case T-35/01, *Kadi* v. *Council and Commission*, [2005] ECR II-3649, para 186; Case T-306/01, *Yusuf* v. *Council and Commission*, [2005] ECR II-3533, para 236. See also Opinion of A.G. Jääskinen in *Commission* v. *Slovakia*, ibid., paras. 73–75.

69. Case 21/72, *International Fruit*, [1972] ECR 1219, para 11; cited in *Kadi* v. *Council and Commission*, previous note, para 195; *Yusuf* v. *Council and Commission*, previous note, para 245.

70. *Levy*, cited *supra* note 68, para 13, 22; *Evans Medical and Macfarlan Smith*, cited *supra* note 68, para 28, 33.

71. Judgment, paras. 60–61.

norms that are similar to each of the provisions invoked by ATA within the Chicago Convention:

– Article 1 of the Chicago Convention, declaring every State's "complete and exclusive sovereignty over the airspace above its territory," is recognized by the Court as a principle of customary international law and applied as such.[72]
– Article 11 of the Chicago Convention contains a general prohibition of discrimination on the ground of nationality which is not broader than its equivalent in Article 2 of the Open Skies Agreement, while the rest of this Article, on the "applicability of air regulations," is similar almost word for word to Article 7 of the Open Skies Agreement.
– Article 15 of the Chicago Convention, which prohibits "airport and similar charges," is directly referred to by Article 3(4) of the Open Skies Agreement and, therefore, it was indirectly reviewed by the Court.
– Article 24 of the Chicago Agreement, prohibiting "local duties and charges" on fuel and equipments, is of similar effect to Article 11 of the Open Skies Agreement. Nonetheless, at a second stage of its reasoning, the Court reviews and rejects the three alleged grounds of invalidity invoked by ATA, based respectively on "jurisdiction," "capacity" and "free trade".

5.2.1. *The jurisdiction argument*

The first ground to contest the validity of Directive 2008/101 calls on the principle of States' equal sovereignty, a founding pillar of international law.[73] Critiques have submitted that the EU ETS on aviation activities has unlawful extraterritorial effects, as it takes into account parts of the flights occurring over third States' territory or over the high seas. Giovanni Bisignani, the director of IATA, eloquently denounced the EU's claimed right "to tax an Australian plane flying from Asia to Europe for emissions over Afghanistan".[74]

Transforming a political argument in a legal one, ATA accused the EU "of having exceeded the bounds of State jurisdiction in breach of principles of customary international law".[75] The first article of the Chicago Convention qualifies a State's sovereignty over the airspace above its territory as

72. Ibid., paras. 104, 110.
73. See Art. 2(1) of the Charter of the United Nations, 26 Jun. 1945; Art. 1 of the Chicago Convention.
74. Bisignani, *Address on behalf of the IATA* (Sydney, 2008).
75. Opinion, para 143.

"complete and exclusive," a principle that the Court considers part of international customary law.[76]

Exercising extraterritorial jurisdiction has often been seen as a form of unilateralism, detrimental to international cooperation. Advocate General Kokott recognizes that Directive 2008/101 intends to have extraterritorial effect, in pushing air carriers flying to or from the EU to "expel as few greenhouse gases as possible". However, she highlights, "there is no concrete rule regarding their conduct within airspace outside the European Union".[77] Accordingly, "[t]he decisive element from an international-law perspective is that the particular facts display a sufficient link with the State or international organization concerned".[78] The Court follows a similar reasoning when it considers that:

> "[A]n aircraft flying over the high seas is not subject, in so far as it does so, to the allowance trading scheme. . . . It is only if the operator of such an aircraft has chosen to operate a commercial air route arriving at or departing from an aerodrome situated in the territory of a Member State that the operator, because its aircraft is in the territory of that Member State, will be subject to the allowance trading scheme".[79]

In fact, legislation with extraterritorial effects has become common State practice.[80] Concerning air carriers, precisely, the 1990 Convention implementing the Schengen Convention requires that carriers "take all the necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry into the territories of the Contracting Parties", which demands action outside the Schengen area.[81] Another case of commonly accepted extraterritorial jurisdiction is the tax paid in France on airplane tickets, whose amount is higher for flights going out of the European Union, thus reflecting the length of an extraterritorial flight.[82] In environmental law, it has become a common practice to regulate the techniques and quotas that a fishing vessel must respect, whatever its nationality, if it wants to sell its catch to certain countries.[83] In criminal law, the claim of some States to impose "universal jurisdiction" on anyone passing by in their jurisdiction, or more frequently to apply domestic criminal law to

76. See *supra* note 72.
77. Opinion, para 147.
78. Ibid., para 149.
79. Judgment, paras. 126–27.
80. See Ryngaert, *Jurisdiction in International Law* (OUP, 2008), p. 185.
81. Art. 26 of O.J. 2000, L. 239/19.
82. Art. 99 of the Code général des impôts (France), as amended by Regulation 2008-173 of 22 Feb. 2008.
83. See Ellis, "Fisheries conservation in an anarchical system", 3 *Journal of International Law and International Relations* (2007), 31.

certain crimes committed by nationals abroad, are other instances of extraterritorial jurisdiction.

Therefore, as Advocate General Kokott and the Court suggest, the argument against legislation with extraterritorial effects should be framed more specifically. However, the test of a "jurisdictional link" they suggest seems to boil down to a tautology – limiting State *de jure* jurisdiction to the capacity to enforce its legislation (its effective control, or "*de facto* jurisdiction"). Rather, a line has to be drawn somewhere: some extraterritorial jurisdictions are not desirable. A perfect example is the 1996 US Helms-Burton Act, prohibiting companies operating in Cuba from operating in the United States, with the unique goal, according to contemporary observers, of "further[ing] US policy by isolating the targeted countries through the imposition of severe penalties upon certain persons and companies investing in these countries".[84] The contrast with Directive 2008/101 is at least twofold. Firstly, the EU ETS is not as prescriptive as the US anti-Cuba legislation. Air carriers can continue their activities provided that they reduce their GHG emissions or buy allowances at a reasonable cost. Secondly, the nature of the objective pursued by domestic measures with extraterritorial effects is relevant.[85] Legislation that prohibits child sex tourism or genocide, or seeks to avoid exhaustion of natural resources pursues internationally recognized legitimate aims, reflected in numerous international conventions and "soft law" instruments. Directive 2008/101 does not aim at isolating a State, or at containing an ideology, but at promoting climate change mitigation, an objective recognized by the 195 parties to the United Nations Framework Convention on Climate Change (UNFCCC) (and by the 191 parties to the Kyoto Protocol).

In addition, the Court implies that the emissions of GHG by air carriers anywhere in the world do in fact affect EU Member States through climate change. The territorial effect of extraterritorial events could certainly justify measures with an extraterritorial effect. This argument refers to the *Commune de Mesquer* judgment, which concerned the massive oil spill that followed the sinking of oil tanker Erika in the exclusive economic zone of France.[86] Yet, in the circumstances of the present case, the argument may be somewhat stretched.[87] There is a broad scientific consensus to establish a causal relationship between a flight over Siberia and the degradation of the environment anywhere in the world, including in the EU. However, airplanes surely do not have as a direct (palpable, evident) impact on climate change as

84. Smis and Van der Borght, "The EU-US compromise on the Helms-Burton and D'Amato acts", 93 AJIL (1999), 227.

85. This argument is implied in paras. 128–29 of the judgment.

86. Case C-188/07, *Commune de Mesquer*, [2008] ECR I-4501, para 61.

87. See, in this sense: Havel and Mulligan, op. cit. *supra* note 62, 21–22.

a sinking oil-taker may have on a close coastal area. Flying is not considered as reprehensible in the same manner as discharging tons of oil in the sea; the latter – even if unintentional – is generally criminalized, but not the former.

5.2.2. *The capacity argument*

The second challenge to Directive 2008/101 relates to the capacity of the EU to apply an ETS to international aviation activities without involving its international partners, thus doing it "unilaterally". From the EU perspective, there is no denying that a multilateral cooperation would have been more commendable, not least because climate change is by nature a global issue that should be addressed globally.[88] As recalled, the EU turned to a regional scheme only after the apparent failure of multilateral negotiations at the ICAO. Yet, what is politically more desirable is not necessarily the only authorized pathway.

ATA claimed two sets of legal arguments. On the one hand, it argued that the EU cannot limit GHG emission from aviation otherwise than through the ICAO. This argument was based on Article 2 of the Kyoto Protocol, which provides that developed States "shall pursue limitation or reduction of emissions of greenhouse gases . . . from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively".[89] The Court does not consider this argument as it concludes that Article 2 of the Kyoto Protocol was not "unconditional and sufficiently precise" to be invoked by ATA. In any case, as Advocate General Kokott notes, such an interpretation is, to say the least, "unconvincing".[90] Nothing in this provision indicates that mitigation policies in these domains can *only* be pursued through ICAO or IMO. Moreover, such a restrictive interpretation would contradict the general purpose of the Kyoto Protocol, which is to mitigate climate change through limiting and reducing GHG emissions, preferably but not exclusively through international cooperation.[91] Thus, rather than limiting the options of developed States, Article 2 of the Kyoto Protocol should be understood as expressing a "preference" and "an obligation of conduct"[92] of the contracting parties to try and negotiate a multilateral solution.

88. Recital 17 of Directive 2008/101; Art. 25a(2) of Directive 2003/87 as amended by Directive 2008/101.

89. Art. 2.2 of the Kyoto Protocol.

90. Opinion, para 176.

91. See generally: Petersen, "The legality of the EU's stand-alone approach to the climate impact of aviation", 17 *Review of European Community & International Environmental Law* (2008), 203–204.

92. Opinion paras. 183, 184.

ATA argued that unilateral steps by the EU are also prohibited by the Open Skies Agreement. To this end, ATA referred to Article 15(3) of the Open Skies Agreement, according to which, "[w]hen environmental measures are established, the aviation environmental standards adopted by the [ICAO] in annexes to the Convention shall be followed except where differences have been filed". It may be difficult to argue, however, that this Article prevents States from adopting their own environmental measures when no environmental standard has been adopted by the ICAO. Nonetheless, according to ATA, the EU was in breach of Resolution A36-22 adopted by the ICAO Assembly in 2007, which "urge[d] Contracting States not to implement an emissions trading system on other Contracting State's aircraft operators except on the basis of mutual agreement between those States".[93] If this was true, complying with such a rule would have resulted, for the EU, in a political dilemma: either unfairly discriminating against domestic air carriers, or, more realistically, not taking any action. Yet, as Advocate General Kokott highlighted with humour, it may be difficult to consider Resolution A36-22 as an environmental measure, for, to say the least, it does not go far in the direction of environmental protection.[94] In any case, the argument did not hold water, as the EU Member States and fifteen other States had issued a statement on resolution A36-22 to reserve their "right under the Chicago Convention to enact and apply market-based measures [on emission trading] on a non-discriminatory basis to all operators of all States providing services to, from or within their territory".[95] In addition, the Court recalled that resolution A37-19 superseded resolution A36-22 in 2010. Resolution A37-19 is a subtle diplomatic compromise that does not say much, but at least it is not as hostile to ETS as was resolution A36-22. In fact, one of its dispositions incidentally mentions the possibility that market-based measures be "established on national, regional and global levels," and it lists some "guiding principles for the design and implementation" of ETS.[96] As the Court recalls, there is no question that the EU ETS conforms with these guiding principles.[97]

93. ICAO Assembly Resolution A36-22, "Consolidated statement of continuing ICAO policies and practices related to environmental protection", appendix L, Art. 1(b)(1).

94. Opinion, para 191.

95. Reservation by Portugal on behalf of the Member States of the European Community (EC) and the other States Members of the European Civil Aviation Conference (ECAC) with regard to Assembly Resolution A36-22, Minutes of the eleventh and tenth meetings of the executive committee <legacy.icao.int/icao/en/assembl/a36/docs/A36_MIN_EX_10_11_en.pdf>.

96. ICAO Assembly Resolution A37-19, "Consolidated statement of continuing ICAO policies and practices related to environmental protection – Climate change", Art. 15(a), Annex.

97. Judgment, paras. 149–151.

5.2.3. *The free trade argument*

The third challenge to Directive 2008/101 is based on legal provisions intended to promote free trade. A distinction should be made between an argument based on the prohibition of discriminations and one based on the prohibition of charges (even if they are non-discriminatory). The first argument is based on a very basic rule in both the Chicago Convention and the Open Skies Agreement: the principle of non-discrimination.[98] Numerous public statements hostile to Directive 2008/101 put forward the alleged discriminatory effect of the Directive.[99] Yet this argument was not submitted by ATA before the Court. This is certainly because there is absolutely no element showing that adverse treatment is applied to third State companies. To assess that there is no discrimination, the Court notes "the express terms" of the preamble to Directive 2008/101,[100] but it may also have looked at the economic effects of the Directive.

Counter-intuitively, several economic studies have shown that applying the EU ETS to aviation activities may have a discriminatory effect, but that this will be in favour of non-Member State air carriers and to the detriment of European ones.[101] For instance, Scheelhaase et al. showed that Continental would be significantly less affected by the scheme than Lufthansa, partly because of the lower fuel efficiency of short haul flights (which, in the case of Continental, do not fall under the territorial scope of Directive 2008/101).[102] More particularly, peripheral hubs will have a considerable advantage over European companies. A direct Singapore-Frankfurt flight would require allowances for the whole journey, while a Turkish Airlines journey with a transit in Istanbul would be subject to Directive 2008/101 only for the short-haul flight between Istanbul and Frankfurt. Beside Turkish Airlines, to a lesser extent, companies based in the Arab Emirates gain from a similar competitive distortion. An even greater comparative advantage may concern enclaves. Swiss Air long-haul flights heading to or leaving from Zurich are not subject to the same obligation as their competitors leaving from Frankfurt,

98. Art. 11, 15(1) Chicago Convention; Art. 2, 3(4) Open Skies Agreement.

99. See e.g. Joint declaration of the Moscow meeting on inclusion of international civil aviation in the EU-ETS, 22 Feb. 2012, first and tenth Recitals ("Considering that the inclusion of international civil aviation in the EU-ETS leads to serious market distortions and unfair competition").

100. Judgment, para 155.

101. See e.g. Scheelhaase and Grimme, "Emissions trading for international aviation: An estimation of the economic impact on selected European airlines", 13 *Journal of Air Transport Management* (2007) 253, and following notes.

102. Scheelhaase, Grimme and Schaefer, "The inclusion of aviation into the EU emission trading scheme: Impacts on competition between European and non-European network airlines", 15 *Transportation Research Part D: Transport and Environment* (2010), 24.

Paris or even London.[103] This issue is indeed at the core of the current negotiations between the EU and Switzerland on the expansion of the EU ETS: while Switzerland wants to join the EU ETS for stationary installations, the EU seeks to impose Directive 2008/101 within a "package".[104] It is, consequently, well-established that the EU does not pursue any economic strategy through Directive 2008/101 as, on the contrary, EU-based air carriers will suffer a comparative disadvantage. As a matter of fact, the prohibition of discrimination may even justify that, if the EU ETS is extended to European companies, it should also be extended to non-European ones in the same conditions.

Yet, ATA submitted a stronger free trade argument against Directive 2008/101, based on the prohibition of charges even if non-discriminatory. Article 11(2) of the Open Skies Agreement exempts air carriers from "taxes, levies, duties, fees and charges" on "fuel, lubricants and consumable technical supplies". This is certainly the strongest argument against the regime established by Directive 2008/101. The Court opposes this argument by differentiating carbon allowances from such prohibited charges. Thus, the Court identifies three characteristics of "obligatory levies" which are prohibited by the Open Skies Agreement:

– they are based on "the fuel consumption of the operators' aircraft";
– they have a "direct and inseverable link between the quantity of fuel held or consumed by an airplane and the pecuniary burden on the aircraft's operator," and
– they intend to "generate revenue for the public authorities".[105]

Certainly, carbon allowances do not meet the second and third conditions. As to the second condition, the Court argues that the number of allowances to be surrendered depends not only on the consumption of fuel, but also on an emission factor. Moreover, it recalls that "[t]he actual cost for the operator" depends also "on the number of allowances initially allocated to the operator and their market price when the purchase of additional allowances proves necessary in order to cover the operator's emissions".[106] Regarding the third condition, it is significant that Member States must use the revenue of the EU ETS in climate change-related activities. Therefore, the Court concludes that

103. Albers, Bühne and Peters, op. cit. *supra* note 38, 4.

104. See Federal office for the environment (Switzerland), "Second round of Swiss-EU negotiations on linking emissions trading systems" (20 Sept. 2011), <www.bafu.admin.ch/dokumentation/medieninformation/00962/index.html?lang=en&msg-id=41297>.

105. Judgment, paras. 141–143.

106. Ibid., para 142.

the EU ETS "constitutes a market-based measure and not a duty, tax, fee or charge on the fuel load".[107]

This reasoning is shaky to say the least – Havel and Mulligan denounce a "semantic dodge".[108] The second and third conditions are based on an analogy that the Court draws from a few examples of prohibited levies, but such conditions have no source in the Open Skies Agreement. Yet, while the Court proposes a positive definition of the levies, the Open Skies Agreement purposefully imposes a negative definition including all other "fees and charges that are . . . not based on the cost of services provided".[109] This negative definition reflects the intent of the treaty to prevent not a method, but an effect. Thus, the prohibition naturally extends to what the European treaties call "charges having equivalent effect".[110] There is no denying that, by obliging air carriers to buy market-based allowances, Directive 2008/101 affects the market in the same way as taxes, levies, duties, fees and charges.

More explicitly than the Open Skies Agreement, Article 15 of the Chicago Convention refers not only to "charges" and "fees," but also to "dues". This disposition applies in a slightly different context – the taxes in question concern the right of entry or transit, not fuel – but it equally applies in the circumstances of Directive 2008/101. Although the Court did not recognize the Chicago Convention as a source of law capable of being relied upon to challenge Directive 2008/101, Article 3(4) of the Open Skies Agreement refers to this Article as a binding norm. Even if one conceded that "taxes" and "charges," taken separately, might be interpreted in a restrictive manner, "dues" certainly cannot justify the exclusion of market-based levies. However, the Court surprisingly fails to contemplate the difference of language between Article 11(2) of the Open Skies Agreement and Article 15 of the Chicago Convention.[111]

Other arguments grounded in international law could have justified Directive 2008/101 in the light of both treaties. The Open Skies Agreement and the Chicago Convention provide an exception to the prohibition of charges and similar obligations when they pass on the cost of a service to the air carriers.[112] A possible, alternative argument would qualify the EU ETS as a compulsory service of compensating the environmental consequences of

107. Ibid., para 147.

108. Havel and Mulligan, op. cit. *supra* note 62, 30.

109. Art. 11(a).

110. Art. 28, 29, 30 TFEU.

111. The Court only notes that, "for the reasons set out" when discussing the Open Skies Agreement, the EU ETS cannot "be regarded as an airport charge" (judgment, para 153), thus eluding the difference of terminology in the Chicago Convention.

112. Art. 11(a) of the Open Skies Agreement includes an exception for charges "based on the cost of services provided." Art. 15 of the Chicago Convention prohibits the imposition of

aviation activities. This would be consistent with the proportionality of the GHG emissions of a flight with the cost born by the air carrier, and with the obligation for States to use the revenues of the scheme to "tackle climate change".[113] Analogy could be drawn with security or noise-related charges "designed to recover the relevant costs of providing security and noise-abatement equipment and services"[114] that were approved by the ICAO.

5.3. *An alternative path: Justifying Directive 2008/101 as an exception to international norms*

The conflict between European and international rules in the present case is reminiscent of *Kadi I*, but fundamental differences appear in the reasoning of the Court between the two cases. The Court in *Kadi I* states that, "if the conditions for application have been satisfied," Article 307 EC (now 351 TFEU) "may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights".[115] Thus, to derogate from international norms, *Kadi I* follows a different strategy from the judgment examined here. It does not reject the UN Charter as a block, as does the present judgment with the Chicago Convention. Nor does it go into perilous interpretation of the Security Council resolutions, similar to *ATA*'s interpretation of "tax" or "charges" as excluding market-based measures. Instead, *Kadi I* concedes that the EU should as a rule not affect the international obligations of its Member States, but it excludes from this rule those obligations that it considers clearly incompatible with the constitutional norms of the EU. Acknowledging the natural exception to *Burgoa*, *Kadi I* seeks a model of constructive dialogue and mutual respect between EU law and the international legal order – a respect that does not necessarily mean complete surrender. After all, very few monist countries accord their international obligations a legal value prevailing over their own constitutional norms.

A similar argument, based on constitutional exceptionalism, might have provided a more solid means for the Court to uphold Directive 2008/101 without rejecting the Chicago Convention. It would surely have been more persuasive than the truncated interpretation of a 1980 judgment. At least two constitutional bases could have been considered. Firstly, *Kadi I* recognized the

charges "imposed . . . in respect solely of the right of transit over or entry into or exit from its territory," thus not opposing a charge based on a service.

113. *Supra* note 30.

114. Dempsey, op. cit. *supra* note 22, 368.

115. *Kadi* v. *Council & Commission*, cited *supra* note 60, paras. 301, 304.

protection of fundamental rights as a constitutional ground, and the Charter of Fundamental Rights recognizes a right to a "high level of environmental protection and the improvement of the quality of the environment".[116] It could have been argued that, in mitigating climate change, Directive 2008/101 aimed at fulfilling this right. Secondly, *Kadi I* declares the protection of fundamental rights as only one of the EU constitutional principles prevailing over its international obligations; climate change mitigation or, more generally, environmental protection may be another such principle. The goals of Directive 2008/101 as detailed in its preamble and appearing from its context do support this argument.[117]

This judgment may certainly be understood in the context of a jurisdictional policy. Constitutional arguments may have annoyed third States governments and nourished the depiction of the EU as an arrogant legal fortress. Analysed by the governments of non-Member States, a constitutional derogation denotes a stronger political posture than a would-be unfortunate "technical" judgment. In both cases, however, the Court takes a distant posture toward international law. Such a distant posture would have been more acceptable politically and less detrimental to the development of international law had it been based on a well-justified constitutional exception, rather than on the mere rejection of the Chicago Convention following a truncated reference to old case law and an arbitrary interpretation of EU primary law.

And after all, it may well be that European constitutional values are not just European – that they reflect universal values. All societies seem to have some pre-encounter notion of human dignity, and all of them have environmental concerns opposing climate change. In both cases, plenty of international legal arguments support "EU" "constitutional" "exceptionalism," and, in the case at issue, Directive 2008/101. In particular, both the UNFCCC and the Kyoto Protocol affirm the duty of developed States to take the lead in climate change mitigation,[118] amongst others through regional cooperation.[119]

On this basis, the Court in *Kadi I* and in the present case could also have fully played on the ground of international law rather than on constitutional exceptionalism. A derogation to international air law could have been justified on the basis of the duty of developed States to take the lead in climate change mitigation. Certainly the argument would not have been easy to frame, as international law has no method for organizing different norms from different fields of law in a hierarchy. Article 30 of the 1969 Vienna Convention of the

116. Art. 37 of the Charter of the Fundamental Rights of the European Union, O.J. 2010 C. 83/389.

117. See Recital 9, Art. 3(3) and 3(5) TEU; Art. 191(1) TFEU.

118. Art. 2(a), 3(3), 4(2)(a) UNFCCC. See also: Art. 3(1) Kyoto Protocol.

119. Art. 4(1)(b) UNFCCC; Art. 10(b) Kyoto Protocol.

Law of Treaties deals only with "successive treaties relating to the same subject matter": it does not provide any rule able to overcome inconsistencies between international air law and international climate change law. Yet, several elements would possibly have pleaded in favour of a derogation to international air law: the UNFCCC is posterior to the Chicago Convention; it is ratified by every State party to the latter and five other States; and Directive 2008/101 does not significantly affect the goals of the Chicago Convention. Thus, the Court would have fully complied with a reasonable interpretation of international law, instead of isolating itself from the Chicago Convention.

6. Ways forward

It is not a secret that the EU was built at least partly as a way to ensure that European States maintain a say in international matters in a decolonized world. Thus, it is not surprising for the EU to press for international efforts, and such actions may not be illegitimate, provided they are compatible with international law and global interests. Legal and political goals should be distinguished. The Advocate General's Opinion and the Court's judgment concur in arguing that there is no incompatibility between Directive 2008/101 and applicable norms of international law (although not always very convincingly). Yet, this does not suffice to explain why Directive 2008/101 requires emission allowances for the entirety of flights departing from or arriving at a European aerodrome. A legal analysis can determine what can be done, but it evades the question of what *should* be done and why. For instance, the principle of non-discrimination may exclude the application of the EU ETS to solely European air carriers, as all competitors in a similar situation should be treated in the same way. Yet, neither this principle, nor any other legal norm seem to oppose a limitation of the ETS to the sections of the flights happening within the EU.

European motivations are found in the somewhat messianic language of the preamble of Directive 2008/101, reflecting the EU's desire to create a regime that will "serve as a model for the use of emissions trading worldwide".[120] Yet, this language is not imperialist. It does not impose the interests of the EU, but it promotes goals recognized in agreements as widely ratified as the UNFCCC. Thus, from a European perspective, what has been called "unilateralism" is, indeed, an attempt by 27 States to concert and use their sovereign rights to promote the aims of international law. Already, air carriers themselves, naturally hostile to any kind of charge, now recognize that some concession will be necessary. ATA, for instance, argues that it is "part of an

120. 17th Recital of Directive 2008/101.

industry-wide aviation coalition that has committed to continuing the industry's strong record of GHG emissions savings and has proposed the adoption of a global sectoral approach by the [ICAO]".[121] As Malina et al. have shown, it cannot be ruled out that the passionate public protests by some air carriers are part of a strategy aimed at justifying an increase in their rates, allowing additional profits.[122]

The Court could have taken the EU's laudable goals into account and affirmed a constitutional exception, or to a hierarchy between contradictory international norms (the UNFCCC and the Chicago Convention, in particular). Instead, the Court developed a fragile reasoning. In particular, it truncated its own case law and betrayed EU primary law to exclude any review of Directive 2008/101 based on the Chicago Convention, and, when the Chicago Convention came back through the Open Skies Agreement, it interpreted the prohibition of "fees, dues or other charges" as excluding such dues if they were based on an allowance market. Probably for reasons of jurisdictional policy, the Court avoided entering into any value-based question and arbitrating between climate change mitigation and civil aviation. Yet, sooner or later, these questions will be asked again in different cases. European air carriers may put forward different arguments based on the notion of reverse discrimination. Moreover, cases could be brought to other fora. The Open Skies Agreement provides for dispute settlement through arbitration.[123] The Chicago Convention allows for disputes to be submitted to the Council of the ICAO.[124] This pathway was considered by the recent "joint declaration" adopted in Moscow by 23 States opposed to Directive 2008/101.[125] However, the procedure before the Council of the ICAO provides that parties to the dispute shall not vote, which may paralyse this institution in a multilateral dispute. And, to mention one more possibility: the Chicago Convention also allows appeals against a decision of the Council before an ad hoc arbitral tribunal or the ICJ.[126] The story is not over.

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121. ATA press release, "Air transport association comment on the EU emissions trading scheme preliminary opinion" (6 Oct. 2011).

122. Malina et al., "The impact of the European Union emissions trading scheme on US aviation", 19 *Journal of Air Transport Management* (2012), 36.

123. Art. 19.

124. Art. 84.

125. *Supra* note 99, attachment A: basket of ideas/measures.

126. Art. 84.

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