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Extra-territorial Application of the EU Emission  
Trading System:  
Critical Divergences between the EU and the US

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## **Abstract**

By means of Directive 2008/101 the EU extended its Emission Trading System to airline companies whose aircraft arrive at or depart from the territory of the EU Member States. Requested to provide a preliminary opinion on the validity of the Directive—especially in light of its extraterritorial application—the CJEU confirmed its effectiveness, arguably based mainly on the principle of sovereignty and only subsidiarily on the principle of environmental protection. In light of the interpretation provided by the CJEU, this paper critically assesses Directive 2008/101 and concludes that its consistency with international law should be considered in the light of the secondary consequences of the duty to protect the environment rather than territorial sovereignty.

## **Keywords**

EU Emission Trading System, ICAO, General and Particular International Law, EU-US Open Skies Agreement, Sovereignty, Territory, Environmental Protection, UNFCCC, Kyoto Protocol, Obligations *Erga Omnes*, Countermeasures







# EXTRA-TERRITORIAL APPLICATION OF THE EU EMISSION TRADING SYSTEM: CRITICAL DIVERGENCES BETWEEN THE EU AND THE US

*Ottavio Quirico\**

## I. Introduction

Based on Directive 2003/87, starting in 2005, the total emissions of EU industry sectors covered by the EU Emission Trading System (ETS) have been capped and at the end of defined compliance cycles companies need to surrender allowances matching their emissions.<sup>1</sup> EU Directive 2008/101 expanded the EU ETS to the aviation sector.<sup>2</sup> Based on GHGs emitted in relation to passenger miles, airline companies must now receive permits to produce GHG emissions and surrender allowances. The extension is justified by the fact that aviation has an impact on climate change which might 'significantly undermine' reduction efforts accomplished in other economic sectors.<sup>3</sup> This approach entails that, as of 2012, the number of allowances necessary for each flight to or from the EU–EC prior to the entry into force of the Lisbon Treaty—must take into account the entire route, so that a flight from San Francisco to Paris compels airlines to surrender allowances including the route over US territory, the high seas as well as Portugal, Spain and France.

Directive 2008/101 has been criticized by states such as the US, Russia, China, India and Brazil, which threaten retaliation, insofar as the Directive imposes emission charges on airline companies for segments of flights outside the EU 27-country bloc.<sup>4</sup> In 2011, 26 of the 36 Member States on the ICAO Council—including Brazil, India, China, Japan, Russia and the US—alerted the International Civil Aviation Organisation (ICAO) Council to urge the EU and its Member States not to include flights by non-EU operators in the ETS.<sup>5</sup> These states claim that the unilateral inclusion of civil aviation in the EU ETS is inconsistent with the Chicago Convention on International Civil Aviation 1944, in particular as regards the principle of state sovereignty, as well as relevant provisions of the United Nations Framework Convention on Climate Change (UNFCCC). On 12 November 2012, the EU Commissioner for Climate Action, Connie Hedegaard, requested Member States to suspend the

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<sup>1</sup> 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, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:275:0032:0032:EN:PDF>.

<sup>2</sup> Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:008:0003:0003:EN:PDF>.

<sup>3</sup> Directive 2008/101 of the European Parliament and of the European Council amending Directive 2003/87 so as to Include Aviation Activities in the Scheme for Greenhouse Gas Emission Allowance Trading within the Community, [2009] OJ L8/3, Recital 11.

<sup>4</sup> D. Michaels, *EU's Airline-Emissions Fees Face Challenge*, <http://online.wsj.com/article/SB10001424052970204059804577227173526305492.html>.

<sup>5</sup> ICAO, Working Paper, Council — 194th Session, 17 October 2011, CWP/ 13790, Subject No. 50: Questions related to the Environment: Inclusion of International Civil Aviation in the European Union Emissions Trading Scheme (EU ETS) and Its Impact (presented by Argentina, Brazil, Burkina Faso, Cameroon, China, Colombia, Cuba, Egypt, Guatemala, India, Japan, Malaysia, Mexico, Morocco, Nigeria, Paraguay, Peru, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, South Africa, Swaziland, Uganda, the United Arab Emirates and the United States), [http://www.greenaironline.com/photos/ICAO\\_C.194.WP.113790.EN.pdf](http://www.greenaironline.com/photos/ICAO_C.194.WP.113790.EN.pdf).

application of Directive 2008/101 pending new impetus that might be given by the ICAO General Assembly—Autumn 2013—to a multilateral climate change approach in the aviation sector. Thus, the EU ‘stopped the clock’ for one year as regards the implementation of the international aspects of its ETS concerning aviation by not requiring allowances to be surrendered in April 2013 for emissions occurred in 2012.<sup>6</sup>

Directive 2008/101 as implemented in the UK has been challenged by the Air Transport Association of America (ATAA) and individual American and Canadian airlines, specifically based on the alleged extraterritorial effect of the Directive and the imposition of an illegal charge,<sup>7</sup> in breach of the aforementioned Chicago Convention, Air Transport Agreement 2007 between the US and EU as amended by the Protocol of 24 June 2007 (Open Skies Agreement), and Kyoto Protocol to the (UNFCCC) 1997. The UK High Court Administrative Division submitted a request for a preliminary judgment on the issue to the Court of Justice of the European Union (CJEU), which recently ruled in favour of the legality of the Directive, largely based on crucial international law considerations.<sup>8</sup>

The CJEU addressed, on the one hand, the relationship between international law and European law and, on the other, the consistency of Directive 2008/01 with international law, in particular its alleged extraterritorial application. With respect to the latter issue, the judgment of the Court deals with basic international law principles, which concern mainly the concept of sovereignty.

This paper aims to briefly assess the EU approach to international law, specifically as exposed in the CJEU decision of 21 December 2011. The paper focuses in particular on the territorial application of Directive 2008/01 and issues of jurisdiction.

## II. The Extension of the EU ETS to Aviation and its Mechanisms

EU Directive 2008/101 amended Chapter II of Directive 2003/87, and thus expanded the EU ETS to the aviation sector. In fact, the provisions of the Directive 2003/87 now apply to the allocation and issue of allowances in respect of aviation activities listed in Annex I (Categories of Activities to which this Directive Applies) to Directive 2008/101 (Article 3(a) of Directive 2003/87 as amended by Directive 2008/101), including a new sub-paragraph which provides that: ‘from 1 January 2012 all *flights which arrive at or depart from an aerodrome situated in the territory of a Member State to which the Treaty [TEC, currently TFEU] applies shall be included*’.<sup>9</sup>

In the vein of the general targets in the matter of climate change set out by the Union, from 1 January 2012 to 31 December 2012 the total quantity of allowances to be allocated to aircraft operators shall be tantamount to 97% of the historical aviation emissions (Article 3(c)(1)). In this period, 15% of allowances shall be auctioned (Article 3d). From 1 January 2013, the total quantity of allowances to be allocated to aircraft operators shall be equivalent to 95% of the historical aviation emissions multiplied by the number of years in the period (Article 3(c)(1)); furthermore, 15% of allowances shall be

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<sup>6</sup> MEMO/12/854, Stopping the clock of ETS and aviation emissions following last week’s International Civil Aviation Organisation (ICAO) Council, 12 November 2012, [http://europa.eu/rapid/press-release\\_MEMO-12-854\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-854_en.htm).

<sup>7</sup> However, the estimated impact of the extension of the EU ETS is small on US airlines and emissions (R. Malina, D. McConnachie, N. Winchester, C. S. Paltsev and I.A. Waitz, ‘The Impact of the European Union Emissions Trading Scheme on US Aviation’, *Journal of Air Transport Management* (2012) 36-41); A. Ahnger and G. Kohler, ‘Including Aviation Emissions in the EU ETS: Much Ado about Nothing? A Review’, *Transport Policy* (2010) 38-46.

<sup>8</sup> CJEU, Case C-366/10, judgment of 21 December 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0366:EN:HTML>. See also P. Sarnant, ‘EU ETS to Cap Aviation Greenhouse Gas Emissions’, *National Law Review* (2012), <http://www.natlawreview.com/article/eu-ets-to-cap-aviation-greenhouse-gas-emissions>.

<sup>9</sup> Emphasis added.

auctioned, but such a percentage may be increased as part of the general review of Directive 2003/87 (Article 3(d)(2)).

For each period referred to in Article 3(c), aircraft operators may apply for the allocation of allowances free of charge. Applications may be made by submitting to the competent authority in the administering Member State verified tonne-kilometer data for the aviation activities listed in Annex I performed by an aircraft operator for the monitoring year (Article 3(e)). By 30 April each year, Member States ensure that aircraft operators surrender a number of allowances equal to the total emissions during the preceding calendar year from aviation activities listed in Annex I (Article 12).

Member States ensure publication of the names of operators which do not surrender sufficient allowances to cover their emissions during the preceding year and the payment of an excess emissions penalty of Euros 100 for each tonne of carbon dioxide (Article 16(2) and (3)). In addition, administering Member States may request the EU Commission to decide on the imposition of an operating ban on aircraft operators (Article 14(5)).

Member States will determine the use to be made of revenues generated from the auctioning of allowances. Revenues will be preferably used to tackle climate change in the EU and third countries; to reduce GHGs and 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, in particular the fields of aeronautics and air transport; to foster low-emission transport; to cover the cost of administering the EU ETS; to fund contributions to the Global Energy Efficiency and Renewable Energy Fund as well as measures to prevent deforestation (Article 3(d)(4)).

Under Article 25(a), the Commission must consider options available in order to ensure optimal interaction between the EU scheme and third countries' measures aiming to reduce the climate change impact of flights departing from their territory which land in the EU. Where necessary, the Commission may provide that flights arriving from third countries are excluded from the EU ETS. The Commission may also make recommendations to the Council in accordance with Article 300(1) of the TFEU to open negotiations with a view to concluding an agreement with third countries concerned. Furthermore, the EU and its Member States continue to seek an agreement on global measures to reduce GHG emissions from aviation, which may lead the Commission to amend Directive 2008/101.

### **III. The Relationship between EU Law and International Law**

Consistently with the cases of *Poulsen and Diva Navigation*, and *Racke*,<sup>10</sup> in the case C-366/10 the CJEU held that EU institutions are bound by (customary) international law, which thus overrides secondary EU 'legislation', in particular directives and regulations.<sup>11</sup> This interpretation is consistent with the assumption that intergovernmental organisations, which enjoy international legal personality, participate like states in the creation of customary obligations—*diuturnitas plus opinio juris*—and are bound by them.<sup>12</sup> Moreover, the EU may replace, in whole or in part, Member States in international relations based on a vertical transfer of sovereignty.

Furthermore, consistently with the cases of *Commission v. Germany*, *Algemene Scheeps Agentuur Dordrecht*, *Intertanko*, *Kadi*, and *FIAMM*,<sup>13</sup> the CJEU pointed out that international agreements

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<sup>10</sup> ECJ, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp*, 286/90, judgment of the Court of 24 November 1992, para. 9; *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, 162/96, judgment of 16 June 1998, paras. 45 and 46.

<sup>11</sup> CJEU, Case C-366/10, paras. 101 ff.

<sup>12</sup> See the Vienna Convention on the Law of Treaties between States and International Organisations or International Organisations (1986), especially the Preamble.

<sup>13</sup> ECJ, *Commission v. Germany*, judgment of 10 September 1996, 61/94, para. 52; 311/04, *Algemene Scheeps Agentuur Dordrecht BV v. Inspecteur der Belastingdienst – Douanedistrict Rotterdam*, judgment of 12 January

concluded by the EU are binding upon its institutions, and thus override acts of the EU, only to the extent that the ‘nature and broad logic’ of a treaty does not bar its binding effect, and insofar as its provisions are ‘unconditional and sufficiently precise’.<sup>14</sup> This approach is consistent with the ‘moderately monist’ interpretation of the internal application of international treaties, according to which international agreements constitute an ‘intermediate’ layer between primary and secondary EU law,<sup>15</sup> and are a direct source of EU law conditional upon the fact that they are sufficiently clear and precise.<sup>16</sup>

Although this approach does not resolve the problem raised by the relationship between primary EU law—in particular TEU and TFEU—and international treaties, which is relevant, for instance, as regards the absolute priority established by Article 103 of the United Nations (UN) Charter, the relationship between international law, on the one hand, and secondary EU law—specifically, directives and regulations—on the other, is quite clear.

The CJEU also confirmed that the EU can be bound by international treaties to which it is not a party, but which have been ratified by all its Member States only to the extent that all powers relevant to a given convention have been transferred by the Member States to the Union.<sup>17</sup>

Based on these premises, the CJEU rejected the request for a revision of Directive 2008/101 in light of the Chicago Convention on International Civil Aviation 1944, which is a sort of ‘Constitution’ of international civil aviation.<sup>18</sup> In fact, although all EU Member states are parties to the Convention, they have not completely transferred their relevant powers to the EU.<sup>19</sup>

However, this approach might generate problems for Member States implementing Directive 2008/101, since the Chicago Convention has a mandatory nature under Article 82, and thus commits the contracting States to remove and not enter into any inconsistent obligations and understandings.

The CJEU also rejected the request to ascertain the consistency of Directive 2008/101 with the Kyoto Protocol, in particular under Article 2(2). This rule provides that states must limit or reduce GHG emissions from aviation bunker fuels through ICAO, i.e., the primary source of public international air law and a global forum for cooperation in all fields of civil aviation among the 191 States Member of the Chicago Convention.<sup>20</sup> In this respect, Article 2(2) of the Kyoto Protocol has not been considered unconditional and sufficiently precise to confer justiciable rights upon aviation companies.<sup>21</sup>

(Contd.) \_\_\_\_\_

2008, para. 25; *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) v. Secretary of State for Transport*, C-308/06, judgment of 3 June 2008, paras. 42 and 45; *P Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, joined cases 402/05 and 415/05, judgment of 3 September 2008, 307; *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others v. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P, judgment of 9 September 2008, para. 110.

<sup>14</sup> CJEU, Case C-366/10, paras. 49-52.

<sup>15</sup> L.M. Diez Picazo, ‘Le relazioni tra UE e Convenzione europea dei diritti dell’uomo’, in S.P. Pannunzio (ed.), *I diritti fondamentali e le corti in Europa* (2005) 277.

<sup>16</sup> ECJ, *Meryem Demirel v. Stadt Schwäbisch Gmünd*, Case 12/86, judgment of 30 September 1987, paras. 2 and 14. See, also, P. Pescatore, *L’ordre juridique des Communautés européennes: étude des sources du droit communautaire* (1975) 151.

<sup>17</sup> CJEU, Case C-366/10, para. 63. See also *Intertanko*, paras. 49-50.

<sup>18</sup> See P.S. Dempsey, *Public International Air Law* (2008) 49 and 69.

<sup>19</sup> CJEU, Case C-366/10, paras. 65 ff.

<sup>20</sup> See M. Milde, ‘International Air Law and ICAO’, in Marietta Benkö (ed.), *Essential Air and Space Law* (2008), vol. 4, at 17.

<sup>21</sup> CJEU, Case C-366/10, para. 77.

In practice, ICAO progress towards a GHG emissions reduction policy is slow.<sup>22</sup> ICAO Member States were invited to submit voluntary national action plans outlining their CO<sub>2</sub>-reduction policies and activities by June 2012, and they currently envisage a GHG-reduction policy grounded on market-based mechanisms, including emissions trading schemes.<sup>23</sup> However, the EU ‘stopping the clock’ strategy on the international implications of its ETS based on ICAO progress in negotiations on a global market-based mechanism (MBM) capping GHG emissions from aviation might prompt new developments in the ICAO negotiation process.<sup>24</sup>

Nevertheless, the approach of the CJEU seems problematic insofar as by limiting the effect of treaty clauses which are not ‘sufficiently clear and precise’, it establishes a general *ex post* reservation, the consistency of which with the regime of treaty reservations under the Vienna Conventions on the Law of Treaties is dubious.<sup>25</sup>

#### **IV. The Questionable Lawfulness of Directive 2008/101 under International Law**

Having excluded the applicability of the Chicago Convention and the Kyoto Protocol based on its own traditional approach to the relationship between international law and EU law, the CJEU assessed the validity of Directive 2008/101 within the framework of customary international law and the Open Skies Agreement.

##### **A. Sovereignty**

In light of customary international law, in particular the principles of territorial sovereignty, the freedom of the high seas—including the faculty of flying over it—and the exclusive jurisdiction of the state of registration over aircraft, the CJEU was called to determine whether the creation of a duty—i.e., the exercise of regulatory power—having extraterritorial effect—i.e., outside the jurisdiction of the EU, namely on the high sea and the US and Canadian territory—is lawful.

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<sup>22</sup> See K. Kulovesi, ‘Make Your Own Special Song, Even if Nobody Else Sings along: International Aviation Emissions and the EU Emissions Trading Scheme’, *Climate Policy* (2011) 4.

<sup>23</sup> ICAO, Resolution A37-19, *Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection – Climate Change*, paras. 4 and 6. Scholars are skeptical as to whether ICAO’s mandate to promote the growth of the aviation industry is compatible with the mitigation of emissions from international aviation, and a major obstacle is the conflict between the principle of common but differentiated responsibility embodied in the UNFCCC and the Kyoto Protocol and the principle of non-discrimination embodied in the Chicago Convention (V.M. Tunteng and Others, *Legal Analysis on the Inclusion of Civil Aviation in the European Union Emissions Trading System* (2012), 10, [http://www.cisd.org/public/docs/news/CISDL\\_EU\\_ETS\\_Expansion\\_Legal\\_Brief.pdf](http://www.cisd.org/public/docs/news/CISDL_EU_ETS_Expansion_Legal_Brief.pdf)).

<sup>24</sup> Cf. Jane A. Leggett, *Update on Controlling Greenhouse Gases from International Aviation*, November 19, 2012, 3 ff., <http://www.fas.org/sgp/crs/misc/R42828.pdf>. The ‘unilateral’ adoption of Directive 2008/101 reminds of the case of the ‘Hushkit Regulation’, through which the EU adopted more stringent noise control measures than those endorsed by ICAO, following slow progress by the latter on the issue of aircraft noise control measures. Although the US interpreted Hushkit Regulation as a protectionist trade restriction on US aircrafts rather than an environmental measure, ultimately EU unilateral action raised the profile of the aircraft noise control to such an extent that ICAO responded by adopting a strengthened international noise standard (A. Knorr and A. Arndt, *Noise Wars: the EU’s Hushkit Regulation – Environmental Protection or Eco-Protectionism?* (2002), <http://www.iwim.uni-bremen.de/publikationen/pdf/w023.pdf>).

<sup>25</sup> See Articles 19-23 of the Vienna Convention of the Law of Treaties 1969 and Vienna Convention of the Law of Treaties between States and International Organisations or between International Organisations 1986. In this regard, it has been remarked that ‘it is surprising to find that a legislation that has been enacted to conform to international obligation(s) arising from international agreement(s) cannot be evaluated in light of the same agreement(s) unless some criteria, not emerging from the same agreement(s), are met’ (V.M. Tunteng and Others, *Legal Analysis*, 7). See also ILC, Report of the International Law Commission on the work of its fifty-first session, 3 May – 23 July 1999, Report on Reservations to Treaties (1996) at 93 ff.

Basically, the CJEU assumed that the principle according to which states have exclusive jurisdiction over vessels based on their registration, i.e., the flag state, does not apply analogically to aircraft. The flag state principle has been explicitly stated by the Permanent Court of International Justice (PCIJ) in *Lotus*, where the Court argued that: ‘vessels on the high seas are subject to no authority except that of the state whose flag they fly’.<sup>26</sup> Indeed, the CJEU assumed that there is no sufficient customary practice supporting the analogical application of this principle to aircraft.<sup>27</sup>

However, it must be noted that the analogy does not seem unreasonable, since aircraft are considered an extension of the territory of the state of registration in the same way as vessels, and thus subject to its jurisdiction. In fact, it is useful to recall that under international law ‘territory’ usually means not only ‘land’, but also ‘[atmospheric] airspace, ships and *aircraft* registered in the state, the territorial sea, the contiguous zone, exclusive economic zone and the continental shelf [as well as the exploitable underground]’ so that ‘concurrent jurisdiction is exercised only when a ship or craft enters the sovereign space of another state’.<sup>28</sup>

In contrast, the CJEU confirmed the customary status of the principles of territorial sovereignty and freedom of the high seas—including the faculty of flying over it—and, in light of their general scope, decided to determine whether Directive 2008/101 is based on a manifest error of assessment.<sup>29</sup> The Court assumed that Directive 2008/101 is consistent with these principles, and thus with the principle of territorial sovereignty, insofar as it applies exclusively to aircraft taking off or landing in the EU territory. In the words of the Court:

‘In laying down a criterion for Directive 2008/101 to be applicable to operators of aircraft registered in a Member State or in a third State that is founded on the fact that *those aircraft perform a flight which departs from or arrives at an aerodrome situated in the territory of one of the Member States*, Directive 2008/101, inasmuch as it extends application of the scheme laid down by Directive 2003/87 to aviation, does not infringe the principle of territoriality or the sovereignty which the third States from or to which such flights are performed have over the airspace above their territory, *since those aircraft are physically in the territory of one of the Member States of the European Union* and are thus subject on that basis to the *unlimited jurisdiction* of the European Union.’<sup>30</sup>

It is debatable, however, whether this statement reflects a customary principle of international law. Arguments in favour of this principle seem weaker than those advocating the principle of the state of registration based on the analogical extension of criteria valid for sea going vessels.

In our view, referring to the concept of ‘unlimited jurisdiction’ in this context might be problematic. Actually, it is not even clear whether ‘unlimited jurisdiction’ concerns the spatial validity of the EU competence, its temporal application, the object of the EU regulation, or all of these elements.

The CJEU also mentions as evidence of the rightness of its interpretation the fact that EU regulation does not apply to aircraft which do not land in or take off the EU territory, even if they fly within the EU aerial space:

‘Nor can such application of European Union law affect the principle of freedom to fly over the high seas since an aircraft flying over the high seas is not subject, in so far as it

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<sup>26</sup> PCIJ, *Lotus case, France v. Turkey*, judgment of 7 September 1927, *PCIJ*, Series A, No 10 (1927) 25.

<sup>27</sup> CJEU, Case C-366/10, para. 106.

<sup>28</sup> J. Triggs, *International Law: Contemporary Principles and Practices* (2010) 432 and 460 (emphasis added).

<sup>29</sup> CJEU, Case C-366/10, paras. 103-4 and 110: ‘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 institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles’.

<sup>30</sup> Emphasis added.

does so, to the allowance trading scheme. Moreover, such an aircraft can, in certain circumstances, cross the airspace of one of the Member States without its operator thereby being subject to that 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.<sup>31</sup>

The wording of Directive 2008/101 is clear in this regard, since it mentions ‘all flights which *arrive at or depart from an aerodrome* situated in the territory of a Member State to which the Treaty [TEC, currently TFEU] applies’.<sup>32</sup> For the purposes of the Directive, an aerodrome means ‘a defined area on land or water, including buildings, installations, and equipment, intended to be used either wholly or in part for the arrival, departure and surface movement of aircraft’.<sup>33</sup>

However, it is difficult to see how this argument would strengthen the CJEU’s assumption on EU ‘unlimited jurisdiction’. In fact, since the atmospheric space above the ground is traditionally considered submitted to state jurisdiction,<sup>34</sup> the physical contact of the aircraft with the ground should be irrelevant. Therefore, this approach favours operators whose aircraft cross the EU aerial space without touching ground, and thus operators whose aircraft actually land in and take off the EU territorial space may have reasons to complain of being disadvantaged. In fact, this interpretation might lead to (unreasonably) discriminate between operators whose aircraft take off and land in the EU territory and those whose aircraft simply cross the EU aerial space.

Distinguishing between ‘territory’ and ‘airspace’ is not consistent with the notion of territory under international law. In fact:

‘The state territory is a certain delimited space. It is not a delimited piece of the earth’s surface, but a three-dimensional space which includes the space below the ground and the space above the territory enclosed by the so called frontiers of the state. It is obvious that the unity of this space is not a natural, geographic one ... The so-called state territory can only be defined as the spatial sphere of validity of a national legal order’.<sup>35</sup>

In other words, the concept of ‘territory’ is ‘inclusive’ and not ‘exclusive’ of the notion of ‘airspace’.<sup>36</sup> This is confirmed also by Article 7 of the Open Skies Agreement, which provides for the reciprocal application among states parties of the rules relating to the ‘*admission to or departure from [the] territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within [the] territory*’.<sup>37</sup> The CJEU seems to acknowledge this concept of ‘territory’,

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<sup>31</sup> CJEU, Case C-366/10, paras. 126-7 (emphasis added).

<sup>32</sup> Directive 2008/101, Annex 1 (emphasis added).

<sup>33</sup> Commission Decision of 8 June 2009, *Guidelines on the Detailed Interpretation of the Aviation Activities Listed in Annex I to Directive 2003/87/EC*, 1(2), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009D0450:EN:NOT>.

<sup>34</sup> Cf. *supra*.

<sup>35</sup> H. Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* (1944) – *Pure Theory of Law* (1967) 288.

<sup>36</sup> See, for instance, J. Triggs, *International Law*, 271-2: ‘The sovereign powers of a state are defined to a significant extent by the territory it controls ... A state may exercise jurisdiction within its territory and over all those found in that territory ... territorial sovereignty includes title to the land itself ... territory includes islands, islets, rocks and reefs that in turn attract certain rights in maritime zones, and superjacent airspace’.

<sup>37</sup> Based on the same criteria, reciprocity includes as well ‘laws and regulations applicable within [a] territory relating to the admission to or departure from its territory of passengers, crew or cargo on aircraft (including regulations relating to entry, clearance, immigration, passports, customs and quarantine or, in the case of mail, postal regulations)’ which ‘shall be complied with by, or on behalf of, such passengers, crew or cargo of the other Party’s airlines’ (Article 7(2)).

when, elsewhere in its judgment, it assumes that Directive 2008/101 applies ‘upon the entry of aircraft into the *territory* of the Member States or on their departure from that *territory*’.<sup>38</sup>

A reason for adopting the criterion of the contact of the aircraft with the EU ground could consist in the fact that basing the extension of the ETS on foreign aircraft’s route within the EU aerial space might lead to exclude its applicability to the route outside the EU. In contrast, justifying the extension based on the contact of the aircraft with ground might make it easier to include the extraterritorial route in the EU ETS. However, in this case the extension of the EU ETS would no longer be based on the principle of sovereignty, and thus it is difficult to see what criterion might justify the extraterritorial extension of the scheme. The CJEU seems to embrace this interpretation stating that: ‘it is only if the operators of [an] aircraft choose to operate commercial air routes arriving at or departing from aerodromes situated in the territory of the Member States that, *because their aircraft use such aerodromes*, those operators are subject to the allowance trading scheme’.<sup>39</sup> However, first this statement is inconsistent with the previous assumption that the extension of the EU ETS applies because the ‘aircraft *is* in the territory of [a] Member State’,<sup>40</sup> whereby the mere physical presence triggering jurisdiction is crucial, not the use of the EU aerodromes. Second, it is difficult to understand how a duty linked to fuel consumption and pollution may be justified based on the simple use of an aerodrome, not on the aerial route and EU sovereignty over it.<sup>41</sup>

### ***B. Environmental Protection***

From a different perspective, the CJEU justified the extraterritorial application of the EU ETS based on the ‘high level of environmental protection’, which is a fundamental principle of international law under the Stockholm Declaration (Principle 1), and to which the Union is committed under Article 191(2) TFEU. Disregarding the opportunity of mentioning at least Article 37 of the EU Charter of Fundamental Rights, which has become binding with the entry into force of the Lisbon Treaty and is probably even more significant than Article 191(2) of the TFEU,<sup>42</sup> it is not clear what the relationship between this argument and sovereignty is in the reasoning of the Court.

The Court assumes that:

‘As for the fact that the operator of an aircraft in such a situation is required to surrender allowances calculated in the light of the whole of the international flight that its aircraft has performed or is going to perform from or to such an aerodrome, it must be pointed out that, as European Union policy on the environment seeks to ensure a high level of protection in accordance with Article 191(2) TFEU, the European Union legislature may in principle choose to permit a commercial activity, in this instance air transport, to be carried out in the territory of the European Union only on condition that operators comply

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<sup>38</sup> CJEU, Case C-366/10, para. 131 (emphasis added).

<sup>39</sup> CJEU, Case C-366/10, para. 133, emphasis added.

<sup>40</sup> CJEU, Case C-366/10, para. 127 (emphasis added), which confirms the assumption that ‘aircrafts *are physically in the territory* of one of the Member States of the EU and are thus subject on that basis to unlimited jurisdiction of the EU’ (para. 133 – see *supra*).

<sup>41</sup> In light of these considerations it is difficult to understand whether the CJEU adopts the interpretation according to which unilateral trade measures are territorial rather than extraterritorial measures, since they apply at the border, which is within the territorial jurisdiction of the regulating state (VM Tunteng and Others, *Legal Analysis*, 11).

<sup>42</sup> Article 37 (Environmental protection): ‘A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development’.

with the criteria that have been established by the European Union and are designed to fulfil the environmental protection objectives which it has set for itself.<sup>43</sup>

According to the Court, the obligations contracted by the EU under the UNFCCC and the Kyoto Protocol would further strengthen the extraterritorial application of the ETS.<sup>44</sup>

However, it is difficult to see how the fact that the EU is committed to ensure a ‘high level of environmental protection’ can allow the extraterritorial application of its ETS. Either the ETS is extraterritorially applicable based on sovereignty, and in that case the EU can further freely decide to apply the ETS to the aircraft’s route on the high seas and foreign states’ territory–space–based on its commitment to a high environmental protection, or the ETS is not extraterritorially applicable, and thus the EU commitment to a high level of environmental protection cannot have external effect. In other words, the Court seems to derive a spatial effect from a quantitative parameter concerning environmentally friendly conduct, which is at least debatable.<sup>45</sup> It must also be noted that, with respect to environmental protection, by mentioning ‘commercial activity, in this instance air transport, to be carried out in the territory of the European Union’, the CJEU seems to conceive of the EU territory as inclusive of airspace, no longer exclusive.

Instead, the Court did not explore the connection existing between environment and sovereignty. However, the environment, albeit not clearly defined in international law, certainly includes the physical space where–*inter alia*–states (and international organisations) exercise their sovereignty and act.<sup>46</sup> Thus, the environment is a concept that naturally crosses ‘artificial’ states’ borders and, as a common good, ‘limits’ the concept of state sovereignty regarded as an ‘absolute property right’, imposing universal duties.<sup>47</sup>

With regard to third states which do not comply with environmental and climate change obligations contracted, in particular, under the UNFCCC and the Kyoto Protocol, the EU might justify the extension of the ETS as a ‘countermeasure’. Thus, for instance, if a state included in Annex B to the Kyoto Protocol does not respect its GHG emissions caps, and remedies provided for in the Protocol, in particular under Article 13, prove vain, the EU might justify the extension of the EU ETS as a – last resort – countermeasure. As to states which are not parties to the UNFCCC or the Kyoto Protocol, such as the US and Canada, *i.e.* the states where companies involved in case C-366/10 are registered, it should be assumed that a general obligation to curb GHG emissions applies within the international community and its breach justifies the adoption of countermeasures. However, this is a debated issue.<sup>48</sup> Alternatively, other environmental instruments might be invoked, for instance a breach of the 1979 Convention on Long-Range Transboundary Air Pollution, to which both the US and Canada are

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<sup>43</sup> CJEU, Case C-366/10, para. 128.

<sup>44</sup> *Ibid.*

<sup>45</sup> In contrast, within the context of the high level of environmental protection it might be correct to take into account the principle of common but differentiated responsibility in order not to apply the EU ETS indiscriminately (M.W. Gehring, ‘Air Transport Association of America v. Energy Secretary: Clarifying Direct Effect and Providing Guidance for Future Instrument Design for a Green Economy in the EU’, *RECIEL* (2012) 153; Joanne Scott and L. Rajamani, ‘EU Climate Change Unilateralism’, *EJIL* (2012) 469). In fact, the Commission’s assumption that the extension of the EU ETS targets private companies and not states (V.M. Tunteng and Others, *Legal Analysis*, 16) is problematic, since states may be held responsible for inaction, *i.e.*, for not taking measures to limit GHG emissions from the aviation sector. This interpretation is supported by the observation that the EU ETS does not extend to aviation companies registered with states that adopt aviation GHG reduction measures comparable to the EU ETS (see *supra*).

<sup>46</sup> Principle 2 of the Stockholm Declaration speaks of ‘the natural resources of the earth, including the air, water, land, flora and fauna’.

<sup>47</sup> ICJ, *Gabčíkovo-Nagymaros*, judgment of 25 September 1997, 41, para. 53. See, also, F. Francioni, *Realism, Utopia and the Future of International Environmental Law*, EUI WP 2012/11 (2012).

<sup>48</sup> In favour of the universal application of the obligation to curb GHG emissions see R. Verheyen, *Climate Change Damage and International Law: Prevention, Duties and State Responsibility* (2005) 267.

parties. The further step would then consist in assessing the lawfulness of the extraterritorial extension of the EU ETS in light of international economic rules, in particular under Article XX of the GATT and Article XIV of the GATS.<sup>49</sup>

Within this framework, the EU ETS could apply regardless of the spatial link between aircraft and EU territory also to operators whose aircraft do not cross the EU territory. In fact, the extraterritorial extension of the EU ETS, which is *primarily* licit, would become *secondarily* licit as a countermeasure.<sup>50</sup> It is indeed well-established in international law that ‘the wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State’.<sup>51</sup>

The CJEU adopted this approach only subsidiarily, where it mentioned the environmental protection aim of the EU ETS extraterritorial extension in order to differentiate this ‘market-based measure (MBM)’ from economic duties under Article 11(1) and (2)(c) of the Open Skies Agreement.<sup>52</sup> The Court also mentioned the environmental protection aim of the extraterritorial extension of the EU ETS in order to justify possible limitations to air traffic, which are admitted under Articles 3(4) and 15(3) of the Open Skies Agreement for environmental purposes.<sup>53</sup>

## V. Concluding Observations

EU Directive 2008/101 extends with extraterritorial effect the EU ETS to all flights which ‘arrive at or depart from an aerodrome’ situated in the territory of a Member State to which the Treaty [TEC, currently TFEU] applies. Thus, the physical contact between the aircraft and the EU soil is crucial for the operation of the extension.

However, in light of the jurisprudence of the CJEU it is not clear whether the *ratio* of the extension is the mere use of the EU airports or the exercise of EU jurisdiction over aircraft operated by foreign companies. The first criterion seems quite arbitrary, and thus it is difficult to justify it reasonably. The second criterion is based on a misunderstanding of the concepts of ‘territory’ and ‘sovereignty’, and thus can hardly justify the extraterritorial concept of ‘unlimited sovereignty’, which is questionable in international law.

Instead of relying almost exclusively on problematic primary rules on sovereignty or unclear principles, the extraterritorial extension of the EU ETS might be more correctly grounded on secondary reactions to a breach of the duty to protect the environment under current multilateral environmental treaties, possibly regarded as an *erga omnes* obligation under general international law.

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<sup>49</sup> M.W. Gehring, ‘Air Transport’, 153.

<sup>50</sup> See, for instance, H. Kelsen, *Principles of International Law* (1966) 20 ff.

<sup>51</sup> Chapter V – Circumstances Precluding Wrongfulness, Article 22 (Countermeasures in Respect of an Internationally Wrongful Act) of the 2001 ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts.

<sup>52</sup> CJEU, Case C-366/10, paras. 138-9, 143.

<sup>53</sup> CJEU, Case C-366/10, paras. 153 and 154. In order to justify possible limitations to extraterritorial air traffic, the CJEU could have probably referred also to its previous jurisprudence in the case *Ahlstrom Osakeyhtio v. Commission* (joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85, judgment of 27 September 1988). In this case the Court considered lawful the extraterritorial application of the EC competition laws to the price-fixing arrangements of non-European companies where they have a direct, substantial and foreseeable effect within the EC jurisdiction, thus allowing the extraterritorial application of restrictive trade practices. The CJEU could have also reciprocally referred to the US courts’ jurisprudence on the extraterritorial application of US regulation affecting securities, banking, commodity futures markets, taxation and foreign policy controls over trade, such as *Hartford Fire Insurance Co. v. California*, in which the Supreme Court held that US courts have jurisdiction over practices of London insurance companies in the UK (*Hartford Fire Insurance Co. v. California* 113 S Ct 2891 (1993)).

