THE EU ETS AND INTERNATIONAL AVIATION
An Icarus flight?

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TERMINOLOGY

Unions and Communities

With the entry into force of the Treaty of Lisbon, the European Community (EC) has been replaced and succeeded by the European Union (EU).\(^1\) Hence, all international obligations entered into by the Community now rest on the latter. However, events situated before December 2009 can relate to either the EC or the EU. While it would not be correct to refer to the EU for some of these events instead of the Community, for reasons of consistency this LL.M paper will make use of the terms ‘EU’ and ‘Union’ for all events related to the European Economic Community, the European Community and the European Union. Only when it is absolutely necessary, referral will be made to the other terms mentioned here-above.

Treaties

By analogy the same reasoning is valid with regard to EU Treaty references made in this paper. It is true that subsequent revisions and replacements of the original Treaty establishing the European Economic Community and the Treaty establishing the European Union have changed the content and numbering of Treaty provisions. Within the context of this paper, the changes to provisions referred to are not as such to make a relevant difference. Hence, throughout this paper reference will be made to the Treaties as amended by the Treaty of Lisbon for reasons of consistency and readability. Only when it is absolutely necessary, mention shall be made of previous Treaty provisions and numbering.

Citations

This paper uses the Fourth Edition of the Oxford University Standard for the Citation of Legal Authorities (OSCOLA). If necessary, the 2006 edition shall be used. Often-used citations shall be given in full the first time they are mentioned in a chapter, followed by an abbreviated form between brackets. Upon the second mention in the same chapter, the abbreviated form shall be used. If provided for, abbreviations of full citations can be found in bold on the right side of each citation in the bibliography for easy consulting.

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>ATA</td>
<td>Air Transport Association of America</td>
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<td>BSA</td>
<td>Burden Sharing Agreement</td>
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<td>Chicago Convention</td>
<td>Convention on International Civil Aviation</td>
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<td>Commission</td>
<td>European Commission</td>
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<td>COP</td>
<td>Conference of the Parties</td>
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<td>Council</td>
<td>Council of the European Union</td>
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<td>Court (of Justice)</td>
<td>Court of Justice of the European Union</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>ETS</td>
<td>Emissions Trading Scheme</td>
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<td>EU</td>
<td>European Union</td>
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<td>FAR</td>
<td>First Assessment Report</td>
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<td>GHG</td>
<td>Greenhouse gas</td>
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<td>IATA</td>
<td>International Air Transport Association</td>
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<td>ICAO</td>
<td>International Civil Aviation Organisation</td>
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<td>IPCC</td>
<td>Intergovernmental Panel on Climate Change</td>
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<tr>
<td>(Kyoto) Protocol</td>
<td>Kyoto Protocol to the UNFCCC</td>
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<td>MS</td>
<td>European Union Member State</td>
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<td>NAP</td>
<td>National Allocation Plan</td>
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<td>NIM</td>
<td>National Implementation Measure</td>
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<td>OSA</td>
<td>EU-US Open Skies Agreement</td>
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<td>Paris Convention</td>
<td>Convention relating to the regulation of Aerial Navigation</td>
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<td>TEU</td>
<td>Treaty on the European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNFCCC</td>
<td>United Nations Framework Convention on Climate Change</td>
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<td>Union</td>
<td>European Union</td>
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<td>US</td>
<td>United States of America</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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INTRODUCTION

Millions of years of anaerobic decomposition of fossil remains has created large reserves of petroleum in certain geological layers around the world. After the Second World War, production and consumption of petroleum products have boomed. Upstream, petroleum is processed into three main products, being oil, condensate and gas. Further refinement of oil (also known as ‘crude’) happens downstream, resulting in a.o. diesel, petrol and... jet fuel. Although petroleum has fostered huge economic growth, man has come to discover that there are downsides to this finite resource as well. After all, they constitute fossil fuels, representing large pools of carbon removed from the atmosphere and stored in the Earth’s crust. The less of these parts are found in the air, the less manifestation there is of a greenhouse effect and vice versa. The uncontrolled burning of fossil fuels in the last centuries has led to this effect, which results in a climate change we are already experiencing today.

At the end of the '80’s the United Nations General Assembly declared climate change to be a ‘common concern of mankind.’ After all, greenhouse gas (GHG) emissions know no borders nor territories, resulting in global effects. Indeed, this can be described as a tragedy of free and unregulated access. To study the climate change phenomenon, the United Nations (UN) subsequently set up a panel with that very task. It equally has to report its findings to law and policy makers. It quickly became clear that the international community had to undertake action. As such, an increase in the global temperature of 2°C is currently set as the upper limit, though this may be too high already. International instruments were devised to reach a stabilisation of GHG concentrations in the atmosphere. These will be discussed in the first chapter. As the European Union (EU or Union) is a party to these instruments, it devised its own measures to attain the international commitments it entered into. One of these measures is relevant for this paper and will be delved into in the second chapter.

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2 Tina Hunter and John Chandler, Petroleum Law and Policy in Australia (LexisNexis Butterworths 2013)
3 Emphasis added.
5 This should be distinguished from the so-called ‘tragedy of the commons’. Not the common character of the Earth’s atmosphere is the problem, but the free and unregulated access thereto.
Economic growth is not the only thing that has exploded since the Second World War. The same can be said for air transport, the activities of which are still steadily increasing. If the EU were not to apply its climate measures to aviation as well, the rise in GHG emissions of that sector would increasingly nullify any reduction of emissions in other sectors. It opted henceforth to include aviation among the activities the EU measure was targeted to. The fact that this also entailed international aviation, was not received well by the international community. In this connection questions arose whether the EU measures contravened international agreements on aviation as well as rules of customary international law. It has to be noted that the expansion of international aviation has been made possible by the conclusion of international agreements on air transport. As these have been alleged of conflicting with the Union measures on the reduction of GHG emissions from international aviation, attention will go out towards those as well in the first chapter. Finally, some aspects of the conflict are assessed in the third chapter.

Before going into the legal issues of each chapter, the relevant context will be set out first. Subsequently, each chapter will be recapped and final thoughts added to.
In the first chapter we will assess which international agreements and rules the Union is bound by, in the light of the inclusion of international aviation in the Emissions Trading Scheme to be discussed in the second and third chapter. Thus, only the rules and agreements relevant for this paper shall receive attention.

As international agreements are not generally conceived from a vacuum, a short contextual overview will be provided first, for the international rules on aviation as well as climate change. This will be followed by an overview of the Chicago Convention, the EU-US Open Skies Agreement and the Kyoto Protocol. An evaluation will conclude the chapter.
1. CONTEXT

As early as the 17th century the free and open use of airspace was envisaged in the writings of Hugo Grotius' *Mare Liberum*. It would, however, take several centuries after Da Vinci’s flying machine for such a right to have any use in the field of aviation. Only in the beginnings of the 20th century airplane development reached the point of providing for a feasible method of transportation by air, which would lead to the launch of pioneering airlines such as SNETA (later Sabena) and KLM.

In contrast, however, with the principle of free navigation at the high seas and the right of innocent passage, the starting point for the regulation of international aviation is the complete and exclusive sovereignty of the state over the airspace above its territory. This was recognised by the first article of the 1919 Paris Convention on the regulation of aerial navigation.

While it sought to encourage air transport between the signatories through the adoption of common rules, the Paris Convention was only ratified by 37 countries, excluding large states such as the United States (US) and Russia. In order to ameliorate the existing situation, representatives of 54 states accepted the invitation of the US government to meet in Chicago in 1944 to arrange the establishment of 'provisional world air routes and services' and 'discuss the principles and methods to be followed in the adoption of a new aviation convention.' However, during the Conference the aim of only exploring the possibilities towards the conclusion of a new convention shifted to the aim of an actual agreement thereon. As such, the Chicago Convention on international civil aviation was concluded in 1946, upon the ratification of which it succeeded the Paris Convention. It should be noted that the Chicago Convention is only concerned with *civil aviation*.

At the inauguration of the Conference, a message from US president Roosevelt was read in which he warned states against both locking up their airspace as well as exercising dominance over another

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11 ibid, preamble.
12 Kraśnicka, 194.
14 ibid 5.
state’s airspace. The difficulty in finding the balance between protectionism and protection against dominance can be discerned from the Chicago Convention. Because of disagreement on the level of liberalisation of international aviation, the Convention primarily deals with international cooperation in technical, administrative and safety-related issues concerning air navigation. As a consequence, provisions on movement rights for air carriers were relegated to two separate agreements, being the ‘Two Freedoms Agreement’ and the ‘Five Freedoms Agreement’. The former was widely ratified and laid down the right of overflight and the right of landing for technical purposes. The latter, however, failed to gain wide support because of the market access rights it incorporated.

As the ‘Five Freedoms Agreement’ could not fulfil its promise, states resorted to bilateral agreements in order to gain market access for their air carriers in foreign countries. In this connection, the US concluded a number of air services agreements with European states. Because the US wanted to further liberalise the air transport market between itself and various EU Member States (MSs), it started in 1992 a policy of concluding so-called ‘open skies’ agreements with the MSs. The European Commission (Commission), however, believed that the MSs were overstepping their competence in this regard and argued that the Union alone had exclusive competence. So, it decided to bring actions before the Court of Justice against seven MSs. In 2002 the Court ruled that the MSs in question had failed to fulfil their EU law obligations by disregarding the EU’s exclusive competence in some (narrow) matters dealt with in the agreements. To mend the situation, the Commission received a mandate from the Council of the European Union (Council) to negotiate an EU-US ‘open skies’

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18 Chicago Conference, 3. See also Brian F Havel and Gabriel S Sanchez, ‘Do We Need a New Chicago Convention?’ (2011) 11 Issues in Aviation Law & Policy 7 (Havel & Sanchez), 12.
19 International Air Services Transit Agreement (adopted 7 December 1944, entered into force 30 January 1945) 84 UNTS 389.
20 International Air Transport Agreement (adopted 7 December 1944, entered into force 8 February 1945) 171 UNTS 387.
21 Chicago Conference, 4.
22 It should be noted that these agreements not only lay down rules on market access, but also on pricing, capacity and flight frequency; see Havel & Sanchez, 12.
25 It actually concerns eight MSs, but the case against the United Kingdom deals with an older bilateral air services agreement, the so-called Bermuda II Agreement; see Case C-466/98 Commission v United Kingdom [2002] ECR I-9427.
26 See e.g. Case C-471/98 Commission v Belgium [2002] ECR I-9681 (Commission v Belgium).
agreement, by which the existing bilateral agreements would be superseded.\textsuperscript{27} Five years later, the EU-US Open Skies Agreement (OSA)\textsuperscript{28} was concluded, after a long and convoluted process.

While aviation activities surged over the previous century, it formed an increasing part of GHG emissions since the industrial revolution.\textsuperscript{29} However, as opposed to the development of the air transport sector, attention towards climate change only emerged in the latter half of that century, gaining momentum in the ’80’s.\textsuperscript{30} In 1988 an Intergovernmental Panel on Climate Change (IPCC) was established by the World Meteorological Organisation and the UN Environment Programme. Its task consists of assessing scientific information on climate change as well as giving advice on possible responses with regard to policy and international law making so to counteract the adverse impact of climate change.\textsuperscript{31} Two years later the IPCC presented its First Assessment Report (FAR) in which it confirmed the substantial influence of human activities on the amount of GHGs in the Earth’s atmosphere, leading to an increased greenhouse effect. The resulting rise in global temperature has and would have negative impacts on the sea level, agriculture and natural ecosystems. The Panel concluded by urging the international community to start negotiations on a framework convention tackling climate change ‘as quickly as possible’.\textsuperscript{32} Hence, the same year the UN General Assembly decided to establish an Intergovernmental Negotiating Committee, open to all states, through which the framework convention on climate change could be drafted.\textsuperscript{33} In 1992 an agreement was reached among the 194 parties, after which the UN Framework Convention on Climate Change (UNFCCC)\textsuperscript{34} was signed at the UN Conference on Environment and Development situated in Rio de Janeiro.\textsuperscript{35}

While the ‘ultimate objective’ of the Convention is to achieve the stabilisation of GHG concentrations in the atmosphere at a safe level, it does not provide for binding targets within defined timelines.\textsuperscript{36} Therefore, in 1995 the first Conference of the Parties (COP) decided to institute an ad hoc group endowed with the task of carrying out the ‘Berlin Mandate’. Concretely, the Group had to iden-
tify possibilities for strengthening the commitment provisions in article 4(2) of the UNFCCC. This includes primarily options towards setting quantified limitation and reduction objectives within specified time frames for GHG emissions.\(^{37}\) In light of the findings of the IPCC in its Second Assessment Report, the parties at COP 2 in 1996 declared support for the development of a protocol containing such legally binding objectives.\(^{38}\) In time for COP 3 in 1997, the work of the Ad Hoc Group on the Berlin Mandate was finished, the result of which the Conference could transform into a protocol to the UNFCCC. Subsequently, the Kyoto Protocol,\(^{39}\) named after the meeting venue of COP 3, was adopted at the Conference and opened for signature a year later.\(^{40}\) It includes the legally binding emission reduction targets sought after by the COP.\(^{41}\)

**2. CHICAGO CONVENTION**

**A. Legal status**

Since its entry into force on 4 April 1947, the Chicago Convention has been adopted by 191 parties to date, including all 28 EU MSs.\(^{42}\) Article 92 of the Convention provides that it shall be open for adherence by any member of the UN or associated thereto as well as states which remained neutral during the Second World War. Although it is not explicitly stated, the Convention only presupposes sovereign states to be allowed for admission. Hence, international organisations such as the EU cannot become a party.\(^ {43}\) As long as the Convention is not amended in accordance with article 94, the Union cannot accede to it. However, the question arises whether the EU nonetheless can be bound by the Convention by reason of article 351 of the Treaty on the Functioning of the European Union (TFEU)\(^ {44}\) or by rea-


\(^{41}\) Kyoto Protocol, art 3.


son of functional succession. This question was brought before the European Court of Justice (Court) in the case of *ATA and others v. Secretary of State for Energy and Climate Change*.45

First, article 351 TFEU states that the Treaty provisions shall not affect the rights and obligations arising from agreements that were concluded by MSs with other MSs or third countries predating their membership of the Union, such as is the case for the Chicago Convention.46 As a consequence, a MS may invoke article 351 as a justification for disapplying EU law or for taking contrary measures if this is still required by non-MS parties for the performance of obligations under such prior international agreements.47 However, as the Court ruled in *ATA*, it should be clear that it is the MS that is bound by such agreements and not the Union.48 In this connection, the Court in *Burgoa*49 saw no possibility for article 351 TFEU to be interpreted as meaning that the Union has to ensure that the MS complies with its international obligations within the scope of that article.50 Indeed, fulfilment of MS obligations under prior international agreements is up to the MS itself and possibly forms the subject of dispute settlement or enforcement mechanisms provided for by the international agreement. The Union only has to permit the MS to perform its obligations under the prior agreement.51 In light of later case law, including *ATA*,52 this seems to imply that the EU only has to respect the legitimate disapplication of Union law. Thus, it does not take away the right of the Union to legislate, even if this would introduce incompatibilities with MS obligations under prior international agreements.53 Moreover, it should be noted that article 351 TFEU formulates an obligation for MSs to take ‘all appropriate steps’ to eliminate such incompatibilities with the Treaties of international agreements within the article’s scope, including denunciation if provided for.54

Secondly, the Union could be the functional successor to the MSs regarding the Chicago Convention. However, in order for this to be the case, the Court in *ATA* referred to the conditions in its *Intertanko*55 case law. Thus, the Union can only be bound by the Convention if it has assumed all those

45 Case C-366/10 *Air Transport Association of America a.o. v Secretary of State for Energy and Climate Change* [2011] ECR I-13755 (*ATA*).
48 *ATA*, paras 60 and 71. See also Case C-366/10 *Air Transport Association of America a.o. v Secretary of State for Energy and Climate Change* [2011] ECR I-13755, Opinion of AG Kokott (*ATA AG*), para 57.
50 ibid, para 9.
51 *ATA*, para 61; *Burgoa*, paras 9-10.
52 *Commission v Slovakia*, para 42; *ATA*, para 61.
53 *Contra Mayer*, 1126-1127.
55 Case C-308/06 *The Queen, ex parte Intertanko a.o. v Secretary of State for Transport* [2008] ECR I-4057 (*Intertanko*).
powers, previously exercised by the MSs, that fall within the scope of the Convention.\textsuperscript{56} Without such a full transfer of power to the Union, the latter cannot be bound simply because all MSs are parties to the Convention.\textsuperscript{57} It is true that some matters falling within the scope of the Chicago Convention have been covered by EU legislation. Examples include the foundation of the European Aviation Safety Agency, the harmonisation of technical requirements for civil aviation, taxation (or rather non-taxation) of fuel used in aviation, etc.\textsuperscript{58} Nevertheless, the Court found that the Union did not yet assume exclusive competence for all matters of international civil aviation dealt with in the Convention.\textsuperscript{59} In comparison with \textit{Intertanko}, the Court made clear in \textit{ATA} that the Union’s competence in this regard has to be exclusive.\textsuperscript{60} In conclusion, the Court ruled that the Union is neither bound by way of functional succession.\textsuperscript{61}

\textbf{B. Relevant provisions}

The cardinal rule of the international civil aviation system is to be found in the first article of the Chicago Convention, taken over from the first article of the Paris Convention. There, it is stated that ‘every state has complete and exclusive sovereignty over the airspace above its territory.’ Not only is it a conventional rule, it is also a rule of customary international law, which can even be traced back to the Roman era.\textsuperscript{62} Hence, any actual freedoms in the field of scheduled air services are contained in the two separate agreements devised at the Chicago Conference, being the ‘Two Freedoms Agreement’ and the ‘Five Freedoms Agreement’, as well as in the subsequent plethora of bilateral air services agreements.\textsuperscript{63} Permission is needed from the authorities of another state for any international air navigation performance, except where it concerns the overflight or landing for technical purposes of aircraft not engaged in scheduled international air services.\textsuperscript{64}

The Chicago Convention contains further rules on air navigation. Article 11 states that the parties have to apply their air regulations in a non-discriminatory fashion. Hence, aircraft of another party

\begin{itemize}
\item \textsuperscript{56} \textit{ATA}, para 63.
\item \textsuperscript{57} \textit{Intertanko}, para 49; \textit{ATA}, para 63.
\item \textsuperscript{58} \textit{ATA}, para 65.
\item \textsuperscript{59} \textit{ATA}, para 69.
\item Geert De Baere and Cedric Ryngaert, ‘The ECJ’s Judgment in \textit{Air Transport Association of America and the International Legal Context of the EU’s Climate Change Policy}’ (2013) 18 European Foreign Affairs Review 369 (De Baere & Ryngaert), 396.
\item \textsuperscript{60} \textit{ATA}, para 71. The only case where the Court has accepted the argument of functional succession by the Union, concerns the General Agreement on Tariffs and Trade (GATT); see De Baere & Ryngaert, 396.
\item Brian F Havel, \textit{In Search of Open Skies} (Kluwer Law International 1997) 31.
\item Text to n 23. These bilateral air services agreements are based on article 6 of the Chicago Convention, which reads: ‘No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.’; see Chicago Convention, art 6.
\item Chicago Convention, arts 5-8.
\end{itemize}
shall not be treated less favourably than a party’s own aircraft. By analogy, the same applies to the level of airport charges, which is laid down in article 15. Moreover, no fees, dues or other charges can be imposed solely for the right of overflight or entry into or exit from the territory of a party with regard to aircraft from another party. Neither shall, according to article 24, customs duties or similar charges be due regarding fuel on board of other parties’ aircraft for overflight or flights to or from a party’s territory. Finally, article 12 provides that aircraft have to abide by the air regulations of the party in which territory it is located. The Convention parties are to ensure the enforcement of this rule.

Aside from air navigation rules, the Convention focuses on technical and administrative requirements to be fulfilled by aircraft. In this regard, cooperation between parties on achieving uniformity through international standards and procedures, is strongly promoted. To that end, article 43 of the Convention formally establishes the International Civil Aviation Organisation (ICAO), which operated under the UN umbrella from 1947 on. It is through this body that the parties cooperate on the development of the ‘principles and techniques of international air navigation’ so to realise international civil aviation in a ‘safe and orderly manner.’ In this regard, safety of flight has been key in the work of the ICAO. However, the body not only is endowed with standard-setting competences, but also with judicial powers. In case of dispute between two or more parties on the application or interpretation of the Convention, the parties have to resort to negotiations. However, if no agreement is reached, article 84 of the Convention provides that the ICAO Council can decide on the issue on request of one of the parties involved in the dispute. Finally, an appeals procedure is provided for in which the matter can be referred to ad hoc arbitrage or the International Court of Justice.

3. OPEN SKIES AGREEMENT

A. Legal status

The EU-US Open Skies Agreement is a mixed bilateral agreement for the sector of air transportation, concluded between the EU and its MSs on the one side and the US on the other. It was signed by the

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65 Havel & Sanchez, 12.
67 Chicago Convention, art 44; Chicago Convention, preamble. See also Weber, 5-6; Olivier Onidi, ‘A Critical Perspective on ICAO’ (2008) 33 Air & Space Law 38, 38.
68 Weber, 6.
69 The competences of the ICAO are not listed in an exhaustive manner here.
parties in April 2002.\textsuperscript{71} For the OSA to enter into force, the agreement provides that all parties should have performed their ratification, which is still pending.\textsuperscript{72} However, no despair is needed, as the OSA has been provisionally applied by the parties as of March 2008, by which its provisions form an integral part of EU law ever since.\textsuperscript{73} The Union and its MSs are thus bound by their provisional application in two ways. First, within the sphere of EU law through a Council decision on the provisional application of the OSA.\textsuperscript{74} Second, within the sphere of international law the Union and its MSs are bound by the provisional application stipulated in article 25 of the OSA.\textsuperscript{75} In this connection, it should be noted that the Union observes international law.\textsuperscript{76} Nevertheless, the parties may at any time give notice to end their provisional application.\textsuperscript{77}

The involvement of the EU in the OSA came after a series of legal challenges brought by the Commission before the Court in 1998. In the so-called ‘open skies’ cases\textsuperscript{78} the Commission argued against the exclusive competence of the MSs in concluding bilateral air services agreements with the US. During the ’80’s and the ’90’s the Union had adopted three legislative packages in order to gradually establish an internal market in air transport, on the basis of article 100 TFEU.\textsuperscript{79} Hence, the Commission asserted that the Union alone had an exclusive external competence for the conclusion of the ‘open skies’ agreements. It based itself on the implied external powers doctrine in the \textit{AETR} ruling,\textsuperscript{80} in the connection of which article 100 TFEU would form the legal basis. Since the EU established ‘a complete set of common rules’ for the creation of the internal market in air transport, the Union would have an exclusive implied external competence in this field, the Commission argued.\textsuperscript{81}

The Court recalled its \textit{AETR} case law and ruled that, indeed, Union competence to conclude international agreements not only arises from an express Treaty provision, but may also flow from other Treaty provisions upon which common internal EU rules have been adopted.\textsuperscript{82} To the effect that MSs’ external action \textit{could} affect these rules, the EU has exclusive external competence for the matters fal-
ling within their scope. However, regarding the ‘open skies’ agreements, the Court found that there were only limited instances of common rules that could be affected by the agreements. These are provisions on the setting of fares and rates in intra-EU air transport and provisions on computer reservation systems. Nevertheless, this means that the EU and the MSs were jointly competent, each within their respective spheres, to conclude ‘open skies’ agreements with the US.

In this regard, it is the question whether or not the ‘absorption doctrine’ of the Court of Justice could regard one of the OSA’s objects falling within the EU’s competence as essential, absorbing all ancillary aspects and making the MSs’ involvement unnecessary. No obvious hierarchy of objectives can be devised, however. Missing a clear essential object falling within one of the sanctioned but limited exclusive implied external competences of the Union, the Court’s ‘absorption doctrine’ could not have provided for comfort. Indeed, in retrospect, the use of bilateral mixity was the only feasible solution.

B. Relevant provisions

The OSA serves to facilitate the expansion of the EU-US air transport market through a system based on competition among airlines. In other words, to a certain degree it has liberalised the EU-US air transport market. Thereto, both EU as well as US airlines shall be allowed a fair and equal opportunity to compete, by virtue of article 2 of the OSA.

Without delving too much into the technicalities of the OSA, article 3 is to realise so-called third, fourth, fifth and sixth freedom rights for EU and US air carriers, in addition to the first and second freedom of overflight and landing for technical purposes. While the third and fourth freedoms permit to fly from one’s own country to the other party or vice versa, the fifth freedom allows an airline to make intermediate stops in other countries as long as the flight originates or ends in one’s own country. The sixth freedom is the same as the latter, except for the fact that the airline’s own country may be an

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83 See Commission v Belgium, para 97, emphasis added.
84 Commission v Belgium, paras 112 and 117.
85 With the Treaty of Lisbon, an attempt was made to codify the implied powers doctrine in article 3(2) TFEU. For a critical analysis of the doctrine, see Dennis Porrez, ‘De doctrine van de implied powers in de EU Externe Betrekkingen’ (Master’s thesis, Universiteit Gent 2012).
88 OSA, preamble.
Seventh freedom rights, meaning air transport services without stopping in one’s own country, are also included in the OSA in a limited fashion.

Some of the OSA provisions are imaged on similar provisions in the Chicago Convention. Article 11 of the OSA exempts aircraft fuel from all customs duties, levies or similar fees and charges, except when they are based on the cost of the service provided. However, as opposed to article 24 of the Chicago Convention, the OSA not only exempts aircraft fuel already on board but also supplies thereof. Similar to article 12 of the Convention, article 7 of the OSA provides that aircraft have to respect the laws and regulations, while entering into, departing from or navigating within a party’s territory. Finally, on dispute settlement article 19 of the OSA provides for a similar procedure of arbitration as to the procedure contained in the Chicago Convention.

Not without importance, article 15 of the OSA contains environmental provisions. However, the article has been amended by a subsequent protocol to the OSA, which is provisionally applied since June 2010. Hence, the new article has expanded significantly, adding provisions on noise-based operating restrictions at airports as well as promoting increased cooperation among the parties on addressing international aviation’s environmental impacts. This includes scientific cooperation on the comprehension of the impact of aviation emissions as well as cooperation on research and development of environmentally friendly aviation technology. Finally, the amended OSA pays attention to issues of possible overlap between and consistency among market-based measures regarding aviation emissions. To this end, the parties can issue recommendations in order to avoid duplication of measures and costs.

4. KYOTO PROTOCOL

A. Legal status

As its title makes clear, the UNFCCC is a framework convention (‘traité-cadre’). This denotes a certain level of flexibility absent from treaties featuring a high level of detail, but lacking the framework structure through which the convention is to be further implemented (‘traité-loi’). In this connection,

89 Balfour, 455-456; Margolis, 86.
80 Balfour, 456.
82 ibid, arts 3 and 9; Council Decision (EU) 2010/465 of 24 June 2010 on the signing and provisional application of the Protocol to Amend the Air Transport Agreement between the United States of America, of the one part, and the European Community and its Member States, of the other part [2010] OJ L223/1, art 1(3). The Protocol was concluded after the so-called ‘second stage negotiations’ called for in article 21 of the OSA; see OSA, art 21.
83 Lecture from Erwan Lannon to author (18 February 2014).
the Kyoto Protocol was adopted in accordance with article 17 of the UNFCCC, to lay out more detailed provisions for the implementation of the commitment provisions in article 4(2) of the Convention.94

The Kyoto Protocol has been ratified by nearly all of the 196 UNFCCC parties (only excluding the US, Canada (which has withdrawn in 2012), South-Sudan and Andorra), including one regional integration organisation in the form of the EU.95 With both the 28 MSs being a party to the Protocol as well as the EU, it constitutes a mixed agreement.96 It is to be noted that the conclusion of the Protocol by the Union is based on article 191 TFEU, of which the fourth point provides that ‘the Union and the [MSs] shall cooperate with third counties and with the competent international organisations’ in the field of environment policy, ‘[each] within their respective spheres.’97 Because some commitments under the Protocol are collective to the EU and its MSs, whereas others are individual, its full effect can only be manifested when both the EU and its MSs alike have performed their ratification.98 The delimitation of these ‘spheres’ or competences of the Union and the MSs for the fulfilment of their legal obligations from the Kyoto Protocol depends upon the scope of the exclusive competences of the Union as well as the extent to which ‘the [Union] has elected to exercise its non-exclusive competence’ in this context.99 To this effect, the Council annexed a declaration on the issue to its ratification decision.100

In May 2002 all MSs of the then EU15 have performed their ratification of the Kyoto Protocol. At the same time, the Council ratified the Protocol as well, by which it conceived binding legal force on the Union and its MSs under article 216(2) TFEU within the sphere of EU law.101 However, it took until 2005 for the Protocol to enter into force. Because of a US failure to ratify it and the complex requirements for its entry into force, a ratification by the Russian Federation was absolutely necessary.102 Hence, only in 2005 the provisions of the Kyoto Protocol became a part of the EU legal order.103

94 Text to n 38.
95 Status of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (2014) MTDSG, chapter XXVII, 7.a. It should be noted that article 24 of the Kyoto Protocol provides that signature of the Protocol is only open to parties of the UNFCCC; see Kyoto Protocol, art 24.
97 Emphasis added.
101 ibid.
102 Massai 2011b, 17. At an EU-Russia summit in May 2004, the EU agreed to support Russia’s WTO accession, while Russia would ratify the Kyoto Protocol; see ‘EU Agrees Terms for Russia’s WTO entry, Putin Signals Support for Kyoto Protocol’ (2004) 8(19) Bridges 5, 5.
103 Haegeman, para 5; Kupferberg, para 11.
However, the Protocol is not only binding on the Union within the context of EU law, it is equally so under international law following the *pacta sunt servanda* rule codified in the Vienna Convention on the Law of Treaties.\(^{104}\) While the Union is not and cannot be a party to this convention, the rule forms a principle of international law which the EU itself declares to be bound by. Moreover, in *Racke* the Court has confirmed that ‘any legal order’, including the Union, has to observe the principle.\(^{105}\)

**B. Relevant provisions**

It should be recalled that the ultimate objective of the UNFCCC as well as the Kyoto Protocol is ‘to achieve [...] [a] stabilisation of [GHG] concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.’\(^{106}\) The parties are to achieve this goal ‘on the basis of equity and in accordance with their *common but differentiated* responsibilities and respective capabilities.’\(^{107}\) Hence, ‘the developed [countries] should take the lead in combating climate change and the adverse effects thereof.’\(^{108}\) This is further reflected. While all parties have to cooperate and take certain administrative and policy measures, the focus lies on the commitments entered into by the developed countries included in Annex II to the Convention. The Kyoto Protocol, forming the further implementation of these commitments, stipulates in article 3(1) that the developed countries in Annex I to the Protocol ‘shall’\(^{109}\) ensure that their GHG emissions\(^{110}\) do not exceed their assigned amounts so that their overall emissions are reduced by at least 5% below 1990 levels in the commitment period 2008 to 2012. Annex A sums up the GHGs falling within the scope of the Kyoto Protocol.\(^{111}\)

The Protocol equally mentions the ways by which the Annex I countries should attain that aim. First, article 2(1) provides that the Annex I parties have to implement domestic policies and measures, such as measures designed to limit or reduce the emission of GHGs in the transport sector. The types of policies and measures enlisted in the article do not seem to be mandatory by the wording of the provision, but rather exemplary. Secondly, Annex I countries should cooperate amongst each other for

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\(^{106}\) UNFCCC, art 2.

\(^{107}\) UNFCCC, art 3(1), emphasis added.

\(^{108}\) UNFCCC, art 3(1).

\(^{109}\) The use of the word ‘shall’ denotes the legally binding nature of the emission reduction targets sought after by the COP during the work of the Ad Hoc Group on the Berlin Mandate.

\(^{110}\) It concerns the GHG emission substances listed in Annex A to the Kyoto Protocol.

\(^{111}\) The GHGs are carbon dioxide (CO\(_2\)), methane (CH\(_4\)), nitrous oxide (N\(_2\)O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF\(_6\)); see Kyoto Protocol, Annex A. It has to be noted that the Kyoto Protocol does not interfere with GHGs regulated by the Montréal Protocol; see e.g. Kyoto Protocol, art 2(2).
increased effectiveness, which includes the sharing of experience and information on their domestic policies and measures. Thirdly and derogating from the rest of the article, article 2(2) stipulates that the ‘limitation or reduction [...] from aviation and marine bunker fuels ['shall' 112 be pursued] working through the ICAO and the IMO, respectively.’

As the emission reduction commitments for Annex I countries to the Kyoto Protocol are legally binding, non-compliance can be enforced through a special procedure. Article 18 of the Protocol provides for the legal provision upon which the convoluted non-compliance procedure, agreed by COP 7 in the 2001 Marrakech accords, 113 is based. 114 A party can be found non-compliant with its obligations under the Kyoto Protocol with regard to certain provisions in the Kyoto Protocol, such as the emission commitments in article 3, the methodology and reporting obligations in article 5 and 7, the requirements on eligibility for participation in the so-called flexibility mechanisms in articles 6, 12 and 17, etc. 115 Subsequently, the non-complying party could be suspended from eligibility in using the flexibility mechanisms, it could be imposed penalties on its assigned amounts of emissions and it could be obliged to abide by a compliance action plan. 116

5. EVALUATION

It is clear that the Union is bound by at least two of the international agreements discussed in this chapter. Both the Kyoto Protocol (including the UNFCCC) as well as the OSA have been concluded by the Union, in the form of mixed agreements. The Kyoto Protocol not only lays down binding targets and timelines for the reduction of GHG emissions by its parties, it even provides for a sanctions mechanism. It has to be noted that the latter is a rare sight in the field of international agreements. The OSA on the other hand aims to liberalise the air transportation market between the EU and the US. In this regard, the agreement contains some provisions which seem to mimic their siblings in the Chicago Convention.

However, the Union is not a party to the Convention. Indeed, in ATA the Court ruled that the Union is not bound by the Chicago Convention on the basis of article 351 TFEU. Moreover, that same article states that the MS bound to an agreement within the scope of article 351 TFEU shall take all appropriate steps to eliminate incompatibilities of the agreement with the Treaties. As has already been discussed, the case law of the Court makes clear that this includes adjustment or denunciation, as has

112 The use of the word ‘shall’ again denotes the legally binding nature of the provision.
114 ibid, 65.
115 ibid, 68.
116 ibid, 75-76.
been referred to by Advocate General Kokott in ATA.\textsuperscript{117} If an adaptation of a possibly incompatible Chicago Convention were to fail, this would mean that all MSs could find themselves (at least theoretically) under an obligation to denounce the Convention. It is, however, left to be seen whether such a drastic step would have to be taken when such a scenario occurs.\textsuperscript{118}

A longer term solution to these issues would come in the form of an accession of the Union to the Chicago Convention and, consequentially, to the ICAO. After all, the ‘open skies’ judgments made clear that the Union enjoys exclusive competences in some aviation matters. Since only sovereign states can become a party, an amendment to the Convention would be necessary. In this connection, when applying the Court’s \textit{Kramer}\textsuperscript{119} case law here, MSs could be under a duty to use ‘all political and legal means at their disposal’ in order to ensure the participation of the EU in the Chicago Convention, which follows from their duty of sincere cooperation enshrined in article 4(3) of the Treaty on the European Union (TEU).\textsuperscript{120} It was exactly that what the MSs tried to achieve after the ‘open skies’ judgments. However, due to the time the ratification process of such an amendment would take, it was not deemed preferable to go along the route of full membership of the Union.\textsuperscript{121} Hence, in order to ameliorate the situation, the EU and the ICAO made a deal by which the former could observe and participate in the ICAO’s work without being a member.\textsuperscript{122}

The duty of sincere cooperation incumbent on the Union and its MSs leads us to another possibility for the Union to be bound by the Chicago Convention. Article 4(3) TEU, in which the duty is laid down, forms the emanation of the customary law principle of good faith.\textsuperscript{123} In view thereof and of the fact that all MSs are a party to the Chicago Convention, the Advocate General in ATA argued that the Convention could affect the interpretation of secondary EU law in the internal EU legal order.\textsuperscript{124} Hence, the Union could be bound in an indirect way. Nevertheless, the Court itself kept mute on this point when ruling in ATA.

\textsuperscript{117} ATA AG, para 58.


\textsuperscript{119} Joined Cases 3, 4 and 6/76 \textit{Arrondissementsrechtbank Zwolle and Arrondissementsrechtbank Alkmaar v Cornelis Kramer a.o.} [1976] ECR 1279 \textit{(Kramer)}, para 44/45.

\textsuperscript{120} cf Inge Govaere, Jeroen Capiau and An Vermeersch, ‘In-Between Seats: The Participation of the European Union in International Organisations’ (2004) 9 European Foreign Affairs Review 155 (Govaere a.o.), 173. While the subject matter in \textit{Kramer} fell under the exclusive competence of the Union, the same reasoning could be made for the Chicago Convention, where the competences are shared between the Union and its MSs; see to this effect Govaere a.o., 174.

\textsuperscript{121} Weber, 17.


\textsuperscript{123} \textit{Intertanko}, para 52. See also De Baere & Ryngaert, 397.

\textsuperscript{124} ATA AG, para 66.
The agreements discussed, however important, are not the only sources of international law by which the Union can be bound. Article 3(5) TEU proclaims that the ‘Union shall [...] contribute [...] to the strict observance and the development of international law [...]’. Indeed, the Court confirmed in *Poulsen and Diva Navigation* that ‘the Union must respect international law in the exercise of its powers.’\(^{125}\) It put it even clearer in *Racke* that ‘rules of customary international law [...] are binding upon the [Union] institutions and form part of the [EU] legal order.’\(^{126}\) The Court again upheld this view in *ATA* when it declared the Union to be bound by a number of principles of customary international law relevant for this paper.\(^{127}\) The first principle, on the complete and exclusive sovereignty of states over their airspace, is expressed in the first article of the Chicago Convention and has already been discussed.\(^{128}\) The second principle, laid down in article 2 of the 1958 Geneva Convention on the High Seas,\(^{129}\) states that no state may validly purport to subject any part of the high seas to its sovereignty. Finally, article 87(1) of the UN Convention on the Law of the Sea\(^{130}\) enshrines the principle of freedom of overflight over the high seas.

\(^{125}\) Case C-286/90 *Anklagemindigheden v Poulsen and Diva Navigation* [1992] ECR I-6019, paras 9-10. See also *Racke*, paras 45-46.

\(^{126}\) *Racke*, para 46.

\(^{127}\) *ATA*, paras 104-105.

\(^{128}\) Text to n 62.


CHAPTER 2
EU INSTRUMENTS

The EU’s Emissions Trading Scheme

The focus will shift from international instruments to internal EU legislation in the second chapter. After all, in response to the international commitments discussed in the first chapter, the Union has established an Emissions Trading Scheme designed to help it fulfil its obligations. An overview of this system is essential to understand the issues to be discussed in the third chapter.

Before delving into the key relevant aspects of the scheme, the coming into existence of the thereof will be put in a broader context. Afterwards an overview of the main features of the ETS will be set out, including the integration of aviation in the scheme. A recap and some final thoughts are provided at the end.
1. CONTEXT

Since the Union was started as an economic integration project, protection of the environment was not explicitly mentioned in the Rome Treaty. It was, however, read into the Treaty by the Court. In 1985, the Court stated in ADBHU that environmental protection is one of the Union’s essential objectives.\(^\text{131}\) Only with the 1986 Single European Act, a Title VII on the environment was inserted into the EEC Treaty.\(^\text{132}\) The situation further developed with the Maastricht and the Amsterdam Treaties, to which the Lisbon Treaty introduced the latest additions. Hence, environmental protection is mentioned twice among the objectives of the Union in article 3 TEU.\(^\text{133}\) Not only shall the EU work for the protection and improvement of the environment internally, it shall also contribute to the sustainable development of the Earth in its external relations.\(^\text{134}\) Not without importance, article 191 TFEU now refers to the fight against climate change as a ‘particular’ objective of the Union’s policy on the environment.

The general trend of the EU’s increased attention towards climate change is equally visible in its policy. While the Commission started communicating on the need to tackle the greenhouse effect at the end of the ’80s,\(^\text{135}\) the European Council of June 1990 in Dublin called on the Commission to issue proposals on introducing measures aimed at limiting GHG emissions. In its statement, the European Council referred to the scientific evidence set out in the IPCC’s FAR, after which it endorsed the early adoption of a ‘Climate Convention and associated protocols’.\(^\text{136}\) Indeed, the Union and the MSs subsequently adopted the UNFCCC and the Kyoto Protocol, binding itself to a joint 8% reduction compared to 1990 levels in the emission of GHGs for the first commitment period 2008 to 2012.\(^\text{137}\) Moreover, Annex I parties should have made ‘demonstrable progress’ in achieving their commitments by 2005.\(^\text{138}\)

In order to attain these goals, the Commission studied the possibility of GHG emissions trading in the EU, which it discussed in its 2000 Green Paper.\(^\text{139}\) This set the stage for a debate on how to implement such a system, while suggesting several options. A proposal was made henceforth by the Commission for the establishment of an EU emissions trading scheme (ETS), which subsequently led to

\(^{134}\) TEU, arts 3(3) and 3(5). See also TEU, arts 21(2)d and 21(2)f.
\(^{135}\) Leonardo Massai, European Climate and Clean Energy Law and Policy (Earthscan 2011) (Massai 2011b) 49.
\(^{138}\) ibid, art 3(2).
the adoption of the 2003 ETS Directive.\textsuperscript{140} As such, the Union opted for a market-based approach instead of a regulatory or a voluntary approach.\textsuperscript{141} This was not as self-evident as it may seem. The idea of a market-based system for the reduction of emissions originated from outside the EU, notably the US, and dates back some decades ago, long before the conclusion of the Kyoto Protocol. Where the Commission was still campaigning the introduction of an EU carbon tax in the early ’90’s, resistance from the MSs and the adoption of the Kyoto Protocol (which includes flexible mechanisms such as emissions allowance trading among the parties) instigated a change of heart.\textsuperscript{142} In what has been described as a ‘volte-face’, the EU ETS ultimately became the ‘flagship’ of EU climate policy.\textsuperscript{143}

One of the sectors not included in the EU ETS, however, was the transportation by air. Though, that is not to say that GHG emissions from aviation should be treated as a marginal phenomenon. In 1999 the IPCC published a special report on GHG emissions from aviation in which it projected that carbon dioxide emissions from air transport would triple by 2050 due to growth in air transportation.\textsuperscript{144} Indeed, the sector’s activities are showing significant expansion with passenger-kilometres performed in total scheduled traffic having increased by more than two thirds between 2003 and 2012 and scheduled freight traffic by approximately 40%.\textsuperscript{145} According to the Commission the rise in emissions from international aviation alone would offset more than a quarter of the total reductions required by the EU’s target under the Kyoto Protocol.\textsuperscript{146}

The possible inclusion of air transportation into an EU ETS was already tentatively foreseen by the Union in its Sixth Community Environment Action Programme in 2002, in which it warned to take action itself in order to reduce GHG emissions from aviation if the ICAO would fail to do so within the same year.\textsuperscript{147} One year earlier, in 2001, the ICAO Assembly endorsed the development of an open ETS for international aviation and burdened the ICAO Council with the development of its own legal instrument thereon.\textsuperscript{148} In 2004 this path was deemed unattractive, after which the Assembly requested

\begin{itemize}
  \item\textsuperscript{141} See Ben Daley and Holly Preston, ‘Aviation and Climate Change: Assessment of Policy Options’ in Stefan Gössling and Paul Upham (eds), \textit{Climate Change and Aviation: Issues, Challenges and Solutions} (Earthscan 2009) (Daley & Preston) 351.
  \item\textsuperscript{142} Elin Lerum Boasson and Jørgen Wettestad, \textit{EU Climate Policy: Industry, Policy Interaction and External Environment} (Ashgate 2013) (Boasson & Wettestad) 56.
  \item\textsuperscript{143} Boasson & Wettestad, 53.
  \item\textsuperscript{144} IPCC, ‘Special Report: Aviation and the Global Atmosphere—Summary for Policymakers’ (1999), 6.
  \item\textsuperscript{146} Commission, ‘Reducing the Climate Change Impact of Aviation’ (Communication) COM (2005) 459 final (Aviation Paper), 2.
  \item\textsuperscript{148} ICAO (Resolution of the Assembly) ‘Resolutions adopted at the 33th session of the Assembly—Provisional edition’ (Montreal 25 September—5 October 2001) <icao.int> accessed 18 August 2014, resolution A33-7, Appendix I, para 2(c).
\end{itemize}
the ICAO Council to redirect its attention towards issuing guidelines for both a voluntary ETS and for the incorporation of emissions from international aviation into the parties’ ETSs. The latter was interpreted by the Commission as a green light for the inclusion of international aviation into its own scheme, which it did through an amending directive in 2008. A year before, the Assembly still tried to hinder the adoption of this legislation through a resolution urging the parties not to include international aviation into their ETSs, except on the basis of mutual agreement. To appease the Union, it even established a Group on International Aviation and Climate Change, tasked to study strategies and measures for the reduction of aviational GHG emissions. To no avail, however, as all EU MSs (as well as all members of the European Economic Area (EEA)) declared a reservation on the forementioned resolution. Although the Union thus adopted unilateral measures on the reduction of GHG emissions from international aviation, its legislation left the door open for the incorporation of a global agreement thereon or for the recognition of equivalent measures by third countries.

2. THE SCHEME AT LARGE

A. Concept of emissions trading

The EU ETS is designed upon the so-called ‘cap and trade’ principle. This denotes two key elements. First, capping refers to the limited amount of allowances in existence for the purpose of emitting GHGs. This serves to provide the environmental benefit of the scheme. Second, the element of

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156 Aviation Paper, 8.
trading allows for a market in GHG emission allowances. Operators\(^\text{157}\) are henceforth not restricted in their amount of GHG emissions as long as they have obtained an appropriate amount of allowances so to have their emissions covered. Marketing of allowances, however, means in principle that the right to emit carries an economic cost for the operator.\(^\text{158}\) Indeed, the cap on the amount of allowances is supposed to introduce scarcity in the market, which should result in a certain price for emission rights based on supply and demand.\(^\text{159}\) As a consequence of this financial penalty, the operator is encouraged to make efforts towards the reduction of its GHG emissions. This should lead to a drop in GHG emissions from those operators for whom the costs to achieve this goal are the least.\(^\text{160}\)

By establishing an ETS the Union has thus given a prominent place to a market-based instrument with regard to the reduction of GHG emissions.\(^\text{161}\) This should be distinguished from either a regulatory or a voluntary approach. The difference with regard to the latter is easy to make: such a system would not be legally binding. On the other hand, the former differs for the fact that an instrument based on this approach would impose a certain standard upon the operator.\(^\text{162}\) This would leave the individual operator with less flexibility regarding its emission practices. Finally, emissions trading should not be confused with environmental taxes, charges or subsidies. Where the cost of tradable allowances fluctuates depending on supply and demand, the price level of the other three instruments is fixed.\(^\text{163}\)

**B. Scope of application**

Geographically the EU ETS is applicable in all MSs. This includes all newly acceded states in the Big Bang enlargement of 2004 as well as the enlargements of 2007 and 2013 most recently. In this context it should be noted that the Union and its MSs fulfil their GHG emission targets under the Kyoto Protocol jointly, through a so-called Burden Sharing Agreement (BSA) in accordance with article 4 of the


\(^\text{158}\) See Aviation Paper, 8.


\(^\text{160}\) Aviation Paper, 8.

\(^\text{161}\) Text to n 141.

\(^\text{162}\) See Daley & Preston, 351.

\(^\text{163}\) See in grosso Daley & Preston, 353-359.
Protocol. This arrangement only applies to the EU15, however. After all, MSs that have acceded afterwards are bound by their commitments under the Kyoto Protocol. These countries cannot get around their obligations through accession to the Union and the application of a subsequent BSA. Nonetheless, upon accession these new MSs have equally assumed the international obligations entered into by the Union, including the Kyoto Protocol. While article 351 TFEU could form the basis for a derogation from these Union obligations, it is left to be seen whether the new MSs would not be under an obligation to renegotiate or denounce their commitments under the Kyoto Protocol, according to the Court’s case law. Finally, the EU ETS not only applies in the Union. Beginning with the ETS’ second phase in 2008, the scope was extended towards the EEA to include Norway, Iceland and Liechtenstein.

The material scope of the ETS is delimited by two elements. On the one hand the system is applied to emissions from the activities listed in Annex I of the ETS Directive, while on the other hand these emissions concern the GHGs listed in Annex II. The activities that are targeted depend upon the phase in which the ETS is operated. Whereas the list in Annex I has expanded over the years, the list in Annex II, containing the GHGs on which the ETS is applied, has not been changed since the original Directive. It not only mentions carbon dioxide, but five other GHGs as well. This does not mean, however, that all activities falling within the scope of the ETS have to take all GHGs listed in Annex II into account. Indeed, the list in Annex I lays down the GHGs for which the ETS will be applied on a certain activity. Nor does it mean that the ETS can only be applied to the activities and GHGs listed in Annex I and II, as the MSs can extend the scope of the system from the second phase

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165 See Massai 2011b, 58-59. The BSA relies on the so-called Triptych approach. A general target is started from, the burden of which is subsequently distributed in a differentiated manner; see Heleen Groenenberg, Dian Phylipsen and Kornelis Blok, ‘Differentiating commitments world wide: global differentiation of GHG emissions reductions based on the Triptych approach: a preliminary assessment’ (2001) 29 Energy Policy 1007.

166 Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, […] and the adjustments to the Treaties on which the European Union is founded, annexed to the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, […] and the Czech Republic, the Republic of Estonia, […] concerning the accession of the Czech Republic, the Republic of Estonia, […] to the European Union [2003] OJ L236/33, art 6.

167 Text to n 54. Denunciation of the Kyoto Protocol is possible in accordance with article 27 thereof; see Kyoto Protocol, art 27.


169 ETS directive, article 2(1).

170 Text to n 175.

171 Annex II lists the following GHGs: carbon dioxide (CO$_2$), methane (CH$_4$), nitrous oxide (N$_2$O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulphur hexafluoride (SF$_6$); see ETS Directive, as amended, Annex II.
As of 2013, the ETS covers more than 11,000 installations, accounting for approximately 45% of the EU’s GHG emissions. With this magnitude, it deserves the title of being the largest ETS in the world.

C. Operation of the scheme

So far, the operation of the EU ETS can be divided into four phases, of which the last is being planned. Starting on 1 January 2005, the ETS entered its pilot phase, which lasted until 2008. The aim was to get the scheme into operation and to ‘learn by doing’. Such an exercise proved to be useful as it exposed certain weaknesses in the system. The main deficiency discovered was the way in which the system too easily allowed for overallocation of allowances. The MSs had to make National Allocation Plans (NAPs) in which they set the cap and decided on the distribution of allowances. These plans were subsequently submitted to the Commission for approval. It is suggested that industry lobbying and ‘grandfathering’ of over-estimated historical emissions caused overallocation by national governments. The abundance of allowances resulted in a significant drop of their market value. By the end of the first phase unit, prices reached an absolute low of €0.10. It is clear, however, that the pilot served to gain experience and not to achieve significant GHG emission reductions. Activities targeted in the first phase include a.o. electricity production, oil refining and the production of steel, glass, cement and paper. In this stage, the activities mentioned only concern the emission of carbon dioxide.

The second phase of the scheme ran for five years, from the beginning of 2008 until the end of 2012. Hence, the period neatly coincides with the first commitment period of the Kyoto Protocol. As opposed to the first phase, emission reductions are thus envisaged and required this time. Because

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179 Okinczyc, 166.

180 Deatherage, 53.


182 Deatherage, 53.
of the overallocation in the first phase, the Commission took a tougher stance when reviewing the NAPs for the second phase.\textsuperscript{183} The scope of application of the ETS remained unchanged during the second phase, except for one significant addition.\textsuperscript{184} As of 2012 both domestic as well as international aviation to and from the EU was included in the scheme.\textsuperscript{185}

The third phase, currently in operation, covers the period 2013 to 2020 and features the longest span yet. In response to the suboptimal experience in the first phase, two significant changes were introduced regarding the governance of the allocation system. First, decision-making on the allocation limit was centralised on EU-level and distribution rules were fully harmonised, while National Implementation Measures (NIMs) became the new NAPs.\textsuperscript{186} Hence, the Commission first sets a pan-EU cap after which the MSs derive their NIMs therefrom, based on harmonised rules.\textsuperscript{187} Free allocation of allowances is now based on benchmarking instead of ‘grandfathering’ so to discourage operators from increasing their historic emissions for a higher amount of future allocations.\textsuperscript{188} The total amount of allowances is gradually reduced by 1.74% each year so to achieve a reduction of emissions within the scope of the EU ETS of 21% by 2020 compared to the 2005 level.\textsuperscript{189} Secondly, auctioning, instead of free allocation of allowances, is to be the norm in this phase.\textsuperscript{190} Whereas only a maximum of 5% of allowances in the first phase and 10% in the second phase were auctioned,\textsuperscript{191} it will form the majority in the third phase to ultimately reach a total phase-out of free allocations in the fourth phase by 2027.\textsuperscript{192} Finally, the third phase also marks a significant expansion of the scope of the activities targeted by the ETS. Production of aluminium and various chemicals are now also included, not only regarding the emission of carbon dioxide, but also perfluorocarbons for the former and nitrous oxide for the latter.\textsuperscript{193} As such, the scope of Annex I was extended for the first time to other GHGs than carbon dioxide.

\begin{footnotesize}
\begin{enumerate}
\item Boasson & Wettestad, 63. \textsuperscript{183}
\item Except for the addition of aviation by Directive (EC) 2008/101, Annex I was only amended for the first time by Directive (EC) 2009/29, the provisions of which were to be applied from the beginning of the third phase in 2013; see Parliament and Council Directive (EC) 2009/29 of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] L140/63, Annex I. \textsuperscript{184}
\item Text to n 194. \textsuperscript{185}
\item ETS Directive, as amended, arts 9, 10a and 11. \textsuperscript{186}
\item Boasson & Wettestad, 64. \textsuperscript{187}
\item ETS Directive, as amended, art 10a. \textsuperscript{188}
\item Okinczyc, 169. \textsuperscript{189}
\item Boasson & Wettestad, 64; ETS Directive, as amended, art 10. \textsuperscript{190}
\item Poncelet, 246. \textsuperscript{191}
\item Okinczyc, 169; Deatherage, 54. \textsuperscript{192}
\item ETS Directive, as amended, Annex I. \textsuperscript{193}
\end{enumerate}
\end{footnotesize}
3. AVIATION WITHIN THE SCHEME

A. Scope of aviation

For determining the scope, article 3a of the amended ETS Directive\(^{194}\) refers to the list in Annex I. First, regarding the air transport activities included, the provision is rather unequivocal. ‘From 1 January 2012 all flights which arrive at or depart from an aerodrome situated in the territory of a [MS] to which the Treaty applies shall be included.’ Thus, aircraft engaged only in overflight fall outside the scope. The 2012 launch date constitutes a departure from the Commission’s proposal where domestic aviation would be included one year earlier than international aviation.\(^{195}\) It is also argued that not including either domestic or international aviation in the scheme could be liable to distort competition among aircraft operators depending upon their precise air transport activities.\(^{196}\) Hence, in principle all flights departing from or arriving in the Union are included in the scheme at the same moment. There are, however, categories of flights exempted from inclusion into the ETS, such as a.o. flights performed for Heads of State, military flights, loop flights, training flights, flights from small operators (*de minimis* arrangement), etc.\(^{197}\) Secondly, concerning aviation Annex I only targets the emission of carbon dioxide, disregarding other GHGs listed in Annex II. Emissions of the whole flight are taken into account, which will prove to be a contentious point in the third chapter.\(^{198}\) Finally, in relation to the geographical scope, it should be noted that the provisions on aviation in the EU ETS have been extended in 2011 to be applicable in all EEA countries, in time for its operational start from 2012.\(^{199}\) As such the scheme includes some 4,000 aircraft operators.\(^{200}\)

\(^{194}\) ETS Directive, as amended.


\(^{197}\) ETS Directive, as amended, Annex I.

\(^{198}\) See ETS Directive, as amended, Annex IV, part B.


\(^{200}\) Okinczyc, 170-171.
B. Operation for aviation

Because of its 2012 start date, the EU ETS for aviation was launched at the end of the second phase. Nonetheless a centralised EU-wide cap on the allocation of allowances to aircraft operators was already in place from the beginning. With the mean of the historical aviation emissions between 2004 and 2006 as a reference point, the cap was set for at 97% for 2012. This was subsequently lowered to 95% for the third phase.\textsuperscript{201} On the basis of benchmarks,\textsuperscript{202} the bulk of the allowances is freely allocated to aircraft operators, representing 82% of the total amount. Another 15% are auctioned, while a remaining 3% are set aside as a special reserve for new entrants in the market and fast growing aircraft operators.\textsuperscript{203}

As aircraft operators have to obtain sufficient allowances to cover their emissions,\textsuperscript{204} it is the question how the amount of emissions is monitored. It is clear from Annex IV to the Directive that monitoring of aviation emissions is only possible by way of calculation.\textsuperscript{205} This stands in contrast to emissions from stationary installations, which can be either calculated or measured.\textsuperscript{206} The formula to be used for calculation is composed of two elements: fuel consumption and an emissions factor. The former is subsequently multiplied with the latter in order to come at the amount of emissions.\textsuperscript{207} Finally, it is the aircraft operator who has the responsibility for holding sufficient allowances covering its total emissions within the scope of the scheme. The Union thus opted for a downstream approach. Indeed, targeting the fuel producers upstream could have resulted in higher fuel prices, thus more resembling a fuel tax for aircraft operators. On the other hand, the inclusion of engine and aircraft manufacturers midstream is argued to have little effect as aircraft have a long lifespan.\textsuperscript{208}

4. EVALUATION

It is a remarkable change in the EU’s policy to adopt a market-based instrument as one of the means to fulfil its commitments from the Kyoto Protocol. The ‘market’ element in the ETS, however, is not

\textsuperscript{201} ETS Directive, as amended, art 3c(1). See also Steppler & Klingmüller, 257.
\textsuperscript{202} ETS Directive, as amended, art 3e(3).
\textsuperscript{203} ETS Directive, as amended, arts 3d and 3f.
\textsuperscript{204} More precisely, aircraft operators have to ‘surrender’ as many allowances as needed to cover the reported emissions of the previous year; see Elmar M Giemulla and Heiko van Schyndel, ‘Aviation and the European Emissions Trading Scheme’ in Elmar M Giemulla and Ludwig Weber (eds), International and EU Aviation Law (Kluwer Law International 2011) 383.
\textsuperscript{205} See ETS Directive, as amended, Annex IV, part B.
\textsuperscript{206} See ETS Directive, as amended, Annex IV, part A.
\textsuperscript{207} See ETS Directive, as amended, Annex IV, part B.
fully implemented yet. While trading among operators can take place, most of the original allocation still occurs through free allocation. Full auctioning is only to be reached by 2027 during the fourth phase of the scheme. A welcome evolution has been the rectification of the mistakes from the first and the second phase. An allowance cap is now set at EU level instead of the national level, while allocation rules have been fully harmonised and rely on benchmarking instead of ‘grandfathering’. Hence, overallocation should not be possible anymore. The ‘learning by doing’ approach of the first phase has thus been fruitful.

However, the actual results of the scheme with regard to a reduction of GHG emissions from the activities within its scope would have been increasingly undermined without the inclusion of air transportation. From a competition as well as an environmental perspective it only seems natural that this covers both domestic intra-EEA aviation and international aviation to and from the EEA. First, not including international aviation would distort competition between EEA aircraft operators and those from third countries. After all, the latter would not face the costs of a domestic scheme. That is not to say that competitive distortions would be absent when international aviation is covered. Third country operators would only be subject to the scheme regarding their international flights. These are typically long-haul flights, which are regarded as more efficient to operate. EEA aircraft operators would still fall under the scheme for both domestic as well as international flights to or from the EEA. Moreover, such a scheme might lead to carbon leakage, resulting in the flagging out of EU airlines to a third country without such environmental rules. Secondly, while excluding domestic aviation from the ETS’ scope could alleviate this concern, it would annihilate the whole purpose of including air transportation into the scheme.

As the ICAO found the creation of its own ETS for international aviation GHGs to be ‘sufficiently unattractive’ to pursue any further, it endorsed the integration of international emissions into the parties’ existing ETSs. The Commission seems to have misinterpreted this resolution as an approval for unilateral measures. Indeed, after the Commission’s plans became public, the ICAO urged parties in 2007 to refrain from such measures and to obtain mutual agreement with other parties first. All EEA states, together with other European parties declared a reservation on this resolution. Indeed, one year later, the Union enacted legislation on the inclusion of domestic and international air transport into its ETS. After all, the EU did not seem to have many options. Either it introduced unilateral measures, or it negotiated with all parties having aircraft operators flying into the EU. The latter approach is far from ideal as it could result in a byzantine system, which might be liable to distort competition among aircraft operators depending on whether or not they fall under the scheme.

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209 Steppler & Klingmüller, 257-258.
211 See Abeyratne, 367-368.
By flying solo, the Union’s measures have given rise to a number of questions on the legality of the EU ETS *vis à vis* international law. A.o. these relate to financial and jurisdictional issues. One can wonder whether the ETS can be qualified as a tax on fuel or a charge solely due for entering or leaving the EU airspace. Moreover, it is left to be seen whether the scheme carries an extraterritorial application, viz. whether the ETS is applicable outside EEA territory. Finally, opponents to the inclusion of international aviation into the EU ETS argue that the Union is bound to act through the ICAO to tackle GHGs from aviation. These questions will be assessed in the third chapter.
In the third chapter, the spotlight turns to the question regarding the compatibility of the EU ETS with the rules of international law discussed in the first chapter. This discussion will be mainly centred around the ATA case law. Before assessing the compatibility, we will look at the conditions to invoke international law before the Court.

Subsequently, three contentious aspects will be focused on. First, the jurisdictional aspect is discussed, involving the alleged extraterritorial field of application of the ETS. Secondly, attention will go towards the question whether the scheme can be qualified as a tax. Finally, we will assess whether the EU should have regarded the ICAO as the exclusive forum for the inclusion of international aviation into an ETS.

As always and not without importance, the relevant context will be set out first. After dealing with the three above-mentioned aspects, the findings of this chapter will be subsequently evaluated at the end.
1. CONTEXT

Once the Union detailed its plans for the inclusion of international aviation into its ETS, opposition around the globe began to emerge. While the ICAO advised against unilateral measures, the International Air Transport Association (IATA) was quick to express its dissatisfaction with the Union’s plans in 2007, even portraying the EU as being ‘out-of-touch’ on emissions trading.\textsuperscript{212} In 2010, the Air Transport Association of America (ATA) and a number of US airlines challenged the validity of the directive including aviation into the EU ETS, through a preliminary procedure.\textsuperscript{213} Not surprisingly, IATA intervened in support of the applicants. The 2011 ruling of the Court in the ATA case, vetting the inclusion of international aviation into the scheme, sparked a worldwide controversy. The issue rapidly escalated on the political agenda of the international community, by which the centre of gravity of the opposition shifted from airlines to national governments.\textsuperscript{214}

The EU became increasingly isolated as some thirty countries formed a bloc against the Union’s scheme. In February 2012, this ‘coalition of the unwilling’\textsuperscript{215} convened in Moscow to discuss ways for putting pressure on the EU, including retaliatory measures.\textsuperscript{216} A trade war loomed. Indeed, within a month Chinese airlines decided to delay orders for Airbus planes worth nine billion euro.\textsuperscript{217} Tensions between the EU and third countries were so high that the latter even adopted legislation prohibiting their own airlines from complying with the EU scheme. While China had already done so shortly before the meeting in February,\textsuperscript{218} US president Obama signed a similar bill into law in November 2012.\textsuperscript{219} The aptly-named ‘EU ETS Prohibition Act’ gained bipartisan support as both Democrats and Republicans were in its favour.\textsuperscript{220} In this context, it has to be noted, however, that airlines did not have

\begin{itemize}
\item \textsuperscript{213}Case C-366/10 \textit{Air Transport Association of America a.o. v Secretary of State for Energy and Climate Change} [2011] ECR I-13755 (ATA).
\item \textsuperscript{214}Stephanie Koh, ‘The case against extending the EU Emissions Trading Scheme to international aviation’ (2012) 30 Singapore Law Review 125 (Koh), 127.
\item \textsuperscript{215}This ‘coalition’ includes a.o. China, India, the US and Russia.
\item \textsuperscript{216}Dave Keating, ‘Opponents of aviation emissions rules draw up retaliatory measures’ \textit{European Voice} (Brussels, 23 February 2012) 3.
\item \textsuperscript{217}Simon Taylor, ‘EU insists plans to include aviation in ETS will go ahead’ \textit{European Voice} (Brussels, 15 March 2012) 3.
\item \textsuperscript{218}Nikolaj Nielsen, ‘China confronts EU on aviation tax’ \textit{EUobserver} (Brussels, 6 February 2012) <euobserver.com> accessed 18 August 2014.
\item \textsuperscript{219}Brian Beary, ‘Obama Signs “EU Emissions Trading Prohibition” Measure’ \textit{The European Institute} (Washington, 29 November 2011) <europeaninstitute.org> accessed 18 August 2014.
\item \textsuperscript{220}Dave Keating, ‘Fight or Flight’ \textit{European Voice} (Brussels, 27 September 2012) 8.
\end{itemize}
to surrender any allowances till April 2013 at the latest. Aircraft operators only had monitoring duties during this period.\textsuperscript{221}

The Union was clearly fed up with the snail’s pace at which the ICAO was working towards plans for the reduction of GHG emissions from international aviation.\textsuperscript{222} Under building international pressure, the European Commissioner for Climate Action Hedegaard continued to reiterate the Commission’s stance on the matter, saying that the EU ETS would be made operative as planned. Only when the ICAO comes up with ‘an ambitious global agreement’ to reduce GHG emissions from international aviation, would the Union abstain from imposing unilateral measures.\textsuperscript{223} In view of the already mentioned US and Chinese legislation as well as the rapidly approaching deadlines for aircraft operators to surrender emission allowances, the Commission succumbed to the pressure in November 2012.\textsuperscript{224} It proposed a decision suspending the enforcement of the EU ETS with regard to international aviation, dubbed the ‘stop-the-clock decision’. Citing ‘significant progress’ made within the ICAO, the Commission argued that a one-year freeze of the scheme could allow for a global aviation cap-and-trade system to be devised and agreed at the ICAO summit in September 2013.\textsuperscript{225} The decision was ultimately adopted in April 2013 and entered into force the same month.\textsuperscript{226}

At the ICAO summit, the EU aimed to persuade the other parties of agreeing on a timetable by which a global agreement had to be reached as well as to obtain a recognition that it could enforce its ETS within its own airspace. In return, it offered to amend the scheme so that it would only be applied on international aviation for the extent that flights occur within the airspace of the EEA states. Although environmental organisations found this to be too great of a concession, the ICAO resolution on climate change went even further.\textsuperscript{227} On the one hand, ICAO provided for a timeframe asked for by the Union. In 2016 a global agreement should be reached with its implementation to be in effect from

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  \item \textsuperscript{222} Geert De Baere and Cedric Ryngaert, ‘The ECJ’s Judgment in Air Transport Association of America and the International Legal Context of the EU’s Climate Change Policy’ (2013) 18 European Foreign Affairs Review 369 (De Baere & Ryngaert), 390. See also Case C-366/10 Air Transport Association of America a.o. v Secretary of State for Energy and Climate Change [2011] ECR I-13755, Opinion of AG Kokott (ATA AG), para 186.
  \item \textsuperscript{223} Simon Taylor, ‘EU insists plans to include aviation in ETS will go ahead’ \textit{European Voice} (Brussels, 15 March 2012) 3.
  \item \textsuperscript{224} Dave Keating, ‘Sign of progress or retreat?’ \textit{European Voice} (Brussels, 15 November 2012) 9.
  \item \textsuperscript{226} Parliament and Council Decision (EU) 377/2013 of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community [2013] OJ L113/1. The decision did not, however, exempt international flights between the EU and Switzerland or Croatia, to the dismay of the Swiss government; see article 1 of the Decision included in this note; Cathy Buyck, ‘Switzerland Opposes Scope Of ETS Stop-The-Clock Proposal’ \textit{Aviation Week} (New York, 28 February 2013) <aviationweek.com> accessed 18 August 2014.
  \item \textsuperscript{227} Dave Keating, ‘EU offers retreat on aviation emissions’ \textit{European Voice} (Brussels, 5 September 2013) 2.
\end{itemize}
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2020.228 On the other hand, the resolution denies the Union’s right to apply its scheme to international aviation within its own airspace without the mutual agreement from third countries.229 However, consistent with its policy, the MSs, including all EEA countries, declared a reservation on that last statement.230

The Commission subsequently proposed to amend the ETS Directive to exclude those parts of international flights occurring outside EEA airspace until 2020. Legislative action had to be taken nevertheless, as the one-year suspension of the enforcement of the EU ETS to international aviation only targeted the emissions from the 2012 period. The Commission also proposed to review the situation if the ICAO would fail to come to a global agreement in 2016.231 The version of the amending regulation that was adopted, did not follow the Commission’s proposal. MSs and Members of European Parliament were heavily lobbied to support the full exclusion of international aviation from the scheme. Fearful of a trade war, MSs such as France, Germany and the UK stood by this idea.232 In April 2014, a compromise was found between the Council and the European Parliament, in which aviation to and from the EEA would be fully exempted, though only until 2017.233 Hence, for the time being, the EU ETS is only applied to domestic intra-EEA air transport, something which European regional airlines deem to be discriminatory.234

2. INVOKING INTERNATIONAL LAW

A. International agreements

In ATA, the applicants invoked before the Court a number of provisions laid down in the international agreements discussed in the first chapter. These were relied upon to challenge the validity of Directive 2008/101. In order for an individual to do so, the Court recalled the conditions to be fulfilled. First, the EU must be bound by the international agreements invoked. Second, the provisions in question must

228 ICAO (Resolution of the Assembly) ‘Resolutions adopted at the 38th session of the Assembly—Provisional edition’ (Montréal 24 September—4 October 2013) <icao.int> accessed 18 August 2014, resolution A38-18, paras 19(c) and 33(e).
229 ibid, para 16(a).
230 ibid, Summary listing of reservations to resolution A38-18.
232 Dave Keating, ‘Will MEPs bow to pressure on ETS’ European Voice (Brussels, 13 March 2014) 15.
234 ‘MEPs back aviation exclusion for ETS’ European Voice (Brussels, 10 April 2014) 5.
carry a direct effect. That is to say, the nature and broad logic of the agreements in which the provisions are contained may not preclude a validity assessment by the Court of EU law in their light. Moreover, as to their content, the provisions have to appear to be unconditional and sufficiently precise. By referring to its milestone Demirel case law, the Court recalls that this requirement is fulfilled where the provisions contain clear and precise obligations which are not subject to the adoption of any subsequent measure. It should be noted that the Court seems to assess the nature and broad logic of an agreement in relation to the possibility of a validity assessment of an EU act rather than the possibility of conferral of rights on individuals, as opposed to Advocate General Kokott in her Opinion. However, it is argued that no clear conclusion can be drawn from this as the Court’s line of case law is ‘essentially casuistic’ in this regard, together with the fact that it still follows its Intertanko approach.

As to the first condition, the issue has already been dealt with in the first chapter. It was found that the Union is bound by the OSA and the Kyoto Protocol, but not by the Chicago Convention. With regard to the second condition, we will start by assessing whether article 2(2) of the Kyoto Protocol has direct effect. The Court quickly came to the conclusion that the nature and broad logic of the Kyoto Protocol were not as such as to function as a benchmark for reviewing the validity of EU acts. The Protocol allows for too much flexibility in the implementation of the parties’ commitments, the Court found. Without further motivation, it also stated that article 2(2) could not be regarded as unconditional and sufficiently precise. Fortunately, the Advocate General sheds more light on the issue. On the nature and broad logic, she argued that the Kyoto Protocol governs relations between states, without directly affecting or even referring to individuals. Only ‘humankind’ in general is mentioned. This view can be debated. If the provision is to be interpreted as obliging the parties to work exclusively through the ICAO for the reduction of GHG emissions by aviation, then the concerned parties could indeed be directly affected in their legal status when the Union imposes on them unilateral measures in contravention of that same provision. After all, the article would then remove all doubt on whether it contains a precise obligation.

236 ATA, paras 52-55.
237 cf ATA AG, para 74.
238 De Baere & Ryngaert, 394-395.
239 ATA, paras 75-76.
240 ATA, para 77.
241 ATA AG, paras 80-84.
242 ATA AG, paras 86-87.
Moving on to the OSA, there is much less controversy. As the Court noted, individuals are specifically addressed by the provisions of that agreement. *In casu*, these involve airlines established in the territory of the parties.²⁴⁴ Hence, the nature and the broad logic of the OSA do allow for a conferral of rights on individuals. Thus, the OSA can serve as a benchmark for a validity examination of EU acts.²⁴⁵ The Court found that all articles invoked by the applicants fulfilled the *Demirel* criteria, more specifically article 7 on the respect of aircraft for the laws and regulations relating to the admission to or departure from a party’s territory and the navigation and operation of aircraft, article 11 regarding taxes and charges on fuel and article 15(3) on the observance of the environmental standards set out in the annexes to the Chicago Convention.²⁴⁶

**B. Customary international law**

Aside from relying upon the international agreements discussed in the first chapter, the applicants in *ATA* also invoked four alleged rules of customary international law. Three conditions need to be fulfilled in order for individuals to call into question the validity of an EU act on the basis of such rules. First, the rules must be a part of customary international law.²⁴⁷ This has been discussed in the first chapter. Three of the principles invoked were deemed to fulfil this criterion.²⁴⁸ Second, the rules must be capable of calling into question the competence of the Union to adopt the EU act that is challenged here. Third, the act must be liable to affect the individual’s EU rights or to create for him EU law obligations.²⁴⁹ However, the Court referred to its *Racke* case law by stating that a rule of customary international law does not have the same degree of precision as a provision of an international agreement. Hence, the Court limited the judicial review of the EU act to the question whether the institutions made manifest errors of assessment in applying the rules when adopting the EU act.²⁵⁰ Having laid down these conditions, the Court abruptly moved on to declaring which rules invoked by the applicants passed the test. All principles which it viewed as part of customary international law, were equally deemed capable of being relied upon by individuals within the context of this case.²⁵¹

In review, the Court developed a new test for assessing the ability of individuals to rely on rules of customary international law.²⁵² The Advocate General, though, suggested to employ the same condi-

²⁴⁴ *ATA*, paras 81-82.
²⁴⁵ *ATA*, para 84.
²⁴⁶ See *ATA*, paras 86-100.
²⁴⁷ *ATA*, para 102.
²⁴⁸ Text to n 127.
²⁴⁹ *ATA*, para 107.
²⁵⁰ *ATA*, para 110.
²⁵¹ *ATA*, para 111.
tions as for international agreements, essentially transposing the *Intertanko* case law on rules of customary international law.\textsuperscript{253} Immediately, she had to admit, however, that the rules, by their very nature and broad logic, are ‘by no means’ capable of having an effect on the legal status of individuals.\textsuperscript{254} As a result, the method applied by the Advocate General led to a strict outcome, which seems to bear parallels with the limited scope attributed by the Court to the *locus standi* requirements for challenging the validity of EU acts on the basis of article 267 TFEU.\textsuperscript{255} The Advocate General’s harsh outcome may be the reason why the Court decided to develop a new test.\textsuperscript{256} However, the Court is not much more lenient in its approach. After all, it requires ‘manifest errors of assessment’ to have occurred, which results in a marginal validity review of the EU act.\textsuperscript{257}

3. CONTENTIOUS POINTS

A. Jurisdictional aspect

When analysing the ‘vehement’\textsuperscript{258} international opposition against the EU ETS, arguably the most contentious point concerns the alleged extraterritorial scope of the Union’s jurisdiction with regard to the application of its scheme on international aviation. In *ATA*, the Court relied strongly on the territorial connection factor of the ETS, the aerodrome, in its review of the Directive 2008/101\textsuperscript{259} in light of the rules of customary international law. In this regard, it first observed that the EU ETS is not applicable to aircraft flying over third states or the high seas.\textsuperscript{260} However, the scheme has full application within EU territory. Indeed, aircraft situated on an aerodrome located in the territory of a MS is subject to the *unlimited jurisdiction* of the MS and of the EU.\textsuperscript{261} Thus, the operator of such aircraft is subject to the ETS.\textsuperscript{262} The Court further noted that it is only when the aircraft operator *chooses* to operate an air route flying into or departing from an EU aerodrome that he has to abide by the scheme.\textsuperscript{263} The fact that the operator has to surrender allowances calculated on the basis of the whole flight is only a re-

\begin{itemize}
  \item \textsuperscript{253} ibid, 1193.
  \item \textsuperscript{254} *ATA* AG, para 136.
  \item \textsuperscript{255} See Case C-50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677; Konstandinides, 1194.
  \item \textsuperscript{256} De Baere & Ryngaert, 397.
  \item \textsuperscript{257} De Baere & Ryngaert, 398.
  \item \textsuperscript{258} Pablo Mendes de Leon, ‘Enforcement of the EU ETS: The EU’s Convulsive Efforts to Export its Environmental Values’ (2012) 37 Air & Space Law 287 (Mendes de Leon), 292.
  \item \textsuperscript{260} *ATA*, para 119.
  \item \textsuperscript{261} Emphasis added.
  \item \textsuperscript{262} *ATA*, para 124.
  \item \textsuperscript{263} *ATA*, para 127, emphasis added.
\end{itemize}
quirement he has to respect in order to be permitted to conduct air transport activities within EU territory. Moreover, while referring to its Commune de Mesquer case law, the Court stated that the full applicability of the ETS within EU territory is not affected simply because the emissions taken into account by the scheme occur partly outside EU territory. Finding that the ETS does not assert sovereignty outside EU territory, the Court declared that the Union had competence to adopt Directive 2008/101 in light of the three rules of customary international law in consideration. For essentially the same reasons, it equally rejected the applicants’ assertion that the scheme contravened article 7 of the OSA.

In view of the highly contested nature of this part of the Court’s judgment, some points deserve further discussion. First, the Court is correct in pointing out that an aircraft operator is not obliged to fly into or depart from an EU airport. If it were not legally possible for an operator to choose its own air routes, one could have indeed argued that the EU ETS carried an extraterritorial application. It has been suggested that, economically speaking, it is not viable for aircraft operators to avoid serving EU airports. This should not be considered relevant, however. An argument based on such economic considerations cannot nullify the fact that an aircraft operator is still not legally obliged to serve airports located in the EU or the EEA for that matter.

Second, a lot of turmoil is caused by the fact that the emissions of the whole flight are taken into account by the scheme. By referring to Commune de Mesquer, the Court essentially relied on the effects doctrine as a justification. That case concerned the oil spill that resulted from the sinking of the oil tanker Erika in the French Exclusive Economic Zone. The municipality of Mesquer claimed satisfaction for the damage suffered by the spill on its shores. Relevant EU law was declared applicable regardless of the fact that the actual oil spill occurred outside EU territory. The effects thereof were directly noticeable on French territory. This is not the case, however, with regard to the facts in ATA. The link between emissions produced outside EU territory and climate change within that same territory seems rather tenuous.

Nevertheless, in view of the scientific evidence on climate change, one might be able to argue that extra-EU aviation emissions indeed have an effect on the EU’s climate and that stretching this notion is legitimate. Such a wider scope could be justified by both referring to the importance of environ-
mental protection within the international legal order as well as within the EU legal order. First, the UN General Assembly has regarded climate change to be a ‘common concern of mankind’. Second, the UNFCCC and the Kyoto Protocol aim for a stabilisation of GHG concentrations at the safe level, in the connection of which Annex I parties have committed themselves to taking the necessary policy measures in order to attain their quantified emission targets. Third, as the Court has stated in ATA, the EU policy on the environment seeks to ensure a high level of protection, which should be read in view of the international commitments entered into by the Union. However, this approach might still fail at the inability of establishing a clear causal link between aviation emissions from outside the Union and climate change inside the Union. Though, in the alternative, it is argued that the protection of the atmosphere as a ‘global public good’ could even justify an EU ETS performing universal jurisdiction.

Third, the Court could have taken another route in ATA. It could have made use of a similar logic as in its Kadi I case law, with regard to fundamental rights. There, the Court essentially stated that international law may not challenge a.o. the protection of fundamental rights within the EU legal order. Whether this concerns international law the Union is bound by or international agreements within the scope of article 351 TFEU does not seem to matter, as primacy of these rules would not extend to EU primary law. As such, the Court could have balanced the rules of international law relied upon in ATA as against the Charter right to a ‘high level of environmental protection and the improvement of the quality of the environment.’ After all, since the Treaty of Lisbon, the Charter of Fundamental rights is equally binding primary law, just as the TEU and the TFEU.

Fourth, whereas the EU ETS might not be regarded as having extraterritorial application, it does carry extraterritorial effects. Such legislation, however, fits within a certain ‘common state practice.’ While Advocate General Kokott highlights that the EU ETS does not provide for a concrete rule regarding the conduct of aircraft operators within airspace outside the Union, she noted that the scheme can have certain effects on the conduct of aircraft operators when flying outside EU territory.

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273 ATA, para 128.
274 See Mayer, 1130.
275 De Baere & Ryngaert, 401-402.
276 Mayer, 1136.
278 ibid, paras 306-308.
281 Mayer, 1129.
282 ATA AG, para 147.
comparison can be made with import rules in the field of international trade. As an example, EU phytosanitary rules can make the importation into the Union of citrus fruit from a third country dependent on certain conditions to be observed in the country of origin. Hence, while the rule itself is essentially territorial and only applied within the Union, it does carry extraterritorial effects.

Finally, it has to be noted that the Court of Justice is not the only venue for dispute settlement that could be used here. If other contracting parties are convinced that the EU ETS contravenes article 1 of the Chicago Convention or article 7 of the OSA, they could trigger the dispute settlement procedures provided for in these agreements against respectively the MSs with regard to the former and the Union and the MS with regard to the latter. This is a rare sight, however, as there have been only two such examples involving MSs. The most recent one concerns the 2000 dispute of the US against 15 MSs regarding the legality of the so-called EU ‘hushkit’ regulation. While it could be argued that the MSs can’t be held directly responsible for an EU act under the Chicago Convention, the EU ETS is based on a directive which henceforth requires transposition into national law for which the MSs can be held responsible.

**B. Financial aspect**

With regard to article 11 of the OSA, the question arose in ATA whether the EU ETS was to be considered as a tax, duty, fee or charge within the scope of that provision. If so, the scheme would be invalid in light of the OSA. First, the Court immediately noted that the EU ETS does not fall within the exception of article 11 concerning charges that are based on the cost of the service provided. Second, while the Court pointed out that the scheme uses fuel consumption for the calculation of the amount of emissions for which the aircraft operator has to surrender allowances, ‘there is no direct and inseparable link between the quantity of fuel held or consumed and the pecuniary burden on the aircraft’s operator in the context of the ETS’ operation.’ After all, the Court argued, the cost for the operator is based on a market-based mechanism, because of which the value of an allowance can fluctuate. As such, the system does not provide for fixed pricing. Finally, the Court noted that the ETS is not intended to generate revenue for the public authorities.

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283 See Kati Kulovesi, ‘“Make your own special song, even if nobody else sings along”: International aviation emissions and the EU Emissions Trading Scheme’ (2011) 2 Climate Law 535 (Kulovesi), 549.


287 *ATA*, para 136.

288 *ATA*, paras 141-142.

289 *ATA*, para 143.
One can wonder how firm these arguments of the Court are. When reading article 11(1) of the OSA, it is stated rather clearly that all levies, duties, taxes and similar charges and fees are prohibited, unless based on the cost of the services provided.\textsuperscript{290} As Mayer notes, this seems to imply a prohibition on all ‘charges [and fees] having equivalent effect’, akin to the Treaty provisions on the free movement of goods.\textsuperscript{291} Moreover, the Court’s requirement for a tax to consist of a fixed price seems to be an artificial limit. It is not immediately clear why a tax could not be variable in nature. According to the Court, a fluctuating market price breaks the link between the amount of fuel consumption and the cost thereof under the ETS. In the author’s opinion, this reasoning cannot be followed. At each moment in time allowances have a market value. The cost for the operator still depends upon the amount of fuel consumption. The connection in this regard is still direct, even if the amount of fuel consumption does not change. The only difference is the total cost in that case, depending upon the market value of an allowance at that moment in time.\textsuperscript{292} As an argument \textit{contra}, formulated by Advocate General Kokott, it is, however, puzzling to see why the ICAO can issue recommendations on ETSs when such a scheme is to be regarded as a prohibited tax within the meaning of article 15 of the Chicago Convention.\textsuperscript{293}

Article 11 of the OSA is essentially based on its sibling in the Chicago Convention, article 15.\textsuperscript{294} Both exempt charges based on the cost of the service provided from the prohibition laid down.\textsuperscript{295} One could wonder whether the cost of the ETS could not be qualified as the cost of a service provision, viz. the cost for compensating the environmental damage caused by aviation GHG emissions.\textsuperscript{296} Finally, it should be recalled that the parties to the Chicago Convention and the OSA have dispute settlement procedures at their disposal in case of disagreement on the interpretation and application of these instruments.

\textbf{C. Forum aspect}

The last aspect to be discussed revolves around the question whether the Union was obliged to work exclusively through the ICAO with regard to the reduction of GHG emissions from international aviation. Article 2(2) of the Kyoto Protocol could not be relied upon by the parties in \textit{ATA},\textsuperscript{297} but that does not mean the Union is not bound by it. Hence, it is still relevant to consider the issue within the context of the international legal order. Article 2(2) provides that the Annex I parties ‘shall’ pursue the

\begin{footnotesize}
\begin{enumerate}
\item Emphasis added.
\item Mayer, 1135.
\item See Havel & Mulligan, 31.
\item \textit{ATA AG}, 219.
\item Havel & Mulligan, 28.
\item Mayer, n 112.
\item Mayer, 1135.
\item Text to n 240.
\end{enumerate}
\end{footnotesize}
limitation or reduction of the emission of GHGs from aviation working through the ICAO. According to Advocate General Kokott there is no reference to any kind of exclusivity in the provision. Indeed, when comparing the text of the Kyoto Protocol in different languages, less stringent wording is used in the non-English versions. While parties to the Protocol committed themselves to the objective contained in article 2(2), it is argued that the provision’s negotiating history and subsequent practice do not seem to support the view that the ICAO concerns the exclusive forum for the issue in question. The inclusion of the provision is said to only ‘lessen the need for the climate regime to be proactive in the controversial policy issues surrounding allocation and control options.

However, as the Advocate General remarked, the inclusion of article 2(2) into the Protocol still marks a preference of the contracting parties towards a multilateral solution for the limitation or reduction of GHGs from aviation. In this connection, it has to be noted that compliance of the parties with their commitment in article 2(2) is subject to reviews by expert review teams and the Protocol’s mechanisms for oversight. Taken together, this does not mean that parties may not pursue the reduction of GHGs from aviation through other means, as long as they are equally committed to work through the ICAO at the same time. As such, the Union fulfils this interpretation. Even when devising its own tools, it kept working through the ICAO for the establishment of a global scheme for aviation. After all, the EU should be able to take the necessary measures for fulfilling its quantitative targets in the Kyoto Protocol. As Advocate General Kokott put it, ‘the EU institutions could not reasonably be required to give the ICAO bodies unlimited time in which to develop a multilateral solution.

4. EVALUATION

With the unilateral measure of the Union regarding the inclusion of international aviation into the EU ETS, the game between the international community and the Union was on, almost resembling a chicken game. Prohibition bills were passed and would-be trade wars fought for what is essentially a means of transport for the happy few. After all, international aviation is only used by a tiny party of the world population, consisting of mostly affluent consumers and businessmen. The whole international kerfuffle even led to a Court case challenging the validity of the EU’s ETS. The reason pre-
dominantly lies in the concerns about the alleged extraterritorial application of the scheme. If the international community were to tolerate this, it might have led to a slippery slope of unilateralism for a sector that is essentially regulated by a multilateral treaty surrounded by thousands of bilateral agreements.

It is apparent that the Court tried to isolate the EU ETS from the apparent horrors of less progressive international rules. Indeed, the global framework on international aviation has been developed first and seems to be deeper entrenched than the fairly recent instruments devised for the combat against climate change. Hence, the latter had to accommodate the existing international aviation structure. A prime example thereof is the fact that article 2(2) of the Kyoto Protocol prefers the ICAO as the body through which the GHG emissions from international aviation should be tackled. The conservatism of ICAO and the international community at large have thus made the Court hesitant to provide for too much of a forum in the fight against the inclusion of international aviation into the EU ETS. The Union’s avant-garde position regarding environmental protection was at stake. Indeed the Court confirmed the importance of the environment in the Union’s policies.

The Court’s criteria on the possibility for individuals to invoke international law before the Court have been an ideal way for shielding the autonomous EU legal order from the conservative excesses of the international jungle. Regarding international agreements, the Court retained the existing Intertanko approach, but for rules of customary international law it developed a new test. It leads to a more strict result, however, as the errors committed by the EU institutions in adopting an act of EU law must be manifest in view of the rules of customary international law invoked. Because of this marginal review, the threshold for success thus lays higher.

While the EU ETS may have extraterritorial effects, it simply cannot be contended that it features extraterritorial application. It is only applied in the EEA with the territorial connecting factor being physical presence of the aircraft on an EEA aerodrome. That the emissions are in part calculated on the basis of flight movement outside the EEA can only have certain extraterritorial effects. After all, aircraft operators remain free to serve the EEA air transport market. Moreover, the EU’s scheme is by far not the only legislation in the world carrying these effects. Import rules equally set requirement that have a farther effect than the harbour customs office. Certification requirements with regard to rules of origin and phytosanitary conditions are excellent examples in this regard.

More legal difficulty seems to surround the validity of the EU ETS in light of the prohibited charges within the scope of article 11 of the OSA. The arguments by Advocate-General Kokott on the non-qualification of the scheme as a charge seem rather artificial. In the author’s opinion a more modern approach should be adopted and the EU ETS should be henceforth regarded as a charge which constitutes the cost of a service provided. Finally, the ICAO is the preferred forum for dealing with

307 See Mayer, 1123.
308 De Baere & Ryngaert, 409.
aviation GHGs, but not the exclusive one. The organisation’s lethargic phase has taken long enough. An easy multilateral solution is unfortunately not at hand for the time being.
CONCLUSION

Attribution lays at the centre of the issue of reducing the GHG emissions from international aviation. When navigating over the high seas, these orphan emissions belong to nobody as well as everybody at the same time. No state has the responsibility for these GHGs, but they do affect the whole of mankind. GHG’s do not stop at the border of the territorial sea. Indeed, attribution to none leads to attribution to all in reality. Where emissions occur on a state’s territory, policy can be made, legal measures can be taken, for which the Kyoto Protocol can be mentioned as an example. Hence, global agreements should be devised to regulate the orphans of the emission world. Lacking such an instrument, the tragedy of the free and unregulated access to the atmosphere at the high seas will continue, with dire consequences to be ours. Climate change is not a thing of the future, it is already here.

The path to such a global agreement has been turbulent, to say the least. After a long lethargic phase, the ICAO suddenly awoke when it discovered that the EU was going to fly solo with regard to GHG emissions from international aviation. Its reaction was not to create positive vibes on this initiative or to be inspired by it for devising its own global agreement, but to hinder or at least cause a delay of the Union’s project as quickly as possible. The rest of the international community organised and united so as to put the EU ETS in quarantine. Some went even further and challenged the EU act itself on its validity before the Court. However, the latter isolated the progressive EU act from conservative action, both by a strict assessment of the international rules the Union is bound by as well as by the application of its case law on the ability for individuals to invoke international law.

It has become clear, however, that the EU ETS may not withstand the compatibility test with some rules of international law. More specifically, this relates to the prohibition of taxes and charges on fuel. It is argued that a more modern approach to the interpretation of that article may provide a way out. In the absence of a global agreement, the use of the fundamental right to a high level of environmental protection as a balancing factor against the challenges based on international law may provide for a more stable and all-encompassing method. After all, climate change is one of the most, if not the most important challenge of mankind this century. It is indeed a ‘common concern’ to us all.

Up to this day, the result of the Union’s initiative seems meagre. We only have the hope that ICAO will come to an agreement on GHG emissions from international aviation by or in 2016. One could argue that the Union seems to have gravely underestimated the allergic reaction that would break out in the international community with regard to the Union’s unilateral inclusion of international aviation into its scheme. As such, the Union’s ambitions have flown too high and have met reality deep below onto the ground. In the Greek mythology, hybris brought Icarus too close to the sun; the wax on his
wings melted and he plunged to the ground. The same could be posited for the Union’s politics. Had it started with the inclusion of international aviation for so far as emissions occur within EU territory, international opposition might have been far less heated. After all, legal challenges from third countries would have been less convincing as regards to their legal assertions. Instead, the ETS for international aviation flirted with hybris as well as possible illegality, and tumbled onto the ground. From a competitive and environmental viewpoint, it could have been difficult to argue for a partial inclusion of international aviation, while only domestic aviation would be fully targeted. The reality is, however, that the situation today is worse than the suggested approach here. Now, we can only wait for 2016 and hope for a *deus ex machina*.

Gent, August 2014
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