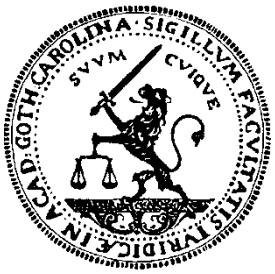


FACULTY OF LAW
Lund University

Karin Henrikz

# Critical Analysis of the EU Emissions Trading Scheme in light of the Case C-366/10 *ATA and Others*

Master thesis
30 credits

Olena Bokareva

International Law

2015 S

# Contents

# Summary

One of the most internationally criticized decisions made by the European Union was the extension of the EU emissions trading scheme (EU ETS) in 2008; so that it would also cover all aviation coming from and going to the EU. The emission trading would cover emissions discharged both outside and within the EU territory. The situation led to a legal battle before the Court of Justice of the European Union (CJEU) concerning the compatibility between EU Law and international law especially the Chicago Convention and the principle of sovereignty. The Court came to the conclusion that the inclusion of Aviation in the EU ETS did not breach international law. In practice the Court had, in their judgment, to choose between the consequences that greenhouse gas emissions have on the climate and the consequences that going against international agreements on international aviation law and trust from other contracting partners. The Court chooses the former and was met with strong opposition. This thesis is critical analysis of the EU ETS based on the questions put forward in the ruling of the CJEU in Case C-366/10 *ATA and Others*. An analysis of this case shows an interpretation in favor of the environment, but also demonstrates the difficulty with laws open for interpretation within a legal system, international law, where enforcing the law has proven so difficult.

# Sammanfattning

Ett av de mest internationellt kritiserade besluten som Europeiska unionen tagit var då de 2008 beslutade att inkludera alla flyg till och från EU i Europeiska unionens handel med utsläppsrätter (EU ETS). Med betydelsen att flygbolagen skulle bli tvungna att handla med utsläppsrätter inte bara gällande de utsläpp som skedde inom Europeiska unionens luftrum utan också utanför. Beslutet resulterade i att ett flertal flygbolag tog frågan till EU-domstolen där beslutet ifrågasattes speciellt utifrån de regler som finns i Chicagokonventionen och utifrån suveränitetsprincipen. Domstolen kom till slutsatsen att beslutet att inkludera flyget i utsläppshandeln inte stred mot internationell rätt, ett beslut som mött mycket starkt motstånd. För domstolen blev det i praktiken ett val mellan skyddet för miljön och den skada det kan innebära för internationell rätt och framtida samarbeten att uppfattas att inte följa avtal som undertecknas. Domstolen valde det förra och kritiken har inte väntat på sig. Syftet med denna uppsats är att kritiskt granska EUs beslut utifrån de frågor som ställs till EU-domstolen och utifrån EU-domstolens tolkningar i fall C-366/10. En genomgång av domen visar på tolkningsmöjligheter till fördel till miljön men också på svårigheterna med lagar öppna för tolkning inom ett system, den internationella rätten, där sanktionssystemen i praktiken är begränsade.

# Preface

I have always been fascinated by international law, the possibilities that come with it and the complicated politics that surrounds it. Another strong interest is environmental law. Therefore, when I read about all the politics and legal arguments surrounding the European Union's inclusion of Aviation in the EU ETS the choice of topic for my thesis was quite easy. Writing it in English was harder.

# Abbreviations

| | |
|---|---|
| ECAC | European Civil Aviation Conference |
| EEA | European Economic Area |
| EU ETS | The EU emissions trading scheme |
| ICAO | International Civil Aviation Organization |
| MBM | Market based measures |
| Small emitters | Aircraft operators emitting less than 25,000 tCO2 per year or operating fewer than 243 flights per period for three consecutive 4-month periods |
| EC | European Community, after 1993 the European Union |
| EU | European Union |
| UNFCCC | United Nations Framework Convention on Climate Change |
| Kyoto Protocol | International treaty that extends the UNFCCC |
| CJEU | Court of Justice of the European Union |
| TFEU | Treaty on the Functioning of the European Union |

# 1 Introduction

## 1.1 Introduction

It is now widely acknowledged that greenhouse gas emissions from human activities are one of the principal causes of climate change over the last century. Emissions trading have become the major instrument for regulating greenhouse gas emissions and to relieve the environmental damage caused by these emissions. Aviation is said to be one of the fastest growing sources of greenhouse gas emissions. In an attempt to reduce the emissions from the aviation sector the European Union decided in 2008 to extend the EU emissions trading scheme (EU ETS) so that it would also cover aviation. This implies that all airlines, passenger and cargo flights, must acquire and surrender allowances for the carbon emissions produced by their flights between EU airports and to the last leg of international flights between EU and non-EU airports. The latter has met strong opposition from international aviation organizations and non-EU countries, especially due to the number of legal questions it raises in different areas of international law. Examples of questions raised are the following: if states are permitted to regulate activities outside their territorial jurisdictions, and if the inclusion of aviation in the EU ETS is consistent with bilateral and multilateral agreements governing air transport, tariffs and trade?

Against this background, the aim of this thesis is to investigate, in light of international law, the legality of the European Union's decision to include aviation in the EU ETS based on the Court's interpretations in case C-366/10 *ATA and Others* and its legal and political implications. The legal analysis in the thesis will be restricted to international customary law and multilateral agreements, leaving out bilateral agreements such as the EU-US Open Skies Agreement.

## 1.2 Methodology and objectives

The present thesis addresses the question of the legality of the EU ETS based on the questions put forward in the ruling of the CJEU in Case C-366/10. The questions in the case are the following:

- EU by applying the EU ETS on flights between the EU and non-EU airports violates the principle of customary international law that each state has complete and exclusive sovereignty over its airspace;

- EU by applying the EU ETS on flights between the EU and non-EU airports violates the principle of customary international law that no state may validly purport to subject any part of the high seas to its sovereignty;

- EU by applying the EU ETS on flights between the EU and non-EU airports violates the principle of customary international law of freedom to flyover the high seas;

- EU by applying the EU ETS on flights between the EU and non-EU airports violates the principle of customary international law that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by international treaty;

- EU by applying the EU ETS on flights between the EU and non-EU airports violates the Chicago Convention (in particular Articles 1, 11, 12, 15 and 24), and finally,

- EU by applying the EU ETS on flights between the EU and non-EU airports violates the Kyoto Protocol (in particular, Article 2(2))?[1]

[1] Reference for preliminary ruling in Case C-366/10, question 1a-g.

In order to answer the questions described above a legal dogmatic method has been used. The primary sources are relevant international conventions and case law in relation to this legislation. Case law analysis plays an important role in understanding the legislation that affects the EU ETS since some of the provisions are vague and open to interpretation. In parts where the case law is limited, relevant scholarly writings are also used to interpret current legislation.

## 1.3 Structure

The thesis is organized into four chapters:

The first chapter gives an introduction to the subject of the thesis, the methodology used, the objectives and the structure of the thesis.

Chapter two provides a background to the questions raised and is divided into four sections. The first section provides the history and background of the EU ETS. The subsequent sections deal with the EU ETS in particular and the international opposition it has met. The fourth section describes, in short, the relationship between EU-law and international law, primarily focusing on those functions that directly affect the case on which this thesis is based.

The third chapter presents the legal aspects of the EU ETS. This chapter is divided into seven sections. The first section presents briefly the ruling of the CJEU in Case C-366/10 *ATA and Others*. The legal questions addressed in Case C-366/10 then forms the base for the following sections of the chapter where the relationship between the EU ETS and international law is examined. For educational reasons and because of the range of legal questions present in Case C-366/10 the different sections are concluded with shorter legal analyses and personal comments regarding that sections specific topic.

The fourth and the final chapter will summarize the findings of the thesis and on the basis of the findings provide a few comments.

# 2 EU'S EMISSIONS TRADING SCHEME

## 2.1 History and Background

The EU Emissions Trading Scheme (EU ETS), of which the EU's aviation scheme is a part, is a large-scale greenhouse gas emissions trading program. The scheme works as European Union's key tool for reducing industrial greenhouse gas emissions. The EU ETS is at present operating in all the EU countries and the three EEA-EFTA States such as Iceland, Liechtenstein and Norway covering about 45% of the EU's greenhouse gas emissions.[2]

The origin of the EU ETS dates back to 1992 and the signing of the United Nations Framework Convention on Climate Change (UNFCCC), a treaty aimed to, according to its second article, stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Following negotiations under the UNFCCC, the European Community (EC) and the initial 15 EU Member States signed the Kyoto Protocol in 1998, committing the EC and EU Member States to reduce emissions of greenhouse gases. To enable the EU to meet its Kyoto targets the EU-ETS was enacted.[3] The EU ETS first directive - Directive 2003/87/EC, entered into force on 13 October 2003 after being adopted unanimously by the Council of Ministers along with a large majority of Parliament.

In November 2008, the European Parliament and the Council adopted Directive 2008/10/EC, which amended Directive 2003/87/EC to include aviation in the EU ETS. This was a result of the increasing concern over the growing emissions from aviation. For example, in the United Kingdom, the country in Europe with the highest level of CO2 emissions from aviation according to UNFCCC National inventory on submissions, greenhouse gas

[2]European Comission Climate Action, 2013.
[3] Pohlmann, 2010, s. 336f.

emissions from aviation has more than doubled since 1990. Furthermore, whilst emissions from other sectors are predicted to decrease till 2050 emissions from aviation will increase contributing to, in the case of United Kingdom, 15% of the total UK emissions in 2020 and 29% in 2050.[4] The European Commissioner for Climate Action, Connie Hedegaard, expressed the following in a press release in March 2011:

> Emissions from aviation are growing faster than from any other sector, and all forecasts indicate they will continue to do so under business as usual conditions. Firm action is needed. [5]

The EU's decision to include aviation in the EU ETS, as will be further discussed under sections 2.2 and 2.3, met strong opposition from international aviation organizations and non-EU countries. This opposition resulting in the EU in 2012, as a "goodwill gesture", suspending EU ETS and aviation emissions for one year to allow time for agreement on a global framework for tackling aviation emissions to be reached by International Civil Aviation Organization (ICAO) in 2013. During the ICAO Assembly's 38th Session a resolution was adopted on October 4 in 2013 where ICAO's Member States agreed on developing and applying a single global market-based measure (MBM) to international aviation emissions. The measures will be presented and voted for by ICAO during their 39th Session in 2016 and implemented in 2020.[6] As a result the EU has decided, via Regulation (EU) No 421/2014 of the European Parliament and of the Council of 16 April 2014, to momentarily exempt flights to and from third countries to facilitate progress at the upcoming ICAO meeting.[7] The European Commission is of the opinion that a global approach to addressing the rapidly growing emissions from aviation would be the preferred way bearing in mind that aviation is of strong international character.[8]

[4]Elena Ares 2012.
[5]European Commission - IP/11/259 07/03/2011.
[6] ICAO A38-WP/430.
[7] Council Regulation No 421/2014.
[8] Commission Decision No 377/2013/EU.

## 2.2 EU's Emissions Trading Scheme

The EU ETS, regulated by Directive 2003/87/EC, works on the "cap and trade" principle. This implies that a cap or limit is set on the total amount of certain greenhouse gases that can be emitted by the factories, power plants, commercial airlines and other installations in the scheme. The cap is reduced over time so that total emissions fall.

Within the cap, companies receive or buy emission allowances that they can trade with one another as needed. Companies can also buy limited amounts of international credits from emission-saving projects around the world.

After each year the company must surrender a number of allowances equal to the total amount of emissions from the company that year, each allowance representing one ton of carbon dioxide. If not followed, fines are imposed according to article 16 of the Directive 2003/87/EG and the names of the operators and companies who are not in compliance will be publicized.

Potentially emissions trading have the capacity to cover many different economic sectors and greenhouse gases, but within EU ETS the sectors and greenhouse gases included have been limited to emissions which easily and with a high level of accuracy can be measured, reported and verified.[9] This means that the scheme today covers emissions of carbon dioxide (CO2) from power plants, a wide range of energy-intensive industry sectors and commercial airlines, nitrous oxide emissions from the production of certain acids and emissions of perfluorocarbons from aluminum production.[10] Participation in the EU ETS is mandatory for companies operating in these sectors, but in some sectors only plants above a certain size are included. Governments can exclude certain small installations from the scheme if fiscal or other measures are in place that will cut their emissions by an equivalent amount.

[9] European Commission, The EU Emissions Trading System, p. 3.
[10] See article 1 of Directive 2003/87/EG and its Annexes.

The EU ETS is divided into a number of phases or trading periods. The first period ran between 2005 and 2007, the second from 2008 to 2012 (coinciding with the Kyoto Protocol's first commitment period.) and the third period started 2013 and runs until 2020.

For commercial airlines, the scheme covers CO2 emissions from flights within and between the states participating in the EU ETS. International flights to and from non-ETS states are also covered, but as a "goodwill gesture" the European Commission has decided to defer the scheme's application to allow time for agreement on a global framework for tackling aviation emissions until autumn 2016. This is further discussed under section 2.1.

## 2.3 International Critique

There has been significant international opposition to the inclusion of aviation in the EU ETS. The opposition has come from within the ICAO as well as from individual countries and the airline industry.

In November 2011 the ICAO Council endorsed a working paper, presented by 26 ICAO Member States, which stated that the unilateral action by the EU and its Member States undermines the role of ICAO in addressing aviation emissions and they urged the EU and its Member States to refrain from including flights by non-EU carriers to/ from airports in the EU in its emissions trading scheme.[11]

The airline industry reacted strongly and opted for a litigation strategy, with the result that a consortium of US airlines, supported by the International Air Transport Association (IATA), and the National Airlines Council of Canada took the dispute directly to the Court of Justice of the European Union (CJEU). The Court dismissed the action brought by the airline industry holding that the EU ETS is consistent with international law. In the context of the failed litigation approach by the airline industry 23 states

[11] ICAO, Working Paper Subject No. 50, paragraph 3.3 and appendix A2 paragraph 6.

decided in February 2012 to adopt the Moscow Declaration denouncing the EU ETS. Threatening with different forms of retribution if not followed, including litigation under Article 84 of the Chicago Convention, the prohibition of domestic airlines and operators from participating in the EU ETS, mandating EU carriers to submit flight details and imposing additional charges on EU carriers and aircraft operators and reviewing air transport service agreements such as the Open Skies agreement.[12]

On an individual state level the including of aviation in the EU ETS provoked strong opposition, especially from China, Russia, India and the United States. Moreover, both India and China prohibit their national carriers from complying with the EU-ETS[13] and China blocked an order of A380 planes from Airbus worth almost US$4 billion.[14] The United States also threatened to take measures, warning the EU that if they follow the CJEU's decision in the *ATA* Case the United States would be compelled to take appropriate action.[15]

## 2.4 International Law and the European Union

To understand the relationship between international law, EU law and the decisions of the CJEU it is important to place the EU in a legal context.
The legislative systems within the EU are extremely complex which has been described by some scholars as incomprehensible.[16] Considering the complexity of the EU legislation and EU constitutional law and the limits of this thesis this section makes no attempt to fully describe the relation between international law and European law, it provides only a backdrop to

[12] Joint Declaration of the Moscow meeting on inclusion of international Civil aviation in the EU ETS, Attachment A paragraph 1-9.
[13] Kotoky, Anurag. India joins China in boycott of EU carbon scheme. Reuters. March 22, 2012.
[14] Leung, Alison and Yan, Fang. China-backed HK Airlines may dump A380 order. Reuters. March 1, 2012.
[15] Krukowska, Ewa. EU Tells Clinton It Won't Abandon Carbon Limits for Airlines. Bloomberg Business. January 17, 2012.
[16] Douglas-Scott 2002 p. 110.

the further sections. Therefore the focus is primarily on those functions that directly affect the case on which this thesis is based.

The EU is, in somewhat simplified terms, a federation of nation states. The EU's primary object is to regulate the relationship among its Member States, and has excelled in doing so. Compared to other international organizations the effectiveness of the EU's actions is far greater within the legal systems of the Member States than within any other organizations.[17] The power of the EU acts is also clearly stated by the CJEU in Case C-6/64 *Costa v. ENEL:*

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry of the force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.[18]

EU law is divided into primary legislation (treaties), secondary legislation (regulations, directives and decisions) and supplementary legislation (case law, international law and general principles of law).

It is the task of the Court of Justice of the European Union (CJEU) to determine the legality of the EU law. One of the actions that may be brought before the CJEU is the action of annulment of a EU act based on its legality. This possibility is regulated in the Treaty of the Functioning of the European Union (TFEU) and more specifically in Article 263 of the TFEU. There are, according to Article 263, several possible plaintiffs among them Member States, the European Parliament and individuals.

The CJEU is assisted by the office of the Advocate General whose task is to give an opinion of the case before the CJEU on how the Court should rule. The opinion is not binding, but strongly influential and followed by the

[17] Wouters, 2002, p. 6ff.
[18] Case C-6/64, p. 593.

CJEU in most cases.[19] The opinions are usually more detailed and easier to follow than the judgments of the CJEU. The opinions, when followed, form an important legal source.

The initial goal of the EU was to regulate the internal market but the EU has with time grown into one of the most important actors when it comes to questions concerning international law. One of the reasons is the EU's role as a major world power due to its nature as a Customs Union and international trade partner. The EU treaties do not explicitly contain rules about the status of international law within the EU law but the CJEU has developed extensive case law concerning international agreements and international customary law. In the case of the CJEU the court has for many years in practice used international customary law to interpret EU law in conformity with customary law[20] and in the *Poulsen* Case C-286/90*,* CJEU explicitly states that European Community must respect international law when exercising its powers.[21]

[19]Craig 2008 s. 70.
[20] Wouters, 2002, s. 6ff.
[21] Case C-286/90, para 9.

# 3 Legality of the EU Emissions Trading Scheme

## 3.1 *Air Transport Association V. SS for Energy and Climate Change C-366/10*

As already mentioned in the Introduction the question of the legality of the EU-ETS is, in this thesis, based on the questions addressed in the ruling of the CJEU C-366/10 *Air Transport Association v. SS for Energy and Climate Change*.

In Case C-366/10 several US and Canadian airlines and airline associations challenged the validity of Directive 2008/101/EC. From the airline industry perspective the Directive violates principles of customary international law and the provisions of the Chicago Convention, the Kyoto Protocol and the Open Skies Agreement. The main legal arguments for the airline industry are that the EU breaches obligations according to Article 2(2) of the Kyoto Protocol to the United Nations Framework Convention on climate Change (hereinafter ”Kyoto Protocol”) by not working through ICAO, that the EU breaches international customary law by applying EU ETS to ”parts of flights which take place outside the airspace of EU Member States”[22] and by imposing illegal charges to aircraft operators and thereby breaching Article 15 of the Chicago Convention. The CJEU found that the EU-ETS does not infringe principles of customary international law or any of the other obligations mentioned in the case.

Briefly, CJEU's interpretations will be discussed in depth in the following sections. The CJEU found that only the Open Skies Agreement and three principles of customary international law, namely sovereignty of the States over their airspace, the unlawfulness of claims of sovereignty over the high seas and freedom to fly over the high seas were applicable for the purpose of examining the validity of the Directive. The CJEU came to the

[22] Case C-366/10, , para 38.

conclusion that the EU was not bound by the Chicago Convention, since the EU is not a party to the convention. Concerning the obligations under the Kyoto Protocol the CJEU found that the Protocol is conditional and not sufficiently precise to be used.

Concerning the three principles of customary international law the CJEU considers that the EU was competent to adopt Directive 2008/101/EC because it only applies to flights arriving in or departing from the EU. It is first when the carrier arrives at an aerodrome situated within the EU that it becomes subject to the jurisdiction of that Member State and the EU. In other words the Directive, according to the CJEU, does not breach the principle of territoriality or the sovereignty which third States have over the airspace above their territory. A carrier flying over the high seas, are not, per se, a subject to the EU ETS and in that sense the EU ETS does not infringe the principle of freedom to fly over the high seas. That is to say that only the aircraft operator who has chosen to operate a commercial air route arriving at or departing from an aerodrome situated in the EU will be subject to the scheme.[23]

When it comes to the Open Skies Agreement the claim was that the Directive breaches the articles in the agreement that exempts fuel loads from taxes, duties, fees and charges and that prohibit measures limiting the volume of traffic and frequency of service. Something that was rejected by the CJEU on the basis that the EU ETS is a market-based measure and not a tax, duty, fee or charge imposed on the fuel load and that the EU ETS sets no limit on the emissions of the aircraft which arrive at or depart from an aerodrome in the EU, in other words the EU ETS does not, according to the CJEU, limit the frequency or regularity of the service as such.[24]

[23] Case C-366/10, para 127.
[24] Ibid, para 153.

## 3.2 EU ETS and the Chicago Convention

### 3.2.1 Background

Regarding the EU ETS and the Chicago Convention, the United Kingdom High Court of Justice referred the following questions to the CJEU in Case C-366/10:

- Is Chicago Convention (in particular Articles 1, 11, 12, 15 and 24) capable of being relied upon in this case to challenge the validity of Directive 2003/87/EC as amended by Directive 2008/101/EC so as to include aviation activities within the EU Emissions Trading Scheme?[25]

- Is the Amended Directive contravening Articles 1, 11 and/or 12 of the Chicago Convention if and insofar as it applies the Emissions Trading Scheme to those parts of flights (either generally or by aircraft registered in third countries) which take place outside the airspace of EU Member States?[26]

- Is the Amended Directive invalid insofar as it applies the Emissions Trading Scheme to aviation activities contravening Article 15 or 24 of the Chicago Convention?[27]

### 3.2.2 The Chicago Convention

The Chicago Convention on International Civil Aviation from 1944 forms the basis of aviation law and is also the reason for the formation of the International Civil Aviation Organization (ICAO), a UN agency with currently191 Member States, including all EU Member States. In Case C-

[25] Application Case C-366/10, question 1e.
[26] Ibid, question 3a.
[27] Ibid, questions 4b and c.

366/10 five articles of the Chicago Convention are of special interest when it comes to the inclusion of aviation in the EU ETS and these are articles 1, 11, 12, 15 and 24.

*Article 1 of the Chicago Convention, Sovereignty*

Article 1 of the Chicago Convention is the codification of international customary law principle of sovereignty and states that the contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

*Article 11 of the Chicago Convention, Applicability of air regulations*

Article 11 of the Chicago Convention is a non-discrimination clause, requiring that all aircraft be awarded the same regulatory treatment regardless of whether they are domestic or foreign.

*Article 12 of the Chicago Convention, Rules of the air*

Article 12 of the Chicago Convention requests that Member States should ensure that airline operators respect national rules and regulations and that each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent. Article 12 also states, somewhat contradictory, that over the high seas, where it is recognized that no state has sovereignty, the rules established under the Chicago Convention should be in force.

*Articles 15 and 24 of the Chicago Convention*

Both article 15 and 24 of the Chicago Convention concerns restrictions on charges and customs duties.

### 3.2.3 The Opinion of the Advocate General

The Advocate General finds that the EU is not bound by the Chicago Convention and the Convention can therefore not be relied upon as a

benchmark against which the validity of acts of EU institutions can be reviewed.

To come to the above conclusion the Advocate General looks at two conditions proposed by the claimants that would make the EU bound by the convention without being a Contracting Party. These are:

- that the European Union is substantively bound by the Chicago Convention based on Article 351 of the TFEU, and
- that the European Union is substantively bound by the Chicago Convention based on the theory of functional succession.

Article 351 of the TFEU stipulates that the EU cannot impose regulations that restrain Member States from fulfilling obligations originating from agreements prior to the existence of the European Union. Taking into account the pacta sunt servanda principle of international law. The Advocate General dismisses that Article 351 of the TFEU would have the implied effect, instead arguing that Article 351 of the TFEU is intended to stop the EU from preventing individual Member States from fulfilling obligation made prior to the formation of the EU. However, according to the Advocate General, the EU institutions duty not to impede the Member States obligations does not mean that the EU itself has entered into any international law commitments towards third states.[28]

The claimants opposed to the above interpretation by the Advocate General based on the functional succession principle, referring to the joined Cases 21/72 to 24/72 *International Fruit Company and others where* the CJEU ruled that:

> …in so far as the then European Economic Community had under the EEC Treaty assumed the powers previously exercised by Member States in the area governed by the 1947

[28] Opinion of AG Kokott, Case C-366/10, para 57.

> General Agreement on Tariffs and Trade (GATT), the provisions of that agreement had the effect of binding the Community even without it formally becoming a Party to that agreement.[29]

The Advocate General dismisses the relevance of this ruling arguing that the EU Members have not delegated to the EU all of the powers in the air transport sector. The Advocate General gives the example of air transport agreements that until recently has been mixed agreements to which both the EU and its Member States have been contracting parties.[30] The Advocate General further argues that the EU has not formally taken place in the ICAO as it did in the GATT.[31] The Advocate Generals arguments is, in this part, based on the *Intertanko* Case - C-308/06 where the CJEU limited the functional succession principle that was identified in the *International Fruit Company case* by allowing for succession into Member States obligations only in case of "a full transfer of the powers previously exercised by the Member States to the Community". [32] A limitation that has met strong criticism due to the fact that it in practice rule out succession into international obligations of the Member States.[33]

Even though the Advocate General come to the conclusion that the EU is not bound by the Chicago Convention the Advocate General still stresses that since all the Member States of the European Union are Parties to the Chicago Convention the convention therefore must be taken into account when interpreting the provisions of secondary EU law.[34] However, even then, the Advocate General does not find that the inclusion of aviation in the EU ETS is in conflict with the obligations under the Chicago Convention.

*Article 1 of the Chicago Convention, Sovereignty*

[29] Ibid, para 61.
[30] Ibid, para 63.
[31] Ibid, para 64.
[32] Case C-308/06, para 49
[33] Eeckhout 2011, p. 400
[34] Opinion of AG Kokott, Case C-366/10, para 163.

The principle of Air Sovereignty in Article 1 of the Chicago Convention was addressed by the Advocate General, after coming to the conclusion that the EU is not bound by the Chicago Convention, in the Advocate General's discussion of jurisdictional implications of customary international law. The view of the Advocate General concerning this principle will therefore be discussed further under section 3.4.3.

*Article 11 of the Chicago Convention, Applicability of air regulations*

The Advocate General dismisses the claim that Article 11 of the Chicago Convention would be in conflict with the inclusion of Aviation in the EU ETS. The Advocate General argues that as an anti-discrimination clause the only substantive requirement laid down by Article 11is that laws and regulations of Contracting States cannot be discriminatory on the grounds of nationality. The EU ETS includes all airlines, no matter nationality, and therefore it does not violate the prohibition of discrimination. The Advocate General states:

> The only substantive requirement laid down by Article 11 of the Chicago Convention in relation to the laws and regulations of Contracting States concerning the admission, departure and operation of aircraft is the prohibition of discrimination against aircraft on grounds of their nationality: the laws and regulations concerned are to 'be applied to the aircraft of all contracting States without distinction as to nationality'. None of the parties involved in the present case has cast any doubt on the fact that the EU emissions trading scheme satisfies that requirement.[35]

*Article 12 of the Chicago Convention, Rules of the air*

The Advocate General dismisses that there are any such rules to be found in the Directive that is forbidden according to Article 12 of the Chicago Convention. The Advocate General argues that the EU emissions trading

[35] Ibid, para 167.

scheme does not require airlines to adhere to any particular flight paths, specific speed limits, or limits on fuel consumption.[36]

*Articles 15 and 24 of the Chicago Convention*

Articles 15 and 24 of the Chicago Convention were partly addressed by the Advocate General under questions concerning The Open Skies Agreement. This due to the referral in Article 3(4) of the Open Skies Agreement to Article 15 of the Chicago Convention and the correspondence between Article 11(2)(c) of the Open Skies Agreement and Article 24(a) of the Chicago Convention.

Article 15 of the Chicago Convention states that no fees, dues or other charges are to be imposed by any Contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a Contracting State or persons or property thereon. The Advocate General dismisses that EU emissions trading scheme would introduce such fees on entry or exit that would be in conflict with Article 15 of the Chicago Convention.

The Advocate General argues that the prohibition in Article 15 cannot be read in isolation from the overall context. It is apparent that the overall aim of the provision is to:

> …afford all aircraft access to airports in Contracting States which are open to public use 'under uniform conditions' irrespective of their nationality.[37]

The meaning of Article 15 is that -

> …charges for the use of airports and air navigation facilities by the aircraft of other Contracting States are not to be higher than those that would be paid by national aircraft.[38]

[36] Ibid, para 169.
[37] Ibid, para 211.

Advocate General further states that-

> Article 15 is construed as a whole as the mere expression of a prohibition of discrimination on grounds of nationality, there can be no reservations with regard to the compatibility with that provision of the EU emissions trading scheme, because that scheme applies in the same way to all aircraft irrespective of their nationality.[39]

The Advocate General examines the compatibility of Article 24 of the Chicago Convention and the Directive together with the corresponding Article 11 (2) (c) of the Open Skies Agreement. Both articles provide that fuel on board an aircraft is to be exempt from customs duties or similar duties and charges. The Advocate General then dismisses that there would be any conflict between prohibition of charging customs and excise duties on fuel for aircraft engaged in international air transportation and the inclusion of aviation in the EU ETS. Arguing that EU ETS cannot be considered a tax or a charge due to the fact that the EU ETS objective is environmental and climate protection and it is not related to the import and export of goods to which taxes and charges aim. The emission allowances that have to be surrendered in respect of flights that take off from or land at aerodromes within the EU are levied in respect of the emission of greenhouse gases, not fuel consumption.[40] The Advocate General further argues that the substance of the provisions in Article 24(a) of the Chicago Convention relate to the quantity of fuel on board an aircraft or supplied to such aircraft while the EU ETS is based on the quantity of fuel actually used by the aircraft during a specific flight.[41]

---

[38] Ibid.
[39] Ibid, para 212.
[40] Ibid, para 229.
[42] Case C-366/10, para 71.

### 3.2.4 The CJEU Judgment

In their ruling the CJEU followed the reasoning of Advocate General, only making a few concessions, which did not affect the overall judgment. In conformity with the Advocate General CJEU states that while all EU Member States are contracting parties to the convention, the EU is not. In line with the Advocate General, the CJEU concludes that Article 351 TFEU, described in further detail under section 3.3.3, does not bind the EU to the Chicago Convention due to the fact that EU does not have exclusive competence. The CJEU states:

> … it must be concluded that, since the powers previously exercised by the Member States in the field of application of the Chicago Convention have not to date been assumed in their entirety by the European Union, the latter is not bound by that convention.[42]

Unlike the Advocate General the CJEU does take into consideration or mention that the Chicago Convention should/could be taken into account when interpreting the provisions of secondary EU law based on the fact that all Member States are parties to the convention.

### 3.2.5 Legal Analysis and Comments

*Pacta sunt servanda* or "agreements must be kept" is the most basic principle of international law that can only be challenged by the peremptory norms. When it comes to the field of aviation the Chicago Convention is, as earlier mentioned, the basis of international aviation law and has been signed by all of the EU's Member States. Therefore, it is not surprising that the dismissal of the Chicago Convention by the CJEU has met with strong opposition. Because what the court actually is saying is that countries can escape their obligations under international conventions by forming a body acting on those countries behalf. Had the Member States themselves

[42] Case C-366/10, para 71.

introduced emissions trading they would have had to do so in conformity with the ICAO and the Chicago Convention, but now since the EU does not have the competence in the entire field of air transport, it is possible for the Member States to escape their obligations. Does this mean that the whole Chicago Convention could fall as long as one competence within the convention is still decided by the Member states themselves? And if the ICAO does not bind the EU is then the ICAO not bound or affected by the interpretations of the Chicago Convention by the CJEU? After all the Advocate General comes to the conclusion that even if the Chicago Convention bound the EU the inclusion of aviation in the EU ETS would be legitimate. Disputes concerning the Chicago Convention could, for example, also be brought before the Council of ICAO, even though the CJEU have stated that CJEU alone has the competence to determine if a EU act is invalid,[43] and what would their interpretation be? In this part the decision seem to raise more questions than it answers and only time will tell how this will affect future relations within aviation.

## 3.3 EU ETS and International Customary Law

### 3.3.1 Background

Based on the claims by the consortium of US airlines, the International Air Transport Association (IATA), and the National Airlines Council of Canada, the United Kingdom High Court of Justice Queen's Bench Division referred the following questions, regarding international customary law, to the CJEU in Case C-366/10:

- If the principle of customary international law that each state has complete and exclusive sovereignty over its airspace can be relied upon in this case to challenge the validity of Directive 2003/87/EC as amended by Directive 2008/101/EC?[44]

[43] Case C-366/10, para 48.
[44] Application Case C-366/10, question 1a.

- If the principle of customary international law that no state may validly purport to subject any part of the high seas to its sovereignty can be relied upon in this case to challenge the validity of Directive 2003/87/EC as amended by Directive 2008/101/EC?[45]

- If the principle of customary international law of freedom to fly over the high seas can be relied upon in this case to challenge the validity of Directive 2003/87/EC as amended by Directive 2008/101/EC?[46]

- If the principle of customary international law that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by international treaty can be relied upon in this case to challenge the validity of Directive 2003/87/EC as amended by Directive 2008/101/EC?[47]

If the customary international law principles were seen as applicable by the CJEU the Court further asked if the amended Directive is invalid, if and insofar as it applies the Emissions Trading Scheme to those parts of flights (either generally or by aircraft registered in third countries) which take place outside the airspace of EU Member States, as contravening one or more of the principles of customary international law asserted earlier by the Court?[48]

### 3.3.2 The Principle of Air Sovereignty and the Principle of Freedom of the High Seas

One of the most criticized aspects of the inclusion of aviation in the EU ETS is the possible breach of the principle of sovereignty. A principle that declares that each state has complete and exclusive sovereignty over its airspace and that derives from the international customary law principle of

[45] Ibid., question 1b.
[46] Ibid., question 1c.
[47] Ibid., question 1d.
[48] Reference for preliminary ruling in Case C-366/10, question 2.

States sovereignty over their territories. This principle was first constituted in 1919 in Article 1 of the Paris Convention and is now codified in Article 1 of the Chicago Convention. The principle is generally viewed as one of the most important principles of international law and recognizes that every State has complete and exclusive authority over their territory.[49]

Areas in the absence of any State's sovereignty for example the high seas (i.e. waters outside the national jurisdiction) are regulated by the principle of freedom of the high seas. A principle that refers to the right of every State to navigate, fish, lay cables etc. in the high seas. The principle also extends to the air space, which legally assimilates to the legal status of the areas underneath. The principle is today codified in, for example, the United Nations Convention on the Law of the Sea under Article 87 (1), where the right to fly freely over the high seas also is clearly stated.

### 3.3.3 The Opinion of the Advocate General

As described in chapter 3.3 the Advocate General came to the conclusion that the Chicago Convention did not bind the European Union, not being a Contracting Party to the Chicago Convention. The principle of air sovereignty is codified in Article 1 of the Chicago Convention, but this in itself does not mean that the European Union is not bound by the customary international law principle of sovereignty of states even though the European Union is not a Contracting Party to the Chicago Convention. This being based on the principle that customary international law exists parallel to the international agreements in which the customary international principles are codified.[50] Based on this the Advocate General came to the conclusion that principle of air sovereignty can be relied upon to challenge the validity of Directive. Leading to the second question if the inclusion of

[49] See for example ICJ *Nicaragua v. United States of America,* Jurisdiction and Admissibility, [1984] ICJ REP. 392.

[50] Ibid..

Aviation in the EU ETS violates the principle of air sovereignty and freedom of the high seas.[51]

To answer the question if the inclusion of Aviation in the EU ETS violates the principle of air sovereignty and freedom of the high seas the Advocate General examines the effects of the directive in three steps.[52] In this section these three steps will be examined based on the following three questions: Is the inclusion of Aviation in the EU ETS an extraterritorial measure? Is there an adequate territorial link? Is there an adverse effect on the sovereignty of third countries?

*Is the inclusion of Aviation in the EU ETS an extraterritorial measure?*

The Advocate General dismisses the claim that the inclusion of aviation in the EU ETS is an extraterritorial measure. Even if the calculation of emission allowances to be surrendered is based on the whole flight, the Advocate General argues, it cannot be seen as a breach of the principle of air sovereignty because the Directive is concerned solely with aircraft arrivals at and departures from aerodromes in the EU. Even if, as Advocate General continues, the inclusion of aviation in the EU ETS might indirectly give airlines an incentive to conduct themselves in a particular manner when flying over the territory of third countries, in particular to consume as little fuel as possible and expel as few greenhouse gases as possible there is no concrete rule regarding the airlines conduct within airspace outside the EU.[53] The Advocate General states:

> The fact that the calculation of emission allowances to be surrendered is based on the whole flight in each case does not bestow upon Directive 2008/101 any extraterritorial effect. Admittedly, it is undoubtedly true that, to some extent, account is thus taken of events that take place over the high seas or on the territory of third countries. This might indirectly give

[51] Opinion of AG Kokott, Case C-366/10, para 118-119 and para 142.
[52] Opinion of AG Kokott, Case C-366/10, para 145-159.
[53] Ibid, para 145-148.

> airlines an incentive to conduct themselves in a particular way when flying over the high seas or on the territory of third countries, in particular to consume as little fuel as possible and expel as few greenhouse gases as possible. However, there is no concrete rule regarding their conduct within airspace outside the European Union.[54]

From the perspective of the Advocate General a concrete rule would have been, for example, the obligation on airlines to fly their aircraft on certain routes, to observe specific speed limits or to comply with certain limits on fuel consumption, neither of which is the case concerning the inclusion of aviation in the EU ETS.

The Advocate General then draws a comparison between Aviation in the EU ETS and the principle of worldwide income tax that applies under the income tax laws in many countries and different antitrust laws. The Advocate General writes:

> Under antitrust law as well as in merger control it is normal worldwide practice for competition authorities to take action against agreements between undertakings even if those agreements have been concluded outside the territorial scope of their jurisdiction and may perhaps even have a substantial effect outside that scope of jurisdiction.[55]

*Is there an adequate territorial link?*

After coming to the conclusion that the inclusion of aviation in the EU ETS has no extraterritorial effects the Advocate General argues that there is an adequate territorial link between emissions over the high seas and third countries and the EU and therefore the EU has jurisdiction over the whole flight if the plane comes to or leaves an airport within the EU. The Advocate

[54] Ibid, para 147.
[55] Ibid, para 148.

General argues that the EU may require all operators that provide services within its territory to submit to the standards set by EU-law. In accordance with this the EU can require airlines to submit to EU-law, in this case the EU ETS, whenever a plane takes off from or land at an aerodrome within the EU.[56] If the place of departure or destination is within the EU, there will be, argues the Advocate General, an adequate territorial link for the flight in question to be included in the EU emissions trading scheme.[57] The Advocate General continues that because of the effects that emissions from aviation have on the EU territory the Aviation Directive is consistent with the territoriality principle. Further arguing that taking the whole length of the flight into account is an expression of the principle of proportionality and reflects the 'polluter pays' principle of environmental law.[58] Here referring to the environmental policy principle, which requires that the expenses of pollution be covered by those who cause it. The Advocate General States:

> It is well known that air pollution knows no boundaries and that greenhouse gases contribute towards climate change worldwide irrespective of where they are emitted; they can have effects on the environment and climate in every State and association of States, including the European Union.[59]

A parallel is then drawn by the Advocate General between Aviation in the EU ETS and established practice formed by CJEU that it is permissible for the EU to confiscate fish caught in the high seas from a vessel sailing under the flag of a third country whilst at a port within the EU. The Advocate general writes:

> A comparison with the aforementioned fisheries case is also worthwhile in this context. If it is permissible under the

[56] Ibid, para 151.
[57] ibid, para 152.
[58] ibid, para 153.
[59] ibid, para 154.

> territoriality principle for fish caught outside the European Union to be confiscated from a vessel sailing under the flag of a third country whilst at a port within the European Union, there cannot be any prohibition against exhaust gases from an aircraft emitted outside the airspace of the European Union being taken into account on its departure from or arrival at an aerodrome within the European Union for the purposes of calculating the emission allowances to be surrendered.[60]

The Advocate General is here referring to the *Poulsen* Case C-286/90 where a vessel flying the Panamanian flag had caught large amounts of salmon on the high seas. Due to problems with the engine and adverse weather conditions the vessel had to head for a Danish port. Criminal charges were then brought against the owner of the ship, a company under Panamanian law, for having salmon on board in breach of community regulation concerning the right to fish in certain areas of the high seas. CJEU came to the conclusion that EU legislation concerning fish caught outside the jurisdiction of the EU may not be applied to vessels on the high seas registered in a non-member country.[61]The court also held that the provisions could not be applied to a vessel sailing or on passage through the Exclusive Economic Zone of a Member State or crossing the territorial waters of a Member State in so far as the vessel is exercising the right of innocent passage and freedom of navigation in those areas. But that the community legislation can be applied to a vessel in the inland waters or in a port of a member state where the vessel generally, according to the CJEU, is subject to the unlimited jurisdiction of the Member State.[62]

*Is there an adverse effect on the sovereignty of third countries?*

The Advocate General argues that the inclusion of Aviation in the EU ETS has no adverse effect on the sovereignty of third countries, defining

[60] Ibid, para 155.
[61]Case C 286/90, para 22.
[62] Ibid, para 23-29.

sovereignty as the right of third countries to make decisions. The Advocate General States:

> Contrary to the view taken by the claimants in the main proceedings and the associations supporting them, Directive 2008/101 does not, either in law or in fact, preclude third countries from bringing into effect or applying their own emissions trading schemes for aviation activities.[63]

The Advocate General then notes the risk of double regulation, for example the risk of one and the same route being taken into account twice under the emissions trading schemes of two different States were both, like the EU ETS, take account of the whole flight.[64] The Advocate General finds this risk unproblematic though as there is no prohibition against double regulations within international customary law and makes a comparison with double taxation that is regularly present.[65] The Advocate General further argues that the risk of double inclusion of a single flight in two different emissions trading schemes can easiest be solved by unilateral measures or by agreement between the States and international organizations concerned.[66]

### 3.3.4The CJEU Judgment

The CJEU shared the Advocate General's opinion that customary international law principles can be relied upon to challenge the validity of the Directive. CJEU then, in line with the Advocate General, found that the inclusion of Aviation in the EU ETS is not an extraterritorial measure, that there is an adequate territorial link and that there is no adverse effect on the sovereignty of third countries.[67]

---

[63]Opinion of AG Kokott, Case C-366/10, para 156.
[64] Ibid, para 157.
[65] Ibid, para 158.
[66] Ibid, para 159.
[67] Case C-366/10, para 123-129.

### 3.3.5 Legal Analysis and Comments

The principle of sovereignty is a founding pillar of international law. The possible breach of this principle is, as earlier described, the most criticized aspects of the inclusion of aviation in the EU ETS. There are limits to state sovereignty and legislation with extraterritorial effects is not uncommon within international law. Take for example the *Poulsen* case, earlier described under section 3.4.3, that claims that fishing techniques and quotas for fishing must be respected no matter under which flag the vessel flies if the vessel plans to sell its catch in certain countries, or criminal law where States regularly apply domestic criminal law on certain crimes committed by nationals abroad. Another example of legislation with extraterritorial effect that has been in focus lately, but that has not met the same resistance from third countries as the inclusion of aviation in the EU ETS, is the Schengen Convention that requires action outside the Schengen area by demanding that carriers

> take all the necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry into the territories of the Contracting Parties.[68]

Extraterritorial legislation not per se being illegal forces the Advocate General to frame the extraterritorial effects more precisely by examining the legislation based on the three following requirements, is the inclusion an extraterritorial measure? Is there an adequate territorial link? Is there an adverse effect on the sovereignty of third countries?

Regarding the first requirement, if the inclusion is an extraterritorial measure, the Advocate General claims that there is no concrete rule regarding the conduct of third countries in their airspace or over the high seas and therefore dismisses the claim that the inclusion of aviation in the EU ETS is an extraterritorial provision. It can here be questioned if

[68] Art. 26 of O.J. 2000, L. 239/19.

regulations concerning emissions allowances are not to be seen as concrete rules? Generally the Advocate General and the CJEU seem to, in this part, try to fit the EU ETS within the context of international law, not fully succeeding, because after all, and as described by the Advocate General, it is undoubtedly true that account is taken of events that take place over the high seas or on the territory of third countries. This might indirectly give airlines an incentive to conduct themselves in a particular way when flying over the high seas or on the territory of third countries, in particular to consume as little fuel as possible and expel as few greenhouse gases as possible.[69] The use of the term indirectly is probably intentional but feels strange when the whole purpose of the inclusion of aviation in the EU ETS is aiming to reduce greenhouse gas emissions.

I largely agree with the argument brought forward by the Advocate General and CJEU that the Aviation Directive is consistent with the territoriality principle due to the negative effects that emissions from aviation have on the EU territory. The object pursued, is of relevance to the measure taken. And it can be argued that the aim to stop climate change is internationally recognized. Facts speaking in favor of this interpretation are for example that 195 States have recognized the United Nations Framework Convention on Climate Change (UNFCCC) and 191 states have recognized the Kyoto Protocol both being soft law instruments promoting climate change mitigation. A parallel can also be drawn to the polluter pays principle, earlier described, that makes the party responsible for the pollution to bear the cost for the damage on the natural environment. It is debatable if the polluter pays principle has emerged into international customary law, but it is clear that the principle is a well acknowledged[70] and it was for example used by the CJEU in Case C-188/07 *Commune de Mesquer* where pollution was caused on the Atlantic coastline of France after the sinking of the oil tanker *Erika*.

[69]Opinion of AG Kokott, Case C-366/10, para 147.
[70] Alam, 2013, p. 50 f.

Regarding the possible adverse effect of the inclusion of Aviation in the EU ETS the Advocate General argues that there are no such effects due to the fact that the inclusion of aviation in the EU ETS does not preclude third countries from bringing into effect or applying their own emissions trading schemes for aviation activities. In other words, the regulation does not affect third countries right to make decisions. Legally the argument makes sense and even though there is a risk of double taxation, double regulations are not illegal under the principles of customary international law and in certain fields, for example concerning direct taxation, it is even rather common.

## 3.4 EU ETS and Article 2(2) of the Kyoto Protocol

### 3.4.1 Background

Regarding the EU ETS and the Kyoto Protocol, the United Kingdom High Court of Justice referred the following questions to the CJEU in Case C-366/10:

- Is the Kyoto Protocol (in particular, Article 2(2))capable of being relied upon in this case to challenge the validity of Directive 2003/87/EC as amended by Directive 2008/101/EC so as to include aviation activities within the EU Emissions Trading Scheme?[71]

Is the Amended Directive contravening the Kyoto Protocol (in particular, Article 2(2)) if and insofar as it applies the Emissions Trading Scheme to those parts of flights (either generally or by aircraft registered in third countries), which take place outside the airspace of EU Member States?[72]

### 3.4.2 Article 2(2) of the Kyoto Protocol

[71] Reference for preliminary ruling in Case C-366/10, question 1g.
[72] Ibid, question 4a.

The Kyoto Protocol,1997 is an international treaty, which aims to reduce greenhouse gas emissions. The Treaty has 192 Contracting Parties, among them the EU and all the EU Member States. In Case C-366/10 one of the main legal arguments from the Airline industry is that EU breaches obligations according to the Kyoto Protocol by not working through the ICAO. Article 2 (2) of the Kyoto Protocol states that the Parties shall pursue limitation or reduction of emissions of greenhouse gases from aviation working through the International Civil Aviation Organization (ICAO).

### 3.4.3 The Opinion of the Advocate General

The Advocate General states that the EU is undoubtedly bound by the Kyoto Protocol as a Party to the agreement but then argues that the Protocol is conditional and not enough precise to be used and that it therefore cannot be relied upon to challenge the validity of Directive.
To come to this conclusion the Advocate General reviews the Kyoto Protocol in two stages;[73]

- Is the Kyoto Protocol by its nature and broad logic capable of conferring rights which an individual can invoke before the courts?
- Is the context of the Kyoto Protocol unconditional and sufficiently precise to enable an individual to invoke them before the courts?

The Advocate General argues that the objective of the Protocol and its overall context indicates that it is a legal instrument governing only the relations between the States. The Advocate General states:

> The ultimate objective of the Framework Convention and all related legal instruments is to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. The preamble to the Framework Convention

[73]Opinion of AG Kokott, Case C-366/10, para 74.

> states, inter alia, that the adverse effects of change in the Earth's climate are a common concern of humankind, calls for the widest possible cooperation by all countries, and reaffirms the principle of sovereignty of States in international cooperation to address climate change.[74]
>
> It can certainly be assumed that the climate change measures taken by the Contracting Parties under the Kyoto Protocol will have a beneficial effect on individuals in the medium and long term, as they serve to conserve the environment. It is also likely that some of the measures taken will be onerous for individuals. However, effects such as these are only indirect. Neither the Framework Convention nor the Kyoto Protocol contains specific provisions that could directly affect the legal status of an individual. There are no more than a few general references to 'humankind' and 'humans' in these legal instruments.[75]

Concerning the preciseness of the Protocol the Advocate General states:

> …the emission limitation and reduction commitments agreed in the Kyoto Protocol, although quantified, afford the Contracting Parties a wide discretion with regard to the specific policies to be implemented and measures to be taken in accordance with their national circumstances. All the commitments in the Kyoto Protocol have to be transposed into national law and they are not sufficiently precise to be capable of having a direct beneficial or adverse effect on individuals.[76]

As a result hereof, the Advocate General argues that individuals cannot invoke Article 2(2) of the Kyoto Protocol before the courts, with the result

[74] Ibid, para 79.
[75] Ibid, para 82.
[76] Ibid, para 84.

that, in this case, the Kyoto Protocol cannot be relied upon as a benchmark against which the validity of Directive 2008/101 can be reviewed.[77]

The Advocate General also examines Article 2 (2) and its effect on the inclusion of Aviation in the EU ETS. The Advocate General finds that it would be contrary to the objectives of the Kyoto Protocol to limit measures to be taken at a multilateral level through ICAO. The Advocate General bases this on that if the Parties to the Kyoto Protocol cannot take measures necessary to achieve the Kyoto objectives there is a serious risk that the objectives of the Kyoto Protocol, to reduce greenhouse gases, might not be achieved.[78] It has been stressed that the EU Member States for years have participated in various multilateral negotiations under the supervision of the ICAO on measures to limit and reduce greenhouse gases from aviation.[79]

### 3.4.4 The CJEU Judgment

Just as the Advocate General, the CJEU observes that the EU is a signatory of the Kyoto Protocol but that the content of the protocol is not sufficiently unconditional and precise for individuals to have the right to rely on it in legal proceedings in order to contest the validity of the inclusion of Aviation in EU ETS. The CJEU states:

> In particular, Article 2(2) of the Kyoto Protocol, mentioned by the referring court, provides that the parties thereto are to pursue limitation or reduction of emissions of certain greenhouse gases from aviation bunker fuels, working through the ICAO. Thus, that provision, as regards its content, cannot in any event be considered to be unconditional and sufficiently precise so as to confer on individuals the right to rely on it in legal proceedings in order to contest the validity of Directive 2008/101.[80]

[77] Ibid, para 87.
[78] Ibid, para 184.
[79] Ibid, para 186.
[80] Case C-366/10, para 77.

### 3.4.5 Legal Analysis and Comments

The Advocate General and the CJEU dismissed the claim that emission from aviation can only be regulated through the ICAO based on Article 2 (2) of the Kyoto Protocol. The basis of the dismissal was that the Kyoto Protocol is not “unconditional and sufficiently precise” to be invoked by the airline organizations. The Advocate General then brings up the question whiter the claim could not also be dismissed based on how Article 2 (2) is written. The article states that Contracting Parties "shall pursue limitation or reduction of emissions of greenhouse gases from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively″. And here the Advocate General brings up a series of interesting questions, such as: can emissions by aviation only be controlled trough the ICAO? If it turns out to be impossible to find a common solution within the ICAO in the near future would it not go against the purpose of the Kyoto Protocol to have such a strict interpretation of Article 2 (2)? It would have been interesting to also see some of this argumentation in the decision by the CJEU.

# 4 CONCLUDING ANALYSIS

In this thesis, I have looked at the legal aspects of the inclusion of Aviation in the EU ETS based on the ruling of the CJEU in Case C-366/10. The focus in the CJEU judgment is legal competence. Interpretations based on the underlying environmental problems are limited. Making the legal question mainly evolve around what can be seen as a constitutional problem. I agree with the CJEU when it comes to the conclusion that the inclusion of Aviation in the EU ETS is legitimate. However, I think it would have been wiser to interpret the conventions and agreements in favor for the environment rather than focusing on legal competence. I will further discuss this below. There are of course several reasons to why the CJEU chose the approach they did, such as historical, legal, etc. Reasons that are in themselves interesting themes for a master thesis, but the focus here will revolve around the legal interpretations and the outcome of those choices made by the CJEU. I want to emphasize that the interpretations and opinions presented are my own, and they just make out one of many different approaches to these questions.

The reason to why I find the approach by the CJEU in parts problematic is that even if the CJEU should be independent, the CJEU is a product of its context and the legislation the Court has to interpret is highly political. As a result the decisions made by CJEU, especially in cases concerning States and individuals outside the EU, will be seen as highly political acts that will be fought with political measures. Something that has been clearly shown by the reactions from the surrounding world. By repeatedly getting into questions concerning competence the CJEU has to, in my view, do a hard job to find arguments, doctrine and case law to provide legal support for their conclusions. And by doing so CJEU at times get into arguments where alternative interpretations definitely can be discussed. For example, I feel hesitant to agree with the argument that the Directive concerning the inclusion of Aviation in the EU ETS holds no concrete rules and therefore is

not an extraterritorial measure. Besides some, in my opinion, legally questionable argumentation I also see in a political, as well as on a legal level, the complications that come with claiming that States can escape agreements by working together with others. The CJEU does this claim when they state that the inclusion of aviation in the EU ETS does not breach the Chicago Convention even if every Member State of the EU has signed it because the EU as an entity is not bound by the convention. I agree with the Court's interpretation, that the EU is not a part of the Chicago Convention, in the sense that it is one legally logical interpretation, but it is an interpretation that weakens an extremely important principle of *pacta sunt servanda*. I base this on the notion that for international law to be law and to be effective the parties bound by it must respect it. One of the greatest challenges in international law is the problem of making and enforcing the law. Something that tends to undermine both the credibility and the effectiveness of international legal systems. Even if I, as earlier mentioned, find the narrow interpretation by the CJEU to be one possible and just view, I do also see a possibility for the CJEU to adopt a less narrow approach. An approach, where the main focus is the purpose of the Convention and the purpose of pacta sunt servanda. All EU Member States are parties to the Convention and as a result EU law that breaches the Convention results in the Member States not fulfilling their obligations. Therefore, in my opinion, any other interpretation than the opinion that the EU should follow the Convention, being a Party or not, undermines international law and the trust needed for making agreements. I think that a wider approach from the CJEU concerning Article 351of the TFEU and the principle of functional succession is needed.

Politically and legislatively the EU has taken on board the strong reactions on the EU ETS. Even if not clearly outspoken the threats towards the EU in the wake of the CJEU decision has forced the EU to stop the clock and give the ICAO a new chance. Based on the strong opposition against the EU ETS it will probably be a challenge to reach a decision trough the ICAO and, in

my opinion, probably more so because of the choice to focus on competence and jurisdiction rather than environment.

The question is then how a legal argument based on the need for environmental actions would look and why I find it more workable. I would like to start by mentioning a few things concerning Greenhouse gas emissions and global warming and the context within which the EU took the decision to include aviation in the EU ETS and then move over to the legal arguments to legitimate the inclusion of Aviation from an environmental approach. Greenhouse gas emissions effect the world as a whole no matter if the discharge is made over Sweden or over Australia and the need to develop and enforce multilateral governance becomes evident. The choice taken by the EU when they decided to include Aviation in the EU ETS did not come out of nowhere. The EU had sought to reach an agreement within the ICAO repeatedly but failed. The greenhouse effect is a great global concern and the EU will be, as all nations and regions, seriously affected by climate change. In other words, the choice to include Aviation in the EU ETS can be seen as a self-protecting act by the EU. And if the CJEU would have taken the environmental approach it could have been argued, for example, that even though the Directive that includes Aviation in the EU ETS has extraterritorial reach its proportional to the problem that the environment faces due to greenhouse gas emissions. International flights to and from Europe makes up a great part of the emissions discharged and these flights take in part place outside the jurisdiction of the EU. Based on proportionality, it could be claimed that it is justified to include also those parts of the flights as long as no other such charges exists, even though double charges might not be illegal, they make the directive less proportionate. As just mentioned the EU has tried several times to reach an agreement within the ICAO. As argued by the Advocate General, but not by the Court, if no agreement is reached within the framework of the ICAO within a reasonable time the Parties to the Kyoto Protocol must be at liberty to take the measures necessary to achieve the Kyoto objectives. By doing this the EU could fulfill the Member States obligations to third parties and

still defend the legality of the act. It would almost certainly also result in criticism, but the protection of the environment would probably have invoked less emotion on a State level. For now, several questions still stand: If a decision is not made within the ICAO or if agreements met will be less progressive than expected from the EU what action will be taken then? Both politically and legally there are many battles to be fought. A dispute over the Chicago Convention, for example, could go through the Council of ICAO. And what if ICAO comes to another conclusion than the CJEU? After all, based on the Moscow Declaration, a large part of the world, or at least its leaders, seem to disagree with the decision of the CJEU. On the other hand the inclusion of aviation in the EU ETS has put the issue of greenhouse gas emissions and aviation on the agenda and maybe by doing so the EU has made ICAO realize the need to take action. One thing is clear; the dispute over emissions from the airline industry remains to be seen.

# Bibliography

Alam, Shawkat ed. (2013) *Routledge Handbook of International Environmental Law* Suffolk

Ares, Elena (2012). *EU ETS and Aviation*. Standard Note: SN/SC/5533, 13 February 2012, section: Science and Environment. House of Commons.

Craig, Paul (2008). *EU Administrative law –Texts, Cases and Materials* 4th ed. Oxford: Oxford University Press

Douglas-Scott, Sionaidh. (2002) *Constitutional Law of the European Union* Harlow: Pearson Education Limited

Eeckhout, Piet (2011) *EU External Relations Law* 2nd ed. Oxford: Oxford EU Law Library

Pohlmann, Markus (2010). The European Union Emissions Trading Scheme. In: Freestone, David and Streck, Charlotte ed. 2010. *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and beyond.* Oxford: Oxford Scholarship Online

*Newspaper articles on the web*

Kotoky, Anurag. *India joins China in boycott of EU carbon scheme*. Reuters. March 22, 2012. http://www.reuters.com/article/2012/03/22/india-eu-emissions-idUSL3E8EM4P920120322

Krukowska, Ewa. *EU Tells Clinton It Won't Abandon Carbon Limits for Airlines*. Bloomberg Business. January 17, 2012. http://www.bloomberg.com/news/articles/2012-01-17/eu-tells-clinton-it-won-t-abandon-carbon-emissions-limits-for-airlines

Leung, Alison and Yan, Fang. *China-backed HK Airlines may dump A380 order*. Reuters. 1 March 2012. http://www.reuters.com/article/2012/03/01/uk-hongkong-airbus-idUSLNE82000X20120301

*Webpages*

European Commission Climate Action, *The EU Emissions Trading System(EU ETS),* [Online], Available: ec.europa.eu/clima/policies/ets/index_en.htm [14 May 2013]

*European Union Materials*

Commissions Decision No 377/2013/EU. 2013 O.J. L 113/1

Commission Press Release, IP/11/259 [March. 7, 2011]

Council Regulation No 421/2014. 2014 O.J. L129/1

European Commission. *The EU Emissions Trading System (EU ETS),* European Union Publications Office, 2013

*Court of Justice of the European Union*

Case C-6/64, *Costa v. ENEL (National Electricity Board)*, Decision

Case C-21/72, *International Fruit Company and Others v. Produktschap voor Groenten en Fruit*, Decision

Case C 286/90, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp,* Decision

Case C-308/06, *Intertanko and Others v. Secretary of State for Transport*, Decision

Case C-188/07, *Commune de Mesquer v Total France SA and Total International Ltd,* Decision

Case C-366/10, *Air Transport Association of America and others v. Secretary of State for Energy and Climate Change*, Decision

Case C-366/10, *Air Transport Association of America and others v. Secretary of State for Energy and Climate Change*, Application

Case C-366/10, *Air Transport Association of America and others v. Secretary of State for Energy and Climate Change*, Opinion of AG Kokott

*International Civil Aviation Organization Materials*

ICAO, *Report of the Executive Committee on Agenda Item 17* (Section on Climate Change), A38-WP/430. 2013

ICAO, *Working Paper, Subject No. 50: Inclusion of international Civil Aviation in the European Union Emissions Trading Scheme (EU ETS) and its Impact*, C-WP/13790. 2011

*Other*

Joint Declaration of the Moscow meeting on inclusion of international Civil aviation in the EU ETS, 2012.

*International Court of Justice*

Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Jurisdiction and Admissibility, [1984] ICJ REP. 392