The EU ETS and Unilateralism within International Air Transport

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L.L.M Thesis

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Abstract

Attempts to stem the continued advance of climate change are now global in nature. Central to achieving these aims is the need to harness the market as well as permitting governments the scope and power to make real regulatory changes. The creation of emissions trading schemes under the UNFCCC and its Kyoto Protocol is just such an market instrument which can, if used correctly, contribute significantly to the international communities efforts. The airline industry is under significant pressure to make its own reductions, for all manner of greenhouse gases. To date, the subjection of the aviation industry to such regulation has been left in the control of the International Civil Aviation Organisation. Progress by this body has not been substantial. As a result, some States have seen it necessary to make the first move in subjecting the aviation industry to emissions trading schemes. Foremost in these efforts has been the European Union's intention to bring flights within its already established emissions trading scheme. As a central tenet of this scheme, the EU intend subject all flights to the scheme, irrespective of the airlines nationality and its point of departure or arrival. Essentially, the scheme will seek to regulate international flights of non-EU airlines. It is the purpose of this thesis to consider the appropriateness of these steps by the EU. Does this project extend the regulation of airline emissions extraterritorially? Should the answer to this question be yes, does this prevent the EU from actually taking these steps? These and other questions are considered in the thesis. Ultimately, the paper seeks to address the proposed inclusion of aviation within the trading system and consider whether such an inclusion is in any way precluded by current international law.

Les tentatives d'enrayer l'avance de la suite des changements climatiques sont maintenant de nature mondiale. Centrale à la réalisation de ces objectifs est la nécessité de mettre à profit le marché ainsi que de permettre à des gouvernements de la portée et le pouvoir de faire de réels changements réglementaires. La création de régimes d'échange de droits d'émission au titre de la CCNUCC et du Protocole de Kyoto est un instrument du marché qui peut, s'ils sont utilisés correctement, contribuent de manière significative aux efforts de la communauté internationale. L'industrie aérienne est soumise à de fortes pressions pour faire ses propres réductions d'effectifs, pour toutes sortes de gaz à effet de serre. À ce jour, l'assujettissement de l'industrie de l'aviation à cette réglementation a été laissée dans le contrôle de International Civil Aviation Organisation. Le Progrès réalisé par cet organisme n'est pas considérable. En conséquence, certains États ont considéré qu'il est nécessaire de faire le premier pas en soumettant l'industrie de l'aviation à de systèmes d'échange d'émissions. Le premier de ces efforts a été fait par l'Union européenne avec leur intention d'y inclure des vols déjà établis dans le cadre de leur système d'échange d'émissions. Comme un élément central de ce régime, l'UE a l'intention que tous les vols soient soumis à ce régime, indépendamment de la nationalité des compagnies aériennes et de son point de départ ou d'arrivée. Essentiellement, le régime cherche à réglementer les vols internationaux de compagnies aériennes non membres de l'UE. Il est l'objet de cette thèse d'étudier l'utilité de ces mesures par l'UE. Est-ce que ce projet étend la réglementation des émissions des compagnies aériennes extraterritorialement? Si la réponse à cette question est oui, s'agit-il d'empêcher l'UE de prendre effectivement ces mesures? Ces questions et d'autres sont prises en compte dans la thèse. En fin de compte, le document cherche à répondre à la proposition

d'inclusion de l'aviation dans le système commercial et d'examiner si une telle inclusion est de toute façon exclue par le droit international actuel.

Contents

1. INTRODUCTION

Concern for the impact of humanity's progress on the wider environment is now widely held, globally connected and is being voiced ever louder. Current economic and industrial development is no longer politically immune from the influences of environmental sustainability. United Nations studies have expressed dismay that such rapid, unregulated development '*risks undermining the many advances human society has made in recent decades*',[1] and the global media continues to raise awareness on the issue of sustainable development across all industry sectors.[2]

As regards the atmospheric environment, '*the major proportion of pollutant emissions results from energy-related activities, especially from the use of fossil fuels*'.[3] The international community's response to this global issue, an international Protocol signed at Kyoto, Japan, under the auspices of the UN Framework Convention on Climate Change, sought to tackle these problems by introducing a cap and trade system for many sectors of the global economy. The concept of this cap and trade system is quite simple. Essentially, a '*total resource access limit (the cap) is defined and then allocated among users. Compliance is established by simply comparing actual use with the assigned firm-specific cap as adjusted by any acquired or sold permits*'.[4] Therefore, within carbon trading, the cap on the amount of carbon that may be emitted is defined and then allocated amongst the carbon emitters the governing body wishes to target. In that way, reduction in the emitting of emissions is done where it is most economically efficient to do so. Essentially, it aims to be the '*best instrument that would minimise the overall cost of achieving prescribed environmental objectives*'.[5]

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[1] Ban KiMoon, Global Environment Outlook: GEO4: Environment for Development, (New York: United Nations Environment Programme, 2007) at Foreword xvi, online: BBC News <http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/15_10_2007_un.pdf>.
[2] 'Airlines losing image war with climate change activistis, say industry strategists', (19 October 2007) online: <http://www.iht.com/articles/ap/2007/10/19/europe/EU-GEN-Greece-Embattled-Airlines.php>.
[3] *Supra* note 1 at 46.
[4] T Tietenberg, *The Tradeable-permits approach to protecting the commons: lessons for climate change*, D Helm ed., *Climate Change Policy* (Oxford: OUP, 2005) at 180.
[5] D W Dewees, *Instrument Choice in Environmental Policy*, R N Stavins ed., The Political Economy of Environmental Regulation (MA US: Edward Elgar Publishing, 2004) at 162.

Despite this international action however, carbon levels have continued to rise 35% faster than was expected in 2000,[6] with the result being a potentially devastating effect on the '*health, wealth and well being of people around the globe*'.[7] Whilst all industry sectors are currently being scrutinised for their 'carbon footprint' and impact upon the environment, the aviation industry has come under particular inspection. Whilst figures vary, the International Civil Aviation Organization (ICAO) cites a report from the Intergovernmental Panel on Climate Change that estimates aircraft to, currently, '*contribute about 3.5 percent of the total radiative forcing (a measure of change in climate) by all human activities*'.[8] It is widely accepted that this figure is forecast to rise.[9] As regards passenger transport, both the media and statistical surveys report an increasing awareness amongst consumers of the impact of air travel on the atmospheric environment.[10] Yet, this has not resulted, and is not forecast to result, in a lessening in the use of air transport for civilian passengers.[11] Professor Dempsey has posited that the forecasted growth in the aviation industry will soon catch up and overtake the 5.2% reductions proposed by the Kyoto Protocol.[12] He has also suggested that, although technical improvements in air navigation would be an important contribution to the reduction in aviation impact on the environment, government intervention will be necessary to effectively neutralise the industry's growth impact on the atmospheric environment.[13]

Against this background, the European Union is proposing to include the international air transport sector within the European emissions trading scheme.[14] This scheme

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[6] 'Unexpected growth in CO2 found' BBC News, online: <http://news.bbc.co.uk/1/hi/sci/tech/7058074.stm>.
[7] 'Natural decline hurting lives' BBC News, online: <http://news.bbc.co.uk/1/hi/sci/tech/7050788.stm>.
[8] http://www.icao.int/icao/en/env/aee.htm; Full report to be found at online: <http://www.grida.no/climate/ipcc/aviation/index.htm>.
[9] RCN Wit et al, *Giving wings to emissions trading: Inclusion of aviation under the European emissions trading system (ETS): design and impacts*, Report for the European Commission (Delft: Director General of the Environment, 2005) at 1 online: <http://ec.europa.eu/environment/climat/pdf/aviation_et_study.pdf>.
[10] 'Jet Green?' online : <http://www.slate.com/id/2175055/>.
[11] 'Blame the passenger, not the plane', online: <http://commentisfree.guardian.co.uk/david_learmount/2007/10/blame_the_passenger_not_the_plane.html>.
[12] PS Dempsey, 'Trade and Transport in Inclement Skies – The Conflict between Sustainable Air Transport and Neo-Classical Economics', (2000) 65 Journal of Air Law & Commerce 639 at 654.
[13] *Ibid* at 660, 662.
[14] For detailed analysis of the EU ETS, see Chapter 3. It operates in a similar fashion to the cap and trade system operated by the Kyoto Protocol described above.

operates much like the cap and trade system mentioned above. In short, it intends to label all airlines, irrespective of the nationality of the airline or aircraft, which utilise European airports as 'polluters'. As such, these airlines will be required to buy and sell allowances sufficient to cover their emitting of carbon dioxide during their flights into and out of European airspace. The details of the scheme will be outlined below. It is sufficient, for now, to provide an example so as to illustrate the issues.

Imagine a flight taking off from Chicago, O'Hare International Airport. It is bound for Paris, Charles de Gaulle Airport in France. On its way, it passes over Newfoundland (Canadian airspace), Reykjavik (Icelandic airspace), Dublin (Eire's airspace) and London (UK airspace). It has also passed over the Atlantic Ocean, which, according to international law, is legally 'high seas' and not subject to any nation States sovereignty. The principal international Convention regulating international civil air transport, the Convention on International Civil Aviation (the 'Chicago Convention), extends that rule of international law to the airspace above the waters.[15] So, the flight, for its entire journey, is within 6 different nation's airspace as well as international airspace over the Atlantic Ocean. Classic international law asserts that the law applicable to an activity is that of the nation State over, or in, which it happens to be being conducted (in addition to that States international law obligations).[16] However, the emissions trading scheme will operate as follows. For every tonne of carbon dioxide the flight emits, it must obtain a single allowance. The tonnage of carbon dioxide emitted will be calculated by taking into account the type of aircraft, its fuel and, importantly, the distance travelled. Consequently, the airline must obtain sufficient allowances for the total flight period – including those periods when the flight was over foreign airspace (i.e not European airspace). Therefore, the scheme effectively purports to regulate the flight of aircraft (that may not be registered within the European Union) over foreign territory.

This paper seeks to question the legality of this proposed measure. It does not seek to assess the political difficulties and/or benefits of the proposal, nor does it seek to assess its economic or regulatory suitability. Many studies have already been

[15] Convention on International Civil Aviation, 7 December 1944, 15 U.N.T.S 295, article 12. [Chicago Convention].
[16] *Netherlands v. United States, The Islands of Palmas Arbitration*, (1928) 2 RIAA 829 per J Huber.

undertaken in this regard.[17] Rather, this paper questions whether the proposed scheme is compliant with, or in violation of, international law. The central question on which the paper concentrates is the allegation that the measure is a unilateral one, which is arguably extraterritorial and illegitimate under international air law and public international law more generally. The concept of (il)legitimacy is used throughout this paper. It is to be understood here as an aspect of governance which makes the imposition of regulation upon one actor by another acceptable. As Bodansky notes, the actor subjected to the rule finds it acceptable not because they are necessarily persuaded by its correctness, nor because they are coerced or persuaded into so accepting.[18] Rather, '*[s]ubjects who obey [legitimate commands or rules] do so not because they believe that the actions commanded are worthy of obedience, but rather in virtue of the fact that they were so commanded*'.[19] Therefore, does the EU have this legitimacy in seeking to regulate the emissions of non-Community aircraft, taking into account their passages of flight outside the territory of the EU?

The paper first outlines the European emissions trading scheme currently in force and attempts to give an understanding of its rationales and goals. Subsequently, the thesis addresses the proposed Directive which seeks to include aviation within the scheme and highlights where this Directive departs from the mechanics of the general trading scheme directive.

The paper then outlines the principal international legal rules which the EU ETS threatens to violate. This section focuses, firstly, on general international law and international air law principles. Attention then turns to address the concept of extraterritoriality before addressing the wider and more pressing issue of unilateralism. This part's penultimate section address principles of international environment law and, specifically, the role of the precautionary principle. It concludes by drawing together the threads of the discussion and examining how the EU ETS stands up to scrutiny under those issues.

[17] *Supra* note 9.
[18] D Bodansky, *Legitimacy*, D Bodansky, J Brunnee, E Hey eds., *Oxford Handbook of International Environmental Law* (Oxford: OUP, 2007) at 706.
[19] S Shapiro, *Authority*, J Coleman & S Shapiro eds., *Oxford Handbook of Jurisprudence and Philosophy of Law*, (Oxford: OUP, 2002) at 386.

The paper then proceeds to address the trend for competition or anti-trust laws to have extraterritorial reach. It also focuses upon anti-trust case law within the aviation field and ultimately seeks to draw analogies between these examples and the current emissions trading dispute.

Following on from this section, the paper undertakes a case analysis concerning a dispute between the US and EU regarding an environmental measure affecting international air transport. Again, the purpose here will be to draw analogies with the current dispute so as to further understand the legitimacy of the EU's proposed actions.

With the focus remaining on the EU and US relationship in air transport matters, attention then turns to consider the 2007 Open Skies Agreement concluded between the two Parties. The focus in this section is on the environmental provisions contained within the Agreement and will serve to further clarify the EU's legal position vis-à-vis the principal objector to its expansion of the EU ETS, the US.

The final part of the paper extracts itself from the focus of unilateral action and examines the role of the International Civil Aviation Organisation and its Committee on Environmental Protection on emissions trading within the international air transport sector. This part of the paper concludes by, again, highlighting the principles that can be taken from the analysis of the role of ICAO and examines the EU ETS against those principles.

The paper concludes by bringing all the main threads and principles addressed throughout the paper together in an attempt to answer the question as to the legitimacy of application of the EU ETS to international air transport.

2. EUROPEAN UNION EMISSION TRADING SCHEME

2.1 Introduction

The European Union established its emission trading scheme in an attempt to fulfil its commitments to the Kyoto Protocol to the United Nations Framework Convention on Climate Change.[20] As a cap and trade system, the scheme seeks to place an overall limit on the amount of greenhouse gases that certain undertakings may emit *en masse*. A set quota, in this instance a metric tonne of carbon dioxide equivalent,[21] of any given greenhouse gas is then translated into one allowance that those undertakings may freely trade. Working on this approach, the aim of the scheme is to allow the price of the allowances to be set by market dynamics, not by the government (once allocation has been achieved). The consequence ought to be that the undertakings which find it cheaper to abate their environmental impact than to purchase permits or allowances will do so. Therefore, the reduction in environmental impact can be made where it is most economically viable within the market.

2.2 The EU ETS Main Components

The following overview of the EU ETS by no means seeks to be comprehensive. Rather, it attempts to provide an elementary outline of its essential features as well as highlighting the concepts which have potential implications for the proposed inclusion of the airline sector.

Entering its first 3 year phase on the 1st January 2005,[22] the EU ETS Directive is applicable to activities, detailed in its first Annex, such as the roasting of metal ore and the production of pulp from timber.[23] Operators of such installations are required

[20] European Parliament and Council Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2003] O.J. L 275.
[21] *Ibid* at art.3(j). 'equivalent' refers to any other greenhouse gas listed in Annex II with an equivalent global-warming potential. These gases are; Carbon Dioxide, Methane, Nitrous Oxide, Hydrofluorocarbons, Perfluorocarbons, Sulphur Hexaflouride.
[22] *Supra* note 20, art. 11. The second 5 year phase begins on 1 January 2008. The Scheme is then envisaged as progressing in 5 year periods.
[23] *Supra* note 20, art. 2.

to obtain a permit from a Member State allowing it to emit certain greenhouse gases[24] and applications for these permits, as well as the permits themselves, must meet certain requirements.[25] These individuals '*may not emit residuals (the defined amount of greenhouse of gas) in excess of the number of quota permits that it holds*'.[26] The EU ETS substitutes the word 'allowance' for 'quota permit'.

An 'allowance' is an '*allowance to emit one tonne of carbon dioxide equivalent during a specific period…*'.[27] "One tonne of carbon dioxide equivalent" means '*one metric tonne of carbon dioxide (CO2) or an amount of any other greenhouse gas listed in Annex II with an equivalent global-warming potential*'.[28]

Each Member State was required, at least 3 months prior to 1 January 2005, to develop a national allocation plan.[29] This plan would detail the method and amount of allowances to be made available to all the operators within the Member State's jurisdiction, though the Directive required that, for the 3 year period between 2005 and 2008, 95% of these allowances be allocated free of charge.[30]

Upon allocation, the operators falling within the scope of the Directive may transfer allowances between both persons within the Community (whether or not falling within the scope of the Directive) and persons in third countries listed in Annex B to the Kyoto Protocol (which have ratified the Kyoto Protocol) where such persons mutually recognise allowances in the EU ETS with 'allowances' in other greenhouse gas emission trading schemes.[31] Each Member State must recognise the validity of an allowance held by an operator from another Member State[32] and each Member State '*shall ensure that, by 30 April each year at the latest, the operator of each installation*

[24] *Supra* note 20, art. 4. The Directive does not stipulate that the Member State which provides the permit must the State in which the activity is conducted. Member State A could provide a permit for an operator conducting an activity detailed in Annex I within Member State B.
[25] *Supra* note 20, art. 5 & 6.
[26] R Stewart, *Economic Incentives for Environmental Protection: Opportunities and Obstacles*, R Revesz, P Sands & R Stewart eds., *Environmental Law, the Economy, and Sustainable Development*, (Cambridge: Cambridge University Press, 2000) at 175.
[27] *Supra* note 20, art. 3(a).
[28] *Supra* note 20, art. 3(j). These gases are; Carbon Dioxide, Methane, Nitrous Oxide, Hydrofluorocarbons, Perfluorocarbons, Sulphur Hexaflouride.
[29] *Supra* note 20, art. 9.
[30] *Supra* note 20, art. 10. For the 5 year period starting on the 1 January 2008, each Member State must make at least 90% of allowances free of charge.
[31] *Supra* note 20, art. 12(1) & 25(1).
[32] *Supra* note 20, art.12(2).

surrenders a number of allowances equal to the total emissions from that installation during the preceding calendar year…'.[33]

The Member States must ensure that they monitor emissions in addition to ensuring effective execution of the scheme.[34] This further requires the Member States to develop and maintain a registry '*to ensure the accurate accounting of the issue, holding, transfer and cancellation of allowances*'[35] which will, in turn, further assist the Member States in reporting to the Commission each year on the application of the Directive.[36] In the event of infringements of the scheme by operators, Member States must adopt penalties which are '*effective, proportionate and dissuasive*'.[37]

Attention now turns to address the rationale behind the 2003/87 Directive establishing the emissions trading scheme. This will be achieved by looking into the preamble of the Directive. Undertaking this exercise will help one to understand what the EU is hoping to achieve through its international measures.

First, the Scheme is supposedly designed so as to assist Member States in attaining its commitments to reduce anthropogenic greenhouse gas emissions under the Kyoto Protocol.[38] To that end, the institutions are, at the same time, enabled to regulate the growth of its industries and restrained in the means and degree to which it may impose those regulations.

The Community institutions also considered it necessary to establish Community-wide provisions regarding the distribution of allowances so as to preserve '*the integrity of the internal market and to avoid distortions of competition*'.[39] Therefore, the scheme is intended to comprehensively cover the environmental impact of undertakings' within the jurisdiction of the European Union.

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[33] *Supra* note 20, art.12(3).
[34] *Supra* note 20, art. 14(2) & (3).
[35] *Supra* note 20, art. 19.
[36] *Supra* note 20. art. 21.
[37] *Supra* note 20, art. 16(1).
[38] *Supra* note 20, Preamble, recital 5.
[39] *Supra* note 20, Preamble, recital 7.

Still, the Preamble stresses that this scheme should only be understood as one part of a more '*comprehensive and coherent package of policies*' to reduce the emitting of greenhouse gases, both within Europe and globally.[40] Indeed, whilst the institutions permitted the continuation of national emissions trading schemes in light of the creation of a European-wide market,[41] they also envisaged extending the applicability and functioning of the European scheme to emission trading schemes in third countries.[42] Moreover, the institutions explicitly predicted the expansion of the scheme to activities outside the industry and energy sectors. In particular, the Preamble to the directive urged the Commission to '*consider policies and measures at Community level in order that the transport sector make a substantial contribution …to…climate change obligations under the Kyoto Protocol*'.[43]

The EU ETS, therefore, is the central pillar in the EU's policy on sustainable development of its industries. It seeks to preserve the global competitiveness of its undertakings and should be seen as part of a wider, more comprehensive approach to environmental policy concerns.

[40] *Supra* note 20, Preamble, recital 23.
[41] *Supra* note 20, Preamble, recital 16.
[42] *Supra* note 20, Preamble, recital 18 & art. 25.
[43] *Supra* note 20, Preamble, recital 25.

3. INCORPORATION OF AVIATION INTO THE EU ETS

As the preamble to the EU ETS Directive had forecasted,[44] the European Commission, after the entry into force of the legislation, set about addressing the potential incorporation of sectors not detailed in Annex I into the scheme. Actors within the emissions trading sector were '*generally supportive*' of this move by the Commission.[45]

3.1.1 Communication of Commission, 27th September 2005

On the 27th September 2005, the European Commission issued a communication to the Council, European Parliament, European Economic and Social Committee and European Committee of the Regions. It was titled '*Reducing the Climate Change Impact of Aviation*',[46] and sought to address, from a European policy perspective, the perceived need to internalise the environmental costs of aviation emissions. The Communication argued that, in light of the predicted 150% increase in emissions from international flights by 2012[47] and considering it '*[un]realistic to expect ICAO to take global decisions on uniform, specific measures to be implemented by all nations,*[48]*…including aviation in the EU ETS [would] be the most promising way forward'.*[49] The Commission called upon those to whom the Communication was addressed to assess the suitability of its proposals.

3.1.2 EU Council Conclusions, 2nd December 2005

At the 2697th EU Council meeting of environment minsters, the Member States addressed the impact of aviation on climate change. The ministers welcomed the initiative, taken by the Commission, to potentially include aviation within the EU

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[44] *Supra* note 20, Preamble, recital 25.
[45] 'Position on the inclusion of Aviation in the EU ETS', International Emission Trading Association online:<http://64.233.169.104/search?q=cache:LWywvQBWnwYJ:www.ieta.org/ieta/www/pages/getfile.php%3FdocID%3D2413+Airline+inclusion+in+EU+ETS&hl=en&ct=clnk&cd=1&gl=ca>.
[46] EC, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Reducing the Climate Change Impact of Aviation,* (27 September 2005, COM(2005) 459).
[47] *Ibid* at 2.
[48] *Ibid* at 5.
[49] *Ibid* at 8.

ETS, but emphasised '*the need to apply the system under uniform conditions to both EU and third country carriers*'.[50] The Council also crystallised earlier sentiments expressed by the Commission in its Communication document, that '*[t]he objective should be to provide a workable model for aviation within emissions trading in Europe that can be extended or replicated worldwide*'.[51]

3.1.3 Economic and Social Committee Opinion, 21st April 2006

Subsequently, an opinion from the European economic and social committee was released.[52] Although it considered purely 'intra-EU' coverage of air transport a '*very feasible option*', it stated that it would be '*necessary to work through the International Civil Aviation Organization (ICAO) in order to ensure the worldwide application of an emissions trading scheme*' to air transport.[53] This was because the problem was '*global in nature and thus deman[ding] [of] a global solution*'.[54] Furthermore, the Committee specifically called for emissions rights (or 'allowances') to be allocated at EU level. This was for two reasons; first, there had been a '*bad experience with national allocation*' drastically over-allocating allowances and, secondly, because aviation, as '*pre-eminently a market with international competition*', ought to be protected from national distortion.[55]

3.1.4 European Parliament Report, 4th July 2006

The European Parliament echoed the words of both the Council and the Economic and Social Committee by stressing that '*the environmental effectiveness of any emissions trading scheme will depend on it having a sufficiently broad geographical*

[50] EC, *2697th Environment Council meeting, EU Council Conclusions – Reducing climate change impact of aviation,* (2 December 2005) at 7, online: <http://europa-eu-un.org/articles/fr/article_5400_fr.htm>.
[51] *Ibid.*
[52] EC, *European Economic and Social Committee, Opinion on the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Reducing the Climate Change Impact of Aviation,* (21 April 2006 COM(2005) 459).
[53] *Ibid* at A.3.
[54] *Ibid* at B.3.
[55] *Ibid* at 4.7.

scope',[56] and that, consequently, the scheme should '*cover all flights to and from any EU airport, … irrespective of the country of origin of the airline concerned*'.[57] Parliament did not consider that the proposed scheme posed any international legal problems such as within the World Trade Organisation, but asked that the Commission be prepared to '*defend this position against possible attacks from third countries*'.[58]

3.1.5 Commission Impact Statement, 20th December 2006

As promised in the 2005 Communication, the Commission, at the end of 2006, produced an impact assessment report on the proposed inclusion of aviation into the EU ETS.[59] This assessment dealt with economic, environmental, design and implementation factors of the proposed inclusion. In accordance with the 6th meeting of the ICAO Committee on Aviation Environmental Protection[60] in 2004, the assessment concluded that the creation of a market trading scheme solely for the aviation sector was not feasible and that, rather, merging international aviation with other industries (already subject to emissions trading schemes) would be preferable.[61] Despite asserting the '*need to maintain equal treatment of operators regardless of their nationality consistent with the Chicago Convention*',[62] the assessment largely ignored the legal issues surrounding the proposal.

3.1.6 Commission Proposal amending Directive 2003/87, 20th December 2006

[56] EC, European Parliament, *Resolution on Reducing the Climate Change impact of Aviation*, (4 July 2006, 2005/2249(INI)) at 22, online: <http://www.europarl.europa.eu/sides/getDoc.do?Type=TA&Reference=P6-TA-2006-0296&language=EN>.
[57] *Ibid* at 31.
[58] *Ibid* at 32.
[59] EC, European Commission, *Commission Staff Working Document, Impact Assessment: Inclusion of Aviation in the EU Greenhouse Gas Emissions Trading Scheme (EU ETS)*, (20 December 2006, COM(2006) 818).
[60] For a more detailed analysis of the CAEP, see Chapter 8.
[61] *Supra* note 59 at 8.
[62] *Supra* note 59 at 4.

On the same date, as the Impact Assessment, the Commission also published the proposal for a Directive to include aviation within the EU ETS.[63] The document (the 'Commission Proposal', 'Proposal' or 'Proposal Directive') proposed to amend the existing Directive regulating the existing EU ETS and its proposals were thereby subjected to the co-decision making procedure. In line with this procedure, the European Parliament was requested to give its 1st reading of the document.

3.1.7 Committee of the Regions Opinion, 10/11th October 2007

Before that, however, the Opinion of the Committee of the Regions finally came on the 11 October 2007.[64] Although largely focusing on the economic and regulatory suitability of the Commission's Proposal, the Opinion agreed that aviation should be included within the EU ETS as '*a rapidly growing source of greenhouse gases*'[65] and that any '*efforts to coordinate the [EU ETS] with comparable approaches in third countries*'[66] should be welcomed.

3.1.8 Parliament 1st Reading, 13th November

The European Parliament convened to give its first reading, pursuant to the co-decision procedure, just over a month after the Committee of the Regions delivered its Opinion.[67] This position formalised the Report that the Parliament had delivered a month earlier.[68] The reading was lengthy and amended a number of important aspects of the proposed Directive. Notably, the text adopted sought to highlight that ICAO, in Resolution 35-5, had endorsed the development of emissions trading for international

[63] EC, European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community*, (20 December 2006, COM(2006) 818).
[64] EC, Committee of the Regions, *71st plenary session, Opinion of the Committee of the Regions on limiting global climate change to 2 degrees Celsius and the inclusion of aviation in the emissions trading system*, (10 & 11 October 2007).
[65] *Ibid* at 28.
[66] *Ibid* at 25.
[67] EC, European Parliament, *Resolution of 13 November 2007 on the proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community*, (13 November 2007, COM(2006)0818 - 2006/0304(COD)). [EP 1st Reading].
[68] EC, European Parliament, *Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community*, (19 October 2007, COM(2006) 818 – 2006/0304 (COD)).

aviation.[69] It added new Recitals to the Directive recognising the need for improvements in technology and air navigation so as to create a more effective and comprehensive approach to sustainable air transport.[70] A principal change in the Parliament's reading was to include all flights entering or departing EU airports within the scheme as from 2010.[71] This was to ensure a '*level playing field*' within the international air transport industry.[72]

Other notable amendments by the Parliament in its 1st reading included the mandatory auctioning of 25% of allowances,[73] the use of revenues of that auctioning to go toward mitigating climate change in other areas,[74] and the granting of power to the Commission to amend the Directive where a 3rd country '*adopts measures for reducing the climate change impact of flights which are at least equivalent to the requirements of this Directive*'.[75] This would be to '*avoid double charging and to ensure equal treatment*'.[76]

3.1.9 Council of Environmental Ministers Common Position Meeting, 20th December 2007

The Council of environmental ministers adopted their common position[77] on the 20th December 2007. In a Press release, the Council reached '*political agreement*' on the draft Directive placed before it.[78] It agreed that all flights will be covered by the scheme as from 2012. Progressing with the scheme, however, would not '*affect other means of addressing climate change through a comprehensive approach based on improved technology and utilisation of aircraft*'.[79] The Council also stressed that the scheme was to be seen as a '*model for aviation emissions trading*' which might also

[69] EP 1st Reading, *Supra* note 67, Amendment 1 of Recital 5.
[70] EP 1st Reading, *Supra* note 67, Amendments 3, 4 & 5 of Recital 8.
[71] EP 1st Reading, *Supra* note 67, Amendments 8, 9, 64, 71 & 78.
[72] EP 1st Reading, *Supra* note 67, Amendment 8 to Recital 10.
[73] EP 1st Reading, *Supra* note 67, Amendment 74 to Article 3c, para 1.
[74] EP 1st Reading, *Supra* note 67, Amendment 76 to Article 3c, para 4.
[75] EP 1st Reading, *Supra* note 67, Amendment 68 to Article 25a, para 1.
[76] *Ibid.*
[77] Technically, only a political agreement was reached at this stage. A new compromise, to be tabled by the President, was awaited before formal adoption of the common position.
[78] EC, EU Council, Press Release, online: <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/envir/97858.pdf> at 9.
[79] *Ibid.*

act to '*promote the development of similar systems worldwide*'.[80] It was also stated that the proposed legislation would also not apply where a '*third country has equivalent measures in place*'.[81]

Clarifying the outcome of this meeting, the Department for Environment, Food and Rural Affairs in the UK asserted that *'this will apply to the entirety of intercontinental flights, not simply the part of the journey in European airspace*'.[82] The scheme, therefore, takes into account and regulates part of the flight over foreign airspace.

3.2 Proposed Directive

It is now appropriate to more closely analyze the Proposal Directive, amending the ETS Directive, in terms of its content. For the purposes of this thesis, only a small number of the proposed articles set down in the proposed directive will be addressed.

3.2.1 Coverage

Firstly, the 2006 Commission Proposal stated that '*[f]or the year 2011 only flights which both depart and arrive in an airport situated in the territory of a Member State to which the Treaty applies shall be included…*'.[83] Under this rule, intra-EU flights only would have fallen within the scope of the Directive. The limitation would have been territorial in that it would have excluded any flights operated by any given carrier which either arrive or depart from an airport *outside* the European Union.[84] The proposal continued to assert that, as of 1 January 2012, all flights arriving *or* departing from an EU airport would have been subject to the EU ETS.[85] The effect of this proposal would have been to extend the jurisdiction of the EU ETS, as of 2012, to air transport which might only have had part of its flight within European airspace.

On this issue, the European Parliament disagreed. At its 1st reading, the Parliament stated that the coverage should begin from the year 2010 (rather than 2011 for intra-

[80] *Ibid* at 10.
[81] *Ibid.*
[82] DEFRA, online: <http://www.gnn.gov.uk/content/detail.asp?NewsAreaID=2&ReleaseID=340564>.
[83] *Supra* note 63 at Annex 1(b).
[84] The Scheme would also encompass 5th freedom rights within the EU for non-EU carriers.
[85] *Supra* note 63.

EU flights, and 2012 for all international flights), and that this coverage should, from the beginning, extend to all international flights which might depart or arrive from an airport situated in the territory of a Member State.[86] The attached justification for this amendment explained that only a scheme covering intercontinental flights as early as possible would have any significant effect on greenhouse gases and that this scheme should be seen only as a first step toward a more global scheme for aircraft emissions.[87]

As noted above, the Council took the view that 2012 was the appropriate date from which to put the scheme into effect and for that date to cover both intra-EU and international flights. Therefore, the territorial application of the scheme is that it will cover all flights which enter or depart from EU airspace as from 2012. No distinction is made as regards the nationality of the air carrier operating the flight. Due to the calculation of the necessary allowances utilising the distance of the flight, the scheme will cover flight of no-EU aircraft over non-EU airspace.

3.2.2 Allowances

Article 12(3) of the 2003 EU ETS Directive establishes that '*Member States shall ensure that, by 30 April each year at the latest, the operator of each installation surrenders a number of allowances equal to the total emissions from that installation during the preceding calendar year…*'.[88] The Commission Proposal amends this provision so as to apply to 'aircraft operators'[89] and the Parliament amendments further asserts that the amount of carbon dioxide a non-aviation allowance permits an aircraft operator to emit should be divided by a factor of 2.[90] The Council accepted these provisions within the draft Directive.

The effect of this provision, therefore, is to place a monetary charge on the emitting of carbon dioxide by any installation or, now, aircraft, falling within the scope of the Directive. For every metric tonne of carbon dioxide emitted, the aircraft operator is

[86] *Supra* note 63 at Amendment 50.
[87] *Ibid.*
[88] *Supra* note 20 at art.12(3).
[89] *Supra* note 63 at (8)(b).
[90] *Supra* note 63 at Amendment 41.

obligated to surrender an allowance. Whilst the matter of allowances and allocating such allowances raises its own legal issues, these issues are largely outside the scope of this thesis. Nevertheless, it is useful to be aware that allowances are obtained in the same manner as under the general scheme, but that the Council, in adopting its common position, required 10% of the allowances distributed to air carriers to be done so through auctioning.[91] Furthermore, it endorsed Member State allocation of allowances, with each Member State being responsible for carriers which have their principal place of business within its territory. This raises the question, not addressed in the official published documents, as to which governmental authority will be charged with allocating allowances to non-Community carriers? The problems that this aspect of the EU ETS's expansion to international air transport raises will be addressed throughout this paper. Most principally, it poses issues of discrimination and unequal treatment toward non-Community aircraft.

Therefore, as of 2012, all flights that fall within the scope of the Directive must have obtained sufficient allowances to equal the amount of carbon that flight has emitted throughout its journey.

Now that the basic provisions are understood, attention will turn to the Preamble and travaux preparatoires of the proposed Directive. Again, this is undertaken to more fully understand the rationale behind the EU taking these steps.

3.3 Preamble and travaux preparatoires to the incorporating Directive

The Commission's Proposal recognises that the Kyoto Protocol requires developed States to reduce the emission of greenhouse gases from aviation, '*working through the International Civil Aviation Organisation*'.[92] The proposal goes on to affirm that, as members of ICAO, the Member States '*support work on the development of market-based instruments working with other states at global level*' and, to that end, cites Resolution 35-5 of the ICAO Assembly as specifically endorsing domestic or regional '*open emissions trading*' which might well '*incorporate emissions from international*

[91] It is envisaged that as the scheme develops, the number of auctioned allowances will increase.
[92] *Supra* note 63, Recital 4.

aviation'.[93] The amendments to these recitals, by the European Parliament, were superficial only and the democratic assembly largely endorsed these sentiments.

As stated above, the Commission proposed a staggered approach regarding coverage of flights, solely intra-EU flights falling within the scope of the Directive a full year before any flight, utilising an EU airport, becomes subject to the Directive's provisions in 2012. The Commission considered that this approach might '*thereby serve as a model for the expansion of the scheme worldwide*'.[94] Also noted above, Parliament rejected this approach and called for all flights to be covered from 2010. The European Parliament considers climate change to be a '*global phenomenon which requires global solutions*'.[95] As such, this amendment ought to be regarded '*as an important first step*' in tackling this global problem, with the input of Non-EU parties being invited so as '*to develop this policy instrument further*'.[96] Echoing the Commission, Parliament added, in its justification for the proposed amendment, that '*[t]he EU should talk to third parties to get a global scheme as soon as possible*'. The Council's ultimate position is something of a compromise between the two positions, whilst maintaining the need for universal coverage.

3.4 Analysis and Evaluation of the Proposed inclusion of aviation

It is evident that at all stages in the preparation of the Directive, each European institution (the Commission, the Parliament and the Council) voiced concerns for the singularly European nature of the project. Each was keen to stress the need for international action and the hope that the 'leadership' of the EU would lead to global acceptance of similar schemes. The compatibility with other international schemes is certainly a central rationale in the promulgation of this Directive. The vision is clearly one of leadership which the EU hopes will promote the replication of other compatible schemes. Nevertheless, it also seems that the Commission is unsure as to what position it ought to afford ICAO in the adoption of such policies. Although it championed the role of ICAO in making progress within the environmental aspects of aviation, it nevertheless proceeded to initiate the scheme solely within Europe. Whilst

[93] *Supra* note 63, Recital 5.
[94] *Supra* note 63, Recital 11.
[95] *Supra* note 67, Amendment 9.
[96] *Ibid.*

ICAO has stated that '*emissions trading schemes should not be applied to aircraft of foreign countries without mutual consent*', the EU regards that position as an '*abdication of the leadership role given to it (ICAO) in the Kyoto Protocol*'.[97] A further central theme is clearly, therefore, the legitimacy of action when taken against the background of a multilateral mechanism designed, by the aviation community, to address exactly these matters. The scheme, moreover, has undergone serious debate surrounding its uniform application to, and equal treatment of, air transport undertakings. This is a principal consideration which must be explored within this paper; how is the legitimacy of the EU's action affected by the category of activity it seeks to regulate?

These are perhaps the main threads that run through this paper. They amount to questions and issues which go to the very core of the debate currently surrounding unilateral action within international air transport.

[97] 'ICAO rejects EU's right to impose emissions trading without mutual consent' online:<http://www.atwonline.com/news/story.html?storyID=10355>.

4. SOVEREIGNTY, EXTRATERRITORIALITY, UNILATERALISM & INTERNATIONAL ENVIRONMENTAL LAW

This part of the paper now proceeds to outline the fundamental principles of international law that impact upon the position of the proposed incorporation of aviation within the ETS within EU international relations.

4.1 Public International Law

The modern concept of sovereignty emerged '*[w]ith the rise of the modern state and the emancipation of international relations*' during the period of medieval history.[98] It originally served to describe the supreme power of a legislature over a geographically defined area, but soon '*transmuted into the principle which gave the state supreme power vis-à-vis other states*'.[99] As such, each State began to engage in matters of international relations at the border of their geographical territories, with the consequence that '*fundamental legal concepts [such] as sovereignty and jurisdiction can only be comprehended in relation to territory*'.[100]

Therefore, the concept of territory, as understood in international law, is involved implicitly in matters of conflicts of sovereignty. Whilst territorial sovereignty confers exclusive competence on a State's governmental institutions to govern its own territory, so too it establishes '*the obligation to protect the [same] rights of other states*'.[101] Therefore, a State is obligated by international law to refrain from violating another State's territorial sovereignty and, moreover, must not knowingly '*allow… its territory to be used for acts contrary to the rights of other States*'.[102]

4.2 Public International Air Law

These concepts of sovereignty have been extended above the land of the territory of a State. '*The principle of respect for territorial sovereignty is also directly infringed by*

[98] M Shaw, *International Law*, 5th edition, (Cambridge: Cambridge University Press, 2003) at 21.
[99] *Ibid* at 21.
[100] *Ibid* at 409.
[101] *Ibid* at 412.
[102] *Corfu Channel Case*, (United Kingdom v. Albania, [1949] I.C.J. Rep 1 at 22.

the unauthorised overflight of a state's territory…'.[103] Internationally recognised in its first codified form by the Paris Convention for the Regulation of Aerial Navigation 1919,[104] the principle of sovereignty over ones airspace is the fundamental principle on which all States interact in the field of air transport and navigation.

Stemming from the progress made by the Paris Convention, Article 1 of the Chicago Convention, entitled 'Sovereignty', '*recognize[s] that every State has complete and exclusive sovereignty over the airspace above its territory*'. Article 6 expands upon this notion, stating that '*[n]o scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorisation of that State, and in accordance with the terms of such permission or authorisation*'.

It is immediately noteworthy that Article 1 refers to 'every' State, rather than, as it does in other articles, 'contracting States'. Furthermore, the article does not claim to create or establish the rule regarding airspace sovereignty, but rather 'recognizes' the principle. The use of this language, in applying to all States irrespective of their voluntary subjection to the treaty, and in codifying an already existing rule, has important implications. First, it indicates that the rule is one of customary international law. It is both respected by States in practice and constitutes the *opinio juris* of the international community.[105] Second, and consequently, it indicates that the principle is, to all intents and purposes, inviolable. Therefore, actions which appear or seek to operate against this principle must be scrutinised to the final degree if that action is to be considered legitimate.

4.3 Extraterritoriality

However, simply stating these basic principles belies the true complexity of the interaction between sovereign territories. The impacts and consequences of a

[103] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v. United States*, [1986] I.C.J. Rep 14 at 128.
[104] 11 L.N.T.S 173.
[105] P Mendes de Leon, *The Dynamics of Sovereignty and Jurisdiction in International Aviation Law*, G Kreijen ed., *State, Sovereignty and International Governance*, (Oxford: OUP, 2002) at 484.

sovereign entity exercising its powers do not always remain solely within the geographical boundaries of its territory.

Indeed, with the onset of economic globalization, States have begun to recognise both the desire and necessity of exercising its sovereignty outside its territory. To that end, in the *Lotus* case, the Permanent Court of International Justice (PCIJ) stated that States have a '*wide measure of discretion*' regarding extending the '*application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory*'.[106] In this regard, there have developed a number of principles which legitimise actions which, *prima facie*, violate the supposedly inviolable rule regarding State sovereignty.

First, the above discussion recognised the right of States to exercise territorial jurisdiction '*over all events occurring within its territory*'.[107] Where territorial jurisdiction gives the State sovereignty over all persons[108] within its territory, the corollary of that statement is that a State may claim sovereignty over persons who are not usually subject to its jurisdiction (because of their nationality), but become so due to the persons activity being conducted within the territory of that State. The jurisdiction is therefore exercised within ones territory but over an actor usually subject to another States' jurisdiction. It is this concept which is manifested in, inter alia, Article 6 of the Chicago Convention which requires all aircraft operating in the territory of another State to operate in accordance with the terms of its entry permit.

A further nuance to this situation is where an act is initiated in one State but concluded in another. Within the field of aviation, the Lockerbie bombing provides an example of this scenario.[109] Here, Libyan terrorists loaded a bomb onto an aircraft in Malta which subsequently exploded over the United Kingdom. International law recognises the need for pragmatism in such instances and establishes *subjective* territorial jurisdiction over the terrorist murder for the State of Malta (in which the act was initiated) and *objective* territorial jurisdiction over the same event for the United

[106] *The Lotus Case*, (*France v. Turkey*), (1927) PCIJ, Ser A, No. 10 at 19.
[107] Basic territorial principle. A de Mestral & T Gruchalla-Wesierski, *Extraterritorial Application of Export Control Legislation: Canada and the USA*, (Leiden: Martinus Nijhoff, 1990) at 19.
[108] 'Persons' here understood as including any natural or legal entity, such as a commercial undertaking.
[109] *The Lockerbie Case, Libya v. United Kingdom*, [1992] ICJ Rep 3; 40 ILM 582 (2001).

Kingdom (in which the act was completed).[110] An international flight clearly emits pollution over at least two territories and can, under this approach, be regulated by both parties.[111]

It has also been established that a State may exercise jurisdiction over a person, due to their nationality, '*regard[less] of the fact that the acts and their effects have no relation to the territory of that state*'.[112] Known as the nationality principle and used '*relatively infrequently*'[113] this principle is at the heart of extradition agreements and clearly impinges upon the principle of territorial sovereignty. Similarly, it has been recognised that a State may exercise jurisdiction '*where the nationals of [that] state are injured, regardless where they may be*'.[114] This 'passive personality' principle has not always been fully accepted in State practise but nevertheless constitutes an example of existing, occasionally legitimate, extraterritorial jurisdiction.[115] In this way, protection can be afforded to ones own nationals where damage to that national occurs outside the territory of the protecting State.

Additionally, and perhaps the most pervasive of all the principles, so far discussed, which derogate from the strict application of sovereign territory, States have begun to recognise that some criminal acts, such as piracy and genocide, '*are so prejudicial to the interests of all states, that customary international law…does not prohibit a state from exercising jurisdiction over them, wherever they take place and whatever the nationality of the alleged offender or victim*'.[116]

The penultimate principle derogating from the strict application of territorial jurisdiction to be discussed, the protective principle of jurisdiction, extends even further into the domain of territorial sovereignty. Even where the action at issue is conducted by a non-national outside the territory of the State seeking to prescribe jurisdiction, that State may exercise legislative jurisdiction so as to protect their '*vital*

[110] V Lowe, *Jurisdiction,* M Evans ed., International Law, (New York: OUP, 2006) at 343-344.
[111] This does not prevent a stand-off, however, should either party refuse to cooperate.
[112] *Supra* note 107 at 21.
[113] *Supra* note 110 at 345.
[114] *Supra* note 107 at at 23.
[115] *Arrest Warrant Case, Democratic Republic of the Congo v. Belgium,* [2002] ICJ Rep at 3.
[116] A Aust, *Handbook of International Law,* (Cambridge: Cambridge University Press, 2006) at 45-46.

interests'.[117] Nevertheless, the extraterritorial scope of this principle is limited by the concept of 'vital interests'; some cases being criticised for the interest the prescriptive jurisdiction sought to protect.[118]

The final principle, closely related to the protective principle and perhaps most important for our current discussion, concerns the potential for a State to apply '*jurisdiction over acts done by persons'* who need not be nationals of the prescribing State, *'beyond its state's borders*' but which have effects within that State's borders.[119] Indeed, it is this latter doctrine, the 'effects' doctrine, which has generated most disputes regarding 'extra'-territorial applications of law. Essentially, a state may '*assume jurisdiction on the grounds that the behaviour of a party is producing 'effects' within its territory*'.[120]

For instance, placed in an aviation context, Professor Abeyratne is of the opinion that '*if… engine emissions of aircraft adversely affect the territories of [other] states… the state in which such aircraft are registered or leased or chartered would incur legal liability at international law*'.[121] As such, the injured State might legitimately exercise prescriptive jurisdiction over the activity.

This sketching of various principles of extraterritorial application of jurisdiction has not sought to be exhaustive.[122] Rather, it aimed to demonstrate that, despite the towering principle of state sovereignty as an inviolable constant within international law, it remains possible to legitimately operate contrary to that principle.

This possibility, that there are exceptions to the strict understanding of a State's sovereignty, is fundamental to the debate addressed by this thesis. Where States begin to interact with one another and matters of sovereignty over airspace underlie those interactions, cooperation becomes essential. As noted, the Chicago Convention operates as the bedrock of that cooperation within international civil aviation. It acts

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[117] *Supra* note 110 at 347.
[118] *US v. Gonzalez* 776 F.2d 931 (1985).
[119] *Supra* note 107 at 19-20.
[120] *Supra* note 97 at 612.
[121] R Abeyratne, *Legal and Regulatory Issues in International Aviation*, (New York: Transnational Publishers, 1996) at 291.
[122] See J O'Brien, *International Law*, (London: Cavendish, 2001) at 257; *Supra* note 110 at 335-358.

as a cooperative multilateral treaty which seeks to impose concrete rules on sovereignty over that regime. As seen, however, exceptions to the rule of territorial jurisdiction exist. Equally, exceptions to cooperative multilateralism exist.

Therefore, the paper now addresses the related notion of unilateralism. Due to the inextricable links between international cooperation and sovereignty over ones airspace established by the contracting States to the Chicago Convention, '*[u]nilteralism'*, as Sands states, *'in the international context, is intrinsically linked to sovereignty, territory and jurisdiction*'.[123] This is because '*the term unilateralism is only meaningful where it relates to situations which are not clearly within the territorial jurisdiction of the State which takes legislative or enforcement action*'.[124] It operates in a manner which impacts upon other States and, in that sense, '*can be associated with the term 'extra-territoriality*'.[125]

4.4 Unilateralism

It is important to be aware, nevertheless, that unilateral acts, in international law, are not illegal or illegitimate *per se*. Their legality is entirely dependent upon the circumstances in which they are executed and the repercussions they may have. Whilst '*[s]ome acts are merely political, others have a legal content and produce legal effects…'*.[126] Intrusion, by a unilateral act of another State, upon the interests of a third party may cause dispute because the person affected '*considers itself to be sovereign… in relation to the matter addressed by the act*'.[127] To re-emphasise, precisely because of globalisation and increasing economic interdependence between states, many actions, though traditionally a '*valid expression of sovereignty*',[128] now impact upon foreign territories. Acts which impinge in such a manner are, therefore, '*seen as 'unilateral acts' and are hence tainted*'.[129]

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[123] P Sands 'Unilateralism, Values and International Law' (2000) 11 EIJL 291 at 293.
[124] B Jansen 'The Limits of Unilateralism from a European Perspective' (2000) 11 EIJL 309 at 310.
[125] *Ibid.*
[126] L Boisson de Chazournes, *The Use of Unilateral Trade Measures to Protect the Environment,* A Kiss, D Shelton & K Ishibashi eds., *Economic Globalization and Compliance with International Environmental Agreements*, (New York: Kluwer Law International, 2003) at 181.
[127] *Supra* note 123 at 292.
[128] D Bodansky 'What's So Bad about Unilateral Action to Protect the Environment?' (2000) 11 EJIL 339 at 341.
[129] *Ibid* at 342.

As regards atmospheric environmental matters, it is not disputed that, where an '*environmental problem has sources in many countries, it is beyond the control of any single country and requires collective action to combat effectively*'.[130] Because of this, it may seem that unilateral action is short-sighted and doomed to failure. As such, there appears to be '*an increasing trend toward direct harmonization of approaches to issues involving international protection of the environment*', largely due to the '*inability of any one country or small group of countries to solve the problems involved*' in such matters.[131]

Despite this apparent understanding, '*it may not always be possible to negotiate an international agreement that achieves the high standard that an individual country may wish to establish*'.[132] In matters of environmental protection, the trend remains, regrettably, to '*gravitate to the least common denominator*'[133] where multilateral systems are in place. In such scenarios, many States may begin to perceive unilateral action as the more fruitful avenue. Moreover, within the field of air transport, the attempt at Chicago to establish a multilateral exchange of traffic rights failed and was usurped by the practice of bilateral negotiations in the form of US/UK 'Bermuda' type agreements.

Ultimately, therefore, unilateral action, particularly in the environmental sphere, is something derided in theory, but nevertheless evident in practice. Bodansky states that '*[i]n demarcating the problem of unilateralism, the issue is to define when a state's right to act as a sovereign – that is, to act unilaterally – is appropriate, and when it should yield to an international decision-making process*'.[134]

Placed back in the context of the EU ETS expansion to international air transport, does the EU have the sovereign right to act in this manner or not? Or should it yield to the international decision making procedure that is ICAO? To help in answering these

[130] *Ibid* at 344.
[131] R Reinstein, *Trade and Environment: The Case for and against Unilateral Actions*, W Lang ed., Sustainable Development and International Law, (Boston: Graham & Trotman/Martinus Nijhoff, 1995) at 225.
[132] *Ibid* at 231.
[133] *Supra* note 128 at 344.
[134] *Supra* note 128 at 340.

questions, the paper now proceeds to more closely analyse the concept of unilateral action before drawing together the issues of unilateralism and extra-territorialism.

4.4.1 Rationale and explanation in such measures

If a unilateral measure might only be appropriate under the circumstance that the issue at hand falls within the realm of a State's uncontested sovereign jurisdiction, then it follows that '*the legitimacy of inherently individualistic measures is questionable when it comes to resolving issues of common interest*'.[135] Common interest, however, does not mean that the matter is, necessarily, *legally* within more than one jurisdiction. For that to be the case, the common interest must denote some issue which, in some way, physically or otherwise, impacts upon the territory or jurisdiction of more than one State.

International environmental law, though arguably '*soft in character, unsystematic and insufficiently comprehensive in scope*',[136] has received some attention from the international courts. Most principally, the *Trail Smelter Arbitration* provides a strong assessment of international environmental law as it currently stands.[137] In this case, a smelter, within the territory of British Columbia, Canada, caused damage due to the sulphur dioxide it emitted to the territory of Washington State, US. Submitted for arbitration over the amount owed for the damage, the case established the principle that a State owes an obligation not to cause transboundary environmental damage. *Prima facie*, the rule, therefore, appears to extend universally, in an *erga omnes* fashion. However, for culpable damage to be quantifiable the 'injury' must be '*established by clear and convincing evidence*'.[138] For a real legal interest in the environmental impact of an activity to be founded, that degree of individual harm is apparently required. Nevertheless, in the *Gabcikovo-Nagymaros Danube Dam* case, Judge Weeramantry (dissenting) asserted that international environmental law '*will need to proceed beyond weighing the rights and obligations of parties within a close compartment of individual State interest, unrelated to the global concept of humanity*

[135] *Supra* note 126 at 182.
[136] P Birnie & A Boyle, *International Law and the Environment*, (??: ???, 2002) at 751.
[137] US v. Canada, *Trail Smelter Arbitration*, (1941) 3 RIAA 1905.
[138] *Ibid.*

as a whole'.[139] This wording implies that seeking to protect humanity as a whole, with humanity having a common interest in ensuring protection of the environment, ought to be legitimately recognised under international environment law. Still, Judge Weeramantry's position was not in the majority in the *Gabcikovo-Nagymaros* case, and, in his judgment, he had previously endorsed the *Trail Smelter* decision. Therefore, whilst Judge Weeramantry's approach may indicate the desired destination of environmental law, the need for a quantifiable personal injury so as to legitimately take action under international law may more closely describe international environmental law as it currently stands. This position is supported by Redgwell who also asserts that '*it remains the case that there is not yet any general customary or treaty law obligation on States to protect and preserve the environment*'.[140] Indeed, Redgwell goes on to point out that the *Trail Smelter* and *Gabcikovo-Nagymaros* cases only succeeded in imposing environmental obligations due to the essentially '*bilateral character of the disputes and of the obligations thereunder*'.[141] This certainly implies that without such a bilateral relationship, one State will find it hard to legitimise taking action against another State it feels has failed to fulfill its obligations under international environmental law. Without that concrete bilateral (or multilateral) agreement, it may be difficult to accurately and confidently state when a measure taken without the cooperation of all states having a common interest in that problem is legal. So, '*what for some may merely be an issue of domestic application of legislation may for others be… [a] unilateral imposition of domestic standards on other entities*'.[142]

Of course, from another angle, unilateral *in*action in the face of an apparently global problem, is just as reprehensible as unilateral action. Essentially, '*[i]f collective action is necessary to achieve a community objective, then the refusal by a state to join the international effort, although within the state's rights under traditional conceptions of international law, frustrates the achievement of that community objective*'.[143] In this instance, where unilateral action leads to '*the development of international*

[139] *Gabcikovo-Nagymaros Danube Dam*, Hungary v. Slovakia, [1997] I.C.J. Rep 1.
[140] C Redgwell, *International Environmental Law*, M Evans ed., *International Law*, (New York: OUP, 2006) at 658.
[141] *Ibid.*
[142] *Supra* note 126 at 187.
[143] *Supra* note 128 at 341.

environmental regimes… the less pejorative term… is leadership'. [144] In fact, as Bodansky notes, the '*threat of unilateral national regulation,… can be one of the principal motivations to develop international standards*'.[145]

4.4.2 Prerequisites for unilateral action

However, the legitimacy of unilateral measures depends on more than simply global necessity. Whether or not a unilateral measure is legitimate may partly depend upon whether it '*leaves… room for flexibility, or for 'equivalency' of measures aimed at reaching the same objective*'.[146] To not allow such room is to derogate from the independency of states in circumstances where no agreement has been reached on the issue. Conversely, however, affording such flexibility would indicate that the measure is more, not less, acceptable.

A proactive view of this issue would be one that encourages States to actively assist other States in the development of measures equivalent to those already established by the leading State. The Kyoto Protocol explicitly facilitates this course of action through its Clean Development Mechanism (CDM). This mechanism essentially permits States to contribute toward their carbon reduction obligations under Kyoto by initiating and participating in projects, in the territories of another State, that serve the objectives of the Protocol. Operators subjected to the EU ETS have the possibility to take advantage of this mechanism due to the 2004 'linking Directive'.[147] This Directive establishes a '*direct link between project based mechanisms and the [emissions trading] Directive*'.[148] This means that operators within the ETS are provided with an alternative means to simply obtaining allowances to satisfy their allowance quota. The linking of CDM also provides the opportunity for a '*piecemeal and ad hoc way to extend the coverage of the trading regime*'.[149] For the purposes of a

[144] *Supra* note 128 at 340.
[145] *Supra* note 128 at 344.
[146] *Supra* note 126 at 188.
[147] European Parliament and Council Directive 2004/101/EC of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emissions allowance trading within the Community in respect of the Kyoto Protocol's project mechanisms.
[148] J Lefevere, *Linking Emissions Trading Schemes: The EU ETS and the Linking Directive*, D Freestone & C Streck eds., *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (Oxford:OUP, 2005).
[149] *Ibid* at 521.

global air transport emissions trading system, this is a promising avenue worth exploring. It serves to spread the concept to States outside the European Union whilst at the same time affording those States full deference to their sovereign rights.

In addition to affording such recognition to the sovereignty of other States, it may be that multilateral negotiations ought to be given the primary opportunity to resolve the issue. Certainly, under international trade law, a prerequisite to unilateral action is the engaging in '*meaningful negotiations toward the conclusion of commonly agreed solutions*'.[150] Without this precursor, the taking of unilateral measures which proceed to impact upon another State may well be considered as hostile, illegitimate and, in effect, extraterritorial. Nevertheless, the WTO has, in the *Shrimp-Turtle II* case,[151] held that the correct approach to the precondition of engaging in meaningful negotiations is that reaching an actual agreement is not an obligation. Provided such negotiations are '*conducted in good faith*', then having '*resort to unilateral measures*' was not necessarily prohibited.[152] Bernhard Jansen has noted that the *Shrimp-Turtle II* dispute may only have been correctly decided because the other international parties to the dispute were not '*obstinately refusing to enter into an international agreement*' on the matter.[153] He suggests that where the international community is in fact acting in such a manner, then it may be the case that an '*individual state [is] entitled to take the necessary measures in order to protect the 'global commons' from irreversible damage*'.[154]

A further, important aspect to consider when assessing the legitimacy of unilateral action is whether such activity is substantively justified. It may be prudent, however, to not afford this consideration too much weight. The ultimate success of a scheme is important, but violating international rules on jurisdiction in order to achieve that success is a very dangerous precedent to set. Nevertheless, '*unilateralism may still be substantively justified as environmentally desirable*'.[155]

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[150] *Supra* note 126 at 189.
[151] United States Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the Dispute Settlement Understanding), (2001) WTO Doc. WT/DS58/AB/RW, (Appellate Body Report), online: <http://docsonline.wto.org/gen_search/asps>.
[152] *Supra* note 126 at 190.
[153] B Jansen, The Limits of Unilateralism from a European Perspective, (2000) 11 EIJL 309 at 311.
[154] *Ibid.*
[155] *Supra* note 128 at 345.

4.5 International Environmental Law & the Precautionary Principle

Unilateral action by States has been of particular significance within the field of environmental law. The EU ETS is, ultimately, an environmental measure and therefore attention now turns to address the guiding principles for pursuing environmental policies within the confines of international law.

The United Nations conference on the Human environment, held in Stockholm 1972, established, in Principle 21 of the Declaration on the Human Environment, [156] (Stockholm Declaration) that '*States… have the sovereign right to exploit their own environment policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*'. It is quite clear, therefore, as Bondansky notes, that '*[a]lthough states have the right to act unilaterally with regard to their domestic affairs, they should not be able to impose their will on others*'.[157]

The matter of imposing ones policies on another was addressed at the Rio Summit.[158] The Rio Declaration, in Principle 12, establishes, in part, that,

'*Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing state should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus*'.

Principle 12 of the Rio Declaration does not '*endorse or imply a blanket prohibition on unilateral actions*'.[159] Rather, it requests that such actions be 'avoided'. Ultimately, therefore, even Principle 12, the first real attempt by states to address circumstances in which '*one state could apply its [environmental] values to activities*

[156] UN DOC A/Conf. 48/14/Rev. 1, June 16th, 1972.
[157] *Supra* note 128 at 341.
[158] P Sands 'Unilateralism, Values and International Law' (2000) 11 EIJL 2000, 291 at 294.
[159] *Ibid* at 295-296.

taking place outside its jurisdiction'[160] does not ban unilateral action. Where consensus is sought but not achieved, unilateral action is, essentially, not illegitimate.

Moreover, that unilateral action must have particular consequences for the complaining State. Discussed above, the arbitral tribunal in the Trail Smelter case has reaffirmed that '*no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another…, when the case is of serious consequence and the injury is established by clear and convincing evidence*'.[161] This clearly raises the important question as to what amounts to cases of 'serious consequence' as well as what amounts to 'clear and convincing evidence'? The need for such 'evidence' of a 'serious' nature is supported by Williams, who states that for responsibility to arise under international environmental law, '*[t]he pollution must have been materially substantial*'.[162] Despite this position, unilateral action within the environmental field appears to benefit from special considerations, as opposed to unilateral action within, for example, international trade.

As stated above, '*[t]o characterise an action as 'unilateral' is to condemn it*' amongst international lawyers.[163] However, '*[i]n the environmental realm, this association is far too simple*' because '*effective multilateral action to protect the environment is impossible*'.[164] Therefore, the choice for States faced with addressing environmental concerns is often '*between unilateralism and inaction*'.[165] In this context, unilateral action in the environmental field may be tolerated more than action in other fields.

Manifesting the special allowance given to environmental measures, the internationally accepted precautionary principle operates as a guiding principle in environmental matters. The precautionary principle establishes that '*a State is under a duty to take preventative action if the evidence is such as to show that it is probable or reasonably foreseeable that serious environmental damage will result*'.[166] This

[160] *Ibid* at 295.
[161] *Supra* note 137 at 1965.
[162] S Williams 'Public International Law Governing Transboudary Pollution' YEAR? 13 University of Queensland Law Journal at 132.
[163] *Supra* note 128 at 339.
[164] *Ibid.*
[165] *Ibid.*
[166] J O'Brian, *International Law* (Old Bailey Press: London, 2002) at 557-558.

principle, as a bedrock principle of international environmental law, is endorsed by Principle 15 of the Rio Declaration, which states,

'*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*'.[167]

As Sands states, '*[t]he principle is intended to provide guidance to states and the international community in the development of specific measures of international law and policy in the face of scientific uncertainty*'.[168] Its implementation can be divisive, however. While one party may '*use it as the basis for early international legal action',* others might consider its use to be *'overregulation… to be used to clamp down on a range of human activities*'.[169]

Therefore, the guiding principle behind much of the international communities' efforts at ensuring environmental sustainability of industry encourages action over inaction. As such, it may be possible to invoke the precautionary principle '*in an attempt to justify unilateral measures*'.[170] Within the field of international trade, the World Trade Organisation Dispute Settlement Unit has encountered a number of cases where use of the precautionary principle has seen states '*resort to unilateral measures alleging the protection of its… environmental interests*'.[171] Such measures might well protect the interests of the wider international community. It is important, however, to recognise that whilst this '*gives the claim a greater appearance of legitimacy… [that] legitimacy… may also tend to camouflage unlawfulness*'.[172]

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[167] This principle is also supported by Judge Weeramantry's opinion in the *Gabcikovo-Nagymaros Danube Dam Case.*
[168] P Sands, *International Law in the Field of Sustainable Development: Emerging Legal Principles,* W Lang ed., *Sustainable Development and International Law,* (Boston:Graham & Trotman/Martinus Nijhoff, 1995) at 65.
[169] *Ibid.*
[170] *Supra* note 126 at 186.
[171] See EC - Measures concerning Meat and Meat products (Hormones), (1999) Report of the WTO Appellate Body, 38 ILM 118. See also Supra note 126 at 187.
[172] L Boisson de Chazournes 'Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues' (2000) 11 EIJL 315 at 335-336.

Utilising the precautionary principle as a rationale for unilateral action to secure ones primary goals has also been addressed more widely in international law. In the *Gabcikovo-Nagymaros* decision, the ICJ stressed the importance of the '*existence of a 'peril' in the sense of a component element of a state of necessity*'.[173] Without this 'imminent' peril,[174]and without clear scientific information supporting that peril, unilateral activity under or within the concept of 'state of necessity' would be illegitimate. Highlighted above in the *Trail Smelter* arbitration, a complaining State must suffer 'serious' damage, 'established by clear and convincing evidence'. The logic of this position is also supported in the reverse by the ICJ in *Gabcikovo-Nagymaros*. That is, where a State wishes to act unilaterally within the environmental field, it ought to demonstrate that it is necessary to do so to protect State interests and that there is evidence to support the need for that unilateral action. Whilst incorporation of the precautionary principle into the concept of 'state of necessity' would allow a '*greater scope for unilateral action to safeguard the environment*',[175] the dangers of abuse of such incorporation have been noted by the international law commission.[176] The role of the precautionary principle and the legitimacy of using it to justify State actions which have repercussions outside ones own jurisdiction is, therefore, dependent upon the facts of each case. But case law from the WTO Dispute settlement unit and the ICJ indicate that its application can legitimise unilateral action where environmental protection is the goal.

4.6 Conclusions on Unilateralism & Extraterritoriality

This section of the paper draws together the various threads that have arisen during the discussion of extraterritorial and unilateral activity within international law. It also places these threads back within the context of the application of the EU ETS to international aviation.

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[173] *Supra* note 139 at 42 para 54.
[174] *Ibid.*
[175] *Supra* note 172 at 335.
[176] *Second Report on State Responsibility*, UN ILC, Addendum, UN Doc. A/CN.4/498 (1999) at 32 para 289. During the construction of two barrages over the River Danube, which would ultimately lead to the *Gabcikovo-Nagymaros* dispute in the ICJ, both Hungary and Czechoslovakia acted unilaterally in derailing the project. Both parties were reprimanded by the ICJ for taking such measures during a time when international cooperation had become legally necessary.

First, it is worthwhile re-emphasising that under international air law the principle of territorial sovereignty presides over any informed discussion of jurisdictional dispute. That right of States is '*complete and exclusive*' and any action which is found to violate that principle will necessarily be a violation of international law.

That being said, it has also been recognised, by customary international law and the ICJ, that laws exist which permit States to extend the application of their laws beyond their borders into the territory of other States. There has, however, been no case pronounced upon by the ICJ[177] which establishes that extraterritorial application of a State's laws might be legitimate within the field of aviation.

From the standpoint of the legitimacy of the EU ETS, therefore, public international law seems to preclude its application where it has extraterritorial effect. There is insufficient precedent to support a purely extraterritorial measure within the environmental field being legitimate.

As the discussion proceeded to address the concept of unilateralism, a strong thread that emerged was how that concept related to, and diverged from, multilateralism. The discussion highlighted that modern governmental regulation of air transport stems from the multilateral regime implemented by the Chicago Convention. However, surrounding this discussion, it was highlighted that such multilateralism was not embraced to its fullest possible extent[178] and could often lead to stagnation. Nevertheless, analogies drawn from trade law recognised the need for, and benefits of, good faith multilateral negotiations before unilateral activity might be undertaken.

Application of the EU ETS to international air transport is a straightforward rejection of multilateral progress. It has been concluded and agreed upon by around 1/8th of the members of ICAO and yet affects nearly all of them. However, as will be addressed toward the end of this paper, multilateral negotiations regarding this issue have been underway for some time and yet appear to have progressed little.[179]

[177] Or any 'international' court or tribunal.
[178] International Air Transport Agreement, 7 December 1944, 171 U.N.T.S 387.
[179] See Chapter 8.

Out of the discussion regarding multilateralism came the idea that unilateralism might more sympathetically be seen as leadership. Where the issue at stake was one in which there was a common, global interest, 'pre-emptory' action gained support from the literature as more a demonstration of initiative than a disregard of cooperation. It was noted that unilateral action by the US in the *Shrimp-Turtle II* case may have been regarded as legitimate had the international negotiations on the matter been stagnated. Despite this, the *Trail Smelter* arbitration tribunal was firm in its position that individual harm was necessary to found a claim of responsibility for environmental harm. The logic of that position leads one to assume that where damage cannot be precisely quantified, taking unilateral steps to regulate that 'damage' would not be legitimate. As was seen in the *Gabcikovo-Nagymaros* case, acting unilaterally where one feels aggrieved in circumstances where one is legally bound to act in a contrary manner is a violation of international law.

Again, clearly, the EU would agree that it considers itself to be leading the way on this issue. The negotiations and reports leading up to the adoption of the Proposal Directive say as much. Nevertheless, the EU ought to be confident that it can demonstrate quantifiable harm if it is to fall in line with the *Trail Smelter* logic described above. If it can do so, then the Proposal Directive can bee seen in a positive light when set against the background of stagnated multilateralism in ICAO.

A third thread which arose was that concerning flexibility for other schemes and suspension of the scheme where a 3rd State adopts measures which are at least equivalent to the attempts of the regulating State. It was recognised that under the CDM provisions of Kyoto, the EU could both take their leadership further and demonstrate restraint in having to impose the ETS on 3rd States. Whether that is a viable proposition is beyond the scope of this paper. However, it is important to recognise how the validity of a unilateral measure can be dependant on its recognition of sovereign activity in 3rd States.

The Council made it clear in its political agreement-common positions that it would not impose the scheme on aircraft which were already subject to measures at least equivalent to those of the Proposal Directive. This, however, is the very minimum

recognition the EU is required to demonstrate in order to avoid allegations of extraterritoriality and distortion of competition.

More importantly, however, is recognising that this issue compounds and illuminates further the problem of taking unilateral measures. In so acting, the EU may pose themselves more problems than they are solving. With a failure to fully commit to assisting other States to make advances in cutting the carbon footprint of aircraft and in over-stressing the benefits of taking a leadership role in the matter, the EU is potentially jeopardising the goal it set out to attain – carbon emission reduction. A major flaw, in that regard, contributing to the allegation that unilateral actions should be discouraged, concerns the allocation of allowances prior to the 2012 start date. There is no literature and no official document addressing how non-EU carriers will be included in, or benefit from, that allocation. If 90% of the allowances are to be allocated free of charge by the Member States,[180] does that mean non-EU carriers will be left to purchase from the remaining 10%, which are to be auctioned? This not the appropriate place to address this question in detail, but it highlights the problems associated with departing from multilateral action.

The final issue which arose in the discussion was the importance of the unilateral measure being an environmental one, and how the guiding principle of international environmental activity is the precautionary principle. It was evident that there was a clear clash between the precautionary principle, which envisages and legitimates action by States in circumstances where scientific evidence may not be fully certain as to the imminence of the impending damage, and the international legality of acting unilaterally as a matter of 'necessity' in line with *Gabcikovo-Nagymaros*. The legitimacy of unilateral action based on the precautionary principle is therefore somewhat unsound. The European Union considers the precautionary principle to be at the heart of its environmental policies, Article 174(2) of the EC Treaty stating that '*Community policy on the environment… shall be based on the precautionary principle*'.[181] Initiatives such as the EU ETS must therefore be seen in that light. Understanding that the EU subscribes to a policy which favours environmental action

[180] As will happen if the Commission and Council's suggestions make it into the final Directive.
[181] Treaty of the European Communities, Article 174(2).

over a 'wait and see' approach helps to understand the rationale behind its attitude within ICAO.

Whether the pursuit of, and '*commitment to, environmental ideals*' is worth the price of potentially undermining the '*spirit of cooperation and… integrity of the international system*'[182] is a question that must be answered by the political leaders of each State. In Europe, agreement on that question must be reached by all 27 member states. The only true conclusion that can be made at this stage, in light of analysis undertaken so far, is that whether a State can '*be excused for actually going beyond the threshold of legality in unilaterally safeguard environmental interests*'[183] remains to be seen.

Ultimately, establishing a universal and workable test for assessing the validity of unilateral action has not been achieved in the WTO, ICJ or ICAO. *'[U]nilateral deviation from the international norm'*[184] may well require assessment on a case by case basis. But certain factors impacting upon that assessment must necessarily be addressed for States to be able to, firstly, regulate their behaviour with legal certainty, and, secondly, to be able to resolve a dispute should one arise.

Therefore, and as Bodansky states, *'[r]ather than reject them outright, we should evaluate each particular unilateral action… to determine whether, on balance, it advances or detracts from desired ends'*.[185]

In order that the EU ETS's true legitimacy can be further assessed, attention now turns to the specific area of the extraterritorial application of anti-trust laws.

[182] *Supra* note 131 at 231.
[183] *Supra* note 172 at 332.
[184] *Supra* note 128 at 346.
[185] *Supra* note 128 at 347.

5. UNILATERALISM, EXTRATERRITORIALITY & ANTI-TRUST LAW

This issue is addressed because it provides an already existing example of the extraterritorial application of national (or, regional in the case of the EU) law.

For the remaining parts of this paper, the laws of the US and Europe will be focused on. This is due to these parties being the central protagonists in the dispute over the EU ETS's application to aviation. Therefore, understanding these parties' positions, vis-à-vis one another in matters of unilateral and extraterritorial action, will provide the most fruitful analysis in assessing the legitimacy of the emissions scheme.

5.1 Competition, Antitrust and Extraterritoriality

5.1.1 The United States

As Aust states '*extraterritorial[ity] has become synonymous with certain controversial US legislation …*'.[186] The United States, for many areas of anti-trust (or competition) law, has developed laws which seek '*to impose domestic policy constraints on companies incorporated and operating abroad*'.[187]

5.1.2 Legislation

The Sherman Act, enacted in 1890, is the bedrock of such legislation, stating in its opening section that '*[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal*'.[188] Consequently, the US seeks to prohibit any commercial activity which may be an unreasonable or undue restraint of free trade vis-à-vis the US economy.[189] Moreover, it is quite clear from the text of this Act that the law is applicable to activity conducted with foreign nations. However, due to the potentially expansive reach of a literal interpretation of the Sherman statute

[186] A Aust, *Handbook of International Law,* (Cambridge: Cambridge University Press, 2006) at 47.
[187] *Ibid.*
[188] Sherman Act 1890 15 U.S.C (Restatment Sign) 1 (2002).
[189] *The Standard Oil Company of New Jersey et al. v. The United States,* 221 U.S 1, 54-60 (1911)

the US Congress enacted the Foreign Trade Antitrust Improvements Act,[190] (FTAIA) which amended the Sherman Act in relation to commerce with foreign nations.

In Title IV, it is established that the Sherman Act shall not apply to,

[C]onduct involving trade commerce (other than import trade or import commerce) with foreign nations unless –
1) such conduct has a direct, substantial and reasonably foreseeable effect-
a) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
b) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
2) such effect gives rise to a claim under the provisions of [the Sherman Act].

5.1.3 Case law

The US courts have, on a number of occasions, had to address the matter of extraterritorial application of US antitrust law. In the *ALCOA* case,[191] the US government sought to disband a monopoly of aluminium producers by challenging what it considered an illegal anti-competitive agreement. That agreement included both Canadian and European producers. The court held that it did have jurisdiction over the subject matter and that where '*conduct outside [a State's] borders… has consequences within its borders*', it may legitimately impose regulations upon that conduct. Such assertions constitute the 'effects doctrine' that was highlighted above.

This decision was followed most notably by the *Timberlane Lumber* cases,[192] in which the Bank of America attempted to distort trade in lumber between the US and Honduras. In this case, the 9th Circuit Court of Appeal (upheld by the Supreme Court) recognised the validity of the effects doctrine as utilised by the US government in the *ALCOA* case. However, it also recognised that application of that doctrine could

[190] *Foreign Trade Antitrust Improvements Act*, Pub. L. No. 97-290, title IV, 96 Stat. 1246 (1982).
[191] *United States v. Aluminium Co. of America et al*., 148 F.2d, (1945).
[192] *Timberlane Lumber Company, et al. v. Bank of America National Trust and Savings Associations, et al*., 549 F.2d 597 (9th Cir. 1976); 574 F.Supp. 1453 (N.D. Cal. 1983); 749 F.2d 1378 (9th Cir. 1984); 472 U.S 1032 (1985).

extend too far into the sovereignty principle. Well aware of international hostility to the expansive approach taken in *ALCOA*, the Californian court tempered the effects doctrine. After stating that '*[t]he effects test by itself is incomplete because it fails to consider other nation's interests*',[193] the court opined that the existing authorities supported a '*tripartite analysis*' as to when a US court ought to apply US antitrust law to foreign aspects of a case.[194] The court continued,

'*As acknowledged above, the antitrust laws require in the first instance that there be some effect actual or intended on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws… Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States including the magnitude of the effect on American foreign commerce are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.*'[195]

The matter arose again, in the context of international air transport, in the *Laker Airways v Sabena* case.[196]

Here, Laker Airways found their attempts to actively compete against other airlines through low prices undercut by other airlines, such as PanAm and British Airways. These carriers lowered their prices also and '*paid travel agents secret commissions in order to divert customers from Laker Airways*'.[197] Laker Airways liquidated in 1982 and initiated claims against such these airlines and others alleging predatory pricing and abuse of their monopolistic positions so as to restrict market access to Laker Airways.

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[193] *Ibid.*
[194] *Ibid.*
[195] *Ibid.*
[196] *Laker Airways Ltd. v. Sabena, Belgium World Airlines*, 731 F.2d 909 (D.C Cir 1984).
[197] A Cheng-Jui Lu, *International Airline Alliances : EC Competition Law, US Antitrust Law and International Air Transport*, (Cambridge: Kluwer International, 2003) at 175.

The central aspect of the Laker Airways litigation which is of current interest is the attempt, by the US judiciary, to subject KLM and Sabena to an injunction sought by Laker Airways.

Monroe Leigh has succinctly summarised the position that KLM and Sabena found themselves in.

'*Laker Airways Ltd., a British corporation in liquidation, filed an antitrust action in the U.S. District Court for the District of Columbia against several defendants including American, British and other foreign airlines. The foreign airlines, British Airways, British Caledonian Airways, Lufthansa and Swissair, obtained an injunction in the Court of Appeal of the United Kingdom restraining Laker from litigating its antitrust claims against them in U.S. courts. … In the meantime, Laker filed a second antitrust suit in the U.S. district court naming as defendants KLM… and Sabena…. On Laker's motion, the district court entered a preliminary injunction to prevent the remaining defendants from taking part in the British action designed to arrest prosecution of Laker's antitrust claims.*'[198]

In this case, both US and UK courts sought to assert jurisdiction over the facts at hand and, in the Court of Appeals, the US judiciary had to decide whether it might continue.

The Court affirmed the approach taken to extraterritorial application of US law by the courts in *ALCOA* and *Timberlane*.[199] The court then considered that the English injunction attempted to '*carve out exclusive jurisdiction*'[200] and hence restrict the power of the US courts to address the matter. As such, the US court considered that principles of judicial comity had, in effect, been waived.[201] Judicial comity essentially '*involves a balancing exercise between national and foreign interests*'.[202] The US

[198] M Leigh '*Laker Airways Ltd. v. Sabena*' (1984) 78 American Journal of International Law at 666.
[199] *Laker Airways Ltd. v. Sabena, Belgium World Airlines*, 731 F.2d 909 (D.C. Cir 1984) at para 169.
[200] *Ibid* at 930.
[201] *Ibid* at 938.
[202] M Dabbah, *The Internationalisation of Anti-Trust Policy*, (Cambridge: Cambridge University Press, 2004) at 168.

Court of Appeal Ninth Circuit has espoused a number of factors which ought to be considered during this balancing exercise, including

'*the degree of conflict with foreign law or policy,… the extent to which enforcement by either state can be expected to achieve compliance,… and the relative importance to the violations charged of conduct within the US as compared with conduct abroad*'.[203]

The central theme of these factors is the need to understand, respect and gauge the impact that extraterritorial application of antitrust law would have on the other State(s) involved.

The Court of Appeals affirmed the District Courts decision, therefore allowing Laker's suit against the foreign airlines to proceed.[204]

Finally, the leading case of *Hartford Fire Insurance* further helps to clarify the position of extraterritorial application of antitrust laws.

When the *Hartford Fire* case reached the Supreme Court, the issue of 'true conflict' between competing national provisions was raised. The court stated that without such a true conflict between the two laws (i.e. where compliance with the law of the US would lead to a violation of the law of another country), there was no need to refrain from asserting US jurisdiction. As Dabbah explains, '*[t]he court referred to sections 403 and 415 of the Third Restatement, holding that there cannot be a true conflict if the firm, subject to the laws of two jurisdictions, can comply with both*'.[205] However,

[203] *Supra* note 192 at 614.
[204] Later, in *British Airways Board v. Laker Airways Ltd* [1985] AC 58, the British House of Lords overturned the decision of the UK Court of Appeal that originally sanctioned the antitrust injunction which had been labelled as 'purely offensive' by the Court of Appeals in the US. See para 122 of *Laker Airways Ltd. v. Sabena, Belgium World Airlines*, 731 F.2d 909 (D.C. Cir 1984). The suit was eventually settled out of court.
[205] Section 403 states that 'no conflict exists where a person subject to regulation by 2 States can comply with both'. Section 415 states 'the fact that conduct is lawful in the State in which it took place will not, of itself, bar application of the US antitrust laws, even where the foreign state has a strong policy to permit or encourage such conduct'. *Supra* note 202 at 172..

Justice Scalia, writing for the minority, considered this to be a '*breathtakingly broad proposition*'.[206]

5.1.4 Analysis of US Antitrust laws

The description of US antitrust law as applied extraterritorially, given above, can only be a sketch. There is neither space to be exhaustive, nor is it the aim of this paper to comprehensively assess this area of law. Rather, what can be drawn from this analysis are principles which help provide, through analogy, guidance regarding the potentially extraterritorial nature of the EU ETS's proposed expansion. Before thoroughly analysing these guiding principles, however, it is useful to gain an understanding of the EU's competition law as applied extraterritorially. A comparison of the two regimes can then frame the analysis of the guiding principles.

5.2 European Community

5.2.1 Legislation

The European Community's principal rule regarding competition law, for current purposes, is found in Article 81 of the EC Treaty. Article 81(1) prohibits, '*agreements, decisions by associations of undertakings and concerted practices that have as their object or effect the restriction of competition*'.[207] In a similar fashion to the Sherman Act, and due to the increasing globalisation of many large companies, this Article has been utilised by the European Commission to investigate alleged abuses of EC Competition law which have an '*international dimension*'.[208]

5.2.2 Case Law

Indeed, '*[m]any non-EC undertakings have been held to have infringed the EC Competition rules*' despite raising important questions of territorial jurisdiction.[209] In

[206] *Hartford Fire Insurance Co. v. California* 113 S.Ct. 2891 (1993) at 820.
[207] Treaty of the European Communities, Article 81(1).
[208] R Whish, *Competition Law*, 5th edition, (Suffolk: Butterworths, 2003) at 428.
[209] *Ibid* at 434; See cases 48/69 *ICI* v. *Commission* [1972] ECR 619; Case 114/85 *A Ahlstrom Oy* v. *Commission* [1988] ECR 5193.

Gencor v. Commission, a case arose which concerned a proposed concentration between 5 companies, 4 of which were incorporated within South Africa. The fifth was a company incorporated within the United Kingdom. The Commission declared that the concentration would have violated Article 8(3) of the 4064/89 Merger Regulation[210] because it would have led to a dominant duopoly in the relevant market as a result of which effective competition would have been significantly impeded in the common market. That decision was contested by the concentrating companies. Most importantly for the current discussion, the Court of First Instance (CFI) addressed whether the Merger Regulation 4064/89 (as amended), if applied to a concentration of non-EU parties, was '*contrary to public international law on State jurisdiction*'.[211] After noting that the Regulation was intended to give effect to, *inter alia*, Article 81 of the EC Treaty, which itself has the power to arrest activity which, '*while relating to… activities outside the Communty, ha[s] the effect of creating or strengthening a dominant position*'[212], the CFI asserted that '*[a]pplication of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community*'.[213] Carefully assessing the facts of the concentration, the CFI held the application of the Regulation to have been in conformity with the principles of public international law regarding jurisdiction.[214]

The precise rationale behind granting jurisdiction to the EU to regulate such matters remains unclear. The concept of the effect doctrine, despite gaining support from Advocate General Mayras in his Opinion to the *Dyestuffs* cases,[215] has never received a '*definitive statement from the ECJ*'.[216] Rather, seen in the ECJ's decision in the *Wood Pulp case*,[217] where an allegation of competition law violation is 'implemented' within the EU, then the ECJ will regard the matter as within the jurisdiction of the EU. Despite this official position, it has been stated that '*the application of both the*

[210] Now EC Regulation 139/2004.
[211] *Gencor v. Commission* T-102/96 [1999] ECR II-753 at para 77.
[212] *Ibid* at para 82.
[213] *Ibid* at para 90.
[214] *Ibid* at para 101.
[215] Cases 48/69 *ICI* v. *Commission* [1972] ECR 619 at 687-694; See also Advocate General Roemer 6/72 *Continental Can* v. *Commission* [1973] ECR 215.
[216] *Supra* note 208 at 436.
[217] Case 114/85 *A Ahlstrom Oy* v. *Commission* [1988] ECR 5193.

EC and US merger regulations is very 'effect'-orientated'.[218] Therefore, the EU's position regarding extraterritorial application of its competition law is broadly similar to that of the US's if not linguistically the same. Indeed, '*in most cases… the reasoning of the ECJ in Wood Pulp will be sufficient to establish jurisdiction*'[219] in the same or similar manner as the US does following *Hartford Fire Insurance*.

Nevertheless, despite these similarities, '*there is no certainty that both applications will arrive at the same result*'.[220] The two parties may have diverging opinions about how to address a given incident.

A good example of such differing of opinions is the proposed merger between General Electric and Honeywell.[221] General Electric, a multinational conglomerate with substantial dealings in the aviation sector, sought to merge with Honeywell, also a company with considerable expertise in the aviation industry. The merger was blocked by the Commission and the CFI upheld that decision in late 2005, affirming that to have allowed the joint venture would have been to '*strengthen dominant positions, as a result of which effective competition would [have] be[en] significantly impeded on the market for jet engines for large regional aircraft [and] the market for engines for corporate jet aircraft…*'.[222] The US authorities, on the other hand, had previously sanctioned the merger, determining that it would not have the effects that the Commission and CFI stated it would.

It has been noted that the '*Commission was accused of being concerned with the interest of competitors as opposed to consumers*',[223] those competitors including, notably, the UK's Rolls-Royce and France's Thales. Equally, on the other hand, allowing the merger would have meant significantly strengthened US market players.

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[218] *Supra* note 197 at 253.
[219] *Supra* note 208 at 437.
[220] *Supra* note 197 at 253.
[221] T-209/01 *Honeywell v. Commission* [2005] ECR II-5527 and T-210/01 *General Electric v. Commission* [2005] ECR II-5575.
[222] 'General Electric Honeywell judgement', online: <http://eulaw.typepad.com/eulawblog/2005/12/general_electri.html>.
[223] *Supra* note 202 at 179-180.

The CFI ultimately upheld the Commission's decision to ban the merger, but did so whilst also managing to placate the concerns of the two US companies regarding the procedure through which the Commission had reached its decision.[224]

5.3 Analysis

This part of the paper now seeks to analyse the positions of the respective Parties as regards the extraterritorial application of their anti-trust laws.

First, it is critically important to recognise that ensuring market competition, free from distortion, is a (perhaps 'the') fundamental ideology underlying the governmental policies of both the US and the EU. To that end, the legislative provisions codifying those policies into law are largely similar. It was recognised that both the Sherman Act (as amended) and the relevant Article of the Community Treaty seek to prevent 'agreements' or 'conspiracies' which 'restrain' or 'restrict' 'commerce or 'competition'. In giving full effect to these provisions, it was also seen that the judiciaries of both parties are willing to extend their application to undertakings operating outside the jurisdiction of each territory. However, and despite the apparently similar rationales regarding preserving free commerce, different outcomes in the extraterritorial application of those laws are possible.

As Cheng-Jui Lu notes,

'*Although the EC Merger Regulations and the US merger statutes are quite similar to each other, the actual outcomes of the [GE/Honeywell merger case] highlight[s] the conflict between the applications of these two different competition law systems; it is apparent that divergent national considerations and policies do play a strong role…*'[225]

It may well be, therefore, that to understand the objections levelled at the EU ETS's incorporation of air transport by the US, one must appreciate the 'divergent national

[224] Cases T-209/01 *Honeywell v. Commission* [2005] ECR II-5527;T-210/01 *General Electric v. Commission* [2005] ECR II-5575.
[225] *Supra* note 197 at 260.

considerations and policies' of both the US and the EU. It is here where political and economic factors overshadow legal ones in assessing the appropriateness and legitimacy of the Proposal Directive – which is beyond the scope of this paper. Nevertheless, it can still be noted that it is such factors[226] which nuance and impact upon the application of antitrust regulations in an extraterritorial manner. Within the context of environmental regulation of air transport, those same factors will colour a Parties perception of whether an emissions trading scheme – affecting undertakings of another State – is legitimate or not.

From this position, it can be seen that holding similar views as a State with which one intends to cooperate with in the air transport sector is critical to avoiding regulatory conflicts. For instance, the US DOT issued an International Air Transportation Policy in 1995[227] which sought to outline and give rationale to the United States' strategy regarding international air transportation. Included within this policy document is the assertion that bilateral negotiations with other states must proceed on the liberalised terms exemplified by the burgeoning 'open skies' type agreements. As Cheng-Jui Lu states, '*the statement strongly urges the negotiation of more liberal air service agreements… with like-minded countries…*'.[228] Indeed, such a policy '*prohibits antitrust immunity in global alliances unless an open skies agreement exists between the contracting parties' respective governments*'.[229]

The US will abstain from any air transport agreements, thereby placing conditions of entry on its airspace, which do not adhere to its policy objectives. This concept, of restricting air transport entering and leaving United States airspace to 'like-minded countries', raises interesting parallels with the EU's application of its ETS to air transport.

To that end, Lowenfeld makes the point that '*[i]n determining whether state A exercises jurisdiction over an activity significantly linked to state B, one important*

[226] Which might include lobbying intensity from the aviation and environmental sectors as well as the EU's principal goal of fostering market integration.
[227] Department of Transportation, Statement of the United States International Air Transportation Policy, May 3, 1995, 60 FR 21841-21845
[228] *Supra* note 197 at 198.
[229] S Kimpel 'Antitrust considerations in international airline alliances' (1997) 63 J Air Law & Comm 475 at 511.

question, in my submission, is whether B has a demonstrable system of values and priorities different from those of A that would be impaired by the application of the law of A.'[230]

Would the ETS operate a system which is demonstrably different from the values held by other States, such as the US? US antitrust law, though engendering disquiet amongst EU Member States, appears to harbour similar rationales and values. Free market competition is a shared value between the two parties. Legitimacy in the implementation of such laws is produced because both parties seek open skies, which protect the consumer, ensure fair trade in services and prevents anti-competitive alliances or mergers. In analogy, it seems that the same common ground ought to be found in environmental measures dealing with aircraft emissions before legitimacy can be found in the extraterritorial application of such laws.

Establishing that common ground is not something that ought to be attempted on a piecemeal basis via the judiciaries of either State. The wording of the CFI in *Gencor* strongly echoes the text of the FTAIA 1982, as well as the American Restatement (Third) highlighted in *Hartford Fire*, but inconsistencies remain. This jointly raises two threads that were addressed in the discussion of the antitrust laws of the two Parties. First, perhaps the most interesting aspect of the courts' judgement in *Laker v Sabena Airways* was its assertion that such conflicts are best resolved by the political and not judicial branches of government. In making this judgement, the Court highlighted that both parties had relatively equal claims to being the correct jurisdiction in which the matter ought to have been addressed. This raises the second issue – that of resorting to judicial comity to resolve such conflicts on a case by case basis. Where resolution has not been achieved by the political branches,

'*[a]n antitrust authority should be encouraged to consider the ability of other antitrust authorities to deal with anti-competitive acts committed beyond its own*

[230] A Lowenfeld 'Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the 'Insurance Antitrust Case', (1995) 89 American Journal of International Law 89 1 at 51.

boundaries and within the latter's jurisdiction, before it should seek extraterritorial enforcement of its own antitrust laws.'[231]

As a consequence, unilateral acts which are considered to have been executed purely, or predominantly, in an attempt to prevent the other state from '*vindicat[ing] its own policies*',[232] will not be a legitimate declaration of jurisdiction.

The dispute surrounding the application of the ETS to air transport could benefit from appreciating the nuances of this analysis of the competition law dispute. By analogy, the EU must not seek to vindicate its own policies where to do so would be to hinder or ignore the ability of other environmental authorities to achieve the same. More than this, however, is the importance of understanding the benefits that political cooperation can bring in the long-term – ultimately avoiding complex and sensitive jurisdictional disputes.

Dabbah considers that, as regards unilateral, resented and, perhaps, illegitimate extraterritorial antitrust matters, '*an increase in bilateral and multilateral negotiations between countries in antitrust policy is required to solve these issues*'.[233] In that regard, the increase in unilateral extraterritorial application of antitrust laws by the US may well contradict '*the efforts of the US authorities to support international co-operation*'.[234] As regards international civil aviation, bilateral negotiations are in abundance and in the sphere of aircraft emissions reductions, that co-operation is formally visible through the work of ICAO's Committee on Aviation Environmental Protection.[235]

Indeed, Cheng-Jui Lu echoes the calls for international cooperation to lead the way in disarming tension over extraterritorial application of antitrust law within the aviation sector;

[231] *Supra* note 202 at 198.
[232] *Supra* note 197 at 667.
[233] *Supra* note 202 at 196.
[234] *Supra* note 202 at 187.
[235] A more detailed analysis of the work of CAEP is addressed later in the thesis. See chapter 8.

'*[A]voiding…clashes between two governments asserting jurisidcition to prescribe law over a single series of transactions should not only depend on whether a single state takes international comity into consideration but also on a more active international solution under public international law*'.[236]

She continues by asserting that '*[a]t the very least, a bilateral agreement can resolve clashes… between like minded countries*'.[237]

It is clear, therefore, that scholars are of the opinion that, in theory, bilateral cooperation between states can lead to avoidance of illegitimate or unwanted extraterritorial application of laws.

In fact, the EC and US have sought such cooperation regarding competition matters on two occasions. In 1991, an agreement was reached[238] which '*sets out detailed rules for cooperation on various aspects of the enforcement of EC and US competition laws*'.[239] For instance, Article II requires cooperation between the activities of each party where on becomes aware that '*their enforcement activities may affect important interests of the other Party*'.[240] In 1998, a second agreement developed on these principles, most notably with regard to achieving comity between the two parties where activities in one State '*are adversely affecting the interests*' of the other.[241] Whish states that these cooperative agreements have been '*highly successful in practice*' and that it is only rarely that cases such as GE/Honeywell cause friction which is subsequently illuminated through the media.[242]

In spite of this positive analogy regarding cooperation in potentially extraterritorial matters, the EU's policy forges ahead on a unilateral basis. The motivation for the EU might be explained by analogy to the US's approach to antitrust policy. Dabbah posits that,

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[236] *Supra* note 197 at 177.
[237] *Ibid.*
[238] Cooperation Agreement, 23 September 1991 [1991] 4 CLMR 823.
[239] *Supra* note 208 at 450.
[240] *Ibid.*
[241] *Ibid.*
[242] *Supra* note 208 at 451.

'*[i]f, by relying on its own antitrust laws, a country is independently able to control activities beyond its boundaries, then its willingness to co-operate with other countries on the international plane will not be particularly strong, unless it could achieve better results through co-operation*'.

If one supposes that the laws referred to above are not antitrust laws, but environmental ones, then the EU's approach might be partly explained. The EU may well regard its emissions trading scheme as sufficient to achieve its goals of Kyoto compliant carbon emissions reduction. As such, the EU may have little incentive to continue with international cooperation and respect for international comity.

However, whether political negotiations between the EU and the US regarding environmental regulation of air transport has the opportunity for success (as in extraterritorial antitrust cooperation) is addressed in Chapter 7. Before addressing this matter, the paper now conducts a case analysis of a similar dispute between the US and EU.

6. THE 'HUSHKIT' DISPUTE: A CASE ANALYSIS

This part of the paper now undertakes a case analysis of the hushkit dispute between the US and the EU. This example provides interesting analogies and contrasts to the current dispute surrounding the EU ETS's extension to international aviation. At the heart of the matter was an EU Regulation addressing environmental concerns of international air transport which was adopted outside, and in opposition to, the cooperative framework of ICAO. After outlining the background to the Regulation and its pertinent provisions, the analysis will focus on the opposing Parties' positions. Attention then turns to address the outcome of the dispute itself before evaluating what lessons can be taken from the incident to help in the analysis of the current emissions trading dispute. (Though the parties in this dispute were the US and the 15 Member States of the EU individually, rather than the EU as a whole, the term 'EU' will be used for convenience when referring to the Respondent party in the dispute).

6.1 Background and Main Provisions

The Commission submitted a Proposal Directive on the 'registration and use within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertified as meeting the standards of volume 1, Part II, Chapter 3 of Annex 16 of the Convention on International Civil Aviation' on March 9, 1998. It sought to address the growing disquiet surrounding the noise pollution created by civil aircraft around the airports of the EU Member States. In the period between the Proposal and its adoption, several rounds of negotiations between the US and the EU took place in an attempt to placate the US's reservations concerning what it regarded as a '*purely protectionist*'[243] measure which had a '*disparate impact on US interests*'.[244] Although the deadline for implementation of the Regulation had been postponed to April 29, 1999, because of these negotiations, the European Parliament

[243] A Knoor & A Arndt 'Noise Wars: The EU's Hushkit Regulation, Environmental Protection or 'Eco'-Protectionism?' (2002) University of Bremen at 4. online: <http://www.iwim.uni-bremen.de/publikationen/pdf/w023.pdf>.
[244] United States Department of State (2000a:17).

ultimately adopted the law and it was slated to come into effect on May 4, 2000. The important aspects of the Regulation[245] for current purposes were as follows.

After establishing in Article 1 that the purpose of the Regulation was to '*lay down rules to prevent deteriorations in the overall noise impact in the Community of recertified civil subsonic jet aeroplanes while at the same time limiting other environmental damage*', Article 2(2) establishes that the Regulation applied to aircraft '*initially certificated to Chapter 2 or equivalent standards, or initially not noise-certificated which has been modified to meet Chapter 3 standards either directly through technical measures or indirectly through operational restrictions*'. This therefore applied equally to Community as well as non-Community air carriers. However, the Regulation would not apply to aircraft operating exclusively outside EU territory,[246] and Article 3 extended an exemption to EU Member States aircraft which *prima facie* fell within the scope of the Regulation provided that they had been '*registered in the Community ever since*' April 1 1999.[247] This same grandfathered exemption extended to carriers of non-EU States provided such aircraft had operated into the territory of the Community '*between 1 April 1995 and 1 April 1999*'.[248] Otherwise, any such aircraft were '*banned from getting registered in any EU Member State after April 1, 1999*'.[249]

6.2 Opposing Positions

The EU adopted this measure after the US had deviated '*from the internationally agreed upon ICAO Chapter 2 phase-out schedule*'.[250] Each 'Chapter' indicated an ever-decreasing limit on the noise registered aircraft were permitted to make. The US had progressed on this phase-out faster than agreed upon and there were worries from both the EU aviation market and the noise-abetment lobbyists that this would be an incentive to the US owners and operators to move their Chapter 2 aircraft into the

[245] EC, Commission Regulation 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertified as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation [1999] O.J. L 115.
[246] *Ibid* at Article 4(2).
[247] *Ibid* at Article 3(2).
[248] *Ibid* at Article 3(3).
[249] *Supra* note 243 at 9.
[250] *Supra* note 243 at 12.

territory of the Community. The method of hushkitting such aircraft to comply with the standards under Chapter 3 of Annex 16, thereby facilitating their operational use within the EU, was therefore countered by the EU with the promulgation of this Regulation. Although '*hushkitted aircraft meet Chapter 3 standards,… their performance is near the bottom of the acceptable noise range allowed by [that] Chapter…*'.[251] Therefore, according to the EU, whilst these aircraft technically complied with the Chapter 3 requirements, it did not mean '*that they ha[d] to accept them as Chapter 3 aircraft*'.[252]

Moreover, a central case figuring in the adoption of the Regulation was the late night noisy arrival and departures of US company FedEx aircraft at Zaventum airport, Brussels, Belgium.[253] Clearly, US interests were high in the enforcement of the hushkit Regulation. However, whilst this may appear to be a Regulation solely inspired by potential market disruption from the influx of US 'Chapter 2 aircraft', progress on the noise reduction of civil aircraft was something that the EU had been seeking, through ICAO, for many years but considered that '*the US was blocking its efforts*'.[254] As such, the EU's position must also be understood as one of perceived stagnation in the development of ever more stringent Chapter 4 standards.

The EU, in its submissions to the ICAO Council, stressed that it '*recognise[d] the leading role of ICAO in the development of air transport world-wide as well as in the establishment of the necessary common framework enabling this development, including in the environmental field*'.[255] However, the EU was of the position that, '*[d]ue to slow progress in ICAO [it] felt compelled to adopt its own measures but took care to ensure that they were in conformity with the binding rules of the Convention*'.[256]

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[251] J Fischer 'Aircraft Hushkits: Noise and International Trade' National Library for the Environment.
[252] *Ibid.*
[253] L Weber, Interview with author, Montreal, 28th March, 2008.
[254] *Supra* note 251.
[255] Preliminary Objection presented by the Member States of the European Union, Before the Council of the International Civil Aviation Organisation under its Rules for the Settlement of Differences, concerning the Disagreement with the United States arising under the Convention on International Civil Aviation done at Chicago in 7 December 1944, 18 July 2000, at p 2 para 7.
[256] *Ibid.*

The US, meanwhile, regarded the creation of such a Regulation as '*focused more on targeting US interests than on reducing noise*'.[257] Representative Lipinski had asserted that '*Europe is engaged in a concerted effort to protect and promote its aviation industry at the expense of the US aviation industry*',[258] with the effect of distorting '*the resale of [targeted] aircraft and incentivising the purchase of Community registered aircraft*'.[259] Furthermore, the US argued that the EU had acted to adopt the Regulation '*without a full evaluation of its impact, in terms of both environmental benefits and costs to air carriers and their uses*'.[260] As to the expense, the actual impact upon the US economy during this period was disputed. Whilst the US aerospace industry had estimated the costs to be around $2 billion, the EU is sceptical. However, '*it would not be difficult to believe that the EU regulation [was] not capable of inflicting significant economic harm to an industry that ha[d] been unexpectedly deprived of access to a potentially important market*'.[261] Professor Weber agrees that the Regulation would have had a '*sizeable impact*' on the US market in this area.[262]

As to the US's legal objections to the implementation of the hushkit Regulation, it argued principally that both the design and effect of the measure was discriminatory. For instance, it was argued that,

'*The regulation discriminates among targeted aircraft on the basis of the aircraft's nationality, past and present. For example, a targeted aircraft transferred to or from a non-Respondent registry after May 4, 2000 loses its ability to operate into Respondents' territory; whereas, the same aircraft transferred between any of Respondents' registries would not be restricted*'.[263]

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[257] United States Department of State (2000b:3)
[258] Comments attributed to William Lipinski, Ranking Minority Member of the House Aviation subcommittee of the Committee on Transportation and Infrastructure, quoted in J Fischer, Aircraft Hushkits: Noise and International Trade, National Library for the Environment
[259] United States Department of State, Memorial of the United States to ICAO, concerning the Disagreement Arising under the Convention on International Civil Aviation, 14 March, 2000, D Newman, Agent for the US at 4.
[260] *Ibid* at 3.
[261] *Supra* note 251.
[262] *Supra* note 253.
[263] *Supra* note 259 at 6.

It was also discriminatory in that it distinguished between Chapter 3 complaint aircraft which had been recertified and Chapter 3 compliant aircraft which had always been so certified. As such, the Regulation also violated Article 33 of the Chicago Convention requiring all States to recognise the validity of airworthiness certificates issued by any other contracting State. In light of this, the US application argued that the '*[r]espondents failed to give ICAO the notice required under Article 38 of the Chicago Convention relative to [the differences with the Annex standards]*'.[264] With the hushkitted aircraft technically complying with the ICAO standards then Article 33 had been violated. Finally, it argued that the measure was discriminatory in its effect, citing the arbitration between the US and UK, concerning Heathrow user charges, as authority that disparate impact could amount to discriminatory conduct contrary to the Chicago Convention.[265] In connection with the fact that many of the manufacturers of the hushkits were US companies, the US considered the Regulation to be indirectly discriminatory in its effect. Fischer explains that '*[s]uch a system, in the US view, clearly conflicts with the Chicago Convention provisions that countries not create regulations for noise, or other aviation activities, that discriminate on the basis of nationality*'.[266] A further principal objection to the Regulation was that it deviated from the '*general requirement, laid down in the Chicago Convention and its Annexes, to adopt performance-based standards only*'.[267] Indeed, Professor Weber notes this aspect of the dispute, the stipulation of 'how' a performance target must be met, was a central issue dividing the two Parties.[268]

More generally, the US highlighted what it perceived as '*acting unilaterally and with discriminatory intent*'.[269] John Douglas argued that the Regulation undermined the ICAO's role as the '*sole generally accepted entity to develop global environmental standards on a multilateral basis*'.[270] Similarly, Representative Lipinski stated that such '*unilateral trade restrictions*' were illegal, unfair and constituted '*intolerable*

[264] United States Department of State, Application of the US to ICAO, March 14, 2000, D Newman, Agent for the US.
[265] *Supra* note 259 at 9/10. See US/UK Arbitration Concerning Heathrow Airport Use Charges (Award on the First Question) (1992) at 324-326. Unpublished.
[266] *Supra* note 251.
[267] *Supra* note 243 at 10.
[268] *Supra* note 253.
[269] *Supra* note 259 at 1.
[270] See Statement of John Douglas, President and CEO of Aerospace Industries association of America, Inc., before the Committee on Transportation & Infrastructure, Subcommittee on Aviation, U.S house of Representatives, September 9, 1999, Washington DC.

action'.[271] These objections largely focused around the obligation of the contracting States of ICAO to abide by internationally adopted standards included in the Annexes in the Convention under Article 37 of the Chicago Convention. Consequently, the US argued that the EU's actions '*represent a failure of collaboration and are inconsistent with the on-going effort to develop and implement new international noise certification standards*'.[272]

With the standoff between the two Parties escalating, and criticism for the Regulation mounting,[273] the US finally decided to utilise Article 84 of the Chicago Convention and submitted the dispute before the ICAO Council on March 14, 2000.

6.3 The decision and outcome of the dispute

In light of the lack of progress made in the negotiations between the two Parties, the ICAO Council accepted to hear the dispute. Initially, the EU responded, on the 18 July 2000, to the claim by '*filing three preliminary objections to the US application relating to the absence of adequate negotiations between the Parties, the non-exhaustion of local remedies, and the scope of the requested relief*'.[274] Most notably for current purposes, the EU took 4 pages in its preliminary objections memorial to outline the restrictions and limitations of the ICAO Council in resolving a dispute of this nature.[275] Principally, the EU cited the *Gabcikovo-Nagymaros Danube Dam* case as support for the proposition that specific performance cannot be ordered by a body such as the ICAO Council.[276] As such, it argued that the Council had no power to dictate to the EU that it ought to annul or remove the Regulation in question. The EU, therefore, considered their unilateral action to be outside the legitimate reach of the ICAO dispute proceedings. In fact, the Council was '*very receptive*' to the position of

[271] *Supra* note 258.
[272] *Supra* note 259 at 2.
[273] In fact, one air carrier, Omega Air, which was '*engaged in the installation of hushkits on Boeing 707 aircraft for the air freight market*',[273] sought the annulment of the Regulation in the English courts. On reference to the ECJ, the European Court held that Article 2(2) of the Regulation, prohibiting the recertification of Chapter 2 compliant aircraft so as to comply with Chapter 3 of Annex 16, remained valid. Case C-27/00 *R v. Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd* [2002] 2 CMLR 143.
[274] *Contemporary Practice of the United States relating to International Law*, S Murphy ed., (2001) 387 The American Journal of International Law at 411.
[275] *Supra* note 256 at 8-11paras 31-45.
[276] *Supra* note 256 at 10 para 39.

the US on these issues.[277] The Council dealt with these objections by accepting the US evidence that adequate negotiations, dating back to 1997, had taken place;[278] by rejecting that exhaustion of local remedies was required for filing a dispute before the Council;[279] and by asserting that the scope of the relief requested was a matter to be decided on the merits, not at the preliminary stage.[280] At that stage, the Council encouraged renegotiations between the two Parties in order to resolve the dispute. Before the merits of the case could be heard, however, the ICAO Council, in June 2001, adopted Chapter 4 noise standards within Annex 16. These standards offered '*member-states a great deal more flexibility in the definition and enforcement of their national and local noise abatement policies*' than did the previous set of standards.[281] As a consequence, the EU Council, in mid October 2001, officially recognised the '*prospect of repealing the 'hushkits' Regulation in the near future*'.[282] It finally took those steps in late March 2002, adopting Directive 30/2002 'on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports'. Article 15 of that Directive explicitly repealed the hushkit Regulation. The Directive avoided stipulating design methods to carriers seeking to comply with the Directive and effectively diffused the dispute between the two Parties.

6.4 Evaluation and lessons learned

Before assessing the impact of this dispute on the current discussion regarding emissions trading, it is important to highlight several peculiarities that underpin the hushkit dispute. First, it ought be recognised that the dispute was as between the US and the (at that time) 15 Member States of the EU, rather than the EU as a single body. Article 84 of the Chicago Convention permits only disagreements between '*two or more contracting States*' to be filed and the dispute is therefore necessarily characterised as multilateral in nature. Second, the promulgation of the hushkit

[277] *Supra* note 253.
[278] Decision of the ICAO Council on the Preliminary Objections in the Matter 'United States and 15 European States (2000)' (November 16, 2000).
[279] *Ibid.*
[280] *Ibid.*
[281] *Supra* note 243 at 7.
[282] EC, *EU Council 2374th meeting*, 15, 16 October 2001. minutes available online: <http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=339&lang=en>.

Regulation has been criticised as an '*unintentional accident of history*' in that the drafters evidently paid little heed to the international air transport regulations to which the Member States of the EU were, at that time, subject.[283] This fact therefore impacts upon the notion of intentionally acting in a unilateral fashion with the potential to deviate form international norms. Third, and in spite of collateral rationales, it is quite clear that common market concerns within the territory of the EU were a strong catalyst for the formulation of this measure. In contrast, whilst it might well be the case that the hushkit Regulation was '*nothing more than a protectionist measure masquerading as an environmental initiative*',[284] the proposed expansion of the ETS gains its central purpose from carbon emissions concerns within the framework of the Kyoto Protocol. As a result of these factors, there are '*large differences*' between the hushkit and ETS disputes.[285]

Nevertheless, there remains sufficiently analogous similarities between the two disputes that insights into the legitimacy of environmental measures within international air transport can be made.

First, it is important to recognise the similar objections raised by the US in relation to both disputes revolve(d) around the disparate impact that the measures threaten(ed) to have on its economy. As such, the underlying reason behind the rejection of unilateral EU measures aimed at the environmental impact of air transport, by the US, is ultimately a territorial one. The US regards such actions as impacting on their national economy to such an extent that the measures are discriminatory toward them and an illegitimate exercise of prescriptive national (or, rather, regional) jurisdiction by the EU. Indeed, this analysis re-emphasises two points raised in the discussion centering on extraterritorial application of antitrust laws. These were that, in a globalised economy, it becomes necessary for a State to defend its markets from distortion from sources outside its territory and that wider economic concerns often dictate policy choices in areas such as environmental protection. Where a State appears to be targeted in such a manner, with the economic interests of another State seemingly provoking that targeting, allegations of discrimination may well occur. It was seen

[283] *Supra* note 253.
[284] Comment attributed to Ruth Harkin, Senior Vice-President at United Technologies, quoted in J Fischer, Aircraft Hushkits: Noise and International Trade, National Library for the Environment
[285] *Supra* note 253.

that the US focused its legal challenge of the Regulation around the concept of discrimination as being contrary to the very spirit of the Chicago Convention. Though not addressed on its merits by the ICAO Council, both the design and effect of the Regulation could well lead one to consider that the measure was indeed a violation of the Chicago Convention.

The EU must therefore ensure that its expansion of the ETS does not lead to allegations of discrimination. It was seen that a number of the reports surrounding the Proposal Directive stressed the importance of uniform application of the system to all carriers as regards any grandfathered rights and date of coverage. However, the matter of allocation of allowances to non-Community carriers did not receive similar attention in the official reports and this would be a fundamental basis on which to ground a claim of discrimination within the Chicago Convention framework. If the EU is to avoid a similar dispute as arose in the hushkit dispute, it is critical that it addresses this issue clearly.

There were suggestions, in the analysis of the hushkit dispute, that a principal rationale behind the adoption of the Regulation was the EU's stance concerning progress within Annex 16 more widely. Cooperation on the development of Chapter 4 standards were seemingly moving too slowly for the EU. Equally, it was noted that the US had failed to abide by the agreed phase-out date of Chapter 2 aircraft and that such unilateral action had economic implications for the EU market. As such, the hushkit Regulation was arguably something of a '*bargaining chip to prod the reluctant US government into eventually accepting Chapter 4*'.[286] With the resultant renegotiations following the ICAO Council decision on the preliminary objections, this was arguably a successful ploy, were that indeed to have been a principal factor in the EU's formulation of the Regulation. Moreover, from the EU's perspective, it might be argued that leadership in the stagnated discussion surrounding environmental regulation of international air transport was sorely needed.

This issue illuminates somewhat of a cat and mouse game between the Parties, eager to both secure their economic growth in the industry and progress within ICAO at

[286] *Supra* note 253 at 6.

their desired speed. Though those same economic concerns are diluted under the emissions dispute, a very similar situation exists within the current progress of ICAO on emissions reduction of air transport. Leadership in this area is something the EU is keen to stress in the documentation surrounding the Proposal Directive and it comes from an environment in which it perceives the US to be stalling. If the EU consider the hushkit Regulation to have had the desired catalytic effect within the field of noise pollution, it may be tempted to act similarly with the Proposal Directive within the field of carbon emissions.

Nonetheless, a strong thread emerging from the case analysis was the role that negotiations played throughout the dispute. The US claimed negotiations had been ongoing for at least 3 years and this was accepted in evidence by the Council. Moreover, the EU shaped an objection to the proceedings around the issue of negotiations and it was ultimately renegotiations, leading to the repeal of the Regulation, which resolved the dispute. This, in turn, reemphasises the wider issue of cooperation as contrasted with unilateralism. There was clearly an emerging worry that unilateral actors might proliferate at the expense of ICAO's mechanisms if the hushkit Regulation went unchallenged. It has been argued that '*[i]f the EU [could] unilaterally decide what the standards are for aircraft noise, then it [was not] a far stretch to consider other aviation regulations that could be subject to the whims of national political expediency*'.[287] Consequently, there was concern to preserve the mandate of ICAO as the '*sole entity*' to regulate environmental standards '*on a multilateral basis*'. This was heightened by the fact that the EU, despite recognising performance compliance of the aircraft concerned with the standards laid down in the Annexes, rejected the operational validity of those certificates. That action clearly violated Article 33 of the Chicago Convention.

Furthermore, the matter echoes the points made when attention focused on the prerequisites for undertaking unilateral action. Case law such as the *Shrimp-Turtle II* dispute was explicit in its calling for international negotiations prior to unilateral action. In other words, international cooperation, whether bilateral or multilateral, ought to be given the opportunity to succeed. By accepting the evidence of the US on

[287] *Supra* note 251.

the matter of negotiations, the ICAO Council arguably recognised that sufficient multilateral negotiations had taken place. The consequence of that position would be that, in light of a failure of progress, unilateral action would not, *prima facie*, be prohibited.

Action by the EU in the field of aircraft emissions seems to confirm the worries that unilateral action could undermine the jurisdiction of ICAO to universally address matters of international air transport. This still seems so despite rhetoric from the EU championing the need for cooperation within the ICAO framework on the matter of carbon emissions trading. That being said, negotiations between the two Parties have faltered and it is arguable that the EU has exercised their duty to attempt international cooperation, in good faith, on an issue which clearly has international dimensions.[288] However, it seems more important, from a legal standpoint, that such unilateral action does not seek to deviate from the standards set down in, here, Annex 16. To avoid claims similar to the hushkit ones, the Proposal Directive must not impose design standards, rather than performance standards, which would have the effect of invalidating operational certificates which nevertheless comply with the standards of Annex 16 (thereby violating Article 33 of the Chicago Convention). In assessing the provisions of the Proposal Directive, it is difficult to state whether it constitutes a performance-standard measure or not. Due to its method of utilising market forces rather than traditional ICAO standard's-tools, the measure can arguably be construed both ways; as a performance-based measure in that it stipulates the conditions attached to carbon emissions and leaving the air carrier to operate as it sees fit in light of those conditions, or as a design-based mechanism in that air carriers are not permitted to reduce their carbon emissions as they see fit but must rather appropriate allowances equal to the tonnage of carbon emitted. Ultimately, the EU must address this question if it is to avoid similar claims as made under the hushkit dispute.

The result of the dispute led to the adoption of ICAO Assembly Resolution A35-5 Appendix D. In this part of the Resolution, the Assembly addressed the practice of phasing out aircraft which exceeded the noise level restrictions of Annex 16. The Resolution, most notably,

[288] See Chapter 8 in which the progress of the ICAO's Committee on Aviation Environmental Protection.

'Strongly encourages States to continue to cooperate bilaterally, regionally and inter-regionally with a view to;

a) *alleviating the noise burden on communities around airports without imposing severe economic hardship on aircraft operators; and*

b) *taking into account the problems of operators of developing countries with regard to Chapter 2 aircraft presently on their register, where they cannot be replaced before the end of the phase-out period, provided that there is proof of a purchase order or leasing contract placed for a replacement Chapter 3 compliant aircraft and the first date of delivery of the aircraft has been accepted.'*

Therefore, in light of the troubles caused by the imposition of the Regulation, the ICAO, only 12 months prior to the communication issued by the Commission concerning expanding the ETS to cover international air transport, urged cooperation in environmental matters between ICAO member states. As will now be addressed in the next chapter, that urge for cooperation has been heeded by the US and EU who have recently entered into a new EU-wide Open Skies Plus Agreement. Part of this Agreement addresses environmental concerns and the analysis will examine how the Agreement realigns the position of the EU Member States and the US since the hushkit dispute.

7. THE UNITED STATES & EUROPEAN UNION OPEN SKIES PLUS AGREEMENT

The European Union and the United States have, for over a decade, been in a constant state of negotiation regarding bilateral transport rights. Following the Netherlands' 'open skies' agreement in the early 90's, the US had sought to implement a policy of 'open skies only' agreements with the various European Member States. As this programme began to progress, the European Commission became dissatisfied with the equality of rights traded within the agreements entered into. Moreover, these bilaterals continued to include clauses regarding ownership and effective control which clearly violated Community principles on non-discrimination regarding nationality.[289] After suffering in negotiations with the US over soft rights, the Commission, in 2002, initiated proceedings against certain Member States for breaches of Article 52 of the EC Treaty (concerning freedom of establishment, free from nationality discrimination) and for acting in an area which it regarded as the preserve of exclusive Community competence.[290]

Although the ECJ agreed that the Commission had exclusive competence to deal with the third countries, such as the US, in areas where European legislation touched upon the sphere of external air transport relations,[291] it rejected that the Commission had similar competence to negotiate a bilateral, which would have horizontal effect across all Member States, with the US. As regards the nationality clauses, it stated that '*[b]y concluding and applying an Air Services Agreement… with the United States of America which allows that non-member country to revoke, suspend or limit traffic rights in cases where air carriers designated by the (Member States) are not owned by the (Member State) or its nationals, the (Member State) has failed to fulfil its obligations under Article 52 of the Treaty*'.[292]

Following the decision, the Commission continued in its quest to gain full competence to deal on behalf of the Member States for transatlantic traffic rights.

[289] Principally Treaty of the European Communities, Article 43.
[290] Under 'exclusive competence', the Member States are prohibited from taking national action on that matter. Article 52 EC Treaty, following the renumbering, is now Article 43.
[291] Case C-467/98 *Commission v. Denmark* [2002] ECR 1-9519 at 63. Lecture delivered by Professor Van Fenema to IASL, McGill, 13.03.08.
[292] Case C-466/98 *Commission v. United Kingdom* [2002] ECR 1-9427 at 61.

Finally, in June 2003, the Council accepted the Commission's request to have a full mandate to negotiate an open skies 'plus' bilateral with the US.[293] It took until March 2007, however, for an agreement to be reached between the two parties over the hard traffic rights that would be contained in such a bilateral. It is this agreement which will now be examined. The sections of the agreement which address, or impact upon, environmental concerns are the central focus of the following section.

7.1 US/EU Air Transport Agreement 'Open Skies Plus'

The general policy of the Agreement vis-à-vis environmental measure can be gleaned from a number of areas.

In the Preamble, the Contracting States' affirm '*the importance of protecting the environment in developing and implementing international aviation policy*'.[294] It is notable, however, that this clause comes more than halfway down the list of preamble recitals and appears after considerations of safety, security, competition and growth of the industry.

Within the body of the Agreement, Article 15(1) states that,

'*The Parties recognise the importance of protecting the environment when developing and implementing international aviation policy. The Parties recognise that the costs and benefits of measures to protect the environment must be carefully weighed in developing international aviation policy*'.

Attached to the Agreement is a Memorandum of Consultations, which details important and notable discussions that transpired between the parties during the formulation of the Agreement. At No.35, the matters dealt with under Article 15 of the Agreement, concerning environmental measures, are noted. It states, in part,

'*the delegations noted the importance of international consensus in aviation environmental matters within the framework of the [ICAO]*'.

[293] Lecture delivered by Professor Van Fenema to IASL, McGill, 13.03.08.
[294] US/EU Air Transport Agreement, [2007] OJ L 134/13 at Preamble, Recital No 8.

No.36 of the Memorandum goes on to state that,

'*Having regard to their respective positions on the issue of emissions trading for international aviation, the two delegations noted that the United States and the European Union intend to work within the framework of the [ICAO].*'

Therefore, it is clear that whilst environmental considerations were a discrete and debated issue, it was not a topic which generated strong obligations. The importance of the topic was 'affirmed' but was tempered with the understanding that the benefits emanating from environmental measures must be balanced against their costs. In addition, whilst the delegates apparently supported international cooperation within the framework of ICAO on the issue, the European Union clearly adopted a differing stance as regards the implementation of emissions trading schemes. Indeed, by the time the Agreement was published, the Commission had already published the draft proposal for the Directive incorporating the international civil aviation sector into the ETS. At Article 21 of the Agreement, entitled 'Second Stage Negotiations', the Parties highlighted '*items of priority*' for the second stage negotiations that would follow on from the date of application of the Agreement.[295] Section 2(c) establishes that one such priority would be the '*effect of environmental measures… on the exercise of traffic rights*'. These talks began in Ljubljana on 15 May, 2008 and, at the time of writing, have focused on the issue of ownership and control rather than the taking of environmental measures. The establishment of an Open Aviation area with the US is the EU's long term goal in these negotiations and the freedom to adopt environmental measures to counteract the potential harm of air transport is important to these aspirations. The two Parties therefore envisioned that such environmental measures could impact upon the traffic rights contained in this Agreement, but that negotiations on their effect ought to occur during the second stage of negotiations.

With these policy comments in mind, it is now appropriate to address the relevant detailed Articles within the Agreement.

[295] *Ibid* at Article 21(2).

7.2 Article 15 – Environment

Article 15(2) of the Agreement states that,

'*When a party is considering proposed environmental measures, it should evaluate possible adverse effects on the exercise of rights contained in this Agreement, and, if such measures are adopted, it should take appropriate steps to mitigate any such adverse effects*'.[296]

Immediately, two definitional questions are raised. What does 'evaluate' mean, and what does 'adverse effects' mean? These are questions which the EU must address before embarking upon the environmental measure of expanding the ETS to international air transport. To not do so would be to act in a manner contrary to the international treaty which the EU has acceded to.[297] Aside from the international treaty law issues that such an action would raise, such non-adherence would certainly weigh as a factor in assessing the legitimacy of the proposed emissions trading measure.

The principal right which Article 15(2) refers to (which is prescient for the current discussion) is that contained in Article 11 – entitled 'customs duties and charges'. This Article establishes that,

'*On arriving in the territory of one Party, aircraft operated in international air transportation by the airlines of the other Party, their… fuel… and other items intended for or used solely in connection with the operation or servicing of aircraft engaged in international air transport shall be exempt, on the basis of reciprocity, from all import restrictions, property taxes and capital levies, customs duties, excise taxes, and similar fees and charges that are (a) imposed by the national authorities or the European Community, and (b) not based on the cost of services provided, provided that such equipment and supplies remain on board the aircraft*'.[298]

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[296] *Ibid* at Art.15(2).
[297] For an analysis of the implications of such a violation under international treaty law, see M Fitzmaurice, *The Practical workings of the Law of Treaties*, M Evans ed., *International Law*, (New York: OUP, 2006) at 187-213.
[298] *Supra* note 294 at Art. 11.

Therefore, Article 15(2) obligates both contracting Parties to 'evaluate' the possible 'adverse effects' on the exercise of the right to be exempt, on the basis of reciprocity, from customs taxes or similar charges (where such charges do not relate to the cost of services provided). First, can the ETS be considered as a customs tax or similar charge? Whilst the concept of an environmental tax is viewed as a negative cost of undertaking a certain activity, the concept of emissions trading serves to present '*[e]nvironmental issues… as an economic opportunity rather than as just a cost factor*'.[299] Morevoer, as Dornau explains,

'*Governments could have chosen to achieve the needed reductions through means of taxation or regulation only. But, by choosing a market mechanism regulators acknowledge that the market itself will be in a much better position to decide where the most reduction is achieved with each Euro invested*'.[300]

Therefore, it is clear that a 'tax' is not regarded as the same thing as a market mechanism levy. On that understanding, application of the EU ETS to aviation fails to trigger Article 15(2) of the Agreement and does not operate contrary to the rights, therein contained, of the US. Nevertheless, it might well be argued, by the US, that it does constitute a 'similar charge' – it, in effect, being a monetary charge attached to air transport utilising European airspace. Therefore, the discussion will proceed on the assumption that the ETS 'levy' could be so construed.

The question that must therefore be asked is whether the coverage of international air transport by the EU ETS does have such adverse effects? If the answer is yes, then the EU is obligated, under Article 15(2), to evaluate those effects. If the answer is no, then Article 15(2) does not 'bite' and this Agreement does not restrict the power of the EU to impose emissions trading measures.[301]

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[299] R de Witt Wijnen, *Emission Trading under Article 17 of the Kyoto Protocol*, D Freestone & C Streck eds., *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (Oxford:OUP, 2005) at 403.
[300] R Dornau, *The Emissions Trading Scheme of the European Union*, D Freestone & C Streck eds., *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (Oxford:OUP, 2005) at 430.
[301] Though, this does not mean the EU is not restricted by other international legal, political or economical agreements.

As Miller notes, '*nearly all of the bilateral air transport agreements provide an exemption from fuel taxes on a reciprocal basis*'.[302] Article 11 of this Agreement performs that function. Therefore, where one Party unilaterally imposes the need for monetary allowances equal to the amount of fuel used on the flight entering or leaving EU airspace, that '*would be a violation of the agreement*'.[303]

Where the measure is deemed to have adverse effects, and the Party is obliged to 'evaluate', then the evaluation can still lead to the adoption of the measure. If the evaluation leads to the measure not being adopted, then the matter effectively ends there. However, where the evaluation does lead to the adoption of the measure, the Party '*should take appropriate steps to mitigate any such adverse effects*'. Two more definitional questions arise here, what does 'should' involve and what are 'appropriate steps'? Regarding 'should', it is important that the drafters did not use the word 'must', but 'should' still implies an '*obligation, duty or correctness*'.[304] 'Appropriate steps', however, is wholly free from being tied down to a concrete definition and the appropriateness of any steps that might be taken could only be adjudged should adoption of a measure ultimately lead to dispute proceedings.

Ultimately, therefore, the EU is obligated, under Article 15(2), to first evaluate the possible adverse effects that the proposed expansion to the EU ETS might have and, second, if it goes ahead with implementation of the scheme, take appropriate steps to mitigate those adverse effects. Failure to do so results in the EU violating Article 15(2) of this Air Transport Agreement.

Such a violation would obviously have ramifications for the political relationship between the Community and the US. Any violation of an international agreement will hinder future dialogue between the two transport ministries or departments in the future. Regarding international law, the breach of an international convention, signed and ratified, is a serious matter. This Agreement might more appropriately be considered as a bilateral, with the Community, in effect and for current purposes, acting as one state. As such, a material breach of this Agreement could lead to the

[302] H L Miller 'Civil Aircraft Emissions and International Treaty Law' (1998) 63 Journal of Air Law and Commerce at 708.
[303] *Ibid.*
[304] Compact Oxford English Dictionary, 2008. Entry for 'should'.

other Party (in this instance, the US) invoking that breach '*as a ground for terminating the treaty or suspending its operation in whole or in part*'.[305] Both Article 60(1) of the Vienna Convention[306] and the ICJ's judgement in the *Gabcikovo-Nagymaros Danube Dam*[307] case support this view.

The Agreement, however, does envisage such disagreements occurring and establishes a Joint Committee to oversee such disputes.[308] This Committee is charged with '*resolv[ing] questions relating to the interpretation or application of th[e] Agreement*'.[309]

Article 15(2), therefore, operates as a check on the freedom of the two parties to undertake environmental measures. It requires those parties to take certain steps should such measures potentially impact upon the central aims and principles contained in the 'open skies plus' ideology and text. What it does not do is impose concrete limitations on the power of either State to ultimately adopt such measures. Nor does it obligate the Parties to consult with, or obtain permission from, the other when adopting such measures. Before evaluating this analysis in the context of unilateralism more generally, attention now turns to part 3 of Article 15.

Article 15(3) has an important impact upon the current discussion and contains two parts which must be broken down.

First, it addresses ICAO standards. It states that,

'*When environmental measures are established, the aviation environmental standards adopted by the International Civil Aviation Organisation in Annexes to the Convention shall be followed except where differences have been filed.*'[310]

The fact that the Annex standards are mentioned as being the standards that 'shall' be followed means that both parties may not impose less or more stringent provisions.

[305] *Super* note 98 at 854.
[306] Vienna Convention on the Law of Treaties, 1155 U.N.T.S 331, 8 I.L.M 679, Art.60(1).
[307] *Supra* note 139 at 7, 65.
[308] *Supra* note 294 Art. 18.
[309] *Supra* note 294 Art. 18(2).
[310] *Supra* note 294 Art. 15(3).

This raises the question as to whether the ETS scheme, as applied to aviation, would in fact impose additional standards, contrary to the wording of Article 15(3), or whether the scheme falls outside such standards altogether. There is certainly a strong argument for suggesting that the scheme does not impinge upon the standards at all. It is a very separate measure which seeks to impose charges for carbon emitted. It does not require more environmentally friendly aircraft or different landing/take off procedures or restricts frequency or duration of flights. As such, the standards detailed in the Annex remain the applicable standards and the scheme does not violate or even trigger Article 15(3). Such a line of argument is very persuasive, but, nevertheless, the fact that emissions trading is not a mechanism so far utilised within the ICAO framework means that it is something which has not explicitly been addressed.[311]

The second aspect of Article 15(3) of importance is that,

'*The Parties shall apply any environmental measures affecting air services under this Agreement in accordance with Article 2 and 3(4) of this Agreement*'.[312]

Article 2 states that,

'*Each Party shall allow a fair and equal opportunity for the airlines of both Parties to compete in providing the international air transportation governed by this Agreement*'.[313]

The relation of this provision to environmental measures is that the proposed measure ought not be implemented or designed in a manner which prevents 'fair and equal opportunity' of competition – essentially, no scheme ought to prejudice one airline over another. The effect of this clause is also to prohibit regulations similar to the ones that triggered the hushkit dispute. This is in line with the principle of non-discrimination, contained in Article 11 of the Chicago Convention. Therefore,

[311] See Chapter 8 addressing the work of CAEP. It is important for the EU to be aware that it has a legal obligation to give immediate notification to ICAO, under Article 38 of the Chicago Convention, should it conclude that the scheme does in fact deviate from the standards.
[312] *Supra* note 294 Art. 15(3).
[313] *Supra* note 294 Art. 2.

provided the ETS scheme is implemented in a manner which is non-discriminatory, then the opportunity to compete fairly, all else being equal, is maintained.

Creating more difficulty, Article 3(4) states, in part, that,

'*Each Party shall allow each airline to determine the frequency and capacity of the international air transportation it offers based upon commercial considerations in the marketplace. Consistent with this right, neither Party shall unilaterally limit the volume of traffic, frequency… of service, or the aircraft type or types operated by the airlines of the other Party… except as may be required for… environmental (consistent with Article 15) reasons under uniform conditions consistent with Article 15 of the Convention*'.[314]

There are several issues arising from this Article which must be taken in turn. Two preliminary observations might be made first. The 'Article 15 of the Convention' referred to in the final line is Article 15 of the Chicago Convention. This Article obliges states to impose only uniform charges, conditions and procedures '*for the use of… airports and air navigation facilities by the aircraft of any other contracting State*'. It follows the same non-discriminatory principle as Article 11 noted above, and again requires environmental measures to be uniform. The second observation is that the Article, again, specifically addresses the situation that was discussed regarding the 'hush-kits' dispute. It seeks to guard against unilateral environmental measures which limit the types of aircraft which each Party may fly into the territory of the other. The US and EU, therefore, clearly considered that incident a) to have the potential to reoccur and b) to be important enough to be guarded against by international agreement.

The Article goes on to state that each Party shall allow airlines to determine the frequency and capacity based upon 'commercial considerations' in the 'marketplace'. As above, both these phrases require defining. If an airline is prevented from determining their frequency and capacity between Parties because of factors outside 'commercial considerations', then the measure causing that prevention violates

[314] *Supra* note 294 Art. 3(4).

Article 3(4). Where that measure is environmental in nature (rather than commercial) then it violates Article 15(3) because that Article requires that any environmental measures adopted be in compliance with Article 3(4). As was noted above, the Parties recognised in Article 21(2)(c) that environmental measures could well have an effect on the exercise of traffic rights. That said, a Party attempting to enforce these provisions must grapple with the concept of internalising the environmental externalities which, under certain theory,[315] operates as a 'commercial consideration'. Indeed, it was noted above that emission trading is often preferred over straightforward taxation due to it providing economic opportunity and incentive for the market players. And, to make matters worse, one can only attempt to deal with commercial considerations when one has defined 'marketplace'. The permutations of airline 'market's' are well known to aviation economists and lawyers.[316] Ultimately, if these concepts can be defined, then one is in a position to understand if the adoption of an environmental measure under Article 15(3), such as the imposition of an ETS, would violate Article 3(4) of the Agreement.

However, there is yet another hurdle which must be examined before it can be evaluated whether or not the ETS is in violation of this Agreement. Article 3(4) goes on to state that '*neither party shall unilaterally limit*' aircraft, frequency or traffic volume '*except as may be required for… environmental reasons*'. It adds that such reasons must be consistent with Article 15 of the Agreement, as well as Article 15 of the Chicago Convention. It has already been demonstrated that Article 15 of the Chicago Convention is apparently satisfied by the design of the Directive imposing the ETS on aviation. Additionally, whether or not a measure is consistent with Article 15 of the Agreement has already been discussed. Therefore, Article 3(4) essentially provides that, where an environmental measure *does* satisfy the incumbent criteria, (i.e. allowing airlines to base their flights on commercial considerations within the marketplace, does not deviate from the ICAO Annex standards on the environment, evaluates any potential adverse effects of the measure and subsequently takes appropriate steps to mitigate those effects) it can be adopted unilaterally in a manner

[315] See R A Ippolito, *Economics for Lawyers*, (Princeton: Princeton University Press, 2005) at 228-246.
[316] See J Gulick, *Its all about market share: competition among US West Coast Ports for Transpacific containerized cargo*, P S Circantell & S G Bunkev eds., *Space and Transport in the World System*, (US: Greenwood Publising, 1998).

which limits the volume of traffic, frequency or aircraft type operating into and out of its territory.

Therefore, despite the numerable hurdles faced by a contracting Party to this international agreement, unilateral environmental measures, which may even have the effect of inhibiting the growth and competition of civil air transport, are not prohibited by this open skies agreement.

7.3 Evaluation

This part of the paper now seeks to highlight and evaluate some of the wider issues raised by the establishment of this Agreement.

Two short observations can initially be made. First, the establishment and ratification of an agreement which operates as a binding international treaty raises questions of good faith for the legitimacy of a subsequent, deviating, unilateral act. Indeed, under such circumstances a State '*is obliged to refrain from acts which would defeat the object and purpose of a treaty*'.[317] This assertion stems from the principle of pacta sund servanda, that '*[e]very treaty in force is binding on the Parties to it and must be performed by them in good faith*'.[318] Notably, in the *North Atlantic Coast Fisheries Arbitration* case, concerning the unilateral rights of Great Britain to permit US nationals to fish in Canadian waters, the Tribunal asserted that '*the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the [relevant] Treaty*'.[319] Similarly, the EU would be limited to act unilaterally within the parameters of its Air Transport Agreements. Article 21 of the Agreement, in addition to its appending travaux preparatoires, implies that both Parties recognise the need for, firstly, a 'stand still' approach to undertaking environmental measures and, second, to work cooperatively on the realisation of those measures. If the EU does forge ahead with the incorporation of international air transport into the ETS then the

[317] Vienna Convention on the Law of Treaties 1969, Article 18(a), 1155 U.N.T.S 331.
[318] *Ibid* at Article 26.
[319] *North Atlantic Coast Fisheries Case, United Kingdom v. United States*, (1910) 11 RIAA 167.

legitimacy of that action is very questionable in light of its concrete undertakings and raises '*the principle of good faith in treaty-making*'.[320]

Second, it is important to recognise how the attitude toward the environmental issues at stake, conveyed by the text of this Agreement, is not necessarily in line with the environmental policy approach of the EU as a whole. Indeed, the Agreement tends to play down the environmental impact of trans-Atlantic air traffic as compared with other priorities. This would indicate, in line with Article 21 of the Agreement, that the Agreement did not seek to overly arrest the development of environmental policies of either Party. The Agreement does not explicitly request its Parties to withhold from pursuing or investigating potential avenues of environmental regulation in line with usual policies. In light of this, political progress within the European decision making procedure on the expansion of the ETS might not be considered improper.

Perhaps a principal issue to highlight, in light of the analysis of this Agreement, is how the two Parties' positions have been realigned since the hushkit dispute. The most obvious manifestation of this realignment is the very existence of a Europe-wide open skies 'bilateral' rather than the multitude of Member State-US bilaterals that previously existed. The two 'Parties' therefore now operate largely as though the EU is simply another State with which the US has a bilateral. The traffic rights in issue are therefore universal for all 27 Member States and the Commission possesses far greater leverage in having the destinations within each of those States within its bargaining portfolio. Moreover, the existence of one such universal agreement means that the obligations and rights of each Party, specifically regarding environmental matters, are clearer than existed during the hushkit dispute. The possibility that an EU Regulation might now be drafted which, through lack of involvement by European air transport authorities and minsters, would unintentionally violate any pertinent air transport regulations is therefore drastically reduced. Furthermore, the Agreement's establishment of a Joint Committee could serve to assist in the resolution of any dispute similar to the hushkit one, should it arise again. Perhaps the most interesting aspect of this Committee is that it serves, in effect, to usurp the role of the ICAO

[320] *Supra* note 172 at 328.

Council in settling disputes relating to international air transport.[321] Although Article 84 of the Chicago Convention, providing the ICAO Council with its dispute resolution powers, is triggered only in relation to disagreements concerning the '*interpretation or application of [the Chicago] Convention and its Annexes*', the essential dispute behind imposition of the ETS environmental measure is that it is unilateral, infringes rights of sovereignty and deviates from the Annexes. The dispute that might arise from implementation of this scheme may violate Article 15(2) of the Agreement, but it could also fit into dispute proceedings before the ICAO Council. The very fact that the US and EU considered it necessary to establish such a panel demonstrates that the Parties envision the need to move away from relying on ICAO to resolve disputes that might arise over bilateral matters. As such, the legal nature of the potential dispute moves away from the jurisdiction of a multilateral body, and into the jurisdiction of a specialised, bilaterally created, tribunal. This in turn indicates that the two parties recognise, or have perhaps learnt, that each party has their own goals and ideologies within transatlantic civil aviation and that, as such, reciprocally recognising the need for a tribunal more sensitive to such needs might ultimately benefit, or assist in, the facilitation and achievement of those goals.

A further important issue which analysis of the Agreement illuminated is that it reaffirmed the position of the ICAO SARPs as the presiding standards to which both Parties are obliged to comply. Article 15 was explicit in this regard. Therefore, the public position of both Parties is the acceptance of, and deference to, the multilateral framework of cooperation provided by CAEP and the SARPs it promulgates in Annex 16. Whether the EU see the extension of the ETS as impinging upon Annex 16 and the jurisdictional mandate it publicly affords CAEP in matters of environmental regulation of civil air transport is far from clear. In analysing the Agreement it was submitted that there is a persuasive argument for concluding that it does not. Nevertheless, it is an issue which remains open to debate.

The final wider matter emanating from the discussion of the Agreement is similarly an issue which remains unclear from the published reports coming form Brussels. It was seen that there exist a number of definitional questions that the EU must address

[321] Chicago Convention Article 84

if it is to formulate the ETS's expansion to aviation without infringing Article 15 of the Agreement. Paraphrasing, this centred around what constituted appropriate measures to mitigate any adverse effects that a proposed environmental measure might have. This essentially raises design questions for the precise structure of the ETS's application to international air transport and are not within the purview of this paper – principally because such matters have been adequately addressed in the literature. However, what has not been adequately addressed, or even explained, concerns the allocation of allowances to non-Community carriers. This is clearly a matter which threatens to have '*adverse effects on the exercise of rights contained in this Agreement*'.[322] It also threatens the maintenance of an equal competition playing field more generally. This matter was highlighted earlier on in the paper when the discussion addressed the objective drawbacks of pursuing unilateral action within a context of inherent bi and multilateralism. Against that background, this Agreement further illuminates the need to ensure that adverse effects in the sector are avoided through cooperation with potentially affected parties.

[322] *Supra* note 294 at Article 11(2).

8. KYOTO, ICAO & SARPs

This part of the paper steps back from the focus on the US and EU relationship and addresses the wider framework in which international air transport standards are formulated. It addresses the principal role of the ICAO and its Committee on Aviation Environmental Protection (CAEP) under the Kyoto Protocol. The section then focuses on the standards and recommended practices (SARPs) which the CAEP is charged with formulating before analysing how this wider multilateral framework, and these uniform SARPs, regulate the legitimacy of taking unilateral action within the field of international air transport.

8.1 Kyoto & ICAO

The matter of climate change, as noted, has been addressed by the United Nations principally through the 1992 Framework Convention on Climate Change (UNFCCC). This was followed by the '*innovative 1997 Kyoto Protocol that is designed, inter alia, to utilise market mechanisms to assist with the massive reductions of greenhouse gas emissions necessary to arrest the process of climate change*'.[323]

Article 3(1) of the Protocol assigns allowances to each government for the amount of greenhouse gasses that may be emitted from designated activities. The government then allocates its overall allowances to emitters within its jurisdiction. An allowance '*embodies a right to be sold and transferred*'.[324]

International aviation, however, was specifically excluded by the contracting States at Kyoto from coverage under this cap and trade system. Instead, the Protocol '*delegates the responsibility for international aviation emissions to the ICAO*'.[325] The two principal benefits from this decision are clearly ICAO's expertise in aviation matters

[323] D Freestone, *The Untied Nations Framework Convention on Climate Change, the Kyoto Protocol and the Kyoto Mechanisms*, D Freestone & C Streck eds., *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (Oxford: OUP, 2005) at 3.
[324] M Wemaere & C Streck, *Legal Ownership and Nature of Kyoto Units and EU Allowances*, D Freestone & C Streck eds., *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (Oxford: OUP, 2005) at 42.
[325] F Carlsson & H Hammar 'Incentive based regulation of CO2 emissions from international aviation' 8 Journal of Air Transport Management 365 at 366.

and, perhaps more importantly for our current discussion, the truly global and multilateral environment in which it operates.

8.2 CAEP

Currently, ICAO's '*environmental policies are pursued through its Committee on Aviation Environmental Protection (CAEP), established in 1983*'.[326] Its principal mandate is to preside over, maintain, update and improve upon Annex 16, which now deals with both noise pollution and engine emissions.

In the past decade, CAEP has met 4 times,[327] and on each of those occasions has addressed, *inter alia*, the matter of emission related charges.[328] Whilst the precise concept of utilising market instruments such as emissions trading schemes to counter aircraft emissions developed over this period, the '*importance of seeking coordination within ICAO in introducing emission levies so as to avoid uncoordinated measures was stressed*' from the beginning.[329] At each session, the matter of emissions trading was discussed without any formal recommendations being made. The creation of a working group at the 1999 meeting made little real progress either. Interestingly, at the 5th meeting in 2001, Resolution A33-7 was passed which encouraged States to '*take short term action to reduce international aviation emissions through the use of voluntary measures*'.[330] Whether or not those voluntary measures envisaged encompassing regional emission trading schemes is not clear from the surrounding text.

The use of CAEP as the principal body to undertake environmental activities, however, has not received universal encouragement. In 1998, the ICAO Assembly

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[326] P Dempsey, Public International Air Law, Reader, Volume I, 2007, unpublished at 163.
[327] And 7 times since its creation.
[328] ICAO, Report of the Fourth Meeting of the Committee on Aviation Environmental Protection, Montreal, 6-8 April 1998, ICAO Doc. 9720, CAEP/4 at i-6; ICAO, Report of the Fifth Meeting of the Committee on Aviation Environmental Protection, Montreal, 8-17 January 2001, ICAO Doc. 9777, CAEP/5 at i-1; ICAO, Report of the Sixth Meeting of the Committee on Aviation Environmental Protection, Montreal, 2-12 February 2004, ICAO Doc. 9836, CAEP/6 at i-1.
[329] Y Nyampong, *The regulation of Aircraft engine emissions from international civil aviation*, McGill IASL LLM Thesis, unpublished, at 85.
[330] ICAO, Consolidated Statement of Continuing ICAO Policies and Practice related to Environmental Protection, Assembly Resolution A33-7 Appendix I in Resolutions Adopted at the 33rd Session of the ICAO Assembly, at 2(a), online: <http://www.icao.int/icao/en/assembl/a33/resolutions/a_33.pdf>.

requested that States from regions that are not represented or under-represented in the CAEP participate in the Committee's work. Despite this, efforts continue to attract new participants.[331] At its most recent meeting, the ICAO Assembly adopted Resolution A36-22 on the recommendation of work undertaken within the CAEP during early February 2007. Appendix L addressed '*market based measures, including emissions trading*'. The Preamble to this Appendix recognised that '*[c]ontracting States are responsible for making decisions regarding the goals and must use appropriate measures to address aviation's greenhouse gas emissions taking into account ICAO's guidance*'. However, it also recognised that '*the majority of the Contracting States endorse the application of emissions trading for international aviation only on the basis of mutual agreement between States*', which resulted in the '*need to engage constructively to achieve a large degree of harmony on the measures which are being taken and which are planned [to be taken]*'. Affirming the potential for dispute in this area, it also noted that '*there remained a number of issues of a legal and policy nature regarding the implementation of GHG charges and the integration of aviation into existing emissions trading systems that have not been resolved*'. Elsewhere in the Preamble it was noted the difference between taxes and charges, with the Council '*[s]trongly recommend[ing] that any [emissions trading] levies be in the form of charges*', '*designed and applied specifically to recover the costs of providing facilities and services for civil aviatio*n'. It also urged States to ensure that any '*open emissions trading systems… be established in accordance with the principle of non-discrimination*'. The Appendix's substantive content is very clear in its wording. It '*[u]rges contracting States to refrain from unilateral implementation of greenhouse gas emission charges*'.[332] Similarly, it also '*[u]rges contracting States not to implement an emissions trading system on other contracting States' aircraft operators except on the basis of mutual agreement between those States*'.[333] That said, the Appendix also '*[r]ecognises that existing ICAO guidance is not sufficient at present to implement greenhouse gas emissions charges internationally…*'.[334] Interestingly, the Appendix also '*[i]nvites contracting States to explore the use of the Clean Development Mechanism (CDM) related to international aviation*'.[335]

[331] ICAO website, ENV UNIT, CAEP, online: <www.icao.int/icao/en/env/caep.htm>.
[332] ICAO Assembly Resolution A36-22, Appendix L, Article 1(a)(3).
[333] *Ibid* at Article 1(b)(1).
[334] *Ibid* at Article 1(a)(2).
[335] *Ibid* at Article 1(d)(1).

Clearly, however, the progress of CAEP on ensuring the sustainability of air transport has somewhat stagnated. Similar sentiments to those expressed in Resolution A36-22 have been made for a number of years now.

Before analysing what this means for the legitimacy of the EU ETS, attention turns to the concept of SARPs. Promulgation of SAPRs for Annex 16 regarding environmental matters is CAEP's primary function. These Standards constitute the internationally agreed upon regulation of international civil air transport's environmental impact. An understanding of the nature of these regulations is critical to understanding the context in which the proposed expansion of the EU ETS is being conducted.

8.3 SARPS

The SARPs, though without the force of an international treaty, do entail legal obligations for the contracting States to the Chicago Convention. Such States have '*accepted an explicit legal undertaking to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures and organization in relation to [air navigation]*'.[336]

The ICAO SARPs are the current multilateral mechanism used to govern or guide, at an international level, the consequential national regulations concerning air transport. Compliance with these standards is the central cause for concern for most States. Without that compliance, the inherent need for cooperation on uniform rules in international air transport is jeopardised. There are two principal mechanisms for ensuring that compliance. First, stipulated by Article 33 of the Chicago Convention, compliance with these SARPs ought to be recognised, on a reciprocal basis, by every contracting State.[337] As highlighted by the hushkit dispute, this means that certificates of airworthiness and certificates of competency and licences '*issued or rendered valid by the contracting State in which the aircraft is registered, shall be recognized as*

[336] M Milde, *Problems of Safety Oversight: Enforcement of ICAO Standards*, Chia-Jui Cheng ed., The Use of Air and Outer Space: Cooperation and Competition, (Boston: Kluwer Law International, 1998) at 254.
[337] Chicago Convention Article 33.

valid by the other contracting States, provided that the requirements under which such certificates or licences were issued or rendered valid are equal to or above the minimum standards which may be established from time to time…'. This Article therefore dictates that one State may not reject or discriminate against the aircraft of another State, where that aircraft is complying with the standards annexed to the Chicago Convention. This issue was litigated in the case of *Caledonian v. Bond.*[338] Here, a recent spate of accidents over US territory involving DC-10's resulted in the unilateral banning of all such aircraft from operating over the airspace of the US.[339] A number of foreign-flag carriers objected that this action disregarded Article 33 of the Chicago Convention in that their DC-10's satisfied the requirements of the standards set down by ICAO in Annex 8 – the relevant annex. The District of Columbia Circuit court agreed and held that the US's unilateral banning of such aircraft violated both international law of the Chicago Convention and the implementing national legislation.[340]

The second mechanism designed to secure adherence to cooperation on uniform rules and prevent States from being exposed to air navigation on non-uniform Standards concerns disclosure of information. Where a state considers it '*impracticable to comply in all respects with any international standard, it has an unconditional legal duty, under Article 38 of the [Chicago] Convention, to give immediate notification to… ICAO*'.[341] Through this mechanism, it was anticipated that contracting States within ICAO could assess, with full information, the air navigation standards of every other contracting State. In the first place, however, compliance by all members with Standards which they (ought to) have participated in drafting is the presumptive position within ICAO.

As such, the SARPs ought to indicate two things. First, that these Standards are being met by every aircraft that retains an operator's certificate of airworthiness. Second, that each contracting State is in agreement that the uniformity established by the SARPs is acceptable and sufficient at that given time.

[338] 665 F.2d 1153 (D.C Cir 1981).
[339] FAA, Emergency Order of Suspension, SFAR 40, June 5 1979.
[340] P Dempsey, Public International Air Law, Reader, Volume I, 2007, unpublished at 27.
[341] *Supra* note 336 at 254- 255.

Achieving uniformity in such regulations is not simple, however. The procedure '*requires harmonization of the potentially conflicting interests of [190][342] Member States at different levels of technical and economic development, each of whom may have different national priorities*'.[343] Consequently, it is obvious that some states may feel that progress on a given standard is too slow, or moving in the wrong direction, whilst others may consider another states' pressure to amend such standards unnecessary or inappropriate. This is the very nature of international cooperation.

8.4 Analysis

This discussion highlights the important point that was made at the very start of this paper. This is that the international community has sought, through the Kyoto Protocol, to address the problems posed by greenhouse gas emissions. Moreover, it recognised that for aviation, ICAO was mandated with addressing this emissions problem. Therefore, an important factor characterising the current dispute is that the multilateral cooperative framework of ICAO gains legitimacy in its action and statements in this area from an international agreement. It is, as a consequence, not to be taken lightly that it explicitly urges individual States not to take unilateral action without first obtaining the 'go-ahead' from other States affected. From a practical perspective, taking such action was recognised to be necessarily limited in its scope. In that regard, analogies were drawn with the potentially limited scope of banning certain unsafe aircraft from ones territory in violation of Article 33 of the Chicago Convention. One might therefore conclude that action in this area is restricted to ICAO under both legitimacy and practical grounds. However, it was also recognised that such progress and action, within ICAO and more specifically the CAEP, has not been forthcoming. This was recognised as being a symptom of the difficulty in harmonising regulations to satisfy all 190 Member States in ICAO. In that light, the concept of leadership is again raised. The EU could argue that against the background of effective abdication of the mandate granted to ICAO by Kyoto, individual State action is necessary. However, where such rhetoric is employed, one would urge the EU to fully exercise that leadership role and take advantage of ICAO's call for initiatives under the CDM to be realised.

[342] At the time of writing. 11.03.2008.
[343] *Supra* note 336 at 257.

Action by the EU therefore, in pressing ahead with it expansion of the EU ETS, explicitly goes against the desires of the body legitimately mandated to tackle the issue. It does so however, in light of a perceived inability of ICAO to fully exploit that mandate. Moreover, it does so with the understanding that ICAO has encouraged voluntary measures under its Resolution A33-7 and recognised the insufficiencies of its international guidelines under its Resolution A36-22. Therefore, this is a very complex matter on which a confident judgement can be made as to the legitimacy of the EU's action.

One can look at state activity in promulgating standards and see it as '*leadership… assert[ing] itself convincingly in the elaboration of international standards*'.[344] From another angle, it is ill thought out unilateralism which disregards States '*hardly able to oppose 'motherhood' initiatives aimed at the enhancement of aviation…*'[345] and ignores the long-term benefits of genuine cooperation. To that end, drawing on the analogy provided by the *Caledonian v. Bond* case, the action of unilaterally banning certain aircraft which nevertheless satisfy ICAO requirements '*cannot be global – it solves only the specific bilateral issues between [one State] and the countries directly concerned*'.[346]

In sum, from the perspective of legitimacy of unilateral action within international law, it is very questionable whether such action can ultimately be defended in light of the explicit mandate granted to the ICAO under Kyoto.

Indeed, this analysis raises the wider question of the appropriateness and fitness of the ICAO to be the sole authority empowered to regulate all aspects of international air transport. If ICAO is regarded as inefficient in achieving progress on a given topic, then any such shortcoming could '*be readily [repaired] by other mechanisms and the progress of aviation… would not forever remain hostage of outdated methods and practices*'.[347] In this light, the role of ICAO is would no longer be universal over every aspect of air navigation regulation. For instance, it has been argued that the

[344] *Supra* note 336 at 257.
[345] *Ibid.*
[346] *Supra* note 336 at 254- 255.
[347] *Supra* note 336 at 260.

WTO is better placed to regulate certain aspects of air transport.[348] '*The inability or unwillingness of States to use ICAO as the forum for multilateral liberalization*' may lead States '*favouring multilateral liberalization to attempt it in a forum more sympathetic to that goal*'.[349] As such, the WTO would serve as an experienced environment in which unilateral applications of international air transport regulation could be more appropriately addressed. Alternatively, Miller has addressed the issue of engine emissions and argued that ICAO is best places, and better placed than the Framework Convention on Climate Change, to regulate these matters.[350]

Therefore, in questioning the legitimacy of the EU's action, one is confronted with the conflicting literature which also questions the appropriateness of ICAO in developing internationally accepted regulations on the same issue. This question lies outside the scope of this paper but serves to demonstrate the seriousness of the underlying topic; the emerging trend for, and legitimacy of, unilateral action within international air transport.

A significant aspect of the discussion undertaken above concerned the issue of compliance with the SARPs. ICAO's Annexes and the incumbent Standards remain the dominant source of detailed international regulations for aviation. Failing to recognise the validity of another contracting States certificate of operation despite compliance with the pertinent SARPs will be challenged – as was seen in both the *Caledonian v. Bond* and Hushkit dispute cases. If the EU is to avoid a similar challenge to its expansion of the ETS, the critical question is therefore whether such an expansion deviates from, or impacts upon, the SARPs.

If the ETS' expansion is not considered as triggering involvement of the SARPs, then the EU, in arguing that the SARPs are not affected, may avoid similar problems confronted in the hushkit dispute. The EU would assert that the scheme does not expressly require additional efforts to be made regarding the environmental impact of aircraft. It simply imposes a charge on the use of fuel for flights destined for, or departing from, EU airspace. In that regard, the EU is perfectly entitled, under

[348] R Janda 'Passing the torch: Why ICAO should leave economic regulation of international air transport to the WTO' (1995) 10 Annals of Air & Space Law at 409.
[349] *Ibid* at 409, 416.
[350] *Supra* note 302 at 722-729.

international air law and in accordance with Article 6 of the Chicago Convention, to establish the terms on which scheduled international air transport operates over, or into, its territory.

That being said, ICAO has been charged with dealing with aircraft emissions by the Kyoto Protocol, and the contracting States of ICAO have setup the CAEP to specifically deal with the matter. Where that body does not seek to address the environmental impact of aircraft outside the normal parameters of the SARPs, then the international aviation community is effectively stating that those standards are the only regulations that ought to govern international civil air transport. Operational certificates issued by contracting States ought to be of sufficient validity to satisfy the conditions of another contracting State. As the US argued in the hushkit dispute,

'*The obligation of a State to recognise a noise certification means that the State into which the certified aircraft seeks to operate cannot deny access to its airspace or airports on the basis of some additional noise based requirement*'.[351]

Consequently, imposing additional requirements, unilaterally, whether or not impinging upon those standards, is consequently unwanted and illegitimate.

These conflicting viewpoints are a manifestation of the legal problem discussed in the *Hartford Fire Insurance* case. Essentially, the ETS' expansion would establish two regulatory frameworks for air carriers. For all non-Community airspace, the environmental regulations imposed are contained in Annex 16. However, where those carriers operate routes which involve Community airspace, the regulations affecting those routes will be those contained in Annex 16 *plus* the emissions trading scheme. The *Hartford Fire Insurance* case ultimately found that where two sets of antitrust regulations impact upon on an undertakings' operations, there is no real conflict where both sets of rules can be complied with. As such, one State ought to respect the regulations of the other State. This was supported by the Restatement position.

[351] *Supra* note 259 at 13.

Therefore, the question above, asking whether the ETS impacts upon the SARPs might mutate into a different question. Are the air carriers affected able to comply with both sets of regulations; the SARPs and the ETS? If so, and there is no real conflict, then international comity and reciprocity might suggest that it is legitimate to allow both sets of regulations to run alongside each other. That view would be reinforced by the notion that the EU is sovereign over its airspace and may impose any requirements it wishes, provided such requirements comply with the Chicago Convention and its attendant Annexes, on entry and departure from its territory.

Still, these are conceptually difficult questions and one must be careful not to become mired in lingual sophistry. Rather, the true effect of the ETS upon the SARPs must remain the principal test as to whether the EU is acting in a manner contrary to Article 33 of the Chicago Convention.

9. EVALUATIONS & CONLCUSIONS

The thesis now concludes by assessing the proposed expansion of the EU ETS to international civil aviation in light of the analysis undertaken throughout.

Throughout this paper, the central premise upon which the EU claims to proceed in its subjecting of foreign aircraft to its emissions trading regime is that leadership in this area is required. The Commission, in stating that it was '*[un]realistic to expect ICAO to take global decisions on uniform, specific measures to be implemented by all nations'*,[352] was quite clear in demonstrating that it does not consider international cooperation on this issue to be sufficiently forthcoming. The other EU institutions have taken similar stances, it being noted that the Council consider the EU's action to '*promote the development of similar systems worldwide*',[353] and that the Parliament sees EU action '*as an important first step*'.[354]

That said, the EU remains keen to follow those comments almost invariably with calls for development of international cooperation in light of these '*first steps*'. The need for this cooperation was seen to be ardent in light of ICAO's mandate from Kyoto and from understanding that, like with safety of the skies, individual measures within international aviation can never be truly '*global… [solving] only the specific bilateral issues between [one State] and the countries directly concerned*'.[355] As such, it was seen that Parliament urges the EU '*to talk to third parties to get a global scheme as soon as possible*', and that the Committee of the Regions encouraged any '*efforts to coordinate the [EU ETS] with comparable approaches in third countries*'.[356] This envisages two types of international cooperation, of course. The first is a global scheme, potentially administered through the ICAO. The second is a network of national/regional schemes, administered nationally or regionally but 'inter-operable' with each other. As things stand, the EU ETS has potential to advance both of these possibilities. As was noted, the original ETS Directive permits transfer of allowances with persons in third countries listed in Annex B to the Kyoto Protocol (which have

[352] *Supra* note 46.
[353] *Supra* note 76.
[354] *Supra* note 65.
[355] *Supra* note 336 at 254- 255.
[356] *Supra* note 62.

ratified the Kyoto Protocol) where such persons mutually recognise allowances in the EU ETS with 'allowances' in other greenhouse gas emission trading schemes.[357] In line with that approach, the European Parliament stressed the need for the Commission to amend the Directive where a 3rd country '*adopts measures for reducing the climate change impact of flights which are at least equivalent to the requirements of this Directive*'.[358] Furthermore, it was highlighted throughout the paper how the CDM of the Kyoto Protocol might be utilised by the EU, though the 2004 linking Directive, in fully exercising its leadership potential, to cooperate internationally in the field of emission trading for aviation emissions. Particularly notable was the call from ICAO itself that States should '*explore the use of the Clean Development Mechanism (CDM) related to international aviation*'.[359] There are various permutations of encouraging use of CDM within air transport, from prioritising the use of credits from the air commerce sector in developing countries to merely allowing use of credits, from any sector, (the use and regeneration of biofuel production being a current example), but not encouraging such use. Again, this is an area where leadership on the part of the EU would strengthen its claims of legitimacy in the eyes of the global community. For instance, the formulation of guiding principles in the use of such credits would foster greater certainty and stability amongst the air transport actors seeking to offset their carbon emissions. Building consensus amongst the wider international community is essential if the EU are to progress with the implementation of this scheme and such actions would immediately gain support from the industry.

Therefore, in light of these aspects, the potential is there for the EU ETS scheme to be one which co-exists with other schemes on the same issue. Indeed, the legitimacy of a unilateral measure generally was noted to depend upon whether it '*leaves… room for flexibility, or for 'equivalency' of measures aimed at reaching the same objective*'.[360] This is crucial within the field of air transport in light of the presiding Article 1 of the Chicago Convention,[361] recognising a State's '*complete and exclusive sovereignty'* over its territory.

[357] *Supra* note 20, art(s). 12(1) & 25(1).
[358] *Supra* note 67, Amendment 68 to Article 25a, para 1.
[359] ICAO Assembly Resolution A36-22, Appendix L, Article 1(d)(1).
[360] *Supra* note 126 at 188.
[361] 15 U.N.T.S 295.

The second possible form of cooperation, noted above, was a global scheme which would be regulated and administered by States through ICAO. Throughout the paper, the role of ICAO and the appropriateness of unilateral action within an activity such as international air transport, seemingly intrinsically multilateral in nature, were consistently raised. The EU, aware that the problem is '*global in nature'* does continue to assert that it is '*necessary to work through the International Civil Aviation Organization (ICAO) in order to ensure the worldwide application of an emissions trading scheme*'.[362] Moreover, it has included within its recent Open Skies Agreement with the US, in both the substantive content and the appended notes,[363] the recognition that ICAO guidance on the issue remains '*important*' and '*shall be followed*'.

The EU therefore recognise that international air transport can only be comprehensively regulated through ICAO, an inherently multilateral environment. Is unilateralism within international air transport regulation therefore the exception to the rule of multilateral cooperation through ICAO? The literature seemed to support cooperative negotiations[364] as the appropriate route toward ensuring long-term standards acceptable to all parties, and it was the rejection of this path which ultimately led to the hushkit dispute - the EU's actions '*represent[ing] a failure of collaboration… inconsistent with the on-going effort to develop and implement new international noise certification standards*'.[365] In fact, however, '*multilateralism in air transport continues to be the exception and not the rule – apart, of course, from matters relating to technical and safety aspects*'.[366] Throughout the paper, it was noted that multilateralism does not personify all areas of international air transport regulation. It has never been embraced to its fullest extent and pursuing it has often led to stagnation. Indeed, the EU's urgency in forging ahead in this area comes from

[362] *Supra* note 53.
[363] US/EU Air Transport Agreement, [2007] OJ L 134/13 at Art. 15(3).
[364] *Supra* note 202 at 196; *Supra* note 197 at 177.
[365] *Supra* note 259 at 2.
[366] M Marconini, *The Globalization of the Economic Regulation of Air Transport*, Chia-Jui Chang ed., *The Use of Air and Outer Space: Cooperation and Competition*, (Boston: Kluwer International, 1998) at 28.

the ICAO's concession that its '*guidance is not sufficient at present to implement greenhouse gas emissions charges internationally…*'.[367]

Nevertheless, ICAO remains the legitimate body to address international aviation emission regulation under Kyoto. In agreeing to this at the UNFCC, the EU has good faith treaty obligations to abide by in this respect as well. Therefore, the potential for this type of trading system to operate as a prototype to a multilateral system administered through ICAO is there. But it currently comes against the wishes of the members of ICAO, despite unilateral action being the norm, and not the exception. In this regard, the legitimacy of the trading scheme is questionable, if not patently illegal. The decision to act independently, therefore, is one which cannot proceed ignorant of the competing interests of other ICAO member States. Success of the system is dependent upon it instigating and merging with one of the above scenarios; either an interoperable network of national/regional systems or a single global scheme operated through ICAO. To achieve that, the EU must proceed carefully. The factors affecting this degree of care have been seen to be numerous.

It was seen that the US judiciary considered it necessary to amend the effects doctrine in a manner that would '*consider other nation's interests*'.[368] The extraterritorial reach of that doctrine needed to be tempered in the eyes of the US courts if it were to continue in a manner conducive to international relations. That same logic was demonstrated by rejecting deference to the English courts where a UK statute sought to overtly restrict the power of the US courts.[369] As such, it was a measure which failed to adequately consider other nation's interests, with the consequence that cooperation through the comity principle had been forfeited. [370]

Complementing this analysis of the legitimacy of extraterritorial application of anti-trust laws was the concept of co-existing of regulation. In the absence of a conflict between the laws promulgated by each State, however, it was legitimate for one State to press forward in the application of its laws. Without the overlapping of jurisdiction, territorial principles were respected. This was the conclusion drawn in the *Hartford*

[367] ICAO Assembly Resolution A36-22, Appendix L, Article 1(a)(2).
[368] *Supra* note 192.
[369] *Supra* note 196 at 930.
[370] *Supra* note 196 at 938.

Fire Insurance case, supported by the American Restatement (Third). Moreover, it was seen that the CFI formulated its approach to the legitimacy of extending EU competition law extraterritorially largely in line with the American Restatement (Third) in the case of *Gencor* and that *Gencor* finds favour with ECJ decisions in the *Woodpulp* and *Dyestuffs* cases.[371] The conclusion drawn from this understanding was that common understanding and a shared set of values was required to assist in the legitimacy of the antitrust regulation.

Propositions for the legitimacy of the current EU proposals can be drawn from this analysis. Expansion of the EU ETS to international air transport must be done on a shared set of values held by the States who argue that this is an area under their own jurisdiction. It must be done in a manner which considers the interests of the other States affected and it would benefit from refraining from impinging upon already existing regulation.

That common ground and those shared values, it was argued in the literature, ought to come not from the judiciary on a piecemeal basis but from prior political agreement.

And, as was discussed, such a political agreement addressing the regulation of air transport between the US, the most vocal objector to the expansion of the ETS, and the EU now exists. That Agreement was analysed for its impact upon the area of emissions and two conclusions were drawn. Firstly, that the Agreement does not ultimately preclude either of the Parties from imposing environmental measures unilaterally and, second, that Article 21 of the Agreement identified this issue as something that ought to be negotiated in further detail during the 'second round' of negotiations. If Article 21 was intended, as was suggested in the discussion, to operate as a stand-still provision in relation to adopting such measures, then the EU may well be acting contrary to its bilateral declarations. To that end, it was highlighted that, in contrast to the circumstances of the hushkit dispute and noise reduction, the Agreement provides a clear understanding of the bilateral position of the two parties on this issue of emissions trading. Therefore, whilst it might have been argued that the 15 Member States were not similarly restricted by clear text in relation to imposing

[371] *Supra* note 211 at para 90.

noise reduction measures, that same understanding cannot be afforded to the EU in relation to emissions trading. Where this is the true effect of Article 21, serious questions surrounding '*the principle of good faith in treaty-making*'[372] can be posed to the EU.

With that caveat, it is submitted that the EU can show deference to the values of the US by abiding by the terms of the 2007 Open Skies Agreement. As has been demonstrated, that Agreement ultimately allows either Party to unilaterally adopt environmental measures aimed at reducing aircraft emissions. It is, of course, essential that the EU acts in a similar fashion as regards other States harbouring similar views to that of the US.

The existing regulation that ought to be avoided from impinging upon was identified as the SARPs promulgated by the CAEP. The principle discussion in this regard centred around whether the EU ETS was a measure capable of deviating from the Standards laid out in Annex 16 and, if so, whether they did so.

There were strong arguments favouring the conclusion that the ETS does not in fact constitute a measure which requires States to go beyond the Standards laid down by CAEP. It was suggested that imposition of the ETS would create a two-tier, or additional regulatory mechanism which would ultimately cause no conflict in both SARPs and EU airspace entry compliance.

It is submitted that this approach sees the ETS as a '*valid expression of sovereignty*'[373] despite constituting a unilateral measure. Although it deals with an environmental problem, the regulation of which '*is beyond the control of any single country and requires collective action to combat effectively*',[374] and falls largely within the domain of the mandated CAEP, the special nature of utilising market mechanisms ensures that the EU are not deviating from international Standards in the same manner that the US did in *Caledonian v. Bond*, or the EU did in implementing the hushkit Regulation. ICAO has moved slowly on the issue of utilising market mechanisms to combat the

[372] *Supra* note 172 at 328.
[373] *Supra* note 128 at 341.
[374] *Supra* note 128 at 344.

environmental impact of aircraft emissions and accepts that its '*guidance is not sufficient at present*' in this area. As such, expansion of the EU ETS does not constitute an illegitimate unilateral act which impinges upon internationally agreed Standards.

Considering the interests of the other States primarily concerns allowing national authorities to regulate the matter for themselves where possible and should be fair toward the economy of those other States in this area.

It follows naturally from the premise that every State is sovereign over its territory that the consequences of an international problem can best be regulated locally by governmental authorities over its territory. Where international cooperation can be achieved on the matter, all the better. Where that is not possible, however, States should be encouraged to deal with the problem within their own sphere of power. Therefore, the EU should operate its ETS in a manner which allows States to so act. The scheme should be suspended where another State operates a scheme of equal effect and it should be coordinated with such other schemes. The need for Kyoto's CDM to be taken advantage of has already been mentioned.

Moreover, the need to apply the system uniformly is a fundamental tenet in considering the interests of other States. As the Commission was keen to stress, ensuring '*equal treatment*'[375] meant '*the need to apply the system under uniform conditions to both EU and third country carriers*'.[376] This is stressed also by ICAO in urging any '*open emissions trading systems… [to] be established in accordance with the principle of non-discrimination*'. Moreover, it was seen that a principal ground on which the US formulated its claim in the hushkit dispute was the apparently discriminatory nature of the hushkit Regulation, both in design[377] and in effect.[378] Furthermore, the EU is obligated not to disrupt the level playing field protected by the US/EU Open Skies 'Plus' Agreement. Indeed, as discussed above, the US will have fought hard to have incorporated its interests in this Agreement. As such, the EU, in seeking to afford consideration for the interests of the US (with the same principle

[375] *Supra* note 67.
[376] *Supra* note 48.
[377] *Supra* note 259 at 6.
[378] *Supra* note 265.

applying to all other States with whom the EU have a bilateral), ought to aim to abide by both the spirit and letter of this Open Skies Agreement. In so doing, it has a strong argument that it is also considering the interests of the US in line with the *Laker Airways* doctrine of legitimate extraterritorial application.

Achieving these requirements and aspects of non-discrimination seems to have been paramount in minds of the EU drafters when designing the ETS. In fact, the Commission's only official reference to the legal aspects raised by the ETS's expansion was that such uniformity and equality of treatment is a legal necessity '*consistent with the Chicago Convention*'.[379] It has been noted, however, that official documents have failed to address the matter of allocation of allowances to carriers of non-EU States. This threatens the equal treatment of all carriers, potentially violating the Chicago Convention, the Open Skies Agreement and, possibly, competition laws on State Aid. The legitimacy of the unilateral action of the EU in expanding the ETS to cover international air transport is threatened by this omission. 100% auctioning of the allowances seems politically impossible, with grandfathered rights a constant in the imposition of such trading schemes. The provision of 10% auctioned allowances with the rest provided to the Member States, however, clearly disrupts the international market of air transport and is discriminatory toward non-EU States. This, however, is a political and economic problem at heart. As such, it goes beyond the ambit of this paper. Nevertheless, it is essential that the EU designs the ETS in a manner which is totally free from discriminatory effects if it is to be a legitimate measure.

The likelihood of Europe progressing with its proposed expansion without enduring either legal or economic repercussions from, most likely, the US, is zero. The EU will be forced to engage in further talks on this issue, whether that be in a tribunal of law or within the IATA forums. Assertion of its legal rights to act in this manner may assist its position in a courtroom. But, in the long run, the detriment posed to the EU's economy (e.g by resulting in the rescheduling of connecting flights outside the EU's airspace) may outweigh the gains of pushing ahead with the ETS's extension. That said, the EU need not shirk from the responsibilities that go hand in hand with

[379] *Supra* note 59 at 4.

leadership. There remain aspects of the ETS's design and implementation that would benefit from greater attention, such as the potential for the CDM to be utilised and the need for clarity regarding allocation of allowances to non-EU carriers. If the EU is to exercise legitimate leadership in this area, then it must ensure that aspects such as these are dealt with in a manner that both respects the doctrine of sovereignty whilst also ensuring that the ETS is as effective as can be. An acceptable trajectory out of this conflict is most likely to be achieved through each State developing their own, similar, schemes which could then be interoperable with the ETS, rather than through straightforward assertion of ones legitimate right to regulate all aircraft entering its airspace.

In conclusion, although there are several legal, political and regulatory hurdles for the EU still to address, the EU may legitimately and unilaterally establish an emission trading scheme which incorporates foreign aircraft. Whether this measure will be significant in the pressing need to curb carbon emissions from the international transport sector is another question which remains to be answered. However, it is essential that global actors are not discouraged or prevented from taking action to halt unregulated development which '*risks undermining the many advances human society has made in recent decades*'.[380]

[380] *Supra* note 1.

The following brief section comprises a postscript note. This is undertaken on the excellent suggestion of my thesis supervisor, Professor Richard Janda, and serves to highlight certain reservations I have regarding the conclusion I have come to in this paper.

Firstly, I am fully aware that a sensible argument can be, and is being, made to support the conclusion that the inclusion of international aviation into the EU ETS is clearly extraterritorial and would be found so in a court or tribunal. Any measure which has the effect of regulating, directly or indirectly, undertakings of another State runs the risk of being labelled such. Proponents of the EU ETS who may share the views of those presented in this paper ought to recognise the quality if not, in my view, the correctness, of the contrary opinion. Doing so allows both parties to more easily find an acceptable trajectory out of the current conflict.

Second, it seems necessary to disclose the fact that this paper has been written by a student of the common law system. As such, the principles propounded within the common law have been hovering on the author's shoulder throughout this thesis' construction. Most prominent of those principles has been the concept that a legal principle is confined to the facts of the case in which it is propounded, allowing for appropriate and judicious extension; where one case can be distinguished from another, the legal principles at play will be dissimilar. I have sought to invite the reader to conclude that, under the current, applicable law, the proposed expansion of the EU ETS is legitimate. I have sought to achieve this, in part, through the use of analogies with anti-trust law and by distinguishing the hushkit dispute case. Nevertheless, a common law lawyer can become loathe to depart from the maxim that '*[e]very judgement must be read as applicable to the particular facts proved…*'.[381] Therefore, as support for a legal argument, analogies from diverse areas of law are far from watertight. Whilst the allusion may be *prima facie* comparable to the current legal problem, closer inspection can reveal important legal dissimilarities, leaving the analogy a misleading falsehood. That said, the common law does not prohibit the extending of legal principles to new fact scenarios, indeed, that is the very basis on which it seeks to develop and lays claim to its supposed 'flexibility' over a civil based

[381] *Quinn* v. *Leatham* [1901] AC 495, per Lord Halsbury.

system. Development on a case by case basis, through analogy with previous cases is the hallmark of a common law system. This postscript note merely seeks to highlight that the author is aware of the dangers posed by attempting to extend analogies too far. It is hoped that the analogies that have been made have been executed judiciously and are understood as focusing upon the legitimacy of extending ones jurisdiction, over whatever area of commerce, outside ones own territory.

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