IN THE COURT OF JUSTICE OF THE EUROPEAN UNION **Case: C-366/10**

THE QUEEN
on the application of
(1) THE AIR TRANSPORT ASSOCIATION OF AMERICA
(2) AMERICAN AIRLINES, INC.
(3) CONTINENTAL AIRLINES, INC.
(4) UNITED AIR LINES, INC.

Claimants

-and-

(1) THE INTERNATIONAL AIR TRANSPORT ASSOCIATION
THE NATIONAL AIRLINES COUNCIL OF CANADA

Interveners

- V-

THE SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE

Defendant

-and-

(2) THE AVIATION ENVIRONMENT FEDERATION
WWF-UK
THE EUROPEAN FEDERATION FOR TRANSPORT AND ENVIRONMENT
THE ENVIRONMENTAL DEFENSE FUND
EARTHJUSTICE

Interveners

WRITTEN OBSERVATIONS OF THE SECOND INTERVENERS

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INTRODUCTION

1. The High Court of England and Wales ('the Referring Court') has referred four Questions to the Court of Justice ('the Court') concerning the validity of EC Directive 2008/101 ('the 2008 Directive'), amending Directive 2003/87/EC ('the Amended Directive'). This legislation extends the EU Emission Trading Scheme ('ETS') to aviation activities. A number of US airlines and their trade association ('the Claimants') argue that the Amended Directive is unlawful. They claim that the extension of the ETS to aviation emissions brings the Amended Directive into conflict with principles of international law and the provisions of certain international treaties which, they say, the Community institutions are obliged to respect.

2. The Second Interveners (the Environmental Organisations, or 'EOs') are non-governmental organisations with substantial expertise and experience in relation to the international community's policies (both proposed and actual) and continuing debates as regards the regulation of greenhouse gas emissions from international aviation.

Context

3. The Amended Directive is a critical environmental measure in the battle against global warming. Member States, and the EU, are obliged to take steps to limit or reduce emissions of greenhouse gases, including from transport, under the United Nations Framework Convention on Climate Change 1992 ('UNFCCC') and the Kyoto Protocol 1997. For 13 years, the Member States and the EU have worked through the International Civil Aviation Organisation ('ICAO') to achieve agreement on a global regulatory regime to limit and reduce emissions from international aviation. No agreement on such a regime has as yet been possible.[1] The Amended Directive therefore addresses the issue on a regional basis, as a necessary preliminary step, while a global solution continues to be pursued through the ICAO.

[1] Although the ICAO has recently agreed "aspirational goals" for limiting emissions from international aviation, and to accommodate national and regional market-based measures, no international system of regulation to limit or reduce emissions from international aviation has yet been agreed.

General observations on the Claimants' legal arguments

4. At the outset, it must be observed that the Claimants' arguments depend entirely on two basic mischaracterisations of the Amended Directive's provisions and effects.

5. The first basic mischaracterisation is that the Claimants portray the Amended Directive as a measure which imposes fees, dues or other charges on airlines (in respect of rights of transit, entry and exit of aircraft, or in respect of fuel), within the meaning of Arts. 15 and 24 of the Convention on International Civil Aviation 1944 ('Chicago Convention'); or else as a measure which imposes a tax on aviation fuel contrary to Art. 11(2)(c) of the Air Transport Agreement between the US and EU 2007 ('Open Skies Agreement').

6. The Amended Directive is not a measure which imposes charges or taxes on airlines. Rather, it introduces into the sphere of aviation activities a "scheme for greenhouse gas emission allowance trading"[2], as a distinct mechanism to control greenhouse gas emissions:

   a. It creates a framework under which allowances, which are market instruments, are allocated to aircraft operators: see Art. 3(e). Those allowances can be traded among airline operators for value, with no additional benefit accruing to the administering Member State.

   b. Under the market framework, a significant proportion of the allowances are allocated without any charge (85%), while the remainder are allocated by means of an auctioning process: see Art. 3(d).

7. These elements show that the "market-based measures" introduced by the Amended Directive cannot properly be regarded as either "charges" or "taxes". In those cases, a public authority demands the payment of sums to defray the costs of particular services or facilities, or as a means to raise revenues.

[2] Amended Directive, Art. 1.

8. Indeed, the concepts of "charges" and "taxes" have been defined in the context of the Chicago Convention, by the ICAO Council. As Directive 2009/12/EC of the European Parliament and of the Council on airport charges records, at recital (10):

"*The ICAO Council has considered that an airport charge is a levy that is designed and applied specifically to recover the cost of providing facilities and services for civil aviation, while a tax is a levy that is designed to raise national or local government revenues which are generally not applied to civil aviation in their entirety or on a cost-specific basis*."

9. Furthermore, the Resolutions of the ICAO Assembly, as well as ICAO working papers,[3] have drawn a clear and specific distinction between, on the one hand, charges and taxes, and, on the other hand, emissions trading systems. Thus, Appendix L to Resolution A36-22[4] is entitled "Market-based measures, including emissions trading". On page 1-73, the ICAO Assembly's declaration distinguishes expressly between (a) "Emissions-related charges and taxes"; and (b) "Emissions trading".

10. The second basic mischaracterisation of the Amended Directive is that the Claimants portray it as an attempt to exercise sovereign rights beyond the territory of the European Union, that is, over the high seas and over the air space of third countries.

11. The Amended Directive does not do this. It provides for the allocation and issue of allowances to aircraft operators, in respect of "flights which depart from or arrive in an aerodrome situated in the territory of a Member State to which the Treaty applies": see Art. 3a ("Scope"), and Annex 1. The aviation emissions by such operators are used as calculation parameters, to determine the allowances that must be surrendered to the administering authorities annually in pursuance of the EU market system. There is no attempt by the Community institutions to subject any part of the airspace of third countries, or the high seas, to their sovereignty.

[3] See the Information Paper for the fourth meeting of the Group on International Aviation and Climate Change (May 2009), at para 4.2.3 [Bundle tab 40].
[4] Bundle tab 32.

12. The EOs observe that, if these points of interpretation of the Amended Directive are resolved by the Court in the manner set out above, this effectively resolves all (or almost all) the legal issues which have been raised in these proceedings.

QUESTION 1

13. By its first Question, the national court seeks to determine whether the validity of the Amended Directive is capable of being assessed by reference to certain rules (or, in one case, an alleged rule) of customary international law, or by reference to certain provisions in three international agreements.

Questions 1(a) to (c)

14. The EOs do not dispute that the validity of the Amended Directive is capable of being reviewed against principles of customary international law: see Case C-308/06 Intertanko at §51. These include the principles referred to in Questions 1(a) - (c) (namely, sovereignty of each state over its air space; no sovereignty over the high seas; and freedom to fly over the high seas). However, as indicated above, and in the response to Question 2 below, those principles are not engaged in this case.

Question 1(d)

15. As respects Question 1(d), the EOs do not accept that there is a principle of customary international law that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by treaty.

16. In support of this proposition, the Claimants rely on three sources: Art. 6(1) of the Convention on the High Seas; Art. 92(1) of the United Nations Convention on the Law of the Sea ('UNCLOS'); and the decision of the International Court of Justice in the Lotus case (1927).[5]

[5] See the "Statement of Grounds" in the national proceedings, at paras 21F-21H [Bundle tab 2].

17. However, in the case of both the Conventions referred to, the rule upon which the Claimants rely relates only to ships, while aircraft are subject to separate provisions in the Treaties.

18. Similarly, the Lotus case concerned the principles of international law applicable to ships on the high seas, and not aircraft.

19. The International Court has referred to the conditions necessary to determining whether State behaviour may be considered to evidence customary international law:

> '*The party which relies on custom... must prove that this custom is established in such a manner that it has become binding on the other party... that the rule invoked ...is in accordance with a constant and uniform usage practised by the States in question, and [in the instant case] that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law.*
> (*Asylum case (Columbia v Peru)* [1950] ICJ Reports at 276-277)

20. In short, while there is a principle that ships on the high seas are subject to the exclusive jurisdiction of their flag State, there is no state practice, cited by the Claimants or otherwise, establishing an equivalent customary international law principle in respect of aircraft. Still less is there any evidence that such practice indicates an acceptance by the EU, its Member States, or any other State, that there is a practice accepted as law.

Questions 1(e) - (g)

21. The Court ruled in Intertanko (at §§42-45) that the validity of Community legislation can be examined in the light of an international treaty if the following conditions apply:

    a. the Community is bound by the treaty; and

b. the "*nature and the broad logic*" of the treaty do not preclude such an examination, and "*the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise*".

Question 1(e): the Chicago Convention

22. The Community is not a party to the Chicago Convention. The Claimants argue that the Community is nonetheless bound by the Chicago Convention, in view of Art. 351 TFEU: see Schedule to the Order for Reference, at para 70. They argue that all the Member States are party to the Chicago Convention (an agreement concluded prior to 1958), and that the relevant provisions of the Amended Directive impede the performance of Member States' obligations under it towards third countries.

23. The EOs note that the purpose of Art. 351 TFEU, first paragraph, is to permit the Member State concerned to continue to apply a prior agreement in so far as it contains obligations which remain binding on that State under international law: see Case 216/01 Budéjovický Budvar,[6] at §172. It does not render the EU measure invalid. In any event, as explained below, there is nothing in the Amended Directive that impedes Member States from complying with any of the provisions of the Chicago Convention that are relied on in this case.

Questions 1(f) and (g): the Open Skies Agreement and the Kyoto Protocol

24. The EU is a signatory to both the Open Skies Agreement and the Kyoto Protocol, and bound by them: see Art. 216(2) TFEU. However, neither agreement satisfies the second limb of the test in Intertanko. This requires that the nature and the broad logic of the agreements should not preclude their use as a basis for reviewing the legality of an EU measure, and that the content of the provisions relied upon should be unconditional and sufficiently precise. In other words, the provisions concerned must be capable of being relied on by individuals and have direct effect.

[6] [2003] ECR I-13617

25. As respects the Open Skies Agreement, the preamble to, and content of, the Agreement show that its main aim is to facilitate the expansion of international air services, to promote competition in the market and enhance the access of air carriers to EU and US air space. It establishes a regime in which each Party grants to the other rights in relation to international air transport and agrees to allow airlines registered in the territory of the other equal access to the air transport market[7]. At the same time, it makes provision as to the law to be applied to aircraft, as to responsibility for safety and security, and as to customs duties, charging and prices[8]. It seeks to strike a balance between the interests of States whose territory is over-flown, and States as the flag States of aircraft, which may conflict.

26. The nature and broad logic of the Agreement is not such as to create rights and freedoms for individuals. Aircraft owners are granted freedom of over-flight only if they establish a close connection with either of the Parties, inasmuch as one of the Parties grants the aircraft nationality under its domestic law[9]. If an aircraft is not registered in one of the State parties, then it enjoys no rights under Open Skies. The situation is therefore similar to that in Intertanko, where, although rights appeared to attach to ships, it did not follow that those rights were conferred on the individuals linked to those ships, because a ship's international legal status is dependent on the flag State and not on the fact that it belongs to certain natural or legal persons: see Intertanko at §§61, 64.

27. Nothing in the other various international agreements referred to[10] by IATA and NACC (see Schedule, at paras 75-76) affects the above analysis. As noted in the Schedule itself, these agreements are nothing more than cases where similar provisions to Articles 7 and 11(2)(c) of the Open Skies Agreement can be found. They tell one nothing about how those provisions should be interpreted, and cannot be used to interpret the Open Skies Agreement in such a way that rights are granted to individuals.

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[7] See Articles 2 and 3 [Bundle tab 17]
[8] See Articles 7-9 and 11-13
[9] See Article 3
[10] Article 4 UK-Australia Agreement [Bundle tab 13]; Articles 6 and 10 EC-Morocco Agreement [Bundle tab 16] [false reference]; Article 4 EC-Australia Agreement [Bundle tab 19]; Articles 5 and 8 EC-Canada Agreement [Bundle tab 21].

28. Turning to the Kyoto Protocol, its preamble, and contents reveal that the main aim of the agreement is to oblige the Parties to adopt policies and measures to limit or reduce emissions of greenhouse gases, in order to achieve the objective of the UNFCCC (see Article 2 thereof, which refers to "*the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*.")

29. Individuals are not granted rights and freedoms by the Kyoto Protocol. The rights and obligations therein attach solely to States Party to the Protocol. As such, it is not capable of being relied on by the Claimants to examine the validity of the Amended Directive.

QUESTION 2

30. Question 2 asks whether the Amended Directive is incompatible with the principles of customary international law that are referred to in Question 1(a)-(c), and the alleged principle of customary international law referred to in Question 1(d).[11]

31. The Claimants' essential argument is that the terms of the Amended Directive impermissibly extend the sovereign rights of the EU Member States, so as to govern those parts of flights which take place outside the airspace of the EU Member States.

32. They rely, first, on the fact that, pursuant to Art. 14(1) and Annex IV Part B of the Amended Directive, the application of the EU ETS is based on emissions calculated by reference to actual fuel consumption for each flight. Some of the fuel will have been consumed outside the airspace of EU Member States.[12]

33. The argument that this calculation exercise involves regulation of parts of the flights which are outside EU air space is plainly wrong. The Amended Directive merely has regard to the fuel consumed during the flight as a whole in order to establish

[11] In the case of Question 1(d), the issue arises only if the Court is satisfied that the alleged principle of customary international law exists.
[12] Schedule to the Order for Reference, para 79.

conditions for the number of allowances required to be surrendered under the EU ETS, and for the use of EU aerodromes.

34. The Claimants' argument depends upon the false premise that the fact that a legislative act takes account of conduct outside the sovereign territories of the EU Member States means that it is *ipso facto* an extra-territorial act, and an interference with the sovereign rights of any relevant third countries.

35. The EOs point out that in the same passage from the International Court's Lotus decision that the Claimants themselves rely upon,[13] the International Court drew an important distinction between (i) attempts to exercise sovereign authority over foreign vessels on the high seas, which are impermissible, and (ii) circumstances where a State exercises jurisdiction in its own territory having regard to acts which have occurred on the high seas, which may be legitimate. The International Court stated:

"*But it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas.*"

36. Even extra-territorial acts may be lawful. In the present case, the application of the EU ETS to flights which depart from or arrive in the territory of a Member State is, by even stronger reasoning, entirely lawful. In the present case, the position is merely that the allowances allocated under the EU ETS have been calculated taking account of emissions which have occurred elsewhere. There is no serious basis for regarding this as an unlawful extension of sovereignty.

37. Furthermore, the EOs would remark that it is far from uncommon for EU legislation indirectly to affect citizens of third countries. For example:

a. Regulation (EC) No 417/2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers: The EU adopted an accelerated timetable, ahead of that agreed by the International Maritime Organisation ('IMO'), for a requirement that oil tankers be constructed with a

[13] Bundle tab 25, page 25.

double hull. That international agreement, and the relevant EU Regulation, was prompted by the United States' unilateral adoption of a double hull requirement after the Exxon Valdez oil spill (United States' Oil Pollution Act 1990). Both the EU's accelerated timetable, and the US' unilateral measure, affect citizens of third countries who own oil tankers. The EU Regulation does not, thereby, assert extra-territorial jurisdiction over those oil tankers when they are on the high seas or docked in the ports of third countries. It merely imposes a requirement that they must comply with certain conditions if they are to dock in EU Member States' ports or offshore terminals.

b. Regulation 1013/2006 on shipments of waste, and Regulation 338/97 on the protection of wild fauna and flora: Both Regulations impose prohibitions on importing certain protected products into the EU, or stipulate that imports may be made only where certain conditions have been met. These measures affect citizens of third countries who may want to ship relevant products to the EU and who have to comply with administrative procedures before entering the territory of the EU Member States. The measures do not, thereby, assert extra-territorial jurisdiction over these products when they are in the third countries, or being transported on or over the high seas.

38. Second, the Claimants say that the Emission Trading System extends the EU Member States' sovereign rights over third countries, arguing that it interferes with the ability of third countries to introduce their own environmental measures in respect of flights over their airspace or (by international agreement) over the high seas, without giving rise to multiple regulation.[14]

39. This second argument also cannot be accepted. Third countries remain entirely free to introduce their own environmental measures, and there is no interference with their sovereign rights. Moreover, Art. 25a of the Amended Directive[15] provides:

"*Where a third country adopts measures for reducing the climate change impact of flights departing from that country which land in the Community, the Commission,*

[14] Schedule to the Order for reference, para 81.
[15] See also recital (17).

after consulting with that third country, and with Members States within the Committee referred to in Article 23(1), shall consider options available in order to provide for optimal interaction between the Community Scheme and that country's measures.

"Where necessary, the Commission may adopt amendments to provide for flights arriving from the third country concerned to be excluded from the aviation activities listed in Annex I or to provide for any other amendments to the aviation activities listed in Annex I which are required by an agreement pursuant to the fourth subparagraph."

40. To like effect, *ad referendum* agreement[16] has been reached on a Protocol to Open Skies, which would replace Article 15 in its entirety and instead provide:

"If so requested by the Parties, the Joint Committee, with the assistance of experts, shall work to develop recommendations that address issues of possible overlap between and consistency among market-based measures regarding aviation emissions implemented by the Parties with a view to avoiding duplication of measures and costs."

41. Also, the recent ICAO Resolution A37-17/2 (as presented in wp/402) [17]:

"*14. Urges States to respect the guiding principles listed in the Annex, when designing new and implementing existing MBMs* [market based measures] *for international aviation, and to engage in constructive bilateral and/or multilateral consultations and negotiations with other States to reach an agreement...*

Annex, paragraph (f): MBMs should not be duplicative and international aviation CO_2 emissions should be accounted for only once." (emphasis added)

[16] At the time of writing, the United States President has signed the Protocol (24 June 2010), the European Council has approved the Commission's proposal that it be ratified (OJ [2010] L 223 p.1) and the European Parliament is considering the proposal.

[17] The EU Member States have expressed their intention to enter a Reservation to the Resolution; the EOs will send a copy of the Reservation to the Court once the text becomes publicly available.

42. This indicates that the ICAO in fact recognises the legitimacy of regional "MBMs". Moreover, if any third country were to adopt measures for reducing the climate change impact of flights departing from that country, it would be open to the Commission to modify the application of the Amended Directive in respect of the flights concerned, or exclude them entirely. There is no restriction on the ability of third countries to adopt such schemes. The EOs note also that international law is not breached simply because of multiple regulation. It is not uncommon for regulation to arise simultaneously at international, regional and national levels. The WTO, for example, co-exists with the EU and the North American Free Trade Agreement.

43. Finally, on this issue, the EOs would draw the Court's attention to the consequences of the Claimants' arguments for the achievement of the aims and objectives of the Amended Directive. According to the Claimants, the EU ETS should, at most, be confined to taking account of emissions from those parts of international flights which occur over EU air space. If the scheme were arranged in that manner, however, airlines would have incentives to alter existing flight patterns in order to minimise their use of EU air space, but without minimising emissions overall. Indeed, such a measure could well be far less effective in reducing the total emissions responsible for global climate change (or even increase them), if airlines were incentivised to use more inefficient flight routes.

QUESTION 3

44. Question 3 asks whether the Amended Directive is incompatible with Articles 1, 11 or 12 of the Chicago Convention, and/or with Article 7 of the Open Skies Agreement, if the Amended Directive may be reviewed against these international agreements.[18]

45. The Claimants' argument is that those Treaty provisions effectively prohibit the application of the EU ETS to "those parts of flights" which take place outside the air space of the EU Member States. It is premised on the same mischaracterisation of the Amended Directive as in Question 2 above. The Amended Directive does not govern

[18] That is, if Questions 1(e) and (f) are answered in the affirmative.

"those parts of flights" which take place outside the airspace of the EU Member States.

Article 1 of the Chicago Convention

46. Article 1 of the Chicago Convention does nothing more than reflect the principle of customary international law relating to sovereignty which is addressed above, in the answer to Question 2. The Claimants' argument fails for the same reasons.

47. The Claimants refer to the view of the ICAO Council in 1999, concerning a proposal by the United States that foreign air carriers should, when departing other States bound for the US, comply with security rules identical to those applied in the USA. [19] This is not a sound analogy. The proposed US measure was entirely different in nature from the Amended Directive. The Amended Directive does not set conditions to be complied with by aircraft operators on departure from foreign airports. Instead, it only applies to arrival and departure from EU airports. There is no requirement that third countries should impose an emissions trading scheme on their air carriers. The Amended Directive is more equivalent, in this regard, to Directive 2004/36/EC on the safety of third country aircraft using Community airports, and Regulation 300/2008 on common rules in the field of civil aviation security, neither of which impose safety or security requirements on aircraft departing from foreign airports.

Article 11 of the Chicago Convention / Article 7 of the Open Skies Agreement

48. The Claimants' arguments in respect of Article 11 of the Chicago Convention and Article 7 of the Open Skies Agreement (which are in similar form) are based on a misreading of those provisions. Those Articles do no more than require that, where a State party imposes conditions on certain aircraft arriving in its territory, overflying it, and departing from it, those conditions must be applied on a non-discriminatory basis. The Amended Directive is non-discriminatory, and complies with these provisions.

[19] Schedule to the Order for Reference, para 89

49. The other agreements referred to by IATA and NACC[20] are to the same effect; they are simply examples of the provisions of Article 7 of the Open Skies Agreement being replicated in substance, and tell one nothing about how that provision should be interpreted.

Article 12 of the Chicago Convention

50. As to Article 12 of the Chicago Convention, the Claimants refer to the fact that rules by States parties on "*flight and manoeuvre*" in their own air space should be kept "*uniform, to the greatest possible extent, with those established from time to time under this Convention*"; and that rules relating to "*flight and manoeuvre*" on the high seas "*shall be those established ... under this Convention*".

51. Their argument is that the phrase "*flight and manoeuvre*", within that Article, should be read as extending to aircraft engine emissions, and that the EU ETS regulates emissions from aircraft. On that basis, they argue, the EU should not lay down rules which differ from those (if any at all) established under the Convention.

52. The Claimants' argument cannot be accepted.

53. First, even assuming that the rules on "*flight and manoeuvre*" by aircraft extends to rules about the levels of emissions that the aircraft concerned may produce, the Amended Directive does not regulate these. It places no limits on the amount of greenhouse gases that aircraft are permitted to emit while over EU air space, the high seas, or anywhere; it imposes conditions on arrival in or departure from EU airports that the operator must surrender allowances to cover such emissions as have taken place: Article 12(2a) Amended Directive.

54. Second, the Claimants refer to two documents as authority for the proposition that "*rules and regulations relating to the flight and manoeuvre of aircraft*" extends to aircraft emissions. The first of these is section 3.1.4 of Annex 2 to the Chicago Convention, which relates to dropping or spraying. The second is an ICAO

[20] Article 6 EU-Morocco Agreement [Bundle tab 16] [false reference]; Articles 2 and 9 UK-Singapore Agreement [Bundle tab 20]; Article 5 EU-Canada Agreement [Bundle tab 21]

Secretariat statement in the document '*Legal Framework and Policy Issues Related to the Use of Emission-Related Levies'*.[21]

55. Neither document avails them. Section 3.1 of Annex 2[22] to the Chicago Convention is concerned with '*Protection of persons and property'.* Thus, physical dropping and spraying is controlled in order to protect persons and property. The emission of greenhouse gases does not fall within this provision.

56. As to the ICAO Secretariat statement in the document '*Legal Framework and Policy Issues Related to the Use of Emission-Related Levies'*, the Claimants' reliance on this is misplaced. The Secretariat's opinions have no legal effect, either as evidence of the meaning of the Convention or as evidence of customary international law. In any event, the statement was concerned with emission levies (charges) concerning polluting activities in territories over which States have no sovereignty; it did not consider an emissions trading scheme in the sovereign territory of the States parties.

QUESTION 4

Question 4(a): Article 2(2) Kyoto Protocol and Article 15(3) Open Skies Agreement

57. Question 4(a) asks whether the Amended Directive is incompatible with Articles 2(2) of the Kyoto Protocol and/or with Article 15(3) of the Open Skies Agreement, if the Amended Directive may be reviewed against these international agreements.[23]

58. The Claimants argue first that Article 2(2) of the Kyoto Protocol imposes an obligation on signatories to address emissions from international aviation working exclusively through the ICAO.

59. Nothing in the wording of Article 2(2) Kyoto Protocol supports the Claimants' argument. If that were the intention of the States parties, Article 2(2) would have

[21] Schedule to the Order for Reference, paras. 92 - 93

[22] Foreword to Annex 2 states: '*Flight over the high seas. It should be noted that the Council resolved, in adopting Annex 2 in April 1948 and Amendment 1 to the said Annex in November 1951, that the Annex constitutes Rules relating to the flight and manoeuvre of aircraft within the meaning of Article 12 of the Convention.'*

[23] That is, if Question 1(f) and/or 1(g) are answered in the affirmative.

been worded accordingly. It would be surprising if it imposed an obligation on the EU to work exclusively through a Treaty to which it is not a party.[24]

60. The Environmental Organisations further submit that the EU has not only "*worked through*" the ICAO in its attempt to pursue a multilateral solution to the problem of global climate change; it continues to pursue multilateral efforts to address greenhouse gas emissions from the aviation sector: see eg Art. 25a(2) of the Amended Directive, which expressly provides: "*The Community and its Member States shall continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation...*".

61. The Claimants nonetheless seek to derive support for their position from ICAO Resolution A36-22, under which the Assembly "*urged*" 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*". Although the EU Member States and 15 other European States entered a reservation to this Resolution, the Claimants allege that this behaviour was unlawful as they "*may not unilaterally excuse themselves from compliance with the Treaty."*[25]

62. However, even taken at face value, ICAO Resolution A36-22 did not say that the Chicago Convention requires States parties to work exclusively under its auspices. It "urges" States to behave in a particular way.

63. Further, the argument that the European Member States have attempted "*unilaterally to excuse themselves*" from their Treaty obligations is plainly incorrect.

(i) Resolution A36-22 is not a Treaty, and it does not enlarge upon, or diminish, the rights and obligations of the EU Member States under the Chicago Convention: see, by analogy, the judgment of the Court in *FIAMM* at §131, where it concluded that a decision by the WTO Dispute Settlement Body "*cannot add to or diminish the rights and obligations provided in the*

[24] The position is the same in respect of the agreement, under Article 2(2) Kyoto Protocol, to pursue the reduction or limitation of emission of marine bunker fuels working through the International Maritime Organisation, as the EU is not itself a party to MARPOL.
[25] Schedule to the Order for Reference, para. 107

agreements concerned." The Resolution is no more than an indication of how certain of the parties interpret the Chicago Convention. Its value is solely as an interpretative mechanism: Article 31 Vienna Convention on the Law of Treaties 1969. The Member States' (and others') reservation was an entirely lawful means by which to register persistent objection to the interpretation adopted by the other parties: *Norwegian Fisheries case (UK v Norway)* [1951] ICJ Rep. 116 at 131.

(ii) Resolution A36-22, as an interpretive device, should be read alongside Resolution A35-5, as a result of which the Amended Directive was adopted[26]. This requested the ICAO Council to focus on two approaches, one of which was to "*...provide guidance for use by Contracting States, as appropriate, to incorporate emissions from international aviation into Contracting States' emissions trading schemes, consistent with UNFCCC processes.*"[27] (emphasis added); and

(iii) Resolution A37-17/2 (as presented in wp/402), adopted on 8 October 2010 and referred to in Paragraph 41 above, supercedes[28] Resolution A36-22. This recognises "*existing MBMs"* [market based measures], and acknowledges that "*some States may take more ambitious actions prior to 2020*"[29].

64. These other interpretive devices, which carry equal weight to Resolution A36-22, indicate that the States parties to the Chicago Convention understand regional emission trading schemes to be compatible with their obligations thereunder.

65. Finally, on this issue, IATA and NACC seek to support the Claimants, referring to Article 18(4) EU-Canada Agreement, which provides that "*The Parties recognise the importance of working together, and within the framework of multilateral discussions..."*. However, a natural reading of this provision is that it acknowledges the possibility of steps being taken outside the ICAO. This undermines the argument

[26] See Recital (9) to the Amended Directive
[27] Bundle tab 31
[28] See paragraph 1
[29] See paragraphs 6(c) and 14. The EU Member States have expressed their intention to enter a Reservation to the Resolution; the EOs will send a copy of the Reservation to the Court once the text becomes publicly available.

that Article 2(2) Kyoto Protocol (or the Chicago Convention) should be interpreted as imposing an obligation of exclusivity.

66. The EOs also point out that the interpretation advanced by the Claimants, if accepted, would prejudice the ability of the EU, and Member States, to comply with their obligation under Article 4(2) UNFCCC to take measures to limit or reduce greenhouse gas emissions. This requires 'developed countries' and other parties listed in Annex I (which includes the EU and its Member States) to:

"...adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. .... <u>These Parties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention and, in particular, that of this subparagraph</u>;" (emphasis added).

67. Although it was decided at a Conference of the Parties in 1996-1997 that emissions from international aviation should be <u>reported</u> separately from national totals (Decision 2.CP3[30]), that does not remove international aviation from the scope of the obligation in Article 4(2) UNFCCC. The requirement to report separately is concerned solely with the obligation in Article 4(1) UNFCCC, which obliges Parties to publish national inventories of emissions "*using comparable methodologies to be agreed upon by the Conference of the Parties".*

68. If the EU and Member States cannot include international aviation in their greenhouse gas emission measures, even where the ICAO has done nothing to address this at an international level, then the express terms of Article 4(2) UNFCCC and its overall objective would be undermined.

69. The Claimants' second argument is that Article 15(3) of the Open Skies Agreement has been infringed by the adoption of the Amended Directive extending the EU ETS to aviation activities.

[30] Bundle tab 42

70. This provides: "*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. The Parties shall apply any environmental measures affecting air services under this Agreement in accordance with Article 2 and 3(4) of this Agreement*."

71. Nothing in either Article 15 or 3(4) of the Open Skies Agreement indicates that the EU must refrain from adopting environmental measures that have not emanated from the ICAO. Those provisions state that where a party requires the 'filing of schedules, programs for charter flights, or operational plans' for environmental reasons, it must do so "*under uniform conditions consistent with Article 15 of the [Chicago] Convention."* In other words, it must do so on a non-discriminatory basis. However:

(i) Nothing in Article 15 of the Chicago Convention prohibits a state (and more particularly a non-party such as the EU) from imposing market-based environmental measures. (Article 15 is considered further in the paragraphs below);

(ii) Neither the Amended Directive, nor the implementation measures proposed by the UK Government, require the filing of schedules, programs for charter flights, or operational plans. The monitoring and reporting of <u>emissions</u> is required, but not schedules or operational plans for the individual flights that have contributed to the total annual emissions. Again, the Claimants' argument is premised on a mischaracterisation of the Amended Directive.

Questions 4(b) and (c): Article 15 of the Chicago Convention (on its own or in conjunction with Articles 3(4) and 15(3) of the Open Skies Agreement); Article 24 of the Chicago Convention (on its own or in conjunction with Article 11(2)(c) of the Open Skies Agreement)

72. Questions 4(b) and 4(c) essentially ask whether the Amended Directive imposes a '*charge'* or '*tax'*, contrary to the Treaty provisions set out above, if the Amended Directive may be reviewed against those international agreements.[31]

73. The Claimants' arguments on both these questions are premised on a mischaracterisation of the Amended Directive as a 'charge' or 'tax'. It is a market-based measure, which allocates 85% of all emission allowances without cost, and makes the remaining 15% available at auction to those who wish to bid for them: Article 3d Amended Directive. An operator which is able to reduce its emissions to 85% of its historical emissions will incur no cost at all, and an operator which is able to reduce its emissions to less than 85% of its historical emissions can sell its excess allowances and actually profit from the extension of the EU ETS to international aviation. In the circumstances, the Amended Directive cannot be properly characterised as either a 'charge' or a 'tax'.

74. Even if the Claimant's characterisation were correct, however, there would be no breach of Articles 15 or 24 of the Chicago Convention, or Article 11(2) of the Open Skies Agreement.

Article 15 of the Chicago Convention

75. Article 15 of the Chicago Convention provides:

> *"No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State..."*

[31] That is, if Questions 1(e) and (f) are decided in the Affirmative.

76. The Amended Directive does not impose a charge '*solely'* in respect of entry, transit, or exit. In fact, under the EU ETS, there may be no charge incurred at all.

77. The EOs refer also, in this connexion, to the interpretation of Article 15 of the Chicago Convention given by the English High Court in *R (Federation of Tour Operators) v Secretary of State for Transport* [2007] EWHC 20652 (Admin). At §56,[32] the Court stated:

"More importantly, since it is not affected by possibly conflicting texts, I find the meaning of the words 'in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon' to be clear. A due imposed for something other than transit or entry or exit of an aircraft (or persons or property on it) is not a due imposed solely *in respect of the specified rights. This is consistent with the remainder of art 15 of the Chicago Convention. It is essentially an anti-discrimination provision (or most favoured State provision), precluding a state from favouring its national airline or airlines when imposing charges. A fee, due or other charge imposed in relation to the right to enter the territory of a state, or the right to leave it, or to transit over it, would discriminate in favour of a local or national airline as against the airlines of foreign states. A fee, due or charge that is payable on take-off, irrespective of destination, and including destinations within the territorial state, does not discriminate against foreign airlines, and is therefore not objectionable.."*

Article 24 of the Chicago Convention and Article 11(2)(c) of the Open Skies Agreement

78. As to whether the Amended Directive may be considered a 'tax' on aviation fuel, contrary to Articles 24 of the Chicago Convention and Article 11(2)(c) of the Open Skies Agreement, the Claimants' rely on the Court's judgment in Case C-346/97 *Braathens Sverige AB v Riksskatteverket* [1999] ECR I-3419. This considered whether Swedish legislation intended to address aviation emissions could be characterised as a tax on fuel. It concluded in that case that it could, as:

[32] Bundle tab 30

> *"...there is a direct and inseverable link between fuel consumption and the polluting substances... which are emitted in the course of such consumption, so that the tax at issue, as regards both the part calculated by reference to the emissions of hydrocarbons and nitric oxide and the part determined by reference to fuel consumption, which relates to carbon dioxide emissions, must be regarded as levied on consumption of the fuel itself."*
> *(Braathens* §23)

79. In this case there is no inseverable link between fuel consumption and the number of allowances an operator is required to surrender. The EOs note that where an operator uses biofuels for a particular flight, or a fuel blend including a proportion of biofuels, then, under the terms of the Amended Directive, the allowance required will be reduced or even eliminated as the number of allowances required is calculated by using the formula 'fuel consumption x emission factor', and the emission factor for biomass is zero. (Annex IV, Part B Amended Directive). The present case is therefore not the same as that considered by the Court in *Braathens.*

80. Nothing in the other international agreements referred to by IATA and NACC[33] alters the above analysis. Those other agreements are simply examples of the provisions of Article 24 Chicago Convention and Article 11(2)(c) Open Skies being replicated in substance, and tell one nothing about how those provisions should be interpreted.

PROPOSED ANSWERS TO THE QUESTIONS BEFORE THE COURT

81. The Environmental Organisations' proposed answers to the Questions before the Court are therefore as follows: -

1. **The validity of Directive 2003/87/EC, as amended by Directive 2008/101/EC, may be assessed in the light of:**

[33] Schedule to the Order for Reference, para. 134: Article 4 UK-Australia Agreement [Bundle tab 13]; Article 10 EC-Morocco Agreement [Bundle tab 16]; [false reference]; Article 4 EC-Australia Agreement [Bundle tab 19]; Article 8(1)(c)(ii) UK-Singapore Agreement [Bundle tab 20]; Article 8(2)(c) EC-Canada Agreement [Bundle tab 21].

(a) The principle of customary international law that each State has complete and exclusive sovereignty over its airspace;

(b) The principle of customary international law that no State may validly purport to subject any part of the high seas to its sovereignty; and

(c) The principle of customary international law of freedom to fly over the high seas;

There is no principle of customary international law that provides for aircraft overflying the high seas to be subject to the exclusive jurisdiction of the State in which they are registered, save as expressly provided for by international treaty.

The validity of Directive 2003/87/EC, as amended by Directive 2008/101/EC, cannot be assessed in the light of:

(a) The Chicago Convention on International Civil Aviation 1944;

(b) The Air Transport Agreement between the US and EU 2007; or

(c) The Kyoto Protocol of 1997 to the UN Framework Convention on Climate Change 1992.

2. Directive 2003/87/EC, as amended by Directive 2008/101/EC, does not apply the EU emissions trading scheme to those parts of flights (either generally or by aircraft registered in third countries) which take place outside the airspace of EU Member States, but merely lays down conditions under which aircraft may depart from, or arrive in, the aerodromes of Member States.

Accordingly, examination of Directive 2003/87/EC, as amended by Directive 2008/101/EC, discloses no factor which calls into question its validity when reviewed against the principles of customary international law referred to in Question 1.

3. The Third and Fourth Questions referred do not require to be answered in view of the answer to the First Question. Alternatively, examination of Directive 2003/87/EC, as amended by Directive 2008/101/EC, discloses no factor which calls into question its validity when reviewed against:

a. **Articles 1, 11, 12, 15 or 24 of the Chicago Convention on International Civil Aviation 1944;**

b. **Articles 3(4), 7, 11(2)(c) or 15(3) of the Air Transport Agreement between the US and EU 2007; or**

c. **Article 2(2) of the Kyoto Protocol of 1997 to the UN Framework Convention on Climate Change 1992.**