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OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 6 October 2011 <sup>1</sup>

**Case C-366/10**

**The Air Transport Association of America and Others**

(Reference for a preliminary ruling from the High Court of Justice of England and Wales, Queen's Bench Division, Administrative Court (United Kingdom))

(Environment – Greenhouse gases – Emission allowances – EU scheme for greenhouse gas emission allowance trading ('EU emissions trading scheme') – Inclusion of aviation activities – International aviation – Public international law – Compatibility of secondary European Union legislation with international agreements and customary international law – Directives 2003/87/EC and 2008/101/EC)

<sup>1</sup> – Original language: German.

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## I – Introduction

1. The scheme for greenhouse gas emission allowance trading adopted by the European Union in 2003 is a cornerstone of European policy on climate change.<sup>2</sup> It is intended, on the one hand, to bring about the achievement of important environmental targets set by the European institutions whilst, on the other, serving to fulfil obligations entered into by the European Union and its Member States since the 1990s within the framework of the United Nations, particularly under the ‘Kyoto Protocol’.

2. Directive 2008/101/EC<sup>3</sup> provides that, as from 1 January 2012, aviation is to be included in this EU emissions trading scheme.

3. This is being opposed by several airlines and airline associations whose headquarters are in the United States of America (USA) or Canada. They are challenging in the High Court of Justice of England and Wales the measures taken by the United Kingdom to implement Directive 2008/101. They submit that by including international aviation – and transatlantic aviation in particular – in its emissions trading scheme, the European Union is in breach of a number of principles of customary international law and of various international agreements.

4. The Court of Justice is now being asked to give a preliminary ruling on the validity of Directive 2008/101. Its judgment will be of fundamental importance not only to the future shaping of European climate change policy but also generally to the relationship between European Union (‘EU’) law and international law. In particular it will be necessary to consider whether and to what extent individuals are entitled to rely in court on certain international agreements and principles of customary international law in order to defeat an act of the European Union.

<sup>2</sup> – Under the Sixth Environment Action Programme, for example, ‘working towards the establishment of a Community framework for the development of effective CO<sub>2</sub> emissions trading with the possible extension to other greenhouse gases’ is set as one of the European Union’s ‘priority areas for action’ on tackling climate change (Article 5(2)(i)(b) of Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ 2002 L 242, p. 1); see also the Communication from the Commission of 9 February 2005 – Winning the Battle Against Global Climate Change (COM(2005) 35 final), which states in point 7(4) that ‘[t]he continued use of market based and flexible instruments’ including emissions trading needs to be one element of the ‘future climate change strategy of the EU’.

<sup>3</sup> – Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ 2009 L 8, p. 3).

## II – Legal framework

### A – *International law*

5. Reference is made in the request for a preliminary ruling, on the one hand, to certain principles of customary international law and, on the other, to various international agreements, especially the Chicago Convention, the Kyoto Protocol and the ‘Open Skies Agreement’ between the European Union and the United States of America.

#### 1. The Chicago Convention

6. The European Union is not a party to the Convention on International Civil Aviation, opened for signature at Chicago on 7 December 1944<sup>4</sup> (‘the Chicago Convention’), although all 27 Member States of the European Union are parties to it. Chapter I (‘General principles and application of the Convention’) contains a provision on sovereignty over airspace in Article 1:

‘The contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory.’

7. In Chapter II of the Chicago Convention (‘Flight over territory of contracting States’) Article 11 provides as follows under the heading ‘Applicability of air regulations’:

‘Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.’

8. In addition, Article 12 of the Chicago Convention states in relation to ‘[r]ules of the air’:

‘Each contracting State undertakes to adopt measures to insure that every aircraft flying over or manoeuvring within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.’

<sup>4</sup> – *United Nations Treaty Series (UNTS)*, Vol. 15, p. 295.

9. Article 15 of the Chicago Convention concerns ‘[a]irport and similar charges’:

‘Every airport in a contracting State which is open to public use by its national aircraft shall likewise ... be open under uniform conditions to the aircraft of all the other contracting States. ...

Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,

- (a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and
- (b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

All such charges shall be published and communicated to the International Civil Aviation Organisation ... 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 or persons or property thereon.’

10. Chapter IV of the Chicago Convention (‘Measures to facilitate air navigation’) contains Article 24 on ‘[c]ustoms duty’, excerpts from which read as follows:

- (a) Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel ... on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. ...

...’

11. The International Civil Aviation Organisation (ICAO) was established by the Chicago Convention and has had the status of a specialised agency of the United Nations since 1947.<sup>5</sup> All 27 Member States of the European Union are members of it whereas the European Union itself merely has observer status within the ICAO. In addition to being able to set legally binding standards, the ICAO can also issue non-binding legal policy recommendations.

<sup>5</sup> – See the Protocol signed in New York on 1 October 1947 (*UNTS*, Vol. 8, p. 315).

## 2. The Kyoto Protocol

12. The Kyoto Protocol to the United Nations Framework Convention on Climate Change ('the Kyoto Protocol')<sup>6</sup> was adopted on 11 December 1997 and entered into force on 16 February 2005. It has been ratified both by the then European Community<sup>7</sup> and by all 27 Member States of the European Union.

13. In the Kyoto Protocol the Contracting Parties classed as 'developed countries'<sup>8</sup> entered into commitments to limit or reduce their anthropogenic greenhouse gas emissions. For the European Union and its Member States this means that in the period from 2008 to 2012 they have a global commitment to reduce their greenhouse gas emissions by 8% below 1990 levels.<sup>9</sup>

14. Under Article 2(1)(a)(vii) of the Kyoto Protocol the possible measures to be taken by the Kyoto Contracting Parties to fulfil their commitments to limit and reduce their emissions include:

'Measures to limit and/or reduce emissions of greenhouse gases not controlled by the Montreal Protocol in the transport sector'.

15. In addition, Article 2(2) of the Kyoto Protocol provides:

'The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organisation and the International Maritime Organisation, respectively.'

## 3. The Open Skies Agreement between the European Union and the USA

16. The Air Transport Agreement between the European Community and its Member States, of the one part, and the United States of America, of the other part,<sup>10</sup> ('Open Skies Agreement') was signed in April 2007 and amended in

<sup>6</sup> – OJ 2002 L 130, p. 4 (*UNTS*, Vol. 2303, p. 148).

<sup>7</sup> – Council Decision of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130 p. 1).

<sup>8</sup> – A list of Contracting Parties considered to be developed countries and some States undergoing the process of transition to a market economy is contained in Annex I to the United Nations Framework Convention on Climate Change (adopted in New York on 9 September 1992; OJ 1994 L 33, p. 13; *UNTS*, Vol. 1771, p. 107); these include, in particular, the then European Community and all its Member States.

<sup>9</sup> – Article 3(1) of the Kyoto Protocol in conjunction with Annex I B and Annex II.

<sup>10</sup> – OJ 2007 L 134, p. 4.

several respects by a Protocol of 24 June 2010 (‘2010 Amending Protocol’).<sup>11</sup> In its original version the Open Skies Agreement was provisionally applied from 30 March 2008;<sup>12</sup> as amended by the 2010 Amending Protocol it has been provisionally applied since 24 June 2010.<sup>13</sup>

17. The principle of ‘fair and equal opportunity’ is laid down in Article 2 of the Open Skies Agreement as follows:

‘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.’

18. Under the heading ‘Grant of rights’, Article 3 of the Open Skies Agreement, specifically subparagraph 4, provides as follows:

‘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 or regularity of service, or the aircraft type or types operated by the airlines of the other Party, nor shall it require the filing of schedules, programs for charter flights, or operational plans by airlines of the other Party, except as may be required for customs, technical, operational, or environmental (consistent with Article 15) reasons under uniform conditions consistent with Article 15 of the Convention.’

19. On the ‘[a]pplication of laws’, Article 7 of the Open Skies Agreement provides:

‘1. The laws and regulations of a Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft utilised by the airlines of the other Party, and shall be

<sup>11</sup> – Protocol to amend the Air Transport Agreement signed on 25 and 30 April 2007 between the United States of America and the European Community and its Member States, signed in Luxembourg on 24 June 2010 (OJ 2010 L 223, p. 3).

<sup>12</sup> – Article 25(1) of the Open Skies Agreement in conjunction with Article 1(3) of Decision 2007/339/EC of the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 25 April 2007 on the signature and provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand (OJ 2007 L 134, p. 1).

<sup>13</sup> – Article 9(1) of the 2010 Amending Protocol in conjunction with Article 1(3) of Decision 2010/465/EU of the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 24 June 2010 on the signing and provisional application of the Protocol to Amend the Air Transport Agreement between the United States of America, of the one part, and the European Community and its Member States, of the other part (OJ 2010 L 223, p. 1).

complied with by such aircraft upon entering or departing from or while within the territory of the first Party.

2. While entering, within, or leaving the territory of one Party, the laws and regulations applicable within that territory relating to the admission to or departure from its territory of passengers, crew or cargo on aircraft (including regulations relating to entry, clearance, immigration, passports, customs and quarantine or, in the case of mail, postal regulations) shall be complied with by, or on behalf of, such passengers, crew or cargo of the other Party's airlines.'

20. The following provision is to be found in Article 11 of the Open Skies Agreement under the heading 'Customs duties and charges':

'1. On arriving in the territory of one Party, aircraft operated in international air transportation by the airlines of the other Party ... 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.

2. There shall also be exempt, on the basis of reciprocity, from the taxes, levies, duties, fees and charges referred to in paragraph 1 of this Article, with the exception of charges based on the cost of the service provided:

...

(c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Party for use in an aircraft of an airline of the other Party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board;

...'

21. Article 15 of the Open Skies Agreement – as amended by the 2010 Amending Protocol – contains a provision headed 'Environment', excerpts from which read as follows:<sup>14</sup>

<sup>14</sup> – The wording of Article 15(3) of the Open Skies Agreement to which the referring court makes express reference in its questions has not changed since the original version of the Open Skies Agreement. The minor difference in the first sentence of the German-language version of Article 15(3) (the term now used is 'Umweltschutzstandards' instead of 'Umweltschutznormen') is not reflected in other language versions; the English version still refers to 'aviation environmental standards' and the French, to 'normes sur la protection de l'environnement'.

‘1. The Parties recognise the importance of protecting the environment when developing and implementing international aviation policy, carefully weighing the costs and benefits of measures to protect the environment in developing such policy, and, where appropriate, jointly advancing effective global solutions. Accordingly, the Parties intend to work together to limit or reduce, in an economically reasonable manner, the impact of international aviation on the environment.

2. When a Party is considering proposed environmental measures at the regional, national, or local level, 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. At the request of a Party, the other Party shall provide a description of such evaluation and mitigating steps.

3. 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 Article 3(4) of this Agreement.

4. The Parties reaffirm the commitment of Member States and the United States to apply the balanced approach principle.

...

7. 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 and reducing to the extent possible the administrative burden on airlines. Implementation of such recommendations shall be subject to such internal approval or ratification as may be required by each Party.

8. If one Party believes that a matter involving aviation environmental protection, including proposed new measures, raises concerns for the application or implementation of this Agreement, it may request a meeting of the Joint Committee, as provided in Article 18, to consider the issue and develop appropriate responses to concerns found to be legitimate.’

#### B – *EU law*

22. The scheme for greenhouse gas emission allowance trading applicable within the European Union (EU emissions trading scheme) serves to limit and reduce greenhouse gas emissions using market-based instruments. This scheme, which is sometimes also referred to as ‘cap and trade’, was introduced by

Directive 2003/87/EC<sup>15</sup> and applies to the whole of the European Economic Area (EEA).<sup>16</sup>

23. According to recital 5 in its preamble the aim of Directive 2003/87 is, not least, to give effect to the European Union's commitments under the Kyoto Protocol:

'The Community and its Member States have agreed to fulfil their commitments to reduce anthropogenic greenhouse gas emissions under the Kyoto Protocol jointly, in accordance with Decision 2002/358/EC. This Directive aims to contribute to fulfilling the commitments of the European Community and its Member States more effectively, through an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment.'

24. Greenhouse gas emissions resulting from aviation activities were originally not covered by the EU emissions trading scheme. In 2008, however, the EU legislature resolved to include aviation activities in the scheme as from 1 January 2012. Thus, 2012 is the first year for which all airlines – including those from third countries – will have to acquire and surrender emission allowances for their flights from and to European aerodromes. Directive 2003/87 was amended and supplemented by Directive 2008/101 for that purpose.<sup>17</sup>

25. The Amended Directive contains a new Chapter II headed 'Aviation' consisting of Articles 3a to 3g. The scope of this chapter is defined in Article 3a as follows:

'The provisions of this Chapter shall apply to the allocation and issue of allowances in respect of aviation activities listed in Annex I.'

According to the definition in Annex I to the Amended Directive, aviation activities for the purposes of the directive are '[f]lights which depart from or arrive in an aerodrome situated in the territory of a Member State to which the Treaty applies.'<sup>18</sup>

<sup>15</sup> – Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32).

<sup>16</sup> – It was expanded to cover the entire EEA by Decision of the EEA Joint Committee No 146/2007 of 26 October 2007 amending Annex XX (Environment) to the EEA Agreement (OJ 2008 L 100, p. 92) and, as regards aviation, by Decision of the EEA Joint Committee No 6/2011 of 1 April 2011 amending Annex XX (Environment) to the EEA Agreement (OJ 2011 L 93, p. 35).

<sup>17</sup> – Directive 2003/87, as amended by Directive 2008/101, will also be referred to below as 'the Amended Directive'.

<sup>18</sup> – A few aspects of aviation are excluded from the EU emissions trading scheme under Annex I to the Amended Directive; for example, military flights performed by military aircraft.

Part B of Annex IV to the Amended Directive states moreover that emissions from aviation activities are to be calculated using the formula ‘fuel consumption x emission factor’. It is also apparent from that annex that the amount of aviation activity by aircraft operators is to be established using the formula ‘tonne-kilometres = distance x payload’ and that ‘distance’ is deemed to be the great circle distance between the aerodrome of departure and the aerodrome of arrival plus an additional fixed factor of 95 km.

26. As regards the ‘[t]otal quantity of allowances for aviation’, Article 3c of the Amended Directive states:

‘1. For the period from 1 January 2012 to 31 December 2012, the total quantity of allowances to be allocated to aircraft operators shall be equivalent to 97% of the historical aviation emissions.

2. For the period ... beginning on 1 January 2013, and, in the absence of any amendments ..., for each subsequent period, the total quantity of allowances to be allocated to aircraft operators shall be equivalent to 95% of the historical aviation emissions multiplied by the number of years in the period.

...<sup>19</sup>

27. Article 3d of the Amended Directive contains the following provision under the heading ‘Method of allocation of allowances for aviation through auctioning’:

‘1. In the period referred to in Article 3c(1), 15% of allowances shall be auctioned.

2. From 1 January 2013, 15% of allowances shall be auctioned. This percentage may be increased as part of the general review of this Directive.

...

4. It shall be for Member States to determine the use to be made of revenues generated from the auctioning of allowances. Those revenues should be used to tackle climate change in the EU and third countries, ...

...’.

28. In Chapter IV of the Amended Directive (‘Provisions applying to aviation and stationary installations’) Article 12(2a) provides as follows with regard to the transfer, surrender and cancellation of allowances:

<sup>19</sup> – Under Article 3(s) of the Amended Directive historical aviation emissions are calculated on the basis of the mean average of the annual emissions from aircraft in the calendar years 2004 to 2006. They have recently been set in Commission Decision 2011/149/EU of 7 March 2011 (OJ 2011 L 61, p. 42).

‘Administering Member States shall ensure that, by 30 April each year, each aircraft operator surrenders a number of allowances equal to the total emissions during the preceding calendar year from aviation activities listed in Annex I for which it is the aircraft operator, as verified in accordance with Article 15. Member States shall ensure that allowances surrendered in accordance with this paragraph are subsequently cancelled.’

29. Under Article 16 of the Amended Directive the Member States have to ensure the effective implementation of the proposed scheme for greenhouse gas emission allowance trading and provide effective, proportionate and dissuasive penalties for infringements. These penalties can extend to an operating ban, which might be imposed by the Commission at the request of a Member State. The names of aircraft operators who are in breach of requirements under the emissions scheme are to be published.

30. Article 25a of the Amended Directive provides under the heading ‘Third country measures to reduce the climate change impact of aviation’:

‘1. 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, after consulting with that third country, and with Member States ..., 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 ... .

...

2. The Community and its Member States shall continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation. In the light of any such agreement, the Commission shall consider whether amendments to this Directive as it applies to aircraft operators are necessary.’

31. Reference must also be made to the preamble to Directive 2008/101, recitals 8, 9, 10, 11 and 17 of which state as follows:

‘(8) The Kyoto Protocol ... requires developed countries to pursue the limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation, working through the International Civil Aviation Organisation (ICAO).

(9) While the Community is not a Contracting Party to the [Chicago Convention], all Member States are Contracting Parties to that Convention and members of the ICAO. Member States continue to support work with

other States in the ICAO on the development of measures, including market-based instruments, to address the climate change impacts of aviation. At the sixth meeting of the ICAO Committee on Aviation Environmental Protection in 2004, it was agreed that an aviation-specific emissions trading system based on a new legal instrument under ICAO auspices seemed sufficiently unattractive that it should not then be pursued further. Consequently, Resolution A35-5 of the ICAO's 35th Assembly held in September 2004 did not propose a new legal instrument but instead endorsed open emissions trading and the possibility for States to incorporate emissions from international aviation into their emissions trading schemes. Appendix L to Resolution A36-22 of the ICAO's 36th Assembly held in September 2007 urges 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. Recalling that the Chicago Convention recognises expressly the right of each Contracting Party to apply on a non-discriminatory basis its own air laws and regulations to the aircraft of all States, the Member States of the European Community and fifteen other European States placed a reservation on this resolution and reserved the right under the Chicago Convention to enact and apply market-based measures on a non-discriminatory basis to all aircraft operators of all States providing services to, from or within their territory.

(10) The Sixth Community Environment Action Programme established by Decision No 1600/2002/EC of the European Parliament and of the Council provided for the Community to identify and undertake specific actions to reduce greenhouse gas emissions from aviation if no such action were agreed within the ICAO by 2002. In its conclusions of October 2002, December 2003 and October 2004, the Council has repeatedly called on the Commission to propose action to reduce the climate change impact of international air transport.

(11) Policies and measures should be implemented at Member State and Community level across all sectors of the Community economy in order to generate the substantial reductions needed. If the climate change impact of the aviation sector continues to grow at the current rate, it would significantly undermine reductions made by other sectors to combat climate change.

...

(17) The Community and its Member States should continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation. The Community scheme may serve as a model for the use of emissions trading worldwide. The Community and its Member States should continue to be in contact with third parties during the

implementation of this Directive and to encourage third countries to take equivalent measures. If a third country adopts measures, which have an environmental effect at least equivalent to that of this Directive, to reduce the climate impact of flights to the Community, the Commission should consider the options available in order to provide for optimal interaction between the Community scheme and that country's measures, after consulting with that country. Emissions trading schemes being developed in third countries are beginning to provide for optimal interaction with the Community scheme in relation to their coverage of aviation. Bilateral arrangements on linking the Community scheme with other trading schemes to form a common scheme or taking account of equivalent measures to avoid double regulation could constitute a step towards global agreement. Where such bilateral arrangements are made, the Commission may amend the types of aviation activities included in the Community scheme, including consequential adjustments to the total quantity of allowances to be issued to aircraft operators.'

### *C – National law*

32. Within the law of the United Kingdom the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009<sup>20</sup> ('the 2009 Regulations') are of relevance here; they form part of the national measures implementing Directive 2008/101.<sup>21</sup>

### **III – The main proceedings**

33. An action has been brought against the 2009 Regulations in the High Court of Justice of England and Wales (Queen's Bench Division, Administrative Court), the referring court.

34. This action was brought on 16 December 2009 by four claimants whose headquarters are in the USA. They are The Air Transport Association of America (ATAA), American Airlines (AA), Continental Airlines (Continental) and United Air Lines (UAL). ATAA is a non-profit trade and service association of airlines in the USA. AA, Continental and UAL are three airlines whose headquarters are in the USA and which operate worldwide, also serving destinations within the

<sup>20</sup> – SI 2009/2301.

<sup>21</sup> – Further national implementation measures are contained in the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010 ('the 2010 Regulations', SI 2010/1996). According to the information provided by the United Kingdom Government, the 2010 Regulations have partly replaced and supplemented the 2009 Regulations; the 2010 Regulations can therefore now be regarded as the new subject-matter of the main proceedings.

European Union. The administering Member State responsible for them for the purposes of the EU emissions trading scheme is the United Kingdom.<sup>22</sup>

35. The defendant is the United Kingdom Minister for Energy and Climate Change<sup>23</sup> as the national authority primarily responsible for the implementation of Directive 2008/101.

36. Both parties are supported by interveners. Two further associations have intervened in the main proceedings on the claimants' side:<sup>24</sup> The International Air Transport Association (IATA), an international association of airline companies, and The National Airlines Council of Canada (NACC), an association of Canadian airline companies. A total of five environmental organisations are supporting the defendant,<sup>25</sup> namely The Aviation Environment Federation (AEF), the British section of the World Wide Fund For Nature (WWF-UK), The European Federation for Transport and Environment (EFTE), The Environmental Defense Fund (EDF) and Earthjustice.

37. The claimants, supported by their interveners, assert, in essence, that Directive 2008/101 – which the 2009 Regulations serve to transpose – is not compatible with international law and is therefore invalid. The defendant and its interveners have adopted a diametrically opposed position.

#### **IV – Reference for a preliminary ruling and procedure before the Court of Justice**

38. By order of 8 July 2010, received at the Court of Justice on 22 July 2010, the High Court of Justice of England and Wales (Queen's Bench Division, Administrative Court) submitted the following questions to the Court of Justice for a preliminary ruling:

- (1) Are any or all of the following rules of international law capable of being relied upon in this case to challenge the validity of Directive 2003/87/EC as amended by Directive 2008/101/EC so as to include aviation activities within the EU Emissions Trading Scheme (together the 'Amended Directive'):

<sup>22</sup> – See, with regard to the administering Member State, Article 3(q) and Article 18a of the Amended Directive and – most recently – Commission Regulation (EU) No 115/2011 of 2 February 2011 amending Regulation (EC) No 748/2009 on the list of aircraft operators which performed an aviation activity listed in Annex I to Directive 2003/87/EC of the European Parliament and of the Council on or after 1 January 2006 specifying the administering Member State for each aircraft operator (OJ 2011 L 39, p. 1).

<sup>23</sup> – The Secretary of State for Energy and Climate Change.

<sup>24</sup> – Both acting as a 'single intervener'.

<sup>25</sup> – Also participating as a 'single intervener'.

- (a) the principle of customary international law that each State has complete and exclusive sovereignty over its air space;
- (b) the principle of customary international law that no State may validly purport to subject any part of the high seas to its sovereignty;
- (c) the principle of customary international law of freedom to fly over the high seas;
- (d) the principle of customary international law (the existence of which is not accepted by the Defendant) that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by international treaty;
- (e) the Chicago Convention (in particular Articles 1, 11, 12, 15 and 24);
- (f) the Open Skies Agreement (in particular Articles 7, 11(2)(c) and 15(3));
- (g) the Kyoto Protocol (in particular, Article 2(2))?

To the extent that question 1 may be answered in the affirmative:

- (2) Is the Amended Directive invalid, if and in so far as it applies the Emissions Trading Scheme to those parts of flights (either generally or by aircraft registered in third countries) which take place outside the airspace of EU Member States, as contravening one or more of the principles of customary international law asserted above?
- (3) Is the Amended Directive invalid, if and in so far as it applies the Emissions Trading Scheme to those parts of flights (either generally or by aircraft registered in third countries) which take place outside the airspace of EU Member States:
  - (a) as contravening Articles 1, 11 and/or 12 of the Chicago Convention;
  - (b) as contravening Article 7 of the Open Skies Agreement?
- (4) Is the Amended Directive invalid, in so far as it applies the Emissions Trading Scheme to aviation activities:
  - (a) as contravening Article 2(2) of the Kyoto Protocol and Article 15(3) of the Open Skies Agreement;
  - (b) as contravening Article 15 of the Chicago Convention, on its own or in conjunction with Articles 3(4) and 15(3) of the Open Skies Agreement;

- (c) as contravening Article 24 of the Chicago Convention, on its own or in conjunction with Article 11(2)(c) of the Open Skies Agreement?

39. The following have participated in the written procedure before the Court of Justice: the claimants in the main proceedings, the interveners for both parties to the main proceedings, the Governments of Belgium, Germany, Spain, France, Italy, the Netherlands, Austria, Poland, Sweden, the United Kingdom, Iceland and Norway, together with the European Parliament, the Council of the European Union and the European Commission.

40. A hearing before the Court of Justice was held on 5 July 2011 at which, with the exception of the Governments of Belgium, Germany, Italy, the Netherlands, Austria and Iceland, all those who participated in the written procedure and also the Danish Government were represented.

## V – Assessment

41. The claimants in the main proceedings and the associations supporting them take the view that the inclusion of international aviation in the European Union’s emissions trading scheme is incompatible with a number of principles of customary international law and with various international agreements. Directive 2008/101, by which the EU emissions trading scheme was extended to include aviation, is therefore (they argue) invalid.

42. In essence, the claimants and the interveners supporting them are challenging Directive 2008/101 on three grounds: First, they contend that the European Union is exceeding its powers under international law by not confining its emissions trading scheme to wholly intra-European flights and by including within it those sections of international flights that take place over the high seas or over the territory of third countries.<sup>26</sup> Secondly, they maintain that an emissions trading scheme for international aviation activities should be negotiated and adopted under the auspices of the ICAO; it should not be introduced unilaterally.<sup>27</sup> Thirdly, they are of the opinion that the emissions trading scheme amounts to a tax or charge prohibited by international agreements.<sup>28</sup>

43. It is undisputed that the European Union is bound by international law. The European Union has legal personality (Article 47 TEU) and can therefore have rights and obligations under international law. Moreover, it expressly avows its aim of contributing to the strict observance and development of international law (second sentence of Article 3(5) TEU) and of seeking to advance respect for the

<sup>26</sup> – This issue is raised in questions 2 and 3 referred to the Court of Justice.

<sup>27</sup> – This issue is raised in question 4(a) referred to the Court of Justice.

<sup>28</sup> – This issue is raised in questions 4(b) and (c) referred to the Court of Justice.

principles of international law in the wider world (first subparagraph of Article 21(1) TEU).

44. It is established case-law that the European Union must respect international law in the exercise of its powers.<sup>29</sup> In the context of its jurisdiction in preliminary ruling proceedings (Article 19(3)(b) TEU and point (b) of the first paragraph of Article 267 TFEU) the Court is obliged to examine whether the validity of acts of EU institutions may be affected by reason of the fact that they are contrary to a rule of international law.<sup>30</sup>

45. However, this does not mean that individuals (that is natural or legal persons) may rely at will on provisions or principles of international law in court proceedings in order to defeat acts of EU institutions. It is always necessary to determine specifically, with regard to each particular provision and principle of international law at issue, whether and to what extent it can be relied upon, in proceedings initiated by a natural or legal person, as a benchmark against which the lawfulness of EU acts can be reviewed.<sup>31</sup> This issue, which is addressed in the first question referred for a preliminary ruling, logically precedes examination of the validity of Directive 2008/101 (or examination of the validity of Directive 2003/87 as amended by Directive 2008/101); it must therefore be discussed first of all.

46. When assessing the legal issues raised I shall, moreover, confine myself to the principles and provisions of international law which the national court has specifically addressed in its questions. It does not seem to me to be appropriate to consider the other international agreements invoked in particular by the claimants' interveners in the main proceedings.<sup>32</sup> It is admittedly theoretically conceivable that the Court of Justice would, in preliminary ruling proceedings, comment on its own initiative on possible grounds for invalidity not considered by the referring court.<sup>33</sup> However, it should make only sparing use of such a possibility in the case

<sup>29</sup> – Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 9; Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 45; Case C-308/06 *Intertanko and Others* ('*Intertanko*') [2008] ECR I-4057, paragraph 51; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ('*Kadi*') [2008] ECR I-6351, paragraph 291.

<sup>30</sup> – Joined Cases 21/72 to 24/72 *International Fruit Company and Others* ('*International Fruit Company*') [1972] ECR 1219, paragraph 6, and *Racke* (cited in footnote 29, paragraph 27).

<sup>31</sup> – *International Fruit Company* (cited in footnote 30, paragraph 8); see, to the same effect, *Intertanko* (cited in footnote 29, particularly paragraphs 43 and 45).

<sup>32</sup> – These are, in particular, the Euro-Mediterranean aviation agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part (signed in Brussels on 12 December 2006, OJ 2006 L 386, p. 57) and the Agreement on Air Transport between Canada and the European Community and its Member States (signed in Brussels on 17 December 2009, OJ 2010 L 207, p. 32). The interveners also refer to certain bilateral air transport agreements concluded by Member States.

<sup>33</sup> – Case C-61/98 *De Haan* [1999] ECR I-5003, paragraph 47.

of references for preliminary rulings on the validity of an EU act. If it is apparent from the documents before the Court that the national court has by implication refused to seek a ruling from the Court on a particular provision it is not for the Court of Justice to consider it.<sup>34</sup> That is the position in the present case: although the High Court's order for reference makes several references to the other international agreements mentioned by the interveners, it has not specifically mentioned them in the questions on validity put to the Court of Justice.

*A – Reliance upon international agreements and principles of customary international law as a benchmark against which the validity of Directive 2008/101 can be reviewed (Question 1)*

47. The fundamental problem to be discussed in the context of the first question is whether and to what extent the international agreements and principles of customary international law mentioned by the referring court can be relied upon at all as a benchmark against which the validity of Directive 2008/101 can be reviewed in the context of legal proceedings before national courts brought by natural or legal persons – in this case by undertakings and associations of undertakings.

48. I shall discuss this issue, first, in the light of the three international agreements at issue: the Chicago Convention, the Kyoto Protocol and the Open Skies Agreement (see Part 1 below) and then with regard to the various principles of customary international law raised by the referring court (see Part 2 below).

#### 1. International agreements (Question 1(e) to (g))

49. According to settled case-law, international agreements can be relied upon as a benchmark against which the validity of acts of EU institutions can be reviewed, subject to two conditions:<sup>35</sup>

- First, the European Union must be bound by the agreement concerned.
- Second, the nature and the broad logic of the agreement concerned must not preclude such a review of validity and, in addition, its provisions must appear, as regards their content, to be unconditional and sufficiently precise.

<sup>34</sup> – See, to this effect, Case 247/86 *Alsattel* [1988] ECR 5987, paragraphs 7 and 8, and Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315, paragraph 34 in conjunction with paragraph 33.

<sup>35</sup> – *Intertanko* (cited in footnote 29, paragraphs 43 to 45); see also *International Fruit Company* (cited in footnote 30, paragraphs 7 and 8); Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079, paragraph 52; and – specifically regarding the second criterion – Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 39; and Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* ('*FIAMM*') [2008] ECR I-6513, paragraph 110.

50. It should be noted in the context of the second criterion that, in the present case, the question of the validity of Directive 2008/101 arises in legal proceedings brought by individuals: a number of airlines and an association of airlines.<sup>36</sup>

a) The Chicago Convention (Question 1(e))

51. The very first of the criteria set out in point 49 above is not met with regard to the Chicago Convention.

52. The European Union is not a Contracting Party to the Chicago Convention. Hence, that convention does not formally create rights or obligations for the European Union.

53. The claimants in the main proceedings and the associations supporting them nevertheless take the view that the European Union is substantively bound by the Chicago Convention. They base this argument, first, on Article 351 TFEU and, secondly, on the theory of functional succession.

54. Both arguments must fail, however.

i) The Chicago Convention is not binding under Article 351 TFEU

55. It is apparent from the first paragraph of Article 351 TFEU (formerly Article 307 EC and Article 234 of the EEC Treaty) that the rights and obligations of Member States towards third countries are not affected by the Treaties (that is by the TEU and the TFEU<sup>37</sup>) in so far as they are rights and obligations arising from international agreements concluded before the Member States concerned joined the European Union.

56. Inasmuch as, under the first paragraph of Article 351 TFEU, EU law recognises such existing treaties between Member States and third countries, it takes account of the *pacta sunt servanda* principle of international law.<sup>38</sup> In other words, membership of the European Union does not impose an obligation on Member States to act, vis-à-vis third countries, in breach of international agreements previously entered into.<sup>39</sup>

<sup>36</sup> – See, to this effect, also *International Fruit Company* (cited in footnote 30, paragraph 8).

<sup>37</sup> – See the first sentence of the third paragraph of Article 1 TEU and the second sentence of Article 1(2) TFEU.

<sup>38</sup> – For the principle *pacta sunt servanda* see Article 26 and also Article 30(4)(b) of the Vienna Convention on the Law of Treaties of 23 May 1969 (*UNTS*, Vol. 1155, p. 331).

<sup>39</sup> – See, to this effect, Case 812/79 *Burgoa* [1980] ECR 2787, paragraph 8; Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraph 56; Case C-62/98 *Commission v Portugal* [2000] ECR I-5171, paragraph 44; Case C-216/01 *Budejovický Budvar* [2003] ECR I-13617, paragraphs 144 and 145; and Case C-118/07 *Commission v Finland* [2009] ECR I-10889, paragraph 27.

57. The EU institutions, for their part, only have a duty not to impede the performance of Member States' obligations which stem from such existing treaties; the European Union itself does not enter into any international-law commitments towards the third countries concerned as a result of existing treaties concluded by Member States.<sup>40</sup> The general principle – recognised also under international law – of the relative effect of treaties applies, according to which treaties do not confer rights or impose obligations on third States (*'pacta tertiis nec nocent nec prosunt'*).<sup>41</sup>

58. The absence of any commitment by the European Union to existing treaties concluded by the Member States also becomes clear when the rules in Article 351 TFEU applicable to existing treaties are compared with those that apply under Article 216 TFEU to agreements entered into by the European Union itself. Whereas Article 216(2) TFEU provides that agreements concluded by the European Union are binding upon the institutions of the European Union and on its Member States, there is no equivalent provision in Article 351 TFEU with regard to existing treaties concluded by the Member States. No obligation on EU institutions to adjust EU law in line with existing treaties concluded by the Member States can be inferred from Article 351 TFEU. Conversely, the Member States are obliged under the second paragraph of Article 351 TFEU to take all appropriate steps to eliminate any incompatibilities between their existing treaties and the European Union's founding Treaties (TEU and TFEU). Member States must, if necessary, adjust or denounce their existing treaties with third countries.<sup>42</sup>

59. It does not, therefore, follow from Article 351 TFEU that the European Union is bound by the Chicago Convention.

ii) The Chicago Convention is not binding by virtue of functional succession

60. Nor can the Chicago Convention be construed as being binding on the European Union on the basis of the functional succession theory.

61. The functional succession theory derives from the judgment of the Court of Justice in *International Fruit Company*, in which the Court ruled that, in so far as the then European Economic Community had under the EEC Treaty assumed the powers previously exercised by Member States in the area governed by the 1947 General Agreement on Tariffs and Trade (GATT), the provisions of that

<sup>40</sup> – *Burgoa* (cited in footnote 39, paragraph 9).

<sup>41</sup> – Case C-386/08 *Brita* [2010] ECR I-0000, paragraph 44.

<sup>42</sup> – *Commission v Portugal* (cited in footnote 39, paragraphs 49 and 52), and *Budejovický Budvar* (cited in footnote 39, paragraph 170).

agreement had the effect of binding the Community even without it formally becoming a party to that agreement.<sup>43</sup>

62. This case-law on GATT cannot, however, automatically be applied to other international agreements.<sup>44</sup> In particular, it is not appropriate to the air transport sector that is at issue here.

63. First – contrary to the view taken by the claimants in the main proceedings and by the associations supporting them – although many of the Member States’ powers in the air transport sector have passed to the European Union, not all of them have yet been transferred.<sup>45</sup> Air transport agreements, for instance, have thus until very recently been concluded as ‘mixed agreements’, to which both the European Union and its Member States are contracting parties.<sup>46</sup>

64. Secondly, there is no indication that the European Union, or the European Community before it, would act as the successor to the Member States in the context of the ICAO and that such action would be agreed to by the other parties to the Chicago Convention, as in the case of the 1947 GATT.<sup>47</sup> It is apparent from the documents before the Court that the European Union merely has observer status at the ICAO and coordinates the views of its Member States prior to meetings of ICAO bodies; as matters currently stand, however, it does not act in place of its Member States within those bodies.<sup>48</sup> The claimants in the main proceedings and the associations supporting them conceded this at the hearing before the Court.

65. In those circumstances it is not possible to infer any functional succession on the basis of which the European Union has assumed the role of its Member States within the ICAO and is thus itself – substantively – bound by the Chicago Convention. The mere fact that all the Member States of the European Union are

<sup>43</sup> – *International Fruit Company* (cited in footnote 30, particularly paragraph 18); see also, with regard to the functional succession theory, Case C-301/08 *Bogiatzi* [2009] ECR I-10185, paragraph 25, and Case C-533/08 *TNT Express Nederland* [2010] ECR I-0000, paragraph 62.

<sup>44</sup> – Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 16; Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, paragraph 85; and *Intertanko* (cited in footnote 29, paragraph 48).

<sup>45</sup> – To the same effect – in relation to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air of 12 October 1929 – *Bogiatzi* (cited in footnote 43, paragraphs 32 and 33).

<sup>46</sup> – See, for example, the aviation agreements with Morocco and Canada cited in footnote 32.

<sup>47</sup> – See, to this effect, my Opinion of 20 November 2007 in *Intertanko* (cited in footnote 29, point 44).

<sup>48</sup> – See also the explanations by the Commission on its website, which can be downloaded in English at [http://ec.europa.eu/transport/air/international\\_aviation/european\\_community\\_icao/european\\_community\\_icao\\_en.htm](http://ec.europa.eu/transport/air/international_aviation/european_community_icao/european_community_icao_en.htm) (last visited on 30 June 2011).

Contracting Parties to the Chicago Convention is not, as such, sufficient to make that agreement binding on the European Union.<sup>49</sup>

iii) Interim conclusion

66. Since the European Union is not therefore bound by the Chicago Convention, that convention cannot be relied upon as a benchmark against which the validity of Directive 2008/101 can be reviewed. The fact that all Member States of the European Union are Contracting Parties to the Chicago Convention can nevertheless have an effect on the interpretation of provisions of EU law;<sup>50</sup> this follows from the general principle of good faith, which also applies under international law and has found specific expression under EU law in Article 4(3) TEU.<sup>51</sup>

b) The Kyoto Protocol and the Open Skies Agreement (Question 1(f) and (g))

67. The European Union – formerly the European Community – is undoubtedly bound by the Kyoto Protocol and the Open Skies Agreement as a party to both agreements (see also Article 216(2) TFEU in conjunction with the third sentence of the third paragraph of Article 1 TEU). The first of the criteria set out in point 49 above is therefore met. However, it is still necessary to examine whether the second criterion is also satisfied, that is whether the Kyoto Protocol and the Open Skies Agreement can, by their nature and broad logic, serve as a benchmark against which the validity of an EU act can be reviewed, and whether the particular provisions of these agreements are, as regards their content, unconditional and sufficiently precise.

i) Preliminary observation

68. Every international agreement concluded by the European Union is binding on it under international law as against the other contracting parties. The application of such agreements within the European Union is, however, not a question of international law but of EU law. The Court’s answer in its case-law has consistently been to the effect that, from the moment they enter into force, the provisions of international agreements concluded by the European Union form an essential (‘integral’) part of the legal order of the European Union.<sup>52</sup> It follows

<sup>49</sup> – To the same effect, *Intertanko* (cited in footnote 29, paragraph 49) and *Bogiatzi* (cited in footnote 43, paragraph 33).

<sup>50</sup> – See my comments below on the third and fourth questions referred for a preliminary ruling (points 161 to 236 of this Opinion).

<sup>51</sup> – *Intertanko* (cited in footnote 29, end of paragraph 52).

<sup>52</sup> – Case 181/73 *Haegeman* [1974] ECR 449, paragraph 5; *IATA and ELFAA* (cited in footnote 35, paragraph 36); *Brita* (cited in footnote 41, paragraph 39); and Case C-240/09 *Lesoochranárske zoskupenie* [2011] ECR I-0000, paragraph 30.

moreover from Article 216(2) TFEU that such agreements are binding on the EU institutions and Member States. The question of the effects of the provisions of an international agreement in a specific case must nevertheless be distinguished from the pure existence of the agreement as part of the legal order, since the nature and broad logic of a particular agreement might be such that its provisions cannot (or can only to a limited extent) be relied upon within the European Union for the purposes of judicial review of the validity of acts of EU institutions.

69. The effects within the European Union of provisions of an agreement concluded by the European Union with third countries may not be determined without taking account of the international origin of the provisions in question. If – as is generally the case – an agreement does not contain an express rule on the effects its provisions are to have in the internal legal order of the contracting parties, it is for the courts having jurisdiction in the matter to so determine by way of interpretation,<sup>53</sup> on the basis in particular of the agreement’s spirit, general scheme or terms.<sup>54</sup> In any event, it falls to the Court of Justice to determine, on the basis, in particular, of the abovementioned criteria, whether the provisions of an international agreement confer on persons subject to EU law the right to rely on that agreement in legal proceedings in order to contest the validity of an act of EU law.<sup>55</sup>

70. In relation to the rules of the World Trade Organisation (WTO) and decisions of WTO bodies, for instance, the Court of Justice has consistently held that these cannot in any way be relied upon as a benchmark against which the validity of acts of EU law can be reviewed, because of the nature and broad logic of such rules and decisions. The Court’s reasoning is essentially based on the great ‘flexibility’ (in French: ‘souplesse’) of GATT (and now of WTO) law, which is designed for negotiated solutions and based on the principle of reciprocity.<sup>56</sup>

71. Furthermore it is generally the case that an international agreement cannot normally serve as a benchmark against which the validity of acts of EU institutions can be reviewed in legal proceedings brought by individuals (that is by

<sup>53</sup> – Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 17; Case C-149/96 *Portugal v Council* [1999] ECR I-8395, paragraph 34; and *FIAMM* (cited in footnote 35, paragraph 108).

<sup>54</sup> – *International Fruit Company* (cited in footnote 30, paragraph 20); Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraph 110; and *FIAMM* (cited in footnote 35, end of paragraph 108); similarly *Kupferberg* (cited in footnote 52, paragraph 18).

<sup>55</sup> – *FIAMM* (cited in footnote 35, paragraph 109).

<sup>56</sup> – See, inter alia, *International Fruit Company* (cited in footnote 30, paragraphs 19 to 27, particularly paragraph 21); *Germany v Council* (cited in footnote 54, paragraphs 106 to 109); Case C-469/93 *Chiquita Italia* [1995] ECR I-4533, paragraphs 26 to 29; *Portugal v Council* (cited in footnote 53, particularly paragraph 47); Case C-93/02 P *Biret International v Council* [2003] ECR I-10497, particularly paragraph 52; Case C-94/02 P *Biret et Cie v Council* [2003] ECR I-10565, particularly paragraph 55; Case C-377/02 *Van Parys* [2005] ECR I-1465, particularly paragraph 39; and *FIAMM* (cited in footnote 35, particularly paragraph 111).

natural or legal persons) unless, by the nature and broad logic of that agreement, it is capable of conferring rights which an individual can invoke before the courts.<sup>57</sup> In other words, therefore, the international agreement in question must affect the legal status of the individual.<sup>58</sup>

72. The legal status of individuals is affected, in particular, where they are granted independent rights and freedoms under an international agreement,<sup>59</sup> as is the case, for instance, with many association, cooperation and partnership agreements concluded by the European Union.<sup>60</sup> Environmental agreements can also contain provisions on which any interested party is entitled to rely before the courts.<sup>61</sup>

73. The only limited ability of individuals to invoke international agreements as a benchmark for validity before the courts can be explained by reference to the objective of affording the individual legal protection: under EU law – as in the majority of domestic legal systems – individuals generally enjoy legal protection in so far as it is necessary to safeguard their guaranteed rights or freedoms (see also the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union).

74. In the light of the foregoing it is necessary in the present case also to review the Open Skies Agreement and the Kyoto Protocol in two stages; first, to ascertain whether by their nature and broad logic they are capable of conferring rights which an individual can invoke before the courts and, secondly, to consider whether the relevant provisions of those agreements appear, as regards their

<sup>57</sup> – *International Fruit Company* (cited in footnote 30, paragraphs 8 and 19). The Court has also ruled in similar fashion when examining whether individuals can rely, against national authorities or national measures, on provisions in international agreements concluded by the European Union: see, most recently, Case C-160/09 *Ioannis Katsivardas – Nikolaos Tsitsikas* [2010] ECR I-0000, paragraph 45.

<sup>58</sup> – This aspect requires varying degrees of consideration according to the circumstances. In *IATA and ELFAA* (cited in footnote 35, paragraph 39) it could be assumed as a matter of course that the Montreal Convention of 28 May 1999 (Convention for the Unification of Certain Rules for International Carriage by Air, OJ 2001 L 194, p. 39; *UNTS*, Vol. 2242, p. 369) was capable of affecting the legal status of individuals, as the relevant provisions of the convention related to civil-law claims in damages made by individuals against air carriers and the limitation of the civil liability of such carriers.

<sup>59</sup> – See *Intertanko* (cited in footnote 29, paragraph 59).

<sup>60</sup> – See, inter alia, Case C-18/90 *Kziber* [1991] ECR I-199, paragraphs 15 to 23; Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraphs 19 to 30; and Case C-265/03 *Simutenkov* [2005] ECR I-2579, paragraphs 22 to 29; also, to the same effect, Joined Cases C-300/09 and C-301/09 *Toprak* [2010] ECR I-0000. The Court has already recognised in Case 12/86 *Demirel* [1987] ECR 3719, paragraph 14, that such agreements are, in principle, capable of direct application.

<sup>61</sup> – Case C-213/03 *Pêcheurs de l'étang de Berre* [2004] ECR I-7357, particularly paragraph 47.

content, to be unconditional and sufficiently precise to enable an individual to invoke them before the courts.

75. In the present case there is no need to determine whether other more favourable conditions should apply where privileged parties entitled to bring an action under the second paragraph of Article 263 TFEU claim in an action for annulment that an act of the European Union is in breach of the latter's obligations under international law.<sup>62</sup> Support for that view could be found in the fact that international law forms an integral part of the legal order of the European Union and, under the system of the founding Treaties of the European Union, privileged parties may not just assert their own rights but also contribute in the public interest to judicial review of the legality of acts of EU institutions. Under the second sentence of Article 3(5) TEU this includes ensuring the strict observance of international law.

ii) The Kyoto Protocol (Question 1(g))

76. First of all, as far as the Kyoto Protocol is concerned, only the claimants in the main proceedings and the associations supporting them are of the opinion that it could be of direct application. The institutions and governments involved in the preliminary ruling proceedings and the environmental organisations have adopted a diametrically opposed position and take the view that the Kyoto Protocol cannot serve as a benchmark against which the validity of Directive 2008/101 can be reviewed.

77. The latter argument is convincing. In neither the nature and broad logic of the Kyoto Protocol in general nor the specific provision at issue (Article 2(2) thereof) in particular is there anything to indicate that it has direct application.

– Nature and broad logic of the Kyoto Protocol

78. The Kyoto Protocol is an agreement on the environment and climate change. It is an additional protocol to the United Nations Framework Convention on Climate Change.<sup>63</sup>

79. The ultimate objective of the Framework Convention and all related legal instruments is to achieve stabilisation of greenhouse gas concentrations in the

<sup>62</sup> – In *Netherlands v Parliament and Council* (cited in footnote 35, particularly paragraphs 53 and 54) the Court found it permissible for a Member State to bring an action against a directive adopted by the Parliament and Council claiming that this directive infringed the international obligations of the European Community (now the European Union) under the Convention on Biological Diversity signed in Rio de Janeiro on 5 June 1992 (OJ 1993 L 309, p. 3; *UNTS*, Vol. 1760, p. 79). The Court expressly considered such a review to be possible even if the provisions of that convention do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts (paragraph 54 of that judgment).

<sup>63</sup> – See the title of the Kyoto Protocol and the first recital in the preamble thereto.

atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.<sup>64</sup> The preamble to the Framework Convention states, *inter alia*, that the adverse effects of change in the Earth’s climate are a common concern of humankind,<sup>65</sup> calls for the widest possible cooperation by all countries,<sup>66</sup> and reaffirms the principle of sovereignty of States in international cooperation to address climate change.<sup>67</sup>

80. This objective alone and the overall context of the Kyoto Protocol indicate that this is a legal instrument governing only relations between States<sup>68</sup> and their respective obligations in the context of worldwide endeavours to combat climate change.

81. That impression is reinforced on examination of the most important provisions of the Kyoto Protocol itself: it lists a non-exhaustive catalogue of policies and measures to promote sustainable development that specified parties (essentially the developed countries) are to implement to fulfil their respective emission limitation and reduction commitments.<sup>69</sup>

82. It can certainly be assumed that the climate change measures taken by the Contracting Parties under the Kyoto Protocol will have a beneficial effect on individuals in the medium and long term, as they serve to conserve the environment. It is also likely that some of the measures taken will be onerous for individuals. However, effects such as these are only indirect. Neither the Framework Convention nor the Kyoto Protocol contains specific provisions that could directly affect the legal status of an individual. There are no more than a few general references to ‘humankind’ and ‘humans’ in these legal instruments.<sup>70</sup>

<sup>64</sup> – See Article 2 of the Framework Convention, reference to which is made in the preamble to the Kyoto Protocol.

<sup>65</sup> – First recital in the preamble to the Framework Convention.

<sup>66</sup> – Sixth recital in the preamble to the Framework Convention.

<sup>67</sup> – Ninth recital in the preamble to the Framework Convention.

<sup>68</sup> – Regional economic integration organisations as well as States can be Contracting Parties to the Kyoto Protocol. This applies in particular to the European Union (formerly the European Community).

<sup>69</sup> – Article 2(1) and (3) in conjunction with Article 3 of the Kyoto Protocol.

<sup>70</sup> – See, for instance, the first, second and seventh recitals in the preamble to the Framework Convention.

83. All of this militates against the assumption that individuals can rely on the Kyoto Protocol before the courts, especially if they come from States that have not ratified this protocol.<sup>71</sup>

84. Furthermore, the emission limitation and reduction commitments agreed in the Kyoto Protocol, although quantified, afford the Contracting Parties a wide discretion with regard to the specific policies to be implemented and measures to be taken in accordance with their national circumstances.<sup>72</sup> All the commitments in the Kyoto Protocol have to be transposed into national law and, moreover, they are not sufficiently precise to be capable of having a direct beneficial or adverse effect on individuals.<sup>73</sup>

– Article 2(2) of the Kyoto Protocol

85. The particular provision in Article 2(2) of the Kyoto Protocol mentioned by the referring court fits seamlessly into the general scenario stated above. In it, the Contracting Parties agree (in so far as is relevant in this context) to pursue limitation or reduction of emissions of certain greenhouse gases from aviation bunker fuels, working through the ICAO.

86. The provision in question therefore confines itself to regulating certain legal relationships between the Contracting Parties to the Kyoto Protocol. It describes the organisational framework within which the Contracting Parties wish to cooperate on the limitation or reduction of emissions of certain greenhouse gases from aviation bunker fuels. The legal status of individuals is not, however, affected by this. In particular, the approach described in Article 2(2) of the Kyoto Protocol – cooperation of the Contracting Parties working through the ICAO – is not akin to a procedural guarantee that would be intended to safeguard any rights or interests of individuals or would even be capable of so doing.

87. Consequently, individuals cannot invoke Article 2(2) of the Kyoto Protocol before the courts, with the result that this provision cannot in the present case be relied upon as a benchmark against which the validity of Directive 2008/101 can be reviewed.

<sup>71</sup> – The claimants in the main proceedings have their headquarters in the USA, a country that has not ratified the Kyoto Protocol.

<sup>72</sup> – See, in particular, the wording of Article 2(1)(a) of the Kyoto Protocol according to which each party included in Annex I is to ‘[i]mplement and/or further elaborate policies and measures in accordance with its national circumstances’.

<sup>73</sup> – See, to this effect, *Demirel* (cited in footnote 60, paragraph 14); *Pêcheurs de l’étang de Berre* (cited in footnote 61, paragraph 39); and *Lesoochránárske zoskupenie* (cited in footnote 52, paragraph 44); it was held in these cases that a provision in an international agreement concluded by the European Union with a third country is to be regarded as being directly applicable when the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.

iii) The Open Skies Agreement (Question 1(f))

88. As far as the Open Skies Agreement is concerned, most of the institutions and governments involved in the preliminary ruling procedure generally deny that it is capable of affecting the legal status of individuals. Conversely, the Commission and the French Government accept, in principle, that natural and legal persons can invoke the Open Skies Agreement before the courts.<sup>74</sup>

89. I agree with the latter approach. It is more in keeping with the nature and broad logic of the Open Skies Agreement and with the various relevant provisions of that agreement.

– Nature and broad logic of the Open Skies Agreement

90. Some of the wording of the Open Skies Agreement could undoubtedly be construed as meaning that this air transport agreement governs relations between the Contracting Parties, that is to say, between the European Union – formerly the European Community – and its Member States, on the one hand, and the USA, on the other.<sup>75</sup>

91. However, much of the remaining wording of the Open Skies Agreement specifically refers to the rights and obligations of individuals; in particular the agreement directly addresses airlines and other service providers.<sup>76</sup> To some extent it even provides for rights for ‘any person’.<sup>77</sup> Such wording strongly suggests that the Open Skies Agreement affects at least the legal status of individuals, especially that of undertakings.

<sup>74</sup> – More specifically, in the opinion of the Commission, all the provisions of the Open Skies Agreement mentioned by the referring court can be relied upon as a benchmark against which the validity of Directive 2008/101 can be reviewed, whereas the French Government acknowledges only Article 7 and Article 11(2) of that agreement as such a benchmark for review, but not Article 15(3).

<sup>75</sup> – See, for example, Article 3(1) (‘Each Party grants to the other Party the following rights for the conduct of international air transportation by the airlines of the other Party: ...’), Article 3(4) (‘Each Party shall allow each airline to determine the frequency and capacity of the international air transportation it offers ...’) or Article 11(7) of the Open Skies Agreement (‘A Party may request the assistance of the other Party, on behalf of its airline or airlines ...’).

<sup>76</sup> – See, for example, Article 3(2) (‘Each airline may on any or all flights and at its option ...’), Article 3(5) (‘Any airline may perform international air transportation without any limitation as to ...’), Article 10(1) (‘The airlines of each Party shall have the right to establish offices in the territory of the other Party for the promotion and sale of air transportation and related activities.’), the second sentence of Article 10(4) (‘Each airline shall have the right to sell ... transportation ...’), Article 10(5) (‘Each airline shall have the right to convert and remit ... to its home territory ... local revenues ...’) and Article 17(1) of the Open Skies Agreement (‘Computer reservation systems ... vendors ... shall be entitled to ...’).

<sup>77</sup> – The second sentence of Article 10(4) of the Open Skies Agreement: ‘... any person shall be free to ...’.

92. This impression is reinforced if the preamble to the Open Skies Agreement is also taken into consideration. Mention is made there of ‘competition among airlines in the marketplace’ which is to be promoted ‘with minimum government interference and regulation’,<sup>78</sup> strengthened<sup>79</sup> and safeguarded from the adverse effects of government subsidies.<sup>80</sup> The express intention is that of ‘opening access to markets’,<sup>81</sup> and the stated desire is ‘to make it possible for airlines to offer the travelling and shipping public competitive prices and services in open markets’;<sup>82</sup> furthermore, the access of airlines to global capital markets is to be enhanced.<sup>83</sup> It is therefore the realisation of classic economic freedoms that is at issue here. Objectives such as these are characteristic of international agreements the substance of which is not confined to the regulation of relations between the Contracting Parties but also takes into account the legal status of individual economic operators. The role of the individual in the Open Skies Agreement is, moreover, particularly evident wherever mention is made of (airline) undertakings, passengers, the travelling public, shippers, consumers, or even workers and labour.<sup>84</sup>

93. The judgment in *Intertanko*,<sup>85</sup> to which several of the institutions and governments have referred in their submissions before the Court of Justice, does not militate against the assumption that the Open Skies Agreement affects the legal status of individuals.

94. In *Intertanko* the Court admittedly concluded from the nature and broad logic of the United Nations Convention on the Law of the Sea<sup>86</sup> that that convention governed only relations between the Contracting Parties and did not confer any independent rights and freedoms on individuals, although occasional mention is made there of ships and their rights.<sup>87</sup> In *Intertanko*, the rights and

<sup>78</sup> – First recital in the preamble to the Open Skies Agreement.

<sup>79</sup> – Eleventh recital in the preamble to the Open Skies Agreement.

<sup>80</sup> – Seventh recital in the preamble to the Open Skies Agreement.

<sup>81</sup> – Tenth recital in the preamble to the Open Skies Agreement.

<sup>82</sup> – Third recital in the preamble to the Open Skies Agreement.

<sup>83</sup> – Eleventh recital in the preamble to the Open Skies Agreement.

<sup>84</sup> – See, in this respect the 2nd, 3rd, 4th and 10th recitals in the preamble to the Open Skies Agreement.

<sup>85</sup> – Cited above in footnote 29.

<sup>86</sup> – The United Nations Convention on the Law of the Sea (OJ 1998 L 179, p. 3; *UNTS*, Vol. 1833, p. 397) was signed at Montego Bay on 10 December 1982 and entered into force on 16 November 1994. It was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1).

<sup>87</sup> – *Intertanko* (cited in footnote 29, particularly paragraphs 58, 59, 61 and 64).

obligations of those who travel by ship through marine waters are understood as merely the product of the rights and obligations of their respective flag States.<sup>88</sup>

95. The mere fact that the exercise of certain rights under an international convention is linked to the nationality of the person concerned or to the nationality of a ship or aircraft does not militate against the direct applicability of a particular provision of the convention.<sup>89</sup> Nor does the generally recognised principle that every State should fix the conditions for the grant of its nationality or citizenship<sup>90</sup> automatically preclude provisions in international conventions linked to nationality or citizenship from affecting the legal status of individuals.

96. Most international conventions make provision for rights and obligations on the part of nationals of the Contracting Parties only. If direct applicability were to be precluded simply on the basis of such a link with nationality, individuals would hardly ever be able to invoke provisions of international conventions affecting them.

97. Regardless of this, however, the solution identified in *Intertanko* in respect of the Convention on the Law of the Sea cannot immediately be adopted for the Open Skies Agreement at issue here.

98. The Convention on the Law of the Sea places much greater emphasis on the regulation of relations between States and attributes much less significance to the legal status of the individual than is the case under the Open Skies Agreement. The main objective of the Convention on the Law of the Sea is to codify, clarify and develop the rules of general international law relating to the peaceful cooperation of the international community when exploring, using and exploiting marine areas<sup>91</sup> and to establish a ‘constitution of the sea’.<sup>92</sup> It seeks to strike a fair balance between the interests of States as coastal States and the interests of States as flag States, which may conflict; the Contracting Parties provide for the

<sup>88</sup> – *Intertanko* (cited in footnote 29, particularly paragraphs 60 to 62).

<sup>89</sup> – See, to this effect, for example, the judgment of the International Court of Justice (ICJ) of 27 June 2001 in *LaGrand (Germany v. United States of America)*, *I.C.J. Reports 2001*, p. 466 (end of paragraph 77 in conjunction with the end of paragraph 76), in which it is stated that Article 36(1) of the Vienna Convention on Consular Relations of 24 April 1963 (*UNTS*, Vol. 596, p. 261) creates immutable individual rights, as opposed to individual rights derivative of the rights of States (in French: ‘des droits intransgressibles de l’individu par opposition à des droits individuels dérivés des droits des États’).

<sup>90</sup> – This principle is expressed, for instance, in Article 19 of the Chicago Convention and in Article 91(1) of the Convention on the Law of the Sea.

<sup>91</sup> – *Intertanko* (cited in footnote 29, paragraph 55); see also the fourth recital in the preamble to the Convention on the Law of the Sea.

<sup>92</sup> – See my Opinion in *Intertanko* (cited in footnote 29, point 55).

establishment of the substantive and territorial limits to their respective sovereign rights.<sup>93</sup>

99. The references to individuals and to undertakings in the Open Skies Agreement are much more marked than in the Convention on the Law of the Sea,<sup>94</sup> and, as already mentioned,<sup>95</sup> the preamble to the Open Skies Agreement emphasises the importance of the individual and of undertakings with a clarity that finds no equivalent in the Convention on the Law of the Sea.

100. Nor, furthermore, does the existence of a Joint Committee and an arbitration procedure for disputes between the Parties relating to the application or interpretation of the Open Skies Agreement<sup>96</sup> necessarily preclude the possibility of that agreement affecting the legal status of individuals and of some of its provisions directly applying to natural or legal persons.<sup>97</sup> Unlike the position under WTO law, the Open Skies Agreement is based to a much lesser extent on negotiations between the Parties and on reciprocity.<sup>98</sup>

101. All in all, therefore, I am of the view that the Open Skies Agreement can, by its nature and broad logic, affect the legal status of individuals. In legal proceedings brought by individuals, the Open Skies Agreement may therefore, in principle, be used as a benchmark against which the validity of EU acts can be reviewed.

– The unconditional and sufficiently precise nature, as regards their content, of the relevant provisions of the Open Skies Agreement

102. The referring court is specifically pointing to three provisions of the Open Skies Agreement: Article 7, Article 11(2)(c) and Article 15(3). It is necessary to consider with regard to each of these provisions separately whether they are, as

<sup>93</sup> – *Intertanko* (cited in footnote 29, paragraph 58).

<sup>94</sup> – See point 91 above.

<sup>95</sup> – See point 92 above.

<sup>96</sup> – Articles 18 and 19 of the Open Skies Agreement.

<sup>97</sup> – Many association, cooperation and partnership agreements concluded by the European Union with third countries contain provisions like these on joint committees and arbitration procedures, but the Court of Justice has not considered this an argument against the direct application of those agreements; see, inter alia, Articles 22 to 25 of the Agreement of 12 September 1963 establishing an Association between the European Economic Community and Turkey (OJ 1964 217, p. 3687) and Articles 105 and 111 of the Agreement of 2 May 1992 on the European Economic Area (OJ 1994 L 1, p. 3).

<sup>98</sup> – Accordingly, none of the parties in the preliminary ruling procedure has relied on the provisions relating to a joint committee and arbitration procedure in order to challenge the direct application of the Open Skies Agreement.

regards their content, unconditional and sufficiently precise to serve as a benchmark against which the validity of Directive 2008/101 can be reviewed.

103. Article 7 of the Open Skies Agreement provides – put simply – that the laws and regulations of one Party within its territory are also to apply to aircraft and the passengers, crew and cargo on aircraft of the other Party and are to be complied with by them. This provision is unconditional as regards its content; in particular, it does not necessarily require any internal implementing rules on the part of the Parties to the Open Skies Agreement. The provision is also sufficiently precise for it to have tangible legal consequences for individuals: it describes in detail the type of laws and regulations to which it relates,<sup>99</sup> and categorically states that these laws and regulations ‘shall be applied’ and ‘shall be complied with’. It also specifically addresses individuals, as it is specifically the airlines (or their aircraft and cargo) and passengers and crew to which the relevant laws and regulations are to apply and by whom/which they are to be complied with. Article 7 of the Open Skies Agreement therefore fulfils all the requirements for direct application.

104. Article 11(2)(c) of the Open Skies Agreement provides – put simply – for exemption from the taxes, levies, duties, fees and charges on fuel, lubricants and consumable technical supplies for the Parties’ aircraft. This provision is indeed sufficiently precise to be directly applied, since it specifically states which items are to be afforded exemption and from what they are to be exempt. The provision is not unconditional, however, as it grants exemption only ‘on the basis of reciprocity’.<sup>100</sup> Whether an airline can rely on this exemption at a particular point in time vis-à-vis a specific Party to the Open Skies Agreement therefore depends upon the conduct of that other Party at that time. A US airline can claim the exemption provided for in the Open Skies Agreement vis-à-vis European authorities only if and to the extent to which the authorities in its own State of registration at the same time grant corresponding exemptions to European airlines. In view of this condition the requirements for direct application of Article 11(2)(c) of the Open Skies Agreement are not fulfilled.

105. The first sentence of Article 15(3) of the Open Skies Agreement provides that when environmental measures are established the aviation environmental standards adopted by the ICAO are to be followed ‘except where differences have been filed’. This provision appears neither unconditional nor sufficiently precise

<sup>99</sup> – These are laws and regulations relating to admission and departure and the operation and navigation of aircraft (Article 7(1) and (2) of the Open Skies Agreement); they include regulations relating to entry, clearance, immigration, passports, customs, quarantine and mail (Article 7(2) of the Open Skies Agreement).

<sup>100</sup> – In *International Fruit Company* (cited in footnote 30, paragraph 21) the Court considered the principle of reciprocity in the Preamble to GATT 1947 (‘on the basis of reciprocal and mutually advantageous arrangements’) to be one of several indications militating against the direct applicability of its provisions.

to be directly applied: in the last part of that sentence ('except ...') it refers to ICAO law and does not itself govern the circumstances in which differences vis-à-vis ICAO environmental standards are permissible. Nor is it apparent that this provision could affect the legal status of individuals in any way: it concerns the establishment of environmental standards in the public interest, not their application in relation to airlines.

106. According to the second sentence of Article 15(3) of the Open Skies Agreement the Parties are to apply any environmental measures affecting air services in accordance with Article 2 and 3(4) of the Open Skies Agreement. Unlike the first sentence of Article 15(3), this provision specifically relates to the application of environmental measures to airlines and can therefore have a concrete effect on their legal status. It provides in substance that environmental measures are to be applied to airlines in accordance with the principle of fair and equal opportunity (Article 2 of the Open Skies Agreement). Furthermore, it is necessary to safeguard the right of airlines to determine the frequency and capacity of the international air transportation they offer based upon commercial considerations in the marketplace (first sentence of Article 3(4) of the Open Skies Agreement). In addition, uniform conditions consistent with Article 15 of the Chicago Convention are to be applied (second sentence of Article 3(4) of the Open Skies Agreement). What all these requirements ultimately have in common is that environmental measures must be applied to airlines in a non-discriminatory manner and must not prejudice the airlines' prospects in competition with each other. Such requirements are both unconditional and sufficiently precise. As with prohibitions on discrimination under many association, cooperation and partnership agreements and in a similar way to the competition principles applicable within the European internal market,<sup>101</sup> they are capable of having direct application.

#### iv) Interim conclusion

107. Only Article 7 and the second sentence of Article 15(3) of the Open Skies Agreement can therefore be relied upon as a benchmark against which the validity of Directive 2008/101 can be reviewed.

## 2. Customary international law (Question 1(a) to (d))

108. It is generally recognised that the European Union is bound by customary international law as well as by the international agreements applicable to it,<sup>102</sup> and

<sup>101</sup> – See the case-law cited in footnote 60 on prohibitions on discrimination. As far as competition principles are concerned, it is generally recognised that Articles 101 TFEU and 102 TFEU are directly applicable (see Case 127/73 *BRT and Société belge des auteurs, compositeurs et éditeurs* [1974] ECR 51, paragraphs 15 to 17).

<sup>102</sup> – *Poulsen and Diva Navigation* (paragraphs 9 and 10), *Racke* (paragraphs 45 and 46) and *Intertanko* (paragraph 51), all cited in footnote 29, and *Brita* (cited in footnote 41, paragraphs 40

this is confirmed by the second sentence of Article 3(5) TEU (‘strict observance and the development of international law’). The relevant principles of customary international law form part of the EU legal order.<sup>103</sup>

109. However, the case-law of the Courts of the European Union has not given rise to any clear criteria for the determination of whether and to what extent a principle of customary international law can serve as a benchmark against which the validity of EU legislation can be reviewed. It would appear that the Courts of the European Union have not in the past had occasion to undertake such a review of validity; customary international law has, up to now, been called upon only in relation to the interpretation of provisions and principles of EU law.<sup>104</sup>

110. As many of the institutions and governments involved in the proceedings have correctly argued, these criteria should not differ from those applicable on an examination of whether and to what extent the validity of EU acts can be gauged against international agreements.

111. First, there appears to be no good reason why individuals should be permitted to rely on principles of customary international law under less stringent conditions than when relying on international agreements. Nor have the claimants in the main proceedings or the associations supporting them raised any such argument in the proceedings before the Court of Justice.

112. Secondly, many principles of customary international law have now been codified in international agreements.<sup>105</sup> It would make no sense if, when individuals are relying on one and the same principle of international law, different conditions were to apply according to whether it was being relied upon

to 42); see, in addition, Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, especially paragraph 90.

<sup>103</sup> – *Racke* (cited in footnote 29, paragraph 46).

<sup>104</sup> – In Case C-405/92 *Mondiet* [1993] ECR I-6133, paragraphs 11 to 16, *Poulsen and Diva Navigation* (cited in footnote 29, final sentence of paragraph 11) and *Brita* (cited in footnote 41, particularly paragraph 45), customary international law is referred to only with regard to the interpretation of acts adopted by EU institutions. In *Racke* (cited in footnote 29, paragraph 47) it was pointed out that the claimant was incidentally challenging the validity of a regulation in order to rely upon rights which it derived directly from an agreement of the Community with a non-member country. In *Opel Austria v Council* (cited in footnote 102, paragraphs 93 and 94) the Court of First Instance (now ‘the General Court’) applied the general principle of protection of legitimate expectations recognised by EU law, which, in its view was the corollary of the principle of good faith under customary international law; however, the benchmark for the validity of the disputed EU act was ultimately an international agreement (the EEA Agreement) rather than a general principle of EU law or customary international law (*Opel Austria v Council*, paragraph 95).

<sup>105</sup> – See, for instance *Poulsen and Diva Navigation* (cited in footnote 29, paragraph 10); *Mondiet* (cited in footnote 104, paragraph 13); and *Brita* (cited in footnote 41, paragraph 40).

as a principle of customary international law or as a principle under an international agreement.

113. In line with the case-law on international agreements discussed above,<sup>106</sup> I therefore propose that the Court of Justice should not recognise principles of customary international law as a benchmark against which the lawfulness of EU acts can be reviewed unless two conditions are satisfied:

- First, there must exist a principle of customary international law that is binding on the European Union.
- Secondly, the nature and broad logic of that particular principle of customary international law must not preclude such a review of validity; the principle in question must also appear, as regards its content, to be unconditional and sufficiently precise.

114. In the context of the second criterion it should again be noted that, in the present case, the question of the validity of Directive 2008/101 arises in legal proceedings brought by individuals: a number of airlines and an airline association.<sup>107</sup>

a) As to whether the principles of customary international law at issue exist and are binding on the European Union.

115. As is apparent from, *inter alia*, Article 38(1)(b) of the Statute of the International Court of Justice,<sup>108</sup> customary international law is one of the generally recognised sources of international law. For this to exist there must be a settled practice on the part of the particular subjects of international law (*consuetudo*; objective element), which is recognised as a rule of law (*opinio juris sive necessitatis*; subjective element).<sup>109</sup>

116. Certain principles of customary international law have from time to time been codified in multilateral agreements involving a very large, representative number of subjects of international law. This applies in particular to some of the

<sup>106</sup> – Cited above in footnote 35; similarly the Opinion delivered by Advocate General Jacobs on 4 December 1997 in *Racke* (cited in footnote 29, particularly points 84 and 85).

<sup>107</sup> – See point 50 above; to the same effect, the Opinion delivered by Advocate General Jacobs in *Racke* (cited in footnote 29, particularly points 71 and 84).

<sup>108</sup> – The Statute of the International Court of Justice of 26 June 1945 forms an integral part of the Charter of the United Nations (*UNTS*, Vol. 1, p. XVI).

<sup>109</sup> – See, in particular, the judgments of the ICJ of 20 February 1969 in the *North Sea Continental Shelf Cases* (*Germany v. Netherlands and Germany v. Denmark*), *I.C.J. Reports* 1969, p. 4 (paragraph 77), and of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), ‘*Nicaragua*’, *I.C.J. Reports* 1986, p. 14 (paragraphs 183 and 184).

provisions of the Chicago Convention,<sup>110</sup> to the Convention on the High Seas<sup>111</sup> and to parts of the Convention on the Law of the Sea.<sup>112</sup>

117. The parties to the present preliminary ruling procedure are agreed in principle that the Chicago Convention and the Convention on the Law of the Sea in particular can provide information on the existence or non-existence of the relevant principles of customary international law and as to whether they are binding on the European Union.

i) The sovereignty of States over their air space (Question 1(a))

118. The principle of sovereignty of States over their air space (sometimes also referred to as ‘air sovereignty’) flows from the sovereignty of States over their respective territories.<sup>113</sup> It was laid down in Article 1 of the Paris Convention<sup>114</sup> as early as 1919; it is now codified in Article 1 of the Chicago Convention, to which 190 States are currently Contracting Parties, including all the Member States of the European Union. As the International Court of Justice has also recognised, the rule of international law in the Chicago Convention merely expresses an established and longstanding principle of customary international law.<sup>115</sup>

<sup>110</sup> – Article 1 of the Chicago Convention which is relevant in this respect contains the following wording: ‘The contracting States recognise ...’, which is indicative of the codification of a pre-existing principle of international law.

<sup>111</sup> – The international Convention on the High Seas, which was opened for signature in Geneva on 29 April 1958 and entered into force on 30 September 1962 (*UNTS*, Vol. 450, p. 11 [82]), refers in the very first recital in its preamble to the desire of the Parties ‘to codify the rules of international law relating to the high seas’; the Court of Justice also recognised this in *Poulsen and Diva Navigation* (cited in footnote 29, paragraph 10).

<sup>112</sup> – The seventh recital in the preamble to the Convention on the Law of the Sea speaks of ‘the codification and progressive development of the law of the sea achieved in this Convention’. This is also confirmed by case-law; see, for instance, the ICJ judgment in the *Nicaragua* case (cited in footnote 109, paragraph 212); and *Poulsen and Diva Navigation* (cited in footnote 29, paragraph 10); *Mondiet* (cited in footnote 104, paragraph 13); and *Intertanko* (cited in footnote 29, paragraph 55).

<sup>113</sup> – ICJ judgment in *Nicaragua* (cited in footnote 109, paragraph 212).

<sup>114</sup> – Convention Relating to the Regulation of Aerial Navigation (which was signed in Paris on 13 October 1919 and entered into force in 1922, *United Nations Treaty Collection*, Series XI [1922], p. 173 et seq.). This Convention was at the time ratified by a total of 33 States. Article 1 of this Convention and Article 1 of the Chicago Convention contain essentially the same wording.

<sup>115</sup> – French wording: ‘Il est hors de doute pour la Cour que ces prescriptions du droit conventionnel ne font que correspondre à des convictions qui, depuis longtemps, sont bien établies en droit international coutumier’; English wording: ‘The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law’ (ICJ judgment in *Nicaragua*, cited in footnote 109, end of paragraph 212).

119. The fact that the European Union is not itself a Contracting Party to the Chicago Convention does not preclude it from being bound by the customary international law principle of sovereignty of States over their air space which is codified in that convention,<sup>116</sup> because a principle of customary international law retains a separate existence alongside the international agreement in which it is codified.<sup>117</sup>

ii) Invalidity of claims of sovereignty over the high seas (Question 1(b))

120. The principle that no State may validly purport to subject any part of the high seas to its sovereignty is a manifestation of the principle of freedom of the high seas the conceptual origins of which can be traced as far back as the year 1609.<sup>118</sup> Freedom of the high seas has been an internationally recognised principle since at least the early 20th century.<sup>119</sup>

121. In 1958, the principle that no State may validly purport to subject any part of the high seas to its sovereignty was codified in the first sentence of Article 2 of the Convention on the High Seas and was later introduced into Article 89 of the Convention on the Law of the Sea under the heading ‘Invalidity of claims of sovereignty over the high seas’. There are at present 162 Contracting Parties to the Convention on the Law of the Sea, including the European Union – formerly the European Community –<sup>120</sup> and all its Member States.

122. In the light of a practice on the part of States that has existed for at least a century – if not longer – and its wide acceptance with the involvement of the European Union and all of its Member States, it can be assumed that Article 89 of the Convention on the Law of the Sea constitutes the codification of a principle of customary international law<sup>121</sup> that is binding on the European Union. None of the parties to the present preliminary ruling procedure has questioned this.

123. Some doubts have been expressed during the preliminary ruling procedure as to whether the principle of invalidity of claims of sovereignty over the high

<sup>116</sup> – To the same effect, with regard to the Vienna Convention on the Law of Treaties, *Racke* (cited in footnote 29, paragraphs 24, 45 and 46) and *Brita* (cited in footnote 41, paragraph 42); similarly, with regard to maritime law, *Mondiet* (cited in footnote 104, paragraph 13).

<sup>117</sup> – To the same effect, judgment of the ICJ in *Nicaragua* (cited in footnote 109, paragraphs 174 to 179).

<sup>118</sup> – See the pioneering publication ‘*Mare liberum*’ (‘The Free Sea’) by Hugo Grotius (1609).

<sup>119</sup> – See in this respect, for instance, the judgment of the Permanent Court of International Justice (PCIJ) of 7 September 1927 in *Lotus (France v. Turkey)*, *PCIJ Publications* 1927, Series A, No. 10 (p. 25).

<sup>120</sup> – See the Council Decision cited in footnote 86.

<sup>121</sup> – See, to this effect, the judgment of the ICJ of 25 July 1974 in *Fisheries Jurisdiction (United Kingdom v. Iceland)* *I.C.J. Reports* 1974, p. 3 (paragraph 50).

seas can be germane to a review of the validity of Directive 2008/101. Suffice to say, however, that according to settled case-law, questions on the interpretation of EU law referred by a national court enjoy a presumption of relevance.<sup>122</sup> Since it is not obvious that Question 1(b) would be irrelevant to a decision in the main proceedings it should be considered by the Court of Justice.

iii) Freedom to fly over the high seas (Question 1(c))

124. Freedom to fly over the high seas (‘freedom of overflight’) was also mentioned as early as 1958 in point 4 of the third sentence of Article 2 of the Convention on the High Seas and is now codified in Article 87(1)(b) of the Convention on the Law of the Sea.

125. For the same reasons as outlined above in connection with the invalidity of claims of sovereignty over the high seas,<sup>123</sup> freedom to fly over the high seas must also be considered a principle of customary international law which is binding on the European Union.

iv) Allegedly exclusive jurisdiction over aircraft overflying the high seas (Question 1(d))

126. Unlike in the case of the principles of customary international law considered above, the existence of the fourth principle raised by the referring court is a matter of dispute.

127. The claimants in the main proceedings and the associations supporting them argue that it follows from customary international law that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by international treaty. Whilst a few of the governments and institutions have not queried this further, some of the other parties involved in the proceedings – that is to say, the Governments of Germany, France, the United Kingdom and Norway, but also the Commission and the environmental organisations – are firmly of the opinion that no such principle of customary international law exists.

128. In fact there is a principle that – put simply – vessels on the high seas are subject to the exclusive jurisdiction of their flag States, but this has been codified only in respect of ships, not aircraft. This is apparent from the first sentence of Article 92(1) of the Convention on the Law of the Sea and its predecessor, the first sentence of Article 6(1) of the 1958 Convention on the High Seas.

<sup>122</sup> – Case C-333/07 *Régie Networks* [2008] ECR I-10807, paragraphs 46 and 47; Case C-45/09 *Rosenblatt* [2010] ECR I-0000, paragraph 33; and Case C-119/09 *Société fiduciaire nationale d’expertise comptable* [2011] ECR I-0000, paragraph 21.

<sup>123</sup> – Points 120 to 122 of this Opinion.

129. The provisions in Article 6(1) of the Convention on the High Seas and Article 92 of the Convention on the Law of the Sea cannot simply be applied to aircraft by analogy. It is clear from consideration of both of these multilateral agreements as a whole that those drafting them made a clear distinction between ships and aircraft and expressly referred to aircraft in numerous provisions that were to apply to both, or specifically to aircraft.<sup>124</sup>

130. In those circumstances Article 6 of the Convention on the High Seas and Article 92 of the Convention on the Law of the Sea cannot be regarded as reliable evidence of the alleged existence of a principle of customary international law in regard to aircraft which are not specifically mentioned there, particularly as no mention of the principle of exclusive jurisdiction of States of registration over their aircraft overflying the high seas is made in the Chicago Convention, which is specifically directed at aviation. In addition, the Tokyo Convention,<sup>125</sup> which, like the Chicago Convention, has virtually worldwide application, contains a provision in Article 4 which, within certain limits, actually permits States to interfere with aircraft in flight in order to exercise their criminal jurisdiction even if they are not the State of registration.

131. It would appear that the relevant case-law hitherto established in relation to the principle at issue concerns only ships, not aircraft.<sup>126</sup>

132. In the light of the foregoing, I propose that the Court should rule that there is currently insufficient evidence of the existence of 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 international treaty’.

133. Consequently, such a principle cannot be used as a benchmark against which the lawfulness of EU acts such as Directive 2008/101 can be reviewed.

<sup>124</sup> – See, for instance, Articles 15, 17, 19 to 21, 23(4) and 23(5)(b) of the Convention on the High Seas and Articles 1(5), 18(2), 19(2)(e), 38, 39, 42(4), 53(1), 53(5) and 53(12), 54, 58(1), 87(1)(b), 101 to 107, 110(4) and 110(5), 111, 212(1), 216(1)(b), 222, 224, 236, 262 and 298(1)(b) of the Convention on the Law of the Sea.

<sup>125</sup> – The Convention on Offences and Certain Other Acts Committed on Board Aircraft (‘Tokyo Convention’, *UNTS*, Vol. 704, p. 219) was opened for signature in Tokyo on 14 September 1963 and entered into force on 4 December 1969. There are currently 185 Contracting States.

<sup>126</sup> – See, in particular, the judgment of the PCIJ in *Lotus* (cited in footnote 119) and the judgment of our Court in *Poulsen and Diva Navigation* (cited in footnote 29). In so far as, for the purposes of the present proceedings, any significance is to be attributed to the judgment of the New Zealand Court of Appeal of 5 November 1998 in *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, to which the claimants in the main proceedings refer, it is sufficient to point out that it would appear that that case did not concern aircraft either.

b) As to whether the principles of customary international law at issue are suitable as a benchmark against which to review validity in proceedings brought by natural or legal persons

134. Even though every principle of customary international law to which the European Union is committed is binding on it under international law, the nature and broad logic of a particular principle might be such that it cannot (or can only to a limited extent) be relied upon within the European Union for the purposes of judicial review of the validity of acts of EU institutions,<sup>127</sup> especially in proceedings brought by natural or legal persons.

135. The common feature of the three principles of customary international law at issue in Question 1(a) to (c) in the High Court’s request for a preliminary ruling is that they determine the scope of sovereignty of States and limit their jurisdiction.

136. Principles such as these are, by their very nature and broad logic, by no means capable of having an effect on the legal status of individuals.<sup>128</sup> The institutions involved in the present proceedings and the majority of the governments involved have correctly pointed this out.

137. In legal proceedings brought by natural or legal persons, therefore, such principles cannot be relied upon as a benchmark against which the validity of EU acts can be reviewed.<sup>129</sup>

### 3. Interim conclusion

138. All in all, therefore, of the provisions and principles of international law mentioned in the first question referred for a preliminary ruling, only Article 7 and the second sentence of Article 15(3) of the Open Skies Agreement can be relied upon as a benchmark against which the validity of EU acts can be reviewed in legal proceedings brought by natural or legal persons.

### *B – Compatibility of Directive 2008/101 with the international agreements and principles of customary international law invoked (Questions 2 to 4)*

139. Questions 2 to 4 focus on the compatibility of Directive 2008/101 with the international agreements and principles of customary international law raised by

<sup>127</sup> – See, in that respect – with reference to international agreements – points 68 and 69 of this Opinion.

<sup>128</sup> – The position might be different in relation to certain rules of customary international humanitarian law; see the Opinion delivered by Advocate General Jacobs in *Racke* (cited in footnote 29, final sentence of point 84).

<sup>129</sup> – The situation might be different where privileged parties bring an action under the second paragraph of Article 263 TFEU (see point 75 above).

the referring court. They are posed only in the event of the first question being answered in the affirmative. According to my comments above, this is so only in respect of Article 7 and the second sentence of Article 15(3) of the Open Skies Agreement. In the alternative and for the sake of completeness I shall nevertheless review the compatibility of Directive 2008/101 with the other provisions and principles of international law raised by the referring court.

140. Highly divergent legal opinions were expressed on this topic in the proceedings before the Court of Justice. Whilst the claimants in the main proceedings and the associations supporting them regard all of the international agreements and principles of customary international law at issue as having been contravened, the governments and institutions involved in the proceedings together with the environmental organisations unanimously adopt the diametrically opposite point of view.

#### 1. Compatibility with certain principles of customary international law (Question 2)

141. By its second question the referring court asks whether the principles of customary international law asserted by the claimants in the main proceedings lead to the invalidity of Directive 2008/101 in so far as that directive extends the EU emissions trading scheme to sections of flights that take place outside the air space of Member States of the European Union.

142. It is generally recognised that the European Union must respect customary international law in the exercise of its powers.<sup>130</sup>

143. In the present case the claimants in the main proceedings and the associations supporting them essentially accuse the EU legislature of having exceeded the bounds of State jurisdiction in breach of principles of customary international law. They argue that the inclusion of flight sections that take place in airspace outside the European Union has created an extraterritorial rule which contravenes, on the one hand, the sovereign rights of third countries and, on the other, the freedom of the high seas.

144. That allegation is untenable. It is based on an erroneous and highly superficial reading of the provisions of Directive 2008/101.

<sup>130</sup> – *Poulsen and Diva Navigation* (cited in footnote 29, paragraph 9); *Racke* (cited in footnote 29, paragraph 45); and Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others v Commission* ('Wood pulp') [1988] ECR 5193, paragraphs 15 to 18.

a) On the absence of any extraterritorial effect of the EU emissions trading scheme

145. As many of the governments and institutions involved in the proceedings have correctly concluded, Directive 2008/101 does not contain any extraterritorial provisions. The activities of airlines within the airspace of third countries or over the high seas are not made subject to any mandatory provisions of EU law by virtue of this directive. In particular, Directive 2008/101 does not give rise to any kind of obligation on airlines to fly their aircraft on certain routes, to observe specific speed limits or to comply with certain limits on fuel consumption and exhaust gases.

146. Directive 2008/101 is concerned solely with aircraft arrivals at and departures from aerodromes in the European Union, and it is only with regard to such arrivals and departures that any exercise of sovereignty over the airlines occurs: depending on the flight, these airlines have to surrender emission allowances in various amounts,<sup>131</sup> and if they fail to comply there is a threat of penalties, which might even extend to an operating ban.<sup>132</sup>

147. The fact that the calculation of emission allowances to be surrendered is based on the whole flight in each case does not bestow upon Directive 2008/101 any extraterritorial effect. Admittedly, it is undoubtedly true that, to some extent, *account is thus taken of events* that take place over the high seas or on the territory of third countries. This might indirectly give airlines an incentive to conduct themselves in a particular way when flying over the high seas or on the territory of third countries, in particular to consume as little fuel as possible and expel as few greenhouse gases as possible. However, there is no concrete *rule* regarding their conduct within airspace outside the European Union.

148. It is by no means unusual for a State or an international organisation also to take into account in the exercise of its sovereignty circumstances that occur or have occurred outside its territorial jurisdiction. The principle of worldwide income thus applies in many countries under income tax law. Under anti-trust law as well as in merger control it is normal worldwide practice for competition authorities to take action against agreements between undertakings even if those agreements have been concluded outside the territorial scope of their jurisdiction and may perhaps even have a substantial effect outside that scope of jurisdiction.<sup>133</sup> In one fisheries case, the Court of Justice even ruled that fish

<sup>131</sup> – See Article 12(2a) in conjunction with Part B of Annex IV to Directive 2003/87 as amended by Directive 2008/101.

<sup>132</sup> – Article 16 of Directive 2003/87 as amended by Directive 2008/101.

<sup>133</sup> – Two well-known examples from European merger control can be found in Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paragraphs 88 and 90, and Case T-210/01 *General Electric v Commission* [2005] ECR II-5575.

caught in the high seas could be confiscated as soon as the vessel concerned, flying the flag of a third country, reached a port within the European Union.<sup>134</sup>

149. The decisive element from an international-law perspective is that the particular facts display a sufficient link with the State or international organisation concerned. The particular connecting factor can be based on the territoriality principle,<sup>135</sup> the personality principle<sup>136</sup> or – more rarely – on the universality principle.

b) On the existence of an adequate territorial link

150. The European Union can rely on the territoriality principle in the present case.

151. In general, the European Union may require all undertakings wishing to provide services within its territory to comply with certain standards laid down by EU law. Accordingly, it may require airlines to participate in measures of EU law on environmental protection and climate change<sup>137</sup> – in this case the EU emissions trading scheme – whenever they take off from or land at an aerodrome within the territory of the European Union.

152. Take-off and landing are essential and particularly characteristic elements of every flight. If the place of departure or destination is an aerodrome within the territory of the European Union there will be an adequate territorial link for the flight in question to be included in the EU emissions trading scheme.

153. Under the EU emissions trading scheme a particular airline may be required, when departing from or arriving at a European aerodrome, to surrender emission allowances that are higher the further the point of departure is from the destination. Taking account of the whole length of the flight is ultimately an expression of the principle of proportionality and reflects the ‘polluter pays’ principle of environmental law.

<sup>134</sup> – *Poulsen and Diva Navigation* (cited in footnote 29, paragraphs 3, 4 and 30 to 34); similarly, *Commune de Mesquer* (cited in footnote 44, paragraphs 60 and 61) in relation to crude oil which was spilled when a ship sank in the exclusive economic zone of a Member State and which was washed up on its coast.

<sup>135</sup> – *Wood pulp* (cited in footnote 130, paragraph 18); the power to confiscate a ship’s cargo is also ultimately based on the territoriality principle in *Poulsen and Diva Navigation* mentioned above (cited in footnote 29, paragraphs 30 to 34).

<sup>136</sup> – See, to this effect, *Mondiet* (cited in footnote 104, paragraph 15) in which the competence of the then European Community to adopt measures for the conservation of the fishery resources of the high seas was derived from the jurisdiction of the flag State.

<sup>137</sup> – The question whether this power is limited in this particular case because of international agreements will be discussed separately in the context of the third and fourth questions referred; see points 161 to 236 below.

154. The territoriality principle does not prevent account also being taken in the application of the EU emissions trading scheme of parts of flights that take place outside the territory of the European Union. Such an approach reflects the nature as well as the spirit and purpose of environmental protection and climate change measures. It is well known that air pollution knows no boundaries and that greenhouse gases contribute towards climate change worldwide irrespective of where they are emitted; they can have effects on the environment and climate in every State and association of States, including the European Union.

155. A comparison with the aforementioned fisheries case is also worthwhile in this context. If it is permissible under the territoriality principle for fish caught outside the European Union to be confiscated from a vessel sailing under the flag of a third country whilst at a port within the European Union,<sup>138</sup> there cannot be any prohibition against exhaust gases from an aircraft emitted outside the airspace of the European Union being taken into account on its departure from or arrival at an aerodrome within the European Union for the purposes of calculating the emission allowances to be surrendered.

c) On the absence of any adverse effect on the sovereignty of third countries

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

157. Admittedly, if sections of flights that take place over the high seas and within the territory of third countries are included there is a risk of ‘double regulation’, that is to say, a risk of one and the same route being taken into account twice under the emissions trading schemes of two States. This might be the case, in particular, if an emissions trading scheme applicable at the place of departure of an international flight and the scheme applicable at its place of destination were both – like Directive 2008/101 – to take account of the whole flight.

158. Nevertheless, however onerous it might be for the airlines concerned, such double regulation is not prohibited under the principles of customary international law at issue here. It is indeed accepted under customary international law, just as the widespread phenomenon of double taxation is accepted in the field of direct taxation.<sup>139</sup>

<sup>138</sup> – *Poulsen and Diva Navigation* (cited in footnote 29, paragraphs 3, 4 and 30 to 34).

<sup>139</sup> – As matters currently stand in the field of direct taxation not even within the European Union is there a general ban on double taxation (Case C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967, paragraphs 20 to 24, and Case C-67/08 *Block* [2009] ECR I-883, paragraphs 28 to 31).

159. The double inclusion of a single flight in two different emissions trading schemes can only be avoided by unilateral measures or by agreement between the States and international organisations concerned. Even though customary international law does not impose any such obligation, the EU legislature expressly mentioned its willingness in that respect in Directive 2008/101 and also included a specific saving clause.<sup>140</sup>

d) Interim conclusion

160. All in all, therefore, the inclusion within the EU emissions trading scheme of parts of flights that take place outside the territory of the European Union does not raise doubts as to the compatibility of Directive 2008/101 with the principles of customary international law at issue here.

2. Compatibility with certain international agreements (Questions 3 and 4)

161. By its third and fourth questions the referring court asks, in essence, whether Directive 2008/101 is compatible with various provisions in international agreements. The inclusion of international aviation activities in the EU emissions trading scheme, as effected by Directive 2008/101, is submitted to the Court of Justice for a review of its legality from four different aspects: first, regarding the taking into account of parts of flights outside EU airspace (Question 3); secondly, regarding the European Union's unilateral action outside the framework of the ICAO (Question 4(a)); thirdly, regarding the prohibition of charges on entry or exit (Question 4(b)); and, fourthly, regarding the prohibition of taxes and duties on fuel in international aviation activities (Question 4(c)).

a) Legality of the inclusion in the EU emissions trading scheme of parts of flights outside EU airspace (Question 3)

162. By its third question the referring court asks whether various provisions of the Chicago Convention and the Open Skies Agreement give rise to the invalidity of Directive 2008/101 in so far as that directive includes in the EU emissions trading scheme those parts of flights that take place outside the airspace of Member States of the European Union.

i) Compatibility with Articles 1, 11 and 12 of the Chicago Convention (Question 3(a))

163. As already stated in the context of the first question, the European Union is not bound by the Chicago Convention; therefore that convention cannot serve as a benchmark against which the validity of EU acts can be reviewed.<sup>141</sup> However, as

<sup>140</sup> – See recital 17 in the preamble to Directive 2008/101 and Article 25a of Directive 2003/87 as amended by Directive 2008/101.

<sup>141</sup> – See points 51 to 66 above.

all of the EU Member States are Parties to the Chicago Convention, it must nevertheless be taken into account when interpreting provisions of secondary EU law.<sup>142</sup> Consequently, Directive 2008/101 (or Directive 2003/87 as amended by Directive 2008/101) is to be interpreted as far as possible consistently with the Chicago Convention.

164. It is, however, apparent from a review of the provisions of the Chicago Convention mentioned by the referring court that there is no conflict with Directive 2008/101 in any event.

165. First, as far as Article 1 of the Chicago Convention is concerned, this merely gives expression to the principle of the sovereignty of States and air sovereignty in particular.<sup>143</sup> As already stated above<sup>144</sup> in relation to customary international law, Directive 2008/101 does not contain any extraterritorial provisions and does not infringe the sovereign rights of third countries. This reasoning can readily be transposed to Article 1 of the Chicago Convention.

166. It should be noted with regard to Article 11 of the Chicago Convention that the very wording of the provisions contained therein shows that they relate only to the admission to and departure from the territory of the Contracting States of aircraft engaged in international air navigation and to the operation and navigation of such aircraft while within the territory of the Contracting States. This is also confirmed by the overall context of Article 11: the provision forms part of Chapter II of the Chicago Convention, which is dedicated to flight over territory of Contracting States. No inference can be drawn from Article 11 of the Chicago Convention as to whether an emissions trading scheme applied by one Contracting State is to be permitted to take account of parts of flights that take place outside the territory of that State.

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

168. Nor can it be inferred from the last half-sentence in Article 11 of the Chicago Convention that it would be prohibited for a Contracting State to take account, within the framework of its emissions trading scheme, of parts of flights

<sup>142</sup> – See to this effect *Intertanko* (cited in footnote 29, end of paragraph 52).

<sup>143</sup> – See point 118 above.

<sup>144</sup> – See my observations on the second question referred (points 145 to 160 of this Opinion).

taking place outside that State's territory. That clause merely states that the laws and regulations of a Contracting State '[are to] be complied with upon entering or departing from or while within the territory of that State'. It is this and only this – compliance with rules upon entering or departing – that the European Union demands of airlines in the context of its emissions trading scheme. The EU emissions trading scheme does not contain rules that would have to be observed during parts of flights that take place outside the territory of the European Union.

169. Finally, as far as Article 12 of the Chicago Convention is concerned, this deals with rules of the air. However, no such rules of the air are to be found in Directive 2003/87 as amended by Directive 2008/101, whether for the territory of the European Union, for the airspace above third countries, or over the high seas, which are specifically mentioned in the third sentence of Article 12 of the Convention. In particular, as already mentioned, the EU emissions trading scheme does not require airlines and the aircraft operated by them to adhere to any particular flight path, specific speed limits, or limits on fuel consumption and exhaust gases.

170. Nor does the reference made by the claimants in the main proceedings to Annex 2 to the Chicago Convention,<sup>145</sup> in which certain rules of the air are laid down, form an appropriate basis for their argument. There is admittedly a provision in section 3.1.4 on 'dropping or spraying'<sup>146</sup> from aircraft in flight. However, the EU emissions trading scheme is in no way comparable to a rule on the dropping or spraying of substances; after all, it does not contain any rules or limits on the emission of greenhouse gases from the engines of individual aircraft when flying to and from aerodromes in the European Union.

171. Since there is therefore no risk of any conflict with Articles 1, 11 or 12 of the Chicago Convention, there is no reason to interpret and apply Directive 2008/101 restrictively in the light of the Chicago Convention. In particular, it is not appropriate, having regard to that convention, to restrict the scope of application of the EU emissions trading scheme to parts of flights that take place within the territory of the European Union.

ii) Compatibility with Article 7 of the Open Skies Agreement (Question 3(b))

172. Unlike the provisions of the Chicago Convention considered above, Article 7 of the Open Skies Agreement can be relied upon directly as a benchmark against which the validity of Directive 2008/101 can be reviewed.<sup>147</sup>

<sup>145</sup> – Published by the ICAO in 'Rules of the Air', 10th edition, July 2005.

<sup>146</sup> – Footnote not relevant to the English translation.

<sup>147</sup> – See above, especially point 103 of this Opinion.

173. As regards the substance, however, there can be no reservations as to the compatibility of the EU emissions trading scheme with this provision of public international law. Article 7 of the Open Skies Agreement essentially provides that within the territory of a Contracting Party the laws and regulations of that party relating to the admission, departure and operation of aircraft engaged in international air navigation are to apply and to be complied with. Article 7 of the Open Skies Agreement, in so far as it is of relevance here, thus contains a provision the substance of which is largely identical to Article 11 of the Chicago Convention. Accordingly, the statements made in relation to the latter provision<sup>148</sup> can readily be transposed to Article 7 of the Open Skies Agreement.

b) As to whether it is lawful for the European Union to act alone outside the framework of the ICAO (Question 4(a))

174. The first part of the fourth question (Question 4(a)) seeks to clarify whether the European Union was permitted to extend its emissions trading scheme to international aviation activities by acting alone, without waiting for a multilateral solution to be formulated within the ICAO. To that end, the referring court is asking the Court of Justice to determine the validity of Directive 2008/101 from two aspects: first, with regard to its compatibility with Article 2(2) of the Kyoto Protocol and, secondly, with regard to any contravention of Article 15(3) of the Open Skies Agreement.

i) Compatibility with Article 2(2) of the Kyoto Protocol

175. As read by the claimants in the main proceedings and the associations supporting them, Article 2(2) of the Kyoto Protocol prohibits the European Union from pursuing the limitation or reduction of greenhouse gases from aviation outside the framework of the ICAO.

176. That construction is unconvincing. As many of the institutions and governments involved in the proceedings have correctly pointed out, under Article 2(2) of the Kyoto Protocol the limitation and reduction of greenhouse gases from aviation is not the exclusive competence of the ICAO. This is clear both from the wording of that provision and from its context and aims.

177. There is no reference to any kind of exclusivity in the actual wording of Article 2(2) of the Kyoto Protocol. The limitation or reduction of greenhouse gases from aviation is not to be pursued ‘exclusively’ or ‘only’ by working through the ICAO. If the Parties to the Kyoto Protocol had wished the ICAO to have exclusive competence they could have been expected to express this with the requisite degree of clarity in the wording of the provision.

<sup>148</sup> – See points 166 to 168 above.

178. Furthermore, the Kyoto Protocol is firmly embedded in the overall context of the United Nations Framework Convention on Climate Change, for the implementation of which it was concluded<sup>149</sup> and in the light of which it must accordingly be interpreted. That Framework Convention permits not just multilateral, but also national and regional policies and measures for the limitation or reduction of greenhouse gases.

179. Thus, Article 4(1)(b) of the Framework Convention expressly states that the Contracting Parties are to ‘formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions ... of all greenhouse gases not controlled by the Montreal Protocol’. Article 4(2)(a) of the Framework Convention similarly provides that all the developed country Parties are to adopt ‘national policies’ and take ‘measures on the mitigation of climate change’, and it is made clear in a footnote that this is to include policies and measures adopted by regional economic integration organisations.

180. Contrary to the view expressed by the claimants in the main proceedings at the hearing before the Court of Justice, there is nothing to indicate that Article 2(2) of the Kyoto Protocol is intended to depart from the principles stated in Article 4 of the Framework Convention.

181. It would be contrary to the objectives of the Framework Convention in general and those of the Kyoto Protocol in particular for measures to limit or reduce greenhouse gases from aviation to be taken solely at a multilateral level within the framework of the ICAO. There is, after all, no congruity between the Parties to the Framework Convention and the Kyoto Protocol, on the one hand, and the Parties to the Chicago Convention and the ICAO based upon it, on the other. If the ICAO were to have exclusive competence, those ICAO members who are not themselves bound by the Kyoto Protocol could impede realisation of the Kyoto objectives. Conversely, it would be more difficult for Parties to the Kyoto Convention to contribute actively to the achievement of the Kyoto objectives if – like the European Union – they are not themselves ICAO members.

182. In view of this it is to be assumed that the Parties to the Kyoto Protocol did *not* commit themselves in Article 2(2) thereof to pursuing the limitation or reduction of greenhouse gases from aviation *exclusively* by working through the ICAO.

183. Admittedly, Article 2(2) of the Kyoto Protocol gives expression to the Contracting Parties’ preference that a multilateral solution to the limitation or reduction of greenhouse gases from aviation be found by working through the ICAO. Nor can the European Union disregard this when drawing up and

<sup>149</sup> – See the title of the Kyoto Protocol and the first recital in the preamble thereto.

implementing its environment and climate change policy, even though it is the Member States, not the European Union itself, that are members of the ICAO.<sup>150</sup>

184. However, the Contracting Parties' preference for a multilateral solution within the framework of the ICAO is only translated by Article 2(2) of the Kyoto Protocol into a very general obligation of conduct (in French: 'obligation de moyen'). If no agreement is reached within the framework of the ICAO within a reasonable period the Parties to the Kyoto Protocol must be at liberty to take the measures necessary to achieve the Kyoto objectives at national or regional level,<sup>151</sup> otherwise there would be a serious risk that those objectives might not be achieved.

185. Whether and when the European Union, working outside the framework of the ICAO, should unilaterally take measures to limit or reduce greenhouse gases from aviation is ultimately a question of expediency, which it is for the European Union's political authorities to determine. Whilst this does not mean that the relevant EU institutions could in that respect act free from judicial scrutiny, it should nevertheless be noted that they have a wide discretion in decisions requiring assessment of complex economic and social matters, as well as in decisions on external action.<sup>152</sup> It is precisely in the weighing up of the advantages and disadvantages of acting alone at a regional level to limit or reduce greenhouse gases from aviation and in choosing the timing of such action that the competent EU institutions must be given a discretion.

186. In the present case it is common ground that the Member States of the European Union have, for many years, participated in multilateral negotiations under the auspices of the ICAO on measures to limit and reduce greenhouse gases from aviation.<sup>153</sup> The EU institutions could not reasonably be required to give the ICAO bodies unlimited time in which to develop a multilateral solution. Regard must be had in particular to the time constraints which the Kyoto Protocol imposes on the European Union and on numerous other Contracting Parties for the achievement of their quantified objectives for the limitation and reduction of

<sup>150</sup> – See, to this effect, *Intertanko* (cited in footnote 29, end of paragraph 52).

<sup>151</sup> – Article 4(2)(e)(i) of the Framework Convention – according to which each of the Contracting Parties 'shall coordinate as appropriate' with the other Parties relevant economic and administrative instruments – can also be construed in this way.

<sup>152</sup> – See, with regard to the EU institutions' discretion or margin of assessment when evaluating complex economic and social matters, *IATA and ELFAA* (cited in footnote 35, paragraph 80); Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* [2008] ECR I-4951, paragraphs 69 and 144; and Case C-58/08 *Vodafone and Others* [2010] ECR I-0000, paragraph 52; see, with regard to the EU institutions' discretion in the sphere of external action, *Racke* (cited in footnote 29, paragraph 52) and Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraph 40.

<sup>153</sup> – See recital 9 in the preamble to Directive 2008/101.

emissions: a highly specific commitment period for obligations is set in the Kyoto Protocol, covering the period from 2008 to 2012.

187. In those circumstances the fact that the EU legislature decided in 2008 to incorporate aviation activities in the EU emissions trading scheme from 2012 onwards cannot be considered in any way premature – particularly as the door to a subsequent multilateral solution under the auspices of the ICAO was by no means closed by Directive 2008/101. Indeed, the European Union and its Member States expressly ‘continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation’.<sup>154</sup> In addition a saving clause in the Amended Directive<sup>155</sup> enables prompt measures to be taken to avoid double regulation.

188. All in all, therefore, in adopting Directive 2008/101, the European Parliament and the Council of the European Union did not exceed the bounds of their discretion in relation to Article 2(2) of the Kyoto Protocol. Directive 2008/101 does not contravene Article 2(2) of the Kyoto Protocol.

ii) Compatibility with Article 15(3) of the Open Skies Agreement

189. The Open Skies Agreement provides that, when environmental measures are established, the aviation environmental standards adopted by the ICAO in annexes to the [Chicago] Convention<sup>156</sup> are to be followed except where differences have been filed (first sentence of Article 15(3) of the Open Skies Agreement). Furthermore, environmental measures are to be applied in accordance with Article 2 and Article 3(4) of the Open Skies Agreement (second sentence of Article 15(3) of the Open Skies Agreement).

– No ICAO environmental standards to the contrary

190. First, as far as the first sentence of Article 15(3) of the Open Skies Agreement is concerned, suffice to say that – at least according to the information submitted to the Court of Justice in these preliminary ruling proceedings – there are currently no ICAO environmental standards for aviation activities that would prevent the inclusion of aviation activities in an emissions trading scheme such as the EU scheme; this also applies to Annex 16 to the Chicago Convention.

191. The ICAO’s 36th Assembly held in September 2007 did admittedly urge the Chicago Convention Contracting States not to implement an emissions trading system on other Contracting States’ aircraft operators except on the basis of

<sup>154</sup> – Recital 17 in the preamble to Directive 2008/101.

<sup>155</sup> – Article 25a of Directive 2003/87 as amended by Directive 2008/101.

<sup>156</sup> – In Article 15(3) of the Open Skies Agreement the Chicago Convention is somewhat unusually referred to [in the German version] as the ‘*ICAO-Abkommen*’ (the ICAO Convention).

mutual agreement between those States.<sup>157</sup> However, that did not establish a legally binding standard for aviation activities, let alone an environmental standard within the meaning of the first sentence of Article 15(3) of the Open Skies Agreement. It was simply a non-binding political declaration by the Contracting States represented at the ICAO Assembly.

192. Even if one wished to attribute legal effect to the aforementioned resolution of the 36th Assembly, however, it would be of no significance to the European Union in any event because all of its Member States, in their capacity as Chicago Convention Contracting States, placed a reservation on this resolution and expressly reserved the right to enact and apply market-based measures on a non-discriminatory basis to all aircraft operators of all States providing services to, from or within their territory.<sup>158</sup>

193. Furthermore, the aforementioned resolution of the 36th Assembly of 2007 has since been superseded by a more recent resolution of the 37th ICAO Assembly of 2010.<sup>159</sup> This later resolution, which was also carried in principle by the European ICAO members, recognises the vital role of market-based measures such as emissions trading schemes and in its annex recommends guiding principles for the introduction of such schemes by the Chicago Convention Contracting States. Leaving aside the fact that the resolution of the 37th ICAO Assembly is not legally binding either, none of the parties to these preliminary ruling proceedings has claimed that Directive 2008/101 is incompatible with it. Furthermore, the later resolution indicates the emergence of a more positive fundamental attitude within the ICAO to the incorporation of aviation activities in national and regional emissions trading schemes.

194. Overall, nothing affecting the validity of Directive 2008/101 can therefore be derived from the reference in the first sentence of Article 15(3) of the Open Skies Agreement to ICAO environmental standards.

– No breach of the principle of non-discrimination in the Open Skies Agreement

195. As far as the second sentence of Article 15(3) of the Open Skies Agreement is concerned, the application of environmental measures for aviation activities is there made contingent upon adherence to the principle of fair and equal opportunity for airlines to compete (Article 2 of the Open Skies Agreement) and the right of airlines to determine the frequency and capacity of their international air transportation (Article 3(4) of the Open Skies Agreement). As already

<sup>157</sup> – Resolution A36-22 of the 36<sup>th</sup> ICAO Assembly, Appendix L, paragraph 1(b)(1) (referred to in recital 9 in the preamble to Directive 2008/101).

<sup>158</sup> – See the 9<sup>th</sup> recital in the preamble to Directive 2008/101.

<sup>159</sup> – Resolution A37-19 of the 37<sup>th</sup> ICAO Assembly in October 2010.

mentioned,<sup>160</sup> what all these requirements ultimately have in common is that environmental measures must be applied to airlines in a non-discriminatory manner<sup>161</sup> and must not prejudice the airlines' prospects in competition with each other.

196. The principle of non-discrimination laid down in Articles 2 and 3(4) of the Open Skies Agreement gives expression to a general legal principle which is recognised under EU law and enshrined in Articles 20 and 21 of the Charter of Fundamental Rights.<sup>162</sup> There is no reason to assume that this principle should be construed any differently in the context of the Open Skies Agreement than elsewhere under EU law. In EU law, according to settled case-law, the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified.<sup>163</sup>

197. Directive 2008/101 includes in the EU emissions trading scheme flights of all airlines from and to European aerodromes, without drawing any distinction according to their nationality or the place of departure or destination of the flights in question. The directive could therefore give rise to discrimination prohibited under Articles 2 and 3(4) of the Open Skies Agreement only if the various situations were not comparable.

198. The comparability of situations must be assessed in the light of the subject-matter and purpose of the EU measure which makes the distinction in question.<sup>164</sup> As an action to reduce the climate change impact of international air transport, the objective of Directive 2008/101 is to limit greenhouse gas emissions produced by this sector of the economy.<sup>165</sup> It serves to implement the United Nations Framework Convention on Climate Change and the Kyoto Protocol.<sup>166</sup>

<sup>160</sup> – See point 106 above.

<sup>161</sup> – See also the reference to 'uniform conditions' at the end of the second sentence of Article 3(4) of the Open Skies Agreement.

<sup>162</sup> – Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v Commission and Others* ('Akzo') [2010] ECR I-0000, paragraph 54.

<sup>163</sup> – *IATA and ELFAA* (cited in footnote 35, paragraph 95); Case C-127/07 *Arcelor Atlantique and Lorraine and Others* ('Arcelor') [2008] ECR I-9895, paragraph 23; *Akzo* (cited in footnote 162, paragraph 55); and Case C-236/09 *Association Belge des Consommateurs Test-Achats and Others* ('Test-Achats') [2011] ECR I-0000, paragraph 28.

<sup>164</sup> – *Arcelor* (cited in footnote 163, paragraph 26); *Test-Achats* (cited in footnote 163, paragraph 29); Case C-221/09 *AJD Tuna* [2011] ECR I-0000, paragraph 93; and Case C-176/09 *Luxembourg v Parliament and Council* [2011] ECR I-0000, paragraph 32.

<sup>165</sup> – Recitals 3, 4, 10 and 11 in the preamble to Directive 2008/101.

<sup>166</sup> – Recitals 2, 7 and 8 in the preamble to Directive 2008/101, read in conjunction with recital 5 in the preamble to Directive 2003/87.

The nationality of the particular airline is immaterial in the light of those aims. The place of departure of a flight to a European aerodrome and the destination of a flight from a European aerodrome are equally immaterial in the light of the aforementioned aims. The situations are comparable. Consequently, it was necessary under Articles 2 and 3(4) of the Open Skies Agreement for the relevant situations to be treated in the same way – as is indeed the case under Directive 2008/101.

199. If the EU legislature had excluded airlines holding the nationality of a third country from the EU emissions trading scheme, those airlines would have obtained an unjustified competitive advantage over their European competitors. Such a course of action would not have been compatible with the principle of fair and equal opportunity laid down in Article 2 of the Open Skies Agreement and which also underpins Directive 2008/101 itself.<sup>167</sup>

200. If the EU legislature had excluded flights to or from an aerodrome in a third country from the EU emissions trading scheme there would have been a risk – in relation to transatlantic flights, for instance – of long-haul flights being treated more favourably than short-haul flights. Such favourable treatment would have been equally unjustified in view of the objective of Directive 2008/101: the EU legislature was concerned to incorporate aviation activities in the EU emissions trading scheme as comprehensively as possible with the aim of reducing greenhouse gas emissions originating from aviation.

201. Overall, therefore, no breach of the principle of non-discrimination laid down in Articles 2 and 3(4) of the Open Skies Agreement can be established.

– No prohibition against acting alone outside the framework of the ICAO

202. The claimants in the main proceedings also rely on Article 15(3) of the Open Skies Agreement because – indirectly, via a reference to Article 3(4) of the Open Skies Agreement – it refers to Article 15 of the Chicago Convention. On the basis of that chain of reference and in the same way as before in connection with Article 2(2) of the Kyoto Protocol, they express the view that the European Union should not have acted alone in subjecting aviation activities to an emissions trading scheme but should have awaited a multilateral solution within the ICAO.

203. It should be noted in that regard that Article 15 of the Chicago Convention, which relates to airport and similar charges and is generally concerned with access to airports, does not contain any specific rules on the permissibility or otherwise of unilateral action in connection with the introduction of an emissions trading scheme for aviation activities. It is therefore somewhat implausible that the Parties to the Open Skies Agreement should have intended, merely by referring to Article 15 of the Chicago Convention, to introduce such a rule ‘through the back

<sup>167</sup> – Recital 16 in the preamble to Directive 2008/101.

door', especially as there was no agreement between them on this point in any event.<sup>168</sup>

204. Indeed, it is clear from Article 15(7) of the Open Skies Agreement as amended by the 2010 Amending Protocol that the Contracting Parties did not in any way intend to rule out the application of 'market-based measures regarding aviation emissions', even if introduced unilaterally. This new paragraph makes express mention of issues of overlap and to recommendations by the Joint Committee with a view to avoiding 'duplication of measures and costs'.

205. After all, Article 15 of the Chicago Convention can play a role in the context of Article 3(4) in conjunction with Article 15(3) of the Open Skies Agreement only in so far as one Contracting Party unilaterally limits the volume of traffic, frequency or regularity of service, or the aircraft type operated, or requires the filing of schedules, programs for charter flights, or operational plans by airlines for environmental reasons. In such instances Article 3(4) of the Open Skies Agreement provides for 'uniform conditions consistent with Article 15 of the [Chicago] Convention'; it therefore merely gives expression to the prohibition of discrimination, which – as just observed<sup>169</sup> – is not contravened by Directive 2008/101.

206. Finally, as regards the question whether the EU emissions trading scheme is to be construed as an airport or similar charge within the meaning of Article 15 of the Chicago Convention, I refer to my observations on the second part of the fourth question (Question 4(b)) below.<sup>170</sup>

c) No breach of the prohibition of charges for the arrival or departure of aircraft (Question 4(b))

207. The second part of the fourth question concerns the issue whether the extension of the EU emissions trading scheme to cover international aviation

<sup>168</sup> – In paragraph 54 of the Memorandum of Consultations on the Open Skies Agreement (OJ 2007 L 134, p. 33) and in paragraph 11 of the Memorandum of Consultations on the 2010 Amending Protocol (OJ 2010 L 223, p. 16) both delegations acknowledge that nothing in the Open Skies Agreement 'affects in any way their respective legal and policy positions on various aviation-related environmental issues'. Although paragraph 35 of the 2007 Memorandum, with respect to Article 15 of the Open Skies Agreement, emphasises the importance of international consensus in environmental matters within the framework of the ICAO and calls for compliance with Resolution A35-5 of the 35th ICAO Assembly of September 2004, it is not possible to infer from that Memorandum or from Resolution A35-5 that there is an express, legally binding prohibition against taking unilateral measures with regard to emissions trading. On the contrary, in paragraph 2(c) of Appendix H to Resolution A35-5 open emissions trading was endorsed and the possibility of States incorporating emissions from international aviation into their emissions trading schemes was not ruled out (see recital 9 in the preamble to Directive 2008/101).

<sup>169</sup> – See points 195 to 201 above.

<sup>170</sup> – See points 207 to 221 below.

activities infringes the rule of international law prohibiting charges on the arrival or departure of aircraft as stated in Article 15 of the Chicago Convention, that provision being addressed either ‘on its own or in conjunction with’ Articles 3(4) and 15(3) of the Open Skies Agreement.

208. As already stated, the Chicago Convention as such is not a benchmark against which the validity of EU acts can be reviewed.<sup>171</sup> However, Article 15 of that convention does apply by virtue of the reference in Article 3(4) in conjunction with Article 15(3) of the Open Skies Agreement.

209. Particular significance must be attributed in the present context to the final sentence of Article 15 of the Chicago Convention, according to which no fees, dues or other charges are to be imposed by any Contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a Contracting State or persons or property thereon.

210. The claimants in the main proceedings and the associations supporting them are of the opinion that the EU emissions trading scheme introduces such a fee on entry or exit, which contravenes the final sentence of Article 15 of the Chicago Convention.

211. It should be noted in this regard that the final sentence of Article 15 of the Chicago Convention must not be read in isolation from the overall context of that provision. It is apparent from the first paragraph of Article 15 that the overall aim of that provision is to afford all aircraft access to airports in Contracting States which are open to public use ‘under uniform conditions’ irrespective of their nationality. The second paragraph of Article 15 adds that charges for the use of airports and air navigation facilities by the aircraft of other Contracting States are not to be higher than those that would be paid by national aircraft. Ultimately, therefore, a prohibition of discrimination against aircraft on grounds of nationality is enshrined in Article 15 in regard to access to the airports of Contracting States. The third paragraph of Article 15 follows on seamlessly from this with the use of the words ‘[a]ll such charges ...’.

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

213. However, even if the final sentence of Article 15 of the Chicago Convention were more than the mere expression of a prohibition of discrimination and could be construed as a wider prohibition of certain fees and charges, the EU emissions trading scheme would not be precluded by that provision. No fees or

<sup>171</sup> – See points 51 to 66 above.

other charges are being exacted of airlines under the EU emissions trading scheme, and certainly none ‘in respect solely of the right of transit over or entry into or exit from’ the territory of any Contracting State.

214. Charges are levied as consideration for a public service used.<sup>172</sup> The amount is set unilaterally by a public body and can be determined in advance. Other charges too, especially taxes, are fixed unilaterally by a public body and laid down according to certain predetermined criteria, such as the tax rate and basis of assessment.

215. An emissions trading scheme such as the EU scheme, however, is a market-based measure. No provision is made for fees or charges for the acquisition of emission allowances. Indeed, for the time being 85% of allowances are to be allocated entirely free of charge and only the remaining 15% of allowances are to be auctioned (Article 3d(1) and (2) of Directive 2003/87). The consideration for the latter allowances is not predetermined either and is governed solely by supply and demand. If emission allowances are subsequently traded in the market after their allocation by the competent authorities, the price will in that case also be governed by supply and demand and is not fixed in advance.

216. It would be unusual, to put it mildly, to describe as a charge or tax the purchase price paid for an emission allowance, which is based on supply and demand according to free market forces, notwithstanding the fact that the Member States do have a certain discretion regarding the use to be made of revenues generated (Article 3d(4) of Directive 2003/87).

217. Furthermore, the consideration for emission allowances does not arise in respect ‘solely of the right of transit over or entry into or exit from’ the territory of any Contracting State, as would be required if the final sentence of Article 15 of the Chicago Convention is applied. Whilst every take-off and landing of an aircraft at aerodromes within the European Union requires the operator of the aircraft to surrender the requisite emission allowances within a certain period of time (Article 12(2a) of Directive 2003/87), that does not mean that the various take-offs and landings are being ‘paid for’ as such but that account is being taken of the greenhouse gas emissions generated by the relevant flights, irrespective of whether the flights take place internally within the European Union or across EU borders.

<sup>172</sup> – The concept of charges seems to be understood in that sense within the ICAO also: ‘a charge is a levy that is designed and applied specifically to recover the costs of providing facilities and services for civil aviation’; see paragraph 3 of the foreword to ‘ICAO’s Policies on Charges for Airports and Air Navigation Services’ (published under the authority of the ICAO Council), 7th Edition 2004 (Doc. 9082/7); see also the fifth recital in the preamble to the ICAO Council Resolution of 9 December 1996 on environmental charges and taxes.

218. A distinction is also drawn within ICAO bodies between environmental charges, on the one hand, and emissions trading schemes, on the other.<sup>173</sup> Many of the institutions and governments involved in the preliminary ruling proceedings have referred to this.

219. If the ICAO were to class emissions trading schemes as falling within the prohibition of fees or other charges within the meaning of Article 15 of the Chicago Convention it could scarcely also make recommendations within its own organisation for guiding principles for the introduction of those very schemes by its Contracting States.<sup>174</sup>

220. It is apparent from Article 15(7) of the Open Skies Agreement, as amended by the 2010 Amending Protocol, that the Parties to the Open Skies Agreement are also assuming that market-based measures are permissible in principle. This new provision would make no sense if the Contracting Parties considered such measures to be contrary to Article 15 of the Chicago Convention, to which the Open Skies Agreement is known to refer.

221. On that basis it cannot be concluded that the EU emissions trading scheme contravenes Article 15 of the Chicago Convention in conjunction with Articles 3(4) and 15(3) of the Open Skies Agreement.

d) No breach of the prohibition of taxes and charges on fuel (Question 4(c))

222. The third part of the fourth question is ultimately intended to clarify whether, by incorporating international aviation in the EU emissions trading scheme, the EU legislature contravened the prohibition under international law of taxes and charges on fuel in international aviation activities, as laid down under Article 24(a) of the Chicago Convention and Article 11(2)(c) of the Open Skies Agreement.

223. Since, as already stated, the Chicago Convention is not a benchmark against which the validity of EU acts can be reviewed,<sup>175</sup> the last question by the referring court can be answered only with regard to the Open Skies Agreement.<sup>176</sup> Article 11(2)(c) thereof must nevertheless be interpreted in the light of

<sup>173</sup> – Such a distinction can be found, for example, in paragraph 1 of Appendix L to Resolution A36-22 of the 36<sup>th</sup> ICAO Assembly of September 2007; mention is made in sub-paragraph (a) of ‘Emissions-related charges and taxes’ and in sub-paragraph (b) of ‘Emissions trading’.

<sup>174</sup> – These guiding principles can be found in the Appendix to Resolution A37-19 of the 37<sup>th</sup> ICAO Assembly of October 2010.

<sup>175</sup> – See points 51 to 66 above.

<sup>176</sup> – As already stated (see point 104 of this Opinion), individuals cannot directly rely on Article 11(2)(c) of the Open Skies Agreement.

Article 24(a) of the Chicago Convention, to which the USA, along with all of the Member States of the European Union, are Contracting States.<sup>177</sup>

224. Under Article 11(2)(c) in conjunction with Article 11(1) of the Open Skies Agreement fuel introduced into or supplied for use in an aircraft engaged in international air transportation is to be exempt, on the basis of reciprocity, from certain charges, particularly customs and excise duties. The second sentence of Article 24(a) of the Chicago Convention, for its part, provides that fuel on board an aircraft is to be exempt from customs duties, inspection fees or similar national or local duties and charges. Both provisions therefore, in essence, prohibit inter alia the charging of customs and excise duties on fuel for aircraft engaged in international air transportation.

i) The prohibition of excise duties on fuel

225. The claimants in the main proceedings and the associations supporting them take the view that the EU emissions trading scheme introduces an excise duty on fuel that is prohibited under Article 11(2)(c) of the Open Skies Agreement and Article 24(a) of the Chicago Convention.

226. I am not persuaded by that view.

227. The EU emissions trading scheme cannot be considered a tax for the same reasons as it is not to be classed as a charge.<sup>178</sup>

228. The aims and substance of Article 11(2)(c) of the Open Skies Agreement and Article 24(a) of the Chicago Convention differ from those of the EU emissions trading scheme in other respects also.

229. First, as far as the aims of the provisions are concerned, Article 11 of the Open Skies Agreement and Article 24 of the Chicago Convention protect airlines from one Contracting State from having their aircraft and stores treated as ‘imported’ when they merely land in other Contracting States; they are therefore to be exempt from certain duties to which imported goods would normally be subject. The EU emissions trading scheme has an entirely different objective, however: its purpose is environmental and climate protection and it has nothing to do with the importing or exporting of goods. Accordingly, the emission allowances that have to be surrendered in respect of flights that take off from or land at aerodromes within the European Union are levied in respect of the emission of greenhouse gases, not merely fuel consumption.

230. It should be noted with regard to the substance of the provisions at issue that Article 11 of the Open Skies Agreement and Article 24(a) of the Chicago

<sup>177</sup> – See, to this effect, *Intertanko* (cited in footnote 29, end of paragraph 52).

<sup>178</sup> – See my observations on Question 4(b) (points 213 to 221 of this Opinion).

Convention relate to the quantity of fuel on board an aircraft or supplied to such aircraft, that is its *fuel stocks*. The EU emissions trading scheme, on the other hand, is based on the *quantity of fuel actually used* by the aircraft during a specific flight. An aircraft's fuel stocks, with which the Open Skies Agreement and the Chicago Convention are concerned, do not as such permit any direct inferences to be drawn as to the actual emission of greenhouse gases by that aircraft for a particular flight.<sup>179</sup> Emission allowances do not have to be surrendered because an aircraft has or takes fuel on board but because it produces greenhouse gas emissions by burning that fuel during a flight.

231. The assumption that, under the EU emissions trading scheme, aircraft fuel as such is being subjected to an excise duty is not supported by the judgment in the *Braathens* case,<sup>180</sup> which is invoked by the claimants in the main proceedings and the associations supporting them. In that case, regarding a Swedish environmental tax on domestic aviation, the Court of Justice admittedly ruled that it was to be considered an excise duty because it was – at least in part – based on aircraft fuel consumption. However, the judgment in *Braathens* cannot be applied to the present case for two reasons.

232. First, the *Braathens* judgment related to two directives on the construction of the single European market by which the structural features of excise duties on mineral oils are harmonised within the European Union.<sup>181</sup> The Court's comparatively wide interpretation in its judgment of the concept of excise duty can be understood in the light of that political objective of a single market. There is no such need in the present case, since neither the Open Skies Agreement nor the Chicago Convention makes provision for any harmonisation of structural features of national excise duty law comparable to that of the EU single market directives.

233. Secondly, in the *Braathens* case there was a direct and inseverable link between fuel consumption and the polluting substances emitted by aircraft by reason of which the Swedish environmental tax was levied.<sup>182</sup> Under the EU emissions trading scheme, however, there is no such direct and inseverable link. Fuel consumption per se does not permit any direct inferences to be drawn as to

<sup>179</sup> – Actual fuel consumption is calculated by subtracting from the amount of fuel contained in aircraft tanks once fuel uplift for the flight is complete the amount of fuel contained in aircraft tanks once fuel uplift for the subsequent flight is complete, and adding the fuel uplift for that subsequent flight (last sentence of paragraph 3 of Part B of Annex IV to Directive 2003/87 as amended by Directive 2008/101).

<sup>180</sup> – Case C-346/97 *Braathens* [1999] ECR I-3419.

<sup>181</sup> – Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12) and Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1).

<sup>182</sup> – *Braathens* (cited in footnote 180, paragraph 23).

the greenhouse gases emitted in the course of a particular flight; instead, an emissions factor must additionally be taken into account according to the fuel used. In the case of fuel which is considered by the EU legislature to be particularly environmentally friendly, this may be zero, as in the case of biomass.<sup>183</sup>

234. All in all, therefore, the EU emissions trading scheme cannot be regarded as a prohibited excise duty on fuel for the purposes of Article 11(2)(c) of the Open Skies Agreement or Article 24(a) of the Chicago Convention.

ii) The prohibition of customs duties on fuel

235. Nor, I would add just for the sake of completeness, is it the case that any customs duties are levied on fuel as a result of the EU emissions trading scheme, since customs duties are charges to which goods are subject by virtue of the fact that they cross a border, that is on importation or exportation. Emission allowances, on the other hand, do not have to be surrendered because fuel is taken across customs borders; they arise as a result of the emission of greenhouse gases in the course of a particular flight. Emission allowances have to be surrendered even in respect of flights within the European Union during which no customs borders are crossed at all.

iii) Interim conclusion

236. Directive 2008/101 does not contravene Article 11(2)(c) of the Open Skies Agreement, interpreted in the light of Article 24(a) of the Chicago Convention.

*C – Summary*

237. All in all, therefore, Directive 2008/101 (or Directive 2003/87 as amended by Directive 2008/101) is compatible with all of the provisions and principles of public international law referred to in the request for a preliminary ruling.

238. Accordingly, the questions raised in the present proceedings do not give rise to a restrictive interpretation or application of that directive with regard to any of the aforementioned provisions or principles.

239. Overall, the answer to be given to the referring court is that consideration of the questions referred has disclosed no factor of such a kind as to preclude the validity of Directive 2003/87/EC as amended by Directive 2008/101/EC.

<sup>183</sup> – Final sentence of the fifth paragraph of Part B of Annex IV to Directive 2003/87 as amended by Directive 2008/101.

## **VI – Conclusion**

240. In the light of the above arguments, I propose that the Court answer the questions referred for a preliminary ruling by the High Court of Justice as follows:

- (1) Of the provisions and principles of international law mentioned in the first question referred for a preliminary ruling, only Article 7 and the second sentence of Article 15(3) of the Air Transport Agreement concluded in April 2007 between the European Community and its Member States, of the one part, and the United States of America, of the other part, can be relied upon as a benchmark against which the validity of acts of the European Union can be reviewed in legal proceedings brought by natural or legal persons.
- (2) Consideration of the questions referred has disclosed no factor of such a kind as to preclude the validity of Directive 2003/87/EC as amended by Directive 2008/101/EC.