

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

(1) THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC

(2) AMERICAN AIRLINES, INC.

(3) CONTINENTAL AIRLINES, INC.

(4) UNITED AIR LINES, INC.

Claimants

-and-

THE INTERNATIONAL AIR TRANSPORT ASSOCIATION

THE NATIONAL AIRLINES COUNCIL OF CANADA

Interveners

-v-

THE SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE

Defendant

-and-

THE AVIATION ENVIRONMENT FEDERATION

WWF-UK

THE EUROPEAN FEDERATION FOR TRANSPORT AND ENVIRONMENT

THE ENVIRONMENTAL DEFENSE FUND

EARTH JUSTICE

Interveners

**WRITTEN OBSERVATIONS OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION AND
THE NATIONAL AIRLINES COUNCIL OF CANADA**

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Documents included in the Bundle provided to the Court by the Claimants are referenced in these observations as “(Bundle tab ...)”. Documents not included in the Bundle are included in the Appendix to these observations and are referenced as “(Appendix tab ...)”.

I. EXECUTIVE SUMMARY

Proceedings and parties

1. By its Order dated 8 July 2010, the High Court of England and Wales referred four questions (the “**Reference**”) to the Court of Justice of the European Union (“**CJEU**”) under Article 267 of the Treaty on the Functioning of the European Union (“**TFEU**”). The questions concern the validity of Directive 2003/87/EC, as amended by Directive 2008/101/EC (“**Amended Directive**”), which establishes a scheme for greenhouse gas emissions allowance trading within the European Union (the “**Union**” or “**EU**”) (formerly known as the Community), insofar as it is amended to extend to “aviation activities” (the “**EU ETS**” or “**ETS**”). “Aviation activities” are defined as, “Flights which depart from or arrive in an aerodrome situated in the territory of a Member State to which the Treaty applies”.
2. The questions referred arose in proceedings in which IATA and NACC were granted permission to intervene jointly by Order of the High Court of England and Wales made on 27 May 2010. IATA and NACC are trade associations which, respectively, represent the airlines which account for approximately 93% of all scheduled international airline services (IATA) and Canada’s four largest passenger air carriers (NACC). IATA and NACC are referred to together in these Observations as the “**Airline Association Interveners**”.
3. The Airline Association Interveners’ Observations seek to place the EU ETS in its global regulatory, environmental and financial context, and call this Court’s attention to the many multilateral and bilateral commitments that the EU and its Member States will threaten through the application of the EU ETS to international aviation before addressing the substantive issues raised by the Reference.

The regulatory context

4. In 1944, nations attending the Chicago Convention set out to create a framework within which international aviation could develop in an orderly manner on the basis of equality of opportunity. Today there are 190 signatories to the Chicago Convention, including all of the Member States of the EU.
5. The Chicago Convention conferred on the International Civil Aviation Organisation (“**ICAO**”) the authority to adopt standards and practices addressing aviation matters which are legally binding on the signatories to the Chicago Convention. It is under this framework and through the governance of the organs of ICAO that modern international air travel has developed.
6. More recently, States have begun to cooperate in relation to environmental issues. Principle 7 of the Rio Declaration on the Environment and Development, 31 I.L.M. 818 (June 1992) (“**Rio Declaration**”), made pursuant to the United Nations Conference on the Environment and Development, calls on States to cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystems. ICAO has been addressing these issues in relation to civil aviation for nearly three decades, adopting its first environmental standards in 1981.
7. The Kyoto Protocol is the main source of international law on the emission of greenhouse gasses (“**GHG**”). It confines each signatory’s emission reduction obligations to emissions within that signatory’s territory and expressly excludes emissions from international aviation. Kyoto also explicitly provides that ICAO has exclusive responsibility for reducing greenhouse gas emissions from the international aviation sector, *i.e.*, the parties to Kyoto “shall” pursue reduction of GHG through ICAO. This is mandatory not merely permissive. The US is the only unratified signatory to the Kyoto Protocol.
8. Owing to the unique nature of international aviation, it is obvious why the Kyoto Protocol requires GHG reduction to be managed in this respect through ICAO. International flights, by their nature, emit CO₂ over more than one territory and often

over international waters. No single state or region can accurately account for this and individual national or regional efforts will likely result in incorrect accounting and an inconsistent patchwork of overlapping (and possibly conflicting) measures.

9. By introducing the EU ETS, the EU has elected to act impermissibly outside of the international regulatory framework in respect of both international aviation and climate change and to impose its own set of regulations on the rest of the world. Its unilateral actions threaten seriously to impede effective reduction of GHGs on a legally justifiable international basis.

The environmental and financial context

10. ICAO and IATA have developed a Four Pillar approach to reducing emissions, being: (i) investing in new technologies, (ii) streamlining aircraft operations to conserve fuel, (iii) updating the state-led air traffic control systems to reduce flight times and delays and (iv) using positive economic instruments, including, but not limited to, emission trading schemes. These are having demonstrable, positive effects in the reduction of emission. The EU ETS cuts across this and threatens to jeopardise the progress being made.
11. Fuel accounts for approximately 30% of an airline's costs. An airline therefore needs no further incentive to reduce its fuel consumption and thereby its GHG emissions. However, it is estimated that the EU ETS will cost airlines around €1 billion per annum in 2012, and skyrocketing to €4 billion per annum by 2020, substantial funds that airlines will not be able to expend on the acquisition of new, more fuel-efficient fleets. The EU has not adduced any reliable evidence that the airlines will be able to pass these fees on to their passengers.
12. The costs imposed, moreover, could actually lead to an *increase* in aviation emissions. By diverting revenues from the airlines, the EU ETS will, if anything, actually slow down the replenishment of their fleets with more fuel-efficient and GHG-friendly airplanes. Since aircraft are portable assets, the likelihood is that airlines will fly their more efficient planes into the EU, and simply move their less efficient planes to operate elsewhere. This does not reduce emissions, it merely redistributes them. Redistribution can actually

damage the environment. Because airlines will only have to purchase allowances for those flights using EU airports, long flights to Europe will more frequently be routed through Middle Eastern and other nearby, non-EU hubs. The EU ETS, then, actually creates perverse incentives for inefficiencies that could *increase* overall GHGs.

13. The EU has stated that the EU ETS will not impact adversely on fair competition. In fact, however, it favours European airlines over non-EU airlines, which will have to pay for a greater proportion of their credits, and favours non-European airlines with a hub adjacent to the territory of the EU, as credits are only required for the leg of the flight that enters or leaves the EU. The airlines that will be most adversely affected are those that are situated the farthest from Europe, without a nearby hub.
14. Moreover, the Member States that administer the scheme and receive the revenues are only directed—in mere suggestive language—to commit *half* of the funds they receive to environmental matters, and *none* are specifically dedicated to address aviation GHGs. In the current economic climate, the Member States who collect the revenues and place them in their respective consolidated funds are unlikely to invest them in measures that could have an appreciable effect on aviation GHGs, like more efficient air traffic management and more fuel-efficient planes.
15. Patently, therefore, the EU ETS is unlikely to achieve its stated environmental objective.

The substantive issues

An entitlement to rely upon customary international law (Section III.A.1)

16. The Claimants rely on provisions of customary international law to challenge the validity of the EU ETS. This Court has repeatedly held that customary international law is a proper foil for judicial review of secondary Union legislation.

An entitlement to rely upon the treaties cited (Sections II.A.2-.3)

17. The Claimants rely on provisions in the Chicago Convention, the EU/US Open Skies Agreement and the Kyoto Protocol to challenge the validity of the EU ETS. The Airline Association Interveners also cite additional bilateral aviation agreements with the same or

similar terms that are also affected by the EU ETS. The Defendant contends that the Claimants, as private parties, have no entitlement to rely upon these international treaties.

18. There are three requirements under EU law for a private individual to be able to rely upon a treaty. First, the EU must be a party to that treaty. Secondly, there must be nothing in the nature and broad logic of the treaty that precludes such reliance. Thirdly, the treaty's provisions must be unconditional and sufficiently precise.
19. The EU is a party to the EU/US Open Skies Agreement, the Kyoto Protocol, and a number of other bilateral aviation agreements. Additionally, all of the Member States of the EU are parties to the Chicago Convention. Because air transport is an area where the EU has progressively assumed exclusive responsibility from the Member States (as evidenced by its entry into the EU/US Open Skies Agreement and other bilateral arrangements with third countries), this transfer of powers carries with it a transfer of obligations. The EU is therefore bound by the provisions of the Chicago Convention such that its legislation cannot derogate from those international obligations.
20. It is very clear from the nature and logic of these treaties that they are intended to confer rights on individuals, including airlines. This is demonstrated by the text of those agreements, as well as their object and purpose.
21. The provisions of the treaties are clear and precise in that they do not require further implementing measures in order for individuals to rely upon them. This Court has deemed analogous treaties, with similar provisions, to confer rights on individuals, and the courts of other contracting states have deemed the provisions cited herein to have that same effect.
22. The Defendant's position is contrary to the position it and other Member States have adopted in previous ICAO arbitrations where they have argued that those arbitrations should be stayed in circumstances where the airlines had not exhausted their local remedies. Those remedies could only be an action by the airlines, like the one being litigated here, against the relevant state brought under the requisite treaty provisions.

The EU ETS contravenes public international laws of sovereignty (Section III.B)

23. The regulation of flights taking place over third countries and/or the high seas is plainly an impermissible extension of the EU's jurisdiction. As a matter of customary international law (reflected, *inter alia*, in the Chicago Convention, the EU/US Open Skies Agreement and other bilateral agreements), the EU has no legal right to extend its sovereignty either over third countries or the high seas.
24. Unilateral assertion of legislative jurisdiction over foreign State territory or the high seas invariably draws protests and intractable disputes. When, for instance, the US sought to regulate smoking on inbound or outbound flights—for the entirety of that flight—foreign states whose carriers would be covered by that measure, including several EU Member States, objected to that jurisdictional overreach as a trespass to their natural sovereignty and the role of ICAO concerning global aviation issues.
25. While it remains controversial whether a sovereign state may *ever* extend its jurisdiction over another state save in only the most limited of circumstances—and, indeed, both this Court and various Member States admit no such circumstances—the EU ETS would not satisfy any of the criteria that certain academic commentators have identified as potential grounds for doing so under international law. Professor Brownlie suggested that extra-territorial acts can only lawfully be the object of jurisdiction if certain general principles are observed:
 - (i) that there should be a substantial and *bona fide* connection between the subject-matter and the source of the jurisdiction;
 - (ii) that the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed;
 - (iii) that a principle based on elements of accommodation, mutuality and proportionality should be applied . . .”

The EU cannot establish any of these criteria.

26. There is no substantial and *bona fide* connection between global aviation GHGs and the EU's territorial jurisdiction. The EU has sought to rely—at least in part—on its obligations under the Kyoto Protocol as the objective of the ETS. However, the Kyoto Protocol only relates to emissions from domestic flights (*i.e.*, those within a state) and expressly requires international aviation to be dealt with through ICAO—not through unilateral measures in individual contracting states. The 2008 Directive is explicitly directed to be a “comprehensive package” to “reduce the climate change impact of international air transport” on a “global” level. This objective, too, fails to evince a *bona fide* connection to the EU's territorial sovereignty, and is therefore an illegitimate justification for the EU's extraterritorial overreach.
27. The EU ETS plainly intervenes in the domestic and territorial jurisdictions of other states. Under the EU ETS, a flight from Los Angeles to London which predominantly takes place over US air space and the high seas will be subject to a charge payable to an EU Member State. Not only is this an impermissible overreach by the EU but it also interferes materially with the ability of the US to impose its own carbon charge in respect of that element of the flight over the US since to do so would subject the airline concerned to double charging. Furthermore, in the case of a US registered airline, the EU would be imposing obligations derived from the Kyoto Protocol on that airline, notwithstanding that the US has not ratified the Kyoto Protocol.
28. There is no respect for mutuality or accommodation in the EU ETS. The undisputed fact is that the EU ETS involves the establishment of a non-mutual trading system in which other States' carriers are forced to acquire carbon allowances on a European-administered exchange, or simply not fly to the EU at all. It then imposes charges entirely for the benefit of the EU Member States while materially impeding the possibility of other states introducing their own local systems. The fact that it includes provisions enabling other schemes to be taken into account by the EU offers little comfort as this requires an approach to the EU by an affected party which then has to persuade the EU to amend its legislation. By deeming itself the arbiter of other State's environmental measures, the EU turns mutuality and accommodation—and thus the entire premise of international aviation regulation—on its head.

29. There is no proportionality in the EU ETS. For the reasons given above, this one-sided scheme adopted by the EU undercuts any chance for a real solution to addressing aviation GHGs on a global scale, or even on a national scale. Any reliance on “precaution” to justify this measure is rebutted by the simple fact that the imposition of more fees on airlines will not lead to less airline emissions, and the revenues generated by the EU ETS will not be dedicated to addressing the perceived problem of aviation GHGs. Indeed, there are a host of other, more “proportionate” approaches to this perceived problem, which ICAO has been pursuing, and continues to pursue, on a global scale.

The EU ETS contravenes the Chicago Convention and other EU bilateral agreements (Section III.B)

30. Article 1 of the Chicago Convention reflects the public international law position on sovereignty, *i.e.*, each state has sovereignty over its own territory. Article 11 provides that 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 shall be complied with by the aircraft upon entering, departing from or while within the territory of that state. Read together they are plainly intended to ensure that territorial sovereignty is respected. They do not permit a state to create rules that impose extraterritorial obligations on a foreign airline and then enforce them when aircraft from that airline enter the state. Article 12 further enforces this regime stating that over the high seas, the rules in force shall be those established by the Chicago Convention, *i.e.*, by ICAO, not the EU.
31. Other bilateral commitments by the EU, such as the EU-US Open Skies Agreement and the Agreement on Air Transport between Canada and the European Union (“**the EU-Canada Agreement**”) have the same effect as Articles 1, 11 and 12 of the Chicago Convention. Both of these agreements reflect the notion that States have complete and exclusive sovereignty over the airspace above its territory.
32. In particular, the EU-Canada Agreement expressly provides at Article 18(2) that each party shall have the right within its *own* jurisdiction to take and apply the appropriate measures to address the environmental impacts of air transport. The EU-Canada

Agreement therefore only countenances a party enacting environmental measures that apply within its own sovereign jurisdiction and not beyond.

33. The EU-Canada Agreement is equivalent to the Open Skies Agreement in many respects and contains a number of similar provisions, albeit that Article 18 is drafted in more express terms than the Open Skies Agreement (and other air services agreements). In light of the Article 18 provisions, the EU ETS arguably breaches the EU-Canada Agreement. Whilst the Court has not been asked to rule on any possible breach of the EU-Canada Agreement as part of this preliminary reference, the significance of the issue is that, as noted above, the EU-Canada Agreement contains provisions relating to territoriality and sovereignty which are generally reflective of the same principles of sovereignty which apply in relation to the Open Skies Agreement. To the extent that EU ETS breaches the EU-Canada Agreement in this respect, it also implicitly constitutes a breach of the Open Skies Agreement.

The EU ETS ignores the obligation to work through or within the framework of ICAO (Section III.C.1)

34. Pursuant to Article 2(2) of the Kyoto Protocol the EU is obliged to reduce emissions of GHGs from international aviation “working through the [ICAO]”. Article 2(2) requires that it “shall” do so, which is a mandatory requirement. Similarly, the parties to the EU/US Open Skies Agreement agreed to pursue emissions trading measures “within the framework of ICAO”. In breach of its international treaty obligations, the EU failed to do this when it extended the ETS to aviation. Furthermore it acted in breach of public international law when it imposed obligations on other nations and third country nationals without their consent.

The EU ETS imposes impermissible charges under the Chicago Convention (Section III.C.2)

35. Article 15 of the Chicago Convention permits charges to be imposed on airlines for the use of airport facilities and air navigation facilities. However, it expressly states that, “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”. Properly construed, it permits charges to recoup the airport or navigational costs of that state but does not permit charges for overflight, take off or landing *per se*. The EU ETS is precisely a charge on take off or landing that bears no relationship to the associated airport or navigational costs. The EU has adopted this very position in relation to the Russian Federation where the EU has described fees payable in respect of the overflight of Siberia as illegal and in contravention of Article 15 of the Chicago Convention to which Russia is a signatory.

The EU ETS imposes impermissible fuel levies under the Chicago Convention and other EU bilateral agreements (Section III.C.3)

36. If the EU ETS is not an illegal charge, then it must be an illegal tax. Article 24 of the Chicago Convention provides that fuel “shall be exempt from customs duty, inspection fees or similar national or local duties and charges”. Article 11.2(c) of the EU/US Open Skies Agreement requires that fuel shall be exempt from “taxes, levies, duties, fees and charges”. Emissions are inextricably linked to the use of fuel. If the EU ETS is not a charge (which is denied), it must be a tax (and indeed the use to which the funds raised are to be put make it identical to a tax). As such it is impermissible under the Chicago Convention and the EU/US Open Skies Agreement.

Conclusions

37. The Claimants can rely on one or more rules of international law to challenge the validity of the Amended Directive so as to force aviation activities into the EU ETS.
38. The Amended Directive is invalid insofar as it applies the ETS to those parts of flights which take place outside the airspace of EU Member States. This application contravenes the fundamental principle of customary international law that no state may subject the territory of another state or the high seas to its jurisdiction.
39. The Amended Directive is unlawful under Articles 1, 11 and/or 12 of the Chicago Convention, Article 7 of the Open Skies Agreement, and various other bilateral agreements, insofar as it applies the ETS to those parts of flights which take place outside

the airspace of EU Member States and thereby subjects the territory of other states and the high seas to EU sovereignty.

40. The Amended Directive contravenes Article 2(2) of the Kyoto Protocol, which requires the EU to work through ICAO in applying a trading scheme to international aviation emissions. The Amended Directive also involves an unlawful charge or tax, violating Articles 15 and 24 of the Chicago Convention, on their own or in conjunction with Articles 3(4) and 15(3) of the Open Skies Agreement and various other bilateral agreements.

II. BACKGROUND

A. THE AIRLINE ASSOCIATION INTERVENERS

41. The International Air Transport Association (“**IATA**”) has represented the international airline industry since its formation in 1945, the year following the Chicago Diplomatic Conference. It was founded in anticipation of the creation pursuant to United Nations’ (“**UN**”) Charter of ICAO and the development of a new body of international aviation law. IATA’s statutory purposes, objects and aims are:
- (i) to promote safe, regular and economical air transport for the benefit of the peoples of the world, to foster air commerce and to study the problems connected therewith;
 - (ii) to provide means for collaboration among the air transport enterprises engaged directly or indirectly in international air transport services; and
 - (iii) to co-operate with ICAO and other international organizations.¹
42. IATA’s some 230 member airlines account for approximately 93% of all scheduled international airline traffic.² Member airlines provide scheduled international air transportation services within, to and from the EU, and carry 2.2 billion passengers a

¹ IATA, 1945 Articles of Association. (Appendix Tab 1)

² See IATA, *Mission*, <http://www.iata.org/about/Pages/mission.aspx> (Appendix Tab 2)

year.³ While each of the US air carrier Claimants in this case belongs to IATA, IATA's membership draws from virtually every country and continent on the globe.

43. Aviation is now estimated to contribute to about 2% of the global CO₂ emissions, with international aviation's contribution estimated at about half of that amount.⁴ IATA has hardly ignored this problem. One of IATA's primary objectives in recent years has been to foster the development of fuel-efficient, environmentally-responsible air transportation services. Environmental responsibility is nothing new for IATA or the aviation industry. Well before the Kyoto Protocol was adopted by the UN, IATA's members were cooperating to reduce carbon emissions. Over the past 40 years the aviation industry has improved fuel efficiency by 70%.⁵ In the past decade alone, the industry improved fuel efficiency by 20%.⁶ IATA projects another 17% improvement over the next decade.⁷
44. Acting through their Annual General Meeting, IATA members continue to seek further improvement. They have committed to achieve carbon-neutral growth in the mid-term, from 2020,⁸ and to build a zero emission commercial aircraft within the next 50 years.⁹ They have agreed to achieve a 50% reduction in net emissions by 2050 compared to 2005 levels.¹⁰ To IATA's knowledge, there is no other industry that has made these sorts of commitments (or anything approaching their magnitude) at a global level.
45. Fulfilling the commitments undertaken by IATA members depends on achieving an appropriate balance among several related measures, which have been endorsed by

³ See IATA, *Development of a Global Framework for Addressing Civil Aviation CO₂ Emissions*, at ¶ 1.2 (ICAO Assembly, 37th Session, 28 Sept.-8 Oct. 2010) [hereinafter *Development of a Global Framework*] (Appendix Tab 3)

⁴ See Group on International Aviation and Climate Change, *Chairman's Report to the ICAO*, at ¶ 1.1.1 (1 June 2009) [hereinafter *GIACC Chairman's Report*] (Appendix Tab 4)

⁵ See *id.* at ¶ 1.1.2.

⁶ *Id.*

⁷ See *Development of a Global Framework*, *supra* note 3, ¶ 2.2.

⁸ Carbon-neutral growth means that aviation's net CO₂ emissions stop growing, even when demand for air transport continues to grow. In other words, net CO₂ emissions from aviation would peak in 2020 and would decline after that.

⁹ IATA, *Environment*, <http://www.iata.org/whatwedo/environment/Pages/index.aspx>. (Appendix Tab 5)

¹⁰ See *Development of a Global Framework*, *supra* note 3, at ¶ 1.4.

ICAO. Collectively known as the ‘four-pillar strategy,’ these measures include: 1) investing in new technologies, including revolutionary new plane designs, new composite lightweight materials, radical new engine advances and the development of bio-fuels; 2) streamlining aircraft operations to conserve fuel both on the ground and in the air; 3) updating the antiquated state-led air traffic control systems to reduce flight time and delays; and 4) using positive economic instruments including, but not limited to, emission trading schemes.¹¹

46. As to the last category, IATA has consistently supported the notion of developing a *global* emissions trading scheme for international aviation, but through consensual action at ICAO rather than via a patchwork of regional solutions implemented unilaterally. In its view, “[a]n aviation-specific emissions trading scheme under ICAO auspices could significantly reduce the potential for regulatory inconsistencies, competitive distortions, and the use of cost-inefficient mitigation measures. It would potentially also provide a more logical step following a successful period of voluntary trading.”¹²
47. Each set of measures under these four pillars presents a different opportunity, a different trade-off of costs and benefits and a different price tag. They are interdependent, in no small part because the financial resources of the airline industry are finite. For example, every Euro spent to purchase an EU carbon allowance from an EU Member State is a Euro that is not devoted to the development of bio-fuels or the replenishment of airlines’ existing fleets with the latest, most fuel-efficient aircraft.
48. The National Airlines Council of Canada (“NACC”) is a trade association founded by and representing Canada’s four largest passenger air carriers, namely, Air Canada, Air Transat, Westjet and Jazz Air LP.¹³ These airlines transported 48 million passengers in 2009.¹⁴ Two of NACC’s members, Air Canada and Air Transat, fly extensively to the United Kingdom and elsewhere in the European Union, and both are members of IATA

¹¹ See G. Bisignani, IATA, *2009 Annual Report* 32 (2009) (Appendix Tab 6)

¹² IATA, *Aviation and Climate Change*, at ¶ 2.10 (ICAO Assembly, 35th Session, 8 Feb. 2003) (Appendix Tab 7)

¹³ See NACC Website, <http://www.airlinecouncil.ca/> (Appendix Tab 8)

¹⁴ NACC, *Who We Are*, <http://www.airlinecouncil.ca/en/who-we-are.html>. (Appendix Tab 9)

as well. Pursuant to Union Regulation No. 748/2009, both Air Canada and Air Transat are to be administered by the UK authorities for the purposes of the extension of the EU ETS to aviation.

49. NACC advocates for safe, sustainable and competitive air travel by promoting the development of sound public policy and engaging with government and industry stakeholders on issues that affect its members.
50. The member airlines of the NACC are committed to working actively to reduce the impacts of air travel on the environment. Each airline works in multiple areas, including fuel-efficiency improvement, emissions reduction, noise abatement, waste reduction and best practices for the use of glycol for de-icing.
51. In 2005, Canada's air service providers and Transport Canada signed the first voluntary agreement in the world that is based on ICAO's Guidance Template.¹⁵ Canada's air service providers became the first air carriers to have reached a voluntary agreement with their government to reduce the growth of GHG emissions both domestically and internationally. Under the Memorandum of Understanding ("MOU"), the Air Transport Association of Canada ("ATAC" the Canadian Airlines Association before NACC) undertook to encourage its members to improve their fuel efficiency, with a quantitative goal to reduce collective fleet greenhouse gas emissions on a per unit basis by an average of 1.1 percent per annum, reaching a cumulative improvement of 24 percent in 2012 compared to the 1990 base case scenario.¹⁶
52. The NACC's members exceeded the 2012 target for efficiency improvement in 2005, putting them seven years ahead of schedule, and in 2008 members had exceeded the MOU target for 2012 by 6.1%. This represents an overall improvement of 28.6% from the Canadian baseline year 1990.¹⁷

¹⁵ See ICAO, *Template and Guidance on Voluntary Measures*, http://www.icao.int/icao/en/env/Caep_Template.pdf (Appendix Tab 10)

¹⁶ 2008 Canadian Aviation Industry Report on Emissions Reductions 2, 10, 12 (January 2010) (Appendix Tab 11)

¹⁷ *Id.*

53. The NACC members continue to invest in their respective fleet renewal programs, which will continue to introduce new, more efficient aircraft into their fleets. The carriers also continue to institute policies and procedures that impact their operations by improving efficiency and reducing fuel burn. Efforts are mainly focused on aircraft modifications and maintenance, aircraft operation, cargo and baggage operations, in-flight catering and ground equipment operations.

B. THE AIRLINE ASSOCIATION INTERVENERS' PRINCIPLED OPPOSITION TO THE EXTENSION OF THE EU ETS TO INTERNATIONAL AVIATION

54. The Airline Association Interveners adopt the Claimants' summary of the relevant facts leading up to the current controversy. Below is additional factual information to assist the Court in evaluating the Defendant's stated rationale for adopting the legislation (and implementing rules) at issue here.

55. The challenge in these proceedings to the extension of the EU ETS to aviation is concerned with the legality, or validity, of Council Directive 2003/87/EC, 2003 O.J. (L 275) 32 (the "2003 Directive") as amended by Council Directives 2008/101/EC, 2008 O.J. (L 8) 3 (the "2008 Directive") and 2009/29/EC, 2009 O.J. (L 122) 6 (the "2009 Directive"). The Airline Association Interveners are not merely supporting the Claimants on the basis of a legal technicality. The extension of the EU ETS to international aviation subverts the global regulatory order and wrongly imposes regional environmental measures on airline operators across the globe. This is not only against the interests of international aviation, but also, as the Airline Association Interveners will demonstrate, subverts global environmental interests as well. It undermines a UN-chartered agency whose objective is to preserve international cooperation in a huge part of the world economy. The EU's flouting of the UN Charter may have untold consequences for years to come, as it opens the floodgates to every manner of unilateral, self-interested aviation mandates.

56. The Amended Directive also violates a web of multilateral and bilateral treaties that have governed international aviation for more than half of a century. It is also illegal as a matter of public international law. And, on a purely practical level, it is disruptive of

various ongoing, multilateral efforts to control and reduce aviation emissions. These efforts have been increasingly successful. Aviation emissions fell from 671 million tonnes of CO₂ in 2007 to 666 million tonnes of CO₂ in 2008. For 2009, a further fall of 6.5% to 623 million tonnes of CO₂ is forecast. *See also supra* ¶¶ 43-44.¹⁸

57. Before the Airline Association Interveners address the legal questions referred to the CJEU, they would seek to place the EU ETS into its global regulatory, environmental and financial context.

C. THE GLOBAL FRAMEWORK FOR THE REGULATION OF INTERNATIONAL AIR TRANSPORTATION

58. The Amended Detailed Statement of Grounds (Bundle tab 2) describes the Chicago Convention and the ICAO institutions and acts at paragraphs 22 to 38. It is important to observe their provenance, the nature of the structure created and its place in the global legal order.
59. In the midst of World War II, the major Allied Powers began working toward their idealistic, yet pragmatic, vision of the post-War international order. To avoid repeating the failures of the inter-war period, the UN Charter recognized the need to create “conditions of stability and well-being which are necessary for peaceful and friendly relations among nations”. UN Charter, Art. 55 (Appendix Tab 13). The architects of the post-war international order, however, were not content to include mere aspirations in the UN Charter. At the Bretton Woods Conference in 1944, they laid the groundwork for the creation of specialized UN institutions to address international economic objectives (specifically, the International Monetary Fund and the World Bank).
60. In November of that same year, delegates from fifty-two states met in Chicago to plan the promotion of a post-war international aviation system, with the view that “future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security.” Convention on International Civil Aviation

¹⁸ IATA, *A Global Approach to Reducing Aviation Emissions 2* (2009) (Appendix Tab 12)

pmb., 7 Dec. 1944, 15 U.N.T.S. 295 [hereinafter “Chicago Convention”] (Bundle Tab 11). The Contracting States to the resulting Chicago Convention saw it as “desirable to avoid friction and to promote the cooperation between nations and peoples upon which the peace of the world depends,” and therefore “agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically.” *Id.*

61. There are now 190 signatories to the Chicago Convention, including all the member states of the EU. By virtue of signing the Convention:

Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which uniformity will facilitate and improve air navigation.

Chicago Convention, art. 37 (Bundle Tab 11).

62. The Chicago Conference led to the adoption of several international conventions and the creation of ICAO as another specialized UN institution. The Convention vested ICAO with the authority to “adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures . . . and such other matters concerned with safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.” *Id.* Article 44 provides that:

The aims and objectives of the Organization [ICAO] are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to . . . [m]eet the needs of the peoples of the world for safe, regular, efficient and economical air transport.

63. The Chicago Convention was a forward-looking document placing international interests above those that are purely regional. It recognized that international civil aviation had to develop in the context of pre-existing customary international law.¹⁹ At the heart of the

¹⁹ A. Macintosh, *Overcoming the Barriers to International Aviation Greenhouse Gas Emissions Abatement*, Vol. XXXIII/6 Air & Space Law 403, 410 (Nov. 2008) (Appendix Tab 14)

Chicago Convention is respect for the principle of customary international law that each state has “complete and exclusive sovereignty over the airspace above its territory”. Chicago Convention, art. 1. This principle is reflected in other substantive provisions throughout the Convention, too. For instance, Article 11 limits the application of any Contracting State’s laws to aircraft only upon “admission to or departure from its territory . . . , or to the operation and navigation of such aircraft while within its territory.” Article 12 supplements this rule by providing that “[o]ver the high seas, the rules in force shall be those established under this Convention” by ICAO, and not any particular national law of a contracting state. (*See* Bundle Tab 11).

64. The Chicago Convention also established certain rights for aircraft to be free from taxes, fees, dues and other charges imposed by contracting states. Specifically, Article 15 provides that “[n]o 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.” Article 24 provides that “[a]ircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty . . . [on] [f]uel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State.” (*See* Bundle Tab 11).
65. In addition to adopting principles of customary international law that predated their deliberations, the architects of the Chicago Convention also recognized that they had to give Contracting States an opportunity to determine some aspects of international airline operations through bilateral negotiations. The Chicago Convention, therefore, provides the foundation for the international air transportation system, while several thousand separate bilateral air services agreements build on this foundation (in particular, for the award of traffic rights to airlines of the contracting parties), as well as multilateral air services agreements for selected geographic regions, including the EU and parts of the

Caribbean, South America, West Africa and South-East Asia²⁰ (*see* Bundle tabs 13, 16, 17, 19, 20, 21 and 23).

66. As cited and discussed throughout this brief, the EU has bilateral agreements relating to air services with Canada (17 December 2009) (Bundle Tab 21), Malaysia (30 December 2006) (Appendix Tab 29), Singapore (6 September 2006) (Appendix Tab 30), Australia (7 June 2008) (Bundle Tab 19), to name but a few. On the topics of territorial sovereignty, the extraterritorial application of national laws, the limitation on the frequency of service and the ability to levy charges and taxes, these agreements contain similar, and in many cases identical, terms as the Chicago Convention.
67. One example of an EU bilateral aviation agreement, cited in the questions referred to this Court, is the Open Skies Agreement between the US and the EU was signed in Washington, D.C., on April 30, 2007. Air Transport Agreement, US-EU, 30 Apr. 2007, 46 I.L.M. 470 (2007) [hereinafter EU-US Open Skies Agreement or Open Skies Agreement] (Bundle Tab 17). The Agreement became effective on 30 March 2008. It contains provisions substantively similar to the Chicago Convention and provides similar guarantees to aircraft engaged in international air transport. For instance, pursuant to Article 1(9), it gives each contracting State sovereignty over “the land area, internal waters and territorial sea in which the Treaty establishing the European Community is applied”. Article 3(4) provides the cornerstone of a liberalized environment for private airlines, and “allow[s] each airline to determine the frequency and capacity of the international air transportation it offers based upon commercial considerations in the marketplace.” The ability of each contracting state to regulate aviation beyond its borders is carefully defined, too. Article 7 of this Agreement is almost identical to Article 11 of the Chicago Convention, which delimits the application of national laws to international flights. And Article 11 of the Open Skies Agreement curtails the ability of each State to tax or levy charges upon aviation fuel, similar to Article 24 of the Chicago Convention.

²⁰ A. Macintosh, *supra* note 19, at 410; ICAO Secretariat, *Overview of Trends and Developments in International Air Transport* (8 Feb. 2007) (Appendix Tab 14)

D. THE HUSHKIT DISPUTE

68. The present dispute is, unfortunately, not entirely novel. The EU last tried to substitute its judgment on technical aviation issues for that of ICAO a decade ago, in a failed attempt to limit aircraft noise through a uniquely European “hushkit” regulation. Because this episode began—as here—with a unilateral, quasi-environmental measure that the EU sought to impose on the entire international aviation community, and because it proved to be an embarrassing debacle for the EU, it is worth examining in some detail.
69. In the late 1990s, the issue of aircraft noise came to the fore and was a principal focus of ICAO’s Committee on Aviation Environmental Protection (“CAEP”). Consistent with the Chicago Convention, including its annexes and international practice, the CAEP was working toward stricter aircraft noise certification standards. The objective was to adopt standards that would accommodate the needs of *all* contracting States and would be phased-in to permit the airlines to adjust their fleets in an *orderly* manner.
70. The EU, however, was dissatisfied with the perceived lack of progress. On 9 March 1998, pressured by environmental activists, the EU Commission submitted to the Council of Ministers a proposal to ban certain retrofitted aircraft from Europe within four years—even though they met all international noise standards adopted by ICAO. ICAO immediately objected. As the legislation progressed, the President of the ICAO Council warned that, “[i]f States believe that changes to the content or level of implementation of the Standards in Annex 16 are necessary or desirable, they should use the multilateral mechanism of ICAO.” Letter from Assad Kotaite, President of the ICAO Council, to the President of the Council of the European Union (22 Mar. 1999) (E/4/150); *see also* ICAO Council, Decision on Preliminary Objections, *United States and 15 European States* (16 Nov. 2000) [hereinafter Hushkit Arbitration] (Appendix Tab 17); A. Knorr & A. Arndt, ‘Noise Wars’: *The EU’s ‘Hushkit Regulation,’* Institut für Weltwirtschaft, at 5 (2002) (Appendix Tab 18).
71. In 1999, the EU hushkit regulation was nevertheless adopted, though implementation was delayed one year pending negotiations with the US. *See* Council Regulation (EC) 925/1999, 1999 O.J. (L115) (Appendix Tab 106). The international community again

condemned the EU's unilateral action and the attempt to substitute a regional solution for a global one adopted by consensus at ICAO, in the same way that they are now objecting to the attempt to force the entire international aviation industry to participate in the EU carbon market. The Clinton Administration stated that the US regarded the actions as "a failure of collaboration and . . . inconsistent with the on-going efforts to develop and implement new international noise certification standards." Memorial of the United States Under Article 84 of the Convention on International Civil Aviation, Hushkit Arbitration (Appendix Tab 19).

72. The EU's preemptive action ultimately accomplished little more than diverting the attention of ICAO and the international aviation community away from finalizing these aircraft noise standards. The regulation was challenged in parallel proceedings by private parties before European Courts, and by the United States before an ICAO arbitral body, citing violations of the Chicago Convention among other grounds. In June 2001, the ICAO Council adopted new noise standards. Thereafter, during its meeting concluding 5 October 2001, the 33rd ICAO Assembly agreed on the so-called 'balanced approach' that became its approach to noise management.
73. As the private lawsuits were reaching the European Court of Justice, the EU Council decided to officially welcome ICAO's actions, noting "that the resolution on environmental questions adopted by the ICAO Assembly opens up a prospect of replacing the 'hushkits' Regulation in the near future". Press Release, European Council, Transport and Telecommunications (15-16 Oct. 2001) (C/01/353) (Appendix Tab 105). "With this in view, the Council notes the intention of the Commission, to submit, as soon as possible, a proposal which, whilst complying with the new international provisions, will enable a framework to be established for the operational restrictions at the Community level, taking full advantage of the flexibility offered by the ICAO . . .". *Id.*
74. This face-saving wording marked the suspension of the 'hushkit regulation' with immediate effect. The Council pledged "to give all the necessary priority to this proposal so that it can be adopted before April 2002". *Id.* This deadline was met with the Council's decision, taken during its 2420th meeting on 25-26 March 2002, to adopt the

new Directive 30/2002 “on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports”; the legally required consent by the European Parliament was secured at its sitting on 13 March 2002. *See* 2002 O.J. (L 85) 40 (Appendix Tab 28).

E. INTERNATIONAL ENVIRONMENTAL LAW

75. The UN had begun to address international environmental issues at its 1972 Conference on the Human Environment. *See* H. Miller, *Civil Aircraft Emissions and International Treaty Law*, 63 J. Air L. & Com. 697, 710 (1988) (Appendix Tab 20). Reflecting the principles of customary international law set forth in the *Trail Smelter Case (U.S. v. Can.)*, 3 R. Int’l Arb. Awards 1905, 1967 (1941) (Appendix Tab 21),²¹ the United Nations Conference on Environment and Development (held in Rio de Janeiro in 1992) urged States to cooperate in addressing trans-boundary environmental issues. In particular, Principle 7 of the Rio Declaration (Appendix Tab 109) calls on States to cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem.²²
76. The Kyoto Protocol to the United Nations Framework Convention on Climate Change (“UNFCCC”), 10 Dec. 1997, 37 I.L.M. 22 [hereinafter “Kyoto Protocol”] (Bundle Tab 15), is the main source of international law on the emission of greenhouse gasses. In particular, it obligates contracting states (which includes the EU) to take action to reduce emissions of greenhouse gases. However, it also *expressly excludes* international aviation from its coverage, thus setting implicit territorial restrictions on the measures that contracting states can lawfully adopt to satisfy its obligations vis-à-vis aviation.

²¹ *See also* R.L. McGeorge, *The Pollution Haven Problem in International Law: Can the International Community Harmonize Liberal Trade, Environmental and Economic Development Policies?*, Wisc. Int. Law J. 12:2 (Spring 1994): 277-374 (Appendix Tab 22)

²² *See* R. Abeyratne, *Emissions Trading – Recommendations of CAEP/7 and the European Perspective*, Vol. XXXII/4-5 Air & Space Law 358, 372 (Sept. 2007) (Appendix Tab 23) for a summary of the Rio Declaration and an analysis of its application to the EU ETS. His analysis leads to the conclusion that the Rio Declaration supports the general principle that States must take actions to address climate change but admonishes against taking unilateral action that might inhibit cooperation among States to address effectively those global concerns.

77. The Kyoto Protocol confirms ICAO's exclusive responsibility for reducing greenhouse gas emissions in the international aviation sector. *See* Kyoto Protocol, art. 2.2 (Bundle Tab 15). Indeed, ICAO has been active in addressing international environmental issues relating to civil aviation. In 1983, it established CAEP and assigned to it primary responsibility for most of ICAO's environmental efforts. Annex 16 to the Chicago Convention entitled "Environmental Protection" includes detailed standards and recommended practices relating to environmental quality, including emissions that contribute to global warming and climate change. ICAO is at the forefront of the international community's efforts to address environmental issues in the aviation industry.²³

F. THE NECESSITY FOR A GLOBAL APPROACH TO AVIATION EMISSIONS AND ICAO'S ACTION TO ADDRESS AVIATION'S IMPACT ON CLIMATE CHANGE

78. Much like the hushkit regulation was for noise, the extension of the EU ETS to international aviation emissions is an attempt to force other nations to deal with a common global problem in a particular way prescribed by Europe. This unilateral measure will damage the global regime of aviation law, a regime that—for over half a century—has been founded upon the principles of mutuality, accommodation and non-interference of one sovereign unto the rights of others. This measure will also cause untold damage to the development of environmental law and the viability of multilateral solutions to environmental threats, as well. The likely result of the EU's action will be to delay if not entirely thwart the development of a single global system in a competent multilateral forum.

79. The Airline Association Intervenors have consistently supported the idea of a emissions trading scheme for the aviation sector that is implemented with multilateral consensus. This requires, in the least, a scheme under the control of an exclusive and competent international body for implementation and enforcement, which exhibits due regard for the

²³ *See* A. Macintosh, *supra* note 19, at 426-29 for a good summary of ICAO's greenhouse gas emission achievements from 1993 to 2007 (Appendix Tab 14)

global regimes of both international aviation and environmental laws.²⁴ As acknowledged by the drafters of both the Chicago Convention and the Kyoto Protocol, such a scheme should proceed under the auspices of the UN's designated and specialized agency, ICAO.

80. As IATA explained in 2004, in the lead up to the 35th Assembly of ICAO, the competence of ICAO to deal with aviation emissions has been settled for many years:

While the Kyoto Protocol recognises that ICAO is the appropriate body to address aviation emissions, it should be noted that ICAO's authority in this regard does not derive from the Kyoto Protocol, nor does the Kyoto Protocol limit ICAO's authority. ICAO has its own independent competence deriving from the Chicago Convention that has been interpreted to encompass the environmental aspects of aviation. ICAO has indeed established standards, recommended practices and policies related to the environmental aspects of aviation for over 25 years.²⁵

ICAO has conducted work relating to aviation emissions for several decades—with its first environmental standards enacted in 1981²⁶—and CO2 emissions for over 10 years.²⁷ Through its Assembly and its various specialized groups and committees, as the Airline Association Intervenors will show below, *infra* ¶¶ 81-103, ICAO has been diligently at work on a multi-faceted approach to reduce and control carbon emissions from aircraft.

1. ICAO's Committee on Aviation Environmental Protection ("CAEP")

81. ICAO's Committee on Aviation Environmental Protection is a technical committee of the ICAO Council and is primarily responsible for conducting studies and recommending measures to minimize aviation's impact on the environment, including setting certification Standards for aircraft engine emissions. CAEP consists of 24 Members from

²⁴ See *Development of a Global Framework*, *supra* note 3, at ¶ 4.1 (advocating that, "[a]s the designated United Nations body for international aviation, ICAO should have a central oversight role in the global framework [to address CO2 emissions from international aviation] and establish the framework principles.").

²⁵ IATA, *Aviation and Climate Change*, at ¶ 2.1 (ICAO Assembly, 35th Session, 8 Feb. 2003) (Appendix Tab 24)

²⁶ See Statement from ICAO to the Twenty-Sixth Session of the UNFCCC Subsidiary Body for Scientific and Technical Advice 2 (Bonn, 7-18 May 2007) (Appendix Tab 25)

²⁷ See *GIACC Chairman's Report*, *supra* note 4, at ¶ 1.1.2.

all ICAO Regions and 13 Observers from States, intergovernmental and non-governmental organizations, including airlines, aircraft and engine manufacturers, airports, pilot associations, environmental NGOs and UN bodies. The EU is well-represented. At present, seven EU Member States are CAEP Members, with one more Member State, and the EU Commission itself, acting as Observers. More than 400 world-renowned experts on environmental and technical issues related to aviation are involved in the work of CAEP.²⁸

82. CAEP has considered market-based measures to control international aviation emissions for nearly a decade. In evaluating alternative approaches to addressing aviation's impact on the global climate, CAEP concluded as early as 2001 that, compared to other market-based measures, an emissions trading system would be a relatively cost-effective measure to limit or reduce CO₂ emitted by civil aviation in the long term, provided that the system is a global and open one across economic sectors.²⁹
83. At both the 33rd ICAO Assembly (in 2001) and the 34th ICAO Assembly (in 2004), CAEP endorsed the "development of an open emissions trading system for international aviation" and "requested the Council to develop as a matter of priority the guidelines for open emissions trading for international aviation, focusing on establishing the structural and legal basis for aviation's participation in an open trading system, and including key elements such as reporting, monitoring, and compliance, while providing flexibility to the maximum extent possible consistent with the UNFCCC process."³⁰
84. The most recent meeting of CAEP (CAEP/8) was held in February 2010, and featured an agenda covering an update of NO_x Standards, a review of progress on CO₂ and particulate matter (PM) Standards, and an agreement on priorities over the next work cycle.³¹ CAEP/8 agreed on a comprehensive set of 19 recommendations which will help ICAO fulfill its mandate on the environment (*See* ICAO Doc 9938, Report of the Eighth

²⁸ *See* ICAO, *2010 Environmental Report* 13 (2010) (Appendix Tab 27)

²⁹ ICAO, *Report on the Voluntary Emissions Trading for Aviation*, at ¶ 1.1.1 (2007) (Appendix Tab 26)

³⁰ *Id.*

³¹ ICAO, *2010 Environmental Report*, *supra* note 28, 16 (2010).

Meeting of the Committee on Aviation Environmental Protection).

2. ICAO's Group on International Aviation and Climate Change ("GIACC")

85. At the 36th Session of the ICAO Assembly in September 2007, the 190 ICAO Member States recognized the urgency and critical importance of GHG emissions from international aviation. They also re-emphasized the need for ICAO to continue to provide effective leadership in this area.³²
86. To achieve this, the Assembly called for the formation of the Group on International Aviation and Climate Change (GIACC) with the mandate to develop an ICAO Programme of Action on International Aviation and Climate Change. The Assembly directed ICAO to develop concrete proposals to aid the United Nations Framework Convention on Climate Change (UNFCCC) process, and additionally, it requested that ICAO convene a High-Level Meeting (HLM) on International Aviation and Climate Change, at which the GIACC recommendations would be considered and approved by consensus.³³ All EU Member States supported the creation of the GIACC.
87. The GIACC was formed in January 2008 and is comprised of 15 senior government officials representative of all ICAO Regions. GIACC deliberated and made decisions by consensus, on technical support that was provided by CAEP.³⁴
88. In May 2009, GIACC concluded a Programme of Action for global aviation, consistent with the ICAO Assembly Resolution, which included (1) global fuel-efficiency goals; (2) suggested measures to achieve emissions reductions; and (3) suggested methods and metrics to measure aviation's progress.³⁵
89. The GIACC proposals were accepted by the ICAO Council, which also made recommendations on convening of the HLM in October 2009 and a Global Conference

³² *Id.* at 8.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

on Alternative Fuels for Aviation in November 2009.³⁶

3. High-Level Meeting on International Aviation and Climate Change (“HLM”) and the ICAO Programme of Action on International Aviation and Climate Change

90. ICAO held the HLM on International Aviation and Climate Change in October 2009 with the participation of representatives from 73 ICAO Member States (accounting for 94 % of global commercial air traffic), and from various international organizations. The HLM considered the outcome of the GIACC and discussed areas where progress could be achieved on the formulation of concrete proposals to address GHG emissions from international aviation.³⁷ The EU, and many of its Member States, attended the HLM and considered the GIACC’s work as “as laying an important foundation for the development of ICAO’s strategy to address international aviation’s climate change impact.”³⁸
91. Significantly, the HLM fully endorsed GIACC’s Programme of Action, making it the “first and only globally-harmonized agreement from a sector on a goal to address its CO2 emissions.”³⁹ The Programme “strike[s] a balance between the views of all [ICAO] member States and represent[s] their collective will and determination to act in a coherent and cooperative manner to address international aviation and climate change.”⁴⁰ The Programme includes, *inter alia*, the following elements:
- A 2% annual improvement target in fuel efficiency globally until the year 2050;
 - Collection of international aviation emissions data by ICAO; and
 - Development and submissions to ICAO of States’ Voluntary Action Plans on Emissions.

³⁶ *Id.*

³⁷ *Id.*

³⁸ ICAO Secretariat, *HLM on International Aviation and Climate Change: Summary of Discussions* (10 Aug. 2009) (Appendix Tab 32); *see also* Sweden, on behalf of the European Community and its Member States, et al.; *HLM on International Aviation and Climate Change: Aspirational goals and implementation options* (9 Oct. 2009) (Appendix Tab 33).

³⁹ Chairman of the ICAO Executive Committee, *Report of the Executive Committee on Agenda Item 17*, at ¶ 17.3.9 (ICAO Assembly, 37th Session, 7 July 2010) (Appendix Tab 38).

⁴⁰ *Id.* at ¶ 17.3.10.

92. Other elements of the ICAO Programme of Action parallel IATA's four-pillar strategy outlined above. For instance:

- Development of better aircraft technology: ICAO has committed to develop global CO2 Standards for aircraft and measures to facilitate access to financial resources, technology transfer and capacity-building.⁴¹ Indeed, the industry is making great advances in technology such as revolutionary new plane designs, new composite lightweight materials and radical new engine advances.⁴² ICAO helped IATA to create a roadmap that identifies future technologies that could reduce emissions by 20% to 35% per aircraft. Airlines will spend \$1.5 trillion on new aircraft by 2020, replacing some 5,500 aircraft and resulting in a 21% reduction in CO2 emissions. Modifications to the existing fleet using current technologies (winglets, drag reduction, etc.) could achieve an extra 1% overall emissions reduction by 2020 for an estimated investment of \$2 billion.⁴³ In addition, improved operational practices, including reduced auxiliary power-unit usage, more efficient flight procedures and weight reduction measures, will achieve a 3% emissions reductions by 2020.⁴⁴
- Continued work on alternative fuels for aviation⁴⁵: IATA estimates that sustainable biofuels for aviation could reduce CO2 emissions by 80%. The international community's focus is on biofuels sourced from second or new generation (*e.g.*, algae, jatropha and camelina) biomass. Tests in 2008 and 2009 demonstrated that the use of biofuel from these sources as "drop-in" fuels, *i.e.*, fuels that can be added to kerosene, is technically sound and no major adaptation of aircraft is required.⁴⁶ Biofuels can

⁴¹ ICAO, 2010 Environmental Report 8, 68-95 (2010) (Appendix Tab 27).

⁴² *GIACC Chairman's Report*, *supra* note 4, at ¶ 1.1.3 (noting that [t]echnological advances in airframe and engine design together with improved air traffic management and operational procedures have slowed the rate of growth of aviation CO2 emissions by around 2% per year").

⁴³ IATA, *A Global Approach to Reducing Aviation Emissions* 4 (2009) (Appendix Tab 35).

⁴⁴ Since 2005 IATA's Green Teams have worked with airlines to reduce these inefficiencies. IATA's Green Teams consist of experts that visit airlines and advise them on fuel and emissions savings measures and best practice.

⁴⁵ See ICAO, 2010 Environmental Report 8, 158-187 (2010) (Appendix Tab 27).

⁴⁶ Chairman of the ICAO Executive Committee, *Report of the Executive Committee on Agenda Item 17*, at ¶¶ 17.3.2-3 (ICAO Assembly, 37th Session, 7 July 2010) (Appendix Tab 38).

also be blended with existing jet fuel in increasing quantities as they become available. Assuming availability of a 6% mix of second generation (sustainable) biofuels by 2020, this would reduce aviation CO2 emissions by a further 5%, requiring investment of \$100 billion. IATA members have set a target to be using 10% alternative fuels by 2017.⁴⁷

- A decision to develop a framework for market-based measures for international aviation on a global level.⁴⁸
93. The HLM also agreed to continue working on medium-term and long-term goals, including exploring the feasibility of more ambitious objectives such as carbon-neutral growth and emissions reductions, taking into account the special circumstances and respective capabilities of developing countries and the sustainable growth of the industry.⁴⁹
94. In order to monitor progress towards reaching the goals, the Programme expects States to develop and submit action plans, outlining their respective policies and actions, and annual reporting of data on their aviation fuel consumption to ICAO. Using this information, ICAO can identify specific needs of countries and assist them by facilitating access to financial resources and technologies needed to enable them to contribute to the global efforts to address greenhouse gas emissions from international aviation.⁵⁰

4. Conference on Aviation and Alternative Fuels (“CAAF”)

95. Complementary to the GIACC and HLM, ICAO also held a Conference on Aviation and Alternative Fuels (CAAF) in November 2009. This was an important step towards consensus among ICAO states on potential use and emission effects of sustainable alternative fuels, and to facilitating their development and deployment. The Conference endorsed the use of sustainable alternative fuels for aviation, particularly the use of drop-in fuels in the short- to medium-term, as an important means of reducing aviation

⁴⁷ IATA, *A Global Approach to Reducing Aviation Emissions* 4 (2009) (Appendix Tab 35).

⁴⁸ See ICAO, *2010 Environmental Report* 128-157 (2010) (Appendix Tab 27).

⁴⁹ *Id.* at 9.

⁵⁰ *Id.*

greenhouse gas emissions.⁵¹

96. The Conference noted that the introduction of sustainable alternative fuels for aviation will help address not only environmental issues, but also those of economics and supply security. While currently there is very limited availability of qualified alternative fuels for aviation, it has been demonstrated that sustainable alternative fuels for use in global aviation can be produced from a wide variety of feedstocks, suggesting that many regions are possible production locations. Those alternative fuels have the potential to offer reduced lifecycle CO₂ emissions compared with conventional aviation fuels.⁵²
97. The Declaration and Recommendations approved by the Conference affirmed the commitment of States and industry groups to develop, deploy and use sustainable alternative fuels to reduce aviation emissions. To facilitate the promotion and harmonization of initiatives that encourage and support the development of sustainable alternative fuels for aviation on a global basis, the Conference established an ICAO Global Framework for Aviation Alternative Fuels.⁵³

5. ICAO's work on a global Air Traffic Management ("ATM") system

98. Infrastructure and operational improvements present a major opportunity for fuel and CO₂ reductions in the near-term. The Intergovernmental Panel on Climate Change estimated in 1999 that there was 6% inefficiency in air transport infrastructure.⁵⁴ In reality, such reforms represent a "win-win" solution for all stakeholders. First, based on the premise that the most effective way to minimize aviation *emissions* is to minimize the amount of *fuel* used in servicing and operating each flight, environmental benefits that are achieved through reduced fuel consumption also result in reduced fuel costs. Second, operational measures do not necessarily require the introduction of new equipment or the deployment of expensive technologies. Instead, they are based on different ways of operating aircraft that are already in service.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ IATA, *A Global Approach to Reducing Aviation Emissions 5* (2009) (Appendix Tab 35).

99. ICAO has been especially active on this front. In 2004, ICAO first identified and reviewed various operational opportunities and techniques for minimizing fuel consumption in civil aviation operations by airlines, airports, air traffic management and air traffic service providers, airworthiness authorities, environmental agencies and various government bodies.⁵⁵ CAEP also developed rules of thumb to assist States with estimating the potential environmental benefits from the implementation of new operational procedures. ICAO's present and future efforts to continually improve the ATM system focus on the Global ATM Operational Concept, which aims to achieve an interoperable global air traffic management system for all users during all phases of flight that meets agreed levels of safety, provides for optimum economic operations, is environmentally sustainable and meets national security requirements. The Concept is now an important part of all major ATM development programmes including the European SESAR and the NextGen of the United States.⁵⁶
100. Full implementation of more efficient ATM and airport infrastructure could provide an additional 4% emissions reduction by 2020. Measures include implementation of the Single European Sky which would produce a 70% cut in route extension; the Next Generation Air Traffic Management system in the USA which would lead to a 57% reduction in delays; reorganization of the Pearl River Delta ATM system in Hong Kong; RVSM (reduced vertical separation minima) over Russia; and so-called flex tracks. These measures involve investments of \$58 billion.⁵⁷
101. In 2008, IATA's work with industry partners resulted in 214 en-route and 103 airport-domain improvements for annual fuel savings that equate to 4 million tonnes of CO₂. IATA also identified 121 en-route and 40 airport-domain improvements for implementation in 2009. These include airspace improvements based on Performance-Based Navigation (PBN) and Continuous Descent Arrival (CDA). Using CDA rather

⁵⁵ ICAO, *Circular 303: Operational Opportunities to Minimize Fuel Use and Reduce Emissions* (Feb. 2004) (Appendix Tab 34).

⁵⁶ See ICAO, *2010 Environmental Report* 96-98 (2010) (Appendix Tab 37). SESAR refers to the Single European Sky, which is an ambitious initiative launched by the European Commission in 2004 to reform the European ATM system.

⁵⁷ IATA, *A Global Approach to Reducing Aviation Emissions* 5 (2009) (Appendix Tab 35)

than the traditional stepped approach to landing can save up to 630 kilogrammes of CO2 per landing. The CDA Action Plan initiated by IATA and other partners will save 500,000 tonnes of CO2 through implementing CDA at 100 airports across Europe by the end of 2013.⁵⁸

6. Moving forward at ICAO in conjunction with the UNFCCC

102. Since adopting its Programme of Action, ICAO has continued its “liaison with other UN bodies, with a view to obtaining a better scientific understanding of aviation’s impact on the environment as well as exploring cooperation and synergy in policy-making to limit or reduce aviation emissions.”⁵⁹
103. ICAO has continued to make further progress on the recommendations of the High-level Meeting and the Alternative Fuels Conference, toward the development of proposals for more ambitious policies on international aviation and climate change, which was just considered by the ICAO Assembly in September 2010.⁶⁰ In addition to continuing work on alternative fuels, one of the topics discussed was the “development of a framework for market based measures.”⁶¹

G. THE EU’S PREVIOUS CONCURRENCE WITH MEASURES TAKEN AT ICAO

104. In 2003, all Member States of the EU endorsed a resolution of the ICAO Assembly urging “States to refrain from unilateral environmental measures that would adversely affect the orderly development of international civil aviation”. (Bundle tab 31, appendix A, ¶ 8). As to emissions trading, the EU Contracting States asked ICAO instead to focus on two approaches: 1) the development of a *voluntary* trading system and 2) the

⁵⁸ *Id.*

⁵⁹ Chairman of the ICAO Executive Committee, *Report of the Executive Committee on Agenda Item 17*, at ¶ 17.3.5 (ICAO Assembly, 37th Session, 7 July 2010) (Appendix Tab 38). For instance, ICAO’s Programme of Action was made available to the 15th Conference of the Parties to the UNFCCC. However, due to the complex negotiating process that took place there, this agreement was not considered as a basis for additional negotiations on international bunker fuels and no specific decision was taken in that forum on how to address GHG emissions from international aviation. See ICAO, *2010 Environmental Report 8* (2010) (Appendix Tab 27).

⁶⁰ ICAO, *2010 Environmental Report 8* (2010) (Appendix Tab 27).

⁶¹ See Chairman of the ICAO Executive Committee, *Report of the Executive Committee on Agenda Item 17*, at ¶¶ 17.3.12-.14 (ICAO Assembly, 37th Session, 7 July 2010) (Appendix Tab 38).

provision of guidance to States on how to incorporate emissions from international aviation into their individual trading schemes that would address, among other issues, the “legal basis” for doing so. (*Id.* at Appendix I.)

105. CAEP followed-up on the resolution and provided both sets of requested materials. The “legal framework” that the CAEP issued several months later, in 2004, reaffirmed both ICAO’s primacy in dealing with international aviation emissions and the legal prohibition on States acting unilaterally. The report said:

“Concerning environmental costs . . . States do not directly incur them with regard to airspace over the high seas, since they have no jurisdiction for mitigating the environmental impact on areas outside their national territories. Therefore, *a priori*, it would not be legitimate for States to individually establish a charge including environmental costs related to territories they have no sovereignty over”⁶²

106. In 2006, all EU Member States again supported the ICAO resolution which, in addition to urging States not to proceed unilaterally, acknowledged that any charging scheme must be based on the actual *costs* of mitigating the impact of aircraft engine emissions. (Bundle tab 31).
107. In 2007, even while filing a reservation on other aspects of the Assembly Resolution on environmental matters, the EU still endorsed a similar commitment to “urge States to refrain from environmental measures that would adversely affect the orderly and sustainable development of international civil aviation”. (Bundle tab 32, Appendix A at ¶ 10). Importantly, Europe also supported the rest of the Assembly in requesting that ICAO’s Council establish the GIACC that was tasked with developing an “aggressive programme of action . . . *based on consensus*” that would include market-based measures such as emissions trading.⁶³ As recently as July 2010, the EU “supported ICAO’s

⁶² ICAO Secretariat, *Legal Framework and Policy Issues Related to the Use of Emissions Related Levies*, at ¶ 3.6.5 (Committee on Aviation Environmental Protection, 6th Meeting, Working Paper No. 24, 2004) (Appendix Tab 36).

⁶³ Statement from ICAO to the 27th Session of the UNFCCC Subsidiary Body for Scientific and Technological Advice 3 (Bali, 3-11 December 2007) (emphasis added) (Appendix Tab 37).

comprehensive approach to address aviation emissions.”⁶⁴

H. GLOBAL CRITICISMS OF THE EXTENSION OF THE EU ETS TO INTERNATIONAL AVIATION

108. IATA has voiced its disapproval of the EU’s unilateral measure in clear and unambiguous terms. As early as 2004, IATA urged the ICAO member States to “refrain from any local or regional measure, such as taxes and charges, that could jeopardize ICAO’s policies and compromise the industry’s ability to finance technological, operational and other voluntary progress.”⁶⁵
109. In an August 2005 letter, the Director General and CEO of IATA “remind[ed] the Commission of the obligation of EU states under the Kyoto protocol to address international aviation emissions [by] ‘working through ICAO’.”⁶⁶ This provision, in IATA’s view, “casts doubt on the EU’s competence to regulation emissions from international flights.”⁶⁷ IATA also expressed its concern that the EU’s attempt to regulation emissions “occurring outside the airspace of EU states” is “legally untenable” and correctly anticipated that it would be “likely to draw serious political reactions reminiscent of the hushkit dispute in the late 1990s.”⁶⁸ On a practical level, too, IATA determined that such a scheme would “be discriminatory” and “impose insurmountable costs” on airlines who would “not be able to reflect the full cost of these allowances in their ticket prices.”⁶⁹ In closing, IATA “confirm[ed] the industry’s strong opposition to the use of taxes and charges for addressing aviation climate change.”⁷⁰

⁶⁴ Chairman of the ICAO Executive Committee, *Report of the Executive Committee on Agenda Item 17*, at ¶ 17.3.26 (ICAO Assembly, 37th Session, 7 July 2010) (Appendix Tab 38).

⁶⁵ IATA, *Aviation and Climate Change*, Summary (ICAO Assembly, 35th Session, 8 Feb. 2003) (Appendix Tab 24)

⁶⁶ Letter from G. Bisignani, CEO IATA, to S. Dimas, EU Member, (26 Aug 2005) (quoting the Kyoto Protocol, Article 2(2)) (hereinafter “Dimas Letter”) (Appendix Tab 39).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

110. Non-Member States have made similar protests. Five States, joined by the United States, sent a letter to the EU stating their “deep concern and strong dissatisfaction with the . . . proposal to include international civil aviation” in the EU ETS.⁷¹ In their view, such action would “potentially violate EU Member State international obligations under the [Chicago Convention], as well as bilateral aviation agreements,” and “run counter to the international consensus that ICAO should address international aviation emissions.”⁷² The United States Mission to the European Union separately has stated its “concerns with the inclusion of international civil aviation in the [ETS].”⁷³ It deemed the “unilateral, compulsory application [of the ETS] to foreign carriers . . . without the consent of their governments, [to be] inconsistent with [the Chicago Convention].”⁷⁴
111. These protests have continued and are a reflection of the overwhelming majority of Contracting States to the Chicago Convention. For example, the African States, China and the Russian Federation very recently expressed their respective opinions that “no State should be allowed to take unilateral actions on market-based measures.”⁷⁵ For its part, Colombia supported “emissions trading for international aviation, so long as the airlines of other States become part of such a scheme by mutual consent, respecting each State’s right to determine the best way to manage the aviation emissions of their airlines.”⁷⁶ Canada, Mexico and the U.S. also “underscored the need for an agreement” on a framework for market based measures in international aviation, and the duty of “States seeking to apply emissions trading to international aviation [to] engage other States whose carriers would be affected.”⁷⁷ Earlier, in 2006, Representatives to the

⁷¹ Letter from A. Thomas, et al. to Peter Witt (6 Apr. 2007) (Appendix Tab 40).

⁷² *Id.*

⁷³ Letter from K. Silverberg, U.S. Ambassador to the E.U., to J. Delbeke (30 Oct. 2008) (hereinafter “Silverberg Letter”) (Bundle Tab 48).

⁷⁴ *Id.*

⁷⁵ Chairman of the ICAO Executive Committee, *Report of the Executive Committee on Agenda Item 17*, at ¶¶ 17.3.16, 17.3.19-.20, 17.3.31 (ICAO Assembly, 37th Session, 7 July 2010) (Appendix Tab 38).

⁷⁶ *Id.* at ¶ 17.3.17.

⁷⁷ *Id.* at ¶¶ 17.3.21-.24.

ICAO Council from the United Kingdom,⁷⁸ Brazil,⁷⁹ Canada,⁸⁰ Argentina,⁸¹ Australia,⁸² Japan,⁸³ Peru,⁸⁴ Honduras,⁸⁵ India⁸⁶ and the United States⁸⁷ made it clear that they would not support unilateral measures by any State to include foreign aircraft in their national trading scheme, and that any such measures could only proceed through ICAO.

112. That the EU ETS has been widely regarded as a failure in other sectors, too, has not helped matters. One non-governmental report, after looking at the first phase of the ETS (which did not include aviation), concluded that it “did not reduce emissions at all.” Open Europe, *Europe’s Dirty Secret: Why the EU Emissions Trading Scheme Isn’t Working* 5 (2007) (Appendix Tab 42). Instead, the scheme created “severe distortions,” as large companies lobbied for the most free allocated permits—and thusly sold them at a profit—while small companies less effective at lobbying funded most of the system. *Id.* EUROPOL has even acknowledged that “carbon credit fraud” accounts for up to 90% of all market volume in some Member States, which thereby “endanger[s] the credibility of the European Union Emission Trading System. Press Release, EUROPOL, Carbon Credit fraud causes more than 5 billion euros damage for European Taxpayer (9 Dec. 2009) (Appendix Tab 43). Looking forward, these “distorted incentives . . . [will] continue to act as a barrier to any meaningful action on climate change.” Open Europe, *supra*, at 51.

⁷⁸ ICAO Council, *Summary Minutes of the First Meeting, 179th Session*, at ¶ 23 (2 Oct. 2006) (Appendix Tab 41).

⁷⁹ *Id.* at ¶ 28.

⁸⁰ *Id.* at ¶ 29.

⁸¹ *Id.* at ¶¶ 33-35.

⁸² *Id.* at ¶¶ 36-37.

⁸³ *Id.* at ¶ 38.

⁸⁴ *Id.* at ¶ 58.

⁸⁵ *Id.* at ¶ 59.

⁸⁶ *Id.* at ¶ 53.

⁸⁷ *Id.* at ¶¶ 45-49.

III. THE SUBSTANTIVE ISSUES

A. **QUESTION 1: CAN THE CLAIMANTS RELY ON ONE OR MORE RULES OF INTERNATIONAL LAW 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 ETS?**

113. The Defendant contends that international airline carriers who will suffer direct financial injury from being forced to acquire EU carbon allowances (or reduce their flight operations) may not challenge this result under the specific treaty and bilateral obligations of the EU and its Member States. Rather, according to this argument, they must wait to seek redress for these tangible harms until their respective governments, who suffer only an intangible harm, seek an indirect remedy on their behalf through some combination, presumably, of diplomatic, arbitral and legal means. This contention, however, could leave the airlines without any remedy at all or, at a minimum, result in a vast waste of judicial resources as cases challenging the EU ETS proliferate as more and more States protest the unilateral EU action. Defendant's position also contravenes prior holdings of this Court on the issue of private treaty rights and customary international law, decisions of other tribunals who have studied the same issues and treaties, and positions taken by the UK government, the EU and other Member States in analogous cases involving aviation environmental regulations and airline fees and charges.
114. For these reasons, which we detail below, this Court should allow the case to proceed to be decided on the merits.

1. The Claimants are permitted to rely on customary international law to challenge the EU ETS

115. This Court has previously heard challenges by a private claimant to Union legislation precisely because it contravened customary international law. For example, in Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, [1998] E.C.R. I-3655, ¶¶ 46-47, a private party sought to annul a Council Regulation suspending trade concessions under the 1980 Cooperation Agreement between the Union and Yugoslavia by invoking the rules of customary international law. This Court held that “the rules of customary international law . . . are binding upon the Community institutions and form part of the Community legal order”. Accordingly, it found that a private claimant is entitled to

“challeng[e] the validity of a Community regulation” under customary international law. Similarly, in Case T-115/94, *Opel Austria GmbH v. Council*, [1997] E.C.R. II-39, ¶ 79, a private party sought to annul a Council regulation that withdrew certain tariff preferences guaranteed by an international agreement between the Union and a third state. The Court held that the fact that “certain international agreements are not directly applicable does not in any way affect the Community’s obligation to ensure that they are observed,” because customary international law independently requires the Union to adhere to its international commitments “in good faith.” *Id.* ¶¶ 10, 93 (“The principle of good faith, codified by Article 18 of the First Vienna Convention, is a rule of customary international law . . . which forms part of the Community legal order and on which any economic operator to whom an institution has given justified hopes may rely.”); *see also* Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, [1990] E.C.R. I-6019, ¶ 11 (interpreting a Union measure to “give it the greatest practical effect,” but “within the limits of international law”); Case C-308/06, *Intertanko*, [2008] E.C.R. I-4057, ¶ 51 (holding that “the validity of a measure of secondary Community legislation may be affected by the fact that it is incompatible with such rules of international law”).

116. Under this authority, the Claimants should be permitted to demonstrate to this Court that the extension of the EU ETS to international aviation violates customary international law or, in the least, that it must be *narrowly construed* in light of customary international law. Indeed, the CJEU always has recourse to rules of international law in the interpretation of Union law with a view toward avoiding placing the Union itself in a position of international responsibility.⁸⁸ This is the technique of harmonious or

⁸⁸ Every internationally wrongful act of a state entails the international responsibility of that state. The Permanent Court applied this principles in numerous cases, *see, e.g., Phosphates in Morocco (Italy v. Fr.)*, 1938 P.C.I.J. (Ser. A/B) No. 74, at 28 (Preliminary Objections of 14 June) (Appendix Tab 44), as has the International Court of Justice, *see, e.g., Corfu Channel (Gr. Brit. v. Alb.)*, 1949 I.C.J. 4, 23 (9 Apr.) (Appendix Tab 45), and various arbitral tribunals. *See, e.g., Rainbow Warrior (N.Z. v. Fr.)*, 20 R. Int’l Arb. Awards 217 (1990) (Appendix Tab 46). The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act, and it may not rely on the provisions of its internal law as justification for failure to comply with its obligations. *See Chorzów Factory (Ger. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9 (Jurisdiction), at 21 (26 July) (Appendix Tab 47) (“[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form”).

consistent interpretation in international law, a recognized method of analysis that in the United States goes by the name of the ‘Charming Betsy’ doctrine.⁸⁹

117. As will be discussed below, aviation law is rooted in customary international law. Some of the more common rules are enshrined in multilateral agreements that harmonize the field. And, the widespread adoption of common bilateral provisions in air services agreements after the adoption of the Chicago Convention provides further evidence of the creation of customary international law that were meant to benefit aircraft operators. The EU did not object to these rules as they were created, in many cases assented to be bound by them, and in other cases invoked them for their benefit.⁹⁰

2. Binding treaty obligations of the EU and Member States provide private claimants with directly-enforceable rights

118. IATA, for self-evident reasons, has a keen interest in insuring that all State governments—including the EU and its Member States—fully comply with the obligations assumed by entering into air services agreements with the home countries of IATA members. NACC has the same interest with respect to the EU-Canada Air Services Agreement. Below, the Airline Association Interveners demonstrate that 1) the Chicago Convention, and 2) air services agreements adopted under the auspices of that convention⁹¹, provide ample authority to invalidate the EU ETS.

⁸⁹ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (Appendix Tab 48); *see also* *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (Appendix Tab 49) (holding that various executive agreements with foreign countries that established military bases overseas trumped a conflicting later-in-time statute); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 251-53 (1984) (Appendix Tab 50) (holding that the Warsaw Convention’s liability limitations were still enforceable—despite a later conflicting statutory enactment—due in part to *Weinberger’s* restatement of Charming Betsy); *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 20-21 (1963) (Appendix Tab 51) (construing the National Labor Relations Act in order to avoid violating international law).

⁹⁰ The volume of bilateral treaties evincing consistent definitions and state practice further crystallize these rules as matters of customary international law. States exercise their sovereignty rights by entering into international agreements, and thus have the opportunity to exclude themselves from those rules through contrary State practice before new rules of customary international law are crystallized. *See* I. Brownlie, *Principles of Public International Law* 6-12 (6th ed. 2003) (Bundle Tab 50).

⁹¹ As considerations of space and time do not permit us to address each such air services agreement individually, the Airline Association Interveners submit that the legal analysis demonstrating that the EU is bound by the requirements of the EU-US Open Skies Agreement apply with equal force to all other air services agreements of the EU and its Member States. General principles of international law require respect for all international

119. The EU and its Member States are bound by their legal commitments to all states that have entered into air services agreements with them (including, but not limited to the United States and Canada). The passage of internal legislation—like the EU ETS—cannot void those obligations. This follows from a general rule of international law, codified in Article 46 of the Vienna Convention on the Law of Treaties: no state may rely upon its own internal law to justify a treaty violation.
120. This obligation translates into a hierarchy whereby international treaty law generally prevails over European Union law. *See generally* Case 181/73, *R. & V. Haegeman v. Belgian State*, [1974] E.C.R. 449 (ruling that an international agreement concluded by the EC (now the Union) under the EC Treaty (now TFEU) forms an “integral part of Community law”); J. Wouters et al., *The Europeanisation of International Law* 55-59 (2008) (Appendix Tab 53). So, when the EU signs a treaty, it is bound thereby both as a matter of international law and Union law, and this Court must review any secondary legislation that derogates from that contractual obligation.
121. There are three basic conditions that are placed on the CJEU’s judicial review of Union instruments in light of international treaties, all of which are satisfied here. *First*, the international legal obligation must be binding upon the Union *per se*. *See* Case C-344/04, *IATA and ELFAA*, [2006] E.C.R. I-403, ¶ 39. *Second*, “the Court can examine the validity of Community legislation in light of an international treaty only where [its] nature and broad logic do not preclude it.” *Id.*; Case C-308/06, *The Queen v. Sec’y of State for Transp., ex parte Intertanko*, [2008] E.C.R. I-4057, ¶ 45. In other words, the treaty at issue must “establish rules intended to apply directly and immediately to individuals and to confer upon them rights and freedoms capable of being relied upon against States.” Case C-308/06, *Intertanko, supra*, ¶ 64; *see also* Cases 21-24/72, *International Fruit Co. N.V. v. Produktschap voor Groenten en Fruit*, [1972] E.C.R. 1219, ¶ 8 (before the invalidity of Union law can be asserted based upon an international law, that law “must . . . be capable of conferring rights on citizens of the Community

(continued...)

commitments, and provide for an equality of rights among all sovereign states that have entered into such agreements with the EU and its Member States.

which they can invoke before the courts”)⁹². *And third*, a provision in an agreement must be regarded as being directly applicable when it “contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent [internal] measure.” Case 12/96, *Maryem Demirel v. Stadt Schwabisch*, [1987] E.C.R. 3719, ¶ 14.

122. The first condition is easy enough to determine by looking at the actual signatories to a particular Treaty or Convention. But the inquiry does not end there. While the EU’s signature to a Convention will always demonstrate its assent to be bound by that Treaty, the absence of a signature does not free it from the obligations contained therein. Where a treaty previously concluded by a Member State covers a subject matter that the Union has since incorporated into its own competence, CJEU case law establishes that the Union should be considered bound by the international agreement or—in the least—that the Agreement is a proper foil by which to review secondary Community legislation.
123. Generally speaking, “each time the community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules . . . the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries”. Case 22/70, *Commission v. Council* (ERTA), [1971] E.C.R. 263, ¶ 17.⁹³ That case involved the competence of the Union to enter into an international agreement regarding road transportation. In light of the Union’s express powers and objectives relating to transportation (then provided for pursuant to EC Treaty Article 3(f) (since repealed by the TFEU) & Title V (now Title VI of the TFEU)), and the concomitant duty of the Member States to “abstain from any measure that might

⁹² Compare Case C-308/06, *Intertanko*, *supra*, ¶¶ 64-65 (where an international treaty “does not establish rules intended to apply directly and immediately to individuals and confer upon them rights or freedoms capable of being relied upon against States, . . . [i]t follows that the nature and broad logic of [that treaty] prevent[s] the Court from being able to assess the validity of a Community measure in light of that [treaty]”) with Case 12/86, *Maryem Demirel v. Stadt Schwabisch*, [1987] E.C.R. 3719, ¶ 14 (“A provision in an agreement concluded by the Community with non-member countries must 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 [internal] measure.”).

⁹³ See generally C. Kotuby Jr., *External Competence of the European Community in the Hague Conference on Private International Law: Community Harmonization and Worldwide Unification*, 48 Neth. Int’l L. Rev. 1, 8-14 (2001) (Appendix Tab 54) (setting out the basic standard to determining when the Union has assumed exclusive external competence over a subject matter vis-à-vis its Member States).

jeopardize” those objectives, *id.* art. 10 (since repealed by the TFEU), the CJEU ruled that once internal legislation on road transportation “come[s] into being, the Community alone is in a position to assume and carry out contractual obligations toward third countries.” Case 22/70, *ERTA*, at ¶¶ 18-22. This implied competence applies to pre-existing international agreements as well. In Cases 21-24/72, *International Fruit Company, supra*, ¶¶ 14-18, the CJEU acknowledged that, while the Union never signed the GATT, because it “has assumed the functions inherent in the tariff and trade policy,” and “the member states [have] showed their wish to bind [the Community] by the obligations entered into under” the GATT, “the provisions of that agreement [now] have the effect of binding the Community”.

124. Even if a particular matter has not been completely subsumed within Union competence, Member State treaties relating to that matter may still “have consequences for the interpretation of” (a) other international instruments that may bind the Union and (b) other Union laws “which fall within the field” occupied by the treaty. Case C-308/06, *Intertanko, supra*, ¶ 52. In such cases, the CJEU “has jurisdiction to interpret [those international agreements] in order to forestall future differences in interpretation” between it and courts of the member states. Joined Cases C-300/98 and C-392/98, *Parfums Christian Dior SA v. TUK Consultancy BV, supra*, ¶ 35. “In view of the customary principle of good faith, which forms part of general international law, . . . it is incumbent upon the Court to interpret those [instruments] taking account of” the non-binding treaty. *See generally* J. Wouters et al., *The Europeanisation of International Law, supra*, at 78-79 & nn. 41-42 (Appendix Tab 53).
125. As for the second condition, courts worldwide have regularly found that treaties may give rise to individually enforceable rights. A non-party will have individually enforceable rights under a treaty if—according to the text of the treaty, its drafting history and other secondary sources—that non-party is within a class of individuals or entities that are intended beneficiaries of the treaty. *See* S. Kalantry, *The Intent to Benefit: Individually Enforceable Rights under International Treaties*, 44 *Stan. J. Int’l L.* 63 (2008) (Appendix Tab 55). This Court, in addition to considering the text of international agreements, has always been open to considering their object and purpose as well:

[I]n accordance with settled case-law, an international treaty must be interpreted by reference to the terms in which it is worded and in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the Law of Treaties and Article 31 of the Vienna Convention of 21 March 1986 on the Law of Treaties . . . , which express, to this effect, general customary international law, state that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

Case C-344/04, *IATA and ELFAA*, [2006] E.C.R. I-403, *supra*, ¶ 40 (emphasis added)⁹⁴.

126. This leads to the third element. If an international treaty, whose overall logic and purpose envisages third party rights, also “imposes . . . an unconditional rule” governing the treatment that the contracting states owe to private parties within their jurisdiction, such provisions “may be applied by a court and produce direct effect” for private claimants. Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferburg & Cie K.G.*, [1982] E.C.R. 3614, ¶¶ 26-27 (holding that the non-discrimination obligations of a Free Trade Agreement between the Union and Portugal affords private claimants the right to invoke its provisions in court). Thus, if the rule sought to be invoked can be interpreted and applied by a court without taking on a political function, it has direct effect. Case 12/96, *Maryem Demirel v. Stadt Schwabisch*, [1987] E.C.R. 3719, ¶ 14 (directly effective provisions “contain a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent [internal] measure”)⁹⁵. And, in such cases, “[t]he mere fact that the contracting parties have established a special institutional framework for consultations and negotiations inter se in relation to the implementation of the agreement is not in itself sufficient to exclude all judicial application of that agreement” to private claimants. Case 104/81, *Hauptzollamt Mainz*, *supra*, ¶ 20; *see also* Case C-469/93, *Amministrazione delle Finanze dello Stato v.*

⁹⁴ *See also* Cases 21-24/72, *International Fruit Company*, [1972] E.C.R. 1219, ¶ 20 (to determine whether a treaty confers rights on private claimants, the CJEU will consider “the spirit, the general scheme and the terms” of the treaty); Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferburg & Cie K.G.*, [1982] E.C.R. 3614, ¶ 18 (to determine whether a treaty confers rights on private claimants, the CJEU must interpret the agreement in light of its “subject-matter and purpose”); *cf.* J. Wouters et al., *The Europeanisation of International Law*, *supra*, at 92 (“in its recourse to rules of treaty interpretation the [CJEU] places great emphasis on the context and the object and purpose. . . . This enables the Court to come to very nuanced results.”).

⁹⁵ *See also* Case C-265/03, *Simutenkov v. Ministerio de Educacion y Cultura*, [2005] E.C.R. I-2579, ¶¶ 20-29 (treaty prohibition of discrimination on the basis of nationality in the workforce directly enforceable by private claimants); Case C-192/89, *S.Z. Sevince v. Staatssecretaris van Justitie*, [1990] E.C.R. I-3461, ¶¶ 14-24 (treaty provisions which give foreign workers free access to paid employment after a certain number of years of legal residence in a country can be invoked by private claimants).

Chiquita Italia SpA, [1995] E.C.R. I-4533, ¶ 36 (the fact that a treaty establishes a “special procedure for settling disputes” between the contracting states does not preclude private claimants from directly invoking its provisions in court).

127. Applying this analysis to the Chicago Convention and the various air services agreements potentially at issue, it should be readily apparent that the Claimants and Airline Association Intervenors are entitled to press their claims before this Court.

a. The Chicago Convention

128. The Defendant points out that the EU is not a signatory to the Chicago Convention and restates the general rule that the CJEU will not review a private party’s challenge to the validity of a Union instrument in light of an international treaty to which only a Member State, and not the Union itself, is bound. *See, e.g.*, Case C-308/06, *Intertanko, supra*, ¶ 50. But because the Convention covers a subject matter which the Union has progressively incorporated into its exclusive competence, it has assumed the international obligations previously exercised by the Member States and the Union may be considered bound by the international agreement.
129. In this case, Article 4.2(g) and title VI of the TFEU grants the Union competence over matters of air transport. This conclusion also naturally follows from the CJEU’s decision in 2002 effectively invalidating bilateral air services agreements between EU Member States and the US on the grounds, *inter alia*, that so-called nationality clauses within the agreements violated the principles of the single market. *See* Cases C-466-69/98, C-471-72/98, C-475-76/98; *Commission v. United Kingdom, Commission v. Denmark, Commission v. Sweden, Commission v. Finland, Commission v. Belgium, Commission v. Luxembourg, Commission v. Austria, Commission v. Germany*; [2002] E.C.R. I-9427 (applying the rule in *ERTA, supra* ¶ 123). As the Commission elaborated in that context, “[i]n subjects where Member States have agreed that it makes sense to adopt common rules within the Community, they must draw the consequences and work through its institutions when discussing such matters with foreign countries” *Communication from the Commission on the Consequences of the Court Judgments of 5 November 2002 for European Air Transport Policy*, at ¶ 33, COM (2002) 649 final (19 Nov. 2001)

(Appendix Tab 56). Even more to the point, the Union’s ratification of the Open Skies Agreement in 2007 should be accepted as conclusive evidence that it has exercised, and thus possesses, legal competence over matters relating to international aviation. Indeed, several provisions of the Chicago Convention that are relevant here are repeated *verbatim* in the Open Skies Agreement, *compare* Open Skies Agreement, arts. 7, 11 *with, respectively*, Chicago Convention, art. 11, 24, and other provisions of the latter expressly adopt provisions of the former. Open Skies Agreement, art. 3(4) (Bundle Tab 17). Accordingly, “the member states [have] showed their wish to bind [the Community] by the obligations entered into under” the Chicago Convention, such that “the provisions of that agreement [now] have the effect of binding the Community”. Cases 21-24/72, *International Fruit Company, supra*, ¶ 18.⁹⁶

130. Although the CJEU has never directly addressed the direct effect of the Chicago Convention for private claimants, the preamble to the Convention expressly envisages benefits to private carriers. *See* Chicago Convention, pmb. (aiming to ensure that “international air transport services . . . be established on the basis of equality of opportunity and operated soundly and economically”) (Bundle Tab 11); *see also* Case C-344/04, *IATA and ELFAA, supra*, ¶ 41-42 (citing the preamble of a treaty as evidence that it may be invoked by private claimants). And, “[t]he mere fact that the contracting parties have established a special institutional framework for consultations and negotiations inter se in relation to the implementation of the agreement”—in this instance, ICAO—is not in itself sufficient to exclude all judicial application of that agreement” to private claimants. Case 104/81, *Hauptzollamt Mainz, supra*, ¶ 20. Thus, it cannot be said that the “broad nature and logic” of the overall Convention precludes direct reliance by private claimants.

⁹⁶ And, in any event, even if the Union were itself not bound by the Chicago Convention, that Agreement would still have consequences for the interpretation of other international instruments that do bind the Union (like the EU-US Open Skies Agreement or EU-Canada Air Transport Agreement) and other Union laws which fall within the field occupied by the treaty (like the EU ETS). In such cases, the CJEU “has jurisdiction to interpret [those international agreements] in order to forestall future differences in interpretation” between it and courts of the member states. Joined Cases C-300/98 and C-392/98, *Parfums Christian Dior SA v. TUK Consultancy BV, supra*, ¶ 35. “In view of the customary principle of good faith, which forms part of general international law, . . . it is incumbent upon the Court to interpret those [instruments] taking account of” the non-binding treaty. *See generally* J. Wouters et al., *The Europeanisation of International Law, supra*, at 78-79 & nn. 41-42 (Appendix Tab 53).

131. From a textual standpoint, many of the specific provisions of the Chicago Convention that are cited in the Amended Statement of Grounds confer individual rights on aircraft operators, without dependence upon national, implementing legislation. Each of these articles provides a promise of legal certainty for airlines and aircraft operators, and—as noted in the Convention’s Preamble—are intended to contribute to the goal of ensuring that “international air transport services [are] established on the basis of equality of opportunity”.
132. The CJEU has deemed similar provisions in other international instruments to impart directly enforceable rights upon private claimants. For example, in Case 104/81, *Hauptzollamt Mainz, supra*, the CJEU considered Article 22(4) of the EEC-Yugoslavia Cooperation agreement to have direct effect, insofar as it set the “[c]ustoms duty on imports into the Community of wine and fresh grapes” and provided that the “Community shall apply the duties of the Common Customs Tariff to [certain] imports.” *Id.* at ¶ 4. “By its very wording,” the CJEU held, this provision imposed “an exact calculation of customs duties,” thereby “conferring rights upon which individuals may rely before national courts.” *Id.* at ¶¶ 33-34. The articles of the Chicago Convention that are cited in the Amended Statement of Grounds are similar. Much like an “exact calculation of customs duties,” Articles 11 and 12 of the Chicago Convention direct national courts to apply a specific choice of law, whether it be municipal law (*e.g.*, Article 11⁹⁷), or international law (*e.g.*, Article 12⁹⁸), when assessing the conduct of private airlines in a specific territory.
133. Another example is Case C-265/03, *Simutenkov v. Ministerio de Educacion y Cultura* [2005] E.C.R. I-2579. There, the CJEU deemed Article 23(1) of the EU-Russia Partnership Agreement to have direct effect, as it directed Member States to “ensure that the treatment accorded to Russian nationals legally employed in the territory of the

⁹⁷ Article 11 provides that “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.” (Bundle Tab 11).

⁹⁸ Article 12 provides, *inter alia*, that “[o]ver the high seas, the rules in force shall be those established under this Convention.” (Bundle Tab 11).

Member States shall be free from any discrimination based on nationality.” *Id.* at ¶ 3. Again, Articles 15⁹⁹ and 24¹⁰⁰ of the Chicago Convention are analogous, insofar as they expressly free private airlines from certain national regulatory measures based on their transit over or entry into or exit from a specified territory¹⁰¹. Indeed, the political institutions of the EU has urged the United States Supreme Court to find that treaties which unambiguously prescribe the conduct of national authorities toward private parties are directly enforceable. *See* Brief of the EU et al. as *Amicus Curiae* Supporting Respondents at 7, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (regarding the Vienna Consular Convention) (Appendix Tab 57).

134. Beyond the text of an international agreement, the CJEU also looks to whether its contracting partners provide direct effect before giving an agreement similar effect in European courts. *See, e.g.*, Case C-149/96, *Portugal v. Council*, [1999] E.C.R. I-8395, ¶¶ 42-47. This is an expression of comity and mutuality, as discussed more fully at *infra*, ¶¶ 179-94. Unsurprisingly, US courts have concluded on at least two occasions that many of these same provisions of the Chicago Convention are “self-executing,” and thus can be invoked by private claimants in a national court. *See British Caledonian Airways, Ltd. v. Bond*, 665 F.2d 1153, 1160 (D.C. Cir. 1981) (Appendix Tab 58) (holding that Articles 15 and 24, *inter alia*, of the Chicago Convention can be invoked by private claimants

⁹⁹ Article 15 provides, *inter alia*, that “[n]o 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.” (Bundle Tab 11).

¹⁰⁰ Article 24 provides that “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, lubricating oils, spare parts, regular equipment and aircraft stores 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.” (Bundle Tab 11).

¹⁰¹ These provisions of the Chicago Convention also stand in stark contrast to treaty provisions which the CJEU has deemed incapable of having direct effect. In Case 12/96, *Maryem Demirel v. Stadt Schwabisch*, *supra*, the CJEU held that Article 12 of the Association Agreement between the Union and Turkey did not have direct effect for individuals. That provision provided that “[t]he Contracting parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of securing freedom of movement for workers between them.” Unlike the treaties discussed above, *supra* ¶¶ 132-33, this provision does not set “exact” calculations or rules that apply to private conduct, nor does it expressly free private actors from certain regulatory treatment. Instead, it merely “serve to set out a programme” by which such calculations, rules and treatment will later be determined under national law, and is thus “not sufficiently precise and unconditional” to be directly effective. While certain provisions of the Chicago Convention may arguably fall within that category (*e.g.*, Articles 22 and 23), the provisions cited in the Amended Statement of Grounds do not.

because they “set forth rights or obligations of the contracting states and their flag carriers that require no legislation or administrative regulations to implement them”); *Aerovias Interamericanas de Panama, S. A. v. Bd. of County Comm’rs of Dade County*, 197 F. Supp. 230 (S.D. Fla. 1961) (Appendix Tab 59) (same, regarding “Article 15 *et seq.*”). For the CJEU to conclude otherwise would thus create an imbalanced situation in which carriers could contest violations of these provisions in the US, but not in the EU.

b. The Open Skies Agreement (and the EU-Canada Agreement and other EU bilateral agreements)

135. There is no dispute that the EU is party to, and bound by, the Open Skies Agreement. It is thus an international obligation that can be used to review an inconsistent Union law. *See* Case 181/73, *R. & V. Haegeman v. Belgian State, supra*. While neither the CJEU nor any other court has passed judgment on the direct-enforceability of the Open Skies Agreement, the preamble to that Agreement expressly envisages benefits to private carriers, so it cannot be said that the “broad nature and logic” of the overall convention precludes direct reliance by private claimants. *See, e.g.*, Open Skies Agreement, pmbl. (Bundle Tab 17) (“DESIRING to have all sectors of the air transport industry, including airline workers, benefit in a liberalized agreement”); *see also* Case C-344/04, *IATA and ELFAA, supra*, ¶¶ 41-42 (citing the preamble of a treaty to hold that that treaty may be invoked by private claimants).
136. In the High Court, the Claimants have alleged that the EU ETS violates Articles 3(4), 7, 11, and 15(3) of the Open Skies Agreement. Under the above cases and rationale, these provisions are capable of being invoked by private claimants, and thus provide a basis for the CJEU to review the EU ETS.
- Article 3(4) is the cornerstone of a “liberalized” environment for private airlines envisioned in the preamble. Indeed, it speaks directly to the rights guaranteed by contracting parties to private airlines: “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.” (*See* Bundle Tab 17). Accordingly, this provision “imposes on the contracting parties an unconditional

- rule” governing the treatment they owe to private parties within their jurisdiction, without the need for national legislation. *See* Case 104/81, *Hauptzollamt Mainz supra*, ¶¶ 26-27.
- Article 7 (*see* Bundle Tab 17) is substantively similar (indeed, almost identical) to the choice of law provision in Article 11 of the Chicago Convention. (Bundle Tab 11). This rule provides legal certainty for airlines operating across borders and—again in line with the preamble to the Agreement—is the sort of “self-executing” rule that should inure directly to the benefit of private claimants. *See supra* ¶ 132.
 - Article 11 (*see* Bundle Tab 17) is substantively similar to Article 24 of the Chicago Convention. (Bundle Tab 11). Like the latter, this provision is analogous to the national treatment rules in the EU-Russia Partnership Agreement, and is thereby directly effective for private claimants. *See supra* ¶ 133.
137. This same analysis applies to numerous other bilateral agreements, too. For instance, pertinent to the Airline Association Interveners, the EU-Canada Agreement, which in many respects is the equivalent of the Open Skies Agreement and contains a number of similar provisions, also exempts fuel from local customs duties, in the same way (and in similar language) as Article 24 of the Chicago Convention and Article 11 of the Open Skies Agreement. *See* EU-Canada Agreement, Article 8 (Bundle Tab 21). Article 5 of the EU-Canada Agreement sets clear limits on States’ exercise of their sovereign authority by making its rules and regulations mandatory for private airlines only “*upon entering or departing from or while within the territory of that State*”. *Id.* art. 5. Like Article 11 of the Chicago Convention, and Article 7 of the Open Skies Agreement, this rule is directly effective for private claimants.

c. The Kyoto Protocol

138. There is no dispute that the EU is party to, and bound by, the Kyoto Protocol. It too is thus an international obligation against which secondary Union legislation can be reviewed. *See* Case 181/73, *R. & V. Haegeman v. Belgian State, supra*. Contrary to the Defendant’s assertion, however, the Airline Association Interveners do not read the

Claimants' case as alleging a substantive violation of their rights under the Kyoto Protocol, and thus they need not demonstrate that the protocol envisioned (or does not preclude by its logic) private claims. Rather, the Claimants' argument under the protocol is jurisdictional in nature. The EU agreed that it “*shall* pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation . . . fuels, *working through the International Civil Aviation Organization.*” Kyoto Protocol, art. 2(2) (Bundle Tab 15) (emphasis added). This obligation not only dictates what to pursue (*i.e.*, the “limitation or reduction of emissions of greenhouse gases . . . from aviation”), but also how to pursue it (*i.e.*, by “working through” ICAO). As such, it expresses the intention of the parties to address the climate impacts of aviation, and stresses the need for multilateral cooperation in this respect. This, like other treaty commitments that the EU undertakes, it must be followed “in good faith.” Case T-115/94, *Opel Austria GmbH v. Council*, [1997] E.C.R. II-39, ¶¶ 10, 93-94; accord Rio Declaration, principle 12 (Appendix Tab 109) (“Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.”). See *infra* ¶¶ 217-22 (discussing the drafting history of Article 2(2) of the Kyoto Protocol and the incompatibility of the EU ETS with that provision).

3. Defendant and other Member State governments have repeatedly urged the exhaustion of local private remedies and thus the existence of private rights of action under the Chicago Convention and other, related air services agreements

139. The Defendant, as well as other Member States, have repeatedly urged that arbitrations initiated under the Chicago Convention and bilateral air services agreements be dismissed until the airlines and other private companies had first exhausted local remedies. By doing so, the Defendant and other Member States have acknowledged that local remedies exist for private claimants under the same treaties that they now say were never intended to benefit the Claimants. Taking this litigation position when it was favorable to their interest directly belies the contrary position that they take here, and further demonstrates that the Chicago Convention and various other bilateral air services agreements cited by the Claimants provide a private right of action that can be enforced in national courts, and this Court too.

a. Change of Gauge Arbitration

140. In 1978, Pan American World Airways proposed to introduce a service from San Francisco to Paris with a stop in London, using a Boeing 747 aircraft for the first leg of the trip and a Boeing 727 for the second leg of the trip. *Case Concerning the Air Services Agreement of March 27, 1946 (US v. Fr.)*, 54 I.L.R. 304 (9 Dec. 1978), at ¶ 2. (Appendix Tab 60). French aeronautical authorities informed Pan Am that the proposed change of aircraft type (“gauge”) in London was not authorized by the US-France Air Transport Services Agreement, *id.* at ¶ 3, because the Agreement required France’s consent before a change of gauge could occur in a third country on a flight en route to France. *Id.* at ¶ 14. Pan Am and the US disagreed with France’s interpretation of the Agreement, and arbitration was commenced¹⁰².
141. Before the arbitral tribunal, France argued that Pan Am was first required to exhaust all local remedies before the United States could invoke arbitration:

France contends that the requirement of the exhaustion of local remedies, which is firmly rooted in international practice, must apply to the situation . . . because [it] relates to a dispute over treaty rules which are specifically designed to protect the rights of private entities—the designated air carriers—rather than those of the United States as such.

Id. at ¶ 11. The US argued in response that the local remedies rule did not apply when a State claims either that its own rights have been infringed or that both its nationals’ and its own rights have been infringed. *Id.* at ¶ 12. The arbitral tribunal sided with the US and did not require the exhaustion of local remedies, finding a distinction between cases of diplomatic protection, which require the exhaustion of local remedies, and cases of direct injury, which do not. *Id.* at ¶ 30. The tribunal was satisfied that the American

¹⁰² The US commenced intergovernmental consultations and exchanges, which proved to be fruitless. *Id.* at ¶ 3. In the meantime, even as the issue remained unresolved, Pan Am commenced service with the change of gauge as planned. *Id.* at ¶ 4. By the third day of service, French authorities were refusing to allow passengers off the plane and sent the plane back to London. *Id.* The US immediately protested France’s actions against Pan Am and proposed an expedited arbitration. *Id.* at ¶ 5. When the French did not respond to the US’s request for arbitration, the US instituted two phases of retaliatory measures. *Id.* Before the first phase became effective, the US and France signed a *compromis* of arbitration. *Id.* at ¶ 9.

claim asserted a case of direct injury because the bilateral agreement specifically conferred rights to conduct air services on the States. *Id.* at ¶ 31.

b. Heathrow Arbitration

142. The Heathrow Arbitration, which arose under the Bermuda II Air Services Agreement between the United States and United Kingdom, followed a pattern similar to the Change of Gauge Arbitration. In 1983, the British Airports Authority (BAA) had announced very large increases in user charges for the following year. *US-UK Arbitration concerning Heathrow Airport User Charges, Award on the First Question*, 102 I.L.R. 215 (1992), at ch. 2, ¶ 3.9 (Appendix Tab 61)¹⁰³. After the US disapproved of the UK’s methodology for setting the prices, a series of diplomatic exchanges occurred. *Id.* at ch. 2, ¶¶ 3.10–4.15. Unable to resolve their dispute, in 1987, the US sought formal consultations under the Bermuda II agreement. *Id.* at ch. 2, ¶ 4.16. After these talks failed, the US said it would impose an offsetting charge on British airlines, and when the UK threatened an equal response, the parties agreed to submit the dispute to arbitration. *Id.* at ch. 2, ¶¶ 4.17–4.25.
143. The UK government argued to the Tribunal that the US’s claims were not justifiable because American carriers had not exhausted the remedies available to them under English law:

“The provisions of Bermuda 2 . . . do not bear directly on the financial interests of either the United States or the United Kingdom. Rather, they are aimed at the protection of each country’s designated carriers in their dealings with the other country’s airport authorities.”

Id. at ch. 3, ¶ 1.4. Specifically, the UK government contended that “U.S.-designated airlines in the U.K.” had available to them an action “pursuant to Section 30(3) of the Airports Act 1986 in order to discharge, or to facilitate the discharge of, the international

¹⁰³ This was not the first such controversy. In November 1979, the British Airports Authority (BAA) proposed very large increases in user charges for the 1980–1981 year. *Id.* at ch. 2, ¶ 3.1. In 1980, eighteen international airlines commenced proceedings in the High Court of Justice in London against the UK’s Secretary of State for Trade and the BAA. *Id.* Pan Am, the US designated carrier at the time, and Trans World Airlines (“TWA”) commenced a parallel proceeding. *Id.* The airlines settled the dispute, and the challenge to the 1980–1981 user charges never went to trial. *Id.* at ch. 2, ¶ 3.4.

obligations of the United Kingdom i.e. under Bermuda 2.” *Id.* at ch. 3, ¶ 3.1. The Tribunal eventually deemed this an “ineffective” remedy, and declined to hold the US to an exhaustion requirement. *Id.* at ch. 3, ¶ 6.37-46.

c. Hushkit Arbitration

144. With respect to the EU’s unilateral noise regulations banning “hushkits”, described more fully above, *see supra* ¶¶ 68-74, the US brought a case before ICAO for final settlement under Article 84 of the Chicago Convention. *See* Memorial of the United States Under Article 84 of the Convention on International Civil Aviation at 1, Hushkit Arbitration (Appendix Tab 19).
145. Like the French and UK governments in previous arbitrations, the EU sought to dismiss the arbitration before ICAO on the grounds that local remedies must first be exhausted, arguing that the US was bringing the action to protect US aircraft operators and manufacturers from the EU regulations, who had local remedies available to them. *See* Preliminary Objections presented by the Member States of the European Union ¶¶ 20-24, Hushkit Arbitration. According to the EU, those private parties could challenge the validity of the regulation under Article 234 of the EC Treaty (now Article 267 of the TFEU), or they could bring an action for damages to the General Court. *Id.* The EU argued that the American firms could invoke the EC Treaty (now TFEU) to have the CJEU determine the relationship between treaty obligations of Member States, including those under the Convention. *Id.* Indeed, while the arbitration was pending, a Dublin-based company in the business of installing hushkits filed a complaint in the English court challenging the hushkit regulations under the Chicago Convention, which was referred to the European Court of Justice to determine whether the regulations were incompatible with EU law and ICAO rules. A. Knorr & A. Arndt, *supra*, at 5–7 (Appendix Tab 18). The Advocate General concluded that the hushkit regulations were incompatible with EU law, *id.* at 7, and the ICAO tribunal did not require the exhaustion of local remedies because, much like in the Heathrow Arbitration, the US sought to protect not only its nationals but also its own legal position under the Chicago Convention.

146. Both the US-France Air Transport Services Agreement, and the Bermuda II Agreement, are “part of the relevant context” that emanated from the Chicago Convention—an “international régime for civil air services” that sharply curtails the regulations that a contracting state may impose “on the use of [its] airspace by foreign air carriers.” *Case Concerning the Air Services Agreement of March 27, 1946 (United States v. France)*, 54 I.L.R. 304 (9 Dec. 1978), at ¶ 66 (Appendix Tab 60); *see also US-UK Arbitration concerning Heathrow Airport User Charges, Award on the First Question*, 102 I.L.R. 215 (1992), at ch. 2, ¶¶ 1.1-1.7 (Appendix Tab 61) (noting that the Bermuda I and II Agreements were “signed against the background of the . . . Chicago Convention”). The position taken by the Defendant and other Member States in these three arbitrations thus constitutes persuasive authority on the reciprocal and directly enforceable private rights contained in the Chicago Convention, as well as other bilateral air services agreements that reiterate similar guarantees to private air carriers. *See supra* ¶ 134 (citing Case C-149/96, *Portugal v. Council*, [1999] E.C.R. I-8395, ¶¶ 42-47).

B. QUESTIONS 2 & 3: IS THE AMENDED DIRECTIVE INVALID, IF AND INsofar AS IT APPLIES THE ETS TO THOSE PARTS OF FLIGHTS WHICH TAKE PLACE OUTSIDE THE AIRSPACE OF EU MEMBER STATES, AS CONTRAVENING (1) ONE OR MORE PRINCIPLES OF CUSTOMARY INTERNATIONAL LAW; (2) ARTICLES 1, 11 AND/OR 12 OF THE CHICAGO CONVENTION; OR (3) ARTICLE 7 OF THE OPEN SKIES AGREEMENT?

1. The EU ETS contravenes customary international law that no state may validly subject the territory of another sovereign state to its authority

147. The concept of “sovereignty” is a fundamental concept at the very core of public international law. It is the right of a state to exercise its legislative, executive and judicial functions to the exclusion of all other states within its territory¹⁰⁴.

148. A State’s “territory,” at least with respect to aviation activities, has been consistently defined by treaty, and thereby reflects an emerging norm of customary international law. The EU-US Open Skies Agreement and various other bilateral commitments give the EU sovereignty over “the land area, internal waters and territorial sea in which the Treaty

¹⁰⁴ For the discussion of this principle that predates the Chicago System, *see The Island of Palmas Case (U.S. v. Netherlands)*, 2 R. Int’l Arb. Awards 829, 838 (Perm. Ct. Arb. 1928) (Appendix Tab 62).

establishing the European Community is applied”—no more, and no less. Open Skies Agreement, art. 1(9) (Bundle Tab 17); *see also* EU-Australia Bilateral Agreement on Certain Aspects of Air Services, art. 1(c) (7 June 2008) (Bundle Tab 19); EU-Malaysia Bilateral Agreement on Certain Aspects of Air Services, art. 1(e) (30 Dec. 2006) (Appendix Tab 29); EU-Singapore Bilateral Agreement on Certain Aspects of Air Services, art. 1(d) (6 Sept. 2006) (Appendix Tab 30).

149. The concept of territorial sovereignty over activities occurring on the land area of each state and in the airspace above each state serves as the foundation for virtually all rules of international aviation law. B. Cheng, *The Law of International Air Transport* 3 (1962) (Appendix Tab 107). Article 1 of the Chicago Convention, reflecting customary international law, provides that “each state has complete and exclusive sovereignty over the airspace above its territory.” Article 11 of the same Convention then sets clear limits on States’ exercise of their sovereign authority by giving making its rules and regulations mandatory for private airlines only “*upon entering or departing from or while within the territory of that State*”. (Bundle Tab 11). This limitation on sovereign rights is reflected in the EU’s bilateral arrangements as well. *See, e.g.*, EU-US Open Skies Agreement, art. 7 (Bundle Tab 17); EU-Canada Air Transport Agreement, art. 5 (Bundle Tab 21).¹⁰⁵
150. Under these treaties, conventions and international law more generally, it does not matter whether an aircraft operated in the airspace of another sovereign nation (or over the high seas) *before* entering its airspace, or whether it will operate in the airspace of another sovereign nation (or over the high seas) *after* it departs—while it is in the territory of a sovereign state, all aircraft are subject to that State’s jurisdiction. But, just as

¹⁰⁵ EU Member States, too, have acceded to the same basic principles in their bilateral aviation agreements. The following, incomplete list is merely exemplary of the consistent articulation of these principles. *See, e.g.*, Austria-Australia Bilateral Agreement on Certain Aspects of Air Services, arts. 3 & 6; Austria-Singapore Bilateral Agreement on Certain Aspects of Air Services, art. 2; Germany-Singapore Bilateral Agreement on Certain Aspects of Air Services, art. 2; Germany-Korea Bilateral Agreement on Certain Aspects of Air Services, art. 2; Finland-Singapore Bilateral Agreement on Certain Aspects of Air Services, arts. 2 & 7; France-Maldives Bilateral Agreement on Certain Aspects of Air Services, arts. 2 & 6; Greece-Australia Bilateral Agreement on Certain Aspects of Air Services, art. 3; Italy-Australia Bilateral Agreement on Certain Aspects of Air Services, art. 3; Lithuania-India Bilateral Agreement on Certain Aspects of Air Services, arts. 2 & 8; Netherlands-Nepal Bilateral Agreement on Certain Aspects of Air Services, arts. 3 & 12; Netherlands-Argentina Bilateral Agreement on Certain Aspects of Air Services, arts. 2 & 12; Portugal-Brazil Bilateral Agreement on Certain Aspects of Air Services, arts. 2 & 5; Sweden-China Bilateral Agreement on Certain Aspects of Air Services, arts. 2 & 5.

importantly, it is equally clear that a State does not have jurisdiction to impose its rules for the conduct of a non-national aircraft *before* it reaches the airspace of the State or *after* it leaves that airspace.

151. ICAO’s Decision rejecting the U.S.’ attempt to impose extraterritorial security provisions on foreign carriers is instructive on this point. In 1999, the United States issued a Notice of Proposed Rulemaking (NPRM) that would have required foreign air carriers to adhere to security measures that were “identical” to U.S. security measures when departing other States bound for the United States¹⁰⁶. The ICAO Secretary General concluded that the proposed rule would “fall outside the framework of the Chicago System”¹⁰⁷. Upon review, the ICAO Council agreed, deciding that the proposed NPRM infringed on the right of each State to “legislate and to enforce their legislation within their sovereign territories”¹⁰⁸.
152. As it is written, the EU ETS seeks to regulate conduct that occurs beyond the EU’s “territory”. It requires emissions reporting and the purchase of emissions allowances for all “flights which depart from or arrive in an aerodrome situated in the territory of a Member State,” irrespective of their nationality or their state of origination or destination outside of Europe. *See* 2003 Directive, Annex I (as amended by the 2008 and 2009 Directives). It does not limit those obligations to emissions which occur in EU airspace. Rather, it subjects airlines to liability for emissions that occur over the entirety of their international flight path, including any portion over foreign territory. *See* 2003 Directive, art. 3(a) (as amended by the 2008 Directive) (“‘attributed aviation emissions’ means emissions from all flights falling within the aviation activities listed in Annex I which depart from a Member State or arrive in the Member State from a third country”). Absent a supportable justification, *see infra* ¶¶ 164-206, this sort of extraterritorial

¹⁰⁶ *See* ICAO Secretary General, *Ramifications of the Notice of Proposed Rulemaking (NPRM) related to Security Provisions to be Applied to Foreign Air Carriers by the United States* (ICAO Council, 156th Session, Working Paper No. 11030, 1999) (Appendix Tab 63).

¹⁰⁷ *Id.* at ¶¶ 3.8, 4.1.

¹⁰⁸ ICAO Council, *Summary of Decisions*, C-DEC 156/1, ¶ 5(d) (8 Feb. 1999), *revised* (18 Feb. 1999) (Appendix Tab 64).

legislation trespasses upon the sovereignty rights of other states, and violates customary international law.

153. The mere fact that a unilateral measure implicates important environmental concerns, however well-intentioned, is an insufficient basis to abrogate the usual, accepted and binding limitations on territorial sovereignty. A clear example of such a binding limitation can be found in the EU-Canada Agreement. The EU-Canada Agreement was signed on 17 December 2009, following a mandate to the Council from the European Commission granted in October 2007. The EU-Canada Agreement reflects the fundamental principle of customary international law as set out in Article 1 of the Chicago Convention that each state has complete and exclusive sovereignty over the airspace above its territory. Article 18(2) of the EU-Canada Agreement stipulates that “each Party within its own sovereign jurisdiction shall have the right to take and apply the appropriate measures to address the environmental impacts of air transport.” (Bundle Tab 21). Paragraph 20 of the Memorandum of Consultation accompanying the EU-Canada Agreement and signed by the respective Canadian and European Commission Heads of Delegation defines “sovereign jurisdiction” as referred to in Article 18(2) as including “jurisdiction over the territory of a party.” “Territory” is defined in the EU-Canada Agreement as expressly including the air space above the land areas, internal waters and territorial sea of Canada and the EC Member States. Article 18(2) therefore builds on the manner in which, as has been referred to, the EU habitually defines its territory in its agreements *see supra* ¶ 148; it is quite apparent that the intent of Article 18 of the EU-Canada Agreement was that, whilst the parties should both have freedom to enact environmental measures, it was not contemplated or countenanced that such measures should be applied beyond the sovereign jurisdiction of the other contracting party. Article 18(2) is generally reflective of customary international legal sovereignty and Article 1 of the Chicago Convention. Whilst it is drafted in terms which are more express than other air services agreements, such principles are nevertheless in play in relation to such agreements, including the Open Skies Agreement. The timing of the EU-Canada Agreement is also relevant and instructive to consider: the negotiators who worked on the EU-Canada Agreement were keen to give precision to the notion of “territory” and “sovereign jurisdiction” in the context of environmental measures because

the agreement was being negotiated at the same time that the EU ETS directive was being promulgated. Article 18 of the EU-Canada Agreement was, in particular, the subject of extensive negotiation between the parties and the final text therefore reflects both parties' recognition of the scope and extent of any environmental measures the EU might implement in relation to aviation. Article 18(3) actually requires that a party considering environmental measures evaluate any possible adverse effects on the exercise of rights in the Agreement and, in the event that such measures are adopted, take appropriate steps to mitigate any such adverse effects. The potential impact of the EU-ETS was clearly in the minds of the parties when the EU-Canada Agreement was negotiated. In light of the Article 18 provisions, it is arguable whether EU ETS breaches the EU-Canada Agreement. Whilst the Court has not been asked to rule on any possible breach of the EU-Canada Agreement as part of this preliminary reference, the significance of the issue is that, as noted above, the EU-Canada Agreement contains provisions relating to territoriality and sovereignty which are generally reflective of the same principles of sovereignty which apply in relation to the Open Skies Agreement. To the extent that EU ETS breaches the EU-Canada Agreement in this respect, it also implicitly constitutes a breach of the Open Skies Agreement.

154. As a putatively “environmental measure,” the EU ETS thus threatens “adverse effects on the exercise of rights contained in [numerous bilateral] Agreement[s].” Open Skies Agreement, art. 15(2) (Bundle Tab 17); EU-Canada Air Services Agreement, art. 18(3) (Bundle Tab 21). As a result, the EU is obligated by Treaty to “take appropriate steps to mitigate [those] adverse effects.” *Id.* Consistent with these agreements, the CJEU should invalidate the EU ETS, at least to the extent it purports to require emissions reporting or the acquisition of EU carbon allowances for any portion of international flights by non-EU carriers over the foreign “territory”. *See infra* ¶¶ 207-210.

2. The EU ETS contravenes customary international law that no state may validly subject the high seas to its exclusive sovereignty

155. The definition of a State’s “territory” with respect to international air transport excludes the “high seas”. *See supra* ¶ 148. This accords with customary international law, which defines the “High Seas” as “all parts of the sea that are *not* included in the territorial sea

or in the internal waters of a State”. Geneva Convention on the High Seas art. 1, 29 Apr. 1958, 450 U.N.T.S. 82 (Bundle Tab 12) (emphasis added). As a matter of “international custom” that binds the Union, the high seas remain open to all nations. *See* Case C-286/90, *Peter Michael Poulsen and Diva Navigation Corp.*, [1992] E.C.R. I-6019, ¶¶ 9-10 (acknowledging that the Geneva Convention on the High Seas “codif[ies] general rules recognized by international custom” which “the Community must respect . . . in the exercise of its powers”). This includes the “[f]reedom to fly over the high seas.”¹⁰⁹ *Id.* Accordingly, “no State may validly purport to subject any part of [the high seas or its airspace] to its sovereignty.” *Id.*; *see also Fisheries Jurisdiction Case (UK v. Iceland)*, 1974 I.C.J. 3, 22 (25 July) (Bundle Tab 26) (concluding that the preamble of the Geneva Convention on the High Seas reflected customary international law when it stated that: “The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty.”)¹¹⁰

156. The regulation of activity in or over the high seas is accomplished through international treaties like the Geneva Convention on the High Seas, international judicial bodies like the International Tribunal for the Law of the Sea, or other regulatory authorities that derive their authority from international agreements, such as ICAO. Indeed, in its founding instrument, ICAO was entrusted with creating “the rules in force” “over the high seas.” Chicago Convention, art. 12 (Bundle Tab 11). The EU has expressly assented to following all “aviation environmental standards adopted by [ICAO]” that appear as annexes to that Convention. *See* Open Skies Agreement, art. 15(3) (Bundle Tab 17). This, too, accords with the aforementioned Geneva Convention (to which the EU is a signatory). It requires “[a]ll States [to] cooperate with the competent international organizations in taking measures for the prevention of pollution of the seas

¹⁰⁹ According to Articles 87-89 of the UN Convention on the Law of the Sea, 10 Dec. 1982, 1833 U.N.T.S. 3 (Bundle Tab 14), which have themselves been recognized as reflective of customary international law, *see* R.R. Lowe & A.V. Churchill, *The Law of the Sea* 204 (3d ed. 1999) (Bundle Tab 53), the exclusion of the high seas from any sovereign nation’s reach extends to the airspace above them.

¹¹⁰ The *only* exception to this principle is the “quasi-territorial” jurisdiction of states over aircraft and ships of its nationality (and personal jurisdiction over its nationals wherever they may be located). L. Oppenheim, 1 *International Law* 458 (9th ed. 1992) (Appendix Tab 67).

157. The EU ETS contravenes these obligations in two important ways. *First*, it subjects the high seas to its legislative jurisdiction. As it is written, the EU ETS requires emissions reporting and the purchase of emissions allowances for all “flights which depart from or arrive in an aerodrome situated in the territory of a Member State,” irrespective of their nationality or their state of origination or destination outside of Europe, *see* 2003 Directive, Annex I (as amended by the 2008 and 2009 Directives), and it does not limit those obligations to emissions which occur over EU “territory.” Rather, it subjects airlines to liability for emissions that occur over the entirety of their international flight path, including the portion over the high seas. *See* 2003 Directive, art. 3(a) (as amended by the 2008 Directive). By virtue of this broad scope of coverage, the EU “purport[s] to subject [the high seas] to its sovereignty,” and deprives foreign airlines of their unfettered “[f]reedom to fly over the high seas.” Geneva Convention on the High Seas, art. 2 (Bundle Tab 12).
158. On this point, Case C-286/90, *Peter Michael Poulsen and Diva Navigation Corp.*, *supra*, is instructive. In that case, a Panamanian ship owner and its Danish crew were prosecuted under a Union measure, and in their defense challenged the validity of that measure in light of international law. The measure in question purported to regulate the catching of certain fish species within the EU’s territorial waters, but also sought to cover the possession, transportation and storage of fish within the EU that were caught on the high seas by vessels from non-EU member states. The CJEU held that the regulation in question “may not be applied to a vessel on the high seas registered in a non-member country, since in principle such a vessel is there governed only by the law of its flag,” nor could it be applied to such ships as they enjoyed their right of free passage through the EU’s territorial waters. *Id.* at ¶¶ 21-29.
159. *Secondly*, the EU ETS supersedes ICAO’s given authority to regulate the airspace over the high seas, which the EU has agreed to follow. *See* Geneva Convention on the High Seas, art. 25(2) (Bundle Tab 12); Open Skies Agreement, art. 15(3) (Bundle Tab 17). In

the field of “environmental measures” and the “pollution of the seas or airspace above,” ICAO has already promulgated regulations on the spraying of chemical agents over the high seas, and has concluded that “it would not be legitimate for States to individually establish a charge including environmental costs related to territories they have no sovereignty over”—such as the high seas. ICAO Secretariat, *Legal Framework and Policy Issues Related to the Use of Emissions Related Levies*, at ¶ 3.6.5 (CAEP, 6th Meeting, Working Paper No. 24, 2004) (Appendix Tab 36). The EU cannot derogate from its commitments under the international law and unilaterally override these pronouncements.

160. The EU has itself sought to uphold the preference for multilateral—as opposed to unilateral—measures in a tandem of GATT/WTO disputes that involved environmental issues. In the *Tuna-Dolphin* case, Panel Report, US—Restrictions on Imports of Tuna, 30 I.L.M. 1594 (16 June 1991) (Appendix Tab 68), Mexico challenged US restrictions on imports of tuna, irrespective of where they were caught, if they were caught with technology that did not meet certain dolphin-protection standards. Mexico argued that the Article XX exception to the general principles of free trade for the protection of the environment could only be interpreted to the conservation of resources located within the territory of the importing state. The European Union intervened and supported Mexico’s arguments. The panel ultimately held that, “in view of the fact that dolphins roam the waters of . . . the high seas,” States wishing to protect them should proceed through “international cooperative arrangements,” and not through unilateral action. *Id.* at 1620. If “each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate,” all “multilateral frameworks” would cease to operate with any efficacy, and the only businesses with legal security would be those from states with “identical international regulations.” Later, in the *Shrimp/Turtle* case, the EU again spoke in opposition to a similar measure because it “believe[d] that international cooperation and negotiation must be preferred over unilateral action, particularly in the area of the protection of the environment. The European Communities emphasize[d] that international cooperation by its nature is a *process* and not a result. Such cooperation is necessarily based on reciprocal efforts to resolve a common concern in the mutual interest.” Appellate Body Report, US—Import

Prohibition of Certain Shrimp and Shrimp Products, ¶ 54, WT/DS58/AB/RW (22 Oct. 2001) (emphasis added) [hereinafter *Shrimp/Turtle 2001 Appellate Body Report*] (Appendix Tab 69). Contrary to its prior positions, and this adjudicated outcome, the EU now seeks through its ETS not just to restrict what comes into the EU but what takes place *outside* of the EU, and does so without multilateral consensus – despite having agreed that it “shall” resolve the issue through ICAO¹¹¹.

161. The Defendant’s untenable position in this case—that it may regulate conduct over the high seas or territory of a third state consistent with customary international law—is also flatly inconsistent with its prior position in an analogous controversy over smoking restrictions imposed, unilaterally, by the United States on foreign aircraft departing from or arriving at US airports. In 1994, the US Congress debated the Airliner Cabin Air Quality Act, H.R. 4495, 103rd Cong. (2d Sess. 1994). That Act prevented foreign air carriers from allowing smoking on aircraft serving the U.S., even during the portions of the flight that occurred over the high seas or foreign airspace. Similar legislation was earlier proposed to ban gambling on international flights, which appeared as section 205 of the FAA Authorization Act of 1994 and became known as the “Gorton Amendment.” The justification for the extraterritorial application of this law by its chief sponsor bears remarkable resemblance to the EU’s justification here, that is, avoiding “market distortion” and ensuring “non-discrimination.” Thus, when U.S. Senator Slade Gorton (R-Wash.) introduced the amendment, he stated that he intended to close a loophole in the law that prohibited American carriers from the same activities, but which did not apply to foreign carriers. See B.C. O’Donnell, *Gambling To Be Competitive: The*

¹¹¹ While the WTO Appellate Body ultimately permitted measures regulating extraterritorial conduct in the *Shrimp/Turtle* case, it still acknowledged in that decision that “the protection and conservation of highly migratory [natural resources] . . . demands concerted and cooperative efforts on the part of the many countries whose waters are traversed [by that resource]. . . . [T]he need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations. Clearly, . . . a multilateral approach is strongly preferred [to unilateral measures].” *Shrimp/Turtle 2001 Appellate Body Report*, at ¶ 124 (emphases added). This particular decision permitted national import regulations designed to protect migratory sea turtles from shrimping nets in the waters of third states, only after finding that there was a “sufficient nexus” between the harm felt in the regulating state and the extraterritorial natural resources to be regulated. Appellate Body Report, US—Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 133, WT/DS58/AB/R (12 Oct. 1998) (Appendix Tab 70). See generally C.M. Vazquez, *Trade Sanctions and Human Rights—Past, Present and Future*, 6 J. Int’l Econ. L. 797, 815-16 (2003) (Appendix Tab 71) (harmonizing the *Tuna/Dolphin* and *Shrimp/Turtle* cases). As shown elsewhere in these Observations, see *infra* ¶¶ 168-94, the Amended Directive fails this standard.

Gorton Amendment and International Law, 16 Dick. J. Int'l L. 254, 257-260 (1997-1998) (Appendix Tab 72).

162. In anticipation of the Air Cabin Quality Act, the Aviation Assembly—a group of civil aviation attachés in Washington, D.C., including the embassies of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the European Commission—sent a letter of protest to the United States' Department of State. The group claimed the law sought improperly to extend the jurisdiction of the United States to conduct aboard foreign aircraft operating outside the United States' airspace—which it deemed “a trespass on [their respective] sovereign[ies]”:

“The Governments are of the view that elementary principles of international law are contravened by the applications of U.S. laws and regulations to conduct, such as smoking, aboard an aircraft registered in their nations when operated outside U.S. territory, whether or not the flight of the aircraft originated in or was destined to the U.S.

Letter from Civil Aviation Attaches to the U.S. Dep't of State (8 Aug. 1994), at 1 (Appendix Tab 73). The protest also stated, in language equally applicable here:

For several decades it has been a central principle of the international civil aviation regime that one state cannot unilaterally impose its views on the manner in which airline flights of another state's aircraft are conducted when outside the territory of the first state. The Governments deem HR 4495 to be an unprecedented intrusion on that principle and inconsistent with international law governing the jurisdiction of states over civil aviation matters.

Id. The letter also called the U.S. Government's attention to the “beneficial, multilateral approach of ICAO” as the better alternative to unilateral measures. *Id.* at 2.¹¹²

¹¹² A similar letter was sent with respect to the Gorton Amendment, as well. See Letter from Civil Aviation Attachés to the U.S. Dep't of State (19 Aug. 1994) (Appendix Tab 74).

163. An industry group—dubbed the “International Airline Coalition on the Rule of Law”—whose members included several European airlines, took the same position, and presented it to the U.S. Congress:

International law is crystal clear that when an aircraft flying an international route is outside a particular state’s territorial jurisdiction only the state of the aircraft’s nationality can [regulate its activities]. . . . Moreover, international law is equally clear that one state may not dictate rules regarding such matters that are applicable when aircraft are within the jurisdiction of another state. Only the latter state is competent to so regulate and it may do so irrespective of the nationality of the aircraft. [The Act] would abrogate these bedrock principles of international air law. . . .

These are not novel principles. Rather, they reflect customary international law on the subject and are consistent with every relevant or analogous convention, treaty and international agreement to which the United States is a party. That one state may not impose its views on the manner in which airline flights of another state’s aircraft are conducted when outside the territory of the first state is an established rule that risks being forgotten or ignored. . . .

The bill is a unilateral assertion of U.S. jurisdiction over otherwise lawful conduct on non-U.S.-registered aircraft flying in international airspace over the high seas, in the airspace of third countries, and, indeed, in the airspace of the aircraft’s own country of registration. This intrusion on the rights and the sovereignty of the state of the aircraft’s nationality and the state of the aircraft’s physical presence has caused considerable alarm in the international aviation community, at least among non-U.S. airlines and their home countries. . . . The coalition airlines do not wish to see the current civilized aviation regime deteriorate further into a free-for-all system whereby the various nations to which they fly feel free to prescribe rules affecting the type and quality of passenger service that can be offered outside the territory of those nations.

Airliner Cabin Air Quality Act of 1995: Hearing on H.R. 969 before the Subcomm. on Aviation of the H. Comm. on Transp. & Infrastructure, 104th Cong. (1996) (statement of William Karas on behalf of the International Airline Coalition on the Rule of Law) (Appendix Tab 75).

3. The presumed “effects” of international aviation on climate change do not justify EU regulation beyond its territory

164. Sovereignty is nearly absolute within a State’s “territory.” The extension of legislative jurisdiction beyond that territory, however, must always be justified under international law.¹¹³ It must be reasonable in light of the facts and circumstances of the case,¹¹⁴ the best gauge of which is whether there is some “clear connecting factor,” or factual “linking point . . . of a kind whose use is *approved by international law*, between the legislating state and the conduct that it seeks to regulate [abroad].” V. Lowe, *Jurisdiction in International Law* 342 (M.D. Evans ed., 2d ed. 2006) (emphasis added) (Appendix Tab 78)¹¹⁵. Moreover, not only must the factual link between the conduct and the internal effect exist, but it must also evince an *intent* on behalf of the actor to cause the effect. *See United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (Appendix Tab

¹¹³ There are several common exceptions to this rule—none applicable here. For instance, international law generally allows the extraterritorial extension of jurisdiction to occur when necessary to control a State’s border, to control the acts of its nationals abroad, to deter acts designed to injure its process of government, and to punish universally recognized crimes (such as genocide). H.G. Maier, *Jurisdictional Rules in Customary International Law, in Extraterritorial Jurisdiction in Theory and Practice* 64, 64-69 (K.M. Meessen ed., 1996) [hereinafter Maier] (Appendix Tab 76).

¹¹⁴ *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States § 403 & cmt. a (1987) (Appendix Tab 77) (“a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is *unreasonable*. . . . The principle that an exercise of jurisdiction . . . is nonetheless unlawful if it is *unreasonable* is established in United States law, and has emerged as a principle of international law as well. . . . Legislatures and administrative agencies, in the United States and in other states, have generally refrained from exercising jurisdiction where it would be *unreasonable* to do so, and courts have usually interpreted general language in a statute as not intended to exercise or authorize the exercise of jurisdiction in circumstances where application of the statute would be *unreasonable*.” (emphases added)); Maier, *supra*, at 72 (“Th[e] reasonableness requirement reflects the reciprocal interest of all nations in the world community in dealing reasonable with each other. . . . [I]nternational law reprehends unreasonable acts”); *The Extraterritorial Application of National Laws* 46-47 (D. Lange and G. Born, eds., 1987) (Appendix Tab 80) (“[I]ncreasing support has developed for a jurisdictional rule of reason that would limit unreasonable exercises of national jurisdiction” and thereby “limit[] applications of national laws that unduly interfere with foreign interests and international trade”).

¹¹⁵ *See also* I. Brownlie, *Principles of Public International Law* 309 (6th ed. 2003) (Bundle Tab 50) (requiring a “*substantial and bona fide connection* between subject matter and the source of the jurisdiction” (emphasis added)); F. Francioni, *Extraterritorial Application of Environmental Law, in Extraterritorial Jurisdiction in Theory and Practice* 126, 132 (K.M. Meessen ed., 1996) (Appendix Tab 81) (an assertion of extraterritorial jurisdiction over subjects who have no significant relation to the forum, except transitory presence or an indirect effect, may well constitute a breach of an international due process standard).

79) (extraterritorial application of law permissible where foreign conduct was “intended to affect [the United States] and did affect [it]”)¹¹⁶.

165. Various Member States have espoused an even more limited scope of legislative jurisdiction than the international rule. The UK¹¹⁷ and France¹¹⁸ have both advocated that *any* subjugation of extraterritorial conduct by a State contravenes customary international law or, in the least, that any “effects” that justify jurisdiction must be truly substantial.¹¹⁹ This Court, too, has held that the Union’s jurisdiction extends only to situations where a foreign party’s conduct is “carried on directly within” the EU’s territory, Case 48/69, *Imperial Chemical Industries Ltd. v Commission* (“Dyestuffs”), [1972] E.C.R. 619, ¶¶ 125-129, precisely because “the Community’s jurisdiction to apply its . . . rules to [foreign] conduct is covered by the *territoriality principle as universally recognized in public international law*.” Cases C-89/85 et al., *A. Ahlstrom Osakeyhtio v. Commission* (“Woodpulp”), [1988] E.C.R. 5193, ¶ 17 (emphasis added); *see also* Aluminum Imports from Eastern Europe, 1985 O.J. (L 92) 1 (the “Commission will not

¹¹⁶ The competing view that States have virtually unfettered discretion to extend their legislative jurisdiction extraterritorially unless and until international law says otherwise, *see SS “Lotus” (Fr. v. Turk.)* 1927 P.C.I.J. (ser. A) No. 10 (7 Sept.) (Bundle Tab 25), is generally regarded as “no longer [good law] at the present day.” *Fisheries Case (UK v. Norway)*, 1951 I.C.J. 116, at ¶ 10 (18 Dec.) (Bundle Tab 26); *see also Arrest Warrant of April 11, 2000 (Dem. Rep. of the Congo v. Belgium)*, 2002 I.C.J. 3, at ¶ 50 (14 Feb.) (Appendix Tab 82).

¹¹⁷ British Aide-Memoire to the Commission of the European Communities, Case 48/69, *Imperial Chemical Industries, Ltd. v. Commission* (Dyestuffs case), [1972] E.C.R. 619 (Appendix Tab 83) (asserting that the “effects doctrine” goes beyond the limits imposed by accepted principles of international law, and becomes even more open to objection when, on the basis of alleged “effects” within the state claiming jurisdiction of the conduct of foreign corporations abroad, such corporations are subject to penal sanctions. The territorial principle justifies proceedings against foreign companies only in respect of conduct which consists of some activity, in whole or in part, in the territory of the state claiming jurisdiction).

¹¹⁸ Brief for the Republic of France as *Amicus Curiae* in Support of Respondents at 10, *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) (Appendix Tab 85) (advocating that the “presumption against extraterritoriality” is “based in international law,” and that extraterritorial jurisdiction should be restricted even when there is a mere risk of interference with a foreign nation’s ability to regulate its own affairs).

¹¹⁹ *See* Brief of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Respondents at 33-34, *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) (Appendix Tab 86) (advocating that “customary international law” should guide courts in interpreting the territorial scope of legislation, and espousing “accepted international standards” for the “assertion of jurisdiction” which include “(i) substantial conduct within a state’s territory; and (ii) conduct outside the state’s territory that is intended to, or does have, a *substantial* effect inside its territory. . . . [T]hose standards include and are limited by the caveat that *a state must not exercise jurisdiction where to do so would be ‘unreasonable,’* which circumstances include the likelihood of conflict with regulation by another state.” (emphasis added)).

exercise extraterritorial jurisdiction if doing so would ‘adversely affect important interests of a non-member State’’).

166. As indicated in the Schedule, after awkwardly contending that the “effects” doctrine has little relevance to this case because criminal penalties are not involved¹²⁰, the Defendant then accepts that: “Extra-territorial acts can *only* lawfully be the object of jurisdiction if certain general principles are observed: (i) that there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction, (ii) that the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed, (iii) that a principle based on elements of accommodation, mutuality and proportionality should be applied . . .” (Schedule paragraph 85) (emphasis added).
167. The EU cannot satisfy any—much less all—of these three requirements, and hence its legislation should be invalidated.

a. The EU cannot prove a substantial and bona fide connection between its jurisdiction and the extension of the ETS to global aviation

168. The purpose of a law is typically determined “by an analysis of the recitals in its preamble . . . [in relation to] the whole of the text.” Case C-157/96, *The Queen v. Ministry of Agriculture, Fisheries & Food, ex parte National Farmers’ Union et al.*, [1998] E.C.R. 2211, ¶ 45. The preamble to 2003 Directive expressly states that the EU ETS is aimed—at least in part—at “reduc[ing] anthropogenic greenhouse gas emissions under the Kyoto Protocol”. *Id.*, ¶ 5. Later, the same recital purports to limit the regulation to satisfy “the commitments of the European Community and its Member States” under the Kyoto Protocol, although the 2008 Directive, which includes aviation within Community’s GHG scheme, speaks in broader terms of aiming to address overall, global climate change within that Agreement.

¹²⁰ This assertion is far from obvious. The threatened imposition of severe sanctions—ranging from monetary fines (of €100 per tonne) to outright bans on operators—for airlines who do not comply with the EU scheme surely increases the burden on the EU to justify the extraterritorial reach of its legislation. According, for instance, to the UK Director of Civil Aviation, “[a]ircraft operators who do not comply will face penalties – including, ultimately, being banned from flying into the EU.” Open letter from the UK Director of Civil Aviation, A33 at 729 (Appendix Tab 87).

169. To the extent that the EU ETS is based on the Kyoto Protocol, and to the extent the Kyoto Protocol deals with aviation, only the emissions from *domestic* flights are included in any national targets for reduction in overall emissions (Bundle tab 31, at I-45). International flights are simply excluded from these targets. Europe has never been under any obligation whatsoever under the Protocol to reduce emissions from flights occurring outside its airspace (even if operated by EU carriers), so there is *no* plausible connection between this putative objective and the EU’s chosen course of action.
170. The “whole of the text” of the EU ETS, *see* Case C-157/96, *National Farmers’ Union*, at ¶ 45, confirms that the broader objective of the EU ETS is not merely the satisfaction of the Union’s obligations under the Kyoto Protocol, or any self-imposed GHG target established by the Union institutions, but to establish Europe’s lawmaking primacy in dealing with global climate change. *See* 2008 Directive, Annex I (as amended by the 2009 Directive); 2003 Directive, art. 3(a) (as amended by the 2008 Directive). The preamble to the 2008 Directive demonstrates this far-reaching purpose:
- “The Kyoto Protocol . . . requires *developed countries* to pursue the limitation or reduction of emissions of greenhouse gases.” 2008 Directive, pmb. at recital (8) (emphasis added);
 - As a result, the “European Parliament and . . . the Council [have] provided for the Community to identify and undertake specific actions to reduce greenhouse gas *emissions from aviation*, [and] propose action to reduce *the climate change impact of international air transport*.” *Id.* at recital (10) (emphases added);
 - “Aviation has an impact on the *global climate* through releases of” GHGs. *Id.* at Recital (19) (emphasis added. As a result, “[a]viation contributes to the *overall climate change impact of human activities*” (*id.* at recital (22) (emphasis added)), so “the objective of this Directive is to reduce the *climate change impact attributable to aviation* by including emissions from aviation activities.” *Id.* at recital (14) (emphasis added);
 - Hence, the EU ETS is intended to be a “*comprehensive package*” for “reducing the climate impact of aviation.” *Id.* at recital (12) (emphasis added).
171. Here, the EU lacks a *bona fide* basis to regulate this extraterritorial conduct. The resolution of this dispute is analogous to the Tribunal’s decision in the first *Tuna-Dolphin* case, *see* Panel Report, US—Restrictions on Imports of Tuna, 30 I.L.M. 1594 (16 June 1991) (Appendix Tab 68). The Panel in that case held that “[a] country can effectively

control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is *under its [territorial] jurisdiction.*” *Id.* at 1621 (emphasis added); *see also* Rio Declaration, principle 12 (Appendix Tab 109) (“[u]nilateral actions to deal with environmental challenges outside the jurisdiction of [a] country should be avoided”). The reason for this rule is the very lack of a “clear connecting factor” between the extraterritorial conduct and alleged domestic harm. *See V. Lowe, supra*, at 342 (Appendix Tab 78). This is confirmed by the decision of a subsequent WTO panel, which held that U.S. import regulations designed to encourage turtle-safe shrimping practices in the territorial waters of third states was permissible because the United States was able to point to a migrant turtle population in *its* territorial waters that was being decimated by foreign shrimping nets, thus demonstrating a “sufficient nexus” between specific harms felt in the regulating state and the extraterritorial resource. Appellate Body Report, US—Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 133, WT/DS58/AB/R (12 Oct. 1998) (Appendix Tab 70).

172. In this case, however, the EU is not uniquely affected by climate change, any more than the U.S. had a unique interest in the decimation of worldwide dolphin populations in the high seas. Indeed, “production” of dolphin-laden tuna in Mexican waters destined for the United State market is very much like the “consumption” of jet fuel over the U.S. mainland by an aircraft en route to London Heathrow. In both cases, the State seeking to extend its regulation over another State’s territory lacks a “sufficient nexus” or “clear connecting factor” to the object of the conservation. The ostensibly harmful effect of the extraterritorial conduct is not directly and substantially felt in the regulating state, but, if anywhere, in the State where the conduct occurred (*i.e.*, in Mexican waters, or U.S. airspace). And, what is more, airlines have no more intent to change the European climate by their emissions over North America than Mexican fisherman in Mexican waters have to deplete the U.S. oceans of dolphins. In both cases, no theory “approved by international law,” *id.*, can link the conduct to the alleged harm in the regulating state, and justify the extraterritorial regulation.

b. The EU ETS flouts the principle of non-intervention in domestic affairs and territories of foreign nations

173. The Defendant suggests that the EU ETS does not infringe the sovereignty of other States because they remain free to impose duplicative emissions-reduction systems on those flights. Taking a hypothetical example of a flight from Montreal to Paris, then, it appears that the Defendant is arguing that it is entirely appropriate if: (a) the EU compelled the airline providing those services to buy emissions credits based on its consumption of fuel consumed from origin to destination; and (b) Canada required the airline to pay a tax that would be used to mitigate the damages caused by emissions from the same flight. This reasoning fails for both practical and legal reasons.
174. As a practical matter, the EU's adoption of an emissions trading system that is based on the consumption of fuel for the entire international route will inhibit other sovereign State's opportunities to regulate emissions—or, at least, to adopt fair and sensible regulations. Few States will require international airlines serving their citizens to pay twice for the same emissions. Even fewer States will assent to an international regime that overlaps with the EU regime to which its carriers are subject. So, while the EU ETS is an attempt to force other nations to deal with international aviation emissions (albeit by the particular means prescribed by Europe), the likely result of this unilateral action is to delay if not entirely thwart the development of a single global system, or systems other States who might choose to achieve emission reductions in their own airspace through an entirely different mechanism (such as a carbon tax).¹²¹
175. As a purely legal matter, overlapping (and potentially conflicting) national regimes to control emissions on international flights would be contrary to the requirements of customary international law which limits each State to restrict its environmental regulations to its own territory. *See supra* ¶¶ 147-63. That is precisely why the Rio Declaration obligates State to “cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth's eco system.” Rio Declaration,

¹²¹ Indeed, other national emissions trading schemes exist, though most of them operate on a voluntary basis. *See, e.g.*, ICAO, *Report on Voluntary Emissions Trading for Aviation* ¶¶ 2.1-2.7 (2007) (Appendix Tab 26). The EU ETS threatens to eviscerate and undercut each of these schemes without so much as a nod toward mutuality.

principle 7 (Appendix Tab 109); *accord id.*, principle 12 (“Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.”). And, such overlapping regimes to control emissions on international flights would ignore the delegation of exclusive responsibility for the emission of greenhouse gasses on international flights to ICAO, and demonstrate indifference at best (and hostility at worst) to the overwhelming vote of ICAO delegates to urge against unilateral or regional approaches to this global problem. (Bundle Tab 31, Appendix A, at ¶ 8 (urging “States to refrain from unilateral environmental measures that would adversely affect the orderly development of international civil aviation”).)

176. As noted above, *see supra* ¶ 170, the preamble to the 2008 Directive demonstrates its far-reaching purpose “to reduce greenhouse gas emissions from aviation, [and] propose action to reduce the climate change impact of international air transport” on a global level. 2008 Directive, pmb. at recital (10) (emphasis added); *see also id.*, recitals (14), (19) and (22). The EU ETS pretends to be a “comprehensive package” for “reducing the climate impact of aviation.” *Id.* at recital (12) (emphases added). By its own terms, then, it makes a mockery of any meaningful notion of non-intervention in the domestic affairs of foreign states and, if anything, constitutes a “misuse of powers” by the Union institutions for an illegitimate regulatory intent.¹²² While the TFEU empowers the Union to “preserv[e], protect[] and improv[e] the quality of the environment,” art. 191, it does not authorize the EU to act as a global environmental regulator.
177. As discussed more fully below, *see infra* ¶¶ 211-23, these overly broad objectives flout “the rules of customary international law concerning . . . treaty relations” which are “binding upon the Community institutions and form part of the Community legal order.”

¹²² This problem is further underlined by the fact that the EU ETS is inappropriate for the attainment of its ostensible objective, that is, those envisioned in the EU ETS. As explained below, *see infra* ¶¶ 187-206, the EU ETS is not calibrated to add incentives for fuel efficiency in aviation, address air traffic control problems or inefficient aircraft from the developing world, or encourage greater international cooperation on the issue of aviation GHGs. It is better calibrated, rather, to raise general revenue from foreign airlines and thereby demand that those airlines contribute to “the limitation or reduction of emissions of greenhouse gases” established by the Kyoto Protocol. (2008 Directive, pmb. at recital (8)). This fact “suggest[s] that [the stated objectives] w[ere] not the objective[s] that the [Community institutions] w[ere] trying to attain” by way of the legislation. J. Raitio, *The Principle of Legal Certainty in EC Law* 152-53 (2003) (Appendix Tab 84). An illegitimate objective of Union legislation can and should lead to nullification of that legislation by the CJEU. *See, e.g.*, Case 105/75, *Franco Giuffrida v. Council*, [1976] E.C.R. 1395.

Case C-104/81, *A. Racke GmbH & Co.*, *supra*, ¶¶ 46-47. The Vienna Convention on the Law of Treaties (which binds the Union as customary international law, *see* Case C-344/04, *IATA and ELFAA*, *supra*, ¶ 40) limits the “Territorial Scope of Treaties” *See* Vienna Convention on the Law of Treaties art. 19, 23 May 1969, 1155 U.N.T.S. 331 (Appendix Tab 52). This territorial limitation means that “[a] treaty does not create either obligations or rights for a third State without its consent.” *Id.*, art. 34. While the EU may endeavor to meet its own emissions targets in line with its Kyoto commitments, it cannot—consistent with the principle of non-intervention—force non-parties like the United States to do the same. Nor can it force countries who have ratified the Protocol to abide by its chosen means to implement it. *See infra* ¶¶ 211-14. But by including extra-European flights within the Union GHG scheme, and justifying that inclusion by broadly seeking to “reduce the climate change impact attributable to aviation,” this is exactly what the Union aims to do.

178. It is no surprise then that IATA and various States have vociferously objected to the “unilateral, compulsory application [of the EU ETS] to foreign carriers . . . without the consent of their governments.” Silverberg Letter (8 Oct. 2008) (Bundle Tab 48); *see also* Dimas Letter (26 Aug. 2005) (Appendix Tab 39) (noting the likelihood of “serious political reactions” to the scheme “reminiscent of the hushkit dispute in the late 1990s”); *see supra* ¶¶ 108-11. These protests poignantly demonstrate the interference caused by the EU ETS on other States’ territorial sovereignty.

c. The EU ETS disregards the principles of mutuality and accommodation

179. As the United States Supreme Court stated over a century ago, “international law is founded upon mutuality.” *Hilton v Guyot*, 159 U.S. 113, 228 (1895) (Appendix Tab 88). As an equitable corollary to the principle of non-intervention, the principle of mutuality is “essential to ensure fundamental fairness” and “serves to inculcate the values of law and order” when nationals of one State are swept within the legislative jurisdiction of another. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 284-85 (1990) (Brennan, J., dissenting) (Appendix Tab 89). It dictates that, for one State to expect foreign nationals to abide by its laws and regulatory prerogatives, it must itself respect the protection that

international law and its own legal order would grant to those foreign subjects as if it were their own. *Id.* In this way, the principle of mutuality also speaks to the reciprocal respect of obligations between states. “By respecting the rights” of other States and its subjects affected by a far-reaching regulatory scheme, the regulating state in turn “encourage[s] other nations to respect [its own] rights,” and that of its citizens, to be free from similar legislative overreach. *Id.*; see also *Hilton*, 159 U.S. at 165 (comity “contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong”). Anything less, to be sure, “invites anarchy” at the international level. *Id.* (citing *Olmstead v. United States*, 277 U.S. 438, 485 (1928)).

180. The principle of accommodation speaks to similar principles. According to Lauterpecht, it reflects the implicit understanding among sovereigns that, where there is a gap of jurisdiction to govern a particular matter that is of critical interest to several states, those States have a duty under international law *to come to an agreement* that enables them to regulate the matter as may be necessary. H. Lauterpecht, *International Law: General Works* 174 & n. 6 (1977). This is especially true for environmental matters. See Rio Declaration, principle 12 (Appendix Tab 109) (“Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.”).
181. Taken together, then, the principles of mutuality and accommodation require the EU to narrowly circumscribe the application of its emissions regime to foreign airlines only to the extent that international law—which is reflected in its own internal legal order—allows it. These principles also require the EU to approach the sovereign rights of other states with a degree of mutual respect and “having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.” *Hilton*, 159 U.S. at 164 (Appendix Tab 88).
182. Far from an acknowledgement of these laudable precepts, the expansion of the EU ETS to international aviation runs afoul of each of them, and the very one-sided nature of the scheme renders it illegitimate under international law. The undisputed fact is that

extending the EU ETS to international aviation involves the establishment of a non-mutual trading system in which other States' carriers are forced to acquire EU carbon allowances on a European-administered exchange, or simply not fly to the EU at all. The Amended Directive effectively ignores the existence of other national emissions trading schemes. *See, e.g.*, ICAO, Report on Voluntary Emissions Trading for Aviation ¶¶ 2.1-2.7 (2007) (Appendix Tab 29). The EU ETS threatens to eviscerate and undercut each of these schemes without so much as a nod toward mutuality.

183. As the factual chronology set out in the Amended Detailed Statement of Grounds demonstrates, the EU ETS was applied to international aviation in defiance of objections at ICAO and without true consultation between the EU and affected States. The EU simply declared that ICAO had “failed to act,” and then proceeded “to act” on its own. This action, too, has been met with vociferous protests from the EU’s treaty partners, and their constituents who will be adversely affected by this regulatory regime. The EU has defended this decision as consistent with its international obligations to consult with and accommodate other States in two ways: *first*, by pointing to the “equivalence” provision in the Directive; and *second*, by arguing that it was necessary to include other States’ carriers in the EU scheme without their governments’ consent in order to avoid a “distortion of competition” and ensure “non-discrimination.” Both defenses are unavailing.
184. The ‘equivalence’ provision supposedly ensures that the EU will take into account other States’ interests. Of course, that the EU thought it necessary to include a special provision on how to accommodate conflicting foreign regimes is an indication that the EU was aware that its scheme might infringe on the sovereignty of its aviation partners. But in any case, the “equivalence” provision does not provide for a true accommodation of other States’ interests as much as a political relief valve for the European Commission. It provides:

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 measure, 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 into account of equivalent measures to avoid double regulation could constitute a step toward 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.

2008 Directive, pmbl. at recital (17).

185. However the Defendant wishes to characterize it, this provision does more to subvert the principles of mutuality and accommodation than it does to uphold them. As demonstrated by the text, the Commission alone decides whether other States' efforts to deal with global climate change are "equivalent" to the EU's and if so, whether to amend the ETS and how. By, once again, deeming itself the arbiter of other State's environmental measures, the EU turns mutuality and accommodation—and thus the entire premise of international aviation regulation—on its head.
186. The EU's "non-discrimination" argument is equally inapt. Throughout the deliberations leading to the 2008 Directive, the EU's decision making seemed premised almost entirely on avoiding "severe distortions in competition" between EU carriers and foreign rivals if foreign operators *were not covered*. (*Delft Report*, Bundle tab 43). The study preceding the legislation only considered legislative "variants that are 'non-discriminatory' with regard to participants" to ensure that "European and non-European airline companies are treated equally, . . . [and] that all commercial aircraft operators flying a particular route are covered by the scheme, irrespective of nationality . . ." (*Id.* at 759-60; *see also id.* at 894 ("Of particular concern in this respect would be effects on competition between EU and non-EU carriers.")) While avoiding the "distortion of competition" and ensuring "non-discrimination" might be persuasive justification for EU extraterritorial legislation in the context of *protecting foreign airlines*, where the legislation is aimed at *protecting the EU's own airlines* from competitive disadvantage, the argument loses much of its

force. While this might be a legitimate internal aim of the EU, it does not provide any basis to justify the legislation from an international legal perspective.

187. The Directive not only fails to protect foreign airlines, but in some ways it actually places them at a competitive disadvantage in the new aviation marketplace. Because airlines will be given free allowances based on their flight activity, which encompasses both wholly intra-European operations as well as international flights, EU airlines will naturally get the majority of those allowances. Thus, they start with a much bigger stockpile of allowances than do non-EU carriers competing on the same international routes.
188. The Directive also creates a “distortion of competition” *among* foreign carriers, depending on where they are based. In practical effect, the airlines most adversely affected by the EU ETS are those who fly the longest distances to EU airports on a non-stop basis from their home countries. For example, for a non-stop flight from Singapore to London, Singapore Airlines must purchase allowances on the entirety of the trip, the expressed logic being that the EU did not want to disadvantage the likes of British Airways on its competing flight. This ignores, however, that Singapore Airlines competes with other non-EU airlines who offer connecting service to London from airport hubs that are much closer to the destination, such as Jet Airways (over Mumbai) and Qatar Airways (over Doha). According to the ICAO carbon calculator¹²³, for a single premium economy passenger flying roundtrip on the route, Singapore must have allowances sufficient to offset 2963 kgs of CO₂ whereas Jet Airways will need only 1983 kgs worth, and Qatar Airways just 1559 kgs.
189. This is not a mere hypothetical concern. Soon after the EU proposal began to advance, the Korea Times reported that the South Korean government, research institutes and airlines had formed a task force to deal with the problem warning that, “The regulation is expected to deal a serious blow to Korea’s airline industry”. The article notes that Korean carriers’ emissions were likely to grow beyond the allowance provided by the EU scheme and that “Korean airlines have more of a disadvantage, as they have to fly farther

¹²³ Available at <http://www2.icao.int/en/carbonoffset/Pages/default.aspx>

distances than carriers of countries nearer Europe, consequently burning more fuel.” K. Rahn, *Korea Faces EU Emission Rule*, *Korea Times*, 8 Feb. 2007, available at 2007 WLNR 2571034 (Appendix Tab 90).

190. Additionally, there must be an agreed way to reconcile the binding legal *requirement* of equal treatment of aircraft operators laid down in Article 11 of the Chicago Convention with the UNFCCC guiding *principle* of “Common But Differentiated Responsibilities” (“**CBDR**”) for developing countries. The two are not completely incompatible, but they cannot be reconciled by simply ignoring the former in favor of the latter, as the EU ETS does by importing wholesale the “clean development mechanism” and its loosely monitored system of credits. Special treatment of developing countries as embodied by “CBDR” is not the norm under the Chicago Convention, which instead aims at “securing the *highest practicable degree of uniformity* in regulations, standards, procedures and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.” Chicago Convention, Art. 37 (Bundle Tab 11). Thus, while ICAO has traditionally recognized and accommodated states that have difficulty complying with standards or recommended practices, this is normally done with careful oversight and through technical assistance, limited financial support, and differentiated timelines for implementation of measures.
191. While the notion of requiring foreign airlines to purchase carbon allowances at an EU auction for emissions occurring in their own airspace seems suspect from the start, the particular provisions respecting use of revenues in the ETS make it completely indefensible. The lack of spending controls in the scheme (and in the implementing regulations) belies any claim that the proceeds will benefit the environment by accelerating investment in measures to mitigate aviation’s impact on the climate. To begin with, the legislation leaves it entirely in the hands of “Member States [to] determine the use of revenues generated from the auctioning of allowances.” 2009 Directive, Amendments ¶ 11. Of those revenues, the Amended Directive states only that 50% of such revenues “*should*” be directed toward environmental purposes; the remainder presumably can be used to balance the State’s budget. 2009 Directive, pmb. at recital (18). Indeed, that appears to be contemplated by the UK, whose government

freely admits that the monies raised will be placed in the “consolidated fund.” See *Implementing Aviation EU-ETS in the UK: A Government Consultation* (“It is worth remembering that revenue from auctioning of allowances accrues to the auctioning state. In the UK the government does not ring fence revenue, so revenues from ETS auctions is paid into the consolidated fund.”)¹²⁴; *Consultation on the Second Stage Transposition of EU Directive 2008/101/EC To Include Aviation in the EU Emissions Trading System*, A26 at 694 (“Auctioning revenues are fed into the Government’s consolidated fund”) (Appendix Tab 91).

192. Even as to those funds ostensibly earmarked for the environment, the legislation is, at most, an indirect mechanism to raise money, at the expense of foreign firms, to subsidize *Europe’s* emission-reduction commitments and environmental goals. Permissible environmental uses and expenditures include “measures to avoid deforestation and facilitate adaptation in developing countries, and to address social aspects such as possible increases in electricity prices in lower and middle income households.” 2009 Directive, pmbl. at recital (18). While laudable in and of themselves, these objectives do nothing to address GHG emissions from international aviation. The legislation would also permit *all* the earmarked revenues to be retained in the States’ coffers so long as “the equivalent in financial value of these revenues” is spent on “environmental” purposes. *Id.*, ¶ 11. The Administering States can fulfil this ‘spending’ obligation “if they have in place and implement fiscal or financial support policies, including in particular in developing countries, or domestic regulatory policies, which *leverage* financial support . . . and which have a value equivalent to at least 50 % of the revenues generated from the auctioning of allowances”. *Id.* The net result is that the UK government could permissibly use the ETS to collect €1 billion from a hundred foreign airlines, place all of the revenues in the Consolidated Fund, spend half of it for uses unrelated to climate change, and then simply sequester the other half to underwrite *loans* to third-parties working on the environment.

¹²⁴ Available at http://www.youtube.com/watch?v=sr4oO0tXfeQ&feature=Playlist&p=3C6FC7FB9EB6DBCA&playnext_from=PL&index=0&playnext=1

193. The airline industry’s support of market-based initiatives to reduce GHG emissions does not extend to such ill-conceived measures. In a recent statement to the ICAO Assembly regarding the “Development of a Global Framework for Addressing Civil Aviation CO2 Emissions,” the industry conditioned its support of such initiatives so long as “[a]ny eventual revenues . . . [are] clearly earmarked for aviation and environmental purposes. Such revenues should be prioritized for re-investment in additional measures to further improve the emissions profile of aviation, for instance by supporting the development of and deployment of more fuel-efficient aircraft, engines, infrastructure, low carbon sustainable alternative fuels and investment in [efficient air traffic management] technologies.”¹²⁵ The revenue generated from the EU ETS comes nowhere close to supporting these objectives.
194. And finally, to put an even finer point on it, the EU has chartered this unilateral course with its global emissions trading scheme after itself, for instance, (a) objected to unilateral U.S. regulations seeking to protect migratory marine species, *see supra* ¶ 160, and (b) objected to unilateral U.S. regulations banning gambling and smoking on international flights en route to the U.S., *see supra* ¶¶ 161-63. These actions, by any measure, demonstrate complete disregard for any semblance of mutuality and accommodation.

d. The EU ETS does not respect the principle of proportionality

195. The principle of proportionality requires that the means employed in legislation be suitable for achieving the desired objective, that they are necessary and that they do not go beyond what is necessary to achieve that objective. *See, e.g.,* Case 84/94, *United Kingdom v. Council (Working Time Directive)*, [1996] E.C.R. 5755, ¶ 57. By virtue of the first requirement of proportionality, then, Article 296 TFEU “require[es] a relationship to exist between the objective pursued and the methods used.” J. Schwarze, *European Administrative Law* 864-65 (1992) (Appendix Tab 92). If there is, then this Court must then consider whether the means chosen goes beyond what is necessary to

¹²⁵ *See Development of a Global Framework, supra* note 3, ¶ 4.1.

achieve that objective. *See, e.g.*, Case 84/94, *United Kingdom v. Council (Working Time Directive)*, [1996] E.C.R. 5755, ¶ 57.

(1) The ETS is an unsuitable means to achieve the EU's stated objectives, and, in many ways, undercuts them

196. The EU has not, and cannot, establish a substantial link between the imposition of a global ETS on foreign airlines and the protection of the environment from the presumed impact of their aviation activities. Aircraft emissions are directly correlated with fuel usage, and fuel represents nearly 30% of an airline's operating costs. In an intensely competitive industry, and with fuel prices rising, airlines hardly need greater financial incentive than exists today to reduce their emissions. Legislation like the EU ETS that taxes, charges or levies additional fees on airlines certainly does not improve fuel efficiency (unless, of course, the legislation is aimed at reducing the frequency of flights, which the Directive does not profess and which would raise a host of legal obstacles under the EU's bilateral agreement)s.¹²⁶
197. The Directive also does nothing to ensure any of the funds will be used to mitigate aviation's GHGs—in Europe or globally. Half the revenue generated is permitted to go into each Member State's general and consolidated fund, to be used just as any other State income. As to those monies destined ostensibly for "environmental" improvements, the legislation allows a wide assortment of uses with only the vaguest guidelines. *See supra* ¶¶ 191-92. It is hard to see how it is anything other than a mechanism to raise foreign funds to subsidize European social priorities that stray far afield from managing aviation GHGs.
198. As briefly noted above, *see supra* ¶¶ 87-89, rather than lowering worldwide GHG's, the EU ETS actually creates market distortions that greatly undermine the scheme's objectives. *First*, by diverting revenues from the airlines, the EU will, if anything,

¹²⁶ *See, e.g.*, Open Skies Agreement, art. 3(4) (Bundle Tab 17) ("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."); EU-Canada Air Services Agreement, art. 13(2) (same) (Bundle Tab 21).

actually slow down the replenishment of their fleets with more fuel-efficient and GHG-friendly airplanes. *Second*, because airplanes are highly mobile assets, the older and less-fuel efficient ones will simply be moved from EU service to other markets—such as the fast growing intra-Asian and transpacific markets. Indeed, the EU’s own consultant’s report anticipates that “[t]he response of non-EU-based carriers might be to deploy their newest and cleanest aircraft on routes falling under the scheme, diverting older aircraft to other routes.” (*Delft Report*, Bundle tab 43, at 895). *Third*, because airlines will only need allowances for those flights using EU airports, long flights to Europe could be routinely (and, in the long-run, inefficiently) routed through Middle Eastern and other nearby, non-EU hubs. For example, a flight from Singapore to London might connect in Dubai so the airline only has the allowance requirement on the second leg.¹²⁷ The EU ETS, then, actually creates perverse incentives for inefficiencies that could *increase* overall GHGs.

199. The Commission has relied on the “precautionary” principle to supply the necessary linkage between its chosen means and its stated objective (*Delft Report*, Bundle tab 43, at 25). Under this principle, “[w]here . . . threats of serious or irreversible damage [exist], lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Rio Declaration, principle 15 (Appendix Tab 109). The Union points to this codification of the precautionary principle as evidence that “it has . . . become a full-fledged and general principle of international law.” *Communication from the Commission on the Precautionary Principle*, at 11, COM (2000) 1 (2 Feb. 2000) (Appendix Tab 93).¹²⁸
200. But “reliance on the precautionary principle is no excuse for derogating from the . . . principle of . . . proportionality”. *Id.* at 18. The precautionary principle is relevant *only* in

¹²⁷ Contrary to the Commission’s Impact Assessment—which seeks to minimize this possibility—connections on long-haul flights to Europe will make more and more economic sense for foreign airlines as the EU ETS is expanded to cover their activities. For example, for Quantas to fly from Sydney to London and stop in Dubai, the connection amounts only to a 0.031% increase in total mileage, but exempts 68.6% of the total trip from the EU ETS. See *Non-Stop v. Connecting Comparison Charts* (Appendix Tab 65).

¹²⁸ That same international instrument, however, also states the customary international law principle that “[u]nilateral actions to deal with environmental challenges outside the jurisdiction of [a] country should be avoided” and that “[e]nvironmental measures addressing trans-boundary or global environmental problems should, as far as possible, be based on an international consensus.” Rio Declaration, principle 12 (Appendix Tab 109).

determining the existence of a potential risk as a matter of scientific fact, and whether to act on it, and not in determining what measures are needed to address the perceived risk. While accepting *arguendo* that GHG emissions from aviation contribute to climate change, and that some regulatory action is justified as a precaution to combat that risk, a legislative response that merely generates revenue without any conceivable effect on the perceived risk cannot be justified as a “proportionate” and “precautionary” response. Nor does it override international law’s reluctance to authorize unilateral and extraterritorial action, or supply the “objective factors of law or fact” that must serve as a “linking point” between the extraterritorial conduct and the uncertain harm it may cause.

(2) Imposing a local trading scheme on a worldwide industry was a disproportionate response to ICAO’s alleged “inaction”

201. In structuring the ETS as it did, the EU rejected less controversial means and went farther than it needed to, effectively prompting the current dispute. The European Commission considered more measured schemes that included operators only from those countries that had ratified the Kyoto Protocol, or covering only emissions in EU airspace (*see Delft Report*, Bundle tab 43, at 60-61). Indeed, it considered no fewer than six alternative “scenarios” with regard to geographic scope. Similar limitations that reflect the territorial limitations of a State’s jurisdiction are not novel in aviation agreements. For instance, Article 4(2) of the EU-Malaysia Bilateral Agreement on Certain Aspects of Air Services (30 Dec. 2006) (Appendix Tab 29) allows the EU to impose “taxes, levies, duties, fees or charges on fuel” used by Malaysian aircraft, but only those that operate *between a point in the territory of that Member State and another point in the territory of that Member State or in the territory of another Member State.*” (emphasis added). With the 2008 Directive, Europe ultimately preferred and adopted the alternative that went the farthest¹²⁹, and against the overwhelming weight of international opinion. *See supra* ¶¶

¹²⁹ The Commission considered limiting the ETS’ application to aviation to: (1) intra-EU routes; (2a) intra-EU routes and 50% of emissions on routes to and from EU airports; (2b) all flights departing from EU airports; (3) EU airspace only; (4) all flights departing from EU airports plus remaining emissions in EU airspace; and (5) intra-EU routes and routes to and from countries that have ratified the Kyoto Protocol (*see Delft Report*, Bundle tab 43, at 61). The choice it ultimately made—all emissions for all flights into and out of EU airports—was not even one of the options that had been examined in the consultant’s report commissioned by the EC. (*Id.*)

108-11.

202. The Defendant's *ipse dixit* reasoning that its unilateral yet global action is justified because of ICAO's inaction is not correct. As described in detail above, *see supra* ¶¶ 78-103, ICAO, its Assembly and its various specialized groups and committees have been diligently working on a multi-faceted approach to reduce and control carbon emissions from aircraft for the better part of the last decade. With the assent of its 190 Member States, it managed to adopt a detailed Programme of Action on International Aviation and Climate Change—the first and only globally-harmonized agreement from an industry sector addressing the goals to address its CO₂ emissions. One of ICAO's specialized committees, CAEP, has met repeatedly since 2005 to review the details of a plan by which ICAO's Member States could lawfully use emissions trading for aviation as a “market-based” measure to control greenhouse gases. Various EU Member States participated actively in CAEP; the EU Commission also took part as an observer. *See supra* ¶ 81.
203. The global imposition of a European initiative is especially disproportionate because the EU ETS was never cost-justified, and to the extent that there was an attempt to do so, the cost numbers used were wildly underestimated. Admittedly, in structuring the scheme, the EU assumed that airlines can and will pass on the higher costs to passengers.¹³⁰ But all the evidence in the industry, based on real experience with fuel price increases, suggests exactly the opposite. Airlines can rarely succeed in passing on the entirety of any cost increase to consumers, but instead must internalize a good portion of it. Indeed, one report concluded that key studies underlying the U.K.'s adoption of the scheme “fails to take account of the realities of the airline industry. This results in an overestimate of both the extent of pass-through and the expectation that airlines will earn windfall profits. . . . Airline passengers are price sensitive. This is the primary constraint on airlines’

¹³⁰ (*See Proposal for Directive from EC*, Bundle tab 6, at 5; *see also Delft Report*, Bundle tab 43, at 131.) The scant economic analysis that formed the basis for this critical assumption appears to have, on close examination, almost nothing to do with airline ticket prices. Rather, the Commission cites two studies concerning the abolition of duty and tax-free allowances applicable to the purchase of goods in transit. Evidently, the airlines polled did not feel that they could absorb the allowances being eliminated and thus that their passengers would have to bear the brunt of it. What this has to do with airline (as opposed to airport) economics is not clear but, in any event, this hardly proves that airlines can pass on operating cost increases to their passengers.

ability to pass increased costs onto customers. The [U.K.’s] model does not capture the extent of this sensitivity because it does not accurately capture the characteristics of passengers, the nature of pricing in the sector or the relationship between costs and fares.”¹³¹

204. Rather than look to the airlines for revenue that may or may not be applied to environmental projects the EU and its Member States would be better suited to look at themselves to address GHGs. An Oxford University study has found that the quickest way to reduce aircraft emissions is better flight management.¹³² Much of the GHG reduction that the ETS seeks to achieve could actually be accomplished if government-controlled air navigation service providers exercised greater discipline over air traffic management. Indeed, the simple implementation of the European ATM Master Plan purports to achieve a 10% reduction in aviation GHG emissions per flight.¹³³
205. Even if *the emission of* airline GHGs decreased less in the short run with a geographically-limited regulatory scheme, such a scheme would have nevertheless promoted measures at international level to deal with regional or worldwide environmental problems. And, it would have left a way for ICAO to develop a global scheme that would govern emissions over the high seas. The importance of this aim is reflected in the TFEU; Article 174(4) qualifies all of the environmental objectives of the TEU by requiring the Community to “cooperate with third countries and with the competent international organizations” on environmental matters. By minimizing the perverse incentives and furthering the efficient ones—like, for instance, better air traffic management and the upgrade of airline fleets—a geographically limited regulation could better achieve *all* of the objectives listed in TFEU Article 174.

¹³¹ Frontier Economics, *Impact of Emissions Trading on Pricing and Profits in Aviation; Review of Vivid Economics Report*, at iii (2008) (Appendix Tab 108); *see also* Dimas Letter (26 Aug. 2005) (Appendix Tab __) (stating IATA’s “serious concerns” with the ETS scheme being applied to international aviation, because, “[a]s recently seen with escalating fuel prices, airlines would not be able to reflect the full costs of these allowances in their ticket prices.”).

¹³² *See* ICAO, *2010 Environmental Report* 109 (2010) (Appendix Tab 27) (citing O. Inderwildi et al., *Future of Mobility Roadmap* ch.3, Air (2010)).

¹³³ ICAO, *2010 Environmental Report* 96-98 (2010) (Appendix Tab 27).

206. In resolving the hushkit controversy, *see supra* ¶¶ 68-74, the parties agreed to “adopt a balanced approach . . . taking full account of ICAO guidance . . . , relevant legal obligations, existing agreements, current laws and established policies” (Bundle tab 31). A key part of this accord was the commitment to use a “transparent process when considering measures” to address the environment, including an “evaluation of the likely costs and benefits of the various measures available and, based on that evaluation, selection of measures with the goal to achieve maximum environmental benefit most cost-effectively.” *Id.* The lead-in to the enactment of the EU ETS illustrates the exact opposite and, for that reason, cannot be considered a proportionate measure of Community legislation.

4. If the scheme were otherwise lawful, there is a more proportionate alternative that would give the ETS some practical effect within the limits of international law

207. The Airline Association Intervenors believe strongly that the inclusion of international aviation in the EU ETS is invalid not only because it infringes foreign sovereignty, but also because it effectively imposes an exit/entry charge or impermissible fuel tax. *See infra* ¶¶ 211-40. If this Court were to agree with the latter argument, it would need to invalidate the 2008 Directive entirely because these fees are integral to the trading scheme.

208. If this court were to reject the 2008 Directive only on sovereignty and customary international law grounds, however, and consistent with the prior position of the EU and its member states, the CJEU should invalidate the EU ETS, at least to the extent it purports to regulate emissions for any portion of international flights by non-EU carriers in foreign airspace or over the high seas.

209. This narrow construction would respect the principles of mutuality and accommodation, and avoid the legislation’s direct interference in the sovereignty of other states. It would also be a more proportionate measure, and eliminate some of the market distortions that a unilateral, yet global, scheme produces.

210. Such a result is consistent with EU law. Faced with an extraterritorial Union measure in Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, *supra*, this Court narrowly interpreted that measure to “give it the greatest practical effect,” but “within the limits of international law”. *Id.* at ¶ 11. By limiting the ETS only to the portion of a flight that occurs over EU territory, the same goal can be accomplished here.

C. ***QUESTION 4: IS THE AMENDED DIRECTIVE INVALID, INSOFAR AS IT APPLIES THE ETS 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?***

1. In by-passing ICAO, the EU ignored the Kyoto Protocol and the customary international law principle that treaty obligations may be imposed on third states only by express consent

211. As discussed at various points above, *see supra* ¶¶ 170, 176, one of the guiding premises for the enactment of the EU ETS was the EU’s ratification of the Kyoto Protocol. While later recitals purport to limit the regulation to satisfy “the commitments of the European Community and its Member State” under the Kyoto Protocol, the Directive which includes aviation within Union’s GHG scheme speaks in broader terms of seeking to “require[] *developed countries* to pursue the limitation or reduction of emissions of greenhouse gases.” 2008 Directive, *pmbl.* at recital (8).

212. In practical effect, then, the application of the EU ETS to U.S. carriers is an attempt to force the U.S. to live by an emission reduction target established by the Kyoto Protocol, even though the U.S. never ratified the Protocol. As applied to foreign carriers from developed countries who both signed and ratified the Kyoto Protocol, the ETS is an attempt by the EU to force the rest of the world to adopt the EU’s chosen means to implement the Protocol. As applied to airlines from developing countries (Non-Annex I countries), it is an attempt to force those countries to adopt the Kyoto Protocol’s emissions reduction goals.

213. This situation runs afoul of customary international law. The CJEU has held that the Vienna Convention on the Law of Treaties codifies customary international law that

binds the Union and its institutions. *See* Case C-344/04, *IATA and ELFAA*, *supra*, ¶ 40. In relevant part, that Convention provides for the “Territorial Scope of Treaties.” *See* Vienna Convention on the Law of Treaties art. 19, 23 May 1969, 1155 U.N.T.S. 331 (Appendix Tab 52) (“a treaty is binding upon each party in respect of its entire territory.”). This territorial limitation means that “[a] treaty does not create either obligations or rights for a third State without its consent.” *Id.*, art. 34.

214. Under customary international law, then, the European Union cannot impose the strictures of the Kyoto Protocol or a particular means of implementation on foreign carriers without their States’ assent to that Treaty. *Cf.* Case C-162/96, *A. Racke GmbH & Co.*, *supra*, ¶¶ 46-47 (holding that “the rules of customary international law concerning the termination and the suspension of treaty relations . . . are binding upon the Community institutions and form part of the Community legal order”). Accordingly, and as discussed more fully above, *see supra* ¶¶ 115-17, a private claimant is entitled to “challeng[e] the validity of a Community regulation under [under customary international law] in order to rely upon rights which it derives” from a Treaty. *Id.* Once again, Case C-286/90, *Peter Michael Poulsen and Diva Navigation Corp.*, *supra*, is instructive. In that case, a Panamanian ship owner and its Danish crew sought the interpretation of a Union measure regulating maritime fisheries in light of international law. The Union urged the CJEU that the Union regulation was justified by a multilateral convention signed by the EU to conserve certain protected species of fish. *Id.* at ¶¶ 11, 23. However, the flag-state of the vessel in question—Panama—had not signed that Convention. The CJEU held that the fisheries-conservation limits established by “that Convention may not be invoked against non-signatory States and cannot, therefore, be applied to vessels registered in those States.” *Id.* at ¶ 23; *see also id.* at ¶ 11 (interpreting a Union measure to “give it the greatest practical effect,” but “within the limits of international law”).
215. Based on these external and internal limitations, it is not surprising that the EU’s political institutions have routinely advocated that other States’ environmental and aviation measures be based on international consensus. *See supra* ¶¶ 160-63. This is a reflection of the express preference for multilateral, rather than unilateral, regulation in these fields.

See, e.g., Rio Declaration, Principle 12 (Appendix Tab 109) (“Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.”). As discussed elsewhere in these Observations, *see infra* ¶¶ 76-77, Article 2(2) of the Kyoto Protocol expressly vests ICAO—and not the individual contracting states—with primary rulemaking authority over aviation emissions. This is consistent with most aviation issues. The Chicago Convention was born out of the desire and necessity to ensure that multilateral harmonization of aviation law occurred in a measured and balanced manner. These principles are also acknowledged in Article 15(3) of the Open Skies Agreement (Bundle Tab 17) and Article 18 (4)-(5) of the EU-Canada Agreement (Bundle Tab 21), all of which place emphasis on the importance of multilateral discussions in considering the impact of aviation on the environment and the economy and also require that aviation environmental standards adopted by ICAO shall be followed.

216. Imposition of a regional emissions trading scheme over the objections of the entire aviation community outside of Europe inhibits the orderly development of international civil aviation, and thus stands the entire premise for international aviation regulation on its head. Instead of “working through” ICAO—and accepting the measured judgment of the international community on global aviation issues—the EU has appointed itself as the default regulator of GHG emissions from commercial aviation.¹³⁴ But the official drafting history of Article 2(2) of the Kyoto Protocol, and the views of numerous commentators, environmental groups, and the UNFCCC itself, lend support to the notion that good faith execution of the Kyoto Protocol means *deferring* to ICAO when aviation emissions are at issue.
217. A technical paper prepared for the UNFCCC chronicling the protocol shows that the current wording of Article 2.2 was not accidental. Rather, it resulted from an express

¹³⁴ Indeed, this is evidenced by the fact that the global approach on emissions trading is still unsettled precisely because the EU will not accept the judgment of the international community. This stance forced ICAO to debate the issue once again at its 2010 Assembly; and once again, consensus was not reached. *See Development of a Global Framework*, *supra* note 3, at ¶ 1.2 (stating that “the trend towards the adoption of increasingly fragmented national/regional and ad hoc policy to adjust public finances has been of great concern to the industry. . . . [P]lans for increasingly stringent auctioning regimes for emissions permits . . . is not conducive to our common goal of sustaining an orderly, efficient and financially viable aviation industry.”).

compromise in which the pursuit of limitation/reduction of GHGs from aviation bunker fuels was altered from an optional measure into a binding commitment *in exchange for transferring responsibility to ICAO* and removing language that would have allowed international taxation of those fuels.

Article 2.2: Aviation and marine bunker fuels

113. Provisions concerning policies and measures to address aviation and marine bunker fuels, including specific reference to the role of ICAO and IMO, were included in the proposals from the EU and New Zealand. Switzerland's proposal also made reference to aviation emissions and ICAO. The proposals from both the EU and Switzerland included the possibility of taxation, while New Zealand's proposal simply covered "the development of policies and measures".

114. A substantively similar paragraph was included as part of the list of priority areas put forward by Chairman Estrada in his CNT [Consolidated negotiating text]. It was then incorporated as one of the policies and measures listed in Alternative B (EU) in the RTUN [Revised text under negotiation], with some important modifications. The paragraph was redrafted to refer to "limitation or reduction of emissions" to be undertaken by Parties, "through ICAO and IMO" (rather than just cooperation with those organizations), and new language was included on "introducing aviation fuel taxation". The paragraph did not appear, however, in CRP.2 [Conference room paper 2]. As part of a compromise package on bunker fuel emissions, the provisions were reintroduced in CRP.4 [Conference room paper 4] as a stand-alone paragraph, using the word "shall", rather than as part of the optional list in subparagraph 1(a). The reference to introducing taxation, however, was deleted.

J. Depledge, *Tracing the Origins of the Kyoto Protocol: An Article-By-Article Textual History* (UNFCCC) FCCC/TP/2000/2 (2000), at 27 (Appendix Tab 94).

218. In context, the drafters' deliberate choice of the word, "shall," in referring the issue of international aviation emissions to ICAO, is highly significant. As one scholar on treaties has noted, the term "shall" in an instruments produced by international Conferences of the Parties (COPs), such as the Kyoto Protocol, embodies a binding legal commitment:

Consensus-based COP activity also varies in the type of language used to address the parties, conveying different intentions and expectations about the degree of obligatory and legal force contained in the resolution or decision. . . . [Some instruments] use[] "shall," "should," "are

encouraged,” and “must” in different parts. . . . As such, it is arguable that COP resolutions using terms like “shall” have a harder legal status than those that simply “urge” the parties to act. These latter would be regarded as soft law or reflecting political, rather than legal, commitments.

A. Wiersema, “*The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements*” (2009) ExpressO (Appendix Tab 95). Even the EU, outside of this litigation, has acceded to this view of Article 2.2. The European Commission climate change glossary acknowledges that “Article 2.2 of the Kyoto Protocol *requires* industrialised countries to pursue the limitation or reduction of GHG emissions from international civil aviation through ICAO.” (emphasis added).

219. What the Kyoto Protocol does, in essence, is split jurisdiction over aircraft emissions of greenhouse emissions into two distinct parts, in line with the territoriality principle of customary international law and innumerable treaties, *see generally supra* ¶¶ 148-56. As stated by one commentator, “[d]omestic aviation emissions are required to be included in national emission totals and are intended to be addressed at the national level within the UNFCCC/Kyoto Protocol regime. In contrast, international emissions are excluded from national emission totals,” and left to ICAO¹³⁵. “This decision implies a deliberate choice on the part of the drafters of the Kyoto Protocol that a Party to the Protocol is only responsible for emissions that originate within its territory. Conversely, a Party is not responsible, nor can it assume responsibility for emissions originating outside its own territory”. A. Hardeman, *A Common Approach to Aviation Emissions Trading*, Vol. XXXII/1 Air & Space Law 3, 15 (2007) (Appendix Tab 96).
220. The Secretariat of the United Nations Framework Convention on Climate Change has endorsed and reiterated this division of competence as well. In a September 2010 letter to ICAO, he states that:

[T]he methodologies for GHG inventories of the Intergovernmental Panel on Climate Change (IPCC) stipulate that emissions from domestic and international air and sea transport are to be handled differently. Emissions from domestic activities form part of the parties’ total national emissions, and are addressed under the UNFCCC. Emissions from international

¹³⁵ Macintosh, *supra* note 19, at 405.

aviation and maritime transport are estimated as part of national GHG inventories but are excluded from national emissions totals, and are not further addressed under the UNFCCC. *Indeed, the Kyoto Protocol to the UNFCCC requires Annex I parties to pursue limitation or reduction of GHG emissions from aviation working through ICAO.*¹³⁶

221. Environmental groups have endorsed this conclusion, as well. The Deputy Director of the Australian National University Centre for Climate Law and Policy has said that:

The reasons for the separation of international and domestic aviation emissions relate to the nature of international transport and the UNFCCC/Kyoto greenhouse accounting framework. The emission accounting rules dictate that emissions are only attributable to a country if they result directly from activities that occur within its territory . . . Much of the fuel used in international transport occurs in or over the high seas, and in or over the territory of countries that have no direct involvement in the relevant transport movement (*i.e.*, when planes transit through a country's airspace). Placing international transport in a separate category and transferring responsibility for these emissions to separate UN bodies was seen as a convenient solution to a difficult problem.¹³⁷

222. The alternative approach that the Defendant espouses here turns any logical division of competences into inefficient, overlapping competences. This kind of regional intransigence naturally, and almost invariably, leads to sovereign discord. Take for example, the statements of U.S. Congressman Bill Lipinski, then the ranking Democratic member of a key congressional committee on aviation, in the face of the EU hushkit legislation:

Let me state for the record that the United States is fully committed to the development of a Stage 4 noise standard. However, it is difficult to move forward towards a new noise standard while the EU hushkit regulation is still on the books. With its hushkit regulation, the EU has ignored its prior agreement with ICAO and has developed its own regional restriction. Given this, it will be nearly impossible to convince the 185 countries of ICAO to agree to a new noise requirement on aircraft. Why would any carrier in any country want to invest in Stage 4 aircraft if any country in

¹³⁶ Letter from UNFCCC Secretariat to ICAO (1 Sept. 2010) (emphasis added).

¹³⁷ Macintosh, *supra* note 19, at 405.

the world can also impose its own restrictions on aircraft? It doesn't make any sense.

The European Union's Effort To Ban Hush-Kitted AircraftL Hearing before the Subcomm. on Aviation of the H. Comm. on Transp. & Infrastructure 3, 106th Cong. (1999) (statement of Rep. W. Lipinski (D-Ill.)) (Appendix Tab 97).

223. More recently, too, the Obama Administration has been raising similar objections to the unilateral imposition of the European scheme. It is not the idea of cap and trade itself, but rather the manner in which the EU has sought to impose its will on the aviation community, that has created forceful international protest. Thus, in their pre-Assembly working paper at ICAO, the official United States position was to “urge[] Contracting States [of the Chicago Convention] seeking to implement an emissions trading system that applies to other Contracting States’ aircraft operators to do so on the basis of *mutual agreement*.” Canada, Mexico and the United States, *A More Ambitious, Collective Approach To International Aviation Greenhouse Gas Emissions* 4 (ICAO Assembly, 37th Session, Working Paper No. 186, 10 Sept. 2010) (Appendix Tab 98); *see also* J. Kanter, *U.S. Steps Up Its Effort Against a European System of Fees on Airline Emissions*, *N.Y. Times*, 9 Sept. 2010 (Appendix Tab 99).

2. The EU ETS creates an impermissible exit/entry charge on airlines, in violation of numerous treaty commitments that bind the EU

224. Article 15 of the Chicago Convention (Bundle Tab 11) provides that:

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.

225. The EU is bound by the Chicago Convention, even as a non-signatory. *See supra* ¶ 129. Even if it is not so bound, by virtue of Article 3(4) of the Open Skies Agreement, the EU has *expressly* assented to bind itself to Article 15 of the Chicago Convention, at least as it regulates U.S. airlines. *See* Vienna Convention on the Law of Treaties art. 35, 23 May 1969, 1155 U.N.T.S. 331 (Appendix Tab 52) (“An obligation for a third state arises from

a provision of a treaty if . . . the third state expressly accepts that provision in writing.”). Article 3(4) (Bundle Tab 17) forbids the EU from:

unilaterally limit[ing] 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 reasons under uniform conditions consistent with Article 15 of the [Chicago] Convention.

Article 13(2) of the EU-Canada Agreement contains a substantively similar obligation, along with a substantive provision that mirrors Article 15 of the Chicago Convention. *See* EU-Canada Air Services Agreement, art. 8 (Bundle Tab 21) (“Each Party shall . . . exempt airlines of the other Party with respect to their aircraft operated in international air transport, their . . . fuel . . . from all . . . fees and charges that are imposed by the Parties, and not based on the cost of services provided.”)

226. Accordingly, the EU cannot impose an environmental “fee[], due[] or other charge[],” or require certain “filings” for “environmental reasons,” based “solely o[n] the right of . . . entry into or exit from its territory.” This is in tension with the EU ETS, which requires emissions reporting and the purchase of emissions allowances for all “flights which depart from or arrive in an aerodrome situated in the territory of a Member State,” irrespective of their nationality or their state of origination or destination outside of Europe. *See* 2003 Directive, Annex I (as amended by the 2008 and 2009 Directives). Thus, airlines once exempt from environmental regulation when flying into or from European territory are now subject to stringent reporting and payment regulations for doing just that. And, because aircraft cannot fly without jet fuel, and jet fuel cannot be consumed without incidentally generating CO₂ emissions for each gallon of fuel, a legislative requirement that a European carbon “allowance” be acquired from the EU exchange for each tonne of carbon emitted in flying to or from an EU airport is, for all intents and purposes, the same thing as a licensing fee imposed in respect of transiting those airports. The only way to escape the allowance requirement is to avoid using the airports, and the airlines get nothing—except for authorization to entry or exit—in

exchange for their payments.¹³⁸ By any measure, the EU ETS imposes “charges . . . solely [for] the right of . . . entry into or exit from [European] territory.” *Contra* Chicago Convention, art. 15.

227. If the text of Article 15 of the Chicago Convention were ambiguous, which it is not, the drafting history provides supplemental justification to invalidate the EU ETS on this basis. The *Travaux Préparatoires* of Article 15 confirms that its intent was to exclude all manner of charges for use of the airspace (and airports) that were not linked to and justified by the costs of service being provided. *See Proceedings of the International Civil Aviation Conference*, Chicago, Ill., 1 Nov.-7 Dec. 1944, Dep’t of State Pub. No. 2820 (1949) (hereinafter “*Travaux Préparatoires*”) (Appendix Tab 16).
228. Article VIII, Section 9 of the Interim Agreement that pre-dated the Convention, for instance, allowed each State to “impose or permit to be imposed on any [international air] service just and reasonable charges for the use of airports and other facilities.” *Travaux Préparatoires* 140. This provision is based on early work of drafting committees, all of which contain the same, verbatim permissive rule allowing charges linked to the use of facilities¹³⁹. Eventually, the United States proposal separated charges linked to use and charges linked to mere exit and entry, and treated them differently. That Proposal stated in one provision that “[a]ircraft in transit and persons or property thereon shall not be subject to any dues, fee or charges imposed on the *right of transit (including entry and exit)*,” *Travaux Préparatoires* 557 (emphasis added), and stated elsewhere that the imposition of “fees and charges for landing and the *use of accommodations and facilities*” was permitted. *Travaux Préparatoires* 561. Unlike an earlier Canadian proposal, which cast all charges as permissive and linked to usage, the early U.S. draft contained both prohibitive and permissive rules on charges, separating them respectively according to “usage” and “rights/access.”

¹³⁸ This is poignantly illustrated by the fact, discussed elsewhere in these Observations, that the revenue collected from the EU-ETS is not allotted to any service provided to the airlines or air navigation infrastructure, and only half of it is even slated for putatively environmental projects. *See supra* ¶¶ 191-92.

¹³⁹ *See Travaux Préparatoires* 377 (Article II, section 4 governing the “Rights and Duties of Member States,” in the Third Revised Committee Draft); 392 (same, in Second Revised Draft); 406 (same, at Article II, section 5 of the First Revised Draft); 420 (same); 525 (same, in Article I, section 5 of United States’ Proposal).

229. Both the U.S. and Canadian Proposals were worked into the “Proposed Convention.” *Travaux Préparatoires* 616. Specifically, the permissive Canadian rule was included in Article 68, *Travaux Préparatoires* 635-36, and both rules from the American Draft (permissive and prohibitive) were included in what would become Article 15. *Travaux Préparatoires* 622. The obvious overlap between Articles 15 and 68 was noted in the Minutes of Meeting on December 2, at which time Article 68’s reference to permissive charges was eliminated. *Travaux Préparatoires* 652-53, 1383-84. From then forward, the permissive rule on charges was left only to appear in the first few clauses of Article 15 of the final draft Convention, followed by the prohibitive rule. The official “Commentary on the Development of the Individual Articles of the Convention on International Civil Aviation,” *Travaux Préparatoires* 1380, acknowledges that Article 15 regarding “Airport and similar charges, represents a combination of Articles 9 and 22 of the United States draft convention.” *Travaux Préparatoires* 1383 (emphasis in original).
230. Thus, one can state with reasonable certainty that the precursor to the critical, last sentence of Article 15 of the Chicago Convention was Article 9 of the U.S. draft proposal. The text of that Article is as strong for the Airline Association Interveners as is the final text of the Convention. Again, it states that “[a]ircraft in transit and persons or property thereon shall not be subject to any dues, fee or charges imposed on the right of transit (including entry and exit).” *Travaux Préparatoires* 557. Fuel certainly qualifies as “property thereon,” and that phraseology more clearly captures the fact that the framers of the convention looked very dimly on any charges “imposed on the right of transit.”
231. This view is further supported by the decision of the Belgian Council of State in *B.A.R. Belgium v. the Belgian State*, Decision 144.081 of 3 May 2005 (Appendix Tab 31). The case concerned a yearly tax on the operation of aircraft imposed by the Belgian local council of Zaventem on persons having a civil aircraft that they “regularly cause[d] to participate in air traffic, from and/or to the territory of the municipality.” *Id.*, ¶ 1. When the tax was challenged, the Belgian Council of State first held that Article 15 was directly

enforceable in Belgian law, and second held that the tax contravened the last paragraph of that Article because it imposed an entry/exit fee:

Article 15 contains the basic rules concerning the costs with respect to public airports and aviation facilities; . . . the defending party rightly remarks that it prohibits treating foreign and national aircraft unequally; that it *however also does more; that it, in the last paragraph, does not only recommend contracting states refraining [sic] from imposing discriminating fees, dues or other charges solely for the right of transit over, entry into or exit from its territory of any aircraft of a contracting state or persons or property thereon, but prohibits altogether establishing fees, dues or other charges that are purely dictated for transit over, entry into or exit from and have nothing to do with the use of the airport or other facilities.* Considering that this last paragraph can essentially be read and understood, not in the first place as a measure that wants to ensure that international air transport services can be established on the basis of equal opportunities, but as a measure that must ensure that those air transport services . . . can be operated soundly and economically.”

Id., ¶¶ 3.10; *see also id.*, ¶ 3.12.

232. The UK Government has attempted to explain away this *de facto* entry/exit fee by arguing that the price of an allowance is totally unrelated to the cost of any services that airlines receive when taking off or landing in an EU airport (*see Delft Report*, Bundle tab 43). Therefore, they argue, the price paid by these airlines is neither a fee, due or charge. But this argument proves the Interveners’ point. No one can dispute that the EU intends to generate a significant stream of revenue from the airlines by virtue of the EU ETS, *see supra* ¶¶ 191-92, so the fact that they are giving the airlines nothing in return for this revenue simply means that the charges imposed are not “usage charges”—which are permitted to be imposed on a non-discriminatory basis—but rather fall within the final clause of Article 15 and are thereby prohibited.¹⁴⁰ And, the fact that the carbon license requirement is being imposed ostensibly for environmental reasons does not ameliorate the fact that it is being imposed “solely” in exchange for “the right of transit over or entry into or exit from its territory—in other words, acknowledgment of that right, which is

¹⁴⁰ If it is not a charge, in the practical meaning of the word, then the only other possible conclusion is that it is a tax, and must be assessed under Article 24 of the Chicago Convention. *See infra* ¶¶ 235-40.

itself granted by the Chicago Convention, is all that the complying airlines can expect to receive in exchange.

233. The EU itself has espoused an expansive reading of Article 15 of the Chicago Convention to prohibit certain charges that are imposed solely for the right of transit when their airlines are levied. The Russian Federation has long extracted royalty payments for overflights of Siberia as a way to subsidize Aeroflot and provide a revenue stream to invest in air traffic and airport infrastructure.¹⁴¹ The payments were not made directly to the state, however, as the obligation to pay them was incorporated into commercial agreements between various EU carriers and Aeroflot as agreed in EU-Russian bilaterals. Russia then defended the practice on the grounds that it simply reflected private commercial arrangements, served a valid purpose, and could be avoided if EU carriers chose other routes. S. Sokolov, *Russia, EU Still Divided On Trans-Siberian Overflight Charges*, Russian News & Information Agency RIA Novosti, 14 Nov. 2007 (Appendix Tab 100). The EU has asserted that these charges run afoul of the Chicago Convention, even though (as is the case here with carbon allowances) the payments were set in a commercial market, made to a non-governmental entity, facially linked to the provision of a service and justified by a social purpose.
234. In 2005, the European Commission characterized the Russian overflight charges as “an unacceptable charge for transit,” and the Rapporteur to the European Parliament’s Committee on Transport and Tourism flatly stated that “the overflight charge is illegal and contravenes Article 15 of the Chicago Convention to which Russia is a signatory.” R. Zile, *Report On Relations with the Russian Federation and China in the Field of Air Transport*, EU Parl., A6-0375/2005 at 7-8 (29 Nov. 2005) (Appendix Tab 101). The following year, the Council of Ministers adopted a decision that the overflight payment scheme violated the Chicago Convention and recommended that the scheme’s elimination be tied to Russia’s accession to the WTO. Press Release, European Council, Transport, Telecommunications and Energy (27 Mar. 2006) (Appendix Tab 103).

¹⁴¹ The revenue has become substantial, in excess of €430 million as of 2006. See R. Zile, *Report On Relations with the Russian Federation and China in the Field of Air Transport*, EU Parl., A6-0375/2005 at 7 (29 Nov. 2005) (Appendix Tab 101); T. Forsberg and A. Seppo, *Power Without Influence: The EU and Trade Disputes with Russia*, 9-10 (2008) (Appendix Tab 102).

Although a tentative agreement between the parties to resolve the dispute was reached later that year, the matter remains unresolved today. European Commission, *EU Russia Common Spaces, Progress Report – 2009 27-28* (March 2010) (Appendix Tab 104).

3. The EU ETS imposes an impermissible fuel tax on airlines, in violation of numerous treaty commitments that bind the EU

235. Article 24 of the Chicago Convention (Bundle Tab 11) provides that:

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, lubricating oils, spare parts, regular equipment and aircraft stores 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.

236. The EU is bound by the Chicago Convention, even as a non-signatory. *See supra* ¶¶ 123-24, 129. Even if it is not so bound, a similar provision is replicated in the Open Skies Agreement, to which the EU is a signatory. Article 11(2)(c) of that Agreement obligates the EU to exempt U.S. airlines from “taxes, levies, duties, fees and charges” on fuel that is “introduced into” the EU on an arriving flight from outside the EU. (Bundle Tab 17). And, this prohibition of European taxes and duties on fuel in the tanks of aircraft upon arrival in its territory has been expanded through numerous EU air services agreements, including the EU-Canada bilateral agreement. *See* EU-Canada Air Services Agreement, art. 8 (Bundle Tab 21) (“Each Party shall . . . exempt airlines of the other Party with respect to their aircraft operated in international air transport, their . . . fuel . . . from all import restrictions, property taxes and capital levies, customs, duties, excise taxes, and similar fees and charges that are imposed by the Parties, and not based on the cost of services provided.”)¹⁴²

¹⁴² Numerous EU air services agreements include provisions that expand this exemption to all fuel used in international air transport, including fuel onboard aircraft when it enters the airspace of a State and fuel taken onboard the aircraft upon arrival in a State. Again this pattern of exemptions is not the product of coincidence. It is an element of the Chicago System. More particularly, it is an example of State practice to implement the recommendations of the lead UN agency on international aviation—as ICAO has developed a policy guidance for States on taxation recommending an exemption on all taxes levied on fuel taken on board by aircraft in connection with international air services. *ICAO’s Policies on Taxation in the Field of International Air Transport* (3d ed. 2000) (Bundle Tab 35).

237. If the mandated purchase of emissions allowances is not a “fee, due or other charge” under Article 15 of the Chicago Convention, *see supra* ¶¶ 224-34, then it is surely a “tax” on “fuel” that is levied upon “[a]ircraft on a flight to, from, or across [EU] territory.” There is no third, amorphous category that could encompass the carbon allowance requirement and somehow make it legal. Indeed, the manner in which the revenue stream from these payments is earmarked to be managed within the EU is strikingly similar to income a State receives from taxation. As discussed more fully above, *see supra* ¶¶ 191-92, the legislation allows the moneys generated to be deposited into the Member State’s consolidated fund, leaves it entirely in the hands of Member States to determine the use of revenues generated from the auctioning of allowances, and permits half of it to be used for non-environmental purposes, such as balancing the state budget. Legislation which results in € billion being collected from private parties, deposited into the State treasury, and spent on whatever purpose the State deems proper is, by any measure, a “duty” or “tax”.
238. The ICAO Council has interpreted Article 24 of the Chicago Convention as prohibiting taxes and duties levied upon the “consumption” of fuel. *ICAO Policies on Taxation in the Field of International Air Transport*, ¶ 1(d) (3d ed. 2000) (Bundle Tab 35). The EU is bound to follow this interpretation by virtue of Article 15(3) of the Open Skies Agreement. The CJEU has, in turn, held that imposing a charge on fuel emissions is the equivalent to imposing a charge on fuel consumption. *See* Case C-346/97, *Braathens Sverige Riksskatteverket*, [1999] E.C.R. I-3419.
239. It logically follows that a regulatory scheme which purports to calculate emissions by measuring fuel consumption, *see* 2003 Directive, Annex IV, Pt. B. (added by the 2008 Directive), and then levy a duty or fee on those emissions, directly conflicts with the EU’s international obligations. Airlines once exempt from levies on their fuel consumption when arriving in Europe are now subject to stringent reporting and payment requirements for the fuel they consumed in their cross-border flights. This demonstrates the tension between the EU ETS and the EU’s international commitments

240. As an “environmental measure,” the EU ETS thus threatens “adverse effects on the exercise of rights contained in [the Open Skies] Agreement.” Open Skies Agreement, art. 15(2) (Bundle Tab 17). As a result, the EU is obligated by Treaty to “take appropriate steps to mitigate [those] adverse effects.” *Id.* To that end, there is a better law that achieves many of the environmental objectives authorized by the Article 191 of the TFEU, but without the negative externalities and high costs to competing interests. For instance, Article 4(2) of the EU-Malaysia Bilateral Agreement on Certain Aspects of Air Services (30 Dec. 2006) replicates many of the substantive provisions of the Open Skies Agreement, but expressly allows the imposition of “taxes, levies, duties, fees or charges on fuel supplied in its territory for use in an aircraft of a designated air carrier of Malaysia that operates between a point in the territory of that Member State and another point in the territory of that Member State or in the territory of another Member State.” Similarly, a regulation which only required reporting and payments when flying *within* Europe would mitigate any adverse effects on the EU’s international obligations, and the concomitant rights of foreign airlines under those international commitments. *See* Case C-286/90, *Peter Michael Poulsen and Diva Navigation Corp.*, *supra*, ¶ 11 (interpreting a Union measure to “give it the greatest practical effect,” but “within the limits of international law”).

IV. CONCLUSIONS

241. The Claimants can rely on one or more rules of international law to challenge the validity of the Amended Directive so as to force aviation activities into the EU ETS.
242. The Amended Directive is invalid insofar as it applies the ETS to those parts of flights which take place outside the airspace of EU Member States. This application contravenes the fundamental principle of customary international law that no state may subject the territory of another state or the high seas to its jurisdiction.
243. The Amended Directive is unlawful under Articles 1, 11 and/or 12 of the Chicago Convention, Article 7 of the Open Skies Agreement, and various other bilateral agreements, insofar as it applies the ETS to those parts of flights which take place outside

the airspace of EU Member States and thereby subjects the territory of other states and the high seas to EU sovereignty.

244. The Amended Directive contravenes Article 2(2) of the Kyoto Protocol, which requires the EU to work through ICAO in applying a trading scheme to international aviation emissions. The Amended Directive also involves an unlawful charge or tax, violating Articles 15 and 24 of the Chicago Convention, on their own or in conjunction with Articles 3(4) and 15(3) of the Open Skies Agreement and various other bilateral agreements.

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