Inclusion of the aviation sector in the European Union Emission Trading Scheme:

An assessment of the compatibility of the Aviation Directive with international law illustrated by Case C-366/10
ABSTRACT

Since 1 January 2012 all flights arriving and departing from an aerodrome situated in the European Union (EU) are covered by the EU Emissions Trading Scheme (ETS) despite the nationality of aircraft operator. This decision to include the aviation sector in the EU ETS caused tremendous criticism from the non-European countries. The opposing countries argued that participation in the EU ETS violates international law and that emissions from the aviation sector should be regulated by the ICAO and not imposed unilaterally by the EU. As a result, the American Transport Association brought a legal action against the inclusion of aviation in the EU ETS. However, the Court of Justice in Case C-366/10 concluded that the EU ETS does not violate international law. Since the judgment the criticism towards the decision to include third countries aircraft operators did not diminish. The present thesis examines the compatibility of the inclusion of aviation in the EU ETS in regard to the international agreements addressed in that case. As the EU decision to include aviation is a highly debatable issue, the thesis discusses the potential outcome of the conflict.
# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ATA</td>
<td>Air Transport Association</td>
</tr>
<tr>
<td>CAEP</td>
<td>Committee on Aviation and Environment Policy</td>
</tr>
<tr>
<td>CDM</td>
<td>Clean Development Mechanism</td>
</tr>
<tr>
<td>CJ</td>
<td>Court of Justice</td>
</tr>
<tr>
<td>DG CLIMA</td>
<td>Directorate-General for Climate Action</td>
</tr>
<tr>
<td>ECCP</td>
<td>European Climate Change Programme</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EU ETS</td>
<td>European Union Emissions Trading Scheme</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
</tr>
<tr>
<td>GHG</td>
<td>Greenhouse gases</td>
</tr>
<tr>
<td>GIAC</td>
<td>Group on International Aviation and Climate</td>
</tr>
<tr>
<td>JI</td>
<td>Joint Implementation</td>
</tr>
<tr>
<td>ICAO</td>
<td>International Civil Aviation Organizations</td>
</tr>
<tr>
<td>IPCC</td>
<td>Intergovernmental Panel on Climate Change</td>
</tr>
<tr>
<td>NAP</td>
<td>National Allocation Plan</td>
</tr>
<tr>
<td>NIC</td>
<td>Newly Industrialized Countries</td>
</tr>
<tr>
<td>SARPS</td>
<td>Standards and Recommendations Practices</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty of the European Union</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>UK</td>
<td>The United Kingdom</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNFCCC</td>
<td>United Nations Framework Convention on Climate Change</td>
</tr>
<tr>
<td>US</td>
<td>The United States</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENT

CHAPTER 1: Introduction .......................................................................................................................... 5  
1.1 Background ........................................................................................................................................ 5  
1.2 Problem Statement ............................................................................................................................... 7  
1.3 Delimitations ....................................................................................................................................... 8  
1.4 Methodology ........................................................................................................................................ 9  

CHAPTER 2: Political context of the inclusion of aviation in the EU ETS .................................................. 10  
2.1 International efforts to address climate change .................................................................................. 10  
2.2 International efforts to address aviation emissions ............................................................................. 12  
2.3 Actions at the EU level ....................................................................................................................... 14  

CHAPTER 3: EU legal framework .............................................................................................................. 16  
3.1 Legal basis for including aviation in the EU ETS ............................................................................. 16  
3.2 Scope of Directive 2008/101/EC ....................................................................................................... 17  
3.2.1 Allocation of the allowances ........................................................................................................ 18  
3.2.3 Non-compliance with the Aviation Directive ............................................................................... 19  
3.2.4 Global solution for aviation emissions .......................................................................................... 20  

CHAPTER 4: International legal framework ............................................................................................... 21  
4.1 UNFCCC as an international legal framework to mitigate climate change .................................... 21  
4.2 Kyoto Protocol and express role given to the ICAO ........................................................................ 22  
4.3 ICAO and Chicago Convention ....................................................................................................... 23  
4.4 Open Skies Agreement ....................................................................................................................... 25  

CHAPTER 5: Compatibility of the Aviation Directive with international law ............................................. 28  
5.1 Relationship between the EU law, international law and international customary principles ....... 28  
5.2 The US-EU legal conflict illustrated by the ATA Case ..................................................................... 31  
5.3 Applicability of the Chicago Convention .......................................................................................... 34  
   i. First condition: the EU must be bound by the Chicago Convention ............................................... 34  
   ii. Interim conclusion ........................................................................................................................... 37  
   iii. Second condition: provisions unconditional and precise enough ............................................. 37  
   iv. Interim conclusion ........................................................................................................................... 40
5.4 Can the express role given to the ICAO by Article 2 (2) of the Kyoto Protocol undermine the validity of the Aviation Directive? ................................................................. 41
   i. Interim conclusion ......................................................................................................................... 44

5.5 Does the participation in the EU ETS by the US aircraft operators violate the provisions of the Open Skies Agreement? .................................................................................. 45
   i. Nature and broad logic of the Open Skies Agreement ................................................................. 45
   ii. Unconditional and sufficiently precise ..................................................................................... 46
   iii. Interim conclusion .......................................................................................................................... 48
   iv. Compatibility with Article 7 of the Open Skies Agreement ....................................................... 48
   v. Compatibility with Article 11 (2) (c) of the Open Skies Agreement ............................................ 49
   vi. Compatibility with Article 15 (3) read in conjunction with Articles 2 and 3 (4) of the Open Skies Agreement ................................................................................................................................. 50
   vii. Interim Conclusion ........................................................................................................................ 51

CHAPTER 6: Potential outcome of the conflict ..................................................................................... 53
   6.1 Position of the opposing countries and alternative ways to challenge the Aviation Directive 53
   6.2 Global solution for aviation emissions ......................................................................................... 55

CHAPTER 7: Conclusion ....................................................................................................................... 56

BIBLIOGRAPHY .................................................................................................................................. 59
CHAPTER 1: Introduction

1.1 Background

Climate change is an internationally recognized problem facing the world.\footnote{See the UN Environmental Programme: Climate Change \url{http://www.unep.org/climatechange/} (last visited 2 September, 2012).} According to the Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment Report 2007 a rise in global average temperature is likely due to an increase in greenhouse gas (hereafter GHG or CO$_2$) emissions caused by human activity.\footnote{See the IPCC-the leading international body in climate assessment \url{http://www.ipcc.ch/organization/organization.shtml#T7phVKGG70} (last visited 2 September, 2012).} It is scientifically recognized that a temperature rise of more than 2°C could have irreversible environmental consequences on the planet.\footnote{See the EU Directorate-General for Climate Action (further DG CLIMA): \url{http://ec.europa.eu/clima/policies/international/index_en.htm} (last visited 10 September, 2012).} Therefore, it is important to take necessary measures on international level to reduce CO$_2$ emissions.

The European Union (EU) has been committed over the time to international efforts to combat climate change and reduce GHG emissions.\footnote{See the European Climate Change Programme (ECCP) \url{http://ec.europa.eu/clima/policies/eccp/index_en.htm} (last visited 10 September, 2012).} In 2003, Directive 2003/87/EC establishing the European Emission Trading Scheme (hereafter called the EU ETS) for trading in GHG emission allowances within the EU was introduced.\footnote{See Directive 2003/87/EC of the European Parliament and of the Council, 13 October 2003.} This scheme is a mechanism to fight climate change and reduce CO$_2$ emissions in a cost effective way. The EU ETS Directive has been amended a number of times.\footnote{See, for instance, Directive 2004/101/EC and Directive 2009/29/EC.} One of these amendments was Directive 2008/101/EC (hereafter Aviation Directive) which included aviation activities under the EU ETS.\footnote{See Directive 2008/101/EC of the European Parliament and the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (hereafter the Aviation Directive), preamble paragraph 14 and Chapter 2 ‘Aviation’, Article 3 litra a.} According to the Aviation Directive all flights arriving and departing from EU airports are covered under the scheme despite the nationality of operator.\footnote{Id at Annex I, ‘Categories of activities to which this Directive applies’, paragraph 2.} Operators will have to surrender emission allowances equivalent to the total number of emissions produced by them in the preceding year.\footnote{Id at Article 12.} In case of non-compliance with the rules, penalties or an operating ban may be imposed. These sanctions caused tremendous criticism from non-European countries. Countries like the United States (US), China, India and Russia oppose the
scheme and state that these actions interfere with international law. They argue that participation in the EU ETS constitutes a tax on their airlines; it will penalize fast growing airlines and add significant costs to the industry which is operating on small margins. This criticism resulted in a legal action brought by the US Air Transport Association and others (hereafter ATA) before the court in the United Kingdom (UK). The ATA argued that, in adopting the Aviation Directive, the EU infringed a number of the principles of customary international law and various international agreements. On this basis the High Court of Justice of England and Wales asked the Court of Justice of the EU (hereafter CJ) whether the Aviation Directive was valid in the light of those principles of customary law and international agreements. In Case C-366/10 (hereafter ATA case) the CJ thus examined whether certain rules and provisions of international law may be relied upon for the purpose of assessing the validity of the Aviation Directive. The CJ concluded that some of those international principles and provisions may be relied upon. However, the examination of the Directive did not show any factors which could undermine the validity of the inclusion of aviation into the EU ETS.

In February 2012, a group of over 20 countries including the US, China, Russia and Brazil, agreed upon a set of possible countermeasures against the EU’s inclusion of aviation in the EU ETS. In the joint declaration they stated that the inclusion of international civil aviation in the EU ETS cause serious market distortions and unfair competition. Taking into account that many countries oppose the scheme, the EU decision to include aviation will be challenged not only in a court room, as in the ATA case, but also during political and trade negotiations. Despite all the criticism from the opposing countries, the EU argued that its intention was for the EU ETS to serve as a model for

---

13 See Case C-366/10, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change (hereafter ATA case).
14 The decision of the CJ is examined further in the thesis in order to establish whether the Aviation Directive is compatible with the international treaties.
other countries. In addition, the European Commission (hereafter Commission) reaffirmed its commitment to work through the International Civil Aviation Organization (hereafter ICAO) with other countries in order to find a global solution for reducing GHG emissions from aviation.\footnote{See DG CLIMA: http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm (last visited 22 October, 2012).}

1.2 Problem Statement

The conflict between the EU and non-European countries can have serious implications on the aviation industry and international trade and it can affect multiple stakeholders not only at the EU level but also globally. On the one hand, the non-European countries claim that the inclusion of the aviation sector in the EU ETS violates international law and causes serious market distortions. On the other hand, the EU states that its actions do not interfere with international legal order and that the EU is willing to work on a global solution in order to address GHG emissions from aviation. On this basis, the thesis analyses the conflict between the EU and non-European countries from a legal point of view. Thus, the Aviation Directive is examined in the light of the principles of customary law and international agreements, addressed in the ATA case, in order to determine whether the inclusion of aviation in the EU ETS is compatible with those principles and provisions. The conflict between the EU and international law is illustrated by the ATA case, and as such the arguments of both parties are examined in the thesis.\footnote{At the time of writing, the case brought by the ATA and others against the UK’s Secretary of State for Energy and Climate Change before the High Court of Justice of England and Wales is not available, therefore the questions referred by the UK’s court for a preliminary ruling are analysed instead. See the reference for a preliminary ruling from High Court of Justice Queen’s Bench Division (UK) made on 22 July 2010 to the Court of Justice of the European Union, 2010/C 260/12.} The objective of the thesis is to assess the compatibility of the Aviation Directive with international legal order and to identify possible outcome of the conflict between the EU and non-European countries. Particular attention is devoted to the international agreements addressed in the ATA case, namely: the United Nation Framework Convention on Climate Change (UNFCCC), its Kyoto Protocol, the Chicago Convention and the Open Skies Agreement.

Chapter 2 of the thesis puts the EU’s decision to include aviation in the EU ETS into a broader political context in order to understand what reasons facilitated the inclusion. The international efforts to address GHG emissions from the aviation sector are examined together with the actions of the EU. Chapter 3 addresses the EU legal framework with the focus on the Aviation Directive. There, the legal basis for including aviation in the EU ETS and the scope of the Directive are analysed. Furthermore, specific provisions laying down the basis for the system are examined. In
chapter 4 the international legal framework is assessed with the focus on the international agreements regulating emissions from the transport sector and specifically aviation, namely: the UNFCCC, its Kyoto Protocol and the Chicago Convention. Furthermore, the bilateral agreement between the EU and US called the Open Skies Agreement is examined in the chapter. The Open Skies Agreement has a particular importance in assessing the validity of the Aviation Directive, because the ATA challenged the inclusion of aviation based on the specific provisions of the Agreement. Chapter 5 addresses the question of the compatibility of the Aviation Directive with the international legal framework discussed in the previous chapter. First, the provisions of the EU treaties which regulate the relationship between the EU law, international agreements and principles of customary law are analysed. Next, the US-EU legal conflict is illustrated by the ATA case. There, the arguments of both parties are presented. Furthermore, the potential incompatibilities between the Aviation Directive and international legal framework are assessed and examined further in the next sections. In the final part of the thesis, the potential outcome of the conflict is discussed briefly. There, the criticism from non-European countries is examined further.

1.3 Delimitations

The thesis examines the compatibility of the Aviation Directive with international law illustrated by the US and the EU conflict presented in the ATA case. Therefore, the thesis is limited to legal analyses of the EU law and international agreements relevant to the understanding of the Aviation Directive, namely: the UNFCCC, its Kyoto Protocol, the Chicago Convention and the Open Skies Agreement. Despite the fact that there are many countries opposing the inclusion of aviation in the EU ETS, the US and EU legal conflict is analysed due to lack of legal actions from other countries at the time of writing. The position of other non-European countries is discussed briefly due to scope of the thesis.

Since the focus of the thesis is the Aviation Directive and not Directive 2003/87/EC establishing the EU ETS, the EU ETS itself is addressed briefly. The thesis does not include economic implications of the inclusion of the aviation sector in the EU ETS. Furthermore, whether the EU ETS is a good mechanism to address GHG emissions from aviation is not addressed in the thesis. In addition, the
literature suggests that the Aviation Directive may violate the WTO law; however, due to the scope of the thesis, this issue is not going to be examined here.\textsuperscript{19}

1.4 Methodology

The thesis is based on the legal analyses of the compatibility of the Aviation Directive with international law. Therefore, all relevant primary and secondary sources of the EU law, such as: Treaties establishing the European Union, Directives and Decisions are analysed in the thesis. The detailed discussion of the legal content of the Aviation Directive is presented in order to understand the potential incompatibilities. Furthermore, the thesis includes the analyses of the legal content of the international agreements relevant to the understanding of the Aviation Directive, namely: the UNFCCC, its Kyoto Protocol, the Chicago Convention and the Open Skies Agreement. After that, the conflict between the Aviation Directive and international agreements is illustrated by the ATA case. There, the judgment of the CJ and the opinion of Advocate-General Kokott are assessed. Relevant legal journals and other peer-reviewed literature are consulted for more in depth knowledge about the conflict. In order to interpret the provisions of the EU law and to evaluate the EU’s position, all relevant communications, recommendations, guidelines, opinions and proposals are examined. Similarly, all relevant international reports, communications, opinions and recommendations from the UNFCCC, the ICAO and others are consulted.

CHAPTER 2: Political context of the inclusion of aviation in the EU ETS

Since January 2012 emissions from all domestic and international flights that land or take off in EU airports are covered under the EU ETS. In order to understand what facilitated the adoption of the Aviation Directive, this chapter puts the inclusion of aviation activities into a broader political context. Section 2.1 discusses the international efforts to address climate change with a focus on the UNFCCC and its Kyoto Protocol. Section 2.2 presents the international efforts to address GHG emissions from the aviation sector and the express role given to the ICAO by the Kyoto Protocol. Finally, section 2.3 introduces the position of the EU towards climate change and its actions to address GHG emissions from aviation.

2.1 International efforts to address climate change

The international efforts to combat climate change are presented in the UNFCCC and its Kyoto Protocol. In 1994, the UNFCCC entered into force and it was ratified by 195 countries. It represents nearly universal consensus on the importance of climate change. The aim of the UNFCCC is to limit average global temperature increases and the resulting climate change, and to cope with its impact. The parties to the Convention acknowledge that climate change is a shared responsibility and they recognize the importance of reducing GHG emissions. However, the UNFCCC does not set any binding targets to achieve reduction in GHG emissions. As a result, the Kyoto Protocol was negotiated and approved by a number of nations.

The Kyoto Protocol sets binding targets for industrialized countries. The aim of the Protocol is to reduce GHG emissions to an average of 5% compared to the 1990 level, achieved by 2008-2012 period. It binds only developed countries listed in the Annex B of the Protocol, because it recognizes that they are largely responsible for the high levels of GHG emissions in the atmosphere. It also introduces three new mechanisms to help the countries to achieve the targets: (1) emission

---

20 See the Aviation Directive Annex I litra b.
21 By August 2012 it is ratified by 195 countries. See the UNFCCC essential background http://unfccc.int/essential_background/convention/items/6036.php (last visited October 15, 2012).
22 See the UNFCCC preamble.
23 The industrialized countries are listed in Annex I of the UNFCCC http://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php (last visited October 24, 2012).
trading; (2) Clean Development Mechanism (CDM); and (3) Joint Implementation (JI).\textsuperscript{24} These mechanisms give countries certain degree of flexibility in addressing GHG emissions.

Despite the importance of climate change, there is a significant difference in the attitude developed countries have towards the Kyoto Protocol.\textsuperscript{25} For instance, the EU sets even higher targets than the ones agreed in the Protocol and creates the largest emissions trading system (the EU ETS) in the world. In addition, in 2007 the heads of the EU Member States agreed on the EU climate goals for 2020: 20\% GHG emissions reduction below the levels of 1990, 20\% share of renewable energy in the EU energy consumption, and 20\% increase in energy efficiency.\textsuperscript{26} While the EU is fully committed to the Kyoto Protocol, the US has chosen a different strategy. In 2001, the Bush Administration decided to withdraw the US from the Protocol.\textsuperscript{27} As a reason, the president stated the negative economic consequences on the US due to exemption of developing countries or so called Newly Industrialized Countries (NICs) like China and India. Furthermore, the US argued that the Protocol puts a disproportionate burden on them. Since then the EU and the US policies have diverged, with the EU supporting a multilateral agreement under the Kyoto Protocol with clear targets and timetables and the US pursuing a foreign policy that engaged few countries on joint research, investment and technology transfer.\textsuperscript{28}

Developing countries such as China and India ratified the Protocol in 2002. However, they are not under the obligation to reduce GHG emissions under the common but differentiated responsibility clause.\textsuperscript{29} Another important emitter is Australia, which ratified the Kyoto Protocol only in 2008.\textsuperscript{30} Initially it supported the US position, however due to change in the political leadership Australia has ratified the Protocol.

\textsuperscript{24} All these mechanisms are presented in Kyoto Protocol and they are focused on different means of combating climate change. See the Kyoto Protocol Article 6: JI, Article 12: CDM, and Art 17: emission trading.
\textsuperscript{26} See the Europe 2020 Targets http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/targets/index_en.htm (last visited 28 October, 2012).
\textsuperscript{29} See the Kyoto Protocol Article 10.
In December 2011 Canada announced that it will withdraw from the Kyoto Protocol. This action is legally possible due to existence of a ‘way-out’ clause in the Protocol.\textsuperscript{31} The environment minister of Canada stated that the country is not able to meet the targets.\textsuperscript{32} Furthermore, he argued that as the Kyoto Protocol does not cover two biggest emitters the US and China, it is not going to work. The withdrawal of Canada created a tension around negotiations of the post-Kyoto targets.

As there is a need to combat climate change at a universal level and not only locally, the difference in attitude between developed and developing countries towards the Kyoto Protocol and future negotiations can undermine the effectiveness of the Protocol. Furthermore, as the Protocol expires in 2012, the compliance with the emission reduction targets of the Kyoto Protocol and its effectiveness as a mechanism to combat climate change can be assessed.

\subsection*{2.2 International efforts to address aviation emissions}

The aviation sector contributes only around 2% of the global GHG emissions, yet it attracts an attention of environmentally-conscious countries.\textsuperscript{33} This is mainly due to the fact that the aviation sector is one of the largest growing sources of CO\textsubscript{2}. According to the ICAO’s Environmental Report 2007, the growth of GHG emissions from aviation is largely attributed to economic development.

Under the Kyoto Protocol Annex 1 countries adopted targets to reduce GHG emissions. However, emissions from international aviation are explicitly excluded. Art 2 (2) states that:

‘...the Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol\textsuperscript{34} from aviation ..., working through the International Civil Aviation Organization.’

The Kyoto Protocol places responsibility of GHG emissions reductions from aviation under the ICAO. The ICAO, a specialized agency of the United Nations, was created to promote the safe and orderly development of civil aviation throughout the world. In case of environmental protection, the

\textsuperscript{31} Article 27 of the Kyoto Protocol gives a right to withdraw from the Protocol.
\textsuperscript{34} The Montreal Protocol is an international treaty designed to protect ozone layer from substances that deplete it. Both the UNFCCC and the Kyoto Protocol regulate gasses ‘not controlled by the Montreal Protocol’ because the gasses addressed in the Montreal Protocol are already under regulatory framework of that Protocol.

Page 12 of 65
ICAO establishes Standards and Recommendations Practices (SARPS), policies and guidance for international civil aviation.\(^{35}\)

In response to the obligations under the Kyoto Protocol, the ICAO requested the UN’s Intergovernmental Panel on Climate Change (IPCC) to prepare a report on the aviation’s role in climate change.\(^{36}\) The report presented some economic and technical policies which were focused on reduction of the impact from aviation on climate change. As a result, in 2004 the Assembly issued a resolution presenting the guidelines for market-based measures.\(^{37}\) The resolution requested the ICAO to focus on two approaches in its further work.\(^{38}\) Under one approach, the ICAO would support the development of a voluntary emissions trading system that interested contracting states and international organizations might propose. Under the other approach, the ICAO would provide guidance for use by contracting states, as appropriate, to incorporate emissions from international aviation into contracting states’ emissions schemes consistent with the UNFCCC process.

Since 2004, the ICAO’s Committee on Aviation and Environment Policy (CAEP) worked on the development of guidelines to assist contracting states to pursue these approaches. During the development of the guidelines for inclusion of aviation into existing emissions trading schemes, the difference of opinions about the geographic scope of the scheme become evident.\(^{39}\) The scope of the scheme plays crucial role because it defines the environmental effectiveness of the system and potential impact on competition between airlines. Many states argued that the emissions from flights performed by a third country should not be included into the existing state’s emissions trading system without mutual consent. This issue was addressed at the ICAO Assembly in 2007 and the resolution supporting mutual consent was adopted.\(^{40}\) The EU strongly opposed the concept of mutual agreement and as a result it placed a reservation on the part of the resolution dealing with market-based measures.

\(^{35}\) See the ICAO environmental protection section [http://www.icao.int/environmental-protection/Pages/default.aspx](http://www.icao.int/environmental-protection/Pages/default.aspx) (last visited 23 October, 2012).


\(^{38}\) Id at Appendix I litra c.


Following the ICAO Assembly, a Group on International Aviation and Climate (GIAC) was set up to develop ‘an aggressive Programme of Action on International Climate Change’.

However, the group lacks ambitious objectives; it merely states that it will identify possible aspirational goals and possible options for their implementation.

2.3 Actions at the EU level

The European Community ratified the Kyoto Protocol in 2002. Thus, the States which were members of the EU before 2004 must collectively reduce their GHG emissions by 8% between 2008 and 2012. In response to the Kyoto Protocol, in June 2000 the Commission launched the European Climate Change Programme (ECCP). The main goal of the ECCP is to identify and develop all necessary elements for an EU strategy implementing the Kyoto Protocol.

The work of the first ECCP for the period 2000-2005 involved all relevant stakeholders working together on identifying the most environmentally and cost effective policies. Along with a wide range of different climate policy measures, the EU ETS was created.

The EU ETS is a tool to reduce industrial GHG emissions in a cost effective way. It covers around 11,000 power stations and industrial plants in 30 countries. It is based on ‘cap and trade’ principle, where the Member States allocate emission allowances (through NAP) to different power stations and industrial plant, and in the end of the year these installations have to surrender their emission allowances. In case of emitting more GHG units, the installation needs to buy allowances from other installations which emitted less. This system creates a carbon market, where different installations can trade their allowances with each other. Price for the emissions units is set by the

41 Id at Appendix K.
42 It is important to note here that the actions of the ICAO to address emissions from aviation are examined in this section only until year 2008. The later actions of the ICAO in response to the Aviation Directive are examined in Chapter 6 of the thesis.
44 The 8% target was translated into differentiated emissions reductions for the Member States by the Burden Sharing Agreement based on Council Decision 2002/358/EC. Member States which joined the EU after 2004 undertake to reduce their emissions by 8%, with the exception of Poland and Hungary (6%), and Malta and Cyprus, which are not listed in Annex I to the UNFCCC. See also the summaries on EU legislation ‘Kyoto Protocol on climate change’ http://europa.eu/legislation_summaries/environment/tackling_climate_change/l28060_en.htm (last visited 29 October, 2012).
46 See, for instance, Promotion of Renewable Energy Directive 2001/77/EC or Biofuels Directive 2003/30/EC.
47 See Directive 2003/87/EC establishing the EU ETS.
48 For more information on National Allocation Plan (NAP) see http://ec.europa.eu/clima/policies/ets/allocation/index_en.htm (last visited 27 October, 2012). For the third allocation period starting in 2013 there will no longer be national allocations, but it will be done directly at EU level.
market. In this way the companies are motivated to invest into measures to reduce their GHG emissions. However, the scheme excludes one of the biggest emitter: the transport sector.

In 2002, the Sixth Environmental Action Programme (2002-2012) was established. It creates the strategic framework for the EU environmental actions and includes climate change among the top priorities.\textsuperscript{49} It also sets the objectives to reduce GHG emissions in the transport sector by identifying and undertaking further specific actions. It explicitly addresses emissions from aviation and calls for action at the EU level if no such action is agreed within the ICAO by 2002.\textsuperscript{50}

Following the ICAO’s Assembly 2004, the Commission issued the communication where it set out a comprehensive approach to address emissions from aviation.\textsuperscript{51} It argued that despite the fact that emissions from the aviation sector represent a small share of around 2%, due to stable growth in the international aviation emissions, it can offset the Kyoto targets. Furthermore, the Commission stated that the inclusion of aviation in the EU ETS is a promising solution from an economic and environmental point of view. In parallel, it recommended to strengthen the existing policies such as more research into greener air transport and improvements in air traffic management. Finally, the Commission proposed to set up an Aviation Working Group under the ECCP with the aim to put forward a legislative proposal to include aviation into the EU ETS.

In December 2006, the Commission issued a draft legislation to amend Directive 2003/87/EC to include aviation in the EU ETS.\textsuperscript{52} Following the legislative proposal, the European Parliament and the Council approved some additional amendments to the initial proposal and Directive 2008/101/EC so called Aviation Directive was adopted.

\textsuperscript{49} See Decision No 1600/2002/EC laying down the Sixth Environmental Action Programme.
\textsuperscript{50} Id at Article 5, 2 section iii.
\textsuperscript{51} See the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions, ‘Reducing the climate change impact of Aviation’, Brussels, COM(2005) 459 final, 27.9.2005.
CHAPTER 3: EU legal framework

This chapter presents the EU legal framework with the focus on the scope of the Aviation Directive. It is crucial for the following analyses to examine the legal content of the Aviation Directive in order to assess whether the Directive can be incompatible with the international legal framework discussed in chapter 4. This chapter is structured in two parts: section 3.1 discusses legal basis for the inclusion of aviation and argues whether the original EU ETS was meant to develop further to other sectors. Finally, section 3.2 defines the scope of the Directive and discusses different provisions laying down the basis for the amended EU ETS.

3.1 Legal basis for including aviation in the EU ETS

First of all, the question arises whether the EU provides necessary legal framework to include aviation in the EU ETS. The Treaty on the Functioning of the European Union (hereafter TFEU) lays down a legal basis for including aviation. Specifically, Articles 191 and 192 TFEU deal with environmental policy. It states that the EU environmental policy should preserve, protect and improve the quality of environment. Furthermore, the EU should promote measures at an international level to deal with regional and worldwide environmental problems, and in particular to combat climate change. The Treaty acknowledges the importance of fighting climate change and allows, acting in accordance with ordinary legislative procedure, to decide what actions to be taken by the EU in order to achieve the environmental objectives. Therefore, the EU legal competences to legislate in order to achieve environmental objectives are not questionable.

Secondly, it is should be discussed whether the EU ETS is a secluded system or it is open to other sectors, in particular to aviation. Under Directive 2003/87/EC establishing the EU ETS only the power stations and industrial plants listed in Annex 1 are covered by the scheme. The EU ETS Directive is limited to energy activities, production and processing of ferrous metals, mineral industries and other related activities. However, Article 30 of this Directive explicitly states that the Commission may make a proposal to the European Parliament and the Council to amend Annex 1

53 The choice of legal basis plays a crucial role in establishing whether the validity of Aviation Directive can be challenged. It is illustrated by Case C-94/03, where the CJ annulled Council Decision 2003/106/EC concerning the approval, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade, because the legal basis were solely based on Article 175 EC, where two legal basis Articles 133 EC and 175 EC were equally important.

54 See the TFEU Article 192. Another example of the EU actions to achieve environmental objectives is Directive 2003/30/EC to promote the use of biofuels in order to reduce GHG and the environmental impact of transport.
to include other activities and emissions of other GHGs. With regard to aviation, Article 30 (2) states:

‘...the Commission shall draw up a report on the application of this Directive, considering: how and whether Annex I should be amended to include other relevant sectors, inter alia the...transport sectors.'

Therefore, it can be concluded that the EU ETS was meant to develop further to other activities and to include transportation sector.\(^55\) In addition to that, the Directive is not restricted to measures that are related only to the territory of the Member States. This is explicitly presented in the amendments introduced to the Directive in 2004.\(^56\) These amendments link the EU ETS to project-based CDM\(^57\) and JI\(^58\) credits under the Kyoto Protocol. As a result, the allowances originated in third countries can be incorporated in the EU ETS. Consequently, the scheme allows instruments which go beyond the territory of a Member States.

### 3.2 Scope of Directive 2008/101/EC

From 1 January 2012 all flights arriving and departing from an aerodrome situated in the territory of a Member State are included in the EU ETS.\(^59\) All flights are covered despite the nationality of aircraft operator in order to avoid distortion of competition and improve environmental effectiveness of the scheme.\(^60\) However, the Aviation Directive is not intended to apply to international flights over the territory of the Member States or a third country which do not arrive or depart from an EU aerodrome. Commercial air transport operators which perform less than 243 flights for three consecutive four-month periods are exempted from the EU ETS.\(^61\) In addition,
flights performed exclusively for the transport on official mission, for military issues, or for search and rescue purposes are not covered by the scheme.\textsuperscript{62}

\textbf{3.2.1 Allocation of the allowances}

The extension of the EU ETS requires aircraft operators\textsuperscript{63} to surrender emission allowances equivalent to the total number emitted in preceding year. From the period of 1 January 2012 to 31 December 2012, the total allowances allocated to aircraft operators are equivalent to 97\% of the historic aviation emissions\textsuperscript{64}. According to Article 3 (d) of the Directive, 15\% of total allowances should be auctioned by the Member States. A special reserve of 3\% of the total allowances is set aside to ensure access to the market for new aircraft operators and to assist fast growing aircraft operators.\textsuperscript{65} It is for the Member States to determine the use made of auctioning revenues.\textsuperscript{66} Nevertheless, those revenues should be used to tackle climate change in the EU and in third countries. That includes investing in reduction of GHGs, funding research and development of aeronautics and air transport, improving global energy efficiency and renewable energy, and measures to avoid deforestation.

Each aircraft operator can apply for allocation of free of charge allowances. Article 3 (e) of the Directive establishes the application procedure for these allowances. Following the procedure, an aircraft operator has to submit to the competent authority in the administrating Member State\textsuperscript{67} verified tonne-kilometre data for aviation activities for the monitoring year. The monitoring year is the year that ended twenty-four months before the year for which the aircraft operator is requesting an allocation. The aircraft operators have to apply at least twenty-one months before the start of the period. Furthermore, the Member States forward the submitted application to the Commission. The Commission decides on: (1) the total quantity of the allowances to be allocated, (2) the number of the allowances to be auctioned, (3) the number of allowances in a special reserve for small aircraft operators and start-ups, and (4) the benchmarks to allocate allowances free of charge. The

\textsuperscript{62} For the list of exempted activities see the amended Annex 1 of the Aviation Directive.
\textsuperscript{63} Aircraft operator is a person who operates an aircraft at the time it performs an aviation activity listed in Annex 1, or where that person is not known or is not identifies by the owner of the aircraft, the owner of the aircraft.
\textsuperscript{64} Historic aviation emissions is the mean average of the annual emissions in the calendar years 2004, 2005 and 2006 from aircraft performing an aviation activity listed in Annex 1.
\textsuperscript{65} See the Aviation Directive Article 3 litra f.
\textsuperscript{66} Id at Article 3 litra d section 4.
\textsuperscript{67} Administrating Member State is the Member State responsible for administrating the Community scheme in respect of an aircraft operator in accordance with Article 18 litra a of the Aviation Directive.
benchmark is calculated by dividing the number of allowances (referred in point three) by the sum of tonne-kilometre data reported by all aircraft operators.

After the Commission has calculated the benchmark, the Member States have three months to calculate and publish each aircraft operator’s allocation of allowances. This implies that the Member States have to calculate how much each aircraft operator is allowed to emit for entire allocation period and separately for each year. This information should be provided to aircraft operators by 28 February of each year.

3.2.2 Calculation of emissions

It is worthwhile examining the method to calculate aviation GHG emissions in order to determine whether the submission of emission allowances by the third countries aircraft operators can be regarded as a tax or a charge on them. Annex IV (b) of the Aviation Directive declares that emissions should be monitored by calculations. It also presents the formula: fuel consumption \times emission factor. The actual fuel consumption should be used whenever possible, if these data are not available, a standardized tiered method should be used to estimate fuel consumption based on the best available information. Finally, the emission factor is available on the 2006 IPCC Inventory Guidelines or updated version of these guidelines.\textsuperscript{68}

3.2.3 Non-compliance with the Aviation Directive

According to Article 16 of the Aviation Directive, any aircraft operator who did not surrender sufficient allowances by 30 April to cover its emissions for the preceding year is held liable for the payment of an excess emission penalty. The excess emissions penalty is EUR 100 for each tonne of carbon dioxide\textsuperscript{69} emitted. The Member States have to ensure the publication of the names of aircraft operators who are in breach of the requirements to surrender efficient allowances. Nevertheless, the payment of penalty does not release the aircraft operator from the obligation to surrender its emissions in relation to the following year. Furthermore, if the penalty measures are ineffective, the administrating Member State may request the Commission to decide on imposition of an operating ban for the aircraft operator in breach of the Directive. But then again, imposition of an operating ban would need to pass a proportionality test set out in Article 16 (1) of the Directive.

\textsuperscript{68} For more information on the IPCC Inventory Guidelines see \url{http://www.ipcc-nggip.iges.or.jp/public/2006gl/index.html} (last visited 5 December, 2012).

\textsuperscript{69} Or in other words greenhouse gases (GHG) or CO\textsubscript{2}.
3.2.4 Global solution for aviation emissions

The Aviation Directive states that the Community and its Member States should continue negotiations to reach a global solution for reducing GHG form the aviation sector. Taking this into account, the Directive presents an option for a third country to propose a different measure to address this issue. In particular, if the third country adopts measures, which have an environmental effect at least equivalent to that of the Aviation Directive, the Commission should consider providing an optimal interaction between the EU ETS and the measures proposed. This could apply to emission trading systems developed by other countries in relation to aviation. However, the Aviation Directive does not specifically mention measures which could be regarded as having equivalent effect.

70 See the Aviation Directive preamble 17.
CHAPTER 4: International legal framework

This chapter introduces the international legal framework with the focus on the regulation of emissions from the transport sector and specifically aviation. Particular attention is devoted to the international provisions relevant to the analysis and understanding of the Aviation Directive. Section 4.1 presents the UNFCCC with the aim of assessing whether it regulates the reduction of emissions in the transport sector. The later section 4.2 focuses on the Kyoto Protocol and the express role given to the ICAO to address aviation. Section 4.3 introduces the main principles and provisions gathering international civil aviation established by the Chicago Convention. Since the compatibility of the Aviation Directive with international law is illustrated by the US-EU conflict, section 4.4 examines the US-EU Open Skies Agreement with the aim to clarify the provisions gathering it.

4.1 UNFCCC as an international legal framework to mitigate climate change

The UNFCCC creates an international framework to address climate change. The main objective, set out in Article 2, is to stabilize GHG concentration in the atmosphere. The UNFCCC states that the parties should protect the climate system on the basis of equity\(^{71}\) and in accordance with common but differentiated responsibilities and respective capabilities.\(^{72}\)

The UNFCCC treats developed and developing countries differently.\(^{73}\) It acknowledges that developed countries should take the lead in combating climate change due to their largest share of historic and current emissions.\(^{74}\) They should undertake to develop and adopt policies and measures to mitigate climate change.\(^{75}\) Such policies and measures can be implemented individually or jointly with other parties. The UNFCCC also states that specific needs and vulnerability of the developing countries should be taken into account when addressing climate change. For instance, the countries listed in Annex II should assist developing countries to promote transfer of technology to enable them to implement the objective of the UNFCCC.\(^{76}\)

---

\(^{71}\) For more information on international equity and its role in climate change policy see the article ‘International equity in climate change policy’, Metz, B., 2000, Integrated Assessment, 1(2), 111-126.

\(^{72}\) See the UNFCCC, Articles 2 and 3.

\(^{73}\) Id at Article 4: Commitments.

\(^{74}\) Developed countries are listed in the Annex I to the UNFCCC.

\(^{75}\) Id at Article 4 section 2.

\(^{76}\) See more commitments in the UNFCCC Article 4 (section 2, 3, 4 and 5).
Despite the differentiated treatment, the UNFCCC requires all parties to develop, implement and periodically update national and/or regional programmes containing measures to mitigate climate change. In relation to the transport sector, the UNFCCC states that all parties, taking into account their common but differentiated responsibilities, should:

‘...Promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport...sectors.’

This means that the UNFCCC encourages parties to control, reduce and prevent GHG emissions from the transport sector. However, the UNFCCC places emphasis on the fact that measures taken to fight climate change, including unilateral ones, should not be discriminatory or put restrictions on international trade.

While all these commitments by developed and developing countries represent an important intention to combat climate change, they lack binding nature. As a result, in 1997 the Kyoto Protocol to the Convention was negotiated and adopted. It represented an important step further towards commitments made under the UNFCCC.

4.2 Kyoto Protocol and express role given to the ICAO

The Kyoto Protocol sets binding targets and a time frame for reduction of GHG emissions for developed countries listed in Annex I to the UNFCCC. The overall reduction of GHGs should be at least 5% below 1990 levels in the commitment period 2008-2012. By the end of this year, the commitment period runs out and there is a need for a new international agreement.

---

77 Id at Article 4 section 1.
78 Id at Article 4 section 1 litra c.
79 Id at Article 3 section 5. See also the discussion about the interaction of the UNFCCC, the Kyoto Protocol and the WTO in the article ‘UNFCCC, the Kyoto protocol and the WTO - brewing conflicts or are they mutually supportive? Halvorsen Anita M., Denver J. International Law Policy, 2008, 36, 3-4, 369.
80 The Protocol strengthens the commitments under the UNFCCC Article 4 section 2 litras a and b.
81 Id at Article 3 section 1.
The Protocol provides means to achieve these targets in a form of flexibility mechanisms.\textsuperscript{82} One of which is emission trading. Article 17 states that the parties included in Annex B may participate in emissions trading for the purpose of achieving the reduction targets.\textsuperscript{83} Furthermore, the Protocol mentions that relevant principles, modalities, rules and guidelines should be defined by the Conference\textsuperscript{84}. Thus, it can be noted that the Kyoto Protocol lays grounds for the creation of emission trading systems and encourages further developments in this area.

With regard to the transport sector, the Kyoto Protocol states that the Parties included in Annex I to the Protocol should implement and/or further elaborate policies and measures to reduce emissions of GHGs not controlled by the Montreal Protocol.\textsuperscript{85} Therefore, the Kyoto Protocol provides an option to achieve the targets by addressing the transport sector. In addition, the Protocol presents a possibility to implement these measures and policies in cooperation with other parties like the UNFCCC.

However, with regard to the aviation sector, Article 2 (2) explicitly excludes it from the reach of the Protocol. It states that the Parties to Annex I should pursue reduction of GHG emissions from the aviation sector working through the ICAO. This provision shifts the burden of addressing aviation emissions to the ICAO. Despite of that, the term ‘working through the ICAO’ seems rather ambiguous and it is not clear whether the parties can pursue their own reductions of GHG emissions in this sector, if no such reductions are achieved by the ICAO. This issue is examined further in chapter 5.

4.3 ICAO and Chicago Convention

The ICAO was created in 1944 by the Convention on International Civil Aviation also known as Chicago Convention.\textsuperscript{86} The main objective of the Convention is to ensure safe and orderly development of international civil aviation based on the principle of equality, as well as sound and

\textsuperscript{82} The Kyoto Protocol, Article 6: Join Implementation, Article 12: Clean Development Mechanism, and Article 17: emission trading. In relation to the topic of the thesis, only the emission trading mechanism will be addressed further.


\textsuperscript{84} Conference/Conference of the Parties is the supreme decision-making body of the UNFCCC, established by Article 7 of the Convention.

\textsuperscript{85} The Kyoto Protocol, Article 2 section 1 vii.

\textsuperscript{86} At the time of writing the Chicago Convention is ratified by 191 parties including all EU Member States. However, the EU itself is not a party to the Convention. See more about the ICAO on the official website http://www.icao.int/Pages/icao-in-brief.aspx (last visited 15 November, 2012).
economic operation of air transport services. The Chicago Convention establishes rules on airspace, aircraft registrations and safety, together with specific rights of the signatories in relation to air travel. It is applicable only to civil aircrafts, not state or in state use.

Furthermore, it is supported by eighteen annexes containing Standards and Recommended Practices (SARPS), which do not have the same legal binding effect as the Chicago Convention. The purpose of SARPS is to achieve highest practicable degree of uniformity in regulations, standards, procedures and organization in relation to aviation. In environmental matters, the ICAO’s Committee on Aviation and Environmental Protection (CAEP) assist in developing new policies and adopting new standards on aircraft noise and aircraft engine emissions. The CAEP also develops guidelines for use of market-based measures to address GHG emissions from aviation such as emissions trading, emissions related levies and emissions offsetting.

The Chicago Convention establishes an important set of principles and rules which guide international civil aviation until present days. One of the main principles, set out in Article 1, is sovereignty. Every state has complete and exclusive sovereignty over the airspace above its territory. This principle can be particularly relevant in the case of inclusion of aviation in the EU ETS, because this scheme includes also emissions originated outside the territory of the EU.

In addition, Article 11 emphasizes the importance of equality and states that:

‘... the laws and regulations of contracting State ... shall be applied to aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering and departing from or while within the territory of that State.’

From this it can be concluded that the contracting states should not discriminate based on nationality when putting in place laws and regulations. This principle of equality or non-discrimination is reaffirmed in Articles 15 and 24 with regard to imposition of airport charges and custom duties. It is worth noting the difference in principles between the Chicago Convention and the UNFCCC, where the later one applies the principle of ‘common but differentiated responsibility’.

---

87 Id at preamble.
88 See the Chicago Convention or also called the Convention on International Civil Aviation, Doc 7300/8.
89 Id at Article 3.
90 Id at Articles 37 and 38.
91 See the ICAO’s CAEP www.icao.int/environmental-protection/pages/CAEP.aspx (last visited 15 November, 2012).
The ICAO addresses emission related levies such as charges and taxes which could be an alternative to emissions trading. Article 15 and 24 of the Chicago Convention regulate the imposition of charges and taxes. In regard to Article 15, the ICAO provides specific guidelines to define charges.\(^92\) The term ‘charges’ is defined by the ICAO’s guidelines as a levy that is designed and applied specifically to recover the costs of providing facilities and services for civil aviation.\(^93\) The charges imposed on an international aircraft should not exceed the charges imposed on a domestic aircraft operator. In addition, the revenues collected should be used to mitigate the environmental impact caused by emissions. In regard to taxation of international aviation, the Chicago Convention does not extensively regulate it.\(^94\) The ICAO defines a tax as a levy to raise general national and local government revenues that are applied for non-aviation purposes.\(^95\) Furthermore, Article 24 states that fuel, lubricating oils, spare parts and regular equipment on board should be exempted from customs duty, inspection fees or similar national duties. The ICAO’s guidelines also list other exempted duties such as import, export, excise, sales, consumption and internal duties and taxes.\(^96\)

### 4.4 Open Skies Agreement

Since the compatibility of the Aviation Directive with the international legal framework is illustrated by the US-EU conflict, it is important to examine the bilateral agreement concluded between them. The US-EU Air Transport Agreement also called the Open Skies Agreement is a comprehensive agreement concluded in 2007 between the US and 27 EU Member States with the aim to liberalize aviation between these countries.\(^97\) It is worth noting that the provisions of the Open Skies Agreement refer to the Chicago Convention and it acknowledges the standards and practices established by the ICAO.\(^98\)

\(^93\) Id at 3.
\(^94\) See the Chicago Convention. For more information see also ‘Putting International Aviation into the European Union Emissions Trading Scheme: Can Europe Do It Flying Solo?’ Daniel B. Reagan, Boston College Environmental Affairs Law Review, 35(2), 349.
Article 2 of the Open Skies Agreement declares that each party shall allow a fair and equal opportunity for the airlines of both parties to compete in providing the international air transportation. Further, Article 3 of the Agreement addresses rights that each party grants to the other party in order to ease the international air transport operations. According to this article, each airline may operate flights in either or both directions, combine different flights in either or both directions, omit stops at any point, etc. And as such, the EU’s carriers become authorized to operate flights between any EU Member State and the US without touching their home base.

Moreover, the Open Skies Agreement allows each party to determine the frequency and capacity of the international air transport based on commercial considerations. The parties cannot unilaterally limit the volume of traffic, frequency or cannot require the filing of schedules, programs for charter flights, or operational plans by airlines. Though, the exception can be made if required for customs, technical, operation, or environmental reasons under uniform conditions consistent with Article 15 of the Chicago Convention. Article 15 of the Convention state that any charges imposed on international aircraft operators should not be higher than the ones imposed on national aircraft operators. In other words, the Article 15 of the Chicago Convention declares that State should not discriminate based on the nationality of aircraft operators.

Article 7 of the Agreement addresses the application of laws and states that:

‘The laws and regulations of a Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, ..., shall be applied to the aircraft utilized by the airlines of the other Party, and shall be complied with by such aircraft upon entering or departing from or while within the territory of the first Party’.

It can be noted that while an aircraft is in the territory of a party or upon entering and departure, the laws and regulations of that party applies. Furthermore, Article 10 of the Open Skies Agreement specifies that the airlines have the right to establish offices in the territory of the other party for the promotion and sales of air transportation and related activities.

In regard to the imposition of taxes, charges, levies and custom duties, Article 11 clarifies that regular and ground equipment, fuel, spare parts, consumable technical supplies and other items intended for or used solely in connection with operation of servicing of aircraft shall be exempt. In

---

99 *Id* at Article 3.
100 *Id* at Article 3 section 4.
addition, the taxes, charges, levies and duties for fuel, lubricants and consumable technical supplies, when these supplies onboard are to be used on a part of the flight performed over the territory of the party to the agreement should be exempt as well.\textsuperscript{101} However, the charges based on the costs of service provided can be applied.

Article 15 of the Open Skies Agreement recognizes the importance of protecting the environment. Therefore, the parties also acknowledge that the costs and benefits of environmental measures must be carefully weighed against the effect it will have on aviation development.\textsuperscript{102} When a party considers measures, the environmental standards adopted by the ICAO should be followed except where the differences have been filed.\textsuperscript{103} Still, the environmental measures should be in accordance with Article 2 and 3 (4) of the Open Skies agreement.

\textsuperscript{101} \textit{Id} at Article 11 section 2 litra c.
\textsuperscript{102} \textit{Id} at Article 15 section 1.
\textsuperscript{103} \textit{Id} at Article 15 section 3.
CHAPTER 5: Compatibility of the Aviation Directive with international law

This chapter analyses the compatibility of the Aviation Directive with international law illustrated by the ATA case. Section 5.1 examines the relationship between the EU law, international agreements and principles of international customary law. Later, section 5.2 presents the ATA case and discusses the legal grounds on which the ATA had challenged the validity of the Aviation Directive. There, the position of the EU, presented in the judgment of the CJ and the opinion of the Advocate-General Kokott, are examined. After the examination of the both parties’ arguments, questions which could undermine the validity of the Aviation Directive are presented and later analysed in the following sections. Thus, section 5.3 examines whether the Chicago Convention can be used as a benchmark to assess the validity of the Aviation Directive, even though the EU is not a party to the Convention. Section 5.4 analyses whether the express role given to the ICAO by the Article 2 (2) of the Kyoto Protocol can undermine the validity of the Directive. The final question, addressed in the section 5.5, is whether the participation in the EU ETS by the US aircraft operators violates the Open Skies Agreement.

5.1 Relationship between the EU law, international law and international customary principles

The EU is seeking to develop itself as an important international actor in the global arena. And with the entry into force of the Lisbon Treaty, a range of new provisions was introduced in order to strengthen the EU position as global actor. One of them is Article 47 Treaty of European Union (TEU), which states that the EU shall have legal personality. This provision acknowledges that the EU has legal personality, though it does not elaborate more in this matter. However, Article 335 Treaty on the Functioning of the European Union (TFEU) declares that:

‘In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.’

---

Article 3(5) TEU highlights the values of the Union in regard to international relations such as protection of citizens, peace, security, sustainable development of the Earth and it declares that the EU shall contribute to the strict observance and the development of international law. In addition to that, Article 21 TEU introduces the core objectives of all EU external policies among which are:

‘The Union shall be guided by principles ...of democracy, the rule of law..., and respect for the principles of the United Nations Charter and international law.’

Thus, it can be seen from above that the TEU encourages the EU to respect the principles of international law and to contribute to the development of international law. Furthermore, as the EU has legal personality, it is a subject to the rights and obligations arising under international agreements and international law. According to Article 216 TFEU, international agreements concluded by the EU are binding on the institutions of the EU and its Member States. The CJ held in the Haegeman ruling that once the agreement enters into force, its provisions become integral part of the EU law. As a result, the Member States are bound by virtue of their obligations under the EU law and not international law.

The question arises whether the EU is bound by an international agreement if all the Member States are party to the agreement but not the EU itself as in case of the Chicago Convention. Article 216 (2) TFEU addresses only international agreements which have been concluded by the EU. Nevertheless, Article 351 TFEU mentions that the rights and obligations arising from agreements concluded before 1 January 1958 between one or more Member States and one or more third countries shall not be affected by the provisions of the TEU or the TFEU. Where the agreement is not compatible with the Treaties, Member States should take appropriate actions to eliminate the incompatibilities. However, the EU itself is not bound by such previous agreements. The CJ also confirmed in its rulings that the lawfulness of the EU acts does not depend on its conformity with an international agreement to which the EU is not a party. On the contrary, in the International Fruit Company case, the CJ declared that certain provisions of the General Agreement on Tariffs

---

105 See the TEU, Article 3 section 5.
107 See Case 181/73, R. & V. Haegeman v Belgian State paragraph 5.
108 For acceding states it is the date before their accession.
109 See Article 351 TFEU second paragraph.
110 See Case C-377/98, Kingdom of the Netherlands v European Parliament and Council of the European Union paragraph 52, Case C-149/96, Portuguese Republic v Council of the European Union paragraph 47.
and Trade (GATT) 1947 had binding effect on the EU, even though the EU was not originally a contracting party.\textsuperscript{111}

Furthermore, the distinction between international agreements and principles of international customary law\textsuperscript{112} should be examined. Principles of international customary law are not regulated by the treaties. However, in few cases the CJ has invoked or applied principles of international law other than international agreements.\textsuperscript{113} In the Poulsen case the CJ ruled that the EU must respect international law in the exercise of its powers.\textsuperscript{114} In the Racke case, the CJ stated that the principles of customary international law concerning the termination and suspension of the treaty by reasons of fundamental change are binding on the EU institutions and form part of the EU legal order.\textsuperscript{115} Therefore, it can be concluded that even though the CJ confirms the importance of international customary law principles in some of the cases, its legal position in the EU legal order is not clear.

\textsuperscript{111} Joined Cases 21 to 24/72, International Fruit Company NV v. Produktchap voor Groenten en Fruit paragraphs 17-18.

\textsuperscript{112} The International Court of Justice Statute defines customary international law as "evidence of a general practice accepted as law." See The International Court of Justice Statute, Article 38 section 1 litra b.

\textsuperscript{113} See 'EU Law, Text, Cases and Materials', Craig and De Burca, 5\textsuperscript{th} edition, 2011, Oxford University Press, 340-344.

\textsuperscript{114} Case C-286/90, Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp. paragraph 9 and in Case C-386/08, Firma Brita GmbH v Hauptzollamt Hamburg-Hafen, paragraph 44 where the CJ relied on general international law principles.

\textsuperscript{115} Case C-162/96, A. Racke GmbH & Co. v Hauptzollamt Mainz. paragraph 46.
5.2 The US-EU legal conflict illustrated by the ATA Case

On 16 December 2009 the ATA and three US airlines (American, Continental and United Airlines) brought the case against the UK’s Secretary of State for Energy and Climate Change to challenge the measures taken by the UK to implement the Aviation Directive. The case was referred to the CJ for a preliminary ruling.\(^{116}\) The High Court of Justice of England and Wales asked the CJ whether certain international customary law principles and the international agreements can be relied upon to challenge the validity of the Directive, namely:\(^{117}\)

1. The principle of customary international law:
   a. that each state has complete and exclusive sovereignty over its air space,
   b. that no state may validly purport to subject any part of the high seas to its sovereignty,
   c. of freedom to fly over the high seas and
   d. that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by international treaty (not accepted by defendant).

2. The Chicago Convention and in particular Articles 1, 11, 12, 15 and 24.

3. The Open Skies Agreement and in particular Articles 7, 11 (2) (c) and 15(3).

4. The Kyoto Protocol and in particular Article 2 (2).

Therefore, the ATA claimed that the Aviation Directive was unlawful in the light of the international agreements and principles of customary international law presented above.\(^{118}\) In this regard, Advocate-General Kokott argued that the claimants had challenged the validity of the Aviation Directive based on three grounds.\(^{119}\) First, they argued that the EU was exceeding its powers under international law by including flights over the high seas and over the territory of third countries.\(^{120}\) This was due to the fact that the US aircrafts would need to surrender emissions allowances for the flights performed outside the territory of the EU and over the high seas but only

---

\(^{116}\) According to EU law, only the CJ has the powers to declare EU legislation invalid, therefore, the preliminary ruling was necessary, see Cases and Materials on EU law, Stephen Weatherill, 2010, p.238-239.

\(^{117}\) See reference for a preliminary ruling from High Court of Justice Queen’s Bench Division (UK) made on 22 July 2010 to the Court of Justice of the European Union, 2010/C 260/12, question 1.

\(^{118}\) Case C-366/10, ATA paragraph 43.

\(^{119}\) See Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10, paragraphs 41-42.

\(^{120}\) See reference for a preliminary ruling from High Court of Justice Queen’s Bench Devison (United Kingdom) made on 22 July 2010 to the Court of Justice of the European Union, 2010/C 260/12 questions 2 and 3.
if they landed or departed from an EU’s aerodrome. Second, they claimed that an emissions trading scheme should be negotiated and implemented under the ICAO supervision and not introduced unilaterally without other party’s consent. This was partially supported by the Kyoto Protocol and its Article 2 (2) even though the US itself was not a party to it. Third, they considered that the emissions trading scheme constitutes a tax or a charge which would be prohibited by the Chicago Convention and the Open Skies Agreement.

Nevertheless, the CJ in the ATA decided that the examination of the Aviation Directive did not disclose any factors which could affect its validity. More specifically, the CJ concluded that some principles of international customary law could be relied upon, namely: (1) Each State has complete and exclusive sovereignty; (2) No State may validly purport to subject any part of the high seas to its sovereignty; and (3) The principle which guarantees freedom to fly over the high seas. However, since these principles do not have the same degree of precision as a provision of an international agreement, the judicial review of the Aviation Directive was limited to a manifest error of assessment attributable to the EU regarding its competence to adapt it. In regard to the Chicago Convention, the CJ argued that the EU is not a party to it and the EU does not have exclusive powers in the entire field of international civil aviation, and therefore it cannot be bound by it. In regard to the Kyoto Protocol, the CJ claimed the Protocol governs relationship between States and that Article 2 (2) of the Protocol is not unconditional and not sufficiently precise in order to contest the validity of the Aviation Directive. In contrast, the CJ stated that the Open Skies Agreement can be relied up. However, the CJ concluded that as the EU ETS applies in a non-discriminatory manner and it constitutes a market-based measure and not a duty, tax, fee or charge on fuel load, it does not undermine the validity of the Aviation Directive.

Following the arguments presented above, the ATA case raises a number of questions in regard to examination of the compatibility of the Aviation Directive with international law. First of all, it should be examined whether the Chicago Convention can be relied upon when assessing the

---

121 Id at question 4 litra a.
122 Id at question 4 litras b and c.
123 Case C-366/10. ATA judgment.
124 Id at paragraphs 103, 104 and 111. The CJ dismissed the existence of the fourth principle of customary international law that aircrafts overflying high seas are subject to exclusive jurisdiction of the country in which they are registered.
125 Id at paragraph 110.
126 Id at paragraphs 69, 70 and 71.
127 Id at paragraph 77.
128 Id at paragraphs 147, 156 and 157.
compatibility of the Directive with international law. Thus, would the EU be bound by the Chicago Convention even though the EU itself is not a party to the Convention? Here, the fact that all Member States are parties to the Chicago Convention gives rise to some doubts as to whether the CJ would actually rule against the Member States if they challenged the Directive. An argument against this is found in the International Fruit Company case, where the CJ stated that certain provisions of the GATT had a binding effect on the EU, even though the EU was not a party to the Agreement. The second question is whether the express role given by the Kyoto Protocol to the ICAO can undermine the validity of the Aviation Directive. The claimants argued that the emissions trading should be negotiated by the ICAO as it is stated in the Kyoto Protocol. Thus, it should be examined whether Article 2 (2) of the Protocol is unconditional and precise enough to confer rights on individuals, in this case on undertakings. The third questions, which needs to be answered, is whether the participation in the EU ETS by the aircraft operators, in a form of submitting emission allowances, is violating the provisions in particular Articles 7, 11 (2) (c) and 15 (3) of the Open Skies Agreement. This gives rise to the examination of the nature of the emission allowances and an assessment to whether the EU violates the provisions of the Open Skies Agreement.
5.3 Applicability of the Chicago Convention

According to the established case law of the CJ, international agreements can be relied upon in assessing validity of the Aviation Directive if they fulfill two conditions. First, the EU must be bound by the agreement concerned. It is not questionable that the EU is not a party to the Chicago Convention, though it can still be bound by it. Second, the nature and the broad logic must not preclude a review of validity and furthermore the provisions, in their context, must be unconditional and precise enough. Still, it is somehow unclear to what extent an individual or legal person, as in the case of ATA, can challenge the validity of the EU act based on international law.

i. First condition: the EU must be bound by the Chicago Convention

In regard to the Chicago Convention, Advocate-General Kokott argued that as the first of the conditions is not fulfilled, since the Convention does not create rights or obligations for the EU, it cannot as such be relied upon in assessing validity of the Aviation Directive. This conclusion was based on the examination of Mrs Kokkot of the claimants’ arguments that the EU was bound by the Chicago Convention based on Article 351 TFEU and on the theory of functional succession. Article 351 TFEU, as stated in the section 5.1, mentions that the rights and obligations arising from agreements concluded before 1 January 1958 between one or more Member States and one or more third countries, as in the case of the Chicago Convention, shall not be affected by the provisions of the TEU or the TFEU. Moreover, under the second paragraph, Member States are obliged to take appropriate steps to eliminate incompatibilities and in addition, they shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. However, the EU institutions only have a duty not to impede the performance of the Member States’ obligations which stem from this agreement. Therefore, Mrs. Kokott concluded that it did not follow from Article 351 TFEU that the EU was bound by the Chicago Convention. In relation to the functional

---

129 Case C-308/06, Intertanko and others paragraphs 43, 44 and 45.
130 See Joined Cases 21 to 24/72, International Fruit Company NV v. Produktschap voor Groenten en Fruit paragraphs 7 and 8.
131 See Case C-344/04, IATA and ELFAA paragraph 39, where certain provisions of the Montreal Convention were regarded unconditional and sufficiently precise for the CJ to review the legality of the EU acts.
133 See Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10, paragraphs 53-65. The functional succession theory derives from the judgment of the CJ in the International Fruit Company case (Joined Cases 21 to 24/72), where the CJ stated that the GATT is binding on the EU even though the EU was not a party to the GATT.
134 See Case 812/79, Juan C. Burgoa, paragraph 9.
succession theory, the Advocate-General argued that the case law established in the International Fruit Company case could not automatically be applied in this situation. The main argument for that was that the Member States did not pass all their rights in the air transport sector to the Community and they are so called ‘mixed agreements’\textsuperscript{135}. The Advocate-General claimed that there are no indications that the EU would act as a successor to the Member States in the context of the ICAO.

Moreover, the CJ in its judgment followed Advocate-General Kokott argumentation and addressed functional succession theory more explicitly. It stated that the Convention’s provisions would have a binding effect if the EU institutions would have assumed the powers previously exercised by its Member States.\textsuperscript{136} The CJ recognized that the EU has acquired certain exclusive powers to agree with third states falling within international civil aviation.\textsuperscript{137} However, the CJ argued that the EU does not have exclusive competences in the entire field of international civil aviation as covered by the Chicago Convention and therefore the EU cannot be bound by it. For instance, the CJ stated that the Member States retained their powers falling within the field of the Chicago Convention such as awarding traffic rights and setting airport charges.\textsuperscript{138}

As it can be seen from the line of argumentation of Advocate-General Kokott and the judgment of the CJ, both dismissed the Chicago Convention as a benchmark for examining the validity of the Aviation Directive. However, the question arises whether the CJ would rule against the Member States if they challenged the Directive. And as such, it is questionable to what extent the EU can neglect the Chicago Convention. Thus, the following arguments support the view that the EU can be indirectly bound by the Convention.

First of all, Article 3 (5) TEU states that the EU shall contribute to the strict observance and development of the international law. In addition, the EU external policy, as set in Article 21 (1) TEU, should be guided by the rule of law and respect for the principles of the United Nation Charter and international law. And as such, the TEU acknowledges the importance of international law.

\textsuperscript{135} Mixed agreements are the agreements concerning issues where both the EU and Member States have competences and to which both are contracting parties. See ’EU Law, Text, Cases and Materials’, Craig and De Burca, 5\textsuperscript{th} edition, 2011, Oxford University Press, p. 197-198.
\textsuperscript{136} Case C-366/10, ATA paragraphs 62 and 63.
\textsuperscript{137} \textit{Id} at paragraph 69.
\textsuperscript{138} \textit{Id} at paragraph 70.
Second, the CJ has in previous case law declared that the EU must respect international law in exercise of its powers. In the Poulsen case the CJ stated that Article 6 of the Council Regulation must be interpreted, and its scope limited, in the light of the international law of the sea. In the Racke case the CJ declared that rules of international customary law on suspension of treaty based on fundamental change of circumstances are binding and form part of the legal order of the EU. Furthermore, in the International Fruit Company case, which is also mentioned above, the CJ declared that the EU is bound by the GATT even though the EU is not a party to the Agreement. In the examination of the case the CJ found that the EU assumed the powers previously exercised by Member States governed by the GATT. However, it is clear from the ATA case that the EU did not assume all powers within the international civil aviation and as such the judgment in the International Fruit Company case cannot be automatically relied upon.

Third, it is also worth noting the recognized position of the Chicago Convention in the international and EU legal order. The Chicago Convention is an important international treaty, which has 191 parties, and it sets the main principles in the international civil aviation field. In addition, the Convention establishes the ICAO, which is a specialized body of the UN responsible for coordinating and regulating international air transport. Thus, it is not unforeseen that other international and bilateral treaties make references to the Chicago Convention. For instance, the Kyoto Protocol explicitly recognizes the ICAO competence in the international civil aviation and declares that the parties to the Protocol should work through the ICAO to achieve reductions in emissions from aviation. The EU also recognizes the importance of the standards and practices established by the Convention and refers to it in the bilateral agreements. Hence, the Open Skies Agreement between the EU and US follows the aviation environmental standards established in

---

139 Case C-286/90, Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp. paragraph 9 and in Case C-386/08, Firma Brita GmbH v Hauptzollamt Hamburg-Hafen, paragraph 44.
140 Case C-286/90, Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp. paragraph 9.
141 Case C-162/96, A. Racke GmbH & Co. v Hauptzollamt Mainz, paragraph 46.
142 See Joined Cases 21 to 24/72, International Fruit Company NV v. Produktionsvabo Groenten en Fruit paragraph 18.
143 See section 4.3 of this thesis, where the Chicago Convention establishing the International Civil Organization (ICAO) is addressed. For more information on the Chicago Convention http://www.icao.int/publications/Pages/doc7300.aspx (last visited on 1 of December, 2012).
144 See the Kyoto Protocol, Article 2 (2).
Annexes to the Chicago Convention. In addition to that, the EU has adopted some parts of Annex 16 of the Chicago Convention in its legal order.

ii. Interim conclusion

According to the arguments presented by the CJ, the EU is not directly bound by the Chicago Convention. However, all Member States of the EU are parties to the Chicago Convention. Furthermore, both the TEU and the established case law confirm the importance of international law and the fact that the EU should respect it in exercise of its powers. Besides the importance of international law in general, the Chicago Convention itself has a significant place in the international and the EU legal order. The Chicago Convention is a well-recognized international treaty and the EU acknowledges the Convention by referring to it in the Open Skies Agreement. In addition, some parts of the Convention have become an integral part of the EU legal order. Based on these arguments it is hard to dismiss the Chicago Convention as a benchmark to assess the validity of the Aviation Directive in the light on international law. Therefore, it follows from these arguments that the EU can be indirectly bound by the Chicago Convention.

iii. Second condition: provisions unconditional and precise enough

In order to assesses whether the Chicago Convention can have a direct effect and confer rights on individual, it is necessary to examine the second condition. Since the EU can be indirectly bound by the Chicago Convention, it should be determined if the nature and broad logic of the Convention confer rights to individuals, which could be invoked before the courts. Furthermore, the provisions challenging the validity of the Directive should be unconditional and precise enough.

In order to understand how the CJ interprets the nature and broad logic of international treaties and apply it to the Chicago Convention it is essential to examine the established case law. For instance, the CJ in its judgments confirmed that the rules of the World Trade Organization (WTO) and decision of the WTO bodies could not be relied upon due to the nature and broad logic of such

---

146 See ‘Air Transport Agreement between the European Union and the United States of America’, 30 April, 2007, Articles 8, 9 and especially Article 15.
148 The claimants challenged the validity of the Aviation Directive based on the Articles 1, 11, 12, 15 and 24 of the Chicago Convention.
The CJ reasoning is mainly based on the fact that the GATT is based on the principle of negotiations undertaken and its provisions have a great degree of flexibility. For example, measures to be taken in case of conflict confer the possibility of derogation. In the Intertanko case, the CJ declared that the United Nations Convention on the Law of the Sea (UNCLOS) in principle did not grant independent rights for individuals and that it governed only the relationship between States. The CJ established that even though the UNCLOS made occasionally a reference to ships and their rights, those rights were understood as a product of rights and obligations of the respective States. In other words, the CJ argued that a State may be held liable for a harm caused by a ship under its flag if that harm results from a failure of that State to fulfill its obligations under the UNCLOS. However, in the IATA and ELFAA case the Montreal Convention, formally the Convention for the Unification of Certain Rules for International Carriage by Air was capable of affecting the legal status of individuals. There, the CJ established that the relevant provisions of the Montreal Convention were unconditional and precise enough to confer the rights to individuals due to the fact that those provisions address the civil law claims for damages against the air carriers and the limitation of civil liability of those carriers.

It is worthwhile examining the opinion of the Advocate-General and the judgment of the CJ in the ATA case, which are addressed in the thesis, in relation to the assessment of the nature and broad logic of the international agreements, namely: the Kyoto Protocol and the Open Skies Agreement. In regard to the Kyoto Protocol, Advocate-General Kokott argued that the Protocol is a legal instrument governing only relations between States. Mrs. Kokott claimed that the provisions listing the policies and measures to promote sustainable development and to achieve specific emissions reduction targets reaffirmed the argument that the Kyoto Protocol addresses relationship between States. The Advocate-General admitted that the measures implemented in relation to the Protocol would have a beneficial effect on the individuals in the medium and long run. However, Mrs. Kokott concluded that these effects are only indirect and they did not affect the legal status of an individual. In addition, the arguments presented by the CJ were focused on the fact that

---

150 See for example Article XXII and XXV of the GATT, 1947.
151 See Case C-308/06, Intertanko and others paragraphs 58, 59 and 64.
152 Id at paragraphs 60-62.
153 See Case C-344/04, IATA and ELFAA paragraphs 36-39.
154 Id at paragraphs 38 and 39.
155 See Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10 paragraphs 78-84.
156 See the Kyoto Protocol Article 2 (1) and (3) together with Article 3.
157 See Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10, paragraph 82.
provisions of the Protocol allow certain degree of flexibility, especially for the economies in transition.\textsuperscript{158} Furthermore, both the CJ and the Advocate-General concluded that Article 2 (2) is not unconditional and not precise enough in order to confer the rights to individuals, but this issue is addressed further in the next section.\textsuperscript{159}

In regard to the Open Skies Agreement, the Advocate-General stated that the wording of the Agreement strongly suggests that it affects at least the legal status of individuals, especially undertakings.\textsuperscript{160} Mrs. Kokott argued that the preamble of the Agreement explicitly addressed undertakings by mentioning ‘competition among airlines in the market place’ which is to be promoted ‘within minimum of government interference’.\textsuperscript{161} Furthermore, she examined the difference between the UNCLOS, which is addressed in the Intertanko case, and the Open Skies Agreement. In the Open Skies Agreement, the reference to individuals and undertakings is made repeatedly, where the UNCLOS addresses mainly states.\textsuperscript{162} The CJ in this manner confirmed the opinion of the Advocate-General and concluded that since certain rules apply directly to airlines, they are capable of conferring the rights on airlines.\textsuperscript{163}

Therefore, whether the nature and broad logic of the Chicago Convention confer the rights on individuals will be examined in the light of the established case law addressed above. As it was mentioned earlier, the Chicago Convention is a well-recognized treaty, which sets the main principles in the international civil aviation field.\textsuperscript{164} The Convention preamble states that it is desirable to avoid frictions and promote that cooperation between nations and people upon which the peace of the world depends.\textsuperscript{165} Furthermore, the undersigned governments agreed on certain principles and arrangements in order to ensure that the international civil aviation develops in safe and orderly manner. Even though the preamble mentions ‘people’, it mainly addresses States which cooperate in the development of international civil aviation. In regard to the first part of the Chicago Convention, the provisions clearly address the rights and obligations of States. For instance, Article 1 declares that every State has complete and exclusive sovereignty of the airspace

\textsuperscript{158} Case C-366/10, ATA paragraphs 75 and 76.
\textsuperscript{159} Id at paragraph 77 and Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10 paragraphs 86-87. Furthermore, section 5.4 analyses Article 2 (2) of the Kyoto Protocol in detail.
\textsuperscript{160} See Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10, paragraph 91.
\textsuperscript{161} Id at paragraph 92.
\textsuperscript{162} Id at paragraphs 98 and 99.
\textsuperscript{163} Case C-366/10, ATA paragraphs 81-84. See also section 5.5 of the thesis where the nature and broad logic of the Open Skies Agreement is discussed.
\textsuperscript{164} For more information on the Chicago Convention see section 4.3 of this thesis.
\textsuperscript{165} See the Chicago Convention, preamble.
above its territory. Article 3 bis\(^a\)(a) mentions that every State must refrain from use of weapons against civil aircrafts in flight. In addition, Article 17 states that aircraft has the nationality of the State in which they are registered. Even though some of the provisions refer to the rights and obligation of civil aircrafts, it is clear from the wording of those provisions that State is obliged to ensure that the aircraft complies with the provisions of the Convention.\(^{166}\) It also follows from the Intertanko case that the reference made to civil aircrafts and their rights is understood as a product of the rights and obligations of the State.\(^{167}\) Furthermore, comparing the Chicago Convention with the Open Skies Agreement, which is agreement between the EU and US, the Convention does not address the rights of undertakings and does not affect individuals directly. Neither the Chicago Convention provides any rights for civil law claims as the provision of the Montreal Convention. Thus, following the arguments presented above, it can be concluded that the Chicago Convention addresses relationship between States and as such do not confer the rights on individuals.

iv. Interim conclusion

The examination of the Chicago Convention in the light of the established case law has disclosed that the Convention governs mainly relationship between States and as such creates rights and obligations of States. Even though the reference to civil aircraft is made throughout the Convention, this reference is directly related to the rights and obligations of State. Thus, the nature and broad logic of the Chicago Convention cannot confer rights on individual which could be invoked before courts, and therefore the Convention cannot be used as a benchmark for assessing the validity of the Aviation Directive. Finally, as the first part of the second condition is not satisfied, there is no need to examine further whether certain provisions are unconditional and precise enough.

---

\(^{166}\) See, for instance, Article 3bis\(^a\) litra c of the Chicago Convention, where the State is obliged to establish all necessary provisions in its national law and regulations to make compliance of civil aircrafts. Article 8 of the Chicago Convention states that each aircraft undertakes to insure that the flight of an aircraft without a pilot shall be so controlled as to obviate danger to civil aircraft. See also Articles 22, 23, 25 and 28 of the Chicago Convention.

\(^{167}\) See Case C-308/06, Intertanko and others paragraphs 60-62.
5.4 Can the express role given to the ICAO by Article 2 (2) of the Kyoto Protocol undermine the validity of the Aviation Directive?

First of all, as discussed in the previous section, it is necessary to examine whether the Kyoto Protocol and its Article 2 (2) can be used as a benchmark to assess the validity of the Aviation Directive. Thus, the two conditions addressed earlier have to be examined. It is not questionable that the EU is a party to the Kyoto Protocol and therefore, as discussed in section 5.1, the Protocol is binding on the EU institutions and its Member States.\(^{168}\) However, it is still necessary to assess whether the second condition is satisfied, namely: whether the Kyoto Protocol can by the nature and broad logic serve as a benchmark to examine the validity of the Directive and whether Article 2 (2) is unconditional and precise enough.

Before examining the Kyoto Protocol it is worthwhile mentioning the position of the EU and US towards the Kyoto Protocol. The EU is fully committed to the Kyoto Protocol and it sets even higher targets in reduction of GHG emissions than the ones agreed by the Protocol.\(^{169}\) Therefore, the EU argues that the inclusion of aviation in the EU ETS is merely a fulfillment of its commitments under the Protocol.\(^{170}\) On the contrary, the US, where the claimants are from, did not ratify the Protocol. Furthermore, the ATA relied on the Kyoto Protocol and its Article 2 (2) in challenging the UK’s measures to implement the Aviation Directive without the US being a party to it.

In regard to the first part of the second condition, the CJ and Advocate-General Kokott concluded that the nature and broad logic of the Kyoto Protocol precludes from using it as a benchmark to assess the validity of the Aviation Directive.\(^{171}\) This conclusion was based on the argument that the Protocol mainly governs relationship between States, and thus does not confer rights on individuals. The opinion of the Advocate-General and the judgment of the CJ in regard to the nature and broad logic of the Kyoto Protocol are discussed more also in section 5.3 of the thesis.

Nevertheless, it is necessary to examine the Kyoto Protocol in order to determine whether the nature and broad logic of the Protocol confer rights on the individuals. The Kyoto Protocol is a protocol to

---

\(^{168}\) For more information on the Kyoto Protocol see section 4.2 of this thesis.

\(^{169}\) See discussion on this matter in the section 2.1 of the thesis.

\(^{170}\) See the Aviation Directive, preamble.

\(^{171}\) See Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10 paragraph 77 and Case C-366/10, ATA paragraphs 77 and 78.
the UNFCCC and the objective of the UNFCCC is to stabilize GHG concentration in the atmosphere. Unlike the UNFCCC, the Protocol sets binding targets and a time frame for reduction of GHG emissions for the developed countries listed in Annex I to the UNFCCC. For instance, the EU collectively is committed to reduce its GHG emissions by 8% between 2008 and 2012. In addition, Article 2 (1) of the Protocol provides a non-exhausted list of policies and measures to promote sustainable development which the developed countries listed in Annex I to the UNFCCC should implement to fulfill their obligations under the Protocol. Furthermore, the Protocol provides different means to achieve the targets in a form of flexibility mechanisms: one of which is emissions trading.\textsuperscript{172} Besides that, the wording of the Kyoto Protocol suggests that the Protocol addresses States and not individuals.\textsuperscript{173} Thus, it can be concluded from the arguments presented above that the Kyoto Protocol governs the relationship between States and creates obligations on them. As a result, the nature and broad logic of the Protocol cannot confer rights on individuals.

Still, it is worth devoting more attention to Article 2 (2) of the Protocol and assessing whether the provision constitutes an obligation on the EU and prevents the EU from the implementation of its own measures, namely: including GHG emissions from the aviation sector in the EU ETS. In relation to Article 2 (2), the CJ mentioned that since the Kyoto Protocol imposes qualified GHG reduction commitments, the parties to the Protocol may comply with their obligations in a manner and at the speed upon which they agree.\textsuperscript{174} Based on this, the CJ argued that, in particular, Article 2 (2) cannot in any event be considered unconditional and sufficiently precise. Advocate-General Kokott in this matter stated that the approach described in Article 2 (2) is not akin to the procedural guarantee that would be intended to safeguard any rights or interests of individuals.\textsuperscript{175}

Article 2 (2) of the Kyoto Protocol explicitly states that the countries listed in Annex I should pursue limitation or reduction of emissions of GHG from aviation working through the ICAO. So, there is no doubt that the Parties to the Protocol have given the express role to address GHG emissions from aviation to the ICAO. However, as discussed before, it is not clear from the article whether the EU can pursue its own measures. The term ‘working through the ICAO’ seems rather ambiguous and it does not follow from it that the nature of the role given to the ICAO is

\textsuperscript{172} See The Kyoto Protocol, Article 6: JI, Article 12: CDM and Article 17: emission trading.

\textsuperscript{173} See, for instance, Articles 2, 3, 4 and 5 of the Kyoto Protocol, where all the articles address States, not individuals.

\textsuperscript{174} See the Case C-366/10, ATA paragraphs 76 and 77.

\textsuperscript{175} See Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10 paragraph 86.
exclusive.\textsuperscript{176} Furthermore, Article 2 (2) does not explicitly state that the Parties should refrain from pursuing their own measures to address GHG emissions from aviation. Here, it is important to note that the article does not address how the ICAO should achieve reduction of GHG emissions, or what happens in case of a conflict. Neither the article discusses what happens if the ICAO would not take any efficient measures within certain period of time. Thus, it follows from this that Article 2 (2) is not unconditional and not sufficiently precise and as a result it cannot be relied upon in assessing the validity of the Aviation Directive.

In addition to that, there are some arguments supporting that the Aviation Directive does not interfere with the objective of the Kyoto Protocol. First, the Kyoto Protocol sets binding targets for the countries listed in Annex I to the UNFCCC to reduce GHG emissions and the Protocol presents three flexibility mechanisms to achieve it, one of them is emissions trading. Thus, the Protocol lays grounds for creation of emission trading and, moreover, encourages further development in this area.\textsuperscript{177} In addition, the Protocol presents a possibility to implement the measures and policies to promote sustainable development in cooperation with other parties. Therefore, it can be argued that as the Aviation Directive is an amendment to the EU ETS to include GHG emissions from aviation and as such to cover more sectors under the scheme, it does not interfere with the objective of the Kyoto Protocol, but on the contrary is encouraged by the Protocol. Second, the Kyoto Protocol and its Article 2 (2) states that the reduction in emissions from aviation should be pursued working through the ICAO. Therefore, the actions of the ICAO to address aviation emissions should be discussed. In 2004, the ICAO presented market-based measures, one of which was incorporation of the GHG emissions from aviation into already existing emission trading schemes consistent with the UNFCCC. However, in 2007 the resolution supporting mutual consent was adopted and the incorporation of emissions from aviation was not possible without mutual consents. Still, the EU put a reservation on the part of the resolution supporting mutual consent. As presented in section 2.2 of the thesis,\textsuperscript{178} the ICAO did not put in place effective measures to address aviation, and as such

\textsuperscript{176} See further discussion about Article 2 (2) and the nature of the ICAO role in 'The Legality of the EU’s Stand-Alone Approach to the Climate Impact of Aviation: The Express Role Given to the ICAO by the Kyoto Protocol', Malte Petersen, RECIEL 17(2), 2008.
\textsuperscript{177} See the Kyoto Protocol Article 17.
\textsuperscript{178} However, it should be born in mind that the actions discussed in section 2.2 are limited to the time frame between the adoption of the Kyoto Protocol and the adoption of the Aviation Directive. The actions of the ICAO in response to the Aviation Directive will be addressed in the chapter 6 of the thesis.
the EU justified its motives to adopt the Aviation Directive based on the lack of actions from the ICAO. 179

i. Interim conclusion

This section examined whether the express role given to the ICAO by Article 2 (2) of the Kyoto Protocol can undermine the validity of the Aviation Directive. Here, the two conditions were analysed. As the EU is a party to the Protocol it is not questionable that the EU is bound by it. However, the examination of the nature and broad logic of the Protocol has disclosed that it mainly governs relationship between States and, as a result, it does not confer rights on individuals. Furthermore, the assessment of Article 2 (2) has shown that the provision is not unconditional and not sufficiently precise. That follows from the arguments that Article 2 (2) is ambiguous and it does not take into account different situations such as State pursuing its own measures or resolution of conflicts. Furthermore, it was argued that the Kyoto Protocol actually encourages the inclusion of the aviation sector in the EU ETS and that lack of effective measures from the ICAO motivated the EU to adopt the Aviation Directive. Taking into account all the arguments presented in this section, it follows that the Kyoto Protocol and its Article 2 (2) cannot be used as a benchmark to assess the validity of the Aviation Directive and as a result, the express role given to the ICAO cannot undermine the validity of the Directive.

179 See the Aviation Directive preamble.
5.5 Does the participation in the EU ETS by the US aircraft operators violate the provisions of the Open Skies Agreement?

The ATA claimed that participation in the EU ETS constitutes a tax or charge on the US airlines and thus is prohibited under the Open Skies Agreement and the Chicago Convention. In particular, the claimants argued that the Aviation Directive is incompatible with Articles 7, 11 (2) (c) and 15 (3) of the Open Skies Agreement. In regard to the Chicago Convention, it was concluded by the CJ and the Advocate-General that the Convention does not confer rights on individuals and therefore cannot be used as a benchmark to assess the validity of the Aviation Directive. In addition, the examination of the Chicago Convention in section 5.3 has shown that the EU could be indirectly bound by the Convention, but the nature and broad logic precludes from using it as a benchmark to assess the validity of the Directive. And, as a result, the Chicago Convention cannot undermine the validity of the Aviation Directive.

Therefore, it is necessary to examine if the Open Skies Agreement can be relied upon in challenging the validity of the Aviation Directive. It should be assessed if the provisions challenging the validity of the Directive are unconditional and sufficiently precise to confer rights on individuals. In case of an affirmative answer, it should be examined if the Aviation Directive violates those provisions.

i. Nature and broad logic of the Open Skies Agreement

In regard to the Open Skies Agreement, the CJ concluded that certain provisions of the Agreement are designed to apply directly and immediately to airlines and therefore confer rights on them. The CJ examined the preamble of the Open Skies Agreement, where the Agreement directly refers to individuals and mentions that all sectors of the air transport industry should benefit from the Agreement. Furthermore, the CJ referred to the opinion of Advocate-General Kokott which also confirmed that the Open Skies Agreement affects at least the legal status of undertakings. Thus,

---

180 See reference for a preliminary ruling from High Court of Justice Queen’s Bench Division (UK) made on 22 July 2010 to the Court of Justice of the European Union, 2010/C 260/12, questions 3 and 4.
181 For more information about the Open Skies Agreement see section 4.4 of the thesis.
182 In regard to imposition of a charge or a tax, the claimants argued that the Aviation Directive violates Articles 15 and 24 of the Chicago Convention. See reference for a preliminary ruling from High Court of Justice Queen’s Bench Division (UK) made on 22 July 2010 to the Court of Justice of the European Union, 2010/C 260/12, question 4 litra b and c.
183 See Case C-366/10, ATA paragraph 72 and Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10 paragraph 66.
184 See Case C-366/10, ATA paragraph 84.
185 Id at paragraph 81.
186 See Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10 paragraph 91.
the CJ stated the nature and broad logic does not preclude from using it as a benchmark in assessing the validity of the Aviation Directive.

There are more arguments supporting that the nature and broad logic of the Open Skies Agreement is capable of conferring rights on individuals. Unlike the Chicago Convention, the wording of the Open Skies Agreement strongly suggest that it confers rights on airlines. For instance, Article 3 of the Agreement grants rights to airlines such as the right to fly across the territory of another country without landing or the right to make stops in its territory for non-traffic purposes.\(^\text{187}\) In addition, Article 10 of the Agreement addresses commercial opportunities and specifies that the airlines of each party have the right to establish offices in the territory of the other party for promotion and sale of air transportation and related activities.\(^\text{188}\) Moreover, the purpose of the Agreement is to promote international aviation between the US and the EU based on competition among airlines in the marketplace. Therefore, it can be concluded from the arguments presented above that the Open Skies Agreement, in principle, can be used as a benchmark to assess the validity of the Aviation Directive. Consequently, it is necessary to examine each provision challenging the validity of the Directive whether these provisions are unconditional and sufficiently precise.

ii. **Unconditional and sufficiently precise**

Article 7 of the Open Skies Agreement states that the laws and regulations of one party within its territory shall also be applied to aircraft, passengers, crew and cargo on aircraft of the other party upon entering or departing from or while within the territory of the first party. According to Advocate-General Kokott, this provision is unconditional as regards its content and it does not require any internal implementing rules.\(^\text{189}\) Moreover, Article 7 of the Agreement is capable of having legal consequences on the individuals.\(^\text{190}\) The provision specifically addresses individuals to whom these laws and regulations apply, namely: airlines (aircraft and cargo), passengers and crew. Finally, the CJ in the ATA judgment referred to the opinion of the Advocate-General and concluded that Article 7 is unconditional and sufficiently precise to confer rights on airlines.\(^\text{191}\)


\(^{188}\) *Id* at Article 10 (1).

\(^{189}\) See Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10 paragraph 103.

\(^{190}\) *Id* at.

\(^{191}\) Case C-366/10, ATA paragraph 86.
Article 11 (2) (c) of the Agreement provides an exemption, on the basis of reciprocity, from the taxes, levies, duties, fees and charges on fuel, lubricants and consumable technical supplies and other items intended for or solely used in connection with the operation or servicing of aircraft engaged in international air transportation. The Advocate-General argued that due to the existence of the principle of reciprocity, the provision cannot be considered unconditional.\textsuperscript{192} On the contrary, the CJ concluded that Article 11 (2) (c) can be relied upon for the purpose of assessing the validity. This conclusion is supported by the argument that the EU expressly laid down an exemption from taxation of energy products supplied for use as fuel for the purpose of air navigation in order to comply with the existing obligations under the Chicago Convention.\textsuperscript{193} Furthermore the CJ mentioned that, according to the observations submitted by the Member States, the US always exempted the fuel load of the EU’s airlines. As a result, the CJ concluded that the Aviation Directive can be examined in the light of Article 11 (2) (c) of the Open Skies Agreement.

Article 15 (3) states that, when a party establishes environmental measures, the aviation environmental standards adopted by the ICAO should be followed except where the differences have been filed. The last part of the sentence presents a possibility of derogating from the environmental standards established by the ICAO. Furthermore, the second sentence states that the parties should apply environmental measures in accordance with Article 2 and 3 (4) of this Agreement. In regard to Articles 2 and 3 (4), environmental measures have to apply to airlines in accordance to the principle of fair and equal opportunity, and each airline can determine the frequency and capacity of the international air transport it offers based on the market consideration. In addition, Article 3 (4) states that the party to the Agreement cannot unilaterally limit the volume of traffic, frequency or cannot require the filing of schedules, programs for charter flights or operational plans, except as may be required for customs, technical, operational or environmental reasons under uniform condition of Article 15 of the Chicago Convention. The uniform condition presented in the Chicago Convention Article 15 is non-discrimination. In regard to the applicability of the Article 15 (3), Advocate-General Kokott argued that the first sentence is neither unconditional nor sufficiently precise due to a possibility of derogating expressed in ‘where the differences have been filed’.\textsuperscript{194} However, Mrs. Kokott stated that the second sentence of Article 15 (3) of the Open Skies Agreement specifically relates to application of environmental measures to

\textsuperscript{192} See Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10 paragraph 104.
\textsuperscript{193} Case C-366/10, ATA paragraphs 90-93. See also Article 24 of the Chicago Convention on exemption of fuel and Case C-79/10, Systeme Helmholz paragraph 25.
\textsuperscript{194} See Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10 paragraph 105.
airlines and as such have an effect on their legal status.\textsuperscript{195} Furthermore, the CJ in the judgment interpreted the meaning of Article 15 (3) as if the EU adopts the environmental measures in a form of airport charges which have the effect of limiting the volume of traffic or the frequency, such charges imposed on the US airlines should not be higher than the ones imposed on the EU’s airlines, and in doing so the EU should allow fair and equal opportunities to compete.\textsuperscript{196} Thus, the CJ concluded that Article 15 (3) of the Open Skies Agreement, read in conjunction with Articles 2 and 3 (4), is unconditional and sufficiently precise.\textsuperscript{197}

iii. \textbf{Interim conclusion}

As it follows from the judgment of the CJ, the provisions of the Open Skies Agreement, in particular Articles 7, 11 (2) (c) and 15 (3) read in conjunction with Articles 2 and 3 (4), challenging the validity of the Aviation Directive are unconditional and sufficiently precise. Thus, it should be examined whether the participation in the EU ETS by the US airlines violate these provisions of the Open Skies Agreement.

iv. \textbf{Compatibility with Article 7 of the Open Skies Agreement}

Article 7 of the Open Skies Agreement states that the laws and regulations of the EU within its territory shall be apply to the US aircraft operators engaged in international navigation upon entering or departing from or while within the territory of the EU. As it follows from the provision, the participation in the EU ETS shall be applied upon entering or departing from or while within the territory of the EU. And as such, the claimants argued that the Aviation Directive infringes Article 7 of the Agreement due to the fact that the US aircraft operators have to surrender emission allowances for those parts of the flight that are carried out above the high seas and the territory of the third country.\textsuperscript{198}

According to the Aviation Directive all flights arriving and departing from an aerodrome situated in the territory of a Member State are included in the EU ETS.\textsuperscript{199} Furthermore, the Directive is not intended to apply to international flights over the territory of the Member States or the third country which do not arrive or depart from an EU aerodrome. Thus, it follows that the US aircraft operators

\textsuperscript{195} \textit{Id} at paragraph 106.  
\textsuperscript{196} See Case C-366/10, ATA paragraph 99.  
\textsuperscript{197} \textit{Id} at paragraph 100.  
\textsuperscript{198} \textit{Id} at paragraph 131.  
\textsuperscript{199} See the Aviation Directive Annex I litra b.
in order to be covered under the EU ETS have to arrive or depart from an aerodrome situated in the EU. The CJ argued that the US aircraft operators become subject to the EU ETS only if the aircraft operator makes the commercial decision to depart from an aerodrome situated in the EU. On this basis the CJ concluded that the inclusion of aviation in the EU ETS is compatible with Article 7 of the Agreement. Accordingly, the EU ETS is designed in such matter that it applies only for the aircraft operators which choose to depart from an aerodrome situated in the EU, and as such there is nothing in the wording of Article 7 of the Agreement which could preclude the EU to apply the ETS on the US aircraft operators. Therefore, it can be concluded that the EU ETS is compatible with Article 7 of the Open Skies Agreement.

v. Compatibility with Article 11 (2) (c) of the Open Skies Agreement

The essence of the claimants’ statement in regard to Article 11 (2) (c) is that the Aviation Directive infringes the obligation to exempt the fuel load from taxes, duties, fees and charges. Therefore, it is necessary to examine whether the participation in the EU ETS constitutes a tax, duty, fee or charge on fuel. Article 11 (2) (c) allows charges based on the cost of service provided, but is clear from the nature and intentions of the EU ETS that it does not constitute a payment for service provided. The extended EU ETS requires aircraft operators to surrender emission allowances equivalent to the total number emitted in the preceding year. In regard to the claimants’ statement, the important role plays the fact that the total emissions emitted for the preceding year are calculated on the basis of the fuel consumption for all flight and emission factor. However, the CJ argued that there is no direct link between the amount of fuel consumed by the aircraft operators and pecuniary burden on them. This is supported by the fact that the EU ETS does not reduce GHG emissions itself, but encourages aircraft operators to behave in such manner as to achieve the reduction in GHG emissions, and as such the EU ETS constitutes a market-based measure. The scheme leaves it up to the aircraft operators to decide how to comply with the scheme.

However, the participation in the EU ETS can have an indirect effect on fuel consumption. For instance, an aircraft operator can choose to change navigation or/and operation of flights to make it...

---

200 See Case C-366/10, ATA paragraph133.
201 Id at paragraph 135.
202 Id at paragraph 136.
203 See section 3.2.2 of the thesis.
204 See Case C-366/10, ATA paragraph 142.
more fuel efficient and as a result to reduce the GHG emissions. This can be explained by the fact that there is a direct link between the fuel consumption and GHG emission.

Nevertheless, the participation in the EU ETS does not necessarily lead to pecuniary burden on aircraft operators due to the fact that the part of the emission allowances is allocated free of charge. Moreover, it is not possible to rule out the fact that an aircraft operator can even make a profit by assigning its surplus allowances. However, if an aircraft operator emitted more than the allocated free of charge allowances it is obliged to buy the rest of them through auctioning. This obligation bears some resemblance to imposition of a tax and can have an impact on air transport demand, but it does not directly affect fuel consumption. In addition, the Member States determine the use of revenues from auctioning, where the revenues should be used to tackle climate change.

Taking into account the arguments mentioned above, it can be concluded that even though the EU ETS may have an indirect effect on fuel consumption by aircraft operators, the scheme itself does not constitute a tax, duty, fee or charge on fuel. As a result, the Aviation Directive is compatible with Article 11 (2) (c) of the Open Skies Agreement.

vi. Compatibility with Article 15 (3) read in conjunction with Articles 2 and 3 (4) of the Open Skies Agreement

The ATA claimed that the inclusion of aviation in the EU ETS infringes Article 15 (3) of the Agreement, since such an environmental measure is incompatible with standards established by the ICAO. In addition, the claimants argued that the inclusion constitutes a measure limiting in particular the volume of traffic and frequency of service and as such is in breach of Article 3 (4). Finally, the ATA stated that the EU ETS amounts to a charge which is prohibited under the Chicago Convention Article 15, which parties to the Open Skies Agreement undertook to comply with.

First of all, it is necessary to determine whether the EU ETS is contrary to the standards established by the ICAO. In this regard, Advocate-General Kokott argued that currently there are no ICAO

---

205 See the Aviation Directive Article 3 litra e.
206 The ICAO defines a tax as a levy to raise general national and local government revenues. See section 4.3 of this thesis.
207 See the Aviation Directive Article 3 litra d section 4.
208 See Case C-366/10, ATA paragraph 148.
209 Id at.
210 Id at.
standards contrary to the EU ETS.\textsuperscript{211} This conclusion follows from the argument that the latest 37\textsuperscript{th} ICAO Resolution recognizes the vital role of market-based measures and as such emission trading and in its annexes recommends guiding principles for the introduction of such schemes by the contracting parties of the Chicago Convention.\textsuperscript{212} The CJ in this matter confirmed the opinion of the Advocate-General and concluded that the amended EU ETS is not contrary to the ICAO standards. This conclusion is also supported by section 2.2 of the thesis, where the ICAO response to the obligation under the Kyoto Protocol is discussed. Furthermore, the 35\textsuperscript{th} ICAO Resolution was focused on the market-based measures and particularly emission trading, where the 36\textsuperscript{th} ICAO Resolution supported a mutual consent for including the contracting parties of the Chicago Convention in the existing emission trading schemes.\textsuperscript{213} However, the EU put a reservation on that part of the resolution where the mutual consent is required. Therefore, it follows from the arguments presented that there is nothing to suggest that the ICAO environmental standards are contrary to the EU ETS.

Next, Article 3 (4) of the Agreement allows environmental measures limiting the volume of traffic and the frequency of service if such measures are consistent with Article 15 of the Chicago Convention. The CJ in this matter noted that even though the EU ETS is an environmental measure it does not set any limits on emissions and also does not limit the frequency or regularity of service.\textsuperscript{214} Furthermore, as discussed in section 5.5 (v), the EU ETS cannot be considered a charge, tax, fee or duty. Since the Aviation Directive applies to all aircraft operators arriving and departing from an aerodrome situated in the EU, it is compatible with the unilateral condition set in Article 15 of the Chicago Convention and Article 2 of the Open Skies Agreement, namely: non-discrimination and fair and equal opportunities.

\textbf{vii. Interim Conclusion}

The examination of the provision of the Open Skies Agreement did not disclose any factors which could undermine the validity of the Aviation Directive. It was concluded that Article 7 of the Agreement applies to the US aircraft operators only in the case if they make a commercial decision to depart from an aerodrome situated in the EU and as a result it does not violate the provision. In regard to Article 11 (2) (c) of the Agreement, it was established that the inclusion of aviation in the

\textsuperscript{211} See Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10 paragraph 194.
\textsuperscript{212} Id at paragraph 193.
\textsuperscript{213} See section 2.2 of this thesis.
\textsuperscript{214} See Case C-366/10, ATA paragraph 153.
EU ETS does not constitute a tax, charge, fee or duty on fuel, but it is a market-based measure. Furthermore, since the EU ETS is an environmental measure which applies in a non-discriminatory manner to both US and EU aircraft operators, it was determined that it does not interfere with Article 15 (3) read in conjunction with Articles 2 and 3 (4) of the Open Skies Agreement.
CHAPTER 6: Potential outcome of the conflict

This chapter discusses the potential outcome of the conflict between the EU and other non-European countries. Section 6.1 presents the position of the non-European countries and addresses alternative ways in which the Aviation Directive could be challenged. Section 6.2 examines the Commission’s proposal to temporarily postpone the obligation to surrender emission allowances by third country operators (issue at the time of writing).

6.1 Position of the opposing countries and alternative ways to challenge the Aviation Directive

The thesis examined the compatibility of the inclusion of aviation in the EU ETS with international law illustrated by the ATA case. Even though the examination of the Aviation Directive did not disclose factors which could undermine the validity of the Directive, it does not mean that the EU’s decision will not be challenged through other means. As it was discussed earlier, many countries oppose the scheme and claim that the EU cannot impose unilateral regime without other parties consent. The countries criticizing the EU ETS argue that emissions from the aviation sector should be regulated by the ICAO as expressly stated by the Kyoto Protocol. Even though the EU expressed strong commitment towards the decision to include aviation emissions in the EU ETS, the political pressure and a possibility of retaliation expressed by other non-European countries can undermine its position especially in the light of economic crisis. In addition, the EU biggest trading partners: the US, China and Russia oppose the scheme and threaten to retaliate. In protest to the EU ETS, the Chinese airlines consider not buying anymore the EU’s Airbus aircrafts and have already cancelled some orders. Furthermore, in the joint declaration of the Moscow meeting, the non-European countries consider imposing additional charges on EU aircraft operators as a form of...

---

215 At the time of writing the Commission issued a proposal to ‘stop the clock’ temporarily postpone the obligation to surrender emission allowances by third countries aircraft operators. See more in section 6.2.

216 See, for instance, ‘Joint Declaration of the Moscow Meeting on inclusion of international civil aviation in the EU-ETS’, February 22, 2012 or ‘China bans its airlines from paying EU carbon tax’ http://www.guardian.co.uk/world/2012/feb/06/china-airlines-european-carbon-tax (last visited 12, December).

217 Id at.

218 See ‘Joint Declaration of the Moscow Meeting on inclusion of international civil aviation in the EU-ETS’, February 22, 2012.

countermeasure.\textsuperscript{220} And as such, the EU air transport industry may suffer from negative implications of the inclusion of the EU ETS. Moreover, the US Senate in this matter passed a bill to prohibit airlines to participate in the EU ETS.\textsuperscript{221} Thus, it can be seen from the position of the non-European countries that they are not willing to tolerate the EU’s inclusion of the aviation sector. Consequently, there is a clear need for a global solution to address aviation emissions.

In regard to alternative ways to contest the Aviation Directive, the amended EU ETS could be challenged before the ICAO Council under the Article 84 of the Chicago Convention.\textsuperscript{222} Under Article 84, a dispute between ICAO Member States can be heard and decided by the ICAO Council if it cannot be settled through negotiations. Either party may appeal the decision of the Council before an ad-hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice.\textsuperscript{223} So far, this dispute settlement procedure has not been used many times. In the Hushkit dispute, the US brought Article 84 of the Chicago Convention against the EU Member States in 2000 on the EU regulation prohibiting the use of hushkits to reduce engine noise on aircrafts because it violated the Chicago Convention.\textsuperscript{224} The Council decided in favor of the US and invited both parties to engage in negotiations to settle the dispute, though the dispute was settled only in 2003.\textsuperscript{225} The EU withdrawn its ‘Hushkit’ regulation and replaced by another one permitting the EU to develop stricter sound pollution standards for aircraft in the form of a Directive and in return the US withdrawn its complaint. This dispute illustrates that the Aviation Directive could be challenged before the ICAO Council by the contracting states of the Chicago Convention taking into account that all Member States of the EU are parties to the Convention.

\textsuperscript{220} See ‘Joint Declaration of the Moscow Meeting on inclusion of international civil aviation in the EU-ETS’, February 22, 2012.
\textsuperscript{221} See the US Bill S.1956.ENR to prevent participation in the EU ETS by the US airlines http://thomas.loc.gov/home/epoxmcl112/s1956_enr.xml (last visited 20 December, 2012).
\textsuperscript{223} See the Chicago Convention Article 84.
\textsuperscript{225} \textit{Id} at.
6.2 Global solution for aviation emissions

In November 2012, the Commission reaffirmed its commitment to work through the ICAO in order to find a global solution for reducing GHG emissions from the aviation sector.\textsuperscript{226} The Commission proposed to ‘stop the clock’ for one year on the obligation to surrender emission allowances from all flights performed by third parties.\textsuperscript{227} This decision was made in favor of a global solution under the ICAO and the Commission argued that during the ICAO’s meeting of 9 November 2012 significant progress was made towards global regulation of aviation emissions.\textsuperscript{228} The EU is temporarily deferring from its Aviation Directive in order to enhance the chances of successful outcome of the ICAO Assembly 2013 in terms of developing market-based measures to address aviation emissions.\textsuperscript{229} The Aviation Directive will continue to apply to all flights within and between the 30 European countries in the EU ETS.\textsuperscript{230} The Commissions also stressed that if clear and sufficient progress is achieved by the ICAO’s Assembly in September 2013, it will consider appropriate further legislative action. In parallel, the ICAO already agreed to form a special High-level Group to provide near-term recommendations for market-based measures.\textsuperscript{231}

The EU decision to postpone the obligation to surrender emission allowances can be regarded as a compromise towards a global solution. Furthermore, the Aviation Directive serves as a catalyst for the ICAO to put in place a regulatory framework for the biggest growing source of GHG emissions: aviation. If no progress is achieved by the ICAO Assembly 2013 in September, the EU legislation will apply in full again to all flights to and from non-European countries.\textsuperscript{232}

\textsuperscript{226} The preamble 17 of the Aviation Directive confirms the EU commitment to work on a global solution.
\textsuperscript{228} Id at.
\textsuperscript{229} Id at.
\textsuperscript{230} Id at.
\textsuperscript{231} See ICAO Council High-level Group to focus on environmental policy challenges http://www.icao.int/Newsroom/Pages/new-ICAO-council-high-level-group-to-focus-on-environmental-policy-challenges.aspx (last visited 18 December, 2012).
\textsuperscript{232} See the EU Climate Action: Reducing emissions from the aviation sector http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm (last visited 18 December, 2012).
CHAPTER 7: Conclusion

The present thesis examined the international efforts to address climate change itself and in particular the contribution from the aviation sector. This thesis has shown that the diverged attitude towards Kyoto Protocol could undermine the effectiveness of measures to fight climate change. In regard to the aviation sector, the Kyoto Protocol shifted the burden of addressing GHG emissions from aviation to the ICAO. Accordingly, the ICAO developed the guidelines to use market-based measures, but the ICAO did not put in place a regulatory framework to address GHG emissions from the aviation sector. Therefore, it is not unforeseen that the EU took a lead in environmental protection and adopted the Aviation Directive which included the aviation sector the EU ETS. In addition, it follows from the Kyoto Protocol that the EU is obliged to implement measures and policies to achieve emission reductions in transport sector and as such the Aviation Directive can be seen as one of these measures to implement the Protocol.

Furthermore, the EU’s competences to include the aviation sector in the EU ETS have been assessed. It follows from Articles 191 and 192 TFEU that the EU has necessary legal competences in regard to achieving the environmental objectives. Furthermore, it was concluded that the EU ETS established by Directive 2003/87/EC is not a secluded system and that it was meant to develop further to other sectors such as transportation. In addition to that, the amendments introduced in 2004 to the EU ETS linked it to the project-based CDM and JI credits under the Kyoto Protocol and, as a result, the scheme allows instruments which go beyond the territory of a Member State.

The main issue of the present thesis was the examination of the compatibility of the Aviation Directive with international law. Thus, the thesis examined the conflict between the EU and non-European countries illustrated by the ATA case brought before the High Court of England and Wales, and later referred to the CJ, against the UK’s measures to implement the Aviation Directive. The examination of the arguments presented by the ATA and the CJ has raised a number of questions in regard to the compatibility of the Aviation Directive which were addressed further in the thesis. First, the applicability of the Chicago Convention to challenge the Directive was evaluated. Second, whether the express role given to the ICAO by the Kyoto Protocol could undermine the validity of the Aviation Directive. Third, it was analysed whether the inclusion of aviation in the EU ETS can violate certain provisions of the Open Skies Agreement.
The examination of the EU law has shown that in order to contest the validity of the Aviation Directive the EU has to be bound by the agreement challenging the validity. Furthermore, the nature and broad logic of the international agreement should be able to confer rights on individuals and the provisions challenging the validity should be unconditional and sufficiently precise. In this regard, the thesis assessed whether the EU can be bound by the Chicago Convention even though the EU is not a party to the Convention but all Member States are. It was concluded that the EU can be indirectly bound by the Chicago Convention. This conclusion follows from the arguments that both the EU Treaties and the established case confirm the importance of international law and the fact that the EU should respect it in exercise of its powers. Besides that, the Chicago Convention has a significant place in the international and the EU legal order. Some parts of the Convention have become integral part of the EU law. However, in regard to the nature and broad logic of the Chicago Convention it was established that the Convention governs mainly relationship between States and as such does not confer rights on individuals. Even though the reference to civil aircraft is made throughout the Convention, this reference is directly related to the rights and obligations of State. Thus, the nature and broad logic of the Chicago Convention cannot confer rights on individuals which could be invoked before courts, and therefore the Convention cannot be used as a benchmark to assess the validity of the Aviation Directive.

The second issue examined in regard to the compatibility of the Aviation Directive was whether the express role given to the ICAO by Article 2 (2) of the Kyoto Protocol can undermine the validity of the Aviation Directive. It was not questionable that the EU is bound by the Protocol, however the nature and broad logic was examined further. It follows from the examination that the Kyoto Protocol mainly governs relationship between states and as such cannot confer rights to individuals. However, as many non-European countries claimed that emissions from the aviation sector should be regulated by the ICAO, the thesis examined the nature of Article 2 (2) of the Protocol and whether it is unconditional and sufficiently precise. The assessment of Article 2 (2) has disclosed that the provision is ambiguous and it does not take into account different situations such as state pursuing its own measures or resolution of conflicts. Furthermore, it was argued that the Kyoto Protocol actually encourages the inclusion of aviation in the EU ETS and that lack of effective measures from the ICAO driven the EU to adopt the Aviation Directive. As a result, it was concluded that the express role given to the ICAO cannot undermine the validity of the Directive.
The third issue addressed in the thesis is whether the participation in the EU ETS by the US aircraft operators violates the provisions of the Open Skies Agreement. It was established that the nature and broad logic of the Agreement is capable of conferring rights on individuals and the provisions challenging the validity are unconditional and sufficiently precise. However, the examination of the provisions did not disclose any factors which could undermine the validity of the Directive. This conclusion follows from the arguments that the EU ETS applies only to the US aircraft operators who made the commercial decision to depart from an aerodrome situated in the EU. Furthermore, the EU ETS constitutes a market-based measure and not a tax, charge, fee or duty and it applies in a non-discriminatory manner to both EU and US aircraft operators.

Thus, the examination of the international agreements addressed in the ATA case did not disclose any factors that could undermine the validity of the Aviation Directive. Nevertheless, the non-European countries are searching for alternative ways to challenge the Directive. Some of the countries are using political pressure to change the EU’s decision to include aviation and also threaten to retaliate. The thesis also established that the EU ETS could be challenged before the ICAO Council according to Article 84 of the Chicago Convention. However, the recent development in this matter has showed that the EU is willing to temporally postpone the obligation to surrender emissions allowances by the third countries aircraft operators in favor of a global solution to be achieved by the ICAO. Therefore, the EU reaffirmed its commitment to work through the ICAO towards a common approach to address emissions from the aviation sector.
BIBLIOGRAPHY

Legal material

Agreement on Air Transport between Canada and European Community and its Members States, 17/18 December 2009

Air Transport Agreement between the European Union and the United States of America, 30 April, 2007

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions, ‘Reducing the climate change impact of Aviation’, Brussels, COM(2005) 459 final, 27.9.2005

Convention on International Civil Aviation, Doc 7300/8 (Chicago Convention)

Council Decision 2002/358/EC of 25 April 2002 to approve the Kyoto Protocol

Decision No 1600/2002/EC laying down the Sixth Environmental Action Programme

Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market

Directive 2003/30/EC on the promotion of the use of biofuels or other renewable fuels for transport


Directive 2008/101/EC amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community


General Agreement on Tariffs and Trade, 1947


Montreal Protocol on Substances that Deplete the Ozone Layer, 1987

Opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10


Statute of the International Court of Justice

United Nations Convention on Climate Change, adopted 1992, FCCC/INFORMAL/84 GE.05-62220 (E) 200705

Case law

Case C-79/10, Systeme Helmholtz

Case C-149/96, Portuguese Republic v Council of the European Union

Case C-162/96, A. Racke GmbH & Co. v Hauptzollamt Mainz

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

Case C-308/06, Intertanko and others

Case C-344/04, IATA and ELFAA

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

Case C-377/98, Kingdom of the Netherlands v European Parliament and Council of the European Union

Case C-386/08, Firma Brita GmbH v Hauptzollamt Hamburg-Hafen

Case C-94/03, Commission of the European Communities v Council of the European Union

Case 181/73, R. & V. Haegeman v Belgian State

Case 812/79, Juan C. Burgoa

Joined Cases 21 to 24/72, International Fruit Company NV v. Produktschap voor Groenten en Fruit

2010/C 260/12 Case C-366/10: Reference for a preliminary ruling from High Court of Justice Queen's Bench Division (Administrative Court) (United Kingdom) made on 22 July 2010 — The Air Transport Association of America, American Airlines, Inc., Continental Airlines, Inc., United Airlines, Inc. v The Secretary of State for Energy and Climate Change
Articles and books


Halvorssen Anita M., Denver J. (2008). UNFCCC, the Kyoto protocol, and the WTO - brewing conflicts or are they mutually supportive? International Law Policy, 36, 3-4, 369


Links

Air wars: Fears of trade war over EU airline carbon cap, Damian Kahya

Canada pulls out from Kyoto Protocol  

CDM under the Kyoto Protocol  
http://unfccc.int/kyoto_protocol/mechanisms/clean_development_mechanism/items/2718.php (last visited 29 October, 2012)

Chicago Convention  
http://www.icao.int/publications/Pages/doc7300.aspx (last visited on 1 of December, 2012)

China bans its airlines from paying EU carbon tax’  
http://www.guardian.co.uk/world/2012/feb/06/china-airlines-european-carbon-tax (last visited 12, December)

Chinese threaten to cancel Airbus orders in ETS row  

DG CLIMA  

ECCP  

EU Directorate-General for Climate Action (further DG CLIMA):  
http://ec.europa.eu/clima/policies/international/index_en.htm (last visited 10 September, 2012)

EU Climate Action: Reducing emissions from the aviation sector  

Europe 2020 Targets  

European Climate Change Programme (ECCP)  

ICAO  
http://www.icao.int/Pages/icao-in-brief.aspx (last visited 15 November, 2012)

ICAO Assembly Resolution A35-5 Appendix I  

ICAO Assembly Resolution A36-22 Appendix L  
ICAO Council High-level Group to focus on environmental policy challenges
http://www.icao.int/Newsroom/Pages/new-ICAO-council-high-level-group-to-focus-on-environmental-policy-challenges.aspx (last visited 18 December, 2012)

ICAO environmental protection section http://www.icao.int/environmental-protection/Pages/default.aspx (last visited 23 October, 2012)


IPCC- the leading international body in climate assessment
http://www.ipcc.ch/organization/organization.shtml#.T7tphVKGG70 (last visited 2 September, 2012)

ICAO’s CAEP www.icao.int/environmental-protection/pages/CAEP.aspx (last visited 15 November, 2012)


JI under the Kyoto Protocol
http://unfccc.int/kyoto_protocol/mechanisms/joint_implementation/items/1674.php (last visited 29 October, 2012)

Joint Declaration of the Moscow Meeting on inclusion of international civil aviation in the EU-ETS, February 22, 2012 http://www.ruaviation.com/docs/1/2012/2/22/50 (last visited 22 October, 2012)

Kyoto Protocol on climate change


UN Environmental Programme: Climate Change http://www.unep.org/climatechange/ (last visited 2 September, 2012)
