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A Battle for the Skies: Applying the European Emissions Trading System to International Aviation

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Abstract

The European Union (EU) has long been in a diplomatic row with its main trading partners. The row concerns the EU's decision to include foreign aircraft emissions within its Emissions Trading System (ETS). Several States have objected to the inclusion as a violation of their sovereignty. The importance of the quarrel can hardly be overestimated: it is the first real clash concerning unilateral measures to combat climate change. By including foreign aircraft emissions within the ETS, the EU has taken unilateral action to prevent international environmental harm. The EU's action has given rise to some fundamental questions concerning legislative jurisdiction. Moreover, as the impact of climate change becomes more severe, climate change may serve as a pretext for all kinds of protectionist policies. The current quarrel is therefore also one of principle. This article analyses the jurisdictional basis for extending the ETS to extraterritorial flights and the reactions of third States. In doing so, the article reveals fundamental limits in international rules concerning the allocation of competencies between States, especially in relation to the protection of the environment. The article considers these shortcomings in the context of the present case and suggests a new approach to the traditional principles of sovereignty and legislative jurisdiction.

Keywords

extraterritorial legislative jurisdiction; environmental protection; European Union Emissions Trading System (ETS)

1. Introduction

Most States have agreed that average global temperature increase should be kept below 2 degrees Celsius, as compared to pre-industrial levels.[1] In order to achieve this goal all sectors of the world economy must contribute to lowering greenhouse

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1) This was agreed in Copenhagen in 2009 by the Parties to the United Nations Framework Convention on Climate Change, 4 June 1992, 1771 U.N.T.S. 107, Can.T.S. 1994 No. 7 (entered into force 21 March 1994) (hereinafter the "UN Framework Convention on Climate Change"). Currently, the Convention has 195 Parties, thus achieving virtually universal approval. *See* Decision 2/CP.15, Copenhagen Accord (FCCC/CP/2009/11/Add.1, 30 March 2010), para 1.

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gas emissions.[2] For this purpose, the Kyoto Protocol prescribes quantified reductions in greenhouse gases, but international aviation was excluded from targets.[3]

Emissions from aviation account for a growing percentage of global emissions, currently estimated to be around 3 per cent of global emissions.[4] Emissions from aviation are expected to increase significantly,[5] and are suspected of being particularly harmful.[6] Due to a lack of agreement, aviation was nevertheless excluded from the scope of the emissions reductions commitments in the Kyoto Protocol. Instead, the Kyoto Protocol deferred consideration hereof to the International Civil Aviation Organisation (ICAO), a specialised United Nations agency with global responsibility for various aspects of international civil aviation.[7] Negotiations within the framework of the ICAO have so far achieved little in terms of concrete results. Some have even accused the ICAO of serving "as much, if not more, as a forum for championing causes to preclude the sector from mandatory measures aimed at reducing [greenhouse gas] emissions as it has for developing such measures".[8] Disappointed with the limited progress within ICAO, the EU decided to act unilaterally. It has included emissions from aviation within the scope of its ETS thus obliging aircraft operators who land in or depart from the EU to pay for their greenhouse gas emissions.[9] Emissions are calculated on the basis of the entire length of flights, and include emissions over the high seas or even foreign territory. Many States view EU's unilateral action as an impermissible form of extraterritorial legislative jurisdiction and a violation of their sovereignty. So far, no State has taken legal action, but a group of non-EU airlines have challenged a statutory instrument, which implemented the ETS Directive in the

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2) *Ibid.*, Article 3(3). The Article refers to "all relevant sources" leaving States a choice of where emissions reductions should take place.

3) Kyoto Protocol to the United Nations Framework Convention on Climate Change 37 I.L.M. 22 (1998), Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/Add.1. Currently, there are 192 Parties (191 States and the European Union).

4) Figures vary. Some say that aircraft emissions account for 5 per cent of global carbon emissions. *See* European Federation for Transport and Environment, *Grounded: How ICAO failed to tackle aviation and climate change and what should happen now* (September–October 2010).

5) OECD, *Green Growth and the Future of Aviation* (Paper prepared for the 27th Round Table on Sustainable Development to be held at OECD Headquarters 23–24 January 2012) p. 4.

6) In addition to CO^2, aircraft emit a number of other compounds into the atmosphere, which contribute to cirrus cloud formation. This has a potentially strong climate impact, albeit one that has proven extremely difficult to quantify. *See ibid.*, pp. 4–7. For a more scientific account, *see* J. E. Penner *et al.* (eds.), *Aviation and the Global Atmosphere: A Special Report of the Intergovernmental Panel on Climate Change* (1999) p. 367.

7) Kyoto Convention, Article 2(2).

8) C. F. Clarke and T. Chagas, 'Aviation and Climate Change Regulation', in D. Freestone and C. Streck (eds.), *Legal Aspects of Carbon Trading* (2009) p. 609.

9) EC, Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emissions allowance trading within the Community, [2009] O.J. L 8/3 (hereinafter the "ETS Directive" or "Directive 2008/101/EC").

United Kingdom. The case reached the European Court of Justice (ECJ) via a request for a preliminary ruling. This article analyses the judgment of the ECJ while commenting on the jurisdictional basis for extending the ETS to extraterritorial flights.

2. Background: Failed Multilateral Action

Article 2(2) of the Kyoto Protocol provides that Parties included in Annex I (*i.e.* States that were parties to the Organization for Economic Co-operation and Development (OECD) in 1992 together with so-called economies in transition) "shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively". Negotiations within the ICAO have however made little progress,[10] and in contrast to its maritime counterpart, no binding regime to control greenhouse gas emissions from aviation has been established.[11]

In 2004, the ICAO adopted three environmental goals, which, *inter alia*, included the goal to "limit or reduce the impact of aviation greenhouse gas emissions on the global climate".[12] That same year, the ICAO Committee on Aviation Environmental Protection (CAEP) endorsed a template agreement and guidance on voluntary agreements with airlines to reduce emissions.[13] But no agreement has ever been signed. Commenting on the ICAO's role in the global effort towards a more sustainable aviation sector, the ICAO Council President, Assad Kotaite, noted that "liberalization of air travel and the remarkable growth in the air transport sector is outpacing environmental achievements".[14] According to the Secretary General, the ICAO was "considering" market-based options to address emissions.[15]

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[10] *See generally* European Federation for Transport and Environment, *Grounded: How ICAO failed to tackle aviation and climate change and what should happen now* (September–October 2010).

[11] Mandatory measures to reduce emissions from international shipping were adopted by the Marine Environment Protection Committee of the IMO, at its 62nd session in July 2011. The Committee adopted revisions to the International Convention for the Prevention of Pollution from Ships Annex VI introducing Energy Efficiency Design Index (EEDI) and Ship Energy Efficiency Management Plan (SEEMP). *See* Resolution MEPC.203(62) (15 July 2011).

[12] *See* < http:/legacy.icao.int/env/ >.

[13] The CAEP was created in 1983 in recognition of the growing environmental impacts from the international aviation sector. It has led responsibility for responding to climate change-related issues. The CAEP has explored a range of options to reduce greenhouse gas emissions (including taxes and charges) from aircraft but has faced difficulty in making progress.

[14] *See* ICAO News Release, 'International Civil Aviation Day calls for the greening of aviation' (30 November 2005).

[15] *Ibid.*

Guidelines to implement such measures should have been completed in 2007. Despite of this, the ICAO Assembly urged Contracting States not to "implement an emissions trading system on other Contracting States' aircraft operators except on the basis of mutual agreement between those States".[16] Their position reflected a general reluctance to establish a mandatory system for reducing greenhouse gas emissions within the aviation sector. The advice was, moreover, in direct contradiction with the EU's ambitions of reaching a global agreement on a market-based mechanism.[17]

Efforts to reach an agreement culminated in 2010 when the ICAO Assembly adopted Resolution A37-19, which set out a mere "aspirational goal" on improved fuel efficiency, to be achieved gradually by 2050.[18] The Resolution further requested the ICAO Council, a permanent body composed of 36 Member States, to develop a framework for a voluntary market-based approach to emissions limitation.[19] Although the resolution was seen as a "historic breakthrough",[20] the EU found it "insufficient" and entered a reservation.[21] In its reservation, the EU explicitly stated that the implementation of a market-based approach does not require "mutual agreement",[22] and asserted that "the right of each Contracting Party to apply on a non-discriminatory basis its own laws and regulations to aircraft of all States".[23] The EU was by no means alone in voicing its discontent, and an unprecedented 63 States entered a reservation to the Resolution.[24] Most of these were developing States who resisted calls for strengthened global action on

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16) Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection, ICAO Assembly Res A36-22, (28 September 2007) para. 1(b)(1).

17) Already the EU's 6th Environment Action Programme, which was published on 24 January 2001, called for specific action to reduce greenhouse gas emissions from aviation as a priority if no action was agreed within the ICAO by 2002.

18) Assembly Resolution on International Aviation and Climate Change A37-17/2 (officially adopted as A37/19), 37th Session of the ICAO 28 September to 8 October 2010.

19) The Resolution also recognised that "some States may take more ambitious actions prior to 2020". Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection, ICAO Assembly Resolution A37-19, 8 October 2010, at para. 6(c).

20) ICAO News Release, 'ICAO Member States agree to historic agreement on aviation and climate change' (8 October 2010). *See also* M. Adam, 'ICAO Assembly's Resolution on Climate Change: A 'Historic' Agreement?', 36:1 *Air and Space Law* (2011) p. 23.

21) The reservation was joined by 17 additional States that are members of the European Civil Aviation Conference.

22) Written Statement of reservation by Belgium on behalf of the European Union (EU), its 27 Member States, and 17 other States members of the European Civil Aviation Conference (ECAC) on Resolution A37-17/2. Available at <http://legacy.icao.int/icao/en/assembl/A37/Docs/10_reservations_en.pdf>, visited on 17 November 2012.

23) *Ibid.*

24) Even though the Resolution was non-binding, the EU entered a reservation in order to "fully clarify their position with regard to expectations for the UNFCCC climate negotiations to deliver ambitious targets for global greenhouse gas reductions and to ensure effective implementation of the EU Emissions Trading System (ETS)." *Ibid.*

emission from aviation.[25] Others, like Russia, warned that it would not rule out the introduction of retaliatory measures against aircraft operators of States that introduced market-based measures unilaterally.[26] This was the first sign of the troubles ahead.

3. Unilateral Action: The Emissions Trading System

The EU's strategy to combat global warming centres on a "cap and trade" scheme, which came into force with the ETS in 2005.[27] The ETS is the world's first large-scale greenhouse gasses trading programme.[28] The scheme, which covers all 27 EU Member States, aims to ensure compliance with the Kyoto Protocol. It is a market-based mechanism. In contrast to a traditional regulatory approach – where specific kinds of aircraft are banned because of low performance – the market-based mechanism leaves it to individual companies to decide how to lower greenhouse gas emissions.[29] This works by establishing a legal limit ("cap") on the emissions of specific greenhouse gases. Companies receive emissions allowances giving them the right to emit a certain level of greenhouse gases. At the end of each year, companies must surrender allowances equal to their actual emissions or fines will be imposed.[30] A company anticipating that its emissions will exceed its allowance can take measures to reduce its emissions – for example by installing more efficient technology or by reducing output – or it can buy additional emissions allowances. Conversely, if a company's actual emissions are lower than its allowance, it can keep its surplus allowances to cover its future needs or sell ("trade") them to another operator. Hence the name "cap and trade".

Aviation was not included in the first phase of the ETS, which only covered emissions from large emitters in the power and heat generation industry as well as other selected energy-intensive sectors. In 2005, the EU Commission adopted a

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[25] *See e.g.* the Reservation by Argentina, on behalf of Brazil, China, India, Saudi Arabia and others. Declaration of Reservation of the Republic of Argentina in Relation to Resolution A37-17/2 – Consolidated Declaration of the Permanent Policies and Practices of ICAO Related to Protection of the Environment – Climate Change. *Ibid.*

[26] Statement of Reservation of the Russian Federation Regarding Resolution A37-17/2. *Ibid.*

[27] EC, Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2003] O.J. L 275/32.

[28] At that time, 25 Member States.

[29] *See* evidence by P. Gammeltoft, Head of the EU's Clean Air and Transport Unit, to the House of Lords European Union Committee, *Including the Aviation Sector in the European Union Emissions Trading Scheme*, (HL Paper 107, 2006) Q75.

[30] A failure to lower emissions or to purchase sufficient ETS allowances may result in a fine of EUR 100 per tonne of emissions. Directive 2008/101/EC, Article 16(c).

communication that concluded that the most cost-efficient and environmentally effective option to deal with the climate change impacts of aviation was to include emissions from aviation within the ETS.[31] One of the reasons why the EU has chosen a market-based mechanism instead of a tax (for example, a flight departure tax levied on all flights leaving EU airports) was that the market-based mechanism could provide an incentive to airlines to improve environmental performance.[32] In addition, the 1944 Convention on International Civil Aviation, at times referred to as the "Constitution of international civil aviation",[33] explicitly prohibits any taxation of fuel consumed on international flights.[34] The prohibition was originally introduced to avoid double taxation, but has been extended by governments in subsequent years to a general ban.[35] The prohibition has further been enshrined in a large number of bilateral aviation agreements, which would need to be renegotiated if the EU had decided on a tax.[36] A 2002 background study on the inclusion of aviation within the ETS, commissioned by the European Commission, did not find this prohibition to be an obstacle.[37] The report stated that "ICAO takes a prudent stance as to the permissibility of imposing a fuel-related environmental charge, so that there may be scope for other, i.e. more flexible, interpretations of the legal restrictions bearing on imposition of such a charge".[38] A later report simply stated that the relevant provision was "not relevant".[39] The EU has nevertheless

31) Communication from the Commission, *Reducing the Climate Change Impact of Aviation*, COM(2005) 459 final.

32) On 27 September 2005 the Commission adopted its Communication entitled, *Reducing the Climate Change Impact of Aviation*, COM(2005) 459 final. The accompanying Impact Assessment examined in detail 12 policy instruments to tackle aviation emissions. The assessment concludes: "A movement-based tax would provide environmental benefits to the extent that it had influenced air transport demand. However, it would provide no incentive for operators either to improve operational performance or to invest in cleaner technologies ... To the extent that other more sophisticated options are available and deliverable, such taxes are not the preferred way of mitigating the climate impacts of aviation.", at 3.3.5.

33) P. S. Dempsey, 'Public International Air Law', 34:4 *Air & Space Law* (2008) p. 69.

34) Convention on International Civil Aviation, 7 December 1944, 61 STAT. 1180, T.I.A.S. NO. 1591, 15 U.N.T.S. 295, Can. T.S. 1944 No. 36, ICAO Doc. 7300/9 (hereinafter the "Chicago Convention"). Article 24 states: "Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges ..."

35) *See* ICAO Committee on Aviation Environmental Protection, Montreal 2–12 February 2004, CAEP/6-WP/24, para. 2.1. The provision is reflected in Article 11(2) of the Open Skies Agreement.

36) Gammeltoft, *supra* note 29, Q104.

37) CE Delft, 'Economic Incentives to Mitigate Greenhouse Gas Emissions from Air Transport in Europe' (July 2002).

38) *Ibid.*, at p. 83.

39) CE Delft, 'Giving wings to emission trading Inclusion of aviation under the European emission trading system (ETS): design and impact' (July 2005) p. 177.

gone to great lengths to distinguish the ETS from a tax and preferred to adopt a market-based approach.[40]

Consequently, in 2008 the ETS Directive was amended to include "aviation" amongst the capped sectors, encompassing "all flights which arrive at or depart from an aerodrome situated in the territory of a [EU] Member State" from 1 January 2012.[41]

The ETS Directive is designed to take into account legislation in third countries that seek to reduce the climate change impact of international aviation. Thus under the heading "Third country measures to reduce the climate change impact of aviation" Article 25a states that:

> Where a third country adopts measures for reducing the climate change impact of flights... the Commission... shall consider options available in order to provide for optimal interaction between the Community scheme and that country's measures.

The ETS must further be amended in the event of a global agreement to reduce greenhouse gas emissions from aviation.[42]

Revenue from the ETS must be used to tackle climate change in the EU and in third countries. The exact implications are, however, still being discussed.[43]

The fact that aviation has been included within the ETS does not mean that individual airlines will have to pay for their emissions. Airlines are allocated emission allowances equal to 97 per cent of average levels of emissions in the period from 2004–2006. The cap will become more stringent over time,[44] but a large part of emissions allowances (85 per cent) will initially be allocated cost-free.[45] Only airlines that exceed their quota of free allowances will have to purchase further allowances, and thus pay for their emissions. Airlines that reduce their emissions 15 per cent below average levels will not face any charges, and may even profit.[46]

The reason that the ETS has given rise to a diplomatic row is because of its geographical scope of application. The ETS applies to all airlines, regardless of State of registration.[47] Emissions are, moreover, calculated on the basis of the entire length

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[40] *See e.g.* Written testimony for Senate Committee on Commerce, Science, and Transportation hearing on the European Union's Emissions Trading System (6 June 2012) p. 5

[41] Directive 2008/101/EC.

[42] *Ibid.*, Article 25(a)(3).

[43] *See* Council conclusions on climate finance – fast start finance, 3198th Economic and Financial Affairs Council meeting Brussels (13 November 2013), para. 10.

[44] Directive 2008/101/EC, Article 2 and 3(c)(1).

[45] Subject to Directive 2008/101/EC, Article 3(f).

[46] Some claim that if "carriers pass on all additional costs, including the opportunity costs associated with free allowances, to consumers, profits for U.S. carriers will increase". R. Malina *et al.*, 'The impact of the European Union Emissions Trading Scheme on US aviation', 19 *Journal of Air Transport Management* (March 2012) pp. 36–41.

[47] Commercial airlines that fly less than 243 flights a year or perform flights with annual total emissions less than 10,000 tones per year are exempt. *See* Annex I Directive 2003/87 as amended.

of a flight and therefore include emissions that occur over the high seas or over foreign territory. It is precisely this latter detail that has given rise to contention. Several States objected that the EU cannot legitimately apply its environmental legislation to their airlines when these are flying outside the territory of EU Member States (hereinafter "EU territory").

4. A Proxy Case before the European Court of Justice

So far, no State has launched legal action before an international tribunal.[48] Instead, some non-EU airlines, supported by their respective governments, initiated judicial review proceedings in the EU. On 16 December 2009, leading US airlines and the largest airline trade association (collectively referred to as "ATA and others") brought judicial review proceedings in the United Kingdom, the EU Member State responsible for administering the ETS in respect of these airlines.[49] The claimants asked the High Court for England and Wales to quash the 2009 Aviation Greenhouse Gas Trading Scheme Regulations, which implement the ETS Directive in the United Kingdom.[50] In support of their action, ATA and others argued that that in applying its environmental legislation to aviation activities in third countries' airspace and over the high seas, the EU had violated conventional obligations and fundamental principles of customary international law.[51] According to the claimants, foreign aircraft engaged in international navigation need only comply with the laws and regulations of the EU when they enter or depart from the territory of the EU or, in the case of laws and regulations relating to aircraft operation and navigation, when their aircraft are within EU territory. The claimants were, in other words, challenging the EU's legislative competence, both in relation to its conventional obligations, but also, more fundamentally, its competence to regulate extraterritorial conduct under international law. The High Court stayed national proceedings and asked the ECJ for a preliminary ruling.[52] In its request for a preliminary ruling, the High Court asked whether any or all of the

[48] Under Article 84 of the Chicago Convention, the Council can decide a disagreement between two or more contracting States. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal or to the Permanent Court of International Justice. *See infra* section 7, The Reaction by Third States.

[49] Each airline that is subject to the ETS has according to Article 18a an administrating State, which is the State that grants the operating license.

[50] SI 2009/2301.

[51] *See* Written Observations of the Claimants in Case C-366/10 (16 November 2010) para. 7. Available at <www.eenews.net/assets/2011/08/01/document_gw_02.pdf>, visited on 17 November 2012.

[52] Reference for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), made by decision of 8 July 2010, received at the Court on 22 July 2010.

following rules of international law may be relied upon to challenge the validity of the ETS Directive:

> the principle of customary international law that each State has complete and exclusive sovereignty over its airspace;
> the principle of customary international law that no State may validly purport to subject any part of the high seas to its sovereignty;
> the principle of customary international law of freedom to fly over the high seas;
> the principle of customary international law (the existence of which is not accepted by the Defendant [the Secretary of State for Energy and Climate Change]) 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;
> the Chicago Convention (in particular Articles 1, 11, 12, 15 and 24);
> the Open Skies Agreement (in particular Articles 7, 11(2)(c) and 15(3));
> the Kyoto Protocol (in particular, Article 2(2).

The ECJ handed down its decision on 21 December 2011.[53] Sitting as a Grand Chamber, the ECJ upheld the validity of the ETS Directive, finding no violation of international law. Despite this clear ruling, the decision had little influence on the unfolding quarrel. The decision nonetheless provides a convenient starting point to enumerate the questions of jurisdiction arising in connection with the quarrel. The case raised both procedural and substantive issues, which in turn will be analysed below under the heading of relevant instruments and customary international law. Before analysing the arguments, it is useful first to say a few words about jurisdiction.

4.1. Jurisdiction

In international law, jurisdiction describes the limits of the legal competences of States.[54] That is to say, it defines the circumstances in which States can make, apply and enforce rules of conduct upon persons, property or events both in their own territory and beyond. As such, it is concerned with one of the fundamental functions of public international law, *viz.* that of regulating and delimiting the respective competencies of States.[55]

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[53] Judgment of the Court (Grand Chamber) of 21 December 2011, *Air Transport Association of America and Others* v. *Secretary of State for Energy and Climate*, Case C-366/10.

[54] R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed. (1992) p. 457.

[55] *See generally* F. A. Mann, 'The Doctrine of Jurisdiction in International Law', 111 *Recueil des Cours de l'Academie de Droit International de la Haye* (1964-I); F. A. Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years', 186 *Recueil des Cours de l'Academie de Droit International de la Haye* (1984-III); M. Akehurst, 'Jurisdiction in International Law', *British Year Book of International Law* (1972–1973) pp. 145–258; and for more recent contributions C. Ryngaert, *Jurisdiction in International Law* (2008); and V. Lowe and C. Staker, 'Jurisdiction', in M. D. Evans (ed.), *International Law* (2010) pp. 313–339.

Traditionally, States have mostly regulated conduct within their own territory. Consequently, conflicts of jurisdiction have been limited. But in a world where businesses and individuals are increasingly moving across borders, the issue of conflicts of jurisdiction is assuming greater importance. The increase of cross-border operations has also meant that States more often regulate events beyond their own borders. As expressed by the former Attorney General for England and Wales:

> ... [it] is important that we recognise the need for extraterritorial jurisdiction in some cases. In an increasingly globalised world where it is easy for the effects of wrong conduct done in one country to reach and to be felt in different countries there may be a need for extraterritorial jurisdiction so that we can tackle effectively international wrongdoing. This can apply both to the civil and criminal fields.[56]

There is no international definition of the term "extraterritorial jurisdiction", which, moreover, is used with varying meanings in different contexts. This makes it difficult to define. Most commonly, the term is used to describe efforts of national legislatures or regulators to impose their laws or regulations on people and business outside their borders. Such conduct can be regarded in different ways. As in the present case, the legislature may pass a law that is expressly applicable to extraterritorial conduct, such as flying over the high seas or third States. Individuals or corporations may also seek to rely on the law of one State in respect of conduct in another, such as the request for a judicial remedy for an extraterritorial tort. The most well-known example is the Alien Tort Statute (ATS), which allows US courts to entertain suits by foreign plaintiffs against foreign defendants for conduct that has taken place entirely in the territory of a foreign State.[57] Many States have objected to the application of the ATS as an excessive form of extraterritorial jurisdiction contrary to international law.[58] In addition, national courts or regulators may apply national law to acts that have taken place abroad but which have effects in their territory. One example is competition rules, which may prohibit foreign companies to enter into agreements not to compete in a foreign territory. Somewhat confusingly, from a doctrinal perspective this is not considered as a form of extraterritorial jurisdiction as it falls within the scope of the territorial principle.[59]

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56) UK Attorney General, 'How far can laws reach? The problem of extraterritoriality', IBA Annual Conference, Prague (2005), reprinted in the *British Year Book of International Law* (2005–2006) 8/5.

57) Also known as the Alien Tort Claims Act (ATCA), 28 U.S. Code § 1350.

58) *See e.g.* Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of The Netherlands as *Amici Curiae* in Support of the Respondents in *Kiobel* v. *Royal Dutch Petroleum*, reprinted in the *British Year Book of International Law* (2010–2011) 6/95.

59) *Cf. infra* section 5.2.

It follows that States may regulate extraterritorial conduct of individuals (or legal entities), property or events in various ways and based on different jurisdictional bases. The legitimacy of such regulation depends on the legislating State being able to point to a "clear connecting factor" of a kind whose use is approved by international law, between itself and the conduct that it seeks to regulate.[60] ATA and others disputed, *inter alia,* that there was such a connecting factor or that the EU's Member States had limited their competence by way of treaty.

4.2. The Chicago Convention and the Open Skies Agreement

Before reviewing the validity of the ETS, the ECJ had to decide two issues. Firstly, whether it had jurisdiction to review the legality of the ETS Directive in the light of the invoked instruments and, secondly, whether the claimants, as non-State actors, could rely on these to challenge the validity of the ETS Directive. With the exception of the Chicago Convention, the Court found that it had jurisdiction. The reason that it could not review the ETS Directive in light of the Chicago Convention was that the EU is not party to this instrument. Since the powers previously exercised by the Member States in the field of application of the Chicago Convention have not to date been assumed in their entirety by the Union, the EU was not, the Court said, bound by it.[61] Consequently, the Court avoided directly interpreting the Chicago Convention. Some have criticised the ECJ for not considering the Chicago Convention, as several parties to this instrument will be affected by the ETS despite not having an air transport agreement that includes the EU as a party.[62] Although valid, this point is immaterial to establish the ECJ's competence. That said, Article 351 of the Treaty on the Functioning of the European Union states that rights and obligations arising from agreements concluded before the establishment of the European Economic Community or for acceding States before the date of their accession to the EU are not affected by the EU foundational treaties.[63] This implies a duty on the part of the institutions of the EU not to impede the performance of the obligations of Member States that stem from agreements prior to 1 January 1958, such as the Chicago Convention.[64] It is naturally difficult for the ECJ to ensure compliance with Article 351 without considering the Chicago Convention.[65] Pragmatically, however, it might be added that

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[60] Lowe and Staker, *supra* note 55, p. 320.
[61] Case C-366/10, *supra* note 53, para. 72.
[62] B. F. Havel and J. Q. Mulligan, 'The Triumph of Politics: Reflections on the Judgment of the Court of Justice on the European Union Validation the Inclusion of Non-EU Airlines in the Emissions Trading Scheme', 37:1 *Air & Space Law* (2012) p. 10.
[63] Treaty on the Functioning of the European Union, 25 March 1957, [2010] O.J. C 83/47 (hereinafter "TFEU").
[64] Case C-366/10, *supra* note 53, para. 61.
[65] On this point *see also* CISDL, *Legal Analysis on the Inclusion of Civil Aviation in The European Union Emissions Trading System* (May 2012) pp. 6–7.

even though the Court did not directly rely on the Chicago Convention it did indirectly consider many of its provisions, most of which are either copied or explicitly referred to in the 2007 Open Skies Agreement.[66] Thus Article 11 of the Chicago Convention, which concerns the applicability of air regulations, has been reproduced in Article 7(1) of the Open Skies Agreement and other important provisions are subject to the Chicago Convention.[67] Like all air services agreements, the Open Skies Agreement is moreover authorised and governed by the Chicago Convention.[68]

The Open Skies Agreement came into effect on 20 March 2007, replacing 21 existing bilateral agreements between the US and EU Member States. The main purpose of the Agreement was to facilitate the removal of market access restrictions for transatlantic flights. Contrary to the Chicago Convention, the Open Skies Agreement has been approved on behalf of the EU,[69] and its provisions therefore form an integral part of the EU legal order.[70] As the Agreement copied many of the provisions from the Chicago Convention, the ECJ could review whether the ETS is compatible with the relevant environmental standards established by ICAO.[71] ATA and others, *inter alia*, argued that the ETS infringed these standards. They further submitted that in limiting the volume of air traffic and frequency of service, the ETS was in breach of Article 3(4) of the Agreement.[72] Both arguments failed. According to the ECJ, the mentioned provisions did not prevent the parties from "adopting measures that would limit the volume of traffic, frequency or regularity of service ... when such measures are linked to protection of the environment".[73] Following the ECJ's reading, the Open Skies Agreement only requires that charges imposed on US airlines are not higher than those payable by their European counterparts.[74] The ECJ further emphasised that the fundamental

66) Air Transport Agreement, United States and European Union, 25 and 30 April 2007, E.U. Series 005/2011: Cm 8137, [2007] O.J. L 134/4 (hereinafter the "the 2007 Open Skies Agreement").
67) *See e.g.* Articles 2(4) and 7(2).
68) Article 6 of the Chicago Convention authorises the conclusion of air services agreements, and states that "[n]o scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization".
69) *See* Decisions 2007/339/EC and 2010/465/EU.
70) Case C-366/10, *supra* note 53, para. 79.
71) Referred to in Article 15(3) of the Open Skies Agreement.
72) Article 3(4) States: "Each Party shall allow each airline to determine the frequency and capacity of the international air transportation it offers based upon commercial considerations in the market- place. Consistent with this right, neither Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the airlines of the other Party, nor shall it require the filing of schedules, programs for charter flights, or operational plans by airlines of the other Party, except as may be required for customs, technical, operational, or environmental (consistent with Article 15) reasons under uniform conditions consistent with Article 15 of the Convention."
73) Case C-366/10, *supra* note 53, para. 152.
74) *Ibid.*, para. 99.

obligation owed by aircraft operators under the ETS is not to limit traffic but to "surrender allowances corresponding to their actual emissions".[75]

ATA and others further contended that the EU had infringed the obligation to exempt fuel load from taxes, duties, fees and charges, as laid down in Article 11(1) and (2)(c) of the Open Skies Agreement, a provision that is almost a verbatim copy of Article 24 of the Chicago Convention. In particular, they contended that the EU could only impose charges based on the cost of the service provided.[76] The ECJ refused to endorse such arguments and essentially viewed the matter as one of non-discrimination.[77] In emphasising non-discrimination, the ECJ followed the line of reasoning consistently emphasised by the EU. The ECJ additionally refused to regard the ETS allowances as a "levy", stating that the allowance trading scheme constitutes "a market-based measure and not a duty, tax, fee or charge.[78] Also here, the ECJ followed the course set out by the EU. Finally, the ECJ emphasised the voluntary nature of the ETS, as only airlines that "choose" to operate commercial air routes arriving or departing from the EU will be covered by the scheme.[79] Therefore, the ECJ found no violation of the Open Skies Agreement.

4.3. *Kyoto Protocol*

Like the Open Skies Agreement, the Kyoto Protocol forms an integral part of the legal order of the EU.[80] Consequently, the ECJ could also review the ETS Directive in the light of this treaty. But the ECJ noted that Article 2(2) "cannot ... be considered to be unconditional and sufficiently precise so as to confer on individuals the right to rely on it in legal proceedings in order to contest the validity of Directive 2008/101".[81] Thus while the ECJ found it had jurisdiction to entertain the claim, it did not find that the claimants had any rights to invoke the provisions of the Kyoto Protocol. This was a curious finding, as the case concerned a judicial review and therefore not the claimant's individual rights, but rather the legality of EU's

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[75] *Ibid.*, para. 153.
[76] The 2007 Open Skies Agreement, Article 11(1)(b).
[77] Case C-366/10, *supra* note 53, para. 99. A principle ingrained within the 1944 Chicago Convention. *Cf.* Articles 11 and 15.
[78] *Ibid.*, para. 148. The definition of a "tax" is central to the dispute concerning the Chicago Convention, but one that falls outside the scope of the present paper. The EU continues to maintain that the ETS is neither a tax nor a charge because airlines can meet their obligations by remaining within their caps or by purchasing additional allowances, either from government or on the open carbon market. They further maintain that unlike taxes and charges, where money is paid to State funds or to cover specific cost, an ETS allowance has a value and can be bought and sold on the market for profit. *See* Written testimony, *supra* note 40, p. 5. This is far from the only case where the definition of a tax is disputed. Several diplomatic missions in the United Kingdom, for example, refuse to pay the London congestion charge because they perceive this as a tax. *See e.g. British Year Book of International Law* (2010–2011) 7/3.
[79] Case C-366/10, *supra* note 53, para. 133.
[80] *Ibid.*, para. 73.
[81] *Ibid.*, para. 7.

actions.[82] Despite the applicants' lack of standing, the ECJ still pronounced itself on the Kyoto Protocol.

The objective of the Kyoto Protocol is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".[83] As noted above, the Kyoto targets do not include aviation emissions but call on parties to pursue limitation or reduction of greenhouse gas emissions through the ICAO and the International Maritime Organization (IMO).

ATA and others argued that the Kyoto Protocol prohibits the EU from unilaterally pursuing limitation or reduction of greenhouse gases from aviation outside the ICAO. Also this argument failed. The ECJ noted that "the parties to the protocol may comply with their obligations in the manner and at the speed upon which they agree".[84]

The argument concerning the Kyoto Protocol is somewhat peculiar in that it was brought by a group of American companies, with support from a Canadian trade organisation;[85] the only developed States that have either not ratified or recently withdrawn from the Kyoto Protocol.[86] But since the case concerned a judicial review, the claimants are not limited to only asserting their own rights. Instead, they may contribute to a general review of the legality of the EU's actions and whether these are in compliance with international law. And while at first sight it may seem strange that companies from States that have not ratified the Kyoto Protocol may seek to undermine environmental initiatives of States that have, the public interest of all demands that the legal review includes all relevant instruments binding on the EU. In this light, the ECJ's emphasis on the claimant's lack of standing to invoke specific provisions in the Kyoto Protocol is irrelevant. The decisive argument is that the Kyoto Protocol does not impose specific obligations on how contracting States are to fulfil their obligations. Also here, no new arguments were brought to the dispute.

4.4. Customary International Law

With regard to custom, the ECJ noted that Article 3(5) of the Treaty on European Union obliges the EU to observe international law in its "entirety".[87] On this basis,

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[82] Although curious, the ECJ has followed this line of reasoning in other cases, *see e.g. Intertanko and Others* [2008] ECR I-4057, paras. 58, 59, 61 and 64.

[83] Article 2, UN Framework Convention on Climate Change.

[84] Case C-366/10, *supra* note 53, para. 76. Similarly, the Advocate General noted here was that there was "no reference of any kind of exclusivity in the actual wording of Article 2(2) ...". Case C-366/10, Opinion of Advocate General Kokott (delivered on 6 October 2011), para. 177.

[85] Together with other associations, the National Airlines Council of Canada was allowed to intervene.

[86] On Canada's withdrawal from the Kyoto Protocol, *see* depositary notification C.N.796.2011. Treaties-1 (16 December 2011).

[87] Case C-366/10, *supra* note 53, para. 101

the ECJ concluded that it had the power to review the validity of the ETS Directive in light of customary international law. Thus unlike the Kyoto Protocol, it found that the claimants had standing to invoke the sovereign rights of States. Because of the uncertain nature of custom, the ECJ limited its review to an assessment of whether the EU had "made manifest errors" while applying the relevant principles.[88] In doing so, it considered three of the four customary principles invoked by the claimants, and whether by extending the reach of the ETS extraterritorially, the EU or its Member States were acting contrary to the principles: that each State has complete and exclusive sovereignty over its airspace;[89] that no State may validly purport to subject any part of the high seas to its sovereignty;[90] and the principle of freedom to fly over the high seas.[91]

The customary status of the three principles was not contested and was established without discussion. The ECJ merely referred to international treaties and practice by the International Court of Justice.[92] In this connection, it should be noted that most of the invoked instruments referred to the elusive principle of "sovereignty" which does not explicitly prohibit the exercise of legislative jurisdiction, something that will be commented on further below.

The ECJ's deliberation was brief. Without any analysis, it found that the application of the ETS to foreign aircraft arriving or departing from the EU:

> does *not* infringe the *principle of territoriality* or the *sovereignty* which the third States from or to which such flights are performed have over the airspace above their territory, since those aircraft are *physically* in the territory of one of the Member States of the EU and are thus subject on that basis to the *unlimited jurisdiction* of the European Union.[93]

On this basis, the ECJ found that the EU has legislative jurisdiction over all flights that arrive at or depart from an EU airport.[94] Thus the ECJ found that the ETS is based upon the most basic principle of jurisdiction, that of territoriality. Such a finding is in line with the opinion of the Advocate General, who suggested that the

88) *Ibid.*

89) According to the ECJ, the first principle had been codified in Article 1 of the 1944 Chicago Convention. This was confirmed in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Reports 1986, p. 392, para. 212, where it stated that "the 1944 Chicago Convention on International Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory".

90) The second principle was codified in Article 2 of the 1958 Convention on the High Seas, U.N.T.S., vol. 450, p. 11, p. 82 (entered into force on 30 September 1962). This was noted by the Permanent International Court of International in the *Lotus* case, P.C.I.J. 1927, Series A, No 10, p. 25.

91) The last principle was codified in Article 2(4) of the 1958 Convention on the High Seas and Article 87(1) of the 1982 Convention on the Law of the Sea.

92) Case C-366/10, *supra* note 53, para. 104

93) *Ibid.*, para. 125 (emphasis added).

94) *Ibid.*, para. 130.

EU was exercising territorial legislative jurisdiction that merely took into account "events that take place over the high seas or on the territory of third countries".[95] She further emphasised that "there is no concrete *rule*" regarding foreign aircraft's conduct outside EU territory.[96] Therefore, in the view of the ECJ, the inclusion of emissions from aviation does not violate customary international law or the sovereignty of third States.[97]

A fourth principle, that aircraft flying over the high seas are subject to the exclusive jurisdiction of the State in which they are registered, was disputed by the United Kingdom and, to a certain extent, by Germany, who intervened in support of the inclusion of emissions from aviation in the ETS.[98] The fourth principle was not considered in the ECJ's deliberations, but it does give a good insight into the unique problems concerning jurisdiction over aircraft. The United Kingdom and Germany argued that there was insufficient State practice to establish that as a vessel on the high seas is in principle governed only by the law of its flag, the same principle should apply also to aircraft flying over the high seas. This is undoubtedly right. Several treaties oblige contracting States either to extradite or initiate prosecution against persons found on their territory who are suspected of having endangered international civil aviation, *viz.* the principle of *aut dedere aut judicare.*[99] The obligation presupposes no other jurisdictional link than the mere presence of the alleged offender and in effect requires all contracting States to criminalise the relevant conduct extraterritorially, or at least accept that other States may do so. This includes acts over the high seas or over foreign territory. Most States have accepted the obligation, and aircraft flying over the high seas are therefore no longer subject to the exclusive jurisdiction of the State of registration.[100]

It might also be recalled that until the adoption of the 1963 Convention on Offences and Certain other Acts Committed on Board an Aircraft, there was no international agreement on how to coordinate the exercise of criminal legislative

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[95] Opinion of Advocate General Kokott, *supra* note 84.

[96] *Ibid.* (emphasis in original). This argument was repeated by the EU before the US Senate Committee on Commerce, Science, and Transportation, which held a hearing in the ETS in June 2012. *See e.g.* Written testimony, *supra* note 40, p. 7

[97] In this regard *see also* CE Delft, *supra* note 39, pp. 173–175.

[98] The argument was based on an analogy of Article 92(2) of the 1982 United Nations Convention on the Law of the Sea and Article 6(1) of the 1958 Convention of the High Seas.

[99] In accordance with the principle of *aut dedere aut judicare* contained within both the Convention for the Suppression of Unlawful Seizure of Aircraft, 860 U.N.T.S. 105 (entered into force 14 October 1971) and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 U.N.T.S. 178 (entered into force 26 January 1973); Article 7 in both instruments.

[100] A distinction could, however, be made between jurisdiction over someone onboard an aircraft and jurisdiction over the aircraft itself.

jurisdiction on board aircraft over the high seas,[101] thus inducing one commentator to describe them as "flying oases of lawlessness".[102] Also, the ICAO remarked on the peculiarity of aircraft flying over the high seas that "there was no internationally agreed system that would co-ordinate the exercise of national jurisdiction".[103] Since then, the situation has naturally changed, but it should not be forgotten that the extension of legislative jurisdiction to aircraft flying outside the territory of a State is a relatively new phenomenon.[104] According to Brownlie, aircraft have, moreover, "not fitted very readily into the jurisdictional rules of either domestic or international law".[105] This is another element adding to the principal nature of the present quarrel. Yet also in relation to customary international law, no new arguments were brought to the dispute. In fact, it may be argued that the case before the ECJ failed satisfactorily to address the matter at the heart of the dispute, namely the question of the exercise of extraterritorial legislative jurisdiction. That is to say, when a State may legitimately regulate conduct outside its own territory by non-nationals or foreign companies.

5. The Elephant in the Room – Authority to Regulate Persons and Events Abroad

International law recognises various bases on which legislative jurisdiction may be exercised.[106] The most substantial basis for claiming legislative jurisdiction

[101] S. Shubber, *Jurisdiction over Crimes on Board Aircraft* (Ashgate Publishers, London, 1973) p. 24.

[102] B. Cheng, 'International Legal Instruments to Safeguard International Air Transport – the Conventions of Tokyo, the Hague, Montreal, and a New Instrument Concerning Unlawful Violence at International Airports, Aviation Security', *International Institute of Air and Space Law* (1997) p. 25.

[103] *See* Legal Committee, 11th Session, Tokyo (12–25 September 1957), ICAO Doc. 7921-LC/ 143-2, pp. 158–159.

[104] A good example of the practical implications may be found in *USA* v. *Cordova*. The case concerned a fight aboard an aircraft flying over the high seas. As US federal law applied only to vessels on the high seas and not aircraft, the accused was acquitted. *USA* v. *Cordova*, U.S. District Court E.D. New York, 1950. 89 F. Supp. 298. The US Congress subsequently remedied the situation by conferring jurisdiction on the federal courts for certain crimes committed aboard aircraft flying over the high seas. US Public Law 514 (1952). *See also R.* v. *Martin* [1956] 2 QB 272, where the UK Dangerous Drug Act of 1951 was found not to apply on aircraft flying over the high seas.

[105] I. Brownlie, *Principles of Public International Law*, 7th ed. (Oxford University Press, Oxford, 2008) p. 320. The latest edition somewhat modifies this position stating that "aircraft initially posed some problems for the jurisdictional rules of domestic and international law". J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford University Press, Oxford, 2012) p. 466.

[106] There is no universally agreed taxonomy on jurisdiction, but in addition to legislative jurisdiction, most scholars also distinguish between adjudicative jurisdiction, *i.e.* the power to hear and take binding decisions on the application of exercises of prescriptive jurisdiction, as well

derives from the sovereign powers exercised by a State within its own territory and is referred to as "territorial jurisdiction". The territorial principle implies the authority to regulate all acts within a State's territory. This is uncontested. However, as seen in the present case, the limits of the territorial principle are not always uncontested and application of the principle is not as self-evident as it might seem. Problems especially occur where States seek to regulate events with a transnational element, such as international aviation. Despite its name, the territorial principle does allow States to regulate events abroad. The following sections consider the territorial principle as well as other accepted bases of jurisdiction on which the EU or the ECJ could have relied to demonstrate that States' powers do not necessarily end at national borders.[107]

5.1. *The Territorial Principle*

The starting point for jurisdiction is that all States may regulate all events and persons (regardless of nationality or residency) within their own territory. Although the territorial principle seemingly implies territorial limits, it does permit States to regulate events outside their territory. This for instance is the case where an event is initiated in the territory of one State but completed in that of another, commonly referred to as "subjective territorial jurisdiction". The corollary to this base for jurisdiction is the "objective territorial jurisdiction", which authorises a State to apply its law to events that are initiated abroad, but completed with the territory of the legislating State. These two variants of the territorial principle enable both the State where an event is initiated as well as the State where it is completed to exercise legislative jurisdiction.[108] Thus a State may claim jurisdiction if an event has taken place in whole or in part on its territory, commonly referred to as the "doctrine of ubiquity".

The doctrine of ubiquity is mostly used to regulate conduct that States have designated as a crime. Although the doctrine of ubiquity is mostly used in criminal law, the underlying principle concerning legislative jurisdiction is not limited to the criminal sphere. The foremost example is antitrust or competition rules.

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as enforcement jurisdiction, *i.e.* the power to investigate and to arrest individuals, as well as other forms of coercive interference with people or property, usually performed by the executive. The outlined typologies are not rigid and some argue that it is unnecessary to introduce a category of adjudicative jurisdiction. Others contend that to divide jurisdiction into jurisdiction to prescribe and to enforce is to compare primary competence to regulate with a secondary competence to apply. *Cf.* Lowe and Staker, *supra* note 55, p. 315 and R. Higgins, 'The Legal Bases of Jurisdiction', in C. J. Olmstead, *Extraterritorial Application of Laws and Responses Thereto* (1984) p. 5, respectively. These claims may be neither incompatible nor mutually exclusive; they are simply referenced to illustrate the complexity of the subject.

[107] Some commentators seem to infer that the exercise of extraterritorial legislative jurisdiction *per se* is contrary to international law. *See e.g.* Havel and Mulligan, *supra* note 62, p. 18.

[108] The classical example is that of the man shooting over the border killing a person in a foreign country. *Cf.* Mann (1984-III), *supra* note 55, p. 152.

The competition laws of many States apply to extraterritorial conduct that causes some kind of "effect" in the legislating State (cf. below).[109] States might therefore forbid companies from entering into anti-competitive agreements, even where such an agreement is made by foreign companies abroad. The US has traditionally treated such conduct as a criminal offence.[110] The prevailing practice, however, is to treat cartel conduct as purely civil in nature.[111] Despite the dichotomy between civil and criminal law, most States apply cartel rules to extraterritorial conduct. Similarly, many States prohibit mergers between foreign businesses that may have an anti-competitive effect on their territory. Often, such laws rely on the "effects doctrine".[112] At times, the doctrine of ubiquity is also used to regulate environmental issues. Cases of transboundary pollution can however lead to complications, as it can be difficult to define the place where an offence was committed when the constitutive elements of that offence may have been completed in several countries at the same time.[113]

The territorial principle was also applied by the US to justify its unilateral measure to protect endangered sea turtles. This developed into a dispute, which was heard by the World Trade Organisation (WTO) Appellate Body in the *Shrimp-Turtle* cases.[114] A dispute arose after the US prohibited the import of shrimp that had not been caught in compliance with US environmental rules.[115] The aim of the rules was to protect endangered sea turtles, and it was applied to all imports. Indirectly, the US was therefore seeking to regulate extraterritorial conduct. In its first decision the Appellate Body did not find that the US had contravened WTO rules. Instead, it stated that there was "sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)" of the 1994 General Agreement on Tariffs and Trade.[116] This has been interpreted as a justification for environmental policies with extraterritorial reach.[117] Arguably, however, the WTO Appellate Body introduced a qualification in its second ruling from 2001. The second case was brought by Malaysia, which

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109) *See* Report of the International Bar Association, 'Legal Practice Division Task Force on Extraterritorial Jurisdiction' (February 2009) pp. 43–82.

110) *Ibid.*, p. 52.

111) *Ibid.*

112) *See infra* section 5.2.

113) *See e.g.* the Explanatory Report to the 1998 Convention on the protection of the environment through criminal law [not in force].

114) *See* Reports of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT.DS58/AB/R (12 October 1998) and WT/DS58/AB/RW (22 October 2001).

115) The disputed law was Section 609 of Public Law 101-516, US Code §1537.

116) Reports of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT.DS58/AB/R (12 October 1998), para. 133.

117) In general, *see* P. Sands and J. Peel, *Principles of International Environmental Law*, 3rd ed. (2012) p. 193 and in relation to this particular case, *see* K. Kulovesi, 'Make your own special song, even if nobody else sings along: International aviation emissions and the EU emissions trading scheme', 2:4 *Climate Law* (2011) p. 3.

argued that the US had not complied with the original ruling.[118] In its original decision the Appellate Body stated that one aspect of the disputed law and the appraisal of justifiable or unjustifiable discrimination was the:

> failure of the United States to engage... [WTO] Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members.[119]

In Malaysia's view, this meant that the US should have negotiated and concluded an international agreement on the protection and conservation of sea turtles before imposing any import prohibition. Malaysia was, in other words, arguing that WTO rules prohibited unilateral measures to protect the environment if multilateral avenues had not first been exhausted. The second Panel did not reject this argument, but stated that "in view of the serious, good faith efforts made by the United States to negotiate an international agreement" the disputed law "is now applied in a manner that no longer constitutes a means of unjustifiable or arbitrary discrimination".[120] Thus the Appellate Body only seems to endorse unilateral measures when good faith efforts to reach a multilateral agreement have failed. Naturally, the ruling only concerns the WTO regime. It is further questionable whether laws concerning import restrictions, as in the *Shrimp-Turtle* cases, are in any way comparable to the ETS, which introduces an obligation to offset carbon emissions occurring over the high seas or over foreign territory. Whereas the first admittedly seeks to regulate extraterritorial conduct, it does so by limiting access to the territory. In contrast, the ETS obliges airlines to pay for their extraterritorial conduct.[121] The latter is arguably far more intrusive.[122]

5.2. *The Effects Doctrine*

One of the most controversial ways of regulating extraterritorial conduct is by use of the effects doctrine. The US Supreme Court first applied the doctrine in the *Alcoa* case, where it held that the US could exercise jurisdiction over foreign

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118) The US did not change the disputed law. Instead, the US States Department of State issued revised guidelines for the implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations.

119) Appellate Body Report, *United States – Shrimp* (2001), *supra* note 114, para. 166.

120) *Ibid.*, para. 134.

121) Also the present case could be seen as a way to limit access to territory, *i.e.* access to airports. This, however, is not the way most States have decided to view the dispute.

122) For a different perspective, *see* L. Bartels, 'The WTO Legality of the Application of the EU's Emission Trading System to Aviation', 23:2 *European Journal of International Law* (2012) p. 450.

antitrust violations provided that these caused effects on US territory.[123] The extraterritorial application of US antitrust law (the 1890 Sherman Act) led to continuous objections from foreign States.[124] The scope of the effects doctrine has since been limited by US courts.[125] The US is not, however, the only State that applies the effects doctrine. On the contrary, virtually all States apply some form of effects test.[126] The US applies the doctrine to "foreign conduct that was meant to produce, and did produce some substantial effect in the US".[127] Similarly, EU regulations apply to extraterritorial anti-competitive behaviour that has "direct, immediate, reasonably foreseeable and substantial" effects in the EU.[128] While there is widespread consensus that the effects doctrine is necessary to regulate anti-competitive behaviour, both the meaning and application of the doctrine vary considerably. This discrepancy might give rise to disputes, especially since some States rely on very tenuous territorial links. The United States jurisdictional assertions outside the criminal sphere are, for example, generally perceived as broader than those of other States.[129] One example is the US Foreign Corrupt Practices Act, which requires a very limited territorial nexus.[130] The Act permits prosecutions on the basis of a telephone call or e-mail transmission with a US nexus, or use of the US banking system.[131] The territorial principle is, in other words, open to diverging interpretations.[132] The ECJ did not pronounce itself on the matter,[133] but the Advocate-General did note that "air pollution knows no boundaries and greenhouse gases contribute towards climate change worldwide,"[134] thus apparently invoking the effects doctrine.

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123) *United States v. Aluminium Corp of America*, 148 F 2d 416 (2d Cir 1945).

124) *See e.g.* A. Lowe, 'Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980', 75:2 *American Journal of International Law* (1981) p. 257; V. Lowe, 'The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution', 34:4 *International and Comparative Law Quarterly* (1985) p. 724; P. Roth 'Reasonable Extraterritoriality: Correcting the Balance of Interests', *International and Comparative Law Quarterly* (1992) p. 245.

125) *See e.g. Timberlane*, 549 F 2d 613 (1984).

126) Report of the International Bar Association, *supra* note 109, p. 51.

127) *United States v. Nippon Paper Indus Co Ltd*, 109 F 3d (1st Cir 1997).

128) Case C-89/85, *Osakeyhtio* v. *Comm'n* [1993] ECR I-1307.

129) C. Ryngaert, *supra* note 55, p. 29.

130) 15 US Code §§ 78dd-1, *et seq*. On the extraterritorial application of this Act, *see e.g.* R. Dover, 'The Extraterritorial Effects of Legislation and Policies in the EU and US', Study requested by the European Parliament's Committee on Foreign Affairs, EXPO/B/DEVE/FWC/2009-01/Lot3/03 (2012) pp. 24–26.

131) Report of the International Bar Association, *supra* note 109, p. 223. Also the Comprehensive Iran Sanctions, Accountability and Divestment Act (CISADA) of 2010 may consider bank transactions. Sanctions may be imposed for a long list of disfavoured activities, regardless of any link to the US. For comments, see Dover, *supra* notes 130, pp. 27–31.

132) Ryngaert, *supra* note 55, p. 29.

133) Although it did cited several previous decisions where the principle has been upheld. *See* Case C-366/10, *supra* note 53, para. 107.

134) *Ibid.*, para. 154.

Given the universal effect of global warming and the difficulty of establish causality for specific events, any application of the doctrine would necessarily be controversial and potentially far-reaching. That, and the EU's previous objections to the application of the effects doctrine by the US, might explain why the EU has not directly invoked this doctrine.

5.3. *The Protective Principle*

Another widely accepted base of extraterritorial legislative jurisdiction is the protective principle.[135] This base of jurisdiction authorises States to protect themselves by regulating conduct carried out abroad that may damage their fundamental interests. The principle applies regardless of the place of commission (*lex loci delicti*) or the nationality of the offender. The irrelevance of the place of commission distinguishes the protective principle from the territorial principle, although a broad interpretation of the effects doctrine may mean that similar forms of conduct may be covered by both principles.[136]

In the literature it is generally accepted that the application of the protective principle can only be justified by the need to protect "essential interests", but there seems to be little consensus as to how these interests should be defined.[137] Thus the protective principle is inherently elastic and can be used to justify the extraterritorial regulation of all kinds of conduct.

Both the United States and Canada have in the past relied on the protective principle in order to regulate environmental issues on the high seas. In 1970 Canada introduced the Arctic Water Pollution Prevention Act, which extended Canada's jurisdiction 100 nautical miles into the Beaufort Sea.[138] The Act held both prospector and ship owners liable for all costs associated with discharges of waste in the region. The United States protested against this blatant exercise of jurisdiction outside the territorial limits of Canada. In reply, the Canadian government stated that a danger to the environment of a State constitutes "a threat to its security" and that the proposed environmental legislation is based on "the overriding right of self-defense of coastal States to protect themselves against grave

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135) Also known as "*competence réelle*". On this principle, *see generally* I. Cameron, *The Protective Principle of International Criminal Jurisdiction* (Dartmouth Publisher, Dartmouth, 1994).

136) *See Third Restatement of the Foreign Relations Law of the United States* § 402 (1986). *See, however, ibid.*, pp. 52–57.

137) This was the conclusion of the Council of Europe Committee on Crime Problems, which made a comparative study of the rules and principles of territorial and extraterritorial jurisdiction applied in the 21 Member States in 1984. J.J.E. Schutte, *Extraterritorial Criminal Jurisdiction* (Council of Europe, Strasbourg, 1990).

138) Se generally R.B. Bilder, 'The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea', 69:1 *Michigan Law Review* (1970) pp. 1-54.

threats to their environment".[139] In spite of being grounded on the protective principle, Canada's unilateral extension of legislative jurisdiction gave rise to considerable controversy. The principle that coastal States are entitled to exercise jurisdiction over ice-covered adjacent waters outside their territorial limits was eventually accepted and was included in the 1982 United Nations Convention on the Law of the Sea.[140]

The protective principle was arguably[141] also the basis for the US Oil Pollution Act of 1990,[142] which was enacted after the 1989 Exxon Valdez incident.[143] The Act, *inter alia*, creates civil liability for a vessel or facility discharging oil in the navigable waters of the United States, including the adjoining shorelines or the exclusive economic zone (EEZ) of the US.[144]

The EU could in theory also invoke the protective principle to legitimise the application of the ETS Directive to foreign aircraft flying abroad.[145] Similarly to the effects doctrine, the application of the protective principle would be controversial in relation to global warming. But although initially criticised, Canada's action clearly shows that States need not always await the result of potential environmental harm. Instead, precautionary action may be accepted over time. Even so, adding another jurisdictional basis to the territorial principle is unlikely to change the stance of States already objecting to the ETS.

6. A Reasonable Assertion of Jurisdiction

It is clear from the above that States have a wide margin of discretion to extend and apply their laws to events and person outside their territory.[146] The main

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139) Department of State Press Release No. 121 (15 April 1970), reprinted in *International Legal Materials* (1970) pp. 608 and 610.

140) The United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 397 (hereinafter "The Law of the Sea"), Article 234. The US is not a party to the Convention.

141) *Cf.* M. Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Brill Publishers, Leiden, 2007) p. 32.

142) 33 US Code §2701 *et seq.*

143) *See* E. Franckx, *Vessel-source pollution and coastal state jurisdiction : the work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991–2000)* (2001) pp. 374–375.

144) §1002. The definition of the EEZ included areas in the Bering and Chukchi Sea, beyond the 200 nautical miles zone established by US presidential decree in 1983. Presidential Proclamation 5030 (10 March 1983). On this issue *see e.g.* R. Churchill and A.V. Lowe, *The Law of The Sea* (Manchester University Press, Manchester, 1999) pp. 328–329.

145) The Security Council expresses its concern that possible adverse effects of climate change may, in the long run, aggravate certain existing threats to international peace and security (S/PRST/2011/15, 20 July 2011).

146) Especially, if jurisdiction is based on nationality. This base of jurisdiction falls without the scope of enquiry.

source of reference concerning the application of national law to extraterritorial events is the *Lotus* case.[147] In this case, the Permanent Court of International Justice (PCIJ) stated that international law limits the right of States to enforce their laws beyond their territory. A State, it said, may not "exercise its power in any form in the territory of another State."[148] In regard to legislative jurisdiction, however, the PCIJ came to the opposite conclusion, *i.e.* that no general prohibition exists. It stated:

> It does not, however, follow that international law prohibits a State from exercising its jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad ... Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to person, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case ... Far from laying down a general prohibition to the effect ... it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules ...[149]

The passage has at times been read as an indication that States may extend the reach of their prescriptive jurisdiction at will. This is wrong. There are cases where the extension of legislative jurisdiction is manifestly unlawful.[150] That said, it is not a necessary concomitant of sovereignty that flag ships (or aircraft) be treated as part of the territory of a State. The ascription of whatever jurisdiction the flag State has, which may depend upon where the ship or aircraft is situated, is a function of law and not a fundamental nature of the State. This means that disputes over jurisdiction must be settled by practice, not by principle. Practice is, however, extremely difficult to assess. It is, for example, difficult to argue that States generally claim jurisdiction over extraterritorial conduct on planes simply because that plane is in its territory.[151] It is equally difficult to argue that plane operators or States of registration do not claim jurisdiction over a plane in another State's territory. Problems particularly arise where several States might have an interest in regulating specific conduct, especially where there is no global agreement on how to approach the subject.

It is not always easy to establish a clear threshold for when a State may legitimately exercise legislative jurisdiction over extraterritorial conduct or events. The issue is made more contentious by lack of clear State practice. In most cases, States

147) *S.S. Lotus*, *supra* note 90.

148) *Ibid.*, p 19.

149) *Ibid.*

150) *Cf.* Lowe and Staker, *supra* note 55, p. 319.

151) In *Cunard* v. *Mellons* the US Supreme Court found that foreign vessels could not bring liquor into the United States or its territorial waters because of the territorial reach of the Prohibition Laws. *Cunard Steamship Co., Ltd.* v. *Mellon*, 262 U.S. 100 (1923).

do not exercise extraterritorial legislative jurisdiction.[152] If they do, they rarely elaborate the jurisdictional principles on which they legislate. Correspondingly, objecting States rarely clarify why the exercise of jurisdiction in a specific case is against international law. Usually, they simply assert that the legislating State has "no right" to extend the application of its law.[153] This leaves very little guidance and, outside the law of textbooks, the division between a legitimate or an egregious assertion of jurisdiction may not always be clear.

The uncertainty regarding the legitimacy of extending the application of national laws raises the question of the burden of proof. This is particularly relevant where the law is unclear, as may often be the case in developing areas of international law. The *Lotus* case seemingly suggests that the onus lies on the State that seeks to oppose the legality of a legislative act.[154] This is in line with the so-called *Lotus Principle*, according to which States are presumed free unless specific prohibitive rules exist. At times, the presumed freedom is said to imply that States may legislate at will. But, as already noted, this is wrong. States, moreover, do not seem to rely on a presumption of freedom when they object to the exercise of jurisdiction.[155]

Writers have long debated various ways of assessing the question of legitimacy. Some have suggested that all forms of extraterritorial legislative jurisdiction are against international law.[156] But this is contrary to the *Lotus* case. Others have suggested that international law only imposes restrictions in the criminal sphere.[157] This position is, again, contradicted by those who say that there is no reason to distinguish between criminal and other forms of legislative jurisdiction, as the same principles apply.[158] Mann, who did not think that the traditional principle of territoriality was always useful to modern conditions, suggested that international lawyers should ask whether an action "belongs" to this or that jurisdiction or whether a "reasonable relation" exists.[159] Reasonableness is also emphasised in the Third Restatement of the Law, Foreign Relations Law of the United States,

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[152] *Cf.* Jennings and Watts, *supra* note 54, p. 466. *See, however, also* Ryngaert who states that in some cases the extraterritorial effect of some national law has become nearly "inevitable". Ryngaert, *supra* note 55, p. 185.
[153] Lowe and Staker, *supra* note 55, p. 319.
[154] *Cf.* Mann (1984-III), *supra* note 55, p. 167.
[155] *Cf.* Lowe and Staker, *supra* note 55, p. 319.
[156] *Cf.* Akehurst, *supra* note 55, p. 181 and citations therein. *See also* Havel and Mulligan, *supra* note 107.
[157] *Ibid.*, p. 177 (concluding that customary international law imposes no limits "on the jurisdiction of municipal courts in civil trials"); G. Fitzmaurice, 'The General Principles of International Law', *Recueil des Cours de l'Academie de Droit International de la Haye* (1957-II) p. 218; P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev ed. (Routledge, New York, 1997) p. 110.
[158] Mann (1984-III), *supra* note 55, p. 21.
[159] *Ibid.*

which includes it amongst the principles of public international law.[160] There is, however, little State practice to support such a proposition.[161] In order to assess legitimacy, Lowe and Staker refer to a "clear connecting factor".[162] Other scholars have suggested other ways to assess legitimacy. A few believe that legislative jurisdiction is either not regulated or only very loosely regulated by international law. Judge Fitzmaurice famously noted that "international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction".[163] Thus the opinion of lawyers seems to go from one extreme to another. In his monograph on jurisdiction, Ryngaert concludes that it is States that decide on the question of legitimacy.[164] In most cases, States will be in agreement, but as is evident in relation to the ETS, this is not always the case.

The core issue in jurisdictional disputes concerns the question of whether one State is usurping the rights of another State when it legislates for conduct of foreign persons or entities abroad. As stated by Mann, "the State has the right to exercise jurisdiction within the limits of sovereignty, but is not entitled to encroach upon the sovereignty of other States".[165] Thus disputes normally centre on the issue of which State has the strongest interest in regulation of the relevant conduct and whether the exercise of jurisdiction encroaches upon the sovereignty of another State. This implies a balance of interests that is not easily expressed in abstract terms. There is, moreover, no international body with mandatory competence to resolve such disputes. Rather, competence is divided horizontally between States, either by acceptance or objections by one State to the exercise of jurisdiction by another. It is, in other words, States themselves that ascertain whether an assertion of jurisdiction is legitimate or not. States' reactions are therefore of crucial importance.

7. The Reaction by Third States

Even before the amendments of the ETS came into force several States objected. The most dramatic expression of such opposition came with a Joint Declaration issued in September 2011 by 21 States, including the US, Japan, India, Russia and China.[166] The signatories declared that the EU's plan to include extraterritorial

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160) § 403 of the Third Restatement, *supra* note 136.

161) Ryngaert writes that "only the 1982 German Morris/ Rothmans decision and the 2004 US Supreme Court's Empagran decision could be cited as supporting such a rule [rule of reason]". Ryngaert, *supra* note 55, p. 36.

162) Lowe and Staker, *supra* note 55, p. 320.

163) Separate opinion of Judge Fitzmaurice, *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, para. 70.

164) Ryngaert, *supra* note 55, p. 38.

165) Mann (1984-III), *supra* note 55, p. 20.

166) *See* Appendix to ICAO Working Paper C-WP/13790 (30 September 2011).

emissions within the ETS was "inconsistent with applicable international law".[167] The declaration called upon the ICAO to continue its efforts to address emissions from aviation. In addition, China and Russia suggested unilateral retaliation, whereas the US declared that it would respond with "appropriate action"[168] if the extension of the ETS scheme went ahead.[169]

On 24 October 2011, the US House of Representatives overwhelmingly voted in favour of legislation that prohibits "an operator of a civil aircraft of the United States from participating in any emissions trading scheme unilaterally established by the European Union".[170] China has also reportedly banned its airlines from participating in the ETS without governmental approval.[171] This is in line with established State practice whereby objecting States adopt so-called "blocking laws" prohibiting compliance with the disputed legislation. In 1996, for example, the EU introduced a blocking law in order to protect EU individuals and companies against certain specific extraterritorial legislation, including the US Helms-Burton Act, which applied sanctions against non-US companies trading with Cuba.[172]

As anticipated, the decision of the ECJ has not ended controversies. On 21–22 February 2012, representatives from 23[173] States adopted the Moscow Declaration, which states that the EU "must cease application" of the ETS Directive to "airlines/aircraft operators registered in foreign States".[174] Unlike the Joint Declaration from 2011, the Moscow Declaration does not explicitly say that the extraterritorial application of the ETS is contrary to international law. Instead, it outlines eight potential retaliatory measures against the EU. These include assessing whether the ETS is consistent with the WTO Agreements,[175] the imposition of levies on European airlines, the adoption of blocking laws, ending talks with the EU on new flight

167) *Ibid.*

168) It is still unclear what the US considered appropriate in the present circumstances.

169) *See* D. Kahya, 'Air wars: Fears of trade war over EU airline carbon cap', *BBC News*, 21 December 2011.

170) European Union Emissions Trading Scheme Prohibition Act of 2011 (S. 1956). The Act was signed into law on 27 November 2012.

171) J. Chaffin and S. Rabinovitch, 'Europe holds China to carbon tax payments', *Financial Times*, 6 February 2011.

172) Council Regulation 2271/96. In May 1998 following lengthy negotiations an understanding was reached between the EU and the US. The EU agreed to suspend action in the World Trade Organization against the extraterritorial aspects of Helms-Burton Act in exchange for a EU-wide exemption by the US from the extraterritorial elements of the Act.

173) Although the original declaration only had 23 signatories, some media report up to 32 signatories. *See e.g.* South Asian Affairs, 'Indian airlines told not to share emission data with EU' (4 May 2012).

174) Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU-ETS (22 February 2012).

175) With regard to WTO law, the effects of the ETS are likely to be justifiable on environmental grounds. On this issue, *see* Bartels, *supra* note 123, pp. 429–467.

routes and filing an application under Article 84 of the Chicago Convention.[176] There seems, however, to have been little agreement on the choice of appropriate retaliatory action. A Russian minister was reported to have said that "[e]very state will choose the most effective and reliable measures which will help to cancel or postpone the implementation of the EU ETS".[177] Russia itself has threatened to cap EU airlines' flights over Siberia.[178]

The EU has initially delivered a stoic response. Speaking to the European Parliament, the EU Commissioner for Climate Action, Connie Hedegaard, said:

> As the legal case against the law [ETS] seems to weaken, those opposing its application are seeking to increase the political pressure. In this context it is very important that we as [the] EU stand firm in respect of this non-discriminatory legislation and express that we have no intention of amending it ... [T]he Member States are fully behind the Commission and this united EU position was also clear in the ICAO-Council last week, where Member States firmly defended the EU position.[179]

Despite all the protest, most airlines have complied with their reporting requirements under the ETS. In a press release from May 2012, the EU Commission stated that almost all commercial airlines with significant operations to or from EU airports complied with their obligations and reported their 2011 emissions on time.[180] This includes the United States and Russia, some of the most outspoken critics. There has been systematic non-reporting from airlines based in China and India, but the broad level of compliance initially seemed to indicate that there was a lessening resistance to the ETS.

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176) An Article 84 case was brought by the US in 2000. The case concerned European Council Regulation no. 925/1999 (the "Hushkit" regulation) which was intended to prohibit European registration of aircraft fitted with noise-reducing devices. The US filed complaint under Article 84 of the Chicago Convention, claiming that the regulation violated international law and harmed US industry. The EU later agreed to repeal the Hushkit regulation, which resulted in the US formally withdrawing its complaint. For the facts of the case, *see* S. D. Murphy, 'Admissibility of US-EU "Hushkits" Dispute Before the ICAO', 92:2 *American Journal of International Law* (2001) pp. 410–414.
When it became clear that the Council would decide against the EU, a settlement was reached on a "balanced approach". *See* ICAO Resolution A35-5 (September 2004). First with Directive 2002/30/EC and later with Regulation (EC) No 1137/2008. The latter in effect ended the dispute.

177) P. Clark and C. Belton, 'Russia Threatens to Cap EU Flights', *Financial Times*, 22 February 2012.

178) *Ibid.*

179) Meeting of Connie Hedegaard with members of the Transport and Tourism (TRAN) Committee of the European Parliament on 10 November 2011. Writing in *The Guardian*, the EU Climate Commissioner, later stated: "We cannot accept threats of all kinds of trouble just because a small price has to be paid for the pollution caused by travel." C. Hedegaard, 'Polluter pays is the only principle that can limit aviation emissions', *The Guardian*, 4 April 2012.

180) EU Commission, 'Emissions trading: annual compliance round-up shows declining emissions in 2011' (15 May 2012).

8. Territoriality and Sovereignty

Even though many airlines have complied with their reporting obligations some States still maintain that the ETS violates their sovereignty.[181] On 27 November 2012 President Obama signed into law the European Union Emissions Trading Scheme Prohibition Act of 2011, which authorises the US Secretary of Transportation to prohibit US aircraft operators from participating in the ETS. Thus the dispute over sovereignty is still unfolding.

The territorial principle is a corollary of sovereignty,[182] but the two are not coextensive.[183] Sovereignty is, nonetheless, territorial in character.[184] Consequently, in assessing the extent of jurisdiction, the starting point must necessarily be territoriality. In theory, the territorial principle authorises States to regulate all events – be they economic, social or cultural – within their territory. In practice, however, States often do not apply all their laws to people who do not stay permanently or for longer periods of time within their territory.

As noted above, most of the treaties cited by the ECJ, as well as most scholars, refer to sovereignty when they discuss jurisdiction. This is so because the inconsiderate application of the territorial principle may well encroach upon the sovereignty of other States. As noted in *Oppenheim's International Law*:

> That jurisdiction is based on sovereignty does not mean that each state has in international law a sovereign right to exercise jurisdiction in whatever circumstances it chooses ... What one State may see as the exercise of its sovereign right of jurisdiction another state may see as an infringement of its own sovereign rights of territorial or personal authority.[185]

Sovereignty is notoriously difficult to define and it is "doubtful whether any single word has caused so much intellectual confusion and international lawlessness".[186] It is beyond the scope of this paper to add anything to the extensive debate on the meaning of sovereignty.[187] It is sufficient to refer to a classical definition provided by Judge Huber:

> Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any

181) *See e.g.* 'China continues opposition to EU emissions scheme', *China Daily*, 24 May 2012. *See also* Statement of The Honorable Ray Lahood Secretary of Transportation before The Committee on Commerce, Science and Transportation United States Senate (6 June 2012).
182) Lowe and Staker, *supra* note 55, p. 320.
183) Jennings and Watts, *supra* note 55, p. 457.
184) Mann (1984-III), *supra* note 55, p. 20.
185) Jennings and Watts (eds.), *supra* note 55, p. 457.
186) Malanczuk, *supra* note 158, p. 15.
187) *See generally* M. Koskennemi, *From Apology to Utopia* (Cambridge University Press, Cambridge, 2006) p. 240.

> other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations ...[188]

As noted by Huber, at its most essential level, sovereignty refers to independence, *i.e.* to non-interference by external powers in the internal affairs of another State. It is arguably non-interference that lawyers seek to consider when they ask whether an action belongs to this or that jurisdiction or whether a reasonable relationship exists.[189] But this is not always an easy question to answer.

Sovereignty is a cardinal principle of international law, and often invoked in international disputes.[190] In fact, many, if not most, international disputes seem to concern the precise extent of a State's sovereignty.[191] Unfortunately, sovereignty is not a very useful concept to settle disagreements.[192] In most cases, States may invoke sovereignty for opposite ends. As the current dispute well exemplifies, one State may rely on sovereign powers to legislate according to the territorial principle and another State may refer to the same principle to prevent interference in its domestic affairs. Both state their claim in legal terms, but little is resolved. Many have, moreover, argued in favour of harnessing the presumed freedom of States entailed in the concept of sovereignty.

9. A Duty to Act?

All jurisdictional principles – with the exception of universal jurisdiction – exist to limit the assertion of the powers of States and none of them ensure that States act when this should be in the interest of all. The underlying reason for this is that jurisdictional rules exist to regulate and delimit the respective competencies of States in order to avoid conflict. As stated by Higgins: "there is no more important way to avoid conflict than by providing clear norms as to which States can exercise authority over whom, and in what circumstances. Without such rules it is all rancour and chaos."[193]

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188) PCIJ, *Island of Palmas case* (*The Netherlands* v. *US*), 2 RIAA 829, 1928, p. 838.

189) Reasonableness is used is used in two ways. Firstly, to consider the reasonableness of the exercise of legislative jurisdiction (which on this basis may be presumed to be lawful) and to establish priorities when more than one State has a reasonable claim to exercise legislative jurisdiction.

190) *See* J. Crawford, 'Sovereignty as Legal Value', in J. Crawford and M. Koskenniemi (eds.), *International Law* (Oxford University Press, Oxford, 2012) pp. 117–133.

191) *Ibid.*, p. 238.

192) *Ibid.*

193) R. Higgins, *Problems and Process* (Clarendon Press, Oxford, 1994) p. 56.

The question of when and how a State may legitimately take unilateral action to protect the environment has long been debated.[194] The traditional approach seeking to delimit States' competence, rather than to expand it, may give rise to intractable dilemmas in connection with matters where no one State is particularly affected, such as global warning. When all states are affected, then the traditional balancing exercises used to establish which State may legitimately take action provides no satisfactory result.

There is some support for a change in the general approach. Notions like "common heritage", "common interest" and "common concern" have significantly extended the scope of conventional international law and the legitimate interest of States "into the management of every State's domestic environment, at least in respect of issues such as climate change".[195] The underlying premise is that addressing common concerns provides benefits for all States.[196] Arguably, the notion of common concern has entailed a "significant conceptual expansion" of international environmental law.[197] In particular, the concept seems to indicate that States' freedom of action may be subject to limits even where other States' sovereign rights are not affected in the transboundary sense envisaged by Principle 21 in the 1972 Declaration of the United Nations Conference on the Human Environment.[198]

The above-mentioned notions seemingly imply that some environmental issues are of global concern and may change the normal considerations of sovereignty. They might also apply outside the context of specific treaties. In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice repeated its statement from the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* that there exists a "general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States ...".[199] Concerns about the environment were also included in the text adopted by the International Law Commission upon its completion of Part 1 of the Draft Articles on State Responsibility, which listed a "serious breach of an international obligation of essential importance for the safeguarding and preservation of the human

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194) *See e.g.* Bilder, *supra* note 138, pp. 51–95.

195) P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (Oxford University Press, Oxford, 2009) p. 41.

196) J. Brunnée, 'The Responsibility of States for Environmental Harm in a Multinational Context-Problems and Trends', *Les Cahiers de Droit* (1993) p. 843.

197) J. Brunnée, 'Common Areas, Common Heritage, Common Concern', in D. Bodansky, J. Brunnée and E. Hey, *Oxford Handbook of International Environmental Law* (Oxford University Press, Oxford, 2007) p. 553.

198) J. Brunnée, 'The Stockholm Declaration and the Structure and Processes of International Environmental Law', in T. Dorman (ed.), *The Future of Ocean Regime Building: Essays in Tribute to Douglas M. Johnston* (Brill Publisher, Leiden, 2008) p. 4.

199) ICJ, *Gabčíkovo-Nagymaros Project* (Hungary/Slovenia), Judgment, I.C.J. Reports 1997, p. 38, para. 53.

environment, such as those prohibiting mass pollution of the atmosphere or of the seas" as an international crime.[200] The notion of international crimes was later dropped, but its original inclusion does illustrate the importance of the matter, and as the list of issues was inspired by the *erga omnes* obligations mentioned in the *Barcelona Traction* case,[201] some environmental issues may arguably be the legitimate concern of all States.[202]

10. Final Remarks

The controversy relating to the expanded scope of the ETS is the latest in a long series of clashes over extraterritorial jurisdiction. In earlier instances, the roles were reversed, as the EU and other States objected to the exercise of extraterritorial jurisdiction by the US.[203] Such disputes ultimately concern the question of how far a State may exercise its legislative jurisdiction without encroaching upon the sovereignty of other States. Although in theory the matter is fairly clear, the application of the territorial principle is not always as straightforward as it may seem. Similarly, the concept of sovereignty is of limited utility in settling such disputes, although "a State cannot interpose its sovereignty to prevent the impact on it of a new rule articulated as law and widely accepted by other states".[204] Whether this is the case with regard to the ETS has yet to be seen.

The EU has essentially argued that the inclusion of aviation in the ETS does not affect sovereignty. Indeed, the fact that the ETS has an impact on third country nationals (or airlines) does not *ipso facto* mean that the EU is usurping the power of other States. If that was the case, then several existing rules concerning extraterritorial conduct (*e.g.* antitrust or competition rules) should be regarded as a violation of sovereignty. In addition, the ETS Directive is designed to take into account foreign legislation. Thus it is difficult to argue that the EU is usurping the power of others.

The ICAO has recently re-started its discussions on aviation and climate change. In January 2012, the President of the ICAO Council, Roberto Kobeh, initiated a process to develop options for global market-based measures to address aviation

[200] For the text of Article 19, *see* 'Report of the International Law Commission on the work of its twenty-eight session', *Yearbook of the International Law Commission* 1976, vol. II, part 2, p. 159.
[201] *Barcelona Traction, Light and Power Company*, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33.
[202] *See* 'Report of the International Law Commission on the work of its fifty-third session', *Yearbook of the International Law Commission* 2001, vol. II, paras. 45–49.
[203] V. Lowe, 'US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Act', 46:2 *International and Comparative Law Quarterly* (1997) pp. 378–390. *See also* F. A. Mann, 'Anglo-American Conflict of International Jurisdiction', 13:4 *International and Comparative Law Quarterly* (1964) pp. 1460–1465.
[204] Crawford, *supra* note 189, p. 124.

emissions.[205] His aim is to present a proposal by the end of 2012. Current indications are promising. In light of the "very positive discussions" within the ICAO, the EU announced on 12 November 2012 that it would defer the requirement under the ETS for airlines to surrender allowances.[206] This means that the EU will not require allowances to be surrendered in April 2013, when airlines were supposed to have paid for their 2012 emissions. The EU Commissioner for Climate Action further clarified that if negotiations within ICAO do not "deliver" then the ETS will "automatically" include aviation again.[207] Thus the EU only temporarily stopped the clock to facilitate multilateral negotiations within ICAO. Although the United States made a strong statement by adopting the above-mentioned blocking law, it has signalled a willingness to negotiate. The blocking law explicitly calls for the US government "to conduct international negotiations to pursue a worldwide approach to address aircraft emissions".[208] The prospect of reaching an international agreement is therefore brighter than ever.

The law may, however, also change without a new multilateral agreement. If negotiations are unsuccessful and the EU ends the deferral of the ETS, its action might be the first step to establish a customary norm. Naturally, any such development cannot be assumed. Instead, a jurisdictional "battle" may be expected. This is not unusual. As stated by Simma and Müller, a "traditional way for international law to deal with competing jurisdictional claims is to let the respective actors carry out a jurisdictional battle".[209] In such cases, the precise reach of the legitimate extent of a State's jurisdiction is decided by conflict. That is to say, in the interplay of claims and counter-claims between the legislating State and those States objecting to the exercise of jurisdiction. An international tribunal may resolve such conflicts, but more often it will be resolved by agreement or acquiescence by the involved States. At times, opposition to the exercise of jurisdiction will lead the legislating State to withdraw or modify its claim, as happened in the so-called "hush-kit war".[210] At other times, the objecting State has to accept the new claim. Not even the US could, for example, prevent the establishment of the 12 nautical miles limit of the territorial sea.

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205) *See* address by the President of the Council of the International Civil Aviation Organization (ICAO), Mr. Roberto Kobeh González, to the 68th IATA Annual General Meeting and World Air Transport Summit (10 June 2012).

206) European Commission, 'Stopping the clock of ETS and aviation emissions following last week's International Civil Aviation Organisation (ICAO) Council, MEMO/12/854 (12 November 2012).

207) *Ibid.* The European Parliament's Committee on the Environment, Public Health and Food Safety (ENVI) approved the deferral for one year, but stated that it should only be prolonged if "clear and sufficient" progress was made within ICAO. Press release, 'CO2: MEPs want ETS exception for intercontinental flights and progress in ICAO' (26 February 2013).

208) European Union Emissions Trading Scheme Prohibition Act of 2011, S. 1956, s3.

209) B. Simma and A. T. Müller, 'Exercise and Limits of Jurisdiction', in J. Crawford and M. Koskenniemi (eds.), *International Law* (Oxford University Press, Oxford, 2012) p. 152.

210) *See supra* note 176.

How the current dispute will develop is difficult to predict. There seems to be a growing consensus favouring the protection of the environment. Consensus on the desirability of protecting the environment does not, however, mean that there is agreement on how such protection should be achieved. But the development of international environmental law, arguably, means that the traditional arguments of non-intervention and State sovereignty are no longer as forceful as they used to be. This is not in itself an unusual development. In an increasingly interdependent world, the traditional rules were bound to change, as they did in other fields, such as human rights. In this context, it may be questioned whether unilateral measures to protect global public goods should be regarded more favourably than measures taken purely in the pursuit of national interest. The position is arguably even stronger when the relevant measures are taken in absence or as a result of failed collective action, as in the present case.

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