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At the sidelines of implementing the EU ETS: objections to 'validity'[1]

Abstract

As the European Union's Emissions Trading Scheme (EU ETS) nears the final stages of implementation across Member States, it earns greater global recognition. An investigation into the *ethos* and status of the EU ETS raises interesting spaces to lead a sideline discussion on actual and likely objections by industries which emit greenhouse gases. It would appear that although the EU ETS is a model clean development mechanism under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCC), there is reason to question its validity, at least following the recent inclusion of airlines in the EU ETS and with particular respect for its relationship to the Chicago Convention.

Background

As the United Kingdom (UK) finalises its second set of implementing regulations to fully transpose Directive 2008/101/EC ('the Aviation ETS Directive')[2] which amends Directive 2003/87/EC ('the ETS Directive')[3] to include 'aviation activities' in the European Union Emissions Trading Scheme (EU ETS)[4], the UK Department for Transport (DfT) and the Department for Energy and Climate Change (DECC) are developing the regulatory regime to facilitate the EU framework objectives on carbon dioxide (CO_2) emissions. The agreement to include aviation in the EU ETS was adopted in response to the European Parliament's reiterated call for aviation and maritime transport emissions to be included in international greenhouse gas reduction commitments for the post-2012 period.[5] It is estimated that this will lead to a reduction of 194 million tonnes of CO_2 across EU by 2020.

The Aviation ETS Directive came into force on February 2, 2009. Following on from consultations in the UK on the first stage transposition of the Aviation ETS Directive held between March and May 2009, the first set of implementing regulations, the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009 ('the 2009 Regulations')[6], came into force on September 17, 2009. The 2009 Regulations set out the requirements that aircraft operators apply for the free allocation of CO_2 emissions allowances by December 31,

[1] Dr Steven Truxal, Kingston University
[2] Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ L 8/3, 13.01.2009.
[3] Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emissions allowance trading within the Community and amending Council Directive 96/61/EC(c), OJ L275/37, 25.10.2003.
[4] Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ L 140/63, 05.06.2009.
[5] Paragraph 26, OJ C287 E/347, 29.11.2007.
[6] SI 2009/2301.

2009 and begin to monitor their emissions as from January 2010. If satisfied with an aircraft operator's proposal, the UK Environment Agency will issue a plan for monitoring emissions. Aircraft operators are also required to report their emissions on an annual basis to the Environment Agency[7], which if accepted will be submitted to the European Commission by the UK Secretary of State on the Agency's behalf.

The second stage transposition of the Aviation ETS Directive involved a second round of consultations between December 2009 and March 2010, a public response on which is still awaited. The draft Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010 ('the draft 2010 Regulations')[8], the second and final set of implementing regulations, appear more comprehensive in enumerating the obligation on the aircraft operator to surrender allowances equivalent to its total verified CO_2 emissions in the preceding year (each April, beginning in 2013), elaborating the penalty structure for non-compliance and establishing the system of fees associated with the administration of the EU ETS in the UK. The draft 2010 Regulations also provide a new procedure whereby aircraft operators, particularly if new or fast growing, may apply to a special reserve of allowances. Once the draft 2010 Regulations are finalised and enter into force, the 2009 Regulations and draft 2010 Regulations together ('the UK Regulations') will fully implement the Aviation ETS Directive.

Both EU and non-EU aircraft operators applied for emissions plans in late 2009 and have been monitoring their emissions since the first of this year. It should be noted that the ETS Directive provides a *de minimis* exemption for airlines operating fewer than 243 flights per designated period, with the aim of helping third countries which may carry the 'lesser developed' designation and those with weaker connections to the EU.

EU ETS

The EU ETS creates the world's first international market system ('cap-and-trade') of nationally-allocated rights across the EU based on the proportion of industry in each Member State, which may be bought and sold. The EU ETS is an open trading scheme, where 'carbon credits' are traded freely (irrespective of sector) on the market as licences to pollute in accordance with National Allocation Plans (NAPs)[9]. Under each NAP, aircraft operator emissions quotas are prescribed thus encouraging each entity to devise the least costly option to meet their respective quota. The allowances allocated to the aviation sector ('aviation allowances') are to be offset in the final two planned EU ETS phases against the aviation greenhouse gas emissions as set out in the ETS Directive.

In keeping with its traditional regulatory approach, the EU's strategy for achieving its 2020 goals is through incremental measures. The three phases of the EU ETS seem to validate the move from the Kyoto Protocol[10] project-based to an EU ETS sector-based emissions system. EU ETS Phase I (2005-2007) covered over 11,500 energy-intensive installations across the

[7] Commission Decision 2009/339/EC of 16 April 2009 amending Decision 2007/589/EC as regards the inclusion of monitoring and reporting guidelines for emissions and tonne-kilometre data from aviation activities, OJ L 103/10, 23.4.2009.
[8] This is a draft Statutory Instrument, available from the DECC's website: http://www.decc.gov.uk/en/content/cms/consultations/euets_aviation/euets_aviation.aspx [Accessed May 6, 2010].
[9] Directive 2008/101/EC.
[10] Further reference to the Kyoto Protocol measures will be made below.

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EU which together represents over half of the EU's carbon emission.[11] EU ETS Phase II (2008-2012) builds on the first phase to include aviation and the major manufacturing industries such as power plants, oil refineries, iron and steel plants, and various factory installations making goods such as cement, glass, lime, brick, ceramics, pulp and paper. The number of allowances available to aircraft operators in 2012 will be capped at 97 percent of total emissions from the aviation sector between 2004 and 2006 ('the emissions reference point'). The final planned EU ETS Phase III (2013-2020) significantly broadens the scope for new sector activities and gases, including the release of CO_2 and perflurocarbons from certain other activities and expands the previously limited definition of combustion contained in previous phases to include all combustion of fuel. In EU ETS Phase III aviation allowances will be further capped at 95 percent of the emissions reference point.

1st objection: the Kyoto Protocol – EU

The United Nations Framework Convention on Climate Change (UNFCC) came into force in March 2004 and aims to reduce global warming and cope with inevitable temperature increases.[12] The 192 parties to the Convention have agreed to formulate and implement national strategies for addressing greenhouse gas emissions, including providing financial and technological support to developing countries to foster a stronger commitment from their part. Although the Convention is an international treaty, it remains only a framework rather than a programme with mandatory limits on emissions or enforcement conditions.

The Kyoto Protocol[13] ('the Protocol') to the UNFCCC was adopted by the third session of the Conference of the Parties (COP 3) in 1997. It entered into force on February 16, 2005, whereas the EU ETS had already entered into force on October 25, 2003. Although international aviation is excluded from its targets, the Protocol provides that each party ('Annex I Parties')

> ... in achieving its quantified emission limitation and reduction commitments under Article 3 [reducing their overall emissions of such gases by at least five percent below 1990 levels in the commitment period 2008 to 2012][14], in order to promote sustainable development, shall implement and/or future elaborate policies and measures in accordance with its national circumstances, such as ... measures to limit and/or reduce emissions of greenhouse gases not controlled by the Montreal Protocol[15] in the transport sector ... [and] shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organisation and the International Maritime Organisation, respectively.[16]

[11] EC Memo 05/94 ''Questions and Answers on Emissions Trading and National Allocation Plans'', *http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/84&format=HTML&aged=1&language=EN&guiLanguage=en* [Accessed March 18, 2010].
[12] 'Essential background' - http://unfccc.int/essential_background/items/2877.php.
[13] Kyoto Protocol to the United Nations Framework Convention on Climate Change, December 11, 2007, reprinted (1998) 37 I.L.M. 32.
[14] Article 3, *ibid.*
[15] United Nations Environment Programme Montreal Protocol on Substances that Deplete the Ozone Layer as amended in Beijing 1999, Published 2000.
[16] Article 2, Kyoto Protocol.

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The list of Annex I Parties currently includes the EU-15[17], Czech Republic, Estonia, Latvia, Liechtenstein, Lithuania, Monaco, Romania, Slovakia, Slovenia and Switzerland. The Protocol requires additionally that each party 'incorporate in its national communication ... the supplementary information necessary to demonstrate compliance with its commitments'[18] thereunder, such as a clean development mechanism (CDM). The EU ETS is a model CDM, by means of which the EU undertakes to achieve and aspire to exceed its Kyoto commitments.

The true point of formalisation of the climate change initiative in Europe was Council Decision 93/389/EEC[19], which established a mechanism for monitoring greenhouse gas emissions and evaluating progress towards meeting commitments in respect of those emissions. Having regard for the ultimate objective of the UNFCCC requiring all parties to 'formulate and implement national and, where appropriate, regional programmes containing measures to mitigate climate change'[20], which was approved on behalf of the European Community (EC) – now replaced by the European Union (EU)[21] – by Council Decision 94/69/EC[22], the EU and its Member States ratified the Protocol in May 2002.[23] The Decision 280/2004/EC[24] subsequently required Member States and the Commission to

> ... devise and implement national programmes and a Community programme respectively, in order to contribute to:
>
> (a) the fulfilment of the Community's and its Member States' commitments relating to the limitation and/or reduction of all greenhouse gas emissions under the UNFCCC and the Kyoto Protocol; and
>
> (b) transparent and accurate monitoring of the actual and projected progress made by Member States, including the contribution made by Community measures, in meeting the Community's and its Member States' commitments relating to the limitation and/or reduction of all greenhouse gas emissions under the UNFCCC and the Kyoto Protocol.[25]

Upon ratification of the Protocol in 2002, the EC declared[26] it was competent[27] to enter into international agreements and implement obligations arising out of them which 'contribute to

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[17] The members of the European Union in 1990: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.
[18] Article 7, Kyoto Protocol.
[19] Council Decision 93/389/EEC of 24 June 1993 for a monitoring mechanism of Community CO2 and other greenhouse gas emissions, OJ L167/31, 09.07.1993.
[20] Recital 7 in Preamble, Directive 2008/101/EC.
[21] *See* the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C306/1, 17.12.2007.
[22] OJ L 33/11, 07.02.1994.
[23] Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereto; OJ L130/1, 15.05.2002.
[24] Decision 280/2004/EC of the European Parliament and of the Council of 11.2.2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol, OJ L49/1, 19.2.2004.
[25] Article 2, Decision 280/2004/EC.
[26] In accordance with Article 23(4), Kyoto Protocol.
[27] The relevant point of reference is Article 3 of the TFEU, which provides that the EU shares competence with Member States on matters relating to the environment.

the pursuit of ... preserving, protecting and improving the quality of the environment ... [and] promoting measures at international level to deal with regional or worldwide environmental problems'[28] ('the EC Environmental Policy') in accordance with (ex-)Article 174 of the Treaty Establishing the European Community (TEC).

More importantly, the EC declared that its 'quantified emission reduction commitment under the Protocol will be fulfilled through action by the Community and its Member States within the respective competence of each and that it has already adopted legal instruments, binding on its Member States, covering matters governed by the Protocol'.[29] The EU has undertaken to deliver on its Kyoto obligations *inter alia* with the administration of the EU ETS.

Directive 2004/101/EC ('the Linking Directive')[30] links the EU ETS[31] with the Protocol project-based mechanisms, including the joint implementation (JI) and CDMs.[32] The European Parliament and Council's rationale for linking the Kyoto project-based mechanisms and the EU ETS sector-based mechanism '... while safeguarding the [EU ETS's] environmental integrity, gives the opportunity to use emissions credits generated through project activities eligible pursuant to Articles 6 and 12 of the Protocol in order to fulfil Member States' obligations in accordance with Article 12(3) of Directive 2003/87/EC'.[33] Member States have been permitted to allow operators to use certified Kyoto emissions reductions (CERs) from 2005 and emission reduction units (ERUs) from 2008 in the EU ETS. Conversion and use of the Kyoto CERs and ERUs in the EU ETS beyond 2008 is permitted subject to some restriction[34] and is to be specified in each Member States' NAP.[35]

In fact, Member States are required[36] to report to the Commission every two years 'on the extent to which domestic action actually constitutes a significant element of the efforts undertaken at national level ... [and] use of the project mechanisms is actually supplemental to domestic action and the ratio between them.....'[37]

The steps taken by the EU to link the EU ETS with the Kyoto Protocol including the development of mechanism for the conversion of project to sector-based credits demonstrates the positive spirit of the EU with respect to combating climate change. There are no substantive grounds for raising objection of the EU ETS with reference to the Protocol, particularly as the EU undertakes to review and monitor its compliance *vis-à-vis* the compliance of Member States with its agreed commitments to reducing the emission of greenhouse gases. Perhaps from a procedural perspective, non-Europeans might successfully argue that the extension of the emissions catchment area beyond European airspace, for instance, is not provided for in the Kyoto Protocol, but nor is it excluded.

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[28] Annex III, Kyoto Protocol.
[29] *Ibid.*
[30] Directive 2004/101/EC of the European Parliament and of the Council of 27.10.2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading with the Community in respect of the Kyoto Protocol's project mechanisms, OJ L 338/18, 13.11.2004.
[31] Established by Directive 2003/87/EC.
[32] Recital 2 in preamble, Directive 2004/101/EC.
[33] *Ibid*, recital 3 in preamble.
[34] Article 11(a)(1), Directive 2004/101/EC.
[35] Recital 5 in Preamble, *ibid.*
[36] In accordance with Article 3, Decision 280/2004/EC.
[37] Article 1, paragraph 8(c), Directive 2004/101/EC.

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The Kyoto Protocol – US

On the other side of the Atlantic, the United States government indicated its intention not to ratify the Protocol. On the basis that the US industries and population emit roughly 25 percent of the world's greenhouse gases, its support and involvement at the international level is clearly essential to tackling climate change, intimating a contrary intention however, the US Senate passed the Byrd-Hagel Resolution[38] in 1997 which instructs, 'in the sense of the Senate' that the US government

> should not be a signatory to any protocol to, or other agreement regarding, the United Nations Framework Convention on Climate Change of 1992, at negotiations in Kyoto in December 1997, or thereafter, which would
>
> (A) mandate new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period, or
>
> (B) would result in serious harm to the economy of the United States....

Somewhat in defiance of the Byrd-Hagel Resolution and although the US government had not ratified[39] it, the US government signed and agreed to the Protocol and its mandate of a reduction by industrialised countries of greenhouse gas emissions whilst excluding developing nations. Though the US Congress has made some headway towards drafting climate change legislation in subsequent sessions, one could view the steps taken as *quasi* 'backdoor implementation'[40], or more conservatively that the US government signing the Protocol demonstrates implicitly their agreement to be bound by its mandate. The argument in support of the notion that the US government should be bound by at least the objectives that underpin the Protocol may be advanced as sound.

Perhaps the next foreseeable challenge to the already criticised Byrd-Hagel Resolution is the question of whether industrialised nations are doing enough to convince developing nations of the severity of the climate change situation. In any case, there is evidence of increasing momentum towards securing long-term finance for the implementation of measures in developing countries. In the Copenhagen Accord (following the COP 15[41]), the EU and other developed countries declared they 'will mobilise US$ 100 billion (€73 billion) per year by 2020 for mitigation and adaptation actions in developing countries'[42] coming from, among others, the international aviation and maritime transport sectors. Some indication has also

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[38] S. Res. 98, 'A resolution expressing the sense of the Senate regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change', 25.07.1997.

[39] Article II, Section 2 of the US Constitution provides that the government (President) 'shall have power, by and with the advice and consent of the Senate, to make treaties' provided there is an agreement of two-thirds majority in the Senate. To date, the Kyoto Protocol has never been submitted to the Senate for approval.

[40] Arroyo Cochran, V and Roy, M. (2001) 'Climate Change Legislation in the United States', in E. Claussen (ed.), *Climate Change: Science, Strategies, & Solutions*, Arlington, VA: the Pew Center on Global Climate Change, p.364.

[41] The 15th UNFCC Conference of the Parties (COP) held in Copenhagen, Denmark in December 2009.

[42] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'International climate policy post-Copenhagen: Acting now to reinvigorate global action on climate change'; SEC (2010) 261, Brussels, 09.03.2010; COM (2010) 86/11 Final.

been made as to the European preference that actions be pursued through global instruments.[43]

An implied intention by the US government to 'cooperate' as regards Protocol commitments seems to provides some basis for advancing the notion that US industries will respect the spirit of the Protocol in curbing greenhouse gas emissions. The extent to which US industries will work voluntarily towards reducing European emissions is unclear, but with all sense of moral obligation aside, the level of such participation is likely to be minimal.

2nd objection: aircraft operators

Owing to the financial crisis and compounded more recently by the effects of the volcanic ash from Iceland inciting a temporary but prolonged European airspace closure, aircraft operators are experiencing serious financial pressure. There is new concern mounting on top of fundamental protest within the sector that the EU ETS is becoming increasingly burdensome.

What is likely to come under particular objection therefore is the DfT and DECC's proposed fee structure for the EU ETS, including straight charges: £1,120 to apply to the special reserve, £430 for varying one's emissions plan and £115 per hour to determine an aircraft operator's CO_2 emissions; and differential charges linked to actual emissions (per annum): £2,500 for less than 50,000 tonnes of CO_2, £3,320 for between 50,000 and 500,000 tonnes of CO_2, and £4,080 for anything higher.[44]

Aircraft carriers would have expected the EU ETS to be 'self-financing', but the DfT explain that whilst the auctioning of allowances will accrue revenue to the auctioning state, the UK government does not 'ring-fence' revenue. Since revenue is paid into a consolidated account, the UK government's intention is to apply this system for recovery of costs associated with the administration of the EU ETS. The EU appears to have left this particular matter to Member State discretion, as will be discussed in further detail below.

The draft 2010 Regulations also specify how the UK intends to ensure compliance with the EU ETS through the use and enforcement of civil penalties for specific offences[45]. If an aircraft operator provides false or misleading information, or fails to surrender sufficient numbers of allowances, financial penalties will be incurred and enforced. The ETS Directive sets out the penalty of €100 for each allowance an operator fails to surrender – with one allowance is equivalent to one tonne of CO_2[46] – and therefore it cannot be varied by the UK regulators. The UK Government propose that a '£50,000 penalty should apply where an aerodrome operator fails to provide assistance or advice to a regulator, or where a person fails

[43] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions; 'Stepping up international climate finance: A European blueprint for the Copenhagen Deal'; SEC (2009) 1172; ECOFIN Council, 09.09.2009 and COM (2009) 475/3.
[44] Mindful perhaps that the non-EU aircraft operators are less likely to be familiar with the EU ETS, UK Government objectives relating to climate change, or have representatives in the UK, the DfT invited a response through the consultation process and posting an informational video on YouTube.[44] (Source: Benjamin Smith, UK Department for Transport, video at http://www.youtube.com/watch?v=sr4oO0tXfeQ)
[45] The DfT has approached Parts 9 (Civil penalties), 10 (Detention of aircraft) and 11 (Other sanctions) of the Draft Regulations with regard for proportionality and deterrence.
[46] Article 16, Directive2003/87/EC.

to comply with directions regarding an operating ban'.[47] In extreme circumstances involving non-compliance, a regulator may detain an aircraft operated by a defaulting aircraft operator in order to recover the debt. There is also provision for the sale of aircraft for any civil penalties which remain unpaid after a reasonable period of time.

Once enacted, the UK Regulations will apply to all EU-registered aircraft operators and any non-EU operator flying to or from an EU airport that is designated as regulated by the UK. The responsible so-called Administering Member State (AMS) is determined within the EU as the Member State granting the airline an operating licence or in the case of non-EU airlines as the Member State to or from which the airline is estimated to have had the highest emissions in 2006 ('previous compliance'). The full list of aircraft operators to be regulated by each Member State is published in the *Official Journal of the European Union*.[48] Under the Aviation ETS Directive, from 2012 onwards all CO_2 emissions from aviation activities will effectively be 'capped'. Subsequently all aircraft operators performing an 'aviation activity'[49] will be required to surrender allowances equivalent to their verified CO_2 emissions.

In December 2009, the US aviation industry, led by the Air Transport Association of America (ATA) and US aircraft operators United Airlines, Continental Airlines and American Airlines lodged a joint application for judicial review[50] of the 2009 Regulations to contest the national measure and as some attempt to indirectly challenge the inclusion of aviation activities in the EU ETS. The UK is the AMS under the EU ETS for the three particular airlines named in the application.

To date, the International Air Transport Association (IATA) and National Airlines Council of Canada have filed *amicus curiae* briefs with UK High Court. IATA Director General, Giovanni Bisignani, has previously declared the EU ETS 'illegal' and warned in December 2009 that states outside the EU would take legal action over their airlines' inclusion in the scheme.[51]

The claim is currently being reviewed by the UK Administrative Court of the High Court of Justice, but the parties have asked that reference be made to the European Court of Justice (ECJ) under ex-Article 234 on the questions of the validity and interpretation of the ETS and Aviation ETS Directives. As the 2009 Regulations transpose but do not fully implement the ETS and Aviation ETS Directives in UK law, it is foreseeable[52] that the national court will make reference to the ECJ on this matter. Moreover, the US parties argue against the

[47] Under Section 43 of the draft 2010 Regulations, a UK regulator has the power to enforce an operating ban (*i.e.* detain any aircraft of which the regulator has reason to believe the defaulting operator is operating) where an aircraft operator has had an operating ban imposed on it under Article 16(10), Directive2003/87/EC.
[48] Commission Regulation (EC) No 748/2009 of 5 August 2009 on the list of aircraft operators which performed an aviation activity listed in Annex I to Directive 2003/87/EC on or after 1 January 2006 specifying the administering Member State for each aircraft operator, OJ L219/1, 22.08.2009.
[49] A comprehensive list of aircraft operators deemed to have performed an aviation activity, and thereby are included in the EU ETS, is published as in Commission Regulation (EU) of 28 January 2010 amending Regulation (EC) No 748/2009 on the list of aircraft operators which performed an aviation activity listed in Annex I to Directive 2003/87/EC on or after 1 January 2006 specifying the administering Member State for each aircraft operator, OJ L25/12, 29.01.2010.
[50] Under the Civil Procedure Rules, Part 54.
[51] 'IATA enters legal case brought by ATA and three US airlines against the UK over the Aviation EU ETS', *Green Air Online (01.03.2010)*, www.greenaironline.com/news.php?viewStory=774 [accessed March 10, 2010].
[52] Although since it is not the court of last resort, the Court may exercise its discretion under ex-Article 234 TEC on whether to make a reference. *See R* v *Secretary of State for Health ex parté Imperial Tobacco Ltd* [1999] EuLR 582, [2000] 1 All ER 572.

inclusion of aviation activities in the EU ETS. Since the UK Courts have no jurisdiction to pronounce on the validity of EU legislation, only the ECJ can make a decision on such matters.[53] Directives are binding on Member States as to the result to be achieved under ex-Article 249 TEC (Article 288 TFEU): 'the institutions shall adopt regulations, directives, decisions, recommendations and opinions'.

On referral, the ECJ may rule on the validity of the ETS and Aviation ETS Directives and/or clarify the EU measure under ex-Article 234(1)(b) TEC (Article 267 TFEU), the latter of which clarifies to the national court questions on the compatibility of the national measure with the Directives. Given the complexities surrounding the challenges, it is difficult to speculate what would be the ECJ's position if the national court makes reference to the ECJ on this matter. It is needful to consider the jurisprudence on the validity and interpretation of the ETS Directive.

The Arcelor experience

In 2008, the world's largest steel producer Arcelor SA brought an action[54] in the *Conseil d'État* (France) for annulment of the Decree of 14 April 2004[55] which transposed Directive 2003/87/EC, arguing *inter alia*[56] that it breached the constitutional principles of equal treatment in that the steel sector was included in the ambit of the first stage of the implementation of the EU ETS whereas those 'in a comparable situation of emitting greenhouse gases' were not, citing the aluminium and plastics industries. On referral the ECJ held that the French legislature was justified in its definition of the scope of the Directive to exclude the chemical sector owing to the large number of installations in that sector, 'whose inclusion would have made the management of the [EU ETS] more difficult and increased the administrative burden, which could have endangered the functioning of the scheme when it was established'.[57] The ECJ also cited the difference in levels of direct emissions as so substantial (16.2 million tonnes of CO_2 in the chemical sector in 1990 while those of the steel sector were 174.8 million tonnes) to justify the different treatment despite the industries being in 'a comparable position'.

Although this case deals with allegations of discrimination and the legal principle of equal treatment within the EU, Arcelor is a European firm and thus it has the right of recourse against alleged breaches of its fundamental rights. This is less relevant to the subject at hand, but should be taken to emphasise the EU's justification of different treatment of European sectors in comparable situations in the context of the EU ETS. As regards the ambiguity of obligation towards non-EU legal persons, such as the parties requesting the current High Court judicial review, one would expect the EU manner to be even less 'equal'.

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[53] *See* Case 314/85, *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199, on the ECJ's jurisdiction to determine such matters as they relate to the legality of EU law in accordance with ex-Article 234 TEC.

[54] *Assemblée du contentieux sur le rapport de la 6 ème sous-section Séance du 26 janvier 2007 Lecture du 8 février 2007 N°287110 SOCIETE ARCELOR ATLANTIQUE ET LORRAINE et autres.*

[55] *Décret n° 2004-832 du 19 août 2004* (French Decree No 2004-832 of 19 April 2004).

[56] Arcelor also argued that the EU ETS violated its property rights and the right to pursue economic activities under Community law.

[57] European Court of Justice Press Release No 91/08, Judgment of the Court of Justice in Case C-127/07, *Société Arcelor Atlantique et Lorraine and Others v. Premier ministre, Ministre de l'Écologie et du Développement durable, Ministre de l'Économie, des Finances et de l'Industrie*, 16.12.2008, p.3.

More recently however in *Arcelor*[58] the same applicant attempted to bring a direct action in the ECJ for annulment of Directive 2003/87/EC and compensation for damage allegedly suffered in consequence of the adoption of the Directive. On March 3, 2010, the EU's General Court (formerly the Court of First Instance) ruled against Arcelor's attempt to challenge the rules governing the EU ETS on the grounds that the claim was inadmissible because under ex-Article 230 TEC Arcelor is neither 'individually nor directly' concerned by the Directive as it applies 'in a general and abstract manner' to all steel operators. In other words the General Court was 'not capable of characterising the factual and legal situation of Arcelor in comparison with those other operators'.[59] The Court also dismissed the claim for damages as unfounded. Arcelor has the right of appeal limited to points of law.

It is also important to note that in delivering its judgment, the General Court mentioned *en passé* that Arcelor could convert its credits earned under the Protocol to use for EU ETS compliance under the Linking Directive provisos. Article 30 of Directive 2003/87/EC provides additionally that the Commission will 'review and further implement' the EU ETS on the experience of application of the Directive and with consideration for 'how and whether' the list of sectors selected for inclusion in the EU ETS should be expanded to include '*inter alia* the chemicals, aluminium and transport sectors'[60], which demonstrates its ultimate commitment to equal treatment of industrial sectors.

In any case the US parties do not presently have *locus standi* under ex-Article 230 TEC[61] and as such have no entitlement to bring a direct action in the ECJ on the validity of the ETS and Aviation ETS Directives. The requirement of 'individual concern' has been reformed by the Lisbon Treaty[62] and is now reflected in Article 263 TFEU, which reads:

> Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a *regulatory act* which is of direct concern to him or her and does not entail implementing measures.

Although the 'directly and individually concerned' prerequisite has fallen away to challenge a Union act, the US parties are definitely challenging a legislative act, which when adopting even the strictest interpretation of 'regulatory act' would make qualify it as one for the purposes of the TFEU.

The appropriate answer to the question 'would Arcelor be decided differently now' would likely be 'no' as the Directive requires implementation measures. Nevertheless when an EU directive leaves to Member States a significant amount of discretion in their implementation, the Member State and its legislative processes are veritably opened up to liability towards the individual. The advantage is the perhaps implicit requirement of due diligence as monitored by the scrutinous eye of the individual.

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[58] *Arcelor* v *Parliament and Council of the European Union*, Case T-16/04, OJ C100/35, 17.04.2010.
[59] Press Release No 17/10, General Court of the European Union Judgment in Case T-16/04, *Arcelor SA v Parliament and Council*, 02.03.2010.
[60] Paragraph 29, *Arcelor* v *Parliament and Council of the European Union*, Case T-16/04, OJ C100/35, 17.04.2010.
[61] See below where the discussion regarding the application of the new provisions under Lisbon Treaty continues.
[62] Whereby amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C306/01, 17.12.2007, *emphasis added.*

Directive 2003/87/EC leaves a considerable amount of discretion to Member States in their implementation and adoption of national measures with respect to the development of the NAPs[63], determination of the minimum free allocation of allowances[64], establishment of the total number of allowances[65] and actual allocation to operators in accordance with its Annex III criteria. Although Directive 2009/29/EC also allows Member States discretion over the exclusion of small installations emitters, it restricts in part that discretion by requiring that at least 50 percent of the revenues generated from the auctioning of allowances should be used, *inter alia,* to cover administrative expenses of the management of the EU ETS[66].

The point was raised above that that disagreement relating to civil penalties imposed by the UK for non-compliance with the EU ETS is bound to follow, particularly as Directive 2009/29/EC suggests that the EU ETS should be at least partially funded in the UK using revenues accrued from the auctioning process.[67] In the absence of clear direction from the EU with respect to the recovery of remaining administrative costs in the UK, and subject to the outcome of the judicial review on which the US parties might well challenge this particular section of the draft 2010 Regulations once enacted, it appears that there is significant Member State discretion.

3rd objection: the Chicago Convention?

Additionally one would need to consider that the EU might be implicated by the fundamental notions of international law (*e.g.* the extension of one's jurisdiction beyond one's own sovereign land and airspace) if the UK High Court refers the questions. The ECJ will certainly turn its mind to the point the US parties raise, namely that the unilateral requirement and enforcement of the EU ETS provisions with respect to aviation activities breaches the Chicago Convention[68] in the context of considering the validity of the 2009 Regulations, or once fully implemented, the UK Regulations. The EU Member States and the US are Contracting States to the Chicago Convention ('the Convention'), which underlines the principles of international law relating to sovereignty and jurisdiction.

To be precise, Article 1 of the Convention recognises that every State has 'complete and exclusive sovereignty over the airspace above its territory'. The US parties would be likely to argue that the exercise of extraterritoriality by the EU to 'capture the cost' of the total emissions on a flight from Los Angeles to London stands in breach of the principles of sovereignty and jurisdiction.

Article 15 of the Convention requires that 'no fees, dues or other charges shall be imposed by any contracting State in respect of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon' and that any public airport shall 'be open under uniform conditions of all the other Contracting States'.

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[63] Article 9, Directive2003/87/EC.
[64] Article 10, *ibid.*
[65] *Ibid.*
[66] Article 10, paragraph 3, Directive 2009/29/EC.
[67] The Commission intends to provide further clarity on the auctioning process with the issuance of a directive by 30 June 2010; Article 10, paragraph 4, Directive 2009/29/EC.
[68] Convention on International Civil Aviation, International Civil Aviation Organisation, 9th Ed., Doc 7300/9, 2006, http://www.icao.int/icaonet/arch/doc/7300/7300_9ed.pdf [Accessed February 12, 2010].

As a Contracting State, the UK government's transposition of the Aviation ETS Directive to include aircraft operators from non-EU Contracting States in the EU ETS and the act of subjecting them, if so interpreted, to 'fees, dues or other charges' seems *prima facie* to indicate a breach of the Convention rules the effect of whose subjection is non-discriminatory *per se*.

Although the EU is not a Contracting State to the Convention, Member States are Contracting States and members of the International Civil Aviation Organisation (ICAO).[69] When the Single European Sky was created[70] in 2004 establishing the 'European airspace' and the sovereignty that comes with it, the EU became the competent authority with implied rights of a Contracting State to the Convention. Although the Convention is silent on the topic of 'international airspace at high altitudes', Article 12 provides that the rules established under the Convention shall be in force 'over the high seas' where Contracting States undertake 'to ensure the prosecution of all persons violating the regulations applicable'.

The EU has repeatedly expressed its preference for tackling climate change *vis-à-vis* global instruments and points indirectly to the failure of the ICAO, as arguably the most appropriate forum to facilitate the development of an international system of emissions trading with the ICAO at the wheel[71]. It would seem that the EU ETS is a *de facto* legitimacy interim measure.

The ICAO Committee on Aviation Environmental Protection met in 2004 and agreed that an aviation-specific emissions trading system based on a new legal instrument under the auspices of the ICAO seemed unattractive and should not be pursued further.[72] Resolution A35-5 of the ICAO's 35th Assembly held later that year urged Contracting States to 'refrain from unilateral implementation of greenhouse gas emissions charges'[73] and '[endorse] the further development of an open emissions trading system for international aviation'[74] either on a voluntary basis or by incorporating emissions from international aviation into Contracting States' emissions trading schemes under the UNFCCC process. The ICAO has also urged Contracting States not to impose an emissions trading system on other Contracting States' aircraft operators unless conducted by mutual agreement.[75]

Following its 36th Assembly in September 2007, the ICAO called for the formation of the Group on International Aviation and Climate Change (GIACC) to develop a programme of action and present concrete proposals to the UNFCCC. Thus the objective of the ICAO at the COP15 was to deliver concrete input, the GIACC having agreed that the goals 'should be

[69] The relevant point of reference is Article 3 of the TFEU, which provides that the EU shares competence with Member States on matters relating to the transport.
[70] Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10.3.2004 laying down the framework for the creation of the single European sky [2004] OJ L 96, 31.03.2004.
[71] It should be borne in mind that a significant proportion of the aviation emissions are emitted in international airspace. If there is to be consideration for a global approach the consensus is that, ICAO, as the UN body overseeing global civil aviation, would likely be the most effective global framework.
[72] See further consideration of this point by the EU in Recital 9 of the Preamble, Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ L 8/3, 13.01.2009.
[73] Appendix I, paragraph 2(b)(4), ICAO Assembly Resolution A35-5, Doc 9848, 08.10.2004, www.icao.int/env/a35-5.pdf [Accessed February 12, 2010].
[74] *Ibid.*
[75] Appendix L to Resolution A36-22 of the ICAO's 36th Assembly, 27.12.2007.

collectively achieved by States without specific obligations to individual States'.[76] The key source of the ICAO's 'hesitation to act' is that it must consider its diverse membership. With respect for industrialised and developing countries, the ICAO recognises 'the different circumstances, respective capabilities and contribution of developing and developed States to the concentration of aviation greenhouse gas emissions in the atmosphere will determine how each State may contribute to achieving these global aspirational goals'.[77]

Final thoughts

It is significant that on including aviation activities in the scope of the EU ETS, the EU took into consideration as articulated in Directive 2008/101/EC[78] that although Article 11 of the Chicago Convention states that the 'laws and regulations of a State relating to the admission, departure or operation of an aircraft ... shall be applied to the aircraft of all States without distinction as to nationality', the Member States 'placed a reservation on this resolution and reserved the right under the Chicago Convention to enact and apply market-based measures on a non-discriminatory basis to all aircraft operators of all States providing services to, from or within their territory'.[79]

The pertinent question is whether this reservation will be challenged as unreasonable under the principles of international and customary law by the US parties or any future non-EU claimants. The reservation is bound to draw attention to issues around the effectiveness of the ICAO's governance. Last year the ICAO Working Group on Policy Governance reflected on the need for updating of the existing Convention, including Contracting State reservations:

> ... it is sometimes considered that customary law is self-sufficient whereas in other cases it is deemed necessary to enshrine it in the Convention. ICAO's practice has created 'customary' competencies, but entails fragility as a Contracting State could in theory dissociate itself from this consensus by reservation and, for example, refuse security audits or deny ICAO's jurisdiction and action on environmental matters. It may also lead to a conflict of jurisdiction with other organizations holding explicit competencies by treaty in the same fields, such as UNFCCC in the case of environment.[80]

The Working Group approved that its review be presented to at the 38th Assembly in September 2010, when it is foreseen that amendments to the Chicago Convention will be proposed and considered. Perhaps by that stage a definitive ICAO position will be set alongside any necessary powers of monitoring and/or enforcement. Subject to the likely success of the EU's ratification of any future international agreement on civil aviation, this would also lead to a final verdict on whether the inclusion of non-EU aircraft operators in the EU ETS breaches international law or fundamental rights.

In the meantime, the EU's pioneering of the EU ETS as a model clean development mechanism to effectively carry on the legacy commitments of the Kyoto Protocol

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[76] Paragraph 6, Note by the ICAO, 'Update on the Continuing Progress of ICAO on International Aviation and Climate Change: Ad Hoc Working Group on Long-term Cooperative Action under the Convention', Bonn, 10-14.08.2009, http://unfccc.int/resource/docs/2009/smsn/igo/059.pdf.
[77] *Ibid.*
[78] Directive 2008/101/EC.
[79] Recital 9 of the Preamble, Directive 2008/101/EC.
[80] ICAO Working Paper C-WP/13416, 'Review of International Governance (Chicago Convention)', 22.06.2009.

demonstrates the positive and fortifying spirit of the EU with respect to combating climate change. Article 11 TFEU provides that 'environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'.

The EU's objective of combating climate change has been emphasised recently by the Lisbon Treaty and now appears in Article 191 TFEU, that its policies 'contribute to the pursuit of ... preserving, protecting and improving the quality of the environment ... [and] promoting measures at international level to deal with regional or worldwide environmental problems, *and in particular combating climate change*'.[81]

In other words, the EU ETS is now of even greater importance of as a concrete means to fulfil this enhanced objective through the limitation and reduction of greenhouse gas emissions. Climate change is highlighted as a priority within the Union's environmental policies, indicating justification for the EU ETS and inclusion of aviation activities therein. After the linking of the EU ETS and the Kyoto Protocol, it seems clear that the EU's policy on the environment contributes to the pursuit of the Kyoto objectives throughout the remaining commitment period and shall continue to do so under a forthcoming climate change protocol.

Whilst the EU ETS is only a regional mechanism, the EU's decision to include aviation widens the catchment of emissions from EU to some non-EU aircraft operators engaged in aviation activities. Nonetheless the creation of the EU ETS has been instrumental in supporting the impetus of the Kyoto Protocol. In the absence of mutual or international agreement, the extent to which US industries will adopt a similar concern for combating climate change, either under the US government's engagement with the Kyoto commitments or independently, remains unclear and thus raises the moral, extralegal question – 'Until there is a US ETS, why not participate in the EU ETS in the interim?'

The European Parliament once described the EU ETS as a cornerstone of the EU's efforts to curb greenhouse gases but indeed the EU ETS may have already earned its place as the cornerstone of global efforts towards pollution and climate change.

[81] The words in italics represent the amendment to the EC Environmental Policy (ex-Article 174 TEC).