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# The EU Emissions Trading Scheme and the Court of Justice: The “High Politics” of Indirectly Promoting Global Standards

By Dr. Elaine Fahey\*

## A. Overview

The European Union (EU) Emissions Trading Scheme (ETS) is a cornerstone of the European Union's policy to combat climate change and its key tool for the cost-effective reduction of industrial greenhouse gas emissions. Moreover, according to the European Commission, it is the first and biggest international scheme for the trading of greenhouse gas emission allowances, including sophisticated and far-reaching penalties.<sup>1</sup> Notably, however, the scheme arose out of a failure at the international level to agree on global standards. When an amended directive included aviation under this scheme beginning in 2012,<sup>2</sup> it ignited a global controversy that came before the Grand Chamber of the Court of Justice in December 2011.<sup>3</sup> In its decision, the Court and Advocate General explicitly explain that the EU ETS regime arose because of the failure of the International Civil Aviation Organisation (ICAO) to evolve a global regulatory scheme.<sup>4</sup> To some, the decision of the Court of Justice on the EU ETS represents a definitive view on the legality of the EU's ambitions to uphold high environmental standards and to compel others to uphold these standards also.<sup>5</sup> To

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<sup>1</sup> See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Analysis of Options to Move Beyond 20% Greenhouse Gas Emission Reductions and Assessing the Risk of Carbon Leakage*, COM (2010) 265 final (May 26, 2010); *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 in Reinviolate Global Action on Climate Change*, COM (2010) 86 final (Mar. 9, 2010).

<sup>2</sup> See Council Directive 2008/101, 2008 O.J. (L 8) 3 (EC), amending Council Directive 2003/87, 2009 O.J. (L 8) 3 (EC).

<sup>3</sup> See Case C-366/10, *Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change*, 2011 E.C.R. I-000.

<sup>4</sup> See *Id.*, para. 33; see also *id.* at para. 191 (Opinion of Advocate General Kokott).

<sup>5</sup> See Joanne Scott & Lavanya Rajamani, *EU Climate Change Unilateralism: International Aviation in the European Emissions Trading Scheme*, 23 EUR. J. INT'L L. 469 (2012); Sanja Bogojevic, *Legalising Environmental Leadership: A*

others, however, it represents a missed opportunity to pronounce upon the Court's own jurisdiction, or to explicitly consider its own contribution to the promotion of global standards.

A fuller account of the decision is provided elsewhere in the papers of this symposium;<sup>6</sup> suffice to say that the decision of the Court arose from a high-profile challenge by a range of transatlantic private actors, American and Canadian airlines,<sup>7</sup> via a preliminary reference from the English High Court. The airlines objected principally to the inclusion of aviation activities in the EU scheme. They argued, *inter alia*, that the EU was unlawfully applying EU law extra-territorially, thereby exceeding its powers under international law by not confining the scheme to European internal flights. Significantly, it was argued that the scheme should have been negotiated and adopted under the International Civil Aviation Organisation, and not unilaterally by the European Union.<sup>8</sup>

Of particular relevance to the arguments in this Article is the response of the U.S. House of Representatives to the EU ETS. Taking place in the midst of the case before the Court of Justice, the American actions set a dramatic context for the litigation.<sup>9</sup> On 24 October 2011, several months before the decision of the Court of Justice, the U.S. House of Representatives voted to approve the European Union Emissions Trading Scheme Prohibition Act of 2011 (hereafter House of Representatives Act of 2011).<sup>10</sup> The legislation directed the Secretary of Transportation to prohibit U.S. aircraft operators from participating in the EU ETS.<sup>11</sup> In so doing, the House of Representatives sought to express

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*Comment on the CJEU'S Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme*, 24 J. ENVTL. L. 469 (2012).

<sup>6</sup> See Theodore Konstadinides, *When in Europe: Customary International Law and EU Competence in the Sphere of External Action*, 13 GERMAN L.J. \_\_\_\_ (2012).

<sup>7</sup> Notably, Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc., Interveners included International Air Transport Association (IATA), National Airlines Council of Canada (NACC).

<sup>8</sup> See *supra* note 4, at paras. 42-45.

<sup>9</sup> The Court delivered its decision on 21 December 2011.

<sup>10</sup> European Union Emissions Trading Scheme Prohibition Act of 2011, H.R. 2594, 112th Cong. (2011). The bill was introduced by Transportation and Infrastructure Committee Chairman J. L. Mica (R-FL), Transportation Committee Ranking Member N.J. Rahall (D-WV), Aviation Subcommittee Chairman T. Petri (R-WI), Aviation Subcommittee Ranking Member J. Costello (D-IL), and other Members of Congress. See *The European Union's Emissions Trading Scheme: A Violation of International Law*, 112th Cong. (2011) (statement of Nancy Young, vice president, environmental affairs Air Transport Association), available at <http://transportation.house.gov/hearings/Testimony.aspx?TID=6834>.

<sup>11</sup> The bill also instructed US officials to negotiate or take any action necessary to ensure US aviation operators are not penalized by any unilaterally imposed EU emissions trading scheme. Under the scheme, any flights into or out of an EU airport, regardless of how long that flight is in EU airspace, would be subject to the program's emissions

its opposition to the obligation on American carriers to comply with EU law on legal and economic grounds, arguing that the extra-territorial application of EU rules would cost U.S. airlines \$3.1 billion in lost revenue between 2012 and 2020.<sup>12</sup> Ultimately, the Court rejected the EU ETS challenge, upholding the exercise of EU regulatory powers. The American and Canadian airlines have subsequently accepted the decision of the Court and imposed charges on airline tickets to recoup their costs, thereby resulting in compliance with EU law. In the wake of the Court of Justice's adverse decision, which did not expressly refer to the "prohibitive" U.S. Act of 2011, China warned the EU of a looming trade war.<sup>13</sup> Subsequently, however, Australia joined the EU ETS, and the EU is discussing bilateral deals with South Korea, China, Switzerland and California.<sup>14</sup> As such, the EU ETS litigation represents a successful indirect promulgation of global standards through the acceptance of EU standards by entities outside the European Union.

The context of the U.S. legislature's retaliation against far-reaching EU regulatory efforts, in fact and in law, is surely remarkable, although not unprecedented in recent times.<sup>15</sup> Transatlantic actors seem to increasingly deploy law as a political tool. For example, in 2011, the United States intervened informally in the formulation of EU legislation,<sup>16</sup> while

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cap and trade requirements. US airlines would be required to pay an emissions tax to the EU Member State to which they most frequently fly. The US Government also formally objected to the EU ETS.

<sup>12</sup> See Press Release, Transportation and Infrastructure Committee, Committee, Federal Officials, Aviation & Labor Groups United in Opposition to EU Plan to Tax U.S. Air Carriers under Emissions Trading Scheme (July 27, 2011), <http://transportation.house.gov/news/PRArticle.aspx?NewsID=1369>.

<sup>13</sup> Chinese airlines were being reported to be refusing to pay EU carbon taxes. See Jonathan Watts, *Chinese Airlines Refuse to Pay EU Carbon Tax*, THE GUARDIAN, Jan. 4, 2012. Recently, the Chinese Air Transport Association was reported to be threatening the EU with counter-measures, such as impounding EU aircraft. See Alison Leung & Anurag Kotoky, *China Ready to Impound EU Planes in CO2 Dispute*, REUTERS, June 12, 2012. At the time of writing, EU ETS was being discussed in US Senate hearings: Testimony for Senate Committee on Commerce, Science, and Transportation hearing on the European Union's Emissions Trading System, 112th Cong. (2012) (statement of Jos Delbeke, Director-General, DG Climate Action, European Commission), available at [http://ec.europa.eu/clima/news/articles/news\\_2012060601\\_en.htm](http://ec.europa.eu/clima/news/articles/news_2012060601_en.htm).

<sup>14</sup> See Benjamin Fox, *EU in Talks on More International Emissions Deals*, EUOBSERVER, Aug. 29, 2012; *Australia to Join EU's Emission Trading System*, EUROACTIV, Aug. 28, 2012.

<sup>15</sup> See the recent EU-US WTO dispute on Boeing subsidies, displacing through litigation an EU-US Agreement in existence. Appellate Body Report, *United States—Measures affecting Trade in Large Civil Aircraft*, ¶ 892, WT/DS353/AB/R (Mar. 12, 2012).

<sup>16</sup> See *Informal note on Draft EU General Data Protection Regulation* (Dec. 2011), available at [http://edri.org/files/12\\_2011\\_DPR\\_USlobby.pdf](http://edri.org/files/12_2011_DPR_USlobby.pdf):

This informal note comments on certain aspects of the widely leaked draft proposal to modernize the European Union's data protection legal framework, and in particular the draft General Data Protection Regulation ("draft regulation"). It does not necessarily represent the views of the US Federal Trade Commission (FTC) any bureau of office, or any other US government agency . . . .

the EU made amicus curiae submissions before the US Supreme Court in death penalty cases.<sup>17</sup> The extent to which EU legal rules are transplanted or replicated in the United States is increasing; one example is the transposition of EU environmental standards into California's laws.<sup>18</sup> Legal scholars write of the "Brussels effect," describing the rising influence of EU rules upon U.S. regulatory standards.<sup>19</sup> The question remains as to how these developments influence the Court of Justice and how the EU ETS decision will be assessed. It has been argued that the EU ETS scheme has executive-dominated origins as a matter of EU institutional law.<sup>20</sup> In the post-Lisbon Treaty context, the Court's adjudication of an arguably executive-dominated scheme remains significant in light of changes made to EU external relations law considered later in detail. This relationship, between the powers of the Court to adjudicate external action, and the interaction between all matters global and the EU, including its institutions, is explored here in particular.

The decision of the Court in EU ETS overall does not constitute a conceptual reflection on the "high politics" of the EU ETS dispute. The term "high politics" is a term usually employed more with respect to security, military, or executive matters. It is used here metaphorically to capture the extraordinary global and transatlantic context of the EU ETS litigation.<sup>21</sup> Despite this context, the Court did not explicitly pronounce upon the House of Representatives Act of 2011, its own jurisdiction vis-à-vis "high politics" itself, or even EU efforts to regulate with de facto global impact. In fact, the combination of the context of the proceedings, the global ambitions of the EU in its EU ETS aviation policies, and the actions of the American legislature in the course of the litigation seems to have *deterred* the Court from engaging expressly with the "high politics" of the dispute, i.e. it failed to reference the actions of the American legislature or China. Despite this, it is notable that the Court of Justice has considerable external relations powers relative to other

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See Francesco Guarascio, *US Lobbying Waters Down EU Data Protection Reform*, EURACTIV, Feb. 21, 2012; *Informal Comment on the Draft General Data Protection Regulation and Draft Directive on Data Protection in Law Enforcement Investigations* (Jan. 2012), available at [http://www.edri.org/files/US\\_lobbying16012012\\_0000.pdf](http://www.edri.org/files/US_lobbying16012012_0000.pdf).

<sup>17</sup> See e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005). See Marise Cremona, *Values in EU Foreign Policy*, in *BEYOND THE ESTABLISHED LEGAL ORDERS POLICY INTERCONNECTIONS BETWEEN THE EU AND THE REST OF THE WORLD*, 275 (Malcolm Evans & Panos Koutrakos eds., 2011).

<sup>18</sup> See Joanne Scott, *From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction*, 57 AM. J. COMP. L. 897 (2009); Yoshiko Naiki, *Assessing Policy Reach: Japan's Chemical Policy Reform in Response to the EU's REACH Regulation*, 22 J. OF ENVTL. L. 171 (2010).

<sup>19</sup> See Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2012); see Scott *supra* note 18.

<sup>20</sup> See Hans Vedder, *International Context of the Emissions Trading Scheme*, in *BEYOND THE ESTABLISHED LEGAL ORDERS*, 105, 123 (Malcolm Evans and Panos Koutrakos eds., 2011).

<sup>21</sup> See *infra* Part C; *infra* note 47.

comparative international courts and even EU Member State Courts.<sup>22</sup> It is also considered to be a powerful judicial entity.<sup>23</sup> Moreover, the post-Lisbon period has witnessed a heightened concern on the part of the Court of Justice as a Court *and* as a political actor to preserve its autonomy inside and outside the courtroom.<sup>24</sup> The Court is a largely unstudied “actor” in analyses of the actions of the EU in a global context, also known as its “actorness” in non-legal literature, denoting its engagement with the world.<sup>25</sup> It has never enunciated a political question doctrine so as to preclude its own review of political acts in EU external relations.<sup>26</sup> However, on many occasions it has enlarged its own jurisdiction beyond the letter of the treaties.<sup>27</sup> The Court has not shied away from “high politics” explicitly, nor from dramatic constitutional (r)evolutions. The response of the Court in the EU ETS decision is a particularly timid one with respect to the “high politics” of the dispute and the objectives of the EU policies, which would on the one hand, eventually launch a veritable trade war with China and on the other hand would result in the global adoption of EU environmental, legal and political standards by Australia, amongst others. The failure of the Court in the EU ETS decision to engage in a more explicit dialogue with the EU legislature is all the more remarkable and will be explored further here.

This Article assesses the Court’s indirect contribution to the promotion of global standards. The effects of the EU ETS directive, the decision of the Court, and the actions of the House of Representatives are thus considered. The EU ETS litigation also provides insights as to powers of the Court post-Lisbon. The Article briefly explains the recent EU ETS decision in

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<sup>22</sup> Or foreign affairs, both terms are used here interchangeably. The terminology changes reflect contemporary scholarship; external relations pre-Lisbon are largely excluded from references to foreign policy, because as Thym states, the EU now explicitly acknowledges its engagement in foreign affairs itself. See Daniel Thym, *Foreign Affairs*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, 309, 312 (Armin Von Bogdandy & Jürgen Bast eds., 2nd ed, 2009).

<sup>23</sup> See R. DANIEL KELEMEN, EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EU (2011); Daniel Kelemen, *Eurolegalism and Democracy*, 50 J. COMMON MKT. STUD. 55 (2012).

<sup>24</sup> See Opinion 1/09, *Creation of a unified patent litigation system*, 2011 E.C.R. I-000; Commission Regulation 2011/0093, Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection, 2011 O.J. (COD); *8th Working Meeting of the CDDH Informal Working Group in the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission*, CDDH-UE (2011) 16 final (July 19, 2011), available at [http://www.coe.int/t/dlapil/cahdi/source/Docs%202011/CDDH-UE\\_2011\\_16\\_final\\_en.pdf](http://www.coe.int/t/dlapil/cahdi/source/Docs%202011/CDDH-UE_2011_16_final_en.pdf) (last accessed on Nov. 11, 2012); *infra* Part F.

<sup>25</sup> This concept is considered in detail in Part F, with reference to the Court. For a recent analysis of EU “actorness,” see Uwe Wunderlich, *The EU an Actor Sui Generis? A Comparison of EU and ASEAN Actorness*, 50 J. COMMON MKT. STUD. 653, 653 (2012).

<sup>26</sup> See *infra* Part C.

<sup>27</sup> On external relations law and the Court, see Pieter Jan Kuijper, *Fifty Years of EC/EU External Relations/Continuity and the Dialogue Between/Judges and Member States as Constitutional Legislators*, 31 FORDHAM ENVTL. L.J. 1571 (2008) and more generally, but notably, Case C-105/03, *Criminal Proceedings against Maria Pupino*, 2005 E.C.R. I-5285; Case 294/83, *Parti Ecologiste 'Les Verts' v. European Parliament*, 1986 E.C.R. 1339.

Part B. Part C then examines the powers of the Court in external relations and their impact upon the adjudication undertaken in EU ETS, and Part D explores changes to EU institutional law post-Lisbon. Part E explores the exportation of EU values in EU rule-making and global standard-setting through law. Finally, Part F discusses the concept of the “actress” of the post-Lisbon Court in global affairs.

## **B. Summary of Opinion of Advocate General and Decision of the Grand Chamber**

The facts and findings of the EU ETS decision are set out in another account in this special issue;<sup>28</sup> only the key elements of the decision applicable to the present account are set out here to provide a background for the discussion in the remaining sections of the Article.

Advocate General Kokott in her Opinion<sup>29</sup> in the EU ETS decision explicitly rejected the claims of the applicants, concluding that the allegation that the scheme had created extra-territorial rules was based upon an erroneous and highly superficial reading of the Directive.<sup>30</sup> She held that the scheme was ultimately an expression of the principle of proportionality and reflected the “polluter pays” principle of environmental law, which did not breach any principle of customary international law.<sup>31</sup> Similarly, the Grand Chamber of the Court of Justice rejected the challenge and found no reason to invalidate the provisions of the Directive and its scheme.<sup>32</sup> The Court held that even though the EU ETS rules appeared to have the effect of creating obligations only between States, it was nevertheless possible that the Directive was liable to create obligations for private actors under EU law.<sup>33</sup> The Court upheld the policy of the objectives of the EU rules on the basis of the treaties and agreements to which the EU was a signatory. The Court held that the airlines had chosen to commercially operate within the regulatory space of the EU thus subjecting them to EU rules, holding that:

As for the fact that the operator of an aircraft in such a situation is required to surrender allowances calculated in the light of the whole of the international flight that its aircraft has performed . . . *the European Union legislature may in principle choose to permit a*

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<sup>28</sup> See Konstadinides, *supra* note 6.

<sup>29</sup> See Case C-366/10, *Air Transp. Ass’n of Am. v. Sec’y of State for Energy and Climate Change*, 2011 E.C.R. I-000 (Opinion of Advocate Gen. Kokott).

<sup>30</sup> See *Id.* at para. 144.

<sup>31</sup> See *Id.* at para. 160.

<sup>32</sup> See Case C-366/10, *Air Transp. Ass’n of Am. v. Sec’y of State for Energy and Climate Change*, 2011 E.C.R. I-000.

<sup>33</sup> See *Id.* at para. 109.

*commercial activity . . . only on condition that operators comply with the criteria that have been established by the European Union . . . in particular where those objectives follow on from an international agreement to which the European Union is a signatory, such as the Framework Convention and the Kyoto Protocol.*<sup>34</sup>

The Court held that the EU treaties had expressly equipped the EU legislature to legislate for a high level of protection of the environment, pursuant to Article 191(2) TFEU, which provides that “Union policy on the environment shall aim at a high level of protection.”<sup>35</sup> The consensual nature of the commercial activity carried out was held to be a key element of the regulatory space of the EU, in so far as the airlines chose to operate the EU routes.<sup>36</sup> Moreover, there were causal reasons to justify such regulation. The Court held that EU law applied because pollution could partially originate outside the EU. It stated that “certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question . . . the full applicability of European Union law in that territory . . . .”<sup>37</sup>

Notably, both the Advocate General and Court expressly reference the role of failed global regulation in the origins of the EU scheme.<sup>38</sup> In this way, the intent of the EU scheme and its intent to serve the same global purpose as the failed international regulations is discernible in the decision, but is not substantively discussed beyond a historical form of reference. The Court does not expressly reference the actions of the U.S. legislature in its decision, thereby avoiding analysis of the ostensibly “high politics” of the dispute. Equally, the Court does not refer to the global dispute that the EU ETS ignited, for example, with respect to China, on-going at the time of its decision, and the Court does not engage in any explicit analysis of the competences of the EU to engage in direct versus indirect global action. Nor does the Court expressly reference the difference between the judicial review of the Directive (which it conducted in the EU ETS case) and review of an international agreement (which it did not conduct, because the EU ETS was developed in the form of a Directive).

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<sup>34</sup> *Id.* at para. 128 (emphasis added). Note, however, that this does not apply to the Chicago Convention, which did not bind the European Union.

<sup>35</sup> *Id.* at para. 191.

<sup>36</sup> See the emphasis on full applicability of EU law or competence in *id.* at paras. 129–30.

<sup>37</sup> *Id.* at para. 129. Notably, in the judgment of the Court, the Court drew upon the wording of the Open Skies Agreement to *broaden* the range of applicants to include aircraft. *Id.* at paras. 134–35.

<sup>38</sup> See *Id.* at para. 33; *id.* at para. 191 (Opinion of Advocate General Kokott).

Accordingly, the decision ostensibly raises more questions than it answers and most of these questions relate to the manner in which the Court as an actor adjudicates this controversial dispute. This account considers such questions, and reflects next on the powers of the Court as an actor in external relations generally, in *ex post* and *ex ante* judicial review. Part C considers how the EU ETS might have been reviewed had the decision of the Court been in the form of *ex ante* review.

### C. Reflections on the Power(s) of the Court of Justice in External Relations

The Court of Justice characterized the inclusion of aviation within the EU ETS regime as a wholly *internal* EU matter.<sup>39</sup> However, the global impact and genesis of the EU rules themselves suggest otherwise. The role of the Court of Justice in adjudicating the EU *external* action and how “powerful” the Court is in foreign affairs simpliciter, relative to other courts and tribunals, is worthy of consideration. How do its powers to adjudicate EU *external* action impact upon its adjudication of rules such as EU ETS, *ex post facto*? The role of the Court of Justice in foreign affairs or external relations is both a legal and political question which has attracted little interest from scholars of political science and international relations studying the Court of Justice.<sup>40</sup> The Court is regarded as having negligible influence on EU foreign policy generally. Amongst legal scholars, the height of criticism of EU external relations law, for example, has been that it is extraordinarily esoteric and technocratic, mired in disputes about pillars and competence, devoid of constitutionalism in a broad sense.<sup>41</sup> Post-Lisbon, the Court lacks jurisdiction in the realm of Common Foreign and Security Policy (CFSP), notwithstanding its new jurisdiction over the unified Area of Freedom, Security and Justice.<sup>42</sup> Scholars are divided on the significance of this state of affairs, given the manner in which the Court has evolved its own jurisdiction in the past.<sup>43</sup>

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<sup>39</sup> Which one can infer directly from its decision upholding the Directive simpliciter, rejecting the suggestion that it was an extra-territorial application of EU law.

<sup>40</sup> See Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT’L ORG. 171, 178 (1995); Walter Mattli & Anne Marie Slaughter, *Law and Politics in the European Union: A Reply to Garrett*, 49 INT’L ORG. 183, 185 (1995); Walter Mattli & Anne Marie Slaughter, *Revisiting the European Court of Justice*, 52 INT’L ORG. 177, 180 (1998); Alex Stone Sweet & Thomas L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 AM. POL. SCI. REV. 63, 65 (1998); KAREN ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 33 (2001); LISA CONANT, JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION 213 (2002).

<sup>41</sup> See BRUNO DE WITTE, EU FOREIGN RELATIONS LAW: CONSTITUTIONAL FUNDAMENTALS 11 (Bruno De Witte & Marise Cremona eds., 2008).

<sup>42</sup> See Consolidated Version of the Treaty on the Functioning of the European Union art. 42, Dec. 13, 2007, 2010 O.J. (C 83/01) [hereinafter TFEU].

<sup>43</sup> See Peter Van Elsuwege, *EU External Action After the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency*, 47 COMMON MKT. L. REV. 987, 999 (2010); PIET EECKHOUT, DOES EUROPE’S CONSTITUTION STOP AT THE WATER’S EDGE?; LAW AND POLICY IN THE EU’S EXTERNAL RELATIONS 418 (2005).

As a matter of law, however, this disinterest or critique is not justified. As Kuijper states, the entire evolution of EU external relations law has been marked by a dynamic interpretation by the Court of Justice of its legal powers, with ebbs and flows.<sup>44</sup> In reality, the Court of Justice has extensive powers of judicial review in this field. Most remarkable are its powers to give a binding opinion on the legality of international agreements entered into by the EU pursuant to Article 218(11) TFEU.<sup>45</sup> These powers are in the form of *ex ante* abstract review rather than concrete *ex post* review. The powers are extensive given that many legal orders do not allow Courts to engage in abstract review of foreign affairs.<sup>46</sup> For example, the political question doctrine precludes such review under U.S. constitutional law.<sup>47</sup> The Court of Justice itself has never explicitly enunciated a political question doctrine, although as Thym outlines, there are many Advocate General opinions expressing considerably divergent views on this issue.<sup>48</sup> There are some who compare the Court's lack of jurisdiction in CFSP matters to the political question doctrine, but the Court itself is not the origin of this jurisdictional exclusion.<sup>49</sup> As regards this abstract review, the Court's powers of *ex ante* review have rarely been used and represent a miniscule portion of its work.<sup>50</sup> For example, one such Opinion was given in 2009<sup>51</sup> and again in 2011,<sup>52</sup> out of a

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<sup>44</sup> See KUIJPER, *supra* note 27.

<sup>45</sup> See Richard Plender, *The European Court's Pre-Emptive Jurisdiction: Opinions Under Article 300(6) EC*, in JUDICIAL REVIEW IN EUROPEAN UNION LAW: ESSAYS IN HONOUR OF LORD SLYNN OF HADLEY 203 (David O' Keefe & Antonio Bavasso eds., 2000).

<sup>46</sup> See *Operation Dismantle v. The Queen* (1985), 1 S.C.R. 441 (Can.); *R. v. Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 481 (Can.); *Re Secession of Quebec* (1998), 161 D.L.R. (4th) 385 (Can.); *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374 (Eng.); *R (On the application of Gentle) v. Prime Minister*, [2008] UKHL 20 (Eng.); *Bundesverfassungsgericht [BVerfGE - Federal Constitutional Court]*, Case No. 2 BvE 13/83, Dec. 18, 1984, 68 BVERFGE 1 (Ger.); *McKenna v. An Taoiseach* (No. 2) [1995] 2 I.R. 10 (Ir.); *Horgan v. An Taoiseach* [2003] I.E.H.C. 64 (Ir.); see also Pieter Jan Kuijper & Karel C. Wellens, *Deployment of Cruise Missiles in Europe: The Legal Battles in the Netherlands, the Federal Republic of Germany and Belgium*, 18 NETH. YEARBOOK OF INT'L L. 145 (1987).

<sup>47</sup> See *Baker v. Carr*, 369 U.S. 186 (1962); THE POLITICAL QUESTION DOCTRINE OF THE SUPREME COURT OF THE UNITED STATES (NADA MOURTADA-SABBAH & BRUCE CAIN eds. 2007); see also *Boumediene v. Bush*, 553 U.S. 723 (2008); *USA Foundation v. United States*, 242 F.3d. 1300, 1317 (11th Cir. 2001) (refusing to review whether NAFTA was unconstitutionally entered into by executive agreement rather than through an Art. 11 treaty).

<sup>48</sup> See Thym, *supra* note 22, at 328; see also *Case C-241/87, Maclaine Watson & Co. Ltd. v. Council & Comm'n of the Eur. Cmty.*, 1990 E.C.R. I-01797, paras. 95-96; *Case C-120/94, Comm'n v. Greece*, 1996 E.C.R. I-1513, para. 65 (Opinion of Advocate General Jacobs); *Case C-423/98, Albore*, 2000 E.C.R. I-5965, para. 54 (Opinion of Advocate General Cosmas); *Case C-402 P and 415/05 P, Kadi & Al Barakaat Int'l Found. v. Council*, 2008 E.C.R. I-6351, para. 34 (Opinion of Advocate General Maduro).

<sup>49</sup> See Thym, *supra* note 22.

<sup>50</sup> See PIET EECKHOUT, *EU EXTERNAL RELATIONS LAW* (2nd. ed. 2011).

<sup>51</sup> See *Opinion 1/08, In re GATS Schedules*, 2009 E.C.R. I-11129.

total of approximately 600 cases in each year.<sup>53</sup> The legality of a draft international agreement can be challenged before the Court of Justice by way of its jurisdiction to give an opinion *ex ante* according to Article 218(11) TFEU.<sup>54</sup> This *ex ante* review is justified on the basis of the involvement of third parties.<sup>55</sup> Schütze states that *ex post* review could negate the external effects of an agreement on such parties.<sup>56</sup> Additionally, inter-institutional competence disputes can be more swiftly resolved *ex ante*. Another view, however, is that the consequences of *ex post* review in EU law are detrimental to the interests of the EU, seemingly giving it jurisdiction over both “high” and “low” politics in a vast range of areas. In this regard, Koutrakos emphasizes how the consequences of judicial decisions in EU external relations can be peculiarly awkward or complex—a reason often provided for the application of the political question doctrine in other legal orders.<sup>57</sup> In its controversial judgment on *Passenger Name Records*,<sup>58</sup> where the Parliament had initially requested an opinion but withdrew its request and instead took an annulment action under Article 263 TFEU, the consequences of the decision of the Court annulling the agreement on competence grounds did not result in a revised finalized immediate agreement—as international agreements take time to be renegotiated.<sup>59</sup> Instead, the resulting interim agreement was a better bargain for the United States, but not the EU, which ironically had to “beg” the United States to sign.<sup>60</sup> If the Court had annulled the amendments to the EU ETS Directive, it would have weakened the EU policy and generated further uncertainty for the EU Member States and third parties.<sup>61</sup>

On another view, in light of the tremendous legal consequences of the decision for third parties, especially private actors, had EU ETS been put in place by an international agreement, it might have benefitted from judicial review, *ex ante*, thereby providing for

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<sup>52</sup> See Opinion 1/09, *supra* note 25.

<sup>53</sup> See Completed cases in 2009 and 2011 in *D - Statistics concerning the judicial activity of the Court of Justice*, in ANNUAL REPORT OF THE COURT OF JUSTICE 2011, 100 (2012).

<sup>54</sup> A Member State, the European Parliament, the Council or the Commission may obtain the Opinion of the Court of Justice.

<sup>55</sup> See ROBERT SCHÜTZE, EUROPEAN CONSTITUTIONAL LAW 209 (2012).

<sup>56</sup> See *id.*

<sup>57</sup> See *Baker v. Carr*, 369 U.S. 186, 217 (1962); PANOS KOUTRAKOS, EU INTERNATIONAL RELATIONS LAW (2006).

<sup>58</sup> Joined Cases C-317 & 318/04, *Eur. Parliament v Council and Comm'n*, 2006 E.C.R. I-4721.

<sup>59</sup> See DE WITTE, *supra* note 41; ECKHOUT, *supra* note 50, at 273.

<sup>60</sup> See DE WITTE, *supra* note 41.

<sup>61</sup> See Giuseppe Dari-Mattiacci & Josephine van Zeben, *Legal and Market Uncertainty in Market-Based Instruments: The Case of the EU ETS*, 19 N.Y.U. ENVTL. L.J. (forthcoming 2012).

legal certainty. The EU ETS litigation represents a case study of the use of law generating—rather than reducing or managing—uncertainty.<sup>62</sup> The choice by the EU to regulate such a high level of protection for the environment and to bring *global* climate change within the realm of its own legal order clearly represented a highly ambitious effort effectively to regulate the international aviation industry through EU law. This use of its regulatory powers circumvents the legal issues associated with the negotiation of an international agreement, such as ratification in the Member States.<sup>63</sup> Nonetheless, the EU ETS decision emphasizes the benefits of *ex ante* review: avoiding adverse effects on the rights of third parties, eliminating the renegotiation of agreements, and avoiding political judgments on sensitive matters of external policy. *Ex ante* and *ex post facto* judicial review represent highly polarized means of considering foreign relations. EU ETS clearly was not reviewed in the form of an international agreement, and the controversy it attracted perhaps outlines the benefits of *ex ante* review.

In addition to the different postures of judicial review, whether *ex ante* or *ex post*, the institutional context of EU external relations post-Lisbon is also relevant to a consideration of the powers and actions of the Court. The following section further explores this institutional context.

#### **D. The Institutional Dynamics of EU-External Relations Post-Lisbon: The Context of EU ETS for the Court**

Vedder has described how the breadth of the EU Energy and Climate Package, including aviation in the EU ETS, exposes the EU's broad external ambitions.<sup>64</sup> He outlines how the European Council agreed upon the package “despite” the then applicable co-decision procedure, envisaging decision-making by the Commission and Council, not the European Council.<sup>65</sup> Vedder thus argues that the genesis of EU ETS was *executive-dominated*. He emphasizes the central role of the Commission in the drafting and implementation of the Directive, an institution “active” in EU external relations, further providing evidence of the external aspects of the Directive. He also suggests that the EU support for the Kyoto Protocol in its EU ETS scheme emphasizes EU support of international commitments in this area: but diametrically opposed to the prevailing U.S. position on climate change and the Kyoto Protocol, but at the center of international law and policy on climate change. Such a viewpoint possibly underscores why the Court of Justice would not want to annul the EU ETS, nor pronounce upon the larger real politic of the dispute. EU ETS evidently straddles

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<sup>62</sup> *Id.*

<sup>63</sup> A fuller discussion of mixed external action and membership of international organisations is set out in Eeckhout, *supra* note 50.

<sup>64</sup> See VEDDER, *supra* note 20, at 123.

<sup>65</sup> *Id.* at 107.

global and internal objectives, with an arguably more significant external impact. Vedder thus raises an important question as to whether EU External action is in reality executive-dominated post-Lisbon so as to preclude strong judicial review by the Court of Justice.

The judiciary aside, the institutional dynamic of EU foreign or external relations law seems fluid and evolving post-Lisbon. For example, the teething difficulties surrounding the evolving operations of the EU External Action Service support this viewpoint.<sup>66</sup> Moreover, Schütze contends that the Council is not *primus inter pares* with the Parliament but instead is *primus* in relation to the negotiation of international agreements, and thus executive-dominant.<sup>67</sup> Pursuant to Article 218(3) TFEU, the Council shall authorize the opening of international relations negotiations, adopt negotiating directives and may authorize the signing and conclusion of agreements.<sup>68</sup> As Eeckhout states, this process excludes the European Parliament.<sup>69</sup> Post-Lisbon, however, the European Parliament has powers of consent to approve international agreements in a wide variety of circumstances, pursuant to Article 218(6)(a) TFEU.<sup>70</sup> Pursuant to the Inter-Institutional Framework Agreement, the Commission shall take due account of the Parliament's comments throughout the negotiations.<sup>71</sup> Historically, the European Parliament has used its consent powers as "delay" powers and such powers have evolved through the treaties into more substantive legal powers.<sup>72</sup> However, some suggest that there are limits to the Parliament's empowerment in foreign affairs, relying upon the acceptance by the Parliament of the latest EU-U.S. Passenger Name Records Agreement despite its shortcomings in the area of civil liberties.<sup>73</sup> Such conclusions may need revision in light of the Parliament's rejection of a significant international treaty, the Anti-Counterfeiting Trade Act (ACTA), in 2012 on

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<sup>66</sup> See the prescient views of Joris Larik & Madalina Moraru, *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action After the Lisbon Treaty*, (EUI Working Papers Law 2011/10).

<sup>67</sup> See VEDDER, *supra* note 20.

<sup>68</sup> See SCHUTZE, *supra* note 55, at 207; Ricardo Gosalbo Bono, *The Organisation of the External Relations of the European Union in the Treaty of Lisbon*, in *THE EUROPEAN UNION'S EXTERNAL RELATIONS A YEAR AFTER LISBON*, (Cleer Working Papers 2011/3, 13) (Panos Koutrakos ed., 2011); see also Esa Paasivirta, *The EU's External Representation After Lisbon: New Rules, a New Era?*, in *THE EUROPEAN UNION'S EXTERNAL RELATIONS A YEAR AFTER LISBON*, (Cleer Working Papers 2011/3, 39) (Panos Koutrakos ed., 2011).

<sup>69</sup> See EECKHOUT, *supra* note 50, at 199.

<sup>70</sup> See TFEU art. 218(6)(a)(v).

<sup>71</sup> See SCHUTZE, *supra* note 55. See Framework Agreement on Relations between the European Parliament and Commission, Annex III.

<sup>72</sup> See Raya Kardasheva, *The Power to Delay: The European Parliament's Influence in the Consultation Procedure*, 47 J. COMMON MKT. STUD. 385, 399 (2009).

<sup>73</sup> See Ariadna Ripoll Servent & Alex MacKenzie, *The European Parliament as Norm Taker? EU-US Relations After the SWIFT Agreement*, 17 EUR. FOREIGN AFF. REV. 71 (2012).

fundamental rights grounds.<sup>74</sup> Evidently, a new inter-institutional dynamic in EU External Relations is taking effect, with more actors increasingly empowered and having incentives to litigate to enhance or evolve their powers. The new institutional constellation of EU Foreign Relations law might suggest that the Court would want to discourage overreach on the part of the EU institutions in foreign relations or to encourage certain actors to protect their interests, for example, the Parliament. This does not seem to be evident in any way in the EU ETS decision.

Undoubtedly, the evolving state of EU institutional law in foreign relations *might* be seen to influence the view the Court takes of the EU's impact upon global standards through its regulatory efforts. On another view, an executive-dominated Agreement might not represent an appropriate case for the Court to indicate the acceptable limits of EU regulatory powers with foreign policy implications. Also, the role of the type of private actors involved in the EU ETS perhaps complicated the litigation. Non-EU North American airlines could be described as classic "repeat players,"<sup>75</sup> with the capacity to litigate tenaciously to protect their economic interests. Overall, it seems that the post-Lisbon institutional structure did not have any obvious or apparent relevance to this litigation. Indeed, the Court might be perceived as not having availed itself of the opportunity to develop its jurisprudence here or to pronounce on the broader relationship between the EU's global and internal interests.

Beyond institutional power structures, normative questions surrounding the promotion of EU values through law are addressed here next, considering EU and global standard setting, followed by an analysis of the concept of setting high standards in rule-making.

## **E. EU and Global Rule-Making: Standards by and Through Law**

### *I. EU and Global "Standard-Setting" Through Law*

The attempt by the EU to maximize its influence on global climate change policy through law in EU ETS—by setting very high regulatory standards and subjecting a vast range of actors to its values—is remarkable but not necessarily extraordinary. The EU frequently imports values and norms in law, but often also acts itself as an international model for values.<sup>76</sup> Equally, the EU has sought to apply its rules extra-territorially in various

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<sup>74</sup> EP, first reading, EP-PE\_TC1-COD(2005)0127; P7\_TA(2010)0432, European Parliament resolution of 24 November 2010 on the Anti-Counterfeiting Trade Agreement (ACTA).

<sup>75</sup> See Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98 (1974).

<sup>76</sup> See CREMONA, *supra* note 17, at 285. From a vast number, two of the prominent examples of importation might be the European Convention on Human Rights or the Geneva Convention on the status of refugees. See Marise Cremona, *The European Union as a Global Actor: Roles, Models and Identity*, 41 COMMON MKT. L. REV. 553 (2004).

instances, including rules with penalties, as in the case of EU competition law.<sup>77</sup> Article 21(2)(h) TEU expressly provides that the EU seeks to promote *good* global governance.<sup>78</sup> However, Cremona has demonstrated how the importation and exportation of values in EU foreign policy through law is highly fluid.<sup>79</sup> For example, the EU has suspended trade agreements on fundamental rights grounds only in a minority of instances.<sup>80</sup> EU foreign policy may be characterized by precarious commitments made by the EU to the spread of its own values. EU environmental law standards have been transposed in various forms all around the globe, for example, into Japanese and Californian law.<sup>81</sup> The EU ETS litigation is not an example of the adoption by a third country of EU values but instead an ultimately successful promulgation of values with global effects. The controversy created by the EU ETS also emphasizes how much in flux EU values are, without any palpable judicial activism. The Court's notorious decision in the pre-Lisbon *Environmental Crimes* case held that EU environmental law could deploy criminal penalties to enhance its effectiveness, beyond the letter of the treaties, a not uncontroversial evolution of the treaties.<sup>82</sup> EU ETS represents a remarkably successful exportation of EU values, to a point. However, in all, EU ETS represents a major success on the part of the EU to regulate where other global governance mechanisms had failed, as both the Court and the Advocate General explicitly outline.<sup>83</sup>

## II. High and Higher: EU and Global Standards of Rule-Making

The EU ETS aviation rules represent an effort by the EU to engage in rulemaking or standard setting, with effects upon actors and standards outside the EU. Rulemaking enhances the EU's stance as an entity that could set exemplary goals with wide regulatory effects and extend both its legal and political reach beyond what would be possible

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<sup>77</sup> See Joseph Griffin, *EC and US Extraterritoriality: Activism and Cooperation*, 17 *FORDHAM INT'L L.J.* 353, 388 (1993).

<sup>78</sup> In the context of the Common Foreign and Security Policy (CFSP).

<sup>79</sup> See CREMONA, *supra* note 18, at 277 (writing of the double commitment of EU to international law and more specifically to multilateralism).

<sup>80</sup> For example, unilateral EU suspension of treaties has occurred in relation to countries such as Zimbabwe, Liberia, Togo, Fiji, Guinea and Mauritania. The EU has also invoked trade sanctions for human rights violations without a human rights clause strictly providing for it in the case of Myanmar. See Bruno De Witte, *The EU and International Legal Order: The Case of Human Rights*, in *BEYOND THE ESTABLISHED LEGAL ORDERS: POLICY INTERCONNECTIONS BETWEEN THE EU AND THE REST OF THE WORLD*, 127, 143 (Malcolm Evans & Panos Koutrakos eds., 2011); see also ELENA FIERRO, *THE EU'S APPROACH TO HUMAN RIGHTS: CONDITIONALITY IN PRACTICE* (2003).

<sup>81</sup> See EC Regulation No 1907/2006 of the European Parliament and of the Council of 18 December 2006, O.J. L 396/1; Naiki, *supra* note 18; Bradford, *supra* note 19; Scott, *supra* note 18.

<sup>82</sup> See Case C-176/03, *Comm'n v. Council (Environmental Crimes)*, 2005 E.C.R. I-7879; see Ester Herlin-Karnell, *Some Reflections on Criminal Law in the First Pillar*, 13 *EUR. PUB. L.* 69 (2007).

<sup>83</sup> See sources cited *supra* note 5.

through ordinary international legal instruments. The EU ETS rules enacted were thus EU rules with global ambitions. However, to describe laws or rules as global themselves is not an uncontroversial exercise, given that it denotes a shift in the center of political authority, as well as a shift in the structure of the legal order.<sup>84</sup> Global rules might be seen to result from political deterritorialization but it is a highly contested field.<sup>85</sup> A feature of contemporary global rule making is that it is mired in a quest for legitimacy, and even perfection, and seeks to promulgate extraordinarily high standards. EU law and policy is replete with examples of such rules laden in superlatives are plentiful; for example, striving to be the best, the global leader, the world standard. The Lisbon Agenda,<sup>86</sup> its successor Europe 2020,<sup>87</sup> the European Research Area,<sup>88</sup> the goal to eradicate of poverty in Article 3 TEU,<sup>89</sup> or the architecture of the new European system of financial supervision all provide extensive evidence of this.<sup>90</sup> The EU ETS rules were explicitly intended as a cornerstone of the European Union's policy to combat climate change and its key tool for reducing industrial greenhouse gas emissions cost-effectively as the “first and biggest international scheme for the trading of greenhouse gas emission allowances.”<sup>91</sup> Yet it cannot be argued that such rulemaking is inevitably doomed to fail on account of its high objectives. In the event of “failure,” the EU has simply strived for even higher goals, as a comparison of

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<sup>84</sup> See Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247 (2006); see also Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law* Summer/Autumn, 68 L. & CONTEMP. PROBS. 15 (2005); Alexander Somek, *The Concept of Law in Global Administrative Law: A Reply to Benedict Kingsbury*, 20 EUR. J. INT'L L. 985 (2009); Susan Marks, *Naming Global Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 995, 1000 (2006).

<sup>85</sup> See Somek, *supra* note 84.

<sup>86</sup> It set out in 2000 the goal for the EU to be, by 2010, “the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.” EU Bulletin 3-2000, 1-5.

<sup>87</sup> The Union has set five ambitious objectives—on employment, innovation, education, social inclusion and climate/energy—to be reached by 2020. Each Member State has adopted its own national targets in each of these areas.

<sup>88</sup> European Research Area by 2014 will aim at breaking down barriers to create a genuine single market for knowledge, research and innovation.

<sup>89</sup> Article 3(5) TEU provides, “[i]n its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to . . . eradication of poverty . . .”

<sup>90</sup> European system of financial supervisors (ESFS), consisting of three European Supervisory Authorities has as its objective “to help restore confidence; contribute to the development of a single rulebook; solve problems with cross-border firms; prevent the build-up of risks that threaten the stability of the overall financial system.” *The EU Single Market, European Commission*, [http://ec.europa.eu/internal\\_market/finances/committees/index\\_en.htm](http://ec.europa.eu/internal_market/finances/committees/index_en.htm) (last visited Nov. 14, 2012).

<sup>91</sup> See Council Directive 2008/101, 2008 O.J. (L 8) 3 (EC), amending Council Directive 2003/87, 2009 O.J. (L 8) 3 (EC).

Europe 2020 with its predecessor, the Lisbon agenda, suggests.<sup>92</sup> On the contrary, global rulemaking, however imperfect, illegitimate, undesirable, or far-reaching, can still function well.<sup>93</sup> As Krisch states, “failed” examples of Global Governance are in highly technical and specialist regulatory fields such as environment and safety where technical and/or mutual recognition problems across regimes thwart the success of programs like genetically modified organisms (GMOs).<sup>94</sup> The analysis of the *legitimacy* of global rulemaking usually advocates the infusion of fundamental rights into such rulemaking such as Petersmann’s famous advocacy for the use of Fundamental Rights in WTO law or the Manifesto for Social Justice in European Contract Law.<sup>95</sup> The invocation of fundamental rights in this way usually relates to a desire towards “welfare-maximized” rulemaking. Aside from the aims or legitimacy of global rulemaking, the barriers for individual litigants of global rulemaking are frequently high, as they sometimes face highly esoteric legal procedures.<sup>96</sup> Moreover, unintended legal consequences of global rulemaking can have higher stakes. For example, the EU ETS litigation concerned billions of euros of lost revenue, although in that case consumers ended up absorbing those costs.

The House of Representatives Act of 2011 passed by the U.S. House of Representatives clearly marks the EU ETS saga as one of the most controversial global regulatory disputes of modern times. The regulatory capacity of the EU to generate the litigation in the first place is particularly remarkable, showing the precarious “underbelly” of global regulatory ambitions. The rulemaking by the EU impacted so adversely on private American commercial actors that it generated EU-based litigation by such parties and also legislative action to prohibit the impact of EU law in the United States. While there are some historic precedents for U.S. disquiet towards EU regulation being expressed by and through law, the type of legislative response and form of litigation before the Court of Justice is highly distinct.<sup>97</sup> The nature, scope, and consequences of the EU ETS rules provide clear evidence

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<sup>92</sup> Setting out more ambitious targets, for example, with specific national targets in a broader range of areas than simply growth and jobs.

<sup>93</sup> On the workability of such rules, see KINGSBURT, KRISCH & STEWART, *supra* note 84.

<sup>94</sup> See Nico Krisch, *Pluralism in Postnational Risk Regulation: The Dispute over GMOs and Trade*, 1 *TRANSNAT’L LEGAL THEORY* 1 (2010).

<sup>95</sup> See Ernst-Ulrich Petersmann, *Time for a United Nations Global Compact for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from the European Union*, 13 *EUR. J. INT’L L.* 621 (2002); Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: A Manifesto*, 10 *EUR. J. INT’L L.* 633 (2004); Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law*, 14 *DUKE J. COMP. & INT’L L.* 149, 153 (2004) (“[T]he Europeanization of private law should be conceived as a process which must find its legitimacy in the normative quality of the Europeanization process.”).

<sup>96</sup> For example, the lack of direct effect of the WTO agreement in EU law.

<sup>97</sup> See the analysis of EU-US relations in the several accounts given in *Developments in the Law- Extraterritoriality*, 124 *HARV. L. REV.* 1226 (2011).

of the precarious nature of standard setting on such a scale, *i.e.*, EU *qua* global rulemaking. Precedent suggests, however, that any defects or deficiencies in the rules or their adoption processes do not necessarily act as a deterrent to further EU (legislative) action, but rather as a propellant for further, more ambitious action.

The final Part assesses the Court of Justice as an “actor” in global affairs, considering scholarship examining EU “actorness” in global affairs.

#### **F. The “Actorness” of the Court of Justice Post-Lisbon in Global Affairs: Sui Generis Actor, in Theory and Practice?**

There is little doubt but that the EU itself increasingly acts as a powerful actor in global affairs, both politically and legally. However, as Jupille and Caporaso state, there is no consensus in scholarship on what it means to be an actor, despite its centrality to discussions on power and influence and as regards the EU, similar problems bedevil its characterization as an entity.<sup>98</sup> The “actorness” of the EU is assessed unevenly by (non-legal) scholars and is usually treated as a special case, or *sui generis*, on account of its novelty and its complexity. The criteria of “actorness” used to consider the international actions of the EU include, *inter alia*, the de facto or de jure recognition of its actions, the legal authority to act, its institutional autonomy or distinctiveness, and the cohesion between the EU and its Member States in the formulation of policy.<sup>99</sup> Notable studies of EU “actorness” in an international context focus upon the EU institutions generically and largely have not considered the Court of Justice as relevant.<sup>100</sup> There are various views on how sophisticated and coherent the foreign policy action of the EU is, depending upon the policy in question.<sup>101</sup> Either way, the concept usually depicts EU interactions with the wider world, but does not include the Court of Justice. The Court of Justice is not an organization per se and instead is only part of an international organization.<sup>102</sup> However, it

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<sup>98</sup> See Christopher Hill, *The Capability-Expectations Gap, or Conceptualizing Europe’s International Role*, 31 J. COMMON MKT. STUDS. 305 (1993); Joseph Jupille & James A. Caporaso, *States, Agency, and Rules: The European Union in Global Environmental Politics*, in *THE EUROPEAN UNION IN THE WORLD COMMUNITY* (Carolyn Rhodes ed., 1998); WUNDERLICH, *supra* note 25, at 653; Thomas Forsberg, *Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type*, 49 J. COMMON MKT. STUDS. 1183 (2011).

<sup>99</sup> For these specific criteria, the account here draws from Jupille & Caporaso, *supra* note 98, at 213, 214. See also CHARLOTTE BRETHERTON & JOHN VOGLER, *THE EUROPEAN UNION AS A GLOBAL ACTOR* (2nd ed. 2006); Roy H. Ginsberg, *Conceptualising the European Union as an International Actor: Narrowing the Theoretical Capability-Expectations Gap*, 37 J. COMMON MKT. STUDS. 429 (1999).

<sup>100</sup> See, e.g., Hill *supra* note 98.

<sup>101</sup> See Ian Manners, *Normative Power Europe: A Contradiction in Terms?*, 40 J. COMMON MKT. STUDS. 235 (2002); Kalypto Nicolaidis & Richard Howse, “*This Is My EUtopia . . .*”: *Narrative as Power*, in *INTEGRATION IN AN EXPANDING EUROPEAN UNION*, 341 (Joseph Weiler, Ian Begg & John Peterson eds., 2002).

<sup>102</sup> See Manners, *supra* note 101; Nicolaidis & Howse, *supra* note 101.

is very significant that the Court of Justice is perceived as a very powerful judicial entity, so much so as to distinguish the EU from typical international organizations.<sup>103</sup> It is considered to be such a powerful actor that Kelemen argued it contributed to a new form of judicialized governance in the EU, “Eurolegalism,” based upon its role in the Single Market.<sup>104</sup> Thus, while there has been much study on the role of the Court in internal EU integration, its external impact on *global affairs* is perceived as negligible, despite theoretical and perhaps practical indications to the contrary. When one reflects on the criteria used to measure EU “actorness,”—for example, recognition, authority, autonomy,<sup>105</sup>—it can readily be asserted that the Court is an internationally recognized judicial institution. As its interactions with the European Court of Human Rights suggests (*i.e.*, It is cited in European Court of Human Rights decisions, even pre-Lisbon), it has legal authority to deliver decisions from the EU treaties in the field of EU external relations and is autonomous or legally distinct from other EU institutions, pursuant to the treaties. Thus, it is argued here that the Court of Justice can be said to have several “actorness” characteristics at the very least.

In practice, the post-Lisbon period has witnessed a heightened concern on the part of the Court of Justice as a Court and as a political actor to preserve its autonomy inside and outside the courtroom.<sup>106</sup> There are two particularly striking examples of this. First is the recent *EU Patent Court* decision, where the Court annulled a Patent Court system that would have eroded its own autonomy.<sup>107</sup> Another example is the negotiations surrounding the European Convention on Human Rights accession, where it successfully negotiated for a judge from the Court of Justice of the European Union to sit on the bench of the European Court of Human Rights.<sup>108</sup> The Patents Court decision caused considerable

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<sup>103</sup> See KELEMEN, *supra* note 23; see also Karen Alter & Laurence Heifer, *Nature or Nurture: Lawmaking in the European Court of Justice and the Andean Tribunal of Justice*, 64 INT’L ORG. 563 (2010).

<sup>104</sup> See KELEMEN, *supra* note 23.

<sup>105</sup> Cohesion is not employed here on account of its complexity. For reasons of space, a discussion of competence is outside the scope of the present paper. See Jupille & Caporaso, *supra* note 98.

<sup>106</sup> Pre-Lisbon, see *Opinion 1/91 EEA on the creation of a European Economic Area*, 1991 E.C.R. I-6079.

<sup>107</sup> See *Opinion 1/09, Creation of a unified patent litigation system*, 2011 E.C.R. I-000; Commission Regulation 2011/0093, Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection, 2011 O.J. (COD); Tobias Locke, *Taking National Courts More Seriously? Comment on Opinion 1/09*, 11 EUR. L. REV. 576 (2011).

<sup>108</sup> See *8th Working Meeting of the CDDH Informal Working Group in the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission*, CDDH-UE (2011) 16 final (July 19, 2011), available at [http://www.coe.int/t/dlapil/cahdi/source/Docs%202011/CDDH-UE\\_2011\\_16\\_final\\_en.pdf](http://www.coe.int/t/dlapil/cahdi/source/Docs%202011/CDDH-UE_2011_16_final_en.pdf) (last accessed on Nov. 11, 2012); Jean-Paul Jacqué, *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms*, 48 COMMON MKT. L. REV. 995 (2011); Tobias Locke, *Walking on a Tightrope the Draft Accession Agreement and the Autonomy of the EU Legal Order*, 48 COMMON MKT. L. REV. 1025 (2011).

political difficulties and added further delay to the efforts of the EU and its Member States to evolve its patent law system.<sup>109</sup> The ECHR negotiations have had a particularly long duration—almost three years after the entry into force of the Treaty of Lisbon, accession is still not complete, with considerable implications, although the Court cannot be said to be singularly responsible for the overall delay.<sup>110</sup> These instances emphasize the Court’s concern for the autonomy of EU law in a legal and political context, both inside and outside the courtroom. They also emphasize a desire to engage as an actor in a political process, where its own jurisdiction is at stake, as well as the interactions of the EU externally in another legal system. The Court’s jurisdiction was increased by the Treaty of Lisbon to include the Area of Freedom, Security, and Justice, (AFSJ),<sup>111</sup> but is subject to an important five-year transition period, which precludes legality review or preliminary references in this area.<sup>112</sup> This is significant as the AFSJ increasingly has a significant external relations law component and this exclusion impedes the full unity of its jurisdiction in this field. The Court’s “actorness” qualities would be enhanced by its involvement in this sensitive field. Nonetheless, the Court remains a comparatively powerful judicial actor overall in EU law.

As regards International Law, Eeckhout argues that the Court has become less receptive towards international law in the last decade.<sup>113</sup> He demonstrates that, in much of its case law on bilateral free trade, cooperation, and association agreements, the Court has never decided against direct effect *simpliciter*.<sup>114</sup> To put it another way, the great majority of agreements that have come before the Court have been recognized as having direct effect by the Court, indicating its desire to apply its own procedures to external legal instruments.<sup>115</sup> Many argue that the landmark decision of the Court of Justice in *Kadi et al v. Council and Commission*, where the Court reviewed the effects of a UN Security Council Resolution and sanctions adopted in accordance with EU law values and rules, constitutes a

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<sup>109</sup> Finally, a Unified Patent Court system has been agreed after 30 years of negotiations and the adverse decision of the Court of Justice. See Conclusions (EC) No. 76/12 of 29 June 2012, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/131388.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131388.pdf).

<sup>110</sup> Nikolaj Nielsen, *UK Obstructing EU Accession to Human Rights Convention*, EUOBSERVER.COM (April 19, 2012).

<sup>111</sup> See Elaine Fahey, *Swimming in a Sea of Law: Reflections on Water Borders, Irish (-British)-Euro Relations and Opting-out and Opting-in After the Treaty of Lisbon*, 47 COMMON MKT. L. REV. 673 (2010); Maria Fletcher, *Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom’s “Ins” and “Outs,”* 5 EUR. CONST. L. REV. 71 (2009).

<sup>112</sup> Article 10, Protocol No. 36 Treaty of Lisbon Transnational Provisions, or earlier if the basis act is amended.

<sup>113</sup> See ECKHOUT, *supra* note 50, at 436.

<sup>114</sup> For a long time, only the GATT and WTO were the agreements that the court considered to not produce direct effect. However in 2008, the Court held that UNCLOS did not have direct effect. These decisions alone qualify the Court’s openness towards international law: See ECKHOUT, *supra* note 50, at 374.

<sup>115</sup> *Id.*

*sui generis* approach to International law.<sup>116</sup> As is well known, the Court there delivered its landmark decision on the effects of international law within the European legal order, purporting to establish a form of European exceptionalism, or at least a particular relationship with other legal orders. The expansion of international rulemaking has had a distinct impact on the constitutional law of European foreign affairs.<sup>117</sup> Thym describes the pre-Lisbon decade as a period of “constitutional consolidation.”<sup>118</sup> During this period, the Court attempted to accentuate the relevance of the Member States in foreign affairs and to delineate the constitutional limitations of EU action. In this light, *Kadi* provides a reminder of the evolving nature of the Court’s “actorness.” The “actorness” of the Court in Global Governance thus seems quite apparent from more recent developments, inside and outside the courtroom (e.g., ECHR negotiations), but is not evident in EU ETS. The EU ETS decision seems far from convincing in the post-Lisbon context, where the Court is engaging more vividly with international law, for example, ECHR accession or, pre-Lisbon, in its *Kadi* decision. In practice, the EU ETS decision aside, the Court seems to display more rather than less of a desire to act as a global actor, both in its case law and outside the courtroom.

## G. Conclusion

By upholding the amendment to the Directive in the EU ETS decision to include aviation, the Court indirectly contributed to far-reaching EU regulatory ambitions. The result of the decision seems to be that the EU effectively regulates the global standards in this field through EU law, given the rising global adoption of the EU law standards. The approval of the EU ETS regime thus represents an important exportation of EU values through law. Equally, the House of Representatives Act of 2011 passed by the U.S. House of Representatives is a vivid reminder of how controversial the EU ETS saga was, and demonstrates how the Grand Chamber supported tremendous regulatory reach on the part of the EU. The decision of the Court does not engage explicitly with the challenges posed by the political context of the proceedings and actors of non-EU actors. The supposedly executive-dominant context of EU ETS does not feature in the dispute. The EU ETS decision does not constitute a convincing analysis of its vivid context and instead appears both timid and brusque. Given the stature of the Court, it is remarkable that the Court in the EU ETS case did not consider the relationship between the EU ETS and the

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<sup>116</sup> See Joined Cases C-402 P & 415/05 P, *Kadi and Al Barakaat Int’l Found. v. Council and Comm’n*, 2008 E.C.R. I-6351. From a vast literature, see Magdalena Lickova, *European Exceptionalism in International Law*, 19 EUR. J. INT’L L. 463, 472 (2008); Grainne De Burca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT’L L.J. 1, 15 (2010); Mathias Kumm, *How Does European Union Law Fit into the World of Public Law? Costa, Kadi and Three Models of Public Law*, in POLITICAL THEORY OF EUROPEAN UNION (Jürgen Neyer & Antje Wiener eds., 2011); Jack Goldsmith & Eric Posner, *Does Europe Believe in International Law?*, WALL ST. J. (Nov. 25, 2008).

<sup>117</sup> See Joined Cases C- 402 P & 415/05 P, *Kadi and Al Barakaat Int’l Found. v. Council*, 2008 E.C.R. I-6351.

<sup>118</sup> See Thym, *supra* note 23, at 317.

post-Lisbon EU as a global actor. The EU ETS litigation also exposes the dynamic landscape of transatlantic relations through and by law. However, the manner in which the U.S. airlines ultimately succumb to EU jurisdictional rules despite the legislative support received by them in the United States indicates both the “high politics” and narrow parameters of global governance battles. The Court has acted to protect its own integrity and autonomy both inside and outside the courtroom post-Lisbon. The “inside-out” component of EU external values seems to have a consistently tricky relationship with the “outside-in” (*i.e.*, all things global, as the EU ETS saga emphasizes). The Court will no doubt evolve and develop this relationship more explicitly over time.