

THE EUROPEAN UNION OVERSTEPPING ITS
BOUNDS AND BORDERS:
THE EXTRATERRITORIAL EFFECT OF THE
EMISSIONS TRADING SYSTEM AND ITS CALL
FOR MULTILATERAL ACTION

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THE EUROPEAN UNION OVERSTEPPING ITS BOUNDS AND BORDERS: THE EXTRATERRITORIAL EFFECT OF THE EMISSIONS TRADING SYSTEM AND ITS CALL FOR MULTILATERAL ACTION

Lauren E. Mullen*

Imagine a flight departing from San Francisco bound for London's Heathrow Airport. After the passengers settle into their seats and their luggage is stored under the cabin, the pilot announces that they are expected to traverse the 5,363 flying miles to London in approximately ten hours.¹ For passengers, this announcement means they will pull up a blanket, grab a book, and relax. For the airline industry, however, this seemingly simple flight pattern is a source of great concern.

Under the European Union Emissions Trading System (EU ETS), any flight departing from or landing in the European Union is subject to a levy based on the amount of emissions released over the *entirety* of the flight.² This levy is calculated with no consideration given to where the emissions are released—whether over Europe, over the high seas, or over other foreign lands.³ In the example of a flight

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¹ *Geobytes—City Distance Tool*, Geobytes.com, <http://www.geobytes.com/CityDistanceTool.htm?loadpage> (enter “United States, California, San Francisco” as your origin city and “United Kingdom, England, London” as your destination city; then follow “Next” hyperlink) (last visited Apr. 12, 2014).

² Council Directive 2008/101, art. 1(4), 2009 O.J. (L 8) 3. Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amends Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community.

³ There is debate over whether this fee can accurately be called a “tax” as opposed to a “levy.” For purposes of this note, the debate of tax versus levy will not be discussed and the words will be used interchangeably to refer to the allowance paid to the EU by all airlines as calculated by their total flight emissions.

departing San Francisco bound for London, 29% of total emissions are released in U.S. airspace, including those on the ground at the San Francisco airport. 37% of emissions are released in Canadian airspace, and a further 25% over the high seas. Only 9% of emissions are released in EU airspace.⁴ Yet the EU ETS imposes a levy on airline carriers based on emissions released throughout the entire flight from the departure gate to the arrival gate, and may also impose an excess emissions penalty.⁵ This means that a flight from Madrid to London, which emits 100% of its emissions over the European Union is actually subject to a levy that is less than the flight from San Francisco to London, which emits only 9% of its emissions over the European Union.⁶

The EU ETS scheme, which proposes to tax *all* airlines departing from or arriving at *any* airport located within the European Union, has been subject to attack by many nations around the globe who claim that the EU ETS scheme oversteps the EU's authority.⁷ In December 2011, the European Court of Justice (ECJ) upheld the legality of this controversial directive in *Air Transportation Ass'n of America v. Secretary of State for Energy and Climate Change*.⁸ To the dismay of commercial airlines around the world, the ECJ upheld the validity of the EU ETS

⁴ The San Francisco/London example was used by the claimants during oral arguments. See Written Observations of the Claimants on behalf of American Transport Association of America, Inc., Case C-366/10, *Air Transp. Ass'n of Am v. Sec'y of State for Energy and Climate Change*, available at [http://www.airlines.org/Documents/ATA%20Written%20Observations%20of%20the%20Claimants%20_final%20-%20\[1\].pdf](http://www.airlines.org/Documents/ATA%20Written%20Observations%20of%20the%20Claimants%20_final%20-%20[1].pdf) [hereinafter ATA Brief]. See also Susan Kurtz, *EU Carbon Tax Scheme Riles Up U.S. Airlines*, *The Washington Diplomat*, June 28, 2012, http://www.washdiplomat.com/index.php?option=com_content&view=article&id=8428:eu-carbon-tax-scheme-riles-up-us-airlines&catid=1489:-july-2012&Itemid=502.

⁵ *Air Transport Association Calls EU ETS Application to U.S. Airlines Illegal*, PR Newswire, July 5, 2011, <http://www.reuters.com/article/2011/07/05/idUS170661+05-Jul-2011+PRN20110705>.

⁶ The distance from Madrid to London is approximately 787 flying miles. *Geobytes—City Distance Tool*, *supra* note 1 (enter “Spain, Madrid, Madrid” as your origin city and “United Kingdom, England, London” as your destination city; then follow “Next” hyperlink).

⁷ The EU began in 1958 as a coalition of six countries united as the European Coal and Steel Community and the European Economic Community. Since 1958, the EU has expanded to encompass 27 Member States. This is important to note in order to understand the widespread effect that the EU ETS has on the rest of the world, as flights arriving at or departing from any airport in any member state subjects an airline to the scheme. Additionally, six of the top thirty busiest passenger airports in the world are located in the European Union. See *Airports Council International—Year to Date Passenger Traffic*, ACI.aero, <http://www.aci.aero/Data-Centre/Monthly-Traffic-Data/Passenger-Summary/Year-to-date> (last visited Apr. 12, 2014).

⁸ Case C-366/10, *Air Transp. Ass'n of Am v. Sec'y of State for Energy and Climate Change*, 2011 Eur-LEX 62010CJ0366 (Dec. 21, 2011).

and the inclusion of aviation activities into its cap and trade system. In the wake of *Air Transportation Ass'n*, many believe the ECJ's decision represents "a European legal interpretation of EU ETS," and exemplifies a disregard for fundamental principles of international law.⁹

This note confronts the ECJ's reasoning on the ground that the EU ETS is an exercise of extraterritorial legislative jurisdiction that goes against principles of customary international law, while simultaneously highlighting that the legislation is a call for multilateral reform by the European Union. In principle, the extraterritorial scheme infringes on state sovereignty and should not be binding on the rest of the world, but in reality the scheme serves as a wake-up call to the rest of the world that the EU wants to get serious on developing a modern agreement in the area of climate change and emission control. The first portion of this note will explain the intricacies of the EU ETS against the background that the ETS was likely implemented as a call for action by the EU to the rest of the world. The second portion of this note will discuss why Advocate General Juliane Kokott and subsequently the ECJ upheld the legality of the EU ETS. Significantly, neither fully discussed the role of customary international law or the effects of the legislation on fellow sovereign nations. This note concludes that the EU ETS and the ECJ's decision is the European Union's way of signaling its desire to begin negotiations to better address the problem of climate change, likely through an updated multilateral framework agreement.

I. WHAT IS THE EUROPEAN UNION EMISSIONS TRADING SYSTEM?

In January 2005, the EU ETS came into force as the largest multi-country, multi-sector greenhouse gas emission trading scheme in the world.¹⁰ European Directive 2003/87/EC, as amended by Directive 2008/101/EC, provides the basis for the scheme.¹¹ It rests on the principle that reducing industrial greenhouse gas

⁹ Eddy Metcalf, *IATA Disappointed with EU Court Decision on ETS*, AVIATION ONLINE MAG. (Dec. 27, 2011), http://avstop.com/news_december_2011/iata_disappointed_with_eu_court_decision_on_ets.htm.

¹⁰ *Improving the Implementation of the Emission Trading Directive*, DG Env't News Alert Service (Sci. for Env't Policy), May 10, 2007, available at <http://ec.europa.eu/environment/integration/research/newsalert/pdf/64na1.pdf>.

¹¹ An EU directive is a legislative act of the European Union that mandates that all member states achieve certain end results as desired by the directive. National authorities therefore must adapt their laws to meet these goals, yet they are free to decide how to achieve the end result. A directive can be distinguished from a regulation, which is self-executing and does not require any implementing measures. See RALPH H. FOLSOM ET AL., EUROPEAN UNION LAW AFTER MAASTRICHT: A PRACTICAL

emissions in a cost-effective manner will help to combat climate change. The scheme utilizes a “cap and trade” method that places limits on the total amount of certain greenhouse gases that can be emitted by factories, power plants, and other large industries.¹² Within this cap system, individual companies receive emissions allowances, which they can sell or buy from one another as needed.¹³ The EU gradually reduces the number of allowances over time in an effort to ensure that total greenhouse gas emission levels are reduced at a steady pace over the next 10 years.¹⁴

The Directive calls for the implementation of the ETS in phases. The first phase began in 2005 and primarily covers energy activities such as the production and processing of metals, the mineral industry, and pulp and paper activities.¹⁵ Phase II was set to go into effect on January 1, 2012, and expands the scheme to encompass the commercial airline industry.¹⁶ Directive 2008/101/EC states that “[f]rom 1 January 2012 all flights which arrive or depart from an aerodrome situated within the territory of a Member State to which the Treaty applies shall be included [in the ETS].”¹⁷ The Directive now requires commercial airlines to obtain allowances to cover aircraft emissions that are released throughout the duration of their flights when departing from or landing at a EU airport.¹⁸

Each airline is granted a certain number of allowances based on past air traffic levels.¹⁹ Airlines that exceed their allowances may bid on a reserve fund of additional allowance licenses in order to comply with the legislation.²⁰ If an airline

GUIDE FOR LAWYERS OUTSIDE THE COMMON MARKET 5 (Ralph H. Folsom, Ralph B. Lake & Ved P. Nanda eds., 1996).

¹² *Improving the Implementation of the Emission Trading Directive*, *supra* note 10.

¹³ Council Directive 2008/101, *supra* note 2, at art. 1(4).

¹⁴ *Id.*

¹⁵ Council Directive 2003/87, art. 4, 2003 O.J. (L 275) 32.

¹⁶ Council Directive 2008/101, *supra* note 2, at Annex 1(b).

¹⁷ *Id.*

¹⁸ *Id.* Since going to press, the EU has placed Phase II of the EU ETS on hold pending further discussions. See *Stopping the clock of ETS and aviation emissions following last week's International Civil Aviation Organisation (ICAO) Council*, European Commission Memo, Nov. 12, 2012, http://europa.eu/rapid/press-release_MEMO-12-854_en.htm.

¹⁹ *Id.* at art. 1(4).

²⁰ *Id.* at art. 1(4)(3e)(3)(c).

operator does not acquire enough allowances or exceeds his allotted amount, the airline must pay a penalty of 100 Euro per ton of carbon dioxide.²¹ The Directive recommends that revenues received from the auctioning of allowances be used to tackle climate change, to reduce greenhouse gas emissions, and to adapt to the impacts of climate change.²² Member States are not required, however, to use money received from the scheme to combat climate change according to the Directive.²³

While the Directive is stern in meaning, the underlying message appears to be the EU's way of signaling its desire for a modern multilateral agreement on climate change. For example, when a third country has implemented its own measures for reducing the climate change impact caused by aviation emissions, the Directive allows for the EU to divert from the Directive so that the nations involved can negotiate for an optimal outcome for all the constituencies involved.²⁴ Because the Directive allows room for negotiation with countries that are also working to reduce climate change impact, it is likely that the EU's motivation behind the Directive is to signal the need for an updated multilateral treaty to combat climate change. José Manuel Barroso, President of the European Commission, stated that although Europe is not thinking about the possibility of changing its legislation, "the world should unite in some kind of directive like this one."²⁵ The text of the Directive, as well as the comments of EU officials, indicate that the EU is using the ETS as a way to garner attention to an area of environmental law of pressing importance.

With a policy objective of reducing harmful emission levels in mind, the European Commission believes "[t]he environmental impact [of the EU ETS] will be significant because aviation emissions, which are currently growing rapidly, will be capped at their average level in 2004–2006." According to the Commission, a reduction in emissions of 46 percent will be achieved by 2020, when compared to

²¹ *Id.* at art. 1(4)(14b)(3).

²² *Id.* at intro., para. 22.

²³ In fact, the United Kingdom has explicitly stated that it will not earmark funds received to combat climate change. See Elena Ares, *EU ETS and Aviation*, House of Commons (Feb. 13, 2012), at 7, available at <http://www.parliament.uk/briefing-papers/SN05533>.

²⁴ Council Directive 2008/101 *supra* note 2, at intro., para. 18.

²⁵ James Kanter, *U.S. Airlines Challenge European Emissions Rule*, N.Y. TIMES, July 3, 2011, <http://www.nytimes.com/2011/07/04/business/global/04emissions.html>.

present levels and the current path the industry is following.²⁶ In opposition, environmental lobbyists argue that the actual emission reductions achieved by the airlines themselves will be very limited.²⁷

The Air Transport Association of America (ATA), American Airlines, Continental Airlines, and United Air Lines brought action against the Secretary of State for Energy and Climate Change to challenge the validity of the Directive on December 16, 2009.²⁸ Interveners from both sides also contributed.²⁹ The claimants' request for judicial review by the United Kingdom's Administrative Court resulted in the High Court of Justice requesting a preliminary ruling from the European Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the European Union.³⁰ The ECJ heard arguments in the case on July 5, 2011.

As the main spokesperson for the entirety of the claimants and interveners, the ATA challenged the EU ETS against four international backdrops. The ATA argued that the EU ETS is illegal as it goes against: (1) customary international law, (2) the Chicago Convention, (3) the Kyoto Protocol, and (4) the Open Skies Agreement.³¹ Additionally, the ATA argued that the EU ETS is a direct regulation

²⁶ Ares, *supra* note 23, at 5.

²⁷ *Id.*

²⁸ Case C-366/10, *Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change*, 2011 Eur-LEX 62010CJ0366 (Dec. 21, 2011).

²⁹ Interveners on behalf of claimants include the International Air Transport Association and the National Airlines Council of Canada. Interveners on behalf of the defendant include the Aviation Environment Federation, WWF-UK, the European Federation for Transport and Environment, the Environmental Defense Fund, and Earthjustice. *See Air Transp. Ass'n of Am.*, 2011 Eur-LEX 62010CJ0366 (Dec. 21, 2011).

³⁰ The European Union is unique in its structure of courts. Each Member State has its own court system. When a question of European Union law arises, however, the courts of Member States are permitted to request the assistance of the European Court of Justice to aid in the interpretation of a question on the EU treaties. In this case, because the UK court was asked to assess the legality of a piece of EU legislation, the UK High Court was able to request the ECJ's assistance in interpreting the Directive's application. Decisions by the ECJ are not binding per se on the courts of Member States, but are routinely adopted by the Member State's court system. *See* <http://europa.eu/about-eu/institutions-bodies/court-justice/>.

³¹ Case C-366/10, *Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change*, Opinion of Advocate General Kokott, 2011 Eur-LEX 62010CJ0366 (Oct. 6, 2011) [hereinafter *Opinion of Advocate General*]. Additionally, ATA argued that such unilateral action by the EU is a violation of both customary international law and the Convention on International Civil Aviation ("Chicago Convention"), which dictates that countries have sovereignty over the airlines while in their own airspace. The Kyoto Protocol also confirmed that the International Civil Aviation Organization ("ICAO") has the authority to establish greenhouse gas policy for international aviation, not the EU.

of conduct of a third country airline and therefore outside the jurisdiction of a EU Member State. According to the ATA, such a regulation by the EU is contrary to the fundamental principle of customary international law, which provides that a state has complete and exclusive sovereignty over its airspace.³²

Advocate General Kokott released her opinion on the case in October 2011 and upheld the legality of the Directive.³³ Much to the dismay of non-EU countries, the ECJ adopted Advocate General Kokott's opinion in December 2011 and ultimately held that the EU ETS does not infringe the sovereignty of foreign nations.³⁴

Countries outside the EU quickly displayed their disagreement with the decision. U.S. Secretary of State Clinton and U.S. Secretary of Transportation Ray LaHood stated that they "strongly object on legal and policy grounds" to the application of the Aviation Directive to U.S. airlines, and urged the EU to halt, suspend or delay application of the Directive.³⁵ The U.S. House of Representatives went so far as to pass a bill prohibiting U.S. airlines from complying with the EU ETS, after the airline industry estimated that the cap-and-trade system would cost

Finally, the Open Skies Agreement, which allows any airline of the European Union and any airline of the United States to fly between any point in the European Union and any point in the United States, is also violated.

³² During the oral submissions in front of the ECJ in Luxembourg, ATA focused on two points. First, the ATA highlighted what it believes is an extraterritorial effect of the EU ETS as contrary to established principles of customary international law. Second, because of the extraterritorial effect, the Directive should be deemed invalid. While the defendant argued that the ETS does not impose a levy and instead is an incentive based system, ATA lawyers stated,

Let there be no mistake about it, ETS does and will regulate conduct outside the EU. The conduct which is regulated is releasing greenhouse gas emissions by burning fuel on the ground in third countries in third country airspace, over the high seas, and also in EU airspace and on the ground in the EU.

See ATA Brief, *supra* note 4, at 3.

³³ An Advocate General is enlisted by the ECJ in all cases. Once the Advocate General releases his opinion, it is reviewed in detail by the judges of the ECJ. While the Advocate General's opinion is not binding on the ECJ, it is often times adopted. *See* <http://europa.eu/about-eu/institutions-bodies/court-justice/>.

³⁴ Case C-366/10, *Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change*, 2011 Eur-LEX 62010CJ0366 (Dec. 21, 2011).

³⁵ Joshua Meltzer, *The European Union's Regulation of CO2 Emissions from Aviation and the Implications for International Trade*, The Brookings Institution (Jan. 23, 2012), http://www.brookings.edu/opinions/2012/0123_aviation_international_trade_meltzer.aspx#fnt2.

U.S. airlines \$3.1 billion from 2012 to 2020.³⁶ Similarly, China's State Council released an order banning Chinese airlines from participating in the ETS without governmental approval and stated that the EU ETS "runs counter to relevant principles of the United Nations Framework Convention on Climate Change and the international civil aviation regulations."³⁷

II. THE EXTRATERRITORIALITY OF THE ETS

In *Air Transportation Ass'n*, many argue that the ECJ failed to adequately consider whether the EU has authority to apply the ETS to non-EU airlines travelling through non-EU airspace.³⁸ Under the Directive, EU Member States are permitted to tax emissions that are released both over non-EU airspace and over the high seas.³⁹ In other words, emission allowances are calculated based on the emissions released by an aircraft over the entirety of the flight route—not just the proportion of emissions released in EU airspace. In *Air Transportation Ass'n*, the ECJ dismissed the ATA's argument that the ETS is extraterritorial in nature and therefore outside the EU's sphere of competence in contravention of important principles of customary international law.⁴⁰ As such, the ECJ's decision authorizes EU Member States to comply with the ETS, including those portions of the Directive that are extraterritorial in nature, in an approach contrary to principles of customary international law.

The following portion of this note will explain why the ETS's inclusion of flight sections that take place in non-EU airspace creates an extraterritorial effect. Such an extraterritorial effect contravenes two principles of customary international law: state sovereignty of its airspace and freedom over the high seas. The *Air Transportation Ass'n* ruling first will be described in detail to distill the main

³⁶ European Union Emissions Trading Scheme Prohibition Act of 2011, H.R. 2594, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr2594rfs/pdf/BILLS-112hr2594rfs.pdf> ("an act to prohibit operators of civil aircraft of the United States from participating in the European Union's emissions trading scheme, and for other purposes").

³⁷ *Chinese Regime Bans Its Airlines from Participating in EU Emissions Trading System*, NDT Television (Feb. 06, 2012, 10:15 EST), available at <https://www.youtube.com/watch?v=I5AIJaAEDd0>.

³⁸ International Air Transport Association, *IATA Disappointed with CJEU Opinion—Urges Global Solution through ICAO*, Press Release No. 49, Oct. 6, 2011, <http://www.iata.org/pressroom/pr/pages/2011-10-06-01.aspx>.

³⁹ Council Directive 2008/101, *supra* note 2, at Annex.

⁴⁰ Case C-366/10, *Air Transp. Ass'n of Am v. Sec'y of State for Energy and Climate Change*, 2011 Eur-LEX 62010CJ0366, para. 129 (Dec. 21, 2011).

arguments that the ECJ adopted from the Advocate General's recommendation. This will provide the backdrop for further discussion of how the ETS violates the aforementioned principles of customary international law in what is likely a call for multilateral reform.

A. A Brief Explanation of the Advocate General's and the ECJ's Decision in Air Transportation Ass'n

The Advocate General found that the ETS has no extraterritorial effect because airlines are not made subject to any mandatory provisions of EU law via the Directive.⁴¹ Specifically, the Advocate General notes that the Directive does not mandate any specific obligation on airlines to fly certain routes, observe speed limits, or comply with fuel consumption levels.⁴² According to the Advocate General, the Directive is not automatically rendered extraterritorial because the ETS accounts for activity that occurs outside the EU's territorial limit.⁴³ The Advocate General further notes that taking account of the whole length of the flight is ultimately an expression of the proportionality principle and reflects the "polluter pays" principle of environmental law.⁴⁴ With little discussion, the Advocate General dismisses the idea that the ETS contains an extraterritorial component.⁴⁵

⁴¹ Council Directive 2008/101, *supra* note 2, at para. 145.

⁴² *Id.*

⁴³ *Id.* at para. 148.

⁴⁴ *Id.* at para. 153. Polluter Pays Principle, as defined by the Organisation for Economic Co-operation and Development, is a concept where manufacturers and importers of products should bear a significant degree of responsibility for the environmental impacts of their products throughout the product life-cycle, including upstream impacts inherent in the selection of materials for the products, impacts from manufacturers' production process itself, and downstream impacts from the use and disposal of the products. Producers accept their responsibility when designing their products to minimize life-cycle environmental impacts, and when accepting legal, physical or socio-economic responsibility for environmental impacts that cannot be eliminated by design. What the Advocate General fails to address, however, is why it is fair and proportional for the European Union to profit off the scheme without any requirement for the funds received to go into a climate preservation fund. Instead, as noted above, it is only suggested that these funds go towards environmental protection. See *Fact Sheet: Extended Producer Responsibility*, ORGANISATION FOR ECON. CO-OPERATION AND DEV., http://www.oecd.org/document/53/0,3343,en_2649_34395_37284725_1_1_1_1,00.html (last visited Apr. 12, 2014).

⁴⁵ Opinion of Advocate General, *supra* note 31, at paras. 143–44. The Advocate General also cites to Case C-286/90, Poulsen and Diva Navigation 1992 E.C.R. I-6019. In this 1992 case, the ECJ held that under the territoriality principle, fish caught outside the EU can be confiscated from a vessel sailing under the flag of a third country when docked at an EU port. Poulsen, a Danish citizen, navigated a Panamanian ship clearly displaying the flag of Panama. When Poulsen and his crew were fishing for salmon in the North Atlantic Ocean, their ship fell victim to mechanical problems, forcing it to make an emergency stop at a Danish port. While docked, the salmon found on board was in violation of a EU

Similar to the Advocate General's opinion, the ECJ decision also held that the ETS does not infringe upon the sovereignty of foreign states, as foreign states are free to apply their own emissions regulations to aircraft operating in their airspace.⁴⁶ The Court stated that EU law is not intended to apply to international flights flying over the high seas or over third state's territory, but that EU law may be implicated when flights depart or land on EU territory.⁴⁷ "It is only if the operator of such an aircraft has chosen to operate a commercial air route arriving at or departing from an aerodrome situated in the territory of a Member State that the operator . . . will be subject to the allowance trading scheme."⁴⁸ Accordingly, the ECJ held that the ETS does not violate principles of customary international law.⁴⁹

The ECJ's analysis in *Air Transportation Ass'n*, however, does not fully consider the effects of the ETS in upholding the validity of the scheme. While the ETS regulation does not *explicitly* legislate the manner in which airlines operate, it nonetheless has far reaching implications that ultimately regulate flight paths both inside and outside of the EU. Although the ETS does not directly mandate the specifics of air travel, such as flight route, speed limits, or fuel consumption, it continues to impact non-EU commercial carriers who now look to creative alternatives to avoid the ETS tax.

In addition, the Court does not address the manner in which the ETS accounts for the release of emissions over non-EU airspace. The ETS dictates that airplanes that depart from or arrive at a EU aerodrome automatically are subject to the entirety of the scheme.⁵⁰ In being subject to the scheme, aircraft are taxed based on the total amount of emissions released throughout the duration of the flight path. The Court fails to consider that simply landing at or departing from a EU

Directive. Poulsen challenged the seizure, but the ECJ upheld the enforceability of the Directive, noting that its language did not rise to the level of extraterritorial reach. Advocate General Kokott reasons that under the ECJ's logic in *Poulsen*, there cannot be any prohibition against exhaust gases from aircrafts emitted outside EU airspace when the aircraft's arrival or departure point is an at EU aerodrome for purposes of calculating emissions allowances to be surrendered.

⁴⁶ Case C-366/10, *Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change*, 2011 Eur-LEX 62010CJ0366 (Dec. 21, 2011).

⁴⁷ *Id.* at para. 117.

⁴⁸ *Id.* at para. 127.

⁴⁹ *Id.* at paras. 101–13. See also Stephanie Bodoni, *Airlines Lose Challenge to EU Expansion of Carbon Cap-and-Trade System*, BLOOMBERG NEWS (Dec. 21, 2011), <http://www.bloomberg.com/news/2011-12-21/airlines-lose-fight-against-eu-carbon-caps.html>.

⁵⁰ Council Directive 2008/101, *supra* note 2, at Annex 1(b).

aerodrome is not a sufficient nexus to submit the entire flight path to ETS regulation. The ETS seemingly purports to regulate activity that occurs outside the boundaries of EU airspace, without a sufficient nexus to link the location of aircraft emissions and the territory over which the EU may regulate, and can be considered extraterritorial in nature.

B. Customary International Law Limits the Application of the ETS

It is undisputed that the EU is bound by the principles of customary international law and that the ETS must conform to such principles.⁵¹ The facts of *Air Transportation Ass'n* implicate two principles of customary international law: (a) a state's sovereignty over its airspace, and (b) the existence of freedom over the high seas.⁵²

The ATA argued that the ETS breaches these sovereignty principles in two respects by regulating conduct that occurs outside the EU.⁵³ First, the emission cap on *total* aviation emissions, including emissions released outside the territory of the EU, regulates conduct that occurs outside the physical territory of the EU.⁵⁴ Second, the ETS requires airlines to surrender allowances relating to flight paths over the territory of non-EU territories and over the high seas.⁵⁵ Because the extraterritorial reach of the ETS extends beyond the jurisdiction of the EU, the ETS seemingly oversteps its bounds because customary international law grants a sovereign state exclusive competence to regulate conduct that occurs in its own territory, including the airspace above its territory.⁵⁶ Since the ETS accounts for emissions from flights that traverse outside the territory of the EU, the ETS arguably infringes on principles of sovereignty.⁵⁷ Furthermore, there are not any exceptions to the general territoriality rules that justify the application of ETS in respect of non-EU flight paths.⁵⁸

⁵¹ Opinion of Advocate General, *supra* note 31, at para. 142.

⁵² ATA Brief, *supra* note 4, at para. 7.

⁵³ *Id.* at para. 90.

⁵⁴ *Id.* at para. 91.

⁵⁵ *Id.* at para. 92.

⁵⁶ *Id.* at para. 95.

⁵⁷ *Id.*

⁵⁸ *Id.* at para. 77.

1. Non-EU Members have sovereignty over their airspace

The ATA argues that the ETS's inclusion of flight sections that take place in airspace outside the territory of the EU creates an extraterritorial effect, which contravenes the sovereign rights of third countries over their airspace.⁵⁹ Advocate General Kokott believes this allegation is "untenable" and "based on an erroneous and highly superficial reading of the provisions of Directive 2008/101."⁶⁰ The ECJ agreed.⁶¹

Contrary to the Advocate General and ECJ's finding, however, the principle that a state is sovereign over its airspace has been recognized since 1919 when the Convention Relating to the Regulation of Aerial Navigation was signed in Paris, France.⁶² The Convention states that all contracting parties recognize that every sovereign has complete and exclusive sovereignty over the air space above its territory.⁶³ The signing of Article I of the Convention on International Civil Aviation, otherwise known as the Chicago Convention, in 1944 solidified this same principle.⁶⁴

Annexed to the Chicago Convention is the International Air Services Transit Agreement.⁶⁵ This Agreement, which has been accepted by 129 countries, grants commercial airlines the privilege to land in another country's airspace.⁶⁶ The U.S., members of the EU, and most countries housing major international airport hubs are members to this Agreement.⁶⁷ The First Freedom of the Air, as defined by the agreement, is the right to freely fly over a foreign country without landing there.⁶⁸

⁵⁹ Opinion of Advocate General, *supra* note 31, at para. 143.

⁶⁰ *Id.* at para. 144.

⁶¹ Case C-366/10, *Air Transp. Ass'n of Am. and Others v. Sec'y of State for Energy and Climate Change*, 2011 Eur-LEX 62010CJ0366 (Dec. 21, 2011).

⁶² John Cobb Cooper, *Roman Law and the Maxim Cujus Est Solum in International Air Law*, 1 MCGILL L.J. 23, 23 (1952).

⁶³ *Id.*

⁶⁴ *Id.* at 24.

⁶⁵ *Id.*

⁶⁶ International Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. (pt. 2) 1693, available at <http://www.mcgill.ca/files/iasl/chicago1944b.pdf>.

⁶⁷ For a list of signatories, see U.S. Dept. of State, *Treaties in Force 328-29* (2012), available at <http://www.state.gov/documents/organization/202293.pdf>.

⁶⁸ International Air Services Transit Agreement, *supra* note 66, at art. I, § 1.

Similarly, under the Third and Fourth Freedoms of the Air, a commercial airline has the right to fly from one's own country to another country and vice versa.⁶⁹ In effect, this Agreement codified the principle that a nation retains sovereign control over its airspace unless otherwise agreed.⁷⁰

The ETS monitors emissions from aviation activities using the formula "fuel consumption x emission factor."⁷¹ Fuel consumption includes all fuel consumed by the aircraft's auxiliary power unit and is calculated using the following formula: (amount of fuel contained in aircraft tanks once fuel uplift for the flight is complete) – (amount of fuel contained in aircraft tanks once fuel uplift for subsequent flight is complete) + (fuel uplift for that subsequent flight).⁷² Broken down, this calculation takes into account emissions released from takeoff to landing, regardless of the flight path and regardless of the percentage of emissions released in the EU's airspace.⁷³

2. The EU may not regulate the airspace above the high seas for non-Member States

Principles of customary international law are applicable to the high seas and are similarly infringed by the ETS. It is well established that the high seas are open to all States and that this freedom allows for largely unimpeded air travel over the high seas.⁷⁴ No state may validly enact regulations that encroach on the freedom of the high seas or the sovereignty of other territories to use the airspace above international waters.⁷⁵ As noted in *Oppenheim's Treatise on International Law*, "since . . . the open sea is not the territory of any State, no State has as a rule a right to exercise its legislation, administration, jurisdiction, or police over parts of the high sea."⁷⁶ The ETS applies EU emission trading rules to flight paths over the high seas and emissions exerted by flights over the high seas in determining the

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Council Directive 2008/101, *supra* note 2, at Annex 2(b).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ ATA Brief, *supra* note 4, at para. 107.

⁷⁵ *Id.*

⁷⁶ *Id.* at para. 116 (quoting LASSA OPPENHEIM, INTERNATIONAL LAW, A TREATISE 589 (Hersh Lauterpacht ed., 8th ed. 1965)).

amount of allowances that must be handed over by airlines.⁷⁷ Thus, the ETS's attempt to regulate over the high seas appears to be a violation of customary international law.

Similar to regulating conduct that occurs in a third country's airspace, regulating the airspace over the high seas contravenes the principle of customary international law that restricts a state from extending its rule over the high seas. As noted by the ATA, "the inescapable truth is that the EU has sought to arrogate to itself jurisdiction to regulate activities on the high seas by adopting environmental legislation that applies to activities over the high seas."⁷⁸

The calculation for fuel consumption, as mandated by the Directive, does not differentiate between fuel consumption used over the high seas, over EU territory, or over third country territory.⁷⁹ As noted above, the calculation accounts for the amount of fuel in the airplane's tank at lift off, at landing, and during the subsequent uplift path.⁸⁰ By including a calculation that does not differentiate between emissions released over the high seas versus over land, the ETS essentially legislates over the high seas, in what can be considered violation of the principles of freedom of the high seas.

3. The EU is not exempt from principles of customary international law by any of the recognized exceptions

Legislation becomes extraterritorial in nature when a state passes legislation that regulates conduct outside of its territory. As discussed above, a regulation will be deemed extraterritorial when it purports to regulate a sovereign's airspace or the high seas. Prescriptive jurisdiction, also known as legislative jurisdiction, is the power of a state to regulate people, property, and transactions, or to prescribe conduct, usually through the passage of laws or regulations.⁸¹ Two views generally exist on international law's approach to prescriptive jurisdiction.⁸²

⁷⁷ ATA Brief, *supra* note 4, at para. 158.

⁷⁸ *Id.* at para. 118.

⁷⁹ Council Directive 2008/101, *supra* note 2, at Annex.

⁸⁰ *Id.*

⁸¹ Canadian Online Legal Dictionary, http://www.irwinlaw.com/cold/prescriptive_jurisdiction (Apr. 12, 2014).

⁸² Int'l Bar Ass'n, *Report of the Task Force on Extraterritorial Jurisdiction*, at 8, available at <http://www.ibanet.org/Search/Default.aspx?q=Report%20of%20the%20Task%20Force%20on%20Extraterritorial%20Jurisdiction>.

The first view was initially articulated in *SS Lotus*, which held that a state is entitled to extend its prescriptive jurisdiction outside its territory, subject to any rules prohibiting such prescription.⁸³ This view, articulated in 1927, is not widely accepted and has been subject to criticism by commentators who question whether this approach applies to cases under international law in general, or simply to instances of extraterritorial jurisdiction on the high seas, as in *SS Lotus*.⁸⁴ It is highly unlikely that the approach promulgated in *SS Lotus* would be applicable to assess the ETS because it is largely outdated and was decided before the era of globalization.

The second view, which is more widely accepted, is that a state may not extend its prescriptive jurisdiction unless permissive rules support the exercise of extraterritoriality.⁸⁵ Accordingly, extraterritorial legislation is permitted only where a nexus between the state seeking to assert jurisdiction and the regulated persons or conduct exists and when the exercise of jurisdiction is reasonable.⁸⁶ States normally refrain from prescribing laws that govern activities connected to other states when the exercise of such jurisdiction is unreasonable.⁸⁷

The reasonableness of extraterritorial legislation depends on many factors.⁸⁸ These factors include, but are not limited to, the connection between the regulating state and the activity, the connection between the regulating state and the person whose activity is subject to regulation, the importance of the regulated activity to the regulating states, the extent of the other state's interests, the likelihood of conflict with third party states, the effect of the regulation on justified expectations and the impact of the regulation within the international system.⁸⁹

The extraterritorial nature of the ETS is demonstrated in the following scenario articulated by the ATA. First, consider the international uproar that would

⁸³ *Id.* (citing *SS 'Lotus' (Fr v. Turk)*, 1927 P.C.I.J. (ser A) No. 10 at 18–19) (“Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.”).

⁸⁴ *Report of the Task Force on Extraterritorial Jurisdiction*, *supra* note 82, at 9.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1047–48 (2d Cir. 1996).

⁸⁸ *Id.* at 1048.

⁸⁹ *Id.*

ensue if the EU sought to cap emissions or require airlines to surrender allowances for strictly domestic U.S. flights.⁹⁰ It could not be argued feasibly that the EU has jurisdiction to regulate solely domestic U.S. flights.⁹¹ The U.S. has exclusive competence to regulate flights over its own airspace and EU regulation over domestic U.S. flights clearly would breach the principle that a state is sovereign over its own airspace.⁹² Similarly, if the EU sought to regulate international flights from a non-EU country to or from the U.S., the sovereignty principle clearly would also be infringed.⁹³ By extension, these outcomes should not change simply because the flight happens to land at or depart from a EU airport.⁹⁴ Because the ETS imposes obligations, fines, and threatens sanctions in respect to activities taking place outside the EU, the scheme runs contrary to the principle that a state is sovereign over its own airspace.⁹⁵

The EU assumed the legality of the ETS simply because a particular flight departs from or arrives at an airport within the EU, without due consideration of other pertinent factors, such as the proportion of the emissions released over EU Member States or the harm suffered in EU Member States by emissions released abroad.⁹⁶ The link between airport location and emission release is insufficient to justify the exercise of extraterritorial regulation by the EU.⁹⁷ The airport of arrival or departure, in and of itself, is not sufficient to abrogate a non-Member State's right to regulate its own airspace or the airspace above the high seas. Such a flimsy connection does not support the disproportionate effect created by the ETS.

In the example of the flight from San Francisco to London, where only 9% of emissions are released over EU airspace, the EU has the opportunity to tax the entirety of this flight path, 91% of which occurs outside the territory of the European Union.⁹⁸ While recognizing that climate change is a global problem, it is

⁹⁰ ATA Brief, *supra* note 4, at para. 95.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at para. 98.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

unfair for EU Member States to ultimately profit from international flight patterns, especially when Member States are not required to utilize monies received for climate intervention.

4. Implications of the ECJ's Decision in *Air Transportation Ass'n*

By upholding the legality of the ETS, the ECJ failed to consider the implications of the decision on commercial airlines across the globe. First, airlines are not prepared to comply with the emissions allowances requirements. The allowances grant reduces over time and would likely subject airlines to excess penalties and fines, forcing them to purchase additional capacity permits from a reserve fund or from other airlines. Despite assurances that passenger airline ticket prices would not increase, evidence exists that passengers are already paying a premium in their ticket costs.⁹⁹ Current trends indicate that this increased cost to passengers is low, but will likely increase as airlines begin to receive fewer carbon allowances.¹⁰⁰

Additionally, the ECJ did not fully discuss or consider the potential impact to airports located both within the EU and outside the EU. While perhaps extreme in nature, airlines may attempt to defray costs by shortening their flight patterns. Since levies are calculated based on the entirety of the flight when departing from or arriving at an EU airport, airlines can reduce this calculation by first flying to an airport located just outside the EU, such as in Turkey, the Ukraine, or Iceland. In the example of the flight from San Francisco to London, if the carrier first stopped in Iceland before landing in London, the levy could only be calculated based on emissions released during the much shorter flight pattern from Iceland to London—not from San Francisco to London. The levy would therefore be significantly less than that of the longer San Francisco to London flight path. In defraying costs by landing at nearby airports directly before or after leaving an EU airport, EU airports lose business, while outside airports become busier and will experience increased passenger traffic. Similarly, customers may face increased disruption in their travels, as less non-stop flight options might be offered.

While the ETS is a noble effort to tackle climate change as caused by carbon emissions, the scheme's policies target an essential sector of today's globalized

⁹⁹ *Like Dominos: Airlines Globally Raise Fares After EU Trading Scheme Starts*, CAPA Centre for Aviation (Jan. 10, 2012), <http://www.centreforaviation.com/blogs/aviation-blog/like-dominos-airlines-globally-raise-fares-after-eu-emission-trading-scheme-starts-65856>.

¹⁰⁰ *Id.*

economy. International air travel will never go away and the ETS policy is not deterring people from traveling by plane in lieu of a cleaner travel alternative. Rather, the ETS represents a cash grab that targets an essential sector of the economy that is already vulnerable to the whims of oil prices and political pressures. It is difficult for anyone to deny that the aviation industry is in some way disrupting the environment, yet the ETS's attempt to unilaterally address the problem does not appear to be the solution.

The Solution?

All parties in *Air Transportation Ass'n* recognize that environmental protection and reduction of greenhouse gasses is of the utmost importance. Especially in today's world where thousands of flights traverse the globe every day, the effects of pollution caused by aviation is a growing concern. While the ETS helps to put a dent in the level of emissions released by commercial airlines, the EU cannot undertake this challenge alone. Simply implementing schemes similar to the ETS will not solve the problem.

While economists consistently urge the use of tradable permits to address environmental problems, the implementation of the ETS improperly infringes on the rights of sovereign nations.¹⁰¹ Although seemingly noble, the ETS is leading to international backlash and a levy war. China proposes to implement a similar scheme to retaliate against the EU, and the United States is likely not far behind.¹⁰² The realistic solution to this problem therefore is that a multilateral agreement must be negotiated and adopted by all major sovereigns around the globe. Unilateral imposition of the ETS will not solve the problem. Instead, international cooperation and agreement must be utilized to bring awareness and change to the growing problem of aviation emissions in our atmosphere.

III. SUBSEQUENT DEVELOPMENTS

Since the ECJ released their decision, many countries displayed their disdain with the EU ETS and vowed to impose a retaliatory scheme.¹⁰³ In the past few

¹⁰¹ Robert N. Stavins, *What Can We Learn from the Grand Policy Experiment? Lessons from SO₂ Allowance Trading*, 12 J. ECON. PERSP. 69, 69 (1998).

¹⁰² Saira Syed, *UN Body at Centre of Emissions Trading Scheme Storm*, BBC News (Feb. 14, 2012), <http://www.bbc.co.uk/news/business-17002462>.

¹⁰³ Nicola Clark, *Countries Seek Retaliation to Europe's Carbon Tax on Airlines*, N.Y. TIMES, Feb. 17, 2012, http://www.nytimes.com/2012/02/18/business/global/countries-seek-retaliation-to-europes-carbon-tax-on-airlines.html?pagewanted=all&_r=0.

months, the EU ultimately has backed down from imposing the scheme onto foreign-based airlines until a later date in an effort to work with the rest of the world on a more tenable solution.¹⁰⁴ Unsurprisingly, more and more countries have responded positively to this approach and have stepped forward in an effort to establish a multilateral framework agreement addressing the problem of climate change and the role played by aircraft emissions. In February 2012, Brazil, South Africa, India, and China released a joint statement stating that a deal must be reached.¹⁰⁵

With this, it is perhaps clearer that the ECJ's dismissal of the ATA's arguments regarding extraterritorial legislation was too hasty of a decision in the eyes of the rest of the world. As countries now come together to tackle the problem in a more compromising approach, it is perhaps more evident than ever that the EU really did have the environment's best interest in mind. Whatever the reasoning behind the EU ETS and its proposed implementation plan, the EU seems to have made some respectable progress in garnering attention to an area it considers of the utmost importance.

¹⁰⁴ John Parnell, *BASIC Countries Threaten to Block Aviation Emissions Deal, Responding to Climate Change* (Feb. 20, 2013), <http://www.rtcc.org/basic-countries-threaten-to-block-aviation-emissions-deal/>.

¹⁰⁵ *Id.*