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On the compatibility with international legal provisions of including greenhouse gas emissions from international aviation in the EU emission allowance trading scheme as a result of the proposed changes to the EU emission allowance trading directive

Legal opinion

commissioned by the Federal Ministry

for the Environment, Nature Conservation

and Nuclear Safety

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A. Background

Greenhouse gas emissions from international aviation are currently not included in any binding climate protection regulations or measures at international, European or national level. In particular the commitments agreed under the Kyoto Protocol do not cover emissions from international aviation and shipping, partly because it was not possible to reach an agreement on how to allocate these emissions to individual countries.

However, Article 2.2 of the Protocol contains an instruction to the Signatory States to take action with regard to greenhouse gas emissions from international aviation and shipping and to work within the international organisations ICAO and IMO to develop measures to reduce emissions. Given the growth in international air traffic and the particular relevance to the climate of the greenhouse gas emissions it produces, activities to protect the climate, including those aimed at greenhouse gas emissions from international aviation, seemed urgently required at the time and that is still the case today.[1]

Over ten years after this instruction to develop adequate climate protection measures for international air traffic was issued, the International Civil Aviation Organization (ICAO) had not produced any concrete proposals or measures; at the end of 2006, the European Commission therefore presented a proposal to include greenhouse gas emissions from aviation in the EU's emission allowance trading scheme.[2] In view of the failure of ICAO's activities in this area to date, the European Commission's proposal reflects its intention to tackle the issue at international level and establish an internationally workable system for incorporating greenhouse gas emissions from aviation into existing climate policy instruments.

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[1] Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community {SEC (2006) 1684} {SEC (2006) 1685}, Recital 1 of the Explanatory Memorandum: "In 2004 greenhouse gas emissions from the Community's share of international aviation increased by a further 7.5% compared with 2003, resulting in a cumulative growth of 87% since 1990. If this continues, there is a risk that growth in the Community's share of international aviation emissions could by 2012 offset more than a quarter of the environmental benefits of the reductions required by the Community's target under the Kyoto Protocol."

[2] Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community {SEC(2006) 1684}{SEC(2006) 1685}.

The EU Commission's original proposal envisaged that from 2012 all airlines whose aircraft take off from or land at EU airports would have to acquire allowances for carbon dioxide emissions, which they would be able to buy and sell in the EU's emission allowance trading scheme (ETS). A trial run was to have covered all airlines from EU Member States on flights within the European Union from 2011.

This proposal was welcomed by the European Parliament during the co-decision procedure. The resolution adopted in first reading includes a number of amendments and additions to the original proposal.[3] For example, the trial run between 2011 and 2012 will be abandoned and instead in 2011 emissions from all aircraft taking off or landing at airports within the Community are to be included in the emission allowance trading scheme.[4]

In its Political Agreement of 20.12.2007, the Council of the EU also made a number of amendments to the Commission's proposal. It suggests that the start of the inclusion of greenhouse gas emissions in the EU emission allowance trading scheme be postponed until 2012, but should then begin without a trial run in which only flights within the EU are included. The start date – along with other details– will be definitively established during the course of further negotiations between the European Parliament and the Council.

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[3] European Parliament legislative resolution of 13 November 2007 on the proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (COM(2006)0818 – C6-0011/2007 – 2006/0304(COD)).

[4] Ibid, Amendments 64, 71 and 9, Recital 11.

B. Scope of the opinion

The legal opinion presented here was commissioned by the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU) for the purpose of considering the extent to which the EU's proposal to include greenhouse gas emissions from international aviation in the EU emission allowance trading scheme contravenes the obligations under international law of both the Federal Republic of Germany and the EU, what consequences could arise for the proposal from the international dispute settlement procedure, and the possible sanctions the EU could use to counter any non-compliance with emission allowance trading on the part of airlines of third countries. The study is based on the Commission's original proposal, the additions made by the European Parliament, and the amendments adopted by the EU Council in December 2007.

Thus, the subject of this opinion is first of all whether, under the conditions of the draft directives presented to date, including greenhouse gas emissions from international aviation in the EU emission allowance trading scheme is permissible under international law. This will be judged on the criteria of the relevant international agreements and the principles of international law. The consequences of a possible dispute settlement procedure, particularly before the ICAO Council, for an EU emission allowance trading scheme that includes greenhouse gas emissions from international aviation will then be explored, before in conclusion an analysis is undertaken of the EU's possible legal responses in cases of non-compliance with the compulsory emission allowance scheme.

C. The provisions of the Kyoto Protocol and the United Nations Framework Convention on Climate Change

The Framework Convention on Climate Change, which was adopted in New York in 1992 and signed by most countries at the United Nations Conference on Environment and Development (UNCED) held in Rio the same year, is the basis underpinning the obligation of any state signatory to it to reduce its output of greenhouse gas. The signatories to the Convention (currently 189) meet annually at follow-up Conferences of the Parties.

At one of these Conferences in 1997, the Kyoto Protocol was drafted. Amongst other things, it established the system of emission allowance trading and also explicitly mentioned air traffic for the first time.

This opinion will begin by examining the Kyoto Protocol, since it fleshes out the provisions of the Framework Convention on Climate Change regarding the commitment to reduce greenhouse gas emissions.

I. Assignment of responsibility to the ICAO, Article 2.2 of the Kyoto Protocol

The first question to be asked is whether the delegation of responsibility for reducing emissions from international aviation to the ICAO under Article 2.2. of the Kyoto Protocol has a blocking effect in the sense of whether it precludes unilateral action outside the ICAO.

Worthy of particular mention here is the fact that, in its Resolutions A31-11 and A35-5, the ICAO assumes it is the only organisation with the authority to act in this matter:[5]

> *"While the Kyoto Protocol recognises that ICAO is the appropriate body to address aviation emissions, it should be noted that ICAO's authority in this regard does not derive from the Kyoto Protocol, nor does the Kyoto*

[5] ICAO, Assembly Resolution A31-11 (1995); Assembly Resolution 35, 36-WP/85, no. 2.1.

Protocol limit ICAO's authority. ICAO has its own independent competence deriving from the Chicago Convention that has been interpreted to encompass the environmental aspects of aviation. ICAO has indeed established standards, recommended practices and policies related to the environmental aspects of aviation for over 25 years."

This suggests that unilateral environmental protection measures should not be undertaken if they would have a negative impact on the harmonious development of international aviation.[6] This argument was also put forward during the negotiations at the 36th Session of the Assembly in September 2007, in an attempt to take steps to counter the EU's proposal.[7]

The Kyoto Protocol rightly assigned responsibility to the ICAO, because the ICAO has a decidedly positive record of implementing environmental measures in the field of noise protection and emission of NOx.[8] By assigning responsibility to the ICAO it was hoped that this organisation's expertise and greater facility for passing resolutions, by comparison with the Climate Conference, could be taken advantage of in getting greenhouse gas emissions from international aviation included in binding international climate policies.

However, there was no intention that Article 2.2. of the Kyoto Protocol should establish the ICAO's sole authority by prohibiting any other multilateral or unilateral measures, since a ban of that kind on climate protection measures implemented or agreed elsewhere would be contrary to the aims of the Kyoto Protocol. This can also be seen in the fact that Article 7, paragraph 2 of the Framework Convention on Climate Change reserves the right to review any legal instruments adopted on the basis of this Convention, thus leaving competence for monitoring and implementation with the Conference of the Parties.

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[6] ICAO, Assembly Resolution A31-11 (1995), Appendix A, no. 5.

[7] The USA was one of the chief proponents of this argument; cf. 36th Session of the ICAO Assembly, Document A36-WP/XXX, Agenda Item 17: Environmental Protection, Aviation and Emissions – Meeting the Challenge of Aviation Growth, Working Paper presented by the United States.

[8] In the field of the environment, the ICAO has established requirements relating to aircraft noise and aircraft engine emissions. They are in Annex 16. The ICAO has also drawn up requirements and procedures for aircraft operation, particularly for take-off and landing. Furthermore, the ICAO published a policy statement on taxation of fuel and the principles of emission-related charges.

The same conclusion can be derived from Article 4, paragraph 2 (a) of the Framework Convention on Climate Change, which requires developed countries to take the lead in combating climate change at national level. Article 2.2. of the Kyoto Protocol must also be interpreted in this way, so that a multinational approach in the field of aviation is definitely seen as the objective of international action on this matter, but cannot be a criterion for whether action taken unilaterally is legitimate under international law. This is all the more true since over ten years have passed since responsibility for reducing greenhouse gas emissions from international aviation was assigned to the ICAO without any result being produced thus far. This situation is evidence of the lack of effectiveness to date of the ICAO's discharge of the responsibility assigned to it for reducing greenhouse gas emissions from international aviation. This lack of effectiveness on the part of the ICAO in discharging its responsibilities strengthens the national right to take unilateral action to protect the climate against greenhouse gas emissions from international aviation, a right that fundamentally still exists and is explicitly acknowledged in Article 4, paragraph 2 (a) of the Framework Convention on Climate Change, and gains additional weight due to the fact that the ICAO has demonstrated its inability or unwillingness to take action and therefore any opposition to unilateral or multilateral action taken elsewhere can appear to be an abuse of the law or in contradiction to its own previous conduct.

II. The provisions of the Framework Convention on Climate Change

1. The commitment to reduce the output of greenhouse gases

Article 4, paragraph 2 (a) and (b) of the Framework Convention on Climate Change places an obligation on developed countries to limit "their" emissions. However, it is not clear how international emissions should be allocated to specific countries. The Kyoto Protocol was therefore charged with fleshing out these provisions, but failed due to a lack of ability to compromise among the Parties, with the result that the responsibility for finding a compromise in the field of international civil aviation was transferred to the ICAO.

Thus, no conclusion can be drawn from the Framework Convention on Climate Change concerning the form the successor protocol that is to replace the Kyoto Protocol will take. This will have been initiated by the time the Climate Conference in Copenhagen begins in 2009 and is scheduled to be adopted there.

2. The principle of common yet differentiated responsibilities

The principle, codified in Article 4, paragraph 1 of the Framework Convention on Climate Change, of common but differentiated responsibilities in relations between developed and developing countries could possibly be an obstacle to the EU proposal's conformity with international law, in that it envisages imposing charges for emission allowances on flights by all airlines within the EU, to the EU and from the EU, and thus affects industrialized and developing countries equally.

Neither the Framework Convention on Climate Change nor the Kyoto Protocol[9] requires developing countries to reduce their fuel emissions to a specific level nor to take specific measures to do so. During the negotiations at the 36th Session of the ICAO Assembly, numerous developing countries therefore quoted this principle and denounced the EU's approach as breaching international law.[10]

However, the wording of the relevant clauses of the Framework Convention on Climate Change makes it clear that removing any kind of obligation to combat climate change on the part of developing countries was by no means the spirit of the relevant regulations. For example, Article 4, paragraph 1 of the Framework Convention on Climate Change states:

> *(1) All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:*

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[9] On this, cf. in particular the regulation in Article 2 of the Kyoto Protocol: only the Parties included in Annex I committed to limiting their output of greenhouse gases pursuant to Article 3 of the Kyoto Protocol.

[10] Cf. Report of the Executive Committee on Agenda Item 17, A36-WP/355, P/53 (27.09.2007), p. 6 ff.

a) Develop, periodically update, publish and make available to the Conference of the Parties, in accordance with Article 12, national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies to be agreed upon by the Conference of the Parties;

b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;

c) Promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors;

d) Promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems;

e) Cooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods;

f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example

impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change;

g) Promote and cooperate in scientific, technological, technical, socio-economic and other research, systematic observation and development of data archives related to the climate system and intended to further the understanding and to reduce or eliminate the remaining uncertainties regarding the causes, effects, magnitude and timing of climate change and the economic and social consequences of various response strategies;

h) Promote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies;

i) Promote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations; and

j) Communicate to the Conference of the Parties information related to implementation, in accordance with Article 12.

(2) The developed country Parties and other Parties included in Annex I commit themselves specifically as provided for in the following …

This principle thus creates a **common responsibility on the part of all countries** to reduce greenhouse gases, yet takes into account the **possibilities of individual states** for acting on that responsibility that are determined by their available finances and capacities. This means that it is primarily the developed countries that are obliged

within this responsibility to be in the forefront and take the lead in combating global environmental problems.

However, the intention was not to totally acquit the developing countries of the common responsibility, but instead that some countries should contribute more than others - on the basis of what seems proportionate in the overall context – but **that each country should contribute according to its ability**.[11] No other regulation of the matter or legal effect can be derived from the Kyoto Protocol.

It is important to bear in mind here that the European airlines will have to bear the absolute majority of costs incurred from including greenhouse gas emissions from aviation in the EU emission allowance trading scheme if Europe's industrialised countries are to assume appropriately the leading role demanded of them in the Framework Convention on Climate Change. While the airlines of EU Member States regularly frequent airports within the EU, it is more the exception for airlines from developing countries to fly to destinations in Europe.

Furthermore, it should be mentioned that the special needs of the developing countries were taken into account in the EU's draft. We are thinking here in particular of the de-minimis rule provided for in the Council decision, which grants small airlines from developing countries that rarely frequent European airports an exemption from the obligation to acquire emission allowances.

Thus, on 20 December 2007, a de-minimis clause was adopted by the Council, exempting aircraft operators carrying out fewer than 243 flights in three consecutive four-month periods from inclusion in the emission allowance trading scheme.

In fact, it is small airlines from developing countries that are covered by this arrangement and have de facto exemption from the obligation to acquire emission allowances. This was the explicit aim in adopting this regulation.[12]

In the case of aircraft operators from developing countries that have a higher volume of flights to Europe and are therefore not exempt from compulsory participation in

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[11] Cf. also Stone, Common but Differentiated Responsibilities in International Law, American Journal of International Law 2004, pp. 276, 280.

[12] It was also the intention of the Community legislator, cf. Press Release from the European Commission: Environment: Commission welcomes Council agreement on aviation, regrets failure on soil, Brussels, 20 December 2007.

the emission allowances trading scheme, it can be assumed that they have greater economic capacity than the exempt airlines so that including them in the emission allowance trading scheme is permissible on the principle of common but differentiated responsibilities and is also proportionate. Ultimately, it is only the aircraft operators and not the country of origin as such that will be obliged to acquire emission allowances. Thus, the EU's proposal does adequately take into account the principle of common but differentiated responsibilities.

A further systematic argument in favour of the permissibility of including aircraft operators from developing countries arises from the assignment of responsibility to the ICAO: from this it can be concluded that there was an intentional inclusion of developing countries in the responsibility to reduce emissions in the aviation sector.[13] Ultimately, this increases the probability of developing countries being obliged to take corrective action as a result of legal instruments adopted by the ICAO.[14]

Taking into account the fact that European airlines will shoulder the major share of the costs, the de-minimis clause designed to protect airlines from developing countries that have only a low volume of flights to EU airports, and the presumably intended inclusion of developing countries in a system to reduce greenhouse gas emissions from aircraft that can be concluded from the assignment of responsibility to the ICAO, the EU's proposal is not inconsistent with the reduced responsibility of the developing countries as set out in the Framework Convention on Climate Change and the Kyoto Protocol.

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[13] Similarly Miller, Civil Aircraft Emissions and International Treaty Law, Journal of Air Law and Commerce (1998), pp. 697, 728.

[14] Here it must be pointed out that the ICAO continually sets standards (particularly with regard to safety but also in environmental matters, see below) that developing countries also have to comply with to avoid jeopardising their (operating) rights.

D. ICAO provisions

I. Provisions established by the Chicago Convention

The Convention on International Civil Aviation (hereafter: Chicago Convention) was concluded in Chicago on 7 December 1944. It is a multilateral treaty anchored in international law, Part I of which contains general provisions on the rights and obligations of the countries with regard to international civil aviation and Part II of which constitutes the International Civil Aviation Organisation with headquarters in Montreal.[15]

For this legal opinion, the provisions of Articles 15 and 24 of the Chicago Convention relating to charges and taxes are of relevance, since, irrespective of its environmental objective, an emission allowance trading system is in legal terms primarily an incentive levy *sui generis*. The general discrimination prohibition in Article 11 of the Chicago Convention and the ICAO's authority to regulate environmental and technical matters are also relevant here.

1. Article 15 of the Chicago Convention

Article 15 III 2 of the Chicago Convention states:

> *"No fees, dues or other charges shall be imposed by any Contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a Contracting State or persons or property thereon."*[16]

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[15] Weber in Bernhardt, EPIL, "Chicago Convention;" Ipsen, Völkerrecht, Section 55, for example, gives a brief overview of the genesis and content of the Chicago Convention.

[16] Only the English, French, Spanish and Russian versions of the Convention are authoritative. Cf. the final clause of the Chicago Convention and the Protocol on the binding force of the Russian language version of 30 September 1977. The French version says: "Aucun État contractant ne doit imposer de droits, taxes ou autres redevances uniquement pour le droit de transit, d'entrée ou de sortie de son territoire de tout aéronef d'un État contractant, ou de personnes ou biens se trouvant à bord." The German, which is not however authoritative, is: " Die Mitgliedstaaten erheben keine Gebühren, Taxen oder sonstigen Abgaben für ihr Hoheitsgebiet lediglich für das Recht der Durchreise, Einreise oder Ausreise eines Luftfahrzeuges eines Vertragsstaates oder der an Bord befindlichen Personen oder Güter."

Thus, two questions are relevant to the inclusion of aviation in the emission allowance trading scheme:

1. Can the obligation to surrender emission allowances (and particularly to purchase additional emission allowances if the number allocated is not sufficient) be classed as a charge as defined in Article 15 of the Chicago Convention; if the conclusion is drawn that it is a charge or fee in this sense, then
2. It is questionable whether it will be imposed solely for the right to transit, enter or exit a country.

a) Emission allowance trading as a charge as defined in Article 15 of the Chicago Convention

First of all it is questionable whether emission allowance trading can be classed as a charge[17] as defined in Article 15 of the Chicago Convention or whether emission allowance trading fundamentally differs from a charge in that sense by virtue of its purpose and character.

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[17] In the German financial system the generic term **charges** means all monetary obligations imposed under public law that are intended to give financial power to a public body. Charges must be distinguished from monetary obligations such as fines and penalties etc. that do not serve the purpose of providing revenue for the state. Within the term charges a distinction is made between taxes, fees, contributions and special charges. The distinction is relevant because different conditions apply to the permissibility of the different types of charge. The decisive factor for classifying a monetary obligation in one of the individual categories of charge is not its designation but the substantive content alone.

The main difference between **taxes** and other types of charge is that they are imposed by a public body purely for the purpose of generating revenue; taxes, as defined in the Basic Law and detailed in Section 3 I of the Tax Code, are monetary payments that are not made in remuneration of a particular service and are levied by a public body to generate revenue and to which everyone to whom the liability specified by the law relates is subject; the generation of revenue may be a secondary purpose; on the definition of taxes cf. Henneke, Finanzwesen, Mn. 292 ff. By contrast, **fees** are levied in connection with a public service and can be separately allocated to cover the costs of that service. **Contributions** are closely related to fees; however, unlike fees, they are not based on the actual use of a particular service but merely the possibility of using it. Finally, **special charges** are imposed on a homogenous group for a particular purpose and there must be a substantive connection between the group upon whom they are imposed and the purpose pursued. For more details on this see Henneke, Finanzwesen, Section 9.

First of all, the possible purchase of emission allowances on the open market or at an auction organised by the Member States is not directly linked with the use of airports or their facilities, but with the output of emissions.[18] A fee as defined by Article 15 of the Chicago Convention is connected with the use of such facilities; this ensues from the standard on international air traffic issued by the ICAO Council:

> *"Charges are levies to defray the costs of providing facilities and services for civil aviation while taxes are levies to raise general national and local governments' revenues that are applied for non-aviation purposes."*

Since the revenue from sales of emission allowances is not intended to cover the costs of providing facilities and services (and cannot therefore be classed as fees as defined under Article 15 of the Chicago Convention), the charges could conceivably be classed as taxes, although that is doubtful in view of the character of the emission allowance trading scheme. If we take the use of the revenue as the basis for a decision, a certain similarity with tax can ultimately not be denied. The Council decision determines the use of the income as follows:

> *It shall be for Member States to determine the use to be made of revenues generated from the auctioning of allowances. Those revenues should be used to tackle climate change in the EU and third countries and to cover the costs of the administering Member State in relation to this Directive.*

However, for the legal interpretation and classification in the proposed regulations it should be taken into account that including greenhouse gas emissions from international aviation in the EU emission allowance trading scheme is not primarily designed to generate revenue for the state or any other institutions but is intended to reduce emissions from air traffic and protect the climate. The regulations are intended to create market incentives to encourage airlines to reduce the greenhouse gas emissions from their aircraft and, because of the use of the emission allowance

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[18] Schwarze, Including Aviation into the European Union's Emissions Trading Scheme, European Environmental Law Review (2007), pp. 10, 13.

trading scheme as a market instrument, regulations are also needed to govern the use of the revenue generated by the use of this instrument; these regulations do not, however, dictate the actual objective of the Community legislation.

The ICAO environment committee has recognised the independent status and legal character of an emission allowance trading system by distinguishing between environmental charges and emission allowance trading.[19] The ICAO's environment committee also sees emission allowance trading as primarily an administrative system, which obliges airlines to register and report their CO_2 emissions and gives them the option of either remaining within the limit of emission allowances allocated or exceeding it and buying additional allowances. This interpretation and classification also makes classing emission allowance trading as a tax fundamentally implausible.

Thus, the proposed inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme **is not taxation** and cannot be inadmissible as a tax under Article 15 of the Chicago Convention. In addition, however, we shall clarify whether taxes fall under the scope of Article15 of the Chicago Convention and whether they are impermissible under this provision.

To do that it is necessary to interpret this Article. In interpreting international treaties the Vienna Convention on the Law of Treaties of 1969 (Vienna Convention)[20] must be used, which although it entered into force after the Chicago Convention, is nevertheless also valid as codified international customary law for older international agreements.[21] Article 31, paragraph 1 of the Vienna Convention states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and

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[19] EU Background Note, Arguments on aviation ETS to be used towards developing countries.

[20] Vienna Convention on the Law of Treaties of 23 May 1969 (Federal Law Gazette (BGBl.) 1985 II p. 926).

[21] Although, pursuant to its Article 4, the Vienna Convention does not apply to treaties that already existed when it (the Vienna Convention) entered into force in 1980, the Convention nevertheless essentially conforms with the rules of international customary law referring to the interpretation of older treaties, so that it can also be applied by analogy to such treaties. Cf. Dahm/Delbrück/Wolfrum, Völkerrecht, p. 514.

purpose. To do this different indicators are relevant. Below we shall make an interpretation on the basis of the wording, including that of the preamble and annexes, as well as any agreements on the interpretation of the treaty that were made between all the parties at the time the treaty was concluded (Article 31, paragraph 2 of the Vienna Convention), subsequent state practice (Article 31, paragraph 3 of the Vienna Convention) and the authentic language versions of the Chicago Convention (Article 33 of the Vienna Convention).

i. Wording

If we therefore look at the wording of Article 15 of the Chicago Convention in isolation, no unequivocal answer will be found to the question of whether the provision covers only fees or also taxes as defined under German tax law.

Legal dictionaries as a rule base their definition of the term "fee" on the connection to a service provided in return or correspondingly suggest the German term "Gebühr" as a translation, but there is no similarly clear picture in the case of "dues" and "charges." While "due" generally means some kind of debt, the word "charges" usually suggests a state charge connected with a service provided in return, in other words what German law calls a fee, although it can also be interpreted as broadly as the German concept of "Abgaben" (which corresponds to "levies"). Thus, it cannot be concluded from the ordinary meaning of the terms used that Article 15 of the Chicago Convention is generally not applicable to taxes.

Consequently, in accordance with the interpretation rules outlined above, the context of the provision in question must be taken into account, which, according to Article 31, paragraph 2 of the Vienna Convention, covers in addition to the text, including its preamble and annexes, any agreement relating to the interpretation of the treaty that was made between all the parties at the time the treaty was concluded.

If we initially refer to the heading of Article 15 of the Chicago Convention ("Airport and similar charges"), it would follow that the intention of this Article is obviously to regulate only those charges that are systematically and structurally comparable to airport fees.[22] However, the very thing that characterises airport fees is that they are

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[22] Loibl/Reiterer, Rahmenbedingungen, p. 42.

connected to a service provided in return, namely permission to use certain facilities. The basically very broad term "charges" is considerably restricted by the addition of the attribute "similar."

Article 15, paragraph 1 of the Chicago Convention regulates in the first place the right of access to airports and other air transport facilities; paragraph 2 and paragraph 3, 1st sentence contain provisions for levying "charges" *for the use* of that kind of facility. With the exception of paragraph 3, 2nd sentence, the whole of Article 15 refers, as its heading suggests, solely to charges which the German financial system would classify as fees.

ii. Subsequent agreements

Article 31, paragraph 3 of the Vienna Convention stipulates that any subsequent agreement between the parties regarding the interpretation of a treaty shall be taken into account in the same way as the context; the same applies to any subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation. A particularly pertinent example of that kind of practice would be the establishment of an international organisation on the basis of a treaty.[23]

The organs of the ICAO distinguish between "charges" and "taxes" in numerous documents."[24] This distinction is made particularly clear in the 5th recital of the "Council Resolution on Environmental Charges and Taxes" of 9 December 1996:

> *"Noting that ICAO policies make a distinction between a charge and a tax, in that they regard charges as levies to defray the costs of providing facilities and services for civil aviation, whereas taxes are levies to raise general national and local governmental revenues that are applied for non-aviation purposes;"*

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[23] Bernhardt idem, EPIL, "Interpretation in international law," p. 1421; Loibl/Reiterer, Rahmenbedingungen, p. 42.

[24] Cf. the detailed evaluation of numerous past ICAO documents in Loibl/Reiterer, Rahmenbedingungen, p. 43 ff. The authors make a convincing case for the fact that "charges" in the relevant ICAO documents dating from 1949 imply a connection with a service provided in return.

Under the generic term "levies" which is comparable with the German term "Abgaben" [translated above as "charges"], this resolution thus distinguishes between "charges," which are intended to cover the costs of providing certain facilities, and "taxes," which are intended to cover the general financial needs of a public body.

In 2001, the ICAO Assembly, in which all members of the organisation are represented and have equal rights, made explicit reference to the distinction made in this resolution in two new resolutions: both the 9th recital of Resolution A/33-7 Appendix I and the 1st recital of Resolution A/33-19 App. E refer to the distinction between "charges" and "taxes" contained in the Council Resolution of 1996, with Resolution A/33-19 speaking explicitly of a "conceptual distinction." A number of points of Resolution A/33-7 were amended by the last ICAO plenary in October/November 2004, although the reference mentioned was not affected by this; thus it can be assumed that the distinction between "charges" and "taxes" reflects current opinion in the ICAO.[25] As a rule, the Assembly's resolutions are passed by consensus so that it may be concluded from these texts that there is agreement between the Contracting States.[26]

Thus, in summary it can be established that there is a consensus of ICAO members that the term "charges" applies only when there is connection with a service provided in return[27] and corresponds to what the German system classifies as fees, whereas "taxes" are levied to cover general financing needs, so that this term corresponds to what German tax law also classifies as taxes.

Article 31, paragraph 3 (b) of the Vienna Convention says that this consensus between the Contracting States must be referred to when interpreting the word "charges" in Article 15 of the Chicago Convention, so that, in agreement with the results of the systematic interpretation of the provision, it can be assumed that Article 15 of the Chicago Convention refers solely to charges connected with a service

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[25] The third recital of the Council Resolution on Taxation of International Air Transport (Section I of ICAO Doc. 8632), i.e. a more recent document adopted by the Council, also contains a distinction corresponding to that made in the "Council Resolution on Environmental Charges and Taxes" of 1996.

[26] Loibl/Reiterer, Rahmenbedingungen, p. 45.

[27] Also the opinion of Loibl/Reiterer, Rahmenbedingungen, p. 45 f.

provided in return, i.e. the use of facilities or flyover rights and thus does not preclude the inclusion of aviation in the emission allowance trading, since the costs that airlines will incur are not equivalent to charges and fees as defined under Article 15 of the Chicago Convention.[28]

iii. Subsequent state practice

Similarly, state practice since the Chicago Convention came into force speaks equally clearly against Article 15 of the Chicago Convention constituting a prohibition on levying taxes. It is noteworthy in this context that not only have some countries imposed taxes connected to a number of different things (Australia, Barbados, Hong Kong, Ecuador, India, Pakistan, Peru, Austria, Ireland and Norway, for example), but that this was at no time considered to be unlawful. On the contrary, the states party believed it to be permissible to levy as many taxes as they saw fit.[29]

This *opinio juris* is backed by the ICAO's policies on taxation in the field of international air transport, [30] which states that the Chicago Convention of 1944 did not attempt to deal comprehensively with tax matters. Similarly, the ICAO Standard on taxation of international air transport adopted by the ICAO's Council does not prohibit taxes. It requires only that countries refrain as far as possible from imposing taxes. However, should states nevertheless levy taxes they must inform the ICAO, which passes the information on to other states.

It is also worthy of mention here that individual airports have already levied charges. For example, Zurich Airport has introduced an emission supplement to its landing fee, which is based on the emission of pollutants by the aircraft used (the information on which this is based is provided by the ICAO's Engine Exhaust Data Bank). The

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[28] That is also the conclusion of Loibl/Reiterer, Rahmenbedingungen, p. 46; TÜV Rheinland et al., Maßnahmen, p. 113. The ICAO Council also comes to the same conclusion. In Doc. 8632 (ICAO's policies on taxation in the field of International Air transport, 3rd edition 2000, Introduction, para. 2) it formulates its conclusion as follows: "The Chicago Convention … did not attempt to deal comprehensively with tax matters. The Convention simply provides (cf. Article 24 (a)) that fuel and lubricating oils...shall be exempt from customs...." Thus, TÜV Rheinland et al., Maßnahmen, p. 113, which assumes that the ICAO has a different interpretation practice for Article 15, is not relevant. The passage cited as substantiation from the second edition of Doc. 8632 refers firstly to different wording (namely "customs and other duties") and secondly exclusively to this particular document; it is therefore completely inappropriate for an interpretation of Article 15.

[29] Cf. on this the Judgement in Federation of Tour Operators, [2007] EWHC 2062.

[30] ICAO's Policies on Taxation on the Field of International Air Transport, 3rd edition (2000), Doc. 8632.

charge is intended to create an incentive for airlines to deploy the aircraft with the lowest emission rates for flights to Zurich and to drive forward progress in the field of environmentally relevant technology. The revenue gained was used to mitigate emissions at the airport itself.

A similar charge related to emission of pollutants has been levied by ten Swedish airports since 1998. The consensus view is that none of these charges contravene ICAO principles.

Finally, in the Federation of Tour Operators Judgement, the Court cites the response of the community of states to the French proposal[31] to levy a tax on air travel to be used for the benefit of sustainable development in developing countries. This tax – to be used for environmental protection and to promote sustainable development, as the revenue from the emission allowance trading probably would be – has the backing of 79 countries. It must be assumed that the countries that support this kind of tax are working on an assumption of its legality and in doing so are not ignoring the Chicago Convention.

iv. A comparison of the authentic language versions

Alongside the English text that does not explicitly use the word tax, there are three other authentic language versions in French, Spanish and Russian. The French version speaks of "droits, taxes ou autres redevances"; the Spanish "derechos, impuestos u otros grávemenes." Of greatest interest here is the use of the French word "taxe," which is closely related to the English "tax." This makes it questionable whether in the French version taxes are covered by Article 15 of the Chicago Convention.

In the Judgement of the England and Wales High Court the French language version was reviewed in this light and the conclusion reached that in the strict sense the French word "taxe" is a compulsory levy of the same character as a tax, but is used solely to finance a particular service and is only payable by anyone making use of that service. If "tax" in the English sense had been meant, the French word "impôt" would have had to be used.

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[31] This has now also been adopted by the Commission, cf. Financing Development: Commission report shows options for airline ticket contribution, IP/05/1082.

b) Summary

Article 15 of the Chicago Convention covers only charges that are not imposed in return for a specific service. Only certain charges that are specifically linked to a service are impermissible under Article 15 of the Chicago Convention and may not be levied by Contracting States to the Chicago Convention. Article 15 of the Chicago Convention does not preclude charges other than those mentioned and thus does not preclude taxes related to air transport.

The EU emission allowance trading scheme and the compulsory payments resulting from the obligation to acquire emission allowances do not constitute regulations on fees or other charges as defined under Article 15 of the Chicago Convention. Even if the EU emission allowance trading scheme and the inclusion in it of greenhouse gas emissions from international aviation did constitute a tax as defined under German tax law and were classed as tax under the distinctions made by the ICAO and the Chicago Convention – which as has already been described is not the case - it would not be correct to subsume the establishment of an emission allowance trading scheme for emissions from air transport under the types of charge covered by Article 15 of the Chicago Convention and thus the scheme would not be impermissible under this stipulation of the Chicago Convention.[32]

c) Article 15 of the Chicago Convention as a pure non-discrimination provision

As an alternative, we shall examine whether Article 15 of the Chicago Convention would be relevant if the emission allowance trading scheme were classed as an "other charge" as defined by this Article.

Here the question arises as to whether the compulsory surrender of emission allowances contravenes the ban on so-called "gatekeeper charges." All the language versions of the Chicago Convention prohibit charges and fees if they are levied "solely" for the right of transit over or entry into or exit from a country. Thus,

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[32] Also the opinion of Schwarze, Including Aviation into the European Union's Emissions Trading Scheme, European Environmental Law Review (2007), pp. 10, 13; Balfour (Clyde & Co, Beaumont & Son), Gutachten für Peter Liese (19.11.2007), Mn. 15; cf. also the EU's argumentation in its Background Note, Arguments on aviation ETS to be used towards developing countries. For the opposing view, see: Klement, Kollisionen von Sekundärrecht der Europäischen Gemeinschaft und Völkerrecht, Eine Studie am Beispiel der geplanten Emissionszertifikatehandelsrichtline für den Luftverkehr, DVBl. (2007), pp. 1007, 1008.

"solely" could be read as "exclusively," which would make Article 15 of the Chicago Convention a pure non-discrimination provision (meaning that domestic flights that do not cross a country's borders must be accorded the same treatment as international flights).[33]

Thus, what is being regulated here are the minimum requirements for purposes that may be pursued with a charge. However, that kind of minimum requirement obviously makes no sense in the case of charges with which either no particular purpose is being pursued or the purpose is not connected with levying a charge for entry or exit. Since the intention is that the income generated from emission allowance trading is to be used principally for environmental matters and the purpose of emission allowance trading must be seen as being exclusively to reduce greenhouse gases, Article 15 of the Chicago Convention cannot stipulate a prohibition here.

This kind of reading is also supported by the supplementary means of interpretation including the preparatory work of the treaty defined in Article 32 of the Vienna Convention. The version of the Chicago Convention originally drafted by the U.S.A. included a prohibition on levying of landing charges, fees and the like.[34] Canada drafted a similar provision: "just and reasonable charges for the use of the airports and other facilities on its territory, which shall not be higher than would be paid by a national aircraft engaged in comparable international services."[35]

An antidiscrimination stipulation was also upheld in the second interim report and nothing has changed in this respect to this day, since no desire to change this wording has ever been expressed, nor is it evident in the text of the convention. In fact, the contrary is true.

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[33] EU Background Note, Arguments on aviation ETS to be used towards developing countries; Schwarze, Including Aviation into the European Union's Emissions Trading Scheme, European Environmental Law Review (2007), pp. 10, 13; Balfour (Clyde & Co, Beaumont & Son), Report for Peter Liese (19.11.2007), Mn. 15; Judgement in Federation of Tour Operators, [2007] EWHC 2062.

[34] Article 22 of the USA's draft.

[35] Article II Section 2 of Canada's draft: "*just and reasonable charges for the use of the airports and other facilities on its territory, which shall not be higher than would be paid by a national aircraft engaged in comparable international services."* Cf. also the transitional regulation between Canada and the United States valid until the Chicago Convention entered into force, draft Canadian-American agreement on "Air transport services" UNTS 1952, p. 262: No. 409. Exchange of notes constituting an agreement between the United States of America and Canada relating to air transport services, Washington, 17.02.1945, Article IV (a).

Thus, Article 15 of the Chicago Convention is basically an antidiscrimination provision (or most favoured State provision), intended to prevent a country from giving preferential treatment to its national airlines or domestic flights when levying fees.

A charge payable on landing or take-off, irrespective of the starting point or destination (in other words also covering domestic flights), does not discriminate against foreign airlines and thus is in accordance with Article 15 of the Chicago Convention. The wording of Article 15 of the Chicago Convention prohibits only such charges as are levied solely for the right to transit, enter or exit.

Charges for acquiring emission allowances are not, however, levied for the purpose of granting transit rights, but to limit greenhouse gas emissions from air transport. The principal use intended for the revenue - to finance environmental protection measures and cover the general costs of administering the emission allowance trading scheme - is in no way connected with transit rights, but with environmental and climate protection, so that, in that light too, Article 15 of the Chicago Convention does not apply.[36]

d) Conclusion on Article 15 of the Chicago Convention

Article 15 of the Chicago Convention does not preclude including greenhouse gas emissions from international aviation in the EU emission allowance trading scheme.

The inclusion of greenhouse gas emissions in the EU emission allowance trading scheme cannot be classed as the introduction of a fee, tax or other charge levied solely for the right to enter, transit or exit, as defined in Article 15 of the Chicago Convention. It is not worded in a discriminatory way, so that Article 15 of the Chicago Convention does not give rise to any obstacles to including greenhouse gas emissions from international aviation in the EU emission allowance trading scheme.

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[36] Cf. also Lienemeyer, EuR 1998, pp. 478/484; similarly Loibl/Reiterer, Rahmenbedingungen, p. 49; TÜV Rheinland et al., Maßnahmen, p. 113.

2. Article 24 of the Chicago Convention

The heading of Article 24 of the Chicago Convention is "Customs duty." The first two sentences of the first paragraph are of particular interest for this opinion:

> *"Aircraft on a flight to, from, or across the territory of another Contracting State shall be admitted temporarily free of duty, subject to the customs regulation of the State. Fuel, lubricating oil, spare parts, regular equipment and aircraft stores on board an aircraft of a Contracting State, on arrival in the territory of another Contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges."*[37]

The prohibition on levying customs duties in Article 24 of the Chicago Convention is confined to:

> *"Fuel, lubricating oil, spare parts, regular equipment and aircraft stores on board an aircraft of a Contracting State, on arrival in the territory of another Contracting State and retained on board on leaving the territory of that State."*

Thus, the question arises as to whether a charge based on output of emissions can under any circumstances be covered by Article 24 of the Chicago Convention.

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[37] Cf. also the French version: "Au cours d'un vol à destination ou en provenance du territoire d'un autre État contractant ou transitant par ce territoire, tout aéronefs est temporairement admis en franchise de droits, sous réserve des règlements douaniers de cet État. Le carburant, les huiles lubrifiantes, le pièces de rechange, l'équipement habituel et les provisions de bord se trouvant dans un aéronef d'un État contractant à son arrivée sur le territoire d'un autre État contractant et s'y trouvant encore lors de son départ de ce territoire, sont exempts des droits de douane, frais de visite ou autres droits et redevances similaires imposés par l'État ou les autorités locales." The German is: "Luftfahrzeuge auf einem Flug nach, von oder über dem Hoheitsgebiet eines anderen Vertragsstaats sind vorbehaltlich der Zollvorschriften dieses Staates vorübergehend zollfrei zu lassen. Treibstoffe, Schmieröle, Ersatzteile, übliche Ausrüstungsgegenstände und Bordvorräte, die sich bei Ankunft in dem Hoheitsgebiet eines anderen Vertragsstaates an Bord eines Luftfahrzeuges eines Vertragsstaates befinden und beim Verlassen des Hoheitsgebietes des anderen Staates an Bord geblieben sind, sind von Zollabgaben, Untersuchungsgebühren oder ähnlichen staatlichen oder örtlichen Abgaben und Gebühren befreit."

According to an ECJ ruling this is not completely out of the question: the volume of greenhouse gases emitted is directly proportionate to fuel consumption, so that imposing a charge on emissions is equivalent to imposing a charge on fuel consumption.[38] This could make it possible to establish a direct link to the fuel itself, which, if it was already on board the aircraft, comes under the prohibition on levying customs duty under Article 24 of the Chicago Convention.

This view is not, however, justified. First, Article 24 of the Chicago Convention is an exemption clause that restricts the levying of customs duties otherwise fundamentally allowed internationally. This means it must be interpreted in a narrow sense. Thus, emissions cannot be equated with fuel in line with the above argumentation.

This is all the more true in that Article 24 additionally requires the fuel to be on board the aircraft on arrival in the territory of another Contracting State and to be retained **on board** on leaving the territory of that State. However, emissions do not occur on board and can only be quantified outside the aircraft. They also occur continuously and cannot constitute a point of reference linking to Article 24 of the Chicago Convention. This means that the comparison between fuel and emissions cannot be upheld: the effect, by contrast with a customs duty as prohibited under Article 24 of the Chicago Convention, would be fundamentally different, since the charge does not apply to the fuel that is on board the aircraft when it crosses the border, but to the fuel that is consumed during the flight.

Furthermore, in emission allowance trading the fact that the fuel crosses a border is of no relevance; what is significant is the consumption of this fuel, since charges are also payable even if no borders are crossed.

The situation here also differs in a number of fundamental ways from Judgement C-346/97 of the ECJ cited above. There the court decided that a Swedish charge on emissions violated European law in the form of Directive 92/81/EC. However, in that case the charges in question were principally used to generate state income and not, as is the case with emission allowance trading, primarily to reduce greenhouse gas emissions from air transport, a secondary consideration being generation of revenue

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[38] ECJ, Judgement C-346/97, (Braathens Sverige/Riksskatteverket), European Court reports 1999, I-3419.

which the Community legislator envisages being used principally for environmental protection and to cover the costs of administering the emission allowance trading scheme.[39] The case also had a bearing on levying indirect taxes, which must be stringently distinguished from customs duties under international law. Directive 92/12/EC, which was of relevance in the case before the ECJ, deals with excise duty and other indirect taxes levied directly or indirectly on the consumption of goods. By contrast, Article 24 of the Chicago Convention has no bearing on charges that apply only indirectly to fuel consumption.

Finally, it should be noted that the burden of proof within the EU is not the same as under the Chicago Convention. In the EU, Member States must prove that their tax codes conform to European law.[40] In contrast, fulfilment of the criteria described under Article 24 of the Chicago Convention must be presented by opponents to a measure. This cannot be successful due to the circumstance cited above.

In conclusion, Article 24 of the Chicago Convention similarly does not preclude including greenhouse gas emissions from international aviation in the EU emission allowance trading scheme. This results primarily from the fact that Article 24 of the Chicago Convention prohibits the levying of customs duties or similar charges for certain substances retained on board an aircraft, whereas the inclusion of greenhouse gas emissions in the emission allowance trading scheme cannot be classed as a customs duty or similar charge.[41] This results from the fact that the charges levied in the emission allowance trading scheme are not related to the crossing of a customs border, but to consumption of fuel or the emission of greenhouse gases as such. By contrast, a customs duty is interpreted as being a charge, incurred when goods are physically brought across a customs border.

In the case of including greenhouse gas emissions from air transport in the EU emission allowance trading scheme, the obligation to pay a charge arises irrespective

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[39] European Parliament legislative resolution of 13 November 2007 on the proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (COM(2006)0818 – C6-0011/2007 – 2006/0304(COD)), Amendment 76; Article 1 (3) Article 3 c paragraph 4 (Directive 2003/87/EC).

[40] Opinions of Advocate General Fennelly, ECJ, Case C-346/97 (Braathens Sverige/Riksskatteverket), European Court reports 1999, p. I-03419, Mn. 23.

[41] Schwarze, Including Aviation into the European Union's Emissions Trading Scheme, European Environmental Law Review (2007), pp. 10, 14.

of whether customs borders are crossed. It arises in the case of entirely domestic flights where no border is crossed, in the case of international flights sometimes before a border is crossed and within the EU without flying over a customs border.

Since, therefore, the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme does not represent the introduction of a charge similar to customs duty or other charge as defined in Article 24 of the Chicago Convention, Article 24 of the Chicago Convention does not preclude such an action.

3. Article 11 of the Chicago Convention

Article 11 of the Chicago Convention states:

> *Subject to the provisions of this Convention, the laws and regulations of a Contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all Contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.*

The wording of Article 11 of the Chicago Convention characterises it as a provision concerned solely with non-discrimination. It establishes a prohibition on discrimination on grounds of nationality, prohibiting differing regulations based on nationality in the areas concerned.

Correspondingly, this Article means that any kind of obligation may be imposed on air transport operators provided they apply to all air transport operators equally. Since the EU's proposal basically incorporates into the emission allowance trading scheme all flights within the EU, as well as flights into and out of the EU, making no distinction between them, there can be no discrimination. Similarly, the procedure for allocating allowances is not discriminatory. It is particularly noteworthy that the de-minimis clause already mentioned in connection with the principle of common but differentiated responsibilities, which grants exemption to aircraft operators offering fewer than 243 flights in a three consecutive four-month periods, does not

constitute discrimination on grounds of nationality. This regulation makes no direct link to nationality and negative consequences will *de facto* not primarily affect foreign airlines but aircraft operators in EU Member States. In view of this, we shall briefly look, as is appropriate, at the problem of discrimination against a country's own national airlines.

The issue of a country discriminating against its own nationals in this way must also be mentioned since the Commission's original proposal envisaged that from 2011 to 2012 only European airlines would be included in the emission allowance trading, in order to launch a test phase.

The idea was to include in the Community scheme emissions from flights between airports within the Community from 2011. From 2012, emissions from all aircraft taking off or landing at airports within the Community would be included. The Community scheme would thus be a model that could be used to roll out the system on a worldwide scale.[42]

The question arose as to the legal interpretation of "countries discriminating against their own nationals" or "reverse discrimination" in the light of the Chicago Convention. If we look only at the wording, the stipulation of Article 11 of the Chicago Convention would appear to be violated, since the regulation is not being applied without distinction to all aircraft from Contracting States to the Chicago Convention.

However, a country discriminating against its own nationals should not lead to an application of Article 11 of the Chicago Convention. The purpose of this Article is to ensure non-discrimination of aircraft and airlines from foreign countries; it is not the intention of the Article to prohibit measures that place a country's own air transport operators at a disadvantage. This results from the fact alone that taxes for air transport operators differ from country to country.

Furthermore, a country discriminating against its own nationals has no consequence in European law, since in certain cases foreign nationals from other EC countries receive better treatment than citizens of a particular country as a result of the fundamental freedoms. This is particularly the case since a country discriminating

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[42] 11th recital of the Commission's original proposal for a Directive.

against its own nationals and the interpretation of that situation under the law are matters for national constitutional law.[43]

The problem of countries discriminating against their own nationals posed by the Commissions´s proposed Directive also seems to be eliminated in that the amendments proposed by the European Parliament and those proposed by the Council provide for emissions from all aircraft taking off or landing at airports within the Community to be included in the scheme.

However, a further aspect of possible discrimination could be seen in the fact that certain outlying regions even in Europe, namely those that under Article 299, paragraph 2 of the TEC are to be exempt from surrendering emission allowances. The exemption incorporated by the Council into Annex I (h) states:

"Flights performed in the framework of public service obligations imposed in accordance with Regulation (EEC) No 2408/92 on routes within outermost regions as specified in Article 299(2) of the Treaty or on routes where the capacity offered does not exceed 30 000 seats per year."

However, this does not represent discrimination in that it applies only to routes within outermost regions, flights within other remote regions of the world are also not obliged to acquire emission allowances and pay the proceeds to the EU. If there is a discrimination against EU Member States here it is justified by the remote location of the regions concerned and furthermore was consented to by the EU Member States.

Thus, there is no breach of Article 11 of the Chicago Convention, neither in the Commission's original proposal nor in the versions of the Parliament or Council.

4. Environmental and technical provisions of the Chicago Convention

The impermissibility of including greenhouse gas emissions from international aviation in the EU emission allowance trading scheme could also result directly from the Chicago Convention, if the Chicago Convention contained a prohibition on Contracting States establishing environmental regulations or requirements for

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[43] Streinz, Europarecht, Mn. 685.

international air transport and if the proposed provisions relating to the EU emission allowance trading scheme could be classed as environmental regulations. The same would be true if they could be classed as technical regulations for aircraft or operating regulations and if the Chicago Convention included a prohibition on that kind of regulation at national level.

However, the Chicago Convention does not contain any prohibition on environmental protection regulations at national level nor stipulations containing environmental requirements applicable to international air transport. On the contrary, individual provisions of the Chicago Convention explicitly allow for the possibility and permissibility of national regulations designed to protect the environment.

Similarly, no general prohibition on technical requirements for aircraft or air transport follows from the Chicago Convention. However, here attention must be paid to any secondary legislation passed by the ICAO, assuming that binding secondary legislation has been passed.

However, the EU's proposed regulations concerning the inclusion of greenhouse gas emissions from international aviation in its emission allowance trading scheme are not technical provisions relating to international air transport that impose technical requirements on the aircraft or the manner in which it is operated; they constitute a obligation on airlines to acquire emission allowances based on their greenhouse gas emissions. The proposed regulations in no way create a legal obligation to implement technical measures. For this reason alone, the provisions of the Chicago Convention or the ICAO relating to technical requirements for air transport do not preclude the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme.

Furthermore, it must be noted that based on the ICAO's existing authority to issue secondary legislation relating to environmental or technical matters – insofar as such authority exists – no secondary legislation on emission allowance trading has been passed that would preclude the EU's proposal.

Thus, in the light of its environmental objective, the planned inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme is consistent with all the provisions of the Chicago Convention. Similarly, the Chicago Convention's existing provisions on technical requirements of

international air traffic are not contrary to the proposal nor is there any reason for opposition based on the Chicago Convention within the context of the ICAO.

5. Bilateral agreements

The question of whether including international aviation in the EU emission allowance trading scheme is consistent with bilateral aviation agreements concluded by the Federal Republic of Germany or the EU must also be examined.

a) The general significance of bilateral aviation agreements

Bilateral agreements concluded between the individual aviation countries flesh out international aviation law within the framework set by the Chicago Convention.[44] There are currently approximately 3000 bilateral agreements worldwide, the majority of which are concerned with taxation and levying of charges on fuel for international air traffic, one of the purposes of these regulations being to rule out any form of taxation. The EU and its Member States have also concluded agreements of this kind; Germany has concluded approximately 140 such agreements.[45]

The bilateral aviation agreements are based on various model agreements, in particular the Bermuda I Agreement of 11 February 1946 concluded between the USA and Great Britain and the follow-up agreement concluded between the same two parties on 3 July 1977 and known as the Bermuda II Agreement. Individual countries have developed their own model agreements on the basis of these prototypes.[46]

The central component of all aviation agreements is the reciprocal granting of traffic rights for air routes in and between the Contracting States. Many individual regulations are agreed to facilitate the operation of air services between the contracting partners. They range from the naming of airlines authorised to exercise

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[44] Basic information on bilateral aviation agreements can be found, for example, in Ipsen, Völkerrecht, Section 55 Mn. 41 ff.; Weber in Bernhardt, EPIL, Air transport Agreements; Schwenk, Luftverkehrsrecht, p. 482 ff. Probably the most comprehensive description, although some of the details are out of date, can be found in Kloster-Harz, Luftverkehrsabkommen, passim.

[45] Cf. overview at www.luftrecht-online.de.

[46] Cf. the model agreement for Germany at www.luftrecht-online.de.

traffic rights to flight schedules, price setting and authorisation through to air safety issues.[47]

For this opinion, the clauses contained in virtually all the agreements on exemption from customs duties and other charges and the prohibition on unilateral restriction of flight capacity are of particular interest. Theoretically, these clauses may differ from agreement to agreement, but in the aviation agreements mentioned they are identical.

In cases where provisions differ, the decisive factor for the possibility of including aviation in emission allowance trading is the origin of the aircraft and the specific detail of the aviation agreement that has been concluded with the country of origin in question.

b) Classification of aircraft to particular bilateral agreements

In considering the question of which bilateral agreement is applicable to which aircraft, it is not as a rule the nationality of the aircraft[48] that is important. Rather, the tax exemption clauses in the individual agreements apply as a rule to aircraft that are used by a company designated by one of the Contracting Parties.

Thus, the tax exemption covers all aircraft that are deployed by a company that has been cited within the framework of the bilateral agreement or follow-up diplomatic notes as being authorised to exercise traffic rights. From that it follows that neither the nationality of the individual airlines nor the question of what criteria should be used to determine that nationality are decisive, but solely the naming of a particular airline within the framework of the agreement.

c) Relevant provisions of agreements based on the model agreement

This opinion was based on the model adopted within the Federal Government as the basis for the Federal Republic of Germany's bilateral aviation negotiations. The model was made available by the German Federal Ministry for Transport, Building

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[47] A detailed overview of the content of important clauses is given in Schwenk, Luftverkehrsrecht, p. 489 ff., and Kloster-Harz, Luftverkehrsabkommen, p. 49 ff.

[48] With regard to nationality, Article 17 of the Chicago Convention states that aircraft have the nationality of the state in which they are registered, the requirements for registration in accordance with Article 19 of the Chicago Convention being based on the law of the individual states. Thus, according to the wording, the formal criteria alone are decisive. For extensive treatment of this and the question of whether, contrary to the wording, a registration may be carried out only if the country of registration has effective national jurisdiction over the aircraft to be registered cf. Schwenk, Luftverkehrsrecht, p. 261 ff.

and Urban Affairs - Department LR 13 - and can be viewed at http://www.luftrecht-online.de/. It contains the new EU model clauses that Germany is obliged to respect when negotiating agreements.

In addition, the specific text of the aviation agreement between Germany and the USA[49] was examined in order to analyse how the text of an agreement has been fleshed out in practice. Bilateral aviation agreements are implemented in Germany through a ratification Act (Federal Law Gazette (BGBl.), part II).

From Article 7 of the standardized text of the model agreement and the agreement between Germany the USA it can be inferred that the Federal Republic of Germany consistently envisages exemption from customs duties and other charges, albeit solely and exclusively for goods enumerated in the aviation agreements. Article 7 of the model agreement states:

Exemption from customs duties and other charges

(1) Aircraft operated by any designated airline of either Contracting Party and entering, departing again from, or flying across the territory of the other Contracting Party, as well as fuel, lubricants and other consumable technical supplies contained in the tanks or other receptacles on the aircraft (e.g. de-icing fluid, hydraulic fluid, cooling fluid, etc.), spare parts, regular equipment and aircraft stores on board such aircraft, shall be exempt from customs duties and other charges levied on the occasion of importation, exportation or transit of goods. This shall also apply to goods on board the aircraft consumed during the flight across the territory of the latter Contracting Party.

(2) Fuel, lubricants and other consumable technical supplies, spare parts, regular equipment and aircraft stores temporarily imported into the territory of either Contracting Party, there to be immediately or after storage installed in or otherwise taken on board the aircraft of a designated

[49] Air Transport Agreement between the Federal Republic of Germany and the United States of America, current version of the Agreement of 7 July 1955 (BGBl. (Federal Law Gazette) II 1956 p. 403).

airline of the other Contracting Party, or to be otherwise exported again from the territory of the former Contracting Party, shall be exempt from the customs duties and other charges mentioned in paragraph 1 above. Transport documents of any designated airline of one Contracting Party shall, on the occasion of importation into the territory of the other Contracting Party, likewise be exempt from the customs duties and other charges mentioned in paragraph 1 above.

(3) Notwithstanding the provisions of sentence 2 below, fuel, lubricants and other consumable technical supplies taken on board the aircraft of any designated airline of either Contracting Party in the territory of the other Contracting Party and used in international air services shall be exempt from the customs duties and other charges mentioned in paragraph 1 above, as well as from any other further-reaching special consumption charges. Sentence 1 shall not prevent the Federal Republic of Germany from levying on a non-discriminatory basis the taxes and other charges mentioned therein on fuel taken on board in its territory for use in an aircraft of a designated airline of …..... that operates between a point in the territory of the Federal Republic of Germany and another point in the territory of the Federal Republic of Germany or in the territory of another European Community Member State...

Article 7 of the Agreement between Germany and the United States says:

(1) On arriving in the territory of one contracting party, aircraft operated in international air transportation by the designated airlines of the other contracting party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts (including engines), aircraft stores (including but not limited to such items as food, beverages and liquor, tobacco and other products destined for sale to or use by passengers in limited quantities during flight), and other items intended for or used solely in connection with the operation or servicing of their aircraft engaged in international air transportation shall be exempt, on the basis of reciprocity, from all import restrictions, property taxes and capital levies, value added taxes, customs duties, excise taxes, import charges and similar

fees and charges that are (1) imposed by the national authorities, and (2) not based on the cost of services provided, provided that such equipment and supplies remain on board the aircraft.

(2) There shall also be exempt, on the basis of reciprocity, from the taxes, levies, duties, fees and charges referred to in paragraph (1) of this Article, with the exception of charges based on the cost of the service provided:

...

c) fuel, lubricants, and consumable technical supplies introduced into or supplied in the territory of a contracting party for use in an aircraft of an airline of the other contracting party engaged in international air transportation, even when these supplies are to be used on part of the journey performed over the territory of the contracting party in which they are taken on board…

With these regulations, the bilateral agreements do establish more restrictive provisions relating to levying customs duties, taxes and charges than is the case under the conditions of the Chicago Convention alone. However, the introduction of an emission allowance trading scheme is not covered by any legal provision, including those of the aviation agreements cited. Due to the enumerative list of exemptions, it is not possible to extend these provisions in the aviation agreements to emissions from air transport nor to apply them by analogy to the requirement to acquire emission allowances for these emissions. Ultimately, the fuel itself is not subject to charges of any kind even under an emission allowance trading system.

In particular, there is no direct link between the extent of the obligation to acquire allowances and the quantity of fuel taken on board. After all, an aircraft can make several flights with the fuel from one refuelling operation and not all of these flights are necessarily subject to the emission allowance obligation. Thus, Article 7 of these agreements cannot preclude the introduction of an emission allowance trading scheme.

Finally, attention must be drawn to Article 7 bis of the German-American agreement, paragraph 1 of which regulates the imposition of charges in more specific detail:

> *User charges that may be imposed by the competent charging authorities or bodies of each contracting party on the airlines of the other contracting party shall be just, reasonable, not unjustly discriminatory, and equitably apportioned among categories of users. In any event, any such user charges shall be assessed on the airlines of the other contracting party on terms not less favourable than the most favourable terms available to any other airline at the time the charges are assessed.*

This stipulation makes it clear that charges in the context of the emission allowance trading scheme as (incentive) charges *sui generis* may not be assessed more stringently than the fees mentioned there.

This means that the legitimacy decisively depends on whether the measure introduced is discriminatory (cf. also the stipulations under Article 8, paragraph 5 and Article 10 of this agreement). This can be refuted using the same arguments that have been cited above as relevant in the context of Article 11 of the Chicago Convention. The economic stimulus provided by the emission allowance trading scheme, or rather the charges levied under it, affect all airlines that operate within the EU or fly to or from the EU, irrespective of their nationality. The distribution of emission allowances is to take place in a non-discriminatory way. The new regulation of the Council relating to flights to outermost regions in accordance with Article 299, paragraph 2 of the TEC similarly has no detrimental effect with regard to the prohibition on discrimination, as set out above.

Similarly, the provision of Article 8, paragraph 2 of the agreement between Germany and the USA does not preclude including greenhouse gas emissions from international aviation in the EU emission allowance trading scheme. Article 8, paragraph 2 contains a clause that appears in all the USA's agreements with EU Member States.[50] It is concerned with the prohibition of unilateral restrictions on capacity:

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[50] Delft, Giving Wings to Emission Trading, Report for the European Commission, DG Environment, No. ENV.C.2/ETU/2004/0074r, p. 180.

> *Each contracting party shall allow each designated airline to determine the frequency and capacity of the international air transportation it offers, based upon commercial considerations in the marketplace. Consistent with this right, neither contracting party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated airlines of the other contracting party, except as may be required for customs, technical, operational, or environmental reasons under uniform conditions consistent with Article 15 of the Convention [on International Civil Aviation].*

The first question that arises here is whether the introduction of an emission allowance trading scheme can be classed as a restriction of volume of traffic or type of aircraft that the designated airlines of other Contracting States can or are allowed to use.

This is not the case. The EU emission allowance trading scheme does not directly aim to restrict either traffic volume or the type of aircraft that the designated airlines of other Contracting States are allowed to use. No regulatory content of this kind follows indirectly from the proposed regulations. The intention of the European legislator in including greenhouse gas emissions from international aviation in the EU emission allowance trading scheme is to restrict the emission of greenhouse gases. The subject of regulation is solely the fact that any emissions caused must be covered by a corresponding number of emission allowances; by contrast, the traffic volume is not directly restricted nor is the use of certain aircraft prohibited. Objectively and directly no limit is set for traffic volume nor for the use of particular types of aircraft. The prime objective of the emission allowance trading scheme is to provide an incentive to reduce emissions in the long term by making CO_2 output subject to a charge.[51] How this happens is not normatively prescribed by the EU emission allowance trading scheme for international air traffic or anything else.

This is not inconsistent with the fact that, in an emission allowance trading system generally, and in the EU's proposal specifically, an upper limit is set for emission output in that the quantity of emission allowances to be allocated matches the volume

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[51] Ibid.

of emissions for the years 2004-2006.[52] This does not change the fact that the choice of ways to comply with this upper limit is left to the discretion of the airlines themselves.[53]

Furthermore, Article 8, end of paragraph 2 provides for an exemption to the prohibition on unilateral restriction of traffic volume in the event of environmental reasons existing and provided that the restrictions under the Chicago Convention, particularly Article 15 are not breached. Thus, existing bilateral aviation agreements do explicitly permit the restriction of traffic volume between the two parties to such an agreement if this is necessary for environmental protection reasons and if the restriction is consistent with the provisions of Article 15 of the Chicago Convention. Thus, in the case of traffic restrictions being required for reasons of environmental protection, the aviation agreements refer to the relevant provisions of Article 15 of the Chicago Convention as the decisive criterion even in the context of a bilateral agreement.

The permissibility of including greenhouse gas emissions from international aviation in the EU emission allowance trading scheme under the conditions of Article 15 of the Chicago Convention has already been established. The fact that the emission allowance trading system for aviation is being introduced for environmental reasons is undisputed, if for no other reason than that the mandate for it comes from the Kyoto Protocol. This means that there are no grounds for objecting to the emission allowance trading scheme from the point of view of the prohibition on unilaterally introducing restrictions on traffic volume.

d) Possibility of terminating the agreement

Finally, it must be pointed out that Article 26 of the model agreement and the agreement between Germany and the USA provides for the possibility of termination. Notice of such termination would have to be given to the ICAO, after which the bilateral agreement would terminate one year later.

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[52] Cf. the Council's new stipulation of 20 December 2007 in Article 3b which states that "Emissions will be capped at 100% of the average level for the years 2004-2006," cf. Aviation in ETS Presidency Compromise Package.

[53] Delft, Giving Wings to Emission Trading, Report for the European Commission, DG Environment, No. ENV.C.2/ETU/2004/0074r, p. 180.

Thus, if the inclusion of greenhouse gas emissions from international aviation were considered problematic in the light of individual provisions of bilateral aviation agreements, the termination clauses present in every bilateral aviation agreement provide for the contractually envisaged possibility of terminating the agreement and thus eliminate any obstacles to the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme that might exist. If the EU implements its plans and if existing bilateral aviation agreements were to preclude these plans, Germany would be obliged under Community law to terminate an agreement in this way;[54] otherwise it could face infringement proceedings.[55]

However, as we have already shown there are no reasons that substantiate an assumption that the introduction of an emission allowance trading scheme that would include greenhouse gas emissions from international aviation would not be permissible under Germany's current bilateral agreements on aviation.

On the contrary, the bilateral aviation agreements are consistent with the permissibility of including greenhouse gas emissions from international aviation in the EU emission allowance trading scheme.

II. Provisions arising from acts of law implemented in the past by the ICAO

The ICAO organs can pass secondary legislation to the extent established, stipulated and restricted in the Chicago Convention. It is questionable whether or to what extent this secondary legislation can have a binding effect on Contracting States to the ICAO and whether or to what extent the ICAO has passed any relevant secondary legislation that could preclude the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme.

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[54] Cf. http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/506&format=HTML&aged=0%3 Cuage=EN&guiLanguage=en.

[55] Klement, Kollisionen von Sekundärrecht der Europäischen Gemeinschaften und Völkerrecht, DVBl. 2007, pp. 1007, 1016.

1. Binding effect of secondary legislation

In clarifying the question of whether the ICAO organs have passed binding secondary legislation that precludes greenhouse gas emissions from international aviation being included in the EU emission allowance trading scheme two aspects must be distinguished: are the ICAO organs able to pass legally binding secondary legislation in matters of charges and tax policy? If so, can the documents in question be classified as secondary legislation in this sense, in other words do they fulfil the necessary criteria?

a) Secondary legislation passed by ICAO organs

The contractual basis for any legislative activity by the organs of the ICAO is in Article 37 of the Chicago Convention:

> *"Each Contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation. To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with*
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> *(a) …;*
>
> *…*
>
> *(j) Customs and immigration procedures;*
>
> *…;*
>
> *and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate."*

Article 38 of the Chicago Convention regulates the possibilities for differing from the standards and procedures adopted under Article 37 of the Chicago Convention:

> *"Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that State."*

To classify these powers in legal terms, we must begin by pointing out that the ICAO is an international organisation in the classic sense and not a supranational organisation comparable to the EC, for example.[56]

Correspondingly, any secondary legislation passed by the ICAO has an entirely different kind of effect from the secondary legalisation the European Community passes in the form of Regulations and Decisions.

Whereas the Regulations and Decisions of the EC have a direct effect and are directly applicable in the sense that, firstly, they do not require any transposition act

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[56] For a short yet precise treatment of the distinction between international and supranational organisations see Schweitzer, Staatsrecht III, Mn. 684 ff. On the supranationality of the European Communities see also Koenig/Haratsch, Europarecht, Mn. 12 f.

to be valid in national law and, secondly, not only the EU Member States but also individuals have rights and obligations as a result of this legislation,[57] the legislation of the ICAO must be qualified as international law in the classic sense, with the result that a transposition act is required for it to be valid in national law.[58]

By virtue of the fact that the organs of the ICAO may impose obligations in international law on the Contracting States without their consent, thus possibly against their will, they are able to intervene in the sovereignty of the Contracting States on a massive scale, which includes the right to rule on the extent of their obligations under international law. In view of this, and of the fact that the undivided sovereignty of the states beyond the supranational scope is still of central importance to both the understanding and functioning of the system of international law, the powers of the ICAO organs may not be extended beyond what is stated in the actual wording. On the contrary, the ICAO can only obligate the Contracting States to the extent that it has been explicitly invested with corresponding authority.[59]

It must also be taken into account that the distribution of powers in a multi-level system of whatever kind must always be identifiable, definable and distinct in order to ensure that the different actors can work together effectively.

The provisions of Article 37 (f) of the Chicago Convention must therefore be interpreted on the basis of their wording. An extensive interpretation that goes beyond the wording would not only be detrimental to their definable quality and legal clarity, but also to the sovereignty of the Contracting States, and would therefore be impermissible.

i. Possible objects of regulation of secondary legislation passed by ICAO organs

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[57] For a general treatment of the validity of Community law in the national sphere see Geiger, Grundgesetz und Völkerrecht, Section 44. On the legal validity of Regulations and Decisions in particular cf. Schroeder in Streinz, EUT/TEC, Article 249 TEC Mn. 52 ff., 132 ff.

[58] For extensive treatment of this cf. Schweitzer, Staatsrecht III, Mn. 418 ff; and also Geiger, Grundgesetz und Völkerrecht, Sections 29 ff.

[59] Under certain circumstances, powers of international organisations that go beyond the text of the treaty in question can also be inferred under the so-called implied-powers theory, according to which an international organisation must always have the powers that are essential to fulfilling its own remit. However, it is not possible to discuss this problem adequately until the powers the ICAO has been invested with by treaty have been established.

Either Article 37 (j) of the Chicago Convention or the general clause following the list of areas of competence could indicate the general authority to regulate on levy or tax matters.

As far as Article 37 (j) is concerned, it must be assumed that the term customs procedures does not cover charges connected with the emission allowance trading system. Firstly, this area of competence is entitled customs *procedures:* there is no mention of *imposing* customs duties*,* thus of their permissibility, the necessary circumstances for doing so etc. Secondly, the Chicago Convention distinguishes between customs duties and fees, taxes and other charges, as in Article 24 for example. The authority to stipulate an emission charge in the form of an emission allowance trading system can thus not be inferred from Article 37 (j) of the Chicago Convention.[60]

In determining the scope of the general clause in Article 37, it is essential to note that the terms safety, regularity, and efficiency are listed cumulatively and not as alternatives, so that according to the wording there must be a relationship to all three areas.[61]

Regulating emission charges by way of these standards and recommended practices can scarcely be reconciled with this wording. While it is conceivable that that kind of question might be concerned with the efficiency of air navigation, it can hardly be construed that setting up an emission allowance trading scheme would be concerned with the safety and regularity of air navigation. It must be conceded that the term "concerned with" is quite a broad one, that, in particular, direct regulation is not required, but nevertheless attempts to construe a relationship to safety using the argument that higher costs might be detrimental to the maintenance of aircraft seem very far-fetched.[62]

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[60] Cf. Loibl/Reiterer, Rahmenbedingungen, p. 70, end of Fn. 129.

[61] Loibl/Reiterer, Rahmenbedingungen, p. 70 f. rightly point this out. By contrast, many authors seem to work on the assumption that it is a question here of alternatives, cf. for example Erler, Rechtsfragen, p. 115; also Rosenthal, Umweltschutz, p. 150 f. In English and French the three areas are also linked by "and" and "et" respectively, and not by "or" and "ou."

[62] Cf. Loibl/Reiterer, Rahmenbedingungen, p. 71, who consider that kind of argumentation to be "difficult but perfectly acceptable."

If "concerned with" was intended to be understood in such broad terms, the three matters to which it refers could have been listed as alternatives instead of cumulatively. However, from the systematic point of view, doubts concerning the necessity of a cumulative relationship are justified. The wording of the general clause which speaks of "*such other* matters concerned with …," leads us to conclude that the authors of the Chicago Convention were convinced that the matters previously listed were also concerned with these areas – an assumption that in the case of a link between immigration procedures and the safety of air navigation, for example, seems rather doubtful.

From the teleological point of view, too, it is possible to cite arguments for a broad understanding of the general clause, since, although one of the main areas the Chicago Convention focuses on is the technical area, it does also include economic objectives (cf. e.g. the recital in the preamble as well as Article 44 (d) and (e) of the Convention itself).[63]

However, the ICAO's many years of practice outweigh these systematic and teleological objections with regard to questions of taxation. Annex 9 to the Chicago Convention, which was adopted as early as 1947 as a "standard" as defined in Article 37 of the Chicago Convention ("Facilitation"), was concerned, amongst other things, with tax issues. This Annex has been revised many times without – as far as we are aware – the Contracting States ever protesting that the ICAO was overstepping its authority.

In practical terms, we can therefore establish that there is a consensual recognition of ICAO's authority on tax matters, which in legal terms must be classified as subsequent practice in the application of the treaty and which leads to the conclusion that the interpretation is based on a consensus among the Contracting Parties (cf. Article 31 of the Vienna Convention). This consensus evidently centres on the fact that the general clause in Article 37 of the Chicago Convention should be interpreted in such a way as to include tax questions.

Whether this conclusion is reached via an understanding of the three areas safety, regularity, and efficiency as alternatives or via a broad definition of "concerned

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[63] For further details on this teleological approach cf. Loibl/Reiterer, Rahmenbedingungen, p. 71 f.

with" remains questionable. Ultimately, however, this dogmatic classification can be left open to debate: seen in the light of legal practice, it must be concluded that the ICAO does have authority to pass standards and recommended practices that deal with tax issues.[64]

ii. Distinction between "standards" and "recommended practices"

In looking at the question of whether regulations enacted by ICAO bodies are legally binding, it is necessary to distinguish between standards and recommended practices.[65] The ICAO defines standards as:

> *"Standards: Any specification, the uniform observance of which has been recognized as practicable and as necessary to facilitate and improve some aspect of international air navigation, which has been adopted by the Council pursuant to Article 54 (l) of the Convention, and in respect of which non-compliance must be notified by States to the Council in accordance with Article 38."*[66]

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[64] This is also the conclusion of Loibl/Reiterer, Rahmenbedingungen, p. 75. Authors who, like Erler, Rechtsfragen, p. 115, see the general clause as the "unrestricted authority to issue regulations on aviation" would presumably also come to the same conclusion for the question of levying charges on emissions. TÜV Rheinland et al., Maßnahmen, p. 112 f. takes the opposing view, negating an authority here on the grounds that charges on emissions are not one of the matters listed in Article 37 of the Chicago Convention – a perfectly acceptable and convincing approach that takes into account the fact that Article 37 of the Chicago Convention justifies the authority of the ICAO to autonomously develop the obligations of the signatory states under international law. However, as we stated earlier, in the interest of being identifiable, definable and distinct as is constitutionally necessary, this authority needs to be precisely and clearly limited, which is the intention of Article 37 of the Chicago Convention. Against this background, a great deal speaks in favour of excluding tax regulations from the scope of the ICAO's authority. However, the practice of the signatory states, which is not necessarily legally applicable but nevertheless uniform and accepted, is contrary to this interpretation.

[65] Cf. on this Erler, Rechtsfragen, p. 116 ff.; Rosenthal, Umweltschutz, p. 151 f.

[66] ICAO, Annex 9 to the Chicago Convention: Facilitation, 11th edition 2002, Foreword. This definition corresponds to the one that was developed when Annex 9 was first adopted in 1949. It should be noted that the other Annexes to the Chicago Convention use a different definition, dating from 1947, which defines "standards" as "any specification …, which is recognized as necessary for the safety or regularity of international air navigation…" Annex 9 does not, however, refer to the safety and regularity of aviation, so that the extended definition was adopted, which also includes measures aimed at "facilitation." Cf. on this Buergenthal, Law-making, p. 61; Loibl/Reiterer, Rahmenbedingungen, p. 62. In the context of this opinion, the definition from Annex 9 seems relevant, since tax questions fit better into the category of "facilitation" than "safety" or "regularity" and since the ICAO has correspondingly to date treated the question of imposing charges on air transport in Annex 9 only.

By contrast, the definition of recommended practices is as follows:

> *"Recommended practices: Any specification, the observance of which has been recognized as generally practicable and as highly desirable to facilitate and improve some aspect of international air navigation, which has been adopted by the Council pursuant to Article 54 (l) of the Convention, and to which Contracting states will endeavour to conform in accordance with the Convention."*

A comparison of these two definitions leads to the conclusion that standards have a greater binding force than recommended practices. Observance of a standard is considered necessary; by contrast, observance of a recommended practice is considered to be merely desirable. Member States must apply a standard wherever possible, whereas they are merely asked to endeavour to conform with a recommended practice.

What seems to be important is that only in the definition of standards is reference made to the opting-out procedure established under Article 38 of the Chicago Convention. It can thus be established that at most the standards have a binding effect under international law in the sense that Member States are obliged to adopt these regulations into their national law.

iii. Binding force of standards based on the wording of the Chicago Convention

There are essentially three different opinions on the question of how binding standards are: they range from the view that their binding effect is strict, relaxed or non-existent.[67]

Both the English and German text[68] can be cited as an argument against the strictly binding effect[69] of Article 37 I of the Chicago Convention: the wording "undertakes

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[67] On this problem cf. Erler, Rechtsfragen, p. 131 ff.; Rosenthal, Umweltschutz, p. 153 ff.; Cheng, The law of international air transport, p. 64 ff.; Buergenthal, Law-making, p. 57 ff. ; Mankiewicz, L' adoption des annexes a la convention de Chicago par le Conseil de l'Organisation de l'Aviation Civile Internationale. There are also a number of works that examine and compare the legislative powers of the UN and its various sub-organisations and special organisations; cf., for example, Alexandrowicz, Law making functions, p. 40 ff.; Detter, Law making, p. 247 ff.; Yemin, Legislative powers, p. 114 ff.

to collaborate in securing the highest practicable degree" clearly indicates that this is a legal obligation, but that the obligation is not to implement exactly the standards passed by the ICAO but to aim for the best possible implementation, with the Member States being given latitude to assess the possibilities for implementing them.

Article 38 of the Chicago Convention also points in the same direction: it allows the Contracting States to differ from standards if it finds compliance impracticable or deems it necessary to differ from them. Here, too, the Contracting States have discretionary power in assessing implementation. In other words, the Contracting States evaluate the possibilities for implementation.

However, the view that the ICAO's standards should be seen as having no binding force is just as unfounded as an assumption of unlimited binding force.[70] In particular this approach does not take into account the distinction between standards and recommended practices, which is anchored in the Chicago Convention itself by virtue of the fact that Article 38 refers to standards and procedures, but not to recommended practices. Similarly, the notification obligations set out in Article 38 are difficult to reconcile with these standards and procedures having no binding force. Finally, from the teleological point of view, it should be noted that the function of the standards - to promote the safety and regularity of international air navigation - can only be fulfilled if compliance with the standards is not left entirely to the discretion of the states.[71]

Thus, as an interim conclusion it can be said that the Chicago Convention justifies a limited obligation on the part of the Contracting States in the sense that standards must be transposed into national law as far as possible. Thus, there is a kind of obligation to endeavour to comply, where the Contracting States have discretionary

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[68] "Each Contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures..."

[69] Thus, for example, Detter, Law making, p. 248; and probably also Seidl-Hohenveldern/Loibl, Recht der International Organisationen, Mn. 1554.

[70] The opinion of, for example, Cheng, The law of international air transport, p. 64 f; Hailbronner in Bernhardt, EPIL, "International Civil Aviation Organisation," p. 1072; Buergenthal, Law-making, p. 77 f.; presumably also Alexandrowicz, Law making functions, p. 45 f.

[71] Also rightly in agreement with this Rosenthal, Umweltschutz, p. 155.

latitude in assessing what is possible for them to implement. In exercising that discretionary power they are bound by the principle of good faith.[72]

iv. Extended binding force based on the ICAO's definitions?

To make the case that standards have a binding nature that goes beyond the subjective assessment [73] that has been left to the discretion of the Contracting States we cite the fact that - following the principles of Article 31 of the Vienna Convention, under which subsequent agreements between Contracting Parties must be take into consideration in the interpretation - Article 38 of the Chicago Convention must be interpreted in the light of the definitions of 1947, extracts of which have already been cited.[74] It is thus questionable whether the standards adopted by the ICAO itself contain a uniform definition of their binding nature that goes beyond that established under Article 38 of the Chicago Convention, upon which the interpretation of Article 38 would have to be based.

It must be conceded that the 1947 definition of "standards" does say that "in the event of impossibility of compliance, notification to the Council is compulsory under Article 38" and that that does, in fact, replace the subjective discretionary power of the Contracting States accorded under Article 38 of the Chicago Convention by the more objective sounding "in the event of impossibility of compliance."[75]

It is also relevant that, with the exception of Annex 9, this 1947 definition for the Annexes to the Chicago Convention has been in use in the same form for 60 years and is regularly adopted again whenever the Annexes are revised without – as far as we are aware – prompting protests or reservations on the part of the Contracting States.

Nevertheless, in conclusion, it is still not possible to assume a general consensus amongst the Contracting States upon which the interpretation of Article 38 of the Chicago Convention could be based. The reasons for that are as follows:

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[72] Erler, Rechtsfragen, p. 134; Rosenthal, Umweltschutz, p. 154 f.; Loibl/Reiterer, Rahmenbedingungen, p. 69; and Yemin, Legislative powers, p. 149 f come to the same conclusion; cf. also Dahm, DÖV 1959, p. 361/364.

[73] Cf. Article 38: "any state *which finds it impracticable*."

[74] Especially Loibl/Reiterer, Rahmenbedingungen, 67 ff.

[75] The arguments of Loibl/Reiterer, Rahmenbedingungen, p. 67 f., are based on this.

As we have already mentioned several times, two definitions that are regularly repeated have co-existed since 1949. They differ from one another not only on the question of what a standard can regulate but also with regard to what they say about the binding nature of standards. The wording in question in the definition used in Annex 9 is merely "non-compliance must be notified." This wording does not permit the conclusion that the binding force is greater than that suggested by Article 38 of the Chicago Convention; it contains no details at all on the possible grounds for "non-compliance."

It must be noted here that in the extension of the objects of regulation achieved by the 1949 definition no change to the phrase concerned with the binding force would have been necessary; on the contrary, it would have been possible to adopt the existing definition. We must therefore assume that this was a deliberate deviation from the 1947 definition.

It can thus be said that since 1949 two different definitions have regularly been used that differ from one another on the question of the binding nature that is of interest here.[76] From this it can be concluded either that there is no consensus amongst the Contracting Parties upon which the interpretation of Article 38 of the Chicago Convention should be based or that there are more specific agreements that differ on what areas a standard regulates. If one takes the latter view, the definition in Annex 9, which does not differ in terms of degree of binding force from the definition in Article 38 of the Chicago Convention, would be most relevant; the former view would in any case make reference solely to Article 38.

In conclusion, it must therefore be said that at least the standards that are concerned with levying charges on air transport cannot be deemed to have any binding force beyond the wording of Article 38 of the Chicago Convention by virtue of the definitions contained in the Annexes.[77]

v. Extended binding force based on the implied-powers theory?

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[76] Loibl/Reiterer, Rahmenbedingungen, p. 68, overlook this when they speak of the consistent practice of the ICAO since 1947.

[77] Thus, the opinion of Loibl/Reiterer, Rahmenbedingungen, p. 68 f.

According to a ruling of the International Court of Justice (ICJ), powers that go beyond the explicit wording of the founding treaty of an international organisation can exist on the basis of what is known as the implied-powers theory.

The implied-powers theory[78] says that an international organisation must always be invested with the powers that are essential for it to fulfil its remit as set out in the relevant treaty. The agreement of the individual Member States with the purposes of the treaty agreed is considered to implicitly include their acceptance of the means necessary to achieve these aims, since otherwise the Member States would be acting inconsistently.

Irrespective of whether this theory can be generally accepted, in the case of legislative powers in the question of an emission allowance trading system, a recognition of that kind of implied powers for ICAO can be ruled out. In order to fulfil its remit to foster international air transport as established under Article 44 of the Chicago Convention, the ICAO does not depend on its ability to pass standards regarding the permissibility of emission allowance trading scheme for all airlines that fly to or from particular countries. There are no evident grounds to believe that a lack of uniformity in individual state practice on this matter could jeopardise international civil aviation in its development, efficiency or safety to such an extent that the ICAO would not be able to fulfil the remit assigned to it through its founding treaty unless it were granted powers to legislate in the area of emission allowance trading that go beyond the wording of the Chicago Convention.

Thus, with regard to regulations concerning a system to include greenhouse gas emissions from international aviation in an emission allowance trading scheme, a recognition of powers that go beyond the wording of the Chicago Convention on the basis of the implied-powers theory must therefore be refuted.

vi. Subsequent departures from standards

It remains to be examined whether the Contracting States may differ from the standards prescribed by the ICAO only when a new standard comes into force or an

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[78] [78] Cf. on this Ipsen, Völkerrecht, Section 6 Mn. 8 f .

existing one is amended or whether this possibility exists even some time after an amendment or new standard has come into force.

Article 38, 2nd sentence, of the Chicago Convention stipulates only that a Contracting State that does not bring its national law into line with the amendment to a standard must notify the Council within sixty days of the adoption of the amendment to the international standard.

Article 38 of the Chicago Convention does not explicitly regulate for what would be the opposite case – that a Contracting State wishes to differ from ICAO practice by amending its national legislation without any reference to an amendment to an existing international standard or introduction of a new one. However, Article 38, 1st sentence of the Chicago Convention probably does cover this case when it says that "Any state … which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard." The fact that the obligation to notify subsequent differences was explicitly stipulated points to the permissibility of that kind of change to national law.

Thus, it can be established that the Contracting States are allowed to depart from the provisions of a "standard" but that they must notify the ICAO without delay.[79] The criteria for the permissibility of differences described above still apply in such cases, so that any departures from ICAO practice are to be avoided as far as possible.

vii. The powers of ICAO organs to issue standards

The adoption of international standards and recommended practices is the responsibility of the ICAO Council; cf. Article 54 (l) of the Chicago Convention along with the definitions quoted above. The ICAO Council consists of representatives from 36 Contracting States, who are elected for a three-year term by the Assembly, in which all the Contracting States are represented.[80] Standards are

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[79] This is also the conclusion of Rosenthal, Umweltschutz, p. 154 f.; Erler, Rechtsfragen, p. 139 f.; Buergenthal, Law-making, p. 79. This applies equally to new standards and amendments to existing standards, cf. for example Buergenthal, op. cit., p. 92 f.

[80] On the composition of the Council see the provisions of Article 50 of the Chicago Convention. For extensive treatment of this and the Council's fields of activity cf. Erler, Rechtsfragen, p. 20 ff .

adopted or amended by the Council - contrary to the basic provision in Article 52 of the Chicago Convention - by a two-thirds majority; cf. Article 90.[81]

viii. Formal criteria that standards must meet

Article 54 (l) of the Chicago Convention stipulates that the functions of the Council include adopting standards and that it shall "for convenience designate them as Annexes to this Convention." Currently there are 19 such Annexes. The question can remain open to discussion here as to whether the original intention of the Convention was that this designation should have a statutory character. What is of decisive importance is that in the meantime a number of Annexes have been so designated, whereas conversely – as far as we are aware - the ICAO Council has not claimed binding force on the basis of Articles 37 ff. of the Chicago Convention for any document it has adopted that has not been designated an Annex to the Convention and thus laid claim to the character of a "standard."

There is thus a legal practice that all "standards" as defined in Article 37 of the Chicago Convention are declared to be Annexes to the Convention. Seen against this legal practice, it can be assumed that the provision of Article 54 (l) of the Chicago Convention has, for reasons of legal certainty and clarity, acquired a mandatory character, in other words that only those regulations that have been designated Annexes to the Chicago Convention acquire the legal validity of a standard.[82]

ix. Interim conclusion

Seen against the backdrop of the ICAO's long-established legal practice, the only type of regulation that can be considered as standards are those that have been declared to be Annexes to the Chicago Convention.

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[81] Admittedly, this is somewhat controversial in the case of amendments. On this problem see, for example, Erler, Rechtsfragen, p. 124 ff.; Buergenthal, Law-making, p. 64 f.

[82] The endeavours of the ICAO to make a clear and transparent distinction between statements that are non-binding and binding to a limited extent is also evident within the individual Annexes, in which actual "standards" are distinguished from the supplementary "recommended practices" by sub-headings, wording and typefaces. This practice dates back over many years and indicates that ICAO legislation is characterised by a high degree of formal clarity and that against that background the assumption that Article 54 (l) has a binding character is absolutely logically consistent. Also convinced of its binding nature is Abeyratne, ZLW 1992, pp. 387/388.

The Contracting States are obliged to transpose these standards as far as possible into national law. If they deem it to be necessary, the Contracting States may also subsequently depart from existing standards

b) Existence of legally binding secondary legalisation in this particular case

Against this background, we must now examine whether a standard currently exists that prohibits Member States including all international aircraft operators in a regional emission allowance trading system.

As already mentioned, the only Annex that deals with tax issues is Annex 9. There is no mention here of a system of this kind; even if the charges were to be classed as taxes, no difficulties for or obstacles to their introduction would arise from Annex 9.

Thus, no binding secondary legislation currently exists within the context of the ICAO that would preclude the inclusion of greenhouse gas emissions from international aviation in an EU emission allowance trading scheme.

Resolutions of the Assembly, which are not *per se* binding secondary legislation, will be discussed in the next point below.

2. Voluntary commitment on the part of EU Member States

However, it is possible that a unilaterally introduced emission allowance trading scheme could be legally impermissible due to the fact that EU Member States approved those statements by the ICAO that are classified as soft law and according to which the Member States should refrain from unilateral action.

Of relevance here is the recently adopted Resolution of the 36th Session of the Assembly, including its Appendix L.[83] This provides for the following with regard to emission allowance trading:

"The Assembly:

[83] Assembly – 36th Session, Report of the Executive Committee on Agenda Item 17, A36-WP/355 (27.09.2007), Appendix L, p. 34 ff.

1. Encourages Contracting States and the Council to adopt measures consistent with the framework outlined below:

a) ...

b) Emissions trading

1) Urges Contracting States not to implement an emissions trading system on other Contracting State's aircraft operators except on the basis of mutual agreement between those States;

2) Requests States to report on new developments, results and experiences in this area; and

3) Requests the Council to:

a) finalize and keep up-to-date for use by Contracting States, as appropriate, and consistent with this and subsequent Resolutions, the guidance developed by ICAO for incorporating emissions from international aviation into Contracting States' emissions trading schemes consistent with the UNFCCC process; and

b) conduct further studies, as appropriate, on various aspects of the implementation of emissions trading systems and evaluate the cost effectiveness of any systems put in place, taking into account the effect on aviation and its growth in developing economies in line with the principles stated above;

c) conduct an economic analysis of the financial impact of including international aviation in existing trading schemes and undertake literature review of cost-benefit analysis of existing trading systems with a special emphasis on how it has been applied to other sectors in order to draw some pertinent lessons learned for the aviation sector;"

The 4th recital of Appendix L is also relevant:

> *"Recognizing that the majority of the Contracting States endorses the application of emissions trading for international aviation only on the basis of mutual agreement between States, and that other Contracting States consider that any open emissions trading system should be established in accordance with the principle of non-discrimination;"*

Thus, according to the excerpts from Appendix L cited above, the Contracting States are to refrain from including third countries in an emission allowance trading system for aviation against their will or without their agreement.

Also relevant here is Resolution A31-11 of 1995, in which the Contracting States advocated that individual countries should refrain from environment-related action that could have a negative effect on the harmonisation and development of international aviation.

Due to their lack of a direct binding effect, these statements can only have an indirect effect through the principle of voluntary commitment which is also relevant in international law. A state that votes in favour of a Resolution and subsequently acts contrary to the provisions of that Resolution is in fact acting to a certain degree in contradiction of its own former behaviour. This inconsistent conduct could constitute a contravention of the generally valid principle in international law of *venire contra factum proprium,* which is also known as the "estoppel principle."[84]

Against an argument of that kind it must first of all fundamentally be said that to assume a legally binding voluntary commitment has been made by virtue of voting in favour of a non-binding Resolution is ultimately contrary to the non-binding nature of that Resolution. By construing voluntary compliance, purely factual conduct determined solely by political motives, from which no will to create a legally binding situation can be inferred, has been reinterpreted "through the back door" as it were to become a legally binding declaration. The application of the principle of estoppel to

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[84] Cf. on this Doehring, Völkerrecht, Mn. 310; also Verdross/Simma, Universelles Völkerrecht, end of Section 583. With regard to terminology, a distinction is sometimes made between the estoppel principle and venire contra factum proprium, but that is immaterial in this context. Cf., for example, Müller/Cottier: "estoppel" in Bernhardt, EPIL. For a general commentary on the validity of this principle in international law see also Bleckmann, Völkerrecht, Mn. 217 ff.; Doehring, Völkerrecht, Mn. 410.

that kind of resolution must therefore be refuted.[85] Furthermore, the EU has expressed a reservation with regard to Appendix L of the 36th Session of the Assembly,[86] thus pre-empting the estoppel principle.

In the light of the above, the participation of EU Member States in Resolution A31-11 is unproblematic: this Resolution must not be reinterpreted by the estoppel principle to become a legally binding declaration.

Finally, we shall examine the often cited Resolution of the 35th Assembly. Here the ICAO notes that in the long term an emission allowance trading system seems to be the best solution:

> *"An emissions trading system that would allow airlines to trade emission allowances inside and outside the aviation sector could theoretically maximise CO_2 emissions reductions at the lowest cost relative to other options studied. ICAO analysis has shown that emissions trading would be far more cost-efficient than the use of taxes or charges. However, the exact impact on industry growth, costs and competition is very uncertain and would depend on the design of the trading system and industry's access to an adequate supply of affordable allowances. For the hypothetical emissions targets in the ICAO analysis, costs would range from approximately 17 billion US$ to over 60 billion US$ per year. However, compliance costs under emissions trading would be about 66% to 75% lower than with taxes or charges to achieve the same target."*[87]
>
> *"Given that emissions trading may show promise for the long term, particularly when compared to taxes and charges, IATA strongly supports the CAEP recommendation that ICAO continue to assess options for emissions trading. IATA is however not in agreement with the CAEP/6 recommendation to abandon the development of an aviation-specific emissions trading scheme under ICAO auspices, an approach particularly*

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[85] So zu Recht Doehring, Völkerrecht, Mn. 310.

[86] Cf. Written Statement of Reservation on Behalf of the Member States of the European Community (EC) and the other States Members of the European Civil Aviation Conference (ECAC).

[87] Assembly – 35th Session, Report on Agenda Item 15, A35-WP/85, no. 2.8.

> *suited to ICAO's mandate under the Kyoto Protocol and the Chicago Convention. This CAEP recommendation was premature, given that at the time of CAEP/6, the Committee had not yet received the final consultant report relevant to this discussion. Moreover, this final report does not support the argument used by CAEP that pursuing this approach would be too complicated and time-consuming. In fact, this argument runs counter to the statement in the report that it could be implemented in a shorter timeframe than "integrated trading" approach."*[88]

However, this Resolution also records that States should – at least until the 2007 plenary - refrain from unilateral measures, taking the view that the circumstances for emission charges or emission allowance trading have not yet been adequately clarified:

> *"As proposed by the ICAO Council to the Assembly, States are also urged to refrain from local, national or regional taxes and charges to address the climate change impact of aviation and to ensure that their policies are consistent with those of ICAO. Contracting States are also urged to refrain from measures that would disrupt the harmonised international air transportation system, and/or compromise the industry's ability to continue to finance technological, operational and other voluntary progress."*

The plenary extended this moratorium, although the EU Member States voted against it. It was claimed that the circumstances and the measures to be taken had still not been adequately clarified. Thus, the EU's proposal, contrary to what the EU frequently asserts is not consistent with the recommendations of the 35th Assembly. However, since they do not have a binding effect, the Resolutions cited above cannot overall lead to the EU's proposal being illegal.

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[88] Ibid, no. 2.9.

III. Further steps that the Council and future Assemblies might take

The effect on the legality of the European proposal of further steps the Assembly or Council could take is questionable. It should be specially noted that the ECAC states, which are currently alone in the ICAO in advocating that emissions from aviation be included in an emission allowance trading system, account for only 42 of 190 Member States. This means that future Resolutions against the inclusion of greenhouse gas emissions from international aviation can no longer be passed unanimously as has usually been the case; they can, however, be passed by a majority decision even if the ECAC countries vote against them.

Due to the fact that Resolutions of this kind have no direct binding character in law and to the fact that an indirect binding effect in law can in any case be avoided by the ECAC states declaring their reservation against the Resolution, future Resolutions will nevertheless not be able to pose legal difficulties for the inclusion of aviation emissions in the European emission allowance trading system.

By contrast, the situation in the Council poses a greater problem. The Council only needs a two-thirds majority to adopt international standards and recommended practices that then become an Annex to the Chicago Convention. As explained above, the former are binding. Thus, based on the legal practice described above, the Council also has the authority to pass standards related to tax matters, so that it can be assumed that it can also pass regulations that could directly affect the emission allowance trading system.

As set out in Article 50 (a) of the Chicago Convention, the Council is made up of 36 members. Of these only seven are ECAC states. Thus, the Council is able to pass standards against the will of the ECAC states. However, these standards will only be binding on those States that do not inform the Council within 60 days that they do not intend to comply with them, Article 38 of the Chicago Convention (tacit consent clause).

Thus, the EU and its Member States must make sure that they appeal against a standard of this kind in good time. If they do so, these standards will not be able to have a binding effect of any kind and will not be an obstacle to the EU proposal's conformity with international law.

E. Provisions of world trade law

The provisions of the World Trade Organisation (WTO) are not an obstacle to introducing the EU Directive that will include international aviation in the European emission allowance trading scheme. In particular, no liberalisation or market-opening commitments under world trade law exist for international air transportation that might possibly preclude greenhouse gas emissions from international aviation being included in the EU emission allowance trading scheme.

The principal reason for this is that air transportation essentially comes under GATS (General Agreement on Trade in Services). Under this agreement, even charges levied on operations-related emission of pollutants come under the provision of (transport) services category rather than taxation of goods.[89] However, GATS does not apply to all services; the service has to be included in an Annex. To date, the Annex on aviation has covered only "aircraft repair and maintenance, selling and marketing of air transport, and computer reservation systems." The actual transport service *per se* is not mentioned in the Annex, the sale and provision of air transportation being connected more with travel companies than airlines. This means that world trade law is not applicable to the situation under discussion here.

Even if GATT were applied here,[90] it (GATT) first of all, like Article 15 of the Chicago Convention, requires only that the measure in question be non-discriminatory (national treatment clause), so that there would be no contravention if all international airlines have to pay the same amount as European airlines. The exemption clauses in Article XX of GATT also permit environmental objectives to be taken into account.

Article XX (b) and Article XX (g) are of particular relevance to the inclusion of airlines from third countries in the EU's ETS. Here reference can be made to the jurisprudence of the WTO Appellate Body, which since the "shrimp-turtle case" has interpreted WTO texts in the light of evolving international law, taking into

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[89] GATT would be applicable only to a levy of charges on goods, i.e. in this case the fuel.

[90] The view could be taken, for example, that charges levied on emission of pollutants are directly related to fuel and that, since fuel is classed as goods, GATT would therefore be applicable. However, this line of argument is rather abstruse and not likely to be successful. The levy on emissions is far less connected with the fuel than with the provision of the flight service.

particular account international environmental agreements (which are not necessarily binding).[91]

The Member States of the WTO therefore have the latitude needed to pursue their environmental protection policies effectively. However, it should be noted that, before taking unilateral actions, countries should make a "good faith effort" to reach international agreement.

As we have already described in detail, in the case under review here the EU has worked within the ICAO (albeit to no avail) in an endeavour to achieve international agreement on restricting greenhouse gas emissions from international aviation and on introducing an emission allowance trading systems for international air traffic and has thus made its contribution to the "good faith effort."

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[91] AB Report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12.10.1998), Mn. 129.

F. The provisions of general international law

Over and above the provisions of the law of treaties, we shall also examine whether any principles exist under international customary law or international law in general that preclude the unilateral inclusion of aircraft operators from third countries in a regional emission allowance trading system. Here the principle of the sovereignty of states in the material sense must be considered, which could preclude the inclusion in the EU emission allowance trading scheme of emissions from aircraft entering the EU from other countries, since to some extent those emissions occur in the territorial airspace of these other countries, in the territorial airspace of third countries, or over the high seas.

I. The sovereignty of states

As a fundamental principle, third countries must not (are not permitted to) intervene in the internal affairs of another country.[92] Unilateral action on the part of one country that also impacts on third countries is therefore problematic under international law in that it affects the sovereignty of those third countries.

In the case of regulations on charges of any kind for a particular area, chargeable to specific parties, the question therefore arises under general international law as to whether the country introducing a regulation on charges has the sovereign authority to do so. Reference must be made here to a country's own territory, foreign territory and the special legal status of non-territorial areas.[93] Here it is acknowledged that, as a general principle, there is no possibility of a country taking sovereign action beyond its own state borders.[94] Legal difficulties may therefore arise whenever a country levies charges that also have an effect beyond its own sovereign territory or when they "*are to be introduced with reference to situations that have a foreign*

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[92] On the principle of non-intervention in the internal affairs of another state, cf. *Brownlie*, Principles of Public International Law, 6th edition, Mn. 309: "*principle of non-intervention in the internal affairs of other states*."; *Geiger*, Grundgesetz und Völkerrecht, Section 58.

[93] *Epiney*, in Meyer-Ohlendorf, Nils et al. 2006: Rechtliche Ausgestaltung von Nutzungsentgelten für globale Umweltgüter, p. 7.

[94] *Geiger*, Grundgesetz und Völkerrecht, Section 58.

element without the participation of the third countries affected."[95] It is in this light that the protest of many ICAO Member States must be seen, which is an objection to their airlines being included in the European emissions trading scheme without a mutual agreement having been achieved in advance.

The inclusion of international aviation in the European emission allowance trading scheme represents a sovereign action on the part of the EU relating to situations or events with a component that is outside EU territory. It should be noted here that the airlines that will be subject to the charges traditionally have a very close relationship with the countries in which they are based, as evidenced in Article 17 of the Chicago Convention. These circumstances are the backdrop for the reservations expressed by other members of the ICAO against the unilateral inclusion of their airlines in the EU emission allowance trading scheme.

The EU's proposal to include aviation in the European emission trading scheme is based on emission output during the entire flight. Thus, it could be problematic that here airlines from third countries are obliged to pay charges relating to situations and processes that occur – at least in part - beyond the territory of the EU. It is thus questionable under international law whether this leads to impermissible infringements of the sovereignty of third countries. The German Constitutional Court (Bundesverfassungsgericht - BVerfG) considered this issue to be problematic and set strict limits on levying charges on foreign nationals living abroad:[96]

> *"For the imposition of charges on a foreign national living abroad that is based on a situation that took place entirely or partially aboard, there must be, if an intervention in the sovereignty of another country that is in breach of international law is to be avoided, sufficient objective nexus for the charges to be levied in the levying country (cf. F. A. Mann, The doctrine of jurisdiction in international law, in: Recueil des Cours, 111 (1964 - I), pp. 9*

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[95] *Epiney*, in Meyer-Ohlendorf, Nils et al. 2006: Rechtliche Ausgestaltung von Nutzungsentgelten für globale Umweltgüter, p. 7.

[96] The ICJ established similar criteria, cf. "Nottebohm-Fall" *Liechtenstein v. Guatemala*, Second Phase, Judgment, ICJ Reports 1955, Rep 4.

ff., 44 ff., 109 ff.). To comply with international law, these nexuses and their objective relevance must satisfy a minimum degree of transparency."[97]

"The legal possibility of a country holding foreign nationals liable for charges is clearly limited by the necessity of a connection - through, for example, nationality, place of business, place of residence or stay in that country, the performance of an activity subject to charges in that country or achieving a profit subject to taxes in that country (cf. F. A. Mann, op. cit., p. 109 ff.; Neumeyer, Internationales Verwaltungsrecht, vol. IV, 1936, p. 436 f.; Leisner, Finanzarchiv vol. 23 (new version), 1963/64, p. 319 (321 ff.)). The additional protection from tax liability afforded as a result of this may be seen as a certain compensation for the lack of democratic participation in the development of the tax code."[98]

In making a legal assessment of whether including greenhouse gas emissions from international aviation in the EU emission allowance trading scheme is consistent with the principle in international law of the sovereignty of states, we must first draw a distinction as to whether the event to which the obligation to acquire emission allowances is connected takes place entirely or partially beyond the territory of the EU Member States.

With regard to the specific extension of the EU emission allowance trading scheme to include international aviation, two different models are conceivable:

1. The EU requires the surrender of emission allowances solely for emissions occurring in EU airspace, or

2. The EU requires the surrender of emission allowances for emissions occurring during the entire flight, including emissions when overflying third countries, in the country of origin, any countries transited and when over the

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[97] BVerfGE 63, p. 369, Mn. 96.

[98] BVerfGE 63, p. 369, Mn. 96.

high seas and any other areas that cannot be counted as being part of the sovereign territory of any state.[99]

1. Only emissions over EU territory require emission allowances

The first model is unproblematic in that it does not infringe the sovereignty of third countries, since it would be based on a situation occurring within the EU (in its airspace).

Under general international law**,** each country has total and exclusive sovereignty over the airspace above its territory.[100] Thus, on the basis of this territorial sovereignty, a country is entitled to regulate events that take place on its territory, including those involving alien persons and objects entering its national territory. Thus, a country may levy charges for the use of its territorial airspace or for emission outputs in that territorial airspace.[101] Included in this is the airspace over the territorial waters of the country in question, but not the airspace over its exclusive economic zone, nor over the high seas or any other non-territorial areas.[102]

However, with regard to the environmental objectives the EU is attempting to pursue by including greenhouse gas emissions from international aviation in the EU emission allowance trading scheme, a solution of this kind would be problematic and would be at odds with the commitment under the Kyoto Protocol to reduce emissions. If airspace outside the EU were not included, numerous airlines would change their routes to avoid crossing the borders of EU Member States and therefore cut costs. This would be contrary to the aim of including aviation in emissions trading, since it would result in longer flight routes accompanied by higher emissions

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[99] Areas that are not subject to territorial sovereignty of any country and have a special status known as *res nullius* or *res communis*

[100] *Epiney*, in Meyer-Ohlendorf, Nils et al. 2006: Rechtliche Ausgestaltung von Nutzungsentgelten für globale Umweltgüter, p. 10.

[101] A state's territorial sovereignty extends to the space on the earth delimited by borders to the territory of other states and to space that does not belong to any state, i.e. in addition to the land and water within these boundaries to the accessible space beneath the surface of the earth and the airspace above it., cf. *Doehring*, Völkerrecht, 2nd edition, Section 2, Mn. 95 ff.

[102] Cf. Article 135 UNCLOS and Article 1, 2 Chicago Convention; Birnie/Boyle, International Law and the Environment, p. 502.

of pollutants. It would also be difficult to calculate the exact emissions for the part of the route within the EU, since fuel consumption is highest during take-off and landing and consumption during the flight at cruising height is dependent on a number of (climatic and other) factors.

2. Emissions throughout the entire flight require emission allowances

For the reasons cited above, the EU Commission decided in its proposal for the second model, under which the surrender of allowances is based on emissions during the entire flight.[103] Thus, emissions in the country of take-off, transit countries and over the high seas as well as emissions in other areas that are not part of the sovereign territory of any country and the exclusive economic zones will form the basis of the obligation to surrender emission allowances.

Thus, it is questionable to what extent this inclusion in the EU emission allowance trading scheme of greenhouse gas emissions during the entire flight and outside the territory of the EU can be justified in international law.

a) Justification with regard to transit countries

The inclusion of greenhouse gas emissions during the entire flight in the EU emission allowance trading scheme can in any case be justified with regard to those third countries that are transit countries only, because there is definitely a closer nexus of the EU to charging those emissions than there is in the transit countries. It is only in the country of take-off or landing that charges can be levied, since it is only there that the aircraft is actually present. The relevant connection is therefore that a period of time is spent in the country where charges are to be levied.

This argumentation follows from Article 5 of the Chicago Convention, which restricts a country's sovereign rights over its airspace by guaranteeing transit rights, and is also in line with the rationale of Article 24, paragraph 2 of the Chicago Convention. Paragraph 2 of the latter Article requires that financial matters be regulated as stipulated after the aircraft has arrived on the territory of the state in question, whereas paragraph 1 of the same Article prohibits customs duties based on the sole fact of crossing a border.

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[103] See the EU Commission's proposal, Annex, p. 26.

If an aircraft does not land in a country, it does not enter that country's territory as defined in Article 24 of the Chicago Convention so that no nexus for levying charges for this country exists. Thus, the flight across a country and the levying of charges for greenhouse gas emissions during this flight by the EU does not affect the sovereignty of these transit countries in a way that is unreasonable or impermissible under international law.

b) Justification with regard to countries of origin and countries of destination

However, the situation can be different with regard to countries of origin and countries of destination of flights into and out of the EU. Here there is basically both in the countries of origin and countries of destination in the EU and outside the EU an equal nexus for levying charges or for inclusion in an emission allowance trading system if the basis for that is taken to time spent in the country in question.

It is questionable whether other nexuses exist that are relevant enough to satisfy the minimum degree of transparency. This must be negated here since the situation is exactly the same for an international flight into or out of the EU irrespective of whether the country of origin and country of destination are within or outside the EU.

Here it must be taken into account that the signatories to the Framework Convention on Climate Change made a voluntary commitment to mitigate emissions of greenhouse gases. The Kyoto Protocol fleshed out this basic commitment and explicitly included aviation. The Contracting Parties now have to meet this commitment so that in this regard their sovereignty may already have been restricted. If the States meet their commitment and develop their own equivalent measures to reduce aviation emissions there is provision both in the Commission's proposal and in the versions proposed by the Council and Parliament for an exemption from the obligation to surrender emission allowances.

The new Article 25a to be incorporated into the Emissions Trading Directive[104] on the proposal of the Commission stipulates:

> *"Where a third country adopts measures for reducing the climate change impact of flights departing from that country which land in the Community*

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[104] 2003/87/EC.

which are at least equivalent to the requirements of this Directive, the Commission shall amend this Directive to provide for flights arriving from that country to be excluded from the aviation activities listed in Annex I with effect from the next period referred to in Article 3b.

That amendment, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(2a).”

Parliament’s draft proposed the following:

“Where a third country adopts measures for reducing the climate change impact of flights which are at least equivalent to the requirements of this Directive, the Commission shall amend this Directive in order to avoid double charging and to ensure equal treatment.”

The latest Council draft now states:

“1. Where a third country adopts measures for reducing the climate change impact of flights departing from that country which land in the Community, the Commission, after consulting with that third country, and with Member States within the Committee referred to in Article 23(1), shall consider options available in order to provide for optimal interaction between the Community scheme and that country's measures.

Where necessary, the Commission may adopt amendments to provide for flights arriving from the third country concerned to be excluded from the aviation activities listed in Annex I or to provide for any other amendments to the aviation activities listed in Annex I which are required by an agreement pursuant to the fourth subparagraph. Those measures, designed to amend non-essential elements of this Directive, shall be adopted in

accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

The Commission may propose to the European Parliament and the Council any other amendments to this Directive.

The Commission may also, where appropriate, make recommendations to the Council in accordance with Article 300(1) of the Treaty to open negotiations with a view to concluding an agreement with the third country.

2. The Community and its Member States shall continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation. In the light of any such agreement, the Commission shall consider whether amendments to this Directive as it applies to aircraft operators are necessary."

Thus, the Directive's aim is ultimately to establish a global system for emissions trading or at least initiate equivalent measures to achieve more environmentally sound aircraft operation on a worldwide scale. From the European point of view, intervention in the sovereignty of third countries is merely a temporary and not necessarily desirable interim step. If a system of this kind were to be established with complete mutual reciprocity of measures, in which each country based its action solely on flights departing from its territory, the sovereignty principle would be adequately observed.[105] In the case under review here, the sovereignty of third countries would thus only be affected if they ignore their own commitments within the Climate Convention. Thus, including without an agreement to that effect airlines from third countries that have third countries as their point of origin or destination would be only a partial infringement of sovereignty. In any case, sovereignty would already be restricted here: those countries that do not have measures in place are

[105] Cf. p. 9.

acting in breach of international law.[106] Nevertheless, the agreements on climate change cannot justify extraterritorial action that is otherwise prohibited under international law.[107] This would seem to rule out invoking the Climate Conventions alone as being sufficient legitimation.

Also, the wording "which are at least equivalent to the requirements of this Directive," which occurs in both the Commission's proposal and the Parliament's draft, seems problematic. Neither the Framework Convention on Climate Change nor the Kyoto Protocol requires specific action or a maximum level for aviation emissions. Thus, countries were, in fact, meant to have total discretion in deciding what action to take to counter emissions in the aviation sector. This is also an expression of the principle of sovereignty in international law. However, this problem has been eliminated in the Council's latest draft in that "*the Commission, after consulting with that third country, and with Member States within the Committee referred to in Article 23(1), shall consider options available in order to provide for optimal interaction between the Community scheme and that country's measures.*. There is thus no longer provision for a unilateral definition of what represents an equivalent measure.

Thus, only those cases in which third countries have put in place no measures at all, or only obviously inadequate measures, to reduce CO_2 emissions from aviation, still pose a problem. Here the EU intends to abide by its decision to subject all flight routes into and out of the EU to its emission allowance trading regime.

It is questionable whether or to what extent principles of international law can be cited to justify this endeavour on the part of the EU. The first principle to come to mind is the polluter pays principle, which is anchored in the Rio Declaration on Environment and Development and has now been integrated into many other

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[106] Here, one need think only of the commitments under the Framework Convention on Climate Change and the Kyoto Protocol. The principle of protecting the environment, in particular the global commons, is anchored in general international law, cf. Article 192-195 UNCLOS and Birnie/Boyle, International Law and the Environment, Chapter 3.

[107] This would be the case only if the obligation to reduce output of greenhouse gases were *jus cogens*, cf. Lücke, Universales Verfassungsrecht, Völkerrecht und Schutz der Umwelt, Archiv des öffentlichen Rechts, p. 1.

environmental agreements and become a part of European and national law.[108] Principle 16 of the Rio Declaration states:

> *"National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."*

The polluter pays principle endeavours to internalise environment-related costs, thus supporting the EU's proposal to impose charges on the airlines to partially cover the cost of environmental protection. However, in view of the wording used in Principle 16 of the Rio Convention ("endeavour"), the polluter pays principle is not intended to be binding in law.[109] Although it has become extremely widespread, the state practice needed for it to become a recognised principle of international customary law is still insufficient. It represents a guiding principle rather than a binding principle. Nevertheless, reference can be made to it here; after all, it should be of relevance, particularly for the interpretation of other principles of international law, in this case the sovereignty of states.

In the case under examination here, foreign (and national) airlines emit pollutants, especially CO_2, in the airspace within and beyond the EU. The level of pollutants emitted outside the EU is just as relevant to climate change as the level emitted within the EU. It therefore makes sense that any measure to reduce greenhouse gases must be based on the entire flight.

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[108] The wording of the Rio Declaration concurs largely with that of the Paris Convention (1992), the Helsinki Convention on Transboundary Watercourses (1992), the Barcelona Convention (1995), and the Protocol to the London Dumping Convention (1996). See also the European Energy Charter (1991), Article 19 para. 1. Other treaties refer solely to the polluter pays principle without defining it. Furthermore, the polluter pays principle, which has been incorporated into European Community law in Article 174 paragraph 2 of the TEC and has been recognised as a guiding principle in environmental policy since the Federal Government's environmental action programme of 1971, reflects the idea that "the costs of preventing, eliminating or compensating for environmental pollution [must be charged] to the polluter," cf. *Federal Ministry of the Interior*, Umweltbrief 1/1973, 1 (2).

[109] Birnie/Boyle, International Law and the Environment, p. 92.

At the level of international law it is in the first instance the countries of origin and destination that are responsible for fuel emissions. Both have an interest in the transport service and both were obliged to grant entitlements for the flight. This means that there are two countries that are able and permitted to internalise the costs. Fundamentally, it can be assumed that the degree of responsibility of the two countries (country of origin and country of destination) must be classed as equal, so that both are permitted to impose the same charges on the emitters, i.e. the airlines (each country levying 50%).

If one of the countries does not wish to impose charges, the other country may in any event apply "its" half of the charges due if the flight begins or ends on its territory. Ultimately, a country cannot feel that its sovereignty has been infringed if another country seeks to combat climate change as is required of the signatories to the Framework Convention on Climate Change.

Here again it is important that the EU provides regulations that take the measures of other countries into account. Thus, the Commission's proposal also took the 50% regulation into account in that it granted exemption - in one direction only, namely into the EU - to flights in cases where equivalent measures are in place in the country of origin. The Council's draft seeks optimal interaction between its measures and those of the third country's measures, which is not contrary to the 50% regulation.

However, the question of whether it can be legitimate under international law to impose the full charge in cases where the third country that is either the country of origin or country of destination of the flight does not have any measures of its own in place, is still problematic.

i. Exceptions to the prohibition on state action in the case of acts committed outside their territory

Levying the full charge on flight routes into and out of the EU represents a fundamentally problematic intervention in the sovereignty of third countries. However, a number of exceptions to the prohibition on countries exercising sovereign action beyond their own state borders have evolved. Their scope is,

however, controversial and the conditions under which they are justified are still unclear.[110]

Whereas, in principle, due to each country's territorial sovereignty over its territory on the principle of non-intervention in the internal affairs of other countries, the sovereign act of one country should not be able to have an effect on the territory of other countries, in exceptional cases sovereign acts with extraterritorial effects can be seen as permissible on the basis of a country's personal jurisdiction, the universality principle or the effects doctrine. A country's personal jurisdiction justifies national sovereign acts with extraterritorial effect in that under certain circumstances a country may establish legal regulations with regard to the individuals subject to its personal jurisdiction, extending to their conduct outside that country's own national borders (personality principle). The universality principle is particularly significant in criminal law and is based on the assumption of a worldwide and universal need to grant protection and the fundamentally criminal nature of certain behaviours.

Finally, the effects doctrine is based on the fact that certain events that take place outside a country's territory may have an effect within that country, thus entitling it to execute sovereign acts that have an extraterritorial effect.

In this specific case, the entitlement of the EU to include greenhouse gas emissions from international aviation in the EU emission allowance trading scheme on the basis of the effects doctrine can be considered. As described above, the effects doctrine states that if events outside their territory have an ascertainable effect within their territory, countries should be entitled to defend their interests by exercising extraterritorial sovereignty that may also have an effect on foreign countries.[111]

The emission of greenhouse gases from flights leaving the territory of the EU or entering the territory of the EU, including emissions beyond the borders and the territory of the EU is a major cause of global climate change. Climate change due to the greenhouse effect, which is principally caused by emissions of CO_2, is of serious

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[110] *Epiney*, in Meyer-Ohlendorf, Nils et al. 2006: Rechtliche Ausgestaltung von Nutzungsentgelten für globale Umweltgüter, p. 58. Exceptions here are the personality principle, universality principle and the effects doctrine, the latter being the only one of relevance here.

[111] *Doehring*, Völkerrecht, 2nd edition, Section 16, Mn. 823 ff; by contrast *United States – Restrictions on Imports of Tuna* is more likely to refute this view, Panel Report, ILM 1990, p. 1598, Mn. 5.26, 5.31.

international concern but also of concern to individual countries.[112] The fact that nation states are affected by climate change is largely independent of the emission of greenhouse gases within their territory; greenhouse gas emissions do not cause local, regional or national climate change, they cause global climate change. Their effect is worldwide and independent of the specific place they were emitted. For that reason, greenhouse gas emissions are not a local, regional or national problem; they are a global problem. Equally, greenhouse gas emissions from aviation have an effect on the global climate that does not depend on the specific place where they were emitted and in turn on the national climate of each nation state. In other words, each nation state also experiences the effects of greenhouse gases emitted outside its territory; it is directly affected by them so that it the effects of extraterritorial greenhouse gas emissions on the territory of an individual country can be assumed as given.

Due to this global character of climate change, to its cross-border cause and effects, it can be affirmed that each country has a justified interest in taking action to counter it, in the spirit of the effects doctrine, since climate change is a threat to all countries and their populations and for some countries can even pose an existential threat.

However, it must be taken into consideration that this doctrine has to date received only limited recognition in state practice. Worthy of particular mention here[113] is the conduct of the USA in the so-called *shrimp-turtle* case brought before the WTO Panels.[114] Here the USA imposed an import ban on shrimps and shrimp products because the fishing methods used by the exporting countries endangered sea turtle populations, which are a protected species under the CITES Convention. The World Trade Organisation's Appellate Body ruled that the USA could uphold its import ban

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[112] In view of the increasing focus on this as a problem in international negotiations, this is probably no longer seriously disputed.

[113] *Epiney*, in Meyer-Ohlendorf, Nils et al. 2006: Rechtliche Ausgestaltung von Nutzungsentgelten für globale Umweltgüter, p. 59.

[114] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, Panel Report, 15 May 1998. Cf. also *United States – Restrictions on Imports of Tuna*, (not adopted), WT/DS21/R39S/155, Panel Report, 3 September 1991.

based on fishing methods in other countries, a ban that by this time had been modified.[115]

It may seem entirely questionable whether the United States could have invoked the effects doctrine only. One of the factors, and indeed the primary factor, motivating the wish to protect the sea turtles was that the turtles spend part of their lives in US waters.[116] Thus, the purpose was not solely the protection of *global commons*; there was also a sufficient territorial *nexus*. Ultimately, this question can remain unresolved since the USA in any event assumed that sovereign measures in response to events with a foreign component do not necessarily represent a non-justifiable intervention in the sovereignty of third countries. Whether the interest was to protect native species of fauna or, as in the case to attempt to avert a disaster for the national and international turtle population, *a maiore ad minus* cannot make any difference, even if we assume that with its conduct the USA did not intend to apply or endorse the effects doctrine as a doctrine allowing grounds for exception under international law.

The imposition of charges in an emissions trading system based on the effects doctrine is thus also conceivable even for events that take place in a foreign country, so that emissions occurring during the entire flight or fuel consumption related to the flight over foreign territory can also be the basis for determining the charges.

However, it should be noted that here too certain principles that have evolved for sovereign acts beyond a country's own national borders must be respected.[117] One of

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[115] *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (United States – Shrimp Products, Recourse to Article 21.5), Report of the Appellate Body on Article 21.5, WT/DS58/AB/RW, 22 October 2001, Mn. 153

[116] Cf. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body 1998, Statement of the USA, Mn. 25, and Panel Report Mn. 133:" The sea turtle species here at stake, i.e. covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction. Of course, it is not claimed that *all* populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat -- the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)."

[117] Birnie/Boyle, International Law and the Environment, 2nd edition, p. 712 f.; *Brownlie*, Principles of Public International Law, 6th edition, p. 308 ff., with further references.

these is that there must be a direct point of reference between the object of the action taken and the country taking that action, along with consideration and commensurability in drafting and carrying out the action.[118]

A direct point of reference does exist due to the global impact of climate change and pollution of the atmosphere, since the problems they cause are not geographically limited but affect all countries, albeit with differing intensity. In terms of consideration and commensurability of the specific action, no problems arise from the drafts to date relating to the inclusion in the European emission allowance trading system of all airlines flying into and out the EU. The type of charge chosen to "steer" aviation towards a more environmentally sound course seems to be a relatively mild option. Specific use charges, irrespective of whether more environmentally sound measures were applied, would be a more serious intervention, since they would always be payable in this case.[119]

Similarly, a charge based solely on greenhouse gases emitted nationally would not be adequate to achieve the desired objective and would therefore not be as effective. With advance consultations and the greatest possible degree of transparency, the principle of consideration was adequately respected through extensive endeavours during negotiations with the ICAO and through the announcement in good time of the intention to proceed unilaterally if these negotiations were to fail.[120] Furthermore, in an impact assessment the EU analysed all the dangers, including those for third countries, in order to avoid any undue negative impact.[121]

ii. Evaluative view: the emission trading scheme as a special charge

The EU emission allowance trading scheme can also be classed as a charge *sui generis*. As discussed above, its direct and ultimate aim is not to generate revenue for the state; its primary aim is to reduce the emission of greenhouse gases. This is also illustrated by the use of the proceeds from the auctioning procedure. The Parliament's

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[118] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body 1998, Mn. 133; *Epiney*, in Meyer-Ohlendorf, Nils et al. 2006: Rechtliche Ausgestaltung von Nutzungsentgelten für globale Umweltgüter, p. 60.

[119] Cf. on this point also the emission trading scheme as a particular type of charge under ii).

[120] Cf. also Birnie/Boyle, International Law and the Environment, 2nd edition, p. 712

[121] Summary of the Impact Assessment: Inclusion of Aviation in the EU Greenhouse Gas Emissions Trading Scheme (EU-ETS) {COM (2006) 818 final, SEC (2006) 1684}, (unofficial advance version).

provisional version states the following:

> *Revenues generated from the auctioning of allowances shall be used to mitigate greenhouse gas emissions and to adapt to the impacts of climate change in the EU and third countries, especially in developing countries , and to fund research and development for mitigation, especially in the airline sector, and adaptation. In order to reduce to some extent the burden on citizens, revenues generated by auctioning shall also be used to lower taxes and charges on climate-friendly transport such as rail and bus. They may also be used to cover the Member States' justified costs in administering this Directive. Member States may also use the revenues to mitigate or even eliminate any accessibility and competitiveness problems arising for outermost regions and problems for public service obligations in connection with the implementation of this Directive. Member States shall inform the Commission of measures taken pursuant to this paragraph.*[122]

The Commission's previous version stated:

> *Revenues generated from the auctioning of allowances in accordance with paragraph 3 shall be used to mitigate greenhouse gas emissions, to adapt to the impacts of climate change, to fund research and development for mitigation and adaptation, and to cover the costs of the administering Member State in relation to this Directive. Member States shall inform the Commission of measures taken pursuant to this paragraph.*

In the Council's latest decision the hypothecation was relaxed further. It says:

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[122] European Parliament legislative resolution of 13 November 2007 on the proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (COM(2006)0818 – C6-0011/2007 – 2006/0304(COD)), Amendment 76; Article 1 (3) Article 3 c paragraph 4 (Directive 2003/87/EC).

"It shall be for Member States to determine the use to be made of revenues generated from the auctioning of allowances. Those revenues should be used to tackle climate change in the EU and third countries and to cover the costs of the administering Member State in relation to this Directive."

Nevertheless, a certain degree of hypothecation is still supported by recital 14:

"Aviation contributes to the overall climate change impact of human activities and the environmental impact of greenhouse gas emissions from aircraft can be mitigated through measures to tackle climate change […]in the EU and third countries, and to fund research and development for mitigation and adaptation […]. Revenues generated from the auctioning of allowances, or an equivalent amount where required by overriding budgetary principles of the Member States, such as unity and universality, should be used to mitigate greenhouse gas emissions, to adapt to the impacts of climate change in the EU and third countries, to fund research and development for mitigation and adaptation and to cover the cost of administering the scheme. This could include measures to encourage environmentally-friendly transport. The use of auctioning proceeds should in particular fund contributions to the Global Energy Efficiency and Renewable Energy Fund, and measures to avoid deforestation and facilitate adaptation in developing countries. Revenues could also be used[…] to mitigate or even eliminate any accessibility and competitiveness problems arising for outermost regions and problems for public service obligations in connection with the implementation of this Directive.

Provisions for the use of funds from auctioning should be notified to the Commission. Such notification does not release Member States from the obligation laid down in Article 88(3) of the Treaty, to notify certain national measures. The Directive does not prejudice the outcome of any future State aid procedures that may be undertaken in accordance with Articles 87 and 88 of the Treaty."

This in itself demonstrates that this is a relatively low-level intervention. The intervention in the sovereignty of third countries would have to be evaluated as being more serious if revenues that third countries were actually entitled to were to be diverted to other countries purely for the purpose of generating income. The distribution of a portion of the money to combat international climate change is tantamount to a lower-level intervention. Thus, although a clearer hypothecation of the revenue for climate protection purposes would be desirable in terms of a justification under international law, it not absolutely necessary under international law.

Although in the latest version of the Council's proposal, the hypothecation of the revenue for climate protection measures and to cover the costs of emissions trading has been relaxed and further relativising aspects may still be incorporated into the regulations, a certain portion of the revenue is at least being dedicated to environmental protection, thus benefiting not only European countries. It is still first and foremost an administrative system that makes it obligatory for airlines to register and report their CO_2 emissions and creates incentives to encourage the reduction of greenhouse gases. Thus, the system's ultimate objective is to reduce emissions from the air transport industry and not the generation of income by imposing charges.

At this point, we shall examine once more the polluter pays principle. The fact that the polluter (airlines) spends time in a particular country reflects that country's responsibility. By granting operating rights and providing facilities such as airports, they give the airlines the possibility in the first place to emit greenhouse gases. If a country takes seriously its responsibility under the Framework Convention on Climate Change then it is entitled, at least from the point of view of sovereignty, to consider it legally unobjectionable to impose restrictions on greenhouse gas emissions from air transport in a non-discriminatory manner.[123] One way of doing this would be to limit the number of flights into or out of its territory.

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[123] The airspace above the territory of sovereign states is fundamentally subject to the territorial jurisdiction of those states. Article 1 of the Chicago Convention expresses this doctrine of customary law in its stipulation that "every State has complete and exclusive sovereignty over the airspace above its territory." According to this, a state alone may determine the right of other states to transit its airspace. Cf. on this *Epiney*, in Meyer-Ohlendorf, Nils et al. 2006: Rechtliche Ausgestaltung von Nutzungsentgelten für globale Umweltgüter,, p. 258, and *Cheng*, The Law of International Air Transport, p. 122 and p. 8 ff. The Chicago Convention places restrictions on the above-mentioned sovereignty over airspace in the form of a number of freedoms of the air set out in its Annexes.

Here it becomes clear that, according to the general principles of international law, the EU's emissions trading scheme is at least as close to this legal measure[124] as it is to the levying of charges, which if levied with a transnational point of reference is questionable from the point of view of sovereignty. This suggests that an emission trading scheme is only a minor infringement of the sovereignty of third countries.

The nexuses based, firstly, on the aircraft spending time in the country levying the charge and, secondly, on the direct relationship of the airline to that country, seen in the light of the polluter pays principle, are not only valid for a regulation that has extraterritorial effect according to the jurisprudence of the German Constitutional Court (BVerfG), taking into consideration the effects doctrine and the relevance under international law of global climate, they also meet the requirements in international law of national acts of sovereignty that have an impact on the territory of other countries.

Finally, it can be argued that countries must exercise special care when levying charges on foreign nationals living abroad even if a sufficient nexus exists, because "every State [has] an obligation to exercise moderation and restraint … and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State."[125] However, this ultimately requires merely that before assuming extraterritorial jurisdiction of this kind, countries should consider the interests of the other countries. In the case under examination in this opinion this occurred.

Within the ICAO's negotiations, the EU attempted to gain the approval of all the other Contracting Parties for the inclusion of aviation emissions in the emissions trading scheme and considered the interests of individual countries before putting forward its own proposal in 2006 and deciding to take a unilateral approach, primarily as a result of the lack of willingness to negotiate within the ICAO. However, under the resolution of the European Parliament, the EU continues to leave the door open to the possibility of achieving a global scheme:

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[124] Not taking into account here the special regulations of the Chicago Convention.

[125] Separate Opinion of Judge Sir Gerald Fitzmaurice in the ICJ case *Barcelona Traction, Light and Power Co., Ltd*. (Belgium/Spain), ICJ Reports 1970, pp. 65, 105.

"Climate change is a global phenomenon which requires global solutions. The Community considers this Directive as an important first step. Non-EU parties are invited to contribute with their ideas to the debate so as to develop this policy instrument further. To make the voice of third parties heard, the Commission should be in permanent contact with them, both prior to and during the implementation of this Directive. If the European Union agrees with a third party on a common scheme which has at least the same positive effects for the environment as the Directive, the Commission may propose an amendment of the Directive. In any case the Commission may propose that incoming flights from third countries not be covered by the scheme if the third country has in place a system which has at least the same environmental benefit as this Directive."[126]

Similarly, the latest Council decision:

"The Community and its Member States shall continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation. In the light of any such agreement, the Commission shall consider whether amendments to this Directive as it applies to aircraft operators are necessary."

II. Summary

The EU's proposal is, with regard to its effect on the sovereignty of third countries that will be included in the emissions trading scheme against their will, permissible under international law.

However, it must be noted that, since it has the character of a special type of charge, the inclusion of greenhouse gas emissions from international aviation in the EU

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[126] European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (COM(2006)0818 – C6-0011/2007 – 2006/0304(COD)), Amendments 64, 71 and 9, Recital 11.

emission allowance trading scheme does represent a relatively mild intervention in the sovereignty of third countries and that even a mild intervention of that kind must also be justified under international law.

This justification is based here on the effects doctrine in international law. Since greenhouse gas emissions from international aviation impact on climate change and climate change in turn impacts on the territory of the EU, the EU is entitled under international law to take action against these greenhouse gas emissions. Since climate change is also caused by greenhouse gas emissions occurring outside the territory of the EU, the EU may also take action against these greenhouse gas emissions that occur outside its territory, if a sufficient nexus exists under international law. This sufficient nexus consists in the fact that international flights are made into or out of the territory of the EU and the aircraft in question at the moment the surrender of emission allowances is required are within the territory of the EU.

Thus, the result of a synopsis of the international law principles in favour of the EU's action is that the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme does not constitute an impermissible intervention in the sovereignty of third countries.

G. Options open to third countries for taking legal action against the EU Directive

The question of whether and in what way third countries can take action under international law against the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme is of significant practical relevance, as is the question of what consequences the use of such possibilities would have on the ability of the EU directive to be implemented and what kinds of decision could be taken in any proceedings under consideration and what kinds of impact they would have.

I. The ICAO's arbitration procedure

The first option for taking action open to third countries is to initiate a dispute settlement procedure within the ICAO on the basis of the provisions of the Chicago Convention.

In the event of a difference of opinion between two or more Contracting States over the interpretation or application of the Convention or its Annexes, the Chicago Convention itself makes provision for a dispute settlement procedure in Article 84 ff. A difference of opinion as defined by Article 84 of the Chicago Convention can be seen to exist by virtue of the fact that the EU and the third countries that intend to take legal action against the EU's proposed Directive have different legal views on the question of whether the inclusion of greenhouse gas emissions from international aviation is consistent with the provisions of the Chicago Convention and its Annexes.

1. Procedure described under Article 84 of the Chicago Convention

The authoritative English version of Article 84 of the Chicago Convention that regulates the dispute settlement procedure states the following:

Settlement of disputes

If any disagreement between two or more Contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any Contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.

a) The right to initiate and participate in the procedure

Any ICAO Contracting State that is involved in a difference of opinion over the interpretation and application of the Chicago Convention can request a dispute settlement procedure be carried out. Third countries assuming that the inclusion of greenhouse gas emissions from international aviation in the EU emissions trading scheme is not permissible under the provisions of the Chicago Convention and its Annexes belong to the category of ICAO Contracting States that are entitled to initiate a dispute settlement procedure.

However, the EU as such is not a member of the ICAO, so that it is not possible to file an application for a dispute settlement procedure against it directly. However, since all the Member States of the EU are Contracting States to the Chicago Convention and it is most likely that all the Member States of the EU will be of the opinion that including greenhouse gas emissions from international aviation is consistent with all the provisions of the Chicago Convention and its Annexes, a difference of opinion therefore exists - as defined in Article 84 of the Chicago Convention - between Member States of the EU and third countries initiating the procedure.

Thus, the application for dispute settlement must be initiated by the third countries against the Member States of the EU and – provided it is addressed to the Member States of the EU as respondent – is in line with the provisions of Article 84 of the

Chicago Convention with regard to entitlement to initiate action and permissible respondent.

b) Negotiations

The possibility of initiating a dispute settlement procedure under Article 84 of the Chicago Convention is, as evidenced by the wording of the provision, conditional on the fact that negotiations between the Contracting States with differing views on the interpretation and application of Chicago Convention and its Annexes, have taken place without satisfactory conclusion.

Before a dispute settlement procedure under Article 84 of the Chicago Convention is initiated, third countries that take the view that the inclusion of greenhouse gas emissions from international aviation in the EU's emissions trading scheme is not consistent with the Chicago Convention and its Annexes are thus obliged to hold negotiations on this view with the Member States of the EU and to endeavour to settle the existing differences of opinion through the vehicle of negotiation.

Only if these negotiations fail and the difference of opinion has therefore not been settled, is it possible to initiate the dispute settlement procedure before the ICAO Council, as provided for by Article 84 of the Chicago Convention.

c) Dispute settlement by the Council

If the above-mentioned conditions have been fulfilled, a country party to the disagreement can make an application for the disagreement to be decided by the Council.

In a situation like this, Article 84 of the Chicago Convention invests the Council of the ICAO with the authority to settle disputes concerning the interpretation or application of the Chicago Convention or its Annexes. The ICAO's Council is the only body with the authority to interpret the Chicago Convention and its Annexes. This also applies to questions in which the interpretation of the regulations of the Chicago Convention and those of its Annexes play only an indirect role.[127]

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[127] Cf. ICJ in the case of India versus Pakistan, Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, ICJ Reports 1972, p. 46: in the opinion of the ICJ, the legal question was whether the dispute could be resolved without interpretation or application of the Chicago Convention or any agreements based on it. If interpretation or application of the Chicago Convention proved necessary, then the ICAO Council has jurisdiction over the dispute.

In deciding on the permissibility of including greenhouse gas emissions from international aviation in the EU's emissions trading scheme, the ICAO Council could, thus, in particular rule on the compatibility with Articles 11, 15 and 24 of the Chicago Convention.

It is relevant in this that, according to Article 84, second sentence, of the Chicago Convention and Article 15, paragraph 5 of the Rules for the settlement of differences, no member of the Council that is **directly** party to the dispute may vote in the consideration by the Council of the dispute. Thus, in the dispute settlement procedure that may be expected, neither the country filing the application nor any other third countries that have been involved in the prior difference of opinion and negotiations nor the Member States of the EU are entitled to vote on this matter.

d) Procedure before the ICAO Council

The procedure before the ICAO Council is more political in orientation and is geared to mediation and compromise rather than to achieving a binding decision that is both legally workable and secure.

The ICAO Council is a political body, made up of government representatives chosen for their technical and diplomatic skills but also on the basis of their politics. Legal skills tend to be of secondary interest.[128]

The members of the Council do not possess judicial impartiality and the ICAO Council is not a jurisprudence body in the strict sense of the term. The dispute settlement in the Council tends to take place through a political decision-making procedure on the part of the countries involved.[129] "Might makes right" – the most powerful nation will usually win in the most important aspects, even if an objective evaluation would not conclude that this country held the better legal position.[130]

If a dispute settlement procedure concerning the permissibility of including greenhouse gas emissions from international aviation in the EU emission allowance

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[128] Buergenthal, Law Making in the International Civil Aviation Organization (1969), pp. 123-124, 195.

[129] Canetti, Fifty Years after the Chicago Conference: A Proposal for Dispute Settlement under the Auspices of the International Civil Aviation Organization, Law & Policy in International Business (1995), pp. 497, 514.

[130] Cf. also on this Oxman, Complementary Agreements and Compulsory Jurisdiction, American Journal of International Law (2001), pp. 277, 277.

trading scheme is brought before the ICAO Council, this political bias of the Council - given the distribution of power within the ICAO – is likely to be disadvantageous for the EU.

However, the initiation of dispute settlement proceedings before the ICAO does not necessarily, or even regularly, lead to a formal decision by the ICAO Council on the substantive law concerning the object of the dispute. The objective of the dispute settlement procedure is more to negotiate within the remit of this procedure and find a consensual solution between the Contracting States involved, thus ending the dispute without a formal decision by the Council.[131]

This tendency to resolve disputes through political channels without a formal decision by the Council can be clearly seen in all five cases presented for decision to date:

(1) India v. Pakistan (1952)
(2) United Kingdom v. Spain (1969)
(3) Pakistan v. India (1971)
(4) Cuba v. USA
(5) USA v. 15 European nations (2000)

It can be demonstrated in an exemplary fashion by the USA v. 15 European nations case, the first and to date only proceedings that were essentially concerned with economic aspects, whereas all the other cases were to do with airspace restrictions.[132]

The attempts by the Europeans to introduce noise abatement regulations at their airports[133] hit US airlines particularly hard. Unlike airports in the USA that are mostly a long way outside the cities, European airports are usually near densely populated areas. In order to take this into account and achieve effective noise protection for areas near airports, the EU Regulation in question went way beyond

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[131] Cf. Article 14 of the Rules for the settlement of differences, ICAO Doc. 7782/2, 2nd edition (1975).

[132] Dempsey, Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Law, Georgia Journal of International and Comparative Law (2004), pp. 231, 278.

[133] Regulation 925/1999/EC (Council Regulation 925/1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of Volume 1. Para II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993).

the noise protection limits required by Annex 16 Vol. I of the Chicago Convention: whereas it was possible to fulfil the requirements of this Annex by installing special noise reduction equipment, the EC Regulation aimed at tightening the conditions under which such "hushkitted" aircraft would be allowed to be registered in Europe.

When the USA brought this matter before the ICAO Council with the aim of initiating arbitration proceedings under Article 84 of the Chicago Convention, the EU responded with the argument that proceedings of that kind were not admissible at that point in time for two reasons. First, the Council had no jurisdiction to conduct arbitration as long as one of the parties was willing to engage in further negotiations, and secondly the airlines themselves were obliged to first exhaust the legal remedies available to them[134] before a country could instigate proceedings on their behalf before the ICAO.[135]

The ICAO Council held both EU arguments concerning the underlying conditions for the proceedings to be unfounded.[136] It ruled that in the specific case, although the EU was still willing to engage in further discussion, unsuccessful negotiations had already taken place and that the objective of a country bringing a case was not solely to protect its own citizens but also to protect its own legal position within the Chicago Convention.[137] It was therefore not deemed necessary for the airlines to have exhausted all legal remedies available to them.

The dispute over one of the Chicago Convention's standards or Annexes required was therefore found to be constituted by the differing interpretation of the parties to

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[134] Thus the outcome of two cases pending before the High Court of England and Wales: *The Queen v The Secretary of State for the Environment, Transport and the Regions ex parte Omega Air Limited,* which was referred to the ECJ as case C-27/00, and the High Court of Ireland: *Omega Air Ltd. Aero Engines Ireland Ltd, Omega Aviation Services Ltd c/Irish Aviation Authority,* referred to the ECJ as case C-122/00, was awaited.

[135] Preliminary Objections presented by the Member States of the European Union, Montreal, 18.07.2000. Downloadable at: www.state.gov/documents/organization/6839.doc. The EU also considered the damages claimed by the USA to be excessively high.

[136] Murphy, United States Practice in International Law (2002), Admissibility of the U.S.-EU Hushkits Dispute before the ICAO, pp. 190-192.

[137] Dempsey, Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Law, Georgia Journal of International and Comparative Law (2004), pp. 231, 284; Murphy, Contemporary Practice of the United States Relating to International Law: Admissibility of US-EU "Hushkits" Dispute Before the ICAO, American Journal of International Law (2001), pp. 410, 412.

the dispute of Annex 16 Vol. I.[138] The Council therefore voted 26 to 0 in favour of the admissibility of the USA's application. However, it proved possible to resolve the conflict in continuing discussions, after the Council had called upon both parties to return to the negotiating table. That resulted in the USA formally withdrawing its complaint to the ICAO after the EU announced it would revoke the Hushkits Regulation 925/1999/EC. Thus, an actual decision by the ICAO Council on the admissibility of the European Hushkits Regulation was never taken.

Thus, it was not possible to clarify conclusively whether the rules on environmental protection and flight safety prescribed by the ICAO in the Annexes to the Chicago Convention represented the highest standards it was permissible for the countries to demand or whether the Contracting States were allowed to impose more stringent requirements.

In particular, this last dispute settlement procedure illustrated once more with particular clarity that proceedings of this kind very clearly focus on an attempt to achieve consensus between the ICAO Contracting States in dispute through negotiations before the ICAO Council. The quest for consensus typically carries greater weight than the legal aspects of the dispute in question. A decision based on Article 84 of the Chicago Convention and the Rules for the settlement of differences is avoided as far as possible in favour of a consensual dispute resolution.

2. Timing

An essential condition for initiating a dispute settlement procedure under Article 84 of the Chicago Convention is that the EU Directive in question has gone through the co-decision procedure and been published. A further necessary condition is – as already mentioned – that negotiations have taken place and failed before the dispute settlement procedure is initiated.

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[138] Brown, The International Civil Aviation Organization is the Appropriate Jurisdiction to settle Hushkits Dispute between the United States and the European Union, Pennsylvania State International Law Review (2002), pp. 465, 484.

3. Legal consequences of initiating a dispute settlement procedure

The legal consequences of initiating a dispute settlement procedure are problematic. It is particularly questionable whether the fact that a dispute settlement procedure is being conducted either has a delaying effect throughout its duration on the measures of a Contracting State to the Chicago Convention, the compatibility of which with the provisions of the Convention are being reviewed, i.e. whether the Contracting State that has taken these measures has to suspend them or is not allowed to apply them until the dispute settlement procedure has been concluded, and whether the ICAO Council as the dispute resolution body responsible can order a delaying effect, possibly on the application of a third country.

In the specific case of the EU's plans to include greenhouse gas emissions from international aviation in its emission allowance trading scheme, there is to some extent an assumption, not further justified, that the EU will not be allowed to enforce this inclusion before the dispute settlement procedure before the ICAO Council has been concluded.[139]

However, such a far-reaching consequence would occur only if there was a basis for it in international law, i.e.:

- If the initiation of a dispute resolution procedure before the ICAO Council based on Article 84 of the Chicago Convention would have the effect of suspending measures in the sense mentioned above,
  or
- If the ICAO Council were able to issue provisional measures,
  or

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[139] This assumption is quite widespread; it can be found for example in the document "Gesprächsunterlage Luftverkehr EH-1_404_3-3.doc," communicated by Mr. Heinen and dated 22.08.2007; it most probably is based on the suspension of the new EU regulation on noise abatement at airports that actually occurred; however, this suspension did not occur because it was imperative under the law, but because it seemed reasonable and opportune both economically and politically as will be illustrated below, and thus does not as such justify the assumption that the ICAO dispute resolution procedure will have a delaying effect, either because it imperative under the law or self-evident.

- If in the preliminary negotiations the parties had explicitly agreed a delayed enforcement of the regulation under dispute or were obliged to comply with this practice on the basis of prior practice.

a) Delaying effect triggered by initiating a dispute settlement procedure

Initiation of a dispute resolution procedure before an international arbitration body automatically having a suspension effect, approximately comparable with § 80 of the German Administrative Court Procedures Code (VwGO), is neither widespread at the level of dispute resolution under international law nor necessarily appropriate. It could be considered only if there were explicit provision for it in the rules governing the specific dispute settlement procedure under international law.

Article 84 ff. of the Chicago Convention contains no provision stipulating that the initiation of a dispute settlement procedure would have a delaying effect nor does it oblige Contracting States to suspend or refrain from applying the measures that are the subject of the dispute for the duration of the dispute settlement procedure.

Similarly, the Rules for the settlement of differences[140] make no provision for a delaying effect of that kind to be triggered by the initiation of a dispute settlement procedure nor for a commitment on the part of the Contracting States to suspend or refrain from applying the measures that are the subject of the dispute settlement procedure.

Since furthermore there is no general principle in international law under which conducting a dispute settlement procedure under international law would trigger a delaying effect nor trigger a commitment to suspend measures, unless there is a specific basis for it in international law, the fact of initiating and conducting a dispute settlement procedure under Article 84 of the Chicago Convention does not in itself have a suspending effect or obligation to suspend measures under the proposed EU Directive to include greenhouse gas emissions from international aviation in the EU emission allowance trading scheme.

b) Possibility of the Council imposing provisional measures

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[140] Rules for the settlement of differences, ICAO Doc 7782/2, 2nd edition 1975.

While an automatic suspending effect occurring *qua lege* as a result of a review procedure in international law being initiated is unusual, there is a possibility in some areas of international law or EU law that in a review procedure being conducted under international law in a supranational context, a dispute resolution body or court within the context of the proceedings it is conducting may order binding provisional measures.[141]

Thus, provision can be made on the level of international law that in a dispute settlement procedure or court proceeding under international law the appellate dispute resolution body or court can issue provisional measures or instructions. These provisional measures or instructions can theoretically constitute ordering the application of a national measure to be provisionally suspended, if it is precisely the admissibility in international law of this national measure that is the subject of the proceedings under international law and if, without the provisional instruction or measure, the purpose or success of the review procedure instigated would be frustrated or rendered impossible. That means that a delaying effect or obligation to suspend measures can arise from an explicitly precautionary measure (provisional measure; interim measure) on the part of the appellate dispute resolution body, if the regulations in international law on the specific dispute settlement procedure or general provisions of international law provide a basis for provisional measures of that kind.

The difference between this and an automatic suspending effect that occurs *qua lege* is twofold:

1. The suspending effect does not occur automatically as a result of the dispute settlement procedure being initiated (as is the case in German administrative law when an objection is lodged or appeal made under Section

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[141] The International Court of Justice, for example. Cf. Article 41 of the Statute of the ICJ and the Judgement in *LaGrand* (Germany v. United States of America), ICJ Reports 2001, pp. 466, 505, the European Court of Justice, the International Tribunal for the Law of the Sea and since *Mamatkulov and Askarov v. Turkey* also the European Court of Human Rights under Article 39 of the Rules of Court, cf. also Tams, Interim Orders by the European Court in Human Rights – Comments on Mamatkulov and Abdurasulovic v. Turkey, ZaöRV 2003, pp. 681–692 and Oellers-Frahm, Verbindlichkeit einstweiliger Maßnahmen: Der EGMR vollzieht – endlich – die erforderliche Wende in seiner Rechtsprechung', EuGRZ 2003, pp. 689–692. There are, however, other institutions where a provisional measure does not have binding force, cf. Oellers-Frahm, in Zimmermann/Tomuschat/Oellers-Frahm, The Statute of the International Court of Justice: A Commentary, Article 41 Mn. 93.

80 of the German Administrative Court Procedures Code (VwGO)), but only in the event of, and as a result of, a corresponding order issued by the appellate dispute resolution body.

2. The second difference consists in the fact that a provisional instruction of that kind may be issued – providing it is admissible under the applicable procedural regulations – not as a matter of course nor at the discretion of the appellate dispute resolution body, but only under certain narrow restrictive conditions.

Provisional measures at the ICJ (and also at the other arbitration bodies cited below) may be taken only for the purpose of protecting the rights of the parties,[142] i.e. if it is absolutely necessary in order to effectively protect the rights of one of the parties. This means that, according to the established jurisprudence of the ICJ, the rights of the parties to the proceedings would have to sustain irreparable loss if provisional measures were not imposed.[143] Thus, fundamentally the court may only enact provisional measures when they are essential to maintaining the actual matter in dispute,[144] in other words to prevent the actions of one of the parties to the proceedings from causing irreparable loss or irreversible material changes. Thus, the court is ultimately protecting the effectiveness and meaningfulness of its own proceedings by ensuring that the judgement at the close of the proceedings is still meaningful in practice.[145]

In the constellation in the case in hand here, it is not immediately obvious how the Directive including international air transport into and out of the EU in the European emissions trading scheme entering into force before the Council has made a decision in a dispute settlement procedure that might be initiated under Article 84 of the Chicago Convention, or how this Directive having continuing validity during the proceedings, could prejudice the position of the plaintiff in a way that the final decision, assuming it ruled against the EU, would not lead to full compensation (as

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[142] Article 41 of the ICJ Statute: …'to *preserve* the respective rights of either party…'.

[143] '…irreparable prejudice should not be caused to rights that are the subject of judicial proceedings…'

[144] In the case of *LaGrand* it was the life of Mr. LaGrand himself that had to be preserved.

[145] Cf. *LaGrand* (Germany/United States of America), ICJ Reports 2001, p. 466, Mn. 102 f.

far as financially possible). There is no situation that is even remotely comparable with the constellations in which to date at the level of international law it has been assumed that there was a threat of irrecoverable loss that can be the only justification for issuing provisional measures under international law.

Furthermore, for the specific dispute settlement procedure under Article 84 of the Chicago Convention, the question arises as to the basis for the ICAO Council's authority to issue a provisional measure. Neither the Chicago Convention nor the ICAO's Rules for the settlement of differences provide for provisional measures or provisional instructions in the dispute settlement procedure. Thus, there is no basis in an international agreement such as Article 41 of the ICJ Statute or Article 39 of the Rules of Court of the ECHR for provisional measures or orders in the dispute settlement procedure under Article 84 of the Chicago Convention. Due to the lack of will of the ICAO Contracting States to establish such authority a measure of this kind by the ICAO Council is therefore inadmissible in international law.

On the other hand, the opinion is held by some that the authority to issue provisional measures is an inherent component of every judicial function and all court proceedings as a result of the purpose of protecting the effectiveness and meaningfulness of those proceedings.[146] However, this view is fundamentally inapplicable – at least in international law. On the level of international law, subjects of international law make a fundamentally autonomous decision – at least in the field of the law of treaties - as to which commitments to enter into on the basis of international agreements and whether or to what extent they submit to the scrutiny of courts on the basis of those agreements. Within the context of that decision, they also define the extent of the judicial scrutiny's scope with regard to the possibility of the appellate dispute resolution body's ability to take interim measures or issue provisional instructions, since judicial measures of that kind may represent significant interventions in national sovereignty and autonomy.

Like the decision on submission to international jurisdiction, the decision on the powers of this international jurisdiction is taken under a binding agreement and the provisions of that agreement prevail in establishing the extent of the submission to the judicial review system established under international law and its effectiveness.

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[146] Oellers-Frahm, in Zimmermann/Tomuschat/Oellers-Frahm, op. cit., Article 41, Mn. 87.

From this it follows that, since the Chicago Convention does not provide for the ICAO Council to have the power to issue provisional measures in the procedure under Article 84 of the Chicago Convention, it (the ICAO Council) may not take such measures even if it invokes an alleged general principle of the effectiveness of the judicial review.

Furthermore, it is questionable whether the procedure before the ICAO Council is tantamount to judicial proceedings under international law or whether it must not be classified rather as a political process to which this principle of international law - which is any case moot - does not apply.[147] Finally – as we have already detailed – the necessary conditions for provisional measures do not exist even if the authority to issue them existed, which in this case it does not.

Thus, the ICAO Council lacks the authority to issue binding provisional measures; even if it were authorized to issue such measures, it would not be able to in this case, since there is no threat of irreparable prejudice to the rights or interests on which the legal dispute is based nor that the dispute would intensify to an unacceptable degree.

c) Entry into force suspended on the basis of ICAO's established practice?

An obligation for the EU to defer enactment of the Directive on the inclusion of international aviation in emissions trading until initiated proceedings have been concluded could ensue from the general state practice for procedures before the ICAO's arbitration body or by the EU's voluntary commitment through the estoppel principle.

Past state practice during disputes brought before the ICAO Council is thus relevant. If the prior practice in the dispute settlement procedures has been to consistently suspend disputed regulations that were the subject of the judicial proceedings for the period of time negotiations were taking place before the ICAO Council, then, in this case, the EU could also have an obligation to delay the enactment of the Directive.

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[147] Thus, *Appeal relating to the Jurisdiction of the ICAO Council*, ICJ Reports 1972, p. 46 ff is not entirely certain. What is certain is merely that the appeal would have a definitively judicial character, since it would take place before the ICJ or a tribunal; this question is only germane with regard to the Council itself.

However, state practice of this kind has not evolved in the first four cases of disputes brought before the ICAO's arbitration body.[148] Thus, due to the lack of a corresponding practice in four out of the five prior cases the existence of an established state practice must be refuted.

However, it should be noted that during the procedure involving the USA v. 15 European nations in 2000 the EU delayed the enactment of the Hushkits Directive. For that reason, there is a concern that if a case is brought before the ICAO Council, the entry into force the Directive on the inclusion of aviation in the emissions trading scheme could be delayed, which would be extremely undesirable. However this concern is unfounded for the reasons set out below.

The decision of the EU Council to delay the entry into force of the Hushkits Directive arose first and foremost out of the special situation at the time, in particular the already frayed relationship between the EU and the USA. The fact that the EU Council decided in this special case to suspend the entry into force of the legislation that was the subject of the dispute was due to the fact that, at the end of the 1990s, economic conflicts had increasingly evolved in the relationship between the EU and the USA, such as the disputes over beef hormones that was brought before a WTO Panel,[149] over banana imports that was also the subject of a dispute settlement process at the World Trade Organisation, and now the "hushkit disagreement" over noise reduction equipment for aircraft that was brought before the ICAO Council.[150]

Due to these trade conflicts and the American plans to suspend landing rights for Concorde flights from Europe[151] should the Hushkits Directive enter into force, the

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[148] This can be seen particularly clearly in the case of Pakistan v. India of 1971 in which while the appeal against the jurisdiction of the ICAO Council was still pending, the transit ban for Pakistani aircraft was upheld before the ICJ, cf. *Appeal relating to the Jurisdiction of the ICAO Council*, ICJ Reports 1972, pp. 46, 51.

[149] World Trade Organization Report of the Panel, "EC Measures Concerning Meat and Meat Products (Hormones)," WT/DS26/R/USA 18.8.1997.

[150] European Parliament, Resolution on the Transatlantic Economic Partnership and EU/US trade disputes, especially hormones, bananas and hushkits," European Parliament, Texts Adopted by Parliament, provisional edition of 5.5.1999, B4-0430, 0431, 0433 and 0435/99. Downloadable at: http://www.europarl.europa.eu/pv2/pv2?PRG=CALDOC&TPV=PROV&FILE=990505&TXTLST=1&POS=1&LASTCHAP=6&SDOCTA=11&Type_Doc=FIRST&LANGUE=EN

[151] House Resolution H.R. 661, adopted by the US Congress on 3 March 1999: Proposal to refuse landing rights in the USA for Concorde. Can be downloaded at http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HE00086:@@@L&summ2=m&. "*Providing for consideration of the bill (H.R. 661) to direct the Secretary of Transportation to prohibit the commercial operation of supersonic*

EU Council, in an attempt to avoid fanning the flames, decided to postpone its entry into force.[152]

Another important reason for the EU to order a suspension of the Directive was the desire to show its willingness to compromise in its relationship with the USA, which had requested the Directive be suspended in order that a solution to the conflict might still be found.[153] With this the EU wanted to do meet the requirements of the precept of meaningful consultations before adopting a legal act it had established in the North Sea Continental Shelf case.[154] Thus, the delay was based solely on political considerations.

It is also not self-evident that a conciliatory act of this kind could have a binding effect on other cases. On the contrary, the EU Council's singlehanded action in delaying the Directive's entry into force was severely criticised at the time by the European Parliament, and it was furthermore stressed that this behaviour should on no account be allowed to set a precedent for future legislative procedures.[155]

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transport category aircraft that do not comply with stage 3 noise levels if the European Union adopts certain aircraft noise regulations."

[152] On the chronology of events see Knorr/Arndt, Noise Wars: The EU's Hushkits Regulation – Environmental Protection or Eco-protectionism, Materialien des Wissenschaftsschwerpunktes "Globalisierung der Weltwirtschaft, vol. 23, 2002, p. 5 ff. Can be downloaded at: http://www.iwim.uni-bremen.de/publikationen/pdf/w023.pdf.

[153] Preliminary Objections presented by the Member States of the European Union, Montreal, 18.07.2000. Mn. 18: *In the course of these negotiations within CAEP and in particular in November 1999 the US asked for the indefinite suspension of the Regulation or otherwise it would consider other options including the use of the ICAO dispute settlement system. The response of the EU was a letter from the Vice-president of the European Commission and Commissioner for Transport saying that "I would like to confirm again that the European Commission is ready to propose a suspension of the application of this Regulation in the aim of negotiating together with the U.S.A. new noise standards within ICAO to be adopted by the next Assembly on September 2001*."

[154] *North-Sea Continental Shelf*, ICJ Reports (1969). Also *Fisheries Jurisdiction* cases, ICJ Reports (1974) p. 3 ff. Mn. 87: "*the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it."*

[155] Press report of 5.5.1999: Handelskonflikt zwischen der EU und den USA**,** Doc. B4-430, 431, 432, 433, 434, 435, 436 and 452/99, debate: 3.5.1999, Adopted: 5.5.1999. From the decision: *"The European Parliament is deeply dissatisfied with the way in which the decision to delay the entry into force of the hushkits directive was taken by the Council without consulting Parliament, and points out that this should in no way form a precedent for future legislative procedure and with the fact that ignores the EU's efforts to improve the environmental performance of aircraft."*

Thus, not only was the *opinio juris* required for international customary law lacking, but the estoppel principle was also averted. The obligation to negotiate in good faith with a view to arriving at an agreement, as required by the International Court of Justice in North Sea Continental Shelf, has already been met with regard to the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme through the willingness to compromise already demonstrated by the EU and corresponding clauses in the directive, so that there is no need to suspend the directive for further negotiations (unlike in 1999).

The EU's behaviour in 1999 during the hushkit proceedings in no way restricts the EU in its power to enact as planned - without hindrance from ongoing proceedings within the ICAO or any that might be expected in the future - the Directive on the inclusion of international aviation in the emission allowance trading scheme.

d) Conclusion

Since the initiation of a dispute settlement procedure under Article 84 of the Chicago Convention does not give rise to any impact on the effectiveness or entry into force of the directive on the inclusion of international aviation in the emissions trading scheme, the EU may enact the directive without legal complications before the conclusion of any proceedings that might be initiated.

The EU and its Member States have the sole discretion to decide whether in order to avoid putting political relations under strain they might delay the entry into force of the directive until the proceedings are over. In any event, a legal obligation based on international customary law, the estoppel principle or an automatic or enforced delaying effect for the duration of the proceedings need not be feared.

4. The appeal process

Basically, under Article 85 of the Chicago Convention it is possible to appeal against a decision of the ICAO Council under Article 84 if it has not proven possible to achieve a negotiated settlement. Appeal may be brought before the International Court of Justice or an ad-hoc tribunal chosen by both parties.

Ten of the twelve disputes over aviation that have so far been dealt with before the ICJ (Libya v. USA, Iran v. USA, Pakistan v. India, along with a number of cases

during the Cold War) ended with a declaration by the ICJ that it was not competent to rule.

Article 36 of the ICJ Statute states that if the defendant does not declare it recognises the jurisdiction of the ICJ, it (the ICJ) declares it is not competent to rule on the dispute.[156] Since numerous EU Member States have not submitted to the jurisdiction of the ICJ, the only possibility that remains if the Member States of the EU refuse to bring the proceedings before the ICJ is to agree with the plaintiff to go before an ad-hoc tribunal. If no agreement can be reached here, each party is entitled to appoint an arbitrator.

This is regulated under Article 85 of the Chicago Convention as follows:

> *If any Contracting State to a dispute in which the decision of the Council is under Appeal has not accepted the Statute of the Permanent Court of International Justice and the Contracting States parties to the dispute cannot agree on the choice of the arbitral tribunal, each of the Contracting States parties to the dispute shall name a single arbitrator who shall name an umpire. If either Contracting State party to the dispute fails to name an arbitrator within three months from the date of the appeal, an arbitrator shall be named on behalf of that state by the President of the Council from a list of qualified and available persons maintained by the Council. If, within thirty days, the arbitrators cannot agree on an umpire, the President of the Council shall designate an umpire from the list previously referred to. The arbitrators and the umpire shall the jointly constitute an arbitral tribunal. Any arbitral tribunal established under this or the preceding article shall settle its own procedure and give its decisions by majority vote, provided that the Council may determine procedural questions in the event of any delay which in the opinion of the Council is excessive.*

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[156] Dempsey, op. cit., p. 287.

The consequences of appealing a decision of the Council in a procedure under Article 84 of the Chicago Convention are laid down by Article 86 of the Chicago Convention that states:

> *Unless the Council decides otherwise any decision by the Council on whether an international airline is operating in conformity with the provisions of this Convention shall remain in effect unless reversed on appeal. On any other matter, decisions of the Council shall, if appealed from, be suspended until the appeal is decided. The decisions of the Permanent Court of International Justice and of an arbitral tribunal shall be final and binding.*

In the view of the Council, Article 86 stipulates that when a decision of the Council taken under Article 84 of the Chicago Convention is appealed, unless it refers to the question of whether an airline is operating in conformity with the provisions of the Chicago Convention, the decision of the Council is suspended until the appeal is decided.[157]

The consequences of contravening the Chicago Convention's dispute resolution rules are set out in Article 88 of the Chicago Convention. If a country breaches the stipulations in the chapter on arbitration, disregards a decision of the Council or the suspending effect of a procedure pending under Article 84 of the Chicago Convention, Article 88 of the Chicago Convention stipulates at the sanctions provided for there may be imposed, consisting of suspension of that country's right to vote in the Council and the Assembly:

> *Penalty for non-conformity by State*
>
> *The Assembly shall suspend the voting power in the Assembly and in the Council of any Contracting State that is found in default under the provisions of this Chapter.*

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[157] Fitzgerald, The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council, Canadian Yearbook of International Law (1974), pp. 153, 164.

II. Dispute settlement procedure within the WTO

A dispute settlement procedure under the auspices of the WTO seems very unlikely, since, as a service, air transport is to date not subject to GATS and therefore similarly not part of the WTO's remit.

H. Possible responses to airlines operating flights into the EU without emission allowances

According to the provisions of the Chicago Convention, airlines must respect the primary and secondary legislation of the country in which they land or take off. Thus, legislation requiring the submission of emissions statistics and the surrender of emission allowances, as proposed in the Directive, are binding on those airlines.

Implementation of the scheme is to be along exactly the same lines as the EU's current emission allowance trading scheme. Thus, if an aircraft operator does not manage to surrender enough allowances to cover its emissions in a particular year, it must expect not only to be obliged to surrender the additional allowances but also to pay a fine (€100 for each tonne of CO_2 emitted that is not covered by the surrender of an allowance) and from this point on it is no longer in a position to sell allowances. Under the Council decision, the country responsible for administering this airline within the EU emission allowance trading scheme can as an *ultima ratio* revoke or suspend this airline´s operating permit.[158]

In its drafts, the European Parliament also provided for the latter in Article 16 of the emission allowance trading directive. The newly inserted paragraph 5 states:

> *"In the event that an aircraft operator fails to comply with the requirements of this Directive and its administering Member State considers that an operating ban within the Community should be imposed, the administering Member State may request the Commission to take such a decision on the aircraft operator concerned."*

The application of the administering Member State must in line with paragraph 6, also recently added, include the following elements:

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[158]Cf. http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/506&format=HTML&aged=0% 3Cuage=EN&guiLanguage=en.

"Any request by an administering Member State under paragraph 5 shall include:

(a) evidence that the aircraft operator has not complied with its obligations under the Directive;

(b) details of the enforcement action which has been taken by the Member State;

(c) a justification for the imposition of an operating ban at Community level; and

(d) a recommendation for the scope of an operating ban at Community level and any conditions that should be applied."

After informing all Member States (paragraph 7), holding consultations with the Member State making the application (paragraph 8) and informing the airline, which should be given the opportunity to comment on its conduct (paragraph 9), the Commission decides on the basis of the request, in accordance with the procedure set out in Article 23, paragraph 2, to impose an operating ban on the aircraft in question (paragraph 10). The Member States must then implement within their territory the measures decided at Community level and fully inform the Commission of these measures (paragraph 11). The Commission may, if appropriate, make more detailed stipulations regarding the procedure (paragraph 12).

In the Council's new version of 20 December 2007, this mechanism was strengthened with the aim of ensuring uniform and robust enforcement with the EU. The changes include making it possible for Member States as an *ultima ratio* to request an operating ban for aircraft operators within the EU if they consistently contravene the provisions of the emission allowance trading scheme and if other measures have proven to be ineffective.[159]

The specifics of the Council decision (addendum to Article 16) include provision for the following:

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[159] Cf. Press release by the European Commission, Environment: Commission welcomes Council agreement on aviation, regrets failure on soil, Brussels, 20 December 2007.

"5. In the event that an aircraft operator fails to comply with the requirements of this Directive and where other enforcement measures have failed to ensure compliance, its administering Member State may request the Commission to decide on the imposition of an operating ban on the aircraft operator concerned

6. Any request by an administering Member State under paragraph 5 shall include:

a) evidence that the aircraft operator has not complied with its obligations under this Directive;

b) details of the enforcement action which has been taken by that Member State;

c) a justification for the imposition of an operating ban at Community level; and

d) a recommendation for the scope of an operating ban at Community level and any conditions that should be applied.

7. When requests such as those referred to in paragraph 5 are addressed to the Commission, the Commission shall inform the other Member States (through their representatives on the Committee referred to in Article 23(1) in accordance with the Committee's Rules of Procedure).

8. The adoption of a decision following a request pursuant to paragraph 5 shall be preceded, when appropriate and practicable, by consultations with the authorities responsible for regulatory oversight of the aircraft operator concerned. Whenever possible, consultations shall be held jointly by the Commission and the Member States.

9. When the Commission is considering whether to adopt a decision following a request pursuant to paragraph 5, it shall disclose to the aircraft operator concerned the essential facts and considerations which form the basis for such decision. The aircraft operator concerned shall be given an opportunity to submit written comments to the Commission within 10 working days from the date of disclosure.

10. At the request of a Member State, the Commission, in accordance with the regulatory procedure referred to in Article 23(2), may adopt a decision to impose an operating ban on the aircraft operator concerned.

11. Each Member State shall enforce, within its territory, any decisions adopted under paragraph 10. It shall inform the Commission of any measures taken to implement such decisions.

12. Where appropriate, detailed rules shall be established in respect of the procedures referred to in this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23, paragraph 2a."

Thus, the EU and its Member States have appropriate instruments to enable them to enforce the provisions of the EU Directive, even with those airlines that are unwilling to comply. The operating ban provided for can be applied both to national airlines and to airlines from third countries. The aircraft in question then has to remain at the airport until the sum owing has been paid or emission allowances surrendered.

I. Summary of findings

The inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme, as proposed by the planned changes to the EU emission allowance trading directive, is consistent with all relevant international provisions and therefore permissible under international law.

1. The Chicago Convention does not preclude the planned inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme.

a. The inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme does not constitute a fee, due or other charge as defined in Article 15 of the Chicago Convention. It is not applied solely for the right to enter, exit or transit. Finally, it is not discriminatory. Therefore, Article 15 of the Chicago Convention does not preclude the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme.

b. The inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme is consistent with Article 24 of the Chicago Convention, because it does not constitute the introduction of a customs duty or charge similar to customs duty as defined in Article 24 of the Chicago Convention.

c. Similarly, Article 11 of the Chicago Convention is not affected by the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme, since the inclusion will be implemented in a non-discriminatory way.

d. The Chicago Convention cannot be said to contain prohibitions on environmental requirements being made of international air traffic, and recourse to the possible authority of the ICAO would not give rise to any blocking effect even as a result of corresponding secondary legislation, since the ICAO has not issued any secondary legislation on the greenhouse gas emission allowance trading scheme for international air traffic or any other measure to combat greenhouse gas emissions from international aviation.

2. The bilateral aviation agreements entered into by the EU and its Member States do not preclude the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme, because this measure is neither a customs duty nor a charge as defined by the relevant clauses of these agreements and because it is not discriminatory nor does it restrict traffic volume. It is therefore of no relevance that those agreements could be terminated at a year's notice if they were an obstacle.

3. Binding secondary legislation that might preclude the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme has not been issued by the ICAO. In particular, no "standard" exists that would render the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme impermissible. The Resolutions of the ICAO Assembly on the greenhouse gas emission allowance trading scheme are not binding secondary legislation.

4. No voluntary commitment has been made by the EU Member States and through them by the EU itself to the ICAO's Resolutions on the greenhouse gas emission allowance trading scheme. Firstly, a voluntary commitment through participation in a non-binding action must fundamentally be rejected and, secondly, the EU Member States have expressed their reservation regarding all the relevant actions on the part of the ICAO and in doing so prevented a voluntary commitment from arising.

5. International law in general and the doctrine of the sovereignty of states in particular do not preclude the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme. On the basis of the effects doctrine, the EU is entitled with regard to the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme to make reference to greenhouse gas emissions occurring outside its territory and to require that emission allowances be surrendered for these emissions too. Furthermore, the specifics of the changes proposed take into account as far as possible the sovereignty of other countries affected.

6. Third countries affected that are Contracting States to the Chicago Convention may make recourse to the ICAO Council as an arbitration body to appeal the inclusion of greenhouse gas emissions from international aviation in the EU emission allowance trading scheme. The initiation of a dispute settlement procedure of this kind does not have a delaying effect and does not constitute grounds for any obligation under international law to suspend the relevant regulations on including greenhouse gas emissions from international aviation in the EU emission allowance trading scheme. On the contrary, such regulations can continue to be applied throughout the duration of a dispute settlement procedure. In the past, measures under dispute have been suspended in exceptional cases only and only on the basis of a political decision, not as the result of any legal obligation.
7. The proposed Directive gives the EU and its Member States an appropriate set of instruments to enforce an emission allowance requirement that also applies to international air traffic.

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