

**The role of judicial interpretation in environmental
protection**

**An analysis of the EU's leadership ambitions on climate
change action**

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Abstract

The inclusion of foreign as well as domestic airlines in the European Union Emissions Trading Scheme under Directive 2008/101 resulted in aggressive international efforts to derail EU climate change policy. It also spawned a legal challenge to the development that eventually emerged before the Court of Justice of the European Union in the form of the *Air Transport Association of America* preliminary reference. In this context, this thesis seeks to analyse the judiciary's interpretation of the EU's climate change policies on the basis of its environmental competences. More specifically, it strives to evaluate the impact of the Court's interpretation in the *Air Transport Association of America* case on the EU's claim to, and merits as, an environmental leader.

This thesis concludes that the EU is in a unique position to assume the role of environmental leader and to eventually lead the international community toward a multilateral solution to man-made climate change. Additionally, while the EU possesses the relevant competence, it is currently selling itself short in its exercise of that competence. The *Air Transport Association of America* case, together with the EU's political behaviour in its aftermath, has revealed a hesitance to make the hard choices and to assume the responsibilities attached to leadership. In particular, as the supreme court of the EU, the Court of Justice is responsible for interpreting European Union law in a consistent and predictable manner reconciling its progressive and fundamental qualities with the requirements and constraints of international law, the rule of law and the separation of powers. In this regard, the Court's judgment in *Air Transport Association of America* constitutes a failure to reproduce the quality jurisprudence that the Court has become famous for.

Summary

The European Union has for a long time sought to shape itself as an environmental leader and role model. Over time, this pursuit has allowed the EU to develop sophisticated competences in environmental law and external action. Using this expertise the EU has undertaken an ambitious climate change policy with international aspirations. As the defining feature of its climate change programme the EU is pioneering the European Union Emissions Trading Scheme. The EU Emissions Trading Scheme is a market-based means of addressing increasing emissions and is intended to define the EU's leadership as progressive and innovative. An important element of the scheme is the successive expansion of its coverage to new sectors of economic activity. As part of this process, Directive 2008/101 ('Aviation Directive'), provides for the inclusion of civil aviation in the Emissions Trading Scheme starting in 2012. The inclusion of foreign as well as domestic airlines in the scheme resulted in aggressive international efforts to derail the extension, as well as a legal challenge that eventually emerged before the Court of Justice of the European Union in the form of the *Air Transport Association of America* preliminary reference. Against this background, this thesis seeks to analyse the judiciary's interpretation of the EU's climate change policies on the basis of its environmental competences. More specifically, it strives to evaluate the impact of the Court's interpretation in the *Air Transport Association of America* case on the EU's claim to, and merits as, an environmental leader.

This thesis concludes firstly, that the EU is in a unique position to assume the role of environmental leader; it has the competence as well as the constitutional restrictions necessary to succeed in this role, to achieve its objectives, and to eventually lead the international community toward a multilateral solution to man-made climate change. Secondly, that while the EU possesses the relevant competence, it is currently selling itself short in its exercise of that competence. The Aviation Directive is an outstanding example of the EU's ability to play the game of international politics in a measured and constructive manner. Yet the *Air Transport Association of America* case, together with the EU's political behaviour in its aftermath, has revealed a hesitance to make the hard choices and to assume the responsibilities attached to leadership. If the EU is to be a role model and a credible leader, it must play to the strengths of its position and be unapologetic in its pursuit of a progressive and sustainable global climate change policy. And in turn, as the supreme court of the EU, the Court of Justice is responsible for interpreting European Union law in a consistent and predictable manner reconciling its progressive and fundamental qualities with the requirements and constraints of international law, the rule of law and the separation of powers. It is argued in this thesis that despite the Court's generally excellent track record in this regard, its judgment in *Air Transport Association of America* constitutes a failure to reproduce the quality jurisprudence that the Court is famous for. For the moment, it is clear that the EU's political leadership in environmental matters is suffering from several setbacks, amongst them the international reaction to the Aviation Directive. Only time will reveal what lasting impact the Court's approach to the Aviation Directive will have on the EU's environmental leadership ambitions.

Preface

My sincere thanks and admiration go out to those people who have respectively inspired, encouraged and endured me over the life of this thesis. I would specifically like to thank my wonderful supervisor, Sanja Bogojević, who has supported and guided me through thick times as well as thin, and whose thoughtful and valuable commentary has been instrumental in averting unmitigated disaster. I owe a great debt of gratitude to Sofia Casselbrant, whose input and time spent on this thesis surely match my own – your drive and determination have been infectious and invaluable. I am indebted to Tommi Multala and Andreas Barkman at the European Environment Agency for their time and priceless input in the research of this thesis. I must also thank the staff, administration and professors at Lund University and the Law School, and our programme coordinator Anders Tröjer specifically, for their hard work and assistance in all aspects of this thesis. I wish to thank my parents for their endless love and support, and my siblings for the heroic efforts they have made not to interfere. To the friends who have flown in from overseas (if only to philosophise), to the student-city of Lund in all its magnificence, and to my colleague and course-mate Andreas Malmborg – you have certainly managed to make an enjoyable experience of the long winter of Sweden. And on that topic, I am genuinely appreciative of the awful weather and late spring that we have experienced in Lund this year. You have helped me maintain a high level of productivity well into early May! I fully expect a warm and intense summer in return.

Speaking of longer winters and warmer summers, let us move on to the environment;

“The planet doesn’t need saving – the planet will be just fine. It’s the people that are screwed.”¹

¹ A paraphrased extract from George Carlin’s stand-up comedy, ‘Jammin’ in New York’, (24 April 1992), at circa 2:30 minutes.

Abbreviations

ATAA	Air Transport Association of America
ATA	Air Transport Association (of America)
CBDR	Common but differentiated responsibilities
CFREU	Charter of Fundamental Rights of the European Union
CICA	Convention on International Civil Aviation
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
EEP	Energy Efficiency Policy
ETS	Emissions Trading Scheme
EU ETS	European Union Emissions Trading Scheme
GATT	General Agreement on Tariffs and Trade
ICAO	International Civil Aviation Organisation
ICJ	International Court of Justice
OSA	Open Skies Agreement
PCIJ	Permanent Court of International Justice
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNFCCC	United Nations Framework Convention on Climate Change
WTO	World Trade Organisation

1 Introduction

A. International climate change policy and leadership

The greatest challenge to face humanity in modern times is one that mankind is ultimately responsible for causing as well as solving. The problem of anthropogenic climate change is today well known and well documented². Our understanding of the causes behind this phenomenon is constantly evolving, as is our appreciation of the magnitude of its effects. What yet eludes us is an enduring and comprehensive solution³. The reasons for this elusiveness are numerous and range from lack of political will, economic resources and know-how to mistrust of the underlying science and the inability to agree on an international framework for tackling the threat of global warming. The culprit behind the socio-political stalemate dominating international environmental negotiations is the special characteristic of the climate change equation whereby countless local sources of pollution contribute to a single, global, climate-altering effect. This characteristic propagates into all levels of discourse. From an economic perspective, this complicates the quantification and distribution of the costs of remediation⁴. From a political standpoint, advocating unilateral action to raise environmental protection standards becomes a hard sell, especially where new measures are not reciprocated by counterparties⁵. The jurisprudential and ethical task of attributing blame and responsibility for pollution in order to pave the way for new agreements is rendered a practical impossibility in light of the historical distribution of economic and political might and the absence of similar environmental considerations from the global agenda at the time⁶. At its heart, the problem plaguing environmental protection is the same as with any public good. This is to say that environmental action is dis-incentivised as a 'free rider' is able to take part of any benefits resulting from action by others without having to share in the costs⁷.

² Solomon S. et al. (Eds.), 'Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change' (2007: Cambridge University Press, Cambridge).

³ Sterk W. et al. 'Deadlocks of International Climate Policy – An Assessment of the Copenhagen Climate Summit' (2010) *Journal for European Environmental & Planning Law* 7:2, 201, at 217.

⁴ Morris D., 'Who should pay climate change costs?' (21 January 2013). Available at: <http://ourworld.unu.edu/en/who-should-pay-climate-change-costs/>. Accessed 21 March 2013.

⁵ See for instance Tingley D. and Tomz M., 'Conditional Cooperation and Climate Change' (2014) *Comparative Political Studies*, 1, at 2f.

⁶ Rajamani L., 'The Increasing Currency and Relevance of Rights-Based perspectives in the International Negotiations on Climate Change' (2010) *Journal of Environmental Law* 22:3, 391, at 421. See also McManus K., 'The principle of 'common but differentiated responsibility' and the UNFCCC' (2009) *Climatico Special Features*, 2, at 3. Available at: http://www.climaticoanalysis.org/wp-content/uploads/2009/12/kmcm Manus_common-responsibilities.pdf. Accessed 21 March 2013.

⁷ See for instance Coase R.H., 'The Problem of Social Cost' (1960) 3 *JL Econ* 1.

On the level of the nation-state, the problem of the free rider is solved through the institution of government, which is responsible for the provision of public goods, financed by way of tax-contributions from those partaking in the society⁸. The provision of public goods on the level of the international society is stymied by a patent lack of such an authority⁹. Although the institutional infrastructure of the United Nations performs an important coordinating task, it has neither the legislative mandate nor the enforcement-based authority possessed by sovereign governments. As a result there are no settled rules or procedures for dealing with developments of a public-good nature, resulting in an inability to effectively deal with the problem of the free rider. In an ideal scenario, an inclusive and multilateral framework for environmental protection would be adopted as part of, or successor to, the UN Framework Convention on Climate Change¹⁰. Such an agreement would necessarily differ from the UNFCCC in that it would contain a core of legal obligations subject to effective enforcement overseen by a central body¹¹. This framework would focus on climate change and balance broadly agreeable terms and economic incentives for participation with significant sanctions for non-participation or failure to meet obligations. In order to ensure the success of the agreement, environmental obligations should be implemented horizontally across other areas of cooperation such as trade and development aid while respecting the comparative capacities of the states involved¹². This ideal would thus consist of an international framework that sets minimum standards and encourages progressive improvements to environmental protection on the part of states so as to eliminate free-riders and incentivize first movers¹³.

Alas, such a solution remains illusory due to the reality of international environmental politics. The parties to the UNFCCC have largely failed in their task to devise a successor to the Kyoto Protocol that would enter into force upon the expiration of the second Kyoto commitment period in 2020¹⁴. This stalemate can partly be blamed on the current economic climate, which has

⁸ See for instance Groves T. and Ledyard J., 'Optimal allocation of public goods: A solution to the 'free rider' problem' (1977) *Journal of the Econometric Society* 45:4, 783.

⁹ Tingley (2014), *supra* note 5, at 2.

¹⁰ Kulovesi K., 'Addressing Sectoral Emissions outside the United Nations Framework Convention on Climate Change: What Roles for Multilateralism, Minilateralism and Unilateralism?' (2012) *Review of European Community & International Environmental Law* 21:3, 193, at 193. Also French D., 'Finding Autonomy in International Environmental Law and Governance' (2009) *Journal of Environmental Law* 21:2, 255, at 264.

¹¹ French (2009), *supra* note 10, at 259.

¹² Thus recognising for instance the principle of common but differentiated responsibilities; Article 3 United Nations Framework Convention on Climate Change, 9 May 1992, 1917 UNTS 107, discussed further below.

¹³ Hertogen A., 'Sovereignty as Decisional Independence over Domestic Affairs: The Dispute over Aviation in the EU Emissions Trading System' (2012) *Transnational Environmental Law* 2:1, 281, at 283 and 300f.

¹⁴ W Sterk et al (2010), *supra* note 3.

seen environmental concerns overtaken by other priorities¹⁵. While environmental action remains a top priority for many international actors¹⁶, the divergence in priorities nonetheless presents difficulties in pursuing consensus on the shape of a future agreement on environmental protection. What some see as the natural progression of negotiations on controversial matters such as climate change action¹⁷, others see as evidence of international institutional failure and proof of multilateral unwillingness to act¹⁸. As a result, international action on environmental protection is increasingly taking place at bi-lateral, regional and even unilateral level¹⁹, as observed in the increase of bi-lateral environmental agreements as well as the inclusion of environmental obligations in non-environmental agreements²⁰. The increasing dispersion of environmental initiative has an impact on the balance of negotiating power in as far as it circumvents the voting requirements of the United Nations General Assembly. As a result, powerful regional blocs – enabled by their economic strength – are assuming the role of international environmental watchdog by their own fiat. There is a palpable leadership vacuum on the international stage that several regional blocs are now attempting to fill²¹. This thesis will focus specifically on the EU's claim to environmental leadership²² – a claim advanced on the back of an ambitious climate change policy, supported by the unique characteristics that set the EU apart from other would-be contestants to the title.

B. Climate change policy and leadership at EU level

Why, then, is the EU in a position to claim the role of environmental leader? On a policy level, the EU has for a long time sought to shape itself as an environmental leader and role model²³.

¹⁵ See Report of the High-level Panel on United Nations System-wide Coherence in the areas of development, humanitarian assistance and the environment 'Delivering as one' (2006) A/61/583, in Fajardo del Castillo T., 'Revisiting the External Dimension of the Environmental Policy of the European Union: Some Challenges Ahead' (2010) *Journal for European Environmental Planning Law* 7:4, 365, at 377.

¹⁶ Stern N., 'The tide could be finally turning on climate change action' (25 January 2013). Available at: blogs.ft.com/the-a-list/2013/01/25/the-tide-could-be-finally-turning-on-climate-change-action/?#axzz2J00He0uL. Accessed 21 March 2013.

¹⁷ For instance those parties advocating the ICAO as the only avenue for a solution on aviation emissions.

¹⁸ The EU has argued that the Aviation Directive is a response to the failure of the ICAO to take action. See section 2(A)(ii).

¹⁹ Bogojević S., 'Legalising Environmental Leadership: A Comment on the CJEU's Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme' (2012) *Journal of Environmental Law* 24:2, 345, at 356. See also Kulovesi (2012), *supra* note 10, at 194 for a treatment of these concepts.

²⁰ Quirico O., 'Disentangling Climate Change Governance: A Legal Perspective' (2012) *Review of European Community & International Environmental Law* 21:2, 92, at 96. Durán G.M. and Morgera E., *Environmental Integration in the EU's External Relations – Beyond Multilateral Dimensions* (2012: Hart Publishing Ltd, Oxford), at 2.

²¹ Most prominently by the US, the EU, and increasingly China.

²² See for instance Hedegaard C., 'Statement on the European budget agreement' (8 February 2013). Available at: http://ec.europa.eu/commission_2010-2014/hedegaard/headlines/news/2013-02-08_01_en.htm. Accessed 21 March 2013.

²³ Wurzel R.K.W. and Connelly J., *The European Union as a Leader in International Climate Change Politics* (2012: Routledge, Oxon), at 3ff.

Over time, this pursuit has allowed the EU to develop sophisticated competences in environmental law and external action²⁴. On the basis of this expertise the EU has undertaken an ambitious climate change policy with international aspirations²⁵. As the defining feature of its climate change programme the EU is pioneering the European Union Emissions Trading Scheme²⁶. The EU ETS is a market-based means of addressing increasing emissions and is intended to define the EU's leadership as progressive and innovative. An important element of the scheme is the successive expansion of its coverage to new sectors of economic activity. As part of this process, Directive 2008/101²⁷ provides for the inclusion of civil aviation in the EU ETS starting in 2012²⁸. The inclusion of foreign as well as domestic airlines in the scheme resulted in aggressive international efforts to derail the extension, as well as a legal challenge that eventually emerged before the CJEU²⁹ in the form of the *ATAA* preliminary reference³⁰.

Further, the EU is already recognised as a “norm entrepreneur”³¹ and a “market player and rule generator”³² owing to its considerable economic power. In its current ‘fourth phase’ – consisting of the Kyoto Protocol’s post-implementation stage and negotiation of a follow-up agreement³³ – EU climate change policy has expanded to include the practice of inserting environmental protection provisions even into non-environmental international agreements. Perhaps most importantly, the EU has shown considerable interest and dedication to the idea of environmental protection, even at the height of the economic crisis. Regardless of its other qualities, it is the EU’s willingness – at all levels of society³⁴ – to face the climate change challenge and to assume the responsibilities of leadership that places the EU in a league of its own. Evidence of this willingness in terms of environmental protection and the pursuit of a global accord can be found

²⁴ See section 2B for an outline of these competences.

²⁵ Wurzel (2012), supra note 23, at 4f.

²⁶ European Parliament and Council Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275/32. See section 2Ai.

²⁷ Henceforth the “Aviation Directive”. European Parliament and Council Directive 2008/101/EC amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2008] OJ L8/4.

²⁸ Section 2Aii.

²⁹ For the sake of simplicity, and unless otherwise specified, ‘CJEU’ will be used to refer to the all instances of the Court of the European Union, whether before or after the entry into force of the Lisbon Treaty.

³⁰ Case C-366/10 *The Air Transport Association of America, American Airlines, Inc., Continental Airlines, Inc., United Airlines, Inc. v. The Secretary of State for Energy and Climate Change* [2011] OJ C260/9. See section 4A.

³¹ Bogojević (2012), supra note 19, at 355.

³² Cremona, M., ‘The Union as a Global Actor: Roles, Models and Identity’ (2004) *Common Market Law Review* 41, 553, 553ff.

³³ Wurzel (2012), supra note 23, at 1.

³⁴ European Commission, Eurobarometer, ‘Attitudes of European Citizens Towards the Environment’ (2008) Brussels. Available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_295_en.pdf. Accessed 21 March 2013.

from the preamble to the EU Treaties³⁵ and all the way to the top of the EU's political leadership. Jose Manuel Barroso, president of the European Commission has stated that “[r]esponding to the challenge of climate change is the ultimate political test for our generation”³⁶.

Finally, the institutional make-up of the EU sets it apart from sovereign actors as well as other supra-national organisations. This thesis will argue that much can be gained from the EU's compromise-imbued approach to politics³⁷, especially in a dispute-riddled field like climate change action. The Court of Justice of the European Union in particular symbolises the EU's unique standing as an international actor. The Court's considerable contribution to the EU's legal legacy represents a remarkable interpretation of the role of a 'national' constitutional court in approaching the nexus between national and international law. As a legislatively active court, the CJEU has also gained many critics both within and outside the EU. Yet this very role together with the Court's connection to the European Court of Human Rights (through its jurisprudence and now, the Lisbon Treaty), mark it as an influential source of law. In light of this central function, this thesis will examine the role of the Court and the role of judicial interpretation in the context of the EU's leadership on climate change action, using the *ATAA* case as the primary point of reference.

C. Research Questions

The underlying question and theme of this thesis is whether the CJEU through its ruling in *ATAA* complicated, if not endangered, the EU's environmental leadership ambitions. In order to set the context for answering this primary question, the thesis will first consider the substantive policies and legal competences of the EU's environmental leadership, asking whether the two are consistent. It will then deliberate over the role of the judiciary in interpreting EU policy. The author will address two questions in this regard: what role has the CJEU set out for itself within the EU legal and policy framework? And how is the CJEU intended to wield its interpretative powers when faced with conflicting provisions of EU and international law? Having set the context, this thesis will review the response of the CJEU to the ATA's challenge

³⁵ Treaty on European Union (Consolidated version) [2010] OJ C83/13. The preamble includes the provision: “DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields”.

³⁶ European Commission, ‘Boosting Growth and Jobs by Meeting Our Climate Change Commitments’ (23.1.2008) Press Release IP/08/80, Brussels.

³⁷ Wurzel (2012), *supra* note 23, at 9.

to the Aviation Directive – note that I seek to use the non-italized acronym ‘ATA’ to distinguish the ATA organisation from the *ATAA* case. With regard to the judgment in that case, did the Court succeed in fulfilling its role as outlined? Further, could the Court have chosen and phrased its arguments in more constructive terms, more consistent with its role and with EU law and policy? Finally this thesis asks: has the Court’s treatment of the *ATAA* case harmed the EU’s long-term environmental leadership ambitions?

D. Structure and methodology

This thesis begins by setting out the context for the debate to follow. The first section (2Ai) of Chapter II covers the substantive tools of the EU’s climate change policy – the EU ETS and the Aviation Directive. The second section (2Aii) sets out the legal context for these policies by outlining the competences found in the Treaties (2B). To do this, the second chapter applies the standard legal method of analysis where the environmental competence of the EU is quantified on the basis of EU primary law, secondary law and CJEU jurisprudence. The policy-analysis is based on the academic literature on the subject, statements made by the EU institutions, on media coverage as well as an interview with a representative at the European Environment Agency. Through the above, Chapter II aims to give a broad picture of the EU’s environmental competence and climate change policy. The intention is to provide an adequate foundation for the following discussion on the CJEU and its interpretation of the Aviation Directive in light of the arguments in the *ATAA* case.

Chapter III offers some speculative commentary on the socio-political role of a supreme court in a democratic state (or union) where the principles of the rule of law and the separation of powers must be treasured (3A). This commentary is necessitated by the nature of the argument in this thesis, and is intended only as a loose justification for advancing the argument in Chapter IV that the Court perhaps ‘should’ have chosen a particular interpretation over another. Following from this, a short review of some of the most notable (and progressive) judgments of the CJEU will be undertaken (3B), aimed at supporting this author’s standpoint with regard to the Court – that the CJEU stands for an exemplary judicial legacy, characterised by cogent and constructive judicial reasoning that has stood in harmony with the wider EU’s aspirations to safeguard stable, progressive and democratic ideologies based on a set of rights and freedoms that are fundamental to the EU. Finally, a short review of the Court’s environmental legacy will be undertaken, drawing a parallel to the development of another fundamental area of EU law –

human rights and fundamental freedoms. The cases are chosen for their relevance to the arguments advanced in Chapter IV.

With the context in place, the sum of the above interactions is analysed in Chapter IV. The first section examines the preliminary reference, Advocate General's Opinion and the judgment in the *ATAA* case (4A). The following section evaluates the climactic events surrounding the case, and comments on some of the concerns raised because of the non-judicial fallout in the aftermath, with the intention of establishing a connection between the judgment of the CJEU in *ATAA* and the EU's wider environmental leadership aspirations (4B). The third section goes on to deal with the specific issues raised as part of that connection. With a mind to the academic discourse spawned by the *ATAA* case, this thesis will evaluate and propose alternative avenues of judicial interpretation that could meet the EU's policy objectives in a manner consistent with its own legal competence as well as its capacity to act as a matter of international law (4C).

E. Delimitations

As one of the themes of this thesis is EU environmental leadership, much attention is paid to the EU's flagship environmental project – its climate change policy. As a result, treatment of other major fields of environmental policy such as sustainable development, development assistance and trade-related matters is omitted in Chapter II. Moreover, due to the use of the *ATAA* case as an illustrative example of the Court's interpretation of the EU law and policy, discussion within EU climate change policy is limited to the EU ETS. This limitation has a spillover on the competence section in Chapter II, as reference to certain environmental provisions found in the Treaties will be omitted for their lack of relevance in terms of the ETS in specific. With regard to Chapter III, the choice of case law for the review of the Court's jurisprudence is intentionally limited to the most formative cases. Moreover it is conceded that the choice of case law is intended to depict the Court's most progressive, and in this author's opinion, most constructive disposition. Admittedly, this entails that conflicting case law is excluded in this section. However, the purpose of the review is not necessarily to show that the Court exclusively exercises a certain type of interpretation, but rather that at very least the Court is capable of such interpretation. Further, while the thesis discusses the internal competence of the EU in environmental matters, the bulk of the discussion in Chapter IV concerns the Court's interpretation of the external dimension of the EU's climate change policy. As such the author has not felt that a detailed discussion of horizontal integration under the integration requirement is necessary. For the same

reason, analysis of the exact division of competences between member states and the EU is largely omitted.

On the one hand this thesis does not seek to establish whether the dispersion of multilateral environmental policy to sub-global levels, as mentioned above, is to be seen as positive or negative. On the other hand, and to a certain extent, it does explore the potential for this development to “advance the ultimate objective of the UNFCCC to prevent dangerous anthropogenic climate change”³⁸, whether directly or indirectly. It thus eschews any conclusions on the merits of a regional approach, choosing instead to focus on the particular instance of the EU’s ambitions to international environmental leadership by setting a regional example for others to follow.

It is the general theme of this thesis to explore and assess the substance and consistency of the EU’s environmental leadership, while its specific focus is the competence and climate change policy of the EU in light of the regulation of emissions from aviation. As such, the intention is not to define specific parameters within the concept of ‘leadership’ and restrict the analysis according to these, as this risks detracting from the intended focus on environmental competence and climate change policy. To put it plainly: this thesis adopts an open and inclusive approach to the concept of leadership, intentionally avoiding semantic distinctions and surrendering instead to the term as used in the common parlance. Having said that, this thesis will draw on Wurzel and Connelly’s table of ‘types and styles of leadership’³⁹ where helpful and appropriate, in order to support or structure the discussion as to the EU’s leadership.

The ‘types’ of leadership they identify are: structural leadership is a function of ‘hard power’ and depends on material resources and economic power. Entrepreneurial leadership consists of diplomatic power in the form of negotiating and bargaining prowess as well as the ability to facilitate agreements. Cognitive leadership is idea-driven, whereby new areas of action are defined and new approaches to existing issues allow different solutions to arise. Symbolic leadership entails gesturing and grand promises that are not necessarily followed up by corresponding action, or where impetus peters out before policies are fully implemented. The ‘styles’ of leadership identified by Wurzel and Connelly distinguish between: ‘transformational’ and ‘transactional’ leadership – a transactional leader implements change incrementally, while a transformational leader changes the rules of the game, shifting the course of history in the process. Similarly, a ‘heroic’ leader, driven by political willpower and characterised by strong,

³⁸ Kulovesi (2012), supra note 10, at 195.

³⁹ Wurzel (2012), supra note 23, at 13.

objective-driven action may be contrasted with 'humdrum' leader making short-term, practicality-driven decisions unburdened by overarching design.

2 The EU's climate change policy and its legal competence

If the EU is to take charge on the international stage in the fight against climate change, it must have a defined and decisive climate change policy underwritten by the competence to formulate effective solutions and put these to practice. The first section of this chapter thus considers the cornerstone of EU climate change policy, and the second seeks to establish the environmental competence of EU subject to Article 5 TEU on the conferral of powers, on the basis of EU primary law as determined in the Treaties and the jurisprudence of the Court of Justice. Before examining the EU's substantive climate change policy, this thesis will offer an observation as to the general policy-approach and leadership qualities of the EU in international matters.

At a first glance, the seemingly fractured nature of the EU's internal leadership and decision-making process may raise questions as to the suitability of the EU as a global leader⁴⁰. Indeed, “[t]he fact that ‘Europe has made a principle of powerlessness’ could [...] be a serious hindrance to the EU's efforts in offering political leadership in climate change politics”⁴¹. However, this quality does not necessarily have to be negative. The EU is a largely unique type of body in international law, lacking the level of federal authority enjoyed by the US government but nonetheless subjecting its member states to a harmonized legal system as well as operating a partial monetary (and increasingly, fiscal) union. The institutional make-up of the Union also places it apart. The interaction between the Member States, the European Commission, the European Parliament and the Council of the European Union⁴² subjects the EU's legislative efforts to a wide array of diverging opinions and priorities, as clearly demonstrated through the on-going handling of the economic crisis. This means that proposals made by the EU are from the outset of a progressive nature and the products of a competitive process characterised by compromise⁴³. Through this type of ‘soft power’, EU proposals may thusly attract more mainstream interest and support than ‘hard power’ proposals carrying a markedly partisan agenda. Both the EU ETS and the Aviation Directive contain elements of this type of ‘soft power’ – a good example of the EU's entrepreneurial leadership.

⁴⁰ Wurzel (2012), supra note 23, at 9.

⁴¹ Wurzel (2012), supra note 23, at 14.

⁴² Or the ‘Council of Ministers’, hereinafter referred to as “the Council”. The European Council, comprised of the Heads of State, will be referred to as “the European Council”.

⁴³ Wurzel (2012), supra note 23, at 9.

A. Substantive EU climate change policy

The EU's climate change policy, embodied in the EU Emissions Trading Scheme⁴⁴, is its flagship project under the Kyoto Protocol and has received the "Lion's share"⁴⁵ of attention in the EU's "2020" climate and energy strategy⁴⁶. The first section of this chapter will analyse the main features of the EU ETS and the Aviation Directive that extends the scheme to cover the aviation sector. The next section will highlight the relevant competences in EU law in light of the above two instruments so as to provide a foundation for the discussion in Chapter IV.

i. The 'jewel in the crown' of EU climate change policy: the EU Emissions Trading Scheme

The EU ETS, established under Directive 2003/87/EC⁴⁷ and substantially revised as part of the 2009 climate and energy package⁴⁸, is the "jewel in the crown"⁴⁹ of the EU's climate change policy, establishing a 'cap-and-trade' system for high-emission industries with the aim of giving companies the flexibility to cut their emissions in the most cost-effective way. The EU ETS covers some 45% of European emissions and constitutes the largest market for trading emissions allowances in the world, accounting for around three quarters of international carbon trading⁵⁰. The EU ETS has been described by economists from either side of the Atlantic as "one of the most exciting and important initiatives ever taken to limit the greenhouse gas emissions that cause climate change" and as having the potential to "provide the cornerstone for an eventual global trading regime"⁵¹. Describing the EU ETS, one author states that:

"[t]here are thousands of people involved, including prime ministers and bureaucrats, entrepreneurs and inventors seeking to create lower-cost ways of reducing carbon; carbon market analysts, broker and bankers mediating and funding markets; CEOs [...] developing their carbon strategies; engineers in the control room changing the order in which electricity generation plants come on-stream; and academics analysing and discussing evidence so as to give some intellectual shape to what is happening"⁵².

⁴⁴ Wurzel (2012), *supra* note 23, at 8.

⁴⁵ Duran (2012), *supra* note 20, at 44.

⁴⁶ European Parliament and Council Directive 2009/29/EC amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L 140/63. An affirmation of the EU's leadership ambitions. See Wurzel (2012), *supra* note 23, at 8.

⁴⁷ EU ETS Directive, *supra* note, 26.

⁴⁸ 2009 climate and energy package, *supra* note 46.

⁴⁹ Dimas S., 'Climate Change – International and EU Action' (31 October 2008) Speech of the EU Environment Commissioner at the Climate Change Conference in Prague. Available at: http://europa.eu/rapid/press-release_SPEECH-08-570_en.htm. Accessed 21 March 2013.

⁵⁰ European Commission, 'EU ETS factsheet 2012-13'. Available at: http://ec.europa.eu/clima/publications/docs/factsheet_ets_2013_en.pdf. Accessed 21 March 2013. See Anger A. and Köhler J., 'Including aviation emissions in the EU ETS: Much ado about nothing? A review' (2010) *Transport Policy* 17, 38, at 39.

⁵¹ Ellerman A.D., Convery F.J. and de Perhuis C., *Pricing Carbon: The European Union Emissions Trading Scheme* (2010: Cambridge University Press, Cambridge), at 1.

⁵² Ellerman (2010), *ibid*, at 2.

The scope of the EU ETS described here is testament to the magnitude, depth and cross-disciplinary and -sectoral reach of the project. It is also illustrative of the motives behind the EU ETS – to create a modern, market-based mechanism to pave the way for the EU’s transition into a “competitive low carbon economy” in the 2050 roadmap⁵³.

While a ‘cap-and-trade’ mechanism certainly fits with cognitive leadership and market-based approach to emission reductions advertised as part of the 2050 roadmap, it was not the first proposal for curbing emissions at EU level. In response to a 1990 meeting of the European Council calling for the “adoption, at the earliest possible opportunity, of targets and strategies for limiting emissions of greenhouse gases, and in particular carbon dioxide [...] emissions, given their contribution to the greenhouse effect”, the European Commission presented the European Council with a communication⁵⁴ on a Community strategy to achieve said reductions, including through the use of fiscal measures. This in turn led to a 1992 proposal on the introduction of a carbon tax⁵⁵. According to Convery, this first Commission proposal to reduce emissions to sustainable levels failed mainly due to opposition from two sources⁵⁶. Firstly, those Member States who felt that surrendering any degree of fiscal control to a supranational organisation would be a slippery slope to further concessions, and thus tantamount to surrendering their sovereignty. Secondly, powerful industrial lobbies, represented by the then UNICE (known now as BUSINESSEUROPE⁵⁷), lobbied against the proposal at both Community and Member State level. This opposition resulted in the formal withdrawal of the proposal in 1997.

Following from this, ‘cap-and-trade’ approach to emissions reductions gained wind in the post-Kyoto Protocol period, where the EU was face with deciding how it would reach its emissions reduction goals. A common goal of 8% below 1990 CO₂ emission levels by the first Kyoto commitment period was enabled by a burden-sharing agreement reached by the European Council⁵⁸. It was in conjunction with this development that the institution of an emissions trading scheme became increasingly feasible. Furthermore it was noted that an ETS would give

⁵³ European Commission, ‘Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions: A Roadmap for moving to a competitive low carbon economy in 2050’ (8.3.2011) COM 112 final.

⁵⁴ Commission of the European Communities, ‘Communication from the Commission to the Council’ (14.10.1991) SEC(91) 1744 final.

⁵⁵ Commission of the European Communities, ‘Proposal for a Council Directive Introducing a Tax on Carbon Dioxide Emissions and Energy’ (30.6.1992) COM(92) 226 final.

⁵⁶ Ellerman (2010), *supra* note 51, at 16.

⁵⁷ BUSINESSEUROPE. Available at: <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/unice.htm>. Accessed 21 March 2013.

⁵⁸ Council Decision 2002/358/EC concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (25.4.2002) OJ L 130.

the EU a competitive advantage in the field as it was likely that the United States would “embrace emissions trading as a key policy instrument, if and when it addressed climate change seriously”⁵⁹. In March 2001 the United States rejected the Protocol, magnifying the difficulties involved in the task ahead. This also meant that for it to succeed, the EU along with Canada, Japan and Russia had to ratify the Protocol. Convery captures the magnitude of this development, stating that:

“[t]he US decision animated a ‘Save Kyoto’ campaign by the Union and the member states, which was in a sense a coming of age. It required the Union to take leadership at the various Conferences of the Parties to the Kyoto Protocol so as to facilitate continuing engagement and support from others, notably Japan and Canada. Russia was the final domino that needed to fall [...] On October 2004 [the Kyoto Protocol] was approved by the Russian parliament, with European Union support for Russian membership in the [WTO] as the quid pro quo. Russia’s ratification was a demonstration that the Union could be effective at mobilising ‘soft power’ to lead the world in shaping climate change policy, and showed the Bush administration that progress was possible without US leadership or participation. Throughout this process, the EU ETS moved to the centre stage as the core evidence that the [EU] could be innovative, courageous and effective in ensuring that its own performance matched its rhetoric. [...] In other words, Kyoto placed the EU ETS rocked on the launch pad, but it was President Bush and his administration that lit the fuse that finally put it into orbit.”⁶⁰

The EU ETS is clearly an example of both cognitive and entrepreneurial leadership.

The EU ETS took effect on 1 January 2005, a month and a half before the Kyoto Protocol entered into force. It is clear that the EU ETS holds much potential. It played a significant part in the 2009 climate and energy package setting the EU’s 20-20-20 targets: a 20% reduction in EU greenhouse gas emissions from 1990 levels; raising the share of EU energy consumption produced from renewable resources to 20% and achieving a 20% improvement in the EU’s energy efficiency⁶¹. The 2009 package, which has been described by an EEA official as “a very strong package”⁶², introduced significant structural changes to the ETS, taking effect at the start of the third trading period in 2013. The changes include moving the ETS from ‘national allocation plans’ to an EU-wide cap on allowances, set on a linear target path⁶³ that aims to reduce emissions to 21% below 2005 levels by 2020. It also introduces annual compliance cycles,

⁵⁹ Ellerman (2010), *supra* note 51, at 18.

⁶⁰ Ellerman (2010), *supra* note 51, at 18f.

⁶¹ Climate and Energy Package (2009), *supra* note 48. See for instance: http://ec.europa.eu/clima/policies/package/index_en.htm. Last visited 21 March 2013.

⁶² Meeting with Andreas Barkman, Head of group for climate mitigation, energy and air pollution at the European Environment Agency (6 March 2013).

⁶³ Bogojević S., ‘The EU ETS Directive Revised: Yet Another Stepping Stone’ (2009) *Environmental Law Review* 11, 279, at 282: “decreasing by a linear factor of 1.74 per cent compared to the average annual total quantity issued by Member States in their NAPs for the period 2008 to 2012”.

with a two-pronged effect: firstly, Member States are granted some flexibility in the short run in order to allow them to achieve their goals in the long run. Secondly, it gives EU institutions and agencies an improved window of scrutiny, allowing them to ensure long-term compliance⁶⁴. Further, the free allocation of allowances will be phased out in stages in favour of auction. Finally, the ETS's sector coverage will be widened.

This last change in particular is important for the purpose of this thesis. While an expansion of the ETS has been on the table since the scheme's inception, the current timing is more critical than appearances may suggest. Circumstances since the launch of the scheme have now brought the ETS to the brink of collapse. The variety of factors involved in a project like the ETS was certain to bring with it a great deal of uncertainty, but since the beginning of the 2007 economic crisis, these have come together in something of a perfect storm. Even at the time of the 2009 climate and energy package, the EU was near certain to achieve its 20% emissions reduction target. Unfortunately, much of that reduction in emissions is not the result (solely) of a successful climate change policy, but the combination of other variables. Firstly, a drastic decline in output has followed economic decline. This has naturally had a considerable effect on production, and subsequently emissions released by industries across the ETS. As a result, companies have been able to meet their emissions reduction requirements (as these were calculated against a pre-crisis baseline scenario) without the sought-after investment in green technology and without having to resort to the market for permits to cover their excess emissions.

Another factor that has shadowed the development of the ETS since its birth is the well-established and largely successful energy policy driven by the EU⁶⁵. Independently of each other, a functioning climate change and energy policy are environmental victories for the EU, however, the interaction between the two complicates matters⁶⁶. The success of the EEP, which works at a national level, has resulted in lower power requirements across the EU and all sectors covered by the ETS. The structural omnipresence of energy efficiency gains further lowers the threshold for industry to meet the requirements of the ETS, with the same effects as above. On a policy level, tension can be seen between the ETS on the one hand and the EEP on the other. While the ETS is still in its infancy due to a long ramp-up period, and its measurable effects are uncertain and less pronounced, the EEP is relatively well-established and has been producing measurable

⁶⁴ Meeting with Andreas Barkman, *supra* note 62.

⁶⁵ European Energy Policy or 'EEP'.

⁶⁶ See for instance Weisbach D.A., 'Carbon Taxation in the EU: Expanding the EU Carbon Price' (2012) *Journal of Environmental Law* 24:2, 183, at 196ff. Weisbach raises several points of tension, primarily the ability of EEP to offset the distribute goals of the ETS, in the Commission's plan to revise its energy tax system to include a carbon tax component.

energy efficiency gains for some time. If the ETS and the EEP are not to counteract each other, then the interaction between the EEP and the ETS pricing must be predicted and anticipated to great accuracy⁶⁷. This is one of the aims behind the centralization of the EU emissions cap under the 2009 package, which aims to turn “the EU emissions market into a secure investment harbour by creating a predictable and stable system through harmonisation”⁶⁸.

With businesses undershooting their emissions reduction targets without need to resort to the predicted investment, two interlinked problems have arisen. Firstly, there is an over-allocation of unused free allowances⁶⁹ that companies are able to carry over into the next trading period. Secondly, the market mechanism of the ETS has reacted with record-low carbon prices. From a starting price of around €30 per tonne of carbon dioxide emitted in 2005, a record low of €2.81 was hit on 18 January, after a proposal to raise the cost of emission was rejected by the European Parliament⁷⁰. What was supposed to be a “final wake-up call” for the member states and the Parliament⁷¹ has gone seemingly unheard, as Parliament rejected a second plan to boost prices by “backloading” 900 million allowances on 16 April⁷². Once again, the price of CO₂ emissions under the EU ETS is scraping the bottom. The combination of low prices and a massive backlog of free allowances means that the EU ETS will not be able to right itself in the short term under its current design. Even when the move from ‘grandfathering’ to auctioning of allowances takes place, the backlog will mean that the low price on CO₂ emissions will persist for some time to come.

Instead, the EU ETS is being developed in two directions in order to mitigate the above effects, which are arguably as least as much creatures of circumstance as of poor design: firstly, the EU ETS is being linked to other emissions trading schemes around the world⁷³. Secondly, the sectoral coverage of the EU ETS is being expanded. Currently, this has included an expansion of the EU ETS to cover the aviation industry through the Aviation Directive, and a future expansion is likely to include the shipping industry; subject to global efforts to reduce greenhouse gas emissions from shipping “moving too slowly”, the EU has declared its intention to monitor

⁶⁷ Meeting with Andreas Barkman, *supra* note 62.

⁶⁸ Bogojević (2009), *supra* note 63, at 282.

⁶⁹ Bogojević (2009), *supra* note 63, at 279.

⁷⁰ Tromso P.C. et al (24 January 2013) Financial Times. Available at: <http://www.ft.com/intl/cms/s/0/77764dda-6645-11e2-b967-00144feab49a.html#axzz2U1Uy6sf9>. Accessed 21 March 2013.

⁷¹ Hedegaard C., ‘On recent developments in the European Carbon Market’ (24.1.2013). Available at: http://europa.eu/rapid/press-release_MEMO-13-32_en.htm. Accessed 21 March 2013.

⁷² McGrath M., ‘EU Parliament Rejects Plan to Boost Carbon Trading’ (16 April 2013). Available at: <http://www.bbc.co.uk/news/science-environment-22167675>. Accessed 21 March 2013.

⁷³ European Commission, ‘Australia and European Commission agree on pathway towards fully linking emissions trading systems’ (28.8.2012). Available at: http://ec.europa.eu/clima/news/articles/news_2012082801_en.htm. Accessed 21 March 2013.

emissions from shipping starting in 2013⁷⁴ as a first step towards bringing emissions from shipping within the EU ETS. Sectoral expansion is of course not a new goal. The EU ETS initially applied only to about half of the greenhouse gas emissions in Europe⁷⁵, but always included the intention to expand, specifically in the transportation sector⁷⁶. The tension between the sectors covered and those not covered by the EU ETS was even raised as a potential breach of the principle of equal treatment in the *Arcelor*⁷⁷ case. In that case the CJEU recognised that the EU ETS was a ‘novel and complex’ scheme, and that an overambitious launch could have endangered the project⁷⁸, and found the infringement justified on the basis that the EU ETS was envisaged as a step-by-step approach⁷⁹. In doing so, the CJEU laid down an implied requirement on the legislature that the EU ETS must expand into new sectors.

In this section, the main features of the EU ETS are outlined to provide the context for the EU’s climate change action. It has been established that the EU ETS is still in its starting phases and has not been exempt from the pains associated with growth. However, the scheme is advancing according to plan, and has now entered the first stage of its expansion phase. As a result, the EU’s flagship environmental policy is now faced with a crucial test of maturity; will the goals of the first stage of expansion in the aviation sector be achieved, paving the way for further expansion, or will the process be stopped in its tracks? To begin answering this question, we must turn our attention to the Aviation Directive.

ii. Leading the charge (on aviation): the Aviation Directive 2008/101

If the expansion of the EU ETS into multiple new sectors was predetermined from its inception, why, then, is the Aviation Directive exceptional as corroborated by its contentiousness?

Firstly, in light of the above discussion, the Aviation Directive gave the EU ETS much needed impetus⁸⁰ at a time when the limits and viability of the scheme are tested⁸¹. Secondly, the

⁷⁴ Chestney N., ‘EU to monitor shipping emissions from next year’ (1 October 2012). Available at: <http://www.reuters.com/article/2012/10/01/us-shipping-emissions-idUSBRE8900HH20121001>. Accessed 21 March 2013.

⁷⁵ Ellerman A.D., and Buchner B.K., ‘The European Union emissions trading scheme: Origins, allocation, and early results’, (2007) *Review of Environmental Economics & Policy* 1, 66.

⁷⁶ Recital 25 and Article 30 of the EU ETS Directive..

⁷⁷ Case C-127/07 *Arcelor v Premier Ministre* [2008] ECR I-9895, see especially paragraph 22.

⁷⁸ *Arcelor*, *ibid*, paragraphs 60 and 61.

⁷⁹ *Arcelor*, *ibid*, paragraphs 63.

⁸⁰ Bogojević (2012), *supra* note 19, at 347.

⁸¹ See for Rubini L., and Jegou I., ‘Who’ll Stop the Rain? Allocating Emissions Allowances for Free: Environmental Policy, Economics, and WTO subsidy Law’ [2012] *Transnational Environmental Law* 1:2, 325. Manea S., ‘Defining Emissions Entitlements in the Constitution of the EU Emissions Trading System’ [2012] *Transnational Environmental Law* 1:2, 303. Lederer N., ‘The European Emissions Trading Scheme and International Emissions Trading – A Comparative Analysis’ [2008] *New Zealand Journal of Environmental Law* 12, 1, at 26ff.

Commission has identified the growth of the airline industry as endangering the broader development of the EU ETS if left unchecked; “[i]f the climate change impact of the aviation sector continues to grow at the current rate, it would significantly undermine reductions made by other sectors to combat climate change”⁸². Although airline emissions make up a small percentage of total emissions (3%) they are growing rapidly (85% growth in emissions from 1990 to 2004) and will be the major source of carbon dioxide emissions covered by the EU ETS by 2020, and certainly by 2050. Moreover, the Aviation Directive is central to the EU’s climate change policy as the radiative forcing effect of aviation emissions is higher than that of other sectors⁸³. Finally, the Aviation Directive is, to date, the clearest test of a sovereign’s ability to impose unilateral environmental measures on an international industry⁸⁴: the Aviation Directive “will be the first international policy measure with binding targets meant to reduce CO2 emissions from aviation”⁸⁵. This perceived application of ‘sovereignty’ together with the extra-territorial implications of the Aviation Directive raise important questions relating to the compatibility of the Aviation Directive with international law.

Uncertainty as to the standing of the Aviation Directive starts with the fundamentals of multilateral environmental law, that is, the UNFCCC and the Kyoto Protocol⁸⁶. Under the UNFCCC, which covers almost all emissions⁸⁷, there are no binding mitigation targets. Under the Kyoto Protocol, which does contain binding targets, the so-called ‘bunker fuels’ including aviation and shipping, are subject to a special regime: Article 2(2) of the Kyoto Protocol states that Annex I⁸⁸ parties “shall pursue limitation or reduction of emissions of greenhouse gases [...] from aviation and marine bunker fuels, working through the ICAO and the IMO respectively”⁸⁹. Outside of this commitment, bunker fuels do not count toward Annex I parties’ emissions targets under the Kyoto Protocol⁹⁰. What can thus be said is that discussion on targets for the aviation sector has come to a standstill under the UNFCCC and Kyoto Protocol aegis, and the

⁸² 11th Recital to the Aviation Directive. See also Commission of the European Communities, ‘Communication: Reducing the Climate Change Impact of Aviation’, COM (27.9.2005) 459 final. See also Anger (2010), *supra* note 50, at 38. See also Kulovesi (2012), *supra* note 10, at 196. See also Mayer B., ‘Case C-366/10, Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change, with annotation by B. Mayer’ (2012) *Common Market Law Review* 49:3, 1113, at 1117.

⁸³ Kulovesi (2012), *supra* note 10, at 196.

⁸⁴ Kulovesi (2012), *supra* note 10, at 194.

⁸⁵ Anger (2010), *supra* note 50, at 39.

⁸⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 248.

⁸⁷ Kulovesi (2012), *supra* note 10, at 195.

⁸⁸ Massai L., *The Kyoto Protocol in the EU: European Community and Member States under International and European Law* (2010: TMC Asser Press, the Hague), at 29ff.

⁸⁹ Article 2(2) states: “The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively”.

⁹⁰ Kulovesi (2012), *supra* note 10, at 196.

existing requirements on parties, if any, are vague. So the task of advancing the multilateral climate change agenda with regard to aviation has increasingly fallen upon the ICAO. At its 2010 meeting the ICAO Assembly, the main governing body of the ICAO, adopted modest efficiency goals for the aviation sector of 2% fuel efficiency gains per annum until 2050, and agreed to work towards establishing a goal of capping emissions from aviation at 2020 levels⁹¹. The ICAO also agreed to investigate the possibility of a market-based mechanism forming the base of a global trading scheme for international aviation⁹². However Kulovesi believes that “[o]verall, despite recent advances, the multilateral frameworks created under the ICAO and IMO [...] for reducing emissions from aviation and shipping remain relatively weak”⁹³.

Following the ‘failure’ of the ICAO to produce a binding international agreement on aviation emissions⁹⁴, and in light of the problems posed by growth of emissions from the aviation sector, the EU’s move to “fill the gaps in the current international climate change regime”⁹⁵ should not have come as a surprise. With regard to border carbon adjustments, like the EU ETS, Kulovesi writes that their “very rationale [...] relates to defects at the multilateral level: their purpose is to address concerns over carbon leakage and environmental integrity in a situation where an effective multilateral legal framework for climate change mitigation is lacking”⁹⁶.

The Commission put forward its legislative proposal only when faced with what it considered to be an institutional failure at the international level⁹⁷. Moreover, and with crucial implications for the discussion in Chapter IV, the Aviation Directive is clearly phrased in complementary language in line with the EU’s commitments to multilateral solutions. It states that the “Community and its Member States should continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation” and that the “Community scheme may serve as a model for the use of emissions trading worldwide”⁹⁸. Deepening its commitment to international cooperation, the Aviation Directive also allows exemptions for those third states that put in place similar measures to combat emissions from aviation⁹⁹. The Commission has

⁹¹ See ICAO Assembly, ‘Consolidated Statement of Continuing ICAO Policies and Practices related to Environmental Protection –Climate Change’ (2010) ICAO Assembly Resolution A37-19. Available at: http://legacy.icao.int/env/A37_Res19_en.pdf. Accessed 21 March 2013. However, as stated above, by 2020 aviation will be one of the leading causes (if not the leading cause) of greenhouse gas emissions in the EU.

⁹² ICAO (2010), *ibid*, at paragraphs 13-18 and Annex. See also Kulovesi (2012), *supra* note 10, at 197.

⁹³ Kulovesi (2012), *supra* note 10, at 198.

⁹⁴ Aviation and shipping have been on the UNFCCC agenda since the first COP in 1995; see Kulovesi (2012), *supra* note 10, at 196.

⁹⁵ Bogojević (2012), *supra* note 19, at 349.

⁹⁶ Kulovesi (2012), *supra* note 10, at 199.

⁹⁷ Bogojević (2012), *supra* note 19, at 348.

⁹⁸ See Bogojević (2012), *supra* note 19, at 348. See also Aviation Directive, recital 17, Preamble and Article 25a(2).

⁹⁹ Aviation Directive, Article 25a.

signalled its readiness to participate in these discussions with third states¹⁰⁰. This so-called ‘escape route’ grants the EU the flexibility necessary to truly cooperate with third states, as well as partake in multilateral negotiations. The Commission also has the power to consider an amendment to the Directive if an international agreement to reduce aviation emissions is signed¹⁰¹. The inclusion of these provisions “shows that the EU has chosen a measured approach in responding to current drawbacks at the global level to deal with climate change”¹⁰².

Nevertheless, the ‘unilateral’ nature of this move has predictably resulted in far-reaching criticism of EU’s climate change policy at the international level. This includes accusations as to the use of unilateral trade measures and extraterritorial jurisdiction in violation of international law, and of failing to respect the principle of ‘common but differentiated responsibilities and respective capabilities’¹⁰³ in the implementation and design of the Aviation Directive¹⁰⁴. The controversial feature of the Aviation Directive is that it includes emissions taking place during the “last leg” of international flights¹⁰⁵. As a result, emissions produced by a US flight over US territory must be accounted for by the US airline surrendering EU emissions allowances to an EU Member State under the EU ETS¹⁰⁶. Naturally some third states have found this notion offensive¹⁰⁷. Moreover, the Commission began work on the Aviation Directive in parallel with the international negotiations taking place under the aegis of the ICAO, which may be interpreted as a pre-emptive move by the EU.

Despite this, in terms of EU law and policy, the Aviation Directive is nothing less than a shrewd exercise of policy-making that plays to the EU’s strengths, while employing language and concepts that are clearly respectful and encouraging of international law and multilateral solutions. As such, the Aviation Directive is a perfect show of force in terms of the EU’s environmental leadership claim: a progressive piece of legislation, utilising but never exceeding the full breadth of the EU’s environmental competence, in a manner that is consistent and coherent with the EU’s international obligations. Having now outlined the two instruments at the core of the *ATAA* case and briefly set them in a wider socio-political context, let us turn to

¹⁰⁰ Scott J., and Rajamani L., ‘EU Climate Change Unilateralism’ (2012) *The European Journal of International Law* 23:2, 469, at 471.

¹⁰¹ Aviation Directive, Article 25a(2).

¹⁰² Bogojević (2012), *supra* note 19, at 355.

¹⁰³ ‘CBDRRC’ or ‘CBDR’ for short is enshrined in Annex 1 ‘Rio Declaration’, Annex 1 of Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Principle 7.

¹⁰⁴ Kulovesi (2012), *supra* note 10, at 194.

¹⁰⁵ Bogojević (2012), *supra* note 19, at 349. See also Bartels L., ‘The inclusion of aviation in the EU’s ETS: WTO law considerations’ (2012) *International Centre for Trade and Sustainable Development, Trade and Sustainable Energy Series* 6, at 1.

¹⁰⁶ See for instance Scott and Rajamani (2012), *supra* note 100, at 470f.

¹⁰⁷ Bartels (2012), *supra* note 105.

the legal context: the competences in EU law used to establish, extend and maintain the EU ETS.

B. EU environmental competence

The choice and nature of these competences is central to the functioning of the EU's environmental and climate change policy, which must respect the principle of conferral of powers¹⁰⁸ as well as the rules on decision-making. The choice of legal basis determines the relevant decision-making procedure and the involvement of the different EU institutions. Thus it may affect policy development priorities. Any study of EU primary law must necessarily begin with an analysis of the general principles of EU law and the Lisbon Treaty consisting of the Treaty on European Union¹⁰⁹ and the Treaty on the Functioning of the European Union¹¹⁰. The final subsection will outline the EU's role, responsibilities and competences as an actor in international environmental law, as they are envisioned and stipulated in the Treaties.

Following the adoption of the Lisbon Treaty in 2011, some questions remain as to the true magnitude of changes brought about regarding the EU's external environmental competence¹¹¹. Characteristic of many of these changes is that on the one hand, the EU is moving towards increased constitutionalism in its legal system while Member States on the other hand fear the transfer of sovereignty from state to Union level¹¹². At the fundamental level of EU law, the fear of the latter is clearly reflected in the requirement to explicitly assign competences to the EU, emphasised in Article 4(1) TEU, and reiterated in Article 5(2) TEU. Further, the explicit list of competences¹¹³ and Protocol 2 on the application of the principles of subsidiarity and proportionality reinforce a sense of an apparent restraint as to the transfer of sovereignty. Vedder suggests however that although the form of environmental competence is somewhat altered, the reality is that the Lisbon Treaty largely represents a codification of the status quo. What, then, are the present-day climate change-related environmental competences of the EU?

¹⁰⁸ TEU Article 5. Article 5(1) states that: "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality."

¹⁰⁹ TEU.

¹¹⁰ Treaty on the Function of the European Union (Consolidated version) [2010] OJ C83/47.

¹¹¹ See Vedder H., 'The Treaty of Lisbon and European Environmental Law and Policy' (2010) *Journal of Environmental Law* 22:2, 285.

¹¹² Sciolino E., 'French Voters Soundly Reject European Union Constitution' (30 May 2005). Available at: http://www.nytimes.com/2005/05/30/international/europe/30france.html?pagewanted=all&_r=. Accessed: 21 March 2013. The Guardian, 'Dutch say 'devastating no' to EU constitution (2 June 2005). Available at: <http://www.guardian.co.uk/world/2005/jun/02/eu.politics>. Last visited 21 March 2013.

¹¹³ TFEU Articles 2-6.

i. General principles of EU law

The foundation of the rule of law and the balance of powers within the EU legal system can be derived from the general principles of EU law, codified in the TEU. These principles guide the procedural, substantive and constitutional functions of all areas of EU law, including environmental law. This section will highlight those general principles that interrelate in a significant way with the EU's climate change policy. The principles featuring most prominently in this way are the principle of sincere cooperation¹¹⁴ and principle of conferral or attribution of powers¹¹⁵, the principle of subsidiarity¹¹⁶.

The defining, and arguably most important, feature of the general principles is the principle of conferral of powers in Article 5(2) TEU. Unlike the other principles dealt with in this section that have largely substantive functions, the principle of conferral of powers is a formal requirement. It states that the EU may only act in so far as specific competences have been granted by the member states, and then only in the pursuit of the Treaty objectives¹¹⁷. This principle entails two constitutional limits on EU legislative acts. Firstly, the existence of a substantive competence granted in the Treaties, and secondly the choice of appropriate legal basis. It thus relates firstly to the determination of EU competence within a particular area, and secondly to the decision-making procedure applied in the implementation of an EU act. For our purposes, the two are closely related. The identification of a specific competence for regulating aviation emissions (and thus determining the applicable decision-making procedure) has not been an issue with regard to establishment of the EU ETS and the introduction of the Aviation Directive. Yet the applicable decision-making procedure (thus antecedently also the choice of legal basis) may become relevant in the wake of the *ATAA* case should the EU or the Member States choose to change policy direction. In case of contesting opinions, the applicable decision-making procedure could determine which one prevails.

The conferral of powers is further complicated by the division of policy areas into fields of exclusive and shared competences¹¹⁸. Environmental policy and energy policy are expressly stated to be fields of shared competence¹¹⁹. This means that member states are free to act so long as the EU has not acted, or has deregulated that specific field. Yet this does not mean that the environmental policy of the EU does not at times extend into areas of exclusive competence, and

¹¹⁴ TEU Article 4(3).

¹¹⁵ TEU Article 5(2).

¹¹⁶ TEU Article 5(3).

¹¹⁷ TEU Article 5(2).

¹¹⁸ TFEU Article 2.

¹¹⁹ TFEU Article 4(2)(e) and (i).

even take on an exclusive characteristic¹²⁰. Hey argues that the nature of the competence exercised by the EU within a certain field may have implications for the way that the CJEU interprets international agreements in that field¹²¹. Such implications include the possibility of self-executing terms in international agreements carrying over into EU law, as well as impacts on the operation of direct effect with regard to certain international provisions. This could potentially impact the way the Court interprets interactions between international environmental agreements and the EU ETS, for instance. She refers to precedent in the field of Common Commercial Policy (a field of exclusive competence¹²²), questioning whether the approach of the Court would differ in an area of shared competence such as environmental law. While the Treaties have for some time clearly listed the internal competences of the EU, the same could not be said for its external competences¹²³. This resulted in the development of secondary categories of implied external competences, which have now largely been internalised and legislated in the Lisbon Treaty. This matter has to some degree been settled by the CJEU in its *Open Skies* jurisprudence¹²⁴, where the Court affirmed the EU's exclusive treaty-making competence with regard to civil aviation¹²⁵. In essence, this means that for the purposes of this thesis, the external competence of the EU in regulating emissions from aviation is exclusive.

The principle of subsidiarity governs the vertical division of competence and the implementation of acts respectively. This may be relevant in the post-*ATAA* scenario described above as a means of determining whether the opinion of the EU or the Member States weighs more heavily. Vedder argues that the application of this principle is largely unchanged under the Lisbon Treaty¹²⁶. This means that as our understanding of the interrelation between climate change and human activity deepens, it is increasingly clear that the transboundary nature of

¹²⁰ See for instance the CJEU case law on the doctrine of implied powers, especially the Judgment of the Court of 14 July 1976 Joined cases 3, 4, and 6/76 *Cornelis Kramer and others*. See also codification of this law in TFEU, *ibid* n109, Articles 3(2) and 216(1).

¹²¹ Hey E., 'The European Community's Courts and International Environmental Agreements' (1998) *Review of European, Comparative & International Environmental Law* 7:1, 4, at 4ff.

¹²² TFEU Article 3.

¹²³ Koivurova T. et al., Director-General for External Policies, 'EU Competencies Affecting the Arctic' (18.10.2010). Available at <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>. Accessed 21 March 2013, at 15.

¹²⁴ Case C-466/98 *Commission v United Kingdom* [2002] ECR I-9427, Case C-467/98 *Commission v Denmark* [2002] ECR I-9519, Case C-468/98 *Commission v Sweden* [2002] ECR I-9575, Case C-469/98 *Commission v Finland* [2002] ECR I-9627, Case C-471/98 *Commission v Belgium* [2002] ECR I-9681, Case C-472/98 *Commission v Luxembourg* [2002] ECR I-9741, Case C-475/98 *Commission v Austria* [2002] ECR I-9797, and Case C-476/98 *Commission v Germany* [2002] ECR I-9855.

¹²⁵ Hillion C., 'ERTA, ECHR and Open Skies - Laying the Grounds of the EU System of External Relations' in Maduro M.P. and Azoulai L., (eds.) *The Past and Future of EU Law* (2010; Hart Publishing, Oxford).

¹²⁶ Vedder H., 'The formalities and substance of EU external environmental competence: stuck between climate change and competitiveness' in Morgera E., (Ed.) *The External Environmental Policy of the European Union – EU and International Law Perspectives* (2012: Cambridge University Press, Cambridge), 11, at 18.

environmental issues requires effective solutions to be implemented at EU level, thus satisfying the subsidiarity test. In addition, it may even be argued that the principle of subsidiarity demands that the scope of climate change measures decided at EU level should be extended further, as corroborated by the CJEU's *Open Skies* jurisprudence above.

Finally, the principle of sincere cooperation states that member states shall 'ensure the fulfilment of the obligations arising out of the Treaties', and 'shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'¹²⁷. It has been suggested that the principle, or as it is increasingly referred to – the duty – of sincere cooperation is “one of the ‘foundations’ of the [Union] legal order as a whole, if not one of [sic.] ‘constitutional principle of the EC Treaty’ to which the Court forcefully referred in its *Kadi* ruling”¹²⁸. In practice, this can lead to both a further blurring of the purportedly clear distinction between shared and exclusive competences¹²⁹, as well as a streamlining effect with regard to external action.

In this subsection we have seen that although the general principles relate only loosely to establishment of the EU ETS, they may play a significant part in its maintenance – especially if the Member States and the EU disagree on the way forward. Additionally, it may be argued that in its treatment of the external factors in *ATAA*, the Court is considering the distinction between exclusive and shared competences. This may offer some explanation as to why the Court chooses a rather narrow interpretation of which international provisions are applicable in the case.

ii. Express Treaty-based competence

Beyond the general principles, the Treaties are intended to lay down, in a non-restrictive manner¹³⁰, the specific objectives and substance of EU environmental policy. Furthermore, the provisions contained within them form the legal bases used by the EU legislators to satisfy the principle of conferral of power. As such, the provisions of the Treaties mark the extent of the EU's environmental competence. Having said that, Vedder correctly points out that the true extent of the EU's environmental competence – concerning as it does, an evolving and dynamic

¹²⁷ TEU Article 4(3).

¹²⁸ Hillion C., 'Mixity and coherence in EU external relations: The significance of the 'duty of cooperation'' (2009) Centre for the law of EU external relations 2009:2, at 5.

¹²⁹ Cremona M., 'Coherence and EU external environmental policy' in Morgera E., (Ed.) *The External Environmental Policy of the European Union – EU and International Law Perspectives* (2012: Cambridge University Press, Cambridge), 22, at 41ff.

¹³⁰ Duran (2012), *supra* note 20, at 13f.

policy area¹³¹ – cannot be grasped through the provisions of the Treaties alone. Instead, in order to gain an accurate idea of the exact division of competences between the EU and the member states, one must study the specific secondary legislation¹³² adopted by the EU legislators who enjoy a wide margin of appreciation in deciding what is appropriate environmental policy¹³³. With this in mind, the competences outlined in these subsections represent the formal competences of the EU, whereas the practical competences may be more accurately gleaned from the Directives on the EU ETS.

a. Treaty on European Union

The question of environmental competence features prominently in the TEU¹³⁴. In addition to the reference to environmental protection in the preamble¹³⁵, Article 3 TEU includes a ‘high level of protection and improvement of the quality of the environment’ as objectives of the internal market¹³⁶. This objective is traceable back to Article 2 of the Treaty of Maastricht¹³⁷, which called on a balanced approach to economic growth on the one hand and sustainable development and environmental protection on the other. The principle of a ‘high level’ of environmental protection is considered by Jans and Vedder to be “the most important substantive principle of European environmental policy”¹³⁸ due to its inclusion among the general objectives¹³⁹. This principle is usually employed to justify far-reaching environmental requirements, and is referred or alluded to in numerous other Treaty provisions and is often cited in the academia and by the Court (including the *ATAA* case¹⁴⁰). Furthermore, the principle of a ‘high level’ of environmental protection also features in Article 37 of the Charter of Fundamental Rights of the European Union¹⁴¹. This means that the ‘right to a high level of environmental protection’ is recognised in EU primary law, and moreover due to its inclusion in the CFREU, it is recognised as a *fundamental* right¹⁴² - a distinction of some significance, as discussed in section 4C.

¹³¹ Duran (2012), *ibid*, at 18.

¹³² Vedder (2012, *supra* note 126, at 11.

¹³³ Duran (2012), *supra* note 20, at 13f.

¹³⁴ Jans J.H. and Vedder H.H.B., *European Environmental Law After Lisbon 4th ed.* (2012: Europa Law Publishing, Groningen), at 11.

¹³⁵ TEU Preamble.

¹³⁶ TEU Article 3(3).

¹³⁷ Treaty on European Union (Consolidated version), Treaty of Maastricht [2002] OJ C326/5.

¹³⁸ Jans and Vedder (2012), *supra* note 134, at 41f.

¹³⁹ As well as a specific principle of environmental law in TFEU Article 191(2).

¹⁴⁰ *ATAA* (Judgment), *supra* note 30, at paragraph 128.

¹⁴¹ Charter of Fundamental Rights of the European Union [2010] OJ C83/389. Article 37: “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development” recognized in the Treaties as primary law under TEU Article 6.

¹⁴² Mayer (2012), *supra* note 82, at 1136f.

It should be noted that a ‘high level’ of protection is not the same as the ‘highest’ level. The CJEU has stated (in the context of (now) Article 191(2) TFEU) that the standard to be set at EU level must not be the lowest common denominator amongst member states, but neither must it necessarily be the technically highest achievable level of protection:

“whilst it is undisputed that Article 130r(2) [Article 191(2) TFEU] of the Treaty requires Community policy in environmental matters to aim for a high level of protection, such a level of protection, to be compatible with that provision, does not necessarily have to be the highest that is technically possible”¹⁴³

In other words, the harmonized standard should be set at an appropriate level, and is presumably a moving target¹⁴⁴. It is also noted that the inclusion of environmental protection provisions in the TEU is closely linked to the increasingly broad reference to ‘sustainable development’¹⁴⁵, a concept which has evolved from the sustainable development of economic activities¹⁴⁶ into ‘the sustainable development of Europe’. In light of the Commission’s findings and reasoning in relation to the Aviation Directive (refer back to section 2Aii), it may be added here that if Europe is to remain on a sustainable path, Article 3 clearly provides a basis for extending the scope of the EU ETS to cover aviation activities. This expansion of the concept of sustainable development is in line with the increasing horizontal integration of environmental policy into other policy areas. Moreover, Article 3 also makes an express link between the EU’s sustainable development policies and free and fair trade, indicating the possibility of an external relations mandate. A connection can once again be drawn to the Aviation Directive, which relates to the trade of transportation services – a link that may seem tenuous, but has been raised as an argument justifying the extra-territorial impacts of the Aviation Directive¹⁴⁷.

The integration of environmental action in the EU’s external policies features centrally in the TEU; “the EU’s external environmental action is expected to contribute to the other objectives of the Union’s external relations, such as supporting human rights, preventing conflicts and encouraging the integration of all countries into the world economy”¹⁴⁸. Pertinently in this regard, Article 21 TEU places the EU under a general obligation to ‘promote multilateral solutions to common problems, in particular in the framework of the United Nations’¹⁴⁹. The clarity and importance of the EU’s obligation to the UN framework will form one of the cornerstones of

¹⁴³ Case C-284/95 *Safety High-Tech v S. e. T. Srl* [1998] ECR I-4301, para 49.

¹⁴⁴ Duran (2012), supra note 20, at 15.

¹⁴⁵ Jans and Vedder (2012), supra note 134, at 10f.

¹⁴⁶ Treaty Establishing the European Community (Consolidated version) [2006] OJ C321E/1, Article 2.

¹⁴⁷ See section 4C below. See also See Hertogen (2012), supra note 13, at 14.

¹⁴⁸ Morgera E., ‘Ambition, complexity and legitimacy of pursuing mutual supportiveness through the EU’s external environmental action’ (2012) Edinburgh School of Law Research Paper No. 2012/02, at 2.

¹⁴⁹ TEU Article 21(1) second sentence.

this essay, and will become relevant in numerous ways¹⁵⁰. Moreover, the connection between the EU's trade and environmental policy is emphasised further in Article 21 TEU¹⁵¹. Not only are these objectives to guide the EU's common foreign and security policies, but they are also subject to a horizontal integration requirement¹⁵². As a result, environmental protection and sustainable development must be taken into consideration in the development and implementation of nearly all EU external action¹⁵³. The EU is additionally under a humanitarian-natured obligation to assist populations, countries and regions confronting natural or man-made disasters¹⁵⁴. Yet the probability of successfully arguing a link between the global nature of the environmentally harmful effects of aviation emissions and the impacts these are having in developing countries¹⁵⁵ is undeniably remote. Nevertheless, as a result of these provisions the EU's pursuit of a multilateral agreement on climate change is fuelled by both willingness and a legal obligation arising from the TEU itself.

The TEU clearly provides a strong basis for environmental action, going so far as to nearly provide the EU with a mandate for external environmental action. Not only does the TEU contain a broad environmental competence, but actually stipulates that the competence should be used to achieve a "high level" of protection. A further development in the TEU is the successive expansion of the EU's environmental agenda; environmental protection is no longer a distinct field of action, but a policy priority that is intended to permeate all levels of EU policy. Finally, although the provisions are of a general nature they seem to go so far as to imply an obligation on the EU to conclude international agreements on the environment in order to achieve its multilateral objectives and further the goal of horizontal environmental harmonization.

b. Treaty on the Functioning of the European Union

The Treaty on the Functioning of the European Union sets out some of the more specific responsibilities and competences of the EU. Environmental policy is first mentioned in Article 4, which affirms its position as an area of shared competence. Recalling the above discussion on the

¹⁵⁰ See section 2Biii on the EU's international actorship. See also section 4B on common but differentiated responsibilities.

¹⁵¹ TEU Article 21(2)(d) and (f) state that the Union's external action shall 'foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty' and 'help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'.

¹⁵² TEU Article 21(3).

¹⁵³ Jans and Vedder (2012), *supra* note 134, at 10f.

¹⁵⁴ TEU Article 21(2)(g).

¹⁵⁵ Esmailian S., 'Klimatkrisens offer står utan skuld' (9 May 2013) Dagens Nyheter. Available at: <http://www.dn.se/kultur-noje/debatt-essa/klimatkrisens-offer-star-utan-skuld>. Accessed 21 March 2013.

difficulties in delimiting competences, the practical relevance of this provision could however be called into question.

Article 11 TFEU¹⁵⁶ contains a provision known as the ‘environmental integration requirement’, one of the oldest integration requirements in EU primary law. Article 11 traces its roots to the First Environmental Action Programme¹⁵⁷ and was formally recognised in the Single European Act¹⁵⁸. Under the Lisbon treaty the environmental integration requirement features amongst the non-hierarchical general and specific integration requirements¹⁵⁹, but is the most strongly phrased amongst these¹⁶⁰. It states that “[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development”¹⁶¹. This environmental integration requirement contained is considered by some to be “one of the most important aspects of EU environmental law”¹⁶². Article 11 TFEU is perhaps the most significant substantive iteration of the EU’s environmental objectives and competence outside of the Environment Title. Although it is phrased as a *prima facie* obligation as opposed to a competence (using the word ‘must’ as opposed to ‘shall’ or ‘may’¹⁶³), it has wide-ranging implications for the ability of the EU to take environmental considerations into account. According to Duran, this can be seen as placing both a negative and a positive obligation on EU legislators. Firstly, to refrain from interfering with the achievement of the objectives stated in Article 191 TFEU, and secondly, to actively support the achievement of those objectives¹⁶⁴.

The objective of Article 11 is to “ensure a certain ‘horizontal coherence’ (or complementarity) between the EU’s external environmental policy and other policy dimensions of its relations with third countries and regions”¹⁶⁵, although it should be noted that Article 11 in no way restricts itself to external policies alone. As mentioned before, an obligation on the EU to integrate its environmental policy in all areas of activity could be linked to the Commission’s reluctance in the

¹⁵⁶ TFEU Article 11: “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”

¹⁵⁷ Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment (20.12.1973) OJ C112.

¹⁵⁸ Single European Act 1986 [1987] OJ L169/1, Article 130r(2).

¹⁵⁹ TFEU Articles 7-13.

¹⁶⁰ Duran (2012), *supra* note 20, at 28.

¹⁶¹ TFEU Article 11.

¹⁶² Duran (2012), *supra* note 20, at 1.

¹⁶³ This interpretation is corroborated by the case law of the CJEU with regard to what is now Article 11 TFEU. See Case C-26/88 *Greece v Council* [1990] ECR I-1527, paragraph 20. See also Duran (2012), *ibid*, at 29.

¹⁶⁴ Duran (2012), *ibid*, at 30.

¹⁶⁵ Duran (2012), *ibid*, at 20.

case of the Aviation Directive to stand by and wait for a multilateral solution that may or may not materialize. A legal obligation to integrate environmental protection in the EU's policies and activities could be interpreted as having the objective of securing a 'high level' of environmental protection from within the various sectors of EU activity. This in turn could be seen as obligating the EU to preserve or 'support' the viability of its environmental policies, as argued by Duran¹⁶⁶, including the EU ETS. At a stretch, it could be argued that Article 11 compels the EU to take certain necessary steps to ensure the success of its existing environmental policies – as outlined above, aviation emissions posed a direct and pressing danger to the viability of the EU ETS¹⁶⁷, and had to be tackled sooner rather than later. Applying this argument to the CJEU, this obligation would require the Court to adopt an interpretation of EU law that has a positive or a neutral effect with regard to environmental protection¹⁶⁸. This should be kept in mind in the later review of the Court's judgment in *ATAA* – especially as regards the Court's interpretation of the 'equivalence clause'¹⁶⁹ (so-called in this thesis for the sake of clarity, mindful of the fact that reference to 'equivalence' was specifically dropped by the Council during the negotiations leading up to the Aviation Directive¹⁷⁰) contained in the Aviation Directive.

Before moving on to the Environment Title, one last provision of the TFEU must be covered. Subject to Article 351 TFEU¹⁷¹, international agreements concluded by Member States before accession to the EU take priority over EU law. According to Craig & DeBurca, this amounts to an effective exception to the principle of supremacy of EU law¹⁷². The extent of this principle was tested by the CJEU in *Commission v UK*¹⁷³. Interestingly this case concerned the conclusion of "open sky" agreements between the US and numerous Member States. Having concluded the Bermuda I Agreement with the US Government in 1946 followed by the Bermuda II Agreement in 1977, the UK was offered a revision of the Bermuda II terms in 1992. The UK signed the revised agreement in 1995 (the Netherlands had done the same in 1992) despite a formal letter of notice from the Commission stating that air transport was within the exclusive competence of the Commission. The UK argued that due to the new terms constituting an 'update' of an

¹⁶⁶ Duran (2012), *ibid*, at 20.

¹⁶⁷ Refer to section 2Aii for comments on the extent of emissions growth in the aviation sector.

¹⁶⁸ Jacobs F., 'The role of the European Court of Justice in the Protection of the Environment' (2006) *Journal of Environmental Law* 18:2, 185.

¹⁶⁹ EU ETS Directive Article 25(a). See section further discussion under section 4C.

¹⁷⁰ Scott and Rajamani (2012), *supra* note 100, at 482.

¹⁷¹ TFEU Article 351, first sentence states that "[t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties."

¹⁷² Craig P. and de Burca G., *EU Law: Text, Cases and Materials* 5th ed. (2011: Oxford University Press, Oxford), at 267.

¹⁷³ *Commission v UK*, *supra* note 124.

agreement signed prior to accession, rather than a new agreement, they were covered by the exception in Article 351 TFEU. Referring to the text of the preamble to the Bermuda II Agreement, which stated that the latter was ‘replacing’ Bermuda I, the CJEU held that the Bermuda II Agreement was indeed a new agreement, and thus fell outside the scope of Article 351 TFEU. Further, it was demonstrated by the CJEU in *Commission v Italy*¹⁷⁴ that a member state may not rely on an international agreement (the GATT, in this case) to escape obligations under EU law (the free movement of goods in this case). This was reaffirmed in *T. Port*¹⁷⁵, which made it more or less clear that Article 351 TFEU is intended only to ensure the third state concerned that the relevant Member State is unable to rely on EU law as a means of escaping its obligations under the relevant agreement. However, Article 351 may not be relied upon in any internal situation, as this is outside of its scope¹⁷⁶. In *Burgoa*¹⁷⁷, the Court clarified a significant limitation to Article 351 TFEU – it is incapable of binding the EU as such regards the third country. This case will be the focus of considerable attention in the following chapters. The reason for this can be gleaned from Kaczorowska’s concluding remarks on Article 351 TFEU: “[i]n practice, the principle contained in [Article 351 TFEU] poses difficult problems for national judges in the case of a conflict between international agreements and [Union] law”¹⁷⁸.

We have seen that the TFEU, despite laying out only the formalities of the EU’s environmental competence, can be interpreted as having significant practical implications. A reading of Article 11 TFEU as requiring the EU to ‘support’ or ‘preserve’ its level of environmental protection could result in tension with international law down the road. This is most pertinent in a situation where the EU’s environmental action has implications on third countries; the EU, as a result of its environmental ambitions and its economic power, has the capacity (and the obligation) to implement a ‘high level’ of environmental protection. A problem arises when the EU expects and requires other states (states that may lack the capacity and conditions of the EU) to match its own actions, especially in the context of an international legal framework that is naturally suspicious of such demands. Article 351 TFEU represents a further source of friction between EU law and international law, exacerbated by an arguable misapplication of the provision by the Court in *ATAA*, as will be discussed in section 4Aiii.

¹⁷⁴ Case 10/61 *Commission v Italy* [1962] ECR 1.

¹⁷⁵ Cases C-364-365/95 *T. Port GmbH & Co v Hauptzollamt Hamburg-Jonas* [1998] ECR I-1023.

¹⁷⁶ Craig and de Burca (2011), *supra* note 172, at 342.

¹⁷⁷ Case 812/79 *Burgoa* [1980] ECR 2787.

¹⁷⁸ Kaczorowska A., *European Union Law* (2009: Routledge-Cavendish Publishing, New York), at 210.

c. Title XX TFEU on the environment

Having covered the general Treaty provisions relating to the EU's environmental competence, we will now turn our attention to the environmental title of the TFEU¹⁷⁹ which sets out the specific of the EU's environmental competence.

In accordance with the principle of conferral of powers, Article 191 TFEU sets out the prime environmental objectives of the EU¹⁸⁰. These include preserving, protecting and improving the quality of the environment and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. As Duran notes, it is obvious from these broad objectives that the Lisbon Treaty does not take a restrictive approach to the EU's Treaty-based environmental competence. It is reasonable to assume that this is a result of the transboundary nature of environmental problems in general and climate change in particular, and is designed to allow the EU legislators a wide margin in deciding upon the most effective and appropriate means of dealing with developments¹⁸¹. The emphasis on climate change in the last objective in paragraph (1) was added in the Lisbon Treaty and is of particular interest to us. It seems to suggest that climate change is the most prominent global concern facing the EU, and certainly "singles out climate change as the global environmental issue on which the EU must promote action at international level"¹⁸².

Read together with the integration requirement in Article 11 TFEU and the multiple references to sustainable development objectives throughout the Treaties, it is clear that climate change policy is intended to be the centrepiece of the EU's environmental policy and must be one of its highest priorities on the international stage. The wording of the fourth objective in paragraph (1) – "regional or worldwide environmental problems" – also seems to suggest that the territorial scope of the EU's actions (especially with regard to climate change) is not limited to the EU's territory. According to Duran this indicates that "the EU can also take measures targeting the environment beyond its borders, in the same way in which its Member States can do so, within the limits imposed by international law on the extraterritorial application of domestic environmental law."¹⁸³

¹⁷⁹ TFEU Environment Title XX.

¹⁸⁰ TFEU Article 191(1).

¹⁸¹ Jans and Vedder (2012), *supra* note 134, at 32.

¹⁸² Duran (2012), *supra* note 20, at 13.

¹⁸³ Duran (2012), *ibid*, at 14.

She also notes the support granted to this interpretation in the *Kramer* case¹⁸⁴, where the CJEU held that with regard to fishing over the High Seas, the EU's territorial competence and authority mimic those of the Member States. In any case it seems evident that there is room for extraterritorial environmental objectives. Moreover, the tie between the international scope of the EU's environmental competence, seen here, and its prioritisation of climate change policy is of course more than a mere power-grab by the EU – the objective behind a successful climate change policy must naturally be to improve not only the domestic environment but global environment as a whole¹⁸⁵. There is much debate surrounding the extent to which the territorial scope of Article 191(1) could and should be applied. This approach to the (extra)territorial application of the EU's external environmental competence can be used as a basis for arguments relating to the extra-territorial implications of the Aviation Directive as referred to in sections 4Ciii and iv.

Article 191(2) contains the specific principles of environmental law, which are to be given legal force in the acts implementing environmental policy. Paragraph (2) states that the EU's environmental policy 'shall aim' at a 'high level' of environmental protection that 'shall be based' on the precautionary principle, the preventive principle, the source principle and the polluter pays principle. The principle of a high level of environmental protection is a restatement of the wording found in Article 3(3) TEU and Article 37 CFREU, and as already stated, is considered one of the most important principles of EU environmental law¹⁸⁶.

The 'precautionary' principle aims to deal with the risk of environmental damage before the harm takes place¹⁸⁷. It is also recognised as a principle of international environmental law subject to Principle 16 of the Rio Declaration¹⁸⁸, not to mention the reference to precautionary action in Article 3 of the UNFCCC¹⁸⁹. According to Rajamani, "[t]he precautionary principle is seen by some as evidence of a paradigm shift in international environmental law, from the ad hoc and reactive approaches that characterised early environmental regulations, to the precautionary regulation that is on the increase today."¹⁹⁰ Subject to the precautionary principle, action to protect the environment can be taken before scientific evidence can conclusively prove that an

¹⁸⁴ *Kramer*, supra note 120.

¹⁸⁵ Jans and Vedder (2012), supra note 134, at 37f.

¹⁸⁶ Duran (2012), supra note 20, at 15. Jans and Vedder (2012), *ibid*, at 41.

¹⁸⁷ Case T-229/04 *Sweden v Commission* [2007] ECR II-2437, paragraph 161.

¹⁸⁸ Rio Declaration Principle 16.

¹⁸⁹ UNFCCC Article 3(3) states that "[t]he parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects [...]"

¹⁹⁰ Rajamani (2010), supra note 6, at 423. Although they also state that the EU's implementation under Article 191(2) TFEU is the most advanced implementation of the principle to date.

activity or product is harmful to the environment, as is the case with the Aviation Directive¹⁹¹. According to European Commission guidelines, it also gives the Union the right to establish what it deems to be an appropriate level of environmental protection¹⁹². In relation to the ‘public health’ ground, the CJEU has stated as to the risk assessment procedure that:

“Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies adoption of restrictive measures, provided they are non-discriminatory and objective.”¹⁹³

Whatever the level of the risk assessment applied under the precautionary principle, it could be argued that in the case of airline emissions causing climate change, the scientific data available today would certainly support precautionary action against increasing emissions. Moreover Driesen points out the practical advantage of a precautionary approach in so far as it provides the most cost-effective means of combating climate change, the results of which are not rapidly reversed¹⁹⁴.

The ‘rectification at source’ principle states that environmental damage should as a priority be rectified at source¹⁹⁵. It implies a preference for emissions standards rather than environmental quality standards¹⁹⁶, as this encourages those actors or entities closest to the source to alter their behaviour. It is further reasonable to assume that those closest to, or responsible for, the source of pollution are best placed to bring about a reduction in the damage being done. This is especially relevant to the airline industry, which spends large sums of money on research and development. If airlines were to pay a price for their carbon dioxide emissions, they would not only have an incentive to reduce their emissions (under a market-driven system, they may even profit by doing so!¹⁹⁷) but would also be in the best position to do so.

Lastly, the ‘polluter pays’ principle is closely linked to the ‘rectification at source’ principle. According to this principle, the polluter should bear the cost of polluting – certainly a factor in the Aviation Directive, which has even been referred to as “a European-wide environmental

¹⁹¹ Aviation Directive Preamble paragraph 19: “In accordance with [now Article 191(2) TFEU] of the Treaty, Community environment policy is to be based on the precautionary principle. Pending scientific progress, all impacts of aviation should be addressed to the extent possible.”

¹⁹² Commission of the European Communities, ‘Communication from the Commission on the precautionary principle’ (2.2.2000) COM(2000) 1 final.

¹⁹³ Case C-77/09 *Gowan Comercio Internacional e Servicos* (2010) ECR I-13533 Judgment of 22 December 2010.

¹⁹⁴ Driesen D.M., ‘Free Lunch or Cheap Fix?: The Emission Trading Idea and the Climate Change Convention’ (1998) *Boston College environmental Affairs Law Review* 26:1, 87, at 94f.

¹⁹⁵ Duran (2012), *supra* note 20, at 16.

¹⁹⁶ Jans and Vedder (2012), *supra* note 134, at 48

¹⁹⁷ Rubini and Jegou (2012), *supra* note 81, at 328.

aviation ‘polluter-pays’ scheme¹⁹⁸. Part of the reasoning behind this principle is to harmonize the way costs of rectifying pollution are allocated in different Member States¹⁹⁹. This has the effect of minimising competitive distortions that have a negative effect on the internal market (for instance state aid to cover the cost of pollution for business), and of advancing environmental objectives in a coherent manner. Furthermore, the principle means that a European measure should not place the cost of remedying pollution on a person or undertaking that is not responsible for that pollution²⁰⁰. The reasoning behind the ‘polluter pays’ principle is obvious when applied to the airline industry. In line with the ‘tragedy of the commons’²⁰¹, airlines are using a public good (the environment) to profit without accounting for all the costs. As ‘there is no such thing as a free lunch’, the matter is simply one of tracing the cost elsewhere – in this case, to those who will suffer the effects of climate change brought about by greenhouse gas emissions. What we then have is an externality or a misallocation of cost and liability²⁰² – the few profit at the cost of the many²⁰³. The ‘polluter pays’ principle is an attempt to internalize the negative externality so created; in other words, to lift the cost off the many and place it by the responsible few. Airlines would presumably pass on part of the increased cost on to passengers. However, even so causality is easier to establish between pollution from aviation and the few who choose to pay for flying than the many who do not. To restate the reasoning applied to the ‘rectification at source’ principle: those closest to the source are best place to reduce the resulting harm²⁰⁴, whether that be through increased efforts to minimise aircraft emissions by airlines and manufacturers, or through alternatives means of travel by passengers. This may ring truer yet in the context of a market-based solution such as a cap-and-trade scheme; the IPCC’s Fourth annual Assessment Report states that “[m]arket pressures [...] determine fuel efficiency and CO2 emissions”²⁰⁵, and so “[c]arbon pricing could effect further emissions reductions if the aviation industry introduces further technology measures in response”²⁰⁶.

¹⁹⁸ Truby J., ‘Extraterritoriality or an illegal tax? A challenge to the inclusion of aviation in the EU emissions trading scheme’ (2012) *Environmental Law Review* 14, 301, at 301.

¹⁹⁹ Jans and Vedder (2012), *supra* note 134, at 50.

²⁰⁰ Case C-293/97 *Standley* [1999] ECR I-2603, paragraphs 46-52 stating that farmers responsible for nitrate pollution should only be liable to pay for the portion of the pollution caused by their own activities.

²⁰¹ Hardin G., ‘The Tragedy of the Commons’ (1968) 162 *Science* 1243, at 1244–5.

²⁰² European Parliament and Council Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L 143/56, Article 1: “The purpose of this Directive is to establish a framework of environmental liability based on the ‘polluter-pays’ principle, to prevent and remedy environmental damage.”

²⁰³ Mayer (2012), *supra* note 82, at 1115.

²⁰⁴ Jans and Vedder (2012), *supra* note 134, at 50.

²⁰⁵ Ribeiro S.K. and Kobayashi S., ‘Transport and its infrastructure’, in Metz B. Davidson O.R., Bosch P.R., Dave R., Meyer L.A. (Eds.), *Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007: Cambridge University Press, Cambridge), at 352.

²⁰⁶ Ribeiro and Kobayashi (2007), *ibid*, at 364.

Finally, as this thesis is concerned with the external dimension of the EU's environmental actions, it should be emphasised that many of these principles are recognised also as principles of international environmental law: the 'precautionary' principle is reflected in principle 15 of the Rio Declaration²⁰⁷, the 'prevention' principle formed the foundation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal²⁰⁸ and principle 16 of the Rio Declaration contains the polluter pays principle²⁰⁹.

From the key provisions of the TFEU we have learned that climate change policy is prioritised in the EU's external action, and that internally the EU possess some competence to act extra-territorially in environmental matters. Through the principles laid out in Article 191(2) TFEU, the Lisbon Treaty reaffirms the EU's pursuit of a high level of environmental protection; strives to encourage cost-effective environmental action; seeks to obligate environmental damage to be mitigated by those best placed to do so – that usually being the party responsible for the damage. In this way, the TFEU also seeks to minimise misallocation of responsibility and resources, and to disincentivise freeriding.

iii. The EU as an actor in international climate change policy

According to Macrory and Hession the traditional approach of international law to sovereign actors is that "only states are recognised as having legal personality in international law and therefore only states are capable of maintaining rights and contracting responsibilities"²¹⁰. International legal personality is required to have standing, and standing is necessary in order to be a party to an agreement. As such, the EU's capacity to act on the international stage has not always been certain, and indeed it was not until the negotiations leading up to the Montreal Protocol on the protection of the ozone layer²¹¹ that the EU was able to assert its international actorness in environmental matters²¹². Today the EU is considered to have international legal personality²¹³ subject to Article 47 TEU²¹⁴, also described as the "strongest statement of the

²⁰⁷ Rio Declaration Principle 15.

²⁰⁸ See for instance Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, 1673 UNTS 57, introduction and Article 4(2)(C).

²⁰⁹ Rio Declaration Principle 16.

²¹⁰ Macrory R. and Hession M., 'The European Community and Climate Change. The Role of Law and Legal Competence', in O'Riordan T. and Jäger J. (Eds.) *Politics of Climate Change* (1996: Routledge, London).

²¹¹ Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 3, signed by the European Union in 1987.

²¹² Vogler J., 'The European Union as an Actor in International Environmental Politics' (1999) *Environmental Politics* 8:3, 24.

²¹³ Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263.

²¹⁴ TEU Article 47.

European Union's external presence²¹⁵. Thus EU accession is possible for most multilateral agreements²¹⁶, likely resulting from the importance of the EU as an 'environmental norm generator'²¹⁷.

Article 191(4) contains the key provision on the EU's external environmental competence as mentioned above – its Treaty-making power. Subject to this provision, the EU can enter into environmental agreements even where the specific subject matter of the agreement is not yet, or is only marginally, covered by the EU's internal competence²¹⁸. The substance of this competence is determined according to Article 191(1) and (2). In accordance with Article 4(2) TFEU, Article 191(4) grants the EU a 'shared competence' in environmental policy. While this allows Member States to legislate within the shared competence, it also means that they are prevented from doing so with regard to subject-matter already covered by an EU legislative act. As a result, the second subparagraph of Article 191(4), intended as a response by the Member States to the pre-emption doctrine²¹⁹, has created considerable confusion since its introduction in the Single European Act²²⁰. This could be taken to mean that despite the shared competence in environmental policy, Member States could negotiate international agreements even where the EU has adopted internal rules on the same subject-matter. However this would have implied a significant departure from the doctrine of implied powers, consisting of the principle of parallelism from the *ERTA* case²²¹ and the principle of complementarity from *Opinion 1/76*²²². The CJEU in *ERTA* clearly rejected the possibility that Member States could negotiate international agreements on areas covered by EU internal rules, stating that the EU's treaty-making power is an exclusive competence (affirmed by the CJEU in the *Open Skies* cases with regard to the civil aviation). To this effect a Declaration was included in the Final Act of the Single European Act stating specifically that the *ERTA* doctrine was not affected by paragraph (4), presumably as a means of reinforcing the shared as opposed to exclusive nature of the competence. And yet Article 351 TFEU makes it clear that this is irrelevant at least in the case of

²¹⁵ Chalmers D., Davies G. and Monti G., *European Union Law* 2nd ed. (2010: Cambridge University Press, Cambridge), at 632.

²¹⁶ Jans and Vedder (2012), *supra* note 134, at 66.

²¹⁷ Morgera (2012), *supra* note 148, at 1.

²¹⁸ Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraph 94.

²¹⁹ TEU Article 4(3) and *Kramer*, *ibid* n130, *inter alia*.

²²⁰ Jans and Vedder (2012), *supra* note 134, at 67f.

²²¹ *ERTA*, *supra* note 213, at paragraph 17. This principle is codified in Articles 3(2) and 216(1) TFEU.

²²² *Opinion of the Court of Justice of 26 April 1977, 1/76 (European Laying-Up Fund for Inland Waterway Vessels)* [1977] ECR 741.

the CICA, which predates the cut-off point specified in Article 351 – obviously this carries implications for the Court’s treatment of the applicability of the CICA in the *ATAA* case²²³.

Having established the EU’s international actorship and Treaty-making powers, we must now consider what these may or must be used for. This framework can be referred to as the EU’s international environmental responsibility. The Sixth Environment Action Programme “stresses the need for a positive and constructive role of the European Union in the protection of the global environment”²²⁴. Two distinct types of development can be identified in this regard; on the one hand is the substantive body of environmental law either enacted at EU level with the aim to affect or protect the environment outside the territory of the EU, or in which the EU participates on the multilateral level. On the other hand, EU law lays out certain rules for the interaction between itself and international law – these rules can be summed up as a constitutional obligation to respect international law²²⁵.

It appears, then, that the EU considers environmental action with out-of-borders implications²²⁶ a responsibility of an international actor – and needless to say, specifically the responsibility of an economically developed actor²²⁷. As a result, an aspect of the EU’s international actorship is the potential for extraterritorial environmental action and objectives. A Treaty-basis for such action is found in Article 191 TFEU, especially as regards climate change policy²²⁸. In this respect Article 191 goes to the very core of the climate change problem – ultimately, a global phenomenon calls for a global solution. Under the aegis of Article 191 the EU has become party to the multilateral Vienna Convention for the protection of the ozone layer²²⁹ and its Montreal Protocol²³⁰, as well as the UNFCCC and its Kyoto Protocol; the bilateral OSA Protocol to the Air Transport Agreement²³¹; and it has ratified the CICA, although it is not a party thereto.

²²³ See subsection 4C.

²²⁴ Jans and Vedder (2012), *supra* note 134, at 38. See also European Parliament and Council Decision 1600/2002/EC laying down the Sixth Community Environment Action Programme (10.9.2002) OJ L 242/1.

²²⁵ Jans and Vedder (2012), *supra* note 134, at 64. Note that a discussion of the direct effect of international law will be omitted at this point, as the aspects of specific relevance will be covered as part of the discussion on the *ATAA* case in chapter 4.

²²⁶ Such as the Aviation Directive, as alluded to on multiple occasions above.

²²⁷ ‘Common but differentiated responsibilities’, see UNFCCC Article 3(1).

²²⁸ TFEU Article 191: ‘promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change’. See also Jans and Vedder (2012), *supra* note 134, at 37f.

²²⁹ Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 1513 UNTS 293.

²³⁰ Montreal Protocol, *supra* note 211.

²³¹ Air transport agreement between the European Community and the United States, OJ 2007, L. 134/1, as amended by its protocol, [2010] OJ L 223/1.

The amendment to Annex I of the ETS Directive²³² introduced by the Aviation Directive can also be said to fall under the ‘out-of-borders’ objective articulated in Article 191 in so far as it subjects emissions taking place outside the EU’s territory to the EU ETS²³³. The question of the extent and quality of the territorial competence granted by Article 191 is extremely relevant. Jans and Vedder pose this question in terms of Article 191 in general; “the phrase ‘regional or worldwide environmental problems’ is still unclear in several respects. For example, is it intended to exclude unilateral measures?” They also question whether “action to protect the environment of only one or a few third states is excluded”, and conclude that:

“there is a lot to be said in favour of not interpreting Article 191 TFEU too narrowly. Nor should unilateral environmental measures or environmental measures directed at protecting the environment in only one state or a few states *a priori* be excluded, even though the problem of the international law constraints of such measures is at its most pronounced in this very case.”²³⁴

These international law constraints will form an important element of the evaluation of the Court’s *ATAA* judgment in section 4C.

As for the EU’s responsibility to respect international law, the EU Treaties contain numerous references to the EU’s international obligations and its environmental responsibility at the international level. One of the environmental actions emphasised by the EU’s external agenda under the Lisbon Treaty is the promotion of “an international system based on stronger multilateral *environmental* cooperation and good global *environmental* governance”²³⁵. This commitment is articulated in Article 3(5) TEU where it is stated that “[i]n its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to [...] to the strict observance and the development of international law”²³⁶.

The general provisions on the EU’s external action are equally clear. Article 21(1) TEU places the EU under a general obligation to “promote multilateral solutions to common problems, in particular in the framework of the United Nations”²³⁷, while Article 21(2) TEU provides that the EU shall “consolidate and support [...] the principles of international law”²³⁸, “help develop

²³² EU ETS Directive.

²³³ Aviation Directive Annex paragraph 1.

²³⁴ Jans and Vedder (2012), *supra* note 134, at 39.

²³⁵ Morgera (2012), *supra* note 148, at 1. See also Article 21(2)(h) TEU and Article 11 TFEU.

²³⁶ TEU Article 3(5).

²³⁷ TEU Article 21(1), second sentence.

²³⁸ TEU Article 21(2)(b).

international measures to preserve and improve the quality of the environment”²³⁹ and “promote an international system based on stronger multilateral cooperation and good global governance”²⁴⁰. Finally, the Environment Title expressly subjects the EU’s external environmental policy to the obligation to respect international law, stating that “the Union and the Member States shall cooperate with third countries and with the competent international organisations”²⁴¹.

In examining the EU’s international actorship, it is found that the EU has legal personality granting the capacity to partake in international agreements. This capacity also includes external treaty-making powers. EU law stipulates that this capacity be used in a certain way. This places a two-fold responsibility on the EU. Firstly, to seek to protect the global environment as opposed to the environment within the EU. Secondly, in seeking to fulfil its other responsibilities, the EU is obligated to respect international law and encourage participation in and uptake of multilateral solutions. It is, in other words, equipped with the tools of structural leadership.

This chapter has sought to demonstrate that the EU ETS as well as the Aviation Directive lie well within the EU’s environmental competences – in other words, they are lawfully implemented tools of EU environmental policy, aimed at achieving the objectives of the Treaties. The following chapter seeks to identify the role of the CJEU in enforcing this delicate balance. How does – and how should – the Court mediate between a progressive but controversial provision of national law on the one hand, and a recalcitrant, but ultimately malignant, body of international law on the other?

²³⁹ TEU Article 21(2)(f).

²⁴⁰ TEU Article 21(2)(h).

²⁴¹ TFEU Article 191(4).

3 The Court of Justice of the European Union as an environmental actor

“In the name of preserving ‘the rule of law’ the Court has developed principles of a constitutional nature as part of EU law. [...] These principles have defined the very nature of the EU, constitutionalizing it and distinguishing it from other international Treaties. They were especially significant in the years of so-called institutional malaise or stagnation. The Court rendered the Treaty and EC legislation effective when the provisions had not been implemented as required by the political institutions and the Member States. This was exemplified by the ECJ’s role in the creation of the internal market, requiring removal of national trade barriers, at a time when progress towards completing the Single Market through legislative harmonization was hindered by institutional inaction”²⁴².

A. The role of the judiciary in environmental protection

As warden of the Treaties, the Court of Justice of the European Union has accumulated a reputation as a galvanizing force in areas of EU policy where the political will to pursue development has abated. In light of the reputation of the Court, this section will briefly consider the role of the CJEU in the EU’s pursuit of a formidable climate change policy. In doing so, this section will reflect on whether the CJEU can be said to have any obligations and responsibilities beyond interpreting the law in accordance with the rule of law.

The CJEU’s mandate is set out in Article 19(1) TEU²⁴³, providing that the Court ‘shall ensure that in the interpretation and application of the Treaties the law is observed’. It was argued in chapter II that the Aviation Directive is a lawful exercise of the EU’s environmental competence, aimed at achieving the environmental objectives of the Treaties in accordance with the principles of environmental law. Can it be argued that the Court should consider such aims in its interpretation, and would it also be possible to imply an obligation on the Court to provide an interpretation of the Aviation Directive so as to maximise its chances of success?

In this case, one overarching environmental policy of the EU is the pursuit of environmental leadership, through its climate change policy, so as to allow for the greatest impact of the EU’s environmental policies. Does the Court in this manner have a role in advancing, to the best of its ability, the EU’s environmental leadership ambitions? It is clear that Craig and de Burca in the above cited passage, believe that the Court, in many regards, is willing and able to take action beyond the call of duty. This may be because the Court’s jurisprudence “is generally described as purposive or teleological, although not in the sense of seeking the precise purpose of the authors of a text [...] The Court rather examines the whole context in which a particular provision is

²⁴² Craig and DeBurca (2011), *supra* note 73, at 63f. See also Kaczorowska (2009), *supra* note 178, at 244.

²⁴³ TEU Article 19(1).

situated, and gives the interpretation most likely to further what the Court considers that provision sought to achieve”²⁴⁴. The reason why this approach is necessary was outlined by the Court in the *CILFIT* judgment²⁴⁵. According to Kaczorowska, Article 19(1) can even be interpreted as meaning that it is the mission of the Court “not only to apply the law expressly laid down by, or under, the [Treaties] but, more importantly, to promote its continuous development, to supplement its provisions, and to fill gaps in the [Treaties]”²⁴⁶. This goes some way to explaining the activist role often assumed by the Court. This very role has been criticised by Rasmussen as paving the way for a possible usurpation of power by the judiciary²⁴⁷, and by Neill as a tool for the Court to advance its own political interests²⁴⁸. This criticism is thus one aimed at the ‘constitutional’ role of the CJEU – a role defended by Jacobs. Jacobs attributes some of the criticism of the Court’s constitutional role to, amongst other things, the lack of constitutional jurisprudence in some Member States. He goes on to argue that the Court plays an invaluable role in balancing Union and Member State interests, and developing EU law in conformity with the rule of law²⁴⁹. Jacobs thus believes that it is natural, and even inescapable that the Court’s role should include a constitutional element. Craig and DeBurca also note that the Court’s “role as an institutional actor in the [EU] integration process should be recognized.”²⁵⁰

Moravcsik for instance believes that the constitutional role of the CJEU is justified in as much as it allows the EU to overcome the prisoner’s dilemma and the problem of the free rider, which would otherwise be associated with co-operation on a supranational level. Through the agency of the Court, Member States are prevented from enjoying the benefits of the co-operation unless they uphold their obligations as part of that co-operation²⁵¹. Recalling the problem of the free rider in relation to international co-operation mentioned in the introduction to this thesis, the constitutional role of the CJEU becomes almost obvious. It allows the EU to effectively perform the supranational functions which international co-operation has so far failed to produce. It has also been argued that it is misguided to see the Court as a mere agent of the designers of the EU – such an approach fails to account for the Court’s creation of the concept of Union citizenship

²⁴⁴ Craig and DeBurca (2011), supra note 173, at 64.

²⁴⁵ I.e. that EU law is drafted in several languages, all editions of which are authentic. Case 283/81 *srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415.

²⁴⁶ Kaczorowska (2009), supra note 178, at 242.

²⁴⁷ Rasmussen H., *On Law and Policy in the European Court of Justice* (1986: Martinus Nijhoff, Dordrecht), at 62.

²⁴⁸ Neill P., *The European Court of Justice: A Case Study in Judicial Activism* (1995: European Policy Forum, London).

²⁴⁹ Jacobs F., ‘Is the Court of Justice of the European Communities a Constitutional Court?’ in Curtin D. and O’Keeffe D. (Eds.) *Constitutional Adjudication in European Community and National Law* (1992: Butterworths, Ireland), 25, at 32.

²⁵⁰ Craig and DeBurca (2011), supra note 173, at 65.

²⁵¹ Moravcsik A., ‘Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach’ (1993) 31 *JCMS* 473, at 512-14.

as one example. Along this line, Stone Sweet argues that “the ECJ authoritatively reconstituted the Community in ways that linked the demand for and supply of European law and courts to the activities of market actors, and then to all activities governed by EC law. Constitutionalisation not only positioned the courts as primary arenas for negative integration; it made them supervisors of positive integration, and creators of a growing corpus of rights which the Court found in the Treaty itself.”²⁵² To this effect, Kaczorowska points out that “[i]n interpreting Community law, the ECJ takes into consideration the evolving nature of the Community and thus interprets Community law in the light of new needs which did not exist at the time of ratification of the Founding Treaties”²⁵³.

The argument advanced by this thesis is that the role of the Court in fact does extend beyond merely interpreting EU law in strict accordance with the rule of law. Rather, the rule of law and the unique structure of the EU require the Court to perform a wider role, which may include interpreting EU law in the way that it most conducive to advancing the relevant Treaty-objectives. This thesis argues that in the *ATAA* case, the relevant Treaty-objectives include first and foremost a ‘high level’ of environmental protection²⁵⁴, implemented in accordance with the principles of environmental law²⁵⁵, so as to support the achievement of the EU’s environmental objectives²⁵⁶ (including climate change leadership through an effective EU ETS) in a manner that respects international law²⁵⁷ and promotes a multilateral solution²⁵⁸. This catalogue covers only the most fundamental Treaty-objectives, and is thus not intended to be exhaustive. It is evident that reconciling all these objectives is a Herculean task that is not disposed to neat solutions. In other words, the Court is faced with the near-impossible task of reconciling EU law, international law and national law in the context of the interrelation of the EU institutions, international organisations, the Member States and third states, in accordance with EU law – which as demonstrated, does not provide for clear-cut answers. The author believes that precisely because of the impossibility of arriving at an exact solution capable of accommodating often diametrically opposed views, the Court should have abstained from a strict textual interpretation. In *ATAA* the Court should have adopted the approach of a constitutional court and made a purposive interpretation aiming at a reasonable balance between the objectives here presented, or it should have given preference to a ‘lead objective’ and moulded its judgment in a manner consistent with

²⁵² Stone Sweet A., *The Judicial Construction of Europe* (2004: Oxford University Press, Oxford), at 235.

²⁵³ Kaczorowska (2009), *supra* note 178, at 244.

²⁵⁴ CFREU Article 37, Article 3(3) TEU, Articles 114(3) and 191(2) TFEU.

²⁵⁵ TFEU Article 191(2) and internationally recognised principles such as Article 3 UNFCCC.

²⁵⁶ Refer back to section 2Biic. See also Articles 11 and 191(1) TFEU.

²⁵⁷ TEU Article 21(2), Articles 191(4) and 351 TFEU.

²⁵⁸ TFEU Article 3(5) TEU and 21(1).

that objective. With this in mind, the next section aims to impart an image of the Court in its moments of transformational leadership: a Court that is willing to approach a difficult question of law as a constitutional court would, and if necessary to ‘reconstitute’ that law.

B. The CJEU: a legacy of progressive activism

Following the creation of the European Union, a quiet consensus existed amongst the Member States that the relationship between EU law and national law would follow the standard theory of international law – that states would remain entirely sovereign, although they may have to exercise their sovereignty subject to the restrictions of that international law. They would thus be, for all intents and purposes, the “masters of the treaties”²⁵⁹. This impression was perhaps rudely shaken with the statement of the Court that the Treaties establish a “new legal order of international law for the benefit of which the state have limited their sovereign rights”²⁶⁰. As if to clarify the message, the Court made it plain in *Costa v ENEL*, decided the following year, that “the EEC Treaty has created its own legal system which [...] became an integral part of the legal systems of the Member States and which their Courts are bound to apply” and that “the Member States have limited their sovereign rights [...] and have thus created a body of law which binds both their nationals and themselves”²⁶¹. As Chalmers, Davies and Monti put it, “[i]t would be difficult to overstate the radicalism of *Costa*. The claim that EU law enjoys some form of sovereignty means that the Union’s legal power cannot be seen as deriving from the Member States, but must be understood instead as being autonomous and original”²⁶². The Court pursued the extension of this concept of ‘sovereignty’ in numerous subsequent cases; it established the supremacy of EU law over national constitutional law in *Internationale Handelsgesellschaft*²⁶³ and it introduced a requirement for all national courts to set aside national laws that conflict with EU law²⁶⁴. The resilience to this day of the notion of the supremacy of EU law, established in these cases, remains testament to the considerable transformational force of the Court’s jurisprudence. Moreover, in *van Gend* the Court did more than hint at supremacy – in a ‘ground-breaking judgment’ it also introduced the direct effect of EU law. This meant that for the first time, individual applicants could seek the enforcement of their rights under *EU* as opposed to *national* law, before *national* courts. This judgment “was [...] characterised by a vision of the kind of legal

²⁵⁹ Chalmers and Monti (2011), *supra* note 215, at 185f.

²⁶⁰ Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

²⁶¹ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585, at 593.

²⁶² Chalmers and Monti (2011), *supra* note 215, at 187.

²⁶³ Case 11/70 *Internationale Handelsgesellschaft v Einfuhr – und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.

²⁶⁴ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

community that the Treaties seemed designed to create”, and provided “an early example of the ECJ’s teleological methodology”²⁶⁵. The Court built on this purposive interpretation in *Defrenne v Sabena*²⁶⁶, where it introduced the horizontal direct effect of the Treaties; in *Van Duyn*²⁶⁷ where it established the vertical effect of Directives; and in *Von Colson*²⁶⁸ and *Marleasing*²⁶⁹, where the Court developed the doctrine of indirect effect. Even then, individuals in certain cases were left without means to redress under EU law²⁷⁰. Thus in *Frankovich*²⁷¹ the Court explicated that the subjects of the EU legal system are “not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony”. *Frankovich* is seen as a momentous event in EU legal history, particularly because negotiations on the Maastricht Treaty had only recently ruled out the possibility of state liability²⁷². Moving beyond the state, the *ERTA*²⁷³ judgment – mentioned above – in which the Court created the doctrine of implied Treaty-making powers, extended the Court’s purposive interpretation beyond the territory of the EU.

Beyond the general constitutionalisation of EU law undertaken by the Court, some particular fields of law have been substantially altered as well. Internal market law was largely revitalized and shaped by the Court’s intervention through its *Dassonville*²⁷⁴, *Cassis de Dijon*²⁷⁵ and *KECK*²⁷⁶ judgments. It is also within the context of the internal market that the Court first became involved in environmental law. Yet, the approach of the Court to environmental law could in some ways be seen as even more exceptional than in the internal market; an EU competence on common commercial policy was well-established before the CJEU’s involvement. In environmental law, on the contrary, the CJEU anticipated the Treaties in *ADBHU*²⁷⁷ by describing environmental protection as ‘one of the Community’s essential objectives’, before any environmental competence existed apart from within the internal market. According to Lee, this “important decision allowed for the possibility of an autonomous environmental policy”²⁷⁸. In *Danish Bottles* the Court affirmed its statement from *ADBHU* that the “environment is a key

²⁶⁵ Craig and DeBurca (2011), supra note 173, at 185.

²⁶⁶ Case 43/75 *Defrenne v Sabena* (1976) ECR 455.

²⁶⁷ Case 421/74 *Van Duyn v Home Office* (1974) Ch. 358.

²⁶⁸ Case 14/83 *Von Colson* (1984) ECR 1891.

²⁶⁹ Case C-106/89 *Marleasing* (1991) 1 ECR 4135.

²⁷⁰ Chalmers and Monti (2011), supra note 215, at 301.

²⁷¹ Case C-6/90 *Frankovich v Italy* (1990) ECR I-5375.

²⁷² Chalmers and Monti (2011), supra note 215, at 302.

²⁷³ *ERTA*, supra note 221.

²⁷⁴ Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* (1974) ECR 837.

²⁷⁵ Case 120/78 *Reve Zentralamt AG (Cassis de Dijon)* (1979) ECR 649.

²⁷⁶ Cases C267 and 268/91 *Keck and Mitbouard* (1993) ECR I-6097.

²⁷⁷ Case 240/83 *ADBHU* (1985) ECR 531.

²⁷⁸ Lee M., *EU Environmental Law – Challenges, Change and Decision-Making* (2005: Hart Publishing, Oxford), at 16.

objective of the EU²⁷⁹ and introduced environmental protection as part of the *Cassis* ‘rule of reason’²⁸⁰. The Court further chose to insert environmental law into Article 36 as ‘so closely linked’ to human health that the two should be considered together²⁸¹. In *Preussen Elektra*²⁸² the Court helped to carve environmental protection into the fabric of the internal market with regard to state aid, strengthening the overall position of environmental concerns in the EU legal order. The ECJ has not stopped here, however. It has gone as far as to hint at the application of criminal penalties in the enforcement of environmental law²⁸³ – a controversial stance, considering that criminal law is explicitly excluded from the EU’s competences. Finally, in *ATAA* the CJEU went some way to establishing itself as an EU environmental protection hawk at the international level. It is clear that the Court has come a long way in terms of environmental protection. But it could go further still.

With that in mind – this thesis promised to draw a possible parallel between the Court’s development of its jurisprudence in the fields of environmental law and fundamental freedoms and human rights. Certainly the Court’s case law on fundamental freedoms, alongside that on the internal market, constitutes one of its most transformative forays into a specific field of law. The history of EU fundamental rights begins, unsurprisingly, with the *van Gend* and *Costa* judgments. As a result of the absence of reference to fundamental freedoms or human rights in the Treaties, the supremacy of EU law created a lacuna of fundamental freedoms: fundamental freedoms in national constitutional law could not be used to justify action that conflicted with the Treaties, because EU law took precedence over national constitutional law. Yet fundamental freedoms were not a component of EU law²⁸⁴. Thus those that existed could not be relied upon, and those that could be relied upon did not exist. Recognising this outcome towards the end of the 1960’s, the Court began to introduce the language of fundamental rights into its jurisprudence; in *Van Eick*²⁸⁵ the Court held that the administrators of staff disciplinary procedures at EU institutions were ‘bound in the exercise of [their] powers to observe the fundamental principles of the law of procedure’. In *Strander*²⁸⁶ the Court was more direct, and spoke of ‘fundamental human rights enshrined in the general principles of [EU] law and protected by the Court’. Yet the content of these ‘fundamental human rights’ was uncertain, and left national courts no option but to either

²⁷⁹ Case 302/86 *Commission v Denmark (Danish Bottles)* (1988) ECR 4607, at paragraph 8.

²⁸⁰ *Jans and Vedder* (2012), supra note 134, at 271f have a good discussion of other environmental measures which have been accepted by the Court under the rule of reason.

²⁸¹ Case C-142/05 *Mikkelsen and Roos* (2009) ECR I-4273, at paragraph 33.

²⁸² Case C-379/98 *PreussenElektra AG v. Schleswag AG* (2001) ECR I-2099.

²⁸³ Case C-176/03 *Commission v Council* (2005) ECR I-7879.

²⁸⁴ *Chalmers and Monti* (2011), supra note 215, 232ff.

²⁸⁵ Case 35/67 *Van Eick v Commission* [1968] ECR 329.

²⁸⁶ Case 29/69 *Strander v City of Ulm* [1969] ECR 419.

refuse to apply EU law (and opt to apply the established fundamental rights contained in their constitution) or to apply EU law (and its unresolved corpus of fundamental human rights).

The Court sought to bridge this limitation in *Internationale Handelsgesellschaft*²⁸⁷, where it held that “an examination should be made as to whether or not any [guarantee analogous to national constitutional concepts] inherent in [EU] law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice”. A back-and-forth between national constitutional courts and the CJEU ensued, with one national court essentially concluding that national fundamental rights will take precedence over EU law so long as the EU lacks a sufficiently rigorous fundamental rights doctrine of its own. By 1986 the German Constitutional Court felt that EU law did indeed reflect the fundamental rights contained in the German Constitution, and that “[a]s long as this was the case, the German Constitutional Court would no longer review the validity of specific Union acts in the light of national fundamental rights”²⁸⁸. While the Court’s development of EU fundamental rights in the shadow of the supremacy dispute has been criticised as being driven by ulterior motives, that reasoning can hardly be said to apply to the Court’s later, and more progressive, jurisprudence²⁸⁹. The Court has shown at multiple occasions its sensitivity to national fundamental freedoms, and how these may at times take precedence over rules of EU law. This was the case in *Omega*²⁹⁰, where German police interfered with Omega’s Article 56 TFEU freedom to provide services (in this case, a laser-tag game). Paragraph 1(1) of the German Constitution protects human dignity, and according to the German court, exempted a violation of Article 56 TFEU. In its judgment, the CJEU found that the infringement of Omega’s Article 56 freedoms was indeed justified as “the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law” – a general principle of law with no explicit basis in the Treaties, that as a result must have been drawn from the German Constitution.

The culmination of the EU’s protection of fundamental rights – and the development that the CJEU ought to have replicated with regard to environmental protection in *ATAA* – is the *Kadi* judgment²⁹¹. In the run up to *Kadi*, the UN Security Council adopted a Resolution requiring states to freeze the assets of individuals on a list of suspects having links to Al Qaeda. In the EU, the

²⁸⁷ Supra note 263.

²⁸⁸ *Solange II*-decision (22 October 1986) *BVerfGE* 73, 339 2 *BvR* 197/83. See also Chalmers and Monti (2011), supra note 215, at 234f.

²⁸⁹ Chalmers and Monti (2011), *ibid*, at 235f.

²⁹⁰ Case C-36/02 *Omega Spielballen* (2004) ECR I-9609.

²⁹¹ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351

UNSC Resolution was implemented by Regulation subject to Article 352. In 2001, the applicants were put on the list and their assets were frozen. Kadi challenged the Regulation before the General Court where which the claim failed. An appeal was allowed by the ECJ on the grounds that the Regulation violated fundamental rights. In his opinion, AG Maduro recognised the Court's and the EU legal system's obligation to be mindful of, and respect, the international legal order as one that is at times better placed to 'weigh fundamental interests'. The similarity between the two fundamental concepts of human rights and environmental protection is evident. Both are, in essence, universal concepts – the effective protection of which, in the home state, is but the first battle in a long war fought on the international stage of politics, and eventually, law. This, too, is recognized by the Advocate General; "the Court cannot, in deference to the views of those [international] institutions, turn its back on the fundamental values that lie at the basis of the [EU] legal order and which it has the duty to protect. Respect for other institutions is meaningful only if it can be built on a shared understanding of these values and on a mutual commitment to protect them"²⁹².

The parallel with environmental protection and climate change in particular is once again painfully clear. Even if we were able to agree that anthropogenic climate change is a fact, and that it carries devastating consequences, there would still be an indisputable shortage of 'mutual commitment' to do anything about it. Thus, the Court in *Kadi* sets out to justify its rejection of the UNSC Resolution on the basis of a constitutional exception²⁹³; "fundamental rights form an integral part of the general principles of law whose observance the Court ensures" – the Court draws these fundamental rights from 'international instruments', the common constitutional traditions of the Member States, and the ECHR in specific. On this basis, the Court found that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty"²⁹⁴. In hindsight, *Kadi* represents a CJEU equivalent of the BVerfG 'so lange' judgment, stating that the EU will honour its legal obligation to respect and promote international law, so long as it does not run counter to the fundamental or constitutional ideals of the EU. It is the author's opinion that while the CJEU's environmental

²⁹² *Kadi*, supra note 291, Opinion of Advocate General Poiras Maduro, Opinion of 23 January 2008, at paragraph 44.

²⁹³ *Kadi*, *ibid*, Judgment at paragraph 316 especially.

²⁹⁴ *Kadi*, *ibid*, Judgment at Paragraphs 282-285. It is noted that the Court, at paragraph 288, offers an alternative interpretation of its judgment. Here, it is only the EU Regulation implementing the international rule that is incompatible with a 'higher rule of law in the Community legal order' (i.e. the fundamental right) – thus there is never a question of compatibility of international law with EU law, and thus no issue of 'supremacy'. However, this reading of the judgment does not appear as consistent with the rest of the Court's statements, and in either case, the possibility if not the reality of a 'constitutional exception' is raised by the Court at 316.

jurisprudence has covered considerable ground, *ATAA* was an opportunity for the Court to take the same step taken in the field of fundamental rights in *Kadi*.

This chapter has sought to demonstrate that the CJEU has over time assumed the role of a constitutional court of the EU. In this role, it is well within the ambit of the Court to consider the wider ambitions of the EU in the relevant policy areas – and at times, the Court may be required to ‘reconstitute’ the law in order to enable the achievement of Treaty objectives such as a high level of environmental protection. We have seen that the Court has a long history of judicial activism, often aimed at overcoming stalemates in stagnant policy areas. In the next chapter, the Court’s interpretation of EU law as well as international law will be analysed. Its interpretation will then be contrasted against previous cases and academic opinions, as a means to suggest what alternatives the court could, and perhaps should, have pursued. In the final section of this chapter, a parallel was discussed between the CJEU’s approach to fundamental rights, and its treatment of environmental protection and climate change cases. This parallel will form the basis of the last argument, and final section, of this thesis.

4 Interpretation and leadership ambitions

The key legal test of leadership up to this point has been the *ATAA* case and the political dialogue it has generated both inside and outside the EU. Both aspects raise concerns regarding the internal consistency of the EU's actions with regard to its own laws, and as demonstrated in the previous chapter, the interaction between those laws and international law. The first section of this chapter will examine the various stages of the *ATAA* case. The second section will discuss some of the successes and failures experienced as a result of the case. The third section will conclude with a round-up of the most relevant academic arguments relating to those experiences, highlighting areas of improvement and future developments needed to strengthen the EU's claim to climate change leadership.

A. Responding to challenges: revelations from the *ATAA* case

The first legal development in the international challenge to the Aviation Directive came in the form of the legal action started before UK courts in 2009 by American Airlines, Continental Airlines, United Airlines and the Air Transport Association of America (ATA) as to the validity of the Directive. Before the UK High Court, the applicants presented three main arguments. Firstly, it was argued that the EU had acted outside of its powers and had violated customs of international law, the principle of exclusive sovereignty of states in particular, in its attempt to regulate the activities of foreign operators over the high seas and the territory of third states²⁹⁵. Secondly, the applicants argued that Article 2(2) of the Kyoto Protocol²⁹⁶ amounts to an exclusive mandate for the ICAO to negotiate an agreement on aviation emissions. Thirdly, that the EU ETS amounts to a tax and as such violates the principle of freedom of air transportation from charges under the 1944 Convention on International Civil Aviation²⁹⁷ and the Open Skies Agreement²⁹⁸. The High Court chose to stay the proceeding and submitted the case to the CJEU for a preliminary reference²⁹⁹ on certain questions relating to the compatibility of the Aviation Directive with international and EU law.

²⁹⁵ *ATAA* (judgment), supra note 30, at paragraph 45.

²⁹⁶ Kyoto Protocol, supra note 86.

²⁹⁷ "CICA" also known as the "Chicago Convention". Convention on International Civil Aviation, 7 December 1944, 15 UNTS 295.

²⁹⁸ "OSA". OSA, supra note 30. See also Bogojević (2012), supra note 19, at 349. See also CICA Article 15(3) and OSA Article 11(2).

²⁹⁹ *ATAA*, supra note 30.

i. The preliminary reference

The question at the core of the preliminary reference was whether the EU has the ability to unilaterally control emissions from aviation in the absence of an international framework. In other words, the case is one “concerning the legitimacy of regional regulatory responses to global institutional failings”³⁰⁰. Predictably, the case attracted attention far beyond the narrow confines of the law, specifically in the field of international politics and the academia. Before the CJEU had even passed its judgment on the preliminary reference, the matter had been the subject of an open letter by the US Secretary of State³⁰¹ – urging the EU to abandon unilateral action on aviation emissions – and of legislation enacted in both the US and in China, banning national carriers from participating in the EU scheme³⁰². All in all 28 states had shifted their diplomacy over the Aviation Directive denouncing EU unilateralism and pressuring the ICAO to declare its opposition to the Directive³⁰³. Moreover in March 2012 China resorted to retaliatory measures against the European aircraft manufacturer Airbus³⁰⁴, leading to internal pressure from Member States and the already sceptical European airline industry³⁰⁵ to scrap the plans for expansion³⁰⁶. Nevertheless, the political machinery of the EU persisted in its chosen course and the reference appeared before the CJEU.

The preliminary reference asked firstly which of the below international laws could be relied upon to challenge the Aviation Directive. Following from the arguments before the UK courts, the international provisions involved were the CICA, the OSA, the Kyoto Protocol and four principles of customary international law; sovereignty over airspace, incapacity to exert sovereignty on the high seas, freedom to fly over the high seas, and that aircraft flying over the high seas are subject to the exclusive jurisdiction of their country of registration. Secondly, the reference asked the CJEU to assess the validity of the Aviation Directive subject to three arguments. The first argument concerned jurisdiction, and alleged that the EU exerted extra-territorial jurisdiction in breach of the principle of sovereignty by regulating flights outside its

³⁰⁰ Bogojević (2012), *supra* note 19, at 345.

³⁰¹ Bogojević (2012), *ibid*, at 346.

³⁰² And in India in April 2012; BBC News, ‘EU suspends extension of plane emissions trading rules’ (12 November 2012). Available at: <http://www.bbc.co.uk/news/business-20299388>. Last visited: 21 March 2013.

³⁰³ Mayer (2012), *supra* note 82, at 1114.

³⁰⁴ Hopher T., ‘China halts 10 more Airbus orders: sources’ (15 March 2012) Available at: <http://www.reuters.com/article/2012/03/15/us-china-europe-ets-idUSBRE82E11620120315>. Last visited: 21 March 2013. BBC News, ‘China ‘blocks Airbus deals’ in EU Carbon levy spat’ (8 March 2012). Available at: <http://www.bbc.co.uk/news/world-europe-17298117>. Last visited: 21 March 2013.

³⁰⁵ Nichols W., ‘Airbus blames EU carbon trading row for falling Chinese orders’ (9 March 2012). Available at: <http://www.guardian.co.uk/environment/2012/mar/09/airbus-eu-carbon-trading-chinese>. Last visited: 21 March 2013.

³⁰⁶ Bogojević (2012), *supra* note 19, at 346.

territory. The second argument went to the EU's capacity, alleging that the decision to unilaterally regulate aviation emissions was *ultra vires* in light of the mandate given to the ICAO under existing international agreements. The final argument was free trade related, and accused the EU ETS of being tantamount to a tax or charge prohibited by international treaties³⁰⁷.

ii. Opinion of Advocate General Kokott

According to AG Kokott, the jurisprudence of the CJEU is quite restrictive as to the direct effect of international law as means for challenging EU acts. In order to have direct effect, two conditions must be satisfied: i) the EU must be bound by the agreement, and ii) the broad logic of the agreement must not preclude review while setting out unconditional and sufficiently precise rules³⁰⁸. AG Kokott finds that as the EU has not signed the CICA, it cannot be bound by it³⁰⁹. She found that although the EU is bound by the OSA and the Kyoto Protocol, most provisions of their provisions nonetheless fail under the second leg of the test as being either conditional or insufficiently precise. Applying the above conditions, she similarly found the presented principles of customary international law to be too broad for an individual to rely upon. As a result, she considered that only two provisions of the OSA could be relied upon to assess the validity of the Aviation Directive.

Despite this, and for the avoidance of doubt, AG Kokott set out to assess the validity of the Aviation Directive against all the international provisions presented, as if they could be relied upon³¹⁰. Responding to the jurisdiction argument, AG Kokott did not find that the EU ETS contained any extra-territorial provisions³¹¹, drawing a distinction between internal rules (flights must surrender allowances for emissions to and from EU airports) and external rules (airlines must take steps Z and Y to reduce emissions on flights to and from EU airports)³¹². This distinction could be very relevant in terms of the EU's environmental competence in case of international legal action, as the EU certainly possesses the competence to do the former, but may not have the external competence required for the latter³¹³. AG Kokott also pointed out that national legislation concerning taxes or competition law often take into consideration circumstances that take place outside the nation's territory³¹⁴. In order for a provision not to be

³⁰⁷ Mayer (2012), *supra* note 82, at 1119.

³⁰⁸ ATAA (Opinion), *supra* note 30, at paragraph 49.

³⁰⁹ ATAA (Opinion), *ibid*, at paragraph 101.

³¹⁰ ATAA (Opinion), *ibid*, at paragraph 139.

³¹¹ ATAA (Opinion), *ibid*, at paragraph 145f.

³¹² ATAA (Opinion), *ibid*, at paragraph 147.

³¹³ Bogojević (2012), *supra* note 19, at 353.

³¹⁴ ATAA (Opinion), *supra* note 30, at paragraph 148. This will be discussed in the section on the jurisdiction argument.

extra-territorial in the sense alleged, an “adequate territorial link” and the “absence of any adverse effect on the sovereignty of third countries” are required³¹⁵. Referring to environmental protection and climate change policy, she states that greenhouse gas emissions may have to be taken into account as they “can have effects on the environment and climate in every State and association of States”³¹⁶. This also “reflects the nature as well as the spirit and purpose of environmental protection and climate change measures” as well as the polluter pays principle³¹⁷. Although the Advocate General’s sentiments regarding the borderless nature of emissions and climate are a perfect reflection of the reality of the problem, the potential ramifications of this particular approach, with close association to the ‘effects doctrine’³¹⁸, have been covered widely in the academia and will receive closer attention in section 4C.

As to the question of capacity, AG Kokott states that while the Kyoto Protocol does call on parties to participate in ICAO negotiations, this requirement is complementary and not exclusive of other action³¹⁹. She also states that the question of when to institute complementary regional responses in the face of institutional failure is one to be decided by policymakers with an eye to expediency – in order to do this, the EU institutions must be given certain discretion³²⁰. This means that not only do they have the discretion to decide on the expediency of a regional solution, but they also decide when such discretion applies³²¹. AG Kokott concludes that in light of Kyoto Protocol compliance periods and the inaction of the ICAO, the EU’s actions in terms of the Aviation Directive can be described as neither premature nor unilateral³²². Furthermore, the OSA does not prevent (non-discriminatory) unilateral action where none has been taken by the ICAO – to the contrary, had the EU not included foreign airlines in the EU ETS (but nonetheless wished to include the entire length of the journey to/from EU airports), then the Aviation Directive would have infringed the OSA due to its discriminatory effect to the detriment of EU carriers³²³.

Finally, she found that as a market-based mechanism, with prices varying subject to supply and demand, the EU ETS could not be held to be equivalent to a tax or a charge³²⁴.

³¹⁵ ATAA (Opinion), *ibid*, at paragraphs 150-129. See discussion on decisional sovereignty, below.

³¹⁶ ATAA (Opinion), *ibid*, at paragraph 154.

³¹⁷ ATAA (Opinion), *ibid*, at paragraph 153f.

³¹⁸ See below, section 4C.

³¹⁹ ATAA (Opinion), *ibid*, at paragraphs 175-188.

³²⁰ ATAA (Opinion), *ibid*, at paragraph 185.

³²¹ Bogojević (2012), *supra* note 19, at 352.

³²² ATAA (Opinion), *ibid*, at paragraph 187.

³²³ ATAA (Opinion), *ibid*, at paragraph 199.

³²⁴ ATAA (Opinion), *ibid*, at paragraph 215.

iii. Judgment of the Court

On the whole the Court followed the Advocate General’s opinion closely, although it was slightly less restrictive in its interpretation of applicable international law. As a result of the reference primarily concerning matters relating to international law, and as with the Opinion, much of the Court’s judgment addresses the direct effect of the relevant provisions of international law as tools for “assessing the validity of Directive 2008/101”³²⁵. In this respect, the Court establishes that, subject to Article 216(2) TFEU³²⁶, international law will “prevail over the acts of the European Union”³²⁷ – that is to say, international law has supremacy over EU law. As a result, an act of EU law may be invalid where it is incompatible with a (supreme) provision of international law³²⁸. Where such incompatibility is alleged, it is for the CJEU to determine, subject to certain conditions, whether pursuant to Article 267 TFEU³²⁹ the act of EU law is amenable to review in respect of the provision of international law³³⁰. In order for a provision of international law to form a basis of assessment, the EU must be bound by that provision³³¹; the application of the provision to the EU act at hand must not be precluded by the nature and broad logic of the former³³²; the provision must be unconditional and sufficiently precise³³³; and the provision must not be subject, “in its implementation or effects, to the adoption of any subsequent measure”³³⁴.

Applying these conditions to the international agreements concerned in the case, the Court follows the opinion of the Advocate General: because the EU has only ratified the CICA and is thus not a party to it, and because “the powers previously exercised by the Member States in the field of application of the CICA have not to date been assumed in their entirety by the European Union, the latter is not bound by that convention”³³⁵. According to the Court it is however clear that the EU is a party to the Kyoto Protocol, and that “its provisions form an integral part of the legal order of the European Union”³³⁶, meaning that the first condition is satisfied. As such, the

³²⁵ ATAA (Judgment), *ibid.*, at paragraph 46.

³²⁶ TFEU Article 216(2): “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”

³²⁷ ATAA (Judgment), *ibid.*, at paragraph 50.

³²⁸ ATAA (Judgment), *ibid.*, at paragraph 51.

³²⁹ TFEU Article 267: “The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union”

³³⁰ ATAA (Judgment), *ibid.*, at paragraph 51.

³³¹ ATAA (Judgment), *ibid.*, at paragraph 52.

³³² ATAA (Judgment), *ibid.*, at paragraph 53.

³³³ ATAA (Judgment), *ibid.*, at paragraph 54.

³³⁴ ATAA (Judgment), *ibid.*, at paragraph 55.

³³⁵ ATAA (Judgment), *ibid.*, at paragraphs 57-72, especially paragraph 71.

³³⁶ ATAA (Judgment), *ibid.*, at paragraph 73.

particular provision at issue – that is, Article 2(2)³³⁷ – must fulfil the three remaining conditions. The Court finds that while the Kyoto Protocol is clear as to the objectives to be achieved, it leaves room for flexibility as to the means used³³⁸, and in any event Article 2(2) is not sufficiently clear or unconditional to confer rights upon an individual³³⁹. This means that the particular provision of the Kyoto Protocol cannot be relied upon in this case³⁴⁰. As with the Kyoto Protocol, the provisions of the OSA form an integral part of the EU legal order³⁴¹. In this instance however the Court finds that the agreement does indeed confer rights upon individuals (in this case, airlines) against the parties to the agreement, “as it aims to create a fair and equal opportunity for airlines to compete in the international aviation transportation”³⁴². Unlike the Advocate General, the Court found that the ATA is not prevented from invoking the Article 11 OSA condition of reciprocity, although the Aviation Directive clearly satisfies the condition³⁴³. On the applicability of the principles of customary international law, the court detracts somewhat from the Opinion³⁴⁴. While the Court finds that these principles can be relied upon in so far as they “call into question EU’s regulatory competences and, moreover, affect rights of individuals”³⁴⁵, or “at least (given the lack of precision of these principles) in case of ‘manifest errors of assessment’”³⁴⁶.

Turning to the question of the validity of the Aviation Directive, the Court followed the Advocate General in that it rejected all three arguments, although it did so on the basis of somewhat different reasoning. Firstly, the Court justifies the application of the Aviation Directive to the ‘last leg’ of the flight on territorial grounds, all the while affirming its stance that “[t]he European Union must respect international law in the exercise of its powers”³⁴⁷. The Court echoes the Advocate General in stating the Aviation Directive applies only to flights landing at, or departing from EU airports³⁴⁸, but adds that once an aircraft has landed at an EU airport and is physically within the EU’s territory, it is subject to the “unlimited jurisdiction of the EU”³⁴⁹.

³³⁷ Kyoto Protocol Article 2(2).

³³⁸ *ATAA* (Judgment), supra note 30, at paragraphs 75 and 76.

³³⁹ *ATAA* (Judgment), *ibid*, at paragraph 77.

³⁴⁰ *ATAA* (Judgment), *ibid*, at paragraph 78.

³⁴¹ *ATAA* (Judgment), *ibid*, at paragraph 79.

³⁴² Bogojević (2012), supra note 19, at 350.

³⁴³ *ATAA* (Judgment), supra note 30, at paragraph 93.

³⁴⁴ Bogojević (2012), supra note 19, at 250. Mayer (2012), supra note 82, at 1121f.

³⁴⁵ Bogojević (2012), *ibid*, at 350.

³⁴⁶ Mayer (2012), supra note 82, at 1122, referring to *ATAA* (Judgment) paragraph 110.

³⁴⁷ *ATAA* (Judgment), supra note 30, at paragraph 123. See also section 2Biii detailing the Treaty obligations on the EU to respect international law.

³⁴⁸ *ATAA* (Judgment), *ibid*, at paragraph 117.

³⁴⁹ *ATAA* (Judgment), *ibid*, at paragraph 125. The international law implications of this will be discussed further in section 4C.

Relying on the high level of environmental protection requirement set in Article 191(2) TFEU, the CJEU interprets customary international law as providing that

“the European Union legislature may in principle choose to permit a commercial activity [...] to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfil the environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the European Union is a signatory, such as the Framework Convention and the Kyoto Protocol.”³⁵⁰

Although it will be argued below that the Court’s statement at paragraph 125 may be nothing more than a confirmation of the normal operation of the international law principle of jurisdiction, the above excerpts read together do seem bold. It may be said firstly that the CJEU believes that the EU’s environmental competence allows it to set environmental conditions on commercial operators situated outside the EU, with activities within the internal market. Secondly, the Court believes that international environmental agreements, implemented in EU law through separate acts of the EU, can justify the regulation of foreign economic operators acting wholly or in part within the internal market. That is, the intentions of the international community, articulated through (for instance) the Kyoto Protocol, can justify regional responses following multilateral institutional failure³⁵¹. One should also note that the Court follows the reasoning of the Advocate General in questioning whether the territoriality link is broken in the case of emissions taking place outside the territory of the EU. The Court states that “the fact that [...] certain matters contributing to the pollution of the [...] territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question [...] the full applicability of European Union law in that territory”³⁵². While the Court is not mistaken in this analysis, it will be argued below that the phraseology employed is at best unfortunate, and at worst harmful to the EU’s environmental leadership.

The CJEU dispatches the capacity argument relating to the Open Skies Agreement in similar fashion to the Advocate General, as allowing non-discriminatory unilateral measures in the absence of international standards³⁵³. The Court then goes on to agree with the Advocate General in regards to the final argument as to free trade under the OSA, distinguishing the EU ETS from a ‘charge’ prohibited by the agreement. The Court argues that the EU ETS cannot amount to a tax as the scheme is subjected to market forces, meaning that a diligent participant

³⁵⁰ *ATAA* (Judgment), *ibid*, at paragraph 128.

³⁵¹ Bogojević (2012), *supra* note 19, at 351.

³⁵² *ATAA* (Judgment), *supra* note 30, at paragraph 129.

³⁵³ Mayer (2012), *supra* note 82, at 1122.

may even stand to make a profit³⁵⁴. The Court and the Advocate General consequently arrive at the same conclusion, upholding the Aviation Directive on all counts.

B. Interpreting the Court's judgment

Before delving into the legal arguments and their consequences, it is important to set the *ATAA* judgment into a wider social context. As discussed, the case brought much tension to the surface – some of it old (a powerful state acting heedless of international rules), and some of it new (the reaction of airlines and manufacturers from all part of the globe). Although predicted, the judgment of the Court resulted in an international uproar and further denunciation of the EU's climate change policy, which has had a negative impact on the EU's environmental leadership. This section will outline the primary political and economic concerns raised in the aftermath of the *ATAA* case. These incidents will be used as a basis for arguing that while the international reception of the judgment was never going to be welcoming, the Court certainly did not do much to temper fears over the implications of the Aviation Directive.

Firstly, a considerable political backlash followed the ruling. There is talk that the Aviation Directive will affect India's position on future climate change negotiations³⁵⁵ (which, counter-intuitively, only strengthens the case for unilateral action as will be discussed in section 4C). India is also coordinating a multilateral 'Coalition of the Unwilling'³⁵⁶, and in 2011 initiated talks between 21 states on a common position on the Aviation Directive³⁵⁷. These talks led to a Declaration being presented to the ICAO, endorsed by 26 states³⁵⁸. These states met again in Moscow in 2012, where 23 states decided on the possibility of additional retaliatory measures³⁵⁹. These measures include legal action under the dispute settlement mechanism of the CICA and review of legality subject to WTO law. Most measures however relate to the denial of economic

³⁵⁴ *ATAA* (Judgment), supra note 141, at paragraph 142

³⁵⁵ Mukherjee K., 'EU CO2 Law Could Scupper Global Climate Talks' (11 April 2012). Available at: <http://www.reuters.com/article/2012/04/11/uk-india-eu-climate-idUSLNE83A02020120411>. Last visited: 21 March 2013.

³⁵⁶ Buckley C., 'China Bans Airlines from Joining EU Emissions Scheme' (6 February 2012). Available at: <http://www.reuters.com/article/2012/02/06/us-china-eu-emissions-idUSTRE81500V20120206>. Last visited: 21 March 2013.

³⁵⁷ See Press Information Bureau, Government of India, Ministry of Civil Aviation, 'Inclusion of International Civil Aviation in European Union-Emission Trading Scheme (EU-ETS) and its Impact – Press Note'. Available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid577104>. Accessed 21 March 2013.

³⁵⁸ ICAO Council, 'Council – 194th Session Summary Minutes of the Second Meeting (Draft), (2.11.2011), at paras. 9, 30, 47, 68, 70, 80, 82, 84, 86–8, 100, and Appendix, clause 7. Available at: http://ec.europa.eu/clima/policies/transport/aviation/docs/minutes_20111102_en.pdf. Accessed 21 March 2013.

³⁵⁹ 'Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU-ETS'. Available at: <http://www.ruaviation.com/docs/1/2012/2/22/50>. Accessed 21 March 2013. ICTSD, 'Opponents of EU Aviation Carbon Law Agree on Possible Countermeasures' (2012) Bridges Weekly Trade Digest 16:7. Available at: <http://ictsd.org/i/news/bridgesweekly/126278/>. Accessed 21 March 2013..

privileges of the EU and its airlines³⁶⁰. Secondly, and in addition to the multilateral responses contemplated by the ICAO members, some states have instigated unilateral responses against the EU. China is alleged to have prevented a national carrier from placing a large order with Airbus, the European aircraft manufacturer³⁶¹, in addition to threatening further defensive action against the EU³⁶². The US State and Transportation Departments are investigating retaliatory possibilities³⁶³, while the US President has signed a law making it illegal for American companies to comply with the EU ETS³⁶⁴. China³⁶⁵ and India³⁶⁶ have similar rules in place. Thirdly, as mooted in the ICAO talks, legal action poses a further threat to the future of the Aviation Directive. Chinese airlines are considering similar action to that of the ATA, but are ‘waiting for the most appropriate time to file’³⁶⁷. The Aviation Directive may be challenged under Article 19 of the OSA and before the ICAO Council subject to Article 84 of the CICA. Interestingly, a decision of the Council may even be appealed to the ICJ, emphasising the importance of the international case law relied upon in section 4C.

One oft-argued matter (see for instance arguments by China Air Transport Association³⁶⁸, and India³⁶⁹) with regard to potential legal action against the Aviation Directive is that of the ‘common but differentiated responsibilities’ – or the principle of ‘developed country

³⁶⁰ Hertogen (2012), *supra* note 13, at 290.

³⁶¹ Clark P., ‘China Blocks Billion-Dollar Airbus Order’ (24 June 2011). Available at: <http://www.ft.com/intl/cms/s/0/c4ce5aa0-9e4b-11e0-8e61-00144feabdc0.html#axzz1eNoGmzej>. Last visited: 21 March 2013.

³⁶² Blanchard B. and Martina M. ‘China Says to Defend against EU Emissions Plan’ (7 February 2012). Available at: <http://www.reuters.com/article/2012/02/07/us-china-eu-airlines-idUSTRE8160QF20120207>. Last visited: 21 March 2013.

³⁶³ Crawley J. and Quinn A., ‘Analysis: U.S. Weighs Retaliation over Europe Aviation Law’ (6 January 2012). Available at: <http://www.reuters.com/article/2012/01/06/us-usa-eu-airlines-idUSTRE8051YU20120106>. Last visited: 21 March 2013. ICTSD, ‘Washington-Brussels Tension Grows over Aviation Emissions Levy’ (2012) Bridges Weekly Trade News Digest 16:2. Available at: <http://ictsd.org/i/news/bridgesweekly/123211>. Last visited: 21 March 2013.

³⁶⁴ Volcovici V., ‘Obama shields US airlines from EU carbon fees’ (27 November 2012). Available at: http://articles.chicagotribune.com/2012-11-27/news/sns-rt-us-usa-airlines-emissionsbre8aq1ar-20121127_1_airlines-from-eu-carbon-republican-senator-john-thune-eu-ets. Last visited: 21 March 2013. Goldenberg S., ‘Obama fails first climate test by rejecting EU aviation carbon regime’ (28 November 2012). Available at: <http://www.guardian.co.uk/world/2012/nov/28/obama-fails-climate-test-aviation>. Last visited: 21 March 2013.

³⁶⁵ Bloomberg News, ‘China Bans Airlines from Joining EU Carbon Levies System’ (6 February 2012). Available at: <http://www.bloomberg.com/news/2012-02-06/china-bans-airlines-from-joining-european-u-nion-s-carbon-emissions-system.html>. Last visited: 21 March 2013.

³⁶⁶ Kotoky A., ‘India joins China in boycott of EU carbon scheme’ (23 March 2012). Available at: <http://www.reuters.com/article/2012/03/23/uk-india-eu-emissions-idUSLNE82L02220120323>. Last visited: 21 March 2013.

³⁶⁷ Hertogen (2012), *supra* note 13, at 288.

³⁶⁸ China Air Transport Association, ‘Statement by CATA on Inclusion of International Aviation in the EU ETS’ (3.10.2011). Available at: www.wcarn.com/list/13/13140.html. Accessed 21 March 2013.

³⁶⁹ Proposals by India for inclusion of additional agenda items in the provisional agenda of the seventeenth session of the Conference of the Parties (7.10.2011) FCCC/CP/2011/INF.2/Add.1, at 6.

leadership³⁷⁰. CBDR is dealt with separately from the legal arguments in section 4C as it was not raised before the CJEU in *ATAA*, and it would thus be inappropriate to attribute any of the potential weaknesses of the Aviation Directive in this regard to the CJEU. However, in light of the leadership theme of this essay, the author feels that CBDR ought to be considered in the Aviation Directive and as such, some arguments are included below. As stated before, the EU is under an obligation to promote multilateral solutions to common problems, particularly within the framework of the UN³⁷¹, and has adopted CBDR as a guiding principle in its global action³⁷². In addition, CBDR is well-established in international law³⁷³. It consists of two elements; firstly, that some problems (such as climate change) are common (universal) and require the participation of all states. Secondly, that while all states are required to participate, their level of participation should be differentiated in accordance with their contribution to the problem in the first place (thus CBDR is closely related to the principle that the polluter pays³⁷⁴), as well as with their capacity (technological, know-how etc) to participate (although Rajamani argues that these are, in fact, two incompatible approaches to the same question³⁷⁵).

It can clearly be said that the Aviation Directive satisfies the first element of CBRD, in that the EU is assuming leadership on aviation emissions where otherwise a vacuum would exist. It is less clear whether the Aviation Directive offends the second element. Driesen offers the prevention of stratospheric ozone depletion as a successful example of the second element of CBDR – developed countries took on the responsibility to phase out many of the ozone-depleting substances that they had, for a long time, been using and marketing to developing countries. Only ten years after this phase-out, would developing countries come under an obligation to begin reducing their consumption. This allowed developed countries to invent and produce safe substitutes, which could be phased-in by the developing countries in time to meet their obligations³⁷⁶. Specifically, CBDR “calls for financial help and technology transfer”³⁷⁷ – something that cannot be said to be a central feature of the EU ETS in the same way that it was in the Montreal Protocol.

Scott and Rajamani present the authoritative opinion that “the Aviation Directive fails to reflect adequately the demands of the principle of common but differentiated responsibilities and

³⁷⁰ Driesen (1998), supra note 194, at 5ff.

³⁷¹ TEU Article 21(1) second sentence.

³⁷² Fajardo 2010), supra note 15, at 370f.

³⁷³ Rio Declaration, Principles 6-7 and UNFCCC Article 3(1).

³⁷⁴ Rajamani (2010), supra note 6, at 421.

³⁷⁵ Rajamani (2010), *ibid*, at 420.

³⁷⁶ Driesen (1998), supra note 194, at 5f.

³⁷⁷ Driesen (1998), *ibid*, at 23.

respective capabilities”³⁷⁸. They note the Commission’s argument³⁷⁹ as to the inapplicability of the principle to the EU ETS, due to the principle addressing only measures by states whereas the scheme applies only to business. They reject this argument owing to the role of third states in the Aviation Directive. For instance, the activity of a third state, subject to the equivalence clause³⁸⁰ can determine which set of rules (i.e. the EU ETS or a scheme of the third state) an airline is subject to. Moreover, the Aviation Directive demands the *same* action of both developed and developing countries in order to satisfy the equivalence clause. Scott and Rajamani explain the EU’s lack of finesse in this regard as the result of a non-discrimination approach coupled with the hope to avoid letting the ‘richest developing countries completely off the hook’. They rightly argue that instead of seeing states on the basis of a sharp developed/developing distinction, the EU should have adopted a more nuanced understanding of CBDR³⁸¹. This nuance could for instance have been reflected in the level of ‘equivalence’ demanded under Article 25a of the Aviation Directive³⁸², although this would risk inconsistency with the EU’s own law³⁸³ as well as WTO law³⁸⁴. The second proposal advanced by Scott and Rajamani is less problematic, and more reminiscent of that approach taken in the Montreal Convention – applying the revenues raised in association with developing country flights to a global climate change fund used to finance measures in those countries³⁸⁵. Thus Scott and Rajamani argue that although the Aviation Directive fails at present to sufficiently account for the CBDR principle, the task of rectifying this shortcoming is well within the grasp of the EU³⁸⁶. Moreover, it could go some way to bolster the EU’s environmental leadership credentials.

Moving on to the wider context, the international response to the Aviation Directive has had an impact on resolve within the EU, with France asking the Commission to compromise with third states³⁸⁷, as a result of and in addition to the lobbying of the European airline industry³⁸⁸ for a similar move. With regard to this internal tension, it is interesting to note one aspect of the Environmental Title of the TFEU which we have not yet covered (due to its specific relevance in

³⁷⁸ Scott and Rajamani (2012), supra note 100, at 476.

³⁷⁹ Runge-Metzger A., ‘Aviation and Emissions Trading’, ICAO Council Briefing (29 September 2011), at 40. Available at: http://ec.europa.eu/clima/policies/transport/aviation/docs/presentation_icao_en.pdf. Accessed 21 March 2013.

³⁸⁰ Aviation Directive Article 25a.

³⁸¹ Scott and Rajamani (2012), supra note 100, at 481.

³⁸² Scott and Rajamani (2012), *ibid*, at 487ff.

³⁸³ Scott and Rajamani (2012), *ibid*, at 491.

³⁸⁴ Scott and Rajamani (2012), *ibid*, at 490.

³⁸⁵ Scott and Rajamani (2012), *ibid*, at 492f.

³⁸⁶ Scott and Rajamani (2012), *ibid*, at 493f.

³⁸⁷ ICTSD, ‘France Wavers on EU Aviation Emissions Rule’ (2012) Bridges Weekly Trade Digest 16:14. Available at: <http://ictsd.org/i/news/bridgesweekly/130794>. Last visited: 21 March 2013.

³⁸⁸ Michaels D., ‘Airbus vs. ETS: Clean Or Hot Air?’ (28 March 2012). Available at: <http://blogs.wsj.com/brussels/2012/03/28/airbus-vs-ets-clean-or-hot-air/>. Last visited: 21 March 2013.

this issue). Article 191(3)³⁸⁹ sets out the policy aspects that the EU “shall take account of” in preparing its environmental policy. Owing to the relatively weak imperative used in this paragraph, it has been argued that it is subordinate to the objectives and principles found in paragraphs (1) and (2) respectively³⁹⁰. Paragraph (3) requires the EU to consider the potential benefits and costs of its action or lack of action. Jans and Vedder write that “[b]esides producing benefits for the environment, environmental action by the Union entails costs for [...] private actors, such as industrial plants which cause pollution, and manufacturers [...] of goods and products which are harmful to the environment.”³⁹¹

It should be borne in mind that this is a double-edged sword. On the one hand, it can be used by the EU to justify environmental action on the basis of environmental cost. On the other hand, it can be used against such action on the basis that the economic costs implied are disproportionate to the environmental gain – one of the concerns that may have fuelled French hesitance on the Aviation Directive. Paragraph (3) also asks the EU to consider the economic and social development of the Community as a whole and the balanced development of its regions, thus allowing for a multi-speed environmental policy³⁹². A potential application of this consideration for the purpose of this thesis may be higher sector-specific allocation plans for certain Member States particularly reliant on the aviation sector, however this would conflict with the ‘polluter pays’ principle as well as the principle of ‘rectification at source’.

Most importantly however, the international response to the Aviation Directive (and in part, to the CJEU judgment) has caused the Commission to ‘stop the clock’³⁹³ on the enforcement of the Aviation Directive against foreign airlines for a year, so as to give the ICAO Council time to agree to an international regime on airline emissions at its meeting in September 2013. Naturally, a policy-move such as this involves a gamble. On the one hand, it puts considerable pressure on the laggards of international aviation policy to negotiate in ‘good faith’ at the next ICAO meeting, and serves to show that the EU is committed to compromise and, above all, a multilateral solution. On the other hand, it will be taken as a sign of weakness and dissipating

³⁸⁹ Article 191(3) TFEU states: “In preparing its policy on the environment, the Union shall take account of: available scientific and technical data, environmental conditions in the various regions of the Union, the potential benefits and costs of action or lack of action, the economic and social development of the Union as a whole and the balanced development of its regions.”

³⁹⁰ Jans and Vedder (2012), *supra* note 134, at 52 Holder J. and Lee M., *Environmental Protection: Law and Policy* (2007: Cambridge University Press, Cambridge), at 153.

³⁹¹ Jans and Vedder (2012), *ibid*, at 54.

³⁹² Jans and Vedder (2012), *supra* note 134, at 55.

³⁹³ European Commission, ‘Stopping the clock of ETS and aviation emissions following last week’s International Civil Aviation Organisation (ICAO) Council’ (12.11.2012) MEMO/12/854. Available at: http://europa.eu/rapid/press-release_MEMO-12-854_en.htm. Accessed 21 March 2013.

will. Here, a buckling executive and a hesitant judicial branch combine to damage the work of a legislature which passed a resourceful measure to deal with a persistent problem, in a manner consistent with its own law and respectful of international law (although the CBDR principle offers room for improvement).

The gamble may pay off before the end of the year. The question is what happens if it does not? When, and if, enforcement against foreign airlines begins at the end of the year, matters will once again come to a head. This is when the Chinese airlines will pursue their case against the EU with improved arguments, and when cases will be launched before the WTO and ICAO Council. Redoubled commitment and conviction will be required of the Member State and the EU institutions. At this point, the reluctance of the CJEU to make a clear stand for the fundamental and constitutional status of the EU's climate change policy in *ATAA* will become a burden. "Probably for reasons of jurisdictional policy, the Court avoided entering into any value-based question and arbitrating between climate change mitigation and civil aviation. Yet, sooner or later, these questions will be asked again in different cases."³⁹⁴ The following, and final section, will investigate some of the legal questions that were left unanswered in *ATAA*, and which the Court is likely to face again.

C. Missed opportunities in the *ATAA* judgment

i. Semantic isolationism: the Court's choice of terminology and norms

This section is concerned with the substantive relationship between EU and international law, and two points in particular; 1) how the Court perceives this relationship, and 2) how the Court's perception of the relationship is viewed from an international perspective. The arguments made here refer mostly to the terminology relied on by the Court to describe concepts that have perfectly acceptable international law equivalents, and the Court's decision to exclude certain norms from its assessment of the Aviation Directive.

Mayer describes the frustration of international aviation lawyers at the exclusion of the CICA, which, at the very least, symbolises "the growing isolationism of the Court's case law"³⁹⁵. It is also symptomatic of what can now be referred to as the Court's tendency to play fast and loose with the EU's obligations under international law, regardless of its statements to the contrary³⁹⁶.

³⁹⁴ Mayer (2012), *supra* note 82, at 1139.

³⁹⁵ Mayer (2012), *ibid*, at 1123.

³⁹⁶ Above section 4Aiii: see judgment paragraphs 50f, and paragraph 51 where the Court nonetheless subjects the application of international law in such cases to its own determination.

Furthermore it should be recalled that the Court adopted a very restrictive interpretation of the term “binding upon”. Here, another aspect of the Court’s isolationism can be identified as being that of its understanding of the conceptual relationship between EU and international law – that is, whether to adopt a monist or dualist approach. This aspect will be covered in section 4Cii below. Paragraph 50 of the judgment is an example of where the Court uses its own terms to describe a well-known concept of international law (in this case, the monist approach to vertically separate legal systems) instead of resorting to the traditionally accepted language. Although it is not and should not be expected of a national court to use the terminology of, for instance, the ICJ, doing so can be a strategy to legitimise an argument or approach in terms of internationally accepted norms.

This specific problem of isolationism is not so much an irreconcilable jurisprudential clash between norms of EU and international law, but rather an unfortunate side-effect of the Court’s reluctance to meet the ATA’s arguments head on. By skirting around concepts such as ‘jurisdiction’, ‘extra-territoriality’, ‘unilateral action’ and ‘external competence’ instead of submitting its analysis of the Aviation Directive to traditional understanding of these concepts under international law, the Court is doing the EU’s leadership effort a great disservice. As mentioned above, the Aviation Directive is an outstanding example of where the EU’s leadership efforts can pay off. As such, this author believes that the Aviation Directive deserved to fight off the ATA’s attack on the ATA’s terms (and, as will be demonstrated, that it would have won). What took place instead was a match massaged by politics and hesitance to guarantee the Directive’s victory in a minimalist and inoffensive manner. Because the Court sought to ensure the validity of the Directive in such a way, the circumstances of the legal battle were from the beginning eschewed in the Directive’s favour. Although the case is a victory from an EU perspective, the backlash witnessed in its aftermath speaks volumes to the international sentiment. From that perspective, the Court’s approach robbed the Aviation Directive of the legitimacy it may otherwise have enjoyed, and more than anything else, vindicated the critics’ view that the EU is neither ready nor confident enough to play by the common rules.

This consequence is truly regrettable, because as the below analyses will show, had the Court made the hard decision to take the battle on the international stage and subject to common rules of international law, it would have arrived at the same conclusion. The only difference is that it would have been able to do so on the back of conceptually sound, as opposed to circumstantially expedient, legal reasoning. This reasoning would moreover have been much harder for other

states to criticise without risking the consistency and coherence of their own stance under international law.

ii. Conceptual isolationism: monism and dualism

This final subsection addresses one of the systemic tensions between EU and international law – the nature of the conceptual and consequently the practical relationship between the two legal systems. This is a matter that, throughout the *ATAA* judgment, remains as shrouded in uncertainty as ever. As Mayer puts it, the progressive development of legal standards, encouraged and aspired for in international law, is recognized by national courts including the CJEU as having prevalence over national legal systems. The court, referring to Article 216(2) TFEU³⁹⁷, reiterates the accepted traditional stance³⁹⁸ of the superiority of international law over any domestic legal system³⁹⁹, implying (although never expressly stating⁴⁰⁰) support for a monist system. Yet the reasoning of the court is riddled with inconsistency regarding the nature of the relationship, a common characteristic in the “love-hate relationship between EU and international law”⁴⁰¹.

At the core of the inconsistency seems to be the CJEU’s disdain of international rules that are not ‘progressive’ in the above meaning⁴⁰². Mayer writes that “Europe and the world appear to be on two diverging tracks, rather than simply on different positions on the same path: reconciling them becomes all the more difficult”⁴⁰³. This development was clearly demonstrated in the *Kadi*⁴⁰⁴ judgment, where the CJEU rejected measures to implement UN sanctions that contained insufficient procedural guarantees and so conflicted with European fundamental rights⁴⁰⁵. As stated in the comment on ‘decisional sovereignty’ (section 4C) the argument in the *ATAA* case was that in the same way, international rules prevent the EU from taking action to mitigate climate change. The intention of the CJEU is the same in *Kadi* and *ATAA* – to promote progressive EU standards over inflexible and anachronistic international ones. While the intention of the Court is laudable in *ATAA* as in *Kadi*, its effect on legal certainty and the rule of law is unfortunately much more muddled⁴⁰⁶ and detrimental from a leadership perspective. If

³⁹⁷ TFEU Article 216(2).

³⁹⁸ “[I]nternational treaties ‘form an integral part of Community law’” in Case 181/73 *Haegeman* (1974) ECR 449, at paragraph 5.

³⁹⁹ *ATAA* (Judgment), supra note 30, at paragraph 50.

⁴⁰⁰ Refer back to the section 4Ci as to why this is problematic.

⁴⁰¹ Mayer (2012), supra note 82, at 1114.

⁴⁰² Mayer (2012), *ibid*, at 1114. This suggests that the Court embraces a dualist system at least to some extent.

⁴⁰³ Mayer (2012), *ibid*, at 1124.

⁴⁰⁴ *Kadi*, supra note 291.

⁴⁰⁵ Mayer (2012), supra note 82, at 1124.

⁴⁰⁶ Mayer (2012), *ibid*, at 1115.

others are to look to the EU for leadership, they must know that the same rules apply to all the players and that the EU will (or at the least, when it will) honour its commitments. As Mayer puts it, “possibly for reasons of political prudence, the Court grounded its decision on shaky legal arguments, and avoided addressing the challenges brought by ATA, rather than invoking *Kadi*-like reasons”⁴⁰⁷. The parallels between these two cases, and especially the missed opportunities in *ATAA*, will form the basis of the concluding section of this chapter.

Three conceptual models can be used to describe the relationship between EU law and the international obligations of the Member States; ‘mutual ignorance’, i.e. EU isolationism from Member State obligations; ‘complete surrender’ whereby Article 351 TFEU places the EU institutions under an obligation to ensure Member State compliance with international law obligations; and ‘mutual respect’ whereby the EU institutions are under an obligation not to interfere with the Member States’ ability to comply with their international law obligations⁴⁰⁸.

The *ATAA* case is an example of ‘mutual ignorance’. In rejecting the applicability of the Chicago Convention, the Court essentially stated that the EU institutions are free to ignore the international law obligations of the Member States (even where these bind all 27 Member States). Under this scenario, the CJEU is not only assuming a dualist system between EU law and international law, but also between EU law and Member State law. This approach is clearly offensive of the rule of law, as it “reveals a failure of the project of law: its incapacity to provide a unique and consistent set of rules”⁴⁰⁹. Moreover, the fully dualist approach constitutes a prima facie breach of EU primary law – as discussed above, Article 351 TFEU provides that the Treaties should not affect the rights and obligations of Member States arising from certain agreements including the Chicago Convention. Yet in its interpretation of Article 351 TFEU, the Court relied on an old and unclear interpretation of its meaning, drawn from an earlier case, *Burgoa*⁴¹⁰, relying on a passage stating that Article 351 TFEU “does not bind the Community as regards the non-member country”⁴¹¹.

In that case, Mr Burgoa had argued the ‘complete surrender’ model, that Article 351 TFEU placed the EU institutions under an obligation to ensure Member State compliance with international obligations⁴¹². The Court in that case stated that Article 351 TFEU did not place upon the EU or the Member States an obligation to respect their obligations under international

⁴⁰⁷ Mayer (2012), *ibid*, at 1115.

⁴⁰⁸ Mayer (2012), *ibid*, at 1126.

⁴⁰⁹ Mayer (2012), *ibid*, at 1124.

⁴¹⁰ *Burgoa*, *supra* note 177.

⁴¹¹ *Burgoa*, *ibid*, at paragraph 9.

⁴¹² Mayer (2012), *supra* note 82, at 1125.

law, and it certainly did not give rise to an obligation on the EU to ensure that Member States secure these. Indeed, the passage relied on by the Court in *ATAA* was first made in this context, and stated that:

“[a]lthough the first paragraph of Article 234 [now 351 TFEU] makes mention only of the obligations of the Member States, it would not achieve its purpose if it did not imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from a prior agreement. However, that duty of the Community institutions is directed only to permitting the Member State concerned to perform its obligations under the prior agreement and does not bind the Community as regards the non-member country in question.”⁴¹³

In other words, in *ATAA* the Court uses a truncated abstract from *Burgoa* to achieve precisely the opposite of the originally intended effect. Indeed, the full statement of the Court in *Burgoa* conforms to neither of the above conceptual models, and instead forms the basis of the third.

This is the ‘mutual respect’ model, positing that the EU institutions are indeed under an obligation (unlike the Court stated in *ATAA*), just not the one proposed by Mr Burgoa. Instead the EU institutions must ensure that they do not prevent the Member States from being able to comply with their obligations under international law. This meant that the EU would not be isolated from the international obligations of the Member States. This third model has largely been adopted in the case law of the Court following *Burgoa*. In the *International Fruit* case the Court interpreted Article 351 TFEU as meaning that “by concluding a treaty between them [the Member States] could not withdraw from their obligations to third countries”⁴¹⁴. With regard to the Aviation Directive, this would mean firstly that the EU does not have to ensure that Member States comply with the Chicago Convention, nor does it have to incorporate the Chicago Convention in its Directives. On the other hand it would also mean that the Aviation Directive cannot impose obligations on the Member States that would prevent them from complying with the Chicago Convention⁴¹⁵. In *ATAA*, the Court uses a small portion of the *Burgoa* judgment to nullify the effect of Article 351 TFEU, and to contradict both the explicit provision of the Article as well as the established jurisprudence of the Court and in doing so “rejects arbitrarily the backbone of international air law”⁴¹⁶.

Mayer argues that the formalistic exclusion by the Court of the CICA in *ATAA*, although unfortunate, could have been overlooked on its own. Throughout the rest of the judgment, the

⁴¹³ *Burgoa*, supra note 177, at paragraph 9.

⁴¹⁴ Case 21/72 *International Fruit* [1972] ECR 1219 at paragraph 11. In other words, Article 351 TFEU does not allow a Member State to justify a breach of its international law obligations by reference to the Treaties.

⁴¹⁵ Mayer (2012), supra note 82, at 1127.

⁴¹⁶ Mayer (2012), *ibid*, at 1127.

Court in fact deals with nearly all the points argued under the CICA as part of its analysis of the various accepted grounds of invalidity. Article 1⁴¹⁷ of the CICA is recognised by the Court in the form of the principle of sovereignty in customary international law. Article 11⁴¹⁸ is almost identical in its scope to a combined reading of Articles 2 and 7 of the OSA. Article 15⁴¹⁹ of the CICA is indirectly reviewed by the Court as part of the Article 3(4) of OSA. Article 24⁴²⁰ of the CICA bears a similar meaning to Article 11 of the OSA. The sum of all this is that the Court could easily have chosen the path of consistency with EU primary law, its own jurisprudence, as well as with the EU's obligation to respect international law⁴²¹ while arriving at an identical judgment that does not offend international observers. In doing so, it would not have sacrificed so much of the EU's credibility as an environmental leader in the eyes of the international community.

iii. The jurisdiction argument

This section will focus on the first ground of invalidity argued by ATA, that is, the principle of equal sovereignty of states, which is considered a founding pillar of international law⁴²². Exercising extra-territorial jurisdiction is often seen as a form of unilateralism that is either detrimental to international cooperation or outright illegal under international law. It will be recalled that AG Kokott recognised that the Aviation Directive has an 'extra-territorial' effect, but qualified the case on the basis that the Aviation Directive does not dictate how foreign airlines should reduce their emission, and that as a result the important factor as far as international law is concerned is whether there is a sufficient link between the incident/effect and the state in question⁴²³. In a similar vein the Court states that it is not the aircraft that is subject to the EU ETS, but the operator of that flight, having chosen to conduct its flights to or from EU airports⁴²⁴.

The Court's choice of terminology here is another instance of semantic isolation, if not even unfamiliarity with the finer points of the concept of jurisdiction. Although the Court refers to the judgment of the Permanent Court of International Justice in the *Lotus* case⁴²⁵ with regard to the

⁴¹⁷ On states' complete and exclusive sovereignty over the airspace above its territory.

⁴¹⁸ On the general prohibition of discrimination on the ground of nationality

⁴¹⁹ Which prohibits airport and similar charges.

⁴²⁰ On local duties and charges.

⁴²¹ Mayer (2012), *supra* note 82, at 1127f.

⁴²² Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 2(1). CICA Article 1.

⁴²³ See *ATAA* (Opinion), *supra* note 30, at paragraphs 147ff. Indeed, it does not require them to reduce their emissions at all – only to surrender allowances on the basis of their emissions.

⁴²⁴ *ATAA* (Judgment), *ibid*, at paragraphs 126-7.

⁴²⁵ Judgment of the Permanent Court of International Justice, Judgment No 9 of 7 September 1927 in the Case of the S.S 'Lotus', PCIJ 1927, Series A, No 10.

‘nexus’ (discussed below), it could have gone further, exploring the distinct applications of the concept of jurisdiction in international law. For our purposes, one can distinguish prescriptive jurisdiction⁴²⁶ from enforcement jurisdiction⁴²⁷. The international law governing enforcement jurisdiction is clear: enforcement jurisdiction is strictly limited to the territory of the state itself, and may not be exercised in any other state without the consent of that third state. The law relating to prescriptive jurisdiction, on the other hand, is quite convoluted (and in many cases, undecided). Prescriptive jurisdiction may be established subject to various principles⁴²⁸. Two of these need to be explored here; these are the nationality and territoriality principles.

The matter of the nationality principle is easily dealt with. Opponents of the Aviation Directive argue that airlines are subject only to the nationality principle of jurisdiction, and as such are under the sole regulatory jurisdiction of the home state. It has been convincingly shown, however, that the Schengen area passport requirements apply to all airlines and have been accepted without opposition by the international community⁴²⁹.

The issue is more complicated with regard to the territoriality principle. It can be argued that a state is prevented from exercising jurisdiction over acts that are wholly internal to another state. Yet this does not mean that a state only has jurisdiction over matters that are wholly internal to itself. Instead, a nexus must be demonstrated between the regulating state and the activity in question per the *Lotus* Case. In the case of aviation, such a nexus is demonstrable as stated above. As such, it would be incorrect to claim that the EU is exercising extra-territorial jurisdiction with regard to the Aviation Directive, as doing so would deny the rule in the *Lotus* case. The Court does muddle the application of its jurisdiction analysis somewhat, stating at paragraph 125 that the aircraft landing at EU airports are subject to the *unlimited* jurisdiction of the EU. In the following paragraphs the Court justifies how this translates into a non-extra-territorial application of jurisdiction and how the freedom to fly over the high seas is not infringed. And yet, a straightforward application of the principle of territorial jurisdiction under international law would have provided an entirely satisfactory explanation for the operation of the EU ETS under the Aviation Directive, in terms that would appeal to the international lawyer.

⁴²⁶ The right to legislate, or to make law. See Lowe V. and Staker C., ‘Jurisdiction’, in Evans M.D., (Ed.) *International Law*, 3d ed. (2010: Oxford University Press, Oxford), 313, at 318.

⁴²⁷ The right to enforce compliance with law and with judgements rendered under it. See Lowe and Staker (2010), *ibid.*

⁴²⁸ These include (on a more or less open list-basis) the territoriality principle, the nationality principle, the protective principle, the universality principle and treaty-based extension of jurisdiction.

⁴²⁹ See Hertogen (2012), *supra* note 13, at 13.

According to customary international law, there are three distinct applications of the territoriality principle. These three applications are the subjective⁴³⁰ and objective⁴³¹ forms of territorial jurisdiction, as well as the ‘effects’ doctrine⁴³². The contested part of the Aviation Directive would fall under the objective form of territorial jurisdiction: the EU is exercising its prescriptive jurisdiction in a case where an incident has been completed within its territory (the negative impact of emissions in the form of climate change and environmental degradation) although it was initiated outside its territory (as the contested part of the emissions took place outside EU territory). This provides the ‘nexus’ referred to by the Court⁴³³, and would allow the Court’s interpretation to escape the ‘Lotus fallacy’, which the current interpretation is guilty of indulging. The Lotus fallacy is the notion that the *Lotus* case allows a state to “extend the reach of its prescriptive jurisdiction as it chooses”, or in other words, in an ‘unlimited’ manner⁴³⁴. Moreover, because the aircraft is physically within Member State territory, the EU is free to exercise its enforcement jurisdiction. As demonstrated, the implications are almost identical. So why should the Court have bothered to go down this route instead? By referring to the “unlimited jurisdiction” of the EU, the Court is associating its interpretation with the Lotus fallacy, which has clear negative connotations for an international lawyer. Opting for an interpretation that (if only in name) flies in the face of accepted customary international law, when a perfectly accepted one would achieve the same result, is yet another instance of isolationism. Applying the objective form of territorial jurisdiction would give the EU an international law basis for extending its prescriptive territorial jurisdiction to cover the contested emissions.

Moving on, public international law is rife with instances of not wholly-internal applications of jurisdiction⁴³⁵. For instance, WTO rules allow a state to regulate services and service-providers from a second state where the regulating state is the destination market⁴³⁶. This also leads us to the third application of the territoriality principle; the widely-known, if controversial, ‘effects doctrine’ that has seen use in anti-trust cases on both sides of the Atlantic. First used in the *Alcoa Aluminium*⁴³⁷ case as a tool by the US to exert jurisdiction over a non-US company allegedly participating in a cartel that had an effect on US imports and exports. The doctrine then received

⁴³⁰ The exercise of prescriptive jurisdiction by a state when an incident has been initiated within its territory, but completed outside it.

⁴³¹ The exercise of prescriptive jurisdiction by a state when an incident has been completed within its territory, although it was initiated outside it. See e.g. *Lotus* case, supra note 425.

⁴³² Discussed below.

⁴³³ The nexus test has been described in *Attorney-General of Israel v Eichmann* (1961) 36 ILR 5.

⁴³⁴ Lowe and Staker (2010), supra note 426, at 318f.

⁴³⁵ Mayer (2012), supra note 82, at 1129.

⁴³⁶ See Hertogen (2012), supra note 13, at 14.

⁴³⁷ *United States v Aluminium Co. of America (Alcoa)* 148 F.2d416 (1945).

widespread negative coverage in the press for its application in the *Uranium Antitrust*⁴³⁸ case, where a US provision allowing victims of cartel-activity to claim back triple the damage cause by the cartel-members – the only jurisdictional link to the US thus being one of economic effect. It was widely believed that this extension of jurisdiction (at a time when US trade laws shut foreign uranium suppliers out of the US market) constituted nothing but a thinly veiled exercise of economic imperialism. Yet application of the effects doctrine is not limited to the US, as it was used to establish jurisdiction by the EU in the *Wood Pulp*⁴³⁹ case⁴⁴⁰. Furthermore, Hertogen notes that the taxation of worldwide incomes of ‘resident aliens’ in the US⁴⁴¹ is not only comparable, but more far-reaching than the EU’s inclusion of foreign airlines in the EU ETS. The aviation regulation equivalent would be “the position where the EU requires all carriers that regularly land at an EU airport to submit allowances for all their flights, even those between two non-EU airports”⁴⁴².

It is worth considering that whatever justifications for the regulation of aviation emissions may be offered in terms of international law, alternatives to the effects doctrine are to be preferred. The effects doctrine carries with it considerable stigma as it has been used a tool of economic imperialism to be wielded by those states whose economic activities are global and whose interests may thus be affected in a very broad set of circumstances – in other words, not a legacy that the EU’s climate change policy ought to be associated with.

Yet it will be recalled that the Advocate General in *ATAA* makes comments that resemble closely the effects doctrine⁴⁴³ and the Court also ties its comments (although it did not in detail whether this type of effect could justify cross-border regulation⁴⁴⁴) implying an extra-territorial effect – that emissions by air carriers anywhere in the world affect the environment in EU Member States through climate change – to the above *Wood Pulp* case⁴⁴⁵. Mayer argues that

⁴³⁸ *Rio Tinto Zinc Group v Westinghouse Electric Corp (Uranium Antitrust)* [1978] 1 All ER 434 (HL).

⁴³⁹ Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström Osakeyhtiö v Commission (Wood Pulp)* [1988] ECR 5193.

⁴⁴⁰ Although it can be argued that the *Wood Pulp* case involved an aspect of intra-territorial conduct that was absent in the US cases.

⁴⁴¹ E.g. taxation of ‘resident aliens’ under US law; 26 USC § 862(b): “Taxable income from sources without United States - From the items of gross income specified in subsection (a) there shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto, and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income. The remainder, if any, shall be treated in full as taxable income from sources without the United States. In the case of an individual who does not itemize deductions, an amount equal to the standard deduction shall be considered a deduction which cannot definitely be allocated to some item or class of gross income.”

⁴⁴² Hertogen (2012), supra note 13, at 294.

⁴⁴³ *ATAA* (Judgment), supra note 30, at paragraphs 153-155.

⁴⁴⁴ Bogojević (2012), supra note 19, at 353.

⁴⁴⁵ *ATAA* (Judgment), ibid n141, at paragraph 129.

while this line worked well in the *Commune de Mesquer*⁴⁴⁶, the other case cited by the Court at paragraph 129, “in the circumstances of the present case, the argument may be somewhat stretched”⁴⁴⁷. While a flight anywhere in the world contributes to climate change in the EU, the legal task of establishing a causal relation between all flights to and from the EU and climate change within the EU is an entirely different matter.

Hertogen concludes that according to the principles of jurisdiction, the problem with regulation of aviation emissions is not that it is outside a state’s jurisdiction, but rather that it is within all states’ jurisdiction. This results in the risk of double-regulation, which is usually avoided through international agreement or the creation of international organisations with regulatory power. Alas, as we have seen, these approaches have failed to gain traction in the international aviation community – the ICAO has been unable to produce an international agreement, and as such it has not been granted any hard regulatory powers. In the absence of these traditional tools, we must instead look to the best available alternatives: in this case, that alternative is the Aviation Directive.

iv. The sovereignty argument

Hertogen suggests that a variant of the principle of sovereignty may also be applied here. This alternative solution is constructed around the international law concept of sovereignty, used in the sense of ‘decisional independence over domestic affairs’⁴⁴⁸. Decisional jurisdiction was first argued by Australia in the *Nuclear Tests*⁴⁴⁹ case, but was not addressed in the ICJ’s judgment, nor widely covered in the subsequent academia. It is suggested that a state’s decisional inviolability (in this case, the right of a state to determine how much environmental degradation is acceptable within the territory of the state) is a central function of the concept of sovereignty. By leveraging the idea of decisional independence over domestic affairs in the context of ‘multi-territorial activities’⁴⁵⁰ such as aviation, the concept of sovereignty can be used to argue that a state must have the ability to regulate activities⁴⁵¹ carried out by foreign actors when these affect the domestic affairs of the ‘regulating state’⁴⁵². It is important to note the difference between the effects doctrine and decisional jurisdiction. While the effects doctrine seeks to extend

⁴⁴⁶ Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501.

⁴⁴⁷ Mayer (2012), supra note 82, at 1130.

⁴⁴⁸ Hertogen (2012), supra note 13, at 281.

⁴⁴⁹ ICJ, Judgment of 20 December 1979 *Australia v France (Nuclear Tests Case)* ICJ Reports 1974, p. 253.

⁴⁵⁰ These are actions with effects in multiple states, such as international travel or financial services. See Hertogen (2012), supra note 13, at 281f.

⁴⁵¹ The ‘regulatory jurisdiction’.

⁴⁵² The state that is regulating the multi-territorial activity in question. In the *ATAA* case this is the EU.

jurisdiction beyond a state's borders, decisional jurisdiction instead seeks to prevent restrictions on a state's ability to decide on domestic matters.

This approach capitalises on the double-edged nature of the concept of sovereignty, and reveals how such concepts can at times be moulded to suit the argument of the relevant party. Here the sovereignty argument is reversed with respect to the argument submitted by the applicants in the *ATAA* case. Whereas in the *ATAA* case it was essentially argued that the Aviation Directive infringed the territorial integrity and sovereignty of other states, it is instead posited here that a state's sovereignty may be infringed by the lack of multilateral action or action by the 'home state'⁴⁵³ to prevent or minimise negative spill-overs affecting the 'regulating state'. In the case of the aviation dispute, the logic is that it cannot be up to the sole discretion of the home state whether or not airlines should pay for their negative externalities, such as environmental damage in the regulating state⁴⁵⁴. Allocating regulatory jurisdiction on the basis of decisional independence would have the added advantage of diminishing the incentive to free ride, which is of special concern in environmental matters as noted at multiple occasions above. 'Decisional sovereignty' only applies within the territory of the regulating state, and exists in relation to third states' decision sovereignty. This means that decisional sovereignty is contingent on the absence of domestic regulation or multilateral cooperation in other countries.

As we have seen above, the conditions of contingency are satisfied with regard to the Aviation Directive, as firstly, there is no multilateral agreement on aviation emissions, and secondly, the Aviation Directive provides derogations for states that have enacted comparable provisions⁴⁵⁵. As for the condition of territoriality, the argument can be made that while the contested emissions from aviation⁴⁵⁶ do not take place within the territory of the EU, they contribute to anthropogenic climate change which in turn is capable of damaging the environment within the EU's territory. Thus, where the EU and the Member States see nothing more in the Aviation Directive than an exercise of their sovereignty, the other side sees an extra-territorial exercise of jurisdiction. These opponents see sovereignty as the ultimate legal authority to decide to the exclusion of others – or what Brownlie refers to as “territorial sovereignty in public international

⁴⁵³ The state that would traditionally be considered to hold regulatory jurisdiction. In the *ATAA* case for instance, the US airlines would traditionally be seen as being subject to the regulatory jurisdiction of the United States.

⁴⁵⁴ Hertogen (2012), *supra* note 13, at 284.

⁴⁵⁵ The Aviation Directive grants the Commission the authority to amend Annex I.

⁴⁵⁶ Those taking place over third countries' territory and over the High Seas.

law⁴⁵⁷. The question that remains is whether the Aviation Directive is a legitimate exercise of sovereignty, i.e. ‘decisional independence’.

From the perspective of a state’s capacity to decide over its domestic affairs, is the EU’s action in the form of the Aviation Directive preferable to international inaction? The lack of regulation leads to the negative environmental effects associated with the unregulated growth of the aviation sector, the effects of which are naturally not localised to only those states that refuse to take action. This would be incompatible with the *Trail Smelter Case*⁴⁵⁸ which states that sovereignty should not be exercised in a way that causes negative environmental impacts in another state. Secondly, the lack of any ‘borderless’ regulatory mechanism causes competitive disadvantages. Although the fear of a loss of competitiveness does not technically prevent a state from regulating its airlines, it does make doing so a political impracticality, especially when considering that regulating airlines according to a strictly territorial approach would cause only negligibly smaller growth in emissions, and would not prevent the negative environmental consequences. This is one reason why the ‘last-leg’ principle was felt to be a necessary part of the Aviation Directive. These two consequences of inaction effectively prevent the EU from regulating the airline industry in a way that would maintain or improve its environmental quality. Opponents of the Aviation Directive claim that it involves higher costs⁴⁵⁹. However, economic costs are a natural consequence of any economic activity, and according to the International Law Commission, are not covered by the ‘no harm’ principle⁴⁶⁰. Moreover, the ‘polluter pays’ principle from both EU and international law supports placing the cost of pollution with the polluter and not the victim or the regulator.

It is also argued that the Aviation Directive has a negative impact on the ability of other states to regulate the airline industry, and that the EU has gained a ‘first mover’ advantage. However, the Aviation Directive clearly provides for (and even encourages) the adoption of similar rules by other states⁴⁶¹, known as ‘contingent unilateralism’⁴⁶². Whether this provision will translate in a suitable manner into practice will depend on the EU’s treatment of similar but not identical schemes. Too strict an approach here could open the Aviation Directive to criticism for failing to respect the decisional sovereignty of other states. Some guidance as to how it could be applied in

⁴⁵⁷ Hertogen (2012), supra note 13, at 291.

⁴⁵⁸ *The Trail Smelter Arbitration Case (United States v Canada)* (1941) UN Report of International Arbitral Awards 1905 (1945).

⁴⁵⁹ Although many claim that the cost of the EU ETS on airlines will be marginal. See Mayer (2012), supra note 82, at 1118f.

⁴⁶⁰ Hertogen (2012), supra note 13, at 297.

⁴⁶¹ “Equivalence provision”, Aviation Directive Article 25(a).

⁴⁶² Scott and Rajamani (2012), supra note 100, at 1ff.

practice can be gleaned from the *Shrimp/Turtle*⁴⁶³ case where it was stated that unilateral trade restricting action may be exempted from WTO rules where good faith attempts have been made to negotiate a bilateral or multilateral agreement⁴⁶⁴. Where such agreements do not materialise, a state may regulate unilaterally as long as regulation by other states is allowed under the scheme. In this consideration, the regulating state should not require other states to adopt a scheme that is ‘essentially the same’ as its own⁴⁶⁵. This is an example of where the environmental leadership of the EU could have been better maintained had the Court avoided its semantic and conceptual isolationism. “In its original proposal, the Commission suggested that an exemption for a non-EU country should be made conditional upon the adoption by it of measures which are at least equivalent to the requirements laid down in the Aviation Directive”⁴⁶⁶. Not only is this in clear conflict with the *Shrimp/Turtle* judgment, but could also explain why some observers are so worried about the Aviation Directive. Had reference been made by the CJEU to the *Shrimp/Turtle* case as an example of the type of interpretation that could be applied under the ‘equivalence provision’, some international observers could have been appeased. This would allow them in the future to refer to the *ATAA* judgment as a guide to any conflicts as to equivalence of schemes. As it stands, the good intentions behind Article 25(a) risk running into the sand. The *ATAA* judgment gives the cynical observer no reason to believe that the ‘equivalence provision’ is anything more than an empty promise, to be abandoned once the initial controversy over the implementation of the Aviation Directive has faded⁴⁶⁷.

However, even this would have left much room for friction. On the one hand, the risk presented by the *Shrimp/Turtle* approach is that of a traditional ‘race to the bottom’. If the initial standard is high, then entrants to the mechanism may progressively lessen the demands they make with regard to domestic operators, while pointing to the nearly similar, but marginally more onerous, provisions of earlier entrants. On the other hand the integration requirement under Article 11 TFEU may arguably place the Court under an obligation to *interpret* (note that this obviously in no way affects the decision that the Court must arrive at – only its interpretation of the intention and purpose of the legislator behind the act) EU acts so as to allow only a neutral or positive net effect on environmental protection⁴⁶⁸. This would effectively prevent the Court from interpreting

⁴⁶³ Appellate Body Report, *United States – Import prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 Nov, 1998, paragraph 166.

⁴⁶⁴ Refer back to India’s threats of non-cooperation in future climate change talks; a threat that is not in line with the traditional understanding of ‘good faith’.

⁴⁶⁵ *Shrimp/Turtle Case*, *ibid*, paragraphs 163-4.

⁴⁶⁶ Scott and Rajamani (2012), *supra* note 100, at 482.

⁴⁶⁷ See Scott and Rajamani (2012), *ibid*, at 482ff for an interesting discussion of the nuances of ‘equivalence’ which may be applied by the Commission in future applications of Article 25a of the Aviation Directive.

⁴⁶⁸ Refer to section 2Bii and see Jacobs (2006), *supra* note 168.

Article 25(a) of the Aviation Directive as allowing a *Shrimp/Turtle* type approach to ‘equivalent’ third country schemes, precisely because of the possibility that this may allow a net reduction in the level of environmental protection as per the above.

The Directive also emphasises the EU’s continued support for a multilateral solution, and even offers the model utilised in the Aviation Directive as a possible blueprint for an international mechanism⁴⁶⁹. This is significant as the concept of decisional sovereignty is not intended as a ground for attacking multilateralism. Decisional sovereignty recognises the difficulty of achieving multilateral solutions to public good-problems, such as emissions mitigation. Rather, whereas the opposition to the Aviation Directive wishes to retain the incentive to free-ride under the international legal system, decisional sovereignty is designed to circumvent this problem. States will be encouraged to take regulatory lead as this will reward them in terms of experience gained, as well as allow them to shape multilateral regulatory regimes in directions that they find suitable. The impact on competitiveness can also be mitigated if not removed, while apportioning costs according to accepted principle of international (environmental) law. Finally, as the *Shrimp/Turtle* case has demonstrated, states will remain under a good faith obligation to negotiate multilateral solutions before resorting to unilateralism. Decisional sovereignty thus provides a conceptual justification that may help to unravel stalemates in other multilateral negotiations as well, as we have witnessed with regard to the action on aviation emissions that the ICAO has promised for September this year.

Having considered the numerous merits of the approach based on decisional sovereignty, it must be noted that while it certainly appears sound in theory, there are considerable barriers to application in practice. Most importantly, this argument builds on a principle of jurisdiction that has only been argued once, and in that case it was not even addressed by the ICJ. As with many proposed solutions, decisional sovereignty poses an almost utopian means of circumventing international political impotence. Alas, this would require a show of force on the part of states or a respected court that is and will likely remain out of reach for some time. That in turn would require the type of transformational and ‘heroic’ leadership not traditionally associated with the international community.

⁴⁶⁹ Aviation Directive, Preamble paragraph 17.

v. *The free trade argument*

The CJEU stands accused of another “semantic dodge”⁴⁷⁰ with regard to its treatment of the ATA’s challenge Article 11(2) Open Skies Agreement. ATA argued that the EU ETS amounted to a ‘tax, levy, duty, fee or charge’ on ‘fuel, lubricants, and consumable technical supplies’ prevented by the above provision. The Court found that the Open Skies Agreement sought to prevent three characteristics of ‘charges’: 1) they should be based on the fuel consumption of aircraft, 2) there should be a direct and inseverable link between the amount of fuel consumed and the price to be paid by the operator, and 3) they should be intended to create revenue for the responsible government⁴⁷¹.

The Court argues firstly that the amount of allowances to be surrendered is calculated on the basis of both an emission factor and the amount of fuel consumed. Further it argues that the actual cost will vary depending on the allocation of free allowances⁴⁷². As to the third point, the Aviation Directive provides that Member States must apply the revenue from the scheme in climate-change related activities. This leads the Court to conclude that the EU ETS “constitutes a market-based measure and not a duty, tax fee or charge on the fuel load”⁴⁷³. The second and third conditions stipulated by the Court have no basis in the OSA, which intentionally defines the charges referred to in negative terms in order to achieve broader coverage. It is difficult to argue that the EU ETS escapes the phrasing of the OSA, which explains why the Court felt the need to change the phrasing. Furthermore Article 15 of the CICA is imported into the ATA’s argument through Article 3(4) OSA. Article 15 of the CICA expands the meaning of ‘charges etc’ beyond that employed in Article 11 OSA by adding the term “dues” to the others. Mayer points out that even if we allow for the Court’s mistaken reading of Article 11 OSA, the inclusion of “dues” simply does not allow an interpretation of the OSA that would allow the EU ETS to escape its application completely⁴⁷⁴ – yet the Court does not acknowledge the difference in terminology⁴⁷⁵.

Mayer suggests that the Court could have maintained a consistent argument had it instead applied an argument grounded in international law – representing another instance of the Court’s isolationism. The OSA as well as the CICA allow charges where the cost of a service is passed on

⁴⁷⁰ Havel B.F. and Mulligan J.Q., ‘The triumph of politics: Reflections on the judgment of the Court of Justice of the European Union validating the inclusion of non-EU airlines in the emissions trading scheme’ (2012) *Air and Space Law* 37, 3, at 12–13.

⁴⁷¹ *ATAA* (Judgment), *supra* note 30, at paragraphs 141-143.

⁴⁷² *ATAA* (Judgment), *ibid*, at paragraph 142.

⁴⁷³ *ATAA* (Judgment), *ibid*, at paragraph 147. See also Mayer (2012), *supra* note 82, at 1134f.

⁴⁷⁴ Mayer (2012), *ibid*, at 1135.

⁴⁷⁵ *ATAA* (Judgment), *supra* note 30, at paragraph 153.

to the carrier⁴⁷⁶. The Court could have argued that the EU ETS amounts to a compulsory service necessary to compensate for the environmental damage caused by emissions from aviation. This argument would also be consistent with EU primary law, the EU's obligation to respect international law and agreements, and the Aviation Directive itself as it requires Member States to use the revenues gained through the EU ETS on climate change related activities⁴⁷⁷.

vi. *Kadi I: the Aviation Directive as an exception to international law*

The parallel between the *ATAA* case and *Kadi I* has already been touched upon. It was argued in section 4B that not only is it within the role of the Court to protect fundamental interests of the EU, but that in the case of climate change mitigation and environmental policy, the Court *should* have made a stand. *Kadi* demonstrated that the Court has the ability and the willingness to stand up for progressive laws, even in the face of contradictory international law. The question asked in this section is: *could* the Court have replicated its bold defence of fundamental rights from *Kadi* in the field of environmental protection and climate change policy?

In *Kadi* the Court stated that “if the conditions for application have been satisfied”, Article 351 TFEU “may in no circumstances permit a challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights”⁴⁷⁸. Unlike in *ATAA* – where the Court engaged in hair-splitting analyses over language, going as far as inventing conditions for terms like ‘charge’ where none were stipulated, and angered international observers by excluding important international treaties from applying to the EU – the Court in *Kadi* conceded that some norms of EU law are simply too fundamental to capitulate, even in the face of international law. *Kadi* represents a deeper implementation of the *Burgoa* model of mutual respect between the two legal systems. Such a relationship would build on a progressive discourse between the parties intended to improve the quality of international legal standards.

It is clear that such a bold approach comes at a cost. Indeed, it offends many of the sources of consistency previously elevated in this thesis: it sacrifices some legal certainty as well as the EU's primary law obligations to respect international law and interferes with the ability of Member States to comply with their international obligations. These drawbacks must be balanced with the benefits of a *truly* consistent interpretation of EU law – one consisting of a constitutional

⁴⁷⁶ OSA Article 11(a) contains an exception for charges “based on the cost of services provided” and CICA Article 15 only prevents charges imposed solely for “the right of transit over or entry into or exit from its territory”, and thus does not cover charges based on services rendered.

⁴⁷⁷ Mayer (2012), *supra* note 82, at 1135f.

⁴⁷⁸ *Kadi*, *supra* note 291, at paragraphs 301 and 304.

foundation of norms that the EU will not surrender to poorly reasoned international law that itself offends the rule of law. It can be argued that the *Kadi* approach instils a different sense of legal certainty, where the EU stands uncompromisingly for a fundamental set of progressive rights and rules, designed to improve conditions for all humanity. This would indeed set the EU apart as a transformational and heroic leader, unafraid to change the rules of the game where necessary.

In the end, between the semantic and conceptual isolationism demonstrated in *ATAA*, the Court has in any case managed to cover all the negative consequences (and then some) of a *Kadi*-like approach, without achieving any of the benefits. Extending the *Kadi* analysis to the Aviation Directive could moreover have been achieved in one of two ways. Firstly, it could be argued on the basis of the preamble⁴⁷⁹ to Aviation Directive and in the context of the EU's environmental competence (especially Articles 3(3) and 3(5) TEU and 191(1) TFEU) that it aims to implement the 'high level of environmental protection' contained in Article 37 CFREU, and consequently it is not a new exception, but an extension of the protection of fundamental rights already covered by *Kadi*. Mayer notes that such a

“judgment may certainly be understood in the context of a jurisdictional policy. Constitutional arguments may have annoyed third States governments and nourished the depiction of the EU as an arrogant legal fortress [...] a constitutional derogation denotes a stronger political posture than a would-be unfortunate 'technical' judgment. In both cases however, the Court takes a distant posture toward international law. Such a distant posture would have been more acceptable politically and less detrimental to the development of international law had it been based on a well-justified constitutional exception, rather than on the mere rejection of the Chicago Convention following a truncated reference to old case law and an arbitrary interpretation of EU primary law.”⁴⁸⁰

If compliance with the EU's obligations under the UNFCCC and the Kyoto Protocol cannot justify a constitutional exception, then what value are we to assign to international treaties and to the corpus of law they represent?

With respect to the UNFCCC in particular, Mayer suggests a second argument based not on 'constitutional exceptionalism', but the supremacy of one international agreement over another. International law could conceivably be used to justify a derogation from international aviation law (that is, the CICA) in regards to the Aviation Directive on the basis of developed States' duty to take the lead on climate change mitigation (that is, the CBDR principle under the

⁴⁷⁹ Aviation Directive, Recital 9.

⁴⁸⁰ Mayer (2012), *supra* note 82, at 1137.

UNFCCC⁴⁸¹). The Court could have pointed to Article 3(3) UNFCCC as empowering parties to take precautionary action to prevent climate change⁴⁸² in a case like the Aviation Directive. The Law of Treaties could furthermore be used to argue the weight and importance of the UNFCCC relative to the CICA; the UNFCCC is more recent than the CICA, is ratified by five more states, and the Aviation Directive would not significantly impact the objectives of the CICA whilst the primary purpose of the Directive is to achieve the goals set by the Kyoto Protocol to the UNFCCC. The Court could thus have made the argument in a way that is consistent with international law as well as EU law, but politically riskier. Then again, *Kadi* has shown us that such leadership is not beyond the Court's considerable capacity – the EU could demonstrate genuine environmental leadership by fully embracing environmental protection as a fundamental aspect of EU law. This would allow it to extend *Kadi*-like reasoning to the central feature of its environment policy – its action on climate change. In this way, the Aviation Directive could have provided an ideal foundation for establishing a precedent. That precedent is that the European Union will respect international law and honour its responsibilities thereunder. However, so long as the international community fails to agree to a 'sufficiently rigorous doctrine of climate change mitigation and environmental protection', those very laws and responsibilities also obligate the EU as an internationally responsible actor, to assume the duties of leadership where none other is willing and able to do so.

⁴⁸¹ UNFCCC, Article 3(1).

⁴⁸² See the principle of precautionary action in EU law in Article 191(2) TFEU. See also Aviation Directive, Preamble paragraph 19 stating that the Directive is based on the precautionary principle.

5 Conclusion

Where the regulation of aviation emissions is concerned, one thing is certain; the story is not over. Much of what has been said in this thesis corroborates such a hypothesis. Indeed, seen from the perspective of the global fight against climate change, the aim of this thesis has been to answer questions surrounding the future and development of climate change action. It has sought to outline the legal and political background to what has become an international dispute of no small proportion. It has placed much focus on the claim of one particular regional actor to environmental leadership, motivating the choice on the basis of the EU's willingness to take initiative as well as responsibility not only in its own interests, but for a cause that affects and will continue to affect all of mankind. As the EU ETS forms the centrepiece of the EU's climate change policy (and its climate change policy forms the centrepiece of its environmental action), so it also features at the centre of this thesis. As the latest development in the expansion of the EU ETS, the Aviation Directive plays a crucial role in advancing the EU's environmental ambitions. The passage of the Directive has met resistance from industry as well as third states, and now tests the maturity of the EU's environmental leadership. The key to passing this test lies in the common resolve of the Member States of the EU and its institutions to see the Aviation Directive through. This thesis has focused on what the author believes could be the 'weak link' in this chain – the Court of Justice. More precisely, what is at issue is the Court's particular interpretation of various aspects of law in the instance of the ATA legal action against the Aviation Directive.

In Chapter II an overview of the EU ETS demonstrated its importance in the EU's climate change policy, and as result, in its action on environmental protection as a whole. In short, the EU ETS is the flagship project in the EU's environmental protection arsenal, and thus a large share of current efforts to combat climate change depend on its success. Chapter II went on to discuss some of the problems encountered in the early stages of the scheme, many of which persist to date; that the price per tonne of CO₂ emissions in the EU ETS remains around the €3.50 mark⁴⁸³ is symptomatic of this. On top of this, the EU ETS has recently entered a crucial phase of expansion, the first step of which consists of the Aviation Directive. The need for resolve on environmental policy within the EU is greater than ever. Thus the case of aviation emissions is a clear test to the future of the EU's climate change (and thus environmental protection) action. The statistics on sectoral emission growth discussed in this thesis argue that if

⁴⁸³ European Energy Exchange, 'EU Emissions Allowances – Primary Market Auction'. Available at: <http://www.eex.com/en/Market%20Data/Trading%20Data/Emission%20Rights/EU%20Emission%20Allowance%20%7C%20Spot>. Accessed 21 March 2013.

the Aviation Directive fails to take off the ground, the EU ETS will be severely handicapped and its ability to effectively curb EU-emissions fatally undermined.

In its review of the EU's legal competences, Chapter II demonstrated that EU law grants the legislature and executive broad environmental competences, but also places them under certain responsibilities and obligations to international law, and the international community. Although these two features of EU law may at times appear in tension with each other, it can also be argued that they may redeem one another. It has been argued in this thesis that the Aviation Directive in particular is an extraordinary example of how the EU's environmental leadership abilities and qualities can be used to drive and encourage a higher level of international environmental protection in a responsible way. Chapter II argued that the Aviation Directive strikes a balance between the two features of EU law: it reflects the full extent of the EU's internal competences so as to achieve a progressive and high-quality instrument. The Aviation Directive does this in a way that also fulfils the EU's responsibilities to the international community and respects international agreements and the international environmental framework. As a result, it is clear that the Aviation Directive is implemented in accordance with the law of the EU. Chapter II demonstrated that as a matter of law, the EU is indeed well placed to take on the role of environmental leader. The EU has the requisite competence to be a strong leader, but its competences are also bound by constitutional restrictions contained in the Treaties – specifically obligations to and under international law. These seemingly competing qualities, when combined, create a harmony between national, regional and international law and policy unmatched by other legal systems – and so create a foundation for multilateral cooperation.

Chapter III examined the role of the Court and its judicial interpretation in supporting the EU's ambitions in climate change leadership. It concluded that it is in no way beyond the mandate or capacity of the CJEU to act as a constitutional court, to support lawfully implemented policies aimed at achieving the objectives of the Treaties. Chapter III offered a review of some of the Court's seminal constitutional moments and drew a parallel between the development of the Court's jurisprudence on fundamental rights and on environmental protection. It suggested that it may be time for the latter to receive the constitutional treatment given by the Court to the former in 2008 in *Kadi*. In light of the Court's jurisprudence, it is not a stretch to say that not only is it the Court's responsibility to support the lawful policies of the EU, but that it should in fact do so in the way that is most conducive to advancing these policies aimed at fulfilling the objectives of the Treaties. With regard to the Aviation Directive, the EU is seeking to achieve the objective of, inter alia, a high level of environmental protection by establishing itself as an

environmental leader and role model. In this way, the author feels justified in proposing alternatives that may have better supported the EU's leadership ambitions.

Chapter IV turned its attention to the legal arguments surrounding the Aviation Directive. It found that the CJEU's interpretation of the ATA's arguments sells the EU's environmental capabilities short, and may have fuelled international observers' impressions of the EU as 'an arrogant legal fortress' that believes itself to stand above international law. This in turn contributed to the severe backlash of the international community against the perceived high-handedness of the EU. The magnitude and uniformity of the international response, reinforced by domestic calls to abandon the Aviation Directive, caught some EU actors off guard. The aftermath to the *ATAA* case has revealed schisms in the EU's environmental politics and resolve on controversial issues. As a result, the EU has given in to pressure; in a move that may yet prove a deft political manoeuvre, the clock on the Aviation Directive was stopped with regard to foreign operators. Observers eagerly anticipate the result of September's ICAO Council meeting – which, with a considerable dose of luck, may yet produce the keenly sought-after international agreement on the regulation of aviation emissions. More likely, however, the measure will buy both sides time to consider their next moves. Going forward, this thesis finds that if the EU is to be a role model and a credible leader, it must play to the strengths of its position and be unapologetic in its pursuit of a progressive and sustainable global climate change policy.

The time between now and the meeting of the ICAO Council in September will be used by the opponents of the Aviation Directive to build their case against the EU's climate change policy, and they will have learned their lessons from the *ATAA* judgment. The EU must use this time to prepare itself as well. This thesis has outlined what the author believes to be the major legal difficulties left unaddressed by the CJEU in the *ATAA* judgment. Although some are serious, most of the shortcomings highlighted here can be rectified by the EU. Before September, the legislature would do well to address those shortcomings that go to the design of the scheme – first and foremost, the compatibility of the Aviation Directive with the principle of common but differentiated responsibilities. The Commission would do well to offer sceptics an olive branch by clarifying how it will assess applications under the 'equivalence clause' of the Aviation Directive – preferably in a way that is compatible with the international law standard set in the *Shrimp/Turtle* case. And perhaps most importantly – for if the Aviation Directive is to be fully implemented, then sooner or later it will be tested before the law – the Court must decide how it is going to deal with the increasingly urgent issue of environmental degradation and climate change. With a mind to the role of the Court's judicial interpretation in environmental

protection, this thesis proposes that in the interest of the EU's leadership ambitions on climate change action, the Court should choose to address the issue within the environmental framework established in international law. It should do so on the basis of an argument rooted in either the concept of jurisdiction, the concept of sovereignty, or as a matter of the constitutional importance and fundamental nature of the issue; after all, it is not some abstract idea of the 'Earth' that needs 'saving'. We do.

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